The Judicial Ethics of Criminal Law Adjudication

Keith Swisher
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INTRODUCTION

If you put an animal in too small an enclosure, you may rely on it that he will make a violent effort to escape. There is no way of predicting whether he will succeed in this effort, or where he will go if he breaks out. If you put him in a larger enclosure you may be reasonably sure that he will be content to stay inside the enclosure. . . . What we need, as I see it, is a larger grazing area for judges.¹

Or, you could build a stronger cage. That is precisely what has happened in judicial ethics—judges are disciplined regularly and harshly for “legal errors” in order to keep these “animals” in their cages. On a number of levels, it is baffling that judicial discipline for adjudicatory “legal errors” has proceeded of late without controversy and without in-depth critical

¹ L.L. Fuller, American Legal Realism, 82 U. PA. L. REV. 429, 437 (1934) (noting further that the legal “realists are bringing this [change] about, and they ought to realize that in doing so they are making the judge a more tractable and predictable animal”).
analysis. In fact, I dare say that the first substantial effort even to organize
the modern ethical doctrine, and its application to respondent judges,
occurred only five years ago.\(^2\) Besides the (very) occasional court or judicial
conduct commission, no one has subjected this “Rule”\(^3\) to a lengthy critical
evaluation. This fact is surprising indeed in light of the Rule’s power: for
centuries, judges, lawyers, and scholars have philosophized on how the
judge should rule; this Rule has answered that age-old question—it partially
prescribes how the judge must rule.\(^4\)

While it is surprising that no one has examined this powerful Rule, it is
not surprising that the Rule, or something like it, has sprung through the
otherwise concrete curtain of absolute judicial immunity. With judges
having shrouded themselves with such strong civil immunity over even
palpably wrong adjudications and related acts to the extent that bad judges
were getting away with murder,\(^5\) it was only a matter of time before the

\(^2\) See generally Cynthia Gray, The Line Between Legal Error and Judicial Misconduct:
(attempting to categorize the doctrine); see also Jeffrey M. Shaman et al., Judicial Conduct
and Ethics \(\S\) 2.02 (3d ed. 2000) (similar). Rest (un)assured that the relevant scholarly universe
is much smaller than one would expect.

\(^3\) Over time, the Rule has been derived primarily from interpretations of Canons 2A
(imposing a duty to “comply” with the law) and 3B(2) (imposing a duty to be “faithful” to the
J. Legal Ethics 1, 8–9 (1988); see also Gray, supra note 2, at 1246 (quoting Model Code of
Judicial Conduct Canon 3B(7) (1990)) (claiming that the rule also arises in part from the
judge’s duty “to accord to every person who has a legal interest in a proceeding, or that
person’s lawyer, the right to be heard according to law”). Hereinafter, I refer to the duties of
Canons 2A and 3B(2), interchangeably, as the “Rule” and violations of the Rule as disciplinable
“legal errors.” Judges who fail to “comply with” or “be faithful to” the law can receive
significant sanctions for their legal errors, including suspension or even removal from the
bench. For a further explanation of this frequently prosecuted disciplinary rule, see Parts I and
II, infra.

\(^4\) Though the phenomenon has fallen below the legal radar, it is not completely
surprising in light of the modern trend to standardize and enforce ethical rules. See, e.g., W.
(notting that, with respect to attorneys’ ethics, “[t]he Kutak Commission decided to adopt a
black letter set of rules, regulatory in structure, which would establish a minimum standard of
conduct for lawyers . . . . Legal ethics had become law.”); Vincent R. Johnson, America’s
Preoccupation with Ethics in Government, 30 St. Mary’s L.J. 717, 746–47 (1999). The result
is not necessarily good. See, e.g., Daniel R. Coquillette, Real Ethics for Real Lawyers 9
ethics or professional responsibility has been reduced in this manner to a set of mechanical
disciplinary rules, it is no longer apparent what it has to do with ethics or responsibility.”).

\(^5\) E.g., Stump v. Sparkman, 435 U.S. 349, 364 (1978) (holding absolutely immune a
judge who, without authority or precedent under state law, granted a petition to force the
sterilization of a minor); Pierson v. Ray, 386 U.S. 547, 554 (1967) (“This [absolute
adjudicatory] immunity applies even when the judge is accused of acting maliciously and
corruptly . . . .”)}
people and the good judges sought out, or at least acquiesced in, an accountability mechanism: enter judicial discipline.

Thus, for better or worse, we now have an unexamined ethical rule that disciplines judges for “bad” criminal law decisions.⁶ The ABA just finished revising the Model Code of Judicial Conduct, but importantly it did not “reverse” this Rule (although the ABA did modify it in significant ways).⁷ Therefore, further debate is insufficient; we need a new standard for judging. Wittingly or not, the Rule is actually an attempt to deal with the practice of lawlessness in the courts of this nation. The cases and other doctrine are confused primarily because they fail to heed (or comprehend) the differing types of adjudicatory lawlessness and differing species of lawless judges. Once we identify and outlaw the correct type of lawlessness, we likely will agree on the rest of the thesis: (i) that lawlessness on the part of judges is generally bad, (ii) that judges should be professionally punished for it, and (iii) that doing so will not offend our deeply held notions of judicial independence to any significant degree. What follows in this Article is a rather exhaustive attempt to put flesh on that thesis.

This Article thus deconstructs the current Rule (along with attendant considerations in criminal law adjudication) and then reconstructs it toward several practical and theoretical ends. Part I describes the shallow history and current operation of the Rule and practice of professionally disciplining judges for errors in criminal law adjudication. Part II situates the Rule in the criminal law context and interprets the Rule’s most laudable effect—policing violations of criminal defendants’ rights.

To begin the critical project, Part III clarifies and redefines the Rule in a way that cleanses the sloppy and self-defeating descriptions of the Rule that have collected over the last thirty-plus years. Part IV confronts the most fundamental objection to the Rule—the rhetoric of judicial independence—using the objection and ethical theory to discern the Rule’s legitimate limits, the most important of which is excluding adjudications that avert significant injustice in particular cases. In short, when reviewing adjudications at the disciplinary stage, we move the test for violations from the ambivalent and

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⁶. See generally Keith Swisher, The Moral Judge, 56 Drake L. Rev. 637 (2008) (explaining ethical adjudication). Even more remarkable, it is quite possible that most lawyers (and perhaps even some judges) are unaware that judges can be, and often are, disciplined for errors in applying the law.

⁷. See Model Code of Judicial Conduct R. 2.2 (2007); A.B.A. Joint Comm’n to Evaluate the Model Code of Judicial Conduct, Report 46–47 (Dec. 20, 2006) (listing reporter’s explanation of changes). As of this writing, the new Model Code has been adopted, with varying alterations, in nine states: Arizona, Arkansas, Delaware, Hawaii, Indiana, Kansas, Minnesota, Montana, and Ohio. Twenty-six other states have begun to reexamine their existing judicial code in light of the 2007 Model Code. For a discussion of the new Code’s changes to the Rule, see Part VI.
even incoherent existing doctrine to a search for both nonfrivolousness and justice. Part V discusses many of the Rule’s practical consequences on the conduct of judges and attorneys. Finally, Part VI looks briefly into the Rule’s future by assessing the ABA’s ambivalent revisions of the Rule in February of 2007 and concludes that state supreme courts—many of which are currently reviewing their judicial ethics rules in light of the ABA’s work—should not adopt the proposed changes in their current form.

I. THE TEXTUAL EVOLUTION OF THE RULE AND ITS CURRENT APPLICATION

A. The Judicial Ethics of the ABA and the Origin of the Modern Rule

Versions of the current duties to comply with, and remain faithful to, the law—the main sources of the Rule—have appeared in the ABA’s “Codes” since 1924, in the Canons of Judicial Ethics. Canon 5, entitled “Essential Conduct,” stated that: “[a] judge should be temperate, attentive, patient, impartial, and, since he is to administer the law and apply it to the facts, he should be studious of the principles of law and diligent in endeavoring to ascertain the facts.” Even more to the point, Canon 20, entitled “Influence of Decision upon the Development of the Law,” clearly listed the ABA’s then-restrictive judicial philosophy:

A judge should be mindful that his duty is the application of general law to particular circumstances, that ours is a government of law and not of men, and that he violates his duty as a minister of justice under such a system if he seeks to do what he may personally consider substantial justice in a particular case and disregards the general law as he knows it to be binding on him. Such may become a precedent unsettling accepted principles and may have detrimental consequences beyond the immediate controversy. He should administer his office with a due regard to the integrity of the system of law itself, remembering that he is not

8. For a brief (but somewhat dated) history of the ABA’s Codes of Judicial Conduct, see Shaman, supra note 3, at 3. Like the Model Rules of Professional Conduct, the ABA’s Codes have become the law of the land. See Gray, supra note 2, at 1246 n.4 (stating that “[f]orty-nine states, the U.S. Judicial Conference, and the District of Columbia have adopted codes based on (but not identical to) either the 1972 or 1990 model codes”). They impressively govern the conduct of virtually all state and federal judges.

a depositary of arbitrary power, but a judge under the sanction of the law. 10

Furthermore, as stated in Canon 21, the philosophy was breathtakingly bland:

Justice should not be moulded by the individual idiosyncrasies of those who administer it. A judge should adopt the usual and expected method of doing justice, and not seek to be extreme or peculiar in his judgments, or spectacular or sensational in the conduct of the court. 11

In 1972, with the adoption of the ABA’s Code of Judicial Conduct, both duties appeared in (essentially) their current form. In order to prevent “impropriety” (or even the “appearance of impropriety”), 12 Canon 2A states that a “judge should respect and comply with the law.” 13

10. Id.; In re Code of Judicial Ethics, 153 N.W.2d 873, 875 (Wis. 1967) (expressing similar ethical duty in Rule 1 of Wisconsin’s former Code of Judicial Ethics, but making duty aspirational, not mandatory).

11. CANONS OF JUDICIAL ETHICS (1957).

12. CODE OF JUDICIAL CONDUCT Canon 2 (1972). Technically, a violation of Canon 2A would be an actual impropriety, not an appearance of one, but the distinction is unimportant for our purposes. Id. at cmt. (“Actual improprieties under this standard include violations of law, court rules or other specific provisions of this Code.”). The Code later was named the Model Code of Judicial Conduct.

13. CODE OF JUDICIAL CONDUCT Canon 2A (1972). The full Canon provides that “[a] judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.” Id. A reasonable interpretation of the duty to “comply with the law” would be that the judge must not break the law, say by stealing a VCR from Target. In re Garrett, 613 So. 2d 463, 465 (Fla. 1993) (holding that the judge’s theft violated Canon 2A). Courts, however, have interpreted the duty to include “complying” with the applicable law in adjudication. See, e.g., Leslie W. Abramson, Canon 2 of the Code of Judicial Conduct, 79 MARQ. L. REV. 949, 960 (1996); TEXAS PRACTICE SERIES, HANDBOOK OF TEXAS LAWYER AND JUDICIAL ETHICS § 26.4 (2006) (discussing both types of discipline under Canon 2A). The new Code fixes the ambiguity. See MODEL CODE OF JUDICIAL CONDUCT R. 2.2 (2007); see generally A.B.A. JOINT COMM’N TO EVALUATE THE MODEL CODE OF JUDICIAL CONDUCT, REPORT 46 (Dec. 20, 2006) (distinguishing the duty to comply with the law from the duty to follow the law when adjudicating).

Professor Abramson’s article, cited above, is quite useful in the main, but it is unhelpful with respect to the subject at hand. It rebels against application of the Rule without analysis. Its objection consists of the two following sentences: “Clearly, such a sword over the judge’s head would have a tendency to chill his independence. A judge would have to be as concerned with what is proper in the eyes of the disciplinary commission as with what is the just decision.” Abramson, supra, at 962. The article adopted verbatim the criticism of a 1977 law review article, which similarly lacks critical analysis on this point. See Ben F. Overton, Grounds for Judicial Discipline in the Context of Judicial Disciplinary Commissions, 54 CHI.-KENT L. REV. 59, 66 (1977) (taking preceding propositions without citation from STANDARDS RELATING TO JUDICIAL DISCIPLINE AND DISABILITY RETIREMENT 3.4 cmt. (1978)). Even the cited article itself acknowledges that “commission[s] must have authority to discipline a judge when his judicial ruling is made in bad faith.” Id. at 67. Notably, Professor Abramson’s article, a few pages
Canon 3B(2), renumbered in the ABA’s 1990 revisions of the Code, commands that a “judge shall be faithful to the law.”\textsuperscript{14} Other than the renumbering, however, the ABA’s overhaul of the Code in 1990 did not affect either duty.\textsuperscript{15} With the exception of the new Code adopted last year,\textsuperscript{16} the ABA has never issued any further official, or even quasi-official, comment or statement of these duties in the legal error context.

In fact, it has issued a refusal to comment. Generally, the ABA has said definitively that “[a] philosophy about the role of the judge is essential to the development of a code of conduct for judges.”\textsuperscript{17} For the Rule in particular, however, the ABA took a different approach: it “rejected the detailed discussion of judicial opinions, philosophy of law, and judicial idiosyncrasies and inconsistencies in [the] old Canons.”\textsuperscript{18} It chose instead to rely on the general standard of “‘faithful[ness] to the law’ . . . to remind a judge that he is a part of a system and process that places limits and

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\textsuperscript{14} \textit{Model Code of Judicial Conduct} Canon 3B(2) (1990). The full Canon, entitled “Professional Competence and Freedom from Partisanship,” provides that a “[a] judge shall be faithful to the law and maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor or fear of criticism.” \textit{Id.}

Canon 3B(2) (formerly 3A(1)) also imposed—for the first time—an explicit competence requirement on the judge. E. Wayne Thode, \textit{Reporter’s Notes to Code of Judicial Conduct} 51 (1973). It did so because (among other reasons) “a competency standard having been established for lawyers in Canon 6 of the \textit{Code of Professional Responsibility}, surely no less should be required of judges.” \textit{Id.}

\textsuperscript{15} See, \textit{e.g.}, \textit{Annotated Model Code of Judicial Conduct} 29–30, 89 (2005) (comparing 1972 and 1990 Codes). An important change occurred in the face of the text—the Code heightened the duty that a judge “\textit{should} be faithful to the law” to “\textit{shall} be faithful to the law”—but the change had no practical effect, particularly in light of the similar mandatory duty in Canon 2A (which has remained in its present form since 1972). Compare \textit{Code of Judicial Conduct} Canon 3A(1) (1972) (emphasis added), with \textit{Model Code of Judicial Conduct} Canon 3B(2) (1990) (emphasis added). \textit{See generally, Lisa L. Milord, The Development of the ABA Judicial Code} (1992) (giving the drafting history of the 1990 Code).

\textsuperscript{16} \textit{See infra} Part VI.

\textsuperscript{17} Thode, \textit{supra} note 14, at 45 (citing Irving R. Kaufman, \textit{Lions or Jackals: The Function of a Code of Judicial Ethics}, 35 \textit{Law & Contemp. Probs.} 3 (1970)); \textit{see also id.} (stating that “Canon 1 and its text state the Committee’s philosophy” of the judge’s role); Milord, \textit{supra} note 15, at 12 (stating that “[t]he 1990 Code Committee believed that this first Canon stated appropriately the core principles of the Code and as such was important and should remain relatively unchanged, even though its very general nature does not establish a bright line for purposes of discipline”).

\textsuperscript{18} Thode, \textit{supra} note 14, at 50 (discussing current Canon 3B(2)).
obligations on him.”19 It explicitly refused to “spell out those limits and obligations.”20

The ABA’s vagueness notwithstanding, we will see in detail that judges frequently are disciplined for legal errors in violation of Canons 2A and 3B(2).21

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19. Id. at 51.

20. Id. There were benefits, however, to the more particularized proscriptions in the Canons. For instance, Canon 21 stated that “[t]hough vested with discretion in the imposition of mild or severe sentences [a judge] should not compel persons brought before him to submit to some humiliating act or discipline of his own devising, without authority of law, because he thinks it will have a beneficial corrective influence.” CANONS OF JUDICIAL ETHICS Canon 21 (1957). Without this clear guidance, judges repeatedly have made these mistakes and suffered discipline for them. See, e.g., TEXAS PRACTICE SERIES, HANDBOOK OF TEXAS LAWYER AND JUDICIAL ETHICS § 26.4 n.68 (2008) (citing discipline of Texas judge who sentenced one defendant to "jail with three days of bread and water" and another defendant "convicted of illegally dumping toxic torts to drink toxic sludge"); see also In re Best, 719 So. 2d 432, 435 (La. 1998) (censuring judge in part for asking courtroom audience "[i]f you think I ought to find him not guilty, will you stand up?"). Judges also have been disciplined for failing to make transcripts or otherwise to allow parties to make the record. See, e.g., In re Staley, 486 N.W.2d 886, 902 (Neb. 1992) (removing judge in part for preventing a record of various proceedings). Canon 22 ("Review") attempted to prevent such behavior:

In order that a litigant may secure the full benefit of the right of review accorded to him by law, a trial judge should scrupulously grant to the defeated party opportunity to present the questions . . . ; any failure in this regard on the part of the judge is peculiarly worthy of condemnation because the wrong done may be irremediable.

CANONS OF JUDICIAL ETHICS Canon 22 (1957).

21. Professor Shaman has explained the overlapping nature of these two (or more) duties:

The courts have found that legal error may run afoul of several provisions of the Code of Judicial Conduct. Courts have held that legal error may violate Canon 2 of the Code, which requires judges to comply with the law, to avoid impropriety, and to conduct themselves in a manner that promotes public confidence in the judiciary. Legal error also has been found to violate Canon 3, which provides that "a judge should be faithful to the law and maintain professional competence in it." It has further been held that legal error, especially when occurring in a repeated pattern, demonstrates that a person does not have the proper temperament to be a judge or is unfit for judicial office.

Shaman, supra note 3, at 8–9 (footnotes omitted); see also MODEL CODE OF JUDICIAL CONDUCT R. 2.6(A) (2007) (copying former Canon 3B(7)); Gray, supra note 2 at 1246 (quoting MODEL CODE OF JUDICIAL CONDUCT Canon 3B(7) (1990)) (basing the rule in part in the judge’s duty “to ‘accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law.’”).
B. A Primer on the Modern Rule’s Application in Disciplinary Proceedings

The foregoing duties are regularly violated and prosecuted in the state and (to a lesser extent) federal discipline systems. Judicial conduct commissions typically must prove that a violation occurred by clear and convincing evidence. State supreme courts generally must agree with and adopt the commissions’ recommendations, although commissions’ decisions with respect to certain sanctions are final in some states. States ostensibly have different standards (1) to determine the requisite clarity of the “law” that the judge supposedly misapplied and (2) to distinguish between mere “legal error” and “judicial misconduct.”

With respect to the first requirement, several descriptions have been attempted. One version apparently asks whether “reasonable judges could . . . differ” in the legal outcome and whether judges were faced with “a unique situation for which there was no available legal template.” A related, but more refined, standard asks “if a reasonably prudent and


Because Article III of the Constitution protects federal judges’ tenure, their disciplinary system is different. See, e.g., Shaman, supra note 3, at 16–17 (describing federal disciplinary procedures). In short, they generally may be disciplined, but not removed. They nevertheless have (virtually) the same ethical duties as state judges. See CODE OF CONDUCT FOR UNITED STATES JUDGES Canons 2A, 3B(1) (1996).

23. Judicial conduct commissions prosecute these and other code violations. See, e.g., Overton, supra note 13 at, 59 (“The primary function of these commissions is to provide a procedure for enforcement of the code of judicial conduct in force in the jurisdiction.”); see also supra, note 22 (regarding federal discipline).

24. E.g., Overton, supra note 13, at 63; see also Model Rules for Judicial Disciplinary Enforcement R. 7 (1994) (stating that “[c]harges of misconduct . . . shall be established by clear and convincing evidence”); Gray, supra note 22, at 5.

25. See, e.g., Gray, supra note 22, at 5.

26. See generally Gray, supra note 2 (describing the courts’ various criteria to determine disciplinable legal error).

27. See id. at 1259–60 (quoting In re Curda, 49 P.3d 255, 261 (Alaska 2002)).
competent judge would consider that conduct obviously . . . wrong in all the circumstances.”

Even simpler tests—and ones that redundantly make doubly-sure that the law was clear at the time of the judge’s decision—boil down to asking whether the ruling violated “clear and determined law about which there is no confusion or question as to its interpretation.” Indeed, the commissions, and the state supreme courts that adopt their recommendations, should make sure that the law was clear at the decisional moment, but determining the clarity of the law is a difficult task. Even laws “clear” on their face (usually, recently enacted statutes about which there is no dispute concerning their applicability or interpretation in context) can become murky in light of competing constitutional considerations. In recognition, then, of the law’s inherent ambiguity, the test adopted by Maine’s highest court may be the best (albeit somewhat vague) standard: whether a reasonable and competent judge would have considered the ruling “obviously . . . wrong in all the circumstances.”

28. Id. at 1260 (quoting In re Benoit, 487 A.2d 1158, 1163 (Me. 1985)).
29. Id. at 1261 (citing In re Quirk, 705 So. 2d 172, 181 (La. 1997)). Similarly, some courts have asked whether the ruling was “sufficiently debatable.” Id. at 1262 (citing In re Spencer, 798 N.E. 2d 175, 183 (Ind. 2005)). There is a continuing (probably endless) controversy over how clear the law must be before a judge may be disciplined for legal error. See, e.g., Harrod v. Ill. Courts Comm’n, 372 N.E.2d 53, 65–66 (Ill. 1978) (holding that commission could prosecute judges who disregard law that “is clear on its face,” but the commission unconstitutionally exercised the “judicial power” “to interpret statutory ambiguities” by “compel[ling] judges to conform their conduct to any such interpretation”).
30. E.g., Karl Llewellyn, Some Realism About Realism—Responding to Dean Pound, 44 HARV. L. REV. 1222, 1239 (1931) (“[I]n any case doubtful enough to make litigation respectable the available authoritative premises . . . are at least two, and that the two are mutually contradictory as applied to the case at hand.”).
31. In re Benoit, 487 A.2d at 1162–63. The test perhaps should be refined to make explicit what I think is implicit in it: that all reasonable and competent judges would agree that the ruling was obviously wrong in the circumstances. I believe that was the court’s intent, but the quoted passage leaves room to fathom the possibility that only some reasonable and competent judges would have thought that the conduct was obviously wrong while others might not have. That qualification notwithstanding, the test is fair in the sense that a roughly equivalent standard applies to attorneys. See, e.g., MODEL RULES OF PROF’L CONDUCT R. 3.1 (2003) (“A lawyer shall not . . . assert or controvert an issue [in a proceeding] unless there is basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.”). There does not seem to be an appreciable degree of difference between the “obviously wrong” and “not frivolous” standards. Normally, of course, standards for attorneys’ and judges’ conduct may (and sometimes should) differ, but here it would be nonsensical to vary the standard. If an attorney may assert a legal interpretation or outcome, judges can (and indeed must) consider it. I can foresee an objection that there may be reasons for judges’ standard of adjudication to be higher than attorneys’ standard for raising and disputing issues. The purpose of the standard, however, should not be forgotten—that is, to ascertain in part whether the ruling should be disciplined (not whether the ruling was wise). I doubt the existence of a usefully higher standard in this regard. See infra Part IV.
The second requirement—the criteria used to identify **disciplinable** legal errors—is more varied. Identification can be simplified to a two-step process: whether the judge failed to apply, misapplied, or misinterpreted “clear” or “obvious” law (discussed above); and our present inquiry, whether that failure warrants discipline. For this analysis (assuming it deserves to be called analysis), courts ostensibly look for “something more” than “mere legal error.” They have applied several diverse criteria to the task. In the main, they use four factors to discern whether the mysterious “something more” is present: (1) availability of appeal, (2) pattern of error, (3) egregious error, and (4) bad faith. That is, in short, courts consider whether the ruling (1A) is correctable on appeal, (2A) reflects repeated, or a pattern of, conduct, (3A) reflects egregious error (such as a violation of fundamental rights), or (4A) reflects the judge’s bad faith. Courts have not assigned relative weights to these factors and generally apply them in an ad hoc fashion.

Using these (rather loose) principles, commissions and courts discipline judges for criminal “legal errors” of all varieties.

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32. Some commentators have conjoined the clarity of the law analysis with the second inquiry (i.e., whether “legal error” rises to disciplinable “legal error”). See, e.g., Gray, supra note 2, at 1259–63 (combining the analyses). We perhaps could distinguish the two inquiries and (as most courts have done) make the clarity of the allegedly violated law an initial inquiry, because practically speaking if the law was unclear (in the sense that we have described it) the judge either did not commit any legal error or did so in a way that almost never warrants discipline. Nevertheless, I ultimately advocate a unified standard that incorporates the clarity of the law in its analysis. See infra Parts III–IV.

33. In re Benoit, 487 A.2d at 1162–63.

34. The sprawling criteria partially reflect a misunderstanding of the nature of disciplinable “legal errors.” This mistake of definition and treatment is corrected in Parts III and IV below.

35. See, e.g., SHAMAN ET AL., supra note 2, § 2.07 at 37–38. Gray, supra note 2. These factors are discussed, and largely dismissed as unhelpful, in Part IV, infra.

36. See, e.g., SHAMAN ET AL., supra note 2, § 2.01, at 34 (“Unfortunately, courts and disciplinary bodies generally have not established standards for applying the Canon 3 provisions in cases in which judges have been charged with abusing their power or discretion.”). Cf. Abramson, supra note 13, at, 952 (“Judicial discussions of Canon 2 issues frequently devote more attention to the appropriate sanction for the judge’s misconduct than to the question of whether a violation occurred. Reviewing courts rarely define or analyze the relation between the applicable ethical standard and the offending conduct.”).
II. THE CRIMINAL LAW LEGAL ERROR DOCTRINE IN ACTION

A. General Methodology

Before we begin, it should be beneficial to call attention to the limits of the relevant data set, the cases. The cases first must involve discipline. The judicial conduct commissions dispose of many cases without proceeding to impose judicial discipline, these cases are not discussed. That part is simple. The more difficult part is limiting our definition of disciplinable "legal error." For present purposes, by legal error, I mean either (1) failing

37. Part II borrows liberally from my earlier essay. See generally Swisher, supra note 22.

38. The state commissions dismiss the vast majority of complaints against judges. GRAY, supra note 22, at 3 ("Most complaints filed with judicial conduct commissions—generally more than 80%—are dismissed."); Brief of Petitioner at 8, Va. Judicial Inquiry and Review Comm’n v. Peatross, 611 S.E.2d 392 (Va. Feb. 4, 2005), (No. 042306), 2005 WL 2098865 (claiming that "[a]ll but two or three dozen complaints of the nearly one thousand complaints that the Commission receives each year are rejected summarily, with a not insubstantial number being rejected because they represent nothing more than an attempt by a disgruntled litigant to substitute a Commission proceeding for an appeal").

Also, although attorney discipline may result from a judge’s conduct on the bench, this Article does not address those proceedings. See generally Frank D. Wagner, Annotation, Misconduct in Capacity as Judge as Basis for Disciplinary Action Against Attorney, 57 A.L.R.3d 1150 (1974); Shaman, supra note 3, at 17 ("It has been said that a judge is a lawyer who performs his or her job behind the bench instead of in front of it and who therefore may be disciplined accordingly.").

39. Legal-error discipline is incredibly self-ambivalent. The doctrine is filled with propositions that cancel each other, such as the following:

Mere errors of law by a judge is a matter for appeal and does not raise a question of improper judicial conduct subject to judicial discipline. However, legal error and judicial misconduct are not mutually exclusive, and judge is not immune from discipline merely because the judge’s conduct also constitutes legal error.

48A C.J.S. Judges § 106 (2009) (footnotes omitted) (emphasis added). While simultaneously claiming that legal error is not disciplinable, the treatise also states that it could be and cites cases in which judges are disciplined for legal error. Id. (citing cases in several jurisdictions). The treatise is just the messenger—the courts repeatedly expound these contradictory propositions. See, e.g., In re Barr, 13 S.W.3d 525, 544 (Tex. Rev. Trib. 1998) (removing judge in part because he committed an egregious legal error, but protesting that "[t]here can be no greater threat to a free society than judicial anarchy which would certainly be realized through the continued erosion of judicial independence. . . . The potential impact . . . cannot be overstated, for the preservation of an independent judiciary requires that judges not be exposed to personal discipline on the basis of case outcomes or particular rulings").

The commissions and the state supreme courts occasionally still claim that "mere legal error" is not disciplinable—claiming instead that it is a defense to a disciplinary proceeding—but then proceed to impose discipline because the judge allegedly committed more than mere legal error, such as ruling in bad faith. Compare Gray, supra note 2, at 1280 (stating that the mere legal error “rule is usually announced in the course of a decision in which an exception to the rule is applied to allow for sanction”), with Reply Brief of Petitioner, supra note 38, at 8
to apply the law at all or (2) applying it in a negligent (or worse) fashion.\textsuperscript{40} Furthermore, the judge must have made the adjudicatory error in a criminal case (including imposition of criminal contempt); civil cases, which are very rare, are addressed only for purposes of comparison.\textsuperscript{42}

Moreover, I have excluded all cases in which judges have disregarded the law on the basis of a personal relationship, private or professional. For example, when a court found that the “judge’s primary consideration in his setting of bail to have been the fact that the racial group to which the defendants belonged ‘voted against’ [the judge’s] brother in an election,” I condemned his case, but did not count it.\textsuperscript{43} Such vindictive (or preferential) treatment is markedly different than legal error in cases in which the judge does not harbor some secret personal or professional interest.\textsuperscript{44} Finally, I

\begin{quote}
(stating that the commission believes that “[i]t is undeniably true that a basic principle of judicial ethics is that ‘mere legal error’ should not subject a judge to discipline”).
\end{quote}

\textsuperscript{40} As we shall see, I strongly disfavor these definitions of legal error, but commissions and state supreme courts use them (often unwittingly). In Parts III and IV below, I redefine legal error for a more accurate description of the disciplined conduct, and in Part IV, I urge an exception to the Rule (as defined) in the interests of justice.

\textsuperscript{41} As the title states, I am concerned with legal errors in adjudication; off-the-bench illegalities, or other transgressions of various laws, are ignored. See, e.g., \textit{In re Lowery}, 999 S.W.2d 639, 655–56 (Tex. Rev. Trib. 1998) (disciplining judge because he failed to comply with the law by not completing mandatory judicial education). Nevertheless, I define adjudication somewhat broadly—that is, making substantive and procedural decisions in a case. By decisions, I mean not only deciding legal issues, but following (or failing to follow) required procedure while conducting hearings or trials. This definition does not include, however, every on-the-bench ethical transgression. It ordinarily would not include, for example, hostile treatment of counsel while in the courtroom (but it could to the extent that the hostile treatment resulted in a substantive or procedural decision or action affecting the underlying case).

\textsuperscript{42} \textit{See infra} Part II.B.3.

\textsuperscript{43} \textit{In re Quirk}, 705 So. 2d 172, 178 n.14 (La. 1997) (citing \textit{In re King}, 568 N.E.2d 588, 594 (Mass. 1991)); see Steven Lubet, \textit{Judicial Discipline and Judicial Independence}, 61 LAW & CONTEMP. PROBS. 59, 73 (1998) (noting that, in the \textit{King} case, “the punishment was invoked for his bad faith and ill motive in reaching a decision, not for the content of the decision itself”).

\textsuperscript{44} \textit{Cf.}, e.g., MODEL CODE OF JUDICIAL CONDUCT Canon 3E(1) (2003) (requiring that “[a] judge shall disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned”). Not everyone agrees with me that this category should be excluded. See SHAMAN ET AL., \textit{supra} note 2, §§ 2.01, 2.13 (grouping all legal errors, including “favoritism and bias” into one category, “use of power”); Gray, \textit{supra} note 2, at 1265–66 (asserting that a judge who “acts out of bias or revenge” commits “bad faith” legal error). While I agree that a judge acting out of “bias or revenge” should be disciplined, I believe that mischaracterizing such a decision as disciplinable legal error (or merely “judicial misconduct”) only confuses the analysis. An interested judge abusing her office for personal reasons is a far cry from a judge mistakenly (or even callously) applying or failing to apply the law generally. Under a very literal reading, the actively biased judge is applying the law in bad faith and thereby committing serious legal error, but the two categories are entirely separable analytically. Therefore, for clarity of analysis, personal vendettas or conquests should be treated for what they are—conflicts of interest and abuses of power for personal gain—not thrown in the already large pot of adjudicative “legal errors.”
have excluded violations of the separate ethical rule against ex parte communications.\textsuperscript{45}

B. The Modern Legacy of Policing Violations of Criminal Defendants’ Rights Through Judicial Discipline

What some commentators have called “egregious” legal errors generally are, in fact, violations of defendants’ constitutional or important statutory rights.\textsuperscript{46} In light of the liberty at stake,\textsuperscript{47} it seems absolutely appropriate to apply heightened judicial scrutiny whenever rulings impact important rights of criminal defendants (which, as we will see, are often uncorrectable by appeal). The commissions recently have taken an energetic role in policing judges who in their rulings violate these various rights.\textsuperscript{48}

\textsuperscript{45} The cases are riddled with such violations—many of which technically constitute legal error. See, e.g., ANNOTATED MODEL CODE OF JUDICIAL CONDUCT 131–48 (2005) (citing a long list of courts disciplining judges for willful or negligent violations of the rule against ex parte communications). I have omitted them because (among other reasons) (1) they generally are not errors of adjudication (but errors in the adversary procedure leading to adjudication), and more importantly, (2) they are dealt with in a separate ethical rule (with various exceptions and controversies of its own), which does not have nearly the same impact on criminal law adjudication. See MODEL CODE OF JUDICIAL CONDUCT Canon 3B(7) (2003).

\textsuperscript{46} E.g., SHAMAN ET AL., supra note 2, § 2.02, at 37–38; Gray, supra note 2, at 1270–76.

\textsuperscript{47} The court in In re Benoit, 487 A.2d 1158, 1165 (Me. 1985), for instance, suspended a judge after he jailed three defendants either without any legal authority or without following necessary procedural protections against unwarranted incarceration. In doing so, the court emphasized the unmatched importance of proceeding carefully and lawfully when dealing with such an important right. \textit{Id.} The court put the point forcefully: “The most basic right of citizens of this country is to be at liberty in society. That right is so essential to our way of life that it may only be taken away by the courts following carefully prescribed procedures.” \textit{Id.}

\textsuperscript{48} See Gerald Stern, Is Judicial Discipline in New York State a Threat to Judicial Independence?, 7 PACE L. REV. 291, 328 (1987) (noting that New York “[j]udges who abuse their power by disregarding rights of litigants are no longer immune from discipline”); see also id. at 292–94 (noting that in the one hundred years before New York established a judicial conduct commission, only twenty-three judges were publicly disciplined for any on- or off-the-bench misconduct, but following the commission’s establishment in “1975, more than 300 judges have been publicly disciplined, including seventy-five who have been removed”). Although I emphasize the role of judicial conduct commissions for prosecuting these cases, the courts of course have an even more powerful role in theory because (in most states) they hold the ultimate disciplinary authority. See supra Part I.B.

Judicial conduct commissions are a modern invention. See, e.g., John O. Haley, The Civil, Criminal and Disciplinary Liability of Judges, 54 AM. J. COMP. L. 281, 288 (2006) (“Beginning with California in 1960, followed by Ohio and Texas in 1965, by 1979 all but one state had created such a commission.”).
1. Vindicated Rights

This following compendium is not intended to be entirely exhaustive; I have excluded various misconduct at the margins. It shows, however, the breadth and importance of the judicially trampled rights. It also shows the importance of their subsequent vindication.

   a. Failing to Advise Defendants of Their Constitutional Rights

Before defendants can exercise and enjoy their rights, they must know of them. Judges have the duty to ensure that defendants in their courtrooms are advised of all of the pertinent constitutional rights, including rights to counsel, cross-examination, and notice of the charges. Magistrate judges, especially, must be aware of their “extremely important initial role in the criminal justice system.” Many judges apparently have treated, and continue to treat, this duty as a discretionary formality. Judicial conduct commissions have finally disciplined such judges.

   b. Coercing Guilty Pleas and Verdicts

Obviously (to most), judges are not prosecutors or other state agents enlisted to secure expedient convictions. Ignoring their neutral role, judges

49. See, e.g., Comm’n on Judicial Performance v. Hopkins, 590 So. 2d 857, 864–66 (Miss. 1991) (disciplining judge for conditioning acceptance of guilty plea on defendant’s agreement to implicate a third party in the crime); In re Vonderheide, 532 N.E.2d 1252, 1253–54 (N.Y. 1988) (same). I have, however, erred on the exhaustive side to educate recalcitrant judges who (perhaps believing mistakenly that judicial discipline cannot discipline adjudicatory misconduct) treat the bench as a throne and the law as optional, if not an annoyance. Such judges obviously do not comprise a majority of the bench.

50. See, e.g., Office of Disciplinary Counsel v. Hoague, 725 N.E.2d 1108, 1110 (Ohio 2000) (suspending judge in part because he interrogated defendants without advising them of their constitutional right to counsel); In re Williams, 987 S.W.2d 837, 842–44 (Tenn. 1998) (removing judge in part for failing to inform defendant of right to grand jury indictment, right to cross-examination, and right to counsel); see also Swisher, supra note 22, at 262 (collecting cases).

51. See supra note 50.

52. In re Pauley, 318 S.E.2d 418, 421–22 (W. Va. 1984) (“Magistrates must make every effort to advise citizens of their rights and to ensure that no person is unnecessarily incarcerated in jail.”).

53. See supra notes 48, 50.


55. Swisher, supra note 22, at 263; see, e.g., McCollough v. Comm’n on Judicial Performance, 776 P.2d 259, 262 (Cal. 1989) (removing judge because he told jurors to “go in that room and find the defendant guilty”).
have been disciplined for pressuring defendants to enter guilty pleas, or perhaps worse, coercing juries to convict. Instead, judges must ensure that guilty pleas are knowing and voluntary and guilty verdicts are similarly untainted.

c. Exceeding Sentencing Authority

The consequence of the sentencing determination cannot be overstated. It determines the amount of human life forfeited—even to the extent of death—to the state. Judges who have sentenced unjustly and unlawfully, then, perhaps deserve the highest condemnation of all. The commissions have responded by disciplining (often removing) these judges. Before the commissions, no one had the power to do so other than state supreme courts—and they mostly opted not to intervene.

d. Exceeding Bail Authority

The right to be presumed innocent often is forgotten, not unlike the related right to bail before conviction. Some judges think that they

56. See supra notes 54–55.
57. Swisher, supra note 22, at 263; see, e.g., Miss. Comm’n on Judicial Performance v. Byers, 757 So. 2d 961, 967–69 (Miss. 2000) (censuring judge in part because she sentenced a defendant under the wrong statute and unlawfully extended another’s probation); Texas Practice Series, supra note 13, § 26.4 n.68 (citing discipline of Texas judge who sentenced one defendant to “jail with three days of bread and water” and another defendant “convicted of illegally dumping toxic torts to drink toxic sludge”). Justice notwithstanding, judges have been disciplined for imposing or causing lenient sentences, even for defendants whose circumstances seemingly warranted mitigated sentences. See, e.g., Miss. Comm’n on Judicial Performance v. Sanders, 708 So. 2d 866, 878 (Miss. 1998) (disciplining judge because she suspended sentences while she supposedly lacked jurisdiction to do so); Miss. Comm’n on Judicial Performance v. Russell, 691 So. 2d 929, 932, 948 (Miss. 1997) (disciplining judge for releasing defendants before their sentences expired); cf. Judicial Inquiry and Review Bd. v. Fink, 532 A.2d 358, 371, 373 (Pa. 1987) (removing judge in part for sentencing defendant below the minimum of the applicable sentencing guidelines).
58. See, e.g., Robert M. Cover, Violence and the Word, 95 Yale L.J. 1601, 1601 (1986) (“A judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life.”).
59. See supra note 57.
60. See, e.g., supra note 48.
61. See Swisher, supra note 22, at 264; see, e.g., In re La Belle, 591 N.E.2d 1156, 1158, 1163 (N.Y. 1992) (per curiam) (censuring judge for failing to set bail to defendants according to the applicable statute); In re Sardino, 448 N.E.2d 83, 84–85 (N.Y. 1983) (per curiam) (removing judge in part because he failed to grant statutorily required bail). Judges also have delegated bail decisions improperly. E.g., In re Sanchez, 512 P.2d 302, 303 (Cal. 1973) (censuring judge because he effectively allowed bondsman to determine the amount of bail). Furthermore, they have been disciplined for refusing to set statutorily required appeal bonds. See, e.g., In re Inquiry Concerning a Judge, 462 S.E.2d 728, 734, 736 (Ga. 1995) (per curiam) (removing judge from office).
effectively may jail defendants through their trial date with impunity. That impunity may have been justified in the past, but today the commissions discipline judges harshly for such conduct.\textsuperscript{62}

e. Denying Full and Fair Hearings and Trials\textsuperscript{63}

As we have noted, the stakes in criminal adjudication are the highest in the law. Therefore, judges must scrupulously conduct full and fair hearings. Even ignoring all of the constitutional safeguards for that end,\textsuperscript{64} one would assume that judges would do so as a matter of conscience—to assure themselves that innocent defendants were not convicted or guilty defendants were not treated unfairly or punished excessively. The commissions’ discipline records, however, show a long list to the contrary. These transgressions begin at defendants’ first exposure to the criminal justice system, including rushed and irregular arraignments.\textsuperscript{65} They reflect repeated shortcuts for (at best) the sake of expedience, such as holding immediate trials.\textsuperscript{66} They also reflect gross violations of notice and due process, such as convicting defendants on charges not in their indictments or precluding defendants from presenting evidence.\textsuperscript{67} Judges improperly ignore this last legal norm—the right to present a case—even with respect to the prosecution.\textsuperscript{68}

Unsurprisingly, nearly all of these violations receive significant discipline.\textsuperscript{69}

\textsuperscript{62} See Stern, supra note 48, at 322–24 (discussing early New York cases in which courts refused to discipline judges for failing to set bail); supra note 61 (citing cases resulting in discipline for failing to set bail).

\textsuperscript{63} See Swisher, supra note 22, at 264; see, e.g., In re Dash, 564 S.E.2d 672, 672 (S.C. 2002) (censuring judge for finding defendant guilty without allowing defendant to present evidence); Miss. Comm’n on Judicial Performance v. Wells, 794 So. 2d 1030, 1031–32 (Miss. 2001) (suspending judge for entering guilty verdict without a hearing); In re Milhouse, 605 N.W.2d 15, 15–16 (Mich. 2000) (same).

The Rule works both ways in this respect. See, e.g., In re Elloie, 921 So. 2d 882, 899, 904 (La. 2006) (censuring judge for failing to give state authorities notice and a hearing in criminal expungement proceedings); In re Tucker, 516 S.E.2d 593, 595 (N.C. 1999) (censuring judge because he prevented prosecution from presenting its case).

\textsuperscript{64} Some of these safeguards are discussed below. See infra Part II.B.2.

\textsuperscript{65} In re Holien, 612 N.W.2d 789, 792–93, 798 (Iowa 2000) (removing judge in part because she engaged in private arraignments that violated the state criminal procedural rules and interfered with attorneys’ ability to represent defendants at their arraignment and file motions on their behalf).

\textsuperscript{66} See Swisher, supra note 22, at 265.

\textsuperscript{67} See id.

\textsuperscript{68} See id.

\textsuperscript{69} See id.
f. Abusing the Criminal Contempt Power

The contempt power has been called the “‘nearest akin to despotic power of any power existing under our form of government.’” Judges repeatedly abuse it in a variety of ways, such as ignoring due process requirements. In fact, it is one the most common forms of disciplined misconduct. Although some judges still go unpunished, the commissions are providing a necessary (albeit after-the-fact) check on judges’ “despotic” power.

g. Ignoring Probable Cause Requirements

Probable cause is the first check against invasive intrusion of law enforcement and prosecution. Judges have a clear duty to ensure that it

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70. I have grouped these cases separately in response to the relatively large number of them (and because the literature often groups them together). They frequently boil down to an abuse of procedural rights or sentencing authority, and therefore they properly could (and perhaps should) be placed within the other categories listed in this Section. See Swisher, supra note 22, at 263; see, e.g., In re Jefferson, 753 So. 2d 181, 181 (La. 2000) (removing judge in part for multiple instances of unlawfully exercising contempt power); Cannon v. Comm’n on Judicial Qualifications, 537 P.2d 898, 899 (Cal. 1975) (removing judge in part for holding public defenders in contempt and jailing them without process).

71. Green v. United States, 356 U.S. 165, 194 (1958) (Black, J., dissenting) (quoting Ashbaugh v. Circuit Ct., 72 N.W. 193, 194–95 (Wis. 1897)). Justice Black, whose views of the contempt power eventually were endorsed by the Court, further described its awesome, but troubling, nature:

Summary trial of criminal contempt, as now practiced, allows a single functionary of the state, a judge, to lay down the law, to prosecute those who he believes have violated his command (as interpreted by him), to sit in ‘judgment’ on his own charges, and then within the broadest kind of bounds to punish as he sees fit.

Id. at 198.

72. See supra note 70.

73. For example, United States v. Thoreen (arguably) should have resulted in discipline. 653 F.2d 1332 (9th Cir. 1981). There, the Ninth Circuit upheld the contempt conviction against defense counsel who seated another person in the defendant’s seat. Id. At 1342–43. As counsel expected, two prosecution witnesses misidentified the defendant as the man sitting in the defendant’s seat. Id. At 1336–37. Not only should the judge have approved such a highly probative procedure necessary to the criminal defendant’s right to present a defense—and to put the prosecution to its proof beyond all reasonable doubt—the judge should have been disciplined for exceeding his contempt power by disciplining defense counsel. See, e.g., Judicial Inquiry and Review Bd. v. Fink, 532 A.2d 358, 365 (Pa. 1987) (disciplining judge in part because he exceeded contempt power by “holding an attorney in criminal contempt of court because he [was] . . . displeased with the attorney”).

74. In light of the purposes of the probable cause requirement, this category arguably could have been placed in the Section dealing with denials of full and fair hearings. See supra Part IV.A–B. In view of their number and distinctiveness, however, I placed them in a class of their own. See Swisher, supra note 22, at 266; see, e.g., In re a Judge (Hammill), 566 S.E.2d 310, 312 (Ga. 2002) (removing judge in part because he authorized an unreasonable search of a defendant’s home); In re a Judge (Vaughn), 462 S.E.2d 728, 734 (Ga. 1995) (removing judge in part because she issued bench warrants without probable cause).
exists before powerful state-imposed force is inflicted (through, for example, an arrest or execution of a search warrant). For those in custody or under the microscope of a criminal indictment, probable cause provides at least minimal assurance that the state’s actions are justified. Some judges—perhaps because reviewing multiple warrants and indictments becomes monotonous—shirk this duty and grant unwarranted deference to the state. It is a salutary development that they no longer can do so without risk of professional discipline.75

h. Denying Defendants’ Other Constitutional Rights, Particularly Their Right to Counsel76

While judges have committed an array of constitutional violations, many judges seem particularly prone to violating the right to counsel. These violations occur in several ways, from moving forward without counsel present to denying the right to counsel altogether.77 Judges have been disciplined harshly for interfering with the attorney-client relationship.78 Judges have even been disciplined for “trivializing the right to counsel in the process of informing defendants of it.”79 Judges have also been disciplined for disparaging other rights, such as “tricking” defendants into waiving their statutory rights80 or refusing requests for jury trials.81

75. See supra note 74.
76. Swisher, supra note 22, at 262 (collecting cases); see, e.g., McCollough v. Comm’n on Judicial Performance, 776 P.2d 259, 261 (Cal. 1989) (removing judge in part because he forced two defendants to stand trial without their counsel); In re a Judge (Vaughn), 462 S.E.2d 728, 735 (Ga. 1995) (removing judge in part because she violated defendants right to counsel during a change of plea).
77. See supra note 76.
80. Broadman v. Comm’n on Judicial Performance, 959 P.2d 715, 724 (Cal. 1998) (censuring judge in part because he “tricked” defendant into waiving right to a prompt sentencing hearing by withholding his true reason for postponing the hearing).
In an ugly practice, some judges actually have retaliated against defendants for the exercise of their constitutional rights, primarily their rights to counsel and a jury trial. It is somewhat reassuring to know that the commissions have disciplined such judges. This harsh discipline reminds judges that clearing calendars does not excuse attempts to circumvent procedural rights.

2. Justifications

The commissions’ protective inspiration owes much to the legal landscape. In recognition of the incredibly high stakes inherent in criminal litigation, defendants are entitled to a large and varied number of the most fundamental protections; the “prosecution has no similar constitutional rights.” Judges are rightfully disciplined for transgressing these basic procedural and substantive rights—rights that judges have an ethical duty to protect.

Some of the most important rights follow, and they pervade the entire criminal process: (i) the right to a warrant, issued only on probable cause; (ii) right to grand jury indictment; (iii) right to protection against self-incrimination; (iv) right to effective assistance of counsel; (v) right to a

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82 Admittedly, this last category comes the closest to counting cases in which the judge held an improper bias, but because the bias was purely law-related—in the form of disregard or even disdain for the defendants’ constitutional rights—they are correctly grouped here and not excluded under the category of cases in which judges harbored a personal bias. See Swisher, supra note 22, at 267; see also In re Hathaway, 630 N.W.2d 850, 854 (Mich. 2001) (suspending judge in part for threatening to jail defendant if he did not waive his right to jury trial); In re Cox, 680 N.E.2d 528, 529 (Ind. 1997) (suspending judge because he retaliated and threatened to retaliate against defendants for their exercise of their rights to jury trial and assistance of counsel).

83. See supra note 82.


86. This right generally applies only to felonies and does not apply in some states. Its implicit requirement of notice of the charges, however, always applies. Cf. In re Brown, 527 S.E.2d 651, 653 (N.C. 2000) (censuring judge in part because, following defendant’s DUI trial, he convicted the defendant of careless and reckless driving, which was not a lesser included offense); In re Martin, 424 S.E.2d 118, 118 (N.C. 1998) (same).
preliminary hearing;87 (vi) right to exculpatory evidence;88 (vii) right to compel production of evidence; (viii) right to call witnesses and to cross-examine them; (ix) right to present evidence and not to present evidence; (x) right to proof beyond all reasonable doubt (and its corollary, the presumption of innocence);89 (xi) right to trial by an impartial jury;90 and (xii) the right to due process and equal protection throughout the entire proceedings. These rights—these constitutionally based laws—are not in dispute; they must be applied to every case. To the extent that the facts of a case present a question over the reach of these rights, two further considerations, or “protections,” come into play.

These two particular protections are overwhelming in criminal law adjudication. The first protection, which has yet to be mentioned, is the rule of lenity.91 That is, any ambiguous rules, statutes, and precedents must be construed in the defendant’s favor. In light of the inherent ambiguity of the law,92 this rule has much more universal application than some judges realize (or concede). The second, and arguably even more important, is the burden of proof and presumption of innocence. That is, the prosecution maintains the burden of proof at all times and it is the highest burden of all—proof beyond all reasonable doubt.93 The combination of these two staples of criminal litigation results in legal and factual presumptions heavily weighted in a defendant’s favor. Criminal law adjudication cannot proceed logically without these constant protections in mind.

Moreover, judges also must consider the relevant context. They adjudicate in a criminal justice system that (among other negative traits)

87. The right to a preliminary hearing, in which a judge determines whether probable cause exists for the charge, is applicable when a defendant has not had a grand jury indictment, which is required only in certain states and for certain crimes.


92. See, e.g., Llewellyn, supra note 30 at 1239 (noting that “in any case doubtful enough to make litigation respectable the available authoritative premises . . . are at least two, and that the two are mutually contradictory as applied to the case at hand”).

93. E.g., DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 61 (1988) (stating that the criminal justice system uses this burden—the “highest standard to be found in the law”—in order to protect our liberty from the powerful state).
frequently (1) provides ineffective counsel, (2) convicts the innocent,94 and (3) imposes “insanely” disproportionate sentences.95

Heightened even further by this context, then, the legal and factual presumptions render criminal law adjudication more of a protective entrenchment than a rough canvas on which to be creative. To put it differently, by summing the rule of lenity with the high and constant burden of proof, the countless other constitutional protections, and the skeptical context, criminal law adjudication becomes a very defensive enterprise; there is little practical room for contrary rulings or summary practices, unless the facts and law are remarkably clear.96 Indeed, some have argued that the “primary end” of the criminal justice system is “the protection of accused individuals against the state.”97 At a minimum, the end is to convict the guilty in accordance with due process values and not to convict the innocent, with a heavy presumption to let the former go free over convicting the latter. Politically speaking, this conclusion should not be alarming; it is balanced by the law-and-order legislatures, which frequently pass harsh substantive laws (and attempt, sometimes successfully, to pass harsh procedural laws as well).98

In sum, if it seems like judges must walk on eggshells when adjudicating criminal law, that is absolutely right. Defendants are entitled to the meticulous application of the many constitutional safeguards and presumptions.

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95. See, e.g., William H. Simon, The Ethics of Criminal Defense, 91 MICH. L. REV. 1703, 1722–23 (1993) (discussing the frequent and “insanely” disproportionate criminal sentences and, as a consequence, the grossly large and growing United States prison population).

96. Although procedural and substantive distinctions are often illusory, the judge should keep in mind procedural and substantive justice. The procedural justice, for the most part, binds her from deviating from these fundamental principles. Then, assuming the above procedural rules are followed, she should consider substance. As noted, however, criminal law adjudication inherently favors the defendant over anything but the clearest of laws and circumstances.

97. Luban, supra note 93, at 66; see also STANDARDS FOR CRIMINAL JUSTICE: SPECIAL FUNCTIONS OF THE TRIAL JUDGE 6-1.1(a) (3d ed. 1999) (requiring trial judge to guard “the rights of the accused”).

98. See also infra note 108 (noting that many judges, especially elected ones, are biased against defendants).
3. A Note on the Civil and Criminal “Legal Error” Divide

Legal error discipline almost never arises in civil cases. It is remarkable that no commentator has noted, explicitly, this disparate treatment of legal error in civil and criminal cases. From the foregoing principles, the primary reason for this duality seems fairly obvious: the commissions heavily scrutinize failures to protect basic rights of criminal defendants, for reasons inherent in the criminal context. In light of the high stakes of criminal litigation, this heightened scrutiny seems entirely appropriate, particularly given criminal defendants’ difficulties (e.g., procedural bars) in attempting to reverse the error on appeal. Generally speaking, civil cases simply do not warrant the same scrutiny. Moreover, the different scrutiny for civil and criminal adjudication is built in to the test for discerning legal error. By assessing the “egregiousness” of the legal error, commissions and courts necessarily are predisposed to find error more readily in criminal cases in light of the (ordinarily) higher liberty stakes and the emphasis we place on the Bill of Rights.

The one exception is legal error that occurs in substantially similar, if not identical, civil contexts. The most common example arises from the use of the contempt power in civil cases. Again, the reason seems obvious: those cases involve jailing someone. This fact—that discipline occurs almost exclusively in the limited category of civil cases involving incarceration—corroborates the justifications set out in the preceding Section. In any event, acknowledging the (virtual) nonexistence of legal error discipline in purely

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99. Without an empirical study on this question, it is somewhat difficult to prove a negative. The previous (and nearly exhaustive) collections of cases, however, cite less than ten purely civil cases involving legal error discipline, but cite several hundred criminal or criminal-related cases. See ANNOTATED MODEL CODE OF JUDICIAL CONDUCT 43, 51–53, 89–99 (2005); GRAY, supra note 22, passim (discussing primarily cases involving the sanction of removal); SHAMAN ET AL., supra note 2, § 2.02; Gray, supra note 2, passim.

100. See In re King, 399 S.E.2d 888, 891 (W. Va. 1990) (noting that court has “consistently held that the deliberate failure to follow mandatory criminal procedures constitutes a violation of the Judicial Code of Ethics” but “[t]hat concept . . . has not been extended to encompass a violation of statutory guidelines for civil practice”). After noting the distinction, the court refused to discipline the judge for his civil-context legal error, even assuming that the Rule applied to civil cases. Id.

101. See SHAMAN ET AL., supra note 2, § 2.02, at 37 (calling the standard “subjective” but admitting that “the courts seem to agree that legal error is egregious when judges deny individuals their basic or fundamental procedural rights”).

102. See, e.g., id. (citing almost exclusively criminal cases or cases involving improper incarceration).

103. Another example occurred in In re Reeves, in which the judge failed to advise parties of their statutory rights to counsel and to remain silent in certain family law cases. 469 N.E.2d 1321, 1322–23 (N.Y. 1984). Obviously, this example is uncannily similar to criminal litigation.
civil cases, we should return our focus to criminal-context legal errors and the implications of their vigorous prosecution.

4. Implications

There are several important implications in this relatively recent development. Initially, it should be noted that the commissions are policing constitutional rights violations in a way destined to deter—personal discipline of the offending judge. This Article, and hopefully others like it in the future, also will increase general deterrence (at least to some speculative extent) by informing judges that serious consequences result from such misconduct. The movement should have the salutary effect of enforcing the proper role of the judge, which involves (among other traits) safeguarding constitutional and other fundamental rights and construing the law justly according to the concrete circumstances of the case and concrete consequences of the ruling.

The commissions’ work also provides long-awaited counterforces to several negative phenomena. First, many judges are more concerned with moving their calendars along than respecting defendants’ rights. Second,
in the many states in which judges are elected, such judges exhibit a greater likelihood of denying defendants’ rights.\(^\text{110}\) The commissions’ enforcement practices provide a check to these unfortunate truths. Third, the movement provides the judicial accountability that was totally lacking in the former world of absolute judicial immunity (more on this below). Fourth, (although this should not need to be mentioned) judges must decide cases themselves; therefore, judges who allow prosecutors to “ghost-write” orders, or otherwise give disproportionate deference to the prosecution, are abdicating their core judicial function.\(^\text{111}\)

Fifth, and finally, an important trait of discipline for criminal law error is that it warrants a high sanction. The traditional considerations for the determination of the severity of the sanction are “the seriousness of the transgression, whether there is a pattern of improper activity and the effect of the improper activity on others or on the judicial system.”\(^\text{112}\) Two of these four considerations are heavily impacted here: (1) violation of criminal defendants’ fundamental (often constitutional) rights could not be more serious; and (2) the effects of the improper activity on defendants are illegal losses of life, freedom, or constitutional safeguards.\(^\text{113}\) Thus, in addition to being forced to apply meticulously all of defendants’ fundamental rights, judges should be sanctioned harshly when they fail to do so.

With the stakes and context in mind, we now must determine the proper definition and application of the Rule.

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\(^{110}\) See, e.g., In re McMillan, 797 So. 2d 560, 562 (Fla. 2001) (removing a judge in part because his campaign promised to favor prosecution and disfavor defense); Stephen B. Bright & Patrick J. Keenan, Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases, 75 B.U. L. REV. 759, 793 & passim (1995) (documenting a large number of instances in which elected judges in capital cases failed to enforce defendants’ constitutional rights, showed a higher tendency to impose the death penalty, and delegated their decision-making function to prosecutors).

\(^{111}\) See Stern, supra note 48, at 333 (discussing discipline of judge who allowed the district attorney to draft her order); Bright & Keenan, supra note 110, at 803–11 (documenting numerous instances of improper delegation to the prosecution in capital cases).

\(^{112}\) Model Rules for Judicial Disciplinary Enforcement R. 6 cmt. (1994); see also Standards for Imposing Lawyer Sanctions 3.0 (1992) (using the similar factors of “the duty violated” and “the potential or actual injury caused by the . . . misconduct” when determining the sanctions for lawyer discipline).

\(^{113}\) In Mississippi Commission on Judicial Performance v. Sanders, for instance, the court held that a judge “showed reckless indifference to the constitutional rights of” defendant and concluded: “It is fundamental in our justice system that these rights be scrupulously guarded. For a sitting judge to ignore these rights renders meaningless the foundation of our judicial system. Such reckless indifference on the part of [the judge] weighs heavily in favor of [discipline].” 749 So. 2d 1062, 1072 (Miss. 1999).
III. RECONCEPTUALIZING THE RULE

Because the doctrine unwittingly has incorporated a tangled web of disjointed and dissimilar judicial misconduct, we must begin by defining the basic, defensible descriptions of the Rule, including the semantic point that the cases actually are not discussing “legal error.” As we will see, “true” legal errors should not warrant discipline under the traditional tests (but they may warrant discipline for failing to demonstrate judicial competence). In fact, the “legal errors” most commonly discussed as such are neither “legal”—they are beyond legal considerations—nor “error”—error implies mistake, not disregard.

The cases boil down to attempts to deal with the practice of lawlessness. In the vast majority, we properly can describe what the courts and commentators have termed “legal error” as representing three distinct phenomena: (1) failure to know the applicable law; (2) assuming some level of awareness of the law, mistaken application of the law (caused primarily by conflicting laws or misinterpretation of the applicable law); and (3) disregard of the law. The last category has (for now) two simplified subcategories: (a) disregard of the law for a “bad” reason or no reason at all; and (b) disregard of the law for a “good” reason.

All of category (1) and most of category (2) involve issues of judicial competence; in other words, the judge’s alleged negligence has caused a breach in one of her core duties, namely, adjudicating the relevant law in light of the facts at hand. Speaking of “legal errors” in the abstract, then, we can see why the mistake has been made (time and time again) to conflate incompetence with other “legal errors”—the incompetence results in legal error.

Since 1972, however, competence has commanded its own ethical rule. Both the text of the Code and its drafting history reveal that

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114. E.g., id. at 1068, 1072 (disciplining judge for failing to know the law regarding contempt, bond, and expungement); see supra Part II (citing large numbers of cases in which judges were disciplined for argued negligent errors of law).

115. I have chosen the word “disregard” because it conveys a sense of awareness of the applicable law, while not requiring a specific intent or purpose to violate the law’s mandate. Cf. In re Elloie, 921 So. 2d 882, 902 (La. 2006) (“An act does not have to be intentional to [warrant] judicial discipline.”). Judges disregard the law for many reasons, most of which presumably do not involve an intent to disregard the law as the judge’s specific end or goal.

I also have chosen “disregard” for terminological consistency: I think judges’ duties under the Rule are discharged by showing “regard” for the law, not blind adherence to it, and departing from it on the basis of other legalistic considerations. See infra Part IV.


117. As noted above, Canon 3B(2) (formerly 3A(1)) has imposed an explicit competence requirement on the judge. Thode, supra note 14, at 51. It did so because (among other reasons) “a competency standard having been established for lawyers in Canon 6 of the Code of
It deals with the judicial equivalent of negligent malpractice. Like lawyers, judges are charged with knowing the substantive and procedural laws, including the laws dealing with the proper adjudication of conflicting or vague laws. It is analytically flawed to conflate mistakes of negligence with knowing or conscious disregard of the law; it has rendered the Rule confused and the competence duty redundant.

This careless conflation has accounted for much of the official ambivalence associated with the Rule. It may well be true that a judge who in “good faith” makes one or two mistakes of law should not be removed. That claim seems unobjectionable with respect to trivial errors, although most state supreme courts appear to disagree. Like all legal mistakes in the discipline sphere, however, the harm caused is relevant. Thus, even with respect to a good faith mistake, serious or irreversible harm could weigh in favor of discipline. This consideration is particularly true in criminal law—the mistake frequently results in an appreciable and irreversible harm to the fundamental rights of defendants, and to a lesser extent, may frustrate legitimate prosecutions. Thus, the commissions and courts rightly have disciplined offender-judges because (at the least) their conduct represents gross negligence or reckless disregard for fundamental law; they should

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119. “According to the adage, ignorance of the law is no excuse for anyone, but it seems this is particularly true under Canon 2A for judges who misapply the law.” Annotated Model Code of Judicial Conduct 55 (2004) (citing cases); Gray, supra note 2, at 1246 (“It would be incongruous if the principle ‘ignorance of the law is no excuse’ applies to everyone but those charged with interpreting and applying the law to others.”); see also Miss. Comm’n on Judicial Performance v. Sanders, 749 So. 2d 1062, 1068 (Miss. 1999) (stating that ignorance is no excuse and noting that whether the conduct “was intentional or not, the results were the same”).

120. See Broadman v. Comm’n on Judicial Performance, 959 P.2d 715, 721 (Cal. 1998) (holding that negligence does not amount to “bad faith” legal disregard; noting that “performing a judicial act that exceeds the judge’s lawful power with a conscious disregard for the limits of the judge’s authority” would) (emphasis added); see also Shaman et al., supra note 2, § 2.07, at 38 (“It is impossible for a judge to know all of the law.”).

121. See supra Part II (citing large numbers of cases in which judges were disciplined for arguably negligent errors of law). Many of the cases, however, do not involve trivial errors.

122. See, e.g., Model Code of Judicial Conduct pmbl. (2003) (“Whether disciplinary action is appropriate . . . should depend on such factors as the seriousness of the transgression.”).
have known the law in such critical circumstances.\textsuperscript{123} The point for present purposes, however, is that incompetence is a different species from conscious disregard of the law; the Rule will develop more soundly and consistently once that fact is recognized and incorporated into the ethical doctrine.\textsuperscript{124}

Thus, Category (3)—disregard of applicable law—is the heart of the ethical conflict.\textsuperscript{125} The problem arises largely from the fact that categorically following the ready law is not necessarily fair or just (or for many judges, expedient) in the circumstances. For present purposes, it is enough to say that we may presume it is just, but we should not bar judges from rebutting the presumption.\textsuperscript{126} As I indicated above, there are two rough subcategories of legal disregard: (a) disregard for a “bad” reason or no reason at all; and (b) disregard for a “good” reason. In order to contribute anything further meaningful to the development of the Rule, we must unpack these simplistic labels in a way that can be replicated in future cases. That is, we must produce a useful test to discern disciplinable disregard of the law.\textsuperscript{127}

\textsuperscript{123} See, e.g., In re Inquiry Concerning a Judge, 462 S.E.2d 728, 734 (Ga. 1995) (per curiam) (removing judge and holding that her “failure to honor these two defendants’ rights to an appeal bond is clear and convincing evidence of extreme judicial incompetence in the law. Moreover, it also establishes blatant disregard for the law, and as such, judicial misconduct and bad faith.”) (footnote omitted).

\textsuperscript{124} Furthermore, distinguishing incompetence from the already large class of “legal error” cases would result in fairer treatment of the respondent judge. Conscious ethical transgressions generally are seen as worse than negligent ones; the latter often are chalked up to the understandable and universally known fact of human imperfection. Cf. Gray, supra note 2, at 1246–47 (stating—but without explicitly acknowledging the difference between incompetence and legal disregard—that the traditional “mere legal error” defense arose in part because “it would be unfair to sanction a judge for not being infallible while making hundreds of decisions often under pressure”). Even in the event that the resulting sanction is the same (e.g., because the conduct was highly unreasonable or the harm was grave), the conduct still was less culpable.

\textsuperscript{125} See, e.g., Oberholzer v. Comm’n on Judicial Performance, 975 P.2d 663, 680, 682–83 (Cal. 1999) (Werdegar, J., concurring) (noting that the traditional tests for “legal error” “fail[] to address the hard question of when, if ever, the erroneous nature of a ruling might itself be evidence, sufficient for investigation or discipline, of a judge’s improper disregard of the law”). In certain cases, disregard of the law can be described as misapplying the law. The critical distinction between category (2), mistaken application, and disregard of the law is that the former involves a mistake, and such apparent negligence may or may not rise to discipline under the separate judicial competence standard. In order to misapply the law in terms of disregard of the law, however, the judge must have consciously ignored a competing law or interpretation of a law. At that point analytically, the distinctions between misapplying, misinterpreting, or failing to apply the law have no consequence. Practically, of course, one may be more readily provable than another as lawlessness in a disciplinary proceeding.

\textsuperscript{126} See infra Part IV.

\textsuperscript{127} The test also will deal with those category (2) errors—mistaken application of known law—that are neither merely incompetence nor otherwise disciplinable.
IV. BUILDING THE CAGE: THE RULE’S LEGITIMATE DESIGN

Given that courts have ruled that some forms of legal error do amount to judicial misconduct, but that care should be taken to protect judicial independence, it becomes very important to draw a line between “mere” legal error correctable only by appeal and more serious legal error that rises to misconduct. Unfortunately it is not easy to draw such a line.128

That is precisely our task—to draw the difficult line, finally.129 We will start with the traditional tests, and after discovering that they are woefully inadequate, we will proceed to devise a new one.

A. Delineating the Proper Scope of the Rule

In drawing the boundaries of the Rule’s legitimate scope, we should start with the traditional criteria used to distinguish “mere legal error” from disciplinable “legal error” (i.e., legal disregard) developed by courts and commentators; if these are sufficient, we can adopt and adapt one or more of them and avoid reinventing the wheel. These traditional criteria are (1) availability of appeal, (2) pattern of error, (3) egregious error, and (4) bad faith.130 Unfortunately, with the partial exception of egregiousness, these categories are insufficient (if not misleading), separately or collectively.

1. Availability of Appeal

Courts, commentators, and the ABA frequently have cited the availability of appeal as a means to separate disregard of the law and other

128. Shaman, supra note 3, at 9; see also Lubet, supra note 43, at 72 (“To my knowledge, neither any commentator nor any court has yet devised a bright-line test that will solve this problem in all circumstances. Even a pure ‘good faith’ standard—protective as it would be of judicial independence—is insufficient, because it would preclude the removal of a sincere-but-incompetent judge who repeatedly misapplies the law and damages the rights of litigants.”).

The preceding quote (and the surrounding discussion) reflects some of the confusion inherent in conflating incompetence with other types of legal error or lawlessness. See infra Part III.

129. The word “line” is somewhat misleading to the reader versed in the rule-standard dichotomy, because bright lines typically represent rigid rules. See generally Duncan Kennedy, Form and Substance in Private Law Adjudication, 89 Harv. L. Rev. 1685 (1976) (discussing differences between rules and standards). Instead, I propose a contextual standard. See infra Part IV.C.

130. See, e.g., SHAMAN ET AL., supra note 2, § 2.07, at 38; Gray, supra note 2, at 1245–75.
“legal errors” from judicial misconduct. This factor can be dismissed quickly and conclusively as mistaken and useless. The factor is mistaken because criminal defendants infrequently have a meaningful opportunity to reverse the lawless ruling—an objection ordinarily must be raised and prejudice must be shown. It also is mistaken because forcing private parties to prosecute the reversal of unethical conduct is foreign to our modern disciplinary regime, both for lawyers and judges. To be sure, private parties often file the charge letter with the disciplinary commissions, but the commissions handle the investigation and prosecution.

The factor is useless because every instance of judicial misconduct involving a case—from bribes, to ex parte communications, to discrimination—can be appealed. If the objection is that we do not want judicial conduct commissions duplicating the work of the appellate courts, it reflects a fundamental misunderstanding of judicial discipline. The appellate process indeed exists in part to correct lower court judicial errors (whatever those errors may be), but that fact has nothing to do with judicial discipline—which disciplines judges for previous misconduct (whatever that conduct may be). Contrastingly, a reversal on appeal almost invariably does not result in any tangible consequence to the judge (save perhaps more work). That the appellate court may (however unlikely) reverse the ruling does not purge the judge’s misconduct. There has never been a “no harm, no foul” rule, and I suspect there never will be.

131. See, e.g., SHAMAN ET AL., supra note 2, § 2.07, at 38 (citing, among other cases, In re Charge of Judicial Misconduct, 595 F.2d 517 (9th Cir. 1979)).

132. This point is particularly significant because so many criminal defendants have ineffective attorneys who fail to raise issues properly or at all.

133. See Harrod v. Ill. Courts Comm’n, 372 N.E.2d 53, 65 (Ill. 1977) (“Although all misconduct arising during the course of a judicial proceedings may be the subject of an appeal, an individual defendant’s vindication of personal rights does not necessarily protect the public from a judge who repeatedly and grossly abuses his . . . power.”).

134. See id.

135. For a discussion of the rare and only exception, see Wendell L. Griffen, Judicial Accountability and Discipline, 61 LAW & CONTEMP. PROBS. 75, 75–76 (1998) (“[A]ppellate review occasionally includes criticism of judicial behavior and, on rare occasions, has resulted in sanctions such as reassignment of a case to another judge due to misbehavior, bias, or prejudice.”).

136. This point is self-evident in our system of laws, but for the sake of ensuring that the appeal-availability rationale will not persist, I offer two analogies. In the extreme, if the judge shoots someone, the fact that the doctor wholly repairs the victim’s wounds will not absolve the judge of responsibility (it may affect the description and damages of the legal actions that proceed, but legal actions will proceed). In the ordinary, if a judge violates the rule against ex parte communications, he can and often will be disciplined regardless of the consequence to the parties. The consequence may affect the sanction, but not the finding of misconduct.

137. In fact, to the extent we treat the subject truly as one of ethics, such a mindlessly consequential rationale would seem deficient under most theories.
Therefore, the appeal-availability rationale is baseless.\textsuperscript{138}

2. Pattern of Legal Error

In a nearly unprecedented practice, some courts, including the federal judiciary, claim not to allow discipline without a pattern of legal disregard.\textsuperscript{139} This criterion is both hypocritical and mostly unhelpful. There is no precedent in the law holding that an offender gets one “get-out-of-jail-free card.”\textsuperscript{140} It is somewhat hypocritical that judges who have rejected such a rule generally nevertheless apply it to themselves. They certainly do not apply it to attorney discipline.\textsuperscript{141} Furthermore, it certainly is unprecedented for other Code violations (as well as virtually any other type of legal violation). It may be that some judges are unaware that they can be disciplined for legal error (and therefore they should be allowed “a pass” on a lack of notice theory), but that argument has been universally foreclosed.\textsuperscript{142}

Moreover, as we have (accurately) defined legal error—disregard of the law—the criterion is unhelpful.\textsuperscript{143} The judge disregarded the law for either

\begin{itemize}
  \item \textsuperscript{138} Cf., e.g., Lubet, supra note 43, at 73–74 (supporting the appeal rationale but acknowledging that it should not be a per se ban on discipline).
  
  \item \textsuperscript{139} On the state level, such claims are false. See, e.g., Gray, supra note 2, at 1255 (discussing reprimand of New Jersey judge for one instance of using criterion for mitigation of defendant’s sentence that allegedly revealed an issue bias); infra note 143. I nevertheless will treat the proposition as true for purposes of analysis. On the federal level, with the federal judiciary’s generally abysmal record of failing to self-discipline, the pattern criterion is more rigidly enforced (which to be fair, owes in part to the restrictive language of the Judicial Conduct and Disability Act). See, e.g., In re Memorandum of Decision of Judicial Conference Comm. on Judicial Conduct and Disability, 517 F.3d 558, 562 (U.S. Jud. Conf. 2008) (“[A] judge’s pattern and practice of arbitrarily and deliberately disregarding prevailing legal standards and thereby causing expense and delay to litigants may be misconduct.”).
  
  \item \textsuperscript{140} Potentially, there could be repeated, non-disciplinable negligent violations. See supra Part III. As stated, however, judicial negligence or malpractice involves the judicial competence standard. The proper question is whether the judge’s conduct was unreasonable; it is possible that a repeated failure to apply or misapplication of the law would not be unreasonable. (Of course, repeated violations may show that the violation is not merely negligent, but a disregard of the law.)
  
  \item \textsuperscript{141} That is not to imply that bar counsel do not take patterns into account in determining which attorneys to investigate and prosecute in a world of limited resources.
  
  \item \textsuperscript{142} See, e.g., ANNOTATED MODEL CODE OF JUDICIAL CONDUCT 55 (2004) (noting that “ignorance of the law is no excuse for anyone, but it seems this is particularly true under Canon 2A for judges who misapply the law” and citing cases in support); cf. GRAY, supra note 22, at 25) (citing five cases involving town or village court judges who committed a pattern of legal error, but noting that “the statistics do not necessarily support a conclusion that non-lawyer or part-time judges are more likely to disregard the law”).
  
  \item \textsuperscript{143} I should note that the pattern of error criterion is naïve even in the context of judicial competence discipline: When a judge is unaware of the correct law, there is no reason to excuse a judge who has misapplied or failed to apply the law only once; the judge presumably would
the right reasons or the wrong ones. By and large, it makes no difference to the proper inquiry (other than the level of sanction\textsuperscript{144}) whether the misconduct occurred once or one-thousand times. Misconduct is misconduct—more misconduct is just more misconduct.\textsuperscript{145}

3. Egregious Error

As I alluded to above, “egregious” error is primarily error in respecting fundamental rights of criminal defendants. When egregious errors occur in the civil context, they almost invariably do so in a highly analogous context—namely, a party or witness is jailed or confined without procedural

\textsuperscript{144} Miss. Comm’n on Judicial Performance v. Sanders, 749 So. 2d 1062, 1072 (Miss. 1999) (weighing against judge the fact that she “was previously publicly reprimanded and fined for willfully disobeying state law” in determining appropriate level of sanction); GRAY, supra note 22, at 60–61, 77, 82 (noting that a pattern of misconduct may warrant an increased sanction). Patterns do offer several practical benefits for prosecuting commissions independent of their bearing on sanctions, such as proving absence of mistake and demarking those judges who are most deserving of prosecution.

\textsuperscript{145} In 2002, the Supreme Court of Alaska had the audacity to claim that it was “aware of ‘no contested . . . case approv[ing] the disciplining of a judge for a single incident of good faith legal error when the judge acted without animus.’” In re Curda, 49 P.3d 255, 261 (Alaska 2002) (citing respondent judge’s brief) (refusing to discipline judge for one instance of violating a witness’s and a criminal defendant’s procedural rights). To be sure, Curda was a difficult case—the judge apparently lacked an ill-motive and he was operating in uncharted procedural waters—but it is wholly wrong to imply that judges are not disciplined for legal error in and of itself. See infra Part II. Furthermore, its “single instance” exception is both misleading and unfair. It is misleading because judges have been disciplined for one instance of legal error. See, e.g., Gubler v. Comm’n on Judicial Performance, 688 P.2d 551, 565 (Cal. 1984) (noting that the “fact that an act is an isolated incident does not preclude a determination of wilful misconduct”), disapproved of on other grounds by Doan v. Comm’n on Judicial Performance, 902 P.2d 272 (Cal. 1995); In re Perry, 385 N.Y.S.2d 589, 589 (App. Div. 1976) (removing judge from the bench for one instance of abusing his contempt power, coupled with false testimony regarding the incident during the disciplinary proceeding); Gray, supra note 2, at 1255 (discussing reprimand of New Jersey judge for one instance of using criterion for mitigation of defendant’s sentence that allegedly revealed an issue bias). It is unfair because disciplinary cases are rarely brought on the basis of one error. This phenomenon is true of both judicial discipline and attorney discipline. It also mirrors criminal charging decisions, which for a variety of proper and improper reasons, rarely charge only one offense.
protections or substantive justification. Thus, the “egregious” error criterion is valid, but it is mostly unhelpful. It is valid because we are, in fact, discussing “egregious” errors—however one defines egregious—because the legal disregard either (and often both) violates the most fundamental and uncontested protections in the Bill of Rights or results in jail or imprisonment (or death) without adequate process or justification.

In the criminal context, however, that is unhelpful because it is virtually all-inclusive. All violations impacting criminal defendants’ rights are presumably egregious in context, and the test offers only minimal assistance in identifying any other type of legal disregard. For instance, if a judge excludes some evidence on the basis of the prosecutor’s withholding of information that the judge concluded violated the spirit of the *Brady* doctrine but not its black-letter requirements, it is unclear whether such conduct is egregious. Even if we had more context, it is unlikely that the “egregious” standard would be applied consistently and usefully.

Egregiousness, in short, does describe the misconduct that we are after, but it is too simplistic on its own to guide the commissions and courts.

### 4. Bad Faith

Bad faith is not really a criterion; it is a messy mirage. It purports to define a mens rea requirement for legal disregard, but almost universally does so in a way that does not exclude any conduct. The most common formulations are whether the ruling was “for any purpose other than the

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146. See, e.g., SHAMAN ET AL., *supra* note 2, at 37 (discussing egregious errors and citing only criminal cases or cases involving improper incarceration).

147. See SHAMAN ET AL., *supra* note 2, at 37 (calling the standard “subjective,” but admitting that “the courts seem to agree that legal error is egregious when judges deny individuals their basic or fundamental procedural rights”).

148. In light of the importance of the *Brady* rule in criminal prosecutions, I would be inclined to conclude that the judge’s disregard was not egregious, but not only could I be persuaded the other way depending on the circumstances, I am confident that many would disagree with my preliminary conclusion.

149. The criterion could become somewhat more concrete by adding the reasonableness standard. The Maine standard is roughly illustrative. See *In re* Benoit, 487 A.2d 1158, 1162–63 (Me. 1985). It purposely combines both inquiries (i.e., the clarity of the law and whether legal error warrants discipline) into one standard: Whether a reasonable judge would conclude that the ruling was “obviously and seriously wrong.” *Id.*

With respect to the second inquiry (“seriousness”), in theory, I disagree with the court’s exception for “de minimus” transgressions. *Id.* If reasonable and competent judges would have considered the mistake “obviously” wrong in the circumstances, its seriousness should go to the sanction, not the finding of misconduct. In practice, however, I recognize the benefits of not wasting resources and showing mercy in the charging decision. In dealing with criminal defendants, however, “obvious” wrongs will rarely (if ever) amount to “de minimus” violations—the stakes and mandatory protections are simply too high. See *supra* Part II.
faithful discharge of judicial duties” or “[a]n intentional failure to follow the law.”¹⁵⁰ To the extent that a standard can be gleaned from these illusory propositions, it is a very loose one. Thus, courts have stated that bad faith decisions “need not necessarily seek to harm a particular litigant or attorney; disregard for the legal system in general will suffice.”¹⁵¹

Furthermore, to the extent that some bad faith requirements have teeth, such as requiring that the ruling flowed solely from corrupt purposes before imposing discipline,¹⁵² they impose an impossible burden on the disciplinary authority. Absent an admission, it is easy to imagine a routine failure of proof despite objective criteria indicating that the judge must have acted in bad faith.¹⁵³ Moreover, it is unclear why this heightened strand of bad faith

¹⁵⁰ Gray, supra note 2, at 1265, 1268; see also id. at 1279 & n.176 (noting that several states have codified the “bad faith” requirement).


¹⁵² This is purely a hypothetical inquiry because I am unaware of any meaningful bad faith requirement in this context. Most states, in fact, require only negligence for a finding of judicial misconduct. See, e.g., In re Elloie, 921 So. 2d 882, 902 (La. 2006) (“There is no subjective intent requirement for judicial misconduct.”); Miss. Comm’n on Judicial Performance v. Sanders, 749 So. 2d 1062, 1069–70 (Miss. 1999) (holding that judge committed judicial misconduct by acting without legal authority irrespective of whether she acted out of carelessness or willfulness); Goldman v. Nev. Comm’n on Judicial Discipline, 830 P.2d 107, 135 (Nev. 1992) (stating that ignorance of the law can constitute bad faith); Cannon v. Comm’n on Judicial Qualifications, 537 P.2d 898, 908 (Cal. 1975) (stating that ignorance of the law can constitute bad faith).

Thus, it is tremendously foolish to hold onto the bad faith standard: It is seemingly impossible to have bad faith negligent violations. One of the few courts that bothered to grapple with this absurdity did so by holding that a negligent violation could not constitute “willful misconduct” but still defined “bad faith” expansively:

(1) performing a judicial act for a corrupt purpose (which is any purpose other than the faithful discharge of judicial duties), or (2) performing a judicial act with knowledge that the act is beyond the judge’s lawful judicial power, or (3) performing a judicial act that exceeds the judge’s lawful power with a conscious disregard for the limits of the judge’s authority.

Broadman v. Comm’n on Judicial Performance, 959 P.2d 715, 721–22 (Cal. 1998). Prong (1) is extremely broad, and prong (3), of course, requires essentially recklessness and nothing more.

¹⁵³ This problem, of course, is not unique to judicial discipline. High mens rea standards, particularly when coupled with high burdens of proof (such as the clear and convincing burden in judicial discipline proceedings), risk shielding conduct that objectively appears to be in bad faith (or equivalent mental states). Bad faith, however, is particularly hard to prove. See, e.g., Karen Carlson Paul, Note, Destruction of Exculpatory Evidence: Bad Faith Standard Erodes Due Process Rights, Arizona v. Youngblood, 488 U.S. 51, 109 S. Ct. 333 (1988), 21 ARIZ. ST. L.J. 1181, 1195–96 (1989) (explaining problems with the bad faith standard in another context).

Even assuming the propriety of this narrow definition of bad faith, it appears inconsistent with the other—and independent—criteria for discipline (e.g., egregiousness) because they are unconcerned with mental states.
should be required. Defined in this way, it effectively precludes the Rule (despite its universal application in the states). It blindly protects judicial independence, and it does so by arguably devaluing the Rule of Law and shielding evil judges.154

Therefore, the bad faith requirement is either a myth or unacceptable. Of course, a judge’s mental state is important—indeed, it separates incompetence from legal disregard—but the definition should be the one already offered, namely, disregard of the law for a “bad” or inexcusable reason.155 The mental inquiry becomes both simpler and more complex. Simply, it initially asks whether the judge was aware of and regarded the law (or disregarded it). The more complex inquiry is whether the reason given—either during the ruling or after the fact, although the former would have more credibility—excuses any disregard of the law.156

This two-part inquiry is far superior to the illusory “bad faith” requirement; the latter neither explains the case outcomes nor provides a workable theory for discipline.

5. Further Problems and Conclusions

Another, less prevalent test is whether the judge “exercise[d] jurisdiction when he knew none existed.”157 This test is circular and therefore useless. It is designed (at most) to detect whether the ruling was contrary to law and

154. See also infra Part IV.B. (discussing the judicial independence objection).
155. See infra Parts III (discussing incompetence), IV.C. (proposing new standard to discern Rule violations). In Model Penal Code terminology, the mental state regarding consciousness of the law is roughly equivalent to recklessness. See, e.g., Broadman, 959 P.2d at 724 (holding that a judge’s “conscious disregard” that her actions are beyond legal authority would warrant discipline); cf. In re Conduct of Gustafson, 756 P.2d 21, 24 (Or. 1988) (holding, consistent with other states, that “willfulness” requirement for judicial misconduct requires only that “the judge intends to cause a result or take an action contrary to the applicable rule and . . . he is aware of circumstances that in fact make the rule applicable, whether or not the judge knows that he violates the rule”). It also would capture a judge’s “willful ignorance” of the law.
156. See infra Parts IV.C, V. This second inquiry is only partially a mens rea requirement. If the judge’s proffered reason is unchallenged, completing the inquiry has less to do with the judge’s mental state than with the substantive sufficiency of the reason for disregarding the law. We could take a more extreme position and rely solely on the consequence of the decision, which would eliminate the need for any mental inquiry. A good result would excuse the legal disregard, while a bad result would not. That position, however, would give chance too much of a role and the Rule of Law too little of one. By chance, it would mean that, even if the judge disregards the law for a bad reason or even no reason, a good result would excuse the ruling.
157. In re Martin, 424 S.E.2d 118, 120 (N.C. 1993) (censuring judge for acting outside “the bounds of [his] judicial power” by changing a driving-while-impaired charge to one of reckless driving notwithstanding the fact that the “legislature clearly intended to return the offenses of reckless driving and impaired driving to their status as separate offenses” and thereby “eliminate the ability of courts to treat reckless driving as a lesser included offense of impaired driving”).
therefore beyond “the bounds of [the] judicial power.” A ruling contrary to law is the problem, not the answer.

A parting problem in all of the current analyses (save perhaps egregiousness) is that they make no distinctions between rule-based and standard-based (or other discretionary) violations. Perhaps the courts have done so to protect standard-based errors. Such an approach has some surface merit—primarily because it is harder to police standards and the point of allowing discretion is, in fact, to allow discretion—but it does not hold true. First, courts have disciplined standard-based violations. Second, there are many ways in which the application of a standard may reflect disregard of the law for inexcusable reasons.

In sum, with the exception of the simplistic “egregiousness” inquiry, all of the current tests are unhelpful. Therefore, we must generate a new and viable test for recognizing unethical disregard of the law. Before we do, however, we must deal with the most fundamental objection to the Rule—the rhetoric of judicial independence. The strength and reach of this objection will help to discern the proper limits of the Rule and the proper test designed to police violations of it.

158. Id.

159. See, e.g., Gubler v. Comm’n on Judicial Performance, 688 P.2d 551, 556 (Cal. 1984) (censuring judge in part because he abused his discretion under the reasonableness standard of the relevant statute by the manner in which he required defendants to pay the fees of their court-appointed defense attorneys), disapproved of on other grounds by Doan v. Comm’n on Judicial Performance, 902 P.2d 272 (Cal. 1995).

160. One would be exemplified by the following hypothetical: State has a sentencing standard of “just under the circumstances” and its primary penal goal is “incapacitation.” Defendant committed an offense—any offense—for the first time, while eighteen and intoxicated, and the only evidence before the judge suggests that Defendant will not recommit the same (or any) crime. For this offense, the sentencing range is five to fifteen years. Defense asks for five; Prosecutor agrees; Judge sentences defendant to fifteen (for the only stated reason that it is a “serious” offense). On these facts, the judge misapplied the standard. See, e.g., Cunningham v. California, 549 U.S. 270, 303 (2007) (Alito, J., dissenting) (noting that a similar hypothetical sentence would be struck down as “unreasonable”); ABA STANDARDS FOR CRIMINAL JUSTICE, SENTENCING 219 (3d ed. 1994) (“The sentence imposed in each case should be the minimum sanction that is consistent with the gravity of the offense, the culpability of the offender, the offender’s criminal history, and the personal characteristics of an individual offender that may be taken into account.”). Thus, if we ignore the very real fact that judges misapply standards, we mindlessly carve out a whole category of potentially disciplinable conduct (I do not claim that Judge’s decision is disciplinable; it probably is, but we need to know more regarding the reasons for Judge’s decision, which Judge should have stated more completely at sentencing).

161. See, e.g., Oberholzer v. Comm’n on Judicial Performance, 975 P.2d 663, 680-83 (Cal. 1999) (Werdegar, J., concurring) (noting that these tests, and several others, do not answer whether legal error in and of itself warrants discipline and stating that the true test should be whether the ruling had “reasonably arguable merit”).
B. The Judicial Independence Objection

Imposing discipline upon a judge for an incorrect legal ruling is an extremely sensitive issue because it comes closer than any other ground of discipline to threatening judicial independence. It is, after all, an imposition of discipline directly connected to a legal ruling made by a judge.\footnote{Shaman, supra note 3, at 8.}

The most serious threat [to judicial independence] arises when sanctions are imposed based upon the content of a judge’s decision.\footnote{Lubet, supra note 43, at 65.}

I do not summarily dismiss the notion that judicial disciplinary proceedings will become the favored stalking ground against judges who render unpopular decisions.\footnote{Wendell L. Griffen, Comment: Judicial Accountability and Discipline, 61 LAW & CONTEMP. PROBS. 75, 77 (1998) (“If the fear of electoral defeat alone can produce such timidity, I cannot pretend that the prospect of being charged with misconduct and forced to finance one’s own defense will not add to it.”).}

The preceding passages reveal the reflexive retorts beginning any discussion involving disciplinable legal errors. The defensiveness has led some to claim that mere legal errors are not disciplinable—a claim which is completely untrue.\footnote{The “mere legal error” defense does not exist, as courts have held explicitly or at least implicitly through disciplining mere legal error plus some ostensibly additional characteristic that adds little or nothing to the analysis (indeed, by combining the additional characteristics, defined in their usual breadth, they cover every conceivable instance of legal error). Oberholzer, 975 P.2d at 680 (allowing discipline for legal error that involves any of the following: “bad faith, bias, abuse of authority, disregard for fundamental rights, intentional disregard of the law, or any purpose other than the faithful discharge of judicial duty”) (citations omitted); see also Gray, supra note 2, at 1280 (noting that the mere legal error “rule is usually announced in the course of a decision in which an exception to the rule is applied to allow for sanction”). The latter cases reflect the judiciary’s ambivalence to the Rule (the approach is similar to controversial issues in the Model Rules of Professional Conduct). The important point, however, is that discipline for mere legal error not only exists, it is commonplace. True, some courts say that “something more” is required to turn legal error into judicial misconduct. In re Benoit, 487 A.2d 1158, 1162–63 (Me. 1985) (citing In re Scott, 386 N.E.2d 218, 220 (Mass. 1979)). There is no substance to this claim, particularly in light of the universally broad interpretation of “bad faith” and “egregiousness” (at least in the criminal law context). Cf. Stern, supra note 48, at 332 (“A comparison of pre-Commission decisions with the more recent decisions of the Commission and the [New York] Court of Appeals establishes that misconduct which deprives persons of fundamental rights is no longer excused as a mistake, an error of law, or an abuse of discretion.”).}

The more specific retort, however, is no more forceful: mere legal error “plus something more” equals an ethical violation.\footnote{See supra text accompanying notes 33–36. In re Benoit, 487 A.2d at 1162–63.} As we have seen, the “something more” is either nonexistent or elusive or arbitrary. These various protestations and ambivalent descriptions mostly or exclusively arise from the same objection—that the Rule risks
infringing on judicial independence.\textsuperscript{167} This objection—after it has been unpacked and trimmed to size—has merit. Bearing in mind that the Rule is here to stay, our goal is to use the objection’s applicability to help shape the Rule in an analytically sound way. Under this mandate, we must determine the objection’s actual strength and scope.

The objection has its force in the risk that judges may tailor their rulings in fear of discipline. It should be clarified, however, that this rationale does not speak to ignorance of the law, category (1) above; a judge who is ignorant of the law will not change her ruling in the face of the Rule, no matter how strongly worded. If a judge is ignorant of the law, not only does that not immunize her from discipline (under any judicial independence theory), she either (a) is unaware that she is legally deficient or (b) does not fear that a judicial conduct commission will scrutinize her conduct in any event. If (a) or (b) does not apply to the judge (that is, if she is aware that she is legally deficient or she fears that a judicial conduct commission might scrutinize her rulings), she likely will take the time to learn the law\textsuperscript{168} or she is irrational. Therefore, judges who are ignorant of the law do not change their reasoned rulings in fear of discipline.\textsuperscript{169}

The real danger, then, is with respect to conduct that is not actually legal error (incompetence or negligence), but misapplication and legal disregard (or lawlessness). According to the ABA, and all of the reluctant state

\textsuperscript{167}. See Stephen B. Burbank & Barry Friedman, Reconsidering Judicial Independence, in Judicial Independence at the Crossroads: An Interdisciplinary Approach 9, 9 (Stephen B. Burbank & Barry Friedman eds., 2002) (“Judicial independence exists primarily as a rhetorical notion rather than as a subject of sustained, organized study.”). We must clarify what we mean by judicial independence; otherwise other rhetorical devices—such as demanding a government of laws, not of men—would cancel it out in the legal error context.

\textsuperscript{168}. With respect to category (1), then, prosecuting judicial incompetence more regularly would have only a beneficial effect—forcing judges to learn the law—without any corresponding negative effects on the underlying values of judicial independence. To a lesser extent, these conclusions probably apply to category (2), mistaken application, as well. It is conceivable, however, to worry that a judicial conduct commission might view an application of the law as mistaken when reasonable judges might not. See, e.g., Harrod v. Ill. Courts Comm’n, 372 N.E.2d 53, 65–66 (Ill. 1977) (discussing instance in which judge’s interpretation of statute differed from commission’s and concluding that judge should not be disciplined). That could incline judges to make “safe” decisions to steer clear of the commissions’ radar.

\textsuperscript{169}. I have inserted “reasoned” before “rulings” to preclude the following simplistic objection: by forcing the judge to know the law, the Rule has caused the judge to change what her ruling would have been without such a Rule. There are at least two harsh responses to that objection: (1) the judge has a duty to know the law (like every other person), which would have been violated by ruling in her previous ignorance (judicial incompetence); and (2) the change in substance (from the ignorant ruling to the knowing one) is without detriment to any discernable values. See, e.g., Burbank & Friedman, supra note 167, at 11–12. (“No rational politician, and probably no sensible person, would want courts to enjoy complete decisional independence, by which we mean freedom to decide a case as the court sees fit without any constraint, exogenous or endogenous, actual or prospective.”) (citation omitted).
supreme courts that have adopted its view, that should not be a danger at all; it is the judge’s role to apply the law as written, irrespective of its consequences.\textsuperscript{170} I, however, do see a danger—\textit{the risk that judges will be disciplined for doing the right thing}.\textsuperscript{171} There is significant evidence of this phenomenon already.\textsuperscript{172} To put the point dramatically, “[j]udges who must rule in the shadow of personal jeopardy are the very antithesis of independent, as fear and doubt may cause them to steer a safe course rather than a true one.”\textsuperscript{173} Even when the disciplinary complaints are ultimately

170. \textit{E.g.}, \textit{Model Code of Judicial Conduct}, R. 2.2 cmt. 2 (2007) (“Although each judge comes to the bench with a unique background and personal philosophy, a judge must interpret and apply the law without regard to whether the judge approves or disapproves of the law in question.”); \textit{Canons of Judicial Ethics}, Canon 20 (1957) (listing the somewhat apathetic judicial philosophy that “[a] judge should be mindful that his duty is the application of general law to particular instances, that ours is a government of law and not of men, and that he violates his duty as a minister of justice under such a system if he seeks to do what he may personally consider substantial justice in a particular case and disregards the general law as he knows it to be binding on him”).

171. Judicial independence is an instrumental concept; there is no reason in theory why “bad” decisions (as defined) should be independent. \textit{See, e.g.}, Lewis A. Kornhauser, \textit{Is Judicial Independence a Useful Concept?}, \textit{in Judicial Independence at the Crossroads: An Interdisciplinary Approach} 45, 51 (Stephen B. Burbank & Barry Friedman eds., 2002) (“In legal theory, the concept of judicial independence is instrumental . . . . [W]e believe that an independent judiciary will apply legal rules to resolve disputes better than a ‘dependent’ judiciary would.”). The ABA understood the gist of the danger point—that judges will be disciplined for doing the right thing or judges will fail to do the right thing out of fear of discipline—but at times missed the descriptive mark. For example, the Reporters’ Notes explain that “judicial independence requires that judges be permitted to follow the law as best they can without fear that they may be punished for \textit{simple mistakes}.” Charles E. Geyh & W. William Hodes, \textit{Reporters’ Notes to the Model Code of Judicial Conduct} 26–27 (2009) (emphasis added). Mistakes do not hamper judicial independence—by definition a judge does not know of a mistake and therefore will not censor her ruling in fear of discipline. If she fears a mistake—and there is a disciplinary rule on the books mandating competence, as there is—she might be incentivized to learn the law, but she will not otherwise change her ruling. Rather, it is knowing disregard of the law—or a fear that she may be seen as engaging in such conduct—that might prompt a judge to be less independent in her adjudications.

172. \textit{See, e.g.}, \textit{In re Duckman}, 699 N.E.2d 872, 879–83 (N.Y. 1998) (removing judge despite “otherwise unblemished performance in a high-stress, high-volume court” arguably because the media, prosecutors, and other public officials heavily criticized him); \textit{In re Thoma}, 873 S.W.2d 477, 507 (Tex. Rev. Trib. 1994) (removing judge and permanently barring him from judicial office in part because “regardless of the reason” he applied unauthorized time-served credits to a defendant’s sentence); Lubet, \textit{supra} note 43, at 65–67 (1998) (discussing a case in which a dissenting judge faced discipline when he refused to follow controversial precedent and asked the state supreme court to change it).

173. Lubet, \textit{supra} note 43, at 67; \textit{see also id.} (“In a regime where judges are punished for speaking their minds, the judiciary will necessarily become timid and unimaginative. In the worst case, the disciplinary authorities may use such power to enforce a judicial orthodoxy, limiting the way in which the law may be interpreted or understood.”); \textit{cf.} Geyh & Hodes, \textit{supra} note 171, at 26 (“The Commission discussed [the] Rule at considerable length, because it represents a critical point of intersection between judicial independence and accountability.”).
dismissed, the judge still has to endure criticism of her professional behavior and the personal time and expense of defending the charges, and thus “the potential for intimidation nonetheless seems clear.”\(^{174}\) This fact is particularly true of judges who make rulings in favor of criminal defendants; these judges face harsh public scrutiny and even discipline for siding with the defense.\(^{175}\) I therefore agree that the Rule, unlike many cries of wolf, can strike at judicial independence. In fact, “it is best to think of [the need for judicial] independence as applying solely to the content or substance of a judicial opinion or act.”\(^{176}\)

Finally, one legitimately may question the wisdom of leaving the determination of disciplinable legal errors with judicial conduct commissions. First, most of the commissions are not composed entirely of judges or other members of the judicial branch. Second, like bar prosecutors, some commissions have exposed themselves to be readily influenced by political pressures.\(^{177}\) The risk of such pressures may be

\(^{174}\) Lubet, supra note 43, at 69; see also id. at 71 (“While most judges are responsible and some are even courageous, it is safe to assume that few would choose to venture repeatedly into such a hazardous situation.”).

\(^{175}\) In re Duckman, 699 N.E.2d at 879–83 (removing judge despite “otherwise unblemished performance in a high-stress, high-volume court” arguably because the media, prosecutors, and other public officials heavily criticized him); Clayton v. Willis, 489 So. 2d 813 (Fla. Dist. Ct. App. 1986) (dismissing criminal charge brought against judge for committing pro-defendant legal error); see also In re Troy, 306 N.E.2d 203, 217 (Mass. 1973) (“We take notice that in recent years, in this Commonwealth and in other jurisdictions, those few judges who have come under substantial public criticism, by reason of their exercise of judgment and discretion, have in most instances been criticized for alleged leniency and alleged excessive regard for the interests of the accused. If such a judge were intimidated, by fear that disciplinary action would be lightly undertaken by this court, it is possible that he would henceforth treat some accuseds with undue harshness and severity.”); Abraham Abramovsky & Jonathan I. Edelstein, Prosecuting Judges for Ethical Violations: Are Criminal Sanctions Constitutional and Prudent, Or Do They Constitute a Threat to Judicial Independence?, 33 FORDHAM URB. L.J. 727, 766 (2006) (citing some of these and other “examples demonstrat[ing] that judges who issue pro-defense rulings in criminal cases can often find themselves in the political line of fire”).

\(^{176}\) Lubet, supra note 43, at 74 (emphasis added); cf. Abramovsky & Edelstein, supra note 175, at 754 (arguing that “separation of powers might therefore bar criminal misconduct prosecutions of judges predicated on violation of ethical rules that are integral to the process of judging” such as the duty “to be faithful to the law in rendering decisions . . . .”). Professor Lubet is slightly more equivocal on this point. See Lubet, supra note 43, at 74.

\(^{177}\) See In re Duckman, 699 N.E.2d at 879–83 (removing judge despite “otherwise unblemished performance in a high-stress, high-volume court” arguably because the media, prosecutors, and other public officials heavily criticized him); see also In re Troy, 306 N.E.2d at 217 (“We take notice that in recent years, in this Commonwealth and in other jurisdictions, those few judges who have come under substantial public criticism, by reasons of their exercise of judgment and discretion, have in most instances been criticized for alleged leniency and alleged excessive regard for the interests of the accused. If such a judge were intimidated, by fear that disciplinary action would be lightly undertaken by this court, it is possible that he would henceforth treat some accuseds with undue harshness and severity.”); Abramovsky &
particularly dangerous given “the several roles of the Commission—that of investigator, prosecutor and judge.” To be sure, these objections would apply (more or less) to any commission prosecution for any judicial ethics violation. Given that we already are dealing with discipline that treads the closest to infringing judicial independence, however, it should give the judiciary pause to permit the commissions to discipline judges liberally for legal disregard. Indeed, it has been claimed that the very purpose of the commissions was to place “restraint on judicial power” in response to judges who challenged precedent and public consensus.

The problem with judicial independence, however, is when that independence is used as a shield for unethical or inequitable conduct. Judicial independence (and its absolute immunity corollary) has long been used in both good and bad ways. Keeping fair judges independent of extraneous influences, such as mob rule, is important, but allowing unfair judges to immunize themselves under the rhetorical penumbra of judicial independence is not a worthy cause. Thus, eliminating the Rule entirely is not an option: while it blindly would protect judicial independence, it would do so at the expense of Rule of Law values and (more importantly for present purposes) shield evil judges.

Therefore, the Rule rightly polices judges’ attention to the law and equity—they cannot ignore an applicable rule without a legal and just reason. Without the Rule, the judge could ignore the law for any or no reason (such as “bad” or “lawless” reasons). This rationale has limits, however.

A broader application of the Rule—as some courts have done—in the minor sense paternalizes the judiciary and in the major sense stifles the law itself. We have come far from the conclusion that law is merely a collection of abstract principles. It is a means to social ends. If we adopt a strict application of the Rule—one that allows the judiciary to make only “safe” applications of black-letter law—we would step back more than a century.

Edelstein, supra note 175, at 766 (citing “examples demonstrat[ing] that judges who issue pro-defense rulings in criminal cases can often find themselves in the political line of fire.”).

178. In re Brown, 512 S.W.2d 317, 321 (Tex. 1974). In In re Brown, however, the court rejected a due process challenge to the commission’s multiple roles because the court (at least in theory) maintained the ultimate power to remove judges. Id.

179. Of course, it should be reiterated that the commissions, by and large, have done a huge service for fundamental rights. See supra Part II.

180. Abramovsky & Edelstein, supra note 175, at 740–41.

181. E.g., Stump v. Sparkman, 435 U.S. 349, 349 (1978) (holding absolutely immune a judge who, without authority under state law, granted a petition to force the sterilization of a minor); Pierson v. Ray, 386 U.S. 547, 554 (1967) (“This [absolute adjudicatory] immunity applies even when the judge is accused of acting maliciously and corruptly . . . .”). Or it is worthy only in the sense that having a bright-line rule protecting all judges will protect the good judges, even though the bad ones escape liability.
We would have laws enforced and applied for no better reason than so they were in the time of Henry IV. The law would become stagnant and thus unfair. This is true not only because some laws have no purpose in modern times, but also because the laws that have some purpose sometimes cannot be justified in all of the myriad factual permutations to which they might apply. Undisputedly, the lawmaker simply cannot design a fair rule to cover all factual situations. The courts must adapt the rule, or apply another one, when the rule’s foresight has run out. But any attempt to do so necessarily will entail some noncompliance with or nonapplication of the existing law. Furthermore, often two rules directly collide, which likewise requires some divergence from one of the laws.

There is really no other conclusion if courts are to solve disputes in an attractive manner; any other would freeze adjudication under timid judges. This discretion, moreover, is constitutive of judicial independence. If a judge is merely following legislative orders, there is no independence; independent judges must maintain discretion in applying the law to the case. The judicial independence objection, then, although exaggerated at times, maintains its force vis-à-vis the Rule—ignoring the objection completely would breed timid judges who merely follow positivist orders.

In conclusion, the preceding paragraphs can be distilled into a simple summary, which begins by separating (i) lawless judges from (ii) law-regarding judges. Of the former category, there are two types: (a) incompetent judges and (b) supreme judges. The incompetent judge does not know the law. Disciplining her for her lawlessness does no damage to judicial independence: to the extent she reacts at all, the discipline will incentivize her to learn the law; the discipline is not based on her substantive application or interpretation of the law and thus can have no substantive impact on it. The supreme judge is a judge who is above the

182. See Justice Oliver Wendell Holmes, Supreme Judicial Court of Mass., Address at the Dedication of the New Hall of the Boston University School of Law, The Path of the Law (Jan. 8, 1897), in 10 HARV. L. REV. 457, 469 (1897) (calling such blind adherence to the law “revolting”).

183. E.g., Llewellyn, supra note 30 at 1239 (“[I]n any case doubtful enough to make litigation respectable the available authoritative premises . . . are at least two, and that the two are mutually contradictory as applied to the case in hand.”); Swisher, supra note 6 (noting that the failures of legislative law necessitate the selection of judges who will tailor the law to achieve justice as applied).

184. See, e.g., Kim Lane Scheppele, Declarations of Independence: Judicial Reactions to Political Pressure, in JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH 227, 234 (Stephen B. Burbank & Barry Friedman eds., 2002) (noting that the more the judge rigidly adheres to the legislature’s instructions “the harder it is to tell the difference between meaningful independence (the judge considered the request and by independent judgment did what was suggested because the judge thought it was the right thing to do under the circumstances as a matter of professional opinion) and having no mind of one’s own (following orders)”).
law, for no consideration external to herself need enter her consideration while adjudicating. For any number of selfish reasons, she refuses even to address the law. Her discipline likewise would not affect judicial independence in any negative way; it would only incentivize her to take the law into consideration. Judicial discipline of the second category, the “law-regarding” judges, however, does present serious judicial independence problems. Disciplining such judges—judges who have consulted the law, broadly speaking—risks producing timid judges who are afraid to interpret, apply, or make law as the case requires, which in turn will lead to stagnant law, which in turn will lead to unjust results. The following Section elaborates on the important distinction between lawless and law-regarding judges.

C. **Delineating the Proper Scope of the Rule Anew**

Having criticized and distilled the Rule and its application, we now have reached a point at which we can offer a (more) positive program. Using the judicial independence objection and the other legal contexts that we have outlined, the following pages determine the proper scope of the Rule and propose a standard for enforcing it.

1. **The Revised Rule**

We finally return to our most pressing task—distinguishing disregard of the law for bad reasons (or none at all) from good reasons. As one might anticipate, we shall see that the former category should be disciplined while the latter should not. I will start with disregard for bad reasons, because disciplining such conduct should be (mostly) unobjectionable and uncontroversial.

The first point is uncontroversial and even (in a sense) precedes legal disregard. Under every reasonable conception of judicial adjudication, judges abdicate their role when they fail to consider and decide the law. To be sure, they may have assistance, such as law clerks or special masters, but in the end, it always is the judge’s decision. Some judges, however, have

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185. See *In re Benoit* for a discussion on the importance of crafting a viable standard:

In [legal error] cases in other jurisdictions, court opinions appear to have approached this question without any clear articulation of a standard of misconduct, merely stating in a conclusory way whether particular challenged action constituted judicial misconduct. While it may always be possible for this or any court to determine on an ‘I know it when I see it’ basis whether judicial conduct violates Canon 3(B(2)), that approach is plainly unsatisfactory.

487 A.2d 1158, 1163 (Me. 1985) (footnote omitted).
disregarded their core duty, adjudication. These judges properly were disciplined for pawning off the decision on others (or even inanimate objects). This discipline obviously does not implicate independence concerns because the judges were not disciplined for judicial acts, but for failing to perform judicial acts at all (and for the most part, without explanation).

The remainder of the “bad reason” category is hardly more compelling. Judges frequently disregard the law for no other discernible reason than laziness. They simply disregard applicable law, period. Such judges, or at least a subset of them, have two favored, post hoc defenses: (1) “expedience” and (2) “no one else followed the law either.” Expedience—moving the case along—could be a legitimate reason in context, but the cases do not contain that context (such as a party’s purposeful delay or an inequitable procedural rule). Expedience solely for expedience’s sake is a bad reason: it is a more eloquent way of admitting judicial laziness and indifference toward fundamental rights.

186. SHAMAN ET AL., supra note 2, § 2.07 at 39–40 (discussing actual cases in which “judges make a decision by flipping a coin in open court, or by throwing a dart at a dart board, or by taking a vote of the spectators in the courtroom”). The treatise denounces such behavior in the following articulate way:

This sort of behavior goes distinctly beyond the bounds of judicial independence because it constitutes a complete abdication of the duty to exercise judgment. The essence of the judicial function is to make judgments, in other words, to make reasoned decisions according to the law.

Id. at 40.

187. I will treat these defenses as the actual reasons for their conduct. I personally doubt many of these claims; my impression is that many of these judges have—after they were charged with misconduct—reinterpreted their pure judicial laziness into these reasons.

188. This is the judicial version of the street-side, speeding-ticket defense: “But officer, everyone else was speeding too.”

189. In the criminal sphere, expedition is not a significant justification to a violation of basic and constitutional procedural rights when someone is faced with loss of life or liberty. Judges are routinely disciplined for striking such unreasonable and callous balances. See supra Part II. The sole exception might be to honor the constitutional right to a speedy trial, but judges have rarely raised this defense (perhaps because defendants are allowed to waive—or are forced to forfeit—this right and often do so). Generally, however, expedition means only that the judge “failed to ensure the constitutional rights of a criminal defendant and did so to avoid the burden of proceedings” in which those rights were honored. Kloepfer v. Comm’n on Judicial Performance, 782 P.2d 239, 252-53, 263 (Cal. 1989) (removing judge in part for convicting defendant without waiting to proceed with appointed counsel); In re Gustafson, 756 P.2d 21, 28 (Or. 1988) (censuring judge in part for refusing to grant requests for needed continuances solely “to impress on the prosecutor and defense lawyers the importance that he attached to meeting his trial schedule”).
[therefore seek] to avoid, procedures we deem necessary to the fair and evenhanded administration of justice.¹⁹⁰

The second common defense—that “no one else followed the law either”—is worthless standing on its own. It may be that no one followed the law because it was unfair (or unconstitutional); it may be that no one followed the law because it was fair; or it may be that no one followed the law simply because no one felt like it. We simply do not know, and the respondent judges frequently do not tell us. Thus, in the absence of some persuasive reason why no one followed the law, the reason is a bad one.¹⁹¹

Neither excuse implicates judicial independence in any meaningful sense. Lacking context, they are choices not to follow law for reasons other than the content of the law.¹⁹² Thus, there is no risk that judges will make substantively different decisions out of fear of discipline. Moreover, and as the record of discipline expounded in Part II seems to corroborate, it very well may be that there is no legitimate defense to the most common form of disciplinable legal disregard—disregard of defendants’ fundamental legal rights.

In sum, bad reasons generally approach absence of reason. To the extent such decisions contain reason, it is a reason external to the parties, facts, and law before the judge. It is borne of a culture of indifference, callousness, or laziness (or any combination of these traits).

The move to “good” reasons must begin with a clarification: “[g]ood” reasons are not necessarily good, intrinsically or otherwise; rather, they are reasons that do not warrant discipline despite an apparent disregard of the law.¹⁹³ In theory, there are many reasons to disregard the law. We have

¹⁹⁰. Kloepfer, 782 P.2d at 263 (footnote omitted); In re Gustafson, 756 P.2d at 28 (censuring judge in part for refusing to grant requests for needed continuances solely “to impress on the prosecutor and defense lawyers the importance that he attached to meeting his trial schedule”); see also Sierra Nev. Stagelines, Inc. v. Rossi, 892 P.2d 592, 595 (Nev. 1995) (citing Canon 3B(8)—the duty to decide cases promptly and fairly—and criticizing judge for seeking “promptness and efficiency . . . at the expense of fairness”).

¹⁹¹. E.g., In re Elloie, 921 So. 2d 882, 900 (La. 2006) (stating that the defense of “custom” or “that a long-standing procedure was utilized cannot prevail when that procedure is in direct contravention to express written statutory law”); In re Duckman, 699 N.E.2d 872, 879 (N.Y. 1998) (quoting Sardino v. State Comm’n on Judicial Conduct, 448 N.E.2d 83, 85 (N.Y. 1983)) (noting that such evidence is “irrelevant”: “[e]ach judge is personally obligated to act in accordance with . . . the standards of judicial conduct. If a judge disregards or fails to meet these obligations the fact that others may be similarly derelict can provide no defense”).

¹⁹². In the bare expedience scenario, the concern for the content focuses solely on whether the law requires more work or more time; the reasons for the law do not matter to the judge. This is not a legitimate justification without some context (for example, the judge was forced to “triage” cases because of an unavoidably heavy docket, which even then may not justify the disregard in criminal litigation).

¹⁹³. Thus, the category probably should be called “not bad” reasons (with “good” reasons assuming subcategory status), but that name is unappealing for obvious reasons.
discussed the most common “bad” reasons—reasons that by any theory do not justify legal disregard (or lawlessness). In determining “good” reasons, we must bear in mind the judicial independence objection. Thus, we must construe non-disciplinable disregard somewhat broadly in order to protect judicial creativity and justice.

“Good” reasons (to replace a general label with another) are essentially legal reasons—reasons judges use in interpreting, applying, balancing, and choosing laws. Therefore, legal reasons are not overly subjective; they are reasons we can discern objectively from the many years of American adjudication. This conclusion is not merely illusory: (1) the Rule requires compliance with and application of the “law,” which even under a liberal construction does not include everything that the judge had for breakfast; and (2) the judiciary has decided, through years of application, what amounts to legal reasons. It is true that “legal reasons” for decisions are incredibly broad, but they do not include solely personal or ideological preference.

Thus, it is not wrong to take two competing legal propositions, and side with one; indeed, that is required to decide the case. It is wrong, however, and the Rule makes it disciplinable, to refuse to consider a relevant law in making the decision. There must be a legal reason why the law does not apply or one law prevails over another, but the reason need not be exacting; there is no “judicial orthodoxy.”

The judge personally may not like the law—indeed, the judge may feel ethically uncomfortable even in considering it—but the Rule forbids the judge from failing to consider it. Even then, personal preferences do play a role in the ultimate decision. For them to play the sole role, however,

194. See supra Part IV.B.
196. Cf., e.g., Amalgamated Meat Cutters v. Connally, 337 F. Supp. 737, 757–58 (D.D.C. 1971) (holding that congressional delegation of a “fair and equitable” standard was permissible because it constituted an intelligible principle, which received its limits from the context of the underlying statute and its purposes).
197. In effect, then, the standard is one of “reasonable” legal considerations on the basis of the judiciary’s practices. See also Swisher, supra note 6, at 639–55 (discussing adjudicatory justice and the role of personal policies).
198. One patent upshot is that the judge should provide the reason for not applying the law. See infra Part V.
199. Two law and order Texas tribunals illustrate this truth. Compare In re Thoma, 873 S.W.2d 477, 507 (Tex. Rev. Trib. 1994) (removing judge and permanently barring him from judicial office in part because “regardless of the reason” his “actions in ordering a sentence that involved credits not authorized by law were misleading to the public, were in direct violation of established law, and thus, were unlawful. Sentences such as those . . . cast public discredit upon the judiciary and the administration of justice and are condemned. Truth in sentencing is
would elevate judges to unchecked monarchs—for no consideration external to them need matter to the decision.

In light of these valid concerns, namely law as justice and core judicial independence, the proper standard is a familiar one—one that gives adequate deference to judges’ independence and adequate room to craft justice in a case. It is aptly stated in the frivolousness test of Rule 11 of the Federal Rules of Civil Procedure and Rule 3.1 of the Model Rules of Professional Conduct. Somewhat surprisingly, Rule 11’s test captures the proper scope of the Rule almost flawlessly: It would require (after minor adaptations) that any ruling, which must be

1. formed after an inquiry reasonable under the circumstances,

2. is not being presented for any improper purpose, such to harass [or to] cause unnecessary delay . . . [and (3) most importantly for present purposes,] the legal contentions 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.

As explained further below, this standard is completely consistent with the text of the Code and certainly its context.

The first part of the test—that the judge conduct “an inquiry reasonable under the circumstances”—ensures that judges have consulted the law essential to public confidence in the judiciary for no other reason than it is right,”), with In re Jones, 55 S.W.3d 243, 245, 249 (Tex. Rev. Trib. 2000) (disciplining judge because he committed numerous violations of criminal procedure, such as ignoring rights to hearings and written complaints, but only censuring judge because he “appears to mean well” and is “usually effective”). It would appear that the vastly divergent sanctions can be explained only by the premiums both tribunals placed on being “tough on crime” and the discount they apparently placed on defendants’ rights to just punishment and procedures.


201. Fed. R. Civ. P. 11(b). The rule also requires that “factual contentions have evidentiary support.” Id.

Rule 3.1 of the Model Rules of Professional Conduct deploys a similar test, but because it uses the vague term “good faith,” it is more confusing. The “good faith” requirement likely means what Rule 11’s second prong spells out—namely, that the legal argument “is not being presented for an improper purpose, such as to harass or to cause unnecessary delay.” FED. R. CIV. P. 11(b); see MODEL RULES OF PROF’L CONDUCT R. 3.1 cmt. (2003) (noting that good faith is not negated merely because the proponent believes that the “position ultimately will not prevail.”). It is actually a lack of bad faith, and “bad faith” properly warrants discipline, but as I noted earlier, it is not properly understood as legal error or ordinary legal disregard. See supra Parts III–IV.A. It could be, for example, a conflict of interest.

202. The applicable Canons have sufficient flexibility for this reasonable interpretation. See In re Benoit, 487 A.2d 1158, 1162 (Me. 1985) (noting that disciplinable legal error “cannot be defined in clear and absolute terms” like some of the Code’s “more absolutist counterparts”).
(within reasonable time constraints) before issuing their nonfrivolous
decision. The mandatory inquiry ensures that legal research, reasoning,
and deliberation have gone into the decision. Conversely, it bars the “lucky”
guesses and biased, after-the-fact justifications.

With respect to the last part of the test, Rule 11 is not intended “to chill
an attorney’s [read: a judge’s] enthusiasm or creativity in pursuing factual
or legal theories.” That buffer zone is necessary to ensure judicial
independence and maintain maneuverability to craft just results under an
infinite number of circumstances. Furthermore, the Code itself states it “is
to be construed so as not to impinge on the essential independence of judges
in making judicial decisions.” Moreover, at least one jurisdiction already
uses a similar test to frivolousness—whether the ruling was “obviously
wrong.” Another point in the test’s favor is that it does not rely on the
“good or bad faith” of the judge; rather, it focuses on whether the ruling is
reasonable—or more precisely, not clearly unreasonable—in context.

Importantly, the standard allows nonfrivolous rulings for the extension or
reversal of law. That is critical because, for example, “[d]epending on how
one counts the cases, the Supreme Court has overruled its own decisions
200 to more than 300 times.” Such legal shifts (like the frequent changes
in legislation) happen to new law as well as “the most venerable of
precedents.”

203. Cf., e.g., Gubler v. Comm’n on Judicial Performance, 688 P.2d 551, 560 (Cal. 1984)
(censuring judge in part for requiring defendants to pay their court-appointed attorneys’ fees
with cash bail deposits because judge did not bother to produce a “legal theory” or “legal
justification” for doing so), disapproved of on other grounds by Doan v. Comm’n on Judicial
Performance, 902 P.2d 272, 325 (Cal. 1995).

204. With respect to the second part, see note 201 above. It works to discipline “improper
purpose” cases, which are not “legal error” cases.

205. FED. R. CIV. P. 11 advisory committee’s note (1983 amend.); see also MODEL RULES
OF PROF’L CONDUCT R. 3.1 cmt. (2003) (noting that “the law is not always clear and never is
static” and “account must be taken of the law’s ambiguities and potential for change”).

206. Cf., e.g., MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS’ ETHICS
§ 4.08 (3d ed. 2004) (noting the benefits and necessity of creative lawyering and the dangers of
rules against it, particularly in the criminal law sphere).

207. MODEL CODE OF JUDICIAL CONDUCT pmbl. (2003); MODEL CODE OF JUDICIAL
CONDUCT Scope (2007) (“The Rules should not be interpreted to impinge upon the essential
independence of judges in making judicial decisions.”).


Cal. 2005). As we have seen, the bad faith inquiries of the past have been useless or misleading.
See supra Part IV.A.4.

210. FREEDMAN & SMITH, supra note 206, § 4.08[3], at 97.

211. Id. § 4.08[3], at 96 (quoting Neitzke v. Williams, 490 U.S. 319 (1948)); see also
position is one that a lawyer of ordinary competence would recognize as so lacking in [legal]
merit that there is no substantial possibility that the tribunal would accept it.”).
afforded criminal defendants and the fact that “significant deprivation of liberty is often at stake . . . ,'courts generally [should] tolerate [legal] arguments on behalf of criminal defendants that would likely be met with sanctions if advanced in a civil proceeding.”

Finally, the nonfrivolous standard (or its rough equivalent) is necessary to allow judges to avoid absurd results. That basic judicial power is firmly rooted—even Justice Scalia agrees with it.

The content of this Proposed Standard has two meanings, both contextual. First, frivolousness roughly means “‘indisputably meritless’ or ‘outlandish.’” To use a famous description (and loosening it slightly to our context), the ruling must “fit” within the existing law; in this loose sense, the requirement maintains fidelity to the separation of powers and other (whether real or assumed) Rule of Law values. Any would-be objectors to this first meaning should recognize that it would be rather incongruous to apply a different standard to judges’ arguments than attorneys’ arguments. There would be little-to-no reason to allow nonfrivolous arguments on the part of lawyers if judges could not adopt or adapt such arguments.

The real objection, as we will see, is answered by the second meaning of the term: it involves adjudicating the case justly under the circumstances. There are many seemingly nonfrivolous rulings that take no account of the resulting justice or injustice in the case; these rulings are irresponsible for judges. Lawyers, however, may arguably be required to treat their client as if no one else existed; judges cannot, because they undisputedly owe

212. FREEDMAN & SMITH, supra note 206, § 4.08[6], at 102 (quoting in part In re Becraft, 885 F.2d 547, 550 (9th Cir. 1989)).

213. Antonin Scalia, Judicial Deference to Agency Interpretations of Law, 1989 DUKE L.J. 511, 515 (1989); Cass R. Sunstein, Cost-Benefit Default Principles, 99 MICH. L. REV. 1651, 1687–88 (2001) (citing numerous examples of judges using their power of interpretation to avoid absurd or irrational results, and noting that “Congress should not be taken to have mandated irrationality or absurdity”).

214. FREEDMAN & SMITH, supra note 206, § 4.08[2], at 96 (quoting Neitzke v. Williams, 490 U.S. 319, 327 (1989)); see also In re Benoit, 487 A.2d 1158, 1163 (Me. 1985) (holding that test is whether ruling is “obviously wrong” in all of the circumstances). Judge Easterbrook long ago offered a somewhat (in)famous definition of frivolous:

[S]omething is frivolous only when (a) we’ve decided the very point, and recently, against the person reasserting it, or (b) 99 of 100 practicing lawyers would be 99% sure that the position is untenable, and the other 1% would be 60% sure it’s untenable. Either one is a pretty stiff test.


consideration to both parties and the overall system.\textsuperscript{216} The merit of this justice component in the civil sphere is not under consideration, but it is quite explicit in the criminal sphere. As detailed above, the criminal law requires that justice be considered; it is built in through a multitude of procedural and substantive protections.\textsuperscript{217} Importantly, the commissions have corroborated this reading through their vigorous prosecution and discipline of those who have disregarded these protections. Moreover, as an ethical matter, the component is even broader than this somewhat positivist lens suggests—justice in the criminal case is so raw and tangible that a contrary conclusion is untenable.\textsuperscript{218}

Thus, the nonfrivolous standard (properly conceived) aptly distinguishes between disciplinable legal error or disregard and protected or excusable rulings.\textsuperscript{219} Most importantly, in view of our broad definition of law and legal merit, as well as the criminal law context, it gives judges the room to rule ethically in the face of what otherwise would result in injustice.\textsuperscript{220} Finally, it strikes the right balance in mistaken application of known law cases—e.g., the position of the four justices in a five-to-four decision—by protecting the dissenters or other outliers from discipline whenever their position is not frivolous.\textsuperscript{221} Again, granting judges such flexibility allows the law to adapt justly to ever changing circumstances.\textsuperscript{222} Moreover, requiring nonfrivolous

\begin{itemize}
\item \textsuperscript{216} These observations hold true in the main, but obviously lawyers often hold duties to the other party or the court system as well.
\item \textsuperscript{217} See supra Part II. It may be questioned whether the second prong is actually different than the first. That is, by properly situating the ruling in the full criminal context, the nonfrivolous standard already takes justice considerations into account. I generally agree, but the distinction is soon mentioned in the text. I also prefer to separate it to serve as an explicit reminder that the standard places and incorporates intelligible, meaningful, and just limits on adjudication in the criminal sphere.
\item \textsuperscript{218} See supra Part II; cf., e.g., Cover, supra note 58, at 1601 ("A judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life.").
\item \textsuperscript{219} Cf., e.g., Oberholzer v. Comm’n on Judicial Performance, 975 P.2d 633, 680, 682–83 (Cal. 1999) (Werdegar, J., concurring) (noting that traditional tests, and several others, do not answer whether legal error in and of itself warrants discipline and concluding that the test should be whether the ruling had “reasonably arguable merit”).
\item \textsuperscript{220} At the same time, it provides solid guidance with respect to those “bedrock” constitutional norms—most prominently, those of the Bill of Rights—below which the ruling cannot go.
\item \textsuperscript{221} The fact that a judge could be disciplined on the basis of a dissent suggests the absurdity in a broad application of the Rule. See Lubet, supra note 43, at 65–67 (discussing case in which dissenting judge faced discipline when he refused to follow controversial precedent and asked state supreme court to change it).
\item \textsuperscript{222} See id. ("In a regime where judges are punished for speaking their minds, the judiciary will necessarily become timid and unimaginative. In the worst case, the disciplinary authorities may use such power to enforce a judicial orthodoxy, limiting the way in which the law may be interpreted or understood.").
\end{itemize}
arguments to avoid discipline ensures that controversial legal decisions are given thought and deliberation.\textsuperscript{223}

2. The Exception to the Revised Rule: The Avoidance or Mitigation of Significant Injustice in a Case

Under the Proposed Standard, nonfrivolousness, the Rule is relaxed to meet the judicial independence objection and allow creative and just results in adjudication. Why, then, do we need an exception to this already liberal standard? The answer is somewhat complicated, but initially the meaning of “exception” should be clarified. A judge’s “excepted” conduct would not necessarily be vindicated or exalted; rather, it simply would not warrant judicial discipline. The conduct very well may have been brazen or even political suicide, but it may not have been the type of action that we should discipline for ethical reasons. I will use the following pages to explain why.

Motivating the following principled, ethical objections to such discipline is an assumption that, in a significant number of criminal cases, just results would not be possible without (at least arguably) frivolous legal rulings. I

\textsuperscript{223} An analogy to the business judgment rule provides further support for the nonfrivolous standard. Among other overlapping reasons, we give business judgments leeway in order to (1) avoid hindsight vision, (2) avoid chilling entrepreneurial conduct, and (3) leave the judgment with the proper party. Reasons (2) and (3) are wholly applicable here. With respect to the potential “chill factor,” we do not want timid judges afraid of issuing fair or creative law. There also can be no doubt that the judge is the constitutionally determined proper party to make legal decisions. As with the judicial independence rhetoric, the judiciary should resist overreaching legislative attempts to charge judicial conduct commissions with policing judges in their particular constitutional domain.

Reason (1), however, is an uneasy fit for judging. Aside from the laws that are particularly linked to changing times, most legally trained persons would agree that decisions either have a “right” answer or should fall within a range of reasonable interpretations in light of all of the applicable legal norms. \textit{See generally}, e.g., \textsc{Ronald Dworkin, Justice in Robes} (The Belknap Press of Harvard University Press 2006) (summarizing some of the author’s famous views of adjudication). While hindsight bias surely would be present to some extent, it nevertheless seems quite possible to look at the state of the law and decide whether the judge rendered a reasonably fair decision according to the law. \textit{Cf. 28 U.S.C. § 2254(d)(1) (1996) (requiring judges to determine whether the law was “clearly established”).} Indeed, even if hindsight bias is equally applicable, it still seems like an acceptable risk when we are analyzing something so important as dealing justice. Correct legal decisions are so important that they should be reviewed, notwithstanding hindsight bias, to ensure that they are reasonably just.

With respect to this last point, it could be argued that the business-judgment-rule-model should have full applicability because it ultimately affects whether the plaintiff is entitled to damages for some (usually) fiduciary’s decision, and thus we should not tolerate hindsight review even to ensure reasonably just decisions. That argument is unsound for several reasons, not the least of which are the facts that business judgment cases are a very small subset of all cases and we are dealing with criminal cases (which virtually everyone agrees warrant closer scrutiny on the basis of the higher stakes). This reservation is met by the Proposed Standard’s justice component.
do believe that, if the Proposed Standard is applied correctly in the objective context of the criminal law that we have described, such instances should be exceedingly rare, if not nearly impossible. Nevertheless, the danger of such instances—or the danger of courts or commentators tightening the Standard—warrants the following discussion. It also should be noted that the exception takes account of intentions—the intention to avoid significant injustice—more so than the nonfrivolous standard.

The irony in the current, facially strict Rule of “judicial ethics” is that it actually precludes judicial ethics in many adjudications. Judges ethically may question whether they should apply a law requiring what they see as (for example) clearly excessive punishment, but it would be disciplinable not to apply the law. Instead, the rule marries the judge to the unjust law, requiring “faithful[ness] to” and “compl[iance]” with it. Under this interpretation—one that is arguably prevailing (at least on the surface)—the drafters properly entitled the Code of Judicial Conduct—for in this instance especially it is a code and not a rule of judicial ethics. To be sure, the Code makes a normative judgment—that judges should never stray from the law—but without regard to whether the result of that judgment forces judges to apply a law that is unjust in the circumstances.

This reading of the Rule highlights the failure in the unnerving trend of making ethical rules categorical: the only way to work around the (rigidly construed) Rule—as some judges undoubtedly have been doing—is to over-constitutionalize everything, because the only generally accepted way of ignoring or altering legislation is to hold it unconstitutional (or avoid an interpretation that would be unconstitutional), with the possible exception of doctrines such as desuetude. The Constitution—the higher legal norm—could provide some breathing room for core values.

224. See generally Swisher, supra note 6 (explaining ethical, legal, and just adjudication).
225. This is true of any law (or combination of laws) that does not allow the judge to reach a reasonably just result in the circumstances.
227. That this result is problematic likely will be obvious to the concerned reader. See, e.g., SIMON, supra note 4, at 3, 10 (“The important developments in legal theory are not those that encourage skepticism about justice, but those that challenge the idea that justice in the abstract requires deliberate injustice in the here-and-now.”).
228. The doctrine of desuetude can void certain criminal statutes if they have not been used for a long period of time. It is related to a vagueness challenge in that the statute fails to give the actor sufficient notice that he or she may be criminally prosecuted for the act in question. See, e.g., Comm. on Legal Ethics of the W. Va. State Bar v. Printz, 416 S.E.2d 720, 727 (W. Va. 1992).
229. See, e.g., Scheppel, supra note 184, at 244, 247 (discussing ways that judges in Europe and the United States use the Constitution to “soften” and “gain some critical distance on” statutes).
current Rule, then, an originalist or strict textualist—a judge refusing to interpret the Constitution broadly—cannot judge ethically; she will be stopped in a certain definite number of cases from dealing reasonable justice.

Although the following view is not unanimous, it is the right one: when faced with an unjust law, as applied to the context, the judge ethically must not apply it as such. Following orders did not excuse the judges in Nazi Germany, and (to an admittedly lesser extent) it should not work here either. Ethics cannot be solely about following orders—especially unjust ones—and from the public’s point of view, judges ultimately are judged by substantive results. To be sure, judges have a presumptive duty to know the law, respect it, and apply it. Everyone agrees, however, that law is not an end in itself; it is a means to social ends. Therefore, role morality generally will not keep the blood off of a judge’s hands in cases in which the law works a significant injustice; adjudication, particularly criminal law adjudication, in fact “takes place in a field of pain and death.”

In order to remain an ethics rule, then, the Rule must be applied—or not applied—in light of this ethical reality. A categorical reading of the Rule curtails judicial sensitivity, compassion, and creativity. The Rule already outlaws judges who are activist, in the extreme sense of that word. It is highly questionable, however, whether it should be applied to routine instances of so-called “activism,” in the sense that judges often must divorce their loyalty to a strict reading of a law to further justice (whatever their particular brand of justice). Relatedly, a categorical application would strike at the core judicial independence. It would not allow judges to right

230. E.g., David Kennedy, Abram Chayes, in THE CANON OF AMERICAN LEGAL THOUGHT 605, 610, 614 (David Kennedy & William W. Fisher III eds., 2006) (noting the judiciary’s need of “‘responding to . . . the deep and durable demand for justice in our society’” and “‘the importance of substantive results for the legitimacy and accountability of judicial action’” (quoting Abram Chayes, The Role of the Judge in Public Law Litigation, 89 HARV. L. REV. 1281, 1316 (1976))).

231. On rhetorical levels, the duty to respect (meaning respect in the sense of regard for) the law should not be foreign to judges. They operate in courts of law, hearing suits at law, by attorneys at law, after they take their oaths to uphold the law. This aspect of the Rule in the limited sense that we have defined it, then, should do no damage to the judge’s reasonable sensibilities.

232. Cover, supra note 58, at 1601 (“A judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life.”); see also id. at 1607 n.16 (“The violence of the criminal law is relatively direct.”); Swisher, supra note 107, at 577 (same).


234. See Oberholzer v. Comm’n on Judicial Performance, 975 P.2d 633, 680 n.21 (Cal. 1999) (“‘Judicial independence is the judge’s right to do the right thing or, believing it to be the right thing, to do the wrong thing.’”) (citations omitted).
an injustice or avoid absurd results—hardly a way to legitimate the judiciary.\footnote{235}

One would think that the whole of the judiciary would rise up in praise of or opposition to the Rule’s potential deterrent effect on just adjudication.\footnote{236} If so, one would be wrong. The Rule marches on, year after year, undercover. Cynically, perhaps many judges want a strict reading of the Rule: this “ethical” rule precluding ethical judgments functions as a political and ethical insulation for the judge. It suddenly becomes questionable whether judges may be blamed for applying the rule that results in the unjust result because they are ethically bound to apply that law. The Rule, in effect, takes the ethical judgments out of the judiciary’s hands; the judiciary’s ethical charge is blindly to follow the ethical judgments of the underlying lawmakers, on whom the responsibility, and potential blame, fall.\footnote{237}

Alternatively, perhaps the debate has yet to occur because judges are under the mistaken assumption that courts and commissions have not applied the Rule to those who defy it in these political terms—perhaps they believe instead that the Rule is applied only to those who, presumably, did not know about the law at issue for no better reason than it is impossible to know all of the substantive or procedural law.\footnote{238} Equally as frequently, however, the Rule is applied to those who (probably) have consciously disregarded the law, for whatever reason. When they have a purpose, which they may or may not have made public, the rule directly collides with the otherwise awesome power of the judge. Any entity that makes applicable

\footnote{235. When the purpose of the ruling is something other than justice, however, it would not appear to affect common notions of the judicial role and independence.}

\footnote{236. \textit{Cf.}, \textit{e.g.}, Scheppele, \textit{supra} note 184, at 239 (“If a government (or ruling party) can bind judges with rules together with a theory of judging that makes questioning the rules not a judge’s job, then the government . . . can make judges do as they are told.”); \textit{see also id.} at 243 (noting that judges in the former Soviet Union had “no room for the infusion of values, for a sense of the principles inherent in the law, for a sense that a legal subject caught in the cross-fire of conflicting legal regulations deserved relief”).}

\footnote{237. This is a clever game of passing the buck. The judiciary points to the legislature; and the executive enforcing the court’s ruling points to the judiciary. \textit{See, e.g.}, Cover, \textit{supra} note 58, at 1626–27 (discussing the latter shift of moral responsibility). To the extent a judge mistakenly assumes that applying an obviously unjust law (e.g., a statute requiring excessive, mandatory imprisonment for an undeserving act) will further the rule of law by leaving the decision (and blame) in the branch of government charged with enacting such laws, \textit{the judge should remind herself that the legislature (absent the rare exception of legislative supersession of a particular case) never considered this actual case with its specific parties and circumstances. See generally Swisher, \textit{supra} note 6, at 657–61, 669–70 (explaining the proper relationship of judiciary and legislature and offering an expansive view of “legal” adjudication).}

\footnote{238. Offense may be taken by legal process scholars who once claimed that, while no one could know all of the substantive law, jurists could master all (or most) of the procedural law; this claim is doubtful in general and especially holds untrue in the case of judges—they are regularly disciplined for failing to know procedural rules of all varieties.}
law, then, not only trumps this judgment of the judge but also subjects her to discipline. The judge’s ethical view can prevail only when she can root her view in a superior law, such as the Constitution, or perhaps equally compelling law.  

There also are other important facts counseling against a strong application of the Rule. First, there may be a cynical reason to reject the categorical application of the Rule: lawyers may want it for business reasons. They can sell the wrong-doing party their services because they can know what the law is (by what it has been) and advise or argue for or around it. Moreover, the more black-letter—the more non-purposive or positivist—the law becomes, the wider the range of potential services. Generally, however, the closer the law approximates morality, on a case-by-case basis, the less the lawyer can offer the client, not only in actual services (or solutions), but in mystery (i.e., the impression that law and procedure are difficult and therefore the client needs a paid advocate to harness them successfully). These cynical concerns are surely speculative, but they at least warrant additional attention.

Second, justice and fairness are legal considerations. They are so much so that “nullification” remains an important legal device:

There is a precarious, but long-standing tradition in American law that legitimates some measure of this type of activity under the rubric of nullification. The idea of nullification is that in some circumstances legal actors should have the power to subvert the enforcement of presumptively authoritative legal—typically statutory—norms. Nullification is not a license for whim, but a

239. If the judge can root the purpose in some arguable law, even if not equally compelling, she probably can escape discipline, because either the conduct would not amount to a substantive violation of the law or the commission may decline to prosecute if it cannot infer an intent to violate the law. Of course, violations and provable violations are not synonymous, especially for judicial discipline.

240. And legislatures want it for political or power reasons. The lawyer’s business reason is far less persuasive in the criminal law context. Not only do prosecutors earn no fee for their advice (at least not directly), the defense world is inhabited primarily by public defenders who do not get paid directly for their performance (and who, in any event, probably would prefer less duties). The suspicion is still valid because the Rule—and its drafters—operate in the civil sphere (at least in theory, see supra Part II), in which the business reason might have provided significant motivation for its enactment.

241. This explanation, of course, assumes too much—lawyers do know the system better and can present an argument effectively, and they often have sound advice to give. Therefore, even in a system of morality, attorneys still would serve a need.

decentralization of legal authority. The nullifying judgment is a legal judgment, not a subjective one; it considers the particular norm in question against the more general and basic norms of the legal culture.

The nullification power is uncontroversially extended to judges in matters of constitutional review and, more controversially, in nonconstitutional statutory cases. It is readily associated with juries, which are empowered to acquit even in the face of proof beyond a reasonable doubt of a criminal violation, and prosecutors, who are expected to forego prosecution of many offenses on which they could win conviction. 243

Although not always labeled nullification, this view is commonly shared. 244

Therefore, a mechanical application of the Rule can be defended only if we accept its implicit cast of the judiciary. It certainly has support—civics classes still teach that the role of the judiciary is merely to interpret the law as written in some previous time by some superior entity. The naïve notion that judges do not make law, however, has long been discarded. Furthermore, if judges could not “interpret” the law fairly and justly in the myriad of unforeseen circumstances, the bench would be a much less desirable office; I dare estimate that such a Rule would deter worthy candidates from donning a robe. Judges (and prospective judges) attuned to justice, fairness, and compassion surely wince at the thought of applying unjust laws; they know it would be unethical to do so. 245 Professional and political pressure should be enough to “control” judges who do the right thing; 246 we should not discipline those whose actions are the most representative of a just and fair judiciary.

243. William H. Simon, The Ethics of Criminal Defense, 91 Mich. L. Rev. 1703, 1724 (1993). This latter-mentioned power is ordinarily termed prosecutorial discretion, a power that the commissions no doubt possess. I raise this point shortly.

244. E.g., Dworkin, supra note 223, at 18 (“[M]ost people . . . accept that in very rare cases judges may have a moral obligation to ignore the law when it is very unjust or perhaps when it is very unwise, and to use their political power to prevent injustice or great inefficiency.”).

245. A rule-consequentialist judge may object along the following lines: because following the Rule of Law promotes the greatest good, they ethically may do so here, even though it will work a significant injustice. I completely disagree. The Rule of Law is (mainly) to promote justice and fairness and the law at hand is unjust as applied. It is ludicrous to maintain that more justice will be obtained if we allow the current injustice. How? If every judge does so, no justice will be dealt in this circumstance. Moreover, the game is too zero-sum and unpredictable to justify the general-justice/specific-injustice distinction. See, e.g., Swisher, supra note 107, at 586–87.

246. See generally Preble Stolz, Judging Judges (1981) (documenting the ouster of former California Supreme Court Chief Justice Rose Bird for her death penalty voting record, among other allegations).
In addition to the preceding ethical and practical reasons, there are two textual bases for a justice exception to discipline. First, the Code mandates an explicit duty of fairness. Although it leaves the term undefined, it states that “a judge shall dispose of all judicial matters . . . fairly.” This duty not only ensures against excessive efficiency, but it also implies a duty of justice to the parties.

Second, the Preamble of the Code furnishes a related argument, albeit a somewhat attenuated one, in favor of the exception:

The Canons and Sections are rules of reason. They should be applied consistent with constitutional requirements, statutes, other court rules and decisional law and in the context of all relevant circumstances. The Code is to be construed so as not to impinge on the essential independence of judges in making judicial decisions.

Furthermore, the Code officially declares that it “is not intended as an exhaustive guide for the conduct of judges; they should also be governed in their judicial and personal conduct by general ethical standards.” In recognition of defendants’ rights, the power of the state, and the significant inequity in certain laws as applied, the Code provides sufficient justification for construing the law, or even effectively nullifying it in extreme circumstances, to avoid significant injustice.

247. The full text reads as follows: “A judge shall dispose of all judicial matters promptly, efficiently and fairly.” MODEL CODE OF JUDICIAL CONDUCT Canon 3B(8) (2003); MODEL CODE OF JUDICIAL CONDUCT R. 2.2 (2007) (requiring a judge to “perform all duties of judicial office fairly and impartially”). Neither comment directly addresses fairness.

248. MODEL CODE OF JUDICIAL CONDUCT Canon 3B(8) cmt. (2003); see, e.g., Sierra Nev. Stagelines, Inc. v. Rossi, 892 P.2d 592, 595 (Nev. 1995) (citing Canon 3B(8) and criticizing judge for seeking “promptness and efficiency” “at the expense of fairness”).

249. The Comment states that “a judge must demonstrate due regard for the rights of the parties to be heard” and “preserv[e] fundamental rights.” MODEL CODE OF JUDICIAL CONDUCT Canon 3B(8) cmt.


252. See Monroe H. Freedman, In Praise of Overzealous Representation—Lying to Judges, Deceiving Third Parties, and Other Ethical Conduct, 34 HOFSTRA L. REV. 771, 774 (2006) (creating and applying the same argument with respect to attorneys’ conduct and the Model Rules of Professional Conduct). Professor Freedman’s article does so (at least in part) to vindicate “zealous representation—that is, ‘entire devotion to the interests of the client.’” Id. at 782. By adapting his novel argument, I of course do not intend to import his famous views of attorneys’ ethics onto the judiciary. My argument works to justify (or at least excuse) just rulings, unjust laws notwithstanding. It does not follow that the judge’s “entire devotion” would be to one party.
There is, in fact, a nullification principle built into the Code itself: “[i]t is not intended . . . that every transgression will result in disciplinary action.”\textsuperscript{253} It is hard to imagine a more deserving candidate for the Code’s exception than justice. Disciplinary action hinges on “a reasonable and reasoned application of the text and should depend on such factors as the seriousness of the transgression, whether there is a pattern of improper activity and the effect of the improper activity on others or on the judicial system.”\textsuperscript{254} It is highly unlikely that any party, or the judicial system in general, suffers from construing laws justly. In fact, it seemingly bestows integrity and (occasional) praise on the judiciary.

Timid judges may be uncomfortable with these conclusions—the conclusions attribute breathtaking responsibility to their decisions; the days of mechanical application and blind deference would be no more. With this responsibility, however, judges will earn the supreme respect reserved only for those who rule justly. Having preliminarily made the case for a justice exception to the Rule, I use the following Section to offer some examples of the exception’s application.

3. Some Real Life Illustrations: Applications and Misapplications of the Rule’s Exception

The following examples illustrate the applicability of the exception to the Rule. Under the Proposed Standard, all of these cases seemingly violate the Rule because the judges did not bother to offer a nonfrivolous, or even a frivolous, legal justification for their ruling.\textsuperscript{255}

a. \textit{In re Duckman}\textsuperscript{256}

\textit{In re Duckman} is the prototypical example of the Rule misapplied. There, the New York Court of Appeals removed the judge despite “otherwise unblemished performance in a high-stress, high-volume court” ostensibly because he dismissed sixteen criminal cases “‘to do justice’” without giving the prosecutor notice or without following the proper procedure for dismissal.\textsuperscript{257} The genesis of the judge’s prosecution and removal, however, is even more sinister. The judge had issued several pro-defense rulings and in consequence received, both individually and as one

\textsuperscript{253} \textsc{Model Code of Judicial Conduct} pmbl. (2003).
\textsuperscript{254} \textsc{Model Code of Judicial Conduct} pmbl. (2003) (citing \textsc{Model Rules for Judicial Disciplinary Enforcement} (1994)); \textit{see also} Freedman, \textit{supra} note 252, at 774.
\textsuperscript{255} To reiterate, prongs (1) and (3) of the Proposed Standard require that judges consider the law and offer nonfrivolous justifications for their rulings. \textit{See supra} Part IV.C.
\textsuperscript{256} 699 N.E.2d 872 (N.Y. 1998) (per curiam).
\textsuperscript{257} \textit{Id.} at 879, 874.
of several “‘criminal-coddling’” judges, substantial and negative news coverage.\textsuperscript{258} The coverage caused high-ranking politicians and officials to begin investigating him. Meanwhile, the prosecutor’s office had been compiling negative evidence against him, because he allegedly mistreated prosecutors.\textsuperscript{259} After the governor’s office viewed this evidence (in violation of confidentiality rules), the governor demanded that the judicial conduct commission file a formal complaint against the judge, and the commission complied.\textsuperscript{260}

As one of the dissenters to the removal decision correctly observed, however, “despite the fact that some 10,000 pages of transcripts were subpoenaed and scoured for [the judge’s] misdeeds, there were no clear ‘smoking guns.’”\textsuperscript{261} Indeed, all that investigators uncovered were “petty offenses,” the most significant of which were the sixteen improperly dismissed criminal cases.\textsuperscript{262} In addition to the mitigating reality that the judge handled “tens of thousands of cases,” these sixteen cases in particular were unobjectionable: “[t]he . . . ‘misconduct was evidently motivated by petitioner’s view, expressed repeatedly on the record, that the particular prosecutions did not serve the interests of justice. Significantly, none of the 16 dismissed prosecutions was deemed sufficiently important or meritorious to warrant an appeal . . . .”\textsuperscript{263}

This case is an extreme example in which the exception to the Rule should have been applied—not only was the judge furthering justice by dismissing unwarranted prosecutions (the record certainly does not suggest otherwise), but judicial independence itself was under attack.\textsuperscript{264} Importantly, the most common trait of disciplinable conduct was missing: “none of the acts committed resulted in a deprivation of liberty.”\textsuperscript{265} Moreover, the prosecutor’s ethical duty is at least facially consistent with Judge Duckman’s actions—to do justice—and the prosecution is entitled to almost none of the rights of the criminal defendant.

\textsuperscript{258} Id. at 881–82 (Titone, J., dissenting).
\textsuperscript{259} Id. at 882.
\textsuperscript{260} Id.
\textsuperscript{261} Id. There was some other evidence of improper conduct, but it is beyond the scope of the present discussion.
\textsuperscript{262} Id.
\textsuperscript{263} Id. The above quote is not an endorsement of the appeal-availability defense; rather, as I understand it, it corroborates Judge Duckman’s conclusions that the prosecutions were unjust and therefore did not warrant an appeal.
\textsuperscript{264} See id. at 882–84 (discussing threat to judicial independence); id. at 884–88 (Bellacosa, J., dissenting) (noting favorable testimony regarding judge’s conduct).
\textsuperscript{265} Id. at 887 (Bellacosa, J., dissenting).
If as the facts suggest, the cases should have been dismissed “‘to do justice,’” the judge should not have been disciplined for this conduct.\(^{266}\)

\(b. \text{ In re Tucker}^{267} \text{ and In re Kirby}^{268}\)

Both of the following cases refused to discipline judges who disregarded unjust laws in the circumstances. The first, \textit{In re Tucker}, can be read in two ways. The first reading is that the case could be one of the rare instances in which a court actually follows the “rule” that a mere “error of judgment” cannot constitute discipline.\(^{269}\) The second—and more likely explanation in light of the fact that courts frequently do discipline judges for mere errors of judgment or lack of judgment—is that the court recognized that this judge reasonably bent non-constitutional procedure (namely, by delaying conviction and then dismissing the case on a showing of rehabilitation) in order to effect a just result. The result was just in the sense that the DWI “defendant had no prior alcohol-related offenses, that he drove for a living and would lose his commercial driver’s license if convicted of a DWI, and that he had small children.”\(^{270}\) After assuring himself that the defendant had not committed any further offenses over a period of time, the judge dismissed the case.\(^{271}\) Despite directly contrary authority to which ignorance was no defense, the court nevertheless concluded “that the actions of [the judge] at issue here were not so egregious as to amount to conduct prejudicial to the administration of justice.”\(^{272}\)

\textit{In In re Kirby}, the state law was even clearer, but the court did not discipline the judge for using roughly the same procedure as used in \textit{In re Tucker}.\(^{273}\) Instead, the court merely noted that the disregard of legal procedure did not rise to the level of bad faith because the judge did so to rehabilitate offenders and not for some improper purpose.\(^{274}\)

\(^{266}\) Id. at 874. My discussion of this case does not consider the judge’s other “intemperate” behavior. See id. at 882 (Titone, J., dissenting).

\(^{267}\) Id. at 882 (Titone, J., dissenting).


\(^{269}\) See id. at 70–71 (noting that a previous state supreme court case clearly rejected the judge’s legal actions).

\(^{270}\) Id. Although the facts are not crystal clear in this regard, it is reasonably clear that the defendant’s young children were not in the vehicle at the time of the defendant’s drunk driving.

\(^{271}\) Id. at 71.

\(^{272}\) Id.

\(^{273}\) See Kirby, 354 N.E.2d at 418–20.

\(^{274}\) Id. Of course, the judge was shielded by Minnesota’s “bad faith” rule. See id. at 418 n.8 (citing MINN. R. 4(b) BD. JUDICIAL STANDARDS) (barring discipline for legal disregard “in the absence of fraud, corrupt motive or bad faith”). Several other states have similar shields embodied in various legal sources. See Gray, supra note 2, at 1279 & n.176 (citing laws). At first glance, these state constitutional provisions, statutes, and rules seem to preclude or restrict discipline for legal disregard. Because nearly all of these laws have an exception for “bad faith”
Therefore, both cases properly should have been seen as instances of excepting justice from discipline.\(^{275}\)

c.  **Oberholzer v. Commission on Judicial Performance\(^{276}\)**

In *Oberholzer*, the judge dismissed a case when a procrastinating prosecutor refused to proceed, despite the fact that a state supreme court opinion seemingly barred the dismissal. In deciding whether discipline was warranted, the California Supreme Court did not bother to determine whether the opinion was on point or distinguishable.\(^{277}\) Instead, as in the above cases, in finding that the judge committed no misconduct, it noted that the judge’s conduct was not unreasonable and did not reflect (among other things) an “abuse of authority” or a “disregard for fundamental rights.”\(^{278}\)

d.  **In re Brown\(^{279}\)**

*In re Brown* illustrates the objective truth that the Rule and criminal law adjudication generally favor the defendant. It is the inverse of *In re Tucker*, *In re Kirby*, and *Oberholzer*, but the result is not the same. In *In re Brown*, following a defendant’s DWI trial (in which the defendant was found not guilty), the judge convicted the defendant of careless and reckless driving, an uncharged crime that was not a lesser included offense of DWI.\(^{280}\) The judge did so because he felt that the defendant had committed a “horrible” crime, the evidence of which was “compelling.”\(^{281}\)

Notwithstanding the judge’s proffered reasons, the court disciplined him for the conduct.\(^{282}\) In light of the liberty at stake and the fundamental rights accorded to those facing that reality, it is not difficult to understand why the court disciplined the judge (while the other judges mentioned above escaped discipline). The Rule has grown to protect these rights vigorously. That context is not a two-way street; the state (or a judge acting as the state) does not have corresponding fundamental rights.\(^{283}\)

\(^{275}\) These conclusions rest on the factual tealeaves of the published opinions.
\(^{276}\) 975 P.2d 663 (Cal. 1999).
\(^{277}\)  *Id.* at 681.
\(^{278}\)  *Id.*
\(^{279}\) 527 S.E.2d 651 (N.C. 2000).
\(^{280}\)  *Id.* at 654–55.
\(^{281}\)  *Id.* at 655.
\(^{282}\)  *Id.* at 657–58.
exception to discipline applies only to those who understand justice’s dichotomy in the criminal sphere.

V. THE RULE’S EFFECT ON THE LEGAL ACTORS

In light of the foregoing principles, this Part discusses some of the Rule’s primary consequences on the conduct of judges and attorneys.

A. Following the Rule: Advice to the Judge

The Rule, as properly understood, is both a contraction and expansion of judges’ power. It contracts the power by tying rulings to both the positive law and justice, but in doing so, it expands (or preserves, depending on one’s viewpoint) judges’ power by defining law and justice broadly, even forgivingly. This Section partially explicates how judges should act under the Rule.

At bottom, the bounds of adjudication may boil down to a simple line: whether the reasons given for a ruling persuade other judges—judges on the appellate courts; if on the appellate courts, persuading other judges on the panel; if in disciplinary proceedings, persuading judges on the judicial conduct commission and (later) the state supreme court. Of course, this last “persuasion” is the extent of our concern. Thus, rulings (and other judicial actions) first and foremost must persuade the varied commission members (most often, judges, attorneys, and a few public members) and later the judges of the state supreme court reviewing the members’ decisions. This realist formulation, though, is too simplistic and (for ethical purposes) too shallow.

Under the Proposed Standard of implementing the Rule, judges must articulate their reasons for decisions because they (after considering the law) must show that their rulings are not frivolous. The nonfrivolous articulation can come during the ruling itself (as examples, in an opinion, minute entry, or bench ruling) or later during the discipline investigation. Belated articulations, however, are problematic for two reasons: (1) judges have a duty to give their reasons to the parties and reviewing judges; and (2) after-the-fact articulation may be less credible. Timely articulation also may avoid disciplinary proceedings in the first place—the commission simply can read the “nonfrivolous” opinion, order, or transcript and close the investigation.

Trial judges should be aware that the Rule is somewhat slanted in favor of appellate judges, who have less procedural requirements to follow for

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284. In practice, of course, this duty is violated frequently.
defendants, often have a better record, often have more staff, and often have more time to issue reasoned, nonfrivolous opinions on every issue. Whether these are the reasons (or some of the reasons) is unclear, but what is clear is that trial and lower-level judges are almost exclusively disciplined under the Rule. Perhaps the harsher scrutiny is partially justified, however, because trial judges have more raw power, and it is very difficult for defendants to obtain a reversal of a bad ruling. In any event, trial and other lower court judges should be especially concerned with future scrutiny of their rulings.

Turning to the matter of defending charges, judges cannot resort to the traditional defenses, “no one followed the law,” “expedience,” or “isolated error.” As discussed above, these defenses are irrelevant to the question of whether misconduct occurred. Judges instead must defend in one of two ways: (1) showing that their ruling is nonfrivolous, or in other words, not indisputably meritless in light of the state of the law and the criminal law context (and therefore, no Rule violation occurred); or (2) even if the ruling is (or is approaching) frivolous, showing that this instance should be excused because the ruling purposely avoided a significant injustice in context. In effect, judges who wish to push the envelope must work for it initially by crafting a nonfrivolous argument. That fact has the incentive of ensuring that controversial legal decisions are given proportionate thought and deliberation. The second defense obviously is unavailable to the judge who just “got lucky” by disregarding a law for expedience’s sake that, as it turned out, would have worked an injustice in the case. Moreover, neither defense is available to judges who disregard or consciously misapply the law for irrational or arbitrary reasons.

Another important ramification of the Rule is that it applies to all applications of the “law” (which it defines to include court rules, regulations, statutes, and so on). The judge, then, has an obligation to take into account various relevant legal sources, including attorneys’ ethical rules. Attorneys’ ethical rules are state supreme court rules in virtually every jurisdiction. A judge cannot “uphold and apply” or “be faithful” to them by trampling them. Thus, for instance, if public defenders make first requests to continue for more time to complete necessary investigation, judges’ denials of those requests would violate the Rule by disregarding the defenders’ duty of competence and diligence (in addition to violating constitutional norms of effective assistance). It also is a violation

285. See supra Part IV.
287. E.g., Model Rules of Prof’l Conduct R. 1.1 (2003); In re Conduct of Gustafson, 756 P.2d 21, 28 (Or. 1988) (censuring judge in part for refusing to grant, without justification, defendants’ requests for needed continuances). Judges also have a more general ethical duty to
“knowingly [to] assist or induce another” to violate attorneys’ ethics rules. The preceding denial of the motion to continue obviously would be assisting or inducing—if not directly causing—the violation of the competence rule.

The Rule also polices both rules and standards. Judges therefore must follow the rule or standard (although standards obviously grant judges more leeway in application). Self-interest should dictate that judges would prefer standards (regardless of whether they would have before); the greater discretion makes discipline less likely.

Finally, judges should not deny motions or requests for overly technical reasons—at least when the defect does not affect the merits. While other nonfrivolous standards might not discipline such decisions, ours is infused with justice. Thus, even though a technicality may be argued in a seemingly nonfrivolous manner, it could become frivolous as applied in light of obvious countervailing interests. That is one beauty of the standard.

In sum, judges have been accorded great latitude in their adjudication, but that latitude has several prerequisites, the most important of which is taking the time purposively to craft nonfrivolous decisions and doing so in the interest of justice.

B. Policing the Rule

1. The Rule’s Effect on Attorneys’ Conduct

The acknowledgment of the Rule has several ramifications for attorneys’ conduct. They must report Rule violations, yet they are not. Attorneys are prevent such injustices due to their institutional role. See generally Bruce A. Green, Criminal Neglect: Indigent Defense from a Legal Ethics Perspective, 52 EMORY L.J. 1169 (2003); Stephen A. Saltzburg, A Grand Slam of Professional Irresponsibility and Judicial Disregard, 34 HOFSTRA L. REV. 783 (2006) (noting that all legal “players”—judges, prosecutors, and defense counsel—acted unethically by failing to correct a significant legal error in a capital case).


289. See also infra Part V.B. (making similar argument with respect to attorneys inducing judges’ violations of the Rule). The prosecutor should not assist such lawlessness. MODEL RULES OF PROF’L CONDUCT R. 8.4(f) (2003) (making it unethical for attorney to assist in judicial misconduct); see also Johnson, supra note 220, at 1026 (discussing Rule 8.4(f)).

290. See, e.g., supra note 160 (discussing a violation of a sentencing standard).

291. See, e.g., Kloepfer v. Comm’n on Judicial Performance, 782 P.2d 239, 253–54 (Cal. 1989) (removing judge in part for denying defense attorney’s oral motion on the basis that attorney’s motion did not use the exact statutory language, even though judge knew what attorney meant).

292. MODEL RULES OF PROF’L CONDUCT R. 8.3(b) (2003) (“A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial
obviously in the best positions to know when judges have disregarded the law. In fact, given the law’s complexity, they may be the only ones who know. Silence in the face of a violation is disciplinable, and it allows deserving judges to escape discipline. There is a more important ramification, however.

It is arguably malpractice not to raise the violation with the offending judge when it occurs. Several treatises have suggested this fact, and some even offer advice on raising the subject with the offending judge. Attorneys must raise the law: it puts the judges on notice—so that either those judges can correct the problem before any party is prejudiced, or at least, they cannot claim innocent mistake in a subsequent disciplinary proceeding. If judges fail to comply, attorneys should tactfully remind them of their ethical obligations. Just as attorneys must cite the law, they must cite the Code, and they must persuade judges on this point, just like any other legal point.

In the sad state of the law, attorneys do not perform these duties for their clients; they may not even know of these duties. Their ignorance or resistance unfortunately fails to stop repeat players as well: the cases are replete with repeated violations by the same judge. Public defender organizations in particular should be aware of these repeat players and should share this information amongst their attorneys and the offending judge so that the judge’s misbehavior can be recognized and addressed. If the judge does not comply, the office should file a complaint.

It also is worth reemphasizing that the Rule provides protection for attorneys and their clients. In a common example, it disciplines judges for

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293. Swisher, supra note 245, at 580–81; see, e.g., JOEL ANDROPHY, 3 WHITE COLLAR CRIME § 32:33.50 (2d ed.) (noting several types of relevant judicial misconduct that have resulted in a mistrial or an appellate reversal); EDWARD A. RUCKER & MARK E. OVERLAND, 3 CAL. CRIM. PRACTICE § 39:21 (3d ed.) (providing sample motion for mistrial on the basis of relevant judicial misconduct and citing several California cases in support of the motion); 75B AM. JUR. 2D Trial § 1734 (providing “checklist” of various types of relevant judicial misconduct that may warrant a mistrial); see also MICHAEL C. HENNENBERG & HARRY R. REINHART, OHIO CRIMINAL DEFENSE MOTIONS Form 13:37 (2008) (citing Canons and judge’s duty “not only to see that justice is served, but that it is also administered” in motion).


295. An attorney’s use of the Code would not be for the discouraged purpose of “mere tactical advantage.” MODEL CODE OF JUDICIAL CONDUCT pmbl. (2003). Rather, it would be to achieve the substantively correct legal decision—a right to which the parties are entitled. Furthermore, the nonfrivolous standard protects judges from unwarranted discipline.

296. By filing the complaint through department chiefs or administrators, individual attorneys can avoid some of the potential retaliation from the offending judge.
forcing attorneys to proceed when they (reasonably) are not ready.\(^{297}\)

Relatedly, not only have judges been disciplined for their legal rulings, they have been disciplined for abusive behavior toward attorneys in court.\(^{298}\) These insulations—if used correctly—should encourage and protect more vigorous and competent service to clients in legal proceedings.

Finally, we should bear in mind a distinction for the duties of prosecutors. It is well accepted that prosecutors have a duty to justice, not just to obtain convictions.\(^{299}\) Moreover, they do not have a client with constitutional rights to protect. Therefore, if legal errors are hurting defendants’ fundamental rights, they must object because they have a duty to justice. Prosecutors cannot rely on or take advantage of lawless rulings—such rulings should be treated with the same hands-off approach taken with frauds or improprieties on the court.\(^{300}\) Furthermore, it is clearly unethical for prosecutors to induce a lawless reading of the law—at least one that violates basic rights or works injustice.\(^{301}\) An attorney violates the ethical rules by “knowingly assist[ing] a judge . . . in conduct that is a violation of applicable rules of judicial conduct or other law” or “induc[ing] another to do so.”\(^{302}\) The importance of defendants’ fundamental rights and their threatened liberty makes the duty objectively justified.

In light of the prosecutor’s role, duty to justice, rights of the accused, and absence of corresponding rights of the state, however, a prosecutor who has not participated in the legal disregard has a slightly different obligation than defense counsel. Specifically, if the error hurts the state’s case, a prosecutor is not required to object—doing so depends on whether the ruling will affect justice negatively. For example, she need not (and arguably should not) seek to correct a proportionate sentence when the sentencing statute requires a draconian sentence.

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297. *E.g.*, Cannon v. Comm’n on Judicial Qualifications, 537 P.2d 898, 911 (Cal. 1975) (removing judge in part for failing to give attorneys sufficient time to prepare and thereby depriving defendants of their constitutional right to effective counsel).

298. *See, e.g.*, *In re McAllister*, 646 So. 2d 173, 174 (Fla. 1994) (removing judge in part for her abusive conduct toward public defender).


300. *See, e.g.*, MODEL RULES OF PROF’L CONDUCT R. 3.3 (2008) (requiring broad duties to court, such as duties to disclose controlling law and to correct misstatements of law).

301. MODEL RULES OF PROF’L CONDUCT R. 8.4(a), (f) (2003); *see* Johnson, supra note 200, at 1026.

2. The Rule’s Effect on Other Judges’ Conduct

Judges must report violations of the Rule,\textsuperscript{303} and they are not.\textsuperscript{304} The reporting requirement has remained ineffective, and therefore “each of the three [now four] major evolutions of the Code so far has seen a toughening of this standard.”\textsuperscript{305} In 1992, for instance, the ABA noted that:

In the wake of extensive investigations by federal law enforcement authorities revealing widespread corruption in the . . . Illinois court system (‘Operation Greylord’) and elsewhere, indicating not only that significant professional misconduct involving judges was occurring but also that the requirement to report misconduct was frequently ignored, particularly in the cases of judges with regard to the conduct of other judges, the Committee decided to articulate the reporting standards more clearly and more comprehensively.\textsuperscript{306}

Despite the requirements of the heightened duty to report, the cases we have seen are replete with instances of judges’ repeated failures to follow the law in violation of substantial rights. When the commissions and state supreme courts finally brought the judges to justice, there was no evidence that other judges had reported the misconduct.

This fact is troubling given the public nature of judicial proceedings—and rulings—and the requirement that supervisory judges supervise the behavior of these judges.\textsuperscript{307} Other judges working within the misbehaving judge’s court and legal community, especially supervisory judges, should watch and listen for claims of lawlessness (at least lawlessness that results in significant injustice);\textsuperscript{308} this is not a request—it is an ethical duty.\textsuperscript{309}

\textsuperscript{303} Model Code of Judicial Conduct Canon 3D(1) (2003).

\textsuperscript{304} See also California Panel Suggests Reforms to Boost Reporting of Misconduct in Criminal Cases, 82 Crim. L. Rep. (BNA) 139 (Oct. 31, 2007); cf. McMorrow et al., supra note 109, 1429–39 (documenting pervasive failure of judges to report attorneys’ ethical violations in the courtroom even though judges are in the best position to observe misconduct). Informal persuasion by other judges on the court may be a second-best solution, but little evidence exists on the frequency of such practices. The reported cases, documenting repetitive violations, suggest that it is far too infrequent (or too ineffectual).

\textsuperscript{305} Milord, supra note 15, at 24.

\textsuperscript{306} Id.

\textsuperscript{307} Model Code of Judicial Conduct Canon 3C(3) (2003); Milord, supra note 15, at 23 (“The Committee believed that adequate supervision by supervisory judges including . . . requiring adherence to ethical mandates, was a key element in the administration of justice.”).

\textsuperscript{308} Although I am unaware of an empirical study showing the frequency or infrequency of information apprising judges of other judges’ lawlessness, it seems quite probable that judges in the same court learn such information from other judges, litigants, and other disgruntled or gossiping members of the relevant legal community. Supervising judges, of course, have a duty to learn this information, not merely to listen to the local grapevine.
VI. THE FUTURE OF THE RULE: THE ABA’S RECENT REVISIONS

A. The Revisions

The ABA—inadvertently perhaps—had backed off from condoning the “mere legal error” defense for at least a decade. In its 1978 Standards Relating to Judicial Discipline and Disability Retirement, the ABA adopted the typical mere legal error defense (basing it primarily in the right to appeal):

Proceedings Not Substitute for Appeal. In the absence of fraud, corrupt motive, or bad faith, the commission should not take action against a judge for . . . reaching a legal conclusion, or applying the law as he understands it. Claims of error should be left to the appellate process.  

In 1994, however, the ABA superseded its 1978 Standards with the Model Rules for Judicial Disciplinary Enforcement. The Model Rules do not mention in any manner a bar against discipline for so-called “mere” legal error. Furthermore, the 1972 and 1990 Model Codes of Judicial Conduct do not mention the bar, either.  

Ambivalently (like everything else about the Rule’s treatment), the ABA addressed legal error in its most recent 2007 Code revisions. It took a curious “two steps forward, one step back” approach. First, and perhaps most importantly, it explicitly acknowledged the Rule’s existence with its

309. If an outright complaint against the lawless judge would be out of the question (for whatever reason), the other judges at least should engage in more informal methods of correction. See generally Collins T. Fitzpatrick, Building a Better Bench: Informally Addressing Instances of Judicial Misconduct, 44 Judges J. 16 (2005).

310. STANDARDS RELATING TO JUDICIAL DISCIPLINE AND DISABILITY RETIREMENT 20 (1978). Several states have adopted this provision. See Gray, supra note 2, at 1270, 1279 n.176. The commentary to the Standard suggested that judicial independence also supported the rule:

To allow the disciplinary function to be confused with the decision-making function of the judge would undermine judicial independence. Judges would be as concerned with what is proper in the eyes of the disciplinary commission as with what is justice in the cause. Many present practices and procedures are the result of an innovative judge trying to do justice in the cause and improve the administration of justice. STANDARDS RELATING TO JUDICIAL DISCIPLINE AND DISABILITY RETIREMENT 3.4 cmt. (1978).


312. Indeed, as noted earlier, the basis for the legal-error discipline is found in Canons 2A and 3B(2), which have appeared in the Codes largely unaltered since 1972. Although the Codes could have been read as making no mention of legal error discipline, that is not how courts have read them, and the ABA has done nothing to “correct” their interpretation.
new Rule 2.2: “[a] judge shall uphold and apply the law.”\footnote{Model Code of Judicial Conduct R. 2.2 (2007). The new Rule also requires judges to “perform all duties of judicial office fairly and impartially.” Id. The ABA adopted the new Code on February 12, 2007, and it is currently being adopted or considered for adoption by the majority of states. See also supra note 7 (listing states). The Reporter’s Explanation to Rule 2.2 states the new clarity in the Code: “Whereas [renumbered] Rule 1.1 addresses the judge’s duty to comply with the law, this Rule directs the judge to follow the rule of law when deciding cases.” ABA Joint Comm’n to Evaluate the Model Code of Judicial Conduct, Report 46 (2007). Therefore, the Rule is no longer housed in two vague rules, current Canons 2A and 3B(2), but one relatively clear one, Rule 2.2. See id. (noting the combination and the fact that current Canon 3B(2)’s duty to be “faithful” “lack[s] clear meaning”); Geyh & Hodes, supra 171, at 27 (same).} This step was the first time since 1924 that the ABA adopted the Rule explicitly; when the ABA adopted the 1972 and 1990 Codes, the Rule was merely implicit, at best.\footnote{Compare Canons of Judicial Ethics Canons 5, 20–21 (1957), with Model Code of Judicial Conduct Canons 2A, 3B(2) (2003), and Code of Judicial Conduct Canons 2A, 3A(1) (1972).}

At first, the new Comment appears to make the Rule even more explicit and firm: “[a] lthough each judge comes to the bench with a unique background and personal philosophy, a judge must interpret and apply the law without regard to whether the judge approves or disapproves of the law in question.”\footnote{Model Code of Judicial Conduct R. 2.2 cmt. 2 (2007); see also ABA Joint Comm’n to Evaluate the Model Code of Judicial Conduct, supra note 313, at 46 explanation of cmt. 2.} But nothing is ever that simple with this Rule. The next paragraph of the comment expresses the usual ambivalence: “[w] hen applying and interpreting the law, a judge sometimes may make good-faith errors of fact or law[; e] rrors of this kind do not violate this Rule.”\footnote{Model Code of Judicial Conduct R. 2.2 cmt. 3 (2007); see also ABA Joint Comm’n to Evaluate the Model Code of Judicial Conduct, supra note 313, at 47 explanation of cmt. 3.} Nevertheless, an initial draft of the Code would have made the Rule explicit beyond reproach: “[i]ntentional disregard of the law . . . may constitute a violation of this Rule.”\footnote{ABA Joint Comm’n to Evaluate the Model Code of Judicial Conduct, supra note 313, at 43 (“October 31, 2006 Code, with Reporters’ Explanations of Changes Interspersed”).} That sentence finally would have—one and for all—stated the existence of the Rule in terms with which we probably could agree.\footnote{See supra Part IV. Of course, I would not have used the word “intentional” because it suggests a slightly higher intent than necessary, but so long as it does not require a specific intent or purpose not to apply the law (and we have no reason to assume that it does) the term probably is acceptable. The phrasing also is too rule-like when clearly a standard is needed—one that incorporates justice into decisionmaking.}
This significant oversight notwithstanding, the ABA—for the first time in over thirty years—has explicitly recognized the existence of the Rule. If states adopt the new Code in its present form, judges will have a duty to “uphold and apply the law” “without regard to whether the judge approves or disapproves of the law in question”.320 Rule 2.2’s Comment, however, apparently intends to create a “good faith” defense to discipline.321 Despite its lack of meaningful definition, the good faith defense appears necessary to alleviate the new Rule’s otherwise harsh application. It should be construed in the manner discussed above, namely, to protect judges who preserve fundamental rights and avert significant injustices, and to leave unprotected those who disregard rights despite the high stakes of criminal litigation.

B. Appraisal of the Changes

To a large extent, my appraisal is explicit throughout this Article. Perhaps more than any other rule in recent legal history, the Rule has been treated in the most ambivalent manner conceivable.322 The ABA’s latest

319. Compare ABA JOINT COMM’N TO EVALUATE THE MODEL CODE OF JUDICIAL CONDUCT, supra note 313, at 43, with ABA JOINT COMM’N TO EVALUATE THE MODEL CODE OF JUDICIAL CONDUCT, supra note 313, at 45 (omitting sentence—the only change to Rule 2.2). The existing Reporters’ Explanation of the current comment, however, maintains much of the former Comment’s force: “Comment [3] underscores the difference between judges who may occasionally commit good faith errors of . . . law and judges who deliberately or repeatedly disregard court orders or other clear requirements of the law.” ABA JOINT COMM’N TO EVALUATE THE MODEL CODE OF JUDICIAL CONDUCT, supra note 313, at 47. The Reporters’ Explanation nevertheless is deficient for three reasons: (1) official comments have more force than the explanation of them; (2) the explanation uses “deliberately” as the intent, which would be nearly impossible to prove, absent the judge’s admission; and (3) the explanation re-infects the rule with the problematic criterion of a pattern of misconduct through its use of the term “repeatedly.” Another deficiency, as noted above, is its lack of a justice component.

320. MODEL CODE OF JUDICIAL CONDUCT R. 2.2 & cmt. 2 (2007).

321. Id. at cmt. 3. The good-faith standard also may be intended to prevent “innocent” mistakes in applying the wealth of laws in our legal system. If so, the standard was misplaced: Mistakes are competence problems. See MODEL CODE OF JUDICIAL CONDUCT R. 2.5(A) (2007) (“A judge shall perform judicial and administrative duties, competently and diligently.”).

322. As one important example, the Judicial Conference of the United States recently unraveled on paper at the thought of disciplining judges for their rulings and related acts. In re Memorandum of Decision of Judicial Conference Comm. on Judicial Conduct and Disability, 517 F.3d 558, 559 (Jud. Conf. 2008). First, the Conference (in particular, its Committee on Judicial Conduct and Disability) denounced the Rule in the strongest terms it could muster, including:

It would be entirely contrary to the purpose [of the act permitting federal judicial discipline] to use a misconduct proceeding to obtain redress
effort unfortunately continues the Rule’s problematic heritage. By simultaneously creating a mandatory rule requiring judges to “uphold and apply the law” while purporting to except “good faith errors of fact or law,” the new Rule lends little clarity to the confused analyses of countless courts and commissions.323

The language in the Rule itself is mostly unobjectionable, although for reasons I have argued at great length the language should have disciplined frivolous “disregard of the law,” in context, as the proposed comment partially indicated.324 The current duty to “uphold and apply” the law is somewhat naive in light of inherently conflicting laws, but “applying” the law is a familiar concept to judges and it (hopefully) can be stretched to accommodate conflicts and absurdities. Furthermore, the ABA was right to move away from the “faithful” standard—it was too vague and rhetorical.325 It read more like a test of religion (or adultery) than the trigger for an ethical rule backed by earthly sanctions.

The real problems, however, inhere in the Rule’s Comment. First, the Comment mercilessly states that judges “must . . . apply the law without regard to whether the judge approves or disapproves of the law in

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Id. at 561. After all of this bluster, however, the Committee then conceded that “a judge’s pattern and practice of arbitrarily and deliberately disregarding prevailing legal standards and thereby causing expense and delay to litigants may be misconduct.” Id. at 562. But unable to embrace this realism fully, the Committee then articulated a begrudging standard that makes doubly, or even triply, sure that a judge has acted lawlessly:

[A] cognizable misconduct complaint based on allegations of a judge not following prevailing law or the directions of a court of appeals in particular cases must identify clear and convincing evidence of willfulness, that is, clear and convincing evidence of a judge’s arbitrary and intentional departure from prevailing law based on his or her disagreement with, or willful indifference to, that law. Id.; see also supra note 39.


324. Supra notes 318–19; see supra Part IV; see also Ariz. Code of Judicial Conduct R. 2.2 cmt. 3 (2009) (“[A]n intentional disregard of the law may constitute misconduct.”).

It leaves no room for justice—even when objectively or obviously absent—in the case. For all it cares, judges may as well be robots (or foot soldiers) merely following orders from their legislative masters. Fortunately, the Comment is not part of the Rule in any strict sense. Its anti-ethical judgment should be disregarded when justice clearly requires. This crucial inference is found in the text of the new Rule itself: “[a] judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.” For the first time, in fact, the Code explicitly has tied the Rule to the duty of fairness. By juxtaposing the duties to apply the law and adjudicate fairly, the Code itself provides strong support for the obvious notion that laws should be construed in accordance with justice in the case. Indeed, this change may be the most important innovation of the new Code.

There is another problem in the new Rule, however. While it seemingly has clarity, the Comment virtually obliterates the clarity with its infusion of the “good faith” defense. That is, judges “sometimes may make good-faith errors of fact or law; errors of this kind do not violate this Rule.” The initial objection is rather surprising: the defense, as stated, forgets the ABA’s own 1972 innovation: the judicial competence requirement. Mistakes are incompetence problems and the new Code rightfully carries forward the duty of competence. Little is served besides redundancy by reminding us of this fact. Given the historically-loose terminology describing “legal error,” the ABA understandably may have been confused...
or flustered, but we should not let the mistake persist in applications of the new Code. Moreover, it is positively perverse to discipline judges who disregard unjust laws while at the same time protecting judges who make “good faith” mistakes. Arguably, then, the new Code values an incompetent judge over a compassionate one.

An equally compelling objection is that the “good faith” defense is vague and unhelpful on its face. It obviously intends to carve out some “legal error” from discipline, but meaningful specification is completely neglected. It may mean to protect only occasional negligence, or it may include legal disregard, or both. There is no way of knowing. Moreover, “good faith” is the positive equivalent of “bad faith,” which as we have seen, has been applied loosely and misleadingly throughout the Rule’s history. The only advantage of the “good faith” standard follows from its vagueness: it amply allows for the use of the Proposed Standard and the significant justice exception to discipline.

In sum, the ABA’s changes take two positive steps, primarily by noting the undeniable existence of the Rule and tying it to fairness. The ABA then fell into the curse of the Rule, however, by irreconcilably disciplining “legal error” while excepting “good faith mistakes,” ignoring the competence rule, and generally committing a failure of meaningful specification concerning the bounds of the Rule. While the new Code generally has many salutary innovations, the states should not adopt the new Rule in its current form. The new Code largely codifies existing law, but as we have seen, existing law is nearly unintelligible. Instead, the states should revise Rule 2.2 to adopt the Proposed Standard detailed above and to deal with mere negligence in its rightful place, the separate competence rule.

CONCLUSION

This project was bound to be long and difficult; the Rule has been developed and applied ambivalently and even incoherently. In the end, however, we have come to (some) clarity. First, the Rule, as applied, is concerned with violations of fundamental rights; it cares little about excuses for doing so. Second, the Rule’s remarkable bias in criminal defendants’ favor is justified on objective grounds—the protective context of criminal procedure and adjudication. Third, we have seen that a proper interpretation of the Rule accords justice and judicial independence their necessary role in adjudication, and as defined, the Proposed Standard of nonfrivolous

334. See supra Part IV.
335. See supra Part IV.C.
336. See, e.g., supra notes 39, 332.
adjudication preserves those values for the concerned judge. Fourth, we have seen that the ABA’s new Rule is unhelpful (and even perverse) in the main, but to its credit, it explicitly identifies the Rule and ties it to the duty of fairness.

Finally, we have seen that the legal actors need to change their behavior in important ways in light of the Rule. Judges must articulate their reasons for rulings and pay attention to justice; other judges must report and prevent Rule violations; and attorneys must report violations as well, but most importantly, they must use the Rule’s existence to remedy violations before prejudice to their clients’ results. These new clarities jointly testify to one fact: the Rule is as necessary as it is dangerous to our system of justice. My hope is that this work is only the beginning of this important inquiry.