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Exaggeration: Advertising, Law and Medical Quackery in Britain, *c.* 1840–1914

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ABSTRACT

This article revisits the nineteenth-century debate about medical quackery in Britain, to examine its implications for the history of modern advertising. It makes two related claims. First, the prevalent view of advertising as a field prone to exaggeration, often taken as obvious, has a legal history. The circumstances of the quackery debate led to a legal elaboration and formalization of views of advertising as an epistemologically doubtful but not illegal field. Second, advertising's status as exaggeration was part of a legally supported cultural division of labour – or legal boundary work, which carved differentiated roles for science and the market in modern Britain whereby science was increasingly defined by restraint, and the market by its lack. The analysis examines the implications, while also offering new insights on the role of law in the history of quackery, and examining untapped sources, particularly a set of libel cases that developed a legal definition of quackery.

KEYWORDS Defamation; quackery; advertising; cultural legal history; boundary work; *Hunter* v *Sharpe*; *Dakhyl* v *Labouchere*; *Stevens* v *The British Medical Association*; *Tucker* v *Wakley*; *Bell* v *Bashford and British Medical Association*

I. Introduction

> A general scepticism may be taken for granted: nobody *trusts* the adman; nobody admits to believing this or that commercial.[1]

> At a casual, dinner-party level, most people are pretty contemptuous about advertising.[2]

These comments from scholars of advertising reflect a prevalent observation about advertising's status in capitalist societies: it is, on a common perception, epistemologically suspect. The observation has an axiomatic ring to it. So obvious is this status, that its strangeness in cultures in which advertising actually flourishes and performs a key role in the economic

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[1]Fred Inglis, *The Imagery of Power: A Critique of Advertising*, London, 1972, 4.

[2]Mark Tungate, *Adland: A Global History of Advertising*, London and Philadelphia, 2013, 3.

system might fail to register. How has it come to be, what functions does it serve, and what does law have to do with it?

This article offers some answers by examining the formative era of mass advertising in Britain, *c.* 1840–1914. Specifically, it revisits the nineteenth-century medical quackery debate, among the most famous debates about advertising in this period. As the following sections explain, the debate addressed the market in unregulated medicines and medical treatments, often decried as quackery. Medical advertisements propelled the market, and were a major and salient part of advertising in general. Understood as the key to quackery's success, they were also highly contentious. Challenges led by the medical establishment were escalated in this period against a dual background: on the one hand, regular medicine sought closer imbrications with science; on the other hand, the market for quackery expanded and its imperatives, for doctors as for patients, intensified and put pressure on regular medicine. This article aims to demonstrate two related insights. First, advertising's inferior epistemological status has a history, and one in which law played an important role. Specifically, the circumstances of the quackery debate led to a legal elaboration and formalization of views of advertising as a field of exaggeration, epistemologically doubtful but not illegal.[3] Second, advertising's status as exaggeration had important cultural functions that explain its endurance. The quackery debate reveals that this view of advertising was part of an emergent conceptual boundary between science and the market, which supported both. This article traces a legally supported cultural division of labour, whereby ideals of restraint increasingly defined scientific method, logic, and subjectivity, while their negation – leading to exaggeration – defined advertising and the consumer market. Science was established as a paradigm of modern truth by being associated with restraint. Lack of restraint by advertisers rendered the consumer market epistemologically inferior, but also a freer and therefore attractive realm of activity.

Normative support for the cultural division of labour came from a number of legal loci. One was professional ethical codes drafted by medical authorities, in which the boundary between medicine and quackery was articulated. A second was libel cases, in which persons accused of quackery sued their accusers. A suit in libel required an understanding of the insulting term, and therefore courts developed an elaborate definition of quackery that explained its difference from medicine. Libel was not the

[3]Short of fraud, which was itself very difficult to establish, exaggeration was not illegal, and was also largely shielded from civil liability through developments in a legal doctrine known as the doctrine of puffery, which developed from the 1820s. It is most familiar to legal scholars from the exception made to it in the famous case of *Carlill* v *The Carbolic Smoke Ball Company* in 1892 [1892] 2 QB 484; [1893]1QB 256 (CA). For its history see Anat Rosenberg, 'Legal Ridicule in the Age of Advertisement: Puffery, Quackery and the Mass Market', *American Journal of Legal History* (forthcoming). These legal fields are beyond the scope of this article.

only area of litigation that responded to this question. The era also saw civil and criminal proceedings initiated by consumer-patients against advertisers who had failed them, and suits by quack advertisers who tried to curtail competitors through courts. These sources have been almost untapped by historians of quackery and advertising, and are all important for the full picture of advertising's cultural status. This article, however, narrows down the focus to a number of leading libel cases, in order to read them closely and exemplify the import of some of the sources. It sets them within broader developments in the law of libel and moves to explore aspects of law's work in culture that have not been addressed by scholarship. Together with ethical codes, libel litigation reveals extensive normative efforts to demarcate medicine from quackery. Unlike ethical codes, courts functioned as forums of public debate that involved both quacks and regular doctors but were controlled by neither. They therefore provide a more complex picture of the process of differentiation and its implications.

In the sociology of science, processes of cultural differentiation like the one examined here have been described as boundary work. Thomas Gieryn developed the concept to describe efforts of demarcation, which imbue science with an epistemic authority when that authority is underdetermined by the practices of scientists themselves.[4] The legal association of medicine with scientific truths can be easily understood within this framework, which carried benefits for medicine's power in years in which its status as a science was still in the making, and unstable. By contrast, advertising's association with exaggeration might seem more questionable as a source of cultural power. As the inverse mirror image of medicine's scientific- truth claims, advertising was construed as devoid of serious content, which would appear a strictly derogative construction. Yet, this article suggests that there were gains for advertising and market activity that were not strategically intended but nonetheless accrued as quackery was distanced from science. Market experience appeared unconstrained by methods and states of mind committed to formal objectivity, patience, and even just seriousness. Compared with the demands of science, exaggeration had a light and liberating implication that permitted market expansion and encouraged an unbridled culture of health consumerism. Put otherwise, advertising was explicitly disparaged, but the markdown in cultural capital was arguably also its form of license.

The legal history explored in this article sheds light on a neglected role of law in the history of quackery. Law's place in this history has been conceptualized repeatedly through shortfalls and refusals. On this view,

[4]Thomas F. Gieryn, *Cultural Boundaries of Science: Credibility on the Line*, Chicago, 1999. See also Thomas F. Gieryn, 'Boundary-Work and the Demarcation of Science from Non-Science: Strains and Interests in Professional Ideologies of Scientists', 48 *American Sociological Review* (1983), 781.

expansions in quack advertising and the market for quackery were a consequence of legal inaction or vacuum. This view was historically propounded by a frustrated medical establishment, which was unable to enlist legislators to the profession's control of medical services. It was confirmed by the parliamentary Select Committee on Patent Medicines, which found Britain's regulation of medical provision to be laxer than that of any other country and summarized the law in 1914 as abnormal and inadequate. It has since been accepted by historians who have highlighted the state's reluctance to regulate quackery and examined its causes. Such a view of the role of law implicitly supports assumptions that advertising was a free market phenomenon, and therefore distorts the ways in which it was encouraged and shaped with legal means. On a more theoretical level of jurisprudence, this view privileges the role of law as a regime of prohibitions and permissions studied for their direct effects on commercial activity and the distribution of economic capital, over its role as a regime of meaning, which regulated by producing cultural content and distributing cultural capital. The two perspectives are not mutually exclusive, yet the latter has been largely overlooked in the historiography of quackery. As Chantal Stebbings argues in her study of the taxation of proprietary medicines, these kinds of legal influences, the value judgements they carried, and their cultural implications, are too often ignored by medical humanities, or dismissed as incidental.[5] In the quackery debate, law's support for the differentiation between science and the market was not easily quantifiable in terms of commercial effects, but it participated in shaping cultural categories of modernity that have endured to our own days, and therefore merit the attention of historians.

II. Medicine and Quackery, Jekyll and Hyde

1. Medical provision in the nineteenth century

Medical provision in nineteenth-century Britain involved a trained medical profession, or so-called regular medicine, on the one hand, and market offerings of proprietary medicines and treatments by providers unrecognized by the medical establishment, on the other hand. The latter, often decried as quacks, relied heavily on advertising. There was no legislation to stop quackery.[6] Over the century, the state added entry barriers to the medical profession and began to underwrite it, but did not prevent nor regulate through legislation the market provision of preparations and treatments, except at the margins.[7] The key nineteenth

[5]Chantal Stebbings, *Tax, Medicines and the Law: From Quackery to Pharmacy*, Cambridge, 2018, 4.
[6]On legislators' reluctance see Roy Porter, *The Greatest Benefit to Mankind: A Medical History of Humanity from Antiquity to the Present*, London, 1997; Stebbings, *Tax, Medicines and the Law*, 166–172.

century achievement of regular medicine was the Medical Act 1858. The Act created the medical register and thus consolidated a divided profession (historically: physicians, surgeons, and apothecaries, which gradually morphed by mid-century into a division between general practitioners, and consulting physicians and surgeons[8]). The register distinguished qualified from unqualified practitioners based on approved licensing bodies. It did not outlaw unregistered doctors, but rather extended privileges to registered ones.[9] The Act also established the General Council of Medical Education and Registration of the UK (GMC), an ethical and legal authority over regular medicine.

In the second half of the nineteenth century, medicine drew closer to science. Scholarship generally identifies the century's latter part as the era in which a long history of practice-orientation, itself overshadowed by status traditions, began to change, and the relationship of modern medicine to science started to consolidate.[10] However, despite the rise of science and the creation of the medical register, market provision outside the purview of the GMC expanded rather than shrank, and outpaced the rise in real wages and population growth. Estimated sales of proprietary medicines rose from half a million pounds in mid-century to four million pounds at its end, and five million in 1914.[11] Pills and tonics reached closer to homes than doctors: most could be purchased in diverse outlets such as bookshops, stationery shops, barbers, tobacconists, groceries, and pharmacies and were more accessible economically than doctors.[12] Consumer expenditure on medicines almost tripled, from 0.06 per cent to 0.16 per

[7]Meanwhile, the legal tax regime was even perceived as bestowing an official guarantee of the quality of proprietary medicines, despite the punitive measure it involved. Stebbings, *Tax, Medicines and the Law*, ch. 4. For regulatory developments after 1914 see Henk H.H.W. Bodewitz, Henk Buurma, and Gerard H. de Vries, 'Regulatory Science and the Social Management of Trust in Medicine', in Wiebe E. Bijker et al., eds., *The Social Construction of Technological Systems: New Directions in the Sociology and History of Technology*, Cambridge, MA and London, 2012; Derrick Dunlop, 'Medicines, Governments and Doctors', 3 *Drugs* (1972), 305; Stebbings, *Tax, Medicines and the Law*, chs. 4–5. Pre-marketing approval of medicines awaited 1968.

[8]Philip Elliott, *The Sociology of the Professions*, London, 1972, ch. 2; Ivan Waddington, 'The Development of Medical Ethics: A Sociological Analysis', 19 *Medical History* (1975), 36.

[9]Registered doctors became the only ones eligible for public appointments, were exempted from certain duties such as jury service, and exclusively entitled to recover in courts reasonable charges for medical advice, treatment, prescription and supply of medicines. Medical Act 1858 (21 & 22 Vict., c. 90).

[10]A review is available in Peter J. Bowler and Iwan Rhys Morus, *Making Modern Science: A Historical Survey*, Chicago, 2005. See also, for example, W.F. Bynum, *Science and the Practice of Medicine in the Nineteenth Century*, Cambridge, 1994; Anne Digby, *Making a Medical Living: Doctors and Patients in the English Market for Medicine, 1720–1911*, Cambridge, 1994; Roy Porter, ed., *The Cambridge Illustrated History of Medicine*, Cambridge, 1996; Porter, *The Greatest Benefit*; Michael Brown, *Performing Medicine: Medical Culture and Identity in Provincial England, c.1760–1850*, Manchester, 2011. See also additional references in the following sections.

[11]Stanley Chapman, *Jesse Boot of Boots the Chemists: A Study in Business History*, London, 1974, ch. 1 and appendix 1. Estimates were based on tax returns.

[12]Stebbings, *Tax, Medicines and the Law*, 94–97; Lori Loeb, 'Doctors and Patent Medicines in Modern Britain: Professionalism and Consumerism', 33 *Albion* (2001), 404, 409; Digby, *Making a Medical Living*, 62–68.

cent.[13] Medical advertising expanded in scope, media, and capital expenditure. Spending figures are not available, but an estimate of two million pounds annually by members of the Proprietary Articles Section of the London Chamber of Commerce, which represented about 300 proprietors, seemed reasonable.[14] As one contemporary said, 'the money spent in advertising pills ought to be enough to cure earthquakes – not to mention the endowment of hospitals'.[15] Quack advertising has been estimated to make up twenty to thirty per cent of all advertising by the late century.[16] Advertisement numbers were on a rapid rise with the rising circulation of newspapers as well as expansions in outdoor and direct-to-consumer advertising.[17]

While the concurrent processes of medicine's growing cultural authority as a science, on the one hand, and the market success of quackery on the other, were advancing, the dividing lines were murky. In practice it was often unclear where medicine ended and quackery began. As scholarship has repeatedly shown, the lines were hard to draw given multiple co-dependencies. Within the supposedly professionalizing and scientizing world of medicine, qualified doctors worked with and for quacks, were directors and shareholders in their businesses, prescribed and recommended their medicines, and inserted their advertisements in professional publications. The middle grounds of pharmacy were even murkier. Chemists and druggists occupied an obscure position between trade and professionalism and drew on both. Certified chemists, faced with doctors dispensing medicines on the one hand, and consumers self-medicating with quack preparations on the other, joined commercial enterprises that marketed proprietary medicines in the last decades of the century. Meanwhile, leading quack businesses transitioned to scientific, laboratory-based pharmacy. The *Pharmacopoeia* itself was periodically updated with established quack medicines. The difficulty of essentialism is as it should be, Roy Porter argued, for it is a useful index of how

[13]T.A.B. Corley, *Beecham's, 1848–2000: From Pills to Pharmaceuticals*, Lancaster, 2011, 38. His estimates of total sales are slightly lower than Chapman's, Chapman, *Jesse Boot*. Fraser argues that sales of medicines rose by 400 per cent between 1850 and 1914. W. Hamish Fraser, *The Coming of the Mass Market, 1850–1914*, London, 1981, 139.

[14]Report from the Select Committee on Patent Medicines, *House of Commons Parliamentary Papers* (1914) (Cd 414) ix 1, qq. 6333–38 (hereafter, *Report*). The total expenditure on advertising in Britain in 1912 has been estimated at £15 million.

[15]*Chamber's Journal*, 13 May 1895, 311.

[16]Takahiro Ueyama, *Health in the Marketplace: Professionalism, Therapeutic Desires, and Medical Commodification in late-Victorian London*, California, 2010, 74; Loeb, 'Doctors and Patent Medicines', 409. Nevett's sample for 1810–1855 found only 6.5 per cent of advertisements to be medical ones. T.R. Nevett, *Advertising in Britain: A History*, London, 1982, 31. British Newspaper Archive (BNA) data unfortunately cannot at present be analysed to assess the percentage of medical advertising within the general volume. However, in terms of relative change in percentage, mid-century appears to have been the high point, and the turn of the twentieth century a start of decline.

[17]The dramatic rise in newspaper circulations alone should provide a sense of proportions. For a summary of data see Anat Rosenberg, '"Amongst the Most Desirable Reading": Advertising and the Fetters of the Newspaper Press, Britain c. 1848–1914', 37 *Law and History Review* (2019), 657.

things really were.[18] However, in the nineteenth century this elusiveness of categories came to stand for more than messy realties. Contemporaries began to think about it as reflecting the *meaning* of quackery. Quackery was emerging as a relational concept with a particular content: it was a mode of conduct and thought that represented a loss of scientific restraints under the pressures of the capitalist profit motive. The cultural anxiety about quackery, which intensified with market expansion, was not simply that quacks were competing with regular doctors (they certainly were), but that medicine itself could degenerate into quackery. In other words, quackery represented a potentiality that existed also *in* medicine, and therefore threatened the very meaning of medicine-as-science, not merely the economic success of its practitioners. From this perspective, a quack was not a practitioner essentially *other* than a regular doctor, but rather an image of a fallen doctor, a cautionary figure. Of course, as a sociological description most market sellers of proprietary medicines and treatments were not trained doctors, and many famous commercial enterprises did not have doctors among their lead figures. Rather, what we see emerging are relational ideal types. Restraint became a conceptual tool that could explain what medicine and quackery implied and how they differed, despite – or indeed because of – complexities in practice.

The relational view of quackery gained traction after mid-century. Its meaning was articulated through a set of restraints that appeared to be outrageously defied by quacks the more they were expected of doctors. Quackery kept chemical formulas as trade secrets, where medicine claimed privileged access to the human body by presenting its knowledge in terms of openness. Quackery reduced patient contact and so undermined the all-important medical gaze on which medicine insisted. Quackery circulated fantasies of exotic discoveries of indigenous knowledge, where medicine associated itself with a laborious accumulation of data. Quackery was unbridled by professional ethics, while those were increasingly institutionalized for medicine – with scientific justifications as we will see. Quackery used market mechanisms to expand clientele in an open admission of the profit motive, where medicine hailed the public good as a disinterested ideal of science. And crucially, quackery promised cures in its advertisements – medicine's own raison d'être, while medicine was choked by difficult progress and self-disciplined to discuss observable effects rather than cures, and to emphasize danger over hope. Overall,

[18]Roy Porter, *Quacks: Fakers & Charlatans in English Medicine*, Stroud, 2000, 11. For the role of pharmacy see Stebbings, *Tax, Medicines and the Law*, ch. 3; Ueyama, *Health in the Marketplace*; Roy Church, 'Trust, Burroughs Wellcome & Co. and the Foundation of a Modern Pharmaceutical Industry in Britain, 1880–1914', 48 *Business History* (2006), 376; Stuart Anderson, 'From "Bespoke" to "Off-the-Peg": Community Pharmacists and the Retailing of Medicines in Great Britain 1900 to 1970', 50 *Pharmacy in History* (2008), 43.

these demands suggest how a principle of restraint functioned as medical science's mode of knowledge, as Michel Foucault argued in *The Birth of the Clinic*, and indeed as its mode of being.[19] Meanwhile, quackery came to stand for the things that scientifically aspiring medicine could not be, its cultural Mr Hyde. In rhetorical modes, hyperbole contrasted with positivistic minimalism. In modes of wanting, the interested presence of individual desire, particularly for money, contrasted with the self-effacing subject of objective science. In modes of thinking, impatience, imagination and fantasy replaced careful observation and rational analysis.[20]

The relational view of quackery as medicine's Mr Hyde manifested in intensifying normative efforts to articulate the boundary line between them around the ideal of restraint, so that elements banished from scientific medicine were the realm of advertising quacks. Both medicine and quackery were there to stay as practices of medical provision, but more importantly as ideal cultural types of restraint and exaggeration, against which an array of mixed practical options came to be understood.[21]

2. Ethical codes

One locus of normative development was medical ethical codes, a budding genre of the nineteenth century. Because advertising was viewed as the key enactment of quackery's lack of restraint, it received anxious attention in the era's codes. Reservations about advertising had much earlier roots in Hippocratic ethics and in gentlemanly honour codes that distanced the professions from trade.[22] However, elaboration awaited the Victorian era, when

[19] As Foucault argued, the principle was ambitious to the extent implied by its self-imposed modesty. Michel Foucault, *The Birth of the Clinic: An Archaeology of Medical Perception*, trans. A.M. Sheridan, London, 1973. The background demands of restraint had a broader resonance in Victorian ideals of character. See Stefan Collini, *Public Moralists: Political Thought and Intellectual Life in Britain 1850–1930*, Oxford, 1991, ch. 3.

[20] On the latter as a nineteenth century phenomenon see Lorraine Daston and Peter Galison, *Objectivity*, New York, 2007.

[21] As Digby notes, the Victorian age was distinctive in the efforts it invested in drawing demarcation lines between regular medicine and quackery. Digby, *Making a Medical Living*, 62–68. For a legally-related analysis see Sarah Bull's study of the history of quackery and obscenity. Bull finds that the 1868 decision of *R* v *Hicklin* on the meaning of obscenity was informed by ongoing efforts to draw the lines between medicine and quackery by focusing on the commercial practices of quacks. Sarah Bull, 'Managing the "Obscene M.D.": Medical Publishing, the Medical Profession, and the Changing Definition of Obscenity in Mid-Victorian England', 91 *Bulletin of the History of Medicine* (2017), 713.

[22] For example, Gregory's influential Edinburgh lectures, 1772, spoke of 'a profession to be exercised by gentlemen of honour … the dignity of which can never be supported by means that … tend only to increase the pride and fill the pockets of a few individuals'. John Gregory, *Lectures on the Duties and Qualifications of a Physician*, Philadelphia, 1817, 41. See also Laurence B. McCullough, 'The Discourses of Practitioners in Eighteenth-Century Britain', in Robert Baker and Laurence B. McCullough, eds., *The Cambridge World History of Medical Ethics*, Cambridge, 2018. On the Edinburgh reformers' historical role in connecting gentlemanly ideals with science (and sympathy) see Robert B. Baker, 'The Discourses of Practitioners in Nineteenth- and Twentieth-Century Britain and the United States', in Baker and McCullough, *Cambridge World History of Medical Ethics*. On the power of anti-trade gentry culture generally

normative prohibitions expanded in proportion to market temptations. As Anne Digby argues, in those years doctors' financial imperatives were stronger than ever.[23] In Britain codes were not formally adopted by the profession. However, the need for an ever-expanding informal normative instruction revealed that doctors reacted to competitive pressures by straining historical ideals of honour as well as budding ones of scientific restraint.

Three central codes, Thomas Percival's *Medical Ethics*, 1803 (which followed his 1794 *Medical Jurisprudence*), Jukes Styrap's *Code of Medical Ethics*, 1878, and Robert Saundby's *Medical Ethics,* 1902, revealed a deepening anxiety over the century. Percival's, the first modern code, did not even address advertising. He discussed a duty to apprise patients of the fallacy of quack medicines, while also agreeing to compromise with patient demands. The dominating concern of his time was intra-professional conflict.[24] Seventy-five years later, Styrup expanded on advertising as a threat to professional status:

> It is … derogatory to the profession to solicit practice by advertisement, circular, card, or placard; also, to offer, by public announcement, gratuitous advice to the poor, or to promise radical cures; to publish cases and operations in the daily press, or knowingly, to suffer such publications to be made; to advertise medical works in non-medical papers; to invite laymen to be present at operations; to boast of cures and remedies; to adduce testimonials of skill and success … [25]

As Peter Bartrip observes, Styrap showed a hardening of lines.[26] Saundby, secretary of the British Medical Association (BMA),[27] was even more elaborate at the turn of the twentieth century. His code implicitly responded to a widespread argument that everyone advertised and that any public appearance was an advertisement. He explained: 'No medical practitioner should seek publicity by advertisement *except in certain recognised ways.*' He addressed the multiple innovations of doctor-advertisers and a flourishing celebrity culture. His code instructed that medical men should not advertise their studies and experience in the lay press. Even when employed by commercial firms, a medical man's name must not appear in lay newspaper

see Martin J. Wiener, *English Culture and the Decline of the Industrial Spirit, 1850–1980*, Cambridge, 1981.

[23] Digby, *Making a Medical Living*, 6.

[24] Thomas Percival, *Medical Ethics*, Cambridge, 2014, ch. 2, ss. XXI–XXII. One concern related to advertising was canvassing for positions. On the dominance of intra-professional conflict see Ivan Waddington, *The Medical Profession in the Industrial Revolution*, Dublin, 1976; McCullough, 'Discourses'.

[25] Jukes Styrap, 'A Code of Medical Ethics', in Robert Baker, ed., *The Codification of Medical Morality*, vol. 2, Dordrecht, London, 1995.

[26] Peter Bartrip, 'Secret Remedies, Medical Ethics, and the Finances of the British Medical Journal', in Baker, *Codification*, 191, 193.

[27] Founded in 1832 as the Provincial Medical and Surgical Association, it represented by 1912 over 25,000 practitioners and saw itself as 'the voice and opinion of the medical profession as a whole'. *Report*, q. 1529.

advertisements or other laudatory notices. Forbidden were testimonials in advertisements; quotations from a medical man's professional literature in an advertisement; circulars about a change of address or practice beyond 'bona-fide patients only'; paragraphs in the press about a doctor in attendance of celebrities; and signed articles and letters on diseases and their treatment in the lay press. Any 'too favourable an opinion' of secret nostrums, even in conversation, was dangerous because it could be quoted in an advertisement. Popular lectures and advertisements announcing them should not 'draw attention to the lecturer's ability to treat certain kinds of disease'. Medical men were warned that in interviews to newspapers, if unavoidable, they 'should confine themselves to giving such information as they possess'.[28]

In addition to circulating codes, organizations such as the Royal Colleges of Physicians and of Surgeons, local unions of practitioners, the BMA, and the GMC, exercised powers over members on ethical transgressions. Here too responses to advertising gathered momentum in late century.[29] A dentist struck off the register for advertising appealed in 1887, claiming that there was no precedent to this disciplinary position. Interestingly, he argued that the main damage he sustained was because patients assumed that he must have done something much worse, since so many registered dentists advertised.[30]

Internally, the profession could do little more than try to police its ranks. The task was uneasy as both economic and cultural arguments against advertising lost ground. On one front, free market ideologies questioned professional organizations' control over the economic freedom of their members. Judges' ability to adjudicate disputes was also doubted because they submitted to the tyranny of their bar.[31] On another front, gentlemanly traditions appeared increasingly opaque in the age of advertisement: if the eminent Dickens placarded towns, why not doctors?[32] Against these

[28]Robert Saundby, *Medical Ethics*, London, 1907, 3–8.

[29]For bylaws and resolutions regarding advertising see Saundby, appendix. For GMC decisions on advertising see Russell G. Smith, 'Legal Precedent and Medical Ethics: Some Problems Encountered by the General Medical Council in Relying upon Precedent when Declaring Acceptable Standards of Professional Conduct', in Baker, *Codification*. On the British preference for jurisprudence over codification see M. Anne Crowther, 'Forensic Medicine and Medical Ethics in Nineteenth-Century Britain', in Baker, *Codification*. On reluctance to codify or enforce formal ethical rules see Baker, 'Discourses'.

[30]There were a number of hearings. The last two addressed the question of advertising as disgraceful conduct, which came up after the GMC initially lost on technical grounds. *Partridge* v *GMC*, *Times*, 23 Mar. 1892, 3; (1892), 8 TLR 311; (1890), 25 QBD 90; (1887), 19 QBD 467. See also Bull's discussion of disciplinary efforts, Bull, 'Managing the "Obscene M.D."'.

[31]*Times*, 24 Mar.1892, 9. Lord Esher MR indeed took for granted in *Partridge* that the competitive spirit of advertising was disgraceful to his profession as to medicine. The view, however, was not universally shared. See for example Alana Paterson, 'Professionalism and the Legal Services Market', 3 *International Journal of the Legal Profession* (1996), 137 (solicitors); and W. Wesley Pue, *Lawyers' Empire: Legal Professions and Cultural Authority, 1780–1950*, Toronto, 2016, ch. 4 (barristers).

[32]*Elgin Courier*, 7 Dec. 1866, 5. The 'age of advertisement' was a familiar title, e.g., *Daily Telegraph*, 21 Jan. 1888.

erosions, and as medical spokesmen sought a closer identification with science, the meaning of science itself was developed to justify prohibitions. An 1893 *Hospital* article titled 'Why Do Doctors Not Advertise?' presented the modern logic. Advertising was not per se 'wicked', but rather deeply incompatible with medicine, which required discipline and 'self-crucifixion'. Medicine was committed to 'calmness and sobriety, patience and watchfulness'. It was 'forced down … upon the immovable bed-rock of reality' and therefore would not 'thrive "up in the air"' as advertisers did.[33] This justification for ethical restrictions acknowledged that automatic objections to trade rooted in the gentlemanly cultures of the historical professions were insufficient, and proposed an elaborate language of the demands of science. Michael Brown observes that changes in medicine's self-image were turning the market from an irritating financial competition into a moral affront.[34] But arguments about incompatibility also reached beyond morality, to ontology: advertising manifested a lack of restraint, where restraint became science's way of being. Libel cases functioned as public arenas with leeway to examine and solidify the meanings of exaggeration vis-à-vis restraint beyond the internal conversations of the profession.

III. The Libel of Quackery

1. From character type to action type

A few tens of suits in which persons sought redress for being accused of quackery accumulated from the eighteenth century, with important discussions of the figure of the quack in the nineteenth century. With a few exceptions, these were part of a trend historians find in the nineteenth century, in which defamation suits were increasingly civil cases of libel (for written words or other expressions with some degree of permanence as different from slander, a distinct tort for speech),[35] against press publications, where no proof of special damage was required. The action tested the extent of legal protection for individual reputation within the context of the mass press. However, the context of quackery also involved some unique characteristics within this trend. In terms of publication types, some important cases concerned professional medical publications rather than the general press. More interestingly, judicial attitudes prove difficult to align with the general finding of historians that judges in libel cases were growing impatient with the press, partly due to class differences

[33] *Hospital*, 13 May 1893, 97–98.
[34] Michael Brown, 'Medicine, Quackery and the Free Market: The "War" against Morison's Pills and the Construction of the Medical Profession, c. 1830–c. 1850', in Mark S.R. Jenner and Patrick Wallis, eds., *Medicine and the Market in England and Its Colonies, c.1450-c.1850*, Basingstoke, 2007, 238, 256.
[35] For an introduction to the history of defamation, see John Baker, *Introduction to English Legal History*, 5th ed., Oxford, 2019, ch. 25.

between the judiciary and the readership of popular culture.[36] We might have assumed, alternatively, that judges identified with the medical establishment and press publications supporting it, given shared professional and class identities. This was occasionally so, but in the cases examined here outcomes are better explained by the emergent understanding of quackery as loss of restraint than by a generalized attitude toward the press, or toward a social elite. This and the next section demonstrate the role of cases concerned with the libel of quackery in boundary work, focusing on key examples that operated within the broader run. In doing so, the analysis recovers from obscurity cases that have been either unexamined, or examined from doctrinal perspectives that do not shed light on the role of law in boundary work.

The significance of libel for the history of quackery should be self-evident. If pre-moderns knew that quackery was a bad thing, as Porter said, and if the one sure thing about the uncertain term 'quack' was that it was a term of abuse, as Stebbings observes, then the legal field for grappling with abuse could be expected to become a dominant area of conceptualization.[37] The majority of reported cases involved qualified doctors who sued because they were called quacks, rather than unqualified persons who tried to silence criticisms against their practices.[38] This trend gave structural expression to the idea that quackery was a degeneration of medicine. Unsurprisingly, William Blackstone's *Commentaries*, which expressed the same idea, were widely quoted by Victorian jurists. As Blackstone said when he explained the meaning of injuring a man's trade or livelihood, it was 'to call … a physician a quack … '[39] But what turned a physician into a quack? This section examines two famous cases to show how libel litigation shifted the historical emphasis on quackery as character type, to an elaboration of action type that placed advertising at the centre.

In popular culture, quacks were often represented in caricature, often of an itinerant shouty showman. While striking a familiar note, these images were better suited to the Georgian era; they could hardly take on the businessmen and scientific aspirants of the Victorian era. In representing exaggeration, libel cases shifted the emphasis for the age of big business. These cases retained the popular association of the quack with noisy attention grubbing, but they focused on action rather than character type – a subtle but important difference. Specifically, cases examined advertisements as enactments of excess. Advertisements were examined as manifestations of

[36]E.g., William R. Cornish, 'Personal Reputation, Privacy and Intellectual Creativity', in John H. Baker and William R. Cornish, eds., *The Oxford History of the Laws of England*, vol. XIII, Oxford, 2010, 856.
[37]Porter, *Quacks*, 15; Stebbings, *Tax, Medicines and the Law*, 15.
[38]I have not found indications of a reversal of this trend in unreported cases, although it is possible.
[39]William Blackstone, *Commentaries on the Laws of England, Book III: Of Private Wrongs*, (1769), Oxford, 2016, 84

an unbridled profit motive that exaggerated discoveries, patients' and carers' satisfaction, and curing abilities. It bears emphasis that the very search for the content of exaggeration was the crucial conceptual move. By repeatedly asking about the presence, extent and substance of exaggeration, the conceptual effect of framing quackery as a breach of scientific restraints was achieved. Of course, the question what exactly any specific advertisement exaggerated was important contextually for every case. However, in terms of the broader process of differentiating the market from science, posing the question was more important than the concrete answers provided.[40]

A vivid presentation of this outlook appeared in the Irish High Court in 1845. Michael Larkin, a surgeon, published an advertisement for pills in the *Nation*. He claimed to have shown the gentlemen of the newspaper testimonials of successful recoveries from 'appalling stomach, liver, bowel, asthma, and consumptive diseases'. The newspaper's owner, and critic, poet, lawyer, and politician, Charles Gavan Duffy, discovered the advertisement too late. He therefore inserted in the same edition a notice expressing 'great regret that a quack advertisement … has crept in'. Larkin sued for £500.

In opening the defence, counsel for the *Nation*, O'Hagan – almost certainly Thomas O'Hagan who would become the Lord Chancellor of Ireland – explored the term 'quack'. His address is worth quoting at some length.

> It is one of those words which we can better understand than define … on looking to the dictionary of our great lexicographer [Samuel Johnson], I find … : 'To cry as a goose'; and, in its secondary meaning, 'to chatter boastingly-to brag loudly-to talk ostentatiously.' I find, also, that the term is used in Hudibras, [seventeenth century satirical poem by Samuel Butler], where persons are spoken of who
>
> 'Believe mechanic virtuosi,
> Can raise them mountains in Postosi –
> Seek out for plants, with signatures
> To quack of universal cures.'
>
> You will see, when I come to read the advertisement, how clearly it comes within the meaning of the word … how full it is of absurd boasting and incredible assertion, and how remarkably it bears the characteristic of all quackery of all ages – … the false and impudent pretence of power to remove diseases, requiring the most diverse treatment, by precisely the same remedy … A quack advertisement is always distinguishable by offering some panacea to the public – some promise which cannot be realised – some mysterious mode of relief unknown to nature and rejected by science … These are the professions of quackery – universal cures-

[40]Gieryn makes an analogous point about struggles for credibility among scientific experts: the routine appeal to science to settle the question is more important than the outcome of the particular dispute. Gieryn, *Cultural Boundaries of Science*, 3–4.

> immediate cures-mystical cures-impossible cures; and all these professions are made in the most flagrant and preposterous way, by the advertisement of the plaintiff.

Having read the advertisement amid laughter, O'Hagan continued:

> It professes to announce a discovery which the wisdom of four thousand years had failed to accomplish … It has the true old quack quality of perfect disinterestedness … He is impelled by the purest charity … The wretched half-crowns he despises … His advertisement 'quacks of universal cures' – … diseases – all yield to its magic power … .the simple reading of it should … abundantly demonstrate its character to every rational understanding … Is there a single quality of quackery wanting to it – mystery and ignorance, absurd boasting, ridiculous pretension, and extravagant assertion?[41]

O'Hagan discussed substantive elements of quackery, particularly promises of cure. However, his linguistic choices were no less crucial. He used with mastery the advertising techniques that he condemned and showed how linguistic colour could stand in inverse proportion to the underlying reality that it supposedly described. The richness of his language was meant to represent the poverty of Larkin's cure, hence the flow of adjectives that made the point stylistically: absurd, incredible, impudent, flagrant, preposterous, extravagant, ridiculous. O'Hagan suggested that contra ideals of scientific rationality, which explicated reality, quackery made it opaque, and left one with words without a referent. References to mystery, mysticism, magic, ignorance, a moving of mountains, were all in the service of this point. In relation to disenchanted medical science, quackery was a denial of its wisdom, but it was the *style* that made the content: no restraint.

O'Hagan's argument appeared to receive only partial confirmation. His client's defence suffered from the seemingly unprincipled position that the *Nation* took in attacking Larkin but not other advertisers, and was up against testimonies of satisfied patients. Consequently, he lost, albeit with damages of 40s and 6d costs (approximately £160 in 2017). The jury thus expressed a complex view of the circumstances through its wide discretion on damages.[42] Larkin had to bear his own costs, and did not receive the £500 he had asked for.[43] The *Nation's* loss coupled with a refusal to decree almost any damages appeared to cut both ways, and Duffy was indeed dismayed by the ambiguity. The case was not formally reported and so could not be cited as legal authority, but rather remained a popular legal event reported in the press, yet its result deserves attention within the history told here, because it was actually an early harbinger

[41] *Freeman's Journal*, 20 June 1845, 3.
[42] For the history of jury discretion and efforts to structure it, see Paul Mitchell, *The Making of the Modern Law of Defamation*, Oxford, 2005, ch. 3.
[43] The main problem for Duffy was his legal expenses; the Wexford Medical Association announced a subscription to defray them. *Limerick Reporter*, 22 July 1845, 4. He obtained a conditional order to set the verdict aside, but no further development remains on record. *Banner of Ulster*, 11 Nov. 1845, 4.

of things to come in libel law. The logic that O'Hagan presented and his approach to the analysis of quackery would be embraced and developed further. At the same time, the implication was not to quash quackery, as the jury in this case seemed to recognize. Quackery would not be delegitimized entirely, but rather differentiated from medicine. Its ideal type would be associated with market imperatives and allowed to thrive so long as the difference was acknowledged.

2. Hunter *v* Sharpe

In 1866, the same issues came to the fore with more judicial engagement. Robert Hunter, a doctor certified in New York and Canada, advertised his book on consumption and its cure by oxygen inhalation in a series of column publications. The first advertisement in the *Times*, for example, took up an entire column, alongside a variety of reports and letters to the editor.[44] Hunter's columns also appeared in the *Standard, Morning Post, Telegraph, Star,* and other newspapers across Britain. The advertisements avoided familiar pitfalls attributed to quackery, particularly cure-all promises and secret formulas. The first advertisement included a 'Just Published' and price label at the top, but in others nothing appeared but 'Communicated'.[45] As a commentator noted, even to the practised eye the advertisements appeared like 'scientific contributions put in by the editor … '.[46]

Contrary to the last comment, which assumed that Hunter tried to veil the publications' status, he was actually comfortable with identifying these columns as advertisements. He presented paid publicity as a public service in the face of a failing medical response to fatality. Britain had seen a surge in tuberculosis with the spread of industrialization and urbanization. When Hunter arrived in 1864, tuberculosis was fatal and lacking a cure. The medical profession's dominant theories were in line with romanticized views, and it was groping in the dark against the foremost killer of the nineteenth century. Mortality rates are impossible to determine accurately, but estimates for Britain move between 300 and 600 deaths per 100,000. Between 1851 and 1910, nearly four million deaths were attributed to tuberculosis in England and Wales. The percentage attributed to it out of total deaths for 1851–1870 was 14.2 –16.3 for the whole population, but for the vital age group of 15–34, it was 43.3–49.3; the threat was overwhelming.[47] While regular medicine was vulnerable to accusations of failure, the search

[44] *Times*, 6 Sept. 1894, 10.
[45] E.g., *Morning Post*, 7 June 1865, 3.
[46] *Dublin Medical Press*, 12 Dec. 1866, 597.
[47] Gillian Cronjé, 'Tuberculosis and Mortality Decline in England and Wales, 1851–1910', in Robert Woods and John Woodward, eds., *Urban Diseases and Mortality in Nineteenth Century England*, London, 1984, 79. Lung disease represented 60–80 per cent of tuberculosis.

for a cure was an industry, with treatments, health tourism, ventilation solutions, medical books and brochures in wide circulation. At this point, no one – including Hunter, had a cure.[48]

Hunter's work, *Practical Letters*, quickly went through six editions of 1000 copies each, on his account as a result of the advertisements.[49] He attacked the medical establishment, which ignored his treatment against rational explanation and facts of success, and would not confess the fallacy of its own practices. The profession's errors were hidden beneath a technical jargon of 'bad Latin and worse Greek … worthy only an age of ignorance'. Hunter attributed to medicine the opacity traditionally attributed to quackery, and touched a sensitive issue. On Hunter's argument, if the medium was not cheap and universal, the benefits would not reach the public. In the first advertisement he argued that the profession had breached its duty of instruction by shunning publicity. This policy 'may have added to the social status and dignity of the profession itself, but it undoubtedly has proved most fatal to mankind'. He presented himself as a world-historical paradigm breaker facing the wrath of orthodoxy, of the order of Galileo, Jenner, Harvey, and Newton.[50] Things were exacerbated by Hunter's foreign qualifications, which clarified the limits of the Medical Act. He obtained legal advice that he was not barred from practising in the UK and decided not to spend money on a British qualification. Yet, an indefatigable man, he tried and failed to enter the register and was soon proposing to the Home Office to amend the Act and include practitioners from the colonies and foreign countries. Presumably building on his Canadian qualification, he complained about the injustice of allowing British practitioners to work in the colonies but limiting their colleagues in Britain.[51]

Hunter challenged the boundaries of medicine and attracted criticism in medical journals.[52] The combination of medical content and mass advertising was particularly troubling:

[48]Germ theory, an alternative to dominant theories of inheritance, was on the rise from the 1860s; Robert Koch discovered the germ in 1882; vaccination awaited 1923, antibiotic 1944. See generally, Roy Porter, 'Consumption: Disease of the Consumer Society', in John Brewer and Roy Porter, eds., *Consumption and the World of Goods*, London and New York, 1994; Mary Wilson Carpenter, *Health, Medicine, and Society in Victorian England*, California, 2010, ch. 3; Katherine Byrne, *Tuberculosis and the Victorian Literary Imagination*, Cambridge, 2011, ch. 1; Marc Arnold, *Disease, Class and Social Change: Tuberculosis in Folkstone and Sandgate, 1880–1930*, Newcastle, 2012.

[49]Robert Hunter, *The Great Libel Case: Dr Hunter versus Pall Mall Gazette*, London, 1867, 353.

[50]Robert Hunter, *Practical Letters on the Nature, Causes and Cure of Catarrh, Sore Throat, Bronchitis, Asthma, and Consumption*, London, 1865, xxxviii–xxxix, xli–xlii; Hunter, *Great Libel Case*, 368.

[51]Letter from Robert Hunter to the secretary of state, May 2, 1865, in *Lancet*, 3 June 1865. See also *BMJ*, 10 June 1865, 598.

[52]E.g., *Lancet*, 7 Oct. 1865, 420. The *BMJ* was more reserved, probably because it was profiting from Hunter's advertisements, e.g., *BMJ*, 3 Sept. 1864, 290. It did, however, join criticisms, e.g., *BMJ*, 13 Oct. 1866, 411–412, and after the trial: *BMJ*, 8 Dec. 1866, 641–643, and was not shy of chastising the *Times* for its part in the affair, *BMJ*, 2 Dec.1865, 591.

> 'Dr. Hunter' has no British qualification … yet he has been permitted to do what we believe no British physician or surgeon was ever allowed … – to publish his advertisements, not in the ordinary form known to Mr. Morrison and Professor Holloway, in which they would have been at once recognised by the public, but in that of scientific contributions inserted in the body of the newspaper … Hunter imported here a transatlantic system of 'doing medical business' which was painfully felt … to be highly derogatory to the position due to Medicine as a profession … [53]

This comment implicitly admitted that the difficulty of distinguishing a quack from a doctor was more problematic than the fact that quackery existed.

In late 1865 the *Pall Mall Gazette* attacked Hunter in an article titled 'Impostors and Dupes'. It began with an onslaught on the 'modern system of easy advertising' that enabled medical impostors. Admittedly, Hunter's advertisements were 'free from the mysterious hints and suggestions … of the basest class of medical puffs'. However, he was a quack, for he advertised as no 'reputable physician' would, and capitalized on fears. Also noted was a rape charge by one of his patients. Hunter was later acquitted, but the writer thought that either way the charge told something about the dangers of 'kindred quacks (though of a more shameless kind perhaps)'.[54] The rape, in other words, was mentioned as an atmospheric element.[55] Hunter sued the publisher.[56] *Hunter* v *Sharpe* was an expensive case with experts and patients brought into court to testify on certification, scientific theories, and medical practice. It was extensively covered by the general press, debated in legal and medical publications, and followed up by Hunter's *The Great Libel Case*, a 400-page verbatim account of the trial interspersed with repudiations of its injustices – for Hunter, as we will see, considered the outcome a loss. This was an event, one of the few *causes célèbres* of the year in the courts according to the *Law Times*.[57]

The newspaper's defence was based on two grounds: the truth of its accusations, and fair comment. The latter became the case's main legal legacy. Within the doctrinal history of libel, *Hunter* was important because statements by Lord Chief Justice Alexander Cockburn clarified the scope of protected criticism, and developed the two main questions concerning libel explored by courts from the mid-nineteenth century: what counted as a public matter, and what kind of inference from facts would be considered fair comment.[58] Cockburn LCJ emphasized that a reaction to a matter

[53] *Lancet*, 18 Nov. 1865, 570–71 (quoting the *Daily News*, 7 Nov. 1865).
[54] *Pall Mall Gazette*, 10 Nov. 1865, 10.
[55] The acquittal sadly turned on the victim's delayed complaint.
[56] *Hunter* v *Sharpe*, (1866) 4 F & F 983.
[57] 'The Legal Year 1866', 42 *Law Times* 179 (1867).
[58] Mitchell, *Defamation*, ch. 8. Cockburn's statements also became part of his judicial legacy. Van Vechten Veeder, 'Sir Alexander Cockburn', 14 *Harvard Law Review* (1900–1901), 79, at 94. For the case's

already in the public domain by a writer exercising his vocation was protected even if the comment involved an error. The question of fair comment was of course important for the press, which sought extended protections to balance the presumption of malice in defamatory publications.[59] In the wake of the case, an extended article on the law of libel commented on the dramatic change of recent years by which courts invested the press with a 'quasi-judicial position', while the *Jurist* dedicated an article to the advance in 'freedom of discussion'.[60] However, it was the truth defence that led the court to examine the meaning of quackery. This development merits reinstating within legal history in terms of its contribution to the history of legal boundary-work explored here. Incidentally, it also sheds light on an interesting element in the strained relationship between the defences of fair comment and truth. As Paul Mitchell explains, the categorization of fair comment was uncertain after 1863, when it was construed as part of the question of 'libel or no libel' (rather than qualified privilege). From this point, fair comment and truth could overlap. In practice, judges applied the fair comment defence both to verifiable (but unverified) facts, and to unverifiable statements ('opinion'), a distinction that continues to create conceptual difficulties.[61] The question of quackery in *Hunter* revealed that conceptual opaqueness was also a matter of how facts themselves were defined, because that determined whether they were verifiable or not. In an environment of limited scientific knowledge, facts about curing consumption were unavailable. However, Cockburn located the truth of quackery in its loss of restraint rather than knowledge of cure, and worked towards an image of scientific truth from there. That choice made the truth defence possible, and not only the fair comment one.

Cockburn LCJ put the question to the jury:

> Is Dr. Hunter's system one which he has propounded to the public as an honest medical writer or practitioner, for the purpose of enlightening the profession or benefiting the public? Or is it a system of quackery, delusion, and dishonesty put forward – no matter at what cost to the victims … – for the purpose of putting money into his own pocket?[62]

presence in statements of the law see for example, John Shortt, *The Law Relating to Works of Literature and Art*, London, 1871, 446; James Paterson, *The Liberty of the Press, Speech, and Public Worship*, London, 1880, 138; W. E. Ball, ed., *Leading Cases on the Law of Torts*, London, 1884, 80; Richard J. Kelly, *Law of Newspaper Libel*, London, 1889, 67; William Blake Odgers et al, *A Digest of the Law of Libel and Slander*, London, 1911, 224.

[59]For the history of libel as applied to the media see Paul Mitchell, *A History of Tort Law 1900–1950*, Cambridge, 2015, ch. 6.

[60]'The Law of Libel', *Cornhill Magazine*, Jan. 1867, 36; 12 *Jurist* (1866), 465.

[61]From the late nineteenth century, the theory (but not always practice) of libel law applied fair comment to opinion. Difficulties of categorization followed the judicial rejection of fair comment as part of qualified privilege in *Campbell* v *Spottiswoode* (1863), 3 B & S 769. Mitchell, *Defamation*, ch. 8.

[62]*Hunter* v *Sharpe* (1866), 4 F & F 983.

The instruction ideologically bifurcated scientific enlightenment and private profit. The decision was for the jury, yet Cockburn set out to instruct them, trusting, he said, that they were all fresh in body and mind, and had 'a due supply of oxygen'.[63] Medical witnesses led Cockburn to conclude that Hunter's work was so grossly erroneous that it could only exist to excite exaggerated hopes and fears, for profit.[64] The 'system' was illuminated by the advertising campaign. Cockburn exclaimed: 'Gentlemen, we are not in America; we are in England; … Empirics advertise; professional men do not'.[65] The *British Medical Journal* (*BMJ*), the organ of the BMA, recommended Cockburn's words to be written in gold; the ethical rules of the great professions, it said, 'are only the applications of the general laws of morality and social order'.[66]

The jury decided for Hunter but with damages of one farthing, leaving each party to defray its own substantial costs.[67] The decision bore striking similarities to *Larkin*. While commentators pondered the ambiguity, the parties, in contrast with those in *Larkin*, saw it as the newspaper's clear victory. As we have seen, Hunter's critics were indeed concerned with his challenge to the boundary between medicine and quackery more than with the fact that he existed. Because the decision affirmed the conceptual boundary, it justified a celebration. Smith thought it was a 'brilliant triumph' for his journal.[68] The case was hailed by the medical elite as a successful protection of the boundaries of science against quackery. The *Lancet* and the *BMJ* raised a subscription and gave Smith a £250 silver vase with an address of 181 men. The lid represented 'The Flight of Genius', and the medallion showed the crowning of Wisdom and Science in the presence of the Virtues. The inscription celebrated the 'the right of courageous and honest criticism'. The president of the Royal College of Physicians presided over the ceremony. Smith was commended for the magazine's efforts 'to expose the social evil of barefaced systematic quackery, especially the degrading practice of self-laudation … '[69] The turn to symbolism and ritual clarified just how profoundly scientific medicine depended on the public arenas of courts to articulate, to itself as to the public, the sphere of its authority. The event framed advertising as the centre of quackery's excess. The *BMJ* argued that

[63]Hunter, *Great Libel Case*, 294.
[64]The lead medical witness was Dr Williams, who was Cockburn's medical adviser, a point not raised at the time. Smith enjoyed watching Cockburn's friendly questioning that, he admitted, exceeded what was relevant for the case. George M. Smith, 'Lawful Pleasures', *Cornhill Magazine*, Feb. 1901, 190.
[65]Hunter, *Great Libel Case*, 355.
[66]*BMJ*, 8 Dec. 1866, 642.
[67]The *Pall Mall Gazette's* were £1400. Smith, 'Lawful Pleasures',190.
[68]On conflicting interpretations see for example *Evening Standard*, 3 Dec. 1866, 4; *Beverley and East Riding Recorder*, 26 Jan.1867; and a collection of opinions: *Pall Mall Gazette*, 3 Dec. 1866, 2. On the parties' interpretation see Smith, 'Lawful Pleasures', 193–194; Hunter, *Great Libel Case*.
[69]*Illustrated London News*, 17 Aug. 1867, 12. See also Smith, 'Lawful Pleasures', 193.

advertising was more crucial than Hunter's 'pure nonsense' theory: 'what deeply concerns us all is the opinion … on the propriety of the method by which this … theory were forced upon public notice'.[70] The question of science became simply, to advertise or not to advertise. It summarized:

> Once admit the propriety of a professional man seeking publicity by such forms of advertisements, let the long purse and the unblushing cheek become recognised elements in professional success, and the temptations to exaggeration, to excess in self-laudation, to an estimation of the means at the advertisers' command, will soon undermine the regard for truth. Where modesty and reserve are destroyed … the result will not be likely to be favourable to true scientific progress.[71]

Temptation, exaggeration, excess – associated with advertising, all driven by the profit motive, contrasted with modesty and reserve that stood for truth delivered by science.

The unrestrained Hunter was driven out of England. In his admonitions he unwittingly demonstrated the exaggerative bent. If what was done to him had been done to other discoverers, he wrote, 'the world might still have been a plain resting on the back of a turtle; the Archean spirit would certainly have reigned supreme in the arterial tubes; the smallpox have served to prune and keep down our redundant population; while Newton would never have been such a fool as to notice the "fall of the apple" … '.[72]

The cases of *Larkin* and *Hunter* are two elaborate examples that demonstrate how a focus on exaggeration allowed participants in legal cases to engage in boundary work and develop the differences between science and market one against the other. This contextual perspective was incompatible with a formal definition that described quackery simply as lack of credentials. Such an option had been available before mid-century of course, and was actually salient in slander suits, where a focus on credentials was important for procedural reasons: until the Common Law Procedure Act 1852, a physician plaintiff who sued for slander had to prove under the general issue that he practised legally, which often depended on his ability to produce admissible proof of medical certification.[73] In 1852 legal procedure changed, so that unless the defence pleaded otherwise, the plaintiff's qualification was assumed to have been admitted, but from 1858 the Medical Act was in place and provided a *substantive* reason to focus on credentials in the definition of quackery. Despite this development, the option of distinguishing trade from professionalism on

[70] *BMJ*, 8 Dec. 1866, 642.
[71] Ibid., 643.
[72] Hunter, *Great Libel Case*, 368.
[73] Common Law Procedure Act 1852 (15 & 16 Vict., c. 76). On the change in the law see Henry Coleman Folkard, *The Law of Slander and Libel*, London, 1876, 412–413.

that basis was rejected in law, and the perspectives we see in *Larkin* and *Hunter* adopted, as the next section shows. This occurred at the turn of the twentieth century, when the campaign of the medical establishment against quackery was at its height.

IV. Exaggeration Turned Precedent

1. Dakhyl *v* Labouchere

The rejection of a credentials-based definition of quackery became a legal precedent in a series of decisions between 1904 and 1907, when the MP and owner of the journal *Truth*, Henry Labouchere, was sued for libel by Hanna Nassif Dakhyl. Labouchere's legal battles were widely publicized. This was the forty-fourth action against him for publications in *Truth*; as his editor said, his continuous court encounters had no parallel.[74] Of Dakhyl, who was a doctor of medicine, a bachelor of science, and a bachelor of arts from the University of Paris, he wrote:

> Possibly this gentleman may possess all the talents which his alleged foreign degrees denote, but, of course, he is not a qualified medical practitioner, and he happens to be the late 'physician' to the notorious Drouet Institute for the Deaf. In other words, he is a quack of the rankest species. I presume that he has left the Drouet gang in order to carry on a 'practice' of the same class on his own account, and probably he is well qualified to succeed in that peculiar line.

The Drouet Institute's faults were diagnosis and treatment by correspondence, mostly for deafness.[75] It undermined medical authority by denying patients' need to see doctors, or indeed to be seen at all. This problem spoke to Foucault's productive concept of the medical gaze, that is, the objectifying position that scientific medicine assumed over bodies, which many consumers appeared to resist. We also see here more basically the uncertain status of diagnosis in person, which the impersonality of advertising and communication technologies more broadly threw into doubt.

Dakhyl was enraged, and he sued. Labouchere defended with both truth and fair comment. Alverstone LCJ instructed the jury to distinguish commentary on treatment by correspondence from a personal attack on Dakhyl. He thought that the latter was unjustified. A quack, according to a definition that Alverstone LCJ had found, was a 'boastful pretender to a medical skill he did not possess'.[76] Dakhyl was skilled, allowed to practise

[74] R. Bennett, in Algar Labouchere Thorold, *The Life of Henry Labouchere*, New York and London, 1913, 506. By that point Labouchere had won nineteen cases, lost eight, in two the jury disagreed, five were settled, and ten abandoned by plaintiffs. *Edinburgh Evening News*, 12 March 1904, 8.

[75] Witnesses testified to over 100 formulaic letters sent daily to patients by a team of clerks. *Yorkshire Post and Leeds Intelligencer*, 9 Nov. 1907, 12. See also *Bradford Daily Telegraph*, 5 Nov. 1907, 6. The Institute closed by the end of Dakhyl's trials.

in England although it was 'one of the grievances of the medical profession', and had satisfied patients. Alverstone LCJ was not willing to see every advertising medical provider as a quack. As he put it, 'because a man has published an advertisement showing that he is not a gentleman … it does not show that he is a quack … '.[77] Following this instruction, the jury awarded Dakhyl £1000.[78]

Alverstone LCJ's definition was formalist. Far from the ideological bifurcation between scientific enlightenment and self-interested profit, it limited the purview to acquired skill, and not even to the medical register at that. Worse still for ideologues of science, he failed to treat advertising as a problem for the *scientific* aspirations of medicine. In his reference to gentlemanliness he instead associated objections to advertising with medicine's roots in status, from which medicine was seeking to disentangle itself. Unfortunately for Dakhyl, Labouchere was the losing party. Warnings circulated that 'he would go to the House of Lords till he won'.[79] He requested a retrial on grounds of jury misdirection. The Court of Appeal agreed, and the House of Lords affirmed. They corrected Alverstone LCJ: the definition must remain open. Collins MR objected to the rule that the Lord Chief Justice advanced: 'He said … that the question … was Aye or No'.[80] There are, Lord Loreburn said, other meanings, such as a 'person who, however skilled, lends himself to a medical imposture'.[81] With 'all respect to the learned Chief Justice', he had fallen into error.[82]

The open definition of quackery implied an opportunity for the jury to find that the allegation was true, and if not, to move on to the second defence and find that *Truth* commented fairly on a matter of public interest, as the House of Lords explained. Consequently, *Dakhyl* became a reference in the line of legal authorities on the boundaries of fair comment and the difficulty of distinguishing fact from comment.[83] Yet it bears emphasis that here, as in *Hunter*, much of the difficulty lay in identifying the relevant fact to be determined, that is, what counted as quackery. This side of *Dakhyl* and its implications remained marginal in legal analyses, but deserve attention.[84]

[76]Probably from Noah Webster, *A Dictionary of the English Language,* London, 1828.
[77]*Dakhyl* v *Labouchere* (1907) 23 TLR 364, 365.
[78]*Times*, 11 March 1904, 13.
[79]*Globe*, 5 Nov. 1907, 10.
[80]*BMJ*, 13 Aug. 1904, 359.
[81]*Dakhyl* v *Labouchere* [1908] 2 KB 325, 326 (HL).
[82]Ibid., 328 (Lord Atkinson).
[83]On the case's legacy see for example 52 *Solicitors' Journal and Weekly Reporter* (1907–1908), 755; For a recent discussion see Mitchell, *Defamation*, ch. 8; Jason Bosland, Andrew T. Kenyon and Sophie Walker, 'Protecting Inferences of Fact in Defamation Law: Fair Comment and Honest Opinion', 74 *Cambridge Law Journal* (2015), 234.
[84]Despite the fact that *Dakhyl* was occasionally referred to as an authority on the legal meaning of quackery. E.g., Alfred Swaine, *Principles and Practice of Medical Jurisprudence*, London, 1905, 97.

Definitional openness was a revealing move in terms of the legal commitment to boundary work, because opting for it was not an obvious choice. From a legal-institutional perspective, definitional openness not only required the appeal courts to overturn a decision of the Lord Chief Justice and order a new trial, but also and more broadly, implied a shift of power from judges to juries. From 1840 it was settled that Fox's Libel Act 1792, which made the question of criminal libel a matter for jury determination, applied also to civil libel cases.[85] Thus, it was the role of the jury to determine what meaning the insulting words conveyed to an ordinary reader, and *Dakhyl* indeed became a cautionary tale on judicial direction of juries. Jury sovereignty was not usually palatable to judges. As William Cornish recounts, the era was characterized by judicial efforts to spell out what a judge could put to the jury in deciding aspects of defamation, motivated by attempts to have greater control over verdicts in the interests of the right to reputation.[86] Against this background, judges could be expected to endorse formal limitations on the jury's discretion, such as a formalist test of credentials. However, when it came to quackery courts finally endorsed a cultural perspective that preferred to define quackery as a breach of scientific ideals. This perspective demanded a contextual examination of conduct, and judges supporting it therefore showed no formalizing urge and would not settle for credentials. This leads to a second point, noted earlier, concerning legislative history. The refusal to formalize the meaning of quackery in terms of credentials was especially revealing of the role of litigation in boundary work in light of the Medical Act's emphasis on credentials. Credentials were an easy guideline, and were of course the key anchor of modern professionalism, but they were limited as a tool for defining *modes of being* in science and in the market. Libel proceedings were part of an effort to organize these fields as areas answering to distinct modes of conduct, structures of thought, and ultimately, as distinct cultural authorities. This more profound effort of cultural organization could not be satisfied with technical anchors. The relational view did just that.

A new trial was ordered, this time with Darling J presiding. While he too instructed the jury on the meaning of quackery, he shifted from dictionaries to literature to emphasize the excesses of advertising. The etymology of the word 'quack' was uncertain, he said, but it had long been in use. He then read a passage by Joseph Addison, one which O'Hagan had read in *Larkin* over sixty years earlier:[87] 'At the first appearance that a French quack made in Paris a boy walked before him, publishing with a shrill voice, "My father cures all sorts of distempers," to which the doctor added, in a grave

[85]This was settled in *Parmiter* v *Coupland* (1840) 6 M & W 105. Mitchell, *Defamation*, 37.
[86]Cornish, 'Personal Reputation, Privacy and Intellectual Creativity', 856, 870–872.
[87]*Nation*, 21 June 1845, 604.

manner, "The child says true."' Darling J continued: 'a quack may have great skill, but that would only make his trade the more disgraceful. Charlatans, or quacks in all professions had been castigated by writers of genius in all languages; for example, in Pope … and Molière'.[88] On the facts of the case Darling J had a clear stand: The Drouet system sent medicines that would do 'no earthly good', and no careful man, however skilled, would adopt it.[89] Darling J's reasoning suggested metonymically rather than logically, that the style of exaggeration – a 'shrill voice' – also implied a substance of worthless practice and lack of care. He tied one to the other, and was effective. After his summation, it took the jury fifteen minutes to find for Labouchere.[90] The case rendered Dakhyl bankrupt,[91] while the *Lancet* celebrated: 'Fortunately, the meaning of the word quack is not very well established … The back waters of science are the natural lurking-places of imposture … '.[92] In fact, the meaning of 'quack' was now well established in law, not as specifiable content but rather as a mode of thought and conduct marked by diminishing restraint, and hence by the erosion of science.

2. *The implications of* Dakhyl *v* Labouchere

To clarify the historical significance of *Dakhyl* as a contribution to cultural meanings, this subsection probes its limits in terms of practical outcomes. First, despite the *Lancet's* celebration, definitional openness did not necessarily serve the medical establishment.[93] The division of labour between science and the market was a cultural process that established ideal types, and as such was not fully aligned with the aspirations of the real historical establishment to decide who was in and who was out of the boundary line of science. Second, definitional openness did not guarantee a correct assessment of curative value, because ideal types were, indeed, only ideals. The things that *Dakhyl* did not achieve suggest that it would be misleading to assess its impact in terms of direct outcomes of cases. Instead, its historical impact should be evaluated within emergent cultural understandings of modern science as well as the modern consumer market. The cases that demonstrate this point have suffered from an undeserved legal obscurity, but at the time they occupied the medical community and were reported

[88] *Times*, 9 Nov. 1907, 7.
[89] *BMJ*, 16 Nov. 1907, 1469.
[90] *Daily News*, 9 Nov. 1907, 2
[91] *Lancashire General Advertiser*, 28 May 1908, 2.
[92] *Lancet*, 16 Nov. 1907, 1401–02.
[93] Nor, incidentally, could the use of a special jury secure an outcome supportive of the medical establishment. The special jury was an eighteenth-century invention intended to tighten political control over unruly juries. In libel suits special juries secured a harsher approach to political criticism in the press. Quackery and medicine, however, had supporters and detractors across classes.

in the press. As we will see, one of them has continued to interest pharmaceutical and medical historians.

Shortly after *Dakhyl*, the *Lancet* itself was successfully sued for imputing quackery to a man who marketed an asthma inhaler by an American doctor, in the case of *Tucker* v *Wakley*. Thomas Wakley was the *Lancet's* owner. Augustus Tucker was the doctor's brother and agent. Tucker had no credentials and admitted that he had no idea how his inhaler worked, but in court the discussion turned on the treatment's scientific basis, and the *Lancet* was unable to establish a distance from science. Large numbers of patients, including aristocrats, lawyers and doctors, were on Tucker's side. Efficacy was not contested, at least on the level of asthmatic symptoms – but rather the reasons behind it. The *Lancet's* main argument against the treatment was that it contained cocaine, but it turned out that many doctors were prescribing medicines that contained it. Moreover, the dangers of cocaine were contested. The jury awarded £1000 damages with Ridley J's encouragement. Ridley J framed the controversy as a genuinely scientific one. The fact that Tucker did not advertise in the press, which the judge conceded to be problematic, but rather distributed pamphlets, worked in his favour. Ridley J also did not find quack exaggerations. His interpretation denied that Tucker exaggerated the inhaler's curing powers. More interestingly, however, Ridley J pointed out that doctors themselves regularly promised cures.[94] As the *Lancet* learned, the definitional openness of quackery allowed judges to interpret the shifting lines of scientific thought and conduct, and the meaning of exaggeration in relation to them, in ways that did not always affirm established orthodoxies.

Similarly, in 1912 the BMA paid heavily for its attack on Dr Robert Bell, who claimed to have found a cure for cancer. A *BMJ* article accused Bell of quackery and said he was 'one of the most advertised cancer curers of our time'.[95] Bell sued. Alverstone LCJ presided, and had learned his *Dakhyl* lesson: 'I once made a mistake on this matter, and therefore it is in my mind. All I say is, a qualified medical man may be guilty of "quackery" … '.[96] Yet Alverstone LCJ saw that he could help a medical man by moulding him into the image of the reticent hard-working scientist. He conveniently ignored the question of advertising, which would have brought forth a debate about exaggeration. Instead, Alverstone LCJ analysed the evidence to portray Bell's disagreement with prevalent medical opinion as a scientific controversy. He emphasized the many years of work that made Bell poorer rather than richer. This apparent lack of interest in profit assisted in defending Bell, who came closer to ideals of restraint. The jury awarded him £2000,

[94] *Tucker* v *Wakley* reported in *Daily News*, 21 Jan. 1908, 6; the *Lancet* transcribed the proceedings: *Lancet*, 1 Feb. 1908, 301–383; see also *Times*, 21 Jan. 1908.
[95] *BMJ*, 27 May 1911, 1230.
[96] *BMJ*, 22 June 1912, 1463.

a decision received with 'great applause from the back of the court, the clapping … continuing until ushers sternly cried "Silence"'.[97] The frustrated *BMJ* described it as 'Applause … immediately suppressed'.[98]

The BMA won a different libel case that year, but one that history judged to have been wrong. In 1909 it published *Secret Remedies*, the first of two collections in which it analysed and criticized some 270 quack medicines. Charles Henry Stevens, who was targeted in the book, sued. The case was unusual within the run of quack libel cases: unlike many plaintiffs, Stevens had no medical qualifications nor a partnership with doctors. Moreover, most advertisers attacked in *Secret Remedies* were reluctant to respond. They instead built on market dynamics to save them.[99] Stevens decided otherwise.

Stevens claimed to have discovered a cure for consumption, still deadly more than fifty years after *Hunter*.[100] Like Hunter, Stevens argued that the medical establishment refused to consider his findings. He received a particularly angry treatment by the BMA due to his 'effrontery'. Stevens sent patients to their doctors with a list of questions and asked them to remain under their care so that doctors could observe the efficacy of his medicine.[101] He also challenged the Brompton Hospital for Consumptives to inoculate him with tuberculosis on the condition that if he cured himself, the hospital would adopt his medicine.[102] Stevens's story exotically narrated a process of native treatment in South Africa.[103] He added insult to injury by revealing his formula and claiming to undo secrecy: 80 grains of umckaloabo root, and 13.5 grains of chijitse to every ounce. The herbs were ridiculous to the BMA: 'The farce of revealing the formula by the employment of such fancy names as these is one of the oldest dodges of the quack medicine man, and no such names as "umckaloabo" and "chijitse" appear in any available work of reference of pharmacy.'[104]

As it turned out years later, umckaloabo not only existed, but Stevens's cure was good for many cases of tuberculosis. The saving of the drug awaited experiments published by a French-Swiss physician, Adrein Sechehaye – and Stevens was still active and able to celebrate.[105] The plant was

[97] *Bell* v *Bashford and British Medical Association*, *Northern Whig*, 15 June 1912, 9. Bashford was the author of the libel in the *BMJ*.
[98] *BMJ*, 22 June 1912, 1467.
[99] Frederick Phillips, a chemist who published a rebuttal of *Secret Remedies*, reported on advertisers' reluctance. Frederick Phillips, *A Sequel to 'Secret Remedies'*, s. l. 1910, Cambridge University Library.
[100] E.g., advertisement by Stevens in *People*, 10 Oct. 1909, 9.
[101] British Medical Association, *Secret Remedies: What They Cost and What They Contain*, London, 1909, 22.
[102] Letter from C.H. Stevens to the medical experts of the Brompton Hospital (16 July 1908), in *Medical Evidence given in the Consumption Cure Libel Action: Stevens v The British Medical Association*, The Royal College of Surgeons of England, Wellcome Collection.
[103] *Times*, 22 July 1914, 4.
[104] BMA, *Secret Remedies*, 22.
[105] E.g., advertisement by Stevens in *Graphic*, 21 Jan. 1928, 120.

truly mysterious at the time; botanical origins were only confirmed in 1974.[106] Yet, in court Stevens lost. Historians of medicine and pharmacy have noted this historical mistake, but the case's relationship to the legal meaning of quackery can shed more light on its outcome. Stevens's working assumption was that if he could show that the BMA's chemical analysis was wrong, he would win. He was able to challenge the analysis, but not to win. The chemical details did not replace the focus on exaggeration rooted in advertising, which remained the legal core of quackery. As noted in the introduction, this perspective enjoyed a legal resonance beyond libel that is outside the scope of this article, but it is worth mentioning one case that could have resonated in Stevens's trial, namely, *Bile Bean Manufacturing Co., Limited* v *Davidson* in 1906.[107] The Bile Bean Company lost a passing off suit because the Scottish courts found that it told a fraudulent tale in its advertisements, namely, that its pills were made from a secret Australian herb long known to natives, and allegedly discovered by an 'eminent scientist' named Charles Forde, who did not exist. The Australian fiction was less central to the advertising campaign than the cure promises that Bile Bean circulated, which the courts dismissed as mere puffery.[108] Yet, both the attribution of fraud and the dismissal of puffery fed into suspicions of advertisements about exotic discoveries. In Stevens's case, two judges in two courts highlighted for juries that the evaluation of quackery was an exercise in recognizing excess, which was always a relative matter.

Pickford J presided over the first trial in the High Court. He read extensively from Stevens's advertisements. As he explained, '[t]he foundation of the article is that Mr. Stevens is claiming for this [medicine] something which he knows that he cannot perform'. Stevens had testimonies from both patients and doctors, but indications of efficacy were not enough; Pickford J insisted that the point was relative: 'I say you must consider "efficacy to what extent".'[109] This statement clarified how style and substance were mutually supportive in the legal framing of quackery: stylistic exaggeration meant that even if there was a substantive merit to a medicine, the claims made for it were disproportionate to its reality. The jury could not agree, and Shearman J presided over a second trial two years later.

[106]E.g., Axel Helmstädter, '"Umckaloabo": Late Vindication of a Secret Remedy', 26 *Pharmaceutical Historian* (1996), 2; S.W.B. Newsom, 'Stevens' Cure: A Secret Remedy', 95 *Journal of the Royal Society of Medicine* (2002), 463; Sabine Bladt and Hildebert Wagner, 'From the Zulu Medicine to the European Phytomedicine Umckaloabo', 14 *Phytomedicine* (2007): 2; T. Brendler and B.E. van Wyk, 'A Historical, Scientific and Commercial Perspective on the Medicinal Use of Pelargonium Sidoides (Geraniaceae)', 119 *Journal of Ethnopharmacology* (2008), 420; P.J. Footler, 'Umckaloabo, Secret Remedy', *Pharmaceutical Journal* (Nov. 2012) .

[107]*Bile Bean Manufacturing Co.* v *Davidson* (1906) 23 RPC 725; (1906), 22 RPC 553.

[108]Rosenberg, 'Legal Ridicule in the Age of Advertisement'.

[109]*BMJ*, 9 Nov. 1912, 1343, 1344.

Shearman J, observing *Dakhyl's* authority, told the jury that he would not comment: 'A case very much like this was tried … when the judge instructed the jury as to what is the meaning of the word "quack" … The higher court said that it is for the jury to decide … '.[110] He then went on to interpret the evidence and tell the jury what to think while prefacing every suggestion with the caveat that they were 'obviously the best people to judge'.[111] Stevens represented himself and was disadvantaged. Shearman too read out advertisements, and agreed: 'the gist of the libel' was the promise of infallible cure, and the question of fair comment had to be assessed relative to the advertisements.[112]

The jury decided within a few minutes for the BMA, and Stevens sustained costs of £2000. The Select Committee on Patent Medicines, reporting shortly after the decision, announced that Stevens's cure was a fraud.[113] Stevens did not give up. He argued in the Court of Appeal that the question of therapeutic value was not properly put before the jury, to no avail. Bankes J, who had represented Labouchere and the *Lancet*, was now on the bench. He placed the right to comment in proportion to marketization: it had to be free where 'large sums were made out of proprietary medicines'.[114] For many years, Stevens continued to lobby medical authorities, continued to advertise uninhibitedly, and continued to sell. His rehabilitated cure became a lucrative medicine that survived him. In 2006 it had a turnover of €80 million.[115]

As this and the previous section suggest, legal outcomes did not serve a single interest group, were open to criticism in terms of their ability to identify curative value, and anyway did not consistently determine the fate of medical providers, some of whom collapsed in the wake of legal battles, while others continued to thrive. Their historical significance therefore cannot be explained in terms of practical results. Instead, their impact was cultural, and lay in generating a set of ideas about exaggeration and restraint. They began with the profit motive, and converged on advertising as the preeminent quack action type, or 'method'. In examining advertising, ideals of medical science came into play, which celebrated a philanthropic exercise characterized by methodological reticence, positivistic minimalism, and personal humility. These ideals enjoyed an expansive legal articulation precisely because they were always in danger of losing restraints and unleashing quackery. Quackery, in turn, was not delegitimized completely, but rather made to inhabit a differentiated role characterized by exaggeration.

[110] *BMJ*, 1 Aug. 1914, 267.
[111] Ibid., 272.
[112] Ibid., 270.
[113] *Report*, S. 43.
[114] *BMJ*, 15 May 1915, 873.
[115] Brendler and van Wyk, 'Historical, Scientific and Commercial Perspective', Table 2.

V. Conclusion

In the formative years of the mass market in Britain, *c.* 1840–1914, legal means were involved in a wide-ranging process of a cultural division of labour, which gradually articulated the ideal boundaries between science and the market as it carved differentiated roles for medicine and quackery. Ethical codes, and more importantly libel proceedings, had a unique role in elaborating and formalizing what was otherwise a set of potent but elusive ideas. Two interrelated conclusions bear emphasis.

A first conclusion is the mutual indebtedness of medicine and quackery. Contra a common assumption, the history examined here suggests that they did not undermine one another. While practitioners associated with one or the other undeniably competed for economic and cultural capital, from a historical perspective the fundamental characteristic of the relationship of medicine and quackery was that each contributed to the other's emergence as a recognizable and, within defined boundaries, legitimate sphere of action and thought in modern Britain. Viewed one against the other, the cultural roles of medicine and quackery could make more sense than either of them could offer with its own resources and claims to knowledge in the unsure realities of medical provision in this era. As Gieryn argues, in such conditions, science assumes meaning through its boundaries: 'we learn about science by seeing what is far from it, or near … '.[116] And so does the field on the other side of the boundary, in this case the market for quackery. Normative interventions did not drive out quackery, did not preclude messy realities, and did not impose restraint on the entire world of medical provision. The jurisprudence of the medical state in this case did not prevent, or even attempted to prevent 'abuses, inadequacies, and imperfections'.[117] Instead, law organized the field of health by distributing cultural meanings between alternatives. The conceptual organization in law accommodated a variety of perspectives on medical treatment, which sustained scientific medicine, but also supported the market.

Historians have explored medicine's rising power as a science more than they have explored how its history dialectically framed the market, and specifically advertising. The restraints of science were a mode of cultural power, but their lack in advertising defined the market as a distinct field of action. Here we can turn to a second conclusion, namely, the paradoxical power of advertising as a negation of restraints. Normative efforts in ethical codes and in libel cases that intervened in the quackery debate, reveal part of the legal history that shaped advertising's cultural role as an acceptable form of exaggeration. They remind us that advertising's

[116]Gieryn, *Cultural Boundaries of Science*, 10.
[117]As Foucault put it in his French-based study: Foucault, *Birth of the Clinic*, 30.

epistemologically suspect status is a historical construct, and they explain the attractions of that construct, not only for science but also for the market. Exaggeration was permissive as much as it was derisive. As exaggerations, advertisements were often disparaged and treated with an ironic distance that saw them as unworthy of serious consideration and rational attention. Yet, the same ironic distance was also a removal of the demanding ideals of scientific objectivity and the limitations that came with scientific seriousness, in favour of a less responsible, and therefore also freer realm of action. The excesses of this institution of the market were a target of criticism, but equally a basis for growth. Powerful fantasies of health, beautiful bodies, and thriving selves, induced consumers to respond to medical advertising. Those fantasies could circulate unbridled through advertising's cultural-legal construction as an unrestrained field.

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