HOW WILL I KNOW? AN EPISTEMOLOGY OF LAWYERING

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A DISSERTATION SUBMITTED TO
THE FACULTY OF GRADUATE STUDIES
IN PARTIAL FULFILLMENT OF THE REQUIREMENTS
FOR THE DEGREE OF
DOCTOR OF PHILOSOPHY

GRADUATE PROGRAM IN LAW
YORK UNIVERSITY
TORONTO, ONTARIO

August 2021

Abstract

What does anyone know after a trial, after a witness gives testimony, or even after seeking the counsel of a lawyer? Hopefully, the answer to these questions has something to do with the truth. Legal systems claim to have truth-seeking functions. Lawyers have specific roles in the procedures by which legal systems seek the truth and these roles are informed by the norms of legal practice. Yet, lawyers' relationship to truth and knowledge remains underexplored in the philosophy of lawyering. I argue that the philosophy of lawyering needs to develop the epistemic branch of inquiry. The epistemic study of the legal profession offers both enrichment of this applied field of philosophy itself and the opportunity for the philosophy of lawyering to link up with a nexus of emerging scholarship about cognition in legal systems and legal services—especially metacognition in legal pedagogy and behavioural legal ethics (which explores the psychology of lawyers).

Advancing an epistemic approach to the philosophy of lawyering, I study the way in which the lawyer is involved in the adversarial system's truth-seeking function. My theory of lawyering is informed by recent scholarship in social epistemology and virtue epistemology. I propose a normative epistemology of lawyering, meaning specifically that my approach speaks to the professional character development of the lawyer. In the adversarial system of adjudication, lawyers can support the truth-seeking function of the system by developing the intellectual virtues of an epistemic partisan. I put my proposal to the test against Monroe Freedman's Client Perjury Trilemma, reaching new conclusions about the responses to the famous problem.

Ultimately, I call for a commitment to professional character formation in service of the legal system's search for truth.

Acknowledgements

I am thankful to my family—especially Kate Tucsa and Delia Tucsa—for your love and support. You listened to me talk about this project, read these pages, and suggested ideas for me to consider. Beyond the project itself, you stood by me for years as I wrote and refined. My appreciation for this will never end.

I cannot express enough thanks to the members of my supervisory committee: Allan C Hutchinson, Faisal Bhabha, and Trevor CW Farrow. Each of you contributed in profound ways to making me who I am today and to setting me on the path ahead. Trevor, I have benefitted greatly from your comments and guidance and from having the chance to collaborate in teaching legal ethics with you. Allan and Faisal, you have been mentors to me in teaching, scholarship, and life. You prompted me to be ambitious in my writing and inventive in my teaching. You helped me find a voice to speak both to the scholarly community and to students. Your trust in me has opened up opportunities. You have sharpened my mind and modelled the character to which I aspire. I hope to be able to pass on the same goodwill and illumination that you have shown me as your student.

I have many thanks and congratulations to give to Winston Benn, who also recently finished his PhD. United in outlook (academic and well beyond), our camaraderie has been a continued source of inspiration and encouragement. We are just beginning our work and contributions to the professional formation of lawyers, my friend.

I also want to express my appreciation to Robert E Atkinson, François Tanguay-Renaud, and Michael Giudice for the careful consideration that they gave to my work as part of my examination committee. It was an honour to present my work to you, to receive your feedback, and to be welcomed by you to the academic community.

To everyone mentioned here and to others not named who have been sources of joy and kindness, my most sincere thanks,

Emanuel Tucsa

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Introduction

Ethics has been fruitful in the philosophical study of the legal profession and should still occupy a central place therein. However, it is time for the philosophical study of lawyering to develop other strong branches. Reaching beyond comfortable topics in ethics, the philosophical study of lawyering can benefit from pursuing other philosophical branches of inquiry, especially metaphysics and epistemology.

Metaphysical and epistemological issues have already been raised on the ethics branch of the philosophy of lawyering. Metaphysical questions about the nature of morality and law (e.g., whether justice has an objective metaphysical grounding and about the nature of law) have largely existed as unaddressed assumptions of the moral and legal philosophies that have been the basis of various theories of lawyering. Epistemology has been more explicitly present in these discussions, including in questions about truth-seeking in trials, honesty and candour in the behaviour of lawyers, the reliability of types of evidence, the treatment of witnesses, etc. Thanks to recent developments in epistemology, as well as developments in adjacent fields of study, the epistemological branch of the philosophy of lawyering—much more so than the metaphysical branch—is ready for a growth spurt.

I will study both the practice of law, and the training of lawyers, from a philosophical perspective that focuses on cognition as a vital part of developing the professional character of lawyers. In doing so, I can draw upon consonant contributions from emerging fields of research that coalesce around the cognitive processes of participants in legal processes. A network of scholarship about cognition and law is ready to emerge, informed by: (1) philosophy, in the social and virtue-inspired turns in epistemology (including legal epistemology); (2) education theory, in the development of metacognition as a theory of education and learning (including in law schools); and (3) science, through the rise of behavioural legal ethics as a scientific study of cognition in the

legal field.[1] These domains look at the cognitive processes of people who are participants in legal processes. Epistemology, metacognition, and behavioural legal ethics provide a broad spectrum of resources and modes of discourse to the topic that unifies them: the cognition of participants in legal processes. My project of developing an epistemology of lawyering thus exists at a nexus between exciting theories that appreciate what can be gained by studying the mind of participants in legal processes. As a work in the philosophy of lawyering, most of the attention in this dissertation is given to lawyers' cognition.

While this dissertation expands the philosophy of lawyering beyond the ethical study of lawyering, this is not to say that I intend to cast off ethics. Questions, examples, modes of thinking, and sources in ethics (including legal sources and ethical codes of conduct) will inspire much of this dissertation. In fact, thinking in moral philosophy (virtue ethics, in particular) has inspired the developments in epistemology of which I make the greatest use. However, scholarship—especially philosophical scholarship—about lawyering is ready to achieve new kinds of insights that can recast the knowledge and norms already propounded. By staying so comfortably within the domain of ethics, scholarship on the legal profession has even overlooked the broader influence that ethical modes of thought are having beyond ethics itself. Missing these contributions thus limits the appreciation of the influence that ethical thinking has had on other domains.

One place in which epistemology and ethics meet is in virtue theory. A prominent recent use of virtue theory in legal ethics comes from Andrew B Ayers' application of the normative ethical theory of virtue ethics to legal ethics. Ayers challenges the prevailing pattern of thinking in legal ethics, which is focused on identifying an abstract principle (or set of abstract principles)

[1] This is not to say that these different domains of cognition-centred scholarship about lawyering have interacted deeply or have even found one another. I aim to give one of the first calls, if not the first call, to these domains to make the connections between their new and insightful approaches to studying the legal profession.

and applying that (or those) principle(s) to discrete problems in legal ethics. As Ayers explains, "Most theories [of legal ethics] focus on an abstract value, like justice, autonomy, or political legitimacy, and argue that it is what matters most. In many cases, the theory then endorses a maxim that tells lawyers how to promote the abstract value in their daily practice".[2] Differing substantially, Ayers proposes an account of legal ethics that centralizes the character of lawyers, rather than lawyer's adherence to abstract norms. Ayers' thinking is based on the pattern of thought in virtue theory, which is most famously developed in the ethics of Aristotle.[3] Lawyers are exhorted to enact appropriate virtues, rather than merely satisfy a set of maxims, or master maxim.[4]

I am starting a new flow of thought that can eventually join Ayers', but from a point of origin that is largely unheard of in legal ethics. My research in legal ethics is primarily based on a relatively recent development in the field of epistemology[5]: the rise of virtue epistemology as a normative approach to the study of knowledge.[6] In line with the spirit of Ayers' alternative to models of legal ethics that emphasize abstract values, virtue epistemology brings the insights of Aristotle's virtue ethics into the field of epistemology by treating knowledge as a matter of

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[2] Andrew B Ayers, "What if Legal Ethics Can't be Reduced to a Maxim?" (2013) 26:1 Geo J Legal Ethics 1 at 2.

[3] See Aristotle, *The Nicomachean Ethics*, reissued ed, translated by David Ross, JL Ackrill & JO Urmson, eds, (New York: Oxford University Press, 1998) (for the most famous articulation of Aristotle's ethics). Even earlier than Ayers, Allan Hutchinson, *Legal Ethics and Professional Responsibility*, 2nd ed (Toronto: Irwin Law, 2006) articulated his contextual and pragmatic approach to legal ethics, which emphasized many ideas that are also central in this dissertation, such as lawyers taking responsibility, *ibid* at 45–50, and "develop[ing] a professional *modus vivendi*", *ibid* at 210.

[4] See Ayers, *supra* note 2 at parts iii–iv.

[5] As is often the case in the field of epistemology, and certainly in virtue epistemology, I will use the terms "epistemic"/ "intellectual" and "epistemic virtue"/"intellectual virtue" interchangeably. Of course, there are scholars who would, in some instances, distinguish between epistemic virtues and intellectual virtues because, for example, there may be intellectual virtues that do not have the acquisition of knowledge as their focus. See Jason Kawall, "Other-Regarding Epistemic Virtues" (2002) 15:3 Ratio 257 at 259, n 8. However, Kawall uses the terms "intellectual virtue" and "epistemic virtue" interchangeably in the article that was just cited and describes this interchangeable use as "common practice".

[6] A "normative approach" to virtue epistemology attempts to make prescriptions about—rather than merely describe the acquisition of—knowledge. See generally John Turri, Mark Alfano & John Greco, "Virtue Epistemology", *The Stanford Encyclopedia of Philosophy* (Fall 2019), Edward N Zalta, ed, online: Center for the Study of Language and Information, Stanford University <plato.stanford.edu/entries/epistemology-virtue/> [perma.cc/JJ3T-4YUJ], s 1 (explaining varying approaches to treating virtue epistemology as a normative discipline).

epistemic character. This still young theory develops accounts of dispositions and behaviours that lead individuals and communities to knowledge. An intellectual agent or community is judged by whether he/she/it has/have these intellectual virtues, rather than by whether the agent or community meets a set of abstract conditions for possessing knowledge (as in more traditional approaches to epistemology).

Epistemology provides a fresh set of resources that legal scholars can bring to their thinking about the behaviour of members of the legal profession. I am presenting a new vantagepoint to the philosophy of lawyering, a complement, an enrichment, not a replacement of existing theories in the philosophy of lawyering (the overwhelming majority of which are philosophies of ethics). My research herein is presented from the perspective that there is a fundamental relationship between knowledge and ethics, as well as their associated fields of study. This relationship is seen vividly when turning normative analysis in epistemology and ethics towards the behaviour and dispositions of agents who participate in fields that are especially assessable by epistemic and ethical criteria. We see this foundational relationship and its theoretical fruitfulness illustrated in depth in the legal community and the roles of its various actors (both professionals and non-professionals). Increased attention to the cognition of lawyers creates an opportunity to approach the philosophy of lawyering in a way that deals more deeply with the professional life of the lawyer and the development of the professional character of the lawyer within the social institutions and practices of law. My epistemology of lawyering contributes to this.

One particular benefit of discussing epistemology in relation to legal ethics and models of lawyering is that epistemology provides additional richness to our understanding of the lawyer's knowledge-producing role. Too often, ethics and professionalism are discussed as being constraints on what seems to be the dominant understanding of what the "real job of a lawyer" is,

i.e., securing a favourable result for the client.[7] Ethics is treated as telling a lawyer what s/he cannot do in service of the client (what s/he cannot do in service of what s/he must do). Epistemic analysis has the advantage of being more readily seen as more than a constraint on the behaviour. Virtually all lawyering behaviour (including especially technical and procedural behavior) is assessable on epistemic grounds. With the paradigm that I develop, questions about character (both epistemological and ethical) are built into all assessments of a lawyer's professional efficaciousness. Thus, rather than merely thinking of the lawyer's knowledge-producing role in functional terms, discussing the epistemology of lawyering will allow me to understand even technical tasks as coming down to matters of character (epistemic character). This way of thinking about the epistemology of lawyering is largely thanks to the responsibilist line of thought in virtue epistemology.

This dissertation is primarily intended to be *about* lawyers, not *for* lawyers. I will discuss and propose an epistemic model of lawyering here, but I am not presently writing with the aim of giving advice to lawyers. To the extent that practicing lawyers can draw insight from this work (especially insight that they can take into their practice), that is a welcome secondary benefit. I do not say this to remain aloof of the practical realities of lawyering. Indeed, it is my hope that my interest in the practicalities of lawyering will become abundantly apparent throughout this dissertation, especially during my articulation of the virtue epistemology of lawyering. Rather, I am establishing my aims in this way because I am introducing a way of philosophizing about lawyers that is so new, and so different, from what exists now, that my focus must remain on laying out the conceptual groundwork of this branch of the philosophy of lawyering. Most accurately, I

[7] One of the more famous and strongly-given statements of the view that emphasizes client service to the exclusion of all else can be found in Lord Brougham's words, where he says that, for lawyers, "To save that client by all means and expedients, and at all hazards and costs to other persons, and, among them, to himself, is his first and only duty", *Trial of Queen Caroline*, vol 2, (New York: James Cockcroft & Co, 1874) at 3.

am not merely suggesting that scholars who study the legal profession should turn in a different direction in terms of studying lawyering philosophically. Rather, I am suggesting that legal scholars recognize, and better integrate, new and different modes of transportation.

Outline

Part I of this dissertation gives an account of the philosophy of lawyering as it has developed thus far. This includes discussions of traditional and alternative models of lawyering and waves of philosophical legal ethics. Additionally, I discuss what I hope to bring forward with my epistemological approach to lawyering. Finally, I will explain the type of knowledge that I plan to discuss in relation to lawyers and some key premises about knowledge that inform the particular way in which I make use of epistemic theories.[8] This will require briefly explaining the theory of truth that motivates this dissertation.

Subsequently, Part II sets out the epistemological theories that are the basis for the research undertaken, and position endorsed, in this dissertation. Section (2) and Section (3), will be surveys of the developments of social epistemology and virtue epistemology, respectively. Providing these surveys will put a spotlight on the exciting theoretical resources that I am bringing to the philosophy of lawyering. Throughout my surveys, I will, as often as possible, illustrate developments in the field of epistemology by using examples that apply to the field of law. I can do this so readily because some of the major contributions to these developments have been made by scholars who work on the epistemology of law, especially the social epistemology of law.

In Part III, Section (4), I will develop the main idea of this dissertation, namely that the application of virtue epistemology to law and legal knowledge can provide a number of insights

[8] One could challenge and propose different underlying premises about knowledge than the ones presented here. I leave such work for the future, dealing with more basic questions in epistemology and perhaps even in meta-epistemology. That work is beyond the scope of this dissertation, which is meant to give a normative understanding of epistemology and—more so—to apply that understanding to a practical field: legal practice.

into the functions of legal systems and the roles of lawyers in legal systems. I will develop a virtue epistemic account of lawyering that deals with the lawyer's role-differentiation, putting forward epistemic partisanship as an epistemic virtue.

Part IV of this dissertation brings forward the importance of understanding the relationship of this dissertation to an emerging network of cognition-focused approaches to studying participants in legal systems, including lawyers. In Section (5), I will discuss the way in which the study of metacognition in education provides vital resources for the development of the epistemically virtuous lawyer; developments in metacognition support virtuous dispositions and metacognition is seeing similar turns as the broader field of epistemology. A key feature of the lawyer-client relationship involves an offloading of metacognitive work from the client to the lawyer. In Section (6), I will explore developments in behavioural legal ethics, an approach to legal ethics that uses scientific literature, especially psychology, to explore the ethics of lawyering.

Part V contains the central case study of this dissertation: Monroe Freedman's Client Perjury Trilemma. In Section (7), I will explain the Client Perjury Trilemma, discuss various responses to the Client Perjury Trilemma, and analyze the Client Perjury Trilemma from the perspective of the theory of virtue epistemology that I develop in this dissertation. Finally, in Section (8), I will undertake a detailed epistemic evaluation of Monroe Freedman's controversial answer to the Client Perjury Trilemma. I do not propose a new solution to the Client Perjury Trilemma, but I bring fresh resources to bear in dealing with it.

Throughout this dissertation, as I discuss professional rules of conduct, I will refer to the American Bar Association's *Model Rules of Professional Conduct* (the "ABA *Model Rules*")[9] and

[9] American Bar Association, *ABA Model Rules of Professional Conduct*, ABA, 2019, online: ABA <www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents/> [perma.cc/5WED-59ZP] [ABA *Model Rules*].

the Federation of Law Societies of Canada's *Model Code of Professional Conduct* (the "FLSC *Model Code*")[10]. These sources are cited to raise the relevant professional norms that connect to the epistemic and ethical ideas being discussed and the cases to which the norms and ideas are being applied. However, a deep comparative study of relevant provisions in these documents does not fall within the scope of this dissertation. Moreover, no set of rules can exhaustively cover the work of a lawyer or exhaustively cover any social interaction. Professional codes of conduct will, ideally, set out a number of requirements and permissions that are well grounded in the justification for the lawyer's role-differentiation, and that may form part of a deposit of knowledge that the lawyer can use in guiding his/her behaviour as a professional. On this topic, Hutchinson says, "[A]n ethical code is not an exhaustive compendium of right answers and settled guidelines. While it often recommends bounds on acceptable conduct and seeks to distinguish good from bad behavior, it will operate more as a set of resources through which to think about and decide what to do than a corpus of pat answers to moral dilemmas".[11] Accordingly, I will treat codes of professional conduct as resources for reasoning through challenges in the philosophy of lawyering—especially in my philosophy of lawyering—and as guardrails for epistemic character development.

[10] Federation of Law Societies of Canada, *Model Code of Professional Conduct*, FLSC 2019, online (pdf): FLSC <flsc.ca/wp-content/uploads/2019/11/Model-Code-October-2019.pdf> [perma.cc/U4WA-H2T7] [FLSC *Model Code*]. Before the FLSC *Model Code*, the document that played the role of national model code in Canada was the Canadian Bar Association *Code of Professional Conduct*. See Canadian Bar Association, "Codes of Professional Conduct" (last modified 26 April 2020), online: *Canadian Bar Association* <www.cba.org/Publications-Resources/Practice-Tools/Ethics-and-Professional-Responsibility-(1)/Codes-of-Professional-Conduct> [perma.cc/3EDN-GJM6] (a brief history of the code); Canadian Bar Association, *CBA Code of Professional Conduct*, Ottawa: CBA, 2009, online (pdf): CBA <www.cba.org/getattachment/Publications-Resources/Resources/Ethics-and-Professional-Responsibility/Code-of-Conduct/Code-of-Professional-Conduct-(2009)/codeOfConduct2009Eng.pdf>.

[11] Allan C Hutchinson, *Fighting Fair: Legal Ethics for an Adversarial Age* (New York: Cambridge University Press, 2015) at 8.

Part I – History & Turns in the Philosophy of Lawyering

As this dissertation aims to bring forward new ways of philosophizing about lawyers, the arguments in Part I connect with major ideas developed thus far in the philosophy of lawyering. Appreciating themes in the historical development will be more helpful for the purposes of this dissertation than having a chronological account of the development of the philosophy of lawyering.

(1) Ethical Models, Ethical Waves, and Epistemic Ripples

As stated already, the primary developments in the philosophy of lawyering have been on the ethics branch of philosophy. The existing lines of thought have developed models and connected them to theories of ethics, political philosophy, and legal philosophy. I explore these existing waves and feed the epistemic ripples that I hope will develop into an epistemic wave of the philosophy of lawyering.

(1.1) Traditional & Alternative Models of Lawyering

Underlying various moral and philosophical approaches to lawyering constructed by theorists over multiple decades is the debate between (1) traditional models of lawyering[1]—sometimes called the standard conception, standard model, or zealous advocate model of lawyering—and (2) alternative models of lawyering. Traditional models of lawyering, also called zealous advocate models, have three key aspects[2]: the principle of neutrality which says that,

[1] I have deliberately used the plural form "traditional models" throughout this dissertation. It is true that there is more unity among advocates of traditional lawyering than there is among advocates of alternative models of lawyering, whose advocates often differ from one another beyond of their basic agreement that traditional lawyering cannot be all that there is to the practice of law. However, the comparative unity among advocates of traditional lawyering is not reason enough to miss the nuance within traditional lawyering. The history of legal ethics scholarship has included a wide variety of proposals about traditional lawyering and the reasons that justify traditional lawyering. The time has come to use language that recognizes, rather than elides, the diversity within traditional lawyering.

[2] See generally Tim Dare, *The Counsel of Rogues?: A Defence of the Standard Conception of the Lawyer's Role* (Farnham, UK: Ashgate Publishing, 2009) [Dare, *Counsel of Rogues*] at 74–76 (Dare discussing the three key aspects of traditional models). See also David Luban & W Bradley Wendel, "Philosophical Legal Ethics: An Affectionate History" (2017) 30:3 Geo J Legal Ethics 337 at 343, n 17 and accompanying text (citing accounts of traditional models that divide up the aspects of traditional models in slightly different ways).

"[T]he lawyer must not allow their own view of the moral merits of the client's objective or character to affect the diligence or zealousness with which they pursue the client's lawful objectives";[3] the principle of lawyer non-accountability, "according to which lawyers are not to be judged by the moral status of the client's projects";[4] and the principle of partisanship, which stipulates that, "A lawyer must, within the established constraints on professional behavior, maximize the likelihood that the client's objectives will be attained".[5] The overarching idea is that lawyers must focus their attention (almost exclusively) on zealous promotion of the client's legal interests. Tim Dare, a philosopher of legal ethics whose ideas are discussed in more depth in Section (1.2), advocates a traditional model of lawyering.

In contrast to traditional models, alternative models of lawyering generally advocate for the lawyer to take moral accountability (or more moral accountability) for his/her own legal practice and for the legal services that s/he provides to the client.[6] The major theme that unites many alternative models of lawyering is the idea that a lawyer's duties go beyond the duty to pursue the client's interests and also beyond certain minimal duties to the court (such as the duty to not present false evidence to the court). In particular, alternative models of lawyering often advocate that, in addition to resolutely serving the client, lawyers should take into account the interests of third parties to the case, or even the interests of the opposing party in the case. These

[3] Dare, *Counsel of Rogues, supra* note 2 at 74.
[4] *Ibid* at 75. See also David Luban, "Partisanship, Betrayal and Autonomy in the Lawyer-Client Relationship: A Reply to Stephen Ellmann" (1990) 90:4 Colum L Rev 1004 [Luban, "Partisanship"] at 1004 (Luban's definition of non-accountability). Luban's definition of non-accountability additionally specifies that lawyers are not to be held "legally, professionally, or morally accountable" for their service of the client (*ibid*).
[5] Luban, "Partisanship", *supra* note 4 at 1004 (Luban's definition of partisanship). See also Dare, *Counsel of Rogues, supra* note 2 at 75–76 (Dare responding to some of Luban's arguments about partisanship) [footnote omitted].
[6] See generally Trevor CW Farrow, "Sustainable professionalism" (2008) 46:1 Osgoode Hall LJ 51 at 71–83 (Farrow's account of alternative models of lawyering). For an example of another alternative model of lawyering, see Robert K Vischer, "Legal Advice as Moral Perspective" (2006) 19:1 Geo J Legal Ethics 225.

additional duties are often justified in terms of the legal profession's wider duties to the public. Explaining this point, Farrow says:

> [L]awyers, as self-regulated professionals, have been given the opportunity and responsibility to act not just in the interests of their clients but, more fundamentally, in furtherance of the 'public interest.' Therefore, in addition to the interests of the client, the advocate must take into consideration a number of other interests (as required by his or her status as a member of the legal profession) including those of other clients, himself or herself, opposing lawyers, the court, and other sectors of society included in the overall administration of justice.[7]

This consideration of the interests of other parties will usually involve some boundaries that the lawyer will not cross to pursue the client's interests. These boundaries, of course, involve more than simply not breaking the law to pursue the client's interests; traditional models would agree with that as well. Instead, some moral standards (conceived of in diverse ways) provide a limit on the actions that alternative models allow for the lawyer to take. Farrow suggest that, "In the 'extreme' form, the lawyer should 'avoid doing harm' by refusing to act if the lawyer thinks that the outcome of 'winning' would be on balance a 'bad thing' or 'socially unfortunate,' in spite of the fact that 'the client will pay' and that the lawyer 'wouldn't be doing anything that came close to violating the canons of professional ethics'".[8] The lawyer who follows an alternative model of lawyering thus places limits—to greater or lesser degrees—on the extent to which s/he will go in order to serve the client.

As an example of alternative models of lawyering, Allan Hutchinson has drawn insights from military ethics, arguing that lawyers should consider concepts such as collateral damage and proportionality to avoid causing undue harm to third parties and even to adversaries.[9] Going beyond considerations related to the immediate conduct of litigation, Hutchinson has also

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[7] Farrow, *supra* note 6 at 71–72 [footnotes omitted].
[8] *Ibid* at 73 [footnote omitted].
[9] See Allan C Hutchinson, *Fighting Fair: Legal Ethics for an Adversarial Age* (New York: Cambridge University Press, 2015) [Hutchinson, *Fighting Fair*] at 94–104.

expanded his application of his alternative model of lawyering to just cessations of legal disputes—a just peace.[10] A prominent strand of support for alternative models of lawyering has been put forward by scholars who approach legal ethics from positions inspired by critical legal theory and progressive political positions aimed at promoting social justice.[11]

The extent to which various models of lawyering are supported by codes of professional conduct differs. Even so, both the of the major schools of thought—traditional models and alternative models—are codified to some extent in the leading model codes of conduct in Canada and in the United States of America. Codes contain provisions supporting aspects of traditional models and aspects supporting alternative models. The following examples are given not to compare which model of lawyering is better supported by various codes of professional conduct, but rather to show that both models have been codified to some extent.

Beginning with support for traditional models of lawyering, the principle of partisanship is likely the best supported aspect of traditional models of lawyering, as partisanship can be understood as a necessary aspect of the adversarial system of adjudication. The principle of neutrality does not have such explicit support in rules of professional conduct, though the principle appears to follow from rules supporting partisanship. The FLSC *Model Code* has the following key provisions on partisanship. Under Rule 5.1-1, which defines the role of the lawyer as an advocate, including within litigation as well as other contexts, the commentary in FLSC *Model Code* stipulates that:

> Comment 1: "In adversarial proceedings, the lawyer has a duty to the client to raise fearlessly every issue, advance every argument and ask every question, however

[10] See *ibid* at 110–114.

[11] See generally, Susan D Carle, ed, *Lawyers' Ethics and the Pursuit of Social Justice: A Critical Reader* (New York: New York University Press, 2005) (exploring a number of issues in, and positions on, social justice lawyering). Accord Allan C Hutchinson, "Calgary and Everything After – A Postmodern Re-Vision of Lawyering" (1995) 33:4 Alta L Rev 768 (arguing for a postmodern approach to lawyering).

> distasteful, that the lawyer thinks will help the client's case and to endeavour to obtain for the client the benefit of every remedy and defence authorized by law".[12]
>
> Comment 3: "The lawyer's function as advocate is openly and necessarily partisan. Accordingly, the lawyer is not obliged (except as required by law or under these rules and subject to the duties of a prosecutor set out below) to assist an adversary or advance matters harmful to the client's case".[13]

Matching the stipulation given in the principle of partisanship that the lawyer must "maximize the likelihood that the client's objectives will be attained",[14] Comment 1 requires the lawyer to use a variety of lawyering skills to their fullest extent (even when doing so is distasteful) to gain every possible benefit that the law offers to the client. Comment 3 makes clear the exclusivity with which the lawyer's duties belong to the client.

The reasoning underlying the principle of non-accountability is supported by the ABA *Model Rules*. First the ABA *Model Rules* explicitly identify the client's control over the services of the law, stating in Rule 1.2 (a) that "a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued".[15] The commentary to Rule 1.2 specifies that, "Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations".[16] Second, and explicitly, the ABA *Model Rules* give the principle of non-accountability and its underlying reasoning, declaring that, "A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political,

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[12] Federation of Law Societies of Canada, *Model Code of Professional Conduct*, FLSC 2019, online (pdf): FLSC <flsc.ca/wp-content/uploads/2019/11/Model-Code-October-2019.pdf> [perma.cc/U4WA-H2T7] [FLSC *Model Code*], r 5.1-1, commentary 1.
[13] *Ibid*, r 5.1-1, commentary 3.
[14] Luban, "Partisanship", *supra* note 4 at 1004 [footnote omitted], quoted above at note 5 and accompanying text.
[15] American Bar Association, *ABA Model Rules of Professional Conduct*, ABA, 2019, online: ABA <www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents/> [perma.cc/5WED-59ZP] [ABA *Model Rules*], r 1.2 (a).
[16] *Ibid*, r. 1.2, commentary 1.

economic, social or moral views or activities".[17] The portion of the commentary to Rule 1.2 titled "Independence from Client's Views or Activities" further specifies the reasoning underlying this rule, which is to remove a disincentive that would discourage lawyers from taking on controversial cases,[18] matching Tim Dare's reasoning for the principle of non-accountability.[19]

Alternative models of lawyering too have support in codes of professional conduct. More interpretation is sometimes (though not always) needed to draw out the support. The FLSC *Model Code* has some permissive language on discussing non-legal aspects of the client's interest and actions. This permission is found in a comment to the rule on competence,[20] not as a distinct rule. Moreover, the Canadian provision does not include morals among the non-legal considerations on which the lawyer can express views. In stark contrast to the FLSC *Model Code*, the ABA *Model Rules* contain explicit and strongly stated support for lawyers discussing the moral considerations of a case with the client. The explicit support begins with Rule 2.1, which says, "In rendering advice, a lawyer may refer not only to law but to other considerations such as *moral*, economic, social and political factors, that may be relevant to the client's situation".[21] The lawyer receives permission under this rule to raise moral and other considerations with the client.

The commentary to the rule begins by noting the potential for purely legal advice to be of limited value to the client, saying that, "Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate".[22] Given the limitations of purely legal advice, the ABA *Model Rules* grant permission to the lawyer to raise

[17] *Ibid*, r 1.2 (b).
[18] *Ibid*, r 1.2, commentary 5.
[19] See Dare, *Counsel of Rogues*, *supra* note 2 at 75.
[20] See FLSC *Model Code*, *supra* note 12, r. 3.1-2, commentary 10.
[21] ABA *Model Rules*, *supra* note 15, r 2.1 [emphasis added].
[22] *Ibid*, r 2.1, commentary 2.

non-legal consideration (most notably moral considerations for your present purposes) with the client. The commentary states, "It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied".[23] The permission is explicitly connected both to the moral aspects of the case itself and to the influence of moral considerations on legal interpretation. Finally, emphasizing the importance of non-legal considerations, the commentary to Rule 2.1 of the ABA *Model Rules* also discusses cases in which the lawyer should raise non-legal considerations even in response to a client who "expressly or impliedly ask[s] the lawyer for purely technical advice".[24]

As long as the adversarial model of adjudication is in use, it appears that the debate between traditional models of lawyering and alternative models of lawyering will continue to be relevant. The theories bring forward differing answers to the core question of whether the lawyer should take anything else into consideration other than the interests of the client.

(1.2) Waves of Philosophical Legal Ethics

Debates in legal ethics have extended in a variety of directions on the moral branch of the philosophy of lawyering. Traditional and alternative visions of lawyering underlie many existing and emerging approaches to the philosophy of lawyering, as the debates develop in waves of scholarship. The waves of philosophical legal ethics theories cannot be reduced to merely being different ways of supporting traditional models of lawyering or alternative models of lawyering. That is to say that developments in legal ethics have been about much more than each wave of legal ethics theory stating zealous advocate models and alternative models in the terms of their own new theory (in terms of the philosophical concepts that the author has argued is significant).

[23] *Ibid*.
[24] *Ibid*, r 2.1, commentary 3.

However, each wave of philosophical legal ethics has contributed a range of perspectives and deep insights about the debate between traditional models of lawyering and alternative models of lawyering. In works tracking the historical development of philosophical legal ethics, scholars such as Katherine Kruse,[25] and Bradley Wendel and David Luban (in their joint work),[26] outline the development of two waves of legal ethics. These waves of legal ethics conform to the trend observed by Ayers of defining an abstract value that lawyers should pursue and exhorting lawyers to pursue that value.[27]

The first of these waves approached problems in legal ethics equipped with the tools and understandings of moral philosophy and political philosophy.[28] This includes the application of: philosophical theories in normative ethics; political philosophy and political stances and movements, such a liberalism and critical legal studies (which often sought to understand the role that law plays in systems of oppression as well dealing with contested questions about how law can be used to promote change or whether the oppression imposed by the legal system must simply be resisted); and religious theories of lawyering, which focus on integrating faith traditions into the life of a lawyer.

During the second wave of philosophical legal ethics, theorists turned to legal philosophy to inspire accounts about lawyering. Included among these approaches are: the legal positivist theories of H.L.A. Hart and Joseph Raz,[29] Dworkinian interpretivism,[30] and Lon Fuller's

[25] See generally Katherine R Kruse, "The Jurisprudential Turn in Legal Ethics" (2011) 53:2 Ariz L Rev 493.
[26] See generally Luban & Wendel, *supra* note 2.
[27] Above, Introduction, note 2 and accompanying text.
[28] See generally Kruse, *supra* note 25 at 498–505; Luban & Wendel, *supra* note 2 at 339–352 (both articles tracking developments in the first wave of legal ethics, which was inspired largely by moral and political philosophy).
[29] See generally Dare, *Counsel of Rogues*, *supra* note 2 (giving a Razian exclusive positivist defence of traditional lawyering); W Bradley Wendel, *Lawyers and Fidelity to Law* (Princeton: Princeton University Press, 2010); W Bradley Wendel, "Legal Ethics and the Separation of Law and Morals" (2005) 91:1 Cornell L Rev 67 [Wendel, "Legal Ethics & Separation"], Wendel giving a Razian-influenced and heavily Hartian defence of traditional lawyering.
[30] See generally William H Simon, *The Practice of Justice: A Theory of Lawyers' Ethics* (Cambridge, MA: Harvard University Press, 1998) (a Dworkinian-influenced alternative model of lawyering).

procedural naturalism featuring the internal morality of law.[31] In my own earlier graduate work, I developed a theory of lawyering based on Fuller's internal morality of law.[32]

The dominant debate in legal philosophy, which also gives the second wave much of its shape, is between legal positivism and natural law theory. The debate between legal positivism and natural law theory centres on the relationship between law and morality, especially the question of whether the validity of law depends on law's moral merits. According to positivism, law and morality are ontologically independent. Crucially, the validity of law does not depend (certainly not by necessity) on law's moral merit.[33] Speaking broadly, "Natural law theory is a mode of thinking systematically about the connections between the cosmic order, morality, and law".[34] There is a wide variety of natural law theorizing, most of which suggests important and often necessary connections between law and morality, while not claiming that law's validity and essence depend on its moral merits.[35]

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[31] See generally David Luban, "Rediscovering Fuller's Legal Ethics" (1998) 11:4 Geo J Legal Ethics 801; Luban, David. *Legal Ethics and Human Dignity* (New York: Cambridge University Press, 2007) ch 3 (Luban discussing the relevance of Fuller's work to legal ethics and Fuller's contributions to legal ethics).

[32] See Emanuel Tucsa, *Legal Ethics as a Moral Idea: A Theory of Philosophical Legal Ethics Based on the Work of Lon Fuller* (LLM Thesis, Osgoode Hall Law School, York University, 2014) [unpublished].

[33] See Brian Bix, ed, *A Dictionary of Legal Theory*, (Oxford: Oxford University Press, 2004) [Bix, *Dictionary*] sub verbo "legal positivism" 120–121; Andrei Marmor & Alexander Sarch. "The Nature of Law", *The Stanford Encyclopedia of Philosophy* (Fall 2019), Edward N Zalta, ed, online: Center for the Study of Language and Information, Stanford University <plato.stanford.edu/entries/lawphil-nature/> [perma.cc/L9NW-U4NU], s 1.1 (explaining legal positivist account of the conditions required for legal validity).

[34] Bix, *Dictionary*, *supra* note 33 sub verbo "natural law theory" 143. My thanks to David Novak for highlighting for me that some natural law theories have not given a central role to, or have even eschewed discussion of, the cosmic order and its relationship to law and morality.

[35] In line with the previous footnote, these theories place varying emphasis on the cosmic order, especially in their focus on specific religious traditions. Somewhat arranged in order from authors who engage more with cosmic/religious questions to authors who are more secular in outlook, see generally Saint Thomas Aquinas, *Treatise on Law*, translated by Richard J Regan (Indianapolis: Hackett, 2000); David Novak, *Natural Law in Judaism* (Cambridge: Cambridge University Press, 1998); Anver M Emon, *Islamic Natural Law Theories* (Oxford: Oxford University Press, 2010); Anver M Emon, Matthew Levering & David Novak, *Natural Law: A Jewish, Christian, and Muslim Trialogue* (Oxford: Oxford University Press, 2014); Germain G Grisez, "The First Principle of Practical Reason: A Commentary on the Summa Theologiae, 1-2, Question 94, Article 2" (1965) 10 Am J Juris 168; Germain G Grisez, Joseph Boyle & John Finnis, "Practical Principles, Moral Truth, and Ultimate Ends" (1987) 32 Am J Juris 99; John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980) [Finnis, *Natural Law*]; Robert P George, *In Defense of Natural Law* (Oxford: Clarendon Press, 1999); Lon L Fuller, *The Morality of Law*, revised ed (New Haven, Conn: Yale University Press, 1969) [Fuller, *Morality of Law*]; Michael S Moore, "Moral Reality Revisited" (1992) 90:8 Mich L Rev 2424.

Models of lawyering (traditional and alternative) and jurisprudential questions about the nature of law intertwine deeply in philosophical legal ethics. Perhaps most critically, in an approach to philosophical legal ethics that looks to derive insights about lawyering from the nature of law and law's relationship to morality, some theories of legal philosophy have a stronger internal impetus to support some models of lawyering more than others. This is seen especially when contrasting legal positivist theories with natural law theories. Legal positivism more readily supports traditional models of lawyering, while natural law theory lends itself better to supporting alternative models of lawyering. Alternative models of lawyering are often also proposed on grounds other than natural law theory. For instance, critical approaches to legal theory can also be the driving force behind alternative models of lawyering.[36] For the sake of manageability, this dissertation mentions models of lawyering based on critical approaches to law but will draw the main juxtaposition of jurisprudential theories of lawyering as involving legal positivism and natural law, supporting traditional models of lawyering and alternative models of lawyering, respectively.

(1.2.1) Legal Positivism & Traditional Models of Lawyering

Legal positivism's core tenet is the dependence thesis—the idea that the validity of law does not depend on law's moral merits.[37] This thesis is better advanced within the philosophy of lawyering by approaches to lawyering that emphasize the distinctness and separation of law and morality in legal work. Specifically, positivists would oppose the idea that lawyers should introduce moral considerations into their advice to clients. This opposition to the inclusion of moral considerations within the work of lawyers is especially true of positivist theories—like Raz's—

[36] Mentioned above at note 11 and accompanying text.
[37] Above at note 33 and accompanying text.

which focus on law as an exclusionary reason for action. Joseph Raz is a key influence in positivist strands of philosophical legal ethics, especially in his political philosophy.

Raz emphasizes the dispute resolution function of law as vital to cooperative action in society. He claims that law provides an authoritative settlement of disputes, and guide for action, by replacing the differing substantive claims (the differing reasons for action) underlying those disputes (e.g., differing views about moral values/norms) with legal reasons for action (i.e., legal sources and judgments containing legal values/norms). Thus, rather than bringing our different viewpoints and arguments (about morality and other topics) into all of our practical interactions with other people and with public and private institutions, we can cite the legal resolution that law has provided to a dispute as the reason for which we will take a certain course of action and for which the other person or institution in a situation should take a certain course of action.[38]

Raz's argument about law's dispute resolution function can be read descriptively and prescriptively. His argument both describes law's independence from morality being based on law's dispute resolution function and provides politically and morally grounded reasoning about when and how to act in a way that is guided by this same function.[39] Law's dispute resolution function is politically and morally valuable, says Raz, because the authoritative resolution provided by law helps individuals who have a plurality of viewpoints live peacefully and cooperatively with one another in the same society.[40] Law cannot perform this authoritative replacement role if law is bound to be consistent with the reasons for action (i.e., moral

[38] See Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon, 1988) [Raz, *Morality of Freedom*] ch 2, especially at 41–42. Therein, Raz gives his famous arbitrator example, explaining law's dispute resolution function.
[39] See *ibid* at 63–66, where Raz explains that his account of authority is both conceptual and normative.
[40] See *ibid* at 58, 63–66. Doing work that is even more prescriptive in aim, some authors have given a greater role to morality in legal positivism by arguing that "the separation of law and morality…[is] a good thing, something to be sought for various political or moral reasons". See generally Bix, *Dictionary*, *supra* note 33 sub verbo "legal positivism – ethical positivism". See generally Tom Campbell, *The Legal Theory of Ethical Positivism* (Aldershot, Eng: Dartmouth, 1996); Neil MacCormick, "A Moralistic Case for A-Moralistic Law?" (1985) 20:1 Val U L Rev 1, authors who provide moral cases for positivism.

values/norms) that law was meant to replace when resolving disputes about those underlying concerns.[41]

The fact that Raz's account of positivism is descriptive and has a strong prescriptive element positions it better to translate into a theory of legal ethics than positivist theories that are more purely descriptive. By contrast, the Midas Theory of law,[42] an even stronger positivist theory than Raz's, is a stark example of a descriptive positivist theory that would be difficult to translate into legal ethics. The theory is more purely descriptive than any other positivist theory—not relying on, or offering, supporting arguments (especially prescriptive arguments) from political or moral philosophy. The key focus of the Midas Theory is to explain what happens when law interacts with other domains of knowledge and how law keeps its essential ontological independence[43] while interacting with these other domains of knowledge.

Law's ontological independence from other domains of knowledge is guaranteed by law's freedom to develop its own goals, methods, and institutions apart from the conceptions of other disciplines. The nature of the relationships between disciplines themselves, rather than additional political and moral argumentation of the kind that some positivists give,[44] allows law to both interact with other domains of knowledge and maintain its ontological independence from those

[41] See Raz, *Morality of Freedom*, *supra* note 38 at 42, 47–48. See generally, *ibid* at 57–62, for Raz's discussion of pre-emption of authoritative reasons for action.

[42] See generally Ralf Poscher, "The Hand of Midas: When Concepts Turn Legal, or Deflating the Hart-Dworkin Debate" in Jaap C Hage & Dietmar von der Pfordten, eds, *Concepts in Law* (New York: Springer, 2009) 99 (propounding the Midas Theory of law).

[43] See generally Fabrice Correia, "Ontological Dependence" (2008) 3:5 Phil Compass 1013 at 1014. Correia explains that essential ontological dependence "involves requirements for identity or essence: an essentially dependent object is one which, as it were, would not be the object that it is had a condition of a certain sort not been met". *Ibid*. Thus, the Midas Theory holds that law is essentially ontologically independent (most notably of morality) in that law does not depend on other domains of knowledge to be the sort of thing that it is. Essential dependence is perhaps better understood when contrasted with existential dependence, in which one thing depends on another in order to exist at all. Crucially, if law is essentially dependent on morality and a purported legal system or purported particular law fails to meet the essential requirements that morality sets, then the thing that was incorrectly purported to be law still exists, but that thing is not law.

[44] Above at notes 39–40 and accompanying text.

domains. The Midas Theory says that when the law seems to adopt conceptions from other domains of knowledge, what the law is actually doing is creating a legal analogue, an *ontologically legal conception* of the *shared concept* that law has in common with that other field.[45] The workings of this theory are illustrated with through comparison with the myth of King Midas, who was able to turn everything that he touched into gold. So too, law turns things it touches into law. The Midas Theory is concerned about describing what law as a domain has the ability to do, not with evaluating what the domain does. Lawyers would have difficulty abiding by, or resisting, the Midas Theory because the theory is so free of normative content.

By contrast, Raz's theory of law discusses benefits, grounded in moral and political philosophy, that law provides. Philosophical legal ethicists who have been inspired by Raz's reasoning contend that law's dispute resolution function justifies the traditional model of lawyering in general and its components. The traditional model of lawyering, Razian authors suggest, accounts best for the mediating role that the lawyer places in the dispute resolution function of law. If lawyers reintroduce moral considerations into the lawyer-client relationship, the lawyers are allowing for the terms of the underlying conflict to make their way into the dispute resolution process that is supposed to replace the terms of the underlying conflict.[46] However, it may be possible even in positivist terms, to distinguish between cases in which lawyers raise moral considerations to discourage a client from fully pursuing his/her legal entitlements and cases in which lawyers might raise a moral point in favour of the client pursuing his/her legal entitlements.

[45] Poscher uses the terms "concepts" and "conceptions", which he borrows from WB Gallie, "Essentially Contested Concepts" (1955) 56 Proceedings of the Aristotelian Society 167.

[46] See Dare, *supra* note 2 at 70–73 (arguing that, in order to respect the dispute resolution function of law, lawyers should refrain from re-introducing into their legal work the substantive arguments, e.g., moral arguments, that law has addressed in resolving disputes). But see Wendel, "Legal Ethics & Separation", *supra* note 29 at 100–106 (taking the view that it can be appropriate, under an inclusive positivist account of law, for lawyers to refer to morality).

The latter exhortation uses morality to support the use of the resolution to a problem provided by law. It thus makes use of the prescriptive aspects of Raz's positivist theory.

At a granular level, Tim Dare argues that justification for the principles that make up the traditional model[47]—the principle of neutrality, the principle of non-accountability, and the principle of partisanship—can be based in the dispute resolution function of law, especially in resolving disputes between "reasonable but inconsistent views".[48] Dare contends that the *principle of neutrality* supports both the functioning of law's dispute resolution process in a pluralistic society and the application of the decisions reached by these same dispute resolution processes. "[L]egal representation", Dare notes, "is at least sometimes necessary to secure legal rights".[49] He further expands that if lawyers calibrate the zealousness of their representation, or otherwise fail to serve clients with whom they disagree, then lawyers can render a person's legal rights (especially the rights of an unpopular client) "worthless".[50]

Given that lawyers play a vital role as mediators in law's dispute resolution function, Dare claims that this mediating role must be respected by not placing blame on the lawyer for the views, goals, or character of the client.[51] Thus, in support of the *principle of non-accountability*, Dare says that honouring the value of procedures that recognize and respond to "reasonable pluralism" also requires the recognition of the role that lawyers play in the legal system that mediates between differing viewpoints.[52] He reasons, moreover, that lawyer non-accountability removes a barrier to representing clients within the dispute resolution processes of law. Even when the lawyer takes on an unpopular client, the lawyer can cite the principle of non-accountability "in response to the

[47] Described above at notes 2–5 and accompanying text.
[48] Dare, *supra* note 2 at 74.
[49] *Ibid*.
[50] *Ibid*.
[51] See *ibid* at 75.
[52] *Ibid*.

mistaken assumption that they would not have taken on the case if they did not endorse the goals of the client".[53]

For the *principle of partisanship,* Dare begins his defence by identifying two levels of zealous advocacy: "hyper-zeal" and "mere-zeal".[54] According to the "hyper-zeal" conception of traditional lawyering, a lawyer will attempt to secure "any advantage obtainable for her client through the law",[55] even when the particular benefit does not fall within the purpose of the law in the case on which the lawyer is working. This hyper-zealous conception of traditional lawyering can be associated with Lord Brougham's classic statement about zealous advocacy, in which he argues that the lawyer must pursue the client's interests "by all means and expedients, and at all hazards and costs to other persons, and, among them, to himself".[56] Brougham expands that the lawyer "must not regard the alarm, the torments, the destruction which he may bring upon others" and must "go on reckless of consequences".[57] Dare makes the connection between Brougham and "hyper-zealous" lawyering too.[58] In the "mere-zeal" conception, on the other hand, the lawyer works to achieve for the client all that the client is legally entitled to obtain under law, with "no obligation to pursue interests that go beyond the law".[59]

Dare is critical of the "hyper-zeal" conception and presents "mere-zeal" as the correct way in which to apply traditional zealous advocacy such that the approach to legal practice achieves law's dispute resolution function.[60] Stated briefly, his argument against hyper-zeal is that being hyper-zealous places the lawyer's actions beyond what can be justified by the role of the lawyer

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[53] *Ibid*.
[54] See Tim Dare, "Mere-Zeal, Hyper-Zeal and the Ethical Obligations of Lawyers" (2004) 7:1 Legal Ethics 24 [Dare, "Zeal"].
[55] *Ibid* at 30.
[56] *Trial of Queen Caroline*, vol 2, (New York: James Cockcroft & Co, 1874) at 3.
[57] *Ibid*.
[58] See Dare, "Zeal", *supra* note 54 at 32.
[59] *Ibid* at 30.
[60] See *ibid* at 32–34, especially.

within the social institutions of law. Crucially, we are told that, "Lawyers occupy roles in an institution designed to allow pluralist communities by specifying what rights members of the community shall have. The role-obligations are framed by reference to the point of that institution".[61] Since, by definition, the lawyer who practices hyper-zeal seeks to secure more than the client's legal entitlements, such a lawyer is exceeding the task of getting for the client the things that the dispute resolution processes have determined s/he should have. In some cases, securing for the client more than his/her legal entitlements will mean denying others the things that the dispute resolution process of law has determined they should have, whether those things are substantive or procedural legal rights.

Some limited prohibitions on exercises of hyper-partisanship exist in codes of professional conduct. Putting the point more generally, the ABA *Model Rules* specify that, "The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, establishes the limits within which an advocate may proceed".[62] Dealing with the relationship between the opposing parties and counsel and competition within the adversarial system of adjudication, the ABA *Model Rules* also explain, "The procedure of the adversary system contemplates that the evidence in a case is to be marshalled competitively by the contending parties. Fair competition in the adversary system is secured by prohibitions against destruction or concealment of evidence, improperly influencing witnesses, obstructive tactics in discovery procedure, and the like".[63] Similarly, the FLSC *Model Code* prohibits lawyers from "instituting or prosecuting proceedings that, although legal in themselves, are clearly motivated by malice on the part of the client and are brought solely for the purpose of

[61] Dare, *Counsel of Rogues*, *supra* note 2 at 79.
[62] ABA *Model Rules*, *supra* note 15, r. 3.1, commentary 1. As Dare also notes, "[T]he institutional rights of law structure the lawyer's responsibility". Dare, *Counsel of Rogues*, *supra* note 2 at 79.
[63] ABA *Model Rules*, *supra* note 15, r 3.4, commentary 1.

injuring the other party".[64] At least some cases of hyper-partisanship will involve lawyers using legal proceedings merely to harm other parties for the client. In such cases, getting for the client everything that law can be made to give involves using the law merely to harm another party.

Notwithstanding Dare's distinction between mere-zeal and hyper-zeal for the purpose of justifying the principle of partisanship using Razian political philosophy, it is fair to consider both conceptions of zeal to be traditional models. A lawyer who practices hyper-zeal can respect the principle of neutrality by not allowing his/her own view of the moral merits of the client's case to affect the zealousness of the representation. Such lawyers can be granted the benefit of the principle of non-accountability as other people do not judge the lawyer by the goals of the client. Finally, as long as hyper-zeal does not lead the lawyer into illegality, it appears to be merely another conception of the principle of partisanship.[65] Dare himself recognizes the "pedigree" of hyper-zeal and its association with the famous words of Lord Brougham.[66] This is not to say that I consider hyper-zeal to be consistent with any model of lawyering that I would endorse. However, the history of legal ethics shows that hyper-zeal has a strong claim to be a conception (if not the leading conception) of the traditional model of lawyering.[67]

The unifying focus expressed by conceptions of the traditional model based on mere-zeal and conceptions of the traditional model based on hyper-zeal is the centrality of the duty to the client. Even though traditional models would recognize duties at least also exist to the courts,[68] the

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[64] FLSC *Model Code*, *supra* note 12, r 5.1-2(a).
[65] The principle of partisanship is discussed above at note 5 and accompanying text.
[66] See Dare, *Counsel of Rogues*, *supra* note 2 at 78.
[67] Once again, Dare himself recognizes this as he says of his critique of hyper-zeal and endorsement of mere-zeal, "I am quite happy to concede that this may be a revision of the standard and well-pedigreed understanding of the standard conception. If it is, then so be it: it is one which gives a proper place to the moral considerations which inform the lawyer's role, while holding on to the idea that such roles are subject to role-differentiated obligations", Dare, *Counsel of Rogues*, *supra* note 2 at 80.
[68] Traditional models are sometimes criticized as recognizing only a duty to the client. To some extent, this characterization is not without warrant because some classic statements of traditional models only address duties to pursue the client's interests. Of course, versions of the traditional model based on Dare's mere-zeal, and likely even

duty to the client is most emphasized by the two approaches to zeal and to the legal and political systems overall are trusted with the duty to consider the interests of other parties. Lawyers are meant to strictly perform the primary function that they are said to have in the society-wide system of dispute resolution: pursuing their client's interests.

(1.2.2) Natural Law Theories & Alternative Models of Lawyering

In contrast to legal positivism and its support of the traditional model of lawyering, natural law theories, which emphasize connections between law and morality, will fit better with alternative models of lawyering that argue that lawyers should bring moral, or other extralegal, considerations into the advising context with the client and even into the lawyer's selection of clients. Natural law theory does not necessarily lead to a complete rejection, or to any rejection, of the traditional model of lawyering. Advocates of numerous natural law theories might well accept the basic idea in traditional models, for example that lawyers must act as champions in vindicating their clients' legal interests and must not bring their own morality into their work as lawyers. However, natural law would be an awkward fit with the exact principles stated in traditional models of lawyering, whether in the conception given by Lord Brougham or Tim Dare. The motivations and theoretical bases of natural law theories have aspects that would more strongly incline them to recognize the place of morality in the work of the lawyer.

There is greater divergence between natural law theories of jurisprudence than between positivist theories of jurisprudence. Natural law theories are based on vastly different moral groundings and even claims about legal ontology. As noted earlier, most natural law theories suggest important and often necessary connections between law and morality, while not necessarily claiming that law's validity depends on law's moral merits.[69] Nevertheless, one theme

on the notion of hyper-zeal, would recognize duties that the lawyer has to the court. I know of no traditional model of lawyering that would countenance perjury, for example.

[69] Above, Section (1.2), note 35.

that emerges in some natural law theories is the argument that law's validity can (or does) depend on law's moral merits.[70] Thus, natural law theories differ with one another even in terms of their response to the main thesis of positivism, the leading rival to natural law theories. The differences go even deeper.

A significant portion of the divergence between natural law theories can be explained by the fact that, whereas legal positivism aspires to make an important but narrow point about legal ontology, many natural law theories are bound up with projects of articulating whole ways of life and worldviews. For example, natural law theory has deep roots in religious traditions. At the same time, secular strands of natural law theory also exist.[71] Positivism does not have such broad aspirations about articulating whole ways of life or playing a role in religious systems of thought. However, the distinction between religious and secular natural law traditions has the potential for substantial divergence. If law has vital, and even ontologically necessary connections to morality, then it matters a great deal, for example, what the ontological grounding of the morality is—a question to which religious and secular philosophical viewpoints speak.

In distinguishing between religious natural law theories and secular natural law theories, I do not mean natural law theories that have been articulated by people who are religious believers as opposed to people who are not religious believers. By secular natural law theory, I mean natural law theories that are not premised on adherence to a particular religious belief. Accounts of natural law such as Fuller's procedural naturalism certainly fall under this heading. If Dworkin's account

[70] See Marmor & Sarch, "Nature of Law", *supra* note 33, s 1.1. The extent of this dependence is debated.
[71] See e.g., Lloyd L Weinreb, "A Secular Theory of Natural Law" (2004) 72:6 Fordham L Rev 2287 (asking whether there is a natural law viewpoint that is unaided by faith and whether such a theory is worthy of attention); Iván Garzón Vallejo, "Public Reason, Secularism, and Natural Law" in Francisco José Contreras, ed, *The Threads of Natural Law* (New York: Springer, 2013) 223 (exploring whether the Rawls' and Habermas' theories of public reason can be considered secular versions of natural law).

of law is taken to fall under natural law theory, then he too would belong here.[72] John Finnis also offers aspects of his natural law theory that can be understood without particular religious or theological assumptions, while noting also that questions about God can have a significant explanatory role in his theory.[73]

Natural law theory is also among the competing positions in moral philosophy[74] and political philosophy.[75] Natural law speaks to crucial concerns in politics philosophy, such as relationships between individuals, between individuals and communities (as well as states), relationships between communities, and natural rights. Moreover, as a theory that seeks to be the centre of, or participate in, the articulation of entire worldviews, natural law theory provides a moral basis for wide swaths of substantive law. Natural rights, for example, can be the basis of much of constitutional and human rights law. This is not to say that legal positivists philosophers have not made arguments in political philosophy. Earlier in this dissertation, I emphasized the aspects of political philosophy that are in Raz's positivist theory. The point is, rather, that few theses in political philosophy require, or are motivated by, the theses of legal positivism itself. The dependence thesis has highly limited relevance to questions such as the justification of the

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[72] See generally María Lourdes Santos Pérez, "Dworkin and the Natural Law Tradition" in Francisco José Contreras, ed, *The Threads of Natural Law* (New York: Springer, 2013) 211 (discussing the nuances in the relationship between Dworkin's theory of law in relation to natural law theory, including the fact that it is difficult to classify Dworkin because he does not frame his theory in relation to the traditional debate between legal positivism and natural law theory). Bix also says of Dworkin's interpretive theory of law that "it is a 'natural law theory' (a term that Dworkin rarely adopted for his own work) in the broad sense that it asserts that there is no sharp conceptual separation between what law is and what it ought to be; rather, moral evaluation is an integral part of the process Dworkin proposes for determining what the law requires". See Bix, *Dictionary*, *supra* note 33 sub verbo "interpretive theory of law".

[73] See Finnis, *Natural Law*, *supra* note 35 at 48–49.

[74] See generally Mark Murphy, "The Natural Law Tradition in Ethics", *The Stanford Encyclopedia of Philosophy* (Summer 2019), Edward N Zalta, ed, online: Center for the Study of Language and Information, Stanford University <plato.stanford.edu/entries/natural-law-ethics/> [perma.cc/UGY7-RYY7] (exploring the features of natural law as a moral theory).

[75] See generally Christopher Wolfe, "Political Theory and Natural Law" in Tom Angier, ed, *The Cambridge Companion to Natural Law Ethics* (Cambridge: Cambridge University Press, 2019) 235 (discussing the political life that would flow from natural law theory); Michael H Hoeflich, "Natural Law Theory" in Kermit L Hall et al, eds, *The Oxford Companion to American Law* (Oxford: Oxford University Press, 2002) sub verbo "natural law theory" (examining the influence of natural law theory on ancient, medieval, and especially early modern political philosophy and American law, including in notions of sovereignty and natural rights).

existence of the state, the form of government, and the relationship between citizens and the state. As natural law touches such broad and contested ground, it has greater potential to splinter than the much more narrowly focused legal positivism.

In addition to serving as the basis for divergences in natural law theory, these broader connections with ways of life and worldviews are what positions natural law theory to better connect with alternative models of lawyering. There will be an affinity between natural law theorists and advocates of alternative models of lawyering who call for lawyers to incorporate morality into their legal practice, including into the context of advising the client. Natural law theory it capable of furnishing both the moral ideas that lawyers would want to incorporate into their legal practice and the justification for bringing those ideas into their legal practice. The affinity between natural law theory and alternative models of lawyering is easiest to understand in the case of natural law theories which argue that there are at least some moral conditions for the validity of law. An example would be Lon Fuller's theory of law, in which he argues that some level of abidance of the rule of law is a necessary moral condition for the existence of law.[76] I have previously articulated a theory of legal ethics that is based on Fuller's thesis about the validity of law.[77]

More strongly than Fuller's procedural naturalism, theories that identify substantive moral norms as conditions of legal validity exist as well,[78] and could be the basis of philosophical theories of lawyering based on their account of the validity conditions of law. If the lawyer is faced with a case in which a purported law that is relevant to the case violates a moral condition for the existence

[76] See generally Section (2.3.1), below; Emanuel Tucsa, "The Gold Standard: Legal Theory and Fuller Revisited" (2020) 13:1 Wash U Jurisprudence Rev 85 (both proving a detailed account of Fuller's argument about the internal morality of law).
[77] See Tucsa, *supra* note 32.
[78] See generally Philip Soper, "In Defense of Classical Natural Law in Legal Theory: Why Unjust Law is No Law at All" (2007) 20:1 Can JL & Jur 201 (giving a defence of a much more robust role for morality in determining the validity of law and giving brief overviews of the range of views in natural law theory).

of law, then natural law theory about law's validity conditions both gives an impetus for the lawyer to seek the incorporation of morality into his/her legal practice (i.e., the concern about the moral issues at stake) and the justification for incorporating morality into his/her legal practice (i.e., the failure of the purported law to actually meet the standard for being law and the lawyer's responsibility to raise this issue).

The connection between natural law theory and alternative models of lawyering is found not only in the existence criteria of law. Some natural law theories argue that morality is a (necessary) source of normativity that gives meaning to law (especially to legal rules). Dworkin is one such theorist, taking the view that "[d]etermining what the law is in particular cases depends on moral-political considerations about what it ought to be".[79] This dependence is present because law includes not just rules, but also principles.[80] Principles work in terms of weight, rather than in an all or nothing manner (as rules do). Principles necessarily raise moral considerations about ideas such as justice. Indeed, on Dworkin's view, "propositions of law are true if they figure in or follow from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community's legal practice".[81]

William Simon, who has taken Dworkin's legal theory into the realm of legal ethics, argues that lawyers, like judges, should interpret the bounds in law in accordance with the background

[79] Marmor & Sarch, "Nature of Law", *supra* note 33, s 1.1. Inclusive legal positivists (or soft positivists) also contend that morality can be incorporated into law, even as rules of recognition, by contingent choices made by legal institutions to adopt moral concepts, such as fairness and justice, into positive law. See Bix, *Dictionary*, *supra* note 33, sub verbo "legal positivism – inclusive v. exclusive positivism". Crucially, through, whereas inclusive legal positivism allows that law can contingently incorporate moral principles, "Dworkin maintains that the dependence of legal validity on moral considerations is an *essential* feature of law that derives from law's profoundly interpretative nature". Marmor & Sarch, "Nature of Law", *supra* note 33, s 1.1.

[80] See generally Ronald Dworkin, "The Model of Rules" (1967) 35:1 U Chicago L Rev 14 (explaining the role of principles in law).

[81] Ronald Dworkin, *Law's Empire* (Cambridge, MA: Belknap Press, 1986) at 225. See also, Bix, *Dictionary*, *supra* note 33 sub verbo "constructive interpretation".

values that inform law, including especially justice.[82] If a lawyer is advising a litigant in a case that involves legal norms that have morality embedded within them (e.g., a constitutional law case about values such as freedom and equality), the lawyer will be discussing moral norms as s/he explains these parts of the case to the client. In Dworkin's case, the impetus to incorporate morality into legal practice and the justification to do so are one and the same: the fact that legal interpretation cannot be done without discussing the morality that is embedded in the law.

Beyond the question of discussing morality with the client and including morality in legal arguments, Simon proposes grounds by which lawyers can use Dworkinian thinking to resist unjust law. Boldly, in his application of Dworkin's legal philosophy to the philosophy of lawyering, William Simon critiques the idea of there being a categorical duty for lawyers to obey the law.[83] In the approaches to natural law articulated thus far, the lawyer is called to go far beyond merely pursuing the client's legal entitlements. The lawyer is giving moral analysis, reintroducing the considerations that law was meant to replace.[84]

Though not impossible, it is a more awkward fit to deploy natural law theories in support of traditional models, with their principles of neutrality, non-accountability, and partisanship.[85] Even within a legal system that uses an adversarial model of adjudication, a natural law theory of lawyering *could* completely reject at least one of the aspects of traditional models of lawyering: lawyer non-accountability. Dare grounds the principle of non-accountability in the argument from political philosophy that Raz uses to support his account of law having value for its dispute

[82] See Simon, *supra* note 30 at 138–139.
[83] See *ibid*, ch 4.
[84] Recall the Razian argument above at notes 38–41, 46 and accompanying text.
[85] Recall these three principles as discussed above at notes 2–5 and accompanying text. The fit is especially awkward in transactional lawyering or in lawyering that involves navigating around regulatory regimes. Compared with the criminal defence context, where due process arguments provide perhaps the strongest case for zealous advocacy, the justifications for traditional zealous advocate lawyering (such as the need to defend the client against the potentially overwhelming power of the state) are more remote than they would be in criminal law or even in civil litigation.

resolution function in a pluralistic society.[86] According to Dare, if we recognize that law plays an important mediating role in disagreements between reasonable viewpoints, we cannot assume or require that lawyers, who have a gatekeeping role in the mediating processes, have any particular viewpoint, even though lawyers play an adversarial role in the mediating process.[87]

To assume that lawyers' views are in alignment with their clients' views/goals is to treat lawyers in a way that fails to recognize their procedural role in the dispute resolution system of law. Such a reading of the lawyer does not allow the lawyer to play a personally neutral role in either (1) helping the legal system decide between reasonable differing viewpoints or (2) facilitating the application of already-existing legal norms that have authoritatively decided between reasonable differing viewpoints. To deny the lawyer his/her neutrality is to smuggle underlying substantive disagreement (e.g., disagreement about a moral issue to which law applies) back into the legal order. The locus of the disagreement merely shifts from the substance of the dispute to the relationship between participants in the legal dispute.

This Razian account makes sense in discrete scenarios that fit the model of two parties in a legal dispute, each having competent legal representation. A natural law theory of lawyering might not necessarily want to completely reject the idea that lawyers should not be held morally responsible for their clients' goals. At the very least, advocates of natural law theory might want to avoid placing moral accountability on the so-called "last lawyer in town". More broadly, legal systems need lawyers to perform procedural functions on behalf of clients, even to conduct proceedings that will lead to just resolutions of disputes. Natural law theorist should have no problem recognizing that defendants in criminal trials require a legal defence, no issue with a lawyer competently providing such a defence, and no reason to disincentivize such lawyers.

[86] Raz's ideas about law's dispute resolution function are discussed above at notes 38–41 and accompanying text.
[87] See Dare, *Counsel of Rogues*, *supra* note 2 at 75.

However, Dare's argument in favour of the principle of non-accountability is not adequate to the task of describing legal systems, or lawyers' role in legal systems, as they actually are. Dare does not adequately describe the fact that lawyers, who are members of a self-regulating profession, are central figures in shaping and giving meaning to law in the activity of legal interpretation—itself a political endeavour.[88] Lawyers are actively involved with strategic planning for their clients even beyond legal disputes. For large repeat clients, lawyers can even become identified with the client's political and economic cause. Dare's account also omits the fact that legal adjudication, especially at the appellate court levels, is heavily laden with political values that are shaped by lawyers. Judges too cannot simply be taken as neutral arbiters, especially in relation to questions that require the interpretation of moral and political values. These factors, largely raising moral concerns such as justice and equality, differ too widely from the account of dispute resolution that is imagined by traditional models of lawyering.

The other two aspects of traditional models—the principle of neutrality and the principle of partisanship—will be difficult for advocates of any account of lawyering within an adversarial system of adjudication to give up completely. With respect to the principle of neutrality, as scholars as dissimilar as Tim Dare and Allan Hutchinson have argued, it would be inappropriate for a lawyer to take on a client and then calibrate his/her service to the client on the basis of the extent to which the lawyer agrees with the moral merits of the client's cause.[89] It may be appropriate for

[88] See Allan C Hutchinson, "Democracy and Determinacy: An Essay on Legal Interpretation" (1989) 43:3 U Miami L Rev 541 (arguing about the political nature of legal interpretation).
[89] See Dare, *Counsel of Rogues*, *supra* note 2 at 74; Allan C Hutchinson, *Legal Ethics and Professional Responsibility*, 2nd ed (Toronto: Irwin Law, 2006) at 75; Allan C Hutchinson, "Taking It Personally: Legal Ethics and Client Selection" (1998) 1:2 Leg Ethics 168 at 176.

a lawyer to refuse to represent a client because of the lawyer's disagreement with the client's cause,[90] but that calculation must be made before the lawyer begins representing the client.

At the same time, the principle of neutrality does not prevent the lawyer from raising his/her moral concerns with the client. This is especially so if lawyer non-accountability has already been rejected. If the lawyer can be held morally responsible for the goals that s/he pursues on behalf of the client, then the lawyer has every reason to counsel the client against violating precepts of morality that would bring the lawyer's practice of law out of alignment with the requirements of natural law, or the moral theory that the lawyer believe will be the best guide. Similar reasoning applies to the principle of partisanship. Overzealous applications of the principle of partisanship could also be challenged on similar grounds. If the lawyer is morally accountable for what s/he does in pursuing the client's aims, then the lawyer has an impetus to avoid partisanship in favour of immoral ends. Holding lawyers morally accountable (against the principle of non-accountability) allows a torrent of moral considerations become live questions in lawyers' ethics.

Natural law theories come in so many varieties and address such a broad range of philosophical questions that it is difficult to lay out general statements that translate natural law theory into a theory of lawyering. One is best served by discussing specific natural law theories. At the very least, however, natural law theories of lawyering would be unsatisfied with the positivist calls to keep moral considerations out of the lawyer/client relationship and broader legal practice.

(1.3) Setting the Stage for an Epistemological Turn in Legal Ethics

I offer the epistemology of lawyering in this dissertation as a broad expansion of the resources of philosophers of lawyering, not as a replacement for existing theories. I do not suggest

[90] Not all jurisdictions permit the lawyer to refuse to represent on these grounds. The most notable jurisdictions that would not permit such a refusal are jurisdictions that have the cab rank rule. See generally Maree Quinlivan, "The Cab Rank Rule: A Reappraisal of the Duty to Accept Clients" (1998) 28:1 VUWLR 29.

that the preceding waves of philosophy of lawyering and their understandings need to cease or be supplanted by the approach to the philosophy of lawyering that I offer in this dissertation. There is great insight in what has been said and much remains to be said by drawing inspiration from earlier works that were more connected with various aspects of moral theory. Moreover, developments will continue in moral philosophy and legal philosophy that can inspire work in the philosophy of lawyering. Philosophers of lawyering themselves will continue to make advancements in moral philosophy and legal philosophy to the mutual benefit of these fields. Moral philosophers, legal philosophers, and philosophers of lawyering who work in ethics are also likely to make developments in their domains that can benefit the epistemology of lawyering. The development of epistemological research in the philosophy of lawyering should be responsive to insights from, and reciprocally contribute to, the development of the parts of the philosophy of lawyering that are based on moral philosophy and on legal philosophy.

Rather than attempting to arrive at definitive answers to a set of problems, my primary aim in this dissertation is to supply philosophical resources. Allan Hutchinson emphasizes the importance of "the discursive resources that lawyers can use to address and occasionally resolve ethical challenges that perennially confront them".[91] In his own alternative theory of legal ethics, he describes Just War Theory, the inspiration for an account of lawyering that he recently developed, as not being a "definitive manual for conducting a just war, but as a set of discursive resources to frame reflection and orient decision making".[92] I have a similar aim for the epistemology of lawyering that I offer, aimed at providing resources that can be used to address problems in the philosophy of lawyering.

[91] Hutchinson, *Fighting Fair, supra* note 9 at 118.
[92] *Ibid* at 90.

Hutchinson argues that the traditional model of lawyering, and its defences found in legal positivist account of philosophical legal ethics, leave lawyers with few discursive resources to resolve ethical challenges. Hutchinson states, "Indeed, the traditional framework runs out at exactly the point when lawyers most need some set of conversational resources by which to identify and help resolve the conundrums of how to be a good legal professional in modern society".[93] I argue that the problem of running out of discursive resources goes even deeper when the philosophy of lawyering is conceived of broadly to include branches of philosophy such as metaphysics and epistemology. Though ethics is a vital part of the philosophy of lawyering, though legal ethics has many discursive resources and even answers from competing perspectives to various problems, and though legal ethics is perhaps the natural point at which to begin philosophical inquiries into lawyering, legal ethics is only one aspect of what can be a richer philosophy of lawyering. The issue is thus not merely that traditional frameworks in legal ethics run out, but that philosophical *legal ethics* runs out of resources that can be provided by a philosophy of lawyering that considers other branches of philosophy. The aim of this dissertation is to identify and provide epistemic discursive resources for challenges and assumptions that have existed all along in the legal profession, and in the philosophy of lawyering.

Showing the value of epistemic discursive resources involves some demonstrative application of the resources. However, that application need not arrive at an uncontestable result for the resources to be shown worthy of further exploration and application. In addition to not having the aim of displacing existing theories of the philosophy of lawyering, it is also not my aim to resolve every existing controversy in the philosophy of lawyering. Nor should it be expected

[93] *Ibid* at 19.

that an epistemology of lawyering will provide discursive resources that assist with every existing dispute in the field.

I do not bring forward my epistemological theory of lawyering in order to assist advocates of traditional models of lawyering or alternative models of lawyering. Certain aspects of epistemology, and certain theories of epistemology, may be more supportive of one side than another. Though this dissertation is not actively seeking to come down on one side or another of existing debates in the philosophy of lawyering, it would be a mistake to imagine that epistemology, or specific epistemological theories, are a neutral set of resources that can be employed equally to the benefit of any existing theory of lawyering. Resources and the use of resources often bring with them embedded values. This is especially so for a set of resources that is stated in normative terms, as is my virtue epistemology of lawyering. As I argued just above, although models of lawyers and philosophies about the nature of law can diverge in theory, some models of lawyers are better fits with some theories about law.

Statements about improving cognition, or about how cognition should work, come both with values embedded in them and are given additional meaning by people reading those statements from the perspective of their own values and assumptions. Existing perspectives will be informed by commitments to models of lawyering, ethical stances, and philosophies of law. My own sympathies from my work in philosophical legal ethics are with the procedural naturalism of Lon Fuller and alternative models of lawyering. Although I will say when the epistemological ideas in this dissertation are compatible with different models of lawyering and different theories of law, it is not my purpose here to give an approach to the study of lawyering that is equally favourable to all existing views. Developing discursive resources for a field of study (especially

one that deals in normative ideas) does not require neutrality about the implications of those discursive resources.

Eventually, I do hope to engage in a deep epistemic study of models of lawyering and the philosophical theories with which those models of lawyering are most closely aligned. This work, which would be normative and evaluative, would draw conclusions about the extent to which models of lawyering succeed on epistemic grounds and are supported by epistemic theories. Some analysis that touches on these questions will be unavoidable even in this dissertation. Even a demonstration of the applicability of discursive epistemic resources will require some evaluation of existing theories and answers to problems in the philosophy of lawyering. However, a sustained analysis of models of lawyering is beyond the scope of this dissertation.

(1.4) Truth, truths, and Lawyers[94]

This dissertation strongly aligns with a certain perspective on questions of truth: the correspondence theory of truth. Assuming the correspondence theory of truth is not necessary to benefit from a virtue epistemology of lawyering. However, I will articulate the virtue epistemology of lawyering in a way that takes that stance on the nature of truth. Other theorists may have different understandings about truth. I welcome input from these perspectives that are different from my own, but I will not purposely articulate the ideas in this dissertation in a way that leaves room for those different perspectives. Wherever the development of a line of thought requires that one takes a position on the metaphysics of facts, I will take the position articulated in this section.

The correspondence theory has its origins in what the philosopher Susan Haack describes as the Aristotelian Insight, which says that "to say of what is that it is, or of what is not that it is

[94] This heading is inspired by Susan Haack, "Truth, Truths, 'Truth,' and 'Truths' in the Law" (2003) 26:1 Harv JL & Pub Pol'y 17 [Haack, "Truth, Truths"].

not, is true".[95] According to this view, truth is a property that can be had by propositions, statements, beliefs, theories, interpretations, etc. It is a relationship between things like statements and reality.[96] If a statement claims that S and it is actually the case that S, then the statement has the property of truth. The correspondence between the statement and reality is what makes the statement true. The statement can then also be called *a* truth. As Haack says, "Truths are the many and various propositions, beliefs, etc., which *are* true".[97] Haack also explains that there is a distinction between truth/truths and what is merely taken to be truth/truths. She identifies the latter with scare quotes and says that they may be described as "so-called" truth/truths.[98] I will refer to them as purported truth/truths. Recognizing that purported truths exist, it is also vital to recognize that truths can have problems. Truths can be vague or partial, for example.[99] Thus, "Truth…is simple; but truths are not".[100] The property is simple, but the bearers of the property are not simple.

Within lawyers' work, there are at least four topics about which there can be truths. Lawyers can also have knowledge about these topics and play an epistemic role in the discovery of these truths during legal disputes. The topics are: (1) facts that pertain to a case, (2) law (e.g., relevant statutes and case law), (3) knowledge about other domains of human endeavour that are related to the field of law in which the lawyer practices, and (4) knowledge about what to do as a lawyer in a situation. The lawyer has distinct roles in relation to these topics as s/he interacts with different participants in the legal process. The first topic will be the focus of the substantive content of this dissertation, all the while also being in service of the fourth topic. The second and third of

[95] *Ibid* at 17, citing Aristotle, "Book IV" in *The Metaphysics*, translated by Hugh Tredennick (Cambridge: Harvard University Press, 1933) 146 at 201.
[96] See Haack, "Truth, Truths", *supra* note 94 at 17–18 (defining truth and truths).
[97] *Ibid* at 17 [emphasis in original].
[98] *Ibid* at 18.
[99] See generally Susan Haack, "The Whole Truth and Nothing but the Truth" (2008) 32:1 Midwest Studies in Philosophy 20 [Haack, "The Whole Truth"] (explaining some difficulties in identifying and understanding truths).
[100] *Ibid* at 22.

these topics raise other basic metaphysical and epistemological issues that will not be the focus of this dissertation, though stances on issues under these two topics will be briefly addressed.

A key aspect about truth is its objectivity.[101] This is a metaphysical question that relates to the basic epistemic questions pursued here. In this dissertation, the key aspect of metaphysical objectivity is what Leiter calls "cognitive independence". This is a kind of independence that is needed for the existence and character of an entity (or class of entities) to be independent of the human mind. As Leiter explains:

> An entity is cognitively independent of the human mind if its existence and character does not depend on any cognizing state of persons: for example, belief, sensory perception, judgment, response, and so on....A metaphysically objective thing is, accordingly, what it is independent of what anyone believes or would be justified in believing about it (or what anyone perceives it to be or would perceive it to be under certain conditions, etc.).[102]

Leiter says that cognitive independence is based on the idea that there is a difference between something that "seems right" or true about reality and "what actually 'is right'" or true about reality.[103] The exact way in which reality is independent of the human mind, and thus the nature of the possible distinction between what "seems right" and "what actually 'is right'", is a matter of substantial debate. Leiter outlines four possible ways in which to conceive of the cognitive independence of reality, beginning with a view of reality as dependent on the human mind, on one side, and going to reality's full cognitive independence from the human mind, on the other. He summarizes:

> (1) According to *subjectivism*, what seems right to the cognizer determines what is right.
> (2) According to *minimal objectivism*, what seems right to the *community of cognizers* determines what is right.

[101] See *ibid* at 24.
[102] Brian Leiter, "Law and Objectivity" in Jules L Coleman & Scott Shapiro, eds, *Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford University Press, 2002) 969 at 970–971 [emphasis in original].
[103] *Ibid* at 971.

> (3) According to *modest objectivism*, what seems right to cognizers *under appropriate or ideal conditions* determines what is right.
> (4) According to strong objectivism, what seems right to cognizers *never* determines what is right.[104]

Haack's description of truth aligns with strong objectivism as she says, "[W]hether a proposition is true or is false is normally an objective matter; i.e., that it is neither necessary nor sufficient for a proposition's being true that you, or I, or anyone, believes it".[105] In this dissertation, I take the facts of a legal case to be strongly objective, meaning that the facts of a case are cognitively independent of any cognizers, including clients, lawyers, and the trier of facts, whether that is a judge or jury. In this view, facts are strongly objective.

My focus is on the application of the truth-seeking function to the task of discovering factual truths. Claims about the truth-seeking function of legal adjudicative procedures can be found in some of the earliest work in the modern philosophy of lawyering. Luban and Wendel track claims about the truth-finding function of the adversarial system of adjudication, noting that Monroe Freedman and Lon Fuller were early advocates of the idea that the importance of partisan advocacy in the *truth-seeking* and rights-vindicating function of the adversarial system of adjudication can justify the partisan role of the lawyer, including as conceived under the standard

[104] *Ibid* [emphasis in original], citing Brian Leiter, "Objectivity and the Problems of Jurisprudence", Book Review of *Law and Objectivity* by Kent Greenawalt (2002) 72:1 Tex L Rev 187 at 192 (giving these four definitions). There are interesting questions to ask about minimal objectivism in terms of "what seems right to the community of cognizers". Does it matter if the community of cognizers believes that a truth is strongly objective? Does this community itself understand that objectivity is minimal with respect to the relevant field? There will perhaps be contexts, such as fashion (an example taken from Leiter, "Book Review", *ibid* at 195), in which the community does know that objectivity is minimal, and other contexts, such as morality, perhaps, where the community does not know about the nature of the mind-independence, or lack thereof, of a topic. The community may well believe that moral reality is strongly objective when it may actually be minimally objective. It is important to ask how such viewpoints relate to the mechanics of minimal objectivism about a topic. For minimal objectivism to be true of a certain field, do some meta-claims about objectivity (such as the statement that "fashion is minimally objective") need to be strongly objective? The questions outlined here should not be taken as objections to any of the conceptions of objectivity listed here. One could ask such questions about any of the conceptions of objectivity just listed; asking these questions would indeed need to be done to have a deep understanding of these views. I mention these questions here only to note that there are mechanics beneath the level to which I will be able to go in the present dissertation.
[105] Haack, "The Whole Truth", *supra* note 99 at 24.

model of lawyering.[106] More recently, HL Ho, "The trial—or more specifically trial deliberation—seeks the truth…*via* justified belief in the facts of the case".[107] He also specifies that "the fact-finder must find that p only if one would be justified in believing that p".[108] In an extended

[106] See Luban & Wendel, *supra* note 2 at 350, citing Monroe H Freedman, *Lawyers' Ethics in an Adversary System* (Indianapolis: Bobbs-Merrill, 1975); Lon L Fuller & John D Randall, "Professional Responsibility: Report of the Joint Conference" (1958) 44:12 ABA J 1159. Luban and Wendel are critical of this line of thought that they cite in Freedman and Fuller, calling it the "adversary system excuse". The critique given by Luban and Wendel says that "[t]he problem with the adversary system excuse is that it is only as good as the adversary system, which is an imperfect truth-seeker and rights-defender", Luban & Wendel, *supra* note 2 at 350. While they are right on the point that the success of the justification does depend on the effectiveness of the adversarial system at seeking the truth, their subsequent argument for the idea that the adversarial system does not seek the truth well is not well founded. Luban and Wendel point out many of the ways in which the adversarial system allows lawyers to suppress facts. See *ibid* at 351. Luban and Wendel are correct that the gamesmanship than can be played by lawyers makes it difficult to assert, even in the abstract, that the adversarial system of adjudication is "the best method of finding the truth". *Ibid*. I discuss the effects of gamesmanship on the ability of the legal system to find truth below in Section (2.2). In many situations, the adversarial system will struggle at the task of discovering the truth and is unlikely to emerge as the best method for arriving at truth in all situations. However, the example used by Luban and Wendel indicates that they are considering situations for which the adversarial system was not designed, e.g., making a choice between two job offers. This example is fundamentally unlike the problem that the adversarial system is meant to address: a dispute. The systems that are effective at truth-discovery in a dispute may be entirely different from those that work situations that do not involve a dispute.

Moreover, many of the "tricks" that lawyers can play in favour of their client are not choices made for the purpose of making the adversarial system less effective at discovering the truth. Rather, the tricks exist as applications (or sometimes abuses) of rights that exist to protect other values, such as privacy. The mere fact that the adjudicative system makes trade-offs that do not always involve maximizing truth-seeking does not imply that the adjudicative system is a poor means of seeking the truth. Many other excellent truth-seeking processes may make similar trade-offs that do not give complete priority to obtaining knowledge. Perhaps no truth-seeking process would be willing to allow certain actions (e.g., certain moral violations), even if doing so would maximize truth-seeking in a particular instance or overall.

We must also be on guard to recognize that the particular rights-protecting trade-offs that are made by the American legal system should not be laid at the feet of the adversarial system of adjudication. Other jurisdictions need not make all the same trade-offs when implementing the adversarial system. Not all legal systems have the American exclusionary rule of evidence, for example. See Adam Liptak, "U.S. Is Alone in Rejecting All Evidence if Police Err", *The New York Times* (19 July 2008), online: <www.nytimes.com/2008/07/19/us/19exclude.html> [perma.cc/3WXL-D92W]. But see Dimitrios Giannoulopoulos, *Improperly Obtained Evidence in Anglo-American and Continental Law* (Oxford, UK: Hart Publishing, 2019) (contesting the idea that the American exclusionary rule for illegally obtained evidence is as unique as it is usually presented to be and proposing a renewed expansion of excluding evidence).

Finally, legal systems might make some short-term trade-offs about truth-seeking to promote the broader truth-seeking of the legal system in the long term. Lawyer-client privilege exists to protect the advising context, so that the client will share information freely with his/her lawyer. Protecting this privilege may impede truth-seeking in a particular case but protecting the privilege might be vital to the basic need to have the client share information, which is the basis for the lawyer to perform his/her role in the adjudicative process itself. A poorly informed lawyer may disrupt the contest of positions that is thought to be at the heart of the truth-seeking function of the adversarial system. Thus, we trade short term truth-seeking for the long-term benefit of the truth-seeking ability of the adversarial system.

[107] HL Ho, *A Philosophy of Evidence Law: Justice in the Search for Truth* (Oxford: Oxford University Press, 2008) at 93.

[108] *Ibid*. The proposition here is a purported fact that has been raised in a trial.

Canadian treatment of the topic of client perjury, David Layton and Michel Proulx say, "A central objective of the adversarial criminal justice system is the search for truth".[109]

Lawyers play a vital role in the adversarial system's truth-seeking function. The system is designed around the idea of a clash of competing viewpoints, articulated by partisans[110] (lawyers),[111] in which the passive and neutral observer(s) decide(s) questions of fact and law. As Johnston and Lufrano explain, "The adversary system is based on the assumption that the truth of a controversy will best be arrived at by granting the competing parties, with the help of an advocate, an opportunity to fight as hard as possible".[112] In a regulated fashion, lawyers serve the client's self-interest because "[t]he system operates on the assumption that the self-interests of the combatants will clash so as to hone the issues in such a way as to find the truth, and thus, reach a just result".[113]

The truth-seeking function of the adversarial system of adjudication is also well recognized by the rules that govern the legal profession, both explicitly and implicitly. For example, in the commentary section of Rule 3.3 of the ABA *Model Rules*, which deals with the lawyer's candour towards the tribunal, the ABA *Model Rules* deal directly with the central case study of this

[109] David Layton & Michel Proulx, *Ethics and Criminal Law*, 2d ed (Toronto, CA: Irwin Law, 2015) at 331.
[110] I will also frequently describe the lawyer as a champion of the client's cause.
[111] Self-represented litigation must be recognized as a significant obstacle to the functioning of the adversarial system's processes and possibly to the system's ability execute these processes to seek truth. The epistemic logic of the adversarial system of adjudication is not designed around self-represented litigants, who often lack the resources and expertise to bring forward a legal case. Indeed, the fact that the legal system is not designed around their needs is one of the major current challenges in access to justice. See generally Self-Represented Litigation Network, "SRLN Brief: How Many SRLs?", (2019), online: *Self-Represented Litigation Network* <www.srln.org/node/548/srln-brief-how-many-srls-srln-2015> [perma.cc/54JB-GQP8] (statistics of self-represented litigants in the United States); Julie Macfarlane, *The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants – Final Report*, by Julie Macfarlane (National Self-Represented Litigants Project, 2013), online: NSRLP <representingyourselfcanada.com/wp-content/uploads/2016/09/srlreportfinal.pdf> [perma.cc/5UB2-EVQ4] (providing statistics for self-represented litigants in Canada, giving detailed accounts of the experiences of self-represented litigants, and discussing how the legal system can address the needs of self-represented litigants).
[112] Robert Gilbert Johnston & Sara Lufrano, "The Adversary System as a Means of Seeking Truth and Justice" (2002) 35:2 J Marshall L Rev 147 at 147.
[113] *Ibid.*

dissertation, and refer to "the *truth-finding process* which the adversary system is designed to implement".[114] The FLSC *Model Code*, discussing communication with witnesses, says, "There is generally no property in a witness. *To achieve the truth-seeking goal of the justice system*, any person having information relevant to a proceeding should be free to impart it voluntarily and in the absence of improper influence".[115] Codes of professional conduct also put forward duties and premises that treat the adversarial system as having a truth-seeking function. Examples include rules prohibiting deception of the tribunal.

In discussing the truth-seeking functions of legal systems, it will be helpful to recall the distinction between truth/truths and purported truth/truths.[116] Consider the context of a trial, which I will use to distinguish between factual truths and purported factual truths. All epistemic agents involved in a trial, or who become aware of a trial, arrive at purported facts. In a criminal trial, for example, purported facts will be possessed by the complainant(s), the defendant, the defence lawyer(s), the prosecution, the police, witnesses (including expert witnesses), intervenors, family and friends of the complainant(s) and the defendant, the court reporter, the media, any person who learns about the case, the judge, and, most crucially, the trier of fact, which in most criminal trials will be a jury. The adversarial process of adjudication is said to be a contest of positions that will allow the neutral trier of fact to form perceptions about the case. The contest of positions itself is said to be a process that is epistemically beneficial to the trier of fact by allowing the trier of fact to decide from evidence that is rigorously presented in the face of an adversary who will oppose

[114] ABA *Model Rules*, *supra* note 15, r 3.3, commentary 11 [emphasis added].
[115] FLSC *Model Code*, *supra* note 12, r 5.4-1, commentary 1 [emphasis added].
[116] Above, note 98 and accompanying text.

the position being offered.[117] Ideally, and most crucially for the outcomes of a trial, the trier of fact arrives at a belief in purported facts that match the actual facts.

When the facts of a case are set out, such as in a judgment, what is being given is always the purported facts, even when all parties involved agree on the facts. Indeed, the only type of fact ever possessed by epistemic agents is a purported fact. There is no external source in a legal system to definitively confirm the extent to which perceived facts match the objective facts. Purported factual truths are always subject to being overturned by evidence that brings purported facts in alignment with the actual facts. When evidence emerges, demonstrating that purported facts did not match the true facts, parties should modify their account of purported facts to be more closely aligned with what the evidence indicates are the actual facts.

Epistemic agents may be able to form perceptions about the extent to which another agent's purported facts match the actual facts. Consider the following example:

(1) Agent A is aware of some evidence that changes Agent A's perception of the facts of a case to more accurately match the objective facts;
(2) Agent B is unaware of this same evidence;
(3) both agents have reached perceptions about the facts of the case; and,
(4) the first agent is aware of the second agent's ignorance of this evidence.

In this case, Agent A can form a correct perception that Agent B has a perception of the facts that less accurately matches the objective facts that Agent B's perception does. There would be no external source to definitively confirm Agent A's perception about Agent B's perception, but Agent A's perception would correspond with reality. Correspondence itself between purported facts and objective facts does not depend on absolute verification of the correspondence. A simple example of the comparison perceptions of facts would be Agent A believing that the defendant in

[117] See Haack, "The Whole Truth", *supra* note 99 at 33, where she describes the epistemic expectations that are made of parties in adversarial litigation and how the confrontation of ideas is supposed to pursue truth. She is specifically focused on how the process works in cross-examination.

a criminal trial did not perform a certain act that is the subject of a criminal trial because Agent A has heard about the defendant's alibi, whereas Agent B has not yet heard about the alibi. Correspondence exists independently of whether it can be verified by other people or by legal processes. This is because, as Haack says, knowledge and truth are not the same thing. Something can be true without people knowing it.[118]

The epistemological study of lawyering does not depend on claims about the truth-seeking excellence of any particular legal process or practice. At the most basic level, an epistemology of lawyering only needs to show that knowledge is, in some way, relevant to the work of lawyers. In this dissertation, I will be working with the view that adversarial system of adjudication can vary in its capacity at discovering the truth about the facts of a case and that lawyers affect the extent to which the system discovers the truth about those facts.

[118] See *ibid* at 22; Haack, "Truth, Truths", *supra* note 94 at 19. Haack applies the distinction between knowledge and truth to the context of the adversarial system.

Part II – Positions & Turns in Epistemology

My thinking about the importance of epistemology in legal ethics has taken somewhat of a similar path as some recent developments in epistemology. The two key developments are: (1) the development of social epistemology, which involves a turn to the social aspects of epistemology and (2) the development of virtue epistemology, which is based on the taking up of virtue ethics as a model for theorizing about knowledge and thereby developing the character of intellectual agents in accordance with sets of epistemic/intellectual virtues. These two developments in epistemology provide opportunities for finding new insights into the epistemology of law and legal ethics. Both developments share the basic move of repositioning focus away from the traditional epistemic project of defining abstract conditions of knowledge and solving puzzles about the way in which the individual person can acquire knowledge.

An example of this traditional approach is the definition of knowledge as an individual having justified true belief (the JTB theory of knowledge).[1] Under the JTB theory, Person A knows that Person B was at 16th and P Streets at 11:00 pm on a specific day if Person A has a justified belief that Person B was at 16th and P Streets at 11:00 pm and Person B actually was at that location at that time.[2] The JTB theory, though having a long history, has been shown to be inadequate by the Gettier counterexamples (situations in which the JTB conditions are met and yet in which the person who meets the conditions does not have knowledge).[3] Substantial work in 20th century epistemology has been dedicated to amending the JTB theory to respond to the Gettier

[1] See generally Jonathan Jenkins Ichikawa & Matthias Steup, "The Analysis of Knowledge", *The Stanford Encyclopedia of Philosophy* (Summer 2018), Edward N Zalta, ed, online: Center for the Study of Language and Information, Stanford University <plato.stanford.edu/entries/knowledge-analysis/> [perma.cc/JY2X-2KJ6], s 1.
[2] With this example, I am referring to Freedman's illustration of the Client Perjury Trilemma, which I discuss in detail in Part V of this dissertation. The illustration is given below in Section (7.1) at note 24 and accompanying text.
[3] See generally Ichikawa & Steup, *supra* note 1, s 3.

counterexamples. These efforts to amend the JTB theory also adhere to the traditional approach of defining abstract conditions that an individual must meet in order to have knowledge.

I view all the broadly-defined approaches to epistemology—including traditional individual-focused, social epistemology, and virtue epistemology—as rewarding philosophical endeavours. Recent developments should not be taken as wholesale replacements for traditional epistemology. Yet, as this dissertation will show, each turn in epistemology beyond the traditional individual-focused approach provides substantial resources for understanding the epistemic role of the lawyer in the legal system and aspects of the legal system that are based upon differing models of the epistemic role of the lawyer.

(2) Social Epistemology – A "Social Turn"[4] in Approach to Epistemology

Social epistemology is the first major turn in epistemology that inspired this dissertation. Rather than focusing on the epistemology of individuals, which has been the primary focus of epistemology in analytic philosophy, the attention shifts to the epistemology of societies and social systems. This insight is vital in understanding the epistemology of lawyers, who play an epistemic function in a system.

(2.1) Defining Social Epistemology

Although social epistemology is relatively new in terms of explicit distinction from standard epistemology, the social epistemologist Alvin Goldman argues that social epistemic thinking can be traced throughout the history of philosophy, even if this thinking was not a distinct approach to epistemology.[5] He points to Plato asking about how a layperson can decide whether

[4] Finn Collin, "The Twin Roots and Branches of Social Epistemology" in Miranda Fricker et al, eds, *The Routledge Handbook of Social Epistemology* (New York: Routledge, 2019) 21 at 22.

[5] See generally Alvin Goldman, "Social Epistemology", *The Stanford Encyclopedia of Philosophy* (Summer 2010), Edward N Zalta, ed, online: Center for the Study of Language and Information, Stanford University <plato.stanford.edu/archives/sum2010/entries/epistemology-social/> [perma.cc/F4X5-P7AP]. [Goldman, "Social Epistemology"] at s 1.

to trust someone who holds himself/herself out to be an expert and to Locke and Hume, who asked how we can decide whether to rely on the testimony of others.[6] In contemporary epistemology, it is possible to identify two leading approaches to social epistemology, one based on epistemology as studied in analytical philosophy and another which takes an approach that is influenced more by sociology.[7] Alvin Goldman is a prominent scholar in the former school of thought, while Steve Fuller is a prominent scholar in the latter.[8] My own academic background is in analytic philosophy, so I will draw more on the insights of authors who work in that field.

Most basically, Goldman defines social epistemology as, "[T]he study of the social dimensions of knowledge or information".[9] More robustly, the philosopher Karen Jones describes social epistemology as "[A] research project characterized by a commitment to understanding the role of social relations and institutions in the production of knowledge. Social epistemology is a normative and not merely a descriptive project inasmuch as it aims to evaluate and not merely describe our epistemic practices".[10] Emphasizing the focus of social epistemology, Goldman proposes a distinction between individual epistemology and social epistemology. According to him, "Individual epistemology would identify and evaluate psychological processes that occur within the epistemic subject. Social epistemology would identify and evaluate social processes by which epistemic subjects interact with other agents who exert causal influence on their beliefs".[11] The evaluative aspect (i.e., the epistemic evaluation of social institutions and practices) is perhaps

[6] See *ibid*. See also Goldman's scholarship on the epistemology of experts in Alvin I Goldman, "Experts: Which Ones Should You Trust?" (2001) 63:1 Philosophy and Phenomenological Research 85 [Goldman, "Experts"].
[7] See generally Goldman, "Social Epistemology", *supra* note 5.
[8] See generally the following early contributions by both authors, Alvin I Goldman, "Foundations of Social Epistemics" (1987) 73:1 Synthese 109 [Goldman, "Foundations"]; Steve Fuller, "On Regulating What Is Known: A Way to Social Epistemology" (1987) 73:1 Synthese 145.
[9] Goldman, "Social Epistemology", *supra* note 5.
[10] Karen Jones, "Moral Epistemology" in Frank Jackson & Michael Smith, eds, *The Oxford Handbook of Contemporary Philosophy* (Oxford: Oxford University Press, 2005) 63 at 64.
[11] Goldman, "Social Epistemology", *supra* note 5, s 2.

the dominant aspect of the literature on social epistemology. The standard according to which our social practices should be evaluated is, of course, also up for debate.

Goldman's approach to social epistemology is only one of many, but his view is congenial to my own philosophical commitments and to the direction in which I would like to take my approach to the social epistemology of law. With respect to the normative preoccupations of social epistemology, Goldman argues for a normative social epistemic theory that he calls "veritism". In this view, true belief is the "ultimate epistemic aim" and is the epistemic standard according to which social institutions and practices should be evaluated.[12] Thus, under veritism, a social institution or practice that is better at producing true beliefs will be assessed as being better from a social epistemic perspective. Some alternatives to veritism that Goldman examines include epistemic: (1) relativism, (2) consensualism, and (3) expertism. These other social epistemic theories would evaluate social institutions and practices not according to whether they are linked to the production of true beliefs, but on the basis of (1) coherence with the viewpoints and methods of a community or group, (2) "the existence or promotion of consensus, or agreement with consensual opinion", or (3) the "promotion of expertise or in terms of agreement with expert opinion".[13] These other approaches to the normative aspect of social epistemology are worth considering elsewhere, however, I will limit my attention in this dissertation to Goldman's veritism because, in my research, he is the social epistemologist who has devoted the most attention to the epistemology of law, his veritism lines up well with my own epistemic viewpoints, and it also lines up well with the virtue epistemic perspective that is the ultimate focus of this dissertation.

While Goldman has worked on a number of other topics in social epistemology, my attention in this dissertation will be directed towards aspects of his theory that demonstrate the

[12] Goldman, "Foundations", *supra* note 8 at 122.
[13] *Ibid* at 114–115.

practical applicability of social epistemology—especially to law—as well as the epistemic resources that social epistemology can bring to the study of law and knowledge in law. A study of Goldman's account of veritism and its normative standards is well suited to the achievement of this task. Goldman provides a number of veritistic standards, i.e., "truth-linked standards", that he says "can be used to [epistemically] appraise social institutions and practices".[14] Five standards to which he has given particular attention are: "(1) reliability, (2) power, (3) fecundity, (4) speed, and (5) efficiency".[15] Respectively, Goldman delineates these terms in veritistic social epistemology (i.e., social epistemology that has the aim of evaluating social institutions and practices on the basis of their ability to produce truth beliefs) as: (1) "the ratio of truths to total number of beliefs a practice would foster", (2) "the ability of a practice to help cognizers find and believe true answers to the questions that interest them", (3) the degree to which true beliefs are widely produced, (4) the relative amount of time that a practice takes to arrive at true beliefs, and (5) the cost of acquiring true beliefs.[16] We can make use of the rubric that Goldman provides by turning to a field of knowledge and assessing whether the social practices and institutions perform well according to Goldman's veritistic criteria. That is exactly what I will do in the following section.

[14] *Ibid* at 128.
[15] *Ibid*.
[16] See *ibid* at 128–129. Questions about the costs of acquiring true beliefs can raise legal ethics concerns about the relationship between access to justice and epistemology. When legal services are inaccessible to a large percentage of the population due to cost, these price barriers, which may or may not be related to any inherent cost of the process and services themselves, make it more difficult for the legal system to produce true beliefs. Cases that are never litigated because one or more party simply cannot afford to go through a legal process never provide the legal system with the opportunity to produce true beliefs about the dispute. Moreover, it is vital to highlight not just the total cost for the legal system, but also the distribution of costs and how that distribution can create more heavily felt burdens on poor (or less financially resourced) participants compared to participants who have more financial resources. See generally Trevor CW Farrow et al. *Everyday Legal Problems and the Cost of Justice in Canada: Overview Report*, Cost of Justice (Toronto: Canadian Forum on Civil Justice, 2016). This report studies legal problems that arise in the everyday lives of Canadians, the resources available to Canadians to resolve these legal problems, and the costs associated with dealing with the legal problems.

(2.2) Social Epistemology, Law, and the Adversarial System

The topics with which social epistemology is concerned are prominently seen in the work of lawyers, including "the justification of testimony, the role of epistemic divisions of labour and norms for cognitive authority, the role of social interests in inquiry, and the role of socially available background beliefs in justification".[17] At a general level, it is worthwhile for the philosophy of lawyering to delve into the social epistemology of law because lawyers have a central role in producing and using knowledge about law and about law's relationship to other disciplines, including morality. The lawyer, as an actor within a legal system (whether s/he is engaged in advising, litigation, political advocacy, etc.), has the role of making knowledge about law available to citizens (especially to clients), so as to make law and the legal system operative for, and accessible to, those same citizens. Inquiring into the social epistemology of law requires a social epistemology of lawyering, which will allow us to talk about the practical and systemic aspects of the lawyer's epistemic relationship to legal and moral reality.[18]

Although the natural sciences have received the most attention in social epistemology,[19] some leading scholars in the field, such as Alvin Goldman, have done substantial work on the social epistemology of law. Almost from the beginning of the emergence of social epistemology as its own school of epistemological thought, Goldman has been discussing the social epistemology of law. He has studied the epistemological foundations of legal systems, the presentation and use of legal evidence and the epistemic roles of judges and lawyers in the adversarial and inquisitorial models of adjudication.[20]

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[17] Jones, "Moral Epistemology", *supra* note 10 at 64.
[18] I am referring to the multiple metaphysical questions raised in Section (1).
[19] See generally Goldman, "Social Epistemology", *supra* note 5.
[20] See Alvin I Goldman, "Epistemic Paternalism: Communication Control in Law and Society" (1991) 88:3 The Journal of Philosophy 113; Alvin I Goldman, *Epistemology and Cognition* (Cambridge, Mass: Harvard University Press, 1986); Alvin I Goldman, *Knowledge in a Social World* (Oxford: Clarendon Press, 1999) [Goldman, *Social World*]; Alvin I Goldman, "Legal Evidence" in Martin P Golding & William A Edmundson, eds, *The Blackwell Guide*

Legal systems are excellent candidates for consideration under the kind of epistemic rubric, including an assessment of "(1) reliability, (2) power, (3) fecundity, (4) speed, and (5) efficiency" discussed above.[21] Goldman has indeed undertaken this kind of analysis, critiquing the adversarial system of adjudication from the perspective of whether it effectively pursues truth.[22] The following account of Goldman's social epistemology of law offers an example of the way in which we can gain insights about law at the systemic level by undertaking a social epistemic analysis of legal systems. I demonstrate the epistemic resources that social epistemology brings to discussions of legal epistemology and legal ethics and set up a theoretical background that is necessary for a deep understanding of the insights that virtue epistemology can bring to the same subjects.

Goldman provides an especially thoughtful social epistemic account of the role of the lawyer in the adversarial system of adjudication—a social practice that has epistemic aims. He has dedicated more attention to this topic than perhaps anyone else in the field of the epistemology of law. Many of the issues that Goldman discusses in relation to lawyerly epistemic activity are familiar topics in legal ethics. Thus, epistemology and legal ethics do a great deal of mixing here.

As a veritistic social epistemologist, Goldman is interested in the question of whether legal systems effectively arrive at true beliefs. He describes his concerns about adversarial logic[23] being used to support epistemic claims about the truth-seeking function of common law legal systems. The primary epistemic reasoning behind the adversarial system of adjudication used in common

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to the Philosophy of Law and Legal Theory (Malden, MA: Blackwell Publishing Ltd., 2005) 163 [Goldman, "Legal Evidence"]; Alvin I Goldman, "Quasi-Objective Bayesianism and Legal Evidence" (2002) 42:3 Jurimetrics 237; Alvin I Goldman, "Simple Heuristics and Legal Evidence" (2003) 2:3 Law, Prob and Risk 215; William J Talbott & Alvin I Goldman, "Games Lawyers Play: Legal Discovery and Social Epistemology" (1998) 4:2 Legal Theory 93 [Talbott & Goldman, "Games"]. Outside of his work on the social epistemology of law, Goldman has also discussed issues that are highly relevant to that field, e.g., epistemological issues around expertise. See Goldman, "Experts", *supra* note 6.

[21] Above at note 15 and accompanying text.

[22] See Goldman, *Social World*, *supra* note 20, ch 9, especially 289–314.

[23] See *ibid*; Goldman, "Legal Evidence", *supra* note 20 at 167–169; Talbott & Goldman, "Games", *supra* note 20 at 157–161.

law jurisdictions is that there are epistemic merits to legal proceedings in which there is a contest of arguments between partisans, decided by a neutral arbiter.[24] Notably for the purpose of this dissertation, having competing sides argue their position as adversaries is an effective way to determine what the facts of a case are.[25] The courtroom context is the situation in which adversarial logic can most fully be applied. Being the representatives of adversarial participants within legal systems that use the adversarial model, lawyers do work that is subject to many epistemic questions related to lawyers' contribution to the truth-producing ability of legal systems.

Goldman is skeptical about how effective adversarial systems of adjudication are at determining factual truths. A significant aspect of his arguments on this topic comes down to what he says about the role of lawyers in the adversarial system of adjudication. Goldman points out that, even in activities that are part of adversarial processes such as litigation, lawyers are involved with the production of knowledge in the legal system in a far more robust way than simply providing arguments before a neutral arbiter. Goldman contends, "[N]ot all that attorneys do in a partisan spirit counts as 'arguing'. In effect, certain lawyerly activities create or change the evidence rather than simply interpret or debate it".[26] Goldman expands this point by arguing that lawyers do not always contribute to the veritistic (i.e., truth-oriented) excellence of the adversarial system. He says, "These dimensions of [lawyers'] activities may hide or camouflage the truth rather than bring it into clearer focus, and the effects of these activities cannot easily be overturned or rebutted by the arguments of opposing lawyers".[27]

[24] Discussed above in Section (1.4).
[25] Such systems may also be good at deciding questions of value, e.g., interpreting value-laden terms in constitutions. The focus here, though, is on more questions of fact, such as whether a person was at a specific location at a certain time on a certain day.
[26] Goldman, *Social World*, *supra* note 20 at 296.
[27] *Ibid*.

Adversarial legal systems thereby allow problematic behaviour from, and create problematic incentives for, lawyers even as part of adversarial processes. The epistemic logic that adversarial systems have about truth production (especially about producing true beliefs in the trier of fact) may actually be undermined when an adversarial approach is taken to the legal processes that exist to support and provide factual, and legal content for, the clash of arguments that take place in contexts like trials. Thus, doing well in epistemic terms in the adversarial process of adjudication might require mitigating adversarial behaviour in certain contexts. Goldman illustrates these points by considering the topic of document discovery.

The example of document discovery shows the way in which lawyers are more deeply and problematically involved with knowledge production in legal proceedings than would be suggested by the epistemic justifications of the adversarial system. Stated generally, Goldman is concerned about the role of the lawyer in controlling access to the information that is supposed to guide the adversarial process as it attempts to arrive at true beliefs. He provides a social epistemic analysis of the rules of civil procedure relating to document discovery and, in doing so, he is aware of the way in which different models of lawyering[28] play into this analysis. The primary focus in this discussion is on traditional models of lawyering, though other models could also easily be subject to criticism.

Goldman and the epistemologist William Talbott distinguish between two types of evidence and the social epistemic problems of disclosure that arise in relation to each type of evidence. On one hand, "*known positive evidence*" is "evidence that a party is aware of that tends to support its position, and thus which it intends to introduce at trial".[29] On the other hand, "*known*

[28] Models of lawyering are discussed above in Section (1).
[29] Talbott & Goldman, "Games", *supra* note 20 at 95 [emphasis in original]. See also Goldman, *Social World*, *supra* note 20 at 301, "Positive evidence is evidence that can assist a party's cause if presented to the trier of fact".

negative evidence" is "evidence that a party is aware of that tends to rebut or undermine its position, and thus which it would not want to be introduced at trial".[30] With respect to each type of evidence, there is the potential problem that adversaries will want to withhold the evidence as long as possible (or perhaps entirely) to obtain strategic (and indeed epistemic) advantages in litigation. Such strategic moves may be realistically expected in adversarial contests and may even be protected by rules of evidence and lawyers' ethical duties, but they can also undermine the ability of the adversaries to make properly informed arguments in the adversarial context of litigation, i.e., to play their part in the truth-seeking functions of adversarial systems.

Encouragingly, Goldman and Talbott note that some problems related to documentary discovery are rather well-handled by rules of civil procedure and thus do not pose substantial problems. Existing requirements in rules of civil procedure to disclose evidence are well suited to providing the correct incentives to parties to act in accordance with the epistemic purposes of the adversarial system of adjudication when disclosing positive evidence. Indeed, given that parties in a legal dispute want their own positive evidence to be disclosed in court, provisions for excluding undisclosed positive evidence, or allowing for an adjournment if evidence has not been disclosed, are sufficiently effective that no substantial differences arise between the way in which models of lawyering approach the disclosure of positive evidence. In the case of the disclosure of positive evidence, the epistemic beneficiaries are the other party *and* his/her lawyer, but the legal beneficiary is the client. Thus, while one could imagine scenarios in which a hyper-zealous lawyer attempts to evade the disclosure of positive evidence until as late a time as possible, all models of lawyering would eventually argue in favour of disclosure of positive evidence.

[30] Talbott & Goldman, "Games", *supra* note 20 at 95 [emphasis in original]. See also Goldman, *Social World*, *supra* note 20 at 301, "Negative evidence is evidence that would hurt [a party's] cause".

Goldman and Talbott argue that the solution to the problem of non-disclosure of positive evidence, largely an issue of trial by ambush, is "[T]o provide the judge with the power to sanction…nondisclosure to the extent necessary to negate any advantage that a party might try to gain by nondisclosure".[31] This can be as simple as ruling evidence to be inadmissible if it is not disclosed.[32] Another potential solution for dealing with such problems is simply adjournment and the granting of time for the other lawyer to prepare a response to the positive evidence that had not been disclosed.

The case of negative evidence, on the other hand, demonstrates deep epistemic challenges for the adversarial model of lawyering as well as substantial differences between models of lawyering and these models' views of the epistemic role of the lawyer within the adversarial system. To illustrate these differences, Goldman and Talbott engage in the extended analysis of a hypothetical product liability case in which a defendant company that produced a type of medication over which a lawsuit is taking place has an internal memo that is known to the company's lawyer and which speaks to potential dangers of an ingredient in the medication.[33] The memo is negative evidence from the perspective of the defendant's case—it is positive evidence from the perspective of the plaintiff's case—and the defence wants to avoid disclosure of this document. Unlike positive evidence, which the lawyer has an incentive to introduce in court, the lawyer has a strong incentive to prevent the discovery of negative evidence.[34] Goldman and Talbott consider the question of the proper course of action for a defence lawyer as assessed in terms of the social epistemology of law.

[31] Talbott & Goldman, "Games", *supra* note 20 at 107.
[32] See *ibid*.
[33] See generally *ibid* at 107–141.
[34] See Talbott and Goldman's discussion of this point in detail in *ibid* at 95–99, 107–128.

The authors argue that, depending on the rules of civil procedure that are in place, a defence lawyer who engages in a model of lawyering that does not support zealous resistance to disclosure—I offer the example of a defence lawyer who practices some alternative model of lawyering that more fully considers the interests of third parties—may be at a competitive disadvantage in the market for legal services when compared with a defence lawyer who is willing to zealously resist even a meritorious request for disclosure.[35] Straightforwardly enough, this is because disclosure of such negative evidence weakens the defendant's case (perhaps even raising concerns about loyalty) though the defendant entered the market for a lawyer for the purpose of obtaining a loyal defender to win, or favourably settle, the case that the defendant is facing.

A crucial feature of document discovery is that, although the adversarial context is relevant in that the lawyer can, to some extent, justify his/her resistance to disclosure as part of the standard push and pull between lawyers representing their own clients' interests, the lawyer who wants to discover information by way of obtaining disclosure of documents has the epistemic disadvantage of not being on an equal epistemic footing with respect to the evidence that the opposing side (in this case, the defendant company and the defendant's lawyer) has in its possession.[36] Thus, the lawyer seeking information by way of document disclosure is often not able to respond effectively to practices that would undermine the promotion of knowledge. Moreover, in the case of a dispute over disclosure, there is no way for an adjudicator to take in information from two informed representatives and render a decision. Certainly, refusal to disclose documents can be challenged before a judge; however, the judge who decides on such a matter is not always (or possibly even

[35] See generally *ibid* at 123–127, where Goldman discusses the disadvantages faced by a lawyer who treats the legal process as a truth-finding exercise when compared to a lawyer who treats the legal process largely as a competition constrained by rules of procedural justice.

[36] Of course, this is also true the other way around. The plaintiff has some information that the defendant wishes to obtain, and in relation to which the defendant is at an epistemic disadvantage. However, if the legal dispute is like the one about product liability that Goldman presents, the defendant will usually have far more information that the plaintiff wishes to access, and thus about which the defendant has an epistemic advantage, than the other way around.

ever) in the position of being informed by the adversarial process about all aspects that would be relevant to rendering a decision on this matter. Rather, the party seeking to avoid disclosure is at an epistemic advantage over all other parties, including the judge, in relation to any dispute over disclosure simply in virtue of knowing the document.[37]

The imbalance between litigators raises difficulties for the adversarial model of adjudication and for traditional models of lawyering that want to emphasize the epistemic reasoning of the adversarial model to justify a more aggressively partisan style of legal practice. Because the adversarial context is inchoate during the discovery process, models of lawyering that would endorse vigorous resistance of document disclosure cannot properly raise the epistemic logic of the adversarial system to argue against the opposing side. That is to say, during document discovery, the lawyer is not merely playing a highly particularized role that is epistemically checked by the opposing lawyer. When the lawyer resists a request for disclosure, information may simply be unavailable for the broader epistemic processes of the adversarial contest.[38]

Thus, if traditional models of lawyering are to allow for opposition to the disclosure of documents such as the ones discussed in Goldman and Talbott's product liability example, it is not open to advocates of traditional models to argue that such actions are justified, at least in part, *by the checking mechanisms of the adversarial process*. Advocates of traditional models of lawyering cannot simply argue, without additional explanation, that the standards for proper epistemic behaviour (truth-seeking standards in veritistic social epistemology) are not the same for the role-differentiated epistemology of the lawyer as for the non-lawyer generally without role-

[37] See generally Talbott & Goldman, "Games", *supra* note 20 at 112–127, especially 115–122.
[38] Sometimes, the request is invalid, in which case the information should not be available. Other times, the request is valid, in which case the information should be available.

differentiation.[39] In the early stages of litigation, lawyers are still informing themselves to be able to properly exercise the checking mechanisms during trial. The checking mechanisms that apply to earlier stages of litigation are, by definition, less epistemically informed. Pointing out this objection is a special concern of social epistemology, as a site for inquiring into the social conditions in which knowledge—in this case, knowledge about the facts of a legal dispute—is created and shared.

The epistemic imbalances just explained in relation to negative evidence and document discovery pose problems with respect to the ability of the adversarial system to excel at the epistemic standards of "(1) reliability, (2) power, (3) fecundity, (4) speed, and (5) efficiency". The lawyer's ability to prevent disclosure of negative evidence or to make such disclosure a difficult process (a burdensome and troublesome ability for another lawyer to check), can substantially impair the legal system's ability to satisfy all five of Goldman's conditions. Perhaps most notably for the purpose of existing concerns in legal ethics, roadblocks in the way of the disclosure of negative evidence can drastically reduce the legal system's epistemic speed and efficiency. It can increase the duration of litigation (and the number of person-hours spent on a case), thus decreasing epistemic speed. The amount of time spent on a case will also be accompanied by an increase in the number of billable hours as well as in the complexity of litigation, thus increasing the legal fees that need to be spent to discover negative evidence and decreasing epistemic efficiency. These social epistemic concerns link up well with access to justice concerns in legal ethics.[40]

[39] Note that zealous opposition to disclosing documents can also be made on the basis of non-epistemic values or principles in the legal system. Thus, the justification, as well as the explicit legal argument given in court, could be based on arguments available in the rules of civil procedure that pertain to the protection of specific legal rights and values rather than truth-seeking concerns. However, in such a case, we would recognize that the argument against disclosure is not an epistemic one but is rather held up against epistemic arguments in favour of disclosure.

[40] See generally Lonny Sheinkopf Hoffman, "Access to Information, Access to Justice: The Role of Presuit Investigatory Discovery" (2007) 40:2 U Mich JL Reform 217 (exploring the way in which pretrial access to information and asymmetric control of information by potential litigants affect access to justice).

In addition to pointing out these challenges about negative evidence, Goldman and Talbott argue about the way in which the rules of civil procedure could be better structured to improve the performance of the legal system under veritistic social epistemic evaluation. These proposals including reworking the incentives that motivate lawyers and removing disadvantages for practicing law in ways that do not exploit unfair knowledge imbalances that fall outside of behaviours that the adversarial model of adjudication can justify. Goldman and Talbott propose multiple solutions to these problems beyond the rules of civil procedure that were in place when their paper was written. These solutions include specific additional disclosure rules as well as professional sanctions for failure to disclose.[41] Canvassing those proposals will not be helpful to the purpose of this dissertation.

Instead, it will be beneficial to realize that the role of the lawyer in document discovery, and the incentives that may motivate the lawyer who is engaged in discovery, show that s/he is epistemically involved in the adversarial process in a way that is much more robust than is set out by the adversarial system's claims about the epistemic benefits of a clash of arguments. According to Goldman and Talbott—I agree with them on this point—the lawyer, in addition to being involved in the social epistemic task of arguing about the subject matter of a case, is at least also involved in the social epistemic task of producing and changing evidence that the adversarial system uses.[42] Legal practice can create problems for the epistemic story that is presented in

[41] See generally Talbott & Goldman, "Games", *supra* note 20 at 128–151.

[42] Expanding on this point by turning to the work of Allan Hutchinson, we should also be aware of the epistemic implications of the insight that lawyers are also involved in the task of producing and changing the law that the adversarial system considers. See some of Allan Hutchinson's discussion about law's indeterminacy and the interpretative insights that he draws from this in Allan C Hutchinson, "A Loss of Faith: Law, Justice and Legal Ethics", Book Review of *Lawyers and Fidelity to Law* by W Bradley Wendel [unpublished, archived in author's personal collection] at 9–10. Hutchinson illustrates the way in which existing law can always be unsettled and reconfigured by individuals involved in the legal process. Chief participants in this would be lawyers. Thus, I would argue that the potential of using social epistemic analysis in law is greater than Goldman has stated. Such analysis can also be relevant to substantive discussions about law.

support of systems of adjudication, necessitating a social epistemic approach to law that deals directly with the way in which legal professionals fit (or do not fit) into epistemic reasoning that supports the adversarial model of adjudication.

I hope to have given an appetizing taste of the applicability of social epistemic insights to the field of law. There is a great deal of theoretical and practical progress that can be made in considering the role of the lawyer in shaping the results that legal systems produce depending on the way that the systems are socially organized (e.g., as an adversarial system). As summarized here, such an analysis can be done in a more systematic way using the criteria developed in epistemology, especially as those criteria are focused on taking account of the social influences on the production of knowledge. Most importantly, social epistemology provides the broader epistemic context for my own proposals about studying the epistemology of law and lawyering. My proposals about virtue epistemology are informed by the insights that social epistemology provides about the epistemology of social systems like law.

(2.3) Social Epistemology & Legal Philosophy

A notable difference between my approach to the epistemology of law and Goldman's is that, when undertaking a social epistemic assessment of legal systems, he starkly separates law and morality. Before undertaking his epistemic analysis of law and legal systems, Goldman sets out the fact that he will be examining systems with statutes, histories of case law and canons of legal interpretation. He then goes on to say:

> Whether these laws and so forth are good from a moral point of view is not up for present discussion. The question of their goodness falls into the realm of general moral and political philosophy…. I shall assume that the job of an adjudication system is to apply whatever laws are 'on the books' (and constitutionally legitimate). If those laws are bad, they should doubtless be changed. But it is not the job of the adjudication system as such to effect that change.[43]

[43] Goldman, *Social World*, *supra* note 20 at 272–273. Later in the same passage, he also discusses judicial review, and the idea that the proper place of remedies for bad legislation is at the legislative level (a point that, on its own, may or may not be relevant to the natural law/positivism debate depending on how those viewpoints are stated). My interest

In making this statement, Goldman is, at the very least, taking the dependence thesis as an assumption that underlies his analysis.[44]

More troublingly, however, Goldman may be assuming away morality from legal adjudication and from the epistemology of law. Debates about the place of morality in law are deeply relevant to the theories of legal philosophy themselves and for the epistemology of law. Natural law theory[45] places the connection between law and morality at its core such that the goodness of laws cannot be limited to the moral and political realm. Some account of goodness is (1) necessarily part of the legal realm and the system of adjudication and (2) necessarily considered by the adjudication system. Most natural law theories suggest important and necessary connections between law and morality without making claims that legal validity depends on the legal system's adherence to morality, but some natural law theories propose that legal validity (including the validity of the laws on the books) depends upon law's abidance of moral norms. Goldman's statement leaves no room for these views of law.

The sharp line that Goldman draws between legal questions and moral questions assumes away not just debates between legal positivism and natural law, but even the debate between inclusive legal positivism and exclusive legal positivism. Legal positivists argue amongst themselves about whether legal institutions (i.e., legislatures and courts) can incorporate morality, including moral values such as fairness, into the legal system and as conditions for the validity of law in their particular legal system via the rule of recognition.[46] Inclusive legal positivists (or soft

in this passage is not in Goldman's view on the role of the judiciary, but in the assumptions he states that are directly relevant to the natural law/positivism debate by way of their implication of the dependence thesis.

[44] Explained above in Section (1), especially notes 33–35, 37 and accompanying text.

[45] Discussed above in Section (1.2).

[46] See Brian Bix, ed, *A Dictionary of Legal Theory*, (Oxford: Oxford University Press, 2004) sub verbo "legal positivism – inclusive v. exclusive positivism" 123.

positivists) contend that morality can be incorporated into law by contingent choices made by legal institutions to adopt moral concepts, such as fairness and justice, into positive law. Exclusive legal positivists (or hard positivists) reject the idea that morality can be incorporated into law,[47] though law may consult morality to inform itself about conceptions within the field of morality.[48] Goldman's statement could at taken as an endorsement of exclusive legal positivism. At the very least, his view leaves little, or no, room to consider the idea adjudication in a legal system in which morality has been incorporated into law by contingent choices made within such a legal system.

Goldman should reconsider the jurisprudential assumptions that he makes. Modestly, I argue that an epistemology of law should make room for the existing discourses in legal philosophy, including the ranges of positions that include legal positivism, natural law theory, and other theories of jurisprudence. Reconsidering Goldman's assumption to achieve this modest goal should involve dropping, or clarifying, that the law on the books is not the only source of norms relevant to adjudication. More strongly, however, I argue that natural law theory is a better fit for Goldman's own epistemic ambitions. This is so for at least three reasons: (1) the merits of natural law theory itself as an account of jurisprudence, (2) the built-in concern that much of natural law theory has about epistemology, (3) the connection between natural law theory and alternative models of lawyering. The natural law theory that I endorse is Fuller's procedural naturalism. Fuller proposes that the rule of law (which he describes as the internal morality of law) provides a necessary connection between law and morality. The way in which Fuller establishes the

[47] See *ibid*; Ralf Poscher, "The Hand of Midas: When Concepts Turn Legal, or Deflating the Hart-Dworkin Debate" in Jaap C Hage & Dietmar von der Pfordten, eds, *Concepts in Law* (New York: Springer, 2009) 99 at 109.
[48] Poscher, *supra* note 48 at 107–109. Law would inform itself about moral conceptions in the same way as it informs itself about conceptions in other fields of knowledge, e.g., "meteorology, medicine, and biology", *ibid* at 107. Note that, when making these statements, Poscher is already describing his own Midas Theory, which purports to dissolve the debate between inclusive legal positivists and exclusive legal positivists.

connection between law and morality is based in the conditions upon which the ontological essence[49] of law depends.

(2.3.1) Procedural Naturalism's Own Merits

In an effective and moderate way, Fuller's procedural naturalism holds out the rule of law as a necessary condition for being a legal norm. Morality is thus assumed by all things legal. As explained by Brian Leiter in his work on law and objectivity, "The class of legal reasons can come to include moral reasons in two ways. First…sources of law—like statutes and constitutional provisions—may include moral concepts or considerations. The United States Constitution provides the most familiar examples, since it speaks of 'equal protection', 'liberty', and other inherently moral notions".[50] The legal theories that have been discussed so far in this dissertation are largely of this first kind. "Secondly," Leiter argues, "moral reasons might be part of the class of legal reasons because they are part of the very criteria of legal validity".[51] Leiter explains, "Satisfying the moral criteria might be *necessary* for a norm to be a legal norm, or it might be both necessary and sufficient. The strongest forms of natural law theory hold the latter".[52]

According to Fuller, there is a set of moral conditions that "legal systems" and particular "laws" must meet in order to perform the function of law. Since law's essence involves the performance of this function, these moral conditions are also requirements for belonging to the ontological category of law (criteria of legal validity).[53] Fuller's idea, also called the "internal

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[49] Above in Section (1.2.1), note 43 and accompanying text.
[50] Brian Leiter, "Law and Objectivity" in Jules L Coleman & Scott Shapiro, eds, *Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford University Press, 2002) 969 at 978.
[51] *Ibid*.
[52] *Ibid* at 978, n 10.
[53] Fuller's work on the ontological essence of law has been packaged in terms that are workable for a debate in jurisprudence that is concerned with legal validity. Kristen Rundle discusses the awkward fit that legal validity has in Fuller's jurisprudence. She notes that the term "legal validity" has its inheritance in legal positivist jurisprudence and explores the extent to which legal validity occupied Fuller's thinking and the place that legal validity takes in his work. See Kristen Rundle, *Forms Liberate: Reclaiming the Jurisprudence of Lon L Fuller* (Oxford: Hart Publishing, 2012) at 76–85. Rundle is right to say that "Fuller's writings are otherwise concerned with the much broader task of understanding law as a distinctive form, and with rejecting pathological instances of that form as rightly belonging

morality of law", [54] has two main steps: a functionalist thesis and a moral thesis.[55] In legal philosophy, the first of these steps receives little contestation and the second is a minority position. The functionalist thesis posits that the rule of law is a necessary condition for the validity of law because the abidance of the rule of law is necessary for legal systems, and particular laws,[56] to perform their functions as members of the ontological category of law. This function is guiding conduct. Described in broader terms, the function is subjecting human conduct to the guidance of rules. As Fuller quotes the words of Vaughan CJ in *Thomas v. Sorrell*, 1677, "[A] law which a man cannot obey, nor act according to it, is void and no law: and it is impossible to obey contradictions, or act according to them".[57]

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within the meaning of law as a concept", *ibid* at 79. I thank Rundle for her commentary on this point, in which she highlighted the extent to which I am packaging Fuller's ideas for my purposes here. I have indeed packaged Fuller's work in a way that focuses on the language of legal validity, and which was not the focus of Fuller's work. At the same time, Rundle has not suggested that discussing Fuller's commentary on legal validity is illegitimate or even a misreading of his work. Questions about legal validity deal with a slice of Fuller's work, but the slice is important and doing a deep dive on it does not need to distort Fuller's broader ideas. Compare with NE Simmonds, who cautions Rundle against too strongly reclaiming Fuller's work from his debates with positivists like Hart, in which legal validity was the focus. Simmonds argues that this debate "is a battle where Fuller's general strategy offers every prospect of victory," and that seeking to move focus away from Fuller's contribution to this debate "risks conceding important territory to those who have in reality failed to achieve the outright victory that is sometimes ascribed to them", NE Simmonds, "Freedom, Responsible Agency and Law", Book Review of *Forms Liberate: Reclaiming the Jurisprudence of Lon Fuller* by Kristen Rundle (2014) 5:1 Juris 75 at 76. Rundle and Simmonds are both astute here. The validity debate was not Fuller's central focus, and yet Fuller has a vital insight to make about validity and law's foundations.

[54] See generally Lon L Fuller, *The Morality of Law*, revised ed (New Haven, Conn: Yale University Press, 1969) at 4, and especially ch 2, where Fuller develops this idea.

[55] For discussions of this two-step thesis, see NE Simmonds, *Law as a Moral Idea* (Oxford: Oxford University Press, 2007) at 65, 81; Jeremy Waldron, "Positivism and Legality: Hart's Equivocal Response to Fuller" (2008) 83:4 NYUL Rev 1135 at 1139–1144. See also Noam Gur, "Form and Value in Law", Book Review of *Forms Liberate: Reclaiming the Jurisprudence of Lon Fuller* by Kristen Rundle (2014) 5:1 Juris 85 at 88–90 (Gur discusses the two-step reading of Fuller's idea of the internal morality of law). Gur also suggests a one-step reading that may be more favourable to Rundle's reclamation of Fuller's jurisprudence. *Ibid* at 90–92. Kenneth Winston provides a 6-step breakdown of Fuller's idea of the internal morality of law (consistent with the two main steps outlined here). Winston's breakdown highlights the central place of liberal political thought in Fuller's work. See Kenneth I Winston, "Introduction [to the First Edition]" in Kenneth I Winston, ed, *The Principles of Social Order: Selected Essays of Lon L Fuller*, revised ed (Oxford: Hart Publishing, 2001) 25 at 53.

[56] See Emanuel Tucsa, "The Gold Standard: Legal Theory and Fuller Revisited" (2020) 13:1 Wash U Jurisprudence Rev 85 at 101–104 (demonstrating that Fuller's theory of the internal morality of law applies, and has been applied by Fuller, to particular laws).

[57] Fuller, *Morality of Law*, *supra* note 54 at 33 (alteration in original), citing *Thomas v Sorrell*, (1673) 124 Eng Rep 1098 (KB).

Fuller provides eight desiderata that a purported "system of law", and purported particular "laws", cannot completely ignore and still belong to the category of law because failing in these conditions would be to fail to guide conduct.[58] The desiderata are: (1) generality—the legal system should have general rules; (2) promulgation—laws should be published; (3) prospectivity—laws should be prospective; (4) clarity—laws should be clearly stated and understandable; (5) consistency—laws should be consistent with one another; (6) possibility—laws should not command the impossible; (7) constancy—laws should not be subject to constant change; (8) congruence—consistency between the law as declared and as administered.[59] Fuller receives broad agreement on this first step of his procedural naturalism, including from inclusive legal positivists like H.L.A. Hart and exclusive legal positivists like Joseph Raz.[60]

The second aspect of Fuller's procedural naturalism, his moral thesis, posits that the rule of law, and Fuller's eight desiderata, are also moral conditions for the validity of law. The desiderata themselves implicitly recognize individual autonomy and set a baseline of respect for individual autonomy as a necessary condition for the validity (or essence) of law. As Fuller says while discussing the account of humanity that is implied in the internal morality of law, "To

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[58] See Fuller, *Morality of Law*, *supra* note 54 at 39. Beyond setting a minimal functional standard below which law cannot fall, Fuller recognizes that law can have the excellences of legality to greater or lesser degrees depending on its adherence to the morality of law. Thus, a "legal system" or particular "law" does not merely either qualify, or fail to qualify, as law in a binary fashion. Rather, the internal morality of law identifies a continuum of legality. See *ibid* at 3–32, 41–44, 122–123. Fuller addresses the criticism that his theory makes it possible for the existence (or I would more accurately say essence, see generally Fabrice Correia, "Ontological Dependence" (2008) 3:5 Phil Compass 1013, discussed above in Section (1.2.1) at note 43) of a legal system to be a matter of degree, replying that "of course, both rules of law and legal systems can and do half exist," see Fuller, *Morality of Law*, *supra* note 54 at 122–123. See also Lon L Fuller, "Positivism and Fidelity to Law: A Reply to Professor Hart" (1958) 71:4 Harv L Rev 630 [Fuller, "Positivism & Fidelity"] at 646; Rundle, *supra* note 53 at 78, 93, 137.

[59] See Fuller, *Morality of Law*, *supra* note 54 at 39. Fuller undertakes a detailed exposition of these desiderata therein at 46–91.

[60] See generally Waldron, "Positivism & Legality", *supra* note 55 at 1144–1169, explaining a number of examples in which Hart shows more openness to Fuller's view, in particular Fuller's functionalist analysis; Joseph Raz, *The Authority of Law: Essays on Law and Morality*, 2nd ed (Oxford: Oxford University Press, 2009) at 219–226. See *ibid* at 226 (containing Raz's example of a knife's minimal functional ability to cut). Raz uses this argument to criticize Fuller's moral thesis. Nevertheless, the soundness of the functionalist portion of Fuller's argument is recognized (even if done unenthusiastically).

embark on the enterprise of subjecting human conduct to the governance of rules involves of necessity a commitment to the view that man is, or can become, a responsible agent, capable of understanding and following rules, and answerable for his defaults".[61] Fuller describes law's commitment to a view of human nature that recognizes people's autonomy as "the most important respect in which an observance of the demands of legal morality can serve the broader aims of human life generally".[62]

Violations of Fuller's desiderata fall below this baseline of respect for individual autonomy. Fuller goes as far as to say, "Every departure from the principles of law's inner morality is an affront to man's dignity as a responsible agent".[63] Raising specific examples of departures from the rule of law, Fuller argues that, "To judge [a person's] actions by unpublished or retrospective laws, or to order him to do an act that is impossible, is to convey to him your indifference to his powers of self-determination".[64] This wrong can be especially egregious in the case of criminal law, where one can raise examples such as a citizen being required by a "law" to perform an impossible task and possibly being imprisoned for failing to perform the task. This example would result in a loss of liberty (through imprisonment) based on a "law" that failed to respect the person's autonomy in the first place.

Not every aspect of morality creates a validity condition for law based in the internal morality of law. Fuller recognizes this as he says, "I have repeatedly observed that legal morality can be said to be neutral over a wide range of ethical issues".[65] His desiderata are specifically

[61] Fuller, *Morality of Law*, *supra* note 54 at 162.
[62] *Ibid*.
[63] *Ibid*. Fuller's statement could be made more modestly. He has recognized that some departures from the internal morality of law might be acceptable and might even be unavoidable, such as the creation of case law. See generally *ibid* at 55–58, for Fuller's discussion of retroactivity in case law.
[64] *Ibid* at 162.
[65] *Ibid*.

relevant to law's function of guiding human conduct.[66] A "legal system", or a "law", that violates substantive morality—but that does not undermine the conduct-guiding function of law[67]—can be critiqued on moral grounds. However, such violations would not result in a failure to perform law's conduct-guiding function. For example, a "law" that has the purpose and/or effect of segregating neighborhoods racially, while subject to rebuke on substantive moral and political grounds, as well as possibly other grounds in the positive law that may be inspired by the substance of moral conceptions, does not fail to perform the conduct-guiding function of law as long as the "law" is consistent with Fuller's eight desiderata. Such a "law" would not raise the specific concerns about legal validity that come from the rule of law. Thus, Fuller's view identifies a limited set of moral norms as internal functional conditions for the essence of law. The pushback that Fuller receives on his moral thesis concerns whether his desiderata are truly moral conditions or simply functional conditions.[68]

Goldman, like legal positivists, could argue that Fuller's eight desiderata are indeed conditions for the existence of law, but that they are merely conditions of efficacy. In that sense, Goldman could help himself to these desiderata and recognize their epistemic relevance while still endorsing a conceptual split between law and morality. Such a move would return any argument that I have with Goldman's jurisprudential assumptions to the familiar debate about whether Fuller's conditions are moral conditions or merely conditions of efficacy. Delving too deeply into the debate Fuller's moral thesis would take this dissertation far afield. The aim here has been to

[66] See *ibid* at 106, where Fuller gives his well-known statement that "law is the enterprise of subjecting human conduct to the governance of rules".
[67] I have avoided using the term "external morality" here because Fuller has his own specialized use for this term. See generally Rundle, *supra* note 53 at 63–65.
[68] See Raz, *Authority of Law*, *supra* note 60 (sharp knife example, discussed above in note 60); HLA Hart, Book Review of *The Morality of Law* by Lon Fuller (1965) 78:6 Harv L Rev 1281. See generally Waldron, "Positivism & Legality", *supra* note 55, for Waldron's discussion of the range of responses that Hart gave to Fuller's idea of the internal morality of law.

show that jurisprudential debates themselves push against the decision to make the jurisprudential assumption that Goldman makes.

(2.3.2) Epistemology & Natural Law

Beyond the merits of natural law theory over legal positivism, epistemic ideas are built into different approaches to natural law theory. Several of Fuller's eight desiderata are directly relevant to epistemology. Fuller's theory is concerned with the ability of those who are governed by law to know the law. Desiderata with notable relevance to epistemology include: (2) Promulgation, (3) prospectivity, (4) clarity, (5) consistency, (7) constancy, (8) congruence.[69] Their epistemic relevance is the following:

> (2) Promulgation: A law that has not been declared openly by the lawmaker(s) to others cannot be known.
>
> (3) Prospectivity: A law that is retroactive presents either an obligation that cannot be known to be binding, or cannot be known at all because the law may not have even been drafted, for at least a portion of the time to which it purports to apply.
>
> (4) Clarity: A law that is difficult to understand (e.g., because they contain unclear terminology) is difficult, or perhaps impossible, to know.
>
> (5) Consistency: A law that is inconsistent, even logically contradictory with itself, fails to present a norm that can be known.
>
> (7) Constancy: A law that is too frequently in flux will be difficult for those governed by law to know.

This is not to say that these desiderata are found in Fuller's internal morality of law completely or mainly because of their relevance to epistemology.[70] Saying so would rob the desiderata of the more robust meanings that Fuller gives them. As noted above, a crucial aspect of the desiderata is that they respect individual autonomy. One could also elaborate other aspects of the desiderata, such as their concern that law treat people fairly. Even so, it is noteworthy, in an

[69] Perhaps only (1) generality, (6) possibility, and (8) congruence do not have prominent epistemic implications.
[70] The exception to this is promulgation, which is indeed primarily an epistemic concern.

epistemic approach to law and lawyering, that the desiderata of Fuller's theory of legal philosophy have clear epistemic aspects to them. Concern about the ability of the governed to know the rules is a built-in aspect of Fuller's internal morality of law.

Other natural law theories go far beyond Fuller with built-in epistemic concerns. The natural law theory of John Finnis is one such example. Finnis gives a broad theory of natural law that connects law with the project of pursuing human flourishing. In explicating this approach, Finnis proposes a set of basic goods, among which are included knowledge and practical reasonableness.[71] Fuller's epistemic concern in the internal morality of law is with knowledge as a condition for allowing people to plan their lives and act on those plans. People cannot plan in relation to law if the law denies them the knowledge about law necessary to make such plans. Finnis goes further, setting knowledge as one of the basic goods that individuals seek in the course of life.

Consider the following example that illustrates the difference between the places given to epistemology in Fuller's theory and Finnis' theory. Fuller gives basic requirements that the law must meet to regulate scientists' pursuit of knowledge about the natural world. Finnis is focused on supporting the impetus behind the scientist's desire to achieve knowledge about the natural world. These are compatible but different epistemic concerns. One question is largely focused with the question of "how", whereas the other is focused on the question of "why". Notably, for the purpose of this dissertation, Finnis' account of the basic requirements of practical reasonableness raises concerns that link up well with discussions of behavioural legal ethics and debiasing strategies that lawyers should adopt to deal with the negative effects of partisanship.[72] Here, Finnis

[71] See John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980) at 86–89.
[72] I discuss behavioural legal ethics below in Section (6) and Perlman's ideas about the biasing effects of partisanship in Section (6.2). Finnis' requirements of practical reasonableness include: "no arbitrary preferences amongst persons", *ibid*, ch V.4., as well as detachment and commitment to life projects, *ibid*, ch V.5.

is an example of the depth to which epistemic concerns can reach in natural law theories that adopt a more substantive approach, as compared to Fuller's procedural naturalism.

This subsection contains a great deal that a legal positivist could endorse. I noted earlier that there is wide agreement with the functional step in Fuller's argument about the internal morality of law.[73] Beyond being able to endorse even the jurisprudential ideas discussed in this section (e.g., the functional aspect of Fuller's internal morality of law), positivists can agree to the epistemic concerns raised by these natural law theories. There is no reason a positivist could not agree that Fuller's desiderata have an epistemic element and that this epistemic element is important in explaining why the desiderata act as functional conditions for the existence of law. Positivists could also agree with the motivations that Finnis gives behind pursuing a certain good as part of one's life plan. Why, then, do the arguments raised in this section raise any reason that an epistemology should have any greater affinity for natural law theory in particular? The reason is that, though positivism is compatible with the epistemic concerns raised here, positivism itself does not contain any impetus to raise these concerns. The positivist dependence thesis does not raise any epistemic concern beyond its own propositional truth. By contrast many natural law theories themselves contain concerns about epistemology built into the theory. The theories that already have built in concerns for epistemology should not be assumed away in an epistemology of law and lawyering.

(2.3.3) Social Epistemology, Natural Law Theory, & Lawyering

Finally, natural law theory speaks to the exact epistemic concerns that Goldman has about lawyering in the adversarial process of adjudication. It must be understood that Goldman's concerns about the adversarial process are deeply linked to prevailing models of lawyering and the

[73] Above at note 60 and accompanying text.

legal philosophical viewpoints that are associated with those models of lawyering. Consider the following illustration of the way in which models of lawyering have a crucial place in explaining the epistemic complaints that Goldman has about adversarial systems of adjudication.

Goldman discusses the epistemic problems that exist in relation to disclosing negative evidence in adversarial proceedings. The disclosure of negative evidence is vital to a full hearing of the evidence and to informed adversarial argumentation in a case. However, as Goldman says, disclosing negative evidence, especially if other lawyers are not also disclosing negative evidence, places the lawyer who does disclose negative evidence at a competitive disadvantage. By no means do codes of professional conduct encourage lawyers to avoid the proper disclosure of negative evidence as part of the document discovery process in adversarial proceedings. Codes of professional conduct do, however, contribute to informing adversarial structures with the traditional model of lawyering. For example, the FLSC *Model Code* also states that, "The lawyer's function as advocate is openly and necessarily partisan. Accordingly, the lawyer is not obliged (except as required by law or under these rules and subject to the duties of a prosecutor set out below) to assist an adversary or advance matters harmful to the client's case".[74]

Adversarial dispute resolution structures reliably raise Goldman's epistemic concerns when the legal professionals who work within the structures adopt specific styles of legal practice. Adversarial systems of adjudication and traditional models of lawyering can mutually shape and reinforce one another in negative ways. Being a good adversary in the context of a specific legal culture can come to mean engaging in behaviours that benefit the client at significant epistemic costs that undermine the intended epistemic benefits of adversarial dispute resolution systems. The most aggressive traditional models of lawyering, those based on Lord Brougham's statement of

[74] *Ibid*, r 5.1-1, commentary 3.

zealous advocacy and hyper-partisanship,[75] risk countenancing abuses of legal processes to avoid the disclosure of negative evidence. Goldman's epistemic concerns thus arise from features of the adversarial model of adjudication and traditional models of lawyering gone awry.

Alternative models of lawyering offer the potential of avoiding these pitfalls. As explained above,[76] alternative models of lawyering allow for lawyers to consider the interests of third parties and to raise moral considerations with the client, such as the question of whether what the client is doing is moral. In the case of document discovery, alternative models might consider the public interest, or the interests of other stakeholders, in acquiring information from the lawyer's client when considering the question of keeping negative evidence from being seen.

Natural law theory offers paths for better awareness of the epistemic pitfalls of traditional lawyering within adversarial systems of adjudication. Natural law theory also better aligns with alternative models of lawyering that might avoid the specific epistemic concerns raised by Goldman. As I argued above,[77] models of lawyering are not completely neutral with respect to the philosophy of law; nor are models of lawyering neutral to questions about the extent to which moral norms form part of the law and have a place in legal adjudication. It may even be the case that models of lawyering assume accounts of jurisprudence: traditional models most readily assuming legal positivism and (at least some) alternative models most readily assuming some version of natural law theory. Relatedly, some theories in legal philosophy—especially theories about the relationship between law and morality—have a greater impetus to support some models of lawyering over others.

[75] Above in Section (1.2.1) at notes 54–67.
[76] Above in Section (1.2.2).
[77] Above in Section (1.2).

Traditional models of lawyering put forward norms such as the principle of neutrality (which prohibits lawyers from allowing their own views of the moral merits of the case to affect the zealousness with which they pursue client objectives), the principle of lawyer non-accountability (which exhorts against judging lawyers on the basis of the morality of the client's case), and the principle of partisanship (which requires the lawyer to seek to maximize the likelihood of the client's victory).[78] Adversarial litigation in common law systems is conducted with the understanding that lawyers are not supposed to bring their moral views into their relationship with the client. The idea that the lawyer's moral views should be kept separate from the lawyer-client relationship (a tenet of traditional models) is difficult to make if moral values are embedded in the law or if morality is part of the validity conditions of law (tenets of natural law theory). The situation is not as stark for alternative models of lawyering; alternative models of lawyering are more compatible with legal positivism than traditional models of lawyering are compatible with natural law theory. However, an important avenue for connecting morality to the lawyer-client relationship (a helpful thing under alternative models of lawyering) is lost if morality is not somehow embedded in law and/or is not part of the validity conditions of law (a tenet of legal positivism).

If Goldman's epistemic concerns arise out of the combined influence of both the adversarial system of adjudication and traditional models of lawyering, then questions about law's relationship with morality as expressed in legal philosophy should not be assumed away. Leaving a space to ask those questions about law and morality allows us to place additional scrutiny on the harshest aspects of traditional models of lawyering that, within adversarial systems of adjudication, condone behaviours such as harsh questioning of witnesses and perhaps even abuse of legal

[78] Above in Section (1.1), notes 3–5.

processes to conceal negative evidence. Asking these moral questions, especially from a natural law perspective, thus has potential to greatly enrich the critical resources that social epistemology can bring to existing adjudicative systems and the styles of lawyering that dominate therein.

Social epistemology is an important recent turn in epistemological thought. It has wide ranging applications to law and can provide great insight into legal ethics as well. Additionally, it sets the stage for the analysis that I wish to undertake in this dissertation as I take account of another turn in epistemology: virtue epistemology. In particular, the idea of virtue orientation in virtue epistemology is substantially enriched by the background of social epistemology.

(3) Virtue Epistemology – A Virtuous Turn in Approach to Epistemology

Whereas authors such as Goldman have studied the epistemology of law from an overarching systemic point of view or from the perspective of attempting to understand specific practices within legal systems (e.g., the disclosure of evidence), I am looking at the epistemology of law from the perspective of the professional life of the lawyer. I am considering the epistemic demands placed on lawyers by their professional role, especially the ethics of their professional roles, which deal with issues such as advising clients about the law, the ethics of taking a particular course of action, and strategies for presenting evidence to juries. From this inquiry, I expect to provide an illuminating reading of the philosophy of lawyering.

The approach an epistemology of lawyering taken by someone working purely from a social epistemic point of view would look much like Goldman's. A social epistemic study that focuses on the role of the lawyer would engage in both the descriptive and normative analysis of the role that the lawyer plays in legal systems, especially under various models of lawyering. If one were to approach the normative project of social epistemology purely in line with Goldman's veritism, one would focus on assessing the extent to which the lawyer, through the services that s/he provides in the legal system, contributes to the legal system's ability to produce true belief. Towards this end, one might take up Goldman's veritistic standards and ask how the lawyer contributes to the legal system's epistemic reliability, power, fecundity, speed, and efficiency. In many ways, this approach would be an extension of the previous discussion about document discovery.[1] There is immense value in such analysis and Goldman's work will continue to inform this dissertation. However, my intention is to take an approach that deals more deeply with both the professional intellectual and moral life of the lawyer within the social institutions and practices

[1] Above in Section (2.2).

of law. With this in mind, I turn to the task of discussing virtue epistemology and the intellectual resources that it provides to the epistemology of lawyering.

(3.1) Understanding the Virtuous Turn

Despite providing a meaningful change in focus from traditional epistemology, there is an extent to which social epistemology is—in its focus on developing abstract conditions of knowledge and dealing with problems that occur for individuals in obtaining knowledge—substantially a broadening of ideas that are done in the spirit of traditional epistemology. As the virtue epistemologist Jason Kawall summarizes:

> Generally, discussion in [social epistemology] has been devoted to (i) to the notion of collective, or group beliefs and their justification, (ii) to how individuals can come to know 'social facts', (iii) to how knowledge-building institutions (such as the sciences) should be organized to maximize the production of knowledge, and (iv) to how being embedded in an epistemic community can impact upon attributions of knowledge (justification, warrant) to individual knowers.[2]

Kawall's description of these projects is that they "either overlap with those of individualistic epistemologists, or they focus on groups and their organization".[3]

The project of virtue epistemology involves a more substantial divergence from traditional epistemology. When one comes to study virtue epistemology, it quickly becomes evident that the commitments and tools guiding the project of virtue epistemology are inspired by those in the field of ethics. According to epistemologists John Turri, Mark Alfano, and John Greco, the two basic commitments of virtue epistemology are (1) that "epistemology is a normative discipline", and (2) that "intellectual agents and communities are the primary source of epistemic value and the primary focus of epistemic evaluation".[4] In explicating the first of these commitments, as shown

[2] Jason Kawall, "Other-Regarding Epistemic Virtues" (2002) 15:3 Ratio 257 at 266–267.
[3] *Ibid* at 267.
[4] John Turri, Mark Alfano & John Greco, "Virtue Epistemology", *The Stanford Encyclopedia of Philosophy* (Fall 2019), Edward N Zalta, ed, online: Center for the Study of Language and Information, Stanford University <plato.stanford.edu/entries/epistemology-virtue/> [perma.cc/JJ3T-4YUJ], s 1.

directly below, virtue epistemology develops an evaluative aspect that is even stronger than that of social epistemology. The evaluative aspect and the extent of its application are the key distinguishing features of virtue epistemology. In the second commitment identified by Turri, Alfano, and Greco, we see an ability to epistemically evaluate both individuals as well as systems and social practices. This second commitment allows for the prevalence of the social analysis of epistemology (consistent with social epistemology) while also providing more impetus to focus on the normative analysis of the epistemic life of the intellectual agent. In this dissertation, the key epistemic agent is the lawyer.

The way in which virtue epistemology's two commitments become the grounds for a distinct epistemological theory is by the way in which virtue epistemologists take their inspiration from the moral theory of virtue ethics. Turri, Alfano, and Greco compare virtue epistemology and virtue ethics in the following way:

> Virtue ethics explains an action's moral properties in terms of the agent's properties, for instance whether it results from kindness or spite. [Virtue epistemology] explains a cognitive performance's normative properties in terms of the cognizer's properties, for instance whether a belief results from hastiness or excellent eyesight, or whether an inquiry manifests carelessness or discrimination. For virtue ethics the relevant properties are moral virtues and vices, and for [virtue epistemology] intellectual virtues and vices.[5]

This is said to be the "direction of analysis" that virtue epistemology takes when compared to traditional approaches in epistemology (which would proceed by stipulating abstract conditions for knowledge, followed by assessments of claims to knowledge on the basis of whether the person meets the abstract conditions).[6] Rather than evaluating the beliefs of people on the basis of whether they meet an abstract standard, virtue epistemology looks for the epistemic agent's practice of intellectual virtues.

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[5] *Ibid*.
[6] *Ibid*.

The idea in virtue epistemology is that an agent's epistemic position is strengthened by action that is in accordance with epistemic virtues such as circumspection, conscientiousness, and honesty. The agent's epistemic position is weakened by action that is in accordance with epistemic vices such as gullibility, intellectual laziness, epistemic insouciance,[7] and dishonesty. Providing a similar account of virtue epistemology, John Greco summarizes the way in which virtue theory re-orients the basis of normative analysis. He says:

> Just as virtue theories in ethics try to understand the normative properties of actions in terms of the normative properties of moral agents, virtue theories in epistemology try to understand the normative properties of beliefs in terms of the normative properties of cognitive agents. Hence, virtue theories in ethics have been described as person-based rather than act-based, and virtue theories in epistemology have been described as person-based rather than belief-based.[8]

The task of defining epistemic virtues is a crucial task within the broader project of virtue epistemology. This task exists one level of abstraction above this dissertation. Whereas my project here is best described as an effort in applied epistemology (specifically, applied virtue epistemology), the task of explaining what a virtue is would be done at a level of abstraction that could be described as normative epistemology.[9] Similar to how moral concepts such as "good", "right", and "moral virtue" are defined at the level of normative ethics, the concept of "epistemic virtue" would be defined at the level of normative epistemology.

One effort to give what might be best described as indicators of epistemic virtues, is undertaken by the virtue epistemologist Jason Baehr who provides "four dimensions of intellectual

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[7] See Quassim Cassam, *Vices of the Mind: From the Intellectual to the Political* (Oxford: Oxford University Press, 2019) at 78.

[8] John Greco, "Virtues and Rules in Epistemology" in Abrol Fairweather & Linda Zagzebski, eds, *Virtue Epistemology: Essays on Epistemic Virtue and Responsibility* (Oxford: Oxford University Press, 2001) 117 at 136–137.

[9] I am drawing parallels to the branches of ethics: metaethics (which deals with questions *about* ethics), normative ethics (which deals with principles, rules, maxims, and virtues of behaviour), and applied ethics (which deals with specific and real-world ethical problems, sometimes focusing on specific human endeavours such as medicine, law, and war).

virtue".[10] Baehr himself says that his dimensions are not meant to be taken as either necessary or sufficient conditions for intellectual virtue. They are meant to "cover[] enough of the relevant cases to be explanatorily illuminating and useful".[11] The dimensions are set out in four principles, described in terms that address the question of what it takes for a person to have an intellectual virtue. The principles are the following.

> Motivational Principle (MP): A subject S possesses an intellectual virtue V only if S's possession of V is rooted in a "love" of epistemic goods.[12]

"Love" is meant to be taken broadly and can also be expressed as "'being for' *epistemic* goods".[13] Showing commitment to epistemic good in a way characterized by epistemic virtue can be distinguished from engaging in behaviour that produces epistemic goods merely for things such as social standing or career interests.[14]

> Affective Principle (AP): S possesses an intellectual virtue V only if S takes pleasure in (or experiences other appropriate affections in relation to) the activity characteristic of V.[15]

The affective principle is meant to highlight the connection between one's affections and virtue. Baehr cites Aristotle, who argues that being virtuous should largely be pleasurable or at least free from pain.[16] Baehr also recognizes that the appropriate affections in relation to some intellectual

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[10] Jason Baehr, "The Four Dimensions of Intellectual Virtue" in Chienkuo Mi, Michael Slote & Ernest Sosa, eds, *Moral and Intellectual Virtues in Western and Chinese Philosophy: The Turn Toward Virtue* (New York: Routledge, 2016) 86 at 86. Note also the Baehr's specifies at 86 that the dimensions he gives are from a responsibilist perspective on virtue epistemology, instead of from a reliabilist perspective on virtue epistemology. That distinction is explained in Section (3.2) of this dissertation.
[11] *Ibid* at 87.
[12] *Ibid*.
[13] *Ibid* at 88 [emphasis in original].
[14] *Ibid* at 87.
[15] *Ibid* at 89.
[16] See *ibid* at 89–90, citing Aristotle, *Nicomachean Ethics* 1099a (pleasure), 1175a (absence of pain). See Aristotle, *The Nicomachean Ethics*, reissued ed, translated by David Ross, JL Ackrill & JO Urmson, eds, (New York: Oxford University Press, 1998).

virtues may be more varied, allowing for feelings of pain or regret when one has made a major error.[17]

> Competence Principle (CP): S possesses an intellectual virtue V only if S is competent at the activity characteristic of V.[18]

The competence principle emphasizes the need to deliberately practice and improve upon intellectual virtues.[19] Additionally, it may provide the link between reliabilist and responsibilist approaches to virtue epistemology.[20]

> Judgment Principle (JP): S possesses an intellectual virtue V only if S is disposed to recognize when (and to what extent, etc.) the activity characteristic of V would be epistemically appropriate.[21]

Baehr explains that this last principle gives a crucial place in virtue epistemology to practical reasoning.

Baehr's approach to defining what an epistemic virtue is and what it means for a person to be epistemically virtuous provides a helpful reference point in this dissertation. This task is not the primary focus of this dissertation. My work here is an effort in the applied virtues epistemology, bringing the normative resources of virtue epistemology to the topic of lawyering. However, one a cannot provide an applied normative analysis without at least some reference (explicit or implicit) to the general normative level of abstraction. As such, I will explain additional normative concepts throughout this section and return to them as needed in this dissertation.

Even as we recognize virtue epistemology's change in the direction of analysis, we should not suppose that virtue epistemology must, by necessity, reject the philosophical contributions of traditional epistemology. Virtue ethics does not need to be stated in a way that puts it in direct

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[17] See Baehr, *supra* note 10 at 90.
[18] *Ibid* at 91.
[19] See *ibid* at 92.
[20] The distinction and the potential to reconcile these competing perspectives is discussed below in Section (3.2).
[21] Baehr, *supra* note 10 at 92.

contradiction with non-aretaic theories of ethics (such as deontology and consequentialism). Similarly, virtue epistemology need not be stated in a way that puts it in direct contradiction with other theories of knowledge (including especially the traditional theories of foundationalism and coherentism, which do begin with abstract definitions of knowledge), or as being dismissive of the preoccupations of these traditional theories (such as defining knowledge and epistemic justification in abstract terms).

Thus, I embrace many of virtue epistemology's insights and am keen to apply them to the subject of law, especially in a way that is aware of the complementary project of social epistemology. However, I will only endorse a virtue epistemological approach that makes room for traditional epistemological debates. Ignoring the traditional questions in epistemology would result in missing some of the value of virtue epistemology. One aim for which virtue epistemology can be used is to gain insight into the traditional questions of knowledge and justification; some epistemologists have pursued exactly that end.[22] More crucially, just as it appears in ethics that virtue ethics cannot stand alone without abstract accounts of the good and the right, virtue epistemology's insights will ultimately be incomplete without an abstract theory of knowledge to explain the aim of our intellectual virtues. The role of traditional epistemology in such explanations is to reference beliefs in addition to people. The epistemology of this dissertation is strongly, *but not exclusively*, "person-based".[23]

(3.2) Reliability & Responsibility

Robert C. Roberts and W. Jay Wood discuss intellectual virtues as "simply acquired bases of excellent intellectual functioning—this being one of those important and challenging

[22] See generally Turri, Alfano & Greco, *supra* note 4, s 4.
[23] Above at note 8 and accompanying text.

generically human kinds of functioning".[24] Excellent intellectual functioning may have two aspects: (1) skills/capacities/competencies and (2) character traits. This is not to say that every intellectual virtue is made up of both of these aspects, but rather that there are intellectual virtues representing each of these aspects. A key distinction is drawn in virtue epistemology between "reliabilist" perspectives and "responsibilist" perspectives on epistemic virtues.[25] The two views differ in terms of what they regard as being intellectual virtues. The epistemologist Will Fleisher describes the reliabilist conception of virtue as being synonymous with "a competence";[26] he defines competence in epistemology as "a disposition to succeed reliably enough at some type of performance".[27] In their account of epistemic virtues, reliabilists "include faculties such as perception, intuition, and memory", which can be called "faculty-virtues",[28] and which help people succeed at intellectual performances. Of note is that, contrary to Roberts and Wood, some reliabilists will classify as virtues capacities that are not acquired and that may not be possible to develop to any significant extent, or perhaps even at all.[29]

In comparison, responsibilists "understand intellectual virtues to include cultivated character traits such as conscientiousness and open-mindedness", which can be called "trait-virtues".[30] Character traits can be defined as "disposition[s] to form beliefs and/or desires of a certain sort and (in many cases) to act in a certain way, when in conditions relevant to that

[24] Robert C Roberts & W Jay Wood, *Intellectual Virtues: An Essay in Regulative Epistemology* (Oxford: Oxford University Press, 2007) at 60.
[25] Turri, Alfano & Greco, *supra* note 4, s 3.
[26] Will Fleisher, "Virtuous Distinctions: New Distinctions for Reliabilism and Responsibilism" (2017) 194:8 Synthese 2973 at 2974.
[27] *Ibid* at 2977.
[28] Turri, Alfano & Greco, *supra* note 4, s 3.
[29] See Guy Axtell, *Knowledge, Belief, and Character: Readings in Virtue Epistemology* (Lanham, MD: Rowman & Littlefield, 2000) at xxv (noting that "[f]or reliabilists not all intellectual virtues are acquired traits"); Christopher Hookway, "How to Be a Virtue Epistemologist" in *Intellectual Virtue: Perspectives from Ethics and Epistemology* (Oxford: Clarendon Press, 2003) 183 at 187 (describing reliabilist virtues like "good eyesight and memory").
[30] Turri, Alfano & Greco, *supra* note 4, s 3.

disposition".[31] A virtuous disposition to form beliefs and/or desires, or to act in a certain way, picks out the mean between two vicious dispositions.[32] Crucially, the intellectual virtues recognized by the responsibilist school are traits that individual epistemic agents can be held responsible for developing.[33] Lorraine Code explains that the idea of "'responsibility' can highlight the active nature of knowers/believers".[34] To illustrate the distinction between reliability in knowing and responsibility in knowing, Code compares the way in which a computer passively and accurately records knowledge to the way in which a person actively makes choices about "modes of cognitive structuring" and can be held responsible for these choices;[35] the computer cannot be so held. This dissertation takes a responsibilist perspective on intellectual virtues and the virtue epistemology of lawyering. The remainder of this text, especially Section (4) is primarily dedicated towards articulating responsibilist concerns and applying responsibilist ideas. Thus, much of the present section will contain a brief treatment of what would be the focus of a reliabilist epistemology of lawyering.

The reliabilist perspective has aspects in which it goes against Ayers' account of virtues. Reliabilism aligns with competence or skill, the latter of which Ayers distinguishes from virtues. According to Ayers, "virtues are essentially connected to intrinsic values, while skills need not be".[36] In ethics, the example of compassion illustrates Ayers' account of responsibilist virtues. Compassion, a virtue, is described by Ayers as being "conceptually linked to the intrinsic value of

[31] Christian B Miller & Angela Knobel, "Some Foundational Questions in Philosophy about Character" in Christian B Miller et al, eds, *Character: New Directions from Philosophy, Psychology, and Theology* (Oxford: Oxford University Press, 2015) 19 at 21.
[32] See generally Aristotle, *supra* note 16, II.6.
[33] See Fleisher, *supra* note 26 at 2975.
[34] Lorraine Code, *Epistemic Responsibility* (Hanover, NH: University Press of New England for Brown University Press, 1987) at 51.
[35] *Ibid*.
[36] Andrew B Ayers, "What if Legal Ethics Can't be Reduced to a Maxim?" (2013) 26:1 Geo J Legal Ethics 1 at 37.

other people's well-being".[37] By contrast, Ayers notes that skills can be used to produce things that have no intrinsic value or that are even intrinsically bad. He gives the examples of a skilled con artists or a skilled composer of advertising jingles.[38] Like Ayers' description of skills, the epistemic faculty-virtues recognized by reliabilists have the potential to become decoupled from intrinsic goods. Memory, for example, can be used to accomplish something good, such as recalling the inspiration given in a speech, the kindness of a colleague in assisting with an urgent matter, or recalling a rule of civil procedure that assists a client in asserting his/her legal rights in a trial. However, memory can also be used to recall grudges, excuses for stubbornness, personally scandalous information that can embarrass an individual, fears that keep a person from developing himself/herself,[39] and even advertising jingles.

Ayers recognizes important dissimilarities based in the reliabilist and responsibilist schools. However, the contrast that he draws between virtues and skills (not recognizing skill/capacities/competencies, i.e., faculty-virtues, as a type of virtues) is too sharp and should take account of potential for rapprochement between reliabilists and responsibilist. It is even important to avoid a possible misconception that could arise in reading Ayers' distinction between virtues and skills. Saying that skills are not essentially connected with intrinsic values and that skills can be used for intrinsically good, neutral, or even bad purposes does not mean that skills are equally suited to, or likely to be used for, any of these kinds of purposes as a matter of fact.[40] Though it may be conceptually possible to associate skills with any of these three categories, it may be

[37] *Ibid*.
[38] See *ibid* at 38.
[39] This may include fears, or other hinderances, that keep people from developing intellectually.
[40] I am not saying that Ayers himself makes this mistake, but that one could easily make this mistake when encountering Ayers' distinction between virtues and skills.

difficult to conceive of, or enact good, neutral, or bad things to do with *certain skills*. There may be limited opportunities to do good, neutral, or bad things with certain skills.

Consider examples of skills that are more suited to be used for intrinsically good purposes. Knowing how to close a wound by stitching is a skill in the medical profession. Philosophers will be able to provide many thought experiments in which knowing how to close a wound can be used for bad purposes. Thought experiments in which a doctor is presented with the choice of intentionally killing one patient so that the patient's organs can be used to save five other people[41] presume that at least someone involved with performing these operations knows how to close the incisions made to perform the transplants. However, it is also true, as a contingent matter, that such cases of using the skill of closing a wound for bad purposes are extraordinary in medicine. A less fanciful example to illustrate the suitedness of some skills towards the good, even while not eliminating the possibility of being used for evil, would be the skill of playing an instrument like the piano. Nefarious purposes for skills such as playing the piano can be conjured up; artists, for example, have supported immoral governments through their artistic endeavours. However, the skill to use an instrument like a piano to make music is much more suited for virtuous purposes related to aesthetic experience, neutral purposes, or even mildly irritating purposes (e.g., advertising jingles) than it is for nefarious purposes.

The lack of necessary connection between skills—or faculty-virtues—and the good does not rule out the possibility that certain skills/faculty-virtues can be associated (even closely so) with good or bad. Focusing specifically on cognitive faculty-virtues, while recognizing the potential for cognitive faculties to be abused, those faculties should not be taken as purely value neutral from the perspective of virtue epistemology. The possibility of virtuous or vicious usage

[41] See generally Judith Jarvis Thomson, "The Trolley Problem" (1985) 94:6 Yale LJ 1395, giving and comparing two famous thought experiments in ethics: the trolley problem and the transplant problem to which I have alluded.

does not imply equal aptness for each type of usage. Many cognitive skills are normally more fit for epistemically virtuous purposes, and are more often used for epistemically virtuous purposes, even though they can also be used for vice.

Ayers himself comes close to this point when he recognizes that "virtues require skills".[42] He notes that, "People who have virtues are inclined to do what is necessary to develop the relevant skills. Virtues necessarily imply commitments, and we can often tell what commitments a person has by noticing what skills she has invested her energies in developing. So there is a sense in which skills can be a better gauge of virtue than the choices a person makes in any one situation".[43] The fact that specific "skills"[44] are relevant, and even necessary, for the development of specific "virtues"[45] demonstrates that these "skills" have strong contingent connections with "virtues" and are better suited for some aims than others. This recognition of the suitability of skills for certain aims calls for a less sharp distinction between trait-virtues and faculty-virtues. My further discussion of the relationship between trait-virtues and faculty-virtues will provide examples of faculty-virtues that are better suited for epistemic virtue than vice, even while not excluding the possibility of being used for vice.

On the topic of a rapprochement between the two leading approaches to virtue epistemology, Turri, Alfano, and Greco note that some scholars have rejected the idea that one must choose between reliabilism and responsibilism since faculty-virtues and trait-virtues "all seem equally good candidates to promote excellence or flourishing".[46] Turri, Alfano, and Greco suggest, for example, that "[f]aculty-virtues seem indispensable in accounting for knowledge of

[42] Ayers, *supra* note 36 at 37 (was an all-caps title).
[43] *Ibid* at 40 [footnote omitted].
[44] Or "faculty-virtues" as used in this dissertation.
[45] Or "trait-virtues" as used in this dissertation.
[46] Turri, Alfano & Greco, *supra* note 4, s 3.

the past and the world around us" and that "[t]rait-virtues could be required to account for the full range of richer intellectual achievements, such as understanding and wisdom, which might presuppose knowledge but which arguably also exceed it".[47] Will Fleisher challenges the distinction between reliabilism and responsibilism, arguing that the two theories should be seen as complementary, with responsibilism building on what he sees as the more foundational project of reliabilism.[48]

Christopher Hookway argues for both reliability and responsibility as aspects of excellent intellectual functioning. Supporting reliabilism, he says that "we would not be reliable seekers after the truth or effective solvers of theoretical problems if we did not possess specific skills and capacities: good eyesight and hearing, a reliable memory, good knowledge of specific subject matters and so on".[49] Epistemic character traits, on the other hand, "enable us to use our skills and capacities effectively when inquiring and deliberating".[50] Hookway later goes on to explain that,

> Success in inquiry thus depends upon the wisdom embodied in our judgements and upon the cognitive habits and skills we have acquired through education, experience, and training. Success depends upon our epistemic 'character'. How observant I am will influence whether relevant evidence grabs my attention; and how intellectually honest I am will influence whether I generally come to doubt propositions once presented with sufficient counter-evidence to them.[51]

I join these scholars in rejecting the need to choose between reliabilism and responsibilism. The philosophy of lawyering itself is well positioned to show that making a good decision in

[47] *Ibid*.
[48] See Fleisher, *supra* note 26.
[49] Hookway, *supra* note 29 at 187. Ayers also cites the dependence that virtues have on skills, saying that "[s]kills make it possible for a person with virtuous motivation to be effective in action", Ayers, *supra* note 36 at 39, n 182 citing Linda Trinkaus Zagzebski, *Virtues of the Mind: An Inquiry into the Nature of Virtue and the Ethical Foundations of Knowledge* (New York: Cambridge University Press, 1996) at 113 (explaining the way in which skill allows people to put virtue into action).
[50] Hookway, *supra* note 29 at 188.
[51] *Ibid* at 200.

preferring faculty-virtues or trait-virtues is more a matter of adapting to the epistemological topic being considered and deciding which epistemic considerations the author wishes to emphasize.

There is a sense in which the reliabilist perspective is best positioned to connect with the technical sense of the "good lawyer". In understanding the technical sense of the good lawyer, I take my lead from an address given by John A. Sutro, a Past-President of the State Bar of California. Sutro discusses the concept of a "good lawyer". While he does engage with ideas that are broader than the technical sense of good lawyer, such as ethical duties to help the poor and duties to engage in the political process, much of his account of the "good lawyer" aligns with what it would mean to be a "good lawyer" under a reliabilist account of virtue epistemology. Speaking generally, Sutro says that, "'The Good Lawyer' has two major characteristics: he has developed a high level of professional competence, and he devotes a significant part of his life to the 'higher aspects' of his profession which are unrelated to the pursuit of financial gain".[52] Given the standards mentioned by Sutro throughout his address, I suggest that he is discussing the "higher aspects" of the lawyer's technical/functional role as much as he is discussing any moral obligations that the lawyer has. Thus, his account of the "good lawyer" is characterized by concerns about competence.

Sutro sets out specific ways in which the "good lawyer" will meet these two general standards. Discussing the lawyer's intellectual capacity to deal with a variety of situations, Sutro cites the famous Judge Learned Hand, who "once said [that the good lawyer] is a person with 'a bathtub mind'; he can fill his head with facts immediately necessary, then pull the plug, scour away all recollection of those facts, and refill for the next situation".[53] In terms of the lawyer's reasoning and problem solving skills, "'The Good Lawyer' can analyze a complicated set of facts

[52] John A Sutro, "The Good Lawyer" (1966) 7:1 Santa Clara Lawyer (now the Santa Clara L Rev) 1 at 1.
[53] *Ibid* at 2.

and state them for anyone to understand. He can find solutions to his clients' problems, and he can convince others of the soundness of his position, be they his clients, opposing counsel, courts or juries".[54] The good lawyer is thus a persuasive advocate for his/her client's cause. Sutro's "good lawyer" is also skilled at drafting documents because s/he, "draws contracts which cannot be construed to bind his client to more than was intended or to obligate the other party to less than was intended. Lawyers, even more than most writers, must make sure that their words mean and convey precisely what they intend, no more, no less".[55]

Sutro discusses a number of other elements of the good lawyer that relate to the lawyer's duties to the client, to the legal system, and to the lawyer's conduct in legal proceedings. These elements include: meeting deadlines that are important to the client, preparation for the eventualities of cases,[56] acting as a 'stabilizing influence' in disputes, conducting himself/herself in accordance with fairness in court by not misquoting or misleading, being kind in dealings with other individuals, especially those who do not have legal training,[57] upholding the rights of individuals (Sutro is especially referring to individuals who are accused of crimes) to have access to—and representation in—the adversarial system (a 'truth-seeking contest between equal rivals'),[58] etc. This account of the technical sense of the "good lawyer" is admittedly incomplete, but it provides a provisional understanding that centres on the ideas of competence and what Sutro calls "higher aspects" of the lawyerly profession.

Granted, some elements of Sutro's account include normative considerations that involve the development of traits for which one can be held responsible to develop. Being kind to other

[54] *Ibid* at 3.
[55] *Ibid*.
[56] See *ibid*.
[57] See *ibid* at 4.
[58] See *ibid* at 5.

participants in the legal process (especially those without legal training), and meetings deadlines, can be considered under the responsibilist heading. However, Sutro's account of the good lawyer leans heavily in favour of the development of competencies, which is more strongly associated with skills, faculties, and reliabilism. A lawyer who has the "bathtub mind" described by Learned Hand is demonstrating excellence with his/her faculties of memory. This lawyer is succeeding at being a "good lawyer" in the technical meaning of the term, which also emphasizes the lawyer's professional competence. With developments cognitive science, reliabilist accounts of virtues are likely to become ever more sophisticated. Reliabilism may even be better positioned to respond to scientific developments and to apply them to lawyering, as can be done in behavioural legal ethics.[59]

Reliabilism and responsibilism both have aspects in which they can enrich an epistemology of lawyering. Since this dissertation emphasizes normativity and the epistemic accountability of lawyers, I take the responsibilist perspective. Responsibilism underscores the lawyer's choice to be a certain kind of professional. In taking this perspective, I am not rejecting reliabilism, or the idea that competences can be considered virtues or saying that competences should be rejected from the purview of virtue epistemology. Indeed, I will mention reliabilist virtues in this dissertation. I am making a choice about which virtues to emphasize so that I can highlight the epistemic accountability of the legal profession. This focus on taking epistemic responsibility is what follows in this dissertation.

[59] I discussion behavioural legal ethics below in Section (6).

(3.3) Virtue Orientation

Ethicists sometimes make a distinction between self-regarding ethical virtues and other-regarding ethical virtues.[60] The virtue epistemologist Jason Kawall describes self-regarding virtues as, "[V]irtues which tend to directly benefit oneself".[61] These virtues "guide and assist us in achieving our own personal flourishing and well-being".[62] An example of such a virtue would be prudence. In contrast, other-regarding virtues are "[V]irtues which tend to directly benefit others".[63] According to Kawall, "[Other-regarding] virtues do not aim primarily at promoting the flourishing of the agent who abides by them, but rather tend to help others in the agent's moral community (and the community as a whole) to flourish".[64] One key example of an other-regarding virtue in ethics is generosity. In relation to this distinction between self-regarding virtues and other-regarding virtues, I refer to "virtue orientations". I suggest this as a general term to refer to the idea of virtues creating benefits that are aimed in particular directions, i.e., the orientation of virtues to the self or to others. A key aspect of virtue orientation is that both the orientations of regard for oneself and regard for others constitute desirable behaviour from the perspective of ethics and the study of knowledge when they are exercised at the appropriate time and in the appropriate measure.

In the context of the development of virtue epistemology, Jason Kawall has proposed that intellectual virtues can be similarly categorized into self-regarding and other regarding virtues.[65] The direction of benefit is the same with epistemic virtues as it is for moral virtues. Examples of intellectual virtues classified under this rubric include the self-regarding epistemic virtues of

[60] See *generally* Michael Slote, *From Morality to Virtue* (New York: Oxford University Press, 1992), ch 8; Gabriele Taylor & Sybil Wolfram, "The Self-Regarding and Other-Regarding Virtues" (1968) 18:72 The Philosophical Quarterly 238.
[61] Kawall, *supra* note 2 at 258.
[62] *Ibid*.
[63] *Ibid*.
[64] *Ibid*.
[65] See *ibid* at 258–261.

perceptiveness and intellectual courage and the other-regarding virtues of honesty and integrity. A key distinction between moral virtues and epistemic virtues of each orientation is that, while it appears that there is no single kind of benefit that is essentially pursued through moral virtues (unless we discuss overall general benefits such as rightness or goodness), knowledge is the central benefit that is achieved by the exercise of epistemic virtues. Thus, the exercise of ethical virtues may provide a number of benefits, whether they are material (e.g., the generous act of giving food to a hungry person), emotional, intellectual, etc., but the exercise of epistemic virtue will always be directed towards the promotion of knowledge, or related ideas of epistemic flourishing.[66]

Perhaps the greatest insight that can be gained by appreciating the distinction between self-regarding epistemic virtues and other-regarding epistemic virtues is that there is a need to engage in focused analysis of other-regarding virtues. This distinction itself brings to light the fact that there exists a whole class of underexplored virtues that can enrich our picture of intellectual virtue, as well as our approach to the social aspects of knowledge. Kawall argues that epistemologists have left the topic of other-regarding virtues underexplored. According to him, "epistemologists have focused on the study of epistemic self-regarding duties and virtues. They have concerned themselves with how individual epistemic agents can flourish *qua* individual epistemic agents…"[67]

In line with the projects of traditional epistemology, virtue epistemologists have been, "[A]ttempting to determine which intellectual virtues lead to knowledge, what constitutes sufficient justification or warrant to attribute the status of knowledge to an agent's beliefs or acceptances, and so on. Thus, they have focused on each agent's own personal set of beliefs and its formation".[68] These projects centre around the idea of acquiring as much knowledge as one can,

[66] See generally *ibid* at 261–266, where Kawall surveys views about what constitutes epistemic flourishing.
[67] *Ibid* at 259.
[68] *Ibid*.

sometimes characterized in terms of acquiring a large number of true beliefs and as few false beliefs as possible.[69] An approach to epistemology that refocuses our attention on other-regarding virtues and their connection to social epistemology is needed to appreciate insights beyond traditional analytic epistemology, in which, "Discussion of an agent's epistemic community would arise only insofar as the members of this community are potential sources of knowledge via testimony, or as the presence of an epistemic community has an impact on attributions of knowledge or justification to the agent".[70]

Kawall suggests that developing both self-regarding and other-regarding epistemic virtues may be important aspects of "epistemic flourishing" and that a person who does not develop both sorts of epistemic virtues may be "a deficient epistemic agent".[71] Illustrating this point, he argues that "A good epistemic agent wants to contribute to knowledge…More generally, we wish to share knowledge and our views with others in our communities. The traits which help us in providing knowledge to others could thus be seen as epistemic virtues".[72] This is especially the case in specific areas of human endeavour. For example, contribution to knowledge is the central goal (or one of the central goals) of the university, whether that is through the support of research or through teaching. Certain professions, such as the medical profession and the legal profession, take contribution to knowledge to be part of their core missions. Moving away from other-regarding institutional and professional roles, individual citizens in their daily life frequently seek to share their knowledge and views with members of their community. These desires and purposes are all part of a picture of virtue epistemology that falls under Kawall's proposals.

[69] See *ibid* at 261–262.
[70] *Ibid* at 259.
[71] *Ibid* at 260.
[72] *Ibid* at 263–264.

Such an argument shows that other-regarding epistemic virtues are fundamentally social and that their development is properly studied under both the headings of social epistemology and virtue epistemology. Other-regarding epistemic virtues may be the key capacities that epistemic agents need to develop in order to make positive contributions to the veritistic excellence of social institutions and social practices. While individual agents must indeed develop self-regarding epistemic virtues so that they can acquire the individual knowledge and capabilities needed to have something to contribute to the knowledge of a community, it is other-regarding epistemic virtues that will allow individuals to contribute to the epistemic reliability, power, fecundity, speed, and efficiency of social institutions and social practices.[73] Thus, the other-regarding virtue of honesty promotes the epistemic reliability and efficiency of a social institution or social practice. An awareness of the primacy of other-regarding virtues in social epistemology allows us to pursue the link between social epistemology and virtue epistemology in an effective way.

Certain other-regarding epistemic virtues and insights can be expected to receive a great deal of attention regardless of whether any scholarly refocusing in the direction of virtue epistemology and social epistemology had taken place. These virtues are relevant to traditional epistemic inquiry. For example, honesty has always been a factor in epistemic analysis, including in epistemic problems related to experts and witness testimony. Other virtues include creativity and integrity,[74] which can also readily be seen as relevant to classic epistemological questions. However, many other valuable pieces of the epistemic puzzle are not essentially related to classical problems in epistemology and thus would likely continue to go underdeveloped without developments in epistemology that focus on intellectual virtue and recognize virtue orientation.

[73] See Goldman's epistemic standards discussed above in Section (2.1) at note 15 and accompanying text, citing Alvin I Goldman, "Foundations of Social Epistemics" (1987) 73:1 Synthese 109 at 128.
[74] See Kawall, *supra* note 2 at 259–260.

Kawall mentions some of these virtues and insights. They include sincerity, "duties to develop the skills of a good teacher, and…duties to develop the skills of a good listener (and critic) insofar as these help other epistemic agents to articulate and examine their own beliefs carefully and lucidly".[75] These elements of epistemic agency are underexplored but Kawall argues that they may "be as essential to being a good epistemic agent as having reliable sensory faculties or good reading skills".[76] Indeed they are essential for the task of being a good epistemic agent because our individual and collective epistemic success is tied to the epistemic development of our community.

Of great benefit to my approach in this dissertation is the practical and personal quality of many of the underexplored other-regarding epistemic virtues. Rather than being abstract notions, such as epistemic warrant or epistemic power,[77] they are highly personal basic elements of the lawyer's intellectual and moral life within the social institutions and practices of law. Being a good listener, for example, is crucial to the role of the lawyer, as it is to the role of the judge, members of a jury, or to performing several other roles within the legal system. Good listening is essential to acquiring and synthesizing information[78] and for giving others the time and space to articulate their own views. Listening is a skill that must be actively done by a person; it is not a property that a person or thing simply has.

A crucial point about self-regarding and other-regarding virtues is that the categories should not be used too strictly, and that the main characterizing trait of a virtue will tend to determine the way in which the virtue is categorized under this scheme. In many cases, possibly even in most cases, it will be possible to discuss the other-regarding benefits that self-regarding

[75] *Ibid* at 260.
[76] *Ibid*.
[77] The definition of "epistemic power" in Goldman's epistemology is given above in Section (2.1) at note 16 and accompanying text, citing Goldman, *supra* note 73 at 128–129.
[78] An aspect in which it is self-regarding.

virtues provide and *vice versa*. In the case of ethical virtues, for example, while prudence is discussed as a self-regarding virtue, it is also easy to see how other people would benefit from a person's prudence. On a global level, consider the fact that the entire world would have benefitted from a more prudent financial sector when it comes to the practices that caused the financial crisis of the late 2000s. Although the financial sector's other-regarding failures were more egregious than its self-regarding failures, the self-regarding failures are also noteworthy. On a local level, entire communities benefit when households exercise prudence in managing their money and resources well. Similarly, in the case of intellectual virtues, while intellectual courage can be discussed as a self-regarding virtue,[79] it is easy to see the way in which others benefit from a person's exercise of intellectual courage. A person's exercise of intellectual courage may introduce novel ideas to a situation, thus challenging and enriching the epistemic position of a group.

Considering examples from the other direction, an individual may benefit from the exercise of other-regarding moral virtues such as generosity. Spending time volunteering in a soup kitchen may develop character traits, such as industriousness and dependability, that also make for personal success. Similarly, again, in the case of intellectual virtues, while honesty is discussed as an other-regarding virtue, it is not difficult to imagine ways in which the exercise of honesty benefits oneself, either by producing positive goods or by preventing certain types of negative results (e.g., negative consequences that arise for being dishonest). Honesty creates an atmosphere of trust in which individuals benefit from richer interactions, additional opportunities brought about by the demonstration of trustworthiness, etc. These interactions can include opportunities to develop one's knowledge and expertise. One can lose these types of opportunities and even be

[79] See generally Turri, Alfano & Greco, *supra* note 4, ss 3, 10.2.

sanctioned in certain circumstances because of the lack of honesty. Thus, there are substantial epistemic benefits that accrue to the self by the exercise of honesty.

None of these nuances in my introduction of the idea of virtue orientation mean that the categories of self-regarding and other-regarding virtues are unhelpful. Prudence and intellectual courage do indeed primarily benefit the self. Generosity and honesty are especially directed towards the benefit of others. Thus, the descriptors "self-regarding" and "other-regarding" illuminate the orientations of virtues, but the categories should be applied flexibly and with the understanding that complexity always lies beneath any account that can be given of epistemic virtues, including ones provided in this dissertation.

Having a flexible understanding of "self-regarding" and "other-regarding" also has benefits in allowing for more nuanced explanations of models of lawyering and difficult situations that lawyers face as a result of the role-differentiation of the legal profession. The terms are thus best taken as signals, not straitjackets.

(3.4) The Epistemic Virtues of Individuals & Communities

Aretaic approaches to epistemology can benefit from a consideration of their social aspects. Of "human cognitive interdependence", Lorraine Code says that "in most of the more complex and interesting things one might claim to know, even within one's own field of expertise, one is dependent upon the cognitive authority of other, better informed, and/or differently specialized knowers whose intellectual virtue clearly *matters*".[80] I will first suggest that the practice of epistemic virtue by individuals can improve the knowledge production of social institutions and practices. Second, and leading into a virtue epistemic understanding of the adversarial system explored in Section (4) of this dissertation, I will introduce some ways in which social settings can

[80] Code, *supra* note 34 at 60.

sometimes complicate conceptions of, and the practice of, epistemic virtues themselves, as well as the way in which the practice of epistemic virtues and vices agglomerate to the benefit or detriment of social practices and institutions.

If our normative epistemic assessment inquires into the capacity of social institutions and practices to produce true beliefs, then we may ask how epistemic virtues contribute to this aim. This is the application of Goldman's veritistic account of social epistemology to virtue epistemology. More specifically, the aim is to ask whether the practice of epistemic virtues/vices by individual cognizers improves/worsens a social institution's/practice's achievement for Goldman's veritistic standards: (1) reliability, (2) power, (3) fecundity, (4) speed, and (5) efficiency.[81] Without turning to a sustained treatment of this topic, we can observe strong indications that virtuous cognition on the part of individuals who are part of social institutions, and who engage in social practices, will tend to improve the capacity of social institutions/practices to generate true beliefs. Relatedly, vicious cognition will undermine the ability of social institutions/practices to generation true beliefs.

Cognizers who are virtuous on reliabilist grounds will have faculty-virtues, such as perceiving ideas and events accurately and the ability to recall relevant information, by which the cognizers are able to perform the more technical aspects of knowledge acquisition, production, and dissemination. Perceiving ideas accurately and having a good memory, for example is one way in which an individual can make a positive contribution to the epistemic reliability of a social institution or practice, i.e., to "the ratio of truths to total number of beliefs" a social institution or "a practice would foster".[82] To consider just one type of benefit, when individuals have better memories, that is likely to increase the number of true beliefs and reduce the number of false

[81] Above in Section (2.1) at notes 15–16 and accompanying text, citing Goldman, *supra* note 73 at 128–129.
[82] *Ibid*.

beliefs that are generated by social institutions and practices that involve witnesses giving testimony about past events. Granted, as discussed earlier,[83] reliabilist faculties will not always be used for intrinsically good purposes. Though skills may have a strong association with certain intrinsic goods, it is possible to deploy many skills for ethically and epistemically neutral or bad purposes. Even so, many responsibilist virtues, including accurate perception and good memory, will have strong associations with the epistemic good.

Cognizers who are virtuous on responsibilist grounds will have trait-virtues such as conscientiousness (by which they work diligently to promote the acquisition of knowledge) and open-mindedness (by which they consider ideas beyond those with which they have become comfortable). Considering the latter of the two virtues, since open-mindedness increases the consideration given to different ideas, the practice of open-mindedness by individuals can also increase the epistemic power of a social institution or practice, i.e., the "the ability of a practice to help cognizers find and believe true answers to the questions that interest them".[84] Conversely, the intellectual vice of closed-mindedness might undermine a social institution's epistemic power, speed (the relative amount of time that a practice takes to arrive at true beliefs),[85] and efficiency (the cost of acquiring true beliefs) by deterring consideration of new ideas.[86] Related to open-mindedness, intellectual courage may be an important virtue for anyone wishing to add to the epistemic fecundity, i.e., the degree to which true beliefs are widely produced,[87] of a social institution or practice. Intellectual courage can be the crucial step by which cognizers overcome barriers to the spread of knowledge.

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[83] Above at notes 36–45 and accompanying text.
[84] Goldman, *supra* note 73 at 128 (definition of "power" in Goldman's epistemology). Goldman's five veritistic standards are explained above in Section (2.1) at notes 15–16 and accompanying text, citing Goldman, *supra* note 73 at 128–129.
[85] See Goldman, *supra* note 73 at 129 (definition of "speed" in Goldman's epistemology).
[86] See *ibid* (definition of "efficiency" in Goldman's epistemology).
[87] See *ibid* at 128–129 (definition of "fecundity" in Goldman's epistemology).

Further insight can be gained about the contribution that epistemic virtues make to veritistic achievement by describing the practice self-regarding intellectual virtues and other-regarding intellectual virtues in relation to social institutions and practices. Through this line of thought, we can understand the extent to which epistemic benefits directed towards the self and directed towards others increase the ability of social institutions to arrive at true beliefs and to satisfy Goldman's veritistic criteria. Increasing the veritistic excellence of social institutions/practices may require the honing of certain epistemic virtues that are oriented towards the epistemic benefit of particular cognizers. As the practice of epistemic virtue is oriented towards epistemic others, especially towards key epistemic others for those social institutions and practices, the practice of other-regarding epistemic virtues is likely to provide an epistemic benefit to these institutions and practices.

Investigating the way in which the practice of epistemic virtues contributes to the veritistic excellence of social institutes and practices provides fertile ground on which to consider the ideas of social epistemology and virtue epistemology together. The achievement of veritistic excellence by social institutions/practice is made into an aim of virtue epistemology. To some extent, however, this uses the newer theory of virtue epistemology to return to the older ways of epistemology that is focused on meeting abstract conditions for the possession of knowledge. That is to say that it looks at the aretaic in terms of the fulfillment of abstract conditions for the possession and promotion of knowledge. I do not reject this aim. However, I have in mind the study of integrations between social and aretaic epistemology that are more in line with the conceptions of the latter. Such an endeavour would involve consideration of the way in which social settings can complicate conceptions of, and the practice of, epistemic virtues and vices, as well as the way in epistemic virtues work together in social practices and institutions.

Recognizing that communities (and I would also argue processes/activities) can have epistemic virtues is of great relevance in providing an epistemology of legal ethics. This insight is a natural result of studying social epistemology and virtue epistemology together. Moreover, it adds a level of complexity to the social understanding of virtue epistemology because, as the virtue epistemologist Christopher Hookway notes, there are epistemic virtues of communities, such as "facilitating debate and regulating the progress of investigations—which may not be reducible to the virtues of the individuals who belong to them".[88] The potential split between part and whole allows for each to have complex needs and for the two to exist in counterintuitive relationships. Hookway's statement brings forward an epistemic logic that is similar to the epistemic logic of the adversarial model of adjudication. Continuing in this vein of thought, he says that the irreducibility of the epistemic virtues of communities to the epistemic virtues of individuals "complicates what we can say about individual virtues".[89]

To illustrate these complications, Hookway gives the example of the epistemic virtues of a small community—namely, a research team. Without recognizing the ability of individual virtues and community virtues to diverge, one might think that individuals' practice of epistemic virtues always helps the team epistemically and individuals' practice of epistemic vices always harms the team epistemically. On the contrary, Hookway says that a research team "may benefit from having some members who are dogmatic, and unwilling to take on board new possibilities, while others are much more ready to take seriously seemingly wild speculations".[90] He has taken two extremes

[88] Hookway, *supra* note 29 at 189.
[89] *Ibid*.
[90] *Ibid.*

virtuous critical thinking and said that, "What would be vices in individual inquirers may be virtues when possessed by members of a team".[91]

On a team, where members who exemplify the vices of dogmatism and unwariness can check one another and where there may also be members who practice the virtue in between the vices, the collective result can be more than an aggregate of vices. The dogmatic team members might keep the team from pursuing fruitless but exciting avenues of research and may be a forceful critical voice checking deviations from their dogmatic view. Additionally, to the extent that the views of the dogmatic team members conflict with one another, the dogmatic members can check one another's interpretations and understandings. The team members who are prone to take wild speculations seriously may spur the team to consider new and exciting ideas, beyond what their existing approaches could conceive. The practice of vices can actually contribute to the virtue of the team. Previewing what I will say later about the adversarial system of adjudication, the social virtue of the team may be found in the clash of ideas between individuals who are presently practicing vices, or what might be understood as vices absent the social context.

Social dimensions thus allow for dynamics between virtues that are beyond what an individual can experience. What does the logic of the adversarial system of adjudication and of various models of lawyering within the adversarial system mean for the individual's practice of

[91] *Ibid*. See also Feng Shi et al, "The Wisdom of Polarized Crowds" (2019) 3:4 Nature Human Behaviour 329. They found that there can be benefits to having political polarization among contributors to collaborative work. Such polarization is often cast in a largely negative light that is expected reduce the potential for fruitful intellectual collaboration. However, the political polarization of collaborators practicing intellectual vices motivated by their political preferences can lead to an epistemically virtuous community collaboration. The authors studied collaboration on Wikipedia articles about contested topics. Politically polarized editors would more frequently call on other editors to abide by Wikipedia's neutral point of view policy, *ibid* at 8–9. The neutral point of view policy says that, "All encyclopedic content on the platform must be written from a **neutral point of view** (**NPOV**), which means representing fairly, proportionately, and, as far as possible, without editorial bias, all the significant views that have been published by reliable sources on a topic" [emphasis in original], "Wikipedia: Neutral point of view" (last modified 5 June 2021), online: *Wikipedia* <en.wikipedia.org/w/index.php?title=Wikipedia:Neutral_point_of_view&oldid=1027050549> [perma.cc/GEX7-GUPU].

the epistemic virtue of honesty and for the legal community's practice of the epistemic virtue of honesty? The complex relationship between individual and community virtues is explored below[92] as I discuss the epistemic roles and virtues of lawyering in the context of the adversarial model of adjudication. This relationship has wide-ranging relevance to all virtue epistemic analysis of law and legal ethics.

None of this is to say that communities should seek to widely promote the individual epistemic vice that works in specific social contexts. Considering the example of the research team, while the presence of some dogmatic members may benefit the community overall, there is a point of diminishing returns and a point at which the proliferation of the epistemic vice among individual members of the community will reduce the epistemic virtue of the community. Thus, while epistemic communities may benefit from the epistemic vices of individuals, it does not follow that epistemic communities should promote individual vices such as dogmatism. Nor does it follow, either, that epistemic communities should refrain from attempting to change the epistemically vicious behaviour of individuals, by encouraging individuals to either simply give up the epistemic vice or begin to practice the associated epistemic virtue. It would be epistemically vicious for a community to purposely keep an individual in the practice of epistemic vice, or to fail to present the individual with the encouragement and support to practice epistemic virtue, merely so that the community can benefit at the individual's expense.

The relationship between social epistemology and virtue epistemology plays a central role in applying virtue epistemology to the social context of lawyering. The remainder of this dissertation will primarily focus on the way in which social settings complicate conceptions of, and the practice of, epistemic virtues and vices, as well as interactions between epistemic virtues

[92] Below in Part III, especially Sections (4.2), (4.3), (4.5).

and vices. This project, out of the approaches discussed in the present section to the relationship between the aretaic and the social, allows for more focus on the epistemic life of the individual actor and notions of taking responsibility. Such endeavours can be done in the language of virtue epistemology, rather than merely applying virtue epistemology to achieve more traditional epistemic aims of meeting the conditions for having knowledge.

(3.5) An Objection – Is This Just Ethics?

Jason Kawall considers an important objection to his proposal about virtue orientation that can be broadened out to virtue epistemology generally and that also applies against my proposals in this dissertation. With respect to the key ideas in Kawall's work, the objection contends that "*all* other-regarding virtues or duties fall within the realm of ethics"[93] and do not also fall within any other realm. If this is the case, then all of Kawall's other-regarding virtues would be ethical virtues rather than epistemic virtues. More broadly, this objection, if successful, takes away the ideas used by virtue epistemology and allocates them to another field—morality. Moreover, it says that virtue epistemology does not add any insight to these ideas that morality is not already doing or cannot also do.

Similarly, one could argue that my proposal in this dissertation about the use of virtue epistemology in law is actually just dealing with ethical considerations about lawyering, and that I am not bringing forward any distinctively epistemic insights. This objection suggests itself quite readily in legal ethics because many virtues that I have discussed thus far, especially other-regarding virtues,[94] are found in the professional ethics codes of the legal profession. One could argue that classifying other-regarding virtues merely as ethical requirements of the legal profession (and not also classifying them under epistemology) sufficiently describes other-regarding virtues

[93] Kawall, *supra* note 2 at 272 [emphasis in original].
[94] Explained above in Section (3.3).

and duties. Hence, one might ask "is this just ethics?" Is virtue epistemology—or wide swaths of virtue epistemology—just ethics?

This objection against Kawall's virtue epistemology, and against the use of virtue epistemology in the philosophy of lawyering, is targeted against other-regarding virtues. It would be more difficult to run this objection in relation to self-regarding epistemic virtues, which often either lack (or have minimal) ethical aspects or simply have more distinct epistemic aspects that stand out in contrast to moral virtues that may also apply to the situation. Other-regarding virtues do not contrast with moral virtues as much. Granted, some self-regarding epistemic virtues may have ethical dimensions. For example, the epistemic virtue of conscientiousness may have implications for what some moral theorists might argue are our self-regarding moral duties to develop our own capacities rather than leading an indolent life. However, numerous self-regarding epistemic virtues, such as circumspection, creativity, foresight, and perceptiveness are more clearly epistemic. It would be difficult to make the case that these self-regarding epistemic virtues are also moral virtues at all, never mind being purely moral virtues. This may be because other-regarding virtues are, by definition, about our treatment of others (a key aspect of morality), whereas some self-regarding epistemic virtues do not raise the issue of treatment of others at all.

Often, self-regarding epistemic virtues are better described as skills/capacities, thus being more aligned with the reliabilist side of virtue epistemology. By contrast, other-regarding virtues, which are often better described as character traits, fall within the bounds of the responsibilist side of virtue epistemology.[95] It is not clear how ethics—a normative field—would purport to be a better classification than reliabilist virtue epistemology for the exercise of capacities that largely

[95] This is not to say that self-regarding virtues are always and only reliabilist concerns whereas other-regarding virtues are always and only responsibilist concerns. Rather, *more* self-regarding virtues can be described in purely reliabilist terms than other-regarding virtues can be.

aim at descriptive goals, such as the acquisition of factual knowledge. Thus, the objection that Kawall considers to his own views (and that I am also applying against my own ideas in this dissertation) strikes more directly against responsibilist virtue epistemology (which recognizes responsibility for developing traits)[96] than reliabilist virtue epistemology (which need not give the same recognition to notions of responsibility).

Kawall's reply to the criticism of his account of epistemic virtues is instructive for responsibilist virtue epistemology generally and for a responsibilist virtue epistemology of law. He demonstrates that the pertinence of ethics to a topic does not preclude there also being distinctly epistemic considerations about that same topic that cannot be explained by ethics alone. Moreover, if positive reasons can be offered for the presence of considerations that cannot be explained by ethics alone, then it must be recognized that a subject matter is more than "just ethics", i.e., is not solely within the domain of ethics. Ethics is thus part of the discussion around the topics being considered but cannot encompass the whole discussion. This is a positive case for the recognition of epistemic considerations about other-regarding virtues alongside ethical considerations about those virtues. It is also a case for identifying the distinctly epistemic and responsibilist aspects of any topic.

Kawall proposes an analogy between epistemology and another field—aesthetics—that also interacts with morality and that may face the "is this just ethics" objection. As with epistemology, the application of aesthetics to a topic can be contested such that there are questions about whether aesthetics applies, morality applies, or both apply. However, when this question arises, aesthetics can readily offer considerations that cannot be explained by morality alone. Kawall asks us to look at the example of a member of an orchestra.[97] He lists the other-regarding

[96] Above in Section (3.2) at note 33 and accompanying text, citing Fleisher, *supra* note 26 at 2975.
[97] See Kawall, *supra* note 2 at 272–273.

duties that a member of an orchestra has, including "to follow the conductor, to adjust her dynamics as appropriate to the other players and the music being performed, and so on".[98] Kawall recognizes that these other-regarding duties may be "both aesthetic and ethical: aesthetic insofar as they lead to a better performance, ethical insofar as they show a proper respect for others".[99] Importantly, Kawall argues that it is implausible that the other-regarding duties that apply to this example could be described as purely ethical duties. The other-regarding duties are vital to the achievement of certain aesthetic goods, such as "more complex harmonies [and] a broader palette of tones…"[100] Thus, a musician who abides by these other-regarding duties has opportunities to achieve a wider range of things aesthetically than a musician who does not abide by the other-regarding duties. These are aesthetic considerations that extend beyond the domain of morality, thus justifying the dual classification of an orchestra performance as ethical and aesthetic.[101] If we find Kawall's case convincing, then we can conclude that, even if all other-regarding duties do fall within the realm of ethics, it does not thereby follow that they do not also belong to other disciplines as well. Moreover, a positive case can be made that other-regarding duties also fall under other headings, in the same way that Kawall made an affirmative case for aesthetic other-regarding virtues.

A similar reply could be given in favour of a responsibilist epistemology of lawyering and would perhaps be even stronger than Kawall's musician analogy. That is to say, there is possibly a stronger positive case to be made that other-regarding virtues that pertain to the practice of law are both moral and epistemic virtues, rather than merely moral virtues. The reason for this is that other-regarding virtues play an even more central role in law than in aesthetics. Although a

[98] *Ibid* at 272.
[99] *Ibid*.
[100] *Ibid* at 273.
[101] Of course, there is also the observation that, if anything, an orchestra performance should be considered primarily as an aesthetic concern and only secondarily under the purview of ethics. This argument is likely true but goes beyond what is needed to reply to the "is this just ethics?" objection.

musician can achieve *additional* aesthetic excellence by respecting other-regarding aesthetic virtues, a musician could also achieve aesthetic excellence simply by performing as a solo artist. S/he may choose never to exercise other-regarding aesthetic/moral virtues or completely lack the opportunity to exercise these virtues and yet still achieve aesthetic excellence. To take it to an extreme, a hermit with a musical instrument (even if the instrument is his/her own voice) could make beautiful/stirring music on his/her own, without ever harmonizing with any other musicians or ever being heard by an audience. Even so, the fact that musicians *can* (and can choose to) achieve aesthetic goods by collaborating with one another is sufficient for Kawall's purposes, in showing that a musician's other-regarding virtues may also be aesthetic virtues, in addition to being moral virtues. To refute the claim that the other-regarding virtues that a musician practices are not merely moral virtues, Kawall only needs to address cases in which other-regarding virtues are applicable.

This argument works even more so in the case of law because the existence of a legal system and epistemic co-operation with other legal practitioners are required for someone to function as a lawyer (or to achieve any good produced by a legal system) *at all*. Contracts, advice, negotiations, pleadings, motions, the presentation of evidence, etc., are meant to be (and only make sense functionally) as interactions between individuals, whether other litigants, third parties, and officers of the court. A person who succeeds at the other-regarding virtues and duties of lawyering is not only a more ethical person but engages in *epistemically* better legal practice. S/he advances essential epistemic excellences, goals, and logic (e.g., adversarial logic) that belong to the field of law. These epistemic excellences contribute to the broader normative, moral, social and political

benefits that governance by law gives to human societies.[102] In contrast, a person who fails completely at the other-regarding epistemic virtues of a lawyer fails completely at the work of a lawyer and in the task of contributing to the possibilities that humans are given when they subject their conduct to guidance by a system of law. With this, we see that the form of Kawall's reply to the "is this just ethics?" objection is even stronger in the case of legal practitioners than it is in the case of musicians. Music and other aesthetic achievements can be practiced individually. Some of law's benefits (e.g., fact-finding) are epistemic. Lawyers have a vital role in achieving these epistemic benefits. Those epistemic benefits, or any other benefits of law, cannot be achieved individually. Other-regarding epistemic virtues in law thus do properly fall under the heading of epistemology and are ripe for analysis under rubrics such as Goldman's veritistic social epistemology and the virtue epistemology of authors such a Kawall and Baehr.

Beyond being able to answer the objection just presented, the foregoing arguments distinguishing virtue epistemology and ethics highlight some essential insights for the remainder of this dissertation. Classifying a certain behaviour as epistemically virtuous or as epistemically vicious does not automatically lead to a classification of that behaviour as ethically virtuous or ethically vicious. A person could be epistemically virtuous while not being ethically virtuous, e.g., being honest with someone who you know intends to do something unethical with the information. A person could also be epistemically malevolent in pursuing an ethically good result, e.g., lying to achieve an ethically good result. The inverse is also true. Ethical excellence is not necessarily epistemic excellence. Ideally, people will be both epistemically virtuous and ethically virtuous in

[102] This argument is related in structure to Fuller's argument about the internal morality of law, briefly discussed above in Section (2.3). This connection raises another opportunity for the epistemology of lawyering to engage with topics in legal philosophy, political philosophy, and with the insights of those fields as applied to the topic of lawyering.

most situations. However, the remainder of this dissertation, especially as it deals with difficult case studies, recognizes that epistemology and ethics can come apart from one another.

Part III – Knowledge & Lawyers

We have explored developments in the philosophy of lawyering (historically mostly in ethics) and developments in epistemology. Throughout, I have mentioned other authors' application of concepts in ethics and epistemology to lawyers. Ethics can be divided into meta-ethics, normative ethics, applied ethics; legal ethics falls under the latter. Relatedly, the preceding parts of this dissertation were meant to explain the normative theory of virtue epistemology.[1] I mentioned lawyers to illustrate ideas, but my primary focus was on articulating approaches to the study of knowledge. The remainder of this dissertation is focused on the applied epistemology of lawyering.

(4) A Virtue Epistemology of Lawyering

In Section (4), I articulate my approach to the philosophy of lawyering, based on virtue epistemology. As stated earlier, I do not eschew existing approaches to the philosophy of lawyering based in ethics or traditional approaches to epistemology. Thus, I will use insights and reasoning from fields such as philosophical legal ethics and especially social epistemology. Nonetheless, in line with the general direction of virtue theory previously explained, the remainder of this dissertation—whether discussing theories or a case study—aims to articulate a way of being as a lawyer, rather than a set of abstract norms for lawyers to follow. This project in applied epistemology can have many important aspects. My focus here is on the intellectual life of the lawyer in the adversarial system of adjudication. Some considerations may need to be modified or expanded for work that lawyers do outside of the central procedures of the adversarial system (e.g.,

[1] I am using "normative" here to refer to both branch of ethics (between metaethics and applied ethics) and to the normative approach of virtue epistemology, explained above in the Introduction at note 6 and in Section (3.1) at notes 4–8 and accompanying text.

in transactional or advising situations,[2] where the adversarial context is either not present at all or not fully present/not fully operational).

(4.1) Epistemic Volition – Enemies of the Epistemic Good?

A key aspect of assessing a person's disposition in relation to virtue (whether epistemic or ethical) is his/her volition. Does the person want to perform an action that is epistemically or ethically good? Questions about volition are central to understanding a person's virtue or vice. Ayers, who has endorsed a virtue ethics approach to legal ethics, describes virtues as "dispositions to act and react in the right ways, for the right reasons, and at the right times".[3] Ayers expands, "Virtues are dispositions to promote intrinsic values *well*; we can't say that someone has a virtue without making a value judgment about the things they do, feel, and believe".[4]

Volition can be described in terms of benevolence and malevolence—intending to do good for its own sake or bad for its own sake. Ethical ideas of benevolence and malevolence are familiar, but there are epistemic versions as well. The epistemic versions identify basic epistemic dispositions, including seeking to promote the acquisition of knowledge and seeking to undermine the acquisition of knowledge. Concern about volition in epistemology is heavily aligned with the responsibilist school of virtue epistemology.[5] The focus is placed on the epistemic decisions made by agents and the will of agents in relation to knowledge.

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[2] Where the client depends upon the lawyer for objectivity and in which there is no adversarial check. For a striking presentation of the distinction between the advising context and the advocacy context, see Kathleen Clark, "Ethical Issues Raised by the OLC Torture Memorandum" (2005) 1:2 J Nat'l Sec L & Pol'y 455 at 465–469; David Luban, *Legal Ethics and Human Dignity* (Cambridge: Cambridge University Press, 2007) at 197–204. When I refer to advocacy in this dissertation, I am mostly referring to adversarial advocacy in litigation. Crucially, in the advising context, the lawyer (a trained legal professional) presents the client (sometimes a layperson and other times a sophisticated client) with information that cannot be immediately checked by an opposing position. By contrast an adversarial advocacy context is one built around trained professionals checking and opposing one another. A level of even-handedness is appropriate when the lawyer discusses the law with the client in the advising context, whereas strong partisanship is appropriate for the advocacy context.

[3] Andrew B Ayers, "What if Legal Ethics Can't be Reduced to a Maxim?" (2013) 26 Geo J Legal Ethics 1 at 38.

[4] *Ibid* at 38 [emphasis in original].

[5] Responsibilism is discussed above in Section (3.2).

If epistemic benevolence is taken to be the task of promoting the epistemic good for its own sake, then this is not a volition that can be derived from the lawyering role and/or models of lawyering. There are rare examples in which the lawyer's own volitions will transcend the role-differentiation of the lawyer and even the lawyer's duties to the client. The most numerous examples will be found in cause lawyering. A lawyer who makes it his/her cause to seek equal educational opportunities for marginalized communities may indeed be motivated by a desire to provide epistemic benefits to the marginalized communities. A lawyer who litigates for the protection of the freedom of the press and freedom of information laws may be epistemically benevolent in a similar way. Outside of the litigation context, a lawyer who participates in public education about law and in community organizing may be said to, in some central way, be seeking the epistemic benefit of the community. Additionally, one could argue that a defamation lawyer may be motivated by epistemically benevolent aims. Desiring the epistemic good can go beyond promoting the acquisition of knowledge. Epistemic benevolence can include the desire to prevent belief in falsehoods and the practice of epistemic vices, of which defamatory statements are an excellent example.

However, the commitments above are largely personal to the lawyer. Most generously, the commitments may be highly correlated with the character of lawyers who practice in certain fields for certain clients and who become involved in certain types of projects and causes, discussed in the previous paragraph. The commitments do not arise out of the adversarial and differentiated lawyering role itself. Coming out of the lawyering role, lawyers pursue the epistemic benefit of others in service of the legal cause of their client within the adversarial system of adjudication. The epistemic good may be achieved as part of the adjudicative process but seeking the epistemic good *for the sake of the epistemic good* is not built into the role of the lawyer. On the contrary,

lawyers must frequently oppose the acquisition of knowledge by others, such as with privileged information, which is vital for trust in the lawyer-client relationship. Lawyers are called upon by codes of professional conduct and by theories of lawyering (including the one advocated in this dissertation) to be epistemically virtuous in particular situations, for the benefit of specific parties, and in service of the adversarial system of adjudication.

I have argued earlier[6] that one of the purposes and functions of the adversarial system of adjudication is to discover truths, such as factual truths. However, the facts that (1) the adjudicative system seeks the truth and (2) that the lawyer has a vital role within that system, do not lead to the conclusion that the lawyer himself/herself either has, or is encouraged to have, a will towards the epistemic good. Agents can have volitions that are different from the good that a system wants to achieve. Indeed, systems may count on the strategic harnessing of otherwise vicious wills and traits to create positive outcomes when put through the structures of the system. Some would argue that capitalism does this with greed.

In the case of lawyers, their reputation for twisting facts and twisting meaning has become so strong that it is worth asking, especially for the purpose of a dissertation on virtue in epistemology, whether lawyers are actually opposed to the epistemic good. Doing so will allow us to understand whether lawyers' volitions, especially as influenced by their differentiated role, needs to be counterbalanced or harnessed in special ways to better promote the truth-seeking function of the whole adjudicative system. The remainder of this subsection will be dedicated to exploring, whether lawyers are opposed, in the strongest sense, to the epistemic good.

"[M]alevolence is essentially paradigmatically a matter of *opposition to the good as such*", Jason Baehr explains.[7] Baehr describes this opposition as being "*robustly volitional, active, and*

[6] Above in Section (1.4).
[7] Jason Baehr, "Epistemic Malevolence" (2010) 41:1/2 Metaphilosophy 189 at 190 [emphasis in original].

'*personally deep*'".[8] By "robustly volitional", Baehr means that the opposition is willful and involves "hostility or contempt for the good".[9] "Active" means that the person makes "attempts to stop, diminish, undermine, destroy, speak out, or turn others against the good".[10] For the opposition to be "personally deep", it must be a core concern of the person, cannot be given up easily, and must be connected with the person's view of his/her self.[11] Notably, however, Baehr does not think that malevolence has such a wide scope that it requires the person to oppose the good in all possible ways. He says that a person can simply oppose some limited part of the good, such as generosity, and even be inconsistent by wanting other people to be generous towards him/her.[12]

Baehr defines "opposition to the good as such" in a way that leaves room for quite a wide range of attitudes towards the good. Inspired by the Satan figure in Milton's *Paradise Lost*, Baehr sees opposition to the good as making the good into one's enemy,[13] coining the term "enemize" to mean making an enemy of something or someone.[14] One way in which Baehr could have defined "opposition to the good as such" is in terms of non-instrumental opposition to the good. He considers this when looking at the definition of malice given by the philosopher Robert Merrihew Adams, which Baehr takes to be the same trait as malevolence and which Adams describes as non-instrumental opposition to the good.[15] While recognizing that there will be a great deal of overlap between making an enemy of something or someone and being non-instrumentally opposed to that thing or person, Baehr argues that non-instrumental opposition to the good does not cover all of the ways in which a person could be "opposed to the good as such". For example, a person might

[8] *Ibid* [emphasis in original].
[9] *Ibid* at 191.
[10] *Ibid*.
[11] *Ibid*.
[12] See *ibid* at 195.
[13] See *ibid* at 190.
[14] *Ibid* at 191–192.
[15] See *ibid* at 192.

instrumentally oppose a thing or person—making that thing or person an enemy—because that thing or person supports another thing or person that has also been enemized. Baehr thus wants to include reasoning of the form "the friend of my enemy is my enemy" within his definition of "opposition to the good as such".[16] Making the good into one's enemy on an instrumental basis would thereby count as "opposition to the good as such".

A crucial distinction that Baehr draws is between impersonal malevolence and personal malevolence. Impersonal malevolence is opposition to goodness itself as an abstract end, whereas personal malevolence is opposition to "a person's or a group of people's well-being or share in the good".[17] Impersonal epistemic malevolence involves deeper commitments against the epistemic good than can be considered in this dissertation. Baehr's examples of impersonal epistemic malevolence are of religious malevolent figures (e.g., Satan), whose cosmic missions are broader than can be achieved by lawyers, Al Pacino films notwithstanding.[18] More down to earth, a striking example that Baehr gives of personal epistemic malevolence is found in the story of Frederick Douglass, the former-slave, abolitionist, and statesman.[19] In his autobiography, Douglass describes his efforts to learn how to read and write, which had been denied to him as a slave. He describes the way in which the family to which he belonged (as a slave) would angrily take reading materials, like newspapers, away from him when they caught him reading. This family is not described as being opposed to the epistemic goodness of literacy itself, but they were opposed to Frederick Douglass', and all slaves', share in the goodness of literacy. As Baehr describes, the family was "enemiz[ing] Douglass's epistemic well-being".[20]

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[16] *Ibid*.
[17] *Ibid* at 193.
[18] See *The Devil's Advocate*. Directed by Taylor Hackford. Warner Bros. Pictures, 2007.
[19] See Baehr, *supra* note 7 at 206–207.
[20] *Ibid* at 207.

Connecting this example with the focus of this dissertation—legal systems—opposition to the epistemic wellbeing of slaves was not merely the practice of particular families. Numerous American states had anti-literacy laws that prohibited the education of slaves.[21] These laws directly attacked the epistemic wellbeing of slaves. Well after the end of slavery, segregation-era laws and policies limited the educational opportunities of Black people in America.[22] Moreover, epistemic barriers—such as literacy tests that only Black people were required to pass in order to vote—were erected to continue the oppression of Black people.[23] At the very least, these literacy tests (and other public policies like them), in which one person uses another person's epistemic oppression—and other oppression—as an instrument are *at least* examples of *moral* malevolence.[24] Using *epistemic* oppression *as a means* may also itself be an example of *epistemic* malevolence.[25]

The distinction between impersonal epistemic malevolence and personal epistemic malevolence very quickly brings up questions about whether lawyers engage in either form of malevolence, especially as a basic requirement of lawyering (including under specific models of lawyering). The question of impersonal epistemic malevolence is somewhat easier to answer. Lawyers are not called on to oppose epistemic goodness as an abstract end. No code of professional conduct, model of lawyering, or professional incentive calls on lawyers to oppose the abstract notion of epistemic goods.

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[21] See generally Christopher M Span, "Learning in Spite of Opposition: African Americans and their History of Educational Exclusion in Antebellum America" (2005) 131 Counterpoints 26.

[22] See generally A'Lelia Robinson Henry, "Perpetuating Inequality: Plessy v. Ferguson and the Dilemma of Black Access to Public and Higher Education" (1998) 27:1 JL & Educ 27 (explaining the rhetoric in favour of racial segregation in education, as well as the implementation and effects of racial segregation in education).

[23] See generally Natasha N Jones & Miriam F Williams, "Technologies of Disenfranchisement: Literacy Tests and Black Voters in the US from 1890 to 1965" (2018) 65:4 Technical Communication 371.

[24] As the aim of the proponents of these barriers was to deny Black people the right to the political and moral good of voting.

[25] It should also be noted that using another person's epistemic oppression to deny him/her the political and moral good of voting likely also has some element of wanting to prevent the oppressed person from changing policies in a way that would be to his/her own, and his/her community's, epistemic benefit (e.g., increasing access to education in oppressed communities).

Personal epistemic malevolence, which opposes "a person's or a group of people's well-being or share in the good",[26] is another matter. This possibility is especially noteworthy since Baehr allows for epistemic malevolence to come down to instrumental opposition to the epistemic good.[27] A lawyer might thus be instrumentally opposed to the epistemic good of certain participants in a legal proceeding because the good of those other participants supports the good (especially the epistemic good) of a thing or person that has been enemized. Under the adversarial system of adjudication, especially under the guidance of Lord Brougham's traditional model of lawyering, if the legal adversary can be considered to be enemized,[28] then it might be concluded that one engages in epistemic malevolence even by opposing the epistemic good of any person or group of people whose epistemic benefit would also be to the legal benefit of the adversary in the case. This would be instrumental personal malevolence.

Before proceeding, it is crucial to recognize that I am not asking whether individual lawyers are, or have been epistemically malevolent, including while practicing law. Lawyers, like all epistemic agents, can have epistemically vicious volitions. There are doubtlessly specific lawyers who were, and are, epistemically malevolent. Such lawyers are likely an exceedingly small percentage of all lawyers, as they would be an exceedingly small percentage of all people in any group. In any case, the focus in the present section of this dissertation is not aimed at exploring

[26] Baehr, *supra* note 7 at 193.
[27] Above, notes 14–16 and accompanying text.
[28] The clear exception to this is the role of the prosecutor in a criminal trial, since the role of the prosecutor is not the normal adversarial role, but instead involves duties to act "fairly and dispassionately", Federation of Law Societies of Canada, *Model Code of Professional Conduct*, FLSC 2019, online (pdf): FLSC <flsc.ca/wp-content/uploads/2019/11/Model-Code-October-2019.pdf> [perma.cc/U4WA-H2T7] [FLSC *Model Code*], r 5.1-3 commentary 1. This is in contrast to the defence counsel in a criminal trial, which is given perhaps the most clear partisan role in all of law, being given the duty to "protect the client as far as possible from being convicted, except by a tribunal of competent jurisdiction and upon legal evidence sufficient to support a conviction for the offence with which the client is charged", *ibid*, r 5.1-1, commentary 9.

actual cases of epistemic malevolence among lawyers. Instead, the aim is to consider the concepts and norms in the legal profession that could are relevant to epistemic malevolence.

At first blush, it may look as if codes of professional conduct require lawyers to be instrumentally personally malevolent. The most consequential example is that lawyers seem to oppose the epistemic good of the other side's lawyer because giving an epistemic benefit to the opposing lawyer supports the legal interests of the opposing litigant. Additionally, lawyers have complicated epistemic relationships with the trier of fact. On one hand, the lawyer supports the epistemic good of the trier of fact because the lawyer wants the trier of fact to obtain knowledge about facts that are legally beneficial to the client. Such beneficial facts might be presented through testimony, documents, etc. On the other hand, the lawyer opposes the epistemic good of the trier of fact when the trier of fact can gain an epistemic benefit that will benefit the adversary in the legal process. Zealous advocacy requires lawyers to assert legal rights that keep pieces of evidence (such as privileged documents or evidence that is obtained inappropriately by the legal adversary) from being seen by the trier of fact; an important goal is to keep the legal adversary from gaining an epistemic benefit or legal advantage that could be prevented from being acquired. This is the difference between the ways in which lawyers are expected to treat positive evidence and negative evidence.[29] Lawyers must seek to introduce all positive evidence, while opposing the introduction of negative evidence (where a legal basis exists for opposing the introduction of negative evidence). Sometimes, an effect way of opposing the epistemic good is to give some, but not all, information.

Even outside of a direct litigation context, lawyers obtain confidential information that, if revealed, could be to the benefit of numerous parties and stakeholders in the wider society (e.g.,

[29] Above in Section (2.2) at notes 29–30 and accompanying text.

information about a client company polluting beyond what is allowed by environmental regulations). Receiving such information would be to the epistemic benefit of parties outside of the company and could also turn into the legal benefit of these third parties if the third parties were to receive confidential information that supports a claim that they have against the lawyer's client. Despite (or perhaps rather because) revealing the information would be to the epistemic (and legal) benefit of third parties, the lawyer is bound by confidentiality to keep from revealing such information. The lawyer opposes the epistemic good that could be done to these third parties by acquiring the information. Thus, it appears that there are numerous ways in which basic lawyering duties oblige the lawyer to be personally epistemically malevolent in an instrumental way, opposing other people's share in the epistemic good (i.e., oppose their acquisition of knowledge) in order to pursue (or protect) the client's legal interests against (or from) the legal adversary.

The expected judgment that would arise out of classifying lawyerly behaviour as epistemic malevolence is that being epistemically malevolent is a negative thing about lawyers. However, lawyers may actually fit a very narrowly tailored epistemic status that allows for a positive reading of epistemic malevolence. In the background of his discussion of epistemic malevolence, Baehr allows for a volitional status that has a complicated relationship with the basic workings of virtue epistemology. He says that he wants to allow for the possibility that epistemic malevolence may not always be an epistemic vice.[30] Epistemic malevolence might be "driven by a sufficiently epistemically appropriate ultimate motivation, such that it is not really an intellectual vice".[31] Perhaps lawyers fit such a niche role. Their role in the legal system may call on lawyers to be epistemically malevolent—especially in relation to the legal adversary, but also possibly to the adjudicator, and third parties—because the legal system's ultimate motivation is the discovery of

[30] See Baehr, *supra* note 7 at 190, n 2.
[31] *Ibid*.

truth via the adversarial system of adjudication. Perhaps the adversarial system of adjudication works of the basis that epistemic malevolence is necessary on the part of adversaries. Lawyers may need to enemize the epistemic good of the adversary to serve their own client's legal interests.

While lawyers do have a complicated relationship with the epistemic good, it would be a mistake to say that, by design or because of any legal or professional norms of conduct, lawyers are required or encouraged to be personally epistemically malevolent, even in an instrumental way. Lawyers are not asked to be epistemically malevolent in a negative sense or in the niche positive sense that Baehr allows. Neither codes of professional conduct nor models of lawyering call on lawyers to enemize the epistemic good itself or the epistemic good of other people. Indeed, lawyers are required to make honest disclosures as part of discovery processes.[32] Adversaries collaborate too much to be epistemically malevolent even towards one another; they benefit one another too much in service of the adversarial system's goals to be epistemically malevolent. Describing legal work as requiring personal instrumental epistemic malevolence fails to appreciate the role, including the epistemic role, of the lawyer in the adversarial system of adjudication and the means by which this system purports to pursue truth. Returning to a key concept from social

[32] See American Bar Association, *ABA Model Rules of Professional Conduct*, ABA, 2019, online: ABA <www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents/> [perma.cc/5WED-59ZP] [ABA *Model Rules*], r 3.4, "A lawyer shall not: (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act…(d) in pretrial procedure…fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party"; *ibid*, r 3.4, commentary 2, "Documents and other items of evidence are often essential to establish a claim or defense. Subject to evidentiary privileges, the right of an opposing party, including the government, to obtain evidence through discovery or subpoena is an important procedural right. The exercise of that right can be frustrated if relevant material is altered, concealed or destroyed"; FLSC *Model Code*, *supra* note 28, r 5.1-2, "When acting as an advocate, a lawyer must not:…(e) knowingly attempt to deceive a tribunal or influence the course of justice by offering false evidence, misstating facts or law, presenting or relying upon a false or deceptive affidavit, suppressing what ought to be disclosed or otherwise assisting in any fraud, crime or illegal conduct". One could also cite the more general duty of candour that lawyers have to the tribunal, which applies to the lawyer's work in an "ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition", ABA *Model Rules*, r 3.3, commentary 2. See also FLSC *Model Code*, *supra* note 28, r 5.1-1 (the lawyer's duties as an advocate, including the duty of candour owed to the tribunal).

epistemology, the volitional status of the lawyer cannot be assessed apart from the lawyer's role in the epistemic division of labour found within legal systems.[33] The adversarial system of adjudication requires lawyers to be partisan, not opposed to the good. The adversarial system exists with the assumption that the legal adversary will also have a lawyer articulating its position in a partisan way.

Codes of professional conduct recognize this as well. For its part, the ABA explains, "The [ABA] Rules presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers and substantive and procedural law in general".[34] The special context gives meaning to rules that require lawyers to behave in ways that would not be in line with normal expectations about promoting the epistemic good. In the case of the examples considered above, we are looking at lawyer-client confidentiality and must be aware of the special context and special role that supports this obligation. In lawyering, the partisan needs of the lawyering role depend on the ability of the client to trust the lawyer enough to freely share information about the case with the lawyer. The legal system does not exist to oppose the epistemic good of anybody; it does, however, require participants to play counterintuitive roles, including keeping confidential information that could benefit other people.[35] Playing such a role is not the same as enemizing the epistemic good of the opposing party or of third parties.

The argument that lawyers are called to be malevolent fails in another more substantial way, even excluding the fact that lawyers practice in a special context. At a basic level, keeping confidences, even outside of a professional context, is not opposition to the epistemic good. The

[33] Some social epistemic analysis of the adversarial system of adjudication is provided above in Section (2.2).
[34] ABA *Model Rules*, *supra* note 32, Preamble and Scope, commentary 15.
[35] See a detailed explanation of the lawyer's special role in the adversarial system of adjudication below in Section (4.2).

epistemic good does not require the end of privacy, or that all things be known by all people. This is all the more so in many professional contexts, where a range of epistemic goods, and other goods, depend on the keeping of confidence by a professional. Typically, confidentiality encourages the free sharing of information between the client and the (non-legal) professional so that the professional may assist the client in the pursuit of a goal. Sometimes there are entire bundles of goods that are pursued under the protection of different kinds of confidentiality or promises of discretion. The professional's confidentiality thus facilitates the client's performance of an other-regarding epistemic good—freely sharing information with the professional—which serves another good that may or may not have further epistemic elements, such as medical treatment or other advice.

In the legal context, the lawyer's own ability to acquire information from the client and to present that information for the epistemic benefit of adjudicators and other observers depends on the ability of the client to trust that the lawyer will keep the client's confidences. A lawyer who protects client confidences is not, merely in virtue of not sharing knowledge as widely as possible, personally epistemically malevolent, showing contempt for another person's, or group of people's, participation in the epistemic good. Lawyering is complex, dissonant, even discomforting, but it is not (epistemically) malevolent.

(4.2) Epistemic Role-Differentiation in the Adversarial System

Popular criticisms of lawyers often portray lawyers as stretching the truth and lying. Even from a scholarly perspective, criticizing dishonesty among lawyers, John Humbach says, "The lawyer's skill is to weave stories that are false out of statements that are true".[36] This dissertation just considered the question of whether lawyers are, and are called to be, epistemically malevolent.

[36] John A Humbach, "The National Association of Honest Lawyers: An Essay on Honesty, 'Lawyer Honesty' and Public Trust in the Legal System" (1999) 20:1 Pace L Rev 93 at 94. Humbach goes on to criticize traditional lawyering on this basis.

At the opposite end, lawyers and the legal profession hold themselves out to be defenders of truth and even openness about the truth, especially about their own client's account of the facts or even economic and social phenomena, when their client is an institution. Both images contain insights about lawyers,[37] but a full picture of the lawyer's epistemic role requires consideration of the lawyer's role within the broader system of which s/he is a part. Lawyers do have a vital role in improving the wider community's, and the legal community's, epistemic position. Even as the lawyer provides epistemic benefits to the community, the benefits accrue to the community in a way that needs explanation beyond the idea that lawyers practice epistemic virtues.

Adversarial legal systems require participants to perform specific roles in order for the legal systems to perform their broader functions of determining the facts of the case and applying the law to the facts.[38] At the most basic level, the way in which the adversarial system of adjudication is supposed to work is that the competing parties present evidence and arguments that support their own position in the dispute that is being litigated.[39] The judge, and possibly a jury, behave as disinterested parties, receiving the competing evidence and arguments and deciding the case on the merits (making legal and factual findings that are assigned to their roles).[40] The process,

[37] Sometimes with rhetorical aims in mind, in Humbach's case, and other times for the sake of exploring a wide range of possibilities, in my case considering epistemic malevolence above in this dissertation.

[38] I am simplifying the process, focusing on what the adversarial purports to do, rather than describing all of its nuances or political, sociological, and other insights about what the adversarial system of adjudication does in practice.

[39] See American Bar Association, *ABA Model Code of Professional Responsibility and Code of Judicial Conduct*, as amended 1980, Chicago: ABA, 1981, EC (Ethical Considerations) 7-19 (explaining the partisan role of the lawyer in presenting a case before neutral arbiter). This code is no longer in force, but the reasoning that it expresses about the adversarial system remains. In this section on the "Duty of the Lawyer to the Adversary System of Justice", the code says, says of the lawyer's partisan role in the adversarial system, "The duty of a lawyer to his client and his duty to the legal system are the same; to represent his client zealously within the bounds of the law".

[40] Judges, of course, take a more active role than juries because judges must manage the legal process itself, deciding questions such as the admissibility of evidence. My thanks to Kate Tucsa for raising the way in which jurors come to the cognitive activities that are part of trials. Jurors' epistemic role in trials are among the least normatively differentiated from the moral and epistemic standards that apply to life outside of the adversarial litigation process. That is to say that the things that are virtuous for jurors to do inside of trials are also largely things that are virtuous to do outside of trials (e.g., attentiveness, fair-mindedness, critical thinking, and reasoning). However, jurors experience among the highest degree of differentiation (other than perhaps a non-expert witness giving testimony) between the degree of difficulty involved in virtuously performing their role in a trial and being ethical and epistemically virtuous in their everyday lives. Epistemic actors such as lawyers, judges, and expert witnesses have relevant training and

in totality, purports to obtain knowledge about the facts of a case by relying on a contest in which partisans act for their side, and only for their side. The disputants have the strongest impetus to put forward their viewpoint and often the best ability to do so because of their access to evidence.

The adversarial system calls upon lawyers, as representatives of parties in a legal dispute, to play a specific role that assists the community in acquiring knowledge about law and facts pertinent to law (usually the facts of cases). Lawyers do things such as advising clients about their options (legal and practical), investigating the facts of cases and the law that applies to a case, presenting evidence and arguments at trial (about both facts and law), bringing cases to the appellate level (at which the courts can develop the law) and (less commonly) assisting in the mobilization of social movements, among other activities. Lawyers even contribute to knowledge about law in ways that are less obvious, such as disclosing legal sources (including both those that are advantageous and those that are disadvantageous to their client's case) to the opposing side in a legal dispute. Additionally, in situations such as document discovery, lawyers contribute to other participants' factual knowledge about a case by disclosing, to the opposing party, factual evidence that is pertinent to a case. Thus, lawyers advance their own clients' case and cooperate in processes that facilitate the opposing party's ability to advance its own case. These two aspects involve the presentation and disclosure of positive evidence and negative evidence.[41] These actions require the practice of epistemic virtues of the reliabilist and responsibilist variety. They require epistemic skills such as reading comprehension and clear speaking, as well as epistemic traits such a perseverance and honesty.

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experience for the task that they are performing and for the degree of difficulty involved. Jurors, by contrast, may have no such epistemic readiness. Jurors' work is not differentiated as much by the norms involved in that work as it is by the dramatic difference in the technical aspect of the epistemic task itself. Such differentiation in epistemic degree of difficulty deserves its own attention in a virtue epistemology of legal processes.

[41] Discussed above in Section (2.2) at notes 29–30 and accompanying text.

However, in applying ethics to lawyering, it is recognized that lawyers do things that are, or could be, unethical if done by non-lawyers, including non-lawyer professionals. The same is true in epistemology. Lawyers do things that work against, or could work against, the epistemic good of both the lawyer himself/herself and the epistemic benefit of the broader community. Ethically and epistemically, lawyers take actions that would be blameworthy or bad outside of the legal context but which are said to be justified by the role of lawyers in the adjudicative system in which lawyers work. Put in terms that are the focus of this dissertation, lawyers do things that are difficult to reconcile with ethical and epistemic virtue outside of the legal context.

This is not to say that all lawyerly behaviour can be described in this negative way. Much of what lawyers do (e.g., presenting positive evidence or challenging the relevance of negative evidence) is virtuous—ethically and epistemically—needing no further justification. However, some crucial lawyerly behaviour (required by the adversarial system, by models of lawyering, and by rules of professional conduct) would be unethical, and would be against the epistemic good, if done outside of the legal context (especially if our concern is about acquiring knowledge about a discrete case under immediate consideration). In service of their partisan position, lawyers will do things such as keeping confidential information about clients (whether that information has to do with legal or illegal actions by the client, even helping clients avoid justified criminal and civil sanctions), impeaching the credibility of, or aggressively cross-examining, witnesses who are telling the truth,[42] challenging the admissibility of evidence that reveals facts about the case, and using limitation periods to have a legal dispute dismissed.[43] Note also that, as has been discussed

[42] Of course, the question of whether a witness is being truthful is a question for the trier of fact to determine. That this is recognized should be clear from the discussion of partisanship below.

[43] Especially in a single case, revealing confidential information would often increase knowledge. Impeaching the credibility of a witness who is telling the truth may cause the trier of fact to disbelieve the witness, may discourage the witness from giving testimony, and could discourage other witnesses from coming forward in the future. Having evidence ruled inadmissible, especially in a discrete case, reduces access to knowledge about the case, even as it

above in Section (2.2), lawyers' incentives and patterns of behaviour in adversarial systems of adjudication can be misaligned with the goal of promoting the acquisition of knowledge.[44]

The way in which lawyers relate to epistemic virtues and advance the epistemic interests of society is thus not easily analogized to other disciplines that have received attention in epistemology, such as science. Compare the standard professional actors in science and law: scientists and lawyers. To state things simply, scientists make epistemic contributions to the wider society and to the scientific community by much more straightforwardly practicing epistemic virtues, including both self-regarding epistemic virtues and other-regarding epistemic virtues.[45] Scientists must practice epistemic virtues such as objectivity, thoroughness, perseverance, adaptability, courage, honesty, and intellectual humility, among others.[46]

These virtues can be challenging to practice, especially in relation to the technical fields to which scientists apply epistemic virtues. Scientific research has specific needs for the way in which these virtues must be practiced. For example, conducting scientific research might require a more specific conception of objectivity and thoroughness than other fields have. However, the difference between the way in which epistemic virtues are practiced in the sciences and the way in which they are practiced by non-scientists outside of the sciences is much smaller than the difference between the practice of epistemic virtues within the legal profession and the practice of epistemic

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protects other rights and interests. Having a case dismissed due to a limitation period prevents the legal system itself from discovering knowledge because the legal system will simply not attempt to discover the knowledge.

[44] Indeed, Goldman has argued that the adversarial system of adjudication may fare worse than the inquisitorial system of adjudication. Thus, in addition to calling on the lawyer to do things that would not be ethically and epistemically justifiable outside of the legal context, adjudicative systems may not always be well structured to achieve goals that are ethically and epistemically justifiable. Exploring that critique of the adversarial system of adjudication is beyond my purposes in this dissertation.

[45] This statement is too simplistic on its own because there is a complex history of applying epistemic virtues. Epistemic virtues are understood and shaped by the scientist's milieu, being therein imbued with cultural, political, and religious significance. An extended treatment of this topic is given in Jeroen van Dongen & Herman Paul, eds, *Epistemic Virtues in the Sciences and the Humanities* (Cham, Switzerland: Springer, 2017). Even so, as will be clear from the remainder of this section, the way in which the scientist makes epistemic contributions to society is profoundly different from the contributions that the lawyer makes.

[46] Those are just the responsibilist epistemic virtues.

virtues by non-lawyers outside of the legal context. Simply, the work of scientists, even when they take critical/skeptical roles, does not appear to be opposed to the acquisition of knowledge (including the community's acquisition of knowledge). Science, like human activities generally, benefits from the practice of what can be described unmistakeably as epistemic virtues. It is rarely difficult to explain how elements of scientific research (especially essential elements) can be consistent with the practice of epistemic virtues.

The most direct analogue in law to the scientist is not the lawyer but the legal scholar. Like the scientist, the legal scholar, whether through publishing scholarly works or teaching in a law school, is expected to contribute to the legal community's knowledge of law and the legal system. The application of epistemic virtues (such as honesty, intellectual courage, and intellectual humility) to scientists can be translated to the role of the legal scholar. That is to say, the epistemic excellence of each role in their respective fields of knowledge is unambiguously improved by the practice of these epistemic virtues. Moreover, no essential element of the work of the legal scholar is difficult to reconcile with the epistemic virtues mentioned in this section. Gaining knowledge and giving access to knowledge (i.e., practicing self-regarding epistemic virtues and other-regarding epistemic virtues) about a topic is a clear-cut epistemic and practical good for both the scientist and the legal scholar.[47]

On the contrary, the lawyer's role does not centre around a knowledge promoting function in such a straightforward way. It can be difficult to see how some essential lawyerly behaviours, including core duties of the legal profession, are consistent with epistemic virtues. How, for

[47] The significant complicating factor for the legal scholar is the way in which politics (often or always) enters into his/her work. See generally Duncan Kennedy, "Legal Education as Training for Hierarchy" in David Kairys, ed, *The Politics of Law: A Progressive Critique*, 3rd ed (New York, NY: Basic Books, 1998) 54 (explaining the politics of legal education). Even so, the legal scholar's work does not turn epistemic virtues on their head in the way that lawyers' work in the adversarial system does. Being a legal scholar does not essentially involve blocking the epistemic benefit of other people.

example, is keeping confidences about illegal behaviour or aggressively cross-examining a truthful witness consistent with honesty that promotes the acquisition of knowledge? How can having a case dismissed for not being commenced before a limitation period be consistent with the practice of any epistemic virtue?

There is a limited, but still enlightening, extent to which the lawyer, meeting all expectations of him/her, is epistemically like a problematic example of a scientist: the scientist who has allowed financial interests to (usually subtly) influence his/her work rather than objectively apply the scientific method and report on whatever results s/he obtains. Evidence and interpretations are given in accordance with the finding that the scientist/lawyer wants to report and wants others to believe. The key difference is that when such behaviour is discovered from a scientist, it is rightly criticized from epistemic and moral perspectives for the violation of both scientific standards and the trust of the community. Conversely, the legal system and the ethics of lawyering purposefully use this kind of practice (which would be blameworthy outside of law) to achieve a number of goals, including epistemic ones.[48]

The reason that we cannot simply ask whether a lawyer has met the standards of the various epistemic virtues and why some behaviours that would be considered bad when done by scientists count as good or acceptable when done by lawyers might be explained by the fact that lawyers participate in an epistemic system in which the straightforward exercise of epistemic virtues is not always what the system needs of the lawyer in order to perform its own epistemic ends.[49] We might

[48] It must be recognized that the scientist who takes money to reach a predetermined result is doing something much worse than the lawyer who takes money to advocate for a position. Even if the scientific community recognizes that this happens and has mechanisms to check any such behaviour, this is not the same as working in a system that is designed to work with paid partisanship as a matter of regular operations. Having a filter that is meant to prevent the negative effects of a behaviour does not leave a system as prepared for the behaviour as working on purpose with the behaviour.

[49] There is some extent to which scientists do this also. For example, scientists running a study might not immediately tell the study's participants the purpose of the experiment. This is so that they can receive genuine responses. However,

describe this reality as a "role-differentiated epistemology" that arises out of the adversarial system of adjudication. As Hutchinson says, "When acting in a professional capacity, persons can (and occasionally must) make decisions and act in a way that might be different to what they would do in a personal and nonprofessional context".[50] Going deep into the lawyer's life, the lawyer can (or must) sometimes act in ways that violate his/her own moral views.[51] Crucially, though such actions would not be permissible outside of the legal system,[52] they are permissible within the legal system because of the expectations that the system places on its participants to act in support of the system's mechanisms.

In the same way that role-differentiated morality allows and/or encourages lawyers to engage in behaviour that would be declared morally flawed in other areas of life, role-differentiated epistemology allows and/or encourages lawyers to engage in behaviours that would be epistemically problematic in other areas of life—i.e., behaviours that would undermine the promotion of knowledge—in order to promote overarching systemic benefits. Some of these benefits may even be moral or epistemic. Allowing lawyers to deviate from the moral and epistemic requirements that non-lawyers should normally follow can produce benefits, even moral and epistemic benefits. Role-differentiation should not be understood as a trumping of regular moral and epistemic requirements, but as a carve-out for a special role. It is a recognition that cooperative action and systems have requirements and produce benefits that ask different things of individual participants than that they behave righteously as individuals.

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such practices rise nowhere near the allowances that are made for lawyers in their role in the epistemic structures of law.

[50] Allan C Hutchinson, *Fighting Fair: Legal Ethics for an Adversarial Age* (New York: Cambridge University Press, 2015) at 13. Putting it in terms of moral norms, we can say that lawyers can (and must) perform actions in their lawyering role that violate moral norms that govern outside of the adversarial system and the role that lawyers have in that system.

[51] See *ibid* at 13.

[52] The opposite of such actions would actually sometimes be mandated outside of the legal system.

If the virtue epistemology of lawyering is role-differentiated, we cannot simply ask whether the lawyer has exercised any particular virtue when looking at the lawyer from a normative epistemic perspective. Instead, a specialized virtue epistemic analysis must be undertaken. This specialized analysis must take account of the epistemic system within which the lawyer works. Our account of epistemic virtues such as honesty must be suited to the task of being applied to legal contexts such as negotiations, as well as the advising contexts and the advocacy contexts, in which lawyers practice.[53] The benefits of undertaking this analysis are that we will be able to both have an epistemic account of lawyering that is responsive to specific demands that legal systems make of their main professional actors, and we will also gain insights into these systems themselves and competing conceptions thereof.

Role-differentiation does not mean that all norms that are not role-differentiated are lifted, relaxed, or otherwise modified. In the case of morality, even as lawyers can abide by a differentiated morality while on the job, that differentiation does not simply remove all moral requirements. As Hutchinson argues, "Professionals do not have carte blanche to do whatever suits them; they must tailor their ethical commitments to the precise contours of their professional situations".[54] The reasons that justify the lawyer's deviation from his/her regular moral obligations only extend to deviations from morality that serve the purposes that the lawyer's work is intended to fulfill in the legal system. Hutchinson goes on to say that the justification for role-differentiation determines both (1) when the lawyer's role calls for differentiated standards of behaviour and (2) what those differentiated standards of behaviour are.[55]

[53] Advising and advocacy contexts are discussed above in Section (4) at note 2.
[54] Hutchinson, *supra* note 50 at 14.
[55] See *ibid*.

Hutchinson argues that the public interest is purported to justify the lawyer's role-differentiation, meaning that lawyers are only permitted (or required) to deviate from general morality when such a deviation serves the public interest.[56] He further explains that the "public interest" is contested.[57] It thus follows that the instances in which role-differentiation applies, and the behaviour permitted by role-differentiation, can be contested. In legal ethics, one norm that emerges in common between different visions of the public good is the "commitment to the Rule of Law".[58] From the perspective of governing the legal system, the public will generally also have an interest in the functioning of whatever adjudicative system is used by the legal system that governs their society. In common law legal systems, having an interest in the functioning of a system of adjudication means that the public has an interest in the functioning of their existing adversarial system of adjudication.

The structure of the argument about the public interest as the justification for the lawyer's moral role-differentiation carries over into epistemology. Similar to the way in which the benefit given to the public by the adversarial system of adjudication justifies and shapes the lawyer's role-differentiated morality, the epistemic benefits given to the public by the adversarial system of adjudication justify and structure the epistemic role of the lawyer. Epistemic role-differentiation is defined specifically by the public's epistemic interest. Virtue epistemic norms that apply outside of the legal context would not apply when the lawyer's deviation from non-differentiated behaviour serves public interests that can justify the deviation.

Defining the public epistemic interest that would justify an epistemic role-differentiation for lawyers is a task that falls squarely within the purview of the social epistemology of lawyering.

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[56] See *ibid*.
[57] *Ibid* at 16.
[58] *Ibid*.

As with a discussion of the public interest in moral evaluation, the public's epistemic interest is contested and can be specified in a wide variety of ways. Earlier, I discussed some different preoccupations that social epistemology can have, i.e., different epistemic aims and standards of achievement for social relationships. I cited Goldman's work discussing relativism, consensualism, expertism, and veritism, the last of which Goldman endorses.[59] These preoccupations can raise entirely different considerations about justifying the lawyer's epistemic role-differentiation. Giving a definitive account of the justification of epistemic role-differentiation is beyond the scope of this dissertation. However, I will work on the basis that ensuring that the legal system has an ability to discover truths (especially factual truths) is common between different accounts of the public epistemic good.

Veritism, which assess the ability of social institutions and practices to produce true beliefs coincides well with the purported aims of the adversarial system of adjudication. In line with Alvin Goldman's veritism, my social epistemic preoccupation (which I bring to defining the epistemic interest that justifies the lawyer's epistemic role-differentiation) is the ability of social institutions or practices to produce true beliefs. The public's interest in the legal system is well connected with this preoccupation towards the production of true beliefs because, as noted previously in this dissertation, the adversarial system is purported to have some capacity to arrive at true beliefs about the facts of a case.[60] Crucially, Goldman limits the impetus to find true beliefs to questions that interest cognizers. Knowledge about all sorts of trivialities can be acquired that do not aid the specific intellectual efforts of cognizers. Such knowledge would be a burden or an obstacle, rather than being valuable. The lawyer's impetus to acquire more truths is limited to the truths that the

[59] Above in Section (2.1).
[60] Above in Section (1.4).

lawyer can helpfully integrate into arguments for the client before the adjudicator or into activities surrounding legal disputes such as ongoing efforts to settle the dispute with the opposing party.

(4.3) Epistemic Others in the Adversarial System

Epistemic virtue orientation, a concept that draws on both social epistemology and virtue epistemology,[61] is susceptible to being influenced by the epistemic divisions of labour of epistemic agents in adversarial litigation.[62] As could be expected from the recognition of epistemic role-differentiation for lawyers, the exigencies of adversarial litigation upend our expectations about virtue orientation—expectations that have been formed on the basis of social dynamics outside of litigation and legal work.[63] Under the unique circumstances of adversarial litigation, virtue orientations—especially other-regarding virtues—have highly structured meanings suited to legal processes.

One of the most crucial aspects of understanding role-differentiation in any social system, including adversarial litigation, is to account for the presence of multiple kinds of participants within the system. Accounting for the presence and role of participants allows for a fuller explanation of context and an explanation of the benefits that are expected to be achieved by participants' actions in that context. That is to say, knowing about participants in the system allows for a fuller explanation of roles within that system, of role-differentiation, and of the justification for that role-differentiation. Many epistemic agents in a legal system must develop and practice epistemic virtues in the legal process to be of epistemic benefit to others and to the adjudicative system as a whole. In addition to lawyers, these epistemic agents include judges, juries, witnesses,

[61] See generally Jason Kawall, "Other-Regarding Epistemic Virtues" (2002) 15:3 Ratio 257 at 261–266 for virtue epistemology and 266–268 for social epistemology.
[62] Recall my mention of this topic above in Section (2.2) at note 17 and accompanying text.
[63] Other milieus, such as the transactional context and lawyering in social movements, for example, each bring their own nuances.

and other actors who should also receive extended attention in terms of how the adversarial system shapes the meaning of epistemic concepts in relation to their roles.

Knowledge about the roles and benefits given by the key participants just mentioned is vital for making prescriptions for the behaviour of every participant in the legal system. In particular, understanding these roles allows us to discuss epistemic "others" and how these others relate to lawyers' role-differentiated other-regarding virtues. Who is the other? What role does this particular other have in the legal system and in the pursuit of the adjudicative system's epistemic aim of acquiring knowledge about things like facts? How must the lawyer exercise other-regarding virtues in relation to other participants in the legal system so that the legal system can achieve the epistemic goal of discovering truths?

Identifying the relevant "other" (the party that is supposed to receive the benefit of other-regarding epistemic virtues), the role of the other, and the way in which to be of epistemic benefit to the other cannot be done thoughtlessly. This is true in life generally and is much more so in law.[64] "Others" are potentially multitudinous, are shaped by the lawyer's many roles and can also be classified as calling for a different level of epistemic regard depending on the model of lawyering that the lawyer is practicing. The choices that lawyers make, and that legal ethicists call on lawyers to make, in identifying "others" is a substantial dividing line between traditional models of lawyering and alternative models of lawyering. Thus, the identification of epistemic "others" should be taken as both a descriptive task as well as a normative task.

[64] Note that the term "other" here is used very differently from the way it is used when discussing topics such as discrimination or postmodern ideas of alterity. Those ideas may be important in developing a better understanding of the "other" in virtue epistemology. However, discussions about the "other" in virtue epistemology are meant simply to recognize the importance of epistemic agents besides ourselves, whatever their position in social institutions and practices.

The client might always be an "other"[65] in relation to whom the lawyer must be epistemically virtuous (especially in the advising context). Additional "others" may include: the opposing party and his/her lawyer (e.g., during disclosure processes), the courts or tribunal (if litigation has been commenced), mediators, government officials such as police, third parties (e.g., stakeholders), witnesses, expert witnesses, juries, the media, the lawyer's own employees (including colleagues, managers, paralegals, administrative assistants, articling students/summer students), the regulatory body that governs lawyers (e.g., possibly to make a complaint about another lawyer or to defend a complaint against oneself), the lawyer's own professional insurance company, etc. The lawyer, of course depending on his/her specialization and practice context, may have to deal with a number of these "others" in any particular case and succeed epistemically when interacting with these individuals and groups.

The understanding that there are many epistemic "others", i.e., many beneficiaries of epistemic virtues, should also bring to light the fact that while there will be epistemic virtues, both self-regarding and other-regarding (e.g., perceptiveness as a self-regarding virtue and integrity as an other-regarding virtue) that are relevant to all, or almost all, contexts, there may also be virtues that are particularly important, or which may be emphasized in specific ways (including by different models of lawyering) in dealing with specific "others" in different practice contexts or at various stages of adversarial processes. Consider the way in which the appropriate way to practice the virtue of honesty can shift based on the context and epistemic other to whom the lawyer must

[65] I say "might always" because I have not yet considered the way in which to discuss epistemic virtues in relation to clients who may not have the capacity to decide legal matters for themselves, such as very young children or individuals who are suffering certain types of disabilities, impairments or incapacities. My early thinking is that, while the lawyer must, of course, be ethically virtuous in relation to such clients and pursue the legal interests of the clients, epistemic virtues in contexts such as that of advising would likely be oriented *primarily*, although not necessarily exclusively, towards the litigation guardian. Depending on each case, (for example, children at various stage of development), the lawyer should also substantially orient his/her epistemic virtuousness towards a client who does not legally have the capacity to make decisions on legal matters.

give an epistemic benefit. In the context of a dispute being heard in a court, it is important for a lawyer to be candid in representing the law and the facts to the court[66] and to not assist others in being dishonest—thus the requirement to "not influence a witness or potential witness to give evidence that is false, misleading or evasive".[67] However, the dynamics of the court context do not carry forward into every legal practice scenario. For example, it may be proper for a lawyer to be less than completely honest when negotiating a settlement.

Discussing negotiations, Hutchinson distinguishes between lying and bluffing. "Lying", he explains, "involves not only telling untruths, but also doing so in order to mislead".[68] Bluffing can be considered telling an untruth as a recognized part of a contest. Bluffing thus exists "[i]n a context in which one professional negotiator is unlikely to accept all the other negotiator's statements at face value and is likely to be engaged in similar behavior".[69] A plaintiff's lawyer in a personal injury case might say that his/her client will not settle for less than $1 million, when the lawyer knows that the client will settle for $800,000. Similarly, a defence lawyer in such a civil case might say that the defendant will not pay more than $500,000, when the lawyer knows that the client is willing to pay as much as $700,000.

There is a great deal of difference between the requirements of the other-regarding virtue of honesty when the "other" is the court vs. when it is the counterparty in a negotiation. In the first case, the lawyer's honesty is central to the epistemic aims of the adversarial system, whereas in the second case, some lack of honesty is part of the expected posturing of the context. Each situation has a fundamentally different sort of epistemic reliance on the lawyer's honesty. The

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[66] See ABA *Model Rules*, *supra* note 32, r 3.3; FLSC *Model Code*, *supra* note 28, r 5.1-1 and 5.1-2 (ABA and FLSC duties of candour and duties against misleading the tribunal when acting as an advocate).
[67] FLSC *Model Code*, *supra* note 28, r 5.4-2. See also ABA *Model Rules*, *supra* note 32, r 3.4(b), prohibiting the lawyer from "counsel[ing] or assist[ing] a witness to testify falsely". ABA *Model Rules*, r 3.4, commentary 1 speaks of what it means to have "fair competition in the adversary system".
[68] Hutchinson, *supra* note 50 at 116.
[69] *Ibid*.

parties themselves depend on the lawyer's honesty to different extents and for different reasons. The court relies on the lawyer's honesty a great deal as a passive recipient that cannot actively seek out the facts for itself nor rebut the lawyer's presentation of the facts when the facts are being presented by the lawyer.

In the negotiation context, the counterparty can actively check the other party. The counterparty can challenge, for example, the size of the loss that the other party claims to have experienced. The other party in a negotiation thus depends less on the lawyer's honesty and expects much less than fully truthful statements. As such, the lawyer can behave differently in a negotiation with respect to practicing honesty than people would normally behave in order to be epistemically virtuous or than s/he would behave in relation to an epistemic other who is more passive and cannot take a competitive position in response to the lawyer. The lawyer's role in negotiations is differentiated—with respect to the other-regarding virtue of honesty—from the behaviour that would be expected of him/her as a contribution to the spreading of knowledge in other contexts.[70]

The relationship between epistemic others and virtues in adversarial systems of adjudication is one of the most promising sites of collaboration between social epistemologists and virtue epistemologists. For the purpose of this dissertation, it will suffice to say that the roles of epistemic others structure social contexts, as well as the justifications for, and shape of, role-differentiation in the practice of epistemic virtues.

(4.4) Virtue Epistemology and Models of Lawyering

In Section (1.1), I discussed models of lawyering for the sake of historical context. In Section (1.2), I explored morally deepened understandings of models of lawyering that can be given by philosophical legal ethics. Treading into epistemology in Section (2.3.3), I raised models

[70] This is not to say that the context of being before a court is not always differentiated with respect to honesty. It is merely to emphasize how the gap between justified epistemic behaviour can vary in different contexts and in relation to different parties who can be the beneficiaries of other-regarding virtues.

of lawyering as a way of expanding the image of lawyering that is considered in social epistemology. In those sections, I worked with an approach to the philosophy of lawyering based on legal *ethics*. As I have expressed in this dissertation, that branch of the philosophy of lawyering has been fruitful, and should continue developing, but should not continue to be the solitary branch of the philosophy of lawyering that grows. Thus, my aim here is to express models of lawyering in terms that centre epistemic concerns, especially the normative epistemic concerns of virtue epistemology. I do not intend for this subsection to be primarily an evaluation of the overarching merits of various models of lawyering using a virtue epistemic model—though that task must eventually be undertaken in the virtue epistemic study of law and lawyering. My purpose for discussing models of lawyering in this dissertation is to take account of one of the primary distinctions in approaches to legal practice. I also aim to explain why different models might accept, emphasize, and conceptualize epistemic virtues differently.

Competing models of lawyering primarily debate the range of people and concerns that a lawyer is permitted, or obligated, to benefit and/or consider.[71] These questions structure the way in which the two broadly described models of lawyering—traditional and alternative—conceive of the lawyer's relationship to the client and whether the lawyer has permissions or obligations to consider people other than the client. Closely related is the question of the scope of any permissions or obligations that exist in relationships with clients and/or other people. Specifically, how far is

[71] For much of this subsection, I will turn from the language of the aretaic (which focuses on the evaluation of actions and actors) to the language of the deontic (which focuses on the "oughts" and duties of a moral code). See generally, Larry Alexander & Michael Moore, "Deontological Ethics", *The Stanford Encyclopedia of Philosophy* (Winter 2016), Edward N Zalta, ed, online: Center for the Study of Language and Information, Stanford University <plato.stanford.edu/entries/ethics-deontological/> [perma.cc/FA47-8CN5]; Jarek Gryz, "On the Relationship Between the Aretaic and the Deontic" (2011) 14:5 Ethical Theory and Moral Practice 493, explaining the distinctions between these two approaches to normativity. I do so because the deontic normative language has been so dominant in scholarly works in legal ethics, in codes of professional conduct, and in describing the various models of lawyering. Many of the concerns expressed in legal ethics using deontic language can be expressed in aretaic ways that emphasize the development of character over the satisfaction of abstract conditions for being ethical. My language here is a non-recast steppingstone to the language of virtue in discussing models of lawyering.

the lawyer permitted or required to go to benefit the client and/or other people? In addressing these topics, traditional and alternative models of lawyering interact in different ways to accounts of, and justifications for, the adversarial system and lawyers' roles with that system.

Models of lawyering were created in the field of legal ethics. Up to this point, models of lawyering, and debates about models of lawyering, have been posed in moral terms. For example, may, or must, the lawyer consider whether injustice or suffering is being imposed on a third party (i.e., a non-litigant stakeholder) by the lawyer's service to the client and seek to prevent or stop that suffering or injustice? To use the language of virtue orientation, the distinction between traditional models of lawyering and alternative models of lawyering can be explained as a difference over whether, and to what extent, lawyers can, or must, practice other-regarding (ethical) virtues in relation to people other than their own client and the extent to which those other-regarding (ethical) virtues can or must be practiced. Lawyers' practice of self-regarding virtues receives little attention in existing discussions about models of lawyering, except perhaps in relation to competence.[72]

In traditional models of lawyering, as conceptualized in legal ethics, lawyers owe other-regarding *ethical* duties (duties to benefit others or avoid causing harm to others) primarily to the client and the courts. Duties to opposing counsel, opposing parties, third parties, the public, etc. are either rejected or are minimal. The duties are expressed in accordance with the primary objective of each competing traditional model of lawyering: hyper-zealous lawyering and merely-zealous lawyering. The person described by Dare as the hyper-zealous lawyer—the lawyer who

[72] Self-regarding virtues merit more attention in the philosophy of lawyering than the brief attention that has been given to duties like competence. This lack of attention may be because ethics not as well-suited to consider benefits to the self as epistemology is. Later in this current section, I also briefly discuss self-regarding virtue in relation to competence. In Part IV of this dissertation, I address theories that provide much more substantial frameworks in which to discuss self-regarding virtues.

tries to obtain everything for the client that the law can be made to give[73]—would reject ethical duties to others besides the client in an extreme way. As Lord Brougham says, "[A]n advocate, in the discharge of his duty, *knows but one person in all the world, and that person is his client*. To save that client by all means and expedients, and at all hazards and costs to other persons, and, among them, to himself, is his first and *only duty*; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others".[74]

Permission is explicitly denied to even take account of other people besides the client and of other concerns besides the interests of the client. Regard for the court, too, is given merely, and perhaps grudgingly, for instrumental reasons in service of the client; disregarding the court is not a long-lasting recipe for consistently achieving results for the client. However, like the law as a whole, the court must be made to give the client whatever the lawyer can obtain for the client. Recognizing freestanding duties to other people besides the client reduces the ability of the lawyer to use, and even bend, the law to the client's advantage.

Alternatively, Dare's merely-zealous lawyer, who seeks only to pursue the client's legal entitlements, might slightly enlarge the circle of regard for other parties as the lawyer recognizes limits on what the lawyer should make the law do for the client. The merely-zealous lawyer has deep ethical commitments to the functioning of the legal system and to ensuring that legal rights are vindicated. Furthermore, the merely-zealous lawyer's approach to practice is said to be justified by the dispute resolution function of law and by the fact that the legal system enables people who have a plurality of viewpoints to coexist.[75] These ethical commitments, expressed as part of a traditional model of lawyering, prohibit the merely-zealous lawyer from considering the interests

[73] Hyper-zeal is explained above in Section (1.2.1) at notes 54–68 and accompanying text.
[74] *Trial of Queen Caroline*, vol 2, (New York: James Cockcroft & Co, 1874) at 3 [emphasis added].
[75] Above in Section (1.2.1), especially notes 60–61 and accompanying text.

of, and seeking to assist, third parties.[76] However, the same commitments also expand the lawyer's other-regarding duties beyond what the hyper-zealous model can support on the basis of principle. At a minimum, the merely-zealous lawyer is committed to assisting the court in arriving at a decision that vindicates the legal entitlements of the participants. The lawyer is prohibited from showing so little regard for the court as to simply try to obtain from the court everything that the court can be made to give the client, regardless of whether those things are the client's actual legal entitlements.

Other-regarding ethical duties, and permissions, to consider the interests of others, are much more wide-ranging and substantial in alternative models of lawyering. Alternative models of lawyering, as conceptualized in legal ethics, share in common with all traditional models robust duties to the client and share with merely-zealous traditional models similarly substantial duties to the courts. Significantly, alternative models might also emphasize duties and permissions to consider opposing counsel, opposing parties, third parties, the public, etc. In alternative models of lawyering, there exist a greater number of participants and stakeholders in relation to whom the lawyer may, or must, provide robust benefits, or at least avoid harming, and in relation to whom the lawyer may, or must, behave in ethically virtuous ways. The recognition of permissions and obligations to consider the interests of people besides the client might lead practitioners of alternative models of lawyering to refuse to take on a certain client, to dissuade clients from pursuing certain courses of action, or even to withdraw from representing a client. There are multiple alternative theories of law that, on the basis of different moral and political underpinnings

[76] Bradley Wendel, a defender of a traditional model that supports seeking the client's legal entitlements, limits the scope of the lawyer's other-regarding moral duties so that the lawyer can abide by another set of other-regarding moral duties, namely those to the community to not "unsettle" the political decisions that they have made in creating law. See W Bradley Wendel, "Legal Ethics and the Separation of Law and Morals" (2005) 91:1 Cornell L Rev 67 at 97.

(e.g., commitments to promoting moral justice or avoiding moral injustice), would support varying degree of permissions and obligations to consider others' interests.

One should not overstate the degree to which alternative models call for lawyers to focus on other-regarding ethical virtues beyond those owed to the client. Few alternative models would so emphasize other-regarding duties or permissions to assist people other than the client to such an extent that all lawyers are called to permanently behave as social activists. Thus, it would be a mistake to conclude that traditional models have an entirely anemic account of norms related to non-clients while alternative models call lawyers to be so other-regarding as to make the client merely a co-equal or secondary concern for the lawyer next to other participants and stakeholders. Any adversarial model of lawyering must recognize a lawyer's primary duty, concern for, and relationship with, the client. The question is the coexistence of other duties, and room for other concerns, not the replacement of duties to, or concern for, the client.

Ethical approaches to models of lawyering are deeply meaningful but leaving models of lawyering to the field of ethics is too philosophically limited. Far from belonging exclusively to legal ethics, any topic that raises differing views about the persons and concerns that lawyers may, or must, consider can be understood in terms of the debate between traditional and alternative models of lawyering.[77] Models of lawyering can be expressed as conceptions outside of the domain of ethics.[78] This includes claims about which epistemic concerns may, or must, be considered by lawyers and to whom the lawyer may, or must, provide epistemic benefits. The key question to

[77] It may eventually be desirable to reframe the broad headings of traditional models of lawyering and alternative models of lawyering to reference concerns to which lawyers are permitted to cater. In the case of traditional models, a better description might be "client-only models of lawyering", since they only permit the lawyer to purposely pursue the client's legal interests, and "client-plus models of lawyering", since alternative models maintain the client as the primary focus but do not exclude the advancement and service of (legal and non-legal) interests besides those of the client.

[78] Recall the distinction between concepts and conceptions, explained above in Section (1.2) at notes 44–45 and accompanying text. The distinction is expressed in WB Gallie, "Essentially Contested Concepts" (1955) 56 Proceedings of the Aristotelian Society 167.

distinguish models of lawyering in epistemology is: what permissions or obligations (if any) does the lawyer have to consider the epistemic interests of people other than the client? Virtue epistemology sheds new light on the question of who the lawyer must benefit and the extent to which models of lawyering permit, or even require, the lawyer to benefit other people. This expansion of perspective is done in accordance with the particular way in which the models conceive of the lawyer's duties to the client in the adversarial system of adjudication.

If the relationship between models of lawyering and norms of different orientations (especially other-regarding norms directed at others who are not the client) is nuanced in legal ethics, it is substantially more complex in the way in which models of lawyering manifest virtue orientation in epistemology. Epistemic norms of both orientations—to the self and to others (including non-clients)—are relevant to the work of the lawyer regardless of which model of lawyering s/he is practicing. Additionally, models of lawyering apply in more finespun ways when conceptualized in the field of epistemology. Models of lawyering are less able in epistemology to deny outright whole collections of permissions and obligations merely because of the direction in which the benefits would go.

Theorists and practitioners of all models of lawyering, will be concerned with self-regarding epistemic virtues. Preparation, conscientiousness, perceptiveness, and additional relevant self-regarding epistemic virtues are non-negotiables in any legal practice. Even just for their importance to basic lawyerly competence, self-regarding epistemic virtues are necessary both for a model of lawyering that is focused exclusively on seeking the benefit of the client and for models of lawyering that incorporate concerns for other parties. A lawyer cannot commence a case, defend a case, conduct discovery, advise a client, have an initial meeting with the client, or even be licensed to practice law, without benefitting himself/herself epistemically.

Furthermore, self-regarding epistemic virtues are non-negotiables of just about every epistemic activity. Imparting epistemic benefits to others is deeply tied to, and often has an immediate need, for epistemic benefits to oneself; sharing knowledge involves acquiring knowledge. For example, from the outset of the lawyer-client relationship, the lawyer must exercise self-regarding epistemic virtues related to being a good listener and having the ability to elicit information about the case from the client in order for the lawyer to acquire basic competence about the facts of the case.[79] Self-regarding virtues such as good listening are what permits the lawyer to function as an expert and champion for the benefit of the client.

Virtue epistemology opens up the sky for other-regarding norms for traditional and alternative models of lawyering. A wide swath of other-regarding epistemic benefits are essentials for legal practice under any model of lawyering in adversarial systems. Other-regarding epistemic norms begin with the client, the central other to whom the lawyer owes duties of loyalty and fiduciary duties. The lawyer must accurately and candidly advise the client about his/her legal interests. Advising the client is the primary epistemic benefit that the lawyer gives directly to the central epistemic other that s/he serves in the lawyering role.[80] This commitment to other-regarding client-oriented epistemic virtues (which come out especially in the advising context) is a vital part of any adversarial model of lawyering. These models, which function by way of lawyers as champions for their client, must all recognize a primary duty, concern for, and relationship with, the other for whom the lawyer is a champion. From this point of agreement onward, models of lawyering diverge from one another in their response to the idea of other-regarding epistemic

[79] These concerns will be articulated in detail below in Part V, as competence about the facts of a case is one of the horns of the Client Perjury Trilemma, the central case study of this dissertation. Note also that being a good listener can be conceptualized in other-regarding terms when one is listening in order to help others articulate and examine their own beliefs, above in Section (3.3) at note 75 and accompanying text.

[80] Of course, being an epistemic champion for the client is also a benefit that the lawyer gives to the client, but that is better described as a legal or practical benefit that the lawyer provides by giving direct epistemic benefits to others (especially the neutral arbiter). In the case of advising, by contrast, the lawyer directly gives knowledge to *the client*.

behaviour. The divergence is based upon their vision of the purpose of lawyering within adversarial legal processes. Nonetheless, the need for other-regarding epistemic virtues abounds.

For the two traditional models considered in this dissertation, the aims of legal representation are either those of hyper-zealous lawyering (obtaining for the client everything that the law can be made to give) or of merely-zealous lawyering (obtaining for the client his/her legal entitlements). Even within these narrowly defined aims, to obtain the results that the models seek for the client, the lawyer must practice other-regarding epistemic virtues for the benefit of a large number of other participants in court processes. At the very least, lawyers must benefit the trier of fact and the opposing party (through the disclosure of negative and positive evidence).[81] Providing epistemic benefits to these others is required as part of the fact-finding processes of the adversarial system.

With respect to the trier of fact during litigation, the lawyer must demonstrate several epistemic virtues in order to perform his/her role(s) in the adversarial system during stages such as oral advocacy. At a minimum, these virtues include some version of those stated by Jason Kawall and quoted above, especially: honesty, creativity (in the sense of inspiring others), and exercising good listening skills.[82] These other-regarding epistemic virtues are to be exercised in relation to the judge and/or jury for the epistemic benefit of the judge and/or jury and for the legal benefit of the client. Considering these virtues from an epistemic perspective adds substantially to what can be said from merely an ethical perspective. During oral advocacy in a trial, much of what the lawyer says can engage the lawyer's ethical duties, however the ethical duties at play are largely negative, requiring the lawyer to not deceive the court. Except through the duty of competence (which is steeped in epistemology), the ethical duties do not themselves contemplate

[81] These types of evidence are explained above in Section (2.2) at notes 29–30 and accompanying text.
[82] Above in Section (3.3) at notes 74, 75 and accompanying text, citing Kawall, *supra* note 61 at 259–260.

things such as effective methods of framing ideas and conveying information in ways that accurately inform the hearer. Virtue epistemology is an approach that allows for broad discussions of what it takes to positively benefit the trier of fact, rather than merely to avoid misleading the trier of fact.

Recognizing the need to benefit others epistemically in the ways just mentioned, does not mean, however, that giving such benefits is free of tension with the basic principles of each model of lawyering. The hyper-zealous lawyer begins to bristle even at the basic other-regarding concern for the trier of fact just mentioned. Beyond participants whose epistemic benefit can assist the client, legally and perhaps epistemically, the lawyer has no permission from the hyper-zealous model to provide epistemic benefits to other people. Even with respect to others who the lawyer must benefit in order to assist the client, e.g., the trier of fact, hyper-zealous lawyering has no impetus within the model itself to place intrinsic value upon the epistemic benefit of these non-clients. While the hyper-zealous lawyer is not encouraged or permitted to be dishonest with the trier of fact;[83] hyper-zealous lawyering actively rejects the idea that the lawyer has duties to anyone other than the client.

The trier of fact is a means to an end for hyper-zealous lawyering, rather than an epistemic other whose epistemic benefit the model sees as essential to its own implementation and vindication.[84] If giving an epistemic benefit to the trier of fact leads to a legal benefit to the client, then hyper-zealous lawyering can happily give epistemic benefits to the trier of fact. If giving an

[83] I do not take the hyper-zealous model of lawyering to condone any sort of deception of the court. Being extremely aggressive during litigation or trying to obtain for the client more than the client is legally entitled to obtain, does not imply deception of the court. As I present them in this dissertation, no model of lawyering openly advocates illegal behaviour on the part of the lawyer.

[84] This is not to say that hyper-zealous lawyering has no deep affiliation to the adversarial system of adjudication. At the meta level, the theory may have such affiliations and individual lawyers who practice this approach may also have such affiliations. However, the model itself does not advocate for such affiliations. Lord Brougham's words could even be understood to counsel against lawyers being protective of the courts, which administer the adjudicative system.

epistemic benefit to the trier of fact will lessen the legal benefit for the client, the hyper-zealous lawyer is called by the hyper-zealous model to stretch and bend rules to give as little epistemic benefit to the tier of fact with respect to knowledge that will lessen the legal benefit to the client. In abiding by these rules, the hyper-zealous lawyer may have to tolerate some amount of disadvantage to the client or find a legal way to avoid giving a benefit to the trier of fact that would also be in the disadvantage of the client (e.g., by having evidence excluded or claiming privilege on documents).

In merely-zealous lawyering, by contrast, the trier of fact is a vital epistemic other who must receive an epistemic benefit from the lawyer (in the form of evidence about facts) (1) as part of service to the client and (2) as part of the functioning of the legal system and thus the model of lawyering itself. This is not to say that merely-zealous lawyers are keen to surrender their client's advantage or positions by freely offering up information to epistemically enrich the court. Merely-zealous lawyers are not ignorant of litigation strategy. However, merely-zealous lawyering, which emphasizes the political and moral value of legal institutions, including the adjudicative system and the courts themselves, has an explicit impetus for the lawyer to ultimately desire that the trier of fact is accurately informed and can give the client his/her legal entitlements, not more or less than his/her legal entitlements.

From the perspective of attempting to develop legal practice as a way of being and developing epistemic character traits, there is a substantial difference between seeking the epistemic benefit of the other—in this case, the trier of fact—only for the sake of strategic benefit (as the hyper-zealous lawyer does) and seeking the benefit of the other both for strategic benefit and as part of the substantive principles underlying one's particular model of lawyering. This distinction in motivations is illuminating even in cases when the practical actions that the lawyer

takes are the same under either traditional model. Thus, merely-zealous traditional lawyering extends the circle of others whose epistemic benefit the lawyer can seek on principle and who can receive the benefit of earnestly applied epistemic character traits.

Merely-zealous lawyering cannot stop there, however, and sees perhaps the biggest expansion out of all models in the people who it can recognize as epistemic others, and in relation to whom the model supports the principled practice of epistemic virtues. The adversarial system of adjudication has a structure by which it carries out the processes of legal dispute resolution, the most formal of which is litigation. Part of this process involves partisan adversaries presenting their evidence and arguments before a neutral arbiter. Practicing merely-zealous lawyering, with its emphasis on the dispute resolution processes of law—showing a deep commitment to the adversarial process—has a principled reason to value the epistemic benefit of the neutral arbiter (e.g., the trier of fact). However, there are other processes that require the lawyer to provide an epistemic benefit in order to contribute to the function of the adversarial system.

One particularly unexpected example that illustrates the potential to expand the circle of epistemic others, especially in relation to a version of the traditional zealous advocate model of lawyering, is the opposing litigant and his/her lawyer during the disclosure process. Lawyers following traditional models may not actually cognize a desire for the opposing party to benefit epistemically from a disclosure. However, the adversarial system requires disclosure processes for litigants to obtain vital information and to avoid trial by ambush. Though an assent to the traditional model does not mean that any particular lawyer seeks the epistemic benefit of any particular legal adversary, it does mean that the lawyer must hope that disclosure processes generally serve the purpose of informing the adversarial litigation process.

Practitioners of hyper-zealous lawyering have reasons to want this process to work solely for the sake of their own client's advantage. Seeking whatever benefit the legal system can be made to give, hyper-zealous lawyering leaves room for lawyers to desire the existence of broken aspects of disclosure rules, of which lawyers can routinely take advantage for the benefit of their own client. By contrast, practitioners of merely-zealous lawyering have principled reasons to want disclosure processes to work for all litigants. Merely-zealous lawyers may not want any particular legal adversary to learn anything that helps that adversary but are committed to providing epistemic benefits to the archetype of the legal adversary in a system of adjudication. This same reasoning can be applied by both traditional models of lawyering to any other parties who play roles that require an epistemic benefit.

Finally, as with ethics, alternative models of lawyering have the capacity to recognize broad epistemic permissions and obligations to participants and stakeholders in legal processes. Like merely-zealous lawyering, this includes many participants, even the legal adversary. Depending on the details of the particular alternative model, the epistemic benefit given to the epistemic other can be recognized for at least the three principled reasons: (1) as part of service to the client and (2) as part of the functioning of the legal system, and (3) as part of service to a principle that is built into the model (whether that principle is epistemic or not). The third principled reason for giving benefits to epistemic others is based on grounds that are different from traditional models of lawyering, including merely-zealous lawyering.

The merely-zealous lawyer can recognize the need to benefit the legal adversary as part of carrying out the adversarial model of adjudicating disputes. Giving this epistemic benefit of the legal adversary is justified on procedural grounds. However, in merely-zealous lawyering, there is no permission or obligation to give an epistemic benefit to the legal adversary simply for the sake

of epistemically benefitting the legal adversary (and apart from the procedural requirements of the adversarial system). By contrast, alternative models of lawyering allow for the possibility of seeking the epistemic (and even non-epistemic) benefit of the legal adversary even for reasons other than the procedural requirements of the adversarial process. A lawyer practicing an alternative model may have reasons founded in the particular alternative model itself to want the legal adversary to acquire knowledge, e.g., facts about a case.

One possible class of examples would be situations in which a lawyer represents a single and powerful organization that harms a disparate group of individuals (such as with environmental liability issues). In addition to simply wanting the case to move through the adversarial litigation process towards resolution, a lawyer practicing an alternative model may have theoretical support (epistemic and non-epistemic) for seeking to have the client-organization admit truths to the individuals who have been harmed. Lawyers working for the polluting client and practicing an alternative model of lawyering might consider the epistemic benefit of the legal adversary (e.g., plaintiffs suing the corporation for causing environmental and consequent health harms) as part of an alternative model's normative prescriptions to consider the interests of parties besides their client. By contrast, traditional models have reasons grounded in their visions of the lawyer's role in the legal system to oppose giving such epistemic benefit to legal adversaries.

Alternative models of lawyering also go beyond having different groundings for sharing knowledge, and beyond wanting to share different types of knowledge, with epistemic others who are also recognized by merely-zealous theories of lawyering. Depending on the precise details of the particular alternative model, adherents can recognize permissions, and even obligations, to people who would be beyond the circle of epistemic others that could occupy the concern of traditional models of lawyering. Lawyers practicing alternative models may be called to provide

epistemic benefits to sections of the public (especially stakeholders), and even to the broad public, who are not participants in any currently active legal process. Preventing a harm to a community, e.g., an environmental harm, may require giving that community knowledge about the danger caused by a polluting company. In such cases, a virtue epistemic theory of lawyering can lend support to the ethical impetus that is already behind the goal of protecting the public in some alternative models of lawyering. Thus, virtue epistemology and epistemic virtue orientation provide grounds for reframing the reasons that lawyers who practice alternative models of lawyering might cite for giving epistemic benefits to epistemic others and for expanding the group of epistemic others that the lawyer has an impetus to benefit.

Models of lawyering relate to virtue epistemology in different ways. Traditional and alternative models of lawyering will view the impact of promoting particular intellectual virtues (whether self-regarding or other-regarding, or particular competing virtues within each of those virtue orientations) as having different implications for the conceptual justifications of the adversarial system (e.g., for the ability of adversarial litigation to be an effective means of providing knowledge of the facts of a case, for vindicating the rights of parties, or for whatever we believe are the aims of adjudication as practiced in common law legal systems). At the same time, virtues and the idea of virtue orientation are complicated by concepts such as partisanship and role-differentiation in the philosophy of lawyering, especially as advocated by competing models of lawyering (traditional models of lawyering and alternative models of lawyering). Competing models of lawyering have the conceptual grounding to support virtue development (ethical and intellectual) in ways that emphasize each virtue orientation differently when it comes to the many roles that lawyers play. These dynamics will continue to be relevant throughout this dissertation.

(4.5) Epistemic Partisanship

Thus far, I have explained key concepts in virtue epistemology and the way in which those concepts take shape in the differentiated role that lawyers have in the adversarial system of adjudication. I have indicated my preferences in terms of approaches to lawyering. However, a normative approach to epistemology demands stronger stances than I have taken thus far. Additionally, the epistemology of lawyering requires more focused accounts of what it means to be an epistemically virtuous lawyer than can be given by piecemeal accounts of discrete virtues. I will propose here a tailored epistemic approach to lawyering that works with the truth-seeking epistemic purposes of the adversarial system and with the justifications for the normative epistemic differentiation[85] of the lawyer's role. Crucially, I am not proposing a super-value or core virtue to which all other values and virtues can be reduced. I am proposing an epistemic virtue that merits special emphasis in the role-differentiated context of lawyering in an adversarial adjudicative system. This virtue exists alongside other epistemic virtues that still apply and that need to be practiced in a way that is responsive to the legal context.

Lawyering in the adversarial system of adjudication, a special context in which the lawyer supports epistemic checks and balances, requires neither thoroughgoing dispositions of epistemic benevolence, nor thoroughgoing dispositions of epistemic malevolence, from lawyers. Rather, lawyering in the adversarial system requires epistemic partisanship. In traditional models of lawyering, partisanship is understood as the requirement for the lawyer to "maximize the likelihood that the client's objectives will be attained".[86] This account of partisanship is an aspect

[85] I.e., epistemic differentiation that recognizes the need for multiple ways of intellectual being in different roles.
[86] David Luban, "Partisanship, Betrayal and Autonomy in the Lawyer-Client Relationship: A Reply to Stephen Ellmann" (1990) 90:4 Colum L Rev 1004 at 1004 (Luban's definition of partisanship). Accord Tim Dare, *The Counsel of Rogues?: A Defence of the Standard Conception of the Lawyer's Role* (Farnham, UK: Ashgate Publishing, 2009) at 75–76 (Dare responding to some of Luban's arguments about partisanship).

of some models of lawyering that are grounded in ethical theory; it serves the positivist underpinnings of some traditional models of lawyering.[87]

In my epistemology of lawyering, partisanship is even more relevant to the central concerns of supporting the system of adjudication than it is in traditional models of lawyering. The key difference between partisanship in moral/political theories of lawyering and partisanship in my virtue epistemic theory of lawyering is in terms of what can be observed about the partisanship norm when emphasis is placed on the role of partisanship in serving a system with an epistemic aim. I consider partisanship in terms of the role that it plays in supporting the adversarial system of adjudication in performing its basic functions, especially seeking truth. Due to this focus, I will have a different conception of the norm of partisanship than existing ethical theories and possibly different results when I apply my conception of the norm. I allow for the possibility that my epistemic approach to partisanship will be consistent with conceptions of partisanship from legal ethics theory (including traditional models of lawyering, which are informed by particular moral and political principles), but I do not actively seek that consistency.

In an adversarial system of adjudication, lawyers are key facilitators of the conflict of positions through which the adversarial system operates. During litigation, lawyers champion their client's case before neutral triers of fact and law. This involves marshalling and disseminating knowledge in a way that advances the client's cause. Far more foundationally than being an ethical duty to maximize the client's chances of success, partisanship within the context of the adversarial system of adjudication can be considered the lawyer's key contribution to the epistemic functions and excellences of the system. Seen in this light, having a specialized function in the community's adjudicative system, what we can call "epistemic partisanship" (i.e., partisanship conceived in light

[87] Traditional models of lawyering and their relationship with legal positivism are explained above in Section (1.1) and Section (1.2).

of the epistemic functions that a lawyer performs in the adversarial system of adjudication) can be taken as an epistemic virtue. Epistemic partisanship might be one of the central epistemic virtues with which an epistemology of lawyering must be concerned.

Partisanship is best conceived of in responsibilist terms, rather than reliabilist terms. It is not a skill, capacity, or a faculty-virtue. It is not "a disposition to succeed reliably enough at some type of performance".[88] Rather, it is a trait-virtue. Partisanship is an undertaking of a certain role within the adversarial system of adjudication, a *taking of responsibility* for the legal and epistemic interests of the client. The partisan has a "disposition to form beliefs and/or desires of a certain sort and (in many cases) to act in a certain way, when in conditions relevant to that disposition".[89] Speaking in the broadest terms, my epistemology of lawyering conceives of epistemic partisanship within the context of the adversarial system of adjudication as:

> a disposition to (a) desire the epistemic and legal success of the client, which leads to (b) taking action to support the advancement of the client's cause, (c) in service of the adversarial system of adjudication, especially its truth-seeking function.[90]

In the normal course of events during litigation, this disposition will require the lawyer to do things such as marshal evidence and information that furthers the interest of the client and check evidence and information that undermines the epistemic and legal interests of the client. I define the "epistemic success of the client" as persuading the adjudicator of the client's position by presenting

[88] Will Fleisher, "Virtuous Distinctions: New Distinctions for Reliabilism and Responsibilism" (2017) 194:8 Synthese 2973 at 2977 (definition of a competence, the definition of a reliabilist type of virtue).
[89] Christian B Miller & Angela Knobel, "Some Foundational Questions in Philosophy about Character" in Christian B Miller et al, eds, *Character: New Directions from Philosophy, Psychology, and Theology* (Oxford: Oxford University Press, 2015) 19 at 21 (definition of character trait, responsibilist virtue).
[90] This elaboration of the intellectual virtue of epistemic partisanship is inspired by Jerry Green's definition of the epistemic virtue of metacognition, which is discussed below in Section (5) at note 7 and accompanying text, citing Jerry Green, "Metacognition as an Epistemic Virtue" (2019) 35:1 Southwest Philosophy Review 117 at 120.

the adjudicator with truths, especially on disputed factual matters or on conceptual matters that can be known.[91] In this dissertation, I restrict myself to epistemic success on factual matters.

Like epistemic virtues that are not based in role-differentiation, epistemic partisanship should be understood as a mean between two vices. These two vices are epistemic neutrality and epistemic hyper-partisanship. An epistemically partisan lawyer pursues the client's legal interests while playing the proper epistemic role of the lawyer in the adversarial system of adjudication. The two vices fail to take appropriate action at the appropriate time to serve the adversarial system of adjudication. An epistemically neutral lawyer would be one who does not favour his/her client's cause, and who thus has no purpose as part of an adversarial dispute resolution process. Epistemic hyper-partisanship puts forward the client's case in a way that undermines the ability of the neutral arbiter to perform a truth-seeking function, perhaps even deceiving the court.

Epistemic partisanship can fulfill all four of Jason Baehr's dimensions of intellectual virtue.[92] Lawyers who practice epistemic partisanship in service of the adversarial system of adjudication and its truth-seeking function can be for the epistemic good (the motivational principle),[93] i.e., for the legal system's effective functioning at discovering truth. They can take pleasure, or have other suitable affections, in relation to performing epistemic partisanship (the affective principle).[94] Lawyers must be competent at the activities that are characteristic of epistemic partisanship, e.g., marshalling evidence (the competence principle).[95] Finally, in order to be epistemic partisans, and not fall into the epistemic vices associated with legal practice,

[91] Conceptual matters that can be known would be a truth such as that a certain term has historically had a specific meaning within a community.
[92] Discussed above in Section (3.1) at notes 10–21 and accompanying text.
[93] See Jason Baehr, "The Four Dimensions of Intellectual Virtue" in Chienkuo Mi, Michael Slote & Ernest Sosa, eds, *Moral and Intellectual Virtues in Western and Chinese Philosophy: The Turn Toward Virtue* (New York: Routledge, 2016) 86 at 87.
[94] See *ibid* at 89.
[95] See *ibid* at 91.

lawyers must be able to recognize when, and to what extent, epistemic partisanship is epistemically appropriate (the judgment principle).[96]

With respect to the judgment principle, which is central in a responsibilist virtue epistemology, I distinguish between two levels of partisanship: global partisanship and local partisanship. *Global partisanship* takes the side of the client regardless of whether taking the side of the client serves the functions of the adversarial system of adjudication, and regardless of whether the particular actions that the lawyer is taking for the client serve the justifications for the lawyer's role and role-differentiated norms. *Local partisanship* takes the side of the client only in service of the functions of the adversarial system of adjudication, and thus only on grounds that serve justifications for the lawyer's role and role-differentiated norms. Within the adversarial system of adjudication, lawyers must not practice global partisanship and must practice local partisanship. Global partisanship leads to the vice of epistemic hyper-partisanship. Local partisanship satisfies the judgment principle for the virtue of epistemic partisanship.

My distinction between global partisanship and local partisanship has a connection with Tim Dare's distinction between hyper-zealous lawyering and merely-zealous lawyering. Recall that the hyper-zealous lawyer attempts to obtain for the client everything that the law can be made to give and the merely-zealous lawyer attempts to obtain for the client all of the client's legal entitlements.[97] Dare's distinction explains two approaches to practice that are encompassed by my broader distinction between global partisanship and local partisanship. His definition of the two approaches distinguishes a failure (based in overzealousness) and a success to satisfy the conditions that Razian legal positivism provides for the role-differentiation of the lawyer.

[96] See *ibid* at 92.
[97] Above in Section (1.2.1) at notes 54–59 and accompanying text.

In Dare's theory, the appropriateness of the style of practice is defined in relation to the question of whether the lawyer facilitates the dispute resolution function of law by seeking to vindicate all of the client's legal entitlements and nothing more. The key question is about whether a particular justification for role-differentiation of the lawyer is satisfied. By contrast, my distinction between global partisanship and local partisanship is based simply on the question of whether the lawyer is serving the justifications for the lawyer's role and the role's associated normative differentiation within the adversarial system. Dare's distinction focuses on a particular justification for role-differentiation, whereas my distinction is about serving any/all justification(s) for role-differentiation. Global partisanship and local partisanship can thus encompass the distinction between hyper-zeal and mere-zeal. Both sets of concepts remain useful but speak to different concerns in relation to individual lawyers, models of lawyering, and aspects of the legal system.

Epistemic partisanship is not the combination of epistemic benevolence for one's client along with epistemic malevolence for the legal adversary. Epistemic partisanship does not make an enemy of the epistemic good. Nor, crucially, does an adversarial legal relationship imply that lawyers make an enemy of the epistemic good of the legal adversary. Lawyers are playing a role in a system that is intended to give a fair hearing to the adversaries in a legal dispute. Part of giving a fair hearing is the use of a process that is believed to allow the trier of fact a good chance to arrive at true conclusions about the facts of a case. In jurisdictions that use the adversarial system of adjudication, the truth-seeking process requires the parties to a dispute to put forward the strongest possible case from their partisan perspective, allowing a disinterested adjudicator to judge the merits of these partisan positions.

While nobody's epistemic good is enemized by epistemic partisanship, the way in which epistemic partisanship serves the pursuit of truth (and, thinking about law as a social system, the way in which partisanship aids in the pursuit of Goldman's five veritistic social epistemic standards—(1) reliability, (2) power, (3) fecundity, (4) speed, and (5) efficiency[98]) is less obvious than the way in which an epistemically benevolent agent would pursue truth, and than the way in which an epistemically malevolent agent would oppose the discovery of truth, within the legal system. The key difference, as I have explained throughout Section (4) of this dissertation, is that the epistemic aim behind partisanship is facilitated by the practitioners of epistemic partisanship through a clash of positions within the adjudicative system. If someone were to behave like a lawyer without having the other key aspects of the adversarial system (i.e., a partisan opponent and a neutral arbiter) this person's behaviour (e.g., being highly protective of information) would often be making it far more difficult for any social practice in which s/he participates to achieve Goldman's veritistic standards. Some lawyerly behaviour would not even make sense for any epistemic agent to practice without the context of the adversarial system of adjudication.[99]

In contrast to epistemic partisanship, epistemic benevolence and malevolence, which are capable of affecting the social epistemology of the adversarial system, do not rely on the processes of the legal system to either be effective or ineffective at their aims. Benevolently giving another person the benefit of an other-regarding virtue such as honesty can be done in the context of legal processes, but one can be honest and achieve the epistemic effects of honesty apart from the litigation process. Similarly, a person can malevolently deceive another person within a legal

[98] See Alvin I Goldman, "Foundations of Social Epistemics" (1987) 73:1 Synthese 109 at 128; discussed above in Section (2.1) & (2.2).
[99] E.g., the discovery process.

process, but one can be deceptive and achieve the epistemic effects of deception outside of a legal process. Partisanship gains meaning from the process.

Of course, this is not to say that epistemic partisanship works perfectly as long as it is practiced within the processes of the adversarial system of adjudication. The system makes sense of the disposition and gives it a place to function; the system does not guarantee that partisanship will serve the legal system impeccably. Even within the adversarial system of adjudication, lawyerly partisanship—ethical and epistemic—may often oppose the legal system's discovery of truth and achievement of Goldman's veritistic standards.[100] Such pitfalls are perhaps features of a system of adjudication that is based on a clash between parties who are represented by champions.[101] A system of conflict that is effective in the aggregate may, in virtue of its own core mechanisms, sometimes impede the achievement of its ends.

Occasionally, the clash itself impedes the system's epistemic goals. Legally legitimate behaviour by lawyers, such as protecting the client's privileged information can go against the achievement of all five of Goldman's standards, and will very frequently reduce that speed at which true beliefs are acquired and increase the cost of acquiring those true beliefs.[102] Lawyers within the legal system itself (the very system that gives meaning to their work) can undermine the veritistic epistemic goals of the legal system. Lawyerly partisanship, even as a virtue that supports the adversarial system of adjudication, can sometimes make Goldman's standards more

[100] See generally William J Talbott & Alvin I Goldman, "Games Lawyers Play: Legal Discovery and Social Epistemology" (1998) 4:2 Legal Theory 93 (discussing various ways in which lawyers stymie the discovery process).
[101] Some pitfalls, explained below in Section (6.2), come from the psychological effects of partisanship.
[102] These obstacles to achieving Goldman's veritistic standards may arise all the more so with legally illegitimate practices that born of vices at opposite ends of the mean of virtuous epistemic partisanship. One such practice, done in service of global partisanship or epistemic hyper-partisanship, is filing motions that are without merit, which are intended to do nothing other than cause delay and increase the other side's costs (especially when the expectation is that the adversary cannot afford such increases in cost).

difficult to achieve. A good system and its supporting virtues can be far from perfection in realizing its aims.

In addition to its own stumbling blocks and internal limits, epistemic partisanship has limits that are external to epistemology and the structures that systems put in place to pursue epistemic ends. The legal community does not have the sole aim of achieving epistemic ends through the processes of the legal system. The acquisition and promotion of knowledge is a crucial value of legal systems, but it is not the only value that a legal system pursues or should pursue. Other values, norms and virtues exist alongside epistemic values, norms, and virtues. Domains beyond epistemology itself may place constraints on the pursuit of epistemic values and may even supersede epistemic values.

Epistemologists have already appreciated this dynamic in their application of epistemic ideas to the field of science. In particular, in accordance with well established practices in the sciences, epistemologists have recognized moral constraints on the pursuit of knowledge. Alvin Goldman argues that:

> Although veritistic value is the fundamental benchmark of epistemic virtue, it is obviously not the only value. Nor is it the preeminent value for all purposes of life and action. Epistemological or scientific value sometimes conflicts with moral value, and when they conflict, epistemological value must give way. There is a moral 'side-constraint' on scientific research, which is that the conduct of such research should not violate human rights or injure people.[103]

Goldman illustrates this by discussing the moral and epistemic value of conducting certain types of scientific experimentation on human subjects. He says that the reasons to not undertake some types of experimentation are "not because it would lack scientific or epistemic value. Rather, it is a case in which the moral disvalue trumps the scientific value".[104]

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[103] Alvin I Goldman, "The Unity of the Epistemic Virtues" in Abrol Fairweather & Linda Zagzebski, eds, *Virtue Epistemology: Essays on Epistemic Virtue and Responsibility* (Oxford: Oxford University Press, 2001) 30 at 45.
[104] *Ibid.*

A similar analysis of constraints can be undertaken in relation to legal processes. In some situations, the evidence-seeking missions of various legal actors are limited not because the information that they would, or could, discover would lack factual/legal/epistemic value and would thus by unhelpful to the truth-seeking mission of the adversarial system of adjudication. Instead, some non-epistemic legal and moral norms/values may constrain the pursuit of factual/legal/epistemic value that would be achieved by discovering evidence. These non-epistemic legal and moral values sometimes take pre-eminence over the factual/legal/epistemic value of the evidence-seeking missions of legal professionals and other participants in investigative roles.

The search for evidence about the facts of a case is constrained by constitutions, statutes, common law, and other legal norms and values. These norms and values are legal instantiations of society's respect for the moral rights and human dignity of citizens. The United States' *Bill of Rights* notably includes the right against unreasonable search and seizure, the right against self-incrimination, the right to a jury trial, among other norms that limit and shape the search for evidence and the adjudication of facts.[105] The *Canadian Charter of Rights and Freedoms* contains similar provisions.[106] The rights against unreasonable searches and seizures and the right against self-incrimination *can* make it more difficult for the police and for the court to obtain evidence

[105] See US Const amend IV (search and seizure), amend V (self-incrimination), amend VI (jury trial – criminal law), amend VII (jury trial – civil law). N.B. It is crucial to recognize that I am not suggesting that constitutional, statutory, and common law limits on the behaviour of government officials and police always inhibit the search for knowledge, thus limiting the legal system's epistemic position, in favour of other legal values. Indeed, some constitutional provisions, such as the right against self-incrimination, are carefully tailored to protect the epistemic interests of the legal system. The unbridled search for evidence can take investigators and adjudicators down misleading paths. See Alvin I Goldman, *Knowledge in a Social World* (Oxford: Clarendon Press, 1999) at 285–289 for a nuanced analysis of the way that the US *Bill of Rights* relates to the legal system's truth-seeking function. Reliability—so closely connected with the aim of seeking truth well—and mentioned above in Section (2.1) at notes 15–16 and accompanying text, is a prominently promoted epistemic standard in the US *Bill of Rights*.

[106] See *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 8 (search and seizure), ss 11(c) and 13 (self-incrimination), and s 11(f) (jury trial – criminal law).

about a case. In certain situations, the police and courts may never discover some evidence because of these rights. Jury trials also raise a host of epistemic issues that may be avoided or mitigated (from an epistemic perspective) if the trier of fact is someone more experienced at hearing and weighing evidence.[107]

Legal protections for various kinds of privileged relationships (e.g., lawyer-client, spousal) may also restrict the pursuit of knowledge about the facts of a case. Furthermore, models of lawyering may do the same, as traditional models of lawyering encourage lawyers to zealously protect their clients' confidentiality, while alternative models may discourage lawyers from aggressively pursuing the disclosure of certain types of information from vulnerable participants in the legal process, such as from victims of sexual assault. Even if it true that a fuller picture of the facts of a sexual assault case could be gained by highly aggressive questioning of a sexual assault complainant (a premise that has not at all been shown to be true),[108] alternative models of lawyering that take into account the interests of third parties would exhort lawyers against such aggressive questioning.

All of these rights, norms, and values can be said to constrain, block, or impede the legal system's epistemic efforts in a case. Nonetheless, constitutions, statutes, common law, and other legal norms and values place these epistemic restrictions on legal systems and on actors within legal systems because there are competing non-epistemic values that must be vindicated, and which can trump the search for truth in some ways and to some extent. Epistemic ends, though

[107] Clearly, there would also be arguments for the inverse, suggesting that jury trials provide epistemic advantages in addition to moral/political/non-epistemic advantages. Even so, it is important to recognize the epistemic challenges that jury trials present.

[108] If the premise cannot be shown to be true, then one possibility is that such highly aggressive questioning would be more likely to create a distorted account of the facts, thus undermining the epistemic aims of the adversarial system of adjudication. In such a case, aggressive questions may actually be shown to be a stumbling block of epistemic partisanship itself.

crucial for the legal process,[109] are not the only values in the legal system. As in science, there are other concerns (legal and moral) that place constraints on the search for knowledge in law. This reality will affect conceptions of epistemic virtues. This includes epistemic partisanship which, though its justification and ability to be of epistemic service to the adversarial system persists, must be practiced in accordance with these restrictions that are external to the epistemic needs of adversarial adjudication.

With all its messy and inconvenient nuances, the idea of epistemic partisanship is the central epistemic virtue that will structure the remainder of this dissertation, especially the Client Perjury Trilemma case study in Part V. My analysis will be directed towards the lawyer's development of the character trait of partisanship, which is a virtue within the lawyer's role in serving the adversarial system and its truth-seeking function.

[109] The legal system depends on knowledge of the facts of cases.

Part IV– Adjacent Theories of Lawyers' Cognition

Epistemology, like the other branches of philosophy, is not free of interaction with, or influence from, other domains of knowledge, and should not be thought to be so in the philosophy of lawyering. As I have stated about my broader aims in this dissertation, epistemology can be part of a more wide-ranging reimagining of the study of lawyering. This re-envisioning centres the cognitive life of the lawyer. Two other fields of study—education and behavioural science—can be partners in developing a study of lawyering that, through the combined strengths of these fields, is descriptive, normative, and reformative.

(5) Metacognition – Pedagogy & Epistemology

Legal education is undergoing reformation. As clinical legal education continues its rise,[1] law students are being challenged to broaden their skills far beyond the all-important final exam that tests a student's ability to reason through, and apply, principles from decisions made in appellate court cases.[2] Richer pedagogies of instruction and evaluation are also at the disposal of legal educators.[3] Developments in legal education that better prepare law students for the realities of legal practice recognize a broader range of intellectual capabilities, as well as other capacities, that have a place in legal education and that are necessary for legal practice. There are increases both in the choices that learners have and in demands that are made of learners. In addition to the initial training that lawyers must have to practice law, the legal profession requires lifelong

[1] See generally Gemma Smyth, Samantha Hate & Neil Gold, "Clinical and Experiential Learning in Canadian Law Schools: Current Perspectives" (2017) 95:1 Can Bar Rev 151.
[2] See generally Steven Friedland, "A Critical Inquiry into the Traditional Uses of Law School Evaluation" (2002) 23:1 Pace L Rev 147; Steve Sheppard, "An Informal History of How Law Schools Evaluate Students, with a Predictable Emphasis on Law School Final Exams" (1997) 65:4 UMKC L Rev 657.
[3] See generally Anthony Niedwiecki, "Teaching for Lifelong Learning: Improving the Metacognitive Skills of Law Students through More Effective Formative Assessment Techniques" (2012) 40:1 Capital UL Rev 149; Anthony S. Niedwiecki, "Lawyers and Learning: A Metacognitive Approach to Legal Education" (2006) 13:1 Widener L Rev 33; Carol Springer Sargent & Andrea A Curcio, "Empirical Evidence that Formative Assessments Improve Final Exams" (2012) 61:3 J Leg Educ 379.

learning. Regulators of the legal profession recognize this as they have adopted and refined requirements for continuing legal education. Basic competence in the present, and over the course of a career, requires a lawyer to be adept at learning, and skillful at imparting what s/he has learned, to key epistemic others—especially clients, judges, and juries. Lawyers' opportunities to take responsibility for their own cognitive development are increasing and persistently relevant to a lawyer's career.

Pedagogy and epistemology are ready to inform lawyers in exercising these opportunities. The two fields share a core focus: the imparting of knowledge. Between these two disciplines, there is a shared concept—metacognition—that should play an ever-increasing role in informing understandings of how knowledge is acquired and imparted. Metacognition[4]—which is defined most simply as thinking about thinking—is built on the insight that thinking is itself an aspect of education that can be studied, understood, and purposefully structured. Making a helpful distinction, the educational psychologist Gregory Schraw explains that "cognitive skills are necessary to perform a task, while metacognition is necessary to understand how the task was performed".[5] When students learn to think about thinking, they become more than passive recipients of knowledge and can do more than muddle through their education. Students who engage in metacognition can themselves improve and direct their own learning processes. The relevance of metacognition is not limited to the formal schooling context. It goes beyond any endeavours that are explicitly directed towards education.

[4] See generally John H Flavell, "Metacognition and Cognitive Monitoring" (1979) 34:10 American Psychologist 906, one of the earliest works on metacognition.
[5] Gregory Schraw, "Promoting General Metacognitive Awareness" (1998) 26:1/2 Instructional Science 113 at 113, citing Ruth Garner, *Metacognition and Reading Comprehension* (Norwood, N.J: Ablex, 1987).

The philosopher Jerry Green proposes that metacognition itself be understood as an epistemic virtue.[6] Green carefully specifies the definition of metacognition in a way that links up with the aims of virtue epistemology and its category of epistemic virtue. He defines metacognition as:

> [A] disposition to (a) form beliefs, desires, and feelings about one's own epistemic situation, processes, goals, and performance, which lead to (b) the mental activity of monitoring, regulating, adapting, and evaluating about one's own epistemic situation, processes, goals, and performance, when (c) in conditions prompting self-aware attempts at problem-solving or strategic thinking.[7]

Green's account of metacognition is responsibilist,[8] describing metacognition as a character trait, rather than as a skill.[9] He goes through a detailed application of Jason Baehr's dimensions of intellectual virtues—which are presented from a responsibilist perspective[10]—finding that metacognition meets the demands for qualifying as an epistemic virtue, including the motivational principle, the affective principle, the competence principle, and the judgment principle.[11]

The disposition of metacognition is a self-regarding epistemic virtue—a virtue that "tend[s] to directly benefit oneself".[12] The direct benefit that metacognition gives to the self is in serving the intrinsic and instrumental value of competence and intellectual growth. As Kawall recognized,

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[6] See Jerry Green, "Metacognition as an Epistemic Virtue" (2019) 35:1 Southwest Philosophy Review 117 [J Green, "Metacognition"].
[7] *Ibid* at 120.
[8] See *ibid* at 121.
[9] See *ibid* at 120, citing the definition of "character trait" given by Christian B Miller & Angela Knobel, "Some Foundational Questions in Philosophy about Character" in Christian B Miller et al, eds, *Character: New Directions from Philosophy, Psychology, and Theology* (Oxford: Oxford University Press, 2015) 19 at 21. Recall the definition of "character trait" given above in Section (3.2) at note 31 and accompanying text. Note, however, that Green recognizes the ways in which metacognition involves skill, particularly in that good metacognizers "are skilled at monitoring and evaluating their own knowledge and abilities, and at having an accurate assessment of their own status and performance", J Green, "Metacognition", *supra* note 6 at 123. This is part of Green's application of Baehr's competence principle.
[10] See Jason Baehr, "The Four Dimensions of Intellectual Virtue" in Chienkuo Mi, Michael Slote & Ernest Sosa, eds, *Moral and Intellectual Virtues in Western and Chinese Philosophy: The Turn Toward Virtue* (New York: Routledge, 2016) 86 at 86.
[11] Discussed above in Section (3.1) at notes 12–21 and accompanying text.
[12] Jason Kawall, "Other-Regarding Epistemic Virtues" (2002) 15:3 Ratio 257 at 258.

the distinction between self-regarding virtues and other-regarding virtues should not be applied too rigidly. Particularly when attempting to understand the metacognition of a professional, it is vital to allow room for the self-regarding benefits of metacognition to be of substantial indirect benefit to epistemic others.

In a more recent line of scholarship, authors have developed the concept of social metacognition. This concept can add a great deal of nuance to our understanding of the virtue orientation of metacognition. Definitions of social metacognition, especially in relation to metacognition simpliciter, are still very much being contested. According to one line of thinking, metacognition is thinking about one's own thought.[13] Social metacognition, by contrast, can include thinking about the thoughts of others and thinking about social relationships.[14] Here too, the direct beneficiary of social metacognition is the person who thinks about others' cognition and about social relationships. Thus, the direct beneficiary is the self. However, the purpose of social metacognition will often be to eventually provide an indirect benefit to epistemic others. Later in this dissertation, I will apply ideas from social metacognition to the lawyer's actions leading up to the Client Perjury Trilemma, especially in the earliest stages of the advising context. In the present section, I will restrict myself to metacognition being an endeavour of thinking about one's own thought.

As virtues are means between vices, so too is metacognition a mean between two vices. Hints at identifying these related vices can be seen when Green discusses the feelings and phenomena experienced by agents who do not metacognize virtuously. These feelings and phenomena are associated with the Dunning-Kruger Effect, on one hand, and Imposter Syndrome,

[13] See Pablo Briñol & Kenneth G DeMarree, "Social Metacognition: Thinking About Thinking in Social Psychology" in Pablo Briñol & Kenneth G DeMarree, eds, *Social Metacognition* (New York: Psychology Press, 2012) 1 at 3.
[14] See *ibid* at 4–5.

on the other. The Dunning-Kruger Effect describes an unskilled person's inability to appreciate his/her own ignorance or incompetence, and thus often being overconfident.[15] Imposter Syndrome is a person's feeling of being a phony or a fraud because s/he believes things such as that s/he is not as intelligent as others perceive him/her to be or that his/her achievements are not actually due to his/her intelligence or capabilities.[16] These feelings and phenomena themselves are not the vices, however. They are the result of epistemic vices. The feelings and phenomena described as the Dunning-Kruger Effect and Imposter Syndrome can be associated with several vices, intellectual and otherwise, that contrast with the virtue of metacognition. For example, the Dunning-Kruger Effect may be associated with the epistemic vice of intellectual arrogance and Imposter Syndrome may be associated with the epistemic vice of intellectual servility or "obsessive introspection"[17]. Between such vices stands the virtue of metacognition, which can assist in addressing the problems that these vices cause.

Components of metacognition have been finely divided and subdivided. Some of these components, "monitoring, regulating, adapting, and evaluating", are mentioned in Green's definition of metacognition as an epistemic virtue.[18] Yet, there remains substantial contestation about these components—enough so that they inform different models of metacognition.[19]

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[15] See J Green, "Metacognition", *supra* note 6 at 123, citing Justin Kruger & David Dunning, "Unskilled and Unaware of It: How Difficulties in Recognizing One's Own Incompetence Lead to Inflated Self-Assessments" (1999) 77:6 Journal of Personality and Social Psychology 1121.

[16] See J Green, "Metacognition", *supra* note 6 at 123, citing Pauline Rose Clance & Suzanne Ament Imes, "The Impostor Phenomenon in High Achieving Women: Dynamics and Therapeutic Intervention" (1978) 15:3 Psychotherapy: Theory, Research & Practice 241.

[17] J Green, "Metacognition", *supra* note 6 at 124. Note that Green is not discussing Imposter Syndrome in this passage.

[18] Quoted above at note 7 and accompanying text.

[19] See e.g., Marcel VJ Veenman, Bernadette HAM Van Hout-Wolters & Peter Afflerbach, "Metacognition and Learning: Conceptual and Methodological Considerations" (2006) 1:1 Metacognition and Learning 3 at 3–5; Marcel VJ Veenman, "Metacognition in Science Education: Definitions, Constituents, and Their Intricate Relation with Cognition" in Anat Zohar & Yehudit Judy Dori, eds, *Metacognition in Science Education: Trends in Current Research* (New York: Springer, 2012) 21 at 21 (Veenman observes the "'fuzziness' of the concept [of metacognition] and its constituents"); Pina Tarricone, *The Taxonomy of Metacognition* (London: Psychology Press, 2011), ch 2 "Models of Metacognition".

Exploring in depth the different components and models of metacognition that are part of the ongoing scholarly debate is beyond the scope of this dissertation. Instead, I will briefly lay out some of the key concepts that are helpful for providing an applied virtue epistemology of the legal profession.

> "*Knowledge of cognition* [also called metacognitive knowledge] refers to what individuals know about their own cognition or about cognition in general".[20]
>
> "*Regulation of cognition* [also called metacognitive regulation] refers to a set of activities that help students control their learning".[21]
>
> "*Metacognitive experiences* are any conscious cognitive or affective experiences that accompany and pertain to any intellectual enterprise. An example would be the sudden feeling that you do not understand something another person just said".[22]

Knowledge of cognition is subdivided into "at least three different kinds of metacognitive awareness: declarative, procedural, and conditional knowledge".[23] The former, declarative knowledge, "includes knowledge about oneself as a learner and about what factors influence one's performance".[24] Procedural knowledge is about *how* to do things.[25] Finally, "[c]onditional knowledge refers to knowing when and why to use declarative and procedural knowledge".[26]

> Regulation of cognition has been divided into three skills. They are:
>
> *Planning*, which "involves the selection of appropriate strategies and the allocation of resources that affect [cognitive] performance".[27] Examples include laying out the sequence of a strategy and allocating time for a cognitive task.[28]

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[20] Schraw, *supra* note 5 at 114 [emphasis added]. Accord Flavell, *supra* note 4 at 906, "*Metacognitive knowledge* is that segment of your…stored world knowledge that has to do with people as cognitive creatures and with their diverse cognitive tasks, goals, actions, and experiences" [emphasis added].
[21] Schraw, *supra* note 5 at 114 [emphasis added].
[22] Flavell, *supra* note 4 at 906 [emphasis added]. Examples that Green gives of "epistemic feelings" can be prominent feelings experienced by participants in litigation. Among these feelings include: "the 'tip of the tongue' state", "the 'feeling of knowing'", and the "'feeling of forgetting'", J Green, "Metacognition", *supra* note 6 at 119, citing Santiago Arango-Muñoz, "Metacognitive Feelings, Self-Ascriptions, and Mental Actions" (2014) 2:1 Philosophical Inquiries 145.
[23] Schraw, *supra* note 5 at 114.
[24] *Ibid*.
[25] See *ibid*.
[26] *Ibid*.
[27] *Ibid* at 115.
[28] See *ibid*.

> *Monitoring*, which "refers to one's on-line awareness of comprehension and task performance. The ability to engage in periodic self-testing while learning is a good example".[29] Two key questions related to monitoring are, "Do I have a clear understanding of what I am doing?" and "Does the task make sense?"[30]
>
> *Evaluating*, which "refers to appraising the products and efficiency of one's learning. Typical examples include re-evaluating one's goals and conclusions".[31] Key questions involve asking which things worked and what should be done differently to improve next time.[32]

In metacognitive knowledge and metacognition regulation, we have the capacity to understand our own cognition and the means by which we can take action in relation to our cognition (usually action to improve cognition). Metacognitive experience, the final component that I discuss here, is not as robustly developed as the last two components of metacognition but is nonetheless indispensable to, and unavoidable in, cognition. Moreover, metacognitive experience plays an important role in the truth-finding efforts undertaken within adversarial systems of adjudication. Anastasia Efklides, a professor of cognitive and experimental psychology, describes metacognitive experience as "the interface between the person and the task",[33] "provid[ing] the input that activates metacognitive skills that control action and behaviour".[34] Being overwhelmed by the large volume of documents in a disclosure is a metacognitive experience, as is a witness' feeling of being caught with an inconsistency is his/her testimony. The experience of being overwhelmed by the number of documents in a disclosure can drive the lawyer

[29] *Ibid*.
[30] *Ibid* at 121.
[31] *Ibid* at 115.
[32] See *ibid* at 121.
[33] Anastasia Efklides, "The Role of Metacognitive Experiences in the Learning Process" (2009) 21:1 Psicothema 76 at 78.
[34] *Ibid* at 79.

to consult his/her metacognitive knowledge and to take regulative action that will allow him/her to bring meaningful order to the documents to find the information that will be useful to the client.[35]

Metacognition allows thinkers to take responsibility for their own cognitive development and is thus vital to an epistemology of lawyering. Numerous participants in legal proceedings require, and will benefit from, metacognition. The ways in which participants ought to, and do, engage in metacognition will be heavily influenced by the participants' role in the adversarial system of adjudication. Some roles, such as the lawyer and judge, have extensive declarative, procedural, and conditional knowledge required to perform their role in the legal process. These roles require extensive regulation of cognition, including metacognitive planning, monitoring, and repeated evaluation of one's own cognitive processes and performance. Lawyers and judges will build up a deposit of metacognitive experiences that will inform their metacognition (often in helpful ways but also possibly in stultified ways). By contrast, jurors and non-expert witnesses may have little to no knowledge of their cognition in a way that is relevant for the purpose of being involved in a legal proceeding. They will have highly limited, or no, opportunities to control their acquisition of knowledge about, and for, legal proceedings. Perhaps most anxiety-inducing, infrequent and first-time participants in legal proceedings will have highly limited metacognitive experiences that could add to their metacognitive knowledge or inform efforts at metacognitive regulation.

Legal representation itself can be described, in part, as an offloading of metacognition from the client to the lawyer. When a client is represented by the lawyer, it is the lawyer who takes the bulk of responsibility for assessing his/her own understanding of concepts and facts that are relevant to the case. This offloading is appropriate because the lawyer has specialized training in

[35] Of course, not all cognizers will respond so virtuously to difficult or unpleasant metacognitive experiences. Some cognizers will respond to metacognitive experiences in epistemically vicious ways.

the topic, which comes with much more developed metacognitive knowledge, metacognitive regulation, and much more challenging metacognitive experiences that relate to adversarial legal processes.[36] The lawyer has already done a tremendous amount of metacognition to refine his/her own thinking. This includes basic metacognitive work to become competent about a field in the comparatively lower stakes environment of law school and/or any subsequent professional training. Additionally, after practicing for several years, the lawyer will have done a great deal of metacognitive work under the stresses and stakes of the lawyer's career. The lawyer will hopefully have taken numerous such positive steps that allow him/her to better prepare for adversarial proceedings and have better cognitive reactions during such proceedings. By contrast many clients will have too infrequent experiences with legal processes to develop their metacognition enough that they can deploy it as a disposition in legal proceedings.[37]

Metacognition about the lawyer's own understanding of the facts of a case and about the lawyer's expertise with a field of law are crucial aspects of the lawyer's competence in a case. This applies to the earliest stages of the lawyer's interactions with a client, during which the law assesses whether s/he actually can competently serve the client. A lawyer telling a client that s/he cannot represent him/her in a case because s/he is not competent in a field of law, in dealing with a specific problem, or even that s/he is overburdened with his/her current case load are acts based on metacognition. The lawyer has declarative knowledge about his/her own ability to carry out the cognitive labour required for a task and has the conditional knowledge to know that s/he must act

[36] Lawyers also have metacognitive experiences with the benefit of being more personally distant from the dispute than the client is. A legal representative is involved in what is fundamentally another person's dispute. Of course, lawyers are sometimes deeply entangled in the dispute itself, thus reducing their distance from the situations that create the epistemic experience.

[37] Concerns about the increase in the number of self-represented litigants can be described as concerns about a rise in metacognition by parties (i.e., the self-represented litigant) happening at an inappropriate time (i.e., during litigation). Of course, some clients (especially institutional repeat litigants via the people who work for the institutions) will have the benefit of highly developed metacognition related to legal processes.

on the basis of his/her declarative knowledge, admitting that s/he cannot do that work and taking appropriate action in assisting the client to find other representation.[38]

When a lawyer decides that s/he can become competent in a practice area in a reasonable time to serve the client properly,[39] the lawyer must engage in metacognitive planning to set out the path along which s/he will achieve competence and must engage in metacognitive monitoring to assess his/her own comprehension of the practice area and performance in using his/her newly acquired comprehension to serve the client. If done well, the lawyer can use these aspects of metacognition to have the metacognitive experience of successful learning and application, rather than a metacognitive experience such as stumbling at trial, failing to make a crucial manoeuvre, and being sued or disciplined for malpractice.[40]

Relatedly, the act of asking for an adjournment to prepare for a fact or a legal source that has not been disclosed requires the lawyer to engage in metacognition. In such a case, metacognition begins with the lawyer's experience of being unaware of the information being used by the opposing side. The lawyer's request for an adjournment to prepare a response immediately commences the lawyer's metacognitive planning. Once the adjournment is granted, the lawyer sets to the task of planning how s/he will become knowledgeable about the information, including logistical planning and time allocation. While familiarizing himself/herself with the information, the lawyer must engage in metacognitive monitoring to ensure that s/he is preparing a sufficient

[38] See Federation of Law Societies of Canada, *Model Code of Professional Conduct*, FLSC 2019, online (pdf): FLSC <flsc.ca/wp-content/uploads/2019/11/Model-Code-October-2019.pdf> [perma.cc/U4WA-H2T7] [FLSC *Model Code*], r 4.1-1, commentary 4 (about assisting the client to find other representation after the lawyer has declined to represent the client).

[39] See American Bar Association, *ABA Model Rules of Professional Conduct*, ABA, 2019, online: ABA <www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents/> [perma.cc/5WED-59ZP], r 1.1, commentary 2, 4; FLSC *Model Code*, *supra* note 38, r 3.1-2, commentary 5, 6 (speaking to the lawyer's professional duties when s/he is not yet competent, but can become competent, to serve a client on a matter).

[40] There is a wide swath of malpractice that does not involve intentional wrongdoing can be understood as an exercise in metacognition.

response to give when court resumes. Numerous additional opportunities to practice the various components of metacognition exist in legal processes. Such inquiry can inform both our concepts of metacognition specifically and epistemic virtue more broadly.

Some of the richest benefits of an epistemology of lawyering can be achieved by making the thinking process itself an explicit concern for lawyers. A legal profession that has learned from the epistemology of lawyering should not merely want lawyers to think well in a sense that means nothing more than acquiring information reliably and/or responsibly. Lawyers are already some of the most intellectually adept members of society in terms of their ability to acquire knowledge and reason logically. An epistemically aware legal profession should want lawyers to virtuously take responsibility for their own thinking processes—understanding and evaluating their own acquisition and use of knowledge through metacognition. What I have given here is just a small example of the ways in which metacognition plays into the legal process through the role of the lawyer. Metacognition in law merits its own extended scholarly treatment, focusing especially on legal education. In this dissertation, I will refer again to concepts in metacognition. I will apply concepts in metacognition to explain the way in which the Client Perjury Trilemma applies to the early stages of the advising context,[41] in which the lawyer takes the role of imparting declarative and procedural knowledge to the client, as well as setting the groundwork for the lawyer's own application of procedural knowledge.

[41] Below in Section (7.3.1).

(6) Behavioural Legal Ethics – Science and Knowledge

Every theory that applies to humans and that describes humans relies on some assertions and/or assumptions about human nature, especially human capacities. Epistemologists Roberts and Wood argue that "different conceptions of the human person and his place in the universe yield strikingly different pictures of proper human functioning, and thus of the virtues".[1] One crucial aspect of understanding the human person is done on scientific grounds. Olin and Doris describe virtue epistemology as "empirically committed" to accounts of human cognition.[2] Virtue epistemology makes, and relies on, claims about human psychology that ultimately must respond to challenges and knowledge from sciences that study human cognition. Human psychology will confound purely theoretical approaches to human cognition. Consider the following.

In purely theoretical terms, it would initially seem that the goal of any epistemic agent should be to maximize his/her practice of epistemic virtues. Although the perfect practice of all the cognitive virtues might in theory create the best possible cognizer, actual cognizers have much more complicated relationships with knowledge. Some psychological literature demonstrates that the possession of some cognitive virtues can actually be consistent with less cognitive excellence or achievement in other respects. Consider the example of intellectual humility, which has been conceived of in general terms as "humility specific to the domain of thoughts, beliefs, ideas, and opinions".[3] More specifically, intellectual humility involves "understand[ing] and accept[ing] that [one's] cognitive faculties are not perfect and that [one's] viewpoints may, at times, be erroneous".[4] It is said to "involve[] openness to new information that may improve one's current

[1] Robert C Roberts & W Jay Wood, *Intellectual Virtues: An Essay in Regulative Epistemology* (Oxford: Oxford University Press, 2007) at 67.
[2] Lauren Olin & John M Doris, "Vicious Minds: Virtue Epistemology, Cognition, and Skepticism" (2014) 168:3 Philosophical Studies 665 at 668. Olin and Doris provide a scientifically informed critique of virtue epistemology.
[3] Elizabeth J Krumrei-Mancuso et al, "Links Between Intellectual Humility and Acquiring Knowledge" (2020) 15:2 The Journal of Positive Psychology 155 at 155.
[4] *Ibid*.

knowledge".[5] Intellectual humility is considered an intellectual virtue; it is an epistemically helpful trait that can be expected to support the acquisition of knowledge because intellectually humble people should better understand their own thinking and are open to viewpoints that are different from their own.

Though epistemic humility is a virtue, the scientific effort to understand intellectual humility complicates the picture of how intellectual virtues are associated with intellectual performance. Krumrei-Mancuso et al. found that meeting the "not a know-it-all" aspect of intellectual humility was predictive of a lower grade point average among honours students who participated in the study.[6] The authors also cite research which finds that "intellectual arrogance predicts better course grades".[7] This is not a case of epistemic virtues conflicting, calling for a pluralistic approach that recognizes multiple competing virtues. Rather, it is a case of one particular virtue and one particular vice having results that complicate what it means to pursue epistemic benefits well overall. None of this means that a person should avoid having intellectual humility and instead be intellectually arrogant. It does mean, however, that being epistemically virtuous might involve more than just finding the mean between two vices.

Moreover, the empirical information brought forward by Krumrei-Mancuso et al. shows that virtues are not purely associated with favourable epistemic results and that vices are not purely associated with unfavourable epistemic results. Even if virtues have a strong tendency to lead to favourable epistemic outcomes, some measure of negative might come with the positive in some situations and vice versa. In the legal context, underestimating one's own cognitive abilities and

[5] *Ibid*.
[6] *Ibid* at 160–161. The openness aspect of intellectual humility did not have this association. Further research can surely be done on the direction of causality between the virtue/vice (humility/arrogance) and academic performance.
[7] *Ibid*, citing Benjamin R Meagher et al, "Contrasting Self-Report and Consensus Ratings of Intellectual Humility and Arrogance" (2015) 58 Journal of Research in Personality 35.

performance—a result associated with intellectual humility—may lead a lawyer to be more careful about taking on a case in an area of practice with which s/he is less familiar. This might help the lawyer to abide by his/her professional duty of competence as s/he avoids matters that are outside of his/her expertise. However, underestimating one's own cognitive abilities and performance can come with downsides, perhaps even slowing a lawyer's professional development as s/he underestimates his/her competence for more challenging legal work. These observations about human psychology and virtuous behaviour show that there is a need for more nuanced analysis of the possession and expression of virtues. Cognitive science can inform such research endeavours. It is a poor theory of virtue epistemology that does not respond to this empirical knowledge.

Efforts to understand such nuances between the ideal and reality, and the way in which context influences the examples under discussion, can be greatly enriched by the empirical study of the human mind. A crucial concern in epistemology and psychology is about whether the human mind is capable of doing the things that virtue epistemology calls on it to do, i.e., whether epistemic virtue is psychologically realizable.[8] Applied to the virtue epistemology of lawyering, the question becomes whether the human mind can do the various things that people are supposed to do in the roles that are part of the legal system, including lawyers, judges, juries, witnesses (of the fact and expert varieties), etc. Such complication may call for a distinction between the best possible epistemic character and best actual epistemic character. The best possible epistemic character is possessed by a being who maximizes the epistemic virtues and has them in perfect alignment, leading to perfect epistemic results. The best actual epistemic character is the character of the human being who most fully possesses the epistemic virtues. The lawyer, like any human, can at most fulfill the latter.

[8] See Olin & Doris, *supra* note 2 at 666 (discussing the psychological realizability of epistemological virtues).

Within the academic study of lawyering, the field of behavioural legal ethics is at the vanguard of applying psychological concepts and research methods to lawyers.[9] I will not be able to give any sort of robust scientific account of human nature in this dissertation. A scientific account of lawyers and virtue epistemology would require the consideration of empirical research that goes far beyond the normative focus that I have here. Even so, this brief consideration of scientific accounts of human nature will allow me to present a virtue epistemology of lawyering more carefully, at the very least by acknowledging some empirical questions that pertain to my epistemic approach to the philosophy of lawyering.

(6.1) Avoiding Determinism in Behavioural Legal Ethics

A crucial potential pitfall should be recognized before considering specific arguments that behavioural legal ethics (or any scientifically informed account of human nature) should be part of a turn in the philosophy of lawyering that focuses on the cognition of lawyers. Based on patterns of thinking that can arise in psychology, this pitfall poses problems both for moral reasoning about lawyering and for a virtue epistemology of lawyering. Focusing on the effects of determinism on moral reasoning, Luban and Wendel note, "[P]sychologists sometimes lapse into something like determinism, the view that human moral choice is an illusion".[10] Determinism makes not only moral choice into a delusion; it also turns any attempts to purposefully direct cognitive processes into delusions. Just as one cannot actually make moral choices on determinism (i.e., an agent cannot perform actions other than the actions that the agent actually performed),[11] one cannot make

[9] See generally Jennifer K Robbennolt & Jean R Sternlight, "Behavioral Legal Ethics" (2013) 45:3 Ariz St LJ 1107 (providing the first "comprehensive survey of the implications of psychology for legal ethics", *ibid* at 1113).
[10] David Luban & W Bradley Wendel. "Philosophical Legal Ethics: An Affectionate History" (2017) 30:3 Geo J Legal Ethics 337 at 363.
[11] I am working with a conception of free will that is described as libertarian free will. See generally Timothy O'Connor & Christopher Franklin. "Free Will", *The Stanford Encyclopedia of Philosophy* (Spring 2020), Edward N Zalta, ed, online: Center for the Study of Language and Information, Stanford University <plato.stanford.edu/entries/freewill/> [perma.cc/VQ4R-ZW9M], s 2.5 (explaining different libertarian accounts of free will).

decisions related to one's own cognition if determinism is true. This is a loss for an epistemological theory based in virtue, which introduces ideas such as epistemic character, virtue, and vice. On determinism, the idea of improving one's epistemic character is illusory. Virtuous character traits, rather than being earned or existing through responsible behaviour, become scripted programs that human beings execute. You cannot attempt to improve your conscientiousness. You simply are as conscientious as you were determined to be. If you become more conscientious or less conscientious, you determined to do so. A parallel explanation could be given for vicious character traits. This line of thought into which psychologists sometimes fall risks becoming a reliabilism for machines, not for human beings.

Beyond what determinism implies for choice in abstract terms, Luban and Wendel raise a significant problem that determinism poses for practical reasoning. Luban and Wendel argue that determinism, when used in practical reasoning, can be an excuse to avoid responsibility.[12] They are talking about the effect that a belief in determinism can have on practical reasoning about moral behaviour, but the same critique applies to practical reasoning about epistemic behaviour. The lack of ability to change what one does can be an excuse to engage in bad epistemic practices. Just as one can use determinism as an excuse for doing an action that harms another person, or that fails to do a good thing for another person, one could use determinism as an excuse for failing to listen, not communicating well, being intellectually arrogant, promoting biased reasoning, and even being intellectually dishonest.

[12] See Luban & Wendel, *supra* note 10 at 363. Serious arguments can be raised about determinism and agents, including lawyers. I welcome that discussion as part of a broader philosophy of lawyering. Even so, dealing robustly with such questions is well beyond the scope of what I can hope to achieve in this dissertation. Thus, I will limit myself to a discussion of what Luban and Wendel describe as being the effects of determinist beliefs on practical reasoning.

Within the legal realm, a lawyer might use determinism as an excuse for behaviours such as failing to develop a sufficient understanding of the client's needs, being condescending or paternalistic to the client, being abusive in cross-examining a witness, failing to disclose documents, and even deceiving other parties or the court. Extending even beyond the excuses that one can give to oneself for one's own behaviour, deterministic thinking can too easily offer excuses for problematic answers to cases such as the Client Perjury Trilemma that I discuss as the central case study of this dissertation. This case study raises epistemic considerations about the behaviour of multiple parties at once. To offer just one example, deterministic thinking about the cognition of other participants in the adjudicative process can offer an excuse for the lawyer to avoid exhorting others (especially the client in this case) against epistemically bad behaviour and might even be raised as an excuse for other-regarding intellectually vicious behaviour. Given that, under determinism, people cannot change their own cognitive processes to make them any better than what has been causally determined to happen, determinism in practical reasoning may "simply offer you false comfort as you follow the path of least resistance".[13] With the foregoing pitfalls about psychological research and determinism in mind, this dissertation will reason on the basis that participants in legal processes are not locked into predetermined moral choices or predetermined modes of thinking.

(6.2) Partisanship & Lawyers' Psychology

Returning to the topic of assumptions about human nature, I turn to Andrew Perlman, who raises a question about the structural integrity of theories of lawyering. Perlman identifies an assumption that exists within numerous theories of legal ethics and in relation to which behavioural legal ethics can bring forward challenging empirical research. The objective-partisan assumption

[13] *Ibid*. Note that this criticism also assumes that free will exists and that lawyers actually can make choices. If determinism makes human choice into an illusion, then the comfort is not false and the path of least resistance. The path that is actually chosen would simply be the only possibility.

is the idea that "lawyers are capable of acting as partisans—being affiliated with one side of a matter—while remaining sufficiently objective about their own conduct to resolve ethical dilemmas in the manner theorists prescribe".[14]

When Perlman discusses "partisans", he is not referring merely to the partisanship principle of legal ethics, which says that, "A lawyer must, within the established constraints on professional behavior, maximize the likelihood that the client's objectives will be attained".[15] Perlman is referring to a broader conception that can be used outside of the context of law and that encompasses the partisanship principle in legal ethics. Perlman's broader conception defines partisans as being "people who fit the dictionary definition of a 'partisan,' that is, those who are adherents to, or aligned with, a specific 'party, faction, cause, or person'".[16] Put simply, he is referring to being on a side. This broader type of partisanship itself has effects on human psychology that have gone underexplored in the literature on legal ethics.

The effects of partisanship challenge the objective-partisan assumption and theories that rely on the assumption. The effects include various cognitive biases that can prevent lawyers from accurately assessing their own behaviour, factual matters in the case, and their client's circumstances. Perlman gives the following examples as effects of partisanship. Optimism bias "is the tendency to imagine that our futures are going to be more positive… than we should reasonably expect".[17] Perlman says that optimism bias helps explain why a lawyer might overestimate his/her client's chance of success.[18] Perhaps more troubling, optimism bias is a factor that may lead to ethical fading, which is the experience of "hav[ing] difficulty identifying situations that implicate

[14] Andrew M. Perlman, "A Behavioral Theory of Legal Ethics" (2015) 90:4 Ind LJ 1639 at 1640.
[15] David Luban, "Partisanship, Betrayal and Autonomy in the Lawyer-Client Relationship: A Reply to Stephen Ellmann" (1990) 90:4 Colum L Rev 1004 at 1004 [footnote omitted]. Recall also, above in Section (1.1) at note 5, the account of partisanship given as part of the conditions of traditional models of lawyering.
[16] Perlman, *supra* note 14 at 1643 [footnote omitted].
[17] *Ibid* at 1654 [footnote omitted].
[18] See *ibid*.

ethical concerns".[19] It is a failure to understand that ethical issues even apply to a scenario. One could describe this as a failure of moral sensitivity.[20] Confirmation bias, yet another possible distortion in cognition that can be caused by partisanship, is a person's bias "in favor of information that is consistent with…desired conclusions".[21] In a lawyer, confirmation bias may distort the ability of the lawyer to assess whether the client is complying with the law.[22]

In addition to identifying the need to interrogate the objective-partisan assumption, Perlman offers scientific evidence that weighs against the objective-partisan assumption.[23] That is to say that the evidence counts against the assumption that a person can be a partisan and be objective about his/her own conduct or the conduct of those on whose behalf s/he is a partisan. None of this evidence is conclusive, but it offers important early insights into the psychology of partisans. Perlman cites evidence about the ability of partisanship to distort judgements when group affiliations exist[24] and when individuals have affiliations to causes.[25] His focus there is on the conduct of non-professionals.

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[19] *Ibid* at 1663–1664, n 153 and accompanying text, citing Ann E Tenbrunsel & David M Messick, "Ethical Fading: The Role of Self-Deception in Unethical Behavior" (2004) 17:2 Social Justice Research 223.

[20] Moral sensitivity is one of the four components of James Rest's four component model of ethical decision-making. Neil Hamilton discusses the application of the model to the legal profession. See Neil Hamilton, "Assessing Professionalism: Measuring Progress in the Formation of an Ethical Professional Identity" (2008) 5:2 U of St Thomas LJ 470. The capacities are: moral sensitivity ("the awareness of how an individual's actions affect other people", *ibid* at 485, citing James R Rest & Darcia Narváez, eds, *Moral Development in the Professions: Psychology and Applied Ethics* (Hillsdale, NJ: L Erlbaum Associates, 1994) at 23); moral reasoning and judgment ("deliberation regrading the various considerations relevant to different courses of action and making a judgment regarding which of the available actions would be most morally justifiable", Hamilton, *supra* at 485–486); moral identity and motivation ("'the importance given to moral values in competition with other values…'", *ibid* at 487, citing Rest & Narváez, *supra* at 24); and, moral implementation (the "ego, strength, perseverance, backbone, toughness, strength of conviction, and courage" required to see through moral behaviour, Hamilton, *supra* at 487, citing Rest & Narváez, *supra* at 24).

[21] Perlman, *supra* note 14 at 1656, n 112, citing Linda Babcock & George Loewenstein, "Explaining Bargaining Impasse: The Role of Self-Serving Biases" (1997) 11:1 Journal of Economic Perspectives 109 at 114.

[22] See Perlman, *supra* note 14 at 1656.

[23] See generally *ibid*, Part II B.

[24] The illustration provided is of students at different schools assessing penalties in a football game between their two schools. See *ibid* at 1651.

[25] Perlman cites studies of political partisans who endorse positions that are actually taken by the opposing party when the partisans are told that their own party has made the proposal. See *ibid* at 1652–1653.

More concerning, however, Perlman cites research on the effects that partisanship has on professionals, including lawyers specifically. As an example of a type of non-lawyer professional, auditors at accounting firms "were, on average, more likely to find that the company's financial reports complied with generally accepted accounting principles (GAAP) when they played the role of the company's accountant than when they were assigned to be the investor's accountant".[26] Discussing lawyers, Perlman cites the distorting effects that partisanship has had on the conduct of prosecutors, especially as these distorting effects have had a role in prosecutors' failures to meet their disclosure duties.[27]

For the objective-partisan assumption to be sustained, evidence must show that lawyers behave differently than the examples considered, or arguments must be given about why lawyering is different in terms of the way in which partisanship does or does not distort the cognition of the lawyer on matters that are crucial to practicing the lawyer's role. If role-differentiation, for example, is to be the saving grace of the lawyer, it must be explained what it is about the lawyer's differentiated role, and that place of that roles in the legal system, that addresses the distorting effects of partisanship. The fact that a system calls for partisanship and is built around partisan contests is not sufficient reason to say that the system cannot be harmed by the distorting effects of partisanship. On the contrary, Perlman argues that the legal profession may be particularly vulnerable to the distorting effects of partisanship because partisanship is built into the role of the lawyer; lawyers have exactly that "institutional function".[28] "[L]awyers", Perlman says, "are

[26] *Ibid* at 1655 [footnote omitted].
[27] See *ibid* at 1657, n 121 and accompanying text, referencing *ibid* at 1640, n 4, citing The Editorial Board, "Rampant Prosecutorial Misconduct", *The New York Times* (4 January 2014), online: <www.nytimes.com/2014/01/05/opinion/sunday/rampant-prosecutorial-misconduct.html> [perma.cc/LA9B-3BWD]; Brad Heath & Kevin McCoy, "Prosecutors' Conduct Can Tip Justice Scales", *USA Today* (23 September 2010), online: <usatoday30.usatoday.com/news/washington/judicial/2010-09-22-federal-prosecutors-reform_N.htm> [perma.cc/C527-NJH3]; Alafair S Burke, "Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science" (2006) 47:5 Wm & Mary L Rev 1587.
[28] Perlman, *supra* note 14 at 1656 (explaining lawyers' adversarial institutional function) [footnote omitted].

supposed to make the best case for the client's position".[29] Consequently, the lawyer's partisan work ends up being tied to his/her professional and personal self-worth. Biasing effects can be stronger when people tie their projects and work to their self-worth, thus placing the lawyer at a higher risk of falling into the cognitive biases being discussed.[30]

A word of caution is warranted here. It would be naïve and self-defeating to interpret the objective-partisan assumption so strongly that the presence of the assumption is taken as being a sufficient weakness in a theory to be a defeater for that theory. After all, the person who makes the critique based on the objective-partisan assumption could himself/herself be described as a partisan of his/her own theory and could thus be subject to similar biases that can arise in any partisan. Unless the critic has a meta-theory about addressing assumptions in reasoning, the type of behaviourist critique brought forward by Perlman would be subject to the same critique that he makes of advocates of traditional models of lawyering and advocates of alternative models of lawyering. His own theory would be making assumptions about the objectivity of the advocates of those theories. But this is not how Perlman's arguments should be read. Speaking about lawyers, Perlman says that he is not suggesting that lawyers will never be able to use existing models of lawyering—currently advanced without addressing the objective-partisan assumption—to distinguish between permissible and impermissible behaviour.[31] Perlman's point is that the objective-partisan assumption has gone uninterrogated in legal ethics. His contribution is to both identify this problem and suggest approaches to ameliorate legal practice. Making the objective-partisan assumption is only a problem for a theory if the objective partisan assumption is false.

[29] *Ibid* [emphasis in original].
[30] See *ibid* at 1656–1657 (discussing the risk of bias when projects and work become deeply entangled with a person's self-worth).
[31] See *ibid* at 1645.

Theories as disparate as zealous advocate models of lawyering, alternative models of lawyering, and even the cognitive approach to lawyering for which I am arguing in this dissertation depend on the objective-partisan assumption. If the objective-partisan assumption is false, then key aspects of these competing accounts of lawyering could be undermined. Zealous advocate models "assume[] that lawyers are capable of acting as partisans—representing one side of a matter—and actually *identifying* the line between permissible and impermissible behavior".[32] Perlman challenges the idea that a partisan lawyer is capable of doing everything legally permissible to advance the legal interests of the client, going right up to the line of legality, but not crossing the line into impermissible behaviour. The issue is that, as summarized in the present section, partisanship itself may distort the ability of the lawyer to identify where the line is. Perlman argues, "[I]f the lawyer is encouraged to approach a line that the lawyer cannot clearly identify, the lawyer is at a heightened risk of engaging in impermissible behavior".[33] Impermissible behaviour could involve breaches of codes of professional conduct, or they could also involve crossing from mere-partisanship to hyper-partisanship[34] (an ethical line that the partisan lawyer may not be able to identify because of the cognitive biases brought about by partisanship itself).

Alternative models of lawyering, on the other hand, "assume[] that lawyers are capable of acting as partisans (in the sense of being aligned with one side of a matter) while making independent moral assessments about the client's ends or the selected means".[35] The danger for zealous advocate models was there being too much partisanship, i.e., too much of a good thing from the perspective of zealous advocate models of lawyering. Conversely, alternative models of lawyering run risks related to having lawyers show concern for considerations (e.g., moral

[32] *Ibid* at 1644 [emphasis in original].
[33] *Ibid*.
[34] Discussed above in Section (1.2), notes 54–58 and accompanying text.
[35] Perlman, *supra* note 14 at 1646.

considerations such as justice) that may be opposed to partisanship or that limit the scope of partisanship. Someone who is a partisan may have a different reading of the requirements of justice or other values that alternative models call on lawyers to consider in addition to the law.[36] A partisan who does not see moral requirements as s/he normally does might be more hesitant to raise moral concerns with the client and might be willing to accept more in the way of morally questionable (or even immoral) behaviour from clients (and potential clients) before giving any sort of response.

Similarly, theories of lawyering based on virtue epistemology assume that lawyers are capable of being partisans while practicing epistemic virtues. In a virtue epistemology of lawyering, lawyers must be capable of being partisans and still correctly identifying the boundaries between virtue and vice—especially the mean between pairs of opposing vices. More specifically, lawyers must be able to behave in ways that work with the epistemology of the adversarial legal system within which their epistemically differentiated role exists and which needs their practice of role-differentiated epistemic virtues.[37] If partisanship distorts the lawyer's ability to identify the difference between epistemic virtue and vice, the lawyer risks becoming unable to practice epistemic virtues, even possibly the partisan epistemic virtues that allow lawyers to advance their clients' positions. To put the concern in terms that are the primary focus of this dissertation, partisanship may distort the behaviour of lawyers beyond what the legal system can use to effectively pursue its truth-seeking function through conflicts between partisan champions. For

[36] See *ibid* at 1646–1647 (Perlman applying his critique of the objective-partisan assumption in William Simon's justice-centred Dworkinian theory of lawyering). See generally William H Simon, *The Practice of Justice: A Theory of Lawyers' Ethics* (Cambridge, MA: Harvard University Press, 1998).

[37] This is easier said than done, given that Perlman shows how traditional models of lawyering can have trouble working within the ethical limits of legal systems that have been built with zealous advocacy in mind.

example, confirmation bias might distort epistemic virtues associated with discerning which types of arguments the trier of fact will find persuasive.

The potential problems go even deeper. The cognitive biases created by partisanship pose challenges not only in knowing what virtue requires in a particular situation but also to a person's development of epistemic virtues. Earlier, I discussed the Baehr's principles that a person must fulfill in order to possess an epistemic virtue. These principles include the motivational principle, the affective principle, the competence principle, and the judgment principle. Satisfying the judgment principle requires a disposition to recognize when acting in a way that is characteristic of a virtue would be appropriate.[38] If partisanship interferes with the ability to identify the difference between virtue and vice in particular situations, it can also interfere with the development of the disposition to distinguish between virtue and vice. Dispositions are acquired and/or honed over time. This is potentially a devastating problem for a responsibilist virtue epistemology of law, i.e., a theory of lawyering that depends on lawyers' development of epistemic traits.

Finally, in applying Perlman's critique of the objective-partisan assumption to the virtue epistemology of lawyering, it should be recognized that the virtue epistemology of lawyering stands out from the other theories and philosophies of lawyering that make the objective-partisan assumption and to which Perlman applies his scientifically informed critique of the objective-partisan assumption. This is not because of any special logical relationship between virtue epistemology and psychology. If Perlman's critique shows that the accounts of human cognition to which virtue epistemology and the virtue epistemology lawyering are "empirically committed"[39]

[38] See Jason Baehr, "The Four Dimensions of Intellectual Virtue" in Chienkuo Mi, Michael Slote & Ernest Sosa, eds, *Moral and Intellectual Virtues in Western and Chinese Philosophy: The Turn Toward Virtue* (New York: Routledge, 2016) 86 at 92, discussed above in Section (3.1) at note 21 and accompanying text.
[39] Olin & Doris, *supra* note 2 at 668; see also above at note 2 and accompanying text.

are untrue, then virtue epistemology will be unable to stand. However, this is also the case when it comes to other approaches to lawyering that depend on the objective-partisan assumption, and this which have similar empirical commitments. Logically, theories of lawyering that have a foundational reliance on the objective-partisan assumption will all fail if the objective-partisan assumption is untrue.

However, virtue epistemology in general, and the virtue epistemology of lawyering in particular, have a relationship with psychology that traditional models of lawyering and alternative models of lawyering do not have. This relationship is that psychology and epistemology share some core subject matter and concepts. Their focus is both on the human mind. One comes from science and the other comes from philosophy. In this way, psychology and epistemology are like law and morality, which also share core concepts and subject matter.[40] Making an assumption about something that is studied in another field (as traditional models and alternative models do) and sharing core subject matter are not the same thing. Virtue epistemology and psychology have a potential to collaborate and compete in ways that philosophical ethics and legal philosophy will not interact with psychology.

No silver bullet for bias is found in Perlman's work, psychology more generally, or in theories of lawyering. Responding to a critique of the objective-partisan assumption does not mean

[40] See generally Ralf Poscher, "The Hand of Midas: When Concepts Turn Legal, or Deflating the Hart-Dworkin Debate" in Jaap C Hage & Dietmar von der Pfordten, eds, *Concepts in Law* (New York: Springer, 2009) 99 at 105 (explaining the Midas Theory's account of the relationship between law and morality in relation to their shared concepts). Poscher also argues, "The difference between the relation of the law to moral philosophy on the one hand and other disciplines on the other is not structural but quantitative and qualitative. Quantitatively many, though not all, legal questions have an equivalent in moral or political theory; qualitatively the two disciplines for one thing share some of their most important and crucial concepts, not only profane ones as in the case of meteorology; for another they are both normative disciplines". *Ibid* at 108–09. *Cf* Leslie Green's discussion of necessary connections between law and morality that do not undermine the idea that law can fail to meet moral standards but still be valid law. Green says that law necessarily: "regulates objects of morality", "makes moral claims of its subjects", "is justice-apt", and "is morally risky". Leslie Green, "Positivism and the Inseparability of Law and Morals" (2008) 83:4 NYUL Rev 1035 at 1047–1054.

positing a way for lawyers to be free of bias and thus completely clear minded in their ability to make the discernments that competing models of lawyering need lawyers to make.[41] Advocates of various approaches to lawyering should not aspire to show how our theories of lawyering allow for perfect decisions by our competing visions of objective-partisans. More fruitful responses recognize that partisanship poses dangers, not destinies. There can be reasons to support partisanship and ways in which to mitigate the negative effects of partisanship. The reasons to desire some level of partisanship have been discussed above in Section (4). Thus, I focus here on mitigating the negative effects of partisanship.

Virtue epistemology stands ready for the aim of mitigating the negative effects of partisanship with concepts and language for just this task. The concept of virtue orientation is particularly instructive here. Recall that virtue orientation introduces the idea of self-regarding virtues (virtues that primarily benefit oneself) and other-regarding virtues (virtues that primarily benefit others). Cognitive biases interrupt both directions of benefit. The lawyer himself/herself is prevented by cognitive biases from achieving understanding, or full understanding, about his/her clients' cases. S/he may reduce his/her ability to produce self-regarding epistemic benefits related to the case the case. Consequently, the lawyer's ability to provide role-differentiated epistemic service to the legal system (to help the legal system seek truth as a champion for his/her client) can also be compromised, as there is a diminishment in the lawyer's ability to meet all of the expectations (efficacious and ethical) that are placed on him/her as the client's champion. S/he may advise his/her client in ways that are overly optimistic, may misjudge evidence, fail to speak

[41] I.e., discernments between permissible and impermissible behaviour, above at note 32 for the assumptions of traditional models; discernments about the client's ends and means, above at note 35 for the assumptions of alternative models; and discernment between epistemic virtue and vice, in the case of the virtue epistemology of lawyering.

persuasively to the trier of fact, etc. Thus, the lawyer fails to give the other-regarding benefits upon which the legal system relies.

Though both self and others are epistemically harmed by cognitive biases, the concept of virtue orientation helps us see that addressing cognitive bias is primarily done by benefitting the self epistemically. Other people are often harmed (epistemically, legally, ethically, and otherwise) by another person's cognitive biases, but it is the epistemic self that must grow in order to overcome the biases. The most direct epistemic beneficiary of overcoming biases is (and must be) the person who overcomes the bias. Other parties may also gain an indirect epistemic benefit, as well as other benefits (legal, financial, etc.). Moreover, other parties may also be the most important beneficiaries all-things-considered. However, reducing cognitive bias and the difficulties that partisanship poses in practicing various theories of lawyering requires active engagement by, and epistemic benefit to, the person who holds the biases. Recognizing virtue orientation is helpful in making this prescription for lawyers.

From recognizing biases, I turn to mitigating biases. Perlman's own proposals for dealing with cognitive biases caused by partisanship are highly compatible with virtue epistemology. Perlman's psychological approach and virtue epistemology raise similar concerns and concepts. There is a close connection between what Perlman describes in scientific terms as cognitive biases and what can be described in epistemic terms as epistemic vices (malformed faculties and traits). Perlman gives proposals for dealing better with the risks of cognitive bias. These are not fixes for the biasing effects of partisanship; they are improvements to the lawyer's position in dealing with bias. The proposals include approaches that can be taken by the lawyer, by lawmaking and governing institutions, and by law schools. Among the suggested courses of action are: making prescriptions for appropriate behaviour on the basis of context, debiasing strategies for individuals

and even via substantive law, and teaching law students about cognitive bias.[42] The debiasing strategies that Perlman suggests for individual lawyers include seeking a second opinion,[43] and writing counterarguments to a position that the lawyer is considering.[44] These strategies are themselves subject to the difficulty of even identifying ethical concerns and thus also some crucial situations that would benefit from debiasing strategies.[45] Nonetheless, difficulty is not destiny.

Crucially, the virtue epistemology of lawyering is already ahead of other theories of lawyering in dealing with the critiques that Perlman has made on the basis of the objective-partisan assumption and in implementing Perlman's own proposed responses to bias. Virtue epistemology's advantage comes from its approach, rather than its substantive content. The theories of lawyering that are the target of Perlman's critique of the objective-partisan assumption, like theories of epistemology before the development of virtue epistemology and like moral theories other than virtue ethics (e.g., deontology and consequentialism),[46] are based on an approach to the norms of lawyering that defines abstract conditions for the satisfaction of concepts or roles and assessing whether individuals meet those abstract conditions. In the case of lawyering, the abstract standards are ones such as traditional models' zealous advocate or alternative models' lawyer who pursues justice. Whatever the existing standard, the person is measured against the maxim. Perlman does not criticize these theories for taking this approach, but the responses that he proposes to the cognitive biases associated with partisanship—solutions that require looking to the agent rather than an abstract standard—involve a different conceptual move.

[42] See Perlman, *supra* note 14 at 1662–1669 (explaining these options).
[43] A strategy that will be revisited below, in Section (7.3), as a response to the Client Perjury Trilemma, though not as a debiasing strategy.
[44] See Perlman, *supra* note 14 at 1663 (explaining the named strategies for lawyers).
[45] See *ibid* at 1663–1664. Perlman explains that the problem called "ethical fading", which itself can result from cognitive biases, makes it difficult to identify ethical problems.
[46] Theories that take these competing approaches—aretaic and non-aretaic—are discussed above in Section (3.1).

Perlman's responses to bias resemble proposals made by theorists who take an aretaic (virtue theory) approach to their field. His debiasing strategies are not centred around finding a principle or set of principles to which the lawyer can adhere. Rather, they are based around improving the lawyer's cognitive capacities and traits. This same focus is what distinguishes virtue epistemology from previous approaches to epistemology and the virtue epistemology of lawyering from previous efforts in the philosophy of lawyering. The form of Perlman's response to the biases caused by partisanship are already baked into virtue epistemology, whereas they can merely be grafted onto non-aretaic theories such as traditional models of lawyering and alternative models of lawyering.

Virtue epistemology itself moves away from the practice of focusing on abstract principles as definitions of knowledge. In dealing with Perlman's critique, virtue epistemology has the advantage over traditional models and alternative models (both ethical theories) of leaning on its own core idea of developing capacities and traits to achieve epistemic ends. In this vein, achieving ends related to cognition, whether the goals are philosophical, pedagogical, or empirical would benefit from more robustly considering ways of being, rather than achieving any one particular static status. This dissertation has highlighted that need and hopes to be an early step in achieving that aim collaboratively across disciples.

Part V – The Trilemma Lemma

This dissertation has explored a number of theories and concepts from the philosophy of lawyering in depth. I have explored debates about the ethics of lawyering, developments in the philosophical study of epistemology, proposed an epistemic approach to the philosophy of lawyering, and explored ways in which adjacent approaches to the study of cognition can my epistemic theory of lawyering. Throughout, I have given illustrations using examples in legal practice. What is left to do is consider a sustained application of my virtue epistemology of lawyering, drawing out nuances in my theory that cannot otherwise be understood well.

(7) Freedman's Client Perjury Trilemma

The case study that will be the central focus of the remainder of this dissertation is Monroe Freedman's Client Perjury Trilemma. Classic and controversial, this case study illustrates key aspects of an epistemological approach to the philosophy of lawyering while pushing concepts in my epistemology of lawyering to their limit. The Client Perjury Trilemma exists because of a conflict that can arise between core values of the legal profession. Though being an example that is rarely experienced by lawyers and being particularly high stakes, the problem and potential answers are widely analogizable to existing debates in legal ethics. This trilemma thus provides a helpful basis for comparing the way in which an epistemology of lawyering can interface with existing philosophies of lawyering and deal with similar (though less severe) tensions that exist widely in everyday legal practice. Thus, I present the following discussion of the Client Perjury Trilemma with the aim of both answering a difficult challenge to the epistemic ideas that I am presently advocating and demonstrating a widely applicable way in which an epistemology of lawyering can interface with existing philosophies of lawyering.

(7.1) The Trilemma

With the aim of directly facing a difficult and controversial problem, Freedman asks the question, "Is it ever proper for a lawyer to present perjured testimony?"[1] Freedman arrives at this question because he identifies three obligations that the adversarial system of adjudication imposes upon the lawyer and that can conflict with one another, creating a trilemma, in which not all three duties can be fulfilled simultaneously.[2] Putting the trilemma broadly and in strong terms, Freedman says that, "[T]he lawyer is required to know everything, to keep it in confidence, and to reveal it to the court".[3] More specifically, the lawyer is required to (1) "determine all relevant facts known to the accused" (a basic need for competent representation), (2) "hold in strictest confidence the disclosures made by the client in the course of the professional relationship" (a basic need for building and maintaining client trust), and (3) as an officer of the court, show candour to the court (a basic need for the fair exchange of information in the adversarial system) in presenting the client's case.[4] I will refer to these duties together as the IKP duties (standing for investigate, keep, and present). An IKP trilemma can theoretically exist in many legal practice contexts, even outside of criminal law. The central scenario to which Freedman applies his analysis, and which raises some of the most severe problems, is the criminal defence litigation context in which a client wants to give perjurious testimony—hence, the Client Perjury Trilemma. In this dissertation, I will

[1] Monroe H Freedman, "Perjury: The Lawyer's Trilemma" (1975) 1:1 Litigation 26 [Freedman, "Lawyer's Trilemma"] at 26.

[2] Some scholars and courts have described the problem discussed in Part V of this dissertation as a dilemma, identifying the contradicting duties differently. The dilemma is usually posed as a conflict between the lawyer's duty to the court (especially duties against misleading the court) and the lawyer's duty to the client (especially the duty of confidentiality). I regard the problems described as being fundamentally the same as Freedman's trilemma. Posing the problem as a trilemma that includes the lawyer's duty of competence adds important nuance to the problem.

[3] Freedman, "Lawyer's Trilemma", *supra* note 1 at 26. I describe the "require[ment]…to know everything", ibid, less strongly below at note 12 and accompanying text.

[4] *Ibid*. Ayers raises a basic tension in civil litigation that is less severe, and that has important analogies to the Trilemma, when he notes that a defence lawyer in a civil discovery "is obligated both to facilitate discovery in good faith and to protect the interests of her client", Andrew B Ayers, "What if Legal Ethics Can't be Reduced to a Maxim?" (2013) 26 Geo J Legal Ethics 1 at 56. These are duties and constraints that, if not in direct conflict with one another, can be in tension.

specify whether I am referring to an IKP trilemma or specifically to the Client Perjury Trilemma (herein "the CP Trilemma").

Freedman identifies the relevant provisions in codes of professional conduct that can lead to an IKP trilemma. He does this in multiple articles[5] over the course of decades, as ABA codes of professional conduct have developed—from the *Canons of Professional Ethics*, to the *Model Code of Professional Responsibility*, and now the *Model Rules of Professional Conduct*.[6] The following are the presently applicable provisions in the ABA *Model Rules* and the FLSC *Model Code*. In the current ABA *Model Rules*, duties to obtain knowledge (to investigate, in my IKP framework) about the facts of a client's case are found in Rule 1.1—Competence—which says that:

> A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.[7]

The ABA's Comments on the *Model Rules* further specify:

> Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners.[8]

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[5] See generally Monroe H Freedman, "Symposium on Professional Ethics: Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions" (1966) 64:8 Mich L Rev 1469 [Freedman, "Three Hardest Questions"]; Freedman, "Lawyer's Trilemma", *supra* note 1; Monroe H Freedman, "Client Confidences and Client Perjury: Some Unanswered Questions" (1988) 136:6 U Pa L Rev 1934 [Freedman, "Client Confidences"]; Monroe H Freedman, "In Praise of Overzealous Representation – Lying to Judges, Deceiving Third Parties, and Other Ethical Conduct" (2006) 34:3 Hofstra L Rev 771 [Freedman, "Overzealous Representation"]; Monroe H Freedman, "Getting Honest About Client Perjury" (2008) 21:1 Geo J Legal Ethics 133 [Freedman, "Getting Honest"]; Monroe H Freedman, "Lawyer-Client Confidentiality: Rethinking the Trilemma" (2015) 43:4 Hofstra L Rev 15.

[6] See American Bar Association, *Canons of Professional Ethics*, Chicago: ABA, 1963; American Bar Association, *ABA Model Code of Professional Responsibility and Code of Judicial Conduct*, as amended 1980, Chicago: ABA, 1981 [ABA, *Model Code*]; American Bar Association, *ABA Model Rules of Professional Conduct*, ABA, 2019, online: ABA <www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents/> [perma.cc/5WED-59ZP] [ABA *Model Rules*].

[7] ABA *Model Rules*, *supra* note 6, r 1.1.

[8] *Ibid*, r 1.1, commentary 5. During Freedman's early writing on the CP Trilemma, the ABA, *Model Code of Professional Responsibility*, the professional code of conduct that was then in force, said, "A lawyer should be fully informed of all the facts of the matter he is handling in order for his client to obtain the full advantage of our legal system. It is for the lawyer in the exercise of his independent professional judgment to separate the relevant and important from the irrelevant and unimportant", ABA, *Model Code*, *supra* note 6, EC 4-1.

Additionally, the ABA's *Criminal Justice Standards for the Defense Function*[9] further add that, "Defense counsel should explain, at an appropriate time, the necessity for frank and honest discussion of *all facts known to the client* in order to provide an effective defense".[10]

Similarly, when it comes to acquiring the facts of a client's case, Rule 3.1-2 of the FLSC *Model Code*—Competence—requires that:

> A lawyer must perform all legal services undertaken on a client's behalf to the standard of a competent lawyer.[11]

Just prior, Section 3.1-1 specifies that:

> In this section, "Competent lawyer" means a lawyer who has and applies relevant knowledge, skills and attributes in a manner appropriate to each matter undertaken on behalf of a client and the nature and terms of the lawyer's engagement, including:
> …
> (b) *investigating facts*, identifying issues, ascertaining client objectives, considering possible options and developing and advising the client on appropriate courses of action.[12]

The requirement is to seek factual knowledge at a level that can be reasonably expected of a legal professional, not to actually have all the relevant knowledge. In this way, the requirement resembles virtue epistemology, which is about capacities, traits, and approaches to acquiring knowledge, rather than meeting abstract conditions for having a specific piece of knowledge. Moreover, the acquisition of factual knowledge *from the client* is a special concern in relation to the CP Trilemma because the ability of lawyers to acquire factual knowledge from the client is

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[9] American Bar Association, *Criminal Justice Standards for the Defense Function* (ABA, 2017, 4th ed), online: ABA <www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition/> [perma.cc/DAU5-LEVW] [ABA *Standards* 2017]. The ABA *Standards* outline best practices for fields of law. They do not add duties to the ABA *Model Rules*. However, they are useful for understanding the aims of the legal profession. See generally *ibid*, Standard 4-1.1.

[10] *Ibid*, Standard 4-3.1(a) [emphasis added].

[11] Federation of Law Societies of Canada, *Model Code of Professional Conduct*, FLSC 2019, online (pdf): FLSC <flsc.ca/wp-content/uploads/2019/11/Model-Code-October-2019.pdf> [perma.cc/U4WA-H2T7] [FLSC *Model Code*], r 3.1-2.

[12] *Ibid*, r 3.1-1 [emphasis added].

acutely at risk when the CP Trilemma is raised, especially if resolutions of the CP Trilemma undermine the ability of clients to trust lawyers to keep information confidential.

Speaking of which, the requirement that I have described as keeping client information refers to well known duties of confidentiality. Rule 1.6 (a) of the ABA *Model Rules*—Confidentiality of Information—states that:

> A lawyer shall not reveal information relating to the representation of a client….[13]

Correspondingly, Rule 3.3-1 of the FLSC *Model Code*—Confidential Information—provides that:

> A lawyer at all times must hold in strict confidence all information concerning the business and affairs of a client acquired in the course of the professional relationship and must not divulge any such information….[14]

Subsequent portions of the respective sections in the ABA *Model Rules* and FLSC *Model Code* explain the exceptions to confidentiality; these exceptions do not apply to the CP Trilemma.

Finally, for my present purposes, duties related to the presentation of the client's case are those rules that protect the court from being misled by lawyers. Rule 3.3 of the ABA *Model Rules*—Candor Toward the Tribunal—requires that:

> (a) A lawyer shall not knowingly:
>
> (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
> …
> (3) offer evidence that the lawyer knows to be false.[15]

The commentary to Rule 3.3 additionally specifies that:

> [A]lthough a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.[16]

[13] ABA *Model Rules*, *supra* note 6, r 1.6 (a).
[14] FLSC *Model Code*, supra note 11, r 3.3-1.
[15] ABA *Model Rules*, *supra* note 6, r 3.3.
[16] *Ibid*, r 3.3, commentary 2.

In the FLSC *Model Code*, Rule 5.1-1—Advocacy—stipulates that

> When acting as an advocate, a lawyer must represent the client resolutely and honourably within the limits of the law, while treating the tribunal with candour, fairness, courtesy and respect.[17]

The commentary to Rule 5.1-1 then explains:

> In adversarial proceedings, the lawyer has a duty to the client to raise fearlessly every issue, advance every argument and ask every question, however distasteful, that the lawyer thinks will help the client's case and to endeavour to obtain for the client the benefit of every remedy and defence authorized by law. The lawyer must discharge this duty by fair and honourable means, without illegality and in a manner that is consistent with the lawyer's duty to treat the tribunal with candour, fairness, courtesy and respect and in a way that promotes the parties' right to a fair hearing in which justice can be done.[18]

Additionally, Rule 5.1-2—Advocacy—also states:

> When acting as an advocate, a lawyer must not:
> …
> (b) knowingly assist or permit a client to do anything that the lawyer considers to be dishonest or dishonourable;
> …
> (e) knowingly attempt to deceive a tribunal or influence the course of justice by offering false evidence, misstating facts or law, presenting or relying upon a false or deceptive affidavit, suppressing what ought to be disclosed or otherwise assisting in any fraud, crime or illegal conduct.[19]

The IKP requirements, wherever they happen to be found in professional codes or legal norms, relate to the need for lawyers to be competent, to keep client confidences, and to deal honestly with the court. In most cases involving litigation, the IKP requirements work together harmoniously or can be reconciled.[20] The lawyer may need to balance the duties, but the fulfillment

[17] FLSC *Model Code*, supra note 11, r 5.1-1.
[18] *Ibid*, r 5.1-1, commentary 1.
[19] *Ibid*, 5.1-2.
[20] A transactional lawyer may rarely be in a position for the IKP duties to conflict. Transactional lawyering requires the lawyer to know the client's circumstances and to keep information about the client confidential, but the duty to present information to a tribunal may never become operative. Of course, it would be too simple to believe that duties related to presenting information are completely removed in the case of transactional lawyering. Even in a transaction, parts of negotiations about the transaction may require the revealing of information from one party to another or from one party to a regulatory body (e.g., disclosures made during the processes of mergers and acquisitions).

of each duty is consistent with the fulfillment of the other duties. The lawyer can learn about the facts of the case, the lawyer will be permitted to keep the information that the lawyer has learned about the client's case confidential to an appropriate extent, and the lawyer can assist the client in pursuing his/her legal and practical interests via an honest presentation of knowledge to the court (especially factual knowledge for my present purposes).

If the IKP duties were routinely in irresolvable conflicts with one another, the adversarial system of adjudication would not function properly. Copious insuperable conflicts could lead to lawyers regularly failing to properly investigate the facts of the case, failing to keep the client's information confidential (which would likely result in future clients being uncooperative with lawyers' efforts to investigate the facts of cases), or lawyers presenting incomplete or misleading information to the court. This would be the result of lawyers attempting to provide legal services to the client while failing to meet the requirements of at least one of the IKP duties. Another possibility would be that lawyers might simply have to withdraw from representing such cases, since they could not provide legal services to the client while abiding by their professional responsibilities as lawyers. Clients in the latter case may have difficulty finding legal representation at all. In any of these cases, lawyers—the combatants in the adversarial system of adjudication—would be unable to be competent champions for their clients.

To pinpoint conflicts between the three duties, it is helpful to recall the difference between positive evidence and negative evidence, which are classifications of evidence as either helpful or harmful to a client's case, respectively.[21] In relation to positive evidence, the IKP duties are mutually supporting. With the information being helpful to the client's case, the client is able to

[21] Explained above in Section (2.2), especially notes 29–30 and accompanying text, citing William J Talbott & Alvin I Goldman, "Games Lawyers Play: Legal Discovery and Social Epistemology" (1998) 4:2 Legal Theory 93 at 95; Alvin I Goldman, *Knowledge in a Social World* (Oxford: Clarendon Press, 1999) at 301.

readily offer the relevant positive information to the lawyer, the evidence does not normally raise problems for the lawyer in keeping confidentiality, and the client can be happy to disclose positive evidence information to the court. The previous sentence is slightly tentative because there may still be aspects outside of the legal merits of the dispute that create some level of tension between the IKP duties, even if that tension is ultimately resolved. For example, even with respect to positive evidence, the client may not be comfortable disclosing all positive facts because some of these facts may be embarrassing to the client or may cause the client to lose some sort of advantage outside of the legal merits of the case. Even when a trilemma does not arise between the IKP duties because the evidence is positive for the lawyer's client, this does not mean that the IKP duties exist a tensionless relationship.

Even so, for lawyers, it is negative evidence that more likely brings out tensions and even conflicts between the IKP duties. Earlier, I discussed Goldman and Talbott's argument that parties are not incentivized well to disclose negative evidence.[22] The same incentives can make it difficult to abide by the IKP duties in the criminal defence context. Notably, clients may be disinclined to reveal all negative evidence, even to their own lawyer under the protection of lawyer-client confidentiality.[23] If the client is reluctant to share negative evidence, including possibly with the lawyer, then even the lawyer who competently seeks to acquire all relevant information may not be able to acquire the level of factual knowledge to competently represent the client. Additionally, lawyers may be disincentivized against presenting evidence and making arguments honestly when the lawyer has acquired negative evidence from the client. In more mild cases (which may well be the vast majority of cases) the tensions between the IKP duties are resolvable, i.e., all duties can

[22] Above in Section (2.2).
[23] See Freedman, "Three Hardest Questions", *supra* note 5 at 1473.

be fulfilled. However, Freedman deals with situations in which the IKP duties are not only in tension, but actually conflict with one another, resulting in an IKP trilemma.

Freedman presents the following example of such a conflict between the IKP duties in the criminal law context, which generates the CP Trilemma.

> Your client has been falsely accused of a robbery committed at 16th and P Streets at 11:00 p.m. He reveals to you that he was at 15th and P Streets at 10:55 that evening, but that he was walking east, away from the scene of the crime, and that, by 11:00 p.m., he was six blocks away. At the trial, there are two prosecution witnesses. The first mistakenly, but with some degree of persuasiveness, identifies your client as the criminal. The second prosecution witness is an elderly woman who is somewhat nervous and who wears glasses. She testifies truthfully and accurately that she saw your client at 15th and P Streets at 10:55 p.m. She has corroborated the erroneous testimony of the first witness and made conviction extremely likely.
>
> The client then insists upon taking the stand in his own defense, not only to deny the erroneous evidence identifying him as the criminal, but also to deny the truthful, but highly damaging, testimony of the corroborating witness who placed him one block away from the intersection five minutes prior to the crime.[24]

Freedman positions the example as one in which the reader knows that the client has been falsely accused. The lawyer's knowledge about the facts of a case can have consequences in terms of the options that are available to the lawyer seeking to provide the client with an ethical (and possibly even an epistemically virtuous) defence.[25] However, readers of this dissertation and lawyers (in the actual situation) can know that the CP Trilemma exists[26] even without being

[24] Freedman, "Lawyer's Trilemma", *supra* note 1 at 27–28.

[25] See ABA *Model Rules*, *supra* note 6, r 3.1 (prohibiting lawyers from bringing or defending a proceeding "unless there is a basis in law and fact for doing so"), though note that the prohibitions in r 3.1 "are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim or contention that otherwise would be prohibited by this Rule", r 3.1, commentary; FLSC *Model Code*, supra note 11, r 5.1-1, commentary 10 (limitations on defence counsel when "the accused clearly admits to the lawyer the factual and mental elements necessary to constitute the offence").

[26] Raising a serious concern from behavioural legal ethics, Perlman applies his analysis about the objective-partisan assumption to the CP Trilemma. Perlman notes that partisanship itself, as understood in social psychology, can interfere with the lawyer's ability to identify that the CP Trilemma has arisen. Not only is the lawyer dealing with the difficulty of the trilemma, but s/he is subject to the cognitive biases that are created by partisanship itself. These biases may make a lawyer more likely to pursue a course of action, giving preference to one aspect of the trilemma. This is not a resolution of the normative problem that results from the Trilemma, but rather a description of the phenomena that are likely to influence decision-making by lawyers faced with the trilemma. I offer the following explanation of the way in which partisanship itself can interfere with the lawyer's ability to address the CP Trilemma. A lawyer is

convinced of (or knowing for certain) the client's guilt or innocence of the offence with which s/he has been charged. All that must be known to identify the CP Trilemma is that the IKP duties conflict in such a way that they cannot all be fulfilled together because the client intends to put forward a version of events in testimony about which the lawyer can "reasonably draw[] an *irresistible conclusion* of falsity from available information…a conclusion that not even a zealous but honest partisan could deny".[27]

The narrative that the client gives to the lawyer about the facts of the case and the client's communication to the lawyer of his intention to deny the truthful testimony suffices for the CP Trilemma to be evident. IKP duties conflict in this example in response to negative evidence against the client's case, i.e., testimony from one witness that the client is the person who committed the crime and testimony from a second witness that places the client close to the scene of the crime around the time of the crime. In this case, the lawyer has already achieved the duty of investigating facts so s/he can competently represent the client.[28] Of special note for my purposes here, among the factual evidence, the lawyer knows that the client was at the location that the second witness specifies; the client has told the lawyer this. The lawyer must continue to fulfill the confidentiality requirement and must present the client's case with candour to the court. The

prohibited by the ABA *Model Rules* from offering testimony that the lawyer *knows* to be false, ABA *Model Rules*, *supra* note 6, r 3.3(a)(3) and r 3.3, commentary 8. Perlman argues that partisanship increases the risk of the lawyer concluding that s/he does not meet the standard of *knowing* that the client's testimony will be false. See Andrew M Perlman, "A Behavioral Theory of Legal Ethics" (2015) 90:4 Ind LJ 1639 at 1645. The specific prohibition against knowingly offering false testimony would thus not be violated even if the client were to facilitate the false testimony. In this lawyer's view, one of the horns of the CP Trilemma—based on duties against deceiving the court—might thus not even be engaged. S/he mistakenly thinks that s/he is not facing the CP Trilemma. She should see the problem, but s/he does not. The concern expressed here is that partisanship can elevate the risk of the lawyer failing to see when zealousness in defence of the client has made him/her unable to correctly identify when s/he is crossing the line from permissible partisan advocacy into impermissible partisan advocacy. Answering such an objection is beyond the scope of this dissertation.

[27] David Layton & Michel Proulx, *Ethics and Criminal Law*, 2d ed (Toronto, CA: Irwin Law, 2015) at 338 [emphasis in original]. See generally *ibid* at 338, note 37 covering the jurisprudential and scholarly approval accorded to this test of "knowing" about the falsity of assertions of fact.

[28] Below, especially in Section (7.3.1), I will consider examples in which investigation of facts is the IKP duty that is sacrificed.

client's desire to commit perjury creates the conflict. If the lawyer facilitates the client in presenting false testimony, then the lawyer knowingly participates in the deception of the court. At the same time, the lawyer cannot reveal the client's deception without breaching the duty of confidentiality. Notably, for the American context, the ABA *Model Rules* do not permit the lawyer to decline to offer as evidence the defendant's testimony in a criminal law matter, even if the lawyer *reasonably believes* that the testimony is false.[29] In Canada too, the dominant line of opinion among commentators and courts supports the client's authority to determine whether to testify and allows the lawyer to withdraw from representing the client if facilitating the client's testimony would violate the lawyer's legal and ethical obligations.[30] The analysis given in these paragraphs demonstrates that Freedman's example presents a conflict between the lawyer's IKP duties to investigate, keep, and, present. It is a client perjury trilemma.

(7.2) Mapping the Client Perjury Trilemma Using Virtue Epistemology

The existence of situations like the CP Trilemma is expected in virtue theory, whether virtue ethics or virtue epistemology, because virtue theorists often accept a plurality of values into their theories. This means that virtue theorists "believe that there are multiple intrinsic values in the world, and that these values can't be reduced to any one super-value like human dignity or well-being or utility".[31] The epistemic values that pertain to the CP Trilemma, and lawyering duties that create the CP Trilemma if the right facts arise, will normally be consistent with one another, even as they require skill to practice and virtue to apply properly. In the vast majority of cases, there will be no conflict between the lawyer determining the facts of the case from the client for

[29] See ABA *Model Rules*, *supra* note 6, r 3.3 (a) (3) and r 3.3, commentary 7. This same rule does, however, permit the lawyer to refuse to offer the client's testimony if the lawyer *knows* that the client's testimony will be false, *ibid*, r 3.3, commentary 9. The rules also give the lawyer the vital leeway of refusing to offer false testimony when that testimony is given by a third party or by the client outside of a criminal matter, *ibid*, r 3.3(a)(3), rule 3.3, commentary 5–9.
[30] See generally Layton & Proulx, *supra* note 27 at 351–353.
[31] Ayers, *supra* note 4 at 42.

the benefit of the lawyer's own competence, maintaining the client's confidence, and being candid with the court. The values and duties may come into conceptual tension, but this tension will usually be resolvable. However, since virtue theories recognize that values cannot be reduced to a single master value, virtue theory also recognizes that the values will sometimes come into conflict with one another and that this conflict can be more profound than a tension that is ultimately resolvable with enough careful deliberation.

The ability to begin dealing with tensions between values requires an important skill and its related virtue. Ayers identifies the skill of tolerating tension and the disposition to tolerate tension at the right times[32] as a combination of a faculty-virtue and trait-virtue that are crucial to dealing with conflicts between norms. Without this capacity and trait, the agent may be hampered in addressing the issues at stake. He observes that, "Different lawyers have different capacities. For some lawyers, struggling on the horns of a dilemma may lead to nothing more than unproductive guilt and self-berating".[33] Being able to live with the scenario is crucial to attempts to resolve, or otherwise respond to, the conflicting norms.

Even prior to the specific virtue epistemic issue raised by the CP Trilemma, the epistemic context of witness testimony in an adversarial litigation context—and the tensions created by this context—must be understood. During witness testimony, the lawyer hopes to exercise other-regarding epistemic virtues so as to contribute to the knowledge of the judge and/or jury (the triers of fact) such that the legal result of the adversarial process will be in his/her client's favour, i.e., so that his/her client will win the trial. The lawyer thus has secondary *epistemic* goals (goals related to the procedural carrying out of the legal process) that pertain to his/her primary *legal* goals (goals related to the substantive aim of a legal process). At a level even removed from that, the lawyer's

[32] See *ibid* at 54–55.
[33] *Ibid* at 55.

contribution to the knowledge of epistemic agents other than the judge and/or jury may be relevant to the lawyer's purposes but is only incidentally relevant to the persuasive activity that the lawyer is performing on behalf of the client in a trial and during witness testimony. Hence, the opposing lawyer and his/her client may also be the epistemic beneficiaries of the lawyer's exercise of epistemic virtue in conducting examination or cross-examination of a witness. In a more detached way, the court reporter, any readers of the transcript of the trial, and anyone who receives information about the trial that is based on the transcript will also be beneficiaries of the process of testimony in the adversarial system.[34]

Witness testimony is a part of adversarial litigation in which the lawyers (i.e., the champions of the litigants) have a reduced ability to control the process of conveying information to epistemic others. More so than during other parts of a trial, epistemic agents besides the lawyer also influence the flow of information and may come from perspectives that are friendly, adverse, or neutral to the lawyer's (and thus the client's) epistemic and legal goals. The second of these three possibilities—participants adverse to lawyer and his/her client—is especially determined by the epistemic nature of the adversarial process.[35] Adverse participants will oppose, resist, contradict, etc. the efforts of a particular lawyer to serve his particular epistemic and legal goals. At the same time, even the actions of a friendly or neutral witness may not offer information in a way that perfectly serves the lawyer's aims. The lawyer may be able to direct the course of the

[34] Document discovery is another example in which tensions arise between values and duties. The primary or immediate beneficiaries of epistemically virtuous document disclosure are the opposing client and his/her lawyer. Secondary beneficiaries of document discovery, *via* presentation of the discovered evidence by opposing counsel, are the judge and/or jury. Additionally, there may be more removed/incidental but wide-ranging beneficiaries, such as the public, if some information that is in the public interest is revealed during document discovery and certainly if it is presented at trial. The incidental beneficiaries of the presentation at trial include the court reporter, any readers of the transcript of the trial, and anyone who receives information about that trial that is based on the transcript, as was the case with witness testimony.

[35] This is not to say that influence from parties who are favourable, or neutral, to the lawyer's epistemic and legal interests is unrelated to the epistemic nature of the adversarial process.

testimony through the questions that s/he asks, but s/he relies on witnesses' answers to supply the information or perspective that is the focus of witness testimony. The witness can throw the lawyer off his/her intended message or make the lawyer adjust his/her approach to the behaviour of the witness. The lawyer must also deal with the opposing lawyer's interactions with the witness and with the other lawyer's attempts to frame the testimony given by the witness. Additionally, the judge structures the disclosure of information by administering procedural rules that govern the process of witness testimony. The lawyer is thus working alongside other epistemic agents who can control the epistemic outcome depending on their own practice of epistemic virtues.

A crucial element of social tension in witness testimony is that a lawyer sometimes has the epistemic aim to steer the judge and/or jury into making an unfavourable epistemic evaluation of some witnesses (i.e., not believing those witnesses who are giving evidence that is negative to the client's cause). Such social tensions can be better understood by distinguishing between what I will call a "concordant epistemic context" (or, more succinctly, a "concordant context") and "discordant epistemic context" (or a "discordant context"). In a concordant context, all participants and observers want all epistemic agents to behave in an epistemically virtuous way in the context and want all participants to be known to behave in an epistemically virtuous way by the other participants. In the vast majority of contexts to which a virtue epistemic analysis applies, we would at least hope for concordance. A collaborative research effort is (or can be) a concordant context. Researchers want the contributors to the project to behave in epistemically virtuous ways (e.g., being honest in reporting their data) and would want all of the contributors to be known to behave in epistemically virtuous ways. Much more mundanely and on a smaller scale, an appointment for a yearly physical with a family doctor is a concordant epistemic context. The doctor and patient want to be epistemically virtuous in relation to one another and are pleased to mutually implicitly

(or possibly even explicitly, if the interaction so warrants) recognize one another's epistemic virtue during the consultation.

By contrast, in a "discordant context",[36] participants in the context want other participants to be believed to be comparatively worse at practicing, or to not at all be practicing, the epistemic virtues that are relevant to the context. The epistemic and/or non-epistemic goals of one or more parties depend on participants making such negative, or less favourable, conclusions about other participants. Many competitive scenarios that require the demonstration of epistemic virtue are discordant epistemic contexts. Job applications often create such dynamics, as do proposals for government contract. Applicant for jobs want to appear to be better at the skills and aptitudes (some of which are intellectual) that are required on the job. The most discordant contexts are those that involve disputes in which epistemic performance is relevant.

In some sense, all, or a vast number of, trials in the adversarial system of adjudication create an obvious discordant context, especially when the facts of a case are in dispute. The epistemic discordance of an adversarial trial is on display during witness testimony, especially when a lawyer attempts to demonstrate that a witness is failing, or has failed, during the testimony

[36] There may be space to further distinguish between concordant, marginally concordant, non-concordant, and discordant epistemic contexts. These terms would indicate various levels of epistemic unity of purposes and interests between epistemic agents. Marginal concordance would indicate the presence of a weak unity of purpose and interests. Non-concordance would include contexts in which concordance is not relevant and possibly situations in which there is no concordance, but there is also no discordance.

In addition to distinguishing between levels of concordance, distinctions can be drawn between the ways in which concordance or discordance arises. One distinction would be between whether concordance/discordance arises by design or as a matter of fact. Contexts may be designed to feature concordance or discordance. Additionally, concordance and discordance may arise as a factual matter that can align with, or differ from, what the context is designed to create. The broader context of the adversarial system is discordant by design, as has been explained throughout this dissertation. The narrower advising context in the lawyer-client relationship is concordant by design, promoting candidness between lawyer and client to facilitate the free flow of information and candidness advice. Despite the design, the contexts may or may not be factually concordant/discordant to varying extents. Litigants may look at, and treat, one another more or less favourably—and virtuously—than the adversarial system envisions. Lawyers and clients may have more discord (e.g., view one another with more or less trust) than the context is designed to feature. In this dissertation, and in the CP Trilemma, I deal primarily with broad litigation contexts that are discordant by design and discordant in fact.

to practice epistemic virtue. Such failure to practice epistemic virtues in the discordant context of witness testimony can be understood as the failure to practice faculty-virtues or trait-virtues that are relevant to giving an accurate account of the facts of a case.[37] An example of a failure to practice a faculty-virtue is being unable to remember key details about the facts of a case. A failure to demonstrate trait-virtues, particularly egregiously, would be a witness being dishonest in his/her testimony, thus violating his/her witness oath.

Even in a discordant epistemic context, epistemic virtues can facilitate a successful epistemic system. Indeed, this is the central aim behind the adversarial system of adjudication. The adversarial system deals with a dispute—itself a discordance—by structuring the aspects of discordance into a system for truth-seeking and dispute resolution. Participants in the system (especially lawyers on behalf of clients) use their virtues to advance competing interests in the discordant context. The participants also use their vices to advance their interests; the system differentiates the role and normative status (virtue or vice) of their actions within the system from their role and normative status outside of the system. These are the features of epistemic partisanship explained above in Part III and Part IV, especially Section (3.4),(4.2), and (4.3). When epistemic virtues and vices (or what would be merely vices if they were not role-differentiated) are structured into a functioning system, the legal and practical discord at the level of individuals can become harmonies of knowledge-seeking at the level of the system.

During witness testimony, participants in the discordant context of the adjudicative system can, with varying degrees of success, practice numerous epistemic virtues, including self-regarding virtues and other-regarding virtues. If the client is going to give testimony during the trial, the lawyer and the client giving testimony ought to both engage in self-regarding and other-regarding

[37] I am here recognizing the importance of both reliabilist and responsibilist approaches to virtue epistemology.

epistemically virtuous behaviour. As noted earlier, the division between self-regarding epistemic virtues and other-regarding epistemic virtues should not be taken too strictly. The client's practice of other-regarding virtue with the lawyer is to the direct epistemic benefit of the lawyer. Of course, the client is seeking the epistemic benefit of the lawyer so that the lawyer may, in turn, act in the epistemic benefit of the jury and the judge, and, ultimately, in the legal benefit (and perhaps other practical benefit) of the client. The lawyer seeks the same chain of other-regarding epistemic benefit, with the lawyer's own economic benefit at the end of the chain. Ideally, there are also moral or political ends that the lawyer seeks, such as the promotion of the rule of law, fairness, etc.[38]

Keeping the focus on the priorities of this dissertation, the lawyer must practice epistemic virtues in relation to the facts of the case. These virtues include those that are generally applicable to the lawyer's work; epistemic partisanship has been my focus in this dissertation. However, they also include virtues that are specific to the context of witness testimony. The lawyer practices reliabilist and responsibilist virtues to obtain, understand, and prompt the client to communicate the facts of the case in a way that is helpful to the legal argument that the lawyer is presenting on behalf of the client. Reliabilist virtues relevant to the lawyer's work in the discordant context of witness testimony include questioning and listening skills as well cognitive skills required to organize information and communicate information effectively. The client too must practice numerous reliabilist virtues related to accurate perception of the facts of the case, as well as communication skills both when the client is speaking to the lawyer privately and giving testimony before the tribunal. If the client fails to perceive the facts of the case properly, then his/her testimony could be epistemically like the testimony given by the elderly woman in the fact scenario

[38] The explanation of these last benefits is done under theories of philosophical legal ethics that are grounded in moral and/or political philosophy, discussed above in Section (1.1) and Section (1.2).

summarized above to illustrate the CP Trilemma.[39] The testimony would be given in good faith but be mistaken.

Responsibilist virtues have been the key focus of this dissertation and are centrally at stake in the discordant context of witness testimony in adversarial litigation, including the CP Trilemma. As with reliabilist virtues, lawyers and clients must also practice numerous responsibilist virtues to aid in satisfying the epistemic needs and structures of the adversarial system. Exploring these virtues is the work of a treatise on the virtue epistemology of witness testimony. For my present purposes in mapping the CP Trilemma, it will suffice to focus on the epistemic virtues that pertain to the IKP duties. During this discussion, I refer to both duties and virtues. I have said that I do not reject perspectives on the philosophy of lawyering that emphasize duties. Such perspectives make important contributions to the applied theory of lawyering. I will explain the virtues in the epistemic map of witness testimony and the CP Trilemma in relation to the duties of the lawyer. At the same time, my own priorities are aretaic, relating to the development of professional ways of life that allow the lawyer to perform his/her role in discordant contexts and the legal system's application to those contexts.

As described above, the lawyer is required—during a legal dispute that leads to litigation—to (1) "determine all relevant facts known to the accused" (needed for competent representation), (2) "hold in strictest confidence the disclosures made by the client in the course of the professional relationship" (needed for building and maintaining client trust), and (3) "show candour to the court" (needed for the fair exchange of information in the adversarial system) in presenting the client's case.[40] The lawyer is required to investigate, keep, and present facts about the case. Even

[39] Above in Section (7.1) at note 24.
[40] Above in Section (7.1) at note 4 and accompanying text, citing Freedman, "Lawyer's Trilemma", *supra* note 1 at 26.

with respect to the IKP duties, numerous epistemic virtues could be relevant. This is particularly the case with the lawyer's duty to investigate the facts of the case as part of the duty of competence. Responsibly investigating the facts of a case can be supported by several epistemic virtues, including virtues that can be practiced over a long term relating to developing and maintaining cognitive acuity and being conscientious, as well as virtues practiced in each specific case, such as being disposed to dedicate the proper thoroughness to the investigation of facts. Dispositions to know how to exercise such behaviours in service of the partisan epistemic needs of the client within the adversarial system are virtues. The duty to keep client confidence is supported by a disposition to know when and how to keep client information from being known by people to whom the lawyer is not required, or permitted, to disclose. This virtue could be described as the disposition to be a confidant, a person who can be trusted with secrets. A single word that might readily capture this virtue is discretion, as in being discreet. Finally, for the virtues that correspond to the IKP duties, the lawyer's ability to fulfill his/her duties in presenting client information to the court is grounded in the lawyer's practice of the epistemic virtue of honesty when dealing with the tribunal.

The client's responsibilities relate primarily to the first and third of the IKP duties. The client's disposition to be appropriately candid with the lawyer about the facts of the case (i.e., completely candid about all matters about which the lawyer requires information to achieve competence about the case) is a vital virtue to receiving legal representation that is informed by sufficient investigation of the facts. If the client will be providing testimony to the court, the client's honesty in giving the testimony is vital for the lawyer's presentation of the client's case in facilitation of the lawyer's partisan role within the adversarial system. As the lawyer must be honest in eliciting information from the client, so too must the client be honest in responding to

the questioning before the court. The client's honesty is also legally mandated as part of the legal requirements for giving witness testimony. This is merely a brief mapping of the duties and virtues that lawyers and litigants are expected to fulfill in the discordant epistemic context of witness testimony in the adversarial system.

This discordant context, which is part of the regular functioning and truth-seeking processes of the adversarial system of adjudication, is what the lawyer faces in the scenario that Freedman narrates[41] before the client expresses an intention to commit perjury. In Freedman's fact scenario, the lawyer needs to raise a doubt that the first witness (who mistakenly identified the client as the person who committed the robbery) has failed in some way to perform an epistemic virtue—likely a reliabilist virtue such as accurate perception. The lawyer can also show that a factual conclusion should not be drawn from the second witness' truthful testimony. The lawyer must advance these assessments of the witnesses' testimony while himself/herself practicing epistemic partisanship and all other relevant epistemic virtues just summarized.

As the IKP duties conflict in the CP Trilemma, so too the epistemic virtues by which the lawyer makes his/her contribution to the functioning of the adversarial system in the context of witness testimony are disrupted in the CP Trilemma. The accused in a criminal trial has a right to not be compelled to testify in his/her own trial.[42] The accused may testify, but his/her testimony must be given in accordance with the obligation that the adversarial process places on witnesses to give truthful testimony. The client's plan to practice the epistemic vice of dishonesty prompts the conflict. Crucially, dishonesty in witness testimony is not a vice or otherwise undesirable

[41] Above in Section (7.1) at note 24.
[42] See US Const amend V; *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 11(c).

behaviour that the adversarial system has shaped to serve its purposes.[43] The legal system has provisions to check the client's practice of the vice of dishonesty (e.g., questioning by opposing counsel), but the epistemic vice of dishonesty is not a positive contributor to the system's functioning.

As the client intends to practice the vice of dishonesty by committing perjury, the lawyer loses the ability to perfectly practice the virtues that support the IKP duties. In Freedman's particular scenario, the lawyer has already exercised the epistemic virtues needed to investigate the facts of the case well enough to meet that aspect of being a competent lawyer. The lawyer cannot now unknow the facts—nor should an epistemically virtuous lawyer want to become incompetent by failing to know the facts.[44] In the scenario discussed here, the lawyer is actually faced with a conflict between practicing the virtue of being a confidant and the virtue of honesty. If the lawyer facilitates the client's perjurious testimony, then the lawyer fails to practice the epistemic virtue of honesty. At the same time, the lawyer must not prevent the client from committing perjury in a way that is inconsistent with the virtue of being a confidant.[45] Lawyers in other cases will be faced with other difficulties in practicing IKP-supporting virtues. When competence has not already been achieved (or has not yet been achieved), there may be numerous conflicts between virtues, since so many virtues support the lawyer's achievement of factual competence. Centrally, the common virtue epistemic problem when the CP Trilemma arises is that

[43] Above in sections (2.2), (3.4), (4) for discussions of how the legal system shapes even vices and many other behaviours (even ones that are ethically and epistemically unhelpful in other contexts) for its purposes.
[44] Below in Section (7.3.1), I explore a response to the CP Trilemma that is based in not investigating all the facts of the case: selective ignorance.
[45] As explained above at note 29 and accompanying text, the ABA's *Model Rules* are particularly constrained because lawyers in criminal cases are not permitted to decline to introduce the client's testimony if the lawyer *reasonably believes* that the testimony is false. To be permitted to refuse to offer the testimony, the lawyer must *know* that the testimony is false.

the lawyer cannot practice all of the virtues that support, and that are necessary to meet, the IKP duties.

Before concluding this section, I will say something brief about epistemic volition in the CP Trilemma. In Section (8) of this dissertation, assessing Freedman's response to the CP Trilemma, I will discuss the volition of the lawyer. However, as I begin my analysis of the CP Trilemma, it is also relevant to ask about the client's volition, as the client's volition might inform the epistemic analysis that we have of proposed responses to the CP Trilemma. Certain responses to the CP Trilemma may be difficult to carry out[46] or inappropriate[47] for a client who exhibits epistemic malevolence or certain kinds of epistemic malevolence. The vital question about the client's volition is whether the client in the CP Trilemma—the client who intends to commit perjury—is epistemically malevolent. Specifically, does the CP Trilemma necessarily involve an epistemically malevolent client or are there features of the CP Trilemma that make it highly likely that the client will be epistemically malevolent?

As stated earlier, Baehr defines epistemic malevolence as opposition to the epistemic good. This opposition can be: impersonal or personal,[48] intrinsic or instrumental,[49] and exists when an epistemic agent's opposition to the epistemic good is "robustly volitional, active, and 'personally deep'".[50] The distinction between impersonal epistemic malevolence and personal epistemic malevolence informs my analysis here.[51] Impersonal epistemic malevolence is opposition to the

[46] E.g., dissuasion or withdrawal (in a way that does not do a disservice to the next lawyer). It may be very difficult to dissuade an epistemically malevolent client or to withdraw from representing this client while keeping him/her from misleading his/her next lawyer into facilitating perjurious testimony or otherwise performing an epistemic vice in the trial.
[47] E.g., the narrative testimony approach. The pitfalls of the narrative testimony approach are already difficult with a client who intends to lie, not to mention one who has enemized the epistemic good.
[48] See Jason Baehr, "Epistemic Malevolence" (2010) 41:1/2 Metaphilosophy 189 [Baehr, "Epistemic Malevolence"] at 193.
[49] See *ibid* at 191–192.
[50] *Ibid* at 190 [emphasis removed].
[51] This distinction is discussed above in Section (4.1) and explained therein at notes 17–20 and accompanying text.

abstract notion of the epistemic good, whereas personal epistemic malevolence is opposition to someone's participation in the epistemic good. Nothing in the CP Trilemma itself involves necessarily enemizing the abstract good or being highly likely to enemize the abstract good. This is not to say that there could not be a client in the CP Trilemma who is impersonally epistemically malevolent. The CP Trilemma is compatible with (i.e., can feature) a client who opposes the abstract notion of the epistemic good, but the CP Trilemma does not necessarily involve such a client. Moreover, the CP Trilemma does not have features that act as a motivation for impersonal epistemic malevolence, or in any other way make it highly likely that the client will oppose the abstract epistemic good.

The question about whether the client is personally epistemically malevolent is more difficult to resolve. The details of the CP Trilemma itself suggest that clients in the trilemma might necessarily be personally epistemically malevolent or might be highly likely to be so. In particular, the client who intends to commit perjury wants to prevent, limit, or control, the way in which the court, especially the trier of fact, participates in the epistemic good. Depending on the extent of the perjury in the case, the client might not want the trier of fact to participate in the whole truth about the facts of the case (on the high end of personal epistemic malevolence) or in some smaller factual element of the case (on a lower end that may or may not actually reach the level of malevolence). The client takes some level of negative posture towards the epistemic good of the trier of fact on an instrumental basis, rather than on an intrinsic basis. The client's opposition to the epistemic good of the trier of fact is aimed at securing a favourable legal result for himself/herself. In its most broadly worrisome description, the client might be described as having enemized the adversarial system of adjudication itself (i.e., the proper functioning truth-seeking of the system) and thus the system's participation in the epistemic good. The system relies on an

honest articulation of positions and presentation of facts; the client in the CP Trilemma opposes this to some extent.

At the same time, the wide range of situations to which the CP Trilemma could apply also indicates that it may simply be unwarranted to attribute even personal epistemic malevolence to clients in the CP Trilemma. The epistemic and legal aims of the client in any particular scenario will be different. Every client's motivation to commit perjury will be different. There is wide scope for mitigating factors, or factors that suggest against classifying the client as epistemically malevolent. The client may even qualify for a volitional status that Baehr leaves open when giving his account of epistemic malevolence. In a footnote on his paper about epistemic malevolence, Baehr says:

> While I do hope to identify the defining features of epistemic malevolence, I want leave open the question of whether epistemic malevolence is always or necessarily intellectual or epistemic vice. Specifically, I wish to leave open…the possibility of a person who is epistemically malevolent in sense I lay out, but whose malevolence is driven by a sufficiently epistemically appropriate ultimate motivation, such that it is not really an intellectual vice.[52]

In Freedman's example of the CP Trilemma above, the client does not want to deceive the trier of fact about the overall case. The client's legal interests are jeopardized by the testimony given by the two witnesses and the client wants to neutralize this risk to save his own legal interests. The client's personal epistemic malevolence would extend at most to the trier of fact acquiring knowledge about a particular fact in the case (about the client's presence in a location) that would lead the trier of fact to arrive at a false overall judgment about the facts of the case. A morally and epistemically bad act (deception) is being intentionally performed by the client in order that a lesser epistemic bad (the jury being led to believe mistaken testimony corroborated by

[52] Baehr, "Epistemic Malevolence", *supra* note 48 at 190, n 2.

testimony that is honest but mistaken) that was unintentionally performed by the witness does not result in the highly negative legal, moral, and epistemic result of a false conviction.

Arguably, the client is seeking to help the third party in the wrong way, i.e., to help the jury reach the overall right conclusion in the case using illegitimate means—deception—to keep the jury from being incorrect about a part of the whole truth in the case. It is unclear whether fixing a serious epistemic wrong (i.e., the mistaken conclusion that the client committed the offence) by epistemically vicious means should be described as vicious malevolence, malevolence that is not a vice (i.e., personal epistemic malevolence that is not a vice), or perhaps not as malevolence at all. Does the client who wants to pursue such a path oppose the participation of the trier of fact in the epistemic good? Of course, it is not only truly innocent clients who will wish to deceive the court for their instrumental benefit; truly guilty clients will want to succeed at instrumental deception as well, and possibly much more often than innocent clients. In such a case, the client might be better characterized as making an epistemic enemy of the jury as s/he seeks to act to their epistemic detriment by deceiving them to reach an incorrect factual conclusion.

The numerous possible characterizations of the client's behaviour and intentions suggest that there may be a wide swath of client intention and behaviour in the CP Trilemma, some of which is epistemically vicious but that falls short of malevolence and *enemizing* the ability of another participant in the legal process (most notably, the trier of fact) to participate in the epistemic good. Other intentions might oppose the epistemic good of a participant in the legal process but may not be epistemically vicious. I can reach few conclusions about the client's epistemic volition here, but the considerations about nuances in client motivations should at least temporarily rule out broad assessments about clients in the CP Trilemma being necessarily, or likely, epistemically malevolent.

With this map of the epistemic terrain, we understand the way in which the adversarial system of adjudication uses the virtues and even vices of disputants to structure the search for truth in the system and the way in which the CP Trilemma disrupts this function. In my consideration of responses to the CP Trilemma, especially Freedman's own response, I will refer to IKP-supporting virtues and to the virtue of epistemic partisanship, which touches every aspect of the lawyer's role in the adversarial system.

(7.3) Responses to the Trilemma

Responses to the CP Trilemma are multitudinous and cover many stages of the lawyer-client relationship. The responses are not limited to the immediate advising context after becoming aware that the client wants to commit perjury or to the examination of the witness during sworn testimony. I will comment on multiple responses to the CP Trilemma, comparing and contrasting them with one another and with Freedman's answer to the CP Trilemma. I will discuss possible responses to the CP Trilemma in the order in which they would be available to the lawyer during the course of the lawyer-client relationship and during legal proceedings. I will begin with responses that are available to the lawyer as early as the outset of the lawyer-client relationship (largely in anticipation of conflicting responsibilities) and end with responses that are available to the lawyer after the client has committed perjury. I will, however, save Freedman's response for last. Freedman's own answer—which is for the lawyer to give preference to the duties of competence and confidentiality by presenting the client's perjurious testimony in the normal way that a lawyer would present client testimony that the lawyer did not suspect to be perjurious—is the central applied focus of my analysis in this dissertation. I will thus consider the following responses to the CP Trilemma in this order: selective ignorance, dissuasion, withdrawal from representation, narrative testimony, disclosure of perjury, and Freedman's proposal to assist the client to testify in the normal way.

My evaluative criteria for responses to the CP Trilemma will be based in virtue epistemology, especially the virtue of epistemic partisanship. Moreover, this analysis will be influenced by social epistemic considerations[53] about the functions of the adversarial system. As I go through these responses to the Trilemma, in the remainder of this dissertation, I recall Bradley Wendel's insight as he says, "Telling lawyers either to flat-out lie to a judge or to knowingly introduce perjured testimony is the kind of uncompromising stance that riled up Monroe's critics. The alternatives, on the other side, would be just as troubling—a fact that critics often prefer to gloss over".[54] We cannot praise or condemn a response to a normative problem without understanding what that response aims to address, what the alternative courses of action aim to do, and what the alternatives sacrifice.

In line with my caution about judging Freedman's answer to the CP Trilemma too quickly, I want to recommend against a related rush to judgment that Freedman himself makes about judging people's decisions and priorities as they deal with conflicting norms and dispositions. We should not rush to judge a person who makes a decision or who proposes a certain course of action in dealing with a difficult normative decision. I do not mean any of this to suggest a simplistic prohibition against making normative judgments about other people. Normative domains cannot function without the ability to make judgments. Instead, my caution about making judgments is based in an informed understanding about the complexity of developing, and adhering to, ethical and epistemic ways of being. We do not have to walk a mile in someone else's shoes to make judgments about that person, but we do have to take account of what is required for someone to walk and why someone might prefer to walk a different path.

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[53] See Goldman's veritistic standards, discussed above in Section (2.1) at note 15–16 and accompanying text, citing Alvin I Goldman, "Foundations of Social Epistemics" (1987) 73:1 Synthese 109 [Goldman, "Foundations"] at 128–129.

[54] W Bradley Wendel, "Monroe Freedman: The Ethicist of the Non-Ideal" (2016) 44 Hofstra L Rev 671 at 675–676.

Giving the example of a friend who was opposed to the death penalty, Freedman explains that looking at a person's decisions can reveal the person's true priorities much more so than the person's stated preferences.[55] Freedman's friend lamented that he would not be allowed to serve on a jury because the questionnaire given by the Jury Commission to jurors asked about a potential juror's view on the death penalty. Potential jurors would have been disqualified if they had indicated that they opposed the death penalty. Freedman challenges his friend, saying that "his conduct was inconsistent with his asserted ethical priorities".[56] From his friend's unwillingness to lie about his views on the death penalty, Freedman concludes that the friend actually values telling the truth to the Jury Commission more than having the power to vote in a death penalty case. Using language similar to this dissertation's approach to character, Freedman argues, "[W]hen ethical values are in conflict, our decisions show what our true priorities are. In making a series of such decisions, therefore, we create a kind of ethical profile of ourselves".[57] A different way to put this using the language of virtue ethics might be that a person's decisions provide indications about what his/her actual dispositions are.

About the general principle that actions provide insights (sometimes more revealing insights than words) into a person's true priorities, Freedman is correct. However, it is important to avoid applying this principle too quickly or without sufficient openness to different explanations, as it could well be argued that Freedman has done in his example. It does not follow that a person prioritizes one value over another, or even does not truly hold a value, just because s/he would not commit a wrongful action (even a wrongful action that would be far lesser in consequences than the positive consequences that the wrongful action could achieve). In the first

[55] See Monroe H Freedman, "Lawyer-Client Confidences Under the A.B.A. Model Rules: Ethical Rules Without Ethical Reason" (1984) 3:2 Criminal Justice Ethics 3 at 3.
[56] *Ibid*.
[57] *Ibid*.

place, one might not subscribe to the consequentialist reasoning[58] that is the basis of Freedman's argument here, which allows the commission of one wrongful action (lying) in order to produce what the agent considers to be a positive action (preventing the use of the death penalty).

Second, Freedman makes the error of assuming that reasoning can only be done on the basis of the scenario with which the agent is immediately faced. If one could only consider the consequences of the current scenario—being a juror on a death penalty case—then Freedman's act-consequentialist reasoning[59] would correctly describe the ethical priorities of someone applying consequentialist reasoning to the scenario. However, people who are considering the possibility of lying in order to be selected as jurors who can then prevent the death penalty from being applied may well be considering the possibility that negative consequences can arise from the lie. Another concern of the prospective juror may be that, though they oppose the death penalty, they simply cannot take proper account of the multitude of factors that could come into play if they personally make the decision to disrupt the system by breaching its rules (in this case, rules against lying to the court). Thinking in epistemic terms, the concern may be that the potential juror cannot take sufficient account of the factors that would affect the situation of s/he were to they lie to disrupt a system that relies on the truthfulness of its participants.

Delaware's history with the death penalty is illustrative of reasons to be more cautious than Freedman is when deciding whether or how to act—and whether or how to judge other people's

[58] See generally Walter Sinnott-Armstrong, "Consequentialism", *The Stanford Encyclopedia of Philosophy*, (Summer 2019), Edward N Zalta, ed, online: Center for the Study of Language and Information, Stanford University <plato.stanford.edu/archives/sum2019/entries/consequentialism/> [perma.cc/BJY6-AKGH], which most defines consequentialism as "simply the view that normative properties depend only on consequences".

[59] "*Act consequentialism* is the claim that an act is morally right if and only if that act maximizes the good, that is, if and only if the total amount of good for all minus the total amount of bad for all is greater than this net amount for any incompatible act available to the agent on that occasion", *ibid* s 1 [emphasis in original]. Act consequentialism is most prominently contrasted with rule consequentialism, "which makes the moral rightness of an act depend on the consequences of a rule", *ibid*. Rule consequentialism is more concerned with the consequences of a behaviour over numerous scenarios and can thus better tolerate choices in favour of a course of action that does not produce the best consequences in a particular scenario.

decisions. Delaware modelled its sentencing law for capital punishment after Georgia's capital punishment law.[60] The Delaware law created a two-stage trial. The jury made a determination about guilt for first-degree murder in the first stage and, if the accused had been found guilty of first-degree murder, determined the sentence in the second stage.[61] Imposing the death penalty required a unanimous decision by the jury. 11 out of 57 death-penalty cases (19%) resulted in a death sentence while this system was in place from 1977-1991.[62] There was a perception that juries were lenient in terms of rarely imposing the death penalty. This issue came to a head in 1991, when the jury in a murder case—in which four men killed two armoured car guards—did not impose the death penalty on any of the four men.[63]

The public and political outrage about sentencing in the case led to the state of Delaware adopting a different sentencing system for first-degree murder trials. Under the new system, when juries convicted a defendant of first-degree murder, the trial would enter a different penalty phase in which jurors would make findings about mitigating and aggravating factors, but in which the final sentencing authority was given to the judge.[64] When Delaware adopted the system in which judges determined death sentences, 31 out of 58 death penalty cases (53%) were given death sentences. From the perspective of a person who opposes the death penalty, this is a negative result. Summarizing their findings, Hans and her co-authors write:

> In 1991, the Delaware legislature moved the central responsibility for capital sentencing away from juries to judges. Legislators were motivated to do so because, in their view, Delaware juries were overly reluctant to give death sentences in appropriate cases. They anticipated that replacing the jury with the judge would

[60] See Valerie P Hans et al, "The Death Penalty: Should the Judge or the Jury Decide Who Dies?" (2015) 12:1 J Empirical Legal Stud 70 at 74.
[61] See *ibid* at 74.
[62] See *ibid* at 86.
[63] See *ibid* at 75.
[64] See *ibid* at 75–76, nn 30, 32 and accompanying text. Hans et al cite the legislative history on the bills that brought about the changes in legislation and a piece that tracks the way in which the case was used rhetorically to push the change in the sentencing process.

> increase the likelihood that capital murders would be punished by death sentences. Our findings confirm that they were right.[65]

The point here is not to say that acting against a system that one opposes (i.e., the sentencing system) using means that are unsanctioned by the legal system (in this case, a lie about one's stance on the death penalty) will lead to negative results. Some of history's greatest progress has been achieved using strategies such as civil disobedience against unjust regimes. It is also true that no single juror's reluctance to give a death sentence can be blamed for the instatement of a sentencing system that led to more death sentences. However, the legislative change that produced more death sentences was motivated by the public's, and legislators', view of jury behaviour.

The point here is that understanding the consequences of action that disturbs a complex social system is difficult. If a person refuses to covertly act against the system using deception, that does not necessarily indicate that the person places a higher priority on telling the truth than s/he does on his/her opposition to the death penalty. Not only are our ethical and epistemic profiles complex, but the way in which ethical and epistemic profiles are developed is complex. If the complications that I have raised here are considered in response to what Freedman's friend has said, it becomes unclear how his friend's statements add to his friend's ethical profile. Without having more information about the friend than the fact that his friend was unwilling to lie to get on a death penalty jury, it cannot be known what his friend's true priorities are or what his friend's ethical profile is.

Freedman is right that a person's decisions create a sort of ethical profile of the person. This profile matters a great deal and is a core concern of virtue-based theories of ethics and epistemology. However, the profile is a combination of the actions, intentions, reasoning, and perhaps other factors that are opaque to other people. Individuals should even be careful about

[65] *Ibid* at 96.

overestimating their knowledge of their own cognition. Psychological factors briefly explored in this dissertation may impede a fully honest and complete analysis. To some extent, this means that we may never have a complete ethical and virtue epistemic profile of a person because we often only ever have fleeting insights about the factors underlying the profile. Since we have incomplete information about the factors that underlie a person's actions, and thus the elements that going into shaping a person's ethical and epistemic profile, we should take caution about discussing an actual person's actions in a particular situation and especially expanding that discussion to a person's overall profile.

When applying virtue epistemic analysis to actual people who are dealing with the CP Trilemma, one of the most important epistemic virtues for observers and commentators to practice is intellectual humility. Humility is vital in avoiding the false attribution of intentions and reasoning to the agents whose behaviour the observer/commentator may be judging. At the same time, we should not concede too much about the inaccessibility of factors that underlie decision-making. We can draw inferences between a person's actions and what his/her intentions and reasoning are likely to have been. As an analogy, the criminal process relies on our ability to make some level of determinations about a person's intentions and reasoning, though those determinations are a small sliver of a person's complete ethical and epistemic profile. Being humble in making judgments a factor in another real person's decision-making does not imply the factor's inscrutability.

It could be argued that the importance given to information that often cannot be accessed makes it too difficult to apply my epistemology of lawyering. I do not at all regard the difficulty of accessing crucial information, and the resultant tentativeness of application to actual cases, as being fatal to the theory that I am proposing any more than such limitations are weaknesses of any

other domain of knowledge that has not yet achieved complete knowledge (i.e., any human domain of knowledge). Recognizing such limitations is a great advantage of a normative theory, allowing us to better appreciate the requirements of fair-mindedly applying the theory.

Moreover, the caution taken in applying the theory to actual people does not have to impinge upon the articulation and demonstration of the theory. Thus, in the subsequent sections of this dissertation, I will analyze various approaches to the CP Trilemma from a perspective that enjoys access to more information in the hypothetical than is typically available to the onlooker of an actual situation. Such information may only later, or perhaps never, become accessible to parties who are not directly involved in the situation. In particular, I will examine different intentions and reasoning that lawyers, and even other participants in a litigation process, might have while they deal with the CP Trilemma. Granting myself access to this information about the hypothetical will allow me to provide greater insights about what can be done with a virtue epistemic analysis when information that is normally only available to a small number of people can be use in the analysis. I am thus calling for, and exercising, boldness in theory but caution in the application of the theory to any other specific person.

Finally, before moving directly into a consideration of responses to the CP Trilemma, I want to briefly address a course of action that a lawyer is well advised to take when faced with a wide array of difficulties related to practice: seeking advice from another lawyer. At a certain point in the deliberative process, especially if the lawyer has exhausted his/her own knowledge and understanding,[66] the lawyer's deliberative process must seek the counsel of another lawyer. Any theory of lawyering inspired by virtue theory should give prominent place to the need to receive legal advice about dealing with professional challenges, including the CP Trilemma.

[66] The intellectual humility needed to recognize and seek guidance, along with virtuous responses to the guidance, is itself vital to the lawyer's own deliberative process.

The ABA *Model Rules*[67] and the FLSC *Model Code*[68] both permit the lawyer to disclose confidential information to another lawyer in order to obtain advice about the lawyer's compliance with his/her own professional duties. The protection given to the lawyer under these rules is, in some sense, a profession-wide metacognitive plan—a selection by the legal profession of an appropriate strategy for the lawyer to inform himself/herself, and confirm his/her understanding of, the professional duties that the lawyer must respect in challenging situations.[69] Moreover, structures exist to facilitate the seeking of a second opinion, including counsel assigned to this role in large firms and ethics hotlines run by the legal profession's own regulatory bodies.[70]

Seeking advice from another lawyer will often be enhanced by metacognition on the part of the lawyer who is seeking advice: the lawyer advisee. The lawyer advisee will almost inevitably engage in metacognitive monitoring, which is defined as, "[O]ne's on-line awareness of comprehension and task performance",[71] in which the cognizer asks, "Do I have a clear understanding of what I am doing?" and "Does the task make sense?"[72] The lawyer advisee will also have metacognitive experiences of dealing with the Trilemma. S/he may experience frustration with his/her own inability to deal with the client's intent to commit perjury. If the lawyer cannot think his/her way out of the CP Trilemma on his/her own, the lawyer may experience frustration at his/her own inability to persuade the client, and perhaps even at the client's lack of consideration for the risks that the client would be taking by giving false testimony. The client will also surely have his/her own complex metacognitive experiences about the situation that may have put him/her out of step with his/her lawyer (i.e., his/her epistemic partisan).

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[67] See ABA *Model Rules*, *supra* note 6, r 1.6 (4).
[68] See FLSC *Model Code*, supra note 11, r 3.3-6.
[69] Metacognitive planning is discussed above in Section (5) and is defined therein at note 28 and accompanying text.
[70] See Perlman, *supra* note 26 at 1663.
[71] Gregory Schraw, "Promoting General Metacognitive Awareness" (1998) 26 Instructional Science 113 at 115.
[72] *Ibid* at 121.

The lawyer advisor, who gives advice to the other lawyer, will be engaging in metacognition about the lawyer advisee to whom s/he is giving advice and about the client. Some of the advice that the lawyer advisor gives may be about influencing the understanding and deliberative process of the client. For example, to the extent that the lawyer advisor may speak on the topic of dissuading the client against committing perjury, the lawyer advisor must look to the considerations that the client would find meaningful, especially sufficiently meaningful to convince the client against his/her plans about giving false testimony.

Interestingly, the thought process relating to the need to seek legal advice may be different for a lawyer than from the perspective that I am taking in this dissertation. In the case of the practicing lawyer, s/he is wise to consider the possibility that what s/he sees as a real CP Trilemma is merely an apparent CP Trilemma to which another lawyer may see a correct answer that allows the lawyer to fulfill all of his/her duties and to act virtuously. If another lawyer can show the first lawyer that s/he is not in the CP Trilemma or show him/her a way to avoid facing the CP Trilemma, this is a great benefit to the lawyer to the beneficiaries of the lawyer's work.

In this dissertation, the focus is on the actual occurrence of the CP Trilemma, and thus on situations in which the legal advice that the lawyer receives might help the lawyer respond to the CP Trilemma (possibly by navigating trade-offs among duties and virtues), but not on situations in which an apparent trilemma can be resolved. This is not because resolving merely apparent instances of the CP Trilemma or other apparent conflicts of duties is unimportant to an epistemic theory of lawyering. On the contrary, resolving apparent conflicts of duties and virtues is one of the most useful things that any theory of lawyering or piece of advice about legal practice can do. Resolving apparent conflicts will help lawyers avoid making unethical and epistemically undesirable decisions. It will also help lawyers avoid seeking extreme answers to the challenges

that they face. My focus, however, is on the actual occurrence of the CP Trilemma because the actual conflict poses a direct problem for the epistemic partisanship that I am advocating in this dissertation. Thus, all of the responses discussed below will attempt to deal with actual instances of the CP Trilemma.

(7.3.1) Selective Ignorance – "I Didn't Know"

From the beginning of the legal process, the lawyer can determine the way in which s/he approaches the client, the court, the IKP duties, and the practice of epistemic virtue during the adjudication process. The lawyer's ability to structure his/her relationship with other participants includes the ability to shape the way in which communication happens between participants and the information that participants share with one another. Selective ignorance—one approach to dealing with the CP Trilemma—is based on structuring the communication of factual information from the client to the lawyer. I will begin this subsection by explaining the broad structure of communications between the lawyer and the client, especially in an advising context that will lead to the adversarial litigation context,[73] followed by a discussion of how selective ignorance alters that process.

Communication between the lawyer and the client sets the epistemic foundation for the lawyer's service of the client, whether that service is done in adversarial adjudicative processes or in other contexts that do not immediately involve dispute resolution (e.g., in facilitating a transaction). Ideally, lawyer-client communication takes place in a concordant epistemic advising context.[74] That is to say that, ideally, the lawyer and the client behave in an epistemically virtuous way in the advising context and want one another to be known by the other as behaving in an epistemically virtuous way. Having the client share information with the lawyer is vital to the

[73] The advising context and the advocacy context are briefly discussed above in Section (4) at note 2 and accompanying text.
[74] Concordant epistemic contexts and discordant epistemic contexts are described above in Section (7.2).

lawyer's ability to achieve a sufficient level of competence about the facts of a case to perform his/her role as an epistemic partisan in the adversarial system of adjudication and in service of the system's truth-seeking function. A lawyer who does not properly inquire into the facts of a case fails to meet the professional requirement of competence.

The lawyer's duty of competence on factual matters is well defined in codes of professional conduct. As mentioned earlier, the ABA *Model Rules*, in Rule 1.1 on competence, states that, "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation".[75] Sufficiently inquiring into the facts of a case can be understood as falling under the requirements for thoroughness and preparation. The comments to Rule 1.1 of the ABA *Model Rules* specify in further detail, saying that, "Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners".[76]

In the FLSC *Model Code*, factual inquiry is built into Rule 3.1-2, which requires that, "A lawyer must perform all legal services undertaken on a client's behalf to the standard of a competent lawyer".[77] The preceding section, 3.1-1, defines the term "competent lawyer" as "a lawyer who has and applies relevant knowledge, skills and attributes in a manner appropriate to each matter undertaken on behalf of a client and the nature and terms of the lawyer's engagement, including…(b) *investigating facts*, identifying issues, ascertaining client objectives, considering possible options and developing and advising the client on appropriate courses of action".[78]

[75] ABA *Model Rules*, *supra* note 6, r 1.1, mentioned above at note 7 and accompanying text.
[76] *Ibid*, r 1.1, commentary 5.
[77] FLSC *Model Code*, supra note 11, r 3.1-2, mentioned above at note 11 and accompanying text.
[78] *Ibid*, r 3.1-1 [emphasis added].

Sufficient factual inquiry is thus definitionally part of the norm created by the rule on competence. Competence requires the lawyer to satisfy the investigating requirement of the IKP duties.

The lawyer has significant abilities to structure communications between himself/herself and the client—and thus also his/her own ability to acquire competence about the facts of a case. In the early advising context, it is up to the lawyer to explain to the client the need for the client's epistemic virtue in communicating with the lawyer and the protections (in the form of the duty of confidentiality)[79] that safeguard the client's information as s/he shares it with the lawyer. The ABA's *Criminal Justice Standards for the Defense Function* provide a basic guideline for conveying such information to clients in the criminal law context. The ABA's advice on establishing a relationship of trust with the client begins with explaining the need for the client to share factual information with the lawyer and the ways in which these communications are protected. Lawyers are advised to do the following:

> Immediately upon appointment or retention, defense counsel should work to establish a relationship of trust and confidence with each client. Defense counsel should explain, at an appropriate time, the necessity for frank and honest discussion of all facts known to the client in order to provide an effective defense. Defense counsel should explain that the attorney-client privilege protects the confidentiality of communications with counsel except in exceptional and well-defined circumstances, and explain what the client can do to help preserve confidentiality.[80]

[79] The duty of confidentiality is meant to encourage the client to freely share factual information about the case with the lawyer. Another way to conceive of the protections given to the client by the lawyer's duty of confidentiality is that the duty reduces disincentives that the client might have to live up to his/her end of a concordant epistemic context. The task of explaining confidentiality to the client has been little explored in the academic literature. Two notable contributions are found in Clark D Cunningham, "How to Explain Confidentiality?" (2003) 9:2 Clinical L Rev 579; Elisia M Klinka & Russell G Pearce, "Confidentiality Explained: The Dialogue Approach to Discussing Confidentiality with Clients" (2011) 48:1 San Diego L Rev 157.

Communications between a lawyer and his/her client are also protected by solicitor-client privilege. I will refer almost exclusively to the duty of confidentiality here. Though the duty of confidentiality and solicitor-client privilege are distinct, nothing in my arguments here hinges on that distinction. Nothing about the distinction would make my arguments here inapposite to one or the other.

[80] ABA *Standards* 2017, *supra* note 9, Standard 4-3.1 (a).

The ABA's guidance illustrates the nuances of the relationship between self-regarding virtues and other-regarding epistemic virtues in lawyer-client relationship within an adversarial legal system. In explaining aspects of lawyer-client communication to the client, the lawyer wants the client to achieve understanding about a norm so that the lawyer can obtain true beliefs about facts of a case. The lawyer must benefit the client (an other from the lawyer's perspective) with an explanation of the protections that are given to communications between the lawyer and the client, so that the client will benefit the lawyer (an other from the perspective of the client) with an account of the facts of the case. The lawyer will use this information to exercise self-regarding virtues needed to prepare for the trial so that the lawyer can give an epistemic benefit to the court, which the lawyer and client ultimately hope will be to the legal benefit of the client.

The process of explaining the need for open communication and the protection given to the communication is a major opportunity to affect client behaviour. The client can be steered towards epistemic virtues and/or epistemic vices. S/he can be steered towards the other-regarding epistemic virtue of honesty. An explanation that sufficiently emphasizes the duties of honesty that the various participants in litigation have in relation to the court can support an epistemically virtuous mindset in the client (who hears the explanation), and in the lawyer (who gives the explanation). The task of explaining communication within the lawyer-client relationship also sets the groundwork for carrying out some of the competing approaches to dealing with the CP Trilemma. Such an explanation can be the first steps in a strategy of dissuasion from dishonest behaviours such as committing perjury or a strategy of selective ignorance (the main topic of this subsection) via, for example, what Freedman describes as a Miranda warning early in the advising context.

Setting the stage for lawyer-client communication can be seen as a lawyer's exercise in social metacognition about the thoughts of the client.[81] In particular, it is an effort in the regulation of cognition, an exercise of the skills of metacognitive planning around the client's comprehension of communication and protection of communication. This is to say that the lawyer's planning about how to explain the contours of lawyer-client communication in a way that will be meaningful to the client's thinking "involves the selection of appropriate strategies and the allocation of resources that affect performance".[82] For our present concern, performance is the communication (honest and complete or otherwise) of factual information. The ABA *Criminal Justice Standards for the Defense Function* advise that, "In communicating with a client, defense counsel should use language and means that the client is able to understand, which may require special attention when the client is a minor, elderly, or suffering from a mental impairment or other disability".[83] Guidance about the social regulation of cognition is thereby already present in the guidance that the legal profession gives to lawyers.

I argued above[84] that metacognition allows thinkers to take responsibility for their own cognitive development. In the context of legal representation, metacognition is largely offloaded from the client to the lawyer. The client can benefit from the cognitive development of the lawyer. This cognitive development includes the knowledge of substantive law and the ability to organize one's factual knowledge. The lawyer takes on the responsibility of acquiring and marshalling his/her knowledge of law and knowledge of the facts. The lawyer's earliest interactions with the client, in which s/he may explain the dynamics of lawyer-client communication to the client, thus become central in facilitating the transfer of not only knowledge, but also responsibility in relation

[81] Social metacognition is explained above in Section (5), note 14 and accompanying text.
[82] Schraw, *supra* note 71 at 115.
[83] ABA *Standards* 2017, *supra* note 9, Standard 4-3.1 (d).
[84] Above in Section (5).

to that knowledge, from the client to the lawyer. The pursuit of factual competence in a case is thus central to the lawyer taking epistemic professional responsibility for one of the litigants (the one for whom the lawyer is a partisan). It is a key process in achieving responsibilist epistemic virtues.

Considering the broader activity of shaping communication between the lawyer and client, selective ignorance is not actually an approach to dealing specifically with a client who the lawyer believes intends to commit perjury as in the CP Trilemma. Rather, selective ignorance is a strategy in which the lawyer is interested in "gaining the tactical advantage of knowledge and the immunity-providing benefit of ignorance".[85] Ignorance, the thinking goes, allows the lawyer to gain a tactical advantage by avoiding limitations that norms of legal practice place on lawyers. This is because, as Stephen Ellmann explains, "the rules of professional duty leave no room for knowing violations, but they do leave some room for not knowing".[86]

Speaking broadly about information passed between the lawyer and client, some information, if shared with the lawyer, restricts the evidence that the lawyer can present at trial and thus also restricts the range of possible defences that the lawyer can present on the client's behalf. For example, FLSC *Model Code*, Rule 5.1-1 [Comment 10] says that:

> Admissions made by the accused to a lawyer may impose strict limitations on the conduct of the defence, and the accused should be made aware of this. For example, if the accused clearly admits to the lawyer the factual and mental elements necessary to constitute the offence, the lawyer, if convinced that the admissions are true and voluntary…must not suggest that some other person committed the offence or call any evidence that, by reason of the admissions, the lawyer believes to be false. Nor may the lawyer set up an affirmative case inconsistent with such admissions, for example, by calling evidence in support of an alibi intended to show that the accused could not have done or, in fact, has not done the act.[87]

[85] Christian Turner, "The Burden of Knowledge" (2009) 43:2 Ga L Rev 297 at 330.
[86] Stephen Ellmann, "Truth and Consequences" (2000) 69:3 Fordham L Rev 895 at 908. Ellmann cites Luban's wide-ranging discussion of strategic uses of ignorance in David Luban, "Contrived Ignorance" (1999) 87:4 Geo LJ 957.
[87] FLSC *Model Code*, supra note 11, r 5.1-1, commentary 10.

Some lawyers will thus use selective ignorance to avoid curtailment of their ability to put forward normally permissible defences. If the client avoids admitting the factual and mental elements of a crime to the lawyer, then the lawyer's tactics remain unconstrained by rules such as the one just cited because the lawyer does not know the information that would constrain his/her options.

From a social epistemic perspective, selective ignorance can be seen as an attempt to deal with a social interaction (between the lawyer and client) that is too epistemically powerful for what the lawyer perceives to be the client's legal interest. One way in which to understand selective ignorance is thus as a reduction of the epistemic power of the advising process, i.e., a reduction in "the ability of a practice to help cognizers find and believe true answers to the questions that interest them".[88] The lawyer's concern is not the number of beliefs that the lawyer-client interactions produce, but rather avoiding an epistemic process between the lawyer and client which produces true beliefs that limit the client's strategic options in litigation. The lawyer would theoretically be happy to know many facts that do not place strategic limits on the work that s/he does for the client. However, since the lawyer cannot know, before hearing it from the client, what information will place the client at a strategic disadvantage (at which point the lawyer already cannot be selectively ignorant anymore), the lawyer will be better able to practice selective ignorance if s/he undertakes a measure (such as the lawyer-client Miranda warning) that will limit the total number of beliefs that the lawyer acquires from the client (i.e., limit epistemic power).[89]

[88] Goldman, "Foundations", *supra* note 53 at 128 (definition of epistemic power).

[89] A dangerous aspect of this social epistemic dynamic that I will not develop in this dissertation is that, while reducing epistemic power, selective ignorance also works against the reliability of the legal system. Substantially more so than a lawyer who diligently seeks to become competent about the fact of a case, a lawyer who elects to be ignorant about the facts of a case creates an opportunity for himself/herself to introduce false information into a case (information that professional codes of conduct would bar him/her from introducing when s/he is not ignorant about facts of the case).

An important possible benefit[90] of practicing selective ignorance is that the lawyer can also avoid facing the CP Trilemma because, as with practicing selective ignorance to protect one's ability to set up an affirmative case for the client, the lawyer simply never acquires enough information to knowingly engage, or assist, in deception. On the specific topic of offering false evidence to the court, the ABA *Model Rules* say, "The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact".[91] "Knows" is defined in the *Model Rules* as "denot[ing] actual knowledge of the fact in question".[92] A lawyer who never *knows* that evidence is false thus never fulfills the investigation aspect of the IKP duties sufficiently to become aware of a specific client's intention to commit perjury and to be prohibited from introducing the evidence (including the client's testimony). Only by obtaining the information that the selectively ignorant lawyer is attempting to avoid would the lawyer cross into the realm of suborning perjury as s/he facilitates the client's deception. By investigating in a way that avoids this information, the lawyer never faces a conflict between the IKP duties. His/her investigations never produce results that would allow him/her to *know* that s/he is facilitating the misleading of the court.

A lawyer who is motivated by the CP Trilemma to practice selective ignorance expects that the three duties that result in the CP Trilemma will conflict often enough that it is worthwhile for the lawyer to modify his/her approach to lawyer-client interactions, especially in early stages of the lawyer-client relationship. This does not mean that the lawyer expects that s/he will frequently

[90] I use the term "benefit" here largely to mean tactical advantage.
[91] ABA *Model Rules*, *supra* note 6, r 3.3, commentary 8.
[92] *Ibid*, r 1.0. Granted, though, *ibid*, r 3.3, commentary 8 does explain, "A lawyer's knowledge that evidence is false…can be inferred from the circumstances" and that "the lawyer cannot ignore obvious falsehoods". Rule 3.3, commentary 8 cites *ibid*, r 1.0(f), which specifies that "[a] person's knowledge may be inferred from the circumstances".

have a client who wishes to commit perjury. More often than not for lawyers who practice selective ignorance, the lawyer's concern will simply be about not being limited in the arguments that s/he can make on the client's behalf, as already explained in this section.

One way to practice selective ignorance is for the lawyer to "make it clear to the client from the outset that the attorney does not want to hear an admission of guilt or incriminating information from the client".[93] The lawyer commences discussion about the case with what Freedman describes as a "lawyer-client Miranda warning".[94] This warning is given early within the advising context, setting the tone for the rest of the lawyer-client relationship. The lawyer informs the client that s/he should not share any incriminating information with the lawyer or admit to the lawyer that s/he is guilty of the offence of which s/he is accused.[95] This "lawyer-client Miranda warning" may work in concert with the approach that the lawyer takes to explaining lawyer-client communications to the client. To be clear, selective ignorance does not, strictly speaking, require this lawyer-client Miranda warning. Since clients do not all have the same personal traits related to sharing information and dealing with lawyers, not every client will be equally eager to independently proffer to the lawyer all the information about his/her case. Some clients may need to be led by the lawyer into disclosing enough information to even give the lawyer sufficient information to build a case. What the "lawyer-client Miranda-warning" does is set up expectations so that clients who do offer information freely to the lawyer do not give up the tactical advantage that the lawyer wants to gain from selective ignorance.

Another way to practice selective ignorance is for the lawyer to simply "learn the [factual] information in a way that will not ascribe knowledge to her".[96] Christian Turner describes an

[93] Freedman, "Lawyer's Trilemma", *supra* note 1 at 29.
[94] Freedman, "Getting Honest", *supra* note 5 at 138.
[95] See Freedman, "Lawyer's Trilemma", *supra* note 1 at 29.
[96] Turner, *supra* note 85 at 330.

approach in which the lawyer speaks in hypotheticals, rather than about the actual facts of the case as the client recalls them.[97] Another approach that avoids the lawyer-client Miranda warning is explained by Bradley Wendel while discussing the CP Trilemma. He cites the example of a famous Texas lawyer named Richard Haynes, who would not ask the client for his/her account of the facts of the case. Instead, Haynes would ask his client what the other side might say the facts are.[98] Whatever the specifics of the lawyer's approach, the lawyer is attempting to be in a state of selective ignorance without explicitly warning the client about the limitations that can be placed on the lawyer's advocacy if the lawyer obtains specific kinds of information. An advantage of such an approach is that the client may feel less confronted than s/he would by the lawyer explicitly explaining the limitations that factual knowledge can place on the lawyer's advocacy and may thus be more likely to feel comfortable sharing information with the lawyer.

Selective ignorance is a difficult position to support in an epistemology of lawyering. Admittedly, one could claim that the terminology that I have given to the approach ("selective ignorance") already stacks the deck against the strategy. Aware of these concerns, I offer the following argument for the types of strategies described in this section. The argument is based on the idea of professional discretion in pursuing factual competence and is given specifically for the criminal defence context. In offering this argument, I will give a generous reading of the strategy and demonstrate why it deserves the name of "selective ignorance".

Selective ignorance can be understood, most generously, as the lawyer structuring the client's exercise of other-regarding epistemic virtues in the advising context. The lawyer wants the client to give enough information for the lawyer to provide effective representation but recognizes that the client giving too much information—even to the lawyer—could be a tactical disadvantage

[97] See *ibid*.
[98] See Wendel, *supra* note 54 at 673.

for the client. Knowing just enough to keep the lawyer's options open could be understood as a mean between knowing too little to deploy tactics in the client's benefit and knowing too much to deploy tactics in the client's benefit.

The provisions on competence in the ABA *Model Rules* and the FLSC *Model Code* are primarily concerned with the lawyer being sufficiently competent to use processes by which s/he can obtain, understand, evaluate, and marshal evidence and law on the client's behalf. Norms about competence do not give prescriptions that the lawyer must use any particular process to engage in factual inquiry. This strategic decision is properly left up to the lawyer. Moreover, knowing how to make decisions about which factual inquiries to pursue is itself a hallmark of a competent lawyer who does not waste his/her client's resources. In the criminal defence context, in particular, lawyers have explicit duties to "protect the client as far as possible from being convicted, except by a tribunal of competent jurisdiction and upon legal evidence sufficient to support a conviction for the offence with which the client is charged".[99] With this professional discretion in this practice context, it may be reasonable for the lawyer to interact with the client in a way that is less epistemically powerful (i.e., in a way that produces fewer total true beliefs) so that the lawyer can most effectively pursue the client's acquittal. Such an approach to structuring the epistemology of lawyer-client interactions could be understood as a virtuous mean: managing one's pursuit of knowledge in between the vice of apathy and knowledge acquisition and what could be described as the vice of blindly seeking to acquire all possible knowledge regardless of context.

Some ideas in virtue epistemology even resemble the generous reading that I am giving to selective ignorance. Discussing metacognition, epistemologist Christopher Lepock describes effective management of one's cognition. He argues that, as with other capacities, cognitive

[99] FLSC *Model Code*, supra note 11, r 5.1-1, commentary 9.

processes must be applied to environments to which they are suited, in a "selective application".[100] Lepock gives the example of cases in which senses such as vision and sense of smell can be distorted by environmental factors (e.g., lighting conditions).[101] Similarly, cognitive faculties such as "memory and deduction are only reliable when their inputs are reliably formed".[102] Lepock's focus is on applying cognitive processes "only in environments in which and for contents for which the process yields true beliefs".[103]

I am not arguing here that the lawyer-client advising context (especially a conversation between the lawyer and client about the facts of a case) is one in which the lawyer's cognitive faculties would not be suited to reliably form true beliefs. To the contrary, lawyers' cognitive virtues (faculty-virtues and trait-virtues) are well suited to reliably forming true beliefs. The straightforward application of faculties such as memory and deduction will normally be of great assistance to lawyers in acquiring competence about the facts of a case. However, perhaps there is some space in an epistemically role-differentiated profession[104] for a distinct approach to the selective application of cognitive virtues. That space may be created by the client's need for the most robust form of partisanship in the criminal law context. In that case, the terms for selective application of epistemic faculties and traits, including in pursuit of factual competence, would be

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[100] Christopher Lepock, "Metacognition and Intellectual Virtue" in Abrol Fairweather, ed, *Virtue Epistemology Naturalized: Bridges Between Virtue Epistemology and Philosophy of Science*, Synthese Library (Cham: Springer, 2014) at 35–36. Similarly, Baehr's Judgment Principle holds that intellectual virtue involves the ability to recognize when the application of an epistemic virtue would be appropriate. See Jason Baehr, "The Four Dimensions of Intellectual Virtue" in Chienkuo Mi, Michael Slote & Ernest Sosa, eds, *Moral and Intellectual Virtues in Western and Chinese Philosophy: The Turn Toward Virtue* (New York: Routledge, 2016) 86 at 92, discussed above in Section (3.1) at note 21 and accompanying text.

[101] See Lepock, supra note 100 at 35.

[102] *Ibid* at 35.

[103] *Ibid* at 36.

[104] Above in Section (4.2), explaining, "In the same way that role-differentiated morality allows and/or encourages lawyers to engage in behaviour that would be declared morally flawed in other areas of life, role-differentiated epistemology allows and/or encourages lawyers to engage in behaviours that would be epistemically problematic in other areas of life—i.e., behaviours that would undermine the promotion of knowledge—in order to promote overarching systemic benefits".

determined by the lawyer's role in the specific context. If selective application of cognitive virtues is appropriate, this may include using such strategies to be selectively ignorant of the facts of a case to protect the strategic interests of the client.

The lawyer who practices selective ignorance may have determined that the type of factual competence that emphasizes the importance of knowing all facts of a case, and the faculties and traits needed to achieve that level of competence, are not suited to the context. When knowing certain information would substantially reduce the strategies that a lawyer is permitted to employ on a client's behalf, it might be concluded that the lawyer should be permitted to refrain from applying the epistemic virtues and skills that would give the lawyer a more complete knowledge of the facts of a client's case. Such a decision might be especially appropriate to the criminal law context, where the justification for the adversarial model of adjudication is at its strongest.

The argument just considered for selective ignorance on the basis of the lawyer's discretion to apply epistemic virtues is insufficient for two reasons: (1) it does not set workable boundaries for selective application of epistemic virtues and (2) it allows the lawyer to create a policy that avoids taking epistemic responsibility for the client in a way that supports the epistemic functions of the adversarial system of adjudication. Considering the first of these two problems, this argument misses key factors about selective application and the Judgment Principle. Selective application exists to minimize the inappropriate use of an agent's epistemic capacities. As Lepock argues, an agent can engage in selective application of his/her cognitive processes so that the agent is "able, most of the time, to use cognitive processes to form beliefs only in environments in which and for contents for which the process yields true beliefs".[105] The idea is to carefully exercise one's capacities in a way that produces epistemic successes, such as yielding true beliefs.

[105] Lepock, *supra* note 101 at 36.

This reasoning does not translate to selective ignorance by lawyers as described in the present section of this dissertation. Here, selective ignorance, has been described as a broad pragmatic approach that some lawyers may apply to a wide swath of cases. It is one thing to decide that inquiring into a particular factual aspect of the case will not be fruitful or should be pursued in a particular way. It is another thing altogether to make a blanket decision against the pursuit of factual knowledge that is so crucial to the cases that knowledge of those facts would severely restrict, or even negate, the ability of a lawyer to offer an affirmative defence for clients. The former is a one-off decision in which the lawyer can be responsive to the needs of specific clients and to the features of the specific lawyer-client relationship. The latter is a broad policy that limits factual inquiry to avoid crucial information and that potentially reduces responsiveness to client needs. The latter may even leave the lawyer without sufficient knowledge to make an informed decision about which factual matters need further inquiry.

Selective ignorance, being directed at preventing the lawyer from acquiring the information necessary to knowingly facilitating deception, can leave the lawyer poorly positioned to even identify possible problems with the client's expected testimony (such as an intention to lie to the court) and without enough knowledge to even attempt to dissuade the client from committing perjury.[106] A broad policy of selective ignorance can thus prevent the lawyer from achieving full competence of the facts but can also limit or prevent a lawyer from being able to make informed decisions about factual competence. Rather than virtuously using one's discernment to put epistemic virtues in their proper context, selective ignorance discourages the use of these virtues in a fitting context and limits the lawyer's ability to acquire the knowledge to assess when virtues would be properly used.

[106] Properly done dissuasion is a highly virtuous and desirable response to the CP Trilemma.

The second problem with selective ignorance is that the lawyer thereby avoids taking epistemic responsibility for the client in a way that supports the epistemic functions of the adversarial system of adjudication. The lawyer's avoidance of epistemic responsibility is illustrated well by a practical objection that Freedman gives to selective ignorance. He argues that selective ignorance puts the burden on the client to decide what s/he should tell the lawyer.[107] Such a strategy is an abdication of a large swath of the lawyer's epistemic role in the lawyer-client relationship. At the beginning of the lawyer-client relationship, the lawyer is passing on some of his/her own the epistemic responsibility—and thus also professional responsibility—onto the client. The epistemic division of labour in the adversarial system of adjudication would normally require the lawyer to solicit this information from the client and then decide how to proceed using the information obtained from the client. Instead of allowing the client to play his/her epistemic role of freely sharing information about the case with the lawyer, selective ignorance either puts the client in the position of filtering out information, especially when the lawyer gives a lawyer-client Miranda warning or walks the client through a process that filters out information (as in the example of Richard Haynes).[108] The lawyer-client Miranda warning raises reliabilist concerns that come from the lawyer not taking epistemic responsibility for the case. On the other hand, examples such as those of Richard Haynes prompt consideration of what the lawyer is actively doing as a knower/believer.

In the case of the lawyer-client Miranda warning, the strategy (1) pursues ignorance, (2) facilitated by placing an epistemic burden on the client, (3) in order to reduce the competence of the lawyer, (4) so that the client can gain a tactical advantage supported by dishonesty. Numerous

[107] See Freedman, "Lawyer's Trilemma", *supra* note 1 at 29.
[108] Above in Section (7.3.1) at notes 93–98 and accompanying text (lawyer-client Miranda warning and Haynes selective ignorance approach).

problems exist with this strategy for a virtue epistemic perspective. Freedman recognizes a crucial epistemic problem that affects the epistemic reliability of the lawyer-client consultation. "[A] lawyer", Freedman argues, "can never anticipate all of the innumerable and potentially critical factors that his client, once cautioned, may decide not to reveal".[109] The client may actively decide to not reveal certain information. However, the client also does not have the epistemic skill required to sift through and decide which facts are relevant to the case and which facts are even legally helpful to his/her own case. When it comes to assessing epistemically and legally relevant facts for a case, the client may believe that actually relevant facts are irrelevant and that some actually irrelevant facts are relevant.

A problem in medical ethics is emerging that shares some similar reliabilist concerns. Before beginning this comparison, it is crucial to note that this problem does not indicate any malice on the part of medical practitioners. Indeed, there is a strong argument that this issue in the practice of medicine is merely an unintended consequence of a deep commitment by doctors who practice it to managing their medical practice well. Despite this fundamental difference of intentions and practice of epistemic trait-virtues,[110] the comparison is instructive for understanding the reliabilist consequences that result from a professional (i.e., someone who has a particular epistemic role) leaving some epistemic responsibility with the client (or patient). I am speaking specifically of epistemic responsibility that would normally be passed on from the client (or patient) to the professional.

[109] Freedman, "Three Hardest Questions", *supra* note 5 at 1472. Indeed, even if clients are not cautioned against revealing the "wrong" information, lawyers cannot anticipate all of the factors that clients may not reveal during a consultation. This is why the lawyer's practice of epistemic virtue in the consultation and the broader advising context is so crucial to the lawyer's ability to acquire factual competence about a case.

[110] That is to say that the doctors are committed to fully practicing relevant epistemic trait-virtues whereas the lawyer in this analogy is not committed to fully practicing relevant epistemic trait-virtues.

In order to avoid spending excessive time on one appointment and so that they can stay on track with their appointments, some family doctors have instituted the practice of limiting patients to raising only one medical issue during an appointment.[111] Like the legal client who is given a lawyer-client Miranda warning, the patient who is told that the doctor will only deal with one medical issue per visit is left with the decision about what to raise with the professional who is seeing him/her. Just as the lawyer cannot predict the large number of factors that the client may not disclose, doctors who have a one issue per visit policy may be unable to anticipate the number and severity of issues that the patient will omit when the patient chooses which issue to discuss. A patient may incorrectly rank the severity and priority of issues or may not even consider that issues that they perceive to be distinct are actually part of the same medical problem.

The application of the professional's knowledge is necessary to determine which facts or medical complaints the professional must know in order to provide the appropriate professional services. The professional has the competencies to make such judgments and to investigate such information. Professionals are, of course, expected to direct the client (or patient) in sharing information so that the scope of information communicated by the client (or patient) does not go beyond the capabilities of what the professional can realistically address. However, professionals risk substantial limitations of their epistemic reliability when they use blanket policies that limit the transfer of epistemic responsibility from the client (or patient) to the professional.

Approaches like those of Richard Haynes involve the lawyer actively soliciting information from the client and not raising explicit warning signs but also carefully narrowing the scope of what the client is likely to say. As noted above, Haynes would ask the client what the other side

[111] See generally Vik Adhopia, "Canadian Health Care's 'One Issue Per Visit' Problem", *CBC News* (20 March 2019), online: <www.cbc.ca/news/health/second-opinion-one-problem-visit-1.5061506> [perma.cc/P4PQ-3R8C]; Merrilee Fullerton, "Understanding and Improving on 1 Problem Per Visit" (2008) 179:7 Canadian Medical Association Journal 623.

might say the facts are. In the first place, Haynes' strategy does not completely avoid the risks of being unable to control what the client will hide from the lawyer. The client may not hold back as much as s/he would in response to a lawyer-client Miranda warning, but Haynes' line of questioning may steer the client away from being sufficiently forthcoming, even for Haynes' purposes, and may fail to give the sort of positive elicitation that would move specific clients to share the information that Haynes wants to obtain. Haynes does not avoid reliability concerns merely by not Mirandizing the client.

Haynes' approach also raises concerns that fall specifically under the core of responsibilist virtue epistemology and its application to the legal profession. The way that Haynes poses questions to the client about the facts involves taking an active role as a knower/believer.[112] The lawyer is making active choices about the way in which s/he structures the client's communication of information about the facts of the case. Clients may need sustained guidance to explain what the opposing party would say about the facts of the case, requiring the lawyer to be adept at metacognitive monitoring of the client's cognition to be aware of whether the client understands and can execute the task. Explaining the perspective of the opposing side will be an unusual ask to make of a client, rather than simply explaining one's own perspective.

Most crucially, Haynes' approach is highly suitable for critique using a responsibilist approach to virtue epistemology. His approach: (1) pursues ignorance, (2) by walking the client through a carefully choreographed communication process, (3) in order to reduce the competence of the lawyer, (4) so that the client can gain a tactical advantage supported by dishonesty. Though Haynes does not pursue ignorance by passing the burden onto the client, it does pursue ignorance

[112] I discuss the active role of knowers/believers in responsibilism in Section (3.2) at note 34 and accompanying text, citing Lorraine Code, *Epistemic Responsibility* (Hanover, NH: University Press of New England for Brown University Press, 1987) at 51.

in order to reduce competence. Epistemically, Haynes' approach does not aim to facilitate a clash of competent champions before an impartial tribunal. Rather, it aims to put forward a champion who does not fully comprehend the situation. It is a partisan advantage sought without the support that a competent champion gives to the adversarial system's truth-seeking function. The lawyer is taking epistemic responsibility in the sense that s/he is guiding the client through the process of a consultation with the lawyer (i.e., in the sense of not making himself/herself passive about receiving information from the client), but s/he is not taking responsibility for pursuing the epistemic virtues by which epistemic partisanship provides a benefit to the adversarial system of adjudication.

Selective ignorance is undertaken through the use of what John Humbach describes critically as "[t]he lawyer's skill", which he says is to "weave stories that are false out of statements that are true".[113] If a lawyer avoids acquiring select pieces of information that would limit his/her available avenues to defend the client,[114] s/he can pursue these otherwise prohibited avenues, telling a story about the case that is false or misleading (because the story is incomplete or even based on an incorrect account of the facts), and yet (arguably) avoid breaching rules of professional conduct against misleading the court (because s/he is presenting only true statements and statements that s/he believes to be true). This is a distorted process of metacognitive monitoring that centres on the lawyer avoiding epistemic responsibility and in which the lawyer protects his/her innocence via vice. Rather than using metacognition to advance one's own knowledge, the lawyer who engages in selective ignorance uses skills and practices associated with metacognition

[113] John A Humbach, "The National Association of Honest Lawyers: An Essay on Honesty, 'Lawyer Honesty' and Public Trust in the Legal System" (1999) 20:1 Pace L Rev 93 at 94.

[114] E.g., avoiding information by which the lawyer would come to know the falsity of a fact that the client wishes to assert and which the lawyer (knowing its falsity) is prohibited from offering under ABA *Model Rules*, *supra* note 6, r 3.3(a)(3); avoiding the client's admission of the factual and mental elements of an offence, which would prohibit the lawyer from building an affirmative case for an alibi or a case that another person committed the offence, FLSC *Model Code*, supra note 11, r 5.1-1, commentary 10.

to acquire an advantage that is not itself connected with acquiring knowledge for oneself or promoting the acquisition of knowledge by others, especially others who are the key epistemic agents in an adversarial adjudicative process. Selective ignorance is thus fundamentally inconsistent with the epistemic role of the lawyer.

(7.3.2) Dissuasion – "I'll Convince You"

Dissuasion, *if it can be achieved (and achieved properly)*, is an ideal response to the CP Trilemma.[115] Put most simply, the lawyer attempts to convince the client out of committing perjury.[116] The opportunity to dissuade the client arises in the advising context of the lawyer-client relationship.[117] In that context, the lawyer's IKP duties have not yet actually come into conflict. In the advising context, the IKP duties require the lawyer to obtain relevant information about the case, to keep it in confidence, and to advise the client and prepare the case in a way that will show candour to the court. The lawyer's duty of candour before the court, does not become fully operative (i.e., cannot be violated) in the way imagined by the CP Trilemma before the lawyer actually has occasion to deceive the court—or to assist the client in deceiving the court—during the lawyer's presentation of the client's case. Until the lawyer enters the adversarial context and can present the client's case to the court, the lawyer is merely preparing to present the client's case, not actually presenting it. If the lawyer convinces the client out of committing perjury before the lawyer begins to present the client's case, then the lawyer will be unencumbered by the CP Trilemma in presenting the client's case to the court with candour.

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[115] As the court put it in *People v Johnson*, 72 Cal Rptr 2d 805 at 812 (1998) at 812, "The persuasion solution, when it succeeds, is the ideal solution since it involves neither the presentation of perjured testimony nor disclosure of client confidences".

[116] I am not specifying more than this definition right now because dissuasion can be an ongoing process. I will explain some of that ongoing process later in this section.

[117] The advising context is briefly explained above in Section (4) at note 2 and accompanying text.

Connecting back to the previous section on selective ignorance, I also note that, for the lawyer to specifically attempt to dissuade the client out of an actual plan to commit perjury, the lawyer must have some minimal level of factual competence about the case and some sufficient understanding of the client's intentions to identify the need to specifically dissuade this client. A lawyer who practices selective ignorance can advise the client in general terms against committing perjury, but once the lawyer understands the need to dissuade a particular client out of a specific plan to commit perjury, the lawyer has entered the realm of *knowingly* assisting the client to deceive the court if the lawyer facilitates the client's presentation of false testimony. The lawyer who can attempt to dissuade a client with reference to the client's specific situation has met the investigating requirement of the IKP duties to a large enough extent that selective ignorance, even on that approach's own terms, cannot be achieved.

Dissuading the client as part of the lawyer's fulfillment of the IKP duties is well supported by norms of professional conduct. Attempting to dissuade the client out of committing perjury is mandated and encouraged by norms of professionalism (being stated in rules of professional conduct). Some of the guidance in codes of professional conduct deals directly with what lawyers are required to do in the CP Trilemma, whereas other guidance is generally stated such that dissuading the client from committing perjury falls under its ambit. Speaking directly about the CP Trilemma, the ABA *Model Rules* state, "If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered".[118] The ABA gives this guidance to accompany their rules on candour towards the tribunal.

[118] ABA *Model Rules*, *supra* note 6, r 3.3, commentary 6.

More broadly, the appropriateness of convincing the client out of committing perjury stems from the nature of the advising relationship between the lawyer and the client contemplated by codes of professional conduct. Rule 3.2-2 of the FLSC *Model Code* requires that, "When advising a client, a lawyer must be honest and candid and must inform the client of all information known to the lawyer that may affect the interests of the client in the matter".[119] The Commentary on the rule expands that:

> [2] A lawyer's duty to a client who seeks legal advice is to give the client a competent opinion based on a sufficient knowledge of the relevant facts, an adequate consideration of the applicable law and the lawyer's own experience and expertise. The advice must be open and undisguised and must clearly disclose what the lawyer honestly thinks about the merits and probable results.[120]

Giving candid advice to a client about his/her plan to commit perjury necessarily involves the lawyer explaining the legal prohibitions against committing perjury, the sanctions that the client faces for committing perjury,[121] that the lawyer is not permitted to assist the client in committing perjury,[122] and the way in which the client's plan to commit perjury limits the ability of the lawyer to serve the client[123]. These are attempts by the lawyer to explain the negatives about the client's plan. Additionally, and perhaps more importantly from the perspective of changing the client's mind, the lawyer should offer positive arguments for litigating the case in an honest manner, emphasizing the lawyer's role in serving the client and the honest means of argumentation

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[119] FLSC *Model Code*, supra note 11, r 3.2-2.
[120] *Ibid*, r 3.2-2, commentary 2.
[121] See ABA *Model Rules*, *supra* note 6, r 1.2(d), "A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client…."
[122] See *ibid*; FLSC *Model Code*, supra note 11, r 5.1-2, "When acting as an advocate, a lawyer must not:… (b) knowingly assist or permit a client to do anything that the lawyer considers to be dishonest or dishonourable…(e) knowingly attempt to deceive a tribunal or influence the course of justice by offering false evidence, misstating facts or law, presenting or relying upon a false or deceptive affidavit, suppressing what ought to be disclosed or otherwise assisting in any fraud, crime or illegal conduct".
[123] See ABA *Model Rules*, *supra* note 6, r 1.4 (a)(5), "A lawyer shall:…(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law".

that the lawyer can use to advocate for the client. In Freedman's example of the CP Trilemma, the lawyer as of yet faces no particular restrictions on the approach that s/he may take to defending the client.[124] The lawyer should explain in positive terms how s/he will convince the trier of fact that there is a reasonable doubt about the client's guilt. In explaining the lawyer's duties and the options available to the lawyer to serve the client, the lawyer acts in accordance with a strong foundation of norms of professional conduct supporting dissuasion.

In addition to (1) allowing the lawyer to meet his/her IKP duties and (2) the support that dissuasion receives in norms of professional conduct, dissuasion is well at home in a virtue epistemology of lawyering. In the first place, any lawyer who can undertake a strategy of dissuasion in response to the plans of a specific client has already taken a level of partisan responsibility beyond what would be consistent with selective ignorance. The lawyer would not even be able to know that dissuasion is needed or to choose strategies for dissuading the client without having already created an epistemic relationship with the client in which the lawyer and the client both practice self-regarding epistemic virtues and other-regarding epistemic virtues required to listen to one another and share information freely with one another. Thus, dissuasion requires the lawyer to already have performed at least some minimal level of epistemic virtue in service of his/her own duty of competence and taking of partisan epistemic responsibility from the client.

Dissuasion from committing perjury is an act in the furtherance of epistemic virtues (e.g., furthering the virtue of honesty) and itself requires epistemic virtues to be performed successfully. The epistemic virtues required are technical epistemic skills and character traits. Convincing the

[124] The lawyer does not face limitations contemplated in FLSC *Model Code*, supra note 11, r 5.1-1, commentary 10 about a defence lawyer being restricted in strategy when the client admits to the lawyer the factual and mental elements of an offence.

client who intends to lie against pursuing such a course of action itself is better achieved, or perhaps only achieved, through persuasive engagement with the client. Some of this involves technical skills, like good listening while hearing the client's desire to take a certain course of action, demonstrating to the client that his/her position is understood, persuasively articulating the reasons to not commit perjury, and addressing the client's concerns and motivations.

Trait-virtues are also required for dissuasion, having a unique direction of benefit. Recall previously that epistemic partisanship is:

> a disposition to (a) desire the epistemic and legal success of the client, which leads to (b) taking action to support the advancement of the client's cause, (c) in service of the adversarial system of adjudication, especially its truth-seeking function.[125]

In attempting to dissuade the client from committing perjury, part (b) of epistemic partisanship becomes wholly directed towards the client. The lawyer communicates information and advice to the client. However, the purpose of the communication is not primarily for the client to acquire knowledge; that would be more common in the advising context, in which the lawyer is communicating information to the client about the law. Instead, the action that the lawyer takes to advance the client's cause is directed as spurring the client to practice epistemic trait-virtues of honesty in dealing with the tribunal. Dissuasion is thus the practice of the role-differentiated trait-virtue of epistemic partisanship in support of the client's practice of a trait-virtue, for the epistemic benefit of the trier of fact.

Alongside the place for epistemic virtues, convincing the client out of taking the illegal action of committing perjury allows the lawyer to fulfill his/her role in the social epistemology of the adversarial system of adjudication. The lawyer supports the legal system in meeting Goldman's

[125] Above in Section (4.5) at note 90 and accompanying text.

veritistic criteria.[126] If the client is persuaded against giving false testimony, the client avoids introducing a factor into the legal process that would increase the number of false beliefs in the adversarial litigation process—protecting the legal system's epistemic *reliability*. A client who gives only truthful testimony increases the ability of an adversarial trial to arrive at true beliefs about a matter under litigation—increasing the legal system's epistemic *power*. A legal process into which false testimony is not introduced can be *speedier*, as no time in cross-examination needs to be used on statements that are known to the client to be false. Finally, the cost of arriving at true beliefs is reduced, thereby increasing *efficiency*, as the legal process is not put to work assessing the truth of a false claim. Done successfully, dissuasion is the ideal result for a social epistemology of lawyering, which is concerned with serving the client in furtherance of the epistemic function of the adversarial system of adjudication.

What are some of the mechanics of dissuasion? The first occasion to use dissuasion might take the lawyer by surprise or leave the lawyer with little time to think through the situation. A client may, without having given previous indications, raise the possibility of intentionally giving false testimony to the court. The lawyer faces an immediate need to discourage the client from committing perjury. In such cases, dissuasion is the only response to the Trilemma that may sometimes (at least when first deployed) be impossible for the lawyer to plan for by using careful deliberation or seeking advice from another lawyer about compliance with the ethical duties of lawyering. Thus, the first opportunity to dissuade a client from giving false testimony may be undertaken without the benefit of metacognitive planning[127] on the lawyer's part. That is to say that the lawyer may have no, or limited, opportunity to structure his/her own thinking on the topic

[126] See Goldman's veritistic standards, discussed above in Section (2.1) at note 15–16 and accompanying text, citing Goldman, "Foundations", *supra* note 53 at 128–129. The effects of dissuasion on fecundity merit additional exploration that I do not give here.
[127] Metacognitive planning is discussed above in Section (5) and is defined therein at note 28 and accompanying text.

or to plan about how the client will react to the lawyer's attempt to fulfill his/her ethical and legal duties.

Thankfully, even when the lawyer has not prepared specifically to dissuade the client in a particular case, the lawyer is able to draw upon clear norms in the legal system against perjury, the lawyer's own duties to the court, and the guidance that the lawyer has given to previous clients about testifying honestly. The lawyer has a basic foundation of content that can ground his/her initial dissuasive reply to a client who unexpectedly indicates to the lawyer that s/he will commit perjury. Should this first reply fail, the lawyer will need to reflect more carefully about the means that s/he will use to communicate during later attempts at dissuasion and about the substance that the lawyer will raise in relation to the particular circumstances of the client's case and which might motivate the client more than the generally stated norms of the adjudicative process.

Whereas other strategies for dealing with client perjury call for a single act (or set of acts carried out in a short sequence) that cannot be attempted again if they fail, dissuasion can be attempted on multiple occasions as part of ongoing advice to the client. Freedman notes that sustained efforts to dissuade the client from committing perjury "have often proven successful".[128] The tenacity to return to an effort at dissuasion, to seek solutions, and to seek ways to reconcile a conflict (real or apparent) of lawyering duties is itself part of the task of dealing virtuously with situations in which values come into conflict. As Ayers says referencing a different case of conflicting values, "A choice like this should be difficult, and it should be preceded by a sincere attempt to have it both ways",[129] i.e., to serve the competing values and adhere to the competing duties.

[128] Freedman, "Client Confidences", *supra* note 5 at 1953.
[129] Ayers, *supra* note 4 at 54. Ayers was discussing the case of Alton Logan. Logan spent 26 years in jail, having been falsely convicted as an accomplice to an armed robbery and murder. The person who was actually guilty of the crime, Andrew Wilson, refused to allow his lawyers to disclose that he, not Alton Logan, was guilty of the crime. See *ibid* at

Later, arguing more generally about the value of struggling with a dilemma before choosing in favour of one particular value, Ayers says, "Rather than ending the struggle prematurely by making a choice and moving on, it is sometimes admirable to continue racking one's brain in an attempt to find a practical solution".[130] Until the client actually commits the action, the lawyer cannot be sure, and so dissuasion remains appropriate for the lawyer to continue pursuing, even as s/he prepares other responses to his/her expectation that the client will commit perjury. Of course, sometimes, such as in the CP Trilemma, the lawyer will face an impending event (the trial, in this case) that will not allow additional time for reflection and reconsideration of options. Understanding how much time is appropriate to dedicate towards racking one's brain is itself virtuous prudential behaviour. Even so, a key benefit of dissuasion is that it offers the lawyer numerous opportunities and tacks at epistemic virtue in confronting conflicts of lawyering duties.

Before ending this section, replete with praise for a strategy, and thus far only cautioning that the strategy may not always work, I will recognize a risk of vice (epistemic and ethical). Even a strategy that is generally permissible or laudable can be carried out in a way that is both epistemically and ethically unvirtuous. In particular, the lawyer can attempt to dissuade the client in a way that harms the trust in the lawyer-client relationship and in which the lawyer leverages the client's trust in the lawyer against the client. Making this point, Freedman argues that a dissuasive strategy "should not include threats to betray the lawyer's pledge of confidentiality" if the client does not refrain from his/her plan to commit perjury.[131] Threatening to reveal confidential information in this way imperils the foundation for the client's trust that s/he can

47–50. Wilson's lawyers had to wrestle with the conflict of values between their duty of confidentiality to their own client and their desire to not have an innocent person be imprisoned.

[130] *Ibid* at 56.

[131] Freedman, "Client Confidences", *supra* note 5 at 1953.

safely share information with the lawyer. The foundation for the client's trust (i.e., for the client's performance of other-regarding epistemic virtues to give an epistemic benefit to the lawyer) is imperiled both as the client reasons through what has happened because of the lawyer's threat and as the client goes through the affective experience[132] of receiving such a threat from his/her own lawyer. Clients faced with such threats from the lawyer are likely to begin to rethink their earlier trust in the lawyer and feel that the lawyer has a weapon that s/he can now use in other situations. The lawyer then turns from being a confidant[133] for the client to someone who uses the information entrusted in him/her to even coerce the client.

While discussing dissuasion in the CP Trilemma, Freedman highlights not only the way in which the lawyer's response to the trilemma can help maintain the integrity of the knowledge seeking aspect of litigation (especially fact finding), but also that the lawyer's ability to protect the epistemic integrity of the legal process depends on the lawyer's own knowledge. Freedman says that if the lawyer, "[L]earns that the client is going to commit perjury, the lawyer should take advantage of the knowledge—knowledge that the lawyer rarely would have without the pledge of confidentiality—to dissuade the client from testifying falsely".[134] The protections given to the client by confidentiality facilitate the lawyer's acquisition of knowledge that allows the lawyer to dissuade the client from committing perjury. The lawyer may have acquired both the knowledge to recognize the intent to commit perjury and the knowledge by which the lawyer can persuade the client against perjury. If a threat to reveal confidential information weakens the client's trust in the lawyer, then a lawyer can thereby also undermine the foundation for his/her own ability to learn about and deal with the particular instantiation of the CP Trilemma. Even in a single lawyer-client

[132] Metacognitive experiences and the idea of epistemic experience are discussed above in Section (5), especially at notes 22, 33–37 and accompanying text.
[133] The virtue of being a confidant is briefly discussed above in Section (7.2).
[134] Freedman, "Client Confidences", *supra* note 5 at 1953.

relationship, a lawyer who threatens to reveal confidential client information to dissuade the client from committing perjury takes a serious risk of undermining the foundation for the lawyer's own position.

When it is used within a strategy of trying to dissuade the client, threatening to reveal the client's confidences can cause a shift in the lawyer's efforts at dissuasion. In the worst case, such a threat causes a breakdown of the lawyer-client relationship and is the last opportunity that this lawyer has to dissuade the client. The client may end his/her relationship with this particular lawyer and may move to another lawyer.[135] Even if the client does not leave the lawyer, at least two possible branches of outcomes arise if the lawyer-client relationship continues. On one branch, the client is not dissuaded by the threat. If the client is not dissuaded, then the lawyer has used one of his/her potentially most impactful dissuasive tools (a sort of nuclear option for the lawyer-client relationship) but has still failed in the effort at dissuasion. The lawyer may continue with other dissuasive efforts to the extent that the lawyer-client relationship can continue to bear attempts at dissuasion. As noted earlier, however, the client's trust in the lawyer may be severely undermined after the lawyer has attacked the protection that gave the client the trust to share information with the lawyer in the first place. Continued efforts at dissuasion are thus undertaken from a weak position and with potentially incomplete information (if the client no longer shares all information with the lawyer, for fear of another situation in which the lawyer can use the client's trust against the client).

On the other branch, the client is dissuaded by the threat. If the client is dissuaded, it is possible that the client does not perceive that any harm has been done to the lawyer-client relationship. Even if the client's perception is correct and such harm was not caused, this does not

[135] A problem then arises of whether the second lawyer will be able to even discover the client's intent to commit perjury. I deal with this same issue in Section (7.3.3), on withdrawal.

mean that the lawyer has acted in an epistemically virtuous, or even neutral, way. The threat itself rashly risks impairing the lawyer's access to information from the client, thus hardly serving the lawyer's epistemic partisanship and epistemic function within the adversarial system of adjudication. Alternatively, the client may be dissuaded, but may conclude that damage has been done to the lawyer-client relationship. The client may respond in any number of ways, but one particularly worrisome response is the client losing trust in the lawyer and holding back information from the lawyer. If the client holds back information from the lawyer, the lawyer may have a reduced ability to stay factually competent about the case. The lawyer could enter a client-imposed selective ignorance.[136] Thus the violation of the client's trust represented by threatening to reveal confidential information if the client does not abandon the plan to commit perjury raises severe epistemic risks that undermine the lawyer's epistemic role.

Even as he speaks strongly against threatening the client with revealing confidential information, Freedman is not blind to the potential need to take a strong approach to dissuasion (to the need to make the perils of perjury obvious to the client). Freedman thus allows for what he describes as "threats of adverse tactical and legal consequences" if the client commits perjury.[137] This would be better described as a warning, given as part of complete legal advice, than a threat. Notably, such a warning would be about legally legitimate consequences that the client may face for committing perjury. The ABA *Model Rules* support this approach as they note that "a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or

[136] In a sort of roll reversal of selective ignorance (where the lawyer attempts to keep from acquiring knowledge that would limit the lawyer's options in defending the client), the client may even reason that if s/he does not inform his/her lawyer about a certain matter, then the client can offer testimony to which the lawyer would object if the lawyer were to come to know the true fact of the matter.
[137] Freedman, "Client Confidences", *supra* note 5 at 1953.

application of the law".[138] More broadly, the FLSC *Model Code*, under the duty of candour, states that:

> A lawyer's duty to a client who seeks legal advice is to give the client a competent opinion based on a sufficient knowledge of the relevant facts, an adequate consideration of the applicable law and the lawyer's own experience and expertise. The advice must be open and undisguised and must clearly disclose what the lawyer honestly thinks about the merits and probable results.[139]

Informing the client of the possible negative consequences of committing perjury is just an instance of informing the client about the negative legal consequences of performing any action that is prohibited by law. In such cases, the client is the beneficiary of the lawyer's knowledge, rather than the target of knowledge that the lawyer is weaponizing against the client.

Though an ideal response when carried out properly, not every client in every situation can be dissuaded. After considering options available to the lawyer in the CP Trilemma and recognizing the desirability of dissuasion, the Court of Appeal in California says, "Yet, [the persuasion solution] does not answer the question of what should be done when the client insists on testifying falsely despite his attorney's best efforts to dissuade him".[140] The lawyer should not move too quickly into a conclusion that the client will not be dissuaded. Convincing the client out of committing perjury can be a sustained effort to respond to the CP Trilemma. Should these persistent efforts be unsuccessful, however, the lawyer should consider responses to the trilemma other than dissuasion. The remainder of this dissertation deals with situations in which the lawyer recognizes that s/he must consider actions other than dissuasion in response to the client's plan to commit perjury.

[138] ABA *Model Rules*, *supra* note 6, r 1.2 (d).
[139] FLSC *Model Code*, supra note 11, r 3.2-2, commentary 2.
[140] *People v Johnson*, *supra* note 115 at 812.

(7.3.3) Withdrawal from Representation – "I Can't Help You"

If a lawyer cannot achieve the ideal of dissuading a client from committing perjury, one approach that is widely supported is for the lawyer to avoid participating in, facilitating, or in any way condoning the client's perjury. Lawyers can achieve this by withdrawing from representing the client. As with dissuasion, withdrawal from representation in response to the CP Trilemma can take place within the advising context. Thus, withdrawal from representation can be done before the third aspect of the Trilemma, arising out of the lawyer's duty of candour to the court, becomes operative (i.e., before the lawyer and the client have the opportunity to deceive the court).[141] Prior to actually withdrawing, a lawyer may inform the client that, if the client persists in the plan to commit perjury, the lawyer will have to withdraw from representing the client. This lead up to withdrawal can also be viewed under the umbrella of threatening adverse tactical consequences,[142] except that it is the lawyer who actually delivers on the threat, rather than the broader legal system by way of a ruling made by a court against the client. The loss of one's lawyer can be viewed as a tactical setback within the client's broader efforts at winning the dispute with the opposing party.

Withdrawal as a response to the client putting the lawyer in the position of being involved in breaching the law and professional ethics is well grounded in codes of professional conduct and norms of professionalism. The FLSC *Model Code* requires the lawyer to withdraw from representing a client who insists on committing perjury. Pertaining generally to withdrawal, Rule 3.7-7 on Obligatory Withdrawal says that, "A lawyer *must* withdraw if:…b) a client persists in instructing the lawyer to act contrary to professional ethics".[143] Rule 5.1-1 of the FLSC *Model*

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[141] Withdrawing within the advising context is one possibility. However, the need to withdraw may also arise at much less favourable times, even in court after the client has already completed an act of perjury. See generally Layton & Proulx, *supra* note 27 at 368–370 (explaining withdrawal after completed client perjury).

[142] Above at note 137–139 and accompanying text.

[143] FLSC *Model Code*, supra note 11, r 3.7-7 [emphasis added]. Crucially, the rule stipulates that the client's instructions to the lawyer to perform an act contrary to professional ethics must be persistent. When considered in

Code sets out the lawyer's duty of candour to the court; this duty is part of the lawyer's role as an advocate.[144] A client who cannot be dissuaded from the plan to commit perjury is persistently asking the lawyer to participate in deceiving the court, i.e., to violate the lawyer's duty of candour to the court in Rule 5.1-1. Additionally, Rule 5.1-2(b) prohibits the lawyer from "knowingly assist[ing] or permit[ting] a client to do anything that the lawyer considers to be dishonest or dishonourable".[145] Perjury, and the facilitation of perjury, require the performance of dishonest activities and not being candid with the court, violating Rule 5.1-2. Facilitating untruthful testimony in court should certainly qualify as something that the lawyer considers dishonourable. Continuing with a plan to give untruthful testimony and asking the lawyer to facilitate the untruthful testimony is a persistent effort to have the lawyer act contrary to professional ethics.

Moreover, Rule 3.7-2 of the FLSC *Model Code* allows the lawyer the option to withdraw "[I]f there has been a serious loss of confidence between the lawyer and the client".[146] The commentary further specifies circumstances that may give "justifiable cause for withdrawal".[147] These circumstances include "if a lawyer is deceived by his client, the client refuses to accept and act upon the lawyer's advice on a significant point, a client is persistently unreasonable or uncooperative in a material respect…."[148] As we will see later in this section, the CP Trilemma can involve the client withholding information from the lawyer. Furthermore, a client who persists in his/her intention to commit perjury after the lawyer's repeated attempts at dissuasion has refused to accept the lawyer's advice on one of the most immediately pressing issues in the trial (giving honest testimony) and has also been uncooperative and unreasonable.

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light of the CP Trilemma, Rule 3.7-7 contemplates continued efforts by the lawyer at dissuading the client from committing perjury.

[144] See *ibid*, r 5.1-1.

[145] *Ibid*, r 5.1-2(b).

[146] *Ibid*, r 3.7-2.

[147] *Ibid*, r 3.7-2, commentary 1.

[148] *Ibid*.

In addition to the general norms on withdrawal, Rule 5.1-4 of the FLSC *Model Code* pertains to withdrawal related to breaches of the lawyer's duty of candour (and other duties as an advocate). Rule 5.1-4 requires the lawyer to disclose and rectify the errors and omissions that s/he makes in the performance of his/her role as an advocate.[149] The commentary to Rule 5.1-4 explains, "If a client desires that a course be taken that would involve a breach of this rule [i.e., Rule 5.1], the lawyer must refuse and do everything reasonably possible to prevent it. If that cannot be done, the lawyer *should*, subject to rule 3.7-1 (Withdrawal from Representation), withdraw or seek leave to do so".[150] The lawyer is advised (though not mandated) to withdraw if the client desires for the lawyer to breach the duty of candour to the court (and other norms in Rule 5.1 that govern the lawyer's role as an advocate).

The Supreme Court of Canada has also given broadly relevant guidance about withdrawal in the case of *R v Cunningham*.[151] Most notably for my purposes here, the court set out the protections given to a withdrawal done for ethical reasons. Therein, the court says counsel may cite "ethical reasons" as the justification for withdrawal, giving the example of "the accused…requesting that counsel act in violation of his or her professional obligations".[152] Where a lawyer seeks to withdraw for ethical reasons, the court "must grant withdrawal"[153] and "must accept counsel's answer at face value and not enquire further so as to avoid trenching on potential issues of solicitor-client privilege".[154] Thus, when a lawyer comes to

[149] See *ibid*, r 5.1-4.
[150] *Ibid*, r 5.1-4, commentary 1 [emphasis added]. Where the language in the FLSC *Model Code* refers to "this rule", the parallel section in the LSO *Rules of Professional Conduct* explicitly refer to "rules in Section 5.1", Law Society of Ontario, *Rules of Professional Conduct*, Toronto: LSO, 2019, online: LSO <lso.ca/about-lso/legislation-rules/rules-of-professional-conduct/complete-rules-of-professional-conduct> [perma.cc/CMQ8-VUH2] [LSO *Rules*], r 5.1-4, commentary 1.
[151] *R v Cunningham*, 2010 SCC 10.
[152] *Ibid* at para 48.
[153] *Ibid* at para 49.
[154] *Ibid* at para 48.

understand that s/he faces the CP Trilemma, the law can and must ask for withdrawal under codes of professional conduct, citing "ethical reasons" as the justification for withdrawal. The court must accept this explanation and not further inquire into the matter.

The ABA *Model Rules* bring some complications with them that go beyond the FLSC *Model Code*. In particular, the ABA *Model Rules* explicitly contemplate what a lawyer must do in response to client perjury. Dissuasion, disclosure, and withdrawal are specifically discussed.[155] I will explain much more about the ABA's stance on disclosure in response to client perjury below.[156] With respect to withdrawal, Rule 1.16 specifies terms for mandatory or optional withdrawal. Pertaining to the former, Rules 1.16 (a) says that, "[A] lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if: (1) the representation will result in violation of the rules of professional conduct or other law".[157] In the CP Trilemma, a lawyer who assists the client in presenting perjurious testimony would be violating his/her professional duty of candour to the court.[158] Additionally, the ABA *Model Rules* contain a broader range of justifications for optional withdrawal, including that "the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement", which one should hope includes assisting the client to deceive the court.[159]

From a virtue epistemic perspective, there is good reason to look favourably upon withdrawal as a response to the CP Trilemma that can be used after the lawyer has attempted, and

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[155] See ABA *Model Rules*, *supra* note 6, r 3.3(a)(3) (false evidence given by the client); r 3.3(b) (criminal or fraudulent conduct in an adjudicative proceeding); r 3.3, commentary 6 (dissuasion), commentary 10 (withdrawal and disclosure), commentary 11 (disclosure), commentary 15 (withdrawal).
[156] Below in Section (7.3.5).
[157] ABA *Model Rules*, *supra* note 6, r 1.16. As FLSC *Model Code*, supra note 11, r 3.3-7 requires that the client *repeatedly* instruct the client to violate professional ethics before the lawyer is obligated to withdraw, so too the ABA *Model Rules* leave room for dissuasion. The ABA explains, "The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation", ABA *Model Rules*, *supra* note 6, r 1.16, commentary 2.
[158] See ABA *Model Rules*, *supra* note 6, r 3.3.
[159] *Ibid*, r 1.16 (b) (4).

failed, to dissuade the client. Withdrawal allows the lawyer to avoid personally facilitating or condoning the practice of epistemic vice in deceiving the court. There is also a significant sense in which the lawyer who withdraws from representing the client in the CP Trilemma practices the role-differentiated epistemic virtue of epistemic partisanship that the adversarial system needs. I defined epistemic partisanship as:

> a disposition to (a) desire the epistemic and legal success of the client, which leads to (b) taking action to support the advancement of the client's cause, (c) in service of the adversarial system of adjudication, especially its truth-seeking function.[160]

The client's epistemic and legal success does not include deceiving the court. Earlier, I defined the epistemic success of the client as persuading the adjudicator of the client's position by presenting the adjudicator with truths, especially on disputed factual matters or on conceptual matters that can be known.[161] Since the CP Trilemma exists when the client plans to mislead the tribunal, a lawyer facilitating the perjurious testimony would not be presenting the adjudicator with truths and would thus not be pursuing the client's epistemic or legal success. In such a case, the lawyer might be exclusively pursuing the client's material benefit, for example.

When the lawyer cannot continue to work for the client without stepping outside the bounds of pursuing the client's *epistemic and legal success*,[162] the lawyer cannot participate in a clash of positions to facilitate the work of a neutral arbiter in service of the adversarial system of adjudication. To continue working for the client would mean engaging in global partisanship, which I defined as taking the side of the client regardless of whether doing so serves the functions of the adversarial system of adjudication, and regardless of whether the particular actions that the lawyer is taking for the client serve the justifications for the lawyer's role and role-differentiated

[160] Above in Section (4.5) at note 90 and accompanying text.
[161] Above in Section (4.5), note 91 and accompanying text.
[162] Stepping outside these bounds by deceiving the tribunal.

norms.[163] Instead of participating in this epistemically vicious behaviour, the lawyer can withdraw and thereby cease providing legal services when the lawyer's actions are not supportive of, and cannot be justified by, the adversarial system of adjudication.

Like dissuasion, though, even withdrawal is not a problem-free response to the CP Trilemma. Although the lawyer can use withdrawal to avoid personal involvement in epistemic vice, the lawyer's clean hands do not, by themselves, inoculate the legal system against the client's intention to commit perjury. When the lawyer withdraws, the CP Trilemma also remains unresolved from the perspective of the legal needs of the client who must now find another lawyer. To do more than protect the lawyer, withdrawal must lead to some change in the client or the legal proceeding. The client, for example, must be persuaded by the withdrawal (or perhaps because of a series of results started by the withdrawal) that the benefit of persisting in the plan to deceive the court is not worthwhile. If the client continues to pursue the legal matter and persists in the plan to commit perjury, the adjudicative system's own mechanisms may perpetuate the tension, or the successor lawyer will be placed in an epistemically disadvantaged position.

Speaking of perpetuating the tension, the Court of Appeal of California in *People v Johnson*, described withdrawal as an "intermediate solution[]" that "often result[s] in no solution", specifically when the initial lawyer's "withdrawal leads to an endless chain of withdrawals".[164] The court is imagining a situation in which the first lawyer who represents the client in the CP Trilemma is sufficiently competent to understand the need for withdrawal and withdraws from representing the client. The client, not dissuaded from the plan to commit perjury, seeks representation from another lawyer. This successor lawyer too becomes sufficiently competent to recognize the CP Trilemma and the need to withdraw from representing the client. The successor

[163] Above in Section (4.5).
[164] *People v Johnson*, *supra* note 115 at 817.

lawyer too withdraws and sends the client onto the next step of a never-ending chain of withdrawals. The client will repeatedly find himself/herself hiring new lawyers and losing their service as the lawyers respond to the CP Trilemma by withdrawing from the relationship.

Of course, given the real-world costs and institutional/social dynamics involved with obtaining legal representation, this chain is unlikely to have many links before some change occurs in the client or the legal proceeding to interrupt the chain. A real client will quickly tire of hiring and losing new lawyers and the legal community will quickly realize that something is wrong in the client's relationship to his/her lawyers.[165] Noting the theoretical possibility of the endless chain—of obtaining legal representation, having the lawyer understand and respond to the CP Trilemma, and seeing the lawyer withdraw from representing the client—is not the purpose of this line of thought. Instead, we ought to approach the Court of Appeal's argument as showing that withdrawal does not give a resolution to the CP Trilemma merely on the basis of the adjudicative system's own internal resources (which include norms of legal professionalism) functioning as they are designed to function. The lawyer's abidance of the norms on withdrawal do not, on their own, resolve the scenario. To this, I add the observation that, for withdrawal to be any sort of resolution to the CP Trilemma, withdrawal must lead to a change in the client (whether a change of viewpoint or even simply a prudential calculation that comes out against the plan to give untruthful testimony).

With the aim of causing a change in the client, another way in which to look at withdrawal goes beyond considering it as an act by an individual lawyer, or as an act by a series of disconnected lawyers acting independently (in the case of a client who attempts to have another

[165] On a related point, see Layton & Proulx, *supra* note 27 at 345, n 71 and accompanying text, noting that "an accused whose lawyers repeatedly apply to get off the record for ethical reasons will soon be taken to have waived the right to be represented by counsel and be forced on to trial without a lawyer".

lawyer allow him/her to commit perjury). Rather, if the lawyers that a client encounters are all able to gain enough information to understand that the client plans to commit perjury, then withdrawal by multiple lawyers can be understood as a collective effort at dissuasion in fulfillment of the professional duties that all lawyers are bound to follow. When a lawyer withdraws, it can be taken as demonstrating to the client that his/her desire to commit perjury is incompatible with receiving a full defence because lawyers are not prepared to knowingly act in a way that undermines the adjudicative system that lawyers serve. The profession will have taken a unified stance against assisting a client to commit perjury and it is up to each lawyer that faces this problem to give that stance practical effect. Continuing the tension of the CP Trilemma through a chain of lawyers then becomes a measure that protects the legal system, rather than a problem with withdrawal. Critically, the tension of duties in the trilemma and the social tension experienced by being the client in the trilemma are aimed at causing a change in the client.

Another, more problematic, possibility may intervene well before continuing the tension of the CP Trilemma can cause a change in the client. Withdrawal may eventually lead the client to a lawyer who is in an epistemically disadvantaged position. This position can exist for various reasons and serve various purposes. For example, rather than facing an unending chain of withdrawals, the client may find a lawyer who practices selective ignorance. A lawyer in this position will purposely not achieve sufficient factual competence to recognize the CP Trilemma and will thus not have the impetus to withdraw from representing the client. Considering the effects on the legal system as a whole, all that withdrawal has achieved in such a case is to shuttle the client from a lawyer who is factually competent about the matter, and who has the integrity to refuse to assist the client in deceiving the court, to a lawyer who builds incompetence about the

facts of a case into his/her practice strategy. The reasons articulated above for opposing selective ignorance apply here too.

Finding a selectively ignorant lawyer is not the only way for the client to obtain the services of a lawyer who is in an epistemically disadvantaged position. Describing the aftermath of a lawyer's withdrawal from representing a client, Freedman suggests that, "The client will then go to the nearest law office…and *withhold* incriminating information or the fact of his guilt from his new attorney".[166] In more general terms, what Freedman is saying is that, having lost a lawyer over the CP Trilemma, the client may omit information from his/her interactions with this successor lawyer so that the successor lawyer will not have enough information to know that the client is planning to commit perjury and will thus not be impelled to withdraw from representing the client. There are major virtue epistemic problems in this possibility.

Before moving onto considering those virtue epistemic problems, I will explain why the process of transferring from one lawyer to another could put the successor lawyer in an epistemically disadvantaged position. Would the successor lawyer not be informed by the first lawyer about the client's intention to commit perjury and thus also recognize the CP Trilemma? Codes of professional conduct have provisions about the role of the first lawyer in facilitating the transfer of information to the successor lawyer. The FLSC *Model Code* says that, "Co-operation with the successor lawyer will normally include providing any memoranda of *fact* and law that have been prepared by the lawyer in connection with the matter, but confidential information not clearly related to the matter should not be divulged without the written consent of the client".[167] A

[166] Freedman, "Three Hardest Questions", *supra* note 5 at 1476 [emphasis added]; Freedman, "Lawyer's Trilemma", *supra* note 1 at 28 [emphasis added]. The quote is nearly identical in both sources.
[167] FLSC *Model Code*, supra note 11, r 3.7-9 [commentary 4] [emphasis added].

memorandum of the facts of the case might include information that would let the successor lawyer know that the client intends to commit perjury.

However, the first lawyer's duty of confidentiality can interrupt a complete flow of information from the first lawyer to the successor lawyer and could place the successor lawyer in a position where the client can omit information in the way described by Freedman. In discussing "confidential information not clearly related to the matter",[168] the FLSC *Model Code* recognizes that the first lawyer cannot simply transfer all confidential information to the successor lawyer, and thus that there is such a thing as confidential information that the successor lawyer can be kept from seeing. That same rule and its commentary, Layton and Proulx argue, "appear to recognize an implicit authority to reveal confidential information clearly related to the matter to the successor lawyer".[169] Yet, Layton and Proulx argue that this implied authority does not prevail against the client expressly forbidding the lawyer from sharing the information with the successor lawyer.[170] If the client expressly instructs the first lawyer to not divulge information about the client's intended perjury to the successor lawyer, the first lawyer would be bound by the duty of confidentiality to not disclose the information to the successor lawyer.[171] By examining the virtue epistemic problems with the client keeping information from the successor lawyer that would

[168] *Ibid*, r 3.7-9, commentary 4. Layton and Proulx, *supra* note 27 at 571, n 143 cite the LSO *Rules*, *supra* note 150, r 3.7-9, commentary, which is parallel to the section just cited from the FLSC *Model Code*.
[169] Layton & Proulx, *supra* note 27 at 571.
[170] See Layton & Proulx, *supra* note 27 at 571. Layton & Proulx also note that some provinces have previously restricted the extent to which the first lawyer can share information with the successor lawyer. See *ibid* at 571, note 144. Also, as an observation of legal practice, "Many criminal lawyers who have withdrawn from a matter or been discharged require a signed direction from the client before releasing the file or relevant confidential information to successor counsel", *ibid* at 571.
[171] The two authors argue that an exception or exclusion to the duty of confidentiality could permit the first lawyer to share the information with the successor lawyer when the client has expressly forbidden the first lawyer from doing so. See *ibid* at 345–347. Layton and Proulx also explore ethical rules in Saskatchewan, Manitoba, and New Brunswick, which provide an exception to the lawyer's duty of confidentiality to permit the lawyer to disclose confidential information to prevent a crime. See *ibid* at 346. If the lawyer's plan to commit perjury falls under this heading of preventing a crime, then these ethical norms might justify the first lawyer in disclosing to the successor lawyer the client's intention to commit perjury.

allow the successor lawyer to identify the CP Trilemma, I am dealing with situations in which the first lawyer is held back by the duty of confidentiality from sharing this information with the successor lawyer.

One level of virtue-epistemic problem deals with the mechanics of lawyer-client interactions. When the client withholds information from the successor lawyer for fear of losing a strategic advantage, the client is avoiding the practice of epistemic virtue that the contours of the lawyer-client relationship are designed to encourage in service of the mechanisms of the adversarial system of adjudication. The epistemology of the adversarial system of adjudication requires competent champions for the parties to a legal proceeding. Lawyers and their clients are given protections—in the form of duties of confidentiality and the protections of privilege—to facilitate open and honest communication. These protections are meant to create an advising context in which the lawyer, and especially the client, can practice other-regarding epistemic virtues, with the aim of the lawyer acquiring competence of the facts so that the lawyer can advise the client about the law and possibly represent the client before a neutral arbiter (if the dispute actually makes it to court). When things work as intended, the advising context is epistemically reliable and epistemically powerful[172] for the lawyer. Quite the opposite from practicing epistemic virtues in the way intended to support the adversarial system, the client who withholds information[173] from the successor lawyer seeks to generate false beliefs in, and deception of, the successor lawyer so that the successor lawyer will not prevent the client from testifying falsely and so that the successor lawyer will not withdraw.

[172] See Goldman's veritistic standards, discussed above in Section (2.1) at note 15–16 and accompanying text, citing Goldman, "Foundations", *supra* note 53 at 128–129.
[173] Information by which the successor lawyer would identify the CP Trilemma and, eventually, be impelled to withdraw from representing the client.

Using Freedman's example of the CP Trilemma, the client could attempt to keep the lawyer from knowing that s/he was at 15th and P Streets at 10:55PM, i.e., that he was close to the scene of the crime, even though he was moving away from the scene of the crime. If the successor lawyer discovers this information, then this lawyer might also attempt to dissuade the client from giving perjurious testimony and may also eventually withdraw from representing the client. The client hiding information from the lawyer makes the conditions of the successor lawyer-client relationship less epistemically reliable for his/her successor lawyer (i.e., worsens the ratio of true beliefs to the total number of beliefs[174] produced in the lawyer in the advising context), thus reducing the lawyer's factual competence.

When the client decides to withhold information to protect a tactical advantage, s/he creates similar downsides to when a lawyer practices selective ignorance by giving a lawyer-client Miranda warning.[175] In the case of a client keeping information from a subsequent lawyer after their earlier lawyer has withdrawn, the client can be said, in his/her reasoning process, to give himself/herself a Miranda warning based on the events that led the first lawyer to withdraw. This is to say that the lawyer-client Miranda warning would be self-administered by a layperson, who would have less capacity to understand the consequences of that decision than a lawyer practicing selective ignorance.[176]

Such a client places himself/herself in the position of making a strategic decision about what information to share with his/her next lawyer. Cutting off the successor lawyer's opportunities for epistemic virtue, the client is also removing the successor lawyer from being in

[174] See Goldman, "Foundations", *supra* note 53 at 128 (definition of epistemic reliability).
[175] These downsides are stated above in Section (7.3.1).
[176] This is not to say that the lawyer practicing selective ignorance is any sort of model. The client self-administering a lawyer-client Miranda warning creates an even worse epistemic relationship between that lawyer and the client, however.

a "position to attempt to discourage the client from presenting [his/her perjurious testimony]".[177] The client prevents the lawyer from giving the client the benefit of advice about the prohibitions on perjury, the risks of perjury, and the benefits of either giving honest testimony or not testifying at all. The client also denies, or reduces, the lawyer's ability to think through the ways in which the lawyer can fulfill his/her own duties to the court (especially duties related to honesty) while representing a client who intends to commit perjury. This is the kind of decision-making and epistemic responsibility that legal representation is supposed to provide for the client, but which the client has appropriated to himself/herself, or at least prevented the lawyer from giving.

Broadening out my concerns from the level of epistemic mechanics in the lawyer-client relationship, I turn to the topic of what legal representation is supposed to provide for the client by addressing epistemic responsibility and epistemic partisanship. If legal representation can itself be described as an appropriate offloading of epistemic work from the client and onto the lawyer,[178] withdrawal from representation removes the normal aspects of the workload from the lawyer. This does not mean that the full workload is passed from the lawyer to the client when the lawyer withdraws from representing the client. Unless the client will self-represent from this point onward, the load is not transferred from the lawyer to the client in the sense of requiring the client to perform the epistemic work that is assigned to the lawyer in the adversarial system. Rather, the client becomes newly responsible for retaining a new lawyer to bear the epistemic load.

Outside of self-representation—and dealing with the issue of the client holding back information from the successor lawyers—the broader epistemic concern is that the client who holds back information from the successor lawyer will deny the successor lawyer the opportunity

[177] Freedman, "Three Hardest Questions", *supra* note 5 at 1476 (discussing the possibility of a client going to another law office and withholding information from the new lawyer after the client's first lawyer has withdrawn in response to the CP Trilemma).
[178] Described above in Section (5).

to take epistemic responsibility in the legal proceedings, to offload key aspects of epistemic work from the client to the lawyer. The successor lawyer, even wanting to pursue the epistemic virtues by which lawyers provide a benefit to the adversarial system of adjudication, can be denied the ability to do so by a determined client who intends to give perjurious testimony. All the while, the first lawyer is stopped from assisting the second lawyer by the duty of confidentiality that the first lawyer owes to the client.[179] If the successor lawyer never discovers the client's deception, the successor lawyer will have a blind spot that s/he does not know to check, thereby limiting the extent to which s/he can acquire and marshal knowledge for the benefit of the client. If the successor lawyer makes all appropriate investigative efforts within the lawyer-client relationship to acquire the knowledge needed to serve the client, the successor lawyer is not committing epistemic vice. This lawyer is like a soldier who has dispositions for courage but who is shuttled away by others when danger arrives. The lawyer has the trait-virtues needed to give partisan but honest representation—a function needed by the legal system—but the lawyer is not able to put those dispositions into practice.

If some of Freedman's worst predictions about the result of withdrawal come true, then withdrawal ends up being far less than perfect, and potentially raises serious problems, from a social epistemic perspective. Rather than producing a positive result by keeping false testimony out of the adjudicative process, i.e., instead of maintaining the veritistic reliability of the adjudicative process by preventing false beliefs from being added to the set of beliefs that the adjudicative system produces, withdrawal would weaken the veritistic excellence of the process by introducing misleading information into the (successor) lawyer-client relationship(s). In doing

[179] A lawyerly duty (confidentiality) that is meant to facilitate the functioning of the adversarial system is not merely ignored or does not merely conflict with other duties; it exists as an obstacle to the first lawyer's ability to rectify the client's relationships to his/her lawyers in line with the needs of the adversarial system.

so, withdrawal prevents epistemic partisanship and the passing of epistemic responsibility from the client to the lawyer. For withdrawal to do more than allow the lawyer to "evad[e] the ethical problem",[180] it must ultimately result in some change in the client or in the legal proceedings. For an actor with a role-differentiated epistemology in a system that seeks truth, responses to conflicting responsibilities need to do more than allow the actor to himself/herself avoid practicing epistemic vice.

(7.3.4) Narrative Testimony Approach – "I'll Let You Tell Them"

The narrative testimony approach, also called "passive representation",[181] was advanced "[i]n the early 1970s" by "members of the ABA Standing Committee on Association Standards for Criminal Justice" who drafted the ABA *Standards Relating to the Prosecution Function and the Defense Function*.[182] Under their proposal, the narrative testimony approach could be undertaken after the lawyer has tried and failed at using other methods to address the CP Trilemma. Before engaging in passive representation in response to the CP Trilemma, the lawyer would be required to attempt to dissuade the client[183] and to seek withdrawal (if feasible).[184] Good counselling and persuading the client away from misleading the court is still recognized as the most preferrable response and outcome. Should those other avenues have failed, the lawyer would facilitate the client's testimony while following a specific set of instructions to avoid actively participating in the deception of the court. The lawyer "confine[s] his examination [of the client]

[180] Freedman, "Lawyer's Trilemma", *supra* note 1 at 28.
[181] Freedman, "Getting Honest", *supra* note 5 at 150.
[182] Susan E Thrower, "Neither Reasonable nor Remedial: The Hopeless Contradictions of the Legal Ethics Measures to Prevent Perjury" (2010) 58:4 Clev St L Rev 781 at 791, n 66 and accompanying text, citing American Bar Association, *Standards Relating to the Prosecution Function and the Defense Function* (ABA, 1971) [ABA *Standards* 1971].
[183] See Thrower, *supra* note 182, n 67 and accompanying text, citing ABA *Standards* 1971, *supra* note 182, Standard 4-7.7(a).
[184] See Thrower, *supra* note 182, n 68 and accompanying text, citing ABA *Standards* 1971, *supra* note 182, Standard 4-7.7(a).

to identifying the client and permitting him to make a statement to the finder of fact".[185] The approach prohibits direct examination and prohibits the lawyer from later "refer[ring] to or rely[ing] on known perjury in his argument to the fact-finder".[186]

Though not being widely recommended as a way of dealing with the CP Trilemma, the narrative testimony approach continues to be permitted or required in some courts. The current ABA *Model Rules* recognize that lawyers in some jurisdictions are required by courts to use the narrative testimony approach and that the orders of such courts take precedence over other requirements (including in professional codes of conduct) pertaining to a client who plans to give false testimony.[187] California is one jurisdiction that permits the narrative testimony approach in the *California Rules of Profession Conduct*. The State Bar's commentary on the use of the narrative testimony approach cites the case of *People v. Johnson*, [188] where the Court of Appeal of California described the narrative testimony approach as the "Best Accommodation of the Competing Interests" when the lawyer expects the client to give perjurious testimony.[189]

In the *Johnson* case, the trial level judge agreed to a request by the defence attorney to prevent the accused from testifying. The lawyer made this request of the trial court because the

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[185] Thrower, *supra* note 182, n 70 and accompanying text, citing ABA *Standards* 1971, *supra* note 182, Standard 4-7.7(c). Compare Freedman's more critical description in Freedman, "Getting Honest", *supra* note 5 at 150–152. Therein, Freedman says that the lawyer who practices the narrative testimony approach "identifies the witness as the defendant, tells him to tell his story to the jury, and then turns his back on the defendant and sits down", Freedman, "Getting Honest", *supra* note 5 at 150.

[186] Thrower, *supra* note 182, n 71 and accompanying text, citing ABA *Standards* 1971, *supra* note 182, Standard 4-7.7(c).

[187] See ABA *Model Rules*, *supra* note 6, r 3.3, commentary 7. Commentary 7: "In some jurisdictions…courts have required counsel to present the accused as a witness or to give a narrative statement if the accused so desires, even if counsel knows that the testimony or statement will be false. The obligation of the advocate under the Rules of Professional Conduct is subordinate to such requirements". See generally Thrower, *supra* note 182 at 790–797, especially n 78 (explaining the narrative testimony approach and cataloguing instances in which it has been required, permitted, and rejected by courts); Layton & Proulx, *supra* note 27 at 354, n 113 (cataloguing cases in large jurisdictions such as California, New York, Massachusetts, Illinois, Pennsylvania, and Florida, that have adopted the narrative testimony approach).

[188] State Bar of California, *California Rules of Professional Conduct*, State Bar of California, 2021, online: State Bar of California <www.calbar.ca.gov/Portals/0/documents/rules/Rules-of-Professional-Conduct.pdf> [perma.cc/QLA3-HVYR], r 3.3, commentary 4.; *People v Johnson*, *supra* note 115 at 817.

[189] *People v Johnson*, *supra* note 115 at 817.

lawyer expected the client to perjure himself. Later, the Court of Appeal explained that the trial court should not have prevented the accused from testifying because doing so involved the "impossible task" of "determine[ing], as a matter of fact, that Johnson would perjure himself once he took the stand".[190] Instead of barring the client from testifying, the Court of Appeal said that the trial court should have permitted the client to give testimony in the narrative form.

Though arguably preferrable to preventing the client from testifying at all, the narrative testimony approach poses significant problems for the epistemic structure of the adversarial system of adjudication and for epistemically virtuous lawyering within the adversarial system. Passive representation during, and in response to, the client's testimony is not so much an exercise in epistemic partisanship[191] as it is a break from partisanship. It makes the lawyer's role one of episodic or segmented representation within a single legal dispute, though the client needs enduring and unbroken partisan representation, especially during criminal litigation.

In passive representation, the lawyer takes a posture of epistemic neutrality, even of an observer, with respect to the client's own testimony. A lawyer who is epistemically neutral about an aspect of their client's case is avoiding responsibility (in the sense of avoiding guilt) that would accrue to the lawyer if s/he were to take positive action that facilitates the client's deception.[192] But this idea of a lawyer aiming to limit his/her own guilt by being passive is deeply connected with avoiding the kind of responsibility that is the focus of the responsibilist school of virtue

[190] *Ibid* at 818.
[191] Above in Section (4.5), at note 90 and accompanying text (this dissertation's definition of epistemic partisanship).
[192] But see Thrower, *supra* note 182 at 796, where she critiques the idea of distinguishing between the lawyer passively aiding the client's perjury as opposed to actively assisting the client's perjury. She argues that the ABA *Model Rules*, *supra* note 6, r 3.3 (on candour towards the tribunal) and 1.2(d) (prohibiting the lawyer from assisting the client to engage in criminal or fraudulent behaviour) do not make a distinction between active assistance and passive assistance. This too is a powerful argument against the narrative testimony approach that can be explored from an epistemic analysis, though I do not do so in this dissertation.

epistemology. Minimizing the active nature of "knowers/believers"[193] is precisely the problem with the narrative testimony approach when it comes to the reliance that the adversarial system of adjudication has on the epistemic partisanship of the lawyer. In the adversarial system of adjudication, the lawyer is responsible for being one of the primary active knowers/believers, doing epistemic work on the client's behalf and in service of the clash of positions on which the adversarial system is based. This is the core of the notion of epistemic partisanship articulated in this dissertation. Suspending one's role within the system—especially during its most challenging and consequential moments—is thus a poor way to avoid one's own professional guilt.

Being more specific, the narrative testimony approach is a substantial offloading—from the lawyer to the client—of the cognitive work that the lawyer would normally be required to do in relation to the client's testimony.[194] The client is left with the task of structuring the way in which s/he presents his/her testimony to the trier of fact. In the terms of virtue epistemology, this means that s/he must determine how s/he will practice other-regarding virtues for the parts of the testimony that are true and the other-regarding vice of dishonesty[195] for the parts of the testimony that is untrue. Notably, the onus is placed on the client at one of the most vital moments of the case. The lawyer, not being permitted to assist the client in preparing this perjurious testimony because doing so would assist the client in giving false or misleading evidence,[196] leaves the client with the task of deciding which facts to include in the narrative and how to work the perjurious

[193] This is in contrast with responsibility in epistemology, which "can highlight the active nature of knowers/believers", discussed above in Section (3.2) at note 34 and accompanying text, citing Code, *supra* note 112 at 51.
[194] As argued in Section (5), the offloading is properly done the other way around, from a layperson to a skilled professional.
[195] In practicing the vice of dishonesty, the client would want to skillfully tell the untrue aspects of his/her story. Thus, practicing a vice here involves some epistemic capacities, even as they are deployed for vicious ends.
[196] See ABA *Model Rules*, *supra* note 6, r 3.3(a)(3) (prohibiting the lawyer from offering evidence that the lawyer knows to be false), r 3.4 (prohibition on "counsel[ling] or assist[ing] a witness to testify falsely"); FLSC *Model Code*, supra note 11, r 5.1-2(e) (prohibiting the lawyer from offering evidence that the lawyer knows to be false), r 5.4-2 (prohibiting the lawyer from influencing a witness to give false evidence).

aspect into the testimony. The client, lacking the formal training that would give him/her the technical skill to structure his/her testimony, may not see how transparent his/her lie is.

I do not lament the fact that the client may do a poor job of concealing his/her perjury. Technical proficiency at an epistemically vicious behaviour (i.e., the skill needed to be epistemically vicious) is not a desirable trait to have in a client or in any epistemic agent. Nor am I promoting sympathy for the client who intends to commit perjury, especially not sympathy for someone who is facing a difficult task (the difficult task of preparing and delivering perjurious testimony). However, even when someone bears the blame for his/her own situation and should not be wished success in their misguided endeavour, it can still be recognized that s/he is not well equipped to manage the situation or to perform a task that would normally be assigned to someone who occupies a different role in the situation. It is the lawyer's responsibility to ensure that the client is not put in the position of attempting to figure out how to be effective at deceiving the tribunal. In terms of the lawyer's function in the adversarial system of adjudication, it is the lawyer's responsibility to assist the client in successfully practicing other-regarding epistemic virtues. Not participating in the client's exercise of epistemic vice by stepping outside of the lawyer's role leaves the adversarial system without the benefit of an actively participating professional fulfilling his/her designated role and shifts responsibilities in a high-stakes situation to the layperson. Virtue epistemology counsels lawyers to step into responsibility, not to step out of responsibility.

Finally, the narrative testimony approach adds a wrinkle to the avoidance of responsibility that is different from the avoidance of responsibility in selective ignorance. This is because refusing to assist one's cause is not equal at all stages of a process. With selective ignorance, not taking epistemic responsibility undermines the lawyer's ability to competently represent the client.

In the narrative testimony approach, avoiding epistemic responsibility—in the sense of not being actively partisan in advancing the client's claims and case—may signal to the trier of fact a reason to distrust the client's testimony and even overall case. As Freedman says, "[E]xperienced trial attorneys have often noted that jurors assume that the defendant's lawyers knows the truth about the case, and that the jury will frequently judge the defendant by drawing inferences from the attorney's conduct in the case".[197] Worse than passive representation, which could be described as not positively taking action for or against the client (especially during a particular part of the trial, i.e., during the client's testimony), a lawyer who communicates to the trier of fact that there is reason to distrust his/her own client could be better described as momentarily opposing the client during the heat of the adversarial clash.

The narrative testimony approach to the CP Trilemma attempts to achieve an accommodation that satisfies the client's desire to testify along with the lawyer's duties to the court. It proposes to arrive its aims, however, by having the lawyer step out of his/her partisan role. It is doubtful whether the legal system should tolerate a solution that has the lawyer place so much epistemic responsibility with a client, especially a client who intends to practice epistemic vice by misleading the court.

[197] Freedman, "Lawyer's Trilemma", *supra* note 1 at 29. See *State v Robinson*, 224 SE (2d) 174 (NC Sup Ct 1976) at 180, where the Supreme Court of North Carolina said of the narrative testimony approach, "This procedure could hardly have failed to convey to the jury the impression that the defendant's counsel attached little significance or credibility to the testimony of the witness, or that the defendant and his counsel were at odds. Prejudice to the defendant's case by this trial tactic was inevitable". This case is recognized as giving a criticism of the narrative testimony approach in *People v Johnson*, *supra* note 115 at 814. The Court of Appeal of California did not agree that juries will draw the inference that the client's testimony is not credible just because the client's own attorney does not actively participate in the client's testimony. The court in *People v Johnson* says that the jury may simply believe that the procedure for a defendant's testimony is different than the procedure for other witness testimony, *People v Johnson*, *supra* note 115 at 817. This possibility is true, though it would not address the negative inference that the trier of fact would be likely to draw from seeing the attorney not rely on his/her own client's perjurious testimony at any later point in the trial.

(7.3.5) Disclosing Perjury to the Court – "I'll Tell Them What You're Doing"

The responses to the CP Trilemma considered so far in this dissertation have one element in common: the maintenance of client confidentiality. Though the extent to which they maintain client confidentiality exists on a spectrum—with the lawyer keeping confidential information to himself/herself and even *from* himself/herself (selective ignorance) to the lawyer engaging in behaviours that hint at confidential information (withdrawal and the narrative testimony approach[198])—the lawyer never explicitly reveals the client's anticipated or completed perjury.[199] I now turn to disclosure, which breaks the pattern of keeping the client's confidence. As a response to the CP Trilemma, disclosure involves the lawyer informing another person (usually another participant in the legal proceeding, especially the judge) about the client's anticipated or completed perjury. Informing this other participant gives preference to the norms requiring candour to the court and against misleading the court[200] (or to avoiding a specific violation of the norms on candour) over the lawyer's duty of confidentiality to the client. Susan E. Thrower describes this trade-off as "the single biggest producer of cognitive dissonance in the entire ethics enterprise".[201] This dissonance is expected as disclosure involves a breach of confidentiality, one of the core duties that support the partisan role of the lawyer.

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[198] I am referring here to the point that withdrawal (especially at key moments) and using the narrative testimony approach may be interpreted by other participants in the adjudicative system as a signal that something unethical has taken place, is taking place, or will take place—or even specifically that the lawyer's client is lying. Some related points are mentioned above in Section (7.3.3) at note 165 and accompanying text and in Section (7.3.4) at note 197 and accompanying text.

[199] Anticipated client perjury and completed client perjury are categories used in Layton & Proulx, *supra* note 27 at 336 (anticipated perjury), 366 (completed client perjury). The authors apply the responses used in this dissertation, and variations of these responses, to anticipated client perjury and completed client perjury, to the extent that the responses are relevant to the context. Thus, they consider withdrawal in response to both anticipated client perjury and completed client perjury. In future work, this distinction between anticipated and completed perjury will help epistemologists of lawyering give even more finely stated analysis than I have here. These more finely stated points may be especially numerous in relation to social epistemology (such as Goldman's veritistic standards, discussed above in Section (2.1) at note 15–16 and accompanying text).

[200] See ABA *Model Rules*, *supra* note 6, r 3.3 and commentary 2; FLSC *Model Code*, supra note 11, r 5.1-1 and commentary 1; *ibid*, r 5.1-2. These passages are quoted above in Section (7.1) at notes 15–19 and accompanying text.

[201] Thrower, *supra* note 182 at 809.

In this section, I will discuss the use of disclosure in a jury trial. I will focus primarily on situations in which the lawyer anticipates that the client will commit perjury. In this situation, the lawyer comes to know about the client's intention in the advising context, having acquired enough knowledge about the situation that s/he cannot practice selective ignorance about the facts of the case.[202] It should also be understood that the lawyer has repeatedly and unsuccessfully attempted to dissuade the client from giving false testimony. The question is whether, to fulfill requirements of candour to the court, the lawyer can or must disclose to the judge that the client *intends to commit perjury*.

American and Canadian professional norms differ substantially on the question of disclosure. This difference exists both in terms of the substance of the rules and in the clarity of the rules. Whereas the ABA *Model Rules* offer guidance generally favouring disclosure that is difficult to parse and difficult to follow in practice, the Canadian rules are much more clearly in unison against allowing disclosure. The ABA *Model Rules* have a complicated history of prohibiting disclosure (thus giving preference to the lawyer's duty of confidentiality) and requiring disclosure (thus giving preference to the lawyer's duty of candour to the court). This history, documented by Thrower,[203] includes changes to ethics codes, conflicts between ethics codes and

[202] There are numerous contexts in which a lawyer would not know that the client's testimony is perjurious until the client has given the testimony. On the less than epistemically virtuous side, the lawyer may have practiced selective ignorance and have discovered, only after the testimony has been given, that the client was not testifying truthfully. On the more epistemically virtuous side, the lawyer may have made robust efforts to learn the facts of the case well enough to competently represent the client, put the client on the stand in good faith, and yet discover afterwards that the client committed perjury. In the second type of case, the lawyer has made reasonable efforts to practice epistemic partisanship, specifically to practice self-regarding virtues to allow himself/herself to protect the epistemic and legal interests of the client. S/he has followed the steps that are normally requisite for marshalling evidence and information that furthers the interest of the client and checking evidence and information that undermines the epistemic and legal interests of the client. The practice of a virtue is no guarantee, however, that one's purposes will be perfectly achieved. Virtuous people sometimes fail. The practice of virtuous behaviour (in this case, proper investigation of the facts and honesty in dealing with the court) is sometimes impeded by the vicious behaviour of other people (in the case, the client giving perjurious testimony). In such cases, remedies like disclosure may be helpful.

[203] See generally Thrower, *supra* note 182 at 809–816 (explaining changing, unclear, and even conflicting rules about disclosure).

ethics opinions given by ABA committees, and court decisions on the topic. The current ABA *Model Rules* have settled on what appears (and perhaps only appears) to be a preference for candour to the court and disclosure of intended and completed client perjury.

The ABA *Model Rules* speak to disclosure of both anticipated criminal and fraudulent conduct generally and completed false testimony specifically. About criminal and fraudulent conduct in general, Rule 3.3(b) says, "A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal".[204] This rule speaks to future, present, and past conduct permitting disclosure in all timeframes if necessary. When a lawyer anticipates that a client will testify falsely, the lawyer must attempt to dissuade the client and can refuse to allow the client to offer testimony that the lawyer *knows* is false.[205] Disclosure is an option, but it is not the first option.

Speaking specifically to completed false testimony, "If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal".[206] With respect to completed false testimony, the lawyer must also pursue other avenues before disclosing the false testimony. The lawyer must "remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence".[207]

[204] ABA *Model Rules*, *supra* note 6, r 3.3(b).
[205] See *ibid*, r 3.3, commentary 6. Note though that the criminal defence lawyer is not permitted to refuse to offer evidence that the lawyerly merely *reasonably believes* is false, *ibid*, r 3.3(a)(3), and r 3.3, commentary 9.
[206] *Ibid*, r 3.3(a)(3).
[207] *Ibid*, r 3.3, commentary 10.

Ultimately, if the lawyer is not permitted to withdraw, or withdrawal will not remedy the offering of false evidence, the commentary explains that the lawyer must disclose the falsity of the testimony to the tribunal "even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6".[208]

This requirement appears to take a strong stance in favour of disclosure to prevent the client from misleading the court or to prevent the negative effects of a client misleading the court. Moreover, these rules on disclosure of client perjury appear to be based on a commitment to the epistemic processes of the adversarial system of adjudication and the trade-offs that might be required to protect the system's epistemic processes. Explaining the need for the requirement for disclosure, the ABA *Model Rules* say that "the alternative [to the lawyer disclosing the client's perjurious testimony] is that the lawyer cooperate in deceiving the court, thereby subverting the *truth-finding process which the adversary system is designed to implement*".[209] The fact that the rule is made with epistemic aims in mind is not to say that the rule is epistemically good, or good in other ways. However, the stated commitment to the truth-finding process indicates a clear social epistemic vision (protecting the processes of the court in the adversarial system) and the extent of the commitment to that vision (requiring lawyers to even breach the duty of confidentiality, a key aspect of the adjudicative system's processes).[210]

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[208] *Ibid*. Rule 1.6 sets out the lawyer's duty of confidentiality in the ABA *Model Rules.* See also *ibid*, r 3.3(c) "The duties stated in [Rule 3.3] paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6". I have cited first to the commentary and then to the rule because r 3.3, commentary 10 outlines much more of the process for taking remedial measures than the r 3.3 itself does. Note also that the duty to remedy false statements given by the client is limited in time to "the conclusion of the proceeding", *ibid*, r 3.3(c). The commentary justifies the duration of the obligation on the basis of a need for a practical time limit, stating that "[t]he conclusion of the proceeding is a reasonably definite point for the termination of the obligation", *ibid*, r 3.3, commentary 13. In setting out this time limit, the legal profession is not giving endless priority to the duty of candour. Seemingly, the duty of confidentiality would then also reassert itself after the conclusion of the proceeding. It does appear somewhat incongruous, however, for the lawyer to be newly obligated to keep information confidential that s/he was obligated to disclose during the proceeding.

[209] *Ibid*, r 3.3, commentary 11 [emphasis added].

[210] The ABA *Model Rules* recognize the damage that can be done to the lawyer-client relationship by the lawyer's abidance of the duty of candour towards the court. The commentary to Rule 3.3 allows the lawyer to seek withdrawal

With these epistemic commitments to the truth-seeking function of the adversarial system motivating the rules requiring disclosure of anticipated and completed client perjury, it is noteworthy that the biggest wrench in the system's truth-seeking gears is another condition related to knowledge within Rule 3.3 of the ABA *Model Rules*. Under Rule 3.3(a)(3), which speaks to completed client perjury, the lawyer must come to *know* the falsity of the evidence offered by the client before any obligation to remedy false testimony (including remedy by disclosure) arises.[211] Similarly, the requirement to disclose under Rule 3.3(b) pertains to when a lawyer "*knows* that a person intends to engage…in criminal or fraudulent conduct related to the proceeding".[212] As discussed earlier in this dissertation, knowing in the ABA *Model Rules* means having actual/subjective knowledge.[213] In the CP Trilemma, this means that the lawyer must have actual/subjective knowledge of the client's intention to commit perjury before disclosing the perjury. Though "a person's knowledge may be inferred from circumstances",[214] showing that a lawyer had actual/subjective knowledge of such a client intent is a difficult standard to meet.[215]

Thus, the ABA requires disclosure in certain scenarios but has established confounding rules for these scenarios. The existing rules "force lawyers to agonize over whether to disclose perjury and subject their clients to all manner of bad results, or to maintain their confidentiality

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from representation "if the lawyer's compliance with this Rule's duty of candor results in such an extreme deterioration of the client-lawyer relationship that the lawyer can no longer competently represent the client", *ibid*, r 3.3, commentary 15.

[211] See *ibid*, r 3.3(a)(3).

[212] *Ibid*, r 3.3(b) [emphasis added].

[213] See *ibid*, r 1.0(f), defining "knows" as "denot[ing] actual knowledge of the fact in question", discussed above in Section (7.3.1), notes 91–92 and accompanying text, above.

[214] *Ibid*.

[215] See generally Wendel, *supra* note 54 at 674. See generally *ibid* at 674, nn 17–19 citing case law that demonstrates the difficulty of showing the actual/subjective knowledge needed to trigger the lawyer's responsibilities to take remedial action, e.g., *United States v Midgett*, 342 F (3d) 321 (4th Cir 2003). Notably, Wendel highlights a decision of the Wisconsin Supreme Court which says that, "Absent the most extraordinary circumstances, such knowledge must be based on the client's expressed admission of intent to testify untruthfully", Wendel, *supra* note 54 at 674, n 18 and accompanying text, citing *State v McDowell*, 681 NW (2d) 500 (Wis Sup Ct 2004) at 513.

and suffer professional opprobrium".[216] Reducing tensions between obligations and setting clearer standards of behaviour may require the ABA to make stronger commitments to specific epistemic aims. Thrower agrees on the need to make clearer epistemic commitments when she says, "If the ABA privileges truth to a court above every other consideration—and there can be no doubt now that it does—then it should simply say so in its rules and launch a new era in lawyer regulation".[217] Whether giving ultimate preference to candour is the correct approach is not as important to me here as the need for clear epistemic commitments in the regulation of lawyers and their roles in the adversarial system of adjudication.

Canadian codes of professional conduct take a clearer stance on the question of disclosure to prevent or remedy client perjury, as outlined by Layton and Proulx in their work on ethics in criminal law. These codes explicitly put forward withdrawal as the ultimate response if the client persists in pushing for the lawyer to violate his/her professional duties as an advocate. Earlier in this dissertation,[218] I summarized and analyzed the prescriptions in the FLSC *Model Code* requiring and favouring withdrawal when clients "persist in instructing the lawyer to act contrary to professional ethics",[219] if the client wants the lawyer to take a course of action that would breach the lawyer's duty of candour to the court,[220] as well as other applicable rules about withdrawal.

Additionally, as Layton and Proulx explain in their discussion of rules pertaining to disclosure, codes of professional conduct preclude disclosure by the terms that they set: (1) for the lawyer to prevent breaches of the lawyer's duties as an advocate, (2) for withdrawal when the client insists upon asking the lawyer to conduct himself/herself unethically, and (3) to remedy

[216] Thrower, *supra* note 182 at 816.
[217] *Ibid*.
[218] Above in Section (7.3.3), notes 143–150 and accompanying text.
[219] FLSC *Model Code*, supra note 11, r 3.7-7.
[220] See *ibid*, r 5.1-4, commentary 1.

errors and omissions. Layton and Proulx cite numerous rules on the topic of the lawyer's duty to prevent breaches of the lawyer's duties as an advocate.[221] In Ontario, the relevant section is the commentary for Rule 5.1-4. This comment says, "If the client desires that a course be taken that would involve a breach of the rules in Section 5.1, the lawyer must refuse and do everything reasonably possible to prevent it. If that cannot be done the lawyer should, subject to the rules in Section 3.7 (Withdrawal from Representation), withdraw or seek leave to do so".[222] With respect to this rule and similar rules in other jurisdictions, Layton and Proulx point out that the guidelines ultimately set out "[w]ithdrawal, not disclosure" as the "response of last resort…."[223]

Layton and Proulx also explain that the rules about withdrawal require the lawyer to maintain the client's confidences throughout and after the withdrawal.[224] The ongoing protections of confidential client information during and after withdrawal "make[] sense only if there has been no prior disclosure of the problem".[225] If the lawyer were to disclose client perjury to the court, the lawyer would not be able to satisfy the confidentiality rules around withdrawal. To Layton and Proulx's example, I would add Rule 3.7-4 of the FLSC *Model Code*, which governs withdrawal from criminal proceedings. The commentary to this rule explains that, "A lawyer who has withdrawn because of conflict with the client should not indicate in the notice addressed to the court or Crown counsel [i.e., the prosecution] the cause of the conflict or make reference to any matter that would violate the privilege that exists between lawyer and client".[226] Recall also that the lawyer's duty of confidentiality persists during and after withdrawal, even to the extent that

[221] See generally Layton & Proulx, *supra* note 27 at 360, n 144, citing 333 n 21 (reference to numerous similar rules in Canadian jurisdictions), citing LSO *Rules*, *supra* note 150, r 5.1-4, commentary 1, for Ontario.
[222] LSO *Rules*, *supra* note 150, r 5.1-4, commentary 1.
[223] Layton & Proulx, *supra* note 27 at 361.
[224] See *ibid* at 361, n 147 and accompanying text.
[225] *Ibid* at 361.
[226] FLSC *Model Code*, supra note 11, r 3.7-4, commentary 1. "Conflict" in this passage does not refer merely to conflicts of interest, but to broader disputes between the lawyer and client.

the withdrawing lawyer can be restricted in terms of what s/he can share with the successor lawyer.[227] The restrictions on what a withdrawing lawyer can disclose to the court, prosecution, and successor lawyer thus preclude disclosure.

On the topic of disclosure to remedy an error or omission, Layton and Proulx cite Rule 5.1-4 of the Law Society of Ontario's *Rules of Professional Conduct*,[228] which states the lawyer's responsibility to disclose and rectify errors and omissions in the performance of his/her role as an advocate. These disclosures are subject to the lawyer's duty of confidentiality.[229] The fact that this duty to disclose and rectify is subject to the lawyer's duty of confidentiality precludes disclosure as a remedy for completed client perjury. Moreover, note that Rule 5.1-4 of the LSO *Rules* specifically addresses completed actions (e.g., completed false testimony). As Layton and Proulx argue, "The fact that disclosure of a completed perjury is prohibited militates strongly against interpreting the commentary under discussion to countenance disclosure of an anticipated falsehood, absent a clear expression of intent otherwise".[230] Taking into account all that has just been said about rules pertaining to disclosure, Canadian codes of conduct contain strong protections of confidentiality and do not endorse disclosure as a corrective for client perjury. Moreover, rules about remedying errors and omission, as well as rules about withdrawal, are not consistent with withdrawal.

None of the foregoing, where I have outlined the clearer and stronger terms in which Canadian codes of professional conduct prescribe withdrawal and prohibit disclosure, is meant to be an endorsement of the Canadian approach to the CP Trilemma. Section (7.3.3) of this

[227] Above in Section (7.3.3), notes 170–171.
[228] See Layton & Proulx, *supra* note 27 at 371, n 197, referring to *ibid* at 333, n 20 and accompanying text (reference to numerous similar rules in Canadian jurisdictions), citing LSO *Rules*, *supra* note 150, r 5.1-4 for Ontario.
[229] See LSO *Rules*, *supra* note 150, r 5.1-4. See also FLSC *Model Code*, supra note 11, r 5.1-4.
[230] Layton & Proulx, *supra* note 27 at 361.

dissertation provides an extended discussion and critique of withdrawal as a response to the CP Trilemma. Indeed, I hope that one of the enduring contributions of this dissertation will be to shake the firm foundations on which withdrawal (especially as a response to the CP Trilemma) stands within Canadian norms of professional conduct. However, it is worthwhile to explain in this section on disclosure how clearly the Canadian legal profession has chosen withdrawal over disclosure.

Moving beyond understanding requirements in codes of professional conduct, the main question from an epistemic perspective is what disclosure is meant to achieve in relation to the CP Trilemma. Layton and Proulx identify the main functional justification offered for disclosure. This justification is based on the epistemic aims of the adversarial system of adjudication. As I have noted numerous times in this dissertation, the adversarial system of adjudication aims to pursue truth about factual matters by having partisan advocates present competing positions before a neutral arbiter. The system has some mechanisms for the competing sides to check one another (e.g., cross-examination of a witness), but fundamentally relies on the idea that the participants in the process are not actively trying to introduce false information into the dispute resolution process. Purposely introducing false evidence "skew[s] the truth-finding function of the criminal justice system".[231] Allowing the lawyer to disclose the client's perjury to the tribunal is an effort to prevent specific impairments of the neutral arbiter's epistemic position—specifically, being misled by information known by the giver to be false.

From this perspective, there may be justification for allowing the lawyer to disclose to the judge that the client intends to commit perjury, or has committed perjury, if (1) disclosure would prevent the client from offering false testimony that would skew the adjudicative process or (2)

[231] *Ibid* at 359–360.

disclosure would prevent false testimony that will be presented, or that has been presented, from skewing the truth-finding function of the adversarial system of adjudication. In the present section of this dissertation, dealing with a lawyer anticipating that the client will commit perjury, I am primarily addressing the aim of preventing the client from introducing false testimony, and secondarily addressing the aim of preventing any false testimony introduced by the client from skewing the truth-finding function of the adversarial system of adjudication. With respect to the context of a jury trial in a criminal law case, I am primarily considering the aim of preventing the client from giving perjurious testimony that would skew the decision-making process that the jury follows in arriving at a decision about the facts of the case and secondarily considering the aim of preventing any false testimony introduced by the client from skewing the jury's decision-making process.

After presenting the argument about protecting the truth-finding function of the adversarial system, Layton and Proulx present what they call another "*argument* in favour of disclosure" based on the "benefits to be derived from involving a neutral arbiter in the process".[232] The neutral arbiter in this small slice of the procedure in which the disclosure would happen is the judge standing between the client who intends to commit perjury and the lawyer who wants to prevent the perjury or the negative effects of the perjury. The lawyer has unsuccessfully attempted to dissuade the client from committing perjury. Explaining the benefit of bringing the judge into this situation, Layton and Proulx say, "Depending on the nature of the procedure governing the act of disclosure, a judge may be able to examine and assess the disagreement between counsel and the client. Judicial intervention at this stage might conceivably serve to fashion a resolution to the problem or even discover that counsel's fears are unjustified".[233] While there is something to be said for

[232] *Ibid* at 360 [emphasis added].
[233] *Ibid.*

the word "argument" as a description here, what Layton and Proulx have more so given is the mechanism (the "how") by which disclosure would work to prevent false testimony from being introduced during trial or from skewing the truth-finding function of the adversarial system of adjudication. The value of disclosure as a response to the CP Trilemma ultimately lies in the judge being able to take some action to prevent the untruthful testimony from being given or to prevent harm to the processes of the adversarial system.

Some questions that arise about disclosure include whether the client is immediately told about the lawyer's plan to disclose the anticipated perjury. Not informing the client, Layton and Proulx argue, is seriously problematic because of the lawyer's duty to keep the client informed about the legal matter and proceedings.[234] Layton and Proulx also consider whether the prosecutor should be informed about the anticipated perjury.[235] The authors also briefly touch on variations of disclosure in which the lawyer informs a judge other than the trial judge.[236] These and other possibilities for disclosure would indeed affect the ethics and epistemology of disclosure as a response to anticipated client perjury. However, two common questions arise in all possible variations of disclosure: (1) what will the judge be able to do to prevent the client from testifying falsely or prevent the harms that could arise from false testimony and (2) how would disclosure affect the epistemology of the lawyer-client relationship?

In dealing with the first of these two questions, Layton and Proulx explain various steps that a judge might take after being informed by the lawyer that the defendant[237] intends to commit perjury. These steps include:[238]

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[234] See *ibid* at 363, n 160 and accompanying text.
[235] See *ibid* at 363, nn 158–159 and accompanying text.
[236] See *ibid* at 363.
[237] As I now move to discussing the judge's responses to the CP Trilemma, I have temporarily switched from mainly using the term "client" to mainly using the term "defendant". I will switch back to the term "client" as I return my focus to the lawyer.
[238] The steps are described in Layton & Proulx, *supra* note 27 at 363–365.

> allowing the defendant to testify if the defendant agrees not to offer the testimony in question;
>
> (if the defendant claims that the testimony in question would not be false) holding an evidentiary hearing to determine if the defendant intends to give false testimony;
>
> dissuading the accused from offering false testimony if the judge believes that the testimony would be false;
>
> allowing the accused to give testimony using the narrative form;[239]
>
> allowing the use of Freedman's approach;
>
> finding that the information that the lawyer has disclosed about the defendant's intended perjury is not confidential or privileged and allowing the prosecution "to lead evidence of the accused's plan and/or cross-examine the accused on the matter if he takes the stand";[240]
>
> or declaring a mistrial.

All the while, the judge must also consider whether the lawyer-client relationship has been so damaged by the disclosure that the lawyer should withdraw from representing the defendant.

One thing that can be observed from this buffet of options is that disclosure is best understood as the beginning of a response to the CP Trilemma rather than a complete response itself. Disclosure relieves the lawyer of responsibility for misleading the tribunal but leaves the tribunal with the task of addressing the trilemma to prevent false testimony or the negative effects of the false testimony. Even after the disclosure from the lawyer to the judge, the judge has options that involve similar choices that the lawyer faced in terms of giving preference to one of the conflicting IKP norms (or IKP duties when considered in light of the lawyer's role in the adversarial system). For example, in considering whether to allow the defendant to give testimony in the narrative form, the judge is again weighing the question of how to balance the defendant's

[239] Layton & Proulx note that allowing the use of narrative testimony is the normal approach in the United States when a disclosure is made and that disclosure is usually one of the steps involved in the narrative testimony approach in jurisdictions that allow narrative testimony, *ibid* at 364, n 166.
[240] *Ibid* at 364.

right to confidentiality and to have his/her case presented against the concern about allowing the tribunal to be misled by the defendant and the lawyer to take a passive role. The judge does not escape the need to deal with those considerations; s/he is instead put in the position of making the ultimate decision about balancing those IKP considerations. Even in attempting to dissuade the defendant, the judge should be mindful of dissuading the defendant in an epistemically virtuous way, a consideration that the lawyer shares.[241]

The difference between the judge's epistemic relationship to the defendant as compared to the epistemic relationship of the defence lawyer to the defendant does introduce some new epistemic dynamics. The judge has different responsibilities than the lawyer and the defendant may respond differently to admonition from the judge than to admonition from the lawyer. However, these differences do not eliminate the idea of virtue and vice and the need for the judge to find the virtuous mean between two vices. Recognizing the difficult decisions that are passed to the judge after a disclosure, Layton and Proulx correctly say, "The judge will in effect face many of the options that initially bedevilled defence counsel".[242] In this sense, disclosure can represent a recycling through of the replies already considered in this dissertation but done by the neutral arbiter (a participant with a different epistemic function in the adversarial system).

With respect to the question of how disclosure would affect the epistemology of the lawyer-client relationship, Layton and Proulx recognize the deep harm that disclosure can cause to the relationship as they refer to the violation of the client's confidence[243] and the possibility that the professional relationship may have been "destroyed by the disclosure".[244] If disclosure undermines the client's trust in the lawyer, then the lawyer's ability to obtain information and even instruction

[241] Above in Section (7.3.2).
[242] Layton & Proulx, *supra* note 27 at 364.
[243] See *ibid*.
[244] *Ibid* at 363.

from the client could be undermined or severely impaired. If the relationship has broken down sufficiently that the lawyer must withdraw, the successor lawyer may also have difficulty building the trust that allows the lawyer to be an effective epistemic partisan for the client because the client has already experienced a breach of confidentiality. Avoiding guilt for assisting the client in misleading the court is by no means the end of the virtue epistemic considerations relevant to the lawyer.

What I have presented in the disclosure option is a fundamental break with the responses considered beforehand in this dissertation. Up to this point, the lawyer would have never directly breached confidentiality (one of the most basic protections of the lawyer-client relationship). If a lawyer is to take an action that can undermine his/her partisan role and relationship to the client so profoundly, the judge (the neutral arbiter) should be in at least as good of a position to prevent perjury or the harm caused by perjury as the lawyer was. Otherwise, the lawyer is allowed to avoid responsibility (as in guilt) with the result of harm to the client as well as harm to the mechanisms and relationships that support the epistemic functions of the adversarial system.[245]

[245] I am not objecting to allowing the lawyer to avoid guilt here. If the lawyer has not participated in misleading the court, then s/he has avoided the guilty action in which a lawyer would be involved in the CP Trilemma. However, the dynamic of avoiding that lawyerly guilt while causing harms to the client and the adversarial system is not attractive (especially from an epistemic perspective). The lawyer thereby ends up harming the people and institutions that the lawyer is supposed to serve.

(8) Testifying as Usual in the CP Trilemma – "I'll Help You Lie"

Bradley Wendel describes non-ideal situations as those in which it is "impossible to do the right thing without, at the same time, engaging in some kind of wrongdoing".[1] He argues, "Dilemmas in political life, of which…the practice of law is a part, are sometimes incapable of resolution without a sense that there is something disagreeable, even wrongful, about the resolution, even though the conclusion may be justified".[2] In such situations, a lawyer should "reason to the best resolution of the competing values at stake…and act on that resolution, but should also be aware of the remainder or residue of competing values".[3] None of the responses to the CP Trilemma considered so far in this dissertation deal as directly with the impossibility of resolution as the answer given by Monroe Freedman.[4] The approach that Freedman advocates for responding to the CP Trilemma is so direct and controversial that Warren Burger, then the Chief Judge of the 8th Circuit Court of Appeals in the United States, sought to have Freedman disbarred for giving the proposal.[5]

When a lawyer is faced with the CP Trilemma, Freedman says that "[T]he attorney's obligation in such a situation would be to advise the client that the proposed testimony is unlawful [i.e., dissuasion], but to proceed in the normal fashion in presenting the testimony and arguing the

[1] W Bradley Wendel, "Monroe Freedman: The Ethicist of the Non-Ideal" (2016) 44 Hofstra L Rev 671 at 676. *Cf* my discussion above, in Section (7.2), notes 31–33, about virtue theorists' expectation of tension between values and virtues.
[2] Wendel, *supra* note 1 at 676.
[3] *Ibid*. On a similar point, Ayers comments that, "There are times when one should not try to integrate the values that seem to be in conflict. Sometimes it is more admirable to simply choose one, and sacrifice the other", Andrew B Ayers, "What if Legal Ethics Can't be Reduced to a Maxim?" (2013) 26:1 Geo J Legal Ethics 1 at 50.
[4] Even disclosure, considered in Section (7.3.5), leaves hope that that judge will be able to provide some resolution that eliminates the conflict or that removes the lawyer from needing to choose between the conflicting duties.
[5] See Monroe H Freedman, "Getting Honest About Client Perjury" (2008) 21:1 Geo J Legal Ethics 133 at 133–134. Freedman himself took it as a point of pride that Burger sought to have him disbarred and opposed Freedman being allowed to teach law. Burger once wrote a letter to Robert Kramer—then the dean of George Washington University Law School—saying that Freedman should not be teaching on any law school faculty. Kramer, a defender of Freedman, gave Freedman the letter, which Freedman later framed and displayed prominently on his office wall. See Norman I Silber, "Monroe Freedman and the Morality of Dishonesty: Multidimensional Legal Ethics as a Cold War Imperative" (2016) 44:4 Hofstra L Rev 1127 at 1151, n 164.

case to the jury if the client makes the decision to go forward".[6] Freedman does not pretend to supply a neat solution to the trilemma. He does not purport to resolve a merely apparent trilemma. Directly addressing the conflict of IKP duties, he argues that, if the lawyer cannot dissuade the client from giving perjurious testimony, the lawyer must give preference to the duty of competence (i.e., becoming fully informed about the facts of the case) and to the duty of confidentiality (i.e., not informing anyone about the untruthfulness of the testimony). The lawyer is to satisfy the duties of competence and confidentiality as s/he puts forward the client's cause and facilitates the testimony in the normal way.

Freedman's recommendation for the CP Trilemma constitutes a violation of the following rules of professional conduct:[7]

> ABA *Model Rules*, Rule 3.3—Candor Toward the Tribunal
>
> (a) A lawyer shall not knowingly:
>
> (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
> …
> (3) offer evidence that the lawyer knows to be false.[8]
>
> FLSC *Model Code*, Rule 5.1-1—Advocacy
>
> When acting as an advocate, a lawyer must represent the client resolutely and honourably within the limits of the law, while treating the tribunal with candour, fairness, courtesy and respect.[9]
>
> FLSC *Model Code*, Rule 5.1-2—Advocacy
>
> When acting as an advocate, a lawyer must not:

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[6] Monroe H Freedman, "Perjury: The Lawyer's Trilemma" (1975) 1:1 Litigation 26 at 28.
[7] These provisions are presented in more detail above in Section (7.1), notes 15–19 and accompanying text.
[8] American Bar Association, *ABA Model Rules of Professional Conduct*, ABA, 2019, online: ABA <www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents/> [perma.cc/5WED-59ZP] [ABA *Model Rules*], r 3.3.
[9] Federation of Law Societies of Canada, *Model Code of Professional Conduct*, FLSC 2019, online (pdf): FLSC <flsc.ca/wp-content/uploads/2019/11/Model-Code-October-2019.pdf> [perma.cc/U4WA-H2T7] [FLSC *Model Code*], r 5.1-1.

> …
> (b) knowingly assist or permit a client to do anything that the lawyer considers to be dishonest or dishonourable;
> …
> (e) knowingly attempt to deceive a tribunal or influence the course of justice by offering false evidence, misstating facts or law, presenting or relying upon a false or deceptive affidavit, suppressing what ought to be disclosed or otherwise assisting in any fraud, crime or illegal conduct.[10]

By knowingly presenting the client's perjurious testimony, the lawyer facilitates and makes false and misleading statements to the court. The lawyer facilitates the deception of the court, rather than acting with candour.

I will give a hearing to Freedman's arguments from the virtue epistemic perspective that I have cultivated throughout this dissertation. As I proceed, it is vital to recall that, in response to the CP Trilemma, Freedman advocates for a course of action—a choice—that involves trade-offs, not a resolution that could vindicate all values fully. Instead of focusing exclusively on the satisfaction of abstract principles, Freedman's proposal invites lawyers to approach the problem from his expression of a way of being—a way of living as—a legal professional.

(8.1) Volition in the Non-Ideal

I have explored the issue of volition on multiple occasions in this dissertation. In particular, the question that I have considered is whether people who are involved in some sort of deception are epistemically malevolent. I explained Jason Baehr's definition of epistemic malevolence in Section (4.1) and revisited epistemic malevolence in Section (7.2) to consider the intentions of the client in the CP Trilemma. With respect to the client, I concluded that there are too many possibilities about client intentions to make blanket statements about the epistemic intention of the client. The issue of malevolence is relevant again as I consider a reply to the CP Trilemma in which

[10] *Ibid*, r 5.1-2.

the lawyer breaches his/her duty of candour and facilitates the client's deception of the court. My conclusion about clients is not replicate for lawyers.

Epistemic malevolence is broadly about opposition to the epistemic good. A person can oppose the epistemic good in a way that is impersonal or personal,[11] as well as in a way that is intrinsic or instrumental.[12] Additionally, the epistemic agent's opposition to the epistemic good must be "robustly volitional, active, and 'personally deep'".[13] Impersonal epistemic malevolence is a type of malevolence in which a person opposes the abstract notion of the epistemic good. By contrast, personal epistemic malevolence is a type of malevolence in which a person opposes someone's participation in the epistemic good.[14] The CP Trilemma is compatible with opposing the abstract notion of the epistemic good but does not necessarily involve any sort of opposition to the abstract notion of the epistemic good. Nor, importantly, does the CP Trilemma contain any elements that prompt consideration of impersonal epistemic malevolence. My emphasis will be on drawing insights about personal epistemic malevolence in the lawyer who responds to the CP Trilemma by facilitating the client's testimony in the normal way.

I argued above[15] that it is not completely clear whether the client in the CP Trilemma is personally epistemically malevolent. The client may not want the trier of fact to participate in the whole truth or in some smaller aspect of the truth about the facts of the case. Such a position would fall under the heading of personal epistemic malevolence if other conditions of epistemic malevolence are met. As somewhat of a contrast to the idea of opposing the participation of the trier of fact in the epistemic good, in the specific example of the CP Trilemma presented earlier,[16]

[11] See Jason Baehr, "Epistemic Malevolence" (2010) 41:1/2 Metaphilosophy 189 at 193.
[12] See *ibid* at 191–192.
[13] *Ibid* at 190 [emphasis removed].
[14] Types of epistemic malevolence are discussed above in Section (4.1).
[15] Above in Section (7.2).
[16] Section (7.1), note 24 and accompanying text.

the client may have a misguided idea about keeping the trier of fact from making a mistake about the facts of the case. The client may thus want to prevent the trier of fact from doing something epistemically bad (reaching an incorrect conclusion about the facts of the case) by himself/herself doing something epistemically wrong (giving untruthful testimony).[17] It is a dishonest way of preventing a false overall view about the facts of the case. This appears to not involve any sort of opposition to the epistemic good, especially not opposition to having the trier of fact achieve knowledge about the facts of the case.

With respect to personal epistemic malevolence, the lawyer in Freedman's reply to the CP Trilemma is in a less ambiguous position. In the first place, the lawyer who gives Freedman's response gives strong indications that s/he is not opposed to other participants in the legal proceeding sharing in the epistemic good and, in fact, actively supports their participation in the epistemic good. Before Freedman allows the lawyer to assist the witness to testify in the normal way, Freedman requires the lawyer to repeatedly attempt to dissuade the client out of committing perjury.[18] Sincerely wanting, and repeatedly trying, to dissuade the client out of giving untruthful testimony is a strong indication that the lawyer following Freedman's advice is not being epistemically malevolent. A person who is behaving in an epistemically malevolent way, who has

[17] Freedman has chosen an example that casts the client in a favourable light. The favourability is both ethical and epistemic. Although the client is willing to deceive the tribunal, a wrongful act from an ethical (especially deontological) and epistemic perspective, the deception is in service of avoiding the morally bad result of an innocent person being convicted and punished and of avoiding the epistemically bad result of arriving at an incorrect factual conclusion about whether the client committed the *actus reus* of the crime of which s/he is accused. The client's proposed actions might be justifiable on consequentialist account of ethics. Even a deontological account, though it would prohibit deception of the court for being a wrongful act, could recognize the moral desirability of avoiding the conviction of an innocent person.

[18] See Monroe H Freedman, "Client Confidences and Client Perjury: Some Unanswered Questions" (1988) 136:6 U Pa L Rev 1934 [Freedman, "Client Confidences"] at 1953. Freedman's approach to dissuasion is discussed above in Section (7.3.2).

enemized the good (especially the participation of the trier of fact in the epistemic good), is unlikely to attempt to dissuade the client from giving untruthful statements to the court.[19]

When Freedman notes the importance of sustained efforts at dissuading the client from committing perjury, he is suggesting that the lawyer engage in an act of epistemic benevolence towards the court. As the lawyer does something like exhorting the client to give honest testimony to the court, the lawyer is suggesting that the client practice the other-regarding epistemic virtue of honesty and benefit the court (especially the trier of fact) epistemically. The client's honest testimony would even provide an epistemic benefit to the client's legal adversary—the prosecution—a consequence that is highly unlikely to align with personal epistemic malevolence. Discouraging the client from misleading participants in the legal process and encouraging the client to give truthful testimony indicates, at the very least, a desire to avoid misleading the trier of fact in ways that are prohibited by the legal process.

In addition to the indications given by dissuasion, the lawyer has a noteworthy avenue available in numerous situations for avoiding the classification of his/her volitions as malevolent: the lawyer's volitions must be understood in relation to his/her role in the adversarial system. The lawyer's volition may be shaped in ways that can only be understood by exploring the effects of various options for dealing with a scenario in the adversarial system of adjudication. At a basic level, the lawyer's epistemic volitions can be primarily understood through his/her role in being a champion for his/her client in the adversarial system of adjudication. The adversarial system pursues truth by having competing parties and their partisans argue their position before a neutral arbiter. Lawyers have the role of supporting the adversarial system's truth-seeking function by being champions for the litigants. This function justifies the lawyer's role-differentiation, thus

[19] I say "unlikely" because scenarios can always be imagined in which intentions and plans do not align with the more mundane expectations that I have about intentions here.

determining when the lawyer's role is differentiated and the shape of the differentiated standards of behaviour.[20] To the extent that the lawyer seeks to fulfill this function, the lawyer's broad epistemic volitions are to support the adjudicative system's truth-seeking function, even when the partisan way in which the lawyer supports this function would not be justified outside of the context of the adjudicative system. With respect to evidence, the lawyer's intention is to present evidence that is favourable to his/her client's case and to undermine confidence in evidence that is unfavourable to his/her client's case to the extent that treating evidence in this way is consistent with the lawyer's epistemic role as an officer of the court.

In the CP Trilemma, the lawyer is faced with the impossibility of abiding by all three of the IKP duties. No answer will involve perfect satisfaction of all three IKP duties that structure and support the lawyer-client relationship and the lawyer's ability to be an effective partisan in the adversarial system of adjudication. Yet, the lawyer must perform the role of partisan advocate on behalf of his/her client (i.e., must find some balance of the IKP duties to apply) or simply cease to function in the adversarial system on this case. In Freedman's response, the lawyer chooses strongly in favour of the duties to investigate and keep the client's information (i.e., choosing to satisfy the requirements of competence and confidentiality while failing to fulfill the duty of candour to the court). Choosing against abiding by the duty of candour to the court may indicate opposition to the epistemic benefit of the court. However, another more plausible reading would be that the lawyer is simply making a choice that the adversarial system leaves with the lawyer when the CP Trilemma arises and when the lawyer cannot dissuade the client or withdraw from representing the client.

[20] See Allan C Hutchinson, *Fighting Fair: Legal Ethics for an Adversarial Age* (New York: Cambridge University Press, 2015) at 14.

The lawyer who applies Freedman's response, will be making a decision between conflicting duties of his/her role in the adversarial system, and will be deciding that s/he will not compromise on fulfilling the duty of competence and the duty of confidentiality (by which lawyers and clients are able to be open in sharing information). On such a reading, using Freedman's response no more indicates the client's opposition to the court's (especially the jury's) participation in the epistemic good than disclosing the client's intention to give untruthful testimony indicates that the lawyer deeply opposes client confidentiality. Apart from properly executed dissuasion, all responses to the CP Trilemma have downsides. It is inappropriate to ascribe to the lawyer any sort of personal epistemic malevolence just because the lawyer does not choose in favour of a particular duty (candour) in the face of a genuine conflict of duties. Given his/her role in the adversarial system, s/he must choose between conflicting duties. When duties genuinely conflict, the mere act of choosing between those duties (including when candour is duty that the lawyer breaches) does not evince malevolent volitions.

Between (1) indications about intention that lawyers give by attempting to dissuade the client from misleading the court and (2) the leeway that should be given to lawyers because their role in the adversarial system assigns lawyers a particularly difficult epistemic task and choice, lawyers in adversarial litigation dealing with the CP Trilemma can readily push back against the claim that they are epistemically malevolent. However, lawyers who assist the client in testifying normally are not out of the woods yet. Pushing back against claims of epistemic malevolence does not mean that lawyers are properly playing their epistemic role in the adversarial system of adjudication.

(8.2) Partisanship in the Non-Ideal

The ultimate question in this dissertation when it comes to Freedman's response to the CP Trilemma is whether, and how, his response works with the epistemology of the adversarial system

of adjudication (i.e., with the context in which the lawyer is practicing). Freedman's reply to the CP Trilemma could work positively with adversarial system. His response centres the lawyer's partisan role within the adversarial system of adjudication. The adversarial system seeks truth about the facts of a case via a clash of positions between litigants—who (ideally) are represented by lawyers acting as epistemic partisans—before a neutral arbiter. Epistemic partisanship is required and justified by the epistemic needs of the adversarial system of adjudication. As I defined earlier, epistemic partisanship is:

> a disposition to (a) desire the epistemic and legal success of the client, which leads to (b) taking action to support the advancement of the client's cause, (c) in service of the adversarial system of adjudication, especially its truth-seeking function.[21]

The two vices between which epistemic partisanship stands are epistemic neutrality and epistemic hyper-partisanship.

In the CP Trilemma, being an epistemic partisan would not be a complete and perfect response to the situation that the lawyer faces. In this dissertation, I am dealing with actual, rather than apparent, instances of the CP Trilemma. Thus, epistemic partisanship will not resolve the conflict of duties and even the types of behaviour that normally fulfill the role of an epistemic partisan may need to shift in the CP Trilemma. However, the CP Trilemma does not eliminate the basic need that the adversarial system of adjudication has for epistemic partisanship from lawyers. If a lawyer following Freedman's response satisfies the adversarial system's need for epistemic partisanship and avoids falling under the heading of epistemic vices, then Freedman's response could be an acceptable way of dealing with a negative situation.

A surprisingly strong case can be made for the position that Freedman's reply to the CP Trilemma satisfies the requirements of, or supports, epistemic partisanship. His arguments connect

[21] Above in Section (4.5) at note 90 and accompanying text.

deeply with the needs of the adversarial system of adjudication and with the justifications that the adversarial system gives for the role-differentiation of the lawyer. In the early stages after a lawyer realizes that the client intends to give false testimony, Freedman's recommendations address a situation in which "a lawyer's zeal on behalf of a client is to be exercised only within the law and the disciplinary rules".[22] After finding out that the client intends to give untruthful testimony, the lawyer is required to maintain the client's confidence and attempt to dissuade the client from testifying perjuriously. Dissuading clients out of taking a wide array of actions (legal and illegal), not limited to committing perjury, is part of the core of the advising context in the lawyer-client relationship; it is a key part of taking the client's side and protecting the client's interests.[23] Freedman's response to these early stages of the CP Trilemma supports epistemic partisanship in a way that is no different from what any other commentator would suggest and violates no rules of professional conduct.

As efforts at dissuasion fail, the lawyer moves outside of an ordinary lawyering context and into a context that Freedman thinks permits a level of zeal beyond what the law and disciplinary rules prescribe. "Zealous representation", he explains, "may sometimes require the

[22] Monroe H Freedman, "In Praise of Overzealous Representation – Lying to Judges, Deceiving Third Parties, and Other Ethical Conduct" (2006) 34:3 Hofstra L Rev 771 [Freedman, "Overzealous Representation"] at 772.

[23] Here, I am referring both to the lawyer's responsibility to encourage clients to abide by the law and to the non-legal knowledge that lawyers might have and by which they can dissuade clients from taking courses of action that would harm the client's non-legal interests. Codes of professional conduct recognize this non-legal knowledge and its place in the lawyer-client relationship too. ABA *Model Rules*, *supra* note 8, r 2.1, "In rendering advice, a lawyer may refer not only to law but to other considerations such as *moral*, economic, social and political factors, that may be relevant to the client's situation"; *ibid*, r 2.1, commentary 2, "Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate…. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied"; FLSC *Model Code*, *supra* note 9, r 3.1-2, commentary 10, "In addition to opinions on legal questions, a lawyer may be asked for or may be expected to give advice on non-legal matters such as the business, economic, policy or social complications involved in the question or the course the client should choose. In many instances the lawyer's experience will be such that the lawyer's views on non-legal matters will be of real benefit to the client".

lawyer to violate other disciplinary rules".[24] Freedman describes such behaviour as "overzealousness".[25] His support of overzealousness in some situations (even in some regular lawyering situations) is informed by the idea of zealous representation requiring the lawyer's "entire devotion to the interests of the client".[26] This level of devotion to the client's cause, Freedman argues, in informed by his reading of "the larger legal context of the lawyers' role", inconsistencies between ethical rules, "the purposes of legal representation, and…moral philosophy".[27]

As a straightforward example of his thinking, Freedman explains that participants in settlement negotiations have certain expectations of behaviour and that, for the lawyer to perform his/her function of being a zealous advocate for the client, the lawyer must apply his/her professional duties with an understanding of the participants' situational expectations and the way in which the social system functions.[28] Given the dynamics of settlement negotiations, Freedman says that lawyers should be able to "properly give an inflated or deflated settlement figure to an adversary" and even to a judge in a pretrial settlement conference.[29] The lawyer should be allowed to do this, Freedman says,[30] even though ABA Model Rule 4.1(a) prohibits the lawyer from "mak[ing] a false statement of material fact or law to a third person"[31] and even though ABA

[24] Freedman, "Overzealous Representation", *supra* note 22 at 772.
[25] *Ibid*.
[26] *Ibid* at 771. Note that Freedman does not address the CP Trilemma directly in this article. Instead, he discusses examples of lawyer giving untruthful statements to judges and third parties in-between formal court proceedings, in negotiations, and in sting operations done by activists to catch breaches of human rights laws. The same reasoning applies to the CP Trilemma, however.
[27] *Ibid* at 782.
[28] See *ibid* at 778–780 (Freedman explaining ethical expectations in negotiations).
[29] *Ibid* at 779. Freedman was arguing against Standing Committee on Ethics and Professional Responsibility, Formal Opinion 93-370, *Judicial Participation in Pretrial Settlement Negotiations* (American Bar Association, 1993), which permitted lawyers to refuse to answer judges' questions about settlement figures but did not permit lawyers to give an inaccurate settlement figure to a judge; see Freedman, "Overzealous Representation", *supra* note 22 at 779–780, nn 47–48. See also Hutchinson, *supra* note 20 at 116 (discussing the idea of bluffing in negotiations).
[30] See Freedman, "Overzealous Representation", *supra* note 22 at 778.
[31] ABA *Model Rules*, *supra* note 8, r 4.1(a).

Model Rule 8.4(c) prohibits the lawyer from "engag[ing] in conduct involving dishonesty, fraud, deceit or misrepresentation".[32] The lawyer, Freedman is saying, should not be restricted by the black letter rules when the black letter rules present the lawyer with conflicting duties that do not support the functioning of the social system in which the lawyer operates. Working with the social/legal practice of negotiation requires the lawyer to reinterpret and apply existing professional duties in a way that allows the social system to function.

Freedman's reasoning—justifying overzealousness on the basis of a contextual understanding of the lawyer's role in a social system—could apply to the CP Trilemma as well. When the client intends to give untruthful testimony, the lawyer has not left of the role of the client's partisan advocate. The client maintains his/her right to a lawyer even when the client intends to give, or has given, untruthful testimony. The legal system is not built around expectations that the client will lose the advocate in such situations. "A defendant", Freedman argues, "must testify truthfully or suffer the consequences. The consequences, however, are not forfeiture of the right to counsel or of confidentiality of communications with counsel".[33] Instead, the adversarial system has mechanisms by which the person committing perjury can be checked and the trier of fact's confidence in the person giving the testimony can be undermined. In particular, "the defendant faces 'the risk of confrontation with prior inconsistent utterances,' which is the 'traditional truth-testing device[] of the adversary system.'"[34] This risk of being confronted during testimony is a built-in mechanism of the adversarial system to deal with behaviour that is not desired but that is expected to be part of the adjudicative system at least some of the time.

[32] *Ibid*, r 8.4(c).
[33] Freedman, "Client Confidences", *supra* note 18 at 1951 [footnote omitted].
[34] *Ibid*, citing *Harris v New York*, 401 US 222 at 225–26 (1971).

From the beginning of the client forming an intention to commit perjury all the way to a lawyer scrutinizing the client's testimony during cross-examination, the client still requires a partisan champion. That is to say that the client still depends on his/her lawyer being his/her expert legal partisan and the legal system still depends on the lawyer advocating the client's position before the neutral arbiter. In the CP Trilemma, however, partisan advocacy on behalf of this particular client (perhaps the central demand of the lawyer's role) can no longer be achieved by abiding by all of the lawyer's usual professional duties. Fulfilling the role of the client's partisan now means giving preference to competence and confidentiality, somewhat sacrificing abidance of the duty of candour to the court by facilitating the client's testimony in the normal way.[35]

Though proposing a stark choice made against fulfilling the duty of candour to the court, Freedman's response is deeply rooted in the ethics of the legal profession and can be expanded to the epistemology of the legal profession. His response to the CP Trilemma is grounded in the lawyer's role/function within the legal system. Lawyers must fulfill numerous duties, but those duties can only be explained and justified (as role-differentiated morality and epistemology can only be explained and justified) by the lawyer's role within the legal system. In Freedman's view, lawyers are first and foremost to be partisan representatives for their clients and their duties are to be understood and applied (or not) in relation to that function. Performing that partisan function is more basic than duties of candour to the court. In service of that partisan function, Freedman would allow lawyers to breach other professional duties and to be so partisan that they cross over into the vice of hyper-partisanship because there are contexts that call for hyper-partisanship. From an epistemological perspective, Freedman is arguing against strict adherence to duties in favour of dispositions to perform a role that serves a system of knowledge production. In his view, the lawyer

[35] I say "somewhat" here because Freedman by no means says that the lawyer in the CP Trilemma is given a pass to introduce any falsehoods that s/he likes into the proceeding.

can perform that role by living out the virtue of epistemic partisanship and even by living out the vice of epistemic hyper-partisanship.

This is a difficult stance for a scholar in the epistemology of lawyering to accept, and all the more so for a virtue epistemologist. Freedman is arguing that the performance of a vice may be needed to perform the lawyer's role in some situations. The difficulty of the conclusion should not impede an appreciation for the way that it speaks to the deepest interests of social epistemology and virtue epistemology. With this level of foundational engagement, if Freedman's response to the CP Trilemma is indeed preferrable to other responses, then he is not merely addressing a specific moral or epistemic problem. In his view, the role of the lawyer as a partisan representative is a normative lodestar in the ethics and epistemology of law. Duties and dispositions are all guided by the partisan role.

Even Freedman himself understates the centrality that he gives to partisan representation, its importance over other lawyering responsibilities (i.e., its ability to override other professional duties) and its ability to shape the lawyer-client relationship. Freedman claims that "zealous representation…may *sometimes* require the lawyer to violate other disciplinary rules",[36] but he actually makes a great deal of space for overzealousness in legal practice. Overzealousness is not something that Freedman proposes the lawyer should briefly do during the client's untruthful testimony in the CP Trilemma. Quite the contrary, in Freedman's approach, overzealousness in service of the lawyer's role in the adversarial system exists in the background of the lawyer-client relationship and is suggested to support the functioning of normal partisan zeal in the adversarial system and even dissuasion as a reply to the CP Trilemma. Consequently, Freedman's response to the CP Trilemma, perhaps more so than any other response to the trilemma considered in this

[36] Freedman, "Overzealous Representation", *supra* note 22 at 772 [emphasis added].

dissertation, is a conscious decision in favour of a way of being as a lawyer; it is a broad normative choice to be a lawyer who pushes the boundaries of permitted practice, regularly arranging the practice context to be able to push these boundaries, especially in favour of partisan service to the client.

Freedman proposes that, at the beginning of the lawyer-client relationship, the lawyer can steadfastly state what could easily be described as an overzealous commitment to client confidentiality. When the lawyer is explaining to the client how confidentiality protects lawyer-client communications, the lawyer could promise to never disclose confidential client information, even when required by law to disclose (such as to prevent or remedy a fraud on the court).[37] This promise would be meant to encourage the client to trust that his/her information will be safe and that s/he can thus be open in communicating with the lawyer about the case. In making this promise, the lawyer would commit to risking civil and criminal sanctions to protect the client's information.[38]

A significant upside of Freedman's robust guarantee of confidentiality is that his commitment is a renunciation of the selective ignorance approach to criminal defence lawyering.[39] Such a strong (or overzealous) guarantee of confidentiality may indeed inspire in the client more openness with the lawyer than the selective ignorance approach can tolerate. Selective ignorance aims to keep the lawyer from acquiring information that would close off strategic options for the

[37] See Elisia M Klinka & Russell G Pearce, "Confidentiality Explained: The Dialogue Approach to Discussing Confidentiality with Clients" (2011) 48:1 San Diego L Rev 157 at 186, n 138, citing Monroe H Freedman & Abbe Smith, *Understanding Lawyers' Ethics*, 3rd ed (Newark, NJ: LexisNexis, 2004), s 6.09 at 172. Promising nondisclosure also typically includes a promise to not disclose confidential information when the disclosure is optional (such as to prevent harm, defend against malpractice, and collect unpaid fees), see generally Klinka, *supra* at 184–185.

[38] See Klinka, *supra* note 37 at 186, n 139 and accompanying text.

[39] Freedman's commitment to confidentiality, beyond even what the law allows, could be read as a political stance to lawyering that Freedman takes in the criminal law context, defending the vulnerable client against the great power of the state.

defence in a criminal case. Achieving exactly the opposite purpose of the aims of selective ignorance, the client might be encouraged by Freedman's guarantee of nondisclosure to give information to the lawyer that would diminish the range of options that the lawyer can use in defence of the client. Moreover, the lawyer is seeking all information, rather than attempting to only find specific pieces of information.

More ambiguous in terms of its desirability, Freedman's guarantee of nondisclosure also locks the lawyer out of using disclosure as a response to the CP Trilemma. In Canada, locking oneself out of disclosure is not a problem, since disclosure is not a permissible response to the CP Trilemma.[40] However, in jurisdictions of the United States that follow the ABA's guidance for the CP Trilemma,[41] the lawyer would be committing to not disclose anticipated or completed client perjury. Furthermore, since disclosure to the court is often part of engaging the narrative testimony approach,[42] a lawyer who makes Freedman's commitment is impeding himself/herself from using the narrative testimony approach. Where the narrative testimony approach is required by the courts as the response to the CP Trilemma, the lawyer would be pledging to breach his/her jurisdiction's ethical norms.

Thinking about the benefits that overzealousness in the CP Trilemma can have in lawyer-client relationships, Freedman argues that his proposal for the CP Trilemma is vital to dissuasion—the ideal resolution to the CP Trilemma. His argument is based on the idea that other responses to the CP Trilemma would signal to clients generally that they cannot trust their lawyers to keep their confidential information. Clients would thus enter lawyer-client relationships with their guard up, not freely sharing information with their lawyers and thus keeping from their lawyers the

[40] Discussed above in Section (7.3.5) at notes 218–230.
[41] Discussed above in Section (7.3.5) at notes 203–217 and accompanying text.
[42] Noted above in Section (7.3.5) at note 239 and accompanying text.

information that the lawyers could use to dissuade clients from committing perjury. Freedman argues:

> In the rare case in which the client persists [with the intention to give false testimony after the lawyer's attempts at dissuasion], the lawyer must present the client's testimony in the ordinary way and remain true to the lawyer's pledge of confidentiality. If lawyers were to follow *any other course*, it would soon become common knowledge that clients cannot trust their lawyers with confidential information. The result would not be less perjury, but more, because lawyers would cease to have either the knowledge or the trust that enables them to dissuade clients from wrongful conduct in general and from perjury in particular.[43]

When a client does not share all relevant information with the lawyer, the lawyer is incompetent in the advisory context, not to mention the advocacy context. When the client trusts the lawyer enough to freely offer information to the lawyer in the advising context, the lawyer may also gain information that is vital to dissuading the client from committing perjury. This information might simply be enough knowledge about the facts of a case to be able to present the client with a strong strategy for the case as an alternative to the client committing perjury. In a strong relationship of trust with the client, the lawyer may also acquire information that will allow the lawyer to more effectively present the client with the risks and harms that will be caused by the client committing perjury.[44] Since the lawyer's ability to acquire information about a case is vital to the lawyer's ability to dissuade the client from illegal action, and if presenting testimony in the normal way in some cases builds trust in lawyer-client relationships generally, overzealousness/hyper-partisanship in a small number of cases may reduce perjury overall.

What we have seen from Freedman are principled arguments for expanding the scope given to zealousness, citing the need to go beyond the normal ideal of zealousness to respond to certain problems (especially those in which duties conflict) and suggesting that it can even be beneficial

[43] Freedman, "Client Confidences", *supra* note 18 at 1953 [emphasis added].
[44] Including the risk that the client's deception will be undiscovered and sanctioned for the deception.

for a lawyer to structure some aspects of his/her approach to practice (e.g., guaranteeing nondisclosure) around these (hopefully) rare instances that Freedman says call for overzealousness. Freedman is not arguing for an abandonment of lawyerly duties and dispositions, but for understanding lawyerly duties and dispositions in the context of a social system that has moral and epistemic purposes. Lawyers, in his view, should most centrally carry out their partisan function in the social system, even when carrying out that central function means sacrificing other responsibilities and turning the virtue into the vice (zeal into overzealousness and partisanship into hyper-partisanship).

A significant part of understanding Freedman's proposal is realizing how it approaches the lawyer's role in a situation that is far from the best function of the adversarial system of litigation. Some recent insights given by Wendel about the process of moral deliberation help with this understanding. Wendel's arguments explicitly consider Freedman's approach to reasoning through the CP Trilemma. Wendel approaches Freedman's ethical thought from a perspective that is heavily influenced by Christopher Gowans' definition of a "moral remainder" as "something that remains of a moral conflict after the process of moral deliberation and that thereby explains the presence of wrongdoing even when the correct conclusion of deliberation has been followed".[45] Such a result should especially be expected in the case of a genuine trilemma, rather than a merely apparent dilemma.

These mixed moral feelings and results are what Freedman suggests come about for the lawyer who follows his advice about dealing with the CP Trilemma. The lawyer has taken all steps to abide by his/her professional role, including especially becoming competent about the client's case (and not engaging in a selective ignorance strategy), maintaining the client's confidence, and

[45] Wendel, *supra* note 1 at 676, n 29, citing Christopher W Gowans, *Innocence Lost: An Examination of Inescapable Moral Wrongdoing* (New York: Oxford University Press, 1994) at 90–91.

dealing honestly with the court. The lawyer has also undertaken repeated attempts to dissuade the client from giving perjurious testimony. Under Freedman's account, the lawyer has acted in accordance with the demands that the legal profession places on him/her up to the point of assisting the client to testify untruthfully[46] but otherwise in the normal way that testimony is given in a trial.

In response to the context—and supported by a consideration of the lawyer's purpose in the lawyer-client relationship, the adversarial system of adjudication, and the broader legal system—the lawyer who follows Freedman's line of thought determines that the best response is to continue being a zealous representative and sacrifice the duty of candour to the court. The lawyer believes that this is the best thing to do for the sake of the legal system in this situation but can also recognize that failing to abide by the duty of candour is an element of wrongdoing that accompanies the best course of action that the lawyer thinks is available to him/her.

With the explanation just given, Freedman's response to the CP Trilemma looks highly compatible with the epistemology of lawyering that I have developed here, paying central attention to the virtue of epistemic partisanship within the adversarial system of adjudication. Freedman's view is a theory of ethics, but it can easily be articulated in epistemic terms. I have already summarized his view in language that could fit into either moral or epistemic discussions. Putting his theory in terms closest to my theory of the epistemology of lawyering, it would take few steps to describe Freedman's response to the CP Trilemma as a stance about how to locate the virtuous mean of epistemic partisanship between the epistemic vices of epistemic neutrality and epistemic hyper-partisanship. With the lawyer's function in the adversarial system as basis for identifying virtuous behaviour, a virtue epistemic articulation of Freedman's response to the CP Trilemma would essentially be the claim that the virtuous mean of epistemic partisanship falls closer to the

[46] With the exception being that the lawyer has not withdrawn from representing the client.

extreme of hyper-partisanship in the CP Trilemma, when the lawyer cannot completely fulfill all three of the IKP duties and the adversarial system of adjudication still needs the benefit of having an epistemic partisan for the client. In some cases, even epistemic hyper-partisanship would be permitted.

Read in this light, Freedman's response to the CP Trilemma is fundamentally different from selective ignorance, withdrawal, the narrative testimony approach, and disclosure.[47] Whereas all of the responses just given are somehow failures by the lawyer to be an epistemic partisan, or are cessations of epistemic partisanship, the way that I have presented Freedman's view is as contesting the way in which to be an epistemic partisan. To advocate that the lawyer should continue to play his/her role as a champion for the client in the CP Trilemma on the basis that the adversarial system and the client benefit from, and depend on, this work is to contest and stretch the meaning of my own theory of epistemology and epistemic partisanship. Such contestation is welcome and would be an expected debate in virtue epistemology.

However, as the rash person shares commonalities with the courageous person but takes his/her behaviour to a vicious excess, so too does Freedman's (more than occasionally)[48] overzealous lawyer share some things in common with the epistemic partisan. Freedman's overzealous lawyer shares with the epistemic partisan the reasoning that grounds epistemic partisanship within the adversarial system of adjudication—all the while advocating for behaviours that reach an epistemically vicious extreme[49] and developing a disposition other than epistemic partisanship. The motivations that push Freedman to advocate even for behaviour that reaches the

[47] I have left dissuasion out of this list because dissuasion can be endorsed by theorists from all perspectives and involves the fulfillment of all IKP duties when done properly.
[48] I am referring to the way in which I have described Freedman as building space for overzealousness to exist in the background of the lawyer-client relationship and service to the client in the adversarial system of adjudication.
[49] When I write about vicious extremes, I am not referring to the intensity of a wrong (i.e., that a behaviour is extremely vicious/wrong/bad). Rather, I am referring to the idea of a behaviour or disposition being on one of the two vicious sides of a spectrum and not falling within the virtuous mean.

vicious extreme can be understood in virtue epistemology but evince a virtue epistemic approach that is far different from mine.

Throughout this dissertation, I have been developing the epistemology of lawyering around the idea of a way of being—a way of living as—a legal professional. Lawyers can adopt broad approaches to knowledge in the legal system. As with any way of life, it will be rare for any individual to perfectly adhere to that way of life, but every individual can develop dispositions that are more or less inclined to living out particular ways of life. I hesitate to immediately apply firm labels to these ways of professional life. My hesitation comes not from an opposition to labels or categories,[50] but because explaining an ethical or epistemic way of life and comparing that way of life to an actual person's life requires an understanding of a large set of dispositions, volitions, practice contexts, systems of social organization, and other normative factors that require more exploration and explication than I can give here.

Nonetheless, what I can describe are clusters of concepts and norms that are part of an epistemic way of life or that indicate different tracks for one's life as an epistemic agent. Freedman's writing indicates a conscious decision in favour of a way of being as a lawyer. As I said earlier in this section, he made a broad normative choice to be a lawyer who pushes the boundaries of permitted practice, regularly adjusting his approach to practice and even the practice context to be able to push these boundaries in favour of the client. The risk in this way of professional life is that Freedman's model (which explicitly makes room for overzealousness) encourages the lawyer to develop vicious dispositions.

[50] One could hardly accuse the author of this dissertation—which is steeped in the tradition of analytic philosophy—of being opposed to categorization.

As part of evaluating people epistemically,[51] virtue epistemology is deeply interested in the types of dispositions that people develop. "Virtues", as Ayers explains "are dispositions to promote intrinsic values *well*".[52] In virtue epistemology, there are two main schools of thought about virtues: (1) reliabilism, which treats virtues as competences ("disposition[s] to succeed reliably enough at some type of performance"[53]) and (2) responsibilism, which treats virtues as character traits ("disposition[s] to form beliefs and/or desires of a certain sort and…to act in a certain way, when in conditions relevant to that disposition").[54]

Pursuing a way of being in which the lawyer pushes the boundaries of permitted practice in favour of the client raises the question of whether a lawyer following Freedman's broad approach to lawyering is likely to develop dispositions (whether epistemic capacities or epistemic character traits) that are different from epistemic partisanship. In particular, does Freedman's way of being as a lawyer encourage the lawyer to develop vicious dispositions? As I described earlier in this section, overzealousness in Freedman's approach to lawyering is supposed to contribute to the lawyer's partisan role for the client, exist in the background of the lawyer-client relationship, and support the functioning of normal partisan zeal in the adversarial system. If overzealousness has such an important place in the lawyer-client relationship and in the legal system, then the lawyer must have dispositions (competences and character traits) that will allow him/her to recognize the need to be overzealous and to actually behave in an overzealous way. Even if such

[51] See John Turri, Mark Alfano & John Greco, "Virtue Epistemology", *The Stanford Encyclopedia of Philosophy* (Fall 2019), Edward N Zalta, ed, online: Center for the Study of Language and Information, Stanford University <plato.stanford.edu/entries/epistemology-virtue/> [perma.cc/JJ3T-4YUJ], s 1.
[52] Ayers, *supra* note 3 at 38 [emphasis in original].
[53] Will Fleisher, "Virtuous Distinctions: New Distinctions for Reliabilism and Responsibilism" (2017) 194:8 Synthese 2973 at 2977.
[54] Christian B Miller & Angela Knobel, "Some Foundational Questions in Philosophy about Character" in Christian B Miller et al, eds, *Character: New Directions from Philosophy, Psychology, and Theology* (Oxford: Oxford University Press, 2015) 19 at 21.

dispositions are rarely put into practice, the lawyer must have them to follow the way of being that Freedman proposes.

Freedman believes that the CP Trilemma is an instance in which it is appropriate for a lawyer to be overzealous by assisting the client to testify in the normal way. Taking this path would require the lawyer to exercise relevant capacities and character traits to facilitate the testimony. Many of these capacities and character traits are the same unproblematic dispositions that allow all lawyers to assist any client in litigation. This includes reliabilist capacities like the ability to reading technical material and reason logically about principles and facts, as well as responsibilist character traits, such as diligence with one's work. However, the capacities would also include the ability to lie (or participate in a lie) convincingly and the character trait of dishonesty (at least some inclination to be dishonest).[55]

There may be some instances in which the capacity to lie (or participate in a lie) convincingly would be helpful to a lawyer and be appropriate for the lawyer to apply. Some examples of situations in which the capacity to lie convincingly might be helpful include bluffing in negotiations[56] and keeping a client's confidential information (such as when answering a question truthfully, or not giving an answer at all, will communicate information that the lawyer has a duty to keep confidential).[57] The character trait of dishonesty is different, however. It is a disposition to choose to mislead other people.

Lawyers are not called to lead all people to all knowledge that they have. However, dishonesty actively places impediments (that are not part of the intended design of the legal

[55] Other capacities and character traits—virtuous and vicious—that I cannot explore here would also be helpful to the lawyer while practicing the kind of overzealousness for which Freedman calls in the CP Trilemma.
[56] See Hutchinson, *supra* note 20 at 116.
[57] Any appropriate application of the ability to lie convincingly is, however, not usually imagined to involve misleading the tribunal in any way.

system) upon the ability of other participants in legal processes to discover truth. The legal system expects some level of dishonesty from participants, but that dishonesty is undesired, especially in testimony given under oath. Thus, whereas the capacity to lie convincingly has some minimal utility to lawyer-client relationships and the functioning of the legal system, the character trait of dishonesty appears to have no such utility. To develop the capacity to lie convincingly is to develop a skill that can sometimes be used virtuously and that can often be used viciously. The ability to lie is a dangerous skill that should be treated with the greatest caution. To develop the character trait of dishonesty is to develop a disposition that can only be used viciously within the legal system.

From a virtue epistemic perspective that emphasizes the importance of developing dispositions that are oriented towards the truth and that values the practice of other-regarding virtues in relation to the trier of fact, it is difficult to endorse a response to the CP Trilemma and way of being that encourages lawyers to develop vicious dispositions. Endorsing such an approach would be to endorse a cultivation of concept (epistemic vice) against which my epistemology is fundamentally positioned. Choosing a way of life as a lawyer in which the lawyer pushes the permissible boundaries of practice in favour of the client does not necessarily involve the development of epistemic vice. Freedman's response to the CP Trilemma and the particular way that he has made space for overzealousness does, however, involve the cultivation of epistemic vice, including a vicious character trait.

Worse yet, Freedman's response involves the application of cultivated vice to the neutral arbiter—the main participant who is supposed to benefit from the lawyer's practice of other-regarding virtues in the adversarial system of adjudication.[58] I part with Freedman in his

[58] The neutral arbiter is a professionally sophisticated participant in the case of the judge. However, the jury is a neutral arbiter that may be particularly vulnerable to be misled by a professional's application of a cultivated vice.

endorsement of a way of being as a professional that involves such cultivation of epistemic vice. Role-differentiation can justify behaviours, and the cultivation of dispositions, in specific roles that would be impermissible or vicious outside of those roles. However, it is a dangerous endeavour to cultivate dispositions (i.e., dishonesty) that are vicious outside of the system and within the system in hopes that the disposition and behaviours produced by the disposition can be justified by giving a benefit to part of the system (i.e., to partisan representation). Admitting that the ideal cannot be achieved in a scenario does not need to involve such a surrender to the vices and snares of the non-ideal.

In the final section of this dissertation, I have considered the position of the scholar who has most prominently discussed the CP Trilemma. His prominence on this topic is for good reason, as he offered an approach that controversially faced the problem directly—recognizing the conflict of duties, outlining desirable responses like dissuasion, but ultimately realizing that the lawyer would need to make a choice between conflicting values. His proposal of facilitating the client's testimony in the normal way, prioritizes the lawyer's duties of competence and confidentiality above the lawyer's duty of candour to the court. Unlike other responses to the CP Trilemma, Freedman's response is supported by argumentation that delves deep into the function of the adversarial system of adjudication and the lawyer's role in that system. Freedman's particular reasoning about the lawyer's role in the adversarial system states a broad commitment to pushing the boundaries of permitted practice. Pushing boundaries is one of the basic roles of a lawyer, especially a lawyer defending a client in a criminal case against charges brought by the state. From my virtue epistemic theory of lawyering, the depth of Freedman's normative reasoning is to be praised and repeated, but his conclusions about the lawyer's role and the space that he makes for

vice (overzealousness/hyper-partisanship) sacrifice too much of what a normative epistemology values.

There may be a best approach to the CP Trilemma, a question that I have not addressed in this dissertation other than with respect to dissuasion. Except for dissuasion (which eliminates the conflict of duties), every response to the CP Trilemma considered here prioritizes some IKP duties, values, and/or virtues over others. These approaches (ideal and imperfect) can be stated (though have often not actually been previously stated) from viewpoints about the proper functioning of: the legal system and the lawyer's role in that system; the parts of the legal system that would be affected by certain responses to the trilemma, political stances about the participants involved in the legal system; and other considerations based on differing approaches to ethics and knowledge. Numerous views can be articulated for judging the merits of different approaches to the CP Trilemma and the sacrifices (of duty or virtue) that each approach requires. Deciding on the best answer is a difficult task, even with the new evaluative epistemic resources that I have brought forward in this dissertation. In facing this difficult scenario, however, I hope to have demonstrated numerous conceptual resources that can be derived from the epistemic study of lawyering. Distinctly, these resources are not mostly principles to be applied to different scenarios, but choices to make about how to live the intellectual life of a lawyer—both when that life is rote and when that life is wrought.

Conclusion

Recapitulation

The philosophy of lawyering has taken a laser-like focus on a worthy field of study: ethics (under which I include politically informed theories and theories based on the philosophy of law). As scholars have pursued this project, they have largely omitted discussion of other branches of philosophy. I have no intention to turn away from the ethics of lawyering, nor am I calling for other scholars to do so. What I am calling for philosophical scholars of lawyering to do is to take in the broader panorama of concepts that their focus on ethics has overlooked.

Topics in epistemology are some of the least discussed theoretical questions in the philosophy of lawyering, yet they have wide-ranging theoretical and practical implications. Moreover, scholars working with different domains of knowledge pertaining to cognition have developed elements of an emerging network of approaches to lawyering that centre the cognition of participants in legal proceedings. This network includes behavioural legal ethics, metacognition in legal education, and the epistemology of lawyering, i.e., cognitive science, pedagogy, and philosophy.

I have made the case in this dissertation that developments in epistemology, especially the rise of social epistemology and virtue epistemology, provide insightful frameworks for studying the lawyer's role in knowledge production. Social epistemology and virtue epistemology can be the foundations of an integrated approach to the epistemology of law. Social epistemology involves the broadening of epistemology from the study of one cognizer to the study of communities of cognizers (including the community as a whole and relationships between the cognizers). Virtue epistemology brings a normative approach to the study of knowledge, applying concepts from Aristotelian ethics to develop accounts of dispositions and behaviours that lead

individuals and communities to knowledge.[1] In these theories of epistemology, the philosophy of lawyering takes important steps to becoming the subject of the full range of philosophical inquiry (i.e., of all branches of philosophy).

In this dissertation, I began my calls for a broader philosophical inquiry of the legal profession by presenting the history of the philosophy of lawyering, one that has so far been dominated by waves of philosophical legal ethics. These theories include those that apply concepts from the philosophical study of ethics, legal philosophy, and political philosophy to the study of lawyering. I have made my own contributions to this branch of the philosophy of lawyering with my Fullerian theory of legal ethics. The ethical branch of the philosophy of lawyering will continue to be relevant and timely. As ethics benefits from (and contributes to) development in other branches of philosophy generally, so too will the ethics branch of the philosophy of lawyering benefit from (and contribute to) the development of other branches in the philosophy of lawyering. However, ethics does not contain all philosophical discursive resources that can be applied to study the legal system and the role of lawyers in the legal system.

The study of knowledge brings significant discursive resources as well. Alvin Goldman has already demonstrated the resources of social epistemology, studying the legal system and the work that lawyers do in the legal system through his veritistic social epistemology, which sets the production of true beliefs as the standard for evaluating social institutions and practices.[2] Goldman identifies five epistemic standards—(1) reliability, (2) power, (3) fecundity, (4) speed, and (5) efficiency[3]—according to which social systems can be evaluated epistemically. Perhaps more than

[1] See generally John Turri, Mark Alfano & John Greco, "Virtue Epistemology", *The Stanford Encyclopedia of Philosophy* (Fall 2019), Edward N Zalta, ed, online: Center for the Study of Language and Information, Stanford University <plato.stanford.edu/entries/epistemology-virtue/> [perma.cc/JJ3T-4YUJ], s 1 (explaining varying approaches to treating virtue epistemology as a normative discipline).
[2] Above in Section (2.1), note 12 and accompanying text.
[3] Above in Section (2.1), notes 14–16 and accompanying text.

any other epistemologist, Goldman has turned his attention to the legal system and lawyers, covering topics such as rules for the disclosure of evidence before trials[4] and the assessment of legal evidence in trials.[5] He was an early, and is a continuing, leader in applying a normative social epistemic lens to the legal system and to the work that lawyers do.

Lawyers, however, cannot be put under normative epistemic scrutiny only from the grand overview perspective that social epistemology takes. A normative epistemology of the legal profession requires a deep understanding of the lawyer as an intellectual being—of his/her dispositions[6] to promote the intrinsic value of knowledge production well.[7] Virtue epistemology stands ready to offer this understanding, in a theory that, rather than asking whether cognizers meet abstract conditions for having knowledge, focuses on the epistemic excellences of cognizers. The key question in virtue epistemology is not whether a cognizer has something like justified true belief, but whether that cognizer is practicing epistemic virtues, especially those virtues relevant to the context.

Virtue epistemology is a multifaceted approach to knowledge. Two schools of thought set out different types of virtues. Reliabilism focuses on skills and capacities as "disposition[s] to succeed reliably enough at some type of performance".[8] By contrast, responsibilism deals with "disposition[s] to form beliefs and/or desires of a certain sort and (in many cases) to act in a certain

[4] See William J Talbott & Alvin I Goldman, "Games Lawyers Play: Legal Discovery and Social Epistemology" (1998) 4:2 Legal Theory 93.
[5] See Alvin I Goldman, "Simple Heuristics and Legal Evidence" (2003) 2:3 Law, Prob & Risk 215; Alvin I Goldman, "Quasi-Objective Bayesianism and Legal Evidence" (2002) 42:3 Jurimetrics 237.
[6] Skills (reliabilism) and traits (responsibilism).
[7] I am borrowing Ayers' formulation, in which he says, "Virtues are dispositions to promote intrinsic values *well*", Andrew B Ayers, "What if Legal Ethics Can't be Reduced to a Maxim?" (2013) 26 Geo J Legal Ethics 1 at 38 [emphasis in original].
[8] Will Fleisher, "Virtuous Distinctions: New Distinctions for Reliabilism and Responsibilism" (2017) 194:8 Synthese 2973 at 2977.

way, when in conditions relevant to that disposition".[9] These two approaches to virtue epistemology both have significant merits. I took the responsibilist perspective in this dissertation to emphasize normativity and the epistemic accountability of lawyers. Other helpful concepts in virtue epistemology include the notion of virtue orientation, which explains the direction of benefit of virtues. Jason Kawall distinguishes between self-regarding epistemic virtues and other-regarding epistemic virtues. These two categories are not meant to be overly strict, as the benefits given by the practice of virtues often spills onto people other than the main beneficiaries of those epistemic virtues.

Having recognized the deep insights about cognizers and knowledge being achieved in virtue epistemology, I developed a virtue epistemic approach to the philosophy of lawyering. Understanding the context of the lawyer's work was vital to this task. Responsibilist virtue epistemology looks at dispositions relevant to specific conditions. Lawyers' roles in systems of social organization determine the relevant epistemic dispositions for lawyers to practice. Put differently, the system of social organization in which the lawyer works determines the extent, and shape, of the differentiation between the norms (ethical and epistemic) that apply to all people and norms (ethical and epistemic) that apply to lawyers (i.e., people in highly specific and specialized roles).

Lawyers work in various systems of social organizations and various practices contexts. I chose to focus on the context of the adversarial system of adjudication, which has long been the central focus of much philosophizing about lawyering. The adversarial system of adjudication has inspired a great deal of scholarly literature with which I interacted. Helpfully, selecting this specific

[9] Christian B Miller & Angela Knobel, "Some Foundational Questions in Philosophy about Character" in Christian B Miller et al, eds, *Character: New Directions from Philosophy, Psychology, and Theology* (Oxford: Oxford University Press, 2015) 19 at 21.

practice context allowed me to paint the lawyer's role and the normative distinctions between lawyers and non-lawyers with cleaner lines.[10] Finally, the adversarial system has been the site of stark normative debates that even arise out of conflicting professional duties for lawyers within its context. Having chosen to focus on the adversarial system of adjudication, I have left much work to be done in terms of giving a complete responsibilist epistemology of lawyering. Doing that additional work would require exploring the lawyer's epistemic role in other practice contexts such as: transactional lawyering, collaborative lawyering, less adversarial forms of dispute resolution (such as mediation and negotiation), and even cause lawyering and political activities (including political activities that are outside of the bounds of what qualifies as providing legal services).[11] Such tasks require a lifetime of scholarly work and the contributions of a scholarly community researching from virtue epistemic perspectives.

I based the virtue epistemology of lawyering in this dissertation on the epistemic needs that the adversarial system of adjudication has of lawyers. On an epistemic level, the adversarial system of adjudication pursues truth through the process of having partisans argue their client's case before a neutral arbiter. This clash of arguments itself is thought to have epistemic value. In this system, lawyers are tasked with being the partisans who put forward their client's position. Within this system, it is appropriate for lawyer to practice what I have called the epistemic virtue of epistemic partisanship, which I defined as:

> a disposition to (a) desire the epistemic and legal success of the client, which leads to (b) taking action to support the advancement of the client's cause, (c) in service of the adversarial system of adjudication, especially its truth-seeking function.[12]

[10] That is to say that I can draw cleaner distinctions between the norms that lawyers must follow and the norms that apply to people generally, i.e., people as they act outside of a normatively differentiated role.
[11] Law Society Act, RSO 1990, c. L.8, s 1(5) (definition of the provision of legal services).
[12] Above in Section (4.5), note 90 and accompanying text.

Being an epistemic virtue, epistemic partisanship is a mean between two epistemic vices: epistemic neutrality and epistemic hyper-partisanship. Crucially, partisanship is a virtue for the lawyer to practice within the adversarial system of adjudication. The system is designed to function through partisan argumentation and lawyers are expert partisans who help laypeople put forward their positions. When the same person steps outside of the role of the lawyer who serves the adversarial system of adjudication, it may no longer be epistemically virtuous for him/her to be an epistemic partisan. The suitability of epistemic partisanship, epistemic neutrality, and even possibly epistemic hyper-partisanship is determined by the context in which the epistemic agent is acting.

Significantly, I recognize that lawyers' abidance of their epistemic role within the adversarial system does not produce perfect results (i.e., perfect truth-seeking practices) and is not any sort of ultimate epistemic value. Partisanship, even practiced properly, does not guarantee impeccable service of the adversarial system of adjudication nor is the adversarial system of adjudication a perfect system for discovering factual truth. Even properly practiced partisanship can reduce the speed at which true beliefs are acquired and can make it more costly to acquire true belief, for example, as lawyers legitimately battle over procedural issues that can shift the advantage for or against their client.[13] Additionally, there are other values besides discovering factual truths—especially legal and moral values—that constrain the legal system's pursuit of epistemic goals. These values include examples such as respect for individual rights (e.g., rights against unreasonable search and seizure) and the protection of specific relationships (e.g., the relationship between spouses). Epistemic partisanship must therefore be understood as having its own internal limitations and must be practiced in a way that respects external constraints.

[13] Above in Section (4.5), notes 100–102 and accompanying text.

As I have mentioned on multiple occasions in this dissertation, there is an emerging network of approaches to lawyering that centre the cognition of participants in legal proceedings. This network could be overwhelming to explore without the benefit of focus. Proposing a virtue epistemology of lawyering focused on the lawyer's partisan role within the adversarial system of adjudication allowed me to similarly zero in on specific aspects of adjacent theories of cognition in the legal system. Thus, as I discussed the educational theory of metacognition, I addressed the topic of the metacognitive benefits that legal representation provides to a client, especially in the context of adversarial litigation. This allowed me to develop the idea of legal representation being a sort of offloading of metacognition from the client to the lawyer. Lawyers thus take on epistemic responsibility from the client and must facilitate this passing of responsibility from the client to the lawyer. These notions (taking epistemic responsibility[14] and metacognitive offloading[15]), which I began articulating as I defined epistemic partisanship and continued in my discussion of metacognition, formed the basis of a critique that I gave of multiple responses to the CP Trilemma, including selective ignorance, withdrawal (in some instances), and the narrative testimony approach.

The network of cognitive theories also includes behavioural legal ethics, in which scholars have applied insight from cognitive science, especially psychology, to study the legal profession and the norms of lawyering. My epistemology of lawyering, based on philosophical reasoning, can both contribute, and be responsive, to the insights that come out of behavioural legal ethics. Philosophy can interact critically with, and push back against, the deterministic tendencies that sometimes arise in cognitive science. My responsibilist virtue epistemology thus asserts the normativity that applies to lawyers, including in relation to epistemology and knowledge

[14] Above in Section (4.5), note 89 and accompanying text.
[15] Above in Section (5), note 36 and accompanying text.

production. This is to say that lawyers cannot use determinism to escape responsibility for practicing the cognitive virtues that the adversarial system of adjudication requires of them.

At the same time, it is a great benefit for my epistemology of lawyering to face challenges that have been understood thanks to behavioural legal ethics. Perhaps central among these challenges is one posed by Andrew Perlman in his account of the objective-partisan assumption. Perlman's arguments about the assumption were directed towards ethical theories in the philosophy of lawyering, but they also apply to the epistemology of lawyering. His arguments apply perhaps especially to the idea of epistemic partisanship as an epistemic virtue. Thankfully, as I argued above, a virtue epistemology of lawyering stands open and eager to receive knowledge from the complementary discipline of psychology. Illustrating this point, I look favourably towards the content and form of Perlman's strategies for dealing with the biasing effects of partisanship. Perlman's insights can be an aid to finding the epistemically virtuous mean that serves the adversarial system in between two opposing epistemic vices that undermine the adversarial system.

After forging a path for the epistemology of lawyering and putting forward my own virtue epistemic approach, I came to the task of applying my theory to a challenging case study: the Client Perjury Trilemma. I selected this case study to see how my theory performs under stress, dealing with a scenario that raises conflicting duties of professionalism and even conflicting epistemic responsibilities in relation to the lawyer's service of the adversarial system. Happily, virtue epistemology has provided significant advances in understanding the CP Trilemma and the responses to the trilemma. The trilemma is not resolved, but that was never the aim. Instead, the aim was to gain a different vantagepoint on the case study and better understand the trade-offs being made by different proposed responses.

I began my consideration of the case study by mapping the CP Trilemma using concepts in virtue epistemology. This involved understanding the epistemic roles that various participants play in the legal system and how the CP Trilemma affects those roles. Beyond pointing out that the CP Trilemma involves conflicting professional duties, I was able to achieve a deeper explanation of the mechanics of what is wrong in the CP Trilemma. This includes an explanation of the expectations brought to the situation by participants in the process, the responsibilities of these same participants, the direction of epistemic benefit (especially as it relates to virtue orientation) given by the various participants, and the client's volition in the scenario. Giving this explanation required understanding how processes function normally in the adversarial system and the way in which the CP Trilemma affects these processes.

Finally, I came to an extended application of my virtue epistemic theory to various responses that lawyers may have to the CP Trilemma (i.e., to situations in which the lawyer expects his/her client to commit perjury). These varied responses included everything from officially permitted responses for lawyer to take (the most widely accepted of which are dissuasion and withdrawal) to responses in which the lawyer would be violating professional norms (selective ignorance) and violating legal norms (Freedman's response of preferring the client's confidentiality so that the lawyer facilitates the client's testimony in the normal way). I also considered the narrative testimony approach, which has some support in certain jurisdictions of the United States, and disclosure of the client's anticipated or completed perjury. Each of the responses to the CP Trilemma evince different professional and epistemic priorities. They protect different participants' epistemic interests, different epistemic relationships, and different epistemic strategies within adversarial litigation. Through my virtue epistemology of lawyering, especially in the ideas of epistemic partisanship and "taking epistemic responsibility", I provided new

descriptions and evaluations that were not previously available to the philosophy of lawyering under a framework purely within the ethics branch of philosophy.

Most notable are my treatment of selective ignorance, withdrawal, and Freedman's response to the trilemma. Epistemology is uniquely suited to explaining and critiquing selective ignorance, a response to the CP Trilemma in which a lawyer deliberately avoids acquiring knowledge in order to maintain a wide array of strategic options. Theories of knowledge have robust conceptual resources to explain the purpose of knowledge acquisition by various participants in legal processes and the downsides of professionals evading the acquisition of knowledge. Applying these concepts to withdrawal allowed me to achieve critical insights about an under-scrutinized and often default answer to difficult professional situations, including the CP Trilemma. Theories of legal professionalism based in ethics have provided critiques of withdrawal, but the epistemology of lawyering allowed me to develop that line of thought in a deeper way than can be done with conceptual resources from ethics alone. Casting doubt on the appropriateness of an under-scrutinized default is a significant advancement in the field of legal professionalism. Finally, epistemology allowed me to deal with Freedman's proposed reply to the CP Trilemma with fresh and fair eyes, and to develop a critique of his proposal from a perspective that centres the lawyer's role in the adjudicative system as much (or perhaps more so) than Freedman himself does.

The overall value of this dissertation is twofold. First, I made room for ideas in the philosophy of lawyering besides those grounded in ethics. Ethics is an understandable starting point for the philosophy of lawyering and should continue to be pursued widely by scholars. However, ethics should not crowd out other branches of philosophical thought. Second, I proposed a theory on epistemology, another branch of philosophy. My theory is based on more recent

developments in epistemology that centre the intellectual life of the thinking being. In treating one's relationship to knowledge as a matter of character, virtue epistemology brings a powerful normative perspective to the study of knowledge and the lawyer's role in social structures that use and produce knowledge. With this perspective, we can see that the title of this dissertation asks for more than a descriptive answer. It asks for a commitment to a way of being in furtherance of knowledge. "How Will I Know?" becomes "Who will I be?"

Looking Forward

I came to this doctoral research in pursuit of a broad research agenda. It began with my work on philosophical legal ethics. Therein, I developed my own Fullerian theory of lawyering in which I proposed an approach to fidelity to law that is based on the moral conditions for the existence of law. In doing this, I recognized that fully understanding the concepts that I was addressing would require attention to foundational philosophical concepts in metaphysics and epistemology.[16] This is to say that working on the ethics of lawyering ultimately requires attention to the other branches of philosophy.

In an effort to better understand the systems of social organization in which lawyers work, I have dedicated this doctoral research to the epistemology of lawyering. I identified the need for this research in my LLM thesis, wanting to "explore the question of how it is that the lawyer has the epistemic capacities to do the things that are required of him/her under my principles of Fullerian lawyering"[17] and "the way in which lawyers' use of such methodologies of moral epistemology, play into the larger epistemic structures of legal systems"[18]. These broad aims that were intended to serve the purposes of my Fullerian theory of lawyering also had epistemic sub-

[16] See Emanuel Tucsa, *Legal Ethics as a Moral Idea: A Theory of Philosophical Legal Ethics Based on the Work of Lon Fuller* (LLM Thesis, Osgoode Hall Law School, York University, 2014) [unpublished], Looking Forward.
[17] *Ibid* at 172.
[18] *Ibid* at 173.

goals that evolved into the themes of this dissertation and that can stand within the epistemic branch of the philosophy of lawyering independent of my own Fullerian commitments. These epistemic aims included exploring "the way in which these legal systems make use of various actors to arrive at the knowledge (such as about the material facts of cases) that the legal systems seek to obtain"[19] and "the epistemic role of the lawyer" as the "core ethical actor in the social epistemology of the internal morality of law"[20]. I have pursued exactly these aims, discussing the epistemic role of the lawyer within the adversarial system of adjudication.

Proposing a virtue epistemic theory of lawyering has allowed me to focus on the character of the lawyer in his/her professional life. As I deepened my research into the knowledge producing role of the lawyer, I benefitted from a network of scholarship about cognition that I had not anticipated would be so robust when I began thinking about the epistemology of lawyering. The way forward in this line of research involves continuing to develop the virtue epistemology of lawyering itself while collaborating with the emerging network of scholars studying cognition in the legal system and in the work of lawyers.

Through the theoretical resources of each approach to epistemology, including social conditions of epistemic excellence and virtue analysis that is suited to a highly personalized analysis of the epistemic life of the lawyer, we can provide a rich framework that allows us to understand both the epistemic context in which the lawyer works and the individual qualities that can be used to achieve epistemic success. Undertaking this type of analysis has allowed me to suggest new insights into the adversarial system of adjudication and to explore the way in which different models of lawyering conceptualize the lawyer's role in that system. This project requires

[19] *Ibid*.
[20] *Ibid* at 173–174.

continuation, with even greater focus on providing a deeper account of the virtues that allow lawyers to be discoverers and stewards of knowledge in the legal system.

Forming links between research agendas focused on the cognition of lawyers and other participants in the legal system should be a priority for scholars in these fields. As scholars in this emerging cognitive approach to studying the legal system and lawyers establish their own niches in legal scholarship, it is vital for these scholars to know about research that is complementary to their own work, especially from the perspective of a different discipline. This is both for the practical support that scholars working on these topics can offer to one another and because it will be beneficial for our theories and research to evolve together—sharing concepts, projects, and values—rather than in isolation. Developing in isolation, the cognitive approaches to lawyering that I have mentioned—(1) epistemological, (2) teaching with metacognition, and (3) behavioural theory based in cognitive science—could, in the worst case, hamper the ability of these approaches to say meaningful things to one another if they develop in ways that are closed to the possibilities that each of the others raise. Thus, advancing the cognitive study of the legal system and the legal profession requires recognizing overlaps in research and fostering this emerging intellectual community of scholars who study the cognition of participants in the legal system.

A wide network of collaboration between scholars focused on cognition has the potential to make a meaningful contribution to the legal system and to legal education. By this, I do not mean that practicing lawyers will rush out, read works in the field, and be inspired to change their approach to practice. Some practitioners may do that but expecting that to be widespread shows a misunderstanding of the resources brought forward by the network of legal cognition scholars and by many legal scholars in other fields. Research within this network of scholarship about cognition and the law should be done with aims that are similar to basic research in the sciences. The study

of cognition in the legal system, like basic science, is a "quest for new knowledge", which exists in an interdependent relationship with efforts at application and innovation in the field of law.[21] "Without a specifically envisaged or immediately practical application", it nonetheless is often the basis of innovation as the knowledge that it produces is integrated into applied research and projects.[22] The conceptual tools created by the network of legal cognition scholars may be taken up by legal educators, practitioners, institutions, participants in legal processes, etc. My key concerns are that the tools and knowledge come into being—available to be taken up—and are thereafter refined for their purpose.

Making such contributions depends on a boldness of vision and a collaborative spirit. Turning the lens on contributors to the network of legal cognition scholars, the development of resources and knowledge originating from the study of cognition in the legal system depends on scholars' own practice of intellectual virtues. We have the epistemic responsibility for our projects' shared success.

[21] International Council for Science, "Annual Report 2004: Strengthening International Science for the Benefit of Society" (2004) at 3, online (pdf): International Council for Science <council.science/wp-content/uploads/2017/04/Annual-Report-2004.pdf> [perma.cc/ZYN5-D8JY].
[22] *Ibid*.

Bibliography

LEGISLATION

Canadian Charter of Rights and Freedoms, Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

US Const

JURISPRUDENCE

Harris v New York, 401 US 222 (1971).

People v Johnson, 72 Cal Rptr 2d 805 (1998).

R v Cunningham, 2010 SCC 10.

State v McDowell, 681 NW (2d) 500 (Wis Sup Ct 2004).

State v Robinson, 224 SE (2d) 174 (NC Sup Ct 1976).

Thomas v Sorrell, (1673) 124 Eng Rep 1098 (KB).

United States v Midgett, 342 F (3d) 321 (4th Cir 2003).

SECONDARY SOURCES: PROFESSIONAL REGULATION

American Bar Association, *ABA Model Code of Professional Responsibility and Code of Judicial Conduct*, as amended 1980, Chicago: ABA, 1981.

———, *ABA Model Rules of Professional Conduct*, ABA, 2019, online: ABA <www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents/> [perma.cc/5WED-59ZP].

———, *Canons of Professional Ethics*, Chicago: ABA, 1963.

———, *Criminal Justice Standards for the Defense Function* (ABA, 2017, 4th ed), online: ABA <www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition/> [perma.cc/DAU5-LEVW].

———, *Standards Relating to the Prosecution Function and the Defense Function* (ABA, 1971).

Canadian Bar Association, *CBA Code of Professional Conduct*, Ottawa: CBA, 2009, online (pdf): CBA <www.cba.org/getattachment/Publications-Resources/Resources/Ethics-and-

Professional-Responsibility/Code-of-Conduct/Code-of-Professional-Conduct-(2009)/codeOfConduct2009Eng.pdf>.

———, "Codes of Professional Conduct" (last modified 26 April 2020), online: *Canadian Bar Association* <www.cba.org/Publications-Resources/Practice-Tools/Ethics-and-Professional-Responsibility-(1)/Codes-of-Professional-Conduct> [perma.cc/3EDN-GJM6].

Federation of Law Societies of Canada, *Model Code of Professional Conduct*, FLSC 2019, online (pdf): FLSC <flsc.ca/wp-content/uploads/2019/11/Model-Code-October-2019.pdf> [perma.cc/U4WA-H2T7].

Law Society of Ontario, *Rules of Professional Conduct*, Toronto: LSO, 2019, online: LSO <lso.ca/about-lso/legislation-rules/rules-of-professional-conduct/complete-rules-of-professional-conduct> [perma.cc/CMQ8-VUH2].

State Bar of California, *California Rules of Professional Conduct*, State Bar of California, 2021, online: State Bar of California <www.calbar.ca.gov/Portals/0/documents/rules/Rules-of-Professional-Conduct.pdf> [perma.cc/QLA3-HVYR].

SECONDARY SOURCES & OTHER MATERIALS

The Devil's Advocate, Directed by Taylor Hackford. Warner Bros. Pictures, 2007.

"Wikipedia: Neutral point of view" (last modified 5 June 2021), online: *Wikipedia* <en.wikipedia.org/w/index.php?title=Wikipedia:Neutral_point_of_view&oldid=1027050549> [perma.cc/GEX7-GUPU].

Adhopia, Vik, "Canadian Health Care's 'One Issue Per Visit' Problem", *CBC News* (20 March 2019), online: <www.cbc.ca/news/health/second-opinion-one-problem-visit-1.5061506> [perma.cc/P4PQ-3R8C].

Alexander, Larry & Michael Moore, "Deontological Ethics", *The Stanford Encyclopedia of Philosophy* (Winter 2016), Edward N Zalta, ed, online: Center for the Study of Language and Information, Stanford University <plato.stanford.edu/entries/ethics-deontological/> [perma.cc/FA47-8CN5].

Aquinas, Saint Thomas, *Treatise on Law*, translated by Richard J Regan (Indianapolis: Hackett, 2000).

Arango-Muñoz, Santiago, "Metacognitive Feelings, Self-Ascriptions, and Mental Actions" (2014) 2:1 Philosophical Inquiries 145.

Aristotle, "Book IV" in *The Metaphysics*, translated by Hugh Tredennick (Cambridge: Harvard University Press, 1933) 146.

———, *The Nicomachean Ethics*, reissued ed, translated by David Ross, JL Ackrill & JO Urmson, eds, (New York: Oxford University Press, 1998).

Axtell, Guy, *Knowledge, Belief, and Character: Readings in Virtue Epistemology* (Lanham, MD: Rowman & Littlefield, 2000).

Ayers, Andrew B, "What if Legal Ethics Can't be Reduced to a Maxim?" (2013) 26:1 Geo J Legal Ethics 1.

Babcock, Linda & George Loewenstein, "Explaining Bargaining Impasse: The Role of Self-Serving Biases" (1997) 11:1 Journal of Economic Perspectives 109.

Baehr, Jason, "Epistemic Malevolence" (2010) 41:1/2 Metaphilosophy 189.

———, "The Four Dimensions of Intellectual Virtue" in Chienkuo Mi, Michael Slote & Ernest Sosa, eds, *Moral and Intellectual Virtues in Western and Chinese Philosophy: The Turn Toward Virtue* (New York: Routledge, 2016) 86.

Bix, Brian, ed, *A Dictionary of Legal Theory*, (Oxford: Oxford University Press, 2004).

Briñol, Pablo & Kenneth G DeMarree, "Social Metacognition: Thinking About Thinking in Social Psychology" in Pablo Briñol & Kenneth G DeMarree, eds, *Social Metacognition* (New York: Psychology Press, 2012) 1.

Burke, Alafair S, "Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science" (2006) 47:5 Wm & Mary L Rev 1587.

Campbell, Tom, *The Legal Theory of Ethical Positivism* (Aldershot, Eng: Dartmouth, 1996).

Carle, Susan D, ed, *Lawyers' Ethics and the Pursuit of Social Justice: A Critical Reader* (New York: New York University Press, 2005).

Cassam, Quassim, *Vices of the Mind: From the Intellectual to the Political* (Oxford: Oxford University Press, 2019).

Clance, Pauline Rose & Suzanne Ament Imes, "The Impostor Phenomenon in High Achieving Women: Dynamics and Therapeutic Intervention" (1978) 15:3 Psychotherapy: Theory, Research & Practice 241.

Clark, Kathleen, "Ethical Issues Raised by the OLC Torture Memorandum" (2005) 1:2 J Nat'l Sec L & Pol'y 455.

Code, Lorraine, *Epistemic Responsibility* (Hanover, NH: University Press of New England for Brown University Press, 1987).

Collin, Finn, "The Twin Roots and Branches of Social Epistemology" in Miranda Fricker et al, eds, *The Routledge Handbook of Social Epistemology* (New York: Routledge, 2019) 21.

Correia, Fabrice, "Ontological Dependence" (2008) 3:5 Phil Compass 1013.

Cunningham, Clark D, "How to Explain Confidentiality?" (2003) 9:2 Clinical L Rev 579.

Dare, Tim, *The Counsel of Rogues?: A Defence of the Standard Conception of the Lawyer's Role* (Farnham, UK: Ashgate Publishing, 2009).

———, "Mere-Zeal, Hyper-Zeal and the Ethical Obligations of Lawyers" (2004) 7:1 Legal Ethics 24.

Dongen, Jeroen van & Herman Paul, eds, *Epistemic Virtues in the Sciences and the Humanities* (Cham, Switzerland: Springer, 2017).

Dworkin, Ronald, *Law's Empire* (Cambridge, MA: Belknap Press, 1986).

Dworkin, Ronald M, "The Model of Rules" (1967) 35:1 U Chicago L Rev 14.

Editorial Board, The. "Rampant Prosecutorial Misconduct", *The New York Times* (4 January 2014), online: <www.nytimes.com/2014/01/05/opinion/sunday/rampant-prosecutorial-misconduct.html> [perma.cc/LA9B-3BWD].

Efklides, Anastasia, "The Role of Metacognitive Experiences in the Learning Process" (2009) 21:1 Psicothema 76.

Ellmann, Stephen, "Truth and Consequences" (2000) 69:3 Fordham L Rev 895.

Emon, Anver M, *Islamic Natural Law Theories* (Oxford: Oxford University Press, 2010).

Emon, Anver M, Matthew Levering & David Novak. *Natural Law: A Jewish, Christian, and Muslim Trialogue* (Oxford: Oxford University Press, 2014).

Farrow, Trevor CW, "Sustainable Professionalism" (2008) 46:1 Osgoode Hall LJ 51.

Farrow, Trevor CW et al, *Everyday Legal Problems and the Cost of Justice in Canada: Overview Report*, Cost of Justice (Toronto: Canadian Forum on Civil Justice, 2016).

Finnis, John, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980).

Flavell, John H, "Metacognition and Cognitive Monitoring" (1979) 34:10 American Psychologist 906.

Fleisher, Will, "Virtuous Distinctions: New Distinctions for Reliabilism and Responsibilism" (2017) 194:8 Synthese 2973.

Freedman, Monroe H, "Client Confidences and Client Perjury: Some Unanswered Questions" (1988) 136:6 U Pa L Rev 1934.

———, "Getting Honest About Client Perjury" (2008) 21:1 Geo J Legal Ethics 133.

———, "In Praise of Overzealous Representation – Lying to Judges, Deceiving Third Parties, and Other Ethical Conduct" (2006) 34:3 Hofstra L Rev 771.

———, "Lawyer-Client Confidences Under the A.B.A. Model Rules: Ethical Rules Without Ethical Reason" (1984) 3:2 Criminal Justice Ethics 3.

———, "Lawyer-Client Confidentiality: Rethinking the Trilemma" (2015) 43:4 Hofstra L Rev 15.

———, *Lawyers' Ethics in an Adversary System* (Indianapolis: Bobbs-Merrill, 1975).

———, "Perjury: The Lawyer's Trilemma" (1975) 1:1 Litigation 26.

———, "Symposium on Professional Ethics: Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions" (1966) 64:8 Mich L Rev 1469.

Freedman, Monroe H & Abbe Smith, *Understanding Lawyers' Ethics*, 3rd ed (Newark, NJ: LexisNexis, 2004).

Friedland, Steven, "A Critical Inquiry into the Traditional Uses of Law School Evaluation" (2002) 23:1 Pace L Rev 147.

Fuller, Lon L, *The Morality of Law*, revised ed (New Haven, Conn: Yale University Press, 1969).

Fuller, Lon L & John D Randall, "Professional Responsibility: Report of the Joint Conference" (1958) 44:12 ABA J 1159.

Fuller, Steve, "On Regulating What Is Known: A Way to Social Epistemology" (1987) 73:1 Synthese 145.

Fullerton, Merrilee, "Understanding and Improving on 1 Problem Per Visit" (2008) 179:7 Canadian Medical Association Journal 623.

Gallie, WB, "Essentially Contested Concepts" (1955) 56 Proceedings of the Aristotelian Society 167.

Garner, Ruth, *Metacognition and Reading Comprehension* (Norwood, N.J: Ablex, 1987).

George, Robert P, *In Defense of Natural Law* (Oxford: Clarendon Press, 1999).

Giannoulopoulos, Dimitrios, *Improperly Obtained Evidence in Anglo-American and Continental Law* (Oxford, UK: Hart Publishing, 2019).

Goldman, Alvin, "Social Epistemology", *The Stanford Encyclopedia of Philosophy* (Summer 2010), Edward N Zalta, ed, online: Center for the Study of Language and Information, Stanford University <plato.stanford.edu/archives/sum2010/entries/epistemology-social/> [perma.cc/F4X5-P7AP].

Goldman, Alvin I, "Epistemic Paternalism: Communication Control in Law and Society" (1991) 88:3 The Journal of Philosophy 113.

———, *Epistemology and Cognition* (Cambridge, Mass: Harvard University Press, 1986).

———, "Experts: Which Ones Should You Trust?" (2001) 63:1 Philosophy and Phenomenological Research 85.

———, "Foundations of Social Epistemics" (1987) 73:1 Synthese 109.

———, *Knowledge in a Social World* (Oxford: Clarendon Press, 1999).

———, "Legal Evidence" in Martin P Golding & William A Edmundson, eds, *The Blackwell Guide to the Philosophy of Law and Legal Theory* (Malden, Mass: Blackwell, 2005) 163.

———, "Quasi-Objective Bayesianism and Legal Evidence" (2002) 42:3 Jurimetrics 237.

———, "Simple Heuristics and Legal Evidence" (2003) 2:3 Law, Prob & Risk 215.

———, "The Unity of the Epistemic Virtues" in Abrol Fairweather & Linda Zagzebski, eds, *Virtue Epistemology: Essays on Epistemic Virtue and Responsibility* (Oxford: Oxford University Press, 2001) 30.

Gowans, Christopher W, *Innocence Lost: An Examination of Inescapable Moral Wrongdoing* (New York: Oxford University Press, 1994).

Greco, John, "Virtues and Rules in Epistemology" in Abrol Fairweather & Linda Zagzebski, eds, *Virtue Epistemology: Essays on Epistemic Virtue and Responsibility* (Oxford: Oxford University Press, 2001) 117.

Green, Jerry, "Metacognition as an Epistemic Virtue" (2019) 35:1 Southwest Philosophy Review 117.

Green, Leslie, "Positivism and the Inseparability of Law and Morals" (2008) 83:4 NYUL Rev 1035.

Grisez, Germain G, "The First Principle of Practical Reason: A Commentary on the Summa Theologiae, 1-2, Question 94, Article 2" (1965) 10 Am J Juris 168.

Grisez, Germain G, Joseph Boyle & John Finnis, "Practical Principles, Moral Truth, and Ultimate Ends" (1987) 32 Am J Juris 99.

Gryz, Jarek, "On the Relationship Between the Aretaic and the Deontic" (2011) 14:5 Ethical Theory and Moral Practice 493.

Gur, Noam, "Form and Value in Law", Book Review of *Forms Liberate: Reclaiming the Jurisprudence of Lon Fuller* by Kristen Rundle (2014) 5:1 Juris 85.

Haack, Susan, "Truth, Truths, 'Truth,' and 'Truths' in the Law" (2003) 26:1 Harv JL & Pub Pol'y 17.

———, "The Whole Truth and Nothing but the Truth" (2008) 32:1 Midwest Studies in Philosophy 20.

Hamilton, Neil, "Assessing Professionalism: Measuring Progress in the Formation of an Ethical Professional Identity" (2008) 5:2 U of St Thomas LJ 470.

Hans, Valerie P et al, "The Death Penalty: Should the Judge or the Jury Decide Who Dies?" (2015) 12:1 J Empirical Legal Stud 70.

Hart, HLA, Book Review of *The Morality of Law* by Lon Fuller (1965) 78:6 Harv L Rev 1281.

Heath, Brad & Kevin McCoy, "Prosecutors' Conduct Can Tip Justice Scales", *USA Today* (23 September 2010), online: <usatoday30.usatoday.com/news/washington/judicial/2010-09-22-federal-prosecutors-reform_N.htm> [perma.cc/C527-NJH3].

Henry, A'Lelia Robinson, "Perpetuating Inequality: Plessy v. Ferguson and the Dilemma of Black Access to Public and Higher Education" (1998) 27:1 JL & Educ 27.

Ho, HL, *A Philosophy of Evidence Law: Justice in the Search for Truth* (Oxford: Oxford University Press, 2008).

Hoeflich, Michael H, "Natural Law Theory" in Kermit L Hall et al, eds, *The Oxford Companion to American Law* (Oxford: Oxford University Press, 2002).

Hoffman, Lonny Sheinkopf, "Access to Information, Access to Justice: The Role of Presuit Investigatory Discovery" (2007) 40:2 U Mich JL Reform 217.

Hookway, Christopher, "How to Be a Virtue Epistemologist" in *Intellectual Virtue: Perspectives from Ethics and Epistemology* (Oxford: Clarendon Press, 2003) 183.

Humbach, John A, "The National Association of Honest Lawyers: An Essay on Honesty, 'Lawyer Honesty' and Public Trust in the Legal System" (1999) 20:1 Pace L Rev 93.

Hutchinson, Allan C, "Calgary and Everything After – A Postmodern Re-Vision of Lawyering" (1995) 33:4 Alta L Rev 768.

———, "Democracy and Determinacy: An Essay on Legal Interpretation" (1989) 43:3 U Miami L Rev 541.

———, *Fighting Fair: Legal Ethics for an Adversarial Age* (New York: Cambridge University Press, 2015).

———, *Legal Ethics and Professional Responsibility*, 2nd ed (Toronto: Irwin Law, 2006).

———, "A Loss of Faith: Law, Justice and Legal Ethics", Book Review of *Lawyers and Fidelity to Law* by W Bradley Wendel [unpublished, archived in author's personal collection].

———, "Taking It Personally: Legal Ethics and Client Selection" (1998) 1:2 Leg Ethics 168.

Ichikawa, Jonathan Jenkins & Matthias Steup, "The Analysis of Knowledge", *The Stanford Encyclopedia of Philosophy* (Summer 2018), Edward N Zalta, ed, online: Center for the Study of Language and Information, Stanford University <plato.stanford.edu/entries/knowledge-analysis/> [perma.cc/JY2X-2KJ6].

International Council for Science, "Annual Report 2004: Strengthening International Science for the Benefit of Society" (2004), online (pdf): International Council for Science <council.science/wp-content/uploads/2017/04/Annual-Report-2004.pdf> [perma.cc/ZYN5-D8JY].

Johnston, Robert Gilbert & Sara Lufrano, "The Adversary System as a Means of Seeking Truth and Justice" (2002) 35:2 J Marshall L Rev 147.

Jones, Karen, "Moral Epistemology" in Frank Jackson & Michael Smith, eds, *The Oxford Handbook of Contemporary Philosophy* (Oxford: Oxford University Press, 2005) 63.

Jones, Natasha N & Miriam F Williams, "Technologies of Disenfranchisement: Literacy Tests and Black Voters in the US from 1890 to 1965" (2018) 65:4 Technical Communication 371.

Kawall, Jason, "Other-Regarding Epistemic Virtues" (2002) 15:3 Ratio 257.

Kennedy, Duncan, "Legal Education as Training for Hierarchy" in David Kairys, ed, *The Politics of Law: A Progressive Critique*, 3rd ed (New York, NY: Basic Books, 1998) 54.

Klinka, Elisia M & Russell G Pearce, "Confidentiality Explained: The Dialogue Approach to Discussing Confidentiality with Clients" (2011) 48:1 San Diego L Rev 157.

Kruger, Justin & David Dunning, "Unskilled and Unaware of It: How Difficulties in Recognizing One's Own Incompetence Lead to Inflated Self-Assessments" (1999) 77:6 Journal of Personality and Social Psychology 1121.

Krumrei-Mancuso, Elizabeth J et al, "Links Between Intellectual Humility and Acquiring Knowledge" (2020) 15:2 The Journal of Positive Psychology 155.

Kruse, Katherine R, "The Jurisprudential Turn in Legal Ethics" (2011) 53:2 Ariz L Rev 493.

Layton, David & Michel Proulx, *Ethics and Criminal Law*, 2d ed (Toronto, CA: Irwin Law, 2015).

Leiter, Brian, "Law and Objectivity" in Jules L Coleman & Scott Shapiro, eds, *Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford University Press, 2002) 969.

———, "Objectivity and the Problems of Jurisprudence", Book Review of *Law and Objectivity* by Kent Greenawalt (2002) 72:1 Tex L Rev 187.

Lepock, Christopher, "Metacognition and Intellectual Virtue" in Abrol Fairweather, ed, *Virtue Epistemology Naturalized: Bridges Between Virtue Epistemology and Philosophy of Science*, Synthese Library (Cham: Springer, 2014).

Liptak, Adam, "U.S. Is Alone in Rejecting All Evidence if Police Err", *The New York Times* (19 July 2008), online: <www.nytimes.com/2008/07/19/us/19exclude.html> [perma.cc/3WXL-D92W].

Luban, David, "Contrived Ignorance" (1999) 87:4 Geo LJ 957.

———, *Legal Ethics and Human Dignity* (New York: Cambridge University Press, 2007).

———, "Partisanship, Betrayal and Autonomy in the Lawyer-Client Relationship: A Reply to Stephen Ellmann" (1990) 90:4 Colum L Rev 1004.

———, "Rediscovering Fuller's Legal Ethics" (1998) 11:4 Geo J Legal Ethics 801.

Luban, David & W Bradley Wendel, "Philosophical Legal Ethics: An Affectionate History" (2017) 30:3 Geo J Legal Ethics 337.

MacCormick, Neil, "A Moralistic Case for A-Moralistic Law?" (1985) 20:1 Val U L Rev 1.

Macfarlane, Julie, *The National Self-Represented Litigants Project: Identifying and Meeting the Needs of Self-Represented Litigants – Final Report*, by Julie Macfarlane (National Self-Represented Litigants Project, 2013), online: NSRLP <representingyourselfcanada.com/wp-content/uploads/2016/09/srlreportfinal.pdf> [perma.cc/5UB2-EVQ4].

Marmor, Andrei & Alexander Sarch, "The Nature of Law", *The Stanford Encyclopedia of Philosophy* (Fall 2019), Edward N Zalta, ed, online: Center for the Study of Language and Information, Stanford University <plato.stanford.edu/entries/lawphil-nature/> [perma.cc/L9NW-U4NU].

Meagher, Benjamin R et al, "Contrasting Self-Report and Consensus Ratings of Intellectual Humility and Arrogance" (2015) 58 Journal of Research in Personality 35.

Miller, Christian B & Angela Knobel, "Some Foundational Questions in Philosophy about Character" in Christian B Miller et al, eds, *Character: New Directions from Philosophy, Psychology, and Theology* (Oxford: Oxford University Press, 2015) 19.

Moore, Michael S, "Moral Reality Revisited" (1992) 90:8 Mich L Rev 2424.

Murphy, Mark, "The Natural Law Tradition in Ethics", *The Stanford Encyclopedia of Philosophy* (Summer 2019), Edward N Zalta, ed, online: Center for the Study of Language and Information, Stanford University <plato.stanford.edu/entries/natural-law-ethics/> [perma.cc/UGY7-RYY7].

Niedwiecki, Anthony, "Teaching for Lifelong Learning: Improving the Metacognitive Skills of Law Students through More Effective Formative Assessment Techniques" (2012) 40:1 Capital UL Rev 149.

Niedwiecki, Anthony S, "Lawyers and Learning: A Metacognitive Approach to Legal Education" (2006) 13:1 Widener L Rev 33.

Novak, David, *Natural Law in Judaism* (Cambridge: Cambridge University Press, 1998).

O'Connor, Timothy & Christopher Franklin, "Free Will", *The Stanford Encyclopedia of Philosophy* (Spring 2020), Edward N Zalta, ed, online: Center for the Study of Language and Information, Stanford University <plato.stanford.edu/entries/freewill/> [perma.cc/VQ4R-ZW9M].

Olin, Lauren & John M Doris, "Vicious Minds: Virtue Epistemology, Cognition, and Skepticism" (2014) 168:3 Philosophical Studies 665.

Pérez, María Lourdes Santos, "Dworkin and the Natural Law Tradition" in Francisco José Contreras, ed, *The Threads of Natural Law* (New York: Springer, 2013) 211.

Perlman, Andrew M, "A Behavioral Theory of Legal Ethics" (2015) 90:4 Ind LJ 1639.

Poscher, Ralf, "The Hand of Midas: When Concepts Turn Legal, or Deflating the Hart-Dworkin Debate" in Jaap C Hage & Dietmar von der Pfordten, eds, *Concepts in Law* (New York: Springer, 2009) 99.

Quinlivan, Maree, "The Cab Rank Rule: A Reappraisal of the Duty to Accept Clients" (1998) 28:1 VUWLR 29.

Raz, Joseph, *The Authority of Law: Essays on Law and Morality*, 2nd ed (Oxford: Oxford University Press, 2009).

———, *The Morality of Freedom* (Oxford: Clarendon, 1986).

Rest, James R & Darcia Narváez, eds, *Moral Development in the Professions: Psychology and Applied Ethics* (Hillsdale, NJ: L Erlbaum Associates, 1994).

Robbennolt, Jennifer K & Jean R Sternlight, "Behavioral Legal Ethics" (2013) 45:3 Ariz St LJ 1107.

Roberts, Robert C & W Jay Wood, *Intellectual Virtues: An Essay in Regulative Epistemology* (Oxford: Oxford University Press, 2007).

Rundle, Kristen, *Forms Liberate: Reclaiming the Jurisprudence of Lon L. Fuller* (Oxford: Hart Publishing, 2012).

Sargent, Carol Springer & Andrea A Curcio, "Empirical Evidence that Formative Assessments Improve Final Exams" (2012) 61:3 J Leg Educ 379.

Schraw, Gregory, "Promoting General Metacognitive Awareness" (1998) 26:1/2 Instructional Science 113.

Self-Represented Litigation Network, "SRLN Brief: How Many SRLs?", (2019), online: *Self-Represented Litigation Network* <www.srln.org/node/548/srln-brief-how-many-srls-srln-2015> [perma.cc/54JB-GQP8].

Sheppard, Steve, "An Informal History of How Law Schools Evaluate Students, with a Predictable Emphasis on Law School Final Exams" (1997) 65:4 UMKC L Rev 657.

Shi, Feng et al, "The Wisdom of Polarized Crowds" (2019) 3:4 Nature Human Behaviour 329.

Silber, Norman I, "Monroe Freedman and the Morality of Dishonesty: Multidimensional Legal Ethics as a Cold War Imperative" (2016) 44:4 Hofstra L Rev 1127.

Simmonds, NE, "Freedom, Responsible Agency and Law", Book Review of *Forms Liberate: Reclaiming the Jurisprudence of Lon Fuller* by Kristen Rundle (2014) 5:1 Juris 75.

Simmonds, NE, *Law as a Moral Idea* (Oxford: Oxford University Press, 2007).

Simon, William H, *The Practice of Justice: A Theory of Lawyers' Ethics* (Cambridge, MA: Harvard University Press, 1998).

Sinnott-Armstrong, Walter, "Consequentialism", *The Stanford Encyclopedia of Philosophy*, (Summer 2019), Edward N Zalta, ed, online: Center for the Study of Language and Information, Stanford University <plato.stanford.edu/archives/sum2019/entries/consequentialism/> [perma.cc/BJY6-AKGH].

Slote, Michael, *From Morality to Virtue* (New York: Oxford University Press, 1992).

Smyth, Gemma, Samantha Hate & Neil Gold, "Clinical and Experiential Learning in Canadian Law Schools: Current Perspectives" (2017) 95:1 Can Bar Rev 151.

Soper, Philip, "In Defense of Classical Natural Law in Legal Theory: Why Unjust Law is No Law at All" (2007) 20:1 Can JL & Jur 201.

Span, Christopher M, "Learning in Spite of Opposition: African Americans and their History of Educational Exclusion in Antebellum America" (2005) 131 Counterpoints 26.

Standing Committee on Ethics and Professional Responsibility, Formal Opinion 93-370, *Judicial Participation in Pretrial Settlement Negotiations* (American Bar Association, 1993).

Sutro, John A, "The Good Lawyer" (1966) 7:1 Santa Clara Lawyer (now the Santa Clara L Rev) 1.

Talbott, William J & Alvin I Goldman, "Games Lawyers Play: Legal Discovery and Social Epistemology" (1998) 4:2 Legal Theory 93.

Tarricone, Pina, *The Taxonomy of Metacognition* (London: Psychology Press, 2011).

Taylor, Gabriele & Sybil Wolfram, "The Self-Regarding and Other-Regarding Virtues" (1968) 18:72 The Philosophical Quarterly 238.

Tenbrunsel, Ann E & David M Messick, "Ethical Fading: The Role of Self-Deception in Unethical Behavior" (2004) 17:2 Social Justice Research 223.

Thomson, Judith Jarvis, "The Trolley Problem" (1985) 94:6 Yale LJ 1395.

Thrower, Susan E, "Neither Reasonable nor Remedial: The Hopeless Contradictions of the Legal Ethics Measures to Prevent Perjury" (2010) 58:4 Clev St L Rev 781.

Trial of Queen Caroline, vol 2, (New York: James Cockcroft & Co, 1874).

Tucsa, Emanuel, *Legal Ethics as a Moral Idea: A Theory of Philosophical Legal Ethics Based on the Work of Lon Fuller* (LLM Thesis, Osgoode Hall Law School, York University, 2014) [unpublished].

———, “The Gold Standard: Legal Theory and Fuller Revisited” (2020) 13:1 Wash U Jurisprudence Rev 85.

Turner, Christian, “The Burden of Knowledge” (2009) 43:2 Ga L Rev 297.

Turri, John, Mark Alfano & John Greco, “Virtue Epistemology”, *The Stanford Encyclopedia of Philosophy* (Fall 2019), Edward N Zalta, ed, online: Center for the Study of Language and Information, Stanford University <plato.stanford.edu/entries/epistemology-virtue/> [perma.cc/JJ3T-4YUJ].

Vallejo, Iván Garzón, “Public Reason, Secularism, and Natural Law” in Francisco José Contreras, ed, *The Threads of Natural Law* (New York: Springer, 2013) 223.

Veenman, Marcel VJ, “Metacognition in Science Education: Definitions, Constituents, and Their Intricate Relation with Cognition” in Anat Zohar & Yehudit Judy Dori, eds, *Metacognition in Science Education: Trends in Current Research* (New York: Springer, 2012) 21.

Veenman, Marcel VJ, Bernadette HAM Van Hout-Wolters & Peter Afflerbach, “Metacognition and Learning: Conceptual and Methodological Considerations” (2006) 1:1 Metacognition and Learning 3.

Vischer, Robert K, “Legal Advice as Moral Perspective” (2006) 19:1 Geo J Legal Ethics 225.

Waldron, Jeremy, “Positivism and Legality: Hart’s Equivocal Response to Fuller” (2008) 83:4 NYUL Rev 1135.

Weinreb, Lloyd L, “A Secular Theory of Natural Law” (2004) 72:6 Fordham L Rev 2287.

Wendel, W Bradley, *Lawyers and Fidelity to Law* (Princeton: Princeton University Press, 2010).

———, “Legal Ethics and the Separation of Law and Morals” (2005) 91:1 Cornell L Rev 67.

———, “Monroe Freedman: The Ethicist of the Non-Ideal” (2016) 44 Hofstra L Rev 671.

Winston, Kenneth I, “Introduction [to the First Edition]” in Kenneth I Winston, ed, *The Principles of Social Order: Selected Essays of Lon L Fuller*, revised ed (Oxford: Hart Publishing, 2001) 25.

Wolfe, Christopher, “Political Theory and Natural Law” in Tom Angier, ed, *The Cambridge Companion to Natural Law Ethics* (Cambridge: Cambridge University Press, 2019) 235.

Zagzebski, Linda Trinkaus, *Virtues of the Mind: An Inquiry into the Nature of Virtue and the Ethical Foundations of Knowledge* (New York: Cambridge University Press, 1996).