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Reconceptualizing Advocacy Ethics

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Reconceptualizing Advocacy Ethics

Fred C. Zacharias* & Bruce A. Green**

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Contemporary regulation of the legal profession is rooted in a nineteenth-century debate about the proper conduct of advocates. The debate is commonly thought to have had only two sides. One side finds its popular expression in the observations of Lord Henry Brougham, which highlighted the advocate's single-minded devotion to the client. The other side is identified with the writings of David Hoffman, which emphasized the need for lawyers to be guided by personal conscience. The two views of the advocate's role set the terms of a debate that continues in the professional and academic literature to this day.¹

Brougham's observations were offered in 1820 to justify his representation of Queen Caroline against charges of adultery and treason. Brougham told the British House of Lords that "an advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client."² In England, Brougham's characterization of the advocate's role was repudiated, including eventually by Brougham himself.³ But the speech found a more receptive audience in antebellum America. Within a short time, Brougham's declaration came to stand for the popular conception that an attorney in this country must do everything legally permissible to promote his client's interests and objectives.⁴ Today, Brougham's declaration remains

¹ See W. Bradley Wendel, *Civil Obedience*, 104 COLUM. L. REV. 363, 367-72 (2004) (describing the "remarkably stable debate [that] has developed in legal ethics between those who argue that a lawyer should always act on the balance of first-order moral reasons as they would apply to a similarly situated nonlawyer actor, and those who believe that a lawyer is prohibited from taking into account certain ordinary first-order moral reasons because of some feature of the lawyer's role, such as the obligations of partisanship and neutrality").

² 2 TRIAL OF QUEEN CAROLINE 8 (Joseph Nightingale ed., London, Albion Press 1821). The speech continued:

To save that client by all means and expedients, and at all hazards and costs to other persons, . . . is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of consequences, though it should be his unhappy fate to involve his country in confusion.

Id. The speech was made while defending Queen Caroline against King George IV's attempt to remove her from the throne, and constituted a veiled threat to reveal the King's earlier marriage to a Catholic widow, for which he would have forfeited the crown. See Catherine J. Lancot, *The Duty of Zealous Advocacy and the Ethics of the Federal Government Lawyer: The Three Hardest Questions*, 64 S. CAL. L. REV. 951, 960 & nn.26-30 (1991).

³ See JOHN R. DOS PASSOS, *THE AMERICAN LAWYER: AS HE WAS—AS HE IS—AS HE COULD BE* 142-43 (Fred B. Rothman & Co. 1986) (1907) (stating that Brougham "publicly repudiated [the views he expressed on advocacy in Queen Caroline's trial] by saying they were used as a sort of political menace" (citing WILLIAM FORSYTH, *HISTORY OF LAWYERS* 380 (1875))).

⁴ See, e.g., MONROE H. FREEDMAN & ABBE SMITH, *UNDERSTANDING LAWYERS' ETHICS* 80 (2d ed. 2002) (quoting Brougham and stating, "[t]hat is the kind of representation that . . . we

emblematic of a conception that is arguably the “dominant” one among United States lawyers⁵—that advocates owe “entire devotion to the interest of the client”⁶ or, as some would put it, that a legal advocate is a “hired gun.”⁷

Sixteen years after Brougham’s defense of Queen Caroline, a Baltimore lawyer, David Hoffman, offered a contrasting vision of the advocate’s role. The *Fifty Resolutions in Regard to Professional Deportment*,⁸ which Hoffman offered as guides rather than as “didactic rules,”⁹ emphasized that “I am resolved to make my own, and not the conscience of others, my sole guide. What is morally wrong cannot be professionally right.”¹⁰ Hoffman’s answer to Brougham was that personal conscience and morality place substantial restraint on what a lawyer should do to promote a client’s cause.¹¹ Hoffman’s alternative approach to advocacy won favor within the professional elite. The *Resolutions* were reprinted in casebooks and commentary on legal ethics throughout the early to mid-twentieth century.¹² Hoffman’s vision of conscientious lawyering anticipated modern scholarship—by William Simon, David

feel bound to provide as lawyers”); DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* xix–xxi (1988) (arguing that an approach to lawyers’ responsibilities based on a “theory of role morality,” heavy reliance on an extreme theory of the adversary system, and a “standard conception of the lawyer’s role” have “been around for a long time, and . . . have always informed the ethical ideals of legal practice in the adversary system”).

⁵ See, e.g., LUBAN, *supra* note 4, at 54–55.

⁶ See, e.g., MONROE H. FREEDMAN, *LAWYERS’ ETHICS IN AN ADVERSARY SYSTEM* 9 (1975) (characterizing Brougham’s declaration as a classic statement of the ideal, and quoting the American Bar Association (“ABA”) Canons of Professional Ethics).

⁷ See, e.g., RICHARD L. ABEL, *AMERICAN LAWYERS* 247 (1989) (“Lawyers are hired guns: they know they are, their clients demand that they be, and the public sees them that way.”); Michael I. Krauss, *The Lawyer as Limo: A Brief History of the Hired Gun*, 8 U. CHI. L. SCH. ROUNDTABLE 325 (2001) (tracing the history of the hired gun motif); Deborah L. Rhode, *An Adversarial Exchange on Adversarial Ethics: Text, Subtext, and Context*, 41 J. LEGAL EDUC. 29 (1991) (debating the legitimacy and contemporary significance of Brougham’s position); W. Bradley Wendel, *Busting the Professional Trust: A Comment on William Simon’s LADD Lecture*, 30 FLA. ST. U. L. REV. 659, 674 (2003) (assuming “the persistence of the dominant view, the hired gun ethic”).

⁸ 2 DAVID HOFFMAN, *Fifty Resolutions in Regard to Professional Deportment*, in *A COURSE OF LEGAL STUDY* 751, 752–75 (William S. Hein & Co. 1968) (1936), reprinted in HENRY S. DRINKER, *LEGAL ETHICS* 338–51 app. E (1953). For discussions of Hoffman’s *Resolutions* and their significance, see Stephen E. Kalish, *David Hoffman’s Essay on Professional Deportment and the Current Legal Ethics Debate*, 61 NEB. L. REV. 54 (1982), and Thomas L. Shaffer, *Legal Ethics and the Good Client*, 36 CATH. U. L. REV. 319, 320–22 (1987).

⁹ HOFFMAN, *supra* note 8, at 751.

¹⁰ *Id.* Resolution XXXIII; see also *id.* Resolution XIV (“My client’s conscience and my own are distinct entities.”).

¹¹ Lawyers subscribing to Hoffman’s *Resolutions* promised, among other things, not to assert frivolous claims or defenses to extort “an unjust compromise,” *id.* Resolution X, not to plead the statute of limitations to avoid a just debt, *id.* Resolution XII, not to continue the representation once convinced that the facts were against the client, *id.* Resolution XI, and generally “never [to] permit professional zeal to carry me beyond the limits of sobriety and decorum,” *id.* Resolution I.

¹² E.g., GLEASON L. ARCHER, *ETHICAL OBLIGATIONS OF THE LAWYER* 317–42 (Fred B. Rothman & Co. 1981) (1910); GEORGE P. COSTIGAN, JR., *CASES AND OTHER AUTHORITIES ON THE LEGAL PROFESSION AND ITS ETHICS* 695–709 (2d ed. 1933); DRINKER, *supra* note 8.

Luban, and others—that offers more sophisticated justifications for moral self-restraint in the representation of clients.¹³

The legal profession never fully embraced either conception of the advocate's role, however, and its approach to the regulation of advocacy refutes aspects of both. On one hand, contrary to Brougham's conception, professional rules of conduct place substantial limits on the lengths to which lawyers may go to achieve their clients' objectives and recognize specific areas in which lawyers may act on conscience. On the other hand, contrary to Hoffman, the rules substantially limit the areas in which personal conscience is given rein and, in many situations, dictate how advocates must represent clients. The tendency, therefore, is to view professional regulation as lacking any clear theoretical underpinning and, rather, as simply reflecting a compromise between the two competing conceptions.

This Article argues to the contrary. It posits that, since the early twentieth century, professional regulation has reflected a coherent conception of advocacy ethics that finds its origin in the observations of neither Brougham nor Hoffman. Rather, we contend, the modern understanding is primarily indebted to a noted chief justice of the Pennsylvania Supreme Court, John Bannister Gibson, an intellectual giant of American judicial history¹⁴ whose forays into constitutional,¹⁵ matrimonial,¹⁶ and

13 See generally LUBAN, *supra* note 4; WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS* (1998). See also Heidi Li Feldman, *Codes and Virtues: Can Good Lawyers Be Good Ethical Deliberators?*, 69 S. CAL. L. REV. 885, 885, 887–89 (1996) (arguing that “any black letter statutory codification regulating lawyers’ conduct will be flawed as an instrument of ethics for lawyers” and setting forth a fluid approach based on “virtue ethics” analysis); David Luban, *Legal Ideals and Moral Obligations: A Comment on Simon*, 38 WM. & MARY L. REV. 255, 260–67 (1996) (distinguishing Simon’s and Luban’s approaches); Gerald J. Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. REV. 63, 82 (1980) (arguing for “a broader scope for engaged moral judgment in day-to-day professional activities while encouraging a keener sense of personal responsibility for the consequences of these activities”); cf. DEBORAH L. RHODE, *IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION* 67 (2000) (accepting the importance of professional rules but arguing that lawyers “cannot simply rely on some idealized model of adversarial and legislative processes” and that “reference to broader moral principles is necessary”); Maura Strassberg, *Taking Ethics Seriously: Beyond Positivist Jurisprudence in Legal Ethics*, 80 IOWA L. REV. 901, 934 (1995) (“Positing integrity as an ethical virtue requires the positive law of legal ethics to be read as embedded with underlying moral principles.”).

14 See, e.g., MORRIS R. COHEN, *LAW AND THE SOCIAL ORDER: ESSAYS IN LEGAL PHILOSOPHY* 333 (1982) (identifying Gibson as one of five American legal theorists, along with Marshall, Kent, Story, and Wilson, “who may be said to have laid the foundations of the American common law”); LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 381 (2d ed. 1985) (“The great judges—Lemuel Shaw, John Bannister Gibson, John Marshall—were builders of institutions and molders of doctrine; moreover, they had style”); ROSCOE POUND, *THE FORMATIVE ERA OF AMERICAN LAW* 4, 30–31 (1938) (listing John Bannister Gibson as one of the ten greatest judges in American history).

15 See *Eakin v. Raub*, 12 Serg. & Rawle 330, 339 (Pa. 1825) (setting forth the argument against the power of courts to find legislation unconstitutional, at least where the constitutional issue is arguable); see also MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780–1860*, at 65–66 (1977) (characterizing Gibson as “the foremost judicial advocate of the view that just compensation provisions were ‘disabling, not . . . enabling’ clauses”).

16 See Neal R. Feigenson, *Extraterritorial Recognition of Divorce Decrees in the Nineteenth*

contracts¹⁷ law set the standard for future debates on many other core issues.¹⁸

Gibson entered the debate over the advocate's role in 1845. Firmly rejecting Brougham's vision, Gibson declared in *Rush v. Cavanaugh*¹⁹ that "[i]t is a popular, but gross mistake, to suppose that a lawyer owes no fidelity to any one except his client; and that the latter is the keeper of his professional conscience."²⁰ In Justice Gibson's conception, an advocate was required to behave "with all due fidelity to the court as well as the client."²¹

Many assumed that, in rejecting Brougham, Justice Gibson was endorsing Hoffman's conception of personal conscience as the primary limit on advocacy. Proceeding on this understanding, George Sharswood drew on Justice Gibson's conception of the advocate's role in his famed *Essay on Professional Ethics*.²² So did the drafters of the two dominant early codes of professional responsibility—the 1887 Alabama Code of Ethics²³ (the first American professional responsibility code) and the American Bar Association's ("ABA") 1908 Canons of Ethics.²⁴ Perhaps because of this understanding of the case, *Rush v. Cavanaugh* has largely been forgotten in modern times. It is included in none of the legal ethics casebooks²⁵ and has rarely been cited by courts or commentators of the past half century.²⁶

Century, 34 AM. J. LEGAL HIST. 119, 142 n.125 (1990) (discussing Gibson's seminal opinion in *Dorsey v. Dorsey*, 7 Watts 349 (Pa. 1838)).

¹⁷ See Sarah Beth Rem, Note, *Reconstructing Texas' Construction Industry: A Note on Centex Homes v. Buecher*, 22 J.L. & COM. 99, 100–01 (2003) (noting Gibson's contributions to defining the place of "caveat emptor" in contracts law).

¹⁸ See WILLIAM A. PORTER, AN ESSAY ON THE LIFE, CHARACTER AND WRITINGS OF JOHN B. GIBSON, LL.D. 62 (1855) (lauding the "genius" of John Bannister Gibson and citing numerous decisions in which the judge "boldly" established influential doctrines).

¹⁹ *Rush v. Cavanaugh*, 2 Pa. 187, 1845 Pa. LEXIS 306 (1845). Our citations are primarily to the original Pennsylvania reports, but references to the procedural history are only available on LEXIS.

²⁰ *Id.* at 189.

²¹ *Id.*

²² GEORGE SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS 96–97 (5th ed. 1896).

²³ ALA. STATE BAR ASS'N, CODE OF ETHICS (1887) [hereinafter ALABAMA CODE], reprinted in 2 THE ALABAMA LAWYER 245 (Walter B. Jones ed., 1941). For a history of the Alabama Code, see Allison Marston, *Guiding the Profession: The 1887 Code of Ethics of the Alabama State Bar Association*, 49 ALA. L. REV. 471 (1998).

²⁴ CANONS OF PROF'L ETHICS (1908).

²⁵ The earliest law school legal ethics casebook included the *Rush* opinion in a section on the ethical duties of prosecuting lawyers. COSTIGAN, *supra* note 12, at 302–04. Other early casebooks did not include *Rush*. See HERSCHEL WHITFIELD ARANT, CASES AND OTHER MATERIALS ON THE AMERICAN BAR AND ITS ETHICS (1933); ELLIOTT E. CHEATHAM, CASES AND OTHER MATERIALS ON THE LEGAL PROFESSION (1938); FREDERICK C. HICKS, ORGANIZATION AND ETHICS OF THE BENCH AND BAR: CASES AND OTHER MATERIALS (1932).

²⁶ Probably the last legal ethics treatise writer to rely on *Rush* was Henry Drinker. See DRINKER, *supra* note 8. Drinker, perhaps the leading ethicist of his day, quoted from *Rush* and cited it in support of his observation that "[a] lawyer is not bound to give his client a moral lecture. He should advise what the law requires, but should not further any of the client's unjust schemes, and should refuse to become a party to them." *Id.* at 145 & n.32. We have identified only three recent opinions and one recent law review article citing *Rush* for its normative, rather than historical, significance to legal ethics. See *Cyphers v. Fuji Heavy Indus. Co.*, 32 F. Supp. 2d 1199, 1201 (D. Mont. 1998); *In re Malloy*, 248 N.W.2d 43, 45 (N.D. 1976); *Krueger v. Herman*

We argue that *Rush* did not endorse Hoffman's conception of conscientious lawyering but, in fact, offered a separate alternative to Brougham's conception—one in which lawyers' duties of zealous advocacy are limited by duties to the court that are implicit in the lawyer's professional role, capable of being articulated, and, in some cases, judicially enforced. As we read *Rush*, Justice Gibson anticipated core procedural and substantive aspects of modern lawyer regulation, including both the codification of professional limitations on advocacy and the courts' enforcement of limitations on advocacy that are not explicit in the disciplinary rules. Ultimately, Justice Gibson's distinction between professional and personal conscience offers a way to understand features of professional regulation that might otherwise be regarded as anomalous or unjustified. It bridges the gap between seemingly irreconcilable visions of professional regulation.

Part I of this Article briefly describes the *Rush* opinion. Part II addresses three secondary themes in *Rush* that continue to have force in professional regulation. Part III focuses on what we consider its most significant contribution; namely, its endorsement of the idea of "professional conscience," which constitutes an alternative conception of advocacy norms. Finally, Parts IV and V argue that Justice Gibson's conception makes sense of both the subsequent development of professional regulation and the advocacy norms that are expressed in the modern codes and judicial opinions.

I. *Rush v. Cavanaugh*

Rush v. Cavanaugh is a short but complex decision reviewing a slander lawsuit, in which a lawyer sued his former client for calling the lawyer a "cheat."²⁷ The merits hinged on whether the client's allegations were true, an issue that in turn depended on whether the lawyer's conduct was, or was not, consistent with his professional role.²⁸ Consequently, the case gave Justice Gibson an opportunity to take a side in the debate about advocates' responsibilities. The *Rush* opinion offers a series of observations about advocates, their role, and their responsibilities, some of which are ambiguous in their meaning and implications.

Rush arose at a time when clients could hire lawyers to act as private prosecutors in criminal matters. Client Cavanaugh charged Crean with forgery, and attorney Rush undertook to prosecute on Cavanaugh's behalf. Early in the proceedings, however, Rush was persuaded by the testimony of a key witness that "the accusation was false."²⁹ Although his client remained convinced of Crean's guilt and insisted that Rush force Crean to answer the charges, Rush withdrew the charge of forgery.³⁰

Mut. Ins. Co., 139 N.W.2d 592, 594 (Wis. 1966); Robert E. Rodes, Jr., *Legal Ethics for Government Lawyers: Straight Talk for Tough Times*, 9 WIDENER J. PUB. L. 281, 282 n.9 (2000).

²⁷ *Rush v. Cavanaugh*, 2 Pa. 187, 189 (1845).

²⁸ *Id.* For an interesting discussion of the various types of "cheating" by lawyers that might be considered part of the lawyer's role or, alternatively, misconduct, see Jack L. Sammons, "Cheater!": The Central Moral Admonition of *Legal Ethics, Games, Lusory Attitudes, Internal Perspectives, and Justice*, 39 IDAHO L. REV. 273, 273-74 (2003).

²⁹ *Rush*, 2 Pa. at 190.

³⁰ *Id.*

To add insult to injury, Rush insisted that he was entitled to compensation for the services that he had provided.³¹ Cavanaugh called Rush “a thief, robber, and cheat.”³² When Rush filed suit for slander, Cavanaugh renewed these accusations by entering a “plea of justification”—in other words, a claim that his allegations were true.³³ Cavanaugh soon tried to withdraw that plea.³⁴ The trial court, however, exercised its discretion to reject Cavanaugh’s motion and required him to justify his accusations in the slander action.³⁵ The Pennsylvania Supreme Court ultimately held that the trial court’s exercise of discretion was correct, because, “by posting the plaintiff on the very record as a professional cheat, the defendant had given durability to what was originally momentary.”³⁶

The key to the case, therefore, was whether Rush had acted appropriately by dismissing the private prosecution against his client’s wishes and then retaining compensation for the representation. The trial court instructed the jury that if Rush was correct about the falsity of Cavanaugh’s forgery charge against Crean, Rush had discretion to discontinue the prosecution.³⁷ The jury found for Rush, and the Pennsylvania Supreme Court upheld the verdict.³⁸ Although the precise basis for Justice Gibson’s opinion for the supreme court is unclear, as we suggest below,³⁹ one fact is not: the opinion was unwavering in holding that Rush’s conduct was entirely proper.

Justice Gibson’s opinion first considered whether Rush should have obeyed Cavanaugh’s instructions to proceed with the prosecution despite believing in the criminal defendant’s innocence. In repudiating Lord Brougham, Justice Gibson appeared to echo Hoffman’s resolve to be guided

31 *Id.*

32 *Rush v. Cavanaugh*, 1845 Pa. LEXIS 306, at **1 (Pa. 1845).

33 *Id.* at **3.

34 *Id.*

35 *Id.*

36 *Rush*, 2 Pa. at 190.

37 The judge charged the jury as follows:

2d. As to the second point—the withdrawal of the suit before Ald’n Thompson, without the consent of Cavanaugh, A lawyer is sometimes thrown into a delicate predicament. Casuists have disputed how far a lawyer ought to be active in a cause which he may not think just. These questions have been long debated, and will be. Some men are more fastidious than others. The case may be put in a great variety of ways, in which it would be puzzling to decide what a lawyer ought to do. Suppose he is thoroughly convinced in his own mind, from a statement of the circumstances and the testimony of a credible witness, that, if persevered in, the suit will ruin his client, but the client insists on going on. Now what is the duty of the lawyer? There may be numerous circumstances taken into consideration, for the man who says this may not be believed when before the jury. The lawyer takes the peril. It is a question of professional morals rather than of law. No authority has been cited. I should say this: 2d. If Bacon’s statement was true, that [defendant] had in his possession a receipt for the note, then I should think the counsel was justified in advising his client to abandon the prosecution, and, if he refused, to retire. If not true, the reverse. But if his client persisted in proceeding, notwithstanding his advice, it was not the duty of counsel to discontinue the prosecution.

Minutes of *Rush v. Cavanaugh*, Pennsylvania Supreme Court, Eastern District, at Nisi Prius, June Term, 1843 No. 142 (on file at Pennsylvania State Archives).

38 *Id.*

39 See *infra* note 137 and accompanying text.

solely by conscience. The opinion declared: "It is a popular, but gross mistake, to suppose that a lawyer owes no fidelity to any except his client; and that the latter is the keeper of his professional conscience."⁴⁰ Gibson did not endorse Hoffman's conviction that a lawyer's personal moral views dictate his professional obligations, however. Gibson instead suggested that the lawyer's obligations are rooted in the lawyer's professional undertaking:

He is expressly bound by his official oath to behave himself in his office of attorney with all due fidelity to the court as well as the client; and he violates it when he consciously presses for an unjust judgment: much more so when he presses for the conviction of an innocent man.⁴¹

The opinion proceeded: "The high and honourable office of a counsel would be degraded to that of a mercenary, were he compelled to do the bid-dings of his client against the dictates of his conscience."⁴² Gibson concluded that "Mr. Rush [was not] bound to give credence to the instructions of a heated client, rather than to the sober testimony of a dispassionate witness. It is enough that he acted to the best of his judgment on reasonable premises."⁴³

Accordingly, because Rush's "relinquishment of the prosecution [was] defensible, he was entitled to compensation for his services so far as he had gone."⁴⁴ Indeed, in the court's view, "[h]ad he continued to prosecute against the dictates of his conscience, he would have been entitled to nothing."⁴⁵

Having found attorney Rush's professional conduct laudable, Justice Gibson had no patience for Cavanaugh's claim that Rush had cheated him. He sternly held that the trial judge "very properly prevented [Cavanaugh] from eluding the consequences of his misconduct"⁴⁶ by denying Cavanaugh's motion to withdraw his slanderous defense. The judgment for Rush was affirmed.⁴⁷

II. Justice Gibson's Secondary Themes and Their Enduring Significance

Read most narrowly, *Rush* was simply about the obligation of a lawyer exercising prosecutorial power. Attorney Rush was acting in the role of prosecutor, or at least quasi-prosecutor, and this evidently played a key part in Justice Gibson's conclusions.⁴⁸ On this interpretation, *Rush* is an unremark-

⁴⁰ *Rush*, 2 Pa. at 189.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 190.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ Justice Gibson stated, for example, that had Rush "succeeded in having Crean held to answer" at this initial stage of the prosecution, the prosecution would later have been abandoned "at the return of the recognisance," when the formal rules of prosecution would come into play. *Id.* at 189. Justice Gibson had reservations about the use of private prosecutors:

able case. Justice Gibson's view of prosecutors, and their duty to serve justice,⁴⁹ continues today.⁵⁰ Most observers understand that a prosecutor who becomes convinced of a defendant's innocence should no longer pursue the case.⁵¹

But the opinion used sweeping terms that seem more generally applicable. Much of the opinion—including its rejection of the “popular” client-centered view associated with Lord Brougham,⁵² its approbation of Rush's “extremely delicate sense of propriety,”⁵³ and especially its endorsement of the broad principle that advocates may not consciously press for unjust judgments⁵⁴—indicated that Justice Gibson was speaking to all lawyers engaged in advocacy, not just those engaged in criminal prosecutions.

As we discuss later, Gibson's most significant and enduring contribution is encapsulated by the idea of “professional conscience.” But the *Rush* decision reflected three other noteworthy themes: that lawyers are limited even in the lawful objectives they may pursue, that lawyers' personal rights are entitled to weight in the development of professional regulation, and that systemic imperatives are entitled to weight. At first glance, each idea might be viewed as archaic. But, as we show, each finds resonance in contemporary regulation.

As the office of attorney-general is a public trust which involves . . . the exercise of an almost boundless discretion by an officer who stands as impartial as a judge, it might be doubted whether counsel retained by a private prosecutor, can be allowed to perform any part of his duty.

Id. But, accepting that the law recognized the legitimacy of private prosecutors in some cases, *id.*, Gibson noted that a counsel who serves in that capacity, “like the regular deputy, exercises not his own discretion, but that of the attorney-general whose locum tenens at sufferance he is; and he consequently does so under the obligation of the official oath,” *id.* at 189–90—meaning the *prosecutor's* oath. Thus, *Rush* arguably turned on the attorney's specific role as a prosecutor.

⁴⁹ See generally Bruce A. Green, *Why Should Prosecutors “Seek Justice?”*, 26 *FORDHAM URB. L.J.* 607 (1999) (discussing possible sources of prosecutor's duty).

⁵⁰ See generally Bruce A. Green & Fred C. Zacharias, *Prosecutorial Neutrality*, 2004 *Wis. L. REV.* 837 (discussing common conceptions of prosecutors' obligation to act “neutrally”); Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 *VAND. L. REV.* 45 (1991) [hereinafter Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice*] (discussing the meaning of saying that prosecutors have a duty to serve justice); Fred C. Zacharias, *The Role of Prosecutors in Serving Justice After Convictions*, 58 *VAND. L. REV.* 171 (2005) (discussing the obligation of prosecutors to continue serving justice after trial).

⁵¹ See, e.g., Bruce A. Green & Fred C. Zacharias, *Regulating Federal Prosecutors' Ethics*, 55 *VAND. L. REV.* 381, 470 (2002) (“[P]rosecutors typically will avoid intentionally trying to charge or convict innocent defendants . . . because they agree with the impropriety of such conduct and can expect personal retribution if the behavior becomes known.”); George T. Felkenes, *The Prosecutor: A Look at Reality*, 7 *Sw. U. L. REV.* 98, 110 (1975) (noting prosecutors' “major function” of securing “release of the innocent”); H. Richard Uviller, *The Virtuous Prosecutor in Quest of an Ethical Standard: Guidance from the ABA*, 71 *MICH. L. REV.* 1145, 1168 (1973) (discussing prosecutor's obligation “to protect the innocent”).

⁵² *Rush*, 2 Pa. at 189.

⁵³ *Id.* at 190.

⁵⁴ *Id.* at 189.

A. Rush's Secondary Themes

1. Lawyers' Obligations to Pursue Appropriate Goals

The question of whether an advocate must pursue the client's objectives without regard to the justness of the client's cause is, of course, a central question of professional obligation.⁵⁵ The *Rush* court was forced to consider directly whether the lawyer's will or the client's will controls. Cavanaugh "offered to prove the goodness of his own character"⁵⁶ by way of showing that Rush had a duty to defer to the client's judgment. The court could have answered in at least four possible ways: (1) lawyers must obey their clients' orders, even when the lawyers disagree; (2) lawyers need not obey their clients' orders, but must act in a way that is best for their clients; (3) lawyers have discretion to determine when client directions should be subordinated to the societal interests in achieving justice; and (4) lawyers have an independent obligation not to seek unjust verdicts, regardless of the clients' desires or interests.

In rejecting Cavanaugh's defense, the *Rush* court distanced itself from the first approach. It held directly that Rush was not "bound to give credence to the instructions of a heated client, rather than to the sober testimony of a dispassionate witness."⁵⁷ But the opinion contained statements supporting the interpretation that Rush's conduct was appropriate only because it was in the client's best interest: "[Rush] did not only what every honest man would do, but what happened to be the very best thing he could do for his client—he abandoned the prosecution for the avowed reason that it could not be supported."⁵⁸ Presumably, dismissing the prosecution benefited Cavanaugh because the court believed that the prosecution would have been dismissed, in any event, at a later stage.

Still, there is ample language in *Rush* to the effect that attorney Rush's conduct would have been appropriate even if it had undermined the client's interests and objectives. Besides articulating a duty to refrain from pursuing unjust judgments,⁵⁹ the opinion noted pejoratively that "[t]he high and honourable office of a counsel would be degraded to that of a mercenary were he compelled to do the biddings of his client against the dictates of his conscience."⁶⁰ And Justice Gibson was quick to point out that it is a "gross mistake [] to suppose that a lawyer owes no fidelity to any one except his client."⁶¹

If, as the opinion suggested, lawyers have an independent professional obligation—or, at least, discretion—to assess the justness of a client's objectives, the further question is by what professional and factual standards the

⁵⁵ See, e.g., John T. Noonan, Jr., *The Lawyer Who Overidentifies with His Client*, 76 NOTRE DAME L. REV. 827, 828 (2001) ("The lawyer has a specific duty to preserve the confidence of the client, but that duty is subordinate to an equally specific duty not to participate in fraud upon the court. A hierarchy of duties—not a conflict—exists.")

⁵⁶ *Rush*, 2 Pa. at 190.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* at 189.

⁶⁰ *Id.*

⁶¹ *Id.*

lawyer is to assess the client's objectives. In *Rush*, the professional standard was an uncontroversial one, because it stemmed from criminal law and was implicit in the prosecutor's role: seeking to punish an innocent person was "unjust" because that is not a legitimate use of state authority. The opinion, however, left open whether and how the restriction on seeking unjust results might apply in civil litigation. Would it be "unjust" to bring an unfounded civil lawsuit or to interpose a baseless defense? As important, should the justness of the client's objectives be evaluated exclusively under a strictly legal standard, or should lawyers also refrain from pursuing judgments that violate the "spirit of the law" or that are unjust in a moral, wholly nonlegal, sense? And, finally, does the lawyer's obligation to act justly extend to the means by which he seeks to achieve the client's objectives; that is, should a lawyer refrain from "unjust means" to achieve just ends?

Likewise, *Rush* was unclear about how a lawyer is to evaluate the facts relevant to the justness of the client's cause. Attorney Rush evidently concluded that Crean was innocent of the forgery charge based on "the sober testimony of a dispassionate witness."⁶² Justice Gibson's opinion indicated that it was not necessary in hindsight for Rush to have reached a correct, or the only reasonable, conclusion: "It is enough that he acted to the best of his judgment on reasonable premises; for, judging in sincerity, he would not be responsible for the accuracy of his conclusion."⁶³ The opinion thus suggested that lawyers may make independent judgments about witnesses' credibility and need not resolve all factual doubts in the client's favor. At the same time, however, the opinion did not require the lawyer to make an independent assessment of the facts or preclude a lawyer from resolving doubts in the client's favor, as advocates generally are expected to do today.⁶⁴

2. Lawyers' Personal Rights

In contrasting the lawyer's fidelity to a client and the lawyer's fidelity to other interests and the "dictates of his conscience," the *Rush* opinion seemed to highlight personal interests on the part of the lawyer. The opinion acknowledged an attorney's independence and discretion: in characterizing lawyers as "counsel," the court noted that "the origin of the name [i.e., counsel] proves the client to be subordinate to his counsel as his patron."⁶⁵ The court found that "[i]t is enough that [Rush] acted to the best of his judgment on reasonable premises."⁶⁶

In addition to protecting the lawyer's independence, the court's strict ruling on the slander issue suggested that the court recognized a substantial

⁶² *Id.* at 190.

⁶³ *Id.* This is a point on which Justice Gibson's opinion departed from the trial judge's instruction on the law. The trial court charged the jury that if the disinterested witness's statement in defense of Crean was true, then Rush was justified in withdrawing, but "[i]f not, the reverse." See *supra* note 37.

⁶⁴ See, e.g., MODEL CODE OF PROF'L RESPONSIBILITY EC 7-6 (1969) ("In many cases a lawyer may not be certain as to the state of mind of his client, and in those situations he should resolve reasonable doubts in favor of his client.").

⁶⁵ *Rush*, 2 Pa. at 189.

⁶⁶ *Id.* at 190.

right of the lawyer to maintain and protect his own reputation. In modern times, we are used to a public view that lawyers are dishonest and untrustworthy; lawyer jokes are common and rarely are lawyers characterized respectfully in the media. One might have expected both the lower and appellate courts in *Rush* to tell Rush to roll with the punches and, when Cavanaugh offered to withdraw the allegedly slanderous allegations in the plea of justification, to dismiss the case. Instead, the Pennsylvania Supreme Court castigated Cavanaugh for “giving durability” to the slander by filing the accusations in court.⁶⁷ There was, in the motion to withdraw the plea, “no informality here”;⁶⁸ the stain on Rush’s reputation was serious and he had an independent right to redeem it.

3. *Systemic Imperatives*

Two aspects of the decision lie just below the surface. First, in much the same way as the court deemed important Rush’s personal right to maintain his reputation, it seemed to place significant weight on maintaining the image of the profession as a whole. For example, Justice Gibson responded to the “popular” view that lawyers should serve only their clients’ interests and explained why that view is a “gross mistake.”⁶⁹ The opinion spoke of the lawyer’s conduct as a “public trust.”⁷⁰ It was important to Justice Gibson to justify attorney Rush’s conduct and to illustrate that it reflected pure motives⁷¹ and a proper assessment of priorities.⁷²

Second, and related, is that the court took it upon itself to resolve the professional responsibility issues. The jury decided the factual issue of whether Rush was a thief or a cheat. But the court defined what constituted appropriate conduct. Its view, not the “popular” view, controlled. Implicit in the whole *Rush* decision was the notion that identifiable standards for professional conduct exist and that these are to be determined by the judicial branch.

B. *The Tension Between the Early Interpretation of Rush and the Modern Conception of Lawyers’ Responsibilities*

At first glance, the pronouncements in *Rush* just discussed might seem to be at odds with prevalent modern understandings. In offering this observation, we are not positing a “standard conception” of lawyering to which members of today’s bar uniformly adhere. Scholars correctly have questioned the existence of such a “standard conception.”⁷³ At a minimum, pop-

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 189.

⁷⁰ *Id.*

⁷¹ *Id.* at 190 (referring to Rush’s “sincerity”).

⁷² *Id.* (“Had [Rush] continued to prosecute against the dictates of his conscience, he would have been entitled to nothing.”).

⁷³ See, e.g., Ted Schneyer, *Moral Philosophy’s Standard Misconception of Legal Ethics*, 1984 Wis. L. REV. 1529, 1543 (arguing that the “Standard Conception is really only one, and never a completely dominant, strand of thought in a vague and sometimes contradictory field”).

ular visions of appropriate lawyering have fluctuated over time.⁷⁴ Nevertheless, it is fair to say that the bar's general approach to lawyering has become far more partisan and client-centered than the model suggested by *Rush*, in which lawyers owe "all due fidelity," and perhaps equal or greater fidelity, "to the court."⁷⁵

The proposition that lawyers, private or public, should not pursue unjust goals in litigation, for example, is remarkable—at least if one understands "unjust" to mean something different from "unlawful." Modern professional codes posit that clients are entitled to control the objectives of representation.⁷⁶ The codes place issues of potential injury to third parties that might arise from litigation or litigation tactics largely in the client's hands.⁷⁷ Malpractice law, too, suggests that lawyers must obey the direct orders of their clients unless that would involve a lawyer in unlawful activity.⁷⁸ That is not to say that lawyers must accept every case or do everything that a client insists upon.⁷⁹ But the modern bar emphasizes client authority to a far greater degree than the *Rush* court appeared to.⁸⁰ And when the lawyer's view and the client's view conflict, the modern tendency is to limit the lawyer's remedy to withdrawal⁸¹ rather than authorizing the lawyer's unilateral dismissal of the client's cause.

⁷⁴ See Fred C. Zacharias, *Reconciling Professionalism and Client Interests*, 36 WM. & MARY L. REV. 1303, 1314–26 (1995) (discussing the history of changing attitudes regarding the appropriate role of lawyers).

⁷⁵ See, e.g., David Luban, *The Adversary System Excuse*, in THE GOOD LAWYER 83, 83 (David Luban ed., 1983) (describing adversarial lawyering); Fred C. Zacharias, *The Civil-Criminal Distinction in Professional Responsibility*, 7 J. CONTEMP. LEGAL ISSUES 165, 168–69 (1996) (discussing the paradigm of super-aggressive lawyering, particularly in the criminal defense context).

⁷⁶ See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2002) ("Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation . . .").

⁷⁷ See, e.g., *id.* R. 1.2 cmt. (pre-2002 version of the Model Rules) ("[T]he lawyers should defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected.").

⁷⁸ See, e.g., *Jarnagin v. Terry*, 807 S.W.2d 190, 194 (Mo. Ct. App. 1991) (holding that a lawyer must obey a client's instructions "unless prevented by unavoidable accident or unless the instructions require the doing of an immoral or illegal act"); cf. *Olfe v. Gordon*, 286 N.W.2d 573, 577–79 (Wis. 1980) (holding, in a case not involving third-party interests, that a failure to obey a direct client order is malpractice per se); RONALD E. MALLIN & JEFFREY E. SMITH, 2 LEGAL MALPRACTICE 1002–03 & nn.6, 13 (2005 ed.) (citing authorities holding that a lawyer is not liable to a client "for failing to follow . . . instructions to pursue unspecified legal remedies" and that a lawyer may be sanctioned for complying with a client's direction to maintain groundless actions, and generally noting uncertainty regarding which discussions are for the client and which are for the lawyer).

⁷⁹ See *infra* note 95 and accompanying text.

⁸⁰ See, e.g., Fred C. Zacharias, *Limits on Client Autonomy in Legal Ethics Regulation*, 81 B.U. L. REV. 199, 199–200 (2001) (discussing the centrality of autonomy in modern legal ethics regulation, and limits on autonomy included in the modern codes); Fred C. Zacharias, *Waiving Conflicts of Interest*, 108 YALE L.J. 407, 412 (1998) [hereinafter Zacharias, *Waiving Conflicts*] (discussing the role of autonomy in the regulation of conflicts of interest).

⁸¹ See generally MODEL RULES OF PROF'L CONDUCT R. 1.16.

The *Rush* court's apparently generous view of the attorney's interest in maintaining his personal reputation⁸² also seems inconsistent with the modern outlook. In cementing the alliance between lawyers and clients and insisting that lawyers have a fiduciary responsibility to put the clients' interests ahead of their own,⁸³ the modern bar has accepted the notion that lawyers must sublimate their personal desires.⁸⁴ This principle has been made explicit in confidentiality rules, some of which go so far as to state that lawyers must maintain the client's confidences "at every peril to himself or herself."⁸⁵ Standard exceptions to confidentiality that allow lawyers to protect their own reputations often are limited to legal "proceedings" in which lawyers must defend their own conduct.⁸⁶ Likewise, many jurisdictions limit the process by which lawyers can vindicate their interest in obtaining payment for a job well done, but questioned by the client,⁸⁷ on the theory that it is unseemly for a lawyer to contradict or oppose the client publicly.⁸⁸

Finally, Justice Gibson's emphasis on maintaining the popular image of the legal profession also has lost ground in the modern era, though perhaps more slowly than Gibson's other propositions. The 1969 ABA Code of Professional Responsibility underscored the importance of image by encouraging lawyers to "avoid the appearances of impropriety."⁸⁹ Although image considerations may underlie some of the more recent professional rules,⁹⁰ the

⁸² See *Rush v. Cavanaugh*, 2 Pa. 187, 190 (1845); *supra* text accompanying note 67.

⁸³ See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. ("The lawyer's own interests should not be permitted to have an adverse effect on representation of a client."); see also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 16 cmt. b (2000) (discussing lawyers' duty of loyalty arising out of their status as fiduciaries).

⁸⁴ Cf. Daniel Markovits, *Legal Ethics from the Lawyer's Point of View*, 15 YALE J.L. & HUMAN. 209, 220 (2003) (discussing the importance of focusing on "first-personal" ethics principles that justify client-oriented action as being consistent with lawyer integrity).

⁸⁵ CAL. BUS. & PROF. CODE § 6068(e) (West 2004).

⁸⁶ See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(5) (limiting the lawyer's right to disclose client confidences to protect his reputation to situations in which it is "necessary . . . to establish a claim or defense . . . in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer . . . , or to respond to allegations in any proceeding concerning the lawyer's representation"). *But cf.* Az. State Bar Comm. on Rules of Prof'l Conduct, Op. 93-02 (1993) (concluding that a lawyer may respond to allegations of misconduct made by a former client to a book author).

⁸⁷ See, e.g., N.J. R. CT. 1:20A-3 (requiring fee arbitration at the option of the client); ME. BAR R. 9(e)(5)(E) (requiring attorneys to notify clients thirty days prior to initiating lawsuit involving fees that the client has the right to settle the dispute through arbitration).

⁸⁸ See *Anderson v. Elliot*, 555 A.2d 1042, 1049 (Me. 1989) (stating that fee disputes are the principal source of public dissatisfaction with the judicial system and thus mandatory arbitration is necessary to resolve such disagreements quickly and reliably); *Bolte v. Rainville*, 48 A.2d 191, 196 (N.J. 1946) (noting the adverse impression fostered by attorneys involved in contract disputes with clients arising from the perception that attorneys have an inherently dominant position in the relationship); see also *In re LiVolsi*, 428 A.2d 1268, 1279-80 (N.J. 1981) (stating that it is inappropriate for attorneys to force clients to resolve fee disputes in court because clients are disproportionately burdened by the process and such face-offs lead to an overall deterioration of the relationship between the legal community and the public).

⁸⁹ MODEL CODE OF PROF'L RESPONSIBILITY Canon 9 (1969).

⁹⁰ See *infra* text accompanying note 136. Of course, the emphasis on image considerations continues to manifest itself in forms other than the professional rules, including civility codes.

later Model Rules have dispensed with explicit references to the importance of appearances.⁹¹

At least on the surface, therefore, it is fair to say that Justice Gibson's approach to professional ethics would be rejected by the modern bar. As today's lawyers interpret and apply the codes, partisanship and vindicating client objectives are the central imperatives of lawyering. The following Section explores the superficial tension between Justice Gibson's conception and contemporary understandings to suggest that the gap between Justice Gibson's vision and that of the contemporary bar is not as wide as it first seems.

C. *The Significance of Gibson's Themes*

The popular media has often caricatured lawyers as being virtually unrestrained in their promotion of clients' causes, and this caricature has found some academic support.⁹² As Ted Schneyer has described, contemporary professional responsibility scholarship often assumes the existence of a "standard conception" of lawyer ethics⁹³ in which lawyers lack discretion to follow the dictates of their consciences and are required, by the professional codes, to emphasize client autonomy and maximize clients' economic interests.⁹⁴

As Schneyer demonstrates, the standard conception may reflect some lawyers' understanding, but it does not accurately reflect the expectations of the professional ethics codes,⁹⁵ which authorize lawyers to exercise moral re-

⁹¹ Modern courts, too, have placed less emphasis on the appearance of impropriety rationale. See, e.g., *Bd. of Educ. v. Nyquist*, 590 F.2d 1241, 1247 (2d Cir. 1979) ("[W]hen there is no claim that the trial will be tainted, appearance of impropriety is simply too slender a reed on which to rest a disqualification order except in the rarest cases."). See generally Bruce A. Green, *Conflicts of Interest in Legal Representation: Should the Appearance of Impropriety Rule Be Eliminated in New Jersey—or Revived Everywhere Else?*, 28 SETON HALL L. REV. 315, 318–19 (1997) (discussing the declining use of appearance of impropriety standard in addressing conflicts of interest).

⁹² See, e.g., Postema, *supra* note 13, at 73 (positing a single, "standard conception" of the lawyer's role); Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1, 3–6 (1975) (accepting as a premise that lawyers routinely harm third parties in a way that would be immoral if they were not lawyers).

⁹³ Schneyer, *supra* note 73, at 1534; Ted Schneyer, *Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct*, 14 LAW & SOC. INQUIRY 677, 686 (1989) (describing the common conception of lawyering that "requires the lawyer to practice without regard to her own views concerning a lawyer's character or aims").

⁹⁴ See, e.g., FREEDMAN & SMITH, *supra* note 4, at 59 ("Once the lawyer has chosen to . . . represent a client, however, the zealotry of that representation cannot be tempered by the lawyer's moral judgments of the client or of the client's cause."); LUBAN, *supra* note 4, at xix–xx (discussing the "standard conception of the lawyer's role"); SIMON, *supra* note 13, at 7–8 (describing the "Dominant View of legal ethics"); Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613, 616 ("When the client's interest and the professional's interest conflict, the professional is to forgo his interest in favor of the client's."); William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1085 (1988) (describing a model under which "the only ethical duty distinctive to the lawyer's role is loyalty to the client"); cf. Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469, 1477–78 (1966) (arguing that a lawyer may discuss moral issues with clients but ordinarily must bow to the client's will).

⁹⁵ Schneyer, *supra* note 73, at 1553; see also Bruce A. Green, *The Role of Personal Values in Professional Decisionmaking*, 11 GEO. J. LEGAL ETHICS 19, 56 (1997) (arguing that personal

straint. Under the Model Rules, for example, lawyers control the “means” of representation⁹⁶ and “need not press for every advantage.”⁹⁷ As advisors, they are charged with exercising “independent judgment.”⁹⁸ They may not participate in wrongdoing⁹⁹ and have discretion to withdraw when the client asks them to engage in conduct that they consider to be “repugnant.”¹⁰⁰ Provisions of the professional codes, taken as a whole, require lawyers to exercise a measure of “objectivity” in considering client demands and client interests.¹⁰¹

Whether or not the ethics codes *require* lawyers to exercise moral discretion, Schneyer is certainly correct that the codes *allow* lawyers to do so in many aspects of representation. Some modern theorists would argue that, in particular contexts, lawyers should not exercise whatever discretion the codes accord them to act in contravention of a client’s wishes,¹⁰² and some lawyers may be uninterested in bringing their personal moral views to bear insofar as they may do so.¹⁰³ But professional regulations do not entirely rule out the possibility.

The question then becomes, what considerations justify a lawyer’s self-restraint? As we have suggested, Justice Gibson’s opinion identified, among relevant considerations, the lawyer’s personal view of whether the client’s goals are appropriate ones, the lawyer’s personal rights, and systemic imperatives. An initial reaction might be that these considerations are no longer considered important, but that is scarcely true.

values may play a significant, albeit secondary, role in lawyer decision making under the ethics codes); Zacharias, *supra* note 74, at 1349 (“[T]he codes in fact accord lawyers significant choice in selecting tactics, screening arguments, and presenting accurate versions of the facts.”); cf. Samuel J. Levine, *Taking Ethical Discretion Seriously: Ethical Deliberation as Ethical Obligation*, 37 IND. L. REV. 21, 46 (2003) (questioning approaches to legal ethics that posit either an inability of lawyers to exercise discretion or an option not to exercise discretion).

⁹⁶ MODEL RULES OF PROF’L CONDUCT R. 1.2(a) (2002).

⁹⁷ *Id.* R. 1.3 cmt.

⁹⁸ *Id.* R. 2.1.

⁹⁹ See, e.g., *id.* R. 1.2(d) (“A lawyer shall not . . . assist a client[] in conduct that the lawyer knows is criminal or fraudulent.”); MODEL RULES OF PROF’L CONDUCT R. 1.6(b)(2)–(3) (2003 amendment) (allowing lawyers to disclose confidences to prevent or rectify certain crimes and frauds, particularly those in which the lawyer’s services have been used).

¹⁰⁰ MODEL RULES OF PROF’L CONDUCT R. 1.16(b)(4) (2002).

¹⁰¹ Zacharias, *supra* note 74, at 1327–50 (discussing objectivity under the professional codes).

¹⁰² See, e.g., FREEDMAN & SMITH, *supra* note 4, at 58–62 (emphasizing the importance of client autonomy); Pepper, *supra* note 94, at 633 (presenting “a moral justification for the lawyer’s amoral professional role”).

¹⁰³ See Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1, 4 (1988) (noting “a disturbing trend among some corporate lawyers . . . to see themselves as value-neutral technicians”); Luban, *supra* note 75, at 104 (arguing that lawyers “commonly act as though all their functions [are] governed” by the requirements of partisanship); William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 Wts. L. REV. 29, 30 (discussing the lawyer’s “explicit refusal to be bound by personal and social norms which he considers binding on others”); Wasserstrom, *supra* note 92, at 5 (arguing that the lawyer’s role “is to prefer . . . the interests of the client . . . over those of individuals generally”).

1. Pursuing Appropriate Goals

Consider first *Rush's* view that lawyers have an obligation to avoid "consciously press[ing] for an unjust judgment."¹⁰⁴ Stated broadly, this principle finds its way into modern professional responsibility standards as well. Lawyers and commentators may underestimate the degree to which professional regulation affords lawyers discretion and, indeed, expects lawyers to reject unjust causes. Unlike under the British system,¹⁰⁵ the American codes markedly avoid requiring lawyers to accept all nonfrivolous cases. They instruct lawyers "not [to] bring or defend a proceeding, or assert or controvert an issue . . . unless there is a basis in law and fact for doing so,"¹⁰⁶ and this instruction is bolstered by American legislatures and courts through provisions like Federal Rule of Civil Procedure 11.¹⁰⁷ The duty to provide representation is limited to clients who do not have the means to pay.¹⁰⁸ The codes provide broad leeway to lawyers to withdraw from representing clients in causes that the lawyer considers "repugnant or imprudent."¹⁰⁹ The case law suggests that lawyers who withdraw, like the lawyer in *Rush*,¹¹⁰ remain entitled to compensation on a quantum meruit basis for the services they have provided, even if those services did not satisfy the client.¹¹¹

When a lawyer remains in a case, either by choice or because a court has refused to permit withdrawal, the lawyer's obligations to justice remain intact. A lawyer may not assist a client in criminal or fraudulent conduct,¹¹²

¹⁰⁴ *Rush v. Cavanaugh*, 2 Pa. 187, 189 (1845).

¹⁰⁵ See, e.g., Maimon Schwarzschild, *Class, National Character, and the Bar Reforms in Britain: Will There Always Be an England?*, 9 CONN. J. INT'L L. 185, 202 (1994) ("[T]he so-called 'cab-rank' rule . . . requires a barrister to accept any case that is offered, regardless of what the barrister might privately think of the client, the case, or the social desirability of the client's winning the case."); CODE OF CONDUCT FOR THE BAR OF ENGLAND AND WALES § 13.4.1 (1989) (providing that "a barrister is bound to accept any brief," subject to prescribed exceptions); cf. Norman W. Spaulding, *Reinterpreting Professional Identity*, 74 U. COLO. L. REV. 1, 19 (2003) (observing that the Model Rules of Professional Conduct "do not have much to say about a lawyer's selection of clients" and questioningly noting that "[t]he inference typically drawn from this fact is that a lawyer is free to represent clients of her choosing, to accept or reject requested representation at will").

¹⁰⁶ See, e.g., MODEL RULES OF PROF'L CONDUCT R. 3.1 (2002).

¹⁰⁷ FED. R. CIV. P. 11(b) (requiring a lawyer filing a pleading to certify that "it is not being presented for any improper purpose," that "the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law," and that "the allegations and other factual contentions have evidentiary support").

¹⁰⁸ See, e.g., MODEL RULES OF PROF'L CONDUCT R. 6.1 cmt. ("Every lawyer . . . has a responsibility to provide legal services to those unable to pay . . ."); *id.* R. 6.2 ("A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause.").

¹⁰⁹ *Id.* R. 1.16(b)(4).

¹¹⁰ *Rush v. Cavanaugh*, 2 Pa. 187, 190 (1845) (holding that *Rush* was entitled to fees on a quantum meruit basis).

¹¹¹ See, e.g., *Kannewurf v. Johns*, 632 N.E.2d 711, 714 (Ill. App. Ct. 1994) (holding that when an attorney withdraws for a good reason, he or she is entitled to the quantum meruit value of his or her services); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 40 (2000) (stating that where an attorney's discharge or withdrawal is not due to misconduct, he or she may recover the fair value of his or her services).

¹¹² E.g., MODEL RULES OF PROF'L CONDUCT R. 1.2(d).

and he must avoid dishonesty.¹¹³ A lawyer must “exercise independent judgment and render candid advice,” which may include advice referring to “moral” and “social” considerations.¹¹⁴ The question therefore is not whether modern standards allow lawyers to honor what Justice Gibson characterized as the “dictates of [their] conscience”¹¹⁵—they clearly do—but what the lawyer’s obligation is when he has tried unsuccessfully to persuade a client of the correct course.

With respect to this, there is ambiguity even in what Justice Gibson expected. Arguably, his view of the appropriate response was colored by whether the lawyer’s proposed conduct ultimately served the client’s interest (whether the client believed that, or not).¹¹⁶ Interestingly, the modern codes of professional responsibility share this precise ambiguity with *Rush*.

At one level, lawyers are told that they are the experts in litigation and therefore control the means of the representation¹¹⁷ and need not “press for every advantage that might be realized for a client.”¹¹⁸ Yet the client may set the objectives and should be consulted even with respect to the means.¹¹⁹

In cases of disagreement on how to conduct the representation, the Model Rules—in particular, the newest version of the Model Rules—offer no resolution. They instruct lawyers to discuss the disagreement with the client, note that clients normally defer on the means and that lawyers normally defer on the objectives, but then expressly do not “prescribe how . . . disagreements are to be resolved.”¹²⁰ On the objectives, the client seems to have the final say about how the client will proceed, but not so with respect to the means. The Model Rules’ final word on the subject is that, when the lawyer has “a fundamental disagreement with the client, the lawyer may withdraw from the representation.”¹²¹ The Rules nowhere suggest that the lawyer should sublimate the “dictates of his conscience” and follow the course upon which the client insists.

2. Lawyers’ Personal Rights

In at least one sense, modern standards of professional responsibility build upon Justice Gibson’s view of lawyers’ personal rights and emphasize them even more than *Rush*. Gibson seemed to contrast two conflicting obligations—to serve the client and to do what conscience requires.¹²² By recognizing the lawyer’s interest in following his conscience but making discretionary the choices accorded to the lawyer,¹²³ the modern codes expand

¹¹³ *E.g.*, *id.* R. 8.4(c).

¹¹⁴ *Id.* R. 2.1.

¹¹⁵ *Rush*, 2 Pa. at 189.

¹¹⁶ *See id.* at 190; *supra* text accompanying note 58.

¹¹⁷ *E.g.*, MODEL RULES OF PROF’L CONDUCT R. 1.2(a); *id.* R. 1.3 cmt.

¹¹⁸ *Id.* R. 1.3 cmt.

¹¹⁹ *Id.* R. 1.2(a).

¹²⁰ *Id.* R. 1.2(a) cmt.

¹²¹ *Id.*

¹²² *See supra* note 37; *infra* text accompanying note 139.

¹²³ For example, in controlling tactics (at least under the pre-2002 Model Rules) or implementing confidentiality exceptions.

his options. The modern lawyer need not always act as ordinary conscience requires. Nor need he follow the client's dictates. Implicit in the grant of discretion is a requirement that the lawyer consider the "justness" of his action, but also that the lawyer take into account the system's interests in serving clients.¹²⁴ The ability to role-differentiate, in many situations, turns the lawyer into the dominant decision maker—both emphasizing the lawyer's "rights" and, in Gibson's terms, subordinating the client "to his counsel as . . . patron."¹²⁵

And we should make no mistake. This modern enhancement of the lawyer's rights is no illusion. The trend clearly is to think of lawyers' discretion as a "right" rather than an element of lawyers' obligations. Most recently, the Restatement of the Law Governing Lawyers suggested, in conflict with some case law, that a lawyer's exercise of discretion granted under the professional standards sometimes should immunize the lawyer from malpractice liability.¹²⁶

The same cannot be said for Justice Gibson's emphasis on the attorney's right to protect his personal reputation. Modern expectations of client orientation in some respects do require lawyers to sublimate their personal interests to the client and are less tolerant of the desire of an attorney like Rush to sue his client to vindicate his honor.¹²⁷ But the possibility of vindication still

¹²⁴ See Zacharias, *supra* note 74, at 1328–30 (discussing what role-differentiation requires). In a recent article, Samuel Levine focuses directly on this difference between deeming rules "discretionary"—which requires lawyers to consider and take seriously various courses of action—and deeming them merely "suggestive" or "optional." Levine, *supra* note 95, at 46–62. Levine proposes a "Deliberative Model" for legal ethics that incorporates, in part, the type of mandatory exercise of discretion that we find implicit in *Rush v. Cavanaugh's* approach to professional conscience. See *supra* text accompanying note 87; *infra* text accompanying note 300.

¹²⁵ *Rush v. Cavanaugh*, 2 Pa. 187, 189 (1845).

¹²⁶ The Restatement's position is complicated. In the attorney-client confidentiality context, sections 66(3) and 67(4) provide that a lawyer cannot be held liable solely for exercising discretion to disclose under the professional rules. Comment h to section 54 holds lawyers immune from suit for action or inaction they reasonably believe is required by the professional rules—presumably including action that is merely allowed by the rules but that the lawyers believe is required by the spirit of the applicable provisions. ACCORD RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 23(2), 50 cmt. e (2000).

¹²⁷ See *supra* text accompanying notes 86–88; see also A. Fred Miller, Attorneys at Law, P.C. v. Purvis, 921 P.2d 610, 618 (Alaska 1996) (rejecting the argument that mandatory fee arbitration violates attorneys' due process rights, on the basis that the benefit provided to attorneys by a litigation and appeals process is outweighed by detriments to clients including injury to the integrity of the attorney-client relationship, the difficulty clients may have in finding an attorney to represent them in the litigation, and the vulnerability of clients forced to litigate against their former attorneys); Bryon D. Brown, Note, *Restoring Faith in the Attorney/Client Relationship: Alaska's Mandatory Fee Arbitration System*, 1998 J. DISP. RESOL. 95, 98–99 (discussing unsuccessful constitutional arguments attorneys have made against mandatory fee arbitration statutes).

exists.¹²⁸ And, arguably, new avenues have developed to protect the reputations of lawyers, like Rush, who are maligned for simply doing their jobs.¹²⁹

3. Systemic Imperatives

The image of the profession was of evident importance to Justice Gibson, Sharswood, and the drafters of the 1908 Canons.¹³⁰ Courts and bar associations continue to emphasize image considerations today.¹³¹ The literature regarding the importance of professionalism has burgeoned in recent years,¹³² as have bar association task forces and reports.¹³³

The trend in attorney regulation has been to de-emphasize the significance of appearances.¹³⁴ What lawyers do, and how their conduct affects clients and third-party interests, has become more important than how their

¹²⁸ See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(5) (2002) (allowing lawyers to disclose confidences when necessary to "respond to allegations in any proceedings concerning the lawyer's representation of the client"); *id.* R. 1.6(b)(2)–(3) (allowing lawyers to sometimes disclose confidences to prevent or rectify client misconduct that has involved the lawyer's services); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 64 ("A lawyer may use or disclose confidential client information when and to the extent the lawyer reasonably believes necessary to defend the lawyer . . . against a charge or threatened charge by any person that the lawyer . . . acted wrongfully in the course of representing a client.").

¹²⁹ Disciplinary complaints, for example, are the clearest way for clients to express their displeasure with attorney performance. But disciplinary proceedings ordinarily are kept confidential in the early stages, precisely to protect lawyers from the stain of unwarranted charges. See 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, 1010 (2002) (discussing the justifications offered for secrecy in disciplinary proceedings and citing authorities for and against secrecy); *id.* 1010 n.170 (citing authorities). Similarly, courts ordinarily require plaintiffs in legal malpractice actions to introduce the testimony of an expert witness who will confirm the lawyer's wrongdoing. See, e.g., *Wastvedt v. Vaaler*, 430 N.W.2d 561, 565–66 (N.D. 1988) (requiring expert testimony to establish the standard of care). This requirement, too, has the effect of protecting lawyers from unjust charges.

¹³⁰ See *supra* note 69 and accompanying text.

¹³¹ See, e.g., *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 625 (1995) (upholding the constitutionality of a restriction on targeted mailings to disaster victims and their families partly on the basis that the restriction legitimately "protect[ed] the flagging reputations of Florida lawyers by preventing them from engaging in" deplorable conduct); *Florida Bar v. Bussey*, 529 So. 2d 1112, 1114 (Fla. 1988) ("[T]his sort of conduct . . . reflects adversely on the practice of law and does irreparable harm to the public image of attorneys in this state."); *In re Elliott*, 694 S.W.2d 262, 266 (Mo. 1985) ("We caution respondent that the appearance of mishandling of causes and funds can destroy the professional image of the lawyer almost as effectively as misdeeds themselves."); see also Charles S. McDowell, *President's Corner*, IN RE, Sept. 2003, <http://www.dsba.org/AssocPubs/InRe/sep03pc.htm> (announcing bar programs designed to counteract lawyers' "concern about the public image of lawyers").

¹³² For a substantial discussion and cataloguing of the literature concerning professionalism, see Zacharias, *supra* note 74, at 1307–14.

¹³³ See, e.g., ABA SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, TEACHING AND LEARNING PROFESSIONALISM: REPORT OF THE PROFESSIONALISM COMMITTEE (1996) (reporting the conclusions of a professionalism study); ABA COMM'N ON PROFESSIONALISM, IN THE SPIRIT OF PUBLIC SERVICE: A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM (1986) (reporting the conclusions of an ABA commission on professionalism); CONFERENCE OF CHIEF JUSTICES, A NATIONAL ACTION PLAN ON LAWYER CONDUCT AND PROFESSIONALISM (1999) (reporting work of a conference of chief justices studying lawyer professionalism).

¹³⁴ See *supra* note 91 and accompanying text.

conduct looks to the public.¹³⁵ Nevertheless, many of the most important professional standards still rest, for their essential justifications, on the importance of a respectable professional image and on the effect of this image in encouraging clients to use and trust lawyers.¹³⁶

That said, would a contemporary attorney conceive of dismissing a client's case against the client's will, as Rush did, because doing so would maintain public respect for lawyers? Perhaps the answer lies in the question. Arguably, popular opinion today would disdain lawyers who acted against their clients' wishes. More to the point, however, professional standards today do vest clients with the right to determine the objectives of representation, including whether to pursue a cause of action at all. The profession's stake in the lawyer's conduct is limited to the lawyer's authority to decline to participate or to withdraw.

III. Professional Conscience

As we have described it thus far, *Rush* is an interesting relic of the past. Disinterring and analyzing the decision helps explain early developments in professional responsibility. *Rush* once again highlights Justice Gibson's foresight. This Article's analysis provides recognition for Justice Gibson's hitherto underestimated role in producing modern professional standards.

But Justice Gibson was an intellectual giant during a formative period in the development of American law. The interpretations of *Rush* that we have offered so far may not do him justice. One can read the opinion as reflecting a more original and profound understanding of professional regulation—one that ultimately gives the opinion greater contemporary significance. This interpretation relies upon the aspect of *Rush v. Cavanaugh* that this Article has not yet examined in detail; namely, Justice Gibson's idea that lawyers' exercise of judgment should be governed by their "professional conscience."

We begin by returning to the *Rush* opinion to underscore the ambiguity as to whether Justice Gibson's reference to "professional conscience" was meant to draw a distinction from Hoffman's conception of advocacy ethics as resting largely on lawyers' individual moral sense.¹³⁷ This ambiguity helps explain why, as the debate over the advocate's role continued into the early twentieth century, the significance of a distinctively *professional* conscience

¹³⁵ See, e.g., *Burrow v. Ne*, Ill. Reg'l Commuter R.R. Corp., No. 00-C 3648, 2002 U.S. Dist. LEXIS 8100, at *19–20 (N.D. Ill. May 6, 2002) (noting that "the ethical rules ha[d] been modified to eliminate Canon nine's 'appearance of impropriety' standard"); *Kansas v. Dimaplas*, 978 P.2d 891, 894 (Kan. 1999) ("In determining attorney disqualification issues, the appearance of impropriety standard is specifically rejected in favor of a 'function approach' concentrating on preserving confidentiality and avoiding positions actually adverse to the client.").

¹³⁶ See Elizabeth D. Whitaker & David S. Coale, *Professional Image and Lawyer Advertising*, 28 TEX. TECH L. REV. 801, 802 (1997) (arguing that restrictions on lawyer advertising may still be imposed, in part, to protect the legal profession's image); Fred C. Zacharias, *Specificity in Professional Codes: Theory, Practice, and the Paradigm of Prosecutorial Ethics*, 69 NOTRE DAME L. REV. 223, 233–34, 267–68 (1993) (noting that, often, "prohibitive language in the codes serves primarily as a public relations device"). The pertinent provisions range from specific rules prohibiting potential conflicts of interest—such as engaging in sex with clients or accepting certain gifts from clients—to core attorney-client confidentiality rules that seek to foster client trust.

¹³⁷ See *supra* note 37; *infra* text accompanying notes 139–40.

was largely (though not entirely) overlooked.¹³⁸ Then, by analyzing *Rush* closely in light of the regulatory context in which it was written, we demonstrate that Justice Gibson in fact meant to accord professional conscience a distinctive role—a role that underlies the development of several core features of professional regulation.

A. Distinguishing Forms of “Conscience”

Justice Gibson’s opinion referred alternately to the lawyer’s “conscience” and the lawyer’s “professional conscience.” On the surface, it is unclear whether Gibson viewed these as different. The role he ascribed to conscience in the practice of law, however characterized, also seems undefined.

One ordinarily thinks of conscience—meaning *personal* conscience—as reflecting individual, subjective ethical perspectives. If this is the sense in which Justice Gibson was referring to conscience, lawyers would take varying positions on what conscience requires in particular situations. For this reason, lawyer decisions to act on this form of conscience typically are also viewed as being part of a discretionary process; in some (but perhaps not all) situations, a lawyer may act on conscience, but a lawyer is not required to do so.

Justice Gibson’s opinion, however, contained language at odds with both of these understandings. Gibson stated that “[h]ad Rush continued to prosecute against the dictates of his conscience, he would be entitled to nothing,” which is to say that Rush was professionally obligated—not simply entitled—to abandon the prosecution. At least on the question of whether to prosecute an innocent person, this professional requirement of conscience apparently dictated only one course of conduct, and the adoption of the conscientious course was compulsory. This conclusion effectively rejected the trial court’s instruction that, if Rush knew that Crean was innocent but Cavanaugh rejected Rush’s advice to abandon the prosecution, Rush could discontinue the prosecution yet had no duty to do so.¹³⁹

On this reading, conscience—meaning *professional* conscience—plays a potentially powerful role in the work of a lawyer, while conscience in the personal sense arguably plays a very minor role. Under Justice Gibson’s approach, Rush’s individual sense of morality was not the source of his obligation not to “consciously press[] for an unjust judgment.” The opinion observed that proceeding with the prosecution would have violated not only “the dictates of [the lawyer’s] conscience,” but also, and perhaps more importantly, the lawyer’s “official oath.” If the restriction on seeking wrongful convictions was implicit in the official oath or in the nature of the lawyer’s role as prosecutor, conscience simply dictated that Rush comply with standards of professional conduct set independently and externally (albeit implic-

¹³⁸ Cf. James A. Cohen, *Lawyer Role, Agency Law, and the Characterization “Officer of the Court,”* 48 *BUFF. L. REV.* 349, 366 (2000) (historical argument asserting that “[i]n the American legal system, lawyers have never owed duties to justice inconsistent with responsibilities to clients”).

¹³⁹ See *supra* note 37.

itly). The opinion highlighted the limited role of personal conscience by noting that it would have been wrong for Rush to pursue the apparently false allegations, even if doing so would have been consistent with a conscientious adherence to the popular but mistaken conception ascribed to Lord Brougham. Rush's only legitimate issue of personal conscience was whether to comply with his professional obligation or instead to do "the biddings of his client" in defiance of what the profession demanded.

Stated another way, one can infer that Justice Gibson ascribed a narrow role to personal conscience from his characterization of the particular principle of professional conduct in question as nondiscretionary. Although the opinion noted that lawyers in the prosecutorial role ordinarily exercise "an almost boundless discretion," it made clear that lawyers have no option to prosecute someone they reasonably believe to be innocent. On the narrowest reading of the opinion, Rush may have been required to follow the dictates of conscience only because, in this case, his personal conscience coincided with the commands of his profession.

Nevertheless, overall, it is hard to imagine that Justice Gibson meant to attribute such an insignificant role to the general concept of conscience in the lawyer's professional life, given his invocation of the concept three times in his short opinion.¹⁴⁰ *Rush* seems inconsistent with the idea that the lawyer's personal conscience may or must be given entirely free rein, but it does not foreclose the possibility that personal and professional conscience together set some (albeit limited) standards of conduct. Personal conscience could lead to only one result for Rush because no lawyer in good professional conscience could believe that it is proper to prosecute an innocent person. On other questions, however, lawyers of good professional conscience could conceivably have different views of how to conduct themselves, and might have authority to act on their personal ethics.

Insofar as the opinion implied that a lawyer's conscience may independently set standards of professional self-restraint, it becomes important to know what the opinion meant by "conscience." Arguably, at least, *Rush v. Cavanaugh* drew a distinction between an attorney's rights and obligations in exercising his professional conscience and his rights and obligations in exercising his personal conscience. In connection with each interpretation of *Rush* discussed above, Justice Gibson's opinion in some fashion referred to the lawyer's role. The opinion's central passage objected to the contention that the client is the "keeper of [the lawyer's] professional conscience,"¹⁴¹ which echoed the reference in the trial court's jury instruction to "professional morals rather than law."¹⁴² Later in the opinion, Justice Gibson emphasized that the lawyer's "official oath" binds him to behave "with all due fidelity to the court"¹⁴³ and that the lawyer violates his "office of attorney"¹⁴⁴

¹⁴⁰ The opinion stated: the client is not "the keeper of [the lawyer's] professional conscience"; the lawyer is not "compelled to do the biddings of his client against the dictates of his conscience"; and Rush was forbidden from prosecuting "against the dictates of his conscience." *Rush v. Cavanaugh*, 2 Pa. 187, 189–190 (1845).

¹⁴¹ *Id.* at 189 (emphasis added).

¹⁴² See *supra* note 37.

¹⁴³ *Rush*, 2 Pa. at 189.

when he presses for an unjust conviction. In discussing Rush's prosecutorial obligations, the opinion equated Rush's obligations to that of "the regular deputy"¹⁴⁵ who exercises the discretion "of the attorney-general . . . under the obligation of the official oath."¹⁴⁶ And, when alluding to lawyers' general discretion, the opinion again referred to "the high and honorable office of counsel";¹⁴⁷ it described the lawyer's obligations as protecting the "public trust."¹⁴⁸ These references suggest that the "conscience" to which Justice Gibson referred is something different from the individualistic conscience to which Hoffman referred. Whereas Hoffman suggested that personal morality dictates professional obligations, *Rush* hinted at a unique professional morality that stems from the lawyer's distinctive role.

To the extent that Justice Gibson viewed "professional conscience" as distinct from personal conscience and regarded it as a source of enforceable professional mandates, the opinion takes on a very different cast. As we will argue, Justice Gibson in fact had a more nuanced and prescient understanding of the advocate's role than later readers of *Rush* gave him credit for.

B. Early Interpretations of *Rush* and Its Influence

Rush v. Cavanaugh was Justice Gibson's second decision addressing attorney ethics. The first opinion, *In re Austin*,¹⁴⁹ affirmed judicial authority to disbar an attorney for conduct in violation of his oath as an attorney, while also recognizing the bounds of that authority.¹⁵⁰ Some early com-

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 190.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 189.

¹⁴⁸ *Id.*

¹⁴⁹ *In re Austin*, 5 Rawle 191, 1835 Pa. LEXIS 31 (Pa. 1835).

¹⁵⁰ *Austin* arose out of a series of written exchanges between Judge Baird, a judge of the Court of Common Pleas of Fayette County, and the lawyers of that county. Evidently believing that the lawyers were conducting proceedings in a hostile and undignified manner, and holding the lawyers at least indirectly responsible for his being assaulted outside court by a disgruntled litigant, Judge Baird wrote a private letter to the ten members of the county bar requesting their courtesy and respect. The lawyers responded with a letter indicating that they shared the judge's regret about the loss of public confidence in the bar and court, and suggesting that matters might be improved if the judge retired. Somehow, the correspondence was made public and was published. Another round of correspondence followed, after which Judge Baird, in an opinion for the Court of Pleas, ordered eight of the lawyers disbarred based on the content of their correspondence. *Austin*, 1835 Pa. LEXIS 31 at **1-27.

In an opinion for the Pennsylvania Supreme Court, Justice Gibson reversed the order of disbarment. Considering first the scope of courts' authority to remove attorneys, Justice Gibson recognized that attorneys cannot be subject to removal simply at the court's pleasure, because "that would leave them too small a share of the independence necessary to the duties they are called to perform to their clients and to the public." *Austin*, 5 Rawle at 203. But "[o]n the other hand, to declare them irresponsible to any power but public opinion and their consciences, would be incompatible with free government." *Id.* Justice Gibson concluded that for the public protection, courts have authority to remove attorneys from their office for unfitness—an authority different from that of the court to punish an attorney for contempt—and that "any breach of the official oath is a valid cause" for an attorney's removal. *Id.* at 203-04. Further, although attorneys owe respect to the judge's office but not to the judge personally, "professional fidelity" to the court "may be violated by acts, which fall without the line of professional functions, and which may have been performed out of the pale of the court," as would be true if an attorney

mentary refers to *Austin*,¹⁵¹ but *Rush* was the more influential of the two opinions.

Early readers of *Rush* assumed that the opinion's multiple references to the lawyer's conscience represented not only a rejection of Lord Brougham's argument for untempered advocacy on the client's behalf, but also an endorsement of Hoffman's view that lawyers had discretion to act on considerations of personal morality.

James Altman and Russell Pearce have documented *Rush*'s influence on the earliest ethics codes adopted in the United States.¹⁵² Professional codes, of course, do not ordinarily cite cases. But the drafters of both the 1887 Alabama Code of Ethics and the ABA's 1908 Canons of Ethics were well aware of George Sharswood's *Essay on Professional Ethics*,¹⁵³ which did cite and rely on *Rush*.¹⁵⁴ Indeed, on the recommendation of the committee that drafted the 1908 Canons, Sharswood's essay was reprinted and circulated to all ABA members before they deliberated and voted.¹⁵⁵

Justice Gibson's opinion was evidently read as an endorsement of the view that a lawyer's advocacy on the client's behalf was tempered by the lawyer's "independent moral judgment"¹⁵⁶—in other words, that lawyers had discretion, in some aspects of their professional work, to act in accordance with their personal moral beliefs and contrary to their clients' interests and objectives. The opinion, so understood, influenced Sharswood heavily. The relevant language in the *Rush* opinion was quoted in Sharswood's essay.¹⁵⁷ As *Rush* itself noted, there was a contemporary debate regarding lawyers' purported responsibility to act as if client interests were all that mattered.¹⁵⁸ Sharswood became a major participant. The 1887 Alabama Code cited Sharswood and incorporated language that seemingly echoed Justice Gibson's.¹⁵⁹ The 1908 Canons built on the 1887 Alabama Code's vision

physically assaulted or insulted "a judge in the street for a judgment in court," as well as if an attorney attempted to intimidate the judge through the use of the press. *Id.* at 204–05. Justice Gibson, however, ultimately found the attorneys' correspondence to be "bland and respectful," and regarded nothing in it as a breach of professional fidelity. *Id.* at 207–08.

¹⁵¹ See, e.g., SHARSWOOD, *supra* note 22, at 58, 62.

¹⁵² See James M. Altman, *Considering the A.B.A.'s 1908 Canons of Ethics*, 71 *FORDHAM L. REV.* 2395, 2424 n.182 (2003) ("[T]he second sentence of Canon 18 . . . is identical to Section 27 [T]hat Code section bears an even greater resemblance to Chief Justice Gibson's opinion in *Rush v. Cavanaugh* . . ."); *id.* at 2444–45 (tracing the influence of *Rush*); Russell G. Pearce, *Rediscovering the Republican Origins of the Legal Ethics Codes*, 6 *GEO. J. LEGAL ETHICS* 241, 257–58, 263 (1992) (discussing *Rush*'s influence on Sharswood).

¹⁵³ SHARSWOOD, *supra* note 22.

¹⁵⁴ Altman, *supra* note 152, at 2429 n.217, 2444.

¹⁵⁵ *Id.* at 2426.

¹⁵⁶ Pearce, *supra* note 152, at 263.

¹⁵⁷ SHARSWOOD, *supra* note 22, at 96–97. Similar language was soon incorporated into section 511 of New York's Field Code of Civil Procedure. Altman, *supra* note 152, at 2445.

¹⁵⁸ *Rush* refers to this as a "popular" mistake. *Rush v. Cavanaugh*, 2 Pa. 187, 189 (1845); see also Altman, *supra* note 152, at 2446–47 (discussing the debate).

¹⁵⁹ Section 10 of the Code, while acknowledging a duty of zealous representation, adopts limits: "The attorney's office does not destroy the man's accountability to the Creator, or loosen the duty of obedience to law, and the obligation to his neighbor; and it does not permit, much less demand, violation of law, or any manner of fraud or chicanery, for the client's sake." ALABAMA CODE, *supra* note 23, at 263. Section 27 echoes *Rush*'s emphasis even more: "An attorney

of the lawyer's moral independence,¹⁶⁰ although cabining the lawyer's authority to rely on conscience much as the later ethics codes would do.¹⁶¹

As early 20th century commentators continued the debate over the advocate's role in which Lord Brougham and David Hoffman had staked opposing positions, most either overlooked Justice Gibson's opinion or continued to identify it with Hoffman's conception. Commentators largely disregarded the possibility of a third approach marked by the distinctive concept of professional conscience.

is under no obligation to minister to . . . prejudices of his client in the trial or conduct of a cause. The client can not be made the keeper of the attorney's conscience in professional matters." *Id.* at 269. Most emphatic is section 30: "No client has a right to demand that his attorney . . . should do anything . . . repugnant to his own sense of honor and propriety." *Id.* at 270.

¹⁶⁰ James Altman's meticulous analysis concludes that nine of the Canons enlarged the moral autonomy of lawyers beyond that recognized in the 1887 Alabama Code. Altman, *supra* note 152, at 2441; *cf.* ALABAMA CODE, *supra* note 23, at 259 (preamble) ("The purity and efficiency of judicial administration, which, under our system, is largely government itself, depend as much upon the character, conduct, and demeanor of attorneys in this great trust, as upon the fidelity and learning of courts, or the honesty and intelligence of juries."). For example, Canon 15 states that a lawyer "must obey his own conscience and not that of his client." CANONS OF PROF'L ETHICS CANON 15 (1908). In language reminiscent of *Rush*, Canon 15 suggests that part of the reason for expecting the independent exercise of moral discretion is that overly partisan lawyering provokes "popular prejudice against lawyers as a class" and undermines "public esteem." *Id.*

¹⁶¹ The Canons talk explicitly about conscience and the modern codes do not. But the Canons do not give the notion of conscience free play. Canon 15, for example, refers to conscience, but only in the context of saying that a lawyer may not engage in fraud even when requested to do so by the client. CANONS OF PROF'L ETHICS CANON 15 ("The office of attorney does not permit, much less does it demand of him for any client, violation of law or any manner of fraud or chicanery. He must obey his own conscience and not that of his client."). The Model Rules of Professional Conduct are to like effect. *See* MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (2002) ("A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent . . .").

So too, the Canons' injunction that the lawyer not "do anything . . . repugnant to his own sense of honor and propriety" is restricted, applying only "[a]s to incidental matters" not affecting the merits or prejudicing the client. CANONS OF PROF'L ETHICS CANON 24. The implication of Canon 24 is that a lawyer may not prejudice the client simply because of his own moral sensibilities—although, as other Canons make clear, he sometimes may or must do so out of fidelity to the court (e.g., lawyers may not lie or use false testimony). The ABA Code is similar. *See* MODEL CODE OF PROF'L RESPONSIBILITY DR 7-101(A)(1) (1969) (recognizing that a lawyer does not violate the duty to seek the client's lawful objectives "by acceding to reasonable requests of opposing counsel which do not prejudice the rights of his client, . . . by avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in the legal process").

Likewise, Canon 31 allows for the right to decline employment and holds lawyers responsible for bringing questionable suits or urging questionable defenses, and Canon 32 requires lawyers to advise the client based on moral law and conscientious belief about the just meaning of the law. Although the modern codes may set the threshold lower, they recognize the same obligations of lawyers to play a gatekeeping role and the same authority to advise clients based on nonlegal considerations. *Compare* MODEL RULES OF PROF'L CONDUCT R. 3.1 ("A lawyer shall not bring or defend a proceeding . . . unless there is a basis in law and fact for doing so that is not frivolous."), *with id.* R. 2.1 ("[A] lawyer shall . . . render candid advice . . . [and] may refer not only to law but to other considerations such as moral, economic, social and political factors."). *See generally* Fred C. Zacharias, *Lawyers as Gatekeepers*, 41 SAN DIEGO L. REV. 1387 (2004) (discussing the continued gatekeeping role of lawyers).

Some of the commentary, anticipating the modern emphasis on the “law” of lawyering,¹⁶² simply had nothing to say about an advocate’s possible discretion or obligation to act on conscience.¹⁶³ Others discounted the idea. For example, one treatise writer, George Warvelle, adopted a tone distinct from Justice Gibson’s and consistent with Brougham’s.¹⁶⁴ Warvelle explicitly rejected lawyers’ role as “moralists” and, with it, the notion that lawyers need to judge the client’s objectives and refrain from pursuing those deemed to be unfair.¹⁶⁵ Another commentator, Harvard Professor Emory Washburn, took the view that once an advocate accepts a client, the advocate should do everything legally permissible on the client’s behalf, regardless of the doubtfulness of the client’s cause.¹⁶⁶

At the other end of the spectrum, commentators ascribed a significant role to personal conscience. Gleason M. Archer, the Dean of Suffolk School of Law, authored a 1910 ethics treatise¹⁶⁷ that firmly rejected Brougham’s proposition while strongly endorsing the lawyer’s public responsibilities¹⁶⁸ and the role of the lawyer’s conscience.¹⁶⁹ In part, this meant that an advo-

162 The conceptualization of the professional regulation of lawyers as forming part of a larger “law governing lawyers” is a relatively modern phenomenon. Geoffrey Hazard first noted the increasing legalization of professional regulation in Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 *YALE L.J.* 1239, 1249–60 (1991). As Director, Hazard presided over the American Law Institute’s production of a restatement focusing directly on the subject of the law governing lawyers. See *RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS* (2000). Chuck Wolfram, the Chief Reporter for the Restatement, has written numerous works furthering this conceptualization. See, e.g., Charles W. Wolfram, *Bismarck’s Sausages and the ALI’s Restatements*, 26 *HOFSTRA L. REV.* 817, 819 (1998) (describing the conceptual approach of the Restatement); Charles W. Wolfram, *Legal Ethics and the Restatement Process—The Sometimes-Uncomfortable Fit*, 46 *OKLA. L. REV.* 13, 14–18 (1993) (same).

163 See, e.g., EDWARD P. WEEKS, *A TREATISE ON ATTORNEYS AND COUNSELLORS AT LAW* (1878). Weeks’s only reference to *Rush* was in support of the proposition that “[t]o call an attorney a cheat is actionable.” *Id.* at 247 n.4.

164 GEORGE W. WARVELLE, *ESSAYS IN LEGAL ETHICS* (2d ed. 1920).

165 *Id.* at 155–58 (“If the client desires to know what course the law requires under particular circumstances, it is the duty of the legal advisor to explain it. But here his duty ends. He is under no obligation to further the unjust schemes of the client, and should refuse to become a party to them. It has been urged that the attorney, on such occasions, should take advantage of the opportunity to deliver to the client a moral lecture. The attorney should do nothing of the kind. He was consulted as a lawyer, not a moralist.”).

166 EMORY WASHBURN, *LECTURES ON THE STUDY AND PRACTICE OF THE LAW* 125 (Fred V. Rothman & Co. 1982) (1871) (“[I]f a lawyer is applied to, to undertake a suit which he does not know to be wrong, and he sees fit to engage in it, he has no right to withhold from his client any of the rights, privileges, or immunities which the law has provided for him. Nor is he called to act the part of the judge beforehand, and settle points of doubtful propriety, beyond the rules which the law itself has prescribed. All he has to do is to use fairly and honorably such means as the law puts into his hands in establishing and sustaining the claims of his client.”).

167 ARCHER, *supra* note 12.

168 *Id.* at 103–04 (“It has been said by lawyers, even by some who have obtained eminence at the bar, that one’s duty to a client supercedes all other obligations that might conflict with it, even that of one’s duty to the State and Nation. But it is recognized nowadays that such an attitude results from a fantastic and distorted idea of duty, or from a guilty desire to excuse criminal conduct in behalf of a client.”).

169 *Id.* at 207 (“Every lawyer is the keeper of his own conscience and any practice of the profession that conflicts with his ideas of right and wrong, even though it be sanctioned by custom, should be avoided.”); *id.* at 102–03 (“Once engaged in behalf of a client, the lawyer is under

cate must comply not only with the law but also with “the spirit of the law”¹⁷⁰ and “unwritten ethical obligation[s].”¹⁷¹ But it also meant that an advocate should be true to his “own ethical ideal[s]”;¹⁷² that an advocate should avoid promoting results that are “unfair” or “unjust” not only in a legal sense¹⁷³ but in a moral sense,¹⁷⁴ and that an advocate should avoid promoting the client’s cause through unfair means.¹⁷⁵ Although Archer recognized some limits—e.g., the lawyer may not withdraw over a matter of mere conscience where the client will be harmed¹⁷⁶—his view was that conscience, unwritten obligation, and the demands of professional reputation placed considerable restraint on what a lawyer may or should do on behalf of the client.

Archer’s understanding of the expansive role of *personal* conscience was shared by Henry W. Williams, an Associate Justice of the Pennsylvania Supreme Court whose writings on the legal profession were published posthumously in 1906.¹⁷⁷ Williams cited various opinions, including *Rush*, to make the general point that obligations to the client are counterbalanced by both

a duty of unswerving loyalty to the client *so long as he proves himself worthy of loyalty.*” (emphasis added)); see also HENRY WYNANS JESSUP, *THE PROFESSIONAL IDEALS OF THE LAWYER* 25 (Fred B. Rothman & Co. 1986) (1925) (observing that “Lord Brougham’s ‘heresy’ has been repudiated” and stating that “[s]o far as it can be performed within the bounds of the law and involves no violation of his conscience [the lawyer’s duty to the client] is superior to any of his other professional duties”).

170 ARCHER, *supra* note 12, at 196 (“It is a dishonorable act to assist a client to secretly violate existing law. It is scarcely less dishonorable to assist him to circumvent the spirit of the law while obeying it to the letter. Many wise and just laws have been rendered nugatory by some crafty lawyer finding a way whereby a wealthy client might still carry on, with impunity, the very business that the statute was aimed to remedy. Such things cast the profession of law into disrepute and foster a public distrust of all laws and judicial institutions.”).

171 *Id.* at 104–05 (“[I]t remains a fixed duty of the lawyer, in choosing ways and means of conducting the client’s case, to conscientiously refrain from violating any law, or outraging any unwritten ethical obligation to the public.”).

172 *Id.* at 105–06 (The lawyer should refrain not only from any illegal act but also from any act that “merely offends his ethical ideals without descending to the plane of ethical duties. . . . The lawyer is the keeper of his own conscience and if any of the client’s biddings offend his conscientious ideals, he is not under a duty to obey.”).

173 Archer writes that the lawyer “must not be blinded by partisanship for his client, but should exercise a conscientious regard for the rights of others, to the end that he may be an instrument of justice and not a worker of injustice.” *Id.* at 140.

174 *Id.* at 186 (stating that, when a client seeks to invoke the statute of limitations as a defense to repaying a just debt, “if, after a careful and conscientious survey of the case, the lawyer feels that his client is not justified in invoking the remedy sought, he should endeavor to persuade him to adopt the upright and manly course of discharging his moral obligations with the same fidelity that he would discharge his legal obligations”).

175 *Id.* at 140 (stating that a lawyer “should not resort to trickery to obtain” knowledge of the adversary’s evidence); *id.* at 143 (“[The lawyer] is under an ethical obligation to refrain from unjustly disparaging an adversary for mere effect.”); *id.* at 162–63 (“[Lawyers should not exploit] apparently trivial technicalities [to] defeat the ends of justice Many lawyers of the present day disdain to take advantage of a mere formal defect in an opponent’s pleading, unless the opponent is clearly seeking an unjust end and the means of opposing him are doubtful or inadequate. In other words, their aim is to see that justice is done and, unless it will further the ends of justice to take advantage of the technicality, they ignore it entirely.”).

176 See *id.* at 106.

177 HENRY W. WILLIAMS, *LEGAL ETHICS AND SUGGESTIONS FOR YOUNG COUNSEL* (1906).

duties to the court and personal morality.¹⁷⁸ He quoted from *Rush* specifically to support the idea that the lawyer owes duties to the court¹⁷⁹ that are reflected in the lawyer's oath.¹⁸⁰ He did not, however, distinguish professional from personal conscience. Rather, he saw professional ethics as simply a special application of personal ethics.¹⁸¹ Williams therefore stressed the lawyer's obligation of obedience to personal conscience.¹⁸²

One of the few exceptions is a volume by John R. Dos Passos.¹⁸³ Dos Passos, too, rejected and refuted Brougham, while bemoaning that "the great name of Lord Brougham is still used[] to sustain many ridiculous and false positions of advocates."¹⁸⁴ He agreed that lawyers should not pursue "unjust and unfounded claims" and even took Sharswood to task for not making this point clearly enough.¹⁸⁵ And he identified the role of "enlightened conscience."¹⁸⁶ But for Dos Passos, conscience evidently was the product of professional socialization—"training and education"—not the lawyer's "innate" sense or intuition.¹⁸⁷ Dos Passos's implication arguably was that the relevant conscience is *professional* conscience, not personal conscience.¹⁸⁸

178 *Id.* at 211 ("[P]rofessional ethics has been uniformly understood by those best qualified to speak upon the subject, as requiring the strictest fidelity to the court and the strictest personal and professional integrity. No countenance is given to the idea that the interests of a client or the stress of a trial can absolve a lawyer for one moment from his obligations to the court or his duty as a man.").

179 *Id.* at 210 ("The idea that a lawyer may disregard his duty to the Court in the interest of his client is stripped of all disguise by the late Chief Justice Gibson in his vigorous style in *Rush* vs. Cavanaugh, already cited." (quotation from *Rush* omitted)).

180 *Id.* at 206.

181 *Id.* at 202 ("'Professional ethics' is not a distinct system of morality, but it is the application of the accepted standards of right and wrong to the conduct of men in the business relations peculiar to their professional employment."); *id.* at 203 ("There is no difference between personal and professional ethics. The lawyer who overlooks this important truth and assumes the existence of one code of morals for the man and another and less exacting one for the practitioner will sooner or later find that his lower code has . . . no distinct boundary between the permitted and the forbidden . . .").

182 *Id.* at 61 ("Your clients have a right to your learning, your ability as an advocate and your skill and experience as a practitioner. They contract for these when they employ you, but they have no right to your conscience. That is your own, and you should keep it, as much as in you lies, inviolate. Your duty to your client does not require you to do that which is not honest or that which will violate your sense of right.").

183 DOS PASSOS, *supra* note 3. Dos Passos was a prominent commercial lawyer and the father of the novelist of the same name.

184 *Id.* at 134, 141–42.

185 *Id.* at 144–45.

186 *Id.* at 135.

187 *Id.* at 162.

188 See also EDWARD M. THORNTON, A TREATISE ON ATTORNEYS AT LAW 81 n.13 (1914) ("An attorney expressly bound by his official oath to behave himself with all due fidelity, to the court as well as the client, violates it when he consciously presses for an unjust judgment; for it is a popular but gross mistake to suppose that a lawyer owes no fidelity to anyone except his client, and that the latter is the keeper of his professional conscience." (citing *Rush*)). Thornton cites *Rush* for various other propositions, including the public or private prosecutor's duty to refrain from prosecuting an innocent defendant, *id.* at 81, 951, 1120, and the advocate's duty to refrain from proceeding on false testimony, *id.* at 244 n.2.

C. *Support for the Distinction Between Professional and Personal Conscience*

As we have discussed, one can understand Justice Gibson's observation that it is a "gross mistake" to suppose that the client "is the keeper of [the lawyer's] conscience"¹⁸⁹ in more than one way. It clearly rejects Lord Brougham's claim that lawyers should do everything lawful to promote their clients' interests and objectives without regard to the fairness of what the client seeks to accomplish or the means by which the clients' interests and objectives are pursued. But what *Rush* proposed as an alternative is far from clear.

We have also already noted that the 1887 Alabama Code treated Gibson's principle as a general endorsement of moral conduct: "The client can not be made the keeper of the attorney's conscience in professional matters."¹⁹⁰ Some modern commentators would favor this interpretation as well, because it leaves room for values that are extrinsic to the professional norms, including lawyers' political, social, philosophical, and religious values.¹⁹¹ This understanding of Justice Gibson's position cannot be wholly discounted.

Nonetheless, we have offered the alternative interpretation that, while Justice Gibson explicitly rejected Lord Brougham's extreme conception of zealous advocacy, he also implicitly rejected Hoffman's extreme conception of conscientious lawyering. And we have suggested that Gibson's opinion staked out a wholly different position on appropriate advocacy—one that placed "professional conscience" at the fore. The reasons for preferring this interpretation are based in part on a close analysis of the *Rush* opinion and in part based on our understanding of the context in which the opinion was written—in particular the state of the professional norms and of prevalent professional practice in 1845, when Justice Gibson was writing.

1. *Gibson's Patent Skepticism Regarding Purely Personal Conscience*

From the outset, there is good reason to question Sharswood's and later commentators' reading of *Rush* as endorsing personal conscience as the touchstone of advocacy ethics. For one, that reading is breathtaking in its scope. By its strict holding, *Rush* upheld the lawyer's decision to dismiss a case over his client's objection. Could Justice Gibson really have meant to authorize lawyers to overrule their clients based on *any* personal notion of "justice," however idiosyncratic?¹⁹² And does this authority to exercise per-

¹⁸⁹ *Rush v. Cavanaugh*, 2 Pa. 187, 189 (1845).

¹⁹⁰ ALABAMA CODE, *supra* note 23, § 27.

¹⁹¹ See, e.g., Symposium, *Faith and the Law*, 27 TEX. TECH L. REV. 911 (1996) (collection of writings on integration of religious faith and legal practice); Symposium, *Rediscovering the Role of Religion in the Lives of Lawyers and Those They Represent*, 26 FORDHAM URB. L.J. 821 (1999) (same); Symposium, *The Relevance of Religion to a Lawyer's Work: An Interfaith Conference*, 66 FORDHAM L. REV. 1075 (1998) (same); see also W. Bradley Wendel, *Public Values and Professional Responsibility*, 75 NOTRE DAME L. REV. 1, 26–35 (1999) (reviewing commentary that situates legal ethics principles in lawyers' personal, moral or religious beliefs).

¹⁹² Cf. Markovits, *supra* note 84, at 215 ("[T]he principle that a lawyer may not damage a client's case on the ground that his conscience dictates that the client should lose is . . . deeply

sonal conscience and subordinate client interests apply in all aspects of advocacy and client representation?

Indeed, the language of *Rush* supports the notion that Justice Gibson did not intend to cede lawyers so much independence. Justice Gibson's reference to "professional conscience" was followed immediately by the explanation that lawyers are bound by an "official oath to behave . . . with all due fidelity to the court as well as the client."¹⁹³ Although the opinion acknowledged that professional conscience takes account of values other than those of fidelity to the client, it did not refer to religious, political, or other personal beliefs. Indeed, "due fidelity to the court" is the only consideration that the opinion noted as pertinent to professional conscience." Read as a whole, the key passage therefore at least suggested limits to Justice Gibson's view of the professional conscience on which lawyers must act. Professional conscience simply embodied professional values that balance the interests of the court (or public) and those of the client.¹⁹⁴ That view differs significantly from an endorsement of unfettered discretion grounded in lawyers' individual senses of morality.¹⁹⁵

This interpretation, which stakes out a middle ground between Brougham and Hoffman, seems especially plausible when one notices what Justice Gibson did not say. The *Rush* opinion, in fact, never referred to a lawyer's *discretion* to dismiss, based on the lawyer's moral calculus. Nothing in the opinion indicated that Justice Gibson would have approved of Rush exercising discretion so as to continue the prosecution of Crean once Rush concluded that Crean was innocent. The opinion recognized that Rush "acted to the best of his judgment on reasonable premises,"¹⁹⁶ which is to say that Rush had some discretion. But in context, it appears that this was discretion in evaluating the evidence, not discretion to decide how to act upon concluding that the evidence established the defendant's innocence. Once he reached that conclusion, Rush *had to* seek to withdraw the prosecution, and if he had not done so, Rush would have been *violating* Gibson's standard for

ingrained in lawyers' professional consciousness. . . . [I]n every case . . . that has addressed the question head-on, the principle has been affirmed . . .").

¹⁹³ *Rush*, 2 Pa. at 189.

¹⁹⁴ Justice Gibson refers to this balance: "The high and honourable office of a counsel would be degraded to that of a mercenary, were he compelled to do the biddings of his client against the dictates of his conscience." *Id.* at 189.

¹⁹⁵ Likewise, when one unpacks *Rush's* reference to "unjust judgments" that lawyers may not pursue, it seems to be a limited concept. Justice Gibson seems to have had in mind judgments that are not based on the law and facts, as in the conviction of an innocent defendant. But note that Gibson upheld Rush's dismissal of the case specifically because the Attorney-General would have been required to dismiss the case at a later stage if it had proceeded. Ordinarily a prosecutor must dismiss only when the underlying prosecution is unsupported by the facts and law; the Attorney-General need not dismiss whenever he disbelieves a complaining witness if a jury may reasonably feel differently. Cf. CANONS OF PROF'L ETHICS Canon 30 (1908) (providing, consistently with the modern view, that a prosecutor may bring a triable case, just not a frivolous case brought merely to harass). The opinion said little about whether lawyers may, or must, refrain from other conduct that might seem to them unjust—such as relying upon false testimony or using questionable tactics. See *supra* Part II(A)(1).

¹⁹⁶ *Rush*, 2 Pa. at 190.

professional conduct.¹⁹⁷ Rush was accountable to that standard (i.e., a duty to refrain from pursuing unjust prosecutions), though it had not been explicitly spelled out in the lawyer's oath or in prior state court opinions, because Gibson evidently believed that lawyers would know of it independently.

Arguably, therefore, the "professional conscience" upon which Justice Gibson relied embodies professional norms that derive loosely from the lawyer's professional relationship to the court, which is itself committed to promoting justice. The norms have not necessarily been expressed in the law; they are transmitted through professional socialization. Even in the absence of an explicit judicial ruling—like the one that *Rush* sets forth (i.e., thou shalt not consciously prosecute an innocent man)—lawyers are supposed to know through training and experience what is expected of them professionally¹⁹⁸ and to comport with the professional expectations even in the face of conflicting client demands.

2. The Regulatory Context in Which *Rush* Was Decided

When *Rush* was decided, agency law set the terms of the attorney-client relationship, but there was little comparable law governing limitations on advocacy. There were no professional rules, there were few judicial pronouncements, and the official oaths to which lawyers swore were vague.¹⁹⁹ The larger question facing Justice Gibson was how advocates should conduct themselves within the bounds of law that set few bounds. Lord Brougham's answer, which was consistent with agency law, was: do what the client wants, even if a kingdom topples in the process. From Justice Gibson's perspective, that answer was unsatisfactory because it justified a type of practice, evidently not unusual, that derogated duties owed to the courts.²⁰⁰ As the chief

¹⁹⁷ *Id.* ("Had he continued to prosecute against the dictates of his conscience, he would have been entitled to nothing . . .").

¹⁹⁸ It is important to note that reliance on professional socialization is common even today. Twentieth-century courts refer to the "lore of the profession": lawyers are supposed to know what's expected of them, even when the disciplinary rules are vague, because of professional lore. For example, in *In re Snyder*, 472 U.S. 634 (1985), the Supreme Court stated:

Read in light of the traditional duties imposed on an attorney, it is clear that "conduct unbecoming a member of the bar" is conduct contrary to professional standards that shows an unfitness to discharge continuing obligations to clients or the courts, or conduct inimical to the administration of justice. More specific guidance is provided by case law, applicable court rules, and "the lore of the profession," as embodied in codes of professional conduct.

Id. at 645 (citation omitted); *cf. In re Ruffalo*, 390 U.S. 544, 555 (1968) (stating that, even when disciplinary rules are unspecific, "members of the bar can be assumed to know that certain kinds of conduct . . . will be grounds for disbarment . . . [including] conduct which all responsible lawyers would recognize as improper for a member of the profession"). The *Snyder* Court linked the expectation that lawyers would be familiar with the professional lore to their role as "officer[s] of the court." *Snyder*, 472 U.S. at 644–45. For a recent discussion of the regulatory role of unwritten norms, see W. Bradley Wendel, *Nonlegal Regulation of the Legal Profession: Social Norms in Professional Communities*, 54 VAND. L. REV. 1955 (2001).

¹⁹⁹ See DOS PASSOS, *supra* note 3, at 66 ("[N]one of [the] formal oaths define the duties of the lawyer; they neither explain his relations to the court which licenses him, nor to his client, nor to the community. . . . [Lawyers] must search elsewhere than in these oaths, to discover the full measure of their duties.").

²⁰⁰ See also ROSCOE POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 223, 240

jurist of the state judiciary, he surely took to heart the courts' interest in "due fidelity to the court." At least in his day, lawyers evidently were not exercising personal conscience in a manner consistent with the judicial interest in promoting justice.²⁰¹

The answer that Justice Gibson gave in *Rush* was not that lawyers should or may follow personal conscience, but that lawyers have distinctive professional obligations beyond the legal ones. That is implicit in his observation that lawyers take an oath to behave "with all due fidelity to the court as well as the client."²⁰² *Rush* identified one such professional obligation: in general, advocates may not "press[] for an unjust judgment."²⁰³ In particular, advocates exercising prosecutorial authority, even when retained to do so by a private party, may not "press[] for the conviction of an innocent man."²⁰⁴ This means, according to *Rush*, that a prosecutor may not pursue a case when the prosecutor is convinced by credible evidence that the defendant is inno-

(1953) (describing the period from 1836 to 1870 as one of "unchecked advocacy and want of ethics in the conduct of litigation").

²⁰¹ Justice Gibson's opinion in *Austin* expressed even clearer skepticism about the adequacy of personal conscience as a check on attorneys' conduct. Justifying the courts' authority to disbar an attorney for conduct in violation of his oath, Justice Gibson states: "[T]o declare [lawyers] irresponsible to any power but public opinion and their consciences, would be incompatible with free government." *In re Austin*, 5 Rawle 191, 203 (Pa. 1835).

²⁰² *Rush*, 2 Pa. at 189. Justice Gibson's opinion in *Austin* placed similar weight on the attorney's oath:

An attorney-at-law is an officer of the court. The terms of the oaths exacted of him at his admission to the bar, prove him to be so; "you shall behave yourself in your office of attorney within the court, with all due fidelity as well to the court as the client."

In re Austin, 5 Rawle at 203.

M.H. Hoeflich's review of 19th century writings and speeches on the lawyer-client relationship suggests that the oaths were "a very significant element [in] the debate on lawyer ethics" because they "elevated the lawyer from being a private citizen to being a public official and, as such, gave the lawyer a whole new set of obligations." M.H. Hoeflich, *Legal Ethics in the Nineteenth Century: The "Other Tradition,"* 47 U. KAN. L. REV. 793, 798 (1999) (citing Simon Greenleaf's 1834 Harvard address). Hoeflich does not, however, identify 19th century references to lawyers' public responsibilities as reflecting a coherent conception of advocacy ethics that is separate and distinct from the ones offered by Hoffman and Brougham. Rather, Hoeflich's survey initially identifies the competing conceptions of Hoffman and Brougham, *id.* at 794-97, and then places their contemporaries between those two poles, *see, e.g., id.* at 798 (comparing Greenleaf's views with Hoffman's); *id.* at 799 (observing that Job Tyson's 1839 lecture on "The Integrity of the Legal Character" rejected Brougham's ethic but echoed Hoffman); *id.* at 802 (noting that in an 1849 oration before the Law Academy of Philadelphia, William Porter "did not accept Brougham's idea . . . though he also was clearly not willing to go so far as . . . Hoffman"); *id.* at 808 ("Although [David Paul] Brown and [George] Sharswood differ in small details, their general approach to legal ethics was quite similar and fell between the two poles established by Hoffman and Brougham."). Hoeflich ultimately concludes that, insofar as the 19th century commentators recognized obligations to the public as well as the client, the commentators favored leaving it to advocates' individual consciences to decide how to strike the balance. *Id.* at 813 ("In the end, the question of the lawyer's obligation to his client versus his obligation as an officer of the court became one of individual judgment and integrity.").

²⁰³ *Rush*, 2 Pa. at 189.

²⁰⁴ *Id.*

cent, even if a witness—who happens to be the lawyer's client—is prepared to testify to the contrary.²⁰⁵

The question then becomes, what is the source of the lawyer's distinctive obligations? Agency law establishes duties to the client. But the problem for Justice Gibson was that no comparable body of law set the terms of a lawyer's relationship to the court (or, more broadly, the public). An agreement to comply with his public obligations, whatever they may be, is undertaken when the lawyer takes his oath.²⁰⁶ But the oath itself does not enumerate the lawyer's obligations.²⁰⁷

Justice Gibson's answer was that the lawyer's duties are implicit in the lawyer's role. *Rush* referred to the lawyer's "office of attorney"²⁰⁸ and "[t]he high and honourable office of a counsel."²⁰⁹ In effect, a lawyer as advocate has implicit obligations arising out of his official role—in common parlance, his role as "officer of the court."²¹⁰ These professional obligations qualify the lawyer's duties as an agent of the client: while an ordinary agent might be required, in other contexts, to follow the client's direction, *Rush* as an attorney was required to do the opposite. Thus, lawyers' obligations are distinguished from those of other agents because of their office, which imposes countervailing obligations to the court to which the lawyer owes fidelity.²¹¹ In the case of an advocate prosecuting a criminal case, the lawyer's obligations are further distinguished by the exercise of the power of the "office of attorney-general," which "is a public trust."²¹² The lawyer's obligations thus are defined not only by the advocacy role, but also by the particular type of advocacy in which the lawyer is engaged.

Rush also made clear that the court, to which the advocate owes "due fidelity,"²¹³ has authority to articulate or confirm the content of the lawyer's duties. Justice Gibson did just that in stating that lawyers may not seek unjust judgments and, in particular, unjust convictions. Although the client is not the keeper of the lawyer's professional conscience, as Justice Gibson confirmed, the court most assuredly may be.²¹⁴ When the court chooses to exer-

²⁰⁵ *Id.* at 190 ("Convinced by the testimony of Mr. Bacon, that the accusation was false, he did . . . the very best thing he could do for his client—he abandoned the prosecution . . . Mr. Rush [was not] bound to give credence to the instructions of a heated client, rather than to the sober testimony of a dispassionate witness.").

²⁰⁶ See *supra* note 202.

²⁰⁷ According to Jessup, as of 1925, the oaths of admission in most states did not identify the lawyer's duties even at a level of generality. JESSUP, *supra* note 169, at xvi & n.*.

²⁰⁸ *Rush*, 2 Pa. at 189.

²⁰⁹ *Id.*

²¹⁰ Justice Gibson began his earlier opinion in *Austin* by characterizing the attorney as "an officer of the court." *In re Austin*, 5 Rawle 191, 203 (Pa. 1835). The enduring notion of lawyers as "officers of the court" is discussed *infra* text accompanying notes 281–84.

²¹¹ Justice Gibson's earlier opinion in *Austin* placed similar weight on the lawyer's duty of fidelity to the court. See *supra* note 150.

²¹² *Rush*, 2 Pa. at 189.

²¹³ *Id.*

²¹⁴ Justice Gibson's opinion in *Austin* also made this point, in holding that courts may discipline or disbar attorneys for conduct that breaches professional duty, including duties to the court. See *supra* note 150. The opinion recognized that the court's authority reflects, in part, the proper ordering of government accountability: "It is indispensable to the purposes of [the legal

cise this function, it may also enforce the obligations that it identifies. Had Rush continued to prosecute, Justice Gibson said, “he would have been entitled to nothing”²¹⁵—the court could have held his fees forfeit.

What we identify as Justice Gibson’s recognition of the courts’ role in articulating and enforcing lawyers’ distinctive professional obligations was echoed twenty years later by New York’s high court in another opinion that James Altman has identified as seminal.²¹⁶ In *Third Great Western Turnpike Road Co. v. Loomis*,²¹⁷ the court confirmed the trial judge’s discretion to impose limits on cross-examination. Like *Rush*, the New York opinion condemned Lord Brougham’s speech but acknowledged it as being emblematic of a prevalent style of practice that the trial court had authority to curb.²¹⁸ In bemoaning Lord Brougham’s impact on lawyers’ practice, both opinions suggest precisely why a court might be skeptical about personal conscience as the primary limitation on lawyer advocacy—namely, that not every lawyer has “an extremely delicate sense of propriety” like Rush. Lawyers cannot universally, or even generally, be trusted to act responsibly solely as a matter of personal conscience.

At the same time, *Rush* indicated that judicial pronouncements about lawyers’ obligations—of which there were then few—are not the only place for lawyers to look for the requirements of their professional role. Justice Gibson expected Rush to understand his duty, even in the absence of an official articulation or codification. And Rush *did* understand—hence, Justice Gibson applauded his “delicate sense of propriety.”²¹⁹ How is a lawyer like Rush supposed to learn or identify his obligations? The answer: socialization, professional lore, independent reflection on the expectations of the lawyer’s professional “office”—all the things that go into forming what Justice Gibson called a “professional conscience.”

profession’s] creation to assign it a high and honourable standing, but to put it above the judiciary, whose official tenure is good behaviour, and whose members are removable from office, by the legislature, would render it intractable.” *Austin*, 5 Rawle at 204.

²¹⁵ *Rush*, 2 Pa. at 190.

²¹⁶ Altman, *supra* note 152, at 2446.

²¹⁷ *Third Great W. Tpk. Rd. Co. v. Loomis*, 32 N.Y. 127 (1865).

²¹⁸ The court stated:

There is much diversity of opinion, even among eminent members of the profession, as to the measure of obligation imposed upon counsel, by the implied pledge of fidelity to the client. This could not be more strikingly illustrated than by the atrocious but memorable declaration of one of the leading lawyers of England, on the trial of Queen Caroline:

that an advocate, by the sacred duty which he owes his client, knows, in the discharge of that office, but one person in the world, that client, and none other. To save that client by all expedient means, to protect that client, at all hazards and cost to all others, and, among others, to himself, is the highest and most unquestioned of his duties; and he must not regard the alarm, the suffering, the torment, the destruction, which he may bring upon any other.

Such a proposition shocks the moral sense, but it illustrates the impolicy of divesting the presiding judge of the power to protect witnesses from irrelevant assault and inquisition.

Id. at 133 (quoting Brougham).

²¹⁹ *Rush*, 2 Pa. at 190.

So, we suggest, decades of legal ethicists misread *Rush*. “Professional conscience” was, for Justice Gibson, something very different from personal conscience. It dictates duties to the court that are mandatory, not discretionary. Taken together, these duties and those countervailing duties owed to the client establish the lawyer’s professional obligations. Within these bounds, personal conscience plays at most a secondary and interstitial role.

IV. *The Significance of Rush in Understanding the Development of Professional Regulation*

The *Rush* decision, as we have interpreted it, anticipated contemporary regulation. First, the opinion opened the way for a regime of professional regulation marked by the development of ethics codes, on the one hand, and ad hoc judicial oversight, on the other. Additionally, the opinion affirmed the existence of advocacy limits inherent in the lawyer’s professional role. It also provided a justification for the approach to advocacy that the modern code drafters and regulating courts, perhaps unwittingly, seem to have adopted.

A. *Understanding the Codification Process*

Much has been written about the regulatory role of the lawyer codes.²²⁰ The bar’s development of codes of ethics, beginning with the Alabama Code, is the defining feature of professional regulation in the United States. The story ordinarily told about the early codes is that they were not meant to be enforceable. Their provisions are typically characterized as “precatory,” “hortatory,” and “aspirational.”²²¹ When, in the early to mid-1900s, the provisions began to be enforced in disciplinary proceedings by courts and by bar associations to whom the courts had delegated authority, the vague provisions proved unsuited to the task.²²² The ABA therefore drafted a new code, the Code of Professional Responsibility, which it explicitly intended state courts to adopt as “law” for use in disciplinary proceedings.²²³

²²⁰ See, e.g., Hazard, *supra* note 162, at 1249–61 (discussing the history and enforceability of the codes); Strassberg, *supra* note 13, at 905–10 (discussing ethics codes’ role as positive law); David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468, 478–508 (1990) (discussing problem of ethics rules’ indeterminacy); cf. Alfred L. Brophy, *Race, Class, and the Regulation of the Legal Profession in the Progressive Era: The Case of the 1909 Canons*, 12 CORNELL J.L. & PUB. POL’Y 607, 614 (2003) (arguing that the 1908 Canons resulted from three strands of thought, including “the desire to protect the public . . . a desire to raise the status of the legal profession . . . [and] a desire to maintain the elite bar’s status and integrity”).

²²¹ E.g., CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* § 2.6, at 54–55 (1986).

²²² *Id.* at 55–56.

²²³ MODEL CODE OF PROF’L RESPONSIBILITY preliminary statement (1981) (“The Code is designed to be adopted by appropriate agencies both as an inspirational guide to the members of the profession and as a basis for discipline when the conduct of a lawyer falls below the required minimum standards stated in the Disciplinary Rules.”).

Geoffrey Hazard has described the history of professional regulation as a steady march toward “legalization” of professional norms. See Hazard, *supra* note 162, at 1241 (“[O]ver the last twenty-five years or so the traditional norms have undergone important changes. One important development is that those norms have become ‘legalized.’”); see also Roger C. Cramton & Lisa K. Udell, *State Ethics Rules and Federal Prosecutors: The Controversies over the Anti-*

The conventional account ascribes either of two roles to lawyer codes. First, they may serve as unenforceable, aspirational “guidelines”—like a gentlemen’s unwritten code of conduct or courtesy. Alternatively, they may serve as regulatory “law,” adopted by courts pursuant to their inherent authority to make rules for lawyers or pursuant to some other source of judicial rulemaking authority.²²⁴ Under either account, the early codes seem anomalous, because they were initially meant to serve exclusively as guidelines but eventually became regulatory law.

James Altman has already contradicted one aspect of this account by showing that at least some of the drafters of the 1908 Canons desired and anticipated that courts would enforce their provisions.²²⁵ Our reading of *Rush* contradicts the account more fundamentally by suggesting a third way of looking at lawyer codes generally and at the early codes particularly.

Justice Gibson’s central premises were, *inter alia*, that (1) lawyers have particular professional obligations—such as the duty to refrain from seeking unjust convictions—that are aspects of lawyers’ duty to the court; (2) these duties are implicit in lawyers’ professional role—either the general role as an attorney or a particular role such as that of prosecutor; (3) these duties can be articulated; (4) these duties may be legally enforceable; and (5) lawyers are responsible for knowing and adhering to these duties as a matter of “professional conscience,” regardless of whether the duties have previously been codified in the law or announced in judicial opinions. These understandings opened the way for lawyer codes to serve as articulations of preexisting but previously uncoded professional norms. The process of drafting an ethics code would not exclusively be a process of legislation but also one of revelation, at least with respect to provisions on advocacy ethics. Code provisions would be enforceable not simply because they were formally adopted as “law” by the courts pursuant to their rulemaking authority, but because courts believed that at least some of these provisions accurately articulated preexisting professional duties implicit in the lawyer’s role.

Viewed from this perspective, the Canons served several functions. They expressed the professional elite’s collective sense of the lawyer’s role and, thus, what “professional conscience” required. They also served as a vehicle by which lawyers’ professional conscience could be developed. The Canons comprised an articulation of norms that lawyers might otherwise

Contact and Subpoena Rules, 53 U. PITT. L. REV. 291, 300 (1992) (“Since about 1930, with accelerating speed since 1970, ethical codes have developed into law.”); Samuel J. Levine, *Taking Ethics Codes Seriously: Broad Ethics Provisions and Unenumerated Ethical Obligations in a Comparative Hermeneutic Framework*, 77 TUL. L. REV. 527, 530–37 (2003) (discussing “the evolution of ethics rules [as law] in the twentieth century” and the implications of that for interpretation of the rules). The modern codes, from the 1969 Model Code on, look less like the Canons’ collection of general principles and more like a collection of statutes. They also tend to be enforced with greater regularity, not only in extreme cases as was true of the Canons.

²²⁴ See Fred C. Zacharias & Bruce A. Green, *Federal Court Authority to Regulate Lawyers: A Practice in Search of a Theory*, 56 VAND. L. REV. 1303, 1305–06 (2003) (discussing the source and nature of state and federal judicial authority to adopt ethics rules governing lawyers).

²²⁵ Altman, *supra* note 152, at 2421 (stating that Jacob M. Dickinson, the outgoing ABA president in 1908, expressed his hope that the Canons would be enacted into and enforced as law throughout the United States).

have assimilated haphazardly, by reviewing judicial opinions and treatises and perceiving the oral tradition. By virtue of their formality, however, the Canons made it fairer for courts to hold lawyers to the standards of conduct implicit in the professional role. There was, in short, nothing anomalous about early 20th century disciplinary authorities' enforcement of Canon provisions. Nor was there a need for courts to adopt additional rules that would put lawyers on specific notice of what was demanded of them. The Canons were the organized bar's collection of inherent professional standards that could be enforced even if unwritten.

Rush, therefore, both presaged the Canons and highlighted the necessity for them. *Rush* recognized that courts could enforce lawyers' implicit obligations. According to *Rush's* theory, courts were the final arbiters of the content of these obligations, but lawyers would be expected to know what was required of them even if no judicial decision had yet articulated the relevant standard. It thus became helpful for some body to make those obligations explicit. In the absence of comprehensive judicial articulations, the code-drafting process also provided the bar an opportunity to influence the professional understandings and thereby shape future judicial decisions.

This understanding of *Rush* and the subsequent codes makes sense of America's professional regulatory history. If, as *Rush* suggests, courts can enforce implicit understandings about what professional conscience demands, there was good reason for the organized bar to intervene with its own articulation of professional duties before the courts ruled, and for the courts to rely on the bar's articulation in reaching subsequent decisions.²²⁶ In contrast, if personal conscience had formed the core of lawyers' obligations, there would have been far less need for the codes.²²⁷ Moreover, if the early Canons had been meant only to guide lawyers' personal consciences, courts would not have been justified in enforcing them.²²⁸

²²⁶ In a sense, *Rush* represented the first step in the development of legalized ethics norms. By noting that attorney *Rush* had no choice but to dismiss the prosecution once he concluded that the defendant was innocent, Justice Gibson's decision effectively placed the oversight of appropriate attorney behavior in the court's hands and removed it from the legislative arena, jury decision making, and the vagaries of attorney discretion. The recognition that lawyer conduct was limited by professional conscience invited the development of judicially supervised ethics codes that, insofar as possible, made the requirements of professional conscience explicit.

²²⁷ Indeed, one could argue that ethics codes would be pernicious, in that they would reduce lawyers' exercise of independent moral decision making.

²²⁸ As Geoffrey Hazard has noted, one thrust of the post-Canon codes was to eliminate uncertainty about the scope of the professional norms by codifying them with greater precision, thereby making it easier and fairer to enforce them. Hazard, *supra* note 162, at 1250 (describing the "transformation of these norms [i.e., as exemplified by the Canons] into an enforceable legal code"). The 1969 Code of Professional Responsibility represented a leap forward in adding specificity, a process that continued in the 1983 Model Rules of Professional Conduct. See David Luban & Michael Millemann, *Good Judgment: Ethics Teaching in Dark Times*, 9 GEO. J. LEGAL ETHICS 31, 44 (1995) ("The move from the Canons to the Model Code was a watershed event, because the DRs marked the first time that legal ethics was regulated by hard law [However, the] transition to hard law was not complete until [the ABA] adopted the Model Rules of Professional Conduct . . . in 1983.").

B. Understanding Interstitial Judicial Regulation

Another distinct feature of lawyer regulation in the United States is that courts feel free to issue opinions articulating standards of professional duty, as Justice Gibson did in *Rush*. Courts continue to issue such rulings even after state supreme courts have adopted formal, enforceable rules of professional conduct.²²⁹ Such ad hoc judicial pronouncements seem peculiar if one's view is that lawyers must comply with the law but otherwise must do everything legally permitted for the client. The ad hoc pronouncements also are questionable under a view that the only legally enforceable regulation of lawyers is law promulgated by competent lawmakers or the common-law process.²³⁰ *Rush* rejected both of these views. It recognized that lawyers owe duties to the court that temper their duties to clients and held that these duties exist independent of the formal law.

Under *Rush's* approach, there is nothing at all strange about courts adopting rules for lawyers while continuing to issue pronouncements about lawyers' duties in the interstices. One might prefer, as a matter of fair notice, that courts attempt to catalogue lawyers' duties completely and to do so precisely.²³¹ But it is logically consistent for a court to hold that lawyers' general

²²⁹ See, e.g., Bruce A. Green, *Her Brother's Keeper: The Prosecutor's Responsibility when Defense Counsel Has a Potential Conflict of Interest*, 16 AM. J. CRIM. L. 323, 332-52 (1989) (discussing opinions obligating prosecutors to call conflicts of interest to the court's attention). Perhaps the most influential ad hoc judicial decision was Judge Weinfeld's decision in *T.C. Theatre Corp. v. Warner Bros. Pictures, Inc.*, 113 F. Supp. 265, 268 (S.D.N.Y. 1953), restricting a lawyer from litigating against a former client in a matter substantially related to the former representation. The standard was subsequently codified. See MODEL RULES OF PROF'L CONDUCT R. 1.9(a) (2002).

²³⁰ In other words, growing out of decisions in cases brought specifically for the purpose of establishing controlling law in the field.

²³¹ Due process protections do apply to the regulation of attorneys. See, e.g., *In re Ruffalo*, 390 U.S. 544, 552 (1968) (reversing disbarment on grounds that attorney had received insufficient notice that his conduct was subject to discipline); *Willner v. Comm. on Character & Fitness*, 373 U.S. 96, 102-05 (1963) (applying due process requirements to hearings regarding lawyer fitness to practice). Some courts, however, have considered them secondary. See, e.g., *Crowe v. Smith*, 151 F.3d 217, 229 (5th Cir. 1998) ("Although both the Supreme Court and this court have often relied on this 'quasi-criminal' characterization to hold that 'an attorney is entitled to procedural due process which includes notice and an opportunity to be heard in disbarment proceedings,' we have only rarely gone farther." (citations omitted)); *In re Ming*, 469 F.2d 1352, 1355 (7th Cir. 1972) ("All that is requisite to their [disbarment proceedings] validity is that, when not taken for matters occurring in open court, in the presence of the judges, notice should be given to the attorney of the charges made and opportunity afforded him for explanation and defence." (emphasis omitted) (alteration in original) (quoting *Randall v. Brigham*, 74 U.S. (7 Wall.) 523, 540 (1868))). Ordinarily, one would expect that statutes, rules, or common law would put lawyers subject to discipline on relatively clear notice of what conduct is forbidden. Courts, however, have liberally construed their own ability to impose sanctions based on vague prohibitions against interfering with "the administration of justice," engaging in "dishonesty," and committing actions that suggest "unfitness" to practice law. See, e.g., *In re Surrick*, 338 F.3d 224, 234 (3d Cir. 2003) (authorizing reciprocal discipline of lawyer who had made "reckless misstatements" that he should have known would violate the state version of Model Rules of Professional Conduct Rule 8.4(c)); *In re Edelstein*, 214 F.3d 127, 130 (2d Cir. 2000) (upholding discipline for "ruse" that allegedly "prejudiced the administration of justice"); *In re Phelps*, 637 F.2d 171, 175-76 (10th Cir. 1981) (holding that attorney was on sufficient notice that his conduct violated prohibitions against dishonesty). For the most part, disciplinary courts have hewn to the

professional role imposes obligations or restrictions that have not previously been articulated and to expect lawyers both to anticipate and adhere to the relevant standards. Standards expressed in prior judicial pronouncements and codifications do not represent the exclusive source of a lawyer's duties to the court; they are only exemplary.

Indeed, the very standard articulated in *Rush* is one that is well recognized but that contemporary ethics codes have not included. No provision of the Model Rules forbids a lawyer from prosecuting someone the prosecutor believes to be innocent. The Model Rules include one rule on prosecutorial conduct, Rule 3.8, which identifies only a handful of distinctive prosecutorial obligations.²³² Model Rule 3.8(a) forbids prosecuting without probable cause,²³³ but that is not the same thing as prohibiting a prosecution of someone whom the prosecutor believes to be innocent.²³⁴ Nevertheless, it is ordinarily assumed that other, unarticulated obligations are implicit in the lawyer's "office" as prosecutor (which entails a general duty to "seek justice")²³⁵ and that courts may articulate these distinctive duties in opinions,²³⁶ as Justice Gibson did. Even in the absence of a mandatory rule, most prosecutors and courts probably would conclude that it is wrong to prosecute someone when a prosecutor is personally convinced, based on the weight of the credible evidence, that the individual is innocent.²³⁷

Justice Gibson's view of the prosecutor's obligation towards the innocent is one example of a norm dictated by professional conscience that most lawyers would accept or learn as part of the lawyer-socialization process. Over time, other examples have made their way into the professional rules.²³⁸ The

line that the enforcement of vague code provisions is permissible because lawyers should know what is expected of them. *E.g.*, *Howell v. State Bar of Tex.*, 843 F.2d 205, 208 (5th Cir. 1988); *Attorney Grievance Comm'n v. Goldborough*, 624 A.2d 503, 510 (Md. 1993); *Rogers v. Miss. Bar*, 731 So. 2d 1158, 1164 (Miss. 1999).

To the extent that courts discover obligations of professional conscience that are not forecast in the terms of the rules, one may find the courts doing so in legal proceedings that do not involve direct discipline or punishment of the attorney. *Rush* itself involved tort litigation brought by the attorney. More contemporary examples like *Zamos*, discussed *infra* note 279, have arisen in the context of malicious prosecution lawsuits. Due process considerations make it perfectly reasonable for courts to develop extra-code standards for the exercise of professional conscience on a common-law basis and to avoid implementing them in the disciplinary context until the judicially developed standards become clear.

²³² See, e.g., Bruce A. Green, *Prosecutorial Ethics as Usual*, 2003 U. ILL. L. REV. 1573, 1587-96 (discussing new Model Rule 3.8).

²³³ MODEL RULES OF PROF'L CONDUCT R. 3.8(a) (requiring prosecutors to "refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause").

²³⁴ For example, there would be probable cause if, as in *Rush's* case, the defendant was accused by an interested witness whom the prosecutor personally considered to be incredible and exonerated by a disinterested witness whom the prosecutor believed. Under the technical terms of Model Rule 3.8(a), the prosecutor could proceed with the prosecution.

²³⁵ See generally Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice*, *supra* note 50 (discussing the contours of prosecutors' obligations to do justice under the professional codes).

²³⁶ See Green, *supra* note 232, at 1596 (citing examples).

²³⁷ See *supra* note 51. Many would set a higher threshold, requiring the prosecutor to have some degree of confidence that the defendant is in fact guilty. See Green, *supra* note 232, at 1588-89 nn.78-81 (citing authority).

²³⁸ See *infra* text accompanying notes 281-83.

most prominent uncodified illustrations of professional conscience today fit into four categories: expectations of civility,²³⁹ principles of honor²⁴⁰ and professionalism,²⁴¹ and practices pertaining to the administration of justice.²⁴² Some, such as the accepted notion that lawyers should keep their commitments and promises to one another, fit into more than one category.

For the most part, these aspects of professional conscience are not the product of specific rules that mandate or forbid particular behavior. Yet through the process of professional socialization, peer pressure, or the fear of regulatory repercussions, most lawyers learn their content and abide by them. In many instances, bar regulators might not be prepared to enforce the norms through discipline because they are uncodified. There nevertheless is a real possibility that, in appropriate cases, courts would treat them as mandatory aspects of the professional role.

C. *Understanding the Modern Codes' Approaches to Lawyers' Obligations of Fairness*

Substantively, the modern professional codes have been criticized from the perspective of adherents to Lord Brougham, on one end of the spectrum,²⁴³ and David Hoffman, on the other.²⁴⁴ From the former perspective,

²³⁹ Expectations of civility range from the mundane (e.g., forgoing scheduling matters intentionally to interfere with an adversary's vacation schedule) to the more important practice of refraining from tactical personal attacks on counsel, including racial or gender slurs, for the purpose of provoking an unwise response. Most lawyers abide by them naturally. Courts may enforce these expectations on a case-by-case basis or may adopt them as parts of separate civility codes.

²⁴⁰ Consider, for example, a discretionary provision that allows lawyers to disclose client confidences to prevent harm to third parties. Many lawyers would argue that such an exception to confidentiality gives them absolute discretion in deciding when to disclose, and some lawyers might even claim a right to adopt a principled posture that loyalty to clients justifies never revealing confidences. Most lawyers nevertheless would agree that, as a matter of "honor" (i.e., professional conscience), they should not be able to bargain for an enhanced fee in exchange for a promise never to report client misconduct. See Fred C. Zacharias, *Coercing Clients*, 47 B.C. L. REV. (forthcoming 2006).

Similarly, lawyers routinely act as spokespersons for clients and represent clients' positions. But even the most client-centered lawyers probably share the view that, when testifying or making public statements in their own name, they need not express their clients' opinions nor should do so if they personally disagree.

²⁴¹ For example, accepted standards of professionalism (or honesty) would prevent most lawyers from billing two clients for the same work. Cf. Sammons, *supra* note 28, at 273 (identifying double-billing as a form of "cheating" by lawyers). Lawyers also know that they should not trade their obligation to report another lawyer's misconduct for a payment or a favorable settlement. Although these principles are not codified in the professional rules, courts probably would enforce them in cases in which lawyers are shown to defy them. See, e.g., *In re Himmel*, 533 N.E.2d 790, 796 (Ill. 1989) (suspending a lawyer for not reporting a lawyer in exchange for an enhanced settlement on the client's behalf).

²⁴² Lawyers should not assert unwarranted privileges to avoid discovery. Sammons, *supra* note 28, at 273. As Justice Gibson suggested in an earlier decision, they should take care not to foster disrespect for the courts. See *In re Austin*, 5 Rawle 191, 204-08 (Pa. 1835); see also *supra* note 150 (describing *Austin*).

²⁴³ See, e.g., FREEDMAN & SMITH, *supra* note 4, at 73 (criticizing the Model Rules of Professional Conduct for including language resembling "the Haynesworth-Wasserstrom" notion of the lawyer-client relationship); Schneyer, *supra* note 93, at 711-14 (describing the Association of

the codes do not sufficiently establish lawyers' responsibility to serve the client (subject only to narrow legal limits). From the latter perspective, the codes do not adequately recognize lawyers' authority to act on personal conscience even at the client's expense.²⁴⁵ Justice Gibson's model both anticipates these developments and explains the substantive features of the codes (and the apparent uncertainty regarding where they fall in the Brougham-Hoffman divide) that the critics have questioned.

Although the modern codes were designed to serve as enforceable disciplinary standards, many of the provisions dealing with lawyers' duties to the court are vaguely worded—most notably, those prohibiting lawyers from engaging “in conduct that is prejudicial to the administration of justice.”²⁴⁶ The Ethical Considerations that accompany the Model Code and the comments that accompany the Model Rules identify a host of professional responsibilities to the court, third parties, or the public that are worded in very general terms. For example, advocates have “special duties . . . as officers of the court to avoid conduct that undermines the integrity of the adjudicative process,”²⁴⁷ an “obligation as an officer of the court to prevent the trier of fact from being misled by false evidence,”²⁴⁸ “a duty not to abuse legal procedure,”²⁴⁹ an “obligation to treat with consideration all persons involved in the legal process and to avoid the infliction of needless harm,”²⁵⁰ a “duty to aid in preserving the integrity of the jury system,”²⁵¹ and, in the prosecutor's case, a duty to “seek justice”²⁵² and “specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence.”²⁵³

Trial Lawyers of America's reaction to the original draft of the Model Rules of Professional Conduct and to the subsequent compromise provisions in the final code).

²⁴⁴ See, e.g., LUBAN, *supra* note 4, at 10 (citing Hoffman); Simon, *supra* note 94, at 1085–86 (criticizing the “regulatory approach” to legal ethics on the basis that it foreclosed the exercise of moral discretion); SIMON, *supra* note 13, at 8–9, 138–69 (criticizing the modern codes and arguing for a “Contextual View” of ethical behavior); cf. Altman, *supra* note 152, at 2503–04 (suggesting that the Canons reflected a philosophy of “conscientious lawyering” that the modern codes rejected); Feldman, *supra* note 13, at 885 (questioning any attempt to codify legal ethics).

²⁴⁵ Simon, *supra* note 103, at 34, 130–33 (arguing that “respect for the value of law itself may require the repudiation of legal professionalism”); cf. Rob Atkinson, *Beyond the New Role Morality for Lawyers*, 51 MD. L. REV. 853, 888 (1992) (arguing for legal ethics based on a system of “fideist” interpretation “that binds only those who find themselves in agreement with it”); Strassberg, *supra* note 13, at 923 (arguing for an “interpretation and application of the existing rules of ethics” that acknowledge more room for ethical conduct).

²⁴⁶ E.g., MODEL CODE OF PROF'L RESPONSIBILITY DR 1-102(A)(5) (1969); MODEL RULES OF PROF'L CONDUCT R. 8.4(d) (2002); see also MODEL CODE OF PROF'L RESPONSIBILITY DR 1-102(A) (forbidding lawyers to “(3) [e]ngage in illegal conduct involving moral turpitude,” “(4) [e]ngage in conduct involving dishonesty, fraud, deceit or misrepresentation,” and “(6) [e]ngage in any other conduct that adversely reflects on his fitness to practice law”).

²⁴⁷ MODEL RULES OF PROF'L CONDUCT R. 3.3 cmt.

²⁴⁸ *Id.*

²⁴⁹ *Id.* R. 3.1 cmt.

²⁵⁰ MODEL CODE OF PROF'L RESPONSIBILITY EC 7-10.

²⁵¹ *Id.* EC 7-32.

²⁵² *Id.* EC 7-13.

²⁵³ MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt.

As a result, the proponents of ultrazealous advocacy within the bounds of the law²⁵⁴ find much to criticize in the codes, especially the “tepid endorsement of zealous representation in the Model Rules.”²⁵⁵ The open-textured provisions arguably can chill advocates from serving clients zealously out of concern for overstepping uncertain boundaries between what is and is not permissible. The identification of general duties and obligations in the Ethical Considerations and comments to the Model Rules is perceived as equally flawed, at least to the extent that its purpose is not merely to justify specific disciplinary provisions but to authorize lawyers to restrain their advocacy in ways not commanded by the disciplinary rules. To adherents of Brougham’s approach, judicial restrictions on zealous representation that have no textual basis in the applicable code are especially illegitimate.

Justice Gibson’s opinion, however, provides a justification for the odd mix of specific and vague disciplinary rules, code commentary, and judicial opinions that together identify limits on lawyers’ advocacy for clients. If lawyers owe equal fidelity to the court and their specific obligations regarding the fairness of judicial proceedings grow out of their professional role, there is no reason to regard a professional code’s enumeration of limits on advocacy as being exclusive. To the extent that the disciplinary provisions are not comprehensive, it makes sense for judicial opinions, like Gibson’s opinion in *Rush*, to include supplemental statements of general principles from which obligations striking a balance between fidelity to the client and to the court can be inferred in situations not specifically contemplated by the code drafters. Likewise, there is authority for courts, again in situations not specifically covered by the more specific rules, to infer additional obligations. According to this view, lawyers are not invariably supposed to serve client interests by practicing as closely as possible to the lines that limit zealous advocacy; lawyers are supposed to maintain the balance.

At the same time, the *Rush* opinion provides support for the subordinate role of personal conscience in the codes that the modern Hoffman adherents criticize. Under the codes, lawyers may exercise conscience in their choice of clients and, to some extent, in deciding whether to continue or terminate representation, but the codes do not rely heavily on lawyers’ personal conscience in defining lawyers’ obligations while representing the client. That is consistent with Justice Gibson’s approach. What matters according to *Rush* is “professional conscience,” which embodies ascertainable professional standards implicit in the lawyer’s role that strike a balance between duties to the client and the court. The 1908 Canons articulated some of these duties (mostly in general terms) while leaving it to lawyers to apply the general standards and make their own informed judgments in the interstices. The Model Code and Model Rules articulate these duties with greater clarity. In the end, however, all three codes represent the bar’s collective standards for professional conduct—an attempt to help define professional conscience.²⁵⁶

²⁵⁴ E.g., MODEL CODE OF PROF’L RESPONSIBILITY Canon 7 (“A lawyer should represent a client zealously within the bounds of the law.”); see also *id.* EC 7-1 to -2.

²⁵⁵ See, e.g., FREEDMAN & SMITH, *supra* note 4, at 88.

²⁵⁶ Other mechanisms for identifying professional standards exist, but they are beyond the scope of this Article. One important source is bar association ethics opinions. These serve as an

In charging that lawyer codes have subordinated lawyers' independent exercise of personal conscience, critics fail to appreciate the codes' design as promoting Justice Gibson's conception of a well-regulated bar—that is, a bar regulated primarily by a sense of professional duty and at best secondarily by personal ethical norms.

V. *The Significance of Rush in Understanding the Substance of Modern Advocacy Standards*

The Brougham-Hoffman dichotomy has continued to dominate the debate over advocacy ethics. Lawyers widely perceive the duty of loyalty as trumping most other interests—whether interests of the court or the legal system, or interests of society more generally. To the extent that lawyers perceive a right of conscience (arising, for example, from discretionary provisions in the codes), they typically view it as a personal right to be exercised, or not, entirely as the lawyer sees fit. Thus, the common understanding of the controversy surrounding modern lawyer regulation is that the battle lines are cleanly drawn between proponents of relatively nondiscretionary client-oriented lawyering—led by scholars such as Monroe Freedman²⁵⁷—and proponents of allowing or requiring lawyers to follow the dictates of their individual consciences, typified by the academic work of David Luban²⁵⁸ and, in part, William Simon.²⁵⁹

expression of collective standards of the profession that the rules and judicial decisions may not yet have identified (or may never identify). Ethics opinions generally purport to interpret disciplinary rules, but they often engage only in very loose interpretations or provide advice that actually is independent of the rules. See generally Ted Finman & Theodore Schneyer, *The Role of the Bar Association Ethics Opinions in Regulating Lawyer Conduct: A Critique of the Work of the ABA Committee on Ethics and Professional Responsibility*, 29 UCLA L. REV. 67, 68–92 (1981); Bruce A. Green, *Bar Association Ethics Committees: Are They Broken?*, 30 HOFSTRA L. REV. 731 (2002).

²⁵⁷ See generally FREEDMAN, *supra* note 6; FREEDMAN & SMITH, *supra* note 4; Freedman, *supra* note 94. See also Jay Sterling Silver, *Equality of Arms and the Adversarial Process: A New Constitutional Right*, 1990 WIS. L. REV. 1007, 1009 (arguing that the adversarial process is under attack); Spaulding, *supra* note 105, at 6 (arguing that “the lawyer’s role is grounded in a logic of [client-centered] service” rather than mere “identification” with the client); Zacharias, *supra* note 74, at 1319–20 (discussing Freedman’s work and citing authorities). We do not mean to suggest that Freedman wishes lawyers to act as automatons in their relationship with clients, but rather that he perceives client autonomy ultimately to be the governing factor in lawyer decision making.

²⁵⁸ See, e.g., LUBAN, *supra* note 4, at 10 (citing Hoffman).

²⁵⁹ William Simon, though clearly in the Hoffman camp, has presented a complex approach that, in part, seems consistent with Justice Gibson’s world view. On the one hand, Simon emphasizes each lawyer’s “ethical discretion.” See Simon, *supra* note 94, at 1083, 1090–91 (“Lawyers should have ethical discretion to refuse to assist in the pursuit of legally permissible courses of action and in the assertion of potentially enforceable legal claims.”). Simon argues that, at times, exercising this discretion may require a lawyer even to violate the standards of behavior commonly ascribed to professionalism. Simon, *supra* note 103, at 130–33. More generally, however, Simon adopts a “contextual” approach, under which lawyers need to serve “justice” not merely by asserting personal preferences in the course of representation, but by according appropriate deference to judicial and legislative pronouncements, the adjudicative process, and the requirements of the adversary system. SIMON, *supra* note 13, at 138.

We argue that Justice Gibson's alternative, albeit long-overlooked, conception of advocacy ethics provides a middle ground in the debate that best explains both contemporary rules and judicial decisions relating to advocacy ethics. Part V(A) shows that, in general, professional norms are more consistent with Justice Gibson's conception than with the polar views associated with Brougham and Hoffman. Part V(B) shows more specifically that the concept of professional conscience has significance for how lawyers should exercise the discretion that is accorded to them by the current ethics rules. While in some situations, lawyers may rely on personal conscience, in others they must exercise professional conscience—that is, they must attempt to strike a fair balance between competing professional values and interests. Finally, Part V(C) suggests that the concept of professional conscience helps make sense of several theoretical puzzles that have been prominent in the professional responsibility literature over the past two decades.

A. *Post-Rush Developments: How Modern Professional Regulation Squares with Justice Gibson's Approach*

Our explication of *Rush's* distinction between professional and personal conscience suggests that the common understanding of the modern codes and the modern debate is too facile, and that it overlooks a viable middle ground embodied in opinions like *Rush*.²⁶⁰ Although the structure and form of regulation has changed significantly over time, the normative content of the professional standards governing advocacy ethics has not changed as dramatically as observers have assumed.²⁶¹ The sense that a revolution has occurred derives largely from the attitudes, or interpretations, of modern commentators and practicing lawyers.

It is almost certainly a misreading of the contemporary codes to view them as endorsing the philosophy of extreme partisanship. The codes in fact recognize far greater authority to act contrary to client interests than most modern practitioners, and many scholars, acknowledge.²⁶² Moreover, the codes' inclusion of catch-all standards²⁶³ that courts may invoke to impose supplemental limitations on lawyer behavior²⁶⁴ flatly contradicts the assump-

²⁶⁰ See *supra* text accompanying notes 243–58.

²⁶¹ The Canons admittedly leave some leeway for the exercise of personal conscience, but in very narrow areas and in much the same way as the modern codes. See *supra* note 161. Indeed, a close comparison of the Canons with the modern codes reveals few, if any, situations in which the Canons expressly authorize lawyers to exercise conscience in derogation of client interests while the modern codes forbid the lawyer from doing so. The most significant difference between the Canons and, say, the *Model Rules of Professional Conduct*, is one of nuance. The Rules do not explicitly exhort lawyers to draw on moral or professional considerations, which would suggest that doing so is a good (or required) practice, but simply permit resort to such considerations.

²⁶² See *supra* text accompanying notes 95–102.

²⁶³ See *supra* text accompanying note 246.

²⁶⁴ See, e.g., *Ambati v. Reno*, 2 Fed. Appx. 500, 501–02 (7th Cir. 2001) (sanctioning two attorneys who were unprepared for oral arguments and acted disrespectfully toward the court for “conduct unbecoming of a member of the bar”); *DCD Programs, Ltd. v. Leighton*, 846 F.2d 526, 527–28 (9th Cir. 1988) (sanctioning an appellate attorney for “lack of diligence” resulting in a misrepresentation of the district court’s statements and rulings); *In re Wiltsie*, 186 P. 848, 848 (Wash. 1920) (upholding decision of State Board of Law Examiners in disbaring an attorney for

tion that the codes allow, or require, lawyers to promote their clients' objectives in any way that is not expressly forbidden.

The gloss on the codes that supports hired-gun practices initially developed largely as a result of economic factors and historical anomalies.²⁶⁵ Because the codes did not define the extent of lawyers' authority to act in furtherance of justice, it became easy for practitioners to argue that the codes contained an exclusive list of limits on advocacy.²⁶⁶ It was, however, this interpretation of the codes and not the codes' terms that justified the claim that the bar had been stripped of authority to act against client wishes.²⁶⁷

At the other extreme, even though the modern codes in some instances vest lawyers with an array of choices regarding how to act, the codes do not support the assumption that the drafters anticipated no limits on the exercise of discretion. As a practical matter, those who responded to the client-oriented interpretation of the codes were so preoccupied with counteracting the notion that moral conduct is irrelevant to lawyer behavior that they too

"moral turpitude" in falsifying draft exemptions for his clients); *State ex rel. Solicitor v. Johnson*, 93 S.E. 847, 849 (N.C. 1917) (disbarring an attorney for being "unfit to practice law" after being convicted on numerous occasions of illegally selling wine).

²⁶⁵ In the period surrounding the adoption of the first modern code in 1969, the financial incentives of lawyers—particularly those of the large metropolitan firms—probably predisposed the bar to emphasize client orientation in the lawyer's role. The decades of the 1960s and 1970s were marked by a significant leap in law firms' economic success. See William E. Nelson, *Contract Litigation and the Elite Bar in New York City, 1960-1980*, 39 EMORY L.J. 413, 425 (1990) ("[T]he income of lawyers increased between three and four times between the beginning of the 1960's and the end of the 1970's."); see also MARC GALANTER & THOMAS PALAY, *TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM* 20 (1991) (noting that law firms enjoyed their "golden age in . . . the early 1960s"). In some measure, this occurred because firms had come to serve client objectives more zealously and unrestrainedly than in the past. To the extent that the firms could justify this form of practice by referring to the mandates of the professional codes, they had good financial reasons to do so. Cf. Richard L. Abel, *Why Does the ABA Promulgate Ethical Rules?*, 59 TEX. L. REV. 639, 667-68 (1981) (arguing that the professional self-regulatory standards serve as legitimization, "the attempt by those engaged in some realm of social activity to offer a normative justification for their actions").

Lawyers' practical incentives were reinforced by the development of academic support for the partisanship model. Lord Brougham's pronouncements, over a century old, had never dominated the thinking of code drafters and professional responsibility theorists. But near the time of the adoption of the 1969 Code, true believers in the model, led by Monroe Freedman, staked out their claims. See generally FREEDMAN, *supra* note 6; FREEDMAN & SMITH, *supra* note 4; Freedman, *supra* note 94. Cf. Silver, *supra* note 257, at 1009 (arguing that the adversarial process is under attack); Spaulding, *supra* note 105, at 6 (arguing that "the lawyer's role is grounded in a logic of [client-centered] service" rather than mere "identification" with the client).

²⁶⁶ Stated another way, the process of legalizing lawyers' ethics may have contributed to the way in which lawyers respond to open-ended regulation. Codification enabled practitioners, in the tradition of Lord Brougham, to infer from the inclusion of specific rules on loyalty, confidentiality, and zealous advocacy that partisanship and client-orientation had become the overriding standards and that provisions tempering advocacy therefore were the occasional and narrow exception. That position was bolstered by the modern codes' elimination of explicit references to conscience. By reducing lawyer obligations to writing, the codes could be seen as suggesting that the only limits on advocacy were those set forth explicitly in the rules or elsewhere in the law.

²⁶⁷ These developments were ironic in light of the fact that the original code, the 1908 Canons, was specifically intended to counteract the popular perception that lawyers act purely as hired guns. See Altman, *supra* note 152, at 2399-400.

quickly accepted the proposition that the codes' discretionary aspects authorize *all* types of conduct, including the refusal even to exercise discretion.²⁶⁸ That again was an assumption not mandated directly by the terms of the regulation itself.²⁶⁹

Indeed, when one considers the major differences between Justice Gibson's approach in *Rush* and what many have come to accept as the ordinary conception of modern practice, one finds that the differences are matters of *practice* and *interpretation* rather than of mandates in the governing standards. The first key element of *Rush*—that lawyers have no discretion to violate the dictates of “professional conscience” and that courts should oversee lawyers' compliance with that requirement—is perfectly consistent with the codification of some specific standards of behavior. The authority of courts to impose duties beyond those expressed in the codes comports with the practice of modern courts of utilizing catch-all rules to impose supple-

²⁶⁸ With the increase in the public discourse about, and scholarly attention to, the rules, a backlash to the Brougham-like interpretation of the codes developed. See, e.g., Stephen Gillers, *What We Talked About when We Talked About Ethics: A Critical View of the Model Rules of Professional Conduct*, 46 OHIO ST. L.J. 243, 244 & n.10 (1985) (noting the increased media attention focusing on legal ethics as a result of the debates over the Model Rules of Professional Conduct); Schneyer, *supra* note 93, at 695–97 (discussing the influence of media attention on the drafting of the Model Rules of Professional Conduct). Accepting as a premise that the client-centered approach minimized lawyer discretion to act on “conscience,” some commentators pointed to discretionary provisions remaining in the codes as authorizing “ethical” behavior. E.g., Schneyer, *supra* note 73, at 1544–50; Serena Stier, *Legal Ethics: The Integrity Thesis*, 52 OHIO ST. L.J. 551, 554 (1991); Zacharias, *supra* note 74, at 1335–50. Other commentators argued that “moral discretion” (i.e., individual conscience) should govern lawyer behavior even in the face of contrary professional standards. See, e.g., Luban, *supra* note 75, at 85 (“defend[ing] the morality of conscience . . . against the claim that professional obligation can override it”); LUBAN, *supra* note 4, at xvii–xviii (urging a professional ethic emphasizing moral decision making and “defend[ing] it against a professional vision based only on client service and the bottom line”); Simon, *supra* note 103, at 37, 131 (noting that “[m]ost debates within the Ideology of Advocacy concern the location of [the line between partisanship and serving as an officer of the court]” and arguing for the exercise of “personal ethics”); SIMON, *supra* note 13, at 8 (“The Dominant View is assumed in the most important provisions of each of the two [modern] codes promulgated by the American Bar Association . . .”); Wasserstrom, *supra* note 92, at 8 (arguing that lawyers should exercise personal morality to decline particular acts). As a result, it soon became common practice to interpret those provisions of the codes which did grant discretion according to a Hoffman-like perspective that ignored the professional-versus-personal-conscience distinction.

²⁶⁹ The legalization process, again, probably had unintended effects on the perspectives of the readers. As code drafters undertook the task of memorializing professional norms almost from scratch, they were confronted with the need to write rules that governed a plethora of situations, some of which could not easily be anticipated. The natural response was to leave leeway in the rules, to allow lawyers to react to the varying scenarios appropriately. Lawyers could do so by resorting to “professional conscience,” in *Rush's* sense; that is, by asking themselves how best to proceed in light of the countervailing duties to the client and the court. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 2.1 cmt. (2002) (urging lawyers faced with an unresolved dilemma to consult other sources of authority). Nevertheless, although the drafters of the modern codes may have anticipated that lawyers would rely on the professional conscience to flesh out the discretionary provisions, the drafters' use of permissive rules opened the door to the implementation of a Hoffman-like approach to discretion in instances where resort to conscience was allowed.

mental limitations on client-oriented representation.²⁷⁰ The only sense in which Gibson's premise regarding the judiciary's role conflicts with modern regulation is that it contradicts the Brougham adherents' interpretation that the codes allow whatever they do not expressly forbid.

On the question of what appropriate behavior entails, the modern codes do introduce the notion that morality and personal conscience sometimes are relevant to lawyer decisions. They thus suggest that individual lawyers' implementation of those concepts may be purely discretionary. For example, new Model Rule 2.1 authorizes lawyer-advisors to "refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation."²⁷¹ It is unlikely that the rule envisions sanctions for lawyers who do not discuss some or all of these factors with their clients. Similarly, the codes typically permit lawyers to withdraw from cases when the client insists on pursuing lawful but "repugnant" or "unwise" tactics or objectives,²⁷² but seem to leave the decision of whether to do so entirely to individualized conscience. On the surface, therefore, the codes seem to adopt a Hoffman-like approach that recognizes the authority of lawyers to exercise discretion based on purely personal and idiosyncratic considerations that are unlike the mandates of Gibson's professional conscience.

On closer examination, however, the codes' references to this type of discretion are not at odds with Justice Gibson's reliance on a professional conscience that requires particular behavior. In *Rush*, Justice Gibson was concerned with the question of how a lawyer exercises power to bring criminal charges and, in particular, whether a lawyer should proceed once he becomes convinced of the criminal defendant's innocence. In this situation and many others, professional norms call for a specific response, or at least a particular type of response. Justice Gibson was not focusing on instances in which the exercise of personal conscience might be appropriate. It is therefore perfectly consistent with *Rush* for the modern codes to recognize a separate category of cases in which lawyers have an option to act, or not, based on individualized moral considerations.

This distinction highlights a tension between Justice Gibson's approach and the gloss that most modern practitioners have added to the codes' references to discretion. These practitioners view *all* code provisions that vest discretion—for example, in the exceptions to attorney-client confidentiality rules²⁷³—as falling within the permissive category. In other words, they view them as granting discretion that is personal in nature and that allows lawyers to decide how to act, and even whether to consider acting at all, based on wholly idiosyncratic considerations.²⁷⁴ Justice Gibson, in contrast, implicitly

²⁷⁰ See *infra* note 347; see also Paul Lowell Haines, *Restraining the Overly Zealous Advocate: Time for Judicial Intervention*, 65 IND. L.J. 445, 462–63 (1990) (advocating increased judicially imposed limits on advocacy).

²⁷¹ MODEL RULES OF PROF'L CONDUCT R. 2.1.

²⁷² *E.g.*, *id.* R. 1.16(b)(2), (4).

²⁷³ *E.g.*, *id.* R. 1.6(b).

²⁷⁴ See, *e.g.*, JOHN T. NOONAN, JR. & RICHARD W. PAINTER, PROFESSIONAL AND PERSONAL RESPONSIBILITIES OF THE LAWYER 107 (2d ed. 2001) ("The Code also, like the Model Rules, is permissive; in no circumstances is a lawyer required to disclose . . .").

recognized two potential categories of discretionary decisions, one of which (i.e., those involving professional conscience) is subject to constraints, the other of which (i.e., those involving personal conscience) may be idiosyncratic.²⁷⁵ His distinction remains consistent with the language of the model codes; arguably, the codes also envision some exercises of discretion that are voluntary and can be purely idiosyncratic and others that are mandatory and must at least be based on professional considerations.²⁷⁶ Indeed, as discussed in Part V(B), this interpretation of the codes provides a more coherent understanding of the drafters' intent than does the modern practitioners' common view.

Like the professional rules, contemporary judicial decisions also can be read to reflect the middle ground suggested by Justice Gibson. In a variety of areas, courts continue to implement the notion that lawyers have duties to the court—obligations of professional conscience, so to speak—that lawyers cannot ignore. In a modern decision that is not at all unique, the New Jersey Supreme Court echoed Justice Gibson's sentiments:

It is known and accepted by every attorney that he or she owes continuing and constant fidelity to the administration of justice. Lawyers have "a professional commitment to the judicial process and the administration of justice." . . . This commitment is heightened in the context of the administration of criminal justice, in which the public welfare is most profoundly implicated. . . . The attorney's allegiance to his client is no stronger than his commitment to preserving the integrity of the administration of justice. Indeed, an attorney's loyalty to a client can never override the professional loyalty owed to the justice system.²⁷⁷

Similarly, a recent California case echoed the facts and flavor of *Rush v. Cavanaugh*. In *Zamos v. Stroud*,²⁷⁸ a lawyer had properly filed a case based on statements of his clients but, in contrast to attorney Rush, failed to dismiss the case when the adversary provided him with evidence that his client had made contradictory statements in the past.²⁷⁹ The California court upheld a malicious prosecution claim against the lawyer, holding that loyalty to the client and the obligation to give the client the benefit of the doubt were overridden, as in *Rush*, by the lawyer's professional obligation to dismiss an action which he no longer had "probable cause" to prosecute.²⁸⁰

275 These two categories correspond roughly to Samuel Levine's distinction between requirements that are "discretionary" and those that are "optional." Levine, *supra* note 95, at 46.

276 See *infra* text accompanying notes 302–18.

277 *In re Conway*, 526 A.2d 658, 664–65 (N.J. 1987) (citation omitted).

278 *Zamos v. Stroud*, 87 P.3d 802 (Cal. 2004).

279 *Id.* at 803–06.

280 *Id.* at 809–10. Although *Zamos* is consistent with the law in most jurisdictions, some federal courts have held that a lawyer may not be sanctioned for violating the ban in Federal Rule of Civil Procedure 11 on filing a pleading with an "improper purpose" unless the initial pleading itself was frivolous. *E.g.*, *Sussman v. Bank of Isr.*, 56 F.3d 450, 457 (2d Cir. 1995).

Lawyers today might be horrified by *Rush's* suggestion that they are not allowed to seek "unjust results." But that restriction is established by Federal Rule of Civil Procedure 11, which requires lawyers to certify that pleadings are not being filed for any improper purpose and are

The judiciary's continued belief in uncodified but nonetheless enforceable limits on advocacy and partisanship is evident in judges' frequent references to lawyers as "officers of the court."²⁸¹ Commentators and the bar have tended to treat that phrase as a tautological concept: lawyers, as officers of the court, must act in accordance with the requirements of the professional rules.²⁸² Nevertheless, judges in their opinions²⁸³ and other writings²⁸⁴ continue to emphasize lawyers' officer-of-the-court role, at times viewing the role as an independent source of lawyer obligations.

"warranted" by the facts and law. FED. R. CIV. P. 11. Arguably, all that has changed is our idea of what is an "unjust" result, and perhaps not even that has changed.

²⁸¹ E.g., *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1031, 1072-75 (1991); *United States v. Shaffer Equip. Co.*, 11 F.3d 450, 457-59 (4th Cir. 1993); *Hirschkop v. Snead*, 594 F.2d 356, 366 (4th Cir. 1979); *Statewide Grievance Comm. v. Sideleau*, No. CV010384234S, 2003 Conn. Super. LEXIS 1393, at *22 (Super. Ct. Mar. 27, 2003); *Fla. Bar v. Richardson*, 574 So. 2d 60, 62 (Fla. 1990).

²⁸² See, e.g., COHEN, *supra* note 14, at 351, 380-81 (arguing that the codes are based on agency law and that the officer-of-the-court-doctrine notion cannot include any obligation to justice because lawyers, as agents, owe a duty of obedience to the principal); Martin H. Malin, *Ethical Concerns in Drafting Employment Arbitration Agreements After Circuit City and Green Tree*, 41 BRANDEIS L.J. 779, 806 (2003) ("The lawyer's duties as an officer of the court are directly related to the lawyer's role in the justice system. They are not general moral duties to society that override the lawyer's duty to zealously advocate the client's interests. This distinction is clearly evident in the Model Rules' treatment of the lawyer's duty to maintain client confidences."); Robert J. Martineau, *The Attorney as an Officer of the Court: Time to Take the Gown off the Bar*, 35 S.C. L. REV. 541, 557, 571 (1984) (arguing that the term officer of the court is empty of meaning, but that courts should exercise supervisory authority over lawyers without reference to the term); Bradley C. Mayhew, *Indigent Defendants and Reimbursement: Counsel's Duty to Report Changes in Financial Conditions to the Tribunal*, 18 J. LEGAL PROF. 281, 284-85 (1993) (arguing that "the 'officer of the court' obligation is quickly becoming an outdated method for defining ethical attorney conduct" and should be read in light of the requirements of the ethics codes).

²⁸³ See, e.g., *Gould v. Bowyer*, 11 F.3d 82, 84 (7th Cir. 1993) ("[P]arties must advise a court when a settlement is imminent The duty is implicit in the characterization of lawyers as officers of the court"); *Fuller v. Fuller*, 210 Cal. Rptr. 73, 76 (Ct. App. 1985) (finding that an officer of the court has a duty to do more than direct a client to comply with an order and then leave the country without making sure the client could, would, or did comply); *Christopher v. State*, 824 A.2d 890, 893 (Del. 2003) ("Lawyers are 'officers of the Court' who must conform to the judge's instructions without derogatory comments or debate."); *State ex rel. Register-Herald v. Canterbury*, 449 S.E.2d 272, 276 n.9 (W. Va. 1994) ("[L]awyers, as officers of [the] Court, [are cautioned] to carefully scrutinize any documents prior to press release for information subject to confidentiality restrictions").

²⁸⁴ E.g., Marvin E. Aspen, *Let Us Be "Officers of the Court,"* A.B.A. J., July 1997, at 94, 95 ("All attorneys, as 'officers of the court,' owe duties of complete candor and primary loyalty to the court before which they practice. An attorney's duty to a client can never outweigh his or her responsibility to see that our system of justice functions smoothly." (quoting *Malautea v. Suzuki Motor Co.*, 987 F.2d 1536, 1546 (11th Cir. 1993))); Warren E. Burger, Remark, *The Decline of Professionalism*, 63 FORDHAM L. REV. 949, 953 (1995) ("Lawyers, as officers of the court, should be problem-solvers, harmonizers, and peacemakers—the healers, not the promoters, of conflict."); Judith S. Kaye, *Safeguarding a Crown Jewel: Judicial Independence and Lawyer Criticism of Courts*, 25 HOFSTRA L. REV. 703, 715 (1997) ("Lawyers [as officers of the court] are part and parcel of the legal system; they depend on, and in turn are depended on for, the effective administration of justice.").

In numerous cases, judicial opinions have referred to lawyers' duties to volunteer information helpful to the adversary²⁸⁵ or ensure fair settlements even when doing so might require the revelation of client confidences.²⁸⁶ The bar typically treats such references as errors or aberrations in the law, or interprets their scope narrowly.²⁸⁷ As we discuss below,²⁸⁸ however, it probably is the commentators who fail to understand that the modern codes have not, and perhaps could not, entirely displace the obligations of professional conscience that the judiciary has recognized since the days of *Rush*.

B. *Implications for the Discretionary Provisions of the Modern Ethics Codes*

Under Justice Gibson's conception, advocates must resolve certain questions of professional propriety by reference to professional conscience, which captures norms that lawyers should be aware of and that strike a fair balance between duties to the client and the court. In Gibson's day, professional conscience was informed by understandings that for the most part were not enshrined in judicial decisions or other law. Today, in contrast, the ethics codes perform most of the hard work of identifying the duties to the court that supersede clients' wishes and interests. Many of these professional obligations are relatively clear and categorical. For example, the codes establish that lawyers may not knowingly participate in illegality and fraud,²⁸⁹ file frivolous claims,²⁹⁰ or lie or present false evidence to the court.²⁹¹ Such rules

²⁸⁵ See, e.g., *S. Trenching, Inc. v. Diago*, 600 So. 2d 1166, 1166 (Fla. Dist. Ct. App. 1992) (reversing for a new trial based on failure of plaintiff's personal injury lawyer to volunteer that his client had suffered a prior injury).

²⁸⁶ See, e.g., *Virzi v. Grand Trunk Warehouse & Cold Storage Co.*, 571 F. Supp. 507, 511–13 (E.D. Mich. 1983) (rescinding an order approving a settlement after the court learned that the plaintiff's lawyer had settled without informing the adversary that his personal injury client had died); *Spaulding v. Zimmerman*, 116 N.W.2d 704, 709–10 (Minn. 1962) (vacating a settlement order after plaintiff learned that the adversary had withheld discovery by the defendant's expert that the plaintiff's condition was worse than he believed); *State ex rel. Neb. State Bar Ass'n v. Addison*, 412 N.W.2d 855, 856 (Neb. 1987) (holding that plaintiff's lawyer was obligated to correct a hospital's mistaken impression regarding plaintiff's insurance status before settling the hospital's bill).

²⁸⁷ See Nathan M. Crystal, *The Lawyer's Duty to Disclose Material Facts in Contract or Settlement Negotiations*, 87 Ky. L.J. 1055, 1083–86 (1999) (interpreting the cases as being consistent with Model Rule 4.1 insofar as "Rule 4.1(a) is properly interpreted to require lawyers to disclose material facts or law when the nondisclosure is the equivalent of a material misrepresentation"); Paul Rosenberger, Note and Comment, *Laissez-Fair: An Argument for the Status Quo Ethical Constraints on Lawyers as Negotiators*, 13 OHIO ST. J. ON DISP. RESOL. 611, 628 (1998) (reading the *Virzi* line of cases as applying only to "particularly egregious attorney conduct").

Cases like *Southern Trenching*, *Virzi*, and *Spaulding* can be distinguished. *Southern Trenching* has not been followed by other courts. The *Virzi* court itself noted a possible narrower ground for its decision—that the plaintiff's lawyer had failed to substitute parties upon the decedent's death, which would have alerted the adversary. See *Virzi*, 571 F. Supp. at 511. *Spaulding* involved a party who was a minor, which necessitated special judicial oversight of the settlement. See *Spaulding*, 116 N.W.2d at 352–53. Nevertheless, these and similar cases can justifiably be read, as a whole, to reflect a judicial view that attorneys have some obligations to the truth.

²⁸⁸ See *supra* Part V(B).

²⁸⁹ E.g., MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (2002).

²⁹⁰ E.g., *id.* R. 3.1.

eliminate the need for lawyers to intuit the content of the relevant normative standards from their professional role.

But not all ethics rules are transparent, and some do not provide any explicit criteria for resolving ethically problematic situations in which the interests of the public and clients are in tension.²⁹² Instead, lawyers are charged with deciding for themselves how to balance the competing interests, based on considerations that are not specified in the rules. For example, an advocate *may* refrain from offering testimony that he believes but does not know to be false,²⁹³ withdraw from the representation if he reasonably believes the client is using his services to commit a crime or fraud,²⁹⁴ or disclose client confidences to prevent specified harms or criminal conduct.²⁹⁵ But, as far as the codes are concerned, the lawyer does not invariably have to act or refrain from acting in the specified way. The bases for deciding in any given case are not spelled out.

There are two possible explanations for why the code drafters would decline to enunciate a decision-making standard in these contexts. The prevalent explanation is that lawyers are meant to have unbridled discretion to decide how to behave whenever faced with a situation that falls within the class of cases, as a matter of personal conscience. The drafters may have believed, for example, that when a lawyer reasonably believes the client is about to commit a crime, the lawyer should be able to decide whether to blow the whistle based on any criteria (even wholly arbitrary and irrelevant criteria, such as a coin flip) and that, from the code's perspective, it does not matter what choice the lawyer makes. The alternative explanation, which reflects Justice Gibson's conception, is that the rules presuppose that lawyers will exercise professional conscience in deciding how to act in individual cases within the category identified by the rule. In other words, lawyers will strive to strike an appropriate balance between the competing interests, based on legal and systemic considerations that are familiar to lawyers.²⁹⁶ If a lawyer fails to exercise this professional conscience, he abuses his discre-

²⁹¹ *E.g.*, *id.* R. 3.3(a)(1), (3).

²⁹² For purposes of the discussion that follows only, we include third-party interests within the notion of the "public's" interests. We also set aside the issue (because it does not bear on our discussion) of whether and when acting in the client's interest in fact serves the interest of the public.

²⁹³ MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(3) ("A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.").

²⁹⁴ *Id.* R. 1.16(b)(2).

²⁹⁵ *Id.* R. 1.6(b)(1)-(2).

²⁹⁶ Thus, for example, the decision of how to act when the lawyer suspects a client or witness will testify untruthfully may depend upon how insistent the client or witness is that he has told the truth, the importance of the issue being testified about, the likely effect on the client of taking particular remedial steps, or whether the opposing lawyer is in a position to counteract any perjury. Similarly, factors that might affect a lawyer's determination of whether to implement a discretionary confidentiality exception include the relative harm to the client and third party if disclosure is (or is not) made, whether the potential third party or systemic interest is preventable by other means, how certain the injury is, and the client's reaction to the lawyer's proposal to disclose.

tion, just as trial courts abuse their discretion when they make discretionary decisions based on irrelevant or impermissible criteria.

In certain situations, the ethics codes undoubtedly do give lawyers complete personal discretion—in particular, when the paramount interests at stake are those of the lawyer. In those situations, as far as the legitimate public and client interests are concerned, it does not matter what the lawyer does. Consider, for example, the rule permitting (but not requiring) a lawyer to reveal client confidences to the limited extent necessary to establish a personal claim or defense²⁹⁷ or the rule permitting (but not requiring) a lawyer for an indigent client to pay court costs or expenses.²⁹⁸ In the scenarios covered by these rules, public interests and client rights do not have a strong claim. The lawyer should be allowed to disclose confidences to collect a fee or to defend himself, but there is no reason why he should have to do so. Likewise, the lawyer is allowed to fund an indigent client's litigation, but there is no reason why he should be obliged to commit his own resources to the matter. No overarching systemic values would be served either by requiring or by forbidding the lawyer to act. In these situations, the rationale for granting discretion thus is consistent with the lawyer's exercise of discretion based on any criteria, including personal self-interest or the lawyer's particular philosophy of representation.

But this reasoning does not support all of the different delegations of discretion in the codes, such as lawyers' discretion regarding the introduction of seemingly false testimony or the disclosure of a client's intent to commit a crime. These are situations where the most compelling interests are those of the public and the client, and where those interests are squarely at odds. It would be anomalous to conclude that the existence of this tension justifies authorizing lawyers to resolve the tension without reference to the underlying interests of either the public or the client, based on the lawyer's own interests, beliefs, or values.

It is conceivable, even in instances in which the balance to be struck involves public and client interests, that the drafters accorded lawyers unilateral discretion to use personal criteria as part of a political compromise between constituents who believed that lawyers should always favor the public interests and constituents who believed that lawyers should always favor client interests. Consider, for example, the future crime context, in which a client credibly tells a lawyer of his intent to commit a murder and cannot be dissuaded from following through. Drafters divided in their views of how lawyers should reconcile the client's interests in confidentiality and the public's interest in disclosure might consciously have decided to leave the issue to individual lawyers to resolve, based on each lawyer's philosophical preferences. There does not seem to be much evidence in the history of the drafting process to support this explanation, however. It also overlooks the reality that the state courts, which have been responsible for adopting the ABA models (with or without modification), remain the ultimate arbiters of the

²⁹⁷ E.g., MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(5).

²⁹⁸ E.g., *id.* R. 1.8(e)(2).

ethics norms and can therefore undermine any political compromise through their interpretations of lawyers' obligations.

The better explanation of the discretionary code provisions follows from Justice Gibson's recognition of professional conscience. In certain classes of cases, it is too difficult to write a rule drawing a line between cases in which lawyers should act one way (e.g., reveal the crime) and those in which the lawyer should act a different way (e.g., keep the confidence). Although the decision should be made by reference to professional interests, the preferable approach in any given case requires weighing various relevant facts in light of the competing interests. The best that a rule can do is to tell lawyers that there is no one correct answer for all cases within the broad category and then leave it to individual lawyers, at least in the first instance, to try to get it right in individual cases.²⁹⁹ This is not to say, however, that it is a matter of indifference how each lawyer acts, or that the lawyer may exercise idiosyncratic personal conscience. Although the rule's permissive language directs lawyers to exercise discretion, lawyers are expected to exercise professional discretion, not personal discretion.

The more discretionary the codes' mandates are, the more difficult they become to enforce.³⁰⁰ Moreover, to the extent courts rely on the codes for guidance with respect to the collective view of appropriate professional conduct, discretionary provisions are less likely to find their way into judicial rulings that regulate lawyers.³⁰¹ The increased emphasis on discretion even by the courts has therefore been an inevitable consequence of legalization of the codes. But that does not change the expectation that lawyers will implement discretion in a manner that strikes a reasonable balance between competing professional interests given the circumstances of the particular case.

This analysis highlights an important point about the nature of the modern codes. Practitioners' typical conception of the codes, which we have already described,³⁰² incorporates a fundamental misunderstanding of the regulatory role of conscience and discretion. The modern codes in fact identify two very different kinds of discretionary activity: (1) activity involving professional conscience, in which discretion should be exercised with a view to implementing appropriately the multiple interests and values that the law-

²⁹⁹ Cf. *Dos Passos*, *supra* note 3, at 161 ("With a full conception of the general nature of his duties, it is with the lawyer himself to determine, whether he will aid, or defeat, justice. No special rules can be laid down, for all kinds of conditions constantly confront him.").

³⁰⁰ Justice Gibson might have disagreed, but modern conceptions of due process limitations require some form of notice regarding punishable conduct. *E.g.*, *In re Ruffalo*, 390 U.S. 544, 552 (1968). That, however, has not proven too much of an obstacle to the ability of courts to discipline lawyers for actions that interfere with "the administration of justice" or that illustrate "unfitness to practice law." See *supra* note 231.

³⁰¹ See *Zacharias*, *supra* note 136, at 249–57 (discussing the relationship between specificity in code commands and enforcement of the codes); see also *RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS* §§ 66(3), 67(4) (2000) ("A lawyer who takes action or decides not to take action permitted under this Section [authorizing discretion to disclose confidences] is not, solely by reason of such action or inaction, subject to professional discipline, liable for damages to the lawyer's client or any third person, or barred from recovery against a client or third person."); *supra* note 126.

³⁰² See *supra* text accompanying notes 262–70.

yer is obligated to serve; and (2) activity involving personal conscience, in which different lawyers will have different approaches because their individual consciences may emphasize different values. With respect to the first activity, there often are right and wrong answers, and lawyers should expect the possibility of judicial remediation or criticism if they respond inconsistently with the collective professional conscience. Where personal conscience is at issue, the lawyer's exercise of discretion is less constrained.

When the discretionary provisions in the modern codes are considered in context, it may be intuitively clear whether the exercise of discretion is professional or personal. We have previously identified a lawyer's discretion to disclose client wrongdoing, to refrain from using apparently false testimony, and to withdraw from a representation involving an abuse of the lawyer's services as discretion that should be exercised based on professional criteria. Other examples include the decision whether to take specified steps upon learning of wrongdoing by a constituent of a corporate client³⁰³ and the decision whether to discuss with a client the legal consequences of a proposed course of action.³⁰⁴

In situations in which the rules expect lawyers to exercise discretion in a professionally appropriate way, it would be wrong—that is, an abuse of discretion—for a lawyer to refuse to make a considered decision. For example, a lawyer should not, in his retainer agreement with prospective clients, promise never to disclose confidential information in order to protect a third party, even if the lawyer conscientiously makes this promise to enhance the attorney-client relationship.³⁰⁵ When the situation arises, the confidentiality exception requires the lawyer to consider whether a particular disclosure should be made given the third party's interest and the systemic interest in maintaining confidences.³⁰⁶

³⁰³ *E.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.13 (2002).

³⁰⁴ *E.g.*, *id.* R. 1.2(d).

³⁰⁵ The propriety of promising at the outset of the representation never to exercise discretion to disclose client confidences was addressed at a recent ABA legal ethics conference. See *Attorney's Obligation to Explain Rules on Keeping Clients' Secrets Is Debated*, 20 *Laws. Man. On Prof. Conduct (ABA/BNA)* 310 (June 16, 2004) (reporting a conference panel entitled "Communicating Concerning Confidentiality" at the ABA National Conference on Professional Responsibility, at which panelists discussed whether the lawyer may promise not to disclose confidences except where it was mandatory to do so).

³⁰⁶ Arguably, provisions that are not explicitly discretionary can, in effect, contain the same tension. Consider, for example, the rules requiring the expediting of litigation and the reporting of misconduct. *E.g.*, MODEL RULES OF PROF'L CONDUCT R. 3.2 ("A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client."); *id.* R. 8.3(a), (c) ("A lawyer who knows that another lawyer has committed [certain] violation[s] . . . shall inform the appropriate professional authority," but this requirement "does not require disclosure of information otherwise protected by Rule 1.6 . . ."). These include caveats (*e.g.*, "consistent with the interest of clients" and "do not require the disclosure of confidential information") that threaten to swallow the rules. It is unlikely that the code drafters intended the provisions to be meaningless, as they would be if each lawyer implemented the caveats with a view to maximizing the client's interests; rarely would a client benefit from accepting the inconvenience of an action that is not "consistent with" her interests or that discloses her confidence. Presumably, these issues are matters of degree and must be discussed with the client, but the lawyer cannot unilaterally adopt a policy of never implementing the interests that the rules serve.

Likewise, a lawyer should not adopt a policy of introducing into evidence all helpful testimony unless he is certain that it is false.³⁰⁷ The rule permitting the lawyer to refuse to introduce potentially false evidence imposes a professional obligation on the lawyer to consider how likely the testimony is to be false, the impact of the testimony on the fact finder, and the impact on the client's rights if the testimony is withheld.³⁰⁸ In Samuel Levine's terms, the rule adopts a "Deliberative Model" for the lawyer's response, not an option to refuse ethical consideration.³⁰⁹

In contrast, some provisions do contemplate that lawyers will refer to their personal sense of morality. For example, a lawyer has discretion to refuse a case,³¹⁰ to withdraw if the client insists on pursuing a repugnant objective,³¹¹ to give advice referring to moral, economic, social, and political factors,³¹² and, as we previously noted, to reveal client confidences in order to establish a personal claim or defense,³¹³ or to pay an indigent client's court costs or expenses.³¹⁴ With respect to such decisions, different lawyers might reasonably take varying positions in the same situation. Professional conscience does not mandate a particular result.³¹⁵

There are some grey areas of discretion, of course. The codes, for example, do not make clear what a lawyer must do when his "conscience" encourages him to forego lawful trial tactics that the client insists upon³¹⁶ or when the client insists on filing a claim for an improper purpose when a proper purpose can also be identified.³¹⁷ An argument can be made that these involve professional conscience, at least in part, because these are activities on

³⁰⁷ An intelligent client represented by a lawyer adhering to such a policy could always create *some* uncertainty simply by claiming the testimony is truthful.

³⁰⁸ Similarly, lawyers should not accept all technically legitimate client conflict of interest waivers. Professional discretion requires lawyers to consider whether each waiver is consistent with the client and systemic interests underlying the conflict rules. *See, e.g., Zacharias, Waiving Conflicts, supra* note 80, at 429 (discussing lawyers' obligations when a client waives a conflict of interest). Nor, under the expediting litigation rules, may a lawyer rely upon "client interests" to nullify entirely his professional obligation to expedite. *Cf. MODEL RULES OF PROF'L CONDUCT R. 3.2 cmt.* ("Nor will a failure to expedite be reasonable if done for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose.").

³⁰⁹ Levine, *supra* note 95, at 49-52; *see also* Green, *supra* note 95, at 51-56 (arguing that lawyers' right to rely on personal conscience is restricted when discretion under the ethics code is "grounded"—i.e., where "a lawyer must make an individual decision based on a range of relevant factors").

³¹⁰ *Cf. Spaulding, supra* note 105, at 19-20 (accepting this discretion but suggesting that the "professional identity" endorsed by the codes suggests that lawyers should be receptive to accepting even clients with whose causes they disagree).

³¹¹ *E.g., MODEL RULES OF PROF'L CONDUCT R. 1.16(b)(4).*

³¹² *E.g., id. R. 2.1.*

³¹³ *E.g., id. R. 1.6(b)(5).*

³¹⁴ *E.g., id. R. 1.8(c)(2).*

³¹⁵ *See SIMON, supra* note 13, at 16 (noting norms in the Code of Professional Responsibility and the Model Rules of Professional Conduct, including the withdrawal provisions, "that delegate broad, unreviewable autonomy to lawyers to consult their personal values").

³¹⁶ *E.g., MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt.* ("[T]his Rule does not prescribe how such disagreements are to be resolved.").

³¹⁷ *E.g., id. R. 3.1.*

which a court may impose supplemental obligations.³¹⁸ That the codes are not always precise about the nature of the discretion to be exercised does not change the overriding conclusion, however, that there are areas of professional conscience that the codes recognize and in which they expect discretion to be exercised nonidiosyncratically.

C. *Explaining Theoretical Puzzles, or Anomalies, in Professional Responsibility Commentary and Regulation*

Recognizing the distinction between professional conscience enforced, when necessary, by courts and a general moral conscience that is wholly discretionary on the part of each lawyer helps resolve or explain several theoretical issues with which modern professional responsibility scholars have struggled.

1. *Susan Koniak's Nomos*

In one part of a seminal article, Susan Koniak has posited that the practicing bar and the courts each have a different vision, or "*nomos*," concerning appropriate behavior by lawyers and the substantive law that governs, or should govern, legal practice.³¹⁹ Koniak cites, for example, the contrast between judges' approach to attorney-client secrecy, as encapsulated in the law of privilege, and the bar's approach in attorney-client confidentiality rules.³²⁰ Most ethics codes appear to protect confidentiality in situations in which the attorney-client privilege does not. Koniak concludes that the bar's belief in the overriding importance of the attorney-client relationship is inconsistent with the judiciary's more practical determination to resolve cases in a fair way, based on the fullest possible evidentiary record.³²¹

Although most of Koniak's examples center on attorney-client confidentiality,³²² she offers others as well. One involves a court's reaction to a group of securities lawyers' failure to respond to client fraud in "closing a merger deal."³²³ The court agreed with the SEC that the law required the lawyers to avoid complicity and to take remedial measures.³²⁴ But the court failed to reach the issue of whether the lawyers had an obligation to disclose the fraud or to take other specific actions identified by the SEC because, in the instant case, the lawyers had done nothing at all.³²⁵ This, Koniak concludes, illustrated two realities: (1) that the SEC and the court shared a vision of the

³¹⁸ In the filing situation, for example, Federal Rule of Civil Procedure 11 already imposes constraints. See FED. R. CIV. P. 11.

³¹⁹ Susan P. Koniak, *The Law Between the Bar and the State*, 70 N.C. L. REV. 1389, 1390-92 (1992).

³²⁰ *Id.* at 1405-06, 1427.

³²¹ *Id.* at 1438-39.

³²² *Id.* at 1427 (discussing "the centrality and power of the norm of confidentiality in the bar's *nomos*").

³²³ *Id.* at 1461 (referring to SEC v. Nat'l Student Mktg. Corp., 457 F. Supp. 682 (D.D.C. 1978)).

³²⁴ *Nat'l Student Mktg. Corp.*, 457 F. Supp. at 715 ("[T]he Court finds that the attorney defendants aided and abetted the violation of § 10(b), Rule 10b-5, and § 17(a) through their participation in the closing of the merger.").

³²⁵ Koniak, *supra* note 319, at 1464.

substantive law regarding lawyers' obligations when confronted by client wrongdoing that was at odds with the bar's vision; and (2) that the court's commitment to its own vision was weak and that it ceded to the bar the right to define what lawyers in this situation must do.³²⁶

Commentators have been quick to embrace Koniak's theory, in part because it explains apparent anomalies in the law.³²⁷ And, to be sure, Koniak's excellent article discusses many other, broader issues than the one to which we have alluded—including what comprises law³²⁸ and who has power over aspects of the law of lawyering that do not hinge on the exercise of discretion.³²⁹ Koniak's focus also is on the distinct *nomos* of the "state," not limited to the *nomos* of courts.³³⁰ At root, however, insofar as the theory does rely largely on a recitation of the differences between the visions of the bar and the judiciary, it offers a pessimistic account. It posits the existence of parallel, inconsistent positions concerning identical issues that can be bridged only if one institution cedes its beliefs.

Our analysis provides an alternative way of evaluating the phenomenon that Koniak highlights. Koniak argues the existence of two entirely separate visions of the same substantive issues. We suggest that in many of Koniak's examples, the visions are reconcilable. The bar's vision to which her examples refer typically is rooted in an ethics rule that covers an aggregation of cases in which a uniform line cannot be drawn and that therefore directs lawyers to exercise professional discretion when confronted with an individual case. The judicial vision, in contrast, typically is identified with reference to a particular case before the court that falls within the broader category covered by the rules. The deciding court is resolving how professional discretion should have been exercised in that one case. The court's resolution may be precisely the same one that the bar would have reached if the bar had been dealing with the single matter at hand. Conversely, had the court been looking at all the cases in the broader category, it might have agreed that not all of them could be resolved the same way—as, indeed, the jurisdiction's high court presumably decided when it adopted a discretionary rule.

Thus, for example, if we are correct that the decision whether to disclose client wrongdoing under the codes' confidentiality rules is a matter of professional and not personal discretion, the apparent gap between the codes' discretionary confidentiality exceptions and the common-law exceptions to the

³²⁶ *Id.* at 1465.

³²⁷ See, e.g., Levine, *supra* note 95, at 64 (discussing a series of cases and suggesting that they might be explained on the basis of "Professor Koniak's view that '[t]he state and the profession have different understandings of the law governing lawyers'" (alteration in original) (citation omitted)); Thomas Ross, *Lawyers and Fraud: A Better Question*, 43 WASHBURN L.J. 45, 56 (2003) ("The bar talks and acts in ways that project its understanding that its law, most especially the rule of confidentiality, controls even in the face of conflicting obligations under other forms of the state's law."); Wendel, *supra* note 198, at 1964–65 ("More commonly, lawyers are aware of the governing legal norms, but assert a contradictory set of norms, often produced by the organized bar's ideological vision of ethical lawyering.").

³²⁸ Koniak, *supra* note 319, at 1402–04.

³²⁹ *Id.* at 1398–99 (discussing the bar's efforts to exempt itself from undisputed obligations of law applicable to other citizens).

³³⁰ *Id.* at 1397.

attorney-client privilege becomes much narrower. Consider, for example, a case in which a kidnapper's victim has been buried alive and the attorney knows the whereabouts of the victim and that the victim will die unless the attorney discloses. Many American jurisdictions would permit disclosure, but only pursuant to a permissive ethics rule under which the attorney "may" breach confidentiality.³³¹ Evidentiary attorney-client privilege rules, in contrast, would typically deem such information unprivileged if the client gave it to the attorney for the purpose of seeking assistance in committing the crime;³³² in such a case, the attorney must disclose the information if it is requested in court proceedings. Koniak's analysis suggests that the two rules represent different visions. Arguably, however, one can interpret the permissive confidentiality exception as being governed by the professional conscience; absent compelling reasons, the spirit of the exception and its imperative that the lawyer consider the third-party interests may, in the particular case, require the lawyer to disclose.³³³ And if that is so, courts that espouse a disclosure obligation in the attorney-client privilege context may not be relying on a different vision than the code drafters, but rather may only be considering a subset of disclosure cases in which the professional rules actually can be read as matching the judicial rule.³³⁴

Likewise, Koniak's securities law example may not represent the court's failure to enforce its different vision of lawyers' responsibilities so much as a statement of where the (enforceable) professional conscience ends and the (purely permissive) personal conscience begins. The codes vest lawyers with significant discretion to choose the appropriate remedy when confronted

³³¹ See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.6(b) (2002). Some states have mandatory disclosure rules governing this situation.

³³² RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 82(a) (2000). In contrast, the privilege exception traditionally has not been deemed to apply if the client gave the lawyer the information solely in order to facilitate the representation. The modern trend, however, is to expand the privilege even in those situations. See *id.* § 82(b) (stating that the privilege does not apply when the client, "regardless of the client's purpose at the time of consultation, uses the lawyer's advice or other services to engage in or assist a crime or fraud").

³³³ At a very minimum, it requires the lawyer to consider whether disclosure is the most appropriate course, given the *valid* countervailing interests.

³³⁴ *Henderson v. State*, 962 S.W.2d 544 (Tex. Crim. App. 1997), provides an interesting variation on this scenario. *Henderson* involved a kidnapping, much like the above scenario, in which the government knew that the lawyer had obtained a map from the defendant that identified the whereabouts of the victim. *Id.* at 548–49. Interestingly, the prevailing rules reversed the visions that Koniak ascribes to the court and bar. The Texas confidentiality rule virtually required disclosure, but the attorney-client privilege exception did not apply because the defendant had not given the information to the lawyer in order to further the crime. *Id.* at 554–56. The lawyer therefore felt duty-bound to withhold the information when subpoenaed.

The court interpreted the ethics rules as "accurately reflect[ing] the nature of the policy interests regarding an attorney's disclosure of ongoing or future criminal activity." *Id.* at 556. It then imported those policy considerations into the attorney-client privilege standards, holding that "a third party need show only a reasonable possibility of the occurrence of a continuing crime or future crime likely to result in serious bodily injury or death to compel disclosure of the privileged information." *Id.* at 557. The court, in other words, effectively denied the existence of Koniak's different *nomos*. It held that the same policy considerations—the same obligations of professional conscience—governed the lawyer's obligation to disclose under the ethics and evidentiary rules, even though neither set of rules explicitly incorporated those obligations into its terms.

with client fraud.³³⁵ The lawyers in the securities case chose to do nothing. The court specifically held that (1) the obligation to what we call the professional conscience was to exercise their discretion to determine the appropriate remedy and (2) failure to do so in and of itself was a violation of law.³³⁶ Had the lawyers taken some steps, the court no doubt would have evaluated their conduct in order to determine whether professional conscience required more (or whether the choice among the reasonable options was a matter of personal discretion). Our point simply is that, on close examination, the court may have had no substantive disagreement with the bar and was not ceding authority to set the standards that fell within the realm of professional conscience.

We do not mean to overstate our position. Often the courts and the bar in fact approach particular issues differently or have different emphases. But our analysis explains a nagging void in this narrow aspect of Koniak's theory; namely, the question of how it is that judges and practicing lawyers, who share training and experiences, would come to view the identical issues in different ways. We suggest that they do not. When seeming to disagree, courts and the bar actually are often discussing different aspects of a problem—the court is dealing with the resolution of an individual case, while the bar is dealing with a set of cases that cannot all be resolved the same way.

2. *The Judicial Imposition of Disclosure Obligations that Exceed Discovery Requirements and that Do Not Fit Exceptions to Attorney-Client Privilege*

Professional responsibility scholars have long puzzled over a line of cases in which courts have identified and enforced duties by lawyers that seem inconsistent with lawyer obligations under the professional codes.³³⁷

³³⁵ See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.2(d) ("A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct . . ."); *id.* R. 1.2 cmt. ("Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action . . . [Sometimes] the lawyer must . . . withdraw. . . . In some cases, withdrawal alone might be insufficient.").

³³⁶ SEC v. Nat'l Student Mktg. Corp., 457 F. Supp. 682, 713–14 (D.D.C. 1978) ("[I]t is unnecessary to determine the precise extent of their obligations here, since . . . they took no steps whatsoever to delay the closing. . . . [A]ttorneys cannot rest on asserted 'business judgments' as justification for their failure to make a legal decision.").

³³⁷ See, e.g., STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 626–27 (6th ed. 2002) (probing the meaning of *Virzi*); Eugene R. Gaetke, *Lawyers as Officers of the Court*, 42 VAND. L. REV. 39, 74–75 (1989) ("If the *Virzi* and *Kath* courts were truly concerned with the nondisclosure of facts because they were important to the settlements reached, rather than because of the lawyers' potential deception, the cases expand the officer of the court obligation in civil litigation beyond that stated in the law of legal ethics."); Michael H. Rubin, *The Ethics of Negotiations: Are There Any?*, 56 LA. L. REV. 447, 472–74 (1995) (analyzing the *Virzi* line of cases); W. Bradley Wendel, *Rediscovering Discovery Ethics*, 79 MARQ. L. REV. 895, 939–40 (1996) (attempting to reconcile the *Virzi* line of cases with traditional notions of attorney-client confidentiality); Fred C. Zacharias, *The Future Structure and Regulation of Law Practice: Confronting Lies, Fictions, and False Paradigms in Legal Ethics Regulation*, 44 ARIZ. L. REV. 829, 856 (2002) (noting that the *Virzi* line of "cases requiring lawyer candor that might be proscribed under attorney-client confidentiality rules seem to contradict the codes' premise that aggressive advocacy and full partisanship maximize the search for truth").

Many of these cases involve issues of whether lawyers must volunteer information to adversaries despite attorney-client confidentiality rules, but other aspects of the codes have been implicated as well—including notions of loyalty to clients and the role of lawyers in negotiating settlements.³³⁸

A well-known example is *Virzi v. Grand Trunk Warehouse and Cold Storage Co.*, in which an attorney failed to volunteer to the court and opposing party that his client had died before a settlement was reached and recorded.³³⁹ Putting to the side the question of the lawyer's obligation to the court,³⁴⁰ *Virzi* held that the lawyer had a duty of disclosure to the opposing party because his client's death was "a major event,"³⁴¹ essential information upon which "the settlement of the case [was] based."³⁴² To confuse matters further, the court cited professional rules governing confidentiality and candor as mandating this duty of disclosure.³⁴³ Other courts have followed the *Virzi* approach in rescinding final judgments in cases in which a plaintiff's attorney has failed to disclose a client's preexisting injury,³⁴⁴ an insurance policy covering a debt,³⁴⁵ and the complicity of a potential witness in wrongdoing.³⁴⁶

Scholars have struggled to rationalize and harmonize these decisions with the perceived role of lawyers as champions of the client. Because the pertinent information in these cases fit the definition of confidential information and no explicit confidentiality exception applied, the duties of loyalty and confidentiality seemed to prevent the lawyers from volunteering the information to their adversaries. One response might be Koniak's: the code drafters and the courts simply have different understandings of the lawyer's

³³⁸ We focus below on the *Virzi* line of cases, but another illustration is the line of cases dealing with the obligations of a fiduciary's lawyer. The ABA's position is that a lawyer who learns of wrongdoing by the fiduciary owes no duties to the beneficiaries or others whom the fiduciary serves, other than duties that lawyers ordinarily owe to third parties, because no ethics rule identifies additional obligations. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 380 (1994). In decisions typified by *Fickett v. Superior Court*, 558 P.2d 988, 989-90 (Ariz. Ct. App. 1976), however, courts have recognized particular disclosure obligations owed to the beneficiaries. Commentators have struggled with how to explain the judicial decisions. See, e.g., Geoffrey C. Hazard, Jr., *Triangular Lawyer Relationships: An Exploratory Analysis*, 1 GEO. J. LEGAL ETHICS 15, 31 (1987) (suggesting that beneficiary may be viewed as a quasi-client); Robert W. Tuttle, *The Fiduciary's Fiduciary: Legal Ethics in Fiduciary Representation*, 1994 U. ILL. L. REV. 889, 953 ("[T]he lawyer bears a legal duty not to advise or assist her client to breach his fiduciary obligations and a moral duty to protect the beneficiary from harm. These responsibilities derive from a proper understanding of the attorney's client, as the fiduciary officeholder, and also from the lawyer's own moral duties of nonmaleficence and beneficence.").

³³⁹ *Virzi v. Grand Trunk Warehouse & Cold Storage Co.*, 571 F. Supp. 507, 509 (E.D. Mich. 1983).

³⁴⁰ The lawyer may, for example, have had an obligation to make sure the executor of the estate was immediately substituted for the deceased party in the proceedings.

³⁴¹ *Virzi*, 571 F. Supp. at 512.

³⁴² *Id.*

³⁴³ See *id.* at 509-11 (citing Model Rules of Professional Conduct 1.6 (governing confidentiality), 3.3 (governing candor to the tribunal), and 4.1 (governing misrepresentations to third persons), none of which by its terms imposed any duty to volunteer information to one's adversary).

³⁴⁴ E.g., *S. Trenching, Inc. v. Diago*, 600 So. 2d 1166, 1166 (Fla. Dist. Ct. App. 1992).

³⁴⁵ *State ex rel. Neb. State Bar Ass'n v. Addison*, 412 N.W.2d 855, 856 (Neb. 1987).

³⁴⁶ *Kath v. W. Media, Inc.*, 684 P.2d 98, 102 (Wyo. 1984).

role and, when lawyer conduct occurs in the context of litigation, the court's "nomos" overrides the bar's. That, however, does not explain the courts' citation of the professional rules as justification for their decisions. For if the rules simply codify the bar's separate vision, judges should be candid enough to note that the vision is inconsistent with the judicial approach.

The concept of professional conscience makes sense of this dichotomy. Courts in the *Virzi* line of cases seem simply to be acting in the time-honored tradition of Justice Gibson in *Rush*. To the extent the open-ended provisions of the codes³⁴⁷ and the spirit of the candor-to-the-tribunal provisions³⁴⁸ and confidentiality exceptions (including the exception for disclosures authorized or required by law)³⁴⁹ incorporate duties arising from professional conscience, the codes are consistent with supplemental judicial rulings that refine the lawyers' role. When courts, like the *Virzi* court, cite rules that do not by their terms authorize the disclosures in question, they are not necessarily misreading the rules. Instead, the courts are concluding that lawyers' general authority not to volunteer information must be exercised in conjunction with the spirit of discovery rules,³⁵⁰ the need for efficient judicial administration,³⁵¹ the obligation of candor to the courts, and a modification of the lawyer's partisan role in aspects of the settlement process that are not monitored by the safeguards of the adversary process.³⁵² In other words, the courts' decisions are recognizing that these rules stand for a standard of conduct that is nuanced and that incorporates a background set of principles that comprise

³⁴⁷ See, e.g., MODEL RULES OF PROF'L CONDUCT R. 8.4 (2002) ("It is professional misconduct for a lawyer to: . . . (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer . . . ; (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation; [or] (d) engage in conduct that is prejudicial to the administration of justice."); MODEL CODE OF PROF'L RESPONSIBILITY DR 1-102(A) (1969) ("A lawyer shall not . . . (3) [e]ngage in illegal conduct involving moral turpitude[,] (4) [e]ngage in conduct involving dishonesty, fraud, deceit, or misrepresentation[,] (5) [e]ngage in conduct that is prejudicial to the administration of justice, [or] (6) [e]ngage in any other conduct that reflects adversely on his fitness to practice law.").

³⁴⁸ See, e.g., MODEL RULES OF PROF'L CONDUCT R. 3.3 & cmt. (setting forth "the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process"); MODEL CODE OF PROF'L RESPONSIBILITY DR 7-102 (listing duties of lawyer to safeguard the integrity of the litigation process).

³⁴⁹ See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(6) ("A lawyer may reveal [client confidences] to the extent the lawyer reasonably believes necessary . . . to comply with other law or a court order."); accord MODEL CODE OF PROF'L RESPONSIBILITY DR 4-101(C)(2); see also *id.*, EC 4-2 ("The obligation to protect confidences and secrets obviously does not preclude a lawyer from revealing information . . . when necessary to perform his professional employment . . . or when required by law.").

³⁵⁰ Cf. Marianne M. Jennings, *The Model Rules and the Code of Professional Responsibility Have Absolutely Nothing to Do with Ethics: The Wally Cleaver Proposition as an Alternative*, 1996 WIS. L. REV. 1223, 1241 ("In order to restore the lawyer's role as an officer of the court seeking to assist a jury in its arrival at truth, the profession must be willing to continue to move toward mandatory and timely discovery and disclosure The rules on disclosure include the obligation to supplement.").

³⁵¹ Disclosure in the *Virzi* situation, for example, serves judicial administration by forestalling the potential need for courts to rescind settlements that are based on erroneous factual premises.

³⁵² Cf. Zacharias, *supra* note 74, at 1334 n.99 (discussing why society might hold lawyers to an obligation to seek fair settlements).

the professional conscience.³⁵³ In the tradition of *Rush*, a failure by attorneys to implement the professional conscience may require courts subsequently to intervene.

3. *Reconciling Judicial Use of Officer-of-the-Court Terminology with Commentary Disfavoring the Concept*

We have already alluded to judges' continued reliance on the concept of lawyers' duties as "officers of the court."³⁵⁴ One of the perplexing themes in the modern professional responsibility literature has been whether the concept continues to have force. Beginning with the Canons, the ethics codes have identified particular obligations that advocates owe to the court,³⁵⁵ but the codes have never stated that advocates, as officers of the court, owe duties to the court other than those specified in the rules. Only the Model Rules specifically refer to the lawyer as an "officer of the court"—in passing, in the preamble and the candor-to-the-court provisions.³⁵⁶

As we have noted, commentators and the bar have tended to dismiss the officer-of-the-court concept as tautological, while judges have continued to emphasize it as if it provides a source of lawyer obligations independent of the rules.³⁵⁷ The commentators' rhetoric makes it appear that the ethics codes do not acknowledge any professional obligations to the system that are not explicit in the terms of the rules. The judicial response makes it appear that courts are imposing obligations that are inconsistent with the codes' mandates.³⁵⁸ On the surface, therefore, we have a conundrum. Who has it right? Or is this another instance of Koniak's separate *nomos*, in which the bar and courts simply view the world differently?³⁵⁹

³⁵³ Interestingly, the *Virzi* court unwittingly made specific reference to Justice Gibson's approach: in its view, fair dealing and adequate disclosures in negotiation are "morally binding on the conscience of the professional." *Virzi v. Grand Trunk Warehouse & Cold Storage Co.*, 571 F. Supp. 507, 512 (E.D. Mich. 1983) (emphasis added).

³⁵⁴ See *supra* text accompanying note 281.

³⁵⁵ For example, the Canons frequently called upon lawyers to treat judges, juries, opposing parties, and other lawyers respectfully as part of their duty to the court. The Canons also required lawyers to contribute to the integrity of the judicial system by acting with candor and fairness in their presentation of evidence and questioning of witnesses. See generally CANONS OF PROF'L ETHICS CANON 22 (1908).

³⁵⁶ This reinclusion of "officer of the court" language might have been intended to have significance, but lawyers have disregarded it. See FREEDMAN & SMITH, *supra* note 4, at 9–10.

³⁵⁷ See *supra* text accompanying notes 283–84. Compare Jane Aiken & Stephen Wizner, *Law as Social Work*, 11 WASH. U. J.L. & POL'Y 63, 79 (2003) ("Lawyers are governed by professional rules that stress zealous advocacy on behalf of their clients while remaining ever aware of their role as 'officers of the court.'"), and Robert Gilbert Johnston & Sara Lufrano, *The Adversary System as a Means of Seeking Truth and Justice*, 35 J. MARSHALL L. REV. 147, 160 (2002) ("Interpreting the Model Rules of Professional Conduct as holding an attorney's duty to the public as officer of the court to be the attorney's first priority and by broadly construing the rules of discovery, the adversary system is supported in arriving at a truthful and just result."), with *Gould v. Bowyer*, 11 F.3d 82, 84 (7th Cir. 1993) (finding the duty to advise a court when a settlement is imminent "implicit in the characterization of lawyers as officers of the court"), and *Fuller v. Fuller*, 210 Cal. Rptr. 73, 77 (Ct. App. 1985) (finding within the lawyer's obligation as officer of the court the duty to ensure a client's compliance with a court order).

³⁵⁸ See *supra* text accompanying notes 339–49.

³⁵⁹ Koniak seems to start with the premise that the bar's vision comports with what she

The puzzle disappears, however, if one reads the codes as incorporating the notion of professional conscience, which in turn depends upon the role of lawyers as officers of the court.³⁶⁰ Judges are wrong in treating the *term* itself as an independent source of obligations, but the concept has meaning. And commentators who treat the concept as extinct are incorrect. Under our understanding of the contemporary codes, the codes incorporate an element of professional conscience that takes into account the very factors that the courts are emphasizing.³⁶¹ Judicial enforcement of duties to the court corresponds to the mandates of professional conscience to which *Rush v. Cave-naugh* referred; namely, conduct that all lawyers should know the legal system requires, even if not expressed in specific regulation. Indeed, by including a reference to the role of lawyers as “officers of the legal system,” the preamble to the Model Rules suggests that the modern codes do not reject the concept.

D. *Bridging the Gap in the Modern Discourse About Professional Responsibility*

The three themes just discussed reveal that procedural and rhetorical differences have often become substantive in the minds of professional responsibility commentators. New visions of appropriate conduct by lawyers seem to have captured different institutions or bodies of code drafters at different times in our history. When courts and commentators have been unable to explain these phenomena logically, they have assumed that the results are largely political—reflecting the temporary dominance of proponents of the separate visions within the institutions in which they operate (e.g., the bar, the code drafters, and the courts).

On the surface, as Koniak has suggested,³⁶² the differences in vision often do seem insurmountable. It is easiest to conceptualize the theoretical divide as a reflection of developments in the increasingly political arena of

terms the “classic formulation of the legal profession’s ethos”; namely, “that short of violating the law, the lawyer should do all she can to further the client’s cause no matter how morally objectionable that cause is and no matter what moral wrongs are perpetrated on others in the process.” Koniak, *supra* note 319, at 1395–96.

³⁶⁰ This interpretation is in full accord with the view of the annotators of the Model Rules of Professional Conduct themselves. In discussing the candor-to-the-tribunal provisions of Rule 3.3, the annotations state: “Although a lawyer’s paramount duty is to pursue the client’s interests vigorously, ‘that duty must be met in conjunction with, rather than in opposition to, other professional obligations.’ . . . Implicit in the lawyer’s role as officer of the court is the general duty of candor.” ANNOTATED MODEL RULES OF PROF’L CONDUCT R. 3.3 annot. (2003) (citations omitted). The annotators immediately follow this with a citation to the contrary, the Brougham-like view of Monroe Freedman, which the annotators appear to dismiss, that the “truth-seeking function of adversary system works best when lawyer holds duty to client over all other duties.” *Id.*

³⁶¹ For example, in Koniak’s securities scenario, *see supra* text accompanying note 323, the fact that the codes accorded remedial discretion to the lawyers did not mean, as Koniak suggests, that the codes (and the bar’s *nomos*) justified the lawyers in refusing to take any remedial action at all under the facts at hand. *Cf. Gaetke, supra* note 337, at 79 (arguing that the codes’ duties do not derive from the officer-of-the-court model but, given the survival of the conception of lawyers as officers of the court in the Model Rules of Professional Conduct, that the term should be given new meaning in the codes).

³⁶² *See supra* text accompanying notes 319–26.

professional rulemaking. Supporters of judicial activism perceive the codification process as having atrophied lawyers' consciences or as having undermined the opportunities for lawyers to exercise conscience.³⁶³ In contrast, a considerable portion of the bar perceives the history of underenforcement of the codes as reflecting a conscious and reasoned preference on the part of the regulators to leave professional decisions to lawyers' discretion and individual conscience.³⁶⁴

By explaining the simultaneous development of these inconsistent views of the history of professional regulation, this Article's analysis helps bridge the gap between them. Both perspectives overstate the case. Professional norms were underenforced in the 19th and early 20th centuries. The modern codes have attempted to specify lawyers' responsibilities where possible. But, as we have shown, courts have at all times insisted that lawyers exercise a measure of independence from client desires and interests. And contemporary professional regulation is consistent with that; the modern codes at least leave open the possibility that lawyers should exercise professional conscience.

As for the notion that the exercise of conscience is, has always been, and should be, personal, this certainly was not the case by 1906, when the Canon-writing process began. The very concept of codifying norms in Canons, rather than leaving them to informal transmission, is antithetical to the idea (held at the time in England and perhaps by the American legal elite) that gentlemen know what is expected of them and do not need rules. But even in 1845, as *Rush* illustrates, courts would tell lawyers how to act when they had occasion to do so. The modern codes, by increasing the possibility of enforcement, press this notion forward rather than abandoning it.

Our analysis, therefore, suggests that the current discourse—be it concerning Koniak's *nomos* of the bar and courts, specific duties of lawyers, or the meaning of being an officer of the court—should expand. It seems clear that the notion of professional conscience has always been embedded in professional and judicial regulation of lawyers,³⁶⁵ and that it continues to play a role today.³⁶⁶ Recognizing the notion explicitly can only help us in rewriting

³⁶³ See, e.g., Paul J. Lipscomb & Jonathan Diehl, *Officers of the Court: Another Perspective*, 62 OR. ST. B. BULL. 29, 32 (2002) ("The recent codification of these professional responsibilities in the Code of Professional Responsibility does not transform the code into the source of those [officer-of-the-court] duties."); Malin, *supra* note 282, at 803–04 (noting the "fear that the Rules' minimalist approach to regulating lawyer conduct will become accepted as the ultimate declaration of normatively desirable behavior," but arguing that "[t]he Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law.").

³⁶⁴ See *supra* text accompanying note 268.

³⁶⁵ Cf. Richard C. Stanley, *A Professional Model of Ethics*, 47 LOY. L. REV. 773, 776, 786 (2001) (arguing for a "professional model of ethics [that] is not revolutionary, and in fact represents a return to the traditional basis for any real system of legal ethics" under which "even in the absence of a specific ethical rule, . . . a lawyer [must] make ethical choices that first and foremost are faithful to the lawyer's role as a trustee of the public's system of justice").

³⁶⁶ Inherent in such a change is the need for a redirection of the debate—a modern rethinking of a central question of legal ethics; namely, the extent to which lawyers may or must act contrary to the direction, objectives, or interests of the client in service of other values. Al-

the codes, in understanding discretionary language that the codes might include, and in harmonizing judicial and other regulatory expressions about lawyers' obligations.³⁶⁷

VI. Conclusion

The traditional understanding of the ethics of advocates is that there are two seminal approaches—Brougham's model of zealous advocacy and Hoffman's emphasis on personal conscience and discretion.³⁶⁸ The common view is that professional regulation has veered between these two approaches, never fully embracing one or the other, and thus has remained unprincipled and, to some degree, incoherent.

though the most recent revisions to the Model Rules of Professional Conduct recognize the centrality of this issue, the drafters have avoided facing the issue head-on—even more so than past code drafters. The clearest example of this evasion is found in the comments to new Model Rule 1.2:

Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer.

MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt. (2002).

³⁶⁷ By this point, it should be clear that this Article is not offering the concept of professional conscience as the solution to all professional responsibility questions. The concept simply helps explain and reconcile the prevailing conceptualizations of professional regulation and offers a way for lawyers and courts to respond to some unresolved issues. The broader question of how lawyer behavior should be regularized—by a single set of rules, context-specific rules, or multiple regulators—is a question for another day. Cf. David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799 (1992) (discussing regulation by multiple regulators); Fred C. Zacharias, *Reconceptualizing Ethical Roles*, 65 GEO. WASH. L. REV. 169 (1997) (discussing context-specific and role-specific professional rules). So also is the question of how the concept of professional conscience might affect the conduct of lawyers in nonadvocacy settings, including the advice and settlement stages of representation.

³⁶⁸ See, e.g., Spaulding, *supra* note 105, at 1 (“It has become quite unfashionable to defend vigorous, client-centered lawyering . . . [F]or nearly three decades the project of defining and explicating professional ethics has been colonized by a group of scholars fundamentally hostile to the concept of client-centered representation . . .”).

A few recent commentators have attempted to refocus the debate, positing that the best arguments in favor of lawyers' partisan conduct do not necessarily stem from Brougham's adversarial, client-centered notions. Daniel Markovits, for example, identifies a need for lawyers to justify their tactics in a way that maintains their integrity, based on “first-personal” ethical considerations. Markovits, *supra* note 84, at 220–21. The vehicle Markovits prefers for this justification is to conceptualize otherwise questionable tactics as aspects of meritorious “statesmanship,” of which lawyers can be proud. *Id.* at 272–77.

Bradley Wendel offers an “authority conception of legal ethics.” Wendel, *supra* note 1, at 365–66. Under Wendel's approach, lawyers ordinarily “are duty-bound not to frustrate the achievement of law by reintroducing contested moral values . . . as the basis for an ethically motivated decision to act or not to act on behalf of a client.” *Id.* at 366. This obligation, however, derives not from any sense that an adversarial orientation produces appropriate results (e.g., client autonomy), but because the prescribed standards of conduct represent “an inherently valuable achievement of a pluralistic democracy.” *Id.*

We have suggested that Justice Gibson's 1845 opinion in *Rush v. Cave-naugh* offers a third conception of advocacy ethics: advocates owe fidelity to the court as well as to the client and therefore—contrary to Brougham—may not do everything legally permissible to promote the client's cause. Under this conception, limits on advocacy and partisanship are not derived from personal morality, as Hoffman and others would have it, but are implicit in lawyers' professional undertakings. Lawyers can be held accountable; they must recognize their professional obligations and comply with them. Courts and, presumably, the bar may articulate lawyers' professional duties on an ongoing basis. When lawyers face issues of professional duty on which no definitive direction has been given, lawyers must rely on their own sense of professional (as opposed to personal) propriety.

The term "professional conscience," which sums up Justice Gibson's conception, never caught on. But the ideas behind it did. In many important respects, Gibson's conception not only anticipated the development of professional regulation, but also offers a coherent understanding of the modern regulatory process and modern professional norms that otherwise seem unprincipled. Justice Gibson's distinction between professional and personal conscience also challenges conventional wisdom about how lawyers should exercise discretion accorded by the ethics rules. At a minimum, it provides a basis for discussing lawyer discretion that offers hope for a meeting of the minds among proponents of the extreme Brougham and Hoffman models. In the final analysis, Justice Gibson's middle-ground perspective may provide a more palatable approach than either of the traditional conceptions of the advocate's role.