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CONTENTS

THE REAL SOCRATIC METHOD: AT THE HEART OF LEGAL EDUCATION LIES A FUNDAMENTAL MISUNDERSTANDING OF WHY SOCRATES ASKED SO MANY QUESTIONS

JOSHUA KROOK *

In a true Socratic law school, I suggest, students would be instructed to ask questions of those in authority instead of answering them. Nothing and no one would be beyond a student's questioning, especially by virtue of claims to authority or expertise alone. Students would be empowered to question the wisdom of professors, judges, politicians, and the law itself, unpacking the hidden values, ideological motivations, and philosophical foundations of legal principles. By questioning the origins of law, students would learn to refine their critical thinking and analytical skills to judge whether or not a law, in itself, is just.

CONTENTS

I INTRODUCTION

A stern, almost cruel-looking professor stands at the front of a law class and picks on a student at random.

'Mr Hart' the professor says, 'What are the facts of the case?'[1]

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[1] *The Paper Chase* (Directed by James Bridges, Thompson-Paul Productions, 1973).

The student stands.

> 'I haven't read the case', the student says quietly.[2]

The professor grumbles in frustration, mentioning that the assignment has been stuck on a wall in Langdell Hall for over a week.

> 'I will give you the facts of the case myself, Mr. Hart' the professor says, to the student's visible relief.[3]

The above scene from the 1973 film *The Paper Chase* is a classic example of what is now called the Socratic Method – a system of asking questions to a student about a particular case of law. Invented by the law professor Christopher Langdell in 1870, the Socratic Method bears little resemblance to the actual ideas of Socratic wisdom in *Meaieutics* and the *Apology*. In this paper, I intend to challenge Langdell's interpretation of Socrates and ask whether his method reinforces authoritative structures of law as opposed to granting students the ability to test their critical thinking skills.

In a true Socratic law school, I suggest, students would be instructed to ask questions to those in authority instead of answering them. Nothing and no one would be beyond a student's questioning, especially by virtue of claims to authority or expertise alone. Students would be empowered to question the wisdom of professors, judges, politicians, and the law itself, unpacking the hidden values, ideological motivations, and the philosophical foundations of legal principles. By questioning the origins of law, students would learn to refine their critical thinking and analytical skills in a manner that Langdell himself intended to teach, but which he never truly managed to achieve. Finally, students would be able to examine the interests of the state in enforcing a particular law, and whether that law abided by certain principles of justice, fairness, and equity.

II LANGDELL'S SOCRATIC METHOD

As Dean of Harvard Law from 1870 to 1895, Professor Christopher Langdell systematically laid out the foundation of legal education in most common-law countries, including

[2] Ibid.
[3] Ibid.

America, the UK, and Australia.[4] His two primary inventions were the case method of instruction and the Socratic method. Langdell taught on the basis of 'a settled conviction that law could only be taught or learned effectively by means of cases'.[5] He taught these cases by asking students a series of questions about the 'principles and doctrines' contained therein.[6] Students were expected to understand the facts of a case, the legal principles of a case, and understand how those legal principles could be applied in a new set of factual circumstances.[7] Although some law schools have recently adopted a less interrogative approach, the case method and to a lesser extent the Socratic method, remain the benchmarks of modern legal education.[8]

Langdell's Socratic method was inspired by a similar method outlined by Socrates in *Maieutics*.[9] The ancient philosopher outlines a method of interrogating young Greek men by asking them a series of questions to draw out fallacious reasoning in their logic.[10] Socrates boasted of an 'ability to apply every conceivable test to see whether [the] young man's mental offspring [was] illusory and false'.[11] This bears some resemblance to Langdell's technique of interrogation. By forcing students to justify illusory or false understandings of case law, Langdell was applying his own version of Socrates' technique.

Under his Socratic method, Langdell encouraged students to come to a different opinion on the ratio decidendi of a case. However, his method lacked any sustained debate on the origins of those legal decisions or the method by which they were reached by judges. A student could distinguish a particular case from a new set of facts — suggesting that the old legal principle may not apply in a new circumstance — but where a judge provides an opinion, it was not the student's place to disagree with the judge on first principles or the philosophical foundations of that opinion. Indeed, philosophy is not a part of the method at all, which is ironic, given that the method is named after one of the most famous

[4] Harvard Law School, *The Case Study Teaching Method* <http://casestudies.law.harvard.edu/the-case-study-teaching-method/>.
[5] Christopher Columbus Langdell quoted in William Schofield, 'Christopher Columbus Langdell' (1907) 55(5) *The American Law Register* 273, 278.
[6] Harold Anthony Lloyd, 'Raising the Bar, Razing Langdell' (2016) 51 *Wake Forest Law Review* 231, 231.
[7] Todd D Rakoff and Martha Minow, 'A Case for Another Case Method' (2007) 60 *Vanerbilt Law Review* 597, 599.
[8] Christopher M Ford, *The Socratic Method in the 21st Century* (Masters Thesis, United States Military Academy, 2008) 3 <http://www.usma.edu/cfe/literature/ford_08.pdf>.
[9] Plato, 'Maieutics' in *Plato: Theatetus* (R Waterfield trans, Penguin, 1987) 25–29.
[10] Ibid.
[11] Ibid.

philosophers of all time. If a student does question a judge, they must do so by reference to another case, and another judge — ie they must question authority by reference to prior authority alone, rather than questioning authority itself. In this sense, the current Socratic method is used to pacify students and prevent them from questioning what they are being taught. This works in a similar manner to the ways in which ideologies discourage lateral thinking by discouraging followers from questioning the basic foundations of their ideological principles. As Yuval Harari suggests: 'How do you cause people to believe in an imagined order[?] First, you never admit that the order is imagined'.[12]

Langdell himself questioned legal authority on occasion but only if an 'opinion did not square with the original [cases themselves]'.[13] He 'cultivated the intellectual autonomy of students' but only in so far as they had a different, judicial opinion on how a case should be read and understood.[14] If a student uncovered a new ratio decidendi in a case, Langdell was the first to reconsider his opinion on the case in question.[15] He did so three times in a week, on one particular case.[16] However, Langdell consistently failed to interrogate the origin of those ratios, the philosophy behind those decisions, or whether the decisions themselves were just or fair. Langdell taught the law, but his method failed to question where the law came from. What mattered to Langdell was the outcome itself.

> Law, considered as a science, consists of certain principles or doctrines. To have such a mastery of these as to be able to apply them with constant facility and certainty to the ever-tangled skein of human affairs, is what constitutes a true lawyer.[17]

In the above reasoning of law as a "science [of] principles" Langdell closely mirrors the German legal philosopher Hans Kelsen. Kelsen argued for a study of law as "pure law" suggesting that law should be rid of the "baggage" of the social sciences and studied in its own right as law alone.[18] By advocating "pure law" Kelsen meant that no justification for a

[12] Yuval Noah Harari, Sapiens: A Brief History of Humankind (Harper, 2014).
[13] Schofield, above n 5.
[14] Bruce A Kimball, 'Christopher Langdell: The Case of an 'Abomination' in Teaching Practice' (2004) *The NEA Higher Education Journal* 30.
[15] Ibid.
[16] Ibid.
[17] Christopher Columbus Langdell, 'Preface' in *A Selection of Cases on the Law of Contracts* (Brown & Little, 2nd ed, 1879) 82–83.
[18] Andrei Marmor, 'The Pure Theory of Law' in *Stanford Encyclopedia of Philosophy* (Stanford University, 2016); Hans Kelsen, *Pure Theory of Law* (University of California Press, 2007).

law was ever necessary as law derives its authority from prior law alone, and in his view, the highest piece of law can presuppose its own validity as in the case of a country's constitution.[19] Once students learn that a law is self-justified, they begin to implicitly learn to 'draw boundaries between the spheres of legal, moral, and political consideration'.[20] By focusing solely on the reasoning of judges, students are taught that a decision is always justified by reference to another prior decision.[21] Never is the 'end point' or the original conception of law, in terms of its derivation from politics, society, morality, social values and so on, allowed to be questioned.[22]

The final flaw in Langdell's Socratic method is its tendency to promote an inequitable power dynamic by allowing those in a position of power — the teacher, the judge, the law, and so on — to interrogate those in a position of weakness: the student. As the American founding father Benjamin Franklin elucidated: 'I found this [Socratic] method the safest for myself and very embarrassing to those against whom I used it.'[23] Orin Kerr calls the method 'cruel and psychologically abusive' because it creates a strange power dynamic between teacher and student.[24] It is this kind of power dynamic — which Socrates himself sought to redress in his actual use of the Socratic method in Ancient Greece — discussed below.

III TOWARD A NEW SOCRATIC METHOD

Although Langdell correctly identifies a Socratic form of questioning in *Maieutics*, he fails to understand that the method used by Socrates in his own time was primarily used on figures of authority, rather than students. This is revealed in a wider reading of Socrates — particularly his discussions in the *Apology*.

At the heart of the *Apology* is Socrates' trial for the corruption of the youth of Athens.[25] Socrates is charged with corrupting the youth by questioning their wisdom, but also by questioning the social and political institutions of Athenian high society. His "curious"

[19] Ibid.
[20] Vanessa E Munro, 'Legal Education at the Intersection of the Judicial and the Disciplinary' (2003) 2 *Journal of Commonwealth Law & Legal Education* 1, 39; Gonzalo Vitalta Puig, 'Legal Ethics in Australian Law Schools' (2008) 42(1) *The Law Teacher* 34.
[21] Edward J Phelps, 'Methods of Legal Education' in Steve Sheppard (ed) *The History of Legal Education in the United States: Commentaries* (Salem Press, 1999) 529, 532.
[22] John D Whyte, 'Finding Reality in Legal Education' (2013) 76 *Saskatchewan Law Review* 99.
[23] Benjamin Franklin, *Benjamin Franklin: His Autobiography* (Harpers & Collins, 1849) 26.
[24] Ford, above n 8.
[25] Plato, *Apology* (Benjamin Jowett trans) <http://classics.mit.edu/Plato/apology.html>.

nature is what condemns him in the eyes of his Greek accusers.[26] At the trial, Socrates lays out a vision of what it means to be wise, including a Socratic method of analysing the state. Before one can look to his own private 'interests', Socrates says, in the trial, one must 'look to himself, and seek virtue and wisdom'.[27] Before one can look to the interests of the state, Socrates says, one must 'look to the state'.[28]

By 'look' Socrates here means examine, in the sense that one must examine the state before blindly following its dictates. One must 'look' to himself, in the same manner in which the '[unexamined life] is not worth living'.[29] Here we might extend the idea of the state's 'interests' to the enforcement of the law. The law is, after all a state's primary interest, its existential interest — for a state can only exist on the basis that the people follow the law — foremost of which is the constitutional basis of the state's authority. A lawyer who does not examine the law they learn, or what the state wishes them to do, or the states 'interests' in enforcing said law is not virtuous or wise in Socrates' phrasing. They are not 'looking' to the state, before enforcing its interest. A study of law which neglects to mention that the state has *any* interests in applying one particular law over another, one particular case over another, or one particular agenda over another, is not a Socratic study of law at all.

Instead of using the Socratic method on inexperienced students, the *Apology* seems to suggest that the Socratic method should be used on figures of authority. In the middle of the trial, Socrates recounts the story of the Oracle of Delphi declaring him the wisest of all men.[30] To disprove this claim, Socrates seeks out figures of authority and wisdom whom he suspects are wiser than he. He begins to interrogate them using his Socratic method, and this is what gets him in trouble with the Greek authorities.[31] The Socratic method is here shown to be used as a tool to interrogate those who hold themselves out to be wise; to test whether they are in fact wise at all.

To undergo such a test, the figure must have authority — which is why it is strange to use the technique on a student. Socrates himself suggests that he primarily used the method on

[26] Ibid.
[27] Ibid.
[28] Ibid.
[29] Ibid.
[30] Ibid.
[31] Ibid.

three particular individuals: a politician who claimed himself wise, an artist who did the same, and a poet whose wisdom was self-evident in his poetry.[32] In each of these cases, Socrates questioned the figure of authority on the subject matter of their authority. In the case of the politician, Socrates was literally 'looking' to the state in the manner expressed above, before following the state's interests.[33]

The above examination of the Socratic method, as used in the *Apology,* reveals three distinct claims. One, the method should be used to question the interests of the state. Two, the method should be used to question those in authority. Three, the method should be used to question those who hold themselves out to be wise. A modern version of the Socratic method would therefore encompass all three.

The law, being an interest of the state, a source of authority, and an often self-proclaiming source of wisdom, would be an ideal target for the modern Socratic method. The student, being a subject of the state, a subordinate, and a self-proclaimed amateur in their field of training, would *not* be an ideal target for the Socratic method. It is this foundational mistake which Langdell made in his formulation, and which should be corrected to adjust the method for the use of students.

IV THE ALTERNATIVE LEGAL EDUCATION METHODS

Various attempts have been made in the past to create a more "critical" approach to teaching in law schools. In almost all cases however, ideology has trumped Socratic principles when criticism has been put to the test. Instead of critiquing the ideology inherent in law, many of the modern "critical" movements have advanced their own ideological perspective, seeking to change the legal order to represent a new hidden agenda, to replace the old hidden agenda.

Critical Legal Studies (CLS) was one such attempt, so-called because it aimed to critique the political, moral, and social impacts of law on society.[34] The CLS movement, however, frequently referred to law's interaction with Marxist understandings of class, hierarchy,

[32] Ibid.
[33] Ibid.
[34] Guyora Binder, 'Critical Legal Studies' in Dennis Patterson (ed), *A Companion to Philosophy of Law and Legal Theory* (Wiley-Blackwell, 2nd ed, 2010) 267.

gender, race, and sexuality.[35] CLS writers tended to argue that the law was biased towards certain groups over others, but did so from a politically ideological perspective, rather than a higher, Socratic method of critique.[36]

In challenging the 'law's ideological neutrality', Duncan Kennedy, Karl E Klare, and other CLS scholars of the 1980s were arguing against a status quo that all law was apolitical.[37] They explicitly rejected this idea, critiquing the law for its "hidden" ideological agenda.[38] In reality, the core subjects of law school, they said, hid an unseen agenda of re-enforcing hierarchy, status, and class. They pointed to the facts that: 'property rights are understood to confer power… contractual bargaining is never truly equal' and so on.[39] The curriculum itself, said Karl Klare, 'is emblematic of the notion that the core of … capitalism is rational' and that transactional law is somehow inherently justified on its face, and should never be questioned.[40]

Although CLS writers aimed to critique the ideology of law through questions, in a similar vein to Socrates, they fell into the trap of advancing their own ideology as a replacement. Instead of critiquing whether a law was just or fair in some quantitative sense, a law was only seen as just or fair if it comported with the ideology of Marxism.[41] Rather than simply 'looking to the interests of the state', they aimed to supplant the state completely with their own vision — something far beyond a Socratic critical analysis.[42]

The CLS movement was revealed as such when it found a home in Macquarie Law School in the mid-1970s.[43] In a largely Marxist faculty, CLS was seen as a way of critiquing the 'traditional norms' of law from a new, radical Marxist perspective.[44]

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[35] Ibid.
[36] Sally E Hadden and Alfred L Brophy (eds), *A Companion to American Legal History* (Wiley-Blackwell, 2013) 172.
[37] Ibid.
[38] Ibid.
[39] Binder, above n 34.
[40] Karl E Klare, 'The Law School Curriculum in the 1980s: What's Left?' (1982) 32 *Legal Education* 339.
[41] Binder, above n 34, 267.
[42] Ibid.
[43] Margaret Thornton, *Privatizing the Public University* (Taylor and Francis, 2011) 62.
[44] Drew Fraser and Patrick Kavanagh 'Readings in the History and Philosophy of Law' (1995) *Macquarie University School of Law* 2.

Macquarie's experiment with CLS teaching did not last very long however, due to the aforementioned problems of ideological bias. In 1977, the dean of the law school, P E Nygh, began firing staff.[45] In a letter to staff, Nygh wrote that as dean he was 'given a mandate … to create a course of professional training' for students, rather than ideological training.[46] He feared that training students in a Marxist framework could lead to violence as students became 'defeatist about their legal training' and that some could 'come to the conclusion that the only answer to the problems of our society is to throw bombs around'.[47] Here Nygh recognized that the replacement of one ideology for another was not a "cure" for the symptoms of law. By 1987, the Australian-Government-commissioned Pearce Report recommended the closure of Macquarie Law School due to a lack of 'solid legal substance' in its curriculum.[48] Although the law school did not close, the CLS teaching style was abandoned, explicitly due to its ideological nature.[49]

There is a danger in Macquarie Law School's example, in categorising "critical thinking" as left wing or Marxist, rather than Socratic. Historically, critical thinking was advocated by thinkers on both sides of the political divide. The Christian philosopher, Thomas Aquinas, was arguably the greatest critical thinker of the middle ages. In more recent times, the Jesuits perform what amounts to a classical training in critical thought: questioning what they are taught and who they are taught by. It is a relatively recent phenomenon to frame progressives as "sceptics" and "critical thinkers" and conservatives as "market-centric". This framing does not serve the purposes of an objective study of Socratic critical thought.

A second, more recent movement, feminist legal scholarship, suffers from a different kind of drawback: this time the analysis is too narrow, in only critiquing one aspect of law's influence. It would be useful, however, to pair feminist legal scholarship with broader scholarships in an attempt to critique the law in various ways, for various purposes. Feminist scholar Carrie Menkel-Meadow explains that feminist legal theory aims to understand the many ways women are 'oppressed, dominated, and devalued' by a legal system purportedly created to serve society equally.[50] Instead, a male-dominated system

[45] P E Nygh, 'Memorandum to: Law School Staff' (1988) 5 *Australian Journal of Law & Society* 57.
[46] Ibid.
[47] Ibid.
[48] Thornton, above n 42, 57.
[49] Ibid.
[50] Carrie Menkel-Meadow, 'Feminist Legal Theory, Critical Legal Studies, and Legal Education or "The Fem-Crits Go to Law School"' (1988) 38 *Journal of Legal Education* 61, 61–65.

prevails, one which decontextualizes the voices of women in a hierarchical legal structure.[51] This is true in many respects, and is a worthwhile line of enquiry. However, for the purposes of a reformulated Socratic method, feminist legal scholarship will not suffice on its own in every subject. A broader philosophical critique is required as an ancillary to more targeted, specialist critiques.

V CONCLUSION

While Langdell's Socratic method was an improvement on prior forms of legal education, a new formulation is necessary to accommodate the actual wisdom and virtue of Socrates' critical views. It is time for a second Socratic method, one that equalises the power dynamics between professor and student and empowers the student to critically examine legal principles, without ideological biases.

I propose that a new Socratic method would allow students, not lecturers, to ask the questions in a classroom on the law, legal authority, and the interests of the state. Once students are empowered to admit that they do not, in fact, have all the answers to law waiting for them in a dusty old casebook somewhere but must reason through the law for themselves by asking questions to those in authority, they will grow to understand that the foundation of knowledge is ignorance as Socrates suggests, and that wisdom comes from challenging authority rather than blindly following it.

The resultant graduate lawyers will have a greater ability to determine whether or not a law is just, fair, or principled on the basis of an independent analysis, exceeding that which is possible in a legal class today. Society, by extension, will benefit from a new generation of critically engaged lawyers.

[51] Ibid.

REFERENCE LIST

A *Articles/Books/Reports*

Binder, Guyora, 'Critical Legal Studies,' in Dennis Patterson (ed), *A Companion to Philosophy of Law and Legal Theory* (Wiley-Blackwell, 2nd ed, 2010)

Ford, Christopher M, *The Socratic Method in the 21st Century* (Masters Thesis, United States Military Academy, 2008) <http://www.usma.edu/cfe/literature/ford_08.pdf>

Franklin, Benjamin, *Benjamin Franklin: His Autobiography* (Harpers & Collins, 1849)

Fraser, Drew, and Patrick Kavanagh, 'Readings in the History and Philosophy of Law' (1995) *Macquarie University School of Law* 2

Hadden, Sally and Alfred L Brophy (eds), *A Companion to American Legal History* (Wiley-Blackwell, 2013)

Harari, Yuval Noah, *Sapiens: A Brief History of Humankind* (Harper, 2014)

Kelsen, Hans, *Pure Theory of Law* (University of California Press, 2007)

Kimball, Bruce A, 'Christopher Langdell: The Case of an "Abomination" in Teaching Practice' (2004) *The NEA Higher Education Journal* 30

Klare, Karl E, 'The Law School Curriculum in the 1980s: What's Left?' (1982) 32 *Legal Education* 339

Langdell, Christopher Columbus, 'Preface' in *A Selection of Cases on the Law of Contracts* (Brown & Little, 2nd ed, 1879)

Lloyd, Harold Anthony, 'Raising the Bar, Razing Langdell' (2016) 51 *Wake Forest Law Review* 231.

Marmor, Andrei, 'The Pure Theory of Law' in *Stanford Encyclopedia of Philosophy* (Stanford University, 2016)

Menkel-Meadow, Carrie, 'Feminist Legal Theory, Critical Legal Studies, and Legal Education or "The Fem-Crits Go to Law School"' (1988) 38 *Journal of Legal Education* 61

Munro, Vanessa E, 'Legal Education at the Intersection of the Judicial and the Disciplinary' (2003) 2 *Journal of Commonwealth Law & Legal Education* 1

Nygh, P E, 'Memorandum to: Law School Staff' (1988) 5 *Australian Journal of Law & Society* 57

Phelps, Edward J, 'Methods of Legal Education' (1892) in Steve Sheppard (ed) *The History of Legal Education in the United States: Commentaries* (Salem Press, 1888)

Plato, 'Maieutics' in *Plato: Theatetus* (R Waterfield trans, Penguin, 1987)

Puig, Gonzalo Viltalta, 'Legal Ethics in Australian Law Schools' (2008) 42(1) *The Law Teacher* 34

Rakoff, Todd D, and Martha Minow, 'A Case for Another Case Method' (2007) 60 *Vanerbilt Law Review* 597

Schofield, William, 'Christopher Columbus Langdell' (1907) 55(5) *The American Law Register* 273

Thornton, Margaret, *Privatizing the Public University* (Taylor and Francis, 2011)

Whyte, John D, 'Finding Reality in Legal Education' (2013) 76 *Saskatchewan Law Review* 99

B *Other*

Harvard Law School, *The Case Study Teaching Method* <http://casestudies.law.harvard.edu/the-case-study-teaching-method/>

Plato, *Apology* (Benjamin Jowett trans) <http://classics.mit.edu/Plato/apology.html>

The Paper Chase (Directed by James Bridges, Thompson-Paul Productions, 1973)