

2012

Beyond Caperton: “Public Confidence” in Courts and Close Relationships Between Judges and Jurors

Byron C. Lichstein

Follow this and additional works at: <https://scholarship.law.edu/lawreview>



Part of the [Judges Commons](#)

Recommended Citation

Byron C. Lichstein, *Beyond Caperton: “Public Confidence” in Courts and Close Relationships Between Judges and Jurors*, 61 Cath. U. L. Rev. 429 (2012).

Available at: <https://scholarship.law.edu/lawreview/vol61/iss2/3>

This Article is brought to you for free and open access by CUA Law Scholarship Repository. It has been accepted for inclusion in Catholic University Law Review by an authorized editor of CUA Law Scholarship Repository. For more information, please contact edinger@law.edu.

Beyond Caperton: “Public Confidence” in Courts and Close Relationships Between Judges and Jurors

Cover Page Footnote

Clinical Associate Professor, University of Wisconsin Law School; Deputy Director, Frank J. Remington Center; Director, Criminal Appeals Project; J.D., 2003, University of Wisconsin; B.A., 2001, University of Michigan. I thank Keith Findley and Cecelia Klingele for helpful comments on earlier drafts of this Article. I thank my former student, Hannah Schieber, for her outstanding research assistance.

BEYOND *CAPERTON*: “PUBLIC CONFIDENCE” IN COURTS AND CLOSE RELATIONSHIPS BETWEEN JUDGES AND JURORS

Byron C. Lichstein⁺

I. THE SUPREME COURT'S TREATMENT OF THE NEED TO PROTECT PUBLIC CONFIDENCE IN THE COURTS	431
II. A FRAMEWORK FOR ANALYZING PUBLIC CONFIDENCE IN THE COURTS	435
III. WHAT TO DO WHEN THE PRESIDING JUDGE HAS A CLOSE RELATIONSHIP WITH A JUROR	440
A. <i>Constitutional Provisions on Qualifications for Jurors and Judges</i>	440
B. <i>Statutory and Ethical Rules on Qualifications for Jurors and Judges</i>	441
C. <i>Cases Addressing Related Jurors and Judges</i>	444
D. <i>The Constitutional Problem Created by a Juror with a Close Relationship to the Presiding Judge</i>	445
E. <i>Why a Close Relationship Between Judge and Juror Can Imperil the Fairness of a Trial: Judicial Cues to Jurors, and Jurors' Propensity for Following Those Cues</i>	449
F. <i>What Specific Rules and Procedures Should Govern Close Relationships Between the Presiding Judge and a Potential Juror?</i>	453
1. <i>Exclusion of a Juror or Recusal of the Judge</i>	453
2. <i>Defining Rules and Procedures for the Exclusion of Jurors</i>	453
IV. CONCLUSION.....	456

Judicial opinions and legal commentary frequently debate how best to protect public confidence in the courts.¹ Supreme Court Justices recently

⁺ Clinical Associate Professor, University of Wisconsin Law School; Deputy Director, Frank J. Remington Center; Director, Criminal Appeals Project; J.D., 2003, University of Wisconsin; B.A., 2001, University of Michigan. I thank Keith Findley and Cecelia Klingele for helpful comments on earlier drafts of this Article. I thank my former student, Hannah Schieber, for her outstanding research assistance.

1. *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2266–67 (2009); Stephen Breyer, *Serving America's Best Interests*, DAEDALUS, Fall 2008, at 139, 139; Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787, 1823, 1825–27 (2005); Keith R. Fisher, *Education for Judicial Aspirants*, 43 AKRON L. REV. 163, 186 (2010); Ann Richardson Oakes & Haydn Davies, *Process, Outcomes and the Invention of Tradition: The Growing Importance of the Appearance of Judicial Neutrality*, 51 SANTA CLARA L. REV. 573, 614 (2011); James Sample & David E. Pozen, *Making Judicial Recusal More Rigorous*, JUDGES' J., Winter 2007, at 17, 18; see also FRANK A. BENNACK, JR., NAT'L CTR. FOR STATE COURTS, A REPORT

invoked public-confidence arguments to support their opposing positions in both the majority and dissenting opinions in *Caperton v. A.T. Massey Coal Co.*, which held that a state supreme court justice who received campaign contributions from a party should have recused himself from the case.² Although courts frequently invoke such arguments, they rarely, if ever, define “public” or explain how a particular decision will foster or harm public confidence.³ If courts conceive of the “public” as the general public, then serious questions arise regarding the courts’ ability to send messages to this audience, as most members of the general public do not read judicial opinions, have little or no direct experience with the court system, and receive legal news from incomplete or inaccurate media reports about highly salient cases.⁴ Further, regardless of how courts define the public, that group is undoubtedly divided into many social and political factions; therefore, controversial court decisions that breed trust in some of these factions seem just as likely to breed distrust in others.⁵ Thus, it seems questionable to maintain that a judicial opinion can foster broad public confidence in the courts.

This Article offers a framework that accounts for these problems and gives greater practical meaning to judicial rhetoric about fostering public confidence in the legal system. It suggests that although courts may have difficulty affecting general public opinion on a large scale, courts can foster the confidence of people who directly participate in the judicial system by creating and following basic rules of procedural fairness. The Article then argues that *Caperton*, although unlikely to broadly affect the general public’s confidence in the courts, will improve the confidence of people who directly experience the court system by improving fundamental procedural fairness.

Turning to jury selection, a context in which members of the general public directly experience the court system, this Article discusses how the legal system should respond when a potential juror has a close relationship—familial or nonfamilial—to the presiding judge.⁶ Although

ON THE NATIONAL SURVEY: HOW THE PUBLIC VIEWS THE STATE COURTS: A 1999 NATIONAL SURVEY 12 (1999), available at http://www.ncsconline.org/WC/Publications/Res_AmtPTC_PublicViewCrtsPub.pdf (discussing the public’s confidence in public institutes compared to confidence in courts).

2. 129 S. Ct. at 2266–67.

3. See *infra* notes 16–22 and accompanying text.

4. Paul H. Robinson & John M. Darley, *Does Criminal Law Deter? A Behavioral Science Investigation*, 24 OXFORD J. LEGAL STUD. 173, 178 (2004). Professors Paul Robinson and John Darley have raised similar concerns when discussing deterrence rationales for criminal laws. *Id.* at 175–76. They argue that traditional deterrence justifications fail to acknowledge that potential offenders lack accurate knowledge of specific legal rules, thus creating a “Legal Knowledge Hurdle” *Id.*

5. See Fallon, *supra* note 1, at 1824–25 (discussing court decisions on abortion rights).

6. See, e.g., *State v. Tody*, 316 Wis. 2d 689, 739 (2009) (discussing a judge’s refusal to strike his mother as a juror); *State v. Sellhausen*, 330 Wis. 2d 778, 794 (Wis. Ct. App. 2010) (involving an appeal protesting the presence of the judge’s daughter-in-law on the jury panel).

judges and lawyers may not view this as problematic at first blush, and although legal rules do not specifically prohibit this situation,⁷ courts should consider how an average citizen may perceive a close relationship between a judge and a juror as a threat to procedural fairness. This Article proposes a categorical rule excluding jurors who have at least a third degree of kinship to the judge. For other relationships (more distant familial relationships or close nonfamilial relationships), this Article suggests that courts utilize voir dire concerning the relationship, require full disclosure by the parties, and employ a balancing test that errs on the side of exclusion.

I. THE SUPREME COURT'S TREATMENT OF THE NEED TO PROTECT PUBLIC CONFIDENCE IN THE COURTS

Underlying the *Caperton* discussion about whether a judge should be able to preside over a case involving a significant campaign contributor,⁸ a deeper question emerged: how to protect public confidence in the courts.⁹ At oral argument, counsel for Massey argued that the mere appearance of judicial bias does not violate due process, to which Justice Anthony Kennedy replied: "But our whole system is designed to ensure confidence in our judgments."¹⁰ Justice Kennedy reiterated this sentiment in the majority opinion, quoting a previous discussion that stated, "The power and the prerogative of a court . . . rest, in the end, upon the respect accorded to its judgments. The citizen's respect for judgments depends in turn upon the issuing court's absolute probity."¹¹ Thus, a major theme underlying the *Caperton* majority opinion is that the public will lose confidence in the courts if judges preside over cases involving their own significant campaign contributors. The dissenting Justices acknowledged the importance of protecting public

7. See *infra* Part III.B.

8. See *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2266–67 (2009) (discussing a contribution by Don Blankenship, Massey Coal's Chairman and CEO, to judicial candidate Brent Benjamin as the company was preparing to appeal an adverse \$50 million jury verdict). Victorious in the 2004 election, Judge Benjamin twice denied *Caperton*'s recusal motions and reversed the verdict against Massey Coal. *Id.* at 2257–58.

9. *Id.* at 2266–67 (quoting *Republican Party of Minn. v. White*, 536 U.S. 765, 793 (2002) (Kennedy, J., concurring)).

10. Transcript of Oral Argument at 36–37, *Caperton*, 129 S. Ct. 2252 (No. 08-22).

11. *Caperton*, 129 S. Ct. at 2266–67 (quoting *Republican Party of Minn.*, 536 U.S. at 793 (Kennedy, J., concurring)); see also *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 864 (1988) ("[I]n determining whether a judgment should be vacated for a violation of [a judicial recusal statute,] it is appropriate to consider the risk of injustice to the parties in the particular case, the risk that the denial of relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process. We must continuously bear in mind that 'to perform its high function in the best way justice must satisfy the appearance of justice.'" (emphasis added) (internal quotation marks omitted) (quoting *In re Murchison*, 349 U.S. 133, 136 (1955))).

confidence in the courts,¹² but argued that the majority opinion would foster doubts, not confidence, by encouraging frivolous allegations of judicial bias.¹³

Neither the majority nor the dissent defines “public” or explains how public confidence can be fostered through rules governing judicial recusal.¹⁴ In that respect, *Caperton* is no different than the cases leading up to it. The Supreme Court has frequently used these undefined concepts when explaining that its role is to protect not only justice in fact, but also the appearance of justice by protecting public confidence in the legal system.¹⁵

For example, the Court has held that appointing a special prosecutor with a conflict of interest violates due process—a violation not insulated by harmless-error analysis because of the need to protect public confidence.¹⁶ The Court’s judicial-recusal opinions reflect this notion as well, holding that the appearance of bias, rather than actual bias, is the determining factor in such cases.¹⁷ In the context of a judge’s financial interest, the Court has held that the

12. *Caperton*, 129 S. Ct. at 2267 (Roberts, C.J., dissenting).

13. *Id.*

14. *See id.* at 2266–67 (majority opinion); *id.* at 2268–69 (Roberts, C.J., dissenting).

15. *See, e.g.*, *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 811 (1987); *Offutt v. United States*, 348 U.S. 11, 14 (1954); *Cooke v. United States*, 267 U.S. 517, 536 (1925).

16. *Young*, 481 U.S. at 814. In *Young v. United States ex rel. Vuitton et Fils S.A.*, the trial court entered a civil injunction preventing the defendants from infringing the plaintiff’s patent. *Id.* When the plaintiffs began to suspect that the patent infringement was continuing despite the injunction, the plaintiff’s attorneys convinced the trial court to appoint them as special prosecutors in the subsequent contempt proceedings. *Id.* at 791–92. The defendants were eventually convicted of contempt. *Id.* at 792. The Supreme Court, however, exercised its superintending authority and reversed the contempt convictions because of the special prosecutors’ conflict of interest. *Id.* at 814. In concluding that harmless-error analysis could not apply, the Court emphasized the need to protect public confidence in the courts:

[A]ppointment of an interested prosecutor creates an appearance of impropriety that diminishes faith in the fairness of the criminal justice system in general. The narrow focus of harmless-error analysis is not sensitive to this underlying concern A concern for actual prejudice in such circumstances misses the point, for what is at stake is the public perception of the integrity of our criminal justice system. “[J]ustice must satisfy the appearance of justice,” and a prosecutor with conflicting loyalties presents the appearance of precisely the opposite. Society’s interest in disinterested prosecution therefore would not be adequately protected by harmless-error analysis, for such analysis would not be sensitive to the fundamental nature of the error committed.

Id. at 811–12 (citation omitted) (quoting *Offutt*, 348 U.S. at 14).

17. *See, e.g.*, *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 864–65 (1988); *In re Murchison*, 349 U.S. 133, 136 (1955). It was not always clear in the early cases that the mere appearance of impropriety was a significant constitutional consideration in cases concerning judicial conduct. The right to an impartial judge is not an explicit constitutional right, but is implicit in the Fifth Amendment’s guarantee of due process. *See Tumey v. Ohio*, 273 U.S. 510, 523 (1927). The Court has recognized the common law rule that a judge may not preside over a case in which he or she has “a direct, personal, substantial, pecuniary interest.” *Id.* at 523. The Court also explained that the Framers intended for “[n]o man . . . to be a judge in his own cause; because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity.” *Caperton*, 129 S. Ct. at 2259 (quoting THE FEDERALIST NO. 10, at 55–56 (James

mayor of a municipality cannot preside over criminal cases if the municipality's treasury would benefit financially from convicting the defendants.¹⁸ In a similar, though less direct, example involving a judge's financial interest, the Court held that a state supreme court judge could not preside over a lawsuit that closely resembled a prior lawsuit brought by the judge.¹⁹ Outside the context of a judge's financial interest, the Court has also held that a judge may not sit as both the "one-man grand jury" that charges a person with a crime and the presiding judge in the same person's trial.²⁰

In these cases, the Court emphasized that reversal does not rely on whether justice has been served in the ultimate outcome of the case;²¹ rather, even if justice likely was served, reversal may be required because the circumstances did not satisfy the *appearance* of justice and therefore harmed public confidence.²² These cases culminated in *Caperton*, which applied the previous

Madison) (E.H. Scott ed., 1894)). However, this did not clarify whether the appearance of impropriety alone could create a due-process violation. In fact, most questions involving judicial disqualification were historically for the legislature to decide and "did not rise to a constitutional level." *FTC v. Cement Inst.*, 333 U.S. 683, 702 (1948) (citing *Tumey*, 273 U.S. at 523). Moreover, the traditional common law rule did not permit "disqualification for bias or prejudice" because "the law [does] not suppose a possibility of bias or favour in a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea." *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 820 (1986) (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *361).

18. *Tumey*, 273 U.S. at 532. In *Tumey v. Ohio*, the mayor of a village presided as judge over cases in which citizens were accused of illegally possessing alcohol. *Id.* at 516. The mayor's salary was supplemented for convicting people of these alcohol offenses, and the proceeds from fines resulting from such convictions were placed into a treasury fund for the village. *Id.* at 516–17, 519. The Court concluded that these financial incentives resulted in a due-process violation because the mayor had both a direct and an indirect incentive to convict people. *Id.* at 532–33. In a similar case years later, the Court found a due-process violation even though the mayor did not directly benefit. *Ward v. Monroeville*, 409 U.S. 57, 58–59 (1972).

19. See *Lavoie*, 475 U.S. at 823. In this case, a state supreme court justice's lawsuit claiming that an insurance company had refused to compensate an insured in bad faith. *Id.* The justice then presided over a very similar lawsuit in the state supreme court and voted against the insurance company. *Id.* at 818. The Supreme Court held that this violated due process because the justice's vote in the state supreme court aided his own financial interests in his lawsuit. *Id.* at 825.

20. *Murchison*, 349 U.S. at 133 (footnote omitted) (internal quotation marks omitted).

21. *Caperton*, 129 S. Ct. at 2259–62 (holding that the campaign contributions required recusal and invoking the need to protect both the appearance of justice and the public confidence in the courts).

22. See, e.g., *Lavoie*, 475 U.S. at 825 ("We make clear that we are not required to decide whether in fact Justice Embry was influenced, but only whether sitting on the case then before the Supreme Court of Alabama 'would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true.'" (quoting *Ward*, 409 U.S. at 60)); *Murchison*, 349 U.S. at 136 ("Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.'" (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954))); *Tumey*, 273 U.S. 510, 523 (1927) ("There are doubtless mayors who would not allow such a consideration as

recusal standards to the factual context of judicial campaign contributions.²³

Although the Court has repeatedly raised concern for protecting public confidence, the Court has never offered a detailed analysis of who “the public” is and how judicial decisions protect the public’s confidence. Indeed, without such explanation, any case that relies on a public-confidence argument is vulnerable to attack based on Chief Justice John Roberts’s dissent in *Caperton*, which argued that public confidence is harmed, not helped, by Supreme Court decisions affirming claims of potential partiality or bias, because such decisions will encourage additional (possibly frivolous) claims.²⁴ To evaluate that point, courts need a better framework for analyzing public-confidence arguments. Scholarly commentary on *Caperton*, however, has yet to provide such a framework.²⁵

\$12 costs in each case to affect their judgment in it; but the requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice.”). The Court in *Caperton* acknowledged that the justice had subjectively inquired into the possibility of his own bias and had found none, and refused to question this finding. *Caperton*, 129 S. Ct. at 2262–63. The Court expressly stated that it would not attempt to “determine whether there was actual bias.” *Id.* (noting that the Court would not attempt to “determine whether there was actual bias”).

23. 129 S. Ct. at 2265. Although Justice Kennedy’s opinion relied on principles similar to those underlying past decisions, it contained a subtle linguistic distinction from the previous recusal cases and from most state judicial-recusal codes. State codes generally require recusal when there is an appearance of bias—when a judge’s “impartiality might reasonably be questioned.” See *id.* at 2266 (quoting W. VA. CODE OF JUDICIAL CONDUCT Canon 3E(1) (2011)). However, Justice Kennedy declined to hold that violating this standard constituted a due-process violation and noted that “most disputes over disqualification will be resolved without resort to the Constitution.” *Id.* at 2267. Justice Kennedy noted that the due-process violations required a “probability of actual bias” or “serious risk of actual bias,” rather than the mere appearance of bias. *Id.* at 2263, 2265.

24. *Id.* at 2274 (Roberts, C.J., dissenting).

25. Instead, scholars have focused largely on *Caperton*’s relation to judicial elections by debating whether and to what extent *Caperton* attacks judicial elections, if such an attack is beneficial or detrimental, and what its likely effect will be. See Bert Brandenburg, *Inevitable, Flexible, Expandable Caperton?*, 33 SEATTLE UNIV. L. REV. 617, 624 (2010) (positing that *Caperton* was an inevitable response to large donors in judicial elections); Eric Sandberg-Zakian, *Rethinking “Bias”: Judicial Elections and the Due Process Clause After Caperton v. A.T. Massey Coal Co.*, 64 ARK. L. REV. 179, 181, 203 (2011) (criticizing *Caperton* for attacking judicial elections and noting that bias “is an element of judicial elections that is intended, constitutive, and, in some views, normatively desirable”). Other commentators have debated whether *Caperton* represented an extreme situation; some agree that the justice’s non-recusal was outrageous, whereas others maintain that the Court’s decision relied on an inaccurate version of the actual facts. Compare Jeffrey W. Stempel, *Completing Caperton and Clarifying Common Sense Through Using the Right Standard for Constitutional Judicial Recusal*, 29 REV. LITIG. 249, 268 (2010) (“Justice Benjamin’s recusal was clearly required. The average judge presiding over a very important (\$50 million) case to a very substantial benefactor (\$3 million) would of course be tempted to be biased in favor of the benefactor and prejudiced against his litigation opponent.”), with James Bopp, Jr. & Anita Y. Woudenberg, *Extreme Facts, Extraordinary Case: The Sui Generis Recusal Test of Caperton v. Massey*, 60 SYRACUSE L. REV.

II. A FRAMEWORK FOR ANALYZING PUBLIC CONFIDENCE IN THE COURTS

Although courts fail to define what target audience constitutes the “public,” or how the messages in judicial opinions will reach the public, they appear to refer to a broad, nationwide conception of the general public.²⁶ This conception is problematic because it relies on the highly questionable assumption that knowledge of judicial opinions is widespread.

Survey researchers debate how much basic knowledge the general public has about the court system,²⁷ but even the most optimistic estimates do not suggest that the general public has knowledge of judicial decisions—even those from the Supreme Court.²⁸ Rather, researchers assume that the general public lacks knowledge of all but the few most salient Supreme Court decisions.²⁹

Therefore, courts cannot pretend to influence broad public opinion through average judicial opinions because the messages will not reach the intended recipients. Professors Robinson and Darley raised similar points when analyzing the deterrent effect of criminal laws.³⁰ Robinson and Darley argue that the target audience for a deterrent effect must acquire accurate knowledge of what the law requires for criminal laws to deter crime.³¹ They analyze

305, 312–13 (2010) (noting that the Court’s “test was designed to fit the facts exactly”). Other commentary discusses the Court’s “probability of bias” standard, and the extent to which it differs from the traditional state-law recusal standard based on the “appearance of bias.” See Jed Handelsman Shugerman, *In Defense of Appearances: What Caperton v. Massey Should Have Said*, 59 DEPAUL L. REV. 529, 539–45 (2010); see also Dmitry Bam, *Understanding Caperton: Judicial Disqualification Under the Due Process Clause*, 42 MCGEORGE L. REV. 65, 75 (2010) (“[P]robability of bias is not the same as appearance of bias, although many commentators—and even Justice Ginsburg—conflate the two. But the difference is crucial: an appearance-based standard focuses on the public’s perception of the fairness of the court, while a probability-based standard centers on a reasonable judge’s likelihood of actual bias. The subject of the former inquiry is a member of the public; the subject of the latter inquiry is the judge in question. These are two very different tests, and the relevant factors in determining whether the test is met may be wildly different.”).

26. See, e.g., *Young v. United States ex rel. Vuitton Et Fils S.A.*, 481 U.S. 787, 811–12 (1987); *Murchison*, 349 U.S. at 136; Robinson & Darley, *supra* note 4, at 175–76; *supra* notes 16–17.

27. Compare JAMES L. GIBSON & GREGORY A. CALDEIRA, *CITIZENS, COURTS, AND CONFIRMATIONS* 34 (2009) (arguing that survey data shows the general public’s “relatively high levels” of knowledge of Supreme Court decisions), with HERBERT M. KRITZER, *INTO THE ELECTORAL WATERS: THE IMPACT OF BUSH V. GORE ON PUBLIC PERCEPTIONS AND KNOWLEDGE OF THE SUPREME COURT* 2–3 (2002), available at http://users.polisci.wisc.edu/kritzer/research/opinion/BvG_Impact.pdf (indicating that research supports that Americans tend to “know[] little about the Court or its workings”).

28. See, e.g., GIBSON & CALDEIRA, *supra* note 27, at 27–29 (declining to conclude that Americans “have a great deal of substantive knowledge” of the Court’s rulings).

29. See GIBSON & CALDEIRA, *supra* note 27, at 6 (“Typically, courts are thought to be relatively low salience institutions”); VALERIE J. HOEKSTRA, *PUBLIC REACTION TO SUPREME COURT DECISIONS* 6 (2003) (“Most cases simply do not appear to resonate on the national agenda.”).

30. Robinson & Darley, *supra* note 4, at 175.

31. *Id.*

behavioral-science data in various contexts to conclude that people do not have sufficiently accurate knowledge of specific criminal laws to facilitate such a deterrent effect.³² The same knowledge requisite is necessary to foster public confidence through judicial opinions because, if the general public does not know about a judicial decision, then the opinion cannot foster public confidence in the court system. To be sure, some highly salient court decisions on controversial subjects are widely known, and even less salient decisions are known by some segments of the population.³³ But even then, mere knowledge of a judicial decision does not always cultivate confidence.³⁴

A second problem with trying to foster broad-based public confidence through judicial decisions is the difficulty of identifying what triggers confidence in the courts.³⁵ One might relate “confidence” to agreement with court decisions, based on the commonsense notion that people have confidence in courts if they like the outcomes courts reach. But this approach yields problems; most high-profile decisions involve highly controversial social or political issues and thus will displease a significant percentage of the population.³⁶ Indeed, as courts perform one of their proper roles as sometimes counter-majoritarian institutions, they will make decisions that are unpopular with a majority of the general public.³⁷ Therefore, it makes little sense to assess public confidence in the courts by assessing whether courts are reaching popular outcomes.

The problem stretches beyond the courts’ resolution of controversial issues. As Professor Richard Fallon has noted, it is difficult to ascertain whether a collective notion of public confidence in the courts exists when even close court observers do not collectively agree on the proper extent and use of courts’ power.³⁸ Members of the academic community broadly disagree about core aspects of the courts’ role and how courts should carry out such obligations.³⁹ To name only one example, strong disagreement arises regarding the proper methodology for constitutional interpretation, specifically

32. *Id.* at 176.

33. *See* HOEKSTRA, *supra* note 29, at 6, 9.

34. *See id.* at 10–11 (noting that individuals are only inclined to think about court decisions regarding areas of personal importance).

35. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 999 (1992) (Scalia, J., concurring in part and dissenting in part) (“Instead of engaging in the hopeless task of predicting public perception—a job not for lawyers but for political campaign managers—the Justices should do what is legally right.”); *see also* GIBSON & CALDEIRA, *supra* note 27, at 5 (“When it comes to the question of how legitimacy is created, maintained, and destroyed, social scientists have some theories and conjectures, but precious little data, and scant understanding of processes of opinion updating and change.” (emphasis in original)).

36. *See* Fallon, *supra* note 1, 1824–25 (discussing public reaction to *Roe v. Wade* based on anti-abortion sentiments rather than due-process issues).

37. *See id.* at 1825.

38. *Id.* at 1826–27.

39. *Id.* at 1826.

whether courts should interpret the Constitution in light of original intent or as a living document that changes along with social values.⁴⁰ When court decisions touch on such controversial issues, it will be difficult for such decisions to foster broad public confidence.

Overall, then, there are good reasons to doubt whether courts, through judicial opinions, can broadly affect the general public's confidence in the legal system. From that perspective, the public-confidence arguments used by both the majority and the dissent in *Caperton* appear hollow. The general public probably does not know about the *Caperton* decision or understand the majority's opinion, which undermines the Court's rhetoric about fostering public confidence. Even if *Caperton* is one of the rare highly salient opinions that the national media widely reported to the general public, such media coverage may be inaccurate or may fail to communicate the Court's intended message in a way that builds public confidence. Likewise, the dissent's assertion that the decision will reduce public confidence by leading to an increase in unfair recusal motions seems problematic, as it is unlikely that the general public will ever know about this development.⁴¹ Even a very large increase in recusal motions probably would not attract significant media attention, especially not the kind of attention that an average person in the general public would notice.⁴²

But a different conception of public confidence leads to different conclusions. Instead of focusing on the "general public," courts should target those directly involved in or observing specific cases,⁴³ and instead of focusing on the outcomes of cases involving controversial social issues, courts should focus on basic procedural fairness.⁴⁴

40. *Id.* at 1810–11.

41. See *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2274 (2009) (Roberts, J., dissenting).

42. See, e.g., Gregory A. Galdeira, *Neither the Purse Nor the Sword: Dynamics of Public Confidence in the Supreme Court*, 80 AM. POL. SCI. REV. 1209, 1211 (1986); Jeffery J. Mondak, *The Dynamics of Public Support for the Supreme Court*, 59 J. POL. 1114, 1121–22 (1997).

43. See Tom R. Tyler, *Does the American Public Accept the Rule of Law? The Findings of Psychological Research on Deference to Authority*, 56 DEPAUL L. REV. 661, 663 (2007) (“[P]eople’s reactions to their dealings with legal authorities are most strongly shaped by whether they think they have received a fair ‘day in court.’”).

44. The concept of procedural fairness incorporates two related ideas: the “experience that court users have with the court system, whether as litigants, jurors, witnesses, or affected parties,” and people’s perceptions of the manner in which public officials use their authority. CTR. FOR COURT INNOVATION, *PROCEDURAL FAIRNESS IN CALIFORNIA: INITIATIVES, CHALLENGES, AND RECOMMENDATIONS* 1 (2011); Tyler, *supra* note 43, at 663. Survey researchers have extensively studied how procedural fairness affects public confidence in the legal system. See generally, e.g., TOM R. TYLER & YUEN J. HUO, *TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS* (2002); Jonathan D. Casper, Tom R. Tyler & Bonnie Fisher, *Procedural Justice in Felony Cases*, 22 L. & SOC. REV. 483 (1988); Raymond Paternoster et al., *Do Fair Procedures Matter? The Effect of Procedural Justice on Spouse Assault*, 31 L. & SOC.

Reviewing data from survey participants who had personal interactions with the court system, Professor Tom Tyler identified four elements of procedural fairness that affect people's confidence in the courts: 1) "an opportunity to state their case to legal authorities"; 2) the outward neutrality of the decision maker; 3) the dignity, respect, and politeness with which they are treated; and 4) the impression that the authorities are "benevolent and caring," and trying to act in the public interest.⁴⁵ The concern for procedural fairness cuts across race, ethnicity, and economic status.⁴⁶

Furthermore, the surveys revealed that people care more about procedural fairness than they do about ultimate outcomes, and that issues of procedural fairness related centrally to the reactions of the losing parties.⁴⁷ Therefore, a losing party who believes court procedures were fair is much more likely to accept the outcome of the case.⁴⁸

The empirical research also examined whether public confidence in the courts is declining and how it can be improved.⁴⁹ Tyler concluded that some survey data makes it "tempting" to conclude that public confidence in the courts is declining, but that ultimately there is insufficient evidence to support that general conclusion.⁵⁰ However, he does acknowledge that public confidence in all courts, particularly the Supreme Court, is low, and has been low for several decades.⁵¹

Tyler uses this data to argue that public confidence in the courts can be improved by "designing court procedures that lead the people who personally deal with the courts to have positive experiences."⁵² Such efforts can focus not only on the litigants in specific cases, but on other members of the public who participate in the court system, such as witnesses, jurors, and litigants' family members. Tyler recommends that "[c]ourts should emphasize their position as neutral authorities whose role is to interpret and apply the law. The belief that courts make decisions based upon the neutral application of principles to the facts of particular cases is central to the legitimacy of courts."⁵³

Such a framework proves useful in analyzing public-confidence arguments like those in *Caperton*. Under this framework, the majority opinion seems

REV. 163 (1997); Jason Sunshine & Tom R. Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 L. & SOC. REV. 513 (2003).

45. Tyler, *supra* note 43, at 664.

46. *Id.* at 665.

47. *Id.* at 664; accord CTR. FOR COURT INNOVATION, *supra* note 44, at 1.

48. Tyler, *supra* note 43, at 664.

49. *Id.* at 690–91.

50. *Id.* at 690.

51. *Id.* at 691. Other scholars appear to disagree with this conclusion to some extent. See, e.g., GIBSON & CALDEIRA, *supra* note 27, at 47–49 (arguing that the decline in confidence resulted from an unusually high period of court favorability and that "the court seems as widely trusted today as it was a decade ago").

52. Tyler, *supra* note 43, at 692.

53. *Id.* at 694.

likely to foster the confidence of people participating in the court system.⁵⁴ People will be impressed with the impartiality and integrity of a judge who recused herself because a party had been a significant campaign supporter, whereas the refusal to recuse in such circumstances runs a great risk of fostering the view that the courts are vulnerable to improper influence.⁵⁵ This is the kind of core aspect of procedural fairness that relates centrally to people's confidence in the courts.

When "public" refers to participants in a particular case, and courts seek to uphold procedural fairness, the dissent's argument in *Caperton*—that an influx of recusal motions will weaken public confidence⁵⁶—seems less convincing. It seems implausible that the participants in a case would lose much confidence in the court due to mere recusal motions, and that minimal impact would pale in comparison to the significant impact a judge could have by choosing to recuse him- or herself under circumstances like those in *Caperton*. Viewing the concept of public confidence in this manner, the majority in *Caperton* appears to have the better argument.

Thus, in writing opinions and conducting cases before them, courts can influence public confidence through fair procedures that will resonate with people who directly participate in court proceedings.⁵⁷ If applied widely

54. See Jonathan H. Todt, Note, *Caperton v. A.T. Massey Coal Co.: The Objective Standard for Judicial Recusal*, 86 NOTRE DAME L. REV. 439, 467 (2011) (arguing that the *Caperton* majority's approach will improve public confidence in the courts and noting the Court's fairness in opinions).

55. Cf. *Cheney v. U.S. Dist. Court for D.C.*, 541 U.S. 913, 928 (2004) (Scalia, J., denying motion to recuse) ("The people must have confidence in the integrity of the Justices, and that cannot exist in a system that assumes them to be corruptible by the slightest friendship for favor . . .").

56. *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2267–68 (2009).

57. Realistically, fostering public confidence through individual litigants is an uphill battle, because the system's institutional structure is, in many respects, inherently alienating. Access to the legal system often relies on the ability of individuals to hire a lawyer; indeed, the rules and procedures governing the system assume that litigants will have legal representation. Russell Engler, *And Justice For All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 FORDHAM L. REV. 1987, 1988 (1999). But in reality, self-representation is now the norm in many kinds of cases. *Id.* at 1987–88. Pro se litigants face extraordinary barriers to successfully pursuing their claims, including: legal rules that are difficult to understand and navigate, court personnel who are prohibited from providing legal advice, and busy judges have minimal time to explain proceedings to pro se litigants. *See id.* at 1988–89.

Even litigants who are able to afford a private lawyer or who receive state-appointed representation may find the legal system inaccessible and alienating, as a lawyer prepares written pleadings typically with minimal client assistance and often speaks in court while the client remains silent. Furthermore, attorneys communicate with opposing counsel and court personnel on the client's behalf. Moreover, lawyers and judges often have professional friendships and use a common jargon-laden language that those outside the profession may not understand.

Racial and ethnic minorities in particular enter the system with a preexisting—and not necessarily unjustified—sense of distrust and injustice. BENNACK, *supra* note 1, at 30 (showing that 33.5 percent of non-Hispanic whites, 28.6 percent of Hispanics, and 17.7 percent of African Americans "strongly agree" that "[j]udges are generally honest and fair in deciding cases").

throughout the legal process, such procedures may have a substantial, broad-based impact on public confidence.

III. WHAT TO DO WHEN THE PRESIDING JUDGE HAS A CLOSE RELATIONSHIP WITH A JUROR

Every day in courts around the country, people with close relationships to the presiding judge in a case report for jury duty. Although no empirical data exists examining how frequently this occurs, commonsense suggests that it happens with some frequency, especially in smaller communities with fewer judges and limited jury pools. Despite this inevitable occurrence, constitutional texts, statutes, and ethical rules provide little guidance as to how this situation should be addressed.

A. *Constitutional Provisions on Qualifications for Jurors and Judges*

Juror qualifications are governed by the U.S. Constitution's Sixth Amendment, which states that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed."⁵⁸ A similar, though not identical, provision in the Seventh Amendment guarantees a jury trial in certain civil cases.⁵⁹

These provisions do not regulate relationships between jurors and judges. The Sixth Amendment states only that the jurors must be "impartial," but does not specify whether impartiality should be measured by objective factors, such as whether the juror is related to another participant in the case, or by more subjective factors revealed during voir dire, such as the juror's subjective views about various matters related to the case and the legal system.⁶⁰ The Seventh Amendment does not use the term "impartial," and thus provides even less guidance on what factors should be considered in determining whether a

Nearly seventy percent of African Americans in the study believed that courts treated African Americans worse than whites and Hispanics, and forty percent of whites and Hispanics agreed. *Id.* at 38; see HOWARD SCHUMAN ET AL., RACIAL ATTITUDES IN AMERICA: TRENDS AND INTERPRETATIONS 153–55 (1997); RONALD WEITZER & STEPHEN A. TUCH, RACE AND POLICING IN AMERICA: CONFLICT AND REFORM 5 (2006); Lawrence D. Bobo & Devon Johnson, *A Taste for Punishment: Black and White Americans' Views on the Death Penalty and the War on Drugs*, 1 DU BOIS REV. 151, 151 (2004); Terry Carter, *Divided Justice*, A.B.A. J., Feb. 1999, at 42, 43 (discussing a survey of African American lawyers that concludes similarly).

58. U.S. CONST. amend. VI.

59. *Id.* amend. VII ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."). Unlike the Sixth Amendment, the Seventh Amendment has not been incorporated against the states. *Minneapolis & St. Louis R.R. Co. v. Bombolis*, 241 U.S. 211, 219 (1916).

60. See U.S. CONST. amend. VI.

juror is qualified.⁶¹ Thus, the jury-trial guarantees of the Constitution do not specify any juror qualifications addressing a juror's relationship to the judge.

The constitutional provisions for judicial qualifications are even less specific. Unlike the right to trial by jury, the right to an impartial judge is not specifically enumerated in the Bill of Rights, and has instead been read into the Fifth Amendment's guarantee of due process by the Supreme Court.⁶² This due-process provision does not specifically enumerate the qualifications required of judges.⁶³

Thus, although there is a constitutional right to an impartial jury⁶⁴ and a constitutional right to an impartial judge,⁶⁵ the Constitution does not specifically speak to whether a juror and the judge may have a close personal relationship.

B. Statutory and Ethical Rules on Qualifications for Jurors and Judges

Legislatures in every state have passed laws delineating qualifications for jurors and judges.⁶⁶ However, these laws mainly regulate jurors' and judges' relationships to the parties or the issues in a case, not the relationship between the judge and juror.⁶⁷

As to juror qualifications, legislatures around the country have created statutes and rules specifying when a juror should be disqualified based on his or her relationship to a participant in a given case.⁶⁸ These statutes and rules focus on the relationship of the juror to the parties, and his connection to or interest in the case.⁶⁹ Thus, most state legislatures have enacted statutes or court rules excluding jurors who are related by blood or marriage to a party, attorney, or witness in the case.⁷⁰ Such statutes often also allow exclusion of a

61. See *id.* amend. VII. The Seventh Amendment does, however, contain language that mostly insulates jury verdicts from reexamination. See *supra* note 59.

62. See *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2259 (2009) (citing *Tumey v. Ohio*, 273 U.S. 510, 523 (1927)).

63. U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . .").

64. See *id.* amend. VI.

65. See *Caperton*, 129 S. Ct. at 2259 (citing *Tumey*, 273 U.S. at 523).

66. See *infra* notes 70–73.

67. See, e.g., FLA. R. CIV. P. 1.431(c)(1).

68. William T. Pizzi & Morris B. Hoffman, *Jury Selection Errors on Appeal*, 38 AM. CRIM. L. REV. 1391, 1409–11 (2001).

69. *Id.* at 1410 ("[L]itigants may challenge jurors who are related not just to the defendant but also to the lawyers, are in an employee/employer relationship with the defendant, are in a landlord/tenant relationship with the defendant, are in a debtor/creditor relationship with the defendant, are in any fiduciary relationship with the defendant, were witnesses to any of the alleged events, or were jurors in any previous trial regarding the same allegations." (footnotes omitted)).

70. See, e.g., ALA. CODE § 12-16-150(4) (LexisNexis 2005); ARIZ. REV. STAT. ANN. § 21-211(3) (2002); ARK. CODE ANN. § 16-31-102(b)(1) (1999 & Supp. 2011); CAL. CIV. PROC. CODE § 229(a) (West 2006); COLO. REV. STAT. § 16-10-103(1)(b) (2010); FLA. STAT. ANN.

juror who has a financial interest in the outcome of the case.⁷¹ No state explicitly allows disqualification based on a juror's relationship to the judge, although a few states have enacted laws that could potentially exclude a related juror.⁷²

Similarly, statutes requiring judicial recusal focus primarily on the judge's impartiality to the parties and the dispute at issue.⁷³ Although no state law explicitly provides that a judge's relationship with a juror is grounds for disqualification, most states permit judicial disqualification if the judge is related to any party or attorney in the case or has a financial interest in the outcome.⁷⁴ Codes of judicial conduct in all but two states (Louisiana and

§ 913.03(9) (West 2001); GA. CODE ANN. § 15-12-163(b)(4) (2008); IDAHO CODE ANN. § 19-2020(1) (2004); LA. CODE CIV. PROC. ANN. art. 1765(3) (2003); LA. CODE CRIM. PROC. ANN. art. 797(3) (1998); ME. REV. STAT. ANN. tit. 14, § 1301 (2003); MO. ANN. STAT. § 494.470(1) (West 1996); MONT. CODE ANN. §§ 25-7-223(2), 46-16-115(2)(a) (2011); NEV. REV. STAT. ANN. § 16.050(1)(b) (LexisNexis 2008); N.C. GEN. STAT. § 15A-1212(5) (2009); N.D. CENT. CODE § 28-14-06(2) (2006); N.Y. CRIM. PROC. LAW § 270.20(1)(c) (McKinney 2002); OHIO REV. CODE ANN. § 2313.42(G) (LexisNexis 2010); OKLA. STAT. ANN. tit. 12, § 572 (West 2000); OKLA. STAT. ANN. tit. 22, § 660(1) (West 2008); OR. REV. STAT. ANN. § 136.220(1) (West 2003); R.I. GEN. LAWS § 9-10-14 (1997); S.D. CODIFIED LAWS § 15-14-6.1(2)–(3) (2004); W. VA. CODE ANN. § 56-6-12 (LexisNexis 2005); WIS. STAT. ANN. § 805.08(1) (West 1994 & Supp. 2010); WYO. STAT. ANN. §§ 1-11-203(a)(ii), 7-11-105(a)(iv) (2011); ALASKA R. CIV. P. 47(c)(9); ALASKA R. CRIM. P. 24(c)(9); COLO. R. CIV. P. 47(e)(2); COLO. R. CRIM. P. 24(b)(1)(II); FLA. R. CIV. P. 1.431(c)(1); IDAHO R. CIV. P. 47(h)(2); IND. JURY R. 17(a)(6); IOWA R. CIV. P. 1.915(6)(d); IOWA R. CRIM. P. 2.18(5)(d); MASS. R. CIV. P. 47(a)(1); MASS. R. CRIM. P. 20(b)(1); MINN. R. CRIM. P. 26.02(5)(1)(5); OHIO R. CRIM. P. 24(C)(10); OR. R. CIV. P. 57(D)(1)(c); UTAH R. CIV. P. 47(f)(2); UTAH R. CRIM. P. 18(e)(3); VA. SUP. CT. R. 3A:14(a)(1).

71. ALA. CODE § 12-16-150(12); ARK. CODE ANN. § 16-31-102(b)(4); N.D. CENT. CODE § 28-14-06(3), (5); N.Y. C.P.L.R. 4110(a) (McKinney 2007); ALASKA R. CIV. P. 47(c)(13); ALASKA R. CRIM. P. 24(c)(12); CAL. CIV. PROC. CODE § 229(b), (d); COLO. R. CIV. P. 47(e)(3), (5); IDAHO R. CIV. P. 47(h)(5); OR. R. CIV. P. 57(D)(1)(d), (f); UTAH R. CIV. P. 47(f)(5).

72. *See, e.g.*, KY. CT. R. 9.36(1) (“When there is reasonable ground to believe that a prospective juror cannot render a fair and impartial verdict on the evidence, that juror shall be excused as not qualified.”).

73. *See, e.g.*, N.C. GEN. STAT. § 15A-1223(b) (2009) (requiring judge recusal for prejudice or familial relations to the defendant); ARIZ. R. CRIM. P. 10(a) (“[A]ny defendant shall be entitled to a change of judge if a fair and impartial hearing or trial cannot be had by reason of the interest or prejudice of the assigned judge.”).

74. *See* ARK. CONST. amend. 80, § 12; TEX. CONST. art. V, § 11; ALA. CODE § 12-1-12; ALASKA STAT. § 22.20.020 (2010); COLO. REV. STAT. § 16-6-201 (2010); CONN. GEN. STAT. ANN. § 51-39 (West 2005); FLA. STAT. ANN. § 38.02 (West 2010); HAW. REV. STAT. ANN. § 601-7 (LexisNexis 2007); IND. CODE ANN. § 33-25-3-2 (LexisNexis 2004); KAN. STAT. ANN. § 20-311 (2007); KY. REV. STAT. ANN. § 26A.015(2) (LexisNexis 1998); MO. ANN. STAT. § 544.290 (West 2002); MONT. CODE ANN. § 3-1-803 (2009); NEB. REV. STAT. ANN. § 24-739 (LexisNexis 2004); N.C. GEN. STAT. § 15A-1223; OHIO REV. CODE ANN. § 2701.031 (LexisNexis 2008); OKLA. STAT. ANN. tit. 20, §§ 1401-02 (West 2002); OR. REV. STAT. ANN. § 14.210 (West 2003); S.C. CODE ANN. § 14-1-130 (1976); S.D. CODIFIED LAWS § 15-12-37 (2004); UTAH CODE ANN. § 78A-2-222 (LexisNexis 2008); VT. STAT. ANN. tit. 12, § 61 (2002); VA. CODE ANN. § 16.1-69.23 (2010); WASH. REV. CODE ANN. § 35.20.175 (West Supp. 2011); W. VA. CODE ANN. § 51-2-8 (LexisNexis 2008); WIS. STAT. ANN. § 757.19 (West 2011); CAL.

Texas) direct a judge to recuse herself if the judge or the judge's relative is related to a party, attorney, or person likely to be a material witness.⁷⁵

The American Bar Association's *Model Code of Judicial Conduct*, Canon 3(E), provides:

(1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

....

(c) the judge knows that he or she, individually or as a fiduciary, or the judge's spouse, parent or child wherever residing, or any other member of the judge's family residing in the judge's household, 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;

(d) the judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

CIV. PROC. CODE §§ 170.1, 170.6 (West 2006); COLO. R. CIV. P. 97; IDAHO R. CIV. P. 40(d)(2); LA. CODE CIV. PROC. ANN. art. 151; LA. CODE CRIM. PROC. ANN. art. 671; MICH. CT. R. 2.003; MINN. R. CIV. P. 63.02; N.H. SUP. CT. R. 2.11; N.J. CT. R. 1:12-1; N.Y. JUD. LAW § 14 (McKinney 2002); PA. R. CT. 8 (2011).

75. See, e.g., ALASKA CODE OF JUDICIAL CONDUCT Canon 3(C) (2011); ARIZ. CODE OF JUDICIAL CONDUCT R. 2.11 (2011); ARK. CODE OF JUDICIAL CONDUCT Canon 3(C) (2009); CAL. CODE OF JUDICIAL ETHICS Canon 3(E) (2005); COLO. CODE OF JUDICIAL CONDUCT R. 2.11 (2011); CONN. CODE OF JUDICIAL CONDUCT R. 2.11 (2011); FLA. CODE OF JUDICIAL CONDUCT Canon 3(E) (2011); GA. CODE OF JUDICIAL CONDUCT Canon 2(B) (2011); HAW. REV. CODE OF JUDICIAL CONDUCT R. 2.11(a)(2) (2011); ILL. CODE OF JUDICIAL CONDUCT Canon 3(C) (2009); IND. CODE OF JUDICIAL CONDUCT R. 2.11 (2011); IOWA CODE OF JUDICIAL CONDUCT R. 51:2.11 (2010); KAN. R. JUDICIAL CONDUCT R. 2.11 (2010); LA. CODE OF JUDICIAL CONDUCT Canon 3(C) (2006) (providing only general terms for recusal); ME. CODE OF JUDICIAL CONDUCT Canon 3(E) (2004); MD. CODE OF JUDICIAL CONDUCT R. 2.11 (2011); MASS. CODE OF JUDICIAL CONDUCT Canon 3(E) (2011); MICH. CODE OF JUDICIAL CONDUCT Canon 2(C) (2011); MINN. CODE OF JUDICIAL CONDUCT R. 2.11 (2011); MISS. CODE OF JUDICIAL CONDUCT Canon 3(E) (2011); MO. CODE OF JUD. CONDUCT R. 2.03, Canon 3(E) (2011); MONT. CODE OF JUDICIAL CONDUCT R. 2.12 (2011); NEV. CODE OF JUDICIAL CONDUCT R. 2.11 (2011); N.H. CODE OF JUDICIAL CONDUCT R. 2.11 (2011); N.J. CODE OF JUDICIAL CONDUCT Canon 3(C) (2012); N.M. CODE OF JUDICIAL CONDUCT R. 21-400 (2011); N.Y. CODE OF JUDICIAL CONDUCT § 100.3(c) (2011); N.C. CODE OF JUDICIAL CONDUCT Canon 3(C) (2011); N.D. CODE OF JUDICIAL CONDUCT Canon 3(E) (1998-99); OHIO CODE OF JUDICIAL CONDUCT R. 2.11 (2009); OKLA. CODE OF JUDICIAL CONDUCT R. 2.11 (2011); OR. CODE OF JUDICIAL CONDUCT R. 2-106 (2011); PA. CODE OF JUDICIAL CONDUCT CANON 3(C) (2011); R.I. CODE OF JUDICIAL CONDUCT Canon 3(E) (2011); S.C. CODE OF JUDICIAL CONDUCT Canon 3(E) (2011); S.D. CODE OF JUDICIAL CONDUCT Canon 3(E) (2006); TENN. CODE OF JUDICIAL CONDUCT Canon 3(E) (2011); UTAH CODE OF JUDICIAL CONDUCT R. 2.11 (2011); VT. CODE OF JUDICIAL CONDUCT Canon 3(E) (2009); CANONS OF JUDICIAL CONDUCT FOR THE COMMONWEALTH OF VA. Canon 3(E) (2011); WASH. CODE OF JUDICIAL CONDUCT Canon 3(D) (2011); W. VA. CODE OF JUDICIAL CONDUCT Canon 3(E) (2011); WYO. CODE OF JUDICIAL CONDUCT R. 2.11 (2010).

- (i) is a party to the proceeding, or an officer, director or trustee of a party;
- (ii) is acting as a lawyer in the proceeding;
- (iii) is known by the judge to have more than a de minimis interest that could be substantially affected by the proceeding;
- (iv) is to the judge's knowledge likely to be a material witness in the proceeding⁷⁶

Some states have used this model code to form judicial disqualification rules; for instance, the *Ohio Code of Judicial Conduct* directs a judge to recuse himself if the judge is related to another judge who has presided over the same case.⁷⁷ The *Ohio Code* specifically provides for recusal when “[t]he judge knows that the judge’s spouse or *domestic partner*, or a person within the *third degree of relationship* to either of them, or the spouse or *domestic partner* of such a person has acted as a judge in the proceeding.”⁷⁸ Despite such regulations on relationships with other judges, case issues, or financial interests, neither the statutes nor rules governing juror and judicial qualifications answer whether a judge and juror may have a close relationship to each other.

C. Cases Addressing Related Jurors and Judges

In addition to the lack of textual guidance from constitutional provisions, statutes, or ethical rules, very little case law addresses judges who have a close relationship with a juror.⁷⁹ Instead, the vast majority of cases addressing qualifications of jurors focus mainly on ensuring that jurors have no bias toward or relationship with any of the parties, lawyers, or witnesses.⁸⁰ The cases have largely ignored jurors’ relationships to the judge.⁸¹

76. MODEL CODE OF JUDICIAL CONDUCT Canon 3(E) (1999).

77. OHIO CODE OF JUDICIAL CONDUCT R. 2.11(A)(6) (2009).

78. *Id.*

79. See *infra* notes 80–89 and accompanying text.

80. See *Smith v. Phillips*, 455 U.S. 209, 220–21 (1982) (finding no due-process violation when a juror previously applied for a job at the prosecutor’s office); *United States v. Barone*, 114 F.3d 1284, 1305–07 (1st Cir. 1997) (affirming the lower court’s dismissal of a juror after deliberations had started due to impracticality); *United States v. Ramos*, 861 F.2d 461, 464–66 (6th Cir. 1988) (affirming juror’s removal because juror’s wife was seen talking to the defendant and hugging the defendant’s wife); *State v. Kauhi*, 948 P.2d 1036, 1040–41 (Haw. 1997) (finding that failure to excuse a juror who worked as a prosecutor in the same office as the prosecution resulted in the defendant’s use of his last preeminent challenge); *Taylor v. State*, 656 So.2d 104, 111 (Miss. 1995) (explaining that a for-cause juror challenge was improperly overruled because the juror’s sibling was an assistant state’s attorney); *State v. Sanchez*, 901 P.2d 178, 183–84 (N.M. 1995) (noting that a juror’s tenuous relationship with prosecutors was insufficient to disqualify her).

81. See *supra* note 80.

Only three appellate courts—two state supreme courts and one state court of appeals—have addressed the issue.⁸² All three held that the juror who had a close relationship to the judge served in error, and reversed the judgment without providing a detailed constitutional analysis.⁸³ In *State v. Tody*, the Wisconsin Supreme Court concluded that the judge erred by allowing his mother to serve on the jury; however, the six-justice panel disagreed as to the rationale and produced two split opinions.⁸⁴ One opinion invoked, but did not extensively analyze, the state and federal constitutional jury provisions, and held that the judge’s mother was “objectively biased” because she had “an interest in the case, namely her familial relationship with the judge, that is extraneous to the evidence on which the jury is to base its decision,” and which she “would not have been able to set aside . . . when discharging her duties as a juror.”⁸⁵ The second opinion concluded that there was no constitutional violation, but that reversal was necessary because the trial judge failed to invoke his “broad inherent authority . . . to administer justice” by either recusing himself or striking his mother from the jury.⁸⁶

The Arkansas Supreme Court and the Appellate Division of the New York Supreme Court reached the same result in similar cases, but with even more truncated analyses.⁸⁷ Both courts reversed verdicts reached by juries on which the judges’ wives served.⁸⁸ In support of their rulings, both courts invoked arguments for the appearance of propriety and constitutional jury rights, but neither elaborated on these reasons in any depth.⁸⁹

D. The Constitutional Problem Created by a Juror with a Close Relationship to the Presiding Judge

Despite the rather sparse constitutional analysis in the case law, there is, in fact, a serious constitutional concern when a presiding judge and a juror share a close relationship. It is true that judges and juries are both expected to act as neutral and impartial entities; based on this expectation, there may be an assumption that no constitutional problem arises when a relationship exists

82. See *Elmore v. State*, 144 S.W.3d 278, 279 (Ark. 2004); *People v. Hartson*, 553 N.Y.S.2d 537, 538 (N.Y. App. Div. 1990) (per curiam); *State v. Tody*, 764 N.W.2d 737, 739 (Wis. 2009).

83. See *Elmore*, 144 S.W.3d at 280; *Hartson*, 554 N.Y.S.2d at 539; *Tody*, 764 N.W.2d at 740.

84. *Tody*, 764 N.W.2d at 744. The author represented Mr. Tody on appeal as part of the author’s work at the Frank J. Remington Center, a program at the University of Wisconsin Law School. The Wisconsin State Public Defender appointed the Remington Center to handle the appeal as part of one of its clinical programs, the Criminal Appeals Project.

85. *Id.* at 745 (footnote omitted).

86. *Id.* at 749 (Ziegler, J., concurring).

87. See *Elmore*, 144 S.W.3d at 279–80; *Hartson*, 554 N.Y.S.2d at 538–39.

88. *Elmore*, 144 S.W.3d at 279–80; *Hartson*, 554 N.Y.S.2d at 538–39.

89. *Elmore*, 144 S.W.3d at 279–80; *Hartson*, 554 N.Y.S.2d at 538–39.

between these two neutral entities. However, the focus on neutrality overlooks the framers' intent concerning the right to trial by jury.⁹⁰

The framers were concerned not only with the jury's neutrality to the parties in a case, but also with the jury's independence from the presiding judge.⁹¹ That concern stemmed from the English common law history of judicial tyranny, when judges in the seventeenth century were essentially puppets of the monarchy and served at the pleasure of the King.⁹² Although juries existed, they were often aggressively influenced and intimidated by the monarch's hand-picked judges and faced possible punishment for disagreeing with the monarch's desired result.⁹³

Eventually, English statutes and courts provided legal measures to insulate jurors from judicial intimidation and influence.⁹⁴ This shift is illustrated in the famous *Bushell's Case* of 1670, in which jurors were imprisoned for refusing to follow the trial judge's directions to convict the defendants of illegal assembly.⁹⁵ Bushell, one of the jurors, petitioned for writ of habeas corpus and argued that the jury had a right to reach a verdict contrary to the judge's directions.⁹⁶ The Court of Common Pleas sided with Bushell and held that Bushell could not be punished for defying the trial judge's orders regarding the verdict because the jury had a right to act independently from the judge.⁹⁷

90. See generally Thomas Regnier, *Restoring the Founders' Ideal of the Independent Jury in Criminal Cases*, 51 SANTA CLARA L. REV. 775, 781, 819 (2011) (discussing the need for jurors to be independent arbiters).

91. *Id.* at 781.

92. See, e.g., FRANCIS BACON, *Of Judicature*, in THE ESSAYS OF FRANCIS BACON 251, 257–58 (Mary Augusta Scott ed., 1908) (“Let judges also remember, that Salomon’s throne was supported by lions on both sides: let them be lions, but yet lions under the throne; being circumspect that they do not check or oppose any points of sovereignty.” (footnote omitted)).

93. See 4 DAVID HUME, THE HISTORY OF ENGLAND: FROM THE INVASION OF JULIUS CAESAR TO THE ABDICATION OF JAMES THE SECOND, 1688 at 449–50 (1849) (“Timid juries, and judges who held their offices during pleasure, never failed to second all the views of the crown. And as the practice was anciently common of fining, imprisoning, or otherwise punishing the jurors, merely at the discretion of the court, for finding a verdict contrary to the direction of these dependent judges, it is obvious that juries were then no manner of security to the liberty of the subject.”).

94. Act for the Abolition of the Court of Star Chamber, 1641, 16 Car. 1, c. 10. (Eng.) (“Whereas by the Great Charter many times confirmed in Parliament It is Enacted That no Freeman shall be taken or imprisoned or disseised of his Freehold or Liberties or Free Customes or be Outlawed or exiled or otherwise destroyed and that the King will not passé upon him or condemn him but by lawfull judgement of his Peers or by the Law of the Land . . .”).

95. *Bushell's Case*, (1670) 124 Eng. Rep. 1006, 1007 (C.P.); see also John Marshall Mitnick, *From Neighbor-Witness to Judge of Proofs: The Transformation of the English Civil Juror*, 32 AM. J. LEGAL HIST. 201, 206–07 (1988) (discussing the background and significance of *Bushell's Case*).

96. See Mitnick, *supra* note 95, at 206.

97. *Bushell's Case*, 124 Eng. Rep. at 1012.

Later, in 1701, the English government codified this idea by enacting a statute providing for judicial independence from the King.⁹⁸ American colonial judges, however, continued to serve the King⁹⁹ until the Declaration of Independence provided for judicial independence.¹⁰⁰

The framers separated the judge and the jury as two wholly independent institutions based, in part, on this English common law history.¹⁰¹ Like the court in *Bushell's Case*, Alexander Hamilton believed that the jury should serve as “a defence against the oppressions of an hereditary monarch,” and, as such, must remain independent of judges too often subservient to the monarch.¹⁰² Therefore, Hamilton emphasized that providing the right to a jury, separate and independent from the judiciary, created a “double security” against corruption:

[T]he trial by jury must still be a valuable check upon corruption. It greatly multiplies the impediments to its success. As matters now stand, it would be necessary to corrupt both court and jury; for where the jury have gone evidently wrong, the court will generally grant a new trial, and it would be in most cases of little use to practice upon the jury, unless the court could be likewise gained. Here then is a double security; and it will readily be perceived, that this complicated agency tends to preserve the purity of both institutions. By increasing the obstacles to success, it discourages attempts to seduce the integrity of either. The temptations to prostitution which the judges might have to surmount, must certainly be much fewer,

98. See Act of Settlement, 1701, 12 & 13 Will. 3, c. 2 (Eng.), reprinted in HISTORICAL SOURCE BOOK 58–62 (Hutton Webster ed., 1920); Naamani Tarkow, *The Significance of the Act of Settlement in the Evolution of English Democracy*, 58 POL. SCI. Q. 537, 555–56 (1943). This history led Blackstone to describe the jury as a separate and independent check on a judiciary too closely connected to the monarchy:

The impartial administration of justice, which secures both our persons and our properties, is the great end of civil society. But if that be entirely intrusted to the magistracy, a select body of men, and those generally selected by the prince or such as enjoy the highest offices in the state, their decisions, in spite of their own natural integrity, will have frequently an involuntary bias towards those of their own rank and dignity. It is not to be expected from human nature, that *the few* should always be attentive to the interests and good of *the many*.

3 BLACKSTONE, *supra* note 17, at *379.

99. See AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 109 (1998).

100. THE DECLARATION OF INDEPENDENCE paras. 11, 20 (U.S. 1776) (“He has made Judges dependent on his Will alone, for the tenure of their offices . . .”).

101. See Regnier, *supra* note 90, at 779–82 (describing the framers’ “willing[ness] to improve [the legal system] in ways that would align with their new vision of government” and their interest in renewing the idea of an independent jury).

102. THE FEDERALIST NO. 83, at 456 (Alexander Hamilton) (E.H. Scott ed., 1894).

while the co-operation of a jury is necessary, than they might be, if they had themselves the exclusive determination of all causes.¹⁰³

The U.S. Supreme Court incorporated this understanding of juries into its interpretation of the Sixth Amendment.¹⁰⁴ According to the Court:

The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies *and against judges too responsive to the voice of higher authority*. The framers of the constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor *and against the compliant, biased, or eccentric judge*.¹⁰⁵

Justice Antonin Scalia, discussing whether an allegedly independent judiciary provides sufficient protection for the individual against state overreaching, wrote that “[j]udges, it is sometimes necessary to remind ourselves, are part of the State.”¹⁰⁶ The Court thus has incorporated the framers’ intent that the judge and jury be considered two separate institutions, and that juries must be able to exercise independent judgment shielded from judicial influence.¹⁰⁷

Thus, there is a significant constitutional problem with a juror having a close personal relationship with the presiding judge, as it cannot be assumed that the jury is truly separate and independent from a possibly biased judge in such instances.¹⁰⁸ Rather, when a juror has a close relationship to the judge, the very problem the framers sought to avoid arises—that is, there is a greater likelihood that the jury will defer to the judge and fail to act as an independent decision maker.¹⁰⁹ This is problematic, not because it contravenes the framers’ intent, but also because it weakens the basic procedural safeguards that shape average people’s perceptions of the legal system.

Moreover, as discussed in the next section, these concerns are not merely matters of perception. The risk of improper judicial influence on jurors is more prevalent than one might think.¹¹⁰ Courts have long recognized that

103. *Id.* at 458.

104. *Duncan v. Louisiana*, 391 U.S. 145, 155–56 (1968).

105. *Id.* (emphasis added) (footnote omitted).

106. *Apprendi v. New Jersey*, 530 U.S. 466, 498 (2000) (Scalia, J., concurring).

107. *See Duncan*, 391 U.S. at 155–56.

108. *See id.* at 156.

109. *See id.* (discussing the founders’ intent to create an unbiased jury).

110. *See infra* Part III.E.

jurors are likely to be influenced by even subtle and unintentional cues from the judge.¹¹¹ When a juror knows the judge well, it is even more likely that the juror will pick up on and follow even unintentional cues.¹¹²

E. Why a Close Relationship Between Judge and Juror Can Imperil the Fairness of a Trial: Judicial Cues to Jurors, and Jurors' Propensity for Following Those Cues

Most judges seek to uphold strict standards of propriety in their dealings with jurors,¹¹³ and thus may believe that judges and jurors acting in good faith will not allow their close personal relationship to taint the fairness of the proceedings. Although this is certainly an admirable aspiration, it understates the extent to which a judge can unconsciously influence jurors, and the extent to which jurors will defer to even subtle judicial influence.

The Supreme Court has recognized that jurors naturally look to the judge for guidance, and are easily swayed by the judge's words and actions.¹¹⁴ The Court has stated that a judge's "lightest word or intimation is received [by the jury] with deference, and may prove controlling."¹¹⁵ Because of jurors' profound sensitivity to the judge's views about a case, courts around the country have concluded that a judge's comments or actions revealing favor to one of the parties can require reversal of a judgment.¹¹⁶ As a result, trial judges "must make every effort to avoid words or actions that the jury could conceivably interpret as expressing any opinion on the evidence or any partiality to one side."¹¹⁷

In one case, for example, a Colorado appellate court reversed a criminal conviction because the trial judge escorted the prosecution's witness, a child, to the witness stand.¹¹⁸ The court reversed the conviction because the jury "could have perceived the trial court's action as an endorsement of the child's

111. See, e.g., *Starr v. United States*, 153 U.S. 614, 626 (1894) ("It is obvious that under any system of jury trials the influence of the trial judge on the jury is . . . of great weight" (citing *Hicks v. United States*, 150 U.S. 442, 452 (1893))).

112. See *infra* text accompanying notes 128–31.

113. See *Jackson v. United States*, 329 F.2d 893, 894 (D.C. Cir. 1964) (per curiam) (counseling restraint in jury trials to avoid prejudice).

114. *Starr*, 153 U.S. at 626.

115. *Id.* (citing *Hicks*, 150 U.S. at 452); see also *State v. Carprue*, 683 N.W.2d 31, 41 (Wis. 2004) ("The opinions of our appellate courts are replete with precatory admonitions that trial judges must not function as partisans or advocates, or betray bias or prejudice, or engage in excessive examination, particularly in front of juries." (citing *State v. Garner*, 194 N.W.2d 649, 651 (Wis. 1972); *Breunig v. Am. Family Ins. Co.*, 173 N.W.2d 619, 626 (Wis. 1970); *State v. Driscoll*, 56 N.W.2d 788, 791 (Wis. 1953))).

116. See *infra* notes 118–123 and accompanying text.

117. Andrew Horwitz, *Mixed Signals and Subtle Cues: Jury Independence and Judicial Appointment of the Jury Foreperson*, 54 CATH. U. L. REV. 829, 851 (2005).

118. *People v. Rogers*, 800 P.2d 1327, 1329 (Colo. App. 1990).

credibility.”¹¹⁹ The court stated that trial judges “must be free of even the appearance of bias and partiality.”¹²⁰ Other courts have similarly reversed decisions by trial judges who were seen giving candy or treats to child witnesses after his or her testimony.¹²¹

The cases are not limited to trial judges’ conduct with child witnesses in sexual-assault cases. A Florida appellate court reversed a conviction based on an even slighter appearance of partiality—a handshake and brief conversation between a trial judge and a state’s witness, which occurred in front of a jury.¹²² Similarly, a North Carolina appellate court reversed a criminal conviction because the trial judge “turned his back to the jury for forty-five minutes during the defendant’s testimony on direct examination.”¹²³

In the same vein, numerous appellate courts and the American Bar Association (ABA) have criticized the practice of judges questioning witnesses in front of the jury or commenting on the evidence.¹²⁴ ABA standards particularly emphasize the independent role played by the jury and “the uniquely influential position of the trial judge.”¹²⁵

Fears of judicial influence on juries extend to nonverbal communication, and even unintentional communication.¹²⁶ The Alabama Supreme Court once expressed “that facial expressions, gestures, and nonverbal communications which tended to ridicule defendant and his counsel, could, standing alone, operate so as to destroy the fairness of a trial.”¹²⁷ Social-science research, in legal and non-legal contexts, suggests that judges likely communicate their

119. *Id.* (citing *People v. Martinez*, 652 P.2d 174, 178 (Colo. App. 1981)).

120. *Id.* at 1328 (emphasis added) (citing *People v. Hrapski*, 718 P.2d 1050, 1054 (Colo. 1986)).

121. See Horwitz, *supra* note 117, at 851–52 (citing *State v. Cook*, 485 So. 2d 606, 609 (La. Ct. App. 1986); *State v. R.W.*, 491 A.2d 1304, 1309 (N.J. Super. Ct. App. Div. 1985)).

122. *Abrams v. State*, 326 So. 2d 211, 212 (Fla. Dist. Ct. App. 1976).

123. *State v. Jenkins*, 445 S.E.2d 622, 624–25 (N.C. Ct. App. 1994). A Tennessee appellate court reversed a criminal conviction under similar circumstances, in which the trial judge shook his head during the defense attorney’s summation. *Veal v. State*, 268 S.W.2d 345, 346 (Tenn. 1954).

124. See *United States v. Beaty*, 722 F.2d 1090, 1095–96 (3rd Cir. 1983); *United States v. Bland*, 697 F.2d 262, 265 (8th Cir. 1983); *United States v. Hickman*, 592 F.2d 931, 936 (6th Cir. 1979); *United States v. Hill*, 332 F.2d 105, 106–07 (7th Cir. 1964); *Billeci v. United States*, 184 F.2d 394, 403 (D.C. Cir. 1950); *Jackson v. United States*, 329 F.2d 893, 894 (D.C. Cir. 1964); *Benedict v. State*, 208 N.W. 934, 936 (Wis. 1926); see also Horwitz, *supra* note 117, at 846 (noting that the ABA disfavors allowing judges to comment on evidence presented at trial); Michael Pinard, *Limitations on Judicial Activism in Criminal Trials*, 33 CONN. L. REV. 243, 253 (2000).

125. STANDARDS FOR CRIMINAL JUSTICE DISCOVERY & TRIAL BY JURY § 15-4.2 cmt. at 225 (3d ed. 1996).

126. See Peter David Blanck, Robert Rosenthal & La Doris Hazzard Cordell, *The Appearance of Justice: Judges’ Verbal and Nonverbal Behavior in Criminal Jury Trials*, 38 STAN. L. REV. 89, 98 (1985). See generally Arthur F. Greenbaum, Note, *Judges’ Nonverbal Behavior in Jury Trials: A Threat to Judicial Impartiality*, 61 VA. L. REV. 1266 (1975).

127. *Allen v. State*, 276 So. 2d 583, 586 (Ala. 1973).

impressions and expectations to juries in subtle and unintentional ways,¹²⁸ and that the expectations influence juries' decision making.¹²⁹ Compounding this danger, jurors naturally crave the judge's guidance during the decision-making process:

[J]urors, like most people, respond to unfamiliar surroundings by looking for clues about how to behave and what to think. Because the judge is the authority figure and the figure with the most prestige in the courtroom, jurors tend to look to the judge for those clues. Having sought and then received those clues from the trial judge, jurors will do their best to follow them, seeking to avoid the feeling that they have not done their jobs properly or the feeling that they have somehow disappointed the judge; jurors, like most people, aim to do a good job and to please those in a position of authority.¹³⁰

Thus, there is little question that judicial influence—even if subtle and unintentional—poses great risk to a juror's neutral decision making, because jurors search for indications of the judge's views, the judge communicates his or her views, and jurors perceive and follow the judge's views.¹³¹

These dangers are more prevalent when a judge has a close relationship with one of the jurors; in such a situation, the juror is much more likely to perceive the judge's views, either because the juror knows the judge's predispositions and thus can guess which way the judge is leaning, or because the juror is more able to interpret the judge's words, body language, and other subtle communications. For instance, a particular juror in a medical-malpractice case who knows that the judge had a similar traumatic experience might believe that the judge is likely to sympathize with the patient. Similarly, a juror who has a close relationship with the judge might recognize subtle facial expressions or

128. Horwitz, *supra* note 117, at 856 (noting that judges “cannot help but form opinions” that a jury could perceive).

129. See Blanck, Rosenthal & Cordell, *supra* note 126, at 108–09, 137–38.

130. Horwitz, *supra* note 117, at 859.

131. In many jurisdictions, the judge instructs the jury to disregard any impression the jury has about the judge's opinion in the case. See, e.g., WIS., JI-CRIMINAL § 100 (2004) (“If any member of the jury has an impression of my opinion as to whether the defendant is guilty or not guilty, disregard that impression entirely and decide the issues of fact solely as you view the evidence. You, the jury, are the sole judges of the facts, and the court is the judge of the law only.”). However, the assumption that such instructions are effective is arguably a legal fiction: “The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction.” *Krulewitch v. United States*, 336 U.S. 440, 453 (1949) (Jackson, J., concurring) (citation omitted). Addressing whether judicial influence on jurors can be erased by curative instructions, another judge stated that “no matter how much we may admonish them not to, jurors do pay a great deal of attention to the person behind the bench.” Horwitz, *supra* note 117, at 860 (quoting La Doris H. Cordell & Florence O. Keller, *Pay No Attention to the Woman Behind the Bench: Musings of a Trial Court Judge*, 68 IND. L.J. 1199, 1207 (1993)). Rather than relying on curative instructions, “the key is to avoid the potentially prejudicial conduct in the first place.” *Id.* at 861.

changes in tone of voice as revealing exasperation with a party's attorneys or witnesses.

Once these subtle cues have been sent by the judge, even if unintentionally, and understood by a juror who knows the judge well, that juror is much more likely to trust and follow the cues and decide the case in accordance with them.¹³² Or, such a juror may fear the repercussions of reaching a decision that contradicts the judge's views, and feel intimidated by contradicting the judge.¹³³

Furthermore, there is an additional risk that, outside the courtroom, a juror with a close relationship to the judge will be much more likely to have *ex parte* conversations about the case, despite prohibitions against this, as mention of the case would be difficult to avoid in social settings. And, as previously discussed, it would be easy for the juror to pick up even unintentionally communicated views from the judge that reveal his or her views about the case, even in brief and casual exchanges.

Finally, in the jury room during deliberations, there is a risk that a juror closely connected to the judge will carry more weight with other jurors.¹³⁴ As explained above, most jurors are in an unfamiliar setting and are looking for an authority figure with greater knowledge or experience with the legal system. Other jurors may perceive a juror closely connected to the judge as such an authority figure. If other jurors defer to that juror, then the parties have been deprived of a jury consisting of independent community members.¹³⁵

Thus, there are strong constitutional and practical arguments for excluding a potential juror who has a close personal relationship to the presiding judge. However, there is a more fundamental systemic argument that harkens back to *Caperton*—protecting public confidence in the absolute probity and neutrality of the court system.¹³⁶ At a basic level, it does not appear appropriate for the presiding judge to empanel a juror with whom he or she has a close personal relationship.¹³⁷ A judge who fails to exclude such a juror will likely create the perception that the judge is not concerned with maintaining absolute probity and neutrality.¹³⁸ By contrast, a judge who excludes someone with whom he or she has a close personal relationship will build confidence in case

132. Horowitz, *supra* note 117, at 850 (discussing a judge's effect on jury instructions). Admittedly, the opposite will be true in some cases. A juror who knows the judge and does *not* trust the judge's opinion might be inclined to go against the judge.

133. *Id.* at 859 (discussing even the average juror's desire to please the judge).

134. *See State v. Tody*, 764 N.W.2d 737, 745 (Wis. 2009).

135. *Id.* at 740.

136. *See Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2266 (2009).

137. *See Tody*, 764 N.W.2d at 739–40 (“The immediate reaction of the members of the court upon hearing the facts of the case was that the presence of the circuit court judge's mother on the jury raises red flags of danger of juror bias and of a circuit court judge having to rule on matters involving a member of his or her family.”).

138. *Cf. Caperton*, 129 S. Ct. at 2263 (noting the apparent prudence of avoiding any possible partiality *sua sponte*).

participants and observers, who will think that the judge is performing his or her duties with total neutrality and probity.

F. What Specific Rules and Procedures Should Govern Close Relationships Between the Presiding Judge and a Potential Juror?

Once one accepts that problems arise from a close relationship between the presiding judge and a potential juror, a number of questions arise about how best to respond. If it is impermissible for a jury to include someone who has a close relationship to the presiding judge, should the remedy be exclusion of the juror or recusal of the judge? What type and degree of relationship between a potential juror and the judge should disqualify the juror? If the rule primarily focuses on familial relationships, what degree of kinship triggers disqualification? What about nonfamilial, but close, personal relationships, such as friendships or business relationships? Should exclusion be a categorical rule or a balancing test—or both, based on the type of relationship? If there is a balancing test for some relationships, who should conduct it?

1. Exclusion of a Juror or Recusal of the Judge

Exclusion of jurors is preferable to recusal for mainly logistical reasons. In small counties, judicial recusal can be very burdensome, in that it often requires a judge from an outside county to travel to a neighboring county and hear the case.¹³⁹ Not only is this inconvenient for the out-of-county judge, but it can also potentially delay the proceeding at issue, which is inconvenient to jurors and litigants. In larger communities, more judges may be available, but delays and inconveniences are nonetheless inherent in replacing a judge.¹⁴⁰

Although such logistical burdens may be justified when no other alternative exists, here there is a much simpler alternative: removing the juror. This is not a completely cost-free solution—citizens have an important interest in participating in jury duty,¹⁴¹ and, therefore, a rule excluding certain people closely connected to a judge in a single-judge county from participating as jurors will prevent them from ever serving on a jury. But, compared to requiring judicial recusal, exclusion of jurors is preferable.

2. Defining Rules and Procedures for the Exclusion of Jurors

The next step is defining which relationships are, in fact, problematic. As a starting point, it makes sense to define familial relationships categorically in terms of degrees of kinship. Thus, one could imagine excluding relatives at

139. See Lauren Treadwell, Note, *Informal Closing of the Bypass: Minors' Petitions to Bypass Parental Consent for Abortion in an Age of Increasing Judicial Recusals*, 58 HASTINGS L.J. 869, 880 (2007).

140. Cf. *id.* (noting that reassignments may be burdensome).

141. See *Powers v. Ohio*, 499 U.S. 400, 407 (1991) (noting that apart from the ability to vote, “for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process”).

either the first degree (parents, children, siblings), the second degree (grandparents and grandchildren), or the third degree (uncles, aunts, nieces, and nephews).¹⁴²

Regardless of where the line is drawn, such a categorical rule will be imperfect in some cases; even some typically close familial relationships (such as siblings) will be strained in certain families, and thus will not raise problems of independence from the judge. Similarly, some typically distant familial relationships (such as second or third cousins) will be very close in some families, and thus may raise problems of independence from the judge. Nonetheless, it seems sensible to assume that kinships in the first, second, and third degrees are sufficiently close in most families to raise concerns about independence from the judge.¹⁴³ Therefore, jurors who fall within these degrees of kinship should be categorically excluded. Legislatures seeking to craft such a rule need not write on a blank slate: family and intestacy statutes often contain legislative definitions based on degrees of kinship,¹⁴⁴ which may be referenced or incorporated into juror statutes.¹⁴⁵

Certain nonfamilial relationships, such as friendships, business relationships, fiduciary relationships, and employer/employee relationships, will often also be sufficiently close to raise serious concerns about juror independence from the judge. For these nonfamilial relationships, a categorical approach is ineffective because inherent subjectivity is required to determine what constitutes a “close” relationship.¹⁴⁶

For such nonfamilial relationships, judges and jurors should be required to fully disclose the relationship, and the parties should have the right to full voir dire. After voir dire, if a party moves to strike the juror, the judge should conduct a balancing test to determine whether the juror raises concerns about judicial independence. In balancing, judges should consider factors such as the nature and length of the relationship between the judge and potential juror, the time and nature of the most recent contact, whether the judge and the juror are

142. See 23 AM.JUR. 2D *Descent & Distribution* §§ 72–73 (2002).

143. Cf. OKLA. CODE OF JUDICIAL CONDUCT R. 2.11(a)(2) (2011).

144. See, e.g., WIS. STAT. ANN. § 990.001(16) (West 2007).

145. Apart from the question of which jurors should fall within the categorical rule, the additional question arises of whether the judge should strike such jurors sua sponte, or whether the parties should be required to make a motion to strike. The author is currently litigating this issue in the Wisconsin Supreme Court. *State v. Sellhausen*, 794 N.W.2d 793, 796 (Wis. Ct. App. 2010), review granted, 794 N.W.2d 899 (Wis. 2011). In that case, we argued in the court of appeals that a sua sponte strike is preferable, because it avoids the need for one of the lawyers to potentially antagonize the judge by moving to strike the judge’s family member. A lawyer in that position might understandably fear that the judge, consciously or unconsciously, might take offense to the insinuation that the judge’s family member is not an appropriate juror. Such a scenario could lead to problems later in the trial, either because the lawyer advocates less zealously for fear of further antagonizing the judge, or because the judge’s leftover hostility toward the lawyer could affect later rulings at trial.

146. John C. McKeon & David G. Rice, *Administering Justice in Montana’s Rural Courts*, 70 MONT. L. REV. 201, 215 (2009) (discussing one test used by judges for recusal purposes).

likely to see each other in an out-of-court setting during the case proceeding, and whether the judge or the juror believes the relationship could influence the juror's decision making.

Admittedly, requiring the judge to assess his own relationship to a juror presents risks.¹⁴⁷ Some judges would likely be unable to put aside their own subjective view regarding their (and their close associates') ability to rise above any possible prejudice.¹⁴⁸ Other judges might be overly cautious and strike anyone with any conceivable connection to the judge, therefore excluding jurors who, in fact, pose no threat to the jury's independence from the judge.¹⁴⁹

Although not entirely ideal, judicial balancing is probably the best solution compared to the alternative solutions. As indicated above, it is not sensible to categorically prohibit any person with any conceivable connection to the judge, and it is logistically unworkable to suggest that someone other than the judge should conduct the requisite balancing test.¹⁵⁰ At some point, the system must accept that, in these instances, a judge's determination, even though involving someone with whom she has a prior relationship, is logistically necessary.

There is, admittedly, a potential harm to public confidence if the judge concludes that the juror should not be excluded based on the balancing test. However, this harm is minimized by using a transparent voir dire procedure and by requiring a full explanation in open court of the basis for the judge's decision. If such procedures are followed, survey research suggests that public participants and observers will have more confidence in the judge's ultimate decision not to remove the juror.¹⁵¹

147. See *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2263 (2009) (acknowledging that the judge who subjectively examined whether he was biased toward his campaign contributor concluded that he was not, and finding this insufficient because of the likelihood that judges are not capable of objectively discerning their own motivations). The Court wrote:

Following accepted principles of our legal tradition respecting the proper performance of judicial functions, judges often inquire into their subjective motives and purposes in the ordinary course of deciding a case. This does not mean the inquiry is a simple one. . . .

There are instances when the introspection that often attends this process may reveal that what the judge had assumed to be a proper, controlling factor is not the real one at work. If the judge discovers that some personal bias or improper consideration seems to be the actuating cause of the decision or to be an influence so difficult to dispel that there is a real possibility of undermining neutrality, the judge may think it necessary to consider withdrawing from the case.

Id.

148. See *id.*

149. Cf. *Hayes v. Forman*, 568 P.2d 579, 580 (Nev. 1977) (reinstating a judge who had been forced to recuse on the basis of his religion, which was alleged to favor one party).

150. See *McKeon & Rice*, *supra* note 146, at 214 (discussing limitations of resources and demands on courts).

151. See *supra* notes 47–48 and accompanying text.

IV. CONCLUSION

Public confidence in the courts is an important, yet elusive, ideal. Although *Caperton* and other judicial opinions have relied on rhetoric about fostering such confidence, few courts or commentators have closely examined what target audience is meant by “public” or how to foster this group’s confidence through judicial opinions. Courts have limited ability to communicate with the general public through judicial opinions, because most people do not read or know about specific opinions. Further, highly salient opinions that do reach the public often deal with controversial social issues upon which the public is divided, and thus the decisions on such issues may be unlikely to build broad-based public confidence.

Nonetheless, courts have an opportunity to improve public confidence in the legal system through members of the public who directly participate in and observe the court system in various settings. As people’s perceptions of courts depend heavily on observance of basic procedural fairness, courts hoping to improve public confidence in the legal system should focus on following procedural rules that will resonate with people directly participating in or observing court proceedings.

From this perspective, *Caperton* will likely positively affect public confidence in courts because it implements a fundamental rule of procedural fairness—preventing a judge from presiding over a case in which a party was a significant campaign contributor.¹⁵² Similarly, courts can positively influence public confidence during jury selection, which is a common instance of interaction between people outside of the legal profession and the court system. Potential jurors who have a close relationship to the presiding judge should be excluded due to significant constitutional concerns that are rooted in the right to trial by jury, and concerns about preserving the public’s confidence in the judiciary’s neutrality and probity. Courts addressing this situation should exclude such jurors based on procedural-fairness rules to preserve the confidence of people participating in and observing legal proceedings.

152. *Caperton*, 129 S. Ct. at 2263–64.