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## ‘Gorilla exceptions’ and the ethically apathetic corporate lawyer

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### ABSTRACT

This paper draws on interviews with 57 corporate finance lawyers working from global law firms based in the City of London. Drawing on this data, we highlight common themes of taking deals at ‘face value’, being the lawyer-technician who uses the law to effect his client’s wishes, and not ‘pushing’ ethics. We suggest that there is an apathy – a lack of concern or interest – about ethics on the part of corporate lawyers. This apathy stems from various sources. It is linked to assumptions about the sorts of clients that large law firms are willing or not willing to act for, and assumptions about the ‘right sort of people’ the firm hires and retains; it is linked to strong notions of role morality; and it is founded on the classic legal ethics ‘standard conception’ principles of neutrality and non-accountability. Our data also highlights a lack of ethical infrastructures in large firms, and a lack of ethical leadership from law firm partners for the associates and trainees working for them.

### KEYWORDS

Corporate lawyers; large law firms; standard conception; apathy; regulation; ethical infrastructure; non-accountability; neutrality

I: How would you describe an ethical lawyer?

R: If you mean by ethical do I quiz my clients to make sure none of them participate in any abuse of human rights up or down the supply chain for example? Well, no I don’t. For all I know we are using solar panels made by child labour in China or something. (CP8, renewable energy lawyer)

Forty years ago, the American jurist Charles Fried asked the question: ‘Can a good lawyer be a good person?’<sup>1</sup> The answer over those intervening five decades has been, at various times and for various people: yes; no; and maybe. In this paper we draw on empirical data from interviews with 57 lawyers based in the City of London to suggest that the modern-day corporate lawyer is ethically apathetic: neither good nor bad, but rather indifferent and unenthusiastic when it comes to the ethics of what they do and the impacts their work may have. We show how these corporate lawyers articulate their client-centred, client-first role along the classic lines of the ‘standard conception’ of legal ethics: as such, it is not for them to judge what their clients do, nor should they be held accountable for the actions of their clients. Running parallel to this articulation, however, are various, closely held, somewhat

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<sup>1</sup>C Fried, ‘The Lawyer as Friend: The Moral Foundations of the Lawyer–Client Relationship’ (1976) 85 *Yale Law Journal* 1060.

hypocritical and highly personalised ‘redlines’ (things which corporate lawyers will not do for their clients) which, for reasons that will become obvious, we call the ‘gorilla exceptions’. We are of the view that such ethical apathy is potentially harmful given the important role corporate lawyers can play as norm intermediaries between their clients and the limits of the law,<sup>2</sup> and given that ethical apathy may well give rise to ethical numbness.<sup>3</sup>

The paper unfolds in three parts. First, we set the scene by talking about legal ethics, both from the viewpoint of the moral philosophers and from how we see ethics written down in the regulatory codes of the legal services regulators in England and Wales. This is so that we can compare and contrast those debates and approaches with how corporate lawyers themselves speak about ethics. The second part sets out our methodology, and situates our work in the wider field. This paper engages with important aspects of contemporary professional life in large law firms, and in a field where other existing empirical work on corporate lawyers in large law firms is scarce.<sup>4</sup> Finally, we turn to how our interviewees responded to various questions on legal ethics and a number of ethical hypothetical scenarios. This paper is unapologetically thick with data, and we draw heavily on the words our interviewees used to frame their approaches to questions of legal ethics. Our paper is concerned partly with ‘applied’ legal ethics and partly with issues of moral philosophy, but is primarily focused on the ‘realist approach’ seen in other empirical research on legal ethics where ‘the starting point in studying legal institutions should be as they actually are’ in order that they can then held up to scrutiny.<sup>5</sup> We suggest that the approach of corporate lawyers in large law firms to ethics is a powerful and underexplored field in which to map and comment on tensions between the conception of professionalism as a monopolistic legal services market control device, or professionalism as an ethical commitment to public service and public benefit.

### Competing approaches to lawyers’ ethics

The moral philosophy literature on lawyers’ ethics is vast. For present purposes we need only to offer up a snapshot such that, in our later review of what our interviewees said to us, we can map their responses onto some of the relevant key debates. For the moral philosophers, tensions exist between the ‘standard conception’ of lawyer’s ethics (in which lawyers are seen as owing ‘special duties to the clients that allow and perhaps even require conduct that would otherwise be morally reprehensible’),<sup>6</sup> and other conceptions based on notions of ‘justice’ or morality.

The standard conception sees lawyers do all that is permissible for their clients within the bounds of the law. At the core of the ‘standard conception’ (cloven to to various degrees by different scholars) are the value-trinity of: (1) neutrality (it is not for the lawyer to be the judge of their client); (2) partisanship (the lawyer can or may do all that they can to achieve the client’s objectives); and (3) non-accountability (the

<sup>2</sup>S Sturm, ‘Law’s Role in Addressing Complex Discrimination’ in Laura Beth Nielsen and Robert L Nelson (eds), *Handbook of Employment Discrimination Research* (Springer, 2005).

<sup>3</sup>R O’Brien, ‘Ethical Numbness: Some Glimpses of Lawyers Across Asia and the South Pacific’ (2012) 5 *Journal of International Business Ethics* 40.

<sup>4</sup>We discuss this further in the Methodology section.

<sup>5</sup>H Sommerlad, ‘Editorial’ (2014) 17 *Legal Ethics* i, iii.

<sup>6</sup>T Dare, ‘Mere-Zeal, Hyper-Zeal and the Ethical Obligations of Lawyers’ (2004) 7 *Legal Ethics* 24.

lawyer is not responsible for the client's decisions).<sup>7</sup> These three principles form an important part of our discussion below. Some of those who take 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'.<sup>8</sup> Others, who take the same approach, base their arguments on the lawyer as a technical mechanic who should respect the autonomy of their client,<sup>9</sup> or on the idea of the 'civil obedience' of a lawyer who obeys the law (including professional obligations to a client) even when it conflicts with her own morals.<sup>10</sup>

The standard conception has many critics. One of the core objections lies in the fact that

The law does not provide some fixed point of reference but can be adapted by clever lawyers to their clients' needs. Rather than replacing client interests with legal entitlements, lawyers just obscure the rent-seeking process with a rhetorical façade.<sup>11</sup>

As an alternative to the standard conception, Simon would have lawyers make contextual, discretionary judgements about justice. They 'should take those actions that, considering the relevant circumstances of the case, seem likely to promote justice'.<sup>12</sup> Here, and in line with Dworkin,<sup>13</sup> 'justice' is a synonym for 'legal merit', with lawyers analysing the law in the light of fundamental legal values and principles to arrive at substantively just outcomes. Simon's preference for legal merits-based reasoning (over a lawyer who uses her own morals) is founded on the idea that lawyers, being lawyers, have the necessary knowledge and skills to problematise legal ethics issues in terms of competing legal values (and do not have any special morality that makes them any better able than anyone else to approach ethical issues in terms of morals). Luban disagrees, and instead suggests that common morality can trump the professional role in certain circumstances. He argues that 'no form of reasoning, artificial or not, can bear the burden of discerning right from wrong in particular cases',<sup>14</sup> and that 'some laws are morally unacceptable under any interpretation that does not do violence to the text'.<sup>15</sup> We are of the view that Simon's approach may reify legal reasoning and being

<sup>7</sup>See also: Fried (n 1); ML Schwartz, 'The Professionalism and Accountability of Lawyers' (1978) 66 *Cal L Rev* 669; and R Wasserstrom, 'Lawyers as Professionals: Some Moral Issues' (1975) 5 *Human Rights* 1.

<sup>8</sup>Dare (n 6). Here, Dare sees the lawyer as the instrument of the institution of law. Postema disagrees: 'The lawyer must recognise that the institution acts only through the voluntary activities of the lawyer and client. The lawyer is not the instrument of the institution, rather the institution is the instrument of the client and the client engages the lawyers to make use of the instrument.' G Postema, 'Moral Responsibility in Professional Ethics' (1980) 55 *New York University Law Review* 63, 89.

<sup>9</sup>S Pepper, 'The Lawyer's Amoral Ethical Role: A Defense, A Problem and Some Possibilities' (1986) *American Bar Foundation Research Journal* 613. Schneyer also writes of the importance of respect for a client's autonomy; see T Schneyer, 'Moral Philosophy's Standard Misconception of Legal Ethics' (1984) *Wisconsin Law Review* 1529, 1539.

<sup>10</sup>A Woolley and B Wendel, 'Legal Ethics and Moral Character' (2010) 23 *Georgetown Journal of Legal Ethics* 1065. Wendel argues that 'the law supersedes societal controversy and provides a moderately stable, provisional framework for cooperation, notwithstanding normative and empirical disagreement.' W Bradley Wendel, 'Legal Ethics is About the Law, Not Morality or Justice: A Reply to Critics' (Cornell Law School Research Paper No. 1202, 2012) 2. See also W Bradley Wendel, *Lawyers and Fidelity to Law* (Princeton University Press, 2010).

<sup>11</sup>Wendel (2012) *ibid*, 3.

<sup>12</sup>WH Simon, *The Practice of Justice* (Harvard University Press, 2000) 138.

<sup>13</sup>R Dworkin, *Law's Empire* (2nd edn, Hart Publishing, 1998) 52ff.

<sup>14</sup>D Luban, 'Reason and Passion in Legal Ethics' (1999) 51 *Stanford Law Review* 873, 876.

<sup>15</sup>*Ibid* 887.

inducted into the law, into learning to ‘think like a lawyer’. For example, it assumes that lawyers, through time and experience, ‘correctly’ learn legal reasoning and how to arrive at ‘correct’ decisions relatively unproblematically. Such also assumes that there is a ‘correct’ view of law. Empirical data would tend to suggest that while there is a distinct logic of practice to ‘legal’ reasoning, it nevertheless remains a cultural practice and, as such, is informed by the wider social context. For example, criminal law lawyers have been shown repeatedly to be informed by their cultural context in ways that put the ‘workgroup’ (such as magistrates, other court staff with whom they regularly interact, and other lawyers) before their clients.<sup>16</sup> Simon’s perspective therefore downplays the ways in which power relations shape the way that law is created, interpreted and used, and so fails to see the inherently political and contingent nature of ‘legal reasoning’.

Under Luban’s approach, lawyers would engage in ‘moral reflection’ when they encounter ethical dilemmas.<sup>17</sup> Such, he argues, is a less ‘professorial’ endeavour than the pursuit of justice require by Simon,<sup>18</sup> not least because we all have emotional reactions to ethical questions. Luban’s approach requires that lawyers not hide behind their professional status or the adversarial system ‘to release themselves from moral obligations they would have if they weren’t lawyers’.<sup>19</sup> When Luban’s lawyer encounters certain ethical dilemmas, ‘they will sometimes find their conscience compelling them to disobey the principle of partisanship as well, by refraining from morally improper tactics or by declining to pursue objectionable client ends’.<sup>20</sup> Like Luban, Postema suggests that there is a ‘dangerous simplification of moral reality’ (and a corollary dangerous risk of moral distance) in expecting lawyers to act in their professional lives in a way that is morally contrary to how they would act in their private lives.<sup>21</sup> Known commonly as role morality, such separation may, Bellow and Kettleson argue, ‘atrophy those qualities of moral sensitivity and awareness upon which all ethical behaviour depends’.<sup>22</sup> Luban tries to articulate the case that role morality makes strong claims over personal moral preferences, but that ‘common morality’ (where it is clear and strong) can trump role morality.

There has been significant pushback against the idea of the justice-seeking or morally activist lawyer. Schneyer, for example, writes that the moral philosophers (not being practising lawyers) come to the territory of legal ethics as ‘missionaries rather than prospectors. And missionaries bent on converting the Bar are what the philosophers have mostly been’.<sup>23</sup> In their critique, Woolley and Wendel argue that such approaches offer up ‘idealized portraits of the moral [lawyer] agent’.<sup>24</sup> In this they must be right,

<sup>16</sup>See, for example: D Newman, *Legal Aid Lawyers and the Quest for Justice* (Hart Publishing, 2013); and H Sommerlad, ‘The Implementation of Quality Initiatives and the New Public Management in the Legal Aid Sector in England and Wales: Bureaucratisation, Stratification and Surveillance’ (1999) 6 *International Journal of the Legal Profession* 311–43.

<sup>17</sup>Luban (n 14) 893.

<sup>18</sup>Ibid 894.

<sup>19</sup>D Luban, ‘How Must a Lawyer Be? A Response to Woolley and Wendel’ (2010) 23 *Georgetown Journal of Legal Ethics* 1101, 1118.

<sup>20</sup>D Luban, ‘Partisanship, Betrayal and Autonomy in the Lawyer–Client Relationship: A Reply to Stephen Ellmann’ (1990) 90 *Columbia Law Review* 1004, 1005.

<sup>21</sup>Postema (n 8) 64.

<sup>22</sup>G Bellow and J Kettleson, ‘The Mirror of Public Interest Ethics: Problems and Paradoxes’ in American Bar Association (ed), *Professional Responsibility: A Guide for Attorneys* (ABA, 1978).

<sup>23</sup>Schneyer (n 9).

<sup>24</sup>Woolley and Wendel (n 10).

but we would suggest that imagining how the world could and should be is an essential dimension of the human condition and an important part of conversations about legal practice. At the same time, the normative should not be privileged over accounts of how humans actually behave and considerations of why this is so – in terms of identifying broad ‘general’ patterns, and also in particular contexts. Each requires the other. Equally, and as Luban argues, ‘being difficult to fulfil is not in itself a legitimate reason for rejecting a conception of moral agency’.<sup>25</sup> These disagreements, in part at least, concern where the bar should be set. That is, they concern the standard by which we might judge the conduct of lawyers. Such disagreements also pull between aspirational conduct goals and what appears to be pessimism about legal practice in the real world. Here, and offering himself up as a ‘man of the [lawyer] people’, Wendel writes:

In my view, which I think is shared by most practitioners, lawyers are not all purpose agents who facilitate moral deliberation; rather, they are simultaneously representatives of their clients and ministers of the law who help clients fit their conduct within the scheme of rights and duties created by the law.<sup>26</sup>

As we will come to show, Wendel’s articulation fits well with how our interviewees framed their own roles.

Each of the competing approaches to legal ethics we have outlined has limitations. 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,<sup>27</sup> may be challenging in situations in which the law is unclear, or in which there are competing interpretations of the law.<sup>28</sup> Pepper counters by arguing that ‘questions of interpretation and application [are] the normal grist for the lawyer’s mill’.<sup>29</sup> While this may (to varying degrees) be true, such an approach opens up grey areas for debate in which lawyers could push the spirit of the law towards their client’s goals. Here, Dare suggests that lawyers should not engage in what would amount to ‘abuses of process’ in their zealous pursuit of a client’s legal entitlements,<sup>30</sup> although such (at least in his formulation) would require lawyers in engaging in exactly the sort of thinking processes (i.e. bottoming out why the client wants what the client wants) that he rejects as part of the approach taken by Luban and others. The lawyer seeking substantively just outcomes may be required to engage in intellectual exercises beyond the ordinary capacity of many,<sup>31</sup> and the morally activist lawyer may lack the disposition to resist institutional compliance,<sup>32</sup> or indeed lack the power to effect change (for example, given increased competition for clients, and the corollary

<sup>25</sup>Luban (n 19) 1102.

<sup>26</sup>Wendel (2012) (n 10) 7.

<sup>27</sup>Using Dare’s language (n 6) 30ff.

<sup>28</sup>Here, Dare suggests it would be arrogant for lawyers to introduce their own morals into client relationships. However, what is not clear is why it is any less arrogant for lawyers to do their own determination of a client’s legal entitlements. Such approach also assumes (wrongly) that the determination of legal entitlements will also be straightforward (ibid).

<sup>29</sup>SL Pepper, ‘Three Dichotomies in Lawyers’ Ethics (With Particular Attention to the Corporation as a Client)’ (2015) 28 *Georgetown Journal of Legal Ethics* 1069, 1100.

<sup>30</sup>Dare (n 6) 34ff.

<sup>31</sup>Woolley and Wendel (n 10).

<sup>32</sup>On this, see the discussion by Luban (2010) (n 19) 16 ff. See further, on the morally activist lawyer: RK Vischer, ‘Legal Advice as Moral Perspective’ (2006) 19 *Georgetown Journal of Legal Ethics* 225.

reduction in client loyalty to large firms).<sup>33</sup> It is also clear that ‘reasonable, conscientious people may disagree in good faith about what is required by morality or justice in a particular situation’.<sup>34</sup>

One of the stronger pushbacks against a moral philosophy approach to consideration of lawyers’ ethical dilemmas argues that ‘the common financial, psychological and organisational pressures of law practice explain the exclusively client regarding behaviour of lawyers better than the rules of legal ethics’.<sup>35</sup> Here, the suggestion is that an exploration of what lawyers actually do is a more valid approach than abstract questions of how lawyers should be.<sup>36</sup> As set out above, we are of the view that both are important: we need *both* an idea of what the ‘ideal lawyer type’ should be *and* an idea of how far we are away from that ideal (for scholarly purposes, but also for the practical purposes of education and regulation). What lawyers ought to do must begin with a clear understanding of how lawyers actually behave *in situ*, and how this relates to their specific practice contexts, as well as wider organisational, social and economic conditions of their work: in Bourdieu’s terms, the ways in which their everyday practices reflect the relationship between their field and *habitus*.<sup>37</sup> Like Woolley, and Parker, we see legal ethics as simultaneously practical and normative.<sup>38</sup>

## Legal ethics written down

The regulatory field for lawyers in England and Wales is complex: there are nine types of regulated professional providing reserved legal services, and nine different legal services regulators.<sup>39</sup> For this paper, we need only concern ourselves with the Solicitors Regulation Authority (SRA), the body responsible for regulating solicitors in England and Wales. These 130,000 practising solicitors are found in over 10,000 law firms and over 6000 private and public employers.<sup>40</sup> Our focus is on the top end of the ‘corporate hemisphere’.<sup>41</sup> The SRA takes a three-pronged approach to standard setting and principles in the context of lawyers’ ethics: (1) it sets out high level, mandatory ‘principles’; (2) it gives a series of detailed, topic specific rules on conduct; and (3) it promulgates a statement on the competence of qualified solicitors (which includes, among other things, ethical matters).<sup>42</sup> The 10 high-level principles – found at the very front of the SRA’s Handbook – are ‘mandatory’ and apply to all solicitors at all times. They cover a wide range of matters, including the rule of law, the client’s interests, independence, respecting the

<sup>33</sup>DD Wilkins, ‘Race, Ethics and the First Amendment: Should a Black Lawyer Represent the Ku Klux Klan?’ (1994) 63 *George Washington Law Review* 1030, 1088. See further: 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.

<sup>34</sup>Wendel (2012) (n 10) 7. This also ties in with the position by some scholars that there is no ‘universal morality’.

<sup>35</sup>Schneyer (n 9) [1543].

<sup>36</sup>See D Rhode, *In the Interests of Justice: Reforming the Legal Profession* (Oxford University Press, 2003); S Dolovich, ‘Ethical Lawyering and the Possibility of Integrity’ (2002) 70 *Fordham Law Review* 1629; and Wendel (2012) (n 10) 3, who ‘will only suggest that legal scholars should pay more attention to what lawyers actually do, as opposed to arguing about abstractions’.

<sup>37</sup>P Bourdieu, *Outline of a Theory of Practice* (Cambridge University Press, 1977)

<sup>38</sup>A Woolley, ‘The Problem of Disagreement in Legal Ethics Theory’ (2013) 26 *Canadian Journal of Law & Jurisprudence* 181; C Parker, ‘A Critical Morality for Lawyers: Four Approaches to Legal Ethics’ (2004) 30 *Monash University Law Review* 53.

<sup>39</sup>See <[http://www.legalservicesboard.org.uk/can\\_we\\_help/approved\\_regulators/](http://www.legalservicesboard.org.uk/can_we_help/approved_regulators/)> accessed 10 May 2016.

<sup>40</sup>Law Society, ‘Trends in the Solicitors Profession: Annual Statistical Report 2015’ (Law Society, London, April 2016).

<sup>41</sup>JP Heinz and EO Laumann, *Chicago Lawyers: The Social Structure of the Bar* (Russell Sage Foundation and American Bar Foundation, 1982).

<sup>42</sup>The SRA is also, of course, engaged in the discipline of solicitors, has an Ethics helpline, undertakes ‘fitness’ reviews of those wishing to join the profession, and so on.



regulator, and issues of equality and diversity. These 10 principles are not ranked, and the SRA makes it clear that no one principle takes precedence. Instead, if the principles come into conflict, the SRA Handbook sets out that the principle which best serves the ‘public interest’ is the way forward.<sup>43</sup> As we have argued elsewhere, such use of the notion of ‘public interest’ may bring with it significant uncertainty and challenge.<sup>44</sup> What is also important to keep in mind when we come to look at the data is that nowhere, *at no point*, does the SRA say in its Handbook (or, indeed, anywhere else) that the client’s interests come first. They do not.

Further on in the SRA’s Handbook are detailed conduct rules on matters including confidentiality, client acceptance, anti-money laundering, conflicts of interest, and so on.<sup>45</sup> What we will see from the rest of this paper is that corporate lawyers cleave to, and know about, these topic-specific rules far more than they cleave to, or know about, the 10 underlying, front-end, mandatory principles in the Handbook. This may be of significant concern (in that the conduct rules are largely context and point-in-time specific, whereas the principles apply at all times).<sup>46</sup> In March 2015, the SRA released a ‘Competence Statement’ that sets out the expected standards of all qualified solicitors. The Statement begins with the following two requirements: (1) ‘recognising ethical issues and exercising effective judgment in addressing them’; and (2) ‘understanding and applying the ethical concepts which govern their role and behaviour as a lawyer’.<sup>47</sup> Our data suggest that, on one reading, a good number of corporate lawyers may fall some way short of competence when it comes to these two requirements.

Despite the increasing regulatory complexity we have just outlined, and the enormous range of activities that legal practice now covers, all lawyers remain governed by one set of broad (and necessarily high-level) set of principles and conduct rules. This makes certain assumptions about the way that rules operate to govern behaviour. Broad principles may appear to have the benefit of being shaped at the local level to suit the needs of a diverse legal profession; but this may also mean that, unless expressed as specific rules to be obeyed, they are unlikely to have any real, direct purchase. There also comes a point where principles are so abstract that instead of operating deontologically (as duties), they develop a very strong dispositional or ‘virtue-like’ dimension that needs to be instilled (in situations where, as we will come to show, the environment of large corporate law simply does not operate in a way to instil or reinforce those virtues, except that of the primacy of the client interest).

<sup>43</sup>SRA, ‘The Handbook – Principles’ (Version 15, 2015), para 2.2.

<sup>44</sup>See <[http://epapers.bham.ac.uk/1990/1/cepler\\_working\\_paper\\_9\\_2015.pdf](http://epapers.bham.ac.uk/1990/1/cepler_working_paper_9_2015.pdf)> accessed 10 May 2016.

<sup>45</sup>The current SRA Handbook is more than 400 pages long. Despite this, the regulator says it takes an ‘outcomes-focused’ approach to regulation. The length of the Handbook is under review as part of a wider review of how the SRA regulates solicitors. On this, see the paper by Crispin Passmore in this Special Issue.

<sup>46</sup>On this distinction, and more generally, see: J Loughrey, ‘The Perils of (Meta)regulating Large Law Firms in England and Wales’ (2016) 19 (2) *Legal Ethics* (forthcoming).

<sup>47</sup>See <<https://www.sra.org.uk/solicitors/competence-statement.page>> accessed 10 May 2016. It is perhaps important to note that the requirements on ethics in the Competence Statement are not further elaborated on, or explained, by the SRA.

## Methodology

While the moral philosophical work on lawyers' ethics over the last five decades has been voluminous,<sup>48</sup> the associated empirical field on lawyers in large law firms is much smaller.<sup>49</sup> This is despite the fact that, in England and Wales, one-fifth of all solicitors work for the largest City firms,<sup>50</sup> and the turnover of just the top 10 law firms accounts for more than one-third of the turnover of the *entire* legal services sector.<sup>51</sup> The lack of empirical work is also striking given the acceptance that corporations, as clients, pose the potential for greater societal harm than individuals and have 'limited [ethical] motivations' in the form of aggressive pursuit of profits (and so the ethics of their lawyers might require close attention).<sup>52</sup> Large firms thus represent a numerically significant and socially economically important, but largely overlooked, site of study. What other qualitative work does exist on the ethics of lawyers in large firms is primarily focused on litigation lawyers rather than corporate lawyers,<sup>53</sup> and/or tends to be small scale.<sup>54</sup> The wider scholarship on legal ethics continues to point to the need to explore the particular contexts in which particular lawyers practise.<sup>55</sup> Here, one of the many interesting findings from our work (discussed further below) is that the 'zealous lawyer' paradigm, considered classic among law firm litigators, is also widespread among corporate lawyers in large firms.

In total, we have spoken with 135 transactional lawyers, compliance officers for legal practice and others,<sup>56</sup> from 30 top 100 law firms operating in the UK, as ranked by the trade publication *Legal Business*.<sup>57</sup> All but two law firms in the top 100 were asked to

<sup>48</sup>Including in relation to corporate lawyers. See, for example: Joan Loughrey, *Corporate Lawyers and Corporate Governance* (Cambridge University Press, 2012).

<sup>49</sup>There is a relatively large body of empirical work on in-house lawyers. It is not, however, our intention for this piece to be comparative. For a review of this empirical work, and a comparison of private practice and in-house lawyers, see R Moorhead and V Hinchly, 'Professional Minimalism? The Ethical Consciousness of Commercial Lawyers' (2015) 42 *Journal of Law and Society* 387.

<sup>50</sup>Law Society, *Annual Statistical Report 2014* (London, April 2014) 11.

<sup>51</sup>See <<http://www.thelawyer.com/news/uk-200-2013/>> accessed 10 May 2016; and Law Society, *Legal Services Forecasts* (Law Society, 2014) 3.

<sup>52</sup>Pepper (2015) (n 29) 1131. See further: JA McMorrow and LM Scheuer, 'The Moral Responsibility of the Corporate Lawyer' (2010) 60 *Catholic University Law Review* 275, 277ff.

<sup>53</sup>See, for example: K Kirkland, 'Ethics in Large Law Firms: The Principle of Pragmatism' (2005) *University of Memphis Law Review* 631 (here, of 22 lawyers interviewed, 17 were litigators); and D Frenkel, 'Ethics: Beyond the Rules – Questions and Possible Responses' (1998) 67 *Fordham Law Review* 875 (interviews with 19 litigators in large firms).

<sup>54</sup>For example, Moorhead and Hinchly (n 49) interviewed nine private practice lawyers in large firms for their project alongside a number of other in-house lawyers; and Griffiths-Baker undertook 17 interviews for her work on conflicts of interest in large firms – although it is not clear, from the Methodology appendix to her work, as to the practice area of those who took part in her interviews; see J Griffiths-Baker, *Serving Two Masters: Conflicts of Interest in the Modern Law Firm* (Bloomsbury Publishing, 2002). There are, of course, much larger bodies of qualitative empirical work on lawyers in other practice settings who also consider legal ethics. For example, in the mid-1960s, Jerome Carlin undertook more than 800 interviews with a cross-section of lawyers in New York City on lawyers' ethics – see JE Carlin, *Lawyers' Ethics: A Survey of the New York City Bar* (Russell Sage Foundation, 1966). A decade later, John Heinz and Edward Laumann (n 41) interviewed more than 700 lawyers for their study of the Chicago Bar. More recently, in their study of 106 Canadian corporate lawyers, Ronit Dinovitzer, Hugh Gunz and Sally Gunz explored complex and nuanced, direct and indirect, examples of 'client capture' (in which corporate lawyers became in a variety of ways beholden to their clients), but their direct engagement with how such capture impacts on lawyers' ethics was rather thin – see: R Dinovitzer, H Gunz and S Gunz, 'Unpacking Client Capture: Evidence from Corporate Law Firms' (2014) 1 *Journal of Professions and Organization* 99; and R Dinovitzer, H Gunz and S Gunz, 'Reconsidering Lawyer Autonomy: The Nexus Between Firm, Lawyer, and Client in Large Commercial Practice' (2014) 51 *American Business Law Journal* 661.

<sup>55</sup>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); Kirkland (n 53) 632; R Moorhead and V Hinchly (n 49) 393.

<sup>56</sup>Compliance Officers for Legal Practice are a creation of the Solicitors Regulation Authority (SRA). They are responsible for ensuring that processes are in place to enable the law firm, its managers and employees, and anyone who has any interest in the firm to comply with the SRA Handbook.

<sup>57</sup><<http://www.legalbusiness.co.uk/index.php/analysis/4615-lb100-2015>> accessed 10 May 2016.

participate.<sup>58</sup> Our project operated in three distinct phases. This paper primarily concerns just one of those phases,<sup>59</sup> and draws on interviews with 57 transactional (i.e. non-litigation) lawyers that took place between December 2014 and September 2015.<sup>60</sup> For convenience, we use the shorthand ‘corporate lawyers’ in the rest of this paper to cover the various flavours of transactional lawyer who took part (which included leveraged, structured, and project finance lawyers; financial services lawyers; and public and private mergers and acquisition lawyers) and to make clear that our focus is on lawyers in large corporate law firms.

Interviews took place either in person (at the lawyer’s office) or over the telephone, and lasted between 30 and 61 minutes. The majority were over 50 minutes long. Interview schedules provided a series of themes and questions to be explored in a semi-structured dialogue between interviewer and interviewee.<sup>61</sup> These schedules included, among other matters, direct questions on ethics, ethical training, client advice on ethics and ethics in the workplace. These are set out more fully in the following sections. We also deployed a number of vignettes (hypothetical scenarios involving potential ethical dilemmas). As Moorhead and Hinchly note, such vignettes are one way of mitigating risks associated with ‘error, omission ... memory lapse [and] ... response biases’ in these sorts of elite interviews.<sup>62</sup> Once completed, the interviews were professionally transcribed, coded and analysed. Below, we use anonymised identifiers to show the range of interviews from which we draw.<sup>63</sup>

Gaining access to elites for interview purposes can be challenging, and this is particularly true of lawyers.<sup>64</sup> Our approach was to send an initial email to the senior partner and/or office managing partner and/or head of corporate/finance, and then two further follow-up emails.<sup>65</sup> Some firms agreed to participate on the basis that we provided them with anonymised, follow-up benchmarking of how they compared to other firms. We were happy to do this. We make no claims that the data on which we draw is representative; it is not. But it does offer an important and powerful insight into how the transactional lawyers we spoke with think about the topics we are interested in, and (as we have already set out) in an area where comparable empirical work is scarce.

## The ethical lawyer

Our interviews included specific questions on ethics. We began by asking our interviewees this question: ‘How you would describe an ethical lawyer?’. This was both intentionally

<sup>58</sup>The two who were not asked do not do any transactional work.

<sup>59</sup>We make some small cross-reference later in the paper to the first phase of interviews (with 53 partners and Compliance Officers for Legal Practices) that touched on the nature of the lawyer–client relationship.

<sup>60</sup>When firms were contacted, we set out that our preference was to speak with lawyers in the firm’s corporate and finance teams. Different firms sourced interviewees differently, and forwarded on our call for participation differently. In some firms, for example, real estate lawyers who did primarily transactional work also came forward. Everyone we spoke with engaged in transactional work. In total, we spoke with 23 partners, two counsel, 29 associates, and three trainee solicitors.

<sup>61</sup>Schedules available on request.

<sup>62</sup>Moorhead and Hinchly (n 49) 395.

<sup>63</sup>The markers are made up of three parts: first, C or F (Corporate or Finance); then P, C, A or T (Partner, Counsel, Associate, or Trainee); and then a number. So CP2 is the second corporate partner we spoke with, and FA7 is the seventh finance associate.

<sup>64</sup>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).

<sup>65</sup>The reason for the multiple use of ‘and/or’ is that it was not always possible to easily identify the relevant role holders in the various firms.

broad and intentionally referred to a hypothetical third party. Our aim was to be able to contrast how our interviewees would describe the hypothetical ethical lawyer with how they acted in their own practices. We might expect that lawyers, if the professional principles we discussed above were an important and meaningful dimension of ethicality, to draw closely on and reference these. As we shall see, they did not. It was fair to say that our initial question caused many to pause:

How would I describe an ethical lawyer? ... that is a very good question ... [long pause] Good job this isn't a job interview; I wouldn't be doing very well. (FA1)

The answers we received to this question reflected a very broad church. The vast majority made reference to compliance with the law. Some of these wrapped that compliance with either acting in the best interests of the client or not doing anything illegal for the client:

Someone who wouldn't necessarily do everything the client asks them to do, simply because they are the client. That they would have regard to the regulatory framework, the legal framework, in which they're operating. (CC1)

The vast majority of our interviewees referenced the 'rules' and 'lawfulness' and the 'regulatory framework' (i.e. not going outside the bounds of the law), but nothing about what the professional principles might require. Around one-third of the responses referenced, in some form, values or morality. Some of these were rather expansive:

I think somebody who clearly has a set of core values that they profess to abide by, and those don't necessarily have to be values that have been impressed upon them by external regulation or the firm that they act for. They can simply be personal values ... So forget the SRA, forget the law; ultimately, deep down inside, what are those things that you as an individual just will or will not do? (CP5)

Of those who referenced values or morals, honesty and integrity were commonly cited principles.<sup>66</sup> A handful talked about the ethical lawyer adhering to the spirit or purpose of the law (in the vein of Simon, discussed above). Women lawyers were more likely than men to frame their responses in terms of values or character. As such, and drawing on Kohlberg's stages of moral development,<sup>67</sup> one might suggest that the women corporate lawyers had a greater ethical disposition than their male peers. However, our sample size of 57 was relatively small compared with the wider population, and the proportion of women to men (25:75) makes drawing stronger gender-related conclusions challenging.

This corporate partner spoke about the ethical lawyer being alive to the consequences of the advice they were giving:

Somebody who is conscious of, alive to, the morality of the situation, of the wider community interest – by which I mean the interests of the wider firm and the community in which we operate, both business and non-business. I think that an ethical lawyer ought to be worrying, frankly, about the advice that they give and the reasons why they're being asked to give it and the consequences of that advice, on a daily basis; if not consciously, then subconsciously. (CP19)

<sup>66</sup>This reflects how the in-house and private practice interviewees responded to questions by Moorhead and Hinchly (n 49, 395) as to what first came to their mind as ethics in legal practice.

<sup>67</sup>For an overview of this area, see: J Rest, MJ Bebeau, and SJ Thoma, *Postconventional Moral Thinking: A Neo-Kohlbergian Approach* (Psychology Press, 1999).

Later, however, we will see this same partner talk about the lack of ‘black and white’ (as regards ethicality) when working for clients in potentially challenging areas (tobacco, animal testing, etc). Indeed, what is so interesting about the responses to the hypothetical ‘ethical lawyer’ question is the wide range of articulations (a good number of which had space for the inclusion of morals, characters, values, etc), when the way in which these lawyers spoke about their actual work and their day-to-day real-world lived roles had almost no space for these matters. Earlier in the interviews we had asked a range of questions on the role of the corporate lawyer, and on how the interviewees described what they did. None of those responses included positive references to values or morality. Instead, they were universally framed within the ‘standard conception’ (i.e. the lawyer pursuing the client’s interests within the bounds of the law). In fact, some interviewees, without prompting, had spoken of their role as not including ethical or moral considerations:<sup>68</sup>

Well, I think of our role as facilitators, and service providers, and they call us in to mitigate risk; and I don’t think of our role as being kind of ethical or moral or anything like that. (CA4)

A constraint refrain was the corporate lawyer seeing their role in terms of effecting the client’s wishes. While some of the partners brought up the notion of the lawyer as trusted advisor or wise counsellor, most of our interviewees spoke instead of their role as one of ‘conduit’ [CA4], ‘facilitator’ [CA19] or ‘catalyst’ [CA10]. Since the mid-1990s, a number of commentators have been lamenting the decline of large law firm culture,<sup>69</sup> a world in which business demands, the ‘eat what you kill culture’ of some firms and/or sheer growth are said to be to blame.<sup>70</sup> There are those who suggest that the notion of a corporate/finance lawyer as a professional exercising professional judgment has all but disappeared: Hanlon writes of ‘commercialised professionalism’,<sup>71</sup> while Boon and Levin talk of these lawyers as ‘cogs in a machine’.<sup>72</sup> While all of our interviewees recognised this shift towards a ‘service provider’ paradigm, only a minority thought it was of concern.<sup>73</sup> Most accepted it as a *fait accompli*.

### Ethical dilemmas in transactional work?

In the first interviews we conducted, we had asked for examples of ethical dilemmas that our interviewees had faced in their own practices. We also asked about the extent to which ethics was an active part of their thinking processes. It quickly became clear that our interviewees struggled to think of ethical dilemmas they had themselves faced, and that ethics was, for them, more of a subconscious than conscious matter:

<sup>68</sup>It is perhaps worth noting here that the interviewees were told, in the email soliciting their participation, that the project was concerned with a variety of matters and made specific reference to ethics.

<sup>69</sup>E Chambliss, ‘Measuring Law Firm Culture’ in Austin Sarat (ed), *Law, Politics and Society: Law Firms, Legal Culture and Legal Practice* (Special Issue, 2010).

<sup>70</sup>M Galanter and WD Henderson, ‘The Elastic Tournament: The Second Transformation of the Big Law Firm’ (2008) 60 *Stanford Law Review* 1867; MC Regan, *Eat What You Kill: The Fall of a Wall Street Lawyer* (University of Michigan Press, 2004).

<sup>71</sup>G Hanlon, *Lawyers, the State and the Market: Professionalism Revisited* (Palgrave Macmillan, 1998) 123.

<sup>72</sup>A Boon and J Levin, *The Ethics and Conduct of Lawyers in England & Wales* (2nd edn, Hart Publishing, 2008) 178.

<sup>73</sup>In the 1960s Talcott Parsons argued that lawyers’ ‘function in relation to clients is by no means only to “give them what they want” but often to resist their pressures and get them to realise some of the hard facts of their situations, not only with reference to what they can, even with clever legal help, expect to “get away with” but with reference to what the law will permit them to do’. T Parsons, ‘A Sociologist Looks at the Legal Profession’ in Talcott Parsons (ed), *Essays in Sociological Theory* (Free Press, 1964).

- I: On a day-to-day basis, how often does ethics come to your mind?  
 R: Not very often, thankfully. I don't have to ask myself ethical questions very often, I think.  
 I: Because you're not in situations which would ... ?  
 R: I don't see, or I don't come across, situations where I need to ask myself or require or it's desirable to ask myself the question or to raise any points of ethics. I don't remember coming across an ethical sort of situation as such. (FA8)

It was challenging for the corporate lawyers we interviewed to see ethical considerations arising in their own field. A different associate had commented: 'maybe that's just the nature of the work' (FA3). A number contrasted what they did as corporate lawyers with lawyers acting in other areas (where ethical issues were, the corporate lawyers thought, more likely to arise: 'take litigation ...' [FP1]). So, for example, this managing partner told us:

I don't want to kind of diminish the importance of it, but at the same time, you know, it's not like we are doing Children Act applications or, you know, something of that nature. It's far more from a business focus. (MP1)

In this response, reflective of the broader sample, we may be seeing a form of moral distancing: a view that matters between large, sophisticated parties (company A buying company B, bank C lending to company D) simply do not engage questions of ethics. One trainee, in discussing the connection between what the lawyer did in their office and what the end result was in the real world, said to us: 'often ... you're telling stories, that's a good way of putting it, so you're telling the stories of companies and when you tell the stories the entities within them can come fictionalised to you in some sense, just the nature of a story' (CT3). These responses may also indicate forms of moral inattentiveness, in which those who are unable to recognise moral aspects in everyday experiences may be less likely to recall and report on morally relevant behaviour.<sup>74</sup> This finance associate spoke of how her geographic distance from a matter influenced how she felt about it:

It's those when you are personally very aware of the impact that the project is having where I think it resonates particularly with you. Although it might sound a terrible thing to say, but it is true, when you're doing a motorway financing in Lithuania you are necessarily that far removed from the debate because the press isn't in English often and you don't know the people and so on. So, I think it's necessarily the UK projects that are affecting people that you are personally friendly with where you are aware of that. (FA7)

This geographical distancing is interesting given the increasingly global nature of legal practice for large law firms whose lawyers may regularly work on matters taking place thousands of miles from their offices. If corporate lawyers take the view that their work does not engage ethical considerations, or distance themselves from the ethics of their work, then we might argue that that this makes them less sensitive to those ethical considerations as and when they do arise (as indeed they surely will). We come back to this later.

<sup>74</sup>S Reynolds, 'Moral Attentiveness: Who Pays Attention to the Moral Aspects of Life?' (2008) 93 *Journal of Applied Psychology* 1027.

### **The environmental pollution dilemma**

Given the lack of concrete examples offered up to us by our interviewees, we decided to introduce hypothetical ethical scenarios to the interviews and to ask our interviewees how they would respond. Similar scenarios have been used in other work on corporate and in-house lawyers.<sup>75</sup> One dilemma concerned the potential for environmental pollution linked to a company purchase: ‘Imagine your client is buying a company in a developing country, the target is in compliance with all local environmental law, but the laws there actually are not very effective, and you know that post-purchase, the company’s going to have a significant detrimental impact on the environment’.<sup>76</sup> Most of our interviewees saw no legal issue with this dilemma (given that the target was in compliance) and few said they would raise the potential for environmental harm as part of a moral dialogue with the client:

It’s got nothing to do with my profession, I guess. No. If it’s legal, of course; but no, not over and above. (CA8)

So all the client cares about is minimising the cost and making the most profit it possibly can, so I’ll put those objectives first and I don’t have any guilt, no! (CP13)

One corporate partner reframed our hypothetical:

I think in that case you would be thinking, if a large UK company is buying that company then actually that is probably a good thing because they are then going to have reporting obligations going forward and they are likely to clean it up. (CP16)

This is, perhaps, engagement in a form of storytelling (‘And they all lived happily ever after ...’) which makes the partner more comfortable about what their clients are doing. Other work has shown that individuals can reframe and construe a situation (here, in a business-like frame) in which client interest is paramount.<sup>77</sup> As such, self-interest triggers self-deception, which decreases the likelihood that an ethical frame will be adopted.

A number of the interviewees spoke of potential reputational harm to the client if they bought the target:

So, the target is having a negative impact – yes, I think you would raise it and say, ‘You must be aware there’s a potential goodwill impact of buying this company’. Yes, I think you would say that. But that I think, in the circumstance you’ve raised, that is giving advice to say, ‘If you buy this company and it’s doing this sharp practice this could blow back at you’. And then it becomes the client’s call as to whether they want to do it. They’re doing nothing illegal, but it looks very sharp. (CA6)

In a scenario like that where the local laws are not as, you know, to the same standard as the client’s laws, I think that is more of a sort of reputational issue, a sort of corporate responsibility issue. And we come across this in a lot of – it could be things like human rights, it could be things like corruption – where laws generally differ; and in those scenarios where clearly the client would be compliant locally, and there isn’t anything in their own laws as a buyer that would say, you know, that applies the same standard. We do, or what I do quite a lot, is say: Look, this is not a legal risk but it is a reputational risk; do you want to

<sup>75</sup>Moorhead and Hinchly (n 49) 395.

<sup>76</sup>We used this vignette to explore a situation in which a client is in compliance with the letter of the law but perhaps not its spirit. This example creates the potential space for an ethical dialogue with the client. We were interested whether that dialogue took place.

<sup>77</sup>AE Tenbrunsel and DM Messick, ‘Ethical Fading: The Role of Self-deception in Unethical Behavior’ (2004) 17 *Social Justice Research* 223, 233.

be associated with this company that does this? And in most cases they might come back and say, 'Actually, we will still go ahead with the investment, but we are going to put in undertakings in the document that this is remedied'. That is sort of how I've dealt with it. It's not a hypothetical scenario; it happens a lot. (CA12)

The idea of the lawyer not being the decision maker was a common part of the responses to the dilemma:

I don't really think a legal adviser is there to do the decision making for the client. You can advise and you can offer different options and permutations in what you think, with your experience, what might happen, but I think the decision has to be the client's final decision, so to be a check on their decision making, I think – other than saying, 'Look, these are your options, this is what we think' – I think it would be very difficult to go beyond that threshold. (CA1)

One of my partners – but at the time was an associate – who had a bit of a reputation for being a little bit fiery, and we had some US client who was over and this particular colleague sort of had said, for I think about the third time, that they thought the client should do X rather than Y. This was an associate; and I won't try the US accent, he [the client] said, 'I'm the client, I'm allowed to be bleeping stupid if I want to!'. And there's a balance between – in the end you are an advisor, you are not a principal. If you want to be the principal ... you get a lot of influence here, as we were talking about, but you are not the principal; and so on some things, you just have to let them do it even if they are wrong. (CP16)

This is a classic liberal view of autonomy and non-interference: if the client has capacity, let them do it, even it is stupid or wrong. A strong sense of non-accountability (through not being the decision maker) was also seen in the following dilemma, and is reflective of how the lawyers Moorhead and Hinchly interviewed in their work 'distanc[ed] themselves from ethical responsibility'.<sup>78</sup>

### ***The job losses dilemma***

Our second hypothetical concerned the consequences of one large company taking over another: 'Imagine you are acting for a company on a public takeover. You know that, once the takeover is effected, it is likely that 2000 people working for the target will lose their jobs'. Only one of the interviewees saw this particular scenario as engaging ethical questions with which they might need to grapple. This sole exception saw the potential for concern, but said that they (happily) had never come across the situation before. Most interviewees instead framed their responses in terms of compliance with the relevant English law and guidance from the Takeover Panel (which would, under various conditions, permit the job losses).

That is not something I would feel terrible about. I think that that's inherent in M&A. And that ... if the proper procedures are gone through I wouldn't ... it wouldn't ... it wouldn't cause me to lose sleep over that. (CA16)

This associate framed her response in terms of distance and a decision maker/non-decision maker divide:

If it was overt and they sat there in a meeting and I had a client turn around and say, 'Obviously when we buy it and we're going to sack everybody', I probably would feel a bit

<sup>78</sup>ibid 396.



bad. But it wouldn't stop me doing the deal, because that's what I'm employed to do by [my law firm]. Which makes me horrible, doesn't it! Oh my god! If that's what they've decided commercially they're going to do, then they're going to get legal advice from somewhere to do it. And we're not physically the ones making people redundant. We're just facilitating the transaction; which somebody would do for them, whether it's us or someone else. We're basically providing a service, which is legal advice. We're not getting involved in any of the ethics; we're not making anybody resign or sacking them or anything. (CA7)

This is a powerful example of the rationalising process (based on drawing careful inferences, of course) and how instrumental,<sup>79</sup> and expressive,<sup>80</sup> frames come into play. What was clear in the responses to this hypothetical scenario, and the responses to the other scenarios, was the principle of non-accountability that sits at the heart of the standard conception: the idea that lawyers cannot, and should not, be held accountable for the actions of their clients. A number of interviewees framed this in terms of the lawyer who was advising the client not being the decision maker who made the thing happen and it not being their place to supplant or interfere with the decision maker's autonomy. We return to this below. Recent work in the field of social psychology has shown how people who obey orders may subjectively experience their actions as closer to passive movements than fully voluntary actions.<sup>81</sup> Here, because the corporate lawyer is acting on instructions, they may see less responsibility for what they do.

### The ethics of client actions

We also asked our interviewees about the extent to which they reflected on the consequences of decisions their clients had taken. The vast majority undertook none of this reflection, and framed their views along classic lawyer neutrality lines (as set out above, one of the other principles of the standard conception approach). This finance associate said:

It's not for me to judge whether my oil and gas client should or shouldn't be doing business in Venezuela. The fact is, they are; and they've asked me for help doing it. It's also not for me to judge whether the Venezuelan environmental standards are despicably low and that the Venezuelan government wants to make them weaker, thereby meaning that this awful trade will damage the environment in Venezuela unnecessarily. If I was king of the universe, I'd make a lot of changes. I can't judge that for my clients. (FA2)

Some interviewees saw how others might expect them to be concerned, but were clear that they were in fact not:

- I: The kind of transactions you work on, do you ever think about the consequences of the decisions that your clients take?
- R: [Laughing] Probably not! No, is the honest answer. We just get the deals done; get the next one in. You probably want me to say something different there; but no, we don't. Thinking about it, I probably should feel quite guilty about that. I guess you just get so tied up in the deal, and so kind of we're here to do what our clients want us to do, we're

<sup>79</sup>That is, 'If that's what they've decided commercially they're going to do then they're going to get legal advice from somewhere to do it'; 'It's legal; it's going to happen anyway'; 'All that will happen if I don't do it is that a competitor will get the work'.

<sup>80</sup>That is, 'I'm not actually making these people redundant; I'm just facilitating a transaction, which is the service I've been hired for'.

<sup>81</sup>EA Caspar, JF Christensen, A Cleeremans and P Haggard, 'Coercion Changes the Sense of Agency in the Human Brain' (2016) 26 *Current Biology* 585.

not here to get involved and get personally upset about things; if we don't advise them, somebody else will – and that will be our competitors. So, no, I don't. (CA7)

What did keep the interviewees up at night was wondering about whether they had advised their clients properly on the law, or whether their clients were going to take the course of action their lawyers had suggested for them. Where ethical considerations led to sleepless nights, these reflected the personal histories of the interviewees (i.e. when client decisions had impacted on them in very real terms and the moral distance between what they did as lawyers and the consequences of their client's actions narrowed). For example, the parents of one lawyer had lost their jobs after a merger; another lawyer randomly came to face to face at a party with a man who, unknown to him, was about to lose his job because of the deal she was working on. As with the example of motorway financing in Lithuania, these instances raise questions about empathy and corporate lawyers.

Some of the moral philosophers who toe the 'standard conception' line argue that lawyers have agentic power to exercise moral discretion at the point in time at which they become lawyers: nobody forces them to choose that career path and so, having made the choice to become a lawyer, that lawyer then doesn't get to judge their clients. This form of rationalisation was seen in some of the interviewees:

Can you feel uncomfortable about the knowledge that if you crash these two businesses together there's going to be some fallout with people dropping off the cliff? Yes, you're aware of it. I guess I've got pretty cynical/hardnosed about that over the years, that's business ... if I felt so strongly about obligations to keep as many people in work as is humanly possible at the detriment of profit and running a profitable business, I wouldn't be doing the job I'm doing now, I'd probably be a human rights lawyer or something like that. So I've made my bed in that context and I lie in it pretty comfortably. (CP4)

Again, many of our interviewees were at pains to tell us that they were not the decision makers. They simply advised and facilitated. Many also thought it would be inappropriate to link lawyers to the actions of their clients because the lawyers only saw one small piece of the overall puzzle of which the client had control. Given the increasing packaging of small parts of a major transaction among a panel of firms and/or alternative services provides (what is often referred to as 'unbundling'),<sup>82</sup> this may be an increasingly important way of corporate lawyers avoiding responsibility for the actions of their clients.

This corporate partner articulated one aspect of Dare's approach to legal ethics<sup>83</sup> – namely that while we live in a pluralistic society that allows a variety of viewpoints to flower, the law takes one approach or another (with which some people may nevertheless still disagree):

We don't any more, but we used to act for one of the big tobacco companies, going back in time – and certainly, going back in time, I did a small amount of work when I was a junior lawyer for one of the animal testing companies ... so they are issues which I've thought about in my career. I think that very often, the morality around those businesses is not necessarily black and white. The advice that we are asked to provide is advice which all businesses are entitled to ask for and I've never seen a problem with providing advice to the best of my ability to companies which are undertaking activities which some people might see as morally dubious, because I don't think that the situation is always black and white by any

<sup>82</sup>See Allen & Overy, *Unbundling the Market: The Appetite for New Legal Services Business Models* (London, 2014).

<sup>83</sup>Dare (n 6).

means, and a business that one person might see as being morally dubious another might see as being essential to the forward progression of science or technology or whatever it might be. (CP19)

Here, while some people might take issue with animal testing, or the sale of cigarettes, or the use of certain tax structures, each of those matters are legal and not something for the lawyers to take a view on. Indeed, many of those who participated in the interviews had in fact acted for such animal-testing and tobacco companies, and also for oil and gas clients. What was interesting, however, was that a number of the interviewees, despite acting (very happily) for company X or Y (which others might have moral concerns about), still had their own very personal, highly individualised redlines, things they simply would not do for their clients. We have decided to call these personal redlines ‘gorilla exceptions’, for reasons that will soon become apparent.

### Gorilla exceptions

The vast majority of our interviewees clove strongly to the principles of neutrality and non-accountability: it was not their job to judge what their clients did (as long as such conduct was legal), and lawyers should not (for a variety of reasons) be held accountable for the actions of their clients. In his interview, this finance partner 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. But he went on:

In spite of everything that I’ve said so far, I do have a very strong view about environmental protection and animals in particular. I have a very deep-seated and strongly felt view about preservation of wildlife. 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. (FP2)

Later in the interview, the same finance partner spoke about his firm doing defence work for tobacco companies:

- R: Funny thing is, I’ve got absolutely no qualms about that [tobacco defence] whatsoever.  
 I: Different sources of angst ...  
 R: Take the money and go with it. (FP2)

This corporate associate, in a different law firm, also had a soft spot for gorillas:

The public company work is quite a pertinent issue; I mean [in] the public markets, obviously people lose real money, companies go to the wall, companies fail. I’ve worked on extractive industries, and then I’ve worked on IPOs where you read the prospectus or the circular or the commission document and there’s bits on the environment where they say ‘Oh well, in this bit of jungle that we’re going to raze there’s a type of gorilla that only lives there, so what we’re going to do is we’re going to catch them all and we’re just going to move them 100 miles south and they’ll be fine, they won’t notice the difference’. And you think ... That really upset me, yeah, that one did upset me. So yeah, it does penetrate; but I suppose I just sort of try not to focus on it too much. (CA9)

However, his moral concern only seemed to extend to gorillas, and not to humans. Later in the interview, the same associate said:

If company A is acquiring company B and identifies that they’ve got duplication in the hospitality team and the payroll team and a few people lose their jobs, right, that’s not my role to

advise them on whether or not they should be doing that ... But it's a commercial decision that that needs to happen, perhaps, and that's not ever a decision I would be involved in. (CA9)

A different corporate associate (CA20) told us he had turned down a secondment to a tobacco company because of his personal beliefs about the harms from tobacco, but was happy to do work for automotive clients which he knew had significant deleterious impacts on the environment. This corporate partner, who had earlier said that he did not care if his clients' solar panels were made using slave labour, went on to say:

There are some things that I wouldn't, you know, I wouldn't – I'd be uncomfortable with advising, like a gambling company. I'd be uncomfortable, I wouldn't advise a gambling company; I wouldn't advise somebody doing porn or, you know, that kind of ... I mean, I've no problem with tobacco or alcohol; but there are just some things, you know – well, I just think I'm not going to do that. And it's probably a product of my character and personal beliefs as much as anything else. (CP8)

It struck us that we have corporate lawyers who strongly feel that it is not for them to judge the actions of their clients, save when those actions confront and contest certain, often very specific, closely held issues for the given lawyer. These sorts of personal redlines were relatively common. If these are forms of conscientious objection, they are very selective indeed and, as we will see in the following section, reflect a rather odd parsing of one client (whose actions are acceptable) from another (whose actions are unacceptable).

### Saying 'no' to clients, and withdrawing from acting

With all of the interviewees we discussed the extent to which they did, or felt obliged to, say 'no' to the clients because of concerns as to the course of action the client proposed. We also talked about how often our interviewees declined to act for certain clients (for whatever reason). We were interested in these topics because the ethical approaches of both the standard conception and the morally activist philosophers speak about the power of saying 'no' and walking away. Luban argues that his morally activist approach 'may create awkward moments of saying "No" to clients and partners on a more frequent (but not super frequent) basis than lawyers have to do now'.<sup>84</sup> Equally, Freedman and Pepper, both proponents of the 'standard conception' of legal ethics, suggest that the standard conception approach allows for the exercise of moral judgement by lawyers as it permits the law to reject or withdraw from acting for the client.<sup>85</sup> Wilkins suggests that both refusing and agreeing to act for clients carry 'moral significance'.<sup>86</sup> Our data, however, suggest that saying 'no', walking away and having 'awkward' conversations happen only infrequently in real-world corporate practice. One corporate partner told us:

It's ultimately the clients [who] make the decisions [as] to what advice they take. If they are doing something that you think is illegal, or something that you might even stop if you think it's unethical, then we wouldn't do it, we wouldn't advise them. And the great advantage of

<sup>84</sup>Luban (2010) (n 19) 8.

<sup>85</sup>See MH Freedman, 'Personal Responsibility in a Professional System' (1978) 27 *Catholic University Law Review* 1919; and S Pepper (n 9) 630–32. See further: M Freedman and A Smith, *Understanding Lawyers Ethics* (4th edn, Carolina Academic Press, 2010) 69–72.

<sup>86</sup>Wilkins (n 33) 1039.

being an out-house lawyer has always been that at the end of the day you can say to the client 'I'm sorry, I don't want to act for you any more'. (CP17)

However, in 25 years of practice, she had only ever once said to a client that she no longer wanted to act for them because of what the client was planning to do (at which point, the client changed their mind). But this partner also acknowledged that she was in a 'privileged position' in a well-respected law firm that was careful about which clients they took on, and which operated a traditional lockstep (which, she said, reduced the incentive to keep any one client of any one partner).<sup>87</sup> It struck us that saying 'no' or refusing to act were nuclear deterrents: powerful and potent in theory, but unused and somewhat limp in practice. This exchange was typical, and replicated in various forms throughout most of our interviews:

R: Maybe you do get to the point where there are some clients, or some jurisdictions, or some industries, where you don't work or don't want to work.

I: Has that ever happened to you? Have you ever had to say 'no' to a client, or have you seen a partner saying 'no' to a client and walking away?

R: I haven't personally, and I haven't seen it. (CA18)

The 'nuclear deterrent' would only be exercised in extreme cases – for example, around fraud or clear illegality, or because of the highly personal 'gorilla exceptions' discussed in the previous section. What came out was a belief among those we interviewed that the firms that they worked for would not take on certain types of client, so the need to exercise the nuclear deterrent of saying 'no' or walking away never came up.

I can't think of too many examples, though, where we would resign from a mandate, although there probably are, and we would always think about it; but if we were asked by a client to invest in ... in, I don't know ... I mean it's not as if we're not going to act for people in the arms industry, or things like that! (CP12)

What is interesting about this quote, and the 'gorilla exceptions', are the ways in corporate lawyers parse various types of client: oil and gas clients are better than or different from tobacco clients; tobacco clients are better than or different from animal testing clients; animal testing clients are better than or different from arms industry clients, and so on. Such highly differentiated moral relativism suggests that the standard conception approach has, for our interviewees, a number of fact-specific exceptions. Their general apathy about the ethics of their own work, and the work of their clients, gives way in highly individualised contexts (a '99 times out of 100 role morality' approach). This suggests that their commitment to respect for the law as a neutral field in which their clients play may be somewhat limited.<sup>88</sup> We also question whether those we spoke to drew on their own 'gorilla exceptions' to persuade themselves both that they did in fact set some moral boundaries to their work, and that there were elements of choice and moral agency to what they did as lawyers. As such, the 'gorilla exceptions' may be used as a protection for ethical apathy, a kind of false claim to ethicality. What we also see is

<sup>87</sup>Lockstep is a system of remuneration in law firms, and other organisations, which is based solely on rank (and not, say, on merit or performance) – for example, all those made partner in 2016 are rewarded in the same way. It operates in contrast to the 'eat what you kill' system of remuneration in which individual profits are directly tied to individual billings. The power of lockstep has also been shown in relation to more general lawyer–client power relations in large firms. See C Coe and S Vaughan, 'Independence, Representation and Risk' (Report for the SRA, October 2015).

<sup>88</sup>Here, Bradley 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.' See Wendel (2010) (n 10) 125.

that the decision frames of the lawyers spoken to are simultaneously shaped by and shape the institutional context, and that this context takes a highly rule-based approach: it assumes that new staff learn appropriate behaviours by being appropriately socialised or enculturated by the firm, and that these processes are supported by hiring the 'right sort of person' in the first place (which also speaks to recruitment practices).

### Ethical infrastructures in large firms

We were interested in the extent to which ethics was the subject of training and education programmes in large firms, and where or how the ethics of corporate lawyers was assessed by their firms. Other work, largely in the business field, has discussed the importance of the extent to which organisations have an infrastructure that protects and promotes ethicality.<sup>89</sup> From our interviews, three matters struck us as of importance. First, 'ethics' training took place, but this was by and large focused on the specific rules of the SRA Handbook (conflicts of interest, anti-money laundering etc).<sup>90</sup> These quotes, from lawyers in three different firms, are reflective of the wider sample:

Maybe at the beginning we had to have a risk management training, but I don't think we ever have specific ethics training. We have a ton of practical skills training, but nothing to do with ethics. (CA19)

We have quite a lot of training here. For example, right now they're talking about that you need to know the rules and regulations around bribery and taking gifts for clients and accepting gifts, client entertainment, that type of thing. (FA4)

There's no ethics training in gen[eral] ... but then, there would be like ... you know, like money-laundering training and ... competition stuff. Like, anti-competitive stuff. But not specifically ethics. (CA16)

The recurrent focus is on conduct rules, illegality and risk management. Only a handful of firms engaged their lawyers in debates about principles (instead of rules) and the wider ethics of what they and their clients were doing.<sup>91</sup> This is striking, and of serious concern, given that the SRA Competence Statement (discussed above) sets out that all qualified solicitors should be able to 'recognise ethical issues and exercise effective judgment in addressing them' and 'understand and apply the ethical concepts which govern their role and behaviour as a lawyer'.<sup>92</sup> Where ethics training (rule specific, or wider) took place, it seemed focused largely on those at the lower end of the scale. One corporate partner told us that ethics training was given at his firm to trainees and to new partners. When we asked why the same training was not also compulsory for more senior partners, he said: 'I mean, I think it's more that you shouldn't need to be told' (CP17). This managing partner interestingly framed the same issue as one of control:

We can certainly have a, you know, significant influence with junior lawyers. In terms of how the more senior lawyers behave, and, you know, it's not just training, but it's behaviour and all those things. (MP1)

<sup>89</sup>See, for example: L Treviño, N den Nieuwenboer and JJ Kish-Gephart, '(Un)ethical Behavior in Organizations' (2014) 65 *Annual Review of Psychology* 635.

<sup>90</sup>Our findings provide further support for what Moorhead and Hinchly found in their earlier study (n 49, 403): 'Some private practice firms did have some infrastructure [here, training in particular] for taking ethics matters more seriously but an ethical culture tended to be assumed rather than actively fostered'.

<sup>91</sup>We were told, for example, that training would be given not only on what the lawyer would be required to do in Situation X to be in compliance with the SRA Handbook, but also what might be the 'right' thing to do in that situation.

<sup>92</sup><<https://www.sra.org.uk/solicitors/competence-statement.page>> accessed 10 May 2016.

The second matter of note was how few firms engaged with issues of ethics as part of their recruitment and retention practices. Interviewees from only two (of 30) firms told us they asked would-be trainee solicitors in interview to respond to ethical scenarios:

We give them a scenario, and I did one probably only a couple of months ago, and I think it had things like, ‘You’re approached by a potential client and they are conducting animal testing in Sri Lanka and Sri Lanka has very limited regulations around animal testing, so it’s committed in that jurisdiction but in 150 other jurisdictions what is happening there would be unlawful. What are the considerations before you take on this client?’. Yeah, there’s a lot more around the case study than that, but that’s an ethical piece in there, so we absolutely test people on the way in. (CP12)

In our interviews with the trainees, we do put ethical questions in, for example, and in a joint venture scenario. And we give them the scenario where it’s a joint venture, so these parties are going to be working together for the next 20 years or whatever. You see a provision the day before signing that is not consistent with your client’s instructions but actually allows you to screw the other side completely, and this could be really valuable in the future; what do you do? And that is quite interesting. (CP11)

Look at how CP12 frames the issue: ‘... considerations *before you take on this client*’ (our emphasis). This strikes us as a question primarily about risk management. We would be keen to know what would happen to the hypothetical would-be trainee who said, ‘I’m sorry, but I’m adamantly against animal testing, so I wouldn’t work for this client’ (although we can guess that that might be the end of the milk round for them).

It was not clear to us that ethics formed part of the assessment of those seeking promotion to partnership in any of the participating firms, and only one lawyer told us that ethics was a specific part of the firm’s annual associate appraisal processes:

I don’t think you would really use that word [ethics], specifically, no. I mean, it’s on our appraisal forms. ‘Have you considered ethics and the risk management?’ and things like that. You know? And then you ... every year you just say, ‘Yes, I have’. (CA16)

This quote suggests that, although ethics is present in that firm’s appraisal documentation, at least one of that firm’s lawyers treats its presence as no more than a box-ticking exercise. This is contrary to the reflective approach to continuing competence (what was once known as continuing professional development) taken by the SRA.<sup>93</sup> Instead, there was a belief among a number of interviewees that their firms only employed ethical lawyers, who in turn learned from other members of the firm:

The lateral hires you make and the partners you select and the associates you keep on. They should naturally absorb from everyone around them that this is an ethical business. We don’t ram it down people’s throats in a way that some businesses do – we’re not a delicatessen in Camden, we’re not selling Fairtrade products – but we do things the right way, we treat people with respect, we comply with the law, we take that seriously. And you expect people to pick that up by osmosis. (CP18)

This supports other empirical work on corporate lawyers undertaken by Moorhead and Hinchly, who found that ‘one reason ethical infrastructure is given a low priority (beyond pressure of work), is the belief that lawyers’ ethics is maintained by recruiting the “right kinds of people” who come already trained (principally through the [vocational

<sup>93</sup><https://www.sra.org.uk/solicitors/cpd/tool-kit/continuing-competence-toolkit.page> accessed 10 May 2016.

stage of their legal education]) in their professional obligations'.<sup>94</sup> The 'osmosis' referred to here is reminiscent of empirical work undertaken by Kirkland on litigators in large law firms.<sup>95</sup> Drawing on Jackall,<sup>96</sup> she shows that the norms lawyers choose to deploy in their day-to-day lives depend on the norms other lawyers around and above them also deploy (a phenomenon Jackall labels 'looking up and looking around').<sup>97</sup> However, and somewhat surprisingly, we did not find strong evidence for the conclusions reached by Nelson and by Kirkland that law firm partners play a 'crucial role' in setting the firm's ethical norms and 'creating the ideology that rationalises those norms'.<sup>98</sup> This is perhaps something worthy of further exploration.

### The ethical environment of large law firms

Our interviews also included 'water-cooler' questions on ethics: that is, on the extent to which (and how) our interviewees actively engaged in informal ethical conversations with other lawyers inside their own firms. Existing social psychology literature suggests that learning happens via informal norms through processes of imitation and conformity.<sup>99</sup> Haidt draws upon Durkheim to suggest that the primary source of our moral thinking is our interaction with others, with whom we develop and share norms that bind us together as 'moral communities'.<sup>100</sup> In other words, ethics are part of a wider set of learned dispositions that we acquire as part of social interaction with others and through membership of social groups. Here, Mather and Levin argue that 'the most powerful normative constraints on lawyers likely stem from their clients, colleagues, and practice organisations and not from edicts of the organised bar'.<sup>101</sup> Most interviewees told us that 'water-cooler' ethical conversations were few and far between:

Not commonly, I think, is the easy way of putting it. We have an ethics committee, obviously. It's a philosophy we buy into, and conceptually we buy into it and we would act in a way which is deemed to be ethical, because ultimately our clients will expect to see that. But to put my hand on my heart and say [that] actually there is a point on the agenda which looks at ethics, no there is not, because we are a very business-minded law firm. I can tell you for a fact that most of our agendas are KPIs, utilisation, production, recovery rates, and whether people are working hard enough. That's just the cold reality of a modern-day law firm, I think. (CP3)

On my day-to-day basis, no, I've never had a conversation about ethics, until this point! (CT3)

As in the section above, there was a sense that these conversations were perhaps not needed because the firm hired 'the right sorts of people',<sup>102</sup> who had had the relevant training on ethics as part of their legal education:

<sup>94</sup>Moorhead and Hinchly (n 49).

<sup>95</sup>Kirkland (n 53).

<sup>96</sup>R Jackall, *Moral Mazes: The World of Corporate Managers* (Oxford University Press, 1988).

<sup>97</sup>Ibid 77.

<sup>98</sup>Kirkland (n 53) 658; R Nelson, *Partners with Power* (University of California Press, 1988).

<sup>99</sup>RB Cialdini and NJ Goldstein, 'Social Influence: Compliance and Conformity' (2004) *55 Annual Review of Psychology* 591.

<sup>100</sup>J Haidt, 'The New Synthesis in Moral Psychology' (2007) *316 Science* 998, 1000.

<sup>101</sup>Mather and Levin (n 55) 4.

<sup>102</sup>The same was found by Smigel in his study of Wall Street lawyers in the 1960s; see EO Smigel, *The Wall Street Lawyer: Professional Organization Man?* (Free Press of Glencoe, 1969).



I think it's something again that's not really talked about, but I think people would know the difference between acting ethically and unethically. Yes, it's not something that I've ever had a conversation with anybody about. (CA1)

It's assumed you learn about it at law school, you follow good examples. I mean, the partners I work for I would have said are very ethical; and I do act with integrity. (CA9)

Others were of the view that ethics was 'inherent' (CP5) in what they did, or 'in the background' (CP21), and so did not need explicit verbalisation. Partners were more likely than the associates to tell us they had conversations about ethics (with other partners). This corporate partner spoke about how his fellow partners regularly engaged in right/wrong debates (here, about things people outside his firm had done), but that he wondered whether this also extended to his own associates:

I think the question I sometimes ask is: Do we have the discussions internally amongst our associates of what is wrong and right? Is what we are doing right or wrong? Is what the client is doing right or wrong? And we do have those discussions; and yet I get the sense that our associates, certainly my fellow partners, freely engage in those discussions. We will just pick up on something that has happened in the *FT* and the 'wrong or right?' test arises in the conversation; and if we were part of that transaction, what would we have done? Maybe there is a lack of interaction, actually, on that from the younger ones. Maybe I hadn't really sort of thought about it in any particular sense, but now that you kind of feed that back to me I wonder if maybe we do need to take a bit more time to reiterate some of that history that gives rise to the way that we – certainly people of my generation – feel. (CP11)

This partner, and a number of others, spoke about changes in the way in which junior lawyers are inculcated into the world of lawyering. This played out in a shift from a mentor-like relationship, where historically the partner had the time to sit with the junior and talk things through, to the modern, fast-paced, 'getting the deal done' approach.

We had some sense that 'ethics' was seen as a dirty word – perhaps because it implied that someone, somewhere, had done something blameworthy:

I don't think the word 'ethics' is used very often, no. Again, I think what sits behind a lot of conversations we have are ethical concerns, ethical issues. But I think the language people use is not very often direct in that way. (FA6)

We asked this associate why she thought ethical conversations did not take place in her practice:

I think people just don't like to think about them; if you start to think about it, then probably a lot of people would query doing things. And then also, I guess, a more practical reason might just be that you're really pressed for time; so then you're like, well, let's just get this done and who cares about the ethics – because guess what? we're not going to change it anyway! – so let's just do this; if we were here to save lives and do good, then probably we wouldn't be here. And amongst the team, even internally, you would never talk about that, and 'Oh, I wonder what they're doing, I wonder if they're doing things that are, like, just like killing people or whatever' – you know, like we'd never talk about that. It's more just like ... like it's ... we focus very much on the legal stuff, and I don't think we talk about the ethics of what we do, ever. (CA19)

Elsewhere in our interviews, we found no real variation between different flavours of transactional lawyer. However, we did notice that those working in financial services regulation were more likely than other types of lawyer to say that they did speak to each other

about ethical issues. What is unclear is whether this reflects the personal predilections of the financial services lawyers we spoke with and/or is driven by changes in financial services regulation (or, indeed, by something else). Our hypothesis would be that this links to the narrow view of ‘ethics’ as compliance and dishonesty (fraud), and that there are so many rules about financial services (and thus far more compliance activity going on). There is also the fact that being accused of financial irregularities is enormously socially stigmatising, especially given the background conditions of financial crisis. As such, ethical consciousness may well reflect the particular institutional and social contexts of the work of the various flavours of corporate lawyer that we spoke with.

## Conclusions

- I: How would you describe an ethical lawyer?
- R: There are going to be levels: you’ve got someone who does the bare minimum, and someone who is extremely ethical and pushes ethics all the way. I’m assuming you want something which is in the middle of all of that. An ethical lawyer would be – no, actually, maybe I would think of someone who was more into pushing the ethics of the deal and being someone who did worry about that sort of impact on the country or the end result, and actually looked into it. Because I guess I just don’t look into it; I just take the deal as face value, [assuming that there] has to be someone else has thought about it.
- I: So, does that mean you’re an unethical lawyer? Or you’re just not a strongly ethical lawyer?
- R: It depends. I wouldn’t say I was unethical. I just don’t push ethics on things. It’s a difficult one, isn’t it? (FA7)

Taking the deal at ‘face value’, being the lawyer-technician who uses the law to effect his client’s wishes, and not ‘pushing’ ethics were common themes from our interviews. We suggest that there is an apathy – a lack of concern or interest – about ethics on the part of corporate lawyers. This apathy stemmed from various sources. It was linked to assumptions about the sorts of client that large law firms are willing or not willing to act for,<sup>103</sup> and assumptions about the ‘right sort of people’ the firm hired and retained; it was linked to strong notions of role morality; and it was founded on the classic legal ethics ‘standard conception’ principles of neutrality and non-accountability. As such, our work provides empirical support for the claim made by Luban that lawyers ‘commonly act as though the standard conception characterises their relationship with clients even when the representations do not involve the courtroom’.<sup>104</sup>

In their work comparing the ethics of in-house and private practice lawyers, Moorhead and Hinchly offer up various forms of ‘ethical minimalism’ seen in their interviews, which they set out as meaning ‘narrowly drawn ethical consciousness’.<sup>105</sup> It is hard to disagree with their findings (which, indeed, resonate with our own). However, we are of the view that the notions of ‘narrowly drawn ethical consciousness’ and ‘minimalism’ perhaps underplay the richness of the social world of corporate lawyers and the processes through which their sense of ethicality is constructed and maintained (i.e. the dynamic relationship between structure and agency). In our interviews, and as suggested in work

<sup>103</sup>Which in turn links to wider social and economic conditions, and financial and reputational issues in particular.

<sup>104</sup>D Luban, *Lawyers and Justice: An Ethical Study* (Princeton University Press, 1988) 57.

<sup>105</sup>Moorhead and Hinchly (n 49) 409.

by Mark Sargent on the role of in-house lawyers in corporate scandals,<sup>106</sup> we saw what he calls an ‘apparent indifference’ to ethics and what we term ethical apathy.<sup>107</sup> It was not that our lawyers possessed a *de minimis* form of ethics, or were unable to rationalise problems from different ethical viewpoints; rather, that they were largely unenthusiastic, disinterested and unconcerned about the ethics of what they and their clients were doing. Their own moral compasses ‘seemed to disappear into a smog of expediency, rationalisation, wilful blindness and slavish obedience’ to the client;<sup>108</sup> one in which self-deception was bought about by self-interest. The active distancing of our interviewees from the consequences of their clients’ actions (i.e. a suppression of concern as part of this rationalisation) is also consistent with classic understandings of apathy.<sup>109</sup>

Our view is that conditions of ethical minimalism and working assumptions about the nature of ethics in the context of corporate law leads to ethical apathy. This is almost a (sub)field/*habitus* point, to put it in Bourdieusian terms – a way of thinking about how structures are maintained through practice, and *vice versa*. In other words, an ethically minimalist subfield creates and maintains an ethically apathetic habitus. Framing minimalism and apathy in these terms helps to highlight the relational and dynamic processes at work in constructing and maintaining ethicality and legal practices – something often missing from the work on lawyers and law firms, even in interpretivist accounts.

The corporate lawyers we spoke with were almost exclusively adamant that the sort of work they do does not present ethical dilemmas. We agree, to an extent. Corporate lawyers in large firms are almost certainly not faced, on a daily basis, with clear and bright-line instances of ethically questionable conduct. As Luban says, ‘By and large lawyers do not go frantically through life encountering one moral dilemma after another like challenges in a video game’.<sup>110</sup> However, subtle, dynamic and challenging questions of ethics are present in much of the work undertaken by these lawyers: issues of independence and honesty;<sup>111</sup> work where the law is uncertain or grey (and the lawyer uses that uncertainty to their client’s advantage);<sup>112</sup> thinking about (and advising on) the consequences of client decision making;<sup>113</sup> conduct between lawyers in the same firm and with those on the opposite side of the table, and so on. These are all relevant. We were also struck, very vividly, by the fact that for many of those who had participated, the interview had been the first time they had reflected to any real degree on the ethics of what they did. This speaks volumes for the ethical climates in large law firms. At the end of the interviews, as we said our good-byes, a number commented on the cathartic aspects of the interview process:

It’s interesting to talk about things that you don’t often think about. (FC1)

I was a bit stumped by the ethical questions, I must say, because it’s just not really something I ever need to at least talk about in terms of my job. (FA5)

In this way, our interviews provided a space in which corporate lawyers could begin to reflect on issues of ethics. For some, this space was more disturbing than for others:

<sup>106</sup>MA Sargent, ‘Lawyers in the Moral Maze’ (2004) 49 *Villanova Law Review* 867.

<sup>107</sup>*Ibid* 871.

<sup>108</sup>*Ibid* 871–72.

<sup>109</sup>L. Gardner, D. Gilbert and ST Fiske. *The Handbook of Social Psychology* (Oxford University Press, 1998).

<sup>110</sup>Luban (2010) (n 19) 18.

<sup>111</sup>For an account of these issues, see Coe and Vaughan (n 87).

<sup>112</sup>On ambiguity, see Moorhead and Hinchly (n 49).

<sup>113</sup>For one concrete example of this, see Kershaw and Moorhead (n 33).

'I'm not sure I'll be able to sleep at night now, Steven!' (CA7). We are of the view that large law firms can, and should, do much more to make space for these ethical dialogues to happen on a regular basis. These dialogues, we would suggest, need to be framed in terms of a critical morality that moves lawyers beyond learning ethical rules of conduct as set by the SRA in its Handbook without an additional critical consideration of their consequences, limitations and possible alternatives.<sup>114</sup> Such would in fact be well in line with how the SRA frames ethical competence in its own Competence Statement.

There is an obvious disconnect between how the SRA, as regulator, views the principles on which corporate solicitors act (i.e. the SRA has a flowering in its Handbook of multiple concerns, with the 'public interest' as the top trump) and how corporate solicitors in practice view their roles (i.e. an almost exclusively client-centred, client-first approach). If what we have are lawyers who are apathetic about the ethical issues posed by their own practices and by their own clients (save for very selective 'gorilla exceptions'), and if law firms are not routinely engaging in training and dialogues on the ethics of lawyering in large firms, then there is a risk that those who advise the world's most powerful organisations are blind to the potential for ethical failures. This, we would suggest, requires much more than apathy. Like Pepper, we see space for the modern-day corporate lawyer to engage in a process of moral dialogue with their clients, while still doing what the client is seeking to do within the bounds of the law.<sup>115</sup> We also – perhaps somewhat naively, given what our data suggests, and given the swathes of work on the neoliberal transformation of the legal profession<sup>116</sup> – see the power and potential in corporate lawyers acting as public service norm intermediaries; acting as checks, or wise counsellors, on decision making by their corporate clients. Put simply, we are of the view that the renewable energy lawyer *should* care that his client's solar panels are being made by slave labour; and not just because 'caring' makes good business sense.

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<sup>114</sup>Parker (n 38).

<sup>115</sup>Pepper (2010) (n 29) and Pepper (1986) (n 9). Here, Joan Loughrey argues that moral counselling by corporate lawyers is routinely not discharged; see Loughrey (n 48) 72ff.

<sup>116</sup>See, for a review of these: H Sommerlad, S Harris-Short, S Vaughan and R Young, *The Futures of Legal Education and the Legal Profession* (Hart Publishing, 2015).