A Commentary on Pepper's
"The Lawyer's Amoral Ethical Role"
Andrew L. Kaufman

It is a nice thing to be asked to comment on an essay\(^1\) to which I myself would have given a prize. A more explicit way of disclosing my positive feelings about the essay is to reveal that before the program I asked Professor Pepper for permission to reprint it so that not only my students but also students in other sections of professional responsibility at Harvard Law School this spring could have the advantage of being able to read it. I made this request because I had been asked explicitly by the teachers of those sections, to whom I had shown the paper, to do so on their behalf.

Turning now to the essay itself, I would like to make my comments from the perspective of practitioners, for after all it is lawyers who have to make decisions daily with respect to the issues that are the subject of today's essay. Ever since Charles Curtis gave a provocative talk on the topic of the lawyer's ethical role some 35 years ago, the subject has received increasing attention, first from lawyers and more recently from philosophers. With the notable exceptions of the contributions of Monroe Freedman and Charles Fried, however, most of the writings have been critical of the position that argues for an amoral ethical role. Moreover, the more completely argued presentations have tended to be those of the critics. Now, drawing on the insights of Freedman and Fried but advancing beyond them, Professor Pepper had produced a first-rate paper presenting a complete theory that seeks to justify, at least presumptively, an amoral role for lawyers.

As I survey the field of professional responsibility today, I must confess to a feeling of nakedness. Everyone who is anyone has either created or adopted a model. We have "the lawyer as moral force in a non-differenti-

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ated or weakly-differentiated role”; “the lawyer as friend”; and now “the lawyer as facilitator of first-class citizenship.”

To start with a conclusion, my sense after practicing law for 10 years and teaching professional responsibility for nearly 20 years is that both sides of the argument over the moral accountability of lawyers have a good deal to teach practitioners—but that neither has the full answer, for there is more paradox in the lawyer’s role than either theory provides for. In holding high the importance of autonomy, diversity, and equality, Professor Pepper links those goals with the notion that if proposed conduct has not been made unlawful, then at least generally the lawyer should help the client achieve his or her objective. Note that Professor Pepper does not make the lesser point that it is permissible for the lawyer to aid the client. He seems to be making the larger point that it is wrong for lawyers, except perhaps in exceptional cases, to refuse to help their clients to achieve lawful ends.

The comparison is to the technician fixing a car. Such a person, we are told, is normally held to have no responsibility for the use to which the car is to be put. But that judgment, I suggest, stems from the fact that the technician normally has no dilemma. Suppose that a technician fixes and delivers a car to a husband who tells the technician that he is leaving his wife and taking their jointly owned car with him at the time when the technician knows that the wife is expecting a child and needs the car to get to the hospital? Do we then all agree that the technician has no moral problem? The real difference between the lawyer’s situation and that of the technician is simply one of opportunity: the opportunity to learn of other people’s troubles creates moral dilemmas.

Professor Pepper’s presentation on this point shares the same problem as Professor Fried’s piece, since he finds it necessary to argue that it is always, or almost always, morally good to help the client achieve an end that is not unlawful. It is one thing, however, to play up the autonomy and equality points in urging an amoral role for lawyers. It is quite another to play down the moral aspect of the reality that sometimes—for a variety of reasons having nothing to do with morality—conduct generally agreed to be immoral is not made unlawful.

For example, to take a homely situation, it is not unlawful for a wife to cut her husband out of her will without telling him, even though she knows that his will favors her, but I think that most of us would agree that there are many situations in which it would be immoral for her to do so. As a lawyer drafting the will, I would not be assured by the argument that I am facilitating the wife’s first-class citizenship in doing so. Moral dialogue may not be enough in that kind of case. And if that example does not grab you, how about doing the legal work that sets the seller of Saturday Night Specials up in business and helps him to continue. Professor Pepper is not bothered by that one, at least not in the abstract. Is it unfair of me to ask how many dead people shot by guns sold by his client would begin to make
him worry? Note that I am not even arguing for the proposition that the lawyer ought to refuse to form the corporation for the client. I am only arguing for the proposition that the professional rules ought not to prevent him from declining to do so.

I realize that there is the problem of "the last lawyer in town" and that that situation sometimes does occur, but Professor Pepper is not dealing with that very special problem. His is a much more across-the-board view. Professor Pepper does leave the "out" of conscientious objection for extreme cases—but I don't think he would regard either of the ones I have put as extreme cases. In making that judgment I rely on his use of the "hidden bodies" case to make his point about extreme cases. He would find an extreme case if the lawyer were to discover that the body he had found were still alive. In choosing that example, I assume that he rejected the one that was much closer at hand, namely, that the lawyer is told by the doctor of the parent of the murder victim that the strain for the parent of not knowing whether her child was dead or alive was highly likely to kill her because she had a bad heart. We can change the adjectives describing the certainty of harm as much as we want, but moral dialogue is not going to work in this situation. The killer is not likely to allow the lawyer to let the parent know by any means that her daughter is dead. I believe that the case I have put, which is disturbingly close to the real case, is one that at least ought to be regarded as raising a hard question as to whether the amoral role is justified in that situation.

And so I have two problems with where Professor Pepper comes out on this point. For me and for many lawyers, I suspect that there are enough situations where the moral constraints are such that they outweigh what Professor Pepper calls the first-class citizenship considerations that they cannot be called truly exceptional. Moreover, I wonder about a system of law that compels lawyers to be conscientious objectors, that is, that makes the law such that lawyers must break it in order to achieve what are conceded to be highly desirable moral ends. It is an insufficient answer to say that it enables us to put a satisfactory label—"amorality"—on the role of the lawyer. And so I think that the ethic of professional responsibility should and does recognize that it is entirely appropriate for the lawyer to refuse the amoral role in a significant number of situations—not just in the matter of choice of client, but also in the performance of the actual tasks the client wishes the lawyer to do.

However, having said all that, I think I should also say that I part company with Professor Luban on the general thrust of his position as I have understood it. I believe that there is a great deal more scope for role-differentiated behavior than his position allows and that lawyers have to be very careful about overriding clients' wishes in the name of morality.

The issues we like to discuss under the heading of morality often turn out to be considerably less clear-cut in reality than we portray them in the class-
room. It may not be so much that, as Professor Pepper suggests, our value sources have disappeared in the 20th century. (Indeed, it seems to me that as to some things—at least, for example, care about have-nots—there is more moral awareness in this century than there was in most recent ones.) But moral issues are often cloudy in the lawyer’s office because in many, if not most, situations when people come to lawyers, it is very difficult for lawyers to get a strong sense of moral right and wrong because of one-sided, incomplete information about facts and especially about the consequences of particular actions.

And so the occasions on which lawyers may have a real moral choice to make in the advice they give—aside from the important initial choice they make about the kind of practice to which they aspire—may not be so numerous as the protagonists on this issue would have us believe. Likewise, there are other situations where it is perfectly appropriate for a lawyer with a strong moral position to recognize that there are other reasonable solutions to the moral dilemma and thus to defer to the client’s differing moral judgment. That kind of deferring has a moral quality to it too. Thus, I believe that in a great many situations it is proper to separate Professor Pepper’s view of the lawyer’s role as “amoral” into two words. The role should in fact be regarded as “a moral” role.

Finally, there is the relationship stressed by Professor Pepper between legal realism and an amoral ethic for lawyers—the notion that the lawyer’s role requires education of clients in the indeterminacy and manipulability of law. As law teachers, we are all realists who recognize the fictional nature of the common view that there is, in Professor Pepper’s words, “‘something there’ for the lawyer to find (or know) and communicate to the client.” He tells us that all second-year students know that where setting forth “the law” is concerned, except for obvious and therefore uninteresting questions, there are no lines, only possibilities. While that is all true, I think most practicing lawyers know that there is a great deal of law—statutes, doctrine—that goes to inform our judgment about possibilities. We teachers are so caught up in the frontier questions that we sometimes see more chaos and manipulability than there really is. The lawyer who tells the client, “Do what you want; it is all indeterminate and manipulable,” does the client no favor.

And while I am at it, I might add that I am a little puzzled by Professor Pepper’s tendency to make his point that lawyers should not be screeners of moral conduct by treating as equivalent those situations in which lawyers are pictured as concealing the uncertainty of legal doctrine or enforcement of law from clients and those situations in which lawyers decline to undertake certain lawful means or ends for clients. For me, those two types of cases present very different moral issues in that the former involves a lawyer in deceiving a client whereas the latter does not.

2. Id. at 624.
Professor Pepper concludes his paper by saying that there is enough latitude for lawyers’ exercise of their own moral autonomy in his picture of the generally amoral role he envisages, that “the good lawyer can be a good person, not comfortable, but good.”\(^3\) It is a nice, ironic turn of phrase, but I can hear his critics saying that he has got it backwards, that the prescription is one for making lawyers comfortable at a time when they are not being good.

I do not know how Professor Luban comes out on the issue of comfort, but I am fairly certain that he believes that his own formulation comes closer to making the lawyer a good person than does Professor Pepper’s. For myself, I hold eclectic views on the theoretical issue that divides Professors Pepper and Luban—and indeed, the whole community of professional commentators.

On those occasions when the issue of the appropriate professional role arises, it seems to me that there is no need to make the choice for all cases, even for all ordinary cases, between the views expressed by Professors Pepper and Luban. Here is where it is a good thing not to have a model that justifies, at least presumptively, an amoral or a moral role. In my opinion, it has been a good thing and not a bad thing that the rules of professional responsibility have recognized that there are strong principles supporting both views and that they have not opted for a mandatory rule one way or the other in a great many situations, and especially not at the metalevel of theory.

I do not think it all bad that the kind of advice clients get depends to some extent on the chance of whom they choose or have chosen for them as lawyers. That kind of chance happens all through life with the chance of whom we wind up with as parents, children, priests, ministers, or rabbis, teachers, friends, and leaders. In some cases there are costs of leaving things to chance. But so are there costs in trying to force very different lawyers with very different sensibilities into one attitudinal mold for nearly all situations.

In any event, when the issue of role arises in a particular situation that does not fit into an area where there is a rule, I think that it is good that we lawyers are not always given a prepackaged answer. There is something to be said for our being forced to figure out for ourselves what action is called for by the facts of a particular situation, being, in Professor Pepper’s words, as good as we can, or perhaps, to put it another way, doing the least bad that we must—even if it is uncomfortable to have to work it out for ourselves.

3. *Id.* at 635.