

## Archival Justice, or *Who is Afraid of Rhetorical Measure?*\*

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### Abstract

Most broadly, this presentation investigates the origin of law. For the guiding problematic, I follow Plato's warning about the challenge of rhetoric to law. The power of enunciation to destabilize the norm points to the intrinsic instability of law. I explore this instability by focusing on the origin and the composition of the normative order in relation to the rhetorical order. For the place of meeting for the two orders I take Archive. With Michel Foucault, Jacques Derrida, and Giorgio Agamben I examine the properties of Archive toward its law-forming potential.

### 1. Introduction

Law is calculative. That is to say, it orders the buzzing confusion of the everyday by giving it a measure. In his dialogue Protagoras Plato employs the mythical allegory of Prometheus to demonstrate the origin of law. Prometheus came to people with a gift of fire, his intentions were to illuminate their path to truth. Yet, he failed to take them out of chaos. And so Zeus had to take matters in his own hands; he sent Hermes to give people a different kind of gift, what they needed most to survive and prosper: shame and truth, the two sides of Goodness. Goodness thus became the measure of order. Yet, as a measure, goodness could not deliver order on its own: it had to be applied. In other dialogues, but most prominently in The Laws, Plato addresses this problem by introducing a different measure, rightness. Imposed upon goodness, rightness becomes a normative measure of truth, "the holiest, Man's most intimate possession" (The Laws, p. 1410). However, twice separated from truth, a measure of measure, the legal norm remained fragile and fallible in the face of untruth. Forever elusive, it was capitalized on by the enemy of goodness—Sophistry, or the art of creating illusions. By offering a competing rhetorical measure that challenged the normative measure of rightness,

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Sophistry emerged as a threat to Justice. Intrigued by the *agon* between rhetoric and law, I would like to pose my first question: *What makes the rhetorical ordering of law possible?*

## 2. Between Rhetoric and Law

Bernhard Waldenfels (1996) approaches the rhetorical authority with Aristotle who, in his Rhetoric, distinguishes between forensic and deliberative discourses. Originally, Aristotle assigned different venues for the two kinds of rhetoric, designating court for forensic discourse and politics for deliberative. Waldenfels suggests that we reconsider this distinction on account of the temporal vector. He places the two kinds of discourse on a continuum: forensic discourse that establishes truth-conditions for the events that happened in the past informs deliberative discourse that transforms the past events into future possible situations. In turn, those situations provide the conditions for truth. On the one hand, politics and law form a broadly-conceived normative complex; on the other hand, the self-referential relationship between the two discourses indicate a temporal order that implies and, at the same time, precedes normification; finally, in answer to the question posed before, *What makes the rhetorical ordering of law possible?*, rhetoric appears to be a generative phenomenon. This is where Plato recognized its dangerous powers: rhetoric gives discourse shape. We should ask, *How is it shaping discourse?* In order to answer that question, we need to understand what shapes rhetoric first.

According to Waldenfels (1996), the origin of rhetoric is in the chiasm that separates being and beings, the self and the other, transcendental morality, or ethics, and normative morality, or law. The divide between ethics and morality is predicated on ethics-in-experience. Here, Waldenfels follows Emmanuel Levinas who locates ethics outside of the normative realm in the experience of the other as the Other. In contrast, as a normative complex, law is located in itself. Its totalizing effect makes one experience it as the moral same. As a matter of morality, law is a matter of formality. Hence, the Husserlian insight: “law is applied to something that is not contained in it like a part within the whole” (Ideas I,

72ff), meaning that law extends its normative order by extending its norms into other orders. For example, in the sphere of regulating behaviour, law admits of abnormality not in the terms of abnormality itself but in the terms of its own norms. By adopting abnormality as a variation of the same, norms push it beyond the border into the unsayable, silencing the evicton in the passage of a moral judgement.

An embodiment of a moral judgement by a rhetorical figure alerts us to a way with which norms reach outside of their own order. On the one hand, rhetoric precedes the normative realm, it thus lies closer to the pre-adjudicative ethics; on the other hand, it announces the norm, serving as a vehicle for adjudication. This paradoxical relation shows that, when employed as a measure of rightness, a rhetorical figure in fact imposes a different measure. At the same time, the unmeasurability of ethics, its resistance to calculus prevents us from suggesting that rhetoric measures goodness. *What does it measure then?* At this point, Plato's concern appears in a different light. Rhetoric does not oppose truth by creating an illusion of truth, the untruth. It rather lends its form to truth. When law divides events into normative and non-normative by excluding non-normative events, it formalizes the division in enunciative structures based on the same operations, division and exclusion, which are employed to regulate ab-normal occurrences. The formalization occurs vis-à-vis ordinary discourse. For example, in the realm of the everyday, the sanctive "You must not" functions as the most basic form of legal regulation. In the legal realm, the same statement is formalized in adjudicative discourse: "you-Animal-did-Man//and therefore//Man-does-you-Animal." A rhetorical figure transforms the corrective statement by rerouting its reference to the discourse that originated the figure. It appears then that rhetoric measures but itself; it serves neither morality nor ethics but an order of its own. I would like to call this extra-order Archive and turn to Foucault for an examination of its most basic properties.

### 3. Archiving Rhetoric

In his Archeology of Knowledge, Michel Foucault introduces and defines Archive as a locus of historical *apriori*, understood untraditionally as “the conditions for reality of statements” (1972, p. 127). One decodes Archive by defining “how statements relate to each other” (*ibid.*). Breaking through and into Archive implies traversing three levels: a) discursive field; b) discursive event; c) discursive object. The movement is regressive, that is to say, it begins with the pre-formed object. As what is already formed, the object results from the operations of inclusion and exclusion that connect the three levels, simultaneously concealing them. The operations generate omissions and deletions, a reduction of paradigmatic choices to certain selections. We tend to overlook these selections because Archive discloses them not in events but in syntagmatic wholes. The holistic givenness of Archive makes the transitions and links between and among *epistemes*, or discursive fields, appear seamless. Only a disruptive event that appears on the surface of Archive as “inflection,” to borrow a Deleuzian term, reveals how and to what end related events are selected and combined. An inflected object is *archionic*; it is a rhetorical figure that warps the surface of Archive. It is in this sense that “a purely empirical figure” stands for “formal apriori whose jurisdiction extends to object-events” but not to rhetoric (Foucault, 1972, p. 128). In sum, for law, the rhetorical landscape is formed by local figurations and their effects.

The logic of local figurations is “the logic of a great strategy, or rhetoric” (Foucault, 1972, p. 176). The chiasmic structure of law therefore replicates the rhetorical logic of law. It thus is based on the co-determination of *judicative* and *veridicative* discourses. As judicative discourse, law applies norms. As veridicative discourse, law establishes truth conditions for those norms. Rhetoric stabilizes and sustains law by connecting the two discourses together with its figures. Foucault finds two figures that explicitly re-present the two discourses: *prosopopaea* (used to represent an abstract quality or idea as a person or creature: Man→Monster) and *asyndeton* (based on a conjunctive omission that generates the effect of unpremeditated multiplicity, of an extemporaneous rather than a laboured account:

Man...Monster). The figures conceal the legal chiasm by filling it with rhetorical chiasmus. Yet, the relationship between the two figures and their discursive fields is not of complementarity. According to Foucault, “this relationship is at the same time reciprocal incitation and struggle...a permanent provocation” (1972, p. 134). Thus, Foucault confirms Plato’s suspicions that rhetoric archives law; but, in addition, he demonstrates that rhetorical archiving is not without internal tension, or agonism.

#### 4. The Laws of Archive

It is to the agonistic character of rhetoric that Derrida attaches his name for Archive. In his own genealogical analysis of madness, Derrida focuses on the etymology of the word ‘archive’ as originating in the Greek word *arkhe* that signifies both “the commencement and the commandment.” The implications, according to Derrida, are such that what keeps also begins and what begins commands. Archive is therefore an unsettled place for events that not only have happened but are going to happen. Derrida writes, “The archivization produces as much as it records the event” (1995, p. 34). Shooting his interpretation from and through Freud, who has illuminated the archontic principle of the archive, which in itself presupposes not the originary *arche* but the nomological arche of the law, of institution, of domiciliation, of domestication, Derrida equates the latter’s fascination with the drive of the subconscious to death and pleasure with the originating power of the paper keeper, archive, a history machine par excellence. The tension between Tanatos and Eros is called by Derrida “archive fever.”

This fever leaves nothing but impressions, lovely, seductive, erotic memories of death, which are burning with desire: “Archive takes place at the place of originary and structural breakdown of the said memory” (Derrida, 1995, p.11). The question of the archive is therefore not the question of the past but the future, never the question of the past but the question of the future itself, the question of a response, of a promise and a responsibility for one’s self and for tomorrow. The future it speaks for is indicated by a coming or an event which one *allows* or *incites* to come (without seeing anything come) in “an experience which

is heterogeneous to all taking note, as to any horizon of waiting as such: that is to say, to all stabilizable theorems as such” (ibid., p. 56). The stability of archive comes from a deposition in an *archeion*, the creation of a place of relative exteriority, whether it has to do with writings, documents, or ritualized marks on the body proper. In other words, the Archive turns the outside into the inside, makes open spaces into places of worship, creates figures from speech.

“Law is the first archivist,” utters Derrida. By speaking law, archive gathers acts, actions, and activities together, establishes its boundaries and borders, turns itself into a law. It is a law of economy, once again, “a law of the *oikos*, of the transaction of signs and values, but also of some familial domesticity: haunting implies places, a habitation, and always a haunted house” (Derrida, 1995, p. 86). It is law that institutes the archive as it should be, not only in exhibiting the documents but in governing the exhibit. Law reads it, law interprets it, and law archives it. The repetitive mode of archival production produces the chiasmic fold. From inside that fold emerges a figure; it is a figure of speech that indicates that there is no future without repetition and thus no future can possibly come without a recourse to drama, to rhetorical evidence: dramatic proof, mark, clue, dramatic testimony, in the broad sense of testimony. Archival law is inseparable from the world’s drama. Archive theatricalizes the world. The Sophist is the master of ceremonies for these theatrics. Essentially, rhetorical theatricalizations elude perception. Archive is a phantom writer that “makes the law—even, and more than ever, when one contests him” (ibid., p. 61). Of itself, Archive leaves but a trace. This trace is the only experience of law. *How shall we understand this experience?*

### 5. Archival Justice

In his Remnants of Auschwitz, Giorgio Agamben (1999) addresses the concept of Archive from aside, so to speak, of Derrida’s Archive Fever. Largely coming from the Derridian problematics, Agamben thematizes the concept of archive with Levinas and Benveniste, thus returning us to the beginning of this presentation, the origin of rhetorical justice, ethics-in-

experience. Hence the aside: the precise ethics of responding to the extreme experience, the unimaginable, an event that leaves no impression, only depression. In his essay, “Monolingualism of the Other or the Prosthesis of Origin,” Derrida (1998) proposes that Holocaust refuse a response; no dialogue can be conducted about the unspeakable; speech is unable of expressing the experience of annihilation. Horror cannot be communicated. Neither in language, nor in speech, nor in rhetoric. Agamben disagrees. His disagreement is largely predicated upon his method, metasemantics, a modification of Foucault’s archeology. Agamben returns the question of archive to Benveniste, and to the things themselves, Auschwitz, its testimonies. A testimony is an embodiment of extreme experiences. For an example, Agamben evokes the figure of Musselmann, a human being who, while under severe duress of the concentration camp, leaves his subject but continues to function biologically. *How is it possible to render this experience?*, asks Agamben, *Where can it be archived?*

The question draws a sharp line between the event of a violent death witnessed by a court historian and an event of the living dead witnessed by a dying person. The experience of Musselmann is positioned between life and death unable of completing/connecting the two. Hence, the failure of Heidegger’s concept “anxiety before death.” For Musselmann, death has not come yet but there is no anxiety already. Witnesses to these experiences are also archivists. But, in contrast to Derrida’s archons, official archivists of power, witnesses to Musselmann are the bearers of the extreme, and so, instead of collecting in order to conceal, they conceal in order to tell. Witnesses to the impossible become impossible witnesses: “The Shoah is an event without witnesses in the double sense: one cannot bear witness to it from the inside of death and from the outside since the outside is excluded from the event” (Agamben, 1999, p. 35). The rejection of the inside/outside dichotomy by extreme witnessing sabotages a common measure of truth in the legal arena, witness testimony, for Shoah testimonials cannot rely on language; they are rather without language. I can only say what can be said, but I cannot retell the unsaid, especially so when the bearer of the unsaid,

Musselmann, falls out of reach. The possibility of such a figure and of such an existence problematizes not only the notions of subjectivity and intersubjectivity, but, most prominently, for this presentation, “a different possibility of bearing witness—that which does not have language” (ibid., p. 39). Shall we say, then, and no ethics? *What can one do in response to someone who does not, cannot issue a response?*

Agamben responds that, in comparison to other liminal inter-subjects, Musselmann demands a radically different kind of ethics. Not only normative morality falls short of responding to this experience; the absolute ethics of the Levinasian kind falters as well: “After Auschwitz, it’s impossible to use tragic paradigm in ethics” (Agamben, 1999, p. 99). Musselman issues no call; there is no subject whose face demands a response. But, the ethical imperative remains: it is the imperative to bear witness to what is unimaginable. From that ethics, one can derive an imperative to tell about this absence. In an interesting neo-Platonic twist, Agamben shows that the relationship between the witness and the witnessed is predicated on guilt, for that one is guilty who cannot bear witness and shame because, in the moment of death, the experience of intimacy with the killer is the strongest. According to Martin Heidegger, shame is “an emotive tonality that traverses and determines the whole being” (1996, p. 263). Or, shame is auto-affection is the sensation of self is time. In witnessing, the passivity of shame and the feverish need to express it “is the place of testimony. Testimony takes place in the non-place of articulation. In the non-place of the voice stands not writing but the witness.

Witnessing is without language. Between language and speech there is chiasm. The testimony comes from the chiasm that separates and unites the living being and the speaking being, and co-extensively, the inhuman and human: “the human being exists in the human being’s non-place, in the missing articulation between the living being and logos” (Agamben, 1999, p. 134). This is what is inhuman, but, at the same time, the one who truly bears witness. “Testimony takes place where the speechless one makes the speaking one speak and where

the one who speaks bears the impossibility of speaking in his own speech, such that the silent and the speaking, the inhuman and the human enter into a zone of indistinction in which it is impossible to establish the position of the subject” (ibid., p. 120). The distinctions between human/inhuman, living being becoming speaking, and the logos becoming a living creature create currents that are interruptive, or, once again, with Deleuze, inflective, the origin and the place of testimony. The subject without speech becomes the chiasmic figure: “Man-Animal. Man. Break. Animal. Break.” His/her enunciation is pure existence, the fact that a certain being, language, took place, but outside of language. It is a rhetorical testimony without archive, order, or law.

## 6. Conclusion

On this point, this essay has taken the issue of rhetorical measure full circle. Following Plato’s warning about rhetoric’s spellbound effects in passing untruth for truth, this exploration has been guided by the questions about the import of the rhetorical measure for law, as well as the origin and the place of the rhetorical order. With Waldenfels, I located rhetoric outside of the normative realm between morality and ethics. Here, removed from either the norm or the good, the rhetorical figure responded to the order of its own, generating this order in place of politics or law. Foucault gave us the name for this order: Archive. An order that connects statements in a web of power, Archive is neither linguistic nor normative but agonistic. The *agon* is developing between the archived and the archiving, the saying and the said, morality and ethics. Derrida further exposes this tension as burning, a memory tending to the future, without ever arriving there, preventing any measure, denouncing any structure. Finally, digressing, Agamben reinstates the measure for Archive by finding it in the figure of a witness, whose testimony of extreme experiences re-figured rhetoric as Archive without order, a form of primordial justice before law.

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