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Role morality in action? An empirical exploration of the professional ethics of practising environmental lawyers

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ABSTRACT

This article examines the professional ethics of environmental lawyers. Drawing on a survey of 126 and 39 interviews, we find that when it comes to attitudes towards legality in general and legality in hierarchical professional contexts, environmental lawyers seem to share the attitudes of other lawyers, as described by previous research. However, environmental lawyers otherwise demonstrated an approach to ethical choices that was remarkable in two ways. First, a notably high proportion expressed a willingness to exploit legal uncertainty for the benefit of clients, even where doing so would override countervailing ethical considerations. Second, while respondents spoke to environmental commitments in their personal lives – in choosing their career, in choices regarding consumption and private lifestyle – environmental considerations were muted in explanations of legal-ethical choices, even where these choices had evident downstream environmental impacts. We suggest that environmental lawyers may demonstrate here the 'role morality' (a potential disjunct between private and professional moralities) that scholars have found at play in other parts of the profession. We also reflect on whether these lawyers' pervasive exposure to legal uncertainty in the polycentric context of environmental law, combined with a misconceived (legally incorrect) client-primacy approach to lawyering, may account for their distinctive approach.

KEYWORDS

Environmental law; lawyers' ethics; role morality; legal uncertainty

1. Introduction

This paper offers insights both into the 'doing' of environmental law – into those lawyers who help create and make material environmental law – and to lawyers' ethics. It does so, a first in England & Wales,[1] drawing on a survey of 126 environmental law solicitors and barristers (working in the private, public, and third sectors) and 39 follow-on interviews. Practising environmental lawyers do things for their clients that have serious

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[1]See this 1991 survey of 73 environmental lawyers practising in the US: JM Wakefield, 'Attitudes, Ideals, and the Practice of Environmental Law' (1991) 10 *UCLA Journal of Environmental Law & Policy* 169.

environmental (and social) consequences;[2] their work and worlds are often hidden (not least because of client confidentiality and legal privilege);[3] and increasingly there are questions about the roles of environmental lawyers and the legal harms they bring about (including about the extent to which they are engaging in greenwashing).[4] At the same time, many law firms are looking to advance their ESG (environmental, social, and governance) practices and to offer dedicated ESG advice within or without their environmental law teams.[5] Partly this is because of the vast wealth of ESG norms, softer and harder, that apply to their clients and, on occasion, to law firms themselves.[6] Despite all of these reasons for studying environmental lawyers and environmental lawyering, there is, some notable exceptions aside,[7] little empirical work to date in this area.

As a space of inquiry, lawyers' ethics asks how and why lawyers act, and how and why they *should* act.[8] Scholarship on legal ethics continues to point to the need to explore the particular contexts in which particular lawyers practise (litigators, corporate lawyers, family advice, etc).[9] Our survey asked practising environmental lawyers – one specific practice context – to respond to fixed-choice scenarios and to explain, in free text, why they had made those choices. Survey responses were used to scaffold the conversations that took place in the interview phase. What we show below is that the reported behaviour of environmental lawyers (i.e. how they say they would act in relation to a given scenario) is almost identical in two particular ways to that of other lawyers as reported in other legal ethics studies. Many of the environmental lawyers participating in our study rationalised their choices in terms of 'zealous advocacy', or putting-the-client-first lawyering. This is also consistent with previous work more generally on lawyer conduct.

More remarkable, we think, is how the role of uncertainty stands out in our data. As compared to studies of lawyers working in other practice areas, the environmental lawyers we studied reported much more comfort with using uncertainty in the law to their clients' advantage. This is of potential concern because other research has clearly shown that lawyers' facility with uncertainty is the *single strongest* statistical predictor of a poor ethical inclination. Given we otherwise have nothing to suggest that, en masse, environmental lawyers have poorer ethical inclination than other lawyers, we

[2]S Vaughan, 'Existential Ethics: Thinking Hard About Lawyer Responsibility for Clients' Environmental Harms' (2023) 76 *Current Legal Problems* 1.

[3]C Passmore, *Privilege* (Sweet & Maxwell 2024)

[4]See, generally: 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 *Environmental Law Review* 3.

[5]PQ Watchman and P Clements-Hunt, 'Chasing the Dragon: The Rise of the ESG Law Firm' (Blended Capital Group Report, 2021); JW Pitts III, 'Business, Human Rights, & The Environment: The Role of the Lawyer in CSR & Ethical Globalization' (2008) 26 *Berkeley Journal of International Law* 479.

[6]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; S Brabant and E Savourey, 'From Global Toolbox to Local Implementation: The IBA Practical Guide on Business and Human Rights for Business Lawyers' (2017) 2 *Business and Human Rights Journal* 343.

[7]In particular, see: C Abbot and M Lee, *Environmental Groups and Legal Expertise: Shaping the Brexit Process* (UCL Press 2021); 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.

[8]As a way into this vast field, see: D Luban and WB Wendel, 'Philosophical Legal Ethics: An Affectionate History' (2017) 30 *Georgetown Journal of Legal Ethics* 337; V Holmes and F Bartlett, *Parker and Evans's Inside Lawyers' Ethics* (Cambridge University Press 2023).

[9]L Mather and LC Levin, 'Why Context Matters' in LC Levin and L Mather (eds), *Lawyers in Practice: Ethical Decision Making in Context* (University of Chicago Press 2012).

raise questions whether what some academics claim to be the special nature of environmental law – 'hot', polycentric, and so on – means that a comfort with both the idea and the use of uncertainty on behalf of a client is much more part of the quotidian life of an environmental lawyer.

What is also striking in our data is the indication of 'role morality' at play: a disjuncture between personal and professional lives. Many participants explained that they became environmental lawyers because of an interest in environmental issues, and all interviewees stated they take action to support the environment in their personal lives. Nonetheless, potential or actual harm to the environment is very much a minor chord when these environmental lawyers are asked how and why they would act in the scenarios we presented. The role morality here is (in large part) a misguided one: one which frequently sees putting the client first as of paramount concern to the lawyer's role when, as we will show, this is incorrect as a matter of law in England & Wales. We suggest that the culture of client-first lawyering appears to have the worrying effect of downplaying, masking, sidestepping and/or subverting the concerns of those who specialise in environmental law for the environment. As well as being legally misguided, this culture may in turn lead to serious, negative impacts on the environment.

2. Methodology

Data for this project was generated in two phases: an online survey and a follow-on set of interviews. All social scientific methods are available to researchers exploring ethics and ethical behaviour within professional sites. However, exclusive reliance on interview data can leave the researcher with data prone to 'cognitive biases and impression management'.[10] Surveys have also been used extensively in studying ethical behaviour and can be utilised to efficiently collect significant volumes of data,[11] but analysis of survey data alone can sometimes not go the depths of other empirical work.

Our sample frame was practising environmental lawyers in England & Wales: those who say publicly that they are environmental lawyers (e.g. through website profiles) or who belong to professional environmental law associations.[12] Given there is no list of who is an 'environmental lawyer', our research assistant Gareth Deane manually compiled a database (through website trawling) of 682 email addresses of environmental law solicitors from 76 of the top ranked 100 law firms.[13] The nature of practice as a barrister at the Bar (more generalisation early on), and some practical challenges (including the majority of chambers' websites that do not list barristers' email addresses),[14] meant we could not do a similar exercise for barristers. Instead, links to the survey were distributed via the Planning and Environment Bar Association. For those working in-house and in the third sector, we sent a series of emails to personal contacts – again because of

[10]LK Trevino, 'Experimental Approaches to Studying Ethical-Unethical Behaviour in Organizations' (1992) 2 *Business Ethics Quarterly* 121.

[11]FN Kerlinger, *Foundations of Behavioral Research* (3rd edn, CBS College Publishing 1966).

[12]Somewhere, but not here, we might want to get into the debate about 'Who is an environmental lawyer?'. See for example: E Elkind, 'What Is An "Environmental" Lawyer?' *LegalPlanet* (29 Oct 2014) https://legal-planet.org/2014/10/28/what-is-an-environmental-lawyer/

[13]Of the remainder of the top 100, 17 were firms with no listed environmental lawyers, and seven were firms where the website was so poor that any potential environmental lawyers could not be found.

[14]See generally: A Goulandris, *The Enterprising Barrister: Organisation, Culture and Changing Professionalism* (Oxford: Bloomsbury Publishing 2020).

identification issues. Links were also sent via the UK Environmental Law Association, which comprises private practice, in-house, and third sector solicitor and barrister members (among others). Over the summer of 2020, we sent almost 1,000 emails seeking survey participants.

135 lawyers completed the online survey: 108 solicitors; 18 barristers; 2 trainee solicitors; and 2 paralegals.[15] 27 (20%) respondents worked for a 'public body' (government department, local government, regulator etc); 17 (13%) worked for a charity, NGO, or in the third sector; 73 (54%) worked in a law firm;[16] and 14 (10%) were self-employed as barristers. The survey asked respondents to engage with five vignettes; hypothetical scenarios involving ethical dilemmas with fixed-choice responses. This technique offers the opportunity to explore a range of complex issues in social situations,[17] and has been successfully deployed in other studies exploring lawyers' ethics.[18] Responses to vignettes may not automatically and unproblematically translate into how respondents would in fact act when faced with similar scenarios in real life but, as Richard Moorhead and Rachel Cahill-O'Callaghan argue regarding the use of hypotheticals in their work, 'it is a reasonable assumption that [respondents'] initial framing of such problems in real life would be similar'.[19] With careful composition, vignettes provide an opportunity for participants to reflect on the issues at hand in a way that comes closer to the complexities of real life than direct questions alone.[20]

Our vignettes were chosen to explore well-known issues in legal ethics, including: whether lawyers will or will not exploit (legal and other) uncertainty for their clients;[21] the limits of acting on client instructions; whether and how lawyers have agency; acting in a 'client's best interest'; and the extent of a client's legal and other entitlements.[22] Four of the five vignettes were based in private practice settings and not other contexts (in-house, government, NGO, etc). This was intentional and we explain as the paper unfolds why this was the case. Quantitative analysis conducted across all five hypotheticals did not yield any significant associations between the survey responses and variables such as professional title, organisational employer/type, and amount of time in practice.[23] While we saw some (non-statistically significant quantitative and some qualitative) variation between practice setting (especially in the context of NGO and public office lawyers),[24] there was not enough for us to meaningfully comment on

[15]This totals 126. Nine other respondents skipped this question but answered other questions in the survey.
[16]54 respondents in what The Law Society terms a 'large' firm (those with more than 81 partners); 14 in a 'medium' firm (11–80 partners); and 5 in a 'small' firm (under 5 partners).
[17]J Finch, 'The Vignette Technique in Survey Research' (1987) 21 *Sociology* 105.
[18]R Moorhead and V Hinchly, 'Professional Minimalism? The Ethical Consciousness of Commercial Lawyers' (2015) 42 *Journal of Law and Society* 387; S Vaughan and E Oakley, '"Gorilla Exceptions" and the Ethically Apathetic Corporate Lawyer' (2016) 19 *Legal Ethics* 50.
[19]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, 48.
[20]Finch (n 17).
[21]R Moorhead, S Vaughan and C Godinho, *In-house Lawyers' Ethics: Institutional Logics, Legal Risk and the Tournament of Influence* (Oxford: Bloomsbury Publishing 2018).
[22]T Dare, 'Mere-Zeal, Hyper-Zeal and the Ethical Obligations of Lawyers' (2004) 7 *Legal Ethics* 24; WB Wendel, *Lawyers and Fidelity to Law* (Princeton University Press 2010).
[23]This was mainly attributable to insufficient data for certain tests. For example, with chi-square tests, while the first assumption of independence of data was met, the second assumption, that expected frequencies should be greater than five, was often violated.
[24]This is in line with other work. See: Moorhead, Vaughan and Godinho (n 21); Abbot and Lee (n 7).

those differences in this paper. This is an area where further research might usefully be undertaken.

We used the survey data to build themes and questions for semi-structured interviews. Interviewees self-selected through completion of an interview request question at the end of the survey.[25] 39 interviews took place in late 2020: 9 with barristers, 28 with solicitors, and two with dual-qualified lawyers. Five interviewees were based in chambers, six in NGOs, two in government, one in-house in industry, and 25 in law firms. A phased thematic analysis of free-text survey data and interview transcripts was undertaken individually by both authors, using an inductive approach in which there was no attempt to fit the data into extant theory.[26] The research had ethical approval from University College London.

We would make strong claims that our approach is rigorous, but make no claims that the data on which we draw is representative.[27] This is for two reasons. First, and as discussed, there is no reliable data on the population of 'environmental lawyers' in practice in England & Wales. As a result, whilst the absolute numbers (a survey of 126 and 39 follow-on interviews) are sufficient to provide interesting exploratory data,[28] we cannot say what proportion of the population is represented by the sample. Second, there is likely some self-selection bias: those who came forward are probably those who felt they had something to say.[29] At the same time, gaining access to elite groups can be challenging, and this is particularly true of lawyers.[30] Given this, and accepting the two caveats just raised, we suggest that this work offers an important insight into how some environmental lawyers think about the topics we are interested in, and in an area where comparable empirical work is almost non-existent.

3. The survey hypotheticals

In what follows we move between the survey and interview data, using the survey vignettes as the architecture of our paper and the interview data to flesh out what we see from the survey responses.[31] Signifiers – such as '(R1)' – are the anonymised markers we used for each survey and interview participant.

3.1. Vignette 1 – If it's clearly illegal, it's clearly wrong?

Our first two vignettes set the scene. We began the survey, quite intentionally, with a hypothetical that had nothing to do with environmental law to get a sense of how our

[25] 65 survey respondents indicated a willingness to be interviewed. All were contacted. 39 subsequent interviews took place.

[26] First- and second-order coding was undertaken, a number of resultant themes were identified and reviewed to see if themes could be subsumed into higher-order themes. See: V Braun and V Clarke, *Thematic Analysis: A Practical Guide* (Sage 2022).

[27] On rigour in qualitative work, see: S Tracy, 'Qualitative Quality: Eight "Big-tent" Criteria for Excellent Qualitative Research' (2010) 16 *Qualitative Inquiry* 837; J Morse, 'Reframing Rigor in Qualitative Inquiry' in N Denzin and others (eds), *The Sage Handbook of Qualitative Research* (Sage 2018).

[28] On this, see further: J Cho and A Trent, 'Evaluating Qualitative Research 2.0' in P Leavy (ed), *The Oxford Handbook of Qualitative Research* (Oxford University Press 2014).

[29] See: D Collier and J Mahoney, 'Insights and Pitfalls: Selection Bias in Qualitative Research' (1996) 49 *World Politics* 56; D Collier, J Mahoney and J Seawright, 'Claiming Too Much: Warnings about Selection Bias' in H Brady and D Collier (eds), *Rethinking Social Inquiry: Diverse Tools, Shared Standards* (Rowman & Littlefield 2004).

[30] S Vaughan, 'Elite and Elite-lite Interviewing: Managing our Industrial Legacy' in A Franklin and P Blyton (eds), *Researching Sustainability: A Guide to Social Science Methods, Practice and Engagement* (Earthscan, 2011).

[31] For reasons of space and substance, we discuss four of the five vignettes in this paper.

respondents related to legality in general, here with respect to an act outside of their professional contexts:

> You come home to find that your son is illegally downloading to his laptop a copy of a TV series only accessible in the United States.

Respondents were asked if they would do nothing; or if they would insist the download be deleted. Just over a quarter (26%) of our respondents declared that they would do nothing; and three quarters (74%) would insist on the deletion. This vignette was first used by Moorhead and Cahill-O'Callaghan in their work testing the motivations of 154 finance and commercial lawyers (in-house and in private practice).[32] Interestingly, they found almost exactly the same split (75:25) as we did in our survey.

Moorhead and Cahill-O'Callaghan used a well-validated values instrument by Schwartz in their study to explore what might have motivated their respondents to act.[33] This instrument suggested that the minority in their study who would insist the download was deleted did so because it was felt to be the right thing to do (and not to punish the child), prioritising justice and the interests of others over personal interests. We saw similar reasons given by our own respondents. The majority of those who confirmed that they would insist that their son deleted the download gave reasons for their responses which were framed in terms of illegality or criminality. Several respondents went further to include the necessity for the child to understand that the act was wrong. A smaller number of respondents referred to their professional duties or professional responsibility in their explanations of deleting the download being the right thing to do. These responses are worth further reflection when we compare the results of this first vignette with those of the second.

3.2. Vignette 2 – Acting on instructions

We moved, with our second vignette, into a legal practice hypothetical:

> You work in a law firm and the Partner supervising you gives you some files to get ready for costing. She asks you to total the number of hours you have spent on each file. She asks you to 'round up' your hours to the next hundred in each file, saying that, on average, clients are happy because the main thing they demand is quality work. You know that these clients are more or less satisfied with the firm and are unlikely to query the bills. You are uncomfortable with rounding up the hours billed to the clients and, feeling that your supervisor is not about to debate the issue with you, share your concerns with another Partner. He gives you a clear indication that he does not want to be troubled with this matter but says, 'if you feel strongly about this, put your concerns in writing to me'.

Respondents were asked to choose if they would: (a) carry out the first partner's instructions to round up the hours; or (b) write a letter to the second partner outlining their concerns. 11% of respondents said that they would carry out the first Partner's instructions. 89% said would write a letter to the second Partner detailing the concerns.

[32]Moorhead and Cahill-O'Callaghan (n 19).
[33]SH Schwartz, 'Universals in the Content and Structure of Values: Theoretical Advances and Empirical Tests in 20 Countries' (1992) 25 *Advances in Experimental Social Psychology* 1.

This scenario was first used by Adrian Evans and Josephine Palermo in their study of ethical decision making by Australian law students,[34] and later adopted by the Jubilee Centre study on 'Virtuous Character For the Practice of Law.'[35] The Jubilee Centre study, of 297 English & Welsh solicitors and barristers working in a range of practice areas and organisational settings, found *identical* proportions in their responses as we did in our study: 89% would not round up the hours, and 11% would. Given this, and responses to Vignette 1, we suggest that practice area context may not be an especially strong predictor of ethical outcomes in these two situations.

What is also clear is that environmental lawyers responded differently to Vignette 1's illegality in the context of personal life than they did to Vignette 2's illegality in a professional context: the percentage of respondents stating they would take measures against rose from 74% in the former to 89% in the latter. This apparent inconsistency is perhaps no surprise, given the (in theory) powerful pull of professional ethics and role morality, which we discuss in the sections that follow.

3.3. Vignette 3 – A client's best interests and the scope of a client's legal entitlements

Our third vignette, an ethics problem first posed by Stephen Pepper in 1986,[36] explores enduring issues in legal ethics: what is within the scope of a client's legal entitlements?; and what are the limits of lawyer zeal?

> You are an environmental lawyer in a regional private practice law firm. Your client owns a paper factory which discharges wastewater into a local river. New regulations set a limit on ammonia discharges of no greater than .050 mg per litre. However, you know that the prosecution policy of the regulator is not to prosecute discharges of less than .075 mg per litre. Moreover, you know that this stretch of river has no chemical detection, which means that the only way in which your client will be discovered is by manual sampling. You know that manual sampling is currently not operative.

Survey respondents were asked two separate questions about this vignette. First, would they tell their client about the prosecutorial policy of not prosecuting discharges under .075 mg per litre? Second, would respondents tell their client about the lack of chemical detection and the low likelihood of manual sampling? Table 1 sets out the responses.

3.3.1. The pull of professional duty

In explaining their choices, many respondents referred to disclosure of the prosecutorial policy and the detection likelihood as following from a duty or an obligation. For some, this was expressed as a duty linked to their professional status:

> Paragraph 6.4 of the SRA Code of Conduct obliges solicitors to make clients aware of all information material to the matter of which the solicitors have knowledge. (R58)

> Professional duty of disclosure, of all material information to the client. (R70)

[34] A Evans and J Palermo, 'Australian Law Students' Perceptions of their Values: Interim Results in the First Year – 2001 – of a Three-Year Empirical Assessment' (2002) 5 *Legal Ethics* 103.
[35] J Arthur and others, 'Virtuous Character for the Practice of Law' (2014) *The Jubilee Centre for Character & Virtue* 33.
[36] SL Pepper, 'The Lawyer's Amoral Ethical Role: A Defense, a Problem, and Some Possibilities' (1986) 11 *American Bar Foundation Research Journal* 613, 627–28.

Table 1. Wastewater discharge vignette responses.

	Tell the client	Do not tell the client
Prosecutorial Policy	85%	15%
Lack of Detection + Sampling	75%	25%

Others referred to these disclosures as a responsibility or a need, without mentioning professional obligation:

> I would view it as my responsibility to the client to pass on all the information in my possession that is relevant to their case. (R3)

> Because you need to inform your client. (R123)

Some had in mind an obligation to act in the best interests of the client: 'These are facts I am aware of, and my duty is to act in the best interest of my client' (R54). There is, however, no legal services regulatory guidance on what the requirement to act in a client's best interests looks like.[37] Equally, there is no work (academic or otherwise) which speaks to how the complex of a lawyer's legal obligations in England & Wales – in contract, tort, as a fiduciary, through professional regulation – sit with each other (and what to do when those differing obligations might rub up against each other). What has instead been claimed is that climate change (as one set of environmental issues) requires hard reflection and recalibration of what it means to act in a client's best interests: thinking about risk, success, and long-term gains in different sorts and sets of ways.[38] This 'environment conscious' thinking was not evident in our survey responses.

Acting in the best interests of a client was also echoed in comments where respondents stated they were obligated to pass on the information to the client because this information was material to their client making an *informed* judgement:

> My client deserves to know this and be treated on a level playing field with others. It is up to my client to make the moral/commercial judgment call on the full facts, not me. (R27)

> You have to tell the client the full facts. If they choose to breach that's up to them – what you tell them does not encourage them to breach. (R73)

Putting aside the sophistry, the expression of obligation is interesting. While there is variance in the narrative – 'deserves to know', 'you have to tell', 'important to tell' – these respondents and those like them then proceed to make clear that the ultimate fully-informed decision as to action sits with the client. There is more than a sense of 'hand-washing' about these explanations: lawyers distancing themselves from the client who is the decision-maker; the lawyer's role being to advise and enable the client's informed choice. This sort of moral distancing in also seen in studies of corporate and finance lawyers.[39] Various legal ethicists would argue that the lawyer who tells their client of the *legal* discharge limit and nothing else might be thought to be denying the moral agency of their client to make decisions for themselves, fully informed of all possibly

[37]This sounds like it cannot be true, but it is.
[38]BJ Preston, 'Climate Conscious Lawyering' (2021) 95 *Australian Law Journal* 51; 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); see Vaughan, 'Existential Ethics' (n 2).
[39]Vaughan and Oakley, 'Gorilla Exceptions' (n 18).

relevant facts.[40] In not sharing, the lawyer might become part of the enforcement of a society's rules, instead of a partisan servant of their client. As we come to discuss below, we feel that this view incorrectly downplays the agency of the lawyer as a servant of the rule of law.

3.3.2. The zealous advocate

The concept of the zealous advocate is found in much legal ethics writing, this being the idea of a lawyer acting in partisan pursuit of their client's aims and using all means to secure those aims that are not clearly prohibited by the relevant law or professional rules.[41] As Moorhead and Cahill-O'Callaghan say, 'It is an idea broadly uncontroversial in the profession but very controversial within the academy.'[42] In their study, Moorhead and Cahill-O'Callaghan empirically tested the values for lawyer-reported action and came to the conclusion that:

> … more zealous lawyers [have] stronger self- rather than client-interested motivation. More zealous lawyers are also less constrained by valuing conformity to rules. If our results are valid, they suggest that the claim that zeal is motivated by placing a high value on the interests of the client is false.[43]

Two of our survey respondents stated that to not share information with the client in the context of Vignette 3 would be unethical:

> It would be unethical to keep from a client knowledge in the possession of its lawyer, indeed both of these facts would properly be in the wider public domain. (R92)

However, the opposite stance was taken by another respondent who considered the ethical consequences connected with providing the information, rather than withholding it:

> By providing this information, you would be implying that the client is able to circumvent the law (which would mean that they would knowingly be breaking the law if they chose to pollute over the legal limits) … This would be highly unethical, as there would be local environmental and health implications. (R104)

This was echoed by R86, who understood the disclosure of information to be tantamount to advising the client how to cheat:

> Because it is against the law and it would be advising him how to cheat – it is illegal and unethical. (R86)

Beyond these comments, respondents made limited reference to professional ethics or what particular actions might be considered to be unethical in connection with this vignette.[44] Instead, the more prominent consideration appeared to be 'professional duty.'

Respondents' confusion and disregard for the ethics of zealous advocacy in this Vignette suggest attempts to shrug off moral agency, a phenomenon addressed in the broader

[40]See: Pepper (n 36); T Schneyer, 'Moral Philosophy's Standard Misconception of Legal Ethics' (1984) *Wisconsin Law Review* 1529.
[41]On zeal, see Dare, 'Mere Zeal' (n 22).
[42]Moorhead and Cahill-O'Callaghan (n 19) 31.
[43]ibid 47.
[44]Here, see generally: R Moorhead, 'Precarious Professionalism: Some Empirical and Behavioural Perspectives on Lawyers' (2014) 67 *Current Legal Problems* 447.

legal ethics literature. A modified version of Pepper's hypothetical, the basis for Vignette 3, has also been considered by William Simon; a lawyers' ethics scenario about notifying clients of the low frequency of tax audits.[45] In deciding what to disclose, Simon argued that the lawyer had to make a 'contextual judgement' based on an assessment of the client's intention and whether it was lawful or not.[46] In his recent work on lawyers' ethics, Moorhead has written of the risk of what he terms 'mutually assured irresponsibility';[47] the idea being that 'lawyers may tend to the view that lawyers advise and the client decides; simultaneously, clients may justify their actions on the basis that the lawyers told them they could or should take some particular action.'[48] The result is that neither the client nor the lawyer thinks they are responsible for the thing being done. This is a concern and a challenge to the rule of law, to the system in which lawyers are responsible for counselling their clients towards legality.[49] We come back to this below.

3.3.3. The limits of client entitlements

Some survey respondents considered the issue of disclosure in Vignette 3 to be nuanced in that they viewed their obligations to differ as between disclosing the prosecutorial policy versus the (un)likelihood of discharges being detected. This was put succinctly by one respondent:

> I am obliged to let my client know about the public policy on enforcement against breaches (0.75 mg per litre). Acting in my client's best interests does not extend to an obligation to reveal the deficiency in the detection and sampling regime. (R1)

Another explained that advising on the prosecutorial policy would help the client to assess legal risks but:

> Advising on lack of detection prospects could be perceived as encouraging illegal practice, and might encourage deliberate major infringements. (R25)

Advising on the (un)likelihood of detection was also seen by some respondents as implying a 'green light' for the client to discharge (R110). A possible explanation is that these respondents saw the disclosure of the (un)likelihood of detection as being more proximate to environmental harm occurring.

Respondents' differential treatment of the vignette's two potential disclosures raises interesting questions about the extent of a client's entitlements. The ethics literature usually examines client entitlements as a matter of knowledge regarding the law: telling a client what the rules are and how they might be complied with. The situation in our vignette is slightly different given the law here is said to be clear. Instead, the question for respondents was to what knowledge – about the law but also the *operation* of the

[45]WH Simon, 'Should Lawyers Obey the Law?' (1996) 38 *William & Mary Law Review* 217, 219.
[46]ibid.
[47]R Moorhead, 'Mutually Assured Irresponsibility: An Example from the Post Office' Lawyer Watch (18 Sept 2021) https://lawyerwatch.wordpress.com/2021/09/18/mutually-assured-irresponsibility-an-example-from-the-post-office/. See, relatedly, Beck's 'organised irresponsibility': U Beck, *Risk Society: Towards a New Modernity* (Sage 1992).
[48]R Moorhead, S Vaughan and K Tsuda, 'What Does It Mean for Lawyers to Uphold the Rule of Law?' (Report for the Legal Services Board 2023) 41.
[49]ibid. For reflections on environmental lawyers counselling clients towards the environment protecting aims of environmental regulation, see: JW Futrell, 'Environmental Ethics, Legal Ethics, and Codes of Professional Responsibility' (1993) 27 *Loyola of Los Angeles Law Review* 825.

law – is the client entitled? In his work, Tim Dare (a proponent of more nuanced 'client first' lawyering) suggests that lawyers should not engage in what would amount to 'abuses of process' in their zealous pursuit of a client's legal entitlements.[50] Brad Wendel acknowledges 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'.[51] The purpose of the law in our vignette is clear (as is the law itself): to keep discharges below a legal limit. The purpose of the law, per Wendel, might then suggest that clients are not entitled to the knowledge of either the prosecutorial policy or the unlikelihood of detection. Despite this, the majority of respondents said they would tell their clients both about the policy (85%) and about the lack of sampling (75%). An alternative, but not necessarily contradictory, analysis might instead reflect on the dominance of 'risk-based regulation' in the UK that internalises a form of risk-based approach to enforcement – i.e. the regulator is explicitly taking into account certain types of behaviour (where, say, there might be some occasional discharges just above the legal limit for various reasons), and that encourages the regulated to do the same.[52] This information is potentially relevant to the client because it is relevant to the regulator.

A small number of respondents put forward the minority position that they had no obligation to disclose either piece of information. The risk of the client breaking the law was raised by some respondents as a reason not to provide the information:

> I do not need to provide this information and it if encouraged the client to break the law I would be an accessory to that. (R9)

Another considered that there was no obligation to disclose as they had not been instructed on the points raised by the dilemma and they needed also to consider the possibility of environmental damage:

> I have not been instructed and neither of these points relate to specific legal obligations. Therefore, I do not feel obliged to report general knowledge which may lead to my client accessing loopholes which will cause environmental damage. (R82)

Many respondents explained that, whilst they would in fact disclose all the various information to the client, it was important that such disclosure was accompanied by further advice to the client about the need to obey the legal limits and the possibility of legal action being taken against them if they did not do so.

> I would be careful in providing this information to note that I would not be advising the client to breach the law. (R6)

> Passing this information on does not give the client carte blanche to break the law and I would make clear that policies and sampling regimes can and do change. (R7)

These and similar respondents clearly considered that they needed to do more than just automatically share the enforcement/detection information. One explanation could be that such understandings are attempts to reconcile what respondents saw as their duty

[50]Dare 'Mere Zeal' (n 22) 34ff.
[51]Wendel (n 22) 177.
[52]See, for example, the work of Keith Hawkins – including: K Hawkins *Environment and Enforcement: Regulation and the Social Definition of Pollution* (Oxford: Oxford University Press 1984); N Gunningham, 'Enforcing Environmental Regulation' (2011) 23 *Journal of Environmental Law* 169.

to disclose material information and to act in a client's best interests with concerns about the potential consequences of disclosure. In reflecting on this scenario, Pepper – like a number of our respondents – preferred a situation in which the lawyer shared with their client all the information (the law, the prosecutorial policy, and the lack of sampling) and then engaged in 'moral dialogue' about the correct course of action.[53] This, he argued, supported client autonomy (allowing the client the opportunity to achieve their goals) and also gave the lawyer a space for moral education. While this is a neat idea – in that it seems to satisfy various audiences and concerns – multiple accounts make clear how few clients look to their lawyers for any form of moral counselling.[54] As such, a lawyer's narrative of 'I have to tell everything, but I would counsel towards legality' may just be a comforting self-rationalisation.[55] We wonder if this group of responses might provide a good example of lawyerly participation in mutually assured irresponsibility, introduced above.

3.4. Vignette 4 – Legal uncertainty and the rule of law

We developed a fourth scenario to explore how lawyers relate to legal uncertainty and the rule of law. We also use responses to this vignette, and the discussions above, to reflect on what our data suggests about the extent to which 'the environment' shapes how environmental lawyers say they will act in their professional lives.

> You are an environmental lawyer working for a large law firm. A new piece of environmental law on chemicals has been passed in the EU, which has the potential to significantly increase your clients' costs. The EU regulator is newly set up and lacking in expertise. The regulator suggests it is willing to publish, in its name, guidance on Regulation X in the new law that is drafted by industry. Your clients ask you to draft that guidance, and to make sure the guidance has as little impact as possible on their operations. Several words in Regulation X are vague and give you the space to draft the guidance in favour of your clients. If you did this, you are pretty sure in your own mind that some of the guidance would not be agreed by the regulator if they properly understood it, and would also allow for potentially significant environmental harm. Do you draft the guidance in favour of your clients?

Almost half (46%) of respondents said that they would draft the guidance in favour of the client; 54% indicated that they would not. This is a striking difference to Vignette 3's water discharge scenario just discussed. We wonder here if the absence of a clearly stated rule (the discharge limit present in Vignette 3) shapes how our respondents related to this hypothetical.

3.4.1. A breach of professional rules, the public interest, and the rule of law

For some, the guiding force in their deliberations on this vignette was the lawfulness of drafting the guidance in a certain way, often expressed as though the law provided bright lines:

> The guidance has to reflect the law. (R54)

[53]Pepper (n 36) 630. On moral dialogue in the context of environmental regulation, see: KW Rizzardi, 'The Duty to Advise the Lorax: Environmental Advocacy and the Risk of Reform' (2012) 37 *William & Mary Environmental Law & Policy Rev* 25.
[54]C Coe and S Vaughan, 'Independence, Representation and Risk' (Report for the Solicitors Regulation Authority, October 2015); Vaughan and Oakley, 'Gorilla Exceptions' (n 18); Moorhead, Vaughan and Godinho (n 21).
[55]K Hall and V Holmes, 'The Power of Rationalisation to Influence Lawyers' Decisions to Act Unethically' (2008) 11 *Legal Ethics* 137.

> You draft guidance which represents your best view of the legal position, not your clients. (R91)

One respondent expressed a less definitive view, and with it a greater sense of agency:

> The best medium-term solution would be to produce sound guidance, respecting the spirit of the legislation but building in a balance that would be satisfactory to my client and allow it enough time to amend its operations. (R22)

Note that R22's reference to 'spirit of the legislation' is almost akin to 'taking a step away' and, by so stepping, it enables the respondent to balance duties between the legislative spirit and the client.[56] Recent work on lawyers and the rule of law has suggested that, 'where there is space for competing interpretations of the law, lawyers also have a role to play as products and agents of the rule of law.'[57] Moorhead and David Kershaw framed this matter in the following terms, writing on the role of lawyers in bringing about the 2007 global financial crisis:

> [J]ust as the client needs to trust the lawyer to draft an enforceable will, society needs to trust the legal profession to be faithful to the law, in both letter and spirit and not to abuse its capacity to play with rules in ways which undermine regulatory objectives or otherwise actively facilitate a client's unlawful actions or probably unlawful actions.[58]

However, the agency that a lawyer gains from 'stepping back' to view the law can be forfeited by rationalisations that deny their agency or adhere uncritically to the client. Forms of 'stepping back' were also evident in survey responses that sought to place the decision to draft guidance in the legal context – meaning that some respondents chose to rationalise their approach by referring to how they viewed the guidance vis-a-vis the legislation and the capability of the regulator to take action.

> Vagueness in the legislative instrument means vagueness in the law. Drafting industry guidance in a pro-client way is legitimate if it is consistent with a rational construction of the regulation. It is arrogant to assume that I know better than the regulator and that they simply do not understand. (R95)

Note the positioning of this respondent and the imbuing of the regulator with capability, to the extent that any questioning of that capability presupposes arrogance.[59] R95's reasoning is also a form of rationalisation: if the other party is considered capable, this frees the lawyer up from having to consider the consequences of their actions. We have seen this rationalisation elsewhere, for example in arguments by some lawyers as to why the mutual, voluntary nature of Non-Disclosure Agreements in alleged sexual abuse cases makes them an appropriate tool to be deployed.[60] R95's response demonstrates the risk of losing one's ethical agency when the lawyer responds to legal indeterminacy by standing behind the client.[61]

[56]Much like William Simon's justice-based approach to legal ethics. See: WH Simon, *The Practice of Justice: A Theory of Lawyers' Ethics* (Harvard University Press 2000).
[57]Moorhead, Vaughan and Tsuda (n 48).
[58]D Kershaw and R Moorhead, 'Consequential Responsibility for Client Wrongs: Lehman Brothers and the Regulation of the Legal Profession' (2013) 76 *Modern Law Review* 26, 47.
[59]See Birgit Spiesshofer (n 6) on whether it is undemocratic for lawyers to exercise autonomy when it comes to interpreting the law: For an opposing view, see Vaughan, 'Existential Ethics' (n 2).
[60]R Moorhead and S Vaughan, 'In Search of Public Interest Lawyering: What Does it Take to give Practical Content to Better Professional Norms?' in J Webb (ed), *Leading Works in Legal Ethics* (Routledge 2023).
[61]Vaughan, 'Existential Ethics' (n 2) 24.

Several respondents who refused to draft guidance in favour of the client perceived the alternative course as a professional breach. They expressed the perceived breach in a variety of ways including reference to a breach of duty, a breach of the rules, a matter of integrity, and unethicality or morally wrong. With regard to rules, some respondents focused on conflicts:

> There is a clear conflict of interests between the instruction from the regulator and the interests of my chemicals client. Rules of professional conduct preclude me from accepting the instruction, probably at the outset but certainly from the moment at which a conflict appears. (R80)

Others referred to integrity,[62] stemming from the SRA rules, or with special reference to the vignette's environmental aspect:

> Such action would likely not constitute acting with integrity, in accordance with the SRA code of conduct. (R74)

> Possible breach of the conduct rules – its dishonest and lacks integrity. Also, I object on personal ethics because of (i) contribution to environmental harms and (ii) involvement of a private entity in this way in public regulation. (R11)

Impact on the environment was, however, very much a minor chord our respondents' reasoning. We come back to this below.

Various respondents stated that drafting the guidance in favour of the client was unethical or morally wrong (without saying much more). Others were more expansive and alongside their reference to ethicality also referred to areas of concern such as the rule of law and the possible future consequences for the client:

> This would be contrary to the intention of parliament and contrary to the rule of law principles. It is also highly unethical, given that the legislation would have been designed for environmental protection … drafting soft guidance would be undermining to the effectiveness of the law and may actually cause the client more risk in the future if the guidance or implementation of the guidance by the regulator is successfully challenged in court. (R107)

We had asked our interviewees about the relevance of the public interest in their work. Understandings of 'public interest' are worth exploring both as some survey participants raised the concept in responses to the vignettes but also because the concept is central to professional ethics: where a solicitor's professional duties conflict in England & Wales, the Solicitors Regulation Authority (SRA) says that 'the public interest' takes precedence (without defining what this means or might look like).[63] Interview comments varied, ranging from defining the public interest as the 'overarching foundation that our work depends on' (R36) to the perception it did not apply to legal work very much at all (R22, R25, R39).[64] In terms of substance, interviewees understood the public interest to entail alignment with SRA rules (R12) and the SRA's regulatory toolkit (R15), maintenance of confidence in the profession (R19, R9), alignment with the working of the

[62] A compulsory professional principle/duty for both solicitors and barristers. On integrity, see: DL Rhode, 'If Integrity Is the Answer, What Is the Question?' (2003) 72 *Fordham Law Review* 333.

[63] See the chapeau section of the SRA Principles here: https://www.sra.org.uk/solicitors/standards-regulations/principles/

[64] Our RA Kenta Tsuda noted it is interesting that R25 had this response (and a similar one regarding rule of law), given that s/he also was one of the very few who was motivated by environmental considerations; and wondered if this means, for R25 at least, that the public interest and environmental considerations are non-overlapping.

legal system (R33) and upholding the rule of law (R29, R30, R35). Some interviewees said that they did not know about the public interest at all or that they had only recently become aware of it after a training session (R11): 'Now that you say it, it rings a bell' (R27).

These differing responses align with other work addressing how corporate and finance lawyers in large law firms understand and think about 'the public interest'.[65] This is an issue worth further exploration, and part of the focus of the current 'Taskforce on Business Ethics and the Legal Profession'.[66] Thinking about the public interest may be especially challenging in environmental law contexts. Some, like Jennifer Gerarda Brown (writing on environmental ethics and alternative dispute resolution), have suggested that, 'The public nature of environmental disputes necessarily implicates interests and values that might not be as salient in other contexts'.[67] A better framing, we think, is that offered up by Maria Lee who has argued, in the context of nuisance, that there is 'the difficulty (even impossibility) of defining public or collective interests in the abstract, or of distinguishing public from private, collective from individual, in any neutral or universal way.'[68] For example, while we might agree there is a public interest in effective environmental laws that seek to ameliorate inappropriate harm to the environment, we might (and will and do) disagree about what 'effective', 'ameliorate, and 'inappropriate' mean. Such disagreements may be animating the diverse responses of our interviewees and survey respondents.[69]

Our interviewees were also asked about the rule of law and what impact it had on their work. Again, responses were mixed. Regarding its relevance, some felt that it did impact their work but not to a major extent (R25); and others said that they did not think about the rule of law at all and/or that it did not apply to their work (R22, R27, R28). By contrast, others said the rule of law affected their work to a significant extent (R5, R7, R11, R15), as something they considered all the time (R34, R35), as a 'golden thread' and a 'foundation' for their legal work (R16, R26, R30, R36). In terms of substance, some interviewees 'didn't know what it means,' (R6), or felt that the rule of law was a 'nebulous and flannelly statement' (R34). Respondents' view of the concept's substantive indeterminacy resonates. While '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,'[70] what behaviours constitute a professional commitment to the rule of law is subject to ongoing nuanced debates among legal academics, judges, and government officials. The meaning of the 'rule of law' is an 'essentially contested concept',[71] with no agreed definition in general,[72] in relation to legal services,[73] or in relation to the

[65]S Vaughan, 'Corporate Lawyers and the Public Interest' (2015) CEPLER Working Paper, available at http://epapers.bham.ac.uk/1990/1/cepler_working_paper_9_2015.pdf
[66]Institute of Business Ethics 'Taskforce on Business Ethics and the Legal Profession' https://www.ibe.org.uk/knowledge-hub/legal-profession-taskforce.html
[67]JG Brown, 'Ethics in Environmental ADR: An Overview of Issues and Some Overarching Questions' (2000) 34 *Valparaiso University Law Review* 403.
[68]M Lee, 'The Public Interest in Private Nuisance' (2015) 74 *Cambridge Law Journal* 329.
[69]See the discussion in Wakefield (n 1) 200 ff.
[70]AC Hutchinson, *Fighting Fair: Legal Ethics for an Adversarial Age* (Cambridge University Press 2015) 16.
[71]J Waldron, 'The Rule of Law as an Essentially Contested Concept' in J Meierhenrich and M Loughlin (eds), *The Cambridge Companion to the Rule of Law* (Cambridge University Press 2021).
[72]BZ Tamanaha, *On The Rule of Law: History, Politics, Theory* (Cambridge University Press 2004).
[73]Moorhead, Vaughan and Tsuda (n 48).

environment.[74] This is an area of current regulatory interest,[75] and worth further exploration.

3.4.2. A paramount duty to the client, perhaps?

Let us come back to the vignette. Among the 46% of survey respondents who said they *would* draft the guidance to advantage their clients, the pervasive consideration was an overriding duty to the client. This was often expressed simply:

> My duty is to the client. (R2)
>
> I owe a duty to do the best for my client. (R10)

One respondent put it more forcefully:

> There is a professional duty to fight fearlessly in your client's interest subject to the boundaries of professional conduct. There is no professional conduct or similar issue arising from this scenario. (R86)

Such respondents generally appeared to view their obligations narrowly: a focus on the client and pursuing the client's interests without more complicated ethical considerations or 'look in' to other professional obligations. This understanding of the lawyer's obligations is, as a matter of law, plainly wrong for both barristers and solicitors. Under the respective professional regulatory frameworks, the client is not owed *any* overriding duty.[76] Moreover, the rules surface the need to act with integrity and independence and include duties to the administration of justice and so on.[77] As the English Solicitors Disciplinary Tribunal said in *Simms*, 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"'.[78] Our finding of a pervasive misunderstanding of the place and relative importance of a lawyer's duty to the client is also unsurprising; other accounts have shown how client-first lawyering dominates English legal practice.[79]

Unlike respondents who viewed their relation vis-à-vis the client in clear affirmative or negative terms (either a strong obligation to draft guidance; or considering such drafting unethical or unprofessional), for a number of respondents the decision was not clear cut and required nuance. For example, even as concerns the client's interests, a lawyer might do more than defer uncritically to the client's stated short-term goals.[80] One respondent made such an observation, considering the risks of drafting guidance to the client as well as to the law firm:

[74]See, for example: https://www.ucl.ac.uk/law-environment/climate-change-and-rule-law
[75]Moorhead, Vaughan and Tsuda (n 48).
[76]See the Principles section of the SRA's Code of Conduct for Individuals and the Core Duties Section of the BSB's Handbook.
[77]Ibid.
[78]*In the Matter of Paul Francis Simms* (Solicitors Disciplinary Tribunal, 2 February 2004) at [76].
[79]See: 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 *Journal of Law and Society* 83; Vaughan and Oakley, 'Gorilla Exceptions' (n 18); Moorhead and Hinchly (n 18). For comparable work with comparable findings in Australia, see: J Bagust, 'The Legal Profession and the Business of Law' (2013) 35 *Sydney Law Review* 27.
[80]Vaughan, 'Existential Ethics' (n 2) 18–19.

> … taking it at face value, it would not be in the long-term interest of the client for it to promote guidance that created a realistic risk of significant environmental harm and doing something like this would create a risk also for the law firm. (R12)

Other respondents looked beyond client interest to a wider array of considerations to inform their decision-making: 'Solicitors have duties that extend beyond the duties they owe to their own clients' (R66). Some respondents also went on to set out what those wider duties compromised:

> While lawyers have duties to their clients and must act on instructions, I would hold serious reservations about acting in this manner to deceive a regulator. Despite the nature of the lawyer's role being to advance our client's interests and exploiting ambiguity, and arguing our client's position is the 'bread and butter' of our role, there has to be a limit in terms of our wide duty to the legal system and the courts. (R29)

This reference to wider duties owed to the legal system was echoed by other respondents: 'This would be contrary to the intention of parliament and contrary to rule of law principles' (R107); and 'Your duty is to act in accordance with the law, plus this sort of fixing would be picked up eventually anyway and is poor work' (R87). One respondent also referred to the need to maintain 'the public's faith in the profession' (R42). This minority of respondents understand (at least on some level) that the relevant legal requirements on them as professionals extend beyond client-first lawyering.

3.4.3. Does care for the environment shape how environmental lawyers say they will act?

The consideration of the consequential effects on the environment was – atypically for our survey respondents – voiced by some respondents in relation to Vignette 4:

> To the extent that it would cause significant environmental harm, no. To the extent it was simply more favourable from a compliance perspective (e.g. ease of reporting, scope of reporting etc.) then it would be more palatable. (R30)

> Environment is greater interest than clients. (R50)

> I do not believe that it is in anyone's interests, including my client's best interest, to permit occurrences of significant harm to the environment. (R51)

> Although I have a clear duty to the client, I would have a duty to the law/the regulator and the wider environment. (R25)

These respondents, who chose not to draft the guidance in their client's favour, were clearly driven by the risk of environmental harm flowing from their actions, in contrast to others who seemingly prioritised the client's wishes and/or the need to manage commercial and reputational risks. This is interesting, not least because there is no explicit professional 'duty to the environment'.[81]

As noted above, concern for 'the environment' was only a minor chord in survey respondents' explanations of their choices across the vignettes. In follow-on interviews, we asked those who took part about their career paths. Without prompting, almost half

[81] On those arguing for a change to US professional ethics rules to include such a duty, see: T Lininger, 'Green Ethics for Lawyers' (2016) 57 *Boston College Law Review* 61. For an argument that the professional obligations on solicitors include the need to think about the environment, see: Preston (n 38); de Gay (n 38); Vaughan 'Existential Ethics' (n 2).

(17 of 39) explicitly identified interest in (sometimes passion for) environmental issues and environmental protection as motivating (for some, the main reason) their becoming environmental lawyers. These 17 interviewees worked in law firms, chambers, in NGOs, and in the public sector (i.e. across all practice domains). One even went as far as to say that it was, 'easier to throw all my effort into something I believe in … ' (R8), something of a (lone voice) challenge to the amoral neutral technician accounts of various legal ethics scholarship.[82]

We had also asked our interviewees about what, if anything, they did in their personal lives in relation to environmental protection. Every interviewee expressed some level of care and action: recycling; flying less; choosing renewable energy options at home; changing eating habits; and so on. Expressed levels of care/action varied: from 'utmost concern' (R36) to 'high but not obsessive' (R38) to 'Probably a B- … ' (R2). These responses, and those above, are perhaps not much of a surprise; other commentators having noted that environmental lawyers may identify positively with protection of the environment.[83]

Four interviewees, each of whom worked for a global elite law firm with oil and gas clients, included in their answers on personal care for the environment the following additional reflections:[84]

> … people doing climate change work still fly around the world. Not as hypocritical as that, but certainly not a tree hugger.
>
> I am not an extremist advocate – again because of the work I do and the companies I work for.
>
> If you want to protect the environment in Africa the best way to do it is to help the local community … the best way to do it is through free market principles …
>
> I am a proponent of a regulated free market that acknowledges the environment and adapts to properly compensate environmental harm.

One of the most significant starting points for legal ethics scholarship is the idea of role morality: that professionals might be willing or feel obliged to do things in their professional lives that they might find morally repugnant or otherwise challenging in their personal lives.[85] Here, role morality potentially reconciles interviewees' environmental commitments in their personal lives with respondents' relative de-prioritisation of environmental concerns in (their reported) professional decision-making. With the four interviewees quoted above, we may see examples of lawyers (based in very large law firms) wanting (or trying to have) ways to maintain coherence in navigating the contradictions of role morality. These four were lawyers who saw client-first lawyering as their primary obligation. As we have said repeatedly, this is legally incorrect. But there is something perhaps more morally consistent with these four (who have less clear-cut

[82]See, generally: R Wasserstrom, 'Lawyers as Professionals: Some Moral Issues' (1975) 5 *Human Rights* 1. For a discussion with particular purchase to this study, see: I van Domselaar and R de Bock, 'The Case of David vs. Goliath. On Legal Ethics and Corporate Lawyering in Large-Scale Liability Cases' (2023) 26 *Legal Ethics* 74.

[83]D Dana, 'Environmental Lawyers and the Public Service Model of Lawyering' (1995) 74 *Oregon Law Review* 57.

[84]We have not put interviewee identifiers here for obvious reasons.

[85]There are great debates here. See, for example: T Dare, 'Robust Role-Obligation: How Do Roles Make a Moral Difference?' (2016) 50 *Journal of Value Inquiry* 703; WH Simon, 'Role Differentiation and Lawyers' Ethics: A Critique of Some Academic Perspectives' (2010) 23 *Georgetown Journal of Legal Ethics* 987.

views on environmental protection) than with the other interviewees who had a more pronounced disconnect between their environmental views and how they talked about how they would act in their professional lives. Consistency may speak to how easily (or why) these four can engage in role morality, but it may also surface a chicken and egg situation: do (at least some) lawyers in global elite law firms who help their clients legally harm the environment do that sort of work because they have, a priori, certain views on the environment?; or does that sort of work shape how those lawyers view the environment? These four aside, expressed levels of care and environmental protection action were spread among firms, chambers, NGOs, and public sector lawyers.

While many environmental lawyers say they become environmental lawyers because of an interest in environmental issues, and all our interviewees say they take action to support the environment in their personal lives, our survey respondents *almost never* raised the environment as a relevant consideration when talking about professional action. Put another way, a form of green identity in aspects of the personal lives of our practising environmental lawyers did not seem to translate into how and why they said they would act in hypothetical professional contexts.[86] What is distinctive about the role morality we may be observing is (in the main) that it proceeds on misguided premises: survey respondents' deprioritisation of environmental concerns in the professional context may be associated with their misapprehension of client-first professional duties. This is incorrect as a matter of law.

We should note that environmental lawyers thinking in these terms is not confined to the UK. In 1991, James Wakefield surveyed 59 UCLA law students interested in a career in environmental law and 73 US practising environmental lawyers.[87] He found that, although a substantial percentage of environmental law students believed that environmental lawyers' primary obligation is to society (42%), environmental practitioners were much more likely to state that their primary obligation is to their clients (76%). We reflect further on these issues below.

3.4.4. Uncertainty as a feature of environmental regulation

We had designed Vignette 4 to investigate, in part, lawyers' perception and use of uncertainty, an important factor and predictor in work on professional ethics. The world's largest study of in-house lawyers showed, through multiple statistical models and measures of ethical inclination, that 'an orientation to exploit uncertainty is normatively problematic'.[88] There, a lawyer's attitude to uncertainty was the *single strongest* statistical predictor of ethical (mis)conduct.

> Imagine being faced with a legal question to which one is not sure of the legal answer, but to which the commercial answer is clear. Here, consciously or unconsciously, the incentive is to adjust one's view of the legal uncertainties to accommodate organisational imperatives.[89]

Client counselling has the potential to shore up or to threaten the 'stability, intelligibility and equal administration of the law – important rule of law values'.[90] Lawyers who

[86]For discussion of green identity performance in another, but related, context, see: D Horton, 'Green Distinctions: The Performance of Identity Among Environmental Activists' (2003) 51 *The Sociological Review* 63.
[87]Wakefield (n 1).
[88]Moorhead, Vaughan and Godinho (n 21).
[89]ibid 212–13.
[90]SH Kim 'Reimagining the Lawyer's Duty to Uphold the Rule of Law' [2023] *University of Illinois Law Review* 781, 816.

manipulate uncertainty through client counselling away from a reasonable interpretation of the law risk eroding, 'public faith in the impartial administration of laws and, in turn, law's legitimacy'.[91] Lawyers sometimes forget that, 'they themselves contribute to producing the social meanings of law;'[92] including the meaning of environmental law.[93] The application of law, and legality itself, can become discretionary for those clients able to access and exploit such lawyering: 'a trained facility to manipulate legal and factual uncertainty to a client's advantage may inform lawyers' behaviour in the grey zone.'[94] We also know that it is sometimes lawyers, and not their clients, who are pushing for particularly egregious 'creative compliance' with the law.[95]

Our use of this vignette was not intended to put a spotlight on particular respondents and call out their declared responses as unethical or not. It is, however, striking how many said they would take advantage of uncertainty and draft the guidance in favour of their clients, broadly rationalising that approach in terms of the client's best interests and the role of a lawyer in partisan contexts. Vignette 4 should be contextualised not only by previous research on the uses of uncertainty, but also by what environmental law scholars claim about the nature of environmental problems.

Ceri Warnock has argued that in environmental law, 'prospective legal certainty is less possible because of the very nature of the problems we seek to address';[96] what Liz Fisher labels the polycentric 'hot law' nature of environmental challenges.[97] Jonas Ebbesson writes that identifying what the law requires in environmental law involves a complex exercise of weighing statute (which is often 'open textured'),[98] precedent, legal principles, guidelines, international agreements and so on.[99] This exercise may be even more complex in the context of climate change, because climate change's 'highly uncertain, socio-politically charged and dynamic nature presents particular challenges for legal orders and adjudication'.[100] In the environmental practice area, it may be then that the lawyer routinely and unavoidably confronts legal uncertainty in ways different to other practice areas. Indeed, there is nothing to suggest that environmental lawyers, as a group, have significantly poorer ethical inclination than other lawyers. Instead, we wonder if our respondents see dealing with uncertainty as a core part of their practice (given environmental law is often uncertain); something much more quotidian for them than for other lawyers.[101] Uncertainty also cuts in multiple directions. As Dana writes, 'some of the "loopholes" in environmental protection statutes

[91]Kim (ibid). See further: A Morse, W Wang and S Wu, 'Executive Lawyers: Gatekeepers or Strategic Officers?' (2016) 59 *Journal of Law and Economics* 847.
[92]R Gordon, 'Corporate Law Practice as a Public Calling' (1990) 49 *Maryland Law Review* 255, 263.
[93]On how lawyers 'shape' environmental law, see the discussion in: C Abbot and M Lee, 'NGOs Shaping Public Participation Through Law: The Aarhus Convention and Legal Mobilisation' (2023) *Journal of Environmental Law*.
[94]Moorhead, Vaughan and Tsuda (n 48) 33.
[95]CE Parker, RE Rosen and VL Nielsen, 'The Two Faces of Lawyers: Professional Ethics and Business Compliance With Regulation' (2009) 22 *Georgetown Journal of Legal Ethics* 201.
[96]C Warnock, 'Environment and the Law: The Normative Force of Context and Constitutional Challenges' (2020) 32 *Journal of Environmental Law* 365, 365.
[97]E Fisher, 'Environmental Law as "Hot" Law' (2013) 25 *Journal of Environmental Law* 347.
[98]HLA Hart, *The Concept of Law* (Oxford University Press 1961) 124–36.
[99]J Ebbesson, 'The Rule of Law in Governance of Complex Socio-Ecological Changes' (2010) 20 *Global Environmental Change* 414.
[100]E Fisher, E Scotford and E Barritt, 'The Legally Disruptive Nature of Climate Change' (2017) 80 *Modern Law Review* 173, 174.
[101]See: D Michaels, *Doubt is their Product: How Industry's Assault on Science Threatens Your Health* (Oxford University Press 2008).

and regulations can be construed as actually advancing the public purpose of environmental protection.'[102] Although, of course, that was not how Vignette 4 was framed.

Uncertainty surfaces,

> the tension between an adversarial view (a client has a right to do or say whatever is not plainly forbidden by clear rules) and a contextual view (a client's rights are central but are restrained, and those restraints must be sensibly not self-servingly interpreted).[103]

For our respondents, uncertainty has provided more space for application of the pervasive 'client-first' (mis)understanding of lawyers' legal obligations. It may further be that the meaning of the law is decided and deployed in certain practice contexts (e.g. a law firm comes to its own view on the meaning of Regulation X), downplaying (in practice, if not in reality) the uncertainty of the law. All these matters are worth further empirical investigation.

4. Conclusion

What environmental lawyers do or will do not for their (private practice, government, and third sector) clients has important consequences, both for the integrity of environmental regulation (and the communal faith we have in citizens playing by the rules and following the law) and for how, where, and when the environment is harmed. This work has explored how environmental lawyers in England & Wales report how they would act, and why they would so act, in relation to a set of hypothetical professional ethics scenarios. One key insight is that 'the environment' seems to have little impact in respondents' explanations for their decision-making. Even where the scenarios made clear the potential for harm to the environment, that harm was rarely raised or reflected on by survey respondents or in the follow-on interviews. This limited role is striking when our work also shows these same lawyers' personal interests in environmental issues and environmental protection was part of why many became environmental lawyers. We have raised the question of whether the disjunct between professional and personal relations to environmental considerations may show role morality in action: lawyers care about the environment in their personal lives, but put aside those concerns in their professional lives. We might be comfortable with this disjuncture were it based on proper premises, but our data also shows how 'client-first' lawyering is often the primary driver for how respondents say they would act. The culture of client-first lawyering, seen here and in so many other studies of lawyers, may have the effect of downplaying, masking, sidestepping and/or subverting the interests of those who specialise in environmental law for the environment. However, client-first lawyering is *not* required by the law in the respective solicitor and barrister legal services regulatory regimes in England & Wales. In fact, in some situations lawyers are required by their professional rules to prioritise *other interests* over client interests. It may be that those who profess interest in and care for the environment are putting those interests and care to one side in their professional work because of a misguided belief about what 'good' lawyering looks like. This in turn has consequences for how and when the environment is harmed, as well as for the professional competence of practising lawyers.

[102]Dana (n 83) 65.
[103]Moorhead, Vaughan and Tsuda (n 48) 36.

Hard questions are being asked of the role of lawyers generally and environmental lawyers specifically in enabling and facilitating environmental harms permitted by environmental and other laws. Many see lawyers as amoral, neutral agents of their clients when they are, and we should see them as, products, agents, and servants of the rule of law; where such roles include, but are by no means limited to, acting in the best interests of clients. Whilst acting in the best interests of clients was prominent in our study, acting with integrity was not. Very few participants made reference to this professional duty when considering what actions they might take. Further work might seek to explore lawyers' understanding of integrity and how it manifests in practice; plus the capacity of such a duty, and the prospect of its enforcement, to *actually* shape lawyers' behaviour.

This work begins a provocative conversation in a field with little comparable work about how and why environmental lawyers act in practice (and not in theory): what animates their decisions; what heuristics are at play; how logics, institutions, and behaviours interact, and so on. To ignore these issues is to deny or downplay the agency that environmental lawyers have in the work they do; in how their choices and how they exercise their choices take us down different paths and lead to greater, lesser, and/or different environmental harms. Such matters of course in relation to the existential crisis that is climate change but, and to misquote Chris Hilson, 'it's not all about climate change, stupid'.[104] Work backwards and tell the story of any environmental harm and it is almost certain there will have been one or more environmental lawyer (in private practice, in-house, working for a government or public body, based in an NGO) involved at some point. Having insight into how and why they would act might permit us to have new and different conversations with those lawyers about their legal obligations, about how they exercise their discretion, and about how their choices lead to environmental harms.

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[104]C Hilson, 'It's all about Climate Change, Stupid! Exploring the Relationship Between Environmental Law and Climate Law' (2013) 25 *Journal of Environmental Law* 359.