

The state of the Union under a failed Constitution

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The abandonment of ethics by the American legal profession through the adoption of the ‘Lawyer’s Amoral Ethical Role’. The resulting material decline in the Nation’s moral standards. (Part 2 of 4)¹

We will now rebut in detail the legal profession’s attempt to justify its abandonment of ethics, referred to as the adoption of the ‘Lawyer’s Amoral Ethical Role’. Let us begin by examining the profession’s arguments as presented by Professor Stephen L. Pepper in his 1985 ‘prize winning essay’: *The Lawyer’s Amoral Ethical Role*.²

The legal profession’s moral ‘justification’ of its abandonment of ethics.

The full title of Professor Pepper’s paper is: *The Lawyer’s Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*. The moral ‘justification’ for the new amoral role is ‘*premised primarily upon the values of individual autonomy, equality and diversity*’. *The basic theory is that morality is viewed as an obstacle to a client’s access to the law.* Let us examine these alleged ‘justifications’. Like all false sophistical arguments this argument has the initial appearance of logic, but it is the appearance only. The generally desirable values asserted as being served are: (1) avoidance of ***conflict of interest***, (2) ***autonomy***, which is independence, (3) ***equality***, which is synonymous with equity and justice, and (4) ***diversity***, which is a code word for equality of treatment for all members of our diverse multi-ethnic society. The legal profession rests its case on those four points. Here are the details of its position:

The ‘conflict of interest’ and ‘autonomy’ arguments.

The law is a public good available to all and society is committed to individual ***autonomy***. Autonomy or first class citizenship is often dependent upon access to the law, which means access to a lawyer. Thus if the lawyer facilitates any action that is not ‘unlawful’³ the lawyer does a ‘social good’. Therefore neither the lawyer’s personal morality nor the guidelines spelled out in a professional code of ethics should interfere with the client’s ***autonomy***. In fact such interference would constitute a ***conflict of interest*** between the lawyer’s desire to impose his moral standards on the client and the client’s right to access to information unobstructed by such ‘improper’ hurdles.

The ‘equality’ and ‘diversity’ arguments.

Lawyer’s do not share ***equal*** moral values. ***Equality*** of access to the law dictates that a client not be subjected to the obstacle of one particular lawyer’s moral values that other lawyers may not possess. Clients have diverse moral views. Therefore ***diversity*** requires allowing each client to do right and wrong in accordance with *his own moral views*.

The legal profession says it is concerned that the inequality of levels of morality or ethics in the legal profession would serve to create an *unequal* delivery of legal services. Thus the client receiving services from an ethical lawyer will have a lesser and not *equal* access to the law as compared to the client seeing a less ethical lawyer. So the less ethical the adviser, the better off the client.

Therefore, since clients cannot be certain that the lawyer they are seeing is the least moral in his profession,⁴ the profession's view is that it will create a 'level playing field' by making sure that all its members advise their clients as if they themselves had no morals, i.e. 'amorally'. That means advice from a crooked lawyer will be the same as advice from any lawyer following his profession's 'amoral ethical' guidelines.

Rebuttals to the moral 'justification' of the legal profession's abandonment of ethics.

In general- the false argument of allegedly promoting a 'social good'.

The moral justification for the lawyer's 'amoral' role is allegedly premised on promoting the 'social good' of providing a client with the *highest possible level of autonomy, equality and diversity*. That argument is a false sophistical argument classified by Aristotle as 'secundum quid'. Which is defined as: *according to its truth as holding only under special provisos, 'applying a general proposition as a premise without attention to the tacit restrictions and qualifications that govern and invalidate its application in the matter at issue'*.⁵

What that means is that although the promotion of certain values is generally regarded as a 'social good', the promotion of these values in this way is not a social good. Because in this case the promotion of these values is used to simultaneously promote a recognized evil which is the facilitation of the client's evil intent. The fallacy of the argument is founded on the fact that the alleged 'good' is greatly outweighed by the concurrent evil.

Virtually every crime or heinous act can be presented as arguably promoting a 'social good'. For example: (1) Reducing crime is a 'social good'. Therefore every gangland murder by one gang of another gang's members is a reduction of the criminals left alive and therefore a reduction of crime and a 'social good'. (2) Getting people off welfare is a 'social good'. Therefore a career criminal who avoids welfare through crime is in at least in one respect performing a 'social good'. (3) Reducing government costs is a 'social good'. The cost to the State of keeping prisoners in prison is over \$20,000/year. Every prisoner who escapes saves the State the cost of his keep and is thereby performing a 'social good'.

The argument that promoting and facilitating evil by providing access to specialized information on an immoral or 'amoral' basis is a promotion of the social goods of autonomy, equality and diversity is in the same category of

false arguments as the above examples. *Because no value is desirable when it is used or aids in the facilitation of evil or undesirable ends.*

It is also true that values generally regarded as good in themselves may result in highly undesirable consequences. For example our society has no desire to provide ‘*autonomy*’ to crooks by making them independent of the police. Or provide ‘*equality*’ to crooks by allowing them to ‘share equally’ with working members of society in the fruits of their labor. Or in the name of ‘*diversity*’ to allow unlimited immigration from those areas ‘less represented’ in our society. Therefore invoking the promotion of a ‘noble’ value as the achieving of a ‘social good’ is not necessarily true. Let us now examine the specifics of the legal profession’s arguments.

The conflict of interest argument.

This argument asserts that a lawyer’s concern with his ethics may place him in conflict with the ‘immoral’ intentions of his client. This is the least persuasive argument of all. Lawyers are known world wide for their general lack of ethics. The members of the American legal profession lead the world in the absence of ethics. Therefore to suggest that lawyers will regard their own morality as inhibiting anyone else’s is a proposition devoid of logic.

What is logical to conclude is that it is the unscrupulous lawyer who will make the most money in a corrupt legal profession.⁶ A lawyer preventing his client from acting by withholding legal advice he deems unethical will simply lose his client to his less ethical colleagues. Thus he will make no money at all!

Whereas the unethical lawyer who counsels his client in an unethical/amoral manner has two major money making advantages.

First he can bill his client for his ‘information/advice’.⁷ Then the more unethical and improper the information/advice used by the client, the greater trouble the client is either likely to get into, or seek to avoid and the greater the potential risks and rewards to the client! That is a win/win situation for the lawyer. For in either case the client will have great need for his legal services. It is also well known that the clients well served by the most unscrupulous lawyers are the least likely to argue over routine overbilling. These are clients who cannot afford to get into arguments with their own lawyer! For the lawyer knows too much about their business and they need him too much.

The autonomy argument.

The problem of control of access to the law which lawyers tell us they are seeking to correct was unconstitutionally created by lawyers themselves, for their own profit. It is true that some degree of similar control by other professions exists in other fields. But no other profession comes close to the degree of oppressive control that lawyers have acquired. *Therefore if they have any real desire to allow greater access to the legal system the best way to do so*

is for them to give up the unconstitutional monopolistic control they now possess.

All other ‘accesses’ to specialized services needed by Society such as medical, dental, pharmaceutical, accounting, architectural, engineering, electrical, plumbing, air conditioning, etc., are also limited. Yet most, if not all of these goods and/or service suppliers, have ethical codes to which they generally adhere. No-one has suggested that the need felt by consumers to ‘freely access’ services provided by other professionals is a good reason to throw out all ethical standards. If the legal profession truly believed this argument why has it not called for the need for the adoption of ‘amoral’ ethics for even a single other supplier of services?

Living in a civilized Society involves making some personal sacrifices for the general good. The best way for each of us to act in the best interests of the whole society is on the basis of strong ethical standards. That which we may give up as individuals in the short term is more than made up by the advantages that accrue to us all collectively, when we all live by moral standards. All professional groups (except lawyers) seem to understand that.⁸

The equality argument

The same arguments that invalidate the ‘autonomy’ argument are valid here. No other profession regards potential differences in the morals of its members as a problem in the delivery of goods or services. Even if it did, the emphasis should be on establishing and maintaining the highest possible values, ***not the lowest***. Suggesting the removal of all moral values from everyone to achieve equality makes no sense whatever. That worse than useless ‘solution’ hurts society immeasurably. It takes from the client far more on a collective basis than he can hope to gain on an individual basis. It also tends to ‘legitimize’ corruption and immorality. It destroys the souls of the practitioners and primarily benefits the worst scoundrels in the profession. It certainly does not help the public that the profession is sworn to serve.

The diversity argument.

‘Diversity’ is served we are told, by ensuring that that the ‘diverse’ levels of potential immorality of clients are not inhibited in their expression by the obstacle of a lawyer’s moral standards. This misuse of the word ‘diversity’ is appalling. No public good is served by facilitating the evil intentions of immoral clients by calling that facilitation an effort to create as many ‘diverse’ possibilities for action as a client’s absence of morality may desire to implement.

Consequences of legal profession’s ‘ethics’ spreading to other professions.

Let us examine the impact on Society if the ‘amoral’/immoral ethical role of lawyers spreads to other professions. In principle the same arguments asserted by the legal profession can be made by many other professions as justification

for *them* to abandon their ethics. If that happened, doctors for example, might become obligated to provide medical information on a so called ‘amoral’ basis to patients wishing to harm themselves or others. Accountants would be obligated to provide specialized information to clients wishing to evade taxes. Architects would be obligated to provide information necessary to avoid building inspections. As a result people would die, taxes would be evaded and buildings might collapse.

If non lawyers tried that sort of behavior there is little doubt that the law would characterize such action as ‘aiding and abetting’. The definition of which in *Black’s Law Dictionary* is: *Help, assist, facilitate, encourage, counsel or incite the commission of a crime. It comprehends all assistance rendered by words, acts, encouragement, support, actual or constructive, to render assistance if necessary.*

When a lawyer explains to a client that he must look at the law as flexible and only in terms of its consequences and not as an obligation to obey , it is reasonable for the client to perceive that advice as: *helping, assisting, encouraging, and supporting (at least morally), as well as facilitating the object of the client, including breaking the law as written, even when that means the commission of a crime.* Furthermore the ‘amoral/immoral’ lawyer stands ready to render assistance if necessary to hide the truth from authorities on the basis of basis of the ‘lawyer/client’ privilege. How the legal profession can perceive that as anything other than ‘aiding and abetting’ must be regarded as a continuing tribute to its infinite capacity for self deceit.

Abandonment of ethical standards: Conspiracy or not?

The following is a recurring question that arises regarding these issues: *Is what happened the result of a conspiracy or just the natural evolution of unbridled power?* The evidence does not support any conclusions with certainty. There are almost one million lawyers in this Nation, most of whom had little to do with consciously adopting a ‘policy of abandonment of ethics’. However the law regards results that occur from action that are the same as results that would result from a conspiracy as a *constructive conspiracy*. To that extent the results suffered by the Nation make the action taken by the legal profession a constructive conspiracy.

The law defines a conspiracy as: *An agreement between two or more persons for accomplishing an unlawful end, or a lawful end by unlawful means.*⁹ It is certain that at least two people agreed to accomplish the end intended . Was the end ‘unlawful’, or was it a ‘lawful end by unlawful means’? If put to a jury of non lawyers there is little doubt that both the means and the ends would be deemed unlawful. That would make it a conspiracy under the law. However as long as the legal profession unconstitutionally controls all government it will probably prevent that question from ever reaching a jury.

PUBLIUS II
(Ronald Bibace)

About the author: *This writer is a constitutional scholar who wrote Federalists 86 through 99, in defense of the Constitution. He is like Madison, a non lawyer and like Hamilton an immigrant and naturalized American.*

1. This Paper and Federalists 104, 106-107 should be read as a single unit.
2. We must remember that Professor Pepper is not necessarily advocating this position. In light of the professor's current amoral standards he may have viewed his own role as that of 'the devil's advocate', required to put the best face on an indefensible situation. The fact that his essay won the contest with arguments that are utterly without merit, merely confirms that there are no better arguments.
3. The definition of '*unlawful*' is then made flexible enough to include the justification for providing advise that may result in killing innocent people. This is done by indicating and even emphasizing to the client on an 'amoral' basis that a risk analysis on the cost of damages for the unlawful death of potential victims versus the cost of compliance with the law can result in substantial bottom line profits.
4. The difference between the 'least moral lawyer overall' and the '*least moral lawyer in giving advice*' is too fine a distinction for most clients. It is also true that the very best indication of a lawyer's readiness to give the 'least moral' advice is that he is a crook himself!
5. Encyclopedia Britannica, (page 280, Vol 23 15th ed. 1988), Logic. The History and Kinds of, The critique of forms of reasoning, correct and defective arguments.
6. As will *in the short term*, the members of any other group who compete with each other. It is the long term adverse effect on the unscrupulous, *when conduct enforcement is feared and occurring*, that keeps them from pursuing this policy at the time. When, as in the case of the legal profession there is not only no enforcement but official encouragement, unscrupulous behavior and profitability soars.
7. Judging from the income levels and current indictments of some drug lord defense lawyers in the Miami area, the more unethical the advice asked for and received, the higher the fee to the lawyer.
8. Although it must be said that so long as they maintain their unconstitutional control of all government this statement is true for all of society except them!
9. See *Black's Law Dictionary*, West Publishing, Revised Fourth Edition (1968)