May 15th, 9:00 AM - May 17th, 5:00 PM

Legal and Philosophical Fictions: At the Line Where the Two Become One

Michael G. Dzialo
Yale University

LEGAL AND PHILOSOPHICAL FICTIONS:
AT THE LINE WHERE THE TWO BECOME ONE

Michael G. Dzialo
Department of English
Yale University
©1998, Michael G. Dzialo

Abstract:

Anti-foundationalism is a central topic in recent legal scholarship. The critical legal studies movement (CLS) has mounted a strong challenge to the traditional belief that legal materials (constitutions, statutes, and precedents) determine legal outcomes and constrain judicial decisionmaking. This scholarship has overlooked, however, the degree to which the debate between traditional legal determinacy and anti-foundational indeterminacy is yet another manifestation of a continuous debate in Western thought—one that has its roots in pre-Socratic rhetoric and philosophy.

My presentation traces the indeterminacy thesis back to the contest of ideas between Protagoras and Plato. I examine two well-known and related Protagorean notions: first, that two arguments (*logoi*) are always set in opposition to one another with regard to every matter and, second, that the rhetorician can always "make the weaker argument the stronger." I contend that taking these Protagorean notions seriously—perhaps even more seriously than self-avowed anti-foundationalists customarily do—leads paradoxically to a modified endorsement of foundationalism that is nevertheless wholly consistent with the Protagorean project. Calling upon texts by Aristotle, Seneca and René Girard, I focus upon how fictionality in representations of Platonically conceived Truth reveals a binarization in thought that is simultaneously untenable and unavoidable.

***

Like other parliamentary democracies, the United States and Canada have as a central legitimating tenet that their residents live in a society of laws, not men. The idea has an older, metaphysically significant formulation in an older language: "*Non sub homine sed sub deo et lege*"— "Not under man but under God and law."[1] Critical legal studies (CLS) a contemporary movement in (or, perhaps more precisely, *against*) jurisprudence has challenged the notion of a society of laws.[2] Briefly stated, in its most philosophically radical manifestation CLS' indeterminacy thesis holds that legal doctrine can never determine legal outcomes because every argument in favour of a particular outcome can be met with an equally valid counterargument. CLS acknowledges as the source of this tenet the American law professor Karl N. Llewellyn's practice of demonstrating how legal rules can be seen to cancel each other out when set one against the other. In such works as "Remarks on the Theory of Appellate Decision and The Rules or Canons About How Statutes are to be Construed," and *The Common Law Tradition: Deciding Appeals*, Llewellyn, a central figure in the Legal Realism of the 1920s and 30s, sets rule against counter-rule in opposing columns of type.[3] Llewellyn does not say, and may not have realized, however, that his method bears striking affinities to the practices of Protagoras and his fellow sophists. These affinities are a major topic of what follows.

Contemporary though it is, therefore, the CLS challenge to the notion that the law expresses and captures some

transcendental truth (which is just another way of saying that it is ultimately founded upon something other and better than merely the play of political interests) is actually an old and recurring one. In various periods, various notions—transcendental or anti-transcendental, foundational or anti-foundational, natural law or positive law—may enjoy dominance, but a contentious symbiosis remains. The way in which we understand or try to understand our world ensures that the anti-transcendentalist position can never fully expel its opposite nor rid itself of what we may call—in an effort to capture the topsy-turvy manner in which concepts are "grounded upon" what is "above" them—its own unacknowledged "transcendental foundation." By the same token, the transcendental notion can never fully prevail.

Rhetoric's lesson in all this is, as I hope to develop it below, that binaries, classifications, and definitions, such as the foundational/anti-foundational binary, can always be made to fail through a selective application of linguistic pressure brought to bear by assertions that themselves could be challenged if the same focus and pressure were applied to them. Breaking things down, as I shall, into recurring binaries of rhetoric vs. philosophy, anti-foundational vs. foundational—and, in my most tendentious, but not wholly unprecedented move, a "*real*" of rhetoric vs. a "fictional" of philosophy—is necessary in order for any discussion to take place (opposition creates clarity) but also obscures the extent to which seemingly clear oppositions contain elements of their opposite and, even more basically, the way in which each term in an opposition has its opposite as its founding principle.

Rhetoric, that ancient common ground of literary, legal and (quasi- or anti-) philosophical study is the place from which the search for fundamental connections between legal and philosophical fictions must begin. Putting forward the binary "rhetoric vs. philosophy" starts a drawing up of sides, further and related provisional binarizations, that partake of and extend the principal oppositional force that underlies the disputes between two camps. Here is a chart of at least one possible, and, I think, rather uncontroversial set of these oppositions; I shall examine certain of them in more detail below. What I wish to mention now is that, uncontroversial though I believe this set of oppositions to be, it is also, ultimately, as arbitrary and contingent as every other of my claims regarding the investigation of this arbitrary and contingent field. After all, I shall end by arguing that both "One Truth" and "Fiction" can comfortably coexist under the column headed "Philosophy."

Rhetoric	*Philosophy*
Seeking to persuade	Seeking the truth
Man-made system	"Transcendental foundationalism"
Atheism, agnosticism, secularism	Theism
Positive law	Natural law
What works	What is right
Argument based on "the many" (for every rule there is a counter-rule)	One truth
Pluralism/relativism (different truths for different people)	One truth
Judges make law	Judges find law

Legal enactments	Justice
Nothing behind appearances	A "really real," an essence, to which knowledge must conform

By thinking in the terms of this division, one can break down the debate between CLS and what might be called "classical" jurisprudential thought. The contemporary debates in jurisprudence take place on the line that divides the columns headed by "rhetoric" and "philosophy" (or "expressible"/"inexpressible"); they are yet another instance, another reenactment of on-going conflicts. The jurisprudential world is now divided between foundationalists and anti-foundationalists. It is in this sense that CLS anti-foundationalism is essentially a continuation of the rhetorical project of the sophists which began in theological agnosticism and ended by demonstrating how to make the weaker argument the stronger. "Sophist" is a dirty word in the history of philosophy (since it is virtually synonymous with "practitioner of rhetoric"); in some mouths it is also virtually synonymous with "liar," "opportunist," or "con man." Nevertheless, if one is willing to treat the term sophist as a descriptive one rather than a pure pejorative—as a description of a group of thinkers expressing a secularism, relativism and pluralism in thought not unlike that with which we are familiar today (rather than merely those who are inevitably wrong because Socrates and Plato must inevitably be right) the term loses its menace. Ferdinand Schiller, with William James one of the founders of Pragmatism, described their "new name for some old ways of thinking" as merely a reapplication of the method of the sophist Protagoras,4 and Protagoras is the key figure for the notion of sophistic that I shall describe.5

Protagoras' thought can be summed up by reference to four interrelated ideas that form the basis of anti-foundationalism and show its connection to what have always been the basic principles of legal advocacy. In his essay on rhetoric, Stanley Fish demonstrates the link between the first two of these positions:

> The first declares the unavailability (not the unreality) of the gods: "About the gods I cannot say either that they are or that they are not." And the second follows necessarily from the absence of godly guidance: "Man is the measure of all things, of the things that are that they are, and of the things that are not that they are not".... This is not to say that the categories of the true and good are abandoned, but that in different contexts they will be filled differently and that there exists no master context (for that could only be occupied by the unavailable gods) from the vantage point of which the differences could be assessed and judged.6

The first two Protagorean positions in turn lead to the third and fourth, the ones that are virtually synonymous with the practice of legal argument. It is Protagoras who first stated the principle that I shall refer to by its Greek name, *dissoi logoi*: that there are two arguments set in opposition to one another with regard to every matter.7 In this phrase the etymological ancestry, at least, for Schiller and James's Pragmatism could not be clearer. Matters here are "*pragmata*" and like 20th century Pragmatism, Protagoras was interested in practical application. The notion that argument will always generate its equal opposite is a constitutive rule of thought in *dissoi logoi* and it leads to the assertion by which Protagoras virtually invented all subsequent legal advocacy. It was Protagoras, as Aristotle famously complains in the *Rhetoric*, who promised that he could teach how to make the worse argument, the worse *logos*, the better. Aristotle discusses the Protagorean qualities of argument with an example taken from law, the core of Protagoras' educational project. The mode of argument, and the attitude of mind that it reveals, are familiar to all present-day lawyers. It is precisely the attitude of mind that distinguishes "thinking like a lawyer" from, as it were, thinking like a normal human being. Aristotle's complaint against it emphasizes what he believes to be the error in basing a system with pretensions to truth not upon the

true itself but upon "the probable," "*to eikos*." In a moment, I shall discuss the significance of the word *eikos* and its cognates. For the moment, to emphasize the importance of "the probable" and the number of times variations upon *eikos* appear in Aristotle's complaint, I have re-inserted them into the following translation.

> For if a man is not likely to be guilty of what he is accused of, for instance if, being weak, he is accused of assault and battery, his defence will be that the crime is not *eikos*; but if he is likely to be guilty, for instance, if he is strong, it may be argued against that the crime is not *eikos*, for the very reason that it was bound to appear *eikos*. It is the same in all other cases; for a man must either be likely to have committed a crime or not. Here, both the alternatives appear equally *eikota*, but the one is really *eikos*, the other not...absolutely, but only in the conditions mentioned. And this is what "making the worse appear the better argument" means. Wherefore men were justly disgusted with the promise of Protagoras; for it is a lie, not a real but an apparent *eikos* not found in any art except Rhetoric and Sophistic [lit. Eristic].8

Aristotle criticizes Protagoras' method of argument for not leading to the discovery of truth. Following Plato, Aristotle, at least in this passage, conceives of truth as something that exists "for itself." Truth here is independent of a human knower; it is beyond the reach of argument, dispute and doubt; it is that about which there can be no difference of opinion; that which God knows independently of man's knowledge or the human limitations to knowing. Aristotle, as most of us do, starts from a premise of the "really real" which he wishes to believe is somehow recoverable: the man in the example either did or did not illegally strike and harm another. Protagoras' method of argument is a lie because it does not aid in revelation of that prior actual event—precisely half of the time its purpose is actually to obscure the revelation of that event: if one side, be it prosecution or defense, is arguing for a just outcome, the other is necessarily arguing for an unjust one. It is a lie, then, as Aristotle defines truth, that one can make the worse appear the better argument with regard to questions of truth. For Greek philosophy, all truth aspires to the condition of geometry. What, Aristotle might have asked, is the counterargument to the statement that the sum of the angles of a triangle is equal to two right angles?9

Protagoras starts from a different premise about the real. For him, there is no such thing as a "really real"—never mind a fully recoverable one. Granted, the man in the example either did or did not illegally strike and harm another. No one, however—not even the alleged victim and alleged perpetrator—necessarily *knows* whether he did or not. Even if the basic act itself is established or acknowledged, its legality or illegality is something for the court to determine. Sometimes people may think they know that they are guilty of something, but are merely unaware of an effective advocate's panoply of defenses.10 Protagoras knows (as does Aristotle, of course) that reality is not directly revealed to the minds of the judges. Whether the alleged perpetrator is strong or weak may makes us think *in general* that he was more or less likely to have committed the crime, but, by definition, each case must be decided *in particular,* not in general. "To make the weaker argument the stronger" is as valid a translation of Aristotle's Greek as is "to make the worse argument the better."11 *Dissoi logoi,* the Protagorean theorem of argument, we might say, means that no matter how bad a case looks, no matter how weak a litigant's position looks, a skillful advocate can always find a way to construct an argument that—at least with respect to deciding matters on the basis of argument—brings the two sides into parity. After all, even while criticizing Protagoras for promising to be able to make the worse argument the better, Aristotle acknowledges that this characteristic is not found in any "art" except rhetoric and eristic. The very fact of Aristotle's writing his *Rhetoric* is an acknowledgment that only through rhetoric can practical matters, *pragmata* such as legal disputes, be decided.

Dissoi logoi assumes further not only that each term in a binary opposition contains elements of its opposite, but

that it is founded upon its opposite, upon that which it seeks to exclude. Plato and Aristotle each attempted to refute Protagoras by pointing out the internal contradiction. If, as Protagoras asserted, man is the measure of all being and anything that any person believes to be true is true, the belief that Protagoras is wrong—that *not* every belief is true—is also true. In this, the *peritrope* or "turn-around," Protagoras is said to undo himself.[12]

The *peritrope* and its supposed self-contradiction are related to another one of Aristotle's accusations against Protagoras: that he violated the law of noncontradiction. The law of noncontradiction, one of Aristotle's three laws of thought, carries with it more than a millennium's worth of profound philosophical prestige. An accusation that one has violated it is no small matter. It is, however, precisely a willingness to disregard the law of noncontradiction—if not, perhaps, so much by violating it as by concerning oneself only with those aspects of experience that fall outside its application—that makes for the power and flexibility of a Protagorean approach to social phenomena.

A standard translation puts Aristotle's statement of the law of noncontradiction (*Metaphysics*, 1005b19-20) this way: "The same attribute cannot at the same time belong and not belong to the same subject in the same respect."[13] According to Aristotle, those who, like Protagoras, fail to follow the law of noncontradiction end in absurdity:

> But if all contradictions at the same time in the same manner are true, it is clear that everything will be one. For the same thing will be a trireme, a wall and a man if it is possible both to affirm and to deny anything about anything, just as is necessary to those who state the argument (lit. "speak the *logos*") of Protagoras. *Metaphysics*, 1007b18-23 (my translation).

Let us assume that Aristotle is right about Protagoras' denying the validity of the law of noncontradiction by saying two *logoi* opposed to each other exist regarding every thing. What results? For Aristotle the same subject cannot be P and not-P; for Protagoras the same subject is always P and not-P—it is because of this that the sophist and rhetorician is equally able to argue for P or not-P. Aristotle's law is concerned with establishing what a thing *is*; as Protagoras' statement regarding the gods demonstrates, however, he is not interested in questions of ultimate being. To side with Protagoras is not necessarily to say that the law of noncontradiction is wrong within its own rigidly narrow metaphysical terms of identity of time and respect;[14] one might say instead that like the geometer's ideal circle, noncontradiction is of strictly limited relevance and applicability in the experiential world. The law of noncontradiction is a filter: for those who consider it a valid minimum criterion for the true, only those things that successfully pass through it will qualify as truth. Since Protagoras, not concerned with questions of ultimate truth, assumes experience to be contradictory, statements about that experience will duplicate those contradictions.[15]

Avoiding contradiction is not the end—all and be—all of a Protagorean description of experience, and so a perfectly valid response to the *peritrope* is to turn it right around again. The practice of *dissoi logoi* means that to acknowledge the same data or premises does not prevent one from arriving at the diametrically opposed conclusion. Does the fact that not everyone accepts *dissoi logoi* argue for or against its validity when *dissoi logoi* itself predicts that the *logos* denying its validity lies in opposition to the one affirming its validity? How does one refute the rejection of the law of noncontradiction by pointing out a contradiction?

Seneca well expressed what is Protagoras' positive take on criticism of his position: "Protagoras says that one can argue equally well on either side of any matter, including the matter itself whether both sides of any matter can be argued."[16] For some to argue that there are not two sides to every proposition is the best proof the proposition could have. Perhaps the best way to understand Protagoras' assertion, then, is by treating it as

merely a description or prediction of social phenomena. Argument never stops.

Dissoi logoi naturally also predicts an argument against never-ending argument, but it is more effectively made, it seems to me, as a moral argument rather than a metaphysical one. In *The Clouds*, Protagoras' "better" and "worse" argument reappear as characters named "Just" and "Unjust" argument (*Dikaios Logos* and *Adikos Logos*).[17] Socrates complained in *The Apology* that Aristophanes' parody of him in *The Clouds* was one of the things that got him in trouble with the Athenian state. Aristophanes' characterization of Socrates is unjust in some respects, but it is right in raising the question whether there is any difference between the Socratic and Protagorean simply on the question of *argument*. The later tradition recorded in Diogenes Laertius, at least, did not think so. Just after stating that Protagoras was the first to claim that in every matter there are two opposite arguments, Diogenes adds that Protagoras made use of these in arguing by the method of questioning, a practice he originated. A little later Diogenes is even more explicit, stating that Protagoras first introduced the "Socratic" type of argument.[18] Socrates may have testified to his scorn for lawyerly traps and rhetorical tricks, but as Quintilian, that Roman champion of lawyers and rhetoricians knew, practicing lawyers could have no better model for putting words into witnesses' mouths:

> It remains to consider the technique to be followed in the examination of witnesses.... If ... I am asked to point out a model for imitation, I can recommend but one, namely that which may be found in the dialogues of the Socratics and more especially of Plato, in which the questions put are so shrewd [*adeo scitae*] that although individually as a rule the answers are perfectly satisfactory to the other side, yet the questioner reaches the conclusion at which he is aiming.[19]

There simply is no way to conduct argument other than through rhetoric. The Platonic dialogues are full of passages in which Socrates' disputants accuse him—quite reasonably and legitimately—of all the rhetorical, sophistic, or eristic tricks that one could possibly employ. Socrates is always "playing with" people, being "ironic" rather than serious and straightforward, pretending not to understand statements that he must understand perfectly well. He uses the binary principle, the oppositional principle, in the same way that a sophist does.[20] In argument Socrates out-sophists the sophists because he gets to ask the questions (and, one suspects, because Plato gets to write both the questions and the answers), Socrates plays the sophists' game better than sophists do. The difference is that while he, like they, recognizes the inherent constitutive void at the centre of argument (that since that is equally good at proving either of two things it can never prove either thing) only Socrates stays on the right side of the metaphysics of morals by appealing to something outside of the system, on the other side of the line—a transcendent principle of The Good, The Beautiful, The Just, The True, The One, The Divine. The Platonic emphasis on transfigured states that go beyond or are inexpressible in ordinary language is another aspect of this: the divine madness of poetic or prophetic inspiration.[21] Both Plato and sophistic ultimately have an anti-rational conception of argument.[22] The difference is that sophistic—in this respect somewhat more rational than the seeming rationalism of Plato—stops at argument. Platonism adds the extra-argumentative categories, things about which there can be, it says, no argument.

None of the Socratic/Platonic categories works anymore. It is right that they should not. Rhetoric's unraveling of them, as of everything else, was necessary and complete. But there will be something, if only because there has to be something. One can believe both that God, as powerful, intelligent, creative Being, does not and never did exist and believe that mystery and the incompleteness of knowing, the reason that humankind has always created and believed in gods is as real now as ever and requires articulation. The question, then, is articulation in what form?

As I mentioned briefly a moment ago, the key binary in the ancient Greek dichotomy between rhetoric and philosophy distinguishes between the true and the probable. The key term in the binary, the probable, is "*to eikos*." "Likely" is a synonym for "probable" in English and one that captures more of the etymological relationship between *eikos* and related words: *eoika*, the adjective "to be like"; *eikôn* (root of the English "icon") a likeness, image, or, in Platonic usage, a mental representation.23 These words in turn call up two apparently distinct verbs, each with the form "*eikô*." Etymologists trace the words related to the concept "likeness" to a verb that survives only in a few forms, but that has a hypothesized form identical to a verb meaning "to yield," "give back," "draw away from" or "retire." The consistency between this and commonplaces of the interpretation of Platonic thought is almost too good to be true, as if etymology viewed the *eikôn* as being a "drawing back from," as well as a copy of, an original. The last lines of the *Timaeus* reflect this: the God that is perceivable is an "icon" of the "Intellect-ible," the *noetic*.24 In being "like" the truth *eikos* is not the truth but a falling away from the truth. In the Platonic system creation itself is only an imperfect copy of perfect Being. Man is in a fallen state and, *eikos*, not truth, is what human beings use in resolving the human disputes. Although opposed to Plato in so many ways, Aristotle in the criticism of Protagoras and *eikos* quoted above seems to have inherited the position found in Plato's *Phaedrus*.

> For in the courts, they say, nobody cares for truth about these matters [i.e., things that are just or good], but for that which is convincing; and that is probability [*to eikos*]. For sometimes one must not even tell what was actually done, if it was not likely [*eikots*] to be done, but what was probable [*ta eikota*-lit. "probable things"], whether in accusation or defence; and in brief, a speaker must always aim at probability [*eikos*] paying no attention to truth; for this method, if pursued throughout the whole speech, provides us with the entire [rhetorical] art.25

But with what I hope is only a slight gesture of etymological sleight of hand, we can slip from the Greek *eikos* to the English "likeness" (sound etymological evidence aside, there is, essentially, only an "l" or a *lambda* between them) to the German "*Gleichnis*" and make the connection from a constitutive principle of legal argument to a constitutive principle of fiction—from probable to parable. The German for parable and the English "likeness" are, furthermore, even closer than the modern forms suggest. The Old English root of "like" is *gelîc* and so recourse to German as the root language of the "simpler" words in English recalls to us the way in which a parable presents itself as a fictional "likeness" simultaneously concealing and revealing a truth.

But what of the actual English word "parable," its origins and its connections to the theological source from which it comes and with which, in English, it cannot but be associated? For this there is no better place to look than the epigraph that, translated, becomes the title for René Girard's *Des choses cachées depuis la fondation du monde*.26 The text is Matthew 13:35 and I give the full sentence from which Girard takes the last three words: *Anoix en parabolais to stoma mou, ereuxomai kekrummena apo katabols*, I will open my mouth in parables; I will utter things which have been kept secret from the foundation of the world (KJV). These few words and a brief glance a Girard's project contain a remarkable amount of material shedding light upon the connections linking *eikos*, truth and parable. First, only in Greek can we see that the statement depends upon a pun lost in subsequent languages: "in parables," *en parabolais*/"from the foundation," *apo katabols*. The move from parable to foundation, seemingly such a distant one in translation, is, in Greek, merely one of changing prefixes (and in this case, the prefixes are further prefixed by prepositions, *en* and *apo*, that could themselves serve as prefixes to the operative verb: *ball*: "to throw"). A parable in Greek is literally something "thrown alongside" (as one physical object might be thrown alongside another for purposes of comparison); the figurative meaning of comparison comes from this literal one. A foundation in Greek is literally something "thrown down." A painfully literal translation would thus be "I will open my mouth in things-thrown-alongside; I will utter forth

things which have been kept secret from the throwing-down." Furthermore, *kataball* is one of those words that explicitly declares its own internal binarization, a word with two senses set in opposition to one another: *kataball* can mean either "I found, establish" or "I overthrow." Once again, as with icon's meaning of both image and "drawing back" we come across a coincidence in language and the history of philosophy that is almost too good to be true: Protagoras is credited with a book that goes by two titles, "Truth" or "*Kataballontes*,"[27] a subtitle that is generally translated as "The Down-Throwers" (as it is in R.G. Bury's translation of Sextus Empiricus) or as "Knock-down Arguments" (Thomas Cole's suggestion),[28] but that can also be "Foundations." As we have seen thus far, every foundation, as of a metaphysical or moral system, is also an overthrowing, and even a self-overthrowing. Every overthrowing is also a foundation.

But from the throwing down of what? This is the second point. The Latin, English, French texts add "*mundi*," "of the world," "*du monde*," but there is no *kosmou* in the Greek original (the Girard title adds it, but the epigraph itself does not); it is as if the "throwing-down" or foundation (or "overthrowing") was itself so secret, so indecipherable, that the thing thrown down cannot be named or loses its full meaning upon naming. Because so much of this paper has been devoted to attempts to demonstrate the foundedness of anti-foundationalism and the self-overthrowing of foundationalism, I prefer to leave *apo katabols* as it is, founded and overthrown in one, without a cosmos, a world, an ordered thing set up and added in order to "explain" just what it is that was thrown down. Whoever added the word *kosmou*—and especially *that* word—in an effort to name the "what" of *apo katabols* is an enemy to my project. The orderedness of things comes not from the foundation, but from the parables.

What does this epigraph, this title, mean for Girard's discussion of mimesis, in Plato and elsewhere, as the core principle upon which conflict—that which law seeks to manage—is based? Are we to take his description of the originary conflicts based upon mimesis as themselves parables, that is fictions, that is mimesis? More basically, what is the relationship between a fiction and a non-existent (because non-experiencible) but—as I hope I have demonstrated—necessary and inevitable resort to something beyond the experience, language and argument?

Up until now I have not mentioned Kant or the degree to which all of that which has been said so far is an aspect of the Kantian quirk in all subsequent metaphysics. This is partially because with Plato and Protagoras we have, full-strength as it were, the two realms that Kant tries to account for, mediate and reconcile: Protagorean phenomena and Platonic noumena. As long as the noumena has that definition in metaphysics, and therefore our habits of thought, of the "truer truth" which can never be known, it is inevitable that all phenomena, that which can be known (or at least experienced) will be lower, an image, an "icon," only the probable, "like" truth and therefore not true. The true is, by definition in this scheme, that which God knows and which men cannot know.

Except, that is, in fictions: ordinary, philosophical or legal. Fictions are parables (the religious colouring of the word is definitely intended) for a real that is not there (in the sense of being necessary but unreachable). Fictions provide the God's-eye-view to human beings that human beings cannot have in the created world. "*Un cercle n'existe pas*," says Roquentin (and Protagoras, and Nietzsche) and he is right as to the question of ultimate existence, which has always enjoyed a position of privilege in metaphysics. The circle, like God, like Roquentin himself, is a fiction. But Roquentin (fictionally) knows what a circle is, knows how to conceptualize of one and knows that, because he and others know how to conceptualize of a thing that can never exist they can do certain things with the things *in existence* that they could not do otherwise. Justice is a fiction. Since for every argument there is a counterargument, no outcome viewed as solely within the rhetorical system of legal or moral argument can ever be either just or unjust. Only in fictions, be they novels, religious parables, legal hypotheticals or baseless (that is, necessary) ideals, can we have given to us—precisely because there is no thing-in-existence

referred to—reality as our fictional God would receive it.29 Only in a legal hypothetical, for example, can one categorically begin, "Say that X is guilty of a crime..." Since X is not in existence, the rhetorical attack of "he is not guilty of a crime" cannot be mounted. Plato writes against the mimesis of the literary artist as the consummate literary artist: in such a way as to simultaneously overthrow and found himself. Plato writes fictions because only in that way can truths be told.

Notes

1. The phrase itself, however, also has an older, slightly different meaning, or at least a slightly different application. It was probably invoked most famously by Sir Edward Coke as part of his justification for denying King James I the right to issue legal judgments in his own court of the King's Bench. As Coke used the phrase, it was not the citizen but the king himself who was "not under man but under God and law." Prohibitions del Roy, 12 Co. Rep. 63, 65, 77 Eng. Rep. 1342, 1343 (1608).

2. For an introduction to CLS *see* Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, (Cambridge, MA: Harvard University Press, 1986) and Allan C. Hutchinson, ed., *Critical Legal Studies*, (Totowa, NJ: Rowman & Littlefield Publishers, Inc., 1989), a compilation of excerpts from influential articles.

3. Karl N. Llewellyn, "Remarks on the Theory of Appellate Decision and The Rules or Canons About How Statutes are to be Construed," *Vanderbilt Law Review* 3 (1951): 395-406; *The Common Law Tradition: Deciding Appeals*, (Boston: Little, Brown, 1960).

4. Schiller even titled one of his philosophical works *Plato or Protagoras?* (Oxford: B. H. Blackwell, 1908).

5. G. B. Kerferd, a leading scholar of the Greek philosophy of the period, has argued that "the method of Protagoras...was in effect the method of the whole of the sophistic movement...." G. B. Kerferd, *The Sophistic Movement*, (Cambridge: Cambridge University Press, 1981), 54. For Protagoras as the originator of a prototypical secular humanism *see* Edward Schiappa, *Protagoras and Logos*, (Columbia, SC: University of South Carolina Press, 1991), 162.

6. Stanley Fish, *Doing What Comes Naturally: Change, Rhetoric and the Practice of Theory in Literary and Legal Studies* (Durham: Duke University Press, 1989), 480.

7. The statement, from Diogenes Laertius' *Lives of the Philosophers*, 9.51, can be found in Hermann Diels and Walther Kranz, eds., *Die Fragmente der Vorsokratiker*, Vol. 2 (Berlin: Weidmannsche Verlagsbuchhandlung, 1964), 253: 80, A1. There is an English translation by Michael J. O'Brien, in Rosamond Kent Sprague, ed. *The Older Sophists* (Columbia, SC: University of South Carolina Press, 1972), 4.

8. Aristotle, *The "Art" of Rhetoric* (Translated by John Henry Freese) Loeb Classical Library (Cambridge, MA: Harvard University Press, 1994), 1402a, trans. p. 335.

9. One answer, Protagoras' revenge, as it were, is found in non-Euclidean geometry, in which, depending upon whether one's brand of non-Euclideanism is "hyperbolic" or "elliptic," the sum of the angles are either less than two right angles or more. Up until the 1800s all geometry was Euclidean, but a Protagorean approach is only too happy to view the question historically, as one in which the "eternal verities" of the triangle are capable of changing over time. Protagoras, not surprisingly, was "hostile and contemptuous" of mathematics and the other Greek sciences, with their emphasis on purportedly unchanging truth:

> in his attacks on geometers, he used to say that the tangent touched the circle not at a point, but along a line. This remark seems to be part of his view that all appearances are valid: he merely appealed to the visible circle and rejected the notion of the circle as defined by the mathematician. [Kathleen Freeman, *The Pre-Socratic Philosophers: A Companion to Diels*, Fragmente der Vorsokratiker (Oxford: Basil Blackwell, 1946), 351-52.]

Freeman concludes that, "[t]he remark is therefore of no interest to mathematics," but this is a misleadingly harsh pronouncement. Protagoras' critique does not, of course, change pre-set rules of mathematics—they remain as they are, however variable from system to mathematical system. Protagoras' point is merely that the ideal triangle is just that—ideal and therefore impossible in the real, experiential world. Any tangent touching any "real" circle that you or I draw, no matter how precisely, *does*, in fact, touch not at a point, but along a line. Protagoras' protest and perspective is essentially the same as the one Roquentin "discovers" in the park in Bouville: "*le monde des explications et des raisons n'est pas celui de l'existence. Un cercle n'est pas absurde, il s'explique très bien par la rotation d'un segment de droite autour d'une de ses extrémités. Mais aussi un cercle n'existe pas.*" Jean-Paul Sartre, *La nausée* (Paris: Gallimard, 1938), 184.

10 This notion is the impetus behind the later development in rhetoric—probably starting with Hermagoras, and running through the *Rhetorica ad Herennium*, Cicero and Quintilian Book III—of *stasis* or *status* theory, what we would now recognize as including the framing of the specifically *legal* as opposed to the factual issue. If, like the Menendez brothers for example, you must admit the fact of the thing done, your defense had better be that it was legal under the circumstances for you to do it.

11. Either one, actually, is closer to the original than the Loeb translation, since in Greek the word for "appear" does not appear.

12. For contemporary discussions of Protagoras' alleged self-refutation *see* M. F. Burnyeat, "Protagoras and Self-refutation in Plato's *Theaetetus*," *The Philosophical Journal* 85 (1976): 172-95; M. F. Burnyeat, "Protagoras and Self-refutation in Later Greek Philosophy," *The Philosophical Review* 85 (1976): 44-69; Jack W. Meiland, "Is Protagorean Relativism Self-refuting?," *Grazer Philosophische Studien* 9 (1979): 51-68; and James Haden, "Did Plato Refute Protagoras?," *History of Philosophy Quarterly* 1 (1984): 223-40.

13. Schiappa, 136.

14. Schiappa notes the narrowness of Aristotle's formulation of noncontradiction (p. 138) and the extent to which Protagoras carried on Heraclitus' idea of constant flux (pp. 95-98). Aristotle does not say that the same attribute cannot both belong and not belong to the same subject, but only that it cannot both belong and not belong *at the same time and in the same respect*. But when in this world of constant flux, the Protagorean might ask, is the same subject ever in the same time and same respect? When, the Heraclitean might ask, is it

ever even the same subject?

15. Paul De Man bases his chapter on Nietzsche and the "Rhetoric of Persuasion" on Nietzsche's strikingly similar attack upon the law of noncontradiction. Nietzsche's rejection of noncontradiction parallels Protagoras' attack on geometry. (Quoting in translation, de Man (p. 121) adds key German terms; the italics are Nietzsche's):

> The conceptual ban on contradictions proceeds from the belief that we *can* form concepts, that the concept not only designates [*bezeichenen*] the essence of a thing but *comprehends* it [*fassen*]....In fact, *logic* (like geometry and arithmetic) applies only to *fictitious truths* [*fingierte Wahrheiten*] *that we have created.*

16. Seneca, *Epistulae,* 88.43; Diels-Kranz, 80, A20; *The Older Sophists,* 13. In the context of Seneca's Letter 88—with its denouncement of not only Protagoras, Parmenides, Zeno, and skeptical schools of philosophy, but also much of the study of literature, and practically all of music, mathematics, astronomy, art and athletics for failing to teach Stoic ideals of virtue—the statement is meant not as a defense, but an utter condemnation. Since *dissoi logoi* operates by drawing two diametrically opposed conclusions from the same premise, however, it seems particularly in keeping with the spirit of *dissoi logoi*, that an attack should provide the best articulation of its defense. One merely needs to demonstrate that a conclusion opposite from the one intended can be drawn from the statement.

17. These may be later emendations, however, and not the names that Aristophanes gave them. Schiappa, 111 & 116 n.37, citing Kenneth J. Dover, *Aristophanes: Clouds*, (Oxford: Clarendon Press, 1968), lvii-lviii and Alan H. Sommerstein, *Aristophanes: Clouds*, (Warminster: Aris and Phillips, 1982), 95-117.

18. Diogenes Laertius, 9.51, 9.53; Diels-Kranz, 80, A1; *The Older Sophists*, 4, 5.

19. Quintilian, *Instituto Oratoria* (Translated by H. E. Butler) Loeb Classical Library (Cambridge, MA: Harvard University Press, 1985), 5.7.26, 28. Legal instruction often proceeds by what it calls the "Socratic method." Perhaps, both in order to credit Protagoras with an invention rightfully and unapologetically his and—in spite of Socrates' skill at it—to acknowledge Socratic disdain for eristic, the practice should be called the "Protagorean method." *See* William C. Heffernan. "Not Socrates, But Protagoras: The Sophistic Basis of Legal Education," *Buffalo Law Review* 29 (1980): 399.

20. See, e.g., *Gorgias* 483a, where Callicles accuses Socrates of "a clever trick you have devised for our undoing in your discussions: when a man states anything according to convention you slip "according to nature" into your questions; and again, if he means nature, you imply convention." Plato, "Gorgias" in *Lysis, Symposium and Gorgias* (Translated by W. R. M. Lamb) (Loeb Classical Library) (Cambridge, MA: Harvard University Press, 1991), p. 383.

21. *See, e.g., Ion*, 534a and *Phaedrus*, 245a both of which relate poetic inspiration to prophecy and divine madness. Paradoxically, the direct revelation of the divine that these irrational states are believed to provide is taken to be a surer link to truth and reason than is rational argument. People may dissemble but the muse, and Socrates' daimon, do not.

22. Burnyeat's "Protagoras and Self-refutation in Later Greek Philosophy." *The Philosophical Review* 85 (1976): 44-69, in clarifying the relationship between Protagorean thought and later Greek skepticism, shows how, like skepticism, *dissoi logoi* is at its core anti-rational. Like skepticism, Protagorean argument displays an "unwillingness to take sides one way or the other on the issues that divide everybody else" (p. 50). (Consider Protagoras' statement on the gods or how—equally able to argue either side—he need not believe in either side). From *dissoi logoi*, skepticism developed the notion of "equipollence or equal strength (*isotheneia*), which says that to every dogmatic assertion another can be opposed of equal plausibility or implausibility, with the result that one is unable to decide between them and is forced to suspend judgment" (p. 53). Burnyeat concludes (pp. 60-61):

> It was thus no accident that the ancient Greek Skeptics denied reason itself. Their principle of equal strength (*isotheneia*) of opposed assertions does say precisely that "Yes" and "No" are equally valid answers, between which no decision can be made....[T]he Skeptic and the Protagorean positions are equally inimical to the idea of reason. If there really are two equally valid sides to every question, the idea of a reason for preferring one to the other collapses.

As Nicholas Rescher points out, the sophistic movement anticipated all of the important insights of Greek skepticism. "Greek Scepticism's Debt to the Sophists," *Essays in the History of Philosophy*, (Aldershot England and Brookfield VT: Avebury, 1995): 51-70, 67. The difference between sophistic and skepticism is not the insights, but what is done with them. Rather than withdrawing into skepticism's individual inaction and purely philosophical contemplation, the sophists used the same insights as the key to effective participation in public life. *See id.*, 67.

23. Cf. Kathy Eden, *Poetic and Legal Fiction in the Aristotelian Tradition*, (Princeton: Princeton University Press, 1986), 68-69.

24. Plato, *Timaeus* (Translated by R. G. Bury) Loeb Classical Library (Cambridge, MA: Harvard University Press, 1989), 91c.

25. Plato, *Phaedrus* (Translated by Harold North Fowler) Loeb Classical Library (Cambridge, MA: Harvard University Press, 1990), 272d-273a.

26. (Paris: Bernard Grasset, 1978) trans. by Michael Metteer (Book I) and Stephen Bann (Books II & III) as *Things Hidden Since the Foundation of the World* (London: The Athlone Press, 1987).

27. Diels-Kranz, 80, B1; Sextus Empiricus, *Adversus Mathematicos*, 7.60.

28. Thomas Cole, *The Origins of Rhetoric in Ancient Greece*, (Baltimore: Johns Hopkins University Press, 1991), 99.

29. To my knowledge, Montesquieu best expressed the relationship between justice and this fictional notion of God: that we would love justice even if God did not exist because we would make every effort to resemble that Being of which we had so nobly conceived and Who, if He did exist, would necessarily be just. "*Ainsi, quand il n'y aurait pas de Dieu, nous devrions toujours aimer la Justice: c'est-à-dire faire nos efforts pour ressembler à cet être dont nous avons une si belle idée, et qui, s'il existait, serait nécessairement juste.*"

Lettres persannes, No. 83, (Usbek to Rhedi), ed. Paul Vernière, (Paris: Éditions Garnier Frères, 1960), 175.