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Existential Ethics: Thinking Hard About Lawyer Responsibility for Clients' Environmental Harms

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Abstract: This paper challenges the conventional understanding among many legal ethicists that environmental harm can be a necessary, if regrettable, collateral effect of lawyerly work. It argues that lawyers sometimes do things that cost society too much and that legal ethics (being the rules of ethical conduct set out by regulators of lawyers and broader theories of 'good' lawyering) has the potential to act as a mediator on lawyers' environmental harm-causing action. The paper begins by examining lawyers' formal rules of professional conduct in England & Wales, showing how those rules require lawyers to provide active counselling to clients but do not fully address clients' legally permissible choices that may result in environmental harm. The paper then turns to theories of legal ethics that go beyond these baseline rules. Here, I argue that the dominant 'Standard Conception' of lawyers as neutral technicians is not only implausible in the context of environmental law but also fundamentally incomplete. The paper also considers the ethical implications of a lawyer's initial decision to represent a client. The commonly held belief that 'Everyone deserves legal advice' often masks a simple ethical choice, where lawyers prioritise commercial concerns over environmental considerations, unburdened by more complex ethical constraints. However, this rationalisation rests on unsound premises and frequently clashes with lawyers' personal moral boundaries; a problem I label 'Meatloaf Lawyering'. Ultimately, I argue that lawyers have significant ethical agency and that their professional obligations do not impede (and sometimes require) an active, ethically responsible stance towards environmental harms.

Key words: lawyers; ethics; professional responsibility; climate change; environmental law; Standard Conception; codes of conduct; client onboarding.

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1. *Introduction*

Let me begin with a story, partly because it is a good story and partly because narrative is an important part of environmental law scholarship.[1] After I finished my law degree, I came to London and started my training as a lawyer. On a blind date, I was met by a handsome guy in a bar in Soho. We got to talking about our jobs.

'I'm a lawyer' I said.
'What sort of lawyer?', he asked.
'An environmental lawyer', I replied.
He smiled. 'Oh wow', he said, 'you get to save the whales'.

There was then a long and awkward pause. 'Actually', I said, 'I'm probably on what you would think of as the whale-*killing* side of the legal profession. I act for fossil fuel companies and arms manufacturers'. The date ended quickly after that. What I found interesting, as I cried alone into my martini, was the assumption my blind date had made that being an environmental lawyer went together with protecting the environment when, in my experience, that was not necessarily the case. Only later in my career, when I left one large law firm for another, did I stop to really think about the consequences of the work that I was being asked to do for my clients. Until that time, I had largely accepted the justification fed to me by the partners that I worked for that 'Everyone deserves legal advice'. Such lack of reflection and such rationalisation are endemic in many parts of the legal profession.[2]

This paper is concerned with lawyer responsibility and shows how some of the (perfectly legal) environmental harms that lawyers help their clients create raise important and significant questions about the ethics of that lawyering. It is, quite intentionally, a paper of multiple arguments and multiple angles; spanning lawyer regulation, theoretical legal ethics and the practices of law firms onboarding new clients and new matters. These multiple takes coalesce around an overarching broad claim: that lawyers sometimes do things that cost society—in the form of environmental harms—too much. What I show is that lawyers have significant ethical agency and that their professional obligations do not impede (and often require) an active, ethically responsible stance

[1] C Hilson, 'The Role of Narrative in Environmental Law: The Nature of Tales and Tales of Nature' (2022) 34 JEL 1.

[2] S Vaughan and E Oakley, '"Gorilla Exceptions" and the Ethically Apathetic Corporate Lawyer' (2016) 19 Legal Ethics 50; R Moorhead and V Hinchly, 'Professional Minimalism? The Ethical Consciousness of Commercial Lawyers' (2015) 42 JLS 387.

towards environmental harms. These matters are worth considering in some depth for three reasons. First, because of the seriousness of the environmental harms we are facing. Second, because of the roles that lawyers play in actively facilitating those harms through the advice they give. And third, because key to the legitimacy of lawyers' claims to professional status is, as Richard Moorhead has said, a 'manifest and demonstrable commitment' both in principle and in practice to exercise knowledge and skills primarily in the public interest, placing the public interest above both the lawyer's self-interest and that of their clients.[3] These matters are also timely. There is recent and increasing environmental activism aimed directly at large law firms,[4] recurrent claims of greenwashing labelled against firms and their clients,[5] and ongoing conversations among regulators and representative groups about lawyers as 'professional enablers' of problematic harms.[6]

In what follows, I do three different but connected things. I begin by arguing that professional rules of conduct place some limits on the work lawyers do that lead to environmental harms sought by their clients: showing how those professional rules require reflection by lawyers about their responsibility for consequential environmental harms and require engagement in active client counselling. Those conduct rules mean that lawyers should not loophole, bully or cheat to achieve their client's environmental harm-causing aims.[7] At the same time, those professional conduct rules are less useful where a client says 'I have listened to your advice and would still like to proceed with these perfectly legal, environmental harm-causing activities'. In those situations, and as a second strand of this paper, I counsel us to think about the relevance of the competing theories of lawyers' ethics. I focus on the Standard

[3] R Moorhead, 'Precarious Professionalism: Some Empirical and Behavioural Perspectives on Lawyers' (2014) 67 CLP 447.

[4] Including protests by Extinction Rebellion outside the offices of Eversheds Sutherland and Slaughter and May.

[5] SV de Freitas Netto and others, 'Concepts and Forms of Greenwashing: A Systematic Review' (2020) 32 Environmental Sciences Europe 1. Would it, I wonder, be greenwashing for a firm to publicly declare its many commitments to sustainability and responding to the climate crisis while also deploying the Standard Conception as a defence of its lucrative oil and gas work?

[6] See, for example: J Goldsmith, 'The New Slur: We Are Professional Enablers' (*The Law Society Gazette*, 2 March 2021).

[7] I should note that others, while accepting that lying and cheating are fully outwith the SRA's rules of conduct, might think that some forms of loopholing and bullying are more permissible (in regulatory terms).

Conception,[8] the dominant approach to lawyers' ethics. I do this to show how the Standard Conception is ultimately an impoverished account of legal ethics and one entirely unsuited to the environmental harms we face.

Third, this paper draws back the veil on client and matter onboarding. It argues that the decision for a solicitor or law firm to take on a new matter for a new client is not one of legal ethics, but instead one of ordinary morality (i.e. morality away from any specific ethical obligations of certain role-holder professionals).[9] The position is much the same when deciding whether or not to act for an *existing* client on a new matter, subject only to the complication of the law firm possibly being on the client's panel of external legal advisers, and having won that place after a competitive pitching process.[10] While the ethics of acting for a client who wishes to use the law to harm the environment is (as we shall see) complex, agreeing to take on a new client and/or new matter in the first place should be rather simple for lawyers in ethical terms. What I show is that arguments that practising lawyers like to put forward about access to justice (the 'Everyone deserves legal advice' account) do not stand up to much scrutiny, especially in the context of legal work for large corporations that want to harm the environment. At the same time, many lawyers have their own, deeply personal redlines about work they would refuse to do.[11] Here, what I call Meatloaf Lawyering—the work-limiting boundary expressed by a number of lawyers that 'I would do anything for my clients but I won't do that'—offers a challenge to the suggestion that solicitors and firms only take on clients (who want to seriously harm the environment) on consistent, public interest-related bases.

Two points to note before we turn to substance. First, while my focus in this paper is on lawyers' ethics (the professional codes in England & Wales and dedicated theories), there are of course other drivers of action that might see lawyers take decisions that lead to less environmentally harmful outcomes. These drivers and factors include: law firm reputation[12]; pressure from law firm employees or new

[8] See: D Luban and WB Wendel, 'Philosophical Legal Ethics: An Affectionate History' (2017) 30 Geo J Legal Ethics 337.

[9] On which, see: MW Martin, 'Professional and Ordinary Morality: A Reply to Freedman' (1981) 91 Ethics 631.

[10] Here there is a strong expectation (although not necessarily as strong as a contractual commitment) that the law firm will take on any work the client asks it to do (subject only to conflicts checks and competence). I am grateful to Sarah de Gay for this prompt.

[11] Vaughan and Oakley, 'Gorilla exceptions' (n 2).

[12] M Smets, T Morris and W Morris, 'Reputation and Performance in Large Law Firms' (2008) Academy of Management Annual Meeting Paper.

hires[13]; pressure from clients who are increasingly interested in environmental, social, and governance (ESG) matters[14]; the competing logics that are at play[15]; and the normative clash of lawyer obligations in tort, contract and equity (as well as professional obligations).[16] There are also the business benefits for law firms of acting in certain ways when it comes to environmental harms[17]; and the many ways in which environmental governance (hard and soft, local and elsewhere) and increased regulatory and investor interest is nudging and pushing many actors (including lawyers) towards more and better environmental protection.[18] These are relevant and not unimportant *drivers* of and *frames* for action, but largely irrelevant to lawyers' *obligations* under their professional codes and to the Standard Conception. Second, in what follows, I will not speak to the 'good things' that law firms do for the environment, such as trying to reduce their emissions from their law firm buildings,[19] or membership of the Net Zero Lawyers Alliance, or advising on, financing and facilitating the buying and selling of renewable energy.

[13] L Bleasdale and A Francis, 'Great Expectations: Millennial Lawyers and the Structures of Contemporary Legal Practice' (2020) 40(3) Legal Studies 376.

[14] On the potential for demand-side drivers to be influential, see: R Lee and B Filgueira, 'Sustainability and the Commissioning of Legal Services' (2018) CEPLER Research Working Paper Series 02/2018. See also: R Dinovitzer, H Gunz and S Gunz, 'Unpacking Client Capture: Evidence from Corporate Law Firms' (2014) 1(2) Journal of Professions and Organization 99.

[15] C Tureta and C Castelo Júnior, 'Organizing Professionalism: Integrating Institutional Logics in Brazilian Law Firms' (2020) 43 Management Research Review 1421; M Smets, T Morris and R Greenwood, 'From Practice to Field: A Multilevel Model of Practice-Driven Institutional Change' (2012) 55(4) Academy of Management Journal 877.

[16] On lawyers' climate responsibilities and tort, see: S de Gay, 'Do England & Wales Qualified Solicitors Have a Legal Duty to Advise Their Clients on Climate-Related Risks?' (2022) UCL Faculty of Laws Research Paper Series No. 7/2022. On lawyers as fiduciaries (and the interplay with legal ethics), see: A Woolley, 'The Lawyer as Fiduciary: Defining Private Law Duties in Public Law Relations' (2015) 65 U Toronto L J 285; D Luban, 'Fiduciary Legal Ethics, Zeal, and Moral Activism' (2020) 33 Geo J Legal Ethics 275; WB Wendel, 'The Problem of the Faithless Principal: Fiduciary Theory and the Capacities of Clients' (2019) 124 Penn St L Rev 107.

[17] PQ Watchman and P Clements-Hunt, 'Chasing the Dragon: The Rise of the ESG Law Firm' (Blended Capital Group Report, 2021).

[18] Regulatory and investor interest will primarily bite on large law firm clients, as opposed to their lawyers. This, in turn, shapes what those clients see as material and acts as public markers of more or less acceptable conduct. Many soft norms are also said to apply to law firms. On CSR and law firms, see: B Spiesshofer, 'Be Careful What You Wish For: A European Perspective on the Limits of CSR in the Legal Profession' (2021) 24 Legal Ethics 73.

[19] The Legal Sustainability Alliance <https://legalsustainabilityalliance.com/> accessed 19 March 2023.

In getting into the heart of the 'blurred boundary between the technical and moral aspects of [lawyers'] work',[20] I disagree with Brad Wendel that 'the ambitions of legal ethics should be toned down a bit.... [and that the] role of the legal profession is not to make clients, or the surrounding society, good [in an ethical sense]'.[21] Instead, I would argue that as professionals who are meant to deploy their expertise in the public interest (to respond, in this context, to existential environmental harms), members of the legal profession may (and sometimes should) do exactly that. I accept, of course, that some environmental harms are hard to establish and that some harms clearly involve complex trade-offs.[22] My goal here is not to engage in lawyer-shaming, to 'saddle lawyers with moral blame if they provided legal assistance to a client bent on pursuing antisocial projects, and did so without violating any applicable standards of professional conduct'.[23] It is instead to show how the actions of lawyers, *as lawyers*, in harming the environment may in fact be crossing (or at least rubbing up against) their professional codes of conduct and amount to unethical conduct.

2. *The Environmental Harms We Face and Lawyers' Roles in Those Harms*

As a species and as a planet, we are facing significant environmental harms, many of which are almost certain to only get worse over time: climate change, air pollution, biodiversity loss, deforestation, chemical harms, waste pollution, poor water quality and so on. Somewhere in the story of each of these harms, and in many other stories, are lawyers.[24] In those stories, lawyers take on various roles and do various

[20] S Liu, 'Between Rules and Power: Finding a Place for Lawyers in the Sociology of Professions' in RL Abel and others (eds), *Lawyers in 21st-Century Societies: Vol. 2: Comparisons and Theories* (Hart Publishing 2022) 448.

[21] WB Wendel, 'Community, Goodness and Solidarity in Legal Ethics' in J Webb (ed), *Leading Works in Legal Ethics* (Routledge 2023) 42.

[22] A friend, who is a General Counsel for a petroleum company, asked me, when I talked to him about this research, how I proposed to fuel a global fleet of ships that was so necessary to feed the world.

[23] WB Wendel, 'Lawyer Shaming' (2022) U Ill L Rev 175, 180.

[24] With some notable exceptions, lawyers are generally 'missing people' in environmental law scholarship. On this, see: N Affolder, 'Transnational Environmental Law's Missing People' (2019) 8 TEL 463. For one of the notable exceptions, see: C Abbot and M Lee, *Environmental Groups and Legal Expertise: Shaping the Brexit Process* (UCL Press 2021).

things in relation to the environment.[25] They work in law firms large and small; they work for the government and regulators as civil servants; they work in-house in large corporations and charities. These lawyers make things happen for their clients at national and international scales[26]: the sale and financing of fossil fuel-fired plants; the shipping of waste overseas etc.[27] Lawyers also seek, in both the private and public sectors, to shape and negotiate future environmental laws on their clients' behalves.[28] Lawyers engage in the drafting of environmental laws, and also advance and agree legal meanings in relation to environmental law in contracts and other non-legislative fora.[29] Lawyers advise on how changing regulatory environments may impact on, and provide opportunities for, clients' businesses and interests.[30] Lawyers take part in the adjudication and arbitration of environmental law disputes.[31] Lawyers are, put short, very active when it comes to environmental issues and harms.

In this paper, I am interested in matters in which environmental lawyers are involved and which have some legal basis, but which are environmentally problematic: 'lawful but awful', to borrow a phrase.[32] As should be clear from the preceding discussions, I am concerned both with environmental lawyers (those who profess expertise in environmental law and self-label as having such expertise) and with other lawyers whose work leads to environmental harms (the finance lawyer who

[25] There is a wide literature on how lawyers 'add value' in the work that they do. As a starting point, see: SL Schwarcz, 'Explaining the Value of Transactional Lawyering' (2007) 12 Stan J L Bus & Fin 486.

[26] CS Arjona, 'The Usage of What Country: A Critical Analysis of Legal Ethics in Transnational Legal Practice' (2019) 32 Can J L & Juris 259.

[27] See, for example: RG Lee and S Vaughan, 'The Contaminated Land Regime in England and Wales and the Corporatisation of Environmental Lawyers' (2010) 17 International Journal of the Legal Profession 35.

[28] Abbot and Lee (n 24); E Korkea-aho, 'Legal Lobbying: The Evolving (But Hidden) Role of Lawyers and Law Firms in the EU Public Affairs Market' (2021) 22 German L J 65.

[29] J Ramos, 'Shifting the Mindset of Commercial Lawyers to Rewire Contracts, to Mitigate Climate Change More Effectively in Practice: The Chancery Lane Project' (2021) 23 Env L Rev 3; LC Backer, 'Lawyers are not Algorithms: Sustainability, Corruption, and the Role of the Lawyer in Institutional Frameworks and Corporate Transactions' (2021) 24 Legal Ethics 4.

[30] In-house as well as in private practice. See: JF Sherman III, 'The Corporate General Counsel Who Respects Human Rights' (2021) 24 Legal Ethics 49.

[31] As a starting point in this wide field, see: E Lees and OW Pedersen, *Environmental Adjudication* (Bloomsbury 2020).

[32] On which, see: N Passas, 'Lawful But Awful: "Legal Corporate Crimes"' (2005) 34 The Journal of Socio-Economics 771.

helps to put in place loans for the building of a new coal-fired power plant, and similar).[33]

In these 'lawful but awful' situations the conduct of the lawyer as a lawyer may be more or less problematic. I divide these cases into the 'prima facie or obviously ethically problematic' cases (such as where lawyers bully, cheat or loophole or take unfair advantage of their opponents) and then the 'more difficult and not so obviously ethically problematic' cases.[34] We have seen lawyers bring libel claims and fraud counter-claims against environmental defenders,[35] and racketeering claims against environmental NGOs.[36] Lawyers threatened to remove statutory protections given to environmental groups when court decisions went against the government[37]; they loophole lawyered on the international climate regime's Clean Development Mechanism (to create, in effect, artificial reduced-emissions credits).[38] Lawyers instituted a 'peer-review' process of environmental evidence that led to experts changing their evidence[39]; and they deployed 'legal intimidation' tactics by a mining company which were said to be a 'threat to democracy'.[40] Government lawyers sought to bankrupt (via punitive costs orders) a conservation

[33] For work focussed specifically on environmental lawyers, see: T Lininger, 'Green Ethics for Lawyers' (2016) 57 BC L Rev 61; and SM Stein and JM Geht, 'Legal Ethics for Environmental Lawyers: Real Problems, New Challenges, and Old Values' (2002) 26 Wm & Mary Envtl L & Pol'y Rev 729. An interesting point, raised with me by Chris Hilson, is whether we might or should expect more of environmental lawyers than, say, finance lawyers, given the former's expert knowledge of the environmental harms their clients wish to bring about. My short reply is that: (a) (generally) ignorance tends not to (significantly) mediate ethical responsibility; and (b) some base level of environmental (and especially climate) knowledge is likely now expected of all lawyers—given the nature of the risks to their clients—as a simple competence matter. See the further discussion on climate consciousness later in this paper.

[34] Wendel writes that many instances of 'lawyer shaming' are about the tactics lawyers pursue, as well as (or sometimes instead of) a general concern about the sorts of clients lawyers represent. See: Wendel, 'Lawyer Shaming' (n 23) 198–99.

[35] See: RJ Fisher, 'Ecolawriors: Knights of the Green Law Consciousness' (2022) 22 Global Jurist 493.

[36] 'Federal Court Dismisses Racketeering Counts Against Greenpeace' (*Greenpeace*, 22 January 2019) <https://www.greenpeace.org/usa/news/federal-court-dismisses-racketeering-counts-against-greenpeace/> accessed 19 March 2023.

[37] A Reynolds, A Ray and S O'Connor, 'Green Lawfare: Does the Evidence Match the Allegations?' (2020) 37 EPLJ 497.

[38] New Scientist, 'Kyoto Protocol "loophole" has cost $6 billion' *New Scientist* (7 February 2007).

[39] I am grateful to Brad Jessup for this example. See: *Brown v Forestry Tasmania* (No 4) [2006] FCA 1729.

[40] B Smee, 'Adani's "Legal Intimidation" Tactics Against Community Groups a "Threat To Democracy"' (*The Guardian*, 19 February 2019).

organisation for bringing claims against the government.[41] Other lawyers applied for overly wide injunctions against environmental protestors,[42] and engaged in disproportionate approaches to jurisdiction cases on environmental harms including the 'dress[ing] up' of disputes in a particular way, ignoring 'well-known warnings' given to them by judges about litigation conduct.[43] We have seen lawyers engage in repeated litigation delays and other tactics on toxic waste water claims,[44] and in relation to raw sewage flooding.[45] Lawyers were said to have deployed 'bullying techniques' directed at university environmental law clinics (including legislation to withhold university funding),[46] and in facilitating the 'reckless, bordering on deliberate' shipping of waste to India and Indonesia (after their client was successfully prosecuted for the same issue previously).[47]

In each of the examples just listed, from the UK and beyond, we have lawyers loopholing, cheating, bullying, taking unfair advantage and so on, to enable clients' environmentally harmful conduct. In this set of examples both the means to the end and the ends themselves are of concern. These are situations which might, at first blush, look ethically problematic in some way but where no action was taken by regulators or courts to suggest that those actions crossed a professional conduct line. Lawful, but awful.

By contrast, in another set of more difficult (and not so obviously ethically problematic) cases, lawyers are part of the narrative of environmental harms (they are in the room where it happened) but their

[41] *Blue Wedges Inc v Minister for the Environment, Heritage and the Arts* (No 2) [2008] FCA 1106.

[42] For examples of this, see: T Murombo and H Valentine, 'SLAPP Suits: An Emerging Obstacle to Public Interest Environmental Litigation in South Africa' (2011) 27 South African Journal on Human Rights 82; CJ Hilson, 'Environmental SLAPPs in the UK: Threat or Opportunity?' (2016) 25 Environmental Politics 248; and R White, 'Stifling Environmental Dissent: On SLAPPS and Gunns' (2005) 30 Alternative L J 268.

[43] *Vedanta Resources plc v Lungowe* [2019] UKSC 20 [6]-[15] (Lord Briggs).

[44] On which, see: A Salyzyn and P Simons, 'Professional Responsibility and the Defence of Extractive Corporations in Transnational Human Rights and Environmental Litigation in Canadian Courts' (2021) 24 Legal Ethics 24.

[45] 'Thames Water Ordered To Pay £345,000 After Serious Sewage Spill' (*Thames Anglers' Conservancy*, 15 March 2011).

[46] HM Babcock, 'How Judicial Hostility toward Environmental Claims and Intimidation Tactics by Lawyers Have Formed the Perfect Storm against Environmental Clinics: What's the Big Deal about Students and Chickens Anyway?' (2010) 25 J Envtl L & Litig 249.

[47] 'Biffa Fined £1.5 Million for "Reckless" Export Breach' (*Environment Agency*, 20 July 2021) <https://www.gov.uk/government/news/biffa-fined-15-million-for-reckless-export-breach> accessed 19 March 2023.

lawyering was, as a starting point, well within the conventionally understood bounds of existing professional conduct rules. These are the sort of 'perfectly legal' environmental harm-causing cases; a client says, 'Help me with this new oil and gas licensing round' and the lawyer does the lawyering which achieves just that. These are situations in which we are not concerned with lawyer tactics, but with the choice of client or matter and the environmental harms the client wishes to pursue. In these latter situations, by contrast to the first set of cases, we are more concerned with the ends than the means. Lawful, and also awful.

3. *The Regulation of Lawyers' Ethics*

How might we assess the ethicality of the work of lawyers who help their clients to cause environmental harms? When people (scholars, practitioners and others) talk about 'ethics' and lawyers they are often unclear on their framings or meanings.[48] First, we can talk about professional conduct and the rules written by the regulators of lawyers that seek to shape how lawyers act (legal ethics put on paper).[49] Second, we can also talk about theories of ethics that have been created for lawyers in particular—and where these theories seek to provide role morality schemas for justifying or not justifying the actions that lawyers take.[50] Third, we have what is usually referred to by legal and other philosophers as 'ordinary morality'—the ethics of everyday people (which, as I suggest below, is relevant for when lawyers are thinking about taking on new clients or new mandates with environmentally harmful consequences).

When it comes to legal ethics written down in England & Wales for solicitors, the Solicitors Regulation Authority (SRA) takes a three-pronged approach to standard setting: (1) it sets out high-level 'Principles'; (2) it gives a series of detailed, topic-specific rules on conduct; and (3) it promulgates a statement on the competence of qualified

[48] On which, see: E Wald, 'The Access and Justice Imperatives of the Rules of Professional Conduct' (2022) 33 Geo J Legal Ethics 375, 379ff.

[49] Christine Parker would disagree, arguing that 'professional responsibility' is not an ethical approach as it abandons ethics for rules. See: C Parker, 'A Critical Morality for Lawyers: Four Approaches to Lawyers' Ethics' (2004) 30 Monash Univ L Rev 49.

[50] On which, see: A Gewirth, 'Professional Ethics: The Separatist Thesis' (1986) 96 Ethics 282; A Woolley, 'To What Should Lawyers Be Faithful?' (2012) 31 Criminal Justice Ethics 124.

solicitors (which includes, among other things, ethical competence).[51] The regulator also produces guidance on key issues. Below, I focus on the Principles. Their starting point is in the Legal Services Act 2007 and they are then given life in the SRA's STaRs (its 'Standards and Regulations'), which are in turn based on previous professional codes of conduct.[52] The SRA says that its Principles, 'comprise the fundamental tenets of ethical behaviour that we expect all those that we regulate to uphold'.[53] Or, as the Chair of the SRA Board put it in 2007, the Principles 'set out what should be at the heart of what it means to be a solicitor'.[54]

One of the many things that is striking about the Principles is that they apply to everything a solicitor does. They are pervasive and mandatory.[55] They are also not ranked. The current Principles say that solicitors should act[56]:

1. in a way that upholds the constitutional principle of the rule of law, and the proper administration of justice.
2. in a way that upholds public trust and confidence in the solicitors' profession and in legal services provided by authorised persons.
3. with independence.
4. with honesty.
5. with integrity.
6. in a way that encourages equality, diversity and inclusion.
7. in the best interests of each client.

[51] I am not going to speak in this paper about reform of the SRA's regulatory toolkit. See, however, the following papers from the US that focus on environment-positive potential ABA rules rule changes: J Gostel, 'Ethics, Energy, and the Environment: A Proposal to Hold Attorneys to Certain Standards in Protecting Our Planet' (2017) 30 Geo J Legal Ethics 819; VB Flatt, 'Disclosing the Danger: State Attorney Ethics Rules Meet Climate Change' [2020] Utah L Rev 569; Lininger (n 33); and Stein and Geht (n 33) 729.

[52] See A Boon, 'The Legal Professions' New Handbooks: Narratives, Standards and Values' (2016) 19 Legal Ethics 207, 215.

[53] SRA, STaRs, Principles, at Introduction, first para <https://www.sra.org.uk/solicitors/standards-regulations/principles/> accessed 19 March 2023.

[54] As quoted in Boon (n 52) 228.

[55] I know some will say that this is at odds with how the High Court in *Beckwith v SRA* [2020] EWHC 3231 understood the SRA's Principles. The plain fact of the matter is that the High Court got the law wrong in *Beckwith*, as I make clear here: S Vaughan, 'Personal Lives and Professional Principles: Beckwith, Integrity and the High Court' *Lawyer Watch* (20 November 2020) <https://lawyerwatch.wordpress.com/2020/11/30/personal-lives-and-professional-principles-beckwith-integrity-and-the-high-court/> accessed 19 March 2023. See further: <https://www.kingsleynapley.co.uk/insights/blogs/regulatory-blog/beckwith-v-sra-an-analysis-of-the-courts-landmark-decision> accessed 9 April 2023.

[56] SRA, Principles (n 53).

The regulatory scheme of professional ethics that the SRA promulgates via its Principles is unusual in that it explicitly accepts a particular form of justice, one that is uncommon among other common law legal services regulators. What the SRA does is to make compulsory a form of socially responsible lawyering, even if we might debate how strong or a weak a form of social responsibility the SRA in fact promotes. At no point—nowhere in these Principles, or elsewhere in its regulatory toolkit—does that SRA say that the client or the client's interests come first. This often comes as something of a surprise to practising solicitors.[57] Instead, the regulator says that a complex matrix of things—the rule of law, independence, integrity and so on—operate in tandem, together with acting in the best interests of each client. What the regulator also does is to set out what should happen when its Principles rub up against each other[58]:

> Should the Principles come into conflict, those which safeguard the wider public interest (such as the rule of law, and public confidence in a trustworthy solicitors' profession and a safe and effective market for *regulated* legal services) take precedence over an individual client's interests.[59]

In what follows I want to think about what the SRA's Principles mean, both generally and in the context of environmental harms. I begin with independence and integrity.

A. *Independence*

As a professional principle, 'independence' sees lawyers as mediators between their clients and the state.[60] In one direction, independence means lawyers protecting clients from unwarranted interference by the state—this reflects a certain liberal, 'market' conception of the rule of law. In the other direction, independence means that lawyers should be setting limits on how their clients use the law. As Emma Oakley and I have argued elsewhere, professional independence is thought to ensure

[57] Vaughan and Oakley, 'Gorilla exceptions' (n 2); Moorhead and Hinchly (n 2).

[58] The environment is not listed here specifically. As we will come to see, I think it nevertheless remains relevant. Chris Hilson reminded me of this principle of interpretation: *noscitur a sociis* (to understand the meaning of a word from the company it keeps). That might suggest quite a narrow framing for the 'public interest' in this context. However, I think the use of 'such as' and the lack of definition (on the rule of law etc) keeps the debate about the content of the 'public interest' open.

[59] SRA, Principles (n 53) Introduction.

[60] BA Green, 'Lawyers' Professional Independence: Overrated or Undervalued?' (2013) 46 Akron L Rev 599; EW Myers, 'Examining Independence and Loyalty' (1999) 72 Temple L Rev 857; R Gordon, 'The Independence of Lawyers' (1988) 68 B U L Rev 1.

that professionals exercise their professional judgement in individual cases in line with communal standards of competence and ethicality, and in a detached fashion.[61] At least in theory, independent professionals and their specialist knowledge can simultaneously serve the wider public interest as well as the interests of their clients.

Limited guidance from the Legal Services Board sets out that professional independence means solicitors shying away from 'unwarranted influence[s]'.[62] The courts, in their handful of cases on this Principle, say independence requires solicitors saying 'No' to clients and accepting that independence might lead to negative financial impacts for the solicitor.[63] Put another way, independence is about professional distance, about not becoming so close to a client that you forget about your professional status and obligations. It is about not being a Poodle, despite what this very senior lawyer in a City firm once told me[64]:

> Because, most law firms, we're hired hands and we're instructed to do things, and if your client says, 'I want you to go in there and be a Poodle', you go and be a Poodle, and if they say 'I want you to go there and rip these guys to pieces', that's what you try and do.

The professional principle of independence is a reminder—and an obligation—that solicitors should be wise counsellors and not hired guns.[65]

B. *Integrity*

Integrity is a difficult principle to get one's hands around, there being at least six different philosophical accounts of integrity as a virtue,[66] and little guidance for solicitors on integrity meaning-making. Robert Audi and Patrick Murphy argue that 'In a great many cases, "integrity"

[61] E Oakley and S Vaughan, 'In Dependence: The Paradox of Professional Independence and Taking Seriously the Vulnerabilities of Lawyers in Large Corporate Law Firms' (2019) 46(1) JLS 83.

[62] LSB, 'The Regulatory Objectives – Legal Services Act 2007' (undated) at 11 <https://www.legalservicesboard.org.uk/news_publications/publications/pdf/regulatory_objectives.pdf> accessed 19 March 2023.

[63] For the relevant doctrine, see the discussion in Oakley and Vaughan, 'In Dependence' (n 61) 90.

[64] Quoted in Oakley and Vaughan, 'In Dependence' (n 61) 97.

[65] On this, see broadly: RA Kagan and RE Rosen, 'On the Social Significance of Large Law Firm Practice' (1985) 37 Stan L Rev 399; RL Nelson, 'Ideology, Practice, and Professional Autonomy: Social Values and Client Relationships in the Large Law Firm' (1985) 37 Stan L Rev 503.

[66] G Scherkoske, 'Whither Integrity I: Recent Faces of Integrity' (2013) 8 Philosophy Compass 28. See further: DL Rhode, 'If Integrity Is the Answer, What Is the Question' (2003) 72 Fordham L Rev 333.

is a specific sounding term for something like moral soundness, whose exact character is left unspecified'.[67] Case law on solicitors tells us that integrity is thought to denote a higher moral standard than honesty, requiring a 'moral soundness, rectitude and steady adherence to an ethical code'.[68] Jackson LJ framed the Principle as follows in *Wingate and Evans*:

> In professional codes of conduct the term 'integrity' is a useful shorthand to express the higher standards which society expects from professional persons and which the professions expect from their own members.[69]

Integrity as 'higher standards' does not take us very far, however. The SRA sets out that it will take action in relation to a lack of integrity where a solicitor takes unfair advantage of others, and/or where they have knowingly or recklessly caused harm or distress to another, and/or where clients or third parties have been misled or allowed to be misled.[70] As such, integrity, like independence, tempers acting like an automaton on a client's instructions.[71] These Principles mean, and the regulator clearly accepts that they mean,[72] that there are limits to what lawyers can and should do when it comes to advising on potential environmental harms, and that tactical lawyering may often be outside those limits. There is nothing new about me suggesting that these SRA Principles have a tempering function,[73] save that that sort of tempering and those sorts of limits are not especially helpful when the environmental harms that clients want to bring about are *clearly* legal and where the lawyer is acting well within the ambit of the Principles—a client says 'Help me with this new oil and gas licensing round' and the lawyer does just that, with no loopholing or bullying etc. The SRA's other Principles, however, likely have greater purchase.

[67] R Audi and PE Murphy, 'The Many Faces of Integrity' (2006) 16 Business Ethics Quarterly 3, 8.

[68] *SRA v Wingate and Evans* [2018] EWCA Civ 366 (Jackson LJ).

[69] ibid [97].

[70] SRA, Acting with integrity (23 July 2019, updated 1 September 2022) <https://www.sra.org.uk/solicitors/guidance/acting-with-integrity/> accessed 19 March 2023.

[71] See further: R Moorhead, 'Court of Appeal Criticism of Advocate Extends Beyond the Man Himself' (*Lawyer Watch*, 2 October 2013).

[72] See, for example: SRA, 'Use of Non-Disclosure Agreements' (Regulatory Guidance of 12 March 2018, updated 12 November 2020) <https://www.sra.org.uk/solicitors/guidance/non-disclosure-agreements-ndas/> accessed 19 March 2023.

[73] Vaughan and Oakley, 'Gorilla Exceptions' (n 2); Oakley and Vaughan, 'In Dependence' (n 61).

C, *The Rule of Law*

Allan Hutchinson reminds us that, 'there is a relatively clear and shared norm that underwrites the work and privileged position of lawyers in most societies – it is a commitment to the Rule of Law'.[74] However, what actually constitutes a professional commitment to the rule of law opens space for more competing views.[75] As set out above, the SRA Principles require solicitors to act, 'in a way that upholds the constitutional principle of the rule of law'. The regulator, however, does not give guidance on what this Principle means, including whether the word 'constitutional' is somehow intended to shape the framing or content of the 'rule of law'.[76]

What is also a challenge is that lawyers are often periphery players, if mentioned at all, in many academic accounts of the 'rule of law'; meaning that their roles and functions are under-theorised and largely absent.[77] This is surprising. Bob Gordon reminds us that lawyers are part of 'constructing the complex of norms, institutions, specialized staffs, and cultural dispositions that make up the (incredibly plural and contested) set of social practices that are grouped under the broad umbrella label of the Rule of Law'.[78] Here, lawyers can either be 'instruments of enhancing autocratic rule and extending the state's authority, by lending it legitimacy and helping it secure the co-operation it needs' or lawyers can 'serve as centres of resistance to novel impositions of authority'.[79]

Martin Krygier writes that the rule of law 'is not a thing like a stone we might stumble over, but a complex practical ideal'.[80] Just as the idea, content and practices of the rule of law are complex and contested in general (taking the form, as Jeremy Waldron so vividly puts it, of different 'laundry lists of demands'),[81] they remain contested (and do not become any easier) when it comes to thinking about how lawyers—as products, servants and agents of the rule of law—should act in relation

[74] AC Hutchinson, *Fighting Fair: Legal Ethics for an Adversarial Age* (CUP 2015) 16.
[75] See the discussion in Boon (n 52).
[76] I am grateful to Sarah de Gay for this prompt on the SRA's framing.
[77] BZ Tamanaha, *On the Rule of Law: History, Politics, Theory* (CUP 2004) 59. See, however: A Boon, *Lawyers and the Rule of Law* (Bloomsbury Publishing 2022).
[78] RW Gordon, 'The Role of Lawyers in Producing the Rule of Law: Some Critical Reflections' (2010) 11 Theoretical Inquiries in Law 441, 445.
[79] ibid.
[80] M Krygier, 'What's the Point of the Rule of Law?' (2019) 67 Buffalo L Rev 743, 758.
[81] J Waldron, 'The Rule of Law and the Importance of Procedure' (2011) 50 Nomos 3, 5.

to the climate crisis and other environmental harms.[82] Given this, what the rule of law via the SRA's Principles asks or may require of solicitors will likely look different depending on whether one (individual lawyer, firm, regulator and/or representative group) adopts a thicker or thinner conception of the rule of law: thinner 'conceptions that focus on questions of legal procedure, structure, and the formulation of laws, and … those [thicker conceptions] which include social and political rights at their core'.[83] In particular, questions arise about how much the focus should be for lawyers on the (thinner) formal and/or procedural aspects of the rule of law and how much they should be reflecting on, and then seeking to deliver, the (thicker) values which might underpin the rule of law.[84]

Let me give an example. In 2021, I was at an event in the City of London, a debate on whether law firms can have a purpose beyond profit. In the Q&A section of the event, a senior partner at a law firm expressed the view that all law firms have a ready-made societal purpose (meaning there was no need to adopt one), as providing their clients with legal advice was a key part of the rule of law. It seemed to me that that senior partner had a formal and/or procedural conception of the rule of law which he thought went hand-in-hand with political neutrality[85]; he saw the rule of law 'as a threshold condition for a valid legal system, while nevertheless remaining neutral on the substantive ends that may be pursued by law'.[86]My sense was that that partner was arguing, implicitly, that a thinner (formal and/or procedural) understanding of the rule of law sees lawyers do all that they can to advise on and enact the law as drafted; to give effect to rule of law ideas of legal certainty and legality.[87]

[82] On the 'remarkable lack of consensus' on what the rule of law means, see: Sir John Laws, 'The Rule of Law: The Presumption of Liberty and Justice' (2017) 22 Judicial Review 365.

[83] NW Barber, 'Must Legalistic Conceptions of the Rule of Law Have a Social Dimension?' (2004) 17 Ratio Juris 474, 475.

[84] See, for example, the discussion in Chapter 2 of WH Simon, *The Practice of Justice: A Theory of Lawyers' Ethics* (Harvard UP 2000).

[85] On which, see: C Arjona, 'Amorality Explained. Analysing the Reasons that Explain the Standard Conception of Legal Ethics' (2013) 4 Ramon Llull Journal of Applied Ethics 51.

[86] M P Foran, 'The Rule of Good Law: Form, Substance and Fundamental Rights' (2019) 78 CLJ 570.

[87] It also, I think, places too much emphasis on only one aspect of solicitor independence (protecting a client from unlawful interference from the state) and not enough on solicitor independence requiring solicitors to say to their clients 'Thus far shall you go and no further'. See the earlier discussion in this paper.

However, this thin framing is one thing when the law is settled and the client's legal entitlements clear, but another when there is scope for interpretation and the exercise of discretion by a lawyer or where the law is frequently changing.[88] The same is true in the situation where we do not have law on a particular topic and instead perhaps have soft norms or international laws not translated into local commitments. These challenges are especially relevant for environmental law and environmental harms. Ceri Warnock has said that legal certainty, one core aspect of thinner, procedural takes on the rule of law, is harder when it comes to environmental law problems.[89] This is because, as Jonas Ebbesson has written, identifying what the law requires in environmental law involves a complex weighing exercise of statute (which is often open-textured), precedent, principles, guidelines, international agreements and so on. Equally—and as Liz Fisher, Eloise Scotford and Emily Barritt have framed it—climate change's 'highly polycentric, uncertain,... and dynamic nature presents particular challenges for legal orders and adjudication'.[90] Being 'hot law',[91] environmental law is less amenable to (false) legal certainties and requires an acceptance of complexity and the exercise of discretion by lawyers, judges and others.

As Jeff Twentyman, a magic circle law firm partner, has observed, the rule of law can, 'cast a long shadow under which commercial solicitors occasionally and conveniently shelter from daylight'.[92] Too often lawyers use terms, like the rule of law, as, '…"magic solving words" that in reality beg the question'.[93] This displays a preference by those lawyers for (meaningless) formalism and an ignorance of context. A less generous commentator might say that a thinner, more formal and/or procedural conception of the rule of law usefully allowed, as a form of post hoc rationalisation, that particular law firm in my previous example to continue to act in the long shadow of the rule of law, without

[88] Wendel does acknowledge that legal entitlements may be ambiguous, but also says that 'the law is always aimed at some end—that is, it is a purposive activity'. See: WB Wendel, *Lawyers and Fidelity to Law* (Princeton UP 2010) 177.

[89] C Warnock, 'Environment and the Law: The Normative Force of Context and Constitutional Challenges' (2020) 32 JEL 365.

[90] E Fisher, E Scotford and E Barritt, 'The Legally Disruptive Nature of Climate Change' (2017) 80 MLR 173.

[91] E Fisher, 'Environmental Law as "Hot" Law' (2013) 25(3) Journal of Environmental Law 347.

[92] As quoted in: S de Gay, 'What Does Climate-Conscious Lawyering/Insuring/Broking Look Like and What Should It Look Like in the Future?' (Report of City of London Solicitors' Company Sustainability Dinner, 2022).

[93] Luban, 'Fiduciary Legal Ethics' (n 16), 298–99 (quoting F Cohen, 'Transcendental Nonsense and the Functional Approach' (1935) 35 Colum L Rev 809, 820).

much reflection or angst, for their important and lucrative oil and gas clients—the argument being that such oil and gas work is perfectly legal. Here, Paul Craig reminds us that formal conceptions of the rule of law do not address 'the actual content of the law itself'.[94] What should lawyers do where they feel that there is a 'lack of fit' between legal and moral rights, when legal rights 'appear unjust or otherwise morally objectionable'?[95] The challenge here, as Allan Hutchinson has argued, is that 'By depicting the Rule of Law as being only about procedural justice and not substantive justice, lawyers compound the very problem that legal ethics is supposed to resolve—it casts ethical behaviour as little more than conformity to law without any real attention paid to the worthiness of any particular law or process'.[96]

D. *The Best Interests of Each Client*

The SRA Principles also require solicitors to act in the best interests of each client. Little is said by the SRA about what this means, nor is there is much in the relevant case law to help frame this obligation. Despite this lack of guidance, it seems relatively clear that, in thinking about a client's best interests, a lawyer asked to help bring about environmental harms for the client will need and want to think about the long term as well as the short term,[97] about the scope of directors' duties in an age of Corporate Social Responsibility and Environmental Social and Governance regulation and related norms,[98] and about a client's social licence to operate.[99] As such, it is not unreasonable to argue that the obligation to act in a client's best interests—given what we know of increasing regulatory, financial and reputational risks to

[94] P Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' [1997] PL 467, 467.

[95] GJ Postema, 'Moral Responsibility in Professional Ethics' (1980) 55 NYU L Rev 63, 86.

[96] Hutchinson (n 74) 63.

[97] This general shift in thinking underpinned much of the reform in the Companies Act 2006. Consider here the risks facing clients over time from a degraded climate and poor biodiversity. On the Act, see: C Bradshaw, 'The Environmental Business Case and Unenlightened Shareholder Value' (2013) 33(1) Legal Studies 141.

[98] P Sales, 'Directors' Duties in a Post-Hayne World: "The Company" as More Than the Sum of its Shareholders' (2020) 94 ALJ 936; BJ Preston, 'The Influence of the Paris Agreement on Climate Litigation: Causation, Corporate Governance and Catalyst (Part II)' (2021) 33 JEL 227.

[99] N Gunningham, 'Environment Law, Regulation and Governance: Shifting Architectures' (2009) 21 JEL 179; S Wheeler, 'Global Production, CSR and Human Rights: The Courts of Public Opinion and the Social Licence to Operate' (2015) 19 The International Journal of Human Rights 757.

clients for environmental harms (even the legal ones)—means that lawyers should be thinking beyond 'getting the deal done' and should be engaged in active client counselling on environmental impacts.[100] We might see this as an expanded form of climate-conscious legal practice, as Kim Bouwer and Brian Preston put it[101]; where such environmental consciousness is a simply consequence of the Principle requiring action in a client's best interests (and across the medium and longer terms).

E. *The Public Interest*

> Should the Principles come into conflict, those which safeguard the wider public interest (such as the rule of law, and public confidence in a trustworthy solicitors' profession and a safe and effective market for regulated legal services) take precedence over an individual client's interests.[102]

I noted earlier how the 'public interest' can act as a tie-breaker in situations in which the SRA's Principles come into conflict. There is something potentially very powerful here. We have recent UN recognition of a human right to a healthy environment,[103] following similar constitutional practices in many nation states[104]; and we know what awful impacts environmental harms do and can have on society and multiple forms of 'the public'. We also recognise 'the environment' as a relevant and important stakeholder in lots of different ways: section 172 of the Companies Act 2006; giving standing to environmental NGOs[105]; the

[100] This is resonant with Stephen Pepper's ideas about lawyers engaging in 'moral dialogues': SL Pepper, 'The Lawyer's Amoral Ethical Role: A Defense, A Problem and Some Possibilities' (1986) 11 American Bar Foundation Research Journal 613. There is a wide and deep literature on 'business and human rights' that (often) includes environmental matters. See, as a starting point: JG Ruggie, *Just Business: Multinational Corporations and Human Rights* (WW Norton & Company 2013).

[101] K Bouwer, 'The Unsexy Future of Climate Change Litigation' (2018) 30 JEL 483; BJ Preston, 'Climate Conscious Lawyering' (2021) 95 ALJ 51.

[102] SRA, Principles (n 53) Introduction.

[103] 'In Historic Move, UN Declares Healthy Environment a Human Right' (*UN Environment Programme*, 28 July 2022) <https://www.unep.org/news-and-stories/story/historic-move-un-declares-healthy-environment-human-right> accessed 19 March 2023.

[104] DR.Boyd, 'The Constitutional Right to a Healthy Environment' (2012) 54 Environment: Science and Policy for Sustainable Development 3.

[105] See, for example, L Vanhala, 'Shaping the Structure of Legal Opportunities: Environmental NGOs Bringing International Environmental Protection Rights Back Home' (2018) 40 Law and Policy 110.

granting of legal personality to parts of the environment, etc.[106] As such, when will it be in 'the public interest' for lawyers to bring about environmental harms on behalf of their clients?

There are two significant challenges, however, with this line of thinking. The first is that 'the public interest' *only* gets engaged in regulatory terms when the Principles come into conflict; and it is unclear when, how or how frequently that would happen with perfectly legal environmental harms where the solicitor was not doing any form of tactical lawyering. Perhaps on occasion, but infrequently, would be my guess. The second problem is what Maria Lee has called the 'uncertain and contested nature of public interests' and what we should or might do when environmental protection rubs up against things like the economy or defence or food or health provision.[107] If we add in temporal challenges—what 'the public interest' means now or for different futures[108]—and geographical challenges—which publics?; whose interests?[109]—this makes scoping out 'the public interest' when it comes to environmental harms particularly challenging.

Let me recap about lawyers' ethics written down. While the Principles are useful when it comes to tempering and seeking to prevent tactical lawyering (what I have labelled the easy ethically problematic cases of environmental harms) the most they likely require is counselling when it comes to the perfectly legal, properly lawyered environmental harm-causing matters. If counselling is given by a solicitor— 'We don't think you should engage in this new oil and gas licensing round for the environmental harms that will be caused'—but ignored, what then? For that question, we need to engage in lawyers' ethics.

4. *Theories of Lawyers' Ethics*

The SRA's Principles we have just considered are not maximums. They are, instead, a *baseline* of the ethicality required by the law—the SRA's rules providing minimal standards of acceptable conduct; bounding

[106] For example: A Argyrou and H Hummels, 'Legal Personality and Economic Livelihood of the Whanganui River: A Call for Community Entrepreneurship' (2019) 44 Water International 752.

[107] M Lee, 'The Public Interest in Private Nuisance: Collectives and Communities in Tort' (2015) 74 CLJ 329.

[108] On time as a challenge in environmental matters, see: E Stokes, 'Wanted: Professors of Foresight in Environmental Law!' (2019) 31 JEL 175.

[109] M Feintuck, *'The Public Interest' in Regulation* (OUP 2004).

off behaviour which is clearly unacceptable.[110] Given this, we can use and explore theories of lawyers' ethics both as what might be required or needed beyond the SRA baseline and/or to challenge deficiencies in the SRA's approach.[111] We might also want to say that, whatever the content of the rules, we have general views linked to notions of professionalism and the special role of the lawyer in society by which we can assess whether conduct is ethical or not. Christine Parker argues that while professional rules can be helpful in guiding behaviour, they do not (or do not sufficiently) 'provide a basis for considering what values should motivate lawyer behaviour and choices about what kind of lawyer to be'.[112] As the Solicitors Disciplinary Tribunal said in the case of *Simms*,[113] a solicitor, 'must and should on occasion be prepared to say to his client, "What you seek to do may be legal but I am not prepared to help you do it"'.[114]

A. *The Standard Conception*

The competing approaches to lawyers' ethics are generally mutually exclusive attempts by academics to think about the position of lawyers in society and to create and substantiate frameworks that tell us how lawyers should act.[115] I focus in this paper on what is often called the Standard Conception. This approach to legal ethics argues that lawyers should do all that is permissible for their clients within the bounds of the law and has lawyers acting as adversarial or zealous advocates. At the core of the Standard Conception is a mutually constituting value trinity: (i) neutrality (it is not for the lawyer to be the judge of their client); (ii) partisanship (the lawyer should do all that they can to advance their client's objectives); and (iii) what Wendel calls the 'magic shield or force field' of non-accountability (the lawyer is not responsible for the

[110] Practising lawyers tend to forget this. See: R Moorhead, C Denvir, M Sefton and N Balmer, 'The Ethical Capacities of New Advocates' (UCL Centre for Ethics & Law, 5 December 2015).

[111] What could be done better—and what the SRA has done in some other contexts—is to provide toolkits or other forms of guidance which flesh out the context of the Principles in particular contexts.

[112] Parker (n 49) 49–74, 53.

[113] And as the SRA emphasises in its guidance.

[114] *In the Matter of Paul Francis Simms* (Solicitors Disciplinary Tribunal, 2 February 2004) para 76.

[115] On the mutual exclusivity of the approaches, see Woolley, 'To What Should Lawyers Be Faithful?' (n 50).

client's decisions).[116] The Standard Conception is, as the name suggests, the dominant form of legal ethics, both among scholars and among practising lawyers (including among environmental lawyers).[117] This is perhaps no surprise given the Standard Conception is so helpful to practitioners: 'by adopting a professional persona of hands-off neutrality, the profession manages to prioritise the values and interest of the status quo…[and] to serve its own self-interest under the enabling cover of professional honour and expertise'.[118]

Some scholars who support the Standard Conception approach argue that we live in a pluralistic society based on competing notions of the public good, that the institutions of law are designed to mediate between these diverse ranges of views, and that it is not for lawyers to determine 'what we will do as a community, what rights we will allocate and to whom'.[119] Others base their arguments instead on the lawyer as a technical mechanic who should respect the autonomy of their client,[120] or on the idea of the 'civil obedience' of a lawyer who obeys the law even when it conflicts with her own morals.[121] A common thread in these academic accounts is that the moral justification and responsibility for action by a lawyer on a client's behalf lies at the institutional level, rather than the individual or personal level.[122]

Putting this into the context of environmental harms, a broad Standard Conception argument would go like this: 'Regardless of how I personally feel about my client's plan to harm the environment, we live in a world with complex and competing views on natural resources, health, poverty, the economy and so on. And laws have been democratically made which set out what my client can and cannot do. It's not my job to judge my client for seeking to do things that are legal. Clients get to decide what they want to do, and they need me, as a lawyer, to help

[116] WB Wendel, *Canceling Lawyers: Case Studies of Accountability, Toleration, and Regret* (OUP 2023) 5. See further: R Wasserstrom, 'Lawyers as Professionals: Some Moral Issues' (1975) 5 Human Rights 1.

[117] JM Wakefield, 'Attitudes, Ideals, and the Practice of Environmental Law' (1991) 10 UCLA J Envtl L & Pol'y 169, 197.

[118] A Hutcinhson, 'Race Matters: White Dispatches from the Professional Front' in J Webb (ed), *Leading Works in Legal Ethics* (Routledge 2023) 196.

[119] T Dare, 'Mere-Zeal, Hyper-Zeal and the Ethical Obligations of Lawyers' (2004) 7 Legal Ethics 24.

[120] A Woolley, 'The Lawyer as Advisor and the Practice of the Rule of Law' (2014) 47 UBC L Rev 743; Pepper, 'The Lawyer's Amoral Ethical Role' (n 100).

[121] WB Wendel, 'Civil Obedience' (2004) 104 Colum L Rev 363.

[122] A Woolley and WB Wendel, 'Legal Ethics and Moral Character' (2010) 23 Geo J Legal Ethics 1065.

them do what they want to do, even if the environmental harms that arise are really significant'.

I find the Standard Conception a bitter pill to swallow. Reid Mortensen argues, and I would agree, that the approach downplays the moral quality of the Standard Conception value trinity (neutrality, non-accountability and partisanship), and so 'neutrality' is not really neutral. Instead, 'neutrality' is saying that 'there is a moral value in having procedures embedded in law that allow individuals to pursue different moral plans'.[123] Tim Dare, a Standard Conception proponent, would seem to accept this as well when he writes that:

> These institutions and practices cannot guarantee outcomes that will suit all reasonable views: often there will be no such universally accepted outcomes. The hope of liberalism, however, is that even those whose substantive preferences do not win the day on this or that occasion will have cause to accept the decisions of these institutions as fair and just.[124]

As a second challenge to the Standard Conception, and as I have argued with Trevor Clark, Richard Moorhead and Alan Brener elsewhere,[125] if the basis for neutrality is respect for the individual as an autonomous moral person,[126] it is harder to see how that applies where the client is a company, a legal fiction without human dignity. Equally, and following David Luban, accepting respect for autonomy generally does not necessarily mean accepting respect for any particular exercise of autonomy.[127]

Third, what the Standard Conception also does, and does problematically, is to offer up a particular form of justice—small justice, as Rob Atkinson puts it[128]—as the best we can hope for or expect. The best we can hope for or expect because we live in this world of 'radical normative disagreement',[129] a world in which it is not for the lawyer to seek to impose and preference their own views over the products of a democratically elected parliament. As such, a Standard Conception lawyer might

[123] R Mortensen, 'Lawyer Regained' in J Webb (ed), *Leading Works in Legal Ethics* (Routledge 2023) 55. Not all proponents of the Standard Conception downplay the moral quality of this approach but see the suppression of one's own moral opinions (etc) as a moral act in itself. I'm grateful to Vivien Holmes for this reminder.

[124] T Dare, 'Virtue Ethics and Legal Ethics' (1998) 28 Victoria U Wellington L Rev 141, 148–49.

[125] T Clark and others, 'Agency Over Technocracy: How Lawyer Archetypes Infect Regulatory Approaches: the FCA Example' (2021) 24 Legal Ethics 91.

[126] An argument advanced by Woolley in 'Lawyer as Fiduciary' (n 16).

[127] On which, see generally: D Luban, *Legal Ethics and Human Dignity* (CUP 2009).

[128] R Atkinson, 'The Neo Orthodox Neutral Partisanship Trinity' in J Webb (ed), *Leading Works in Legal Ethics* (Routledge 2023) 103.

[129] ibid.

say: 'The law allows us to seriously damage the environment potentially beyond repair; it is what it is'. There is something unpleasant and unpersuasive about this defeatist approach,[130] not least because the small form of justice that the Standard Conception preferences and prioritises is not the form of justice needed for significant action to be taken on environmental harms.[131] Dare writes of the institutions of law mediating between 'a plurality of reasonable views', plausibility and reasonableness being central to the acceptability of his support for Standard Conception lawyering.[132] But what about laws that permit significant environmental harms that we do not think are reasonable? Or where, despite their legal entitlements, clients do not have good moral reasons (good plausibility) for the environmental harms they wish to bring about?[133]

Fourth, for the Standard Conception lawyer, being faithful to the law and working out exactly what the 'law' is, or the 'legal entitlements' of any given client, may be challenging in situations in which the law is unclear,[134] or in which there are competing interpretations of the law.[135] As set out above, this challenge may be particularly acute for Standard Conception lawyers who are advising on or whose work is shaped by environmental law which is often open-textured, less amenable to legal certainty and (sometimes) constitutionally complex.[136] Stephen Pepper would likely counter by arguing that 'questions of interpretation and application [are] the normal grist for the lawyer's mill'.[137] While this may (to varying degrees) be true, such an approach opens up grey areas for debate in which Standard Conception lawyers could, and many would, push uncertainty in the law towards their client's goals and away from environmentally harm-reducing outcomes.

[130] What I am not doing here, quite intentionally, is offering up a particular form of justice that I think is preferable. This will follow in later work.

[131] See, for example: L Benjamin and SL Seck, 'Mapping Human Rights-Based Climate Litigation in Canada' (2022) 13 Journal of Human Rights and the Environment 178; E Donger, 'Children and Youth in Strategic Climate Litigation: Advancing Rights Through Legal Argument and Legal Mobilization' (2022) 11 TEL 263.

[132] Dare, 'Mere-Zeal' (n 119) 25.

[133] See the discussion in Wendel, 'Problem of the Faithless Principal' (n 16) 126ff.

[134] Using Dare's language. Dare, 'Mere-Zeal' (n 124) 30ff.

[135] Hard adherents to the Standard Conception might reply to say that, where the law is unclear, taking advantage of that uncertainty in their client's interests is a simple requirement of partisanship. Some of those hard adherents might also accept limits to that exploitation of uncertainty; such as Dare's 'merely zealous' lawyer.

[136] On the latter, see: NS Ghaleigh, 'Climate Constitutionalism of the UK Supreme Court' (2021) 33(2) JEL 441; and A McHarg, 'Climate Change Constitutionalism? Lessons from the United Kingdom' (2011) 2(4) Climate Law 469.

[137] SL Pepper, 'Three Dichotomies in Lawyers' Ethics (With Particular Attention to the Corporation as a Client)' (2015) 28 Geo J Legal Ethics 1069, 1100.

Fifth, there is what Iris van Domselaar and Ruth de Bock label the 'argument of domination' as a challenge to the Standard Conception. This critique argues that proponents, 'show little interest in and sensitivity to the empirical conditions that obtain in a concrete legal system and to the concrete features of the parties involved'.[138] What the Standard Conception does is, as Sung Hui Kim frames it, to both entrench and amplifying unequal power, 'potentially undermining the autonomy and equal dignity of individuals'.[139] Here, Rick Abel has powerfully argued that a legal system could not be just unless it not only provided legal services to the unrepresented but also denied them to those who sought to amplify unequal power and privilege.[140]

Sixth, and as Parker reminds us, 'Historically, the adversarial advocate approach was essentially liberal, motivating lawyers to pursue client interests primarily against the power of the state'.[141] Over time, this has moved to the lawyer representing private clients against other private interests and in other (non-state) contexts. Much of the work in favour of the Standard Conception is based in the need for, and role of, zealous lawyering in the criminal law context. There, an individual is facing off against the resources of the state, with particularly significant consequences where rigorous defence by the accused's lawyer is not offered.[142] In the criminal context, it may also be especially important for a lawyer not to be associated with the taint of unpopular clients.[143] As such, the Standard Conception performs a useful social role in maintaining 'the integrity of the criminal justice system as well as protecting a defendant's private interests'.[144] However, the position may be different in much environmental adjudication in which disputes are often about the need for *collective* action, for the wants and needs of the many to sometimes

[138] I van Domselaar and R De Bock, 'The Case of David vs. Goliath. On Legal Ethics and Corporate Lawyering in Large Scale Civil Liability Cases' (2023) Legal Ethics (forthcoming).

[139] SH Kim, 'Economic Inequality, Access to Law, and Mandatory Arbitration Agreements: A Comment on the Standard Conception of the Lawyer's Role' (2019) 88 Fordham L Rev 1665, 1682.

[140] RL Abel, 'Socializing the Legal Profession: Can Redistributing Lawyers' Services Achieve Social Justice?' (1979) 1 Law & Policy 5.

[141] Parker (n 49) 57.

[142] A Boon and J Levin, *The Ethics and Conduct of Lawyers in England and Wales* (Bloomsbury 2008).

[143] Generally here, see: A Smith, 'Defending Defending: The Case for Unmitigated Zeal on Behalf of People Who Do Terrible Things' (1999) 28 Hofstra L Rev 925. Some corporate clients (such as the carbon majors) may be unpopular in different senses to, say, alleged murderers and rapists. But the unpopularity remains.

[144] J Loughrey, *Corporate Lawyers and Corporate Governance* (CUP 2011) 63.

outweigh the wants and needs of the individual[145]; and where 'big law' and the government are likely to have better resources than the individuals and NGOs bringing environmental claims. This ignores, of course, the important point that most of the legal work that leads to environmental harms takes place away from courtrooms and often happens in private—in the giving of legal advice, in financing client action, in mergers and acquisitions, etc.[146] In those situations, 'excessive partisanship is not checked by the machinations of the adversarial system'.[147] Such might in fact strongly suggest *less* of a role for the Standard Conception's zealous advocate.[148] As I have argued elsewhere, 'The institutional checks which limit adversarial zeal in courts do not regularly exist in the transactional context; here there is no neutral umpire to scrutinise the claims made by lawyers on behalf of their clients'.[149] Related to this, Emma Oakley and I would argue that the supposed public interest of zealous lawyering (that brings about environmental harms) in corporate and finance contexts to shore up the integrity of the legal system is less self-evident.[150] In corporate and financial work, the value trinity of the Standard Conception makes the zealous corporate-finance advocate into a partisan, amoral technician[151]: a qualitatively different relationship with qualitatively different consequences than in the criminal context.

Even if some Standard Conception proponents accept that the criminal context is different from the environmental (and the litigious from the transactional),[152] they would, it seems, still argue (as Wendel does) that, 'it is an aspect of the principal-agent structure of the client-lawyer relationship that the moral judgment calls are for the client to make'.[153]

[145] Putting this another way, van Domselaar and de Bock write of how the 'protection of the autonomy of the defendant, i.e. the corporation, may well come at the expense of the (capacity for) autonomy of large groups of citizens'. See: van Domselaar and de Bock (n 138) 32.

[146] See a wider discussion in Wakefield (n 120); and D Nicolson and J Webb, *Professional Legal Ethics: Critical Interrogations* (OUP 1999) 166.

[147] Salyzyn and Simons (n 44) 23.

[148] See: V Holmes and S Rice, 'Our Common Future: The Imperative for Contextual Ethics in a Connected World' in R Mortensen, F Bartlett and K Tranter (eds), *Alternative Perspectives on Lawyers and Legal Ethics: Reimagining the Profession* (Routledge 2011).

[149] Clark and others, 'Agency Over Technocracy' (n 125).

[150] As would Moorhead and Kershaw: D Kershaw and R Moorhead, 'Consequential Responsibility for Client Wrongs: Lehman Brothers and the Regulation of the Legal Profession' (2013) 76 MLR 26.

[151] Wasserstrom (n 116).

[152] Some criminal cases are, naturally, about environmental issues or derive from environmental law.

[153] Wendel, 'Community, Goodness and Solidarity in Legal Ethics' (n 21).

This brings us back, full circle, to the idea of lawyers advising on and working within the law as properly enacted. If something is really so bad, the argument would go, then why is there not a law against it? The risk, according to Birgit Spiesshofer, is that, 'the lawyers would be replacing the legislator and/or the courts as the ultimate body that decides in a democratic society what is acceptable and where to draw the line in case of competing rights and interests'.[154] Pepper similarly suggests that 'Lawyers cannot magically socialize the economy or legal services'.[155] These arguments have some weight, in that they usefully ask us to reflect on the role of lawyers in society and on the content as well as the procedural validity of law.[156] However, as well as being servants of their clients, lawyers also have agency to bring about, to not bring about, or to mediate environmental harms; the notion that lawyers are members of a democracy while also acting in relation to it.[157] This agency of lawyers, often unhelpfully ignored by Standard Conception theorists, is of course constrained—in practice shaped and limited by the rules, contexts, cultures and logics of the fields in which lawyers work,[158] by the associated (individual and group-level) capacity of those lawyers to act on that agency and by the character of individual lawyers.[159] However, we read and hear far too much about lawyers as amoral technician facilitators of their clients' objectives versus lawyers as *active* designers and structuring forces, creating, innovating and *influencing* client decision-making.[160] Gordon reminds us that, 'lawyers do more than encode the social bargains; they themselves contribute to producing the social meanings of

[154] Spiesshofer (n 18) 83.

[155] Pepper, 'The Lawyer's Amoral Ethical Role' (n 100) 619.

[156] Admittedly, and as Vivien Holmes pointed out to me, these arguments have some weight only in a liberal democratic system where the institutions of the rule of law mediate between competing moral claims. Many large law firms work for clients who commit environmental harms in jurisdictions where there is no such system, and so the Standard Conception 'shield' falls away. On this, see: Arjona 'The Usage of What Country' (n 25).

[157] Richard Moorhead kindly reminded me of Brint's work which suggests that professionalism is being increasingly seen as technocratic: S Brint, *In an Age of Experts: The Changing Role of Professionals in Politics and Public Life* (Princeton UP 1996).

[158] D De Cremer and W Vandekerckhove, 'Managing Unethical Behavior in Organizations: The Need for a Behavioral Business Ethics Approach' (2017) 23 Journal of Management & Organization 437; R Moorhead, S Vaughan and C Godinho, *In-house Lawyers' Ethics: Institutional Logics, Legal Risk and the Tournament of Influence* (Bloomsbury Publishing 2018).

[159] R Moorhead and others, 'Designing Ethics Indicators for Legal Services Provision', UCL Centre for Ethics and Law, Working Paper No. 1 (2012).

[160] On the 'amoral technician', see: Wasserstrom (n 116).

law'.[161] As such, while, in Wendel's terms, the 'moral judgment call' is for the client to make, this does not necessarily deny the role of lawyer (exercising their agency) in actively speaking to and seeking to shape that call: in having lawyers develop and deploy moral *qualities* (if having those lawyers take moral *positions* seems too unpalatable).[162]

5. *The Ordinary Morality of Client and Matter Onboarding*

When a lawyer says 'What I am doing for my client is perfectly legal, including the associated environmental harms' we will want to think about their actions in relation to professional ethics rules and lawyers' ethics more generally. But a related and important question is: 'Why did you take that client's mandate on in the first place?' Here, I am unconvinced that lawyers' ethics (either written down in the SRA's professional conduct rules or more generally in the competing philosophical approaches) actually has very much to do with the question of whether or not to act on an environmentally harmful matter for any given client.[163] Law firms and their solicitors will ask themselves 'Should we take on this client and their matter?' by reference to the law (is what the client seeking to do and/or asking of their lawyers legal?), by reference to some of their legal professional obligations (are there any conflicts of interest?), by reference to more general values (does this matter or client fit with how they see themselves as a firm?) and by reference to questions of capacity, expertise and profit. Such decisions are, at heart, business decisions with (some) moral components.

Client onboarding, as well as client deselection, has been a matter of some debate among legal ethicists. In a recent piece, Wendel writes, 'Perhaps surprisingly [as a Standard Conception theorist], I believe

[161] RW Gordon, 'Corporate Law Practice as a Public Calling' (1990) 49 Md L Rev 255, 259, 265. See further this work that shows how lawyers sometimes *lead* on creative compliance approaches rather than being pushed into them: C Parker and others, 'The Two Faces of Lawyers: Professional Ethics and Business Compliance with Regulation' (2009) 22 Geo J Legal Ethics 201.

[162] Mortensen (n 123). Wendel, in his work on lawyers as fiduciaries, accepts (at least on one level) this argument: 'an agent has the freedom to make decisions about how to act, coupled with the power to change the normative situation of the principal'. Wendel, 'Problem of the Faithless Principal' (n 16) 115.

[163] The SRA's Principles also apply to client onboarding decisions, such that (for example) a decision to not take a Black client on because of the racist views of the approached solicitor would be problematic. A complaint about a refusal of service can also be made, if 'unreasonable', to the Legal Ombudsman (LEO), but the relevant rules would not include the clients of large law firms as complainants. I'm grateful to Sarah de Gay for raising this LEO point with me.

many lawyer-shaming campaigns are ethically defensible, and lawyers may be subject to moral criticism for the clients they choose to represent',[164] although he also says that refusal to act should be an 'exceptional event'.[165] Monroe Freedman, another Standard Conception proponent, says lawyers have a personal moral responsibility for their decision to represent a client,[166] and (like Pepper) suggests that the Standard Conception approach allows for the exercise of moral judgement by lawyers as it permits the lawyer to reject or withdraw from acting for the client.[167] David Wilkins argues that both refusing and agreeing to act for clients carries 'moral significance'.[168] This is something accepted by at least some lawyers in the largest and most prestigious of law firms. In 2020, the Clifford Chance Global Senior Partner Jeroen Ouwehand spoke at the Green Horizon Summit: 'We can choose what we support, and what we don't support. We do not have to be neutral professional service providers. We must use the power of the law to deliver a sustainable future'.[169]

In response to the 'Why did you take on this client's mandate in the first place?' question, there is something that lawyers who work in large law firms frequently say: 'Everyone deserves legal advice'. I find this response problematic for three reasons. The first is that it is very much the active choice of a large law firm whether to decide to act for a corporate client who wants to harm the environment. Few clients of these large firms are taken on because of financial *necessity* (despite focus on 'profits per equity partner') or, I suspect, strong moral drivers. Equally, the reasons that law firms have for choosing environment-harming clients may be varied, including variation between what is offered up in public as the reasons for those choices and what is discussed or believed in private. Deborah Rhode has suggested that lawyers have the 'ability

[164] Wendel, 'Community, Goodness and Solidarity in Legal Ethics' (n 21) 182.

[165] Luban and Wendel, 'Philosophical Legal Ethics' (n 8) 353.

[166] MH Freedman, *Understanding Lawyers' Ethics* (M. Bender 1990) 49–50.

[167] See MH Freedman, 'Personal Responsibility in a Professional System' (1978) 27 Catholic Univ L Rev 191; Pepper, 'The Lawyer's Amoral Ethical Role' (n 100) 630–32. See further: MH Freedman and A Smith, *Understanding Lawyers' Ethics* (4th edn, LexisNexis 2010) 69–72.

[168] DB Wilkins, 'Race, Ethics, and the First Amendment: Should a Black Lawyer Represent the Ku Klux Klan' (1994) 63 Geo Wash L Rev 1030, 1040.

[169] 'Global Senior Partner Jeroen Ouwehand speaks about tackling climate change at Green Horizon Summit' (*Clifford Chance*, 13 November 2020) <https://www.cliffordchance.com/insights/resources/blogs/responsible-business-insights/2020/11/jeroen-ouwehand-speaks-about-tackling-climate-change-at-green-horizon-summit.html> accessed 19 March 2023.

to repackage occupational interests as societal imperatives',[170] with Ted Schneyer commenting that many client-regarding behaviours are often the result of the 'financial, psychological and organisational pressures of law practice… [rather than] the rules of legal ethics'.[171] This leads me to wonder whether, or how often, we see the vice of environmental harms and associated law firm profits dressed up by lawyers in large firms as the professional virtue of providing neutral legal advice?[172] Is zealous, client-first lawyering in fact just a 'convenient trope for disguised self-interest'?[173] One practical way of perhaps exploring this commitment to access to justice would be to count up how many hours of legal pro bono advice large law firms give, expressed as a percentage of that firm's billable hours. Work from an earlier project would suggest that that percentage would be very low indeed.[174] My general concern here is that the line 'Everyone deserves legal advice' is one that has become conveniently justified within the field of large law firm lawyering and in individual firms without much thought as to what those words mean, or on under what conditions that starting premise is or could be acceptable.[175]

The second problematic aspect to the line that 'Everyone deserves legal advice' is that it likely presupposes a legal system in which there is some form of equality of arms. As we know, access to justice often depends on resources: 'Clients who can afford to pay for [legal services] can rapidly exhaust adversaries who cannot; and thus turn the legal system into a device for evading the very rules it is designed to enforce or, worse, into a medium for extortion and oppression of the weak by the strong'.[176] Economic strength can have a destabilising effect on the integrity of the justice system,[177] and we see this made tangible in lawyers engaging in

[170] DL Rhode, *In the Interests of Justice: Reforming the Legal Profession* (OUP 2003).

[171] T Schneyer, 'Moral Philosophy's Standard Misconception of Legal Ethics' [1984] Wis L Rev 1529, 1543.

[172] Much in the way that Brooke Harrington suggests that: 'practitioners create institutional change by altering the way they see themselves and their work, transforming the "vice" of tax avoidance into the professional "virtues" of public service and expert neutrality'. See: B Harrington, 'Turning Vice into Virtue: Institutional Work and Professional Misconduct' (2019) 72 Human Relations 1464.

[173] R Moorhead and R Cahill-O'Callaghan, 'False Friends? Testing Commercial Lawyers on the Claim that Zealous Advocacy Is Founded in Benevolence Towards Clients Rather Than Lawyers' Personal Interest' (2016) 19 Legal Ethics 30, 47.

[174] S Vaughan, L Thomas and A Young, 'Symbolism Over Substance? Large Law Firms and Corporate Social Responsibility' (2015) 18 Legal Ethics 138.

[175] Smets and others (n 12).

[176] Gordon, 'Corporate Law Practice as a Public Calling' (n 161) 259.

[177] On which, see Parker (n 49).

environmental lawfare (including in the examples discussed above).[178] The rule of law does not guarantee the right to any particular lawyer or any particular law firm (or, arguably, to a lawyer at all in civil cases),[179] and there is nothing to suggest that a firm's refusal to take on any given client or mandate is a particular matter of rule of law significance.[180]

The third thing I find problematic is that the lawyers who say 'Everyone deserves legal advice' are often also deeply hypocritical. The line 'Everyone deserves legal advice' would be more palatable if lawyers actually acted on it. But they do not. In one project, the corporate-finance lawyers that Emma Oakley and I interviewed repeatedly told us that it was not their job to judge what their clients did; that they were simply neutral providers of advice; and that the client took the decisions on how to act. What was interesting, however, was that several interviewees, despite acting very happily for certain companies or industries (which others might have moral concerns about), still had their own very personal, highly individualised, moral redlines. We decided to call these personal redlines 'gorilla exceptions', for reasons which will become obvious in a moment. Though I now think we should have called this Meatloaf Lawyering, in that many of the lawyers we interviewed were saying, 'I'll do anything for my clients, but I won't do that'.

Let me offer three examples. One finance partner we interviewed was absolutely clear that his job was not to judge the actions of his clients, that his clients could engage in whatever business they chose within the limits of the law and that he would, for example, happily do tobacco defence work. But he went on to say this[181]:

> In spite of everything that I have said so far, I do have a very strong view about environmental protection and animals in particular... If somebody came to me and said, 'We've got this amazing mandate to build a something on the mountains of DRC that currently are home to 500 gorillas', I might struggle a bit with that.

[178] On which, see: A-M Marshall and SM Sterett, 'Legal Mobilization and Climate Change: The Role of Law in Wicked Problems' (2019) 9 Oñati Socio-legal Series 267; van Domselaar and de Bock (n 138).

[179] Note that Article 6(3)(c) of the European Convention on Human Rights, incorporated into the Human Rights Act 1998, says that everyone charged with a criminal offence has the right, 'to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require'. The same right does not apply in civil cases. See: ECHR Registry, *Guide on Article 6 of the European Convention on Human Rights: Right to a Fair Trial (Civil Limb*) (31 August 2022).

[180] See the discussion in Wendel, 'Community, Goodness and Solidarity in Legal Ethics' (n 21) 191ff.

[181] Vaughan and Oakley, 'Gorilla Exceptions' (n 2) 66.

A different corporate partner had said to us that he did, 'not care if his clients' solar panels were made using slave labour', but went on to say that he could not do any work for gambling companies.[182] In my own professional life, I was content enough to act for oil and gas companies and arms manufacturers, but left my first law firm in part because I was unwilling to do tobacco litigation defence work. These examples resonate with more current trends. Think of how, in early 2022, so many London law firms began one week by saying 'Everyone deserves legal advice and we will continue to act for our Russian clients' and then had dropped those same clients by the end of the following week. What these less and more contemporaneous examples suggest is that the commitment of certain lawyers to respect for the law as a neutral field in which clients operate and deserve legal advice may be somewhat constrained. What we see in Meatloaf Lawyering, and what I think we will see more and more of when it comes to environmental harms, are what we might broadly call 'own-interest' or positional conflicts; some kind of conscientious objection by a lawyer or a firm to a particular client or particular matter.[183] Wendel argues that lawyers only have a conscientious objection where they have 'such a fundamental moral disagreement that it essentially rises to the level of a conflict of interest'.[184] Some lawyers asked to effect environmental harms for their clients may now be in that space, especially in the context of climate-harming work for the carbon majors.[185]

6. *Conclusion*

In the things they do for their clients—advising on the law, buying and selling companies, raising finance, meaning-making (in contract, via lobbying, through arguments in court etc), resolving disputes and so on—lawyers are repeat players, yet often overlooked, in the stories of (legally permitted) environmental harms. Such (legal) environmental harm-causing work may be more or less ethically problematic. For those who loophole, bully, cheat and/or take unfair advantage of others, the associated rules of professional conduct place boundaries on permissible

[182] ibid 67.

[183] On which, see: FC Zacharias, 'The Lawyer as Conscientious Objector' (2001) 54 Rutgers L Rev 191; RM Palumbos, 'Within Each Lawyer's Conscience a Touchstone: Law, Morality, and Attorney Civil Disobedience' (2004) 153 U Pa L Rev 1057.

[184] Wendel, *Lawyers and Fidelity to Law* (n 88) 125.

[185] See: L Benjamin, 'The Responsibilities of Carbon Major Companies: Are They (and Is the Law) Doing Enough?' (2016) 5 TEL 353.

tactics. In other situations, where lawyers do not deploy these sorts of tactics, I have argued that professional rules, in the form of the SRA's Principles, require active counselling by solicitors with their clients on the environmental harms that their clients wish to engender. This active counselling is about giving life to the regulatory requirements to act with integrity, independence and in a client's best interests. There may also be times when the public interest, acting as a tie-break in the SRA's Principles, will require solicitors to step back from environmental harm-causing work for their clients, although under what conditions this rule will bite in this way is unhelpfully unclear.

When it comes to the theories of lawyers' ethics, the Standard Conception, as the name suggests, is the dominant approach, both among legal ethicists and (because it is so useful as a rationalisation for potentially problematic action) among practising lawyers. In this paper, I have challenged the supposed neutrality of the Standard Conception, set out how its preference for a 'thin' rule of law approach to legal certainty is problematic given the nature of environmental law, questioned its foundations (in the criminal law context) and how well they map onto environmental issues, and suggested that the small form of justice that the Standard Conception preferences and prioritises is not the form of justice needed for the urgent work necessary on climate and other environmental harms.[186] In his recent book, Wendel writes that lawyers are accountable to others for the clients they represent. What he means by this is not that they are wrongdoers for so acting, but that, 'lawyers must give an account for themselves, that is, offer a justification in terms that others can accept'.[187] When it comes to lawyers who act for clients who seek to (legally) harm the environment, the much-repeated accountability line that 'Everyone deserves legal advice' is problematic. It ignores the fact that solicitors' decisions to act for any given client are commercial decisions, and not ones of legal ethics. It presupposes a legal system in which there is some form of equality of arms, when there is not. It also assumes that solicitors act consistently about client and matter onboarding, when they instead sometimes engage in Meatloaf Lawyering. That much-repeated line may simply be a story that lawyers tell themselves to rationalise their conduct.[188] And so the accounts

[186] There is important work to be done on this issue. As a starting point, see: D Bell, 'Environmental Justice and Rawls' Difference Principle' (2004) 26 Environmental Ethics 287.

[187] Wendel, *Canceling Lawyers* (n 116) 8.

[188] On which, see: K Hall and V Holmes, 'The Power of Rationalisation to Influence Lawyers' Decisions to Act Unethically' (2008) 11 Legal Ethics 137.

given for why lawyers (especially those in large firms) act for clients who want to significantly harm the environment are seriously lacking. Here, it seems evident to me that lawyers acting for the carbon majors on significant climate projects (new fossil fuel plants, new oil and gas licensing rounds etc) will need to give *particular* account of why they are so acting, given the special and existential nature of the threat of climate change. As such, lawyers should face head into, and not shy away from, the moral judgements of the effects of their work.

I wrote earlier that I was not interested in the various forces and factors that made lawyers act in the way that they act. But having set out my stall—my claim that professional conduct rules require lawyering that seeks to counsel on and reduce environmental harms, and that solicitors may legitimately decide to not act (and in some situations must not act) for certain clients—it would be naïve not to recognise explicitly the challenge in operationalising this version of professional ethicality. What is needed next is some work on putting this theory into practice. Lawyers might, for example, say to their clients 'We think you shouldn't do [X] because it is very risky, not least because of these relevant and significant environmental, social, and governance concerns and drivers'. Or they might say 'We think doing [X] is environmentally unsound, ethically reprehensible, and that you would be an awful person/entity if you did it'. One strategy might have better practical traction than the other.

Finally, if you are a lawyer and find yourself on a blind date, let us hope that you can marshal a sufficient account of your professional choices that the good-looking and environmentally conscious individual on the other side of the table concludes that you are on the whale-saving side of the profession. That is probably a better outcome for your evening, and also for the planet.