

The State of the Union under a failed Constitution.

June 14, 1997

The need for public opinion to support the removal of lawyers from elective office.¹ The issue of unfitness of lawyers for elective office. The corruption of the legal profession as a whole. The Rational² Approach. (Part 1 of 4).³

Federalist 96 discussed the need to provide evidence of the harm being done by the legal profession to the Nation, as a catalyst for change. The search for that evidence commences with the nature of man and government. Plato in *The Republic* conceived of a philosopher king as the ideal head of state. Montesquieu asserted in *The Spirit of Laws* that only government by virtuous men could provide a free, just and democratic society. But the nature of man falls short of that ideal. *However the people do have a right to expect that their government will not be materially less honest than themselves.* For it is axiomatic that such a government would harm the people. Thus, if it can be established to a standard of proof of reasonable suspicion or probable cause, that the **legal profession is materially less honest than the population as a whole**, public opinion should support the principle that **all members⁴** of that profession should be excluded from elected office.

The nature of man is such that no group is likely to be found in which all of the members are completely honest. The 'honesty scale' for legitimate groups or professions is a continuum possessing no bright lines of demarcation. What must be determined is whether or not the legal profession is materially more dishonest than the population as a whole.

To make such a case both the *rational and the empirical⁵* approaches will be used. The rational approach will examine what is known of man's nature as a means of determining which professions are logically and statistically most likely to become corrupt. The *empirical* approach will examine available factual evidence in an attempt to confirm that determination.

The Rational approach.

Man's behavior is governed by heredity and environment. Heredity constitutes the genetic makeup each of us is born with and remains unchanged through life. Environment is everything else. No studies are available that provide information on the influence that heredity or environment may have had on particular individuals, by the time they arrive at the threshold of their professional lives. Thus the only reasonable assumption is that at that point in time, on average, there is no material difference in integrity between groups. The influence of a lawyer's professional environment begins when he enters

law school and continues throughout his career. Therefore it is the causal effect of that environment which we must examine.

What environmental causes corrupt a profession? How is integrity measured and corruption identified? It is said that while opportunity knocks only once, *temptation keeps banging on the door for years. The results of the struggle between temptation and conscience demonstrates the level of integrity of an individual.* It is the cumulative result of that struggle by the members of a particular profession, that determine its overall integrity.

Measuring Integrity and identifying Corruption.

For an individual:

- A single dishonest act constitutes the temporary victory of temptation over conscience.
- Several dishonest acts constitute the increasing power of temptation over conscience.
- A continual pattern of dishonest acts constitutes the complete dominance of temptation over conscience.

That kind of victory for temptation constitutes corruption of the individual.

When that corruption taints a sufficient number of individual members of a particular group, *the entire group will be publicly perceived as corrupt.*

Temptation: the mother of all corruption.

All men are subject to some degree of temptation. *It is axiomatic that the greater the temptation the more likely the fall.* The degree of temptation to which professionals in America are subject is a function of: a) The temptation to which all men are subject; *plus* b) the particular increase in temptation one's profession creates anywhere; *plus* c) any additional temptation created by *one's profession in America.* The four things that materially impact temptation are: **1. Opportunity, 2. Risk of discovery, 3. Probability, speed and severity of punishment, and 4. Peer Pressure.**⁶ Let us examine the impact of these factors. First on everyone, then on lawyers worldwide, and finally on members of the American legal profession.

1. Opportunity

Temptation is increased by opportunity. A janitor in a bank may be tempted to steal the millions he knows lie in the bank vault. However absent any opportunity to get near the vault when it is open, temptation is reduced. On the other hand a senior bank teller who is trusted to operate inside the vault with ample opportunity to steal, will be subject to increased temptation.

2. Risk of discovery

Temptation is increased by a low risk of discovery. The risk involves

both whether and when the wrongdoing will be discovered. The bank teller who has the opportunity to steal will be far less tempted to do so if discovery will be imminent. However if he believes that the theft will not be discovered for a long time, if at all, his degree of temptation will increase.

3. Probability, speed and severity of punishment

The less probable, slower and milder the potential punishment, the greater the increase in temptation. If the bank teller knows that being caught will result in swift, certain and severe punishment, temptation diminishes. Should he believe that if caught, punishment is improbable, mild and will be much delayed, temptation increases.

4. Peer pressure

Temptation is greatly increased by peer pressure. When an individual discovers that his peers are routinely involved in corrupt practices and he is urged to do the same, he either conforms or risks the status of a pariah for his honesty. Peer pressure also serves to provide the false rationalization that since 'everybody does it' it is somehow alright. Consequently the greatest degree of temptation to become corrupt occurs when a) a high degree of opportunity, combines with b) a low risk of discovery, c) a low probability of severe or speedy punishment, and d) a high degree of peer pressure. Let us examine how temptation impacts lawyers worldwide and United States lawyers in particular.

Lawyers' degree of temptation.⁷

Some lawyers handle large sums of money for others. Lawyers are part of the social elite. They see better than most how the rich live. To these lawyers the level of temptation that their profession provides *worldwide* is among the very highest of any profession. *In America, the power achieved by the legal profession's control of government has enormously increased all of those temptations for all lawyers. Every opportunity that can bring income to the members of the profession under color of law, has been developed more completely here than anywhere else. So has the temptation to be dishonest in the United States.*

1. Lawyers' degree of professional opportunity.

As fiduciaries, lawyers play a role which combines high levels of temptation with high levels of opportunity. Lawyers often give investment advice to their clients or invest funds for their clients. They represent their clients in disputes with others. Lawyers thus have immense opportunity to do wrong. It is fair to say that no other professional group *worldwide* has as much opportunity. *As with temptation and in the same manner, the American legal profession's*

control of government has dramatically increased its opportunity for wrongdoing.

2. Lawyers' risk of discovery.

Consumers can tell whether they are receiving their money's worth for most goods and services. A man pays to fix his car. If the car is not fixed he knows it. But when a man goes to a lawyer things are different. Often he has no idea what the lawyer should be doing, or how much is a fair price for the job. Afterwards he may be unsure of whether adequate service was provided. A client may lose a fortune in a lawsuit due to his lawyer's wrongdoing and never realize it. That tends to make the probability of discovery of wrongdoing slight or negligible, anywhere in the world.

The tyrannical power of lawyers in the United States makes things far worse here. The complexity of the law, serving lawyers to the detriment of their clients and the ever present threat of retaliation through frivolous countersuits is much greater in the United States. These and other factors lowering the risk of discovery and raising the level of temptation have been dramatically increased for lawyers in the United States.

3. Lawyers' probability, speed and severity of punishment.

Professionals everywhere who are not lawyers and who do wrong, face civil and criminal proceedings, as well as the imposition of licensing penalties that can be very severe. This may be true for lawyers outside the USA, but not for American lawyers.

Civil proceedings: Clients who have been cheated by their lawyers must spend more time and money consulting other lawyers, if they wish to discover how and of how much they were cheated. They are not generally inclined to do so, having been burned once. An additional obstacle is that lawyers are often reluctant to sue other lawyers. As a result clients are much less able or likely to sue their lawyers, even if they know that they have been cheated.

Criminal Proceedings: If the aggrieved non lawyer wishes to pursue criminal charges, he must again appeal to a lawyer who is a prosecutor to bring charges. He will find that prosecutors are very reluctant, except in the most egregious cases that include a substantial paper trial, to do anything.

Licensing/State Bar Proceedings: Non lawyers who hold professional licenses are licensed by the State and supervised by the Executive branch of the State. *However that is not true of lawyers in the United States. As a profession they unconstitutionally control their own 'licensing' or their 'legal right to practice', through State Bars that are arms of the State*

Supreme Courts. These State Bars write rules that favor their own and make it almost impossible for complainants to receive justice.⁸ Thus fear of punishment from the State Bars does not materially discourage lawyer wrongdoing.

4. Lawyers exposure to peer pressure. American lawyers are the only professional group in which many new members are routinely pressured by their peers to conform to corrupt practices. This pressure comes from lawyers at their own level and from those above them in the hierarchy. Routine 'overbilling' is the only way young lawyers can keep up with the expectations of many employers. Thus the temptation to become corrupt is reinforced by the threat of being fired!⁹

The criminogenic occupational structure of the legal profession.¹⁰

The legal profession all over the world operates in a context that includes a number of the aforementioned factors that increase temptation. ***In this country all the factors are present at the highest levels.*** So much so that the profession's 'occupational structure' is defined by the eminent criminologist Dr. Gary S. Green, as being 'criminogenic', *meaning that it tends to create criminals. That means that the American legal profession has achieved the epitome of both temptation and corruption.*

Conclusion.

The examination on a rational basis of the factors that impact corruption indicates that all factors operate to make temptation as strong as it can get for the American legal profession. That therefore a materially increased level of corruption is statistically highly probable.¹¹ Although precise statistical evidence is unavailable due to the nature of the problem, it is reasonable to regard the result of the rational analysis as sufficient to exceed statistical legal requirements for proving a case.¹² That is why rational analysis supports the conclusion that the most corrupt 'legitimate' professional group¹³ in the Nation is the American legal profession.¹⁴

PUBLIUS II
(Ronald Bibace)

About the author: *This writer is a constitutional scholar who wrote Federalists 86 through 96, in defense of the Constitution. He is like Madison, a non lawyer and like Hamilton an immigrant and naturalized American.*

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1. See Federalist 96 by this writer.
 2. Philosophically there are two possible approaches to truth. They are *Rationalism*, or the rational approach, which is *the theory that truth and knowledge are attainable through reason rather than through experience*, and *Empiricism*, or the empirical approach, which is *the belief that all*

- knowledge is derived from experience through the senses.* Funk & Wagnall's International Dictionary, 1973.
3. This paper and Federalists 98, 99, and 100, should be read as four parts of a single unit.
 4. The argument that the Nation should not disqualify *all members* of a profession, if it is shown that the profession as a whole is materially less honest than most people, is invalid. It is a false argument identified by Aristotle as *secundum quid*, in his *Sophistical Refutations*. The issue is not the right of any individual to be viewed as 'innocent' until proven guilty, as if he were on trial for liberty or life. Rather the issue is whether the people of this land have a right to reduce the substantial risk of electing a corrupt government, by excluding from that government those who belong to a group or profession, demonstrably more corrupt than any other. Because it is a given that in addition to the increased probability that a particular individual from that particular group is corrupt in the first place, *the continuing pressure to become corrupt* is far greater for individuals in that group, than for members of all other groups.
 5. See Footnote 2.
 6. Peer pressure in this context is the pressure by one's colleagues or peers to conform to *prevailing corrupt practices*. Although extremely rare in legitimate groups it is highly prevalent in the legal profession.
 7. Temptation levels are not uniform for all members of the legal profession. Temptation, though always high, will vary somewhat depending on a lawyer's particular career choice within the law. Private practice for example, offers more opportunities and increased temptation than does public defender work.
 8. This is true notwithstanding the State Bars' mandates and declared intention of protecting the public. The best available evidence indicates that *only about 4% of the complaints against lawyers are not dismissed, whereas the average for all other professions is 25%, which is a rate of acceptance of the validity of complaints over six times greater than those against lawyers.*
 9. See *How lawyers screw their clients* by Donald E. de Kieffer Esq., Barricade Books (1995)
 10. See *Professional Occupational Crime* by Dr. Gary S. Green, Published by Nelson-Hall (1991)
 11. A rough unscientific attempt at quantifying the element of 'temptation' is useful for comparison purposes. If all individuals start out at a factor of say 1, on a 1 to 10 scale of temptation, and if the four factors of Opportunity, Risk of Discovery, Punishment and Peer Pressure are each given a maximum value of 2.5, with the higher value representing the greatest increase in temptation, American lawyers would be at a 10. Lawyers worldwide would rank about a 5, while other professionals might rank between 1 and 3.
 12. See *Griggs v Duke Power Co.* 401 US 424,432(1971).
 13. Obviously there are *illegitimate* 'professional groups' like some organized crime groups or youth gangs whose very existence is for criminal purposes.
 14. Even though there may be many lawyers within the profession who have succeeded in retaining their integrity in spite of all temptation.