High Crimes, Treason, and Chicken Theft: "Infamous Crimes" in Arkansas and Disqualification from Political Office[*]

I. INTRODUCTION

Consider whether any of the following persons should be barred from seeking or holding public office:

(1) A small-town mayor who funneled municipal funds for personal use and was convicted of embezzlement;

(2) A mayoral candidate who removed an opponent's campaign signs while seeking re-election and was convicted of theft;

(3) A county sheriff who took three chickens from an overturned freight truck over thirty years before seeking office and was convicted of theft.

Under current Arkansas law, all three of these individuals are barred from political office.[1] The Arkansas Supreme Court has encountered each of these scenarios and determined that the convictions disqualified the individuals from seeking or holding office.[2] This may truly surprise those unfamiliar with Arkansas politics, but substantial precedent backs this strict state policy.

In the mid-2000s, a pesky, undefined term of art in the Arkansas Constitution emerged from under its proverbial rock. Article 5, section 9 states, "[n]o person hereafter convicted of embezzlement of public money, bribery, forgery or *other*

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1. Although article 5, section 9 of the Arkansas Constitution does not distinguish between publicly elected officials and political appointees, this comment is limited to discussion of the former. *See* ARK. CONST. art. 5, § 9 ("No person hereafter convicted of embezzlement of public money, bribery, forgery or other infamous crime, shall be eligible to the General Assembly or capable of holding any office of trust or profit in this State.").

2. *See* State v. Cassell, 2013 Ark. 221, 427 S.W.3d 663; Edwards v. Campbell, 2010 Ark. 398, 370 S.W.3d 250; State v. Oldner 361 Ark. 316, 206 S.W.3d 818 (2005).

infamous crime, shall be eligible to the General Assembly or capable of holding any office of trust or profit in this State."[3] The term "infamous crime" often connotes notorious law-breaking. One may think of the dynamic duo of John Dillinger and George "Baby Face" Nelson robbing the Merchant's National Bank in South Bend, Indiana in 1934, outfitted with powerful getaway vehicles and machine guns.[4] Similar connotations attach to the Burr-Hamilton Duel on the banks of the Hudson River in 1804 that resulted in the death of Alexander Hamilton.[5] However, crimes qualifying as "infamous" in Arkansas include much lesser offenses than high-profile robberies and duels.[6] For example, Arkansas considers misdemeanor theft to be an "infamous crime."[7]

In relation to the Arkansas Constitution, the term "infamous crime" evaded clear and precise definition for more than a century.[8] In recent years, however, the Arkansas Supreme Court issued a trio of opinions in an attempt to clarify the mystery.[9] These decisions established dangerous precedent

3. *See* ARK. CONST. art. 5, § 9 (emphasis added).

4. *See* HENRY M. HOLDEN, FBI 100 YEARS: AN UNOFFICIAL HISTORY 70 (2008) (describing the robbery of Merchant's National Bank).

5. *See* THOMAS FLEMING, DUEL: ALEXANDER HAMILTON, AARON BURR, AND THE FUTURE OF AMERICA 321-31 (1999) (reciting the tale of the Burr-Hamilton Duel and the details of Hamilton's death).

6. Although outside the scope of this comment, the interplay between article 5, section 9 of the Arkansas Constitution, regarding "infamous crimes," and article 19, section 2, governing dueling, is extremely intriguing. Article 19, section 2 bars any person from office for a period of ten years who fights, acts as a second, or sends or accepts a challenge to duel. ARK. CONST. art. 19, § 2. These two constitutional provisions showcase what may be some inconsistency between how serious a crime must be before Arkansas law actually considers it "infamous" and whether that crime should permanently bar a person from office. Under current law, it appears that a duel is regarded as less serious than an "infamous" misdemeanor theft. Yet, there is no binding interpretation of article 19, section 2, or the term "duel," which a litigant may use to argue in favor of a narrower interpretation of "infamous crime" under article 5, section 9. *See* Ark. Op. Att'y Gen. Op. No. 92-164 (1992). Of further intrigue, article 19, section 2 features an integrated time limitation that allows an individual to hold office ten years after a conviction for dueling, which this comment argues should be implemented in determining qualification to hold office under article 5, section 9. *See infra* Part V.

7. *Edwards*, 2010 Ark. 398, at 10-11, 370 S.W.3d at 256; *see also Cassell*, 2013 Ark. 221, at 7-8, 427 S.W.3d at 667 (analyzing federal misdemeanor theft conviction).

8. *See* ARK. CONST. art. 5, § 9 (leaving the term undefined). The term "infamous crime" had no direct definition until 2005. *See* State v. Oldner, 361 Ark. 316, 327, 206 S.W.3d 818, 822 (2005) (defining "infamous crimes" as those involving "deceit and dishonesty").

9. *Cassell*, 2013 Ark. 221, 427 S.W.3d 663; *Edwards*, 2010 Ark. 398, 370 S.W.3d 250; *Oldner*, 361 Ark. 316, 206 S.W.3d 818.

for individuals with blemished records who intend to run for public office or, in some instances, already hold office. The court construed the term so broadly as to include such crimes as misdemeanor theft and disregarded the totality of circumstances surrounding a conviction. This interpretation can easily be considered a "bright-line rule," which created a harsh reality for those facing its wrath.[10] The court's formulation only considered whether a person had been convicted of an "infamous crime" and, if so, the conviction acted as a complete disqualification from holding office, regardless of any existing mitigating factors.[11] Accordingly, the implications and consequences for affected individuals were drastic. Take, for example, the aforementioned conviction for theft of poultry. Despite the fact the crime occurred over thirty years prior to the qualification question, the convicted sheriff was ordered to step down after he had been elected to office and had served for ten months.[12]

In response to the harsh effects of the Arkansas Supreme Court's interpretation, the Arkansas General Assembly sought to define the term "infamous crime" more narrowly by promulgating Act 724 of 2013.[13] The legislature wanted to create a new approach to determine eligibility for public office that would avoid the inequitable outcomes produced by the judiciary's sweeping interpretation of a constitutional term of art.[14] However, in an inexplicable sequence of political events, the legislature ended up doing the exact opposite—it codified the very holdings it sought to undo.

Act 724 will likely harm those whom it was intended to protect because it lacks a mechanism that allows a court to consider the totality of the circumstances of an alleged "infamous crime." As enacted, the Act prevents a court from weighing factors such as the amount of time that has passed

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10. *See Edwards*, 2010 Ark. 398, at 10-11, 370 S.W.3d at 255-56 (rejecting candidate's plea to refrain from adopting a "bright-line rule").

11. *See id.*

12. Matt Buhrman, *Searcy County Sheriff Kenny Cassell Asked to Resign over 1979 Incident*, THV11.COM (Oct. 31, 2011, 5:46 PM), http://www.thv11.com/news/article/178838/2/Searcy-County-Sheriff-asked-to-resign.

13. *See* Act 724, §1, 2013 Ark. Acts 2714, 2715 (codified at ARK. CODE ANN. § 7-1-101(16) (Supp. 2013)).

14. Telephone Interview with David L. Branscum, Ark. State Representative, Dist. 83 (Nov. 24, 2013) [hereinafter Branscum Interview] (on file with author).

since the crime occurred, the age of the person when he or she committed the crime, or the overall severity of the crime.[15] Further, any party seeking to use article 5, section 9 as a political sword can now contend that the Arkansas General Assembly endorsed the Arkansas Supreme Court's bright-line bar to office. This could force an otherwise good, moral, and qualified candidate out of contention, or out of office, due to youthful indiscretions or previous lapses in judgment that may have little or no bearing on present character.

This comment proposes revisions to current Arkansas law that would achieve the Arkansas General Assembly's apparent goal. The revisions employ a fact-based analysis to determine whether a crime should be considered "infamous," and thus, whether it should bar a candidate from holding an office of public trust. This approach is superior to current law because higher levels of fairness and equity are achieved by allowing a court to consider the totality of the circumstances. Substantial support for fact-based approaches can be found among judges,[16] who seek to ensure judicial legitimacy through the deliberation of outcomes.[17] Lastly, and most importantly, the proposed approach furthers the goal of maximizing the social utility of the democratic process. Allowing the bright-line rule of Act 724 to remain in place would cause continuous injury to the democratic principles revered by the citizens of Arkansas.

Part II of this comment explores the cases and issues considered by the Arkansas Supreme Court prior to the passage of Act 724. Part III analyzes the problems created by the passage of Act 724 and questions the legislative process behind its enactment.[18] Part IV addresses the intricacies of fact-based

15. This list of factors is not exhaustive. For additional factors a court might consider, see *infra* part V.

16. *See* Jeffrey R. Lax, *Political Constraints on Legal Doctrine: How Hierarchy Shapes the Law*, 74 J. POL. 765, 769-70 (2012).

17. *See* Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 66-68 (1992).

18. The applications of article 5, section 9 and Arkansas Code Annotated section 7-1-101(16) give rise to a number of other questions. Does a crime committed in an extraterritorial jurisdiction disqualify an Arkansas candidate or office-holder in the same manner as a crime committed in Arkansas? Similarly, is an individual disqualified for a crime committed in an extraterritorial jurisdiction where the crime is treated less seriously than in Arkansas? Is a person barred for committing a crime in an extraterritorial jurisdiction that involved "deceit" or "dishonesty" under Arkansas law but not under the law of the convicting jurisdiction? What is the effect of an expunged offense on a

approaches,[19] offense-based approaches,[20] and their application within the framework of Act 724. Lastly, Part V proposes a solution to remedy the unjust outcomes produced by the combined application of Act 724 and the Arkansas Supreme Court's interpretation of "infamous crimes."

II. THE ROAD TO ACT 724

A. "Great Moral Turpitude" and Political Privilege

For many years, the term "infamous crime" was ambiguous with respect to specific qualifying crimes.[21] The Arkansas Supreme Court first attempted to define the term in 1935, where the court characterized a crime of infamy as one involving "great moral turpitude."[22] The case, styled as *State ex rel. Attorney General v. Irby*, presented a straightforward factual situation. W.O. Irby, an Arkansas postmaster, was convicted of embezzling funds from the post office and sentenced to 366 days in federal prison.[23] The case presented two relevant issues: (1) whether holding public office in Arkansas is a political privilege or a civil right; and (2) if considered a political privilege, whether the conviction precluded Irby from holding public office.[24]

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candidate's qualification for office? These intriguing questions, as well as a multitude of similar questions on the topic, are not expressly examined by this comment. Yet, it is the opinion of the author that, in following the spirit of previous Arkansas Supreme Court cases, the outcome of the four listed questions would likely be disqualification.

19. What is characterized as a fact-based approach may be described using other terms, such as "standards" or "balancing." *See* Sullivan, *supra* note 17, at 58-59. Some scholarship refers to this approach as "factor-based," "factual-based," or "fact-intensive." *See* Claire Marie Hagan, Note, *Sheltering Psychiatric Patients from the* DeShaney *Storm: A Proposed Analysis for Determining Affirmative Duties to Voluntary Patients*, 70 WASH. & LEE L. REV. 725, 729, 765-66 (2013).

20. An "offense-based" approach may be referred to as a "bright-line" approach, a "per-se" approach, or simply a "rule." *See* Lax, *supra* note 16, at 769.

21. Article 5, section 9 has been the fulcrum of a number of cases over the years, but the inluded term "infamous crime" remained untouched until recently. *See infra* note 171 and accompanying text (discussing fourteen appellate cases involving article 5, section 9).

22. State *ex rel.* Att'y Gen. v. Irby (*Irby II*), 190 Ark. 786, 795, 81 S.W.2d 419, 423 (1935) (quoting State *ex rel.* Olson v. Langer, 256 N.W. 377, 385 (N.D. 1934)).

23. *Id.* at 787, 81 S.W.2d at 419.

24. *Id.* at 789, 81 S.W.2d at 420. The court did not discuss Irby's disqualification from office in great detail because the outcome was simple—Irby was previously declared ineligible because he was convicted of embezzlement, which was an enumerated disqualifying crime under article 5, section 9. *See* Irby v. Day (*Irby I*), 182 Ark. 595, 599, 32 S.W.2d 157, 158 (1930). Therefore, the court did not consider whether Irby's crime was "infamous." Aside from the discussion of the issues most relevant to this comment,

As to the first issue, the court determined that holding office in Arkansas is a political privilege, not a vested civil right.[25] After making this determination, the court found that disqualification from holding office is not a punishment; rather, it represents the withholding of a privilege.[26] The court noted:

> The presumption is, that one rendered infamous by conviction of felony, or other base offense indicative of great moral turpitude, is unfit to exercise the privilege of suffrage, or to hold office, upon terms of equality with freemen who are clothed by the State with the toga of political citizenship.[27]

Through this deceptively discrete statement, the court characterized all offenses that would require disqualification from holding public office in Arkansas, other than felonies, as involving "great moral turpitude." In simpler terms, the court interpreted all enumerated offenses in article 5, section 9, including the term "infamous crime," to involve "great moral turpitude." The court did not define "great moral turpitude," but it clearly included embezzlement. Accordingly, Arkansas's first attempt at defining "infamous crime" provided a mere cardinal direction in which to venture and certainly left much ground to explore.

B. Tampering, Abuse of Office, and Theft

In 2005, after a long hiatus from analyzing article 5, section 9, the Arkansas Supreme Court was tasked with further interpreting "infamous crime." Clay Oldner, the former Mayor of Dumas, Arkansas, asked two city employees to lie about the misappropriation of city funds.[28] Authorities charged Oldner

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the court in *Irby II* also considered whether presidential pardon restores the right to hold political office. *See* 190 Ark. at 796-97, 81 S.W.2d at 423-24. The court answered in the negative. *See id.* at 797, 81 S.W.2d at 424. Interestingly, although the Arkansas Supreme Court ruled in 1935 that a pardon would not restore the privilege of holding political office, a more recent opinion noted an individual may be eligible to hold office after certain convictions have been declared null and void. *See generally* Powers v. Bryant, 309 Ark. 568, 832 S.W.2d 232 (1992) (allowing an individual to hold office after felony convictions received as a minor were set aside by a writ of error *coram nobis*).

25. *Irby II*, 190 Ark. at 794, 81 S.W.2d at 422.

26. *Id.* at 794-95, 81 S.W.2d at 422-23.

27. *Id.* at 795-96, 81 S.W.2d at 423 (quoting State *ex rel.* Olson v. Langer, 256 N.W. 377, 385 (N.D. 1934)).

28. State v. Oldner, 361 Ark. 316, 323, 206 S.W.3d 818, 819-20 (2005).

with several offenses, and a jury convicted him of witness tampering and abuse of office.[29]

Oldner urged the court to focus on the punishment applicable to the crime instead of the crime's categorical classification.[30] He also contended that he should not be precluded from holding office because he was only convicted of misdemeanors.[31] Oldner's position relied on the following discussion of "infamous crimes" in *Corpus Juris Secundum*: "[T]he question of whether a crime is infamous is determined by the nature of the punishment, and not by the character of the crime . . . . The decision turns not on the punishment actually inflicted, but on the punishment which the court is authorized to impose."[32]

The *Oldner* court utilized the construction doctrines of *ejusdem generis*[33] and *noscitur a sociis*[34] to side with the State's position that "infamous crimes" should be classified based upon the categorical nature of the crime rather than the applicable punishment.[35] Accordingly, the court held that the drafters of the Arkansas Constitution contemplated an "infamous crime" to be one involving deceit and dishonesty.[36] The court also characterized "infamous crimes" as those that "impugn[]" the integrity of office and directly impact a person's ability to serve

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29. *Id.* at 323, 206 S.W.3d at 819.

30. *Id*. at 327-28, 206 S.W.3d at 823.

31. Oldner, by asking the court to focus on the "applicable punishment," essentially claimed that the term "infamous crime" was synonymous with a felony offense. *See id.*

32. *See id.* (quoting 22 C.J.S. *Criminal Law* § 6 (1989)). A number of authorities support this proposition. *See* 21 AM. JUR. 2D *Criminal Law* § 23 (2008) ("[A]n infamous crime is one punishable by imprisonment in a penitentiary for a term of over one year."); 1 CHARLES E. TORCIA, WHARTON'S CRIMINAL LAW, *Infamous Crimes* § 22 (15th ed. 1993) ("[T]he question of whether a crime is infamous is determined . . . by the punishment prescribed. . . . A misdemeanor is not ordinarily infamous."). *But see* 1 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 1.6(d) (2d ed. 2003) ("[T]he term 'infamous' properly has reference to those crimes involving fraud or dishonesty or the obstruction of justice . . . .").

33. *Black's Law Dictionary* defines *ejusdem generis* as "[a] canon of construction holding that when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same class as those listed." BLACK'S LAW DICTIONARY 594 (9th ed. 2009).

34. *Black's Law Dictionary* defines *noscitur a sociis* as "[a] canon of construction holding that the meaning of an unclear word or phrase should be determined by the words immediately surrounding it." *Id.* at 1160-61.

35. *Oldner*, 361 Ark. at 327, 329, 206 S.W.3d at 822-23.

36. *Id.* at 327, 206 S.W.3d at 822.

as an elected official.[37] In the same vein as *Irby II*, the *Oldner* court briefly acknowledged other terms, such as moral corruption and *crimen falsi*.[38]

To further support its conclusion, the court emphasized that when the current Arkansas Constitution was drafted, it was uncommon to classify a crime as "infamous" based on its corresponding punishment.[39] Rather, classification was generally determined by the categorical nature of the crime.[40] The court also rejected Oldner's contention that misdemeanors could not be "infamous." The court vilified this assertion as "nonsensical" and claimed such a rule "would lead to an absurd result."[41] Finally, the court stated that if the drafters had intended the narrower interpretation—that only the punishment applicable to a certain crime should determine whether the crime is "infamous"—they would have used more precise language to express that intent.[42]

In *Edwards v. Campbell*,[43] the Arkansas Supreme Court declared an individual ineligible to run for re-election on the basis that he committed a crime of infamy.[44] Kenneth Edwards, then-Mayor of Greenwood, Arkansas, was convicted of misdemeanor theft of property after stealing three campaign signs that expressed opposition to a proposed tax measure he

37. *Id.* at 332, 206 S.W.3d at 826. At least one lower court included the "impugn[ing] the integrity of office" language as part of the prescribed test to determine whether an individual was barred from office. *See* State v. Cassell 2013 Ark. 221, at 2-3, 427 S.W.3d at 665 (referencing the state-appealed decision by the Searcy County Circuit Court that allowed an individual to remain in office because his crime "did not impugn the integrity of office").

38. *See Oldner*, 361 Ark. at 327, 206 S.W.3d at 822. *Black's Law Dictionary* defines *crimen falsi* as "[a] crime in the nature of perjury. . . . [or] [a]ny other offense that involves some element of dishonesty or false statement." BLACK'S LAW DICTIONARY 429 (9th ed. 2009).

39. *Oldner*, 361 Ark. at 328-29, 206 S.W.3d at 823.

40. *Id*. at 329, 206 S.W.3d at 823.

41. *Id.* at 329, 206 S.W.3d at 824.

42. *Id.* at 331, 206 S.W.3d at 825. Interestingly, the court noted the different contexts in which the term "infamous crime" can be utilized. *See id.* at 330, 206 S.W.3d at 824. Specifically, it observed a different meaning of "infamous crime" when used to impeach witnesses compared to "infamous crime" when used in connection with determination of disqualification from office. *Id.* Regardless of the differences in contextual usage, the court ultimately relied upon the usage in relation to impeaching witnesses to hold that theft is a crime of "infamous" nature, expanding the role of "infamous crimes" in disqualification from office. *Id.*

43. 2010 Ark. 398, 370 S.W.3d 250.

44. *Id.* at 10-11, 370 S.W.3d at 256.

supported.[45] Edwards argued his crime was not "infamous," and urged the court to adopt a fact-based approach instead of a bright-line rule to determine whether his crime was "infamous."[46]

The Arkansas Supreme Court declined, reasoning that *Oldner* established an "infamous crime" is determined by the categorical nature of the crime—not the applicable punishment.[47] In support of this contention, the court stated, "calling a man a thief amount[s] to a charge of larceny, 'which is an infamous crime.'"[48] The court also recognized theft involves dishonesty for the purpose of impeaching a witness under Arkansas Rules of Evidence 608 and 609.[49] The court ruled, "a person exhibits dishonesty when he or she knowingly takes unauthorized control of someone else's property or obtains that property through deception or threat with the purpose of depriving the owner of the property."[50] Thus, Edwards' theft constituted an "infamous crime" because it involved dishonesty, and the conviction barred Edwards from holding office.[51]

Oldner and *Edwards* contributed to the definition of "infamous crime" by placing specified crimes, such as witness tampering, abuse of office, and theft within the term's broad grasp. For other crimes, the Arkansas Supreme Court concluded that the determination of whether a crime is "infamous" hinges upon whether the crime involved "deceit" or "dishonesty."[52] Further, in both *Oldner* and *Edwards*, the court emphasized its aversion to subjective analysis to determine whether a crime is "infamous." Through these opinions, the court ruled that

45. *Id.* at 1, 370 S.W.3d at 251.

46. *Id.* at 3-4, 370 S.W.3d at 252-53.

47. *Id.* at 9, 370 S.W.3d at 255.

48. *Edwards*, 2010 Ark. 398, at 6, 370 S.W.3d at 254 (quoting Gains v. Belding, 56 Ark 100, 100, 19 S.W. 236, 236 (1892)).

49. *Id.*; *see also* ARK. R. EVID. 608; ARK. R. EVID. 609.

50. *Edwards*, 2010 Ark. 398, at 9-10, 370 S.W.3d at 255.

51. *Id.* at 10-11, 370 S.W.3d at 256. Although *Edwards* declared misdemeanor theft to be "infamous," it has long been held in Arkansas that any felony conviction disqualifies an individual from holding office. *See, e.g.*, Powers v. Bryant, 309 Ark. 568, 570, 832 S.W.2d 232, 233 (1992) (stating article 5, section 9 of the Arkansas Constitution prohibits convicted felons from holding office in the state). A candidate is also required by statute to declare that he or she is not a convicted felon. *See* ARK. CODE ANN. § 7-6-102 (Supp. 2013).

52. *See Edwards*, 2010 Ark. 398, at 10-11, 370 S.W.3d at 256; State v. Oldner, 361 Ark. 316, 331-32, 206 S.W.3d 818, 825 (2005).

conviction of certain crimes was the only relevant consideration in determining whether a candidate was disqualified from office.

C. Eternal Look-Back Period

More recently, in *State v. Cassell*,[53] the Arkansas Supreme Court determined convictions have no apparent time limit with respect to their disqualifying nature.[54] In 2010, voters elected Kenny Cassell as Sheriff of Searcy County, Arkansas after he disclosed a 1979 theft conviction for stealing Cornish hens from an overturned poultry hauler.[55] As punishment, Cassell paid a fine, served thirty days in jail, and received an eleven-month suspended sentence.[56] Cassell was twenty-one years old when he committed the crime and was over the age of fifty at the time he was elected.[57]

The Arkansas Supreme Court reversed the circuit court's interpretation of the operation of article 5, section 9, ruling that disqualification following a theft conviction turns solely on whether the crime involved deceit or dishonesty—not whether the factual circumstances impugn the integrity of the office sought or held.[58] Extending the reasoning from *Oldner* and

53. 2013 Ark. 221, 427 S.W.3d 663.

54. *Id.* at 8, 427 S.W.3d at 667-68 (noting Cassell's conviction occurred thirty-three years prior to the qualification issue). It is important to again mention *Powers v. Bryant*. The elected official in that case pursued a writ of error to declare his nearly fifty-year-old convictions void on the basis he was not informed of his right to counsel. *See* Powers v. Bryant, 309 Ark. 568, 570, 832 S.W.2d 232, 232-33 (1992). The court allowed the elected official to retain his office after his convictions were voided. *See id.* at 572, 832 S.W.2d at 234. This outcome might suggest the pre-*Cassell* incorporation of a temporal element into the test to determine whether to bar an individual from public office. However, *Powers* can be distinguished on two significant grounds: (1) the convictions occurred when the politician was a minor; and (2) both convictions were declared null and void after a writ of error *coram nobis* was issued. *See id.* at 570, 832 S.W.2d at 232-33. The *Powers* court did not anchor its holding on the dated nature of the elected official's crimes. Instead, the court focused on the violation of the official's right to counsel, which nullified the effect of conviction. *See id*. at 570-71, 832 S.W.2d at 233.

55. *Cassell*, 2013 Ark. 221, at 1-2, 427 S.W.3d 664, 664. While campaigning for election, Cassell placed a full-page advertisement in the *Marshall Mountain Wave* disclosing his conviction. *See A Message from Kenney* [sic] *Cassell, Republican Candidate for Searcy County Sheriff, to the Citizens of Searcy County*, Marshall Mountain Wave, Oct. 15, 2009, at 3.

56. *Cassell*, 2013 Ark. 221, at 1, 427 S.W.3d at 664.

57. *See* Buhrman, *supra* note 12.

58. *Cassell*, 2013 Ark. 221, at 6-7, 427 S.W.3d at 667. The Arkansas Supreme Court declined to adopt Cassell's proposed two-part "infamous crime" and "impugning the office" test mentioned by the court in *Oldner* for determining whether a candidate is ineligible for elected office. *See id.* at 7, 427 S.W.3d at 667.

Edwards, the court ruled Cassell was ineligible for office because the theft conviction itself acted as the relevant disqualifying factor.[59]

In essence, *Cassell* entrenched the Arkansas Supreme Court's interpretation of the Arkansas Constitution—disqualification from office for conviction of an "infamous crime" was to be determined by bright-line rule, not fact-based analysis. Cassell's situation presented several mitigating factors: (1) more than thirty years had passed since the crime occurred; (2) the crime caused relatively minor harm; (3) Cassell voluntarily disclosed the crime to Searcy County constituents; and (4) voters overwhelmingly chose Cassell despite his criminal conviction.[60] Nonetheless, the court found Cassell had committed an "infamous crime" and was immediately subject to removal from office.[61] Therefore, *Cassell* stands for the premise that if an individual has ever been convicted of any crime determined to involve deceit or dishonesty, misdemeanant or felonious, that individual is barred from holding political office in Arkansas with no clear exception.

III. ACT 724

Act 724 is one of the more interesting pieces of legislation passed during the 2013 regular session. While *Cassell* was pending before the state supreme court, the Arkansas General Assembly passed Act 724 in response to *Oldner*, *Edwards*, and the legal proceedings involving Kenny Cassell.[62] A reading of the Act's operative language unambiguously demonstrates the effect of codifying the Arkansas Supreme Court's bright-line interpretation of grounds for disqualification from office by clarifying the term "infamous crime."[63] However, the actual application intended is less certain because the Act includes

59. *Id.* at 8-9, 427 S.W.3d at 667-68.

60. *Id.* at 1-2, 427 S.W.3d at 664.

61. *Id.* at 7-8, 427 S.W.3d at 667-68.

62. The Arkansas General Assembly passed Act 724 during the month before the Arkansas Supreme Court issued its opinion in *Cassell*. *Compare* Act 724, 2013 Ark. Acts 2714, 2716 (signed into law April 4, 2013), *with Cassell*, 2013 Ark. 221, at 1, 427 S.W.3d at 663 (opinion issued May 23, 2013). The *Cassell* opinion did not address the passage of Act 724, presumably because the Act did not take effect until several months after its passage.

63. Act 724, § 3, 2013 Ark. Acts 2714, 2716 (codified at ARK. CODE ANN. § 7-1-101(16) (Supp. 2013)).

uncodified language that controverts the codified bright-line approach.[64] Further, the apparent original purpose of the Act was undermined by procedural limits placed upon the state constitutional amendment process.

A. The Act's Operation as Currently Written

The Act expressly classifies the following crimes as "infamous":

> (A) A felony offense;
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> (B) A misdemeanor theft of property offense;
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> (C) Abuse of office, § 5-52-107;
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> (D) Tampering, § 5-53-110; or
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> (E) A misdemeanor offense in which the finder of fact was required to find, or the defendant to admit, an act of deceit, fraud, or false statement.[65]

These enumerated offenses are the product of opinions issued by the Arkansas Supreme Court, and an individual is disqualified from holding office if convicted of such an offense. The first four crimes are expressly derived from the "infamous crime" opinions issued by the Arkansas Supreme Court, but the fifth enumeration, encompassing a group of crimes, cannot be attributed to a particular opinion. However, it can be easily extracted from the holdings in *Oldner*, *Edwards*, and *Cassell*.

Effectively, Act 724 ensures that the Arkansas Supreme Court's bright-line interpretation remains operative. Contained within the Act, however, are two contradictory uncodified sections, which are not binding upon the courts.[66] These sections indicate that the Arkansas General Assembly intended an outcome significantly different from that which was ultimately achieved.

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64. *See* Act 724, §§ 1–2, 2013 Ark. Acts 2714, 2714-16. The author uses the phrases "codified" and "uncodified" to refer to different portions of Act 724 based on whether the particular section was ultimately included within the Arkansas Code Annotated. Only section three of Act 724 was codified. *Compare* Act 724, 2013 Ark. Acts 2714, 2714-16 (legislation in its entirety), *with* ARK. CODE ANN. § 7-1-101(16) (Supp. 2013) (codifying only section three of Act 724).

65. Act 724, § 3, 2013 Ark. Acts 2714, 2716 (codified at ARK. CODE ANN. § 7-1-101(16) (Supp. 2013)).

66. *See* Act 724, §§ 1–2, 2013 Ark. Acts 2714, 2714-16.

B. The Intended Operation of Act 724

The Arkansas General Assembly likely intended a different outcome for Act 724 than the codification of the Arkansas Supreme Court's bright-line rule. To support this conclusion, one need not look further than the Act's uncodified language.[67] The legislative findings endorse a fact-based approach rather than the offense-based approach codified by the Act. Further, early drafts of House Bill 1354, the predecessor to Act 724, contained operative language requiring courts to analyze the totality of the circumstances.[68] Likewise, an interview with the lead sponsor of the legislation, State Representative David Branscum, confirmed legislators intended the Act to consider factual circumstances discounted by the Arkansas Supreme Court's approach.[69]

Act 724 exclusively lists which crimes are "infamous," but the first statement of uncodified legislative findings differs from the operative language of the Act by generally describing the "nature" of an "infamous crime."[70] The explanatory assessment bears strong resemblance to the definition of *crimen falsi*:

> A definition of "infamous crime" should also encompass those criminal offenses that lead to a loss of public confidence as well as offenses in the nature of perjury or subornation of perjury, false statement, criminal fraud, embezzlement, false pretense, or any other offense that involves some element of deceitfulness, untruthfulness, or falsification . . . .[71]

The inclusion of the word "also" in the explanatory assessment, which textually follows the legislature's recital of existing "infamous crime" case law, implies that the legislature intended to modify the court's interpretation of "infamous crimes." The final codified list of "infamous crimes," and the uncodified explanatory assessment that describes what should be considered an "infamous crime," do not facially present a mutually exclusive relationship. Overlap exists in the types of

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67. *See* Act 724, § 2, 2013 Ark. Acts 2714, 2715-16.

68. *See* H.B. 1354, 89th Gen. Assemb., Reg. Sess. (Ark. 2013) (requiring a court to consider "all attendant circumstances" when analyzing an offense that would lead to a loss of public confidence).

69. *See* Branscum Interview, *supra* note 14.

70. *See* Act 724, § 2, 2013 Ark. Acts 2714, 2715.

71. Act 724, § 2, 2013 Ark. Acts 2714, 2715.

crimes listed in both, but when addressed together, they are clearly anomalous in evaluating the intended Act 724 analysis of which characteristics comprise an "infamous crime."

The second uncodified portion conflicting with the as-codified operation of Act 724 provides additional considerations for a reviewing court.[72] It includes specific mitigating "variables" for a reviewing court to consider in determining whether a crime is infamous:

> A reviewing court should also measure certain variables when determining what constitutes an "infamous crime," such as the attendant mental state of the offense, the particular circumstances surrounding the charged offense, the age and education of the person committing the offense, and, if the offense occurred before the person has assumed public office, the age of the person at the time of the conviction itself.[73]

Taken together, the two uncodified provisions of legislative findings paint a picture vastly different from the final as-codified operation of the Act. The language suggests that the Arkansas General Assembly contemplated a different method for determining whether a crime is one of infamy—one that considers the totality of circumstances. However, one question still looms. Why would the Arkansas General Assembly pass legislation that conflicts with its apparent intent?

According to Representative Branscum, Act 724 was originally intended to accomplish three goals: (1) reduce the possibility for inequitable outcomes such as *Cassell*; (2) prevent article 5, section 9 from being used as a tool to remove a political opponent from office or contention for office; and (3) produce a rule capable of considering mitigating factors.[74] The Arkansas General Assembly would have accomplished these objectives had the legislative findings been codified within the Arkansas Code Annotated.

Early drafts of House Bill 1354 also demonstrate the Arkansas General Assembly's intent. A provision in the first draft would have statutorily required courts to consider "all attendant circumstances" of crimes leading to a loss of public

72. *See* Act 724, § 2, 2013 Ark. Acts 2714, 2716.
73. Act 724, § 2, 2013 Ark. Acts 2714, 2716.
74. *See* Branscum Interview, *supra* note 14.

confidence.[75] Presumably, the precise meaning of the phrase "all attendant circumstances" was left intentionally broad in order to break away from the Arkansas Supreme Court's bright-line methodology. It follows that the legislature initially intended a court's analysis to include limitations upon article 5, section 9 preclusion from office.[76] It envisioned an approach that more closely resembled a fact-based analysis than the Arkansas Supreme Court's bright-line rule.[77]

However, because the intended changes would have drastically altered the definition of "infamous crime," they would have required an amendment to the state constitution.[78] The Arkansas Constitution limits legislators to three amendment proposals per legislative session,[79] and during the 2013 session, Act 724 failed to make the cut.[80] Proposals regarding political ethics,[81] legislative review of administrative rules,[82] and ballot initiatives and referenda[83] took center stage early in the session, eliminating the opportunity for further constitutional amendment by the time House Bill 1354 was discussed.[84] In lieu of abandoning the "infamous crime" legislation, the sponsors decided it would be better to submit House Bill 1354 to a vote, including the uncodified provisions intended to guide judicial decision-making, than to scrap the project altogether.[85]

Due to the hurdle imposed by the amendment proposal procedure, Act 724 codified the case law it was intended to abrogate. In this sense, the Act accomplishes very little in light

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75. H.B. 1354, 89th Gen. Assemb., Reg. Sess. (Ark. 2013) (February 14, 2013 draft).

76. Branscum Interview, *supra* note 14.

77. The February 14, 2013 draft of House Bill 1354, while leaning heavily towards the fact-based end of the spectrum, proposed a hybrid of the fact-based and offense-based approaches. *See* H.B. 1354, 89th Gen. Assemb., Reg. Sess. (Ark. 2013) (Feb. 14, 2013 draft) (classifying all felonies as crimes of infamy, while allowing a court to consider "all attendant circumstances" for other unspecified crimes).

78. Branscum Interview, *supra* note 14.

79. ARK. CONST. art. 19, § 22 ("[N]o more than three amendments shall be proposed or submitted at the same time."). *See generally* Stephen B. Niswanger, *A Practitioner's Guide to Challenging and Defending Legislatively Proposed Constitutional Amendments in Arkansas*, 17 U. ARK. LITTLE ROCK. L.J. 765 (1995) (providing an overview of constitutional amendment and repeal procedures in Arkansas).

80. Branscum Interview, *supra* note 14.

81. H.J.R. 1009, 89th Gen. Assemb., Reg. Sess. (Ark. 2013).

82. S.J.R. 7, 89th Gen. Assemb., Reg. Sess. (Ark. 2013).

83. S.J.R. 16, 89th Gen. Assemb., Reg. Sess. (Ark. 2013).

84. *See* Niswanger, *supra* note 79, at 777 (noting the order of introduction often dictates what amendments are ultimately presented to voters).

85. *See* Branscum Interview, *supra* note 14.

of the original goal of creating a fact-based approach to determine whether a person should be barred from office on the basis of committing an "infamous crime." The silver lining, however, is that the uncodified legislative provisions run entirely contrary to the bright-line approach. This creates a powerful argument for judicial legislation the next time an "infamous crime" controversy sinks its teeth into an elected official or a person seeking public office.

IV. THE PITFALLS OF ACT 724

Act 724 is flawed for three primary reasons: (1) the legislation accomplishes an outcome contrary to what was apparently intended; (2) it utilizes an inequitable method to determine whether a crime is "infamous;" and (3) it has no integrated limiting mechanism. Part III discusses the first issue, and this Part focuses on the second and third issues. The method the Act uses to determine whether a crime qualifies as "infamous" can only be characterized as robotic. Substantial improvement is achievable if courts were required to use a fact-based test on a case-by-case basis. Had *Cassell* been decided under such a test, the outcome would likely have been much different. Mitigating factors such as Kenny Cassell's age at the time of the crime, the amount of time that had passed since the offense occurred, and evidence of his rehabilitation would have carried considerable weight in the court's final determination. Overall, the flexibility of a fact-based approach produces more equitable outcomes.[86]

A final flaw lies in the fact that Act 724 lacks a safety mechanism because the Arkansas General Assembly codified existing precedent instead of breaking away from the Arkansas Supreme Court's approach. As Act 724 codified prior case law, it is helpful to analyze how the supreme court's bright-line rule came into existence. For example, the *Edwards* court relied heavily on Arkansas Rule of Evidence 609 to determine that theft was "infamous."[87] Unlike Rule 609, the current process for determining whether a candidate is disqualified from office does not include an integrated limiting mechanism, such as a time

86. *See* Sullivan, *supra* note 17, at 66-69 (discussing arguments advanced by proponents of standards-based tests and approaches).

87. *See* Edwards v. Campbell, 2010 Ark. 398, at 7-9, 370 S.W.3d 250, 254-55.

limitation on the admissibility of previous criminal convictions.[88] The Arkansas Supreme Court made clear it does not intend to consider any limiting factors when determining whether a candidate should be barred from office, so long as a crime qualifying as "infamous" is accompanied by a conviction.[89] However, justice would have been better served if the court had fully considered Rule 609 when crafting its bright-line rule that all theft constitutes a bar to office, and if it had integrated a limiting mechanism, similar to that found in Rule 609, into analyses of whether an "infamous crime" bars an individual from office. This incomplete reasoning was relied upon by the legislators who drafted the limitation-lacking Act 724.

A. The General Assembly Should Adopt a Fact-Based Approach

The archetypal approach to determining whether a crime is "infamous" should be either purely offense-based or purely fact-based in order to prevent any loss of economy in application.[90] These two approaches rest at opposite ends of the broad continuum of legal methodology for making decisions, leaving a myriad of hybrids between them.[91] Oddly enough, supporters of both approaches advance similar arguments to demonstrate the supremacy of their chosen approach.[92] As the inequities that accompany rigid offense-based outcomes seem apparent,[93] the fact-based approach is the superior choice for determining whether a crime is "infamous."

Instead of considering only whether a conviction exists, the ideal method should determine whether a crime is "infamous" through a holistic and fact-based approach based upon a set of guiding factors. Utilizing this approach realizes substantial

88. *See* ARK. CODE ANN. § 7-1-101(16) (Supp. 2013).

89. *See* State v. Cassell, 2013 Ark. 221, at 6-8, 427 S.W.3d 663, 667-68 (dismissing the notion that a court should consider certain "mitigating" factors).

90. More or less, this argument encapsulates the debate between so-called "rules" and "standards." *See generally* Sullivan, *supra* note 17.

91. *Id.* at 61.

92. *See id*. at 66 ("The substantive arguments for standards correspond to the four categories of arguments that are outlined . . . for rules, but they arrive at the opposite conclusion."). Fairness, utility, and equality are all cited as justifications for both approaches. *Id.* at 62-69.

93. *See, e.g.*, *Cassell*, 2013 Ark. 221, at 6-8, 427 S.W.3d at 667-68.

benefits: (1) it facilitates fairness and reduces arbitrariness;[94] (2) the approach maximizes social utility through flexibility;[95] (3) the method harbors support from the judiciary and enables intelligent deliberation of outcomes that reassure judicial legitimacy;[96] and, most importantly, (4) the approach embodies the essence of a democracy in multiple ways.[97]

1. The Offense-Based Approach

An offense-based approach is one that classifies a specific event within a pre-determined legal category.[98] It is based on straightforward, succinct dimensions[99] and binds a decision-maker to consider only whether narrowly specified facts occurred.[100] Such an approach is most useful when an absolute and clear rule is necessary to act as a forceful deterrent against certain conduct.[101] Within the context of "infamous crimes," an offense-based approach only considers whether a particular crime resulted in a conviction. Once a conviction has been established, the crime falls into one of two clear categories: (1) a conviction for an "infamous crime;" or (2) a conviction for a crime other than an "infamous crime." A court must disregard the criminal conduct itself and the circumstances surrounding the commission of the crime once it has been established the actor was convicted of an "infamous crime." In this sense, it is similar to a strict-liability offense—if the conviction exists, the consequences follow, regardless of any mitigating circumstances.[102]

Offense-based approaches offer substantial outcome certainty because they require decision-makers to treat all cases and circumstances alike.[103] Supporters of such an approach

94. Lax, *supra* note 16, at 769; *see also* Sullivan, *supra* note 17, at 66.

95. *See* Sullivan, *supra* note 17, at 66.

96. *See* Lax, *supra* note 16, at 769-70; Sullivan, *supra* note 17, at 67.

97. Sullivan, *supra* note 17, at 68.

98. *See* Lax, *supra* note 16, at 769.

99. *See id.*

100. Sullivan, *supra* note 17, at 58.

101. David M. Silk, Comment, *When Bright Lines Break Down: Limiting* New York v. Belton, 136 U. PA. L. REV. 281, 285 (1987).

102. For a general overview of strict liability in the field of criminal law, see Richard A. Wasserstrom, *Strict Liability in the Criminal Law*, 12 STAN. L. REV. 731 (1960).

103. Sullivan, *supra* note 17, at 62; James G. Wilson, *Surveying the Forms of Doctrine on the Bright Line-Balancing Test Continuum*, 27 ARIZ. ST. L.J. 773, 777 (1995)

claim it removes subjectivity, personal bias, and arbitrariness from the decision-making process.[104] Offense-based approaches also simplify the process for a decision-maker by minimizing time-consuming application of law to fact.[105] Commentators note that offense-based approaches produce greater net social utility by allowing individuals to productively order their affairs because the consequences of action are certain.[106]

These perceived benefits of utilizing an offense-based approach are far outweighed by the disadvantages. Critics condemn such approaches as either too inclusive or too exclusive, which increases the likelihood of inequitable and unjust results.[107] Widespread knowledge of offense-based approaches also encourages individuals to misbehave up to the line of punishment.[108] Further, any economies gained by avoiding repetitive application of law to fact are counterbalanced by attempts to create exceptions to the rule,[109] exponentially increasing the risk of drowning in Justice White's "sea of ever-finer distinction." Finally, even though offense-based approaches may reduce judicial arbitrariness in outcome determination, they remain "arbitrary at the border"[110] because the approach forces the decision-maker to treat differently cases that are factually similar, while treating similarly cases that are factually different.[111] As a result of the lethargic requirements for adjudication, a judge utilizing an offense-based approach is

("Formal rules limit future judicial discretion and generate predictability and consistency . . . .").

104. Sullivan, *supra* note 17, at 62; Wilson, *supra* note 103, at 777.

105. Wilson, *supra* note 103, at 777; *see also* Sullivan, *supra* note 17, at 63 ("[R]ules promote economies for the legal decisionmaker by minimizing the elaborate, time-consuming, and repetitive application of background principles to facts.").

106. Sullivan, *supra* note 17, at 62.

107. *See id.* at 63. The United States Supreme Court stated similarly, "[a]ny approach that designates a single fact or occurrence as always determinative of an inherently fact-specific finding . . . must necessarily be overinclusive or underinclusive." Basic Inc. v. Levinson, 485 U.S. 224, 236 (1988). This opens the door for rules rife with exceptions and inconsistent judicial application. *See* Lax, *supra* note 16, at 768-71. Justice White claimed that bright-line rules bear the seeds of their own demise and will disappear into the "sea of even-finer distinctions." Illinois v. Gates, 462 U.S. 213, 265 (1983) (White, J., concurring).

108. Sullivan, *supra* note 17, at 62-63.

109. *Id*. at 63.

110. *Id.* at 62.

111. *Id.*

not required to thoroughly explain the basis for his or her decision.[112]

Act 724 operates in the spirit of the offense-based approach promulgated by the Arkansas Supreme Court. To apply Act 724 in a tangible manner, consider a basic scenario.[113] An Arkansan gubernatorial candidate was convicted of shoplifting at age eighteen. All fees, fines, and punishments were satisfied, and he is now sixty-eight years old. Since returning to Arkansas from seminary at age twenty-four, the candidate positively impacted his community through philanthropy and community service. Experts expect the well-known minister to easily capture the governorship. Not since age eighteen has he broken the law, except for a few run-of-the-mill speeding tickets during his travels.

Under the offense-based approach, the outcome is simply shocking. Arkansas law prevents the candidate from holding office because of his antiquated shoplifting conviction.[114] Shoplifting is a form of theft,[115] and theft is "infamous" whether misdemeanant or felonious.[116] Although it is seemingly impossible to argue on these limited facts that the candidate is a man of reprehensible moral character, Arkansas courts have no discretion and need no other facts—the candidate is clearly ineligible to hold office.

2. The Fact-Based Approach

A fact-based approach considers a number of suggestive factors in a totality-of-the-circumstances analysis.[117] The decision-maker has substantial discretion to reach the most equitable and socially beneficial outcome.[118] In the context of

112. *See* John W. McCormac, *Reason Comes Before Decision*, 55 OHIO ST. L.J. 161, 165-66 (1994); *see also* JOSEPH GOLDSTEIN, THE INTELLIGIBLE CONSTITUTION 19 (1992) (arguing that the Justices of the United States Supreme Court have the responsibility to articulate language about the principles on which adjudication is based).

113. This scenario is intended to be entirely hypothetical. Any similarities to real persons or events are unintentional on the part of the author.

114. ARK. CODE ANN. § 7-1-101(16)(B) (Supp. 2013) (declaring misdemeanor theft of property an "infamous crime").

115. ARK. CODE ANN. § 5-36-102(a) (Repl. 2013) (stating the crime of "theft" includes various crimes, such as larceny, conversion, receiving stolen property, and "other similar offenses").

116. *See* ARK. CODE ANN. § 7-1-101(16)(A)–(B) (Supp. 2013).

117. *See* Lax, *supra* note 16, at 768-69; Sullivan, supra note 17, at 59.

118. Sullivan, *supra* note 17, at 66.

"infamous crimes," a court may consider a number of important factors: (1) whether the crime was in fact committed in a manner which involved deceit or dishonesty as compared to the general nature of the crime; (2) the amount of time that has passed since the crime occurred; (3) the age of the individual at the time the crime was committed; (4) the punishment the person received; and (5) the presence of rehabilitative evidence.[119]

A fact-based approach distinguishes an individual's conduct from the category for which the crime qualifies. Analysis of all facts from the time prior to the commission of the crime until the date of the posed office-qualification question, as opposed to merely the existence of a conviction, determines whether the crime's consequences should be disqualifying for the purpose of holding office. Courts often employ abstract language "to capture the circumstances" when determining whether the facts of a particular case fit into a specific test.[120] Although a fact-based analysis separates a conviction from the manner in which the crime itself was committed, the seriousness of the crime is inherently analyzed based on the circumstances surrounding the criminal conduct.[121]

A pure fact-based approach offers substantial benefits compared to its offense-based counterpart. First, fact-based approaches facilitate fairness—they are less arbitrary than bright-line rules because cases can be treated differently when justice so requires.[122] By ensuring fairness, fact-based approaches maximize social utility by permitting decision-makers to maintain flexibility and adapt to ever-changing circumstances.[123] Second, a fact-based approach requires a judge to explain his reasoning. Justifying a judicial decision is so important that its fair and intelligent rationale should be divulged, even if that means "proceeding only one case at a

119. The Arkansas General Assembly mentioned four of these factors in the uncodified provisions of Act 724. *See* Act 724, § 2, 2013 Ark. Acts 2714, 2716. The list of factors presented in the above text is not exhaustive. See Part V *infra* for additional factors that a court might consider under a fact-based approach.

120. *See* Lax, *supra* note 16, at 769.

121. *See* Sullivan, *supra* note 17, at 59.

122. *Id*. at 66; *see also* Lax, *supra* note 16, at 769 (stating few areas of the law can be reduced to a single dimension).

123. Sullivan, *supra* note 17, at 66.

time."[124] To do otherwise questions the underpinnings of judicial legitimacy.[125]

Fact-based approaches also ensure that the judiciary fulfills its role by engaging in at least some deliberation.[126] In this sense, a decision-maker must face his decision and cannot abdicate responsibility by claiming that his or her "hands are tied."[127] Similarly, one may not be arbitrarily confined to a certain action as demonstrated in *Cassell*.[128] Further, fact-based approaches promote efficient democracy by satisfying the civic commitment to resolve conflict through intelligent debate founded upon firm rationale.[129] In relation to disqualification from office, fact-based approaches also serve to protect a voter's right to choose adequate representation in the legislature, which is a bedrock democratic principle.[130]

Additional support for fact-based approaches can be found from the group best positioned to comment—the judiciary. Aside from Justice Scalia,[131] most judges prefer tests giving them the ability to consider mitigating factors rather than strict, bright-line rules.[132] One scholar noted, "[f]ew judges truly believe in absolute rules for all circumstances" and "[f]ew areas of the law truly reduce to a single objective dimension."[133]

The legislative findings of Act 724, if codified, would function as a guided fact-based scheme. The fact-based characteristics of the Act can be seen in the list of subjective factors that a court should consider when determining whether

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124. *Id.* at 69 (alteration and internal quotation marks omitted).

125. *Id.*

126. *See id.* at 67.

127. *Id.* (internal quotation mark omitted).

128. The case involving Kenny Cassell highlights this point. Prosecutor Cody Hiland was required to act arbitrarily during the prosecution of Kenny Cassell. Hiland claimed Cassell may be "transformed" and "a good man," but stated "it is illegal for anyone convicted of theft to hold office in Arkansas." Buhrman, *supra* note 12. Hiland further noted that, although unfortunate, he had "a job to do and . . . intend[ed] to do it." *Id.*

129. Sullivan, *supra* note 17, at 68.

130. *See id.* Arkansas courts, however, distinguish between the right to vote for someone who has been disqualified as opposed to the individual right to vote. *See* State v. Oldner, 361 Ark. 316, 333, 206 S.W.3d 818, 826 (2005).

131. *See generally* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989) (arguing in favor of bright-line rules).

132. *See* Lax, *supra* note 16, at 769-70.

133. *Id.* at 770.

to bar an individual from holding office.[134] If codified and supplemented with additional guidance, the provisions would be exceptionally helpful to the judiciary. However, the current application of mitigating factors is limited to situations in which litigants raise arguments based upon the uncodified portions of Act 724. Such an argument would require legislation from the bench because the provisions remain non-binding upon the courts.

Consider once more the hypothetical gubernatorial candidate.[135] If analyzed under a fact-based approach, such as the one proposed in Part V, the outcome would be substantially different than one realized under the current bright-line, permanent bar to office. A decision-maker would be able to consider a litany of mitigating circumstances. Because the candidate committed the crime five decades prior to seeking office, repaid his debt to society, contributed substantially to the community since his transgression, and has not crossed the law in any material manner in fifty years, he should be allowed to hold office. The author hopes a reviewing court would consider such factors while making a determination regarding the candidate's qualification for office.

B. Act 724 Lacks a Safety Valve

Act 724 provides non-operative language a court may utilize in determining whether a crime is "infamous," but the legislation currently does not feature a fully operative, integrated safety valve. As a matter of practicality, it lacks any form of limitation on total disqualification after an individual is convicted of an "infamous crime." Cases such as *Cassell* and the preceding hypothetical illustrate situations in which a safety valve could be employed to avoid inequitable results.

As enacted, Act 724 codified the Arkansas Supreme Court's bright-line approach to disqualification. Even when the legislation was merely a twinkle in the eye of the Arkansas General Assembly, the state's high court had already crafted a judicial definition of "infamous crimes." The Act certainly has flaws, but the case law preceding its enactment cannot be

134. *See* Act 724, § 2, 2013 Ark. Acts, 2714, 2716.

135. *See supra* note 113 and accompanying text.

attributed to the legislature.[136] The Arkansas Supreme Court's determination that theft is an "infamous crime" was based upon the analogy that the Arkansas Rules of Evidence consider theft to involve dishonesty.[137] Rule 609 allows a party to use a prior crime to impeach the testimony of a witness by presenting the crime in an attempt to disprove the witness's credibility.[138] The Rule states:

> For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted . . . if the crime (1) was punishable by death or imprisonment in excess of one [1] year . . . or (2) involved dishonesty or false statement, regardless of the punishment.[139]

In addition to evidentiary rule buttress, Arkansas case law has also recognized theft is considered a crime involving dishonesty for impeachment purposes, which makes it admissible under Rule 609.[140] The Arkansas Supreme Court then drew the inference that, because theft is considered a crime of dishonesty under Rule 609, theft must be a crime of "infamous" nature.[141] The inferential link can be found in *Oldner*, which held that crimes involving dishonesty are "infamous crimes" for the purposes of article 5, section 9.[142] Thus, theft is "infamous" under article 5, section 9 because theft involves dishonesty in numerous legal contexts. The inference was valid, but the court's reliance upon Rule 609 as a foundation failed to acknowledge the limitations placed upon the Rule's operation. The Arkansas General Assembly relied upon this error when it failed to include an operative time limitation within Act 724.

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136. Of course, one must consider the argument that wayward judicial interpretation could have been avoided by clearly defining "infamous crime" in the Arkansas Constitution of 1874.

137. Edwards v. Campbell, 2010 Ark. 398, at 7, 370 S.W.3d 250, 254.

138. ARK. R. EVID. 609.

139. ARK. R. EVID. 609(a).

140. *Edwards*, 2010 Ark. 398, at 7, 370 S.W.3d at 254; Floyd v. State, 278 Ark. 86, 89, 643 S.W.2d 555, 556-57 (1982); James v. State, 274 Ark. 162, 164, 622 S.W.2d 669, 670 (1981).

141. *Edwards*, 2010 Ark. 398, at 8-9, 370 S.W.3d at 255.

142. *State v. Oldner*, 361 Ark. 316, 326-27, 206 S.W.3d 818, 822 (2005) (finding the "elements of dishonesty and deception" to satisfy the requirements of an "infamous crime").

Compared to Act 724, Rule 609 features a safety valve that prohibits the use of a criminal conviction for the purpose of impeaching a witness after a certain period of time has passed.[143] Rule 609(b) reads:

> Evidence of a conviction under this rule is not admissible if a period of more than ten [10] years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date.[144]

The Arkansas Supreme Court neglected to mention the limiting provision in Rule 609 when making its analogical conclusion that a bright-line bar to office exists following an individual's conviction of a crime involving deceit or dishonesty. The argument for inclusion of a limiting mechanism is further supported by Rule 609's *absolute* bar on the usage of the prior crime after the allotted time period.[145] The Rule 609 mandate is substantially more restrictive than the corresponding federal rule, which gives courts discretion to determine whether a previous crime can be used to impeach after the passage of ten years.[146] Therefore, if Rule 609 was the foundation for considering theft a crime of infamy in *Edwards*, there is no reason that Rule 609, in its entirety, should not have been the model for deciding *Cassell*, when the "infamous" controversy was rife with significant mitigating circumstances.[147]

Had the court considered Rule 609 in its entirety in *Edwards* and relied upon that determination when deciding *Cassell*, the "infamous crime" analysis in *Cassell* would not have differed. Without dispute, Kenny Cassell committed and was convicted of theft, which is an "infamous crime."[148] However, the end result—Cassell's removal from office—

143. ARK. R. EVID. 609(b).

144. ARK. R. EVID. 609(b).

145. *See* ARK. R. EVID. 609(b)

146. *Compare* FED. R. EVID. 609(b) (enunciating a balancing test), *with* ARK. R. EVID. 609(b) (creating a bright-line restriction on the use of a conviction after a certain time).

147. It is important to note that the temporal element in *Edwards* did not approach ten years from the time of the theft. *See* Edwards v. Campbell, 2010 Ark. 398, at 1, 370 S.W.3d 250, 251 (charged with crime during reelection campaign). In *Cassell*, the temporal element greatly exceeded ten years. *See* State v. Cassell, 2013 Ark. 221, at 1-2, 427 S.W.3d 663, 664 (convicted of theft more than thirty years prior to seeking office).

148. *Cassell*, 2013 Ark. 221, at 1, 427 S.W.3d at 664.

differs when Rule 609(b) is considered because of the Rule's ten-year limitation on the use of a past conviction for evidentiary purposes.[149] Thus, the Arkansas Supreme Court should have gone one step further with its analogical reasoning when relying upon Rule 609. If a crime cannot be used to impeach an individual after the passage of a certain amount of time under Rule 609, so too should a theft conviction be inadmissible to determine article 5, section 9 disqualification after a certain amount of time has passed.

Limiting the effects of otherwise disqualifying convictions best serves the objectives of Rule 609's limitation on the use of prior convictions. The drafters of the Federal Rules of Evidence recognized that considerations of fairness, relevance, and equity demand limits upon the use of a previous conviction under the evidentiary rules.[150] Further, a timeworn conviction does no more than prove that a person was adjudicated to have engaged in a particular act considered criminal at the time of the conduct.[151] Such information only possesses probative value of present character in unique and rare circumstances.[152] Whether the conviction weighs on the propensity of that person to perform his or her official duties in a moral and legal way is always a question worthy of consideration. However, while no doubt exists that society favors the general premise that convicted criminals should not hold elected office, the mitigating circumstances surrounding certain previous criminal convictions should at least be considered by a court tasked with determining current fitness to hold office.

Although the preceding discussion is limited to analysis of the Arkansas Supreme Court's route to determining theft as a crime of infamy, the principle can easily be extended to other "infamous crimes" and other crimes falling within article 5, section 9. Realistically, there should be a limitation upon the use of article 5, section 9, as a whole, when the provision is used for disqualification. Although the proverbial "scarlet letter"[153]

149. *See* ARK. R. EVID. 609(b).

150. FED. R. EVID. 609, advisory committee's note.

151. Mason Ladd, *Credibility Tests—Current Trends*, 89 U. PA. L. REV. 166, 176 (1940).

152. Elizabeth Williams, Annotation, 160 A.L.R. FED. 201, 220-21 (2000).

153. In Nathaniel Hawthorne's *The Scarlet Letter*, a seminal piece of American literature written in 1850, an adulterous woman was forced to wear a scarlet-colored "A"

may attach to an individual because of a criminal conviction, this need not determine the actual qualities of his or her character in perpetuity. The mere fact a person was convicted of a crime at one point does not brand that individual with reprehensible character for all eternity, and certainly should not be the dispositive factor in deciding whether the person is qualified to hold elected office.

V. IMPROVING THE PROCESS

When compared to the current operation of Act 724, the superior method to determine whether a crime is "infamous" is to adopt a strictly fact-based approach to situations falling under the proviso of article 5, section 9 of the Arkansas Constitution.[154] Candidly, the best approach is to repeal Act 724 and amend the constitution for a fresh start. This Part suggests a fact-based approach that seeks to rectify the problems caused by the "infamous crimes" language within the Arkansas Constitution. First, a proposed constitutional amendment is discussed. An outline of the benefits associated with the amendment follows.

A. Proposed Method of Determining Qualification for Political Office

An amendment to article 5, section 9 that incorporates a revamped disqualification trigger, a safety mechanism, and a conviction-disclosure requirement would greatly benefit the citizens of Arkansas. This revised process could be easily implemented in a streamlined fashion to the existing legal framework, providing the positive social utility which is discussed throughout the comment.

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on her dress as punishment for her indiscretions. *See generally* NATHANIEL HAWTHORNE, THE SCARLET LETTER (John Harvard Library ed. 2009).

154. In great commendation of the Arkansas General Assembly, it is not as if a fact-based approach was never considered. The legislature contemplated and almost certainly intended such an approach, but procedural hurdles prevented implementation. The proposed approach assumes that such procedural limitations may be surmounted.

1. "Infamous Crimes" and Determinative Factors

Article 5, section 9 of the Arkansas Constitution should be amended to include language such as, or similar to, the following:

> No person hereafter convicted of an "infamous crime" shall be eligible to the General Assembly or capable of holding any office of trust or profit in this State.[155]

This language removes the specifically enumerated crimes of embezzlement, bribery, and forgery from article 5, section 9 of the Arkansas Constitution,[156] leaving only the issue of whether an individual is permitted to hold elected office to a fact-based analysis of whether a certain crime is "infamous."

To supplement the proposed amendment to article 5, section 9 of the Arkansas Constitution, the amendment, or a companion statute, should include language such as, or similar to, the following:

> In determining whether a crime is "infamous," a reviewing court should consider the following factors, giving weight to both mitigating and aggravating circumstances:
>
> (1) The seriousness of the crime;
>
> (2) The person's age at the time of the crime;
>
> (3) The time elapsed since the crime occurred;
>
> (4) The person's motive for committing the crime;
>
> (5) The sentence the person received as punishment for the crime;

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155. At first glance, it would seem more practical to circumvent the glaring hassles of constitutional amendment. *See generally* Niswanger, *supra* note 79 (surveying legislatively proposed constitutional amendment and repeal procedures in Arkansas). After all, these hassles are a substantial reason Act 724 ended up falling short of success. Branscum Interview, *supra* note 14. However, constitutional amendment is necessary because curing the problems with Act 724 requires: (1) recharacterizing the term "infamous crime" or (2) repealing article 5, section 9 entirely so that a new statutory framework may take its place. In either scenario, amendment is required, and this proposal reflects this requirement. If desired, this proposal could be morphed into statutory form following a complete repeal of article 5, section 9. Alternatively, a hybrid method may be achieved by simply supplementing the current constitutional language to include a provision that, "the legislature shall, as necessary, define what constitutes an 'infamous crime.'" Both alternatives would materially lessen the impact of procedural hurdles to future modification by the legislature. Further, the whole proposal is intended to serve as a foundation and is fully subject to augmentation at the discretion of the Arkansas General Assembly.

156. *See* ARK. CONST. art. 5, § 9.

> (6) Evidence of the person's rehabilitation since the crime;
>
> (7) The person's social contribution since the crime; and
>
> (8) Any other circumstances relevant to a determination of the person's possession, or lack thereof, of the requisite character and moral quality expected of an individual entrusted to public office in this State.

These factors will assist a reviewing court in determining whether a crime is "infamous" without significant deviation from the factors currently found within the uncodified portions of Act 724.[157] Whereas the present bright-line approach only allows judges to consider the conviction itself, the proposed approach allows for consideration of indispensable facts, such as the seriousness of the crime, the time that has passed since the crime occurred, and evidence of rehabilitation. For example, theft of $50 should not weigh as heavily as theft of $100,000. Although theft is theft, with the only major distinction being whether it is misdemeanant or felonious, the latter offense is clearly more reprehensible than the former from a utilitarian perspective. The punishment imposed also merits consideration from the judiciary in deciding an outcome. The punishment received highlights the informed thoughts of the assigning judge regarding the seriousness of the crime, the chances of rehabilitation and reform, and the ultimate effects of the crime on society.

Similarly, the age of the person when he or she committed the crime and how much time has passed should also be considered. A crime committed when a now sixty-five-year-old individual was eighteen years of age should not weigh as heavily as a crime committed at age fifty by the same person. Even though legally an adult for most purposes, an eighteen-year-old has not received the benefits of full cognitive development, but absent circumstances such as a intellectual disability, a normal fifty-year-old should be held accountable for possessing developed logical processes.[158]

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157. Act 724, § 2, 2013 Ark. Acts, 2714, 2716.

158. Kurt W. Fischer, et al., *Adult Cognitive Development: Dynamics in the Developmental Web in* HANDBOOK OF DEVELOPMENTAL PSYCHOLOGY 491, 511 (J. Valsiner & K. Connlly eds., 2003) (noting full cognitive development may not occur until age thirty or forty).

Importantly, the final enumerated factor, requiring consideration of any other relevant circumstances, acts as a safety valve for the court to utilize when necessary. It allows for absolute flexibility when justice so requires. For example, if a person committed a crime at a young age with diminished legal capacity, the Act 724 approach would have no mercy, even if the offender recovered, rehabilitated, and matured with age. This hypothetical, and the preceding gubernatorial candidate hypothetical, showcase dramatic results for the purpose of illustrating the benefits of the proposed approach. As such, the principle of balancing justice is protrusive from the proposed approach, and the remaining factors should be considered in similar fashion.

2. Disclosure Requirement

In addition to the proposed constitutional amendment, the Arkansas General Assembly should require a political candidate to disclose any crimes for which he or she has been convicted.[159] The disclosure requirement should be temporally limited to avoid being overbroad, and the requirement should be stated such as, or similar to, the following:

> Any person seeking elected office in the State shall disclose, for a period of ten [10] years preceding the first day allowed by law to formally announce running for election, any crime for which that person has been convicted under the law of Arkansas or any other state. This disclosure shall not include traffic offenses for which the minimum fine is five-hundred dollars ($500) or less, but shall include all offenses which have been expunged pursuant to any current or previous law, whether domestic or foreign.

159. The disclosure requirement borrows its foundation from legislation introduced in 2011 that would have required production of criminal information about an elected official upon request. *See* H.B. 1982, 88th Gen. Assemb., Reg. Sess. (Ark. 2011). The proposed disclosure requirement places the onus on the candidate to disclose certain information upfront, avoiding the post-removal costs of a special election or the stifling of democracy through political appointment. *See* Nic Horton, *Sheriff Vance's (Disqualifying) Criminal Record*, ARK. PROJECT (Aug. 10, 2012), http://www.thearkansasproject.com/sheriff-vances-disqualifying-criminal-record/ ("Grant County may, for the third time in [seven] years, find itself having a sheriff appointed by the Governor and not one elected by the voters.").

The disclosure requirement seeks to strike a tripartite balance among various competing interests—protecting the rights of the voters to determine satisfactory representation, maintaining the purity of elections by imposing certain political transparency, and not placing candidates at a disadvantage to attaining elected office despite a criminal conviction. This disclosure requirement could be easily implemented by simply requiring candidates to reveal any qualifying offenses on an updated Political Practices Pledge.[160] The Political Practices Pledge is a form signed by prospective candidates that presently requires the candidate to acknowledge applicable election laws and certify that he or she is not a felon.[161]

The Arkansas General Assembly could task the State Board of Election Commissioners with reviewing pledges that do not pass an initial inspection.[162] This would create a review process similar to the procedure used by the State of Arkansas to admit a prospective attorney to the state bar. If an appeal is sought from a decision of the State Board of Election Commissioners, an expedited review of the decision could be sent to the Pulaski County Circuit Court. Centralizing appeals in Pulaski County allows for consistency and predictability of judicial application, even in the absence of a bright-line analysis. A candidate could file subsequent appeals with the appellate courts in the traditional manner or in a fitting manner prescribed by the General Assembly.

B. Benefits and Criticisms of the Proposed Approach

These suggestions seek to avoid any degradation of the proposed fact-based approach into the bright-line, offense-based approach currently used. The proposed approach allows for a case-by-case analysis of the totality of the circumstances based on legislative guidance. Should the Arkansas General Assembly adopt a fact-based approach, substantial benefits will be realized over the approach implemented by Act 724.

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160. *See* ARK. CODE ANN. § 7-6-102 (Supp. 2013) (requiring a candidate to declare that he or she is not a convicted felon). To ensure compliance, criminal penalties would remain in place. *See* ARK. CODE ANN. § 7-6-102(c) (declaring falsification of a Political Practices Pledge to be a felony).

161. *See* ARK. CODE ANN. § 7-6-102.

162. *See* ARK. CODE ANN. § 7-6-102(a) (listing various offices where a candidate may submit a Political Practices Pledge).

Instances of constitutional overbreadth and inequitable results are considerably less likely to occur under the proposed approach.[163] Critics might argue that adopting a fact-based approach decreases social utility by reducing certainty.[164] However, under such an approach, the *Cassell* outcome would have been drastically different, and Kenny Cassell would have remained sheriff as elected by an informed constituency. Due to the flexibility provided by a fact-based approach, social utility is amplified, as one who seeks office may use the democratic processes to reach that goal, and voters may carry out their civic duty to make that determination. This permits a candidate to seek office because he or she wants to serve the community and allows voters to determine the best candidate for the job.

The proposed approach also produces less objective arbitrariness than the offense-based approach codified by Act 724 because a decision-maker is not bound to a stringent outcome. Supporters of the Act 724 approach claim otherwise. They assert that a fact-based approach promotes arbitrary decision-making at the discretion of the judiciary based on personal or political preference.[165] Keep in mind that Arkansas judges are elected on a non-partisan basis,[166] and the Arkansas Code of Judicial Conduct requires non-political and impartial decision-making.[167] Additionally, if any personal or conflicting relationship arises, the judge must recuse from the case.[168] Moreover, Arkansas law criminalizes deplorably immoral behavior in the Arkansan political sphere.[169] These safeguards offer adequate protection from arbitrary decision-making because the threat of punishment looms over a judge who fails to follow state law and abide by ethical constraints.

Additionally, the proposed approach would produce more equitable outcomes, while not materially increasing the burden on the courts, contrary to what supporters of offense-based

163. *Cf.* Sullivan, *supra* note 17, at 66 (recognizing the "fairness" of fact-based approaches).

164. *See id.* at 62-63 (noting this concern).

165. *See id.* at 62.

166. *See* ARK. CONST. amend. 80, § 17.

167. *See* ARK. CODE OF JUDICIAL CONDUCT Canons 1–4 (2009).

168. *See* ARK. CODE OF JUDICIAL CONDUCT R. 2.11.

169. *See* ARK. CODE ANN. § 7-1-103 (Supp. 2013) (enumerating miscellaneous political misdemeanors and penalties); ARK. CODE ANN. § 7-1-104 (Supp. 2013) (enumerating miscellaneous political felonies and penalties).

approaches may readily claim.[170] Few published cases mention article 5, section 9,[171] and 100 years passed before the term "infamous crime" had any meaningful definition.[172] Of the few cases filed regarding article 5, section 9, an average of one case every six years produces an appellate opinion. Admittedly, the proposed approach would require augmented deliberation on the part of the judiciary, but the judiciary stands ready to take on whatever slight increase in duty that may be required. More importantly, the approach strengthens the democratic core by requiring judicial reasoning to be thoroughly explained, which produces a net social gain that far outweighs any accompanying burden.[173]

Supporters of the Act 724 approach may also claim that the proposed changes facilitate the attainment of political office by individuals with blemished records. However, simply because someone seeks office does not mean that he or she will be elected. The proposed disclosure requirement seeks to quell these concerns. By requiring transparency, the proposal ensures the public is educated about those running for office. If voters make an informed decision to elect a candidate to office, that decision should not be stifled by a judicial determination such as the one in *Cassell*. By oppressing the voice of the constituent body, the judiciary seeks to suppress the foundation upon which the representative democracy was built and flourishes.

Undoubtedly, the net positive effects on society through the determination of whether a crime is "infamous," will be substantially greater under the proposed fact-based approach. Leaving the current approach in place is not only inequitable and

170. *See* Sullivan, *supra* note 17, at 63 (suggesting this is a common argument).

171. Only fourteen cases have reached the appellate level since 1930, three of which stemmed from a single set of facts regarding W.O. Irby. *See generally* State v. Cassell, 2013 Ark. 221, 427 S.W.3d 663; Edwards v. Campbell, 2010 Ark. 398, 370 S.W.3d 250; State v. Oldner, 361 Ark. 316, 206 S.W.3d 818 (2005); Moncrief v. State, 325 Ark. 173, 925 S.W.2d 776 (1996); Powers v. Bryant, 309 Ark. 568, 832 S.W.2d 232 (1992); Campbell v. State, 300 Ark. 570, 781 S.W.2d 14 (1989); Martin v. Hefley, 259 Ark. 484, 533 S.W.2d 521 (1976); May v. Edwards, 258 Ark. 871, 529 S.W.2d 647 (1975); Reaves v. Jones, 257 Ark. 210, 515 S.W.2d 201 (1974); Ridgeway v. Catlett, 238 Ark. 323, 379 S.W.2d 277 (1964); Irby v. Barrett, 204 Ark. 682, 163 S.W.2d 512 (1942); State *ex rel.* Evans v. Wheatley, 197 Ark. 997, 125 S.W.2d 101 (1939); *Irby II*, 190 Ark. 786, 81 S.W.2d 419 (1935); *Irby I*, 182 Ark. 595, 32 S.W.2d 157 (1930).

172. *See supra* note 8 and accompanying text.

173. *See* Sullivan, *supra* note 17, at 67-68.

unjust, but it attacks the substructure of democracy in a straightforward and unacceptable manner.

VI. CONCLUSION

Article 5, section 9 of the Arkansas Constitution originally sought to preserve the purity of elections, offices, and politics in Arkansas. A pesky term of art in article 5, section 9, left undefined by the drafters, took on a life of its own while searching for its purpose within the politico-legal landscape. By its pre-Act 724 definition, the term "infamous crime" was so broadly defined as to include a multitude of crimes that seemingly fell far short of the connotations it conveyed. To combat this, the Arkansas General Assembly attempted a grand revision, seeking to reconstruct the approach to determine whether a crime is "infamous." However, the attempt was unsuccessful and ultimately achieved the opposite of the intended result.

This comment's proposed approach aims to correct a patent injustice cemented by Act 724. No doubt, the proposed approach differs substantially from Act 724, but it does so entirely by design. Significant reform is needed with respect to the current method for determining whether a person is disqualified from holding office following a conviction for certain crimes. The robotic approach of Act 724 casts a net with miniscule relief because it fails to allow for human consideration of situational circumstances. For this reason, the implementation of the proposed method or, at the very least, an alternate approach that features some equitable characteristics, is offered to the Arkansas General Assembly for further consideration. Should the legislature fail to consider a more equitable method for determining disqualification from political office, it would be doing a genuine disservice to the citizens of Arkansas.

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