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COMMENT

DON'T I KNOW YOU FROM SOMEWHERE?: WHY DUE PROCESS SHOULD BAR JUDGES FROM PRESIDING OVER CASES WHEN THEY HAVE PREVIOUSLY PROSECUTED THE DEFENDANT

PETER M. FRIEDMAN

I. INTRODUCTION

Picture the following scenario: California voters elect a Superior Court Judge who was formerly a Los Angeles County Deputy District Attorney who prosecuted O.J. Simpson in his criminal case. Some months later, Simpson is arrested and charged with grand larceny in an unrelated matter, and his case is randomly assigned to that judge's chambers. Hopefully, the judge would recognize the possibility that she was likely biased against Simpson, or at least would appear so to many people, and would recuse herself. However, for whatever reason, she presides in Simpson's case. The defendant is convicted, and after exhausting all of his state remedies, files a habeas corpus petition in federal court alleging a due process violation. Simpson's lawyers posit that although the trial record shows no overt bias, Simpson was unable to get a fair trial because the judge may have felt that her failure to convict Simpson in his murder trial allowed Simpson to commit this second crime.

Could the judge divorce herself from her past involvement with Mr. Simpson and her intimate knowledge of the crime previously alleged? Could she conduct a trial comporting with the due process promise of a neutral adjudicator? Does it matter whether or not the appearance of injustice might compromise her participation in the grand larceny trial?

The question of whether a defendant has a due process right not to be tried by a judge who has previously prosecuted him on an unrelated offense has not been directly addressed by the Supreme Court. However, the scenario strikes at the heart of our notions of fairness and judicial impartiality.¹ Whatever else due process guarantees, especially in the criminal context, its most vital element is a neutral, independent adjudicator.²

Since the advent of legal realism and modern psychology, it is almost universally recognized that no one's mind is a *tabula rasa*, and that judges do not live in ivory towers.³ Even when a party has no direct connection to a judge, subtle and unspoken factors may impact the decision-maker's rulings. As Professor Leubsdorf points out:

To decide when a judge may not sit is to define what a judge is
One can scarcely advance the ideal of judicial impartiality without feeling doubts. We all take it for granted that personal values and assump-

¹ Judicial neutrality falls under the rubric of due process guaranteed by the Constitution. "No person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V. "[N]or shall any State deprive any person of life, liberty, or property, without due process of the law." *Id.* amend. XIV, § 1.

Under federal statute, parties may move for removal of a judge for bias under 28 U.S.C. § 144 (1994), which provides:

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding. The affidavit shall state the facts and the reasons for the belief It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

Section 28 U.S.C. § 455 (1994) is also salient:

- (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
- (b) He shall also disqualify himself in the following circumstances:
 - (1) Where he has personal bias or prejudice concerning a party or person knowledge of disputed evidentiary facts concerning the proceeding . . . ;
 - (2) Where he has served in governmental employment and in such capacity participated as counsel, advisor or material witness concerning the proceeding . . . ;

² See Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 457 (1986). Professors Redish and Marshall argue that, at least in some adjudicatory proceedings, a neutral arbiter is both a necessary and sufficient factor in assessing whether a party has received procedural due process. *Id.*

³ See Jeffrey M. Shaman, *The Impartial Judge: Detachment or Passion?*, 45 DEPAUL L. REV. 605 (1996).

tions help shape every judge's decisions. Suggesting that a judge could escape her prepossessions sounds like a throwback to the days when people believed . . . that judges deciding constitutional issues placed a challenged law next to the Constitution and checked whether the one would fit inside the other.⁴

When a judge has some positive or negative connection to a party, or the judge is tempted to make rulings based on extrajudicial factors, a potentially impermissible bias is added to these accepted "values, assumptions and prepossessions,"⁵ and may poison the due process well. As the New Hampshire Supreme Court has stated, "[i]t is the right of every citizen to be tried by judges as impartial as the lot of humanity will admit."⁶ Even if the actual outcome is not tainted by bias, the appearance of justice is compromised by the potential for bias.

This Comment examines whether a criminal defendant can obtain a truly neutral adjudication or a trial satisfying the "appearance of justice" when the presiding judge has previously prosecuted him in an unrelated matter. I do not suggest that judges who previously served as prosecutors are undesirable.⁷ On the contrary, those involved in judicial selection often see prosecutorial experience as a valued asset.⁸ It is only in specific, easily identifiable circumstances where there is a direct conflict between the judge and the defendant that prosecutors-turned-judges should disqualify themselves or be disqualified. Mandated disqualifications should be limited, as many conscientious judges will disqualify themselves if they recognize the problems that such trials represent both for individual defendants and the whole system.

⁴ John Leubsdorf, *Theories of Judging and Judge Disqualification*, 62 N.Y.U. L. REV. 237-38 (1987) (footnote omitted). See also Peter David Blanck, *The Appearance of Justice: The Appearance of Justice Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 887 (1996).

⁵ Leubsdorf, *supra* note 4, at 238.

⁶ *In re Mussman*, 302 A.2d 822, 824 (N.H. 1973) (citations omitted); see also Shaman, *supra* note 3, at 605.

⁷ Such an argument would not only be untenable but would fly in the face of common practice. Of President Clinton's 187 judicial nominees in his first term, nearly 40% were former prosecutors. See Jack Quinn, *GOP Playing Politics on Clinton Judicial Choices*, U.S.A. TODAY, Apr. 23, 1996 at 11A.

⁸ Interview with Abner J. Mikva, former White House Counsel, in Chicago, Ill. (Dec. 18, 1996). Judge Mikva was intimately involved in the selection of federal judges when he served as White House Counsel. Among the attractive factors prosecutors bring to the federal bench are: familiarity with law and procedure; demonstrated commitment to public service; and respect in the legal community and general populace.

First, this Comment reviews Supreme Court decisions defining a neutral and independent adjudicator. Second, because the Court has not addressed whether defendants have a due process right not to be tried by a judge who has previously prosecuted them, this Comment reviews lower court opinions to show that their inconsistency with the Supreme Court's definition of due process fails to protect defendants in this situation. Third, this Comment briefly examines the differing roles of prosecutor and judge. While there are areas where skill and experience as a prosecutor may benefit a judge, there are also facets of the prosecutorial function that can potentially cause serious tension between the two roles. Fourth, this Comment focuses on two major failings of judicial review in this area. One is the frequent underestimation of the influence trial judges have over the outcome of trials. This influence may unfairly prejudice defendants, even unintentionally, by permitting judges who have previously prosecuted the defendant to adjudicate a new case against the defendant. Also, reviewing courts have failed to reconcile the non-instrumental values due process serves, such as participation, justification and openness, when allowing a defendant to be tried by a judge who has previously prosecuted him. Fifth and finally, this Comment proposes that courts should find that when a judge played a tangible role in previously prosecuting the defendant before them, the defendant has a due process right not to be tried by that judge.

II. WHAT COURTS HAVE HELD CONSTITUTES A NEUTRAL ADJUDICATOR

Before examining the specific question posed by this Comment, it is necessary to understand the types of judicial conflict of interest or bias the Supreme Court and lower federal courts recognize as violating an individual's due process.

The Supreme Court's first pronouncement on this issue remains its most oft-quoted: a due process violation occurs when some temptation would lead a judge "not to hold the balance nice, clear and true between the State and the accused . . ."⁹ In *Tumey v. Ohio*, the Court invalidated a scheme under which an unlawful possession of liquor charges was adjudicated by a town

⁹ *Tumey v. Ohio*, 273 U.S. 510, 532 (1927).

mayor empowered to assess fines for culpability.¹⁰ Per a state statute, the proceeds of the fine were split evenly between the municipality and Ohio's state treasury.¹¹ The municipality allowed the mayor to recover his out-of-pocket costs if the proceeding resulted in a conviction.¹²

Despite the absence of any evidence showing actual bias by the mayor in adjudicating *Tumey's* case, a unanimous Supreme Court held that the scheme violated *Tumey's* Fourteenth Amendment due process rights.¹³ The Court was apparently untroubled by the lack of specific evidence showing the mayor's partiality—it recognized the inherent difficulties such a showing would place on both the *Tumey* and the mayor.¹⁴

In deciding *Tumey*, the Supreme Court stated what has become a central, although somewhat opaque, tenet of due process neutrality:

Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the state and the accused, denies the latter due process of the law.¹⁵

In defining the outer limits of what “possible temptation” might induce a judge “not to hold the balance nice, clear and true,” the *Tumey* Court set no threshold of incentive automatically triggering a due process violation. In the absence of a bright line, and acknowledging the difficulties of computing such a calculus, “it seems reasonable to conclude that any financial temptation, regardless of how indirect or insubstantial, presents a possibility of temptation.”¹⁶

While *Tumey's* holding did not absolutely limit the constitutional due process protection of an unbiased adjudicator to cases in which bias, or the appearance of bias, stemmed from financial temptation, the Court came close in dicta. In finding a constitutional violation in the case before it, the Court stated that “not all questions of judicial qualification . . . involve consti-

¹⁰ *Id.* at 510.

¹¹ *Id.* at 517.

¹² *Id.* at 520.

¹³ *Id.* at 510.

¹⁴ *Id.* See also Redish & Marshall, *supra* note 2, at 495.

¹⁵ *Tumey*, 273 U.S. at 532.

¹⁶ Redish & Marshall, *supra* note 2, at 496. This was born out in *Connally v. Georgia*, 429 U.S. 245 (1977) (per curiam). See *infra* text accompanying notes 28-29.

tutional validity. Thus matters merely of kinship, personal bias, state policy, and remoteness of interest, would seem generally to be matters merely of legislative discretion."¹⁷ However, because the mayor's interest was "direct, personal . . . [and] pecuniary," *Tumey's* due process rights were violated.¹⁸

In 1955, the Supreme Court deviated from this focus on financial conflict of interest in *In re Murchison*, a decision authored by Justice Black.¹⁹ Relying on *Tumey*, the Court held that a Michigan judge sitting as a one-man grand jury could not punish witnesses for contempt for conduct arising out of the grand jury hearings.²⁰ The Court ruled that upholding such a system permitted a judge to serve as judge "in his own case and no man is permitted to try cases where he has an interest in the outcome."²¹ The Court took pains to note that while the "interest" triggering the judge's disqualification escaped precise definition, it did not necessarily have to be financial temptation.²² Most strikingly, Justice Black wrote:

A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness Such a stringent rule may sometimes bar trial judges who have no actual bias and who do their very best to weigh the scales of justice equally between contending parties. But to perform its highest function in the best way, "justice must satisfy the appearance of justice."²³

In other words, to satisfy due process guarantees, even the possibility of unfairness as manifested through a potentially biased adjudicator must be prevented. Equally important for defendants faced with trial by a judge who previously prosecuted them, the basis for bias, or the appearance of bias, was not limited to financial motivation.²⁴

However, in the 1970s two important cases reaffirmed and underscored the Supreme Court's focus on a judge's potential financial bias as a due process disqualifier.²⁵ In *Ward v. Village of*

¹⁷ *Tumey*, 273 U.S. at 523; see also *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986).

¹⁸ *Tumey*, 273 U.S. at 523.

¹⁹ *In re Murchison*, 349 U.S. 133 (1955).

²⁰ *Id.* at 134.

²¹ *Id.* at 136.

²² See *id.*

²³ *Id.* (citations omitted).

²⁴ *Id.*

²⁵ See *Connally v. Georgia*, 429 U.S. 245 (1977) (per curiam); *Ward v. Village of Monroeville*, 409 U.S. 57 (1972).

Monroeville, the financial temptation again revolved around a mayor empowered to sit as judge with the fines he assessed contributing a substantial portion of the town's fisc, and thus his wages.²⁶ As in *Tumey*, the Court rejected the town's scheme despite the absence of any actual bias on the mayor's part.²⁷

Similarly, *Connally v. Georgia* featured a system that offered state Justices of the Peace \$5.00 for issuing search warrants. The Georgia system provided no compensation for denial of the warrant.²⁸ In overruling the Georgia Supreme Court, the United States Supreme Court specifically rejected the idea that a \$5.00 fee amounted to a *de minimis* violation, thus invalidating Georgia's "fee for warrants" system.²⁹

Perhaps because neither case presented the occasion to consider the issue, the Court did not reiterate its prior limitation of due process protection to cases involving financial temptation. Nothing in either decision suggested a narrowing of *In re Murchison's* broad language. However, in *Aetna Life Insurance Co. v. Lavoie*,³⁰ a divided Court reinforced the financial temptation limit on due process protection.³¹ The facts of *Aetna* showed two kinds of bias against the defendant.³² First, the Ala-

²⁶ *Ward*, 409 U.S. at 57. The town netted almost half of its revenues from the fines. *Id.* at 58.

²⁷ *Id.* The Court held that a "possible temptation" existed because the mayor's judicial responsibility and his partisan interests in maximizing village revenue were "practically and seriously inconsistent," thus making it impossible for the defendant to get a fair trial. *Id.* at 60.

²⁸ *Connally*, 429 U.S. at 246.

²⁹ *Id.* at 251. While the *Connally* decision makes sense, it highlights the fallacy of a bright line distinction between financial bias and bias brought about by personal animus or prior involvement with a defendant. From a normative standpoint, it is difficult to swallow the principle that a defendant's right to a fair trial is compromised more by a \$5.00 pay-off than by a hypothetical former prosecutor's outrage or vindictiveness at seeing a defendant in front of her whom she once vigorously argued should be sent to jail for life.

³⁰ 475 U.S. 813 (1986).

³¹ *Id.* at 820. In *Aetna*, the plaintiff, Margaret Lavoie, brought suit against the defendant insurance company for failure to pay a claim. *Id.*

³² One of Alabama's Supreme Court Justices, Justice Embry, had two on-going civil actions against insurance companies contemporaneously with the appeal in Margaret Lavoie's case. *Id.* at 817. In one, Justice Embry alleged bad-faith refusal to pay a claim arising from his wife's loss of a valuable mink coat. In the other, Justice Embry was the class representative for a suit on behalf of Alabama's state employees alleging willful and intentional withholding of payment. Both suits sought punitive damages. *Id.*

During one of Justice Embry's depositions, he stated that he had had problems with insurance companies for "years and years." *Aetna* contended that this showed

bama Supreme Court justices were alleged to be predisposed against the defendants (insurance companies) by reason of personal animus.³³ Second, and more significantly, there was a potential financial interest on the part of Justice Embry, who cast the deciding vote in what was a precedent-establishing case.³⁴

In dismissing Aetna's claim that Justice Embry's previously expressed personal antipathy toward insurance companies warranted a new trial, Chief Justice Burger pointed to both the language in *Tumey*, which suggested that only financial bias could constitute a due process violation, and supporting common law history.³⁵ Chief Justice Burger limited this portion of his decision to Aetna's specific facts.³⁶ The Court did not completely shut the door on non-monetary bias as a constitutional issue however, noting that courts should only find due process violations "in the most extreme cases . . . and [Aetna's] arguments here fall well below that level."³⁷ Justice Embry's financial interest violated Aetna's due process because it "had the clear and immediate effect of enhancing both the legal status and settlement value of his own case."³⁸

Justice Brennan expressed strong disagreement with the majority's emphasis on financial conflicts of interest in a concurring opinion:

I do not understand that . . . the Court states that only an interest that satisfies this test [the interest be direct, substantial and pecuniary] will

that Embry was constitutionally and impermissibly biased against it. *Id.* at 820. The U.S. Supreme Court rejected this argument. *Id.* at 821.

Embry's potential recovery in the second suit was contingent on the precedent established in the Alabama Supreme Court's decision in *Aetna Life Insurance Co. v. La-voie*, 470 So. 2d 1060 (Ala. 1985)—the case that went before the United States Supreme Court.

³³ *Aetna*, 475 U.S. at 820.

³⁴ *Id.* Whether the fact that Embry cast the deciding vote was the source of the due process violation split the Supreme Court. The majority suggested that if Embry's vote was not outcome determinative, his potential bias might have been harmless. The concurrence suggested otherwise. Compare *Aetna*, 475 U.S. at 831, with *id.* at 831-33 (Blackmun, J., concurring).

The issue of whether or not a due process violation is contingent on the biased judge's participation being outcome determinative has subsequently caused a circuit split. Compare *Stivers v. Pierce*, 71 F.3d 732 (9th Cir. 1995) (participation of one biased decisionmaker on a multi-member panel invalidates entire decision), with *Bradshaw v. McCotter*, 796 F.2d 100 (5th Cir. 1986).

³⁵ *Aetna*, 475 U.S. at 820.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 824.

taint the judge's participation as a due process violation. Nonpecuniary interests, for example, have been found to require recusal as a matter of due process . . . The participation of a judge who has a substantial interest in the outcome of a case . . . necessarily imports a bias into the deliberative process. This deprives litigants of the assurance of impartiality that is the fundamental requirement of due process.³⁹

The Supreme Court's most recent case involving judicial bias is *Bracy v. Gramley*.⁴⁰ In *Bracy*, the Court held that where a habeas corpus petitioner could rebut the presumption of a judge's probity, he was entitled to discovery on the question of whether or not the judge was actually biased against him.⁴¹ Bracy was tried and sentenced to death in front of a judge who frequently solicited bribes from other criminal defendants.⁴² Bracy's argument was that in cases without bribery, the judge was "hard" on defendants in order not to draw attention to his otherwise pro-defendant rulings.⁴³ Although the Court noted that Bracy's contention was "speculative," because there was so much evidence of corruption,⁴⁴ it granted him discovery to attempt to prove his argument.⁴⁵ Despite the difficulties of proof, the Court held that, "if it could be proved, such compensatory, camouflaging bias on [the judge's] part in petitioner's own case would violate the Due Process Clause of the Fourteenth Amendment."⁴⁶

The Court made no mention of directly overturning Bracy's conviction and death sentence based on the appearance of unfairness, nor did it delve into whether on its face the judge's corruption and possible bias was sufficient to fail the *Tumey* or *Murchison* tests. Thus, while *Bracy* holds out the possibility that defendants can obtain discovery, it sheds little light on the question of whether, in the absence of concrete evidence showing bias, a trial in front of an "interested" judge can ever be constitutionally infirmed.

³⁹ *Id.* at 829 (Brennan, J., concurring) (emphasis omitted).

⁴⁰ 117 S. Ct. 1793 (1997).

⁴¹ *Id.* at 1797.

⁴² *Id.* at 1795-96.

⁴³ *Id.* at 1797.

⁴⁴ The Court noted that the trial judge, who was caught up in the web of the Chicago anti-corruption "Operation Greylord" effort, was "thoroughly steeped in corruption." *Id.* at 1799.

⁴⁵ *Id.*

⁴⁶ *Id.* at 1797. Following the Supreme Court's *Bracy* decision, the Illinois Supreme Court ruled that a defendant had in fact been denied due process where the trial judge presided over a case where he first accepted a bribe and then returned it to the defendant. *People v. Hawkins*, 609 N.E.2d 999 (Ill. 1998).

Despite *Bracy*, the distinction between financial and other kinds of bias (such as kinship or extreme personal antipathy) that the *Tumey* and *Aetna* Courts drew seems misplaced at best. It serves no constitutional purpose to allow a judge to sit in a case in which her niece is the defendant, or in which her best friend was the victim of a crime, but not to sit in a case where a \$5 benefit might accrue to her.

One commentator has suggested that the only justification for this standard is the Court's desire to obtain the advantages of a "bright-line distinction."⁴⁷ The problem with this distinction is that the bright line seems to have been drawn in the dark—it excludes cases of potential bias, which may be far more egregious than those motivated by small financial gain. The result of this rule is that it may be constitutional for "grossly biased decisionmakers [to be] allowed to try cases."⁴⁸

Notwithstanding the Court's focus on financial bias in *Tumey* and *Aetna*, it is clear from *In re Murchison*, and Justice Brennan's concurrence in *Aetna*, that financial bias need not be the *only* reason for judges to be disqualified from presiding over tri-

⁴⁷ See Paul B. Lewis, *Systemic Due Process: Procedural Concepts and the Problem of Recusal*, 38 U. KAN. L. REV. 381, 385 (1990). Lewis notes that "[j]udicial prejudice based not only on financial interest, but also on bias or relationship is antithetical to the rule of law." *Id.*

Another justification for the focus on financial conflicts of interest besides the "bright line distinction," is the fact that at common law, this was the only type of bias that forced judicial recusal. See, e.g., *Bonham's Case*, 77 Eng. Rep. 638 (K.B. 1608); 3 WILLIAM BLACKSTONE, COMMENTARIES *361. See also John P. Frank, *Disqualification of Judges*, 56 YALE L.J. 605, 609 (1947) (explaining that judges were only disqualified for direct pecuniary interest).

For a full treatment of the subject of financial conflict of interest and judicial bias, see Steven Lubet, *Disqualification of Supreme Court Justices: The Certiorari Conundrum*, 80 MINN. L. REV. 657 (1996); Steven Lubet, *Regulation of Judges' Business and Financial Activities*, 37 EMORY L.J. 1 (1988).

⁴⁸ Lewis, *supra* note 47, at 386. Differences of opinion over whether due process protections of judicial neutrality extend beyond financial conflicts are seen through the prism of whether one believes due process is flexible, or whether it is inflexible and ought to be cast in stone as mandated by the dictates of common law and statutes. Compare Redish & Marshall, *supra* note 2, at 457-68, with *Del Vecchio v. Illinois Dep't of Corrections*, 31 F.3d 1363, 1389 (7th Cir. 1994) (en banc) (Easterbrook, J., concurring), *cert. denied*, 115 S. Ct. 1404 (1995). Redish and Marshall certainly have the late Justice Frankfurter on their side. Frankfurter wrote that due process is not confined to "particular forms in which rights have heretofore been found to have been curtailed for want of procedural fairness. Due Process is perhaps the most majestic concept in our whole Constitutional system . . . it is . . . a living principle not confined to past instances." *Joint Anti-Facit Refugee Comm. v. McGrath*, 341 U.S. 123, 174 (1951) (Frankfurter, J., concurring).

als. Indeed, *In re Murchison* points to the fact that a judge's personal embroilment with a party can, in extreme cases, result in a due process violation. Moreover, the Supreme Court has never expressly required a showing of actual bias in order to find a due process violation, and has even disavowed the need for such a showing.⁴⁹ Even the temptation of as little as \$5.00 was sufficient to invalidate a criminal conviction in *Connally v. Georgia*.⁵⁰

Yet in light of the Supreme Court's lack of clear guidance in bias cases, it is not surprising that lower courts do not find it troublesome when judges sit in cases where they have previously prosecuted the defendant on unrelated charges. If this situation is recognized early enough, however, the problem can be avoided in many states through a peremptory request for a different judge.⁵¹ Where these challenges are not available, the issue may arise in federal courts post-conviction, when a prisoner files a petition for habeas corpus.⁵² When a bias allegation is brought in federal court, the defendant may move for recusal under 28 U.S.C. § 455.⁵³ This provides for recusal where a

⁴⁹ See *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972); *In re Murchison*, 349 U.S. 133, 136 (1955).

⁵⁰ 429 U.S. 245, 251 (1977) (per curiam).

⁵¹ See ALASKA STAT. § 22.20.022 (Michie 1996); ARIZ. REV. STAT. ANN. § 12-409 (West 1992); HAW. REV. STAT. § 601-7(b) (1993); 725 ILL. COMP. STAT. 5/114-5(a) (West 1996); IND. CODE ANN. § 35-36-5-1 (West 1986); KAN. STAT. ANN. § 20-311d (1995); MINN. STAT. ANN. § 542.16 (West 1988); NEV. SUP. CT. R. 48:1; N.M. STAT. ANN. § 38-3-9 (Michie 1992); N.D. CENT. CODE § 29-15-21 (1991); OR. REV. STAT. §§ 14-250 to 70 (1995); S.D. CODIFIED LAWS § 15-12-22 (Michie 1984); WASH. REV. CODE ANN. §§ 4.12.040-50 (West 1988 & Supp. 1997); WIS. STAT. ANN. § 801.58 (West Supp. 1994). See also Blanck, *supra* note 4; text accompanying notes 92-114.

⁵² Since 1953, the Supreme Court has allowed prisoners to attack their state convictions collaterally through habeas corpus by petitioning lower federal courts to review their trials for procedural defects. See, e.g., *Brown v. Allen*, 344 U.S. 443 (1953). The federal habeas statute, as amended by the Anti-Terrorism and Effective Death Penalty Act of 1996, is codified at 28 U.S.C. §§ 2241-66 (1994 & Supp. 1997). For a prisoner in state custody to obtain a writ of habeas corpus, the petitioner must show that the law was applied to him in a manner contrary to, or unreasonably in light of, a clearly established federal law as interpreted by the Supreme Court. 28 U.S.C. § 2254(d)(1) (1994 & Supp. 1997).

Under habeas corpus jurisprudence, there are structural constitutional errors and trial errors. A trial with a structural error, on its face, violates a defendant's due process. See *Arizona v. Fulminante*, 499 U.S. 279, 289-90 (1991) (White, J., dissenting). Judicial bias is one of those structural errors, and cannot be harmless. *Id.* at 290 (White, J., dissenting). Less important are "trial" errors, which are harmless and do not require overturning a conviction unless they have a "substantial and injurious" influence on the jury's verdict. *Brecht v. Abrahamson*, 507 U.S. 619, 622 (1993).

⁵³ 28 U.S.C. § 455 (a)-(b)(1) (1994). See *supra* note 1 for the text of § 455.

judge's impartiality may be reasonably questioned or appears unfair because of prejudice or bias from an extrajudicial source.⁵⁴

The allegations of bias and the degree of apparent injustice in these cases varies widely. In some, the convicted defendant has merely alleged that the prosecutor-turned-judge signed off on a brief or played a tertiary role in a long ago criminal case.⁵⁵ In others, the history between the defendant and the judge is more substantial, and thus more troublesome.⁵⁶ In all cases, federal appeals court judges have found there was either insufficient evidence to find bias or no appearance of unfairness.⁵⁷

⁵⁴ See James Oleske, *The Authority of the Trial Judge*, 84 GEO. L.J. 1179, 1181-83 (1996).

⁵⁵ See *Murphy v. Beto*, 416 F.2d 98, 100 (5th Cir. 1969).

⁵⁶ See *Del Vecchio v. Illinois Dep't of Corrections*, 31 F.3d 1363, 1368-69 (7th Cir. 1994) (en banc) [hereinafter *Del Vecchio II*], cert. denied, 115 S. Ct. 1404 (1995).

⁵⁷ Outside of 28 U.S.C. § 455, it is unclear whether a judge should sit in a case where he has been involved in the actual prosecution of the defendant in that particular case, although it seems that if the involvement is any more than mere formality, the judge will be disqualified. See *Bradshaw v. McCotter*, 785 F.2d 1327 (5th Cir.) [hereinafter *Bradshaw I*], modified by 796 F.2d 100 (5th Cir. 1986) [hereinafter *Bradshaw II*]. In *Bradshaw I*, the Fifth Circuit granted a habeas petition on the grounds that a Texas Appeals Court judge should not have heard a case where his name appeared on the prosecution's brief, even though the judge's name appeared on the brief only as a formality. The petitioner was not required to show any proof that the judge was biased—"the appearance [of the judge's name] undermined a fundamental aspect of our criminal justice system: a judge's neutrality. The separation between the roles of judge and prosecutor must be certain and inflexible." *Bradshaw I*, 785 F.2d at 1329. In *Bradshaw II*, the same court ruled that, in light of the Supreme Court's decision in *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986), the fact that the appellate court judge's vote was not outcome determinative made the error harmless, and thus reversed its decision to grant the writ. 796 F.2d at 101.

Concurring with the new result, one judge wrote that he disagreed with the appearance of fairness rule used in *Bradshaw I*. *Id.* (Gee, J., concurring). Examining the facts, Judge Gee noted that there was no possibility that an average person would be tempted or biased against the defendant because his name appeared on the prosecution's brief. Thus, the rule of "appearance of fairness" discussed in *In re Murchison* is only applicable "where a real possibility of bias exists against the defendant on the part of the judge." *Id.* at 102 (Gee, J., concurring). The judge wrote:

The rule [for disqualification] to apply is a prophylactic one keyed to the ability and temperament of the average man, even though the particular judge in question might be capable of rising above the situation [W]here there is room for doubt about the existence of bias I quite agree that appearance must be served. Doing so will sometimes require one who feels no bias to disqualify himself despite this. But where there is no room for doubt and no contention whatever of actual bias, I do not believe that naked appearances should be held to require a magistrate's recusal.

Id. at 102-03 (Gee, J., concurring).

There are two states whose courts have reversed the convictions of defendants who were tried by judges who previously prosecuted them on unrelated offenses. However, those cases do not specifically rely on the federal Constitution.⁵⁸

In *People v. Correlli*,⁵⁹ a New York appeals court partially addressed the problem analyzed in this Comment. The judge in *Correlli* had previously prosecuted the defendant in an unrelated case.⁶⁰ The court reversed Correlli's conviction even though the judge claimed he could be entirely impartial, because the "appearance of bias or prejudice can be as damaging to public confidence in the administration of justice as the actual presence of bias or prejudice."⁶¹ The court noted that regardless of how guilty the defendant was, he was entitled to adjudication from a tribunal free of any possible bias. Trial by a judge who had previously prosecuted him did not accord Correlli that right.⁶² However, a serious shortcoming in the *Correlli* decision was its failure to ground the right to be free from such an unfair trial in any textual mandate—either constitutional, state statute or judicial code.

The widest ranging pronouncement on whether defendants have a constitutional right not to be tried by a judge who has

Under 28 U.S.C. § 455(b) (2), a judge must disqualify himself where he has "served in governmental employment, and in such capacity participated as counsel, adviser, or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy." See *supra* note 1. Thus, a judge may not preside over hearings where he, as an Assistant U.S. Attorney, had represented the government on an underlying matter involving the criminal case now in front of him as a judge. *Mixon v. United States*, 620 F.2d 486, 487 (5th Cir. 1980). Where the judge was not "actively involved" in the underlying prosecution, courts have held that he did not "participate" under the meaning of § 455, and no recusal is statutorily mandated. See *Mangum v. Hargett*, 67 F.3d 80, 83 (5th Cir. 1995), *cert. denied*, 116 S. Ct. 957 (1996); *United States v. Gipson*, 835 F.2d 1323, 1326 (10th Cir. 1988). For an interpretation of a similar statute in the military court system, see *United States v. Kincheloe*, 14 M.J. 40 (C.M.A. 1982).

⁵⁸ *Carter v. Commonwealth*, 641 S.W.2d 758 (Ky. Ct. App. 1982); *accord Woods v. Commonwealth* 793 S.W.2d 809 (Ky. 1990). In *Carter*, the Kentucky judicial recusal statute was interpreted to mandatorily disqualify a judge from a case in which he previously prosecuted the defendant even if there was "no hint in the record of any impropriety or bias on the part of the [judge]," and the trial judge had "little, if any, recollection of any involvement in the [defendant's] plea bargaining." *Carter*, 641 S.W.2d at 759-60. See also *People v. Correlli*, 343 N.Y.S.2d 555 (N.Y. App. Div. 1973); *accord People v. Smith*, 503 N.Y.S.2d 72 (N.Y. App. Div. 1986).

⁵⁹ 343 N.Y.S.2d 555 (N.Y. App. Div. 1973).

⁶⁰ *Id.* at 556.

⁶¹ *Id.*

⁶² *Id.*

previously prosecuted them came in 1979 in *Jenkins v. Bordenkircher*.⁶³ The Sixth Circuit in *Jenkins* refused to establish a per se rule prohibiting judges from sitting in cases where they had previously prosecuted the defendant.⁶⁴ In *Jenkins*, the trial judge had prosecuted the defendant on four occasions in a span of nine years, with the last prosecution coming only five years prior to the instant trial.⁶⁵ The charges in the case at hand were armed robbery and murder; the previous charges ranged from felonies such as brandishing a murderous weapon to grand larceny.⁶⁶

In reaching its decision, the Sixth Circuit found significant the fact that the charges in the murder trial "were of an entirely different magnitude" than the charges on which the judge had prosecuted the defendant.⁶⁷ The court did not rule out the possibility that a closer connection between the previously prosecuted crimes and the crime at hand might have compelled a different result.⁶⁸

The Sixth Circuit refused to consider granting a habeas petition based on the defendant's argument that irrespective of actual bias, an inherent temptation existed for a judge to be prejudiced against a defendant he previously prosecuted.⁶⁹ Instead, the court combed the record for evidence of actual bias and found none.⁷⁰ The court praised the trial judge for putting all motions and rulings on the record, not holding unreported bench conferences or proceedings in chambers and fully explaining his rationale for "each ruling of consequence."⁷¹

In addition to *Jenkins*, other lower federal courts have refused to find cognizable grounds for due process violations in a number of contexts where no actual bias or substantial tempta-

⁶³ 611 F.2d 162, 166 (6th Cir. 1979), *cert. denied*, 446 U.S. 943 (1980).

⁶⁴ *Id.* at 167.

⁶⁵ *Id.* at 166.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 166-67.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* at 166. By countering the defendant's claim of an inherent appearance of bias with a review of the actual record, the court seemingly conceded that the possibility of bias existed, but nevertheless implied that the appearance of unfairness was either irrelevant or nugatory.

tion for bias was shown. For example, in *Murphy v. Beto*,⁷² a court denied habeas corpus relief to a petitioner where the trial court judge was the district attorney at the time of a prior prosecution, but there was no evidence he had played an active role in the petitioner's trial.⁷³ Similarly, in *Layer v. Lyles*,⁷⁴ a district court found no due process violation where the presiding trial judge was both a prosecuting and defending attorney for the defendant in a previous trial.⁷⁵ Unlike *Jenkins*, however, in *Layer* the prior trials were for crimes of substantially the same magnitude as the instant case.⁷⁶ Both *Lyle* and *Murphy* essentially rejected the "appearance of fairness" test in favor of an actual bias test.⁷⁷

In a more recent case, where similar but not identical due process concerns were at stake, the Tenth Circuit laid out a two-step test that more accurately reflects the Supreme Court's current approach of an "appearance of fairness" test.⁷⁸ The Tenth Circuit attempted to reconcile divergent due process standards on judicial bias. On the one hand, it noted the requirement that a judge be "actually biased or prejudiced against the petitioner,"⁷⁹ and on the other it noted the Supreme Court's "appearance of bias" standard in *In re Murchison*.⁸⁰ Thus, the lower court allowed the petitioner to establish a due process violation in one of two ways.⁸¹ He could show that the judge was actually showing bias, or he could demonstrate that the appearance of bias created a "conclusive presumption of actual bias."⁸² Because there was no contention of actual bias, the court exam-

⁷² 416 F.2d 98 (5th Cir. 1969).

⁷³ *Id.* at 100.

⁷⁴ 598 F. Supp. 95, 98 (D. Md. 1984), *aff'd*, 767 F.2d 912 (4th Cir. 1985).

⁷⁵ *Id.* at 102.

⁷⁶ *Id.* at 96-97.

⁷⁷ *Id.* at 102; *Murphy*, 416 F.2d at 100.

⁷⁸ *Fero v. Kirby*, 39 F.3d 1462, 1478 (10th Cir. 1994), *cert. denied*, 115 S. Ct. 2278 (1995). Here, the defendant's argument was not premised on the judge's position as a former prosecutor, but rather on the fact that the judge's son was a clerk for the prosecution. *Id.* at 1475. The judge's brother-in-law had also filed a wrongful death action against the defendant on behalf of the victim's family. *Id.* These facts, while not exactly the same as those this Comment is concerned with, are similar enough to make a strong analogy.

⁷⁹ *Id.* at 1478 (citations omitted).

⁸⁰ 349 U.S. 133 (1955). See *supra* text accompanying notes 19-24 for a discussion of *In re Murchison*.

⁸¹ *Fero*, 39 F.3d at 1478.

⁸² *Id.*

ined the standards under which the claim of a conclusive presumption of bias could be maintained.⁸³

The key factor was whether an incentive for actual bias existed. The court strictly interpreted the Supreme Court's *Tumey* analysis, which suggested that the incentive for bias is almost exclusively financial.⁸⁴ The trial judge's kinship relationship to the prosecution was held irrelevant because the judge did not rule on motions or objections made by his son.⁸⁵ The only benefits accruing to the judge would be "feelings of pride and satisfaction"—matters not sufficient to create due process violations.⁸⁶

Without further inspection, none of these rules or cases may appear intuitively troublesome. However one case which has adopted the standards discussed above reveals reason for serious concern. That case, *Del Vecchio v. Illinois Department of Corrections*,⁸⁷ highlights the danger for a potential deprivation of rights when there are no clear standards for what constitutes a due process violation.

In 1979, George Del Vecchio was tried and convicted of murder, rape, and deviate sexual assault and sentenced to death in Cook County Criminal Court.⁸⁸ The presiding judge, Louis Garippo, had successfully prosecuted Del Vecchio on murder charges fourteen years earlier in a highly publicized and sensationalized case.⁸⁹ Judge Garippo's participation in the second case was troublesome not only because of his prior prosecution of the defendant, but because as judge, he ruled on the admissibility of evidence and testimony from the first murder case.⁹⁰

Judge Garippo's level of participation in the earlier prosecution was hotly disputed between the majority and dissenters in the en banc decision (*Del Vecchio II*).⁹¹ The majority maintained

⁸³ *Id.*

⁸⁴ *Id.* at 1479-80. See *supra* text accompanying notes 9-18 for an analysis of *Tumey*.

⁸⁵ *Fero*, 39 F.3d at 1480.

⁸⁶ *Id.*

⁸⁷ 8 F.3d 509 (7th Cir. 1993) [hereinafter *Del Vecchio I*], *rev'd*, *Del Vecchio II*, 31 F.3d 1363 (7th Cir. 1994) (en banc), *cert. denied*, 115 S. Ct. 1404 (1995).

⁸⁸ *Del Vecchio I*, 8 F.3d at 510.

⁸⁹ *Del Vecchio II*, 31 F.3d at 1368.

⁹⁰ *Id.* Judge Garippo's participation in the trial was also troublesome because even though he remembered prosecuting Del Vecchio, Del Vecchio did not remember being prosecuted by Garippo. At no point during the trial did Judge Garippo reveal his earlier role as prosecutor.

⁹¹ *Id.*

that Judge Garippo's participation in the prosecution was tertiary, and that the few decisions he made were pro-forma rather than exercises of discretion or judgment.⁹² In contrast, the dissenters in *Del Vecchio II* accused the majority of obfuscating Judge Garippo's role in the first murder trial, instead suggesting he was "intimately involved" in that trial.⁹³

Specifically, the dissent maintained that Judge Garippo, in his previous role as prosecutor, had been involved in every major decision in the case.⁹⁴ In particular, Garippo's exercise of prosecutorial discretion in charging Del Vecchio as a minor in the first murder resulted in Del Vecchio's early release from prison, allowing him to kill again.⁹⁵ While much in this case turned on which characterization of the facts was accepted, stripped of the factual dispute, the opinions in *Del Vecchio II* still hold much interest.

One important issue *Del Vecchio II* addressed was whether the appearance of bias itself created a necessity for recusal.⁹⁶ The majority's interpretation of the Supreme Court "appearance of justice"⁹⁷ language was extremely constricted. The *Del Vecchio II* court found that language to stand for the proposition that "judges must sometimes recuse themselves when they face possible temptations to be biased, even when they exhibit no actual bias against a party or cause,"⁹⁸ rather than the more stringent standard that "bad appearances alone . . . require disqualification to prevent an unfair trial."⁹⁹

Another controversial aspect of the majority opinion suggested that even if Judge Garippo was tempted to be biased, the temptation did not amount to a due process violation because it was not financial.¹⁰⁰ Moreover, the court contended that even if Judge Garippo gave George Del Vecchio a "clear break" in the first trial, the risk of bias would still be insufficient to mandate

⁹² *Id.* at 1378.

⁹³ *Id.* at 1393 (Cummings, J., dissenting).

⁹⁴ *Id.* (Cummings, J., dissenting).

⁹⁵ *Id.* at 1393-94 (Cummings, J., dissenting).

⁹⁶ *Id.* at 1371.

⁹⁷ See *In re Murchison*, 349 U.S. 133 (1954).

⁹⁸ *Del Vecchio II*, 31 F.3d at 1389.

⁹⁹ *Id.* at 1371. The majority opinion also mentioned judicial bias was most problematic when the "lure of lucre" was involved. *Id.* at 1372-73.

¹⁰⁰ *Id.* at 1372.

disqualification.¹⁰¹ While bias may have existed, it was not “substantial.”¹⁰² The court rejected the notion that an average judge in Garippo’s situation would violate his oath of impartiality.¹⁰³ Suggesting bias in such a situation would be “inconsistent with the presumption of honesty and integrity of those serving as adjudicators.”¹⁰⁴ The majority warned against an exaggerated sense of propriety and erecting barriers in the way of Illinois’ attempts to give “an unrepentant and twice convicted murderer . . . a sentence the people of Illinois deem appropriate”—i.e. the death penalty.¹⁰⁵

As for actual bias, the court held that the record showed none.¹⁰⁶ While this conclusion could be interpreted as evidence that Judge Garippo erected a firewall between his previous prosecution of Del Vecchio and the instant case, it does not necessarily prove that he did. Actual bias can be extremely difficult to prove. If the system operates under the premise that fair decision-making is not compromised by Judge Garippo’s actions, it will reconcile the facts it sees in front of it with that view. In *Del Vecchio I*, the court noted that:

If the judge is silent [and there is no obvious bias in the record] there is no proof of actual bias. And if the judge does say things that sound partial, there is still no evidence of bias because [in the mind of skeptics] if the judge were really partial, he would have been smart enough to remain silent.¹⁰⁷

The en banc panel majority provoked two pointed dissents.¹⁰⁸ Judge Cummings, the author of the *Del Vecchio I* majority, wrote that Judge Garippo’s participation violated George Del Vecchio’s due process rights in two ways. First, Judge Garippo was forced to sit in judgment of his own decisions as a

¹⁰¹ *Id.*

¹⁰² *Id.* at 1378-79.

¹⁰³ *Id.*

¹⁰⁴ *Id.* (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)).

¹⁰⁵ *Id.* at 1379-80.

¹⁰⁶ *Id.* For an interesting perspective on bias manifested through physical activities by the judge not appearing in the written record but which may influence the jury anyway, see Rachel Shoretz, Note, *Let the Record Show: Modifying Appellate Review Procedures for Errors of Prejudicial Nonverbal Communications by Trial Judges*, 95 COLUM. L. REV. 1273 (1995).

¹⁰⁷ *Del Vecchio I*, 8 F.3d 509, 516 n.6 (7th Cir. 1993).

¹⁰⁸ *Del Vecchio II*, 31 F.3d at 1392 (Cummings, J., dissenting); *id.* at 1399 (Ripple, J., dissenting).

prosecutor.¹⁰⁹ Second, Garippo heard a case in which it would have been natural for him to hold a grudge against the defendant.¹¹⁰ Judge Cummings posited that when faced with a defendant like Del Vecchio, any judge in Garippo's position "would have felt a strong personal connection to the case."¹¹¹ Garippo apparently felt that Del Vecchio's recidivism was a personal affront to him, and that Del Vecchio had "dirtied his sweatshirt," by committing the second murder after Garippo's office had treated him leniently.¹¹² Judge Cummings' dissent in *Del Vecchio II* stressed that while he did not necessarily see evidence of actual bias, the appearance of bias overhanging the trial was so strong as to require that Garippo be disqualified.¹¹³ The test Judge Cummings suggested was whether a judge "under a realistic appraisal of psychological tendencies and human weaknesses ought not to have presided" over a trial.¹¹⁴ He wrote:

A rule that requires recusal when the appearance of bias is as strong as it is in this case, without requiring an independent showing of actual bias, serves many ends . . . such a rule protects the accused from the danger of unfair judging. It maintains for the benefit of society the appearance of justice so necessary to the continued esteem of the judicial system. Moreover, it protects judges . . . from unseemly excursions into their psyches [because they did not follow this rule].¹¹⁵

In a separate dissent, Judge Ripple criticized the majority for its "underestimation of the effect that considerations other than financial advantage can play in skewing judicial impartiality."¹¹⁶ In addition to the personal emotions Del Vecchio might have aroused in Judge Garippo, electoral motivation might skew impartiality as well. As a trial judge in Illinois, Judge Garippo was required to run for reelection to continue serving.¹¹⁷ Al-

¹⁰⁹ *Id.* at 1392. (Cummings, J., dissenting). During the sentencing phase of Del Vecchio's 1979 murder trial, evidence pertaining to his confession in his 1965 murder trial was brought out. Del Vecchio claimed that the confession was coerced, and thus should not be admissible to prove a pattern of violent crimes. Judge Garippo refused to grant a hearing to Del Vecchio on this issue. *Del Vecchio I*, 8 F.3d at 516. With the federal government and states moving more and more towards "three strikes and you're out" mandatory sentencing, the likelihood that a prosecutor-turned-judge might be in such a situation will likely increase.

¹¹⁰ *Del Vecchio II*, 31 F.3d at 1392 (Cummings, J., dissenting).

¹¹¹ *Id.* at 1395 (Cummings, J., dissenting).

¹¹² *Id.* (Cummings, J., dissenting).

¹¹³ *Id.* (Cummings, J., dissenting).

¹¹⁴ *Id.* at 1396 (Cummings, J., dissenting).

¹¹⁵ *Id.* at 1397-98 (Cummings, J., dissenting).

¹¹⁶ *Id.* at 1399 (Ripple, J., dissenting).

¹¹⁷ *Id.* (Ripple, J., dissenting).

though not directly drawing a link between Judge Garippo's trial conduct and his concern for his own electoral future, the dissent noted that Del Vecchio's second murder trial "called into question the wisdom of the decisions that this trial judge had made in the earlier stage of his career."¹¹⁸ Pointing to recent American political history,¹¹⁹ Judge Ripple pointed out that "[f]or many, if not most figures in public life, avoiding a cloud over one's professional judgment is a great deal more important than financial gain."¹²⁰

One argument the dissent should have addressed more forcefully was the majority's assertion that "bad appearances alone [do not] require disqualification."¹²¹ This argument sets up a straw man. "Bad appearances"—without any limiting factor—could encompass so much as to allow challenges in nearly every case. Republicans trying Democrats, teetotalers trying drunks (but hopefully not vice-versa), and an endless variety of permutations of judges and defendants on opposite sides of issues could fall under the rubric of "bad appearances." However, when the "bad appearances" involve individuals with particular and identifiable adversarial experiences towards each other, such as prosecutor and defendant, the potential for bias should not be sloughed off as cavalierly as did the majority.

The few circuit cases that have addressed the issue of whether due process prohibits a judge from sitting in a case where he has prosecuted the defendant are in agreement that

¹¹⁸ *Id.* (Ripple, J., dissenting).

¹¹⁹ This dissent cited Michael Dukakis's response to the Willie Horton advertisement during the 1988 presidential campaign. *See id.* at 1399 n.1 (Ripple, J., dissenting).

This point raises the interesting complications of having elected state judges. On the general question of due process and judicial elections, see Scott D. Weiner, Note, *Popular Justice: State Judicial Elections and Procedural Due Process*, 31 HARV. C.R.-C.L. L. REV. 187 (1996); *see also* Brown v. Doe, 2 F.3d 1236 (2d Cir. 1995) (defendant did not have due process rights violated where judge used his conviction and sentence in a re-election campaign advertisement). Of course, *Del Vecchio* poses the thorny problem where a judge had the incentive to be especially hard on the defendant so he did not appear to have let a murderer off easy a second time. The political ramifications of having twice allowed a defendant to "get off" are presumably ominous enough to tempt many reasonable people into biased decisionmaking.

¹²⁰ *Del Vecchio II*, 31 F.3d at 1399 (Ripple, J., dissenting).

¹²¹ *Id.* at 1373.

no violation of due process has occurred.¹²² Courts have found no bias in the records in these cases, despite, at least in one instance, powerful evidence to the contrary, and despite the Supreme Court's admonition that the appearance of unfairness can compromise due process as greatly as manifested bias itself.

III. THE PROSECUTORIAL AND JUDICIAL FUNCTIONS

To properly examine the prosecutor-turned-judge bias, it is necessary to understand the differing roles of prosecutors and judges, and why those roles might be in tension in certain cases. The judiciary's failure to give this tension even cursory examination is one reason the jurisprudence in this area is so flawed.

A. THE JUDICIAL FUNCTION

Judicial behavior is generally guided by the Code of Judicial Conduct, set forth by the American Bar Association.¹²³ The ideal judge should be neutral and detached, and, in the words of Justice Felix Frankfurter, "[b]e able to think dispassionately and submerge private feelings on every aspect of the case."¹²⁴ Judges should be open-minded and should not prejudge the facts or law in any case.¹²⁵ Judges are to be detached reasoners, not forceful advocates for one side or the other in a case.¹²⁶ In addition to not prejudging facts and law, ideally, judges must be completely willing and able to apply the law equally to all persons.¹²⁷

As human beings, judges may have different temperaments and styles on the bench and in their writings. However, they must strive to remain open-minded and fair, lest they run afoul of 28 U.S.C. § 455 or, if they are state judges, their state's equivalent.¹²⁸ To buttress the ideal of fairness, judges are explicitly prohibited from hearing cases in which they have financial interests,¹²⁹ or obtain knowledge of the evidence through extra-

¹²² *Id.*; *Layer v. Lyles*, 598 F. Supp. 95 (D. Md. 1984), *aff'd*, 767 F.2d 912 (4th Cir. 1985); *Jenkins v. Bordenkircher*, 611 F.2d 162 (6th Cir. 1979); *Murphy v. Beto*, 416 F.2d 98 (5th Cir. 1969).

¹²³ MODEL CODE OF JUDICIAL CONDUCT (1990).

¹²⁴ *Public Utilities Comm'n v. Pollak*, 343 U.S. 451, 466 (1952).

¹²⁵ *See Shaman*, *supra* note 3, at 619-20.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *See Leubsdorf*, *supra* note 4, at 238.

¹²⁹ *See supra* text accompanying notes 8-44.

judicial sources, or appear to have pre-judged the evidence in a case.¹³⁰

B. THE PROSECUTORIAL FUNCTION

The prosecutorial function is to represent the people of the community in court. As part of the executive branch,¹³¹ prosecutors are teamed with the police to serve as law enforcement officers.¹³² Certain aspects of the prosecutorial role grant prosecutors virtually unfettered discretion over individuals suspected of crimes.¹³³ There are four distinct elements of the prosecutorial function entailing the amount and kind of contact with a suspect/defendant that raise concerns about the prosecutor-turned-judge's ability to grant these defendants fair trials. These four roles are: first, investigating and charging a defendant; second, the adversarial role during trial; third, contact with the media about a trial; and fourth cooperation with the victim and his family.

First, prosecutors make the decision to charge an individual with a specific crime—a virtually unreviewable decision left almost entirely to the discretion of the individual prosecutor.¹³⁴ This decision, even if it never leads to a guilty verdict, can have a devastating impact upon the charged person's life.¹³⁵ It may lead to short-term incarceration, loss of employment, social ostracism, financial cost, and tremendous stress on the part of the defendant.¹³⁶ The decision to prosecute is necessarily based on a lower evidentiary standard than that needed to convict, and may be arrived at through relying on items inadmissible in court such as police reports, rap sheets, and loyalty to and concern for the victims,¹³⁷ rather than a full balancing of all exculpatory evi-

¹³⁰ See Leubsdorf, *supra* note 4, at 238.

¹³¹ See *Morrison v. Olson*, 487 U.S. 654, 681 & n.20 (1988) (noting the general executive nature of prosecutions, and the limited exceptions where a court undertakes prosecutorial functions).

¹³² James W. Gunson, Comment, *Prosecutorial Summation: Where is the Line Between "Personal Opinion" and Proper Argument?*, 46 ME. L. REV. 241, 243 (1994).

¹³³ See Kenneth J. Melilli, *Prosecutorial Discretion in an Adversary System*, 1992 BYU L. REV. 669 (1992). See also *Bordenkircher v. Hayes*, 434 U.S. 357 (1978); Steven Alan Reiss, *Prosecutorial Intent in Constitutional Criminal Procedure*, 135 U. PA. L. REV. 1365 (1987).

¹³⁴ Melilli, *supra* note 133, at 671-72.

¹³⁵ *Id.*

¹³⁶ *Id.* at 672.

¹³⁷ Nina Schuyler, *Invisible Victims*, CAL. LAW., Dec. 15, 1995, at 29, 30.

dence.¹³⁸ In this stage, the prosecutor may familiarize himself with extremely lurid and grotesque details of the most heinous crimes. The defendant is often thought of only in the context of criminal accusations, and as the prosecution turns into trial, evidence is usually viewed as conforming to the theory of the defendant's culpability.¹³⁹

The second part of the prosecutorial function, which is incompatible with giving a fair trial to a specific defendant, is the prosecutor's role during the adversarial stage of the trial. At this stage, prosecutors may be forced to paint an extremely negative picture of the defendant in order to obtain a conviction. Certainly prosecutors cannot cross certain professional lines—they may not pepper their remarks with personal opinions, nor are they supposed to inflame jury passions based on a defendant's immutable characteristics, or other irrelevant factors.¹⁴⁰ Nevertheless, in court, the prosecutor is an advocate for the people and against the defendant. Because “[e]nsuring the infliction of deserved punishment is part and parcel of the prosecutor's job,” the “prosecutor's attitude toward the defendant in a hard-fought case is seldom benign or neutral.”¹⁴¹ Thus, many legitimate prosecutions can be deemed “punitive” in nature.¹⁴² Once his case goes to trial, so long as he believes in its validity, the prosecutor's job is to persuade twelve jurors beyond a reasonable doubt that the defendant is guilty of the crime charged.

In persuading those jurors, the prosecutor may make all reasonable inferences about a defendant that are supported by the record evidence.¹⁴³ The record may include gory details of crimes, references to prior bad acts and damning reputation evidence. In closing arguments and rebuttal, the prosecutor must use his advocacy skills to their fullest extent in “wag[ing] the war” against the criminal.¹⁴⁴ If the defendant takes the

¹³⁸ Melilli, *supra* note 133, at 689.

¹³⁹ *Id.*

¹⁴⁰ Gunson, *supra* note 132, at 243.

¹⁴¹ Reiss, *supra* note 133, at 1387.

¹⁴² *Id.*

¹⁴³ Gunson, *supra* note 132, at 242, 245.

¹⁴⁴ *Id.* at 244. See also AMERICAN BAR ASS'N, PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION 77 (1974).

stand, the prosecutor may question her credibility on cross-examination.¹⁴⁵

A third feature of the prosecutorial function raising concerns about the defendant's ability to receive a fair trial from that specific prosecutor-turned-judge is prosecutorial interaction with the media. The media will obviously not seek prosecutorial comment in all cases. However, in high profile cases, prosecutors often become media figures.¹⁴⁶ Prosecutors are bound by due process and ethical constraints not to reveal prejudicial information about the case or defendant.¹⁴⁷ They may, however, reveal information about the nature of the crime, or status of an investigation, so long as they do not "try their case in the press."¹⁴⁸

Nevertheless, prosecutors cannot ignore the press during a highly publicized case, lest they lose control of their case, or be misunderstood in the court of public opinion.¹⁴⁹ Thus, the prosecutor may leak sensitive and select information by speaking to the media off the record or not for attribution.¹⁵⁰

One prominent member of the defense bar accused prosecutors of using press leaks to generate public pressure to kill plea bargains, to stir up public condemnation of the defendants, provide graphic and unflattering confidential information about the defendants, and generally to "infect [a] jury and salvage what was clearly a dying prosecution."¹⁵¹ However prosecutors choose to interact with the media, press dealings force a prosecutor to invest herself in a case outside the courtroom, and may intensify the feelings against a defendant.

Finally, the recent trend in many states towards passing victims' rights constitutional amendments or legislation assuring the victim or family of the victim a place along side the govern-

¹⁴⁵ AMERICAN BAR ASS'N, *supra* note 144, at 77.

¹⁴⁶ Consider the O.J. Simpson case, the Menendez brothers case, and the Bobbitt trial. See Ellen Minnefor, *Looking for Fair Trials In the Information Age: The Need for More Stringent Gag Orders Against Trial Participants*, 30 U.S.F. L. REV. 95, 95-97 (1995).

¹⁴⁷ Scott M. Matheson, Jr., *The Prosecutor, The Press, and Free Speech*, 58 FORDHAM L. REV. 865, 865-67 (1990).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 889.

¹⁵⁰ *Id.* at 892.

¹⁵¹ Robert S. Bennett, *Press Advocacy and the High-Profile Client*, 30 LOY. L.A. L. REV. 13, 13-18 (1996). These comments refer to the unsuccessful prosecution of one of Mr. Bennett's higher profile clients—banker Robert Altman.

ment at a criminal trial or during the investigation may cause tension for the judge presiding in a case where he has prosecuted the defendant.¹⁵² As of early 1997, at least twenty-six states had constitutional amendments requiring that prosecutor's take into account "victim's rights"¹⁵³ and three others had laws requiring or permitting the same.¹⁵⁴ Under the auspices of these laws, prosecutors may be required to consult with, or in some cases seek the approval of, the victim or family about plea bargains.¹⁵⁵ Prosecutors may also be required to keep victims and their families apprised of the status of the investigation or trial, and elicit their testimony in a victims' impact statement post-conviction.¹⁵⁶ While there is not yet an exact federal analog to these state laws,¹⁵⁷ one federal statute requires prosecutors to assist criminal victims in obtaining compensation and in preparing victim impact statements.¹⁵⁸ This intense personal contact with a victim and/or his family may further personalize the crime the prosecutor is prosecuting. Thus, the relationship between a particular prosecutor and defendant may become even more adversarial and emotional.

¹⁵² See *Payne v. Tennessee*, 501 U.S. 808 (1991) (upholding impact statements as a legitimate part of trial, relevant to a jury's decision); GEORGE FLETCHER, WITH JUSTICE FOR SOME: VICTIMS' RIGHTS IN CRIMINAL TRIALS (1995); Carrie Mulholland, *Sentencing Criminals: The Constitutionality of Victims' Impact Statements*, 60 MO. L. REV. 731 (1995); Stellisa Scott, *Beyond the Victims' Bill of Rights: The Shield Becomes a Sword*, 36 ARIZ. L. REV. 249 (1994).

¹⁵³ See ALA. CONST. amend. 557; ALASKA CONST. art. I, § 24; ARIZ. CONST. art. II, § 2.1; CAL. CONST. art. I, § 28; COLO. CONST. art. II, § 16a; FLA. CONST. art. I, § 16(b); IDAHO CONST. art. I, § 22; ILL. CONST. art. I, § 8.1; IND. CONST. art. I, § 13(b); KAN. CONST. art. 15, § 15; MICH. CONST. art. I, § 24; MO. CONST. art. I, § 32; NEB. CONST. art. I, § 28; NEV. CONST. art. I, § 8; N.J. CONST. art. I, § 22; N.M. CONST. art. 2, § 24; N.C. CONST. art. I, § 37; OHIO CONST. art. I, §10(a); OKLA. CONST. art. II, § 34; R.I. CONST. art. I, § 23; S.C. CONST. art. I, § 24; TEX. CONST. art. I, § 30; UTAH CONST. art. I, § 28; VA. CONST. art. I, § 8-a; WASH. CONST. art. I, § 35; WIS. CONST. art. I, § 9m.

¹⁵⁴ GA. CODE ANN. § 17-8-55 (Michie Supp. 1993); MONT. CODE ANN. §§ 42-24-01 to 46-24-207 (1993); TENN. CODE ANN. § 24-7-116 (Supp. 1993).

¹⁵⁵ Robert Fichenberg, *The Controversial Victims' Rights Amendments*, 30 PROSECUTOR 5, 38-40 (1996).

¹⁵⁶ *Id.* See also John Albrecht, *The Rights and Needs of Victims of Crime: The Judges' Perspective*, 34 JUDGES' J. 1, 29 (1995).

¹⁵⁷ Numerous members of Congress have introduced a Victims' Rights Constitutional Amendment, which President Clinton endorsed during the 1996 Presidential campaign. As of yet, the amendment has made no headway in Congress. See Fichenberg, *supra* note 155, at 38.

¹⁵⁸ Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, 96 Stat. 1248 (codified as 18 U.S.C. §§ 3663-64) (1994). See Peggy Tobolowsky, *Restitution in the Federal Criminal Justice System*, 77 JUDICATURE 90 (1993).

The job of prosecutor involves at least four roles that may personalize a criminal action and demonize or dehumanize an individual defendant whether or not that person is convicted. From the highly discretionary and unreviewable decision to investigate and indict, to interaction with the media before, during and after trial, to the aggressive and necessary courtroom advocacy to win conviction, and substantial and substantive contact with the victim and her family, a prosecution is a substantial undertaking. At the very least, opportunities for bias against the defendant or suspect abound at every turn.

IV. PRACTICAL AND THEORETICAL PROBLEMS

In examining the practical problems with the current jurisprudence on due process, it is important to remember that not all bias can be eliminated. As Judge Jerome Frank noted:

[T]here can be no fair trial before a judge lacking in impartiality and disinterestedness. If, however, "bias" and "partiality" be defined to mean the total absence of preconceptions in the mind of the judge, then no one has ever had a fair trial and no one ever will. The human mind, even at infancy, is no blank piece of paper. We are born with predispositions Without acquired "slants," life could not go on. Interests, points of view, preferences, are the essence of living . . . [some of these interests] represent the community's most cherished values and ideal . . . and are part of the legal system itself.¹⁵⁹

These kinds of preconceptions—"interests, points of view and preferences"—cannot and should not be eliminated from judges' minds. They keep our legal system vital and connected with public mores and morals. Other "interests" that a reasonable judge may hold spring from personal contact, such as having been involved in prosecuting a particular individual. When an interest tainting the appearance of fairness comes from this kind of experience, it poisons the system.¹⁶⁰ That is not unavoidable bias, and it does nothing to foster the legitimacy of the legal system. As demonstrated by George Del Vecchio's case, bias can actually undermine the system by leaving questions about a judge's motivation, and the propriety of a death sentence.¹⁶¹

Thus, two important issues must be explored: first, how courts have underestimated how influential even neutral judges

¹⁵⁹ *In re Linahan*, 138 F.2d 650, 651-52 (2d Cir. 1943).

¹⁶⁰ Lewis, *supra* note 47, at 404.

¹⁶¹ See *supra* text accompanying notes 87-121.

are in jury trials. If neutral judges can strongly influence juries in myriad ways, common sense dictates that the law should vigorously attempt to exclude judges with a strong reason to be biased from hearing certain cases. Second, the failure of courts to properly examine their due process decisions in light of the values due process implicates and purports to uphold.

A. THE JUDICIAL IMPACT ON THE JURY

Judges play a substantial role in determining the outcome of a trial. However, it can always be exceptionally difficult for a judge to maintain neutrality, or for a defendant to challenge a judge's proclaimed neutrality. The judge may not even know she is biased against a defendant, or if she is, may incorrectly assume or rationalize away examples of bias in her decision-making process. Finally, a past record of criminal behavior has the potential to be extraordinarily prejudicial. When the criminal record is well known to the judge because she personally shaped it as a prosecutor, it is too much to ask a reasonable person to put that information aside and guarantee a defendant a fair and neutral trial.

Decisions on whether defendants can truly receive due process from judges who have previously prosecuted them have failed to fully consider the role trial judges play in trial outcome. One of the few judges to consider this issue wrote:

We cannot ignore the influence that the judge retains even in a jury trial. I do not refer so much to the ability of the judge to communicate his opinions to the jury through raised eyebrows, choice bits of sarcasm and questioning of the witnesses that strays into advocacy I mean the extraordinary ability of the trial judge to shape the trial itself She decides what evidence the jury may hear . . . what legal principles the jury must apply, and even, to a significant degree, who will sit on the jury. Thus, even when a verdict is not entrusted to her, a judge retains great influence, if not directly upon the jury, then upon the myriad events that culminate in the jury's decision.¹⁶²

When making all of these decisions, a judge necessarily filters them through the prism of her perceptions. It would be extremely difficult, if not impossible, for judges to divorce themselves from their preconceptions, especially when examining questions of fact. "[P]hysiological, psychological or emotional mechanisms may prevent assimilation of all the incoming in-

¹⁶² Collins v. Welborn, 81 F.3d 684, 701 (7th Cir. 1996) (Rovner, J., dissenting), *rev'd sub nom.* Bracy v. Gramley, 117 S. Ct. 1793 (1997).

formation, forcing judges . . . to process only those pieces of information that conform to their preexisting cultural and social biases."¹⁶³ By extension, it seems natural that a prosecutor, who may have developed deep-seated feelings about a particular defendant through the adversarial system,¹⁶⁴ would fail to shed those feelings upon becoming a judge, and would process pieces of information through the prosecutorial prism.

In addition, in an overburdened legal system (such as many state and federal jurisdictions are) where judges do not have sufficient time to gather or evaluate information, judges may be more likely to rely on their own preconceived notions and mold the limited information they receive to those expectations.¹⁶⁵ Buttressing this, lawyers often rely on stereotypes, portraying defendants as career criminals or social deviants.¹⁶⁶ And, as one commentator points out:

[M]ost judges strive diligently to avoid bias . . . in making their decisions and firmly believe their rulings are free from extraneous influences. But psychologists tell us it is easy for persons to rationalize their behavior; individuals can almost always find excellent grounds for doing what they want to do. Therefore, the bases judges give for their decisions could be rationalizations or afterthoughts and not real determinants.¹⁶⁷

The issue of post-judgment rationalization causes problems from the very outset of a trial. When the defendant moves at a trial's inception to have the judge removed from the case for bias, that judge paradoxically determines the merits of the motion.¹⁶⁸ This raises concern because:

[W]hen a party claims a judge's known passions and opinions will prevent her from deciding according to the law . . . the judge can construe the affidavits as setting forth conclusions rather than facts [and] can assert a willingness to set aside extrajudicial views in court . . . [W]riting an opinion in this mode may prop up the judge's sense of her own recti-

¹⁶³ Donald C. Nugent, *Judicial Bias*, 42 CLEV. ST. L. REV. 1, 6 (1994). Nugent points out that these factors operate both consciously and unconsciously. *Id.*

¹⁶⁴ See *supra* text accompanying notes 131-58.

¹⁶⁵ Nugent, *supra* note 163, at 14.

¹⁶⁶ *Id.* at 12.

¹⁶⁷ *Id.* at 6-7 (footnotes omitted).

¹⁶⁸ Jeffrey W. Stempel, *Rehnquist, Recusal and Reform*, 53 BROOK. L. REV. 589, 633 (1987). Although it is beyond the scope of this Comment, Stempel's article contains interesting insights on this portion of the recusal conundrum, and an extremely sharp criticism of then-Justice Rehnquist's refusal to recuse himself in *Laird v. Tatum*, 408 U.S. 1 (1972), a case about which he testified before Congress as an Assistant Attorney General for the Office of Legal Counsel in the Nixon Administration. Stempel, *supra*, at 633.

tude; reading it often increases one's own dismay that the judge insists on sitting.¹⁶⁹

In one respect, allowing judges to determine their own fitness to sit in cases makes sense because they have subjective knowledge about their own bias. However, the possibility of unacknowledged and unseen motives is troublesome. As the Supreme Court has noted, "when [a] trial judge is discovered to have had some basis for rendering a bias judgment, his actual motivations are hidden from review."¹⁷⁰ Moreover, winning on appellate review is difficult, if not impossible, because proof of improper motives must often be made inferentially. It is "incredibly difficult to prove these matters, particularly if the . . . adjudicator resists admitting bias."¹⁷¹ In light of this, when "litigants seeking to recuse unfavorable judges file motions, judges either step aside or resist, with the most biased judges the least willing to withdraw"¹⁷²

This is not to suggest that more than a few judges purposely act with bias against defendants. Nor does this analysis suggest that prosecutors-turned-judges knowingly hide their motives when they refuse to recuse themselves in certain cases. However, armed with the knowledge that judges may make decisions to square with their own preconceptions of defendants and offer justifications, a more vigorous enforcement of the "appearance of justice" standard is merited.

A series of articles by Peter David Blanck highlights two issues of particular concern: the difficulty in obtaining the appearance of fairness, and the enormous control judges exercise over trials.¹⁷³ Blanck's articles are based on a series of empirical studies showing that the "appearance of justice as reflected in judges' behavior alone could predict the verdicts returned by juries, as well as other aspects of juries' decision-making proc-

¹⁶⁹ Leubsdorf, *supra* note 4, at 243-44 (footnotes omitted).

¹⁷⁰ Vasquez v. Hillery, 474 U.S. 254, 263 (1986).

¹⁷¹ Leubsdorf, *supra* note 4, at 277 (footnotes omitted). See also *Del Vecchio I*, 8 F.3d 509, 516 n.6 (7th Cir. 1993). Additionally, a trial by a potentially biased adjudicator cannot be constitutionally remedied by having an unbiased appellate court review the case. See *Ward v. Village of Monroeville*, 409 U.S. 57, 61 (1972).

¹⁷² Leubsdorf, *supra* note 4, at 245.

¹⁷³ Blanck, *supra* note 4; Peter David Blanck, *What Empirical Research Tells Us: Studying Judges' and Juries' Behavior*, 40 AM. U. L. REV. 775 (1991) [hereinafter Blanck, *What Empirical Research Tells Us*]; Peter David Blanck et al., *The Measure of the Judge: An Empirically-Based Framework for Exploring Trial Judges' Behavior*, 75 IOWA L. REV. 653 (1990).

esses."¹⁷⁴ Blanck also notes the consensus that "juries accord great weight and deference to even the most subtle behaviors of the judge."¹⁷⁵ Not surprisingly, according to Blanck, a judge's behavior is often predicated on his conceptions of the defendant.¹⁷⁶ Most alarming, judges tend to expect a guilty verdict when the defendant has a relatively serious criminal history.¹⁷⁷ And, although criminal history should have no bearing on a determination of guilt or innocence in an unrelated proceeding, it appears to "influence judges' expectations for trial outcomes in predictable ways."¹⁷⁸ Expectations or predictions of certain outcomes in trials may influence judges to reveal what they think the trial's outcome should be.¹⁷⁹ This behavior can turn into a self-fulfilling prophecy and prejudice a jury against the defendant.¹⁸⁰

A judge's knowledge of a defendant's criminal history—ordinarily not available to a jury unless a defendant testifies—can "reveal to juries [the judge's] underlying beliefs about defendants through nonverbal channels."¹⁸¹ The judge's behavior alone may convey a message to jurors concerning the defendant's guilt or innocence.¹⁸² Studies indicate that this information relates to a judge's behavior when she instructs a jury.¹⁸³ This behavior influences juries' verdicts more often than is assumed,¹⁸⁴ particularly in cases where the evidence is close.¹⁸⁵ If this empirical research is accurate, the danger of allowing defendants to be tried by judges who previously prosecuted them is obvious, both to the appearance of justice, and in subtler ways, to the actual fairness of the trial.

Although not addressed in Blanck's study, a judge's own participation in the creation of the defendant's criminal history

¹⁷⁴ Blanck, *supra* note 4, at 898; *see also* Shoretz, *supra* note 106, at 1274.

¹⁷⁵ Blanck, *supra* note 4, at 892.

¹⁷⁶ *Id.* at 891-92.

¹⁷⁷ *Id.* at 898.

¹⁷⁸ *Id.*

¹⁷⁹ *See* Shoretz, *supra* note 106, at 1281.

¹⁸⁰ Blanck, *What Empirical Research Tells Us*, *supra* note 173, at 784.

¹⁸¹ Blanck, *supra* note 4, at 898.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ Blanck, *What Empirical Research Tells Us*, *supra* note 173, at 792-93.

¹⁸⁵ Blanck, *supra* note 4, at 899.

clearly aggravates this problem. In cases such as *Bordenkircher*¹⁸⁶ and *Lyles*,¹⁸⁷ where the judge previously prosecuted the defendant, or *Del Vecchio*,¹⁸⁸ where the initial prosecution was for a brutal and notorious murder, the judge's role in creating the defendant's criminal record could exacerbate the negative inferences that a detached judge could draw about the defendant. The "leaks" to the jury through verbal and non-verbal channels might be more pronounced than in an ordinary trial.¹⁸⁹ They may be heightened if the judge feels, consciously or unconsciously, his previous prosecution was faulty in some way and allowed the defendant lenient punishment, or failed to convict. In rare instances, these "leaks" may be so flagrant as to cause an appellate court to reverse the jury verdict.¹⁹⁰ However, this net's mesh is not fine enough to remedy the problem—defense attorneys face substantial obstacles in winning new trials because of a judge's "leaks" to the jury.¹⁹¹ Obviously, this problem would only be amplified when a defendant like George Del Vecchio (who did not recall Judge Garippo at the outset of his trial) chooses a bench trial. If the defendant recognizes the judge, and the judge chooses to hear the case, she is functionally deprived of a bench trial.

Given these factors, to ensure both actual impartiality and the appearance of justice, a strong constitutional rule of recusal is mandated. A prophylactic shield taking into account the practical reality that a judge who helped form a defendant's criminal record through active participation in the adversarial system would alleviate some of these problems.¹⁹²

¹⁸⁶ *Jenkins v. Bordenkircher*, 611 F.2d 162 (6th Cir. 1979).

¹⁸⁷ *Layer v. Lyles*, 598 F. Supp. 95 (D. Md. 1984), *aff'd*, 767 F.2d 912 (4th Cir. 1985).

¹⁸⁸ *Del Vecchio II*, 31 F.3d 1363 (7th Cir. 1994) (en banc), *cert. denied*, 115 S. Ct. 1404 (1995).

¹⁸⁹ See Blanck, *supra* note 4, at 898-99. Blanck suggests that a judge's attitude can "leak" to the jury as indicated by the tone of his voice, or his verbal demeanor. *Id.* This might also occur non-verbally through body language, shrugs, ignoring the defendant, inattention and disapproving facial expressions. See Shoretz, *supra* note 106, at 1275-80.

¹⁹⁰ Shoretz, *supra* note 106, at 1287.

¹⁹¹ *Id.* at 1283-85.

¹⁹² Although prophylactic rules are not favored, they are not forbidden either. See Joseph D. Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 Nw. U. L. REV. 100, 103 (1985).

V. THE PHILOSOPHICAL UNDERPINNINGS OF DUE PROCESS

In addition to the practical dangers discussed, the current status of constitutional recusal law fails to account for the participatory, dignitary and legitimizing functions of the law. To borrow an analogy, constructing such a due process house without sufficient minimum floors protecting these interests is no house at all.¹⁹³

There are generally two conceptions of due process: instrumental and non-instrumental.¹⁹⁴ The protections of a genuinely neutral adjudicator are essential to all the values served by these conceptions, including accuracy, equality, preservation of the state's accusatory burden, respect for the personal dignity of the defendant and the defendant's participation.¹⁹⁵ This Section highlights how the current system of optional recusal in trials where the judge has previously prosecuted the defendant undermines these primary values.

The instrumental theory of due process places the highest premium on procedures that achieve accurate fact-finding in an efficient manner.¹⁹⁶ Processes designed to efficiently arrive at truth are most highly desired.¹⁹⁷ The Supreme Court adopted and defined the instrumental view in *Matthews v. Eldridge*.¹⁹⁸ *Matthews* identified three relevant factors to weigh in determining what process was due a party in an administrative hearing: first, the private interest affected by the official action; second, the risk of erroneous deprivation of the interest and the value additional safeguards might add; and third, the burden on government that the additional safeguard would impose.¹⁹⁹

In this context, the right involved is the defendant's liberty interest, and his freedom from erroneous conviction. There is a variable risk of erroneous deprivation (depending on the level of involvement the judge had in the prior prosecution, and how

¹⁹³ See Redish & Marshall, *supra* note 2, at 473.

¹⁹⁴ *Id.* at 475-91. See also Lewis, *supra* note 47, at 390-401 (referring to conceptions as instrumental and intrinsic due process); John R. Allison, *Combinations of Decision-Making Functions, Ex Parte Communications, and Related Biasing Influences: A Process-Value Analysis*, 1993 UTAH L. REV. 1135.

¹⁹⁵ See Redish & Marshall, *supra* note 2, at 475-91.

¹⁹⁶ Allison, *supra* note 194, at 1135 & n.1.

¹⁹⁷ Lewis, *supra* note 47, at 390.

¹⁹⁸ 424 U.S. 319 (1976).

¹⁹⁹ *Id.* at 335 (citations omitted).

effectively she checks the factors Blanck notes²⁰⁰). This risk can be avoided by mandating recusal pre-trial where the judge actively participated in the defendant's previous trial. Arguably, the cost of a prophylactic, mandatory recusal is lower than multiple appeals to determine (perhaps fruitlessly) whether there was actual bias, or the appearance of bias was so great as to mandate a new trial.

Another due process value (or as Jerold Israel calls it "a cornerstone of the criminal justice system"²⁰¹) is the discovery of truth. This differs from the purely instrumental approach because the search for truth does not tolerate bias in favor of efficiency.²⁰² This search for truth probes into minute allegations of bias difficult to root out, regardless of cost (such as the kind of bias explored in this Comment).²⁰³ As applied to *Del Vecchio*,²⁰⁴ for example, that might mean allowing the defendant intense and searching discovery in order to probe every facet of Judge Garippo's attitude and actions towards him. The search for truth alone is inadequate by itself to promote a strong prophylactic recusal standard because it does not at all account for appearances. In *Del Vecchio II*, as Judge Cummings noted—conceding for argument's sake that no actual bias existed—there was still an indelible stain over *Del Vecchio*'s death sentence merely because Garippo presided.²⁰⁵ Thus, the search for truth is not always paramount in the criminal process, both on epistemological grounds and because truth finding may subvert fairness goals such as "preservation of human dignity and personal autonomy."²⁰⁶

The protection of human dignity is a cornerstone of the criminal process, and a core non-instrumental value of due process. Non-instrumental values do not focus on the result of ac-

²⁰⁰ See discussion *supra* Parts III & IV.A.

²⁰¹ Jerold H. Israel, *Cornerstones of the Judicial Process*, 2 KAN. J.L. & PUB. POL'Y 5, 6 (1993).

²⁰² *Id.* at 6, 11-12.

²⁰³ *Id.*

²⁰⁴ See discussion *supra* notes 87-121.

²⁰⁵ *Del Vecchio II*, 31 F.3d 1363, 1397 (7th Cir. 1994) (en banc) (Cummings, J., dissenting), *cert. denied*, 115 S. Ct. 1404 (1995).

²⁰⁶ Israel, *supra* note 201, at 12. Preserving these values despite the fact that they may hinder fact-finding is why defendants have protections including the right against self-incrimination, protection against warrantless searches and the right to counsel. *Id.*

curacy, but rather ensuring that the truth can be arrived at fairly using adequate procedural safeguards.²⁰⁷ Non-instrumental values primarily emphasize a party's right to participate in the decision-making process.²⁰⁸

The non-instrumental approach emphasizes the appearance of fairness as a key to due process.²⁰⁹ Some commentators recognize the Supreme Court's stamp of approval to recognition of these values: "even if a given procedure does not clearly advance accuracy, it generates 'the feeling, so important to popular government, that justice has been done.'"²¹⁰ To feel that justice has been done, fairness must be guaranteed and delivered upon: "[t]he fact that criminal justice procedures are fair is not sufficient; the procedures must also be seen as fair (and fairly administered) by both its participants and the public. The appearance of fairness . . . is vital to maintain the public confidence."²¹¹ This appearance of fairness is what distinguishes outlaws from the government. Government must play by fair, neutral rules, even when those rules act to its detriment. If it fails to honor those rules, or stacks the deck in its favor, it is little better than the criminals it prosecutes, from a due process standpoint.

As Professors Redish and Marshall point out, "[f]ew situations more severely threaten [the appearance of fairness] than the perception that a litigant never had a chance because the decisionmaker may have owed the other side special favors."²¹² If defendants are perceived to have been convicted by judges for reasons of bias, and not because they actually violated laws, institutional faith in the justice system may be diminished, decreasing respect for the rule of law.

To prevent this, the perception of fairness requires that a judge be disqualified from a case if she has an identifiable potential bias.²¹³ This Comment has already identified potential biases inherent in a judge overseeing a case where she previ-

²⁰⁷ See Redish & Marshall, *supra* note 2, at 483.

²⁰⁸ See Lewis, *supra* note 47, at 394.

²⁰⁹ Redish & Marshall, *supra* note 2, at 483.

²¹⁰ *Id.* at 483 (quoting *Joint Anti-Facist Refugee Comm. v. McGrath*, 341 U.S. 123, 172 (1951) (Frankfurter, J., concurring)).

²¹¹ Israel, *supra* note 201, at 20.

²¹² Redish & Marshall, *supra* note 2, at 483.

²¹³ *Id.*

ously prosecuted the defendant: revenge for failed prosecution; disappointment that exercises of prosecutorial discretion resulting in leniency failed to assist in the defendant's rehabilitation; and fear of looking "soft" a second time in front of the electorate in a competitive or retentive election.²¹⁴ Putting aside whether these biases could be sufficiently avoided to guarantee a fair trial, the appearance of unfairness still exists. Judges Mannion and Easterbrook's majority and concurring opinions in *Del Vecchio II* highlight the jurisprudential failure to take this appearance problem seriously enough.²¹⁵

Respecting the dignity of the individual is another cornerstone of the criminal justice system.²¹⁶ Dignity includes the "basic needs of the human personality, including . . . freedom from humiliation and abuse."²¹⁷ This element of due process is justified because "all persons, including criminals, are entitled to governmental respect for their dignity as an inherent element of the social compact [that] provides the foundation for a democratic society."²¹⁸ In the face of society's vigilant desire to solve crimes and impose severe sanctions (sometimes at all costs) on suspects, human dignity must be preserved by employing procedural safeguards.²¹⁹

This means not subjecting an accused defendant to a trial where the judge has previously prosecuted her. Where the judge participated as a prosecutor in a previous trial, the judge likely drew negative conclusions about the defendant in deciding to bring charges. She may have harshly condemned the defendant in the courtroom or media, challenged her veracity, or portrayed her as defective or immoral in some way. To be tried by this same person does not keep the defendant free from humiliation or abuse, nor does it protect her dignity.²²⁰

²¹⁴ See *supra* Part II (discussion of *Del Vecchio* dissents).

²¹⁵ *Del Vecchio II*, 31 F.3d 1363 (7th Cir. 1994) (en banc), cert. denied, 115 S. Ct. 1404 (1995).

²¹⁶ Israel, *supra* note 201, at 19.

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ It is important to again emphasize that nothing is wrong with prosecutors vigorously exercising their duties. The problem is the incompatibility of exercising this duty against a defendant and later exercising the far more restrained and dispassionate judicial function against the same person.

An interest that serves both instrumental and non-instrumental due process values is the state's accusatorial burden.²²¹ Putting greater burdens on the state acknowledges its greater resources, enabling it to gather facts more easily. The burden is non-instrumental in that it relies on the premise that the accused is innocent unless and until the state meets very high burdens.²²² The purpose of the presumption is to force judgment of the "accused's guilt or innocence solely on the evidence adduced at trial."²²³ Allowing judges to try defendants they have prosecuted may undermine this burden. Professor Blanck's conclusion and concerns about the effect of a judge's knowledge of a defendant's inadmissible criminal past (which would ordinarily come from second hand documentary evidence)²²⁴ can only be amplified where a judge knows about a defendant's criminal record (or other bad acts) from previously prosecuting him. Although empirical evidence is lacking on this point, the possibility of lessening the burden is apparent.

Another non-instrumental value due process should serve is equality.²²⁵ At bottom, this embodies the ideal that a judge should not favor one side's facts or contentions for reasons extrinsic to their accuracy or legal merits.²²⁶ "[S]imilarly situated defendants must be treated alike . . . distinctions drawn between defendants must be based on grounds that are" not based on impermissible factors.²²⁷ This value also implicates instrumental concerns—when a judge treats defendants unequally, the "truth" is more difficult to ascertain.²²⁸ Again, prior participation with the defendant's previous prosecutions weakens the defendant's opportunity to receive actual equal treatment, and diminishes the appearance of fairness.

Other values due process in the criminal justice system seeks to promote are predictability, transparency, rationality and participation.²²⁹ The first three factors are designed to facilitate

²²¹ See Israel, *supra* note 201, at 15-16.

²²² *Id.*

²²³ *Id.* at 16.

²²⁴ Blanck, *supra* note 4, at 898.

²²⁵ See Redish & Marshall, *supra* note 2, at 483-84.

²²⁶ *Id.*

²²⁷ Israel, *supra* note 201, at 21.

²²⁸ See Redish & Marshall, *supra* note 2, at 484.

²²⁹ See *id.* at 485-89.

understanding of a judge's decision-making rationale.²³⁰ The public planning its future behavior, and other defendants awaiting trial, must be confident that the "evidence . . . [was] in fact meaningful to the outcome," lest they fear that the rule of law is supplanted by judicial fiat.²³¹ If the decision-maker is using irrelevant or forbidden criteria stemming from bias against the defendant (including first-hand knowledge of prior prosecutions), these goals are badly compromised.

Finally, due process should protect participation.²³² "[T]he participation value recognizes an individual's interest in confronting the decision-maker in order to attempt to persuade her to rule in his favor, or alternatively, to gain the psychological satisfaction of having had some input into the decision."²³³ These goals are frustrated if the defendant has little or no chance of changing the judge's mind. If the defendant believes the prosecutor-turned-judge is biased against him because of his criminal activity, he may not even attempt to meaningfully participate in his own trial, believing that the outcome is preordained.

VI. CONCLUSION

A judge sitting in a case where he has previously prosecuted a defendant implicates due process concerns if he actually participated in the prosecution. The issues discussed here strike at deeply held notions of due process and fairness—criminal defendants should not be able to invoke them without showing that they are likely to be present. As the Fifth Circuit noted in *Mangum v. Hargett*,²³⁴ concerns about non-financial or kinship bias are only relevant where the judge participated in the earlier prosecution, and participation requires "active involvement."²³⁵

Participation may take many forms—certainly Judge Garippo's prosecutorial activities in George Del Vecchio's first murder trial constituted "active involvement."²³⁶ He exercised substantial discretion in charging and sentencing. Other participation includes the functions this Comment discusses: the

²³⁰ *Id.*

²³¹ *Id.* at 486 (citations and emphasis omitted).

²³² *Id.* at 488.

²³³ *Id.*

²³⁴ 67 F.3d 80, 83-84 (5th Cir. 1995).

²³⁵ *Id.*

²³⁶ See *supra* discussion accompanying notes 87-121.

decision to investigate and attempt to indict; participation in the adversarial state of the trial; contact with the media about the case; and fulfillment of the requirements of victims' rights laws. If the judge has had previous involvement of any of these types (or similar to it) with the defendant, the concerns raised here are implicated.

Although courts have not recognized the problem, a criminal defendant's right to a fair trial is compromised when the sitting judge has previously prosecuted him. The bias, which may arise, or the stain on the appearance of justice, is greater and more dangerous than the bias we should allow. Because these dangers are personal and specific between one defendant and one judge, it is always possible to find a less interested decision-maker. The failure to do so in George Del Vecchio's capital murder case left a "cloud of doubt that now and forever hangs over the Del Vecchio trial that the judge was irremediably biased."²³⁷

As two academics have noted, "[t]o the extent that the [bias] includes . . . avoidable predisposition, courts should respond as in the case of a judge with a direct financial interest in the outcome of the case."²³⁸ Although not all courts recognize this, heeding this admonition fits within Supreme Court precedent, recognizes due process and practical concerns, and can avoid placing serious doubts on the fairness of criminal convictions—including those involving the ultimate penalty.

²³⁷ *Del Vecchio II*, 31 F.3d 1363, 1398 (7th Cir. 1994) (en banc) (Cummings, J., dissenting), *cert. denied*, 115 S. Ct. 1404 (1995).

²³⁸ Redish & Marshall, *supra* note 2, at 501.