
THE BEHAVIORAL ECONOMICS OF LAWYER ADVERTISING: AN EMPIRICAL ASSESSMENT

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*When Justice Blackmun authored the famed opinion striking down the universal ban on lawyer advertising in *Bates v. Arizona State Bar*, he envisioned opening the market to information and competition in ways that would address a long-enduring access to justice problem for low- and moderate-income individuals. Nearly a half-century later, the same access to justice gap endures. Yet lawyer advertisements proliferate, ranging from late-night television commercials with flames and aliens to website profiles with performance reviews and live-chat features.*

*In this first-of-its-kind empirical project, we examine this persisting market failure. Using the lens of behavioral economics, we explain why opening the market to advertising failed to resolve the access to justice gap. We studied the dominant form of modern lawyer advertising—online websites and profiles—in three legal markets: Austin, Texas; Buffalo, New York; and Jacksonville, Florida. Our research included review of the websites for all driving-while-intoxicated and automobile-crash lawyers in those cities, coding for over 60,000 pieces of unique data. This Article describes our findings and recommends regulatory interventions designed to fulfill the Supreme Court’s ambitions in *Bates*. In particular, we suggest ways to expand access to information about legal representation for those in need.*

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I. INTRODUCTION

Lawyer advertising—what’s the first thought that comes to mind? Likely it is the late-night television commercial for a failed medical device or a mass tort. Images of sledgehammers, swiveling gavels, flames, or even aliens appear with a voiceover asking: “Have you or someone you know been injured? If so, call now!”¹ Selling lawyers is a big business, projected to soon reach almost a billion dollars.²

The main source individuals use to actually find an attorney when in need, however, is not that late-night television commercial but is increasingly websites. According to recent studies, an Internet search is a primary route to finding legal representation, even over asking family or friends for a recommendation.³ For

1. Sean Cole, *Call NOW!*, LIFE OF THE LAW (June 25, 2013), <http://www.lifeofthelaw.org/2013/06/call-now/>.

2. KEN GOLDSTEIN & DHAVAN V. SHAH, U.S. CHAMBER INST. FOR LEGAL REFORM, TRIAL LAWYER MARKETING BROADCAST, SEARCH AND SOCIAL STRATEGIES 10 (Oct. 2015), http://www.instituteforlegalreform.com/uploads/sites/1/KEETrialLawyerMarketing_2_Web.pdf.

3. See, e.g., Cassandra Burke Robertson, *Online Reputation Management in Attorney Regulation*, 29 GEO. J. LEGAL ETHICS 97, 106–07 (2016) (“By 2014, however, those numbers had changed dramatically, with a significant shift from personal connections to online resources: a full 38% would search on the Internet first, with only 29% turning to personal recommendations from friends and family.”); Mike Blumenthal, *How People Find*

most consumers of legal services, a website profile often will be the first encounter with the attorney they hire (or decline to hire).⁴

Online websites with live-chat features and blogs surely are not what the United States Supreme Court had in mind when it struck down the nation-wide ban on lawyer advertising in *Bates v. Arizona State Bar*.⁵ Instead, the Court envisioned straightforward, easy to understand print ads like that published by newly licensed attorneys John Bates and Van O'Steen in 1976.⁶ Their legal clinic advertisement listed routine services such as an uncontested divorce or a name change and the corresponding flat fee.⁷ The opening text read: "Do you need a lawyer? Legal services at very reasonable fees."⁸ The only graphic in the black-and-white ad was a scale, and it directed potential clients to the address of the Legal Clinic of Bates and O'Steen.⁹ The ad's clarity and simplicity is refreshing, easily understandable to all.

The Court justified its holding in *Bates*, at least in part, on a hypothesis that advertising would expand access to legal services for some 70% of the American public that could not afford an attorney or lacked information about legal rights and entitlements.¹⁰ In analyzing the market impact, the Court noted that advertising bans make it difficult, if not impossible, for consumers to find "the lowest cost seller of acceptable ability."¹¹ Protecting attorneys from competition, wrote Justice Blackmun in the 5-4 majority opinion, decreases the "incentive to price competitively," but "where consumers have the benefit of price advertising, retail prices often are dramatically lower than they would be without advertising."¹²

In an important *NYU Law Review* article published soon after the *Bates* decision, scholars similarly speculated about the potentially positive impact of advertising on supply and demand in the legal services market.¹³ Yet nearly a half-century later, the *Bates* Court's promise has gone unrealized.¹⁴ Studies show

Lawyers in 2015, MOSES & ROTH ATTORNEYS AT LAW, <https://www.mosesandrooth.com/how-people-find-lawyers-in-2015/> (last visited Mar. 21, 2019) (According to a 2015 survey of 1,500 people, 13.6% turn to friends and 9.4% turn to the Internet, though participants ages eighteen to twenty-four and participants earning more than \$150,000 a year were more likely to select an attorney through an Internet search); Gyi Tsakalakis, *How Do People Find and Hire Attorneys?*, LAWYERNOMICS (Apr. 30, 2013), <http://lawyernomics.avvo.com/legal-marketing/how-do-people-find-hire-attorneys.html> (citing a 2013 survey of 1,183, 34.6% ask a friend and 32.4% use an Internet search).

4. Tsakalakis, *supra* note 3.

5. 433 U.S. 350 (1977).

6. *Id.* at 385.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* at 376.

11. *Id.*

12. *Id.*

13. 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, 1087 (1983) ("[Applying] basic market and economic theory to the production and consumption of legal services and demonstrat[ing] that lawyer advertising offers important advantages to consumers of legal services.").

14. See, e.g., Deborah L. Rhode, *Access to Justice: Connecting Principles to Practice*, 17 GEO. J. LEGAL ETHICS 369, 421 (2004) ("Almost two decades ago, in a prominent report on professionalism, the American Bar Association concluded that the middle class's lack of access to affordable legal services was 'one of the most

that at any given time, as many as 85% of American households face two to three legal problems without assistance from a lawyer.¹⁵ Lack of information is the primary reason, followed by cost, according to a 2015 study by the American Bar Foundation—the very concerns the Supreme Court aimed to address.¹⁶

More, not less, of the American public now goes without legal help even after decades of advertising.¹⁷ This incongruity between *Bates*'s aspirations and modern realities raises the question: was the Supreme Court's market analysis about the impact of lawyer advertising flawed?

Some suggest yes and argue for a return to the advertising ban. For example, with the aftermath of advertising like those notorious late-night commercials that thrive post-*Bates*, Justice O'Connor declared that the Court should have gone the other way and upheld the ban.¹⁸ Her concern, however, is grounded in notions of professionalism rather than an economic market analysis.¹⁹

intractable problems confronting the profession today.' That problem remains . . .") (citation omitted); John T. Broderick, Jr. & Ronald M. George, *A Nation of Do-It-Yourself Lawyers*, N.Y. TIMES, Jan. 2, 2010, at A21 ("An increasing number of civil cases go forward without lawyers. Litigants who cannot afford a lawyer, and either do not qualify for legal aid or are unable to have a lawyer assigned to them because of dwindling budgets, are on their own—pro se. What's more, they're often on their own in cases involving life-altering situations like divorce, child custody and loss of shelter.")

15. See, e.g., D. MICHAEL DALE, *THE STATE OF ACCESS TO JUSTICE IN OREGON* iv (2000) (documenting that the legal services delivery system is only meeting the needs of low income people in 17.8% of cases requiring a lawyer's assistance); MELVILLE D. MILLER JR. & ANJALI SRIVASTAVA, *POVERTY RESEARCH INST. OF LEGAL SERVS. OF N.J., LEGAL PROBLEMS, LEGAL NEEDS: THE LEGAL ASSISTANCE GAP FACING LOWER INCOME PEOPLE IN NEW JERSEY* 13 (2002) (documenting that 65% of lower income adults who experienced a legal problem attempted to resolve the issues without the assistance of counsel); REBECCA L. SANDEFUR, *AM. BAR FOUND., ACCESSING JUSTICE IN THE CONTEMPORARY USA: FINDINGS FROM THE COMMUNITY NEEDS AND SERVICES* (2014), <http://ssrn.com/abstract=2478040>; THE TASK FORCE TO EXPAND ACCESS TO CIVIL LEGAL SERVS. IN N.Y., *REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK* 1 (2010), <http://ww2.nycourts.gov/sites/default/files/document/files/2018-04/CLS-TaskForceREPORT.pdf> ("99 percent of tenants are unrepresented in eviction cases in New York City, and 98 percent are unrepresented outside of the City. 98 percent of borrowers are unrepresented in hundreds of thousands of consumer credit cases filed each year in New York City. 97 percent of parents are unrepresented in child support matters in New York City, and 95 percent are unrepresented in the rest of the State; and 44 percent of home owners are unrepresented in foreclosure cases throughout [the] State."); WASH. STATE SUPREME COURT TASK FORCE ON CIVIL EQUAL JUSTICE FUNDING, *THE WASHINGTON STATE CIVIL LEGAL NEEDS STUDY* 8 (2003) (documenting that more than 85% of people in Washington State face legal problems without an attorney's help).

16. See, e.g., SANDEFUR, *supra* note 15, at 3; see also Robert Echols, *State Legal Needs Studies Point to "Justice Gap,"* A.B.A. DIALOGUE 32, 35 (2005), <https://legallaidresearch.org/wp-content/uploads/nlada-state-legal-needs-justice-gap-2005.pdf> ("These findings indicate that for most of those with legal needs who did not seek help, the reason was *not* that they regarded the problem as unimportant. Rather, many did not understand that their problem had a potential legal solution . . .") (emphasis added); D. MICHAEL DALE, *COMM. ON CIVIL JUSTICE, CIVIL LEGAL NEEDS OF LOW AND MODERATE INCOME HOUSEHOLDS IN GEORGIA* 2 (2009), https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ATJReports/ls_GA_clns_2008.pdf ("[A] lack of understanding as to how the court process works represents an obstacle to the courts' ability to administer justice for all. . . . [M]any low and moderate income Georgians are not sufficiently aware of available resources to help resolve one's legal needs.")

17. Echols, *supra* note 16, at 32.

18. See discussion *infra* notes 60–63 and accompanying text.

19. *Shapero v. Ky. Bar Ass'n*, 486 U.S. 466, 481 (1988).

Others contend that the complexity of restrictions currently placed on lawyer advertising by state regulatory authorities effectively compromises the market for legal services in the same way as a wholesale ban.²⁰ In other words, it may be that we have yet to see the full impact of advertising because lawyers are so restricted in the content and timing of the information they share. If lawyers were subject to fewer restrictions, advertising would be less costly and the public would have greater knowledge about legal options.

We offer a different explanation here, deploying a novel research method that uses advertisements to diagnose behavioral market failure in the legal services market. By performing an empirical content analysis of attorney advertisements, we detect ways in which consumers make irrational or suboptimal decisions in the current market for legal services because of their behavioral biases. Our study is the only comprehensive empirical examination of website advertisements for attorneys specializing in DWI/DUI (driving while intoxicated/driving under intoxication) and personal injury work. We use this analysis as a basis for recommending advertising reforms that will create advertisements that better achieve the objectives articulated in *Bates*.

Time after time, regulatory bodies have implemented advertising regulations for lawyers without any empirical studies. Our research here provides empirical justification for regulatory intervention. Our argument is not that *Bates* should be reversed, even though we challenge the Court's reliance on traditional economics in making the decision to overturn the advertising ban. Instead, we propose mechanisms to more fully realize the benefits of advertising in the legal services market espoused by *Bates*. Our recommendations include a proposal that policy-makers require certain disclosures or disclaimers to address consumer irrationality and biases. We also call on bar associations and legal education institutions to use advertising to engage in public education campaigns in order to counter consumers' biases and remedy market failure.

This Article proceeds as follows. Part II provides a brief history of lawyer advertising and identifies current debates about the efficacy and ethics of advertising regulation relevant to the findings of our study. Part III situates our work in the larger context of empirical work on attorney advertising. Here we also explain the research design and methodology of our study. Part IV unveils our findings and uses them to critique the Court's analysis in *Bates*. Part V offers recommendations for regulatory interventions and related efforts to enhance consumer understanding about legal services.

20. See, e.g., Gillian K. Hadfield, *Legal Barriers to Innovation: The Growing Economic Cost of Professional Control over Corporate Legal Markets*, 60 STAN. L. REV. 1689, 1692 (1980); Renee Newman Knake, *Legal Information, the Consumer Law Market, and the First Amendment*, 82 FORDHAM L. REV. 2843, 2844 (2014).

II. HISTORY OF LAWYER ADVERTISING AND MODERN DEBATES

Advertising creates and influences markets.²¹ The market for legal services, for many years, went without advertising precisely because of this influence.²² Regulators of the legal profession feared advertising might manipulate the public to pursue unnecessary litigation or otherwise cause harm. Part II provides a brief history of American lawyer advertising and identifies current debates about the efficacy and ethics of advertising regulation relevant to the findings of our study.

A. *A Brief History of Lawyer Advertising*

Lawyer advertising was not prohibited in the early years of the United States.²³ Abraham Lincoln, for example, famously posted information about his services in Illinois newspapers during the 1830s.²⁴ When the American Bar Association adopted its Canons of Professional Responsibility in 1908, however, among the restrictions was a complete bar on lawyer advertising and solicitation.²⁵ The most a lawyer could do was to communicate via family, friends, or existing clients about their services, and list a phone number in a directory.²⁶ Anything more was considered unprofessional and unethical. When the ABA revised the canons and adopted the Code of Professional Responsibility in 1969, the ban was reaffirmed.²⁷

The nationwide ban endured nearly seventy years until the Supreme Court struck down the State Bar of Arizona's prohibition on lawyer advertising because it violated the First Amendment.²⁸ Chief among the Court's justifications for doing so was a concern about "the right of the public as consumers and citizens to know about the activities of the legal profession."²⁹ The Court believed that advertising could address market inefficiencies caused by the lack of information about legal services.³⁰ The particular advertisement at issue in the case is instructive.

Two newly licensed attorneys, John Bates and Van O'Steen, established a legal aid clinic targeting what is now known as the "consumer law market,"*i.e.*, those who do not qualify for legal aid but cannot afford a lawyer at six-figures-

21. See, e.g., Kyle Bagwell, *The Economic Analysis of Advertising*, in 3 HANDBOOK OF INDUSTRIAL ORGANIZATION 1724 (Mark Armstrong & Rob Porter eds., 2007); Richard Craswell, *Interpreting Deceptive Advertising*, 65 B.U. L. REV. 657, 662–63 (1985); Raj Sethuraman et al., *How Well Does Advertising Work? Generalizations from Meta-Analysis of Brand Advertising Elasticities*, 48 J. MARKETING RES. 457, 457 (2011).

22. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 377 (1977).

23. Hazard et al., *supra* note 13, at 1085 n.2.

24. See LORI B. ANDREWS, *BIRTH OF A SALESMAN: LAWYER ADVERTISING AND SOLICITATION I* (A.B.A. 1980).

25. See generally James M. Altman, *Considering the ABA's 1908 Canons of Ethics*, J. PROF. LAW. SYMP. 235, 235 (2008). By 1924, nearly all states had adopted the Canons of Ethics or a similar version. See *id.* at 236.

26. *Id.* at 321.

27. *Id.* at 235 n.2.

28. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 384 (1977).

29. *Id.* at 358.

30. *Id.* at 376.

per-hour for multiple hours.³¹ In short, they aimed to fill a justice gap, a phenomenon that still persists today.³² In an effort to reach their target market, they placed a simple newspaper advertisement listing the cost of basic legal services, including uncontested divorce, adoption, personal bankruptcy, and name change.³³ The Arizona State Bar disciplined them, contending that all advertising compromised professionalism and might cause clients to have unjustified expectations or to sue when they otherwise would not do so, stirring up unnecessary litigation.³⁴

The Supreme Court sided with Bates and O'Steen.³⁵ The Court criticized the advertising ban as the State Bar of Arizona's "failure to reach out and serve the community."³⁶ Justice Blackmun, authoring the majority, opinion wrote:

Although advertising might increase the use of the judicial machinery, we cannot accept the notion that it is always better for a person to suffer a wrong silently than to redress it by legal action. As the bar acknowledges, the middle 70% of our population is not being reached or served adequately by the legal profession. *Among the reasons for this underutilization is fear of the cost, and an inability to locate a suitable lawyer. Advertising can help to solve this acknowledged problem: Advertising is the traditional mechanism in a free-market economy for a supplier to inform a potential purchaser of the availability and terms of exchange.* The disciplinary rule at issue likely has served to burden access to legal services, particularly for the not-quite-poor and the unknowledgeable. A rule allowing restrained advertising would be in accord with the bar's obligation to facilitate the process of intelligent selection of lawyers, and to assist in making legal services fully available.³⁷

The Court acknowledged that "[a]dvertising does not provide a complete foundation on which to select an attorney" but went on to observe that "it seems peculiar to deny the consumer . . . at least some of the relevant information needed to reach an informed decision."³⁸

In the years that followed *Bates*, the Supreme Court continued to take up a variety of cases involving questions about state regulations of lawyer advertising. The Court struck down a rule constraining the American Civil Liberties Union from in-person solicitation³⁹ but upheld a rule banning ambulance chasers.⁴⁰ A

31. See generally Knake, *supra* note 20.

32. *Id.*

33. See *Bates*, 433 U.S. at 385 (showing a reproduction of the Bates and O'Steen advertisement).

34. *Id.* at 368, 372.

35. *Id.* at 384.

36. *Id.* at 370.

37. *Id.* at 376-77 (internal punctuation and citation omitted) (emphasis added).

38. *Id.* at 374.

39. See *In re Primus*, 436 U.S. 412, 439 (1978) (holding that the use of a state disciplinary rule to bar the solicitation of a client by a political association attempting to effectuate political change is an unconstitutional infringement of that organization's First and Fourteenth Amendment rights).

40. See *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 468 (1978) (upholding ban on in-person solicitation of personal injury victims).

categorical ban on direct mailings to potential clients was struck,⁴¹ but a thirty-day waiting period for sending such mailings upheld.⁴² The Court held that mandatory disclosures did not violate the First Amendment,⁴³ but that some restrictions on the content of advertising might.⁴⁴ Lower courts and disciplinary authorities continually grapple with questions about lawyer advertising, often reaching inconsistent results.⁴⁵

A state-by-state patchwork of advertising restrictions currently exists throughout the country. Although no jurisdiction bans lawyer advertising completely, many place significant restrictions on the content and the timing. At one end of the spectrum, some jurisdictions merely prohibit false or misleading advertising.⁴⁶ At the other end, some jurisdictions impose heavy burdens, such as mandatory disclaimers, waiting periods, and pre-approval of advertising content by the regulatory authority.⁴⁷ The American Bar Association, for its part, adopted Model Rules of Professional Conduct in 1983 to govern advertising and solicitation.⁴⁸ While the Model Rules are simply that—models—most jurisdictions are

41. See *Shapero v. Ky. Bar Ass'n*, 486 U.S. 466, 479 (1988) (holding that categorical ban on direct-mail solicitation targeting potential clients with specific legal claims violates First Amendment).

42. See *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 635 (1995) (holding that a thirty-day prohibition on direct mail solicitation by lawyers of personal injury or wrongful death clients withstood First Amendment scrutiny under *Central Hudson*).

43. See *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 250–52 (2010) (applying *Zauderer* to uphold mandated disclosure in advertising by lawyers for bankruptcy-related services); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 627 (1985) (holding that disciplinary rules could mandate disclosure regarding payment of costs in advertisement, but that First Amendment protected attorneys so long as the advertisement is truthful and nondeceptive).

44. See *Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation*, 512 U.S. 136, 138–39 (1994) (striking down Florida regulation prohibiting listing of degrees on business card); *Peel v. Attorney Registration & Disciplinary Comm'n of Ill.*, 496 U.S. 91, 100 (1990) (striking down Illinois regulation prohibiting listing as certified specialist); *In re R.M.J.*, 455 U.S. 191, 197, 203–04 (1982) (striking down Missouri restrictions on allegedly deceptive advertising terms, for example the use of the term “personal injury” instead of the authorized term “tort”).

45. As just one example of this divergence, compare CONN. STATEWIDE GRIEVANCE COMM., ADVISORY OPINION #07-00188- A PRINT MEDIA ADVERTISEMENT SUPER LAWYER 9 (2007) (requiring a disclaimer with the use of “Connecticut Super Lawyer”), with DEL. STATE BAR ASS'N COMM. ON PROF'L ETHICS, OPINION 2008-2 1 (2008) (permitting lawyers to reference the designation as a “Super Lawyer” or “Best Lawyer” if the “lawyer states the year and particular specialty or area of practice of the designation”); STATE BAR OF MICH., RI-341 (2007) (allowing reference to designation as a “Super Lawyer” but the lawyer cannot state he or she is the best lawyer); N.C. STATE BAR, 2007 FORMAL ETHICS OPINION 14: ADVERTISING INCLUSION IN LIST IN NORTH CAROLINA SUPER LAWYER AND OTHER SIMILAR PUBLICATIONS (2008) (permitting lawyers to state “Super Lawyer” so long as the advertisement is not misleading or deceptive and no compensation paid).

46. This test is based on *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of N.Y.*, 447 U.S. 557, 564 (1980). See also *Mason v. Fla. Bar*, 208 F.3d 952, 954, 956 (11th Cir. 2000) (holding that a lawyer’s truthful claim that he is “AV Rated, the Highest Rating in the Martindale-Hubbell National Law Directory” is not a misleading or potentially misleading statement and rejecting the Florida Bar’s argument that it had “an interest in encouraging attorney rating services to use objective criteria”).

47. See, e.g., *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 620 (1995) (holding that a thirty-day prohibition on direct mail solicitation by lawyers of personal injury or wrongful death clients withstood First Amendment scrutiny). A number of states mandate pre-approval of advertising content, including the jurisdictions studied in this Article.

48. *Model Rules of Professional Conduct: About the Model Rules*, AM. BAR ASS'N, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.

heavily influenced by them. Model Rule 7.2 expressly authorizes lawyer advertising “subject to the requirements of Rules 7.1 and 7.3 . . . through public media, such as a telephone directory, legal directory, newspaper or other periodical, outdoor advertising, radio or television, or through written or recorded communication.”⁴⁹ Rule 7.1 provides that “[a] lawyer shall not make a false or misleading communication about the lawyer or the lawyer’s services.”⁵⁰ Rule 7.3 lays out the parameters for in-person or written solicitation of prospective clients.⁵¹ States subsequently adopted regulatory provisions based upon the ABA Model Rules, though they vary wildly in their specific requirements.⁵²

Even with these burdensome restrictions, advertising plays a significant role in the legal services markets. Lawyers spend millions of dollars annually on legal advertising, close to \$800 million in 2016.⁵³ While much of this goes to television commercials, increasingly, lawyers invest in Internet advertising such as individual websites, pop-up ads, and search engine optimization.⁵⁴ Indeed, legal terms dominate Google’s keyword search terms purchases, with “nine out of the top 10 and 23 of the top 25” terms being legal terms in 2015.⁵⁵ The most expensive phrase is “San Antonio car wreck attorney,” which cost \$670.⁵⁶

B. *Modern Debates on the Efficacy and Ethics of Lawyer Advertising*

Many scholars and commentators suggest advertising restrictions (beyond a requirement that the ad be truthful and not misleading) undermine the market for legal services without any benefit to the public.⁵⁷ Calls for reform over the years have fallen on deaf ears, and in some instances led to more restrictive rules.⁵⁸

Some advocate for a return to the advertising ban.⁵⁹ For example, not once but twice Justice O’Connor wrote in dissent to make this point.⁶⁰ She critiqued

49. MODEL RULES OF PROF’L CONDUCT r. 7.1, r. 7.2, r. 7.3 (AM. BAR ASS’N 1983).

50. MODEL RULES OF PROF’L CONDUCT r. 7.1 (AM. BAR ASS’N 2018).

51. MODEL RULES OF PROF’L CONDUCT r. 7.3 (AM. BAR ASS’N 2018).

52. See, e.g., *Differences Between State Advertising and Solicitation Rules and the ABA Model Rules of Professional Conduct*, AM. BAR ASS’N (June 2, 2016), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/state_advertising_and_solicitation_rules_differences_update.authcheckdam.pdf.

53. See Victor Li, *Ad It Up*, A.B.A. J. 35, 36 (Apr. 2017) (citing Kantar Media’s Campaign Media Analysis Group figures from October 31, 2016).

54. As just one example, the national personal injury firm Sokolove Law “spends about \$30 to \$40 million per year on advertising[,] . . . 45 percent on TV, 45 percent on internet, and 10 percent on other outlets such as social media or print.” *Id.* at 38.

55. *Id.* at 36.

56. *Id.*

57. See Gillian Hadfield, *The Price of Law: How the Market for Lawyers Distorts the Justice System*, 98 MICH. L. REV. 953, 964 (2000); Knake, *supra* note 20, at 2844.

58. See Hadfield, *supra* note 20, at 1006 (explaining the need to do more to pursue reform).

59. Mark L. Tuft, *Rethinking Lawyer Advertising Rules*, 23 PROF. LAW. 2 (2016), https://www.americanbar.org/content/dam/aba/publications/professional_lawyer/volume_23_number_3/ABA_PLN_v023n03_01_rethinking_lawyer_advertising_rules.authcheckdam.pdf.

60. *Edenfield v. Fane*, 507 U.S. 761, 778 (1993) (O’Connor, J., dissenting); *Shapiro v. Ky. Bar Ass’n*, 486 U.S. 466, 485 (1988) (O’Connor, J., dissenting).

Bates a decade after it was decided as “an early experiment with the doctrine of commercial speech, and it has proved to be problematic in its application.”⁶¹ She would leave the states to determine whether to permit advertising and, if so, how to do so, reasoning that “it is quite clear to me that the States may ban such advertising completely.”⁶² Several years later, she again observed that “this Court took a wrong turn with *Bates v. State Bar of Arizona* . . . and [] it has compounded this error by finding increasingly unprofessional forms of attorney advertising to be protected speech.”⁶³

The Association of Professional Responsibility Lawyers (“APRL”) spearheaded the most recent nationwide effort to revise lawyer advertising restrictions in 2015.⁶⁴ APRL contends that “rules of professional conduct governing lawyer advertising . . . are outdated and unworkable in the current legal environment and fail to achieve their stated objectives.”⁶⁵ Their report observes that “[t]he trend toward greater regulation in response to diverse forms of electronic media advertising too often results in overly restrictive and inconsistent rules that are under-enforced and, in some cases, are constitutionally unsustainable.”⁶⁶

It is notable that lawyer advertising restrictions—typically justified as protecting potential clients as well as the reputation of the legal profession—rarely (if ever) are the subject of bar discipline complaints from clients or the public.⁶⁷ Rather, lawyers complain about the advertising engaged in by other lawyers,⁶⁸ or lawyers challenge the impact of the restrictions on their own ability to communicate about their services.⁶⁹

It is equally notable that lawyer advertising restrictions are adopted with minimal or no serious empirical study about the actual impact on the market for legal services. For example, in one rare instance of reliance upon a study, the Supreme Court upheld a waiting period for attorney mailings based upon a purported “empirical study” surveying Florida residents by telephone that subsequently was critiqued as invalid and misinterpreted.⁷⁰ Even the most recent calls for reform are not grounded in studies of the impact advertising has on the legal services market. Our empirical work here aims to fill this void.

61. *Shapero*, 486 U.S. at 487 (O’Connor, J., dissenting).

62. *Id.* at 485.

63. *Edenfield*, 507 U.S. at 778 (O’Connor, J., dissenting).

64. See generally ASS’N OF PROF’L RESPONSIBILITY LAWYERS, LAWYER ADVERTISING REPORT (2015), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aprl_june_22_2015%20report.authcheckdam.pdf.

65. *Id.* at 4.

66. *Id.* at 3.

67. See *id.* at 27 (“There is a general lack of consumer complaints and virtually no empirical data demonstrating actual consumer harm caused by lawyer advertising.”). The lack of consumer complaint could, however, not be due to lack of harm but lack of sufficient information to assess harm, as discussed more fully below in Part V.

68. See *id.* at 28 (finding in a 2014 study of thirty-six lawyer regulation offices in the United States that “complaints about lawyer advertising are rare” and “people who complain about lawyer advertising are predominantly other lawyers and not consumers”).

69. See, e.g., *Alexander v. Cahill*, 589 F.3d 79, 94 (2d Cir. 2010).

70. *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 628 (1995).

III. LITERATURE REVIEW AND STUDY METHODOLOGY

A. Literature Review

We are the first, to our knowledge, to attempt to create a study of this breadth and depth regarding lawyer advertising via the Internet.⁷¹ Some scholars have examined the impact of advertising generally on the market for legal services. For example, studies have documented “that advertising increases competition among sellers in a market” to the benefit of consumers through lower prices⁷² and that the audience of “clients most likely to be attracted [by advertising] are relatively poor and uneducated.”⁷³ Other studies primarily focus on the image of lawyers and the legal profession. Many of these were conducted, not surprisingly, in the twenty years following the Supreme Court’s decision in *Bates*.⁷⁴ More recently, a longitudinal study found that public perception of lawyer advertising has deteriorated significantly.⁷⁵ For example, respondents in 2003 believed advertising costs were passed onto clients (where the 1988 respondents did not), and they did not believe “that advertising helps consumers make more intelligent choices between lawyers” whereas the earlier study indicated greater optimism for the usefulness of lawyer advertising.⁷⁶ The same researchers revisited their conclusions in a 2014 study, finding that while “the present image of lawyers is not positive, most respondents agreed it is proper for lawyers to advertise” and that “the quality of service and reputation of lawyers were more important to the consumer than price.”⁷⁷

71. To the extent studies have been conducted about electronic or online lawyer marketing, the focus is on whether the marketing activities violate professional conduct rules. See, e.g., Eric Goldman & Angel Reyes III, *Regulation of Lawyers’ Use of Competitive Keyword Advertising*, 2016 U. ILL. L. REV. 103, 112; Tanya M. Marcum & Elizabeth A. Campbell, *Legal Marketing Through the Decades: Pitfalls of Current Marketing Trends*, 6 ST. MARY J. ON LEGAL MALPRACTICE 244 (2016).

72. John R. Schroeter et al., *Advertising and Competition in Routine Legal Service Markets: An Empirical Investigation*, 36 J. INDUS. ECON. 49, 49 (1987) (conducting a study of lawyers advertising in Yellow Pages, newspaper, TV, or radio for routine legal services such as wills, uncontested divorce, and uncontested bankruptcy).

73. Michael G. Parkinson & Sabrina Neeley, *Attorney Advertising: Does It Meet Its Objective?*, 26 SERVS. MARKETING Q. 17, 26 (2003).

74. See, e.g., AM. BAR ASS’N COMM’N ON ADVERT., THE IMPACT OF ADVERTISING ON THE IMAGE OF LAWYERS: A MALL INTERCEPT STUDY i (1995); Cathy J. Cobb-Walgren & Kenneth L. Bernhardt, *Consumer Reactions to Legal Services Advertising in the State of Georgia* 191 (Oct. 1995) (prepared for the State Bar of Georgia); Frank N. Magid Associates, *Attitudes & Opinions of Florida Adults Toward Direct Mail Advertising by Attorneys* (Dec. 1987) (prepared for the Florida Bar); see also Richard J. Cebula, *Does Lawyer Advertising Adversely Influence the Image of Lawyers in the US? An Alternative Perspective and New Empirical Evidence*, 27 J. LEGAL STUD. 503, 503 (1998); Richard J. Cebula, *Historical and Economic Perspectives on Lawyer Advertising and Lawyer Image*, 15 GA. ST. U. L. REV. 315, 320 (1998); Roy M. Sobelson, *The Ethics of Advertising by Georgia Lawyers: Survey and Analysis*, 6 GA. ST. U. L. REV. 23, 24 (1989).

75. H. Ronald Moser, *An Empirical Analysis of Consumers’ Attitudes Toward Legal Services Advertising: A Longitudinal View*, SERVS. MARKETING Q. 40, 45 (2005); see also Robert E. Hite & Edward Kiser, *Consumer’s Attitudes Toward Lawyers with Regard to Advertising Professional Services*, 26 J. ACAD. MARKETING SCI. 321, 328 (1985).

76. Moser, *supra* note 75, at 52.

77. H. Ronald Moser et al., *An Empirical Analysis of the Public’s Attitude Toward Legal Services Advertising*, 35 SERVS. MARKETING Q. 105, 121 (2014).

Another significant study published in the *Stanford Law Review* relies upon behavioral economics in connection with an analysis of lawyer advertising, though our use here is different.⁷⁸ That piece uses behavioral economics and cognitive psychology to help explain why personal injury advertisements do not drive down contingency fees.⁷⁹ That study explained a known market failure through behavioral economics; by contrast, we endeavor to uncover previously undetected market failures.

Our study makes an important contribution to the empirical literature on lawyer advertising for three reasons. First, while limited empirical work on lawyer advertising exists, most of it focuses on print ads such as Yellow Pages directories and newspapers or media such as television and radio.⁸⁰ We offer new insights by performing a comprehensive content analysis of lawyer advertising on websites.

Second, our study is exceptional in the use of behavioral economics to diagnose market failures in legal services markets. Behavioral economics challenges the traditional, rational-choice economic model that assumes people act rationally to maximize their utility when making decisions. It argues that people deviate from the rational-actor model of human decision-making in systematic and predictable ways.⁸¹ As just one example, people are predictably over-confident. When asked to rate themselves relative to other drivers, 93% of people consider themselves above-average drivers.⁸² When people make bad decisions because sellers of products and services are exploiting buyers' cognitive limitations, economists conclude that the market is experiencing behavioral market failure.⁸³

Third, we are the first to examine and explain why the prediction of the *Bates* Court has not yet borne out. Our study aims to detect market failure by analyzing the content of lawyer advertising. The content of advertising, we argue, provides evidence of how efficiently a market is functioning.⁸⁴ Advertise-

78. Nora Freeman Engstrom, *Attorney Advertising and the Contingency Fee Cost Paradox*, 65 STAN. L. REV. 633, 640 (2013).

79. *Id.* at 686.

80. Notable examples include Elizabeth Tippet, *Medical Advice from Lawyers: A Content Analysis of Advertising for Drug Injury Lawsuits*, 41 AM. J.L. & MED. 7 (2015); Fred C. Zacharias, *What Lawyers Do When Nobody's Watching: Legal Advertising as a Case Study of the Impact of Underenforced Professional Rules*, 87 IOWA L. REV. 971 (2002).

81. See generally DANIEL KAHNEMAN, THINKING, FAST AND SLOW (2011); RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS (2008).

82. Ola Svenson, *Are We All Less Risky and More Skillful Than Our Fellow Drivers?*, 47 ACTA PSYCHOLOGICA 143, 146 (1981).

83. OREN BAR-GILL, SEDUCTION BY CONTRACT: LAW, ECONOMICS, AND PSYCHOLOGY IN CONSUMER MARKETS 2 (2012); Xavier Gabaix & David Laibson, *Shrouded Attributes, Consumer Myopia, and Information Suppression in Competitive Markets*, 121 Q.J. ECON. 505, 505 (2006); Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630, 635-37 (1999); Ron Harris & Einat Albin, *Bankruptcy Policy in Light of Manipulation in Credit Advertising*, 7 THEORETICAL INQUIRIES L. 431, 442 (2006).

84. See generally Jim Hawkins, *Exploiting Advertising*, 80 L. & CONTEMP. PROBS. 43 (2017) (proposing and arguing for this approach and applying it to reverse-mortgage advertising).

ments show what companies think is motivating consumers' purchasing decisions.⁸⁵ In general, advertisers are excellent at assessing what attributes of a transaction potential buyers value, and they actively work to exploit poor decision-making if buyers are susceptible to it.⁸⁶ If advertising presents information that a rational buyer would value, then the advertising offers evidence that the market is operating as traditional economic principles suggest it should.⁸⁷ But if the advertising only exploits the poor decision-making that behavioral economics identifies, then the advertising suggests the market is failing to operate efficiently.⁸⁸

B. Study Methodology

We studied website advertising by lawyers who defend people charged with the crime of driving while intoxicated ("DWI") and lawyers who sue defendants for causing injuries in car accidents. We included attorneys in Austin, Texas; Buffalo, New York; and Jacksonville, Florida. Our study coded sixty variables for 1,064 websites about 532 attorneys.

To obtain as complete of a picture as possible of the market for DWI and personal injury lawyers in specific cities, we tried to locate every lawyer in each city that did that type of work. We obtained our list of attorneys in these cities from Avvo's public website.⁸⁹ Avvo is a company that provides a website with general legal information and detailed information about lawyers, such as biographical information, client reviews, and disciplinary actions.⁹⁰ We selected Avvo's listing of lawyers in each city because "Avvo uses publicly-available data to populate the basic information we have for 97% of attorneys in the US."⁹¹ Avvo obtains its data from state lawyer licensing authorities.⁹² All lawyers have a basic profile on the Avvo website, which they may claim by registering and editing information.⁹³ Avvo does not charge the lawyer for the basic profile, but the lawyer may purchase advertising.⁹⁴

85. *Id.* at 45.

86. See Sarah C. Haan, *The "Persuasion Route" of the Law: Advertising and Legal Persuasion*, 100 COLUM. L. REV. 1281, 1282 (2000) ("[A]dvertising researchers study human decision making shortcuts . . . to create advertisements that steer consumers down particular routes to persuasion. By investing millions of dollars in follow-up quantitative research—consumer surveys, focus groups, and retail sales information, much of which is never published—advertisers hone their appeals. . . .").

87. Hawkins, *supra* note 84, at 45.

88. *Id.*

89. In future work, we plan to explore the differences between lawyer webpages and their Avvo profiles.

90. *About Us*, AVVO, https://www.avvo.com/about_avvo (last visited Mar. 21, 2019). Avvo was founded in 2006 by Mark Britton, previously legal counsel to Expedia, Inc. See *Avvo*, WIKIPEDIA, <https://en.wikipedia.org/wiki/Avvo>.

91. *How Does Avvo Get Information About Lawyers?*, AVVO, <https://support.avvo.com/hc/en-us/articles/208463046-How-does-Avvo-get-information-about-lawyers-> (last visited Mar. 21, 2019).

92. *See What Is the Avvo Rating?*, AVVO, <https://support.avvo.com/hc/en-us/articles/208478156-What-is-the-Avvo-Rating-> (last visited Mar. 21, 2019).

93. *Id.*

94. *Id.*

To obtain our sample, we searched the “DUI and DWI” and “Car accident” categories on Avvo⁹⁵ and manually entered every attorney’s name and the website for that attorney’s Avvo profile. We also entered the attorney’s firm’s website address if the Avvo profile had the address, or we searched for the firm’s website using standard search engines. We decided to study both Avvo profiles and firm websites because they represent different ways attorneys market themselves online. In future work, we plan on exploring the effect that the marketing platform has on the content of attorney advertising.

Table 1 shows the number of each type of attorney in the cities we studied as well as the population of those cities.

TABLE 1: NUMBER OF LAWYERS AND POPULATION OF STUDY CITIES

City	Population	DWI Attorneys	Car Accident Attorneys
Austin	949,587 ⁹⁶	97	106
Buffalo	292,648 ⁹⁷	52	101
Jacksonville	913,010 ⁹⁸	76	100

After locating the attorneys and their websites, a team of seven research assistants coded sixty pieces of information from each website from February 2017 to September 2017. To establish the coding categories, we reviewed numerous websites for DWI and personal injury lawyers, and we surveyed the existing literature on attorney advertising. Research assistants coded information from the websites and inputted the coded information into an Excel spreadsheet. In general, for websites, we only included information from the firm’s homepage, the “About” page, and any page named something like “why pick us.” We reviewed the data they inputted to evaluate their coding decisions and to minimize concerns related to inter-rater reliability. Finally, we used Stata⁹⁹ to analyze the results.

We chose to study attorney advertising on the Internet because it is an important source of information for people seeking an attorney. According to a Pew Charitable Trust report, 88% of American adults use the Internet.¹⁰⁰ Even among adults making less than \$30,000 a year, 79% use the Internet.¹⁰¹ According to Google, 1.5 million legal-related queries occur each month.¹⁰² As far back as

95. Our list was generated on February 8, 2017 for Austin, Texas DWI attorneys and May 18, 2017 for car accident attorneys, and on February 21, 2017 for Buffalo, New York for both DWI and car accident attorneys.

96. *Demographics*, AUSTINTEXAS.GOV, <http://www.austintexas.gov/demographics> (last visited Mar. 21, 2019).

97. *Buffalo, New York Population*, CENSUSVIEWER, <http://censusviewer.com/city/NY/Buffalo> (last visited Mar. 21, 2019).

98. *Demographics*, CITY OF JACKSONVILLE, FLORIDA, <http://www.coj.net/departments/office-of-economic-development/about-jacksonville/demographics> (last visited Mar. 21, 2019).

99. *Why STATA*, STATA, <https://www.stata.com/why-use-stata/> (last visited Mar. 21, 2019).

100. *Internet/Broadband Fact Sheet*, PEW RESEARCH CTR.: INTERNET & TECH., <http://www.pewinternet.org/fact-sheet/internet-broadband/> (last visited Mar. 21, 2019).

101. *Id.*

102. Avvo Study 2016 (on file with authors).

1996, the topic “internet marketing” occupied an entire book for lawyers, and now, the Internet’s importance for legal advertising has “mushroomed.”¹⁰³

We selected to study DWI and car accident attorneys because people seeking both types of representation are unlikely to be repeat players who already have established relationships with attorneys, so they likely need advertising to direct them to suitable lawyers.¹⁰⁴ Also, both types of clients include groups that are unlikely to have access to lawyers through existing professional relationships and that have lower incomes.¹⁰⁵ Finally, many people use Avvo and the Internet to search for these types of lawyers. More than 70,000 searches a month on Google are for criminal law alone.¹⁰⁶ “DUI” is one of the top five most expensive key words on Bing.¹⁰⁷ The top area of client contacts for Avvo is criminal defense—15%—with DUI/DWI ranking on its own as number four at 9%.¹⁰⁸ Personal injury lawyers are especially important because they are “the biggest attorney advertisers.”¹⁰⁹

Finally, we chose Austin, Buffalo, and Jacksonville because these cities had a similar number of each type of attorney, had similar populations,¹¹⁰ and were in states with distinct lawyer advertising rules.¹¹¹

Our study has several limitations. First, we only examined lawyers in specific cities, so we cannot claim that these cities are representative of lawyers nationally or even in the states in which the cities are located. Second, we examined only two practice areas—DWI and car accidents—so we cannot claim that these areas are representative of all specializations. Third, we limited our review of websites to only the first page, with the exception of searching the entire website for cost. Thus, some attributes may be advertised but not counted here if a user is required to click through two or more pages to locate the information. Last, we did not measure inter-rater reliability, so it is possible that having multiple people

103. Deborah McMurray, *Introduction to the Fourth Edition* of GREGORY H. SISKIND & DEBORAH MCMURRAY, *THE LAWYER’S GUIDE TO MARKETING ON THE INTERNET*, at xiii (2017).

104. Parkinson & Neeley, *supra* note 73, at 23 (Advertising is most important for “one-shotters,” or people who do not regularly use the services of an attorney.).

105. *Id.* at 26.

106. Avvo Study, *supra* note 102.

107. *Id.*

108. *Id.*

109. Engstrom, *supra* note 78, at 667.

110. Buffalo is obviously substantially smaller than Austin and Jacksonville, but we selected it because it is the largest city in New York after New York City, which would have dwarfed Austin and Jacksonville. Also, despite its smaller size, Buffalo has a similar number of car accident attorneys as the other cities. *See supra* Table 1.

111. The similarities and differences among lawyer advertising rules in New York and Texas reflect the complicated array of rules across the country. *See generally* A.B.A., DIFFERENCES BETWEEN STATE ADVERTISING AND SOLICITATION RULES AND THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/state_advertising_and_solicitation_rules_differences_update.pdf (last visited Mar. 21, 2019). In a subsequent paper, we take up the impact these differences have on the market for legal services and explore how we find these differences impacting the results of our empirical study.

coding could introduce errors. We did not consider, however, inter-rater reliability to be a major concern because the assistants were all trained exactly the same and because the coding criteria were relatively objective.¹¹²

IV. STUDY FINDINGS

This Part discusses the major findings of this study. First, we offer a descriptive account of what attributes lawyers highlight on their Avvo profiles and individual websites. Second, we focus on several specific attributes that lawyers advertise to assess whether a rational consumer would value the information attorneys present. While some things attorneys advertise certainly appeal to rational consumers, we conclude that there is evidence of behavioral market failure. Third, we evaluate whether attorney advertising is increasing access to justice for groups currently underutilizing legal services.

A. *What Do Lawyers Advertise?*

We counted the number of Avvo profiles or websites that advertised different attributes of the firm or lawyer. Table 2 describes our findings. We excluded Avvo profiles that were unclaimed by attorneys (n=75) because these profiles only reflect the information Avvo gathered from public sources and not attorneys' advertising choices. Also, we excluded all entries for websites where the attorney did not have a website at all (n=74). Finally, we excluded websites and Avvo profiles for attorneys who were not in private practice but were in-house counsel or were employees at a nonprofit organization (n=6). After we excluded both, we had 909 observations remaining.

The number of each type of advertising appears low in some cases. Several factors cause these low incidences of advertising. First, some profiles and websites are extremely sparse. Even if attorneys have claimed their Avvo profile, they may not have put any additional details beyond those Avvo generated. Also, because we only looked at a limited number of pages on each website, the websites might advertise other attributes that we miss because of the limits on our study. Because of the lower number of each type of advertising, we suggest that the best way to view the frequency of each type of advertising is in relation to other attributes advertised.

112. See, e.g., Jack Y.J. Huang et al., *Quality of Fertility Clinics Websites*, 83 FERTILITY & STERILITY 538, 543 (2005) (“[T]he interrater reliability was not assessed. Nevertheless, because the websites were evaluated according to a set of objective criteria, we believe that interrater reliability should not have been a significant factor in this study.”).

TABLE 2: ATTRIBUTES ADVERTISED (N=909)

Attribute	Percentage	Number
Years of Experience	66.78	607
Website Has Relevant Legal Information for Free	64.76	294 ¹¹³
Free Consultations	55.67	506
Endorsements from Professional Associations	48.18	438
Good Reputation	44.22	402
Client Reviews/Testimonials	43.83	199 ¹¹⁴
Past Victories	39.16	356
Provides Personalized Service	24.31	221
Avvo Ranking Presented on Website	21.81	99 ¹¹⁵
States Actual Cost of Legal Services	18.59	169
Board Certified	13.75	125
Attorney Involved in Pro Bono/Community	13.75	125
Honesty	5.72	52
Attorney Offers Payment Plan	4.29	39
Attorney Is Religious	3.85	35
Attorney Offers Loans to Clients	0.55	5

Professionalism clearly dominated lawyers' overall advertising themes. The general theme for the vast majority of the websites, 70.04% (n=318), was a professional theme. When attorneys or clients were pictured on the websites or Avvo profiles, 93.38% (n=678) of them were dressed in professional attire as opposed to casual attire.

In addition to coding what information websites presented, we also evaluated some of the ways websites presented information to visitors. We disregarded Avvo profiles¹¹⁶ and observed 454 websites for the vehicles through which they provided information beyond the actual webpage. Table 3 summarizes these findings.

113. We only counted websites for this variable because Avvo does not provide a place on its profile page for legal advice.

114. Because Avvo allows consumers to post reviews without attorney consent, we did not count Avvo reviews.

115. We only counted websites because Avvo profiles automatically contain the Avvo ranking on them.

116. Some Avvo profiles have these vehicles as well. For instance, 19.34% (n=88) had videos.

TABLE 3: SPECIAL VEHICLES OF ADVERTISING ON WEBSITES (N=454)

Vehicles of Advertising	Percentage	Number
Blog	48.24	219
Videos	26.21	119
Live Online Chat	15.42	70

The number of websites with blogs is remarkable, given the fact that twelve years ago bar journal articles were suggesting that most lawyers would “be hard pressed to define the word”¹¹⁷ and law review articles were arguing that blogs would have little effect on the practice of law.¹¹⁸

In addition to blogs, we discovered that many websites had icons or pop-up screens that offered live online chat capabilities. Despite the prevalence of this method of advertising, it is rarely mentioned in academic legal literature. Only one article we could locate mentions live chats by nonattorneys on lawyer websites,¹¹⁹ and one CLE program included a description of an ethics opinion on the topic.¹²⁰ Given the number of websites that have this feature, however, more critical attention is needed.¹²¹

We found different websites used the live-chat feature in different ways. Some websites have icons located on the page that use language such as “live chat,” “need help?,” or “have questions?” Other websites have a screen that pops up with a picture of the attorney on the website and a statement: “Hi, you may

117. Sarah Kellogg, *Do You Blog?*, S.C. LAW., July 2005, at 30, 30. Other bar journal articles from that year define the term for readers. Toby Brown, *Tune in and Blog on: New Marketing Technology for Lawyers*, R.I.B.J., May/June 2005, at 19 (“The term blog comes from the fusion of the terms web and log. Blogs are a type of web site that . . .”). Even years later, law review articles continued to feel the need to explain blogs to readers. See Judy M. Cornett, *The Ethics of Blawging: A Genre Analysis*, 41 LOY. U. CHI. L.J. 221, 223 n.10 (2009) (defining blog).

118. Tom W. Bell, *The Impact of Blogging on the Practice of Law: Hit the Snooze Button*, 11 NEXUS 75, 75 (2006).

119. On June 22, 2017, we searched Westlaw’s JLR database of law reviews and journals using this search: (attorney or lawyer) /20 live /3 (consultation or chat). The only law review mentioning this topic was Daniel M. Schaffzin, *Warning: Lawyer Advertising May Be Hazardous to Your Health! A Call to Fairly Balance Solicitation of Clients in Pharmaceutical Litigation*, 8 CHARLESTON L. REV. 319, 338 n.74 (2014).

120. *2011 Formal Ethics Opinion 8*, N.C. STATE BAR (July 15, 2011), <https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2011-formal-ethics-opinion-8/>. Use of live chat support services on a law firm’s website is permitted under the Rules of Professional Conduct, but the practice is not without its risks, and a law firm utilizing this services must exercise certain precautions:

The law firm must ensure that visitors who elect to participate in a live chat session are not misled to believe that they are conversing with a lawyer if such is not the case. While the use of the term “operator” seems appropriate for a nonlawyer, a designation such as “staff member,” or something similar, would require an affirmative disclaimer that a nonlawyer staff member is not an attorney. The law firm must ensure that the nonlawyer agent does not give any legal advice. The firm should also be wary of creating an “inadvertent” lawyer-client relationship . . . [and should be mindful of its duties to prospective clients under Rule 1.18(c)].

Id.

121. See Paige A. Thomas, *Online Legal Advice: Ethics in the Digital Age*, 4 ST. MARY’S J. LEGAL MAL. & ETHICS 440, 474 (2014) (discussing ethical issues faced by legal consultation online).

just be browsing, but we are available to answer your questions . . . Can we help you?"¹²²

For both types of live chat, it appears that nonlawyers respond to consumers that initiate these chat requests because in some cases the chat representative is called an operator.¹²³ As demonstrated by the pop-up screen discussed above and by some of the online chat icons, consumers may be confused about whether they are communicating with an attorney.¹²⁴ Thus, the live online chat features differ from medical or legal services offering a similarly named product. For example, in the case of medical providers, live online consultations often involve an actual doctor consult with patients over the Internet.¹²⁵ Some legal websites have that goal.¹²⁶ Our observations, however, reveal that lawyers often use online chats as business generators rather than for actual consultations, further underscoring the need to study this phenomenon.

B. *Do Lawyers' Advertisements Appeal to Rational Consumers of Legal Services?*

Section IV.A offered a descriptive account of how lawyers advertise. This Section turns to assessing whether legal markets are functioning efficiently by considering some of the ways lawyers advertise. As discussed above, we exploit the advertising on attorney websites and Avvo profiles to better understand the dynamics of these legal markets. If attributes that are commonly advertised would not appeal to rational actors, we try to discern an explanation from behavioral economics for the existence of these types of advertisements. If behavioral

122. Observation 146 (on file with authors) (The study examined website advertising by lawyers who defend people charged with the crime of DWI and lawyers who sue defendants for causing injuries in car accidents. After examining Avvo profiles and firm websites, we had 909 observations detailing our findings.).

123. *E.g.*, Observation 334 (On file with authors. *See* description *supra* note 122.).

124. *E.g.*, Observation 238 (On file with authors. *See* description *supra* note 122.). ("Leon: Hi, welcome to the [Observation 238] Attorneys at Law website. How can we assist you today?").

125. *See* Brian Monnich, *Bringing Order to Cybermedicine: Applying the Corporate Practice of Medicine Doctrine to Tame the Wild Wild Web*, 42 B.C. L. REV. 455, 458–59 (2001) ("CyberDocs is representative of websites that offer consumer-patients the opportunity to initiate 'live' consultations with physicians on the Internet. The two co-founders of the website, Dr. Steven Kohler and Dr. Kerry Archer, advertise the service as a 'virtual house call.' Upon connecting to CyberDocs, patients input their medical history, reason for consulting the doctor and credit card number. After the patient completes these preliminary matters, the 'cyberdoctor' logs on and the physician and patient can engage in real-time communication over the Internet."); *see also* Courtney Kahle, *Scope of Practice Constraints on Nurse Practitioners Working in Rural Areas*, 23 ANNALS HEALTH L. ADVANCE DIRECTIVE 90, 99–100 (2013) ("[T]he state permits [nurses] to use telemedicine techniques. These techniques include remote monitoring systems for patient data through the internet, call centers staffed by nurses, live video consultations, and interactive videos. Telemedicine techniques allow NPs to interact remotely with patients to conduct medical evaluations, patient education, and provide follow up care.").

126. Darren Franklin, *Hanging a Shingle on the Information Superhighway Legal Advice on the Internet and the Problems of Prohibited Client Solicitation and Unintended Attorney-Client Relationships*, 2001 STAN. TECH. L. REV. 2, 4 (2001); Lawrence M. Friedman, *Handheld Marketing*, CBA REC., Oct. 2005, at 60, 60; Leigh Jones, *Lights, Camera, Lawyer: Meeting Potential Clients Through the Internet*, NAT'L L.J., Aug. 20, 2012, at 1; Michael W. Loudenslager, *E-Lawyering, the ABA's Current Choice of Ethics Law Rule & the Dormant Commerce Clause: Why the Dormant Commerce Clause Invalidates Model Rule 8.5(B)(2) When Applied to Attorney Internet Representations of Clients*, 15 WM. & MARY BILL RTS. J. 587, 652 (2006); Dave Pantzer & Bonnie Sullivan, *Technology Expands Pro Bono Service Opportunities*, MD. B.J., July/August 2014, at 34, 37.

economics offers a superior explanation for the existence of these types of advertising, we conclude that the market is experiencing market failure.

Evaluating whether lawyer advertising is aimed at rational consumers is important in assessing the validity of the pivotal *Bates* decision and in unlocking the explanation for why *Bates* has failed to increase access to legal services. In *Bates*, Justice Blackmun and his majority accept a view of advertising that assumes people act rationally.¹²⁷ Traditional economic theory argues that advertising lowers search costs for people seeking goods and services.¹²⁸ Blackmun endorses this approach whole-heartedly: “Advertising is the traditional mechanism in a free-market economy for a supplier to inform a potential purchaser of the availability and terms of exchange.”¹²⁹ Subsequent opinions on advertising repeat this rational-choice rationale.¹³⁰ If it turns out, however, that advertising does not act to inform rational choices, our findings have the potential to undermine *Bates*’s reasoning and explain why advertising has failed to increase access to lawyers as contemplated by the Court.

Some types of advertisements that we found have obvious rational-choice explanations. For example, a rational consumer would care if an attorney is board certified in an area of law because a third party performs this certification and the certification evidences that the attorney has the requisite knowledge base to perform legal work in that area.

We focus here on relatively common types of advertising that do not have obvious explanations under traditional economic theory but have compelling explanations using behavioral economics principles. These types of advertising, we argue, suggest that the legal market for DWI and car accident attorneys in these markets is experiencing behavioral market failure.

1. Advertising About Past Victories

Lawyers frequently mention past victories. 39.16% (n=356) of profiles and websites highlighted the past victories that lawyers or firms had achieved. For instance, one website heralded a DWI victory:

Head-on Collision with .20 blood test—NOT GUILTY. After causing a serious, head-on, collision and failing field sobriety tests, APD’s DWI Enforcement Team procured a search warrant to draw our client’s blood. His

127. For a discussion of the rational-choice theory of advertising, see JERRY KIRKPATRICK, IN DEFENSE OF ADVERTISING: ARGUMENTS FROM REASON, ETHICAL EGOISM, AND LAISSEZ-FAIRE CAPITALISM 22 (2007).

128. Lillian R. BeVier, *Competitor Suits for False Advertising Under Section 43(a) of the Lanham Act: A Puzzle in the Law of Deception*, 78 VA. L. REV. 1, 8 (1992).

129. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 376 (1977).

130. See *Shapero v. Ky. Bar Ass’n*, 486 U.S. 466, 488 (1988) (O’Connor, J., dissenting) (“Even if I agreed that this Court should take upon itself the task of deciding what forms of attorney advertising are in the public interest, I would not agree with what it has done. The best arguments in favor of rules permitting attorneys to advertise are founded in elementary economic principles.”); *Sullo & Bobbitt, PLLC v. Abbott*, No. 3:11-CV-1926-D, 2012 WL 2796794, at *8 (N.D. Tex. July 10, 2012), *aff’d in part sub nom. Sullo & Bobbitt PLLC v. Abbott*, 536 F. App’x 473 (5th Cir. 2013) (quoting the reasoning in *Bates*).

blood alcohol came back at over .20. We took this case to jury trial and our client was found NOT GUILTY.¹³¹

Personal injury attorneys similarly pointed to past victories as evidence they could obtain positive outcomes for potential patients. One website noted: “With more than 20 multi-million-dollar net-to-client verdicts and settlements, [our firm] has the expertise required to get the maximum value for your case.”¹³²

Despite mentioning victories frequently, websites with advertising about victories often did not have the mandatory disclaimers required in some jurisdictions (including those studied here) regarding prior successes.¹³³ Some websites did post disclaimers, such as “All cases are unique and there are no express or implied guarantees as to the results or outcome of any future cases.”¹³⁴ Yet websites with disclaimers were rare. Of the 356 websites that discussed past successes, only 19.94% (n=71) had any disclaimers about the meaning of information about past successes. And, even on some of these websites with a disclaimer, other language undermined the disclaimer’s effectiveness. One website said:

Although past results do not predict future outcomes they do reflect the experience the firm has had handling significant cases. A law firm’s record of results should be seriously considered when you are researching a personal injury law firm. The experienced attorneys at [this firm] have proven themselves, time and again.¹³⁵

While this website formally has a disclaimer, the disclaimer’s significance is downplayed.

It is hard to articulate a rational-choice explanation for why websites and Avvo profiles would mention prior successes without explaining the limitations of the information. Would a rational consumer want to know about individual specific instances where the firm had succeeded in the past?

A large literature addresses the practice of companies advertising atypical results, or as Ahmed Taha aptly puts it, “selling the outlier.”¹³⁶ Past results in a small sample of cases that the seller selects do not indicate the likelihood of success in a new client’s case.¹³⁷ Every lawyer knows that the likelihood of success in each case depends on the facts of the case, the judge and jury, the law, and numerous other factors. Indeed, the Rules of Professional Responsibility codify

131. Observation 134 (On file with authors. See description *supra* note 122.).

132. Observation 654 (On file with authors. See description *supra* note 122.).

133. See N.Y. RULES OF PROF’L CONDUCT 7.1(e)(3) (2017) (stating that when referencing past success or results obtained require the disclaimer: “Prior results do not guarantee a similar outcome”). Texas does not mandate specific language but does require that the lawyer or firm have primary responsibility for the result, that any amount stated was received by the client, and that fees or expenses withheld be stated. TEX. DISCIPLINARY RULES OF PROF’L CONDUCT 7.02(a) (2018). Florida requires that such references be “objectively verifiable.” See RULES REGULATING THE FLA. BAR 4-7.13(b)(2) (2018).

134. Observation 36 (On file with authors. See description *supra* note 122.).

135. Observation 390 (On file with authors. See description *supra* note 122.).

136. See generally Ahmed E. Taha, *Selling the Outlier*, 41 J. CORP. L. 459 (2015).

137. *Id.* at 461–62.

this common understanding: “Prior results do not guarantee a similar outcome.”¹³⁸

Taha offers the example of a weight loss product that advertises past results to demonstrate that rational actors could not value this information:

For example, a weight-loss product advertisement that features a testimonial from someone who lost 30 pounds using the product logically implies only that there exists at least one person in the world who lost 30 pounds using the product. This fact would be virtually irrelevant to a reasonable consumer. The advertisement would be effective only if consumers infer that users experience significant weight loss far more often than that.¹³⁹

The same might be said about legal services. The fact that one person avoided a DWI conviction does not provide any evidence that a potential client will have a similar result, so a rational actor would not value this information.

While traditional economic theory cannot explain why lawyers would include this type of advertising, behavioral economics offer compelling explanations—the optimism bias and the availability heuristic. First, study upon study has documented that people are overly optimistic when making decisions about products with uncertain outcomes in a variety of contexts.¹⁴⁰ In one of the first papers on the optimism bias, a professor asked students if they were more or less likely to experience negative events in their lives than their classmates, such as cancer or divorce.¹⁴¹ Time after time, students said they were less likely to experience negative events and more likely to experience positive events than their classmates.¹⁴² Research has demonstrated that people are too optimistic about a

138. N.Y. RULES OF PROF'L CONDUCT 7.1(e)(3) (2017).

139. Taha, *supra* note 136, at 468.

140. Lynn A. Baker & Robert E. Emery, *When Every Relationship Is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage*, 17 L. & HUM. BEHAV. 439, 443 (1993) (marriage); Kathryn Fritzdixon et. al., *Dude, Where's My Car Title?: The Law, Behavior, and Economics of Title Lending Markets*, 2014 U. ILL. L. REV. 1013, 1042 (auto title lending); Ron Harris & Einat Albin, *Bankruptcy Policy in Light of Manipulation in Credit Advertising*, 7 THEORETICAL INQ. L. 431, 434–35 (2006) (student loans); Ulrike Malmendier & Geoffrey Tate, *Who Makes Acquisitions? CEO Overconfidence and the Market's Reaction*, 89 J. FIN. ECON. 20, 21–22 (2008) (mergers and acquisitions); Ola Svenson, *Are We All Less Risky and More Skillful than Our Fellow Drivers?*, 47 ACTA PSYCHOLOGICA 143, 146 (1981) (driving).

141. See Harris & Albin, *supra* note 140, at 434.

142. See generally Neil D. Weinstein, *Unrealistic Optimism About Future Life Events*, 39 J. PERSONALITY & SOC. PSYCHOL. 806 (1980).

wide variety of things, ranging from their use of credit cards¹⁴³ to their food-safety skills¹⁴⁴ to their marriages.¹⁴⁵

Potential clients who hear about a lawyer's past successes (without hearing qualifying disclaimers about the relevance of those past successes) are likely to misjudge the likely outcome of their case with that lawyer. An overly optimistic client will guess that her case will succeed if prior cases with the lawyer succeeded. Lawyers who want to capitalize on that cognitive failure to gain more business have a strong incentive to include information about past successes.¹⁴⁶ This type of advertising capitalizes on consumers' predictable overoptimism.

For our purposes, the existence of advertising about past successes helps us diagnose behavioral market failure in these markets. We can determine that potential clients are likely overly optimistic because lawyers are spending money trying to exploit this suboptimal decision-making. This type of advertising skews the market for legal services because clients who think they will succeed will pay more than those who are less optimistic about the chances of success.

Second, the availability heuristic explains why lawyers would advertise past successes even if they are not statistically relevant to rational consumers. Cass Sunstein summarizes the vast literature on how this mental short-cut works:

Under the availability heuristic, people assess probabilities by asking whether examples readily come to mind. Lacking statistical information, people substitute an easy question (Can I think of illustrations?) for a hard question (What realities do the data actually show?). . . . But the availability heuristic can lead to significant mistakes. If an incident is readily available but statistically rare, the heuristic will lead to overestimation of risk; if examples do not come to mind, but the statistical risk is high, the heuristic can give people an unjustified sense of security.¹⁴⁷

As one common example, people are overly afraid of dying in a plane crash because stories about plane crashes are vivid and readily come to mind.¹⁴⁸ On the

143. Oren Bar-Gill, *Seduction by Plastic*, 98 NW. U. L. REV. 1373, 1375–76 (2004) (“Consumers tend to underestimate the likelihood of adverse events that might necessitate borrowing. Optimistic individuals tend to underestimate the probability of being involved in an accident that might generate high medical bills or other liquidity needs. Similarly, individuals tend to underestimate the probability that either they or a loved one will become ill and require costly treatment (that is not covered or not entirely covered by their insurance plan). Finally, individuals tend to underestimate the likelihood that they will lose their job, or the time it will take them to find a new job. These and other manifestations of the optimism bias lead consumers to underestimate the likelihood that they will incur a liquidity shock that necessitates a resort to credit card borrowing.”).

144. John Aloysius Cogan Jr., *The Uneasy Case for Food Safety Liability Insurance*, 81 BROOK. L. REV. 1495, 1536 (2016) (“For example, people generally believe that their risk of food poisoning is less than that of the average person, that they are in control of microbial food hazards when they prepare food themselves . . .”).

145. Sean Hannon Williams, *Sticky Expectations: Responses to Persistent Over-Optimism in Marriage, Employment Contracts, and Credit Card Use*, 84 NOTRE DAME L. REV. 733, 757–58 (2009) (“Both men and women believe that fifty percent of marriages end in divorce. More than half, however, predict that there is *no* chance that they will divorce, that is, that their probability of divorcing is zero.”).

146. See Oren Bar-Gill, *Bundling and Consumer Misperception*, 73 U. CHI. L. REV. 33, 45 (2006).

147. Cass R. Sunstein, *What's Available? Social Influences and Behavioral Economics*, 97 NW. U. L. REV. 1295, 1297 (2003) (footnote omitted).

148. KENNETH S. BORDENS & IRWIN A. HOROWITZ, SOCIAL PSYCHOLOGY 92 (2d ed. 2002).

other hand, stories of a car crash are pedestrian, despite being much more statistically significant, leading people to underestimate the risk of dying in a car crash.¹⁴⁹

Potential clients do not have data on the lawyer's overall success rate. Even if they did, it would be difficult to apply that rate to their own case given the unique circumstances of the potential client's case. So lawyers who advertise past successes are counting on people employing the availability heuristic when evaluating whether they think the lawyer will succeed for them. Vivid examples of past successes (*e.g.*, no conviction despite having a high blood alcohol level¹⁵⁰) readily come to mind when a potential client is trying to assess the probability a lawyer will succeed in getting them out of charges.

In sum, advertising that focuses on past successes lacks a rational-choice explanation because no rational consumer could care about the results in one specific past case. But behavioral economics offers a compelling explanation for this type of advertising, suggesting that it is likely that these markets are experiencing market failure.

2. *Advertising Through Selected Client Testimonials*

Many websites also contained client testimonials about, or reviews of, the lawyer's services. Considering just the websites (where lawyers control 100% of the content), 43.83% (n=199) contained reviews by prior clients. Consumer reviews of professionals are becoming more and more common, and these reviews are influential to potential consumers.¹⁵¹

A rational consumer would not be interested in a limited number of customer reviews. Like prior successes, evidence of a specific client's satisfaction with a lawyer does not demonstrate a lawyer's overall success rate. In one Avvo profile, an attorney claimed to have helped clients with 12,000 cases over his twenty-eight year career.¹⁵² The profile also had five very positive reviews.¹⁵³ A rational actor would not view information from 0.004% of an attorney's cases as representative of prior clients' experiences with the attorney.

But customer reviews on websites controlled by the attorney are even more problematic than prior success stories. When consumer reviews appear on third-party websites like Avvo, there are risks that the reviews are biased.¹⁵⁴ But when

149. *Id.*

150. *See supra* Subsection IV.B.1.

151. *See, e.g.*, Cassandra Burke Robertson, *Online Reputation Management in Attorney Regulation*, 29 GEO. J. LEGAL ETHICS 97, 103–06 (2016); Laurel A. Rigertas, *How Do You Rate Your Lawyer? Lawyers' Response to Online Reviews of Their Services*, 4 ST. MARY'S J. ON LEGAL MALPRACTICE & ETHICS 242 (2014).

152. Observation 367 (On file with authors. *See description supra* note 122.).

153. *Id.*

154. *See* David Adam Friedman, *Addressing the Commercialization of Business Reputation*, 80 L. & CONTEMP. PROBS. 73, 76, 79 (2017) (explaining that third-party websites like Angie's List can be biased because of classic search engine bias where the website filters reviews for the most relevant reviews and because of the website selling advertising to businesses being reviewed on the website).

the sellers select which customer reviews they present, the selections are almost certainly going to be biased in favor of the seller.¹⁵⁵

In our study, every testimonial on a firm's website that we recorded¹⁵⁶ was positive, stating things like the attorney "was amazing, professional and really knew what he was doing,"¹⁵⁷ "was up to date with the latest procedures,"¹⁵⁸ and was "professional" and exhibited "personal understanding."¹⁵⁹ And those reviews are just from the first three websites with testimonials in our study.

Indeed, selective customer testimonials are so problematic that the Federal Trade Commission requires that any customer testimonial must be typical before an advertiser uses it:

An advertisement containing an endorsement relating the experience of one or more consumers on a central or key attribute of the product or service also will likely be interpreted as representing that the endorser's experience is representative of what consumers will generally achieve with the advertised product or service in actual, albeit variable, conditions of use. Therefore, an advertiser should possess and rely upon adequate substantiation for this representation.¹⁶⁰

A rational actor would not value testimony selected from only positive reviewers, so traditional economics cannot explain the existence of this type of advertising on lawyers' websites.

But insights from behavioral economics can. In addition to the optimism bias and the availability heuristic, behavioral economists have documented that people observing samples suffer from selection neglect. Selection neglect was first documented in an article noting that, "investors respond to advertised performance data [that is selected by mutual funds] as if those data were unselected (i.e., representative of the population)."¹⁶¹ Numerous other studies have confirmed the results, demonstrating, for example, that "investors are subject to a selection neglect when estimating the skill of top-performers [and] fail to take into account that they limit their analysis to a biased sample when chasing [high

155. Taha, *supra* note 136, at 466 ("Advertisements often contain testimonials from people claiming to have had a positive experience using the advertised product. These advertisements feature a selection bias; the advertiser does not randomly select which users' experiences to include in the advertisement. Rather, only very positive results are included."). The arguments that customer reviews will increase efficiency assume that a third party is gathering the reviews, not the seller. *E.g.*, Kristin Tracy, "And to Your Left You'll See . . .": *Licensed Tour Guides, the First Amendment, and the Free Market*, 46 U. BALT. L. REV. 169, 180 (2016) ("[W]hile perfect information may not be available to all consumers, the internet or even a travel agent can provide consumer reviews and feedback, which will likely help the consumer make rational decisions.") (footnote omitted); *see also* Rigertas, *supra* note 151, at 276 (noting that "little oversight of consumer reviews and anonymous reviews mean[s] that some reviews might not even be written by actual clients" and that there is the "risk that consumers will get information that is not helpful because it is false or too one-sided").

156. Researchers only recorded the first client testimonial on a profile or website.

157. Observation 2 (On file with authors. *See* description *supra* note 122.).

158. Observation 6 (On file with authors. *See* description *supra* note 122.).

159. Observation 8 (On file with authors. *See* description *supra* note 122.).

160. 16 C.F.R. § 255.2(b) (2018).

161. Jonathan J. Koehler & Molly Mercer, *Selection Neglect in Mutual Fund Advertisements*, 55 MGMT. SCI. 1107, 1107 (2009).

returns].”¹⁶² The upshot is that even when people understand that a sample is biased, for instance because the seller picks the sample, they fail to fully adjust their expectations about what the average experience is like or even wrongly think that the sample reflects the entire dataset.¹⁶³

Lawyers who advertise selected client testimonials are likely trying to exploit potential consumers’ selection bias. People considering hiring the lawyer, like people deciding whether to invest in a specific mutual fund, are probably relying too much on these selected consumer reviews. Thus, because behavioral economics explains the existence of these advertisements where rational-choice theory cannot, it is likely there is market failure.

3. *The Absence of Price Information*

One advertising attribute explored in our study is remarkable because of its absence—the price of their services. Usually, price is the most important term that a consumer considers when making a purchase,¹⁶⁴ so the dearth of exact prices on profiles and websites is rather striking. Prior empirical work has also found that lawyers fail to advertise prices.¹⁶⁵ In our study, only 18.59% of websites and profiles (n=169) presented price information. Avvo specifically requests that attorneys state the price of their services, which may encourage more attorneys to provide price information. Still, even with Avvo’s request, only 140 Avvo profiles had prices. That means that many attorneys deliberately refused to include how much they would charge potential clients. We searched firms’ entire websites for pricing information (instead of our normal practice of only looking on a limited number of pages). Even scouring the entire websites, only 6.39% (n=29) of websites mentioned the exact price of services.

The decision to omit pricing information from Avvo profiles and websites is also notable because of the advertisement at issue in the *Bates* case. As Appendix A shows, the advertisement in the *Bates* case listed prices, giving credibility to the Court’s claim that advertising might lower prices.¹⁶⁶ Scholars note

162. Justus Heuer et al., *Fooled by Randomness: Investor Perception of Fund Manager Skill*, 21 REV. FIN. 605, 606 (2017).

163. Taha, *supra* note 136, at 464.

164. Bar-Gill, *Bundling and Consumer Misperception*, *supra* note 146, at 45; *see also* Howard Beales et al., *The Efficient Regulation of Consumer Information*, 24 J.L. & ECON. 491, 492 (1981) (“Information about price . . . allows buyers to make the best use of their budget . . .”). Price is so important in advertising that advertising scholars use price as a key factor in determining if advertising is informative or merely persuasive. *See* Alan Resnik & Bruce L. Stern, *An Analysis of Information Content in Television Advertising*, 41 J. MARKETING 50, 50–51 (1977).

165. *See* Jeffrey O’Connell et al., *Yellow Page Ads as Evidence of Widespread Overcharging by the Plaintiffs’ Personal Injury Bar—and a Proposed Solution*, 6 CONN. INS. L.J. 423, 426–27 (2000) (finding in a study analyzing Yellow Page Ads of twelve major U.S. legal markets that “the number of ads that mentioned [(1) hourly rates, (2) the specific percentage of the fee exacted, (3) a flat fee, and (4) price competition] were all much less than one percent of the total of 1,425 ads”).

166. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 377 (1977).

that the law practice involved in *Bates* is a relic of history and that modern personal injury attorneys operate under different pricing models.¹⁶⁷ Yet despite different pricing structures than that at issue in *Bates*, many of the attorneys in our study have price schemes that could be stated, especially for those charging contingency fees and set hourly rates.

Several plausible rational choice explanations might offer an account for why lawyers do not advertise price. First, it could be that in these markets, there is no price differentiation, so advertising price is superfluous.¹⁶⁸ For instance, in the market for payday loans, lenders do not advertise prices in states where all lenders charge the maximum legal amount.¹⁶⁹ Yet it appears there is substantial price differentiation for legal services in the markets we studied.¹⁷⁰ The websites and profiles that did state prices reflect heterogeneity in pricing. Hourly rates varied from \$125 an hour¹⁷¹ to \$350 an hour,¹⁷² and contingency fees ranged from 25%¹⁷³ to 45%.¹⁷⁴ So this explanation is unlikely to be true.

Second, it could be that rational consumers do not care about costs. In medical markets, some patients do not evaluate costs because third parties pay them.¹⁷⁵ For law, however, clients typically bear the cost themselves in the American system because each side pays its own attorney's fees, barring special circumstances.¹⁷⁶ Thus, there is a strong incentive for clients to evaluate costs.

If a rational consumer would want to know the cost of legal services when picking a lawyer, why is this information omitted from most websites and profiles? Behavioral economics offers a compelling account—attorneys want to shroud the cost of legal services by highlighting aspects of the transaction other than price.¹⁷⁷ When people make complex decisions, like which lawyer to use, they have limited attention and can only focus on several attributes of a decision.¹⁷⁸ In one famous experiment, researchers asked subjects to focus on how many times one basketball team passed the ball.¹⁷⁹ Because participants in the

167. Engstrom, *supra* note 78, at 637–38.

168. See Kimberly D. Krawiec, *Altruism and Intermediation in the Market for Babies*, 66 WASH. & LEE L. REV. 203, 222 (2009) (suggesting advertising accompanies price differentiation). For a source suggesting this explanation in the context of legal fees, see Engstrom, *supra* note 78, at 682 n.253 (“[T]o the extent contingency fees are uniform, no firm has an incentive to advertise on the basis of price.”).

169. Jim Hawkins, *Are Bigger Companies Better for Low-Income Borrowers?: Evidence from Payday and Title Loan Advertisements*, 11 J.L. ECON. & POL’Y 303, 314 (2015).

170. See observations cited *infra* notes 171–74.

171. Observation 339 (On file with authors. See description *supra* note 122.).

172. Observation 59 (On file with authors. See description *supra* note 122.).

173. *Id.*

174. Observation 23 (On file with authors. See description *supra* note 122.).

175. Devon M. Herrick & John C. Goodman, *The Market for Medical Care: Why You Don’t Know the Price; Why You Don’t Know About Quality; And What Can Be Done About It.*, NAT’L CTR. POL’Y ANALYSIS 1, 2 (2007), <http://www.ncpathinktank.org/pdfs/st296.pdf> (“The primary reason why doctors and hospitals typically do not disclose prices prior to treatment is that they do not compete for patients based on price. Prices are usually paid not by patients themselves . . .”).

176. Steven Shavell, *Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs*, 11 J. LEGAL STUD. 55, 55 (1982).

177. See Gabaix & Laibson, *supra* note 83, at 510.

178. *Id.* at 525.

179. See KAHNEMAN, *supra* note 81, at 23–24.

research were so focused on counting the number of passes, around half of them missed the fact that a woman dressed like a gorilla appeared on the screen in addition to the basketball players.¹⁸⁰ By telling subjects to focus on one thing, researchers were able to keep them from recognizing a lady dressed like a gorilla.¹⁸¹

In the same way, lawyers can shroud the costs of legal services by focusing potential clients' attention on other attributes of the transaction. In our study, lawyers framed the transaction in terms of a variety of things—the lawyers' honesty, the lawyers' reputation, and the lawyers' religion.¹⁸² Lawyers even discussed the facts that they are excellent boxers,¹⁸³ that they make their own wine,¹⁸⁴ that they like playing pinball,¹⁸⁵ and that they brew their own beer.¹⁸⁶ In light of the fact some charge hundreds of dollars more an hour than others, it is hard to explain why a rational consumer would rather know information about home brewing habits than price. The absence of price information on many of the lawyers' websites and profiles is evidence of behavioral market failure.

The market failure we uncover here offers a partial explanation for why the promise of *Bates* has not been realized. The rationale of the *Bates* decision relies explicitly on a functioning market. Section C below offers another piece of the puzzle—lawyer advertising does not encourage people left out of the legal system to seek help.

C. *Do Lawyers' Advertisements Encourage Disadvantaged Groups to Seek Legal Help?*

Central to the holding of *Bates* was a promise for expanded access to legal help for disadvantaged groups. As Justice Blackmun noted:

The absence of advertising may be seen to reflect the profession's failure to reach out and serve the community: Studies reveal that many persons do not obtain counsel even when they perceive a need because of the feared price of services or because of an inability to locate a competent attorney.¹⁸⁷ The Court was especially concerned about "the poor and unknowledgeable," or in other words, under-represented constituencies like minorities.¹⁸⁸

We evaluated three factors to determine whether lawyers' advertisements encourage these communities to seek legal help—the race and gender of photographs displayed on the website as well as the readability of the website.

180. *Id.*

181. *Id.*

182. *See supra* Table 2.

183. Observation 1 (On file with authors. *See description supra* note 122.).

184. Observation 324 (On file with authors. *See description supra* note 122.).

185. Observation 7 (On file with authors. *See description supra* note 122.).

186. Observation 74 (On file with authors. *See description supra* note 122.); Observation 122 (On file with authors. *See description supra* note 122.).

187. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 370–71 (1977).

188. *Id.* at 377.

1. *Race and Gender of Photographs*

As a measure to assess whether the legal profession is making an effort to reach disadvantaged groups, we evaluated the photographs that appear on the Avvo profiles and the homepage of attorneys’ websites. Of our 909 observations, 716 displayed pictures of attorneys or clients. Of these websites with pictures, 96.37% (n=690) of websites had pictures of the attorney only, 0.98% (n=7) had pictures of the client only, and 2.65% (n=19) had pictures of both the attorney and the client.

We instructed the coding assistants to use their best guess of the race of the people pictured on the websites or to indicate that it was impossible for them to tell the race of the person pictured. The assistants thought 4.47% (n=32) were impossible to determine. Table 4 summarizes our findings.

TABLE 4: RACE OF PHOTOGRAPHS ON HOMEPAGES/PROFILES (N=716)

Race of Photograph	Percentage	Number
White	88.83 ¹⁸⁹	636
Black	4.89	35
Hispanic	10.89	78
Asian or Indian	1.40	10
Native American	0	0

On these websites, 79.61% (n=570) had pictures of exclusively white attorneys and clients.

We also coded information about the gender of people pictured on the website. Of the 716 websites with pictures, 77.09% (n=552) exclusively had pictures of men.

Our hypothesis, grounded in studies about the patient-physician relationship, is that individuals are more likely to utilize legal services if they “see themselves as similar to their [lawyers] in personal beliefs, values, and communication.”¹⁹⁰ One critical aspect of this is race/ethnicity or gender concordance. In the medical literature, studies show “that minority patients in race/ethnic concordant relationships are more likely to use needed health services, are less likely to postpone or delay seeking care, and report a higher volume of use of health services.”¹⁹¹ Similarly, “[p]atients in race concordant patient–provider relationships also report greater satisfaction and better patient–provider communication.”¹⁹²

189. The percentage and number of pictures of each race do not necessarily equal 100% and 469 because (1) our assistants could not determine the race of some of the pictures and (2) some websites had pictures of different people from different racial groups.

190. Richard L. Street, Kimberly J. O’Malley, Lisa A. Cooper & Paul Haidet, *Understanding Concordance in Patient-Physician Relationships: Personal and Ethnic Dimensions of Shared Identity*, 6 ANNALS FAM. MED. 198, 198 (2008).

191. Ana H. Traylor et al., *The Predictors of Patient-Physician Race and Ethnic Concordance: A Medical Facility Fixed-Effects Approach*, HEALTH SERVS. RES. 792, 793 (2010), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2875760/pdf/hesr0045-0792.pdf>.

192. *Id.*

In addition to these patient-physician studies, social psychologists have found that advertising is most effective when potential clients observe people “like them” enjoying the product or service.¹⁹³ People determine how they should act by seeing how others in their social group act.¹⁹⁴ If specific groups do not observe anyone in their social group behaving a specific way, the principle of social proof may unconsciously lead them away from that behavior.¹⁹⁵

While other factors beyond race or gender likely impact the relationship between a client and a lawyer, this seems to be an important aspect impacting whether an individual receives legal representation. Relatedly, the American Bar Association and others continue to push diversity measures forward in an effort toward a legal profession that reflects the public it serves.¹⁹⁶

A significant body of scholarship examines issues related to the pipeline for who becomes a lawyer or advances within the profession, and numerous initiatives are devoted to this effort.¹⁹⁷ Fewer studies examine the race and ethnicity of individuals represented by an attorney. One of the rare studies documents that African Americans, Asian Americans, and Hispanics are significantly more likely to be unrepresented in legal matters than Whites.¹⁹⁸ Minimal attention, if any, falls on the images selected by lawyers in their advertising.¹⁹⁹ This is rather shocking given that these images may be the only view the public sees outside of lawyers portrayed on television shows or in the movies.

While it is beyond the scope of our study here to evaluate a direct correlation between the lack of legal representation with the images portrayed in lawyer advertising, we suggest our data support further investigation and study in this regard.

193. ROBERT B. CIALDINI, *INFLUENCE: THE PSYCHOLOGY OF PERSUASION* 174 (Collins Bus. Essentials ed. 2007).

194. *Id.* at 140.

195. *Cf.* Jim Hawkins, *Selling ART: An Empirical Assessment of Advertising on Fertility Clinics' Websites*, 88 *IND. L.J.* 1147, 1169–70 (2013) (“It is possible that pictures of white babies give social proof to white individuals considering fertility care but not to people who are of other races, driving up the number of white patients and driving down the number of patients from other races.”).

196. *See, e.g.*, ABA COMM’N ON FUTURE LEGAL SERVS., *REPORT ON THE FUTURE OF LEGAL SERVICES IN THE UNITED STATES* 1, 31–33 (2016), https://www.americanbar.org/content/dam/aba/images/abanews/2016_FLSReport_FNL_WEB.pdf.

197. *See, e.g.*, Cedric Ashley, *Taking Ownership of Diversity*, 2 *INNOVATOR* 1, 3 (2016), https://www.americanbar.org/content/dam/aba/images/racial_ethnic_diversity/Innovator_Vol02Issue01_.pdf (“Many of the diversity and inclusion initiatives within the legal profession focus on efforts to increase representation of diverse attorneys in settings that have historically lacked diversity. These efforts tend to be directed towards change within the institutional setting or securing employment within those environments for diverse lawyers.”).

198. *See* Amy Myrick, Robert L. Nelson & Laura Beth Nielson, *Race and Representation: Racial Disparities in Legal Representation for Employment Civil Rights Plaintiffs*, 15 *N.Y.U. J. LEGIS. & PUB. POL’Y* 705, 714 (2012) (noting the “intriguing” results that African Americans, Asian Americans, and Hispanics were more likely to represent themselves compared to white individuals—20.79% African American, 25.58% Asian American, 21.38% Hispanic, and 8.37% White).

199. Our research uncovered no study precisely on point, though scholars have noted that race is understudied in the access to justice scholarship. *See, e.g.*, Martha F. Davis, *Race and Civil Counsel in the United States: A Human Rights Progress Report*, 64 *SYRACUSE L. REV.* 447, 451 (2014) (“Race has not been put forward as a central issue by the U.S. civil counsel movement, but the evidence demonstrating the racial disparities in access to counsel is deeply disturbing.”).

2. *Readability*

As another measure of whether lawyer advertising increases access for disadvantaged groups, we assessed the readability of the websites and profiles. We took the first 200 words on a webpage or profile and inputted them into an online tool that calculates the SMOG readability formula.²⁰⁰ The SMOG readability formula uses word length and sentence length to predict how readable a passage is.²⁰¹ If there were not 200 words, we used as many as were available, but still 15.29% (n=139) of the observations had an insufficient number of words to test the readability.

Overall, the mean readability for the remaining websites with sufficient text was 10.97, meaning that someone reading at around an eleventh grade level should be able to read the website. The readability scores varied from two to twenty-nine, and the median score was eleven.

Given that 50% of adults cannot read a book written at an eighth grade level,²⁰² and that 21% of adults read below a fifth grade level,²⁰³ we conclude that lawyer advertising likely is not accessible for many of the individuals intended by the *Bates* Court. State bar representatives who regulate lawyer advertising complain that lawyers' websites are aimed at law firms not potential clients,²⁰⁴ and our results confirm that is in fact the case.

V. RECOMMENDATIONS

The results of our empirical study lead us to several recommendations for regulatory interventions and related efforts to enhance consumer understanding about legal services.

First, we propose that policy-makers require certain disclosures or disclaimers to address consumer irrationality and biases. Some jurisdictions already require these sorts of statements,²⁰⁵ but the rules may be under-enforced. For example, New York requires a specific disclaimer when lawyers advertise about past success, though our study revealed that not all websites are in compliance.²⁰⁶

200. See *Automatic Readability Checker (Our Free Text Readability Consensus Calculator)*, READABILITYFORMULAS.COM, <http://www.readabilityformulas.com/free-readability-formula-tests.php> (last visited Mar. 21, 2019).

201. G. Harry McLaughlin, *SMOG Grading—A New Readability Formula*, 12 J. READING 639, 640 (1969).

202. *Illiteracy by the Numbers*, LITERACY PROJECT, <https://www.literacyprojectfoundation.org/> (last visited Mar. 21, 2019).

203. *Id.*

204. Pat Rafferty, *Best Practices in Attorney Advertising*, TEX.BARCLE (Dec. 11, 2013), <http://www.texasbarcle.com/CLE/AALegalSpanTransfer.asp?EventID=13276&SeminarID=13276&lContactID=63141&sStatus=CCC>.

205. See, e.g., *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 627 (1985) (holding that mandated disclosure regarding payment of costs in lawyer advertisement does not violate the First Amendment); *Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 252–53 (2010) (applying *Zauderer* to uphold mandated disclosure in advertising by lawyers for bankruptcy-related services).

206. N.Y. RULES OF PROF'L CONDUCT 7.1(e)(3) (2017).

We recommend the requirement of disclaimers for statements about past success and client testimonials.

While the effectiveness of disclosures is questioned in some contexts, for example, the consumer credit literature, the unique circumstances of legal representation support their use.²⁰⁷ In other contexts, people have strongly criticized disclosures as a remedy for market failure.²⁰⁸ People argue that consumers ignore disclosures,²⁰⁹ that they cannot understand disclosures,²¹⁰ and that they cannot use disclosures in complex markets.²¹¹

While we are sympathetic to these critiques of traditional disclosure regimes, we do not think they are fatal to our suggestion here. At a minimum, disclosures are a signaling and, at best, they are informative. One model that might be adopted is the Federal Trade Commission's adequate substantiation standard, which requires that an "advertiser should possess and rely upon adequate substantiation" when making representations containing endorsements.²¹²

Second, we encourage lawyers to consider the images and readability of their websites. Studies show that individuals are more likely to engage with and trust professionals who reflect their own identities and personal characteristics.²¹³ Readability is important for helping individuals address their legal issues, whether or not they ultimately hire an attorney, but it also may increase the likelihood that an individual will do so. Lawyers wanting to expand their client base would be especially wise to heed the findings of our study.

Third, we call on bar associations and legal education institutions to use advertising to engage in education campaigns in order to remedy market failure.²¹⁴ As the *Bates* Court observed: "it is the bar's role to assure that the popu-

207. See generally Knake, *supra* note 20.

208. See generally OMRI BEN-SHAHAR & CARL E. SCHNEIDER, MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE (2014).

209. See Florencia Marotta-Wurgler, *Will Increased Disclosure Help? Evaluating the Recommendations of the ALI's "Principles of the Law of Software Contracts,"* 78 U. CHI. L. REV. 165, 182 (2011).

210. Debra Pogrud Star & Jessica M. Choplin, *A Cognitive and Social Psychological Analysis of Disclosure Laws and Call for Mortgage Counseling to Prevent Predatory Lending*, 16 PSYCHOL. PUB. POL'Y & L. 85, 98 (2010).

211. See Lauren E. Willis, *Decision Making and the Limits of Disclosure: The Problem of Predatory Lending*, 65 MD. L. REV. 707, 712 (2006).

212. See 16 C.F.R. 255.2(b) (2018) ("An advertisement containing an endorsement relating the experience of one or more consumers on a central or key attribute of the product or service also will likely be interpreted as representing that the endorser's experience is representative of what consumers will generally achieve with the advertised product or service in actual, albeit variable, conditions of use. Therefore, an advertiser should possess and rely upon adequate substantiation for this representation.")

213. See, e.g., Susan Hart & Gillian Hogg, *Relationship Marketing in Corporate Legal Services*, 18 SERVS. INDUS. J. 55, 67 (1998) ("A further contribution of this research relates to the debate over the extent to which customers seek relationships with their suppliers. Our findings suggest that accessibility of the partner to the client is important, along with the partner's involvement with the case. . . . [T]he personal chemistry and the 'fit' between partner and client are rated of high importance.")

214. See Renee Newman Knake, *Democratizing Legal Education*, 45 CONN. L. REV. 1281, 1302 (2013) (finding that few bar associations or law schools have engaged in public education campaigns, despite the Supreme Court's suggestion that this is an important role for the bar).

lace is sufficiently informed [about legal services] as to enable it to place advertising in its proper perspective.”²¹⁵ We echo this observation and expand it to law schools. One of us previously called for “democratizing legal education” with law schools “banding together to conduct a wide-spread public information campaign to encourage access to legal services.”²¹⁶ Our study here reinforces the need for this sort of education.

VI. CONCLUSION

Nearly a half century after the U.S. Supreme Court liberalized lawyer advertising rules to increase public information about and access to legal services, the same access to justice gap endures. Our pioneering advertising study of lawyer websites and Avvo profiles helps explain the persisting market failure. We found that advertising is not aimed at rational consumers like *Bates* envisioned but instead that some advertising exploits systematic poor decision-making. Also, far from Blackmun’s vision of advertising reaching the marginalized, current advertisements focus on pictures of white men and contain text that is inaccessible to many people with legal needs.

New avenues of regulation are needed to cultivate advertising that enhances the efficiency of the legal services market, in particular expanding access to information about legal representation for those in need. Lawyer advertising should include disclaimers about prior successes and testimonials; lawyers should consider advertising images and readability; and bar associations as well as law schools should work together in supporting public information campaigns. *Bates*’s vision for expanded access to legal services has been unrealized, but it does not have to be. Our study offers empirical evidence of the causes for advertising’s failure and of potential solutions to makes *Bates*’s goals a reality.

215. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 375 (1977).

216. Knake, *Democratizing Legal Education*, *supra* note 214, at 1285, 1317.

APPENDIX

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

ADVERTISEMENT

**DO YOU NEED
A LAWYER?
LEGAL SERVICES
AT VERY REASONABLE FEES**



- Divorce or legal separation--uncontested
(both spouses sign papers)
\$175.00 plus \$20.00 court filing fee
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how to do your own simple uncontested divorce
\$100.00
- Adoption--uncontested severance proceeding
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Individual
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