

PRO-PROSECUTION JUDGES: “TOUGH ON CRIME,” SOFT ON STRATEGY, RIPE FOR DISQUALIFICATION

Keith Swisher*

The U.S. justice system is rife with an overexposed, understudied avenger, the tough-on-crime judge. Under the pressure of elective systems, pro-prosecution judges announce that they are “tough on crime” and that their opponents are “soft on crime” to gain votes, and all judges are effectively forced either to adjudicate tough(er) on crime or risk losing office. This phenomenon has become engrained, albeit begrudgingly, in state court culture. The problem is that tough-on-crime judges are antithetical to the American concept of judge; these judges offend, in varying degrees, the three most commonly recognized judicial values: impartiality, integrity, and independence. The Supreme Court opinion in Caperton v. A.T. Massey Coal Co. has reinforced due process disqualification of apparently biased judges, arguably including tough-on-crime judges presiding over criminal cases. And, moreover, tough-on-crime judges seemingly stand opposed to the rules of judicial ethics and even ethics in general. For these reasons, they are ripe for disqualification in all criminal cases. This Article provides the first comprehensive study of the pro-prosecution judge and evaluates the systemic (e.g., public funding) and case-specific (e.g., disqualification) remedies to this perplexing phenomenon.

* Assistant Professor of Law, Phoenix School of Law; LL.M., Harvard Law School; J.D., B.S., Arizona State University. I owe many thanks to Charles Gardner Geyh and Placido Gomez for their comments and to Andrew B. Mazoff, Joshua W. Nunez, and Kim Tirrell-Levinson for their first-rate research assistance. All errors and conclusions are mine.

TABLE OF CONTENTS

INTRODUCTION	319
I. JUDICIAL SELECTION OF TOUGH-ON-CRIME JUDGES:	
THE ROAD TO PERDITION	323
<i>A. Elective Selection and Retention: The Breeding Grounds</i>	323
<i>B. Tough-on-Crime Judges: The Nature of the Beasts</i>	327
1. Tough-on-Crime Boasts	328
2. Soft on Crime Attacks	331
3. Tough-on-Crime Messaging	332
4. Motivating Tough-on-Crime Messaging	334
II. THE ROME OF DISQUALIFICATION:	
ALL ROADS LEAD TO THE SAME PLACE	338
<i>A. Due Process Disqualification: Caperton and Company</i>	339
1. The Caperton Case	340
2. Connecting Caperton: Coal and Crime	342
3. Caperton Standards	345
4. The Post-Caperton Regulatory Environment	348
<i>B. Canon Disqualification</i>	351
1. Canon Law: Tough on Campaign Crime	351
2. Aiding and Abetting Liability	363
3. Canon Law Summary	363
<i>C. Temptations: Recidivism and Empiricism</i>	364
1. Recidivist Judges	364
2. Empirical Findings	365
<i>D. The Appearance of Uncertainty</i>	369
<i>E. Lawlessness and Immorality</i>	373
1. Lawlessness	374
2. Immorality	375
III. FUNDING JUSTICE: THE MIDDLE OF THE ROAD	379
<i>A. Systemic Failure</i>	379
<i>B. Judicial Virtues in a Vice</i>	381
<i>C. Remedies: Antidotes, Painkillers, and Denial</i>	385
1. And Recusal for All	385
2. Public Financing: Clean Elections	387
3. Silence: Is Not Golden	388
4. Summary of Remedies	390
CONCLUSION: THE ROAD TO NOWHERE	392

INTRODUCTION

Persons who undertake the task of administering justice impartially should not be required—indeed, they should not be permitted—to finance campaigns or to curry the favor of voters by making predictions or promises about how they will decide cases before they have heard any evidence or argument. A campaign promise to “be tough on crime,” or to “enforce the death penalty,” is evidence of bias that should disqualify a candidate from sitting in criminal cases.

—Justice John Paul Stevens¹

As at least Justice Stevens would seemingly support, this Article advances the following, slightly scandalous claim: particularly in our post-*Caperton*,² political-realist world, tough-on-crime elective judges should recuse themselves from all criminal cases.³ To set the contextual stage for this claim, a threefold description will be necessary: (i) *Caperton*, its predecessors, and its progeny; (ii) the judicial ethics of disqualification; and (iii) empirical and anecdotal evidence of pro-prosecution (commonly called “tough on crime”) campaigns and attendant electoral pressures.⁴ Building on this description and the work of empiricists, this Article bridges the gap between these tough-on-crime

1. John Paul Stevens, Assoc. Justice, Supreme Court of the United States, Opening Assembly Address, A.B.A. Ann. Meeting, Orlando, Fl. (Aug. 3, 1996), in 12 ST. JOHN'S J. LEGAL COMMENT. 21, 30–31 (1996). Justice Stevens went on to note that “making the retention of judicial office dependent on the popularity of the judge inevitably affects the decisional process in high visibility cases, no matter how competent and how conscientious the judge may be. . . . [I]t was ‘never contemplated that the individual who has to protect our individual rights would have to consider what decision would produce the most votes.’” *Id.* (quoting 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, 814 (1995) (quoting a remark of Justice Ben Overton of the Florida Supreme Court)).

2. *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009) (concluding that party was deprived of due process when a state supreme court justice failed to recuse himself from participating in that party’s case despite having benefited from several million dollars in independent campaign expenditures courtesy of the opposing party’s chief executive officer). For a detailed discussion of *Caperton*, see Part II.A below.

3. For further preliminary support, I again point the reader to Justice Stevens:

The “higher authority” to whom present-day capital judges may be “too responsive” is a political climate in which judges who covet higher office—or who merely wish to remain judges—must constantly profess their fealty to the death penalty. . . . The danger that they will bend to political pressures when pronouncing sentence in highly publicized capital cases is the same danger confronted by judges beholden to King George III.

Harris v. Alabama, 513 U.S. 504, 519–20 (1995) (Stevens, J., dissenting).

4. *E.g.*, Hans A. Linde, *Elective Judges: Some Comparative Comments*, 61 CAL. L. REV. 1995, 2000 (1988) (noting the prevalence of the “tough on crime” judicial “campaign slogan, in advertisements and on billboards”).

campaign promises and subsequent tough-on-crime adjudications.⁵ And in the final analysis, the thesis—namely, that tough-on-crime judges should recuse themselves in most, and probably all, criminal cases in light of personal and systemic biases—is corroborated not just by Supreme Court reasoning and language,⁶ but even more importantly (at least from my perspective as an ethics professor), by the rules of judicial ethics.⁷ Thus, pro-prosecution judges and their not-too-sophisticated message—“me tough on crime, you soft on crime”—must cease and desist or be ceased and desisted, by mandatory disqualification or other means. In that regard, I end the Article by connecting up more explicitly with the topic of the day, funding justice, along the following lines.

In light of the constitutional and ethical problems with tough-on-crime judges suggested above and articulated below, (at least) two concluding tracks are apparent. First, for the devoutly outspoken judge—in other words, the judge who insists on using his First Amendment right to announce that he is “tough on crime”—either (i) he must recuse himself in criminal cases or (ii) at a minimum,

5. See, e.g., 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 *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).

6. See, e.g., *Caperton*, 129 S. Ct. at 2260 (“Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.” (quoting *Tumey v. Ohio*, 273 U.S. 510, 532 (1927))); *Republican Party of Minn. v. White*, 536 U.S. 765, 789–90 (2002) (O’Connor, J., concurring) (concluding that “[e]lected judges cannot help being aware that if the public is not satisfied with the outcome of a particular case, it could hurt their reelection prospects” and their “[re]liance] on campaign donations may leave judges feeling indebted to certain parties or interest groups.”); *id.* at 816 (Ginsburg, J., dissenting) (concluding that an elected judge has a “‘direct, personal, substantial, [and] pecuniary interest in ruling against certain litigants . . . for she may be voted off the bench and thereby lose her salary and emoluments unless she honors the pledge that secured her election.’” (quoting *Tumey*, 273 U.S. at 523)); MONROE H. FREEDMAN & ABBE SMITH, *UNDERSTANDING LAWYERS’ ETHICS* § 9.08[3], at 248–50 (3d ed. 2004) (noting the important fact that Justices Ginsburg and O’Connor were writing for five justices); *infra* Part II.

7. See, e.g., MODEL CODE OF JUDICIAL CONDUCT R. 2.11(A) (2007) (requiring recusal “in any proceeding in which the judge’s impartiality might reasonably be questioned”); MODEL CODE OF JUDICIAL CONDUCT R. 2.11(A)(5) (2007) (requiring recusal whenever “[t]he judge . . . has made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy”); MODEL CODE OF JUDICIAL CONDUCT Canon 3E(1)(f) (2003) (same); *In re McMillan*, 797 So. 2d 560 (Fla. 2001) (removing a judge in part because his campaign promised to favor prosecution and disfavor defense). Of course, the *ABA Model Code of Judicial Conduct*, in one iteration or another, impressively governs the conduct of virtually all state and federal judges. Cynthia Gray, *The Line Between Legal Error and Judicial Misconduct: Balancing Judicial Independence and Accountability*, 32 HOFSTRA L. REV. 1245, 1246 n.4 (2004) (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.”).

the public must provide him with “clean” judicial election money.⁸ Sub-option (ii) is a misleading path, however, because—withstanding clean money—campaign promises abound and the voters rely on those promises in casting their vote. Indeed, even when the voters do not rely on tough-on-crime promises *ex ante*, they will nevertheless hold judges accountable for failing to adjudicate “tough on crime” when an opponent or other critic happily brings the news to the voters’ attention. Therefore, a judge’s noticeable adjudicatory break from these tough-on-crime promises or expectations may very well lead to a revocation of votes in the next election. This looming result—losing votes at either election or reelection—instills in applicable judges an unavoidable pro-prosecution bias. Thus, while public financing has many laudable features, it fails to remedy our problem in any satisfying way.

Second, for the stealth judge—in other words, the judge who foregoes or drastically cabins her First Amendment right to announce her harsh views of criminals and their crimes—she at present may be elected with private money and still sit on criminal cases. Interestingly, this track works a *de facto* repudiation of the Supreme Court’s decision in *Republican Party of Minnesota v. White*,⁹ but whatever one’s opinion of that case, this track is unsatisfactory. While we will see that the stealth judge is not as irreversibly unethical as the outspoken judge, she is still unethical and potentially even more damaging to the judicial virtues than her outspoken counterpart. In the end, she may escape disqualification, but only for the same reason we call some criminals “good”—they do not get caught.

Before leaving the Introduction, I would like to give the reader some brief perspectives to put these problems in context. Narratives that force us to walk a mile in another’s shoes can, of course, drive home a perspective. Consider, then, the following three scenarios in which the reader becomes diverse, significant stakeholders in the criminal justice system. Bear these three Scenarios (S1 through S3) in mind as we weave our way through the constitutional and ethical frameworks affecting recusal decisions.

S1: Observer. Times are tough. Gambling is not. Being a law type, you decide to place your bets within your general area of expertise, namely, the dispositions of court cases. Your latest Las Vegas wager is on the trial of an alleged murderer. A newly elected judge, who campaigned heavily that he was “tough on crime,” will preside over the trial and sentencing (if any). To make the bet worth your while—and you really need this because your firm disbanded six months ago and the line of credit supporting your new solo practice is all but exhausted—the judge must either (1) sentence the defendant to the maximum

8. “Clean” elections, of course, typically involve state-funded election campaigns. Although my discussion will bring in some nuances, the gist here is that a clean candidate is not beholden to private money (and therefore less likely to fear being “soft” on crime while adjudicating). *See infra* Part III.C.2

9. 536 U.S. 765 (2002). In particular, because stealth judges must keep quiet to take the bench in criminal cases, they lose their right to announce their intentions to be “tough on crime.” *See id.* (striking down a Minnesota rule of judicial ethics barring judicial candidates from announcing their views on “disputed legal or political issues” because the rule failed to survive First Amendment strict scrutiny analysis).

sentence allowable by law (if not beyond), or if you cast your bet the other way, (2) sentence the defendant to the minimum sentence allowable by law. Assuming Las Vegas court-gambling rules preclude an independent inquiry into the facts, would you place your bet on sentence (1) or (2)?

S2: Participant. Times just got tougher. You left Las Vegas, and you are now a defendant (or even defending a defendant) charged with felony gambling—a sport of which the voters in the forum state are not fond. This state allows you to “strike” one judge without cause.¹⁰ As in Scenario 1, your judge is the same newly elected (but recently relocated) judge who is “tough on crime.” The other judges—any one of whom could be your replacement judge if you exercise your peremptory challenge—are all over the map in criminal cases; some are draconian, some are divinely forgiving, and some are neither. Would you strike the tough-on-crime judge? Even if your answer is no, would you nevertheless view it as reasonable for a person to strike the judge?

S3: Adjudicator. Times are blind. You have finally been rehabilitated and have taken the bench by favorable election.¹¹ Having seen how the tactic worked for other judges, you ran using a tough-on-crime campaign. Voters loved it, among your other attributes, and consequently voted you into office. In turn, you have loved your new job, but whether you have actually been “tough on crime” is questionable. In six months, however, you face an (almost surely) opposed reelection. You remember your trump card—your tough-on-crime badge. Indeed, you remember it so well that every time you have the discretion—in fact, such pesky discretion presents itself virtually every day—to sentence a criminal defendant to prison or probation, you wonder whether prison is always the safest course. Prisoners are, of course, prisoners, and as a consequence, they cannot go out and commit drunken vehicular homicides, child molestations, rapes, murders, or anything else. Probationers, in contrast, are a political liability: they can, and sometimes do, commit all of those nasty, negative-publicity-garnering crimes. As a good judge, you suppress these realist thoughts, but you still cannot help but wonder whether, all else being equal, prison is your presumption. Should you recuse yourself from your criminal cases?

Again, keep these Scenarios in ready reference as the thesis is constructed and tested throughout this Article. Part I briefly describes elective judicial selection systems and thoroughly describes tough-on-crime judges, their messages, and their motivations. Part II, the core of the analysis, runs tough-on-crime judges through the constitutional, ethical, and other-legal frameworks of

10. See, e.g., ARIZ. R. CRIM. P. 10.2 (2004) (permitting either side in a criminal case to change one judge as a matter of right, provided that the filing party swears that she is not using her “right” for any of several unbecoming purposes).

11. In reality, because the bench and bar (among other professions) systematically exclude felons, your felony gambling conviction would all but preclude your ascension to the bench. See, e.g., Keith Swisher, *The Troubling Rise of the Legal Profession’s Good Moral Character*, 82 ST. JOHN’S L. REV. 1037, 1063–65 (2008). Indeed, because you are operating in an elective state, not only would you have to worry about the professional barriers to felon re-entry, but also any opponent would presumably raise, and re-raise, your prior felony conviction in the judicial campaign. These deflating facts aside, however, nothing of consequence in this Scenario turns on the prior conviction.

disqualification.¹² All of these frameworks—some four or five different legal and ethical barriers, depending on one’s jurisprudential view—ultimately lead to the same place, mandatory disqualification. Part III critically appraises elective systems, the theoretical and economical costs that those systems impose on judges and litigants, and the alternatives, including broadly or narrowly targeted disqualification, public financing, and forced silence. By the Conclusion, the analysis has pointed strongly—if not conclusively—toward a broad-based, mandatory-disqualification remedy.

I. JUDICIAL SELECTION OF TOUGH-ON-CRIME JUDGES: THE ROAD TO PERDITION

[T]he road to perdition has ever been accompanied by lip service to an ideal.¹³

This Part gives us the “Who, What, When, Where, and Why” of tough-on-crime judges and their messages to voters and other interested groups. We begin by taking a descriptive look at elective systems for selection and retention. Such systems are singled out in part because (1) they incentivize judges to announce that they are “tough on crime” and (2) common sense and empirical data suggest that these systems place significant pressure on judges to be “tough on crime.”¹⁴ After briefly examining “the breeding grounds,” we then examine tough-on-crime judges—what they say, the meaning behind what they say, and why they say what they say.

A. *Elective Selection and Retention: The Breeding Grounds*

Here, we take a tough look at all tough-on-crime judges. The focus is on elective judges because, as suggested above, there is particular reason to suspect that elective judges—perhaps even judges who merely face retention elections—are something less than impartial under the pressures necessary to succeed in an elective system.¹⁵ The precise reasons for this focused suspicion are unpacked in

12. Throughout this Article, I often treat judicial recusal and disqualification as interchangeable. In common usage, the former means a decision of the judge whose impartiality is in question that the case should be handled by a different judge; the latter typically means a decision of another (ordinarily superior) court or judge that the case should be handled by a different judge. The terms recusal and disqualification, however, can and often do take on different meanings from state to state.

13. ALBERT EINSTEIN, *OUT OF MY LATER YEARS* 32 (1936).

14. At no point, however, do I claim that such systems solely or even invariably create tough-on-crime judges. I am not alone in believing, though, that such systems are more likely to do so. For the discussion of empirical data, see primarily Parts I.B.4 and II.C.

15. In retention elections, for example, the danger articulated later in this Article is present—namely, that one could be voted out of office for being soft on crime, among other risks—but that danger is more attenuated; almost every judge is retained. See Sanford C. Gordon & Gregory A. Huber, *The Effect of Electoral Competitiveness on Incumbent Behavior*, 2 Q. J. POL. SCI. 107, 108, 128, 133 (2007) (finding that judges facing noncompetitive retention elections sentence less severely than those facing partisan elections); Chris W. Bonneau, *Electoral Verdicts: Incumbent Defeats in State Supreme Court Elections*, 33 AM. POL. RES. 818, 825 (2005) (finding in ten-year study of state supreme court justices that only 1.7% of justices were not retained, compared to 38.5% and

various parts below, but for present purposes, it is sufficient to note that elective judges are incentivized “to turn themselves in,” that is, to boast publicly that they are, in fact, “tough on crime.” Thus, they are the low-hanging fruit for us to pick (or, at least, pick first).

For better or worse, and perhaps the latter, the majority of states use some form of elective system either to select or retain their judges.¹⁶ Indeed, including retention elections, nearly 90% of state court judges face elections.¹⁷ At the trial court level, for instance, twenty-eight states select judges through election. Of that number, approximately nine states hold partisan elections and the remaining nineteen hold nonpartisan elections.¹⁸ The numbers are similar, albeit somewhat lower, for state intermediate and supreme courts.¹⁹

The following Table and Charts illustrate for the reader the differing systems of judicial selection and retention and the rough percentage of each.²⁰

9.57% of justices in partisan and nonpartisan-elective states, respectively, who lost their bid for reelection). Still, a case-by-case inquiry is needed; a high-profile, heavily monied opposition to a specific case or cases could produce timidity even in the judge facing only a retention election. Moreover, as shown in Part II.C below, many judges behave differently even under retention elections.

16. My intent is to be noticeably brief in our discussion of judicial selection generally because so many others have invented and reinvented this wheel. “[I]t is fairly certain that no single subject has consumed as many pages in law reviews and law-related publications over the past fifty years as the subject of judicial selection.” Phillip L. Dubois, *Accountability, Independence, and the Selection of State Judges: The Role of Popular Judicial Elections*, 40 Sw. L.J. 31, 31 (1986). While the sentiment is sound, the article cites no support for this proportion. *Id.* (acknowledging that “surely no one has made a formal count”).

17. Bert Brandenburg & Roy A. Schotland, *Justice in Peril: The Endangered Balance Between Impartial Courts and Judicial Election Campaigns*, 21 GEO. J. LEGAL ETHICS 1229, 1230 (2008). For a thorough new work on the history of judicial elections in the United States, see Jed Handelsman Shugerman, *Economic Crisis and the Rise of Judicial Elections and Judicial Review*, 123 HARV. L. REV. 1061 (2010).

18. See Am. Bar Ass’n, Fact Sheet on Judicial Selection Methods in the States, http://www.abanet.org/leadership/fact_sheet.pdf (last visited Oct. 25, 2009); AM. JUDICATURE SOC’Y, JUDICIAL SELECTION IN THE STATES: APPELLATE AND GENERAL JURISDICTION COURTS (2009), available at <http://www.ajs.org/selection/docs/Judicial%20Selection%20Charts.pdf> (last visited Oct. 15, 2009); BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—2003, at 86 tbl.1.93 (2005), available at <http://www.albany.edu/sourcebook/pdf/t193.pdf> (last visited Oct. 23, 2009).

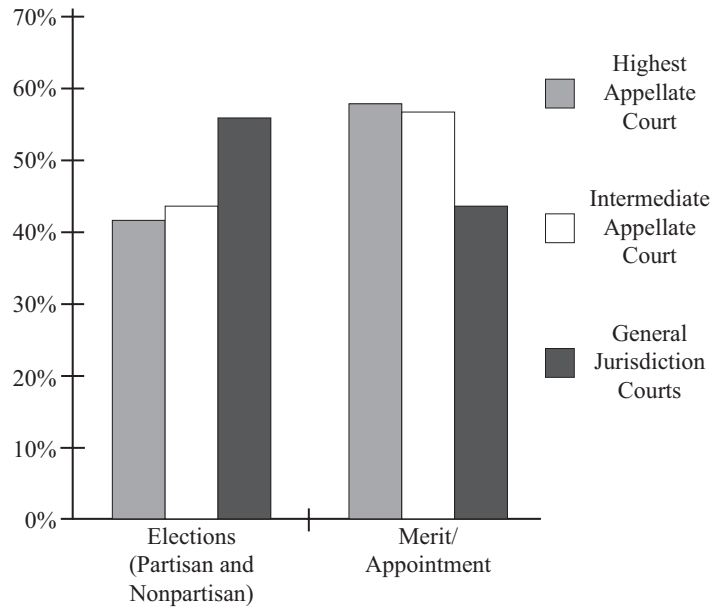
19. At the intermediate appellate court level, seventeen states select appellate justices through election. In particular, five or so states hold partisan elections while twelve states hold nonpartisan elections. At the state supreme court level, twenty-one states select their highest court justices by some elective method—six states hold partisan elections while fifteen hold nonpartisan elections. See Am. Bar Ass’n, *supra* note 18; AM. JUDICATURE SOC’Y, *supra* note 18; BUREAU OF JUSTICE STATISTICS, *supra* note 18, at 83–85 tbls.1.91–1.92, available at http://www.albany.edu/sourcebook/tost_1.html#1_ad (last visited Oct. 23, 2009).

20. These Tables and Chart offer a visual overview of judicial selection. These aids are necessarily simplified, which presents the risk of misleading the reader. As one

**Table 1:
Initial Selection in the States**

State Court Level	Partisan	Nonpartisan	Merit Selection/ Appointment
Highest Appellate Court	12% (6)	30% (15)	58% (29)
Intermediate Appellate Court	13% (5)	31% (12)	56% (22)
General Jurisdiction Court	18% (9)	38% (19)	44% (22)

**Chart 1:
Initial Selection in the States**

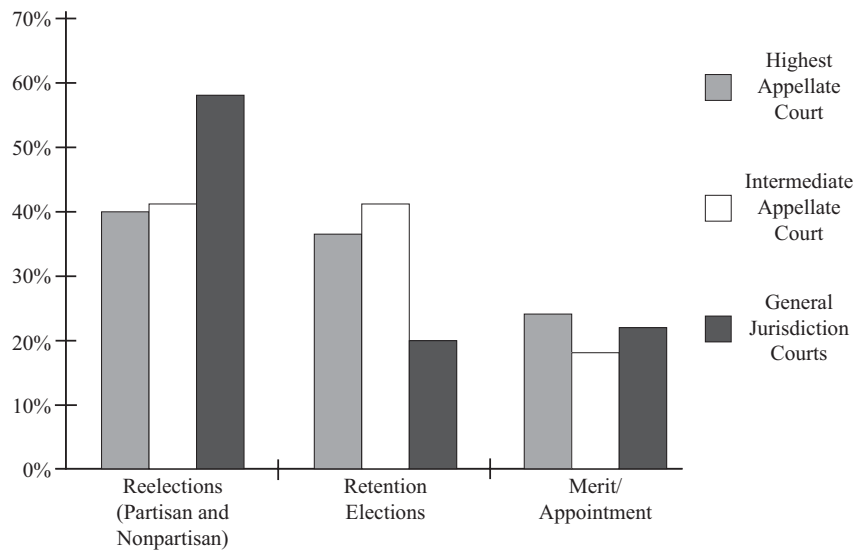


example of the simplification, the reader should note that there actually are “no less than sixteen different combinations of these types of [judicial] elections for different local jurisdictions and different levels of courts” in the United States. Brandenburg & Schotland, *supra* note 17, at 1232.

Table 2:
Retention Methods in the States

State Court Level	Reelections (Partisan and Nonpartisan)	Retention Elections	Merit Selection/ Appointment
Highest Appellate Court	40% (20)	36% (18)	24% (12)
Intermediate Appellate Court ²¹	41% (16)	41% (16)	18% (7)
General Jurisdiction Court	58% (29)	20% (10)	22% (11)

Chart 2:
Retention Methods in the States



As the foregoing Tables and Charts illustrate, elective systems are the norm, not the aberration, for state court judges. The problem then, if there is one, affects the

21. Approximately thirty-nine states have intermediate appellate courts. BUREAU OF JUSTICE STATISTICS, *supra* note 18, at 85 tbl.1.92, available at <http://www.albany.edu/sourcebook/pdf/t192.pdf> (last visited Oct. 23, 2009).

majority of American judges. From these elective breeding grounds come outspokenly tough-on-crime judges, to whom we now turn.²²

B. Tough-on-Crime Judges: The Nature of the Beasts

With a rough idea of the milieu from which most judges take and remain on the bench, we now turn to a description of tough-on-crime judges, their messages, and their motivations. To overuse an already tired metaphor, their three magic words, “tough on crime,” or the equivalent, operate as both a sword and a shield. By boasting “tough on crime,” the judicial candidate or incumbent shields himself from attacks for being soft on crime;²³ and by attacking challengers for being “soft on crime,” the candidate or incumbent takes the sword and inflicts a potentially fatal blow to the challenger. This dual-action political device is ever-present in elective systems.

Indeed, the tough-on-crime message, or some derivation thereof, is among the most, if not *the* most, prevalent in judicial campaigns. In one study of the 2000 judicial elections in four states, for instance, crime control or cracking down on criminals was the most frequent theme in televised campaign advertisements.²⁴ This theme exceeded even those of tort reform and family values, albeit by slim margins.²⁵ As is common in judicial campaigns generally, candidates also used law enforcement endorsements to signal their tough-on-crime *bona fides*.²⁶ In fact, save newspaper endorsements, no other endorsers besides law

22. Again, I am not implying that tough-on-crime judges breed and thrive only in elective systems. To the contrary, the tough-on-crime species of judge is present in virtually any system of judicial selection (save one that specifically and effectively screens out tough-on-crime judges). The point is that, in an elective system, judges who are tough on crime are incentivized to boast publicly that they are, in fact, “tough on crime,” and thereby gain (or avoid losing) votes from the supportive public and interest groups.

23. And, of course, the crest on the shield attracts tough-on-crime sympathizers.

24. See Anthony Champagne, *Television Ads in Judicial Elections*, 35 IND. L. REV. 669, 676–79, 687–89 (2002). *But see* JAMES SAMPLE ET AL., JUSTICE AT STAKE CAMPAIGN, THE NEW POLITICS OF JUDICIAL ELECTIONS 2006 at 10 (2007), available at <http://www.gavelgrab.org/wp-content/resources/NewPoliticsofJudicialElections2006.pdf> (noting that criminal justice issues in television advertisements placed third out of twelve coded categories; “traditional justice” and “conservative values” placed first and second, respectively). Of course, the frequency of advertising does not guarantee its usefulness to the voter. “Unfortunately, TV ads are as likely to educate voters about judicial qualifications as they are to provide nutritional information about french fries.” Brandenburg & Schotland, *supra* note 17, at 1241–42.

25. Champagne, *supra* note 24, at 678–79. Television advertising is lopsided as well: “in 2006, interest group advertising overwhelmingly favored pro-business, pro-Republican interests: 85 percent of special interest television advertisements were sponsored by groups on the political right.” SAMPLE ET AL., *supra* note 24, at 1, 7–8.

26. See, e.g., *In re Kinsey*, 842 So. 2d 77, 88–89 & n.8 (Fla. 2003) (sanctioning judge in part for use of police endorsements); see generally Rebecca Mae Salokar, *Endorsements in Judicial Campaigns: The Ethics of Messaging*, 28 JUST. SYS. J. 342 *passim* (2007) (discussing the use of endorsements generally and law enforcement endorsements particularly); Ariz. Supreme Court Judicial Ethics Advisory Comm., Formal Op. 96-12 (1996) (warning that the judicial “candidate must not employ endorsements which portray the judge as a ‘law enforcement’ candidate”).

enforcement were even mentioned in the campaign advertisements.²⁷ Unsurprisingly, the study concludes by noting that “[i]n the sample of television ads examined for this Paper, judicial candidates battled to outdo one another in their tough-on-crime attitudes and their support for and by law enforcement.”²⁸

Coming from someone who has faced (and won) two judicial elections at the highest state level, Oregon Supreme Court Justice Hans Linde’s anecdotal words on the subject are worth reading:

[C]rime and punishment, guilt and retribution, remain the paradigm of the judicial morality play [in campaigns].

The effect on elective courts is profound when it is not ludicrous. Every judge’s campaign slogan, in advertisements and on billboards, is some variation of ‘tough on crime.’ The liberal candidate is the one who advertises: ‘[T]ough but fair.’ Television campaigns have featured judges in their robes slamming shut a prison cell door. One is said to have been a probate judge, and he was overwhelmingly re-elected.²⁹

To say something is prevalent, however, does not give the reader much of an idea of the beast’s nature beyond its frequency. Therefore, some representative examples of tough-on-crime judges in action follow. Of note, with one exception, these examples omit those judges who do not believe or declare themselves to be “tough on crime,” even if an interest group has independently declared them to be.³⁰

1. Tough-on-Crime Boasts

With a few exceptions, the following pro-prosecution pledges are straight from the horses’ mouths:

- “I’m a prosecution-oriented person,” which means “seeing legal issues from the perspective of the state instead of the

27. Champagne, *supra* note 24, at 677 n.44 (“Endorsements by police, state trooper or sheriffs’ organizations are frequently mentioned in ads.”).

28. *Id.* at 684. Candidates also publicly spar against each other over who is softer on crime. *See, e.g., id.* at 681–82 (discussing attack and rebuttal advertisements).

29. Linde, *supra* note 4, at 2000.

30. Of course, the judge’s exclusion from the analysis rests heavily on whether the interest group(s) that advertised her as “tough on crime” actually acted independently, or instead, whether the judge or her campaign committee encouraged the advertisement. Pointing fingers at one’s campaign committee, for example, does not work. MODEL CODE OF JUDICIAL CONDUCT R. 4.2(A)(3) (2007) (stating judges must “review and approve the content of all campaign statements and materials produced by the candidate or his or her campaign committee . . . before their dissemination”); *see also id.* R. 4.2(A)(4) (stating that judges must take reasonable measures to ensure that those acting on their behalf do not violate the Canons).

perspective of the defense.”³¹ —Sharon Keller, Texas Court of Criminal Appeals

- “Some complain that he’s too tough on criminals, AND HE IS We need him now more than ever.”³² —Mike McCormick, Jefferson Circuit Court (Alabama)
- I “will go to bat for” police officers, and “I will always have the heart of a prosecutor.”³³ —Matthew McMillan, County Judge in Manatee County (Florida)
- I will “stop suspending sentences” and “stop putting criminals on probation.”³⁴ —William Haan, Tippecanoe County Court (Indiana)
- I “will be a tough Judge that supports the death penalty and isn’t afraid to use it,” and I “favor[] the death penalty for convicted murderers.”³⁵ —Elizabeth Burick, Stark County Common Pleas Court (Ohio)

31. Jennifer Lenhart, *Texas Court of Criminal Appeals*, HOUSTON CHRON., Oct. 30, 1994, at 16; Bruce Nichols, *Allegations Stir Up Appeals Court Races*, DALLAS MORNING NEWS, Oct. 9, 1994, at 45A.

32. Bright & Keenan, *supra* note 5, at 823 (citing Comm. to Re-elect Judge Mike McCormick, Birmingham News, Nov. 4, 1994, at 4C (advertisement); Comm. to Re-elect Judge Mike McCormick, Birmingham News, Nov. 6, 1994, at 21P (advertisement)).

33. *In re McMillan*, 797 So. 2d 560, 566–67 (Fla. 2001) (removing judge for these campaign remarks, among other misconduct). Occasionally, candidates will be more indirect in sending the same, or nearly the same, message. Consider the following testimonials as examples:

Over 5000 police and sheriffs statewide who are members of the Washington Council of Police and Sheriffs along with numerous other law enforcement agencies including the Spokane Police Guild have endorsed Judge Walker because she has done an excellent job for our community, first as a prosecutor, then as a commissioner and now as a judge. Vote for Patti on November 7th to keep her working hard for our children and families.

Sgt. Chuck Reisenauer, Vice President WACOPS President, Spokane Police Guild.

Judge Patti Walker is an asset to our community. She is a GU Law School grad, a former Spokane Prosecutor who has demonstrated she is tough on crime, and is the right choice for the Spokane business community. The choice for Spokane is easy – vote for Judge Walker!

Jack Heath, President & CEO Washington Trust Bank. Judge Patti Walker Re-election Campaign, Campaign Website, <http://judgepattwalker.com/press.html> (emphasis in original).

34. *In re Haan*, 676 N.E.2d 740, 741 (Ind. 1997) (reprimanding judge for these campaign statements and noting that “[a] judge has a duty to consider requests for probation or suspension of sentences in accordance with the law and in light of any mitigating circumstances or evidence submitted in individual cases”).

35. *In re Burick*, 705 N.E.2d 422, 425–26 (Ohio Comm’n of Judges 1999) (reprimanding and fining judge for these statements, which appeared in both written and televised advertisements; noting also that the “statements imply to a reasonable person that she will use the death penalty in a capital case regardless of the evidence produced during

- “I’m very tough on crimes where there are victims who have been physically harmed. In such cases I do not believe in leniency. I have no feelings for the criminal. All my feelings lie with the victim.”³⁶ —Tom Price, Texas Court of Criminal Appeals
- [Dialogue from televised advertisement:] “Dangerous sex offenders. Law enforcement puts them behind bars. And [Chief Justice] Shirley Abrahamson wrote the decision to keep them there—for life. Two strikes and you’re out. It’s Wisconsin law. And it’s the support Wisconsin law enforcement needs. ‘Chief, she’s law enforcement’s ally.’ And why police chiefs, sheriffs, district attorneys and cops on the beat all support Abrahamson. ‘She’s protecting Wisconsin families.’ Shirley Abrahamson. She’s Wisconsin’s Chief.”³⁷ —Shirley Abrahamson, Wisconsin Supreme Court
- “Sent more criminals—rapists, murderers, felons—to prison than any other judge in Contra Costa County history.”³⁸

the mitigation phase of trial and notwithstanding the statutory standards a judge or jury must consider in determining the appropriateness of the death penalty”).

36. Brief of National Ass’n of Criminal Defense Lawyers as Amicus Curiae in Support of Petitioners at 6–7, *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009) (No. 08-22), 2009 WL 27299 (citing Clay Robison, Editorial, *Judge’s Politics an Exception to Rulings*, HOUSTON CHRON., Feb. 4, 2001, at 2).

37. CHIEF JUSTICE ABRAHAMSON RE-ELECTION COMM., CAMPAIGN COMMERCIAL FOR RE-ELECTION, <http://vimeo.com/3932652>. While the commercial voiceover is speaking, the television audience is shown the following captions throughout the commercial: “Endorsed by 147 Police Chiefs and Sheriffs; Endorsed by 40 District Attorneys; [and] Endorsed by 14,000 Officers.” *Id.*; see also Chief Justice Abrahamson Re-election Comm., <http://www.abrahamson2009.com/index.php/endorsements> (last visited Dec. 1, 2009) (listing the following law enforcement endorsements on her campaign website: 6 law enforcement organizations, 35 county sheriffs, 41 district attorneys, and 115 police chiefs). Interestingly, Abrahamson had previously been attacked for being soft on crime. See, e.g., Steven Walters, *Supreme Court Campaigns Fight over Her Judicial Endorsements*, JSONLINE, Mar. 14, 2009, available at <http://www.jsonline.com/blogs/news/41236042.html> (noting that Randy Koschnick’s campaign for the Wisconsin Supreme Court asserted that sheriffs support Koschnick over Abrahamson in view of her “anti-law enforcement decisions that have made their jobs more difficult”); Jeannine Bell, *The Politics of Crime and the Threat to Judicial Independence*, in JUSTICE IN JEOPARDY: REPORT OF THE AMERICAN BAR ASSOCIATION COMMISSION ON THE 21ST CENTURY JUDICIARY 1 APP. F, 7 (2003) (noting that in 1999, Abrahamson faced reelection opposition using a decision in which she struck down a sex-predator law as unconstitutional; and according to the attack, if she were reelected, citizens would not have protection against sex predators).

38. Brandenburg & Schotland, *supra* note 17, at 1236 n.27 (noting that the “nastier and noisier” judicial campaign advertisements have roots going as far back as the 1980s).

- “Over 90% Convicted Criminals Sentenced Prison Commitment Rate is More Than Twice the State Average.”³⁹

2. *Soft on Crime Attacks*

As suggested briefly above and exhaustingly below, a tough-on-crime pledge earns substantial political capital, but a soft-on-crime attack can inflict an approximately equal amount of political damage:

- Justice “Butler found a loophole. [The criminal defendant] went on to molest another child.”⁴⁰ —Michael Gableman, Wisconsin Supreme Court
- Justice Lloyd Karmeier of the Illinois Supreme Court was “lenient” because he “gave probation to kidnappers who tortured and nearly beat a 92-year-old grandmother to death.”⁴¹ —Democrat Gordon Maag, Illinois Supreme Court Candidate and/or His Supporters
- “[V]ote against Robertson because he’s opposed to the death penalty and he wants to let them all go.”⁴² —James L. Roberts, Jr., Mississippi Supreme Court

The above messages—“me tough-on-crime, you soft-on-crime”—give us a representative idea of tough-on-crime judges’ pledges to the voters as well as a passing glimpse into their underlying judicial philosophies.

39. *Id.*

40. Patrick Marley, *Gableman Decides to Stay on Criminal Case*, MILWAUKEE J. SENTINEL, Sept. 25, 2009, <http://www.jsonline.com/blogs/news/61507307.html>; *see also* Debra Cassens Weiss, A.B.A. J., *Wisconsin Justice Dubbed ‘Loophole Louis’ in TV Ads*, Mar. 24, 2008, http://abajournal.com/news/Wisconsin_Justice_dubbed_loophole_louis_in_tv_ads (Judge Michael Gableman ran television ads that labeled his opponent Justice Louis Butler “‘Loophole Louis’ for rulings favoring defendants in criminal cases.”).

41. Brandenburg & Schotland, *supra* note 17, at 1242 (noting further that this 2004 Illinois advertisement was purchased by a political action committee, a trial lawyer and labor group). Justice Karmeier, however, did not have clean hands either. *See, e.g.*, Deborah Goldberg, James Sample & David E. Pozen, *The Best Defense: Why Elected Courts Should Lead Recusal Reform*, 46 WASHBURN L.J. 503, 510 (2007) (noting the tough-on-crime rhetoric of both Karmeier and Maag in the race). Of note as well, Justice Karmeier failed to recuse himself from the infamous case of *Avery v. State Farm Mutual Automobile Insurance Co.*, 835 N.E.2d 801 (Ill. 2005), despite having received over \$350,000 in contributions from State Farm employees and other related individuals. He then cast his vote in State Farm’s favor. *See, e.g.*, David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265, 302–03 (2008) (describing this spectacle further).

42. Bell, *supra* note 37, at 5 (“Justice James Robertson of the Mississippi Supreme Court lost his seat in 1992 after a challenger spotlighted an opinion the judge wrote in which he stated that the Constitution did not allow the death penalty for rape when the victim survived the attack.”).

3. *Tough-on-Crime Messaging*

Having reviewed a sampling of actual tough-on-crime pledges, we ought to delve deeper into the actual message behind tough-on-crime and like pledges. As has many a Supreme Court justice in deciding important legal issues, let us first pull and poll the dictionaries.⁴³

According to the dictionaries and the common usage of the terms, the meaning is rather clear: “tough” means “characterized by severity or uncompromising determination, [as in] tough laws [or] tough discipline.”⁴⁴ And “crime” encompasses either or both particular crimes and/or criminals as a class (i.e., those who commit crime).⁴⁵ In other words, then, the tough-on-crime judge is any or all of the following: (i) “severe or uncompromising on shoplifting,” (ii) “severe or uncompromising on shoplifters,” and/or (iii) “severe or uncompromising on all criminals.” To echo Justice Stevens again, “Expressions that stress a candidate’s unbroken record of affirming convictions for rape, for example, imply a bias in favor of a particular litigant (the prosecutor) and against a class of litigants (defendants in rape cases).”⁴⁶ These interpretations of the tough-on-crime message are essentially undisputed; there are no known counter-interpretations.

With these interpretations in mind, imagine—and for this imagination to feign reality it might take a world in which the power structures are drastically shifted—that the judge is running “tough on capitalism.” She might as well be “tough on free-market transactions,” “tough on traders,” and/or “tough on for-profit entities.” Putting aside the positively odd ring to these boasts, we can agree, objectively, that a for-profit corporation or other capitalist ne’er-do-well should not have to suffer through that judge: the judge’s impartiality toward them has been put in question by the judge herself.⁴⁷ Yet, on an ad hominem level at least, this “tough-on-corporate” judge is somewhat less biased than the tough-on-crime

43. See, e.g., *Gross v. FBL Fin. Servs., Inc.*, 129 S. Ct. 2343, 2350 (2009) (turning to three dictionaries to define “because of”).

44. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 2416 (Merriam-Webster Inc., 2002).

45. See also *id.* at 536 (defining crime as the “commission of an act that is forbidden . . . and that makes the offender liable to punishment by that law”); BLACK’S LAW DICTIONARY 399 (8th ed. 2004) (defining crime as “[a]n act that the law makes punishable; the breach of a legal duty treated as the subject matter of a criminal proceeding”); see generally Charles Gardner Geyh, *Why Judicial Elections Stink*, 64 OHIO ST. L.J. 43, 65 (2003) (“[W]henver a judicial candidate takes a categorical position on an issue that concerns a class of would-be parties (be it gays, fundamentalist Christians, women, environmentalists, white collar defendants, immigrants), that position can reflect, or be perceived as reflecting, the candidate’s underlying biases vis-à-vis members of that class. Indeed, judicial candidates on the stump will rarely, if ever, have occasion to make statements that exhibit bias toward particular parties independent of the issues those parties are likely to litigate.”).

46. *Republican Party of Minn. v. White*, 536 U.S. 765, 800–01 (2002) (Stevens, J., dissenting).

47. See *infra* Part II.B (discussing universal standards for recusal/disqualification).

judge. Corporations, as we are reminded frequently in judicial opinions, are a “legal fiction” with a “separate existence.” Crime lacks the same Alice-in-Wonderland quality. Crime is committed by live people, and these people are targeted by a judge’s tough-on-crime campaign.⁴⁸

And such targeted attacks, again, appear facially biased. To take a similar example, we could have the judge who was “tough on retirees” or “tough on parents.”⁴⁹ It likewise would not be beyond the pale for retirees or parents to deserve a disqualification remedy whenever their cases were assigned to the “tough-on-them” judge. Their deservingness would not be appreciably less if the judge’s chosen slogan instead had been “tough on retirement” or “tough on parenting.”⁵⁰ That is, focusing on an activity (e.g., parenting) rather than the people who necessarily engage in that activity is only a thin semantic shift, not a dilution of the bias. It is simply fantasy to maintain that the shift from “tough on criminal defendants” to “tough on crime” is anything less biased than these absurd twists.⁵¹

One obvious counterargument is that, unlike the classes of retirees or parents, “criminals” are in a class (*i*) punishable by law and (*ii*) scorned by a majority of citizens. While this two-pronged argument appears attractive, it risks misleading its converts. The first prong is a wash: for all three classes (retirees, parents, criminals), we must assume a legal violation (or a dispute regarding it) before judges may adjudicate against members of the class. For the retiree, for example, the violation could be something related to his class, such as receipt of Social Security overpayments, but it could be anything else, such as breach of contract. The second prong is also unavailing and perhaps even more so: that the majority scorns the behavior is more reason for an impartial judge, not less. True, the citizens have channeled that scorn into the criminal law, but this reasoning simply folds back into the first prong. Moreover, the criminal law often leaves

48. It is true that a very small subset of crime is technically committed by corporations. *See, e.g.,* Arthur Andersen LLP v. United States, 544 U.S. 696 (2005) (overturning corporation’s conviction on the basis of an erroneous jury instruction). It is indisputable, however, that not only do live people actually commit the acts for which corporations are held criminally liable, but more importantly for present purposes, the vast majority of criminal cases involve individual offenses. Moreover, when a judge “targets” these individuals, he does not merely inflict state action against the named criminal defendant but also (albeit less directly) against that defendant’s family, friends, and community.

49. Criminals as a class, of course, have a notoriously weak lobby, but there is nothing stopping a more courageous (and perhaps less rational) judge from targeting a more powerful class, such as retirees or parents.

50. These slogans might have more narrow interpretations than crime generally, and if so, the protected class of litigants is consequently narrower.

51. One is reminded of Abraham Lincoln’s famous retort: “If you call a tail a leg, how many legs has a dog? Five? No, calling a tail a leg does not make it a leg.” Lincoln may have actually been referring to a calf, not a dog, but the enduring point is that the fundamental qualities of anything (there, a dog; here, the common meaning of a phrase) do not change by the mere switch of a label. Anecdotally, some judges seem to engage in a similarly flimsy trick by pledging “tough on crime,” not “tough on criminals.”

judges considerable discretion in determining the amount of punishment—leaving more room for damage by biased adjudicators.⁵²

If anything, touting a crime-avenging stance might have more sinister implications than the above twists involving seemingly innocuous groups. For instance, in light of (among other events) “the epidemic of crack cocaine[,] gun violence[, and] youth homicides[,]” along with the “media coverage that disproportionately put[s] a black face on young criminals and reinforced the white public’s fear and racial animus,” “conservative *politicians . . . used crime as a code word to make racial appeals for electoral advantage with pledges to get tough.*”⁵³ This troubling meaning—namely, that removing “crime” partially means removing minorities—has plausibility.⁵⁴ We need not pursue the troubling meaning further here, however, because—even assuming that tough-on-crime judges are *not* using “crime as a code word to make racial appeals for electoral advantage”—such judges should still recuse themselves, for the reasons given later.⁵⁵

Following this examination of tough-on-crime judges’ pledges and the meaning behind those pledges, let us examine why these judges choose (or are forced) to send these messages.

4. *Motivating Tough-on-Crime Messaging*

In the main, elective judges are not boasting that they are “tough on crime” for the sake of boasting or principle. They are likely doing so because they assume voters want to hear it. This Section first corroborates the assumption that voters want to hear the tough-on-crime message, and second, offers a few reasons why the public covets this message.

With respect to popular opinion, the public-opinion data show that a supermajority of Americans believe that courts do not treat criminals harshly enough.⁵⁶ “In short, more than four of five of all voting respondents indicated the

52. The “damage” can come in several forms. First, there can be damage to the reputation of the judicial system by perpetuating the negative thought that a defendant, or certain defendants, cannot get a fair trial. Second, damage can be done to the criminal defendant because he has to face time in custody that may not be warranted. Third and finally, but not exhaustively, there can be damage done to the taxpayer for having to fund the defendant’s extra time in custody (whether held pending trial or sentenced to jail or prison).

53. Barry C. Feld, *The Politics of Race and Juvenile Justice: The “Due Process Revolution” and the Conservative Reaction*, 20 JUST. Q. 765, 777–78 (2003) (internal citations omitted) (emphasis added).

54. See, e.g., *id.*; Susan Saab Fortney, *Law Student Admissions and Ethics—Rethinking Character and Fitness Inquiries*, 45 S. TEX. L. REV. 983, 991 (2004) (citing studies).

55. See *infra* Part II (listing several reasons why tough-on-crime judges should recuse themselves).

56. DANIEL R. PINELLO, *THE IMPACT OF JUDICIAL-SELECTION METHOD ON STATE-SUPREME-COURT POLICY: INNOVATION, REACTION, AND ATROPHY* 100 n.3 (1995) (citing the General Social Surveys of the National Opinion Research Center).

criminal courts were too lenient with defendants.”⁵⁷ The concern is international: “Surveys in Canada[,] the United States[,] Australia[,] Great Britain[,] and elsewhere . . . reveal that most people view sentences as being too lenient.”⁵⁸ Conversely, “virtually no one thinks that the courts are too harsh.”⁵⁹ Thus, voters overwhelmingly desire courts to get “tough on crime,” and pledges to be “tough on crime” (and tough-on-crime adjudications) are designed to channel that desire into votes.

But *why* voters crave this toughness has a more complex answer.⁶⁰ One quick explanation, or at least a scapegoat, for the cause of this popular dissatisfaction with criminal justice policy is the media. Recently, for example, “the nature of and content of media coverage have reinforced conservative interpretations of crime, put a black face on it, and intensified popular support for punitiveness.”⁶¹ Moreover:

[M]edia coverage has systematically distorted reality by disproportionately overreporting violent crime and by overemphasizing the role of minority perpetrators in committing violent crimes and thereby has affected public perceptions, [and this] overemphasis on violence and race . . . amplifies, rather than challenges, politicians’ claims about the need for harsher policies toward criminals.⁶²

More troubling on our particular level, “[t]he media’s coverage of the administration of criminal justice typically emphasizes failures of the system—defendants who are freed on ‘legal technicalities’ by lenient judges—and

57. *Id.* When asked whether local courts dealt too harshly or not harshly enough with criminals, most respondents believed that courts did not deal harshly enough with criminals. Indeed, from 1985 to 2002, that belief has been held by 84% and 67% of respondents, respectively. BUREAU OF JUSTICE STATISTICS, *supra* note 18; U.S. DEP’T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS – 2003 at 140-41 tbl.2.47, available at <http://www.albany.edu/sourcebook/pdf/t247.pdf> (last visited Oct. 12, 2009). The numbers held at over 80% through 1994 but have dropped significantly in more recent surveys. *Id.*

58. Julian V. Roberts & Anthony N. Doob, *News Media Influences on Public Views of Sentencing*, 14 L. & HUM. BEHAV. 451, 454 (1990). “It is highly likely that this ubiquitous perception of judicial leniency is derived from incomplete news media coverage of sentencing hearings.” *Id.*

59. Mark Warr, *Poll Trends: Public Opinion on Crime and Punishment*, 59 PUB. OP. Q. 296, 300 (1995).

60. I do not intend the following discussion of media, political, and other effects to be exhaustive of the causes for the popular dissatisfaction with courts’ criminal justice policy. Once we have established the public’s craving, which we have, the reasons for this craving are certainly of interest, but not of essence, to the topic at hand.

61. Feld, *supra* note 53, at 783.

62. *Id.* For example, “[d]uring the 1990s, violent crime decreased 20% while news coverage increased 83%, and homicides declined by one third while network news coverage increased 473%.” *Id.* at 784 (citing LORI DORFMAN & VINCENT SCHIRALDI, OFF BALANCE: YOUTH, RACE AND CRIME IN THE NEWS 6 (2001), available at <http://www.buildingblocksfor youth.org/media/mediaexec.pdf>).

then advocates for more severe punishment as the remedy.”⁶³ Finally, “the framing of crime issues in judicial campaigns and elsewhere probably elevate[s] public support for the [death penalty] independent of levels of violent crime.”⁶⁴

One article recently synthesized this confluence of problematic inputs on the public’s perception:

All three media effects [namely, agenda-setting, priming, and framing of crime] work together especially strongly in news coverage of violent crime. The media cover violent crime more than any other kind of crime, despite the fact that most crimes are nonviolent. This sets the agenda, presenting violent crime to the public as an extremely pressing issue. . . . The availability heuristic ensures that people are likely to make those judgments based on what they remember [i.e., the violent crime stories] rather than on accurate data. . . . [Furthermore,] coverage of violence is more often framed as episodic (event-focused) rather than thematic (context-oriented). These episodic frames leave viewers with the belief that violent crime is caused by individuals rather than social circumstances, which primes voters to judge politicians by how severely they punish individual criminals rather than by how tirelessly they work to ameliorate the social causes of crime.⁶⁵

The public is indeed primed. One dean and professor lamented what has been called the “Willie Horton Syndrome,” under which “political leaders with ambitions for higher office become so obsessed with maintaining a ‘tough on crime’ image they measure every decision in terms of the media labels that might be hung around their necks.”⁶⁶ He went on to note that we have created a political climate in which “real reform is impossible”—such as attacking the rising cost and population of our prisons—“because political leaders are obsessed with the fear that any rational consideration of alternatives will result in their being labeled ‘soft on crime.’”⁶⁷

The public has eaten all of this (dubious) information with an insatiable appetite. For example, “each year there is nearly unanimous agreement that crime is increasing in this country.”⁶⁸ This is remarkable in part because criminal levels

63. *Id.* at 785 (citing J.G. MILLER, SEARCH AND DESTROY: AFRICAN-AMERICAN MALES IN THE CRIMINAL JUSTICE SYSTEM (1996); Julian V. Roberts, *Public Opinion, Crime, and Criminal Justice*, 16 CRIME & JUST.: REV. RES. 99–164 (1992)).

64. Paul Brace & Brent D. Boyea, *State Public Opinion, The Death Penalty, and the Practice of Electing Judges*, 52 AM. J. POL. SCI. 360, 370 (2008) (citing Eric P. Baumer et al., *Explaining Spatial Variation in Support for Capital Punishment: A Multilevel Analysis*, 108 AM. J. SOC. 844, 866 (2003)).

65. Joanna Cohn Weiss, Note, *Tough on Crime: How Campaigns for State Judiciary Violate Criminal Defendants’ Due Process Rights*, 81 N.Y.U. L. REV. 1101, 1117 (2006). The article commendably identifies and explains these media effects on the public’s perception of crime and judges. *See id.* at 1114–17.

66. Gerald F. Uelmen, *Victims’ Rights in California*, 8 ST. JOHN’S J. LEGAL COMMENT. 197, 203 (1992).

67. *Id.* at 199.

68. Warr, *supra* note 59, at 298.

actually *decreased* over those same years.⁶⁹ “[W]hatever the cause [e.g., increased media coverage of crime], the data suggest that an unprecedented public reassessment of the crime problem occurred, and four national surveys taken in . . . 1994 . . . all show that crime continued to lead the list of perceived problems in the United States.”⁷⁰

Therefore, the public has been trained to want—even to believe in a need for—tough-on-crime judges (among other public officials). Of course, what the public wants and what elective judges are willing to deliver could be different, at least in theory. This potential divergence, however, is merely theoretical. For the reasons that follow, judges deliver tough-on-crime messages to gain, or avoid losing, office. For proof, we can directly ask the judges themselves. Assuming judges are telling the truth—and speaking representatively of other judges—their responses speak volumes:

[O]ne recent study of Florida judges by the League of Women Voters found that close to 95 percent of the judges surveyed indicated they are conscious of the consequences that will follow from an unpopular ruling; a quarter of the respondents said this happens frequently. Though the judges denied that being aware of the consequences affects their ruling, the vast majority, some 83 percent, indicated that they believed that their colleagues were affected by the consequences. As a reason for their concerns, judges in the survey cited recent attacks on courts and the likelihood that they would not be re-elected.⁷¹

And the judges’ fears have been corroborated through numerous high-profile instances in which judges were ousted from office, or nearly so, for being “soft on crime.”⁷² The converse is true as well: “In the many examinations that I have done, I have not seen a single example of [a judge being ousted for being too vigorous in enforcing the death penalty] anywhere in the country.”⁷³ Politically, then, punishment runs only one way—up. The judges have gotten this message: some run with the message and give the voters what they want, while others get the message through political consequences.⁷⁴

69. *Id.* at 299 (“Perhaps this attitude reflects a common tendency on the part of the public to romanticize the past.”).

70. *Id.* at 300.

71. Bell, *supra* note 37, at 14 (citing Amy K. Brown, *Judges Say Politics Are Interfering with Independence*, 28 FLA. B. NEWS, Oct. 15, 2001, at I) (footnotes omitted); see also Joseph Grodin, *Judicial Elections: The California Experience*, 70 JUDICATURE 365, 368 (1987) (noting that former California Supreme Court Justice Otto Kaus candidly revealed uncertainty as to whether campaign pressures affected his vote in a controversial case).

72. Bell, *supra* note 37, at 2–9 (describing several high-profile instances).

73. *Breaking the Most Vulnerable Branch: Do Rising Threats to Judicial Independence Preclude Due Process in Capital Cases?*, 31 COLUM. HUM. RTS. L. REV. 123, 156 (1999) (statements of Stephen B. Bright).

74. The following sources provide further anecdotal evidence of the political consequences of being something other than tough on crime. See, e.g., *In re Troy*, 306 N.E.2d 203, 217 (Mass. 1973):

In sum, the electoral pressures—and the pledges kept—produce a vicious cycle for judges: gaining office through tough-on-crime promises, issuing tough-on-crime rulings between elections, and then touting those tough-on-crime rulings in gaining reelection.⁷⁵ These are the ways of the tough-on-crime judge. Our goal, however, is not merely to describe her and her campaign cycle; it is to question how, if at all, she may sit on criminal cases in light of *Caperton*, codes of judicial conduct, contextual temptations (some of which we have already noted), and more general legal and ethical norms. With few exceptions, all of these analytical roads appear to lead straight to mandatory disqualification from criminal cases.

II. THE ROME OF DISQUALIFICATION: ALL ROADS LEAD TO THE SAME PLACE

This Part takes us through a multi-perspective analysis of tough-on-crime judges and disqualification. We begin with those instances in which the Due Process Clause requires disqualification because due process supplies the “floor” for our legal analysis. This floor establishes the minimum standard, below which disqualification is constitutionally mandated.⁷⁶ I then build on this floor for the remainder of Part II.⁷⁷

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 the court, it is possible that he would henceforth treat some accuseds with undue harshness and severity.

Id. Brandenburg & Schotland, *supra* note 17, at 1247 n.80 (“Examples that are deeply disturbing but no surprise are three recent efforts to impeach trial judges: two because of sentencing decisions (in Ohio and Vermont in 2006) and one because of a bail ruling (in New Jersey in 2007).”).

75. For one closing example, “[Nevada Supreme Court] Justice Young ran campaign advertisements proclaiming that he had a ‘record of fighting crime’ which included voting to uphold the death penalty seventy-six times.” Stephen B. Bright, *Judicial Review and Judicial Independence: Can Judicial Independence Be Attained in the South? Overcoming History, Elections, and Misperceptions About the Role of the Judiciary*, 14 GA. ST. U. L. REV. 817, 849 (1998). Unsurprisingly, a capital defendant subsequently moved to disqualify Justice Young, but the Nevada Supreme Court surprisingly denied the motion. In a noted dissent, Justice Springer responded in disbelief:

“Tough on crime” claims made by judges in election campaigns are so common in Nevada as to go almost unnoticed. Our judicial discipline authorities customarily ignore this kind of judicial misconduct once the judge becomes elected or reelected. It goes beyond “tough on crime” for a judge to claim that he is a “crime fighter,” especially when, on top of this, the judge identifies his principal election supporter as being the State’s attorney general. Judges are supposed to be judging crime not fighting it.

Nevius v. Warden, 944 P.2d 858, 860 (Nev. 1997) (Springer, J., dissenting).

76. *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2267 (2009) (“The Due Process Clause demarks only the outer boundaries of judicial disqualifications. Congress

A. Due Process Disqualification: Caperton and Company

[T]his new United States Supreme Court opinion has radically altered the landscape of judicial disqualification⁷⁸

*Caperton*⁷⁹ is the capstone of due process disqualification. Before it, there were essentially only two strands of due process disqualification, neither of which was comfortably applicable to our topic. The first strand was financial interest disqualification; and the second was factual interest disqualification.⁸⁰ The second strand has almost nothing to do with our topic.⁸¹

The first strand, however, had two cases connecting, albeit imperfectly, to our topic: (1) *Ward v. Village of Monroeville*,⁸² which held that a dual mayor-judge arrangement violated due process because as judge he imposed fines upon conviction that partially funded the town's general fisc, and as mayor, his interest in the town's finances gave him a "possible temptation" to convict;⁸³ and (2) *Aetna Life Insurance Co. v. Lavoie*,⁸⁴ which held that a state supreme court justice's failure to recuse himself violated due process because his opinion "had the clear

and the states, of course, remain free to impose more rigorous standards for judicial disqualification than those we find mandated here today." (quoting *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 828 (1986)).

77. As a bare synopsis of Part II, while all judges—across all judicial selection and retention systems—are analyzed, there is special cause to be suspicious of judges in elective systems. This is because in the latter, there is the added (*i*) risk—and attendant appearance—of favoritism to campaign supporters and (*ii*) fear of either losing them or arousing angry interest groups for not being tough on crime (which in turn might publicize purportedly soft-on-crime rulings). When I eventually couple these concerns with criminal recidivism and empirical data that suggest elective judges are more punitive and particularly so in election years, there is a perfect storm for recusal. In these circumstances, recusal screams out under both the Constitution and certainly the Canons. Finally (see I.I.E. *infra*), recusal is the right thing to do.

78. *U.S. Fid. Ins. & Guar. Co. v. Mich. Catastrophic Claims Ass'n*, 773 N.W.2d 243, 253 (Mich. 2009) (Young, J., dissenting) (order denying motion for disqualification).

79. *Caperton*, 129 S. Ct. 2252.

80. With respect to the second strand, see for example *In re Murchison*, 349 U.S. 133, 137 (1955) ("Having been a part of [the one-man grand jury] process a judge cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of those accused.").

81. That said, some quotable (albeit general) propositions were articulated in this strand, such as "no [judge] is permitted to try cases where he has an interest in the outcome." *Id.* at 136.

82. 409 U.S. 57 (1972).

83. *Id.* at 60.

Plainly that "possible temptation" may . . . exist when the mayor's executive responsibilities for village finances may make him partisan to maintain the high level of contribution from the mayor's court. This, too, is a 'situation in which an official perforce occupies two practically and seriously inconsistent positions, one partisan and the other judicial, (and) necessarily involves a lack of due process of law in the trial of defendants charged with crimes before him.

Id. (quoting *Tumey v. Ohio*, 273 U.S. 510, 534 (1927)).

84. 475 U.S. 813 (1986).

and immediate effect of enhancing both the legal status and the settlement value of his own [pending] case.”⁸⁵ With these two bright exceptions aside, due process disqualification had become dormant—frozen under the questionable leadership of judges charged with enforcing it against themselves.⁸⁶

Then along came *Caperton*, a case in which “bad” facts finally made some good law.⁸⁷

1. *The Caperton Case*

For background work,⁸⁸ we need not cover much more than petitioner’s question presented, which puts the issue bluntly:

[Acting Chief] Justice Brent Benjamin of the Supreme Court of Appeals of West Virginia refused to recuse himself from the appeal of the \$50 million jury verdict in this case, even though [Don Blankenship,] the CEO of the lead defendant[,] spent \$3 million

85. *Id.* at 824.

86. See generally Monroe H. Freedman, *Judicial Impartiality in the Supreme Court—The Troubling Case of Justice Stephen Breyer*, 30 OKLA. CITY U. L. REV. 513 (2005) (discussing instances in which Justices Breyer and Scalia egregiously failed to recuse themselves).

87. I thus reach the exact opposite conclusion of Chief Justice Roberts, who claimed that the majority’s opinion exemplified the “legal aphorism: ‘[h]ard cases make bad law.’” *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2272 (2009) (Roberts, C.J., dissenting). His conclusion is surprising: “Few situations more severely threaten trust in the judicial process than the perception that a litigant never had a chance because the decisionmaker may have owed the other side special favors.” Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 483 (1986).

88. As one might expect of such an important decision, *Caperton* has generated much discussion. Indeed, after the first drafts of this Article had been completed, the Harvard and Syracuse Law Reviews each published *Caperton*-dedicated symposia. Thus, for further background and discussion regarding the *Caperton* decision, see Comment, *Caperton v. A.T. Massey Coal Co.: Due Process Limitations on the Appearance of Judicial Bias*, 123 HARV. L. REV. 73 (2009); Pamela Karlan, *Electing Judges, Judging Elections, and the Lessons of Caperton*, 123 HARV. L. REV. 80 (2009); Lawrence Lessig, *What Everybody Knows and What Too Few Accept*, 123 HARV. L. REV. 104 (2009); Penny White, *Relinquished Responsibilities*, 123 HARV. L. REV. 120 (2009); Dahlia Lithwick, *Caperton Symposium*, 60 SYRACUSE L. REV. 215 (2010); Steven Lubet, *It Takes a Court*, 60 SYRACUSE L. REV. 221 (2010); Bruce A. Green, *Fear of the Unknown: Judicial Ethics After Caperton*, 60 SYRACUSE L. REV. 229 (2010); Elizabeth B. Wydra, *The Fourteenth Amendment’s Due Process Clause and Caperton: Placing the Federalism Debate in Historical Context*, 60 SYRACUSE L. REV. 239 (2010); Ronald D. Rotunda, *Judicial Disqualification in the Aftermath of Caperton v. A.T. Massey Coal Co.*, 60 SYRACUSE L. REV. 247 (2010); Andrew L. Frey & Jeffrey A. Berger, *A Solution in Search of a Problem: The Disconnect Between the Outcome in Caperton and the Circumstances of Justice Benjamin’s Election*, 60 SYRACUSE L. REV. 279 (2010); James Sample, *Caperton: Correct Today, Compelling Tomorrow*, 60 SYRACUSE L. REV. 293 (2010); James Bopp, Jr. & Anita Y. Woudenberg, *Extreme Facts, Extraordinary Case: The Sui Generis Recusal Test of Caperton v. A.T. Massey*, 60 SYRACUSE L. REV. 305 (2010); Roy A. Schotland, *Caperton Capers: Comment on Four of the Articles*, 60 SYRACUSE L. REV. 337 (2010).

supporting his campaign for a seat on the court—more than 60% of the total amount spent to support Justice Benjamin’s campaign—while preparing to appeal the verdict against his company.[89] After winning election to the court, Justice Benjamin cast the deciding vote in the court’s 3-2 decision overturning that verdict. The question presented is whether Justice Benjamin’s failure to recuse himself from participation in his principal financial supporter’s case violated the Due Process Clause of the Fourteenth Amendment.⁹⁰

In the face of this grim question, and as many predicted,⁹¹ the Supreme Court voted five to four that Benjamin’s failure to recuse himself violated the Due Process Clause.⁹² Justice Kennedy authored the opinion concluding that Benjamin harbored a serious, objective “probability of bias” when he refused to recuse himself in a case involving his biggest supporter from his previous—and perhaps future—election.⁹³

In its narrowest form, the Court held “that Blankenship’s significant and disproportionate influence—coupled with the temporal relationship between the election and the pending case—offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true.”⁹⁴ Stated slightly differently, there was “a serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge’s election campaign when the case was pending or imminent.”⁹⁵

89. The \$3 million-plus that Blankenship spent on the campaign broke down as follows:

In addition to contributing the \$1,000 statutory maximum to Benjamin’s campaign committee, Blankenship donated almost \$2.5 million to “And For The Sake Of The Kids,” a political organization formed under 26 U.S.C. § 527. . . . Blankenship’s donations accounted for more than two-thirds of the total funds it raised. . . . Blankenship spent, in addition, just over \$500,000 on independent expenditures—for direct mailings and letters soliciting donations as well as television and newspaper advertisements—“to support . . . Brent Benjamin.”

Caperton, 129 S. Ct. at 2257 (internal citations omitted); see also YouTube, Don L. Blankenship’s Channel, <http://www.youtube.com/user/DonLBlankenship#p/u> (last visited Mar. 20, 2010) (containing access to video of the advertisements Blankenship funded during the election).

90. Brief for Petitioners at i, *Caperton*, 129 S. Ct. 2252 (No. 08-22), 2008 WL 5433361. Although not central to the Court’s opinion, Justice Benjamin also chose the two replacement jurists for the two justices who did recuse themselves from the case. *Caperton*, 129 S. Ct. at 2258. Thus, he did not merely “cast the deciding vote,” as stated above.

91. See, e.g., Judicial Ethics Forum, *Supreme Court Hears Oral Argument in Caperton v. AT Massey Coal Co.* (March 23, 2009), <http://judicialethicsforum.com/2009/03/23/supreme-court-hears-oral-argument-in-caperton-v-at-massey-coal-co/> (predicting a five-to-four opinion in Hugh Caperton’s favor).

92. *Caperton*, 129 S. Ct. 2252.

93. *Id.* at 2263, 2265.

94. *Id.* at 2265 (internal quotation omitted).

95. *Id.* at 2263–64.

The opinion especially drew out two elements of this test: (i) election influence and (ii) case status. The former inquiry “centers on the contribution’s relative size in comparison to the total amount of money contributed to the campaign, the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election.”⁹⁶ The opinion thus adds credence to the interesting thought that “[j]ustice is a special commodity[:] [t]he more you pay for it, maybe the less it’s worth.”⁹⁷ The Court cautioned, however, that “[w]hether . . . campaign contributions were a necessary and sufficient cause of Benjamin’s victory is not the proper inquiry.”⁹⁸ Thus, more money might strengthen the corrupting appearances, but the money need not have carried the day (indeed, we need not even inquire into the political science of it).

The Court also focused in the second inquiry on the status of any impending or pending case. The opinion has a heavy undercurrent that no one should get to choose—even with good money—their own judge in a pending matter. As the Court put it, the “temporal relationship between the campaign contributions, the justice’s election, and the pendency of the case is also critical. It was reasonably foreseeable, when the campaign contributions were made, that the pending case would be before the newly elected justice.”⁹⁹ The principle seems simple and sound enough: “Just as no man is allowed to be a judge in his own cause, similar fears of bias can arise when—without the consent of the other parties—a man chooses the judge in his own cause.”¹⁰⁰

2. *Connecting Caperton: Coal and Crime*

Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.¹⁰¹

Following the above sketch of *Caperton*, it would not be unreasonable to ask whether *Caperton* has much to do with our topic, namely, that tough-on-crime judges should recuse themselves in criminal cases. Moreover, the *Caperton* majority stressed repeatedly the “extreme” nature of the underlying facts that had unfolded in West Virginia.¹⁰² But *Caperton* and our topic overlap substantially and

96. *Id.* at 2264.

97. Tony Mauro, *Can Money Obstruct Justice?*, USA TODAY, Feb. 26, 2009, <http://blogs.usatoday.com/oped/2009/02/can-money-obstr.html> (quoting retired Justice Sandra Day O’Connor).

98. *Caperton*, 129 S. Ct. at 2264.

99. *Id.* at 2264–65.

100. *Id.* at 2265.

101. *Id.* at 2260 (quoting *Tumey v. Ohio*, 273 U.S. 510, 532 (1927)). The *Caperton* Court cites this principle, in one iteration or another, more than three times. *Id.* at 2261, 2264–65.

102. For example, as of March 15, 2010, of the fifty cases citing *Caperton* appearing in LexisNexis and Westlaw databases, essentially nineteen of those cases reject judicial disqualification on the basis of *Caperton* because it contains “extreme” or

have more in common than most assume. The following paragraphs expand on two of the similarities, particularly those similarities that seem dissimilar at first blush.

Perhaps foremost among the seeming dissimilarities is the observation that *Caperton* involved only one powerful campaign supporter, which is atypical of judges' campaigns generally and particularly for the judges typically elected on the basis of tough-on-crime platforms. This proffered dissimilarity, however, has no meaningful content. The lead-in counter-illustration should be Hobbes's *Leviathan*.¹⁰³ On the cover of that classic text, as the reader may recall, the sovereign appeared at first glance to be only one (albeit a giant) man. On closer examination, however, the man was actually composed of countless citizens, the aggregation of whom gave the Leviathan its shape and strength. In *Caperton*, the Leviathan-like supporter was indeed one man, whereas the supporters under analysis—the countless citizens who vote in a judge, and/or who give that judge campaign money, in return for her tough-on-crime campaign pledge—more closely resemble Hobbes's original illustration. They are a giant of many, but a giant nonetheless. And what the Supreme Court finally was forced to acknowledge in *Caperton* is that a giant—like an elephant in a room—cannot be ignored. Rather, the gravitational pull of this giant—i.e., the fear that failing to please will result in loss of office¹⁰⁴—will probably affect the judge. Indeed, even if that pull does not affect the judge in fact, the public is both (i) justified in reasonably perceiving to the contrary and (ii) deserving of a judge who does not labor under such a significant influence. Thus, the reasoning of the *Caperton* opinion is unaffected by the number of supporters, particularly where, as here, the supporters are unified in their expectations.

In fact, nowhere in the opinion does the number of contributors or expenders matter; nor does the form (e.g., individuals, 527s, corporations) of those contributors matter. Indeed, one would have to strain to find any part of the opinion to which such numbers or forms might matter.¹⁰⁵ If Blankenship had been the Brothers Blankenship (whether twins or octuplets), it would not have mattered consequentially to the Court's reasoning. Similarly, if Blankenship had been the A.T. Massey Coal Company, it would not have mattered.¹⁰⁶ Of course, if Blankenship had been the Blankenship Trade Union, to which Massey belonged along with fifty other entities, it might have mattered—that is, it might have mattered less to the Blankenship Trade Union (though it would have mattered a

“extraordinary” facts, and the remaining thirty-one cases do not raise similar issues in the judicial disqualification context.

103. THOMAS HOBBS, *LEVIATHAN* (1651).

104. The Court primarily referred to the positive corollary, i.e., “the debt of gratitude” for the support, in its opinion. *Caperton*, 129 S.Ct. at 2262.

105. Perhaps one could point solely to the obviously “extreme” or “rare” nature of the case, but again, this would be reaching. A better argument would be that the facts did not present the issue of multiple campaign supporters, but the reasoning remains unaffected.

106. In fact, the Court treated Blankenship as if he *was* the Massey entities. The distinction—i.e., that Massey's CEO is not the same as Massey itself—was given no consideration.

great deal to one of its members, Massey).¹⁰⁷ In short, the one-or-many distinction is inconsequential.

The second apparent dissimilarity is that my analysis downplays an admittedly important *Caperton* consideration—case status.¹⁰⁸ In *Caperton*, the contributor (technically, the independent-expenders) gave the money with a specific, pending case in mind. In the tough-on-crime scenario, in contrast, voters and campaign contributors do not always have a particular case in mind. While we of course cannot change the *Caperton* facts, we can see that an analytically sound due process standard should not rest dispositively on the fortuitous status of a case. At base, independence and impartiality must remain unencumbered: judges must be free to rule in the interests of justice whenever and wherever the occasion presents itself.¹⁰⁹ In particular, if a voter and/or contributor votes or contributes because the judge's public pledges suggest that she will rule a certain way once the issue presents itself in a case, the consequences would be the same, or nearly so.

For example, in *Caperton*, the money was spent (presumably) to defeat Justice McGraw, which in turn would install a judge who would support Massey, not *Caperton*. In the more numerous tough-on-crime campaigns, the money and votes are spent and cast to install a judge who will be “tough on crime” in future cases. If in either example the judge defied her voters or contributors, and they found out, the result would be the same: loss of support. Indeed, the tough-on-crime example is more pernicious: the support is not tied to a single, pending case (as in *Caperton*),¹¹⁰ but instead, it is tied to all future cases containing certain issues (here, criminal cases). In any event, the *Caperton* test for “pending” cases is merely foreseeability: whether it “was reasonably foreseeable, when the campaign contributions were made, that the pending case would be before the newly elected justice.”¹¹¹ Under a foreseeability analysis, the tough-on-crime supporters can certainly foresee—to a degree of certainty even beyond that of Blankenship—that their judicial candidate will hear criminal cases of all varieties once he takes the

107. If the Blankenship Trade Union had spent the money to place a judge who would rule in a certain way in the *Caperton* case or cases like it, the distinction in form would be unimportant. *Caperton*, of course, mandates a case-by-case inquiry.

108. As noted above, *Caperton* focused heavily on both (i) election influence and (ii) case status, among other points.

109. See *Republican Party of Minn. v. White*, 536 U.S. 765, 789–90 (2002) (O'Connor, J., concurring) (concluding that “[e]lected judges cannot help being aware that if the public is not satisfied with the outcome of a particular case, it could hurt their reelection prospects” and their “rel[iance] on campaign donations may leave judges feeling indebted to certain parties or interest groups”); *id.* at 816 (Ginsburg, J., dissenting) (concluding that an elected judge has a “‘direct, personal, substantial, [and] pecuniary interest’ in ruling against certain litigants . . . for she may be voted off the bench and thereby lose her salary and emoluments unless she honors the pledge that secured her election” (quoting *Tumey v. Ohio*, 273 U.S. 510, 523 (1927))).

110. Technically, the Massey entities had other cases pending or impending in the West Virginia Court of Appeals, but the other cases played no role in the *Caperton* Court's opinion.

111. *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2264–65 (2009).

bench.¹¹² Massey’s case could have settled before it reached Justice Benjamin; all criminal cases cannot similarly go away (absent the wholesale disqualification suggested later in this Article).

Now that the primary differences have been bridged, or nearly so, we should explore whether the “temptation” faced by tough-on-crime judges (i.e., that they might lose their job for not being “tough on crime”) crosses the due process standards for mandatory disqualification.

3. Caperton Standards

*Caperton*¹¹³ refashioned approximately five standards for due process disqualification. While I have condensed the *Caperton* standards a bit, most still substantially overlap. The standards follow:

- I. Recusal is required whenever “the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.”¹¹⁴
- II. Recusal is required whenever “‘under a realistic appraisal of psychological tendencies and human weakness,’ the interest ‘poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.’”¹¹⁵
- III. Recusal is likewise required whenever there is a “serious risk of actual bias—based on objective and reasonable perceptions.”¹¹⁶

112. And if the candidate will not be hearing criminal cases, a tough-on-crime platform would be manifestly misleading.

113. One of the first judicial commentators on the subject claimed that the *Caperton* “opinion is positively Delphic in explaining the standards for courts attempting to implement it.” U.S. Fid. Ins. & Guar. Co. v. Mich. Catastrophic Claims Ass’n, 773 N.W.2d 243, 247 (Mich. 2009) (Corrigan, J., dissenting) (order denying motion for disqualification).

114. *Caperton*, 129 S. Ct. at 2257 (“Under our precedents there are objective standards that require recusal when ‘the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.’” (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975))); see also *id.* at 2266 (stating that recusal is required whenever there is an “unconstitutional probability of bias.”). The Court was (and has been) quite clear that—whatever the threshold level of intolerable—actual bias is not required. *Id.* at 2263 (“In lieu of exclusive reliance on that personal inquiry, or on appellate review of the judge’s determination respecting actual bias, the Due Process Clause has been implemented by objective standards that do not require proof of actual bias.”). Of course, the level at which a probability rises to “constitutional intolerability” is the question, not the answer.

115. *Id.* at 2263 (quoting *Withrow*, 421 U.S. at 47).

116. *Id.* at 2263–64 (“We conclude that there is a serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge’s election campaign when the case was pending or imminent.”). The Court similarly concluded that recusal is required whenever there is “[a] serious, objective risk of actual bias.” *Id.* at 2265 (“Just as no man is allowed to be a judge in his own cause, similar fears of bias can arise when—without the consent of the

- IV. Recusal is required whenever “an objective inquiry into [all of the circumstances reveals that a] contributor’s influence on [an] election . . . ‘would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true.’”¹¹⁷
- V. Recusal is perhaps required whenever a judge “would . . . feel a debt of gratitude to [an independent-expende] for his extraordinary efforts to get him elected.”¹¹⁸

The question is whether tough-on-crime judges operate under substantially similar “serious risk[s]” of “actual bias or prejudice,” “debt[s] of gratitude,” or “possible temptations” in their elective environment, and we are to answer that question through the lens of a “realistic appraisal of psychological tendencies and human weakness[es].”¹¹⁹ Particularly for the reasons given in Part II.C (which lists the empirical evidence of the serious risks and temptations and how judges respond to them), the answer appears affirmative. At this rather early stage of contextual development, however, it would be premature to attempt a final answer.

Consider, for now, only the forceful prediction of Monroe Freedman with respect to our question:

The most important potential significance of *White* is the strong suggestion in the opinions of Justices O’Connor and Ginsburg (writing for a total of five justices) that no judge subject to reelection can decide a controversial case without violating due process. . . . [D]ue process is denied if there is a “possible temptation to the average . . . judge . . . which might lead him not to hold the balance nice, clear, and true. . . .” There is substantial reason to believe that elective judges are influenced in controversial cases by the threat of being voted out of office. Particularly in a case involving issues like the death penalty or abortion rights, therefore, there is a strong argument that a decision by such a judge violates the Due Process Clause of the Fourteenth Amendment.¹²⁰

other parties—a man chooses the judge in his own cause. And applying this principle to the judicial election process, there was here a serious, objective risk of actual bias that required Justice Benjamin’s recusal.”).

117. *Id.* at 2264 (quoting *Tumey v. Ohio*, 273 U.S. 510, at 532 (1927)).

118. *Id.* at 2262; see also Note, *The Rule of Law in the Marketplace of Ideas: Pledges or Promises by Candidates for Judicial Election*, 122 HARV. L. REV. 1511, 1531–32 (2009) (“The special focus of the courts on deciding particular cases or controversies makes the feeling of indebtedness fostered by contributions more troubling than in the context of ordinary politics. Much more than any pledge, promise, or commitment regarding general issues of law, contributions by lawyers or litigants threaten to undermine the process of application of law to facts that characterizes the judicial process.”) (footnotes omitted).

119. In light of these standards, *Caperton* itself was clearly decided correctly on its facts. Indeed, that *Caperton* was a five-to-four split exemplifies that disqualification was safely called for under a “risk” or “perception” analysis.

120. FREEDMAN & SMITH, *supra* note 6, at 248.

Part of the reason for deferring at this early stage to Professor Freedman's general conclusion is that, for tough-on-crime judges to be mandatorily disqualified from all criminal cases, we do not need to use the nuclear option of the Due Process Clause. Rather, every state has in place recusal standards that exceed the constitutional floor, as discussed in the next section.

To be sure, however, *Caperton* should long be remembered for raising that floor to some significant extent.¹²¹ And before we leave *Caperton*, we should at least speculate on its essential implications for disqualification. This legacy of *Caperton* has little to do with Blankenship or his pawn, but with the expanding limits of due process disqualification. *Caperton* is new ground because it constitutionally connects links that many had dismissed as too attenuated to require disqualification. In particular, *Caperton* constitutionally established that campaign supporters (and perhaps detractors), link *x*, tend to bias the judge, link *y*. While the social science literature had all but established the link,¹²² pre-*Caperton* courts nevertheless treated the link as too ephemeral or intangible to justify recusal. *Caperton* not only established that the link is real, not ethereal, to the point of constitutionally requiring recusal (at least in "rare" cases) but also established by both explicit and implicit implication that codes of judicial conduct could more heavily scrutinize the link and even the appearance of such a link.

These points are critical. If, as in *Caperton*, due process mandates disqualification in light of the "serious risk[s]" of "actual bias or prejudice," "debt[s] of gratitude," or "possible temptations" toward one large independent-expenditure, due process should mandate disqualification, *a fortiori*, when a judge faces a "serious risk" of losing her job for appearing soft on crime. Similarly, to the extent that the judge has received campaign support for her tough-on-crime pledges, the risk of losing future support "would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the State and the accused. . . ."¹²³ Finally, to the extent that the impermissible "temptation" can be merely a "debt of gratitude," the case for mandatory disqualification for being soft on crime is again even stronger. The possible "temptation" to harbor a "debt of gratitude" pales in comparison to the "temptation" to avoid losing one's livelihood.¹²⁴ This is no small point: using even

121. In addition to having raised the floor, *Caperton*'s lasting influence may be its signaling effect to state regulators. This last point is discussed in the next section.

122. See generally *infra* Part II.C.2 (listing public- and judicial-opinion polls as well as studies finding various instances in which judicial decisions responded to electoral pressures).

123. *Caperton*, 129 S. Ct. at 2260 (quoting *Tumey v. Ohio*, 273 U.S. 510, 532 (1927)).

124. See *Republican Party of Minn. v. White*, 536 U.S. 765, 789–90 (2002) (O'Connor, J., concurring) (concluding that "[e]lected judges cannot help being aware that if the public is not satisfied with the outcome of a particular case, it could hurt their reelection prospects" and their "rel[iance] on campaign donations may leave judges feeling indebted to certain parties or interest groups."); *id.* at 816 (Ginsburg, J., dissenting) (concluding that an elected judge has a "direct, personal, substantial, [and] pecuniary interest in ruling against certain litigants . . . for she may be voted off the bench and thereby lose her salary and emoluments unless she honors the pledge that secured her election"

a cursory “realistic appraisal of psychological tendencies and human weakness[es],” one can see that a debt of gratitude would be less corrupting, on average, than a threat of termination. And if losing one’s office causes at least as much risk of bias as a debt of gratitude, the Due Process Clause must mandate the disqualification of our tough-on-crime specimens.¹²⁵

The second legacy of *Caperton* may rest in its message to regulators, discussed below.

4. *The Post-Caperton Regulatory Environment*

Let us now leave *Caperton* on the floor, and turn to the second legacy point of the opinion. *Caperton* supercharged—both legitimized and green-lighted—disqualification based on canons of judicial ethics. The Court explicitly blessed “the judicial reforms the States have implemented to eliminate even the appearance of partiality.”¹²⁶ In particular, “States may choose to adopt recusal standards more rigorous than due process requires.”¹²⁷

This green light was a carry-forward from *White*, in which Justice Kennedy offered it up as a then-hollow consolation prize in his concurring opinion.¹²⁸ *Caperton* renewed this notion in a majority opinion (and to boot, one in which the Court concluded that the higher standard of due process disqualification was violated). The Court then specifically identified some of these blessed, “more rigorous” reforms: (1) the ubiquitous standard that disqualification is mandatory in any “proceeding in which the judge’s impartiality might reasonably be questioned”; and (2) even the controversial “appearance of impropriety” standard, which is contravened whenever “the conduct would create in reasonable minds a perception that the judge’s ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired.”¹²⁹ These canons should be encouraged, according to the Court, because they are “[t]he principal safeguard against judicial campaign abuses” that threaten to imperil “public confidence in the fairness and integrity of the nation’s elected judges.”¹³⁰

(quoting *Tumey*, 273 U.S. at 523)); FREEDMAN & SMITH, *supra* note 6, at 248 (noting the important fact that Justices Ginsburg and O’Connor were writing for five justices)

125. With respect to elective judges, most of my disqualification arguments have implications beyond criminal cases. One obvious category to which these arguments might more or less apply is other pro-con positions (e.g., pro-life, con-same-sex-marriage). I might discuss those implications in a future article.

126. *Caperton*, 129 S. Ct. at 2266 (internal quotation omitted).

127. *Id.* at 2267 (internal quotation omitted); *see also id.* (reiterating that “states, of course, remain free to impose more rigorous standards for judicial disqualification than those we find mandated here today”) (internal quotation omitted).

128. *White*, 536 U.S. at 794 (Kennedy, J., concurring) (States “may adopt recusal standards more rigorous than due process requires, and censure judges who violate these standards.”).

129. *Caperton*, 129 S. Ct. at 2266 (quoting ABA Model Code of Judicial Conduct and identical West Virginia Code of Judicial Conduct).

130. *Id.* (quoting Brief of the Conference of Chief Justices as Amicus Curiae in Support of Neither Party at 4, 11, *Caperton*, 129 S. Ct. 2252 (No. 08-22), 2009 WL 45973).

The judicial seal of approval from the nation's highest court is a big deal, to be sure, but in the main, the Court just repeated the laws (Codes) that had been on the books for many, many years.¹³¹ The arguably more important effect of the *Caperton* opinion is psychological. Pre-*Caperton*, commentators were predicting and hastening an end to judicial campaign regulation, and regulators were living in fear of the First Amendment.¹³² The following is a telling summary of the post-*White*, pre-*Caperton* picture:

The increasing and often successful attacks on [a] wide array of canons have left state bodies charged with regulating judicial conduct in disarray, especially when applying canons applicable to campaign conduct. As one trial court observed: "To say that there is considerable uncertainty regarding the scope of the Supreme Court's decision in *White* is an understatement. . . ."¹³³

Post-*Caperton*, the world has changed. It is not a change that can be measured yet, at least not satisfactorily. It is loosely akin to the change that recently happened to the housing markets in Arizona and Nevada, among other places. In 2006, for example, a home might have been worth \$300,000; in 2008, the same home was worth only \$150,000. To be sure, we could waste time in this inappropriate venue pointing to both macro and microeconomic explanations, among others, but the best, ground-level explanation for this change is simply attitudinal. The homes did not, in fact, change; neither did our geopolitical environment to any significant extent; and neither did anything else. What changed was that, one minute, homebuyers were motivated to purchase homes and to do so at \$300,000, and another minute (and perhaps with good reason and growing financing hurdles), they were not. For judicial ethics, the divide of course is not the economy; it is pre- and post-*Caperton*. Post-*Caperton*, regulators should be fully uninhibited to enforce existing disqualification rules to the letter, to draft stricter disqualification rules, and to discipline judges for failing to follow those rules. The legal and social context otherwise looks the same, but *Caperton* is a confidence builder.¹³⁴

131. See *infra* Part II.B.1 (discussing applicable canons of judicial ethics).

132. See, e.g., Steven Lubet, *Judicial Campaign Speech and the Third Law of Motion*, 22 NOTRE DAME J.L. ETHICS & PUB. POL'Y 425 (2008) (forecasting that bans on extrajudicial speech may be doomed by expanding First Amendment doctrine); James Bopp, Jr. & Anita Y. Woudenberg, *To Speak or Not to Speak: Unconstitutional Regulation in the Wake of White*, 28 JUST. SYS. J. 329, 332–33 (2007) (concluding that disciplining judges for failing to recuse would be unconstitutional to the extent it "chills" campaign speech protected by the First Amendment); Cohn Weiss, *supra* note 65, at 1127 n.156.

133. Goldberg et al., *supra* note 41, at 508–09 (quoting N.D. Family Alliance, Inc. v. Bader, 361 F. Supp. 2d 1021, 1041–42 (D.N.D. 2005)); see also *id.* at 515 (noting that, although some recent scandals have driven recusal reform, "it is the *White* ruling more than any other development that now has the potential to alter the nature and practice of judicial disqualification"); Pozen, *supra* note 41, at 297–98 (noting the many post-*White* challenges to various canons).

134. Sample, *supra* note 88, at 303–04 (observing that *Caperton* "provides real momentum for state-based recusal reform efforts").

This attitudinal shift does not reside solely in what *Caperton* said. In truth, of course, everyone agrees that the case involved “extreme” and “rare” facts. Instead, *Caperton* is as important for what it did not say: that is, its importance rests in the fact that neither the majority nor the dissent suggested that the First Amendment should pose any kind of hurdle to regulators fashioning recusal standards.

To sum up the point, pre-*Caperton*, there was healthy skepticism whether the judicial ethics codes’ mandatory recusal provisions would all withstand First Amendment attack in the wake of *White*.¹³⁵ That is why some persuasively argued that if a judge had a right to announce a certain view, such as “tough on crime,” he should not face a corresponding duty to recuse himself for exercising his right.¹³⁶ Beyond commentators’ articles, however, was a less tangible, but perhaps even more meaningful, result—judicial regulators were tentative, if not outright scared, to enforce these recusal provisions broadly. Since *Caperton*, that fear, or at least tentativeness, must surely have dissipated. As listed above, the majority opinion cited these very recusal provisions approvingly. Indeed, the majority did so to show that those provisions’ stricter requirements would—and should—dispose of most tough recusal decisions. Tellingly, the First Amendment did not creep into any of the opinions, including the dissents.¹³⁷

To end the *Caperton* discussion in general and the discussion of the attitudinal shift in particular, the case of *Bauer v. Shepard* is fitting.¹³⁸ Pre-*Caperton*, the court in *Bauer* granted a permanent injunction against several campaign-related Canons (although not the disqualification Canon).¹³⁹ Likewise, courts and ethics opinions were generally construing the ban against “pledges, promises, and commitments” rather solicitously of tough-on-crime speech. Post-*Caperton*, however, the court upheld all of the Canons as constitutional. Indeed, the language in the opinion explicitly corroborates the change of heart; it echoes *Caperton* on the importance of the judicial canons and on the idea that those canons may impose “more rigorous” rules of disqualification.¹⁴⁰ To the extent that

135. See *Republican Party of Minn. v. White*, 536 U.S. 765 (2002) (striking down a Minnesota rule of judicial ethics barring judicial candidates from announcing their views on “disputed legal or political issues” because the rule failed to survive First Amendment strict scrutiny analysis).

136. Bopp & Woudenberg, *supra* note 132, at 332–33 (concluding that disciplining judges for failing to recuse would be unconstitutional to the extent it “chills” campaign speech protected by the First Amendment); see also Geyh, *supra* note 45, at 69–70 (“Although the Supreme Court’s recent decision in *Republican Party v. White* creates uncertainty as to its continuing vitality, Canon 5 of the Code provides that candidates for judicial office shall not ‘make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office.’”) (footnotes omitted). To be sure, Justice Kennedy’s concurrence nodded approvingly to stricter recusal provisions, but the majority’s holding strongly suggested to the contrary.

137. To be fair, the First Amendment was not raised explicitly in the parties’ briefs, but both sides did cite the *White* opinion.

138. 634 F. Supp. 2d 912 (N.D. Ind. 2009).

139. The case (technically, two related cases) has a much longer and tortured history than I am presenting here. See *id.* at 917–20.

140. *Id.* at 942–44.

this case is representative of *Caperton*'s impact, it suggests that the fear and uncertainty surrounding the constitutionality of these canons has been lifted.

In conclusion, *Caperton* indeed connects to our tough-on-crime subjects, and importantly, sends out a message of regulation to the states. Perhaps, however, the most uncannily similar thing about *Caperton* and pro-prosecution judges is that the very same tough-on-crime boasts and soft-on-crime attacks were in play in the campaign. In particular, the television advertising accused Justice Warren McGraw (Justice Benjamin's rival) of "[l]etting a child rapist go free" and of being "too soft on crime[—]too dangerous for our kids."¹⁴¹ With this attack (and the corollary tough-on-crime boasts) in mind, let us turn to what the canons of judicial ethics have to say on the matter.

B. Canon Disqualification

Canon disqualification—the mandatory, code-based disqualification standards applicable in every state and federal court—is the architecture resting atop the due process floor. To be sure, this architecture is at times both abstract and minimalist, but it does contain the necessary elements, and those elements repeatedly point to disqualification of the tough-on-crime judge. Indeed, by the end of our run through canon disqualification, we will see that the current failure to recuse must rest on truly tortured and professionally deficient textual interpretations. This Section proceeds first by listing the various implicated standards and working toward application of those standards primarily in later sections.

1. Canon Law: Tough on Campaign Crime

Mainstream judicial ethics—the codes of judicial conduct—command impartiality (and independence) through several vehicles, old and new. Impartiality includes not only a lack of bias toward a particular party, but also open-mindedness. With respect to our subject matter (namely, campaign conduct and disqualification), the codes work at two stages: (1) on the front end by attempting to deter judicial sins; and (2) on the back end by requiring the penance of disqualification (and occasionally professional discipline) for undeterred sins. The codes seek to temper tough-on-crime judges at both stages.

a. Campaign Conduct and Impartiality: Historical Concerns

Ethical doctrine on campaign speech and impartiality is not new. The 1924 *Canons of Judicial Ethics*,¹⁴² for example, contains a host of provisions

141. DEBORAH GOLDBERG ET AL., THE NEW POLITICS OF JUDICIAL ELECTIONS 2004 4–5 (2005), available at <http://www.gavelgrab.org/wp-content/resources/NewPoliticsReport2004.pdf>.

142. The American Bar Association (ABA) adopted the Canons in 1924 and amended the individual canons several times, with the most recent amendment occurring in 1957. The Canons were adopted by most states and ruled judicial behavior for nearly fifty years (until ABA adopted a new code of judicial conduct in 1972). STEPHEN GILLERS & ROY SIMON, REGULATION OF LAWYERS: STATUTES AND STANDARDS 687 (2008).

regulating such speech and related conduct. In that regard, compare the following Canons, which have enjoyed nearly a century of influence in the states:

- Canon 14: Independence: “[A judge] should not be swayed by partisan demands, public clamor or considerations or personal popularity or notoriety, nor be apprehensive of unjust criticism.”¹⁴³
- Canon 29: Self-Interest: “[A judge] should abstain from performing or taking part in any judicial act in which his personal interests are involved. . . .”¹⁴⁴
- Canon 30: Candidacy for Office: “A candidate for judicial position should not make or suffer others to make for him, promises of conduct in office which appeal to the cupidity or prejudices of the appointing or electing power; he should not announce in advance his conclusions of law on disputed issues to secure class support, and he should do nothing while a candidate to create the impression that if chosen, he will administer his office with bias, partiality or improper discrimination. . . . [H]e should refrain from all conduct which might tend to arouse reasonable suspicion that he is using the power or prestige of his judicial position to promote his candidacy”¹⁴⁵
- Canon 34: A Summary of Judicial Obligation: “In every particular his conduct should be above reproach. He should be . . . impartial, fearless of public clamor, regardless of public praise, *and indifferent to private political or partisan influences*; . . . *he should not allow other affairs or his private interests to interfere with the prompt and proper performance of his judicial duties, nor should he administer the office for the purpose of advancing his personal ambitions or increasing his popularity.*”¹⁴⁶

Thus, at least since 1924, we have had in place the fundamental ethics of campaign speech and related judicial behavior.

143. CANONS OF JUDICIAL ETHICS Canon 14 (1957).

144. *Id.* Canon 29. Arguably, of course, campaign speech is not a “judicial act,” but the Canon’s wise sentiment is to remind judges to avoid acting on “personal interests” in cases before them. If a judge ran a tough-on-crime campaign, the personal interest of gaining reelection seemingly requires a pro-prosecution tilt that translates into judicial acts, such as bail rulings, verdicts (in bench trials), sentences, and even evidentiary rulings.

145. *Id.* Canon 30.

146. *Id.* Canon 34 (emphasis added); *cf. id.* Canon 28 (“While entitled to entertain his personal views or political questions, and while not required to surrender his rights or opinions as a citizen, it is inevitable that suspicion of being warped by political bias will attach to a judge who becomes the active promoter of the interests of one political party as against another. He should avoid making political speeches, making or soliciting payment of assessments or contributions to party funds, the public endorsement of candidates for public office and participation in party conventions.”).

b. Ubiquitous Impartiality

Like the codes of the past, the more recent ethics codes demand impartiality in this and every context.¹⁴⁷ With slight modifications, the *ABA Model Code of Judicial Conduct* has been adopted by forty-nine states and the federal judiciary.¹⁴⁸ From many angles, it requires impartiality and open-mindedness. Thus, these components have been both an aspiration and a rule of conduct since 1924, if not before.¹⁴⁹ Impartiality means the absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge.¹⁵⁰ This definition is consistent with, if not nearly identical to, the discussion of impartiality in *White*.¹⁵¹

As we will see over and over, the *Code* treats impartiality as so fundamental that the concept is repeated throughout. Almost immediately, Rule 1.2 demands that “[a] judge shall act *at all times* in a manner that promotes public confidence in the independence, integrity, and *impartiality* of the judiciary”¹⁵² Likewise, “[a] candidate for a judicial office . . . shall maintain the dignity appropriate to judicial office and act in a manner consistent with the impartiality, integrity and independence of the judiciary.”¹⁵³ Moreover, the specific standards for both federal judges and all trial judges are in full accord with these provisions.¹⁵⁴

147. I apologize to the reader in advance that this Section contains repetition in its listing of Canons, particularly with respect to the value of impartiality. That repetition owes to the Codes themselves (i.e., the message, not the messenger). The one upside to the repetition, however, is that it evidences the importance that the Codes attach to impartiality.

148. See, e.g., Gray, *supra* note 7, at 1246 n.4. In February 2007, the ABA House of Delegates adopted a new *Code*. Because states are amidst the adopting process—with some states now operating under the new *Code* and many more still operating under the old *Code*—I list both citations throughout.

149. See, e.g., Bopp & Woudenberg, *supra* note 132, at 329–30 (providing the history of the “pledges-and-promises” and the “commits” clauses).

150. MODEL CODE OF JUDICIAL CONDUCT Terminology (2007); see also MODEL CODE OF JUDICIAL CONDUCT Terminology (2004) (using substantively identical language).

151. See *Republican Party of Minn. v. White*, 536 U.S. 765, 775–78 (2002) (defining impartiality as either (1) “lack of bias for or against either party” or (2) “lack of preconception in favor of or against a particular legal view” or (3) “as open-mindedness”). Open-mindedness “in a judge demands, not that he have no preconceptions on legal issues, but that he be willing to consider views that oppose his preconceptions, and remain open to persuasion, when the issues arise in a pending case.” *Id.* at 778. While the Court supported category (1) and (3) impartiality, the Court was outright dismissive of category (2). See *id.* at 777–78; see also *Buckley v. Ill. Jud. Inquiry Bd.*, 997 F.2d 224, 230 (7th Cir. 1993) (striking down announce clause as well).

152. MODEL CODE OF JUDICIAL CONDUCT R. 1.2 (2007) (emphasis added).

153. MODEL CODE OF JUDICIAL CONDUCT Canon 5A(3)(a) (2003); MODEL CODE OF JUDICIAL CONDUCT R. 4.2(A)(1) (2007) (same). All asterisks (which are used in the Code to denote defined terms) have been omitted.

154. CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 2 (2009) (“A judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. . . . A judge should not allow . . . political, financial, or other relationships to influence judicial conduct

In light of the above mandates, which require impartiality not only on the campaign trail but “at all times,” it should not be surprising or incongruous to learn that impartiality must be guarded even when judges are engaged in off-the-bench activities. Thus, “when engaging in extrajudicial activities,” Rule 3.1 bars judges from “participat[ing] in activities that would appear to a reasonable person to undermine the judge’s independence, integrity, or impartiality”¹⁵⁵ Even more burdensome for the outspoken judge is Canon 4A(1), which requires that judges “conduct all of the[ir] extra-judicial activities so that they do not . . . cast reasonable doubt on the judge’s capacity to act impartially as a judge.”¹⁵⁶ This “reasonable doubt” standard deserves pause; the reader will immediately recognize the standard from its famous criminal law counterpart. To the extent the ethical and criminal standards are the same or similar, as their identical language suggests,¹⁵⁷ judges must mentally reach “a subjective state of certitude” or “utmost certainty” that their extrajudicial activities—such as proclaiming their tough-on-crime mindset—do not “cast reasonable doubt on the[ir] ability to act impartially.”¹⁵⁸

Also in light of the above Canons, it will surely not be surprising to learn that judges must exude impartiality on the bench as well. Judges must “perform all duties of judicial office fairly and impartially.”¹⁵⁹ The comment accordingly notes that “[t]o ensure impartiality and fairness to all parties, a judge must be objective and open-minded.”¹⁶⁰ Therefore, impartiality is commanded and re-commanded throughout the *Code* and throughout judges’ activities, from campaigning to adjudicating to (perhaps) breathing.

c. The Front-End Remedy of Discipline: Tough-on-Crime-Centric Canons

As suggested in our rather long listing of Canons dealing generally with judicial impartiality, Canon 3B(5) broadly states that judges “shall perform judicial

or judgment.”); STANDARDS FOR CRIMINAL JUSTICE: SPECIAL FUNCTIONS OF THE TRIAL JUDGE 6-1.6(a) (3d ed. 1999) (“The trial judge should avoid impropriety and the appearance of impropriety in all activities, and should conduct himself or herself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. The judge should not allow . . . political or other relationships to influence judicial conduct or judgment.”).

155. MODEL CODE OF JUDICIAL CONDUCT R. 3.1(C) (2007).

156. MODEL CODE OF JUDICIAL CONDUCT Canon 4A(1) (2003).

157. Indeed, their similarity curiously caused the drafters of the 2007 *Code* to amend the language slightly: “The Commission believed that the standard used in the 1990 *Code*, which prohibited activities or conduct that ‘cast reasonable doubt’ on a judge’s impartiality, was too closely associated with the criminal law, and did not accurately express the appropriate threshold for prohibiting any particular activity.” CHARLES E. GEYH & W. WILLIAM HODES, REPORTERS’ NOTES TO THE MODEL CODE OF JUDICIAL CONDUCT 57 (2009).

158. *In re Winship*, 397 U.S. 358, 364 (1970); MODEL CODE OF JUDICIAL CONDUCT Canon 4A(1) (2003).

159. MODEL CODE OF JUDICIAL CONDUCT R. 2.2 (2007).

160. *Id.* R. 2.2 cmt. 1.

duties without bias or prejudice.”¹⁶¹ “Statements . . . that indicate that the judge has a preference for or is biased against a party violate Section 3B(5).”¹⁶² This absence-of-bias or prejudice prerequisite is uncontroversial; its denial would be a violation of due process. For our purposes, however, the words “bias or prejudice”—commonly known as the “actual bias” standard—are subject to several competing interpretations, and some of those interpretations might deem judges’ tough-on-crime dispositions something short of “bias or prejudice.” While I disagree with those interpretations,¹⁶³ more specific Canons allow us to proceed without relying solely on this standard. Moreover, because both federal and state courts typically demand only an “appearance of bias,” not actual bias, when discerning whether a failure to recuse was proper,¹⁶⁴ I discuss this lesser standard in the following section on recusal.

There are at least three more specific Canons covering our topic. First, a candidate for judicial office “shall not[,] with respect to cases, controversies, or issues that are likely to come before the court, make pledges, promises or commitments that are inconsistent with the impartial performance of the adjudicative duties of the office”¹⁶⁵ The same duty applies to sitting judges.¹⁶⁶ Discerning a “pledge, promise, or commitment” from something less, however, can be difficult. The only official comment on the matter allays only some of this difficulty:

The making of a pledge, promise, or commitment is not dependent upon, or limited to, the use of any specific words or phrases; instead, the totality of the statement must be examined to determine if a reasonable person would believe that the candidate for judicial office has specifically undertaken to reach a particular result. Pledges, promises, or commitments must be contrasted with statements or announcements of personal views on legal, political, or other issues, which are not prohibited. When making such statements, a judge should acknowledge the overarching judicial

161. MODEL CODE OF JUDICIAL CONDUCT Canon 3B(5) (2003); MODEL CODE OF JUDICIAL CONDUCT R. 2.3 (2007) (same). The comment echoes that judges “must perform judicial duties impartially and fairly.” MODEL CODE OF JUDICIAL CONDUCT Canon 3B(5) cmt. (2003).

162. ANNOTATED MODEL CODE OF JUDICIAL CONDUCT 125 (2005) (citing cases).

163. *See supra* Part I.B.

164. RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION § 5.2, at 106–07 (2d ed. 2007); *see also id.* § 5.5, at 117; *In re Murchison*, 349 U.S. 133, 136 (1955) (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)) (noting that not only actual justice, but the “appearance of justice” must be satisfied).

165. MODEL CODE OF JUDICIAL CONDUCT R. 4.1(A)(13) (2007); Model Code of Judicial Conduct Canons 3B(10), 5A(3)(d) (2004).

166. MODEL CODE OF JUDICIAL CONDUCT R. 2.10(B) (2007); MODEL CODE OF JUDICIAL CONDUCT Canon 3B(10) (2004) (same). Notably, two political scientists recently found that the “presence of campaign restrictions that limit candidates for judicial office from taking positions on capital punishment significantly increase the probability of reversal votes” in death penalty cases at the state supreme court level. Brace & Boyea, *supra* note 64, at 367.

obligation to apply and uphold the law, without regard to his or her personal views.¹⁶⁷

Outside the context of promises in judicial elections, the Supreme Court has acknowledged that it is difficult to articulate a concise formula “by which we might distinguish between those ‘private arrangements’ that are inconsistent with democratic government, and those candidate assurances that promote the representative foundation of our political system.”¹⁶⁸ Nevertheless, it “hesitant[ly]” offered the following criteria that might aid the determination of whether a statement is a pledge, promise, or commitment: “the precise nature of the promise, the conditions upon which it is given, the circumstances under which it is made, the size of the audience, [and] the nature and size of the group to be benefited. . . .”¹⁶⁹

Second, Canon 3B(2), along with its federal code counterpart, demands that judges in their “[a]djudicative responsibilities” “shall not be swayed by partisan interests, public clamor, or fear of criticism.”¹⁷⁰ The comment reminds judges that an “independent judiciary requires that judges decide cases according to the law and facts, without regard to whether particular laws or litigants are popular or unpopular with the public, the media, government officials, or the judge’s friends or family.”¹⁷¹ Thus, (1) whatever the judge has told his voters and (2) whatever the voters might think about a particular decision of the judge are both ethically impermissible considerations in adjudication.

167. MODEL CODE OF JUDICIAL CONDUCT Canon 4 cmt. 13 (2007); *see also id.* cmt. 15 (discussing answers to judicial questionnaires); JAMES J. ALFINI ET AL., JUDICIAL CONDUCT AND ETHICS § 12.06B, at 12-16 (4th ed. 2007):

As a theoretical matter, there is a clear distinction between a judge expressing her view on a legal issue and promising or otherwise committing herself to deciding that issue when it comes before her as a judge in a manner consistent with her previously expressed view. . . . As a practical matter, the distinction is often less clear. Depending on the context, a judicial candidate who announces his views on a matter likely to come before him later need not use the terms ‘commit,’ ‘promise,’ or ‘pledge’ to convey the distinct impression that he is wedded to his views and will act upon them as a judge.

Id.

168. *Brown v. Hartlage*, 456 U.S. 45, 56 (1982).

169. *Id.*

170. MODEL CODE OF JUDICIAL CONDUCT Canon 3B(2) (2003); MODEL CODE OF JUDICIAL CONDUCT R. 2.4 (2007) (same); CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 3A(1) (2009) (same); STANDARDS FOR CRIMINAL JUSTICE: SPECIAL FUNCTIONS OF THE TRIAL JUDGE 6-1.6(e) (3d ed. 1999) (“A judge should not be influenced by actual or anticipated public criticism in his or her actions, rulings, or decisions.”). Rule 2.4(B) of the new *Code* adds that “[a] judge shall not permit . . . political, financial, or other interests or relationships to influence the judge’s judicial conduct or judgment.” MODEL CODE OF JUDICIAL CONDUCT R. 2.4 (2007); STANDARDS FOR CRIMINAL JUSTICE: SPECIAL FUNCTIONS OF THE TRIAL JUDGE 6-1.6(a) (same).

171. MODEL CODE OF JUDICIAL CONDUCT R. 2.4 cmt. 1 (2007).

Third, a judge must “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.”¹⁷² Therefore, irrespective of whether a litigant is a “criminal,” the judge is ethically bound to hear him and provide him with his legal rights.¹⁷³

Finally, there are catchall Canons, such as: judges “shall not participate in activities that will interfere with the proper performance of the judge’s judicial duties . . . [or] participate in activities that will lead to frequent disqualification of the judge.”¹⁷⁴ Thus, when judges engage in activities that interfere with their duties—when they, for example, show partiality toward the prosecution or fail to provide criminal defendants with their procedural rights—those judges act unethically. And when judges engage in activities that require them to recuse themselves from all criminal cases, and/or when they fail to recuse themselves in those cases, they also act unethically, a point to which we now turn.

d. The Back-End Remedy of Recusal: Do the Crime, Do the Time

Both the *Model Code* and statutes require recusal “in any proceeding in which the judge’s impartiality might reasonably be questioned.”¹⁷⁵ This standard has been carved in stone:

The term ‘reasonably be questioned’ is, admittedly, a somewhat nebulous and elusive concept. Still, the idea that when a judge’s impartiality may reasonably be questioned she must either recuse or face the prospect of being disqualified involuntarily has become a fundamental tenet of both federal and state disqualification provisions; as well as both federal and state case law. This principle is, in addition, a guiding precept of the American Bar Association Code of Judicial Conduct.¹⁷⁶

Furthermore, were there any residual doubts about the prevailing standard, according to the Supreme Court and a nearly identical federal statute,

172. *Id.* R. 2.6(A); MODEL CODE OF JUDICIAL CONDUCT Canon 3B(7) (2004).

173. Lately, there has been a steady trend of professionally disciplining judges who fail to honor criminal defendants’ rights while adjudicating. *See* Keith Swisher, *The Judicial Ethics of Criminal Law Adjudication*, 41 ARIZ. ST. L.J. 755 (2009) [hereinafter Swisher, *Judicial Ethics*] (describing judges’ failures to honor due process and other fundamental rights and showing that state supreme courts have subsequently censured, suspended, or removed such judges from the bench).

174. MODEL CODE OF JUDICIAL CONDUCT R. 3.1(A)–(B) (2007).

175. MODEL CODE OF JUDICIAL CONDUCT R. 2.11(A) (2007); *see also* 28 U.S.C. § 455(a) (2000); CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 3C (2009); MODEL CODE OF JUDICIAL CONDUCT Canon 3E(1) (2003) (same).

176. FLAMM, *supra* note 164, § 5.5, at 117 (2d ed. 2007); *see also* ALFINI ET AL., *supra* note 167, at § 4.01 (similar). Requiring recusal at the reasonable appearance, not the actuality, has several benefits, including better preserving public confidence in the courts, providing litigants with a disqualification method that does not require them to accuse their judge of being actually biased, and avoiding the difficult issues of proof that would arise if the judge’s actual state of mind was at issue. *See, e.g.*, FLAMM, *supra* note 164, § 5 .3, at 112.

“quite simply and quite universally, recusal [is] required whenever ‘impartiality might reasonably be questioned.’”¹⁷⁷

As a mirror to the front-end rules discussed in the previous section, the *Code* contains several similar, but more specific, Canons addressing recusal. At the most uncontroversial level, recusal is mandatory whenever “the judge has a personal bias or prejudice concerning a party [e.g., a criminal defendant] or a party’s lawyer [e.g., a public defender].”¹⁷⁸ On the federal court level (and in many states), this bias or prejudice must arise from an extrajudicial source (i.e., not prior proceedings), but this condition is clearly met because the bias comes from the tough-on-crime pledge and/or predisposition.¹⁷⁹ More specifically, the *Code* now demands recusal “[whenever t]he judge . . . has made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy.”¹⁸⁰ One disciplinary court addressed “bias” in the tough-on-crime context and came to the following conclusions: “While [the] judicial code does not prohibit a candidate from discussing his or her philosophical beliefs, in the campaign literature at issue Judge Kinsey pledged her support and promised favorable treatment for certain *parties and witnesses* who would be appearing before her (i.e., police and victims of crime).”¹⁸¹ Thus, “[c]riminal defendants and criminal defense lawyers could have a genuine concern that they will not be facing a fair and impartial tribunal.”¹⁸² While “most statements identifying a point of view will not implicate the ‘pledges or promises’ prohibition, [t]he rule precludes . . . those statements of intention that single out a

177. *Liteky v. United States*, 510 U.S. 540, 548 (1994) (quoting 28 U.S.C. § 455(a)); MODEL CODE OF JUDICIAL CONDUCT R. 2.11(A) (2007); MODEL CODE OF JUDICIAL CONDUCT Canon 3E(1) (2003) (same); see generally Goldberg et al., *supra* note 41, at 513 (discussing the various ways in which disqualification standards have recently been “liberalized,” i.e., they now command disqualification in a much broader array of circumstances than ever before).

178. MODEL CODE OF JUDICIAL CONDUCT Canon 3E(1)(a) (2003); CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 3C(1)(a); MODEL CODE OF JUDICIAL CONDUCT R. 2.11(A)(1) (2007) (same). Indeed, unlike other grounds for recusal, whenever recusal is required for bias or prejudice, the parties may not choose to waive the conflict following the judge’s disclosure on the record. MODEL CODE OF JUDICIAL CONDUCT R. 2.11(C) (2007).

179. See, e.g., *United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966); *Berger v. United States*, 255 U.S. 22, 31 (1921).

180. MODEL CODE OF JUDICIAL CONDUCT R. 2.11(A)(5) (2007); see also MODEL CODE OF JUDICIAL CONDUCT Canon 3E(1)(f) (2003) (requiring recusal whenever “the judge, while a judge or a candidate for judicial office, has made a public statement that commits, or appears to commit, the judge with respect to (i) an issue in the proceeding; or (ii) the controversy in the proceeding”).

181. *In re Kinsey*, 842 So. 2d 77, 88–89 (Fla. 2003) (reprimanding judge and ordering that she pay a fine of \$50,000); see also Rebecca Mae Salokar, *supra* note 26, at 354 (discussing the implicit messaging in the *Kinsey* case).

182. *Kinsey*, 842 So. 2d at 89 (concluding that judge improperly “pledged her support and promised favorable treatment for certain *parties and witnesses* who would be appearing before her (i.e., police and victims of crime)).

party or class of litigants for special treatment, be it favorable or unfavorable. . . .”¹⁸³

As another potential brick in the wall of disqualifying Canons, we should consider those that address campaign funding. Recusal is mandatory whenever “the judge knows that he or she . . . has an economic interest in the subject matter in controversy or in a party to the proceeding *or* has any other more than de minimis interest that could be substantially affected by the proceeding.”¹⁸⁴ “De minimis,’ in the context of interests pertaining to disqualification of a judge, means an insignificant interest that could not raise a reasonable question regarding the judge’s impartiality.”¹⁸⁵ Thus, quite inclusively, any interest that raises a “reasonable question regarding the judge’s impartiality” is not *de minimis*. As the *Caperton* Court finally recognized, an economic interest—such as the future support from a judge’s major campaign supporters—can warrant disqualification.¹⁸⁶

Finally, and directly on point to our topic, but practically in disuse, is Canon 3E(1)(e), which was adopted in 1999. It requires recusal whenever “the judge knows or learns by means of a timely motion that a party or a party’s lawyer has within the previous [] year[s] made aggregate contributions to the judge’s campaign in an amount that is greater than . . . [[\$] for an individual or [\$] for an entity]”¹⁸⁷

In sum, the multiple Canons in this Section all seem to demand disqualification whenever a judge appears anything less than impartial toward a party, such as criminal defendants, or toward an issue, such as crime. Puzzlingly, tough-on-crimes judges have not been disqualified with any significant frequency. One explanation is surely underenforcement of the Canons, but another possible explanation, discussed below, is something less understandable.

183. *In re Watson*, 794 N.E.2d 1, 7 (N.Y. 2003); *Commw. v. Lemanski*, 529 A.2d 1085, 1088–89 (Pa. 1987) (holding that judge should have recused himself in a drug case because he had pledged that “in all drug cases the maximum penalty should be imposed,” and this pledge evidenced “a bias against a ‘particular class of litigants’”; stating also that “[w]e emphasize that a defendant is entitled to a trial before a judge who is not biased against him at any point of the trial, and most importantly, at sentencing.”).

184. MODEL CODE OF JUDICIAL CONDUCT Canon 3E(1)(c) (2003) (emphasis added); CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 3C(1)(c) (2009); MODEL CODE OF JUDICIAL CONDUCT R. 2.11(A)(2), (3) (2007) (same).

185. MODEL CODE OF JUDICIAL CONDUCT Terminology (2007).

186. *See Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252 (2009).

187. MODEL CODE OF JUDICIAL CONDUCT Canon 3E(1)(e) (2003) (brackets in original); MODEL CODE OF JUDICIAL CONDUCT R. 2.11(A)(4) (2007) (same). Post-*Caperton*, this Canon’s time has certainly come. At present, however, only three states (Alabama, Mississippi, and Arizona) employ a version of it (or at least a distant relative of it), but the many states currently revising their judicial codes may include it in the resulting code. *See, e.g.*, ALA. CODE §§ 12-24-1, 12-24-2 (2006); MISS. CODE OF JUDICIAL CONDUCT, Canon 3E(2) (2008). Interestingly, despite its similarity to the facts in *Caperton*, this Canon might not have required Justice Benjamin’s recusal because he received only \$1000 in “contributions” from Don Blankenship. The rest of the \$3-million-plus came through independent expenditures in support of Benjamin and against his opponent. *See supra* note 91 (listing the breakdown of Blankenship’s spending).

e. Conflicting Examples: Ethics Opinions and Cases

Despite all of this clear code, ethics opinions have somehow divided on the issue, with the rough majority reaching the tenuous conclusion that tough-on-crime pledges do not violate the ethics rules.¹⁸⁸ Yet it seems facially impossible to be “pro-prosecution”—i.e., in favor of one party in a criminal case—or “tough on crime”—i.e., harshly against the other party in a criminal case—and be impartial at the same time.

But, as a sweeping proposition, the cases are inconsistent on this point, and a great many are deficiently reasoned.¹⁸⁹ *State v. Myers* provides a rich example of the poor reasoning that attends much tough-on-crime recusal case law.¹⁹⁰ There, at the hearing on the defendant’s motion for a change of judge for cause, he “presented an affidavit alleging essentially that Judge Coulter had expressed the opinion that criminals were presently being treated too leniently.”¹⁹¹ The defendant also “requested a five-day continuance in order to procure witnesses

188. Compare, e.g., Tex. Comm. on Judicial Ethics, Advisory Op. 212 (1998) (“[T]ough on crime” boasts “would not violate Canons 5(2)(i) and 2A. The pledges to be tough with criminals and “tough on crime” are of such an amorphous nature that they do not define any specific conduct and, therefore, are not violative of Canon 5(2)(i). The Committee also believes the amorphous nature of these phrases prevents them from indicating an opinion on an issue subject to judicial interpretation as proscribed in Canon 2A.”), and Ind. Comm’n on Judicial Qualifications, Preliminary Advisory Op. 1-02, at 2 (2002), available at <http://www.in.gov/judiciary/jud-qual/docs/adops/1-02.pdf> (claiming a “constitutional right” to “tough on crime” statements), with Ariz. Supreme Court Judicial Ethics Advisory Comm., Formal Op. 96-12 (1996) (“[T]he candidate must not employ endorsements which portray the judge as a “law enforcement candidate. We are concerned about newspaper reports that indicate that the sheriff endorses only those candidates who support his ‘law-and-order agenda.’ This statement strongly suggests that the sheriff’s endorsement means that the candidate is pro law enforcement rather than the independent and impartial decision maker required by Canon 1. Under these circumstances, such an endorsement would be inconsistent with the judge’s role and should not be solicited or publicized.”).

189. Compare *In re Watson*, 794 N.E.2d 1, 4–5 (N.Y. 2003) (holding that a judge engaged in impermissible pledges and promises by “repeatedly indicat[ing] that he intended to ‘work with’ and ‘assist’ police and other law enforcement personnel if elected to judicial office” and by “singl[ing] out for biased treatment a particular class of defendants—those charged with drug offenses”; censuring the judge), and *In re Kaiser*, 759 P.2d 392, 396 (Wash. 1988) (“Judge Kaiser’s statements that he is ‘Toughest On Drunk Driving,’ and ‘TOUGH ON DRUNK DRIVING,’ single out a special class of defendants and suggest that these DWI defendants’ cases will be held to a higher standard when tried before Judge Kaiser. It is not clear whether this higher standard would be imposed only at sentencing or whether Judge Kaiser might somehow apply a reduced burden of proof. On the whole these statements promise exactly the opposite of ‘impartial performance of the duties of the office.’”), with *In re Shanley*, 774 N.E.2d 735, 737 (N.Y. 2002) (refusing to sanction judge’s use of the term “law and order candidate”), and *Kan. Judicial Review v. Stout*, 196 P.3d 1162, 1178 (Kan. 2008) (“A statement that a judge will be tough on crime does not mean that the judge will not or cannot apply the law fairly and impartially.”).

190. 570 P.2d 1252 (Ariz. 1977). For other examples, see FLAMM, *supra* note 164, at § 10.8.

191. *Meyers*, 570 P.2d at 1259.

and other evidence of Judge Coulter's alleged bias and prejudice," which was denied.¹⁹² The trial court denied defendant's motions, and the state supreme court affirmed.¹⁹³ In affirming, the supreme court's analysis consisted solely of the following paragraph:

Appellant's affidavit did not contain any allegations which could support the conclusion that Judge Coulter had "a hostile feeling or spirit of ill-will, or undue friendship or favoritism, towards" the appellant. Assuming that the allegations in the affidavit were all true, they merely indicated that Judge Coulter felt that less leniency should be shown to criminals; there was no indication that Judge Coulter was prejudiced against the appellant. Therefore, the motion for change of judge for cause was properly denied.¹⁹⁴

Thus, "that Judge Coulter felt that less leniency should be shown to criminals" was "*no indication* that Judge Coulter was prejudiced against the appellant,"¹⁹⁵ a criminal defendant. Even ignoring the court's minimizing gloss, its analysis does nothing to silence, or even address, the screaming fact that as a convicted "criminal," the defendant had become a member of the class for which the judge was predisposed (at least according to his own words) to increase their sentences above the prevailing rates. Even under the court's definition of bias—namely, hostility, ill-will, undue friendship or "favoritism"—the judge was apparently favoring the prosecutor.¹⁹⁶

Heath v. State, for our counterexample, at least reaches the right result, if leaving something to be desired in the analysis department.¹⁹⁷ There, the defendant entered a plea bargain by which he would be committed to a state hospital to complete a sex offender treatment program. The agreement further provided that, after successful completion of the program, which would take four years, he would be returned to the court for sentencing. The sentencing range would then be zero to twenty years, which the judge had to consider with an "open mind," with due consideration for all of the circumstances (including the sex offender treatment program).

By the time the defendant had completed this four-year sex offender program, however, the judge who had accepted the plea agreement was no longer on the bench. Unfortunately for the defendant, the newly assigned judge stated:

[S]he was treating the plea agreement as one "negotiated for a 20-year sentence" . . . although she later acknowledged that the twenty

192. Because the trial court blindly denied this request to present witnesses, and the state supreme court affirmed this denial, the factual record on the disqualification issue is limited to the sparse sentences that I have listed above. *See id.*

193. *Id.*

194. *Id.*

195. *Id.* (emphasis added).

196. Some evidence that the judge did, in fact, make good on his threat to raise sentences is the defendant's actual sentence, which was "30 to 50 years and 50 years to life." *Id.* To be sure, his underlying crimes were armed robbery and attempted murder, respectively, for which we would expect long sentences.

197. 450 So. 2d 588 (Fla. Dist. Ct. App. 1984).

years' imprisonment was technically only "a cap"; that she considered the sex offenses in question far too serious to impose anything less than twenty years' imprisonment; that it mattered not whether the defendant had successfully completed the sex offender program in view of the seriousness of these offenses; and that it was the defendant's "hard luck" to draw her as a trial judge upon remand given her strong views on sex offenses involving minor children.¹⁹⁸

When the case reached the appellate court, rather than take the *Myers* road and reach questionable conclusions about presumptions of impartiality or lack of "bias," that court acknowledged reality:

Plainly, this trial judge was in no position to honor the plea agreement herein given her strong personal views concerning the crimes in question and, indeed, it is questionable whether she would have ever accepted the plea agreement, as negotiated, had she been the original trial judge in the case. It is therefore our view that she should have recused herself from the case as she could not conscientiously honor the terms of the plea agreement.¹⁹⁹

While the case is unique in that the judge failed to honor the terms of a plea bargain previously accepted by a different judge, the actual posture places the case squarely on the same footing as other cases before tough-on-crime judges. That is because the issue was whether the judge *could*, using her "open mind," sentence the defendant to zero to twenty years; this judge could not and therefore she had to be disqualified. The same is true for any other tough-on-crime judge—they all are bound to adjudicate impartially with an "open mind," and if they cannot, they should recuse themselves. The analysis is simple; it becomes more complicated only because of the prevalence of tough-on-crime judges (and the fact that they themselves often are adjudicating such disqualification motions in the first instance).²⁰⁰ But that which is prevalent is not necessarily right.²⁰¹

In sum, while the rules of disqualification speak in one facially consistent voice, the general practice and many (but fortunately not all) ethics opinions and cases gloss over the rules. These frivolous interpretations have taken advantage of the rules' general phraseology. Perhaps, then, to make explicit what was already at least implicit, the comments to the rules should be supplemented along the following lines:

Deciding in advance to be "tough on crime" generally, tough on particular crimes, or tough on particular criminal defendants is inconsistent with impartiality; likewise, a judge's announcement to the electorate or appointing authority that she is "tough on crime," "pro-prosecution," or the essential equivalent is inconsistent with impartiality. Having made such a prejudgment or announcement, the

198. *Id.* at 590.

199. *Id.*

200. *See infra* Part II.D (noting the laudable push to amend disqualification rules and practices so that a judge is not deciding the motion to disqualify herself).

201. We could literally drown in examples: rape, drug use, teenage pregnancy, smoking, and so on.

judge should recuse herself from applicable criminal cases, and failing her *sua sponte* recusal, she should be disqualified.

Adding such a comment to current Rule 2.11 to the *Model Code of Judicial Conduct*, and the state equivalents, should put an end to any current ambiguity, whether real or contrived.²⁰²

2. *Aiding and Abetting Liability: A Note on the Role of Attorneys*

Corporations aside, attorneys are the largest contributors of judicial campaign money.²⁰³ Those attorneys who give the money to buy decisions are arguably acting unethically.²⁰⁴ The principal *Code* violations are those listed in detail above.²⁰⁵ The contributing attorneys in turn are aiding and abetting those violations.²⁰⁶ That the practice is pervasive should not allow it to continue unabated. Indeed, *because* attorney contributions are so pervasive, we should heavily scrutinize the practice. The point of this brief note is not to indict anyone, but instead, it is to raise awareness and hopefully start a conversation on the matter.²⁰⁷

3. *Canon Law Summary*

The Canons quite clearly and quite universally require disqualification even at the appearance of partiality. Why, then, tough-on-crime judges persist in sitting on criminal cases is baffling. It might be explained in part because the foxes guard the hen houses (that is, the actually or apparently biased judges are the ones

202. Rules 3.1 and 4.1 would likewise be good homes for such a comment. *See* MODEL CODE OF JUDICIAL CONDUCT R. 3.1, 4.1 (2007).

203. “The 1998 Report of the ABA Task Force on Lawyers’ Political Contributions details the rising costs of judicial campaigns and the proportion of campaign contributions made by lawyers, which range from 10 percent to over 75 percent of all funds collected by judicial candidates in different states.” ABA STANDING COMM. ON JUDICIAL INDEPENDENCE ET AL., REPORT (2002), available at <http://www.abanet.org/judind/pdf/hod-final.pdf>.

204. *Cf., e.g.,* Leslie Miller, *The Impact of Judicial Selection on an Independent Judiciary*, THE BRIEF, Winter 2008, at 24 (recounting *New York Times*’s study finding the voting patterns of members of the Ohio Supreme Court overwhelmingly favored their contributors); ABA STANDING COMM. ON JUDICIAL INDEPENDENCE ET AL., *supra* note 206, at 3–4 (describing several studies finding that attorneys, judges, and voters believe that campaign contributions influence judicial decisions); *see also* Stephen J. Ware, *Money, Politics and Judicial Decisions: A Case Study of Arbitration Law in Alabama*, 30 CAP. U. L. REV. 583, 584 (2002) (finding a “remarkably close correlation between a justice’s votes on arbitration cases and his or her source of campaign funds” in a four-year study of the Supreme Court of Alabama).

205. *See supra* Part II.B.

206. MODEL RULES OF PROF’L CONDUCT R. 8.4(f) (2003) (making it unethical for attorneys to assist in judicial misconduct). There is no exception for those times in which the contributions are made begrudgingly, although explicit judicial coercion might warrant an implicit exception. More often, however, the coercion would be merely a mitigating factor.

207. I hope to write on the subject in a future work, and any comments hereby elicited would surely benefit that project.

who normally decide whether to disqualify themselves) and because the elective system itself renders those foxes even less trustworthy than normal.²⁰⁸

C. *Temptations: Recidivism and Empiricism*

In light of both *Caperton* and the Canons, disqualification likely is mandated whenever judges labor under prohibitive “temptations” or any other basis on which a reasonable person “might question” the judge’s impartiality. With respect to the “temptations” and other bases for disqualifying tough-on-crime judges, there are two grounds in particular that counsel for disqualification: (1) startling criminal recidivism rates; and (2) empirical data showing, among other things, that judges are, in fact, “tough(er) on crime” when facing elections. Each ground is discussed in turn below.

1. *Recidivist Judges*

[J]udges in criminal cases are required to make thousands of decisions regarding the suppression of evidence and bail. While it is impossible to predict who will commit a crime while released on bail, it is easy for politicians in hindsight to criticize a judge who granted bail to the defendant who re-offends while out on bail.²⁰⁹

Recidivism rates show us that—even in seemingly low-publicity criminal cases—there is still a “serious risk” in being soft on crime. That is, there is a significant, if not likely, chance that a criminal defendant will commit another offense—and that new offense might make bad headlines. Therefore, the publicly prudent course is to sentence the defendant to prison (or jail) and for that sentence to keep the defendant in prison through the next election (or perhaps any anticipated election).²¹⁰

In a fifteen-state study in 1994, for example, within three years of their release, 67.5% of all prisoners were rearrested; 46.9% were reconvicted; and, 51.8% returned to prison with or without a new prison sentence.²¹¹ These numbers are staggering. Even if the numbers were unreliable across time or states, the point—the pressure on the judges—would still be significant at much lower percentages.

To take an example from the federal context, from 1986 to 1994, 15.7% of federal prisoners returned to federal prison within three years.²¹² Of note, this mean percentage reflects a 7.2% increase from 1986 to 1994 in the number of returning federal prisoners—11.4% in 1986 to 18.6% in 1994.²¹³ Of note as well,

208. In addition to Part II.C immediately below, see also Part II.D (suggesting that judges should not be deciding disqualification motions in their own cases).

209. Bell, *supra* note 37, at 3 (footnotes omitted).

210. Incapacitation, of course, is one of the four traditionally mentioned purposes of criminal sentencing, but incapacitation to guarantee a smooth judicial election is absurd.

211. BUREAU OF JUSTICE STATISTICS, *supra* note 18, at 515 tbl.6.50, available at <http://www.albany.edu/sourcebook/pdf/t650.pdf> (last visited Oct. 12, 2009).

212. BUREAU OF JUSTICE STATISTICS, *supra* note 18, at 527 tbl.6.68, available at <http://www.albany.edu/sourcebook/pdf/t668.pdf> (last visited Oct. 12, 2009).

213. *See id.*

prisoners who had been released after serving a sentence for violent crime showed a higher rate of return at 32.4%.²¹⁴ And these percentages are understated because they do not include federal prisoners who subsequently entered a state prison or local jail. The point of this brief (and necessarily incomplete) excursion into recidivism rates is not to nail down the numbers with any precision. Whether the applicable recidivism percentage is five, fifteen, or fifty, the recidivism rate puts significant pressure on judges to be “tough on crime,” particularly because judges run a significant political risk if any defendant turns recidivist.

Thus, the time is ripe to ask again, at least rhetorically, whether tough-on-crime judges operate under substantially similar “serious risk[s]” of “actual bias or prejudgment,” “debt[s] of gratitude,” or “possible temptations” in their elective environment, viewed through the lens of a “realistic appraisal of psychological tendencies and human weakness[es].”²¹⁵ In light of the above statistics on recidivism (and on the documented instances in which judges lost their jobs and salaries for being soft on such crime), the answer seems obvious. But even if the answer—one way or another—is somehow unclear, the elective judge’s impartiality might reasonably be questioned.²¹⁶ If anyone remains unconvinced, the following findings may make a convert out of the reader.

2. Empirical Findings

“It may well be impossible to establish empirically that the threat of electoral reprisal affects judicial behavior.”²¹⁷ It is not impossible. In fact, several, largely unchallenged empirical studies have demonstrated that a link does exist between electoral incentives and judicial behavior in criminal cases.²¹⁸ These studies almost invariably find that electoral pressures make judges more punitive, i.e., “tough on crime.”²¹⁹ While more studies would be beneficial, they would be primarily piling on, not necessarily plowing new ground.²²⁰

Analyzing data from virtually all state supreme court cases in the years 1995 through 1997, two political scientists recently concluded that “[i]n states that

214. BUREAU OF JUSTICE STATISTICS, *supra* note 18, at 527 tbl.6.69, available at <http://www.albany.edu/sourcebook/pdf/t669t668.pdf> (last visited Oct. 12, 2009).

215. See *supra* Part II.A (discussing *Caperton* and due process disqualification).

216. See *supra* Part II.B (discussing Canon disqualification).

217. Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, 1583 (1990). The article cites only the “occasional anecdote,” including Justices Otto Kaus and Joseph Grodin of the California Supreme Court, both of whom acknowledged that heavy electoral pressures may have affected their votes. *Id.*

218. See Joanna M. Shepherd, *The Influence of Retention Politics on Judges’ Voting*, 38 J. LEGAL STUD. 169 (2009) (finding that judges facing retention elections tend to decide cases in accord with the ideology of the political party likely to reelect them).

219. Obviously, judges may be “tough on crime” for other reasons as well. As just one possible example, past prosecutors predominate the bench. See, e.g., Bradley C. Canon, *The Impact of Formal Selection Processes on the Characteristics of Judges—Reconsidered*, 6 L. & SOC. REV. 579, 583, 589, 591 (1972).

220. I should caution the reader that the following empirical review is not meant to be entirely exhaustive, only representative.

retain their judges electively, a direct effect exists which encourages judges to affirm lower court punishments where the public is most supportive of capital punishment.²²¹ Conversely, “public support for capital punishment has no measurable effect on nonelective state supreme courts.”²²² In a separate work, the same conclusion was reached: “Judges who require the approval of voters to keep their positions may avoid taking positions that challengers could use against them in a campaign,” and positions favorable to criminal defendants in particular appear to be the most politically dangerous.²²³

Similarly, analyzing 22,095 criminal cases in Pennsylvania, two noted researchers recently found that “all judges, even the most punitive, increase their sentences as reelection nears. . . .”²²⁴ The researchers also “attribute[d] more than two thousand years of additional incarceration to this” election effect.²²⁵ In elective systems, moreover, a single mistake can cost a high political price: “Under conditions of near absolute voter ignorance, information about the adverse consequences of a single case, when publicized, can be decisive in swaying voter opinion against a presiding judge.”²²⁶ Thus, “[b]ecause voters are more likely to learn about perceived instances of underpunishment than overpunishment, reelection-minded trial judges might take steps to sentence more harshly than they would if they were not bound by periodic review.”²²⁷

221. Brace & Boyea, *supra* note 64, at 370; *cf.* Harris v. Alabama, 513 U.S. 504, 513 (1995) (noting that elected Alabama judges rejected juries’ death sentences only five times, but rejected juries’ life sentences in favor of death sentences forty-seven times); *id.* at 519–20 (Stevens, J., dissenting) (criticizing this seemingly poor-performing system).

222. Brace & Boyea, *supra* note 64, at 360.

223. LAWRENCE A. BAUM, AMERICAN COURTS: PROCESS AND POLICY 119 (6th ed. 2008).

224. Gregory A. Huber & Sanford C. Gordon, *Accountability and Coercion: Is Justice Blind When It Runs for Office?*, 48 AM. J. POL. SCI. 247, 258 (2004) (“Our finding is not attributable to bidirectional convergence with a preponderance of lenient judges. Similarly, the proximity effect is largest in the least punitive counties, thereby ruling out the possibility that uniform judicial liberalism explains the observed relationship.”). Compare this finding, however, with the curious conclusion of three economists: “We find that judges from the lenient party, Democrats, are rewarded for being harsh, and that judges from the harsh party, Republicans, are rewarded for being lenient.” Steven G. Craig et al., *The Demand for Judicial Sanctions: Voter Information and the Election of Judges*, 9 ECON. GOV. 265, 279, 283 (2008); *see also id.* at 269 (“In 1988, the Democratic incumbent was more lenient than the most lenient Republican, and again in 1992 no Democrat was as harsh as any of the Republicans. In 1990, Republicans imposed sentences that were on average 9.4% harsher than Democrats.”). The number crunching was focused on election years, however, not on a comparison of election years to non-election years.

225. Huber & Gordon, *supra* note 224, at 261.

226. *Id.* (noting that “[a] Chicago trial judge, for example, lost an election bid in 1986 as a consequence of acquitting a defendant who had allegedly attacked a police officer”) (citation omitted).

227. *Id.* at 262. The authors convincingly summarize the conundrum:

[O]n the rare occasion that voters do become aware of judicial behavior, it is usually due to coverage of high-profile trials or controversial cases

Although showing interstate variation on the issue, political scientist Daniel Pinello also found that elected judges tended to be more “prosecution-sympathetic” than their appointed counterparts.²²⁸ Placing his findings in the well-hashed “theoretical prism” of judicial selection rhetoric, he concluded that:

[A]ppointed judges, insulated from direct popular control, are the most free to adopt unpopular policies by sustaining constitutional protections making criminal-law enforcement more onerous; in contrast, elected judges, directly controlled by popular opinions, weigh in on the side of order, and against freedom, by rejecting a due-process model of criminal justice in favor of a crime-control model.²²⁹

Pinello’s findings also cast additional doubt on the ability of both conservatives and liberals, operating in an elective system, to protect or innovate criminal defendants’ constitutional rights.²³⁰

With respect to the death penalty in particular, judges are especially tainted. In California, Tennessee, and South Carolina, for example, an empirical examination suggested that pro-death penalty publicity positively increased appellate court affirmances of death sentences.²³¹ Judges’ behavior coheres to the general public opinion on the subject: “capital punishment [as of 1995] enjoys immense public support; the 1994 Gallup figure of 80% is the highest recorded in

of recidivism. Critically, adverse publicity nearly always corresponds to cases of perceived judicial *leniency*. Media accounts of courtroom proceedings tend to result in voters believing judges are too lenient. Additionally, voters are inclined to believe the criminal justice system as a whole is too lenient. Finally, nearly all convicts claim to have been punished too much, and more definitive evidence of overpunishment typically comes to light years after a judge hands down a sentence. By contrast, an episode of recidivism or unusually pointed criticism of a judge by a victims’ rights group or police union (or challenger) provides a more immediate signal that a judge’s sentence did not fit the crime.

Gordon & Huber, *supra* note 15, at 110–11 (citations omitted).

228. PINELLO, *supra* note 56, at 82–83, 130–31; cf. Robert A. Kagan et al., *The Evolution of State Supreme Courts*, 76 MICH. L. REV. 961, 994 tbl.6 (1978) (indicating that in several, but not all, states using judicial elections, the state supreme court opinions issued between 1940 and 1970 less frequently favored the criminal defendant).

229. PINELLO, *supra* note 56, at 131.

230. See, e.g., *id.* at 175, fig.B.12. *But see id.* at 99 (concluding that popularly elected judges in West Virginia were more likely to issue criminal “defense-sympathetic” rulings than legislatively selected judges in Virginia).

231. John Blume & Theodore Eisenberg, *Judicial Politics, Death Penalty Appeals, and Case Selection: An Empirical Study*, 72 S. CAL. L. REV. 465, 499 (1999). *But see id.* at 500–01 (noting that data did not reveal same effect in Mississippi or Texas). Of note to our topic as well, the authors concluded that “[w]hether a state is classified as having partisan judicial selection methods is not a useful predictor of capital case outcomes. Specific state political campaigns raising the death penalty issue are more helpful in explaining case outcomes, but even they do not always assure measurable change.” *Id.* at 502.

this century.”²³² Perhaps unsurprisingly, then, elective judges are also much more likely than appointive judges to override a jury’s sentence of life and impose the death penalty.²³³

Finally, using data on murder cases in Chicago over a sixty-year period during the late-nineteenth and early-twentieth centuries, Professors Richard Brooks and Steven Raphael found that “criminal defendants were approximately 15% more likely to be sentenced to death when the sentence was issued during the judge’s election year.”²³⁴ Moreover, “[a] correlation between political events and judicial sentencing may exist even in states where there is no genuine competition in the electoral process. . . .”²³⁵ Of course, in the non-judicial elective world, it has been shown that the death penalty is more frequently sought during both gubernatorial and prosecutorial election years. Thus, “[i]t would be surprising if judges, during their elections cycles, were unresponsive to the politics confronting their elected counterparts in the governors’ and prosecutors’ offices.”²³⁶

Despite the consistent conclusions of the above studies, the counter-argument to such studies might be that elective judges are better adjudicators; that is, their votes in criminal cases will naturally be different—indeed better—than appointive judges. For example, if the elective judges reverse death-penalty cases less frequently than their appointive counterparts, that is because fewer death-penalty cases legally need reversing. This argument, however, virtually crumbles when one important variable is highlighted. These studies—which particularly examine the differing decisional effects in election years—rule out the possibility that elective judges might “better” interpret the law. For that argument to have significant force, their “better” interpretations should be consistent year to year, which they are not. For one to buy the argument in light of this empirical evidence, then, one would have to accept the self-defeating position that their interpretations

232. Warr, *supra* note 59, at 301; Brace & Boyea, *supra* note 64, at 362 (showing similarly strong public support for the death penalty).

233. Harris v. Alabama, 513 U.S. 504, 513 (1995) (noting that elected Alabama judges rejected juries’ death sentences only five times but rejected juries’ life sentences forty-seven times); *id.* at 519–20 (Stevens, J., dissenting) (criticizing this seemingly poor-performing system); Bright & Keenan, *supra* note 5, at 793–94 (comparing jury override use in Alabama, Florida, Indiana, and Delaware);

234. Richard R.W. Brooks & Steven Raphael, *Life Terms or Death Sentences: The Uneasy Relationship Between Judicial Elections and Capital Punishment*, 92 J. CRIM. L. & CRIMINOLOGY 609, 610 (2002). These data may not be reliably applicable to our context. For example, while Chicago did employ elections during the study period, and while the death penalty rate did rise during election years, juries—not judges—generally decided whether sentences would be death (over life imprisonment). The authors note, however, that “a defendant [could have] waive[d] his or her right to a jury trial, . . . [and] even in a jury trial, judges were still able to influence the juries’ decisions in various ways, particularly through jury instructions.” *Id.* at 638. Also of note, the study reviewed cases between 1870 to 1930 and no later. *Id.* at 616, 638 & 638 n.42.

235. *Id.* at 611 n.5 (citing consistent conclusions).

236. *Id.* at 612.

are better, but only in election years.²³⁷ Perhaps, though, one would not only buy the argument, but would retort that it is the elective system alone that is the only thing keeping judges honest to public accountability. In other words, elective years work exactly as intended; every other year fails. Of course, this argument necessarily counsels for annual, or at worst biennial, elections. It is perhaps telling that few states have done so, not to mention (further) the extrajudicial time-drain such arguments would ultimately hoist onto judges.

We have thus seen that elective pressures indeed affect decisional behavior, but which pressure is worse: tough-on-crime or campaign-contributor pressures.²³⁸ For example:

[T]he New York Times reviewed . . . the Ohio Supreme Court [and] found that justices rarely disqualified themselves from cases in which the parties had made contributions to their campaigns. On average, the justices ruled in favor of the contributors 70 percent of the time. One justice favored his contributors 91 percent of the time.²³⁹

If those contributors want tough-on-crime judges, as most of the public and many interest groups do, then we have a perfect storm threatening impartiality and warranting disqualification.

But even if contributors do not care about a judge's tough-on-crime stance, we must ask whether the pressures confirmed in the foregoing empirical studies tip the scales in favor of recusal. As the following section makes plain, we need not be certain to conclude that recusal is warranted.

D. The Appearance of Uncertainty

One pervasive issue in this disqualification thicket is how best to deal with all of the uncertainty. Indeed, perhaps the treatment of uncertainty is the fundamental divide in disqualification law. Both sides must concede that it is uncertain whether the run-of-the-mill criminal case will impact future votes; and if so, whether the impact would be negative or positive; and regardless, whether the particular judge's impartiality might actually be compromised. As the preceding highlights of recidivism statistics reveal, a significant percentage of criminal defendants present the risk to the judge of negative electoral reaction. The counterpoint, though, would correctly note that, in any given case, recidivism is speculation, and in any event, the judge might not have speculated. The higher-value point, however, is that uncertainty weighs in favor of recusal, not refusal of recusal; in other words, uncertainty should be resolved against the judge (in the

237. The curious converse could be argued as well—that elective judges are indeed better, but only in nonelection years—but that argument would suggest that either an appointive system or an elective system without reelections would be optimal.

238. Of course, these two dangers are not mutually exclusive, and when they are both present, this confluence practically screams for disqualification.

239. Miller, *supra* note 204, at 24; *see also* Ware, *supra* note 204, at 584 (finding a “remarkably close correlation between a justice’s votes on arbitration cases and his or her source of campaign funds” in a four-year study of the Supreme Court of Alabama).

form of recusal or, failing that, disqualification). That is what the Codes say,²⁴⁰ that is what a fair trial presupposes (at least according to the Supreme Court),²⁴¹ and that is what judicial morality might require.²⁴² Moreover, the disqualification cases are fairly clear that “any reasonable doubts about the partiality of the judge ordinarily are to be resolved in favor of recusal.”²⁴³

This presumption—that significant uncertainty should be resolved in favor of disqualification—is also needed because the same judges being challenged are normally the ones deciding the challenges, and more generally, judges have revealed that they are not necessarily adept at determining when their biases, whether real or perceived, warrant disqualification. In one study involving 571 judges across four states, judges expressed a high level of ambivalence as to whether to recuse when issues of bias arose.²⁴⁴ Indeed, in addition to judges expressing ambivalence as to whether to disqualify, 32% of respondent-judges indicated a strong disposition *against* recusal in such cases. The judges’ responses to a particular tough-on-crime question were even more troubling. Judges were asked two related questions: (A) “Assume that shortly before becoming a judge, you made a speech during which you said that all convicted drug offenders should receive the maximum sentence permitted by law, [and f]urther assume that you are now to preside over several cases against drug offenders”; and (B) “[s]ame facts as in [Question A], but your record shows that subsequent to the speech, you have NOT imposed the maximum sentence in some cases.”²⁴⁵ Surprisingly, the answers to Question A strongly suggested that the respondent judges either would not

240. The Code standard is, again, that recusal is mandatory “in any proceeding in which the judge’s impartiality *might reasonably be questioned*.” MODEL CODE OF JUDICIAL CONDUCT R. 2.11(A) (2007) (emphasis added); *see also* 28 U.S.C. § 455(a) (2000); MODEL CODE OF JUDICIAL CONDUCT Canon 3E(1) (2003) (same). “[Q]uite simply and quite universally, recusal [is] required whenever ‘impartiality might reasonably be questioned.’” *Liteky v. United States*, 510 U.S. 540, 548 (1994) (quoting 28 U.S.C. § 455(a)). Neither the Code nor statute requires that disqualified judges are biased in fact. Rather, the standards require recusal on the showing only that impartiality might be questioned (not found). *See also* Monroe H. Freedman, *What a Reasonable Person “Might,” “Could,” and “Would” Do*, JUDICIAL ETHICS FORUM, Mar. 25, 2009, <http://judicialethicsforum.com> (explaining that usage of “might” in the disqualification standard signifies a low bar for mandatory recusal).

241. *See, e.g., In re Murchison*, 349 U.S. 133, 136 (1955) (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)) (noting that not only actual justice, but the “appearance of justice” must be satisfied).

242. *See infra* Part II.E.

243. *E.g., In re United States*, 441 F.3d 44, 56 (1st Cir. 2006) (disqualifying judge pursuant to 28 U.S.C. § 455(a) (2000)); *Potashnik v. Port City Constr. Co.*, 609 F.2d 1101, 1112 (5th Cir. 1980) (noting that federal disqualification law “clearly mandates that it would be preferable for a judge to err on the side of caution and disqualify himself in a questionable case”).

244. JEFFREY M. SHAMAN & JONA GOLDSCHMIDT, JUDICIAL DISQUALIFICATION: AN EMPIRICAL STUDY OF JUDICIAL PRACTICES AND ATTITUDES 31–32 (1995) (“indicating these situations involving . . . bias issues present the greatest difficulty for judges on the issue of disqualification”).

245. *Id.* at 77.

recuse or were, at a minimum, ambivalent about the decision to recuse.²⁴⁶ In response to Question B, unsurprisingly, the judges were even less likely to recuse.²⁴⁷ Interestingly, for both questions, judges would recuse themselves slightly more often than they would recommend recusal to a colleague judge seeking advice on whether to recuse in the exact same situation.²⁴⁸ Perhaps judges' questionable responses owed, at least in part, to cognitive shortcomings. For example, "research on social psychology shows that much bias is unconscious and that people tend to underestimate and undercorrect for their own biases and conflicts of interest."²⁴⁹

In addition to the cognitive shortcomings, and to the extent that appearances should matter—and perhaps they should insofar as we are operating within the realm of uncertainty—the public believes that campaign contributions bias judges toward their contributors.²⁵⁰ Of course, this argument rests on the weaker strength of appearances and the public interpretation of such appearances, and it applies only when a judge has received monetary support in seeming exchange for his "tough-on-crime-ness," but it further tips the scales toward disqualification.

Anecdotally, this poor, self-biased, and prosecution-biased reaction to disqualification has continued unabated post-*Caperton*; judges are not disqualifying themselves whenever they have dogs in the fight.²⁵¹ For example, of

246. See *id.* at 38, 73, 77 (showing values closely approaching the "strong tendency not to disqualify" category but falling narrowly within the "ambivalent" category); see also *id.* at 38 (citing *United States v. Thompson*, 483 F.2d 527 (3d Cir. 1973)) (noting that the statements in Question A "might be indicative of the kind of closed-minded bias that calls for disqualification").

247. *Id.* at 35. Question B, of course, presents a picture of a more open-minded judge. She is the equivalent of Judge Political, discussed below, who says she is tough on crime, but in actuality, she is not. See *infra* Part III.B.

248. SHAMAN & GOLDSCHMIDT, *supra* note 244, at 77; see also *id.* at 65–66 (offering possible explanations for this unexpected finding).

249. Goldberg et al., *supra* note 41, at 525 (citing studies); see also Debra Lyn Bassett, *Recusal and the Supreme Court*, 56 HASTINGS L.J. 657, 666–70 (2005) (discussing subconscious forces affecting judges' ability to recognize their own biases).

250. See, e.g., Geyh, *supra* note 45, at 43 (discussing the "'the Axiom of 80': Eighty percent of the public favors electing their judges; eighty percent of the electorate does not vote in judicial races; eighty percent is unable to identify the candidates for judicial office; and eighty percent believes that when judges are elected, they are subject to influence from the campaign contributors who made the judges' election possible"); Charles Hall, *Poll: Huge Majority Wants Firewall Between Judges, Election Backers*, JUSTICE AT STAKE CAMPAIGN, Feb. 22, 2009, http://www.justiceatstake.org/newsroom/press_releases.cfm/poll_huge_majority_wants_firewall_between_judges_election_backers?show=news&newsID=5677 ("By overwhelming margins, U.S. adults doubt that elected judges can be impartial in cases involving their biggest election campaign financial supporters, and the public says judges should step aside from such cases, according to a new national poll by Harris Interactive.").

251. Here is the frustrating attitude to which I am referring. After a criminal defendant asked a district judge to recuse himself from the defendant's case in light of *Caperton* and the not insignificant fact that the defendant may have made death threats against the judge, the judge tersely retorted "What [*Caperton*] has to do with the current

the fifty cases citing *Caperton* appearing in LexisNexis and Westlaw databases to date, no court—trial or appellate, state or federal—has granted a disqualification motion on the basis of *Caperton*.²⁵² This is indeed a frustrating state of affairs. Granted, the related question whether a judge’s “impartiality might reasonably be questioned” in any given situation does not always return foregone answers; like the troubled “appearance of impropriety,” the standard arguably might be too vague (i.e., uncertain) at times to base professional discipline.²⁵³ But we are primarily concerned with judicial disqualification—not discipline. To be sure, a failure to recuse can be a basis for discipline, but it does not have to be. In other words, there are two possible tracks: (1) failures to recuse violating (higher) Standard X are disciplinable; and (2) failures to recuse violating (lower) Standard Y are not disciplinable, but that still should result in disqualification upon review. Moreover, there is really no professional detriment to a judge by mandating recusal. Indeed, it could be a benefit, in the form of less, or less-difficult, work.²⁵⁴

From all of this, the virtually unassailable conclusion is that the impartiality of tough-on-crime judges “*might* reasonably be questioned” enough to warrant disqualification. Indeed, the unassailable conclusion is actually stronger: it *would be unreasonable not* to question such judges’ impartiality.²⁵⁵ Indeed, recall the three Scenarios in the Introduction, impartiality would be questioned by all three participants—a third-party observer, a criminal defendant (and/or her attorney), and even the judge himself.

The only significant counterpoint to disqualification in the *Code* is Rule 2.7 (which reads very much like the outdated “duty to sit”): “A judge shall hear and decide matters assigned to the judge, *except when disqualification is required*

case is anyone’s guess. The *Caperton* motion is denied.” United States v. Basciano, 05-CR-060 (E.D.N.Y. July 6, 2009) (unpublished).

252. Approximately nineteen cases deny *Caperton* challenges on the stated basis that *Caperton* involved “extreme” or “extraordinary” facts. While a total of fifty cases cite *Caperton* for one proposition or another as of March 15, 2010, only these nineteen cases present analogous challenges in the judicial disqualification context.

253. I disagree, but let us assume for the moment that I am wrong. *See generally* Leslie W. Abramson, *Appearance of Impropriety: Deciding When a Judge’s Impartiality “Might Reasonably Be Questioned,”* 14 GEO. J. LEGAL ETHICS 55 (2000) (suggesting, among other improvements, greater specificity in disqualification rules).

254. Indeed, the only detriment might be an illegitimate one: requiring recusal might remove the judge from a case in which the judge could make a name for himself. CANONS OF JUDICIAL ETHICS Canon 34 (1957) (stating that judges should not “administer the office for the purpose of advancing his personal ambitions or increasing his popularity”). Although there is no tangible detriment to the judge who denies a disqualification motion and then is reversed, it is worth noting that judges do not like to be reversed. Richard S. Higgins & Paul H. Rubin, *Judicial Discretion*, 9 J. LEGAL STUD. 129, 130 (1980) (“For reasons not completely understood, judges seem to desire to avoid being reversed.”).

255. This stronger formulation, while accurate, is admittedly a tortured read, like the SEC’s attorney regulations promulgated pursuant to the Sarbanes-Oxley Act. *See* 17 C.F.R. § 205.2(e) (2003) (requiring reporting of fraudulent activity after learning of “credible evidence, based upon which it would be unreasonable . . . for a prudent attorney not to conclude that it is reasonably likely that a material violation has occurred, is ongoing, or is about to occur”).

by Rule 2.11 or other law.”²⁵⁶ The Comment states that “[t]he dignity of the court, the judge’s respect for fulfillment of judicial duties, and a proper concern for the burdens that may be imposed upon the judge’s colleagues require that a judge not use disqualification to avoid cases that present difficult, controversial, or unpopular issues.”²⁵⁷ At first blush, this apparent “duty to sit” might seem to temper, if not trample, the duty to recuse on close calls, but Rule 2.7 is nothing more than a tautology. “The purpose of this Rule and the accompanying Comment is not to resurrect a ‘duty to sit’ that trumps disqualification rules, but *simply to emphasize that judges have a duty to do their jobs when they are not properly disqualified.*”²⁵⁸ Moreover, as one commentator has recently noted, “To the extent that the concepts and rules collide on occasion, the duty of impartiality and mandatory disqualification trumps the more generalized ‘Responsibility to Decide’ found in the Code.”²⁵⁹

Uncertainty, in sum, should be resolved in favor of disqualification, particularly on the record before us, in which judges (i) face electoral repercussions for not sentencing defendants harshly, (ii) change their judicial behavior in criminal cases accordingly as elections near, (iii) operate under cognitive shortcomings in discerning and interpreting their own biases, and (iv) face no significant consequences by recusing themselves. Indeed, perhaps during their next election or retention cycle, tough-on-crime judges who recused themselves could brag to the voters that they were “so ‘tough on crime’ that the authorities forced me to sit out on criminal cases.”

E. Lawlessness and Immorality

There are two final, transcendent objections to tough-on-crime judges: (1) that they are often lawless; and (2) that they exhibit a questionable morality.²⁶⁰

256. MODEL CODE OF JUDICIAL CONDUCT R. 2.7 (2007) (emphasis added).

257. *Id.* R. 2.7 cmt.

258. GEYH & HODES, *supra* note 157, at 35(emphasis added); *see generally* Jeffery W. Stempel, *Chief William’s Ghost: The Problematic Persistence of the Duty to Sit*, 57 BUFF. L. REV. 813, 832–34 (2009) (“Comment 1 to Rule 2.7 and the Reporter’s Explanation make clear that, as has been the case for more than thirty years, the correct resolution of this tension was to require judges to recuse when presented with valid grounds (the command currently in Rule 2.11) but to caution against unwarranted recusal due to unsupported assertion, baseless suspicion, frivolous arguments, or manufactured grounds (the command currently in Rule 2.7).”) (footnotes omitted).

259. Stempel, *supra* note 258, at 832–34.

260. We have arrived at the most universally judgmental section of this Article. If—somehow—a tough-on-crime judge or judicial regulator has concluded that none of the foregoing reasons mandate recusal, this Section still applies. Perhaps the decision not to recuse was reached on some perceived premise of that broadly joined, always intellectually alluring field of “regulation of speech.” In the United States, people of course can say virtually whatever they want. Judges are people—or almost people. Judges can say almost whatever they want. Indeed, if the very speech under discussion were to reach the Supreme Court, we would have to conclude, at least cautiously, that judges may announce that they are either or both (i) “tough on crime” and/or (ii) in favor of some similar noxious slogan. That is *White*. If those same judges were to fail to recuse themselves from a subsequent criminal case, however, the answer is unsettled as a matter of constitutional

1. Lawlessness

It should be uncontroversial to say that judges have an obligation to the law. The *Code* requires that judges “uphold and apply the law.”²⁶¹ And judges must “perform all duties of judicial office”—especially adjudication—“fairly and impartially.”²⁶² The comment appropriately cautions that “[t]o ensure impartiality and fairness to all parties, a judge must be objective and open-minded.”²⁶³ In the face of this (hopefully) uncontroversial law, tough-on-crime judges are lawless.

With respect to the law of sentencing, for example, judges must weigh individually “the nature and circumstances of the offense and the history and characteristics of the defendant.”²⁶⁴ Then, judges must “impose a sentence sufficient, *but not greater than necessary*, to comply with” the purposes of criminal sentencing.²⁶⁵ Those purposes often include rehabilitation and “the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.”²⁶⁶ Likewise, “[t]he 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.”²⁶⁷ Thus, a tough-on-crime judge cannot categorically impose their maximum sentences without violating the law. Even when judges have discretion within a range of years, such discretion can be legally abused.²⁶⁸

Pro-prosecution judges are particularly anathematic in the United States, in which procedural rights are heavily tilted in criminal defendants’ favor. For a variety of reasons, the criminal defendant is armed with an array of procedural and even substantive rights. The prosecution, in comparison, generally lacks all of

law. (Of course, for the reasons listed in Part II.A, tough-on-crime judges should be disqualified as a matter of constitutional law.) What *is* settled is that these failing judges would have acted unethically by clinging to the bench, as explained below. The First Amendment cannot protect judges from ethical judgment.

261. MODEL CODE OF JUDICIAL CONDUCT R. 2.2 (2007). The previous version of the Code essentially required the same, only in more opaque terms. *See* MODEL CODE OF JUDICIAL CONDUCT Canon 3B(2) (2004) (“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.”).

262. MODEL CODE OF JUDICIAL CONDUCT R. 2.2 (2007).

263. *Id.* R. 2.2 cmt. 1.

264. 18 U.S.C. § 3553(a)(1) (2000).

265. *Id.* § 3553(a) (emphasis added). Of course, citation to the federal sentencing statute is primarily because that statute is representative of the various state sentencing statutes throughout the country. *See, e.g.,* ARIZ. REV. STAT. § 13-101 (1994); N.Y. PENAL LAW § 1.05 (McKinney 2006); MODEL PENAL CODE § 1.02 (1962) (sentencing forth similar sentencing purposes).

266. 18 U.S.C. § 3553(a)(2)(D), (6); *see also* N.Y. PENAL LAW § 1.05; MODEL PENAL CODE § 1.02 (similar).

267. STANDARDS FOR CRIMINAL JUSTICE: SENTENCING Standard 18-6.1 (3d ed. 1994).

268. *See, e.g.,* *Cunningham v. California*, 549 U.S. 270, 303 (2007) (Alito, J., dissenting) (providing an example of when a discretionary sentence would be struck down as “unreasonable”); Swisher, *Judicial Ethics*, *supra* note 175, at 790 n.160.

these rights.²⁶⁹ These rights include the obvious—e.g., the right to bail—but also the rule of lenity as well as the presumption of innocence and the corollary burden of proof.²⁷⁰ A truly tough-on-crime judge simply cannot function lawfully in a criminal justice system that gives criminal defendants both a presumption of innocence and a rule of lenity, which construes all ambiguous law in criminal defendants’ favor. Likewise, the elective judge risks breaching the constitutional contract:

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts[:] One’s right to life, liberty, and property, to free speech, a free press, . . . and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.²⁷¹

To be sure, judges can be “tough” in a particular, deserving case, after a careful, procedurally proper, open-minded, individualized consideration of the facts and law. Thus, while a judge should never pledge to be “tough on crime,” she could pledge (with little hope of gaining many votes) to “give criminal cases careful, procedurally proper, open-minded, individualized consideration.” To be “tough on crime” in the absence of careful and open-minded consideration of actual cases, however, is lawless, and a pledge of lawlessness is not something that a judge can honor and still remain on the bench.²⁷²

2. *Immorality*

Without fail, each judge swears an oath of office.

Each justice or judge of the United States shall take the following oath or affirmation before performing the duties of his office: “I, [name of new and ostensibly tough-on-crime judge], do solemnly swear . . . that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as [judge] under the Constitution and laws of the United States. . . .”²⁷³

269. Keith Swisher, *The Modern Movement of Vindicating Violations of Criminal Defendants’ Rights Through Judicial Discipline*, 14 WASH. & LEE J. CIV. RTS. & SOC. JUST. 255, 268–71 (2008) (listing these rights).

270. *Id.* at 270.

271. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943).

272. *See, e.g.*, Swisher, *Judicial Ethics*, *supra* note 173 (examining the practice of judicial conduct commissions and state supreme courts censuring, suspending, and removing judges for lawlessness in criminal cases).

273. 28 U.S.C. § 453 (2000) (emphasis added). State oaths are generally identical in material import:

Every justice of the supreme court and of the superior court and of the family court shall, before exercising any of the duties of his or her office, subscribe in duplicate and take the following engagement: “I _____ do solemnly swear (or affirm) that I will support the

Tough-on-crime judges thus swear that they will “faithfully and impartially” adjudicate each and every case. To gain office, then, the tough-on-crime judge must either shed her tough-on-crime skin or lie. Assuming the latter (else we have little to analyze other than the voter fraud that occurred when the judge lied to the public that she would be “tough on crime”), the judge takes office through deception—far from an upright start.

But this initial deception does not end the problematic behavior, for it is the underlying behavior (the tough-on-crime predisposition) in the judicial role that works the injustices. As a general matter, it would be blameworthy for one to take a position in order to misuse it to cause harm. For example, if one undertook to direct traffic at a downed light only to let people crash, that would be immoral.²⁷⁴ In contrast, a person who did not assume this role would ordinarily be less morally culpable. The tough-on-crime judge, however, affirmatively assumes the role of an impartial adjudicator and then uses the role to inflict partial applications of state power.

The tough-on-crime judge may object to this comparison for two reasons. First, unlike the failing traffic cop, the judge is appropriately approaching some disputes in an impartial manner; it is only criminal disputes that he is approaching in a partial manner. Thus, the traffic cop example needs to be refined as follows to capture more accurately the judge’s conduct: he is like a traffic cop who, while safely directing all cars, allows all trucks to crash. Unfortunately for the tough-on-crime judge, even our refined example reveals his immorality. In particular, the judge has assumed a role—indeed, a “good” role that he swears to uphold “without respect to persons”—and then lets criminal defendants crash, irrespective of the merits.²⁷⁵

But the tough-on-crime judge has a second objection. In the traffic-cop example, the person assuming the role did not state explicitly that she would fail to direct some or all traffic (or fail to do so in a safe manner), whereas the tough-on-crime judge often explicitly states to all the world that he will treat criminal

constitution of the United States and the constitution and laws of this state; that I will administer justice without respect to persons, and do equal right to the poor and to the rich; and that I will faithfully and impartially discharge and perform all the duties incumbent on me as _____ according to the best of my abilities, agreeable to law; so help me God.” (Or, “this affirmation I make and give upon peril of the penalty or perjury.”)

R.I. GEN. LAWS § 8-3-1 (2009); *see also* R.I. CONST. art. 3, § 4 (binding all judicial officers to oath).

274. To be sure, it might be immoral as well for mere passersby to let the cars crash, but the person accepting the responsibility—and indeed, perhaps explicitly or implicitly telling the passersby that they need not accept the responsibility—has surely acted immorally and even more so than the others.

275. Because I am not enamored with role-differentiated ethics, let me point out that the condemnation of the judge is more about doing wrong than doing wrong in a particular role.

defendants harshly.²⁷⁶ That is indeed a valid distinction, but whether it should absolve the judge of moral liability is doubtful. One may explicitly declare her intentions—and thereby absolve herself of most claims of fraud or misrepresentation—but that declaration will not necessarily make right a wrong act. For instance, the judge could tell a stranger that he planned to take the stranger's life away, but this expressed intention would not right the planned wrong. The resulting murderous act might be somewhat less heinous (in that it lacks deceit or a breach of trust), but the act would still be heinous and the result—the dead victim—would still represent a regretful event.

The tough-on-crime judge might respond critically in that we have jumped to the extreme, namely, ubiquitous murder examples. But murder, or at least “killing” or “taking life,” is particularly fair game with respect to judges: not only do they preside over death cases, but they have been shown to impose the death penalty more frequently as their elections near.²⁷⁷ Moreover, they routinely mete out life sentences to criminal defendants. To judge another human being in such a significant way is a righteous act that should not be taken partially or unfairly.

There is another moral objection to tough-on-crime judges worth lodging. Many (but certainly not all) tough-on-crime judges exhibit an enthusiasm for being “tough on crime” that seems morally problematic. Not only is assuming a good role and purposely failing to perform that role typically immoral, but it also can be immoral to take pleasure in certain aspects of an assumed role. We can use as our example the executioner who loves to execute people. Let us assume that convicting and punishing criminal defendants is, in the main, a necessary, and possibly even a good, role. While the role may be justified, any judge who delights over reducing, or even extinguishing, another human's life has questionable scruples.

More fundamentally, it is immoral to pre-doom the future of another human being—particularly one whom the judge has never met—in order to further the judge's personal (*i*) perversions (namely, sadism) or (*ii*) ambitions (namely, election and reelection). Not only is it wrong to doom another for one's career ambitions—a hopefully uncontroversial proposition—but it is also wrong because the prejudgment might be unfitting to the circumstances of the actual case. Perhaps a deity could perform such prejudgment without naivety and error, but humans cannot.

To avoid this incompetence, open-mindedness is required. Indeed, even if a dogged, tough-on-crime judge has continued to disagree with every point of moralizing above, we need merely to return him to the oath in which he swore to adjudicate “faithfully and impartially,” “without respect to persons.” Open-mindedness is not just a component of the codes of judicial conduct, it is also a constitutive element in making sound judicial, and certainly ethical, judgments. Whether using heuristics, Kantian categoricalness, or the tough-on-crime pledge,

276. Of course, how this pledge can be reconciled with his sworn oath is puzzling. Perhaps he tries to avoid the oath in some way, such as “crossing his fingers.”

277. See *supra* Part II.C.2.

“[t]o rule categorically means to treat one specific fact (or law) as a necessary and sufficient condition to rule a certain way.”²⁷⁸ Here that law or fact is the crime or criminal on the docket or in the courtroom; once present, the judge has predetermined to rule a certain way, harshly. Such categorical rulings are not only closed-minded but invariably naive as well. Take the simplest and least controversial of rules—“thou shalt not kill” (and if thou dost kill, I will sentence thee severely)—but still “the ethical judge could not enforce that rule, as written, in every case.” “She would be turning her back on the parties sub judice—the battered wife, the police officer, or the insane, just to name a few.”²⁷⁹ She would be turning her back on parties over whom she swore to rule “faithfully and impartially.”²⁸⁰

The tough-on-crime judge could not entirely dispute that impartiality is a prerequisite for the job. He might, however, lodge a final, and rather fundamental, objection—that open-mindedness is unnecessary to his role.²⁸¹ If the judge is “tough on crime,” as pledged, perhaps it is because he believes that judges’ adjudicatory acts should simply apply public opinion—a strong interpretation of public accountability. The orthodox (and in many ways, correct) response to that way of thinking is that judges should be more directly loyal to the law than public opinion.²⁸² But we need not rehash that response here, for there is a better

278. Keith Swisher, *The Moral Judge*, 56 DRAKE L. REV. 637, 662–65 (2008) [hereinafter Swisher, *Moral Judge*].

279. *Id.* at 657–58.

280. There is little use in debating the matter much further in this venue. To the extent the matter approaches the rules-versus-standards debate, for example, there is no hope of settling it. In closing, however, one particularly relevant point in favor of both contextualism and open-mindedness is worth repeating: studies have shown that members of the public—presumably the same public who almost invariably believes that judges are too lenient in sentencing—show a much higher rate of agreement with judicial sentences when they read the actual court documents instead of the media’s sparse account of the crime. Thus, while the public might be “tough on crime” when crime is just a label devoid of its context, the public also believes that context significantly affects accurate assessment. Roberts & Doob, *supra* note 58, at 462 (noting that this effect has been replicated in other studies). One potential problem, however, is that this study primarily involved Canadians, not Americans. *See id.* at 460. Similar results were found with Americans, however. *See* Julian V. Roberts & Don Edwards, *Contextual Effects in Judgments of Crimes, Criminals, and the Purposes of Sentencing*, 19 J. APPLIED SOC. PSYCHOL. 902 (1989).

281. Presumably, he would need to define impartiality quite narrowly, along the lines of Justice Scalia’s first interpretation in *White*, to make the distinction of any moment. *See* Republican Party of Minn. v. White, 536 U.S. 765, 775–78 (2002) (defining impartiality as, among other interpretations, a “lack of bias for or against either party”). Even then, however, the distinction is worthless in criminal litigation, which always boils down to “state v. criminal.” Bias against either would trigger even the narrow definition of impartiality. Perhaps, the judge could be “impartial” in that he would rule for whomever the electorate wants, not for whomever he wants.

282. Perhaps the tough-on-crime judge is being more sophisticated and taking the less-controversial position that, where the law is indeterminate (such as within a sentencing range left to the judge’s discretion), public opinion should drive the interpretation. In practice, however, sentencing discretion is guided by factors that almost never include public opinion, but this response admittedly does not answer the judge on a theoretical level.

response: public opinion can be palpably wrong. Some of the best examples come from the (in)famous cases: *Dred Scott*,²⁸³ *Buck*,²⁸⁴ *Korematsu*,²⁸⁵ and so on. The justices and judges of those cases cohered with public opinion—they might have been publicly accountable in this strong sense—but they got justice dead wrong.

In the final analysis, the tough-on-crime judge generally is a partial and primitive adjudicator. She facially violates a fundamental, timeless tenet of justice—“that everyone will have the opportunity to be accorded their due,” in the words of Aristotle.²⁸⁶ While that tenet permits no substantive application, it is fully engaged when we select our method of judicial selection. It quite understandably requires that our judges are willing to give *each* his due.²⁸⁷

III. FUNDING JUSTICE: THE MIDDLE OF THE ROAD

This final Part has three sections: (A) pessimistic concerns about the all-judge-corrupting elective systems; (B) a theoretical mapping of those concerns onto the quintessential judicial virtues; and (C) a discussion of remedies with an emphasis on disqualification.

A. Systemic Failure

This Article has, by now, taken on the minor purpose to say, formally, “shame on you” to all categorically tough-on-crime judges who fail to recuse themselves from criminal cases. But in an election-filled world such as ours—one that is akin to crime-filled neighborhoods—it is more productive, and perhaps fairer, to blame the system. It is elective systems—even, but to a lesser extent, retention elections—that are universally to blame. In comparison, in systems of life tenure (and to a lesser extent state appointive systems), there are both good and bad apples on the bench. In elective systems, however, all of the apples are presumptively bad.²⁸⁸

283. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856).

284. *Buck v. Bell*, 274 U.S. 200 (1927) (Holmes, J.) (upholding forced sterilization law on the basis of its perceived—now debunked—societal good).

285. *Korematsu v. United States*, 323 U.S. 214 (1944).

286. See generally Aristotle, *The Nicomachean Ethics* bk. V (J. E. C. Welldon trans., Prometheus Books 1987) (discussing justice); cf. MODEL CODE OF JUDICIAL CONDUCT Canon 3B(7) (2003) (requiring that judges “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”); MODEL CODE OF JUDICIAL CONDUCT R. 2.6(A) (2007) (same).

287. In the Rawlsian original position as well, we would demand no less of our judges. See, e.g., Swisher, *Moral Judge*, *supra* note 278, at 662–63. As we stand in that position, we would require impartial judges in criminal cases because, among other reasons, the loss of liberty and the costs of error are so severe. We might even go further and put ourselves in the shoes of a factually guilty criminal: in a world stuffed full of potential crimes—e.g., business fraud, bad-check-writing, child neglect, vehicular manslaughter—we would indeed want an impartial, not a tough-on-crime, judge. Of course, we would still want punishment in recognition of the presumably more frequent situations in which we were the contemplated victim.

288. To be fair and more accurate, all of the judge-apples are not necessarily bad, but there is a much higher risk that they are bad in their environment.

On the liberal–conservative axis, elections risk corrupting both sides in a number of ways: “District-based elections, close margins of victory, approaching the end of a term, conditioning from previous representational service, and experience in seeking reelection influence liberal justices to join conservative majorities in death penalty cases”²⁸⁹ Moreover, the

informational environment in which judges have greater reason to fear voters perceiving them as too lenient than too severe (if they perceive judges at all) creates an asymmetry: if the constraint of public opinion binds at all, it will tend to make judges weakly more punitive rather than more moderate with respect to constituent preferences.²⁹⁰

As a final point, we need merely recall the showstopping finding that “*all judges*, even the most punitive, increase their sentences as reelection nears. . . .”²⁹¹ Thus, as a product of their questionable environment, both liberals and conservatives become more punitive, which is bad policy for a number of reasons (e.g., fiscal, fairness, forgiveness). The product is also partial toward the prosecution and against the criminal defendant; that is antithetical to the foundations of our criminal justice system.²⁹²

To be sure, these forces could be alleviated by longer terms in office, but at present, “[t]hirty percent of elective trial judges (on courts of general jurisdiction) serve initial terms of four years or shorter, [and o]f elected appellate judges, twenty-eight percent have two-year (or shorter) initial terms, and another four percent have only three or four years.”²⁹³ In any event, as one study found, “[e]ven in the low information setting created by nonpartisan retention elections, and *despite the ten-year terms* that afford judges significant distance from electoral review, Pennsylvania trial judges appear to respond to the potential electoral consequences of sentencing leniently by becoming more punitive as reelection approaches.”²⁹⁴ We thus have strong reasons to blame the system and little reason to assume that longer term limits, if even in use, are solving all of the problems.

Then again, lest the reader think that these arguments selectively prosecute only elective judges, let me be clear: all tough-on-crime judges should recuse themselves in criminal cases, irrespective of the method by which they become or remain judges. Tough-on-crime *elective* judges are being targeted,

289. Melinda Gann Hall, *Electoral Politics and Strategic Voting in State Supreme Courts*, 54 J. POL. 427, 442 (1992) (studying Texas, North Carolina, Louisiana, and Kentucky courts). It is not surprising, then, that the author of this study concluded “that judicial elections do have an impact on individual justices’ voting behavior in state supreme courts.” *Id.*

290. Gordon & Huber, *supra* note 15, at 111 (citations omitted).

291. Huber & Gordon, *supra* note 224, at 261 (noting that this “finding is not attributable to bidirectional convergence with a preponderance of lenient judges. Similarly, the proximity effect is largest in the least punitive counties, thereby ruling out the possibility that uniform judicial liberalism explains the observed relationship.”).

292. See *supra* Part II.E.1.

293. Roy A. Schotland, *Judicial Independence and Democratic Accountability in Highest State Courts: Comment*, 61 L. & CONTEMP. PROBS. 149, 152 & App. (1998).

294. Huber & Gordon, *supra* note 224, at 262 (emphasis added).

however, primarily for two reasons: (1) we know who they are by their campaign propaganda; and (2) they are operating in a system that greatly incentivizes them to be “tough on crime”—their tenure may very truly depend on it. Reason (1) is purely administrative: under the current practice of judicial silence in other systems as to issues and parties, the rule of recusal can be externally enforced only against elective judges, because they are incentivized to beat their chests and self-declare their tough-on-crime agenda.²⁹⁵ They are the start, not the end.

With the knowledge accumulated in the earlier parts of this Article, let us now take a taxonomical look at tough-on-crime judges and the specific judicial virtues they impair. This view will allow us to track more precisely the theoretical damage inflicted by pro-prosecution judges.

B. Judicial Virtues in a Vice

Elective systems produce approximately four types of tough-on-crime judges. Each has her theoretical downside, but some are palpably worse than others, particularly with respect to the negative impact on the three prime judicial virtues—(1) impartiality,²⁹⁶ (2) integrity,²⁹⁷ and (3) independence.²⁹⁸

(1) Judge Lawnorder: the judge who is (or plans to be) “tough on crime” and says so;

295. See also *infra* Part III.C.3 (discussing the implications of silence). This rule of recusal in criminal cases may be internally enforced, however. That is, the offending judge may choose to honor the ethics rules, and arguably constitutional law as well, by recusing *notwithstanding that the parties or disciplinary authorities do not know of her tough-on-crime ways*. Moreover, outside of elective systems, judicial candidates occasionally self-declare “tough on crime” to the appointing authority (e.g., the governor or legislature) at the time of appointment. To the extent of this practice, the administrative concerns are lessened.

296. MODEL CODE OF JUDICIAL CONDUCT Terminology (2007) (defining “impartiality” not only as the “absence of bias,” but also the “maintenance of an open mind in considering issues that may come before a judge”); see also *Republican Party of Minn. v. White*, 536 U.S. 765, 775–78 (2002) (listing competing definitions of impartiality: (1) “lack of bias for or against either party,” (2) “lack of preconception in favor of or against a particular legal view,” or (3) “as openmindedness”).

297. MODEL CODE OF JUDICIAL CONDUCT Terminology (2007) (“‘Integrity’ means probity, fairness, honesty, uprightness, and soundness of character.”).

298. See *id.* (“‘Independence’ means a judge’s freedom from influence or controls other than those established by law.”); see generally Stephen B. Burbank & Barry Friedman, *Reconsidering Judicial Independence*, in *JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH* 9 (Stephen B. Burbank & Barry Friedman eds., 2002) (discussing forms of judicial independence); Malia Reddick, *Merit Selection: A Review of the Social Scientific Literature*, 106 DICK. L. REV. 729, 729 (2002) (“Generally, judicial independence refers to the common law tradition of a judiciary that is institutionally immune from outside political pressures in the resolution of individual cases, whereas judicial accountability comports with democratic principles and allows the judiciary to be responsive to changes in public opinion. Lifetime appointment systems are said to ensure judicial independence; popular elections at frequent intervals are favored by those who value judicial accountability.”). As the reader may recall from Part II.B, these three virtues are repeated throughout the *Code*.

- (2) **Judge Stealth:** the judge who is “tough on crime” but does not say so;
- (3) **Judge Hellina-Handbasket:**²⁹⁹ the judge who would like to be impartial and says so, but who (under external pressures, such as elections) adjudicates “tough on crime”; and
- (4) **Judge Political:** the judge who is not “tough on crime” but says she is.

All of these judges are featured in the following table.

299. Judge Hellina-Handbasket’s name, while dramatic, is fitting because her adjudicatory actions triply infringe on the three modern judicial virtues.

Table 3:
Tough-on-Crime Taxonomy:
Truth or Electoral Consequences

Judge	Private Attitude on Criminal Adjudication ³⁰⁰	Public Promise on Criminal Adjudication	Public Promise Disposition	Judicial Virtue(s) Impaired
(1) Lawnorder	Tough	Tough	Honored	Impartiality
(2) Stealth	Tough	Impartial ³⁰¹	Dishonored	Impartiality Integrity
(3) Hellina-Handbasket	Impartial	Impartial	Dishonored	Impartiality Integrity Independence
(4) Political	Impartial ³⁰²	Tough	Dishonored	Integrity

Each of these judges theoretically presents differing risks to criminal defendants and the judicial virtues. Unlike elective systems, the federal system and state

300. Barring constraints (which may, at times, be formidable), we should assume that a judge will implement her predisposition on the bench. *See, e.g.*, Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 310–11 (2007) (discussing various constraints on federal judges, the majority of which would apply equally, if not more so, to state judges).

301. Whether a promise not to make promises is still a promise is certainly not a question on which we need to dwell for this framework to serve its taxonomical purpose.

302. To paint a more complete picture, we could subdivide “impartial” judges into two groups: (1) judges who are impartial (in the Aristotelian mean sense) and (2) judges who are soft on crime. This further division would be unnecessary because soft-on-crime judges never campaign or self-identify as such.

Could Judge Political actually be impartial? He is willing to lie so that the voters (or powerful interests groups) believe he is “tough on crime.” If he will lie to protect his office, it is not a tenuous stretch to assume that he would also be tough on crime, irrespective of the merits, if he believed that the voters were tracking a particular case. If he would not—that is he would be unwilling to be tough on crime irrespective of the merits and irrespective of protecting his tenure in office—then we are indeed dealing with a judge who is impartial. In any event, this is a judge appreciably different than one who would lie *and* alter their adjudication to vote-pander. Nevertheless, the fact that he gave in to pressure to say that he was “tough on crime,” gives us a significant reason to be suspicious of his integrity and impartiality.

appointive systems generally fail to expose Judge Lawnorder.³⁰³ In appointive systems, he lacks the same incentive to tout his tough-on-crime agenda to garner votes. In elective systems, however, his tough-on-crime agenda greatly assists his (re)election, and therefore he is incentivized to come out of hiding.

Under either system, Judge Stealth accedes to the bench, his lack of impartiality and integrity (here, honesty) notwithstanding. He is the only judge who is strategically sensitive to the Canons and perhaps to the Due Process Clause and public confidence in the judiciary as well; the rest of the judges are strategically sensitive to (re)election, not the Canons or other concerns.³⁰⁴ By lying about (or simply not stating) his intentions, he avoids the Canons prohibiting less-than-impartial public promises and similar behavior. The result with respect to Judge Stealth is sound in appearance, but it is absurd in actuality.³⁰⁵ The primary point of the applicable (if not all of the) Canons is to promote impartiality: Judge Stealth has merely gamed the system—a system that allows itself to be gamed. We will return to Judge Stealth in a moment.

Judge Hellina-Handbasket and Judge Political are spawned in an elective system. The surprising discovery here is Judge Hellina-Handbasket, and many like him, who are impartial in nonelection years and perhaps whenever the public is not watching, but who are “tough(er)-on-crime” in election years and perhaps whenever the public is watching. This creature is not only counterintuitive, but he represents an armageddon to the judicial virtues—simultaneously supplanting all three. In addition to compromising his integrity by both failing to fulfill his public promise of impartiality to the voters and failing to stay true to his own judicial philosophy, he has pulled a hat trick of judicial failure by compromising his

303. *But see supra* note 295 (noting that tough-on-crime judges may reveal themselves to the appointing authority, such as the governor or legislature, at the time of appointment).

304. From the public pledges, promises, and commitments framework, only Judge Lawnorder has an ethical problem. (We must first control for mere coincidence, that is, the unlikely event that Judge Lawnorder was willing to rule less tough on crime, but fortunately for him, all of his cases happened to be ones that deserved tough-on-crime adjudication on the merits.) He informed the voters of his “tough on crime” attitude, and he held true to his word. Thus, he would seem to have a Canon problem. In particular, he honored his “pledges, promises, [or] commitments” to his voters as to how he would rule in a particular category of cases (criminal). This facially and (in light of the case dispositions) empirically plausible interpretation of the Pledges Canon, however, leaves no room between the Supreme Court’s holding in *White*—permitting judges to “announce” their views on disputed legal “issues”—and mandatory recusal. Perhaps such an extreme reading of recusal law would be constitutionally acceptable: a judge could still announce on the front end but would (almost) always have to recuse on the back end. Without more context, however, it is unclear whether a lone tough-on-crime announcement violates the recent interpretations of the Canon. *See supra* Part II.B (discussing the pledges, promises, and commitments Canon).

305. *See supra* Part III.B. As suggested in Table 3, a judge who has intentionally gamed the system to rule partially toward certain parties may well be a more dangerous judge than Judge Lawnorder, who was at least forthright in his intentions. The latter is partial, but the former is both partial and a calculating deceiver.

independence and impartiality as well.³⁰⁶ While these lapses may be only temporary (but cyclical), Judge Hellina-Handbasket is the worst of the lot and single-handedly provides some strong evidence of a system too damned to rescue.

This brings us finally to Judge Political, the judge who lies to the public that he is “tough on crime” when actually he is impartial. When judges have no present intention of honoring their public promises to be, or not to be, “tough on crime,” those judges have perpetrated a fraud of sorts on the voters. Both Judge Stealth and Judge Political fall into this camp.³⁰⁷ Not all frauds, however, are created equally. Whereas Judge Stealth lies to take the bench despite his bias against criminal defendants, Judge Political lies not to be voted out of office. Unlike Judge Stealth, if Judge Political’s lies succeed, he takes the bench only to adjudicate impartially. Professor Paul Butler, for example, has argued that judges should lie while adjudicating provided they “carefully choose their cases, based on the plausibility of their ‘lie’ (i.e., their analysis of the case) and on [an extreme] degree of injustice” that the lie would remedy.³⁰⁸ Whether Butler himself would authorize lying under these different circumstances is questionable, at best,³⁰⁹ but the point is transferable. Here, Judge Political might have to lie to survive as an impartial judge in the partial world of elections and reelections. When a corrupt system forces a lie to continue to do good (i.e., to preserve impartial judges), perhaps we should look the other way—at least long enough for the system to be changed.

In sum, the above taxonomy reveals that three (if not four) out of four tough-on-crime judges supplant judicial virtues and burden litigants with partiality. The remainder of the Article considers what to do about it.

C. Remedies: Antidotes, Painkillers, and Denial

1. And Recusal for All

In light (or dark) of the above, tough-on-crime judges have performed poorly both in adjudication and in recusal. With respect to recusal, there is a heavy push of late for the adoption of procedures by which a *different* judge would rule on a disqualification motion.³¹⁰ The reasons for this approach include (among the

306. Judges who caved to electoral pressure while adjudicating lack decisional independence. For true tough-on-crime judges, however, independence is not an issue. These judges are not bullied by electoral pressures when adjudicating criminal cases. Their predetermined judicial mindset simply happens to be working in harmony with those electoral pressures; judges do not lack independence for mere synergy.

307. Judge Hellina-Handbasket has failed to fulfill his promises as well, but we can assume that, when he claims to be impartial, he believes that he is or will be.

308. Paul Butler, *When Judges Lie (and When They Should)*, 91 MINN. L. REV. 1785, 1820 (2007); see generally William H. Simon, *Virtuous Lying: A Critique of Quasi-Categorical Moralism*, 12 GEO. J. LEGAL ETHICS 433 (1999) (showing, among other arguments, that lying is not necessarily wrong irrespective of the context).

309. Butler, *supra* note 308, at 1820 (limiting his rule of subversion “to laws that violate bedrock principles of international law,” i.e., *jus cogens*).

310. E.g., ABA STANDING COMM. ON JUDICIAL INDEPENDENCE, REPORT TO THE HOUSE OF DELEGATES 2 (July 31, 1999) (“In the event that a disqualification motion is

considerations already mentioned) the “high level of ambivalence found among judges surveyed regarding disqualification under the many factual (and typical) scenarios posed in the survey, the differences found between responses depending upon whether a personal decision [to recuse] is made versus a recommendation to a colleague, and the importance of disqualification as it affects public trust and confidence in the courts.”³¹¹ While I wholeheartedly agree with the proposals to place the disqualification decision in the hands of another judge, there is little room for decision here—no matter who is adjudicating.

Instead, owing to the concerns articulated in Part II, the only ethical conclusion may very well be that all elective judges must recuse themselves in all criminal cases. Even the less (but still) drastic remedy of recusal only in election years would be insufficient: challengers and interest groups routinely bring up stale incidents of supposed softness on crime.³¹² Therefore, judges have bad incentives to stay “tough on crime” even in non-election years. Thus, mandatory recusal in all, or virtually all, criminal cases is necessary as an ethical matter. This conclusion while seemingly correct as an ethical matter is not without costs. It would initially leave the criminal bench vastly under-populated.³¹³ But Justice O’Connor’s words in *White* offer tough wisdom here: the state—having chosen this problematic system for selecting its judges—should now bear the responsibility by, for example, hiring more full or part-time (including *pro tem*) judges.³¹⁴ Indeed, it may be a vicious cycle: judges who neither rule invariably

denied, States should consider adopting a uniform procedure for assigning contested disqualification motions to a different judge. . . . State courts should consider adopting a *de novo* standard of appellate review in matters in which judges’ decisions not to disqualify themselves are challenged.”)

311. SHAMAN & GOLDSCHMIDT, *supra* note 244, at 66 (noting further the “obvious” benefit from such a procedure in that “parties’ confidence in the justice system will be enhanced if they see that the judge they complain of is not the one rendering the decision on the ultimate issue of partiality”); Goldberg et al., *supra* note 41, at 525 (noting psychological issues preventing optimal self-evaluation in recusal situations); *see also* Bassett, *supra* note 249, at 666–70 (discussing subconscious forces affecting judges’ ability to recognize their own biases).

312. *See, e.g.*, Marley, *supra* note 40; *see also* Weiss, *supra* note 40 (“Judge Michael Gableman ran television ads that labeled his opponent Justice Louis Butler ‘Loophole Louis’ for rulings favoring defendants in criminal cases.”). Justice Gableman, for instance, misleadingly raised Justice Butler’s old record as a public defender against him. Marley, *supra* note 40.

313. Again, this is a good thing: the remaining, albeit much smaller, population would be impartial (or at least, less partial than their recused, tough-on-crime colleagues). Moreover, sweeping recusal would presumably return diminishing numbers the longer this new regime of mandatory recusal was in place.

314. *See* Republican Party of Minn. v. White, 536 U.S. 765, 792 (2002) (O’Connor, J., concurring) (“Minnesota has chosen to select its judges through contested popular elections instead of through an appointment system or a combined appointment and retention election system along the lines of the Missouri Plan. In doing *so the State has voluntarily taken on the risks to judicial bias described above*. As a result, the State’s claim that it needs to significantly restrict judges’ speech in order to protect judicial impartiality is particularly troubling. *If the State has a problem with judicial impartiality, it is largely one*

“tough on crime” nor at least say that they do around election time may routinely lose their reelection for being “soft on crime”; or they may not have been elected in the first place; and as a consequence, the state will continually foot the bill for replacement jurists.³¹⁵ But while this predicament is not perfect, it is exactly right under the circumstances: elective states would be forced finally to internalize the externalities of their selective system—externalities that have heretofore been dumped on criminal defendants.³¹⁶ The internalization of these systemic costs would force the state to seriously reconsider its commitment to elections. Obviously, in light of criminal defendants’ powerlessness—they are a notoriously weak lobby—they have been unable on their own to rearrange this unfair arrangement.

Before moving to the contra-conclusion that criminal defendants, not the state, should bear the costs created by their criminal acts, we must remember (*i*) that criminal defendants are presumed innocent through trial; (*ii*) that constitutional and rule-based procedural rights are guaranteed even to the guilty; (*iii*) that sentencing laws arguably preclude lockstep toughness on crime (see Part II.E.1 above); and (*iv*) that the state must guarantee—i.e., must pay for the conditions under which—every litigant receives an essentially impartial judge. Thus, externalizing the costs in criminal defendants’ direction fails to accord with the law and the American criminal justice paradigm.

The call for no elective judges on criminal cases is neither necessarily new nor unprecedented. Many states do not trust elective judges on any type of case.³¹⁷ Internationally, moreover, virtually no other nation elects its judges.³¹⁸ Still, the change would be drastic, and for this reason, we should consider some alternatives, namely, public financing and silence.

2. Public Financing: Clean Elections

Public financing, also known as clean money,³¹⁹ is an option, but in the final analysis, it is not a very good one for the present problem.³²⁰ To be sure, the

the State brought upon itself by continuing the practice of popularly electing judges.”) (emphasis added).

315. This consequence assumes that the state foots the bill rather than let the criminal justice system grind to a halt when faced with the absence of the tough-on-crime cadre. It also assumes, however, that in a world in which tough-on-crime judges were mandatorily recused from criminal cases, the electoral politics would hold constant—that, in other words, being “tough on crime” would still be attractive and therefore potentially corrupting.

316. See, e.g., *supra* Part II.C.2 (finding that criminal defendants have paid the price of elections by receiving more death sentences, more years in prison, less protection of rights, and so on).

317. See *supra* Part I.A.

318. Herbert M. Kritzer, *Law Is the Mere Continuation of Politics by Different Means: American Judicial Selection in the Twenty-First Century*, 56 DEPAUL L. REV. 423, 431 (2007).

319. The terms “clean money” and “public financing” can take on different meanings from state to state and context to context, but here we are using the terms as synonymous for state- or local-government-funded judicial elections.

idea behind it is well-intended: public funding would break the chains that bind elective judges to the money of particular parties, attorneys, and groups. Thus, assuming the continuing presence of judicial elections, public funding might well make the world of adjudication a more impartial place.³²¹ But for tough-on-crime judges, it is normally, though not invariably, the loss of votes en masse that worries them, not the loss of big money.

To be sure, money is spent in elections (and in fighting retention sieges) to get or retain votes.³²² But whether that money is public, private, or mixed, the elective judge vitally craves votes.³²³ Public funding is a misguided path for us, then, because (i) campaign promises would still abound and the voters would still rely on those promises in casting their vote; and (ii) even when voters did not rely on tough-on-crime promises ex ante, they would still (as they do now) hold judges accountable for failing to be “tough on crime” should an opponent or other critic happily bring the news to the voters’ attention. Therefore, a judge’s noticeable break in either tough-on-crime promises or tough-on-crime expectations may very well lead to a revocation of votes in the next election.³²⁴ Thus, the problem is less about funding and more about the message—both to and from voters. There is little reason to assume that the message will improve when private dollars are exchanged for public dollars. Rather, any dollars will be spent primarily on sending effective messages, such as “me tough on crime, you soft on crime.”

Therefore, public financing, while salutary for other reasons, would not substantially solve our problem.³²⁵

3. *Silence: Is Not Golden*

The silence option, in many ways the traditional approach, would ban tough-on-crime advertising, or as much of it as constitutionally possible post-

320. To complicate matters, in light of the recent decision in *Citizens United v. Fed. Elections Comm’n*, 130 S. Ct. 876 (2010), corporate (and other) independent expenditures could continue relatively unabated even in a “clean election” world.

321. For a good pro-con discussion of public financing in the judicial election context, see Brandenburg & Schotland, *supra* note 17, at 1251–58. For the broader literature, see for example Jason B. Frasco, *Full Public Funding: An Effective and Legally Viable Model for Campaign Finance Reform in the States*, 92 CORNELL L. REV. 733 (2007).

322. Cf. Bonneau, *supra* note 15, at 826–27 (discussing campaign spending studies, primarily in the legislative context; noting that “[b]ecause most challengers begin the race in relative obscurity, the more money they spend, the better known they will become, and hence the better they will perform electorally” (citation omitted)).

323. To oversimplify a bit, money is only instrumental; the goal is votes. To obtain votes, judges must make representations and pledges. Money then multiplies those representations and pledges by buying advertising for them; the advertising, if done correctly, in turn multiplies the votes.

324. Again, that is why public funding would not eliminate the problem. While it would take out the wealthy contributor problems—including the debt of gratitude for funds, most pledges made to receive funds, and the expectation of future funds from private parties—it would not take away the larger problem: tough-on-crime pledges. Such pledges would be resilient because votes still depend on them.

325. For both favorable and unfavorable characteristics of judicial public financing, see Brandenburg & Schotland, *supra* note 17, at 1251–58.

White. Like public financing, silence can be viewed as a funding issue: it takes disciplinary resources to police the silence on the front end and to discipline outspoken judges on the back end. Silence actually aggravates our problem by keeping many of the negative characteristics of elective systems while eliminating the primary positive characteristic. As mentioned above, elections give tough-on-crime judges a strong incentive to reveal themselves to the world; in return for their revelation, they generally receive votes and other support. Regulators benefit from the revelation in that judges have self-declared their judicial partiality—and there is arguably no better proof than words straight from the horse’s mouth. In the terminology of this Article, the combination of elections with the absence of forced silence brings to light a great many Judge Lawnorders, and it likewise gives incentives for Judge Stealths—the tough-on-crime judges who have yet to self-declare—to announce that their sympathies rest with Judge Lawnorders. Forced silence, in contrast, robs us of incriminating evidence.³²⁶ That is, “forcing . . . judges to conceal their prejudice” or partiality would undercut “the more compelling state interest of providing an impartial court for all litigants.”³²⁷

Under a regime of silence, then, the mass of stealth judges can take the bench and preside over all criminal cases. Yet, they might have the exact same tough-on-crime predisposition as the disqualified outspoken judge (Judge Lawnorder). But as an administrative matter, we might never know. Indeed, the inability to read minds has of course been a ubiquitous problem in lawmaking.³²⁸ At a minimum, instead of silence, we should affirmatively ask judges whether they are predisposed against certain parties (because, apparently, the oath is insufficient for some judges).³²⁹

There is, however, one silence-friendly distinction to take into account before we dismiss silence entirely. Listed on the pro-silence ledger is the self-fulfilling-prophecy argument. Silence allows judges to rule as they choose without breaking their word. Without forced silence, the judge who publicly proclaims that he is “tough on crime” may later be unwilling to stray from his word. And of course, he may be particularly unwilling to stray from his word if his office depends on being true to those words.³³⁰ Put another way, unlike Judge Lawnorder, Judge Stealth—who has never announced his tough-on-crime agenda—would not

326. Swisher, *Moral Judge*, *supra* note 278, at 670–71 (arguing that *White* result was laudable insofar as it lifted the flawed “don’t ask, don’t tell” policy in judicial regulation).

327. Mark I. Harrison & Keith Swisher, *When Judges Should Be Seen, Not Heard: Extrajudicial Comments Concerning Pending Cases and the Controversial Self-Defense Exception in the New Code of Judicial Conduct*, 64 N.Y.U. ANN. SURV. AM. L. 559, 605 (2009) (quoting *Miss. Comm’n on Judicial Performance v. Wilkerson*, 876 So. 2d 1006, 1015 (Miss. 2004)).

328. *See, e.g.*, *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2263 (2009) (“The difficulties of inquiring into actual bias, and the fact that the inquiry is often a private one, simply underscore the need for objective rules. Otherwise there may be no adequate protection against a judge who simply misreads or misapprehends the real motives at work in deciding the case.”).

329. *See generally supra* Part II.E.2 (discussing oaths of office).

330. This forceful influence would presumably apply to both Judge Stealth and Judge Lawnorder, all else being equal.

have to break his word to rule in contravention of that agenda in a particular case.³³¹ Judges' word (like everyone else's word)—particularly when one has broadcast that word to the public—does form a precedent that may restrict judges' future behavior to the contrary. Of course, this restrictive precedent is not incontrovertible, but it is a restrictive precedent nevertheless.

On balance, though, this Article would be underreaching if it did not question Judge Stealth and his comrades. It is troubling that he is out there judging with impunity. While he may be less irretrievably partial than Judge Lawnorder, he is still partial, and any regime—such as silence—that conceals him is merely “whistling past the graveyard.”³³²

4. *Summary of Remedies*

From these thoughts, (at least) four remedies are apparent.

- (1) **Disqualify all tough-on-crime judges across all systems, whether elective, appointive, or whatever.** The advantage and strong validity of this remedy is in its focused breadth—it seeks to capture all tough-on-crime judges. Its enforceability (i.e., finding and forcefully disqualifying or disciplining all tough-on-crime judges) would be difficult at times. The financial costs would also be high, not only in disciplinary resources, but also to fund replacement jurists, and therefore the option's affordability would be low or weak.
- (2) **Disqualify only self-declared tough-on-crime judges, whether elective, appointive, or whatever.** Certain systems, primarily elective, incentivize judges to self-declare their tough-on-crime agenda in order to receive votes or (less frequently) financial support. These self-declarations would obviously ease enforceability/administrative hurdles. The remedy is suboptimal, however, in that (1) it would not capture all tough-on-crime judges, and (2) judges who would have self-declared “tough on crime” in the current regulatory environment might withhold their declarations in this new system of mandatory disqualification, which would compound the shortcoming noted in (1).
- (3) **Provide public financing to elective judges.** The remedy has low/weak validity in that it would only insignificantly affect tough-on-crime judges; it would alleviate partiality concerns only where the public funding replaces private contributions earmarked for tough-on-crime adjudications (in one, some, or all criminal cases).³³³ The enforceability—

331. Cf. Geyh, *supra* note 45, at 65–67 (“There is . . . a clear difference between the judge who harbors preconceptions on issues of law, which is both inevitable and desirable, and the judge who has publicly etched his position on such issues in stone before the case is heard—which is the problem that the announce clause was designed to address.”).

332. *Caperton*, 129 S. Ct. at 2272 (Roberts, C.J., dissenting).

333. Of note in this regard, most judges' campaign funds (and of course, votes) flow from individuals. See, e.g., Nat'l Inst. on Money in State Politics, *The Race for Wisconsin's Supreme Court*, <http://www.followthemoney.org/press/ReportView.phtml?r=390&ext=4#tableid4> (detailing

assuming an across-the-board change—would be high or strong, but the financial costs would be high (affordability = low) as well.

- (4) **Enforce silence.** This traditional remedy—exemplified by the old judicial codes—has the weakest or lowest validity because it would not stop any partial, tough-on-crime judges from taking the bench (save, perhaps, the few who would disregard the silence rules and be disciplined). While the remedy could be easily enforced in theory, in a post-*White* world, elective judges could not be completely silenced in light of their First Amendment rights to announce their views on legal issues. Therefore, the enforceability would correspondingly be medium to low, but the tradeoff is that affordability (assuming some significant and reasonably clear level of enforceability) would be rather high.

Table 4:
A Range of Selected Remedies

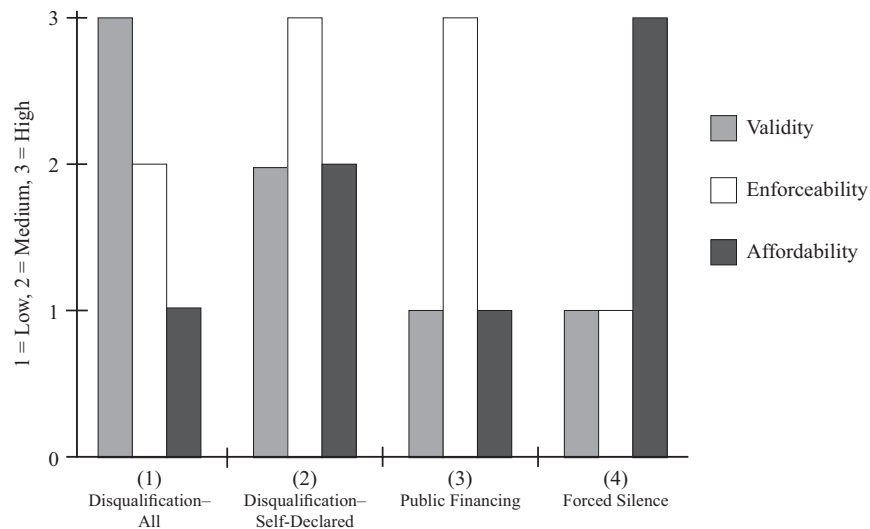
Remedy	Validity	Enforceability	Affordability
(1) Disqualification—All	High	Medium	Low
(2) Disqualification—Self-Declared	Medium ³³⁴	High	Medium
(3) Public Financing	Low	High	Low
(4) Forced Silence	Low	Low ³³⁵	High

the funding sources in recent Pennsylvania and Wisconsin appellate elections). Those individuals, on average, will want tough-on-crime judges. *See, e.g., supra* Part I.B.4 (noting that the public wants judges tougher and offering some reasons for the preference).

334. Valid but underinclusive, and for this reason only, this remedy did not receive a high or strong rating.

335. As an administrative matter, enforceability would be high, but after *White*, the range of constitutional enforceability is medium to low—essentially the tough-on-crime boast must amount to a “pledge, promise, or commitment” as those terms are used in the Canons, the determination of which has been difficult, arbitrary, and everything in between.

**Chart 3:
Range of Selected Remedies**



From a validity and theoretical efficacy standpoint—a standpoint on which I will rest—remedies (1) or (2) are far superior to the others. If states and even the federal judiciary were serious about impartiality, one of those remedies would be implemented notwithstanding the attendant financial disruption of uncertain, but quite possibly temporary, duration. The financial and administrative tradeoffs cannot be dismissed so lightly, but most states have opted for the status quo over good-faith cost-benefit analysis—hardly an endearing indication of willingness to improve.³³⁶

CONCLUSION: THE ROAD TO NOWHERE

By the end, if not before, the arc of this Article is that all tough-on-crime judges act unethically when they sit on criminal cases. When elective systems add the force of votes and money into the equation, the troubling confluence renders sitting tough-on-crime judges doubly unethical. Redemption lies in recusal, not in rationalization. For all of the reasons that we have worked through, the road goes nowhere either way.³³⁷ But, whether tough-on-crime judges will ever take the road

336. A clarification on the purported “status quo” is in order: the text of the rules—listed in detail in Part II.B—unambiguously calls for disqualification. Thus, the best remedy—mandatory disqualification—is already in the legal text (albeit in terms a bit vaguer than I would prefer), and the “status quo” has been to avoid or misinterpret this black-letter text and its accompanying aspirational guidance.

337. Tough-on-crime judges choosing to redeem themselves through recusal take the road to nowhere quite literally—they must proceed no further on the case; judges choosing instead to rationalize their failure to recuse take a road that goes nowhere intellectually, faithfully, and legally. *See supra* Parts II.A (unconstitutional, arguably), B

to recusal remains to be seen. They could, of course, hit the road *sua sponte* through internal enforcement—and both their legal analysis and their conscience should lead them there—or through external enforcement, such as a regime of mandatory disqualification courtesy of the Due Process Clause or the Canons. Then the rubber will finally meet the road.

(violation of canons of judicial ethics), C–D (unavoidable risk of bias), E (lawless and immoral), III.B (value debasing).