

WHAT “TOUGH ON CRIME” LOOKS LIKE: HOW GEORGE
PATAKI TRANSFORMED THE NEW YORK STATE COURT OF
APPEALS

*Benjamin Pomerance**

I. INTRODUCTION

On November 1, 1995, Governor George E. Pataki fired a warning shot at the New York State Court of Appeals.¹ “They are creating their own rules,” the state’s Chief Executive declared of New York’s highest judicial body.² “The Court of Appeals has gone too far.”³ Later, he went on to pin his disgust on a specific body of the court’s caselaw: rulings that overturned criminal convictions solely because the defendant was denied one or more protections that Pataki considered mere technicalities.⁴ “These are just irrational, mindless, procedural safeguards—not for those who are wrongfully charged but for criminals who can get off,” the Governor announced.⁵ To Pataki, a court comprised of judges chosen solely by his predecessor in the Governor’s Mansion, Mario Cuomo, was simply “coddling” criminals, returning dangerous individuals to the streets of New York to prey on more innocent victims.⁶

Certain recent decisions drew particular ire from Pataki on that

* Benjamin Pomerance, J.D., Albany Law School, B.A., State University of New York at Plattsburgh, serves in Counsel's Office for the New York State Division of Veterans' Affairs. Mr. Pomerance previously served as Executive Editor for Symposium for the *Albany Law Review*. He also founded and directed the Albany Law School Veteran’s Pro Bono Project, and has taught a class on the First Amendment at Union College. The author wishes to thank Prof. Vincent Bonventre for his intellectual nourishment about all levels of the judicial process, the staff of the *Albany Law Review* for their ever-meticulous work, and Ron and Doris Pomerance for a lifetime of support and encouragement. All views expressed here are the author's own based on independent research and opinions, and do not necessarily represent the views of the Division of Veterans' Affairs or any other New York State entity.

¹ See John Caher, *Pataki Assails Court of Appeals*, TIMES UNION (Albany, N.Y.), Nov. 2, 1995, at A1 [hereinafter *Pataki Assails Court of Appeals*].

² *Id.* (internal quotation marks omitted).

³ *Id.* (internal quotation marks omitted).

⁴ *Id.*

⁵ *Id.* (internal quotation marks omitted).

⁶ Clifford J. Levy, *Pataki Proposes Law to Let Prosecutors Appeal Sentences*, N.Y. TIMES, Feb. 23, 1996, at A1.

day. *People v. O'Doherty*,⁷ a 1987 ruling requiring the prosecution to disclose any confessions or identifications to the defense, was “inflexible.”⁸ *People v. Ranghelle*,⁹ demanding reversal of criminal convictions when a witness’s prior statement was not disclosed, presented a terrible outcome in Pataki’s opinion.¹⁰ A set of cases guaranteeing a defendant the right to be present for all criminal proceedings perpetrated a gross misconstruction of the law.¹¹ Not only were the decisions wrong, Pataki argued, but their radical degree of inaccuracy was unprecedented among the entire nation.¹² “Over the course of the past decade, we have seen a network of law evolve from the Court of Appeals that is very different from the rest of the country,” he concluded.¹³ “Many of these rules are only rules in New York state. The other 49 states have a common-sense system of justice.”¹⁴

It would not be the last time that Pataki took aim at the Court of Appeals. On multiple subsequent occasions, he vigorously condemned the judges whom the more liberal Cuomo brought to the bench.¹⁵ Other high-ranking New York officials soon joined in his fight. New York City Mayor Rudolph Giuliani, for instance, echoed Pataki’s derision toward the court’s decisions in criminal cases.¹⁶

⁷ *People v. O'Doherty*, 70 N.Y.2d 479, 517 N.E.2d 213, 522 N.Y.S.2d 498 (1987).

⁸ *Pataki Assails Court of Appeals*, *supra* note 1, at A1 (internal quotation marks omitted).

⁹ *People v. Ranghelle*, 69 N.Y.2d 56, 503 N.E.2d 1011, 511 N.Y.S.2d 580 (1986).

¹⁰ *Pataki Assails Court of Appeals*, *supra* note 1, at A1.

¹¹ *Id.*

¹² *See id.*

¹³ *Id.* (internal quotation marks omitted).

¹⁴ *Id.* (internal quotation marks omitted).

¹⁵ *See, e.g., John Caher, 7 Are Nominated for Opening on Court of Appeals*, TIMES UNION (Albany, N.Y.), Nov. 6, 1996, at B2 [hereinafter *7 Are Nominated*] (“Pataki repeatedly has characterized the high court as a panel of criminal-coddling liberals, although studies show the Court of Appeals almost always rules in favor of the prosecution.”); James Dao, *Pataki Announces First Nomination to Highest Court*, N.Y. TIMES, Dec. 4, 1996, at A1 (“The Governor has been a vocal critic of the Court of Appeals, all of whose members were selected by Mr. Cuomo, particularly on criminal justice issues.”); Levy, *supra* note 6, at A1 (“The Governor last month went after the state’s highest court, the Court of Appeals, introducing legislation that would make it more difficult for it to throw out evidence in criminal cases.”); Richard Pérez-Peña, *Pataki Gets a Decision He Wanted on the State’s Highest Court*, N.Y. TIMES, July 7, 2006, at B7 (“From the time he took office, Gov. George E. Pataki vowed to remake the state judiciary, calling it too liberal and too eager to usurp elected officials’ powers.”); Joel Stashenko, *On Law Day, Forces Rally Around Embattled Judiciary*, TIMES UNION (Albany, N.Y.), Apr. 29, 1996, at B2 (“Pataki has been the most persistent critic of both the Court of Appeals and of other courts and judges in New York when they’ve ruled in favor of criminal defendants on what the governor has condemned as hypertechnical grounds.”); James Taranto, *An Unappealing Court*, CITY J. (Spring 1996), http://www.city-journal.org/html/6_2_sndgs10.html.

¹⁶ *See* Clyde Haberman, *State Courts Found Guilty by Jury of Peers*, N.Y. TIMES, Mar. 8,

New York State Attorney General Dennis Vacco did the same.¹⁷ New York City Police Commissioner William J. Bratton publically pronounced that the Court of Appeals created “phenomenal burdens for our police” and was full of judges who were “living off in Disneyworld somewhere.”¹⁸ New Yorkers would be better off, Bratton argued, if the state’s courts marched in lockstep with the United States Supreme Court’s holdings in criminal cases “rather than the screwball system that we have in this state with the screwball Court of Appeals that we have in this state.”¹⁹

During that press conference in 1995, however, Pataki made it clear that he did not plan to influence decision making at the Court of Appeals, despite focusing his remarks on their methods of deciding criminal cases.²⁰ Instead, he turned his attention to a different branch of the state’s government.²¹ “[I]t is ‘not my intention to criticize the Court of Appeals,’” he said.²² “It is our intention to solve the problem and the way to solve the problem is to pass [new laws].”²³ Subsequently, Pataki would attempt to do precisely that, even proposing legislation that would prohibit the Court of Appeals from using the New York State Constitution when deciding whether to suppress evidence obtained by police in criminal investigations.²⁴ Such a measure would have forced the Court of Appeals to follow only federal law, and the United States Supreme Court’s interpretations of that law, in deciding these cases.²⁵ One of Pataki’s spokespeople, Michael McKeon, tried promoting the bill as a way to keep the Court of Appeals from

1996, at B1.

¹⁷ Norman A. Olch, *Soft on Crime? Not the New York Court of Appeals*, N.Y.L.J., May 6, 1996, at 1 (“[T]he State Attorney General, Dennis Vacco, has declared the Court [of Appeals] is intent on coddling dangerous criminals.”).

¹⁸ Haberman, *supra* note 16, at B1 (internal quotation marks omitted); *see also* John M. Goshko, *Accusations of Coddling Criminals Aimed at Two Judges in New York*, WASH. POST, Mar. 14, 1996, at A3 (discussing Commissioner Bratton’s comments regarding the Court of Appeals).

¹⁹ Haberman, *supra* note 16, at B1 (internal quotation marks omitted); *see* Goshko, *supra* note 18, at A3.

²⁰ *Pataki Assails Court of Appeals*, *supra* note 1, at A1.

²¹ *Id.*

²² *Id.*

²³ *Id.* (alteration in original) (internal quotation marks omitted).

²⁴ *See* Joel Stashenko, *‘Eggs and Tomatoes’ Won’t Sway Judges*, TIMES UNION (Albany, N.Y.), Feb. 3, 1996, at B2.

²⁵ *See id.*; *see also* Editorial, *The Governor’s Attack on the Judges*, N.Y. TIMES, Feb. 3, 1996, at 22 (stating that the legislation would prevent the Court of Appeals from departing from United States Supreme Court jurisprudence in deciding unlawful seizure cases).

“making law” in its criminal decisions.²⁶ Unquestionably, however, Pataki’s bill shocked plenty of observers, as it proposed a complete about-face from New York’s deeply rooted traditions of state constitutional independence.²⁷

²⁶ Stashenko, *supra* note 24, at B2.

²⁷ See, e.g., *The Governor’s Attack on the Judges*, *supra* note 25, at 22. The term “state constitutional independence” does not in any way claim that New York’s judiciary sought to sever ties with the federal government of the United States. Rather, it refers to the long-accepted principle that while states cannot offer less protection to a particular party than what the United States Constitution offers, state constitutions can provide *more* protection than the current federal threshold in a particular area of law. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977) (discussing the important, independent roles that state constitutions play in protecting the fundamental liberties of their state’s citizens); William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 550 (1986) (“[T]he Fourteenth Amendment fully applied the provisions of the Federal Bill of Rights to the states, thereby creating a federal floor of protection and . . . the Constitution and the Fourteenth Amendment allow diversity only *above and beyond* this federal constitutional floor.”). As James Madison explained in *Federalist Paper No. 51*:

In the compound republic of America, the power surrendered by the people, is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other; at the same time that each will be controled [sic] by itself.

THE FEDERALIST NO. 51, at 270 (James Madison) (George W. Carey & James McClellan, eds., 2001) (emphasis added).

Certainly, some states have, over the years, remained closely tied to federal law and federal court decisions on all or most issues arising in their state courts. See, e.g., Mary Cornelia Porter & G. Alan Tarr, *The New Judicial Federalism and the Ohio Supreme Court: Anatomy of a Failure*, 45 OHIO ST. L.J. 143, 150 (1984) (analyzing the Ohio high court’s tendency at that time to remain in “lockstep” with the United States Supreme Court, virtually never recognizing higher levels of protection under Ohio’s state constitution); Christopher Slobogin, *State Adoption of Federal Law: Exploring Florida’s “Forced Linkage” Amendment*, 39 U. FLA. L. REV. 653, 654–655 (1987) (discussing an amendment to Florida’s state constitution requiring that the state’s courts, when deciding search-and-seizure cases, use only the United States Supreme Court’s interpretations of the Fourth Amendment to the Federal Constitution, and not rely on any state constitutional provisions or jurisprudence); see also Earl M. Maltz, *Lockstep Analysis and the Concept of Federalism*, 496 ANNALS AM. ACAD. POL. & SOC. SCI. 98, 99, 101 (1988) (discussing various reasons why a state court may adopt lockstep analysis).

However, refraining from independent state constitutionalism is a choice, not a mandate. See, e.g., Ronald K. L. Collins, *Reliance on State Constitutions: Some Random Thoughts, in DEVELOPMENTS IN STATE CONSTITUTIONAL LAW* 1, 2 (Bradley D. McGraw ed., 1985); Charles G. Douglas III, *State Judicial Activism—The New Role For State Bills of Rights*, 12 SUFFOLK U. L. REV. 1123, 1123 (1978); Donald E. Wilkes, Jr., *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court*, 62 KY. L.J. 421, 421 (1974). Moreover, it is a choice that New York State, and particularly the New York State Court of Appeals, has historically not made. See, e.g., Vincent Martin Bonventre, *State Constitutionalism in New York: A Non-Reactive Tradition*, 2 EMERGING ISSUES ST. CONST. L. 31, 31 (1989) (“[T]he record [of independent state constitutionalism in New York State] is a long one and, overall, quite impressive.”); Peter J. Galie, *State Constitutional Guarantees and Protection of Defendants’ Rights: The Case of New York, 1960-1978*, 28 BUFF. L. REV. 157, 158–59 (1979); Robert M. Pitler, *Independent State Search and Seizure Constitutionalism: The New York State Court of*

Beyond promoting such radical changes in the law, however, Pataki seemed to have little hope of influencing the Court of Appeals in 1995 and 1996.²⁸ During his tenure as governor, Mario Cuomo had completely reshaped New York's court of last resort, making an unprecedented eleven appointments to the court's bench.²⁹ He left office with most of his appointees near the beginning of their fourteen-year terms and relatively far away from the court's mandatory retirement age of seventy.³⁰ Consequently, Pataki appeared to be stuck with virtually all of Cuomo's choices. Only one vacancy was slated to occur during his first term: Richard D. Simons, a conservative Republican who was one of the court's most prosecution-friendly judges in criminal cases.³¹ Thus, even this one opportunity to wield the power of appointment would produce little momentum toward Pataki's goal of a more "tough on crime" court.³²

The ultimate outcome, however, was something far different than

Appeals' Quest for Principled Decisionmaking, 62 BROOK. L. REV. 1, 14 (1996).

²⁸ Notably, Pataki's ardent efforts to "reform" New York's judiciary stretched well beyond the Court of Appeals. While New York's high court is the focus of this article, Pataki also exerted heavy pressure on the appellate division and on the state's trial courts for more prosecution decisions. Through new appointments, formal investigations into the criminal case rulings of certain judges, and battles in the court of public opinion, the Governor left his imprint on these courts as well. See, e.g., *In re Duckman*, 92 N.Y.2d 141, 145, 159–60, 699 N.E.2d 872, 874, 882, 677 N.Y.S.2d 248, 250, 258 (1998) (Titone, J., dissenting) ("Given the timing of the investigation and the severity of the sanction imposed [on a Bronx County trial court judge who dismissed nineteen prosecutions, leading to a Pataki-ordered investigation into whether this judge had abused his position], the conclusion is inescapable that the Judicial Conduct Commission bowed to the Governor's political threats and allowed itself to be used to advance the agenda of the Judge baiters who were feeding off the media frenzy."); Gary Spencer, *Protection Order Abuse Elevated to Felony*, N.Y.L.J., Aug. 9, 1996, at 1 (quoting Pataki calling judges the "weak link" in New York's criminal justice system); John Caher, *Pataki Altering Face of Justice*, TIMES UNION (Albany, N.Y.), Sept. 26, 1999, at E1 (discussing Pataki's appointments to New York's appellate division courts, the vast majority of whom were Republicans reputed to be "tough on crime"); Levy, *supra* note 6, at A1 (describing Pataki's own legislative proposal to allow prosecutors to appeal sentences and bail amounts for being "too lenient"); Sam Roberts, *Pataki Goes Far Afield to Find Political Allies for the City Appellate Bench*, N.Y. TIMES, Dec. 9, 2006, at B1 (discussing Pataki's departure from tradition in "importing" judges from outside New York City to sit on the Appellate Division, First Department, the highest state court in New York City).

²⁹ See Benjamin Pomerance, *When Dad Reached Across the Aisle: How Mario Cuomo Created a Bipartisan Court of Appeals*, 77 ALB. L. REV. 185, 187–88 (2013/2014).

³⁰ *Id.* at 264 (noting the relatively young age of many Mario Cuomo appointees to the Court of Appeals); see Dao, *supra* note 15, at A1 (stating that Pataki had only one opportunity to appoint a Court of Appeals judge prior to running for re-election).

³¹ VINCENT MARTIN BONVENTRE, "STREAMS OF TENDENCY" ON THE NEW YORK COURT: IDEOLOGICAL AND JURISPRUDENTIAL PATTERNS IN THE JUDGES' VOTING AND OPINIONS 194 (2003) [hereinafter *STREAMS OF TENDENCY*]; Dao, *supra* note 15, at A1.

³² See Dao, *supra* note 15, at A1.

Pataki ever could have dreamed in 1995. Winning two more gubernatorial elections, he wound up serving twelve years in Albany, remaining in the Governor's Mansion until 2007.³³ During this time, he appointed six judges to the Court of Appeals.³⁴ His overall influence over the membership of the state's highest court was second only to Mario Cuomo himself.³⁵ And today, with Pataki appointees forming the majority of the court's current membership, there is no question that the legacy of New York's fifty-third governor continues to leave a weighty impact on the daily lives of New York State citizens.³⁶

The lingering question, though, is how Pataki utilized that tremendous power to reshape the Court of Appeals. Certainly, his public remarks demonstrated a desire for judges who would be less "lenient" on defendants in criminal cases.³⁷ Even so, however, evaluating whether a particular jurist is "tough on crime" is hardly a uniform process. Various value judgments could factor into the equation of whether an individual was likely to vote the way that Pataki favored in criminal cases. Additionally, if faced with the candidacy of two or more historically pro-prosecution candidates,

³³ *Governor George Pataki*, THE PATAKI-CAHILL GROUP, <http://www.patakicahillgroup.com/theTeam.aspx> (last visited Nov. 22, 2014) ("Prior to starting the Pataki-Cahill Group, [Pataki] served three terms as the 53rd governor of New York State, from 1995 through 2006.").

³⁴ Those six judges were Richard Wesley, Albert Rosenblatt, Victoria Graffeo, Susan Read, Robert Smith, and Eugene Pigott. For a discussion about each of these judges, see *infra* Part V.

³⁵ At the time of this writing, only Mario Cuomo has selected more Court of Appeals judges than Pataki. See STATE OF N.Y. COMM'N ON JUDICIAL NOMINATION, CANDIDATES NOMINATED FOR APPOINTMENT TO THE NEW YORK STATE COURT OF APPEALS: 1979 TO PRESENT, available at <http://nysegov.com/cjn/assets/documents/CJN%20Nominees%20for%20Court%201979%20to%20present.pdf>. During his brief time in office, Eliot Spitzer selected only one new Court of Appeals judge, Theodore Jones, but also reappointed Chief Judge Kaye and Associate Judge Ciparick. Sewell Chan, *Spitzer Selects a Black Jurist for Top Court*, N.Y. TIMES, Jan. 15, 2007, at B1; see STATE OF N.Y. COMM'N ON JUDICIAL NOMINATION, *supra*, at 6. David Paterson, after replacing Spitzer, also selected just one judge, Chief Judge Jonathan Lippman. John Eligon, *Paterson Picks Nominee for Top Judge, and Objects that his Choices Included No Women*, N.Y. TIMES, Jan. 14, 2009, at A28; see STATE OF N.Y. COMM'N ON JUDICIAL NOMINATION, *supra*, at 6. At the time of this writing, Andrew Cuomo has selected two judges for the Court of Appeals, Jenny Rivera and Shelia Abdus-Salaam. Ken Lovett, *Gov. Cuomo Set to Name Sheila Abdus-Salaam to Court of Appeals*, N.Y. DAILY NEWS (Apr. 5, 2013), <http://www.nydailynews.com/blogs/dailypolitics/gov-cuomo-set-judge-sheila-abdus-salaam-court-appeals-update-blog-entry-1.1694155>. However, if Andrew Cuomo wins re-election in the 2014 gubernatorial race, then he would have the opportunity to trump Pataki's record by appointing seven Court of Appeals judges, leaving an Andrew Cuomo appointee in every seat on the court's bench. See Pomerance, *supra* note 29, at 185.

³⁶ Four Pataki appointees remain on the Court of Appeals as of this writing: Graffeo, Read, Smith, and Pigott.

³⁷ See, e.g., *supra* notes 1-14 and accompanying text.

Pataki would need to utilize other factors to break the tie and make a selection. Lastly, there is the possibility that pro-prosecution inclinations in criminal cases may not have been the dominant factor—or even a factor at all—in every Pataki appointment to the Court of Appeals. If this were the case, then new queries arise about what factors rose to the top in the selection process, and new speculations could emerge as to why.

“There is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and action,” wrote Judge Benjamin Cardozo in 1921.³⁸ Commentators frequently cite this perceptive passage when discussing trends in the voting records of appellate court judges, noting that a judge’s tendency to vote a certain way in certain types of cases likely reflects a key aspect of that jurist’s closely held values and beliefs.³⁹ The same principle, however, holds true for the executive branch officials who appoint these judges to the bench. By studying common factors among the judicial selections of a particular leader, one can reasonably gain a window into the leading principles, objectives, and ideals of that individual. Of course, the process is not foolproof, and one must always be wary of butterfly effects when examining the trends contained within any set of appointments data. On the whole, however, the process tends to be rather revealing, pulling back the curtain on what the leader in question considered most important (or was counseled by his or her advisors to consider most important).

Finally, there is an additional motivation to studying this particular governor’s Court of Appeals appointments. Today, “tough on crime” rhetoric appears to be more common than ever when it comes to both electing and appointing judges.⁴⁰ A thirst for pro-

³⁸ BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 12 (1921) (footnote omitted).

³⁹ See, e.g., *STREAMS OF TENDENCY*, *supra* note 31, at 6; Catharine Pierce Wells, *Improving One’s Situation: Some Pragmatic Reflections on the Art of Judging*, 49 WASH. & LEE L. REV. 323, 323 (1992); Robert J. Brenner, Note, *Institutional Conservatism and its Impact on Appellate Decision-Making: An Empirical Study of the United States Court of Appeals for the Second Circuit*, 75 ALB. L. REV. 1145, 1146 (2011/2012); Christopher J. Stevens, Note, *An Empirical Study of Dissent at the Supreme Court, Appellate Division, Third Department*, 74 ALB. L. REV. 913, 913–14 (2010/2011).

⁴⁰ See, e.g., Anthony Champagne, *Television Ads in Judicial Campaigns*, 35 IND. L. REV. 669, 677–78 (2002) (describing the prevalence of tough on crime messages in judicial campaign ads); Henry J. Reske, *Pointed Resignation: Judge Blasts Politicization of Judiciary*, A.B.A. J., July 1996, at 40; Keith Swisher, *Pro-Prosecution Judges: “Tough on Crime,” Soft on Strategy, Ripe for Disqualification*, 52 ARIZ. L. REV. 317, 323–38 (2010) (discussing the effective use of “tough on crime” marketing and messaging in recent judicial campaigns);

prosecution jurists appears to be a calling card for a substantial number of elected officials.⁴¹ However, merely professing to appoint judges who will not show leniency toward criminals avoids the deeper questions of what, precisely, a “tough on crime” judge looks like and how a “tough on crime” judge acts. Through the lens of Pataki’s Court of Appeals picks, we can glean an understanding of how, at least for this one individual, a pledge to appoint “tough on crime” judges factored into his judicial selection process. By doing so, we can gain a sense of how objective or subjective this phrase really is and how other factors may lead to unexpected decisions by an executive vowing to ensure that criminals receive their just deserts.

Part II of this article briefly looks at Pataki himself, focusing on major events that appear to be key features in shaping his life and political career. Part III studies the Court of Appeals as Pataki inherited it, looking at its composition at the time when the new governor began his first term in office. Part IV describes the factors used here to study possible rationales behind each of Pataki’s Court of Appeals selections. Part V examines Pataki’s six appointments to the Court of Appeals, studying each by highlighting and evaluating certain factors that may have been important to Pataki at the time of making each selection. Lastly, Part VI connects the dots among these six picks, determining whether any common attributes or characteristics existed among Pataki’s six Court of Appeals appointments, and, in so doing, possibly gaining a sense of what

Joanna Cohn Weiss, Note, *Tough on Crime: How Campaigns for State Judiciary Violate Criminal Defendants’ Due Process Rights*, 81 N.Y.U. L. REV. 1101, 1103–09 (2006).

⁴¹ See *supra* note 40; see also N. Lee Cooper, *Judges Are Not Fair Game*, A.B.A. J., Oct. 1996, at 6 (analyzing the political tactic of “scapejudging,” or taking certain cases out of context in an effort to prove that certain judges are “soft on crime” and thus responsible for crime rate increases in their jurisdiction); David N. Dinkins, *Judicial System Under Attack*, N.Y.L.J., June 10, 1996, at 2; Stephanie Ebbert, *Brother Runs As Election Insurance in Governor’s Council Race*, BOS. GLOBE, Sept. 13, 2010, at B1 (quoting candidate for office as saying that our society should not be so soft on crime); Jerry Hicks, *Tough Laws, Judges Vital, Wilson Says*, L.A. TIMES, July 31, 1991, at A3 (describing then-California Governor Pete Wilson praising judges who are “tougher” on defendants in criminal cases); Mike McPhee, *Most Judges Picked by Owens: Governor Leaves Lasting Legacy Amid High Judge Turnover, Owens Says He’s Used His Seven Years in Office to Restore Balance to Courts*, DENVER POST, Dec. 12, 2005, at A01 (quoting then-Colorado Governor Bill Owens saying that he wants prosecutor-friendly judges); Phil Williams, *Justices Say They’re Defending ‘Independence’ of Courts*, NEWS CHANNEL 5 (May 27, 2014), <http://www.jrn.com/newschannel5/news/newschannel-5-investigates/260859921.html> (criticizing politicians for attacking judges with claims that certain jurists are “soft on crime”). See generally Anthony M. Platt, *The Politics of Law and Order*, 21 SOC. JUST. 3, 3 (1994) (discussing the rampant use of “law and order demagoguery” to achieve successful election outcomes).

Pataki's vision of "tough on crime" looked like.

II. THE APPOINTER: A SNAPSHOT OF GEORGE E. PATAKI

In many ways, George Elmer Pataki was the ideal candidate to run against Mario Cuomo in 1994. The two men were polar opposites on multiple levels.⁴² For instance, while Cuomo spent his boyhood in Queens, Pataki grew up on a farm in the small New York town of Peekskill.⁴³ While Cuomo thrived on political suavity and dynamic oratory, Pataki exuded a charming Jimmy Stewart-esque cordiality that endeared him to voters.⁴⁴ In a report published three weeks before the 1994 gubernatorial election, journalist Maureen Dowd captured some of the differences between the two politicians in the *New York Times*:

While Mr. Cuomo is intense, intellectually challenging, nitpicking, magnetic and volatile, Mr. Pataki is affable and sentimental. Mr. Cuomo likes Teilhard de Chardin; Mr. Pataki prefers the Rolling Stones and David Letterman. He seems to enjoy blending into the scenery as much as Mr. Cuomo enjoys standing out.⁴⁵

The contrasts extended to their politics. Indeed, the bulk of Pataki's campaign in 1994 seemed focused on informing voters that he was Cuomo's political antithesis.⁴⁶ Pledges to cut government spending in New York State and reduce taxes—and, of course, the vow to make New York's government tougher on criminals—were

⁴² See 1 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY 151 (G. Alan Tarr & Robert F. Williams, eds., 2006) ("In fact, in 1994, Cuomo himself became the key issue. Opponents appealed for votes for George Pataki, Cuomo's Republican opponent, simply on the basis that Pataki was not Cuomo."); Lisa Anderson, *G.O.P. Novice Pataki Knocks Off Cuomo in N.Y.*, CHI. TRIB., Nov. 9, 1994, at 14 ("Pataki won the governor's mansion in Albany less because the people voted him in than because they voted Cuomo out.").

⁴³ See GEORGE E. PATAKI & DANIEL PAISNER, PATAKI: AN AUTOBIOGRAPHY 127 (1998) (describing key aspects of his "small town" upbringing in Peekskill, including working on coal cars at a local factory, an assignment that he called "[t]he hardest job [he] ever had"); see also *Pataki Offers a Vision for New York*, N.Y. TIMES, Oct. 10, 1994, at B5 ("I have experience in local government, which Mario Cuomo didn't have before he went into the Governor's office, and I think that's one of the reasons why we have seen things like the cost shifts and the mandates imposed on local government . . .").

⁴⁴ See generally Eric Pooley, *The Un-Cuomo*, N.Y. MAG., Sept. 19, 1994, at 41–42 (describing Pataki's mannerisms on the campaign trail and their particular allure to voters in New York's smaller, upstate communities).

⁴⁵ Maureen Dowd, *Just Who Is Pataki Anyway?: The Politics of Self-Deprecation and Sentimentality*, N.Y. TIMES, Oct. 21, 1994, at B1.

⁴⁶ See STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY, *supra* note 42, at 151; Anderson, *supra* note 42, at 14; Dowd, *supra* note 45, at B1; Pooley, *supra* note 44.

pillars of his message.⁴⁷ Restoring the death penalty in New York, a measure that Cuomo vetoed seven times during his time in office, was a primary goal.⁴⁸ Beyond that, however, Pataki's objectives in that first campaign seemed unclear to many observers, and many political commentators found his speeches to be forgettable.⁴⁹ Nevertheless, it was enough. New Yorkers who simply wanted a change after Cuomo's three terms of office found their answer in Pataki.⁵⁰

That election victory was an impressive mountaintop for a man whose journey had started at a bucolic white frame house in the rural Hudson Valley.⁵¹ In an often overlooked similarity to Cuomo, Pataki was a second-generation American who rose to the Governor's Mansion from humble beginnings.⁵² Born to a mailman and a waitress of Hungarian, Italian, and Irish heritage, Pataki worked on the family's farm until leaving for college.⁵³ Norman Rockwell-style scenes of his childhood surfaced during his first race for governor, including one of the young Pataki picking apples and another of Pataki's father, a volunteer firefighter, marching down Main Street in a parade.⁵⁴

When he left that home, Pataki enrolled first at Yale University, then at Columbia Law School, both of which he attended on scholarship.⁵⁵ While in college, he became the leader of the conservative wing within Yale's student union.⁵⁶ Yet he later

⁴⁷ See Dowd, *supra* note 45, at B1; Richard Pérez-Peña, *Pataki's Record: 2 Terms, Unexpected Turns*, N.Y. TIMES, Oct. 30, 2002, at A1 ("George E. Pataki ran for governor in 1994 promising tax cuts, tougher criminal penalties, welfare reform and not much else.").

⁴⁸ Eric Prokosch, *Death Penalty Developments*, in THE INTERNATIONAL SOURCEBOOK ON CAPITAL PUNISHMENT 66, 71 (William A. Schabas ed., 1997); Elizabeth Kolbert, *As Vote on Death Penalty Nears, Cuomo Advocates Life Sentences*, N.Y. TIMES, June 19, 1989, at B10; Kevin Sack, *Cuomo and Pataki End Bitter, Costly Race*, N.Y. TIMES, Nov. 8, 1994, at B1; Kevin Sack, *Pataki, Backing Executions, Assails Cuomo at Murder Site*, N.Y. TIMES, Nov. 5, 1994, at A1.

⁴⁹ See Anderson, *supra* note 42, at 14; Dowd, *supra* note 45, at B1.

⁵⁰ See Anderson, *supra* note 42, at 14; John J. Goldman, *In New York, Cuomo Loses to Once-Obscure Challenger*, L.A. TIMES, Nov. 9, 1994, at A33; Kevin Sack, *Pataki Beginning Bid to Transform State Government*, N.Y. TIMES, Nov. 10, 1994, at A1.

⁵¹ See Dowd, *supra* note 45, at B1.

⁵² See *id.* For a discussion of Mario Cuomo's upbringing and its effect on his political positions, see Pomerance, *supra* note 29, at 189-99.

⁵³ See PATAKI & PAISNER, *supra* note 43, at 91, 100, 117 (noting that Pataki even strongly considered farming as his full-time career before entering law, and then politics); Dowd, *supra* note 45, at B1.

⁵⁴ Dowd, *supra* note 45, at B1.

⁵⁵ Goldman, *supra* note 50, at A33.

⁵⁶ Paul Grondahl, *From 'Grufus' to the Governor*, TIMES UNION (Albany, N.Y.), Dec. 18, 1994, at A1.

claimed that he found some of the extreme conservative viewpoints to be just as distasteful as the far-left liberal ideals.⁵⁷ "The conservatives leaned toward social Darwinism and making decisions based on money. And some of the liberals acted like they knew what was best for everyone and could force it on them," he recalled to one interviewer.⁵⁸

At law school, Pataki found significant academic success, serving as an editor on the *Columbia Law Review*.⁵⁹ He graduated in 1970, departing from student life during the zenith of the Vietnam War.⁶⁰ Poor eyesight, however, kept him away from the draft.⁶¹ Instead, he found a job in the prestigious New York City firm Dewey, Ballantine, Busby, Palmer & Wood.⁶² After practicing there for four years, he then transferred to the firm of Plunkett & Jaffe as a partner.⁶³ He remained at Plunkett & Jaffe until 1987, focusing his work primarily on corporate litigation, real estate, and estate planning for affluent clients.⁶⁴

It was during this period that Pataki decided to follow one of his heroes, Theodore Roosevelt, into the world of politics.⁶⁵ During the 1970s, he worked on several Republican campaigns, including the gubernatorial candidacies of Nelson Rockefeller and Malcolm Wilson.⁶⁶ He later became Peekskill's Republican chairman and, in 1981, decided to launch a campaign of his own.⁶⁷ He entered his first political race and won his first victory: a surprising defeat of the three-term incumbent mayor of Peekskill.⁶⁸ This achievement

⁵⁷ Dowd, *supra* note 45, at B1.

⁵⁸ *Id.* (internal quotation marks omitted).

⁵⁹ PATAKI & PAISNER, *supra* note 43, at 139; *George Pataki to Speak at Graduation*, FORDHAM U. SCH. LAW (May 9, 2011), <http://law.fordham.edu/22080.htm>.

⁶⁰ PATAKI & PAISNER, *supra* note 43, at 132 ("Vietnam was all we talked about."). Pataki supported American involvement in Vietnam during his student days. Dowd, *supra* note 45, at B1.

⁶¹ Dowd, *supra* note 45, at B1.

⁶² *George Pataki*, CBS NEWS (Oct. 9, 1998), <http://www.cbsnews.com/news/ny-gov-pataki/>.

⁶³ *Id.*

⁶⁴ *Former New York Governor Pataki Joins Chadbourne*, CHADBOURNE (Mar. 7, 2007), <http://www.chadbourne.com/newsevents/newsdetail.aspx?news=449>; *George Pataki*, *supra* note 62.

⁶⁵ See Dowd, *supra* note 45, at B1 (noting that Roosevelt was one of Pataki's favorite political figures).

⁶⁶ PATAKI & PAISNER, *supra* note 43, at 143 ("In the summer before I joined Dewey, Ballantine full-time, I applied for a low-level advance position in Nelson Rockefeller's 1970 gubernatorial campaign."); *George Pataki*, *supra* note 62.

⁶⁷ Pooley, *supra* note 44, at 44.

⁶⁸ *Id.* During his time as mayor of Peekskill, Pataki carved out a reputation for hardball tactics, but also for excellent economic results. See *id.*

made Pataki the youngest mayor in the history of his hometown.⁶⁹ It also foreshadowed another unexpected victory over a popular three-term incumbent more than a decade later in his race against Mario Cuomo.⁷⁰

In 1984, Pataki entered state politics, winning election to the New York State Assembly.⁷¹ He also opened a law office in Peekskill with his brother, focusing largely on handling real estate closings.⁷² This enterprise proved to be controversial, with much of the business coming from real estate developers whom Pataki attracted to town while serving as mayor.⁷³ For his part, though, Pataki saw no conflict of interest in this work, determining that representing the developers posed no problems because “he never represented them before city agenc[ies].”⁷⁴ “Never did I use political influence to benefit anyone other than the city of Peekskill,” he stated in one interview.⁷⁵ Other commentators, however, disagreed vehemently, asserting that Pataki had exploited his position as mayor to later attract the developers into his law office.⁷⁶ The fact that one of these developers granted Pataki a \$60,000 personal loan for developments on his family farm did not exactly alleviate these fears of favoritism.⁷⁷

By the beginning of the 1990s, Pataki was living with his wife, Libby, whom he had met in the 1970s while body surfing during a hurricane, and their children in a \$700,000 Victorian home in Garrison, New York.⁷⁸ The property stood in close proximity to the farm where he had grown up but was light years away in terms of affluence and style.⁷⁹ Winning a 1992 election for a New York State

⁶⁹ Ian Fisher, *Pataki Unveils a Television Ad Campaign*, N.Y. TIMES, Aug. 2, 1994, at B4.

⁷⁰ See *infra* notes 82–94 and accompanying text.

⁷¹ *George Pataki*, *supra* note 62.

⁷² Joseph Berger & Matthew Purdy, *Pataki and Peekskill: Reviving a City, Then Profiting in a Realty Boom*, N.Y. TIMES, Oct. 27, 1994, at B7.

⁷³ *Id.*; Pooley, *supra* note 44, at 44.

⁷⁴ Berger & Purdy, *supra* note 72, at B7.

⁷⁵ *Id.* (internal quotation marks omitted).

⁷⁶ See *Id.*

⁷⁷ James Dao, *Pataki, Too, Is Pinched Without Pay*, N.Y. TIMES, May 2, 1995, at B1 (“Mr. Pataki received a \$60,000 loan in 1991 from Paul Guillaro, a developer, to finance engineering plans for the Peekskill farm.”); Tom Precious, *Pataki: From Peekskill to the Big Time*, TIMES UNION (Albany, N.Y.), Oct. 30, 1994, at A1 (“One development company, for example, involved in Peekskill real estate projects—including turning part of Pataki’s family farm into a subdivision—gave Pataki a \$60,000 personal loan a few years ago.”).

⁷⁸ See Dowd, *supra* note 45, at B1; *George Pataki*, *supra* note 62.

⁷⁹ Dowd, *supra* note 45, at B1.

Senate seat only increased his personal prestige.⁸⁰ Still, Pataki continued to maintain a rather low profile, saying that he “wanted to re-create his small-town upbringing for his own family.”⁸¹

Yet on March 14, 1994, Pataki—billed by the *New York Times* as “a little-known Republican lawmaker from Putnam County”—threw his hat into a crowded ring of Republicans, vying for the chance to defeat Mario Cuomo.⁸² His pathway to this decision was anything but straightforward. Initially, Senator Alfonse D’Amato, an outspoken conservative who dubbed himself “Senator Pothole” and attacked opponents with ferocity, seemed to be a lock for the Republican nomination.⁸³ However, seeing Pataki as a fiscal conservative who could possibly bridge the widening gap between the moderate and hard-line conservative factions of the Republican Party, D’Amato loudly endorsed Pataki for several months before Pataki even decided to run.⁸⁴ He continued serving as Pataki’s most vigorous cheerleader throughout the entire election cycle.⁸⁵

D’Amato’s constant presence both hindered and helped Pataki. On one hand, his endorsement became fodder for pro-Cuomo tabloids, some of which labeled Pataki as “D’Amato’s farmer.”⁸⁶ On the other hand, D’Amato brought Pataki an impressive lineup of experienced aides and supporters, from Fundraising Chair Charles A. Gargano to aggressive Press Manager Zenia Mucha to key strategists Arthur Finkelstein and Kieran Mahoney, and helped Pataki raise an impressive pot of campaign cash.⁸⁷

Even with D’Amato’s experience and expert fundraising behind him, however, Pataki still faced numerous obstacles. His own party

⁸⁰ See Pooley, *supra* note 44, at 46. Some commentators viewed this victory as a pivotal point in Pataki’s political career, priming him for the gubernatorial race in 1994. See *id.*

⁸¹ Dowd, *supra* note 45, at B1.

⁸² Kevin Sack, *State Senator Pataki Formally Declares Challenge to Cuomo*, N.Y. TIMES, Mar. 15, 1994, at B5.

⁸³ See Francis X. Clines, *Just Don’t Call Me King, D’Amato Says of Pataki Victory*, N.Y. TIMES, Nov. 10, 1994, at B1; Craig Horowitz, *Al D’Amato: Senator Pothole, Proudly*, N.Y. MAG., Apr. 6, 1998, at 135, 135; Kevin Sack, *D’Amato’s Push for Pataki Ends a Long Cuomo Truce*, N.Y. TIMES, Aug. 22, 1994, at A1.

⁸⁴ See Sack, *supra* note 83, at A1.

⁸⁵ See Anderson, *supra* note 42, at 14; *Governor’s Race Poses the Big Pataki Question*, ORLANDO SENTINEL, July 4, 1994, at A14 (describing D’Amato “shepherding” Pataki’s nomination through the daunting State Republican Convention); Steve Kornacki, *The Saddest Republican Candidacy of Them All*, SALON (Aug. 25, 2011), http://www.salon.com/2011/08/25/george_pataki_2012/ (arguing that Pataki owed his 1994 gubernatorial victory to D’Amato’s efforts on his behalf).

⁸⁶ See Dowd, *supra* note 45, at B1.

⁸⁷ See Clines, *supra* note 83, at B1; Dowd, *supra* note 45, at B1; Sack, *supra* note 83, at A1.

was badly divided into warring factions.⁸⁸ Four other Republicans sought the nomination, including former New York State Republican Party Chairman Richard Rosenbaum.⁸⁹ Then, even after winning the vote at the Republican State Convention, Pataki's campaign received a tremendous blow when Mayor Giuliani—arguably the most influential Republican in the state—endorsed Cuomo rather than supporting Pataki.⁹⁰ Not surprisingly, the far more seasoned Cuomo jumped out to an early lead in virtually all of the political polls.⁹¹

Still, when the dust finally settled, it was Pataki who ended up on top, winning forty-eight percent of the votes to Cuomo's forty-six percent.⁹² Perhaps even more impressively, he had emerged victorious without ever spending much time discussing what he actually planned to do as governor.⁹³ A tough on crime and tough on spending platform, coupled with protracted attacks on Cuomo's record in office, proved to be all he needed.⁹⁴

With New York facing an economic downturn, Pataki's pledge to slash income taxes by twenty-five percent received significant support from voters.⁹⁵ His frequent speeches in favor of restoring the death penalty and instituting harsher punishments for criminals overall also attracted many New York citizens to his side.⁹⁶ The gruesome case of Arthur Shawcross, a convict paroled by New York State only to commit multiple murders after his conditional release from prison, made Pataki's tough on crime rhetoric particularly appealing.⁹⁷ Messages such as a Pataki ad

⁸⁸ Clines, *supra* note 83, at B1; James Dao, *G.O.P. Leaders Bury Hatchets, But Shallowly*, N.Y. TIMES, Sept. 8, 1994, at B6. In fact, some observers asserted that D'Amato supported Pataki so vigorously only because D'Amato was upset with Mario Cuomo for comments that D'Amato considered offensive. See Sack, *supra* note 83, at A1.

⁸⁹ Kevin Sack, *G.O.P. Race for Governor is Narrowed*, N.Y. TIMES, May 21, 1994, at 27; see Dao, *supra* note 88, at B6. Ultimately, the Republican primary came down to Pataki against Rosenbaum. Dao, *supra* note 88, at B6.

⁹⁰ See John J. Goldman, *Boost from Giuliani Lifts Cuomo Back Into Tight Contest*, L.A. TIMES, Oct. 28, 1994, at A35.

⁹¹ See, e.g., *New Poll Gives Cuomo 13-Point Lead in New York*, ORLANDO SENTINEL, Nov. 2, 1994, A6 (noting that even as late as November 2, at least one major poll showed Cuomo leading Pataki by 13 percentage points).

⁹² Anderson, *supra* note 42, at 14; Goldman, *supra* note 50, at A33.

⁹³ See *supra* notes 46–49 and accompanying text.

⁹⁴ See *supra* notes 46–49 and accompanying text.

⁹⁵ See Kevin Sack, *New York Voters End a Democratic Era*, N.Y. TIMES, Nov. 9, 1994, at A1.

⁹⁶ Ian Fisher, *Clamor Over Death Penalty Dominates Debate on Crime*, N.Y. TIMES, Oct. 9, 1994, at 45.

⁹⁷ See Editorial, *No More Willie Hortons*, N.Y. TIMES, Dec. 13, 1991, at A38.

featuring a woman blaming Cuomo for her son's murder by a paroled criminal hit home during the immediate aftermath of the Shawcross killings.⁹⁸ Such straightforward but impactful promises, combined with a general weariness among many New Yorkers toward Cuomo's administration, helped Pataki become one of many Republicans victorious in major elections during that year⁹⁹—even if, as the *New York Times* claimed, New York's newest governor was “more loved for who he isn't than who he is.”¹⁰⁰

Still, despite the narrow scope of his first campaign, Pataki proved to be anything but one-dimensional during his years as governor.¹⁰¹ Through three terms in Albany, he delivered on his two major promises: restoring the death penalty¹⁰² and lowering taxes.¹⁰³ He remained strict on law enforcement issues, openly favoring police and prosecutors in most disputes, but he did seem to grow somewhat less dogmatic as the years passed, calling for unexpected measures such as tempering the Rockefeller drug laws.¹⁰⁴

Beyond this, though, Pataki became an unexpected champion of several causes that are rarely identified with contemporary conservative Republican politicians: gun control, expanded health

⁹⁸ See Dowd, *supra* note 45, at B1 (describing this advertisement in detail).

⁹⁹ See Joel Connelly, *The 1994 Republican Landslide and Its Aftermath*, CHI. TRIB., June 13, 1996, at 3 (reviewing ELIZABETH DREW, *SHOWDOWN: THE STRUGGLE BETWEEN THE GINGRICH CONGRESS AND THE CLINTON WHITE HOUSE* (1996)); Todd S. Purdum, *Voters Cry: Enough, Mr. Cuomo!*, N.Y. TIMES, Nov. 9, 1994, at B11. Interestingly, most of these Republican triumphs in 1994 had at least one common factor: a vow from the victorious candidate to implement “tough on crime” policies. See John J. DiIulio, Jr., *Prisons Are a Bargain, By Any Measure*, N.Y. TIMES, Jan. 16, 1996, at A17 (“All 30 Republican governors elected or re-elected in 1994 promised to get tough on crime.”).

¹⁰⁰ Dowd, *supra* note 45, at B1.

¹⁰¹ See, e.g., Michael Cooper, *The Shadow of His Predecessor Dominates the Pataki Legacy*, N.Y. TIMES, July 29, 2005, at B5; Marc Humbert, *Pataki's Legacy Still Being Written*, POSTSTAR.COM (Dec. 17, 2006), http://poststar.com/opinion/commentary/pataki-s-legacy-still-being-written/article_de903ef9-82e6-54a2-b949-a77030b8e50a.html; *N.Y.'s Pataki Says He Won't Run for Re-Election*, NBCNEWS.COM (July 27, 2005), <http://www.nbcnews.com/id/8719363/ns/politics/t/nys-pataki-says-he-wont-run-re-election/>; Rita Nissan, *Governor George Pataki's Legacy a Mixed Bag*, TIME WARNER CABLE NEWS: NY1 (July 27, 2005), <http://www.ny1.com/content/news/52396/governor-george-pataki-s-legacy-a-mixed-bag>.

¹⁰² James Dao, *Death Penalty in New York Reinstated After 18 Years; Pataki Sees Justice Served*, N.Y. TIMES, Mar. 8, 1995, at A1; William Glaberson, *Division Over Death Penalty*, N.Y. TIMES, Nov. 29, 2003, at B1.

¹⁰³ Michael Finnegan & Zachary Margulis, *Gov. Rivals OK Plan to Ax Taxes by 25%*, N.Y. DAILY NEWS, May 21, 1995, at 2.

¹⁰⁴ See Mary Beth Pfeiffer, *Pataki Introduces Drug Law Reforms*, POUGHKEEPSIE J. (Jan. 18, 2001), <http://archive.poughkeepsiejournal.com/projects/prison/co011801s1.shtml>; see also Kenneth Lovett, *Pataki Set to Spring Inmates*, N.Y. POST, Jan. 31, 2003, at 3 (describing Pataki's willingness in 2003 to allow early release to those incarcerated for drug crimes).

insurance coverage for New Yorkers previously without insurance, immigrant-friendly initiatives, a pro-choice stance on abortion, and significant environmental conservation strides.¹⁰⁵ New York State's budgets swelled under his watch, increasing New York's already substantial debt and ending many of Pataki's claims of tightening the state's fiscal belt.¹⁰⁶ By the time he opted not to run for a fourth term and left office on December 31, 2006, many Democrats had denounced him as a counterfeit liberal and many Republicans had labeled him as a counterfeit conservative.¹⁰⁷

During his governorship, Pataki also found himself embroiled in scrutiny that echoed his postmayoral days in Peekskill, engaging in practices that many observers considered conflicts of interest.¹⁰⁸ He took at least two trips overseas that were paid for by corporations doing business with New York State, appointed several close friends to lucrative political positions, and accepted millions of dollars in campaign contributions from corporations that were also awarded sizable state contracts.¹⁰⁹ In each of these cases, he steadfastly defended his actions.¹¹⁰

¹⁰⁵ See Kenneth Lovett & Alison Gendar, *Pataki for Prez? It's Just Wacky*, N.Y. DAILY NEWS, Aug. 22, 2011, at 4 ("[Pataki is] pro-choice, pro-union and pro-gay marriage. . ."); Darryl McGrath, *Many Credit Pataki as Conservationist*, BOS. GLOBE, Aug. 1, 2004, at A22; Pérez-Peña, *supra* note 47, at A1.

¹⁰⁶ See, e.g., Marc Humbert, *'Fiscal Conservative' Pataki Becoming Big Spender*, PRESS-REPUBLICAN (Plattsburgh, N.Y.), Jan. 21, 1998, at A5; Marc Humbert, *Pataki Unveils \$99.8 Billion Budget Plans*, CANARSIE COURIER (Jan. 22, 2004), <http://m.canarsiecourier.com/news/2004-01-22/OtherNews/054.html>; George J. Marlin, *Blue NY Gets a Red Budget*, LIBN.COM (Apr. 22, 2011), <http://libn.com/2011/04/21/marlin-blue-ny-gets-a-red-budget/> (stating that New York State's budget increased eighty-three percent during his tenure); E.J. McMahon, *Final Pataki Budget: Spend Now, Cut Taxes Later*, N.Y. TORCH (Mar. 23, 2006), <http://www.empirecenter.org/publications/final-pataki-budget-spend-now-cut-taxes-later/>.

¹⁰⁷ See Richard Pérez-Peña, *Golisano Attacks Pataki on Conservative Issues*, N.Y. TIMES, Aug. 17, 2002, at B1; Stephen Slivinski, *Pataki: The Fall of a 'Rising Star'*, N.Y. POST, Oct. 25, 2006, at 29; Richard Brookhiser, *One Critic's View of the Pataki Era*, N.Y. OBSERVER (Oct. 23, 2006), <http://observer.com/2006/10/one-critics-view-of-the-pataki-era/>; Thomas W. Carroll, *Governor Pataki's Failure*, CITY J., (Spring 2000), http://www.city-journal.org/html/10_2_governor_pataki.html.

¹⁰⁸ See, e.g., Editorial, *Governor Pataki's Ethics Problem*, N.Y. TIMES, Sept. 30, 1999, at A28; Clifford J. Levy, *Donor Linked to Pataki Trips*, TIMES UNION (Albany, N.Y.), Sept. 28, 1999, at A1; Editorial, *Mr. Pataki's Moonlighting*, N.Y. TIMES, Feb. 4, 1997, at A22; *Pataki Says He Was Unaware of Who Contributed to Trips*, DAILY GAZETTE (Schenectady, N.Y.), Oct. 15, 1999, at B6; Pérez-Peña, *supra* note 47, at A1.

¹⁰⁹ See, e.g., *Governor Pataki's Ethics Problem*, *supra* note 108, at A28; Levy, *supra* note 108, at A1; *Pataki Says He Was Unaware of Who Contributed to Trips*, *supra* note 108, at B6; Pérez-Peña, *supra* note 47, at A1.

¹¹⁰ See, e.g., *Governor Pataki's Ethics Problem*, *supra* note 108, at A28; Levy, *supra* note 108, at A1; Pérez-Peña, *supra* note 47, at A1. Interestingly, Pataki also vigorously campaigned for stiffer ethics laws governing the conduct of New York State's legislative branch. See BETH A. ROSENSON, *THE SHADOWLANDS OF CONDUCT: ETHICS AND STATE*

Viewed as a whole, Pataki's record in Albany demonstrates a substantial lack of predictability. Neither uniformly conservative nor uniformly liberal, he showed a willingness to cross party lines on several sensitive issues and to change his views on issues from healthcare to environmental reforms. However, he also demonstrated an unabashed enthusiasm for forming new alliances and rewarding those allies with favors. And certain planks of his platform, including upholding more criminal convictions and cutting down on the use of parole, remained largely (although not completely) consistent throughout his three terms as governor.

The question facing this article, though, is what side—or sides—of Pataki seemed to emerge in his Court of Appeals appointments. Before moving on to this examination, however, it is worth glancing at the Court of Appeals as Pataki found it, looking at its composition and considering what, precisely, Pataki wanted to change.

III. THE NEW YORK STATE COURT OF APPEALS AS GEORGE PATAKI INHERITED IT

During that revealing press conference in November 1995, Pataki made it quite clear that he disliked the Court of Appeals.¹¹¹ That day, and on several other occasions, he condemned the criminal law decisions of Cuomo's judicial appointments.¹¹² In doing so, he implied that "the court" spoke with one voice and employed a uniform approach to judging, particularly in criminal cases.¹¹³ From Pataki's descriptions, an observer could easily assume that the Court of Appeals stood in total sympathy to the rights of the accused in virtually all criminal matters.

However, Pataki's perceptions of the so-called "Cuomo Court" appear to be somewhat distanced from reality. To begin, the Court of Appeals that Pataki inherited was not filled solely with liberal judges.¹¹⁴ Judges Richard D. Simons and Howard A. Levine were

POLITICS 115 (2005) (discussing Pataki's calls for greater oversight of legislative ethics).

¹¹¹ See *supra* notes 1–14 and accompanying text.

¹¹² See *supra* notes 1–15 and accompanying text.

¹¹³ For example, Pataki's remark that "[t]he Court of Appeals has gone too far," rather than naming specific judges who had "gone too far," implied uniformity among the court's voting in criminal cases. *Pataki Assails Court of Appeals*, *supra* note 1, at A1. However, as this section points out, such an assumption about the court's voting patterns was quite far from the truth.

¹¹⁴ For an overview of the ideological diversity among Mario Cuomo's Court of Appeals appointees, see Pomerance, *supra* note 29, at 262–63, 268–69.

Republicans.¹¹⁵ Judge Joseph W. Bellacosa belonged to no political party, but court watchers widely considered him to be the most conservative—and most pro-prosecution—judge on the bench.¹¹⁶ Only Chief Judge Judith S. Kaye, Judge Vito J. Titone, Judge George Bundy Smith, and Judge Carmen B. Ciparick were Democrats.¹¹⁷

Voting records of these seven judges, particularly on criminal cases, reveal an even more closely balanced court than their party affiliations suggest. This was a court of judges who had traveled many journeys together. Kaye, Simons, Titone, Bellacosa, and Smith had all served with former Chief Judge Sol Wachtler during a period when Wachtler led the court in a decidedly pro-prosecution direction in criminal cases and a clearly pro-Government slant overall.¹¹⁸ In 1991, for instance, seventy-nine percent of the court's decisions favored the Government over individuals in both criminal and civil disputes.¹¹⁹

Then, after Wachtler resigned when federal agents arrested him for blackmailing and harassing his ex-lover,¹²⁰ these same judges contributed to the court's shift to a more pro-defendant and

¹¹⁵ John Caher, *Levine OK'd for High Court*, TIMES UNION (Albany, N.Y.), Sept. 8, 1993, at A1; Michael Oreskes, *Cuomo Appoints a G.O.P. Judge to Appeals Seat*, N.Y. TIMES, Jan. 4, 1983, at A1.

¹¹⁶ Timothy B. Lennon, *Joseph W. Bellacosa: Cardozo's Knight-Errant?*, 59 ALB. L. REV. 1827, 1827 (1996) (describing Bellacosa as "one of the most consistently 'conservative' members" of the Court of Appeals).

¹¹⁷ James Dao, *Cuomo Choice for Top Court Is Woman*, 51, N.Y. TIMES, Dec. 2, 1993, at B1; Sarah Lyall, *Cuomo Says He'll Name Black Judge to Top Court*, N.Y. TIMES, Aug. 25, 1992, at B5; Editorial, *The Cuomo Court*, N.Y. TIMES, Dec. 2, 1985, at A14; Jeffrey Toobin, *The Bench: Special Kaye*, NEW YORKER, Dec. 15, 2008, at 34.

¹¹⁸ See STREAMS OF TENDENCY, *supra* note 31, at 241; Luke Bierman, *The Dynamics of State Constitutional Decision-Making: Judicial Behavior at the New York Court of Appeals*, 68 TEMP. L. REV. 1403, 1408–09 (1995); Daniel Wise, *Wachtler Court at 5: Panel Defies Labels, but Individual Trends Emerge*, N.Y.L.J., Oct. 15, 1991, at S-3 (1991). In a way, Wachtler was a surprising judge to lead such a shift in the court's voting, given that he had written rather outspokenly about protecting individual rights and the important role state constitutions play in safeguarding these personal liberties. See, e.g., Sol Wachtler, *Our Constitutions—Alive and Well*, 61 ST. JOHN'S L. REV. 381, 397 (1986). However, there is no question that Wachtler's decisions were the barometer of the court's direction during his time as chief judge. Remarkably, he wrote only fifteen dissents during his entire period in the chief judge's chair. John R. Bunker, *"You Could Look It Up": The Judicial Opinions of Sol Wachtler on the New York Court of Appeals*, 52 SYRACUSE L. REV. 847, 879 (2002). Thus, even as he switched from markedly proindividual to markedly pro-Government in his decision-making, Wachtler's vote continued to represent the majority vote of the court in almost all cases. See *id.*

¹¹⁹ Vincent Martin Bonventre, *Court of Appeals—State Constitutional Law Review, 1991*, 14 PACE L. REV. 353, 442 (1994) [hereinafter *1991 Review*].

¹²⁰ See Lisa Anderson, *Judge's Fall a Painfully Public Tale of Obsession*, CHI. TRIB., Nov. 14, 1992, at 1.

proindividual inclination. During the first eight months of Kaye's tenure as Chief Judge, the number of proindividual decisions rose to fifty percent.¹²¹ This trend would continue at the court for the immediate future.¹²² However, the fact remained that five of the seven judges sitting on the court when Pataki became governor—and all but one of its Democrat judges—had already served on a "law and order" bench that typically ruled in the Government's favor.¹²³ Based on this observation alone, it seems that decisions favoring defendants would not be automatic from this judicial body.

Drilling down into the individual voting patterns and proclivities of each judge, the picture of this court becomes even less evident. While Chief Judge Kaye later became known for achieving an unprecedented level of consensus on the Court of Appeals, such unanimity did not exist during the end of the Wachtler years and the earliest years of Kaye's tenure.¹²⁴ Thus, plenty of deeply divided decisions provided ample fodder for determining how each judge on the court tended to lean in a particular type of case.¹²⁵

At the time of Pataki's first inauguration, the Court of Appeals had two judges whom an observer could reasonably consider to be a predictable pro-defendant vote in criminal cases. One was Judge Titone, recognized as the leader of the court's liberal wing¹²⁶ and soon known to be Pataki's judicial enemy number one.¹²⁷ In 1990,

¹²¹ Gary Spencer, *Dust Settles After Year of Turmoil*, N.Y.L.J., Nov. 1, 1993, at S2.

¹²² See Marcia B. Smith, Comment, *Judith S. Kaye: Progressive Decisionmaking Rooted in the Common Law*, 59 ALB. L. REV. 1763, 1772–77 (1996); see also Vincent Martin Bonventre, *New York's Chief Judge Kaye: Her Separate Opinions Bode Well for Renewed State Constitutionalism at the Court of Appeals*, 67 TEMP. L. REV. 1163, 1199–1205 (1994) [hereinafter *New York's Chief Judge Kaye*] (stating that during this time the court began to side with individual claimants much more often).

¹²³ Holdovers from the "Wachtler Era" of dominantly pro-Government judging were Simons, Kaye, Titone, Bellacosa, and George Bundy Smith. See *New York's Chief Judge Kaye*, *supra* note 122, at 1201, 1203. Smith served on the Court of Appeals only a couple of months before Wachtler's arrest; the others had served significantly longer. *Id.* at 1203.

¹²⁴ See, e.g., Vincent Martin Bonventre, *Court of Appeals—State Constitutional Law Review, 1990*, 12 PACE L. REV. 1, 47 (1992) [hereinafter *1990 Review*] (stating that in 1990, the Court of Appeals was divided on sixty-three percent of cases involving substantive questions of state constitutional law); William Glaberson, *Dissenting Often, State's Chief Judge Establishes a Staunchly Liberal Record*, N.Y. TIMES, Oct. 10, 2011, at A19.

¹²⁵ Divided decisions are often thought to contain the most revealing observations into a particular judge's ideologies and beliefs. See, e.g., *New York's Chief Judge Kaye*, *supra* note 122, at 1167–68.

¹²⁶ Bierman, *supra* note 118, at 1441; Richard Pérez-Peña, *A Liberal on Top Court is Resigning*, N.Y. TIMES, Feb. 21, 1998, at B1; Wolfgang Saxon, *Vito Titone of Top New York Court Dies at 76*, N.Y. TIMES, July 8, 2005, at B8 ("Judge Vito J. Titone [was] a firm liberal voice on the New York State Court of Appeals.")

¹²⁷ Paul Schwartzman, *Judge Tells Pataki to Can Criticism*, N.Y. DAILY NEWS, Feb. 3,

Titone voted for the defendant in ninety-two percent of criminal cases in which the Court of Appeals was divided on the outcome.¹²⁸ The following year, he voted for the defendant in ninety percent of such cases.¹²⁹ Even during the rightward shift under Wachtler, Titone's concerns for the rights of the accused remained paramount in his jurisprudence.¹³⁰

The other virtually guaranteed pro-defendant voter, Judge Ciparick, was far newer to the Court of Appeals, yet had already shown a strong tendency to side with the defendant in close criminal cases.¹³¹ In a sense, Ciparick was a particularly sharp thorn in Pataki's side. Appointed in 1993, and well below the mandatory retirement age of 70, she was eligible to remain on the Court of Appeals for at least the remainder of her fourteen-year term.¹³² Even if he were to win re-election twice, Pataki still would not be able to replace Ciparick unless she decided to resign.¹³³

On the other end of the spectrum were Judge Simons and Judge Bellacosa. Both were extremely predictable votes for the prosecution in criminal cases.¹³⁴ Between 1987 and 1998, Bellacosa—whom Pataki would later publically praise¹³⁵—ruled in favor of the prosecution in eighty percent of the court's divided criminal decisions.¹³⁶ Simons was similarly consistent in holding for the Government on criminal matters.¹³⁷ Both believed in following the jurisprudence of the generally prosecution-friendly United

1996, at 5.

¹²⁸ 1990 Review, *supra* note 124, at 50.

¹²⁹ See 1991 Review, *supra* note 119, at 455 tbl. B; see also STREAMS OF TENDENCY, *supra* note 31, at 1 & n.1 (stating that between 1987 and August 1998, Titone voted for the defendant in seventy-seven percent of all divided criminal cases that he heard on the Court of Appeals).

¹³⁰ See *supra* notes 128–29 and accompanying text (pointing out Titone's almost uniformly pro-defendant record during the heart of Wachtler's pro-prosecution shift).

¹³¹ See John M. Bagyi, Comment, *Carmen Beauchamp Ciparick: The Court of Appeals' Voice of Compassion*, 59 ALB. L. REV. 1913, 1920–22 (1996).

¹³² Pomerance, *supra* note 29, at 256–57.

¹³³ See *id.* at 257. Ciparick was fifty-one-years-old when Mario Cuomo appointed her to the Court of Appeals. *Id.* Thus, she could serve her entire fourteen-year term on the court and have five years left before reaching the mandatory retirement age of 70.

¹³⁴ See, e.g., STREAMS OF TENDENCY, *supra* note 31, at 14 (calling Bellacosa a "militant" pro-prosecution jurist); John Caher, *Cuomo's High Court is Steering Rightward, Study Concludes*, TIMES UNION (Albany, N.Y.), June 2, 1991, at B2 (crediting Simons as joining Wachtler in steering the Court of Appeals toward more prosecution-friendly decisions).

¹³⁵ Alan Finder, *Judge Bellacosa to Leave Court of Appeals Before Term Ends*, N.Y. TIMES, Apr. 1, 1999, at B9.

¹³⁶ STREAMS OF TENDENCY, *supra* note 31, at 1–2.

¹³⁷ See, e.g., 1991 Review, *supra* note 119, at 455 tbl. B.

States Supreme Court in most cases.¹³⁸ Consequently, these two steady pro-prosecution voters ideologically nullified the pro-defendant votes that almost always came from Titone and Ciparick on divided criminal cases.

When this typical counterbalance held firm, decisions in criminal cases rested with three Court of Appeals judges: Smith, Levine, and Kaye. Today, observers recognize Judge Smith as one of the most overall liberal members of the Court of Appeals during the era in which he served.¹³⁹ At the time when Pataki took office, however, Smith's liberal legacy was far from defined. Indeed, many of Smith's most outspoken pro-defendant holdings, such as *People v. Calabria*¹⁴⁰ and *People v. Benevento*,¹⁴¹ came considerably later in his career.¹⁴² Between November 1992 and March 1995, the period immediately preceding Pataki's inauguration, Smith cast a vote in forty-one divided criminal cases.¹⁴³ He voted in favor of the defendant in twenty-one of those cases, while holding for the prosecution in the remaining twenty.¹⁴⁴ Therefore, at the time when Pataki was judging the Court of Appeals, Smith was a "swing

¹³⁸ Bellacosa's signed opinions in criminal cases frequently offered effervescent paeans to the United States Supreme Court. See, e.g., *People v. Harris*, 77 N.Y.2d 434, 442, 570 N.E.2d 1051, 1056, 568 N.Y.S.2d 702, 707 (1991) (Bellacosa, J., dissenting) (blaming the Court of Appeals's majority for ignoring the "analysis, wisdom and experience" of the United States Supreme Court regarding self-incrimination after warrantless arrests by police); *People v. Kohl*, 72 N.Y.2d 191, 199, 527 N.E.2d 1182, 1186, 532 N.Y.S.2d 45, 49 (1988) (praising the "modern and sound jurisprudence" of the United States Supreme Court and then denouncing his dissenting brethren on the Court of Appeals for departing from the Supreme Court's line of cases). Simons, while not as effervescent as Bellacosa about the United States Supreme Court's logic, still strongly believed that state court departures from the Supreme Court's jurisprudence should be few and far between. See David E. McCraw, "Doubts About Our Processes": *Richard D. Simons and the Jurisprudence of Restraint in State Constitutional Analysis*, 13 *TOURO L. REV.* 613, 615 (1997).

¹³⁹ See EDWARD V. SCHNEIER ET AL., *NEW YORK POLITICS: A TALE OF TWO STATES* 260 (2d. ed., 2010) (describing Smith as arguably the most liberal judge on the entire Court of Appeals bench); *STREAMS OF TENDENCY*, *supra* note 31, at 16–17 (revealing Smith's proindividual voting trends in both civil and criminal cases); Richard C. Wesley, *A Tribute to Hon. George Bundy Smith: A Friend and Colleague*, 34 *FORDHAM URB. L.J.* 1156, 1158 (2007) (noting that Smith was widely considered the "most liberal" judge on the Court of Appeals).

¹⁴⁰ *People v. Calabria*, 94 N.Y.2d 519, 727 N.E.2d 1245, 706 N.Y.S.2d 691 (2000).

¹⁴¹ *People v. Benevento*, 91 N.Y.2d 708, 697 N.E.2d 584, 674 N.Y.S.2d 629 (1998).

¹⁴² *Calabria*, 94 N.Y.2d at 522–23, 727 N.E.2d at 1247–48, 706 N.Y.S.2d at 693–94 (holding that unfair Government tactics deprived the defendant of a fair trial); *Benevento*, 91 N.Y.2d at 713, 697 N.E.2d at 588, 674 N.Y.S.2d at 633 (deciding that New York State recognized a higher standard under its state constitution regarding the criminal defendant's right to effective assistance of counsel than the United States Supreme Court allowed under the United States Constitution).

¹⁴³ Charles J. Scibetta, Jr., *George Bundy Smith: A Reliability Based Criminal Jurisprudence*, 59 *ALB. L. REV.* 1853, 1854 (1996).

¹⁴⁴ *Id.* at 1855.

voter” in criminal cases, voting for the defendant just barely more than fifty percent of the time.¹⁴⁵

Like Smith, Judge Levine’s voting swung in favor of defendants’ rights later in his career on the Court of Appeals.¹⁴⁶ Between 2000 and 2001, for instance, only George Bundy Smith provided a more defendant-friendly voting record than Levine.¹⁴⁷ When Pataki was elected, however, Levine was another reliable vote for the prosecution—a judge who might have been the most prosecution-friendly member of the entire court between 1994 and 1996.¹⁴⁸ As one prosecutor told the *New York Law Journal* in 1994: “It was just nice to look up and see Simons, Bellacosa and Levine all in a row.”¹⁴⁹

Finally, Chief Judge Kaye’s voting patterns revealed the opposite trend: beginning as a frequent pro-defendant voter and then siding with the prosecution more frequently in criminal cases later in her career.¹⁵⁰ Thus, Pataki would have viewed Kaye as a likely, but not completely guaranteed, pro-defendant vote.¹⁵¹ The fact that she had

¹⁴⁵ *Id.* Among Smith’s pro-prosecution votes during this period were several cases that seem well-suited to Pataki’s law enforcement-friendly desires. *See, e.g.*, *People v. Wesley*, 83 N.Y.2d 417, 425, 633 N.E.2d 451, 455, 611 N.Y.S.2d 97, 101 (1994) (deciding that the trial court properly admitted DNA evidence against criminal defendant); *Boyd v. Constantine*, 81 N.Y.2d 189, 196, 613 N.E.2d 511, 514, 597 N.Y.S.2d 605, 608 (1993) (declining to extend the exclusionary rule to a New York State Police administrative hearing, holding that excluding certain evidence would adversely affect “the truth-finding process” in the proceeding); *People v. Castillo*, 80 N.Y.2d 578, 585–87, 607 N.E.2d 1050, 1054–55, 592 N.Y.S.2d 945, 949–50 (1992) (agreeing that denying a defendant’s motion to inspect a search warrant and related law enforcement papers did not violate the defendant’s federal and state constitutional due process rights).

¹⁴⁶ Vincent Martin Bonventre & Kelly M. Galligan, *Court of Appeals Update, 2000 & 2001: Conservative Voting, Narrow Rulings*, 65 ALB. L. REV. 1085, 1108–10 (2002).

¹⁴⁷ *Id.* at 1110.

¹⁴⁸ Bagyi, *supra* note 131, at 1931 (stating that Levine’s voting record in criminal cases was the “most ‘conservative’” of any Court of Appeals judge during this period); *see also* STREAMS OF TENDENCY, *supra* note 31, at 5 (“[Levine’s] voting has generally been favorable to the prosecution”); Jason J. Legg, *Howard A. Levine: Paladin of the State*, 59 ALB. L. REV. 1879, 1882–83 (1996) (“[Judge Levine’s voting record] places a great deal of reliance and discretion into the hands of the police and prosecutors as initial screeners in determining whether a legitimate violation is brought before the court . . . routinely granting wide latitude and discretion to police, prosecutors, and the state.”).

¹⁴⁹ Gary Spencer, *Conservative Look to 1994 Rulings: Prosecutors Have Reason to Be Encouraged*, N.Y.L.J., Oct. 3, 1994, at S3 (internal quotation marks omitted).

¹⁵⁰ STREAMS OF TENDENCY, *supra* note 31, at 67–68.

¹⁵¹ *See id.* at 67; *see also* Smith, *supra* note 122, at 1763 (noting that Kaye decides each case independently and one is not always able to predict her vote based on past cases and her label as a liberal judge); John Caher, *Kaye Named to Replace Wachtler*, TIMES UNION (Albany, N.Y.), Feb. 23, 1993, at A1 (“Kaye, often characterized as a liberal feminist, is squarely in the ideological center of the court, a potential swing vote on a panel known more for consensus than contentiousness.”); Carol Demare, *Kaye Exits ‘Role of a Lifetime,’* TIMES UNION (Albany,

authored the majority opinion in a case striking down the death penalty in New York certainly would not have sat well with the new Governor, considering that restoring the death penalty was one of his campaign's primary messages.¹⁵²

Connecting the dots, the revealed picture does not exactly reflect Pataki's contention of a court that coddled criminals. Instead, Pataki appeared to inherit a Court of Appeals in which the outcome of criminal cases usually rested with the inclinations of two judges: Smith and Kaye.¹⁵³ The others at this time were rather predictable: Titone and Ciparick for the defendant; Simons, Bellacosa, and Levine for the Government.¹⁵⁴ Far from being a foregone conclusion in the defendant's favor, the outcome of criminal cases before the Court of Appeals in this era actually seems to have been very much in doubt.¹⁵⁵

Along with being more ideologically diverse than Pataki's attacks indicated, the Court of Appeals on January 1, 1995, was more diverse in gender, race, and ethnicity than it ever had been in its history. Upon taking office, Mario Cuomo had pledged to change the court from a bastion of white Anglo-Saxon male judges into a judicial body more reflective of New York's diverse population—a

N.Y.), Dec. 28, 2008, at A1 (stating that Kaye was "idealistic" and able to sway the court in her chosen directions early in her career on the Court of Appeals, but ultimately settled into the role of a moderate liberal on the bench (internal quotation marks omitted)).

¹⁵² *People v. Smith*, 63 N.Y.2d 41, 78–79, 468 N.E.2d 879, 898, 479 N.Y.S.2d 706, 725 (1984). During her tenure on the Court of Appeals, Kaye would vote twice more to find the death penalty unconstitutional in New York State. *People v. Mateo*, 2 N.Y.3d 383, 398, 811 N.E.2d 1053, 1060, 779 N.Y.S.2d 399, 406 (2004); *Hynes v. Tomei*, 92 N.Y.2d 613, 626, 706 N.E.2d 1201, 1207, 684 N.Y.S.2d 177, 183 (1998).

¹⁵³ Again, this reflects the court's position when Pataki became governor, not the ultimate stances of these judges. In fact, at the time of Pataki's first election, one could reasonably argue that Kaye qualified as a consistent vote for defendants in criminal cases rather than an unpredictable voter in these matters. *STREAMS OF TENDENCY*, *supra* note 31, at 67–68. Under this viewpoint, the court's direction really rested in the hands of George Bundy Smith, with the bench deadlocked between three typically pro-prosecution voters (Simons, Bellacosa, and Levine) and three typically pro-defendant voters (Titone, Ciparick, and Kaye).

¹⁵⁴ See *supra* notes 126–38, 148–49 and accompanying text.

¹⁵⁵ This fact was not lost on commentators of that time period. See Vincent Martin Bonventre & Judi A. DeMarco, *Court Bashing and Reality: A Comparative Examination of Criminal Dispositions at the New York Court of Appeals and Neighboring High Courts*, 36 *JUDGES J.* 9, 12–13 (1997) (finding that the Court of Appeals was actually one of the more prosecution-friendly state high courts in the northeastern United States during the previous six years); John Caher, *Rulings Are Anything But Predictable at the Top*, *TIMES UNION* (Albany, N.Y.), Jan. 28, 1996, at A6; Olch, *supra* note 17, at 1; Robert Reno, *If Jails Are Full, How Much Tougher Can Judges Get?*, *NEWSDAY*, Feb. 8, 1996, at A55 (pointing out that the Court of Appeals ruled in favor of prosecutors nearly three-quarters of the time during the previous term, and asking how much "tougher on crime" Pataki wanted the court to become).

promise that he kept.¹⁵⁶ Kaye and Ciparick were the first two female judges appointed to the Court of Appeals.¹⁵⁷ Ciparick was also the court's first Hispanic jurist.¹⁵⁸ George Bundy Smith was the first African-American judge to serve a full term on the Court of Appeals.¹⁵⁹ Titone and Bellacosa both were Italian-Americans, another ethnic group historically underrepresented in New York's highest judicial body.¹⁶⁰

The Court of Appeals was not diverse, however, in geographic representation. Only Simons and Levine came to the court from a home outside of the New York City region.¹⁶¹ The other five judges came from distinctly urban backgrounds.¹⁶² Some observers wondered whether this heavy dose of appointments from New York City arose from the conventional wisdom that individuals from New York City are generally more liberal-leaning than New Yorkers from upstate communities.¹⁶³

Lastly, Pataki received a court that seemed destined to stay together. Most of the seven judges on the bench were appointed at relatively young ages, meaning that they were in no danger of striking the mandatory retirement age of seventy.¹⁶⁴ Furthermore, several were appointed late in Mario Cuomo's final period in office, and thus had several years remaining on their fourteen-year terms.¹⁶⁵ As a result, the composition of the Court of Appeals

¹⁵⁶ See Pomerance, *supra* note 29, at 199–200, 260–62.

¹⁵⁷ Antonio E. Galvao, *Carmen Beauchamp Ciparick*, in *JUDGES OF THE NEW YORK COURT OF APPEALS: A BIOGRAPHICAL HISTORY* 910, 918 (Albert M. Rosenblatt ed., 2007) [hereinafter *JUDGES OF THE NEW YORK COURT OF APPEALS*]; Jennifer Fermino, 'Special' Kaye Made *Herstory*, N.Y. POST, Mar. 12, 2010, at 7.

¹⁵⁸ Gary Spencer, *Ciparick Named to Court of Appeals: Supreme Court Justice is First Hispanic Nominee*, N.Y.L.J., Dec. 2, 1993, at 1.

¹⁵⁹ Pomerance, *supra* note 29, at 246 n.414.

¹⁶⁰ E.R. Shipp, *New York's High Court is a Cuomo Production*, N.Y. TIMES, Jan. 18, 1987, at 35.

¹⁶¹ Pomerance, *supra* note 29, at 263. Judge Stewart F. Hancock also came from an upstate location, but was no longer on the Court of Appeals when Pataki was elected (replaced by Ciparick). See Hope B. Engel, *Stewart Freeborn Hancock, Jr.*, in *JUDGES OF THE NEW YORK COURT OF APPEALS*, *supra* note 157, at 854, 855.

¹⁶² Pomerance, *supra* note 29, at 263.

¹⁶³ See, e.g., ROBERT B. WARD, *NEW YORK STATE GOVERNMENT* 36 (2d. ed. 2006) ("[T]he political and economic divide between Upstate and Downstate retains some of that historical flavor. . . . Upstaters tend to be more socially and fiscally conservative, and Downstaters more liberal."). Of course, this notion does not always hold true. For example, Bellacosa came from New York City but proved to be one of the most prosecution-friendly and conservative judges on the court. See *STREAMS OF TENDENCY*, *supra* note 31, at 14; Jeffrey Schmalz, *Cuomo Is Said to Pick Judge for Top Court*, N.Y. TIMES, Jan. 5, 1987, at B1.

¹⁶⁴ See Pomerance, *supra* note 29, at 264.

¹⁶⁵ See *id.* Between 1990 and 1992, a flurry of events allowed Cuomo to make four changes

2014/2015]

Pataki's "Tough on Crime" Court

211

seemed unlikely to change anytime soon, potentially leading Pataki to claim that he would seek legislative changes for "bad laws" stemming from criminal cases rather than remaking the Court of Appeals.¹⁶⁶

Overall, the Court of Appeals that Pataki inherited was less ideologically predictable than he asserted; unprecedentedly diverse in gender, race, and ethnicity but practically homogeneous in terms of its geographic composition; and seemingly primed to remain intact for a considerable period of time. There is little doubt, based on Pataki's multiple public comments about the court, that he found this judicial bequest distasteful and dislikable. We now turn to an examination of how he sought to change the court that he received upon taking office in 1995.

IV. THE FACTORS: MEASURING STICKS OF PATAKI'S REVISIONS ON THE COURT OF APPEALS

Short of mind-reading and telepathy, it is impossible to know with certainty all the factors present in choosing a given Court of Appeals nominee. However, by recognizing certain often discussed attributes and by studying other elements that might fly under the radar but would seem to be of importance to the nominator, one can at least observe whether any trends exist in a governor's set of nominations. With this in mind, we will examine the following criteria when reviewing Pataki's Court of Appeals appointments:

Race

Gender

Region

Political Affiliation

Predecessor's Political Affiliation

Age on Date of Appointment

Prior Judicial Experience

Judicial Record in Criminal Cases

Known "Pet Causes"

Previous Appearances on "Short List"

"Friendship Factors" with Governor Pataki

to the Court of Appeals: elevating Kaye to the position of Chief Judge after Wachtler's arrest and resignation, appointing Levine to replace Kaye's vacant Associate Judge's seat, appointing Smith to replace Fritz Alexander II (who resigned to become Deputy Mayor of New York City), and appointing Ciparick to replace the retiring Stewart F. Hancock. *See id.* at 242-43, 252, 255-57.

¹⁶⁶ *See supra* notes 22-27 and accompanying text.

The first two factors on this list focus on extremely visible diversity factors. Mario Cuomo received significant positive attention from the media and many members of the bench and bar for diversifying the Court of Appeals.¹⁶⁷ Importantly, though, he also received significant pressure from certain racial and ethnic groups to appoint individuals of their race or ethnicity. For example, after Judge Fritz Alexander II, an African-American, left the Court of Appeals, Cuomo faced intense scrutiny over whether he would appoint an African-American judge as Alexander's successor.¹⁶⁸ Similarly, his appointment of Ciparick came in the wake of a lengthy campaign by Hispanic-American groups to choose a Hispanic judge.¹⁶⁹ By examining these factors here, we can conceive whether Pataki: (a) prioritized crafting a Court of Appeals that was diverse in gender and race as much as his predecessor, and (b) went along with any external pressures to appoint judges of a particular gender and race.¹⁷⁰

Geographic region, the key area in which the Court of Appeals

¹⁶⁷ See, e.g., Sol Wachtler, *Judiciary in Need of Diversity*, TIMES UNION (Albany, N.Y.), Mar. 22, 2013, at D2 ("Gov. Mario Cuomo brought diversity to the Court of Appeals . . ."); *Mario Cuomo, Former Governor of New York*, F. ON L., CULTURE & SOC'Y AT NYU SCH. L., <http://www.forumonlawcultureandsociety.org/bio/mario-cuomo-former-governor-of-new-york/> (last visited Nov. 22, 2014) ("Governor Cuomo also set a new standard for both diversity and judicial achievement on the state's highest court, appointing all seven members of New York's highly regarded Court of Appeals, including the first and second women judges, the first black, the first Hispanic, and the first woman to serve as Chief Judge."); Press Release, P.R. Bar Ass'n, Court of Appeals Vacancy (Nov. 13, 2012), <http://prbany.com/prba-press-release-court-of-appeals-vacancy/> ("Governor Mario Cuomos [sic] record on diverse appointments will be lauded for generations to come. It is a legacy he can be proud of."); see also Mario Cuomo, *We Must Lead the Charge*, 36 CT. REV. 14, 15 (Fall 1999) (discussing the benefits that diversifying the Court of Appeals had for New York State).

¹⁶⁸ See, e.g., Editorial, *A New Judge for New York's Top Court*, N.Y. TIMES, Aug. 25, 1992, at A20 ("Mr. Cuomo was wise to choose Justice Smith, a black member of the Appellate Division's downstate region, thereby maintaining previously achieved racial and geographic balance."); Kevin Sack, *Alexander's Departure Leaves Cuomo Tricky Task of Picking a New Judge*, N.Y. TIMES, Feb. 9, 1992, at 36.

¹⁶⁹ Dao, *supra* note 117, at B1; see also Edwin Martinez, Jr., *Choosing Ciparick Boosts Hispanics*, BUFF. NEWS, Jan. 25, 1994, at B-2 ("I know that I, as a Hispanic parent with two young children, feel even more proud today to be Hispanic.")

¹⁷⁰ John F. O'Mara, Pataki's Special Counsel during those early years in Albany, apparently held the concept of a diverse bench in high esteem. JOHN F. O'MARA, TESTIMONY BEFORE THE SENATE STANDING COMMITTEE ON THE JUDICIARY ON THE NOMINATION PROCESS FOR JUDGES TO THE NEW YORK STATE COURT OF APPEALS 10 (Feb. 3, 2009), available at http://nysegov.com/cjn/assets/documents/press/Prepared_Testimony_of_Judge_OMara.pdf ("There is no doubt in my mind that diversity in appointments to the Court of Appeals reinforces public confidence in the Judiciary and substantially enriches the jurisprudence of this diverse State."). It is worth observing whether this frame of mind—assuming that O'Mara's views were similar in the mid-1990s—may have affected Pataki's appointments in any way.

was not diverse when Pataki took office, is likewise important. During his campaign, Pataki proudly wore the label of a small-town, upstate candidate.¹⁷¹ Frequently, he went out of his way to contrast his upbringing with that of Cuomo, a New York City native.¹⁷² It is worth considering whether Pataki's pride in upstate New York living may have affected his Court of Appeals selections. Considering how few upstate judges were on the court in 1995, this may have been an area in which Pataki saw a chance to "improve" the Court of Appeals.

Political affiliation is an obvious choice if for no other reason than the belief that a chief executive will typically chose judges from his or her own political party.¹⁷³ However, it is also worth examining because Mario Cuomo defied that stereotype, appointing almost as many Republicans as Democrats with his eleven Court of Appeals appointments.¹⁷⁴ Seeing whether Pataki continued on this bipartisan track is worthy of attention. In addition, we look at the political affiliation of each predecessor judge to see whether Pataki tried to maintain the ideological balance of the Court of Appeals or whether he tried to affect it in any way.

Age makes the list because New York constitutionally requires Court of Appeals judges to retire at age seventy.¹⁷⁵ One could therefore hypothesize that a governor would want to select younger judges for the court, permitting them to remain on the bench longer and thus leave a greater impact on the court's direction. We shall see whether this hypothesis holds any truth in Pataki's appointments.

The next three criteria all center on Pataki's public thirst for "tough on crime" judges, the kind who did not "coddle" dangerous criminals or "invent their own rules" in criminal cases.¹⁷⁶ Certainly, it would seem easier for the Governor to evaluate whether a candidate was "tough on crime" if he or she previously served as a

¹⁷¹ See *supra* notes 43–45, 51–54 and accompanying text.

¹⁷² See *supra* notes 43–45, 51–54 and accompanying text.

¹⁷³ When an amendment to the New York State Constitution in 1978 changed the process for choosing Court of Appeals judges from a popular election to a merit appointment system, rampant partisanship was one of the primary concerns that New Yorkers feared the new system would produce. See David Margolick, *New York's Court of Appeals Faces Vast Changes as a New Era Begins*, N.Y. TIMES, Nov. 7, 1982, at A1.

¹⁷⁴ Pomerance, *supra* note 29, at 262–63. Cuomo appointed "five Democrats (Kaye, Alexander, Titone, Smith, and Ciparick), four Republicans (Simons, Wachtler, Hancock, and Levine), and one registered [conservative] independent (Bellacosa)." *Id.* at 262.

¹⁷⁵ N.Y. CONST. art. VI, § 25(b).

¹⁷⁶ See *supra* notes 1–6 and accompanying text.

judge, which is why we study whether Pataki's appointees had prior judicial experience and, if so, how much. We then look at the actual judicial records in criminal cases for each Court of Appeals appointee to see how "tough on crime" they really were. In doing so, we focus primarily on the most public representations of a judge's beliefs: signed opinions—either for a court's majority, a separate concurring opinion, or a dissent—bearing that judge's name.¹⁷⁷ Finally, we look beyond the courtrooms to see whether the individual in question championed any "pet causes," and, if so, whether those platforms overlapped with Pataki's goals in any way.

The factor of whether an appointee previously appeared on the short list could indicate whether Pataki felt obligated to select certain frequently nominated jurists for a Court of Appeals seat. Lastly, we turn to the very personal study of "friendship factors," determining whether the chosen candidate had any particularly strong bonds with Pataki that may have helped him or her have an edge over the other candidates on the list.

Again, there is no precise way to measure exactly why an executive leader appoints one individual over another. However, through this varied and thorough set of factors, we can take a significant step towards deciding what criteria were probably most influential in deciding the new members of New York State's highest court.

V. THE APPOINTMENTS: REVIEWING GOVERNOR PATAKI'S APPOINTMENTS TO THE NEW YORK STATE COURT OF APPEALS

A. *Replacing Judge Richard D. Simons*

This was supposed to be the beginning and the end of the story. The first and only Court of Appeals appointment that Pataki was guaranteed after becoming governor was, in many ways, an anticlimactic one. The new judge would replace the conservative

¹⁷⁷ It is true that researchers typically examine only divided decisions when analyzing jurisprudential patterns. Such decisions are believed to provide the greatest insight into a judge's voting tendencies. *See supra* note 125. However, this article assumes that when deciding whether to select a judge, an executive leader and his or her advisors would examine *all* of that judge's signed opinions, even if the judge were writing for a unanimous court. It is this author's belief that public perception is quite important in selecting judges for appellate positions. Assuming this to be correct, then any published opinion bearing that judge's name would seem ripe for scrutiny and could be factored into the decision of whether to appoint that candidate.

Simons, who had reached the mandatory retirement age.¹⁷⁸ A Republican governor was choosing a staunch Republican judge's replacement, who would then go for confirmation before a Republican-dominated New York State Senate.¹⁷⁹ For people who closely followed the Court of Appeals, this appointment did not exactly appear to be laced with intrigue.¹⁸⁰

However, when the Commission on Judicial Nomination released its seven-member short list for Pataki's review, the candidate pool raised more than a few eyebrows. To begin with, at least three individuals who seemed to be a lock for the list were absent.¹⁸¹ Missing were highly respected Republicans Michael J. Hutter, a professor at Albany Law School; D. Bruce Crew III, a former District Attorney who was serving on the Appellate Division, Third Department; and Thomas Mercure, another former District Attorney who had served on the Third Department since 1988.¹⁸²

Then there was the presence of three Democrats on the list, none of whom Pataki seemed likely to anoint as a successor to Simons. First, Myriam J. Altman, a woman serving on the Second Department after spending nine years as a trial judge, had appeared on two prior short lists but seemed far too liberal for Pataki's liking, even though her voting record on criminal matters was largely unknown.¹⁸³ Secondly, Samuel L. Green, an African-American judge on the Fourth Department, commanded tremendous respect among the state's bench and bar.¹⁸⁴ He also

¹⁷⁸ Simons officially retired on December 31, 1996. See Stewart F. Hancock, Jr., Alan J. Pierce & Patrick M. Connors, *Dedication to the Honorable Richard D. Simons*, 47 SYRACUSE L. REV. 287, 287 (1997).

¹⁷⁹ See Joel Stashenko, *Pataki Expected to Get Republican on Highest Court*, TIMES UNION (Albany, N.Y.), Jan. 13, 1997, at B2.

¹⁸⁰ See *id.*; see also *Pataki Assails Court of Appeals*, *supra* note 1, at B3 (“[O]nly one conservative Republican Richard D. Simons—will be up for reappointment during Pataki’s first term.”); Dao, *supra* note 15, at A1 (“[I]t is also very likely to be the Republican Governor’s only selection to the high court before the next election, and will not substantially shift the ideological position of a seven-member panel that will remain dominated by appointees of former Gov. Mario M. Cuomo, a Democrat.”).

¹⁸¹ *7 Are Nominated*, *supra* note 15, at B2.

¹⁸² *Id.*

¹⁸³ Altman was a downstate Democrat with a generally proindividual rights voting record in civil cases and close ties to Mario Cuomo and Judith Kaye. None of these attributes would appear to be particularly appealing attributes to Pataki. See *7 Are Nominated*, *supra* note 15, at B2; Wolfgang Saxon, *Myriam J. Altman, 65, New York State Appeals Court Judge*, N.Y. TIMES, Feb. 4, 2005, at B7.

¹⁸⁴ See, e.g., Denise M. Champagne, *Justice Green Honored with Courtroom Dedication*, N.Y. DAILY RECORD Jan. 25, 2012, available at 2012 WLNR 28757642; Denise M. Champagne, *Justice Green’s Last Day on the Bench a Memorable One*, CHALLENGER COMMUNITY NEWS (Jan. 12, 2012), <http://challengercn.com/justice-greens-last-day-on-the->

came from the western part of New York State, notable from a diversity factors standpoint since no Court of Appeals judge since Matthew Jasen's retirement in 1985 hailed from that part of the state.¹⁸⁵

However, a brief survey of Green's appellate division record in criminal cases reveals a major reason, beyond his party affiliation, why Pataki did not nominate him. Out of twenty randomly selected¹⁸⁶ Fourth Department criminal cases in which Green issued a signed opinion, he wrote in favor of the prosecution only once.¹⁸⁷ Even more notably, in the twenty cases reviewed here, Green wrote a dissent in ten of them—dissenting each time in the defendant's

bench-a-memorable-one/; Tony Farina, *New York Law Journal to Honor Justice Sam Green*, NIAGARA FALLS REPORTER (Aug. 27, 2013), <http://www.niagarafallsreporter.com/Stories/2013/Aug27/newyork.html>.

¹⁸⁵ Farina, *supra* note 185. With Simons retiring, the only upstate judge left on the Court of Appeals was Howard Levine, who was born in Troy, N.Y., and lived in Schenectady. Carol DeMare, *Cuomo Taps Republican Judge for State's Highest Court*, TIMES UNION (Albany, N.Y.), Aug. 13, 1993, at A1.

¹⁸⁶ All cases surveyed here were obtained by using the search query "writtenby (Green)" in LexisNexis Advance, and then narrowing the search parameters to "New York" and "Criminal Law & Procedure." Cases discussed in this section were all decided prior to the appointment of the relevant Court of Appeals judge in question, thus representing the sample of cases existing for Pataki to review. The same basic procedures and parameters were followed in all of this section's random samplings of judges' appellate division and trial court signed opinions.

¹⁸⁷ Green's pro-prosecution ruling was issued in 1984. See *People v. Benjamin R.*, 103 A.D.2d 663, 670, 481 N.Y.S.2d 827, 832 (App. Div. 4th Dep't 1984). Green had several pro-defendant rulings. See *People v. Bradley*, 211 A.D.2d 388, 396–400, 626 N.Y.S.2d 921, 926–29 (App. Div. 4th Dep't 1995) (Green, J., dissenting); *People v. LePera*, 197 A.D.2d 43, 49, 611 N.Y.S.2d 394, 398 (App. Div. 4th Dep't 1994); *People v. LaDolce*, 196 A.D.2d 49, 51, 607 N.Y.S.2d 523, 524 (App. Div. 4th Dep't 1994); *People v. Glenn*, 185 A.D.2d 84, 93, 592 N.Y.S.2d 175, 181 (App. Div. 4th Dep't 1992) (Green, J., dissenting); *People v. Guins*, 165 A.D.2d 549, 554, 569 N.Y.S.2d 541, 544 (App. Div. 4th Dep't 1991); *People v. Justice*, 173 A.D.2d 144, 149, 579 N.Y.S.2d 502, 505 (App. Div. 4th Dep't 1991); *People v. Guzman*, 153 A.D.2d 320, 324, 551 N.Y.S.2d 709, 712 (App. Div. 4th Dep't 1990); *People v. Morgan*, 151 A.D.2d 221, 226, 547 N.Y.S.2d 711, 714 (App. Div. 4th Dep't 1989); *People v. Di Fabio*, 134 A.D.2d 918, 922, 521 N.Y.S.2d 933, 937 (App. Div. 4th Dep't 1987) (Green, J., dissenting); *People v. Burr*, 124 A.D.2d 5, 13, 510 N.Y.S.2d 949, 955 (App. Div. 4th Dep't 1987) (Green, J., dissenting); *People v. Mingo*, 117 A.D.2d 353, 356–57, 502 N.Y.S.2d 558, 561 (App. Div. 4th Dep't 1986); *People v. Hicks*, 116 A.D.2d 150, 163, 500 N.Y.S.2d 449, 458 (App. Div. 4th Dep't 1986) (Green, J., dissenting); *People v. Larkins*, 116 A.D.2d 194, 198–200, 500 N.Y.S.2d 441, 444–45 (App. Div. 4th Dep't 1986) (Green, J., dissenting); *People v. Minley*, 112 A.D.2d 712, 713–14, 492 N.Y.S.2d 199, 201 (App. Div. 4th Dep't 1985) (Green, J., dissenting); *People v. Farnsworth*, 106 A.D.2d 878, 880–82, 483 N.Y.S.2d 532, 533 (App. Div. 4th Dep't 1984) (Green, J., dissenting); *People v. Ridgeway*, 101 A.D.2d 555, 565–68, 476 N.Y.S.2d 940, 947–49 (App. Div. 4th Dep't 1984) (Green, J., dissenting); *People v. Grice*, 100 A.D.2d 419, 423, 474 N.Y.S.2d 152, 155 (App. Div. 4th Dep't 1984); *People v. McCormick*, 100 A.D.2d 723, 723–24, 473 N.Y.S.2d 622, 623–24 (App. Div. 4th Dep't 1984) (Green, J., dissenting); *People v. Dillard*, 96 A.D.2d 112, 117–18, 468 N.Y.S.2d 259, 263 (App. Div. 4th Dep't 1983).

favor.¹⁸⁸ Certainly this record did not provide the "tough on crime" image that Pataki sought for the Court of Appeals.

Last among the Democrats was Joseph P. Sullivan, a First Department justice who had appeared on an astonishing nine previous short lists.¹⁸⁹ Much like Green, Sullivan was a very experienced appellate court judge who commanded a high level of respect.¹⁹⁰ In his favor, Sullivan also lacked Green's clearly pro-defendant stance. However, although he was raised in a corrections officer's household,¹⁹¹ Sullivan was definitely not a guaranteed vote for law enforcement in criminal cases. In fact, his voting seemed somewhat similar to George Bundy Smith's holdings at that time.¹⁹² Out of twenty randomly selected First Department criminal decisions, Sullivan's signed opinions were almost even in their distribution: eleven for the prosecution, nine for the defendants.¹⁹³

¹⁸⁸ *Bradley*, 211 A.D.2d at 396–400, 626 N.Y.S.2d at 926–29; *Glenn*, 185 A.D.2d at 91–93, 592 N.Y.S.2d at 12–17; *DiFabio*, 134 A.D.2d at 922–23, 521 N.Y.S.2d at 936–37; *Burr*, 124 A.D.2d at 11–13, 510 N.Y.S.2d at 953–55; *Hicks*, 116 A.D.2d at 159–63, 500 N.Y.S.2d at 456–58; *Larkins*, 116 A.D.2d at 198–200, 500 N.Y.S.2d at 444–45; *Minley*, 112 A.D.2d at 713–14, 492 N.Y.S.2d at 201; *Farnsworth*, 106 A.D.2d at 880–82, 483 N.Y.S.2d at 533; *Ridgeway*, 101 A.D.2d at 565–68, 476 N.Y.S.2d at 947–49; *McCormick*, 100 A.D.2d at 723–24, 473 N.Y.S.2d at 623–24.

¹⁸⁹ Sullivan had previously appeared on the short lists for the vacancies ultimately filled by Kaye (twice), Wachtler, Alexander, Titone, Hancock, George Bundy Smith, Levine, and Ciparick. See STATE OF N.Y. COMM'N ON JUDICIAL NOMINATION, *supra* note 35, at 2–4.

¹⁹⁰ See *Joseph P. Sullivan*, APP. DIVISION FIRST JUD. DEPT SUPREME CT. ST. N.Y., <http://www.nycourts.gov/courts/ad1/centennial/Bios/jpsullivan2.shtml> (last visited Nov. 22, 2014) [hereinafter *First Department Bio*]; *Joseph P. Sullivan, Of Counsel*, HOLLAND & KNIGHT, <http://www.hklaw.com/Joseph-Sullivan/> (last visited Nov. 22, 2014).

¹⁹¹ *First Department Bio*, *supra* note 190.

¹⁹² See *supra* notes 143–45 and accompanying text.

¹⁹³ For Sullivan's pro-prosecution rulings, see *People v. Cooper*, 219 A.D.2d 426, 434–35, 643 N.Y.S.2d 532, 537 (App. Div. 1st Dep't 1996); *People v. Elam*, 179 A.D.2d 229, 235–39, 584 N.Y.S.2d 780, 784–86 (App. Div. 1st Dep't 1992) (Sullivan, J., dissenting); *People v. Steinberg*, 170 A.D.2d 50, 76, 573 N.Y.S.2d 965, 981 (App. Div. 1st Dep't 1991); *People v. Enrique*, 165 A.D.2d 13, 22, 566 N.Y.S.2d 201, 207 (App. Div. 1st Dep't 1991); *People v. Campbell*, 160 A.D.2d 363, 365–67, 554 N.Y.S.2d 103, 104–06 (App. Div. 1st Dep't 1990) (Sullivan, J., dissenting); *People v. Bell*, 138 A.D.2d 298, 299–300, 526 N.Y.S.2d 105, 107 (App. Div. 1st Dep't 1988) (Sullivan, J., dissenting in part); *People v. Beavers*, 127 A.D.2d 138, 143, 514 N.Y.S.2d 235, 239 (App. Div. 1st Dep't 1987); *People v. Eldridge*, 103 A.D.2d 470, 474, 480 N.Y.S.2d 481, 484 (App. Div. 1st Dep't 1984); *People v. Duprey*, 98 A.D.2d 110, 116–18, 469 N.Y.S.2d 702, 706–07 (App. Div. 1st Dep't 1983) (Sullivan, J., concurring); *People v. Chestnut*, 69 A.D.2d 41, 49, 418 N.Y.S.2d 390, 394 (App. Div. 1st Dep't 1979); *People v. Allen*, 61 A.D.2d 619, 622, 403 N.Y.S.2d 522, 524 (App. Div. 1st Dep't 1978).

For Sullivan's pro-defendant rulings, see *People v. Cruz*, 149 A.D.2d 151, 163, 545 N.Y.S.2d 561, 568–69 (App. Div. 1st Dep't 1989); *People v. Carrasquillo*, 136 A.D.2d 297, 304, 527 N.Y.S.2d 781, 785 (App. Div. 1st Dep't 1988); *People v. Bagarozzy*, 132 A.D.2d 225, 239, 522 N.Y.S.2d 848, 856 (App. Div. 1st Dep't 1987); *People v. Cable*, 96 A.D.2d 251, 262–63, 468 N.Y.S.2d 470, 477 (App. Div. 1st Dep't 1983); *People v. Alba*, 81 A.D.2d 345, 354–61, 440 N.Y.S.2d 230, 235–40 (App. Div. 1st Dep't 1981) (Sullivan, J., dissenting); *People v. Cuevas*,

In addition, Sullivan was a New York City Democrat; two factors that probably further diminished his chances.¹⁹⁴

A greater surprise came when Pataki passed on Third Department Associate Justice Albert M. Rosenblatt, a Republican who seemed to check virtually every box that Pataki would want. Rosenblatt was a former District Attorney who had amassed a largely pro-prosecution record at both the trial and appellate court levels.¹⁹⁵ Although born in New York City, Rosenblatt had spent his judicial career as an upstate judge, working out of Dutchess County and then Albany County.¹⁹⁶ Still, these factors were not enough for Rosenblatt to earn the nod from Pataki. Nor did Pataki turn to fellow Republicans Guy Struve or G. Robert Wittmer, Jr., both of whom were private law firm partners on the short list.¹⁹⁷ Instead, the Governor turned to the man on the list whom many believed to be the front-runner all along: Richard C. Wesley.¹⁹⁸

It was no secret that Pataki and Wesley were friends.¹⁹⁹ They served together in the New York State Assembly and even roomed together for a period of time.²⁰⁰ Both were champions of conservative causes,²⁰¹ with Wesley successfully advocating for removing an evidentiary rule that commonly blocked prosecutors from convicting individuals accused of child molestation.²⁰² When their careers separated them, Wesley becoming a trial court judge in the seventh judicial district and Pataki moving deeper into the state's political realm, the two men remained close.²⁰³

67 A.D.2d 219, 230, 414 N.Y.S.2d 520, 527 (App. Div. 1st Dep't 1979); *People v. Alvarez*, 65 A.D.2d 146, 155–56, 410 N.Y.S.2d 840, 846 (App. Div. 1st Dep't 1978) (Sullivan, J., concurring); *People v. Candelaria*, 63 A.D.2d 85, 91, 406 N.Y.S.2d 783, 787 (App. Div. 1st Dep't 1978); *People v. Abdul-Malik*, 61 A.D.2d 657, 665, 403 N.Y.S.2d 253, 257–58 (App. Div. 1st Dep't 1978).

¹⁹⁴ Not only was Sullivan from the “wrong” political party, but he also came from a region of the state from which Pataki appeared to distance himself. *See supra* notes 42–45, 51–54 and accompanying text.

¹⁹⁵ *See infra* notes 254–55 and accompanying text (discussing Rosenblatt's criminal law jurisprudence at the trial court and appellate division levels).

¹⁹⁶ *See infra* p. 227.

¹⁹⁷ *7 Are Nominated*, *supra* note 15, at B2.

¹⁹⁸ Dao, *supra* note 15, at A1; Stashenko, *supra* note 179, at B2 (“The two are friends and seem clearly in step philosophically, though Pataki has tried to downplay those similarities since he nominated Wesley last month.”).

¹⁹⁹ *See supra* note 198.

²⁰⁰ Brian Feldman, *Richard Carl Wesley*, in *JUDGES OF THE NEW YORK COURT OF APPEALS*, *supra* note 157, at 926, 929.

²⁰¹ *7 Are Nominated*, *supra* note 15, at B2; Stashenko, *supra* note 179, at B2.

²⁰² Feldman, *supra* note 200, at 929.

²⁰³ *See* William Glaberson, *A Justice Rooted in Small-Town Life and Values: Richard Carl Wesley*, *N.Y. TIMES*, Dec. 4, 1996, at B4 (stating that Wesley and Pataki were friends since

Like Pataki, Wesley often spoke adoringly about his small-town upbringing and about possessing "traditional values."²⁰⁴ Notably, his upbringing in western New York made Wesley the first westerner on the Court of Appeals since Jasen's retirement, and one of just two members on the Court not from New York City.²⁰⁵ He also established himself as someone who favored the use of the death penalty when warranted, declaring on the Assembly floor that the death penalty should be used to punish "animals . . . who have no respect for human dignity";²⁰⁶ remarks that seem to echo Pataki's death penalty position.²⁰⁷

After news of Wesley's appointment broke, one defense attorney said that Wesley was "tough, conservative, and . . . not known to have a great deal of compassion."²⁰⁸ Others who knew him called him "pragmatic."²⁰⁹ The *New York Times* wrote that "[p]eople who know him say he views the world from the perspective of his rural childhood in the 1950's, an outlook that extends to a cautious but strict view of law enforcement."²¹⁰ With fewer than three years of

their days as young members of the Assembly); Editorial, *Mr. Pataki Picks A Judge*, N.Y. TIMES, Dec. 4, 1996, at A28 ("Judge Wesley [was] a longtime friend and ideological soulmate of Mr. Pataki . . .").

²⁰⁴ For example, the following description about Wesley appeared in an article shortly after his nomination:

Their comfortable country home is a few miles from Hemlock, the hamlet in the Finger Lakes region where [Wesley] grew up. In Livonia, friends and family members say, he lives the life of a small-town lawyer, with constant community involvement punctuated by athletics. It is a life, they say, much like the one he knew as a child.

Glaberson, *supra* note 203, at B4. Remarkable similarities exist between this description of Wesley's existence and the lifestyle that Pataki publicized during his first gubernatorial campaign. See *supra* notes 42–45, 51–54 and accompanying text.

²⁰⁵ *7 Are Nominated*, *supra* note 15, at B2. With Simons retiring, Levine was the only other upstate judge on the Court of Appeals at the time of Wesley's appointment. See Pomerance, *supra* note 29, at 211–14, 252–53.

²⁰⁶ Glaberson, *supra* note 203, at B4 (internal quotation marks omitted).

²⁰⁷ See *supra* notes 48, 96–98 and accompanying text. For his part, Pataki claimed that Wesley's views on the death penalty did not particularly sway him toward appointing Wesley to the Court of Appeals. "[Y]ou don't look at a particular issue or a particular vote or a particular decision," the Governor told the media after nominating Wesley. Stashenko, *supra* note 179, at B2 (internal quotation marks omitted). However, other commentators were skeptical of that claim, stating that Wesley's death penalty views were a key factor in his selection. See *Mr. Pataki Picks a Judge*, *supra* note 203, at A28; see also Stashenko, *supra* note 179, at B2 (stating that Pataki and Wesley saw "eye-to-eye" on the death penalty).

²⁰⁸ Glaberson, *supra* note 203, at B4 (internal quotation marks omitted).

²⁰⁹ *Id.* Judge Wesley considered himself "a conservative in nature, pragmatic at the same time, with a fair appreciation of judicial restraint." Dao, *supra* note 15, at A1 (internal quotation marks omitted).

²¹⁰ Glaberson, *supra* note 203, at B4; see also Feldman, *supra* note 200 ("[T]he influence of his rural hometown of Livonia may be discerned in his approach to judging, which, above all else, is founded on the values of common sense and clarity.").

service on the Fourth Department—a position to which Mario Cuomo appointed him—Wesley’s written record in criminal cases was slim.²¹¹ However, what little material existed indicated that he would not “coddle” criminals and his reputation as a trial court judge in the seventh district certainly echoed his outspoken remarks in this regard.²¹² A western New York resident with small-town values, who supported of the death penalty and a tough on crime mentality overall sounded like the ideal pick for the court that Pataki wanted to change.

Wesley’s appointment gave the Court of Appeals a new judge with the following demographic characteristics:

Race: White

Gender: Male

Region: Upstate. Proudly spoke of being from a small-town and soaking in small-town values. First Court of Appeals judge from western New York since 1985.

Political Affiliation: Republican

Predecessor’s Political Affiliation: Republican

Age on Date of Appointment: Forty-seven²¹³

Prior Judicial Experience: Eight years at trial court level (1986 to 1994); a little under three years at the Appellate Division, Fourth Department (1994 to 1997).²¹⁴

Judicial Record in Criminal Cases: Very few published opinions during time at the appellate division. Known at the trial court level for a pro-prosecution stance but this is hard to evaluate due to an overall lack of published opinions from Judge Wesley’s trial court days.²¹⁵

Known “Pet Causes”: Staunchly in favor of the death penalty.

²¹¹ See Feldman, *supra* note 200, at 930–31.

²¹² While Wesley did not have many published opinions in criminal cases at the time of his appointment, the few that existed seemed to show where his sympathies rested. See, e.g., *People v. De Jac*, 219 A.D.2d 102, 106–07, 637 N.Y.S.2d 874, 877 (App. Div. 4th Dep’t 1996) (upholding criminal conviction even though the trial court restricted defendant’s cross-examination of a key witness for the prosecution); *People v. Herner*, 156 Misc. 2d 735, 744–48, 594 N.Y.S.2d 544, 550–53 (Sup. Ct. Monroe Cnty. 1993) (denying defendants’ motions to suppress statements made to police because officers located, arrested, and questioned defendant without a warrant while defendant was illegally residing in another person’s garage and trespassers are not protected by Fourth Amendment safeguards because they have no reasonable expectation of privacy); see also Glaberson, *supra* note 203, at B4 (stating that Wesley is known for his “stern approach to the law” and has been characterized as a “no-nonsense guy”).

²¹³ Glaberson, *supra* note 203, at B4.

²¹⁴ Feldman, *supra* note 200, at 930–31.

²¹⁵ See Glaberson, *supra* note 203, at B4.

2014/2015]

Pataki's "Tough on Crime" Court

221

Strong believer of a no-nonsense approach in his courtroom.²¹⁶ Vigorous promoter of a small-town way of life and keeping traditions intact.²¹⁷ Known as a very good courtroom administrator, including instituting a felony screening program that reduced processing delays in felony cases by sixty percent.²¹⁸

Previous Appearance(s) on Short List: None

Friendship Factors with Governor Pataki: Numerous. Fellow Republican legislators earlier in their careers who roomed together, advocated for similar conservative causes together, and remained close personal friends going forward.

In his first year on the Court of Appeals, Wesley voted for the prosecution in every criminal case that he judged other than those in which the court ruled unanimously for the defense.²¹⁹ Following that year, his pro-prosecution votes lessened somewhat.²²⁰ Still, he remained an extraordinarily reliable voice for the Government in criminal cases, obtaining top honors as the court's most pro-prosecution judge.²²¹ During his entire tenure on the Court of Appeals, Wesley cast his vote in favor of law enforcement interests in eighty-eight percent of divided criminal case decisions.²²² Many of these cases in which Wesley ruled for the prosecution involved key issues about which Pataki had spoken, including the death penalty.²²³ Occasionally, though, particularly after he had served a

²¹⁶ Glaberson, *supra* note 203, at B4.

²¹⁷ *Id.*

²¹⁸ Feldman, *supra* note 200, at 930.

²¹⁹ See VINCENT MARTIN BONVENTRE, NEW YORK COURT OF APPEALS CRIMINAL LAW VOTING AND DECISIONAL PATTERNS: FOCUS ON ROSENBLATT (Nov. 2005), available at http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=0CCIQFjAB&url=http%3A%2F%2Fwww.albanylaw.edu%2Fmedia%2Fuser%2Ffaculty%2Fbonventre-vincent%2FCOA-rosen-present.ppt&ei=-9IBVJT_JdfLsASdiYDgCg&usg=AFQjCNF-kAdY4XaskQJcNwvI5qldBpZggQ&sig2=LIdCtik1ZUgmyXQH_uSAXw&bvm=bv.74115972,d.cWc (displaying chart of judges' voting records before Albert Rosenblatt joined the Court of Appeals and noting on this chart that Wesley never voted for a defendant in a divided criminal case during his first year on the court).

²²⁰ See *id.* (stating that Wesley did vote for the defendant in fifteen percent of divided criminal law cases that he heard during following year).

²²¹ Vincent Martin Bonventre et al., *Richard C. Wesley: Voting and Opinion Patterns on the New York Court*, 66 ALB. L. REV. 1065, 1067 n.11 (2003).

²²² *Id.* at 1067.

²²³ See, e.g., *People v. Robinson*, 97 N.Y.2d 341, 355, 767 N.E.2d 638, 646–47, 741 N.Y.S.2d 147, 155–56 (2001) (allowing police to stop automobiles if they can identify any traffic infraction being committed, even if the stop is really a pretext for police to investigate the driver or passengers for a non-traffic-related offense); *People v. Johnson*, 94 N.Y.2d 600, 616–23, 730 N.E.2d 932, 941–45, 709 N.Y.S.2d 134, 143–47 (2000) (Bellacosa, J., dissenting) (joining Bellacosa in arguing that the Court of Appeals improperly interfered with a trial court's discretion regarding jury selection); *Johnson v. Pataki*, 91 N.Y.2d 214, 228, 691 N.E.2d

couple of years on the Court of Appeals, Wesley's voting took some surprising turns, even authoring the court's opinion in a case that overturned a trial court's death sentence.²²⁴

Despite his overall hard-line stance on criminal cases, Wesley appeared to gain acceptance from his Court of Appeals colleagues rather quickly.²²⁵ Typically, his point of view ended up being the perspective that the court adopted in its decision.²²⁶ During his tenure on the Court of Appeals, he voted with the majority more than eighty percent of the time.²²⁷ Potentially, this could signify Wesley's skills at building consensus among his ideologically varied colleagues.²²⁸ It could also show that Wesley became a leader on the Court of Appeals, moving it in a more Government-friendly direction on criminal cases.²²⁹ Notably, the predictably conservative

1002, 1008, 668 N.Y.S.2d 978, 984 (1997) (determining that Pataki had not exceeded his authority in removing a district attorney who opposed the death penalty from prosecuting a murder case); *People v. Burdo*, 91 N.Y.2d 146, 151–60, 690 N.E.2d 854, 856–62, 667 N.Y.S.2d 970, 972–78 (1997) (Wesley, J., dissenting) (stating that prior interpretations of the right to counsel under the New York State Constitution were overbroad and overprotective of the accused party).

²²⁴ *People v. Harris*, 98 N.Y.2d 452, 473, 496, 779 N.E.2d 705, 710–11, 728, 749 N.Y.S.2d 766, 771–72, 789 (2002) (holding that the trial court could not award the death penalty because the conviction was a result of a unconstitutional statutory scheme that impermissibly encouraged the defendant to waive his Fifth and Sixth Amendment rights to avoid potentially being sentenced to death); *see also* *Attorney Gen. v. Firetog*, 94 N.Y.2d 477, 484–85, 727 N.E.2d 1220, 1224, 706 N.Y.S.2d 666, 670 (2000) (joining Bellacosa's opinion which decided that trial courts could release grand jury minutes to defense attorneys, aiding in the defense's preparations of motions to dismiss); *People v. Owusu*, 93 N.Y.2d 398, 399, 712 N.E.2d 1228, 1229, 690 N.Y.S.2d 863, 863 (1999) (holding that a defendant's teeth did not qualify as a "dangerous instrument" within the meaning of the relevant state law, based on a lengthy examination of the legislative history of the pertinent statute).

²²⁵ This is particularly surprising in light of Pataki's comments about the Court of Appeals protecting criminals. *See supra* notes 1–6 and accompanying text. If the court were as pro-defendant as the Governor alleged, it is unusual that the judges would accept a newcomer who was staunchly pro-prosecution so quickly.

²²⁶ *See* Feldman, *supra* note 200, at 931.

²²⁷ Bonventre et al., *supra* note 221, at 1084.

²²⁸ *Id.* ("Indeed, Judge Wesley's high level of alignment with majority opinions throughout his tenure on the New York Court of Appeals similarly suggests that ideological autonomy has been less compelling for him than other values, such as collegiality." (footnote omitted)); Feldman, *supra* note 200, at 931 ("Judge Wesley quickly emerged as a consensus builder on the Court, owing in large part to his character and his ability to understand his fellow jurists.").

²²⁹ This does not mean that Wesley was the only pro-prosecution judge on the Court of Appeals. As shown earlier, the court had a number of judges at the time of Pataki's election who displayed pro-prosecution sympathies in a significant number of cases. *See supra* Part III. However, the fact that Wesley voted with the majority so often could signal that he was a catalyst for more pro-prosecution decisions, persuading a majority of his colleagues on the bench to join him in these prosecution-friendly holdings. Indeed, Wesley was part of the court's majority in every case where the court's ruling favored the prosecution. Bonventre et al., *supra* note 221, at 1070.

Bellacosa did not vote with the majority nearly as often as Wesley during his time on the court, indicating that Bellacosa could not garner the level of agreement among the other judges that Wesley managed to obtain.²³⁰

Some observers, however, developed an additional hypothesis about Wesley's role on the court. Under their theory, many judges on the court felt chastened after Pataki's public diatribes against their decisions in criminal cases.²³¹ Not long after the most public of these outcries, the previously leftward leaning Court of Appeals abruptly began voting in a more conservative manner, particularly in criminal cases—even though the court's composition had not changed at all.²³² According to some individuals watching this phenomenon, this abrupt shift was a product of certain judges surrendering to Pataki's demands for more pro-prosecution judgments.²³³ By the time Wesley replaced Simons on the bench, the Court of Appeals was already in noticeable motion toward the conservative side of the spectrum.²³⁴ Therefore, under this viewpoint, Wesley merely contributed to the pro-prosecution momentum stimulated by Pataki's remarks, rather than catalyzing this rightward move.

Regardless of the extent of Wesley's leadership and influence, though, the judge evidentially did not feel permanently tethered to the Court of Appeals. In 2003, he severed those ties, resigning from the court and accepting a seat on the United States Court of

²³⁰ Bonventre et al., *supra* note 221, at 1084.

²³¹ See, e.g., STREAMS OF TENDENCY, *supra* note 31, at 3–4; Vincent Martin Bonventre & Amanda Hiller, *Public Law at the New York Court of Appeals: An Update on Developments*, 2000, 64 ALB. L. REV. 1355, 1383 (2001) (“Interestingly, the rightward shift at the court immediately followed the intense ‘court bashing’ by Governor Pataki and other critics. These critics had focused on the court’s criminal case law, suggesting the court was overly-protective of criminals.” (footnote omitted)). This shift in many ways echoed the overall conservative, prosecution-friendly attitude of the United States Supreme Court in decisions during the mid-1990s. See, e.g., CHRISTOPHER E. SMITH, THE REHNQUIST COURT AND CRIMINAL PUNISHMENT 27, 29 (1997) (describing the Supreme Court in the mid-1990s as composed of a majority of “consistently conservative” judges and that even judges like Byron White and Sandra Day O’Connor, both of whom could be proindividual voters in certain brands of civil cases, were generally pro-prosecution conservatives in criminal law decisions).

²³² Bonventre & Hiller, *supra* note 231, at 1383 (“In the 1996-98 period, the court’s public law decisional record dropped to 33% pro-individual. The shift in criminal cases was even more dramatic: the pro-individual rate dropped by half, to 27%—essentially the same record as in Wachtler’s last years.” (footnote omitted)).

²³³ See *supra* note 231.

²³⁴ Bonventre & Hiller, *supra* note 231, at 1383 (“[T]he court took a rightward turn starting in 1996.”). Thus, before Wesley had cast a single vote on the Court of Appeals bench, the court was already favoring prosecutors in criminal cases more frequently than it had since Kaye took over as chief judge.

Appeals for the Second Circuit.²³⁵ To some, leaving New York's highest court for a spot on a federal appellate court represented a "slap in the face" to the state's judiciary.²³⁶ To Pataki, though, it represented something else: the loss of a Republican judge who shared with him a common background and overlapping views about criminal law. This unexpected need to replace Wesley on the Court of Appeals imposed significant challenges on Pataki's tough on crime vision for the court, as discussed in detail below.²³⁷

B. Replacing Judge Vito J. Titone

In November 1998, Pataki convincingly won his gubernatorial reelection bid.²³⁸ Earlier that year, he had received surprising news: Judge Titone, the most defendant-friendly judge on the Court of Appeals, would resign at the year's end.²³⁹ The decision caught many people off guard.²⁴⁰ Titone had a year before his fourteen-year term expired.²⁴¹ Conventional wisdom suggested that he would wait until the election to retire, with the hope that a more liberal governor would win.²⁴² Instead, by retiring early, Titone guaranteed Pataki at least one more Court of Appeals appointment—and one that could shake up the court's ideological balance far more than replacing Simons with Wesley.²⁴³

Of course, Pataki's triumph at the polls made the debate over why Titone chose to retire early a moot point. And just a few days after his election night victory speech, the Governor received the short

²³⁵ Feldman, *supra* note 200, at 934.

²³⁶ See VINCENT M. BONVENTRE, PUBLIC POLICY FORUM: FILLING VACANCIES ON THE NYS COURT OF APPEALS: SELECTION UNDER THE "NONPOLITICAL MERIT" APPOINTMENT SYSTEM 7 (Nov. 29, 2006), available at http://www.rockinst.org/pdf/public_policy_forums/2006-11-29-public_policy_forum_filling_vacancies_on_the_nys_court_of_appeals_selection_under_the_non_political_merit_appointment_system_presented_by_vincent_m_bonventre.pdf [hereinafter FILLING VACANCIES].

²³⁷ See *infra* Part V.E.

²³⁸ Adam Nagourney, *Schumer Uses D'Amato's Tactics to Win Senate Election Handily*, N.Y. TIMES, Nov. 4, 1998, at A1 ("Gov. George E. Pataki, a Republican, won the kind of reelection that would have seemed unthinkable when Mr. Pataki, an unknown state senator from Peekskill in northern Westchester County, defeated Mario M. Cuomo four years ago.").

²³⁹ See Pérez-Peña, *supra* note 126, at B1.

²⁴⁰ See *id.*

²⁴¹ Pomerance, *supra* note 29, at 234.

²⁴² However, Titone said that he wanted to retire immediately, giving himself time to pursue other interests while he was still healthy. Pérez-Peña, *supra* note 126, at B1.

²⁴³ Unlike the retirement of Simons, a conservative, Titone's departure gave Pataki the opportunity to replace the liberal leader of the Court of Appeals with a much more prosecution judge. See *id.*

list from the Commission on Judicial Nomination.²⁴⁴ Joseph Sullivan was present on the list once again.²⁴⁵ Manhattan trial lawyer Guy Struve also returned for the second consecutive short list, as did Second Department justice and former district attorney, Albert Rosenblatt.²⁴⁶ Michael Hutter, a noticeable absence from the previous list, was present on this set of seven Court of Appeals hopefuls.²⁴⁷ Billed by the Albany *Times Union* State Editor John Caher as "an expert in appellate advocacy, as well as a favorite of influential powers in the right wing of the Republican Party,"²⁴⁸ Hutter appeared to be a likely pick for Pataki to make.

Appearing on the list for the first time were two trial court judges from New York County, James A. Yates and George B. Daniels,²⁴⁹ and First Department Associate Justice Richard T. Andrias.²⁵⁰ Given that it was Pataki himself who appointed Andrias to the appellate division in 1996, it seemed as if Andrias could be a stealth candidate for nomination, even though he was a downstate Democrat.²⁵¹ Notably, a number of Andrias's published opinions from his years as a trial court judge upheld pro-prosecution principles that appeared to fit Pataki's own viewpoints.²⁵²

²⁴⁴ John Caher, *Pataki Likely to Pick Conservative for High Court Nominee*, TIMES UNION (Albany, N.Y.), Nov. 13, 1998, at B5 [hereinafter *Pataki Likely to Pick Conservative*].

²⁴⁵ STATE OF N.Y. COMM'N ON JUDICIAL NOMINATION, *supra* note 35, at 4.

²⁴⁶ *Id.*; Anita Womack-Weidner, *Two Court of Appeals Judges Retire*, 2 BENCHMARKS, Fall 2006, at 1, 4.

²⁴⁷ STATE OF N.Y. COMM'N ON JUDICIAL NOMINATION, *supra* note 35, at 4; *see also 7 Are Nominated*, *supra* note 15, at B2 (noting that Hutter's omission from the previous short list was seen as surprising).

²⁴⁸ *Pataki Likely to Pick Conservative*, *supra* note 244, at B5.

²⁴⁹ STATE OF N.Y. COMM'N ON JUDICIAL NOMINATION, *supra* note 35, at 4. Yates, a liberal, was later tapped to become the top counsel to Governor David Paterson. Celeste Katz, *Yates Changes His Mind*, DAILY NEWS (Apr. 23, 2008), <http://www.nydailynews.com/blogs/dailypolitics/yates-mind-blog-entry-1.1670999>. However, he declined the position, choosing to continue his service on the bench. *Id.* Daniels would go on to attain a federal district court judgeship, appointed by President Bill Clinton. *See Biographical Directory of Federal Judges: George B. Daniels*, FED. JUD. CENTER., <http://www.fjc.gov/servlet/nGetInfo?jid=2854&cid=999&ctype=na&instatename=nan> (last visited Nov. 22, 2014).

²⁵⁰ STATE OF N.Y. COMM'N ON JUDICIAL NOMINATION, *supra* note 35, at 4.

²⁵¹ 1 MARK THOMPSON & ELIZABETH SMITH, NEW YORK JUDGE REVIEWS AND COURT DIRECTORY: 2012–2013 EDITION 158 (2012); *Richard T. Andrias*, COURTALEERT, <http://www.courtalert.com/JudgeAndrias.asp> (last visited Nov. 22, 2014).

²⁵² *See, e.g.*, *People v. Polanco*, 158 Misc. 2d 483, 485, 605 N.Y.S.2d 198, 199 (Sup. Ct. New York Cnty. 1993); *People v. Nasbit*, 136 Misc. 2d 605, 611, 519 N.Y.S.2d 84, 88 (Crim. Ct. New York Cnty. 1987); *People v. Kozak*, 128 Misc. 2d 862, 864–65, 490 N.Y.S.2d 993, 995–96 (Crim. Ct. New York Cnty. 1985); *People v. Simmons*, 125 Misc. 2d 118, 124, 479 N.Y.S.2d 135, 139 (Crim. Ct. Bronx Cnty. 1984); *People v. Victor P.*, 120 Misc. 2d 770, 774–75, 466 N.Y.S.2d 572, 575 (Crim. Ct. New York Cnty. 1983); *see also People v. Colon*, 238 A.D.2d 18, 23–27, 667 N.Y.S.2d 692, 695–98 (App. Div. 1st Dep't 1997) (Andrias, J., dissenting) (stating

In the end, though, Pataki settled on Rosenblatt.²⁵³ A former prosecutor,²⁵⁴ Rosenblatt had amassed a largely—although not uniformly—prosecution-friendly record on the Second Department and as a trial judge. Out of twenty-three published criminal cases in which he authored a signed opinion at the trial court and appellate division levels, Rosenblatt sided with the Government in all but four decisions.²⁵⁵ In addition, Rosenblatt brought with him a small-town, upstate background, just like Pataki and Wesley.²⁵⁶ Perhaps most notably for Pataki's purposes, Rosenblatt was at that

that the probative value of expert testimony regarding drug activity outweighed any prejudicial effect to the defendant). *Colon* marked Andrias's only notable published signed opinion on criminal law issues at the time when Pataki was looking to replace Titone. See *Colon*, 238 A.D.2d at 23–27, 667 N.Y.S.2d at 695–98 (Andrias, J., dissenting); Pérez-Peña, *supra* note 126, at B1 (stating that Titone was set to retire on May 28, 1999, but instead decided to resign in June 1998).

²⁵³ Adam Nagourney, *Governor Nominates a Second Judge to the State's Highest Court*, N.Y. TIMES, Dec. 10, 1998, at B10.

²⁵⁴ *Id.* (“Justice Rosenblatt, 62, began his legal career as a prosecutor in Dutchess County in 1964, where he worked until he was elected a county judge in 1975.”).

²⁵⁵ For Rosenblatt's pro-prosecution rulings, see *People v. Marshall*, 228 A.D.2d 15, 18, 653 N.Y.S.2d 604, 606 (App. Div. 2d Dep't 1997); *People v. Neely*, 219 A.D.2d 444, 448, 645 N.Y.S.2d 494, 497 (App. Div. 2d Dep't 1996); *People v. Adessa*, 218 A.D.2d 415, 420, 640 N.Y.S.2d 895, 898 (App. Div. 2d Dep't 1996); *People v. DeFreitas*, 213 A.D.2d 96, 97, 630 N.Y.S.2d 755, 757 (App. Div. 2d Dep't 1995); *People v. Scott*, 206 A.D.2d 392, 395–96, 614 N.Y.S.2d 739, 742 (App. Div. 2d Dep't 1994) (Rosenblatt & Ritter, JJ., dissenting); *People v. Dunn*, 195 A.D.2d 240, 245, 607 N.Y.S.2d 689, 693 (App. Div. 2d Dep't 1994); *People v. Bray*, 154 A.D.2d 692, 694–700, 546 N.Y.S.2d 894, 896–901 (App. Div. 2d Dep't 1990) (Rosenblatt, J., dissenting); *People v. Dickerson*, 153 A.D.2d 897, 900–01, 545 N.Y.S.2d 391, 393–94 (App. Div. 2d Dep't 1989) (Rosenblatt, J., dissenting); *People v. Smith*, 117 Misc. 2d 737, 761–62, 459 N.Y.S.2d 528, 544–45 (Sup. Ct. Dutchess Cnty. 1983); *People ex rel. Harrist v. Dalsheim*, 110 Misc. 2d 734, 735–36, 442 N.Y.S.2d 906, 907 (Sup. Ct. Dutchess Cnty. 1981); *People v. Smith*, 110 Misc. 2d 118, 127, 443 N.Y.S.2d 551, 558 (Cnty. Ct. Dutchess Cnty. 1981); *People v. Gabron*, 103 Misc. 2d 783, 785, 426 N.Y.S.2d 964, 965 (Cnty. Ct. Dutchess Cnty. 1980); *People v. Fentress*, 103 Misc. 2d 179, 198, 425 N.Y.S.2d 485, 497 (Cnty. Ct. Dutchess Cnty. 1980); *People v. Putland*, 102 Misc. 2d 517, 527–28, 423 N.Y.S.2d 999, 1006 (Cnty. Ct. Dutchess Cnty. 1979); *People v. Williams*, 97 Misc. 2d 24, 36, 410 N.Y.S.2d 978, 986 (Cnty. Ct. Dutchess Cnty. 1978); *People v. Davis*, 95 Misc. 2d 1010, 1024–25, 408 N.Y.S.2d 748, 755–56 (Cnty. Ct. Dutchess Cnty. 1978); *People v. Wise*, 94 Misc. 2d 943, 945, 405 N.Y.S.2d 965, 967 (Cnty. Ct. Dutchess Cnty. 1978); *People v. Merfert*, 87 Misc. 2d 803, 805, 386 N.Y.S.2d 559, 560 (Cnty. Ct. Dutchess Cnty. 1976); *People v. La Boy*, 87 Misc. 2d 449, 452–53, 385 N.Y.S.2d 491, 492–93 (Cnty. Ct. Dutchess Cnty. 1976).

For Rosenblatt's pro-defendant rulings, see *People v. Roundtree*, 234 A.D.2d 612, 612–13, 651 N.Y.S.2d 615, 615–16 (App. Div. 2d Dep't 1996) (Rosenblatt & Ritter, JJ., concurring); *People v. Peterkin*, 190 A.D.2d 825, 826–27, 593 N.Y.S.2d 833, 834–35 (App. Div. 2d Dep't 1993) (Rosenblatt, J., dissenting); *In re Tommy C.*, 182 A.D.2d 312, 316, 588 N.Y.S.2d 916, 919 (App. Div. 2d Dep't 1992); *People v. Gonzalez*, 171 A.D.2d 127, 134–41, 575 N.Y.S.2d 75, 79–84 (App. Div. 2d Dep't 1991) (Rosenblatt, J., concurring in part and dissenting in part).

²⁵⁶ See E.R. Shipp, *New Overseer of the Courts: Albert Martin Rosenblatt*, N.Y. TIMES, Mar. 11, 1987, at B3 (stating that even though Rosenblatt was born in New York City in 1936, he moved to Dutchess County in the early 1960s to practice law in a more rural setting and remained in Poughkeepsie ever since).

time the last judge in New York State to impose the death penalty on a defendant, sentencing Lemuel W. Smith to die for killing a corrections officer in 1981.²⁵⁷

However, Rosenblatt also brought with him some characteristics that made him a somewhat surprising choice. To begin with, he was sixty-two years old, meaning that he would face mandatory retirement just eight years into his fourteen-year term.²⁵⁸ Furthermore, although his voting record favored prosecutors overall, Rosenblatt had relatively recently authored some opinions—including two rather pointed dissents—in favor of criminal defendants.²⁵⁹ In the words of Evan Davis, the former counsel to Mario Cuomo, Rosenblatt appeared to be “a middle-of-the-road, traditional, craftsman-type judge.”²⁶⁰ While almost certainly destined to be more prosecution-friendly than Titone, Rosenblatt certainly did not appear to possess the strict “law-and-order” tendencies that Wesley had displayed.²⁶¹

Rosenblatt's appointment provided the Court of Appeals with a judge possessing the following characteristics:

Race: White

Gender: Male

Region: Upstate. While born in the Bronx, Rosenblatt spent virtually all of his professional life as a lawyer and judge in Dutchess County.²⁶²

Political Affiliation: Republican

Predecessor's Political Affiliation: Democrat

Age on Date of Appointment: Sixty-two

Prior Judicial Experience: Five years as a Dutchess County Court

²⁵⁷ Editorial, *Governor Pataki's Wise Choice*, N.Y. TIMES, Dec. 12, 1998, at A20 (“Justice Rosenblatt's imposition of the death penalty in 1983 under provisions of the state's old capital punishment statute no doubt helped him gain favor with Mr. Pataki, an ardent death penalty supporter.”); Nagourney, *supra* note 253, at B10.

²⁵⁸ John Caher, *Senate OKs Nominee for High Court*, TIMES UNION (Albany, N.Y.), Dec. 18, 1998, at B2 [hereinafter *Senate OKs Nominee*].

²⁵⁹ See *Peterkin*, 190 A.D.2d 825 at 826–27, 593 N.Y.S.2d at 834–35 (Rosenblatt, J., dissenting); *Gonzalez*, 171 A.D.2d at 132–41, 575 N.Y.S.2d at 78–84 (Rosenblatt, J., dissenting).

²⁶⁰ Nagourney, *supra* note 253, at B10 (internal quotation marks omitted).

²⁶¹ *Senate OKs Nominee*, *supra* note 258, at B2 (“[E]xperts caution that the Court of Appeals is currently a moderate-to-liberal panel and note that the addition of Rosenblatt will result, at most, in a panel that is moderate-to-conservative.”); *Governor Pataki's Wise Choice*, *supra* note 257, at A20 (“[I]n selecting Justice Rosenblatt as his second appointment to the seven-member bench, Governor Pataki opted for a moderate.”); Nagourney, *supra* note 253, at B10.

²⁶² Nagourney, *supra* note 253, at B10; Shipp, *supra* note 256, at B3.

judge (1975 to 1981), six years as a New York State Supreme Court judge (1981 to 1987), two years as New York State's chief administrative judge (1987 to 1989), and nine years as an associate justice on the Second Department (1989 to 1998).²⁶³

Judicial Record in Criminal Cases: Generally, but not uniformly, pro-prosecution. Most signed opinions favored the Government but a few recent decisions demonstrated a concern for criminal defendants' rights as well. Appeared less predictable overall than Wesley.

Known "Pet Causes": None known

Previously Appearance(s) on Short List: Twice (1993, on the list to replace Judge Stewart F. Hancock, and 1997, on the list to replace Simons).²⁶⁴

"Friendship Factors" with Governor Pataki: No close connections known.

If Pataki sought a second coming of Wesley in appointing Rosenblatt, the Governor likely came away disappointed in his choice. On the whole, Rosenblatt proved to be a "swing vote" on the Court of Appeals, not a lock to vote for either side in a given dispute.²⁶⁵ In criminal cases, the former prosecutor sided with defendants far more often than Pataki probably anticipated and far more often than he had done at the appellate division.²⁶⁶ In fact, studies show that Rosenblatt actually grew more defendant-friendly in his criminal case decisions after he had spent a few years on the court.²⁶⁷ Certainly, he voted for the Government more often than

²⁶³ *Senate OKs Nominee*, *supra* note 258, at B2; Nagourney, *supra* note 253, at B10; *Albert M. Rosenblatt*, MACCABE & MACK, LLP, <http://www.mccm.com/attorneys/counsel/albert-m-rosenblatt/> (last visited Nov. 22, 2014).

²⁶⁴ STATE OF N.Y. COMM'N ON JUDICIAL NOMINATION, *supra* note 35, at 4.

²⁶⁵ *See, e.g.*, John Caher, Defense Bar Considers Rosenblatt the 'Swing' Vote on Criminal Justice Issues, N.Y.L.J., Nov. 28, 2005, at 1 [hereinafter Defense Bar Considers Rosenblatt the 'Swing' Vote]; William Glaberson, *Death Penalty: Court Roster May be Key to Its Future*, N.Y. TIMES, June 26, 2004, at B1 (calling Rosenblatt a swing vote on capital punishment, despite the fact that he had sentenced defendants to death during his years as a trial court judge); Kenneth Lovett, *Picking Gay or Nay — One Judge is Key to Nuptials*, N.Y. POST, Feb. 8, 2005, at 6; Yancey Roy, *A Swing in State's High Court*, TIMES UNION (Albany, N.Y.), Jan. 4, 2005, at B3.

²⁶⁶ *See* Bonventre & Hiller, *supra* note 231, at 1393–94 (evaluating Rosenblatt's record during his first year on the Court of Appeals as being "more liberal" and "sympathetic" to defendants' rights in criminal cases); Defense Bar Considers Rosenblatt the 'Swing' Vote, *supra* note 265, at 16; Vincent Martin Bonventre, *New York Court of Appeals: The Jones Factor in Criminal Cases (Part 2)*, N.Y. COURT WATCHER (Aug. 19, 2008), http://www.newyorkcourtwatcher.com/2008_08_01_archive.html (showing that Rosenblatt voted for the defendant in thirty-seven percent of divided decisions between 2001 and 2006).

²⁶⁷ *See* FILLING VACANCIES, *supra* note 236, at 13 ("I call [Rosenblatt] the non-Pataki

the extremely liberal Titone.²⁶⁸ Yet he definitely did not move the court as far to the political right as liberals feared and conservatives hoped after Titone resigned.²⁶⁹

In the end, though, mandatory retirement cut short Rosenblatt's impact on the Court of Appeals.²⁷⁰ Forced to leave after eight active years on the bench, he went on to pursue a wide range of outside interests, from writing about the history of the Court of Appeals to pursuing an exhaustive study of Sherlock Holmes mysteries.²⁷¹

C. Replacing Judge Joseph W. Bellacosa

If Titone's early resignation was a surprise, then Bellacosa's decision to leave the Court of Appeals soon afterward was downright shocking.²⁷² While Titone was nearing mandatory retirement age, Bellacosa was only sixty-one years old.²⁷³ Had Bellacosa applied for reappointment, one would imagine that Pataki—who had singled out Bellacosa's jurisprudence for public praise on at least one occasion²⁷⁴—would have returned him to the court for another term. Bellacosa was as conservative as Titone was liberal,²⁷⁵ and with Titone now off the court, one reasonably would have expected Bellacosa to seek reappointment and try to gain control over the court's ideological direction.

However, this was not to be. The outspoken Bellacosa decided

judge. It seems that the more he hears that Pataki's mad at him, the more liberal he gets.”).

²⁶⁸ Compare *supra* notes 265–67 and accompanying text (summarizing Rosenblatt's voting record in criminal cases), with *supra* notes 126–30 and accompanying text (summarizing Titone's voting record in criminal cases).

²⁶⁹ Perhaps the biggest blow to Pataki came when Rosenblatt became the pivotal vote in overturning New York State's death penalty law. By writing a separate opinion concurring with George Bundy Smith's opinion in *People v. LaValle*, Rosenblatt provided the tide-turning vote in finding the state's capital punishment statute unconstitutional. See *People v. LaValle*, 3 N.Y.3d 88, 132–33, 817 N.E.2d 341, 368–69, 783 N.Y.S.2d 485, 512–13 (2004) (Rosenblatt, J., concurring). Rosenblatt was the lone Pataki-appointed judge on the Court of Appeals at that time to join George Bundy Smith's opinion. Clearly, Rosenblatt knew that his opinion would be unpopular. “Just as judges should not shrink from carrying out the legislative will, so too should they not shrink from declaring statutes unconstitutional in proper cases, however distasteful *that* may be,” he wrote. *Id.* at 132, 817 N.E.2d at 368, 783 N.Y.S.2d at 512. Still, the judge held firm in this decision, ending his brief opinion with a simple but definite conclusion: “For my part, under constitutional analysis, the Court can come to no other result.” *Id.* at 133, 817 N.E.2d at 369, 783 N.Y.S.2d at 513.

²⁷⁰ Womack-Weidner, *supra* note 246, at 4.

²⁷¹ See *id.*

²⁷² Finder, *supra* note 135, at B9.

²⁷³ *Id.*

²⁷⁴ See *id.*

²⁷⁵ See *supra* notes 134–36 and accompanying text.

that he wanted to return to New York City, hoping to live closer to his extended family members,²⁷⁶ and Pataki was again abruptly left with another Court of Appeals vacancy. Lauding Bellacosa as a judge who wielded “profound wisdom, scholarship, common sense and humor,” Pataki understood the gravity of this appointment.²⁷⁷ If the Court of Appeals were to become a tougher on crime judicial body, a repeat of Rosenblatt would not suffice. While just about any conservative judge (and, indeed, many liberal judges) would have been at least somewhat more prosecution-friendly than Titone, it would take a truly “tough on crime” jurist to match Bellacosa’s prosecution record.

Pataki also received a nontraditional short list from which to make his selection. While most of the previous short lists had a few candidates who were repeats from other lists, this one had only one familiar name: Justice Richard T. Andrias of the First Department, whom Pataki had passed over in appointing Rosenblatt.²⁷⁸ Also, this list marked the first time that two of the seven candidates were judges of the New York State Court of Claims, the forum for civil litigation with monetary damages sought against the State of New York.²⁷⁹ Court of Claims Presiding Judge Susan P. Read, a Republican, and Court of Claims Judge Juanita Bing-Newton, who had previously served as a prosecutor in the Bronx,²⁸⁰ made their first short list appearances with this group of candidates.²⁸¹

Also on the list were private practitioner James C. Moore and two trial court judges, Steven W. Fisher and Stephen G. Crane.²⁸² Fisher’s background, despite being a Democrat from Queens,²⁸³ contained attributes that may have appealed to Pataki. He had served at the Brooklyn District Attorney’s Office for four years.²⁸⁴ From there, after stints in private practice and clerking for the Second Department’s presiding justice, Milton Mollen, he was

²⁷⁶ Finder, *supra* note 135, at B9.

²⁷⁷ *Id.* (internal quotation marks omitted).

²⁷⁸ Kim Martineau, *Pataki Considers List of Seven for Spot on Court of Appeals*, TIMES UNION (Albany, N.Y.), Oct. 5, 2000, at B6; see STATE OF N.Y. COMM’N ON JUDICIAL NOMINATION, *supra* note 35, at 4.

²⁷⁹ See STATE OF N.Y. COMM’N ON JUDICIAL NOMINATION, *supra* note 35, at 5.

²⁸⁰ Martineau, *supra* note 278, at B6.

²⁸¹ See STATE OF N.Y. COMM’N ON JUDICIAL NOMINATION, *supra* note 35, at 5.

²⁸² *Id.*

²⁸³ See James C. McKinley, Jr., *Pataki Puts Nonjudge on the Court of Appeals*, N.Y. TIMES, Nov. 5, 2003, at B5.

²⁸⁴ See *Pioneer in Radio and Esteemed Justice Honored*, BLS LAWNOTES (Summer 2005), at 50.

appointed to the Criminal Court of the City of New York, where he judged criminal cases on a daily basis.²⁸⁵ Criminal law became the bread-and-butter of his legal career, overseeing the creation of specialized criminal courts in Queens—including the Drug Treatment Court, the Integrated Domestic Violence Court, and the Gun Part of the Queens County Supreme Court—and serving as co-chairman of the Committee on Criminal Jury Instructions of the State of New York.²⁸⁶ From his trial court bench, he had issued a number of strongly pro-prosecution decisions.²⁸⁷

Still, nobody could equal the background of Victoria A. Graffeo. Billed by *The New York Times* as “[a] Republican who arrives with solid credentials and no apparent enemies,” Graffeo had amassed an overwhelmingly pro-prosecution record during her years serving on the Appellate Division, Third Department.²⁸⁸ While on the Third Department, she issued a written opinion in fifty-one criminal cases. Out of those fifty-one decisions, all but four favored the prosecution.²⁸⁹ All fifty-one of these signed decisions were the

²⁸⁵ *Id.*

²⁸⁶ *Id.* at 51.

²⁸⁷ *See, e.g.*, *People v. Smelefsky*, 182 Misc. 2d 11, 20–21, 695 N.Y.S.2d 689, 695 (Sup. Ct. Queens Cnty. 1999); *People v. Glaspie*, 170 Misc. 2d 828, 832, 652 N.Y.S.2d 207, 210 (Sup. Ct. Queens Cnty. 1996); *People v. Thompson*, 158 Misc. 2d 397, 410, 601 N.Y.S.2d 418, 426 (Sup. Ct. Queens Cnty. 1993); *People v. Hilton*, 147 Misc. 2d 200, 208, 555 N.Y.S.2d 550, 555 (Sup. Ct. Queens Cnty. 1990); *People v. Williams*, 144 Misc. 2d 688, 695, 545 N.Y.S.2d 457, 462 (Sup. Ct. Kings Cnty. 1989); *People v. Carter*, 134 Misc. 2d 878, 886, 513 N.Y.S.2d 331, 337 (Sup. Ct. Kings Cnty. 1987); *People v. Byrd*, 124 Misc. 2d 987, 991, 478 N.Y.S.2d 542, 545–46 (Crim. Ct. Kings Cnty. 1984).

Importantly, though, Fisher was not uniformly pro-prosecution in his published holdings. Certain published opinions did favor criminal case defendants. *See, e.g.*, *People v. Martinez*, 164 Misc. 2d 314, 319, 624 N.Y.S.2d 783, 786 (Sup. Ct. Queens Cnty. 1995); *People v. Nunez*, 157 Misc. 2d 793, 800, 598 N.Y.S.2d 917, 922 (Sup. Ct. Queens Cnty. 1993); *People v. Manganaro*, 148 Misc. 2d 616, 624–25, 561 N.Y.S.2d 379, 385 (Sup. Ct. Queens Cnty. 1990); *People v. Oliver*, 129 Misc. 2d 432, 437–38, 493 N.Y.S.2d 392, 396 (Crim. Ct. Kings Cnty. 1985).

²⁸⁸ Laura Mansnerus, *A New Judge is Welcomed for Top Court in Albany*, N.Y. TIMES, Nov. 30, 2000, at B5.

²⁸⁹ For Graffeo's pro-prosecution rulings, see *People v. Johnson*, 268 A.D.2d 891, 894, 703 N.Y.S.2d 545, 548 (App. Div. 3d Dep't 2000); *People v. Nichols*, 277 A.D.2d 715, 718, 715 N.Y.S.2d 783, 785–86 (App. Div. 3d Dep't 2000); *People v. Kinred*, 276 A.D.2d 927, 930, 714 N.Y.S.2d 594, 597 (App. Div. 3d Dep't 2000); *People v. Lanahan*, 276 A.D.2d 906, 907–09, 714 N.Y.S.2d 605, 607–09 (App. Div. 3d Dep't 2000); *People v. Denué*, 275 A.D.2d 863, 864, 713 N.Y.S.2d 783, 784 (App. Div. 3d Dep't 2000); *People v. Ebron*, 275 A.D.2d 490, 491–92, 712 N.Y.S.2d 212, 214 (App. Div. 3d Dep't 2000); *People v. Conway*, 274 A.D.2d 663, 665, 711 N.Y.S.2d 210, 211–12 (App. Div. 3d Dep't 2000); *People v. Ray*, 273 A.D.2d 611, 613, 710 N.Y.S.2d 138, 140–41 (App. Div. 3d Dep't 2000); *People v. Rendon*, 273 A.D.2d 616, 619, 709 N.Y.S.2d 698, 701 (App. Div. 3d Dep't 2000); *People v. Spencer*, 272 A.D.2d 682, 686, 708 N.Y.S.2d 488, 492–93 (App. Div. 3d Dep't 2000); *People v. Martinez*, 271 A.D.2d 810, 811, 706 N.Y.S.2d 264, 265–66 (App. Div. 3d Dep't 2000); *People v. Smith*, 271 A.D.2d 752, 753–54, 706

majority opinion of the court, indicating that Graffeo rarely dissented in criminal matters—a factor that may have been important at the time given the increase in unanimous opinions by the Court of Appeals.²⁹⁰

Pataki's potential reasons for appointing Graffeo did not end there. Given that Graffeo lived and worked in the Albany area, her

N.Y.S.2d 737, 738 (App. Div. 3d Dep't 2000); *People v. Heath*, 269 A.D.2d 701, 701–02, 705 N.Y.S.2d 85, 86 (App. Div. 3d Dep't 2000); *People v. Chapple*, 269 A.D.2d 621, 622, 704 N.Y.S.2d 163, 165 (App. Div. 3d Dep't 2000); *People v. Schnackenberg*, 269 A.D.2d 618, 619–20, 704 N.Y.S.2d 161, 163 (App. Div. 3d Dep't 2000); *People v. Johnson*, 277 A.D.2d 702, 707–08, 717 N.Y.S.2d 668, 674 (App. Div. 3d Dep't 2000); *People v. Board*, 268 A.D.2d 795, 797, 702 N.Y.S.2d 201, 203–04 (App. Div. 3d Dep't 2000); *People v. Amadeo*, 268 A.D.2d 672, 673–74, 701 N.Y.S.2d 471, 473–74 (App. Div. 3d Dep't 2000); *People v. Canale*, 268 A.D.2d 699, 701, 704 N.Y.S.2d 151, 153 (App. Div. 3d Dep't 2000); *People v. Govan*, 268 A.D.2d 689, 689–91, 701 N.Y.S.2d 474, 475–76 (App. Div. 3d Dep't 2000); *People v. Williams*, 267 A.D.2d 772, 774, 700 N.Y.S.2d 512, 514 (App. Div. 3d Dep't 1999); *People v. Philbert*, 267 A.D.2d 607, 608–09, 700 N.Y.S.2d 243, 245–46 (App. Div. 3d Dep't 1999); *People v. Stickle*, 267 A.D.2d 604, 607, 700 N.Y.S.2d 248, 251 (App. Div. 3d Dep't 1999); *People v. Grey*, 259 A.D.2d 246, 250, 699 N.Y.S.2d 147, 149–50 (App. Div. 3d Dep't 1999); *People v. Hart*, 266 A.D.2d 584, 585–86, 698 N.Y.S.2d 72, 73–74 (App. Div. 3d Dep't 1999); *People v. Coager*, 266 A.D.2d 645, 647, 698 N.Y.S.2d 349, 350–51 (App. Div. 3d Dep't 1999); *People v. Hart*, 266 A.D.2d 698, 701, 698 N.Y.S.2d 357, 361 (App. Div. 3d Dep't 1999); *People v. Chapin*, 265 A.D.2d 738, 739–40, 697 N.Y.S.2d 713, 714–15 (App. Div. 3d Dep't 1999); *People v. Letendre*, 264 A.D.2d 943, 946, 696 N.Y.S.2d 538, 541 (App. Div. 3d Dep't 1999); *People v. Anonymous*, 262 A.D.2d 717, 718–19, 692 N.Y.S.2d 485, 487 (App. Div. 3d Dep't 1999); *People v. Medina*, 262 A.D.2d 708, 710, 693 N.Y.S.2d 632, 634 (App. Div. 3d Dep't 1999); *People v. Holloway*, 261 A.D.2d 658, 659–60, 691 N.Y.S.2d 583, 584–85 (App. Div. 3d Dep't 1999); *People v. Marrero*, 259 A.D.2d 836, 837, 686 N.Y.S.2d 524, 525 (App. Div. 3d Dep't 1999); *People v. Mettler*, 259 A.D.2d 834, 835, 687 N.Y.S.2d 205, 206 (App. Div. 3d Dep't 1999); *People v. Tyler*, 260 A.D.2d 796, 797–98, 690 N.Y.S.2d 136, 138 (App. Div. 3d Dep't 1999); *People v. Bolarinwa*, 258 A.D.2d 827, 830–32, 687 N.Y.S.2d 442, 446–48 (App. Div. 3d Dep't 1999); *People v. Depta*, 257 A.D.2d 916, 916–17, 682 N.Y.S.2d 648, 649 (App. Div. 3d Dep't 1999); *People v. Duncan*, 256 A.D.2d 1016, 1017, 683 N.Y.S.2d 327, 328–29 (App. Div. 3d Dep't 1998); *People v. Tenace*, 256 A.D.2d 928, 930–31, 682 N.Y.S.2d 279, 281–82 (App. Div. 3d Dep't 1998); *People v. Phillips*, 256 A.D.2d 733, 734–35, 682 N.Y.S.2d 685, 687 (App. Div. 3d Dep't 1998); *People v. Williams*, 256 A.D.2d 661, 662–63, 681 N.Y.S.2d 150, 152 (App. Div. 3d Dep't 1998); *People v. Pochily*, 255 A.D.2d 695, 696–97, 680 N.Y.S.2d 695, 696–97 (App. Div. 3d Dep't 1998); *People v. Geraci*, 254 A.D.2d 522, 523–25, 681 N.Y.S.2d 362, 364–65 (App. Div. 3d Dep't 1998); *People v. Hamilton*, 252 A.D.2d 826, 829, 677 N.Y.S.2d 401, 403–04 (App. Div. 3d Dep't 1998); *People v. Leonard*, 252 A.D.2d 740, 741–42, 677 N.Y.S.2d 639, 641 (App. Div. 3d Dep't 1998); *People v. O'Hanlon*, 252 A.D.2d 670, 672–73, 675 N.Y.S.2d 404, 406–07 (App. Div. 3d Dep't 1998); *People v. Crone*, 251 A.D.2d 889, 890, 674 N.Y.S.2d 836, 836–37 (App. Div. 3d Dep't 1998); *People v. German*, 251 A.D.2d 900, 901–02, 678 N.Y.S.2d 393, 395–96 (App. Div. 3d Dep't 1998); *People v. Jackson*, 251 A.D.2d 820, 822–24, 678 N.Y.S.2d 144, 146–47 (App. Div. 3d Dep't 1998).

For Graffeo's pro-defendant rulings, see *People v. Cataldo*, 260 A.D.2d 662, 664–65, 688 N.Y.S.2d 265, 267 (App. Div. 3d Dep't 1999); *People v. Grey*, 257 A.D.2d 685, 687–88, 683 N.Y.S.2d 627, 628–29 (App. Div. 3d Dep't 1999); *People v. Osgood*, 254 A.D.2d 571, 572–73, 681 N.Y.S.2d 365, 366 (App. Div. 3d Dep't 1998); *People v. Campney*, 252 A.D.2d 734, 735–37, 677 N.Y.S.2d 393, 395–97 (App. Div. 3d Dep't 1998).

²⁹⁰ See *supra* note 124 and accompanying text (stating that the number of unanimous decisions from the Court of Appeals increased during the years when Kaye served as Chief Judge).

selection gave Pataki a third consecutive judge who hailed from someplace outside New York City.²⁹¹ Her upbringing in Guilderland, a quiet suburb of Albany, along with her college years at the State University of New York College at Oneonta, gave her the type of small-town background that Pataki prized in himself.²⁹² She was the third female judge to sit on the Court of Appeals, possibly an answer to individuals who noted that Pataki's first two Court of Appeals picks were white males.²⁹³ Her appointment also kept an Italian-American presence on the Court of Appeals, something that had evaporated with the back-to-back resignations of Titone and Bellacosa.²⁹⁴ At the young age of forty-eight, she was guaranteed to stay on the court for a full fourteen-year term without hitting the mandatory retirement age.²⁹⁵

Perhaps most notably, Pataki already had a deeply established working relationship with Graffeo.²⁹⁶ She had entered state government service in 1982, working in counsel's office for the New York State Division of Alcoholism and Alcohol Abuse.²⁹⁷ Before long, though, she moved on to work as the floor counsel, and then the chief counsel, to the Republican Conference in the Assembly.²⁹⁸ At the time, Pataki was a young assemblyman.²⁹⁹ Early in both of their Assembly tenures, they met one another.³⁰⁰ Then, when

²⁹¹ See Glaberson, *supra* note 203, at B4; Martineau, *supra* note 278, at B6; Shipp, *supra* note 256, at B3.

²⁹² See Raymond Hernandez, *Pataki Selects Judge for Appeals Court He Sees as Lenient*, N.Y. TIMES, Nov. 3, 2000, at B11; Mansnerus, *supra* note 288, at B5; see also *supra* notes 43–45, 51–54 and accompanying text (describing Pataki's pride in having a "small-town" upbringing and his emphasis on that point during his first gubernatorial campaign). Like Rosenblatt, Graffeo was born in a downstate location (Long Island) but spent the bulk of her life and legal career in upstate communities. Hernandez, *supra* note 292, at B11.

²⁹³ Joe Mahoney, *Pataki Picks State Judge*, N.Y. DAILY NEWS, Nov. 3, 2000, at 26; Mansnerus, *supra* note 288, at B5.

²⁹⁴ See Martineau, *supra* note 278, at B6; Victoria A. Graffeo, *Victoria Ann Graffeo, in JUDGES OF THE NEW YORK COURT OF APPEALS*, *supra* note 157, at 966, 968.

²⁹⁵ Hernandez, *supra* note 292, at B11.

²⁹⁶ See *id.* ("Her selection was not considered altogether surprising, particularly since Justice Graffeo is one of Mr. Pataki's political protégés.")

²⁹⁷ Lisa Nicole Viers, *Top-Court Judge and Guilderland Native Honored with State Bar and Trial Lawyers Award*, ALTAMONT ENTERPRISE (Albany, N.Y.), Feb. 6, 2014, at 9. Originally, Graffeo entered college intending to become a social science teacher. *Id.* However, when professors encouraged her to consider a career in the law, she enrolled in Albany Law School. *Id.* After four years in private practice, she shifted to public sector work in 1982, and remained with the New York State government ever since. *Id.*

²⁹⁸ *Id.* ("After 10 years [as floor counsel to the Assembly Republican Conference], she was given the job of chief counsel.")

²⁹⁹ See *supra* note 71 and accompanying text.

³⁰⁰ Mansnerus, *supra* note 288, at B5.

Graffeo rose further to become solicitor general under Dennis Vacco, she joined in a cause that Pataki treasured: defending New York's death penalty statute.³⁰¹

With such a background, it was not surprising that Pataki sparked Graffeo's judicial career by appointing her to the New York State Supreme Court, Third Judicial District, in September 1996.³⁰² Nor was it surprising when Pataki elevated her to the Appellate Division, Third Department, where she would work for only a few years before her appointment to the Court of Appeals.³⁰³ Likewise, it seems reasonable that Pataki would seek someone whom he knew and could trust for this pivotal appointment, rather than appointing someone with whom he had little personal connection—as he had done with Rosenblatt, with surprising results.³⁰⁴

Selecting Graffeo for the Court of Appeals provided the court with a judge who met the following characteristics:

Race: White

Gender: Female

Region: Upstate

Political Affiliation: Republican

Predecessor's Political Affiliation: Independent. Consistently voted as most modern conservative Republicans would vote, particularly in criminal cases.³⁰⁵

Age on Date of Appointment: Forty-eight

Prior Judicial Experience: Just under five years, between time spent as a trial court judge (1996 to 1998) and an associate justice on the Third Department (1998 to 2000).³⁰⁶

Judicial Record in Criminal Cases: Almost uniformly prosecution across fifty-one signed appellate division opinions, none of which were dissents.

Known "Pet Causes": None known.

Previous Appearances on Short List: None

Friendship Factors with Governor Pataki: Several. Worked with Pataki since the mid-1980s, when Pataki was a member of the

³⁰¹ Mahoney, *supra* note 293, at 26. As solicitor general, Graffeo also worked with Vacco to successfully defend New York State's law criminalizing physician-assisted suicide. *Id.*

³⁰² Hernandez, *supra* note 292, at B11.

³⁰³ *See id.*

³⁰⁴ *See supra* notes 265–69 and accompanying text.

³⁰⁵ *See supra* notes 134–38 and accompanying text (describing the voting patterns of two conservative judges, Simons and Bellacosa, in criminal cases).

³⁰⁶ Jeremy A. Cooney, Note, *New York's Court of Appeals: Judge Victoria A. Graffeo: Committed, Conservative, Collegial*, 73 ALB. L. REV. 971, 973–74 (2010).

Assembly and Graffeo served as an attorney for the Republicans in the Assembly. Served as solicitor general in the Pataki administration. Pataki was responsible for appointing Graffeo to judicial posts at the trial court, appellate division, and Court of Appeals levels.

Today, one can reasonably say that Graffeo was everything that Pataki probably hoped she would be on the Court of Appeals. Like Wesley, she sided with the prosecution in every divided criminal case that she faced during her first year on the court.³⁰⁷ Also like Wesley, while her record in criminal cases diversified slightly as the years passed, her overall voting patterns demonstrate a definite pro-prosecution trend.³⁰⁸ Overall, while Graffeo will occasionally side with the liberal members of the court in criminal cases,³⁰⁹ she appears to be almost as predictable a vote for the Government as Bellacosa was before her in criminal law decisions.³¹⁰

Because she replaced a judge who hardly ever ruled against law enforcement interests, Graffeo's jurisprudence did not make the Court of Appeals dramatically more prosecution-friendly than it was previously.³¹¹ However, by appointing Graffeo, Pataki kept the court from moving in a significantly pro-defendant direction after Bellacosa's resignation—no mean feat, considering the homogenous voting record of the departing judge.³¹² Also, true to her appellate

³⁰⁷ Bonventre & Galligan, *supra* note 146, at 1115 (evaluating Graffeo's voting in every divided public law case, both civil and criminal, during her first year on the Court of Appeals, and concluding that she voted against the individual and for the Government every time).

³⁰⁸ See Cooney, *supra* note 306, at 985, 987.

³⁰⁹ However, much like Wesley's Court of Appeals record, Graffeo virtually never will author or join a dissenting opinion in favor of the defendant. See Cooney, *supra* note 306, at 986. It appears that most of the time, when she authors or joins a pro-defendant opinion, she does so for a unanimous or virtually unanimous court. See, e.g., James C. McKinley Jr., *Court Lets Experts Challenge Witnesses' Accuracy in Trials*, N.Y. TIMES, May 9, 2001, at A1 (stating that Graffeo wrote the opinion for a unanimous Court of Appeals holding that trial judges could admit expert testimony on the reliability of eyewitnesses, a major victory for the defense bar in New York State); Cathy Woodruff, *Court Ruling Limits Bus Station Searches*, TIMES UNION (Albany, N.Y.), Jun. 29, 2001, at A1 (stating that Graffeo wrote the pro-defendant opinion of a unanimous Court of Appeals holding that the mere fact a bus's route originated in New York City, a location where drugs exist, did not give police the right to board that bus and search its passengers).

³¹⁰ Cooney, *supra* note 306, at 985 ("[H]er impact and vote on the high court bench has consistently been a reliable conservative vote, essentially always voting pro-prosecution.").

³¹¹ Graffeo also does not provide the hard-line, pro-prosecution dissents for which Bellacosa became famous. See Cooney, *supra* note 306, at 972.

³¹² Indeed, at least one commentator observed that the Court of Appeals moved in a pro-prosecution direction in the year immediately after Graffeo joined the bench. See Yancey Roy, *State's Highest Court Getting Tougher*, TIMES UNION (Albany, N.Y.), Aug. 26, 2001, at E13.

division form, Graffeo rarely writes dissents.³¹³ By joining other opinions, rather than creating separate signed opinions on her own, Graffeo furthered the air of unanimity that seemed absent at the Court of Appeals when she was first appointed.³¹⁴

At the time of this writing, Graffeo was the court's senior judge.³¹⁵ Her fourteen-year term of office is on the doorstep of expiring, and She is seeking reappointment.³¹⁶ Whether current Governor Andrew Cuomo is willing to return such a consistently pro-prosecution judge to the court for another term is still an unanswered question.³¹⁷ If he does not do so, then the resulting vacancy would be as historically significant as Bellacosa's vacancy was fourteen years ago.³¹⁸

D. Replacing Judge Howard A. Levine

In 2002, Judge Levine became another casualty of New York's mandatory retirement age.³¹⁹ With this vacancy, Pataki faced an unusual situation: the loss of a Republican judge, but one who was somewhat more defendant-friendly than Simons or Bellacosa.³²⁰ Despite ultimately voting for the prosecution in most of the cases that he heard on the Court of Appeals,³²¹ Levine did vote several times for defendants in influential decisions, particularly search-and-seizure cases.³²² He was perhaps the most unpredictable voter

³¹³ See *supra* notes 289–90 and accompanying text.

³¹⁴ See *supra* note 124. In an interview around the time that he appointed Graffeo, Pataki himself emphasized his belief that unanimity, or at least strong consensus-building, on the Court of Appeals was very important. See Kim Martineau, *Pataki Nominates Graffeo to Top Court*, TIMES UNION (Albany, N.Y.), Nov. 3, 2000, at A1 (“It’s a collaborative body, and collegiality is an important quality.”).

³¹⁵ See Brandon Vogel, *Court of Appeals Judge Victoria Graffeo Receives State Bar’s Excellence in Public Service Award*, N.Y. STATE BAR ASS’N (Jan. 29, 2014), <http://www.nysba.org/CustomTemplates/SecondaryStandard.aspx?id=46475>.

³¹⁶ John Caher, *NY Court of Appeals Judge to Seek Reappointment*, N.Y.L.J., Apr. 22, 2014, at 1.

³¹⁷ See James M. Odatto, *Cuomo Could Reshape Court*, TIMES UNION (Albany, N.Y.), June 9, 2014, at A3.

³¹⁸ Unlike Bellacosa’s vacancy, however, a potential Graffeo vacancy would be filled by a Democrat, not a conservative Republican. Conceivably, this could signal a substantial ideological shift on the court.

³¹⁹ John Caher, *Self-Described ‘Centrist’ at Court of Appeals Retires*, N.Y.L.J., Dec. 2, 2002, at 1 [hereinafter *Self-Described ‘Centrist’ Retires*].

³²⁰ See *supra* notes 146–47 and accompanying text.

³²¹ STREAMS OF TENDENCY, *supra* note 31, at 5 (noting that while Levine cast most of his votes in favor of the Government, votes favoring defendants were not out of the question in his jurisprudence).

³²² See, e.g., Pomerance, *supra* note 29, at 254 & n.474.

among Mario Cuomo's appointees.³²³ And while Levine was considered an intellectual leader on the Court of Appeals, Pataki probably did not like at least one of the judge's most important cases, *Francois v. Dolan*,³²⁴ in which Levine wrote the court's majority opinion against New York's capital punishment law.³²⁵

With this appointment, therefore, Pataki again had the chance to move the court rightward.³²⁶ This task immediately became tougher, however, when the Commission on Judicial Nomination presented Pataki with an unexpectedly Democrat-heavy short list.³²⁷ Trial court judges Helen E. Freedman, L. Priscilla Hall, and James A. Yates were all Democrats.³²⁸ Although all three had amassed respected judicial records on their respective benches, all three seemed too liberal for Pataki's liking—particularly Freedman, who fought publically with New York City Mayor Rudolph Giuliani about the proper role of a judge.³²⁹ Justice Steven Fisher, a returning face from the previous list, was also a Democrat.³³⁰ Since his appearance on that prior short list, however, Fisher had presided over the trial of John Taylor, who murdered five Wendy's

³²³ See generally Jean D'Alessandro, Note, *Judge Levine: A Survey of His Most Influential Court of Appeals Decisions—1993 to 2002*, 19 *TOURO L. REV.* 451 (2003) (demonstrating the ideological variance throughout many of Levine's most notable signed opinions); see also Self-Described 'Centrist' Retires, *supra* note 319, at 1, 7 (explaining that it is difficult to identify Levine's ideology based on his opinions).

³²⁴ *Francois v. Dolan*, 95 N.Y.2d 33, 731 N.E.2d 614, 709 N.Y.S.2d 898 (2000).

³²⁵ *Id.* at 37, 731 N.E.2d at 616, 709 N.Y.S.2d at 900.

³²⁶ Replacing Levine with a judge whose jurisprudence in criminal cases was more similar to Graffeo or Wesley would enhance the "tough on crime" reputation that Pataki claimed to seek for the Court of Appeals.

³²⁷ See STATE OF N.Y. COMM'N ON JUDICIAL NOMINATION, *supra* note 35, at 5.

³²⁸ John Caher, NY Court of Appeals Candidates Are Named; Commission on Judicial Nomination Submits List of Seven to Pataki, Who Must Decide by Jan. 15, *N.Y.L.J.*, Dec. 3, 2002, at 8 [hereinafter *Court of Appeals Candidates Named*].

³²⁹ Joyce Purnick, *A Polite Reply From a Judge to the Mayor*, *N.Y. TIMES*, Aug. 26, 1996, at B1 (describing the publicized sparring match between Freedman and Giuliani); see *Associate Justice Helen E. Freedman*, APP. DIVISION FIRST JUD. DEP'T SUPREME CT. ST. N.Y., http://www.nycourts.gov/courts/ad1/justicesofthecourt/justices_freedman.shtml (last visited Nov. 22, 2014) (outlining Justice Freedman's experience as a judge and the varying honors she has received); *Hon. L. Priscilla Hall*, APP. DIVISION SECOND JUD. DEP'T, http://www.nycourts.gov/courts/ad2/justice_hall.shtml (last visited Nov. 22, 2014) (outlining Justice Hall's judicial experience, publications, and most important cases); Press Release, Sheldon Silver, Assembly Speaker Sheldon Silver Names Honorable James A. Yates Counsel to the Speaker (Jan. 6, 2011), <http://assembly.state.ny.us/Press/20110106/> (describing Judge Yates' career in law and public service as "distinguished" (internal quotation marks omitted)). That battle began when Giuliani declared to the press that Freedman "has no sense of what it means to be a judge." Purnick, *supra*, at B1.

³³⁰ McKinley, *supra* note 283, at B5.

restaurant employees and was sentenced to death.³³¹ One would imagine that this caught Pataki's attention, given the level of importance that Pataki attached to restoring the death penalty in New York State.

Still, even if Pataki noticed, it was not enough for him to select Fisher, a former district attorney,³³² for the open judgeship. Nor did Pataki choose attorney Guy Miller Struve, appearing for the third time on short lists delivered to Pataki.³³³ From the outside, Fourth Department Presiding Justice Eugene F. Pigott appeared to be the odds-on favorite for the appointment.³³⁴ Like many Pataki appointees, he was a white Republican who came from outside of New York City and had gained respect for his judicial work in the Fourth Department.³³⁵ His record in deciding criminal cases, however, was mixed,³³⁶ certainly not presenting the same tough on crime profile that Graffeo's appellate division record revealed.

Perhaps because of this mixed record, Pataki did not tap Pigott to replace the departing Levine. Instead, he chose Susan P. Read, the presiding justice of the Court of Claims, to fill this vacancy.³³⁷ This pick was largely unanticipated by court watchers in the media.³³⁸ Ironically, the Governor who strove to change the court's criminal justice jurisprudence now had selected a judge who had never sat on a criminal case in her life.³³⁹

Still, she was a jurist whom Pataki knew very well. In 1995, Read left a diverse career in private practice—including an in-house

³³¹ Daniel E. Slotnik, *Justice Steven W. Fisher*, 64, N.Y. TIMES, Jan. 2, 2011, at 22 ("Justice Fisher was the last New York State judge to impose the death penalty, sentencing one of the killers in the Wendy's case, John B. Taylor, to death in 2003."); see STATE OF N.Y. COMM'N ON JUDICIAL NOMINATION, *supra* note 35, at 5.

³³² See *supra* note 284 and accompany text.

³³³ See STATE OF N.Y. COMM'N ON JUDICIAL NOMINATION, *supra* note 35, at 4–5.

³³⁴ Court of Appeals Candidates Named, *supra* note 328, at 8 ("The presiding justice of the Appellate Division, Fourth Department, is widely considered a frontrunner.")

³³⁵ See *id.* (discussing Justice Pigott's background).

³³⁶ See *infra* notes 435–37 (discussing Pigott's background and voting record on criminal cases).

³³⁷ Al Baker, *Pataki to Name Ex-Adviser to State's Highest Court*, N.Y. TIMES, Jan. 7, 2003, at B5.

³³⁸ See *id.* (calling Read a virtual unknown in terms of her philosophical leanings); Court of Appeals Candidates Named, *supra* note 328, at 8 (stating that Pigott was the frontrunner to receive this appointment).

³³⁹ *Senate OKs Judge for Top Court*, TIMES UNION (Albany, N.Y.), Jan. 23, 2003, at B2. This issue arose at Read's confirmation hearing. See *id.* In response to these questions about Read's lack of judicial experience in criminal cases, John DeFrancisco, the Republican Chairperson of the New York State Senate Judiciary Committee, simply responded that judicial candidates "can't be all things to all people and have expertise in all areas." *Id.*

counsel position with General Electric where she worked on litigation regarding toxic waste cleanup in New York State³⁴⁰—to become Pataki's deputy counsel.³⁴¹ For two years, they worked closely together during a rather contentious period in the Governor's tenure.³⁴² Then, in 1999, Pataki designated Read as the presiding judge of the Court of Claims.³⁴³ Evidently, he followed her work on that court closely, telling reporters after her Court of Appeals nomination that he had "read and admired many decisions she had written for the Court of Claims."³⁴⁴ Like all of Pataki's prior selections to the Court of Appeals, Read was a Republican from upstate New York.³⁴⁵ Her appointment also gave the court a majority of female judges for the first time in its history.³⁴⁶

Nobody, though, knew how Read would lean in criminal law decisions.³⁴⁷ Read was not forthcoming with clues either, stating only that her guiding principle in deciding cases was "the observation that technique without morals is a menace and morals without technique is a mess."³⁴⁸ Yet one thing was certain: with the appointment of Read, the Pataki appointees now constituted a majority of the Court of Appeals.³⁴⁹ The man who had so vehemently criticized the court's direction on criminal cases now was the leader responsible for appointing four of the seven judges sitting on its bench.³⁵⁰

Read's appointment gave the Court of Appeals a judge with the following characteristics:

Race: White

Gender: Female

³⁴⁰ Baker, *supra* note 337, at B5.

³⁴¹ *Id.*

³⁴² Dan Janison, *In the Running, but in for the Long Haul?*, NEWSDAY (Sept. 28, 2009), at A17 ("Read was Pataki's deputy counsel during a tension-filled period when Betsy McCaughey was his famously-rebellious lieutenant governor.").

³⁴³ Baker, *supra* note 337, at B5.

³⁴⁴ *Id.* The Governor also said that he had not questioned Read about her views on sensitive legal issues such as abortion, as doing so would be "inappropriate." *Id.*

³⁴⁵ Pomerance, *supra* note 29, at 188 n.20; *Senate OKs Judge for Top Court*, *supra* note 339, at B2. Read was born in Ohio, but at the time of her appointment to the Court of Appeals, she lived in the community of West Sand Lake in New York's upstate Rensselaer County. Susan Phillips Read, *Susan Phillips Read*, in JUDGES OF THE NEW YORK COURT OF APPEALS, *supra* note 157, at 982, 983–84.

³⁴⁶ *Senate OKs Judge for Top Court*, *supra* note 339, at B2.

³⁴⁷ See Baker, *supra* note 337, at B5 ("Though little is known about her philosophy, most analysts said they did not expect her selection to change the court's ideological composition.").

³⁴⁸ *Id.* (internal quotation marks omitted).

³⁴⁹ *Id.*

³⁵⁰ See *id.*

Region: Upstate

Political Affiliation: Republican

Predecessor's Political Affiliation: Republican (but not uniformly conservative in criminal cases).

Age on Date of Appointment: Fifty-five

Prior Judicial Experience: Slightly under four years as presiding justice of the court of claims. Never decided a criminal case.

Judicial Record in Criminal Cases: None. No experience litigating cases as a criminal lawyer, either.

Known "Pet Causes": None known. Most of her work in private practice dealt with commercial torts and environmental regulation.³⁵¹

Previous Appearances on Short List: One (in 2000, for the vacancy that was filled by Graffeo).³⁵²

Friendship Factors with Governor Pataki: Served as Pataki's deputy counsel for two years. Appointed by Pataki as presiding judge of the court of claims.

On the court, Read has proven to be another staunchly pro-prosecution voter, again affirming Pataki's tough on crime goals.³⁵³ In divided criminal cases, she sides with the Government's position as frequently as the prosecution-friendly Graffeo.³⁵⁴ Unlike Graffeo,

³⁵¹ *Id.*

³⁵² STATE OF N.Y. COMM'N ON JUDICIAL NOMINATION, *supra* note 35, at 5.

³⁵³ Last year alone demonstrated Read's consistency as a pro-prosecution voter. Her signed opinions decidedly favored the Government over defendants in criminal cases. *See, e.g.,* *People v. Collier*, 22 N.Y.3d 429, 432–33, 5 N.E.3d 5, 7, 982 N.Y.S.2d 34, 36 (2013); *People v. Howard*, 22 N.Y.3d 388, 403–04, 4 N.E.3d 320, 329, 981 N.Y.S.2d 310, 319 (2013); *People v. Heidgen*, 22 N.Y.3d 259, 285–86, 3 N.E.3d 657, 673, 980 N.Y.S.2d 320, 336 (2013) (Read, J., dissenting); *People v. Brown*, 21 N.Y.3d 739, 749–52, 999 N.E.2d 1168, 1173–76, 977 N.Y.S.2d 723, 728–31 (2013); *People v. Alcide*, 21 N.Y.3d 687, 691, 998 N.E.2d 1056, 1058–59, 976 N.Y.S.2d 432, 434–35 (2013); *People v. Rudolph*, 21 N.Y.3d 497, 511–14, 997 N.E.2d 457, 466–68, 974 N.Y.S.2d 885, 894–96 (2013) (Read, J., dissenting); *People v. Hampton*, 21 N.Y.3d 277, 283–84, 992 N.E.2d 1059, 1063, 970 N.Y.S.2d 716, 720 (2013); *People v. Monk*, 21 N.Y.3d 27, 33, 989 N.E.2d 1, 4, 966 N.Y.S.2d 739, 742 (2013); *People v. Ippolito*, 20 N.Y.3d 615, 624–25, 987 N.E.2d 276, 281, 964 N.Y.S.2d 499, 504 (2013).

However, Read did occasionally issue signed opinions in favor of defendants in 2013. *See* *People v. Kevin W.*, 22 N.Y.3d 287, 297, 3 N.E.3d 1121, 1127, 980 N.Y.S.2d 873, 879 (2013); *People v. Warren*, 20 N.Y.3d 393, 397, 984 N.E.2d 914, 915–16, 960 N.Y.S.2d 716, 717–18 (2013).

This pro-prosecution trend has remained consistent for Read's entire career on the Court of Appeals. Jeremy Cooney outlines a broader view of Read's criminal law jurisprudence. *See* Cooney, *supra* note 306, at 986; *see also* FILLING VACANCIES, *supra* note 236, at 11 (showing Read voting for the prosecution in eighty-five percent of divided criminal cases between 2003 and 2006).

³⁵⁴ *See* Cooney, *supra* note 306, at 986 ("It should be noted that Judge Graffeo and Judge Read often vote together, dependably casting their pro-prosecution votes with or against the Court's majority."); *see also* Sanjeev Devabhakthuni, Note, *How to Win the Read Vote: A*

however, Read dissents often in divided criminal cases, using her dissents to write in favor of law enforcement interests over the interests of the individual.³⁵⁵

With Read joining Wesley and Graffeo on the court, Pataki must have felt a measure of satisfaction. He had taken a court that he considered to be far too liberal and delivered to it three extremely-prosecution-friendly conservatives.³⁵⁶ In a sense, though, it was not that different than the court that he inherited, with the trio of Bellacosa, Simons, and Levine thrilling prosecutors who came before the court.³⁵⁷ However, there was a key difference in this new pro-prosecution trifecta. Bellacosa, Simons, and Levine remained together for several years.³⁵⁸ Given the young ages at which Pataki appointed them, it appeared that Wesley, Graffeo, and Read would do the same. Yet Pataki and the entire State of New York would soon find out that this would never become reality.

E. Replacing Judge Richard Wesley

Just one year after Read's appointment, Wesley announced that he was resigning from the Court of Appeals to accept a federal appointment on the Second Circuit.³⁵⁹ With Wesley's sudden departure, Pataki lost a man who was arguably the Court of Appeals' steadiest pro-prosecution vote.³⁶⁰ In addition, he lost the presence of a close friend and longtime colleague on the court, an individual towards whom Pataki demonstrated tremendous

Profile of the Statutory Interpretation Method of Associate Judge Susan P. Read From a Practical Viewpoint, 73 ALB. L. REV. 993, 994–95 (2010) (noting the frequency with which Read issues dissenting opinions).

³⁵⁵ See Cooney, *supra* note 306, at 986 (“The same trend followed for another Pataki appointment, Judge Susan Read, who in every one of her criminal dissenting opinions, was pro-prosecution.”); Vincent Martin Bonventre, *NY Court of Appeals: Dissents Up With CJ Lippman [and Graphs to Show!]*, N.Y. CT. WATCHER (Aug. 17, 2009), <http://www.newyorkcourtwatcher.com/2009/08/blog-post.html> (demonstrating that Judge Read authored more dissenting opinions and joined more dissenting opinions than Judge Graffeo did in a given year while also noting that Judge Read dissented significantly less during this timeframe than she had in other years).

³⁵⁶ See FILLING VACANCIES, *supra* note 236, at 12 (“In fact, these three, Wesley, Graffeo, and Read, in their entire careers on the New York Court of Appeals have never disagreed with a pro-prosecution decision, not one.”).

³⁵⁷ See *supra* note 149 and accompanying text.

³⁵⁸ The trio formed the “conservative wing” of the court from 1987, the year that Bellacosa was appointed, until January 1997, when Simons retired. STATE OF N.Y. COMM’N ON JUDICIAL NOMINATION, *supra* note 35, at 3–4; see *supra* notes 149, 154 and accompanying text.

³⁵⁹ Feldman, *supra* note 200, at 934.

³⁶⁰ See *supra* notes 219–23 and accompanying text.

respect.³⁶¹ Filling the vacancy created by such an individual would be no easy feat.

Once again, the Commission on Judicial Nomination presented Pataki with a rather unconventional short list. This time, only three of the listed candidates were judges.³⁶² All three were repeats from previous lists.³⁶³ Steven W. Fisher appeared on his third consecutive list, while Freedman and Pigott both made their second list in a row.³⁶⁴ Four aspirants with no judicial experience whatsoever joined them.³⁶⁵ Republican lawyer Guy Miller Struve appeared for the fourth time in five short lists.³⁶⁶ Listed for the first time were Syracuse University College of Law professor, Daan Braveman, a Democrat; Manhattan private practitioner and former Securities and Exchange Commission member Stephen J. Friedman, a Democrat; and Manhattan attorney Robert S. Smith, a Republican.³⁶⁷

Much of the buzz surrounding this list did not focus on who was there but rather on who was missing. From the immediate aftermath of Wesley's announcement until the moment that the short list emerged, pundits hypothesized that the Governor's counsel, James M. McGuire, would be the front-runner for the nomination.³⁶⁸ When the short list came out, however, McGuire was not among the listed seven.³⁶⁹ Pataki did not hide his annoyance over what he considered an oversight by the Commission.³⁷⁰ "It is disappointing," he stated, going on to laud

³⁶¹ See *supra* notes 199–203 and accompanying text.

³⁶² See STATE OF N.Y. COMM'N ON JUDICIAL NOMINATION, *supra* note 35, at 5.

³⁶³ *Id.*

³⁶⁴ *Id.*

³⁶⁵ See *id.*

³⁶⁶ *Id.* at 4–5; McKinley, *supra* note 283, at B5.

³⁶⁷ See STATE OF N.Y. COMM'N ON JUDICIAL NOMINATION, *supra* note 35, at 5; McKinley, *supra* note 283, at B5 (discussing Pataki's choice to nominate Robert S. Smith, who was not a judge, to fill the vacant seat on the New York Court of Appeals); Tom Precious, *Pigott Is Called a Top Choice for State High Court*, BUFF. NEWS, Oct. 16, 2003, at B1 (discussing the list of candidates nominated to fill the vacancy on the New York Court of Appeals, with primary focus on Eugene F. Pigott). Braveman now serves as president of Nazareth College. *Biography of Daan Braveman*, NAZARETH C., <https://www2.naz.edu/about/presidents-office/biography-daan-braveman/> (last visited on Nov. 22, 2014). Friedman would eventually enter the academic realm as well, becoming dean of the Pace School of Law in 2004. *History of Pace Law School*, PACE L., <http://www.law.pace.edu/history-pace-law-school> (last visited on Nov. 22, 2014).

³⁶⁸ See McKinley, *supra* note 283, at B5.

³⁶⁹ *Id.*

³⁷⁰ Precious, *supra* note 367, at B1.

McGuire as an "outstanding lawyer" and a "brilliant individual."³⁷¹ Had McGuire appeared on the list, there seems to be little doubt that Pataki would have chosen him.³⁷²

With McGuire out of the picture, however, the vacancy seemed to be up for grabs. Some commentators suggested that the smart money was on Pigott, due to both his political affiliation and his geographic location.³⁷³ The lack of judges from western New York on the Court of Appeals had provoked recent complaints from attorneys and judges in that region, including former Court of Appeals finalist Justice Samuel L. Green.³⁷⁴ Since Pigott lived in the Buffalo area, belonged to the Republican Party, and often voted for the prosecution in criminal cases, he appeared to be a logical fit.³⁷⁵

Ultimately, Pataki surprised everybody.³⁷⁶ To replace Wesley on the bench, the Governor called on Manhattan trial lawyer Robert S. Smith, astonishing even Court of Appeals insiders with his selection.³⁷⁷ For the second consecutive pick, the Governor who wanted the court to change its voting habits in criminal cases had appointed someone who never judged a single criminal case at trial or on appeal.³⁷⁸ Read was an unexpected choice, but Smith—the first non-judge appointed to the Court of Appeals since Mario Cuomo selected Kaye—was more surprising still.³⁷⁹

Other factors made Smith's selection even more surprising. Smith publically declared that he had mixed views on the death penalty.³⁸⁰ If that did not raise red flags for the pro-capital-

³⁷¹ *Id.* (internal quotation marks omitted).

³⁷² See McKinley, *supra* note 283, at B5. McGuire went on to serve as a justice for the Appellate Division, First Department before leaving the judiciary to engage in complex commercial litigation for Dechert LLP. James M. McGuire, DECHERT LLP, http://www.dechert.com/james_mcguire/ (last visited Nov. 22, 2014).

³⁷³ See Precious, *supra* note 367, at B1.

³⁷⁴ *Id.*

³⁷⁵ For a more detailed discussion of Pigott's background and judicial record, see *infra* Part V.F.

³⁷⁶ See, e.g., McKinley, *supra* note 283, at B5 ("Smith really was the stealth candidate through this whole thing").

³⁷⁷ *Id.*

³⁷⁸ Read was the first such choice. See *supra* note 339 and accompanying text.

³⁷⁹ See Al Baker, *Lawyer, Not Ideologue: Robert Sherlock Smith*, N.Y. TIMES, Nov. 5, 2003, at B5 ("Mr. Smith has never been a judge, so there is no record of his ruling in cases."); McKinley, *supra* note 283, at B5. Pataki publically claimed that he had no concerns about Smith's lack of experience as a judge adversely affecting his performance on the Court of Appeals. Eric Durr, *Pataki Taps NYC Lawyer for State's Top Court*, BUFF. BUS. FIRST (Nov. 4, 2003), <http://www.bizjournals.com/buffalo/stories/2003/11/03/daily16.html>.

³⁸⁰ See Baker, *supra* note 379, at B5.

punishment Pataki, the fact that Smith had successfully argued before the United States Supreme Court in cases that overturned convicted criminals' death sentences likely raised eyebrows in the Governor's office.³⁸¹ Furthermore, Smith came from New York City, a region that Pataki seemed to be avoiding for his Court of Appeals appointments in favor of smaller-town, upstate jurists.³⁸² Although Smith was a registered Republican, he actually spent much of his life as a Democrat.³⁸³ Only after practicing law at the large Manhattan firm of Paul, Weiss, Rifkind, Wharton & Garrison LLP for two decades did Smith change his party allegiance.³⁸⁴

Still, despite these potential warning signals, Pataki expressed full confidence in Smith's ability.³⁸⁵ Some observers questioned whether Smith's personal donations to Republican political campaigns—\$60,000 going to Pataki himself with another \$51,000 going to the New York State Republican Committee over a four-year stretch—was a primary motivation behind Pataki's choice.³⁸⁶ Observers also asked whether the appointment arose partly because Smith was Pataki's primary attorney in a case against a debt repayment plan promoted by New York City Mayor Michael Bloomberg.³⁸⁷ Yet Pataki asserted that he based his selection on legal merits alone.³⁸⁸ One day, he told interviewers, New Yorkers would look back at Smith's appointment and say: "Thank God he is on the Court of Appeals."³⁸⁹

Smith's appointment gave the Court of Appeals a new judge with the following characteristics:

Race: White

Gender: Male

³⁸¹ *Id.*; Durr, *supra* note 379.

³⁸² All of Pataki's four prior Court of Appeals appointees—Wesley, Rosenblatt, Graffeo, and Read—came to the court from upstate New York locations. *See supra* pp. 220, 227, 234, 240.

³⁸³ Baker, *supra* note 379, at B5.

³⁸⁴ *Id.*

³⁸⁵ McKinley, *supra* note 283, at B5; *see Durr supra* note 379.

³⁸⁶ McKinley, *supra* note 283, at B5; James M. Odato, *Lawmakers Sign off on Pataki's Pick*, TIMES UNION (Albany, N.Y.), Jan. 13, 2004, at B3 (noting that Smith's law firm also held a "special counsel" relationship with Pataki, resulting in the state retaining the firm to complete at least \$236,000 worth of legal work for the government).

³⁸⁷ *See Durr, supra* note 379.

³⁸⁸ Pataki claimed that he was completely uninfluenced by Smith's campaign contributions and legal work. In fact, the Governor even claimed that he did not know Smith's political party until after he nominated him for the Court of Appeals. *See id.*; *see also* McKinley, *supra* note 283, at B5 ("Neither party affiliation, nor position on the death penalty, nor other political leanings influenced [Pataki's] choice [of Smith, Pataki] said.")

³⁸⁹ McKinley, *supra* note 283, at B5 (internal quotation marks omitted).

2014/2015]

Pataki's "Tough on Crime" Court

245

Region: Downstate

Political Affiliation: Republican

Predecessor's Political Affiliation: Republican

Age on Date of Appointment: Fifty-nine³⁹⁰

Prior Judicial Experience: None

Judicial Record in Criminal Cases: None. Had successfully litigated cases on a pro bono basis for clients facing the death penalty.

Known "Pet Causes": Member of the conservative Federalist Society.³⁹¹ Legal practice focused on complex litigation ranging from securities cases to federal constitutional challenges.³⁹²

Previous Appearances on Short List: None

Friendship Factors with Governor Pataki: Along with his wife, Dian, Smith donated \$60,000 to Pataki's political war chest between 1999 and 2003 and an additional \$51,000 to the New York State Republican Committee during this same time period. Served as Pataki's chief lawyer in a case fighting a legislative plan promoted by New York City Mayor Michael Bloomberg.

Today, it appears that Pataki's ringing endorsement of Smith's judicial talents was prophetic. Practitioners and scholars alike now praise Smith as one of the finest judges on the present-day Court of Appeals, applauding his insightful questions at oral argument and the depth of his written opinions.³⁹³ One recent newspaper editorial even went as far as to suggest that Smith is the standard by which future Court of Appeals judges should be measured.³⁹⁴ On the whole, it appears that his lack of judicial experience entering the position has not hindered him at all.

For Pataki, however, Smith may have been a disappointment. If Pataki hoped to replace Wesley with another virtually guaranteed vote for the prosecution, he did not receive that from Smith.³⁹⁵

³⁹⁰ *Id.*

³⁹¹ *Id.*

³⁹² Baker, *supra* note 379, at B5; McKinley, *supra* note 283, at B5; Durr, *supra* note 379.

³⁹³ See, e.g., Peter A. Mancuso, Note, *The Independent Jurist: An Analysis of Judge Robert S. Smith's Dissenting Opinions*, 73 ALB. L. REV. 1019, 1021–22 (2010) ("[H]e has emerged as the court's most vigorous questioner from the bench as well as the most independent."); Nathaniel Marmur, *Judge Robert Smith's Fresh Look at Hearsay*, N.Y.L.J., Sept. 2, 2014, at 6 ("When Associate Judge Robert S. Smith of the New York Court of Appeals retires at the end of 2014, the court will lose a truly independent voice."); Yancey Roy, *Top Court's Judge Smith Works Outside the Box*, DEMOCRAT & CHRON. (Rochester, N.Y.), Dec. 27, 2005, at B1.

³⁹⁴ See Seth Lipsky, *How to Fill Judge Smith's Big Shoes*, N.Y. POST, June 26, 2014, at 29.

³⁹⁵ See, e.g., Mancuso, *supra* note 393, at 1054 ("[Smith's dissenting] opinions—especially finding in favor of a criminal defendant based on a statutory 'technicality'—are

Instead, Smith quickly evolved into one of the court's "swing voters," particularly in criminal cases.³⁹⁶ While he votes for the prosecution

uncharacteristic of a typically conservative Republican judge, and are quite telling about Judge Smith's reverence to the law.").

³⁹⁶ Consider, for example, this substantial sampling of Smith's signed opinions in criminal cases between 2006 and 2010:

For Smith's pro-prosecution rulings during this time period, see *People v. Hecker*, 15 N.Y.3d 625, 667–68, 942 N.E.2d 248, 275–76, 917 N.Y.S.2d 39, 66–67 (2010) (Smith, J., dissenting); *People v. Reome*, 15 N.Y.3d 188, 190, 933 N.E.2d 186, 187, 906 N.Y.S.2d 788, 789 (2010); *People v. Dreyden*, 15 N.Y.3d 100, 104–05, 931 N.E.2d 526, 528–29, 905 N.Y.S.2d 542, 544–45 (2010) (Smith, J., dissenting); *People v. McLean*, 15 N.Y.3d 117, 122, 931 N.E.2d 520, 523, 905 N.Y.S.2d 536, 539 (2010); *People v. Contreras*, 12 N.Y.3d 268, 270, 907 N.E.2d 282, 283, 879 N.Y.S.2d 369, 370 (2009); *People v. Caban*, 14 N.Y.3d 369, 372, 927 N.E.2d 1050, 1051, 901 N.Y.S.2d 566, 567 (2010); *People v. Sanchez*, 13 N.Y.3d 554, 567–68, 921 N.E.2d 570, 578, 893 N.Y.S.2d 803, 811 (2009) (Smith, J., concurring); *People v. Simms*, 13 N.Y.3d 867, 871–72, 921 N.E.2d 582, 584–85, 893 N.Y.S.2d 815, 817–18 (2009) (Smith, J., concurring); *People v. Samandarov*, 13 N.Y.3d 433, 436, 920 N.E.2d 930, 931, 892 N.Y.S.2d 823, 824 (2009); *People v. Arafet*, 13 N.Y.3d 460, 468, 920 N.E.2d 919, 924, 892 N.Y.S.2d 812, 817 (2009); *People v. Weaver*, 12 N.Y.3d 433, 451, 909 N.E.2d 1195, 1206, 882 N.Y.S.2d 357, 368 (2009) (Smith, J., dissenting); *People v. Boyd*, 12 N.Y.3d 390, 395, 908 N.E.2d 898, 901, 880 N.Y.S.2d 908, 911 (2009) (Smith, J., dissenting); *People v. Knox*, 12 N.Y.3d 60, 65, 903 N.E.2d 1149, 1151, 875 N.Y.S.2d 828, 830 (2009); *People v. Johnson*, 11 N.Y.3d 416, 422, 900 N.E.2d 930, 934, 872 N.Y.S.2d 379, 383 (2008); *People v. Hall*, 10 N.Y.3d 303, 322, 886 N.E.2d 162, 176, 856 N.Y.S.2d 540, 554 (2008) (Smith, J., dissenting); *Polito v. Walsh*, 8 N.Y.3d 683, 685, 871 N.E.2d 537, 538, 840 N.Y.S.2d 1, 2 (2007); *People v. Cuadrado*, 9 N.Y.3d 362, 365–66, 880 N.E.2d 861, 862–63, 850 N.Y.S.2d 375, 376–77 (2007); *People v. Greene*, 9 N.Y.3d 277, 280, 879 N.E.2d 1280, 1281, 849 N.Y.S.2d 461, 462 (2007); *People v. Jackson*, 8 N.Y.3d 869, 871, 864 N.E.2d 607, 609, 832 N.Y.S.2d 477, 479 (2007) (Smith, J., concurring); *People v. Tzitzikalakis*, 8 N.Y.3d 217, 225, 864 N.E.2d 44, 49, 832 N.Y.S.2d 120, 125 (2007) (Smith, J., dissenting); *People v. Gillian*, 8 N.Y.3d 85, 89, 861 N.E.2d 92, 94, 828 N.Y.S.2d 277, 279 (2006) (Smith, J., concurring); *People v. Leon*, 7 N.Y.3d 109, 111, 850 N.E.2d 666, 667, 817 N.Y.S.2d 619, 620 (2006); *People v. Young*, 7 N.Y.3d 40, 42, 46, 850 N.E.2d 623, 624, 627, 817 N.Y.S.2d 576, 577, 580 (2006); *People v. Wardlaw*, 6 N.Y.3d 556, 558, 849 N.E.2d 258, 258, 816 N.Y.S.2d 399, 399 (2006); *People v. Boyer*, 6 N.Y.3d 427, 434, 846 N.E.2d 461, 465, 813 N.Y.S.2d 31, 35 (2006) (Smith, J., dissenting); *People v. Moore*, 6 N.Y.3d 496, 501, 847 N.E.2d 1141, 1144, 814 N.Y.S.2d 567, 570–71 (2006) (Smith, J., dissenting).

For Smith's pro-defense rulings during this time period, see *People v. McKinnon*, 15 N.Y.3d 311, 313, 937 N.E.2d 524, 524, 910 N.Y.S.2d 767, 767 (2010); *People v. Konstantinides*, 14 N.Y.3d 1, 15–16, 923 N.E.2d 567, 576, 896 N.Y.S.2d 284, 293 (2009) (Smith, J., dissenting); *People v. Hunter*, 11 N.Y.3d 1, 1, 892 N.E.2d 365, 366, 862 N.Y.S.2d 301, 302 (2008); *People v. Taylor*, 9 N.Y.3d 129, 156, 878 N.E.2d 969, 984, 848 N.Y.S.2d 554, 569 (2007) (Smith, J., concurring); *In re Victor M.*, 9 N.Y.3d 84, 86, 876 N.E.2d 1187, 1188, 845 N.Y.S.2d 771, 772 (2007); *People v. Kozlow*, 8 N.Y.3d 554, 561, 870 N.E.2d 118, 122, 838 N.Y.S.2d 800, 804 (2007) (Smith, J., dissenting); *People v. Rowland*, 8 N.Y.3d 342, 345, 865 N.E.2d 1224, 1226–27, 834 N.Y.S.2d 58, 61 (2007); *People v. Grant*, 7 N.Y.3d 421, 426, 857 N.E.2d 52, 55–56, 823 N.Y.S.2d 757, 760–61 (2006) (Smith, J., dissenting); *People v. Diaz*, 7 N.Y.3d 831, 832, 857 N.E.2d 47, 48, 823 N.Y.S.2d 752, 753 (2006) (Smith, J., dissenting); *People v. Conway*, 6 N.Y.3d 869, 873, 849 N.E.2d 954, 957, 816 N.Y.S.2d 731, 734 (2006) (Smith, J., dissenting).

Certainly, such a record would not make anyone mistake Smith for Titone or Ciparick. Smith votes for the prosecution in the majority of cases that he hears. On the other hand, the number of pro-defendant opinions—including some extremely strong dissents favoring the rights of the accused—separates Smith from the likes of Wesley and Graffeo. Of the judges examined in this article, Smith's prosecution-defense balance seems most similar to less-predictable jurists, such as Rosenblatt, *see supra* notes 265–69 and accompanying text, and

more than the defendant in criminal matters, his significant number of dissenting opinions favoring defendants demonstrates a lack of uniformity or predictability in his decision making.³⁹⁷

The same could not be said for Wesley, whose definitively pro-prosecution record is already discussed above.³⁹⁸ Thus, by appointing Smith to the court, Pataki actually moved the Court of Appeals in a moderately pro-defendant direction.³⁹⁹ In Smith, the Governor correctly identified a judge upon whom many judicial commentators would ultimately lavish praise. However, in his search for a Court of Appeals that was tough on crime, the appointment of Smith was a noticeable blow. With Wesley gone, the Court of Appeals lost a key component of its conservative wing. For the remainder of Pataki's term, and beyond, the outcomes of criminal cases in which Wesley almost certainly would have cast a pro-prosecution vote remained very much in doubt with Robert Smith sitting on the bench.

F. Replacing Judge George Bundy Smith

On July 27, 2005, Pataki announced that he would not seek a fourth term in the Governor's Mansion.⁴⁰⁰ Perhaps his decision stemmed from the fact that polls showed him trailing the likely Democratic nominee, Eliot Spitzer.⁴⁰¹ Perhaps he had learned from defeating Mario Cuomo that it is difficult to attract the majority of a state's voters for four consecutive elections, or perhaps he wanted to explore a potential run for President of the United States, a notion

Pigott, *see infra* notes 456–62 and accompanying text.

³⁹⁷ See Mancuso, *supra* note 393, at 1077–78 (explaining Smith's plain meaning interpretation of criminal statutes as logical and wise, but uncommon); Lipsky, *supra* note 494, at 29 (discussing Smith's unprecedented approach to gay marriage); Vincent Martin Bonventre, *Court of Appeals: Centrists Smith & Pigott—Independent & Contrarian, with Each Other & the Majority*, N.Y. CT. WATCHER (Mar. 27, 2009), <http://www.newyorkcourtwatcher.com/2009/03/court-of-appeals-centrists-smith-pigott.html> [hereinafter *Centrists Smith & Pigott*] (describing Smith as an independent centrist whose vote cannot be predicted by previous voting records, ideology, or affiliation with other judges).

³⁹⁸ See *supra* notes 219–23 and accompanying text.

³⁹⁹ Again, Smith is hardly a defendant-friendly liberal. Compared with his predecessor, however, his voting in criminal cases is considerably less predictable. Compare *supra* notes 219–23 and accompanying text (establishing Wesley as pro-prosecution), with *supra* note 396 and accompanying text (establishing Smith as moderately pro-defendant).

⁴⁰⁰ Michael Powell, *Pataki Says He Won't Seek Fourth Term as N.Y. Governor*, WASH. POST, July, 28, 2005, at A2; see *Gov. Pataki Won't Seek Fourth Term*, USA TODAY, July 28, 2005, at 3A.

⁴⁰¹ Powell, *supra* note 400, at A2.

that he did not rule out.⁴⁰² Whatever the reasons, the citizens of New York knew a year and a half before the next election that the incumbent Governor would not return to office.⁴⁰³

On the Court of Appeals, though, Pataki had one more opportunity to leave an impact before the curtain fell on his final term. George Bundy Smith would complete his fourteen years on the court in September 2006, giving the Governor the chance to make a last appointment just weeks before leaving office.⁴⁰⁴

Smith's departure offered Pataki a golden opportunity to shift the court in a significantly more prosecution-friendly direction.⁴⁰⁵ Although he was a moderate "swing voter" on criminal cases when Pataki arrived in Albany, Smith had evolved into perhaps the most liberal judge on the entire court, taking up the mantle left behind by Titone's retirement.⁴⁰⁶ The downstate Democrat's criminal case decisions became increasingly pro-defendant through the years, often lambasting law enforcement officials when they breached federal and state constitutional protections of individuals accused of committing crimes.⁴⁰⁷ He also became the court's most outspoken opponent of the death penalty.⁴⁰⁸ In 2004, it was Smith's opinion that spoke for the court's majority in striking down New York's death penalty statute based on defects in its sentencing provisions.⁴⁰⁹ If Pataki wanted the Court of Appeals to favor the Government over individual defendants in criminal cases, Smith—although deeply respected by his colleagues on both sides of the political aisle—would appear to be a welcome departure for the Governor.⁴¹⁰

⁴⁰² Michael Cooper & Patrick D. Healy, *Pataki Won't Run for a 4th Term, Confidants Say*, N.Y. TIMES, July 27, 2005, at A1; Marc Humbert, *Pataki in his Final Term?*, TIMES UNION (Albany, N.Y.), July 27, 2005, at A1; Powell, *supra* note 400, at A2.

⁴⁰³ See Powell, *supra* note 400, at A2.

⁴⁰⁴ See Celeste Katz, *Judgment Day Approaches for George Bundy Smith*, DAILY NEWS (Aug. 18, 2006), <http://www.nydailynews.com/blogs/dailypolitics/judgement-day-approaches-george-bundy-smith-blog-entry-1.1668978>.

⁴⁰⁵ Pérez-Peña, *supra* note 15, at B7 ("Mr. Pataki will have a chance to put his stamp more firmly on the court in September, with the expiration of Judge George Bundy Smith's 14-year term.").

⁴⁰⁶ See *supra* note 139 and accompanying text.

⁴⁰⁷ See *supra* notes 139–42 and accompanying text.

⁴⁰⁸ See FILLING VACANCIES, *supra* note 236, at 6 ("[Smith] was the most liberal member of the court in criminal cases and, certainly, regarding the death penalty, he always voted against it.").

⁴⁰⁹ *People v. LaValle*, 3 N.Y.3d 88, 130–32, 817 N.E.2d 341, 367–68, 783 N.Y.S.2d 485, 511–512 (2004).

⁴¹⁰ See Michael Cooper, *A Place on the Bench Puts Pataki on the Spot*, N.Y. TIMES, June 21, 2006, at B1.

Yet there was a problem. When the short list of candidates to fill Smith's vacancy came out, one of the listed individuals was George Bundy Smith himself.⁴¹¹ Even though he was sixty-nine years old, and thus could serve on the Court for only one more year before facing mandatory retirement, Smith wanted Pataki to reappoint him to the bench.⁴¹² Plenty of political and judicial leaders loudly supported Smith's candidacy. United States Representative Charles B. Rangel, former New York City Mayor David Dinkins, The Fund for Modern Courts Chairman Victor Kovner, and even a group of retired Court of Appeals judges—including two Republicans—all publically campaigned for Pataki to reappoint Smith.⁴¹³ Since Smith was the only African-American judge sitting on the Court of Appeals, several African-American advocacy groups, including the powerful National Association for the Advancement of Colored People and the Union League, also vigorously petitioned Pataki to keep Smith on the court.⁴¹⁴

This was the first time that Pataki faced significant external pressure to appoint a particular candidate to the Court of Appeals.⁴¹⁵ His choice was an unpleasant one: reappoint Smith, and placate what appeared to be the majority of the people on both sides of the political spectrum, or appoint a new judge, angering the public but hopefully moving the court in a more pro-prosecution direction.

Recent history would not be on his side if he chose the latter option. At the end of 1981, Governor Hugh Carey had faced a similar quandary when the fourteen-year term of Judge Matthew J. Jasen came to an end.⁴¹⁶ Carey was a liberal Democrat from

⁴¹¹ STATE OF N.Y. COMM'N ON JUDICIAL NOMINATION, *supra* note 35, at 5.

⁴¹² See Cooper, *supra* note 410, at B1; Pérez-Peña, *supra* note 15, at B7 ("Judge Smith, a Cuomo appointee and the court's only black judge, is hoping to be reappointed.")

⁴¹³ See, e.g., Pomerance, *supra* note 29, at 236, 252–53 (2014); John Caher, As Pataki Ponders Smith Reappointment, Foes Attempt to Paint Portrait of 'Liberal', N.Y.L.J., July 14, 2006, at 1; Cooper, *supra* note 410, at B1; Katz, *supra* note 404; Editorial, *Take Politics Out of Courts*, NEWSDAY, Aug. 2, 2006, at A32; Elizabeth Benjamin, *Judicial Trivia*, CAPITOL CONFIDENTIAL (July 24, 2006), <http://blog.timesunion.com/capitol/archives/1713/judicial-trivia/>.

⁴¹⁴ See Cooper, *supra* note 410, at B1; Fredric U. Dicker, *Race' Furor on Gov's Court Pick*, N.Y. POST, Aug. 19, 2006, at 2; Katz, *supra* note 404; Yancey Roy, *More Pressure for Smith Re-Appointment*, POLITICS ON THE HUDSON (July 24, 2006), <http://polhudson.lohudblogs.com/2006/07/24/more-pressure-for-smith-re-appointment/>.

⁴¹⁵ While commentators expressed surprise about some of Pataki's prior selections, such as Read and Robert Smith, none of Pataki's previous picks engendered such a widespread and emotional response from the public.

⁴¹⁶ See *Take Politics Out of Courts*, *supra* note 413, at A32.

Brooklyn.⁴¹⁷ Jasen, while a Democrat himself, tended to be considerably more conservative than Carey, particularly on criminal justice matters.⁴¹⁸ Carey thus held the power to appoint a more liberal judge to the bench, moving the court closer to his own political leanings.⁴¹⁹ Indeed, it would seem politically sensible to do so, as Jasen's age would force him into mandatory retirement within just a few years if he were reappointed, creating a quick vacancy that a different governor could then fill.⁴²⁰ However, Carey reappointed him anyway, allowing Jasen to remain on the bench until his seventieth birthday even though their views on certain issues were significantly different.⁴²¹

Complicating Pataki's decision further was the short list he received from the Commission on Judicial Nomination. Top to bottom, this list represented, arguably, the deepest talent pool of Court of Appeals candidates that a New York State governor had ever seen. For the first time in history, every listed individual was a judge at the appellate division level or higher.⁴²² Beyond Smith, whose reappointment bid took one of the seven slots, returning from prior lists were Fisher, Andrias, and Pigott.⁴²³ New to the list was A. Gail Prudenti, the presiding justice of the Second Department, an influential Republican who had previously served as an assistant district attorney in Suffolk County and who was appointed to her Second Department post by Pataki.⁴²⁴ Also appearing on the list for the first time were Republicans James M. Catterson of the First

⁴¹⁷ Richard Pérez-Peña, *Hugh L. Carey, 1919–2011: Governor Who Staved Off Bankruptcy*, N.Y. TIMES, Aug. 8, 2011, at A1.

⁴¹⁸ See 152 CONG. REC. 1769 (2006) (statement of Rep. Higgins) (identifying Jasen as a conservative Democrat and free thinker); see *Take Politics Out of Courts*, *supra* note 413, at A32; see also Lawrence H. Cooke, *Sketches of the Judges on State's Court of Appeals*, N.Y. TIMES, Nov. 7, 1982, at 54 (describing Jasen as a member of the court's conservative wing on criminal justice issues).

⁴¹⁹ See *Take Politics Out of Courts*, *supra* note 413, at A32.

⁴²⁰ *Second Term Recommended*, NASHUA TELEGRAPH (Hudson, N.H.), Oct. 22, 1981, at 41 (pointing out that Jasen, if reappointed, could fill only five years out of the fourteen-year term).

⁴²¹ *Take Politics Out of Courts*, *supra* note 413, at A32.

⁴²² See STATE OF N.Y. COMM'N ON JUDICIAL NOMINATION, *supra* note 35, at 1–5; Benjamin L. Loeffke, Note, *The Pert Perpender: Associate Judge Eugene F. Pigott, Jr.'s Journey from Buffalo to Rochester and Albany*, 73 ALB. L. REV. 1081, 1087 (2010).

⁴²³ See STATE OF N.Y. COMM'N ON JUDICIAL NOMINATION, *supra* note 35, at 5.

⁴²⁴ See *id.* at 1–5; John Caher, Prudenti Named Chief Administrative Judge, N.Y.L.J., Oct. 21, 2011, at 1; *Chief Administrative Judge A. Gail Prudenti*, NYCOURTS.GOV, http://www.nycourts.gov/admin/directory/prudenti_gail.shtml (last updated Nov. 18, 2013). Prudenti would go on to become the Chief Administrative Judge of the Court of New York State. Caher, *supra*, at 1.

Department, a Pataki appointee who had worked previously as a federal prosecutor,⁴²⁵ and Thomas E. Mercure of the Third Department, a former district attorney in New York's upstate Washington County who had served on the Third Department bench since 1988.⁴²⁶ Certainly, if Pataki wanted to choose someone other than Smith, he had rich options from which to pick.

And in the end, that is what Pataki did. On August 19, the Governor announced that he had bucked the tide of popular opinion by appointing Pigott, not Smith, to fill the vacant seat.⁴²⁷ As expected, several leaders throughout the state, including Attorney General Eliot Spitzer, heavily criticized Pataki for this decision.⁴²⁸ The fact that the court's racial composition was now exclusively white particularly angered many New Yorkers.⁴²⁹ "Under the guise of merit selection," wrote William C. Thompson, an African-American and a retired appellate division justice, "Mr. Pataki has effectively eliminated African-American and Hispanic judges from the appointive judiciary."⁴³⁰ Dinkins was similarly upset. "To think that in this state, with the enormous minority population that we have, that of those seven jurists there's not one of color—I'm saddened," the former New York City mayor told the press.⁴³¹

Beyond this furor, however, additional curiosities arose over Pataki's pick. The Governor stated that he declined to reappoint Smith primarily because Smith's mandatory retirement age was drawing near, and Pataki wanted his final Court of Appeals

⁴²⁵ See STATE OF N.Y. COMM'N ON JUDICIAL NOMINATION, *supra* note 35, at 1–5; Sam Roberts, *Pataki Goes Far Afield to Find Political Allies for the City Appellate Bench*, N.Y. TIMES, Dec. 9, 2006, at B1; Daniel Wise, *Pataki Picks Three for Appellate Courts: Two Appointees Chosen for the First Department and One Assigned to the Second*, N.Y.L.J., May 3, 2004, at 1; *James M. Catterson*, KAYE SCHOLER, http://www.kayescholer.com/professional/s/catterson_james (last visited Nov. 22, 2014). Catterson now serves as Special Counsel to the Complex Commercial Litigation Department at Kaye Scholer LLP. *James M. Catterson, supra*.

⁴²⁶ See STATE OF N.Y. COMM'N ON JUDICIAL NOMINATION, *supra* note 35, at 1–5; *Mercure Seeks Re-Election to Court*, SARATOGIAN, Sept. 6, 2009, at 2A (stating that at that point in his career, Mercure had cast a vote in more than 20,000 appeals); Press Release, N.Y. State Unified Court Sys., *New Administrative Judges Named in New York City, Nassau County and the Third District* (Jan. 18, 2013), http://www.nycourts.gov/press/PR13_01.pdf.

⁴²⁷ Elizabeth Benjamin, *Pataki Opts for a New Judge*, TIMES UNION (Albany, N.Y.), Aug. 19, 2006, at A1; Michael Cooper, *With New Pick, Pataki Puts Mark on Highest Court*, N.Y. TIMES, Aug. 19, 2006, at A1.

⁴²⁸ See Benjamin, *supra* note 427, at A1; Cooper, *supra* note 427, at A1.

⁴²⁹ See Benjamin, *supra* note 427, at A1; Cooper, *supra* note 427, at A1.

⁴³⁰ Cooper, *supra* note 427, at A1 (quoting William C. Thompson, *Poor Record on Naming Minorities to the Bench*, N.Y.L.J., June 17, 2005, at 17) (internal quotation marks omitted).

⁴³¹ Cooper, *supra* note 427, at A1 (internal quotation marks omitted).

appointment to have a “long-term impact.”⁴³² However, in appointing Pigott, Pataki selected a judge who did not appear to fit the uniformly pro-prosecution model of Wesley or Graffeo.⁴³³ To begin with, as a trial lawyer, Pigott’s work focused almost exclusively on civil cases, giving him scant experience in litigating criminal matters.⁴³⁴ Later in his career, on the Fourth Department, his voting record was mixed in both criminal and civil matters, not displaying any noticeable trends favoring either side.⁴³⁵ Indeed, commentators at the time of Pigott’s appointment called him “not always predictable”⁴³⁶ and “not rigidly law and order.”⁴³⁷

Furthermore, Pigott even appeared to be changeable in his political viewpoints.⁴³⁸ Like Robert Smith, Pigott was for many years a Democrat, switching allegiances to the Republican Party only after Richard Nixon’s resignation from the White House in 1974, fearing that Nixon’s scandals would leave “a one-party system” in the United States.⁴³⁹ Overall, Pigott did not seem to be bound to any particular ideology or point of view, judicially or politically, making him a potentially risky appointment for a governor who had articulated a definite desire for the Court of Appeals to move in a particular direction.

⁴³² *Id.* (internal quotation marks omitted).

⁴³³ Compare *infra* notes 434–37 and accompanying text (explaining that Pigott had little experience with criminal matters and had a voting pattern that was unpredictable and did not appear to favor or disfavor prosecution), with *supra* notes 219–23 and accompanying text (noting that Wesley’s voting pattern was overwhelmingly pro-prosecution), and *supra* note 289 and accompanying text (noting that Graffeo nearly always favored the prosecution in her decisions while on the Third Department).

⁴³⁴ Loeffke, *supra* note 422, at 1084 (“Aside from a handful of juvenile delinquency matters and one habeas corpus proceeding as county attorney (at least from those that made the official New York Reports), Eugene Pigott’s career focused almost exclusively on civil matters.”).

⁴³⁵ See *id.* at 1085 (“[Pigott] was fairly balanced in civil and criminal cases, showing no real favor to plaintiffs or defendants; and in criminal matters, no clear bias toward either the prosecution or accused.”). Interestingly, Pigott wrote only a handful of signed opinions in criminal cases during his years on the Fourth Department bench, the bulk of which favored the prosecution. See, e.g., *People v. Kopp*, 33 A.D.3d 153, 160, 817 N.Y.S.2d 806, 810–11 (App. Div. 4th Dep’t 2006); *People v. Kennedy*, 20 A.D.3d 137, 140, 797 N.Y.S.2d 219, 220–21 (App. Div. 4th Dep’t 2005); *People v. Swiatowy*, 280 A.D.2d 71, 73, 721 N.Y.S.2d 185, 186 (App. Div. 4th Dep’t 2001); *People v. Finkle*, 262 A.D.2d 971, 973, 692 N.Y.S.2d 265, 267 (App. Div. 4th Dep’t 1999) (Pigott, J., dissenting). However, Pigott had also authored at least one very vigorous pro-defendant dissent in a criminal case regarding ineffective assistance of counsel. See *People v. Dinkle*, 302 A.D.2d 1014, 1017, 755 N.Y.S.2d 189, 192 (App. Div. 4th Dep’t 2003) (Pigott, J., dissenting).

⁴³⁶ Benjamin, *supra* note 427, at A1 (internal quotation marks omitted).

⁴³⁷ Cooper, *supra* note 427, at A1 (internal quotation marks omitted).

⁴³⁸ See Benjamin, *supra* note 427, at A1.

⁴³⁹ *Id.*

In the press conference announcing Pigott's appointment, Pataki stated that the court's newest member possessed "the judicial philosophy . . . to be a tremendous addition to our Court of Appeals."⁴⁴⁰ Yet Pataki never defined precisely what attributes of Pigott's judicial philosophy appealed to him. Thus, it remains unclear why the Governor chose Pigott over other judges on the list who seemed to be more prosecution-friendly, or who at least appeared to have a more established record in deciding criminal cases.⁴⁴¹

One can speculate endlessly as to the reasons. Perhaps, knowing the outcry that would surely follow from appointing anybody other than George Bundy Smith, Pataki intentionally chose a judge who seemed more moderate than others on the list. Conceivably, fearing an even greater backlash if he picked a rigidly pro-prosecution jurist, he selected a more middle-of-the-road judge, knowing that Pigott would still be more prosecution-friendly than his predecessor.⁴⁴² Or, perhaps even Pataki's own views had tempered slightly over time, something that one could hypothesize by comparing the Governor's earlier Court of Appeals choices (such as Wesley, Graffeo, and Read) with his final two picks (Robert Smith and Pigott).⁴⁴³ As described above, Pataki's views on multiple issues changed during his three terms in office.⁴⁴⁴ Even though he never publically reversed course regarding his stance on the Court

⁴⁴⁰ Cooper, *supra* note 427, at A1 (internal quotation marks omitted).

⁴⁴¹ For instance, Fisher had actually sentenced a defendant to death, and had amassed several staunchly prosecution-friendly rulings during his years on the bench. *See supra* notes 287, 331 and accompanying text. While he was certainly not a locked-in vote for the prosecution, he still appeared to have a clearer pro-prosecution inclination—and certainly more experience in criminal law matters overall—than Pigott. *See supra* notes 283–87, 331 and accompanying text. Catterson, who had worked for six years as a federal prosecutor before becoming a judge and was inspired by his father, a hard-nosed Suffolk County district attorney, certainly seemed to arise from the pro-Government, tough on crime pedigree that Pataki said he admired. *See James M. Catterson*, APP. DIVISION FIRST JUD. DEPT SUPREME CT. ST. N.Y., <http://www.nycourts.gov/courts/ad1/centennial/Bios/jcatterson2.shtml> (last visited Nov. 22, 2014). And when looking for a longtime Republican with vast judicial experience, the venerable Mercure—who had served on the Third Department since 1988 and had worked as a district attorney in Washington County before joining the judiciary—certainly appeared to have an edge on Pigott. *See supra* note 426 and accompanying text.

⁴⁴² *See supra* notes 406–09 and accompanying text.

⁴⁴³ While Wesley and Graffeo were outspoken pro-prosecution judges, and Read quickly established herself as a leader of the court's prosecution-friendly conservative wing, Robert Smith and Pigott appeared to be—and, indeed, turned out to be—less-predictable voters on criminal justice issues. Whether this reflected any change in Pataki's own philosophies about appointing judges, or whether it was merely an accident, is a question that is naturally subject to speculation and will never be fully resolved.

⁴⁴⁴ *See supra* notes 104–05 and accompanying text.

of Appeals and the need for “tough on crime” judges in general, there is always the possibility that his views did “soften” on this issue.⁴⁴⁵

Beyond those theories, and other possibilities not elaborated here, Pigott did carry several attributes that were common to Pataki appointees, such as membership in the Republican Party and residence outside of New York City.⁴⁴⁶ He had amassed a solid reputation on the Fourth Department.⁴⁴⁷ And his appointment did give the Court of Appeals a new voice from western New York, something for which attorneys and judges in that region had advocated for quite some time.⁴⁴⁸

Whatever the exact motives may have been, Pigott’s appointment gave the Court of Appeals a judge with the following characteristics:

Race: White

Gender: Male

Region: Upstate (and, importantly, from the Western region of the state)

Political Affiliation: Republican

Predecessor’s Political Affiliation: Democrat

Age on Date of Appointment: Fifty-nine⁴⁴⁹

Prior Judicial Experience: Served on the Erie County Supreme Court for one year, then spent eight years on the Fourth Department (six as the court’s presiding justice).⁴⁵⁰

Judicial Record in Criminal Cases: Mixed. Wrote opinions both for the Government and for the defendant during his years on the appellate division.⁴⁵¹ No clear voting patterns noted.⁴⁵²

Known “Pet Causes”: None known.

Previous Appearances on Short List: Two (in 2002, for the vacancy left by Levine, for which Pataki ultimately selected Read, and in 2003, for the vacancy left by Wesley, for which Pataki chose

⁴⁴⁵ After all, Pataki did make a couple of surprising moves in the criminal justice arena during his three terms in office, particularly his call for a weakening of New York’s Rockefeller drug laws. See MICHAEL TONRY, THINKING ABOUT CRIME: SENSE AND SENSIBILITY IN AMERICAN PENAL CULTURE 134 (2004); Raymond Hernandez, *7 Prisoners Get Clemency from Pataki*, N.Y. TIMES, Dec. 24, 1996, at B1.

⁴⁴⁶ See Benjamin, *supra* note 427, at A1; Cooper, *supra* note 427, at A1.

⁴⁴⁷ See Loeffke, *supra* note 422, at 1087–88; see Benjamin, *supra* note 427, at A1; Cooper, *supra* note 427, at A1.

⁴⁴⁸ See Precious, *supra* note 367, at B1.

⁴⁴⁹ Benjamin, *supra* note 427, at A1.

⁴⁵⁰ Loeffke, *supra* note 422, at 1085.

⁴⁵¹ See *id.*

⁴⁵² See *id.*

Robert Smith).⁴⁵³

Friendship Factors with Governor Pataki: No direct links known between the judge and the Governor. However, Pataki appeared to hold Pigott in high regard, appointing him to four judicial positions during his time as governor.⁴⁵⁴

Today, Pigott's record on the Court of Appeals seems similar to his reputation on the appellate division.⁴⁵⁵ Along with Robert Smith, Pigott became one of two "centrists" on the state's high court.⁴⁵⁶ While not always the deciding vote in major cases,⁴⁵⁷ Pigott's voting does not overwhelmingly follow any particular patterns.⁴⁵⁸ He also is one of the court's most overtly independent judges, dissenting often (again, similar in this regard to Robert Smith).⁴⁵⁹

On criminal cases, the issue of greatest concern to Pataki, the majority of Pigott's rulings favor the prosecution.⁴⁶⁰ However, he also votes relatively frequently in favor of criminal defendants,⁴⁶¹

⁴⁵³ STATE OF N.Y. COMM'N ON JUDICIAL NOMINATION, *supra* note 35, at 5.

⁴⁵⁴ Loeffke, *supra* note 422, at 1087.

⁴⁵⁵ That is, Pigott is recognized today as a judge who is a "moderate," a jurist whose vote is not a lock for the Government or for the individual in any case. See Tom Precious, *Pigott May Provide Swing Vote on 2 Major Cases*, BUFF. NEWS, Sept. 16, 2006, at B1. Commentators expressed virtually identical sentiments about his time on the Fourth Department's bench. See, e.g., Cooper, *supra* note 427, at A1 ("[Pigott is] not rigidly law and order." (internal quotation marks omitted)); Loeffke, *supra* note 422, at 1085 ("Judge Pigott's career at the Fourth Department was marked by his centrist temperament.").

⁴⁵⁶ See *Centrists Smith & Pigott*, *supra* note 397; see also Precious, *supra* note 467, at B1 (noting that Pigott's ideology does not lean consistently to the left or right).

⁴⁵⁷ See *Centrists Smith & Pigott*, *supra* note 397.

⁴⁵⁸ See Loeffke, *supra* note 422, at 1093 (reviewing Pigott's voting record during his time on the Court of Appeals and concluding that he is one of the hardest judges on the court to predict).

⁴⁵⁹ *Id.* at 1092 ("Examining his entire career as an appellate court judge, a notable trend that continues to this day is that Judge Pigott dissents much more frequently than almost all of his peers."); see also Julia Steciuk, *Patterns in Pigott's Dissents*, CENTER FOR JUDICIAL PROCESS (Feb. 24, 2013), http://www.judicialprocessblog.com/2013/02/judge-pigotts-dissents_24.html (stating that between 2009 and December 2012 Pigott had dissented in forty-five cases). However, while both Pigott and Robert Smith frequently author dissents, the two centrist judges do not necessarily vote with one another in these divided decisions. See *Centrists Smith & Pigott*, *supra* note 397 (discussing the frequency with which Pigott and Robert Smith cast their votes on opposing sides).

⁴⁶⁰ See Loeffke, *supra* note 422, at 1094 tbl. 3 (finding that from the time of his appointment until 2009, Pigott voted in favor of the prosecution sixty-six percent of the time in divided criminal cases). For a snapshot of Pigott's published opinions in criminal cases between 2010 and 2013, see *infra* note 461.

⁴⁶¹ See Loeffke, *supra* note 422, at 1094 tbl. 3 (finding that from the time of his appointment until 2009, Pigott voted in favor of the defendant thirty-four percent of the time in divided criminal cases). The frequency of Pigott's votes favoring defendants in criminal cases is unheard of for judges like Graffeo, see *supra* notes 307–10 and accompanying text, Read, see

supra notes 354–55 and accompanying text, and Wesley, *see supra* notes 219–23 and accompanying text.

Since the time of Loeffke's evaluation of Pigott's voting record, the judge continues to remain a centrist on criminal cases. Generally, Pigott votes with the prosecution but he does hold for the defendant in a significant minority of decisions. For Pigott's signed prosecution opinions from the years after Loeffke's note to the time of this writing, see *People v. Maldonado*, 24 N.Y.3d 48, 58, 18 N.E.3d 391, 399, 993 N.Y.S.2d 680, 688 (2014) (Pigott, J., dissenting); *In re Antwaine T.*, 23 N.Y.3d 512, 514, 15 N.E.3d 1175, 1176, 992 N.Y.S.2d 166, 167 (2014); *People v. Lewis*, 23 N.Y.3d 179, 189–90, 12 N.E.3d 1091, 1096–97, 989 N.Y.S.2d 661, 667 (2014); *In re Gabriela A.*, 23 N.Y.3d 155, 165–66, 12 N.E.3d 1054, 1061, 989 N.Y.S.2d 624, 631 (2014) (Pigott, J., dissenting); *People v. Sage*, 23 N.Y.3d 16, 29–30, 11 N.E.3d 177, 187, 988 N.Y.S.2d 104, 114 (2014) (Pigott, J., dissenting); *People v. Aveni*, 22 N.Y.3d 1114, 1118, 6 N.E.3d 1124, 1126–27, 983 N.Y.S.2d 768, 770–71 (2014) (Pigott, J., dissenting); *People v. Reed*, 22 N.Y.3d 530, 534, 536, 6 N.E.3d 1108, 1110, 1112, 983 N.Y.S.2d 752, 754, 756 (2014); *People v. O'Toole*, 22 N.Y.3d 335, 340–41, 3 N.E.3d 687, 691, 980 N.Y.S.2d 350, 354 (2013) (Pigott, J., dissenting); *State v. Nelson D.*, 22 N.Y.3d 233, 243–44, 3 N.E.3d 674, 681, 980 N.Y.S.2d 337, 344 (2013) (Pigott, J., dissenting); *People v. Wells*, 21 N.Y.3d 716, 720, 999 N.E.2d 1157, 1160, 977 N.Y.S.2d 712, 715 (2013) (Pigott, J., dissenting); *People v. Glynn*, 21 N.Y.3d 614, 616, 999 N.E.2d 1137, 1138, 977 N.Y.S.2d 692, 693 (2013); *People v. Jones*, 21 N.Y.3d 449, 452, 994 N.E.2d 831, 833, 971 N.Y.S.2d 740, 742 (2013); *People v. Barboni*, 21 N.Y.3d 393, 397, 994 N.E.2d 820, 821–22, 971 N.Y.S.2d 729, 730–31 (2013); *People v. Mejias*, 21 N.Y.3d 73, 76, 989 N.E.2d 26, 27, 966 N.Y.S.2d 764, 765 (2013); *People v. Padilla*, 21 N.Y.3d 268, 270, 992 N.E.2d 414, 415, 970 N.Y.S.2d 486, 487 (2013); *People v. Lee*, 21 N.Y.3d 176, 178, 991 N.E.2d 692, 693, 969 N.Y.S.2d 834, 835 (2013); *People v. Pagan*, 19 N.Y.3d 91, 96–98, 968 N.E.2d 960, 963–964, 945 N.Y.S.2d 606, 609–610 (2012); *People v. Williams*, 20 N.Y.3d 579, 582, 987 N.E.2d 260, 261, 964 N.Y.S.2d 483, 484 (2013); *State v. Myron P.*, 20 N.Y.3d 206, 209, 981 N.E.2d 772, 773, 958 N.Y.S.2d 71, 72 (2012); *People v. W. Express Int'l*, 19 N.Y.3d 652, 660–61, 978 N.E.2d 1231, 1236, 954 N.Y.S.2d 763, 768 (2012) (Pigott, J., dissenting); *People v. Gause*, 19 N.Y.3d 390, 396, 971 N.E.2d 341, 345, 948 N.Y.S.2d 211, 215 (2012) (Pigott, J., dissenting); *People v. Reid*, 19 N.Y.3d 382, 384, 971 N.E.2d 353, 354, 948 N.Y.S.2d 223, 224 (2012); *People v. Matos*, 19 N.Y.3d 470, 479, 973 N.E.2d 152, 157, 950 N.Y.S.2d 57, 62 (2012) (Pigott, J., dissenting); *People v. Rodriguez*, 18 N.Y.3d 667, 671–72, 967 N.E.2d 661, 663–64, 944 N.Y.S.2d 438, 440–41 (2012); *People v. Smith*, 18 N.Y.3d 588, 595, 965 N.E.2d 232, 236, 942 N.Y.S.2d 5, 9 (2012) (Pigott, J., concurring); *People v. Sosa*, 18 N.Y.3d 436, 443, 963 N.E.2d 1235, 1239, 940 N.Y.S.2d 534, 538 (2012) (Pigott, J., dissenting); *People v. Steward*, 18 N.Y.3d 493, 496, 964 N.E.2d 388, 389–90, 941 N.Y.S.2d 17, 18–19 (2012); *People v. Clyde*, 18 N.Y.3d 145, 148–49, 961 N.E.2d 634, 635–36, 938 N.Y.S.2d 243, 244–45 (2011); *People v. Credle*, 17 N.Y.3d 556, 562, 958 N.E.2d 111, 115, 934 N.Y.S.2d 77, 81 (2011) (Pigott, J., dissenting); *People v. Davis*, 17 N.Y.3d 633, 636, 959 N.E.2d 498, 499, 935 N.Y.S.2d 561, 562 (2011); *People v. Acevedo*, 17 N.Y.3d 297, 303, 952 N.E.2d 1047, 1051, 929 N.Y.S.2d 55, 59 (2011) (Pigott, J., concurring); *People v. Evans*, 16 N.Y.3d 571, 573, 949 N.E.2d 457, 457, 925 N.Y.S.2d 366, 366 (2011); *People v. Rabb*, 16 N.Y.3d 145, 148, 945 N.E.2d 447, 448, 920 N.Y.S.2d 254, 255 (2011); *People v. Ortega*, 15 N.Y.3d 610, 622, 942 N.E.2d 210, 218, 917 N.Y.S.2d 1, 9 (2010) (Pigott, J., concurring); *In re Jimmy D.*, 15 N.Y.3d 417, 421, 938 N.E.2d 970, 972, 912 N.Y.S.2d 537, 539 (2010); *People v. McKinnon*, 15 N.Y.3d 311, 317, 937 N.E.2d 524, 527, 910 N.Y.S.2d 767, 770 (2010) (Pigott, J. dissenting); *People v. Devone*, 15 N.Y.3d 106, 110, 931 N.E.2d 70, 71, 905 N.Y.S.2d 101, 102 (2010); *Cayuga Indian Nation v. Gould*, 14 N.Y.3d 614, 654, 930 N.E.2d 233, 257, 904 N.Y.S.2d 312, 336 (2010) (Pigott, J., dissenting); *Hurrell-Harring v. State*, 15 N.Y.3d 8, 27, 33, 930 N.E.2d 217, 228, 232, 904 N.Y.S.2d 296, 307, 311 (2010); *People v. Zona*, 14 N.Y.3d 488, 495, 928 N.E.2d 1041, 1046, 902 N.Y.S.2d 844, 849 (2010) (Pigott, J., dissenting); *People v. Kadarko*, 14 N.Y.3d 426, 428–29, 928 N.E.2d 1025, 1026, 902 N.Y.S.2d 828, 829 (2010); *People v. Williams*, 14 N.Y.3d 198, 225, 925 N.E.2d 878, 895, 899 N.Y.S.2d 76, 93 (2010) (Pigott, J., dissenting in part and concurring in part); *People v. Ochoa*, 14 N.Y.3d 180, 185, 925 N.E.2d 868, 871, 899 N.Y.S.2d

including authoring a handful of dissents favoring the rights of the accused.⁴⁶² Undoubtedly, Pigott represents a pro-prosecution shift when compared with George Bundy Smith's voting patterns, particularly in Smith's final years on the court.⁴⁶³ On the whole, however, Pigott's voting has never represented the dramatically prosecution-friendly direction for which Pataki called during his first year in office.

VI. THE TRENDS: CONNECTING THE DOTS OF GOVERNOR PATAKI'S COURT OF APPEALS APPOINTMENTS

Now that we have reviewed all of Pataki's Court of Appeals selections, and some of the challenges faced in making those picks, we move to an examination of noticeable trends. In this section we study the demographic data collected above to see whether any noticeable tendencies emerge among these appointments. By doing so, we can consider whether these factors reveal interests that were particularly important to Pataki as he chose new judges for New York's highest court.

66, 69 (2010).

For Pigott's pro-defense rulings following the Loeffke article, see *People v. Galindo*, 23 N.Y.3d 719, 726, 17 N.E.3d 1121, 1126, 993 N.Y.S.2d 525, 530 (2014) (Pigott, J., dissenting); *People v. Dumay*, 23 N.Y.3d 518, 527, 16 N.E.3d 1150, 1156, 992 N.Y.S.2d 672, 678 (2014) (Pigott, J., dissenting); *In re George*, 22 N.Y.3d 323, 334, 3 N.E.3d 1139, 1146–47, 980 N.Y.S.2d 891, 898–99 (2013) (Pigott, J., dissenting); *People v. Abraham*, 22 N.Y.3d 140, 148, 1 N.E.3d 797, 802, 978 N.Y.S.2d 723, 728 (2013) (Pigott, J., dissenting); *People v. Hernandez*, 22 N.Y.3d 972, 978, 1 N.E.3d 785, 790, 978 N.Y.S.2d 711, 716 (2013) (Pigott, J., dissenting); *People v. Oathout*, 21 N.Y.3d 127, 128–29, 989 N.E.2d 936, 937, 967 N.Y.S.2d 654, 655 (2013); *People v. Adams*, 20 N.Y.3d 608, 612, 987 N.E.2d 272, 274, 964 N.Y.S.2d 495, 497 (2013); *People v. McFadden*, 20 N.Y.3d 260, 265–66, 982 N.E.2d 1241, 1244, 959 N.Y.S.2d 108, 111 (2012) (Pigott, J., dissenting); *People v. Halter*, 19 N.Y.3d 1046, 1054, 979 N.E.2d 1135, 1141, 955 N.Y.S.2d 809, 815 (2012) (Pigott, J., dissenting); *People v. Harris*, 19 N.Y.3d 679, 687, 978 N.E.2d 1246, 1251, 954 N.Y.S.2d 777, 781–82 (2012); *People v. Santiago*, 17 N.Y.3d 661, 664, 958 N.E.2d 874, 877, 934 N.Y.S.2d 746, 749 (2011); *People v. Porto*, 16 N.Y.3d 93, 102, 942 N.E.2d 283, 289, 917 N.Y.S.2d 74, 80 (2010) (Pigott, J., dissenting); *People v. Dreyden*, 15 N.Y.3d 100, 102, 931 N.E.2d 526, 527, 905 N.Y.S.2d 542, 543 (2010); *People v. McBride*, 14 N.Y.3d 440, 448, 928 N.E.2d 1027, 1033, 902 N.Y.S.2d 830, 836 (2010) (Pigott, J., dissenting); *People v. Carncross*, 14 N.Y.3d 319, 332, 927 N.E.2d 532, 540, 901 N.Y.S.2d 112, 120 (2010) (Pigott, J., dissenting).

⁴⁶² Steciuk, *supra* note 459 (discussing Pigott's dissents in favor of criminal defendants' rights from 2009 to 2012); *see supra* note 461.

⁴⁶³ *Compare supra* notes 460–62 and accompanying text (discussing Pigott's record in criminal cases), *with supra* notes 406–09 and accompanying text (discussing George Bundy Smith's record in criminal cases).

A. Race

All six of Pataki's Court of Appeals appointments were white. In fact, by the time Pataki left office, Ciparick was the lone judge on the court to come from a racial or ethnic minority group.⁴⁶⁴ This was a noticeable contrast to Mario Cuomo's choices, which included the first Hispanic judge to sit on the Court of Appeals and the first African-American judge to serve a full term on the court.⁴⁶⁵

In part, Pataki's choices were limited by the short lists that he received. The majority of individuals named on these lists were white, constraining Pataki's opportunity to appoint judges from racial or ethnic minority groups.⁴⁶⁶ However, Cuomo also received predominantly white short lists, and still appointed two African-American judges and a Hispanic judge to the court.⁴⁶⁷ Reviewing Pataki's choices, we can see that Pataki did bypass a highly regarded African-American judge in Samuel L. Green when he appointed Wesley to replace Simons.⁴⁶⁸ He passed over two more judges from racial and ethnic minority groups by selecting Graffeo over Juanita Bing-Newton and Read over L. Priscilla Hall.⁴⁶⁹ Most notably of all, he rejected one of most well-known African-American jurists in New York State, if not the entire nation, by choosing Pigott over George Bundy Smith.⁴⁷⁰

The role of race and ethnicity in choosing judicial candidates is a subject worthy of debate. This article does not purport to take either side in this discussion. Rather, it merely points out a marked difference between Pataki and his predecessor in this category. Cuomo went out of his way to diversify the Court of Appeals in terms of race and ethnicity. By the time Pataki made his six picks, however, the state's highest court was almost completely devoid of

⁴⁶⁴ Ciparick is Hispanic. Spencer, *supra* note 158. After Pataki declined to reappoint George Bundy Smith, all of the other judges on the Court of Appeals—Rosenblatt, Graffeo (who, notably, was Italian-American, an ethnic category that Mario Cuomo had emphasized), Read, Robert Smith, and Pigott—were white. Virtually all of Pataki's appellate division selections were white jurists, too. See Cooper, *supra* note 427, at A1 ("In addition to leaving the Court of Appeals without a black judge, the governor has left the lower Appellate Division overwhelmingly white.").

⁴⁶⁵ Pomerance, *supra* note 29, at 260.

⁴⁶⁶ See STATE OF N.Y. COMM'N ON JUDICIAL NOMINATION, *supra* note 35, at 4–5.

⁴⁶⁷ Pomerance, *supra* note 29, at 260 & n.514 (pointing out that the only African-Americans on the short lists Cuomo received were Fritz Alexander II, George Bundy Smith, Lewis L. Douglass, and Samuel L. Green).

⁴⁶⁸ See *supra* notes 184–85 and accompanying text.

⁴⁶⁹ See *supra* notes 280–81, 328–29 and accompanying text.

⁴⁷⁰ See *supra* notes 411–14, 427 and accompanying text.

2014/2015] Pataki's "Tough on Crime" Court 259
minority group representation.⁴⁷¹

B. Gender

Pataki's Court of Appeals selections were considerably more diverse in terms of gender than they were in race and ethnicity. Two of his six appointments were females, Graffeo and Read, leaving the Court of Appeals with more female judges than males.⁴⁷² It is impossible to be certain whether gender was a factor that Pataki considered when making these appointments. Certainly, he did not speak about the importance of gender diversity on the Court of Appeals as much as Cuomo did.⁴⁷³ However, there is no questioning the fact that the court became a more diverse body in terms of gender because of his choices, indicating that gender may have held at least some importance to Pataki as he made these picks.

C. Region

Virtually all of Pataki's Court of Appeals appointments came from locations outside of New York City.⁴⁷⁴ Of his six selections, only Robert Smith came from the Big Apple.⁴⁷⁵ This trend is the antithesis of Mario Cuomo's appointments, all but three of whom came from New York City or the surrounding area.⁴⁷⁶

This trend is reflective of Pataki's own "anti-Cuomo" stance in his first gubernatorial campaign.⁴⁷⁷ Throughout that race, Pataki emphasized his small-town, upstate New York upbringing, using it as a metaphor to demonstrate that he understood "small town values" and related to the people who formed the state's smaller communities.⁴⁷⁸ He then drew contrasts between himself and Cuomo, whose interests he claimed were limited to the boroughs of

⁴⁷¹ This fact received a substantial dose of media criticism, particularly in the immediate aftermath of Pigott's appointment. *See, e.g.,* Cooper, *supra* note 427, at A1; Lauren Jones, *Next Governor's Job: Unpacking the Court*, POST-STANDARD (Syracuse, N.Y.), Sept. 3, 2006, at E1.

⁴⁷² Graffeo and Read joined Kaye and Ciparick, giving the Court of Appeals four female judges and three male judges. *See supra* note 346 and accompanying text.

⁴⁷³ *See, e.g.,* Pomerance, *supra* note 29, at 205 (describing Cuomo's vow to appoint the first female judge to the Court of Appeals).

⁴⁷⁴ *See supra* pp. 220, 227, 234, 240, 245, 254.

⁴⁷⁵ *See supra* p. 245.

⁴⁷⁶ *See Pomerance, supra* note 29, at 263.

⁴⁷⁷ *See supra* notes 46–50, 98–100 and accompanying text.

⁴⁷⁸ *See supra* notes 42–45, 51–54 and accompanying text.

New York City.⁴⁷⁹ By bringing almost exclusively upstate judges to the Court of Appeals, Pataki seemed to appoint judges whose backgrounds were similar to his own. This was particularly true for judges like Wesley, Rosenblatt, Graffeo, and Read, who had lived and worked in smaller upstate New York communities for much of their lives.⁴⁸⁰

The predominant upstate focus in Pataki's appointments may have signaled another trend, too. Conventionally, individuals from smaller upstate communities in New York are regarded as being more conservative voters than individuals from New York City and the surrounding area.⁴⁸¹ Pataki's choices of upstate candidates may have shown a desire to find more conservative judges for the Court of Appeals, particularly in the criminal justice arena, as well as individuals who came from the type of background that Pataki claimed to treasure.

D. Political Affiliation

Pataki picked exclusively Republican judges for the Court of Appeals.⁴⁸² This broke from Mario Cuomo's pattern of choosing a virtually equal number of judges for the court from both political parties.⁴⁸³ All subsequent governors at the time of this writing have followed Pataki's path, selecting Court of Appeals judges only from their own party.⁴⁸⁴

Interestingly, though, Pataki was able to replace a Democrat with a Republican judge only twice.⁴⁸⁵ The remainder of the time, his choices filled only Republican-held seats—or in the case of Bellacosa, a vacancy from an independent who voted like a modern-day Republican in virtually all decisions—with other Republicans. Still, because the court was so balanced in terms of party affiliation at the end of Cuomo's tenure,⁴⁸⁶ Pataki's appointments tipped the

⁴⁷⁹ See *supra* notes 42–45, 51–54 and accompanying text.

⁴⁸⁰ See *supra* Part V.A–D.

⁴⁸¹ See *supra* note 163 and accompanying text.

⁴⁸² See *supra* pp. 220, 227, 234, 240, 245, 254.

⁴⁸³ See Cooper, *supra* note 427, as A1 (“[Pataki] has broken with the tradition of naming appointees from both parties to the higher court, choosing only Republicans.”).

⁴⁸⁴ See *supra* note 35.

⁴⁸⁵ Furthermore, both of those selections—Rosenblatt replacing Titone and Pigott replacing George Bundy Smith—involved the appointment of a Republican whose voting record proved to be far more moderate than Pataki may have predicted. See *supra* Part V.B, V.F.

⁴⁸⁶ Pomerance, *supra* note 29, at 262–63.

scales significantly in favor of Republican judges, leaving "his" five Republicans (Rosenblatt, Graffeo, Read, Robert Smith, and Pigott) and only two Democrats (Kaye and Ciparick) on the high court's bench.⁴⁸⁷

Pataki repeatedly claimed that he never considered party affiliation as a factor in appointing judges.⁴⁸⁸ Given the partisan uniformity of his Court of Appeals selections, however, one might reasonably suspect otherwise.

E. Age on Date of Appointment

The average (mean) age of Pataki's six appointees was fifty-five. Youngest among the Governor's selections was Wesley, age forty-seven,⁴⁸⁹ followed closely by Graffeo, age forty-eight.⁴⁹⁰ Oldest was Rosenblatt, appointed to the court at the age of sixty-two.⁴⁹¹

These ages hold particular significance when considering Pataki's hope of having a long-term, transformative impact on the Court of Appeals. The average Pataki appointee would complete his or her full fourteen-year term at the age of sixty-nine, one year before mandatory retirement. On a more individual level, half of Pataki's appointees were appointed at ages allowing them to complete a full term and be eligible for reappointment before mandatory retirement.⁴⁹² Only one of his appointees—Rosenblatt—had to retire before serving at least ten years on the court.⁴⁹³ By appointing so many relatively younger judges to the Court of Appeals, Pataki all but assured that his impact on the court would last at least a decade, strongly indicating that he considered age quite significantly in making these selections.

⁴⁸⁷ Chan, *supra* note 35, at B1.

⁴⁸⁸ *See, e.g.*, Cooper, *supra* note 427, at A1 ("Reflecting back on it, I think I did know that Judge Pigott was a Republican, but it's not something that even entered my mind," [Pataki] said.); McKinley, *supra* note 283, at B5 ("Mr. Pataki maintained on Tuesday that he did not know Mr. Smith's political affiliation when he made the decision to nominate him, a decision he said he made the night before."); Stashenko, *supra* note 179, at B2 ("[Y]ou don't look at a particular issue or a particular vote or a particular decision' . . . Pataki said.").

⁴⁸⁹ *See supra* p. 220.

⁴⁹⁰ *See supra* p. 234.

⁴⁹¹ *See supra* p. 227.

⁴⁹² Wesley, *see supra* p. 220, Graffeo, *see supra* p. 234, and Read, *see supra* p. 240, all were appointed at ages young enough to afford them this opportunity. Graffeo's reappointment bid is pending at the time of this writing.

⁴⁹³ *See* Womack-Weidner, *supra* note 246, at 4.

F. Prior Judicial Experience

One of Pataki's appointments, Robert Smith, had no experience as a judge.⁴⁹⁴ A second, Read, had decided solely civil suits for monetary damages against New York State.⁴⁹⁵ The remaining four, however, all had previously served as trial court judges and appellate division judges, with their appellate division service ranging in length from two years (Graffeo) to nine years (Rosenblatt).⁴⁹⁶

Considering this record, it appears at first glance that Pataki considered judicial experience a relatively significant factor when making his Court of Appeals picks. However, this becomes less evident when considering the short lists from which Pataki made these choices. Several times, Pataki passed over highly tenured candidates for less experienced appointees. Selecting Wesley over Samuel Green and Joseph P. Sullivan, Graffeo over Steven Fisher, and Pigott over Thomas Mercure (and, of course, George Bundy Smith) all represented occasions when Pataki chose individuals who had noticeably less judicial experience than another member of the short list. Therefore, even though judicial experience may have been a factor that Pataki considered when picking a Court of Appeals judge, it certainly does not appear to be the paramount criterion in his selection process.

G. Judicial Record in Criminal Cases

This is the category that one would expect Pataki to prioritize above all others. Given his adamant public comments about the Court of Appeals "coddling" criminals, an observer would reasonably expect Pataki to seek judges who demonstrated clear pro-prosecution tendencies. One would further assume that the clearest measure of whether a candidate was demonstrably prosecution-friendly would come through studying their appellate court voting record in criminal cases—and, especially, studying the candidate's signed opinions in these disputes.

When reviewing these records it becomes clear that Pataki certainly picked no discernibly pro-defendant judges for the Court of

⁴⁹⁴ See *supra* p. 245.

⁴⁹⁵ See *supra* p. 240.

⁴⁹⁶ See *supra* pp. 220, 227–28, 234, 254.

Appeals.⁴⁹⁷ Surprisingly, though, Pataki chose several individuals whose inclinations in criminal cases were virtually or entirely unknown. For instance, he appointed two judges—Read and Robert Smith—who never decided a criminal case in their lives.⁴⁹⁸ He chose Pigott in spite of the fact that the judge, while overall prosecution-friendly, wrote a number of strongly pro-defendant opinions and dissents during his appellate division years.⁴⁹⁹ And he selected Wesley with his first pick, even though Wesley had spent less than three years on the appellate division, giving Pataki little evidence of how Wesley decided criminal cases at the appellate level.⁵⁰⁰

Similarly notable in this regard are the candidates whom Pataki did not appoint. For instance, choosing Read and Robert Smith over Pigott and Steven Fisher, judges with proven records in criminal cases, seems unusual for a governor purportedly seeking strictly pro-prosecution jurists.⁵⁰¹ Likewise, choosing Pigott over other judges whose voting record and inclinations seemed more uniformly pro-prosecution was a surprise.⁵⁰²

In fact, Pataki's only appointment with a truly obvious pro-prosecution voting pattern in appellate cases was Graffeo.⁵⁰³ The others varied widely in their histories, with some being virtual unknowns as to their criminal case tendencies. To a certain extent, this is a product of the short lists Pataki received, which contained few glaringly pro-prosecution candidates.⁵⁰⁴ More importantly though, this examination indicates that while Pataki seemed to

⁴⁹⁷ See *supra* Part V (discussing the preappointment criminal case voting records, if any, of the judges whom Pataki appointed to the Court of Appeals).

⁴⁹⁸ See *supra* pp. 240, 245.

⁴⁹⁹ See *supra* note 435 and accompanying text. To a much lesser extent, Rosenblatt had also authored some strongly pro-defendant dissents while on the appellate division, potentially a taste of his future swing vote tendencies on the Court of Appeals. See *supra* note 259 and accompanying text.

⁵⁰⁰ See *supra* p. 220.

⁵⁰¹ See *supra* Part V.D–E.

⁵⁰² See *supra* Part V.F.

⁵⁰³ See *supra* note 289 and accompanying text (describing Graffeo's appellate division signed opinions on criminal justice cases). While none of the judges whom Pataki chose demonstrated a pro-defendant voting record prior to joining the Court of Appeals, and some (particularly Wesley) were reputed to strongly favor the Government in criminal matters, Graffeo's record provided the clearest pro-prosecution history of any Pataki appointee.

⁵⁰⁴ See *supra* Part V (showing that throughout Pataki's time in office, the short lists he received included many candidates whose stance on criminal justice issues was either discernibly pro-defendant (like Samuel Green and Myriam Altman), relatively balanced between pro-prosecution and pro-defense decisions (such as Pigott and Joseph Sullivan), or largely unknown (such as Read, Robert Smith, Stephen Friedman, and Guy Miller Struve)).

consider a prosecution-friendly voting pattern an important factor, it was far from the only criterion that the Governor considered when making appointments to the Court of Appeals.

H. “Pet Causes”

Judges who supported the death penalty appeared to find favor from Pataki. For instance, Wesley openly supported capital punishment⁵⁰⁵ and Rosenblatt had actually sentenced a defendant in his courtroom to death.⁵⁰⁶ Graffeo had worked as solicitor general to defend New York’s death penalty law.⁵⁰⁷ Conversely, commentators widely believe that George Bundy Smith’s opposition to the death penalty ruined, or at least helped ruin, his chances for reappointment in 2006.⁵⁰⁸

Of course, there were outliers here, too. Nobody seemed to know how Read and Pigott felt about the death penalty when Pataki appointed them.⁵⁰⁹ Even more surprising was the appointment of Robert Smith, who had defended clients against the death penalty on previous occasions.⁵¹⁰ Perhaps Smith’s remark that his personal views about the death penalty were still unresolved was enough to convince Pataki that he was a “safe” appointee.⁵¹¹ Still, it seems surprising that Pataki would bypass Steven Fisher, a judge who had just sentenced a defendant to death, three times in favor of three jurists whose death penalty views were unknown. Perhaps the fact that Fisher was a Democrat, and Read, Smith, and Pigott were Republicans, was enough to sway Pataki’s favor away from Fisher.

Altogether, a vague stance on the death penalty did not appear to terminate a candidate’s attractiveness in Pataki’s eyes. A firm commitment to defending the death penalty, however, certainly seemed to help elevate Wesley, Rosenblatt, and Graffeo to the top of their respective lists.

⁵⁰⁵ See *supra* note 206.

⁵⁰⁶ See *supra* note 257 and accompanying text.

⁵⁰⁷ See *supra* note 301 and accompanying text.

⁵⁰⁸ See *supra* notes 408–10 and accompanying text.

⁵⁰⁹ See *supra* Part V.D, V.F.

⁵¹⁰ See Durr, *supra* note 379; *supra* note 381 and accompanying text.

⁵¹¹ See Baker, *supra* note 379, at B5.

I. Previous Appearances on Short List

Three of Pataki's appointees—Wesley, Graffeo, and Robert Smith—had never previously appeared on a short list from the Commission on Judicial Nomination.⁵¹² Both Rosenblatt and Pigott had appeared on two previous short lists, while Read had appeared on one.⁵¹³

This data indicates that Pataki cared little about whether a nominee had previously appeared on one or more short lists. Additionally, Pataki did not appoint a number of candidates who had appeared on several short lists. For example, Joseph P. Sullivan appeared on his tenth and eleventh short lists during Pataki's time in office, and Pataki bypassed him both times.⁵¹⁴ Guy Miller Struve appeared on four of the six short lists that Pataki received and was rejected each time.⁵¹⁵ Steven Fisher likewise made it onto four short lists but never got the nod from Pataki to join the court.⁵¹⁶

Considering this information, it seems that Pataki paid no attention to whether a candidate had appeared on previous short lists. If this were a factor at all, Pataki certainly appears to have deemed it inferior to other criteria discussed in this article.

J. Friendship Factors with Governor Pataki

Most of the judges whom Pataki appointed held at least one notably close connection with him. Wesley was Pataki's roommate when they served in the Assembly together, starting a close friendship between the two men.⁵¹⁷ Graffeo worked with Pataki when she was chief counsel to the Assembly Republicans, and then again when she became solicitor general for New York State in 1995.⁵¹⁸ Read served as Pataki's deputy counsel.⁵¹⁹ Robert Smith was a major financial donor to Pataki's campaign war chest.⁵²⁰

Only Rosenblatt and Pigott did not appear to have any

⁵¹² See STATE OF N.Y. COMM'N ON JUDICIAL NOMINATION, *supra* note 35.

⁵¹³ *Id.* at 4–5.

⁵¹⁴ See *id.* at 2–4.

⁵¹⁵ See *id.* at 4–5.

⁵¹⁶ See *id.* at 5.

⁵¹⁷ See *supra* p. 221.

⁵¹⁸ See *supra* p. 235.

⁵¹⁹ See *supra* p. 240.

⁵²⁰ See *supra* p. 245.

particularly close ties with Pataki at the time when the Governor appointed them.⁵²¹ Even Pigott, however, appeared to be on Pataki's radar screen, as the Governor appointed him to three judicial posts before bringing him to the Court of Appeals.⁵²²

Again, this section is not meant to comment on whether these individuals were "good" or "bad" judges, or whether Pataki made "good" or "bad" selections to the court. It merely demonstrates that, on the whole, individuals who held some sort of previous collegial connection to Pataki appeared to have a much higher chance of being named to the Court of Appeals than those who lacked such ties to the Governor.

K. Overall Impact

Finally, we look briefly at Pataki's actual impact on the court's voting in criminal cases. There appears to be little doubt that Pataki accomplished his overall goal of shifting the court in a more prosecution-friendly, "tough on crime" direction. Led by Wesley, Graffeo, and Read, the six Pataki appointees made the Court of Appeals more conservative on criminal cases overall, leading to more decisions in favor of the Government and law enforcement over individual defendants.⁵²³

The degree to which Pataki's appointments actually moved the court in a pro-prosecution slant, however, is almost impossible to measure. To begin with, the Court of Appeals was certainly not uniformly pro-defendant when Pataki inherited it, despite the Governor's public protestations.⁵²⁴ Thus, a more conservative movement in the court's decision making was not as dramatic of a change as Pataki and certain other critics suggested. Secondly, the Court of Appeals abruptly started charting a more pro-prosecution course after 1995, the year that Pataki delivered his most public denunciations of the court's record in criminal cases—or, at least, the Governor's perception of that record.⁵²⁵ Indeed, Pataki's most dramatic impact on the court's voting in criminal cases arguably came from his "tough on crime" themed press conferences rather

⁵²¹ See *supra* Part V.B, V.F.

⁵²² See *supra* p. 255.

⁵²³ See *supra* Part V (providing an overview of the criminal case voting records of each Pataki Court of Appeals appointee).

⁵²⁴ See *supra* Part III (discussing in detail the Court of Appeals as Pataki inherited it, and demonstrating that the court was not as "soft on crime" as the Governor implied).

⁵²⁵ See *supra* notes 231–34 and accompanying text.

than his judicial appointments. Even traditionally pro-defendant judges like Ciparick and Kaye swung toward the prosecution in the immediate aftermath of Pataki's criticisms in 1995.⁵²⁶

Finally, Wesley's resignation in 2003 further diluted the overall impact of Pataki's appointees. Replacing the almost exclusively pro-prosecution Wesley with the more moderate Robert Smith actually moved the court in a slightly defendant-friendly direction.⁵²⁷ Had the trio of Wesley, Graffeo, and Read—all of them predictable votes for the prosecution in the vast majority of criminal cases—remained together longer, the number of decisions favoring prosecutors almost certainly would have been greater. Instead, the substitution of Robert Smith for Wesley, along with Rosenblatt's unexpectedly frequent pro-defendant leanings and the moderate nature of Pigott's voting, prevented the "Pataki Court" from becoming overwhelmingly pro-prosecution in its jurisprudence.⁵²⁸ The fact that most of Pataki's appointments were conservative Republican judges replacing other conservative Republican judges also prevented the court's overall shift from being as dramatic as Pataki may have wanted.⁵²⁹

In total, the Court of Appeals was a friendlier court for prosecutors in criminal cases after Pataki completed his six appointments. Yet considering the vehemence of Pataki's disapproval toward the court in 1995, the overall impact of these six appointments appears to have been more moderate than one might have reasonably expected at that time.

VII. FINAL THOUGHTS

The average Pataki Court of Appeals appointee was a fifty-five-year-old white Republican who came from a location outside New York City, previously served on a judicial body for at least a couple of years, and maintained some prior personal or professional affiliation with Pataki himself. A tendency toward supporting the

⁵²⁶ See *supra* notes 231–34 and accompanying text.

⁵²⁷ See *supra* notes 395–99 and accompanying text.

⁵²⁸ For instance, one study noted that the Court of Appeals between 2006 and 2009—the first three years following Pataki's final appointment—the court ruled for the defense in forty-eight percent of divided criminal cases. Loeffke, *supra* note 422, at 1094 tbl. 3. In other words, the court favored the prosecution *just barely over half the time* in these contentious criminal justice matters. See *id.* This does not seem to be the type of overall record that Pataki sought when he called for a judicial makeover of the Court of Appeals.

⁵²⁹ See *supra* note 485 and accompanying text.

prosecution in criminal cases and a firm stance in favor of the death penalty certainly augmented the likelihood of receiving Pataki's favor. However, a lack of information in either of these categories certainly was not fatal to the individual's chances of appointment, either.

When Pataki ridiculed the Court of Appeals in 1995, he gave the impression that a definite pro-prosecution stance would be his primary criterion in selecting judges for New York's highest court. When it came to actually picking six jurists for these important positions, however, several other factors appeared to enter the equation. Trends noted in this article indicate that Pataki seemed to consider categories such as political party membership, age, home region in New York State, and even past ties and friendships as important, if not more important, than an individual's actual record in criminal cases.

Once again, this article does not purport to answer whether Pataki's selection process was "good" or "bad," or comment on the merits of emphasizing or downplaying any of these factors. Rather, it proves a different point. Today, many political leaders follow Pataki's example in calling for the appointment of more judges who are "tough on crime." Undoubtedly, such pledges influence voters who see "tough on crime" judges as a conduit for maintaining public order and safety.⁵³⁰

Individuals who are influenced by this "tough on crime" rhetoric would be well-advised, however, to reflect upon the multiple factors considered in this article—a list which surely does not cover all of the nuances that go into a political leader's judicial appointments—and remember the multiple elements that appeared to underlie each choice. In doing so, these individuals might gain a sense of how difficult it is for any politician to appoint judges solely on the basis of each candidate's apparent friendliness toward prosecutors and law enforcement. Instead, the more nuanced approach described above presents a picture, albeit an imperfect one, of how a leader's vow to deliver "tough on crime" judges can actually look in the light of reality.

⁵³⁰ See *supra* notes 40–41 and accompanying text.