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Making Moral Sense of the Law on Bias: Public Confidence in the Rule of Law

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Introduction

1. According to the standard, textbook view, the law on bias is concerned with public perception. The public can only have confidence in the administration of justice, on this view, if there is no *appearance* of bias on the part of an official decision-maker. It is of secondary importance whether a decision-maker's interest or conduct *in fact* caused unfairness to the complainant. My aim in this article is invert this orthodoxy (and with it, the celebrated ruling of Lord Hewart in *McCarthy* that it seeks to resurrect). Drawing on the 'interpretive' legal theory of Ronald Dworkin, I contend that judicial decisions on bias do not plausibly give effect to public perception; and I say that public perception is, in any case, a poor moral basis for public confidence. This area of law makes better empirical and moral sense when understood in terms of judicial assessments of *actual unfairness*.

2. The article is in four parts. I begin with an elaboration of the orthodox understanding of the law of bias. I then consider two illustrative cases which cast doubt on that understanding, in that judges appear to *disagree* about the correct legal test. I then briefly examine contrasting understandings of these disagreements through the lens of a positivist and interpretive (anti-positivist) theory of law, settling on the latter. That takes me to the central preoccupation of the article: an interpretive defence of an actual unfairness conception of bias. My core argument is that public confidence is best secured if courts assess bias complaints consistently in light of established principles of justice and fairness. It is best secured, that is, by the rule of law.

The standard picture

3. What is the law of bias in England? Most lawyers, I venture to say, will answer that question with a near identikit rehearsal of the leading cases. Call this the 'standard picture'.[1]

[1]For a particularly clear statement of this picture, see Timothy Endicott and Joanna Bell, 'Determining Bias: A survey of the law in the United Kingdom', *Oxford Pro Bono Publico* (January 2020) <https://www.law.ox.ac.uk/sites/default/files/migrated/opbp_death_penalty_and_bias_final.pdf> accessed 27 June 2025.

The current legal test, they will say, is the one laid down by Lord Hope in *Porter v Magill*.[2] Courts should ask:

4. 'Whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased'.[3]

5. This 'fair-minded … observer' test replaces the earlier 'real danger' test laid down by Lord Goff in *R v Gough*:

> Having ascertained the relevant circumstances, the court should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him.[4]

6. Lord Hope's test 'modifies' Lord Goff's 'real danger' test in two key ways, both of which are designed to engender public confidence in the administration of justice.[5] First, it shifts the *perspective* from which the courts must assess bias away from judges, to an 'objective' (notional) representative of the public,[6] in line with the jurisprudence of the European Court of Human Rights,[7] and the earlier decision in *McCarthy*.[8] In this way, the test is concerned, not with whether the conduct in fact causes unfairness to a party, but with whether there is the appearance of bias, or the public perception of bias.[9] Secondly, it relaxes the *degree of probability* that the observer will find bias from one of 'real danger' to a 'real possibility', lowering the threshold at which courts will make a finding of bias. It allows that judges may disqualify a decision-maker even where the conduct in question does not cause actual unfairness to the complainant.[10]

A fly in the ointment: judicial disagreement

7. The standard picture is one of stability and consensus.[11] Yet when one examines recent case law, things appear to be more complicated. Judges frequently reason, at least in substance, more in terms of the *Gough* 'real danger' test than the *Porter v*

[2]I shall assume for the purposes of my argument that there is, on the standard view, a *single* test of bias. I take up this question in my conclusion below.
[3]*Porter v Magill* [2001] UKHL 67, [2002] 2 AC 357 [103].
[4]*R v Gough* [1993] AC 646.
[5]See the discussion of Lord Phillips in *In re Medicaments and Related Classes of Goods (No 2)* [2001] 1 WLR 700.
[6]According to Lord Goff, it was not appropriate to adopt the standpoint of a reasonable man, external to the court, since 'the court … personifies the reasonable man; and in any event the court has first to ascertain the relevant circumstances from the available evidence, knowledge of which would not necessarily be available to an observer in court at the relevant time'. See *Gough* (n 4) 670.
[7]See e.g. *Findlay v UK* (1997) 24 EHRR 221 [73].
[8]*R v Sussex Justices ex p McCarthy* [1924] 1 KB 256, Lord Hewart famously said that '[I]t is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done'.
[9]As Lord Steyn put it in *Lawal v Northern Spirit Ltd* [2003] UKHL 35 [14], 'Public perception of the possibility of unconscious bias is the key [to the law of bias]'.
[10]For discussion of how the different tests will likely generate different results, see *Medicaments* (n 5) [55]–[69].
[11]Indeed, Lord Hope prefaces his articulation of the 'fair-minded … observer' test in *Porter* (n 3) [101] with the words 'it is now possible to set [the debate about the law of bias] to rest'. For past confusion about the legal tests of bias, see HWR Wade and CF Forsyth, *Administrative Law* (11th edn, Oxford University Press 2014) 386–387.

Magill 'fair-minded … observer' test. More generally, one finds that different courts, and/or different judges within the same court, *disagree* about the correct legal test; hence, they disagree about the correct way to decide the case. Let me illustrate this pattern using two leading cases.

8. In *Belize Bank*, the Privy Council had to decide whether a board set up to hear a statutory appeal on the validity of a government directive, issued by the Central Bank, was tainted by bias.[12] The directive ordered Belize Bank Ltd to transfer US$10 million to the Belize Government. Belize Bank Ltd argued that bias arose by virtue of the position on the board of two former employees of the Bank, appointed by the then Prime Minister qua Finance Minister, who had favoured using the same US$10 million to repay a Government backed loan to Venezuela.

9. Lord Kerr, giving the majority judgment, certainly *claims* to be applying the 'fair-minded … observer' test. He reiterates Lord Hope's emphasis on public perception, offering widely cited guidance on how courts should achieve the objective perspective required for assessment of bias. For instance, he insists that:

> [O]ne needs to be alert to the danger of transforming the observer from his essential condition of disinterested yet informed neutrality to that of someone who, by dint of his engagement in the system that has generated the challenge, has acquired something of an insider's status.[13]

10. Yet the substance of his reasoning feels much closer to a *Gough*-style judicial assessment of actual unfairness. For example, in language that one might associate with the job description of a judge, he says:

> The concept of apparent bias does not rest on impression based on an incomplete picture but on a fair and reasoned judgment formed as a result of composed and considered appraisal of the relevant facts.[14]

11. Applying that dictum, he says that '[i]t would be necessary for the observer to be aware of' the following:

> [T]he general structure of the system of appeal from the Central Bank's directive; to be conscious that this is a procedure under which the minister is statutorily authorised to appoint members of the Board; to have in mind that there is a limited pool of candidates who might fill the position; to be aware that the appointees are required to take the oath of office; and to take into account that the minister's appointees cannot outvote the chairman and that the appointment of the chairman has nothing to do with the minister.[15]

[12] *Belize Bank Ltd v Attorney General of Belize* [2011] UKPC 36.
[13] ibid [38].
[14] ibid [41]. Cf *Taylor v Lawrence* [2002] EWCA Civ 90, [2003] QB 528. In deciding that a judge was not disqualified by the fact that solicitors acting in the case were representing him in relation to his will, Lord Woolf said at [61]: 'The informed observer can be expected to be aware of the legal traditions and culture of this jurisdiction … '.
[15] *Belize Bank* (n 12) [40].

12. Contrary to his own warnings about making the observer an 'insider' rather than an external observer, Lord Kerr here arguably assimilates the observer to a judge, imbuing him with a judge-like temperament, and a judge's detailed knowledge of the relevant legislative scheme and institutional safeguards.[16] This is the *Gough* 'real danger' test in all but name. Indeed, Lord Brown makes precisely this charge in his dissenting judgment. Quoting a lecture given by Lord Rodger,[17] he urges that judges must not 'distance the notional observer from the ordinary man in the street who does not know these things [which we might read here as: the things attributed to him by Lord Kerr]'.[18] Failing to define the observer in the correct way, he says, will 'bring the court into disrepute',[19] undermining confidence in the administration of justice.[20]

13. I now come to the second illustration of disharmony in the case law. In the conjoined appeals *R v Abdroikov*, *R v Green* and *R v Wilkinson*[21] (hereafter *Abdroikov)* the majority (Lord Bingham, Baroness Hale and Lord Mance) held, in relation to the second and third of the appeals, but not the first, that the presence on juries of a police officer and a Crown Prosecution Service (CPS) lawyer respectively gave rise to the appearance of bias. I shall consider the reasoning that led to the majority decision in some detail below.[22] Suffice it to say for now that it plausibly accords with the 'ordinary man' understanding of the 'fair minded … observer' test espoused by Lord Brown (following Lord Rodger) above.

14. I want to focus instead on the dissenting judgments of Lord Rodger and Lord Carswell. Here, again, we see a disjunction between the test the Judges *say* they are applying, and the one they apply in substance. Both Judges *purport* to adopt the perspective of a notional observer, but the substance of their reasoning is far more in line with the *judicial* perspective associated with *Gough*. Consider, first, the comprehensive *knowledge* of the law ascribed to the observer by the Judges.

15. The observer, they tell us, would have knowledge of the detailed history of legislative reform in relation to jurors, including the contrasting recommendations of the Morris and Auld reports;[23] knowledge of the reasons for which Parliament decided to reject the former recommendations in favour of the latter;[24] knowledge of the decisions in

[16]See Mark Elliott, 'The Appearance of Bias, the Fair-Minded and Informed Observer, and the "Ordinary Person in Queen Market Square"' (2012) 71(2) CLJ 247, 249.
[17]Lord Rodger of Earlsferry, 'Bias and Conflicts of Interests – Challenges for Today's Decision-Makers', Twenty-Fourth Sultan Azlan Shah Law Lecture, 6 October 2010 <https://www.sultanazlanshah.com/pdf/2011%20Book/SAS_Lecture_24.pdf> accessed 27 June 2025.
[18]*Belize Bank* (n 12) [99] quoting Lord Rodger (n 17) 467.
[19]ibid.
[20]Applying this 'ordinary man' version of the test, Lord Brown concludes that a number of facts about the appointment of the Board give rise to the appearance of bias, notwithstanding the safeguards listed by Lord Kerr, for example the speed with which the appointments were made: ibid [112].
[21][2007] UKHL 37, [2008] 1 All ER 315.
[22]See paras 44–53 of this article.
[23]*Abdroikov* (n 21) [62]–[64].
[24]ibid [57]–[59].

Porter and *McCarthy*;[25] knowledge that Parliament was aware of those judicial decisions when it enacted the Criminal Justice Act 2003 (which makes police officer and jurors eligible for jury service); knowledge that the Criminal Justice Act 2003 reflected a broad legislative trajectory of trusting juries, as illustrated by greater admissibility of hearsay evidence;[26] detailed knowledge of the institutional safeguards attending the role of jurors, for instance, the requirement that a judge will direct jurors to assess evidence impartially, the need for a verdict-by-a-majority and, failing that, the power of a judge to discharge the jury;[27] and knowledge of the professional qualities of CPS lawyers in assessing evidence free from pressure.[28]

16. As with Lord Kerr's realisation of the observer in *Belize Bank*, this observer might apply with great confidence to the Supreme Court come the next vacancy.[29]

17. Let us now turn to the *degree of probability* employed by Lords Rodger and Carswell. Each of the Judges uses the *language* of the 'real possibility' test, rather than Lord Goff's 'real danger' test; yet their reasoning in substance is far more in tune with the higher threshold reflected in the latter test. I have highlighted key phrases to this effect using italics. Lord Rodger says, for example:

> [The] success [of the different safeguards in place to manage the risk of the appearance of bias] is not left to chance. *If there is an unacceptable risk* of a juror going wrong if [e.g.] he was a friend of the defendant or of the victim … or signed a petition for defendant to be prosecuted … the law would hold that such a person should be discharged from sitting on the jury.[30]

18. The jurors in these appeals, he said, had:

> *no particular contact* of these kinds. The objection is simply to the verdict of a jury which included a police officer or CPS lawyer, that alone is said to mean that there is a real possibility that the jury was biased … [31]

19. Similarly, Lord Carswell says:

> [T]he fair minded and informed observer would not necessarily conclude that the mere presence on a jury of a police officer or CPS staff member would create such a possibility of bias as to deny the defendant a fair trial. *Such an observer would … wish to know more about the circumstances of the case, the issues to be decided, the background of the juror in question and the closeness of any connection which he or she might have to the case to be tried.*[32]

[25] ibid [66]. *Porter* (n 3); *McCarthy* (n 8).
[26] *Abdroikov* (n 21) [55].
[27] ibid [33].
[28] ibid [40].
[29] These are but two judicial decisions, but they can hardly be said to be outliers. Many commentators point to a trend in the case law of assimilating the observer to a judge. See e.g. Abimbola A Olowofoyeku, 'Bias and the Informed Observer: A Call for a Return to Gough' (2012) 68(2) CLJ 388; Ivan Hare KC, Catherine Donnelly SC and Joanna Bell, *De Smith's Judicial Review* (Sweet & Maxwell 2023) 12.019–12.023.
[30] *Abdroikov* (n 21) [35].
[31] ibid [37].
[32] ibid [68].

The requirements of 'unacceptable risk', 'particular contact' and the need to examine all the 'circumstances of the case' echo the precise reasoning of Lord Goff in *Gough*.[33] On their face, they merely tinker with the standard of proof in such cases; but, in substance, I suggest, they point to a qualitatively different type of inquiry to that envisioned by the standard picture, one concerned with actual rather than perceived unfairness.

Three contrasting diagnoses: status quo ante, dog's dinner, or genuine disagreement?

20. What do the differences in judicial reasoning of the sort seen in *Belize Bank* and *Abdroikov* tell us about the status of the standard picture of bias outlined above?

21. The most common response is that the public perception test in *Porter v Magill* remains good law, in line with the standard picture, *despite* these differences.[34] Those judges who reason in terms the *Gough* 'real danger' test, on this view, are simply misapplying the law, whether consciously or unconsciously.[35] The answer to this tendency, such respondents say, is for judges to 'make greater efforts'[36] in future to reason in a way that is more faithful to the 'fair-minded … observer' test and its public perception rationale.

22. The second response is perhaps a more surprising one. It is that these differences tell us that there is *no* law currently governing judicial decisions on bias. The case law is instead a cacophony of conflicting rules. The judges are 'mak[ing] it up as they go along',[37] reasoning on a pragmatic, case-by-case basis, rather than from established legal principles.[38] In order to remedy this situation, and bring necessary certainty and clarity to the law, these respondents say, judges just make a choice. They must either coalesce around an acceptable definition of the 'fair-minded … observer', and cement the *Porter* test; or, they must admit that the fair-minded observer test is too vague and unstable to serve as a legal test. In that case, they should revert to the *Gough* test, and abandon attempts to reason from the perspective of a notional observer.[39]

23. Importantly for the purposes of this article, both of these responses presuppose the correctness of a legal positivist theory of law and disagreement. They each suppose that the content of the law necessarily depends on the existence of clear, widely accepted rules laid down by judges – albeit that the two responses differ on whether such rules do in fact exist in this area of law.[40] They further suppose

[33] *Gough* (n 4). The Court of Appeal in *Abdroikov* took a similar view in emphasising the need for 'special knowledge of a case of individuals involved in it': [2005] EWCA Crim 1986, [2005] 1 WLR 3538 [33]–[35].
[34] This response is implied, for example, in P Craig, *Administrative Law* (9th edn, Sweet & Maxwell 2021) 429.
[35] Elliott (n 16) 250.
[36] ibid. Cf Olowofoyeku (n 29) 393.
[37] Olowofoyeku (n 29) 396.
[38] ibid 389.
[39] See, generally, Olowofoyeku (n 29) who advocates a 'return to *Gough*' on this basis.
[40] The classic statement of legal positivism is HLA Hart, *The Concept of Law* (3rd edn, Clarendon Press 2012).

(what is the logical corollary of the rule-based account of law) that when judges disagree, they are necessarily not disagreeing about *what the law is*.[41] Where it *appears* that judges are disagreeing about the correct legal test (as it does in the cases described above) positivists seek to 'explain away' such disagreement.[42] They typically do so in one or other of the ways seen in the responses above: by claiming either that judges, or the law itself, are malfunctioning.

24. The last thing to note about these positivist-inspired responses to the cases is that, even if it *looks* as if judges have reverted back to the *Gough* test (as it arguably does in the cases described above), it cannot be the case that they have in fact done so unless and until a judge in the appropriate judicial hierarchy explicitly changes the law. The law cannot be something other than what most judges say it is.[43]

25. For reasons that I shall explore only tangentially in the remainder of this article, I think this rule-bound way of understanding law (and therefore *the* law) is defective. It obscures the argumentative, 'protestant' character of legal reasoning – particularly *common law* reasoning, and more particularly *public law* common law reasoning.[44] I shall instead adopt the principal rival theory of law to legal positivism, the anti-positivist, 'interpretive' theory of law propounded by Ronald Dworkin.[45] In contradistinction to the positivist readings of judicial disagreement outlined above, interpretivists do not seek to 'explain away' differences in reasoning of the sort we see in the cases above as a source of embarrassment or legal meltdown; they view them as genuine 'theoretical' disagreements about *the correct legal grounds of bias*.[46] In a way that will seem counter-intuitive to many lawyers – and anathema to legal positivists – this theory allows for the possibility that a *Gough*-style actual unfairness test of bias is correct *even if most judges and academics think and say otherwise*.[47] Indeed, this is precisely the argument I attempt to make in this article.

Interpreting the law of bias

26. Dworkin famously likens common law reasoning to a chain-novel – a single work assembled seriatim by several authors.[48] A judge, like an author in the chain, he says, has a responsibility to advance the line of cases to which he or she is a

[41]There would otherwise not be the necessary consensus for the legal rule to exist. See Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1977), Model of Rules II. Hence, some positivists treat disagreement as necessarily being about the *application*, rather than the *content* of the rule. See e.g. Jules Coleman, 'Negative and Positive Positivism', in Jules Coleman (ed), *Markets, Morals and the Law* (Cambridge University Press 1988) 20.

[42]Brian Leiter, 'Explaining Theoretical Disagreement' (2009) 76 University of Chicago Law Review 1215, 1223; Jeffrey Goldsworthy, 'The Real Standard Picture, and How Facts Make it Law; a Response to Mark Greenberg' (2019) 64 The American Journal of Jurisprudence 163–211.

[43]See, generally, Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Clarendon Press 1994) ch 10.

[44]See TRS Allan, *The Sovereignty of Law: Freedom, Constitution and Common Law* (Oxford University Press 2013). See further G Postema, '"Protestant" Interpretation and Social Practices' (1987) 6 Law and Philosophy 238.

[45]See, in particular, Ronald Dworkin, *Law's Empire* (Fontana 1986).

[46]ibid ch 1.

[47]For robust criticism, see Jeffrey Goldsworthy, *The Sovereignty of Parliament History and Philosophy* (Clarendon Press 1999) 246–259.

[48]Ronald Dworkin, *A Matter of Principle* (Clarendon Press 1986) ch 6; Dworkin (n 45) ch 7.

contributor in a way that is faithful to earlier contributions.[49] Fidelity, he argues, is not about mechanically applying the words or intentions of the first author in the chain (or the attempts by subsequent authors to elucidate that intention); it is about advancing the underlying *point* or *justification* for the case law taken in the round.[50] That endeavour calls for controversial moral judgement at each 'stage of interpretation': judgement about which cases properly make up the object of interpretation (the 'preinterpretive' stage); judgement about what the underlying justification is, and why one way of advancing it might be better than another (the 'interpretive' stage); and judgement about what the justification means for legal doctrine and particular decisions (the 'postinterpretive' stage).[51]

27. For the remainder of this article, I shall proceed gradually through these stages of interpretation, working my way to the conclusion that the *Gough* test of actual unfairness offers the best – and therefore correct – understanding of the law.

The preinterpretive stage

28. The standard picture above centres on the decision in *Porter v Magill*. It refers to the *Gough* test only by way of contrasting the law *as it is* with the law as *it used to be*. In effect, it treats the 'fair-minded … observer' test as the equivalent to a statutory text; and it treats all subsequent decisions as (correct or incorrect) applications of that test.[52] This positivist view, says Dworkin, misunderstands the way in which common doctrine – like a chain novel – evolves as judges and other interpreters reach new and improved understandings of its underlying justification.[53]

29. At the preinterpretive stage, we must instead see these two decisions, together with those in *Belize Bank* and *Abdroikov*, as part of the legal materials that form our overall object of interpretation.[54] Indeed, we will not consider the judicial decisions one by one, but in terms of the scheme of principle underlying the line of cases of which they form part.[55] What significance any particular decision has for the content of the law depends on the outcome of this process, rather than on some descriptive truth established in advance of it.[56]

The interpretive stage

30. What is the underlying justification for the case law on bias – a justification to which all judges plausibly aim to give effect in their decisions? A strong candidate is that this

[49]Dworkin (n 48) 158–159.
[50]ibid 149–158.
[51]For the different 'stages of interpretation', see Dworkin (n 45) 66–68.
[52]Dworkin (n 48) 164; Dworkin (n 41) 111.
[53]Needless to say, Dworkin's interpretive theory of law is a controversial one. For criticism of the chain-novel analogy with legal reasoning see e.g. Joseph Raz, 'Dworkin: A New Link in the Chain' ' (1986) 74 Cal L Rev 1103, 1115–1118.
[54]Allan (n 44) 5 and passim. Dworkin (n 45) 227–228.
[55]Dworkin (n 45) 221.
[56]Allan (n 44) 9 and passim.

area of law aims to engender *public confidence in the integrity of the administration of justice*.[57]

31. At the interpretive stage, we must ask the following question: which of the two tests of bias found in the case law best advances this justification: the 'fair-minded … observer' test and its public perception rationale, or something like a 'real danger' test with its emphasis on actual unfairness? In order to answer that question, we must interrogate each conception in the same way as we would a controversial interpretation of a novel or play. We must ask, first, whether the conception adequately 'fits' the cases, in the sense that it plausibly explains the bulk of judicial decisions. Secondly, we must ask which conception gives a stronger moral *justification* for public confidence.[58]

32. In the hands of Dworkin's judge, Justice Hercules, answering these questions will involve a fully developed justification for the common law reasoning in general, before turning to comprehensive study of the constellation of principles and policies that make up the law of bias in England and Wales.[59] For reasons of lack of space, time and superhuman omniscience, I shall merely attempt to give the shape of such an inquiry, and the direction of an argument in favour of the actual unfairness conception over the public perception conception. But before we launch that inquiry, let us return briefly to the positivist picture.

33. In an excoriating critique of the *Abdroikov* judgments, Olowofoyeku puzzles at how senior judges who

> did not disagree as to the facts, and … did not disagree as to the law … and [whose] arguments supporting [their] different decisions [were] all reasonable, and, sometimes, compelling, as one would expect of the rationalisation of senior judges … [60]

could reach such different conclusions.

34. No doubt he would ask the same question of the judgments in *Belize Bank*. But this question gets things the wrong way round. The pertinent question is: why, when judges make compelling arguments in support of different understandings of the law, should we suppose that there is a single positivist legal rule (or no legal rule)? We should not. What the disagreements in *Abdroikov* and *Belize Bank* show is that it makes no sense to think of law and disagreement in general, and the reasoning

[57] As Lord Goff puts it: 'Justice must be rooted in confidence: and confidence is destroyed when right-minded people go away thinking: "the judge was biased"': *Gough* (n 4) 666. Or, as the European Court of Human Rights has put it in *Hauschildt v Denmark* (1989) 12 EHRR 266 [48]: 'What is at stake [in relation to the right to an 'impartial tribunal' under ECHR Art 6(1)] is the confidence which the courts in a democratic society must inspire in the public and above all, as far as criminal proceedings are concerned, in the accused'.

[58] Dworkin (n 45) 230–231. Dworkin tells us that 'the two dimensions of fit and value represent different aspects of a single overall judgment of political morality'. See Ronald Dworkin, *Justice in Robes* (Harvard University Press 2006) 15.

[59] Hercules is an idealised judge of 'superhuman intellectual power and patience': Dworkin (n 45) 239; Dworkin (n 41) 111.

[60] Olowofoyeku (n 29) 397.

in these cases in particular, in terms of widely shared rules. We should instead view theory and case law in terms of *competing interpretations*.

Which conception of bias best advances public confidence in the administration of justice?

Fit

35. Let us begin with the question of fit, and with the public perception conception of bias. Can this conception plausibly explain most judicial decisions on bias?

36. The first reason to doubt that it can is a conceptual one, even before we consider how courts have applied it. The fact is that the 'fair-minded … observer' is not an 'objective', 'external' observer at all, but a *judicial* construct.[61] Public opinion is, as judges have frankly admitted, 'court's view of the public view, not the court's view … '.[62] This immediately calls into question the cogency of this conception. It suggests that the 'fair-minded … observer' test is not equipped to achieve its purpose, namely to allow judges to decide cases on the basis of what *the public* would think. If the 'fair-minded … test' is, in truth, a conduit for what *judges* think, then the public perception explanation is liable to collapse.

37. Is the judicial construct of public perception an adequate proxy for actual public perception? The answer must be no. No matter how hard a judge tries to reverse the mirror,[63] and step outside of her judicial knowledge and faculties, she is inescapably a judge with full knowledge of the factual and legal circumstances of the case. As such, she is in no plausible sense an objective outsider who can 'see the faults to which insiders are blind',[64] effecting a form of external accountability over the system. Indeed, this conceptual objection to the 'fair-minded observer test' is borne out by, and compounded by, the way that courts have in fact applied the test. As we saw above in *Belize Bank* and *Abdroikov*, judges frequently assimilate the notional observer to a judge, investing him or her with an attitude and knowledge indistinguishable from that of a (particularly proficient) judge. To the extent that this type of assimilation characterises the reasoning of courts in this area, it must count in favour of the actual unfairness conception of bias over the public perception conception.[65]

[61] 'The fair-minded and informed observer is him or herself in large measure the construct of the court': *Abdroikov* (n 21) [81] per Lord Mance.
[62] *Webb v Queen* (1994) 181 CLR 41 [11] per Mason CJ and McHugh J. See also Lord Rodger (n 17) 465: 'Yet, in the end, it is a judge or judges who decide what the observer would think about any given situation.'
[63] Lord Rodger (n 17) 467 warns that if judges 'endow the well-Informed observer with [too much knowledge of judges … the judges will be holding up a mirror to themselves'.
[64] *Gillies v Secretary of State for Work and Pensions (Scotland)* [2006] UKHL 2, [2006] 1 WLR 781 [39] per Lady Hale.
[65] For an intriguing argument that the Supreme Court in its decision in *Serafin v Malkiewicz* [2020] UKSC 23 substantially substituted an actual unfairness test for the 'fair-minded … observer test', see Stevie Martin, 'Bullying, Threatening and Animus: What Remains of the Rule Against Apparent Bias Following the Supreme Court's Judgment in *Serafin*?', UK Const L Blog (22 July 2020) <https://ukconstitutionallaw.org/> accessed 27 June 2025.

38. Note, once again, how this analysis of 'fit' departs from the positivist story assumed by the standard picture. We have not asked, with positivists, simply whether most judges have *said* that they accept the rule in *Porter*. Rather, we have asked, with interpretivists, whether the rule in *Porter* plausibly reflects what judges have *decided* in substance.[66] As I explained above, this latter interpretive approach allows that the law may be something other than what a judge has said or intended.

Justification

39. Let us grant, for the sake of argument, that the cases can be understood as giving effect either to public perception or actual unfairness; that both conceptions *fit* as concurrent, competing explanations for the cases taken as a whole. In order to decide between these conceptions, we must now ask which of them is more apt to advance the underlying justification for this area of law – which we have taken to be *public confidence in the administration of justice*. If one or other conception cannot ground public confidence, then we must disregard it, and look elsewhere.

40. According to the standard picture, we have seen, the way to secure public confidence in the administration of justice is by focusing on whether there was an appearance of bias rather than whether there was *in fact* bias. But this public perception-confidence pairing often has more a feel of a mantra rather than a substantial moral position. Take the following dictum:

> [T]his being a question of public confidence in the administration of justice, we are concerned with the appearance of things. The question has to be decided from the standpoint of the onlooker rather than that of the judge [whose impartiality is in question].[67]

41. The implication here is that there is a logical, incontestable relation between perception and confidence. Or, as the positivist might put it, the bare fact that judges have *said* that the relation holds, makes it the case that it holds.

42. As interpreters, we will not accept this confidence-perception pairing at face value. We must stress test the pairing, asking whether public perception is a morally defensible basis for public confidence. We might put the question to a hypothetical member of the public: would you have more confidence in a decision made by judges about how the public would perceive the subject of your bias complaint; or, would you have more confidence in a judicial assessment of whether the subject of your complaint in fact caused you unfairness?

[66]Dworkin (n 48) 159.
[67]*Davidson v Scottish Ministers* [2002] ScotCS 256 [33] (affd. [2004] UKHL 34) per Lord Justice-Clerk.

Throwing darts

43. At first, the complainant may gravitate towards the public perception conception on the basis that it sets a lower threshold for a finding of bias.[68] This must mean, he may think, that courts will not countenance even a whiff of bias, maximising the chance of his complaint succeeding. He might find added confidence in that view when he learns that courts are avowedly concerned with the 'image of justice',[69] and are eager to 'earn [the] respect' of the public in the face of growing distrust of judges and institutions.[70]

44. But he may then decide, out of curiosity, or for the sake of reassurance, to look at how courts have in fact applied the 'fair-minded … observer' test. What he sees may cause him to question his faith in judicial assessments of public perception. While he might take some comfort from the fact that the House of Lords in *Abdroikov* found bias on the part of a police officer in one appeal and a CPS lawyer in another, he may struggle to understand precisely *why* they did so (he will notice that the Judges in the majority themselves seemed to disagree about this).[71] Was it the fact that:

> [There was a] crucial dispute on the evidence between appellant and the police sergeant, and the sergeant and the juror, although not personally known to each other, shared the same local service background. In this context the instinct (however unconscious) of a police officer on the jury to prefer the evidence of a brother officer to that of a drug-addicted defendant would be judged by the fair minded and informed observer to be a real and possible source of unfairness, beyond the reach of standard judicial warnings and directions.[72]

45. Or was it the

> [P]ossibility of bias which … inevitably flows from the presence on a jury of persons professionally committed to one side only of an adversarial trial process?[73]

46. If the latter, then he will wonder why, if the involvement of police and CPS lawyers on juries 'inevitably' gives rise to bias, the majority did not uphold the complaint of the other appellant despite finding that there was a possibility of unconscious prejudice on the part of the police officer juror. The fact that the judge giving the lead majority judgment reached this conclusion 'not without unease',[74] will make our complainant wonder why this sense of unease did not result in the same decision (and why, whenever judges feel such unease, they do not favour the complainant).[75]

[68]As Lord Brown puts it in *Belize Bank* (n 12) [98]: 'the fair-minded test is' 'designed to give effect to the rule in [*McCarthy*]'.
[69]See the Supreme Court of Canada in *Wewaykum Indian Band v Canada* [2003] 2 SCR 259, 2003 SCC 45 [66].
[70]Lord Rodger (n 17) 455 and passim.
[71]See the short judgment of Lord Mance in *Abdroikov* (n 21) [83] in which he questions whether the bare fact of employment or a significant evidential dispute will always warrant the disqualification of the officer.
[72]*Abdroikov* (n 21) [23].
[73]ibid.
[74]ibid [25].
[75]Compare the judgment of Lord Walker in *Helow v Secretary of State for the Home Department and another* [2008] UKHL 62, [2008] 1 WLR 2416 [25] (finding that there was no bias on the part of a judge, but doing so 'rather less readily' than other judges).

47. The complainant's misgivings will increase when he sees that the Lord Chief Justice in a subsequent case struggled to understand which of the two possible bases in *Abdroikov* was decisive. As he put it, the Court had

> [N]ot found it easy to deduce on the part of the majority of the Committee clear principles that apply where a juror is a police officer.[76]

48. The complainant may now decide to look back at the leading case of *Porter v Magill* for some reassurance about the lower threshold. But he will find there that the members of the House of Lords failed to find a perception of bias despite the plainly more egregious circumstances of the case. Indeed, he may be discouraged by the view of one of the dissenting judges in *Abdroikov* that there is an unexplained disparity between thresholds set in *Porter v Magill* and in *Abdroikov* (with the implication that the higher level is more appropriate).[77]

49. Bit by bit, the individual will start to question the reliability, predictability and consistency of judicial assessments of public perception, and with it his confidence in such assessments.

50. These concerns will intensify when he considers the root cause of these failings, namely the difficulties judges have in defining the notional member of the public. He will read with apprehension the candid account of these difficulties given by Lord Mance in *Abdroikov*:

> the fair-minded and informed observer is him or herself in large measure the construct of the court. Individual members of the public, all of whom might claim this description, have widely differing characteristics, experience, attitudes and beliefs which could shape their answers on issues such as those before the court, without their being easily cast as unreasonable. The differences of view in the present case illustrate the difficulties of attributing to the fair-minded and informed observer the appropriate balance between on the one hand complacency and naivety and on the other cynicism and suspicion.[78]

51. He will nervously wonder whether his complaint of bias will be assessed by a more or less knowledgeable, experienced, complacent, naive, cynical, etc., etc., observer. He will take little comfort from the call by distinguished critics for judges to make the observer 'more realistic',[79] since it will seem clear to him that attempts to define the observer, and what the observer would think, are inherently *indeterminate*; the observer is whatever a judge happens to make him or her in a given case.

[76] *R v Bakish Allan Khan* [2008] EWCA Crim 53 [24] per Lord Phillips of Worth Matravers CJ. See further ibid [25]–[26].
[77] As Lord Rodger puts it in a characteristically colourful way: 'In short, the observer who concluded that there was no real possibility that, after giving his high-profile press conference, the auditor in *Porter v Magill* … was biased would be straining at a gnat if he found that there was a real possibility of bias just because a jury contained a police officer or CPS lawyer': *Abdroikov* (n 21) [42].
[78] *Abdroikov* (n 21) [81].
[79] Olowofoyeku (n 29) 393.

52. Nor will he tell himself that judges, being judges, will bring stable, consistent principles of fairness to their struggles with the notional observer. For he will understand that, on the public perception view of bias, the 'fair-minded … observer' (howsoever defined) is effectively an 'ever present member of the court' with a 'veto' over ordinary judicial assessments of actual fairness.[80] Indeed, he will wonder in what sense, if any, judges are deciding cases of bias *as judges* in this area of law.[81] The model of adjudication required by the public perception test, he may begin to think, turns judges into pseudo-psychologists, deciding cases on the basis of their impression of what someone who is a-bit-like-a-judge-but-not-too-much-like-a-judge would think.[82]

53. After his initial enthusiasm about the public perception view of bias, his confidence will drain away with the thought that a decision on bias affecting him personally will effectively be decided by throwing darts.

Public confidence in the rule of law

54. I shall now take up the reins from our hypothetical complainant. His complaints, we have seen, are that the public perception conception of bias is a recipe for uncertainty, inconsistency and arbitrariness, and that it distorts the judicial role. As such, he may justifiably conclude that this conception does more to undermine his confidence in the administration of justice than justify it.

55. How might the *actual unfairness* conception of bias succeed where the public perception conception fails? In order to answer that question, we must address a deceptively difficult question, albeit briefly: what is good about the type of reasoning seen in the judgments of Lord Kerr in *Belize Bank* and Lords Rodger and Carswell (together with the Court of Appeal) in *Abdroikov* – each of which I have associated with this alternative conception of bias? Put differently what is good about ordinary judicial reasoning about fairness? One common way to characterise (and extol) such reasoning is that it is based on 'all the circumstances of the case', or is 'sensitive to context';[83] but if we are to justify public confidence, we need to say more about what this means, and why such reasoning is superior to the relatively non-contextual inquiry required by the 'fair-minded … observer' test.

56. The short answer I shall offer to our complainant is that the actual unfairness conception is governed by the *rule of law*, where the public perception conception is

[80] ibid.

[81] Other things he reads in judgments will reinforce his concerns about a lack of clarity and consistency, for instance the regular judicial refrain that assessments of public perception are 'intensely fact sensitive' such that there is little use in citing precedents. See *Belize Bank* (n 12) [73] per Lord Dyson.

[82] Alongside the many calls for courts not to make the observer too *like* a judge, there are also calls not to make him or her too *unlike* a judge, e.g. 'The fair-minded observer is not unduly sensitive or suspicious': *Johnson v Johnson* (2000) 201 CLR 488 [33] per Kirby J.

[83] See e.g. *R (L) v West London Mental Health NHS Trust* [2014] EWCA Civ 47, [2014] 1 WLR 3103 [67] per Beatson LJ.

not. A longer answer must explain what is distinctive and valuable about the rule of law and the judicial role it entails. These are notoriously thorny areas of debate in which disagreement is liable to arise at every turn.[84] As I have done throughout this article, I shall nail my colours to the anti-positivist mast, while occasionally adverting to problems with the rival positivist picture.

57. The aspect of the rule of law on which I want to focus is the simple idea that officials of the state (including judges) must act in accordance with law.[85] Dworkin elaborates this idea in the following way:

> [The rule of] law insists that force not be used or withheld, no matter how useful that would be to ends in view, no matter how beneficial or noble these ends, except as licenced or required by individual rights and responsibilities flowing from past political decisions about when collective force is justified.[86]

58. Before we consider how the actual unfairness conception of bias satisfies this ideal, let us first consider how the public perception conception fails it.

59. On Dworkin's formulation, the rule of law holds that judicial decisions must be based on the 'past political decisions' (i.e. the decisions of courts and legislatures), even if this involves sacrificing some 'noble end'. The 'fair-minded … observer' test is the very *obverse* of this ideal: it requires judges to conduct a forward-looking, consequentialist inquiry into how the public would perceive the conduct in question. The focus is entirely on the 'end' of protecting the reputation of judges and the justice system. Such reasoning is entirely untethered from the 'rights and responsibilities flowing from past political decisions'.[87] Indeed the 'fair-minded … observer' test is designed to *supplant* the 'judicial perspective' of ordinary judicial principle and precedent. Seen in the context of ordinary administrative law doctrine, the rule is effectively a standing directive to judges to decide cases on the basis of a classic irrelevant consideration: what decision would be most likely to placate the public at large?[88]

60. Now compare the actual unfairness conception. First, let us recall the judgments of Lords Kerr in *Belize Bank*, and Lords Rodger and Carswell in *Abdroikov*. In determining whether to disqualify Panel members in the former case, or jurors in the latter, the Judges focus their reasoning on considerations such as the legislative scheme, the specific role assigned by law and constitutional principle to decision-makers, the safeguards and procedures in place to ensure that decision-makers stay within their role, the factors that will take a decision-maker outside their role, and the sufficiency of an

[84] Jeremy Waldron, 'Is the Rule of Law an Essentially Contested Concept (in Florida)?' (2002) 21 Law and Philosophy 137.
[85] See e.g. AV Dicey, *Introduction to the Study of the Law of the Constitution* (8th edn, Macmillan & Co 1915) 114: '[E]very man, whatever his rank or condition, is subject to the ordinary law or the realm'.
[86] Dworkin (n 45) 93.
[87] As we noted above, courts treat the 'fair-minded test' as being 'intensely fact sensitive' (n 81).
[88] See *R v Secretary of State for the Home Department ex p Venables* [1998] AC 407. For a powerful rule of law-based critique of this decision, see TRS Allan, 'The politics of the British Constitution: a response to Professor Ewing's paper' [2000] PL 374, 378.

appeal or retrial to correct any failure of role. Only if the position of the subject of the bias complaint posed an 'unacceptable risk' to the fairness of the trial such to fall outside these 'general issues of principle',[89] were the Judges prepared to make a finding of bias.

61. This is precisely the structure of reasoning, I suggest, envisaged by an interpretivist theory of the rule of law.[90] We can understand the Judges as weighing a set of competing moral imperatives: the right of a defendant or litigant to a fair trial, against the right of a political community to decide how best to allocate official power and authority. The correct answer to any question of law (whether common law or statute) must depend, on this view, on how best to reconcile those competing dimensions of morality – which Dworkin puts in terms of 'substantive justice' and 'procedural fairness'.[91] Crucially, this task is a backward-looking one, rooted in the past political decisions of courts and Parliament, rather than the speculative, forward-looking one found in the 'fair-minded … observer' test. Judges are *constrained* in how they decide a case by the duty to reason consistently in principle from the scheme of justice and fairness *instantiated within their constitutional order*.[92] The refrain that judges will decide a case in 'all the circumstances', I suggest, amounts to the commitment that they will engage in this complex moral judgement.

62. Will this rule of law justification for the actual unfairness view assuage our hypothetical complainant? He may object that judges will disagree just as much about how to balance competing moral principles as they will about what the public thinks. Here we must give him a short version of a very long answer: namely that an assessment of actual unfairness may be *uncertain*, but it is nonetheless an objective one, affording individuals a relatively high degree of foreseeability.[93] By contrast, an assessment of public perception, we have said, is *indeterminate*: that is, devoid of any established standards by which to control how a judge decides the case. From the perspective of a litigant or defendant, it is, as we put it above, judicial decision-making by throwing darts.[94] Nor does a positivist account fare much better against rule of law standards. To the extent that the 'fair-minded … observer' test is a positivist *rule*, its

[89] *Abdroikov* (n 21) [72] per Lord Dyson.

[90] I use 'interpretivist theory of the rule of law' here as an umbrella term for a range of theories which view legal reasoning as a localised form of moral reasoning. There are many variations on precisely how and why morality determines the content of the law. See, generally, N Stavropoulos, 'Legal Interpretivism' <https://plato.stanford.edu/entries/law-interpretivist/> accessed 15 June 2025.

[91] Dworkin (n 45). More recently, Dworkin argues that judicial reasoning about justice is shaped and checked by 'structuring principles' including 'principles about fair play, fair notice, and a fair distribution of authority': Ronald Dworkin, *Justice for Hedgehogs* (Harvard University Press 2011) 409.

[92] Dworkin (n 45) 219. For, example, in *Belize Bank* (n 12) [70], Lord Dyson takes the 'limited pool' to be a crucial factor in deciding whether the decision was fair.

[93] See *Ridge v Baldwin* [1964] AC 40 [64] per Lord Reid; Ronald Dworkin, 'Objectivity and Truth; You'd Better Believe It' (1996) 25 Philosophy and Public Affairs 87.

[94] Put differently, there are no standards which a defendant or litigant can demand *as of right* that judges take into account. See Dworkin (n 41) Model of Rules I.

effect would be to direct judges to decide cases on an *extra*-legal basis.[95] The legal rule itself would be practically empty.[96]

63. I want to close by identifying for our hypothetical complainant a more fundamental difference between the rule of law account and the public perception account. We have so far focused on problems in the way that judges *apply* the 'fair-minded … observer' test, or problems with the very fact of judges attempting to apply such a test. But if application were the only problem, then we might rescue a public perception rationale for the law of bias by empanelling juries, or introducing mixed panels of judges and lay members.[97] In my view, these alternatives are no answer to the deeper problem with public perception *itself* as a measure of public confidence. The problem is this: the test is concerned with whether the public *thinks* the justice system is working, rather than with how well the system is *in fact* working. Its focus is *social* legitimacy rather than *moral* legitimacy.[98] It is the equivalent of assessing car manufacturers on the basis of how safe they make us *feel*, rather than on the basis of the quality-control mechanisms in place to ensure that cars are actually *safe*.

64. The rule of law justification for the actual unfairness conception of bias is concerned, not with how it *looks* as if the justice system is working, but with how the state, in deploying 'coercive force', in fact *treats its citizens*. It views public confidence in terms of political legitimacy, and the standing allegiance people owe to law over time, rather than in terms of the psychological impressions people might form about this case or that.[99] In so doing, it confronts a puzzle facing any litigant or defendant who thinks that he has been treated unjustly (where, for instance, a court rules that an appearance of bias has not in fact caused him unfairness): 'But, how can that be the law for me?'[100] Political philosophers disagree deeply about how best to cash out this relationship between the rule of law and political legitimacy; but this, I contend, is where the search for public confidence in the administration of justice must begin, not with the shallow question of what the public thinks.[101]

Conclusion: The postinterpretive stage

65. We have reached the end of a long and winding argument. In a sentence, I have argued that an actual unfairness conception of bias better fits and justifies the case

[95]So-called 'soft' positivists argue that the law may incorporate by reference non-legal standards such as fairness. See e.g. Coleman (n 41).
[96]See Ronald Dworkin, 'Thirty Years On'' (Book Review) (2002) 115(6) Harvard Law Review 1660, 1655.
[97]Olowofoyeku (n 29) 406.
[98]I do not deny that 'social' legitimacy may complement moral legitimacy. There is not space to argue this point here. See e.g. Joe Tomlinson, 'The Social Side of Fair Process' <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5108533> accessed 10 June 2025; CA Thomas, 'The Concept of Legitimacy and International Law', LSE Law, Society and Economy Working Papers 12/2013 <https://eprints.lse.ac.uk/51746/1/__libfile_repository_Content_Law,%20society%20and%20economics%20working%20papers_2013_WPS2013-12_Thomas.pdf> accessed 27 June 2025.
[99]See D Kyritsis, 'Constitutional Law as Legitimacy Enhancer' in D Kyritsis and S Lakin (eds), *The Methodology of Constitutional Theory* (Hart Publishing 2022) ch 8.
[100]David Dyzenhaus, *The Long Arc of Legality: Hobbes, Kelsen, Hart* (Cambridge University Press 2022) 2.
[101]For an intriguing contemporary interpretivist response to this question, see D Kyritsis, *Shared Authority* (Hart Publishing 2015) esp chs 3–4.

law than a perceived bias conception. I shall not attempt to retrace the different steps in that argument here. I shall instead close by offering some very brief reflections on what this conclusion might mean in practice. Where does it leave the standard picture outlined at the start of this article? This is to move to the final 'postinterpretive', reforming stage of interpretation, where an interpreter must 'adjust his sense of what the practice [i.e. the law of bias] "really" requires so as better to serve the [actual unfairness] justification he accepts at the interpretive stage'.[102]

66. On the standard view, the law of bias in England and Wales is made up of several distinct, but associated doctrines, each of which is arguably subsumed within the 'fair-minded … observer' test: 'apparent bias' (bias arising out of irregular conduct), 'automatic disqualification' (arising out of a decision-maker's interest in a decision), and predetermination. What would it look like if we superimposed an actual unfairness test on each of these areas? To begin with, we will make no moral or legal distinction between cases involving a decision-maker's conduct and her interest.[103] In each case, the question will be whether the conduct or interest caused *actual unfairness* in all the circumstances (in the sense defended above) to a defendant or litigant.[104] We may conclude, on this basis, that the House of Lords was wrong to disqualify Lord Hoffmann for his connection with Amnesty International.[105]

67. By the same token, we will not tie the question of predetermination to the 'fair-minded … observer'.[106] Consider, in this context, the recognition by courts that *administrative* decision-makers (such as elected councillors or members of political parties) are entitled to take into account policy considerations in their decision-making, provided that they do not 'close their mind' in reaching their decision.[107] Viewed in terms of 'apparent bias', we are forced to view these decisions as exceptions to the general rule, or the result of a separate doctrine such as 'necessity' or 'indivisible functions'.[108] Within an actual unfairness understanding of bias, they fall squarely within the rule of law theory defended above: a judgement about how to reconcile justice to an individual with the scheme of separation of powers

[102]Dworkin (n 45) 66.
[103]On the standard view, courts arguably now treat former cases of 'automatic disqualification' as cases of apparent bias. See e.g. *R (Kaur) v Institute of Legal Executives Appeal Tribunal* [2011] EWCA Civ 1168 [44]–[45] per Rix LJ.
[104]For an argument to similar effect, see Abimbola A Olowofoyeku, 'The *Nemo Judex* Rule: The Case Against Automatic Disqualification' [2000] PL 456 esp 472.
[105]*R v Bow Street Metropolitan Stipendiary Magistrate ex p Pinochet Ugarte (No 2)* [2000] 1 AC 119. For the argument that, had the Court applied a 'real danger' test as opposed to an 'automatic disqualification' test, it may not have found it appropriate to disqualify Lord Hoffmann, see P Havers and O Thomas, 'Bias Post-*Pinochet* and Under the ECHR' [1999] JR 111, 113.
[106]Again, on the standard picture, predetermination falls within the apparent bias test. See e.g. *R (Island Farm Development Ltd) v Bridgend County Borough Council* [2006] EWHC 2189 (Admin) per Collins J. For a careful doctrinal defence for separating the doctrine of predetermination from the 'fair-minded … observer' test, see James Maurici, 'The Modern Approach to Bias' <https://adminlaw.org.uk/wp-content/uploads/James-Maurici-July-2007.doc> accessed 27 June 2025.
[107]See e.g. *R v Secretary of State for the Environment ex p Kirkstall Valley Campaign Ltd* [1996] 3 All ER 304, 205 per Sedley LJ.
[108]See Wade and Forsyth (n 11) 396–397. As one leading textbook puts it, '[in] many administrative situations the possibility of bias is built into the system': Sir Michael Supperstone, James Goudie KC and Sir Paul Walker, *Judicial Review* (LexisNexis 2024) 12.66.

instantiated in past political decisions.[109] By way of a closing thought, this is a task, in my view, that judges may carry out no less legitimately and effectively in relation to *other judges* as to administrators.[110]

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[109]For a more radical adjustment to the practice still, we might assimilate common law reasoning about actual unfairness to judicial reasoning under ECHR art 6(1) case law on the requirements of an 'independent tribunal'. See e.g. *Runa Begum v Tower Hamlets LBC* [2003] UKHL 5, [2003] 2 AC 430. To my mind, the careful balancing between administrative autonomy and individual fairness reflected in this line of cases is a paradigm of reasoning from actual unfairness, even if one disagrees with precisely how the courts have sought to balance individual rights with decision-making structures. For criticism, see Paul Craig, 'The Human Rights Act, Article 6 and procedural rights' [2003] PL 753.

[110]See e.g. the reasoning of the High Court and Court of Appeal in *Bates v Post Office Ltd* [2019] EWHC 871 (QB), *Alan Bates and Others v Post Office Ltd* (No 4: Recusal Application) [2019] EWHC 871 (QB). Fraser J's judgment runs to 77 pages and analyses in fine detail the background to the proceedings, the timings of the litigation, the Common Issues, contractual and agency issues concerning the claimants, and examples of the numerous assurances that he was not pre-judging future issues. For a critical view of judges judging judges, see Elliott (n 16) 250.