"Doubly Damned Attornies": Lessons on Professional Regulation from Eighteenth-Century England

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Introduction

> The canker worms of human bliss, The serpents that suborn us From honour, honesty, and truth, Are treacherous Attornies. . . .
>
> Oh! If I had a darling child, May fire and brimstone burn me But I would rather cut his throat Than make him an Attorney. . . .
>
> And so believe there is in Hell An Abyss, which so forlorn is, That Satan ne'er has fathomed yet But keeps for the Attornies.
>
> Old Nick will have a Jubilee And doubly heat his furnace, When he of you a boiling gets You doubly damned Attornies. . . .
>
> Then will I lead a pious life, That when to die my turn is, My soul may find a resting place Where there are no Attornies.[1]

Perhaps unsurprisingly, given the public's opinion of lawyers even today, popular perception of legal practitioners in England in the eighteenth century was not favorable. The colorful example of public animus toward lawyers quoted above comes from the anonymously published poem, *The Attorney. By a Victim*.[2] Published in 1825, slightly after the time period of this inquiry, it nevertheless illustrates that popular hostility toward lawyers continued well into the nineteenth century (and, this author would argue, into the present day). Comprised of no fewer than twenty-six stanzas, the poem includes prize lines that betray the anger and disdain felt by many in England in the eighteenth century toward lawyers.

The public's dislike of lawyers created difficulties for the legal practitioner who wanted to improve his station in society, as Harry Kirk explains, "[T]here is the most ample evidence that by and large the fact of being an attorney disqualified a man from decent society in the seventeenth and much of the eighteenth century."[3] According to Robert Robson, public opinion of attorneys was so low that laymen lost even the expectation of professionalism from attorneys; they

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1. *The Attorney. By a Victim*, Lawyers, The Devil, And Other Evils (London?, no publisher 1829).

2. *Id.*

3. Harry Kirk, Portrait of a Profession: A History of the Solicitor's Profession, 1100 to the Present Day 72 (Oyez Publishing, 1976).

were seen as "quacks and pettifoggers; they exploited the mysteries of their craft for their own ends … They were expected to be hypocritical, selfish, and cunning, and were liberally abused for doing what was expected of them."[4] Robson continues, "[It] certainly gave a man no special prestige to be an attorney: rather was it a social handicap he had to overcome."[5]

The root of public hatred of lawyers most likely stemmed from the assumption that the inaccessible cost of legal services, which restricted many less fortunate people from access to justice, was entirely the fault of unscrupulous and greedy lawyers. A deeper cause of the dislike of lawyers, argues C. W. Brooks, is based on "general ideas about the functions of law" in the eighteenth century.[6] Many people saw lawsuits as disruptive to civic peace, a "breach of the social order," because they pit neighbor against neighbor, and people blamed lawyers for stirring up this dissention and social chaos for the sake of their own financial gain.[7]

Publicized cases of lawyer malpractice and unethical practices furthered the public's hostility toward many legal practitioners. Since medieval times the public had cried out against the unethical practice of ambidexterity, or practicing with a conflict of interest.[8] Therefore, in the layman's eyes, lawyers not only relied upon unsavory practices to make money, they enriched themselves by disrupting the social order and whipping up ill will and dissention between neighbors. Facing mounting criticism over unsavory practices and an explosion of litigation, legal professionals and government officials alike knew changes were necessary to reform the practice of law in England.

One of the most fundamental questions surrounding legal ethics is who should enforce them. Can the legal profession self-regulate, or is regulation more safely left to outside bodies? Can society at large regulate the conduct of lawyers? In the eighteenth century, England did not have a central legal regulatory body; actions taken to regulate the legal profession during that time were piecemeal and did not constitute a comprehensive regulatory program. A mostly uncoordinated mix of state regulation through Parliament and the judiciary, and self-regulation, motivated by social pressure from the public at large, all contributed to the effort to oversee the conduct of the legal profession.

Regulation of the English legal profession differed between restraints placed on barristers and those placed on the "lower branch," the attorneys and solicitors. Motivated by public enmity and pressure, four main social and political

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4. ROBERT ROBSON, THE ATTORNEY IN EIGHTEENTH-CENTURY ENGLAND 134 (Cambridge University Press, 1959).

5. *Id*.

6. C.W. BROOKS, PETTYFOGGERS AND VIPERS OF THE COMMONWEALTH: THE 'LOWER BRANCH' OF THE LEGAL PROFESSION IN EARLY MODERN ENGLAND 132 (Cambridge University Press 1986).

7. *Id*. at 133.

8. Jonathan Rose, *The Ambidextrous Lawyer: Conflict of Interest and the Medieval and Early Modern Legal Profession*, 7 U. CHI. L. SCH. ROUNDTABLE 137, 139 (2000); *Ambidexter*, BLACK'S LAW DICTIONARY (10th ed. 2014).

forces—Parliament, the judiciary, the professions themselves, and professional education and training—exerted their influence over the attorneys and barristers. While there were moments of harmony, these social and political forces largely represented a disorganized, reactionary approach to professional regulation. The lessons from their successes and failures recommend a multi-dimensional approach to regulation of the American legal profession today. First, this note will survey the regulation of the English legal profession in the eighteenth century, examining the four main social and political forces that attempted to control the professional behavior of barristers and attorneys. Next, this note will apply the lessons learned from eighteenth-century England to identify the best method for regulating the American legal profession today—a multi-dimensional scheme that employs a mix of legislation, judicial action, and self-regulation.

I. THE LEGAL PROFESSION

For the purposes of this inquiry into lawyer regulation, the main division of roles within the legal profession in the eighteenth century was between barristers, who argued cases in court before the judge and often a jury, and attorneys and solicitors, who built those cases outside the courtroom. Barristers advocated for their clients' interests before the courts, but had little contact with their clients directly.[9] By the end of the sixteenth century, solicitors and attorneys had become responsible for direct client contact and litigation work outside the courtroom.[10]

A barrister's main function was to argue his client's case before the court, and his involvement with the client and the legal dispute ended there. A "barrister did not stand in his client's place, but only used his skilled voice on his behalf," unlike an attorney, so barristers were not subject to the court's discipline in the same way as an attorney or solicitor, who were considered officers of the court.[11]

Pre-trial legal work such as preparing the cases for trial or filing pleadings was done by attorneys and solicitors, referred to as the "lower branch" of the legal profession in England.[12] Before the eighteenth century, solicitors and attorneys were not solely legal practitioners and often conducted non-legal business as well—they could more accurately be characterized as trained administrators than as lawyers.[13] By the eighteenth century, attorneys in particular had begun to specialize in legal practice. Attorneys and solicitors were subjected to more formal regulation by the courts than barristers; because the court licensed them, attorneys and solicitors were considered "officers of the court."[14] Courts "licensed" attorneys and solicitors to practice by adding them to the Rolls of a particular court,

9. ANDY BOON, THE ETHICS AND CONDUCT OF LAWYERS IN ENGLAND AND WALES 40-41 (Hart Publishing, 4th ed. 2014).

10. *Id*.

11. ROBSON, *supra* note 4, at 2.

12. BROOKS, *supra* note 6, at 2.

13. BOON, *supra* note 9, at 40.

14. *Id*. at 45; KIRK, *supra* note 3, at 67.

and an attorney or solicitor was required to be on the Rolls in every court in which he practiced. In addition to their position as officers of the court, attorneys legally stood in their client's place during the litigation, so the court had authority over attorneys as it would have over any party.[15]

Solicitors and attorneys were distinct groups of legal practitioners until the Judicature Act of 1873 reclassed them all as solicitors.[16] Most commonly in the eighteenth century, a solicitor's role was to assist attorneys.[17] This inquiry into regulation of the lower branch will primarily focus on attorneys rather than solicitors. Though barristers also were subject to a certain level of regulation, as this note will explore, the brunt of regulation during this time was targeted at the lower branch, attorneys in particular. Barristers were not as maligned in the public sphere as were attorneys and solicitors so there was less popular pressure to reform their practices.

II. BILLING PRACTICES

The understanding that the legal profession needed to be regulated stemmed in large part from perceived malpractice and dishonesty by lawyers. Legal practitioners commonly were criticized for over-charging fees.[18] There was not a uniform billing framework for both barristers and attorneys, as the two professions worked on different components of cases and therefore their bills varied, not only by virtue of the different services they offered, but also for differing levels of expertise. A common complaint during the eighteenth century was the expense of legal services, but the perceived overcharging by barristers and attorneys cannot entirely be attributed to malfeasance or dishonesty on the part of the lawyers. However, billing malpractice by attorneys who abused the pleading system was prevalent, and remained a persistent issue in England throughout the eighteenth century.

Parliament regulated legal billing as early as 1605, when it passed an act requiring lawyers to present detailed bills of services and charges to their clients.[19] This was a necessary reform because often a client would not have any idea during the course of the litigation how much a lawsuit was costing them, an unfortunate side effect of the particular way the English court system operated. As Brooks explains, "The total cost of a lawsuit was determined by the expense incurred in each of the procedural stages it went through before being decided upon."[20] The total cost of a lawsuit consisted of "[t]he money spent on [writs] plus the expense of making pleadings and consulting barristers together with the

15. ROBSON, *supra* note 4, at 2.

16. *Id*. at 5 n. 2.

17. *Id*. at 4.

18. BROOKS, *supra* note 6, at 132.

19. An Act to reform the Multitudes and Misdemeanors of Attornies and Solicitors at Law, and to avoid unnecessary Suits and Charges in Law, 3 Ja. 1 c. 7 (Eng.).

20. BROOKS, *supra* note 6, at 101.

fees of the attorney."[21] Therefore, if a case dragged on for longer than anticipated, or if a complex legal issue arose that required additional motions to be filed (and more appearances by a hired barrister to argue the motions in court), a case could become very expensive.[22] The attorneys and barristers were not to blame for the inherent unpredictability of lawsuit costs, though the public often did blame them; however, in the absence of regular oversight and regulation, many legal practitioners likely did exploit the system to increase their fees.

By 1720, the most desirable barristers were earning five guineas or more for an appearance before the court, compared to ten or twenty shillings paid to barristers for the same services in 1640.[23] A party to a lawsuit would need a barrister to appear every time the party's attorney filed a motion to be argued before the judge, in addition to trial. The expenses incurred by retaining a barrister to argue a case usually led clients to avoid hiring a barrister if possible, undergoing trial without oral arguments made on their behalf, but that was not always a feasible course of action.[24] The clients' reluctance certainly would have been compounded by the persistent rise in the cost of barristers' services, which began at the end of the seventeenth century and steadily continued into the eighteenth century.[25] David Lemmings explains, "[T]here had been at least a three-fold increase in the sums given for advocacy and advice over the course of the eighteenth century, during a period when consumer prices generally had doubled."[26]

Though the fees charged by barristers increased exponentially during the eighteenth century, it appears that the rise was not the result of illegality so much as a general increase in the cost of barristers' services across the profession; whether this was the result of malpractice or, more likely, inflation due to barristers raising their prices to match each other cannot definitively be determined. However, it seems inaccurate to call this "padding," because the cause may not have been dishonest. Though the price of barristers' services rose unchecked throughout the eighteenth century, it may not have been the result of malpractice or dishonest billing practices by the barristers.

Conversely, attorney billing malpractices were fairly regular and well-documented during the eighteenth century. Attorneys generally charged their clients by the page, which encouraged attorneys to create frivolously long (and therefore financially lucrative) pleadings and other documents to be filed with the court, a practice known as padding the pleadings.[27] James Oldham included three very

21. *Id.*

22. *Id.*

23. DAVID LEMMINGS, PROFESSORS OF THE LAW: BARRISTERS AND ENGLISH LEGAL CULTURE IN THE EIGHTEENTH CENTURY 97 (Oxford University Press, 2000).

24. BROOKS, *supra* note 6, at 192.

25. LEMMINGS, *supra* note 23, at 192.

26. *Id.* at 197.

27. 128 THE PUBLICATIONS OF THE SELDEN SOCIETY liii (James Oldham ed., 2013) [hereinafter SELDEN SOCIETY].

illustrative padded pleadings cases in the introduction to his work for the Selden Society on Sir Soulden Lawrence's case notes, which exhibit the judges' disapproval of the prevalent practice.[28] The pleadings in one such case, *Herriot v. Stewart*, prompted Lord Kenyon to grumble, "'Why did they so foolishly stuff their declarations with all these terms?'"[29] The most likely explanation is that the attorney was attempting to extort more fees from his client by adding frivolous and unnecessary terms to puff up the page count, and therefore the cost, of the pleading.

In *Koops v. Chapman*, another padded pleadings case identified by Oldham, an attorney was disciplined and ordered to pay costs after he submitted to the court an eighty-page declaration, "'when the learned Judge declared, eight would have been sufficient.'"[30] And finally, in a perfect illustration of the abuses of pleadings padding, the attorney in *Cowan v. Berry* filed a declaration "'consist[ing] of 480 counts, containing between 2 and 3000 sheets, and measuring in length upwards of 100 yards.'"[31] This case of pleading padding was compounded by the fact that it was a *qui tam* action, meaning a private party was suing on behalf of himself and also, in part, on behalf of the government.[32] *Qui tam* actions were particularly susceptible to abuse by dishonest and greedy attorneys, because as an action technically on behalf of two parties, clients were charged for double copies of all the pleadings.[33] Perhaps most egregiously, often in *qui tam* actions the attorney would charge his client double for the (likely padded) duplicate pleadings copies, and then abandon the case as soon as the pleading copy fees were paid.[34] This obvious misconduct was discouraged by the court, but it only was curbed at last by a Rule of the Court of King's Bench ordered by Lord Kenyon in 1795.[35] For most of the eighteenth century, the absence of regulation allowed unscrupulous attorneys to abuse the pleading system for greater personal financial gain, at the expense of their clients.

III. OTHER LAWYER MALPRACTICE

Though the practice of padding pleadings prompted serious concern from Lord Kenyon and other judges, additional types of attorney misconduct and malpractice existed. One such offense was ambidexterity, the term for a conflict of interest.[36] An ambidexter was "[a] lawyer who takes money from both sides of a

28. *Id.* at liii–liv.
29. *Id.* at liii.
30. *Id.*
31. *Id.* at liv.
32. *Id.*; *qui tam action*, BLACK'S LAW DICTIONARY (10th ed. 2014).
33. SELDEN SOCIETY, *supra* note 27, at liv.
34. *Id.* at lv.
35. RULES AND ORDERS ON THE PLEA SIDE OF THE COURT OF KING'S BENCH BEGINNING IN EASTER TERM, 1731, AND ENDING IN TRINITY TERM, 1795 56 (W. Bulmer and Co. 1795).
36. Rose, *supra* note 8, at 138.

dispute," either by doing work for both parties to a suit simultaneously, or by switching sides in the middle of a dispute.[37] According to Alexander Rose, "Ambidexterity was an important and common form of medieval lawyer misconduct. This medieval conflict of interest was apparently sufficiently ubiquitous to prompt significant adverse public reaction."[38] The charge of ambidexterity epitomized the stereotype of a greedy, unscrupulous attorney who plays both sides for financial gain, and played heavily into the public's dislike of attorneys.

Another form of attorney misconduct was barratry, stirring up baseless litigation or filing a lawsuit without the client's consent.[39] Whether an attorney had gone beyond regular diligence and engaged in barratry was a decision to be made by the judge, as with other instances of professional misconduct.[40] Given the public attitude toward the increase in litigation in the eighteenth century and toward attorneys generally, an accusation of barratry against an attorney would have been particularly damning.

Many judges, particularly Lord Kenyon, were plagued by attorney nonattendance at court. Distressingly, attorneys sometimes would not appear at court when their clients' cases were called, but still would charge their clients a fee as if they had attended.[41]

This act of attorney malpractice particularly bothered Lord Kenyon, who expressed hope that abandoned clients would bring suit against their absent attorneys.[42] Complaining about the situation, Lord Kenyon "said 'it was scandalous and infamous for Attorneys to charge their Clients for their non-attendance and he wished with all his heart that Clients would bring actions against such Attorneys for negligence.'"[43]

The frequency of the reporting of attorney nonattendance in the *Times of London* and the harsh descriptions suggest a frustration by Lord Kenyon and his peers. There are eleven such entries from July 1789 to December 1801.[44] The entry from November 11, 1789, says, "'Yesterday when Lord Kenyon came into the Court of King's Bench, there was not one Counsel present.'"[45] Again on December 3, 1801, the *Times* reported that "'Lord Kenyon was punctual to time, as usual; but when the Causes were called on, the Attorneys did not appear.'"[46] Not only do these entries show that attorney nonattendance must have caused

37. *Ambidexter*, BLACK'S LAW DICTIONARY (10th ed. 2014).
38. Rose, *supra* note 8, at 139.
39. *Barratry*, BLACK'S LAW DICTIONARY (10th ed. 2014).
40. Brooks, *supra* note 6, at 137.
41. SELDEN SOCIETY, *supra* note 27, at lvi.
42. *Id*.
43. *Id*. at lvi-lviii. James Oldham has compiled a chart of instances of attorney non-attendance at court from the *Times of London* for the Selden Society. *Id*. at lvii.
44. *Id*. at lvii.
45. *Id*.
46. *Id*.

significant and frustrating delays within the court system, they reveal that for over ten years nothing curbed this irresponsible practice.

IV. ATTEMPTS AT REGULATION

A. PARLIAMENT

The most far-reaching regulator of the legal profession was Parliament. Its influence over the barristers was strictly informal, exercised through those members of Parliament who were also judges, prominent barristers, or senior officials at the Inns of Court. Parliament's regulatory power over the lower branch of the profession, however, was in the form of legislation; Parliament passed several important laws in the eighteenth century concerning the conduct, qualifications, and education of attorneys and solicitors.

The first and most important piece of legislation of the eighteenth century concerning regulation of the legal profession was the Attorneys and Solicitors Act of 1729.[47] This Act established that Rolls of attorneys must be maintained by every common law court, and that an attorney must be on the Roll in order to practice in that court.[48] The Act of 1729 also laid out the most significant reform of the eighteenth century, the requirement that anyone seeking admission to the Rolls as an attorney must be articled (apprenticed) to an admitted attorney to serve a clerkship of no less than five years.[49] During that time, the attorney would train his clerk in the profession, and prepare him for admittance to the Rolls; an attorney could only keep up to two clerks at any given time.[50] Upon completion of his articled clerkship, a clerk may apply to one of the common law courts for admittance to the Rolls. His articles would have to be presented to the court, and he himself would have to submit to a legal examination by one of the judges of that court to determine whether he had the requisite legal expertise and knowledge to practice as an attorney in the court. If the judge found his training to be satisfactory, or sometimes upon the affidavit of the attorney under whom he served his clerkship, the clerk would be admitted as an attorney to the Rolls of that court and could begin his practice.[51] The Act also continued the requirement that attorneys admitted to the Rolls take an oath of office, which stated, "I do swear, That I will truly and honestly demean my self in the Practice of an Attorney, according to the best of my Knowledge and Ability. So help me God."[52] Though the Act of 1729 was a landmark piece of legislation in attorney reform in the eighteenth century,

47. An Act for the better Regulation of Attornies and Solicitors, 2 Geo. 2 c. 23 (Eng.) [hereinafter Attorneys and Solicitors Act 1729].

48. KIRK, *supra* note 3, at 72.

49. Attorneys and Solicitors Act 1729.

50. *Id.*

51. *Id.*

52. *Id.*

it does not appear to have been a part of a larger program of reform.[53] At least some members of Parliament appear to have been interested in maintaining the Act of 1729, because Parliament in 1732 passed legislation which amended and extended the earlier Act.[54]

In 1785, Parliament passed the Stamps Act, which required all attorneys and solicitors to procure an annual certificate to practice in any of His Majesty's courts, and of course to pay the £5 stamp duty.[55] Though this may appear simply to be a taxation scheme, the Act also provided that attorneys and solicitors practicing without an annual certificate could be prosecuted.[56] In 1797, Parliament clarified the penalty for a successful prosecution in another Stamps Act in 1797, imposing a £50 penalty for practicing without a certificate; the offending solicitor or attorney also was barred from practice until he procured (and paid for) a certificate.[57]

Parliament's interest in regulating the legal profession occasionally coincided with groups within the profession that were attempting to self-regulate. The Society of Gentlemen Practisers, discussed in greater detail below, occasionally sent reform bill proposals to Parliament, and lobbied for proposed reform bills the Society supported.[58] For example, the Price of Bread Act of 1738 further extended the Attorneys and Solicitors Act of 1729 until 1749.[59] In 1748, the Society of Gentlemen Practisers began efforts to lobby Parliament to extend the Act of 1729 past its 1749 expiration date.[60]

B. EDUCATION

Some regulatory influence was exerted over the legal profession by those who controlled the education of incoming legal practitioners. However, the decline of the Inns of Court in the eighteenth century and the poor enforcement of the training aspect of the articled clerkship program for attorneys meant that the

53. ROBSON, *supra* note 4, at 12.

54. An Act to explain and amend an Act made in the second Year of his present Majesty's Reign, intituled, *An Act for the better Regulation of Attornies and Solicitors*, 6 Geo. 2 c. 27 (Eng.).

55. An Act for granting to his Majesty certain Duties on Certificates to be taken out by Solicitors, Attornies, and others, practising in certain Courts of Justice in *Great Britain*; and certain other Duties with respect to Warrants, Mandates, and Authorities, to be entered or filed of Record, as therein mentioned, 25 Geo. 3. c. 80 (Eng.).

56. *Id.*

57. An Act for granting to His Majesty certain Stamp Duties on the several Matters therein mentioned, and for better securing the Duties on Certificates to be taken out by Solicitors, Attornies, and others, practicing in certain Courts of Justice in *Great Britain*, 37 Geo. 3 c. 90 (Eng.).

58. THE RECORDS OF THE SOCIETY OF GENTLEMEN PRACTISERS IN THE COURTS OF LAW AND EQUITY, CALLED THE LAW SOCIETY: COMPILED FROM MANUSCRIPTS IN THE POSSESSION OF THE INCORPORATED LAW SOCIETY OF THE UNITED KINGDOM 330 (Incorporated Law Society, 1897) [hereinafter RECORDS].

59. An Act for continuing the Act made in the eighth Year of the Reign of her late Majesty Queen Anne, to regulate the Price and Assize of Bread; and for continuing, explaining and amending the Act made in the second Year of the Reign of his present Majesty, for the better Regulation of Attornies and Solicitors, 12 Geo. 2 c. 13 (Eng.).

60. RECORDS, *supra* note 58, at 29.

educational arm of lawyer regulation was not very effective at controlling the quality of new legal practitioners.

Barristers occasionally attended university before beginning their legal careers, but their primary legal education occurred at the Inns of Court through lectures, moot courts, and books on law.[61] However, the benchers of the Inns became lax in their instruction throughout the eighteenth century. The apparent lack of instruction provided to barristers who were training for their calls to the bar prompted Timothy Cunningham to complain in his 1780 history of the four Inns of Court,

> But at this day what are the qualifications necessary for a gentleman who is a candidate for the bar? Is he examined every term or vacation? No. Are any instructions given him by the benchers, or any other by their order relative to what he should read? No. Is he obliged to give any evidence of his having read a single page of any law book? No. Does it appear that he can even read and write his name? Yes. Before he is permitted to dine in the hall, he is obliged to execute a bond . . . this is the only proof he is *obliged* to give of his learning.[62]

By neglecting their educational responsibilities, the Inns of Court relinquished their main regulatory power over the barristers.

The attorneys faced more formalized regulation of their education and training than did the barristers, but those with the power to exercise this authority similarly relinquished their opportunity to influence the quality of practitioners in the lower branch. The Act of 1729 instituted the attorney apprenticeship framework which was to last the rest of the eighteenth century. An aspiring attorney was required to sign articles of clerkship to serve an admitted attorney as his clerk for a term of no less than five years, during which time the attorney would instruct the clerk in the attorney's profession and general legal knowledge.[63] After at least five years of service, and when the attorney was satisfied the clerk was ready to undertake practice as an attorney, the attorney would sign an affidavit affirming that his clerk was prepared to be admitted to the court.[64] Finally, the judge of the court to which the clerk sought admittance would administer a test to the clerk to test his legal knowledge.[65] If, after examination, the judge was satisfied with the clerk's legal proficiency, the clerk would be admitted to practice as an attorney in that court.

However, this framework rarely was followed in reality. Sometimes an attorney would sign an affidavit swearing to the clerk's legal proficiency, even if the clerk was not prepared to practice, in exchange for money; the clerk could

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61. MICHAEL BIRKS, GENTLEMEN OF THE LAW 41 (Stevens & Sons Ltd., 2d ed. 1960).

62. TIMOTHY CUNNINGHAM, THE HISTORY AND ANTIQUITIES OF THE FOUR INNS OF COURT vi (London, printed for G. Kearsly 1780).

63. Attorneys and Solicitors Act 1729.

64. *Id.*

65. *Id.*

essentially purchase admittance to the Rolls by bribing his master.[66] While some clerks paid their attorneys for the green light to practice, other clerks performed menial labor for their attorneys in exchange for an affidavit.[67] In such a situation, the clerk likely was not receiving substantive training and instruction in the law during his articled clerkship, like the law intended, but essentially was a free household servant for the attorney and his family. In some extreme cases, a man who wanted admission to practice would pay an unscrupulous attorney to execute articles of clerkship and backdate them five years, so the aspiring attorney could present himself for admission the very next day.[68] Attorneys' disregard for the rules of articled apprenticeship laid down by the Act of 1729 were a missed opportunity to exercise some control over the education and training, and therefore the professional quality, of the incoming generation of attorneys.

C. SELF-REGULATION

The most significant development in lawyer regulation during the eighteenth century was the push toward self-regulation of the legal profession. The barristers were regulated in theory by the governing authorities of their Inns, though in the eighteenth century this model had not yet fully manifested. The attorneys were more disorganized than the barristers and did not have anything like the Inns, so attorneys primarily were disciplined by the courts they practiced in, even while the Inns were developing into a regulatory body for their barristers.[69] Though neither model was entirely effective, the seeds were planted for the future, as the next century would see the creation of the Law Society to oversee the conduct of attorneys and solicitors, which along with the Inns of Court, exists to this day.[70]

The four Inns of Court – Gray's Inn, Lincoln's Inn, Middle Temple, and Inner Temple—were all located in London. Any aspiring barrister was required to join an Inn before he could begin training for his call to the bar.[71] Once a barrister was called to the bar, he would begin practicing in one of the chambers within his Inn.[72]

According to Boon, the Inns "provided a framework for effective informal discipline," including reporting a barrister's malpractice to the head of his chambers.[73] The Inns also exerted some influence over which students would receive a call to the bar and become barristers, effectively acting as gatekeepers to the

66. ROBSON, *supra* note 4, at 54.
67. *Id*. at 58.
68. KIRK, *supra* note 3, at 75.
69. BOON, *supra* note 9, at 44.
70. *Id*. at 48. Originally chartered as "'The Society of Attorneys, Solicitors, Proctors and others not being Barristers, practicing in the Courts of Law and Equity of the United Kingdom'" in 1831, this organization changed its name to the Law Society in 1903. *Id*. at 48–49.
71. *Id*. at 43.
72. *Id*.
73. *Id*.

highest branch of the legal profession.[74] Though the Inns were the pipeline to practicing as a barrister in the court, they acted with a certain level of independence from the courts. For example, the Inns expelled attorneys and solicitors in the seventeenth century.[75] This came into conflict with the judiciary when in 1704 the judges of the common law courts ordered that all attorneys should belong to an Inn of Court or Chancery.[76] Even in the face of an order from the judges, the Inns refused to admit the attorneys and solicitors.[77]

The most interesting example of professional self-regulation conceived during the eighteenth century is the Society of Gentlemen Practisers, an autonomous body of attorneys unaffiliated with the courts who acted as watchdog against corruption of the profession. The Society was created in 1739 for the purpose of rooting out and condemning attorney malpractice, and at their first meeting in 1739, the Society's official meeting minutes record that "the Meeting unanimously declared its utmost abhorrence of all male and unfair practice, and that it would do its utmost to detect and discountenance the same."[78] The Society agreed to meet as often as necessary to "take into consideration any matters relating to the benefit of suitors, and the honour of the profession."[79] Perhaps most significantly, the Society of Gentlemen Practisers "represented the first spontaneous gesture from within the profession to discipline itself and in the long run to get rid of the rogues and rascals who disgraced it."[80]

One area of concern for the Society was that men who were improperly admitted as attorneys in court were impugning the profession by wrongfully practicing as attorneys. The Society often exhorted its members to report to the Society any attorneys who were improperly admitted, eventually making it a standing Order of the Society for members to do so.[81] Upon such an allegation, the Society would then refer the matter to a committee to investigate – if the allegation of improper admittance was true, the Society would then petition the applicable court to have that attorney struck from the Rolls.[82]

Additionally, members could lodge complaints of illegal practices against other attorneys before the Society, and Society committee members would prosecute those claims in court on the Society's dime, including engaging a barrister to argue in court.[83] Minutes from a Society meeting in February of 1752 state, "It was also ordered, that the Committee take notice of and prosecute, at the

74. *Id*. at 44.
75. *Id*. at 43.
76. ROBSON, *supra* note 4, at 7.
77. *Id*.
78. RECORDS, *supra* note 58, at 1. "Male" most likely is how they pronounced "mal" i.e. malpractice. *Id*. at iii n.1.
79. *Id*. at 5.
80. KIRK, *supra* note 3, at 73.
81. RECORDS, *supra* note 58, at 293.
82. *Id*.
83. *Id*. at 145, 294.

Society's expense, any Attornies guilty of illegal practices, and every Member of the Society was desired to give notice to the Deputy Secretary of all such illegal practices as should come to their knowledge."[84] The Society was resolved to pursue malpractice cases against attorneys "for the credit of the profession,"[85] and instituted a subscription fee for members in order to "defray the contingent expenses lately incurred in protecting and supporting the general interests of the profession, and to make provision for similar expenses in future."[86]

The most common malpractice prosecutions undertaken by the Society were against men illegitimately practicing as attorneys. For example, in 1766 the Society undertook the prosecution of John Jackson, accusing him of practicing as an attorney when he was merely an articled clerk.[87] In 1746, the Society successfully had Landon Jones struck from the Roll after Jones had been convicted of a crime and sentenced to the pillory, but continued to practice as an attorney.[88] In 1774, the Society discovered that Charles Cotterell had been admitted to practice in court without having completed a five-year articled clerkship and prosecuted him for the same, resulting in his being struck from the Roll.[89] The Society also supported prosecutions of attorney malpractice that they themselves did not initiate. In the case of John Sliper, the Society discovered he was already being prosecuted by someone else, but they resolved to assist this prosecution and contribute financially if necessary.[90] The Society also aimed to discourage clerks from illegally practicing in court under their attorneys' names, resolving that "proper methods to prevent such a practice and to remedy that evil should be taken at the expense of the Society."[91]

Not every allegation investigated by the Society turned out to be true, and even if true, the courts did not always decide the cases in the Society's favor. In 1775, a committee of the Society investigated an allegation that William Brown had begun practicing as an attorney before being admitted in any court, but the committee decided that there was no basis for the allegation and did not pursue any prosecution of Brown.[92] In 1746, the Society wanted to strike from the Roll John Hodgson, who faked his articles of clerkship. However, the court decided that because Hodgson had been so long in practice without any complaints against him, the court would allow him to remain on the Roll.[93]

Perhaps the most interesting prosecution the Society involved itself in was the case of William Wreathocke. The underlying case is itself remarkable –

84. *Id*. at 51.
85. *Id*. at 304.
86. *Id*. at 228.
87. *Id*. at 304.
88. *Id*. at 19–20, 22.
89. *Id*. at 152, 306.
90. *Id*. at 80–81, 84.
91. *Id*. at 33.
92. *Id*. at 128.
93. *Id*. at 20–22.

Wreathocke, an attorney, brought suit on behalf of his client, a highway robber, to recover from his client's partner in crime his client's share of the proceeds of their robberies.[94] The suit was widely considered a disgrace, and was dismissed. The two robbers eventually were executed, and Wreathocke was fined £50 for his part in filing the offensive lawsuit.[95] At some point after this case, Wreathocke *himself* became a highway robber, was convicted for such crimes in 1735, and received a death sentence which was commuted to transportation to America.[96] A few years later, the Society somehow found out Wreathocke was back in England and practicing as an attorney again and resolved to write to all of the courts in which he was practicing to get him struck off their Rolls as he was a disgrace and an embarrassment to the profession.[97] However, when the Society investigated further, they discovered that Wreathocke coincidentally was already in the Fleet Street prison for contempt of court in the Court of Common Pleas.[98] The Society eventually succeeded in a suit to get Wreathocke struck from the Roll of Court of Common Pleas.[99] This case illustrates the guiding principle of the Society – to uplift the legal profession and rehabilitate its reputation by purging it of disgraceful and scandalous attorneys.

Apart from litigation, the Society sometimes lobbied Parliament for greater regulations on the legal profession. For example, the Society debated asking Parliament to amend the Price of Bread Act of 1738 to prohibit attorneys from practicing while imprisoned[100] after the case of John Sparry.[101] Sparry undertook client work while imprisoned in the Fleet Street prison.[102]

Though the Society was not an official representative of all attorneys in England, it leveraged whatever tools it had at its disposal toward achieving its regulatory aims. These tools were primarily money and attorneys, to prosecute offenders and lobby Parliament for its desired reforms and regulations. The Society's members lived and worked primarily in London, but the Society screened the entire list of people seeking to be added to the Rolls so the Society kept an eye on potential additions to the attorney pool all around England.[103] The Society resolved to stop admission of unqualified practitioners to the Rolls by appealing to first the courts, then to the judges of the courts, and finally to Parliament, if necessary.[104]

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94. William Renwick Riddell, *A Legal Scandal Two Hundred Years Ago*, 16 AM. BAR ASSOC. J. 422, 422 (1930).
95. *Id.*
96. *Id.*
97. RECORDS, *supra* note 58, at 77.
98. *Id.* at 78–79.
99. *Id.* at 85.
100. *Id.* at 294.
101. *Id.* at 64–65.
102. *Id.*
103. ROBSON, *supra* note 4, at 35.
104. RECORDS, *supra* note 58, at 80.

The Society is a fascinating prototype of self-regulation. Perhaps punching above its relative weight class, the Society boldly resolved to make it known to the courts in England that they "would at all times be ready, at their own expense, to prosecute Attornies for any unfair practices, and would use their utmost endeavours to detect all illegal practices, and to prosecute Attorneys or Sollicitors who should be surreptitiously admitted."[105]

Public perception of the legal profession, which certainly was a motivating factor in many of the attempts at reform discussed herein, also influenced attempts at self-regulation. The public hatred toward lawyers certainly influenced society's reluctance to accept many legal practitioners into the ranks of polite society, which created a considerable roadblock for attorneys who wanted to rise in society and gain respectability. As was illustrated by the actions of the Society, who were driven to purge corrupt and unscrupulous attorneys from their ranks in order to rehabilitate the reputation of their profession in society at large, public perception of lawyers likely acted as a motivating force behind efforts at self-regulation within the legal profession. As Robson argues, changes in the standards for professional conduct of lawyers really began to take hold within the profession not when Parliament or the judiciary stepped in with attempts at regulation, but when attorneys bowed to social pressure and realized that if they wanted to occupy a more respectable place in society they must implement self-regulatory measures.[106]

D. JUDICIARY

Perhaps the most natural regulators of the conduct of barristers and attorneys were the judges before whom they practiced. In exercising control over the trials they oversaw, judges also had the power to issue orders of the court and hand down decisions in particular cases which bore upon the conduct of barristers and attorneys.[107] The Rules and Orders issued by judges covered a wide variety of issues, from clarifying administrative procedures to prescribing at what time attorneys were to appear to file their pleadings.[108] However, judges also used this power to issue rules and orders for their courtrooms to dictate professional legal standards, or to correct perceived lawyer malpractice.

Many of the issues plaguing the legal profession in the eighteenth century were not novel. As the records of rules and orders issued in the Court of King's Bench show, judges had undertaken to correct many of these malpractices by barrister and attorneys a century earlier. In 1662 an order was issued in the Court of King's Bench mandating that all attorneys who were on notice must attend court,

105. *Id*. at 65.
106. ROBSON, *supra* note 4, at 135.
107. RULES, ORDERS AND NOTICES IN THE COURT OF KING'S BENCH (London, Henry Lintot 1747).
108. *See generally id.*

or risk a fine of ten shillings.[109] An earlier 1654 order foreshadowed the actions taken later in the eighteenth century by the Society of Gentlemen Practisers and others to curb unlicensed legal practice by commanding "[t]hat no Person practice in another's Name, nor that any Attorney knowingly permit another to practice in his Name, upon pain of being put out of the Roll."[110]

The records of rules and orders issued by judges during this time also offer interesting insight into which actions by lawyers most concerned the judges. For example, the judges on the Court of King's Bench must have had an issue with attorneys standing as bail for their clients, because in 1740 they issued an order declaring "[t]hat no Attorney of this, or any other Court, shall be bail in any Action or Suit depending in this Court."[111] This type of prohibition illustrates the authority judges could exercise over the conduct of barristers and attorneys by issuing rules and orders from the bench.

Outside of issuing rules and orders relating to professional standards and conduct within their courts, the judges primarily regulated the barristers by influencing who received a call to the bar through their positions as benchers of the Inns of Court. A bencher, or Master of the Bench, was a senior member of an Inn of Court, many of whom held positions of authority within the Inn.[112] If made a judge, a barrister automatically became a bencher within his Inn, and one of the prerogatives of the benchers was to choose the best students to argue the moot trials at their Inns.[113] Judges began to call to the bar only those students who argued the moot trials, presumably the best students at the Inn—in this way, judges effectively chose who became a barrister while maintaining a veneer of neutrality.[114]

Judges exerted more transparently direct control over who was allowed to practice as an attorney by their power to add to or strike from the Rolls of their courts. Attorneys could be struck for misconduct, or for being improperly admitted to the Rolls in the first place. However, judicial discretion often played a role in these decisions, making the process much less uniform and regular than it would appear. Three such cases before Lord Kenyon, sitting on the King's Bench, illustrate the subjectivity of these decisions. *Ex parte Rooswell*, a case before the King's Bench in Trinity Term 1795, shows that Lord Kenyon took this responsibility seriously, even in cases in which he would have preferred not to act. Beginning in 1785, Rooswell was apprenticed to an attorney named Jones, and after Jones' death to one Findlay, but neither apprenticeship lasted the required term of five years.[115] During this time, Rooswell was also employed as a clerk to the magistrates at Shadwell, eventually attaining the position of principal

109. *Id*. at Easter 14 Car. 2 1662.
110. *Id*. at Michaelmas 1654 § 1.
111. *Id*. at 14 Geo. 2 1740.
112. BIRKS, *supra* note 61, at 41.
113. *Id*.
114. *Id*.
115. SELDEN SOCIETY, *supra* note 27, at 80.

clerk.[116] Rooswell was admitted as an attorney, presumably on the assumption that his experience as principal clerk for the Shadwell magistrates constituted an articled clerkship to an attorney. Unfortunately for Rooswell, Lord Kenyon ruled that as Rooswell had not completed a five-year term with the attorney to whom he was articled (not the Shadwell magistrates), and struck him from the Rolls.[117] While announcing his decision, Lord Kenyon did remark upon the apparent unfairness of this ruling, as the case notes of Sir Soulden Lawrence record: "Lord Kenyon said if he had any discretion he might leave [Rooswell] in his present situation, but that he had not . . . Rule absolute to strike him off the roll, but to be expressed in the rule that it was for want of due service only."[118]

Less than a year later in Easter Term 1796, Lord Kenyon heard *Ex parte Hamilton*, a similar case for striking from the Rolls an attorney who had been admitted and practiced before the King's Bench for ten years without ever serving an articled clerkship.[119] In this case, unlike *Ex parte Rooswell*, Lord Kenyon appeared to believe he *did* have discretion to consider the circumstances of attorney Hamilton's position. According to Lawrence's notes, "Lord Kenyon[,] understanding that [Hamilton] had been admitted ten years, said it was too long ago for the court to enquire into it."[120]

Six months later, in *Ex parte Harris*, Lord Kenyon brought down the hammer on both the unqualified attorney and the attorney's master.[121] Harris was sued for being admitted as an attorney without having served an articled clerkship along with Davenport, the attorney to whom Harris nominally was articled but with whom Harris never actually worked.[122] Lord Kenyon struck them both from the Rolls for violating the Act of 1729, though attorney Davenport was restored to the Rolls less than a year later after the court decided his suspension was sufficient.[123] The disparity between these three cases, decided by the same judge in the same court over less than two years, illustrates that judges did sometimes exercise discretion in disciplinary matters.

Under the Act of 1729, judges were responsible for conducting an examination of applicant attorneys to ensure they were equipped to practice as attorneys.[124] This responsibility should have acted as a powerful firewall against admitting unqualified attorneys to practice in court, but it is very doubtful that the judges ever actually undertook such examinations of applicants.[125]

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116. *Id*. at 80–81.
117. *Id*. at 81.
118. *Id*.
119. *Id*. at 139.
120. *Id*.
121. *Id*. at 154.
122. *Id*.
123. *Id*. at 154, 154 n.28.
124. Attorneys and Solicitors Act 1729.
125. Kirk, *supra* note 3, at 72.

In addition to striking attorneys from the Rolls for misconduct or for improper admission, judges also exercised their authority to cancel articles of clerkship if the articles were misused. One famous example is Frazer's Case from 1757, in which Frazer, an attorney, articled Smith, a turnkey at the King's Bench prison, as his clerk solely to solicit business for him in the prison, without any intention of actually training Smith as his clerk.[126] As such an arrangement clearly was not conducive to Smith receiving a proper education as a clerk, the pretext was exposed and Smith's articles were cancelled.[127] Similarly, in a Society of Gentleman Practisers case, Robert Simpson was struck off the Roll for articling William Hurley, who was at the time of his supposed clerkship a domestic servant in another man's household.[128] It was clear to the court that Hurley was not actually receiving an education as a clerk from Simpson, as he was a domestic servant elsewhere.[129] In that case, the issue of cancelling Hurley's articles was moot; by the time of the prosecution against Simpson, Hurley had been hanged for stealing from his master.[130]

Some argue that judges cannot be blamed for their less than robust role in regulating the legal profession because their authority was limited to lawyers who practiced in their courts, or who were brought before their courts as party to a lawsuit.[131] However when such circumstances did arise, a few memorable rules were laid down by judges that affected the legal profession. In one such case, Lord Mansfield and the unanimous judges laid down an absolute rule that attorneys convicted of felonies are not fit to practice.[132] Mansfield reportedly said, "'Having been convicted of felony, we think the defendant is not a fit person to be an attorney. Therefore let the rule be made absolute.'"[133] In another case, the judges affirmed that clients could sue their attorneys for negligence in practice, and recover damages.[134]

Though the judges handed down many decisions and rules which sought to regulate the behavior of the lawyers who appeared before them in court, the lack of uniform and consistent court reporting meant these decisions and rules were nearly inaccessible to the average legal practitioner. Kirk reports that the eighteenth century saw almost five hundred decisions handed down by the judges that were relevant to lawyers' conduct, but until they were compiled into a book by Maugham in 1825 the decisions were scattered throughout various reporters,

126. Frazer's Case (1757) 97 Eng. Rep. 320; 1 Burr. 291.

127. *Id*.

128. RECORDS, *supra* note 58, at 306–08.

129. *Id*.

130. *Id*.

131. KIRK, *supra* note 3, at 73; ROBSON, *supra* note 4, at 19.

132. Ex parte Brounsall (1778) 98 Eng. Rep. 1385; 2 Cowp. 829 (striking an attorney convicted of a felony from the Rolls of the Court of King's Bench).

133. *Id*.

134. Russell v. Palmer (1767) 95 Eng. Rep. 837; 2 Wils. K.B. 325.

utterly useless to a profession in need of easily-accessible guidelines for professional conduct.[135]

V. LESSONS FOR TODAY

The English legal profession in the eighteenth century, unchecked by any formalized framework of regulation, was extremely unpopular. Calls for reform mounted throughout the century, prompted by an increase in the occurrence and costs of litigation, and the popular perception of lawyers as unethical and dishonest men who sought to enrich themselves by preying on otherwise good-natured and peaceable Englishmen.

Though no central regulatory body existed to oversee the legal profession, four different powerful forces exerted their influence in sometimes effective, but uncoordinated, attempts at regulation. Parliament exercised its control over the legal profession formally by passing legislation that regulated the conduct and qualifications of attorneys, as well as informally taking part in choosing which students at the Inns of Court would be called to the bar.

The judiciary, perhaps the most hands-on force of influence, regulated lawyers' conduct by announcing holdings in cases involving lawyer misconduct, and issuing rules and order of their courts, which dictated how lawyers must conduct themselves at court. Statutorily, the judges also had the authority to examine attorneys before their admittance to the Rolls, and to strike attorneys from the Rolls for misconduct, but judges rarely exercised the former power.

Control of the lawyers' training and education should have acted as a powerful gatekeeping mechanism to ensure the quality of new barristers and attorneys, but those with the authority to exercise this power often did not do so, or actively subverted such efforts. This was particularly apparent within the program of articled clerkships for attorneys, the rules of which were easily abused and circumvented by enterprising clerks and the attorneys who accepted their bribes.

Finally, perhaps the most effective method of regulating the legal profession came from within. Public opinion of lawyers was so low, and at times even openly hostile, that in the interest of self-preservation, individual actors within the legal profession took crucial first steps toward reform and self-regulation. The most interesting illustration of the phenomenon is the Society of Gentlemen Practisers, a group of attorneys who took it upon themselves to rehabilitate the reputation of their profession by seeking out and prosecuting misbehaving and otherwise corrupt attorneys.

Though none of these avenues of regulation on its own completely reformed the English legal profession, the first steps were taken toward more formalized, centralized regulation of lawyers. The experience of attempting to regulate the English legal profession in the eighteenth century provides many lessons

135. KIRK, *supra* note 3, at 76.

regarding oversight of legal practitioners today in our own country and time. All of the necessary pieces were there, and had they been properly coordinated and enforced, they could have created a fairly robust framework for regulation. A hybrid system of state regulation and self-interested self-regulation, in addition to a healthy system of legal education, can work together to provide necessary regulation of the legal profession.

The experience of eighteenth-century England holds many lessons for those seeking to reform the American legal profession today. While complete self-regulation is not ideal, neither is total control of the profession by the state. A multidimensional approach to regulation, employing institutions both internal and external to the profession, presents the most workable regulatory scheme. Professor David B. Wilkins agrees, arguing that lawyer regulation should employ all four existing "enforcement systems": disciplinary controls, liability controls, institutional controls, and legislative controls.[136] However, without cooperation and coordination between these systems, Professor Wilkins warns that such a multi-dimensional strategy will not be effective.[137] The wisdom of this statement is confirmed by an examination of attempts at lawyer regulation in eighteenth-century England, in which a similar set of "enforcement systems" each attempted, in an uncoordinated approach, to regulate the legal profession, with limited success. Today, American legal ethics reformers should focus their efforts on improving our multi-dimensional regulatory scheme by strengthening cooperation between legislatures, the judiciary, and bar ethics committees in enforcing ethics rules.

136. David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799, 805–08, 873 (1992).
137. *Id.* at 873.