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Reframing the judicial diversity debate: personal values and tacit diversity

Rachel J Cahill-O'Callaghan*
Cardiff University

It has long been argued that the Judicial Committee of the House of Lords, now the UK Supreme Court, is characterised by Justices who are white and male, with a public school and Oxbridge education. Despite continuous debate and reflection on the lack of diversity, by academics, government and the popular press, little has changed. These debates have centred on explicit diversity, overt characteristics that are easily codified and reflect how the judiciary is seen. Drawing on the psychological theory of decision making, this paper argues that judicial decisions are subject to tacit influences that are not limited to overt characteristics. Personal values serve as one such tacit influence on decision making. Personal values are formed by life experiences and reflect many of the characteristics identified within the explicit diversity debates. However, personal values are influenced by more than simple demographic variables. This paper uses the example of personal values to highlight the fact that despite the lack of explicit diversity, there is an element of tacit diversity in the Supreme Court, which is reflected in judicial decisions. The impact of these findings serves to extend the debates surrounding diversity, highlighting the limitation of debates centred on explicit diversity alone.

Rachel J Cahill-O'Callaghan, Cardiff Law School, Cardiff University, Museum Avenue, Cardiff CF10 3AX, Wales. Email: Cahill-OCallaghanR@cardiff.ac.uk

... in disputed points you need a variety of perspectives and life experiences to get the best possible results. You will not get the best possible results if everybody comes at the same problem from exactly the same point of view. You need a variety of dimensions of diversity, I am talking not only about gender and ethnicity but about professional background, areas of expertise and every dimension that adds to the richer collective mix and makes it easier to have genuine debates.

*Lady Hale*¹

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1. Lady Hale, written evidence to the House of Lords Select Committee on the Constitution. 'Judicial appointments' (HL Paper 272, 28 March 2012) para 90.

Debates surrounding the importance of diversity on the bench have fuelled the reform of the judicial appointments process and served to encourage a wider range of applicants.² Despite this, the Supreme Court bench remains predominantly the domain of public school educated white males, who have graduated from Oxbridge. Indeed, since the Supreme Court was formed in October 2009, 20 Supreme Court Justices have sat on the bench full-time, all but two of whom attended independent schools and graduated from Oxbridge.³ Occasionally, judges are invited to sit on the Supreme Court bench; to date, six judges have done so.⁴ All of these judges were male, but they did have a more diverse education, with four of the six attending independent schools and only three attending Oxbridge. Although the social background of the judges is not recorded by the JAC, studies in the UK demonstrate a close association between educational background and social class, with those attending independent schools typically from higher social classes.⁵ One female judge, Lady Hale, has sat on the Supreme Court bench. No black minority ethnic (BME) judge has sat on the UK Supreme Court bench. As Lady Hale states,

... [I]n the Supreme Court there is still only me and the only ethnic minorities we have are the Scots and the Irish.⁶

This lack of diversity is not new, nor is it limited to the UK. However, the UK has the lowest proportion of women sitting on the bench in the highest court when compared to other common law countries.⁷ Despite two decades of attention and growing

2. Judicial appointments are governed by Pt 4 of the Constitutional Reform Act 2005 and Sch 13 of the Crime and Courts Act 2013. K Malleon 'Justifying gender equality on the bench: why difference won't do' (2003) 11 *Feminist Legal Stud* 1; R Stevens 'Reform in haste and repent at leisure: Iolanthe, the Lord High Executioner and Brave New World' (2004) 24 *Legal Stud* 33; L Moran 'Judicial diversity and the challenge of sexuality: some preliminary findings' (2006) 28 *Sydney L Rev* 565; K Malleon 'Rethinking the merit principle in judicial selection' (2006) 33 *J L Soc'y* 126; D Feenan 'Women judges: gendering judging, justifying diversity' (2008) 35 *J L Soc'y* 490; K Malleon 'Diversity in the judiciary: the case for positive action' (2009) 36 *J L Soc'y* 376; A Paterson and C Paterson *Guarding the Guardians* (2012), available at <http://www.centreforum.org/assets/pubs/guarding-the-guardians.pdf> (accessed 9 January 2015); E Rackley *Women, Judging and the Judiciary: From Difference to Diversity* (London: Routledge, 2013).

3. These data include Lord Hodge. At the time of writing, nine SCJs attended Oxford and nine SCJs attended Cambridge. Lord Kerr attended Queens University, Belfast and Lord Hughes, who joined the bench in April 2013, attended Durham University.

4. Lords Judge and Scott heard four cases on the Supreme Court bench. Lords Clarke and Hamilton heard two and Sir Anthony Hughes and Lord Carlway each heard one case. Of these, Lords Clarke and Hamilton both went to non-fee-paying schools. Lords Hamilton and Carlway attended the University of Glasgow and Sir Anthony Hughes attended Durham University.

5. S. Ball, R. Bowe and S. Gewirtz 'School choice, social class and distinction: the realization of social advantage in education' (1996) 11 *J Educat'l Pol'y* 89; D Reay 'The zombie stalking English schools: social class and education inequality' (2006) 54 *Br J Educat'l Stud* 288. In the absence of specific data on social class, this paper uses education as both an independent factor and an indicator of class.

6. Lady Hale 'Equality in the judiciary', Kuttan Menon Memorial Lecture (London, 21 February 2013).

7. K. Malleon and P Russell *Appointing Judges in an Age of Judicial Power: Critical Perspectives from around the World* (Toronto: University of Toronto Press, 2006). In 2013, the

support, the rate of change has been remarkably slow. Indeed, Kate Maleson goes further and argues that rather than making steady progress, the UK judicial bench is becoming less diverse.⁸

In the setting of increasing media concern regarding the power of the Supreme Court,⁹ public discussion of the lack of explicit diversity has once again increased in prevalence.¹⁰ These debates centre on explicit diversity, that which can be seen. This paper will argue that there is a second form of diversity, tacit diversity, which encompasses influences on judicial decision making that are not overt. Although there is some recognition that innate characteristics can have tacit influences on judicial decision making, these influences are difficult to ascertain and, as a consequence, are not reflected in the diversity debate. The study of personal values transcends many of the limitations of the current studies of tacit influences on judicial decision making and may provide a tool to examine tacit influences that extend beyond overt demographic characteristics. Drawing on theories and techniques developed in psychology, this paper will highlight the prevalence of tacit diversity, even in the absence of explicit diversity, in the UK Supreme Court.

The paper will briefly locate the discussion of explicit and tacit diversity within the debates on judicial diversity, drawing on a case study of gender and judicial decision making to explore the role of tacit influences. The paper will then develop the argument that personal values serve as tacit influences on judicial decision making and highlight the significant variation in personal values identified in the legal judgments of individual Supreme Court Justices. Finally, the paper will demonstrate, through analysis of agreement, that Supreme Court Justices who have similar values reach similar decisions. In doing so, the paper will highlight the influence of personal values on judicial decision making.

1. WHY DO WE WANT JUDICIAL DIVERSITY?

There are several strands to the arguments in support of a more diverse judiciary, which are eloquently discussed both by Erika Rackley in her book *Women, Judging and the Judiciary: From Difference to Diversity* and by Baroness Neuberger in her

US Supreme Court had three female Justices on a bench of nine, the High Court of Australia had three females on a bench of seven and the Supreme Court of New Zealand had two female Justices on a bench of five.

8. Rackley, above n 2; Maleson 'Diversity in the judiciary', above n 2. Indeed, Maleson's argument is supported by the statistics in App 2 in the Judicial Diversity Taskforce Report *Improving Judicial Diversity* (London: Judicial Diversity Taskforce, 2012) pp 53–56.

9. UK Human Rights Blog 'Analysis: Supreme Court asserts its constitutional power in expenses scandal appeal' (2 December 2010); O Bowcott 'Supreme Court becomes a constitutional animal' *The Guardian* 28 November 2012; T Judge 'Supreme Court sits in secret for first time in history' *The Independent*, available at <http://www.independent.co.uk/news/uk/crime/supreme-court-sits-in-secret-for-first-time-in-history-8544535.html> (accessed 9 January 2015).

10. E Rackley 'We need a more diverse supreme court' *The Guardian* 29 March 2011, available at <http://www.guardian.co.uk/law/2011/mar/29/more-diverse-supreme-court-bench> (accessed 9 January 2015); O Bowcott 'UK supreme court's only female judge calls for more diversity in appointments' *The Guardian* 25 October 2011.

2010 report from the Advisory Panel on Judicial Diversity.¹¹ The same arguments have been raised by American legal academic and Court of Appeals judge Harry Edwards, in relation to black judges in the USA.¹²

Two of these arguments relate to democratic legitimacy and are centred on the perception of the judiciary as the 'other' by the general population. The first argument is that the lack of explicit diversity may cause those appearing before the courts to believe that they are being judged by a society to which they do not belong. The second argument centres on the wider population and suggests that being a judge is the preserve of a very limited elite class in society. It is this perception that serves to undermine public confidence in the judiciary.¹³ Erika Rackley highlights the need for a 'reflective' judiciary, arguing that although legitimacy can be derived from legal experience, it is no longer sufficient and the judiciary increasingly must 'reflect' the community it serves.¹⁴ Indeed, this is the argument supported by the House of Lords Constitution Committee:

It is vital that the public have confidence in our judiciary. One aspect of ensuring that confidence is a more diverse judiciary that more fully reflects the wider population.¹⁵

The diversity arguments extend beyond democratic legitimacy. The lack of explicit diversity risks the loss of potential judicial talent due to the absence of lawyers from non-traditional backgrounds.¹⁶ Furthermore, given that legal talent is not gender specific and is not associated with class or race, then the lack of diversity suggests inequality in judicial appointments and/or progress to the senior positions necessary to achieve appointment.¹⁷ Indeed, the advocates of diversity argue that the lack of apparent diversity on the judicial bench creates a situation that deters potential candidates who do not belong to the perceived stereotype.¹⁸ Accordingly, it is argued that

11. Rackley, above n 2; Baroness Neuberger *The Report of the Advisory Panel on Judicial Diversity* (2010). Other sources include Feenan, above n 2.

12. HT Edwards 'Race and the judiciary' (2002) 20 *Yale L & Pol'y Rev* 325.

13. R Moorhead, M Sefton and L Scanlan 'Just satisfaction? What drives public participation and satisfaction with courts and tribunals?' (London: Ministry for Justice, 2008).

14. Rackley, above n 2. Indeed, central to Rackley's discussion of judicial diversity is the distinction between 'representation' and reflection. Rackley argues that representation carries with it the sense of speaking or acting for someone, which has a significant impact on judicial impartiality, and that the judiciary should not represent but 'reflect' society in a way that includes individuals from different classes, and of different educational backgrounds, gender and race.

15. Baroness Jay, Chairman of the House of Lords Constitution Committee, commenting on the Judicial Appointments Report (2012), available at <http://www.parliament.uk/business/committees/committees-a-z/lords-select/constitution-committee/news/jap-report-publication> (accessed 1 July 2013).

16. Malleon, above n 2.

17. It is accepted that only 32% of the Bar, traditionally a source of the judiciary, is female, with only 10% female QCs. Rackley suggests that this percentage is due to a low application rate: Rackley, above n 2, pp 38–39.

18. Moran, above n 2; L Moran and D Winterfeldt 'Barriers to application for judicial appointment research: lesbian, gay, bisexual and transgender experiences', Project Report. Interlaw Diversity Forum for LGBT Networks (London: Birkbeck College, 2011); Judicial Appointments Commission *Barriers to Application for Judicial Appointment Research* (2009), available at http://jac.judiciary.gov.uk/static/documents/Barriers_to_Application_Research_report_1.pdf (accessed 1 July 2013).

a more diverse bench would serve to enhance equality of opportunity both for women and those in minority sections of society.¹⁹

There is agreement amongst academics, politicians and the judiciary that more women and minority candidates should be appointed to the judicial bench and it is clear how this would play a role in addressing the issue of public confidence and equality. These arguments relate to explicit diversity, how the judicial bench is seen by the general public or those aspiring to the judiciary.²⁰ However, there is another strand to the diversity debate, and this focuses on the decision making process and whether altering the demographic profile of the judicial bench will alter judicial decisions. This line of argument suggests that judicial decision making is subject to tacit influences that are associated with overt demographic differences.

2. TACIT DIVERSITY AND JUDICIAL DECISIONS: A CASE STUDY OF GENDER

Michael Polanyi described tacit knowledge as ‘things that we know but cannot tell’.²¹ It is knowledge that influences decisions but is not articulated, and includes the personal ideals and influences that are acquired and transmitted through social networks and experience, yet not set out explicitly. The debates surrounding judicial diversity, which highlight the importance of tacit knowledge, centre on the individual and their unique knowledge:

... the greater the diversity of participation by [judges] of different backgrounds and experiences, the greater the range of *ideas* and information contributed to the institutional process.²²

These *ideas*, according to Mr Justice Cameron, are the ‘inarticulate premises in the process of judging’:

Judges do not enter public office as ideological virgins. They ascend the Bench with built-in and often strongly held sets of values, preconceptions, opinions and prejudices. They are invariably expressed in the decisions they give, constituting inarticulate premises in the process of judicial reasoning.²³

Indeed, Robert Stevens suggests that it is these ‘inarticulate premises’ that serve as the main reason why England and Wales require a more diverse judiciary.²⁴

The majority of work examining judicial tacit (inarticulate) premises has focused on the female judge. It has been argued that increasing judicial diversity would lead to better decision making because women and minorities bring something different to

19. Malleon, above n 2.

20. Ibid.

21. M Polanyi ‘Tacit knowing: its bearing on some problems of philosophy’ (1962) 34 Rev Mod Phys 601 at 601.

22. L Epstein, J Knight and A Martin ‘The norm of prior judicial experience and its consequences for career diversity on the US Supreme Court’ (2003) 91 Cal L Rev 903 at 944 (italics added).

23. Cited in Stevens, above n 2, at 78.

24. Ibid.

the decision making process.²⁵ This gendered difference has been characterised by Carol Gilligan, who argues that the unique *female voice* is a result of both biological and social differences that facilitate greater insight into feminist issues.²⁶ This was translated to judicial decision making by Herbert Kritzer and Thomas Uhlman, who argued that ‘common sense as well as sociological theory suggests that the socialisation experiences of men and women are significantly different’ and these differences, in combination with cultural norms, should lead to differences in judicial behaviour.²⁷ The concept of the different voice has been approved by feminist legal theorists, who argue that as a consequence of the different life experiences, women judge differently to men and bring a different perspective to the judicial decision making process.²⁸

Empirical evidence is varied in its support of the ‘different voice’ theory. These empirical studies examine two forms of influence: individual and panel effects. Studies considering ‘individual effects’ focus on the judge as a unitary subject and argue that individual male and female judges will reach different decisions. To date, the vast majority of these studies have not identified a significant difference between the decisions reached by male and female judges in general cases, but difference could be identified in subsets of cases that involved gendered issues, including sex and employment discrimination cases.²⁹ In this small subset of cases, female judges may decide differently and if cases are decided by a female judge alone, the gender of the judge may influence the final decision.

Unlike in the lower courts, cases in the superior courts tend to be heard by a panel of judges. The study of decision making by panels of judges examines indirect tacit

25. An excellent review of this work can be found in Malleon, above n 2; S Goldman ‘Should there be affirmative action for the judiciary?’ (1979) 62 *Judicature* 488.

26. C Gilligan ‘In a different voice: women’s conceptions of self and of morality’ (1977) 47 *Harv Educ’tl Rev* 481; C Gilligan *In a Different Voice: Psychological Theory and Women’s Development* (Cambridge, MA: Harvard University Press, 1982).

27. H Kritzer and T Uhlman ‘Sisterhood in the courtroom: sex of judge and defendant in criminal case disposition’ (1977) 14 *Social Sci Q* 77 at 86.

28. E Martin ‘The representative role of women judges’ (1993) 77 *Judicature* 126; J Resnik ‘Asking about gender in courts’ (1996) 21 *Signs* 952; H Barwick, J Burns and A Gray *Gender Equality in the New Zealand Judicial System: Judges’ Perceptions of Gender Issues* (Wellington: Joint Working Group on Gender Equity, 1996); T Walker and D Barrow ‘The diversification of the Federal bench: policy and process ramifications’ (1985) 47 *J Pol* 596. There are many feminist theorists who are uncomfortable with this thesis and accuse Gilligan of essentialising women. J Parpart ‘Who is the “other”? A postmodern feminist critique of women and development theory and practice’ (1993) 24 *Dev & Change* 439; M Crawford ‘Agreeing to differ: feminist epistemologies and women’s ways of knowing’ in M Crawford and M Gentry (eds) *Gender and Thought: Psychological Perspectives* (New York: Springer, 1989) pp 128–145; L Code *What Can She Know? Feminist Theory and the Construction of Knowledge* (New York: Cornell University Press, 1991).

29. These studies were carried out in the USA (G Gryski, E Main and W Dixon ‘Models of State High Court decision making in sex discrimination cases’ (1986) 48 *J Pol* 143; D Allen and D Wall ‘The behaviour of women State Supreme Court Justices: Are they tokens or outsiders?’ (1987) 12 *Just Syst J* 727; D Allen ‘Voting blocs and the freshman Justice on the State Supreme Court’ (1991) 44 *W Pol Q* 727; S Davis, S Haire and D Songer ‘Voting behaviour and gender on the US Courts of Appeals’ (1993) 77 *Judicature* 129; D Songer, S Davis and S Haire ‘A reappraisal of diversification in the Federal Courts: gender effects in the Courts of Appeals’ (1994) 56 *J Pol* 425) and in Canada (P McCormick and J Twyla ‘Do women judges make a difference? An analysis of Appeal Court data’ (1993) 8 *Can J L Soc’y* 135).

influences and moves away from the decisions of an individual judge to the influence of a female judge on a the decision of the panel as a whole, or ‘panel effects’. Again, as stated by Boyd et al,

The results of this exercise are now reasonably clear: the presence of women in the federal appellate judiciary rarely has an appreciable empirical effect on judicial outcomes. *Rarely, though, is not never.*³⁰

A large-scale 2005 study by Peresie and others examined the influence of the presence of a female judge on a three-judge panel in a subset of cases that have a gender element (sexual harassment and sex discrimination cases) in the Federal Appeal Courts over a 3-year period (1999–2001).³¹ The authors identified that the plaintiffs lost in the vast majority of cases, but that they were twice as likely to prevail when a female judge was on the bench. Indeed, the authors demonstrate that the presence of a female judge significantly increased the probability that a male judge would support the plaintiff in the cases analysed.³² Similarly, Moloney Smith identified that the presence of women on the bench has resulted in more verdicts for female plaintiffs in sex discrimination cases.³³

This was confirmed by Boyd et al in an analysis of approximately 8000 cases heard in the US Court of Appeals for the Federal Circuit.³⁴ The authors also demonstrated that the presence of a female judge on a panel led to significantly more rulings in favour of the party alleging discrimination in cases of sexual discrimination. Indeed, Boyd et al state

... we observe consistent and statistically significant individual and panel effects in sex discrimination disputes: not only do males and females bring distinct approaches to these cases, but the presence of a female on a panel actually *causes* male judges to vote in a way they otherwise would not – in favour of plaintiffs.³⁵

Why does the presence of a single female judge on a panel influence the panel’s decision in this limited set of cases? The authors argue that this is related to informational effects. It is suggested that male judges recognise that female judges possess information that the male judges perceive as more credible and persuasive than their own knowledge on these gendered issues. In doing so, female judges can either directly or indirectly influence the choices of their male colleagues.³⁶ Indeed, this theory is supported by Farhang and Wawro, who analysed evidence from sexual harassment cases in the US Court of Appeals. The authors demonstrated that women judges influence the panel through the exchange of ideas and information rather than

30. C Boyd, L Epstein and A Martin ‘Untangling the causal effects of sex on judging’ (2010) 54 Am J Pol Sci 389 at 406 (emphasis added).

31. J Peresie ‘Female judges matter: gender and collegial decisionmaking in the Federal Appellate Courts’ (2005) 114 Yale L J 1759.

32. Ibid.

33. S Moloney Smith ‘Diversifying the judiciary: the influence of gender and race on judging’ (1994) 28 U Rich L Rev 179 at 185; citing T Lester ‘The reasonable woman test in sexual harassment laws – Will it really make a difference?’ (1993) 26 Ind L Rev 227.

34. Boyd et al, above n 30. Of note, the authors used a matching system to standardise the comparison between genders. They defined a female panel as one that had a female judge. There was insufficient data to examine the presence of two or more female judges independently.

35. Ibid, p 406 (italics added by authors).

36. L Baldez, L Epstein and A Martin ‘Does the US constitution need an equal rights ammendment?’ (2006) 35 J Legal Stud 243; Boyd et al, above n 30; C Ostberg and M Wetstein *Attitudinal Decision Making in the Supreme Court of Canada* (Vancouver: UBC Press, 2007).

male counterparts making concessions to women to achieve unanimity.³⁷ The study of gender effects on decision making suggests that female tacit influences can alter the panel decisions; however, this is limited to a very specific subset of cases with a gendered element.

Collins et al argue that this inconsistent influence may be due to the principle of 'critical mass', which argues that until women working in a predominantly male environment increase in number beyond 'token status', they will largely conform to the characteristics of the dominant group.³⁸ The authors propose that critical mass theory may explain many of the inconsistencies in previous studies, and suggest that the influence of gender may indeed be more profound if the number of female judges increases to a critical mass. Yet even in cases where a critical mass is achieved, the influence is limited to specific areas of law.

There is very little empirical work examining the influence of the gender of judges on judicial decisions in the UK. Indeed, the paucity of research may be due to the small number of female judges.³⁹ Although radically different from empirical evidence, the feminist scholars Hunter, McGlynn and Rackley have written missing feminist judgments in key cases in English law. These fictitious judgments have served to reveal the underlying gendered influences within the legal decision making process and the potential for values to influence judicial reasoning.⁴⁰

The case study of the female judge suggests that tacit influences on judicial decision making may be related to overt demographic characteristics. In the case of gender, these influences are limited to a small subset of cases in which gender plays a role.

3. THE TACIT INFLUENCE ASSOCIATED WITH OTHER DEMOGRAPHIC VARIABLES

The tacit influence of other demographic variables on judicial decision making has also been assessed, but to a much lesser degree. A study by Massie et al found that race had no effect on judicial decision making in the US Court of Appeals when all cases were analysed.⁴¹ However, as with gender effects, race-associated differences could be detected if the data were limited to specific types of cases that had a racial element.⁴²

37. S Farhang and G Wawro 'Deliberation versus bargaining on the US Court of Appeals', Law and Economics Workshop, Berkeley Program in Law and Economics, UC Berkeley (2010), available at <http://www.escholarship.org/uc/item/1wm7t0hv> (accessed 26 July 2013).

38. The authors applied critical mass theory to the role of gender in legal decision making in the US Federal District Courts and identified that the presence of more than one female justice did influence decision making. Again, this was, however, limited to specific areas of law, with female judges more liberal in criminal justice cases and cases concerning civil liberties and rights. P Collins, K Manning and R Carp 'Gender, critical mass and judicial decision making' (2010) 32 Law & Pol'y 260; R Kanter 'Some effects of proportions on group life: skewed sex ratios and responses to token women' (2002) 82 Am J Sociol 965.

39. The statistics released on 11 July 2013 revealed that 24.3% of judges in the UK were female, of which only five sit in the higher courts where cases are heard by a panel.

40. R Hunter, C Glynn and E Rackley *Feminist Judgements: From Theory to Practice* (Oxford: Hart Publishing, 2010).

41. T Massie, S Johnson and S Gubala 'The impact of gender and race in the decisions of judges on the United States Courts of Appeals', Midwest Political Science Association Annual Meeting, Chicago (25–28 April 2002).

42. Ibid.

Similar findings were identified by Cameron and Cummings, who demonstrated that increased racial diversity on the panels of the US Court of Appeals substantially changed the voting behaviour of the judges on the panels in affirmative action cases, mimicking the panel effect of female judges.⁴³ Indeed, Kastlelec has demonstrated that a black judge is more likely than non-black judges to support affirmative action, and that the presence of a single black judge on a panel of three will significantly increase the likelihood that the panel will vote in favour of affirmative action.⁴⁴ Chew and Kelley suggested that African American judges reach different decisions to white judges, but the difference was limited to a very specific set of cases that concerned racial harassment.⁴⁵

The study of criminal cases and sentencing suggests that the influence of race may extend beyond a distinct subset of race-related cases, but the differences are minimal and inconsistent.⁴⁶ Steffensmeier and Britt examined the influence of race on sentencing in Pennsylvania between 1992 and 1996.⁴⁷ The authors identified very small race-judge effects, with black judges more likely to sentence both black and white offenders to prison. However, black and white judges largely weighted case and offender information in similar ways when making punishment decisions. Despite the limited data, ethnicity appears to exert a tacit influence on judicial decision making in a similar way to gender, with the effect limited to cases with an ethnic element.

There is also very limited data available on the influence of sexual orientation of judicial decision making. Leslie Moran undertook a series of interviews with lesbian and gay members of the judiciary and legal professionals in Australia, England, Wales and South Africa. The interviews reveal that judges do not feel that their sexuality has any impact on judicial decisions.⁴⁸ Similarly, there is very little evidence on the role of religion on judicial decision making; however, one small study, carried out in the USA, did identify that religion played a role in judicial perception of role orientation, with Protestant judges more restrained than Catholic or Jewish judges.⁴⁹ In contrast, a study by Ashenfelter et al did not identify any association between the religion of a judge and decisions reached in civil rights cases in three federal districts.⁵⁰

In summary, there is some empirical evidence that specific overt characteristics such as gender and race may be associated with tacit influences on judicial decision making, in a limited subset of cases. Whether it is unique information or experiences,

43. C Cameron and C Cummings 'Diversity and judicial decision making: evidence from affirmative action cases in the Federal Courts of Appeals, 1971–1999', Working Paper, Princeton University (30 March 2003).

44. J Kastlelec 'Racial diversity and judicial influence on Appellate Courts', Working Paper, Princeton University (11 November 2011).

45. PK Chew and RE Kelley 'Myth of the color-blind judge: an empirical analysis of racial harassment cases' (2009) 86 Wash U L Rev 1117.

46. S Welch, M Combs and J Gruhl 'Do black judges make a difference?' (1988) 32 Am J Pol Sci 126. The authors argued that ethnicity influences judicial decision making, with the black judge more even-handed with white and black defendants than the white judge, who tended to treat the white defendant more leniently.

47. D Steffensmeier and C Britt 'Judges' race and judicial decision making: do black judges sentence differently?' (2001) 82 Social Sci Q 749.

48. Moran, above n 2.

49. J Wold 'Political orientation, social backgrounds, and the role perceptions of State Supreme Court judges' (1974) 27 W Pol Q 239.

50. O Ashenfelter, T Eisenberg and S Schwab 'Politics and the judiciary: the influence of judicial background on case outcomes' (1995) 24 J Legal Stud 257.

tacit knowledge appears to play a role in decision making. One of the key limitations to the assessment of the influence of tacit knowledge is the need to relate tacit influence to overt easily characterised demographic variables.

The study of personal values transcends many of the limitations of the current studies of tacit influences on judicial decision making and may provide a tool to examine tacit influences that extends beyond overt demographic characteristics.

4. PERSONAL VALUES: TACIT INFLUENCES ON DECISION MAKING

When we speak about values, we think of ‘how we live our lives’, the principles we live by and the abstract beliefs that guide our decisions. For decades, the concept of personal values has been the subject of study by psychologists, who define personal values as follows:

enduring beliefs that a specific mode of conduct is personally or socially preferable to an opposite or converse mode of conduct.⁵¹

Personal values are both informed by and formed by life experiences, are fundamentally important to personhood and identity, and therefore provide an insight into the individual that goes beyond overt demographics. Personal values are intimately linked to decision making and function as a largely subconscious guide to everyday decisions.⁵² Personal values may also influence judicial decisions in cases where the judge exercises discretion.

It is widely accepted that judges in the final Court of Appeal have significant discretion and that the exercise of this discretion may be influenced by personal traits. This is particularly true in hard cases ‘in which the result is not clearly dictated by statute or precedent’.⁵³ Although there is no consensus with regard to how many cases fall into this category in the UK Supreme Court, it may extend to those cases that divide judicial opinion. In an earlier paper, I demonstrated using content analysis evidence that judgments supporting opposing positions in cases that divide judicial opinion reflect competing values.⁵⁴ In reaching a decision in such cases, the judge will support one or more values above another. The relationship between legal decisions and values was affirmed using experimental psychometric surveys. The study revealed through content analysis the influence of judicial values on decisions in cases that divide judicial opinion.

This paper extends that work and examines the values expressed by individual Supreme Court Justices and the tacit influence of values on all cases decided in the first four years of the Supreme Court. The examination of judicial personal values in this context may serve to provide further insight into the tacit knowledge that influences judicial decisions and add another deeper layer to the diversity debate.

51. M Rokeach *Understanding Human Values: Individual and Societal* (New York: Free Press, 1979).

52. S Hitlin and J Piliavin ‘Values: reviving a dormant concept’ (2004) 30 *Ann Rev Sociol* 359.

53. R Dworkin ‘Hard cases’ (1974) 88 *Harv L Rev* 1057 at 1057.

54. R Cahill-O’Callaghan ‘The influence of personal values on legal judgments’ (2013) 40 *J L Soc’y* 596.

(a) A model of personal values

The most commonly used framework of personal values is the one developed by Shalom Schwartz in 1992.⁵⁵ This model presents all values as encompassed within ten overarching motivations: *tradition*, *conformity*, *security*, *power*, *achievement*, *self-direction*, *universalism*, *benevolence*, *hedonism* and *stimulation*.⁵⁶ These value types are represented in a circular model, with opposing values reflected on opposite sides of the circle. Psychologists argue that everybody can hold each value in high regard, but to varying degrees. In reaching a decision between opposing values, the decision maker will hold one value above another and it is this variation that is psychologically significant. The values that are most commonly espoused in judgments are encompassed in opposing dimensions. The values *tradition*, *security*, *power* and *achievement* emphasise order, resistance to change and promotion of self. In contrast, *self-direction* and *universalism*, also commonly identified in judgments, emphasise openness to change and the subversion of self-interest for the welfare and interests of others.

The value motivations are defined as follows:

- *Tradition* is defined as respect and commitment to customs and traditions. This motivation includes adherence to legal traditions such as precedent and respect for parliamentary authority. Within the model, the values encompassed within *tradition* and *conformity*, which encompasses obedience to clear rules and structures, including statutes, are closely related motivationally, as they share the same goal of subordinating the self to socially imposed expectations.
- *Security* centres on the stability of society and includes security of state and family.
- *Power* reflects a motivation for social status and prestige. This includes the motivation to control other people and resources, and encompasses values such as authority and social power.
- *Achievement* emphasises the achievement of success through competence according to social standards. This includes values such as ambition, capability, influence and social recognition.
- *Self-direction* encompasses values that promote independent thoughts and actions, and includes autonomy, independence and liberty.
- *Universalism* is a broad value, defined as understanding, appreciation, tolerance and protection for the welfare of all people. The motivation encompasses the subordination of self for society as a whole, and includes values such as equality, protection of the vulnerable and social justice.
- *Benevolence* centres on the preservation and enhancement of the welfare of those people with whom one frequently interacts.

5. PERSONAL VALUES REFLECT DEMOGRAPHIC VARIABLES

The personal values of an individual may reflect their demographic characteristics. Indeed, Gilligan argued that women define themselves through connection with others and emphasise care and the preservation of relationships when solving

55. SH Schwartz 'Universals in the content and structure of values: theoretical advances and empirical tests in 20 countries' (1992) 25 *Adv Expt'l Social Psychol* 1.

56. *Hedonism* and *stimulation* have not been identified in judgments to date and are not included in the discussion. Definitions of both values can be found in Schwartz, *ibid*.

disputes. This association with values has led authors such as Davis et al to propose that the 'different voice' of the female judge should lead female judges to support community values over individual rights when they come into conflict with each other.⁵⁷

Buetel and Marini have demonstrated that females are more likely to express concern and responsibility for the well-being of others and less likely to espouse materialism and competition.⁵⁸ These data are supported by empirical population studies, using the Schwartz psychometric test of personal values, which suggest that women attribute more importance to *universalism*, *conformity* and *security* values. In contrast, men tend to attribute more importance to *power* values and those encompassed in *achievement*, *hedonism*, *stimulation* and *self-direction*.⁵⁹

This gender value difference is, however, nuanced and subject to social moderators. The difference appears to be influenced by nationality, with more apparent gendered value differences in Israel, South Africa and Italy as compared to Canada.⁶⁰ Indeed, although the data regarding the influence of race on personal values are mixed, a small study in Israel demonstrated that ethnicity had a significant impact on the rating of values encompassed within *tradition* and *conformity* and *achievement* and *self-direction*, with a positive correlation between more traditional ethnic groups and the values encompassed in *tradition* and *conformity*.⁶¹

6. PERSONAL VALUES REFLECT BEYOND DEMOGRAPHICS

Population studies reveal an association between some demographic variables and personal values, but personal values are more nuanced and encompass more than simple demographic difference. Although at a population level females tend to support values that are encompassed within *universalism*, *conformity* and *security*, this is moderated by nationality. Moreover, a study of directors of publically traded corporations in Sweden identified that female directors tend to care less about *conformity* and *security* and more about *stimulation* and *self-direction* than the general female population.⁶² Variation of personal values is also influenced by education, with less-educated respondents attributing more importance to *security*, *tradition* and

57. Davis et al, above n 29.

58. A Buetel and M Marini 'Gender and values' (1995) 60 *Am Sociol Rev* 436.

59. S Schwartz and T Rubel 'Sex differences in value priorities: cross-cultural and multimethod studies' (2005) 89 *J Personality & Social Psychol* 1010; E Prince-Gibson and S Schwartz 'Value priorities and gender' (1998) 61 *Social Psychol Q* 49.

60. S Schwartz et al 'Extending the cross-cultural validity of the theory of basic human values with a different method of measurement' (2001) 35 *J Cross-Cultural Psychol* 519.

61. J Watson and J Williams 'Relationship between managerial values and managerial success of black and white managers' (1977) 62 *J Appl Psychol* 20; Prince-Gibson and Schwartz, above n 60. The ethnicity classification used was based on birth country and father's ethnicity, and was divided into five groups: Israeli born/Israeli father, Israeli born/European or American father, European or American born/European or American father, Israeli born/Asian or African father, and Asian or African born/Asian or African father.

62. R Adams and P Funk 'Beyond the glass ceiling: does gender matter?' (2012) 58 *Mgmt Sci* 219.

conformity values than more-educated respondents, regardless of gender.⁶³ Education is associated with increased *self-direction* and *stimulation* and reduced *tradition* and *conformity*.⁶⁴

There is also some evidence that value priorities differ amongst university students in relation to their area of study, with students who study economics according higher priority to *power* and *achievement*, values associated with autocratic behaviour.⁶⁵ In contrast, those who are engaged in study in the humanities are more likely to rate *universalism* highly.⁶⁶

There is also a relationship between political choice and personal values, with centre-left voters rating *universalism*, *benevolence* and *self-direction* higher than centre-right voters. Indeed, centre-right voters are more inclined to rate *security*, *power*, *achievement* and *tradition* higher than their centre-left counterparts.⁶⁷

It is argued that when people attain stable positions in the occupational world and engage with family life, they tend to become less preoccupied with their own success and more concerned with the welfare of others.⁶⁸ This change in motivation is reflected in personal values, with an association between increasing age and an increased priority of *benevolence* and *universalism* and a negative correlation with *power* and *achievement*.⁶⁹ *Self-direction* and *stimulation* are also negatively correlated with age, with an associated increase in *tradition*, *conformity* and *security*.⁷⁰

These data suggest that personal values are more nuanced than demographics and reflect a wide variety of life experiences and influences. The central hypothesis of this paper is that the study of personal values will provide a more discriminating view of judicial diversity. This paper argues that individual Supreme Court Justices, despite the demographic uniformity of the Supreme Court bench, have a variety of personal values that are reflected in judicial decisions. The examination of personal values may serve to reveal tacit influences on judicial decision making and broaden the diversity debate.

The key questions addressed in this paper are as follows:

- Do all of the Supreme Court Justices assert the same personal values?
- If Supreme Court Justices emphasise different values, is the difference in values reflected in decision making? Is there tacit diversity?
- What does this mean for judicial diversity?

63. H Steinmetz et al 'Testing measurement invariance using multigroup CFA: differences between educational groups in human values measurement' (2009) 43 *Quantity & Quality* 599.

64. G Caprara and D Cervone *Personality: Determinants, Dynamics and Potentials* (Cambridge, UK: Cambridge University Press, 2000).

65. S Schwartz et al 'Extending the cross-cultural validity of the theory of basic human values with a different method of measurement' (2001) 5 *J Cross-Cultural Psychol* 519.

66. *Ibid.*

67. G Caprara et al 'Personality and politics: values, traits, and political choice' (2006) 27 *Pol Psychol* 1.

68. J Veroff, D Reuman and S Field 'Motives in American men and women across the adult life span' (1984) 20 *Dev Psychol* 1142.

69. Schwartz et al, above n 65.

70. M Rokeach *The Nature of Human Values* (New York: Free Press, 1973); N Feather *Values in Education and Society* (New York: Free Press, 1975).

7. THE CREATION OF VALUE PROFILES FOR SUPREME COURT JUSTICES – THE CODING METHOD

In an ideal world, judicial values would be directly assessed using psychometric testing. However, given the sensitivity of such an approach, judicial values were identified indirectly using content analysis. This form of analysis is described in detail and validated elsewhere, and is summarised here.⁷¹ The content analysis centres on cases that divide judicial opinion. It is in these cases, which do not have a legally predetermined answer, that personal values may subconsciously influence judicial reasoning. The value profiles for ten of the Supreme Court Justices were based on the content analysis of the 18 cases that divided judicial opinion between October 2009 and April 2011. The analysis yielded 1065 value-coded statements. Although it is accepted that the expression of values within judgments is framed and constrained by the case, the systematic analysis of cases that divided judicial opinion and the analysis of a large number of value statements reduces the influence of the individual case.

The individual judgments were analysed through Nvivo, using a detailed coding framework that identified legal concepts and principles that were associated with an espousal of a personal values. For example, the majority statement in *Radmacher v Granatino* reads as follows:

The reason why the court should give weight to a nuptial agreement is that there should be respect for individual autonomy . . .⁷²

Values are positive constructs and the statement was coded as positively espousing the value of ‘autonomy’. Autonomy is contained within the Schwartz value motivation of *self-direction*, which has the motivational objective of independent thought and action. Therefore, in this majority statement, the Supreme Court Justices espoused the value of *self-direction*.

Positive espousal of the value *security* is easily identified. For example, in *HM Treasury v Al-Ghabra*, Lord Hope espouses the importance of national security:

This is not simply a matter of meeting international obligations. The national interest in resisting threats to our own security is just as important.⁷³

Tradition encompasses affirmation of legal tradition, including the affirmation of parliamentary sovereignty. For example, Lord Hope affirms parliamentary sovereignty in this quote from *Jones v Kaney*:

If there is a need to reform the law in this area, it would be better to leave it to be dealt with by Parliament following a further report by the Law Commission.⁷⁴

Universalism is a very broadly categorised value, which encompasses concepts such as social justice and equality, but also protection of the vulnerable in society. For example:

71. R Cahill-O’Callaghan, above n 54.

72. Majority statement in *Radmacher v Granatino* [2010] UKSC 42 at 114. Values expressed in majority statements could not be attributed to any individual Supreme Court Justice.

73. Lord Hope in *HM Treasury v Al-Ghabra* [2010] UKSC 2 at 15.

74. Lord Hope in *Jones v Kaney* [2011] UKSC 13 at 173.

In these circumstances I would regard such recruits as vulnerable individuals for whom the military authorities have undertaken responsibility.⁷⁵

Every judgment in the selected cases that divided judicial opinion was analysed for the presence of value statements and a value profile was created for individual Supreme Court Justices based on the values that they espoused.⁷⁶ Each Supreme Court Justice heard an average of ten cases that resulted in a divided opinion, with a range of between seven and 14 cases, and each Supreme Court Justice delivered between five and 11 written judgments that were analysed for value statements. Using the coding system, 1065 value-coded statements were identified.⁷⁷

The combined values of all the Supreme Court Justices, expressed as a percentage of the total coded statements in the 18 cases analysed, are presented in Table 1.

Table 1: Values espoused in all cases analysed

Value	Total coding (<i>n</i> = 1065)	Total number of cases (<i>n</i> = 18)
<i>Universalism</i>	315 (30%)	18
<i>Self-direction</i>	269 (25%)	18
<i>Tradition</i>	244 (23%)	17
<i>Security</i>	100 (9%)	16
<i>Conformity</i>	72 (7%)	12
<i>Power</i>	27 (2.7%)	9
<i>Achievement</i>	23 (2.3%)	4
<i>Benevolence</i>	15 (1%)	3
<i>Stimulation</i>	0	0
<i>Hedonism</i>	0	0

The values are expressed as a percentage of the total number of value statements.

Eight of the ten overarching values were identified in legal judgments. Three quarters of the coding was contained within three key value motivations – *tradition*, *self-direction* and *universalism* – with these values expressed in all cases analysed. This result is unsurprising given the nature of the values encompassed within these groups. Although not as frequently espoused, *security*, *conformity* and *power* featured in half or more of the cases analysed.

Stimulation and *hedonism* were not coded in any of the opinions. The defining goal of *stimulation* is excitement, novelty and challenge in life. *Hedonism* is defined as pleasure or sensuous gratification for oneself. By the nature of these values, it is rarely that either will be espoused, denied or affirmed in a legal case. Indeed, in a legal context, it is difficult to envisage a case that would allow the Supreme Court Justices to reveal such values.

75. Lord Rodger in *R (on the application of Smith) (FC) (Respondent) v Secretary of State for Defence (Appellant) and another* [2010] UKSC 29 at 118.

76. Of these cases, the Supreme Court Justice's heard on average 45 cases, of which 22% divided judicial opinion.

77. The average coding density was 11 value statements per individual judgment.

Subject to those limitations, certain values can be identified in legal judgments and analysis of the values expressed may give some insight into the influence of these values on the decision making of individual Supreme Court Justices.

8. DIVERSITY OF EXPRESSION OF VALUES BY THE SUPREME COURT JUSTICES

The values expressed by individual Supreme Court Justices are displayed in Table 2. The average value expression of all Supreme Court Justices is presented at the top. It is notable that not all Supreme Court Justices express all values within their judgments and that the pattern of value expressions varies notably between individuals. The most commonly espoused value was *universalism*, which accounted for 30% of the overall coding within all judgments. Five Supreme Court Justices espoused this value more often than average, with Lord Kerr most frequently espousing *universalism* within his opinions; indeed, over half of the value statements (53.6%) within his opinions were encompassed within *universalism*. These value statements reflected the wide range of values encompassed within *universalism*, including the protection of the vulnerable,⁷⁸

They ought also to have realised that there may well be vulnerable individuals within the workforce whose hearing was particularly at risk at those lower levels⁷⁹

social justice and fairness,⁸⁰

Even if that could be established, it is in no sense an adequate justification for maintaining an immunity whose effect is to deny deserving claimants of an otherwise due remedy⁸¹

and corporate responsibility:

Such an employer should also have known that he could provide ear protection that would have reduced the risk of that hearing loss occurring at not inordinate cost.⁸²

Although many Supreme Court Justices expressed *universalism* more often than average, others were less likely to espouse values encompassed within *universalism*. Lord Rodger was the least likely to espouse values encompassed within *universalism*, accounting for 12.5% of coding, with Lords Brown and Hope also less likely than average to espouse values encompassed within *universalism*.

In contrast, these Supreme Court Justices were more likely than average to espouse values encompassed within *tradition* and *conformity*. Lord Rodger had the highest percentage coding for *tradition*, which accounted for over half (58%) his value

78. Protection of the vulnerable accounted for one fifth of the coding within Lord Kerr's expressions of *universalism*.

79. *Baker v Quantum Clothing Group Limited and others* [2011] UKSC 17 at 142.

80. Social justice and fairness also accounted for one fifth of the coding within Lord Kerr's expressions of *universalism*.

81. *Jones v Kaney* [2011] UKSC13 at 94.

82. *Baker v Quantum Clothing Group Limited and others* [2011] UKSC 17 at 160.

Table 2: Values espoused by individual Supreme Court Justices in judgments

Supreme Court Justice	Total number of coded statements	Coding density	Power	Achievement	Security	Tradition	Conformity	Benevolence	Universalism	Self-direction
Average			2.7% (27)	2.3% (23)	9% (100)	23% (244)	7% (72)	1% (15)	30% (315)	25% (269)
Lord Phillips	126	14	10.3%	3.8%	13.5%	15.1%	3.97%	0.8%	30.1%	22.2%
Lord Hope	188	19	1.6%	2.1%	10.1%	34%	12.8%	0%	18.6%	20.7%
Lord Brown	100	9	4%	6%	7%	27%	8%	4%	17%	26%
Lord Rodger	64	10	0%	0	1.6%	57.85	4.68%	0%	12.5%	23.4%
Lord Walker	59	7	0%	8.5%	3.4%	23.7%	6.8%	0%	35.59%	22%
Lady Hale	116	11	2.5%	0%	8.62%	22.4%	10.3%	0.8%	38%	17%
Lord Kerr	97	11	2.1%	0%	3.1%	9.27%	2.0%	3.1%	53.6%	26.8%
Lord Mance	102	15	0.9%	0%	17.6%	7.8%	5.9%	0%	31.3%	36.3%
Lord Clarke	76	15	0%	2.6%	6.6%	14.5%	1.3%	1.3%	39.5%	34.2%
Lord Collins	34	5	2.9%	2.9%	11.8%	26.5%	0%	0.8%	20.6%	35.3%

There was no coding for hedonism or stimulation and these values are not included in the table. The values are expressed as a percentage of the total number of value-coded statements for each Supreme Court Justice.

expressions. The majority of the coding reflected conforming to statutory purpose and positive espousal of parliamentary supremacy:

The wide general principle of not deviating from the statutory purpose is of such fundamental importance in public law that it can be seen as going to the existence of the power, rather than merely to its exercise. In law the power exists only for the purposes for which Parliament has conferred it on the executive.⁸³

Other values were also frequently expressed, including *self-direction*, *security*, *achievement* and *power*. Lord Mance is most likely to espouse *self-direction*, which encompasses autonomy, freedom and independence, and accounts for 36% of the value statements espoused by Lord Mance in comparison to the average of 25%. Lord Mance also had the highest percentage coding for values encompassed in *security*, which accounted for almost one fifth of his value expression. *Security* was expressed in 16 of the cases analysed and encompasses family and national security but also preventing uncertainty in the law.

Analysis of expression of values in judgments suggests that despite the lack of overt diversity, there is a wide variation in the espousal of values by individual Supreme Court Justices. Indeed, in cases that divide judicial opinion, the Supreme Court Justices draw on different values to support their position. For example, in the case *A v Essex County Council*,⁸⁴ an appeal centred on whether the exclusion of a severely disabled boy from state education breached his right to education under Art 2 of the First Protocol of the ECHR. The majority emphasised values encompassed within *security* and *conformity*, highlighting limitations on the obligations of the state and the constraints imposed by limited resources:

It is plainly highly desirable that a State should make provision for the educational needs of those who are disabled, but the signatories to A2P1 did not commit themselves to establishing educational facilities that did not exist in their countries.⁸⁵

The reality is that, in a case such as this, a local education authority may be unable, through lack of resources, immediately to satisfy the obligations imposed by section 19 of the Education Act . . . Thus the right of access to education conferred on A by A2P1 had to have regard to the limited resources actually available to deal with his special needs.⁸⁶

In contrast, Lady Hale in dissent, espoused values encompassed in *universalism*, including equality and protection of the vulnerable:

If that is at all typical of the length of time for which ordinary children are kept out of school, it is a sorry state of affairs. For very out of the ordinary children, such as this child, it can be catastrophic. This could well be a case in which a failure to treat such a child better than other children amounted to discrimination.⁸⁷

83. Lord Walker in *Walumba Lumba (Congo) v Secretary of State for the Home Department/ Kadian Delroy Mighty (Jamaica) v Secretary of State for the Home Department* [2011] UKSC 12 at 190.

84. *A v Essex County Council* [2010] UKSC 33.

85. Lord Phillips in *A v Essex County Council* [2010] UKSC33 at 80.

86. Lord Phillips in *A v Essex County Council* [2010] UKSC 33 at 85–86.

87. Lady Hale in *A v Essex County Council* [2010] UKSC 33 at 142.

This is where the fact that, unlike the pupil in Lord Grey, the appellant has such very special educational needs comes into play. The effect of exclusion for 'such pupils' can be so much more serious than for other children. A denial of access which would have no long term impact upon an ordinary pupil may be catastrophic for a pupil with special needs.⁸⁸

These data suggest that the Supreme Court Justices have different patterns of value expression within their judgments. The question is whether the diversity of values expressed by individual Supreme Court Justices is reflected in their decisions. Is there tacit diversity, which is reflected in judicial decisions?

9. ASSESSMENT OF AGREEMENT: REFLECTION OF VALUES IN LEGAL DECISIONS

Previous studies examining the tacit influence of gender suggest that the influence is only evident in cases that involve a gendered element. Personal values reflect many facets of the individual and the influence of personal values should therefore not be limited to a narrow subset of cases. To address whether individual judicial values are reflected in the decisions reached, analysis of agreement between Supreme Court Justices with broadly similar values was carried out. If values have a tacit influence on judicial decision making, then Supreme Court Justices with similar values will reach similar decisions in cases that divide judicial opinion.

A larger data set was used to assess judicial agreement. This data set included all of the cases for which a judgment was delivered in the first 4 years of the Supreme Court (cases decided between October 2009 and September 2013). The Supreme Court decided 241 cases, 57 of which divided judicial opinion, 27 (11%) of which resulted in a single dissenting judgment and 30 (12%) of which were classified as minority, where more than one Supreme Court Justice agreed with the dissenting judgment. The minority cases included those cases that were close call, where a single vote decided the case – for example, cases that were decided with judicial division of 3:2 or 4:3 ($n = 20$) – and cases that included more than one Justice supporting the minority position but not a close call ($n = 10$).⁸⁹

On average, each individual Supreme Court Justice heard 96 cases, with a range from 51 (Lord Collins) to 133 (Lord Hope). In the smaller subset of cases that divided judicial opinion, the Supreme Court Justices heard, 25 cases on average, with a range from 12 (Lord Collins) to 34 (Lord Hope).

In the cases that divided judicial opinion, with the exception of one case, Lord Collins consistently reached decisions in support of the majority position.⁹⁰ The remaining Supreme Court Justices supported the majority position in an average of 67% of cases, with Lord Phillips more likely to support the majority position (91%)

88. Lady Hale in *A v Essex County Council* [2010] UKSC 33 at 102.

89. This figure is different from that identified by Alan Paterson in his seminal book *Final Judgment*, who identified 34 close call cases (minority cases). This study uses the normal language usage of 'close call', where a single vote makes a difference in the final decision. In contrast, due to the high level of volatility and vote switches in such cases, Alan Paterson labels close calls as ones in which at least two Justices have voted against the others. *A Paterson Final Judgment: The Last Law Lords and the Supreme Court* (Oxford: Hart Publishing, 2013) p 10.

90. Lord Collins dissented in *R v Maxwell* [2010] UKSC 48.

and Lord Kerr only supporting the majority position in less than half of these cases. Indeed, Lord Kerr and Lady Hale were the most likely to deliver single dissenting judgments.

Agreement was defined as when two Supreme Court Justices reached the same decision in a case. This was calculated as a percentage of the total number of cases in which both Supreme Court Justices were on the bench. On average, every pair of Supreme Court Justices heard 39 cases together, but this ranges from 16 cases heard by Lords Collins and Brown to 68 cases heard by Lord Hope and Lady Hale.

Agreement was calculated for three different categories:

- (i) *Total agreement*: this was the percentage of cases heard by both Supreme Court Justices and includes all cases, both unanimous and divided.
- (ii) *Divided agreement*: this was the percentage of cases heard by both Supreme Court Justices in which there was either a dissenting judgment or a minority judgment.
- (iii) *Minority agreement*: this was the percentage of cases heard by both Supreme Court Justices in which there was more than one Supreme Court Justice adopting a minority position.

(a) A classification of Supreme Court Justices based on value profiles

To facilitate the value-based agreement analysis, the Supreme Court Justices were broadly categorised based on the dominant values in their profiles. In using broadly defined categories, it is clear that subtle differences will not be identified and that differences associated with values not included in the categorisation will be missed. However, the use of broad categories facilitates an analysis of whether Supreme Court Justices who express similar values reach similar decisions in cases that divide judicial opinion.

The most commonly coded values in judgments were *universalism*, *self-direction* and *tradition*, which accounted for 78% of the coding. These values were used initially to identify Supreme Court Justices with similar values. As *conformity* and *tradition* are closely related, these values were categorised together.

(I) TRADITION AND CONFORMITY

Three of the Supreme Court Justices value *tradition* and *conformity* above average and espouse these values in their judgements. Those Supreme Court Justices who supported *tradition* tended to be less likely than average to espouse values encompassed within *universalism* and similarly tended to support decisions that affirmed *tradition* and *conformity*. These judges were Lords Hope, Brown and Rodger.

(II) UNIVERSALISM

In contrast, two of the Supreme Court Justices, Lords Kerr and Clarke, were less likely than average to espouse values encompassed in *tradition* and *conformity* and more likely to espouse values encompassed within *universalism*. These Supreme Court Justices were also more likely than average to reach decisions that favoured values encompassed in *universalism* and to oppose decisions that affirmed values encompassed within *tradition*.

If the study was simply limited to these three values, then it is clear that the Supreme Court Justices could be divided into three groups as follows: the tradition-

alists, who support values encompassed in *tradition* and *conformity* and oppose values encompassed in *universalism*; the *universalists*, who support values encompassed in *universalism* and oppose values encompassed in *tradition* and *conformity*; and those who do not consistently fit either pattern.

(III) SELF-DIRECTION

Values encompassed within *self-direction* include liberty, autonomy, independence and freedom. These values contrast with those of power, which includes dominance over others. Although the coding for power was very low, Lord Mance consistently espoused values encompassed within *self-direction* and opposed decisions that affirmed the values encompassed in *power*.

(IV) WHAT ABOUT THE REMAINING SUPREME COURT JUSTICES?

The analysis of values is more nuanced than the basic categorisation identified above. Indeed, although five of the Supreme Court Justices can be classified into the two broad categories, it is clear from the value profiles that even within those categories there are differences in the values. For example, Lord Mance is also less likely than average to espouse values within *tradition* and *conformity*. Lord Clarke, although classified as a universalist, also espouses values encompassed within *self-direction*.

The remaining Supreme Court Justices cannot be easily classified. To assist classification, values espoused in extra-judicial speeches were analysed, and the value position supported by the Supreme Court Justices in the cases that divided judicial opinion was also used to enable classification. The values espoused by Lord Phillips in his judgments are inconsistent with the decisions that he reaches. Although he is not more likely than average to espouse values encompassed within *universalism* in his judgments, Lord Phillips is more likely to support a position that affirms the values encompassed within *universalism*. Indeed, analysis of his extra-judicial speeches identified that almost half (47%) of all value statements were encompassed within *universalism*, including concepts of liberty, alternative approaches to custodial sentencing and early intervention programmes.⁹¹ Lord Phillips, although unusual in his positive espousal of values encompassed within *power*, is less likely than average to espouse values encompassed within *tradition* and *conformity*. Lord Phillips was therefore categorised with Lords Clarke and Kerr.

Lady Hale espouses values encompassed in *universalism* and *self-direction*, and analysis of 13 of her available extra-judicial speeches revealed a high expression of both values. The majority of her speeches have been in the area of human rights and equality, in which she espouses values that are encompassed in *universalism*, which is a value reflected in her opinions.⁹² Lady Hale also espouses values encompassed

91. Lord Phillips ‘Crime and punishment’, The High Sheriff’s Law Lecture, Oxford (2006). The theme of this speech was the promotion of alternatives to custodial sentences for less serious offences. Lord Phillips ‘Youth Justice’, Royal Society of Edinburgh’s Alternatives to Prison Conference (2006). In a speech delivered to the Magistrates Association Annual General Meeting 2007, Lord Phillips encouraged all magistrates to look to alternatives to the custodial sentence.

92. Lady Hale ‘The quest for equal treatment’ (2005) Pub Law 571; *idem* ‘Equality in the judiciary’, Knutton Memorial Lecture (2013); *idem* ‘The conflict of equalities’, Alison

within *self-direction*. She views herself as having a reform agenda and is happy to support a minority position with a distinctly different viewpoint.⁹³ Lady Hale could align with either the Supreme Court Justices who espouse values encompassed within *universalism* or Lord Mance, who espouses *self-direction*. Unlike the universalists, Lady Hale also espouses values encompassed within *tradition*. This profile therefore does not align with those of the other Supreme Court Justices who espouse *universalism* but who are less likely than average to espouse values encompassed in *tradition*. For this reason, Lady Hale was categorised with Lord Mance.

Lord Walker was less likely than the other Supreme Court Justices to express values within his judgments. However, even with the limited coding, it is clear that Lord Walker is more likely than average to espouse values within *universalism*; however, as for Lady Hale, he is not less likely to espouse values encompassed within *tradition* and *universalism*. Analysis of the judgments of Lord Walker reveals that he is more likely than average to reach decisions that affirm the values within *tradition* and *conformity*. Indeed, analysis of the decisions reached reveals that he supports conformity in 93% of cases.⁹⁴ Dickson identified that Lord Walker was likely to adopt a restrained approach, with a preference for changes in the law to be brought about by Parliament rather than making the changes himself. He also identified that Lord Walker was more likely to take a literal or positivist approach to interpretation of legislation.⁹⁵ Both findings support the view that Lord Walker supports the values encompassed in *conformity*. For this reason, Lord Walker was included in those Supreme Court Justices who espouse values encompassed within *tradition* and *conformity*, although his profile was unusual.

The final groupings based on the values espoused in judgments and extra-legal speeches and the values supported in decisions are as follows:

Tradition and conformity: Lords Hope, Rodger, Brown and *Walker*.⁹⁶

Universalism: Lords Kerr, Clarke and *Phillips*.

Self-direction: Lord Mance and *Lady Hale*.

If the groupings of Supreme Court Justices reflect the value-based decision making of the individual Justices, then it could be predicted that Justices in the same grouping who heard the same case would reach the same decision. If the groupings based on values are broadly accurate, then there should be a degree of agreement within the groups that would be higher than the average agreement between all the Supreme Court Justices.

Weatherfield Memorial Lecture at the Employment Lawyers Association (2013); idem 'Equal access to justice in the big society', Sir Henry Hodge Memorial Lecture (2011); idem 'What's the point of human rights?' Warwick Law Lecture (2013).

93. Lady Hale 'A minority opinion' (2008) 154 Proc Br Acad 319; idem 'Welcome to the UK Supreme Court?' Denning Lecture (2008).

94. Lord Walker supported conformity in 13 of the 14 cases in which it was opposed to any other value.

95. B Dickson 'Close calls in the House of Lords' in J Lee (ed) *From House of Lords to Supreme Court: Judges, Jurists and the Process of Judging* (Oxford: Hart Publishing, 2011) p 290.

96. The names shown in italics are those of the Justices who do not match the profile exactly.

10. AGREEMENT IN CASES THAT DIVIDE JUDICIAL OPINION – A REVEALING DIFFERENCE

The study of personal values and agreement builds on the theory of agreement espoused by Sheldon Goldman in 1969, which assumes that that ‘if judges agree most of the time (which they do) then the explanation of variance among them must lie in their differing values derived from divergent background experiences’.⁹⁷ In doing so, this study not only examined agreement in all the cases decided, but examined agreement in the subset of cases that divided judicial opinion. Studies of the Supreme Court bench usually focus on agreement, typically used to examine unanimous decisions, with a focus on the court as a whole. In analysing agreement in cases that divide, this paper starts to examine the role of the individual in the Supreme Court. Indeed, this approach was used by Alan Paterson in his book *Final Judgment: The Last Law Lords and the Supreme Court*, examining voting relationships through the lens of judicial dialogue, which also centred on the role of the individual.

Alan Paterson identified high and low degrees of agreement in all cases between certain pairs of Supreme Court Justices, which are reflected in this study.⁹⁸ In Table 3, the agreement between pairs of Justices, identified by Paterson, was assessed not only in all cases, but in the subset of cases that divide judicial opinion, minority decisions where more than one Supreme Court Justice supports the minority position, cases in which personal values may play a role.⁹⁹ For many of the pairs, a high degree of agreement in all cases was associated with a high degree of agreement in cases with minority decisions. However, this was not true for all pairings, and analysis of cases that divide judicial opinion revealed differences not previously identified.

In Table 3, Lords Clarke and Dyson have a high degree of agreement over all cases, but in the four minority cases, they agreed on only one. Similarly, in pairings where there is a low degree of agreement, the majority who did not agree in the all cases data set were unlikely to agree in minority cases. However, again, pairs such as Lords Kerr and Philips who do not have a high degree of agreement overall reach a high degree of agreement in cases with minority decisions.

The variations in agreement associated with cases that divide judicial opinion, although a limited number of cases, reveals subtle differences that are not revealed by analysis of the entire case data set. Indeed, it is in the cases that divide judicial opinion that values are more visible in legal judgments.

The data are set out in two tables. Table 4 presents the overall agreement between any pair of Supreme Court Justices in all cases and the agreement in cases that divide judicial opinion, while Table 5 presents the agreement in cases with more than one minority judgment. As expected, overall there is a high degree of agreement in all cases between the Supreme Court Justices (Table 4).

The agreement between Supreme Court Justices in each value grouping is compared with the average level of agreement between all the Supreme Court Justices. The average agreement overall is 84%, with average agreement in divided cases reducing to 53%, and in minority cases reaching a percentage agreement of 44%.

97. S Goldman ‘Backgrounds, attitudes and the voting behaviour of judges: a comment on Joel Grossman’s *Social Backgrounds and Judicial Decisions*’ (1969) 31 J Pol 214 at 215.

98. Paterson, above n 89.

99. It is accepted that this is a small subset of cases with low numbers of cases heard by both Justices. The data does, however, reveal differences in the pattern of agreement.

Table 3: A comparison between those identified as high-level or low-level agreement in all cases

Highest agreement	All cases	Divided	Minority	Lowest agreement	All cases	Divided	Minority
Dyson-Walker	97% (29)	83% (6)	75% (4)	Brown-Hale	65% (49)	23% (22)	0 (11)
Clarke-Hale	93% (43)	70% (10)	100% (4)	Hale-Rodger	72% (36)	23% (13)	0 (7)
Dyson-Hope	94% (35)	82% (11)	60% (5)	Kerr-Rodger	69% (29)	25% (12)	22% (9)
Clarke-Dyson	90% (31)	57% (7)	25% (4)	Kerr-Mance	80% (41)	38% (13)	33% (9)
Collins-Kerr	94% (17)	75% (4)	67% (3)	Brown-Kerr	73% (55)	35% (23)	27% (11)
Brown-Dyson	92% (38)	78% (14)	50% (6)	Hale-Phillips	75% (48)	40% (20)	25% (12)
Dyson-Phillips	94% (31)	82% (11)	86% (7)	Brown-Clarke	72% (25)	30% (10)	0 (5)
Hale-Mance	93% (54)	70% (13)	75% (8)	Brown-Mance	82% (38)	36% (11)	0 (6)
Clarke-Phillips	90% (38)	67% (12)	60% (5)	Kerr-Phillips	81% (37)	63% (19)	67% (12)
Rodger-Brown	91% (45)	76% (17)	80% (10)	Dyson-Hale	73% (26)	30% (10)	25% (8)
Walker-Brown	91% (46)	76% (17)	80% (9)	Dyson-Kerr	77% (35)	53% (17)	75% (8)
				Hale-Walker	82% (57)	47% (19)	40% (10)
				Phillips-Walker	83% (36)	54% (13)	33% (9)
				Rodger-Mance	80% (20)	55% (9)	33% (6)
				Walker-Kerr	73% (34)	40% (15)	40% (10)

This table highlights the difference between examining agreement in all cases and agreement in cases that divide judicial opinion. Although broadly similar, in some cases – for example, Clarke-Dyson – there is a high degree of consensus overall, but in cases in which there is a minority opinion, there is a low degree of consensus. Similarly, Lords Dyson and Kerr have a low degree of consensus overall but a high degree of consensus in cases that divide.

Table 4: The consensus between Supreme Court Justices in all cases and in cases that divided judicial opinion, decided between October 2009 and September 2013

		Agreement in cases that divided judicial opinion										
Supreme Court Justice	Lord Phillips	Lord Hope	Lord Brown	Lord Rodger	Lord Walker	Lady Hale	Lord Kerr	Lord Mance	Lord Collins	Lord Clarke		
Agreement in all cases												
Lord Phillips	81% (26)	67% (12)	68% (10)	54% (11)	54% (13)	40% (20)	63% (19)	58% (12)	60% (5)	67% (12)		
Lord Hope	86% (44)	87% (60)	63% (22)	57% (8)	64% (22)	58% (19)	44% (18)	38% (13)	56% (9)	33% (12)		
Lord Brown	85% (33)	86% (44)	91% (45)	76% (17)	70% (10)	23% (22)	35% (23)	33% (12)	71% (7)	30% (10)		
Lord Rodger	83% (36)	88% (65)	91% (46)	91% (35)	82% (57)	23% (13)	25% (12)	55% (9)	50% (4)	20% (5)		
Lord Walker	75% (48)	88% (68)	65% (49)	72% (36)	73% (34)	47% (19)	40% (15)	47% (17)	70% (10)	38% (13)		
Lady Hale	81% (37)	84% (64)	73% (55)	69% (29)	82% (67)	48% (23)	48% (23)	70% (13)	50% (6)	70% (10)		
Lord Kerr	88% (43)	81% (42)	79% (39)	80% (20)	80% (46)	82% (67)	80% (41)	38% (13)	75% (4)	69% (13)		
Lord Mance	90% (20)	85% (33)	87% (16)	91% (22)	90% (29)	93% (54)	87% (23)	87% (23)	67% (6)	50% (12)		
Lord Collins	90% (51)	84% (51)	72% (25)	85% (26)	82% (46)	89% (27)	88% (32)	86% (46)	89% (28)	40% (5)		
Lord Clarke												

The data are presented as a percentage agreement, with the number of cases heard by any pair of Supreme Court Justices presented in brackets. Cases that divided judicial opinion include individual dissent and more than one dissenting opinion.

Table 5: The consensus between Supreme Court Justices in cases in which more than one Supreme Court Justice supported a minority position, in cases decided between October 2009 and September 2013

Supreme Court Justice	Lord Phillips	Lord Hope	Lord Brown	Lord Rodger	Lord Walker	Lady Hale	Lord Kerr	Lord Mance	Lord Collins	Lord Clarke	Lord Dyson
Lord Phillips	57% (7)	57% (7)	60% (10)	33% (6)	33% (9)	25% (12)	67% (12)	43% (7)	50% (4)	60% (5)	86% (7)
Lord Hope	60% (10)	45% (11)	45% (11)	43% (3)	65% (14)	54% (11)	60% (10)	14% (7)	43% (7)	20% (10)	60% (5)
Lord Brown	33% (6)	43% (3)	80% (10)	80% (10)	80% (10)	0% (11)	27% (11)	0% (6)	66% (6)	0% (5)	60% (5)
Lord Rodger	33% (9)	43% (3)	80% (10)	67% (6)	67% (6)	0% (7)	22% (9)	20% (5)	33% (3)	0% (4)	33% (3)
Lord Walker	25% (12)	65% (14)	80% (10)	67% (6)	40% (10)	40% (10)	40% (10)	33% (9)	67% (6)	22% (9)	75% (4)
Lady Hale	67% (12)	54% (11)	0% (11)	0% (7)	40% (10)	40% (10)	60% (15)	75% (8)	50% (4)	100% (4)	25% (8)
Lord Kerr	67% (12)	60% (10)	27% (11)	22% (9)	40% (10)	60% (15)	33% (9)	33% (9)	67% (3)	71% (7)	75% (8)
Lord Mance	43% (7)	14% (7)	0% (6)	20% (5)	33% (9)	75% (8)	33% (9)	33% (3)	33% (3)	57% (7)	50% (4)
Lord Collins	50% (4)	43% (7)	66% (6)	33% (3)	67% (6)	50% (4)	67% (3)	33% (3)	50% (4)	50% (4)	100% (3)
Lord Clarke	60% (5)	20% (10)	0% (5)	0% (4)	22% (9)	100% (4)	71% (7)	57% (7)	33% (3)	25% (4)	25% (4)

The data are presented as a percentage agreement, with the number of cases in which there was more than one Supreme Court Justice supporting the minority position, heard by any pair of Supreme Court Justices, presented in brackets.

11. VALUES REFLECTED IN AGREEMENT – TACIT DIVERSITY

(a) The traditionalists: Lord Hope, Lord Rodger, Lord Brown and perhaps Lord Walker

The traditionalists support values that encompass *tradition* and *conformity* and oppose values encompassed in *universalism*. Application of these criteria identified three Supreme Court Justices: Lords Hope, Rodger and Brown. If this value-based grouping is accurate, then there should be a high degree of agreement between the decisions reached by Lords Hope, Rodger and Brown. There was above-average agreement between the Supreme Court Justices, with Lords Hope and Brown reaching the same decision in 87% of cases, Lords Hope and Rodger in 86% of cases, and Lords Rodger and Brown in 91% of the cases decided by both Supreme Court Justices.¹⁰⁰ There was also a high level of agreement between these Supreme Court Justices and Lord Walker, with agreement between Lords Walker and Hope in 88% of cases, Lords Walker and Rodger in 91% and Lords Walker and Brown in 91%. Indeed, the average agreement between the Supreme Court Justices was 88% (mean number of cases = 49) without Lord Walker and 89% with Lord Walker (mean number of cases = 49).

The pattern of agreement is more profound when the data set is reduced to those cases that divide judicial opinion. Indeed, in this data set the average agreement between the Supreme Court Justices is 67% (mean 16 cases). This is higher than the overall average agreement in this data set of 53%. This pattern exists even if cases with a single dissent are excluded, with an average agreement of 63% (mean nine cases), again significantly higher than the average for this data set of 44%.

(b) The universalists: Lord Phillips, Lord Kerr and Lord Clarke

The universalists support values that are encompassed in *universalism* and oppose *tradition* and *conformity*. The application of these criteria identified three Supreme Court Justices: Lords Phillips, Kerr and Clarke. Again, if the grouping is accurate, then a high degree of agreement would be expected in the decisions reached.

As predicted, there is a high degree of agreement in decision making between the universalists. In all of the cases combined, there was an average of 86% agreement between the decisions reached by Lords Phillips, Kerr and Clarke. The level of agreement was more significant when the cases that divided judicial opinion were analysed, revealing an average of 66% agreement between the Supreme Court Justices in an average of 14 cases, compared to the average of 53% for all Supreme Court Justices. This level of agreement was maintained when cases were limited to those in which more than one Supreme Court Justice held a minority position. In these cases, the percentage agreement was 66% (mean eight cases) compared with the expected agreement of 44%.

(c) Self-direction: Lord Mance and Lady Hale

Lord Mance and Lady Hale support the values encompassed in *self-direction* and are less likely to affirm those encompassed within *power*. There is significant agreement

100. Of note, Lords Rodger and Hope almost always agreed on Scots Appeals. Although the Justices were more likely to disagree on English Appeals, the agreement was still above average. Paterson, above n 89.

between the decisions that these two Supreme Court Justices reach, with 94% agreement in the 54 cases that they heard together. In the 12 that they heard that divided judicial opinion, Lord Mance and Lady Hale agreed in 75%, while in the seven minority cases that they heard, they agreed in 86%.¹⁰¹

(d) Do Supreme Court Justices who espouse opposing values reach opposing decisions?

The traditionalists hold opposing values to the universalists: therefore it would be predicted that there would be a low degree of agreement between the decisions reached. Indeed, there is a lower level of overall agreement, with an average agreement of 79% in all cases, between the universalists and the traditionalists. In cases that divided judicial opinion, this was reduced to 42%, and it was further reduced to 28% in minority decision cases, lower than the average agreement of 44%. These data suggest that Supreme Court Justices with opposing values are less likely than average to agree in cases that divide judicial opinion. It is of note that if Lord Philips had been excluded from this analysis, the values would have reduced to 33% (divided cases) and 23% (minority cases).

12. WHAT DOES THE STUDY OF PERSONAL VALUES CONTRIBUTE TO THE DIVERSITY DEBATE?

Lady Neuberger highlighted in her report that

Judges drawn from a wide range of backgrounds and life experiences will bring varying perspectives to bear on critical legal issues.¹⁰²

Despite clear acknowledgement of the breadth of experiences that can contribute to a more diverse judiciary, debates surrounding judicial diversity have had a narrow focus on explicit diversity, on overt characteristics and on how the judiciary is seen. This study reveals value diversity on the Supreme Court bench. Indeed, there are stark differences in the value profiles of some of the members of the Supreme Court bench. The variation in value expression is reflected in the decisions reached by the Supreme Court Justices. Those Justices who have similar value profiles will reach similar decisions in cases that divide judicial opinion. It is clear from this study that the Supreme Court Justices are more diverse in their values than the white Oxbridge stereotypes. A focus on overt characteristics alone serves to limit the debates surrounding judicial diversity, fails to recognise the importance of innate characteristics on judicial decision making and diminishes the importance of the Supreme Court Justice as an individual.

101. Brice Dickson identified a pattern of joint dissent between Lords Scott and Mance. Indeed, he identified an agreement between Lords Scott and Mance of 93%, which is similar to the agreement identified in this case. This would suggest that Lord Scott may have shared similar values. The Supreme Court data set selected for this study did not have sufficient data to facilitate this analysis, although this may be addressed in the future using a data set from the House of Lords. Dickson, above n 95.

102. See <http://www.judiciary.gov.uk/publications-and-reports/reports/diversity/advisory-panel-recommendations> (accessed 9 January 2015).

The study of personal values identifies a key limitation to the ‘unique voice’ argument, which argues that all women speak with one voice and that this voice is unique to women. Population studies suggest that females are more likely than males to express concern and responsibility for the well-being of others, and less likely than males to accept materialism and competition – and this is reflected in the values, with females attributing more importance to *universalism*, *conformity* and *security* than males. Although this variation is modified in women who achieve high levels of success in their chosen career, who do not reflect the values espoused by women in the population in general, women still espouse different values to men.¹⁰³ Alignment of values between Lady Hale and Lord Mance undermines the argument that one individual female will reflect the values of a population, and highlights the limitation of the use of population studies to identify the characteristics of the individual.¹⁰⁴ The study of personal values suggests that gender alone cannot be used as a proxy for the many life experiences that influence personal values. A focus on gender alone should therefore be approached with caution: male and female Supreme Court Justices may have a range of life experiences that have a profound effect on their values. These experiences extend beyond overt demographic characteristics. Although there are many legitimate arguments for gender balance on the Supreme Court bench, as Sally Kenney argues,

It is better to argue for the symbolic importance (in the strong sense) of women on the bench, and the multitude of experiences (plural) women bring to the bench, than to fall into the trap of talking about women’s essential difference from men and the distinctive ‘voice’ (singular) they add to the bench.¹⁰⁵

The study of personal values highlights the limits of arguments that centre on the explicit characteristics of the judiciary and lose sight of the judge as an individual. Views such as those espoused by JAG Griffiths in his book *The Politics of the Judiciary*, where he argues that judicial decision making is a consequence of a class-conditioned perspective, treat the judiciary as homogenous and interchangeable.¹⁰⁶ Although class and education may influence values, it is clear that values are more nuanced than class and education alone. In treating the judiciary as a homogenous group, the significant influence of the individual on decisions in cases that divide judicial opinion may be lost.

This paper does not disregard the importance of explicit judicial diversity, and the arguments surrounding legitimacy, public perception and equality are not diminished by the presence of tacit diversity. However, as stated by Lady Hale, ‘You need a variety of dimensions of diversity.’ This study identifies a novel dimension of diversity that recognises the importance of the individual, extends the debates surrounding diversity and highlights the role of innate tacit characteristics on judicial decision making.

103. Adams and Funk, above n 62.

104. A Beutel and M Marini ‘Gender and values’ (1995) 60 *Am Sociol Rev* 436.

105. S Kenney ‘Breaking the silence: gender mainstreaming and the composition of the European Court of Justice’ (2002) 10 *Feminist Legal Stud* 257.

106. JAG Griffiths *The Politics of the Judiciary* (London: Fontana, 5th edn, 1997).