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Modern American Jurisprudence and the Problem of Power

Arthur J. Jacobson
Benjamin N. Cardozo School of Law, ajacobsn@yu.edu

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The chief traditional model of the law professor in the United States has been that of auxiliary to the practitioner. In Europe, of course, the model tends the other way: practitioners are auxiliaries to law professors—carriers of the true doctrine from its source in the academy to a hapless *demos*. American law professors serve as auxiliaries to practitioners in two ways. First, law professors give a quick, relatively cheap, mass-produced education in the rudiments of what we call "thinking like a lawyer" to students who would otherwise have picked up "thinking like a lawyer" laboriously in an apprenticeship, in part at the expense of the employer. Second, law professors have the leisure to distill legal rules from a mass of cases and statutes or regulations, which they compile into treatises used by practitioners. The profession of law professor in the United States has thus justified itself to practice as a species of professional Fordism—assembly-line practice and education into practice.

These two roles have been quite attractive to many law professors over the five generations there have been law faculties in the United States. The roles are useful and profitable, an honest living. Yet the most significant fact of progressive legal education and scholarship in the prestige institutions has been a relentless erosion of the roles, so that the most famous law professors of the past seventy-five years are as likely as not to be those whose main contribution was to show the profession of law professor to be quite impossible. It would be a mistake to suppose that this self-destructive impulse has come from outside the law schools, just as it is wrong to assume that opposition to third-world regimes always comes from foreign agitators. Law schools are so successfully hermetic that they easily resist assaults from disciplines across the lawn: sociology, psychology, and the like. Moreover, the anti-establishment law professors did not at

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first set out to show that law can be reduced to psychology or economics or sociology—that came later. First they set out to show that teaching people to "think like lawyers" means nothing in the first place, or means something distinct from what real lawyers in real offices think, and also that distilling legal rules from cases is impossible. Their effort was self-criticism to the point of seeming self-destructiveness.

Why did the critical law professors choose the vocation of criticism over tending the honest business of being law professors? My thesis is that the work of these professors—apparently destructive of the social position of law professors in relation to their main supporters and benefactors in the Bar—is, in fact, constructive of a position in society separate from the Bar, seeking to carve out a role in the process of production for a legal intelligentsia. In other words, the profession of law professors considered as a legal intelligentsia has ideological needs and responsive activities distinct from the profession of law professors considered as auxiliaries to the Bar.

The story in which the American legal intelligentsia has sought to maintain a distinct interest as an autonomous group with its own power position in American society is a classic instance of the more general story of the intelligentsia in tolerant society. The intelligentsia appears as a group in tolerant society to do the unique and characteristic intellectual work of that society, which I call the "work of enlightenment." The more general story of the intelligentsia concerns their accomplishing the work of enlightenment at the behest of other power groups, and at special moments transforming the work of enlightenment to suit their own needs over the needs of other groups. These special moments I class under the rubric, "dynamic of enlightenment." First, I will briefly describe the dynamic of enlightenment, and then modern American jurisprudence as an example of the dynamic of enlightenment. I thus construe modern American jurisprudence as the story of the emergence of an American legal intelligentsia, justifying its own power position in the system of production with its own special forms of intellectual work apart from any initial relationship it might have had to the Bar.

The Conference on Critical Legal Studies (CCLS) plays a crucial role in this story, for it is the one movement in American jurisprudence that has given the legal intelligentsia an explicit, uncompromising role in its vision of law production in the United States. All prior schools of jurisprudence have avoided or finessed the issue of that role and have been in large measure formed or deformed by their avoidance. CCLS starts from the premise that intellectual work is one of

the works of this world. Its success stands or falls on whether it can find the ideas and institutions to accomplish its work.

The critical stance is part of the world, and if the critical stance is not critical about itself, then it is not true to its mission. This essay is written in that spirit.

I. DYNAMIC OF ENLIGHTENMENT

The phrase "dynamic of enlightenment" refers to a progression of tasks set in motion by a specific sort of intellectual work—the work of enlightenment. "Intellectual work," in turn, refers to any intellectual effort undertaken with the expectation that those who observe and judge the effort will regard it as valuable. Intellectual effort, like any other effort, can be valued by material support, but also by esteem, or maintenance of a social position.

Work of Enlightenment

The work of enlightenment has the task of challenging ends of social action in societies where the legitimacy of ends is expected to be open to contention. "Ends of social action" refers to the ends or goals which people use to explain or justify any action with the expectation that the participants in or auditors of the action will find the explanation or justification sufficient or legitimate.

In societies where the legitimacy of ends is constantly open to question, however, intellectual work must also establish the legitimacy of ends in the face of enlightened challenge. Ends of social action must be won by work, since they are not expected to be "given." The work of establishing the legitimacy of ends may be contrasted with the unenlightened celebration of ends in societies where the legitimacy of ends is not expected to be open to contention.

Those engaged in the work of enlightenment or the work of establishing the legitimacy of ends tend to regard action as a means of achieving the ends being used to explain or justify the action. The universe of actions regarded as means expands at the expense of the universe of actions regarded as ends. The very act of contending over ends and establishing their legitimacy engenders a taste for discovering action calculated to be more effective in achieving the ends—a taste that in societies devoted to the celebration of "given" ends is likely to remain dormant or hidden. The work of discovering means for achieving ends thus accompanies the work of enlightenment and the work of establishing the legitimacy of ends in societies where the legitimacy of ends is expected to be open to contention.

Source of the Dynamic in Social Position

The dynamic of enlightenment—the progression of tasks set in motion by the initial effort of challenging ends—starts within a class of persons whose social position depends on successfully accomplishing the work of enlightenment. The social position can depend as well, though it need not, on the allied tasks of establishing legitimacy of ends and discovering means of achieving them. This class of enlightened ones has sometimes, but not always, been called the "intelligentsia."

The class of enlightened ones does not typically appear as an autonomous class in traditional societies where ends are supposed to be "given." Such societies do, in fact, use intellectual work to attack competing systems of ends threatening to usurp the "given" ends. Yet the strategy of attack does not include, as we shall see, the specific technique of enlightenment (skeptical reversal of means and ends). Unlike techniques of criticism in societies with "given" ends, the technique of enlightenment cannot in principle be constrained to attack only the ends asserted by a power group seeking to make its ends the "given" ends in place of the "given" ends of the power group already controlling the society. Because the technique of enlightenment does not depend on the special characteristics of any "given" system of ends to accomplish its criticism of a competing system, it can just as well be turned on the system of ends of the power group wielding the weapon of enlightenment. Thus in principle enlightened ones are not bound to the power group supporting their social position. (Whether the relative autonomy of enlightened ones in societies where the legitimacy of ends is expected to be open to contention is a result of their determination to use the technique of enlightenment or whether the intention to use the technique of enlightenment is prepared by a social autonomy achieved for other reasons always depends on specific circumstances.) Those who carry on the work of criticism in traditional societies normally find themselves tightly bound within the power group that employs them, and cannot turn the criticism against the "given" ends asserted by the power group.

The difference between societies where ends are supposed to be "given" and societies where ends are expected to be open to contention, therefore, does not lie in the absence or presence of intellectual work whose purpose is the production or destruction of ends, but rather in the nature of that work and the social circumstance in which it is conducted. Even traditional societies with a stable system of ends require intellectual work to reconcile practical conflicts among ends accepted in principle, to educate the young to adopt the ends, and to

provide significant occasions on which the entire society celebrates them. Moreover, societies where the legitimacy of ends is expected to be open to contention do have a stable, albeit limited, system of ends distinguishing them from societies where ends are supposed to be "given," but are in fact open to contention. These are the limited ends of tolerance bounded by minimal ends of social order. Contention over ends takes place within devotion to the system of tolerance, which in the manner of tradition is regarded as stable.

The classic example of an autonomous class of enlightened ones is provided by the *Philosophes* of mid and late eighteenth-century France. They received esteem, and in some instances material support, in the aristocratic salon. Their work of enlightenment—congenial to the salon—was an attack in the service of several forms of secular power on the two principle threats to it: ultramundane Catholicism (which disintegrates secular power because it is more universal than secular power), and political or religious sectarianism (which disintegrates secular power because it is more particular). The strategy of the attack was to show that both Catholicism and sectarianism provide a source of secular power that cannot be rationally legitimated. However, the model of rational legitimation the *Philosophes* developed ultimately threatened—and in alliance with interests hostile to aristocracy for a period overcame—the principle of aristocratic privilege, which could not convincingly be made to satisfy the rational model. The enlightened ones were more faithful to the project of enlightenment than to the interests of the class that had been attracted to the project knowing only its early stages—more responsive to the social conditions of the work of enlightenment than to the demand that the work be truncated, focused and arrested according to the canons of aristocratic taste.

The class doing the work of enlightenment can never assume autonomy, but must fight for it both politically and by constructing a series of tasks justifying the social position of enlightened ones apart from their employment by groups whose primary interest is other than following out the consequences of enlightenment. The dynamic of enlightenment—the series of tasks—is thus a record of the struggle of the class of enlightened ones to assert an autonomous social position. It describes a tendency in intellectual work, when intellectual work is used to achieve the end of autonomy for those who do it as well as the end of criticism for those who want it done.

First Step in the Dynamic: Skeptical Reversal of Means and Ends

The first step in the dynamic of enlightenment thus occurs when

one group uses the work of enlightenment to attack the asserted ends of a competing group. Enlightenment works by capitalizing on the taste it engenders for regarding action as a means of achieving the ends being used to explain or justify the action. The work of enlightenment shows that an asserted end is a pretext for or justification of the possession of means for obtaining the asserted end. The real end is the possession of means. Enlightened ones typically call this real end "power," with respect to which the asserted end is a new sort of means—a means of justifying the possession of power.

No end other than the special end of possessing means for achieving asserted ends can possibly resist the skeptical reversal of means and ends. The enlightened ones are always able to show either that the asserted end of an action is not its secret end (hypocrisy), or that the asserted end is not the actual end (false consciousness). The thoroughness of the first step in the dynamic, which makes *all* ends no more than justification, is an unintended consequence of one group in contention for power using intellectual work to challenge the asserted ends of another group.

Second Step: Construction of a Standpoint Devoid of Ends

Enlightened ones can start the work of enlightenment whether or not they depend on the material or moral support of a group attempting to capture means for achieving ends, including the work of enlightenment. They can accomplish the skeptical reversal of means and ends, in other words, even when they do not have autonomy as a class—a social position providing them with means independent of any group.

Yet the vision of social life as a struggle for power poses a threat not only to the asserted ends of the group sponsoring the work of enlightenment and the ends of the group competing with the sponsors, but also to the social position of enlightened ones, even when they are dependent and do not claim an autonomous position. The work of enlightenment has value only when the ends of social action are legitimate and intellectual work serves to make them illegitimate. A class whose social position depends on attacking the legitimacy of ends always runs the risk that the sponsoring class will cease to find enlightenment attractive once the enlightened ones have accomplished it. The class of enlightened ones is driven to seek an autonomous position, because its relationship with the sponsoring class is unstable. The second step in the dynamic of enlightenment arises precisely in order to assure them an autonomous position.

The social need of the class of enlightened ones to cut themselves

off from direct dependence on any class whose power stems from the legitimacy of ends corresponds to the intellectual demand of at least some enlightened ones that means be distributed without assuming that the ends which happen to be fulfilled by the means are in fact legitimate. Every possible set of ends (except ones exceeding the bounds of tolerance) has the potential to be legitimate, and no set of ends can ever be allowed by the enlightened ones to realize this potential. Constantly maintaining ends as *possibly* legitimate requires a new sort of intellectual work—the work of neutrality—which the class of enlightened ones is prepared to offer *all* groups asserting the legitimacy of ends as the best they can hope for after the destructive work of enlightenment. Neutrality, nevertheless, keeps the work of enlightenment in reserve to knock down the pretensions of any end threatening to realize its potential for legitimacy, just as it always stands ready to rehabilitate ends when the possibility of their legitimacy has been challenged. The work of neutrality destroys ends in order to save them, and saves ends only on the condition that they not destroy others.

Neutrality guarantees the enlightened ones a measure of autonomy as a class that enlightenment only foreshadows. People doing work of a certain kind achieve autonomy precisely when they organize the work to depend on the participation of people doing it as a class, i.e., when the class establishes a monopoly of production. The autonomy available to those doing the work of enlightenment resembles the autonomy of householders in a putting-out system: individually they own the tools of the trade, but as a class are entirely at the mercy of the terms of trade set by the managers of production. Enlightened ones are autonomous, only because they work at home and cannot be stopped from speaking ill of their masters. The superior autonomy of neutrality, in contrast, is the autonomy of a class that organizes the work of enlightenment in order to assert control over the terms of trade in it. The work of neutrality routinely shuttles back and forth from one set of asserted ends to another, shoring up this one when it is weak, attacking that one when it is strong. In principle this can be done only if the enlightened ones coordinate their efforts. One is more likely, as a consequence, to find the work of neutrality in the university than in the salon. It is factory-production enlightenment.

Yet the autonomy appropriate to this sort of neutrality is a reactive or passive autonomy, achieved by constantly playing off one group in contention for power against all others. It is an autonomy of flight from the embrace of power. The class of enlightened ones has not yet asserted itself as an autonomous source of power, weighing in

against groups whose power depends on the legitimacy of ends in a struggle to control distribution of means in the process of production. Only in principle have enlightened ones organized the work of enlightenment to depend on the participation of people doing it as a class. Even in the cardinal institutions of neutrality, such as the university, enlightened ones persist in offering the work of enlightenment individually. The class of enlightened ones has failed to establish the *class*—not isolated workers—as indispensable to the process of production. Hence, enlightened ones strive to discover a contribution to the process of production over which they have complete control as a class, but which nonetheless remains true to the critical stance of enlightenment—their claim to an autonomous position in the first place. Enlightened ones doing the work of neutrality search for a standpoint devoid of asserted ends that requires intellectual work for the distribution of means with which to accomplish the ends. Intellectual work shifts from criticism to construction of a neutral standpoint from which to withstand criticism. Thus transformed, the work of neutrality justifies an autonomous position.

Not every enlightened one (or even many of them) need take the step from work of enlightenment to work of neutrality, just as relatively few people doing intellectual work find it advantageous to do the work of enlightenment in the first place. The dynamic of enlightenment describes a progression of tasks that some people doing the work of enlightenment will follow so long as the spiritual and material incentives available to them are in sympathy with the conceptual dynamic of the tasks.

Furthermore, the work of neutrality—unlike the work of enlightenment—does not take a single, crisply defined form. Political economy—the neutral standpoint *par excellence*—always appears when enlightened ones must decide what to do with the teleological wasteland the work of enlightenment has created. But political economy is by no means the only neutral standpoint. Some, like Montesquieu, have taken the perspective of social science (which Montesquieu identified with demography, broadly considered). Others, like Condorcet, have taken refuge in notions of progress. Bentham found a neutral standpoint in the psychology of action. Kant appealed to the tribunal of reason; Hegel, to history. Most, however, have done nothing.

Third Step: Collapse of Neutral Standpoints and the Reconstruction of Ends

The moment enlightened ones adopt a neutral standpoint as an asserted end, it too is subject to the skeptical reversal of means and

ends with which they expose all other positions. The standpoint devoid of ends differs from the ordinary unenlightened position only in that the end of the neutral standpoint has no content other than its position toward all other ends. The neutral standpoint nonetheless does have this position as an end, and the end of the neutral standpoint does provide the class of persons professing it with a justification for controlling the distribution of means, just as if it were an ordinary end.

The intellectual collapse of neutral standpoints also threatens the autonomy of the class whose social position depends on administering the neutral standpoint. Neutrality allows enlightened ones to be autonomous as a class by providing them with a classwide project—maintenance of the neutral standpoint—the rewards and conceptual integrity of which strike a sufficient number of enlightened ones as more attractive than enlightened service to other groups contending for power. The solidarity of enlightened ones requires keeping enlightenment at bay from the project, thus preserving the neutral standpoint as an ideal system for distributing means at a distance from the ends that attract them. By exposing the neutral standpoint as itself a justification for control over means, enlightenment implicates it in the unenlightened struggle for power.

Just as producers of neutrality can lose interest in producing it, consumers of neutrality can misuse or reject the product. Both losers and winners in a contest fought out in the neutral arena easily regard neutralism as a secondary or superior justification for possessing means the winners would have acquired anyway had there not been a neutral standpoint. Alternatively, if either winners or losers determine that the ends of the winners could not by themselves have attracted the means, then the class whose social position depends on the neutral standpoint appears to be an ally of the winners—just another group seeking to maximize its control over means, its power. In either case, the neutral standpoint avoids being construed as an asserted end by groups struggling over ends only by resolving itself into a component of the ends of the winners. If the unenlightened try instead to dissociate the neutral standpoint from the ends of the winners, enlightenment will always be available to disturb their acquiescence.

The threat to autonomy provides enlightened ones with a social interest, for the first time, in taking a position on ends, since they can no longer retreat into neutral standpoints or offer them as superteleological guides to social action. Having lost the position devoid of ends, enlightened ones cast about for other values to produce and con-

trol, other means of asserting an autonomous position. The skeptical reversal of means and ends has brought enlightened ones back from possessing means as power to reconstructing ends.

The collapse of neutral standpoints—which produced the threat to autonomy in the first place—also frees enlightened ones intellectually to take a position on ends, other than simply exposing them as justifications in the struggle for power or indifferently regarding their fate in the neutral mechanism. Enlightened ones gain nothing now from public neutrality in the contest over ends, since enlightenment convicts them anyway of supporting the winning position. The important point is that they be *inwardly* neutral, even as they take a public position. Others take positions out of vulgar interest or unreflective emotion. Being inwardly neutral, enlightened ones take positions on ends at a distance, as a result of reflection and a complex calculation of enlightened interest. The standpoint of neutrality retreats into reflection—an inward temper rather than an ideal system for deciding distribution—as enlightened ones prepare to enter the contest over ends as full citizens.

Enlightened ones maintain the temper of neutrality in one of three ways. Each stance attempts to cope with the social marginality into which the collapse of neutral standpoints plunges the class of enlightened ones. The strategy is to assert a special role for the temper of neutrality in preparing ends. The roles range from one in which the temper of neutrality is only incidentally involved in the formation of ends to one in which, in theory at least, dominates the formation of ends altogether.

In the first stance, where the temper of neutrality plays only an incidental role in preparing ends, enlightened ones acquiesce to whatever ends have survived skeptical reversal. Acquiescence leads, in turn, either to resignation or to cynical participation in the struggle for power. As they go about the vulgar business of pursuing ordinary interest, enlightened ones recognize each other only by a certain attitude, a shared memory of enlightenment. They lose their claim to autonomy as a class. The class itself has no daily business; it is a ghost class. The institutions that once supported autonomy now survive only as another battleground in the struggle for power, virtually indistinguishable from general political institutions. Enlightened ones achieve the heightened individuality of prominent politicians; the class exists only to qualify entrants to a legislature of intellect. Nonetheless, enlightened ones comfort themselves that the stance of acquiescence is superior to the vulgar pursuit of interest, precisely because it is acquiescence and not the naive, untempered quest for domina-

tion. Enlightened ones would do otherwise, if only they could figure what other could be done. They are not at fault for pursuing interests; they do it by default. Enlightened ones embrace hypocrisy—the original nightmare of enlightenment—as the one authentic end of social action, but they are not, in fact, hypocritical. Others are hypocritical precisely because they do not embrace hypocrisy as a norm.

In the second stance, where the temper of neutrality plays a full, albeit limited role in preparing ends, enlightened ones engage in the self-conscious construction or reconstruction of ends according to aesthetic criteria. The aesthetic reconstruction of ends at once removes enlightened ones another step from the vulgar pursuit of interest and salvages a remnant of autonomy for the class. The stance of acquiescence distinguishes enlightened ones from ordinary groups pursuing interests in a way that is significant only to them and makes no difference whatsoever to their allies and antagonists in the battle over interests. Cynicism and resignation are moods, not modes of behavior. The aesthetic reconstruction of ends, by comparison, purports to recommend interests according to publicly avowed criteria, which others can rationally or ethically be induced to follow. Enlightened ones not only legitimize the content of ends so derived, but also advertise a process by which the content came to be recommended. Unlike the abstract process of the neutral standpoint, however, the process of aesthetic reconstruction leads to a position on the content of ends. Aesthetic reconstruction thus resembles the work establishing the legitimacy of ends, which accompanied enlightenment prior to the discovery and collapse of neutral standpoints. Unlike the work establishing the legitimacy of ends, however, aesthetic reconstruction commits enlightened ones only to applying publicly avowed criteria and not to particular ends recommended by applying the criteria. Enlightened ones thus work at a distance to establish ends, as if administering a neutral standpoint. They are divorced from the success or failure of the ends their criteria happen to establish, since their real end is public avowal of the criteria. Society supports them, because they legitimize ends, but no group dictates which ends they shall legitimize. At the same time, enlightened ones reconstructing ends always choose ends to reconstruct that are already given by groups competing for power. They would never form new groups to pursue novel ends and certainly never band together to pursue the criteria themselves as ends. Their autonomy is an immunity from—not a claim to—power.

In the third stance, enlightened ones propose to make over the formation of ends from every group in society in a manner consistent

with the original enlightenment project of exploding ordinary ends. In so doing, enlightened ones restore intellectual work to the center of production and solve the problem of autonomy by reducing other groups to the same social marginality that struck enlightened ones upon the collapse of neutral standpoints. Enlightened ones make themselves autonomous by constraining other groups to pursue only ends consistent with enlightenment—the skeptical reversal of means and ends. The only end consistent with enlightenment, it will be recalled, is controlling means for the pursuit of other ends—the end of power. Enlightened ones in this position, therefore, adopt as an end for themselves and other groups possession of means for its own sake without ever using the means to achieve (or without necessary reference to or direct connection with) any asserted end. The position is complex, and deserves separate treatment.

Shutting Power Up Within Persons: the Social Norm of Power Reduction

Enlightened ones who take this position affirm the psychological benefits of power possession. But they reject the social consequences of the exercise of power for two reasons. First, the exercise of power by one person has negative effects on the power of the person subject to its exercise. The exercise of power defeats the program of maximizing the psychological benefits of power possession. If everyone would simply be content to possess means without ever using them—power as potential or psychological powers—then no one would suffer the psychological damage of being subject to another person's power. Power itself is drawn inward by the temper of neutrality. It becomes a psychological, not a practical social phenomenon. Second, the exercise of power—using or deploying means to achieve one or another asserted end once latent or hypothetical—embroils the exerciser in the skeptical reversal that attaches to the pursuit of all asserted ends. Enlightened ones thus develop social norms of power reduction, while cultivating power as potential in persons.

The satisfaction one gets from the special end of controlling means without using them is very different from the satisfaction of using means to achieve actual ends. The satisfactions of power come about merely through possessing means. Means do not get spent to achieve power as they get spent to achieve other ends. The satisfactions of power depend only on relations of control or hierarchy amongst persons, leaving the use of means in the background.

Passing a social and cultural transformation about which we now know nothing, groups angling to control means will be unlikely to

stop deploying them to achieve the ends justifying their control in the first place. Nor are they likely to heed or value those telling them to rely instead on the psychological gratifications of pursuing only power. Society supports enlightened ones who acquiesce, precisely because acquiescence does odd jobs to pay its own way and does not by itself need supporting. Society supports those doing aesthetic reconstruction, because they are continuing the old work of legitimizing ends in the face of the constant threat of enlightenment. But why does society support those who would shut power up within persons and reduce the level of power available in society?

Society supports this last position, because it removes the threat of enlightenment. On the level of theory, the position legitimizes the pursuit of means for achieving asserted ends on the minor condition that the means never be put into operation. Society takes what it needs in the transaction—legitimation of the pursuit of means—and leaves the condition to be swallowed up in the mockery of practice. On the level of practice, it is true not only that means will be used, but also that enlightened ones will be diverted from the ceaseless work of enlightenment. The project of enlightenment under these conditions is to create cults of edification, in which persons possessing means as powers can replace the vulgar use of means as power. The cults are supported primarily by those who would otherwise be condemned to acquiescence. They are a place where enlightened ones can share memories of enlightenment and admire each other as if they were performing practical deeds of enlightenment. They are a forum in which those doing aesthetic reconstruction may consider launching novel projects. The cults of edification constitute the premier institution of the enlightened class after the collapse of neutral standpoints. They recall the salon—without the aristocratic premise of the salon. They are the home of enlightenment, once the dynamic of enlightenment has run its course. Society under the regime of edification is as untormented as it was before the deadly weapon of enlightenment was first used to fight the battle over interests. The autonomy of the cults is thus an autonomy of social death; the cults themselves are cemeteries in which the enlightened bury each other, and maintain each other's graves as monuments to their powers.

II. THE DYNAMIC IN AMERICAN JURISPRUDENCE

The premise of this paper is that what I have called "dynamic of enlightenment" is a constant tendency in the special intellectual work of tolerant society. This work combines enlightenment with work at once establishing the legitimacy of ends and discovering more efficient

means of achieving them. Groups use these three sorts of intellectual work to compete for means of production in a social condition where the ends of production are expected to be open to contention. The producers of the special work, however, use it in a different sense—to justify an autonomous social position. Enlightenment has as profound an effect on the social position of the producers of enlightenment as on the positions of its targets and consumers. For this reason, the work of enlightenment is subject to a twofold tendency: a progression of conceptual tasks—from enlightenment through neutrality to reconstruction—and a development of institutions in which those performing the conceptual tasks both assert and protect an autonomous position.

Turning from analysis of types to specific description, one must always bear in mind that the dynamic of enlightenment constitutes a tendency rather than either sort of explanation into which the notion of tendency is easily degraded: an account of necessary and inevitable stages or a list of positions at all times equally open. Stage theories of intellectual work require a belief that the theory dwells in the materials constituting the stages. Steps in the dynamic of enlightenment, by contrast, are always available in principle to those doing intellectual work in tolerant social conditions, if only because people are free to take any position. Nevertheless, the effects of the work—especially its effects on the conditions in which people do it—show in retrospect a distinct and discernable history. The history, however, specifies no more than the spiritual conditions of intellectual work as they play in multiple ways against the backdrop of social opportunity.

Because enlightenment has a history—a story of conditions and a responding impact on those and other conditions—what we look for to understand a case in the dynamic of enlightenment is a beginning of the history. The rest may or may not follow as the conceptual demands of the dynamic intertwine with social conditions determined only in part by the needs and effects of enlightenment.

Twentieth-century American jurisprudence presents a case in which the history and conceptual promise of enlightenment have fully played themselves out. As applied to American jurisprudence, the dynamic of enlightenment focuses on the creation and fate of a legal intelligentsia, drawing its strength from and finding its way in response to the needs of a specific group—the organized Bar. The story of the legal intelligentsia certainly involves the general history of intellect in America. Yet ties between the legal intelligentsia and its patron group have been sufficiently strong and insulated within the institutions of the American intelligentsia that one can meaningfully

consider the history of the legal intelligentsia with only passing reference to more general conditions.

Social Position of American Jurisprudence

The history of our legal intelligentsia begins in the need of the Bar, especially at the end of the nineteenth century, to justify its special access to courts and privileged position towards lawmaking generally, in a political culture where law is legitimate only if the process of making and applying it is democratic.

Democracy can mean as little as "done in the name of the people." It can mean as much as "done directly by the people." Law made in or near law offices satisfies neither definition: it is done in the name, not of the people but of clients, and not by the people but by those in the position of owning an office. Agitation against the production of law in private offices had been a persistent theme of nineteenth-century American political history; examples are the codification movement and democratic control of the legal profession and courts. For their part, lawyers asserted a definition of democracy that could tolerate control of the means of law production in private offices—democracy as "public" instead of "done by or in the name of the people." "Public" has two versions: "available to anyone who can pay the freight" (as a common carrier is available), or "done according to available—publicly known and accepted—criteria." Implicit in either version of "public" is the notion that lawyers are experts in a trade, and the vision of democracy as a community of public-spirited—in this sense, "honest"—tradesmen, charging a fair price for wares that serve the public over their own interests. Lawyers' democracy—the democracy of experts serving the public—with difficulty resists the accusation and easily succumbs to the temptations of dishonesty: charging prices the public can't afford for wares serving the interest of the tradesmen over the public.

Lawyers have arduously and effectively defended their democracy against the charge of dishonesty. Even if they have done little to reduce fees, at least until the recent paralegal movement, the growth of in-house corporate counsel and innovations in middle-class legal services, lawyers have fixed prices for routine work to prevent gouging. After all, they sell an abstract commodity about which clients, in principle, know nothing. The profession publicly defines the goods clients should want and publicly sets the fees lawyers can charge for them. Similarly, even as they have kept unavailable the criteria by which law is made—refusing to make the simple or expose their operation to democratic process—lawyers insist that the education by

which one is admitted to lawyers' expertise be democratic, when the expertise itself is not.

Consequently, the Bar in the United States has come to regard faculty legal education—public training in public principles as opposed to private apprenticeship to the mysteries in an office—as crucial in its effort to harmonize expertise about the fundamental matters of the Republic with a political culture of democracy. Why they started doing so only in the last third of the nineteenth century requires examination of two other factors.

First, only then did lawyers need faculty education to guarantee the status dignity which they had formerly preserved by resort to aristocratic values. The new order of industrial production, and public administration regulating the production threatened to swallow lawyers into departments of bureaucracy. Clients threatened to become employers. Legislation, once the magisterial pronouncement of senates, was reduced to the ministerial act of commissions. Faculty education beat back precisely these public and private challenges to lawyers' professional autonomy. It provided a reference for the claim that lawyers could perform their work properly—dispassionately—only if they were in no way controlled by clients, not even bargaining at arm's length over fees. It limited development of a science of administration, independent of law, which in turn stultified the creation of a rational administration for at least two generations. It promised the politically active classes a decent access to the ranks and services of the profession, encouraging the formation of a greater number of offices than could be accommodated in an apprenticeship system. Thus it forestalled the assignment of "legal tasks" to bureaucrats in either administrative agencies proper, industry, or a bureaucratized judiciary.

Second, only in the last third of the nineteenth century did faculties and faculty-trained lawyers have a model of legal science allowing them to claim a role in law-formation proof against the criticism that laws made by the few, other than representatives of the people, are undemocratic. Prior to this time the models of legal science available to lawyers were natural law and the utilitarian version of positivism. Neither provided a useful balance of lawyers' expertise with democracy.

Natural law gives the entire determination of law over to those with the insight to perceive and apply rational principles of inherent justice, and leaves no room for the caprice of the people. In form it is antidemocratic. The people, however, would naturally wish to follow the rational principles, even if they cannot perceive them, and natural

lawyers are constrained to report only principles people would naturally wish to follow. Natural law thus limits its expertise according to the criterion that the substance of the expertise be democratic. The expertise thus often serves only to pave the way for powergrabs by groups purporting to represent the people. Democracy and expertise reduce each other to the domination of undemocratic, inexpert powers.

Utilitarian positivism, on the other hand, assigns experts in legal matters the precise function of perceiving and declaring the caprice of the people, and these experts are by no means lawyers but utilitarian scientists. In substance, however, it has never been able to shake the stigma of dictatorial scientism. The people do not get to say what their good is: their utility-minded masters say it for them.

These central doctrines of early modern legal theory really parse a single problem two different ways. Only the observers of legal norms have authority to express them. Those on the inside actually creating and authentically experiencing the norms are treated as if they are inarticulate. The observers of norms have knowledge of things they do not experience, depending instead on the experience of those who are not in a position to turn it into knowledge. The problem both natural law and utilitarian positivism pose democracy is that each divides society into two groups—one having knowledge of things not experienced and the other experiencing things without adding knowledge. The working premise of democratic theory is knowledge constrained to conform to experience—knowledge as autobiography of the people. To the degree epistemology tolerates the disseverance of knowledge and experience—creating expert knowledge, on the one hand, and irrational or inexpressible experience, on the other—it cannot be consistent with democratic theory.

The standard recourse of those claiming knowledge without experience in a democracy is the republican epistemology of science—emphasizing the openness of knowledge to the public and use of knowledge for the good of the public as substitutes for the insistence that knowledge be tied to experience. Ordinary science meets the requirement of openness by asserting or demonstrating that anyone wanting to try can acquire scientific knowledge. Because the public accepts this assertion, it regards as valid such knowledge as it believes it could know, not as it does know. The republican epistemology of science reconciles democracy with expert knowledge using science as hypothetical experience for the people cast in the role of the public.

Late nineteenth-century American legal science has the rough structure of ordinary science—openness of legal knowledge to the

public and use of legal knowledge for the good of the public. It gives every person in the democracy the status of member of the legal public. No one is on the inside of norm creation, or if they are, it doesn't matter. Society does not divide into groups that know and groups that experience. Everyone is an articulate observer of norms; no one possesses ineffable experience. The legal experts retain their privileged position in the democracy by agreeing to observe only what the people would observe. In this way late nineteenth-century legal science resembles natural law. Unlike natural law, however, legal science does not confine the people to inarticulate experience; it finds in them the touchstone—the model and boundary—of scientific observation. Thus it makes natural law palatable to democracy. Furthermore, legal experts agree to use the good of the public—public policy—as the highest criterion of normative validity. Legal science preserves the utilitarian principle, but considers the good of the public to be distinct from the sum of separate goods of single persons. Instead of usurping the power of people to speak for themselves (the charge against utilitarians), legal scientists create and defend a notion of public on behalf of which the people speak no more authoritatively than the lawyers.

The authentic lawmaking act of these late nineteenth-century American legal scientists is the academic project of a code (uniform laws and later the Restatements) in place of the democratic projects at midcentury and the early modern code of nature. Lawmaking for them is neither pure politics nor absolute reason; it is the science of public policy. Moreover, the technique by which public policy on an issue can be ascertained involves the interaction of several intellectual formalisms embedded in a series of interlocking institutions. The purpose of the formalisms is to protect the lawmaker—the molder of public policy—from the accusation that his will is not in any way coincident with the will of the people. The strategy is to show that no one involved in making law is in fact exercising will—neither lawmakers nor people—so that the accusation proves to be meaningless.

Thus "will of the people" turns out to be a hypostatization of interests by representatives of the people in legislatures whose real job is articulating public policy. The people do not speak in legislation, but neither do the legislators, whose orientation in making public policy is the selfless observation of the good of the public. The result is a critical formalism about interpreting legislative history from a mass of legislative materials. Furthermore, judges switch from the "grand style" of direct judicial legislation to a critical assessment of precedent

according to the formalism of stare decisis. Legal scholars see themselves as auxiliaries in both tasks: interpreting legislative history and critically elucidating precedent, while acting as a loyal opposition—criticizing and formulating public policy. No one in the legal system makes law directly by reference to his own will, only indirectly by observation of legal materials, which in turn are the product of other observations at different points in the legal system. The debate on the content of codes is in the language of case law and criticism, rather than the political adjustment of interests.

For these reasons faculty legal education provided American lawyers at the end of the nineteenth century with a sort of expertise that resists democratic pressures against the Bar more easily than law office expertise, since faculty education (in theory at least) is public. The faculties housed in the relatively autonomous institution of the American university the three sorts of intellectual work that are the hallmark of the first step in the dynamic of enlightenment—work establishing the legitimacy of the ends enunciated in public policy, work discovering means in the legal system for achieving these ends, and finally the critical work of legal science itself, at once justifying the role of lawyers as legal scientists and fending off competing groups wielding the sword of democracy. The relative autonomy of the institutional setting in which legal scientists practiced their criticism paved the way for a practice of criticism that was intended to embarrass the Bar and assert the preeminence of the legal scientists over their lawyer-masters.

Skeptical Reversal of Means and Ends: American Legal Realism

The critical exercise in legal academics was to show that ratiocination about case law is political, and therefore that the academic construction of a code is impossible. The Realists demonstrated that doctrine derived from cases gives neither necessary nor unique solutions to future cases—that necessary and unique solutions arise as a matter of fact from stable settlements of power, not as a deduction of rules according to the critical formalisms of legal science. Doctrine is the means legal elites use to justify an exercise of power. Hence legal science, in the sense of practical law production rather than philosophy of law, is just another arena in the struggle for power. Realists led a classic effort to explode the claims of a power group—the organized, or integrated, Bar and their auxiliaries in legal academics—using the enlightened method of skeptical reversal.

Realist criticism differs from the critical formalisms of legal science in that it denies the possibility of constructing rules from cases

and of applying rules thus constructed or legislation construed to further cases. Realism attacks the legitimacy of the republican epistemology of science as applied to legal materials. It is the total criticism of law production in a democracy whose reigning fictions are that law comes from the people through representatives and returns to the people through judges and a cadre of lawyers.

Realism from this point of view is a practice of criticism in favor of a profession of law academics and against the academic claims of the integrated Bar, with which the profession of law academics had emerged in the first third of the twentieth century. It is the transformation of a partial criticism—the twin formalisms of legislative purpose and public policy used by legal scientists to forge the alliance of Academy and Bar—into a total criticism, whose immediate result, or even purpose, was to discredit that alliance. Realists turned the weapon of criticism against the power group that had originally requisitioned it—thus supporting, justifying, and reflecting the autonomy of their own, purely academic profession.

Neutral Standpoints

Realism has persevered in the United States as the first thought of law academics wanting to maintain a position in society autonomous from the Bar, while living side-by-side on law faculties with those who continue to cultivate the alliance with the Bar. As in any project of enlightenment, however, the first thought must always be followed by a second. The justifying mission of exploding ends quickly wins whatever victories it will win, and the only task left enlightenment is to recruit and educate personnel for maintaining enlightened institutions. Self-maintenance, however, never constitutes a sufficient claim for the autonomy of institutions. Once the work of enlightenment had been done, the enlightened ones of American jurisprudence found themselves having to supplement Realism with a positive project of enlightenment—a direct claim to support by society in order to circumvent rather than flee from their support in the Bar.

As is expectable in a dynamic of enlightenment, the positive project of enlightenment in American jurisprudence was at first dominated by the work of neutrality, various methods of ensuring the equality of ends in the struggle of ends for supremacy in tolerant society. The purest example of the work of neutrality, commencing in the 1930's, was legal behaviorism. Legal behaviorism treats all ends as sheer fact, eliminating the endworthy quality of ends. The legal behaviorist maintains a neutral stance towards ends, because he does no more than observe their origin and fate in a world process. Ends are

equal, because they are equally lacking in claims on the affection of the observer of the ends. The legal behaviorist assumes the posture on the law faculty of one entirely outside the legal system, a scientist of law as opposed to the legal scientist working within the legal system to produce law according to a public canon. The legal behaviorist thus justifies the autonomy of the law faculty in the same way the social scientist justifies the autonomy of the social science faculty—a priesthood of science.

As in the dynamic enlightenment, so too in American jurisprudence the work of neutrality was quickly succeeded by vigorous and diverse attempts to involve the enlightened ones of the law faculty in a project to rework the conditions under which groups contest ends—a neutral standpoint whose administration by the enlightened ones of the law faculty would seize from the Bar a part of their jurisdiction over the normative fate of society. The enlightened ones of the law faculty thus make a better claim than the Bar to provision of an essential element, in their view at this point, of the structure of tolerant society.

American jurisprudence has suggested two classes of neutral standpoint, distinguished by the position each takes on the relationship between law and neutral standpoint. The first class, approximately described by the term legal process school, claims that law has a specific contribution to make to the structure of social action, which is precisely its neutrality. When legal institutions attempt to contribute something other than neutrality, according to this position, they do something other than law (education, administration, etc.), which may or may not be appropriate for the institution. The sole legitimate end of jurisprudence is discovering an ideal system for distributing means.

Examples of legal process abound in American jurisprudence since the end of the 1930's:

1. allocation of jurisdiction to functionally specific government and social processes;
2. neutral principles in constitutional adjudication;
3. law as guarantor of an adequate political process (in labor law and constitutional law);
4. process account of corporate structure; and
5. systems theories of law.

Social process asserts that law does not have a specific contribution to make to the structure of social action, but is rather a part of a more inclusive structure of social (political, economic) management. We have two main examples of this position: the positive program of

scientistic realism, and the school of law and economics. The latter treats law as a means of production, constructed entirely according to the process-norm of efficiency.

Collapse of Standpoints Devoid of Ends

Each position fails intellectually for reasons peculiar to the position. But every failure is a version of the proposition that the neutral standpoint is a cynical or unwitting instrument for achieving whatever end survives the application of the neutral standpoint. Neutral standpoints, in other words, cannot withstand the fresh and continuing assaults of Realism.

Thus legal behaviorism rejects the possibility of jurisprudence altogether, leaving the behaviorist observer in the practical position of the Realist struggle for power. Unlike Realism, however, behaviorism is not necessarily concerned either to destroy the hold doctrine has over people's minds or to show that doctrine does not have a hold. Behaviorism only wishes to be conscious of the precise ways in which doctrine can or cannot be used to accomplish specific technical or political aims. The content of the aims, of course, is *dehors* the jurisprudence, or even determined by a further set of behaviorist laws. Behaviorist jurisprudence, then, is a weapon of those who choose to accomplish ends using the forms and institutions of law, or (if one abandons the thankless task of pursuing ends that are themselves determined) behaviorist jurisprudence becomes a doctrine of voyeurs only.

Legal process either produces a hypocritical apology for forces that would have won anyway without the window dressing of legal process, or fails convincingly to specify norms that practically constrain the battle of forces.

Social process (in either version) constrains the manner in which interests get expressed, hence their content. Legal process fails because its program of neutrality has no impact on the struggle for power. The neutrality of the legal system ultimately depends on the fact that it does nothing. Social process fails, in contrast, because it has an impact on the natural struggle for power that cannot be neutral, because it turns the struggle for power into a competition of interests.

The efficacy of the neutral standpoints, therefore, collides in every case with their neutrality, and administration of the neutral standpoints can never, as a consequence, give legal academics its rationale for autonomy vis-a-vis the Bar. The very act of supplying neutral standpoints to groups outside the law faculty disintegrates the

faculty. The shuttle between law faculty and administration compromises the very personnel who are supposed to give the faculty its raison d'etre. Colleagues consider this personnel stupid, associating them with whatever policies happen to survive the tumult of administration. Enlightened ones who administer the neutral standpoints are always subject to fresh attacks of skeptical reversal—the Realism just behind the door ready to bat down even a colleague's pretensions to worldly power. So a party of pure academics sets out to reconstruct the line between faculty and world, using an intellectual motor whose maintenance justifies rather than destroys the power, integrity and uniqueness of their home institution.

Reconstruction of Ends

The challenge to the pure academics is to find a position that is at once more withdrawn from the world than the administration of neutral standpoints and more intensely connected to a form of practice confined to the precincts of the faculty. The intellectual choices open to the pure academics for such a position correspond to the choices at this point in a dynamic of enlightenment—resignation, aesthetic reconstruction, and power reduction/cultivation of powers. The form of practice to which these intellectual choices are allied is one or another sort of clinical education, verging in some instances on an academic-political practice whose institutional base is clearly within the faculty.

The standard of resignation has been born in recent American jurisprudence by the ordinary law review writer, trying in good faith to keep going whatever jurisprudence the practical system of legal decisions puts before him. Cynical participation is the jurisprudence of those who treat courts as ordinary agencies of government. The practice allied to these two sorts of acquiescence is skills training.

Aesthetic reconstruction is the position of those who treat legal texts as a species of literary narrative. The "law" in the text is neither the explicit statement of doctrine nor the implicit play of psychological and political forces producing the doctrine. Law is an aesthetic, superseding psychology and politics. The latter *produce* specific doctrines, while standing apart from them. The aesthetic of law, by contrast, *generates*—it does not produce—doctrines as if it were a superdoctrine, neither alien to doctrine nor incomprehensible in terms of it. Aesthetic superdoctrine commonly takes one of two forms: a set of principles (for rationalists) and an aesthetic sense or sense of justice (for nonrationalists). Aesthetic reconstruction has not so far come up with a special practice, but picks and chooses among the practices

associated with acquiescence (skills training) and power reduction/cultivation of powers (faculty-based political action). In some moods aesthetic reconstruction rejects the validity of an academic practice altogether, cultivating instead the suprainstitutional attractions of temperament, thus courting the charge of nihilism.

The third position following the collapse of neutral standpoints—power reduction and the cultivation of powers—belongs to an extraordinary intellectual coalition known as the Conference on Critical Legal Studies (CCLS). This complex position harbors a variety of apparently unrelated or even antagonistic work. The anarchist strain in CCLS, for example, emphasizes the vision of persons as power holders, downplaying the hierarchical or hegemonic results of exercising power and the social prerequisites for possessing it. The "marxist" strain focuses on eliminating hierarchy, while ignoring the cultivation of powers. Much work in CCLS combines elements of both strains in idiosyncratic content, thoroughness and intensity. All of it, however, insists that persons get power only for achieving forever unspecified ends, that they seek to cultivate personal powers having no social effect beyond the edification of other persons. Therefore, the reconstructed social end of CCLS is to inculcate power in persons as a cultivation of powers—without, however, allowing these interior powers to spill out of persons into a social effect, or hierarchy. The refraction of this end in legal theory requires preserving the status of rights as legal adjunct to the psychological vision of persons, whilst stopping the devolution of rights into hegemony.

Because CCLS is not a single position, but a universe of positions running along the two axes of power reduction and cultivation of powers, the institutional practice of CCLS involves a fabulous mixture and combination of projects taking positions at a host of points in the universe defined by those axes. Thus, for example, some practitioners of CCLS have found empirical social science useful in perceiving and formulating projects of power reduction. Other practitioners of CCLS have been able to direct clinical education towards attaining certain concrete political goals. Yet because the social mass finds projects whose source is the academy easier to appreciate than follow, the historic contribution of CCLS to American jurisprudence will undoubtedly be in fulfilling the norm of cultivation of powers. The promise of CCLS as a practical jurisprudence is in transforming the setting of norm creation in the United States, focusing as it does so sharply on the academic world.

The key point in the practice of CCLS is that it is an institution for those who dislike the main institutions of legal scholarship—law

reviews, faculties, and field-specific conferences. It is a *salon des refuses* of scholarly and educational practice.

CCLS is, I believe, the first movement in American academic jurisprudence to find the main institutions in which it is done relatively uncongenial. Realism involved an attack on the isolation of law faculties within universities and the alienation of law professors from legal practice. Realism ultimately engendered, reactively, an authentic role for law professors, nonetheless, as interdisciplinary social scientists at once bridging the gap between law faculty and university and pursuing a suitable practice—that of policy judge or high-level commissioner. Likewise, adherents of neutral standpoints have used the claims of universities to universality to support an administration of neutral standpoints.

The immediate practical concern of CCLS—where it will either make its mark or fail to make its mark—is to carve out a role and specific institutional setting for the law professor as norm-creator as opposed to interdisciplinary social scientist, administrator of a neutral standpoint, trustee in bankruptcy of the practical jurisprudence, or dramatist of the conflict of rights. So far CCLS has been a perfect vehicle for certain charismatic individuals to create the potential for a shift in roles and institutional structure. The test is whether this charisma can be routinized.

CONCLUSION

We have reached the crucial point in American jurisprudence where a dynamic of enlightenment—involving a breathtaking and constant transformation of both ideas and institutions—has run its course. The end of the dynamic might spell resignation. It might spell an alliance of the charismatic impulse contained in CCLS with new power groups. The alliance might or might not produce new institutions of jurisprudence. These are questions that we in legal academics, acting alone, cannot answer.