

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, :
 Appellee, : Case No. 2010-1373
 v. : Appeal taken from the Summit County
 Court of Common Pleas
 ASHFORD THOMPSON, : Case No. CR 2008-07-2390
 Appellant. : **This Is A Capital Case.**

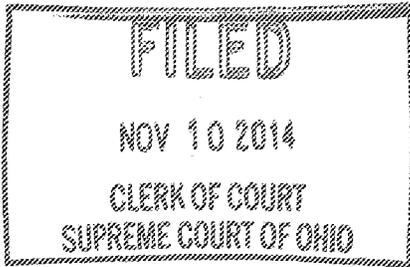
Appellant's Motion for Rehearing and/or Reconsideration

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Appellant's Motion for Rehearing and/or Reconsideration

Appellant Ashford Thompson requests that this Court rehear his death penalty appeal and/or reconsider its merits ruling of October 29, 2014, affirming both his convictions and death sentence. This request is made pursuant to Rules 4.01 and 18.02 of the Supreme Court Rules of Practice. The reasons for this Motion are more fully set forth in the attached memorandum in support.

Respectfully submitted,

Office of the Ohio Public Defender



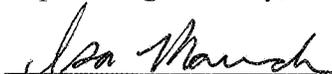
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Memorandum In Support

I. Introduction

This Court should reconsider and/or rehear the death penalty appeal of Ashford Thompson, with the recusal of Justices Judith French and Sharon Kennedy. While this Court unanimously upheld Thompson's convictions, only four votes upheld the death sentence. One vote made the difference between life and death for Thompson.

II. "Elected judges cannot help being aware that if the public is not satisfied with the outcome of a particular case, it could hurt their reelection prospects." *Republican Party v. White*, 536 U.S. 765, 788 (2002) (O'Connor, J., concurring).

Our justice system is based upon foundational principles of fairness, objectiveness, and maintaining confidence that the decisions rendered by the courts are above any appearance of impropriety. There can be no matter where this is more important than decisions rendered by this Court, the guiding Court for our State, and there can be no matter where this is more important than where the question involves someone's life.

Because of these foundational principles, it is an accepted standard that where an inappropriate influence exists, even assuming it did not impact the decision, it still raises the appearance of impropriety and the appearance of undue interference with the decision making process, resulting in the view that a potential bias was involved with the outcome of a case. This is even true with the most well-meaning people, with the best of intentions, who strive to make sure they remain objective. Even if the person acted in as objective a fashion as they believed possible, the simple fact an appearance exists and raises questions is enough to undermine

confidence in our system of justice. Impartiality is of paramount importance in a death penalty case where a life hangs in the balance.

Elections are difficult, time consuming, and all-encompassing for candidates. They can be filled with partisan rhetoric, debates, and perhaps worst of all, political ads. The nature of our political environment today makes the campaign process even more difficult. That political world necessarily then interferes with the need for justice and decisions that have no such influence.

Justice O'Connor explained in her concurrence in *Republican Party v. White*, 536 U.S. 765, 788 (2002) (O'Connor, J., concurring), "Elected judges cannot help being aware that if the public is not satisfied with the outcome of a particular case, it could hurt their reelection prospects." Justice O'Connor further noted, "[I]f judges are subject to regular elections they are likely to feel that they have at least some personal stake in the outcome of every publicized case. . . . Even if judges were able to suppress their awareness of the potential electoral consequences of their decisions and refrain from acting on it, the public's confidence in the judiciary could be undermined simply by the possibility that judges would be unable to do so. *White*, 536 U.S. at 788-89 (O'Connor, J., concurring). *See also* Exhibit A, attached.

The decision denying Thompson relief was released six days before Election Day. This fact, coupled with the political advertisements supporting Justice French for re-election and the controversial nature of Thompson's case, could affect the public perception of the most well-meaning of Justices. One commercial on behalf of Justice French stated that Justice French "protects us," and it briefly described the facts of death penalty cases in which she has voted for death. *Buying Time 2014 – Ohio*, Brennan Center for Justice (Oct. 8, 2014, updated Nov. 4,

2014).¹ Thompson recognizes that this particular commercial was paid for by American Freedom Builders and not by the French campaign. But because of the nature of campaigning and elections, it put Justice French in an arduous spot. It would seem that a vote against death in a controversial case, at a time when she was being praised for upholding death sentences, would be difficult. Even if it did not enter Justice French's thoughts, the timing of the release of the decision in the crucial final week of the election campaign, it is very likely to appear to the public that this case corresponded directly to the campaign.

In addition, the controversial nature of the Thompson case has an impact on the overall appearance of justice, in light of the timing of the opinion. Thompson's case involved the killing of a police officer, and Mr. Thompson's responsibility for the death of Officer Joshua Miktarian was not disputed. Both Justices French and Kennedy had campaign commercials that included references of support for and by law enforcement. One commercial refers to Justice French as a "tough on crime judge," while showing video of her talking to law enforcement and showing her endorsement by the Fraternal Order of Police.² Another commercial notes her Fraternal Order of Police endorsement, emphasizing it both on the screen and in the voice-over.³ The Fraternal Order of Police endorsement said that "French and Kennedy were found to have strong records and to be supportive of our issues."⁴ Justice Kennedy's commercials also highlighted the support for police and being tough on crime. Justice Kennedy referred to herself as "Law

¹http://www.brennancenter.org/sites/default/files/analysis/Buying_Time/STSUPCT_OH_AFB_WORKING_HARD.mov.

² *October 23 – Start Her Career*, Buying Time 2014 – Ohio, Brennan Center for Justice, http://www.brennancenter.org/sites/default/files/analysis/Buying_Time/STSUPCT_OH_FRENCH_START_HER_CAREER%20%2830%20Sec%29.pdf (5th frame) (last visited Nov. 10, 2014).

³ *October 30 – 25 Years 15*, Buying Time 2014 – Ohio, Brennan Center for Justice, http://www.brennancenter.org/sites/default/files/analysis/Buying_Time/STSUPCT_OH_OHRP_25_YEARS_15.pdf (3rd frame) (last visited Nov. 10, 2014).

⁴<http://www.fopohio.org/docs/Ohio%20FOP%20State%20%26%20Local%20Lodge%20Endorsements.pdf> (visited Nov. 5, 2014).

Enforcement's Choice.” In one campaign commercial, it is highlighted that Justice Kennedy “began her career as a police officer working undercover operations,” and said that is “why law enforcement from around Ohio supports Sharon Kennedy.”⁵

Justices French and Kennedy were facing reelection at the time they rendered the deciding votes in a controversial case, a case that split the Court by a vote of 4 to 3. Even if they overcame the incredible pressure of the last week of a campaign and were able “to suppress their awareness of the potential electoral consequences of their decisions and refrain from acting on it,” it is still the case that public confidence in their impartiality is undermined by timing of the Thompson opinion against the backdrop of repeated studies demonstrating that elections affect judges’ impartiality. See Gregory A. Huber & Sanford C. Gordon, *Accountability and Coercion: Is Justice Blind When It Runs for Office?*, 48 AM. J. POL. SCI. 247, 251–58 (2004); John Paul Stevens, Assoc. Justice, U.S. Supreme Court, Opening Assembly Address, American Bar Association Annual Meeting, Orlando, Florida (Aug. 3, 1996), in 12 St. John’s J. Legal Comment. 21, 30–31 (1996) (discussing need to improve quality of judges and espousing belief that judges should not be elected). See also 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, 1107–09 (2006); Article: Antiterrorism and Effective Death Penalty Act: Why Habeas Review of State Court Convictions Is More Important than Ever, 24 Fed. Sent. R. 292 (2012).

The nature of elections, being what they are, demands that closely watched cases with decisions that divide the Court must be released where they will not raise the specter of undermining the public confidence in the Justices’ impartiality. The optics of releasing a 4 to 3

⁵http://www.brennancenter.org/sites/default/files/analysis/Buying_Time/STSUPCT_OH_KENNEDY_LAW_ENFORCEMENT%27S_CHOICE_15.mov.

death penalty decision involving the killing of a police officer just days before an election where law enforcement endorsements are front and center of campaign advertising are not without very troubling problems. There can be no argument that a death penalty decision involving the death of a police officer would garner statewide media coverage. And this case did have such coverage.⁶ Gaining such coverage six days before an election where law enforcement endorsements were central campaign themes only reinforces the potential that the public's confidence in the impartiality of the justice system has been undermined. Again, assuming the impartiality of Justices French and Kennedy remained unaffected by their elections, this Court should rehear Thompson's appeal without the participation of Justices French and Kennedy, in order to avoid this appearance of impropriety.

Justice John Paul Stevens has stated that a campaign promise "to be tough on crime," or to "enforce the death penalty" is evidence of bias that should disqualify a candidate from sitting in criminal cases. Address to the Opening Assembly, American Bar Association Annual Meeting, August 3, 1996, at 12. There is, at the least, a legitimate appearance of impropriety in making these types of statements and at the exact same time be deciding a case that involves these exact issues, only days before a contested election. In the alternative, as stated by Justice Stevens, the campaign promises "to be tough on crime," or to "enforce the death penalty" are evidence of actual bias.

⁶ See e.g., http://www.cleveland.com/open/index.ssf/2014/10/supreme_court_upholds_death_se.html; <http://www.twinsburgbulletin.com/news%20local/2014/11/06/ohio-supreme-court-affirms-death-sentence-for-ashford-thompson-in-shooting-death-of>; <http://www.ohio.com/news/break-news/ohio-supreme-court-upholds-conviction-death-sentence-of-man-who-killed-twinsburg-police-officer-1.536157>; <http://www.wkyc.com/story/news/local/summit-county/2014/10/29/court-upholds-conviction-death-penalty-in-killing-of-twinsburg-officer/18107685/>; <http://www.dispatch.com/content/stories/local/2014/10/29/court-upholds-death-for-killer-of-Ohio-officer.html>

Because a campaign is at its height right before the election, and because Thompson's direct appeal decision was released right before the election, it is too much of a risk that the situation "offer[ed] a possible temptation to the . . . judge to . . . lead him not to hold the balance nice, clear and true." *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 822 (1986) (citing *Ward v. Monroeville*, 409 U.S. 57, 60 (1972)). See also *Caperton v. A. T. Massey Coal Co.*, 556 U.S. 868, 883–84 (2009); *In re Murchison*, 349 U.S. 133, 136 (1955); *Bracy v. Gramley*, 520 U.S. 899, 904 (1997); *Withrow v. Larkin*, 421 U.S. 35, 46 (1975); *Tumey v. Ohio*, 273 U.S. 510, 523 (1927).

"[J]ustice must satisfy the appearance of justice." *Offutt v. United States*, 348 U.S. 11, 14 (1954). This is no less true on appeal than it is during a trial. When a death-sentenced appellant is deprived of having seven neutral justices, it impacts his right to have a "13th juror" conduct an independent review of his sentence. *State v. Thompson*, 2014-Ohio-4751, P318 (Ohio Oct. 29, 2014) (O'Neill, J., dissenting).

Although the election is now over, reconsidering Thompson's case with Justices French and/or Kennedy participating would not resolve the problem. Both Justices would be in an untenable spot: if either changed her vote rendered on October 29, 2014, it would reinforce the perception that she operated under a bias when giving her initial vote. They can, however, step aside to remove the *appearance* of impropriety and/or actual bias, and Thompson can have his case decided anew without their participation. "[A] recusal remedy is the best way to balance the need for free, open campaigns with the dangers that arise when judges win votes by declaring their intent to be tough on crime and then hear alleged criminals' cases." Cohn Weiss, *supra*, at 1127.

III. “The court’s conclusion that Thompson shot Miktarian to avoid being detected, apprehended, or punished is pure fiction.” *State v. Thompson*, 2014-Ohio-4751, P320 (Ohio Oct. 29, 2014) (O’Neill, J., dissenting).

This Court should reconsider its finding that the evidence supported that “[t]he offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender.” Ohio Rev. Code 2929.04(A)(3). *Thompson*, 2014-Ohio-4751 at P284 (“The jury returned guilty verdicts on separate counts of resisting arrest and carrying a concealed weapon, and Thompson does not challenge those convictions. In addition, defense counsel conceded Thompson’s violation of the noise ordinance before the case went to the jury. Accordingly, the evidence supports Thompson’s conviction on the (A)(3) specification based on these three offenses.”) This is, as stated by Justice O’Neill, “pure fiction.” *Thompson*, 2014-Ohio-4751 at P320 (O’Neill, J., dissenting).

The supporting argument that Thompson was resisting being arrested must be reexamined because these were not offenses for which he would be arrested. The concealed carry violation and the noise ordinance violation were not felonies. *See* ORC Ann. 2923.12(B)(1) and 2923.12(F)(3) (emphasis added) (“If, at the time of the stop of the offender for a law enforcement purpose that was the basis of the violation, any law enforcement officer involved with the stop had actual knowledge that the offender has been issued a concealed handgun license, carrying concealed weapons in violation of division (B)(1) of this section is a **minor misdemeanor**, and the offender’s concealed handgun license shall not be suspended pursuant to division (A)(2) of section 2923.128 of the Revised Code.”) As a result, the rationale that Thompson killed a police officer to escape detection from non-arrestable, minor misdemeanors does not follow a logical progression.

The inference that Thompson killed Officer Miktarian to escape detection for minor misdemeanors “is far short of proof beyond a reasonable doubt.” *Thompson*, 2014-Ohio-4751 at P320 (O’Neill, J., dissenting). This Court should reconsider its finding that a death sentence is warranted, by evaluating the case without the (A)(3) specification. When evaluated without this specification, the aggravating circumstances do not outweigh the powerful mitigation offered by a panicked non-violent young man with a promising career in nursing. Thompson should not receive a death sentence.

IV. Conclusion

Ashford Thompson is entitled to the “13th juror” to conduct an independent review of his sentence. *Thompson*, 2014-Ohio-4751 at P318 (O’Neill, J., dissenting). His death sentence was upheld by only one vote, and two of the four Justices in the majority were in the midst of re-election campaigns. The simple fact that an appearance of impropriety exists and raises questions is enough to undermine confidence in our system of justice. Impartiality is of paramount importance in a death penalty case where a life hangs in the balance.

In addition, this Court should reconsider Thompson’s death sentence with the consideration that there is no support for the (A)(3) specification. A man with “Thompson’s history, character, and background” certainly would not have killed a police officer to escape from what would have amounted to minor misdemeanors. *Id.* P 315 (Pfeifer, J., dissenting).

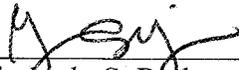
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Certificate Of Service

I hereby certify that a true copy of the foregoing **Appellant's Motion for Rehearing and/or Reconsideration** was forwarded by regular U.S. Mail to Richard Kasay, Assistant Summit County Prosecutor, 53 University Ave., Akron, Ohio 44308, this 10th day of November, 2014.



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NOTES

TOUGH ON CRIME: HOW CAMPAIGNS FOR STATE JUDICIARY VIOLATE CRIMINAL DEFENDANTS' DUE PROCESS RIGHTS

JOANNA COHN WEISS*

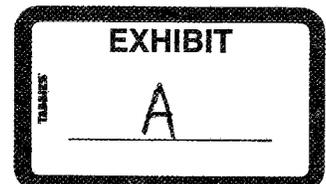
Elected judges often run "tough on crime" campaigns, which raises concerns that they will be biased against criminal defendants once on the bench. Indeed, studies show that elected judges give harsher punishments to criminal defendants as elections near. Nevertheless, in Republican Party of Minnesota v. White, the Supreme Court found that an elected judge can still be considered impartial even if he knows that his decisions throughout a case might affect his job security. This Note argues that the Supreme Court's decision in White failed to account for a key factor complicating the election of unbiased judges: media coverage of crime and elections. The media dynamics at work in elections and the particular way judges respond to them may lead to criminal cases being heard by judges who are biased against defendants. To correct this problem, states must affirmatively act to protect criminal defendants' right to a fair trial by adopting broad recusal requirements. States must change their codes of judicial conduct to allow for mandatory recusal of judges who run tough-on-crime election campaigns.

INTRODUCTION

The election of public officials is fundamental to our democratic process. This principle has led a majority of states to choose their judges through some form of elections.¹ When judges owe their job

* Copyright © 2006 by Joanna Cohn Weiss. B.A., 1999, Duke University; M.A., 2001, George Washington University; J.D., 2006, New York University School of Law. I would like to express my gratitude to Professor Anthony G. Amsterdam for his extensive comments on earlier drafts and his encouragement. Professor Geoffrey Stone and Professor Rachel Barkow graciously gave me advice and suggestions at important stages of the writing process. I am indebted to the staff of the *New York University Law Review*—including Delcianna Winders, Jenny Huang, Leslie Dubeck, Dustin Brown, and, above all, George Luscombe—whose insightful edits and hard work helped me to say what I meant to say. Finally, thank you to my family and friends for listening to my ideas, for challenging me to clarify my arguments, and for reading the many drafts their criticisms inspired. I would especially like to thank my parents, John and Sherry Cohn, and my husband, Matthew Weiss, for their unyielding support.

¹ Twenty-six states elect judges to trial courts as their initial selection method. AM. JUDICATURE SOC'Y, JUDICIAL SELECTION IN THE STATES: APPELLATE AND GENERAL JURISDICTION COURTS (2004), <http://www.ajs.org/js/judicialselectioncharts.pdf>. Of those states, nine have partisan elections, and seventeen have nonpartisan elections, which means judicial candidates are not listed with any party affiliation. *Id.* Seventeen states



security to voters or to reappointment by elected officials, however, concerns about judicial bias arise.

This concern about judicial bias is heightened with respect to criminal cases because so many judges run on "tough on crime" platforms. Criminal defendants facing these judges have legitimate reasons to worry that their judges may be more inclined to rule against them or to be tougher on them than the law requires. Justice Stevens grappled with this problem and proposed a solution that he felt would guarantee fair trials for criminal defendants in a world with judicial elections: "A campaign promise to 'be tough on crime,' or to 'enforce the death penalty,' is evidence of bias that should disqualify a [judicial] candidate from sitting in criminal cases."²

After the Supreme Court's decision in *Republican Party of Minnesota v. White*,³ however, criminal defendants have fewer avenues open to them to argue that campaign speech demonstrates a bias that should be the constitutional basis for recusal. In *White*, the Court held that a judge can still be considered impartial even if he knows that his decisions throughout a case might affect his job security.⁴ Despite the Court's assurances, recent findings suggest that elected judges are not able to transcend fears of job loss, and they are likely to give harsher sentences as their elections near.⁵

This Note argues that the Supreme Court and the state courts now construing *White* fail to account for a key element that complicates states' efforts to elect unbiased judges: media coverage of crime and elections. As a result of the media dynamics at work in elections and the judicial response to them, criminal defendants' trials risk not being conducted by an impartial tribunal. To correct this problem, states must affirmatively act to protect criminal defendants' right to a fair trial. To do so, states should adopt broad recusal requirements that acknowledge the powerful media and interest group effects pushing judges to campaign on tough-on-crime platforms.

elect judges to intermediate appellate courts. *Id.* Twenty-one states elect judges to their courts of last resort. *Id.* Eighteen states in which a nominating committee, the governor, or the legislature appoints judges to courts of last resort require their judges to be reelected after their first terms, either through retention elections where they are not challenged or through regular elections. *Id.* In those states where judges are not required to face elections, they may need to be reconfirmed by the governor or the legislature. *Id.*

² John Paul Stevens, Assoc. Justice, U.S. Supreme Court, Opening Assembly Address, American Bar Association Annual Meeting, Orlando, Florida (Aug. 3, 1996), in 12 ST. JOHN'S J. LEGAL COMMENT. 21, 30-31 (1996) (discussing need to improve quality of judges and espousing belief that judges should not be elected).

³ 536 U.S. 765 (2002).

⁴ See *infra* notes 145-47 and accompanying text.

⁵ See *infra* notes 50-52 and accompanying text.

Part I of this Note sets out the context of this dilemma by describing judicial campaign speech about crime and the ways such speech plays out when judges are on the bench. Part II explains how the media misinform the public about crime, and how, in their campaigns and in their handling of criminal cases, elected judges respond to media-induced public outrage. Part III discusses the Supreme Court's case law on when judicial bias interferes with a defendant's right to a fair trial, and analyzes the ways in which *White* may make it difficult for criminal defendants to recuse tough-on-crime judges. Part IV argues for recusal as a partial solution to the due process concerns raised by the interaction of media effects and an elected judiciary.

I

ON THE TRAIL AND ON THE BENCH: A SURVEY OF JUDGES' SPEECH ABOUT AND ACTIONS TOWARD CRIMINAL DEFENDANTS

Former California Supreme Court Justice Otto Kaus famously said that deciding controversial cases close to reelection "was like finding a crocodile in your bathtub when you go to shave in the morning. You know it's there, and you try not to think about it, but it's hard to think about much else while you're shaving."⁶ Tough-on-crime campaign speech is one judicial response to the crocodile in the bathtub, and this speech is linked to judges' decisions from the bench.

A. *Judicial Campaigns Require Judges to Look Tough on Crime*

A survey of judicial candidates' tough-on-crime campaign speech raises serious questions as to whether these judges can fairly oversee a criminal trial. Judicial speech surrounding death penalty cases is a particularly egregious example:

Judicial campaigns in which the death penalty is an issue can degenerate to almost Orwellian levels of absurdity, raising serious questions about the ability of judges to remain fair and impartial. An opponent can seize upon a judge's ruling in one case and, by focusing on the facts of the crime and completely ignoring the legal issue, make even the toughest judge appear "soft on crime."⁷

⁶ Gerald F. Uelman, *Crocodiles in the Bathtub: Maintaining the Independence of State Supreme Courts in an Era of Judicial Politicization*, 72 NOTRE DAME L. REV. 1133, 1133 (1997) (paraphrasing Justice Kaus and discussing effect of elections on judges' decisions on controversial matters like death penalty).

⁷ Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759, 785 (1995) (documenting politicization of death penalty and proposing solutions for guaranteeing impartial judges).

This is a lesson that many judges learned in 1996, when Tennessee Supreme Court Justice Penny White's retention was opposed based on her vote against the death penalty in a case where she, along with four other justices, had affirmed the defendant's conviction.⁸ This outcome was twisted in inflammatory mass mailings, which denounced then-Justice White as wanting to "free more and more criminals and laugh at their victims."⁹ After Justice White's loss, Tennessee Governor Don Sundquist asked, "Should a judge look over his shoulder about whether they're [sic] going to be thrown out of office?"¹⁰ He answered his own question: "I hope so."¹¹

In 1994, the former chair of the Texas Republican Party called for a sweep of the state's highest criminal court after sitting judges reversed a conviction in a notorious capital case.¹² Candidate Stephen W. Mansfield promised to give the death penalty, to use the harmless-error doctrine more often, and to sanction attorneys who filed "frivolous appeals especially in death penalty cases."¹³ Judge Mansfield was elected despite having lied about his background and his experience, and despite the fact that his opponent was a sitting Republican judge and former prosecutor.¹⁴

⁸ See Fred B. Burnside, Comment, *Dying to Get Elected: A Challenge to the Jury Override*, 1999 WIS. L. REV. 1017, 1036-37 (1999) (explaining that five justices had found legal errors requiring resentencing).

⁹ Stephen B. Bright, *Political Attacks on the Judiciary: Can Justice Be Done Amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions?*, 72 N.Y.U. L. REV. 308 app. A at 332 (1997) (reprinting mass mailing). The influence of such interest groups on judicial elections has driven Richard Neely, a justice of the West Virginia Supreme Court of Appeals, to comment, "I . . . know that when I run for reelection for judge, I would rather have an impecunious Oliver Wendell Holmes as an opponent than a well-financed Jack the Ripper." RICHARD NEELY, *HOW COURTS GOVERN AMERICA* 35 (1981).

¹⁰ Paula Wade, *White's Defeat Poses Legal Dilemma: How Is a Replacement Justice Picked?*, COM. APPEAL (Memphis, Tenn.), Aug. 3, 1996, at A1; see also Burnside, *supra* note 8, at 1037.

¹¹ Wade, *supra* note 10, at A1; see also Burnside, *supra* note 8, at 1037. After Justice White lost her election, she had a sobering encounter with a judge in a class she was teaching at the National Judicial College. See Stephen B. Bright et al., Panel, *Breaking the Most Vulnerable Branch: Do Rising Threats to Judicial Independence Preclude Due Process in Capital Cases?*, 31 COLUM. HUM. RTS. L. REV. 123, 141 (1999) (comments of Penny J. White). The judge insisted on denying a hypothetical motion which, according to the law in that judge's state, should have been granted in the defendant's favor. *Id.* After she explained the facts of the motion to the judge for the third time, she recalled, "He looked me straight in the eye, in a room full of judges from all over the country and he said [for the third time], 'Motion is respectfully denied. That's for the appellate court to worry about. I'll have my job tomorrow, and you don't have yours.'" *Id.*

¹² Bright & Keenan, *supra* note 7, at 761-62.

¹³ *Id.* at 762 (citing Janet Elliott & Richard Connelly, *Mansfield: The Stealth Candidate; His Past Isn't What It Seems*, TEX. LAW., Oct. 3, 1994, at 1, 32).

¹⁴ *Id.*

In 1988, Alabama Judge Bob Austin refused to grant a defense attorney's request for a continuance in a death penalty case even though the attorney was suffering complications of polio.¹⁵ Austin was campaigning for an election that was two weeks away—in which he advertised himself as a “law and order” candidate—yet the defense was unsuccessful in its attempts to disqualify the judge.¹⁶ Judge Austin's denials of the continuance and disqualification requests were front-page news.¹⁷ The jury came back with a verdict imposing the death penalty in time for the election.¹⁸ Austin won.¹⁹

The death penalty is not the only criminal issue exploited at election time. As Oregon Supreme Court Justice Hans A. Linde wrote, “Every judge's campaign slogan . . . is some variation of ‘tough on crime.’ . . . Television campaigns have featured judges in their robes slamming shut a prison cell door.”²⁰ Seeking endorsements from prosecutors' associations and state attorneys general, judicial candidates promise to put criminals behind bars.²¹

Candidates often jockey for the position of who will treat defendants most harshly. In the 1994 primary election for the Texas Court of Criminal Appeals, for example, one candidate and former prosecutor called the Court of Criminal Appeals a “citadel of technicality,”

¹⁵ *Id.* at 787–89.

¹⁶ *Id.* at 788.

¹⁷ *Id.*

¹⁸ *Id.* at 788–89.

¹⁹ *Id.* at 789. In 1999, Stephen Bright discussed Judge Austin's conduct: “That capital trial was nothing but a whistle stop on Judge Austin's campaign for circuit judge. It was not a trial. It was a campaign event.” See Bright et al., *supra* note 11, at 165 (comments of Stephen B. Bright).

²⁰ Hans A. Linde, Comment, *Elective Judges: Some Comparative Comments*, 61 S. CAL. L. REV. 1995, 2000 (1988); see also Vincent R. Johnson, *Ethical Campaigning for the Judiciary*, 29 TEX. TECH. L. REV. 811, 835 (1998) (“One recent San Antonio judicial campaign ad touted the candidate as being ‘Tough-As-Nails. Tough-on-Crime,’ and another ad, for a different judge, announced ‘Respect for the Victim. Tough Justice for the Criminal.’” (footnotes omitted)).

²¹ See Bright & Keenan, *supra* note 7, at 763–65 (describing defeats of incumbent judges by candidates supported by prosecutors). In describing the Prosecutors' Association endorsement of a judge's opponent, one author wrote, “The improvident decision of government lawyers to publicly oppose a sitting judge before whom the State of Mississippi regularly appeals shows, at the very least, a remarkable disregard for judicial independence, and apparent disrespect for the respective roles of prosecutor and judge.” David W. Case, *In Search of an Independent Judiciary: Alternatives to Judicial Elections in Mississippi*, 13 MISS. C. L. REV. 1, 17 (1992); see also Stephen B. Bright, *Can Judicial Independence Be Attained in the South? Overcoming History, Elections, and Misperceptions About the Role of the Judiciary*, 14 GA. ST. U. L. REV. 817, 849 (1998) (detailing story of criminal defendant whose recusal motion was denied even though state was represented by attorney general, who had formed visible alliance with judge during judge's recent election campaign).

claiming it neglected the interests of crime victims.²² Others criticized sitting members of the court for being too lenient on defendants.²³ Judicial candidates in many other states have launched similar attacks against incumbent judges to prove themselves most punitive toward criminal defendants.²⁴ For example, in Alabama, a lower court judge and candidate for the state's supreme court accused the Alabama Supreme Court of being "too liberal" in capital cases, and he challenged the court to set execution dates in cases that were up for habeas corpus review.²⁵

A candidate who has done defense work will likely be attacked for it. In a 2001 California judicial election, a candidate who had been a public defender was impugned for caring about "the rights of violent criminals."²⁶ A sitting judge attacked him for having represented a "cop killer," a "child molester," and an "armed robber."²⁷ In a different election, one judicial candidate pointed out that he was the only candidate for the State Supreme Court "who has actually thrown criminals in prison—and does so gladly," in contrast to his opponent, who had defended "drug kingpins [who] were arrested for selling dope to addict our children," "got paid big bucks to keep his crooked clients from going to prison," and "would rather coddle law-breakers than provide justice to the victim."²⁸

Though some have tried, countering this kind of speech is extremely difficult.²⁹ Justice Joel Blass of the Mississippi Supreme Court unsuccessfully tried to respond to the "soft on crime" campaign being waged against him by explaining that it was misleading, since

²² Gardner Selby, *3 Positions Open on State's Top Criminal Appeals Court*, HOUSTON POST, Feb. 13, 1994, at A29; see also Bright & Keenan, *supra* note 7, at 785–86.

²³ Selby, *supra* note 22; see also Bright & Keenan, *supra* note 7, at 785–86. Even federal judges are not immune from being labeled "soft on crime" for upholding defendants' constitutional rights. See Bea Ann Smith, *Alarming Attacks on Judges: Time to Defend Our Constitutional Trustees*, 80 OR. L. REV. 587, 603 (2001) (describing 1996 presidential campaign, in which both Senator Robert Dole and President Bill Clinton called for Judge Harold Baer to be impeached or to resign because he had suppressed cocaine and heroin seized by New York police officers; he eventually reversed his ruling).

²⁴ See Bright & Keenan, *supra* note 7, at 786–87.

²⁵ *Id.* at 786 (citing Tom Hughes, *Montiel Challenges Court to Schedule Executions*, MONTGOMERY ADVERTISER (Ala.), May 19, 1994, at 3B).

²⁶ Mark Hansen, *When Is Speech Too Free? Campaign Tactics of Judicial Candidates Come Under Disciplinary Scrutiny*, A.B.A. J., May 2001, at 20, 20; see also Mark A. Behrens & Cary Silverman, *The Case for Adopting Appointive Judicial Selection Systems for State Court Judges*, 11 CORNELL J.L. & PUB. POL'Y 273, 275 (2002).

²⁷ Hansen, *supra* note 26, at 20; see also Behrens & Silverman, *supra* note 26, at 275.

²⁸ Max Minzner, *Gagged but Not Bound: The Ineffectiveness of the Rules Governing Judicial Campaign Speech*, 68 UMKC L. REV. 209, 221–22 (1999) (describing campaign ads replete with "suggestive commentary" on opponent's record).

²⁹ See *infra* Part II.

“[n]either a Supreme Court judge nor the whole court can send a person to prison.”³⁰ A Nevada judge tried to address this brand of campaign speech in his dissent to a denial of a recusal motion.³¹ He stated, “It goes beyond ‘tough on crime’ for a judge to claim that he is a ‘crime fighter’ Judges are supposed to be *judging* crime not fighting it.”³²

State codes of judicial ethics³³ contain canons designed to prevent campaign speech that is biased or that creates the appearance of bias.³⁴ Yet state judicial ethics commissions and courts seem reluctant to dole out harsh punishments for violations of their codes. For example, in a pre-*White* case, one Texas judge was found to have gone too far with his campaign ads, which stated, “I’m very tough on crimes where there are victims who have been physically harmed. . . . I have

³⁰ Bright & Keenan, *supra* note 7, at 765 (citing Tammie Cessna Langford, *Two Vying for State’s High Court*, SUN HERALD (Biloxi, Miss.), June 3, 1990, at B1) (describing political pressures on capital judges).

³¹ *Nevius v. Warden*, 944 P.2d 858, 860 (Nev. 1997) (Springer, J., dissenting); John D. Fabian, Note, *The Paradox of Elected Judges: Tension in the American Judicial System*, 15 GEO. J. LEGAL ETHICS 155, 163 (2001).

³² *Nevius*, 944 P.2d at 860 (Springer, J., dissenting); *see also* Fabian, *supra* note 31, at 163.

³³ Each state has its own code of judicial conduct comprised of individual canons and based either on the 1972 or 1990 American Bar Association (ABA) Model Code of Judicial Conduct or on a combination of both. *See* BLACK’S LAW DICTIONARY 274 (8th ed. 2004) (entry for “Code of Judicial Conduct”); John L. Kane, Jr., *Judicial Impartiality: Passionate or Comatose?*, JUDGES’ J., Fall 2001, at 12, 14 (describing evolution of Code of Judicial Conduct). Two important ABA canons for the purposes of this Note are Canon 3, which discusses the circumstances in which judges should be disqualified, and Canon 5, which details the political activity in which it would be inappropriate for judges to engage. MODEL CODE OF JUDICIAL CONDUCT Canons 3, 5 (2003), *available at* www.abanet.org/judicialethics/2004_codesofjudicial_conduct.pdf.

³⁴ For example, prior to 2002, Minnesota’s Code of Judicial Conduct contained an “announce clause” which stated that a “candidate for a judicial office, including an incumbent judge,” shall not “announce his or her views on disputed legal or political issues.” *See* Republican Party of Minn. v. White, 536 U.S. 765, 768 (2002) (quoting MINN. CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(i) (2000)); *see also* MINN. CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(i) (1996), *available at* <http://web.archive.org/web/20041010023450/www.state.mn.us/ebranch/judstnds/canon2.html#CANON%205>. Penalties for violation of the announce clause included removal, censure, disbarment, and suspension. *See White*, 536 U.S. at 768. The current Minnesota code has a separate “pledges or promises” clause that prohibits judicial candidates from making “pledges or promises that are inconsistent with the impartial performance of the adjudicative duties of the office.” MINN. CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(i) (2006). *See also infra* note 134 for more on how Minnesota regulates its judicial elections.

no feelings for the criminal."³⁵ That judge was only issued a warning by Texas's State Commission on Judicial Conduct.³⁶

In a post-*White* case, Florida County Court Judge Patricia Kinsey was charged with misconduct for her campaign.³⁷ Her campaign literature stressed her affinity for law enforcement.³⁸ One leaflet stated, "[Y]our police officers expect judges to take their testimony seriously and to help law enforcement by putting criminals where they belong . . . *behind bars!*" and, "Above all else, Pat Kinsey identifies with the victims of crime."³⁹

The Florida Supreme Court found that it was "beyond question" that Kinsey violated the pledges or promises clause of the Florida Code of Judicial Conduct when she "pledged her support and promised favorable treatment for certain *parties and witnesses* who would be appearing before her (i.e., police and victims of crime)," creating a "genuine concern that [criminal defendants] will not be facing a fair and impartial tribunal."⁴⁰ The court upheld the Judicial Qualifications Commission's recommendation that Judge Kinsey be publicly reprimanded and fined \$50,000.⁴¹ Despite committing "serious campaign violations," she was never disqualified from any criminal case.⁴²

In a similar episode in New York, the State Commission on Judicial Conduct found that City Court Judge William Watson should be removed from the bench because of his campaign statements.⁴³ When Judge Watson was running for election, newspaper articles quoted him as saying that the court had to remain "impartial" but that the city needed a "judge who will work together with our local police department to help return Lockport to the city it once was," and suggesting that a judge could use bail and sentencing to deter crime.⁴⁴

³⁵ Bruce Hight, *Judge Violated Conduct Code, Panel Decides*, AUSTIN AM. STATESMAN, Jan. 31, 2001, at B1 (describing Texas Court of Criminal Appeals Judge Tom Price's campaign statements).

³⁶ *Id.* Judge Price actually praised the Commission's ruling, stating, "As judges, we have to campaign, and we have been campaigning as politicians, and sometimes that gets us out of whack with what judges are really supposed to be doing." *Id.*

³⁷ *In re Kinsey*, 842 So. 2d 77, 92-93 (Fla. 2003) (finding judge violated state code of judicial conduct and punishing her with censure and fine).

³⁸ *Id.* at 87-88.

³⁹ *Id.* (noting another set of campaign materials that stated, "Pat Kinsey will bend over backward to ensure that honest, law-abiding citizens are not victimized a second time by the legal system that is supposed to protect them").

⁴⁰ *Id.* at 88-89.

⁴¹ *Id.* at 91-92 (noting fine equaled approximately fifty percent of her annual salary).

⁴² *See id.* at 92.

⁴³ *See Watson v. State Comm'n on Judicial Conduct*, 794 N.E.2d 1, 2 (N.Y. 2003).

⁴⁴ *Id.* at 3. He also sent out a letter to law enforcement personnel asking for their support in "put[ting] a real prosecutor on the bench," and stating, "We need a judge who

The Court of Appeals agreed with the Commission's finding that Judge Watson had violated the pledges or promises clause of the state judicial ethics code.⁴⁵ The court found that his statements were recurrent and crossed the line into promising that he would not apply the law neutrally in criminal cases but instead would favor law enforcement, effectively assisting another branch of government in catching criminals.⁴⁶ The court publicly censured Judge Watson but chose not to punish him more severely because it was "unpersuaded that his continued performance in judicial office . . . threaten[ed] the proper administration of justice."⁴⁷ While noting that "no judge [had] been removed [from office] for campaign misconduct in the past," the court asserted that such misconduct could warrant removal in the future.⁴⁸

The *Kinsey* and *Watson* cases demonstrate that even when judicial ethics infractions rise to the level where courts could punish the offending candidate, they seem reluctant to do so. The courts often conclude that the harm has passed because the offense usually occurred years before the court is tasked with deciding on a punishment.⁴⁹ As the next Part shows, however, the harm caused by tough-on-crime rhetoric is pervasive and ongoing throughout a judge's tenure because he will need to stand for reelection.

B. Judges' Tough-on-Crime Rhetoric Plays Out in Practice

As described above, judges' campaign language can be heavily anti-defendant or pro-death penalty, and punishment for such speech is rare and relatively light. Judges who have made such statements are still allowed to sit on criminal cases. Studies show that this has a prejudicial impact on criminal defendants.

A 2004 study by Gregory Huber and Sanford Gordon focused on judges in Pennsylvania to determine whether elections made judges

will assist our law enforcement officers as they aggressively work towards cleaning up our city streets." *Id.* at 2.

⁴⁵ *Id.* at 4; see also N.Y. COMP. CODES R. & REGS. tit. 22, § 100.5(A)(4)(d)(i) (2001) ("A judge or a non-judge who is a candidate for public election to judicial office: . . . shall not . . . make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office.").

⁴⁶ *Watson*, 794 N.E.2d at 5. The Court of Appeals differentiated Judge Watson's repeated statements from the "generic phrase 'law and order candidate,'" which the court had recently found not to violate the state's judicial ethics law. See *id.*

⁴⁷ *Id.* at 8.

⁴⁸ *Id.*

⁴⁹ See, e.g., *id.* at 2 (final judgment on judge's campaign speech not entered until three years after campaign). See generally Geoffrey P. Miller, *Bad Judges*, 83 TEX. L. REV. 431, 458-87 (2004) (describing general approaches for disciplining federal and state judges).

less impartial.⁵⁰ They found that “all judges, even the most punitive, increase their sentences as reelection nears.”⁵¹ In their data sample, Huber and Gordon attribute more than 2700 extra years of incarceration to this dynamic.⁵²

Judges in Pennsylvania’s general jurisdiction trial courts are elected via partisan elections, serve for ten years, and are then subject to nonpartisan retention elections.⁵³ Even with this relative insulation from voters,⁵⁴ Professors Huber and Gordon found that elections affected how punitive these judges were toward defendants.⁵⁵ Judges increased the sentences they gave as elections neared throughout their careers, although the “electoral proximity effect” declined somewhat in judges’ later terms.⁵⁶ Professors Huber and Gordon attributed this effect to the media environment surrounding judicial elections in which scrutiny of judicial actions is heightened, and the public’s general knowledge of court actions and judicial candidates is minimal.⁵⁷ They explained that in the relatively information-rich campaign setting, media coverage will focus on, and voters will most remember, “perceived instances of underpunishment [rather] than overpunishment.”⁵⁸ As a result, judges who wish to be reelected might give

⁵⁰ Gregory A. Huber & Sanford C. Gordon, *Accountability and Coercion: Is Justice Blind When It Runs for Office?*, 48 AM. J. POL. SCI. 247, 251 (2004) (sampling sentencing data for convictions in which highest count was form of aggravated assault, robbery, or rape, giving authors 22,095 discretionary sentences to study between 1990 and 1999). The study controlled for such factors as the biographical features of the judge (age, conservatism, prosecution experience) and the defendant (race, gender), and for the conservatism of the district in which the judge sat. *See id.* at 252–58.

⁵¹ *Id.* at 258.

⁵² *Id.* at 256 (noting that extra 2700 or more years of sentences imposed by judges through election proximity effect is conservative estimate because judge might feel constrained by future elections even on her first day, and she might have imposed even lower sentences if she knew that she would never face voters again).

⁵³ *Id.* at 250.

⁵⁴ *See* Angela Allen, Comment, *The Judicial Election Gag Is Removed—Now Texas Should Remove Its Gag and Respond*, 10 TEX. WESLEYAN L. REV. 201, 221–22 (2003) (explaining why judicial candidates in partisan elections will, after *White*, be forced to take positions on controversial issues, with negative ramifications for judicial integrity); Roy A. Schotland, *Financing Judicial Elections, 2000: Change and Challenge*, 2001 L. REV. MICH. ST. U. DETROIT C. L. 849, 886 n.196 (2001) (discussing states’ choice to switch to nonpartisan elections because of perceived drawbacks of partisan elections); *cf.* Fabian, *supra* note 31, at 166–68 (finding judicial candidates in partisan elections are most likely to violate canons of judicial ethics, but also finding nonpartisan elections are only slightly less dangerous).

⁵⁵ Huber & Gordon, *supra* note 50, at 256.

⁵⁶ *Id.* at 260 (noting continued but declining “statistically significant electoral proximity effect” in subsequent terms).

⁵⁷ *Id.* at 262.

⁵⁸ *Id.*

defendants harsher sentences than they would in a world without continual scrutiny by the electorate.⁵⁹

The connection between elections and judges sanctioning the imposition of the death penalty is similarly strong. Affirmance rates for the death penalty in state supreme courts are correlated with the methods of judicial selection in those states.⁶⁰ State supreme courts with judges elected by the legislature or in contested voter elections affirmed death penalty sentences in more than 62% of the cases.⁶¹ In contrast, state supreme courts comprised of judges appointed for life terms affirmed death sentences in only 26.3% of the cases.⁶² A 1995 study found evidence that elected state supreme court justices are more likely to affirm jury verdicts imposing the death penalty in the two years before the end of their terms than at other times.⁶³ A related 1997 study found that Democratic judges in states with short term-lengths were more likely to affirm death sentences than Democratic judges in states with long term-lengths.⁶⁴ This study also found that in conservative political environments, in states without elections, judges vote to overturn death sentences more often than one would expect.⁶⁵

After years of capital defense work in Alabama, Professor Bryan Stevenson has found “a statistically significant correlation between judicial override and election years in most of the counties [in Alabama] where these overrides take place.”⁶⁶ Another study confirms that there is a statistically significant relationship in Alabama

⁵⁹ See *id.*

⁶⁰ Gerald F. Uelman, *Elected Judiciary*, in *ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION* 170, 171 (Leonard W. Levy et al. eds., Supp. I 1992) (examining death penalty affirmance rates nationwide between 1977 and 1987).

⁶¹ *Id.*

⁶² *Id.*

⁶³ See Melinda Gann Hall, *Justices as Representatives: Elections and Judicial Politics in the American States*, 23 *AM. POL. Q.* 485, 485, 496 (1995) (describing study of impact of electoral conditions on state supreme court justices' judgments on death sentence appeals).

⁶⁴ Paul R. Brace & Melinda Gann Hall, *The Interplay of Preferences, Case Facts, Context, and Rules in the Politics of Judicial Choice*, 59 *J. POL.* 1206, 1219–21 (1997) (finding links between electoral politics and judges' voting in death penalty cases).

⁶⁵ See *id.* at 1221.

⁶⁶ See Symposium, *Politics and the Death Penalty: Can Rational Discourse and Due Process Survive the Perceived Political Pressure?*, 21 *FORDHAM URB. L.J.* 239, 256 (1994) (quoting Bryan Stevenson) (describing importance of supporting death penalty for Alabama politicians, including judges). Florida, Indiana, and Alabama have statutes that allow judges to impose the death penalty even though the jury has found the punishment should be life imprisonment; this is known as the judicial override or the jury override. See *id.* at 242 n.9 (explaining judicial overrides); Burnside, *supra* note 8 (arguing that jury override statutes violate due process in states with judicial elections); see also Spaziano v. Florida, 468 U.S. 447, 457–65 (1984) (finding Florida's judicial override practice constitutional).

between judges overriding life sentences and proximity to the next judicial election.⁶⁷

Dissenting in *Harris v. Alabama*, Justice Stevens expressed concern about judicial behavior in death penalty cases.⁶⁸ The *Harris* majority noted that there had been only five Alabama cases in which the judge rejected a jury's recommendation of the death penalty, compared to forty-seven instances where the judge imposed a death sentence despite the jury's recommending life.⁶⁹ Yet the Supreme Court found that those numbers gave an "incomplete picture," and did not render Alabama's death penalty scheme unconstitutional.⁷⁰ In dissent, Justice Stevens lamented:

The "higher authority" to whom present-day capital judges may be "too responsive" is a political climate in which judges who covet higher office—or who merely wish to remain judges—must constantly profess their fealty to the death penalty. . . . The danger that they will bend to political pressures when pronouncing sentence in highly publicized capital cases is the same danger confronted by judges beholden to King George III.⁷¹

The studies cited above and the media effects discussed below strongly suggest that judges bend to political pressure to be tougher on crime as elections near. As a result, defendants' sentences may be lengthened and their motions denied by judges whose campaigns may benefit from those rulings. The next Part argues that the effects of modern media coverage exacerbate this problem to a degree underappreciated in current jurisprudence.

⁶⁷ Burnside, *supra* note 8, at 1041. Burnside found a correlation between jury overrides and proximity to judicial elections in Alabama following the highly publicized removal of Chief Justice Rose Bird of the California Supreme Court in a 1986 election. Jury overrides were 98.5% more extreme than random distribution over the election period would have been. *Id.*

⁶⁸ 513 U.S. 504, 519–20 (1995) (Stevens, J., dissenting) (differing from majority opinion in his finding that judges should not have free rein to override jury verdicts of life sentences, especially in light of political pressures facing elected judges).

⁶⁹ *Id.* at 513 (majority opinion).

⁷⁰ *Id.* at 513–14.

⁷¹ *Id.* at 519–20 (Stevens, J., dissenting) (citation omitted). Justice Stevens continued in a footnote: "This climate is evident in political attacks on candidates with reservations about the death penalty. . . . Some Senators have also made the death penalty a litmus test in judicial confirmation hearings." *Id.* at 519 n.5; *see also* Bright et al., *supra* note 11, at 125–27 (comments of Stephen B. Bright) (describing Bright's experience arguing at capital sentencing hearing in front of Alabama judge being considered for federal judgeship and noting judge paid little attention to trial and overrode jury's verdict of life without parole); Burnside, *supra* note 8, at 1039 ("There is no better opportunity for a judge to demonstrate toughness on crime than through the use of the judicial override.").

II

TELLING US WHAT TO THINK: HOW THE MEDIA COVER
CRIME AND ELECTIONS

In large measure, judges compete in words and actions to treat defendants more harshly because voters learn about judicial candidates and their decisions through the media. This Part argues that media coverage of crime has a substantial effect on the public's understanding of criminal law. Media coverage causes the public to believe that crime occurs with greater frequency than it actually does and that harsh punishments alone can stop crime. Voters are then motivated by these beliefs about crime when deciding for whom to vote. Politicians exploit these misconceptions when campaigning and present themselves as the solution to the crime "problem." Elected judges are no exception, and so they vow to rule against defendants and to sentence them harshly.

A. *Ill Effects: How the Media Influence the Public*

While it is commonly said that the media "may not be successful . . . in telling people what to think, but [are] stunningly successful in telling [people] what to think *about*,"⁷² media coverage of crime may, in fact, do both. For more than ninety percent of people, the media are their most important source of crime information⁷³ because they have no direct experience.⁷⁴ This dependence on the media directly impacts people's punitive tendencies.⁷⁵ The public's reliance on the media as the primary source of crime information is

⁷² See, e.g., BERNARD C. COHEN, *THE PRESS AND FOREIGN POLICY* 13 (1963); see also Maxwell E. McCombs & Donald L. Shaw, *The Agenda-Setting Function of Mass Media*, 36 *PUB. OPINION Q.* 176, 177 (1972) (hypothesizing that media set agenda for political campaigns and influence public's decision as to which issues are salient).

⁷³ KATHERINE BECKETT, *MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS* 62 (1997).

⁷⁴ See Ernestine S. Gray, *The Media—Don't Believe the Hype*, 14 *STAN. L. & POL'Y REV.* 45, 49 (2003) (describing poll results in which "nine out of ten Americans say neither they nor their immediate families have been the victim of violent crime in the past five years").

⁷⁵ See Huber & Gordon, *supra* note 50, at 250 (suggesting that if voters followed court proceedings more closely on their own instead of relying on media coverage, they would not find judges too lenient); Julian V. Roberts & Don Edwards, *Contextual Effects in Judgments of Crimes, Criminals, and the Purposes of Sentencing*, 19 *J. APPLIED SOC. PSYCHOL.* 902, 902–17 (1989) (demonstrating that reading about violent crime increased perceptions of seriousness of unrelated offenses); see also BECKETT, *supra* note 73, at 108 ("The more exposure people have to nonsensationalistic accounts of real criminal incidents (from court documents rather than media accounts), the less punitive they become."); Rachel E. Barkow, *Administering Crime*, 52 *UCLA L. REV.* 715, 750–51 (2005) (noting studies which show laypeople would impose similar—and less punitive—sentences to those of judges when faced with facts of individuals' specific cases); Julian V. Roberts, *Public Opinion*,

problematic, however, because of cognitive errors in the way people process information about crime, how media coverage of crime plays into those cognitive errors, and the many inaccuracies in the media's coverage of crime and punishment.

The media exert such a powerful influence on public perception of crime because of the audience's cognitive errors. "Cognitive error" refers to the idea that people are irrational about risk.⁷⁶ People's opinions are often the products of errors of logic, including overgeneralization, the availability heuristic, overconfidence, and biased processing of information.⁷⁷ As a result of these cognitive errors, people overgeneralize from the events about which they are informed; for example, they see the most heinous crimes as commonplace because those crimes receive the most media coverage.⁷⁸ The availability heuristic suggests that people make judgments based on what they remember rather than on accurate data, and people recall unusual and startling events much more easily than everyday occurrences.⁷⁹ People also become very confident of their opinions once formed, meaning "judgments [about the criminal justice system] reached under the influence of overgeneralization, based upon the sensational cases that are most available, are then held with undue confidence."⁸⁰ Once an opinion or point of view is adopted, all new information is processed in a highly biased fashion, for instance, by ignoring evidence contrary to one's position.⁸¹

The media's crime coverage plays into these cognitive errors. Media coverage signals to the public which social issues and problems are most important; this effect is called agenda-setting.⁸² Under the agenda-setting hypothesis, "those problems that receive prominent attention on the national news become the problems the viewing public regards as the nation's most important."⁸³ Researchers have

Crime, and Criminal Justice, 16 *CRIME & JUST.* 99, 150, 152 (1992) (citing studies demonstrating public favors less punitive sentences than criminal justice system imposes).

⁷⁶ See Sara Sun Beale, *What's Law Got to Do with It? The Political, Social, Psychological and Other Non-Legal Factors Influencing the Development of (Federal) Criminal Law*, 1 *BUFF. CRIM. L. REV.* 23, 57-60 (1997) (describing different forms of cognitive error).

⁷⁷ *Id.*

⁷⁸ *Id.* at 57-58.

⁷⁹ *Id.* at 58-59. See generally Amos Tversky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, 5 *COGNITIVE PSYCHOL.* 207, 228-29 (1973) (showing how clinician makes decisions based on his memories rather than by factual analysis or probabilities).

⁸⁰ Beale, *supra* note 76, at 59.

⁸¹ *Id.* at 59-60.

⁸² See BECKETT, *supra* note 73, at 62 (describing how media set political agenda).

⁸³ See SHANTO IYENGAR & DONALD R. KINDER, *NEWS THAT MATTERS: TELEVISION AND AMERICAN OPINION* 16 (1987) (describing agenda-setting hypothesis and experiments to prove it).

found that even small amounts of coverage on television news elevate the salience of an issue,⁸⁴ and crime is covered quite extensively.⁸⁵ Even if triggered by only a single story, agenda-setting, and its alteration of viewers' political priorities, is a persistent effect.⁸⁶

Agenda-setting works in tandem with the secondary effect of priming.⁸⁷ The priming hypothesis states that issues highlighted in news coverage become the standards against which the audience judges its leaders.⁸⁸ If crime coverage saturates the media, then the audience will measure an elected official's performance by his crime policies, however tenuous the connection between those policies and the actual incidence of crime.⁸⁹ That judgment of a leader's performance has real effects at the ballot box, when voters decide, based on the issues they care about, whether an elected official deserves to remain in office.⁹⁰

A public primed to judge its leaders based on how they handle crime is problematic: Crime news is popular⁹¹ and low-cost,⁹² so the amount of crime news can vastly outstrip the actual crime rate.⁹³ For

⁸⁴ See, e.g., *id.* at 18. Researchers found a "dramatic shift in priorities" in study participants who were shown newscasts containing stories about problems with national defense. *Id.* After watching the newscasts, participants found defense to be a pressing issue, in contrast with the control group—who saw newscasts without such stories—and with their own priority lists before they participated in the study. *Id.*

⁸⁵ See *infra* notes 91–102 and accompanying text.

⁸⁶ See IYENGAR & KINDER, *supra* note 83, at 25 (finding individuals given only one story about unemployment still ranked issue as extremely important one week after reading story).

⁸⁷ See generally *id.* at 63–111 (explaining priming and how it influences public's judgment of government officials).

⁸⁸ *Id.* at 63. See generally Joanne M. Miller & Jon A. Krosnick, *Anatomy of News Media Priming, in DO THE MEDIA GOVERN? POLITICIANS, VOTERS, AND REPORTERS IN AMERICA* 258 (Shanto Iyengar & Richard Reeves eds., 1997) [hereinafter *DO THE MEDIA GOVERN?*] (explaining that issues on which media most focus become those upon which voters will judge elected officials' job performance).

⁸⁹ See Shanto Iyengar, *Overview, in DO THE MEDIA GOVERN?*, *supra* note 88, at 211, 213 (describing effects of priming on public's judgment of elected officials).

⁹⁰ See, e.g., IYENGAR & KINDER, *supra* note 83, at 98–111 (using priming to link media coverage to voters' choices).

⁹¹ See Philip Pettit, *Is Criminal Justice Politically Feasible?*, 5 *BUFF. CRIM. L. REV.* 427, 433–34 (2002) ("[M]edia . . . have a particular incentive to home in on any newsworthy crime, particularly any crime of a shocking variety. It makes for . . . an increased audience Tapping into people's voyeuristic and condemnatory appetites, as the sensational media routinely do, is a sure way of attracting their attention.")

⁹² See DAVID J. KRAJICEK, *SCOOPED!: MEDIA MISS REAL STORY ON CRIME WHILE CHASING SEX, SLEAZE, AND CELEBRITIES* 7, 95 (1998) (describing ease of crime news reporting); see also TIMOTHY E. COOK, *GOVERNING WITH THE NEWS: THE NEWS MEDIA AS A POLITICAL INSTITUTION* 173–74 (1998) (noting newspaper's cost-cutting measures, such as focusing on crime).

⁹³ See Barkow, *supra* note 75, at 749 (describing misleading aspects of media's crime coverage). The disproportionate coverage of crime as compared to the actual crime rate is

example, a Center for Media and Public Affairs study of crime coverage on television found that the number of stories about murder increased by 336% between 1990 and 1995, while the murder rate during that time declined by nearly 13%.⁹⁴ Local news media are especially prolific producers of crime news, prompting many experts to say of local news: "If it bleeds, it leads." In fact, one study of Philadelphia news found that crime news accounted for 31% of stories on the local evening news.⁹⁵ This can lead the public to think that their elected officials are not properly addressing the crime problem when, in reality, the crime "problem" is media-generated and not based on actual data.⁹⁶

Framing picks up where priming leaves off: Priming influences people to think more about crime, and framing then influences *how* they think about crime.⁹⁷ Frames are the "interpretive packages" which are the central organizing ideas that give meaning to stories about crime.⁹⁸ Examples of frames that journalists use when writing crime stories include "[r]espect for authority has broken down because individuals are not being held responsible for their behavior"⁹⁹ and "[c]asual drug users are not victims but criminals."¹⁰⁰ The media have established relationships with individuals in government and law enforcement, and contact with those "official" sources leads to stories shaped by frames that echo official positions.¹⁰¹ After reading or viewing such stories, the public is more likely to support "crime and drug policies aimed at punishment rather than prevention."¹⁰²

an especially pronounced problem with respect to coverage of youth crime. *See, e.g.*, Gray, *supra* note 74, at 45-46 (noting most news stories about children were about violence even though juvenile violent crime was decreasing); Julian V. Roberts, *Public Opinion and Youth Justice*, 31 CRIME & JUST. (YOUTH CRIME & YOUTH JUST.) 495, 500, 504 (2004) (explaining that public belief in prevalence of youth crime is unconnected to its actual frequency and attributing that disconnect to inaccurate media coverage).

⁹⁴ *Network News in the Nineties*, MEDIA MONITOR (Ctr. for Media & Pub. Affairs, Washington, D.C.), July/Aug. 1997, at 1, 3.

⁹⁵ Marc Mauer, *Why Are Tough on Crime Policies So Popular?*, 11 STAN. L. & POL'Y REV. 9, 15 (2000) (describing studies showing heightened media coverage of crime).

⁹⁶ *See* Roberts, *supra* note 93, at 502 ("Politicians tend to respond to [media coverage of new] poll findings as though they have just revealed a new crime problem.").

⁹⁷ *See* JOSEPH N. CAPPELLA & KATHLEEN HALL JAMIESON, *SPIRAL OF CYNICISM: THE PRESS AND THE PUBLIC GOOD* 52 (1997) (describing relationship between priming and framing).

⁹⁸ BECKETT, *supra* note 73, at 65.

⁹⁹ *Id.* at 66.

¹⁰⁰ *Id.* at 72.

¹⁰¹ *Id.* at 77.

¹⁰² *Id.* at 78.

All three media effects work together especially strongly in news coverage of violent crime. The media cover violent crime more than any other kind of crime, despite the fact that most crimes are nonviolent.¹⁰³ This sets the agenda, presenting violent crime to the public as an extremely pressing issue. The public is then primed to judge its leaders through their handling of violent crime and violent criminals. The availability heuristic ensures that people are likely to make those judgments based on what they remember rather than on accurate data.¹⁰⁴ What they will likely remember are the myriad stories about violent crime.¹⁰⁵ Coverage of violence is more often framed as episodic (event-focused) rather than thematic (context-oriented).¹⁰⁶ These episodic frames leave viewers with the belief that violent crime is caused by individuals rather than social circumstances,¹⁰⁷ which primes voters to judge politicians by how severely they punish individual criminals rather than by how tirelessly they work to ameliorate the social causes of crime.

B. Judges Must Appeal to a Misinformed, Fearful Public

Media coverage and the institutional structure of judicial elections leave voters misinformed about the true nature of crime and punishment. The potential for cognitive error in voter thinking about judicial candidates is thus heightened. Judges have no choice but to campaign with an eye toward these cognitive errors and media effects, resulting in campaigns that are low on substance and high on “tough” rhetoric.

While media coverage teaches voters that crime is a key issue by which they should evaluate their elected leaders, it provides little information about judges’ actual performance and responsibilities.¹⁰⁸ In states with nonpartisan elections, for example, voters receive few context clues like party labels.¹⁰⁹ In states with retention elections,

¹⁰³ See Barkow, *supra* note 75, at 749 & nn.103–04 (explaining flaws in crime news and describing problems stemming from exaggerated crime coverage).

¹⁰⁴ See generally Tversky & Kahneman, *supra* note 79, at 228–29 (showing how clinician makes decisions based on his memories rather than by factual analysis or probabilities).

¹⁰⁵ See Barkow, *supra* note 75, at 748–51 (explaining how disproportionate media coverage of worst crimes makes them more memorable, leading public to support ever-harsher punishments); see also JULIAN V. ROBERTS & LORETTA J. STALANS, PUBLIC OPINION, CRIME, AND CRIMINAL JUSTICE 22–34 (1997) (discussing public misperceptions about crime rate).

¹⁰⁶ See Mauer, *supra* note 95, at 15.

¹⁰⁷ See SHANTO IYENGAR, IS ANYONE RESPONSIBLE? HOW TELEVISION FRAMES POLITICAL ISSUES 39–45 (1991) (discussing episodic and thematic framing of crime news).

¹⁰⁸ See Huber & Gordon, *supra* note 50, at 249 (describing informational environment as contributing to voters’ ignorance about judiciary and focus on underpunishment).

¹⁰⁹ See *id.*

there may not even be a challenger to force debate about issues.¹¹⁰ Any information voters do receive about judicial candidates through the media will either come from the candidates themselves or from interest groups, yet judicial elections generate almost no “free media” coverage.¹¹¹ Such an information-limited environment can lead to troubling results, as when publicity about the outcome in a single case sways voters against a presiding judge without review of his record or the subtleties of that case.¹¹² Stories about violent crime prime voters to think either that the judge’s performance should be evaluated on the basis of the salient case or that harsher punishments would have prevented the crime.

The single publicized case is likely one in which a defendant was seemingly underpunished. It is not newsworthy for a convict to believe his punishment too harsh, but it is extremely newsworthy when an ex-convict commits another crime after serving an ostensibly too brief sentence.¹¹³

[I]n any period of reduced sentencing, there is bound to be a crime committed sooner or later that would not have been possible had the sentencing remained at earlier levels. And that very fact will prompt the exposure of the crime in the media, the emergence of

¹¹⁰ See *id.*

¹¹¹ See Richard Briffault, *Judicial Campaign Codes After Republican Party of Minnesota v. White*, 153 U. PA. L. REV. 181, 196 (2004) (explaining that voters are often under-informed about judicial candidates because judicial elections attract little “free media” coverage); cf. Schotland, *supra* note 54, at 855 & n.27 (describing higher vote percentages for judicial candidates who advertised versus those who did not).

¹¹² See Huber & Gordon, *supra* note 50, at 249 (describing salience of individual instances of underpunishment); see also Bright, *supra* note 9, at 319 (explaining how judge’s decision in bail or suppression hearing can be used against him “no matter how little discretion the judge had under the law” because judge can be portrayed “as putting the entire community at risk” if just one defendant commits another crime while out on bail); Anthony Champagne, *Political Parties and Judicial Elections*, 34 LOY. L.A. L. REV. 1411, 1422–23 (2001) (“All it takes in this era of mass media politics is for a judge to do something . . . such as [set] an apparent low bail for a murderer A ten second media message can turn that decision into a charge of coddling criminals that could ruin the judge’s career.”).

Another result of such a poor, information-limited environment is that voters fail to see why they should care about these elections at all, and so they simply do not vote in them. See, e.g., Shirley S. Abrahamson, *The Ballot and the Bench*, 76 N.Y.U. L. REV. 973, 992 (2001) (contrasting turnout in Wisconsin for judicial elections, which hovers around twenty-five percent, with that for presidential elections, which is highest in nation); Jay A. Daugherty, *The Missouri Non-Partisan Court Plan: A Dinosaur on the Edge of Extinction or a Survivor in a Changing Socio-Legal Environment?*, 62 MO. L. REV. 315, 322–23 (1997) (“[J]udicial retention elections attract the smallest voter turnout of all types of elections, apparently because many voters feel they lack sufficient information to cast an informed vote.”).

¹¹³ See Huber & Gordon, *supra* note 50, at 249 (explaining media’s rationale for publicizing perceived underpunishment).

popular outrage, and the political reaction of calling for a return to earlier, tougher policies.¹¹⁴

Influenced by these cognitive errors and by what the public expects to hear about crime, a journalist will choose to frame crime stories in the more “emotionally powerful” way.¹¹⁵ It is far easier to frame a story as an exposé about a judge who gave a too-lenient sentence than to present a complex and perhaps counterintuitive story about how longer sentences may negatively impact society and the crime rate.¹¹⁶ This disparity in media treatment can have real consequences for criminal defendants, as elected judges—like other elected officials—must respond to and prevent public outrage by promising and delivering harsh punishments.¹¹⁷

Underpunishment is also a popular frame because of the many groups—victims’ families, victims’ rights groups, police officers, and legislators—who have incentives to publicize individual cases of “lenient” punishments.¹¹⁸ Interest groups want judges to fear public outrage and job loss if they give short sentences.¹¹⁹ Judges, like all elected officials, may then feel pressure to cast themselves as the solution to the crime problem.¹²⁰ Politicians can run a successful campaign by reflecting the public’s fear and anger and promising “to do something about it.”¹²¹ Thus, tough-on-crime rhetoric serves politicians’ needs perfectly: It allows them to “create the illusion of control over social unrest”—another popular frame—with a “sound bite.”¹²²

Comparatively fewer organized groups have incentives to correct the public’s misinformation about criminal law or to speak about long-term solutions. Even criminal defendants themselves have little

¹¹⁴ Pettit, *supra* note 91, at 437.

¹¹⁵ See Barkow, *supra* note 75, at 750 (explaining why media cover supposedly lenient sentences); see also DENNIS HOWITT, *CRIME, THE MEDIA AND THE LAW* 25–27 (1998) (describing media-induced “moral panics”); Sarah Eschholz, *The Media and Fear of Crime: A Survey of the Research*, 9 U. FLA. J.L. & PUB. POL’Y 37, 47–50 (1997) (same).

¹¹⁶ See Barkow, *supra* note 75, at 750 (detailing rationale for sensationalistic media coverage).

¹¹⁷ Cf. Douglas A. Berman, *A Common Law for This Age of Federal Sentencing: The Opportunity and Need for Judicial Lawmaking*, 11 STAN. L. & POL’Y REV. 93, 110 (1999) (noting that Congress is “institutionally disposed to ‘fight crime with more time’”).

¹¹⁸ See BECKETT, *supra* note 73, at 64 (explaining that “[o]bjective” news is . . . biased in favor of the definitions of the powerful, and particularly those of state officials,” because journalists get their information directly from government public relations departments and from others with money to afford such services).

¹¹⁹ See Huber & Gordon, *supra* note 50, at 249 (describing groups which publicize instances of underpunishment).

¹²⁰ See *id.* at 248–49 (discussing elected officials’ incentives to respond to preferences of electorate).

¹²¹ See Pettit, *supra* note 91, at 434–35.

¹²² Barkow, *supra* note 75, at 752 & n.121.

incentive to advocate for shorter sentences because of the massive collective action problems they face. Those who are not imprisoned will likely be poor and disenfranchised, which makes it unlikely that they will be able to organize to present a unified message to politicians and the public.¹²³ Since no one will represent defendants' viewpoint to reporters, the crime-news frames will invariably slant against criminal defendants.¹²⁴

Agenda-setting and priming encourage voters to think a great deal about crime, and framing ensures they do so only in an anti-defendant way. Voters are uninformed about crime, about how harsh or lenient a punishment "really" is, and about what a judge's role is and should be in assigning that punishment. This leaves voters primed to be disproportionately outraged by crime and forces politicians—including elected judges—to respond to public anger or risk losing the next election. But "when a judge feels compelled to alter his sentencing decision for the approval of the less-informed people outside the courtroom . . . decency is sacrificed,"¹²⁵ as is due process of law for the criminal defendant inside the courtroom.

III

DUE PROCESS CASES: WHEN ARE A JUDGE'S BIASES ENOUGH TO FIND A DUE PROCESS VIOLATION?

The Due Process Clause of the Fourteenth Amendment guarantees the right to an unbiased judge. In *Republican Party of Minnesota v. White*,¹²⁶ however, the Supreme Court complicated the criminal defendant's argument that a judge's tough-on-crime campaign speech makes him impermissibly biased under the Due Process Clause. This Part first discusses the due process standards for when a judge's bias violates a defendant's right to a fair trial. It then discusses how *White* makes it difficult for a criminal defendant to meet this standard, even

¹²³ See Michael S. Barr, *Credit Where It Counts: The Community Reinvestment Act and Its Critics*, 80 N.Y.U. L. REV. 513, 539 n.124 (2005) (describing collective action problems as "a type of market failure that can occur when rational market participants do not produce efficient outcomes because the market involves a public good"). See generally MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (2d ed. 1971) (identifying problems inherent in organizing group activity).

¹²⁴ Cf. COOK, *supra* note 92, at 95–97 (discussing institutional features that explain news media's preference for official sources and difficulties "unofficial" sources have in being deemed authoritative or newsworthy).

¹²⁵ Burnside, *supra* note 8, at 1027; see also Scott D. Wiener, Note, *Popular Justice: State Judicial Elections and Procedural Due Process*, 31 HARV. C.R.-C.L. L. REV. 187, 204 (1996) (voicing opposition to judges' deciding cases based on public opinion—which is likely created when people consume "brief, sensationalistic accounts of the case"—because it is antithesis of "individualized adjudication").

¹²⁶ 536 U.S. 765 (2002).

if his judge campaigned as tough on crime. In Part IV, this Note argues that states should remedy this troubling consequence of *White* by strengthening their own codes of judicial ethics to make tough-on-crime campaign speech explicit grounds for recusal.

A. *The Litigant's Right to an Unbiased Judge*

Since 1927, the Supreme Court has spoken clearly and strongly about when a judge should be disqualified for bias against a litigant or class of litigants. In *Tumey v. Ohio*, it first said that the Due Process Clause of the Fourteenth Amendment was violated in a criminal case when a defendant's "liberty or property [is subject] to the judgment of a court[,] the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case."¹²⁷ The Court explained that even if a judge were not swayed by a reward in any particular case, due process was violated any time there was "a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance *nice, clear and true* between the State and the accused"¹²⁸

In re Murchison further described an unbiased tribunal as one without even the "probability of unfairness."¹²⁹ The Court held that sometimes due process required disqualifying judges who had "no actual bias" in order to "satisfy the appearance of justice."¹³⁰ For example, in *Ward v. Village of Monroeville*, the Court determined that the benefit received by the judge—in this case, also mayor—for finding defendants guilty was only indirect, because the fines went to the village, and not to the mayor himself.¹³¹ Yet, because so much of the village's income was derived from these fines, the Court cited *Tumey's* "nice, clear and true" test in finding that the defendant's due process rights were violated.¹³² As the Court stated in *Marshall v. Jerrico, Inc.*, the Due Process Clause provides litigants and members

¹²⁷ 273 U.S. 510, 523 (1927). In that case, the judge was the town's mayor; he received a direct, personal, pecuniary benefit for convicting certain defendants and received no benefit if he acquitted them. *Id.* The defendant's conviction was reversed because he was denied due process when the judge acted both as an impartial judge and as a partisan politician. *Id.* at 534–35.

¹²⁸ *Id.* at 532 (emphasis added).

¹²⁹ 349 U.S. 133, 136 (1955). The Court held that due process was violated when a defendant was accused of contempt by a judge and then tried for contempt in front of that same judge. *Id.* at 137–39.

¹³⁰ *Id.* at 136 (internal quotation marks and citation omitted).

¹³¹ 409 U.S. 57, 58 (1972).

¹³² *Id.* at 60 (citing *Tumey*, 273 U.S. at 532).

of a democratic society with “both the appearance and reality of fairness.”¹³³

B. White Weakens Defendants’ Argument That Tough-on-Crime Judges Should Be Disqualified for Having a Personal Stake in Criminal Trials

State governments understand the paradoxes inherent in having an elected judiciary and have passed codes of judicial conduct to preserve both actual judicial impartiality and the appearance of that impartiality. Many of these codes included “announce clauses,” which prevented judges running for election from announcing their views on legal or political issues in dispute.¹³⁴ However, in the Court’s most recent statement on the right to an unbiased judge, *Republican Party of Minnesota v. White*, it found that judges must be allowed to make announcements while campaigning which tend to show how they would rule, thereby undermining the Court’s prior protections of a criminal defendant’s right to a fair trial.¹³⁵

In 1998, a candidate for Minnesota judicial office, Gregory Wersal, challenged the announce clause in the Minnesota Code of

¹³³ 446 U.S. 238, 242 (1980). In *Marshall*, an administrator in the Department of Labor assessed a fine against Jerrico for violating the child labor provisions of the Fair Labor Standards Act. *Id.* at 240. No due process violation was found even though the money collected as civil penalties went to the Department of Labor as reimbursement for their enforcement actions. *Id.* at 241–42.

The Court most recently applied the principles from these cases in *Aetna Life Insurance Co. v. Lavoie*, when it found that a ruling against Aetna had to be invalidated because the judge hearing the case had a personal interest in the proceeding. 475 U.S. 813, 824–25 (1986). He was a party to a separate lawsuit against another insurer proceeding in a different court, and his ruling against Aetna had “the clear and immediate effect of enhancing both the legal status and settlement value of his own case.” *Id.* at 824. The Due Process Clause therefore barred that judge from hearing the case. *Id.* at 825; *see also* Connally v. Georgia, 429 U.S. 245, 250 (1977) (per curiam) (finding search warrant’s issuance violated defendant’s due process rights because justice of peace was only paid if he issued warrant); Taylor v. Hayes, 418 U.S. 488, 501–02 (1974) (finding that when judge has personal feelings against litigant, he should recuse himself for purposes of contempt proceedings); Johnson v. Mississippi, 403 U.S. 212, 216 (1971) (per curiam) (“Trial before ‘an unbiased judge’ is essential to due process.”).

¹³⁴ Minnesota’s citizens elect their judges on all levels through nonpartisan elections. AM. JUDICATURE SOC’Y, *supra* note 1. Minnesota’s judicial elections are governed by the Minnesota Code of Judicial Conduct, which is based on the ABA’s Code. Prior to 2002, Minnesota’s Code contained an “announce clause” and a “pledges or promises clause.” *See supra* note 34; *see also* Republican Party of Minn. v. White, 536 U.S. 765, 768, 770 (2002) (quoting MINN. CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(i) (2000) and identifying and distinguishing the two clauses); MINN. CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(i) (1996), available at <http://web.archive.org/web/20041010023450/www.state.mn.us/ebranch/judstnds/canon2.html#CANON%205> (announce clause); MINN. CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(i) (2006) (pledges or promises clause).

¹³⁵ 536 U.S. at 778.

Judicial Conduct under the First Amendment because he was not allowed to announce his views during his campaign.¹³⁶ The State asserted that it had compelling interests in preserving the actual impartiality and the appearance of impartiality of the judiciary; the courts below agreed, finding the announce clause narrowly tailored to achieve these ends.¹³⁷ The Supreme Court, however, found it necessary to define impartiality before ruling on whether either interest was compelling.¹³⁸

The Court considered three possible definitions of impartiality: lack of bias against either party, lack of bias regarding relevant legal issues, and general open-mindedness.¹³⁹ The Court found that the announce clause was impermissibly overinclusive and could not be justified as ensuring an actual lack of bias against either party.¹⁴⁰ It found protection against bias as to particular issues entirely unconvincing.¹⁴¹ And the Court dismissed the third possibility as well, finding the announce clause “woefully underinclusive” to ensure general open-mindedness.¹⁴² Holding that protecting impartiality—defined in any of these three ways—did not justify the announce clause, the Court struck it down as an unconstitutional violation of the First Amendment.¹⁴³

In response to the dissenters’ concerns that judges would feel compelled to rule in line with their announced opinions for fear of losing their jobs,¹⁴⁴ the Court simply stated that such a possibility is inextricably linked to an elected judiciary:

¹³⁶ *Id.* at 769–70.

¹³⁷ *Id.* at 775.

¹³⁸ *Id.*

¹³⁹ *Id.* at 775–79.

¹⁴⁰ *Id.* at 776–77 (explaining that once judge decides legal issue, any party who comes before him arguing opposite will lose, regardless of identity of that party; thus judge is applying law “evenhandedly”).

¹⁴¹ *Id.* at 777–78 (finding judges’ minds are not—and should not be—blank slates).

¹⁴² *Id.* at 778–80 (explaining that judges’ views expressed during election campaigns are fraction of their public views on legal issues, including those expressed in rulings on earlier cases).

¹⁴³ *Id.* at 788. The Court stated:

“[T]he greater power to dispense with elections altogether does not include the lesser power to conduct elections under conditions of state-imposed voter ignorance. If the State chooses to tap the energy and the legitimizing power of the democratic process, it must accord the participants in that process . . . the First Amendment rights that attach to their roles.”

Id. (alteration in original) (quoting *Renne v. Geary*, 501 U.S. 312, 349 (1991) (Marshall, J., dissenting)).

¹⁴⁴ In dissent, Justice Stevens and Justice Ginsburg both found that the state had a compelling interest in maintaining an impartial judiciary, and that states could not ensure litigants a fair trial without the announce clause. *Id.* at 800–01 (Stevens, J., dissenting); *id.* at 817–21 (Ginsburg, J., dissenting). Justice Stevens noted that states needed the announce

[R]egardless of whether they have announced any views beforehand, elected judges] *always* face the pressure of an electorate who might disagree with their rulings and therefore vote them off the bench. Surely the judge who frees Timothy McVeigh places his job much more at risk than the judge who (horror of horrors!) reconsiders his previously announced view on a disputed legal issue. So if . . . it violates due process for a judge to sit in a case in which ruling one way rather than another increases his prospects for reelection, then—quite simply—the practice of electing judges is itself a violation of due process.¹⁴⁵

Despite the inherent risk of bias in an elected judiciary, the Court concluded that the Due Process Clause of the Fourteenth Amendment has coexisted with elected judiciaries since its adoption, so the election of judges could not violate due process.¹⁴⁶ The Court thus dismissed the possibility that a defendant's due process rights are violated if his judge is biased because the judge fears losing his job.¹⁴⁷

clause in order to prohibit language like “[e]xpressions that stress a candidate’s unbroken record of affirming convictions for rape, [which] . . . imply a bias in favor of a particular litigant (the prosecutor) and against a class of litigants (defendants in rape cases).” *Id.* at 800–01 (Stevens, J., dissenting). He also worried that judges would be particularly reluctant to contradict their own campaign statements, and that judges might therefore not be impartial when ruling on issues about which they had previously announced their views. *Id.* at 800. Justice Ginsburg believed that “[s]tates are justified in barring expression of such commitments, for they typify the ‘situation] . . . in which experience teaches that the probability of actual bias on the part of the judge . . . is too high to be constitutionally tolerable.’” *Id.* at 817 (Ginsburg, J., dissenting) (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)). She found the announce clause essential if states were to eliminate the “grave danger to litigants” that would come from judges yielding to the temptation to rule in their own self-interest. *Id.* Justice Ginsburg believed that if a judge ruled in accordance with her previously announced views, she would at least appear to be biased because such a ruling would reduce her risk of being “voted off the bench and thereby los[ing] her salary and emoluments.” *Id.* at 816. To reinforce this point, she cited *The Federalist No. 79*: “In the general course of human nature, a power over a man’s subsistence amounts to a power over his will.” *Id.* at 817 (emphasis in original omitted) (quoting *THE FEDERALIST NO. 79*, at 440 (Alexander Hamilton) (Clinton Rossiter ed., 1999)).

¹⁴⁵ *Id.* at 782 (majority opinion).

¹⁴⁶ *Id.* at 783.

¹⁴⁷ *Id.* at 788. The Court overlooks the key distinction between judges and legislators: Legislators are expected to lose their jobs if they do not achieve their campaign pledges and promises. *Cf.* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 529–32 (2001) (explaining legislators’ incentives with respect to crime policy). Justice Scalia has written that while “the prosecutor . . . represents ‘the People[,]’ the judge represents the Law—which often requires him to rule against the People.” *Chisom v. Roemer*, 501 U.S. 380, 411 (1991) (Scalia, J., dissenting). The *Chisom* majority wrote that “ideally[,] public opinion should be irrelevant to the judge’s role because the judge is often called upon to disregard, or even to defy, popular sentiment.” *Id.* at 400 (majority opinion). Moreover, as the Supreme Court explained in 1943, the Bill of Rights was specifically designed to remove some issues from the reach of politics: “One’s right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and

The conclusion in *White* seriously undermines any claim by a criminal defendant that his judge is impermissibly biased by his fear of losing his job. If a defendant makes a recusal motion because he believes his judge's tough-on-crime campaign statements reveal bias, the judge can point to *White* as support for denying the motion. In allowing this result, the *White* Court clearly overlooked the critical role of the media effects that lead judges to campaign in such a way.

In his concurrence, for example, Justice Kennedy found speech limitations unnecessary in an election because the best way to counter speech is with more speech.¹⁴⁸ Counterspeech is unlikely in the criminal context, however, because no electoral benefit accrues to a judge who aligns himself with defendants. A judge who speaks up in favor of defendants risks becoming the target of misleading ads and attacks from opponents, other officials, and interest groups.¹⁴⁹ Even were they to try, judges cannot effectively rebut tough-on-crime scare tactics with reasoned explanations of constitutional rights.¹⁵⁰ There are only a few influential advocates for defendants to support a judge in any such efforts. Without robust counterspeech, voters are more likely to respond to the agenda-setting, framing, and priming effects of news media coverage of crime—which paint crime as pervasive and defendants as evil—and elect tough-on-crime candidates. Judges, in turn, are more likely to respond to this voter preference by becoming less protective of defendants' constitutional rights.¹⁵¹

other fundamental rights may not be submitted to vote; they depend on the outcome of no elections." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943).

¹⁴⁸ See *White*, 536 U.S. at 794–95 (Kennedy, J., concurring) ("What Minnesota may not do . . . is censor what the people hear as they undertake to decide for themselves which candidate is most likely to be an exemplary judicial officer."). Justice Kennedy argued that the voters and not the state should decide which speech is relevant to their decision. *Id.* ("The State cannot opt for an elected judiciary and then assert that its democracy, in order to work as desired, compels the abridgment of speech.").

¹⁴⁹ Cf. Behrens & Silverman, *supra* note 26, at 275 (describing 2000 Michigan Court of Appeals election in which opponent party's ad flashed "pedophile" next to name of judge who had upheld light sentence for pedophile).

¹⁵⁰ Demonstrating the contrast between the compelling nature of the victim's story and the dry explanation a judge would have to give for upholding a defendant's rights, one commentator has noted:

When the mother of a young daughter, who was brutally murdered and mutilated, complains in a television commercial about a judge vacating the killer's death sentence, the judge has little recourse. A judge can explain that a defendant's right was violated, which warrants a new trial, but the public, unfamiliar with constitutional law, sees only the grieving mother and a picture of the innocent victim.

Thomas M. Ross, *Rights at the Ballot Box: The Effect of Judicial Elections on Judges' Ability to Protect Criminal Defendants' Rights*, 7 *LAW & INEQ.* 107, 127–28 (1988).

¹⁵¹ Abbe Smith, a criminal defense attorney for more than twenty years and a professor at Georgetown University Law Center, discusses her experiences arguing on behalf of

It is problematic, however, for judges to respond to this kind of electoral pressure. As Justice Penny White said shortly after Chief Justice Bird of the California Supreme Court was defeated, "If a judge's ruling for the defendant on a Fourth Amendment claim may determine his fate at the next election, even though his ruling was affirmed and is unquestionably right, constitutional protections would be subject to serious erosion."¹⁵² Judges must be free to rule against public opinion in order to protect the constitutional rights of disfavored minorities like criminal defendants.¹⁵³ Yet after *White*, preventing judges from bending to the media-driven public perception of crime will be more difficult.¹⁵⁴

IV

MANDATORY RECUSAL: A SOLUTION FOR A WORLD WITH JUDICIAL ELECTIONS

With the Supreme Court failing to sufficiently recognize the role of media effects in its due process jurisprudence, states must move to

defendants in state courts throughout the United States in a recent article. See Abbe Smith, *Defense-Oriented Judges*, 32 HOFSTRA L. REV. 1483 (2004). She finds that the vast majority of judges err on the side of being—or consciously choose to be—pro-prosecution, noting that many judges are openly hostile to criminal defendants, bully and ridicule them, and interrupt criminal defense lawyers at inopportune times. *Id.* at 1484, 1490–92. She argues for more "defense-oriented judges," or as she wishes to call them, "Bill of Rights-oriented" judges. *Id.* at 1486. Such judges would, she hopes, understand constitutional rights to be an important strength of our criminal justice system, and would not begrudge criminal defendants' reliance on their protections. *Id.* at 1495; see also Bright & Keenan, *supra* note 7, at 795–813 (detailing ways in which judges in politicized atmospheres are less likely to protect criminal defendants' constitutional rights; for instance, by delegating much of their work to prosecutors and appointing or tolerating poor counsel for indigent defendants).

¹⁵² Ruth Marcus, *Justice White Criticizes Judicial Elections; Protection Is Needed Against Political Pressures, Bar Association Meeting Told*, WASH. POST, Aug. 11, 1987, at A5 (quoting Justice White).

¹⁵³ See *Chambers v. Florida*, 309 U.S. 227, 241 (1940) (calling independent judges "havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement").

¹⁵⁴ Cf. *Braynen v. State*, 895 So. 2d 1169, 1170 (Fla. Dist. Ct. App. 2005) (per curiam) (Farmer, C.J., concurring) (joining denial of disqualification motion of judge even though defendant's lawyer was on judge's opponent's steering committee); *State v. Brown*, No. COA04-384, 2005 N.C. App. LEXIS 845, at *11–14 (N.C. Ct. App. Apr. 19, 2005) (denying defendant's motion to strike death penalty verdict, even though defendant's case was heard by elected judge in highly politicized atmosphere, because state's capital punishment system is constitutional, but noting defendant did not seek recusal). Chief Judge Farmer concurred in *Braynen* to note that after *White*, judicial elections were indistinguishable from any other elections, yet he urged judges to grant recusal under circumstances like those at bar, and he offered to vote to "install a regime of blanket disqualification" in such circumstances, regardless of the disruption such a regime would cause. *Braynen*, 895 So. 2d at 1170 (Farmer, C.J., concurring).

protect a criminal defendant's right to an unbiased judge. As Justice Kennedy suggested, states are free to go beyond the Supreme Court's bare minimum requirements in order to protect the due process rights of criminal defendants.¹⁵⁵ States must therefore make it easier for defendants to require judges to recuse themselves when they have run tough-on-crime election campaigns. A recusal requirement will not solve all of the issues surrounding media coverage of judicial elections, and there are critics who allege that mandatory recusal infringes on the First Amendment rights of judges and deprives voters of important information.¹⁵⁶ But a recusal remedy is the best way to balance the need for free, open campaigns with the dangers that arise when judges win votes by declaring their intent to be tough on crime and then hear alleged criminals' cases.

*A. Nuts and Bolts: How Recusal Works and How It
Should Be Used to Protect Criminal Defendants from
Tough-on-Crime Judges*

To rectify the problems delineated in this Note, the American Bar Association (ABA) should strengthen the connection between tough-on-crime or anti-defendant campaign speech and the recusal option. It should add a provision to Canon 3 or 5 of its Model Code of Judicial Conduct (Model Code) explicitly announcing a new ground for a judge's disqualification. The new provision would state that if a judge runs a tough-on-crime campaign or has one run on his behalf by interest groups, the judge should recuse himself upon motion of the defendant in any criminal case that will raise an issue about which the judge promised to be "tough." For example, if a judge has only promised to be tough on rapists, he may only need to recuse himself from

¹⁵⁵ Justice Kennedy's concurrence in *White* noted that Minnesota had other choices for ensuring that its citizens elect impartial judges: "It may strive to define those characteristics that exemplify judicial excellence. It may enshrine its definitions in a code of judicial conduct. It may adopt recusal standards more rigorous than due process requires, and censure judges who violate these standards." *Republican Party of Minn. v. White*, 536 U.S. 765, 794 (2002) (Kennedy, J., concurring).

¹⁵⁶ See, e.g., Randall T. Shepard, *Campaign Speech: Restraint and Liberty in Judicial Ethics*, 9 GEO. J. LEGAL ETHICS 1059, 1082-83 (1996) (arguing that public would be defrauded by disqualification of judges based on campaign speech); Penny J. White, *A Matter of Perspective*, 3 FIRST AMENDMENT L. REV. 5, 63-75 (2004) (suggesting mandatory recusal might run afoul of First Amendment).

rape trials.¹⁵⁷ States should rewrite their codes of judicial conduct to echo this change.¹⁵⁸

Current judicial ethics laws allow litigants to request a new judge when the one they are arguing before is “biased” or “prejudiced” against a particular litigant,¹⁵⁹ but this standard would likely not be met by tough-on-crime speech. Canon 3(E)(1) of the 1990 Model Code—which is used by states in writing their own codes of judicial conduct—explains: “A judge shall disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned.”¹⁶⁰ State common law may list additional permissible methods for judicial disqualification,¹⁶¹ but these also fail to protect defendants from all tough-on-crime judges.

Post-*White* amendments to the Model Code attempt to make the connection between judicial campaign speech and recusal clearer, deeming disqualification warranted if “the judge, while a judge or candidate for judicial office, has made a public statement that commits, or appears to commit, the judge with respect to (i) an issue in the proceeding; or (ii) the controversy in the proceeding.”¹⁶² Some states have gone further, following Justice Kennedy’s advice in *White*, and amended their state codes of ethics to permit broader recusal options. For example, after eliminating the announce clause from its code of judicial conduct, the Missouri Supreme Court added a note that

¹⁵⁷ Alternatively, states could require disqualification when judges make campaign statements about criminal law that would have violated the announce clause or that do violate the pledges or promises clause. This solution might be somewhat easier for judges who are already familiar with these clauses and their restrictions, but it would not sufficiently protect defendants. See *infra* note 186 and accompanying text.

¹⁵⁸ Cf. Shepard, *supra* note 156, at 1080–81 (noting that current recusal rules allow judges to hear cases unless they engage in “outrageous behavior,” and explaining that recusal “would fail rather spectacularly” in protecting litigants unless rules were changed to allow for more liberal application).

¹⁵⁹ See *id.* at 1079 & n.110 (citing MODEL CODE OF JUDICIAL CONDUCT CANON 3(E)(1) (1990) and RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES §§ 3.1–3.17 (1996)). Almost every state has incorporated a version of the ABA Model Code of Judicial Conduct into its code of judicial conduct or its supreme court rules. Michelle T. Friedland, *Disqualification or Suppression: Due Process and the Response to Judicial Campaign Speech*, 104 COLUM. L. REV. 563, 573 & n.37 (2004).

¹⁶⁰ MODEL CODE OF JUDICIAL CONDUCT CANON 3(E)(1) (1990).

¹⁶¹ Cf. Friedland, *supra* note 159, at 574 & n.43 (explaining that many states allow for at least one peremptory challenge of assigned judge).

¹⁶² MODEL CODE OF JUDICIAL CONDUCT CANON 3(E)(1)(f) (2003); see also Matthew D. Besser, Note, *May I Be Recused? The Tension Between Judicial Campaign Speech and Recusal After Republican Party of Minnesota v. White*, 64 OHIO ST. L.J. 1197, 1216 n.115 (2003) (describing 2003 amendments to 1990 Model Code).

“[r]ecusal . . . may . . . be required of any judge in cases that involve an issue about which the judge has announced his or her views”¹⁶³

Yet the ABA’s and states’ changes are not enough—they must specifically amend their codes to require disqualification of judges who engage in general anti-defendant speech. Then, despite *White*’s language, a defendant could protect himself from a judge who he fears will receive a benefit from ruling against him, including the indirect benefit of remaining in office.

B. Recusal Sends a Strong Message That Criminal Defendants’ Rights Are Worth Protecting

Recusal is the best method for dealing with judges’ anti-defendant campaign statements because it preserves the appearance of fairness and legitimizes the decisionmaking of those judges who are not required to recuse themselves.¹⁶⁴ One commentator wrote before *White* that “[r]ecusal avoids punishing the candidate, protects the rights of litigants, and reduces the incentive for candidates to try and find third parties to endorse them suggestively.”¹⁶⁵ These concerns are even more pronounced after *White*.

Recusal is an extremely important tool because it can insulate judges from political pressure and can stop judges from using cases to political ends.¹⁶⁶ A broader recusal remedy than the one currently in place would reach a judge’s general pro-prosecution campaign statements about criminal law, not just case-specific comments, and would benefit those defendants who are not “lucky” enough to have their judges say something specifically about their cases.¹⁶⁷

¹⁶³ *In re* Enforcement of Rule 2.03 (Mo. July 18, 2002) (en banc), http://www.courts.mo.gov/_862565ec0057e8f0.nsf/0/f1c626db4da8b14086256bfa0073b302?OpenDocument&Highlight=2,2.03; see also Matthew J. Medina, Note, *The Constitutionality of the 2003 Revisions to Canon 3(E) of the Model Code of Judicial Conduct*, 104 COLUM. L. REV. 1072, 1073 & n.7 (2004). Texas put its post-*White* recusal standard in the commentary to a canon to ward off any First Amendment challenges. *Id.* at 1109–10. This means the standard has “no formal legal effect.” *Id.* at 1110. The Texas standard requires recusal only if a judge’s statement causes his “impartiality to be reasonably questioned.” *Id.* at 1109. It is not the fact of the statements, but the statements’ bearing on the judge’s impartiality, that leads to his recusal. See *id.*; cf. Besser, *supra* note 162, at 1225–27 (suggesting similar approach for improving ABA Model Code of Judicial Conduct).

¹⁶⁴ See, e.g., Bright & Keenan, *supra* note 7, at 824 (arguing for recusal).

¹⁶⁵ Minzner, *supra* note 28, at 227.

¹⁶⁶ See Bright, *supra* note 9, at 330 (arguing for broader recusal requirement to respond to political pressures on judges).

¹⁶⁷ Cf. Bright et al., *supra* note 11, at 164–65 (comments of Stephen F. Hanlon) (“[T]he original trial judge . . . said he thought [the defendant] was guilty as hell. That was a wonderful thing from [the defendant’s] point of view, because we immediately moved to disqualify that judge. [The defendant] would be a dead man today if that judge hadn’t said that.”). For this to be a politically viable—and perhaps constitutional—solution, a recusal

Many judges may not want to run anti-defendant campaigns, but feel pressured to do so because of the electoral environment.¹⁶⁸ Recusal removes a candidate's incentive to paint himself as harsher on defendants than anyone else: If he were to do so, he could never sit on a criminal case. A state's strong pro-recusal stance would provide judicial candidates cover to refuse to answer questions on the campaign trail.¹⁶⁹ Most importantly, mandatory recusal provides judges with confidence that future campaign opponents cannot distort their records as soft on crime. As previously discussed, such distortions are nearly impossible to counter, given the media's strong influence. When no candidate can call himself tough on crime, the incentives for painting everyone else as soft on crime will diminish.

*C. Recusal Should Survive Challenges to Its Constitutionality
and Effectiveness*

Recusal has been challenged both on constitutional and effectiveness grounds. While recusal is not a perfect solution, the compelling nature of criminal defendants' interests should weigh heavily in any balancing process, and, even after *White*, any constitutional challenges to recusal should fail. On the ineffectiveness side, recusal should not be analyzed in isolation, but should be viewed as one tool out of many designed to provide criminal defendants with a fair trial.

Recusal does burden speech and therefore could be challenged under the First Amendment for the same reasons as the announce clause.¹⁷⁰ Judges have important First Amendment interests in speaking freely during their election campaigns, as do voters in

motion must be available to the prosecution as well as the defendant. For example, judges who vow never to administer the death penalty may also need to be recused from death penalty cases. This would be similar to the qualification process for jurors in a death penalty case, in which a juror cannot be empanelled if his anti-death penalty views "would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" See *Wainwright v. Witt*, 469 U.S. 412, 424 (1985) (quoting *Adams v. Texas*, 448 U.S. 38, 45 (1980)).

¹⁶⁸ See Roy A. Schotland, *To the Endangered Species List, Add: Nonpartisan Judicial Elections*, 39 WILLAMETTE L. REV. 1397, 1420 (2003) (stating that most candidates would prefer to "campaign judiciously").

¹⁶⁹ See *id.* at 1419–20. This freedom to refrain from answering certain questions is even more important due to the post-*White* proliferation of interest group surveys sent to judicial candidates. See, e.g., *Family Trust Found. of Ky., Inc. v. Wolnitzek*, 345 F. Supp. 2d 672 (E.D. Ky. 2004) (granting preliminary injunction to prevent state from using pledges or promises clause to sanction judges who answer survey, but finding judges who answer survey may be disqualified from certain cases as recusal provision survives strict scrutiny).

¹⁷⁰ Cf. *Medina*, *supra* note 163, at 1096–1107 (arguing that ABA disqualification rule could be considered vague and overbroad).

hearing the candidates' positions.¹⁷¹ Unlike the announce clause, however, recusal would survive a challenge on First Amendment grounds because the state interest in this context is more compelling than that in *White*, and recusal is a more narrowly tailored remedy than outright speech restrictions, including the still-constitutional pledges or promises clause.

First, the state interest in providing fair trials in the criminal context is more compelling than in the broad context examined in *White* because of the threats described throughout this Note.¹⁷² Media coverage of crime—and judges' concerns about whether they will lose their jobs due to that coverage—lead judges to sentence defendants more harshly as elections near, implicating the *White* Court's definitions of impartiality.¹⁷³ A state could defend broadened recusal rules by arguing that tough-on-crime judges would be predisposed to be biased against criminal defendants, and that such judges lack open-mindedness because they have a particular stake in the outcomes of criminal trials.¹⁷⁴ The state therefore has a compelling interest in protecting the impartiality of the judiciary where criminal defendants are concerned.¹⁷⁵ Additionally, the unique media effects in the criminal context, discussed in Part II, undermine Justice Kennedy's counter-speech arguments in *White*.¹⁷⁶ This further proves that the government's interest in protecting criminal defendants' right to a fair trial is compelling—more so than in the general situation faced by the *White* Court.¹⁷⁷

¹⁷¹ See, e.g., *Republican Party of Minn. v. White*, 536 U.S. 765, 781 (2002) (describing debate over candidates' qualifications for office as “‘at the core of our electoral process and of the First Amendment freedoms,’ not at the edges” (quoting *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 222–23 (1989))); *Brown v. Hartlage*, 456 U.S. 45, 59–60 (1982) (explaining that First Amendment does not allow state to forbid certain types of electoral promises based on fear that voters will make bad choices because “[i]t is simply not the function of government to ‘select which issues are worth discussing or debating’ in the course of a political campaign” (quoting *Police Dep’t v. Mosley*, 408 U.S. 92, 96 (1972))).

¹⁷² See *supra* Parts I and II.

¹⁷³ See *supra* notes 139–43 and accompanying text.

¹⁷⁴ See *supra* notes 139–43 and accompanying text.

¹⁷⁵ See *Shepard*, *supra* note 156, at 1076 (finding First Amendment inquiry “inadequate” because it “undervalues the damage done to impartial adjudication by campaign promises”).

¹⁷⁶ See *supra* notes 148–54 and accompanying text.

¹⁷⁷ See *White*, 536 U.S. at 775 (discussing state's offered justification for announce clause: preserving impartial judiciary and appearance of impartial judiciary). The *White* Court held not that impartiality was never a compelling justification, but that the announce clause was not narrowly tailored to serve that end. See *id.* at 775–80; see also *Medina*, *supra* note 163, at 1093–94 (postulating that *White* and subsequent interpretations of *White* demonstrate that impartiality is considered compelling interest).

Second, the remedy of recusal is also a more narrowly tailored and less restrictive means of dealing with this problem than the announce clause. A recusal remedy strikes a balance between the need for unfettered judicial campaign speech and the right to a fair trial. It does so by allowing candidates to make any statements they choose without fear of sanction, in contrast to the announce clause, which forbade judicial candidates from making campaign statements and then subjected candidates to possible fines or censure.¹⁷⁸ Particularly if a canon that mandated recusal were to replace other sanctions, it would strike the necessary balance between the First Amendment interests and the right to a fair trial by drawing a line that a judge could not cross if he wished to be considered impartial enough to hear criminal cases.¹⁷⁹

While the pledges or promises clause might be unnecessary in light of a broader recusal remedy, its constitutionality provides further evidence that a recusal remedy passes First Amendment scrutiny.¹⁸⁰ The judicial rhetoric that would be grounds for recusal, described in Part I.A, is more analogous to a pledge or promise than an announcement because of the results described in Part I.B, and violation of a

¹⁷⁸ See Briffault, *supra* note 111, at 237 (explaining how recusal would foster greater debate and protect judges from arbitrary sanctions); cf. Miss. Comm'n on Judicial Performance v. Wilkerson, 876 So. 2d 1006, 1014–16 (Miss. 2004) (finding judge's anti-gay statements in letter to editor protected but noting that he might be subject to sanction should he deny recusal motions by gays and lesbians).

¹⁷⁹ See Alan B. Morrison, *The Judge Has No Robes: Keeping the Electorate in the Dark About What Judges Think About the Issues*, 36 IND. L. REV. 719, 744 (2003) (deeming recusal to be very different form of "punishment" than sanctions or removal from office because it does not subject judge to discipline).

As judges are public employees, the First Amendment might also allow for more regulation of their speech once they are elected. See *White*, 536 U.S. at 796 (Kennedy, J., concurring) (noting that issue was not raised in case at bar but questioning whether Supreme Court case law could be extended to regulate speech of sitting judges "in order to promote the efficient administration of justice"); see also *Connick v. Myers*, 461 U.S. 138, 147 (1983) (finding that federal courts should generally not extend First Amendment speech protections to public employee when he speaks "not as a citizen upon matters of public concern, but as an employee upon matters only of personal interest"); *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968) (holding that to qualify for First Amendment protection, public employee's interest in speaking must outweigh public employer's interest in preventing workplace disruption). Penny White, a former justice of the Tennessee Supreme Court, found that Justice Kennedy's comments raised a "red flag" for the constitutionality of mandatory recusal provisions. See *White*, *supra* note 156, at 66–67. Even if it is unlikely that recusal provisions would be found unconstitutional, White explained that elected judges do not stop campaigning once elected, so their speech might enjoy heightened First Amendment protections at all times. *Id.* at 75.

¹⁸⁰ See *supra* note 34 (describing Minnesota's pledges or promises clause).

pledges or promises clause can result in harsher sanctions than recusal.¹⁸¹

The recusal remedy would be more likely to survive a challenge on First Amendment grounds than would the pledges or promises clause, which is important because, after *White*, many courts have reevaluated judicial campaign speech restrictions and have found them constitutionally problematic.¹⁸² Although *White* distinguished the announce clause from the pledges or promises clause, the latter may not survive a head-on challenge.¹⁸³ The recusal remedy is more narrowly tailored than the pledges or promises clause, and it is likely to be found constitutional.¹⁸⁴

Even though recusal should be found constitutional, it could still be challenged as unnecessary: Outright speech restrictions like the pledges or promises clause could presumably accomplish the same tasks as a recusal remedy. These speech restrictions can be ineffective, however, because they both over-deter speech and under-protect defendants.¹⁸⁵ For example, judges can act in a biased way even if

¹⁸¹ See Miller, *supra* note 49, at 458–69 (describing possible sanctions for violating codes of judicial conduct, including: impeachment; recusal and disqualification; appeal; writs of mandamus; subjecting judge to legal liability; and disciplinary actions such as admonishments, reprimands, reprovations, censures, transfers, and, rarely, dismissals).

¹⁸² See, e.g., Alaska Right to Life Political Action Comm. v. Feldman, 380 F. Supp. 2d 1080, 1083–84 (D. Alaska 2005) (finding pledges or promises clause unconstitutional but upholding recusal provision of state code of conduct); N.D. Family Alliance, Inc. v. Bader, 361 F. Supp. 2d 1021, 1042–44 (D.N.D. 2005) (same). But see *In re Dunleavy*, 838 A.2d 338, 348–51 (Me. 2003) (upholding constitutionality of canon that prevents judges from soliciting campaign funds because appearance of impartiality is compelling state interest and canon was narrowly tailored to achieve that end).

¹⁸³ See *White*, 536 U.S. at 780 (noting constitutionality of pledges or promises clause was not being challenged); see also Friedland, *supra* note 159, at 608–12 (arguing pledges or promises clause is unconstitutional).

¹⁸⁴ Cf. Friedland, *supra* note 159, at 613–16 (deeming pledges or promises clause unconstitutional yet finding disqualification requirements to be costly).

¹⁸⁵ See *id.* at 612 (arguing that speech codes do not change need for elected judges to please voters and that such codes are neither narrowly tailored nor justified by compelling state interest); see also Anca Cornis-Pop, Republican Party of Minnesota v. White and the Announce Clause in Light of Theories of Judge and Voter Decisionmaking: With Strategic Judges and Rational Voters, the Supreme Court Was Right to Strike Down the Clause, 40 WILLAMETTE L. REV. 123, 170 (2004) (criticizing announce clause for “silenc[ing] judges—the most credible sources for their own views—and empower[ing] interest groups and government officials who have the opportunity to spin judges’ records in service of their causes”); Stephen Gillers, “If Elected, I Promise [_____]”—What Should Judicial Candidates Be Allowed to Say?, 35 IND. L. REV. 725, 730–31 (2002) (discussing impact third parties can have on judicial elections when candidate cannot correct damaging portrayal); Mark Kozlowski, Should the Regulation of Judicial Candidate Speech Regarding Legal and Political Issues Be Reconsidered?, 43 S. TEX. L. REV. 161, 173 (2001) (arguing that speech restrictions leave voters with no information about judicial candidates except for information disseminated in attack ads).

they never promise to do so.¹⁸⁶ Judges also cannot easily be prohibited from skirting the line between “announcing” their views and “pledging or promising” to act in concert with those views once in office.¹⁸⁷ Even if outright bans on tough-on-crime speech are unconstitutional or ineffective, this speech cannot be ignored. Such speech is an important marker for judges who are at risk of not acting impartially. Recusal allows states to take such speech seriously and protect defendants in a constitutional and efficient way.

Practical arguments against recusal focus on the costs and the efficacy of such motions, especially in the short term when many sitting judges would have campaigned on tough-on-crime platforms. There may be a large number of judges who would need to recuse themselves, and cases would have to be moved around.¹⁸⁸ If judges did not voluntarily recuse themselves or there were no peremptory challenges of judges available to litigants, the number of disqualification motions heard by judges would theoretically increase.¹⁸⁹ Alternatively, litigants might not feel comfortable making the necessary motions for fear of angering the judge.¹⁹⁰ States could easily deal with these potential problems by creating independent panels to determine when a judge should be recused on any particular case instead of leaving the determination to the individual judge.¹⁹¹

Washington State Superior Court Judge Robert H. Alsdorf also argues that the public’s right to know how a judge is likely to rule would be compromised by recusal.¹⁹² The public interest in information about judicial candidates is indeed high.¹⁹³ But in balancing that

¹⁸⁶ See Erwin Chemerinsky, *Restrictions on the Speech of Judicial Candidates Are Unconstitutional*, 35 IND. L. REV. 735, 738, 740, 744 (2002) (arguing that it is beneficial to know judge’s ideology before he is elected, and that speech restrictions, while making it impossible for judicial candidates to debate issues and express views during campaigns, make judicial candidates no more impartial).

¹⁸⁷ Justice Ginsburg foresaw this problem, and she took great pains to explain why the pledges or promises clause is both constitutional and important for preserving the integrity of the judiciary. See *White*, 536 U.S. at 812–21 (Ginsburg, J., dissenting).

¹⁸⁸ See, e.g., Shepard, *supra* note 156, at 1081–83 (arguing that recusal might not be worth high costs associated with it).

¹⁸⁹ See, e.g., Friedland, *supra* note 159, at 614 (arguing that disqualification motions would increase and could prove expensive).

¹⁹⁰ See, e.g., *id.*

¹⁹¹ See Morrison, *supra* note 179, at 742 (suggesting “a private, volunteer body, composed of lawyers (including possibly some retired judges) and non-lawyers who are concerned with judicial elections” to assist in regulating judicial campaign conduct).

¹⁹² Robert H. Alsdorf, *The Sound of Silence: Thoughts of a Sitting Judge on the Problem of Free Speech and the Judiciary in a Democracy*, 30 HASTINGS CONST. L.Q. 197, 233–34 (2003).

¹⁹³ See *supra* note 171.

interest and the individual criminal defendant's right to a fair trial, the latter should be paramount.

Commentators have proposed other ways to ensure that impartial judges are elected. Many suggest campaign finance reform in an effort to weaken the impact of interest groups on judicial elections.¹⁹⁴ Yet there would still be elections, requiring judges to please the electorate.¹⁹⁵ Others suggest lengthening the time between judicial elections,¹⁹⁶ although that does not eliminate the problems faced by litigants who come before those judges toward the ends of their terms. In light of the alternatives' shortcomings, an expanded recusal remedy is the most effective means of protecting criminal defendants from tough-on-crime judges.

CONCLUSION

Ensuring judicial impartiality has been essential but difficult for millennia. Thousands of years ago, Moses instructed his people to appoint judges who "shall govern the people with due justice. You shall not judge unfairly: you shall show no partiality; you shall not take bribes Justice, justice shall you pursue" ¹⁹⁷ State governments have joined the esteemed ranks of those who struggle to find the appropriate methods to make certain their judges are impartial. Confounding their efforts are the modern media dynamics at play in the coverage of crime and judicial elections.

Convincing the media to cover crime differently or teaching the public to resist the media's impact would be difficult and would require enormous effort.¹⁹⁸ In the current environment created by the media's coverage of crime, judges will feel compelled to say that they are tough on crime and to act that way on the bench to avoid being branded the opposite.

Despite the *White Court's* conclusion that criminal defendants' due process rights are not compromised by a judge who has previously campaigned as tough on crime, a criminal defendant will not have a fair trial if his judge's livelihood is at stake. Justice Stevens offered the best workable solution to this problem: States should allow defen-

¹⁹⁴ See, e.g., Wiener, *supra* note 125, at 213–14 (suggesting campaign finance reform could partially ameliorate problem of judicial elections).

¹⁹⁵ See *id.*

¹⁹⁶ See Schotland, *supra* note 168, at 1422.

¹⁹⁷ *Deuteronomy* 16:18–20.

¹⁹⁸ See, e.g., Dennis D. Loo & Michael Reibel, *Television News and the 1990s Crime Issue: The Emergence of a Social Problem*, 20 NAT'L SOC. SCI. J. 87, 88–90 (2003), available at http://www.nssa.us/nssajrnl/NSSJ2003%2020_2/pdf/12Loo_Dennis.pdf (listing ingrained institutional factors that result in media's methods for covering crime and describing relationship between those factors and public's response).

dants to disqualify any judge who ran a pro-prosecution or anti-defendant campaign, or who had one run on his behalf by interest groups.¹⁹⁹ Justice Kennedy seemed to endorse this solution in *White* itself, noting that states were free to “adopt recusal standards more rigorous than due process requires, and [to] censure judges who violate these standards.”²⁰⁰ This remedy ensures that a judge cannot hear criminal cases unless he has remained insulated from political pressure to campaign against defendants’ constitutional rights.

A recusal requirement would provide judges with cover to remain impartial without fear of being branded pro-defendant in election campaigns and thereby losing their jobs. With a well-enforced requirement that judges must recuse themselves from criminal cases when they have run tough-on-crime campaigns, states can restore defendants’ right to unbiased judges. In the end, because judicial candidates will no longer be able to offer voters the false panacea of longer sentences and “toughness,” candidates will have to campaign on more salient issues, perhaps leading to a more informed electorate and a more just judiciary.

¹⁹⁹ See Stevens, *supra* note 2, at 30–31.

²⁰⁰ *Republican Party of Minn. v. White*, 536 U.S. 765, 794 (2002) (Kennedy, J., concurring).