

ARTICLE: THE PROFESSIONALISM PARADIGM SHIFT: WHY DISCARDING PROFESSIONAL IDEOLOGY WILL IMPROVE THE CONDUCT AND REPUTATION OF THE BAR

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LexisNexis Summary

... When viewed as a paradigm, legal professionalism determines whether lawyer conduct is legitimate and provides the basis for lawyers' exclusive privilege to provide legal services and their autonomy from external regulation. ... Especially in light of the questionable performance of lawyers under the Professionalism Paradigm, increased competition would likely result in better quality services at a lower cost. ... I The Professionalism Paradigm Thomas Kuhn's theory of paradigms explains how, except in rare instances where a paradigm crisis occurs, socially constructed paradigms shape a community's work and restrain inconsistent views. ... As the tension between lawyers' business conduct and the Business-Profession dichotomy changed from a puzzle within the framework of the Professionalism Paradigm to an anomaly challenging the paradigm's competence, the legal profession entered a period of crisis. ... By the 1990s, violations of the Profit-Maximizer taboo had led to the "common perception among legal commentators ... that lawyers were primarily motivated by self-interest and the desire to make money." ... Law firms of all types marketed their services through advertising, direct mail, newsletters to clients and potential clients, and seminars on areas of practice where they sought to develop clients.

Text

[*1229]

As "professionals," lawyers historically have achieved autonomy from external regulation, distinguishing themselves from businesspersons because their commitment to clients and to public service surpassed their financial self-interest. Recently, however, commentators have lamented the decline of professionalism in the legal services industry. In this Article, Professor Pearce identifies this shift as a time for hope rather than as a cause for despair. Applying Thomas S. Kuhn's theory of paradigm shifts, Professor Pearce traces the transformation of law practice from a profession to a business. Explaining that the crisis created by the proliferation of business activities in law practice cannot be reconciled with the Professionalism Paradigm, he predicts that a Business Paradigm is emerging. Professor Pearce concludes by suggesting an approach to the Business Paradigm midway between a pure market approach and the re-creation of the status quo. This "Middle Range" approach would continue bar admission while permitting non-lawyers to practice law and substituting market and government regulation for self-regulation. Professor Pearce argues that this approach will likely free law practice of the taint of hypocrisy, foster a realistic community ethic of commitment to the common good, and improve the quality and delivery of legal services. [*1230]

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That we are at the end of an era is not something that can be proved scientifically. One senses it or one does not. One knows by intuition that the old images ... have lost their meaning.¹

The policies eliminated here ... free us all to concentrate our efforts on more important matters.²

Introduction

The legal profession is on the verge of a radical transformation. In the past few years, the best and the brightest of the legal world have chronicled the decline of professionalism and offered prescriptions for its revival.³ As this Article demonstrates, this attention is but one result of the loss of faith in the distinction between a business and a profession (Business-Profession dichotomy) at the heart of the existing paradigm that organizes our beliefs and values about the delivery of legal services - what I call the "Professionalism Paradigm." But while many commentators describe the current crisis as cause for despair, this Article identifies it as a time for hope. The crisis presents the legal community with an opportunity to move to a new paradigm offering better service to clients and greater benefit to the public.

As the framework for its analysis of the crisis in professionalism, the Article employs Thomas S. Kuhn's theory of paradigms. In his classic work, *The Structure of Scientific Revolutions*,⁴ Kuhn described how scientific communities, like other enterprises, use paradigms to maintain conformity regarding the legitimacy of questions, methods, and answers. Kuhn disputed the belief that scientific discoveries resulted from the incremental and progressive increase of knowledge. Instead, he demonstrated that such breakthroughs were relatively rare phenomena occurring only when paradigms had broken down. [*1231]

Kuhn's concept of paradigms provides a valuable tool for explaining the current state of legal professionalism and anticipating its future. When viewed as a paradigm, legal professionalism determines whether lawyer conduct is legitimate and provides the basis for lawyers' exclusive privilege to provide legal services and their autonomy from external regulation. Like a scientific paradigm, the Professionalism Paradigm is socially constructed. Its authority rests not on its truth in any abstract sense, but in its acceptance by the relevant community.

Created in the late nineteenth century in response to rising concerns that entrepreneurial aspects of law were undermining the profession's reputation, the Professionalism Paradigm rests on a purported bargain between the profession and society in which the profession agreed to act for the good of clients and society in exchange for autonomy. The conditions that made this bargain possible and necessary all require distinguishing a profession from a business. Under the paradigm, lawyers differ from businesspersons in that they possess esoteric knowledge inaccessible to lay persons. The paradigm also holds that, in contrast to businesspersons, who maximize financial self-interest, lawyers altruistically place the good of their clients and the good of society above their own self-interest. The combination of inaccessible knowledge and altruism makes both impractical and unnecessary the outside regulation of public and market to which businesses are subject.⁵

¹ Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* at v (1983); see also Stephen P. Wink & Walter Wink, *Domination, Justice and the Cult of Violence*, 38 *St. Louis U. L.J.* 341, 377 (1993) (discussing Berman quote).

² Elimination of Unnecessary Broadcast Regulation, 50 *Fed. Reg.* 5583, 5590 (1985) (policy statement of the Federal Communications Commission explaining, inter alia, its withdrawal from regulation of broadcast advertising on grounds that such regulation was duplicative and beyond the agency's expertise). I would like to thank George Cochran and Jimmy Robertson for drawing this wonderful quote to my attention.

³ See generally, e.g., Mary A. Glendon, *A Nation Under Lawyers: How the Crisis in the Legal Profession Is Transforming American Society* (1994); Anthony T. Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* (1993); Sol M. Linowitz & Martin Mayer, *The Betrayed Profession: Lawyering at the End of the Twentieth Century* (1994).

⁴ Thomas S. Kuhn, *The Structure of Scientific Revolutions* (2d ed. 1970). Richard Rorty has recently described this book as "the most influential English-language philosophy book of the last half-century." Richard Rorty, *Untruth and Consequences*, *New Republic*, July 31, 1995, at 32, 33 (reviewing *Killing Time: The Autobiography of Paul Feyerabend* (1995)).

⁵ See *infra* Part I.B.

Because lawyers have always earned their living selling their services to private consumers on the market and because much of their work involves representing the interests of businesses, the Professionalism Paradigm had to reconcile those business aspects of law practice with the Business-Profession dichotomy that underlies the paradigm. The paradigm's response was to make the profession responsible for policing the dichotomy by subjecting business conduct to certain taboos. This Article identifies these prohibitions as the "Profit Maximizer" and "Business Servant" taboos. The Profit Maximizer treats law as a commodity by organizing practice like a business, openly marketing services, and seeking large profits. The Business Servant favors clients at the expense of society.⁶

The Professionalism Paradigm also explained why making a living by selling legal services was not inconsistent with the dichotomy. Lawyers' earning of money in exchange for their services was only "incidental" in light of their higher commitment to the greater good. [*1232] Under the paradigm, the invisible hand of reputation - not efficiency - governed the market for legal services. Consumers who could not understand the esoteric practice of law relied upon a lawyer's reputation, which was earned in the self-policing legal profession by demonstrating excellence and ethical character. When the conduct of lawyers appeared inconsistent with the paradigm, the response was to exhort them to compliance. When a critic challenged the Business-Profession dichotomy and asserted that law was indeed a business, the profession marginalized that perspective.⁷

Today, however, the widespread perception is that law practice is a business. This perception so fundamentally undermines the Business-Profession dichotomy that it has provoked a professional crisis. Even the organized bar, the guardian of the Professionalism Paradigm, has conceded that this conduct threatens the continued viability of the paradigm.⁸

As Kuhn suggests, such a crisis can be resolved by one of three innovations: The community can discover a new way to resolve the anomaly using the existing paradigm; it can bracket the anomaly to be resolved in the future; or it can replace the old paradigm with a new one.⁹ The first two alternatives are not available here; the anomaly is too fundamental to the paradigm. That leaves the third alternative.

A new paradigm should explain the anomaly and offer a compelling account of the community's work. An emerging, and simple, new paradigm satisfies this criteria: The practice of law is a business (Business Paradigm). Implementation of the Business Paradigm is open to a variety of approaches, ranging from recreation of the status quo to nearly complete reliance upon the market. This Article proposes a "Middle Range" approach between these two extremes: allowing nonlawyers to provide legal services but retaining a role for the organized bar with bar membership serving as a certificate rather than a license. The Middle Range approach also includes governmental regulation similar to existing rules for lawyer conduct and shared moral commitment to the public good similar to the aspirations of the Professionalism Paradigm.¹⁰

The Middle Range approach may very well improve the quality of legal services, the administration of justice, and the contribution of lawyers to the public good. Especially in light of the questionable performance of lawyers under the Professionalism Paradigm, increased competition would likely result in better quality services at a lower [*1233] cost. By making legal services more widely available to moderate and low-income persons, competition would also contribute to improving the administration of justice. While this advance would not fully resolve the tension between the societal aspiration of equal justice under law and the absence of equal access to legal services, the Middle Range approach places the tension squarely and unavoidably before the public, who will hopefully address it.

The Middle Range approach would further promote respect for the legal system by removing the taint of duplicity resulting from the Professionalism Paradigm's assertions of lawyer altruism to a disbelieving public. Removal of this taint would also facilitate the development of a vision of public service that would have greater power to influence the members of the legal community than the Professionalism Paradigm.¹¹

Part I of the Article provides an overview of Kuhn's theory of the role of paradigms and describes how legal professionalism functions as a paradigm. Part II describes how in normal discourse the business behavior of lawyers was

⁶ See *infra* Part II.

⁷ See *infra* text accompanying notes 78-84.

⁸ See *infra* Part III.A.

⁹ See *infra* Part IV.A.

¹⁰ See *infra* Part IV.B.

¹¹ See *infra* Part IV.B.2.

a puzzle for resolution under the Professionalism Paradigm. Part III explains how lawyers' business behavior changed from a puzzle within the paradigm to an anomaly that provoked the present crisis. Part IV considers possible conclusions for the crisis and suggests that the most probable result will be the emergence of the Business Paradigm. It further describes how the Middle Range approach to the Business Paradigm may actually do a better job than the existing paradigm in meeting the goals of service to clients and the public.

I

The Professionalism Paradigm

Thomas Kuhn's theory of paradigms explains how, except in rare instances where a paradigm crisis occurs, socially constructed paradigms shape a community's work and restrain inconsistent views. The Professionalism Paradigm serves this function for the legal community. The paradigm relies on the Business-Profession dichotomy to provide the grounds both for normative assessment of lawyer conduct and for the profession's control of the delivery of legal services.

A. Kuhn's Theory of Paradigms

In *The Structure of Scientific Revolutions*, Kuhn demonstrates that the work of science is socially constructed much like other human [*1234] endeavors, such as art and politics.¹² He rejects the notion that the history of science reveals a logical, progressive, and incremental growth in knowledge.¹³ Instead, he shows that emotional and other non-rational factors play a major role in the development and acceptance of scientific discoveries.¹⁴

Kuhn finds that scientific communities use paradigms to organize their problem-solving efforts.¹⁵ In what Kuhn describes as "normal science,"¹⁶ practitioners who "have undergone similar educations and professional initiations"¹⁷ use their shared paradigm as the determi- [*1235] nant of "legitimate methods, problems, and standards of solution."¹⁸ In normal science, the community rejects ideas inconsistent with the paradigm, often without even evaluating their significance.¹⁹

¹² See Kuhn, *supra* note 4, at 208 (noting that "periodization in terms of revolutionary breaks and style, taste, and institutional structure" is common to science as well as literature, arts, and political developments); see also *id.* at 93 (discussing "genetic aspect of the parallel between political and scientific development").

¹³ *Id.* at 208-09.

¹⁴ Commentators disagree as to whether Kuhn rejects the notion of preexisting reality altogether. Compare, e.g., Joyce Appleby et al., *Telling the Truth About History* 165 (1994) (asserting that Kuhn "remained true to essentially realist assumptions about the relationship between what the scientist can know and how scientific laws mirror nature") with Dennis Patterson, *Postmodernism/Feminism/Law*, 77 *Cornell L. Rev.* 254, 275, 307 (1992) (describing Kuhn as a postmodernist). Kuhn's comments on this point are equivocal. Compare Kuhn, *supra* note 4, at 126 (finding it "impossible to relinquish entirely [the] viewpoint" that "sensory experience [is] fixed and neutral") with *id.* at 172-73 (noting that the development of scientific knowledge "may have occurred, as we now suppose biological evolution did, without benefit of a set goal, a permanent fixed scientific truth"). This Article need not resolve Kuhn's understanding of preexisting reality. Professionalism, unlike the speed of light, is quite evidently a social construction.

¹⁵ Steven Winter notes that Kuhn acknowledges three different uses of the term "paradigm." Steven L. Winter, *Bull Durham and the Uses of Theory*, 42 *Stan. L. Rev.* 639, 647 n.44 (1990). These are uses as a "disciplinary matrix," an "exemplar," and a "model." *Id.*; see also Kuhn, *supra* note 4, at 174-91 (discussing "disciplinary matrix" and "exemplar"); Thomas S. Kuhn, *Second Thoughts on Paradigms*, in *The Essential Tension: Selected Studies in Scientific Tradition and Change* 293, 297-98 (1977) (describing use of paradigm as "model").

¹⁶ Kuhn, *supra* note 4, at 5, 144. Richard Rorty describes "normal science" as "the practice of solving problems against the background of consensus about what counts as a good explanation of the phenomena and about what it would take for a problem to be solved." Richard Rorty, *Philosophy and the Mirror of Nature* 320 (1979).

¹⁷ Kuhn, *supra* note 4, at 177.

¹⁸ *Id.* at 48. The paradigm "provides a map whose details are elucidated by mature scientific research." *Id.* at 109.

¹⁹ In normal science, "the research worker is a solver of puzzles, not a tester of paradigms." *Id.* at 144. Kuhn observed that "normal science ... often suppresses fundamental novelties because they are necessarily subversive of its basic commitments." *Id.* at 5. The community generally rejects research challenging or disregarding the paradigm "as metaphysical, as the concern of another discipline, or sometimes as just too problematic to be worth the time." *Id.* at 37. The community even rejects ideas that may form the basis of a later paradigm. Kuhn notes that in the transformations he studied, the new paradigms "had been at least par-

At the same time that a paradigm constrains discourse, its problem-solving nature ensures the paradigm's eventual demise.²⁰ The task of problem-solving will inevitably result in identification of a problem that is not susceptible to problem-solving efforts under the paradigm.²¹ That problem becomes an "anomaly" that provokes a crisis.²² A time of crisis is one of "extraordinary science"²³ where the paradigm itself comes into question.²⁴ In this "period of pronounced professional insecurity,"²⁵ consensus regarding the constitution of the governing paradigm disintegrates, proposals for new paradigms proliferate, and the community "turns" to philosophy as it revisits first principles.²⁶

When the scientific community cannot resolve the crisis by solving the problem under the paradigm or bracketing the problem for the [*1236] future, it replaces the old paradigm with a new one in what Kuhn calls a revolution.²⁷ The new paradigm proposes to "solve the problems that have led the old one to a crisis."²⁸ Whether the new paradigm succeeds in a revolution depends more on the power of conversion than logical argument.²⁹ No "logical" choice is available between competing paradigms that "disagree about what is a problem and what a solution."³⁰ Newer members of the community tend to be more open to new paradigms and more senior members tend to be more resistant.³¹

Kuhn and other commentators have not limited this analysis to scientific communities. Any definable community

tially anticipated during a period when there was no crisis in the corresponding science; and in the absence of crisis those anticipations had been ignored." *Id.* at 75.

²⁰ *Id.* at 181 (describing crisis as "a self-correcting mechanism which ensures that the rigidity of normal science will not forever go unchallenged"); see also Frank Michelman, *Law's Republic*, 97 *Yale L.J.* 1493, 1523 (1988) (observing Kuhn's acknowledgment that "normal-scientific practice is always in some degree nurturing the development of its own impending transformation").

²¹ At some point, "a normal problem, one that ought to be solvable by known rules and procedures, resists the reiterated onslaught of the ablest members of the group within whose competence it falls." Kuhn, *supra* note 4, at 5. This problem can arise either from influences inside or outside of the scientific community. *Id.* at 181.

²² See *id.* at 6 (noting that anomalies lead to scientific revolutions). At the point where "an anomaly comes to seem more than just another puzzle of normal science, the transition to crisis and to extraordinary science has begun." *Id.* at 82.

²³ *Id.* at 82.

²⁴ See *id.* at 82-83 (noting that "formerly standard solutions of solved problems are called in question").

²⁵ *Id.* at 67-68.

²⁶ The crisis period involves "frequent and deep debates over legitimate methods, problems, and standards of solution" that are "almost non-existent during periods of normal science." *Id.* at 47-48; see *id.* at 80-88 ("In periods of acknowledged crisis ... scientists have turned to philosophical analysis as a device for unlocking the riddles of their field."); see also Winter, *supra* note 15, at 679-80 (quoting Kuhn).

²⁷ Kuhn, *supra* note 4, at 84, 92.

²⁸ *Id.* at 153. The new paradigm "need not, and in fact never does, explain all the facts with which it can be confronted." *Id.* at 18.

²⁹ See *id.* at 151, 159 (discussing how new paradigms ultimately find favor through change in generations, not from unqualified acceptance). Kuhn describes how scientists "often speak of the 'scales falling from the eyes' or of the 'lightning flash' that 'inundates' a previously obscure puzzle." *Id.* at 122; see also *id.* at 158 (explaining that conversion relies on "faith that the new paradigm will succeed with the many large problems that confront it, knowing only that the older paradigm has failed with a few"). Indeed, the old paradigm is likely to offer advantages in problem solving. See *id.* at 154 (stating that, when proposed, "Copernicus' theory was not more accurate than Ptolemy's").

³⁰ *Id.* at 109. Without agreement on "evaluative procedures," "logic and experiment alone" cannot establish the superiority of either paradigm. *Id.* at 94; see also William R. Casto, *The Erie Doctrine and the Structure of Constitutional Revolutions*, 62 *Tul. L. Rev.* 907, 909-10 (1988) (discussing how, under Kuhn's model of revolution, "scientific revolutions are ... functions of nonrational faith").

³¹ The process of transforming the profession "begins with one or a few individuals" whose perspective differs from "most other members of their profession." Kuhn, *supra* note 4, at 144. For one, they have "intensely concentrated upon the crisis-provoking problems." *Id.* In addition, they are "committed ... less deeply than most of their contemporaries to the world view and rules determined by the old paradigm" often because they are "so young or so new" to the field. *Id.* The "first supporters" of the paradigm then "develop it to the point where hardheaded arguments can be produced and multiplied." *Id.* at 158.

can possess a paradigm. While asserting the uniqueness of scientific communities,³² [*1237] Kuhn acknowledged the utility of his approach for analyzing change in music, art, literature, and political development.³³ Many legal scholars have similarly applied Kuhn's analysis in areas as diverse as legal history, legal theory, economics, constitutional law, and civil procedure.³⁴

B. Applying Paradigm Theory to the Legal Profession

While commentators have previously used paradigm theory to discuss specific areas of law,³⁵ this Article applies it to professionalism. Unlike a scientific paradigm, in which practitioners take for granted the truth of certain assumptions about the physical world, the Professionalism Paradigm is self-referential. Although defining right [*1238] and wrong, rather than true and false, the Professionalism Paradigm - no less than a scientific paradigm - constrains the scope of legitimate activity for its community.

Created in the late nineteenth century,³⁶ when belief in the Business-Profession dichotomy had eroded,³⁷ the major problem the Professionalism Paradigm sought to address was the preservation of the distinction between a business and a profession. Its essence was a bargain between the profession and society: The profession agreed to use its skills for the good of its clients and the public. In exchange for this promise, society ceded authority to the profession, including the exclusive right to practice law and autonomy from government and, to some extent, market regulation.³⁸ The conditions of esoteric knowledge, altruism, and autonomy - each of which distinguished a profes-

³² See *id.* at 209 (noting that although "scientific development may resemble that in other fields ... it is also strikingly different"). In his view, the unique aspects of scientific communities include their self-governance, the "special nature of scientific education" and values, the "relative scarcity of competing schools," and the small size of the communities. *Id.*

³³ Indeed, in his view, he was borrowing "[the tool of] periodization in terms of revolutionary breaks in style, taste, and institutional structure" from "historians of literature, of music, of the arts, of political development, and of many other human activities." *Id.* at 208; see also *id.* at 92-94 (discussing parallels between political and scientific development).

³⁴ In recent law reviews, at least 307 articles have referred to Thomas Kuhn. Search of LEXIS, Lawrev library, Allrev file (Aug. 17, 1995). Scientific communities tend to be smaller, more uniform in their views, and more insulated from public pressure than the legal community. See Kuhn, *supra* note 4, at 209 (noting "relative scarcity of competing schools in the developed sciences"); Jeffrey W. Stempel, *New Paradigm, Normal Science, or Crumbling Construct? Trends in Adjudicatory Procedure and Litigation Reform*, 59 *Brook. L. Rev.* 659, 697-98 (1993) ("Law ... is expected to be responsive to public concern about perceived problems, while science is given more insulation from the current social environment."). Nevertheless, the legal community "bears significant parallels to the scientific community[.]" Winter, *supra* note 15, at 670 n.162, and even if it did not, Kuhn acknowledges that his approach applies broadly to political and other communities. Kuhn, *supra* note 4, at 92-94, 208. Accordingly, numerous legal scholars have found Kuhn's theory helpful in explaining a wide variety of legal topics. See, e.g., Berman, *supra* note 1, at 22 ("The interaction of revolution and evolution in Western law offers a striking parallel to the interaction of revolution and evolution in Western science."); Richard A. Posner, *Overcoming Law* 426 (1995) (describing "economics [as] increasingly a single field, utilizing a common paradigm in Kuhn's sense"); Casto, *supra* note 30, at 909-10 (applying Kuhn's analysis to development of the Erie doctrine); Richard Delgado, *The Imperial Scholar Revisited: How To Marginalize Outsider Writing, Ten Years Later*, 140 *U. Pa. L. Rev.* 1349, 1369 (1992) (describing transformation of legal scholarship as "if not a full-fledged paradigm shift, something similar"); Michelman, *supra* note 20, at 1522-23 (comparing Bruce Ackerman's account of "constitutional politics" with Kuhn's analysis); Stempel, *supra*, at 661, 734 (observing that "the perceived post-1938 consensus attending adjudicatory procedure and civil litigation reform" constitutes the equivalent of a paradigm that has been under attack but has not yet been replaced); Winter, *supra* note 15, at 669-81 (using Kuhn's theory to describe crisis and change in legal scholarship).

³⁵ See *supra* note 34. Commentators have applied the term "paradigm" to the study of professionalism, see, e.g., Robert L. Nelson & David M. Trubek, *New Problems and New Paradigms in Studies of the Legal Profession, in Lawyers' Ideals/Lawyers' Practices: Transformations in the American Legal Profession* 1, 2-3 (Robert L. Nelson et al. eds., 1992) (applying term "paradigm" to approaches to sociology of profession), but have not applied Kuhn's theory of paradigm shifts to the crisis of professionalism.

³⁶ See generally Burton J. Bledstein, *The Culture of Professionalism* 80-129 (1976) (describing development of professionalism in late nineteenth century); Magali S. Larson, *The Rise of Professionalism: A Sociological Analysis* 104 (1977) ("Professions came of age in America after the Civil War"); Rayman L. Solomon, *Five Crises or One: The Concept of Legal Professionalism, 1925-1960, in Lawyers' Ideals/Lawyers' Practices*, *supra* note 35, at 144, 150 (describing "last quarter of the nineteenth century [as] the 'take-off' period of professionalization in the United States").

³⁷ See Robert W. Gordon, "The Ideal and the Actual in the Law": *Fantasies and Practices of New York City Lawyers, 1870-1910, in The New High Priests: Lawyers in Post-Civil War America* 51, 61 (Gerard W. Gawalt ed., 1984) (noting widespread perception that legal profession had become a business).

³⁸ Some commentators have described the relationship between a profession and society as the following type of contract:

sion from a business - made this bargain both necessary and possible.³⁹ [*1239]

The first condition, esoteric knowledge, made the bargain necessary. Lawyers, like other professionals, have "mastered ... esoteric and inaccessible knowledge," as opposed to the more accessible knowledge of business.⁴⁰ The esoteric nature of the knowledge made it very difficult for lay persons, including clients and the general public, to evaluate the profession's work.⁴¹ In contrast, all persons could understand how businesses worked and what they produced, so that government could regulate them and individuals could make knowledgeable purchases on the market.⁴²

While esoteric knowledge made the bargain necessary, lawyers' altruism made the bargain acceptable. In contrast to businesspersons, who maximized financial self-interest, altruistic lawyers placed the interests of the common good and of their clients above their own financial and other self-interests.⁴³ Clients, who had no choice but to rely [*1240] on the profession, could trust that professionals would not use esoteric knowledge to exploit them.⁴⁴ Similarly, society could trust that professionals would exercise independent judgment and would not use esoteric knowledge to advance their clients' interests at the expense of society.⁴⁵

The conditions of esoteric knowledge and altruism were interdependent with the third condition of autonomy. As noted above, esoteric knowledge made it impossible for the nonlawyer public to regulate lawyers' conduct through the government or the market.⁴⁶ The profession ensured altruism by policing its members "through licensing, codes of ethics, and specialized disciplinary bodies."⁴⁷ Accordingly, in contrast to a business, which was subject to gov-

³⁹ Commentators do not agree on a single definition of professionalism. See Solomon, *supra* note 36, at 145 (citing periodic "crises" in understanding of professionalism). However, these three conditions, perhaps under different labels and with different emphasis, are common to most constructions of professionalism. See, e.g., Jay Katz, *The Silent World of Doctor and Patient* 89 (1984) (discussing "dual criteria of esoteric knowledge and altruism" and claim of "freedom from lay control"); Solomon, *supra* note 36, at 146-47 (describing knowledge and autonomy as "core sets of claims," but including this Article's element of altruism as a subcategory of autonomy). Professional ideology generally falls within progressive or functionalist traditions. Although these traditions are not identical, see, e.g., David Luban, *The Noblesse Oblige Tradition in the Practice of Law*, 41 *Vand. L. Rev.* 717, 724 (1988), they do agree on what this Article describes as the basic conditions of professionalism. See, e.g., *id.* at 723-25; William H. Simon, *Babbitt v. Brandeis: The Decline of the Professional Ideal*, 37 *Stan. L. Rev.* 565, 565-71 (1985) (analyzing empirical critique of both functionalist and progressive theories of legal professionalism).

⁴⁰ Solomon, *supra* note 36, at 146; see also Bledstein, *supra* note 36, at 90 (citing esoteric knowledge as justifying professional status); Moore, *supra* note 38, at 780 (tracing historical use of term "profession"). For a discussion of economic theory supporting the view that absent professional regulation professionals' esoteric knowledge would result in market imperfections, see Roger C. Cramton, *Delivery of Legal Services to Ordinary Americans*, 44 *Case W. Res. L. Rev.* 531, 545-46 (1994).

⁴¹ See, e.g., ABA Comm'n on Professionalism, *In the Spirit of Public Service: A Blueprint for the Rekindling of Lawyer Professionalism* 18 [hereinafter *Commission Report*] (stating that a profession "requires substantial intellectual training and the use of complex judgments ... that clients ... cannot adequately evaluate"); Katz, *supra* note 39, at 89 (noting that "professional knowledge can only be professed, understood, and applied by the initiated").

⁴² See, e.g., Bledstein, *supra* note 36, at 89-92 (contrasting regulation of business with autonomy of profession); see also *Commission Report*, *supra* note 41, at 17-18 (distinguishing profession from other occupations).

⁴³ See, e.g., Louis D. Brandeis, *Business - A Profession*, in *Business - A Profession* 1, 2 (1914) (stating that the profession "is pursued largely for others and not merely for one's self"); *Commission Report*, *supra* note 41, at 18 (observing that "the practitioner's self-interest is overbalanced by devotion to serving both the client's interest and the public good"); Solomon, *supra* note 36, at 147 (noting that "the interests of the client and the public are to take precedence over the lawyer's economic self-interest").

⁴⁴ See, e.g., *Commission Report*, *supra* note 41, at 18 (stating that clients "must trust those they consult"); Katz, *supra* note 39, at 89 (1984) ("The possession of esoteric knowledge required professional authority, and altruism protected patients from any abuse of such authority.").

⁴⁵ See, e.g., ABA Canons of Professional Ethics Canon 32 (1908) [hereinafter *1908 Canons*] ("No client, corporate or individual, however powerful, nor any cause, civil or political, however important, is entitled to receive nor should any lawyer render any service or advice involving disloyalty to the law."); Gordon, *supra* note 38, at 14-17 (tracing history of idea that lawyers exercise judgment independent of client to serve public); Talcott Parsons, *A Sociologist Looks at the Legal Profession*, in *Parsons*, *supra* note 43, at 370, 384 (noting that "the lawyer stands as a kind of buffer between the illegitimate desires of his clients and the social interest").

⁴⁶ See *supra* notes 40-42 and accompanying text.

⁴⁷ Theodore Schneyer, *Professionalism as Politics: The Making of a Modern Legal Ethics Code*, in *Lawyers' Ideals/Lawyers' Prac-*

ernment regulation and market control, the profession obtained the authority to regulate itself. ⁴⁸ [*1241]

II

Lawyers' Business Conduct As a Problem for Normal Discourse

In "normal discourse," Richard Rorty's phrase for describing the equivalent of "normal science" in nonscientific communities, ⁴⁹ a paradigm provides a framework for treating problems as puzzles to be solved. ⁵⁰ The major puzzle for the Professionalism Paradigm was preserving the Business-Profession dichotomy when most lawyers earned their living by selling their services on the market. ⁵¹

As noted above, the Professionalism Paradigm emerged in the late nineteenth century in response to "the extraordinary outpouring of rhetoric, from all the public pulpits of the ideal - bar association and law school commencement addresses, memorial speeches on colleagues, articles and books - on the theme of the profession's "decline from a profession to a business." ⁵² The established paradigm of that time, a "Republican Paradigm" based on the belief that individual professionals who were above the self-interest of the market served as guardians of the public good, ⁵³ appeared powerless to prevent this decline. ⁵⁴ [*1242]

The perception that the Professionalism Paradigm would succeed where the Republican Paradigm had failed led the legal community to adopt it. ⁵⁵ The Professionalism Paradigm rescued the Business-Profession dichotomy ⁵⁶ and a belief in the altruistic commitment of lawyers by promising that the legal community would prevent transgressions of the dichotomy and asserting that only the legal community was qualified for this task. ⁵⁷

tices, supra note 35, at 95, 99; see also Commission Report, supra note 41, at 10 (describing a profession as "self-regulating - that is, organized in such a way as to assure the public and the courts that its members are competent, do not violate their client's trust, and transcend their own self-interest"); Gordon, supra note 38, at 16 (describing development of self-policing schemes ranging from the formation of bar associations to the development of the Canons of Ethics).

⁴⁸ Commission Report, supra note 41, at 18 (asserting that conditions of professionalism justify the profession's "special privileges, such as exclusive licensing"); Gordon, supra note 38, at 6-7 (describing "freedom from outside regulation"); Solomon, supra note 36, at 147 ("The bar, as a collective, is to be free of both governmental regulation and the full effects of market forces.").

⁴⁹ Rorty, supra note 16, at 11. For a discussion of normal science, see supra notes 16-19 and accompanying text.

⁵⁰ Kuhn, supra note 4, at 79 ("No paradigm that provides a basis for scientific research ever completely resolves all its problems.").

⁵¹ The "vast majority" of lawyers have engaged in private practice, as opposed to government service or public interest practice. Richard L. Abel, *American Lawyers* 166 (1989).

⁵² Gordon, supra note 37, at 61.

⁵³ In Federalist No. 35, relying on the dichotomy between business and professional perspectives, Alexander Hamilton explained why professionals would make better political leaders than those in business. He observed that mechanics and manufacturers will seek to promote their economic self-interest. The "learned professions," on the other hand, "truly form no distinct interest in society." The Federalist No. 35, at 48 (Alexander Hamilton) (John P. Kaminski & Richard Leffler eds., 1989). The professional "will feel a neutrality to the rivalships between the different branches of industry, be likely to prove an impartial arbiter between them, ready to promote either, so far as it shall appear to him conducive to the general interests of the society." *Id.* at 49. As Gordon S. Wood has noted, Federalist No. 35 "reinforced a notion that has carried into our own time - that lawyers and other professionals are somehow free of the marketplace, are less selfish and interested and therefore better equipped for political leadership and disinterested decision-making than merchants and businessmen." Gordon S. Wood, *The Radicalism of the American Revolution* 254 (1992).

⁵⁴ See Altman, supra note 53, at 1056 ("By the turn of the century, the republican ideal of the lawyer-statesman existed mostly in lawyers' memories."); Gordon, supra note 37, at 62 (noting how "right after the Civil War, [lawyers] hoped to reconstitute the professions' [sic] virtue ... but that conception of the ideal had worn thin").

⁵⁵ The adoption of the Professionalism Paradigm represented a consensus of bar association leaders and other elite lawyers, not of the entire bar (including those from modest backgrounds who represented immigrants, workers, and other persons of limited means). See, e.g., Jerold S. Auerbach, *Unequal Justice: Lawyers and Social Change in Modern America* 40-73 (1976) (describing how elite dictated norms of stratified profession); Julius H. Cohen, *The Law - Business or Profession?* 244 (rev. ed. 1924) (discussing lawyer who argued that legal community should "admit [that] the commercialism of the profession" was necessary to persons of modest means "who must derive their livelihood from the practice of the profession"); Nelson & Trubek, supra note 35, at 13 ("In an earlier era the elite of the profession may have controlled bar associations to such a degree that they could present their conception of professional ethics as that of the entire profession").

To implement the Professionalism Paradigm, the legal community proscribed business conduct as taboo.⁵⁸ This Article identifies the Profit Maximizer taboo - of which the Business Servant taboo is a special variation - as the primary business conduct taboo.

The Profit Maximizer behaves as if legal services are a commodity like any other. While the professional obtains business by providing excellent and ethical services,⁵⁹ the Profit Maximizer seeks as much money as possible from the client⁶⁰ and disregards obligations [*1243] to the public.⁶¹ The Profit Maximizer openly markets legal services and competes with other lawyers.⁶² Marketing is one of the Profit Maximizer's most pernicious activities. The competition it engenders leads lawyers to cut ethical corners in search of a buck.⁶³ Perhaps more dangerous to perception of law as profession, advertising and solicitation constitute a public manifestation of legal services as a business commodity.⁶⁴

A special case of the Profit Maximizer is the Business Servant, who maximizes profits by serving clients to the detriment of the profession's public trust.⁶⁵ While a professional "holds a position of independence, between the wealthy and the people, prepared to curb the excess of either,"⁶⁶ the Business Servant, in contrast, seeks "to extract the maximum advantage of the legal system" for the interests of wealth.⁶⁷ In so doing, the Business Servant

⁵⁶ The dichotomy afforded professionals both "a source of prestige," Gordon, *supra* note 38, at 16, and a source of authority for persuading the state to enforce their privileges and autonomy. See Larson, *supra* note 36, at 14 (noting that professional entrepreneurs were "bound to solicit state protection and state-enforced penalties against unlicensed competitors").

⁵⁷ See *supra* Part I.B.

⁵⁸ See Ronald J. Gilson & Robert H. Mnookin, *Sharing Among the Human Capitalists: An Economic Inquiry into the Corporate Law Firm and How Partners Split Profits*, 37 *Stan. L. Rev.* 313, 319 (1985) (using term "taboo" to describe legal profession's attitude toward lawyers engaging in business behavior); Glendon, *supra* note 3, at 32 (same). David Thomas observes that "taboos operate on two levels. They forbid action, but they also forbid reflecting on what is forbidden. As an injunction not to notice what is forbidden, a taboo operates out of awareness. That is why people find it difficult to discuss a taboo." David A. Thomas, *Mentoring and Irrationality: The Role of Racial Taboos*, 28 *Human Resources Mgmt.* 279, 281 (1989) (emphasis omitted).

⁵⁹ See *infra* note 77 and accompanying text.

⁶⁰ See, e.g., Commission Report, *supra* note 41, at 51 ("Activities directed primarily to the pursuit of wealth will ultimately prove both self-destructive and destructive of the fabric of trust between clients and lawyers generally."); Luban, *supra* note 39, at 723 (noting that "purely economic motivation [is] ... pernicious"); Solomon, *supra* note 36, at 147 (asserting that "lawyers are to reject the business ethic of profit maximization"); Peter M. Brown, *America's Legal Profession Is in Trouble. What Are We Going To Do About It?*, N.Y.S. B.J., May 1990, at 17 (asserting that where "making of money is the prime, if not the sole, object in law practice ... essential elements of trust and confidence between client and attorney evaporate, leaving a residue of pursuit of money for money's sake").

⁶¹ See, e.g., Peter M. Brown, *The Quiet Revolution in the American Law Profession: Remarks Before the Commission on Professionalism of the American Bar Association*, 14 *Fordham Urb. L.J.* 855, 864 n.24 (1986) (stating that profit-maximizing conduct threatens "lawyer's monopolistic license to practice [law]" which rests on the bar's "traditional commitment to public service"); see also *infra* notes 65-69, 145-46.

⁶² Professionals, in contrast, do not "hawk their wares" or compete aggressively for a greater slice of the pie. Robert D. Peltz, *Legal Advertising - Opening Pandora's Box?*, 19 *Stetson L. Rev.* 43, 51 (1989); see also Brown, *supra* note 61, at 863 ("Unseemly competition "for business" brings rising aggressiveness and incivility."); Warren E. Burger, *The State of Justice*, A.B.A. J., Apr. 1984, at 62, 63 (noting that, historically, "honorable lawyers" did not advertise or solicit business).

⁶³ See, e.g., William H. Rehnquist, *The Legal Profession Today*, 62 *Ind. L.J.* 151, 154 (1987) ("Ethical considerations, after all, are factors which counsel against maximization of income in the best Adam Smith tradition, and the stronger the pressure to maximize income the more difficult it is to avoid ethical margins.").

⁶⁴ See Michael J. Powell, *From Patrician to Professional Elite: The Transformation of the New York City Bar Association* 156 (1988) (asserting that advertising "manifests a spirit of commercialism").

⁶⁵ Henry Stimson captured this notion when he wrote that:

⁶⁶ Louis D. Brandeis, *The Opportunity in the Law, in Business - A Profession*, *supra* note 43, at 313, 321.

⁶⁷ Robert L. Nelson, *Ideology, Practice, and Professional Autonomy: Social Values and Client Relationships in the Large Law Firm*, 37 *Stan. L. Rev.* 503, 508 (1985). In contrast to professionals who use their "specialized knowledge to protect ignorant clients from exploitation ... , [Business Servants use] their specialized knowledge to enable the rich and powerful to exploit the poor and ignorant while enriching themselves in the process." Norman Bowie, *The Law: From a Profession to a Business*, 41 *Vand. L. Rev.* 741, 744 (1988).

"skew[s legal outcomes] in [*1244] favor of resourceful parties, thus undermining the legitimacy of legal institutions."⁶⁸ The Business Servant fails the professional duty to serve as a "buffer between the illegitimate desires of clients and the social interest."⁶⁹

When breaches of these taboos occurred, the initial response was to treat them as problems to be solved within the Professionalism Paradigm. Faced with open marketing of legal services - the "buying and selling of law business"⁷⁰ - the American Bar Association (ABA) declared such profit-maximizing conduct "unprofessional" and sought to prevent it. Towards that end, in 1897, the ABA Committee on Legal Education asked that law schools and practitioners "inculcate proper sentiments and ... counteract[] the evil effects of the introduction of modern business methods."⁷¹ The ABA then adopted Canons of Professional Ethics in 1908 prohibiting advertising and solicitation.⁷²

The response to violations of the Business Servant taboo was similar. In 1905, for example, Louis Brandeis attributed a decline in the profession's reputation to Business Servant conduct. He described how "lawyers have, to a large extent, allowed themselves to become adjuncts of great corporations and have neglected the obligation to use their powers for the protection of the people."⁷³ His response was not to discard the Professionalism Paradigm, but rather to exhort lawyers to adhere to it.⁷⁴ [*1245]

At the same time that the Professionalism Paradigm proscribed business conduct, it explained why even great financial success was legitimate. Lawyers and the market for legal services functioned differently from their business analogues. Financial self-interest was only "incidental"⁷⁵ to lawyers who sought the rewards of achievement and service.⁷⁶ But in the market for legal services, the pursuit of achievement and service was the source of financial success. The invisible hand of reputation, and not of economic efficiency, drove the legal services market.⁷⁷ Under this model, the lawyers who made the most money were those who were the most professional.

Another function of normal discourse was to marginalize perspectives outside of the Professionalism Paradigm.⁷⁸ For example, in 1933, Karl Llewellyn, one of the leading, though sometimes iconoclastic, voices of twentieth-

⁶⁸ Nelson, *supra* note 67, at 508.

⁶⁹ Erwin Smigel, *The Wall Street Lawyer: Professional Organization Man?* 342 (2d ed. 1969) (quoting Parsons, *supra* note 45, at 384); see also Brandeis, *supra* note 66, at 317 (describing such lawyers as mercenaries).

⁷⁰ Cohen, *supra* note 55, at 238, 173-200. Cohen describes, *inter alia*, a firm specializing in railroad litigation with branch offices in 32 cities, "45 salaried railroad employees as solicitors, [and] a hospital and medical staff for the purpose of providing medical treatment for non-resident injured persons while they are awaiting trial." *Id.* at 183.

⁷¹ *Id.* at 149.

⁷² 1908 Canons, *supra* note 45, Canons 27, 28; see Cohen, *supra* note 55, at 237-38 (citing 1897 ABA Report).

⁷³ Brandeis, *supra* note 66, at 321.

⁷⁴ *Id.* Similarly, in 1934, Harlan Fiske Stone suggested that lawyers' actions as Profit Maximizers and Business Servants were in part responsible for the excesses that caused the economic depression of the 1930s. Stone, *supra* note 65, at 1, 8-10. He called on the profession to return to its role as "guardian of public interests" and to consider "the way in which our professional activities affect the welfare of society as a whole." *Id.* at 10; see also Solomon, *supra* note 36, at 152-53 (providing examples "of the denunciation[] of the commercialization of practice").

⁷⁵ Harvard Law School's former dean Roscoe Pound described the "primary purpose" of a profession as the "pursuit of the learned art in the spirit of a public service." Roscoe Pound, *The Lawyer from Antiquity to Modern Times* 5 (1953). He noted that "gaining a livelihood is incidental [to a profession], whereas in a business or trade it is the entire purpose." *Id.*

⁷⁶ See Parsons, *supra* note 43, at 35-36.

⁷⁷ The 1908 Canons of Ethics advised that "the most worthy and effective advertisement possible, even for a young lawyer, and especially with his brother lawyers, is the establishment of a well-merited reputation for professional capacity and fidelity to trust. This cannot be forced, but must be the outcome of character and conduct." 1908 Canons, *supra* note 45, Canon 27. The invisible hand of reputation was not an innovation of the Professionalism Paradigm. Rather, it was a Republican Paradigm notion that the Professionalism Paradigm rehabilitated by introducing the concept of an organized and self-policing legal community. In 1854, George Sharswood observed that "sooner or later, the real public - the business men of the community, who have important lawsuits, and are valuable clients - endorse the estimate of a man entertained by his associates of the Bar, unless indeed there be some glaring defect of popular qualities." George Sharswood, *An Essay on Professional Ethics*, reprinted in 32 A.B.A. Rep. 1, 75 (5th ed. 1907); see Pearce, *supra* note 53, at 260 (noting that Sharswood's model assumed that lawyers were experts to whom consumers would defer in evaluating legal services).

⁷⁸ See *supra* note 19 and accompanying text.

century legal scholarship,⁷⁹ challenged the Business-Profession dichotomy. He asserted that with rare "individual exceptions," lawyers who "work[] for business men toward business ends" develop "a business point of view - toward the work to be done, toward the value of the work to the community, indeed, toward the way in which to do the work."⁸⁰

As an iconoclast, Llewellyn brought to his analysis of the profession what Kuhn described as an outsider perspective open to new [*1246] ideas challenging the Business-Profession dichotomy.⁸¹ In normal discourse, outsider perspectives have little influence.⁸² For example, Rayman Solomon, in his comprehensive study of the "concept of legal professionalism" from 1925 to 1960, observed how the Professionalism Paradigm remained consistent throughout this period.⁸³ He discusses the influence of Llewellyn's support for legal services for low and middle income persons, but does not even mention Llewellyn's rejection of the Business-Profession dichotomy.⁸⁴

III

An Anomaly Provokes a Crisis: The Attack on the Business-Profession Dichotomy

Today, the Professionalism Paradigm's strategies for preserving the Business-Profession dichotomy are no longer effective. As the tension between lawyers' business conduct and the Business-Profession dichotomy changed from a puzzle within the framework of the Professionalism Paradigm to an anomaly challenging the paradigm's competence, the legal profession entered a period of crisis.

A. The Puzzle Becomes an Anomaly

The difference between the status of a problem and an anomaly is one of perception. Kuhn observed that a "problem normal science sees as a puzzle can be seen from another viewpoint as a[n] anomaly] and thus a source of crisis."⁸⁵ The determinant of whether a problem is a puzzle or anomaly is whether the community perceives it as possible of resolution within the paradigm. The precise moment when the distinction between business and profession shifted from puzzle to anomaly is difficult to identify. What is not difficult to identify is that the change has occurred. This Section describes how the view that law is a business entered the mainstream of community discourse and how the perception of epidemic taboo conduct even caused defenders of the paradigm to fear for its survival. [*1247]

1. The Challenge to the Dichotomy Becomes Mainstream

As noted above, in normal discourse⁸⁶ the legal community treated opposition to the Business-Profession dichotomy as marginal. The Supreme Court, for example, endorsed the dichotomy on a number of occasions. In 1935, rejecting a due process challenge to a ban on dental advertising, Chief Justice Hughes described professional standards as "different ... from those which are traditional in the competition of the marketplace."⁸⁷ The Court reiterated this view in 1955⁸⁸ and 1963.⁸⁹

⁷⁹ See Kronman, *supra* note 3, at 210 (characterizing Llewellyn as a "supremely talented but isolated thinker who had no followers in the conventional sense").

⁸⁰ Karl Llewellyn, *The Bar Specializes - With What Results*, 167 *Annals* 177, 177 (1933). Llewellyn argued that "any man's interests, any man's outlook, are shaped in greatest part by what he does ... His sympathies and ethical judgments are determined essentially by the things and the people he works on and for and with." *Id.*

⁸¹ See *supra* note 31.

⁸² See *supra* note 19 and accompanying text.

⁸³ See Solomon, *supra* note 36, at 151 ("A continuity in the contents of the concept of professionalism across the entire period emerges from these articles.").

⁸⁴ *Id.* at 159, 167.

⁸⁵ Kuhn, *supra* note 4, at 79. For a discussion of normal science, see *supra* notes 16-19 and accompanying text.

⁸⁶ See *supra* note 49 and accompanying text.

⁸⁷ Semler v. Oregon State Bd. of Dental Examiners, 294 U.S. 608, 612 (1935).

⁸⁸ Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 491 (1955) (upholding regulation preventing retail establishments

A few years later, however, the discourse within the legal community began to change as three lines of attack on the Professionalism Paradigm emerged. One described the business-related ethics rules, such as the advertising ban, as a hypocritical exercise in constraining the business conduct of small and solo practitioners while permitting the business practices of big firms, such as the use of social networks to recruit wealthy clients.⁹⁰ A historian of the legal profession attributed this hypocrisy to early-twentieth-century efforts of a largely Anglo-Saxon elite to restrict Catholic and Jewish immigrants from becoming lawyers.⁹¹

The second line of attack, not necessarily inconsistent with the first, described the business-related ethics rules as promoting the interests of the profession at the expense of the consumer.⁹² Ralph Nader, Mark Green, and others in the consumer movement pressed [*1248] the case that the legal profession was obstructing competition to maintain the price of legal services at an artificially high level.⁹³ Leading legal scholars, including Monroe Freedman and Thomas Morgan, agreed that the rhetoric of the Business-Profession dichotomy masked lawyers' financial self-interest.⁹⁴

A third line of attack, which did not expressly consider the business conduct of lawyers, went the furthest in attacking the paradigm. William Simon, for example, in his critique of "the ideology of advocacy," proposed abolishing lawyers' monopoly on legal practice.⁹⁵

By 1977, the voice of the United States Supreme Court confirmed that doubts regarding the legitimacy of the Business-Profession dichotomy had become part of the mainstream of the legal community's discourse. After questioning the Business-Profession dichotomy earlier in the 1970s,⁹⁶ the Court rejected it altogether in *Bates v. State Bar* [*1249] of Arizona⁹⁷ when it overturned bans on lawyer advertising.⁹⁸

from providing space to optometrists in "an attempt to free the profession ... from all taints of commercialism").

⁸⁹ *Head v. New Mexico Bd. of Examiners*, 374 U.S. 424, 428-29 (1963) (upholding New Mexico statute that purported to protect high standards of professional competence by proscribing certain forms of advertising by optometrists).

⁹⁰ See Schneyer, *supra* note 47, at 100-01; see also Jerome E. Carlin, *Lawyers' Ethics: A Survey of the New York City Bar* 66-71 (1966) (arguing that lawyers with "low-status" clientele are more likely to violate Canons of Ethics than lawyers serving large, wealthy corporations and well-to-do individual clients from old American families); Phillip Shuchman, *Ethics and Legal Ethics: The Propriety of the Canons as a Group Moral Code*, 37 *Geo. Wash. L. Rev.* 244, 254-66 (1968) (discussing discriminatory effect of legal profession's Canons of Ethics and arguing that "the most cogent factors in the various Ethics Committee opinions have little to do with right and good and much to do with the status quo in regard to clients and the distribution of wealth resulting from service to clients").

⁹¹ See Auerbach, *supra* note 55, at 50. For a later expression of this view, see Monroe H. Freedman, *Understanding Lawyers' Ethics* 3 (1990) ("Just as labor unions of the time joined in demanding restrictive immigration laws to restrain competition for jobs, the established bar adopted educational requirements, standards of admission, and "Canons of Ethics" designed to maintain a predominantly native born, white, Anglo-Saxon, Protestant monopoly of the legal profession.").

⁹² See Schneyer, *supra* note 47, at 101.

⁹³ See, e.g., Powell, *supra* note 64, at 156-57; Mark Green, *The Gross Legal Product: "How Much Justice Can You Afford?,"* in *Verdicts on Lawyers* 63 (Ralph Nader & Mark Green eds., 1976).

⁹⁴ See, e.g., Monroe H. Freedman, *Lawyers' Ethics in an Adversary System* 114-15 (1975); Thomas D. Morgan, *The Evolving Concept of Professional Responsibility*, 90 *Harv. L. Rev.* 702 (1977).

⁹⁵ William H. Simon, *The Ideology of Advocacy*, 1978 *Wis. L. Rev.* 29, 130-40. Simon later sought to preserve the Professionalism Paradigm. See also Robert W. Gordon & William H. Simon, *The Redemption of Professionalism?*, in *Lawyers' Ideals/Lawyers' Practices*, *supra* note 35, at 230 (providing further analysis of ideal of professionalism and speculating about conditions on which its redemption might depend).

⁹⁶ In *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), the Court struck down a county bar's minimum fee schedule as illegal price-fixing under the Sherman Act. Chief Justice Burger, writing for the Court, rejected the bar's argument that as a profession it should be exempt from antitrust regulation. *Id.* at 787. The Court observed that the "exchange of [a legal service] for money is 'commerce' in the most common usage of that word." *Id.* at 787-88. The Court, however, employed the normal discourse approach of declaring the commercial aspect of practice to be incidental. It noted that "it is no disparagement of the practice of law as a profession to acknowledge that it has this business aspect," *id.* at 788, and recognized that the "public service aspect, and other features of the professions" made it "unrealistic to view the practice of professions as interchangeable with other business activities." *Id.* at 788 n.17.

⁹⁷ 433 U.S. 350 (1977).

⁹⁸ The case arose when two former legal aid lawyers in Arizona, seeking to create a high volume practice providing services

The Court's analysis squarely rejected the Business-Profession dichotomy.⁹⁹ It declared that "the belief that lawyers are somehow 'above' trade has become an anachronism"¹⁰⁰ and described the organized bar's continued reliance on the dichotomy as hypocritical.¹⁰¹ The Court treated the market for legal services like the market for other business products and services, not as a special professional market subject to the invisible hand of reputation.¹⁰² Contrary to the Professionalism Paradigm, consumers in a more open market would be able to make informed decisions regarding the purchase of legal services.¹⁰³ As a result, the greater competition engendered by advertising would probably lower prices and benefit individual clients and society as a whole by making legal services more available to persons of low and moderate income.¹⁰⁴

The Court's opinion demonstrated that rejection of the Business-Profession dichotomy had become a respectable position in mainstream legal discourse. Since *Bates*, commentators have continued to assert that financial reward is a significant goal of lawyers.¹⁰⁵ The [*1250] Court itself applied the reasoning of *Bates* to proscribe a number of limitations on lawyer marketing in subsequent cases.¹⁰⁶ Although the Court's recent decision in *Florida Bar v. Went for It, Inc.*¹⁰⁷ may signal a retreat from the *Bates* holding,¹⁰⁸ even overturning *Bates* would not change the role that the *Bates* decision has played in confirming that the perspective of law as a business had moved from the margin

to persons of modest means, advertised a variety of "legal services at very reasonable fees." *Id.* at 354. Arizona, like all other jurisdictions at the time, banned lawyer advertising. *Id.* at 355. Accordingly, the Arizona Supreme Court censured the lawyers for violating the state disciplinary code, and they appealed. *Id.* at 353-58.

⁹⁹ The majority denied that in doing so it was undermining the Professionalism Paradigm. See *id.* at 368 ("We find the postulated connection between advertising and the erosion of true professionalism to be severely strained."). In dissent, however, Chief Justice Burger and Justice (and former ABA President) Lewis Powell recognized the radical implications of the Court's opinion. *Id.* at 386 (Burger, C.J., concurring in part and dissenting in part) ("I particularly agree with Mr. Justice Powell's statement that 'today's decision will effect profound changes in the practice of law.'" (quoting *id.* at 389 (Powell, J., concurring in part and dissenting in part))).

¹⁰⁰ *Id.* at 371-72. The Court observed that "in this day, we do not belittle the person who earns his living by the strength of his arm or the force of his mind." *Id.* at 371.

¹⁰¹ See *id.* at 368 (asserting that there is little value in attorneys "concealing from themselves and from their clients the real-life fact that lawyers earn their livelihood at the bar").

¹⁰² See *id.* at 374 n.30 ("Although the system may have worked when the typical lawyer practiced in a small, homogeneous community in which ascertaining reputational information was easy for a consumer, commentators have seriously questioned its current efficacy.").

¹⁰³ See *id.* at 374-75 (chiding bar for underestimating public's ability to supplement incomplete, but correct, information in advertisements).

¹⁰⁴ See *id.* at 376-77.

¹⁰⁵ See, e.g., Abel, *supra* note 51, at 164-65 (identifying income and status as measures of professional success); Commission Report, *supra* note 41, at 15 (arguing that increased competition among lawyers after *Bates* and other Supreme Court decisions renders collecting fees a priority); Cramton, *supra* note 40, at 610 (referring to "the entrepreneurial spirit of the American bar"); Geoffrey C. Hazard, Jr. et al., Why Lawyers Should Be Allowed To Advertise: A Market Analysis of Legal Services, 58 N.Y.U. L. Rev. 1084, 1093 (1985) (arguing that delivery of legal services is subject to market forces); Deborah L. Rhode, Ethical Perspectives on Legal Practice, 37 Stan. L. Rev. 589, 629 (1985) (attributing strong "patronage alliance" between lawyers and clients to economic and other pressures); Fred C. Zacharias, Reconciling Professionalism and Client Interests, 36 Wm. & Mary L. Rev. 1303, 1337 (1995) (discussing lawyers' economic incentive to puff).

¹⁰⁶ See *Peel v. Attorney Registration & Disciplinary Comm'n of Ill.*, 496 U.S. 91, 109-11 (1990) (permitting advertising of certification as specialist); *Shapiro v. Kentucky Bar Ass'n*, 486 U.S. 466, 478-80 (1988) (overturning ban on targeted direct mailings); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 641-49 (1985) (prohibiting ban on offering legal information regarding nature of potential claims and on use of illustrations to catch reader's attention); *In re R.M.J.*, 455 U.S. 191, 199-207 (1982) (prohibiting, inter alia, ban on lawyer's advertising admission to practice before Supreme Court). And while the Court upheld a ban on in-person solicitation for profit, *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 466-67 (1978), it struck down a ban on such solicitation for pro bono efforts. *In re Primus*, 436 U.S. 412, 438-39 (1978).

¹⁰⁷ 115 S. Ct. 2371 (1995).

¹⁰⁸ In the *Florida Bar* case, the Court upheld Florida rules "creating a brief 30-day blackout period after an accident during which lawyers may not, directly or indirectly, single out accident victims or their relatives in order to solicit their business." *Id.* at 2374. Writing for the Court, Justice O'Connor found that this restriction satisfied the commercial speech test that other restrictions had failed. *Id.* at 2381. In holding that the Florida restrictions directly and materially advanced the government's interest in regulating professions, *id.* at 2377-78, the Court relied upon a Florida Bar study indicating that "the Florida public views direct

to the center of the legal community's discourse.

2. The Perception of Widespread Taboo Violations

By the 1990s, the law community's perception was that taboo business behavior was commonplace. Ronald Gilson and Robert Mnookin observed that "yesterday's taboo [commercial behavior] has become today's fixation."¹⁰⁹ In terms of dollars, law practice was now on par with America's major industries. In their effort to accumulate [*1251] those dollars, lawyers engaged in widespread violations of the Profit Maximizer and Business Servant taboos. Even the ABA, the paradigm's institutional guardian, joined individual lawyers and members of the public in acknowledging the existence of taboo behavior that threatened the Business-Profession dichotomy.

In 1985, Gilson and Mnookin observed that "law practice is a big business in this country."¹¹⁰ As of 1987, the legal services industry "added over \$ 60 billion to the gross national product."¹¹¹ By that time, law was "a larger industry than the steel or textile industry."¹¹² Befitting a big business, individual lawyers at the highly visible large corporate firms received salaries appropriate to business executives. In 1990, "partner earnings [at big firms] averaged over \$ 1 million annually."¹¹³ Starting associate salaries rose in prestigious New York City firms from \$ 10,000 in 1967 to \$ 65,000 in the late 1980s¹¹⁴ and \$ 80,000 in the 1990s.¹¹⁵

By the 1990s, violations of the Profit-Maximizer taboo had led to the "common perception among legal commentators ... that lawyers [were] primarily motivated by self-interest and the desire to make money."¹¹⁶ In large law firms, the profits a lawyer generated by procuring business or producing billable hours, and not professional excellence, [*1252] determined that lawyer's rewards.¹¹⁷ Fewer lawyers appeared to engage in public service,¹¹⁸ and those who did found that it brought them little favor at their firms.¹¹⁹ Some lawyers took advantage of this atmosphere to "generate the highest possible fee," rather than provide the best possible service.¹²⁰ This pursuit of fees be-

-mail solicitations in the immediate wake of accidents as an intrusion on privacy that reflects poorly upon the profession." *Id.* at 2377.

¹⁰⁹ Gilson & Mnookin, *supra* note 58, at 319.

¹¹⁰ *Id.* at 313 n.1.

¹¹¹ Nelson & Trubek, *supra* note 35, at 8.

¹¹² *Id.*

¹¹³ *Id.* at 10.

¹¹⁴ Marc Galanter & Thomas Palay, *The Transformation of the Big Law Firm*, in *Lawyers' Ideals/Lawyers' Practices*, *supra* note 35, at 31, 52-53.

¹¹⁵ See Update, *N.Y. L.J.*, Nov. 7, 1994, at 1 (identifying \$ 83,000 as going rate for first-year associates since 1989).

¹¹⁶ Elizabeth A. Kovachevich & Geri L. Waksler, *The Legal Profession: Edging Closer to Death with Each Passing Hour*, 20 *Stetson L. Rev.* 419, 423 (1991); see also Edward D. Re, *The Causes of Dissatisfaction with the Legal Profession*, 68 *St. John's L. Rev.* 85, 94 (1994) ("The practice of law has become a war for legal business."). Commentators have attributed the increase in lawyers' overt business behavior to a number of factors. Robert L. Nelson and David M. Trubek have noted that in "recent years ... the deregulation of finance and business, the internationalization of economic exchange, the rise of litigation among corporate actors, and the continued expansion of demand for legal services by the middle class has unleashed the entrepreneurial inclinations of American lawyers." Nelson & Trubek, *supra* note 35, at 13. Other significant factors include the trend among businesses to employ a number of firms that compete for their share of business rather than a single firm, Galanter & Palay, *supra* note 114, at 48, and the open marketing of legal services following Bates and its progeny. Carroll Seron, *New Strategies for Getting Clients: Urban and Suburban Lawyers' Views*, 27 *Law & Soc'y Rev.* 399, 400 (1993). In this context, "lawyer-entrepreneurs introduced a series of innovations of scope and breadth unparalleled either in our own history or in comparative perspective." Nelson & Trubek, *supra* note 35, at 13.

¹¹⁷ See, e.g., Galanter & Palay, *supra* note 114, at 49 ("'Eat what you kill' compensation formulas emphasize rewards for productivity and business-getting over 'equal shares' or seniority." (citations omitted)).

¹¹⁸ See, e.g., Luban, *supra* note 39, at 734-35 (noting "loss of faith in progressive professionalist vision" and decreasing interest of private bar in public interest work); see also *infra* notes 128-29 and accompanying text.

¹¹⁹ See, e.g., Thomas D. Morgan, *The Fall and Rise of Professionalism*, 19 *U. Rich. L. Rev.* 451, 460 (1985) (describing disincentives in firms for individuals to act according to "professional" standards).

¹²⁰ Kovachevich & Waksler, *supra* note 116, at 419. Commentators have suggested that the use of billable hours for fees "encourages production of any services for which parties are willing and able to pay." Rhode, *supra* note 105, at 634. Some assert that:

came "a major cause of procedural incivilities."¹²¹ It also became the catalyst for law firms to take on the forms of businesses. They added managers, business plans, marketing directors, and financially driven strategies to maximize efficiency in making profits.¹²² The press eulogized the death of law firms that were not able to adjust from a "professional" to a "business" approach.¹²³ [*1253]

One business strategy many law firms used was marketing.¹²⁴ This led to a perception that unlike professionals who earned their financial success by developing an excellent reputation, lawyers were now "hawking their wares."¹²⁵ Law firms of all types marketed their services through advertising, direct mail, newsletters to clients and potential clients, and seminars on areas of practice where they sought to develop clients.¹²⁶ Sometimes these efforts were quite undignified.¹²⁷

As law firms became more like businesses, lawyers became Business Servants. Instead of mediating between the interests of business and the public, lawyers promoted the interests of business,¹²⁸ even in their pro bono and law reform activities.¹²⁹ Some lawyers have gone [*1254] beyond maximizing the goals within the bounds of the law by aiding, or engaging in, unlawful conduct.¹³⁰ For example, in highly publicized cases, a number of the nation's leading law firms paid tens of millions of dollars to settle proceedings against them arising from the Savings and

¹²¹ Rhode, *supra* note 105, at 635 (noting that "innumerable commentators" have observed this phenomenon).

¹²² See, e.g., Galanter & Palay, *supra* note 114, at 48-49 ("Firms rationalize their operations ... [and] engage professional managers and consultants; their leaders worry about billable hours, profit centers, and marketing strategies."). In 1980, no firm had a marketing director. *Id.* at 49. As of 1989, more than 200 did. *Id.*

¹²³ See, e.g., Jan Hoffman, *Oldest Law Firm Is Courtly, Loyal and Defunct*, N.Y. Times, Oct. 2, 1994, at A33 ("But Lord, Day's passing is about more than financial stratagems. It is also, members of the legal community say, confirmation that a somewhat romanticized way of law-firm life is over, that the profession has become a business.").

¹²⁴ In 1990, the number of law-firm marketers registered in the National Law Firm Marketing Association was 386. By 1994, the Association's membership rose to 1114. Claudia H. Deutsch, *Corporate Lawyers, Too, Turn to the Hard Sell*, N.Y. Times, Apr. 21, 1995, at B20.

¹²⁵ Peltz, *supra* note 62, at 51; see also, e.g., Burger, *supra* note 62, at 62-63 (noting sharp decline in public confidence in legal profession); Re, *supra* note 116, at 98 ("Much of the perceived commercialism of the legal profession has been directly attributed to attorney advertising."); John J. Yanas, *The President's Message*, N.Y. St. B.J., May 1990, at 3, 3 ("We now condone advertising and solicitation of clients, activities that were formerly unethical and unprofessional.").

¹²⁶ See, e.g., ABA Comm'n on Advertising, *Lawyer Advertising at the Crossroads: Professional Policy Considerations 55-57* (1995) (describing marketing and advertising practices at large firms); Seron, *supra* note 116, at 403-04 (discussing how new marketing strategies conflict with Business-Profession dichotomy); David Margolick, *At the Bar*, N.Y. Times, Nov. 16, 1990, at B6 (noting that "the science of selling legal services had evolved from embossing pencils to four-color spreads, newsletters, brochures, seminars and inserts in opera playbills"). A partner at a major New York firm observed, "law firms don't like to admit they have business generation programs, ... but the fact is, there is not a law firm today that does not do marketing." Deutsch, *supra* note 124 (quoting Eugene R. Anderson, founding partner of Anderson, Kill, Olick & Oshinsky).

¹²⁷ See, e.g., Roger Parloff, *Hard Sell*, Am. Law., June 1995, at 67, 67-68 (providing examples of advertisements including one where lawyer stands in junkyard with wrecked automobiles being dropped from crane and another where client states: "John Riley got me \$ 175,000 ... even though the police report said I was totally at fault").

¹²⁸ See, e.g., Linowitz & Mayer, *supra* note 3, at 4 (asserting that lawyers refrain from counselling against "antisocial" business behavior because it "would interfere with the marketing program"); Robert W. Gordon, *Introduction to Symposium on the Corporate Law Firm*, 37 *Stan. L. Rev.* 271, 274 (1985) (noting that lawyers representing large corporations "have neither the opportunity nor the desire to reshape their clients' business or political goals and chiefly confine their role to that of technical execution"). In his survey of lawyers at large Chicago firms, Robert Nelson found that 76% of respondents affirmed the professional ideology "that it was appropriate to act as the conscience of a client," but only 2.4% indicated that they might have done so. Nelson, *supra* note 67, at 532-33. Only 16% of the lawyers "ever refused an assignment or potential work" on the ground of professional or personal values. *Id.* at 535. Nelson concluded that, rather than mediate between the common good and their clients, "in general, large-firm lawyers strive to maximize the substantive interests of their clients within the boundaries of legal ethics." *Id.* at 538.

¹²⁹ Nelson found that "the lawyers of elite firms may well take progressive stands on certain issues within the profession, may lead efforts at legal rationalization, and may exhibit a liberal orientation on general political questions, but the direction of their law reform activities and their approach to the issues that arise in ordinary practice ultimately are determined by the positions of their clients." Nelson, *supra* note 67, at 505.

¹³⁰ See, e.g., Rhode, *supra* note 105, at 628 n.129 (citing cases and surveys that "reveal a striking incidence of overly zealous representation ranging from garden variety discovery abuse to suppression of evidence and complicity in fraud or perjury"); Stuart Taylor, Jr., *Ethics and the Law: A Case History*, N.Y. Times, Jan. 9, 1983, 6 (Magazine), at 31 (describing lawyers' role in assisting fraud perpetrated by O.P.M. Leasing Services, Inc.).

Loan scandals of the late 1980s and early 1990s.¹³¹

These violations of the taboos became the subject of unprecedented media attention. Following Bates,¹³² *The American Lawyer* and the *National Law Journal* emerged to chronicle the business of law, including compensation, marketing, and business strategy for lawyers, as well as more general news regarding the development of legal practice.¹³³ At the same time, perhaps because of the success of the legal press, general interest publications began to pay greater attention to the entrepreneurial conduct of lawyers. In 1983, for example, the *New York Times* observed that for corporate law firms "a new era has dawned, one in which the practice of law has ceased to be a gentlemanly profession and instead has become an extremely competitive business."¹³⁴

Faced with such overwhelming and well-publicized evidence of taboo behavior, the organized bar has conceded that such taboo behavior imperils the Business-Profession dichotomy. Chief Justice Burger's now-famous 1984 report to the ABA on *The State of Justice* forced the profession to confront the tensions erupting within the Professionalism Paradigm.¹³⁵ He complained that the "standards and traditions of the bar" that had "restrained members of the profession from practices and customs common and acceptable in the rough-and-tumble of the marketplace" were no longer achieving this goal.¹³⁶ At Burger's urging,¹³⁷ ABA President John Shepherd created a Commission on Professionalism.¹³⁸

When the Commission issued its report in 1986, it found the major problem facing the bar to be preservation of the Business-Profession dichotomy. The Commission concluded that "a quarter-century of rapid change" in law practice forced the bar to consider whether "our profession [has] abandoned principle for profit, professionalism for commercialism."¹³⁹ The Commission found that [*1256] "getting clients in the door and getting them to pay their bills

¹³¹ See, e.g., *Lincoln Savings & Loan Ass'n v. Wall*, 743 F. Supp. 901, 920 (D.D.C. 1990) (Sporkin, J.) ("Where were [the lawyers] when these clearly improper transactions were being consummated? Why didn't any of them speak up or disassociate themselves from the transactions?"); Steve France, *Unhappy Pioneers: S & L Lawyers Discover a 'New World' of Liability*, 7 *Geo. J. Legal Ethics* 725, 726 (1994) ("At least twenty-two of the largest 200 law firms in the country ... have been sued for malpractice ... [and] law firms have already paid more than \$ 400 million in settlements.").

¹³² 433 U.S. 350 (1977); see supra notes 97-108 and accompanying text.

¹³³ See, e.g., John E. Morris, *Back to the Future*, *Am. Law.*, Jan./Feb. 1994, at 5, 5 (describing history and development of *The American Lawyer* and its central themes of "the increasingly businesslike nature of practicing law and the impact of that trend on individuals"); Steven Brill, *Lawyers and Us 1979-1989*, *Am. Law.*, Mar. 1989, at 5 (describing origins of *The American Lawyer*); Doreen Weisenhaus, *NLJ Grows with the Profession*, *Nat'l L. J.*, Nov. 29, 1993, at S2 (discussing history and development of the *National Law Journal*); see also Stephen Gillers, *The New Old Idea of Professionalism*, 47 *Rec. Ass'n B. City N.Y.* 147, 153 (Mar. 1992) (noting origin and influence of legal press).

¹³⁴ Tamar Lewin, *A Gentlemanly Profession Enters a Tough New Era*, *N.Y. Times*, Jan. 16, 1983, 3, at 1.

¹³⁵ See Burger, supra note 62, at 62.

¹³⁶ *Id.* at 63. Burger himself strongly adhered to the paradigm. He noted that, in the past, lawyers respected the taboos on business conduct. "Historically," Burger observed, "honorable lawyers complied with traditions of the bar and refrained from doing all that the laws or the Constitution allowed them to do. Specifically, they did not advertise, they did not solicit ... they considered our profession as one dedicated to public service." *Id.*

¹³⁷ Burger suggested that the ABA "create a study group of representative leaders of our profession to examine these [and other problems related to decline of the profession] and report to the association." *Id.* at 66. These other problems included competence, lawyer discipline, discovery abuse, and excess zeal. *Id.*

¹³⁸ Chaired by former ABA President Justin Stanley, the Commission included Professor and former dean Thomas Morgan, a leading scholar in the field of legal ethics, and Professor Eliot Friedson, a leading scholar of the sociology of the professions, as well as other scholars, a medical doctor, judges, and practicing lawyers. Commission Report, supra note 41, at vi. Shepherd charged the Commission to examine both the actual and perceived "performance" of the bar including "advertising" and "so-called commercialization," as well as "competence" and duties to clients and courts. *Id.*

¹³⁹ *Id.* at 1. The Commission described two sources of these changes. One was increased competition. As a result of Supreme Court decisions prohibiting restrictions on competition, "as a matter of law, lawyers must face tough new economic competition with respect to almost everything they do." *Id.* at 10. In addition, economic pressure resulted from high associate salaries in large firms, high overhead, ... and corporate clients shifting from "historical relationships" to shopping for low cost services. *Id.* at 15-16. Another source was "changing ways of thinking about lawyers' ethics." *Id.* at 11. Lawyers "tended to look at nothing but the rules" and "to ignore exhortations to set their standards at a higher level." *Id.* at 13.

has become a preoccupation for some members of the bar."¹⁴⁰ It described United States District Judge John F. Grady's assertion, that in many big firms "the dollar is what the practice is all about,"¹⁴¹ as representative of the views of many in the bar.

The Commission recognized that the problem of maintaining the dichotomy had become an anomaly demanding the profession's immediate attention. It observed that "the temptation to put profits first will always be great [and] the increase in competitive pressures on lawyers may make the temptation greater now than at any period in history."¹⁴² It warned that "activities directed primarily to the pursuit of wealth will ultimately prove both self-destructive and destructive of the fabric of trust between clients and lawyers generally."¹⁴³

In its acknowledgment of an anomaly, the Commission was not alone. In addition to the numerous commentators cited above, a 1990 survey found that "nearly two-thirds (65 percent) of the attorneys [surveyed] complained that the legal field has become less of a profession and more of a business."¹⁴⁴ A 1993 ABA-sponsored poll found that 59% of the public considered lawyers "greedy,"¹⁴⁵ and a recent poll found that 56% of the public believed that "lawyers use the system to protect the powerful and enrich themselves."¹⁴⁶

B. Crisis: "A Period of Pronounced Professional Insecurity"¹⁴⁷

As Kuhn's theory predicts, the emergence of an anomaly provoked a crisis.¹⁴⁸ As the Professionalism Paradigm began to unravel, the leaders of an apprehensive legal community feared for the profession's future. Consensus regarding the paradigm dissolved. The legal community could no longer marginalize challenges to the legitimacy [*1257] of the Professionalism Paradigm. Commentators sought guidance in philosophy.¹⁴⁹

Marking the current crisis are the apocalyptic descriptions of the fall of the legal profession.¹⁵⁰ Chief Justice Burger and the ABA Commission on Professionalism have not been alone in perceiving the threat to the Professionalism Paradigm. Since the Commission's Report,¹⁵¹ commentators have asserted that lawyers, their ethics, and their professionalism are "lost,"¹⁵² "betrayed,"¹⁵³ in "decline,"¹⁵⁴ in "crisis,"¹⁵⁵ facing "demise,"¹⁵⁶ near "death,"

¹⁴⁰ Id. at 15. For example, "groups of lawyers within firms who see themselves as bringing in a disproportionate share of firm revenues are breaking off and taking clients with them." Id. at 16.

¹⁴¹ Id. at 14 n.*.

¹⁴² Id. at 89.

¹⁴³ Id.

¹⁴⁴ Margaret C. Fisk, *Lawyers Give Thumbs Up*, Nat'l L.J., May 28, 1990, at S2.

¹⁴⁵ Gary A. Hengstler, *Vox Populi - The Public Perception of Lawyers: ABA Poll*, A.B.A. J., Sept. 1993, at 60, 63; see also Randall Samborn, *Anti-Lawyer Attitude Up*, Nat'l L.J., Aug. 9, 1993, at 1, 22 (noting results from poll showing that most-cited reason for negative view of lawyers was that "lawyers are too interested in money").

¹⁴⁶ Stephen Budiansky et al., *How Lawyers Abuse the Law*, U.S. News & World Rep., Jan. 30, 1995, at 50, 51.

¹⁴⁷ Kuhn, *supra* note 4, at 67-68.

¹⁴⁸ See *supra* note 22 and accompanying text.

¹⁴⁹ See *supra* notes 23-26 and accompanying text.

¹⁵⁰ While apocalyptic pronouncements dominate law reviews and practitioner literature, such sentiment is not unanimous. See, e.g., Milton V. Freeman, *The Profession of Law is NOT on the Decline*, 96 Dick. L. Rev. 149, 162-63 (1992) ("Is [it] correct that the size and prosperity of big firms is bound to ruin our profession? ... I think not."); John H. Pickering, *My Personal Verdict, After 55 Years: The Profession's Better Than Ever, Experience*, Summer 1995, at 22, 23 ("I do not share the gloom and doom that there has been a decline in professionalism."); Michael J. Rooney, *Report on Professionalism: The ABA Attempts Suicide*, Ill. B.J., May 1987, at 480, 480 ("I, for one, simply do not believe there has been a decline in professionalism among lawyers.").

¹⁵¹ See Commission Report, *supra* note 41.

¹⁵² Kronman, *supra* note 3.

¹⁵³ Linowitz & Mayer, *supra* note 3.

¹⁵⁴ Warren E. Burger, *The Decline of Professionalism*, 63 *Fordham L. Rev.* 949 (1995); Association of the Bar of the City of N.Y., *Comm. on the Profession, Is Professionalism Declining?*, 47 *Rec. Ass'n B. City N.Y.* 129 (Mar. 1992); Robert B. McKay, *The Rise of the Justice Industry and the Decline of Legal Ethics*, 68 *Wash. U. L.Q.* 829 (1990).

¹⁵⁷ and in need of "redemption."¹⁵⁸ A president of the Colorado Bar observed that the legal profession is "on the way into a black hole of pure commercialism from which there is no return."¹⁵⁹ The Chief Justice of the Supreme Court of Virginia lamented that "something is wrong, and I think I know what it is. It is commercialism. Yes, Commercialism, with a capital 'C,' and it has invaded the legal profession like a swarm of locusts."¹⁶⁰

Another indicator of a paradigm in crisis is the collapse of the consensus regarding the paradigm's meaning.¹⁶¹ A dramatic example [*1258] of this development¹⁶² is the ABA's turbulent debate regarding the propriety of "lawyers' ownership or operation of entities that provide "non-legal services which are ancillary to the practice of law,"¹⁶³ or "ancillary businesses."¹⁶⁴ In 1991, the ABA Litigation Section proposed a rule banning ancillary business services except "in connection with the provision of legal services and those provided "in house."¹⁶⁵ The Section argued that permitting ancillary businesses would permit law firms "to become profit-oriented conglomerates like other businesses" and would result in "the ethics of the marketplace" supplanting "lawyers' traditional ethical obligations."¹⁶⁶ An opposing proposal of the ABA's Committee on Ethics and Professional Responsibility sought not to ban ancillary businesses but to regulate them to ensure that they did not compromise lawyers' ethical obligations.¹⁶⁷ [*1259]

In August 1991, the ABA House of Delegates adopted the Litigation Section's proposed ban by a narrow 197-186

¹⁵⁵ Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 *Yale L.J.* 1239, 1239 (1991) ("Crisis' in Legal Ethics"); W. Frank Newton, *Crisis in the Legal Profession*, 21 *Tex. Tech L. Rev.* 897 (1990).

¹⁵⁶ George J. McMonagle, *The Demise of Professionalism*, N.Y.S. B.J., May 1990, at 19.

¹⁵⁷ Kovachevich & Waksler, *supra* note 116, at 419.

¹⁵⁸ Gordon & Simon, *supra* note 95.

¹⁵⁹ Alex S. Keller, *Professionalism: Where Has it Gone?*, 14 *Colo. Law.* 1383, 1385 (1985).

¹⁶⁰ Harry L. Carrico, *The New Professionalism*, N.Y.S. B.J., Jan. 1990, at 11, 12 (address delivered to first class in Virginia State Bar's mandatory course on professionalism).

¹⁶¹ See *supra* notes 24-26 and accompanying text. While, as noted above, the consensus to date has reflected the opinions of bar leaders and not necessarily the entire profession, see *supra* note 55, in the crisis the paradigm's loss of authority has diminished the authority of the organized bar's leadership within the profession and weakened the organized bar's ability to prevent deviation from established perspectives on professionalism. See, e.g., Nelson & Trubek, *supra* note 35, at 13 ("In recent years it has become apparent that no single group can lay uncontested claim to the leadership of the bar's collective institutions and thereby impose a single set of professional ideals or values.").

¹⁶² The end of the consensus was evident as early as the bitter debates regarding the adoption of the ABA Model Rules of Professional Conduct. The many close votes in the ABA House of Delegates revealed the "heterogeneity of [the bar's] ethical views," Schneyer, *supra* note 47, at 140, and "little agreement on the meaning of important terms or the paths to be taken." Nelson & Trubek, *supra* note 35, at 2 (arguing that lack of agreement applies to discussion of "professionalism vs. commercialism").

¹⁶³ Ted Schneyer, *Policymaking and the Perils of Professionalism: The ABA's Ancillary Business Debate as a Case Study*, 35 *Ariz. L. Rev.* 363, 364 (1993) (quoting Henry J. Reske & Don J. DeBenedictus, *Ethics Proposal Draws Fire*, A.B.A. J., Oct. 1991, at 34). Although lawyers had traditionally offered clients nonlegal services such as "title insurance, trust services, and patent consulting," Model Rules of Professional Conduct Rule 5.7 cmt. (1991 version, repealed Aug. 1992), in the 1980s firms began to offer other services, such as lobbying and investment consulting. Schneyer, *supra*, at 367-68. In 1986, the Commission on Professionalism suggested that such ancillary businesses undermined the Business-Profession dichotomy and asked the ABA "to initiate a study to see what, if any, controls or prohibitions should be imposed." Commission Report, *supra* note 41, at 54-55. The ABA initiated such a study which resulted in the ABA's consideration of two competing proposals in 1991. Schneyer, *supra*, at 369-71.

¹⁶⁴ Schneyer, *supra* note 163, at 367.

¹⁶⁵ *Id.* at 364.

¹⁶⁶ *Id.* at 371-72 (quoting Letter from Judah Best et al., to members of the ABA House of Delegates, July 19, 1991, at 3-4). The Section's leaders declared that "the resolution of the ancillary business controversy goes to the heart of who we are as a profession and what we will become." Dennis J. Block et al., *Model Rule of Professional Conduct 5.7: Its Origin and Interpretation*, 5 *Geo. J. Legal Ethics* 739, 799-800 (1992) (quoting Best et al., *supra*, at 3). The vote would determine "whether [the legal profession] wished to continue as a self-regulating profession committed to both its traditional (and unique) ethical obligations and to public service, even at the cost of turning away some profits from non-legal ventures." *Id.* at 799 (quoting Best et al., *supra*, at 3-4).

¹⁶⁷ Schneyer, *supra* note 163, at 371.

vote.¹⁶⁸ In August 1992, the House reversed itself by an even narrower 190-183 vote and repealed the ban.¹⁶⁹ In February 1994, by a close but wider margin of 237-183, the ABA adopted a rule similar to that offered by the Ethics and Professional Responsibility Committee in 1991.¹⁷⁰

The adoption of the 1994 rule represents another feature of the paradigm in crisis, typifying the emergence of an alternative version of the Professionalism Paradigm, which this Article will refer to as "Business Professionalism." Business Professionalism either expressly described law practice as both a business and profession or implicitly adopted that view by seeking to regulate, and not prohibit, business conduct.¹⁷¹ Where "pure" professionalism is hostile to business conduct, such as advertising or ancillary business practices,¹⁷² Business Professionalism seeks to regulate these practices to protect clients and to encourage lawyers to perform them in a "professional" manner.¹⁷³ In the altruistic interest of serving the public, some varieties¹⁷⁴ of Business Professionalism may relax the conditions of expertise and autonomy to permit nonlawyer practice of law¹⁷⁵ and public regula- [*1260] tion of the bar.¹⁷⁶

The crisis has also been marked by perspectives of legal commentators dispensing entirely with the Business-Profession dichotomy. Jerold Auerbach and Monroe Freedman assert that the taboos on business behavior are illegitimate products of a bigoted bar elite.¹⁷⁷ Thomas Shaffer ascribes a different type of hypocrisy to the dichotomy. He describes it as the view that lawyers who are "paid well ... from the profits of commercialism ... act in a spirit of public service," but that "those who practice commercialism do not."¹⁷⁸ Instead, he proposes that all persons have an obligation to "serve the common good" and that this obligation apply equally to business and to law practice.

¹⁶⁸ Id. at 364. Ted Schneyer credits the ban's victory on the proponents' ability to use professionalism rhetoric to "mobilize" support. Id. at 365, 372.

¹⁶⁹ Id. at 364 & n.10.

¹⁷⁰ ABA Reformulates Ancillary Business Rule, Reaffirms Support for Universal Health Care, 62 U.S.L.W. 2497 (1994); James Podgers, House of Delegates: Ancillary Business Provision Added to Model Rules, A.B.A. J., Apr. 1994, at 117.

¹⁷¹ Thomas Morgan's influential 1977 article, "The Evolving Concept of Professional Responsibility," anticipated the development of Business Professionalism, including a concern with rules promoting the self-serving interests of the bar and an appreciation of how competition and advertising, as well as nonlawyer practice, could benefit the public. See Morgan, *supra* note 94, at 740-43. Other expressions of Business Professionalism include the Supreme Court's opinion in Bates v. State Bar of Ariz., 433 U.S. 350 (1977), and the description of law as a business and a profession in Hazard et al., *supra* note 105, at 1112 (noting that "the practice of law manifestly is both a profession and a business").

¹⁷² See, e.g., Shapero v. Kentucky Bar Ass'n, 486 U.S. 466, 487 (1988) (O'Connor, J., dissenting) (urging reconsideration of Bates); Burger, *supra* note 154, at 955-57 (asserting that organized bar should implore lawyers not to advertise).

¹⁷³ See, e.g., Model Rules of Professional Conduct Rule 5.7 (1994) (regulating ancillary business services); ABA Aspirational Goals on Lawyer Advertising (1988), reprinted in Stephen Gillers & Roy D. Simon, Jr., *Regulation of Lawyers: Statutes and Standards* 328-29 (1995) ("When properly done, advertising can ... be a productive way for lawyers to build and maintain their client bases.").

¹⁷⁴ Advocates of Business Professionalism will sometimes take a Business Professionalism position on some issues and a pure Professionalism Paradigm position on others. For example, the Commission on Professionalism followed Business Professionalism with regard to advertising and nonlawyer practice, Commission Report, *supra* note 41, at 46-48 (advertising), 54 (nonlawyer practice), and pure professionalism with regard to ancillary businesses. Id. at 53-55.

¹⁷⁵ The leading advocate of nonlawyer practice has been Deborah Rhode. See Deborah L. Rhode, The Delivery of Legal Services by Non-Lawyers, 4 Geo. J. Legal Ethics 209, 233 (1990) [hereinafter Rhode, Non-Lawyer Practice] (discussing role of non-lawyers in providing low-cost legal services); Deborah L. Rhode, Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions, 34 Stan. L. Rev. 1, 99 (1981) ("Absent evidence of significant injury from lay assistance, individuals should be entitled to determine the cost and quality of legal services that best meet their needs."); see also Commission Report, *supra* note 41, at 89-91 (advocating limited nonlawyer practice); Association of the Bar of the City of N.Y., Comm. on Professional Responsibility, Prohibitions on Nonlawyer Practice: An Overview and Preliminary Assessment, 50 Rec. Ass'n B. City N.Y. 190, 192 (Jan. 1995) [hereinafter 1995 N.Y. Bar Ass'n Report] (same); David Luban, *Lawyers and Justice: An Ethical Study* 269-73 (1988) (same).

¹⁷⁶ See Abel, *supra* note 51, at 246-47 (arguing that "regulation of lawyer incompetence and misconduct must be entrusted to an institution wholly independent of both the organized bar and private practitioners"); Rhode, *supra* note 105, at 641-42 (advocating implementation of independent regulatory body free from bar control); Geoffrey C. Hazard, Jr., *Disciplinary Process Needs Major Reforming*, Nat'l L.J., Aug. 1, 1988, at 13, 14 (describing report that "implies that relocating enforcement jurisdiction from the bar to a public agency would substantially improve the machinery's performance").

¹⁷⁷ See *supra* note 91.

¹⁷⁸ Thomas L. Shaffer, *Lawyer Professionalism as a Moral Argument*, 26 Gonz. L. Rev. 393, 403 (1990-91).

¹⁷⁹ Ted Schneyer, however, seeks the exclusion of professionalism from discussion of legal ethics on the ground that professionalism introduces irrational and sloppy thinking. ¹⁸⁰ Meanwhile, although Richard Posner denies that the transformation of the legal community "over the past three decades ... in the direction of a competitive enterprise" constitutes "deprofessionalization," ¹⁸¹ he welcomes the end of professional privilege as nonlawyers are increasingly able to practice law. ¹⁸²

Outside the legal community, a variety of groups have attacked the paradigm. The past few decades have seen the development of a publishing industry providing books to help consumers avoid using [*1261] lawyers and help themselves, ¹⁸³ as well as a consumer movement seeking to end professional privilege and autonomy altogether. ¹⁸⁴ Still another attack rejects the paradigm's assumption that the legal profession provides a public service. A number of economists have described lawyers as self-interested "rent seekers" whose only function is to enrich themselves while unnecessarily expending resources. ¹⁸⁵ Others assert that lawyers promote legal complexity to benefit their own financial interests. ¹⁸⁶ Borrowing from these perspectives, Vice President Dan Quayle complained in 1991 that the large number of lawyers in the United States harmed the economy. ¹⁸⁷ [*1262]

Another characteristic of a paradigm crisis is a turn to first principles. ¹⁸⁸ Some commentators defend the Business-Profession dichotomy on the basis of its progressive roots ¹⁸⁹ or of a republican perspective grounded in Aristotle-

¹⁷⁹ Id. at 403-04.

¹⁸⁰ See Schneyer, *supra* note 163, at 396 ("ABA leaders should take pains to consign the idiom [of professionalism] to the museum of discredited policymaking tools.").

¹⁸¹ Richard A. Posner, *The Material Basis of Jurisprudence*, in Posner, *supra* note 34, at 33, 64.

¹⁸² See *id.* at 79.

¹⁸³ At the forefront of this movement has been Nolo Press, a company dedicated to producing do-it-yourself books, tapes, and software programs. Founded in 1971, Nolo Press offers nearly 100 different legal titles, with sales totaling over \$ 8 million in 1993. See Claire Cooper, *Power to the People*, *Sacramento Bee*, Oct. 16, 1994, at G1 (describing Nolo Press). John Wiley and Sons, Inc. in New York and Sphinx Publishing in Clearwater, Florida also publish self-help legal books. Kathleen Pender, *Publisher Finds Niche in Self-Help Law Books*, *S.F. Chron.*, Apr. 12, 1993, at C1.

¹⁸⁴ See, e.g., *Help from HALT*, *Wash. Post*, Jan. 21, 1988, at B5 ("HALT [Help Abolish Legal Tyranny] makes help available in the form of eight Citizens Legal Manuals, which guide nonlawyers through probate, divorce, small claims, and estate-planning procedures.").

¹⁸⁵ See, e.g., David N. Laband & John P. Sophocleus, *The Social Cost of Rent-Seeking: First Estimates*, 58 *Pub. Choice* 269, 271 (1988) (describing lawyers as "either active or passive participants in the process of legal/political rent-seeking"); Stephen P. Magee, *The Invisible Foot and the Waste of Nations: Lawyers as Negative Externalities*, in Stephen P. Magee et al., *Black Hole Tariffs and Endogenous Policy Theory: Political Economy in General Equilibrium* (1989) (describing effect of legal activity on redistributing income); Kevin M. Murphy et al., *The Allocation of Talent: Implications for Growth*, 106 *Q.J. Econ.* 503, 505 (1991) (characterizing rent-seekers as those whose "private returns come from redistribution of wealth from others and not from wealth creation"). But see Frank Cross, *The First Thing We Do, Let's Kill All the Economists: An Empirical Evaluation of the Effect of Lawyers on the United States Economy and Political System*, 70 *Tex. L. Rev.* 645, 649 (1992) ("The measured negative effects of lawyerification on national welfare are highly uncertain and incomplete."); Ronald J. Gilson, *The Devolution of the Legal Profession: A Demand Side Perspective*, 49 *Md. L. Rev.* 869, 916 (1990) ("The promise for resurrecting important elements of professionalism lies in understanding the demand, not the supply, side of the market for legal services.").

¹⁸⁶ See, e.g., Richard A. Epstein, *The Political Economy of Product Liability Reform*, 78 *Am. Econ. Rev.* 311, 313 (1988) ("Neither plaintiff nor defendant lawyers want a set of rules so complex that no lawsuit will be brought at all, just as they do not want a set of rules so simple that their services could be dispensed with in settling cases"); Paul H. Rubin & Martin J. Bailey, *The Role of Lawyers in Changing the Law*, 23 *J. Legal Stud.* 807, 808-09 (1994) (describing benefits to lawyers from amended tort law); Michelle J. White, *Legal Complexity and Lawyers' Benefit from Litigation*, 12 *Int'l Rev. L. & Econ.* 381, 393 (1992) (concluding that "lawyers prefer an intermediate level of legal complexity" because of trade-off between higher fees and fewer cases brought when law becomes more complex).

¹⁸⁷ See Marc Galanter, *Predators and Parasites: Lawyer-Bashing and Civil Justice*, 28 *Ga. L. Rev.* 633, 645-47 (1994) (noting role of Quayle's speech in promoting claim that the United States has 70% of world's lawyers); Mark Hansen, *Quayle Raps Lawyers: ABA President's Response Spurs Complaints*, *A.B.A. J.*, Oct. 1991, at 36, 36 (quoting Quayle's remarks regarding adverse impact of large numbers of lawyers on economy).

¹⁸⁸ See *supra* note 26 and accompanying text.

¹⁸⁹ See, e.g., Gordon, *supra* note 38, at 11-13 (discussing claim that lawyers must remain independent of all factional interests in society - including their clients - to apply their skills to progressive public purposes); Gordon & Simon, *supra* note 95, at

lian philosophy.¹⁹⁰ Numerous commentators apply moral philosophy to problems arising from the tension between the Professionalism Paradigm's condition of altruistic service to the public and lawyers' adversarial role.¹⁹¹ Other commentators use moral philosophy,¹⁹² postmodernism,¹⁹³ and religion¹⁹⁴ to [*1263] construct frameworks for evaluating lawyer conduct independent of the Professionalism Paradigm.

This turn to philosophy, together with expressions of professional insecurity, diversification of approaches to professionalism, and growing opposition to the Professionalism Paradigm, are symptoms of the legal community's current crisis of professionalism. Provoked by the anomaly resulting from the intractability of the perception that law practice is a business, the crisis has thus far proven impossible for the legal profession to resolve.

IV

Revolution: The Emergence of the Business Paradigm

Kuhn's methodology has thus far helped identify the cause and symptoms of the crisis of professionalism. The next step is to anticipate how the legal community's crisis will end. Kuhn's theory, though, provides no ready formula for determining the outcome of a crisis. As discussed above, a crisis can end with the anomaly resolved within the existing paradigm or bracketed for future consideration, or the crisis can form the basis for generating a new paradigm.¹⁹⁵ This Part considers and rejects the first two alternatives as unlikely to resolve the legal community's crisis. The anomaly is too fundamental to the Professionalism Paradigm, and the perception of law practice as a business is too pervasive to permit these resolutions. With regard to the third, reconceptualizing the current crisis as the breakdown of the Professionalism Paradigm reveals the possible emergence of a new paradigm that would resolve the anomaly quite simply - law practice as a business (Business Paradigm). This new paradigm may surpass the Professionalism Paradigm with respect to the goals of serving clients and society.

A. Why Attempts To Revive the Professionalism Paradigm or Bracket the Anomaly Will Probably Fail

Many commentators have sought to revive the Professionalism Paradigm through exhortation, education programs,

234-35 (advancing public service ideal as reason for taking professionalism seriously); Luban, *supra* note 39, at 736-40 (urging incorporation of "progressive professionalism" into elite law firm practice).

¹⁹⁰ See, e.g., Kronman, *supra* note 3, at 34-52 (outlining Aristotelian-based ideal of lawyer-statesman).

¹⁹¹ See generally, e.g., Luban, *supra* note 175 (arguing that lawyers should determine professional ethics by questioning what profession and its institutions should be doing); Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 *Human Rights* 1 (1975) (exploring moral implications of lawyer's professionalism as it relates to lawyer's conduct towards client and world at large). For a critique of these approaches, see Ted Schneyer, *Moral Philosophy's Standard Misconception of Legal Ethics*, 1984 *Wis. L. Rev.* 1529 (arguing that financial, psychological, or organizational pressures, not professional ethics, cause lawyers to favor client interests at expense of third parties).

¹⁹² See generally, e.g., Daniel R. Coquillette, *Professionalism: The Deep Theory*, 72 *N.C. L. Rev.* 1271 (1994) (arguing that professional and personal morality are inseparable and that legal practice cannot and should not be viewed as mere instrumentalism); Peter Margulies, *Progressive Lawyering and Lost Traditions*, 73 *Tex. L. Rev.* 1139 (1995) (reviewing Milner S. Ball, *The Word and the Law* (1993), and Kronman, *supra* note 3); Simon, *supra* note 95, at 130-44 (advancing "non-professional advocacy" model based on personal ethics as alternative to professional advocacy model).

¹⁹³ See generally, e.g., Gerald P. Lopez, *Rebellious Lawyering* (1992) (using fictional characters and legal institutions to outline and explore ethical and progressive legal practice); Anthony V. Alfieri, *Impoverished Practices*, 81 *Geo. L.J.* 2567 (1993) [hereinafter Alfieri, *Impoverished Practices*] (offering postmodernist inquiry of formal and instrumental enactments of ethical judgment using close examination of single case study); Anthony V. Alfieri, *Stances*, 77 *Cornell L. Rev.* 1233 (1992) (conducting postmodernist critique of writings of Clark Cunningham, James Boyd White, and Naomi Cahn, and arguing that modernist approach to lawyering results in mistranslation of clients' stories); Lucie E. White, *Seeking "... the Faces of Otherness ...": A Response to Professors Sarat, Felstiner, and Cahn*, 77 *Cornell L. Rev.* 1499, 1511 (1992) (arguing that when dealing with clients, lawyers should seek "not just negotiations of power ... but also to recognize in all its alterity, the other's face").

¹⁹⁴ See generally, e.g., Ball, *supra* note 192 (seeking to show how nonreligious theology is relevant to law); Thomas Shaffer, *On Being a Christian and a Lawyer: A Law for the Innocent* (1980) (examining moral dilemma posed to Christian lawyers by demands of secular laws and Judeo-Christian principles); Joseph Allegretti, *Christ and the Code: The Dilemma of the Christian Attorney*, 34 *Cath. Law.* 131 (1991) (proposing Christian "ethic of care" to guide lawyer conduct); Sanford Levinson, *Identifying the Jewish Lawyer: Reflections on the Construction of Professional Identity*, 14 *Cardozo L. Rev.* 1577 (1993) (examining impact of membership in legal profession on one's identity as a Jew); Russell G. Pearce, *Jewish Lawyering in a Multicultural Society: A Midrash on Levinson*, 14 *Cardozo L. Rev.* 1613 (1993) (commenting and expanding on Levinson).

¹⁹⁵ See *supra* note 27 and accompanying text.

and greater policing of the bar.¹⁹⁶ The Supreme Court's recent opinion in Florida Bar [*1264] v. Went for It, Inc.¹⁹⁷ suggests that the Court may consider overruling Bates¹⁹⁸ and permit the bar to strengthen the Profit Maximizer taboo by reimposing a ban on advertising. Business Professionalism attempts to bracket the anomaly by declaring law both a business and a profession. Other possible approaches would make the anomaly irrelevant by using professionalism as a "conceit"¹⁹⁹ or a "'white lie'"²⁰⁰ that sets a moral tone regardless of the validity of the Business-Profession dichotomy.

To be effective, however, these strategies require a continued belief in the Professionalism Paradigm. But the anomaly, in this case, arises because many lawyers and members of the public believe that law practice is a business, and because taboo violations are widespread and ongoing.²⁰¹ Accordingly, faith in the Professionalism Paradigm is almost impossible to sustain. Even overruling Bates²⁰² would probably have little effect. It is unclear whether states would reinstate bans on advertising and even if they did, whether perceptions would change as a result. In Bates, the Court recognized the perception that the Business-Profession dichotomy was an "anachronism" at a time when lawyers had not yet been allowed to advertise.²⁰³

Advocates of bracketing the anomaly could argue that their approaches do not require belief in the dichotomy. They ask the legal community only to put the anomaly aside. The anomaly, however, is too fundamental to the existing paradigm to ignore. Without it, the paradigm has no credibility.²⁰⁴ In addition, the approach of Business Professionalism is internally incoherent. Under the Professionalism Paradigm, an occupation cannot be both a business and a profession.²⁰⁵

In these circumstances, efforts to revive the Paradigm or bracket the anomaly pose dangers to the bar and to the legal system. First, [*1265] differences regarding the dichotomy will continue to divide the legal community into sometimes warring camps, as the ancillary business debate demonstrated.²⁰⁶ Second, if the public and the bar generally disbelieve the dichotomy, lawyers who follow the paradigm appear to be either hypocrites doing one thing while saying another, cynics manipulating for their own purposes an ideology they reject, or naive fools unaware of what everyone else knows. This situation invites disrespect not only for lawyers but for the entire the legal system.²⁰⁷

B. The New Paradigm: Law Practice As a Business

Kuhn suggests that it is difficult to anticipate specific contours of a new paradigm that will succeed in replacing an

¹⁹⁶ See, e.g., Commission Report, *supra* note 41, at 20-25 (offering recommendations for law schools, practicing lawyers, bar associations, and judges); Donna M. Bloemer, The Salmon P. Chase American Inn of Court, 21 N. Ky. L. Rev. 255, 255 (1994) (explaining how the American Inns of Court Foundation, founded in 1985, seeks to "help trial and appellate lawyers and judges rise to higher levels of excellence, professionalism, and ethical awareness"); Burger, *supra* note 154, at 956-57 (urging renewed commitment to professionalism); Gordon & Simon, *supra* note 95, at 257 (suggesting steps for redeeming legal profession); Carrico, *supra* note 160, at 11-12 (explaining importance of required course on professionalism for Virginia lawyers).

¹⁹⁷ 115 S. Ct. 2371 (1995).

¹⁹⁸ See *supra* note 108.

¹⁹⁹ See Schneyer, *supra* note 163, at 383.

²⁰⁰ Deborah L. Rhode, Class Conflicts in Class Action, 34 Stan. L. Rev. 1183, 1262 (1982) (quoting Lon Fuller, Legal Fictions 5 (1967)).

²⁰¹ See *supra* Part III.A.

²⁰² See *supra* note 108.

²⁰³ *Bates v. State Bar of Ariz.*, 433 U.S. 350, 371-72 (1977).

²⁰⁴ See *supra* notes 37-49 and accompanying text.

²⁰⁵ See *supra* notes 37-49 and accompanying text.

²⁰⁶ See *supra* notes 162-70 and accompanying text.

²⁰⁷ Indeed, widespread public cynicism regarding lawyers' self-interest might explain the prevalence of negative and inconsistent views regarding the legal system. Compare Budiansky et al., *supra* note 146, at 52 (noting that the public believes legal system favors the rich) with Galanter, *supra* note 187, at 652-54 (observing that commentators argue that legal system oppresses wealthy and businesses). It may also help explain why the image of lawyers is declining. See, e.g., Galanter, *supra* note 187, at 663 ("Over the past decade, general estimations of lawyers have fallen."); Randall Samborn, Tracking Trends, Nat'l L.J., Aug. 9, 1993, at 20 (discussing polls indicating decline in public view of lawyers).

old one. He does, however, identify the basic characteristic of a successful new paradigm: It resolves the anomaly.²⁰⁸ Without overtly adopting it, the legal community has begun to employ a new paradigm that resolves the anomaly: the Business Paradigm.

1. The New Paradigm Emerges

The Business Paradigm is evident in the way much of the legal community perceives itself. Defenders and opponents of the Professionalism Paradigm agree that lawyers are behaving like businesspersons.²⁰⁹ They structure their practices and sell their services using the same techniques as other businesspersons.²¹⁰ Many, if not most, commentators recognize that financial self-interest plays an important role in lawyers' conduct.²¹¹

The perception that law practice is a business also pervades discussions of professional responsibility. As discussed above, the versions of Business Professionalism, including the Bates opinion,²¹² ABA Commission on Professionalism Report,²¹³ and views of numerous commentators,²¹⁴ reject the Business-Profession dichotomy in whole or in part and accept that law is a business. Still other commentators reject the Professionalism Paradigm entirely and support outside regulation²¹⁵ and the end of professional privilege.²¹⁶

As a corollary to treating law as a business, commentators reject the Professionalism Paradigm's characterization of businesspersons as morally inferior to lawyers. Thomas Shaffer, for example, finds an ethic of service consistent with all occupations and derides the Professionalism Paradigm's characterization of lawyers as somehow superior to others in money-making occupations.²¹⁷ Mary Ann Glendon decries "lawyers' disdain for commerce" and "cramped concepts of business ethics."²¹⁸ Glendon's comments also reflect an understanding of changes in business practice, which, with the development of graduate training and a substantial concern for business ethics, has come to resemble more closely the practice of a profession.²¹⁹

The reinterpretation of business as a worthy endeavor, together with the acknowledgment that law practice has the characteristics of a business, suggest a new understanding of the framework for the delivery of legal services. Whether that understanding will result in a paradigm shift is not possible to predict with certainty. Some commentators have already abandoned the Professionalism Paradigm.²²⁰ Although others are not yet willing to go that far,²²¹ trends appear to favor the new paradigm. Newer members of the profession appear more willing to view law practice as a business,²²² the public²²³ continues to view law practice as a business,²²³ and taboo violations show no sign of

²⁰⁸ Kuhn, *supra* note 4, at 153.

²⁰⁹ See *supra* notes 116-46, 152-87 and accompanying text.

²¹⁰ See *supra* notes 116-31 and accompanying text.

²¹¹ See *supra* note 105.

²¹² Bates v. State Bar of Ariz., 433 U.S. 350 (1977).

²¹³ Commission Report, *supra* note 41.

²¹⁴ See *supra* notes 171-76 and accompanying text.

²¹⁵ See, e.g., Freedman, *supra* note 91, at 2 (criticizing idea that lawyer self-governance is either necessary or beneficial).

²¹⁶ See, e.g., *supra* notes 177-85 and accompanying text.

²¹⁷ See *supra* notes 178-79 and accompanying text.

²¹⁸ Glendon, *supra* note 3, at 70.

²¹⁹ See, e.g., Norman E. Bowie, *Business Ethics as a Discipline: The Search for Legitimacy*, in *Business Ethics: The State of the Art 17* (R. Edward Freeman ed., 1991) (arguing that courses in business ethics are necessary component of business curriculum and that business practice should be informed by both altruistic and self-interested ideals).

²²⁰ See *supra* notes 177-85 and accompanying text.

²²¹ For example, adherents of Business Professionalism cling, albeit inconsistently, to the Professionalism Paradigm. See *supra* notes 36-48, 171-76 and accompanying text.

²²² See Seron, *supra* note 116, at 412-14 (discussing differences in attitudes towards approaches to acquiring new business).

²²³ See *supra* notes 123, 134, 145-46 and accompanying text. The United States Justice Department recently accused the ABA

abating.²²⁴

2. The Operation of the Business Paradigm

The emergence of the Business Paradigm invites consideration of how it would operate and how it would compare with the Professionalism Paradigm. Although necessarily speculative, such consideration suggests a range of potential arrangements under the Business Paradigm, including a "Middle Range" proposal to implement the goals of providing quality legal services and promoting the common good.

The anomaly arising from the Professionalism Paradigm's failure to curtail the business conduct of lawyers disappears under the Business Paradigm. If law is a business, the business conduct of lawyers is expected, not problematic. Business conduct evolves from an anomaly under the old paradigm to a "tautology" under the new paradigm.²²⁵ As the anomaly fades, the conditions of the Professionalism Paradigm lose their vitality.

With regard to the condition of esoteric knowledge,²²⁶ the new paradigm recognizes that legal services resemble many other goods and services in terms of consumers' ability to evaluate them. Many consumers, including individuals who are repeat customers and businesses that employ in-house counsel, are quite sophisticated in their ability to evaluate legal services and do not need special protections.²²⁷ As for the less sophisticated who are unable to evaluate legal services without assistance, their situation is comparable to consumers of many other goods and services. Numerous consumers of goods and [*1268] services - such as automobile repair, computers, and household appliances - lack the expertise to evaluate what they are purchasing.

With regard to the condition of altruism,²²⁸ the Business Paradigm neither assumes superior character for lawyers nor disparages the commitment of other businesspersons to the common good. The Business Paradigm does not assert that lawyers automatically place the interests of clients and society above their own. Like other businesspersons, lawyers place a significant emphasis on maximizing their own financial and other self-interests. Yet, as Thomas Shaffer proposes, the Business Paradigm recognizes that every individual and every occupation possesses the capacity for moral character and conduct.²²⁹

The Business Paradigm does not assume that lawyers are automatically entitled to autonomy from the public and the market. Absent special expertise and altruism, the rationale for the legal community's automatic autonomy fails.²³⁰ Lawyers would be no more entitled than other businesspersons to have an exclusive license to provide services or to regulate their community free from the encroachment of public and market.

This analysis of how the Business Paradigm eliminates the elements of the Professionalism Paradigm also indicates how many issues the Business Paradigm leaves open. Clearing away the Professionalism Paradigm's baggage is only the beginning of problem-solving efforts under the Business Paradigm. The puzzles of how to provide clients with high quality services and how best to promote the common good remain.

of anticompetitive conduct in its regulation of legal education, presumably the least business-like component of the legal profession. See Ken Myers, Settlement Will Mean Changes in ABA's Accreditation Process, Nat'l L.J., July 10, 1995, at A15 (describing consent decree between government and ABA).

²²⁴ See, e.g., Cramton, *supra* note 40, at 610 ("Competition in legal services markets is a fact of life that will not go away."); see also *supra* notes 116-31 and accompanying text.

²²⁵ Kuhn, *supra* note 4, at 78 (asserting that what were previously anomalies become "very much like tautologies, statements of situations that could not conceivably have been otherwise").

²²⁶ See *supra* notes 40-42 and accompanying text.

²²⁷ See, e.g., Galanter & Palay, *supra* note 114, at 48 (describing effect of in-house counsel on market for legal services); Marc Galanter, Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change, 9 *Law & Soc'y Rev.* 95, 97-101 (1974) (describing repeat players as knowledgeable consumers of legal services); Robert E. Rosen, The Inside Counsel Movement, Professional Judgment and Organizational Representation, 64 *Ind. L.J.* 479, 481-86 (1989) (discussing increased expertise and influence of in-house counsel); Irving B. Levinson, Do You Really Need To Hire Outside Counsel? Read This First; 101 Ways To Control Outside Legal Costs - Part I, *Corp. Legal Times*, Aug. 1995, at 11 (offering example of purchasing considerations in-house counsel use).

²²⁸ See *supra* notes 43-45 and accompanying text.

²²⁹ Shaffer, *supra* note 178, at 403-04.

²³⁰ See *supra* notes 46-48 and accompanying text.

Under the Business Paradigm, the institutional arrangements for solving these puzzles could either resemble, or radically depart from, those of the Professionalism Paradigm.²³¹ At one extreme, the public and the legal community could recreate the institutions of the Professionalism Paradigm. The public could authorize the legal community to regulate itself, and the legal community could adopt the same rules and continue the same self-regulatory procedures it now employs. What would be different is how these institutional arrangements would be explained. In contrast to the entitlement under the Professionalism Paradigm, the basis for self-governance would be the actual [*1269] competence of the bar in successfully regulating lawyers to guarantee quality legal services and to ensure dedication to the public good.

At the opposite end of the spectrum, a pure market approach to the delivery of legal services could lead to radical changes. This approach would rely on the self-interest of legal services providers to provide the public with the best quality services at the lowest cost and would disdain a community-wide moral vision.²³² It would end all limits on entry into law practice and reject government (or government-enforced) licensure or certification.²³³ If consumers found private certification valuable, market actors would provide it.²³⁴ Government would intervene only "to do something that the market cannot do for itself, namely, to determine, arbitrate, and enforce the rules of the game."²³⁵ Presumably, this would include mechanisms for permitting redress against lawyers who engage in fraud or fail to keep their promises to clients, courts, and third parties.²³⁶

More appealing than the status quo and market alternatives is a Middle Range approach. It combines the advantages of a market system with a communitarian moral vision and retains a place, though a limited one, for the current institutions of the bar. Under the Middle Range approach, the bar could provide its members with a certificate establishing certain credentials, but not an exclusive license to provide legal services.²³⁷ Lawyers and nonlawyers would be able to provide legal services, but only those admitted to the bar would be able to call themselves "lawyers."²³⁸ Courts and agencies would be able to require knowledge of their rules as a prerequisite for practice before [*1270] them and might choose to permit admission to the bar or graduation from a law school²³⁹ to qualify individuals to practice.

The government, with input from legal services providers, including the bar, would prescribe the ethical or regulatory rules governing the delivery of legal services. These rules could be the same for lawyers and nonlawyers, and could include the existing provisions²⁴⁰ except those limiting competition and prohibiting nonlawyer participation in the de-

²³¹ This Article does not consider one additional approach for resolving the anomaly - the nationalization of legal services - because it has little support in the legal profession and even less support in general as a public policy for regulating business. For a defense of this proposal, see Marvin E. Frankel, *Partisan Justice* 123-29 (1980).

²³² See Milton Friedman, *Capitalism and Freedom* 134-60 (1962); Milton Friedman, *The Social Responsibility of Business Is To Increase Its Profits*, *N.Y. Times*, Sept. 13, 1970, 6 (Magazine), at 32 (arguing that companies that worry about social issues are "unwitting puppets" of socialism, "the intellectual force that has been undermining the basis of a free society").

²³³ See Friedman, *Capitalism and Freedom*, supra note 232, at 137-60. Asserting that consumers are able to evaluate the quality of producers, id. at 147-48, Friedman suggests that professional licensing inhibits competition and reduces the quantity and quality of services. Id. at 155-56. In medicine, professional regulation "renders the average quality of practice low by reducing the number of physicians, by reducing the aggregate number of hours available from trained physicians for more rather than less important tasks, and by reducing the incentive for research and development." Id. at 157.

²³⁴ Id. at 146-47.

²³⁵ Id. at 27.

²³⁶ Id. (arguing that proper function of government includes "the maintenance of law and order to prevent coercion of one individual by another [and] the enforcement of contracts voluntarily entered into").

²³⁷ For a comparison of certification and licensing, see id. at 144-45.

²³⁸ Cf. 1995 N.Y. Bar Ass'n Report, supra note 175, at 204-05 & n.76 (discussing regulation of mental health professionals in New York where all persons are permitted to provide therapy but only licensed psychologists are permitted to use the title "psychologist").

²³⁹ Even without the use of law school graduation as a formal qualification, the end of professional privilege would probably not mean the end of law schools. In the field of business, for example, which does not have licensing, graduate schools of business serve an important function in teaching skills and values that prove valuable to business practitioners.

²⁴⁰ See Rhode, *Non-Lawyer Practice*, supra note 175, at 231.

livery of legal services.²⁴¹ All legal services providers would be bound by obligations of competence, confidentiality, loyalty, civility, and candor to the court.²⁴² The elimination of the assumption that lawyers will behave altruistically would probably lead to rules more protective of consumers, such as requiring written fee agreements.²⁴³ These rules would be enforced through malpractice suits and government enforcement. The bar could, of course, choose to continue some additional form of enforcement in order to assure superior competence and ethics on the part of its members.

This hybrid approach would permit the community of legal services providers to develop a moral aspiration for their work consistent with the commercial context of law practice and free of the perceived hypocrisy of the Professionalism Paradigm. The sources for developing such an ethic already abound in the legal literature, including Mary Ann Glendon's ethic of craft,²⁴⁴ Anthony Kronman's neo-Aristotelian lawyer-statesman model,²⁴⁵ Thomas Shaffer's religious perspective,²⁴⁶ Peter Margulies's civic humanism,²⁴⁷ and Anthony Alfieri's postmodern "theoretics of practice."²⁴⁸ The field of business ethics also offers a fertile source for considering the moral duties of legal services providers.²⁴⁹

An important factor in determining the moral obligations of legal service providers is the role of their occupation in providing access to justice. Under the Professionalism Paradigm, the legal profession has been concerned about the unequal access to justice for low-income persons,²⁵⁰ and commentators have observed that, contrary to the goal of equal justice under law, "justice ... is related to the quality of lawyering that a client can afford."²⁵¹ Mitigating that concern is the condition of altruism under which the legal profession's placement of obligations to the public above those to clients is presumed to moderate any harms that unrepresented persons will suffer. The Business Paradigm removes the assumption that legal services providers serve as such a buffer. It places squarely before the public and providers of legal services the problem of resolving the conflict between the societal aspiration of equal justice and a justice system where the ability to purchase legal services affects the quality of justice a person receives. The public would

²⁴¹ See, e.g., Cramton, *supra* note 40, at 574-76 (discussing Model Rule of Professional Conduct Rule 5.4, restricting nonlawyer ownership of law firms, as "barrier" to competition).

²⁴² See, e.g., Rhode, *Non-Lawyer Practice*, *supra* note 175, at 231 (suggesting that "lay practitioners ... be held to the same standards of ethical conduct as attorneys regarding competence, confidentiality, and conflicts of interest").

²⁴³ The drafters of the Model Rules of Professional Conduct initially proposed such a requirement, but the ABA voted to make written fee agreements "preferable" and not mandatory. ABA Ctr. for Professional Responsibility, *The Legislative History of the Model Rules of Professional Conduct: Their Development in the ABA House of Delegates* 39-41 (1987).

²⁴⁴ Glendon, *supra* note 3.

²⁴⁵ Kronman, *supra* note 3, at 4.

²⁴⁶ Shaffer, *supra* note 194. For other religious approaches to the lawyer's role, including my own work, see *supra* note 194.

²⁴⁷ See Margulies, *supra* note 192, at 1142-43 (describing civic humanist as one who seeks synthesis of law and revolution centered on human community).

²⁴⁸ Alfieri, *Impoverished Practices*, *supra* note 193, at 2568 (analyzing why poverty lawyers accept or reject cases). Alfieri is part of a broader theoretics of practice movement. See generally Foreword to Conference, *Theoretics of Practice: The Integration of Progressive Thought and Action*, 43 *Hastings L.J.* at xvii, xix (1992) (seeking "to promote the reciprocal integration of insights between progressive legal theories and the teaching and practice of law").

²⁴⁹ For discussions on the impact of business ethics in academic and corporate contexts, see generally *Business Ethics: The State of the Art*, *supra* note 219.

²⁵⁰ In 1993, the ABA amended Rule 6.1 of the Model Rules of Professional Conduct, "Voluntary Pro Bono Publico Service," to add a specific goal of 50 hours of free legal services, primarily to persons of limited means or organizations addressing their needs. See Gillers & Simon, *supra* note 173, at 204-05. The Committee Report supporting the amendment urged the bar to increase its pro bono services to the poor because "the inability of the poor to obtain needed legal services has been well documented." *Id.* at 309 (excerpting ABA Standing Comm. on Lawyers' Public Service Responsibility, Committee Report Supporting 1993 Amendment to Rule 6.1 (1993)).

²⁵¹ Hazard et al., *supra* note 105, at 1112; see also Robert L. Nelson & David M. Trubek, *Arenas of Professionalism: The Professional Ideologies of Lawyers in Context*, in *Lawyers' Ideals/Lawyers' Practices*, *supra* note 35, at 177, 195-96 (noting "the contradiction between the public role lawyers claim and actually perform," and observing that "legal services are allocated through the markets and thus their distribution is heavily skewed towards the interests of the better-off and better organized"); Deborah L. Rhode, *Institutionalizing Ethics*, 44 *Case W. Res. L. Rev.* 665, 683 (1994) ("In a society at least in principle committed to equal justice under the law, the absence of adequate representation poses obvious dilemmas for lawyers in adversarial contexts.").

either have to limit the goal of equal justice²⁵² or implement reforms, such as increasing funding for free legal services [*1272] or restructuring legal transactions so that they are cheaper or able to be accomplished without the assistance of a lawyer.²⁵³

The Middle Range approach diverges from both the self-regulation and market approaches. Unlike the self-regulation approach, it rejects both licensing and exclusive lawyer self-policing, while permitting the organized bar control of lawyer certification. The Middle Range approach's greater reliance on the market and lesser deference to the organized bar appears more consistent with treating law practice as a business. Unlike the market approach, the Middle Range approach permits certification and seeks a community ethic beyond the market's accommodation of individual self-interest. It both recognizes values outside those of the market and pragmatically retains a place for the organized bar in the delivery of legal services.²⁵⁴

The Middle Range approach may very well offer a number of advantages over the Professionalism Paradigm. The Middle Range approach could improve the quality of legal services. Many commentators have observed that the legal profession is not particularly effective at ensuring that lawyers provide honest or competent representation.²⁵⁵ Although it appears that significant competition exists for high-priced legal services,²⁵⁶ restrictions on nonlawyer practice and financing of legal services limit competition in providing services to low- and middle-income persons.²⁵⁷ Ending professional privilege will increase competition in this market and lead to better quality services at a lower cost.²⁵⁸

The traditional professional view, however, is that increased competition will lead lawyers to cut corners and provide lower quality services.²⁵⁹ That approach is contrary to the market theory that competition leads to the best quality service at the lowest cost. The justification for the professionalism view is that the market cannot function for legal services because consumers cannot evaluate them.²⁶⁰ As noted above, though, sophisticated consumers can evaluate services.²⁶¹ Less sophisticated consumers are not situated any differently from consumers in many other business transactions, who will presumably be able to purchase such information through consumer guides or paid refer-

²⁵² See, e.g., Rhode, *supra* note 251, at 685 ("Given the elasticity of legal needs and the disparity of financial resources among the public generally, equalizing access is an unrealistic aspiration.").

²⁵³ See, e.g., Cramton, *supra* note 40, at 562-65 (describing reform proposals).

²⁵⁴ While creating a revolutionary change in world view, new paradigms do borrow elements from the old. See Kuhn, *supra* note 4, at 149 (noting that new paradigms "ordinarily incorporate much of the vocabulary and apparatus, both conceptual and manipulative, that the traditional paradigm had previously employed" but also observing that these elements are seldom employed in the traditional way).

²⁵⁵ On competence, see, e.g., Warren E. Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?*, 42 *Fordham L. Rev.* 227, 234 (1973) ("One-third to one-half of the lawyers who appear in serious cases are not really qualified."); Bryant G. Garth, *Rethinking the Legal Profession's Approach to Collective Self-Improvement: Competence and the Consumer Perspective*, 1983 *Wis. L. Rev.* 639, 640 ("No one with any practical experience would deny the superficiality and shoddiness of much legal work, nor would anyone claim that the bar's institutions of quality control have provided effective means of self-regulation in the past."); William J. Genego, *The Future of Effective Assistance of Counsel: Performance Standards and Competent Representation*, 22 *Am. Crim. L. Rev.* 181, 201 (1984) ("Inadequate representation [in criminal cases] is a major institutional problem.").

²⁵⁶ See, e.g., Cramton, *supra* note 40, at 541 (noting that large corporations have few problems and many choices in acquiring adequate legal services); Rhode, *supra* note 251, at 725 ("Large scale repeat purchasers may find sufficient assistance through increased use of audit services, competitive bidding, and monitoring by in-house counsel.").

²⁵⁷ See, e.g., Cramton, *supra* note 40, at 556, 575-78 (discussing pros and cons of easing form-of-practice restrictions to help individual purchasers of legal services); Rhode, *supra* note 251, at 725-28 (noting benefit to low- and middle-income persons of more information about legal services and increased competition in provision of those services).

²⁵⁸ See, e.g., Rhode, *supra* note 251, at 726-28 (suggesting that competition with nonlawyers and among lawyers would benefit consumers).

²⁵⁹ See *supra* note 63.

²⁶⁰ See *supra* notes 40-42 and accompanying text.

²⁶¹ See *supra* note 227.

ral services if they feel they lack the expertise to make a decision.²⁶²

Two other factors suggest higher quality services under the Middle Range approach. First, in a system of certification, the organized bar itself will face competition from nonlawyers. The bar will need to ensure the competence of its members in order to demonstrate the value of certification to the market and will therefore have a greater incentive to police bar members than exists under the bar's current monopoly. Second, the Middle Range approach continues a system of regulation. In light of the bar's inability to demonstrate its capacity to regulate lawyer conduct successfully to date, the government would have the authority to regulate the delivery of legal services.²⁶³ In addition, without the assumption of lawyer altruism, the regulations would probably be more protective of consumers than the existing ethical codes. [*1274]

The Middle Range approach may also enhance lawyers' contribution to the public good in other ways. First, by providing better quality services at lower cost, the new paradigm would make legal services available to more moderate and low-income persons. While it would not fully provide equal access to legal services, it would provide greater access than is available under the existing paradigm. The contradiction between the aspiration to equal justice for all and the market delivery of legal services would remain. However, as noted above, where the old paradigm obscured this contradiction, the new one highlights it and makes this problem one of the Middle Range's priority problems. Presumably, unless society is willing to concede that equal justice under law is a myth, highlighting the problem will lead to some type of solution.²⁶⁴

Second, the Middle Range approach may also increase respect for the legal system. As noted above, under the existing paradigm, the elite profession that staffs the legal system appears to the public to be composed of hypocrites, cynics, or fools.²⁶⁵ The new paradigm would remove this taint. It would also broaden responsibility for the legal system by making the provision of legal services more democratic.²⁶⁶

Third, the Middle Range approach would enable the development of a moral vision of the role of the legal services provider. By eliminating the Professionalism Paradigm's dichotomy and elements that so many reject, the Middle Range frees such a dialogue from the automatic cynicism of many legal service providers and members of the public. As noted above, sources already existing within the legal community and the business community offer the basis for developing a community ethic of service in this new atmosphere.²⁶⁷

Opponents of the Business Paradigm will argue, to the contrary, that adoption of the Business Paradigm will decrease the likelihood that some lawyers will adopt an ethic of service. Indeed, despite widespread rejection of the Business-Profession dichotomy, some lawyers do believe in it. It may be that the Professionalism Paradigm motivates some of the finest members of the legal community to behave in an exceptional way. On the other hand, it may also be that these individuals have a strict personal code of morality that would promote exceptional conduct regardless of the existence of the Professionalism [*1275] Paradigm. Certainly if the legal community succeeded in developing a community ethic of service, it would influence not only these unusual individuals, but also many others to whom the Professionalism Paradigm is empty rhetoric.

Richard Posner has also questioned whether increased competition will undermine civility and obligations to the court.²⁶⁸ Under both paradigms, legal service providers have similar incentives to maximize their clients' interests at the expense of civility and candor to the court. But while the discredited Professionalism Paradigm is unlikely to pro-

²⁶² See, e.g., Cramton, *supra* note 40, at 571 (noting possibility of consumer guides for law); Rhode, *supra* note 251, at 725-26 (asserting that "centralized consumer directives with substantial price and quality information" would allow low- and middle-income purchasers to use legal market more effectively).

²⁶³ See Rhode, *supra* note 251, at 694-700 (discussing problems with self-regulation and possible avenues for government regulation).

²⁶⁴ See *supra* notes 250-53 and accompanying text.

²⁶⁵ See *supra* text accompanying note 207.

²⁶⁶ The Business Paradigm provides an opportunity for moving toward what leading constitutional scholars describe as the "lawyerhood of all citizens." Jack M. Balkin & Sanford Levinson, *Constitutional Grammar*, 72 *Tex. L. Rev.* 1771, 1776 (1994) (symposium on Philip Bobbitt, *Constitutional Interpretation* (1991)).

²⁶⁷ See *supra* notes 244-49 and accompanying text.

²⁶⁸ Posner, *supra* note 34, at 81, 92-93. Posner's view tracks the Profit Maximizer taboo. See *supra* notes 63, 121 and accompanying text.

vide persuasive grounds to motivate lawyers to civility and candor, the new paradigm at least offers the potential for creating credible moral suasion. Although the rules would probably be similar under both paradigms, independent regulation of discipline under the new paradigm may be stricter.²⁶⁹ In addition, an organized bar facing competition from nonlawyers will have both greater incentive to police itself and greater authority in urging policing of nonlawyers.

One last argument for the superiority of the Professionalism Paradigm would be that a self-governing bar is necessary as a bulwark against arbitrary government authority.²⁷⁰ The argument for this view is overstated. In practice, the bar does not have the autonomy it claims under the Professionalism Paradigm. Admission to the bar, promulgation of ethics rules, and lawyer discipline are generally the province of the courts.²⁷¹ While they are composed largely of lawyers, the courts are still a government entity independent of the bar. Moreover, the conduct of lawyers is currently subject to regulation under the common law and statutes the promulgation of which the bar does not control, including tort law, criminal law, agency law, and securities law.²⁷² While the Professionalism Paradigm does not achieve the autonomy it claims, the Middle Range approach permits a significant degree of independence. It continues a role of authority for the or- [*1276] ganized bar. It also provides a large number of diverse legal services providers, making it difficult for the State to dominate them.

Conclusion

The legal community is poised on the brink of a paradigm shift. The anomaly arising from the disjunction between the Business-Profession dichotomy and prevailing perceptions of lawyer conduct has provoked a crisis for the Professionalism Paradigm. The conditions creating the anomaly, and the indispensability of the dichotomy to the paradigm's credibility, make it unlikely that it will be possible to revive the paradigm or bracket this anomaly.

Instead, a new paradigm of law practice as a business is emerging to resolve the anomaly. While susceptible to a number of institutional arrangements, the new paradigm offers the potential for a Middle Range approach that poses an inspiring vision of the legal community's potential for better serving clients, enhancing the administration of justice, and promoting a shared commitment to the common good. The Middle Range approach provides the legal community with the opportunity to turn from lamenting the decline of professionalism to the more important work of improving the delivery of legal services and promoting justice.

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²⁶⁹ See supra note 263 and accompanying text.

²⁷⁰ See, e.g., Rhode, supra note 251, at 688-89 (pointing out drawbacks of external regulation, such as erosion of lawyers' sense of personal responsibility and danger of regulation becoming captive to group it is regulating); Stimson, supra note 65, at xxii (advocating independence of bar as protection for liberty).

²⁷¹ Burnele V. Powell, *Open Doors, Open Arms, and Substantially Open Records: Consumerism Takes Hold in the Legal Profession*, 28 Val. U. L. Rev. 709, 713 (1994) (citing ABA Comm. on Evaluation of Disciplinary Enforcement, Report to the House of Delegates (May 1991) (McKay Report) as support for proposition that legal profession is not "self-regulated," but rather regulated by judiciary).

²⁷² See, e.g., Geoffrey C. Hazard, Jr. et al., *The Law and Ethics of Lawyering* 57-154 (2d ed. 1994) (collecting cases and commentary on relationship between criminal law, tort law, securities and regulatory law, and procedural law and the regulation of lawyers).

