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NOT SOCRATES, BUT PROTAGORAS: THE SOPHISTIC BASIS OF LEGAL EDUCATION*

WILLIAM C. HEFFERNAN**

This essay takes seriously law professors' claim that they teach according to Socratic method. The claim may not always be put forward in all seriousness; in fact, it may sometimes be intended more as a conceit than as an accurate description of the techniques of legal education. But if reference to Socratic method does involve a conceit, then it is surely *the* conceit of legal education¹ and, as such, deserves careful consideration no matter how fancifully it may be proposed. If, on the other hand, reference to Socratic

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1. For a sampling of references to Socratic method, see J. REDLICH, *THE COMMON LAW AND THE CASE METHOD IN AMERICAN UNIVERSITY LAW SCHOOLS: A REPORT TO THE CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING* 12, 25, 29, 30, 51, 69 (1914) [hereinafter cited as REDLICH]; Fuller, *On Teaching Law*, 3 *STAN. L. REV.* 35, 40 (1950); Gilmore, *The Assignee of Contract Rights and His Precarious Security*, 74 *YALE L. J.* 217 (1964); Keeton, *Warren Abner Seavey—Teacher*, 79 *HARV. L. REV.* 1333, 1335 (1966); Kelso, *Teaching Teachers: A Reminiscence of the 1971 AALS Law Teachers Clinic and a Tribute to Harry W. Jones*, 24 *J. OF LEGAL EDUC.* 606, 607 (1972); Kennedy, *How the Law School Fails: A Polemic*, 1 *YALE REV. OF LAW AND SOC. ACT.* 71, 73 (1970); Ladd, *Edmund M. Morgan*, 79 *HARV. L. REV.* 1546, 1548 (1966); Meltzner & Schrag, *Report from a CLEPR Colony*, 76 *COLUM. L. REV.* 581, 582n (1976); Patterson, *The Case Method in American Legal Education: Its Origins*, 4 *J. OF LEGAL EDUC.* 1, 17 (1951); Patton, *The Student, the Situation and Performance During the First Year of Law School*, 21 *J. OF LEGAL EDUC.* 10, 38 (1968); Prosser, *Warren Seavey*, 79 *HARV. L. REV.* 1338, 1339 (1966); Richardson, *Does Anyone Care for More Hemlock?*, 25 *J. OF LEGAL EDUC.* 427, 434-41 (1973); Savoy, *Towards a New Politics of Legal Education*, 79 *YALE L.J.* 444, 457 (1970); Scott, *Samuel Williston*, 76 *HARV. L. REV.* 1330, 1331-32 (1963); Stone, *Legal Education on the Couch*, 85 *HARV. L. REV.* 392, 406-07 (1971); Taylor, *Law School Stress and the 'Deformation Professionelle'*, 27 *J. OF LEGAL EDUC.* 251, 254 (1975); Watson, *The Quest for Professional Competence: Psychological Aspects of Legal Education*, 37 *U. CIN. L. REV.* 93, 119-37; Comment, *Anxiety and the First Semester of Law School*, 1968 *WIS. L. REV.* 1201, 1203. The invocation of Socrates' name was varied somewhat by Dean Casper, who remarked of Harry Kalven that he "was a law teacher who did not teach by 'the Socratic method,' but who was a Socrates." *Dedication to Harry Kalven*, 43 *U. CHI. L. REV.* (1975).

method is meant seriously, there is all the more reason to examine the term with care.

The central thesis of this essay is that legal education can best be described in terms of the *paideia*² offered by Socrates' great rival, the Sophist Protagoras, and not in terms of that offered by Socrates himself. The negative point must be established first: legal education has lived for so long off the favorable connotations of Socrates' name that a reasoned argument must be given showing why the Socratic analogy is inappropriate.³ The first half of the essay will therefore offer a definition of the actual method of instruction employed in legal education, and will then show why it is inaccurate to speak of this as Socratic.

The second half of the essay establishes the analogy with Protagorean *paideia*. It is surprising that this parallel has not been considered before, for it was the Sophists, and not Socrates, who trained the advocates of fifth and fourth century Athens.⁴ It was Protagoras, though, who also laid the pedagogical foundations for

2. It is difficult to capture the full flavor of the Greek term $\kappa\alpha\iota\delta\epsilon\iota\lambda\alpha$. In only a rough sense can this be translated as "education," for the Greeks assigned a broader meaning to $\kappa\alpha\iota\delta\epsilon\iota\lambda\alpha$ than we would to "education." As Professor Jaeger has noted, $\kappa\alpha\iota\delta\epsilon\iota\lambda\alpha$ is closer in meaning to the German *Bildung* than it is to any single English word. See W. JAEGER, 1 PAIDEIA: THE IDEALS OF GREEK CULTURE xxiii (1939). It thus refers to the method by which the values of a civilization are instilled in an individual and not to the method by which any one specific skill is taught. It is in this sense that Plato proposes a system of $\kappa\alpha\iota\delta\epsilon\iota\lambda\alpha$ in the *Republic* (see, e.g., *Republic* 376E and *passim*) and also in this sense that Socrates spoke of education and a sense of justice as marks of the noble character (see, e.g., *Gorgias* 470E).

3. One exception to this must be noted. Professors Shaffer and Redmount have claimed that "the first year of law school is an exercise in intimidation . . . [and that] [l]aw teachers have traditionally called this method of intimidation 'Socratic.'" They have then argued that "Socrates would decline the honor of being identified with [the method]." See T. SHAFER & R. REDMOUNT, *LAWYERS, LAW STUDENTS AND PEOPLE* 8 (1977). The authors certainly stand alone in questioning the propriety of calling the method "Socratic"; but their reason for doing so is, unfortunately, of doubtful validity. It is clear that Socrates *did* intimidate his students. The most famous example of this is to be found at *Meno* 80A-B where Meno, in expressing frustration over Socrates' questioning, states that he believes Socrates to be "exercising magic and witchcraft over" him. (Guthrie trans.) For a compilation of instances of slyness in Socrates' questioning of others, see R. ROBINSON, *PLATO'S EARLIER DIALECTIC* 7-10 (2d ed., 1953) [hereinafter cited as R. ROBINSON].

4. For general discussions of the pedagogical role of the Sophists in training Athenian advocates, see R. BONNER, *LAWYERS AND LITIGANTS IN ANCIENT ATHENS*, Ch. 8 (1927); and J. JONES, *THE LAW AND LEGAL THEORY OF THE GREEKS* 146-49 (1956). The legal education offered by the Sophists is treated satirically in Aristophanes' *Clouds* (Arrowsmith trans.). For further discussion of the Sophists' instruction of advocates, see text & accompanying notes 48-61 *infra*.

the chicanery Plato faulted in the Sophists⁵ — and this may explain both why the parallel between Sophistic and legal education has been ignored and why that parallel is a disturbing, and highly relevant, one today. The second half of the essay will thus have a double purpose. It will demonstrate the strength of the analogy with the Sophists and, in doing so, it will consider the troubling implications that follow from the analogy.

I. LAW SCHOOL SOCRATIC METHOD

What is it law professors mean when they claim to teach by "Socratic method"? Two aspects of this claim deserve particular attention. First, law schools' Socratic instruction consists of a process of question and answer in which students are pressed by their professors to state and then to clarify basic concepts of the law. The source of these concepts is not merely a student's imagination—a student is not asked, for instance, what *he* means by a contract or by due process of law. Instead, the legal ideas at stake are contained in a case, and a professor's questioning is designed to lead students to recognize the shadings of a concept's meaning implicit in the text of a case. Law school Socratic method can, in this way, be defined as a form of *eristical criticism of texts*—"critical" because of the centrality of textual analysis in the curriculum and "eristical" because question and answer, rather than some form of lecture, are used to reach valid interpretations of the legal rules of a case. Textual criticism is of course not the sole component of legal education; it often yields to speculation about novel applications of a rule or to consideration of fact-patterns the author of a decision appeared not to have anticipated. However, even when this occurs, textual criticism remains centrally important, for it discovers the theme (the rule) which can then be subjected to infinite variation.

It was Dean Langdell of Harvard who first introduced this

5. In the Protagorean curriculum, students were taught to develop both sides of an argument. In this respect, they were taught how "to make the weaker cause the stronger." See H. DIELS, 2 FRAGMENTE DER VORSOKRATIKER 266, No. 6b (1952) [hereinafter cited as DIELS], trans. by K. FREEMAN as ANCILLA TO THE PRESOCRATIC PHILOSOPHERS 126, No. 6b (1971). Socrates in turn faulted Sophists who offered instruction in forensic oratory as "peddler[s] of the goods by which a soul is nourished." *Protagoras* 313C (Guthrie trans.). For further discussion of the Platonic critique of the Sophists, see text & accompanying notes 62-68 *infra*.

method of eristical criticism to American legal education.⁶ As far as can be determined, it was also Langdell who first called the method "Socratic."⁷ Because the techniques of legal education have not changed significantly in the hundred years or so since Langdell's revolution (a matter of consternation for some and satisfaction for others⁸), we can use an account of Langdell's own approach to teaching as a basic description of the procedures underlying law school Socratic method. More will have to be said about the purposes of these procedures, but the elements of the instructional technique itself are stated well in the following description:

Langdell began his [classroom instruction] by having each of the cases, which the students had to study carefully in preparation for the class, briefly analyzed by one of them with respect to the facts and the law contained in it. He then added a series of questions, which were so arranged as gradually to lay bare the entire law contained in that particular case. This stimulated questions, doubts, and objections on the part of individual students, against whom the teacher had to hold his own ground in reply. Teacher and pupils then, according to Langdell's design, work together unremittingly to extract from the single cases and from the combination or contrasting of cases their entire legal content, so that in the end those principles of that particular branch of law which control the entire mass of related cases are made clear. *The two ideas taken together [statement of the case and debate over its principles] suggest and are sufficiently well described by the term "Socratic method,"* — an expression which was indeed early employed by Langdell and his pupils.⁹

The text-based character of law school Socratic method is not a matter of dispute. Its purpose has, however, been a subject of intense controversy. In recent years, critics of legal education have argued that an unstated purpose of its Socratic method has been to impose an oppressive, patriarchal domination on law students.¹⁰ Defenders in turn have pointed to a more benign purpose, claiming that the method is designed merely to teach students to think like

6. See Stevens, *Two Cheers for 1870: The American Law School*, 5 PERSPECTIVES IN AM. HIST. 405, 427 (1971); and REDLICH, *supra* note 1, at 9-13.

7. See J. REDLICH, *supra* note 1, at 12.

8. Dean Michael Kelly of the University of Maryland Law School has noted, largely in disappointment, that "[l]aw schools have refused to expand the basic limits set by Langdell" in 1870. KELLY, LEGAL ETHICS AND LEGAL EDUCATION 24 (1980). See also Richardson, *supra* note 1, at 435. For an account of what Stevens calls the triumph of "Harvard orthodoxy," see Stevens, *supra* note 6, at 424-41.

9. J. REDLICH, *supra* note 1, at 12 (emphasis added).

10. See, e.g., Kennedy, *supra* note 1, at 72-73; Savoy, *supra* note 1, at 457; Watson, *supra* note 1, at 119-25; and T. SHAFFER & R. REDMOUNT, *supra* note 3, at 8.

lawyers.¹¹ Although no one seems to have noted the possibility, both sides could be correct. Arguably, the threat of domination encourages rigorous analysis; and law school might, in this sense, offer yet another example of the beneficial effect of suffering. For the purposes of this essay, though, the accuracy of each side's argument is largely irrelevant. If the warrant to use Socrates' name is to be challenged successfully—if, in other words, the conclusions reached here are to be credible beyond a small circle of dissenters who would be predisposed to believe them in any case—legal education must be taken on its most, not its least, favorable terms. Only orthodox accounts of law school Socratic method will therefore be considered here.

When viewed from the standpoint of orthodoxy, the purpose of the method is clear: it is designed to prepare students "to think like lawyers" and, above all, to prepare them for their roles as advocates. Modern defenders of the method such as Edwin Patterson, for instance, have claimed that it offers "good preparation" for the "ordeal" of courtroom debate with judges and lawyers.¹² Similarly, Warren Seavey, who was once singled out for his ability to "out-Seavey Socrates,"¹³ was praised for using the method to train his students in the fine arts of "splitting a hair" and "distinguishing a distinction."¹⁴ And Louis Brandeis, an early defender of the method, apparently hoped that it would induce even more than a capacity to make fine distinctions. Brandeis claimed that law school Socratic method raises each student's interest to a "fever heat" and that "[t]he animated discussions in the class-room induce the student to every means of fortifying himself, either for his own instruction or in order to overthrow his adversary in discussion, be it professor or fellow student."¹⁵

Brandeis' remarks underscore the uniquely adaptive purpose defenders have discerned in law school Socratic method. When

11. See, e.g., Patterson, *supra* note 1, at 19. John Chipman Gray offered the following defense of Langdell's method: "To extract law from the facts is *the* thing that a lawyer has to do all his life; to do it well makes the successful lawyer; to do it pre-eminently well makes the great lawyer; a student cannot begin it too early." Gray, *Methods of Legal Education*, 1 YALE L.J. 159, 161 (1892).

12. Patterson, *supra* note 1, at 19.

13. Keeton, *supra* note 1, at 1333.

14. Hall, *Warren Seavey and the Age of Restatement*, 79 HARV. L. REV. 1329, 1330, quoting HARV. L. D. REC., April 28, 1955.

15. Brandeis, *The Harvard Law School*, 1 THE GREEN BAG 1, 21 (1889).

students are urged to "overthrow" their opponents in argument or when they are encouraged to debate with their professors as if the latter were appellate judges, they are being trained in exactly the processes of thought they will later employ as lawyers. Instruction in legal doctrine cannot offer this training by itself; law professors have long recognized this point and so have placed greater emphasis on learning to think like a lawyer than on legal doctrine. Law school Socratic method thus provides the context *and* also sets the standard for successful acquisition of the lawyer's mental processes. There is, in this sense, a continuum of means and ends¹⁶ in legal education; for unlike some other systems where pedagogical method is employed to impart a specific body of information, in this case the *end* of education is acquisition of the *means* by which the education is imparted. Thus, when a student can "split a hair" or "distinguish a distinction," he not only reflects the instructional method of eristical textual criticism, he also shows that he has made this method his own.

II. NOT SOCRATES

When we turn to the method of the historical Socrates, a problem of interpretation immediately arises, for it is hard to be sure of the accuracy of descriptions of the teaching methods of a man who left no writings. Protagoras poses a similar problem since he left only a few fragments. For the purposes of this essay, these problems are not insurmountable. Plato's early dialogues¹⁷ have long been taken as the chief guide to Socratic method. They will play the same role here and will be supplemented occasionally by references to Socrates in the writings of Xenophon¹⁸ and Aris-

16. This term is taken from the title of Chapter 6 of J. DEWEY, *THEORY OF VALUATION* (1939).

17. This essay follows Richard Robinson's list of Plato's early dialogues. This list can be found at the OXFORD CLASSICAL DICTIONARY 842 (2nd ed., 1970). It consists of *Hippias Minor*, *Laches*, *Charmides*, *Ion*, *Protagoras*, *Euthyphro*, *Apology*, *Crito*, *Gorgias*, *Meno*, *Lysis*, and *Euthydemus*. In another work, Robinson treats Book I of *Republic* as a Socratic dialogue, so this should be added to the list. See ROBINSON, *supra* note 3, at 9.

18. Xenophon, a contemporary of Plato's, discussed Socrates in four of his works, the *Oeconomicus*, *Apologia*, *Symposium*, and *Memorabilia*. Of these, the last is by far the most significant for any discussion of Socratic method. See, e.g., W. GUTHRIE, *SOCRATES* 13-28 (1971) [hereinafter cited as *SOCRATES*]; and Wellman, *Socratic Method in Xenophon*, 37 J. OF THE HIST. OF IDEAS 307 (1976).

totle.¹⁹ Plato's *Protagoras*, a dialogue between Socrates and the Sophist that may actually have occurred in about 430 B.C.,²⁰ offers the most extensive available description of the latter and his views. In the case of Protagoras, though, reliance will be placed on, admittedly opaque, fragments of his writings²¹ and on references to him in other Platonic dialogues²² and in Diogenes Laertius's *Lives of the Philosophers*.²³

A second general point deserves consideration. Eristical debate, which was one of the great Greek contributions to Western civilization and which also lies at the heart of modern legal education, rose to the level of a self-conscious art (Protagoras called it a *τεχνή*²⁴) under the stewardship of Protagoras and Socrates. If Socratic method were defined solely in terms of a process of teachers' questions and students' answers, then Protagoras' method would be indistinct from that of Socrates'. Both men employed pedagogical techniques that can properly be called dialectical as well as eristical.²⁵ (The special philosophical meanings of "dialectic" that Plato introduced in his later dialogues such as the *Republic*²⁶ and the *Sophist*²⁷ are refinements of a term that had a

19. Aristotle has been particularly influential in directing posterity's attention to Socrates' intellectualist approach to morality. See, e.g., *Nicomachean Ethics* 1144b19 and 28, and *Eudemian Ethics* 1216b2ff. For arguments that Aristotle is generally correct in his summaries of Socrates' ideas, see Field, *Aristotle's Account of the Historical Origin of the Theory of Ideas*, 17 CLASSICAL Q. 113 (1923); and Ross, *The Problem of Socrates*, 30 PROC. OF THE CLASSICAL A. 7, 18 (1933).

20. This conclusion is reached by J.S. Morrison in his article, *The Place of Protagoras in Athenian Public Life (460-415 B.C.)*, 35 CLASSICAL Q. 1, 2 (1941). Morrison lists three reasons for placing the dialogue in 433 B.C. Among these are the relative ages of Protagoras and Socrates. At *Protagoras* 317C, Protagoras states that he could be the father of all those in the room, including Socrates. Using birth dates given by others for Protagoras and Socrates, Morrison narrows the possible time for the dialogue to the 430's and then uses other evidence contained in the dialogue to settle on 433.

21. These are to be found at 2 DIELS, *supra* note 5, at 266-68 and K. FREEMAN, *supra* note 5, at 125-27.

22. These are to be found at *Euthydemus* 286C-D, *Meno* 91E, and, most importantly, *Theaetetus* 152Aff.

23. Diogenes, a writer of the third century A.D., is a notoriously unreliable source of information about ancient philosophers. He will therefore be cited only to corroborate claims made elsewhere. For his writings on Protagoras, see 2 DIOGENES LAERTIUS, *LIVES OF THE EMINENT PHILOSOPHERS* 50-56 (Hicks trans. 1925).

24. See 2 DIELS, *supra* note 5, at 266, No. 6 and K. FREEMAN, *supra* note 5, at 126, No. 6.

25. See H. MARROU, *A HISTORY OF EDUCATION IN ANTIQUITY* 51-52 (Lamb trans. 1956).

26. The key to the Platonic transformation of Socratic dialectic lies in the development of Plato's theory of ideas. In Book VI of the *Republic*, Plato has Socrates speak of the

looser meaning in the time of Protagoras and Socrates.) Similarly, both men helped to popularize question and answer as a method of education.²⁸ And, in this sense, both men can be said to have helped channel the spirit of the Olympic agon into the realm of language,²⁹ thus helping to institutionalize the long-standing Greek love of debate.

Viewed from the level of Athenian popular culture, Protagoras and Socrates were in fact often indistinguishable. Aristophanes, for instance, makes Socrates the butt of his jokes in the *Clouds*, but does so by attributing to him doctrines that are Protagorean, not Socratic, in nature.³⁰ Socrates in turn makes an indirect reference to the *Clouds* in the *Apology* when he denies that he ever taught the Protagorean technique of making the weaker argument the stronger.³¹ Even fifty years after Socrates' death, when educated Athenians were generally aware of Xenophon's and Plato's efforts to distinguish Socrates from his rivals, one still finds Aeschines,

"power of dialectic" as enabling philosophers to ascend from hypotheses to an intellectual plateau "which requires no assumptions and is the starting point of all." *Republic* 6. 511B-C (Shorey trans.). In Book VII, the ascent is said to reach the hypostatic entity that Plato's Socrates calls the "good in itself." *Republic* 7. 532A-B (Shorey trans.). While the exact contribution of Socrates to Plato's theory of ideas is not certain, it is safest to assume that Socrates did not offer a comprehensive theory of forms as transcendent entities, such as the theory found in Books VI and VII of the *Republic*. If this is true, then Socrates could also not be said to have employed the approach to dialectic used there.

27. In the *Sophist*, Plato offers an alternative version of dialectic that employs a spokesman other than Socrates and that anticipates some of the features of Aristotle's approach to classification. Dialectic here is still concerned with transcendent realities; in this respect, Plato differs with Aristotle. However, the distinctions made by dialectic involve division and collection, with the master of dialectic being able to distinguish "Kind by Kind, in what ways the several Kinds can or can not combine." *Sophist* 253D-E (Cornford trans.). See also *Sophist* 226Cff.

28. See generally H. MARROU, *supra* note 25, Chap. 5. Ernest Barker has also reminded us in this regard that "[i]n contrasting Socrates with the Sophists, we must remember that in many respects, he was one of them." E. BARKER, *POLITICAL THOUGHT OF PLATO AND ARISTOTLE* 46 (1959).

29. This is the argument of A. GOULDNER, *ENTER PLATO* Chap. 2 (1965).

30. At lines 112-18, Strepsiades informs his son that there are two kinds of logic, "philosophical" logic and "Sophistic or Socratic" logic. William Arrowsmith noted that the originator of the Doctrine of the Two Logics (or *Antilogoi*) was Protagoras of Abdera. Aristophanes, *CLOUDS* 117 (Arrowsmith trans. 1962). At lines 1399ff, Pheidippides, Strepsiades' son, gives a classic illustration of how to make the weaker cause the stronger by "prov[ing] beyond the shadow of a doubt the philosophical propriety of beating my Father." (Arrowsmith trans.)

31. *Socrates' Defense (Apology)* 18B. (Tredennick trans.) It should be noted that Socrates was also mistakenly charged with teaching the doctrines of Anaxagoras. See *id.* 26D.

Demosthenes' great opponent in oratory, classifying Socrates as a Sophist and thus underscoring the strength of popular prejudice.³²

Thus, if we were to confine our analysis to the level of popular culture, the eristical method of question and answer could be called either Protagorean or Socratic—although even here Protagoras would deserve the nod on grounds of historical precedence.³³ However, if we examine the specific features of each man's educational technique, the differences between them become stark indeed, with Protagoras foreshadowing modern legal education and Socrates creating a system of moral education peculiarly his own. The two criteria just used to define law school Socratic method can now be applied to Socrates and Protagoras. Inquiry will start with Socrates, examining first the purpose of his method and then the procedures it employed. Once the negative analogy with Socrates has been established, these same criteria will be used to establish the positive analogy with Protagoras.

Consider first the purpose of Socratic method. It is appropriate to begin discussion with this point, for examination of the *telos* of an object was Socrates' own favored approach to definition.³⁴ The purpose of Socratic method was frankly ethical. Socrates made this clear in the *Apology*, where, addressing his Athenian jurors, he said:

Gentlemen, . . . I owe a greater obedience to God than to you, and so long as I draw my breath and have my faculties, I shall never stop practicing philosophy and exhorting you and elucidating the truth for everyone that I meet. I shall go on saying, in my usual way, My very good friend, you are an Athenian and belong to a city which is the greatest and most famous in the world for its wisdom and strength. Are you not ashamed that you give your attention to acquiring as much money as possible, and similarly with reputation and honor, and give no attention or thought to truth and understanding and the perfection of your soul [ψυχῆ]?

And if any of you disputes this and professes to care about these things, I

32. Aeschines, *Against Timarchus* 173.

33. See generally note 20, *supra*. Morrison offers good reasons for supposing that Protagoras began his public career in Athens no later than 453 B.C., at which time Socrates would only have been in his teens. See Morrison, *supra* note 20, at 5.

34. See, e.g., *Cratylus* 389A-C and *Republic* 353B. The former is admittedly not classified as an early, Socratic dialogue; see note 17 *supra*. However, as Guthrie remarks, the passage cited offers a typically Socratic teleological approach to definition, one that Socrates does employ in dialogues such as Book I of the *Republic* that are considered "Socratic." See *SOCRATES supra* note 18, at 122.

shall not at once let him go or leave him. No, I shall question him and examine him and test him; and if it appears that in spite of his profession he has made no real progress toward goodness, I shall reprove him for neglecting what is of extreme importance, and giving his attention to trivialities.³⁵

With this speech, Socrates made clear the purpose of his eristical duels. For him, question and answer were a means of awakening his students to *ethical* truth. Once this truth was known, he claimed, in a doctrine that has been widely challenged because of its intellectualist approach to human conduct,³⁶ it could *by itself* induce men to act virtuously. Plato's Socratic dialogues point toward two related doctrines of ethics and epistemology—that virtue is knowable and thus teachable,³⁷ and that knowledge of the nature of virtue is a necessary and sufficient condition for engaging in right conduct.³⁸ These propositions remain unproven throughout the Socratic dialogues. In fact, Socrates frequently confessed he did not know what virtue ($\alpha\rho\epsilon\tau\eta$) is,³⁹ and the exact meaning of Socratic "knowledge"⁴⁰ remains uncertain. Such difficulties lie at the root of Socrates' repeated confessions of ignorance. They should not, however, cause any doubt about the overall purpose of

35. *Apology* 29D-30A (Tredennick trans.).

36. Aristotle was the first, and most influential challenger of Socrates' doctrine of virtue as a type of knowledge. See his *Nicomachean Ethics* 1144b25ff. and other sources cited at note 19 *supra*.

37. Aristotle argues that this was Socrates' belief. See *Nicomachean Ethics* 1144b28ff. Socrates argues extensively for the knowability, and thus the teachability, of virtue at *Meno* 89Cff. where he states, "If . . . virtue is knowledge, clearly it is teachable." (Guthrie trans.) However, his entire argument in the *Meno* is framed in hypothetical terms, and he finally concludes that virtue is *not* knowledge because there are no teachers of it. *Meno* 98E. This is undoubtedly a case of Socratic irony directed at the Sophists, for Socrates presents himself as a teacher of virtue at *Apology* 30A, although he of course never makes any claim to know what virtue is. See also Xenophon *Memorabilia* 3.9.5. (Marchant trans.).

38. At *Gorgias* 460B, Socrates claims that, by his principle, "he who has learned justice is just." (Woodhead trans.) This is cited by Aristotle at *Eudemian Ethics* 1216b6 as a genuine Socratic doctrine. Xenophon attributes the same claim to Socrates at *Memorabilia* 4.6.6 where he has Socrates argue that (a) when one knows what he ought to do, one cannot believe that one should do otherwise and (b) no one does other than what he thinks he ought to do.

39. See, e.g., *Apology* 23A-B; *Meno* 71B; and *Charmides* 165B.

40. In fact, "knowledge" is a translator's umbrella term that has been used to stand for $\epsilon\pi\iota\sigma\tau\eta\mu\eta$ and $\sigma\phi\iota\alpha$. For virtue as $\epsilon\pi\iota\sigma\tau\eta\mu\eta$, see *Protagoras* 352C, 361C and *Meno* 87C. For virtue as $\sigma\phi\iota\alpha$, see Xenophon *Memorabilia* 3.9.5. E.R. Dodds has noted that the Greeks often used the term $\epsilon\pi\iota\sigma\tau\eta\mu\eta$ to denote practical skill and trained ability. E. DODDS, *THE GREEKS AND THE IRRATIONAL* 16ff (1951). Given this meaning of "knowledge," Socrates may not have been suggesting that mere understanding of the nature of virtue is a necessary and sufficient condition for engaging in virtuous conduct.

his project. Socrates admitted only to ignorance of the nature of virtue; he did not, however, express doubt that discovery of its nature would induce men to act rightly. His dialogues therefore aimed at the discovery of elusive ethical knowledge, since this, by Socratic reckoning, was the key to moral reform.

The Socratic dialogue was therefore a particularly appropriate way of carrying out his reformist mission. One of the reasons for this lies in his moral epistemology. Another reason, though, is to be found in the special role Socrates assigned to the soul ($\psi\upsilon\chi\eta$) as repository of ethical knowledge. According to Socrates, learning is a form of recollection by which a student recovers from his soul knowledge he has always possessed but of which he was, for one reason or another, no longer consciously aware.⁴¹ The eristic dialogue in turn is the means by which recollection takes place, with the teacher's questions laying the foundation for penetrating barriers of forgetfulness to aid the student in recovering the ethical knowledge contained in his soul. A famous example of this anamnesic process is to be found in Socrates' examination of the slave boy in the *Meno*. After establishing that his pupil had no special training in the subject under discussion, Socrates extracted from the student basic propositions the student had originally believed himself incapable of enunciating. Socrates' conclusion at the end of the lesson indicates the connection between questioning and recollection which underlies his own eristic dialogues: "So a man who does not know has in himself true opinions on a subject without having knowledge . . . This knowledge will not come from teaching but from questioning. He [the subject of the questioning] will recover it for himself."⁴²

Thus, not only were Socrates' dialogues aimed at moral reform, his actual procedures were based on a special conception of the way in which reform could be brought about by awakening the soul to ethical knowledge. By themselves, these points would not suffice to invalidate the analogy between Socratic method and that of legal education. It remains possible, after all, that law professors employ Socrates' eristical techniques while not endorsing the pur-

41. The concept of learning as recollection is introduced at *Phaedo* 76A ff. as well as *Meno* 81E ff. Since the former is definitely not considered an early dialogue, discussion has been confined to the latter. For a review of the doctrine, see Moravcsik, *Learning as Recollection* in *PLATO I: METAPHYSICS AND EPISTEMOLOGY* 53 (G. Vlastos ed. 1971).

42. *Meno* 85C-D (Guthrie trans.).

poses for which he used them.⁴³ However, it should be recalled that the purpose of law school Socratic method has been an important issue in the debate between dissenters from and defenders of legal education, and that the latter have defined a purpose strikingly different from that of Socrates. Furthermore, it should also be recalled that Socrates' approach to definition was teleological; thus, if we are to define his and law schools' method of instruction by his own lights, purpose becomes an unavoidable issue. Considered in this way, Socratic method can be said to bear a mild resemblance to certain contemporary systems of moral education. Legal education, though, is certainly not one of these; its stated purposes are fundamentally at odds with those of Socrates. Given the importance that both Socrates and law professors have accorded to the purposes of their respective systems, this difference appears to be a significant one.

An alternative, and perhaps looser, approach to definition might therefore be appropriate. If one were to ignore both the purpose of Socratic method and its theory of learning as recollection, one might argue for an analogy between legal and Socratic education on the basis of the procedures each employs. Beyond the superficial similarity of eristic questioning, though, the argument for analogy fails. According to law school Socratic method, a professor takes a case as the basis of instruction and then asks students to elucidate its meaning. By contrast, Socrates was determinedly hostile to textual analysis of any kind. A revealing example of this hostility can be found in Plato's account of Socrates' debate with Protagoras himself. There, when the latter was asked to inaugurate a topic of discussion, he took as his text two sections of a poem by Simonides and proposed to examine these for their consistency with one another.⁴⁴ At first, Socrates participated in this discussion. But when asked to initiate a topic of his own, he began by remarking bitingy that conversations about others' writings reminded him of talk amongst "second-rate and commonplace people." "The best people," he said, "avoid such discussions, and entertain each other from their own resources, testing one another's mettle. . . . It is the truth, and our own minds, that we should be

43. See text accompanying notes 46-49 *infra*.

44. *Protagoras* 339A-C.

testing."⁴⁵ Socrates' point was unmistakable: in a dialogue that *he* initiated, no text would be allowed to come between him and his students since this would distract them from the search for ethical knowledge. This point in turn underscores the relation of anamnesis (recollection) and Socratic questioning. Socrates' questions were designed to awaken students to knowledge they already had—thus his hostility to intervening texts. Law professors' questions, by contrast, are meant to stimulate reflection on texts, not to aid students in developing their own a priori beliefs. For legal education, then, eristic furthers the goal of textual criticism. For Socratic *paideia*, on the other hand, textual criticism can only impede the anamnestic goal of eristic. This consideration alone is sufficient to demonstrate the profound difference between the two systems.

However, one more procedure should be cited in order to emphasize the lack of analogy. As Richard Robinson has pointed out, Socrates asked for definitions (of virtue, justice, courage, etc.), framing these requests in one of two forms.⁴⁶ In one, Socrates asked for a definition of one thing in terms of another ("is x y?"); and in the other, Socrates asked directly what a thing is ("what is x?").⁴⁷ Thus, in defining justice, a student of Socrates would not be permitted to give an example of a just relation among men. Instead, he would be required to state the basic characteristic ($\epsilon\tilde{\iota}\delta\omicron\varsigma$) of justice itself. Here, as in the previous discussion of Socrates' hostility to textual analysis, it is hard to disentangle Socrates' ontological presuppositions from the constituent elements of his method. However, a substitution of "abstract" for "essentialist" definition may suffice in this case. But even if this substitution is made, how could it possibly be said that law professors set as an educational goal the production of abstract definitions of key legal terms? And, furthermore, could it be said that professors pursue such definitions by renouncing textual criticism, instead having their students answer questions solely by reference to their own concepts of law? Unless both questions are answered affirmatively, law professors cannot accurately be characterized as employing

45. *Id.* 347C (Guthrie trans.).

46. R. ROBINSON, *supra* note 3, at 49.

47. *Id.* at 50, citing *Meno* 72C and *Euthyphro* 6D. It should be noted that while Socrates employs the term $\epsilon\tilde{\iota}\delta\omicron\varsigma$ in both these passages and thus clearly rejects the kind of ostensive definitions offered by his students, this does not mean that he was committed to metaphysical characteristics of $\epsilon\tilde{\iota}\delta\omicron\varsigma$ that one finds in Plato's middle and later dialogues.

even the procedures of Socratic method. Law schools' own Socratic method can succeed at its own tasks only by ignoring the method of Socrates himself.

Actually, one must go a step further than this: if law professors were to employ the educational methods of Socrates, then they would violate the fundamental norms of their profession. However strong the current interest in moral issues surrounding professional responsibility may be, law professors are not permitted to use their classrooms to carry out direct moral instruction of their students. Furthermore, even if the ethical purpose underlying Socratic method were to be discounted, it must be remembered that law professors do not, as a rule, set aside textual criticism in favor of the pursuit of abstract definitions of basic concepts of law. The term "Socratic method" may therefore serve as a flattering conceit for professors of law, but it bears little similarity to the method of Socrates.

III. BUT PROTAGORAS

Not Socrates, then, but why Protagoras? The answer is that the same criteria employed to demonstrate the lack of analogy between Socratic and legal education can now be used to forge one when the Sophists are substituted for Socrates.

However, before turning to specific points of convergence, it would be wise to consider a general one that arises out of the Sophists' pedagogical role in ancient Greece. Within the limits set by their own milieu, the Sophists can be singled out as the first group in Athens to have created a market in either legal representation or instruction in the law. Two limits are, however, significant. One was the Athenian prohibition against direct representation of litigants.⁴⁸ Absolute as this prohibition may theoretically have been, in practice it was subject to certain exceptions, and it was through the exploitation of these exceptions that the Sophists first established their position in Athens. A litigant could claim, for instance, that he was unprepared for trial or that he was too ill to speak. With the permission of the court, he could then substitute a

48. This is discussed at R. BONNER, *supra* note 4, at 135; G. CALHOUN, *GREEK LEGAL SCIENCE* 44 (1944); and A. HARRISON, *THE LAW OF ATHENS: THE FAMILY AND PROPERTY* 156-57 (1968).

“friend” or relation to speak for him.⁴⁹ Or, if the litigant wished to avoid such a ruse, he could hire a Sophist to serve as a *logographos* in writing a speech for him to deliver on his own.⁵⁰ Whichever role the Sophist played, as either direct or indirect advocate, his very presence provoked alarm. Athenians in general and Socrates in particular were troubled by what they perceived as the introduction of market principles into the previously sacred domain of justice. In the *Clouds*, Aristophanes used the comic figure of Strepsiades to express alarm over the new moral brokerage. There, he had Strepsiades remark breathlessly to his son: “My boy, that little hovel is the Thinkery. Intellectuals live there What’s more—for a fee, of course—they offer a course called *The Technique of Winning Lawsuits*. Honest or dishonest, it’s all one.”⁵¹

Another limit on legal instruction was not so easily circumvented, though. The Athenians restricted the power of the judiciary, giving to the juries of their various courts the authority to make determinations of both law and fact.⁵² The purpose of these allocations of power was to prevent the corresponding growth of a corps of legal specialists who, it was feared, would threaten the foundations of democratic government.⁵³ Unlike the rule on legal representation, this limitation on the power of the judiciary was apparently honored throughout the fifth century. Its effect was to encourage Sophistic instructors to place primary emphasis on forensic technique, since this was more likely than citations of the law to be decisive in the outcome of a suit. This is not to say the Sophists were uninterested in legal doctrine. Protagoras, for instance, drafted at Pericles’ request a legal code for the Athenian-sponsored colony of the Thurii.⁵⁴ Antiphon, one of the great orators of the fifth century, reviewed some of the basic Athenian laws of homicide in display speeches that stated first the prosecution’s

49. G. CALHOUN, *supra* note 48, at 44-45; A. HARRISON, *supra* note 48, at 158; J. JONES, *supra* note 4, at 144-45.

50. G. CALHOUN, *supra* note 48, at 39; A. HARRISON, *supra* note 48, at 157.

51. Aristophanes *Clouds* 94-99 (Arrowsmith, trans.).

52. G. CALHOUN, *supra* note 48, at 35.

53. *Id.* at 47-48. For a discussion of the Athenian failure to develop a body of systematic law, see J. JONES, *supra* note 4, at 292-308.

54. See Ehrenberg, *The Foundation of the Thurii*, 69 AM. J. OF PHILOLOGY 149, 168 (1948). For an example of Protagoras’ interest in legal theory, see Plutarch, *Life of Pericles* 36, in PLUTARCH’S LIVES where Plutarch recounts a debate between Pericles and Protagoras over the responsibility assignable to a javelin thrower who had accidentally hit another person with his weapon while participating in an athletic contest.

argument and then the defense's;⁵⁵ and Isaeus, an orator of the fourth century, serves as a similar source of information for the rules governing inheritance.⁵⁶ However, despite the personal interest of some of the Sophists in Athenian law, as teachers they were more concerned with forensic technique than with substantive law. Such emphasis was appropriate, of course, in a legal system that accorded little authority to its judiciary. Because of the emphasis on forensic technique, though, the analogy with modern legal education must be considered an imperfect one. Sophistic *paideia* laid the foundations for the eristical instruction of advocates. It did not, however, link this with legal doctrine as have law schools of the present day.

When we turn to the purposes of Protagoras' instruction (since "purpose" was the first criterion used to assess Socratic method) we begin to encounter the darker side of Sophistic thought. Protagoras' own fragments offer a good illustration of this since they hint strongly at the special pleasure that Sophists, like modern advocates, took in the game of debate itself. In his treatise on the *Art of Eristics*, for instance, Protagoras told students there are two contradictory arguments about everything.⁵⁷ Pedagogically, this claim was probably connected with the eristical exercises contained in his *Antilogiae*, where students were required first to take one position on an assigned subject and then to refute it.⁵⁸ The most significant of Protagoras' fragments, though, is one that defines the

55. The authorship of the *Tetralogies*, in which these countervailing arguments are outlined, is uncertain. Kenneth Maidment, translator of the *Tetralogies* for the Loeb Classical Library, has argued that they cannot be attributed to Antiphon, although they commonly are. See 1 *MINOR ATTIC ORATORS* 12 (K. Maidment trans. and ed. 1941). To use the terminology of the modern legal system, Antiphon is listed here as author "for identification purposes only."

56. See ISAEUS x, xii-xiii (E. Forster trans. and ed. 1927).

57. 2 DIELS, *supra* note 5, at 266, No. 6; K. FREEMAN, *supra* note 5, at 126, No. 6.

58. 2 DIELS, *supra* note 5, at 265, No. 1; K. FREEMAN, *supra* note 5, at 125, No. 1. The full title of Protagoras' treatise was ANTIΛΟΓΟΝ Α Β. Aristotle appears to have endorsed this Protagorean method of instruction. At *Topics* 163a37ff, he offers the following advice to students:

Always, in dealing with any proposition, be on the lookout for a line of argument both pro and con: and on discovering it at once set about looking for the solution for it: for in this way you will soon find that you have trained yourself at the same time in both asking questions and answering them.

(Pickard-Cambridge trans.) Paul Moraux has noted the Protagorean basis of this portion of the *Topics*. See Moraux, *La joute dialectique d'après le huitième livre des topiques* in *ARISTOTLE ON DIALECTIC: THE TOPICS* 277, 295 (G. Owen ed. 1968).

special task of the advocate; this is the fragment in which he enjoined his students to seek "to make the weaker cause [λόγον] the stronger."⁵⁹ The exact meaning of this dictum, which survives without supporting comment, is hard to determine. It is possible that Protagoras was concerned with arguments commonly viewed as morally weaker than their opposites, and that he wished to show that all moral statements are equally valid.⁶⁰ On the other hand, he may not have been concerned with philosophical issues at all; he may simply have wished to instill in his students the advocate's "love of the chase." But whichever of these hypotheses is correct, Protagoras' fragment on the weaker cause was used in a system of instruction which separated forensic training from moral education (if, indeed, the latter was offered at all), and which thus made victory in debate an important goal in its own right.⁶¹ In this respect, Protagoras established a separate and distinct system of education for advocates, one where the end of instruction was defined, not by moral considerations, but by student acquisition of the eristical method used by the teacher himself.

According to Plato, Socrates was among the first to discern the potential for chicanery implicit in this kind of instruction. Protagoras was never attacked personally in Plato's dialogues,⁶² but Socrates regularly expressed his scorn for Sophistic *paideia*, for legal advocacy, and for the legal mind itself. Sophists, Plato claimed in a non-Socratic dialogue, were "traders in the merchandise of the soul."⁶³ As teachers who remained value-neutral while showing their students how to influence the courts on questions of right and

59. 2 DIELS, *supra* note 5, at 266, No. 6b; K. FREEMAN, *supra* note 5, at 126, No. 6b.

60. At *Euthydemus* 286C-D, Protagoras is said to have claimed that it is impossible to have a false opinion. This claim extends beyond moral statements, though it would obviously include them.

61. Protagoras' argument that it is impossible to have a false belief is consistent with his dictum, reported at *Theaetetus* 152A, that "man is the measure of all things—alike of things that are and of the not-being of things that are not." (Cornford trans.) There is an obvious parallel between Protagoras' philosophical relativism and his concern with advocacy. However, there is no necessary connection between these two concerns, nor is there any evidence in Plato's dialogues or elsewhere that Protagoras mixed philosophical and forensic instruction. In fact, the two dialogues that deal extensively with Protagoras' doctrines, *Protagoras* and *Theaetetus*, avoid this mixture, with the former offering a general introduction to Protagoras' methods of instruction and the latter an outline and critique of his relativist beliefs.

62. In fact, Socrates remarks at *Meno* 91E that Protagoras' "reputation [was] consistently high" throughout his career as a Sophist. (Guthrie trans.)

63. *Sophist* 224C-D (Cornford trans.).

wrong, they were, according to Socrates in the *Protagoras*, "peddler[s] of the goods by which a soul is nourished."⁶⁴ Advocacy, Socrates argued, defeats, rather than furthers, the aims of justice;⁶⁵ in the *Gorgias*, Socrates even claimed that it is immoral for an advocate to defend a man whom he knows to be guilty.⁶⁶ And, given Socrates' general contempt for the legal mind,⁶⁷ it should come as no surprise to discover that he looked forward to the day when lawyers would be exposed as intellectual frauds "and laughed at, not by maid-servants or the uneducated . . . but by everyone whose breeding is the antithesis of a slave's."⁶⁸

Socrates' vituperation aside, can it actually be said that the sole purpose of Protagorean *paideia* was to train students in the arts of chicanery? Certainly many students acquired these as a by-product of Sophistic instruction; and in this sense, Socrates should be viewed not as the originator of the method of legal instruction but instead as the first critic of the uses to which that method can be put. But there is also a positive purpose, directed toward instilling tolerance and respect for pluralism, which, on the one hand, is discernible in Protagorean *paideia* and, on the other, is never men-

64. *Protagoras* 313C (Guthrie trans.).

65. Socrates would claim that there are two senses in which knowledge of the truth is a necessary precondition for criminal justice. First, one must know the truth about a defendant's condition. If a defendant is guilty, then this fact must be publicized as a first step towards his rehabilitation. See *Gorgias* 480B-C (Woodhead trans.). Second, one must know the true nature of justice, its εἶδος. It could be claimed that, in the modern world, we have severed entirely the connection between truth and criminal justice. On the one hand, because of American law's emphasis on the procedural nature of justice, it could be said that a criminal case reaches a just conclusion even though the truth about the defendant's conduct is never publicized. On the other hand, it could also be argued, *contra* Socrates, that truth is not possible in ethics and thus that one cannot know, but only feel, the validity of a standard of criminal justice.

66. Socrates claimed that there is a morally therapeutic power of punishment. He states that a man who has done wrong should go to "the judge as though to a doctor [in order] to prevent the distemper of evil from becoming ingrained and producing a festering and incurable ulcer in his soul." *Gorgias* 480A-B. As for the advocate who defends a man whom he knows to be guilty, Socrates argued that the advocate "ought not to hide the evil away but bring it to light in order that the culprit may be punished and regain his health." *Id.* at 480C.

67. At *Theaetetus* 172E-173A, Socrates remarks that the advocate "acquires a tense and bitter shrewdness; he knows how to flatter a master and earn his good graces, but his mind is narrow and crooked. An apprenticeship in slavery has dwarfed and twisted his growth and robbed him of his free spirit, driving him into devious ways, threatening him with fears and dangers which the tenderness of youth could not face with truth and honesty . . ." (Cornford trans.)

68. *Id.* at 175D (Cornford trans.).

tioned in Plato's assessments of it. This purpose has been a subject of particular scholarly concern in recent years, for as a reaction against the political implications of Platonism has set in, there has been a corresponding tendency to revalue favorably Protagoras' own tolerance for heterodoxy.⁶⁹ One commentator has treated Protagoras as the advocate of an "open society" while Plato has then been classed as the proponent of a "closed" one.⁷⁰ Another has even gone so far as to describe Protagoras as the inaugurator of a "liberal temper" in Greek political thought.⁷¹ Both claims may be as extreme in their way as are Plato's criticisms of the Sophists, but it is not too much to say that Protagoras defines a characteristic attitude of the advocate—skeptical, balanced, unburdened by extensive philosophical commitments—in much the same way that Socrates defines the attitude of the intellectual as moral reformer. The advocate's approach to the world can of course degenerate into amorality; in this sense, Socrates and Plato remain useful guides to the Sophists. However, the advocate's approach can also be highly beneficial to a civilization that depends on open debate of all sides of an issue; and it is here that the purpose of Protagorean *paideia* is distinct from that of Socrates and meritorious in its own right.

The analogy with legal education can be completed if we consider the procedures by which Protagoras taught. Protagoras did not confine himself to question and answer as a pedagogical device;⁷² but of course Socrates did not use this approach to the exclusion of all others.⁷³ However, there is good reason to suppose

69. W.K.C. Guthrie has summarized the trends in modern scholarship that have led to a favorable valuation of the Sophists in general and Protagoras in particular. See W. GUTHRIE, *THE SOPHISTS*, Chap. 1 (1973). This development has, to a certain degree, been bound up with the democratic world's rejection of authoritarian government, the grounding for which some commentators have found in Plato's political theory. See, e.g., W. FITE, *THE PLATONIC LEGEND* (1934); and I. K. POPPER, *THE OPEN SOCIETY AND ITS ENEMIES: THE SPELL OF PLATO* (4th ed., 1963).

70. See K. POPPER, *supra* note 69, at 189. For an appraisal of Popper's argument, see PLATO, POPPER AND POLITICS (R. Bambrough ed. 1967).

71. See E. HAVELOCK, *THE LIBERAL TEMPER IN GREEK POLITICS*, Chap. 7 (1957).

72. In his dialogue with Socrates, for instance, he gave an extended speech on the origin of human morals. See *Protagoras* 320C - 328C. Presumably, this was the kind of speech that Protagoras gave to potential students in order to demonstrate his eloquence.

73. See, e.g., Socrates' discourses on the nature of the soul and immortality at *Phaedo* 80C-84C and 108A-114D. See also Socrates' lengthy speeches to Calicles at *Gorgias* 507A-509E and 511C-514E.

that Protagoras placed higher value on question and answer than on competing techniques. Plato attributes such a preference to him in the *Theaetetus*.⁷⁴ Furthermore, this is supported by Diogenes Laertius, who states that Protagoras was the first to "institute contests in debating [in order to teach] . . . the tricks of the trade."⁷⁵ Eristical give and take was therefore Protagoras' preferred method of instruction.

What is particularly intriguing about Protagoras, though, is that he extended this question and answer approach to the analysis of texts. Socrates, it will be recalled, concluded the debate over Simonides' poem by rejecting the principle of text-based instruction, saying it was fit only for "second-rate and commonplace people."⁷⁶ Protagoras, on the other hand, welcomed debate over texts. That same exchange with Socrates concerning Simonides can now be used to demonstrate why the analogy between Sophistic and legal education is so apt.

The debate can be found in Plato's *Protagoras*. There, once Socrates had completed his examination of Protagoras, the latter was called upon to question him. Protagoras, as we know, selected a poem by Simonides and asked Socrates to consider it with him. First, Protagoras cited two passages from the poem, one where the poet states that it is hard to become a good man, and another where the poet disagrees with Pittacus' claim that it is hard to be noble.⁷⁷ Then, after having recited the passages, Protagoras asked Socrates whether they were consistent with one another.⁷⁸ Socrates, who for once was cast as the respondent, replied he believed they were, though in recounting the conversation to someone else, he added that, in answering, he had feared, as any law student might, that his interlocutor's interpretation of the text might be the correct one.

74. *Theaetetus* 167D-E. There, in imagining a possible defense of Protagoras' methods and doctrines, Socrates states the following as if Protagoras himself were speaking:

Now if you can dispute this doctrine in principle, do so by argument stating the case for the other side, or by asking questions, if you prefer that method, which has no terrors for a man of sense; *on the contrary* it ought to be specially agreeable to him.

(Cornford trans., emphasis added).

75. DIOGENES LAERTIUS, *supra* note 23, at 52-53 (Hicks trans.).

76. *Protagoras* 347C (Guthrie trans.). See text accompanying notes 44-45 *supra*.

77. *Id.* at 339B-C.

78. *Id.* at 339C.

The subsequent exchange between Protagoras and Socrates underscores the parallel between the Sophists' eristical textual criticism and that of modern legal education:

How [Protagoras asked Socrates] can a man be thought consistent when he says both these things? First he lays it down himself that it is hard for a man to become truly good, then when he is a little further on in the same poem he forgets. He finds fault with Pittacus, who said the same thing as he did himself, that it is hard to be noble, and refuses to accept it from him: but in censuring the man who said the same as he does, he obviously censures himself. Either his first or his second statement is wrong.

This sally evoked praise and applause from many of the audience [Socrates is reporting on events here; the dialogue *Protagoras* is in fact presented as a narrative by Socrates to someone who did not attend the actual debate], and at first I was like a man who has been hit by a good boxer; at his words and the applause things went dark and I felt giddy.⁷⁹

Socrates' giddiness did not last for long. He parried by citing the Eleatic distinction between being and becoming and thus tried to save the poet from the charge of self-contradiction. Protagoras in turn challenged the relevance of the distinction in this case, and Socrates' and Protagoras' argument moved on to the question of the meaning Simonides attached to the verb to "become."⁸⁰ This then raised other problems of meaning, and the debate became even more technical as sources other than the poem were cited in attempts to reconstruct the intended meaning of phrases such as "hard to become" and "wrought without blame."⁸¹ Neither participant prevailed; the exchange, like many in law school, was far more important for the opportunity it provided to exercise critical intelligence than for the substantive conclusions it reached.⁸²

In light of this special kind of debate over a text, perhaps it is now possible to see how Protagoras employed such exchanges to train his students in advocacy. Athenian statutes might have been used in eristical instruction of this kind, but it is understandable that they were not given their less than dispositive status in the

79. *Id.* at 339D-E (Guthrie trans.).

80. *Id.* at 339E-340E.

81. *Id.* at 340E-347A.

82. It is possible that Plato wanted the best of both worlds for Socrates. On the one hand, he wanted to show that Socrates was the equal of Protagoras in textual analysis. On the other hand, he had Socrates denigrate such analysis as the pastime of "second-rate and commonplace people." *Id.* at 347C (Guthrie trans.). The latter point is the only one that is consistent with dialogues initiated by Socrates.

legal system itself.⁸³ Instead, eristical exchanges over poetry, particularly exchanges over technically challenging poems like those of Simonides, served as a better means of training advocates. The structure of poetry could be extraordinarily complex, so its analysis, when approached in Protagoras' morally neutral way, could provide the kind of mental gymnastic needed by future advocates. Furthermore, the citation of poetry had the potential to influence the outcome of cases. Such influence would not be likely in the modern world. But in a non-technical legal system like that of Athens, poetry, while not a source of law, could have much the same persuasive force that citation of dicta does today.⁸⁴ Protagoras' use of poetry was thus highly appropriate given the special conditions of ancient Athens.

Both the procedures and purposes of Protagorean *paideia* are analogous, then, with those of modern legal education. In particular, three parallels are discernible. First, a methodological point, eristic lies at the heart of Protagorean *paideia*, just as it does in legal education. Second for both systems, eristic is linked to textual analysis, with debate over a text being used to train future advocates in the techniques of their profession. And third, for both, the purpose of education can be defined by the eristical method it employs. For Protagoras, as for law professors, the aim of instruction is not to expose students to substantive points of knowledge (although this is a byproduct of their training) but instead to equip them with the technique by which instruction is carried out. This is the feature of Sophistic and legal education which has provoked qualms in outside observers, but it is also the one that distinguishes both systems from Socrates' method of

83. J.W. Jones has remarked that throughout the fifth and fourth centuries, there was "uncertainty . . . as to what laws were in force and [there were also] haphazard methods for making an orderly arrangement of them." Furthermore, "not only the validity but also the authenticity of what the pleaders adduced as laws continued to be questionable." Jones also notes that at one time the Athenians even made it a crime punishable by death to cite a law that did not exist. J. JONES, *supra* note 4, at 115.

84. An instructive example is to be found at Aeschines' *Against Timarchus* 144-54. The setting of Aeschines' speech was a trial for treason in which he was accuser and prosecutor. There, after citing poetry by Homer and Euripides, Aeschines claimed that these poets enjoined others to "make decisions not from what witnesses say but from the habits and associations of the accused." (Adams trans.) Aeschines then used these citations to direct jurors' attention to Timarchus' profligate ways and questionable associations. For another example of the use of poetry in a forensic setting, see Demosthenes' citation of a portion of the *Elegiacs* of Solon at *De Falsa Legatione* 255.

moral instruction.

Admittedly, even with these parallels, only the *basis* of legal education has been identified. The fact that Sophistic instructors did not train their students in the analysis of sources of law cannot be overlooked. Nor should it be forgotten that Sophists often served as speechwriters for, not as direct representatives of, their clients. Both of these factors could be accounted for, and the analogy thus defended in all its details, if allowance were made for differences between the legal systems of Athens and the modern world. But instead of forcing the analogy, it is best to concede its incompleteness while still emphasizing its fundamental strength. Within limits set by historical context, then, law school Socratic method is, ironically, the method of Protagorean education.

CONCLUSION

Rather than summarize a fairly straightforward argument, it might be helpful to offer a final, and cautionary, example of the uses that can be made of Sophistic *paideia*. The example is taken from a speech by Protagoras' fellow-Sophist, Gorgias of Leontini, since unfortunately none of Protagoras' discourses on legal topics has survived.⁸⁵ Gorgias' speech, which he entitled an "Encomium on Helen [of Troy],"⁸⁶ illustrates many facets of the Sophist's craft. For instance, it takes a text, in this case the *Iliad* itself, as the basis of discussion. Also, it is addressed to an issue of legal and moral concern, namely the responsibility that individuals bear for

85. According to DIOGENES LAERTIUS, *supra* note 23, at 55, one of Protagoras' treatises was *Of Forensic Speech for a Fee, Two Books of Opposing Arguments*.

86. The Encomium can be found at 2 DIELS, *supra* note 5, at 288-94 and K. FREEMAN, *supra* note 5, at 131-33. It should be noted that this speech is an encomium, which involves a different kind of oratory than the forensic variety. For the addition of a third, political kind of oratory and an analysis of the distinction between political, epideictic (including encomia) and forensic speech, see Aristotle's *Rhetoric* 1, 3. Although the encomium is not a type of forensic speech, there are nonetheless many good reasons for using this defense of Helen rather than Gorgias' set-piece in forensic oratory, *The Defense of Palamedes*. First, modern readers are unlikely to remember the story of Palamedes from the *Odyssey* whereas most people have heard of Helen even if they have never read the *Iliad*. Second, Gorgias' speech takes the form of a defense even though it is admittedly more freewheeling than a forensic defense might be. Third, we have the judgment of Isocrates himself that Gorgias' speech is forensic, not epideictic in nature. See Isocrates' *Helen* 14-15, where he states that "although [Gorgias] asserts that he has written an encomium of Helen, it turns out that he has actually spoken a defense of her conduct." (Van Hook trans.) Isocrates' judgment justifies the use of Gorgias' speech to illustrate forensic oratory, although it should be recalled that forensic speeches were rarely as daring as this encomium.

their conduct. And, perhaps most interesting of all, it seeks to defend what was widely believed then and now to be the weaker cause—to show that Helen cannot be held responsible for fleeing with Paris.

In his encomium, Gorgias offered three exculpatory arguments for Helen. He claimed that “[s]he acted as she did either through fate and the will of the gods and decrees of Necessity, or because she was seized by force, or won over by persuasion, or captivated by love.”⁸⁷ The first two grounds Gorgias discussed only briefly: Helen clearly could not be blamed if either necessity or physical force had controlled her conduct.⁸⁸ It was the third possibility that Gorgias considered at length. Here, too, he claimed that she bore no responsibility, but he did so by advancing an argument that simultaneously enhanced and questioned the stature of Sophistic technique. He claimed that:

The power of speech over the constitution of the soul can be compared with the effect of drugs on the bodily state; just as drugs . . . can put an end either to the disease or to life, so with speech: different words can induce grief, pleasure or fear; or again, by means of harmful kind of persuasion, words can drug and bewitch the soul.⁸⁹

Gorgias’ argument is a two-edged sword, for perhaps the persuasive techniques employed by Paris were of the harmful kind, but perhaps those of Gorgias were as well, in which case his audience could have become so “drugged” that they would not have been able to consider dispassionately the question of Helen’s responsibility. By treating Paris as an advocate, then, Gorgias may have succeeded in exonerating Helen; but he did so only by casting doubt on the integrity of advocacy itself.

There is no need to belabor these disturbing implications in Gorgias’ encomium. The Protagorean injunction to make the weaker cause the stronger encourages a willingness to see both sides of an issue, and to this extent it can play a positive role in education. However, as Plato noted, the injunction can also serve as an incitement to place forensic technique above moral values. The challenge for legal education is to balance both these points—to recognize and accept the Sophistic principles that are

87. 2 DIELS, *supra* note 5, at 289; K. FREEMAN, *supra* note 5, at 131.

88. 2 DIELS, *supra* note 5, at 289-90; K. FREEMAN, *supra* note 5, at 131-32.

89. 2 DIELS, *supra* note 5, at 292-93; K. FREEMAN, *supra* note 5, at 133.

essential to the production of good advocates and to add to this a Socratic awareness of the moral limits of Protagoras' techniques. In this sense, Socratic *method* cannot be considered a part of legal education; but for that very reason, Socratic *concerns* must remain relevant to it.

