

Lawyers' Empire

Legal Professions and Cultural Authority,
1780-1950

W. WESLEY PUE



UBC Press • Vancouver • Toronto

Sample Material © UBC Press 2016

PRAISE FOR *LAWYERS' EMPIRE*

Never one to equivocate, Wes Pue opens this book with a flourish. The past, he insists, is a “foreign place that can never be known.” Unmasking lawyers as “energetic purveyors of historical myth,” Pue then turns his considerable talents toward the “pursuit of better myth.” Read this and marvel at his insight, his painstaking research, and his incomparable wit. These essays, boldly ranging across Britain and its Empire, brilliantly substantiate Wes Pue’s “larger than life” reputation as one of Canada’s most fascinating legal historians.

– **CONSTANCE BACKHOUSE**, Professor of Law at the University of Ottawa

A superb collection of essays from a scholar who eschews the obvious, yet attacks the crux of the issue without rubbing your nose in it. No one lays out for the reader such clarity of proffered understandings with such fascinating histories. There is a cinematic sense about Professor Pue’s approach. He begins with a close-up on the individual specific, then withdraws to global view, with a short flashback, before setting the story in full play. This releases us from “given” theory such as the “sterile” view of the history of legal education as a battle between the profession and the academy and enables a deeper, more nuanced understanding that also enlightens the problems of today.

– **AVROM SHERR**, Woolf Professor of Legal Education Emeritus, Institute of Advanced Legal Studies, University of London

For decades Wesley Pue has stood at the forefront of the world’s leading scholars on the politics of legal professions. This outstanding blending of his writings into a unified whole reveals at once the scope and imagination of his always fertile search for new and enlightening corners of lawyers’ activities at work and collectively. He moves seamlessly and with great intellectual dexterity across the centuries from the heart of the British Empire to its edges, from one colony or post-colony to another. He unearths long-forgotten archives and melds disparate materials into rich theoretical motifs. *Lawyers’ Empire* recasts our thinking about empire and the cultural politics of lawyers.

– **TERENCE HALLIDAY**, Research Professor and Co-Director, Center on Law and Globalization, at the American Bar Foundation

Sample Material © UBC Press 2016



Law and Society Series

W. Wesley Pue, General Editor

The Law and Society Series explores law as a socially embedded phenomenon. It is premised on the understanding that the conventional division of law from society creates false dichotomies in thinking, scholarship, educational practice, and social life. Books in the series treat law and society as mutually constitutive and seek to bridge scholarship emerging from interdisciplinary engagement of law with disciplines such as politics, social theory, history, political economy, and gender studies. For a complete list of titles in the series go to www.ubcpress.ca. Recent titles include:

Sarah Turnbull, *Parole in Canada: Gender and Diversity in the Federal System* (2016)

Amanda Nettelbeck, Russell Smandych, Louis A. Knafla, and Robert Foster, *Fragile Settlements: Aboriginal Peoples, Law, and Resistance in South-West Australia and Prairie Canada* (2016)

Adam Dodek and Alice Woolley, eds., *In Search of the Ethical Lawyer: Stories from the Canadian Legal Profession* (2016)

David R. Boyd, *Cleaner, Greener, Healthier: A Prescription for Stronger Canadian Environmental Laws and Policies* (2015)

Margaret E. Beare, Nathalie Des Rosiers, and Abby Deshman, eds., *Putting the State on Trial: The Policing of Protest during the G20 Summit* (2015)

Dale Brawn, *Paths to the Bench: The Judicial Appointment Process in Manitoba, 1870-1950* (2014)

Dominique Clément, *Equality Deferred: Sex Discrimination and British Columbia's Human Rights State, 1953-84* (2014)

Irvin Studin, *The Strategic Constitution: Understanding Canadian Power in the World* (2014)

Elizabeth A. Sheehy, *Defending Battered Women on Trial: Lessons from the Transcripts* (2014)

Sample Material © UBC Press 2016

© UBC Press 2016

All rights reserved. No part of this publication may be reproduced,
stored in a retrieval system, or transmitted, in any form or by any means,
without prior written permission of the publisher.

Library and Archives Canada Cataloguing in Publication

Pue, W. Wesley, author

Lawyers' empire: legal professions and cultural authority, 1780-1950 /
W. Wesley Pue.

(Law and society series)

Includes bibliographical references and index.

Issued in print and electronic formats.

ISBN 978-0-7748-3309-7 (hardback). – ISBN 978-0-7748-3311-0 (pdf)

1. Lawyers – England – History. 2. Law – Study and teaching – England – History.
3. Practice of law – Social aspects – England – History. 4. Lawyers – Canada –
History. I. Title. II. Series: Law and society series (Vancouver, B.C.)

HKD460 P83 2016

340.023'42

C2016-903105-5

C2016-903106-3

Canada

UBC Press gratefully acknowledges the financial support for our publishing
program of the Government of Canada (through the Canada Book Fund),
the Canada Council for the Arts, and the British Columbia Arts Council.

UBC Press
The University of British Columbia
2029 West Mall
Vancouver, BC V6T 1Z2
www.ubcpress.ca

Contents

Foreword / ix

By David Sugarman

Acknowledgments / xiii

PART 1

HISTORY IN PROFESSIONAL APOLOGETICS

- 1** The Use of History in the Development of Lawyers' Mythologies / 3
- 2** How "French" Was the English Bar? Barristers and Political Liberalism in the Eighteenth and Nineteenth Centuries / 36
- 3** Law and Colony: Making the Canadian Legal Profession / 74

PART 2

SHAPING MINDS AND SOULS: LEGAL EDUCATION

- 4** Professional Legal Education at Queen's College, Birmingham, in the 1850s / 107
- 5** Common Law Legal Education in the Dominion of Canada's Moral Project / 148
- 6** British Empire Perspectives on the Case Method of Legal Education: Canada, 1885-1931 / 185

PART 3

ETHICS, REGULATION, AND THE BUSINESS OF LAW

- 7** Free Trade in Law: English Barristers, County Courts, and Provincial Practice in the 1850s / 229
- 8** The End of Free Trade in Law: Discipline at the Inns in the 1860s / 268
- 9** Regulating Lawyers' Ethics in Early-Twentieth-Century Canada / 333

PART 4

CHALLENGING THE STATUS QUO: COMMUNISTS AND LIBERALS

- 10** Gordon Martin, British Columbia Communist, 1948 / 363
- 11** Liberal Entrepreneurship Thwarted: Charles Rann Kennedy and the Foundations of England's Modern Bar / 389

PART 5

DOMINION AND COLONIAL LAWYERING

- 12** Christ, Manhood, and Empire: The Case Method of Legal Education in Canada, 1885-1931 / 425
- 13** Lawyers' Professionalism, Colonialism, State Formation, and National Life in Nigeria, 1900-60: "The Fighting Brigade of the People" / 465
Co-authored with Chidi Oguamanam

Index / 484

Foreword

It is an honour and pleasure to be invited to contribute a foreword to this notable collection of essays. That Wes Pue deserves recognition for his outstanding scholarship is without question. This book amply manifests Wes's considerable stature as an academic lawyer and his substantial and enduring contributions to the study and development of law-and-society style legal history. It also affords us an opportunity to reflect on what he has achieved.

In his work, Wes has developed a distinctive, wide-ranging, and subtle cultural approach that places centre stage the role and significance of law, the legal profession, and law schools in shaping, transmitting, and normalizing our assumptions regarding ethnicity, masculinity, class, progress, and colonization. He makes a strong case for seeing law and legal professionalism and education as a means of representing and thus helping to create professional, national, religious, ethnic, and cultural identities. Following those commentators who accord a central place to law in the colonizing process, Wes argues that law, legal education, and the socialization of lawyers seek nothing less than the transformation of souls. For him, legal institutions, practices, and thought are often best understood not simply as instrumental to some set of guild interests, economic self-interest, or even societal change but also as factors that promote and protect images of identity. By examining the legal profession and legal education in their political and, especially, cultural contexts, Wes identifies important questions concerning societal governance.

Wes depicts Canadian lawyers as energetic purveyors of historical myth, building worlds out of words. He identifies key historical errors in a professional apologetics founded on history. Acknowledging the mythic dimensions inherent in the use of history, he seeks to lay the foundations for what he terms "better myth." In these and other ways, he enhances our understanding of the use of history by the legal community.

Sample Material © UBC Press 2016

That his essays are consistently insightful and adroit is also evidenced in the detailed attention he lavishes on the margins of, and the marginalized in, society. As perhaps befits one who spent his formative career living and teaching in the periphery of the United States and Canada, Wes is passionate about the significance of this periphery – from Canada as a mere dominion within the British Empire and the prairie west of Canada, to Queen’s College (Birmingham, UK) and Nigeria – and the ways by which they might illuminate the centre. He has sought to show, for example, that lawyers west of Ontario, notably in Manitoba, spearheaded the movement that created modern legal professionalism and education in Canada. It seems likely that this has been much overlooked because it took place in Winnipeg, not Toronto, and during a period (the early decades of the twentieth century) before there was much focus on these matters in Canada. Wes charts Manitoba’s effort to adopt the Socratic method and the casebook, sustained by British and American influences but underpinned by the particularities of Canada. More generally, he challenges assumptions by uncovering a neglected or suppressed voice.

His admirable penchant for de-centring extends to those within the legal professional firmament treated as “outsiders” and “folk devils.” His series of essays investigating English barristers who sought to reform English legal education and legal institutions, and who were demonized for doing so, was a first in the modern literature. This work proved revelatory: it has become an important benchmark and role model for other scholars, and remains the most extensive and important set of case studies of its kind. Similarly, his discussion of lawyers and political liberalism in eighteenth- and nineteenth-century England problematizes the conventional dualisms that have traditionally separated the English Bar from its Parisian cousin. Wes argues that English barristers, like their counterparts in other countries, were frequently drawn to political action. Although English barristers were less activist than the Parisian bar, neither the political quiescence of barristers nor their supposed conservatism should be overstated. Others topics rescued from the condescension of “winner’s history” include attempts at legal, professional, and educational reform that failed and paths that were not taken. Wes analyzes the earliest attempts to implement the recommendations of the 1846 Select Committee on Legal Education, and the difficulties encountered by Queen’s College and Manitoba in seeking to provide a legal education that transcended mere vocationalism. And in a telling essay, the exclusion of an individual from the legal profession in British Columbia solely because he was a communist provides a striking case study that advances our understanding of professional autonomy and its sensitivity to locale and period.

As will be evident from my wave-of-the wand treatment of this book, Wes took care to frame his research in a way that was sensitive to the local and the international before this perspective became more widely adopted. The material that he has brought together on legal education and the legal profession in Canada and Britain is unique. It sheds new light on the commonalities, similarities, and the differences that characterized both sides of the Atlantic, while registering their entangled histories. The same is true of his scholarship on Canadian lawyers in the context of the history of the imperial profession – and of Canada as a British dominion – and its impact on the history of the Canadian legal profession. Although too few people outside Canada pay attention to Canada, Wes demonstrates why they should.

Originally appearing in assorted and sometimes obscure publications, these essays have been revised to produce what I believe is a revelatory work that will become a milestone in the study of legal history and the interplay between law and society. Like most cutting-edge scholarship, it raises as many questions as it answers, but in so doing it successfully highlights important themes and issues for future scholarship to consider and assess.

It is remarkable to realize that the essays in this book are but a relatively small proportion of Wes's published output, and that he has devoted much of his professional life to building institutions and creating the conditions in which scholarship can flourish. Besides being an exceptional scholar, Wes is also an outstanding academic leader, institution builder, and initiator of national and transnational scholarly associations and networks. He founded and is the general editor of the UBC Press Law and Society series (with more than ninety books published since 2001). He has served on national and international bodies, including the American Society for Legal History, the North American Association for Australia and New Zealand Studies, and, as president for two terms, the Canadian Law and Society Association. He has been a leading light in the International Working Group on Comparative Legal Professions – the principal international body in the field – including establishing and co-chairing subgroups on the “Cultural History of the Legal Professions” and “Lawyers and Imperialism.” He has played a prominent role in creating an international network of scholars on the rule of law and lawyers in British colonial and postcolonial nations, and in organizing conferences and publications that have brought together scholars from Africa, Asia, Australia, Canada, Europe, New Zealand, and the United States. He has been a leader in mentorship and program innovation (including initiating new courses and degree programs, such as the first internationally developed and taught World Wide Web-based law course, “Legal History: Law, State and

Society in Canada and Australia,” with colleagues in Canada and Australia) and an indefatigable university administrator (most recently Provost and Vice Principal, University of British Columbia, Okanagan Campus; Vice-Provost and Associate Vice President, Academic, University of British Columbia; and Associate Dean for Graduate Studies and Research, Faculty of Law, University of British Columbia). Above all, perhaps, he has touched an astonishing number of lives as a teacher, colleague, mentor, and friend.

This makes the quality and breadth of Wes’s scholarship all the more remarkable. It testifies to his selfless public-spiritedness and his strong commitment to public education, to broadening and deepening legal scholarship and education, and to bringing people together across national and allied boundaries. Hence, the publication of this book is an occasion to mark Wes’s outstanding contributions across a wide range of roles, and to acknowledge his commitment to the values of collegiality, constructive critique, interdisciplinarity, openmindedness, international dialogue, and transnational perspectives. I am truly privileged to have known Wes as a colleague and friend for over thirty years.

DAVID SUGARMAN, F.R.Hist.S.

*Professor Emeritus of Law, Lancaster University Law School, UK;
Senior Associate Research Fellow, Institute of Advanced Legal Studies,
School of Advanced Studies, University of London*

PART 1

History in Professional Apologetics

1

The Use of History in the Development of Lawyers' Mythologies

What distinguishes the barrister from the insurance adjuster?
The real estate conveyancer from the real estate agent? Tradition!

– J. de P. Wright, “The Value of Tradition”¹

[A]ll invented traditions, so far as possible, use history as a legitimator of action and cement of group cohesion ... All historians, whatever else the objectives, are engaged in this process inasmuch as they contribute, consciously or not, to the creation, dismantling and restructuring of images of the past which belong not only to the world of specialist investigation but to the public sphere of man as a political being.

– E. Hobsbawm, “Inventing Traditions”²

Lawyers are history buffs, much enamoured with the traditions of their profession. Some may look to history for solace or for inspiration: the retreat to an objective and knowable past that speaks to the uncertainties of the present by providing incontrovertible proof that the entire cultural logic of our civilization mandates a particular form of professional organization, training, or conduct. Others may look to history for critique, perhaps recalling the adage that those who forget history, who fail to heed its “lessons,” are condemned to repeat it.³ There are also, no doubt, skeptics who wonder what possible contemporary relevance there can be in the actions or thoughts of long-dead lawyers.

This last position, I have to admit, is one to which I am drawn. Though I hope there is good reason to study history, and the histories of legal professions

in particular, it seems to me to be both naïve and wildly optimistic to seek a singular moral “truth” in history. It is absurd to think that history repeats itself, if only because, as every litigator and every expositor of legal doctrine knows all too well, no fact situation or problem ever repeats itself in exactly the same way as it appeared before. Even were this plausible, events can never recur because historical context itself changes. Nineteenth-century London or New York is not the same place as late-twentieth-century Calgary or St. John’s. Winnipeg in 1919 is not the same place as Edmonton in 1989. Edmonton in June 2016 is not the same as Edmonton in June 2015. The past – even the recent past – is always a foreign place. We can read travelogues but can never go there. We may remember but can never investigate first-hand. It is a foreign place that can never be known. Anyone who has booked a package holiday or returned to an old haunt knows this to be true. If you can never “go home,” you most assuredly cannot fully know the past.

The Importance of Professional Myth

History is not irrelevant, however. The stories told about the past speak powerfully to the self-image of the storyteller. Collective stories define collective identities. Speaking about the past, we make ourselves for the present and project a future. Canadian cultural commentator Northrop Frye explained:

We move in time with our backs to what’s ahead and our faces to the past, and all we know is in a rear-view mirror ...

The question “Where are we going?” assumes that we already know the answer to the question “Where are we now, and how did we get here?” We certainly don’t know the answer to that one, and in fact all our really urgent, mysterious and frightening questions have to do with the burden of the past and the meaning of tradition.⁴

All of this would remain rather abstract and esoteric were it not the case that Canada’s lawyers are, in fact, energetic purveyors of historical myth. The principal oracles of mythic knowledge are professional associations and mysterious communications from lawyers who have attained the glory of the judicial bench.

It will, I hope, be understood that in speaking of professional “myths” I am using that term in a quite precise way. I do not in the least intend to offend. The term carries no pejorative connotation, and I certainly do not wish to be taken as implying anything at all resembling bad faith or a dissembling attitude on the part of professional apologists. Rather, I am content in understanding

“mythology” as the active and communal process of “building worlds out of words.”⁵ Lawyers, like novelists, journalists, poets, comedians, or scholars, are word spinners. As such, we are simultaneously liegeman to and empress of the cultural uses and social functions of language. “Nobody,” according to Frye, “can create, think or even act outside the mythology of his time, but a mythology is not some kind of prison; it is simply the whole body of material we work with. Like science, it is being recreated all the time, partly by critics and scholars and partly by literature itself, because every new writer recreates something already in literature.”⁶

The task for lawyers, then, cannot be to transcend myth. It is futile to seek some objective “truth” beyond the bounds of place, time, and culture – myth. We should, however, expect more rather than less thoughtful professional myth making. Our most immediate goal should be to resist sanctifying our own unexamined assumptions, lest we risk the wilful suppression of knowledge and a descent into an abyss walled by “a complete and mostly phony mythology, made up of cliché and prejudice and stock response.”⁷

In pursuit of better myth, this chapter seeks to explore, to tease out, the mythic narratives that underlie some important professional writings in Canada. By and large, I have confined myself to the publications of professional organizations, and limited my review to common law jurisdictions out of respect for the variations in forms of professional organization and mythic foundations of professional culture that distinguish common law from civil law traditions in Canada. Even with these limitations, there is certainly room for a more comprehensive exploration of myth in Canadian lawyers’ professional rhetoric. This project could – probably should – have been expanded to encompass sources such as judicial pronouncements, academic writings, the *Street Legal* television show, jury addresses, newspaper articles, “talking head” television interviews, and so on. These, however, are much beyond the ambit of this chapter. Much less do I hope to explore the deeper “mythologies of modern law” that may at a much more profound level ground European-derived legal systems in their entirety.⁸

After identifying the major outlines of contemporary professional myth in Canada, I will critique the composite I have sketched. My purpose is not to present “objective” historical fact against professional myth but only to illustrate the ways in which commonplace narratives are cluttered with unfounded prejudices, assumed histories, clichés, and stock responses. To appropriate Peter Fitzpatrick’s language for my own purposes, I seek here to subvert portions of received narratives “by heightening the contradictions and suppressions involved in their construction.”⁹

Contemporary Lawyers' Mythologies

Although anthropology and other human sciences offer competing definitions of “myth,” a number of components recur with some frequency:

- 1 Myths are often stories dealing with “origins and identity, and in particular here with the origins and identity of a group or a people.”
- 2 Myth often provides “the basis for claiming ... a superiority for the group.”
- 3 “The point of origin is sacred – set apart, made transcendent and beyond encompassing in profane experience.”
- 4 “Such a self-generating, sacred force imposes and sustains an order from above. The ability to do this is often transferred in part to agents such as the first man made in the image of God.”
- 5 Agents and forces mediate between the sacred and the profane. “Such mediations locate the profane, mortal world within the sacred, providing members of the group with guidance and orientation to a reality which is perceived and lived through myth.”
- 6 “Myth both sets the limits of the world, of what can be meant and done, and transcends these limits in its relation to the sacred.”
- 7 Contradictions and incoherencies might be obfuscated by “placing contradictory elements in distinct but related myths ... This is a relation of dependence of a myth on other myths for the revelation of its ‘full’ meaning.”¹⁰

Most of these elements of “myth” recur with some frequency in Canadian professional apologetics.¹¹ Professional apologetics is constructed within a web of interconnecting myths relating to self-regulation, independence of the profession, adversarial justice, and public service.

A Note on Sources of Professional Mythology

In seeking out contemporary accounts of professionalism, I conducted a mail survey of lawyers’ professional organizations across Canada in 1994.¹² Each was approached with a request for information covering just about any sort of considered statement relating to the role of the legal profession in Canadian society. Specifically, I asked these organizations to provide me with copies of any documents such as “position papers, submissions to government commissions, public education pamphlets or such-like” speaking to any of the following sorts of matters:

- the social role of the legal profession,
- professional ethics,

- principles of self-regulation and/or the independence of the legal profession,
- the adversarial process,
- the public service orientation of a profession or the meaning of “professionalism”

...

The sort of material that would be helpful to me relates to policy assessments, public statements or philosophical positions rather than the “hands-on” work that all professional organizations in Canada engage in with respect to the development of ethical codes or the application of rules in particular cases.

The responses were varied. Four professional organizations responded with brief letters indicating that they had not prepared any such documents.¹³ The Nova Scotia Barristers' Society explained that, as “a small society, we tend to rely on the work of the larger jurisdictions to assist us in this area,”¹⁴ but kindly provided me with a draft “objects clause” then under active consideration, and with a copy of their new *Legal Ethics Handbook*. The Law Society of Saskatchewan sent me four publicity pamphlets,¹⁵ and I received an extremely interesting, very helpful thirty-five-page document prepared by the Law Society of Newfoundland.¹⁶ The Law Society of British Columbia provided me with a copy of a paper prepared by its chief executive officer in 1993, and with a more recent “public briefing paper.”¹⁷ I found it very helpful to be able to review the *Submission of the Law Society of Manitoba in Response to the Law Reform Commission of Manitoba Discussion Paper on the Future of Occupational Regulation in Manitoba*.¹⁸

I received an interesting package from the Law Society of Alberta – including the final report of its “Futures Committee,”¹⁹ an article by one of its former presidents,²⁰ and other material. I also received copies of both an important government report and the law society's rather poorly constructed response – a document that spoke powerfully to the role of professional rhetoric in the world of myth.²¹

In addition, the Barreau du Québec, the Chambre des notaires du Québec, the Law Society of Ontario (“Upper Canada”), and the Federation of Law Societies inundated me with voluminous and very interesting documentation.

The results of my survey provided me with nearly comprehensive professional documentation for a critical period of time in the evolution of thinking about the roles, functions, and organization of the legal professions in Canada. Although discussions have moved on somewhat, the core emphasis on legal

professionalism as both historically embedded and bearing peculiar relationship with the conditions of freedom in modern society remain strong.²²

History and Myth in Contemporary Lawyers' Discourse

History is everywhere in contemporary professional apologetics. It appears both as in-your-face, explicit appeals to "history" as a source of legitimacy for the status quo and, much more subtly, through a series of cultural codings that are so well understood as to register subconsciously only. But register they do.

History "in Your Face"

Explicit appeals to "history" as a source of authority are found in law society publications from coast to coast. The Law Society of British Columbia, for example, recounts a number of historical tales in a public "briefing" document. It asserts that the contemporary structure of professional regulation in the province is "in keeping with the centuries-old tradition in England" and that "historically" the profession has been "given self-governing status because of society's belief that a lawyer cannot serve two masters."²³ Lawyering, we are told, is "a profession," not a mere "trade," because "a profession has, over many years," developed an ethical code.²⁴

The Alberta law society makes a similar appeal to history, claiming that despite its origins in an Alberta statute of 1907, the late-twentieth-century law society is a direct successor to mysterious "origins of an independent legal profession" that "can be traced to England in early times." Despite the long history of First Nations governance in the territory that is now Alberta, despite two centuries of nominal control by a private corporation, despite the origins of "western Canada" as a central Canadian colony, despite the fact that Alberta was created only in 1905, the Alberta legal profession is quite precise in asserting *its* origins far, far away and long, long ago: "Historically the profession developed as a self-governing entity before there was any legislation and although there has been a legislative framework in Alberta since 1907, it reflects that which had traditionally existed." One presumes here that the reference to what "traditionally existed" does not refer to Peigan or Cree professional structures.²⁵ A dusty prairie town in 1907 cannot provide pedigree adequate to match the needs of a proud Alberta law society.

The Manitoba law society takes pride in the independence of the legal profession manifest in "a long history and tradition of self-governance" that is "rooted in the English common law."²⁶ Saskatchewan modestly informs us only that "[h]istorically self government is rooted in the notion that a lawyer cannot serve two masters," and, therefore, that independence is "for the benefit

of the client and the public, not the lawyers.”²⁷ More modestly still, the New Brunswick and Prince Edward Island legal professions have produced no internal studies or public documents whatsoever that speak to matters of professional organization, independence of the legal profession, or self-governance. Despite a long, impressive, and relatively well-researched history, the Nova Scotia Barristers' Society has produced only a draft “objects clause” emphasizing that the “regulatory role of the Society ... has a long history and a mandate that has evolved over the years.”²⁸ Newfoundland has produced an interesting document generally reiterating the argument that “lawyers have been viewed as standing between the government and private citizens” and, therefore, that lawyers must be “completely independent of government.”²⁹

Not the least modest or self-effacing, the Ontario law society has proved to be far and away the most important producer of lawyers' histories in common law Canada. Several of its texts have entered into the Canadian canon of professional apologetics, and a number of ideas first developed in Law Society of Upper Canada documents have popped up at various places in Canada with some frequency. In the November 1993 draft *Proposed Role Statement*, the Ontario law society invokes history frequently and powerfully.³⁰ The date 1797 appears twice on page 4, then on pages 8, 10, and 11 (note 12), and repeatedly in the three appendix pages where *An Act for the better Regulating the Practice of the Law* (U.K.), 37 Geo. III, c. 12 is “translated” into contemporary language and then reproduced in full (the translation itself is interesting, involving as it does the representation of a monarchical and committedly anti-democratic Imperial authority as the epitome of late-twentieth-century democratic constitutionalism). Overall three full pages of this seventeen-page document are dedicated to a 1797 colonial statute, while that date appears five times over fourteen pages of the principal text – suggesting greater antiquity and a much higher degree of commitment to it than any other Canadian jurisdiction.

In its *Presentation to the Standing Committee on the Ombudsman*, the Ontario law society dedicates fully two pages to the “History and Responsibilities of the Law Society.”³¹ “History” makes frequent reappearances thereafter.³² An earlier document, the Ontario law society's *Submission to The Professional Organizations Committee*, is also replete with historical observations, some of which, in turn, have entered the professional canon. This document informs us that “law” reflects the “community” but is “essentially conservative,”³³ and that lawyers have an important and unique historical function (the “protection of rights”).³⁴ It makes a powerful claim to ancient English tradition, fusing the colonial professional association with “its origins in England” and arguing that this history serves to “demonstrate the close

association between the administration of justice and, not only lawyers, but their governing bodies as well.” “This association,” it is said, “has continued for centuries.”³⁵ A collection of huts on a swampy colonial shore cannot, it seems, provide pedigree adequate to match the pretensions of the Law Society of Upper Canada.

A substantial portion of the first chapter of this report, headed “The Independence of the Legal Profession,” addresses the history of the profession.³⁶ In addition to the above-cited remarks, this includes citation of Holdsworth on 250 years of (English) professional history,³⁷ an argument that the law society is not a “public” body despite its creation by statute,³⁸ and a genuinely astonishing argument for continuity of institutional order from the 1300s through 1797 to the present.³⁹ Again fusing the histories of an Imperial and a colonial legal profession, this portion of the report concludes that

[t]his historical review has established that the Bar in England and in Ontario grew independently of government and exercises responsibility of its own making; that it requested and obtained from government recognition and a legal framework within which it continues to discharge its functions; that this independence of the Bar is necessary to the independence of the Bench and to the freedom for the individual citizens ... Unless there is strong reason for change a structure which has evolved over centuries and which is working well should not be interfered with.⁴⁰

One intelligent and carefully balanced address by a treasurer of the Law Society of Upper Canada is also replete with historical reference, including several pages on “the origins of the modern legal profession in the European Renaissance,”⁴¹ an invocation of the antiquity of lawyers’ governing bodies in Canada – “The history of the governing bodies in Canada is a long one, stretching back two hundred years”⁴² – and an appeal to the Canadian “tradition” of relying on “the self-governing status of the legal profession” to ensure “the independence of lawyers.”⁴³

In summary, then, it is not hard to find explicit appeals to “history” in the writings of Canadian law societies and their officers. I expect that a more thorough survey of professional literature in general would reveal a deep substrata of historical references. The point here is not to analyze or assess the content of these historical arguments but simply to note the frequency with which they appear. One suspects that there would be much less frequent appeals to either ancient English history or the continuity of Canadian tradition in other professions, such as nursing, teaching, engineering, or dental hygiene. The professional organizations of physicians, surgeons, psychiatrists, and

psychologists are, of course, generally content to overlook the quack theories and brutal bodily assaults that have constituted their “respectable practice” in times past. Law celebrates, relishes, and revels in a vision of the past.

The past that lawyers celebrate, however, is richer, more subtle, and more pervasive than even this brief account of in-your-face professional histories would suggest. There is also a history “encoded” in professional rhetoric that contributes powerfully to our myths.

History Encoded

Every litigator, historian, literary critic, and legal historian knows well that language does not work in a simple, straightforward, or linear way. “[L]anguage is not,” according to Mariana Valverde, “a transparent window giving access to the world but is rather itself a part of the world, a kind of object among objects.”⁴⁴ Words can communicate meaning more or less directly (“literally”) or by complex interplays of images, associations, or histories. Sometimes, perhaps invariably, the most simple statement communicates both sorts of meanings simultaneously.

Cultural context loads words with “slippages” whereby text apparently directed to one purpose simultaneously conveys meanings of quite another sort.⁴⁵ In all cultures, including our own, “certain images, words, or constellations of both [resonate] ... with pre-existing cosmologies.”⁴⁶ Meaning is carried through multiple series of representations in which there is no “one-to-one correspondence of signifier and signified” but rather socially shared attributions of meaning working by means of “complex metaphors and chains of metonymies” – “complex relationships within each allegory and among different allegories/symbols.”⁴⁷ Full understanding cannot be had at the surface level. “The meaning of texts is not contained within their boundaries; it can only be deciphered – and the power relations constituted by it exposed – through a thorough knowledge of the social context in which the texts were produced.”⁴⁸

Obvious and simple though it is, this insight has produced powerful new approaches to the understanding of English literature,⁴⁹ history,⁵⁰ contemporary culture,⁵¹ geography,⁵² and law.⁵³ Because, in this approach, understandings of text depend upon the appreciation of the reader or audience as well as the intent of an author or speaker, “real” meaning is elusive. Contextual understanding must be sought, however. There is no meaning more “real.”

It is through such an appreciation of the ways in which language works that “encoded” histories can be identified throughout the literature of “professional apologetics.” References to “liberty,” personal freedom, or the “rule of law” infiltrate professional apologetics at every turn, producing linguistic slippages

that lead the reader to quite wide-ranging associations – all of them, not surprisingly, tending towards reinforcement of the professional status quo. To illustrate the ways in which these slippages work, it may be helpful to consider some sample quotations, followed by an account of the sorts of historical readings that are likely to be brought to these texts. First, the examples:

It may be trite to say that a free and independent legal system is a fundamental right in a free and democratic state. The dual components of any legal system are an independent judiciary and an independent bar. Without both, a legal system is not free, but is merely an agency designed to do the will of the state.⁵⁴

It is to an independent legal profession that a citizen must look to address his or her grievances against the state or to protect his or her interests from excessive, unlawful or improper interference by the state. Therefore it is surely a fundamental public right to have access to a truly independent bar for those purposes.⁵⁵

The legal profession has a unique position in the community. The distinguishing feature is that alone among the professions it is concerned with protecting the personal and property rights of citizens from whatever quarter they may be threatened and pre-eminently against the threat of encroachment by the state. The protection of rights has been an historic function of the law and it is the responsibility of lawyers to carry out that function.⁵⁶

Stress was rightly laid on the high value that free societies have placed historically on an independent judiciary, free of political influence on its decisions, and an independent bar, free to represent citizens without fear or favour in the protection of individual rights and civil liberties against incursion from any source, including the state.⁵⁷

The necessity of the independence of the judiciary is well recognized. The significance of the independence of the profession is often not fully understood. The profession is the source and training ground of the judiciary.⁵⁸

This historical review has established that ... independence of the Bar is necessary to the independence of the Bench and to the freedom for the individual citizens ... Unless there is strong reason for change a structure which has evolved over centuries and which is working well should not be interfered with.⁵⁹

Since in a free and democratic society the legal profession stands between the government and the individual, it is important that the governing body of the legal profession remain totally independent of government.⁶⁰

It is recognized that an independent legal profession is essential to a democratic society. The Chief Justice of the Trial Division of the Supreme Court of Newfoundland, in addressing newly admitted members of the Bar has stated that:

“Officers of the Court assume a very solemn obligation to defend the independence of the judiciary at all times and when appearing as barristers, to follow the standard of ethical conduct which prevails amongst practising lawyers in this Province. Hand in glove with the independence of the judiciary goes the independence of the Bar. It therefore follows that the constitutional protection which guarantees the independence of the judiciary applies with equal certainty to the independence of the legal profession.”

Lawyers have been viewed as standing between the government and private citizens who are directly impacted by the laws and regulations of government. Unless lawyers are completely independent of government, they cannot objectively interpret the laws and represent citizens in their interactions or conflicts with the laws and the government.⁶¹

The legal profession has historically been given self-governing status because of society's belief that a lawyer cannot serve two masters. A lawyer who represents a client must have one allegiance and only one: the client's best interests. A lawyer who is accountable to government for his or her actions would inevitably let that relationship colour the handling of the client's affairs. It is a hopeless case of conflicting interests, and the loser is the client ... graphic examples from totalitarian countries ... Our legal system has always guaranteed the independence of the legal profession, not for the benefit of lawyers, but for the benefit of their clients ... the importance of the rule of law in a free and democratic society.⁶²

Such passages will, of course, be understood in many different ways by different types of readers. Let us assume, however, that they are directed to a reader from the common law provinces of Canada who has had some direct or indirect exposure to British constitutional history *as that subject was popularly understood in early- to mid-twentieth-century Anglo-Canada* (I am

thinking of individuals whose primary exposure to history would be through potted high school versions or their equivalent) and who is complacent about or reasonably content with the current state of social, political, and economic affairs in Canada – someone, in other words, very like Anglo-Canada’s political and legal elite: white, Anglo-Saxon, Protestant or agnostic, middle-aged, middle-class, and, perhaps, male. The interpretive “grid” that overlies everything such a person reads involves a number of assumptions or working hypotheses about the way the world works and about what history has to say about human society.

His or her “pop” sociology and history might well be founded in the belief that there is no value greater than that of individual liberty (which might be valued either as a moral end in itself or because individual liberty is thought to promote economic, scientific, or moral advance). Happily, our hypothesized reader has concluded that no country is more “free” (or at least not substantially more free) than Canada. We are fortunate to have attained, through a lengthy historical process of evolution, a unique combination of liberty and political stability. Canadians, our reader concludes, are heirs to a *peculiarly* British tradition of liberties that can be traced back at least as far as the Magna Carta. Over the centuries, an evolving British constitutionalism has seen the displacement of monarchical power by “democracy.” This has happened, our reader thinks, without descent into the “lawlessness” that so many other countries have experienced, when “mobs” have taken control through violent revolution (at this point, looking askance across the English Channel and recalling with horror 1789). The “magic key,” the “genius of the English people” is found in the peculiarly British notion of the “rule of law” that has developed over centuries to protect us from the pretensions of monarchs and the excesses of mobs alike. Under the “rule of law,” the courts have been crucially important forums for the protection of liberties. In order for them to fill this role, it has been of the utmost constitutional importance that English practice has established both the independence of the judiciary from the legislative and executive branches of government and the independence of the legal profession. As a result, Canadians are heirs and successors to a series of privileges and freedoms that together constitute the much celebrated “Englishman’s birthright.” These include security of property,

freedom from foreign domination ... Freedom from absolutism (the constitutional monarchy), freedom from arbitrary arrest, trial by jury, equality before the law, the freedom of the home from arbitrary entrance and search, some limited liberty of thought, of speech, and of conscience, the vicarious

participation in liberty ... afforded by the right of a parliamentary opposition and by elections ... as well as freedom to travel, trade, and sell one's own labour.⁶³

Taken together, "the rule of law was the distinguishing inheritance of the 'freeborn Englishman,' and was his defence against arbitrary power."⁶⁴ The bloodless "Glorious Revolution" of 1688 has an important place in this cultural tradition, not as a bold embrace of the future but as a restoration of ancient rights.⁶⁵

If anything even vaguely resembling this sort of historic consciousness can be presumed on the part of the readership of Canadian professional apologetics, it is apparent that an encoded history is all-pervasive in the informational pamphlets, informal statements, and considered arguments produced by lawyers' organizations in Canada. While the "British liberties" theme occasionally touches down with concrete historical reference (to Magna Carta or to 1688), for the most part encoded histories register in popular consciousness only through knowledge that the heirs to British constitutionalism are the most free peoples in the world. The repeated references to England take on a heightened poignancy here. British tradition is invoked not merely as the imperial source of our institutions but also because England constitutes a conceptual apex of liberties – a sort of endpoint of history: more free, more stable, more developed, more pristine than any other human society at any other time or place (except, perhaps, us now). The tradition invoked is white, not red; occidental, not oriental; free, not absolutist; European, not African; and, importantly, English, not French.

In celebration of British achievement, multiple "others" are constructed as unenlightened, illogical, inferior, or simply dangerous. "British liberties" always evokes in the reader memories of a dangerous counter-example – the reader, however, being left to fill in the blank on his or her own, as it were. The genius of Alfred Hitchcock and professional apologists alike lies in consistently acting upon the knowledge that an audience can be more effectively terrorized by suggestion than by graphic, detailed, hysterical portrayal. Thus, for example, simple and seemingly straightforward assertions to the effect that without an "independent bar" the entire legal system is transformed into an instrument of the state⁶⁶ does not merely communicate a political belief but also conjures up ghosts of oppressive states throughout history. Depending on the reader, the image that moves to the foreground may be that of Stalin, Castro, Hitler, Mussolini, Idi Amin, the Pope, George III, Louis XIV, Saddam Hussein, Napoleon, Chairman Mao, Richard Nixon, Augusto Pinochet, or Charles II.⁶⁷

All of these – and many more – lurk in the background for our supposed reader. Rather than appearing as weakness, the imprecision of encoded historical reference is a source of great power: presumed alternative histories are called to mind instantly and in infinite variation. Like Orwell's terrifying "room 101," professional myth intimidates through confident knowledge that "[t]he worst thing in the world varies from individual to individual."⁶⁸ But for an independent bar, Canada might not have escaped any number of unnamed horrors of despotism and revolution.

The implication that the present set of institutional arrangements in Canada is both the logical endpoint of developments within a long tradition of "British liberties" *and* that this tradition is better than any developed by lesser peoples, including those south of the forty-ninth parallel,⁶⁹ is irresistible. Many of the statements reproduced above encode historical narratives of just this sort, and several of these have entered into the emergent canon of professional utterances on these matters.⁷⁰ Inferentially, of course, critics of the status quo have chosen to side with Stalin, Hitler, and Charles II or else are simply too uninformed to know any better.

Although at least two law societies have explicitly raised the spectre of "graphic examples from totalitarian countries,"⁷¹ it is, on the whole, unnecessary to do so. Simply reminding the reader that Canada is a "free and democratic society" and that the legal profession in this country is organized in a certain way is sufficient to call forth a whole range of such associations. When some, such as Mr. Justice Estey, imply that a free legal profession is the principal bulwark protecting us from unspeakable horrors ("in a free society ... [there is] no area more sensitive than the independence ... of the members of the bar"⁷²), they render explicit only a portion of the meanings found in "history encoded."⁷³

The Myth in Aggregate

It is, I hope, apparent from the above that "histories" of both the "in-your-face" and "encoded" varieties pervade professional apologetics in Canada. A very large portion of such literature is dedicated to one form or another of historical assertion rather than contemporary policy argumentation. Indeed, it can be said with very little fear of contradiction that such "policy" arguments as appear in these writings are so coloured by encoded histories as to amount to little more than historical myth in disguise.

Many features of the generalized historical "myth" as it appears in common law Canada will be apparent from the passages that have been quoted or described above. A sort of aggregate myth emerges that can be compared

with what historians of the legal profession have been finding in Canada and elsewhere. In summary, the historical portrait that Canadian legal professions draw of themselves looks something like this:

- 1 A centuries-old English tradition requires that lawyers be governed by a body of other lawyers organized, as it happens, much in the fashion of any Canadian law society.⁷⁴ In this respect, Canadian lawyers are heirs to the amalgamated traditions of all English legal professions. In particular, we are heirs to the combined traditions of the English Bar and the solicitors' profession, there being no distinction of importance between these two traditions.
- 2 Despite the existence of statutes that *appear* to have created the possibility of self-governing legal professions (1885 or 1907 in Alberta; 1797 or 1822 in Ontario), the true origins of independent legal professions in Alberta and Ontario are to be found in private institutions in England in early times. There is a direct (though unexplained) continuity from ancient English institutions *that were not created by the state* through to modern Canadian law societies.⁷⁵
- 3 The contemporary law society in British Columbia dates from 1884 and has since then enjoyed "full authority over lawyers and the practice of law in the province."⁷⁶ The Ontario law society, first recognized by Imperial statute in 1787, has had full power and authority to "discipline" lawyers in the jurisdiction since that time.⁷⁷ Canadian law societies routinely claim continuity of corporate existence since at least the time of their originating statute notwithstanding significant changes in the legislative framework of law society practice since that time.
- 4 Because the law societies originate not in statute but in private bodies in the distant past in England, they are not "public" bodies. They do not, therefore, exercise public power.⁷⁸
- 5 Law societies have been given "self-governing status" in order to protect lawyers – and hence, their clients – from control by "the state."⁷⁹ The state is the most fundamental and pervasive threat to individual rights and liberties; the historic and unique responsibility of lawyers is to protect "rights" (principally, one presumes, against encroachment by the state).⁸⁰
- 6 Freedom, democracy, and the "rule of law" rest on the independence of lawyers from state control.⁸¹ In some formulations, the need for independence is not expressed in relation to the state only: "It has long been recognized that lawyers must be independent of external influence and pressure if they are to carry out their responsibilities properly."⁸² In one formulation:

“It is the process of independent advocacy in individual cases ... that has raised us up from slavery.”⁸³

- 7 Constitutional governance *requires* the existence of a self-governing, organized legal profession.⁸⁴ A “lawyer’s right to practice and to earn a living” must rest “in the hands of his or her professional association.”⁸⁵ The source of authority for this constitutional arrangement is unclear but is variously associated with the Glorious Revolution,⁸⁶ mysterious developments in England in the fourteenth century,⁸⁷ or unnamed historical tradition.
- 8 An independent judiciary cannot exist without an independent bar.⁸⁸
- 9 The independence of the legal profession is, for practical purposes, indistinguishable from the question of self-governance. “Self-governance” serves to ensure the independence of lawyers.⁸⁹
- 10 The legal profession has, in the public interest, “over many years, developed a comprehensive code of ethical standards that its members must follow.”⁹⁰
- 11 The governing bodies of the legal profession have historically acted to protect the public interest.⁹¹
- 12 Professional rhetoric routinely elides the legal profession and the legal system as a whole, as in the Law Society of Alberta’s assertion that “a mechanism or a policy for government interference or influence on the affairs of a self-governing legal system is an unjustified and unnecessary encroachment.”⁹²

We have here several of the key elements of myth identified earlier in this chapter. Lawyers’ professional discourses provide an account of the “origins and identity ... of a group” (the legal profession originates in England in ancient time); the myth provides “the basis for claiming ... a superiority for the group” (the legal profession is unique in protecting the rights of subjects); the point of origin is rendered sacred, transcendent (the continuity between twentieth-century Canada and thirteenth-century England) beyond profane experience (which, knowing no better, would seek “origins” only in provincial originating statutes). The frequency with which mythic origins are invoked in contemporary professional discourses well illustrates that, for lawyers, myth provides “guidance and orientation to a reality which is perceived and lived through myth.”

Policy Implications of Myth

Importantly, professional myth “sets the limits of the world, of what can be meant and done” in many ways and in all aspects of professional life. Any number of proposals with regard to the regulation of the legal profession have,

in recent years, been said to contravene historically derived principles. These have included proposals for:

- any “transfer of regulation-making authority to the Lieutenant Governor in Council”⁹³ [including] “the authority of the Lieutenant Governor in Council to approve, amend, or enact regulations governing the day to day affairs of the legal profession”⁹⁴
- an “increase of Lay Benchers to one-third of the total Benchers” [i.e., five] in Newfoundland⁹⁵ or any increase in the number of Lay Benchers above two in Alberta⁹⁶
- the appointment of Lay Benchers by the Lieutenant-Governor-in-Council⁹⁷
- “including Lay Benchers on discipline hearing panels”⁹⁸
- abolishing the practice of naming “the Attorney-General [or the Registrar of the Supreme Court] as a bencher by virtue of Office”⁹⁹
- allowing direct appeal of decisions of disciplinary adjudication panels to the Court of Appeal, rather than through intermediate internal appeal to the Benchers as a whole¹⁰⁰
- granting complainants a right to appeal law society disciplinary decisions to the courts¹⁰¹
- enacting legislation to establish a structure of regulation respecting contingency fees¹⁰²
- assigning responsibility for the oversight of the legal profession to any minister of the Crown other than the Attorney-General¹⁰³
- holding counsel responsible for their undertakings regarding the allocation of court time (in this case a direction by the Court of Appeal of Alberta “that all counsel remain strictly within their estimated times for argument or face a personal penalty of costs associated with any resulting adjournments of any other appeals which had been set for consideration”¹⁰⁴)
- the adoption of a mechanism whereby the membership of the law society at large would participate directly in the approval of rules and regulations governing the profession¹⁰⁵
- any narrowing of the protection of lawyers’ economic monopoly provided under so-called “unauthorized practice” provisions¹⁰⁶
- review of the law society by the provincial Ombudsman¹⁰⁷
- the creation of a public defender system¹⁰⁸
- an increase in court fees¹⁰⁹
- the creation of any “central government bureaucracy, department or commission to oversee the legal profession and significantly alter the current form of self-government for lawyers”¹¹⁰

- the creation of “judicial conduct committees” or the development of a “written code of judicial conduct” – said to be an American “horror story.”¹¹¹

All of this is heavy duty for professional myth. Let us now probe the adequacy of our myths as measured against the standard of historical research.

Professional Historians’ Fallacies

Unfortunately, the ways in which history is used in contemporary Canadian lawyers’ apologetics fail miserably whether evaluated by the standards of logic governing historical research or by the substantive historical findings reported in published scholarship relating to the history of the legal professions.

One of the most striking features of professional myth in Canada is the way in which “historical” accounts of the origins of the contemporary structures of regulation in Canada are offered in place of rigorous policy analysis. David Hackett Fischer, author of the influential book *Historians’ Fallacies*, explains this as one of several “fallacies of narration”:

The genetic fallacy mistakes the becoming of a thing for the thing which it has become. In other words, it is the erroneous idea that “an actual history of any science, art, or social institution can take the place of a [nontemporal] logical analysis of its structure.”

The most hateful forms of the genetic fallacy are those which convert a temporal sequence into an ethical system – history into morality. This pernicious error was embedded in a movement called historicism, which flourished in Germany during the period 1790–1930 ... Historicism was many things to many people, but in a general way its epistemology was idealist, its politics were antidemocratic, its aesthetics were romantic, and its ethics were organized around the nasty idea that whatever is becoming, is right.¹¹²

The “genetic fallacy” pervades Canadian lawyers’ apologetics. It is perhaps the single most important failing of what passes for analysis in contemporary legal writing.

Beyond this, most of Fischer’s “fallacies of narration” appear with some frequency in Canadian lawyers’ apologetics. Time and space preclude a full development or illustration of these. For present purposes, suffice it to note that professional apologetics is chock-full of errors in historical logic, including *fallacies of anachronism*¹¹³ and of *presentism*¹¹⁴ in all its mutations¹¹⁵ (including the very crudest form of “Whig” history),¹¹⁶ the *antiquarian fallacy*,¹¹⁷ the *fallacies of tunnel history*¹¹⁸ and *false periodization*,¹¹⁹ the *telescopic fallacy*,¹²⁰

the *interminable fallacy*,¹²¹ the *fallacy of archetypes*,¹²² the *static fallacy*,¹²³ the *fallacy of presumptive continuity*,¹²⁴ and, especially, the *didactic fallacy*.¹²⁵

Being lawyers, professional apologists are peculiarly susceptible to the logical error of “argument *ad verecundiam*,”¹²⁶ which involves reliance on authority rather than logic to bludgeon into submission those who may hold opposing views. Argument *ad verecundiam* appears in most of its possible forms in contemporary professional apologetics: “never use a little word when a big one will do”;¹²⁷ padding “a lean thesis with fat footnotes which are irrelevant, or superfluous”;¹²⁸ “the use of quotations ... employed for forensic rather than empirical purposes”;¹²⁹ and the excessive reliance on “the authority of the printed page,” involving a tendency to believe anything found in written form.¹³⁰

For fear of falling myself into the error of argument *ad verecundiam* – by sustaining “a thesis ... by the length of its exposition”¹³¹ – I will decline the opportunity to engage in any detailed measurement of our apologetic literatures against the standards of historical logic. In general, canonical statements are most suspect in this regard – a coincidence that taints the entire project. These literatures lapse into teleological functionalism and perpetuate myths as to continuity with an ancient English tradition as well as myths as to what that tradition involves. They “translate” eighteenth-century statutes into a language of democracy and individual right. Though pleasing to contemporary sensibilities, this strategy is misleading in the extreme for the “translation” involves the major historical gaffe of conflating eighteenth-century constitutionalism with late-twentieth-century democracy.¹³²

Canonical statements are also rife with the linking of ideas that obscure historical experience while purporting to reflect it. One example developed from a passage widely cited in professional apologetics will suffice for illustration and will also provide a point of connection with the next portion of this chapter, which provides a narrative of what historical research concerning the legal profession has to say to us.

The independence of the Bar from the state in all its pervasive manifestations is one of the hallmarks of a free society. Consequently, regulation of these members of the law profession by the state must, so far as by human ingenuity it can be so designed, be free from state interference ... The public interest in a free society knows no area more sensitive than the independence, impartiality and availability to the general public of the members of the Bar and through these members, legal advice and services generally. The uniqueness of position of the barrister and solicitor in the community may well have led the province to select self-administration as the mode for administrative

control over the supply of legal services throughout the community. Having said all that, it must be remembered that the assignment of administrative control to the field of self-administration by the profession is subject to such important protective restraints as the taxation officer, the appeal to the courts from action by the Benchers, the presence of the Attorney General as an ex-officio member of the Benchers and the legislative need of some or all of the authority granted to the Law Society.¹³³

It is easy to allow a passage such as this to wash over us without much critical assessment. It sounds so fine, so logical, so necessary. In fact, however, the passage consists of one unexplained logical leap piled upon another. It deconstructs itself completely on what is called a “literal” reading of the text and disintegrates entirely when the actual historical record of the legal professions in the common law world is juxtaposed with assumed historical trajectories.

At the most elementary level, it should be jarring to any critical reader to be told in one sentence that “x” or “y” or “z” must, for tremendously important political reasons, be insulated from state interference, only to read, just three sentences later, a celebration of the direct participation of a member of cabinet (the Attorney-General) *and* of the legislature in that very sphere of activity. The fact that, as lawyers, we do not notice this should be a source of great embarrassment to us.

So too should the leaps of logic involved in simultaneously celebrating the virtues of an “independent” barristers’ profession *and* the creation of a governing body with extensive powers of rule making and punishment. A bare dictionary definition reveals “independent” to mean “not depending on authority,”¹³⁴ yet the statutory creation of governing bodies that exist only to subject barristers to the authority of a political structure (albeit one not directly part of the “state”) is celebrated as mysteriously enhancing rather than infringing upon the independence of barristers. The fact that it is probably very difficult for most modern Canadian lawyers to even perceive a logical flaw here only shows how entirely captive we are to a particular mentality. This was not always the case. In England throughout the nineteenth century, it was widely thought that in order for *barristers* to provide the political benefits associated with an independent legal profession, they would need to be independent *from the organized bar*, not just from the state.¹³⁵ That this is not widely known is testimony to the powerful silencing capability of “winners’ history” in the professional realm.

My reference to English practice in the nineteenth century is not, in this context, merely the conditioned reflex of a colonial suffering a severe case of

cultural cringe. Our legal professions widely celebrate the English inheritance without knowing what it is we supposedly inherited. In a third compression of historical experience, Estey J. confused the histories and functions of two quite distinct English legal professions, treating the barristers' and solicitors' professions as indistinguishable antecedents to the contemporary unified legal profession in Anglo-Canada. The leap in logic and in history is accomplished in a short space, only two sentences separating the idea that an independent *bar* is "one of the hallmarks of a free society" and the quite distinct emphasis on the "uniqueness of position of the barrister *and solicitor*." Earlier generations of Canadian lawyers well understood that "the legal profession in Canada is made up of two distinct professions with different duties, different responsibilities and liabilities, different history and traditions, and subject to different rules."¹³⁶ But our real historical memory is short.

No student of the history of English lawyers would ever confuse the professions of barrister and solicitor in this way. To this day, those professions remain distinct. They perform different functions, are qualified through different professional structures, and have emerged through different historical trajectories. There may indeed be good reason to seek to enhance or to celebrate the "independence" of an advocates' profession. With the possible *exception* of the English profession,¹³⁷ it may be the case that an active advocates' profession has in fact done much to advance the development of political or economic liberalism¹³⁸ through speech and actions in the courtroom. It takes a peculiarly rose-tinted view of the world to find such heroism in the mundane world of solicitors' transactions, past or present. There is a tremendous leap of faith involved in arguing from the standpoint of a political appreciation of the independence of advocates for a regulatory regime that subjects both advocate and professional form-filler to the same regulatory regimen. In Canada, barristers and solicitors become one. That one, it seems, is the barrister.

The same sentence that produces this elision of distinct professions also provides us with a historical fiction that stands in place of historical inquiry. It is simply assumed that "the province" appreciated the "uniqueness" of our biune legal profession and therefore opted to create a system of "self-administration." This assumed history suppresses the reality of conflict, disagreement, and negotiation that has accompanied many changes in the structures of legal professionalism in Canada. It obliterates human agency or self-interest altogether, foreclosing rather than opening up historical inquiry. Like so much of professional apologetics, it denies history by assuming that what is has always been: it is presumed that nothing significant has happened

in professional organization or structure or politics since long-gone days when “self-governance” emerged, fully formed. Such assumptions are the antithesis of the historical imagination.

Historians of Lawyers

Not all accounts of the legal profession in history are distorted to the same extent by the pressing day-to-day concerns of contemporary institutions. While it is regrettable that more primary historical research on the history of the organized legal profession is not under way, it is much more seriously a matter of regret that contemporary professional apologetics is produced in apparent ignorance of the scholarly work that is available. Many fine historians have addressed aspects of the history of the legal profession in Canada, the United States, Australia, and the United Kingdom.

It would be rash – indeed, ahistorical – to attempt to construct any singular storyline from these disparate literatures, dealing as they do with many professional bodies on three continents over four centuries. Nonetheless, at least three important points sit uneasily with history-as-Canadian-lawyers-would-like-it-to-be.

First, scholarly histories of common law legal professions point to the novelty rather than the antiquity of many contemporary professional structures, reflecting, as Eric Hobsbawm would have it, the fact that “[t]raditions’ which appear or claim to be old are often quite recent in origin and sometimes invented.”¹³⁹ Because of the extraordinary reliance placed on appeals to “history” in (Anglo-Canadian) professional apologetics, this simple observation may have far-reaching implications. Far from having existed since time immemorial, each of the hallmarks of modern Canadian legal professionalism, as that concept is now understood by lawyers’ governing bodies, is of relatively recent origin: monopoly, education, disciplinary powers, codes of ethics. What is more, the modern web of professionalism did not even emerge “naturally” from the irresistible though pure urges of colonial lawyers in British North America to emulate an Imperial model. It is rather the product of their deliberate attempt to create a new professionalism peculiarly suited to the needs of a twentieth-century North American state, and is heavily influenced from south of the border.¹⁴⁰ Leaders of the British legal professions all opposed the development of a professional ethical code when Winnipeg lawyers spear-headed that initiative in 1919.¹⁴¹ The Law Society of England and Wales has never had the sorts of powers that Canadian law societies now take for granted,¹⁴² while the English Bar, regardless of what the Law Society of Upper Canada may have said in 1833 or in 1979, did not even *begin* to develop into a disciplinary institution until the mid-nineteenth century!¹⁴³

A second point that emerges from the scholarly literature is that the legal profession has not always been as single-minded and pure of heart in the pursuit of the public interest as the law societies across Canada would have us believe. Very powerful arguments have been made to the effect that lawyers have used their professional organizations first and foremost to advance their own collective economic interest rather than the public interest at large.¹⁴⁴ For very many reasons, I think this is an unhelpful oversimplification, perhaps even an entirely misleading formulation.¹⁴⁵ Nonetheless, if one is committed to the workings of the free market (as most of the leaders of Canadian legal professions would claim to be), the institutions of the legal profession and the histories of many types of interference with free market principles, including freedom of contract, the suppression of economic competitors, restrictions on entry, and so on, do, to say the least, seem problematic. Certainly, Canadian legal professions have often been slow off the mark (generally responding only to great public pressure) to introduce many of the measures of public protection that contemporary law society leaders celebrate.¹⁴⁶

Third, the history of the organized legal professions in Canada, England, and the United States reveals that lawyers have not always virtuously sought to advance the cause of liberty, democracy, and the Canadian way. Professional organizations would be pleased to project the image that they stand somehow apart from politics. They do not. All organizations have their own internal politics – “office politics,” if you will. Moreover, the people who staff and set policy for organizations of all sorts have their own politics, values, opinions. These are not, cannot be, left outside the law society door. The politics that organized legal professions have in fact advanced has not always been liberative. In Canada, it is notorious that the British Columbia law society participated in a McCarthyite suppression of democratic communists after the Second World War,¹⁴⁷ while Auerbach has documented a pervasive racism, anti-Semitism, and class bias in the early “American Bar Association.”¹⁴⁸ The early-nineteenth-century English Bar conspired to preclude the admission of individuals of democratic principle – and was roundly criticized for this in the first Reform Parliament.¹⁴⁹ In fact, there is no well-documented case of an exercise of disciplinary powers against a barrister by the English Inns of Court during at least the first two-thirds of the nineteenth century that is entirely free from the taint of political suppression.¹⁵⁰ Auerbach, Horwitz, and Foster have all described an American legal profession captive to large corporate interests.¹⁵¹ Backhouse paints a rather unflattering picture of active opposition to equality for women within the Ontario legal profession.¹⁵² We do not know exactly how or why a code of professional ethics was first developed in Canada, but we do know that it emerged from a professional

culture that was xenophobic, elitist, and generally aligned with powerful interests.¹⁵³ Far from advancing a liberal notion of advocacy – now all the rage within our governing bodies – the original Canadian Bar Association code of ethics was heavy on duties to “the State” and *very* light on the theme of vigorous advocacy on behalf of the client.¹⁵⁴ It is distinctly possible that Canadian lawyers in the early twentieth century developed their profession wholly or partially in order to *constrain* a democracy that they found frightening.¹⁵⁵

Lawyers’ Histories: England, United States, Canada – Who Cares?

I do not offer these observations as an objective or complete “truth,” only as a partial corrective to some of the worst excesses of professional myth as it is propagated in Canada.

Bridging the gap between historical research and professional rhetoric is essential if we are to develop a perspective on the legal profession, its history, and its role in contemporary Canadian society capable of transcending Frye’s “cliché and prejudice and stock response.”¹⁵⁶ All too often what is presented as “professional” history is merely a melange of assumptions or guesses as to what the history of the legal profession might look like in England or Canada or the United States, far too casually backed up even with reference to existing secondary literatures, much less by credible primary research.

There is reason for optimism, to be sure. Whatever the failings of comprehension made manifest in their writings, it is encouraging that professional organizations recognize the importance of the history of the legal profession to contemporary practice. Canadian legal professions have generally taken steps to preserve their written records for future generations. Many Canadian law schools now have at least one legal historian on faculty, as do a number of university history faculties. Still, the history of the legal profession lives most vibrantly in contemporary apologetics. It is crucially important that we constantly seek to produce better history and, in so doing, better “myth.”

Notes

An earlier version of this chapter appeared as “In Pursuit of Better Myth: Lawyers’ Histories and Histories of Lawyers” (1994-95) 33 *Alta. L. Rev.* 730. It has been revised and reprinted here with permission.

- 1 J. de P. Wright, “The Value of Tradition” (1991) 25 *L. Soc. Gaz.* 441 at 441.
- 2 E. Hobsbawm, “Introduction: Inventing Traditions” in E. Hobsbawm and T. Ranger, eds., *The Invention of Tradition* (Cambridge: Cambridge University Press, 1983) 1 at 13. On the problematic use of historical modes of arguments and justifications in legal practice, see R.W. Gordon “The Struggle over the Past” (1996) 44 *Clev. St. L. Rev.* 123, and “The Past as Authority and as Social Critic: Stabilizing and Destabilizing Functions of History in Legal