JUDICIAL POLICY, PUBLIC PERCEPTION, AND THE SCIENCE OF DECISION MAKING: A NEW FRAMEWORK FOR THE LAW OF APPREHENDED BIAS

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Abstract

The right to an impartial and independent tribunal is fundamental to the administration of justice and public confidence in it. However the test for apprehended bias is not informed by psychological research on cognitive biases, and while courts purport to give effect to the views of a fair-minded and informed member of the public on the risk of bias, little attention has been given to what the public thinks in reality. Using doctrinal analysis and drawing on psychological literature, the paper argues that the law must be re-examined with a view to closing the gap between the case law on which factors give rise to a reasonable risk of bias, public attitudes, and psychological research on decision-making. The article proposes a new framework for the law, including a judicial code that identifies circumstances when judges should and should not sit based on legal policy considerations, measured public opinion, and relevant psychological studies, and new procedures and tests for courts dealing with cases that are not identified as automatic disqualification or non-disqualification scenarios under a code.

I. Introduction

A fundamental principle of justice is that everyone has a right to an independent and impartial judge in the determination of their civil rights or a criminal charge against them.[1] It is also frequently said that justice being *seen* to be done is just as important as the reality because the rule of law depends on public confidence in the administration of justice.[2]

In this article, we argue that while the law of apprehended bias purports to give effect to both these rationales, the law fails to satisfactorily advance either. On the one hand, the definition of legal bias developed by the courts – i.e. relying on considerations extraneous to the case - can only be properly tested scientifically, whilst on the other hand the courts claim to defer to reasonably informed public opinion as to whether a judge should be disqualified. Part of the problem is that neither approach involves any technical legal analysis in assessing whether there is a risk of bias, and yet the task of deciding when judges should be disqualified is made solely by lawyers.

There is a significant amount of psychological studies that calls into question the assumptions on which many of the leading cases identifying circumstances that give rise to a real danger or likelihood of bias. For example, a number of studies strongly suggest that factors which the courts have declared do not give rise to a risk of bias (such as race) do, in fact, influence the decision maker. Recent initiatives to improve judicial awareness of implicit bias, and techniques for controlling for it, are a step forward[3], but the psychological research on factors affecting decision-making has been largely overlooked by judges when developing the case law. Similarly, the extent to which the law of apprehended bias gives

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[1] See e.g. European Convention on Human Rights and Fundamental Freedoms, art. 6.

[2] See e.g. *R. v Sussex Justices; ex p. McCarthy* [1924] 1 K.B. 256; *R* v *Watson, ex p Armstrong* (1976) 136 CLR 248; *Liteky* v *United States* 510 U.S. 540 (1994).

[3] See text to n (X)

effect to public opinion, and promotes public confidence in their impartiality, is open to real doubt. Judges accused of apprehended bias ("the target judge") routinely sit in judgment on public perceptions of their own capacity to decide a case impartially. They do this by constructing a fictional fair-minded and informed observer ("the FMO") as a conduit for public perception. A process that is not far removed from a puppet master asking the puppet what they think about their master is susceptible to cognitive biases and unlikely to inspire public confidence, although no one can say definitively whether judicial decisions on apprehended bias and public perception are in alignment or not. While there are studies examining public attitudes towards the legal system including public trust in the judiciary and the system generally,[4] public opinion about when judges should and should not recuse themselves remains unknown.

We consider some judicial attempts to make the law of apprehended bias better reflect the realities of human decision making by redefining bias around the concept of a 'closed mind.' We argue that this approach fails as a satisfactory test due to the difficulties in applying it in practice. Instead, we propose a new framework for the law of apprehended bias, based on the principle that the law should not principally be administered by lawyers, but instead be developed through a policy making process that expressly balances reliably measured public opinion, legal policy considerations and the science on human decision making. This policy process will also allow for a dialogue between the public, the legal community and psychologists as to what is possible, and desirable, in framing the law of apprehended bias. The aim of this process would be to produce a code identifying scenarios when judges should and should not sit and to identify any borderline categories where the arguments for and

[4] See e.g. D Rottman and T Tyler, 'Thinking about Judges and Judicial Performance: Perspective of the Public and Court Users' (2014) 4(5) Oñati Socio-legal Series 1046 (discussing findings from the US); H Genn, *Paths to Justice: What People Do and Think About Going to Law* (Oxford: Hart Publishing, 1999) (discussing findings from England). One finding potentially relevant to this paper was that 66% of respondents agreed or strongly agreed with the statement that most judges were out of touch with ordinary people, 13% disagreed or strongly disagreed, and 21% felt unable to agree or disagree.

against disqualification are finely balanced. We do not propose a draft code for this would pre-empt the very policy process we are calling for, but we do make recommendations about the structure of the code, and research that could be conducted into public perception and judicial decision-making that might be helpful in drafting it. We also propose new procedures and tests informed by the relevant psychological literature to deal with borderline cases that would not lead to automatic disqualification, or be expressly permitted, by a code. A key principle underpinning our framework is the idea that the judiciary's role should be focused on tasks they are properly trained to perform, rather than the vexed questions of possible bias, or the perception of possible bias, both of which they are poorly positioned to decide. Our article focuses on English law, but we also draw on pertinent examples from other common law jurisdictions including Australia, Canada, Scotland and the United States where the law for apprehended bias, and rationales for the rule, overlap considerably. There are different methods of appointing judges between these systems: judges can be appointed by politicians, or by independent commissions or elected directly by the community. Some non-U.S scholars therefore discount the significance of U.S jurisprudence and scholarship on apprehended bias, because it is suggested the U.S systems of judicial appointment are designed to generate bias, not avoid it. This is an incredibly simplistic analysis. As the U.S Supreme Court's decision in *Caperton* underscores, the U.S is not exempt from the challenges of identifying what it means to be judge, and at what point a judge's preconceptions and implicit biases ought to disqualify them from hearing a case, even where the judge was appointed through an election. Moreover other common law jurisdictions also use politicians to appoint judges, for example Australia, and yet no English or Australian court has described the rationale for the rule against apprehended bias in materially different terms, and courts from both jurisdictions regularly cite with approval case law from the other.[5]

[5] There are some subtle differences in the approaches between Commonwealth jurisdictions. For example in

II. Clarifying the Rationale/s of Apprehended Bias: a Case of Serving Two Masters Badly?

The focus of this paper is the law of apprehended bias however it is worth outlining the other tests for bias under which a judge can be disqualified, as they provide useful insights into the function of the apprehended bias rule. It is possible to disqualify a judge for *actual* bias, although this is rarely alleged and difficult to prove.[6] In most cases the judge will be the only person who knows whether they were biased, and where the bias is operating subconsciously, not even they will know. Given the threat that judicial bias poses to the rule of law, and the difficulty in detecting it, the law must find other ways of combatting bias. One technique is to adopt presumptions of bias in certain circumstances. English law applies a rule of automatic disqualification or "presumed bias" for any judge who has a direct interest in a case which includes both financial interests in and membership of a party before the court.[7] Another technique for avoiding the difficulties of proving actual bias is to base the rule on reasonably reliable proxies for bias that are easier to measure. One possible purpose of the law of apprehended bias, which focuses on reasonable perceptions of the possibility of bias, is to act as a proxy for the real thing. Of course, apprehension of bias is not a perfect proxy. It can create false positives, where an observer might suspect bias where none exists; and false negatives, where there is simply no behaviour for the observer to suspect bias on the

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Australia the test is a double might: whether a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial and unprejudiced mind to the resolution of the question the judge is required to decide: *Johnson v Johnson* (2000) 201 CLR 488 at [11], affirmed in *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337. By contrast the test in England is whether the fair-minded and informed observer *would* conclude that there was a real possibility that the tribunal was biased: *Porter v Magill* [2001] UKHL 67 [103].

[6] For an interesting argument that courts should find actual bias more often, see J Goudkamp, 'Facing Up to Actual Bias' (2008) 27 CJQ 32.

[7] *R. v Bow Street Metropolitan Stipendiary Magistrate; ex p Pinochet Ugarte (No 2)* [2000] 1 A.C. 119. The rule is subject to a de-minimis requirement in cases of financial interest: *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] Q.B. 451 at [8], [10] ('Locabail').

part of the judge who is, in fact, biased. But in the absence of more reliable methods for detecting bias, the doctrine remains a pragmatic way of upholding the right to an independent and impartial tribunal in practice. A judge who is beyond reasonable suspicion of partiality is, all else equal, more likely to decide a case impartially.

The notion of apprehended bias as a proxy for actual bias finds some support in the U.S Supreme Court's decision in *Caperton v Massey*, where recusal was sought of a judge whose election campaign had received a $3 million donation from one of the parties while the case was pending.[8] Justice Kennedy writing for the majority in a 5-4 decision stated: "The difficulties of inquiring into actual bias…underscore the need for objective rules. The Court [asks itself] whether, 'under a realistic appraisal of psychological tendencies and human weakness,' the interest 'poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.'[9] But to highlight how fraught the test for apprehended bias can be, Roberts CJ filed a dissenting opinion[10] declaring that the majority's probability of bias test was 'vague'[11] and listed 40 questions raised by the test. Number 24 is particularly relevant to this article: 'Under the majority's "objective" test, do we analyze the due process issue through the lens of a reasonable person, a reasonable lawyer, or a reasonable judge'[12]

In England it is settled that it is the reasonable person's perspective that matters. This was not always the case. In *R v Gough* Lord Goff had declared that the real question the court should consider is whether there is a real danger of bias, and that there was no need to consider it from a hypothetical observer's viewpoint because, for this purpose, the court personifies the reasonable man.[13] However this approach was criticised for failing to give

[8] *Caperton v A.T. Massey Coal Co., Inc*, 556 U.S. 868 (2009).
[9] Ibid 881.
[10] With whom Justices Thomas, Scalia and Alito joined.
[11] Ibid 889.
[12] *Caperton v. A. T. Massey Coal Co*, 556 U.S. 868 (2009) 895.
[13] *R. v Gough* [1993] AC 646, 648.

proper weight to public perception and the need to maintain public confidence in the impartiality of the judiciary[14], so in *Porter v Magill* the House of Lords made a 'modest adjustment' to the test so that 'the question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.'[15] It is significant that apart from the insertion of the FMO's perspective, the test is not materially different from that endorsed in *Gough*. The court is still trying to assess the objective risk of bias, but they now do so from the perspective of the FMO. That the FMO is objective in the assessment of the risk of bias was reiterated by the Court of Appeal in *Harb v Aziz*.[16] The result is that the English test for apprehended bias encompasses two potentially conflicting objectives without acknowledging that conflict.

If maintaining public confidence were the ultimate purpose of the test, then the FMO we would want to construct is someone who is truly representative of public opinion, or at least a person fully trusted by a broad cross section of the public to fairly assess the risk of bias. However this is not the function of the FMO test as currently applied by the courts. The question of bias could be referred to a jury as the traditional representative of the public, but is instead given to a fictional observer whose knowledge and attitudes are determined by the court. This choice might be mainly influenced by resource considerations, but it could also be motivated by a judicial desire to maintain some control over the application of the apprehended bias test. The courts attribute very detailed knowledge to the FMO, including

[14] See in particular *In re Medicaments and Related Classes of Goods* (No 2) [2000] EWCA Civ 350 [35].

[15] *Porter v Magill* [2001] UKHL 67 [103]. The full quote is: 'I respectfully suggest that your Lordships should now approve the modest adjustment of the test in R v Gough set out [by Lord Phillips in *In Re Medicaments*.] It expresses in clear and simple language a test which is in harmony with the objective test which the Strasbourg court applies when it is considering whether the circumstances give rise to a reasonable apprehension of bias. It removes any possible conflict with the test which is now applied in most Commonwealth countries and in Scotland. I would however delete from it the reference to "a real danger". Those words no longer serve a useful purpose here, and they are not used in the jurisprudence of the Strasbourg court. The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.'

[16] *Harb v Prince Abdul Aziz* [2016] EWCA Civ 556 [69] ('Harb v Aziz').

information that is not widely available due to its technical nature[17] and facts that are not in the public domain at all,[18] and bestow angelic-like character traits on them as well.[19] This has led a number of scholars to argue, and even some judges to concede,[20] that the FMO probably bears little relationship to the average member of the public.[21]

Conversely, if the real objective of the law of apprehended bias is minimising the objective risk of partial decision making then the search for an empirically representative FMO is a distraction. Instead we ought to rely on an "ideal" observer who is both wise and omniscient. It is a relatively small step from delegating the bias assessment to the ideal observer to getting the court to do it directly, for as Lord Sumption has noted, judges have 'outstanding intellectual and personal qualities which will necessarily mark them out from the

[17] This includes the difference between general and special retainers (*S. & M. Motor Repairs Pty Ltd* v *Caltex Oil (Australia) Pty Ltd* (1988) 12 NSWLR 358 at 379–380), the content of professional codes of conduct (*Lawal v Northern Spirit Ltd* [2003] UKHL 35 at [21]); case management practices, the tort of passing off, the rules regarding security for costs and the concept of goodwill (*Hart v Relentless Records Ltd* [2002] EWHC 1984 (Ch) at [31], [45]–[49]; *Flaherty v National Greyhound Racing Club Ltd* [2005] EWCA Civ 1117 at [30]), the judicial oath taken by temporary judges, the limited role of the trial judge in criminal proceedings, the power of appellate courts to correct irregularities at trial and the "independent spirit of the scots bar" (*Kearney v HM Advocate* [2006] UKPC D 1 at [8]), and the close relationship between the bar and the profession (*Taylor v Lawrence* [2002] EWCA Civ 90 at [61])

[18] *Harb v Aziz* [2016] EWCA Civ 556 at [72] citing *Virdi v Law Society* [2010] EWCA Civ 100.

[19] *Helow v Advocate General for Scotland* [2008] UKHL 62 at [2] (the FMO always reserves judgment on every point until she has seen and fully understood both sides of the argument); *R. v Abdroikov (Nurlon)* [2007] UKHL 37 at [81] (Is neither unduly compliant or naïve); *Tibbetts v Attorney General of the Cayman Islands* [2010] UKPC 8 at [3] (Is neither unduly complacent nor unduly cynical or suspicious); *Johnson v Johnson* (2000) 201 C.L.R. 488 at [53] (Is neither sensitive or suspicious, or complacent).

[20] In *Helow* v *Advocate General for Scotland* [2008] UKHL 62 Lord Hope stated at [1] that the FMO has attributes that many of us might struggle to attain to; In *R. v Abdroikov (Nurlon)* [2007] UKHL 37 Lord Mance acknowledged at [81] that the FMO was a construct of the court. Some cases however suggest a troubling lack of self-awareness on the part of the judiciary who do not even acknowledge the possibility that the views of a fair minded observer might differ from their own. A recent example comes from Australia and the decision of a Royal Commissioner, Dyson Heydon, not to recuse himself from an Inquiry examining unlawful trade union practices. The Inquiry, had broad terms of reference to investigate trade union corruption, and chose to focus on 'case studies' including the conduct of lawyers and union officials who subsequently became leaders of the Labour party. During the course of the Inquiry, Heydon accepted an invitation to deliver the Garfield Barwick lecture, which was an event organised by a branch of the Liberal Party, and used to raise funds for the party – the main political rival to the Labour Party. Once Heydon's participation in the event became publicly known and publicly criticised, Heydon decided to withdraw from the event. Heydon, however, declined to recuse himself from the further hearing of the Inquiry. Nowhere in his tightly reasoned 66 pages explaining why the allegation of an apprehension of bias is unfounded does Heydon acknowledge that the fair minded observer's views might be different to his own. Heydon criticised the submissions calling for his recusal as 'imprecise', yet public perceptions, which is what the test is designed to protect, are rarely precise. See JD Heydon, 'Reasons for Ruling on Disqualification Applications' (Royal Commission into Trade Union Governance and Corruption, 31 August 2015), https://www.tradeunionroyalcommission.gov.au/Pages/default.aspx

[21] See e.g. S Atril, 'Who is the "Fair-Minded and Informed Observer"? Bias after *Magill*' (2003) 62 CLJ 279; A Olowofoyeku, 'Bias and the Informed Observer: A Call for a Return to Gough' (2009) 68 CLJ 388; M Groves, 'The Rule against Bias' (2009) 39 HKLJ 485.

average.'[22] On the other hand, a claim that the judiciary represents a meritocratic ideal can be disputed given the relatively narrow backgrounds of the judiciary.[23] More importantly, the approach in *Gough* has been expressly 'adjusted', even if there is real force in the critique that the courts are still following *Gough* albeit under the guise of the FMO test. There is, however, a further major criticism that can be made of the *Gough* "objective" test for apprehended bias, which receives less attention in the literature, at least in England, and is not acknowledged by the courts. From the discussion so far the reader might have gained an impression that the court's aim of avoiding a real danger or likelihood of bias has been hampered by an elusive search for an objective FMO's view point. Yet the objective real danger test, even when it was good law, was never based on the principal source of objective information as to the likelihood of biased judging: namely the psychological literature on decision making. We should stress we do not claim that the concept of legal bias and "psychological bias" overlap precisely. The emphasis on public perception in the law of apprehended bias has no relevance to psychological research on biases. Similarly, while the requirement of independence from the parties covered by the rules on presumed bias could also be seen as means of avoiding impartial decision making, it can also be said to support the principle that no person should be a judge in their own cause whether or not the judge's interest affects their decision making.[24] By contrast, research on psychological bias only deals with actual cognitive biases[25] which are the product of our limited cognitive capacities and

[22] Lord Sumption, 'Home Truths about Judicial Diversity' (Bar Council Law Reform Lecture, 15 November 2012) p 21.

[23] Even Lord Sumption concedes that the most capable minds are likely to be presently excluded from the judiciary, ibid 9; see also K Malleson, 'The Everlasting Story of Over-Representation in the Senior Judiciary' [2016] (Spring) The Reporter 3 at 4, citing Lord Neuberger. In 2017 only 28% of court judges were female, and only 7% of judges identified themselves as being from a black or minority ethnic background (BAME): Courts and Tribunals Judiciary, 'Judicial Diversity Statistics 2017' (20 July 2017) https://www.judiciary.gov.uk/publications/judicial-statistics-2017/.

[24] *Cf* A Olowofoyeku, 'The nemo judex rule: The case against automatic disqualification' (2000) Public Law 456.

[25] Motivational psychology theories could also contribute to our understanding of bias. See e.g. R Nijhof, *The Social Functions of Ingroup Bias: Examining the Role of "Meaning Making" as a Motivational Process*

the human tendency to use heuristics (mental shortcuts). As explained by Rachlinski, the human brain is extremely efficient and must manage a complex array of stimuli, it has a limited ability to process information. Therefore, it relies on shortcuts to ease complex problem-solving. Psychologists like Kahneman and Gigerenzer & Todd have observed that using 'fast thinking' (heuristics) to make choices can be effective and often surprisingly accurate, but it can also lead to judgmental errors when over-applied or misused. Moreover, this is a problem that plagues all experts from doctors to futures traders, and there is growing evidence that judges are not an exception to this rule.[26] Despite their differences, legal bias and psychological bias have at least one crucial objective in common: ensuring decisions are not affected by irrelevant factors. In the words of Justice Kennedy it is to consider whether 'psychological tendencies and human weaknesses' might lead a decision maker to take account of irrelevant information, or fail to give due weight to relevant information.[27]

Due to space constraints it is not possible to provide a survey of the psychological literature on biases in decision making, but we do wish to draw attention to areas where the decision on the law of apprehended bias, even those purporting to apply an *objective* approach do not conform with, or take account of, relevant findings from psychological studies. This is the focus of our next section, which examines the tensions between the law of apprehended bias and the research on cognitive bias in decision making in relation to the risks of judges being influenced by extraneous considerations and in their application of the FMO test.

Underlying Identity Creation (MS Thesis, Leiden University, 2012 https://openaccess.leidenuniv.nl/handle/1887/23564.

[26] J Rachlinksi and AWistrich, 'Judging the judiciary by the Numbers: Empirical Research on Judges' (2017) 13 Annual Review of Law and Social Sciences 203, 204 citing D Kahneman, *Thinking Fast and Slow* (New York: Farrar, Strauss and Giroux 2011),G Gigerenzer& P Todd 'Fast and Frugal heuristics' in *Simple Heuristics that Make Us Smart* (Oxford: OUP 1999) and D Ariely *Predictably Irrational: The Hidden Forces that Shape Our Decisions* 2009).

[27] *Caperton v. A. T. Massey Coal Co*, 556 U.S 868 (2009), 881

III. Tensions Between the Law of Apprehended Bias and Research on Human Decision Making

A. The Legal Meaning of Bias and its Compatibility with Research on Cognitive Bias

Before considering the extent to which the law of apprehended bias conforms with our understanding of decision making as revealed in the psychological research, we must first define the legal meaning of bias. As Leubsdorf has noted, one cannot come up with a definition of bias without coming up with a definition of what it is to be a judge.[28] Historically, the judge's role has been defined in such a way that it assumes judges are capable of mechanically applying the law to the evidence before them as if they were automatons. In the leading case of *Locabail*,[29] the Court of Appeal defined the role of the judge thus:

> 'All legal arbiters are bound to apply the law as they understand it to the facts of individual cases as they find them. They must do so without fear or favour, affection or ill will, that is without partiality or prejudice. Justice is portrayed as blind not because she ignores the facts and circumstances of individual cases but because she shuts her eyes to all considerations extraneous to the particular case.'

By adopting a definition of bias which seemingly demands that judges check their lives at the courtroom door, English law can theoretically rule out various characteristics, experiences, beliefs or prior knowledge of the judge as grounds for apprehended bias—even if they have some connection with the parties before them or the issues that they must decide. In *Locabail* the Court of Appeal warned against providing general guidance on the circumstances giving rise to bias, but went on to identify circumstances in which bias would be considered inconceivable, unlikely, or a real possibility.[30] Factors that appear on the inconceivable list,

[28] J. Leubsdorf, "Theories of Judging and Judge Disqualification" (1987) 62 NYU L.Rev. 237.
[29] *Locabail* [2000] QB 451 at [2].
[30] Ibid at [25].

relate mostly to characteristics that are protected by discrimination law[31] while those that appear in the unlikely category relate mostly to the judge's background, membership of non-political associations or previous experience as a judge.[32] The Court does not explain whether these factors fail to give rise to apprehended bias because they involve no objective risk of partial decision-making, or because they do not think a reasonable observer would require disqualification, or some other unstated reason. The lists are in the nature of judicial declaration.[33] Even though in more recent case law the English courts have emphasised the need to consider bias from the point of view of the fair-minded observer, no decision that we are aware of has decided bias in a manner which is inconsistent with the *Locabail* list.[34]

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[31] Under the Equality Act 2010.

[32] We have presented the full list here in table form for convenience:

'We cannot conceive of circumstances in which an objection could be based on'	**Factors ordinarily insufficient**	**Circumstances where a real danger of bias might well be thought to arise**
- Religion - Ethnic or national origin - Gender - Age - Class - Sexual Orientation	- Social or educational background - Employment or service history - Membership of social, sporting or charitable bodies - Membership of masonic associations - Acting for or against parties or counsel previously - Membership of the same Inn, circuit, Law Society or chambers - Previous judgments - Previous comments adverse to a party or witness, or that a party or witness was unreliable - Extra-curricular statements	- Personal friendship or animosity towards anyone involved in the case. Close acquaintances may also disqualify. - Where the credibility of any individual is in issue, the judge had previously rejected their evidence in such outspoken terms as to throw doubt on his ability to approach such person's evidence with an open mind. - The judge had previously expressed views on live issues in such extreme and unbalanced terms as to throw doubt on his ability to try the issue with an objective judicial mind. - If there were real grounds for doubting the ability of the judge to ignore extraneous considerations, prejudices and predilections…

[33] K Malleson, 'Safeguarding Judicial Impartiality' (2002) 22 LS 53 at 59.

[34] English (and Scottish) cases that are consistent with *Locabail* include: *Taylor v Lawrence* [2003] QB 528: *Lawal v Northern Spirit Ltd* [2004] 1 All ER 187; *Sengupta v Holmes* [2002] EWCA 1104
AWG Group Ltd v Morrison [2006] 1 WLR 1163; *El Farargy v El Farargy* [2007] EWCA Civ 1149
Helow v Advocate General for Scotland [2008] UKHL 62; *JSC BTA Bank v. Ablyazov* [2012] EWCA Civ 1551; *Otkrite International Investment Management Ltd v Urumov* [2014] EWCA Civ 1315; *Watts v Watts* [2015]

Unfortunately, the meaning of bias adopted in *Locabail* is unrealistic. The objective of not being influenced by any factors other than the relevant evidence, or not forming any conclusions about the evidence before all relevant evidence has been heard, is an impossible standard to meet even for the trained judge. While the jurisprudence on judicial bias rarely engages with the psychological literature on cognitive biases,[35] the courts have often made the common sense recognition that judges are not automatons, and that the truly "neutral" judge does not exist. In the US case of *Re Linahan*, Judge Frank observed that if partiality were defined to mean the total absence of pre-conceptions in the mind of the judge, then no one has ever had a fair trial, and no one ever will.[36] The experiences that have influenced judges—and the values, beliefs, and intuitions that are borne by that experience—are likely to influence their decision-making.

In one area of law, it is widely accepted that judges must draw upon their life experiences in deciding cases before them; namely, deciding the credibility of a witness, a task considered more art than science.[37] This is because the law does not presently accept the reliability of alternative techniques for measuring truthfulness, so in cases where there is limited or no independent evidence to verify the testimony of witnesses, a judge must draw upon their life experiences and intuitions to decide whether the witness is being truthful.[38] Yet, even in performing this task, there is a risk that when judges rely on their life experience they might be influenced by irrelevant and/or untested evidence. Could, for example, a black judge draw upon their experience of race relations in the community and the criminal justice system to decide whether a black youth assaulted a white police officer? This question was confronted

EWCA Civ 1297; *Harb v HRH Prince Abdul Aziz* [2016] EWCA Civ 556; *Bubbles & Wine Ltd v Lusha* [2018] EWCA Civ 468. One decision that displays some concern about the risk of possible bias outside the circumstances identified in *Locabail*, but in relation to lay Tribunal members as distinct from trained judges, is: *Lawal v Northern Spirit Ltd* [2004] 1 All ER 187.

[35] G Hammond, *Judicial Recusal: Principles, Process and Problems* (Oxford: Hart Publishing, 2009), p 140.

[36] *Re Linahan*, 138 F.2d 650 (2d Cir. 1943). See also B Cardozo, *The Nature of the Judicial Process* (Newhaven: Yale University Press, 1921), pp.12–13, 167.

[37] *R. v S. (R.D.)* [1997] 3 S.C.R. 484 at [128] (Cory J).

[38] Ibid at [39] (L'Heureux-Dubé and McLachlin JJ), citing D Paciocco and L Stuesser, *The Law of Evidence* (Toronto: Irwin Law, 1996), p 277.

by the Canadian Supreme Court in the case of *R. v S. (R.D.)*. In that case, the only witnesses to the alleged assault were the arresting police officer and the defendant. The judge, who was also black, expressed doubts about the testimony of the police officer and stated that:

> 'I am not saying that the police officer has misled the court, although police officers have been known to do that in the past. I am not saying that the officer overreacted, but certainly police officers do overreact, particularly when they are dealing with non-white groups. That to me indicates a state of mind right there that is questionable. I believe that probably the situation in this particular case is the case of a young police officer who overreacted. I do accept the evidence of [R.D.S.] that he was told to shut up or he would be under arrest. It seems to be in keeping with the prevalent attitude of the day. At any rate, based upon my comments and based upon all the evidence before the court I have no other choice but to acquit.'

This passage became the subject of a successful apprehended bias application, which was ultimately reversed by the Supreme Court in a 6 to 3 decision. The Majority found no apprehension of bias as the judge had not relied upon the racial backgrounds of the police officer or defendant in reaching her verdict, but was split on whether it would have been legitimate to do so. Cory J (with whom Iacobucci J agreed) stated that there was a qualitative difference between "cases in which social context is used to ensure that the law evolves in keeping with changes in social reality and cases, such as this one, where social context is apparently being used to assist in determining an issue of credibility".[39] The latter would come close to the use of statistical propensity evidence, which the courts have consistently rejected. This was the reason why three of the judges, including the chief justice, dissented and upheld the finding of apparent bias.[40] However, McLachlin and L'Heureux-Dubé JJ (with whom Gonthier and Forest JJ agreed) held that, if Judge Sparks *had* chosen to attribute the behaviour of the police officer to the racial dynamics of the situation, then she would not necessarily have erred but instead engaged in appropriate "contextualised judging". As a member of the community, it was open to her to take into account the well-known presence

[39] Ibid at [127].
[40] Lamer CJ and Sopinka and Major JJ.

of racism in that community and to evaluate the evidence as to what occurred against that background.[41] The prospect of justice "opening her eyes" to the context of the case raises fascinating questions about when contextualised judging stops being good judging and becomes bias instead. This issue is further examined in Part III. For present purposes, it suffices to say that, as a matter of law judges resorting to their life experiences is a necessity in some situations and desirable according to some judges.

The debate about the legitimacy of drawing on life experience in judicial decision making is an academic one according to the psychological literature. Numerous studies suggest that the influence of life experiences, and the values, intuitions and implicit biases that those experiences create, is an inevitable part of judging. There are more than a few examples in the cognitive psychology literature that show that judges can be influenced by factors related to their personal experiences when judging cases. Judges are trained professionals, but their decisions are inevitably affected by human nature. For example, a recent study in the United States suggests that judges with daughters are more likely to decide in favour of women's rights than judges who only have sons.[42] Importantly there is evidence to suggest that the life experiences of other judges can also affect court decisions, at least where those other judges are on the same bench. Another U.S study found that the presence of one woman on three-judge appeals panel increased the success rate for female complainants in sexual discrimination cases compared to all male panels.[43]

Studies have also demonstrated that judges' could be susceptible to the influence of implicit racial bias.[44] In England, while the Court of Appeal has declared it to be

[41] Ibid at [56].
[42] A Glynn and M Sen, 'Identifying Judicial Empathy: Does Having Daughters Cause Judges to Rule for Women's Issues?' (2015) 59 AJPS 37–54. According to the study the "daughter effect" is most pronounced among male judges appointed by Republican Presidents.
[43] J Perisie,'Female judges matter: gender and collegial decision making in the Federal Appellate Courts' (2005) 114 Yale Law J 1759–90.
[44] J Rachlinski et al, 'Does Unconscious Racial Bias Affect Trial Judges?' (2009) 84 Notre Dame L.Rev. 1195.

inconceivable that race could be a ground for disqualification of a judge,[45] statistics from the Ministry of Justice confirm that Black, Asian and Minority Ethnic persons may be subject to institutional racism by the criminal justice system including in sentencing decisions by the judiciary.[46] Unfortunately, as this data only shows association between race and outcome, one cannot draw definitive causal conclusions. Equally, however, lawyers cannot easily dismiss statistics showing a strong correlation between race and outcomes in the justice system for lack of causal proof—an approach which would be reminiscent of tobacco company executives dismissing epidemiological studies showing strong correlations between smoking and cancer.[47]

While the studies of statistics on race and the justice system are troubling, they do provide some promising insights into potentially effective ways of minimising the influence of racial bias. In particular, and wherever possible, there appears to be value in rendering explicit sources of implicit bias – so that the decision-maker can at least try to control for them. In the United States, 133 judges took part in a controlled study in which they undertook a general implicit bias test and then received three hypothetical cases, in two of which the race of the defendant was made salient through a subliminal priming technique,[48] and a third case in which the defendant's race was made explicit.[49] The results showed that judges carry implicit biases concerning race,[50] and that these implicit associations influenced judges when the race of the defendant was manipulated by subliminal methods. However, under the explicit

[45] *Locabail* [2000] QB 451 at [25].
[46] BAME persons are more likely to be sentenced to a period of imprisonment, and average custodial sentence lengths remained consistently higher compared to white offenders: Ministry of Justice, 'Race and the Criminal Justice System 2016' p 8 *https://www.gov.uk/government/statistics/race-and-the-criminal-justice-system-2016*.
[47] Strong consistent statistical correlations across different data sets are evidence that can form the basis of causal conclusions at a population level, as affirmed in the landmark 1964 US Surgeon General Report. For an updated discussion of causal criteria, see: *Surgeon General's Report: The Health Consequences of Smoking* (Centers for Disease Control and Prevention, 2004), *https://www.cdc.gov/tobacco/data_statistics/sgr/2004/index.htm*.
[48] By providing implicit cues associated with Black Americans.
[49] J.J. Rachlinski et al, 'Does Unconscious Racial Bias Affect Trial Judges?' (2009) 84 *Notre Dame Law Review* 1195–1246. Implicit bias here refers to 'stereotypical associations so subtle that people who hold them might not even be aware of them': at 1196.
[50] This is true of everyone. Even people who embrace nondiscrimination norms hold implicit biases: *ibid*, 1197.

manipulation where the defendant's race was clearly identified, white judges treated Black and Caucasian defendants comparably.[51] While this latter finding is positive, caution is warranted in interpreting these results, due to the challenges in designing studies that can accurately measure the way racial bias works in actual courtrooms.[52]

The psychological literature also indicates that presenting judges with information accepted to be *irrelevant* and *unconnected* to their life experiences or belief systems, can materially affect their judgments; i.e. judges are affected by cognitive biases and heuristics, even if not inspired by a conscious or sub-conscious predisposition to the parties or the issues before them. In one of their empirical studies using a sample of 167 federal magistrate judges, Guthrie, Rachlinski, and Wistrich found clear evidence of "anchoring."[53] Anchoring describes people's tendency to rely upon an initial value available to them when making numerical estimates, even when this initial value (the anchor) does not provide any information about the actual value of the item being estimated. Judges in the study who were told that the defendant 'moved for dismissal of the case, because it did not meet the jurisdictional minimum for a diversity case of $75,000', awarded the plaintiff substantially less damages than judges who were not provided this information when giving their verdicts ($882,000 on average for judges in the anchor condition compared to $1,249,000 on average for judges in the no anchor condition) even though the damages suffered by the plaintiff were objectively well above the $75,000 figure.[54]

The fact that no judge is a tabula rasa also poses difficulties for the other fundamental precept of the law of bias: judges must not pre-judge an issue. In England, as in many other

[51] *ibid*.
[52] D. Teichman and E. Zamir, 'Judicial Decision-Making: A Behavioral Perspective' in E. Zamir and D. Teichman (eds), *The Oxford Handbook of Behavioral Economics and the Law* (New York: Oxford University Press, 2014) 664–702, 683–686. See also D.B. Mustard, 'Racial, Ethnic, and Gender Disparities in Sentencing: Evidence from the US Federal Courts' (2001) 44 *Journal of Law & Economics* 285–314; T.L. Mitchell et al, 'Racial Bias in Mock Juror Decision-Making: A Meta-Analytic Review of Defendant Treatment' (2005) 29 *Law and Human Behavior* 621–637.
[53] C Guthrie et al., 'Inside the Judicial Mind' (2001) 86 Cornell L.Rev.777–830.
[54] Ibid.

systems, judges are sometimes called on to decide issues at a preliminary hearing which will be live at trial which will be heard by the same judge. Similarly in the course of case management processes, judges may make critical comments about the pre-trial behaviour of parties or witnesses who will give evidence at trial. Because different evidence can be adduced, different arguments can be advanced, and the judge may have to apply a different standard of proof at a trial, a judge may be required to come to different conclusion to that formed at the pre-trial stage. Yet the idea that judges can keep a completely open mind until all relevant evidence is presented is also called into question by the psychological research on confirmation bias. Confirmation bias is the tendency of individuals to favour information that confirms their preconceptions or hypotheses, regardless of whether that information is true or false.[55] The available evidence suggests that the order in which evidence/information is presented does influences the weight given to that evidence in decision-making, and helps predict the decision that is ultimately reached. People generally look for information that they would expect to find as it supports their initial opinions and beliefs, or give greater weight to information that is consistent with a hypothesis but does not confirm its correctness.[56] Moreover, confirmation bias has been shown to exist even when people are *not* motivated by the desire to defend beliefs that they wish to maintain.[57]

There is also nothing in the studies on confirmation bias which suggests that the distinctions made in the case law on when there is an unacceptable risk of prejudgment are sound from the perspective of psychology. For example, English law draws a distinction between a judge's conduct required by their judicial function—such as findings in interlocutory hearings or statements made as part of case management—and intemperate and

[55] R Nickerson, 'Confirmation Bias: A Ubiquitous Phenomenon in Many Guises' (1998) 2 Rev. Gen. Psychol. 175. See also See also N. Pennington and R. Hastie, 'Reasoning in Explanation-Based Decision Making' (1993) 49 *Cognition* 123–163.
[56] Nickerson Ibid at 177.
[57] Ibid at 176. See also P Devine and T Ostrom, "Cognitive Mediation of Inconsistency Discounting" (1985) 49 J. Pers. Soc. Psychol. 5–21.

unnecessary criticisms about the parties' credibility or behaviour. While intemperate criticisms may be more morally blameworthy given the judges' oath of office, this does not preclude the possibility of prejudgment also arising from the judge making preliminary determinations in a professional manner. This is one area where the law of bias is seemingly more concerned with the appearance rather than the reality of bias, given that the focus is not on the conclusions of the judge, but rather the language used to express them. In this context, however, the focus on appearance rather than reality may have the effect of reducing rather than expanding the cases where disqualification is required.

Arguably a more convincing explanation for English law's restricted approach to apprehended bias for pre-judgment is to be found in the legal definition of bias. If bias means taking into account extraneous considerations as was held in *Locabail*, the mere fact that a judge has made findings or comments that were previously adverse to a party does not suggest that they would take into account extraneous considerations in further hearings involving the same party. This assessment changes, however, if the language used by the judge suggests antagonism or animosity to a party, such that their later rulings may be influenced by negative feelings the judge has towards the parties, based on their interactions with them, and not the evidence or arguments that will be presented at trial even if they are familiar with that evidence and have formed preliminary opinions about it.[58] We should candidly acknowledge, however, that this explanation is exclusively legal. It conveniently sidesteps the risk of confirmation bias that is inherent in any legal system where judges are called upon to decide issues that they have considered previously, or hear evidence from parties and witnesses they have dealt with previously.

One area where English law might accurately reflect scientific understanding of confirmation bias is in the courts' acknowledgement that the phenomenon can operate at an

[58] A similar approach was taken by the U.S Supreme Court in *Liteky v. United States*, 510 U.S. 540 (1994).

institutional level. In the case of *JSC BTA Bank v Ablyazov*,[59] the judge had made a series of findings against the Defendant at an interlocutory stage, including finding him in contempt of court. In the course of those proceedings, the judge had questioned the credibility of the Defendant stating that A's description of black as black should be treated with caution without independent evidence. Dismissing the claim of apprehended bias, the Court of Appeal stressed that the judge had not used "intemperate" language [60] and in any event transferring the case to a different judge would not avoid the problem of prejudgment, because the judge's earlier findings were part of "the *res gestae* of the proceedings."[61] There is at least one study that provides support for the phenomenon of institutional prejudgment. A study by Dhami found that decisions by other officials in the justice system, including police and prosecutors, was a more accurate predictor of bail decisions than a more complex model that assumes magistrates would consider all relevant factors might give rise to institutional prejudgment.[62]

Finally, on the positive side, we should note one area where judging is increasingly informed by the psychological literature. This is in the widespread adoption of implicit bias training, and techniques designed to minimise it. For example, The UK Judicial Institute has introduced unconscious bias training for judges.[63] The ABA Judicial Division has also produced a source book for judges on "De-Biasing Strategies" which present strategies to mitigate implicit bias including techniques for making decision makers aware of their own implicit biases.[64] Studies have suggested judges, by virtue of their training, are sometimes

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[59] *JSC BTA Bank v Ablyazov* [2012] EWCA Civ 1551.
[60] Ibid at [70].
[61] Ibid at [69].
[62] M Dhami and P Ayton, 'Bailing and Jailing the Fast and Frugal Way' (2001) 14 J. Behav. Decis. Making 141–168.
[63] See G Langdon-Down, 'Judicial College: Bench Marks', The Law and Society Gazette (12.6.2017)).
[64] American Bar Association, 'Judges: 6 Strategies to Combat Implicit Bias on the Bench' (September 2016), *https://www.americanbar.org/publications/youraba/2016/september-2016/strategies-on-implicit-bias-and-de-biasing-for-judges-and-lawyer.html*.

better able to control for the influence of explicit bias.[65] There are some positive signs that, at least in some contexts, judges are more attune to the potential for cognitive biases and have some capacity to minimise the influence of those biases, especially where the biases are made explicit. However, these biases cannot be eliminated completely, and numerous studies have shown that judges are vulnerable to implicit cognitive biases, which may be the product of their own life experiences, or common heuristic devices used in human decision-making which lead people to take into account irrelevant information, or form views based on the order in which information is presented to them.

B. Judges Limited Ability to Recognise their own Biases

In part I we noted there were widespread doubts as to whether the FMO test applied by the courts reflects reasonably informed public opinion towards the risk of bias. In this part we also wish to emphasise the cognitive biases to which the test is susceptible. The case law demonstrates that courts attribute detailed technical knowledge and enviable wisdom to the FMO. It also reveals a judicial assumption that the more the FMO knows, and the wiser they are, the less likely they are to apprehend bias on the part of the judge. The Court of Appeal's decision in *Taylor v Lawrence*[66] provides an illustrative example. A claim of apprehended bias was made against a judge who accepted free legal services in connection with a will from a law firm representing one of the parties before him. The Court held that, if the truth were known about the legal traditions and culture of the profession, and the often close relationships between the judiciary and the profession, then it would be 'unthinkable that a fair-minded observer would regard it as conceivable' that the target judge might be

[65] J.J. Rachlinski et al, 'Does Unconscious Racial Bias Affect Trial Judges?' (2009) 84 *Notre Dame Law Review* 1195.
[66] *Taylor v Lawrence* [2002] EWCA Civ 90.

influenced in favour of a party represented by the firm that had provided him with free services.[67] The same judicial assumption is also evident in cases where judges have expressly cautioned that it is the observer's, and not the court's perspective, that counts. In *Sengupta v Holmes* Laws LJ stated 'it is not enough to show that those in the know would not apprehend any bias.'[68]

While there are some notable exceptions in the case law[69], the tendency of the judiciary to assert that if the FMO knew the full picture they would be less likely to suspect bias, is both unsurprising and unwarranted from the perspective of psychology. The judge that creates the fictional person is typically the judge accused of possible bias. In a very real sense, the judge sits in judgment on their own capacity to judge impartially, often taking into account their own statements about the circumstances said to create a risk of bias.[70] Numerous studies have shown that individuals see the existence and operation of cognitive and motivational biases much more in others than in themselves.[71] The fact that these decisions are appealable does provide a check on the practice of judge's judging themselves, but judges judging other judges is also susceptible to the phenomenon known as "in-group" bias. In-group bias[72] is the phenomenon where people tend to positively evaluate actions of the in-group relative to the out-group. Several studies have demonstrated in-group bias in judicial decisions,[73] and the

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[67] Ibid at [61], [73].
[68] *Sengupta v Holmes* [2002] EWCA Civ 1104 at [11].
[69] See, for example, *Lawal v Northern Spirit Ltd* [2003] UKHL 35 at [22] where Lord Steyn observed that knowledge of particular legal practices or traditions does not preclude an outsider from believing those practices might create a risk of bias.
[70] These disclosure or clarifying statements, which cannot be tested through cross examination, can still be taken into account by both the target judge and any appeal court: *Locabail* [2000] QB 451 at [19].
[71] See eg E Pronin et al, 'The Bias Blind Spot: Perceptions of Bias in Self Versus Others' (2002) 28 Pers. Soc. Psychol. B. 287. See also D. Chugh et al., 'Bounded Ethicality as a Psychological Barrier to Recognizing Conflicts of Interest' in D Moore et al. (eds), *Conflicts of Interest: Challenges and Solutions in Business, Law, Medicine, and Public Policy* (Cambridge: Cambridge University Press, 2005), ch V.
[72] See eg M Hewstone et al. 'Intergroup Bias' (2002) 53 Annu. Rev. Psychol. 575.
[73] Studies of Arab and Jewish judges in Israel found In-group bias in favour of litigants or defendants from the same background: see eg M Shayo and A Zussman, 'Judicial In-group Bias in the Shadow of Terrorism' (2011) 126 Q.J.Econ. 1447–1484; O. Gazal-Ayal and R. Sulitzeanu-Kenan, 'Let My People Go: Ethnic In-Group Bias in Judicial Decisions—Evidence from a Randomized Natural Experiment' (2010) 7 J.E.L.S. 403–428. Evidence of In-group judicial bias was also found in the more mundane context of different treatment of out of state defendants compared to in state defendants in a study involving U.S judges in Minnesota: A Wistrich and J

phenomenon could even affect the judiciary to a greater degree than other groups given the effect appears to be stronger as groups become more exclusive.[74] The decision in *Taylor v Lawrence* arguably reflects the basic human tendency of those "on the inside" to justify what happens on the inside.

III. Implications, Possible Solutions and Areas for Further Research

A. Next Steps

This part examines whether more reliable and transparent ways can be found to balance the objectives of upholding public confidence in the impartiality of the courts, minimising the risk of bias, and maintaining a functioning justice system with limited resources.

One radical solution would be to abandon the goal of maintaining public confidence, or the goal of avoiding an objective risk of bias, and base the test on just one of these rationales. Some have suggested that focusing exclusively on whether there is a real danger of bias is more likely to engender public confidence than having judges try to guess where public opinion might lie on the facts of individual cases.[75] If one were to settle for only one of the two main rationales for apprehended bias, then some of the proposals in this section would cease to be relevant. In our view, however, it is unlikely that any changes to the law of apprehended bias would involve abandoning either of these objectives completely given the importance of both is widely accepted.

Rachlinski, 'Implicit Bias in Judicial Decision Making: How it Affects Judgment and What Judges can do About it' in S Redfield (ed), *Enhancing Justice: Reducing Bias* (Chicago: American Bar Association, 2017) 95, p.99. In this study, over 100 Minnesota judges were asked to assess a hypothetical case involving a business dumping hazardous chemicals and the place of residence of the parties was manipulated in order to test in-group bias. For half of the judges, the materials indicated that both the plaintiff and defendant were in-state residents. For the other half, the plaintiff was a Minnesotan, but the defendant was from Wisconsin. The results showed that the judges expressed 'an enormous in-state bias'. While the median award against the Wisconsin defendant was $1,750,000, the median award against the Minnesota defendant was only $1,000,000.

[74] B Mullen et al., 'In group Bias as a Function of Salience, Relevance, and Status: An Integration' (1992) 22 Eur. J. Soc. Psychol. 103, 117.

[75] A Olowofoyeku, (n 19)

The relevant psychological literature does not necessarily suggest that there is a greater need for disqualification in certain types of cases, but that there is a gap between the assumptions underpinning the law of bias and the realities of human judgement. Both normatively, and as a matter of legal policy, a legal system may have to tolerate a risk of bias to a certain extent and/or in certain contexts. No legal system could countenance a law of bias that meant some cases could never be tried fairly. The common law recognises a doctrine of necessity as an exception to the rule against bias under which persons can act where they are the only ones able or authorised to do so, and that doctrine could conceivably be extended to cases where the risk of bias is unavoidable because it is universal.[76]

A number of options might be pursued to restore some credibility to the test for apprehended bias, although it is doubtful whether the actual and potential divisions between public perception, the science of decision making and judicial policy could ever be completely closed. To begin with, it would be more transparent if the law explicitly recognised that the current law of bias is the product of a balancing exercise in which the courts weigh up a range of (often competing) considerations. Leubsdorf, for example, acknowledges that political judging threatens the legitimacy of judicial power, whilst purely cognitive decision-making (of the kind upheld in *Locabail*) is impossible. Accordingly, he advocates a constrained dialogue between participants in the justice system and the public, which would both shape the law of bias and perform a didactic function as to the objectives and limits of judicial decision-making.[77] Some courts appear willing to engage in this kind of dialogue, stressing that the law of bias necessarily involves a balancing exercise. English and Australian courts have suggested that the fair-minded observer is not only concerned with the risk of bias, but also with maintaining an accessible justice system, and would take both into

[76] Everyone has a race, gender, sexual orientation or religious beliefs (or the lack of them).
[77] J. Leubsdorf, (n 25) p 279.

account in deciding whether a judge should disqualify themselves.[78] Other courts have disavowed this balancing approach.[79]

We fully support a more transparent dialogue about the tensions involved in the law of bias, although we argue below that the process and the outcome of that dialogue ought to be formalised in the form of a judicial code that takes due account of legal policy considerations, public perception and the best available research on decision making. Before turning to these proposals, we should first consider judicial attempts to improve the credibility and workability of the test for bias.

B. Judicial Experience and the Necessity to Keep an "Open Mind"

The most radical and controversial suggestion for reforming the law of bias is implicit in the majority reasons in the Canadian case of *R. v S. (R.D.)* discussed in Part II. The central idea is that a judge drawing upon their own experience is not an error or bias, but constitutes good judging.[80] If judges do, or should, draw upon their life experiences, then arguably there is an institutional imperative to promote judicial diversity as a judiciary drawn from a narrow segment of society is likely to have limited or distorted perceptions of everyone else's experiences.[81] But this line of argument leads us to a cliff edge. If the absence of relevant life experience, or shared life experiences with only one of the parties, could lead to partial judging, then few persons would ever be qualified to be a judge, and those qualifications would vary from case to case. Moreover, if the risk of partiality is increased through lack of life experience, that risk still exists with a diverse judiciary. Save perhaps for collegiate

[78] *Ebner v Official Trustee in Bankruptcy* (1999) 91 F.C.R. 353 at [37]; *JSC BTA Bank v Ablyazov* [2012] EWCA Civ 1551 at [65].
[79] *AWG Group Ltd v Morrison* [2006] EWCA Civ 6 at [6].
[80] The Constitutional Court of South Africa has also stated it is appropriate for judges to bring their life experiences to the adjudication process: *President of the Republic of South Africa v South African Rugby Union* 1999 (4) S A 147 [42]. See also B McLachlin, 'Why We Need Women Judges' (International Association of Women Judges, Sydney, Australia, 3–7 May 2006) where she stated 'Women are capable of infusing the law with the unique reality of their life'.
[81] Malleson (n 33); R. Hunter, 'More than Just a Different Face? Judicial Diversity and Decision-making' (2015) 68 CLP 119.

decision-making at an appellate level, judging in a particular case is by definition un-diverse. This may partly explain Lord Sumption's invocation of the seemingly oxymoronic term 'vicarious experience' to explain why, a judge need not have shared life experiences of the litigants before them in order to understand their predicament and decide cases justly.[82]

A diverse judiciary is clearly preferable to the alternative for the purposes of the law apprehended bias even if one accepts Lord Sumption's argument that life experience is irrelevant to the judge's task. On the *Locabail* view of the judge's role, a diverse judiciary at least helps evenly spread the risk of implicit bias whereas currently that risk predominantly falls on non-white and non-male middle class groups.[83] Moreover, if one accepts the value of 'vicarious experience' to a judge, then diversity has the potential of reducing in-group bias at an institutional level, if not in individual cases, by exposing judges in their workplaces to different life experiences. There is significant empirical evidence showing that the presence of population diversity in an environment can reduce implicit biases.[84]

On the other hand, if one believes that contextualised judging is legitimate there remains the technical question of how life experiences can be legitimately used by a judge. If one can draw upon life experiences that *might* "tilt the scales" of justice in favour of one party's case, at what point does good or inevitable judging becomes bias? In *R. v S. (R.D.)*, the majority warned that a judge must not resort to experiences that are irrelevant, or based upon inappropriate stereotypes, when judging the issues before them.[85] Given that life experience is always limited, there is inevitably a possibility that someone's life experiences might lead them to forming inappropriate stereotypes. It is perhaps unsurprising that, in *R. v S. (R.D.)*, the majority made it clear that the fundamental requirement of impartiality was for the judge

[82] Lord Sumption (n 22) p 19.
[83] A point made by Malleson (n 33) p 65.
[84] C Sunstein and C Jolls, 'The Law of Implicit Bias', (2006) 94(4) California Law.Rev 969, 981.
[85] *R. v S. (R.D.)* [1997] 3 S.C.R. 484 at [29] (McLachlin and L'Heureux-Dubé JJ, with whom Gonthier and Forest JJ agreed).

to maintain an open mind.[86] It is noteworthy how far removed these principles are from the judicial ideal set out in *Locabail*. Keeping an open mind is a universal value; even conspiracy theorists are unlikely to acknowledge that their mind is "closed" and could not be moved by new evidence.

The closed mind test was primarily developed in the context of apprehended bias claims for prejudgment. The rule does not mean that it is impermissible for judges to form views about the evidence that they hear when they hear it, or in the context of case-management, form views on the conduct of the parties in the course of the proceeding. Rather the requirement is to keep an open mind about the evidence or the credibility of the parties, before they have to decide an issue before them. Unfortunately, the closed mind test is difficult, if not impossible, to measure objectively, and it runs the risk of emptying the bias test of any content. Absent a statement from the judge to the effect that they have already made up their mind, it is impossible to establish that a judge has indeed "closed" their mind to further persuasion. The concept cannot even be tested experimentally, for there is no technique for establishing whether a decision-maker closed their mind to further evidence or argument. The High Court of Australia has acknowledged that the line between legitimate preconception and unacceptable prejudgment is an 'ill defined one.'[87] The law tries to avoid the problem of measuring prejudgment by falling back on public perception: would the observer think that the judge's mind is already made up? But this merely shifts the problem, it does not solve it. How does the FMO decide whether a judge's mind might be closed to further persuasion? An observer might draw inferences from the strength of the statements made by a judge, and whether they were qualified. But where a judge's findings or statements are suitably qualified, a finding of apprehended "closed mind" bias essentially involves a

[86] Ibid at [49].
[87] *Vakauta v Kelly* (1989) 167 C.L.R. 568 at 570–571 (Brennan, Deane and Gaudron JJ).

finding that the public might not believe the judge. [88] As suggested in Part I arguably the better explanation of the current law of apprehended bias on grounds of pre-judgment than an assessment of whether the judge's mind is closed, is that the court is considering, from the perspective of the FMO, whether a judge has formed a hostile view of a party or their case, and thus may not be able to able decide the case impartially.

Briefly turning to the second principle emerging from *R. v S. (R.D.)* designed to recognise the realities of human decision —that improper preconceptions can constitute bias— raise different challenges of measurement. Qualitative judgments as to which preconceptions and stereotypes are improper is an inherently political exercise, which in turn raises questions of judicial legitimacy. If the law of apprehended bias is not to fall back upon tests that are too difficult to apply, or involve the judiciary engaging in inherently political judgments, we need to consider other options to put the law on more secure foundations.

C. The Case for Partial Codification of the Law Bias

A standout feature of the law of apprehended bias is that none of the factors that the courts weigh up, or any of the additional factors we argue that they should weigh up, involve any legal analysis in the technical sense. Put simply there is no law in the assessment of apprehended bias. Instead the courts balance different factors including the need for impartial and independent decision-making, public confidence in the judiciary, professional respect for the judiciary and promoting efficiency in the administration of justice.

Judges are of course well placed to provide input into what makes justice systems work efficiently, and undoubtedly have some insight into relationships between the profession and the bench, but they have no special insights into public perception or training in the relevant

[88] For a case where the High Court of Australia disqualified a judge for apprehended bias on grounds of prejudgment, even though the Judge's views were expressly qualified to be provisional, see *British American Tobacco Australia Services Limited v Laurie* (2011) HCA 2.

science on human decision making. To require judges to weigh up all these factors in individual cases where possible bias is alleged is, to use a colloquial expression, a big ask. Moreover, this weighing exercise is a policy exercise rather than a process of legal reasoning. Policy exercises are best dealt with through formal policy processes. This allows for systematic consideration of all relevant factors and allows for public consultations, which provide some insight into the views of at least self-selecting members of the public, and dialogue between stakeholders (in this case the public and the legal community) and experts (in this case behavioural psychologists who are experts in decision making).

If the results of this process are to meaningfully inform the law of apprehended bias it is likely that there would need to be at least partial codification of the law. The primary purpose of a code on the law of apprehended bias would be to identify circumstances where judges should and should not sit. There are some codes that already perform this function.[89] We deliberately refrain from suggesting what should appear on these "green" (no disqualification) and "red" (automatic disqualification) lists for that would pre-empt the very policy process we are advocating. However we do want to recommend research that should be carried out as part of this process in order to close the gaps in our knowledge of the relevant factors. In particular, we think there is a strong case for carrying out controlled experiments and detailed surveys investigating public attitudes towards judicial bias. Survey techniques face difficulties accurately measuring public opinion when most members of the public are unwilling to answer surveys,[90] but while no study is perfect, there are a host of techniques used by researchers to minimise the problem associated with weighting and to identify the views of population sub-groups, which minimise the self- selection problem of public consultations. Surveys are less effective in measuring the attitudes of the observer who

[89] In particular see the International Bar Association, *Guidelines on Conflicts of Interest in International Arbitration* (2014).

[90] For discussion, see W Kruskal and F Mosteller, 'Representative Sampling' in S. Kotz et al. (eds), *Encyclopedia of Statistical Sciences* (New Jersey: Wiley-Interscience, 2nd edn, 2006).

'is aware of all relevant circumstances'[91] but even in a survey it is possible to assess whether opinions would change when respondents are presented with the consequences of their choices (eg, more disqualifications would lead to a more expensive justice system). An alternative way of ascertaining informed public opinion is the use of citizens' assemblies where members of the public are chosen randomly to meet and discuss issues with experts. This method has been used successfully in advancing national debates in Ireland, such as possible changes to abortion laws, and could constitute one part of the policy process in codifying the law of apprehended bias.[92] Similarly, it may also be possible to conduct controlled experiments comparing the responses of lay members of the public, informed of all 'relevant circumstances' against the lawyer "in-group" in deciding whether there is a reasonable apprehension of bias in different factual scenarios. In addition, we believe there is a strong case for further psychological studies to test the effects of certain biases on judges specifically. In particular it is noteworthy that none of the studies on confirmation bias have used real judges. The results of these studies could be used to help construct the green and red lists in the code.

Codes have their strengths and weaknesses as a means of regulation, and a code covering apprehended bias would need to sensitive to these limitations. A benefit of a code is that it should lead to greater consistency in disqualification applications. A cost is that costs are, by necessity, general in nature and lack the flexibility of the common law. Experience has shown that codes (even case based codes) have usually identified a third category of 'maybe' cases where the outcome must be decided by reference to the circumstances in each individual case.[93] A code on apprehended bias could not avoid having such a third category of borderline or 'orange list' cases, but we argue this category should be kept as narrow as

[91] *Harb v Aziz* [2016] EWCA Civ 556 [72]
[92] See https://www.citizensassembly.ie/en/
[93] The International Bar Association, *Guidelines on Conflicts of Interest* (n 83) has an "orange list" that requires case by case determination. And see the 'unlikely' category in *Locabail* (n 30) above.

possible, limited to situations where the possibility that judges might be influenced by extraneous considerations is real but small and the case for and against disqualification is evenly balanced.

Accepting that code could not and should not cover all cases, the question then becomes how should borderline cases be dealt with under our proposed new framework? There are a number of possibilities but for the reasons outlined in Parts I and II, the practice of an FMO test applied by the target judge accused of possible bias should be discontinued. One option would be to seek to replicate the benefits of a formal policy dialogue in a case specific adjudication. For example, apprehended bias applications could be decided by a panel comprising a judge, a behavioural psychologist and a lay member, representing the three strains of opinion that should be balanced in disqualification decisions. However multiple criticisms could be made of this approach. First, using a lay person to represent reasonable public opinion at large could be dismissed as tokenistic. Secondly, while a trained behavioural psychologist can provide useful insights into the challenges facing a decision maker in certain scenarios, there are no reliable methods to assess how serious the risk of bias might be *in an individual case*. The experiments that psychologists rely on can show only a statistical probability of bias as opposed to actual bias in an individual decision maker.[94] Thirdly, this option would involve extra cost, and in an era of falling public subsidy for the justice system, other potentially more cost effective options also need to be considered.

We think a better and potentially cheaper option for dealing with borderline cases on an orange list is to continue to have them dealt with by judges, but change the procedure so that the issue of possible bias is dealt with indirectly. The courts instead would focus on detecting substantive legal errors in cases where the target judge *might* have been influenced by extraneous considerations. The advantage of this approach is that it shifts the inquiry away

[94] As to whether and when causal conclusions can be drawn from statistical correlations see (n 44).

from essentially non-legal questions that judges are poorly positioned to make and on to issues that judges are well trained to carry out: deciding legal error. Detecting error in individual cases is a much more achievable aim than detecting subconscious bias, and judges are generally very good at doing it. In this regard the proposal is a negative one as all judgments are potentially appealable, even those possibly affected by bias. The proposal is that judges do not also consider the issue of possible bias. For the avoidance of doubt, nothing would prevent a party from alleging actual bias on the facts of a particular case, and that subject to the reforms outlined below, allegations that judges have breached their judicial oath ought to be dealt with directly.

The biggest weakness in an "appellable error' only method for dealing with the risk of bias is that the influence of subconscious bias will not always produce identifiable error. The test would not capture cases where a judge's subconscious bias influenced their decision, but it is not possible for an appeal court to say the decision was wrong because a reasonable impartial judge could have reached the same conclusion even if alternative views might have been available on the facts. Yet it is debatable whether such an outcome would be unsatisfactory. If another judge acting reasonably could have reached the same conclusion as that reached by a judge deemed to be at a higher risk of subconscious bias, it is a defensible position for the law to refuse to delve into a bias inquiry to which there will never be a clear answer at best, and is a will of the wisp at worst.

An alternative way of addressing the risk of subconscious bias through a merits based test, is to alter the usual appellate rules on review to remove any deference to the target judge's decision.[95] Therefore where a case did fall within an 'orange list', an appellate court could uphold an appeal if it would have decided the case differently from the target judge. In technical terms the appeal would be by way of rehearing (based on the same evidentiary

[95] The deference afforded to a first instance court by an appeal court varies according to the nature of the question decided to a lower court and the sources of evidence available to it*: B (A Child) (Care Proceedings: Appeal), Re* [2013] UKSC 33.

record) than review.[96] Given these modified appeal rules would give a disgruntled litigant a greater chance of overturning a decision, it is important that the boundaries of this 'orange list' be carefully monitored by the courts. In particular a court should have the power to dismiss a complaint of apprehended bias where the relevant circumstances are directly analogous to a scenario on a codified green list, even if not expressly covered by the code (and conversely uphold a complaint where it is analogous to a scenario on the red list). Another important check on disgruntled litigants inappropriately wasting court time is that the test would not require any examination of the trial judge's decision for evidence of bias. As we have already note while the right to allege actual bias cannot be removed for obvious rule of law reasons, the trigger for changing an appellate court's approach to the hearing of appeal is merely to inquire whether the circumstances giving rise to the risk of bias, whether they arise before or during a trial, fall on a codified orange list. On balance, we believe that altering appellate review rules is warranted for dealing with borderline orange list cases. This is a real and avoidable risk of subconscious bias influencing the outcome of a case is not something a legal system ought to ignore, even if there are other techniques for addressing subconscious bias.[97]

A second set of objections towards a merits based test that deals with the risk of bias indirectly, is that it might inadvertently undermine public confidence in the impartiality of the judiciary. In cases where bias is alleged and an appellate court overturns the judge's findings on the merits, the public might conclude that they did so because the judge was biased. We cannot rule out the possibility that some members of the public could interpret an appeal court's decision in this way, however we argue that any fair minded observer who *read* the appeal court's decision would not do so. For if the test applied by the court does not address

[96] To be clear it is not suggested that an appeal court should hear the case ab initio. In England the Court already has this power to hear an appeal in this way where it is in the interests of justice to do so, though the default setting is that appeals are heard by way of review: CPR 52.21(1).
[97] Specifically de-biasing techniques such as implicit bias training.

whether the judge's decision was influenced by extraneous considerations, then it would be incumbent on the court to explicitly acknowledge this in its reasons. Secondly, if some members of the public assumed that the original decision was subconsciously biased, the fact that it was overturned could improve, rather than undermine, their confidence in the system as Goudkamp has claimed.[98] Thirdly, if an appellate reversal did undermine confidence in the trial judge, we doubt whether this would be more corrosive of public opinion than current appellate tests. It should be recalled that the usual standard of appellate review at present is that the decision can only be overturned if no reasonable judge could have made it. This is a de facto finding of professional negligence, and if, ex hypothesi, these findings do not undermine public confidence in the justice system, it is hard to imagine how an unwarranted inference that a judge *was* subconsciously biased (a risk that can affect us all no matter how careful we might be) would undermine our confidence in the system.

Finally, even if none of the suggestions outlined in this paper are pursued, at a minimum we suggest it is simply untenable to continue allowing target judges to decide apprehended bias applications against them. Studies are unequivocal that individuals tend to over-estimate their own capacity for impartial decision-making. An obvious implication for the law of bias, and a reform backed by other scholars, is that the judge accused of apprehended bias should not be the person deciding the application. While some judges recognise the oddity and undesirability of sitting in judgment on their capacity to decide a case impartially, this procedure remains the primary method by which disqualification applications are decided. Of course, if a judge feels that they may not be able to decide a case impartially, then they have a responsibility to recuse themselves.[99] But, in any case where an allegation of apprehended bias requires proper consideration, it should be some other judge considering it. This procedure need not necessarily involve significant additional costs to the justice system; it

[98] J Goudkamp, 'Facing Up to Actual Bias' (2008) 27 CJQ 32
[99] See e.g. Courts and Tribunals Judiciary, *Guide to Judicial Conduct*, rev. edn (2018).

would simply mean transferring the resources required for a judge to hear an application against them to another court. Finding another judge might involve some disruption to scheduling; however, any marginal additional costs are likely to be outweighed by the benefit of having another judge decide the application. There is some judicial support for such a change. Justice Callinan, in *Ebner* v *Official Trustee in Bankruptcy*, stated that disqualification applications should be decided by a different judge.[100] This was rejected by other members of the High Court who had doubts as to whether a judge in the same court would have the power to prevent another judge from sitting on a case.[101] It would certainly be ironic if the law was to accept a higher risk of biased decision-making in the name of protecting judicial independence. In England, in the case of *El-Farargy v El-Farargy*, the Court of Appeal considered a claim of apprehended bias against the trial judge for racially discriminatory remarks. Ward LJ suggested that the nature of the alleged bias meant that it would be preferable for a different judge to hear the application, because it would be 'invidious for a judge to sit in judgment on his own conduct' but also stated that 'in many cases there will be no option but that the trial judge deal with [the application].'[102] A related change would be to avoid situations where the result in a disqualification application might depend on the reliability of a judicial clarification or disclosure statement. The Court of Appeal came close to this position in *Locabail*, but left the door open for other judges to declare that a judicial statement could be admitted as evidence of the truth of the statement, even in proceedings presided over by that same judge.[103] The issue will not cause difficulties if the judge's evidence goes to straightforward matters that are not contested or can be verified independently, but in cases where the judge's state of mind is potentially relevant, the inability to test the judge's statement is problematic. If the answer to a test supposedly

[100] *Ebner v Official Trustee in Bankruptcy* (2000) 205 C.L.R. 337 at [185]
[101] Ibid at [73] (Gleeson CJ, McHugh, Gummow and Hayne JJ).
[102] *El-Farargy v El-Farargy* [2007] EWCA Civ 1149.
[103] For an example see JD Heydon, 'Reasons for Ruling on Disqualification Applications' n (20)

designed to maintain public confidence could turn on a target judge stating, “I did not know” or “I do not remember” then we need to change the test, especially given that untested assertions may lack evidential reliability.[104]

IV. Conclusions

This article has examined the potential and demonstrable gaps between the case law on apprehended bias, public perception, and the psychological literature on decision. While the judiciary have recognised the difficulties in upholding the ideal notion that ‘justice is blind’ in light of the realities of human decision-making, the revised principle that ‘justice must keep an open mind’ is a difficult test to apply in practice. The courts have tended to fall back on public perception to avoid addressing the tensions between the judicial ideal of complete neutrality and research on cognitive biases; yet the gap between the judicial understanding of public attitudes and what the public really thinks may be the biggest fault line of all.[105] If public confidence is to remain one of the rationales for the rule, more reliable methods for ascertaining public perception need to be adopted. Equally, to the extent that the law of bias is designed to remove, or at least, minimise the influence of irrelevant factors in judicial decision-making, it would be remiss of lawmakers and judges not to have regard to, and where possible incorporate, lessons learnt from reliable psychology studies. Accordingly, we have proposed a new framework for the law of bias which, through partial codification systematically assesses and balances public perception, the science on decision making and legal policy considerations (and proposed further research that could inform such a code), supplemented by new procedures and tests for deciding borderline cases that are not designated as automatic disqualification or non-disqualification scenarios under the code.

[104] *Al-Rawi v Security Service* [2012] AC 531 at [93].
[105] In a different context, dissenting judges in the UK Supreme Court in *Khuja v Times Newspapers* [2017] UKSC 49 argued at [47]-[48] that the majority cannot convincingly rely on suggestions as to public perception without evidence of what the public think.