THE IMPORTANCE OF BEING EARNESTLY INDEPENDENT

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I. HOW OSCAR WILDE GOT THE WRONG ADVICE FROM HIS SOLICITOR

On Wednesday, April 6, 1881, in its judgment in Wheeler v. Le Marchant, the English Court of Appeal confirmed that the “rule as to the non-production of communications between solicitor and client” had “been established upon grounds of general or public policy” “in order that . . . legal advice may be obtained safely and sufficiently.” On Friday, March 1,

1. (1881) 17 Ch. D. 675 (C.A.).
2. Id. at 683.
3. Id. at 682. The court’s rationale for the preservation of the confidentiality of lawyer-client communications is not universally accepted (and, despite my suggestion otherwise, perhaps the Wilde story I recount here proves that the rationale is not supportable). See, e.g., Neil J. Williams, Four Questions of Privilege: The Litigation Aspect of Legal Professional Privilege, in INTERNATIONAL PERSPECTIVES ON CIVIL JUSTICE 219 n.5 (I.R. Scott ed., 1990); Adam M. Dodek, Reconceiving Solicitor-Client Privilege, 35 Queen’s L.J. 493 (2009); Alice Woolley, Rhetoric and Realities: What Independence of the Bar Requires of Lawyer Regulation, 4 U. Calgary SPP Res. Papers 1, 36 n.149 (2011) [hereinafter Woolley, Rhetoric]. Dodek suggests that the “full and frank disclosure” justification for the privilege is unsustainable when the reason for a client’s decision to reveal has nothing to do with whether the lawyer might or might not pass information along to a third party. See Dodek,
1895, Oscar Wilde visited a solicitor, C.O. Humphreys, in Humphreys's offices in Giltspur Chambers, Holborn Viaduct, London. Humphreys was "a most experienced criminal lawyer." Wilde was forty. "Two of his plays were running in the West End of London . . . , both of them huge successes." A few years earlier, Wilde had taken up with Lord Alfred Douglas, a son of the eighth Marquis of Queensberry. Douglas, who was known as Bosie, was twenty-four in early 1895. Queensberry, who had developed the rules of boxing, was livid about his son's association with Wilde.

supra, at 509-10. Dodek also argues that the privilege rests on a weak footing because many clients don't know there is a privilege to claim. Id. at 509. The response to that point may be to suggest to regulators of lawyers that they require lawyers to explain matters of confidentiality and privilege to their clients as a first step in the creation of the client-lawyer relationship of trust.

4. Franny Moyle, Constance: The Tragic and Scandalous Life of Mrs. Oscar Wilde 257 (2011); H. Montgomery Hyde, Oscar Wilde 253 (1975) [hereinafter Hyde, Oscar Wilde].

5. Hyde, Oscar Wilde supra note 4, at 247; H. Montgomery Hyde, The Trials of Oscar Wilde 9, 80 (1962) ("that very experienced criminal lawyer" and "his extensive criminal practice") [hereinafter Hyde, Trials]. Cf. G.J. Renier, Ph. D., Oscar Wilde 110 (1933) (where C.V. [sic] Humphreys is said to have been "the senior partner of . . . Humphreys and May," described as "family solicitors" with "no experience of criminal matters"). Dr. Renier may have had the wrong Humphreys. Wilde saw Charles Octavius Humphreys, whose firm was known as C.O. Humphreys, Son & Kershaw. Hyde, Oscar Wilde, supra note 4, at 247; Merlin Holland, The Real Trial of Oscar Wilde xx-xxi (2003); Rupert Hart-Davis, Selected Letters of Oscar Wilde 131 n.4 (1962). Humphreys's son, Travers, later Mr. Justice Humphreys, was a junior to Wilde's barrister, Sir Edward Clarke, Q.C., at the Wilde trials. See Hyde, Trials, supra, at 88, 88 n.3. Sir Travers Humphreys wrote a forward to Hyde's Trials book. Id. at 7. It is inconceivable that he would not have corrected Hyde had Hyde been wrong about C.O. Humphreys's experience in criminal matters.

6. He was born on October 16, 1854. See Holland, supra note 5, at 64. It appears he could not accept his age. On April 3, 1895, at the Queensberry trial to which I refer, Wilde's counsel asked him, "I think you are thirty-eight years of age?" Id. at 45. Wilde answered, "I am thirty-nine years of age." Id. Astutely, the first question put to him in cross-examination was, "You stated at the commencement of your examination that you were thirty-nine years of age. I think you are over forty. Isn't that so?" Id. at 64. Wilde had to admit he was, although not before saying he had "no intention of posing [!] for a younger man at all." Id. at 64.

7. Hesketh Pearson, The Life of Oscar Wilde 258 (1946). The plays were An Ideal Husband and The Importance of Being Earnest. See id. at 247, 256; Douglas Murray, Bosie: A Biography of Lord Alfred Douglas 74 (2000). An Ideal Husband was also "running on Broadway." Vyvyan Holland, Son of Oscar Wilde 59 (1954) [hereinafter V. Holland].

8. Wilde met Douglas in January 1891. Holland, supra note 5, at xvi; Hart-Davis, supra note 5, at 89. They became friends in May 1892. Hart-Davis, supra note 5, at 89. In the sources I have consulted, "Marquis" and "Marquess" appear to be used interchangeably. I have used "Marquis" here because Queensberry himself used that spelling, as evidenced by his calling card, infra note 13.

9. See Murray, supra note 7, at 1-2.

10. See Holland, supra note 5, at xvii-xix; Hyde, Oscar Wilde, supra note 4, at 191-95.
and Douglas—Bosie particularly so—were bothered by Queensberry’s opposition and resisted it.\textsuperscript{11} As events later proved, they didn’t take Queensberry seriously enough.

Ten days before Wilde saw Humphreys, Queensberry had left a card for Wilde with a porter at the Albemarle Club, off Piccadilly.\textsuperscript{12} The porter, whose name was Wright,\textsuperscript{13} had read the card. Later he claimed not to have understood its meaning.\textsuperscript{14} On the card, although part of the message is very hard to decipher, Queensberry had written: “For Oscar Wilde posing as Somdomite.”\textsuperscript{15} “Somdomite” was Queensberry’s slip. Wright had placed the card in an envelope, probably without having shown it to anyone.\textsuperscript{16} On Feb-

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\item 12. Pearson, supra note 7, at 280; Holland, supra note 5, at p. xix.
\item 13. Holland, supra note 5, at 4.
\item 14. See Pearson, supra note 7, at 282; Frances Winwar, Oscar Wilde and the Yellow ‘Nineties 262 (3d ed. 1942); Hyde, Oscar Wilde, supra note 4, at 196. As Wright testified at the Queensberry prosecution: “I looked at the card but I could not understand what was written upon it.” See Holland, supra note 5, at 44. That does seem hard to credit when it was he, and no one else I have discovered, who thought Queensberry had described Wilde as a “ponce and somdomite.” See id. at 4 and discussion infra note 15.
\item 15. The card is reproduced in Holland, supra note 5, at xiv; Hyde, Trials, supra note 5, preceding page 99. It can also be found on the Internet (search “Posing Somdomite”). There is some debate about the words Queensberry actually wrote. See, e.g., Holland, supra note 5, at 300 n.41; Ellmann, supra note 11, at 438. There are at least four possibilities: “ponce and somdomite,” “posing somdomite,” “posing as sodomite,” and “posing as a somdomite” (sometimes “Somdomite” is capitalized). See id. On Saturday, March 2, 1895, when Queensberry appeared before a magistrate, having been arrested on a warrant Humphreys obtained on Wilde’s instructions, the porter, Wright, testified that in his presence Queensberry had written on a card the words “For Oscar Wilde ponce and somdomite,” at which moment it is recorded that Queensberry interjected saying his words were “posing as sodomite.” See Holland, supra note 5, at 4. Holland and Ellmann both state that it would have been easier for Queensberry to defend himself were his words “posing as sodomite,” rather than “posing somdomite,” because he would not have to show that Wilde was actually a sodomite. Id. at 300 n.41; Ellmann, supra note 11, at 438. As Hyde put it, the sole question for the jury was one of fact: “did Oscar Wilde pose as a sodomite?” Hyde, Trials, supra note 5, at 96. I am grateful to my wife, Ellen Gerber, a very experienced prosecutor, for helping me with this point. What Wilde said Queensberry wrote is recorded in his counsel’s opening at the trial of Regina (on the prosecution of Oscar Wilde) v. John Douglas (Marquess of Queensberry) and, formally, in the two counts of the indictment against Queensberry. There, Queensberry’s words are recorded as “For Oscar Wilde posing as sodomite.” See Holland, supra note 5, at app. A, at 285-86.
\item 16. See Winwar, supra note 14, at 262; Pearson, supra note 7, at 282; Philippe Jullian, Oscar Wilde 314-15 (1968). Wright’s evidence at the criminal libel trial was that he had placed Queensberry’s card in an envelope on which he wrote Wilde’s name. Holland, supra note 5, at 4. He was then asked by Wilde’s counsel: “And [you] kept it in your custody until the 28th of February, which was the first date after the 18th [the date on which Queensberry had given Wright the card] when Mr. Wilde came to the club?” Id. at 44. Wright answered “Yes.” Id. It is curious that Wilde’s lawyer would lead Wright to say, effectively, that he had control of the envelope for ten days. While Queensberry’s message had obviously been published to Wright, might it not have been advantageous for Wilde’s coun-
ruary 28th, Wright had given Wilde the envelope. Wilde was upset by Queensberry’s imputation. He described Queensberry’s words as “hideous.” Douglas encouraged Wilde to prosecute Queensberry for criminal libel. Wilde didn’t know what to do. Late that night, he consulted his friend, Robert Ross. Ross was twenty-five. Probably against Ross’s advice, Wilde went the next morning with Ross and Douglas to Humphreys’s chambers. After some discussion, Humphreys recommended the proposed prosecution. That course proved to be disastrous for Wilde. Responsibility for the disaster is not uniformly placed on the same shoulders by Wilde biographers. Half a century later, Humphreys’s son justified his father’s

17. HOLLAND, supra note 5, at 4.
18. JULLIAN, supra note 16, at 315.
19. HART-DAVIS, supra note 5, at 129.
20. HOLLAND, supra note 5, at xxi. Douglas’s encouragement has recently been described as “mind-bogglingly incautious.” See MOYLE, supra note 4, at 257. Incautious, but not surprising—in April 1894, when Queensberry wrote Douglas about his son’s “loathsome and disgusting relationship” with Wilde, Douglas replied with a telegram that read simply, “What a funny little man you are.” See ELLMANN, supra note 11, at 417, 450; Cf. HYDE, OSCAR WILDE, supra note 4, at 192.
21. HART-DAVIS, supra note 5, at 129.
22. Wilde had written Ross, “If you could come here at 11:30 please do so tonight.” Id. Canadian readers might be interested to know that Ross’s father had once been the Attorney General of Upper Canada. Id. at 74.
23. HART-DAVIS, supra note 5, at 74.
24. ELLMANN, supra note 11, at 439; HOLLAND, supra note 5, at xxii; HYDE, OSCAR WILDE, supra note 4, at 197.
25. ELLMANN, supra note 11, at 439; HOLLAND, supra note 5, at xxii; HYDE, OSCAR WILDE, supra note 4, at 197.
26. See generally HYDE, TRIALS, supra note 5.
27. Compare, e.g., FRANK HARRIS, OSCAR WILDE: HIS LIFE & CONFESSIONS 199-200, 202 (1910) (blaming Douglas, as does Bernard Shaw), Bernard Shaw, Epilogue to id. at 400, 404, HYDE, TRIALS, supra note 5, at 95 (observing that Douglas “was most anxious that the case against his father should proceed”), and MOYLE, supra note 4 at 257 (“Bosie urged him to sue without hesitation”), with MURRAY, supra note 7, at 75 (reporting that Douglas “certainly supported” Wilde), ELLMANN, supra note 11, at 395 (appearing to blame C.O. Humphreys, at least to some extent, recording that Humphreys was a bad choice because “homosexuality was quite outside [his] field of knowledge”), and RENIER, supra note 5, at 110 (sharing Ellmann’s assessment that “[i]f he had the right Humphreys Humphreys had “no understanding of the questions involved”). See also Sir Travers Humphreys, Foreword to HYDE, TRIALS, supra note 5, at 10 (excusing his father and declaring Wilde and Douglas to be the “two persons responsible”).
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endorsement of the prosecution as “natural and proper” “with the knowledge of the parties which [his father] then possessed.”\textsuperscript{28} It is said that before Humphreys gave Wilde his advice he had “asked Wilde point-blank on his solemn oath whether there was any truth in the libel [and that] Wilde solemnly assured him that he was absolutely innocent.”\textsuperscript{29} Wilde’s solemn assurance was a lie. His prosecution of Queensberry quickly collapsed under the weight of expected evidence of rent boys, turned up by Queensberry,\textsuperscript{30} apparently with help from an actor, Charles Brookfield, who is thought to have been “jealous of Wilde’s success.”\textsuperscript{31} On the Queensberry evidence, Wilde was himself successfully prosecuted for conduct that is no longer criminal, although it took two trials to convict him.\textsuperscript{32} He was sentenced to and served two years imprisonment with hard labor.\textsuperscript{33} After his release, he produced only one further work of art—\textit{The Ballad of Reading Gaol}\textsuperscript{34}—although a long letter to Douglas, now known as \textit{De Profundis}, which he brought with him out of prison, is very interesting.\textsuperscript{35} Wilde died an outcast in 1900, just forty-six. He was witty to the end. He had once declined an invitation “owing to a subsequent engagement.”\textsuperscript{36} In his last weeks, spent very uncomfortably in bed at the Hotel d’Alsace in Paris,\textsuperscript{37} he quipped that either he or the wallpaper in his room had to go\textsuperscript{38} and that he was dying beyond his means.\textsuperscript{39}

\textsuperscript{28} Humphreys, \textit{Foreword to HYDE, TRIALS, supra note 5}, at 9.

\textsuperscript{29} HYDE, OSCAR WILDE, supra note 4, at 197. It is reported that Sir Edward Clarke, Q.C., asked Wilde a similar question. \textit{See id.}, at 202-03; PEARSON, supra note 7, at 283-84.

\textsuperscript{30} “[S]uch individuals as a groom, an unemployed clerk, and a newspaper boy.” \textit{See HYDE, OSCAR WILDE, supra note 4}, at 186; THOMAS WRIGHT, \textit{BUILT OF BOOKS: HOW READING DEFINED THE LIFE OF OSCAR WILDE} 225 n.* (2008) (“former music-hall comedians, grooms and bookmakers’ assistants-turned-whores”); HOLLAND, supra note 5, at 286-91 (including Queensberry’s plea of justification, alleging, as against Wilde, that he incited the commission of “sodomy and other acts of gross indecency and immorality” and himself committed acts of gross indecency and immorality).

\textsuperscript{31} HYDE, TRIALS, supra note 5, at 88-89; PEARSON, supra note 7, at 246-47.

\textsuperscript{32} HOLLAND, supra note 5, at xxxiii-xxxiv; HYDE, TRIALS, supra note 5, at 150-273.

\textsuperscript{33} HOLLAND, supra note 5, at xxxiv.

\textsuperscript{34} WRIGHT, supra note 30, at 283, 286-87.

\textsuperscript{35} HART-DAVIS, supra note 5, at 152, n.1. HYDE, TRIALS, supra note 5, at 297-98, describes the letter as “a curious document, a mixture of apology, self-abasement and violent recrimination.”

\textsuperscript{36} This remark is regularly attributed to Wilde but I cannot recall having seen it reported as having been heard by anyone in particular.

\textsuperscript{37} HYDE, OSCAR WILDE, supra note 4, at 355. The hotel was located, fittingly, on the Rue des Beaux-Arts. \textit{See JULLIAN, supra note 16}, at 327-28; ELLMANN, supra note 11, at 559.

\textsuperscript{38} ELLMANN, supra note 11, at 581.

\textsuperscript{39} RENIER, supra note 5, at 157; HYDE, OSCAR WILDE, supra note 4, at 369; ELLMANN, supra note 11, at 581 (putting the statement less felicitously, saying that Wilde remarked, “I can’t even afford to die”).
Why did Wilde lie to Humphreys? Why didn’t he—in the language of *Wheeler v. Le Marchant*—safely tell Humphreys what Humphreys needed to know to get Humphreys’s *sufficient* advice? In *De Profundis*, Wilde described having been in Humphreys’s office “that fatal Friday” “weakly consenting to my own ruin.” Is that an accurate assessment or a rather pathetic reconstruction of what had occurred? Do these words help us to understand why Wilde didn’t give himself the chance to get the informed advice he needed? The irony is that he would have saved himself had he depended on the public policy articulated in the *Wheeler* judgment, a product of the same system of justice that condemned him.

Wilde’s association with Douglas was well-known in the stratum of English society for which Wilde had become the darling by the mid-1890s. It is likely that his association with the members of the underclass was not generally known, although he had become “more reckless” by 1895. He tried to justify that recklessness on the second day of his abortive Queensberry prosecution. He was under cross-examination by Edward Carson, Q.C., with whom he had been acquainted at Trinity College Dublin in the early 1870s. When Carson asked Wilde what he had in common with a young man of a lower class, Wilde answered:

Well, I will tell you, Mr. Carson, I delight in the society of people much younger than myself. I like those who may be called idle and careless. I recognise no social distinctions at all of any kind and to me youth—the mere fact of youth—is so wonderful that I would sooner talk to a young man half an hour than even be, well, cross-examined in court.

Humphreys’s son later wrote that Wilde’s explanation rang “terribly hollow” and that his advisors, who included the son, “realized that the case [against Queensberry] was lost.”

It may have been acceptable to Wilde for members of his set to know he was consorting with the son of a Marquis but not acceptable to him for them to know he was associating with persons of a different sort. Perhaps he didn’t understand that he could count on Humphreys to have kept his secret. Perhaps he didn’t understand that the law would have protected from publi-
cation almost anything Humphreys might have heard from him. This is tragic because it may be that Wilde’s lie to Humphreys resulted from nothing more than Wilde’s social embarrassment: Bernard Shaw, who knew him, said that Wilde was a snob. There are other possible explanations. It has been remarked that, as Wilde “became more prosperous, he became more preposterous,” and it has been asked whether he was “so tired of his present existence that he did not mind what happened.” Sir John Mortimer, Q.C., creator of Rumpole, has written:

Did [Wilde] somehow feel that his huge success had become unbearable and want to destroy it? Was he attracted by the danger of lying and thought he could get away with it? Or was he, as I believe, a confused and kindly man who did not think, as we would not think nowadays, that he had done anything wrong and that he could rely on his irresistible charm, and his talent for finding clever answers to tricky questions to see him through?

These possibilities are echoed in a comment of Hesketh Pearson, author of one of the most interesting of the Wilde biographies, who perceived “a strange innocence or unknowingness in [Wilde’s] most questionable behaviour.” Wilde’s son, Vyvyan, recorded that his father “lived in a world of his own; an artificial world, perhaps, but a world in which the only things that really mattered were art and beauty in all their forms.” Wilde’s grandson, Merlin Holland, suggests that Wilde took on Queensberry “hoping he could get away with it simply because of who he was.”

Whether it was embarrassment that drove Wilde to tell the lie or naïveté or a feeling of invincibility, perhaps borne of arrogance, or an overly optimistic appraisal of the impact of his wit is neither here nor there for present purposes. For present purposes, the Wilde story is important for its outcome. An unparalleled talent was destroyed, and a life was shortened.

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49. PEARSON, supra note 7, at 244.

50. RENIER, supra note 5, at 105.

51. HOLLAND, supra note 5, at xiii.

52. PEARSON, supra note 7, at 264. HYDE, OSCAR WILDE, supra note 4, at 195 (recounting a conversation between Wilde and Andre Gide in January 1895 during which Gide asked Wilde whether Wilde knew the risk he ran in helping Douglas oppose his father, to which Wilde is said to have answered: “It is best never to know”); HOLLAND, supra note 5, at xxxv, relates the conversation differently, quoting Wilde as saying: “I have to go as far as possible.”

53. V. HOLLAND, supra note 7, at 43.

54. MERLIN HOLLAND, COFFEE WITH OSCAR WILDE 10 (2007). And see HOLLAND, supra note 5, at xxxiv, where it is said that Wilde believed “he was in some way immune from the law.”

55. See WRIGHT, supra note 30, at 299.
just because of Wilde’s foolish decision not to tell Humphreys what had to be said.

I relate this story as pitiful proof of the need to protect confidentiality of communications between lawyers and their clients and to maintain the lawyer-client privilege in order to promote, even if not to ensure, access to informed and objective legal advice. I relate the story to show why the lawyer-client privilege is sacrosanct, why the privilege has been said by my country’s highest court to be both in the public interest and almost inviolate, “all but” or “near” absolute. I refer to the privilege being necessary in the public interest for a reason I have given elsewhere, which is that the privilege is an essential incident of the duty of loyalty all lawyers owe their clients, loyalty being the indispensable attribute of lawyer independence.

II. PROMOTING LAWYER INDEPENDENCE INTERNATIONALLY

And so I shift from privilege to a discussion of the earnestness with which the need for lawyer independence must be expressed. Recently, in unexpected places, including England and Australia, governments have restricted or have positioned themselves to restrict the capacity of lawyers to act independently in their clients’ interests. These developments have led me to question whether the case for (and for that matter against) lawyer independence is being made. I am not a legal academic. I spend most of my time serving clients in my capacity as a practicing lawyer, so my quest for a pure form of lawyer independence is my avocation. My research methodology may not meet academic standards, but I am not wholly inept, and I can certainly google as well as anyone.

56. See, e.g., Can. (Privacy Comm’r) v. Blood Tribe Dep’t of Health, 2 S.C.R. 574, para 9 (2008) (“[A] lawyer’s advice is only as good as the factual information the client provides.”).
59. The Supreme Court of Canada has said that the “integrity of the administration of justice” requires litigants to be assured of their lawyers’ “undivided loyalty”; otherwise, the litigants (and “the public”) will regard the legal system as unreliable and untrustworthy. See R. v. Neil, 3 S.C.R. 631, para. 12 (2002).
60. I canvassed the English and Australian reforms in The Consumption of Lawyer Independence. Turriff, supra note 58, at 284-88.
61. I googled “lawyer independence” in the summer of 2011. What turned up was a list of attorneys working in Independence, Missouri. I googled “independence of the bar.” What turned up was a list of drinking establishments in Independence, Missouri. My research is more hunt and peck than scientific method, but it appears that it has to be because I have been told by a regular contributor to the academic literature in relation to legal ethics and the legal profession that there is no central index of books and journal articles about lawyer independence and regulation of lawyers. The Centre for the Legal Profession at the
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searches, aiming to discover who around the world is thinking carefully about lawyer independence and about what I believe is its necessary connection with the self-regulation of lawyers. Naturally, I have wondered, how might the law schools be treating these topics? I have also wondered whether international organizations that proclaim the importance of the rule of law are specifically concerned about lawyer independence, and, if they are, whether they advocate self-governance of lawyers to secure it? At the same time, I brought together a small group of Canadian lawyers, including a law professor and a former president of the Federation of Law Societies of Canada, and with encouragement from observers, including the Chief Justices in British Columbia and Queensland, incorporated the International Society for the Promotion of the Public Interest of Lawyer Independence (ISPPILI).

The formal objects of the ISPPILI are:

1. to strengthen civil society by promoting lawyer independence as an essential element of the rule of law; and
2. to research, develop and promote common international standards for the regulation of lawyers.

In the paper that resulted from my presentation to a lawyer regulation conference in London in June 2010, which I called The Consumption of Lawyer Independence, I anticipated the creation of the ISPPILI by saying that what the case for lawyer independence required was “a coordinated international effort by lawyers and judges to reclaim . . . lost [independence] ground and to forestall future incursions.” I said that: “It is not enough for independence advocates to depend on laudable efforts of human rights activists who pursue the causes of lawyers whose claims of independence have been ignored. The change has to be cultural and structural, with purity of independent regulation as the international standard.”

The ISPPILI aims to identify people and organizations worldwide who support the cause of lawyer independence, to bring those supporters together in a network, and to operate as a clearing-house for their ideas. The society aims to educate people worldwide about the critical importance of pre-

University of Toronto has published lists of articles and books relating to professionalism but it appears from the lists that the Centre is not particularly concerned with independence or regulation. See Journals and Presentations, CENTRE FOR LEGAL PROF., clp.utoronto.ca/resource/journals-and-other-publications; Articles, CENTRE FOR LEGAL PROF., clp.utoronto.ca/resources/articles; Books, CENTRE FOR LEGAL PROF., clp.utoronto.ca/resources/books. Nor, as my website searches have revealed, are the (U.S.) National Institute for Teaching Ethics and Professionalism, National Institute for Teaching Ethics and Professionalism, GA. ST. U. C. L., law.gsu.edu/nifteb, or the Center on the Global Legal Profession in the Maurer School of Law at Indiana University, Center on the Global Legal Profession, IND. U. MAURER SCH. L., law.indiana.edu/centers/global-profession.shtml.

62. Turriff, supra note 58.
63. Id. at 298.
64. Id.
serving lawyer independence as a necessary incident (or, as Lord Bingham said, "ingredient") of the rule of law and to defend against the assault on independence by governments who claim the power to regulate when they don't understand, or perhaps don't want to admit, that lawyer independence is inevitably undermined by government participation in lawyer regulation. The ISPPILI also aims to help lawyers worldwide who are not independent to advocate for independence and self-regulation and to help those lawyers claim their independence and organize themselves as self-regulators. And the society aims to articulate and encourage the adoption of common standards for lawyer regulation that will secure and maintain public confidence in lawyers as regulators of independent lawyers in the public interest.

My motivation in causing the incorporation of the ISPPILI was to make independence of lawyers a true subject of debate; to elevate the case for independence above what academic lawyers have typically dismissed as rhetoric, and to improve the quality of discussion about self-regulation, which appears to be dominated by two propositions most academic lawyers uncritically accept, namely, that lawyers cannot be trusted to regulate themselves and that when they do so they always do so ineptly and badly. What concerns me is that the anti-independence developments in England and Australia, canvassed in my London paper, occurred without any debate about the implications for lawyer independence of a loss of the capacity to self-regulate. How could that debate not have occurred, particularly when Professor (now Professor Sir) Jeffrey Jowell, Q.C., the director of London's Bingham Centre for the Rule of Law, has reminded us that "it is unrealistic to believe that violations of the rule of law are the preserve of 'far away' countries?"

III. LAW SCHOOL INTEREST IN LAWYER INDEPENDENCE AND REGULATION OF LAWYERS

I have asked myself: are law students, who tend not to read journal articles unless they have to, learning from their course work that lawyer inde-

66. See, e.g., Turriff, supra note 58, at 289.
67. This statement was made at the launch in London, on December 6, 2010, of the Bingham Centre for the Rule of Law of the British Institute of International and Comparative Law. The full text of Sir Jeffrey's talk that day was available at biicl.org/binghamcentre through the summer of 2011 but the text appears to have been removed from the website. As of December 8, 2011, the site included a video of the launch containing a version of Sir Jeffrey's remarks, but the passage I have quoted, and a good deal more of the address, had been edited out. See Launch of the Bingham Centre for the Rule of Law, BRITISH INST. OF INT'L AND COMPARATIVE LAW (Dec. 6, 2010), biicl.org/news/view/-/id/146. I have the full text of the talk on file. The remark I have quoted calls to mind SINCLAIR LEWIS, IT CAN'T HAPPEN HERE (1935).
pendence is or is not worth preserving? Are they being asked to consider whether lawyer independence is under attack? Are they being encouraged to think about whether direct or indirect government involvement in lawyer regulation is an attack? I tried to answer the question by looking for references to lawyer independence and lawyer regulation in course descriptions published on law school websites in the United States and in England, Australia, and Canada. I assumed, although now I wonder whether my assumption was correct, that law deans and law professors devise course offerings that are intended to distinguish their schools from other providers of legal education and that they advertise their courses as attractively as possible, highlighting subjects that are likely to generate provocative discussions on vital public policy questions, discussions that would occur above the humdrum of issues of real property and corporate finance. I didn’t choose the websites randomly, but I also didn’t choose them because I thought they would produce a particular result. What I learned was that while it could not be said that academic lawyers are wholly ignoring lawyer independence and lawyer regulation as subjects of study, there is not much to indicate that the academy sees any reason to use either dissipating independence (or even the possibility of it), or government-lawyer tension over lawyer regulation, as hooks to attract students.

On the Harvard site, I found a course described as covering, among other things, “the development of formal rules of professional conduct and other forms of regulation of lawyers’ behavior.” Another Harvard course advertised a discussion of “the difficulty in assuring quality and a strong consumer orientation in a subsidized delivery system.” And a third promised to provide both “a look at the organization, economics, operation, and ideology of the legal profession,” including a consideration of “professional autonomy, commercialism, and regulation (by clients, by the courts, and by regulatory agencies)” and an inquiry into “the effects of the regulation of legal practice on the organizations and institutions that deliver legal services.” Perhaps “professional autonomy” is the new “independence.”

Canadian academics Richard Devlin and Albert Cheng have also used that term, although it isn’t clear why they or others believe that “independence” is a word to be avoided. Perhaps they think “independence” too powerfully

71. Id.
conveys a notion they regard as questionable, although “autonomy” is pretty strong itself.

The Yale site revealed a clinical course allowing students to “participate in the disciplinary process involving lawyers charged with violating ethical obligations to clients or other interested persons.”

Columbia offers a course about “the law and ethics of lawyering” whose topics include “confidentiality, disclosure, conflicts of interest, litigation tactics, the regulation of the legal profession, the marketing of legal services, law firm structure, and professionalism problems and challenges.”

Columbia also offers a course dealing with, among other topics, “regulatory constraints on the organization and marketing of legal services” and “especially . . . with the application of client loyalty principles to organizational clients in situations where organizational constituencies are in conflict.”

I am not sure what that means but it may simply pose the question: what should a lawyer do to ensure that he or she knows from whom he or she must take instructions? Another Columbia course aims, “in a realistic setting,” to address “governance” and “ownership” of large law firms.

The College of Law at Michigan State University offers a course in professional responsibility that includes discussion of “disciplinary proceedings, the functions of Bar organizations and unauthorized practice.”

Interestingly, the University of Michigan lists a course called “In-House Counsel,” “intended to examine a variety of legal and practice issues from the perspective of the in-house attorney,” including “the particular ethical obligations of an in-house attorney.”

Strangely, nothing is said to suggest that students will be asked to think critically about whether in-house lawyers can, practically speaking, be independent or whether, for the purposes of the lawyer-client privilege, they are.


At Oxford, post-graduate BCL students may choose a generic course called “Regulation” concerning “how modern states seek to govern the activities of individual citizens as well as corporate and governmental actors,” and which aims to analyze “how legal regulation constructs specific relationships between law and society and how legal regulation is involved in mediating conflicts between private and public power.”\textsuperscript{80} A search for “independence of lawyers” and “regulation of lawyers” turned up nothing on the University of Westminster website and neither the University of Sussex nor the London School of Economics and Political Science sites revealed courses in which those topics appeared likely to be treated.\textsuperscript{81}

At Monash University, in the Australian state of Victoria, one course, called “Lawyers Ethics and Society,” addresses, among other matters, “history, organisation, education, functions and regulation of lawyers in Victoria and elsewhere; reform issues; nature and significance of a profession; independence of courts and lawyers.”\textsuperscript{82} Students are expected to emerge from the course with an understanding of “issues surrounding the regulation of the profession.”\textsuperscript{83} The “issues” are left mysteriously undefined. Students at Bond University in Queensland can select a course described as covering “the traditions and regulation of the legal profession.”\textsuperscript{84} At the Australian National University, students who successfully complete “Lawyers Justice and Ethics” “will be able to . . . analyse the structure and workings of the legal profession from a range of perspectives” and to explain “the various forms of regulation of professional conduct.”\textsuperscript{85}

In Canada, Dalhousie University’s course on “The Legal Profession and Professional Responsibility” promises an exploration of “various aspects of the nature and organization of the legal profession” and “wider [but unarticulated] public protection issues which face the organized legal profession.”\textsuperscript{86} Students at the University of Calgary can study “selected [but undisclosed] topics relating to the regulation of lawyers’ ethics,” and

\textsuperscript{80} Overview, OXFORD, http://www.law.ox.ac.uk/subject37 (last visited Jan. 8, 2012).
\textsuperscript{83} Id.
amongst the competencies expected of graduating students are an understanding of the function of the legal profession in society. The University of Victoria offers a course called “The Legal Profession,” intended to provide students “with insights and perspectives into the organization and operation of the legal profession as a vital institution in the legal process,” including the “formal organization” of the profession. At the University of British Columbia, issues to be canvassed in an upper level course on “Professional Responsibility” include “the self-regulation of the legal profession.”

I don’t want to overstate the significance of this little Internet journey. But it may be germane that my searches turned up only one mention of professional autonomy and a single reference to each of lawyer independence and self-regulation. There was certainly nothing to suggest that any of the law schools I investigated offers a course devoted exclusively to the subject of lawyer independence or a course comparing systems of lawyer regulation worldwide.

It isn’t apparent from other searches I have made that very many legal academics are interested in lawyer independence. Many academics are concerned about regulation of lawyers, particularly insofar as regulation serves to further the interests of consumers of legal services, but those thinkers don’t appear to see any need to inquire into the question of whether consumer protection should be preferred over lawyer independence. Why haven’t academic lawyers embraced lawyer independence as a subject worthy of discrete attention? Why do they appear to be content to regard lawyer independence as a lawyers’ game; to accept that all lawyer independence questions were answered satisfactorily years ago and need not be re-visited; and to conclude that lawyer independence is an outmoded concept? Why, especially when lawyer regulation has been radically altered in England and Australia, and when changes are expected elsewhere?

As I have mentioned here and as I said in my London paper, academic lawyers have regularly dismissed as “rhetoric” arguments advanced by lawyer independence advocates. In the London paper, I gave four examples I had encountered. It had seemed curious to me that four authors at different

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91. Turriff, supra note 58, at 289.
92. Id.
times and in different places would all reach for the same word. Now, and without searching particularly for them, I have noticed four further instances from four different academic writers. Thus, we have lawyers “typically in-vok[ing] the rhetoric of autonomous control over their work”;93 we are told of facts that might demonstrate that “lawyers and judges are not doing what the rhetoric and assumptions claim they must do in order to be legitimate regulators”;94 we learn of “rhetoric opposing regulation protecting consumers of legal services”;95 and we read Rhetoric and Realities: What Independence of the Bar Requires of Lawyer Regulation.96

Has the academy’s rhetoric argument become the academy’s rhetoric? Why is the subject of independence for the most part shrugged off? Why haven’t academic lawyers re-assessed the case for lawyer independence, and the arguably embedded case for lawyer self-regulation, in the face of the momentum for regulatory change that has built since the publication of the Clementi report in England and Wales in 2004?97 Why is the claim that lawyers should regulate lawyers presumed to be indefensible? Where is the theoretical refutation of the case for lawyer independence? Where is the empirical evidence that regulation of lawyers by lawyers does not satisfactorily serve the long-term public interest?

My own experience as a public interest regulator of lawyers is that self-governance and the public interest can co-exist very satisfactorily. Let me give just one example by which readers might begin to measure the effectiveness and value of self-regulation. In 2009, when I spoke as president

93. Robert W. Gordon, The Independence of Lawyers, 68 B.U. L. Rev. 1, 8 (1988); See also id. at 7 (another reference to “rhetoric”).
96. Woolley, Rhetoric, supra note 3.
97. See Sir David Clementi, Review of the Regulatory Framework for Legal Services in England and Wales, Legal Servs. Rev. (2004), available at http://www.legal-services-review.org.uk. The English and Australian reforms have generated scholarship in the United States but the focus of the American writers I have encountered is consumerism and the effect of the changes on the business of law. At best, if the subjects of lawyer independence, and the effect on independence of the loss of the capacity of lawyers to govern themselves, are considered at all, they are dealt with peripherally and incidentally. See, e.g., Judith L. Maute, Bar Associations, Self-Regulation and Consumer Protections: Whither Though Goest? 2008 J. Prof. Lawyer 53 (2008); Laurel S. Terry, The Future Regulation of the Legal Profession: The Impact of Treating the Legal Profession as “Service Providers”, 2008 J. Prof. Lawyer 189 (2008); Ted Schneyer, Thoughts on the Compatibility of Recent U.K. and Australian Reforms with U.S. Traditions in Regulating Law Practice, 2009 J. Prof. Lawyer 13 (2009). Professor Terry, for example, first mentions the “autonomy and independence of the legal profession” in the penultimate paragraph of her long article and, in her penultimate footnote, suggests that the legal profession might justify its exclusion from outside regulation by reference to “the fragility of ‘the rule of law,’” but she doesn’t take the matter further. Terry, supra at 210, 211 n.108.
of the Law Society of British Columbia at a Rotary Club meeting in a suburb of Vancouver, I reported that the lawyers who regulate British Columbia’s lawyers in the public interest (they do so with some lay assistance but without government participation) had, without legal compulsion and because they believed it was the right thing to do, required wholly innocent lawyers to contribute a total amount of $38 million (including available insurance proceeds) to recompense the client victims of a British Columbia lawyer who had been party to a complicated real estate fraud. On hearing my report of what the lawyer regulators had done, my Rotary audience applauded spontaneously.

Why haven’t academic lawyers re-examined their premises? I don’t mean to denigrate their work, as far as it goes, and I couldn’t over-emphasize how important their research and thinking might be, as it relates to lawyer independence and self-regulation, if they undertook the work. As I told one of them recently, independent self-regulating lawyers will certainly respond to appropriate suggestions from overseers, even if they decide in the public interest to reject the ideas, and they will certainly review the effectiveness of their regulatory work if scholars have thoughtfully criticized their regulatory performance. Self-regulators, at least Canada’s self-regulators, are constantly reviewing their work in any event. My concern is that many academics seem unable to avoid the temptation of hurdling the independence questions. They typically leap straight into a discussion of the inadequacy of lawyer self-regulation. They harvest the low-hanging fruit, relating stories of imperfect lawyers; suggesting, without proving, that the imperfections result from self-governance; and ignoring the independence implications of regulation by government, by government appointees, or by lawyer-government partnerships.

It is easy, everywhere, to identify lawyers who have not taken care to define their relationships with their own clients; who have not listened as carefully as they should have to what their clients were really saying; who have not appropriately comprehended their clients’ cases; who have pursued hopeless claims; who have acted uncivilly towards clients or opponents; and who have charged their clients more than they should have. It is easy, everywhere, even to find some examples of lawyers who have stolen their clients’ money. But what academic lawyers and other critics have not shown is that conduct of the sort I have described is so prevalent amongst lawyers and so damaging to clients—that “customer service” is so bad—that it justifies dispensing with lawyer independence as an essential ingredient of the rule of law. Moreover, what academic lawyers and other critics have not shown is that regulators other than lawyers would regulate perfectly, or even more satisfactorily than lawyers do.

Is there really a case for enhanced “consumer protection” in place of the protections independent lawyers guarantee? Consider this: there are roughly 10,000 practicing lawyers in British Columbia. If in their practice
lives each of them made ten client decisions a day on each of 200 days in a year, the total number of decisions in that year would be 20 million. How many of those decisions (and a lot of them would have been judgment calls) are likely to have been wrong? How many of the decisions are likely to have harmed clients’ interests? How many of the decisions are likely to have been motivated by lawyer fraud? Probably the answer is a few hundred wrong; fewer that caused harm; and only a tiny few, probably no more than a handful, that constituted fraud. The other 19.999 million plus decisions will probably have helped people to live better lives, even if only in little ways. There is the social utility in having lawyers in all our communities. And the fact is that the fraudsters in British Columbia are always disbarred, actually or effectively, and I think I am right in reporting that there is no instance of British Columbia’s lawyer self-regulators ever having re-admitted a disbarred lawyer (although it would be wrong for me to say it could never happen). Having said that, older British Columbia lawyers do recall that a lawyer who had been disbarred for having committed a serious criminal offence was re-admitted after his conviction was overturned at court.

Should we incur the inestimable cost of the loss of lawyer independence in order to try to win some short-term, relatively small consumer victories?

I return to the questions. Why don’t most academic lawyers who think about the legal profession think about lawyer independence? Why don’t they think about the relationship between independence and regulation? Do they really believe that lawyers need not be independent? That independence is achievable without self-regulation? That of all groups in our communities who should be regulated there isn’t a special case to be made for lawyer self-regulation? That regulation of lawyers by lawyers is a privilege?98 That lawyers are innately incapable of regulating themselves in the

98. Gordon, supra note 93, at 7, assumes that it is, or at least does not suggest that it is something else. In a speech at the Canadian Bar Association 2011 Annual Conference, in Halifax, Nova Scotia, on August 14, 2011, David Johnston, the Governor General of Canada (a former law dean), urged lawyers to meet their “obligations under the social contract[]” and said that, if they didn’t, their “self-regulatory privilege” would be diminished or removed. David Johnston, Canadian Bar Association’s Canadian Legal Conference – The Legal Profession in a Smart and Caring Nation: A Vision for 2017, GG.CA (Aug. 14, 2011), http://gg.ca/document.aspx?id=14195. His Excellency also said that lawyers “enjoy a monopoly to practise law.” Id. Regrettably, by referring to the Canadian Bar Association and to Canada’s “provincial and territorial law societies” in the same paragraph, without explaining their separate functions as, respectively, advocate and regulator, he wrongly suggested that the CBA is involved in the governance of the legal profession in Canada. Id. For an argument that lawyer independence is a constitutional value, see Roy Millen, The Independence of the Bar: An Unwritten Constitutional Principle, 84 CAN. BAR REV. 107 (2005). See also Turriff, supra note 58, at 291; Woolley, Rhetoric, supra note 3, at 2. For an argument that lawyers do not “enjoy” a monopoly in order to further their interests and that our communities reserve
public interest? That government or court regulation would not diminish independence? That “co-regulation” serves the public interest? Are academic lawyers just not interested in independence? Is it just so much pablum for them? Are independence and self-regulation not topics of sufficient urgency? Do academic lawyers think that sufficient numbers of their colleagues are already engaged with the subjects? Do they think there is just nothing more to be said? Am I unfair to suggest that academic critics may be reluctant to be seen by colleagues, deans, funders, and prospective employers as advocating for lawyers by promoting lawyer independence and self-regulation, even though, arguably, they would be advocating for the public interest?

IV. LAWYER INDEPENDENCE, REGULATION OF LAWYERS, AND THE INTERNATIONAL COMMUNITY

In my exploration of the politics of lawyer independence, I also surveyed websites of many international organizations, including lawyer advocacy groups. It is astonishing to see how much good work is being done internationally by groups committed to the advancement of the rule of law, especially in respect of the preservation of human rights. It is equally astonishing, at least for me, to learn that lawyer independence is not apparently regarded as a subject deserving of discrete inquiry or treatment. Understandably, the energies and resources of well-intentioned proponents of the rule of law are marshalled to deal with terrible human rights abuses causing immediate harm to countless people around the world. These rule of law champions have lofty goals. However, they may be trying to do too much, with the result that their achievements are inevitably diffuse. For example, work to lawyers in the public interest, see Turriff, supra note 58, at 295. Perhaps the Governor General should be excused for his assumptions (if they are not mistakes) because even Peter Hogg, Canada’s leading scholar of constitutional law, does not consider lawyer independence to be a subject worthy of inquiry, despite regarding independence of judges as “deeply rooted” and as “such a powerful tradition.” PETER W. HOGG, CONSTITUTIONAL LAW OF CANADA, 7-8, 7-9, (5th ed., 2007). His treatment of lawyer independence consists of a footnote reference to the Millen article. Id. at 15-53 n.267.


100. I am not ignoring the six academic papers that form part of In the Public Interest, which contains the 2007 report of the Law Society of Upper Canada’s task force on the rule of law and the independence of the bar. See LAW SOC’Y OF UPPER CAN., IN THE PUBLIC INTEREST: THE REPORT AND RESEARCH PAPERS OF THE LAW SOCIETY OF UPPER CANADA’S TASK FORCE ON THE RULE OF LAW AND THE INDEPENDENCE (2007). Those papers did not emerge from the academy unprompted: they were commissioned by the Society, owing to a “dearth of literature.” Id. at 40.

101. Not even by Lord Bingham, whose discussion of lawyer independence as an element of the rule of law is just over three lines long. BINGHAM, supra note 65, at 92-93.
in 2007 and 2008, the World Justice Project sponsored a scholarship programme comprising "two internationally diverse teams of scholars from the fields of law, economics, political science and anthropology."102 The first team "developed a body of scholarship examining the relationship between the rule of law and economic, political, and social development." The second team "prepared a series of comparative studies on how marginalized groups obtain access to justice."103 This is all very well, and it is undoubtedly helpful if linked to practical, obtainable results, but in the meantime what disinterested people or groups aim to support the rule of law by ensuring that independent lawyers learn how to govern themselves in the public interest?

The American Bar Association reports that its worldwide Rule of Law Initiative "helps legal professional associations, including special interest bar associations, develop into sustainable organizations, which can train their members while advocating on their behalf."104 It is not surprising that the ABA would promote the establishment of lawyer interest groups given that the Association’s first goal is to serve its members by promoting their "professional growth and quality of life."105 It is interesting to note that preservation of “the independence of the legal profession” is only the fifth part of the Association’s fourth goal.106 Of course, the issue is credibility and legitimacy. How can the ABA be regarded as a promoter of the public interest of lawyer independence when it is, fundamentally, a group that represents the interests of lawyers? Similarly, the Human Rights Institute of the International Bar Association "supports bar associations and law societies worldwide through long-term capacity building programmes."107 But while, like the ABA, the IBA supports lawyer independence, arguably it cannot be a credible promoter of lawyer independence or of regulation of lawyers by lawyers (if it believes that self-regulation is necessary) as long as it is or is seen to be “the global voice of the legal profession.”108 In any event, neither the ABA nor the IBA appears to have made regulation of lawyers a focal point of their bar association development work. If they did, one of the first

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103. Id.
106. Id.
lessons they would have to teach is that the associations should not at the same time advocate for lawyers and claim to regulate them in the public interest. The ABA’s failure to separate the representational and regulatory functions may be understandable if the American Law Institute has reported accurately, at least for the United States, that “bar associations [which must mean representational groups] have become the chief embodiment of the concept that lawyers are a self-regulated profession.”

In April 2010, Gabriela Carina Knaul de Albuquerque e Silva, the United Nations’ Special Rapporteur on the Independence of Judges and Lawyers, reported to the 14th session of the U.N. Human Rights Council that “lawyers must be aware of, and sensitive to, human rights standards, principles, rules and jurisprudence, international human rights systems and international and regional courts in order to strengthen democracy, the rule of law and good governance at the national level.” Ms. Knaul emphasized the need to ensure that judges and lawyers were suitably educated, because, as her predecessors had concluded, “appropriate legal education for judges and lawyers was . . . a determining factor for their independence,” but she did not raise the question of who must regulate lawyers to ensure that independent advocates are always available to make the case for the protection of human rights.

Recently, the International Commission of Jurists published a “Legal Commentary” to its Geneva Declaration on Upholding the Rule of Law and the Role of Judges and Lawyers in Times of Crisis. The need for lawyers to uphold human rights and the rule of law was stressed and the need “to protect and strengthen the independence of the legal profession” was recognized, but curiously, at least to me, the underpinning for these declarative statements was the right lawyers have “to freedom of expression and association.” There was no mention of the argument—it is at least an arguable

109. AMERICAN LAW INSTITUTE, THE LAW GOVERNING LAWYERS 9 (2000). It is interesting to note that in the ALI book, which contains 1,100 pages of text in two volumes, there are only two index references to “self-regulation” and none to “independence.” Canada’s rough equivalent to the ALI book also treats the subject of lawyer independence scantily. See ADAM M. DODEK & JEFFREY G. HOSKINS, Q.C., CANADIAN LEGAL PRACTICE 3-5, 8-29 (2009) (there is a bold foreword by The Honorable Frank Iacobucci, C.C., Q.C., a former justice of the Supreme Court of Canada).


111. Id. at 6.


113. Id. at 84.

114. Id.
The Importance of Being Earnestly Independent

point—that lawyers have to regulate themselves, free from government endorsement and not as partners with government, because, otherwise, to put it simply, independence is illusory.

Where is the point, counter-point on the subject of lawyer independence and self-governance? Where are the reasoned exchanges about whether lawyers can be independent when they function under any degree of government direction, however the direction might be dressed up? My concern is that the subject, which is as ripe as it could be, is not really up for discussion. For example, in May 2011, the International Bar Association published its *International Principles on Conduct for the Legal Profession*,\(^{115}\) and while the Association stressed that “the guarantee of a lawyer’s independence is an essential requirement for the protection of citizens’ rights in a democratic society”\(^{116}\) and while the Association concluded that “[l]awyers and bars should strive for and preserve the true independence of the legal profession,”\(^{117}\) it was said, without any commentary whatsoever, that “[t]here is an ongoing debate as to the extent to which governmental and legislative interference with the administration and conduct of the legal profession may be warranted.”\(^{118}\) Where is that debate occurring? And why didn’t the IBA say what issues were being addressed; who was inquiring into them; who was being consulted; and why there was no need to bring the debate to a boil, despite the force and impact of the politically powerful consumer rationalization for government interference?\(^{119}\)

116. Id. at 12.
117. Id. at 14.
118. Id.
119. Late in December 2011, two things happened that suggest that independence and self-governance are acquiring some international momentum. First, the Law Society of Ireland published a special issue of its Gazette, with a cover title of *Rule of Law under Threat. Legal Independence and the Public Interest*, containing the texts of presentations made at a conference held in Dublin on December 5, 2011, on the subject of “Why the Independence of the Legal Profession Must Be Defended in the Public Interest.” See *Rule of Law Under Threat: Legal Independence and the Public Interest*, LAW SOCIETY GAZETTE, Dec. 2011, available at http://www.lawsociety.ie/Documents/Gazette/Gazette%202012/January2012_GazetteSpecial.pdf. Three of the speakers were the executive director of the IBA, the president of the ABA, and the incoming president of the Council of Bars and Law Societies of Europe (CCBE), the latter of which is the “representative organisation” of about one million European lawyers Id.; see also About Us, CCBE, http://www.ccbe.eu/index.php?id=375&L=0 (last visited Feb. 19, 2012). That roster leads me to wonder whether any of the Irish Law Society (which is both a regulatory and representative body, see About Us, LAW SOCIETY OF IRELAND, http://www.lawsociety.ie/Pages/About-Us/ (last visited Feb. 19, 2012), the IBA, the ABA, and the CCBE understand that their legitimacy on the independence and self-governance question is undermined by their being lawyer interest groups). Second, on December 21, 2011, the then president of the CCBE and the president of the ABA jointly wrote the managing director of the International Monetary Fund expressing concern over the
V. THE NEED TO ENCOURAGE A LAWYER INDEPENDENCE DEBATE

Perhaps we don’t know what we mean by lawyer independence. Perhaps lawyer independence, whatever it is, just isn’t that important. Perhaps it has outlived its usefulness. Perhaps its death is an unavoidable consequence of globalization. Perhaps we’ve talked ourselves into wrongly believing we can’t do without the rule of law—or, as a cynical observer might put it, “the rule of good laws.” Perhaps the rule of law and lawyer independence are completely unrelated. Perhaps self-regulation of lawyers is a privilege, not a constitutional imperative. Perhaps judicial independence doesn’t depend on lawyer independence. Perhaps we don’t need experienced and specially trained legal advocates. Perhaps, by deregulation, we should define lawyers out of existence. Perhaps market efficiency should prevail over all other considerations. Perhaps the value of lawyers’ work really can be measured by the “quantile regression model.” Perhaps we can trust government implicitly. Perhaps government really could regulate lawyers satisfactorily. Perhaps government-appointed boards of leading and specially skilled citizens could regulate effectively while keeping government in tow. Perhaps the recent regulatory changes in England and Australia, and the proposed changes in Ireland and the Netherlands can be


120. See Clifford Winston, Robert W. Crandall & Vikram Maheshri, First Thing We Do, Let’s Deregulate All the Lawyers 40 (2011). The authors are “regulatory economists.” Id. at 7. They acknowledge that American lawyers play a “vital role” “in supporting democratic institutions, protecting individual rights, and the like.” Id. at 8. But they do not mention lawyer independence and they do not say whether government involvement in regulation of lawyers might affect that vital role or how the role might be affected by deregulation of lawyers, which they propose. They report that “regulation of the legal services industry in Japan reflects the interests of the government and major consumers of those services more than the interests of members of the bar,” without commenting on the significance of government regulatory involvement, other than to say that Japanese lawyers may be a less successful interest group than are lawyers in the United States. Id. at 28. Curiously, they refer to U.S. lawyers having to obtain a “government license” to practice their profession. Id. at 1. I suppose they are technically correct because the courts are a branch of “government.”

121. See, e.g., Coulter, supra note 90, see also Not Even Zimbabwe Has a Model Like This, LAW SOCIETY GAZETTE, Nov. 2011 at 12. Both are reactions to a proposed Legal Services Regulation Bill 2011. For another reaction, see Gordon Turriff, Q.C., The Price of Capitulation, LAW SOCIETY GAZETTE, Dec. 2011, at 18-19.
ignored or should be copied. Perhaps these changes don’t or won’t affect lawyer independence at all.

There are so many questions. Who should appropriately decide what academic background aspiring lawyers must have? Which law schools, if any, they must have attended? What courses they must have studied? What training they must complete? What character they must display? Who should decide with whom, whether lawyers are not, lawyers can associate in practice and in what combinations? Who must or might suitably say which clients lawyers can serve? Which courts lawyers can address? Which lawsuits lawyers can prosecute and defend? Which issues they can raise? Which arguments they can make? Who must or might satisfactorily determine what sensible rules lawyers must follow and what professional standards they must meet? When and how they should be disciplined and with what consequences? What insurance they must have against their mistakes? What trust protections clients might need? Perhaps it’s merely a matter of who controls the decision-making. Perhaps it isn’t. Perhaps none of this is all-or-nothing.

For now, because I haven’t been persuaded otherwise and because there is so much at stake, I think I’m right to be a vigorous promoter of lawyer independence and of regulation of lawyers by lawyers, and to be categorical in the statement of my position. I acknowledge that I am at what I call the purer end of the lawyer-independence spectrum. My fellow ISPPILI directors take care to rein me in. Perhaps they’re right and that I needn’t be such a “zealous advocate.” But, as I tell them, I’m open to being persuaded that I need not strive for the ideal. And I’d rather be proved wrong than right about expressing concern.

I hope I’m not naïve. I hope I understand the complexities of the real world. I hope I’m not unrealistic in believing that lawyer independence, in any useful state of purity, will not survive unless it quickly comes to be regarded as an inescapable subject for separate study. If I am right about where lawyers should place themselves on the independence spectrum, then I think that, as much as it is important to ensure that the quality of lawyer regulation is high, it is more important to recognize that worldwide acceptance of and adherence to the rule of law is not achievable without truly independent lawyers. I think it is essential that discussions about lawyer independence and self-governance not be side-tracked by discussions about

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122. See a report that the government of the Netherlands “has published a draft law under which lawyers will be supervised by a board of three non-lawyers”; Jonathan Goldsmith, Lawyers Must Take the Lead in Reshaping Our Values, LAW SOCIETY GAZETTE, Sept. 29, 2011, http://www.lawgazette.co.uk/opinion/state-union/lawyers-must-take-lead-reshaping-our-values. Mr. Goldsmith is the secretary general of the CCBE. See Structure: Secretariat, CCBE, http://www.ccbe.eu/index.php?id=18&L=0.
the quality of regulation, although I don’t suggest that quality is not a critically important subject.124 Two Canadian law professors, Richard Devlin, whom I have mentioned, and Alice Woolley, have recently acknowledged that, at least for some accomplishments, regulation of lawyers by lawyers in Canada should be applauded, even if it could certainly be improved.125 Devlin has called self-regulation in Canada “increasingly muscular”126 and he has remarked on Canada’s “increasingly robust and proactive regulatory strategies, going well beyond conventional regulatory practices to ambitious, challenging and sometimes innovative initiatives,”127 even if he has unaccountably called the recent developments “defensive,”128 when he might just as well have called them “responsive.” Woolley remarks on the “undoubtedly great accomplishments” of Canada’s lawyer self-regulators129 and she accepts that lawyer independence in Canada is constitutionally protected,130 but she, like Devlin, does not agree with me that self-regulation is a necessary condition of independence. As far as I can tell, Woolley’s inability to accept that self-regulation is a necessary condition of independence131 derives from her assumption and insistence that, even if lawyers who regulated themselves strove to regulate themselves in the public interest, anyone else would necessarily do a better job of it. Someone should demonstrate that that is so, or not so. 132 And someone should prove, or disprove, that something less than perfect regulation is the unavoidable cost of lawyer independence.

124. “Which leads to the more fundamental point: far more important than the question of who regulates lawyers is the question of how and in what way lawyers are regulated.” ALICE WOOLLEY, UNDERSTANDING LAWYERS’ ETHICS IN CANADA 9 (2011) [hereinafter UNDERSTANDING LAWYERS’ ETHICS IN CANADA]. Why more important, much less far more important?

125. Devlin & Cheng, supra note 72, at 234, 262-263; see also UNDERSTANDING LAWYERS’ ETHICS IN CANADA, supra note 124, at 8.

126. Devlin & Cheng, supra note 72, at 234.

127. Id. at 247.

128. Id. at 257.

129. UNDERSTANDING LAWYERS’ ETHICS IN CANADA, supra note 124, at 8.

130. Woolley, Rhetoric, supra note 3, at 1.


132. Along those lines, Richard Devlin and Albert Cheng have proposed an elaborate (although they call it “rather simplistic”) assessment methodology for the comparison of “diverse regulatory regimes.” Devlin & Cheng, supra note 72, at 257-62.
The International Bar Association has published an International Rule of Law Directory,\(^{133}\) which runs to thirty-four pages, listing hundreds of associations, institutes, alliances, societies, movements, programs, centers, networks, projects, councils, commissions, campaigns, services, committees, foundations, and trusts, all with rule of law aspirations. But how many of them confine themselves to the promotion and maintenance of lawyer independence by modes of regulation that exclude government participation? I think the answer is none. If that is the case, then you can see why those of us who believe in the necessity and vitality of lawyer independence, as one crucial guarantor of the preservation of the rule of law, are concerned that independence might be lost by default. That is why we believe we have to be earnest in our expression of its importance.
