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The Modern Movement of Vindicating Violations of Criminal Defendants’ Rights Through Judicial Discipline

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THE MODERN MOVEMENT OF VINDICATING VIOLATIONS OF CRIMINAL DEFENDANTS’ RIGHTS THROUGH JUDICIAL DISCIPLINE

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  School, for his detailed comments on an earlier version of this work.
Instead of the increasingly prosecution-oriented judicial aspirants who ascend to the bench, we need more judges who care about protecting the rights of the accused, who will put the government to the test, and who have some compassion for those who come before them.

The truth is these so-called defense-oriented judges are not defense-oriented at all, but Bill of Rights-oriented.

These judges understand the importance of their role as keepers of the Constitution and models of honor, decency, and integrity. They are willing to risk public disfavor to do the right thing.¹

It is perhaps a truism that many judges pay insufficient attention to the constitutional and other fundamental rights of the criminally accused.² In the past, they could do so with impunity; no consequences would follow.³ That was the past. An unexamined modern movement quietly—but forcefully—has started to turn the tables in favor of the accused. Today, judicial conduct commissions and state supreme courts harshly discipline judges who violate fundamental rights from the bench.⁴ This Article publicizes and explicates this underreported, yet earthshaking, movement.⁵

Part I sets forth the legal basis and procedure for disciplining judges who violate criminal defendants’ rights.⁶ Part II details the rights vindicated in nearly every state. Part III justifies not only the widespread discipline in the criminal law context, but also the apparent bias in favor of the rights of criminal

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2. It is equally true, however, that many judges carefully pay significant attention to fundamental rights; this Article is not addressed to them.
3. Indeed, such improper conduct often would be rewarded, either through public support or (at least) avoidance of criticism. See infra Part IV.
5. It is quite possible that most lawyers and many judges are unaware that judges can be, and often are, disciplined for disregarding fundamental legal rights.
6. Over time, the ethical rule has arisen primarily from interpretations of Canons 2A (duty to "comply" with the law) and 3B(2) (duty to be "faithful" to the law) of the Model Code of Judicial Conduct. See generally Jeffrey M. Shaman, Judicial Ethics, 2 Geo. J. Legal Ethics 1, 8–9 (1988); see also Cynthia Gray, The Line Between Legal Error and Judicial Misconduct: Balancing Judicial Independence and Accountability, 32 Hofstra L. Rev. 1245, 1246 (2004) (quoting the Model Code of Judicial Conduct Code Canon 3B(7) and 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’"). For a further explanation of this frequently prosecuted disciplinary rule, see Parts I.A and B below.

Violations of these duties often are referred to as "legal errors" or simply "judicial misconduct."
defendants. Finally, Part IV announces several critical implications of the movement for the criminal justice system.

I. Background: The Ethical Rule and Its Application

A. The Textual Basis for Judicial Discipline

With one unimportant exception, the ABA's Model Code of Judicial Conduct governs the conduct of all state judges. The Code provides three sources of authority for disciplining judges who violate fundamental rights. Since 1972, these sources have remained largely unchanged. First, in order to prevent "impropriety," Canon 2A states that a "judge shall respect and comply with the law." Second, Canon 3B(2) states that a "judge shall be faithful to the law and maintain professional competence in it." Third, Canon 3B(7) demands that a "judge shall 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." Professor Jeffrey Shaman has explained the overlapping nature of these judicial duties:

The courts have found that legal errors 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.

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7 See, e.g., Gray, supra note 6, 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").
9 MODEL CODE OF JUDICIAL CONDUCT Canon 2A (2003). The full Canon, entitled "Duty to Respect and Comply with the Law," provides that a "[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.
10 Id. Canon 3B(2) (2003). 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." Id.
12 Shaman, supra note 6, at 8-9; see also Gray, supra note 6, at 1246 (quoting the Model Code of Judicial Conduct).
The ABA's latest Model Code, which was adopted in February 2007, largely maintains these requirements. The new Rule 2.2 requires the following: "A judge shall uphold and apply the law." Furthermore, Rule 2.6(A) copies Canon 3B(7): "A judge shall 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."

As we will see in detail, judicial conduct commissions frequently prosecute judges who violate these ethical duties.

B. A Primer on Disciplinary Proceedings for Adjudicatory Violations of Fundamental Rights

By discipline, this Article intends the various proceedings (successfully) prosecuted by state judicial conduct commissions. Typical sanctions for judicial misconduct are (in ascending order of severity) reprimand, censure, suspension, or removal. Judges also can be required to pay the costs of their own prosecution, in addition to whatever expense they incur in their defense.

The duties listed in the preceding Section are regularly violated and prosecuted in the state and (to a lesser extent) federal disciplinary 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 (usually lesser) sanctions are final in a few states. States ostensibly have different standards (1) to determine the requisite clarity of the law that the judge supposedly violated and (2) to distinguish between mere legal error and “judicial misconduct.”

For our purposes, we need not enter any debates regarding peculiarities in the ethical doctrine. As we will see, it clearly applies to the disregard of undisputed and fundamental legal rights of criminal defendants. With respect to our focus, in fact, some courts have made the inquiry extremely straightforward: Whether the ruling reflects “disregard for fundamental rights.”

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

II. The Modern Disciplinary Regime in Action

A. General Methodology

As a preliminary matter, it should benefit the discussion to define 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, legal error is either (1) failing to apply the law at all or (2) applying it in a negligent (or worse) fashion.25 Furthermore, the judge must have made the adjudicatory26 error in a criminal case (including imposition of criminal contempt); civil cases, which are very rare, are not discussed.

Moreover, this Article excludes all cases in which judges have disregarded the law on the basis of a personal relationship, private or professional. For example, when a supreme 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," the case was not counted.27 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.28

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16, at 3 (stating that "[m]ost complaints filed with judicial conduct commissions—generally more than 80%—are dismissed"); Brief for Petitioner at 8 (Feb. 4, 2005), Va. Judicial Inquiry and Review Comm'n v. Peatross, (269 Va. 428), available at 2005 WL 2098865 (claiming that "all 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 6, 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.").


This Article is solely concerned with legal errors in adjudication; off-the-bench illegalities, or other transgressions of various laws, are ignored. See, e.g., In re Lowery, 999 S.W.2d 639, 655 (Tex. Rev. Trib. 1998) (disciplining judge because he failed to comply with the law by not completing mandatory judicial education). Nevertheless, this Article's defines adjudication somewhat broadly—that is, making substantive and procedural decisions in a case. By decisions, the definition includes not only deciding legal issues but also 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 affecting the underlying case).

In re Quirk, 705 So. 2d 172, 178 (La. 1997) (citing In re King, 568 N.E.2d 588 (Mass. 1991)); see Steven Lubet, Judicial Discipline and Judicial Independence, LAW & CONTEMP. PROBS. 59, 73 (noting that In re King, "the punishment was invoked for his bad faith and ill motive in reaching a decision, not for the content of the decision itself").

Cf., e.g., MODEL CODE OF JUDICIAL CONDUCT Canon 3E(1) (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 that this category should be excluded. See Gray, supra note 6, at 1266 (claiming that a judge who "acts out of bias or revenge" commits "bad faith" legal error); SHAMAN, supra note 22, §§ 2.02 & 2.13 (grouping all legal errors, including "favoritism and bias" into one category, "use of power"). While a judge acting out of "bias or revenge" should be disciplined, characterizing such a decision as disciplinable legal error (or merely "judicial misconduct") 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 criminal law generally. Under a literal, almost robotic, reading, the 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."
Finally, this Article excludes violations of the ethical rule against ex parte communications. Although the cases are riddled with such violations—many of which technically constitute legal error— they have been omitted because (among other reasons) they generally are not errors of adjudication (although they are errors in the adversary procedure leading to adjudication), and more importantly, 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.

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

The most basic right of citizens in 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.

What some commentators have called "egregious" legal errors generally are, in fact, violations of defendants’ constitutional or important statutory rights. In light of the liberty at stake, it seems absolutely appropriate to require heightened judicial sensitivity whenever rulings impact important rights of criminal defendants (which are often uncorrectable by appeal). The commissions recently have taken an energetic role in policing judges who violate these various rights in their rulings.

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29 See, e.g., CENTER FOR PROF'L RESPONSIBILITY, A.B.A., ANNOTATED MODEL CODE OF JUDICIAL CODE 131–48 (2005) (citing a long list of courts disciplining judges for willful or negligent violations of the rule against ex parte communications).
31 In re Benoit, 487 A.2d 1158, 1165 (Me. 1985).
32 E.g., SHAMAN, supra note 22, § 2.02, at 37–38 (describing the types of judicial errors that are considered judicial misconduct); Gray, supra note 6, 1270–76 (providing specific examples of judicial errors).
33 The court in In re Benoit, 487 A.2d 1158 (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. Id. at 1165.
34 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 100 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 emphasis is placed on 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 note 20.
The following list of vindicated rights is not intended to be entirely exhaustive; various instances of misconduct have been excluded at the margins. It shows, however, the breadth and importance of the judicially trampled rights. It also shows the importance of their subsequent vindication.

1. 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 treat this duty as a discretionary formality; those judges have been disciplined significantly.

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35 See, e.g., In re Vonderheide, 532 N.E.2d 1252, 1253–54 (N.Y. 1988) (disciplining judge for conditioning acceptance of guilty plea on defendant’s agreement to implicate a third party in the crime); Comm’n on Judicial Performance v. Hopkins, 590 So. 2d 857, 865 (Miss. 1991) (same).

36 It is worth noting at the outset that all of the following legal rights are undisputed, at least in the sense that settled law supports them.

37 E.g., Office of Disciplinary Counsel v. Hoague, 725 N.E.2d 1108, 1110 (Ohio 2000) (suspending the judge in part because he interrogated defendants without advising them of their constitutional right to counsel); In re Williams, 987 S.W.2d 837, 844 (Tenn. 1998) (removing the judge in part for failing to inform defendant of right to grand jury indictment, right to cross-examination, and right to counsel); In re Reeves, 469 N.E.2d 1321, 1324 (N.Y. 1984) (sanctioning the judge for repeatedly failing to inform litigants of their constitutional and statutory rights); In re McGee, 452 N.E.2d 1258, 1259 (N.Y. 1983) (removing the judge in part because he failed to advise defendants of the charges against them and their right to counsel); In re Sardino, 448 N.E.2d 83, 85 (N.Y. 1983) (removing judge in part because he failed to advise defendants of their constitutional right to counsel); In re Pauley, 318 S.E.2d 418, 422 (W. Va. 1984) (suspending judge in part for failing to inform defendant of right to remain silent, right to counsel, and right to a preliminary hearing); see also In re Markey, 696 N.E.2d 523, 530 (Mass. 1998) (suspending judge for failing to have plea colloquies, during which judges must make sure that defendants are informed of their rights).

38 See supra note 38 (citing cases) and accompanying text.

39 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.").

40 See supra note 38 (citing cases) and accompanying text.
2. 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 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 that guilty verdicts are similarly untainted.

3. 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.

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41 See, e.g., In re McGee, 452 N.E.2d 1258, 1259 (N.Y. 1983) (removing judge in part for coercing defendants to plead guilty); Richard Klein, Due Process Denied: Judicial Coercion in the Plea Bargaining Process, 32 Hofstra L. Rev. 1349 passim (2004) (citing numerous cases in which judges were disciplined for such misconduct); see also STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY 14-3.3 (3d ed. 1999) (summarizing standards for guilty pleas).

42 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"); see also Kloepfer v. Comm'n on Judicial Performance, 49 Cal. 3d 826, 844-45 & 858-61 (1989) (removing judge in part for failing to remain neutral and impartial by intimidating defendants and their attorneys and cross-examining defense witnesses like a prosecutor).

43 See supra notes 41-42 (citing cases) and accompanying text.

44 See, e.g., Miss. Comm'n on Judicial Performance v. Byers, 757 So. 2d 961, 973 (Miss. 2000) (censuring judge in part because she sentenced a defendant under the wrong statute and unlawfully extended another's probation); Miss. Comm'n on Judicial Performance v. Emmanuel, 688 So. 2d 222, 223 (Miss. 1996) (reprimanding and assessing costs against judge for exceeding sentencing authority); In re Graham, 620 So. 2d 1273, 1277 (Fla. 1993) (same); In re Markle, 328 S.E.2d 157, 164 (W. Va. 1984) (suspending judge for the same); see also TEXAS PRACTICE SERIES, HANDBOOK OF TEXAS LAWYER AND JUDICIAL ETHICS § 26.4 n.67 (2006) (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").

45 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.").

46 See supra note 44 and accompanying text (citing cases in which judges have been disciplined for exceeding their sentencing authority).

47 See, e.g., supra note 34 (discussing the history of judicial conduct commissions in New York, and the low number of disciplinary proceedings prior to their establishment).
4. Exceeding Bail Authority

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

5. Denying Full and Fair Hearings and Trials

As noted or implied several times above, 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, one would assume that judges would do so as a matter of conscience—to

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48 See, e.g., In re La Belle, 591 N.E.2d 1156, 1162 (N.Y. 1992) (per curiam) (censuring judge for failing to set bail for defendants according to the applicable statute); In re Sardino, 448 N.E.2d 83, 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. See, 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, judges 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, 733–34 (Ga. 1995) (per curiam) (removing judge from office for such conduct).

49 See Stern, supra note 34, at 322–24 (discussing early New York cases in which courts refused to discipline judges for failing to set bail); see also supra note 48 (citing cases resulting in discipline for failing to set bail).

50 In re Dash, 564 S.E.2d 672, 673 (S.C. 2002) (reprimanding judge for finding defendant guilty without allowing defendant to present evidence); In re Milhouse, 605 N.W.2d 15, 15 (Mich. 2000) (suspending judge for entering guilty verdict without a hearing); Miss. Comm'n on Judicial Performance v. Wells, 794 So. 2d 1030, 1034 (Miss. 2001) (reprimanding judge); Miss. Comm'n on Judicial Performance v. Willard, 788 So. 2d 736, 746 (Miss. 2001) (removing judge in part because he convicted a defendant without notice); Miss. Comm'n on Judicial Performance v. Fletcher, 686 So. 2d 1075, 1078 (Miss. 1996) (reprimanding and assessing costs against judge in part because he jailed a defendant without notice or a hearing); In re Aucoin, 767 So. 2d 30, 36 (La. 2000) (censuring and assessing costs against judge because he held immediate trials without warning to the defendant); In re Brown, 527 S.E.2d 651, 658 (N.C. 2000) (censuring judge in part because, following a 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, 120 (N.C. 1998) (same); In re Colby, 629 So. 2d 120, 122 (Fla. 1993) (per curiam) (reprimanding judge for finding defendants guilty without allowing defense counsel to present evidence); In re Hammermaster, 985 P.2d 924, 926 (Wash. 1999) (suspending municipal court judge for six months for, among other transgressions, "holding trials in absentia"); see In re Markey, 696 N.E.2d 523, 530 (Mass. 1998) (suspending judge for failing to have plea colloquies during defendants' change of pleas); McCollough v. Comm'n on Judicial Performance, 776 P.2d 259, 267 (Cal. 1989) (removing judge in part because he forced two defendants to stand trial without a hearing to determine whether good cause existed for their attorneys' failure to request a timely continuance); In re Benoit, 487 A.2d 1158, 1167 (Me. 1985) (suspending judge in part for failing to grant counsel's motion to withdraw after a co-defendant abandoned the joint defense agreement and agreed to testify for the prosecution, thereby requiring counsel to cross-examine the codefendant).

51 Some of these safeguards are discussed below. See infra Part III.
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. They reflect repeated shortcuts for (at best) the sake of expediency, such as holding immediate trials. 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. Judges improperly ignore this last right—the right to present a case—even with respect to the prosecution. Unsurprisingly, nearly all of these violations receive significant discipline.

6. 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

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52 In re Holien, 612 N.W.2d 789, 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).
53 See supra note 50 (citing cases that exemplify such shortcuts).
54 See id.
55 See, e.g., In re Elloie, 921 So. 2d 882, 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); see also In re Jefferson, 753 So. 2d 181, 199 (La. 2000) (removing judge in part for barring prosecutor from the courtroom and dismissing prosecutor's case).
56 See supra note 50 (citing cases and noting disciplinary measures taken).
57 These cases are grouped 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, e.g., Cannon v. Comm'n on Judicial Qualifications, 537 P.2d 898,918 (Cal. 1975) (removing judge in part for holding public defenders in contempt and jailing them without process); In re Jefferson, 753 So. 2d 181, 199 (La. 2000) (removing judge in part for multiple instances of unlawfully exercising contempt power); In re Scott, 386 N.E.2d 218, 221 (Mass. 1979) (censuring judge and suspending him from hearing criminal cases for improperly holding defendants in contempt); Miss. Comm'n on Judicial Performance v. Willard, 788 So. 2d 736, 746 (Miss. 2001) (removing judge in part because he issued contempt citation without providing notice); Miss. Comm'n on Judicial Performance v. Fletcher, 686 So. 2d 1075, 1077-78 (Miss. 1996) (reprimanding judge in part because he used improper procedure to find contempt—namely, his own affidavit and warrant—and sentenced defendant to an unlawfully excessive term of jail); Goldman v. Comm'n on Judicial Discipline, 830 P.2d 107, 143 (Nev. 1992) (removing judge for exercising contempt power in six cases); In re Hamel, 668 N.E.2d 390, 391 (N.Y. 1996) (removing judge in part because he failed to follow procedural requirements for summary contempt and sentenced defendants for failing to pay court penalties without determining whether the defendants could afford to pay); In re Pizzi, 617 A.2d 663, 663 (N.J. 1993) (censuring judge because he failed to give the defendant notice of the contempt charge, prejudged the merits, refused to take evidence, and exceeded the sentencing range for contempt); Disciplinary Counsel v. Karto, 760 N.E.2d 412, 420 (Ohio 2002) (suspending judge in part because he unlawfully exercised the criminal contempt power).
58 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:
repeatedly abuse it in a variety of ways, such as ignoring due process require-
ments.59 In fact, it is one of the most common forms of disciplined misconduct.
Although some judges still go unpunished,60 the commissions are providing a
necessary (albeit after-the-fact) check on judges' "despotic" power.

7. Ignoring Probable Cause Requirements61

Probable cause is the first check against invasive intrusion of law
enforcement and prosecution. Judges have a clear duty to ensure that it 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, it 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 discipline.62

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.

59 See supra note 57 (citing cases involving abuse of the criminal contempt power).
60 For example, United States v. Thorereen (arguably) should have resulted in discipline. 653 P.2d 1332
(9th Cir. 1981). There, the Ninth Circuit upheld the judge's contempt conviction against defense counsel who
seated another person in the defendant's seat. As counsel expected, two prosecution witnesses misidentified the
defendant as the man sitting in the defendant's seat. 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").
61 In light of the purposes of the probable cause requirement, this category could have been placed in
the Section dealing with denials of full and fair hearings. See supra Part II.B.5. In view of their number and
distinctiveness, however, they are placed in a class of their own. See, e.g., In re Inquiry Concerning a Judge
(Hammill), 566 S.E.2d 310, 316 (Ga. 2002) (removing judge in part because he authorized an unreasonable
search of a defendant's home); In re Inquiry Concerning a Judge (Vaughn), 462 S.E.2d 728, 736-37 (Ga. 1995)
/removing judge in part because she issued bench warrants without probable cause); In re Wilder, 516 S.E.2d
927, 929 (S.C. 1999) (per curiam) (reprimanding judge in part because he signed blank arrest warrants).
62 See supra note 61 (citing cases where judges have been disciplined for ignoring probable cause
requirements).
8. Denying Defendants’ Other Constitutional Rights, Particularly Their Right to Counsel

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. Judges have been disciplined harshly for interfering with the attorney-client relationship. Judges even have been disciplined for "trivializing the right to counsel in the process of informing defendants of it." Judges also have been disciplined for disparaging other rights, such as "tricking" defendants into waiving their statutory rights or refusing requests for jury trials.

9. Penalizing Defendants for Exercising Their Constitutional Rights

In a rather shocking 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 these

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63 McCollough v. Comm’n on Judicial Performance, 776 P.2d 259, 267 (Cal. 1989) (removing judge in part because he forced two defendants to stand trial without their counsel); In re Inquiry Concerning a Judge (Vaughn), 462 S.E.2d 728, 736–37 (Ga. 1995) (removing judge in part because she violated defendants right to counsel during a change of plea); In re Boles, 555 N.E.2d 1284, 1291–92 (Ind. 1990) (suspending judge in part for effectively denying defendant’s right to appointed counsel); In re Benoit, 487 A.2d 1158, 1167 (Me. 1985) (disciplining judge for, among other reasons, jailing juvenile defendant without assistance of counsel); In re Gustafson, 756 P.2d 21, 27 (Or. 1988) (censuring judge in part for replacing defendants’ attorneys for no reason).

64 See supra note 63 (citing cases in which judges have interfered with the right to counsel).


67 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).


69 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—that is, 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, e.g., In re Hathaway, 630 N.W.2d 850, 861 (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, 531 (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); In re Damron, 487 So. 2d 1, 7 (Fla. 1986) (removing judge in part for aggravating defendant’s sentence because he exercised his right to counsel).

70 See supra note 69 (citing cases in which judges were disciplined for retaliating against defendants
judges that clearing calendars does not excuse attempts to circumvent procedural rights.

10. Conclusion

The preceding Sections of this Article demonstrate that judicial discipline in the criminal context is pervasive and diverse. The violations and subsequent discipline have occurred at every stage of criminal proceedings. The following Parts of this Article attempt to justify and explain this recent phenomenon.

III. Justifications

This Part provides objective justifications for the commissions' seemingly skewed attention to criminal defendants' rights. In fact, 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." 71 Judges rightfully are disciplined for transgressing these basic procedural and substantive rights—rights that judges have an ethical duty to protect. 72

Some of the most important rights follow, and they pervade the entire criminal process:

- The right to a warrant, issued only on probable cause; 73
- The right to grand jury indictment; 74

for exercising their constitutional rights); In re Hathaway, 630 N.W.2d at 854 ("Respondent's conduct in the case of People v. Crosse, wherein Respondent threatened to put defendant in jail if he did not waive his constitutional right to a jury trial, as well as questionable adjournments in view of defendant's resistance to waive a jury, constituted a failure to properly perform Respondent's judicial duties. . . ."); In re Cox, 680 N.E.2d at 530 (noting that the Respondent had said to a defendant, "My question is, do you wish to proceed at this time without counsel or do you wish to have counsel present, in which case we will consider the possibility of direct criminal contempt of court. Which is your choice?").


See id. at 274 & n.148 (citing STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE 167 (1974)); ABA STANDARDS FOR CRIMINAL JUSTICE: SPECIAL FUNCTIONS OF THE TRIAL JUDGE 1.1(a) (3d ed. 2000) ("The trial judge has the responsibility for safeguarding both the rights of the accused and the interests of the public in the administration of criminal justice.").

See, e.g., Henry v. United States, 361 U.S. 98, 100 (1959) (arguing that the probable cause requirement has deep roots in United States history and exists to protect both the criminal defendant and the arresting officer).

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, 658 (N.C. 2000) (censuring judge in part because, following defendant's DUI trial, he convicted the defendant of careless
The right to protection against self-incrimination;\textsuperscript{75} 
The right to effective assistance of counsel;\textsuperscript{76} 
The right to a preliminary hearing;\textsuperscript{77} 
The right to exculpatory evidence;\textsuperscript{78} 
The right to compel production of evidence; 
The right to call witnesses and to cross-examine them;\textsuperscript{79} 
The right to present evidence and not to present evidence;\textsuperscript{80} 
The right to proof beyond all reasonable doubt (and its corollary, the presumption of innocence);\textsuperscript{81} 
The right to trial by an impartial jury;\textsuperscript{82} 
And the right to due process and equal protection throughout the entire proceedings.\textsuperscript{83}

and reckless driving, which was not a lesser included offense); \textit{In re Martin}, 424 S.E.2d 118, 120 (N.C. 1998) (same).
\textsuperscript{75} \textit{See} U.S. CONST. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself.").
\textsuperscript{76} \textit{See} U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy . . . the Assistance of Counsel for his defence."); \textit{see also} Strickland v. Washington, 466 U.S. 668 (1984) (suggesting ineffective representation occurred during a criminal trial when the "errors [were] so serious that counsel was not functioning as the 'counsel' guaranteed . . . by the Sixth Amendment").
\textsuperscript{77} \textit{See}, \textit{e.g.}, \textit{FED. R. CRIM. P. 5(c)} ("The magistrate judge must hold the preliminary hearing within a reasonable time, but no later than 10 days after the initial appearance if the defendant is in custody and no later than 20 days if not in custody."). 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.
\textsuperscript{78} \textit{E.g.}, Brady v. Maryland, 373 U.S. 83, 86 (1963) (holding that withholding exculpatory evidence material to defendant's guilt or punishment violated the Due Process Clause of the Fourteenth Amendment).
\textsuperscript{79} \textit{See} U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy . . . compulsory process for obtaining witnesses in his favor. . . .").
\textsuperscript{80} \textit{See}, \textit{e.g.}, United States v. W.R. Grace, 439 F. Supp. 2d. 1125, 1137 (D. Mont. 2006) ("Though not expressly stated in the text of the Sixth Amendment, a defendant's right to present evidence in his defense is protected by the Federal Constitution.").
\textsuperscript{81} \textit{See}, \textit{e.g.}, \textit{In re Winship}, 397 U.S. 358, 364 (1970) (discussing the importance of the reasonable doubt standard in criminal proceedings). The court noted that the:

use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned.

\textit{Id.}
\textsuperscript{82} \textit{See}, \textit{e.g.}, \textit{In re Heideman}, 198 N.W.2d 291, 291–92 (Mich. 1972) (removing judge in part for denying defendants' requests for jury trials); 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").
\textsuperscript{83} \textit{See} Rose v. Mitchell, 443 U.S. 545, 545 (1979) ("Because discrimination on the basis of race . . . strikes at fundamental values of our judicial system . . . a criminal defendant's right to equal protection of the laws is denied when he is indicted by a grand jury from which members of a racial group have been purposefully excluded."); United States v. Sanders, 452 F.3d 572, 577 (6th Cir. 2006) ("A defendant maintains a right to due process in a criminal proceeding until the entry of final judgment.").
Two protections in particular are overwhelming in criminal law proceedings. The first protection, which has yet to be mentioned, is the rule of lenity. 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, 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. 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) frequently: (1) provides ineffective counsel, (2) convicts the innocent, and (3) imposes "insanely" disproportionate sentences.

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. Indeed, some have argued that the "primary end" of the

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85 See, e.g., Karl Llewellyn, Some Realism About Realism—Responding To Dean Pound, 44 Harv. L. Rev. 1222, 1239 (1931) (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").
87 See, e.g., Mullaney v. Wilbur, 421 U.S. 684, 703 (1975) (reaffirming that the prosecution must prove all the elements of the crime beyond a reasonable doubt, and noting that burden does not shift to the accused to prove he acted in the heat of passion); 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).
90 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
criminal justice system is "the protection of accused individuals against the state. . . ." 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). In sum, if it seems like judges must walk on eggshells when adjudicating criminal law, that is absolutely right. The commissions have provided a police force for the criminal defendant, who is entitled to the meticulous application of the many constitutional safeguards and presumptions.

IV. Critical Implications of the Movement

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 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

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91 DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 61 (1988); see also STANDARDS FOR CRIMINAL JUSTICE, supra note 72, at 6-1.1(a) (requiring trial judge to guard the rights of the accused).
92 See infra note 98 (noting that many judges, especially elected ones, are biased against defendants).
93 See, e.g., In re Hammermaster, 985 P. 2d 924, 926 (Wash. 1999) (suspending a municipal court judge for six months for, among other transgressions, "improper threats of life imprisonment and indefinite jail sentences, improperly accepting guilty pleas, [and] holding trials in absentia").
94 Cf. In re Quirk, 705 So. 2d 172, 180 n.15 (La. 1997) (citing In re Benoit, 487 A. 2d 1158, 1163 (Me. 1985)) (noting the need of "establishing a clear standard . . . [that] inform[s] the judiciary of the ethical standard to which its legal decisions will be held").
96 See Stern, supra note 34, at 322 ("For most of the past ten decades [before New York created a judicial conduct commission], arbitrary conduct in court that deprived litigants or other persons of their guaranteed rights, with few exceptions, has not been a basis for discipline.").
moving their calendars along than respecting defendants’ rights. Second, in the
many states in which judges are elected, such judges appear to exhibit a greater
likelihood of denying defendants’ rights. The commissions’ enforcement
practices provide a check to these unfortunate truths. Third (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 disprop-
ortionate deference to the prosecution, are abdicating their core judicial
function. These judges need to realize that the commissions are watching.

Another critical implication of the movement affects criminal defense
attorneys: It is arguably malpractice not to raise the violation with the judge.
Several practitioner’s 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 offending judges on notice—so that either they can correct
the problem before the defendants are 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 of Judicial Conduct, and
they must persuade judges on this point, just like any other legal point.

At present, attorneys do not perform these duties for their clients; attorneys may not even know of these duties. Furthermore, their ignorance or

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97 See, e.g., Klein, supra note 41, passim (documenting numerous instances of such misbehavior and explaining the incentives for it). Similar behavior occurs in reporting and sanctioning attorney misconduct—judges address it when it affects the trial. Part of that emphasis is wholly proper, but the negative inference is that judges remedy only unethical conduct that risks creating more work for judges, such as a retrial or another hearing. Judith A. McNamara et al., Judicial Attitudes Toward Confronting Misconduct: A View from the Reported Decisions, 32 Hofstra L. Rev. 1425, 1462–63 (2004).

98 See, e.g., In re McMillan, 797 So. 2d 560, 573 (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 (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).

99 See Stern, supra note 34, at 333 (discussing discipline of judge who allowed the district attorney to draft her order); Bright & Keenan, supra note 98, at 803–11 (documenting numerous instances of improper delegation to the prosecution in capital cases).

100 See, e.g., 75B AM. JUR. 2D Trial § 1734 (providing a "checklist" of various types of relevant judicial misconduct that may warrant a mistrial); Edward A. Rucker & Mark E. Overland, 3 CAL. CRIM. PRACTICE § 39:21 (3d ed.) (providing a sample motion for mistrial on the basis of relevant judicial misconduct and citing several California cases in support of the motion); 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); see also Michael C. Hennenberg & Harry R. Reinhardt, Ohio Criminal Defense Motions Form 13.36 (2006) (citing the Canons of judicial conduct and a judge’s duty "not only to see that justice is served, but that it is also administered" in motion).

101 Cf. In re Benoit, 487 A. 2d 1158, 1170 (Me. 1985) (excusing judge’s legal error in part because attorney misinformed judge of the applicable rule).

102 An attorney’s use of the Code would not be for the discouraged purpose of "mere tactical advantage." MODEL CODE OF JUDICIAL CONDUCT Preamble (2003). Rather, it would be to achieve the substantively correct legal decision—a right to which the parties are entitled.
resistance unfortunately fails to stop repeat players: The cases are replete with repeated violations by the same judges. 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 fails to self-correct, the office should file a complaint.103

It also is worth reemphasizing that the Rule provides protection for attorneys and their clients. In a common example, it disciplines judges for forcing attorneys to proceed when they (reasonably) are not ready.104 Relatedly, not only have judges been disciplined for their legal rulings, they have been disciplined for abusive behavior toward attorneys in court.105 These insulations—if used correctly—should encourage and protect more vigorous and competent service to clients in legal proceedings.

Finally, an important trait of discipline for legal error in criminal cases is that it warrants a high sanction against the judge. 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."106 At least two of these three 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.107 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.
V. Conclusion

This Article serves as a testament to the importance of the corrective work of the judicial conduct commissions and (to a lesser extent) state supreme courts. Their efforts have meant that rights-indifferent judges now receive more than just occasional criticism in appellate opinions—they are censured, suspended, and removed. The context of criminal proceedings provides objective justification for the commissions’ stern enforcement practices in favor of criminal defendants’ rights. Going forward, then, we should ensure that these commissions are properly funded, trained, and otherwise supported, because the criminal justice system’s need for them is sure to last long into the future.