

## *Public Law Values in the House of Lords — In an Age of Counter-Terrorism*

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This article examines the judicial reasoning of the United Kingdom House of Lords in cases touching on counter-terrorism issues that were decided between 2004 and 2009. Rather than “judging the judges” critically or bringing together the case law for the purpose of compiling empirical trends,<sup>1</sup> the article uses these cases to explore the Law Lords’ approach to various issues of human rights in an age of counter-terrorism and to investigate deeper questions about the nature of judicial adjudication. It adapts a framework devised by David Feldman just over two decades ago,<sup>2</sup> and seeks to identify, as Feldman did in 1990, some of the “public law values” lying beneath the Law Lords’ decisions. In what follows, the term “public law values” is understood to refer to certain entrenched philosophical convictions about aspects of public law held by the Law Lords consistently across the cases — convictions on which the Law Lords pivot throughout the course of their reasoning.

Five cases are selected as a basis for this exploration: *A v Secretary of State for the Home Department (Belmarsh)*;<sup>3</sup> *A v Secretary of State for the Home Department (No 2) (Torture Evidence)*;<sup>4</sup> *Secretary of State for the Home Department v JJ (JJ)*;<sup>5</sup> *Secretary of State for the Home Department v MB (MB)*;<sup>6</sup> and *Secretary of State for the Home Department v F (F)*.<sup>7</sup> These cases involve the most revealing exposition of public law values across a similar group of Law Lords within a manageable pool of counter-terrorism cases. Other cases have been left out either because they add nothing new to the above five judgments, or because the composition of the House in these cases was too different from the cases listed above to make for a meaningful comparison. The Law Lords that make common appearances in the five cases under analysis are the late Lord Bingham of Cornhill, Lord Hoffmann, Baroness Hale of Richmond, Lord Carswell and Lord Brown

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1 As has been done by others: Aileen Kavanagh “Judging the Judges under the Human Rights Act: Deference, Disillusionment and the ‘War on Terror’” [2009] PL 287; Sangeeta Shah and Thomas Poole “The Impact of the Human Rights Act on the House of Lords” [2009] PL 347.

2 David Feldman “Public Law Values in the House of Lords” (1990) 106 LQR 246.

3 *A v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68 [*Belmarsh*].

4 *A v Secretary of State for the Home Department (No 2)* [2005] UKHL 71, [2006] 2 AC 221 [*Torture Evidence*].

5 *Secretary of State for the Home Department v JJ* [2007] UKHL 45, [2008] 1 AC 385 [*JJ*].

6 *Secretary of State for the Home Department v MB* [2007] UKHL 46, [2008] 1 AC 440 [*MB*].

7 *Secretary of State for the Home Department v AF (No 3)* [2009] UKHL 28, [2010] 2 AC 269 [*F*].

of Eaton-under-Heywood. At least three of the five Law Lords appear in every case, providing sufficient continuity to trace the treatment of certain public law values.<sup>8</sup>

It is not suggested that all of the “bedrock values” or ultimate constitutional commitments of the members of the House of Lords can be revealed through analysing a small sample of counter-terrorism cases: obviously, certain areas of controversy in public law are not even mentioned in these cases.<sup>9</sup> Nor is it implied that the values of the Law Lords selected are necessarily representative of other Law Lords not sitting in these cases. Rather, the exercise is self-consciously confined to a more modest task: the discovery of *some* of the public law values influencing *certain* Law Lords over this five year period of decision-making on counter-terrorism issues.

The first part of this article develops the conceptual framework for the analysis. It begins by outlining Feldman’s 1990 article on judicial reasoning and then moves to consider the influence of legal realism on both Feldman’s piece and the analysis that follows. Attention turns in the second part of the article to the public law values that lie beneath the House of Lords’ judgments. Four fault-lines that divide the judges are discussed: the approach to the European Court of Human Rights as a source of authority; the breadth of definition of human rights; the tension between utilitarian and individualist perspectives on rights; and conceptions of deference in the context of national security. Finally, an attempt is made to tease out the implications of the findings for understandings of the judicial reasoning process.

## I THE THEORETICAL BACKGROUND

### Feldman’s Article

David Feldman’s original article, “Public Law Values in the House of Lords”, analyses an eventful period of public law decision-making between 1981 and 1990. This was a time when the House of Lords was grappling with a rapidly changing social context and refashioning public law to adapt to Thatcher-era conditions of deregulation and privatisation.<sup>10</sup> Feldman examines four areas of contention arising out of the cases: “democratic elitism” and deference to the executive; the treatment of decisions made by experts such as doctors and public servants; the role of rights; and issues of formalism and principled consistency. He notes differences

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8 Lord Brown did not sit in *Belmarsh* and Baroness Hale was not on the bench at the time of *Torture Evidence*; Lord Bingham had retired by the time of *F*. Lords Carswell and Hoffmann deliver judgments in all five cases.

9 The phrase “bedrock values” is used in Sian Elias, Chief Justice of New Zealand “Limiting Rights under a Human Rights Act: A New Zealand Perspective” (Address to the Australian Bill of Rights Conference, University of Melbourne Law School, 3 October 2008) at [32].

10 Feldman, above n 2, at 247–256.

between the Law Lords' values — for instance, highlighting the chasm between Lord Bridge and Lord Scarman's views on justiciability<sup>11</sup> — but also stresses similarities, such as their Lordships' general indifference to issues of individual rights.<sup>12</sup> He concludes that the picture painted of House of Lords decision-making “should lead to the collapse of the notion that legal rules and principles are determinative of difficult cases, at any rate in public law”.<sup>13</sup>

Of course, much has changed since Feldman wrote his seminal piece and the public law context examined here is quite different. The Law Lords described in Feldman's article have been replaced. Further, the legal landscape has changed. As one recent empirical study of the House of Lords observes, “[p]ublic law issues ... have moved from the periphery to the centre of the business of our highest court” in the intervening years.<sup>14</sup> And Feldman's 1990 remark that “human rights have as yet had little real impact on English public law” now seems quaint.<sup>15</sup> As a result of this altered landscape, some of Feldman's terms (such as “democratic elitism”) now have less bite.<sup>16</sup> Feldman's conception of public law as a field needs updating, too — he refers to public law as being almost synonymous with administrative law,<sup>17</sup> whereas public law in the post-Human Rights Act 1998 (UK) (HRA) era has a far wider reach.

Nonetheless, there are many grounds on which Feldman's project remains worthy of retrieval and renewal. First, Feldman's view of public law values as being concerned with “the allocation and regulation of state power to make decisions for or about subjects” does capture the scope of public law in the modern era and so is a definition that is maintained in this article.<sup>18</sup> Secondly, the political and legal upheavals of the 1980s that provided the context for Feldman's article have arguably been mirrored in the political and legal upheavals arising out of terrorism in the latter part of the last decade. Just as the rapid changes in the size and shape of the state in the 1980s forced judges to fall back on their own abstract conceptions of the state as a fixed reference point, so too in recent times judges have been forced to rely more frequently than usual on their background political theories as a stable model against which to evaluate the sudden transformations ushered in by an age of counter-terrorism. Thirdly, the premise of Feldman's article, that “each judge works (consciously or unconsciously) with a *personal* conception of the nature of law, society

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11 Ibid, at 249–251.

12 Ibid, at 276.

13 Ibid.

14 Shah and Poole, above n 1, at 371. For an account of the changing judicial role, see also Robert Stevens *The English Judges: Their Role in the Changing Constitution* (Hart Publishing, Oxford, 2005) at 138.

15 Feldman, above n 2, at 261.

16 Ibid, at 247.

17 Feldman never explicitly defines “public law”. But he uses “public law” and “judicial review” interchangeably: *ibid*, at 259.

18 Ibid, at 246.

and the state”, remains a subject of debate, as will be noted shortly.<sup>19</sup> The notion that a judge exercises discretion in difficult cases has come under even more scrutiny as a result of the HRA,<sup>20</sup> under which United Kingdom judges have increased powers to interpret legislation consistently with rights and declare legislation incompatible with the Act.<sup>21</sup> Fourthly, Feldman’s reasons for exploring public law values — to “test hypotheses about judicial law-making”, “provide evidence for or against a monolithic legal ideology” and “throw light on tensions between the judges’ models of law” — remain reasons for the enterprise to be worthwhile today.<sup>22</sup> These third and fourth points are taken up in more detail below.

That all these issues are of enduring relevance provides an impetus to update Feldman’s project in an age of counter-terrorism, just over twenty years on.<sup>23</sup> This article makes no attempt to deploy Feldman’s concepts and structure with total fidelity. The four categories of analysis in the second part of this article may partly resemble Feldman’s points of discussion (there is overlap on issues of rights, deference and formalism), but they also capture new public law values which have emerged in the House of Lords since 1990, one of which is the weight placed on decisions of the European Court on Human Rights. The analysis below has a more limited focus than Feldman’s work, too: only five cases are discussed, whereas Feldman aimed for a more expansive review of much of the House of Lords’ workload. The smaller sample allows for a greater concentration on individual judges and comparison of values across cases with similar content. In all of this, what is intended is for the overall spirit and outlook of Feldman’s article to be reproduced, albeit in a manner that allows for sufficient acknowledgment of the different age in which we now find ourselves.

### *1 Legal Realists and the Judicial Process*

This article also departs from Feldman’s work in more deeply theorising the legal philosophy that necessarily underpins any enquiry into judicial reasoning. Feldman’s piece contains little by way of theoretical analysis, besides the comment quoted above regarding the fact that a judge invariably has a “*personal* conception of the law”. This might be explained by Feldman’s desire to concentrate on the empirical findings of his research and to steer clear of normative conclusions. However, it is helpful to bring his theoretical assumptions to the surface to achieve both a greater transparency of methodology and to illuminate why it was that his article struck an important chord in the academic debate.

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<sup>19</sup> *Ibid* (emphasis in the original).

<sup>20</sup> HLA Hart *The Concept of Law* (2nd ed, Clarendon Press, Oxford, 1994) at 272.

<sup>21</sup> Human Rights Act 1998 (UK), ss 3–4.

<sup>22</sup> Feldman, above n 2, at 246.

<sup>23</sup> The title of this article is, of course, a gloss on Feldman’s original title.

This article suggests that the resonance of Feldman's project was a product (in part, at least) of its deft deployment of some of the insights of legal realism. As is widely known, legal realists maintain that doctrine and legal rules do not determine judicial decisions. Such rules are not exhaustive in coverage and are capable of multiple interpretations.<sup>24</sup> As a result, legal realists claim that there is much scope for judicial creativity, given that rules cannot create closure.<sup>25</sup> It is in this sphere of judicial discretion that the realists argue that judges' unique outlooks guide their decisions. There is some difference among realists as to the forces at work on judicial thinking and the strength of these forces: Holmes talks of "the intuitions of public policy" contributing to judicial lawmaking;<sup>26</sup> Frank refers to biases from personal experience and social determinants;<sup>27</sup> and Griffith writes more strongly of judges being "swayed by emotional prejudices".<sup>28</sup> But such overlapping views converge on the proposition that judges do not adopt a blank-slate approach to decision-making: a judge will always be guided (consciously and subconsciously) by policy preferences, personal and political philosophies, and background experiences.

The connections between legal realism's approach to judicial reasoning and Feldman's enterprise of inferring public law values from judgments are clear. If the legal formalist is correct, and legal rules and doctrine always govern the decisions reached by judges, there would be little room for judges' background views or personal predispositions to interfere with reasoning. On this account, any effort to divine values lying beneath judgments would be unnecessary. But of course, this is not how Feldman — or this article — conceives of judicial reasoning. For Feldman in his 1990 article, there are definite theoretical fault-lines that divide judges when coming to decisions: these are the four categories of analysis that he employs in his article. Such fault-lines prompt recourse to the intuitions, or biases, or prejudices to which the realists refer. In this way, Feldman, while not expressly using the label, draws on the realist perspective in his 1990 article. At the same time, he enriches the legal realism discourse by focusing in more depth on *judicial values* — fixed underlying commitments from which other aspects of judicial reasoning proceed — as drivers of judicial reasoning.

Do legal realism and this focus on judicial values continue to provide a useful lens through which judgments might be understood? While the view that judges' background views and personalities colour their judgments may seem a truism to some, there remains a sizeable group of scholars and judges that claim that doctrine and precedent are the sole

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24 William W Fisher III, Morton J Horwitz, and Thomas A Reed *American Legal Realism* (Oxford University Press, Oxford, 1993) at 164.

25 JAG Griffith *The Politics of the Judiciary* (Fontana Press, Glasgow, 1985) at 16.

26 Michael Kirby *Judicial Activism: Authority, Principle, and Policy in the Judicial Method* (Sweet & Maxwell, London, 2004) at 21.

27 Jerome Frank *Law and the Modern Mind* (Brentano's, New York, 1930) at 114.

28 Griffith, above n 25, at 185.

source of judicial decisions.<sup>29</sup> What is required to respond to this body of scholarship is not a complete argument for the worth of legal realism. Nor is any normative argumentation for why judges ought to take on a realist mode strictly required. Rather, what is needed for present purposes is a plausible descriptive account of why judges are, in practice, not merely “slot machines” who mechanically churn out the law upon request.<sup>30</sup> Such a descriptive foundation is a necessary prerequisite to the process of teasing out the public law values of the House of Lords in the 2004–2009 period.

Perhaps the best justification of this foundational account of the judicial process is that it is very difficult for individuals to detach or disengage elements of their personality. Individuals may not be aware of all the influences contributing to their actions (some causal forces may only become clearer in hindsight) and even when they are aware of these influences, some moral, political, or cultural leanings may be so deeply embedded that they cannot be suppressed. Judges are surely no different. Whilst they take the judicial oath and face constraints on how to behave, they bring to their job pre-existing inclinations, intuitions and values that colour certain choices that they make and conclusions that they reach, as has been recently noted by Etherton LJ.<sup>31</sup> In the words of former [United States] Federal Court Judge Armistead Dobie:<sup>32</sup>

[T]here never will be ... a judge worthy of his salt who can be classified as a cool and clammy thinking machine. No judge, however he may try, can, in his decisions, completely and effectively divorce himself from what he has seen, has heard, has experienced and has been.

Much of this sounds uncontroversial: judges, of course, are human and are affected by a range of factors when making their decisions. But where the primary disagreement exists amongst scholars is on the degree to which this deep normativity pervades judicial decision-making. The conventional view is that judicial values arise in limited circumstances: where precedents do not point in one direction on occasions where statutory guidelines are vague — in short, only in the “penumbra” of the law, in those exceptional cases where the law runs out.<sup>33</sup>

29 Of course, Dixon CJ of the High Court of Australia famously advocated “strict and complete legalism” in judicial reasoning: Owen Dixon “Address upon taking the oath of office in Sydney as Chief Justice of the High Court of Australia on 21st April, 1952” in Judge Woinarski (ed) *Jesting Pilate And Other Papers and Addresses* (Law Book Co, Melbourne, 1965) 245 at 247. Modern adherents to this mode of thinking include Heydon J of the High Court of Australia: Dyson Heydon “Judicial Activism and the Death of the Rule of Law” (2003) 23 *Australian Bar Review* 110.

30 G Edward White *The American Judicial Tradition: Profiles of Leading American Judges* (3rd ed, Oxford University Press, Oxford, 2007) at viii–ix.

31 Terence Etherton “Liberty, the Archetype and Diversity: A Philosophy of Judging” [2010] PL 727 at 740.

32 Armistead M Dobie “A Judge Judges Judges” [1951] Wash ULQ 471 at 480, cited in Brian Z Tamanaha “The Realism of Judges Past and Present” (2009) 57 *Clev St L Rev* 77 at 85.

33 Hart, above n 20, at 272.

However, both Feldman's article and the ensuing discussion reject this limited view of the role of judicial values. Feldman's article is not limited to cases where Law Lords exercised a great deal of discretion and nor is the present article. It is argued here that values shape judicial reasoning frequently in the structure of that reasoning and the conclusions reached.

In light of this, the analysis that follows does not merely underscore decisions made on the facts by the individual Law Lords. There is as much, if not more, emphasis placed on all of the choices made by Law Lords (around how authorities are cited and how rights are conceived, to take but two examples) in the lead-up to these conclusions, in acknowledgment of the fact that these ostensibly humdrum passages of reasoning may be the most revealing of judicial values. A longer article would look more comprehensively outside the judgments for corroboration of the judges' public law values; constraints of brevity mean that the focus has to be primarily on the judgments themselves. The field of counter-terrorism case law has been spotlighted because it casts these values into stark relief.

Some words of qualification are needed about this theoretical framework. The inductive process of discerning the values that lie underneath the text of a judgment is a little conjectural and so must be approached with care and caution. In the ensuing discussion, judicial intuitions are only identified when they appear to represent a common thread across several cases, and the Law Lords' extra-judicial writing is occasionally drawn upon to corroborate the conclusions. We should also be wary of overstating the centrality of these value judgements. It is not implied that these value judgements are the exclusive determinants of the Law Lords' decisions in the 2004–2009 period. What is presumed is that these judgements are relevant, interesting and have had some bearing on the Law Lords' conclusions.<sup>34</sup> We must accept, too, that intuitions and inclinations are not static, and can change over time: thus, the conclusions reached should not be read as conclusive summaries of the Law Lords' judicial philosophies. The public law values discussed mark the intuitions of the Law Lords at a particular time, recording attitudes within a specific context. With these premises and provisos acknowledged, we may avoid some of the obvious traps involved with identifying public law values in the House of Lords.

## **II NEW AND OLD PUBLIC LAW VALUES IN THE HOUSE OF LORDS**

The cases to be analysed cover a range of subject matter, although all deal with issues of security and human rights. In brief, and to give the

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<sup>34</sup> Coper rightly notes that judicial choice is "constrained" by ethics, shared understandings and the threat of criticism: Michael Coper "The Path of the Law: A Tribute to Holmes" (2003) 54 *Ala L Rev* 1077 at 1086.

ensuing analysis some context, the *Belmarsh* decision touches on the lawfulness of the United Kingdom's derogation from art 5 of the European Convention on Human Rights (Convention) and the compatibility of the regime adopted under the Anti-terrorism, Crime and Security Act 2001 (UK) with art 14 of the Convention; *Torture Evidence* examines whether the Special Immigration Appeals Commission should be able to admit evidence possibly procured through torture perpetrated by states other than the United Kingdom and without the United Kingdom's complicity; *JJ* concerns the consistency of the control order regime with the right to liberty; and *MB* and *F* relate to whether and under what circumstances the special advocate procedure satisfies the right to a fair trial.

From these five cases, several points of philosophical conflict are extrapolated in the following discussion. These are described as ideological "fault-lines" because they represent core disagreements that lurk beneath the surface of the Law Lords' judgments. The fault-lines chosen intersect, but pertain generally to the authority over definition of human rights; open and closed conceptions of those rights; the weight given to rights as opposed to other considerations; and the influence of deference over rights considerations. All concern issues of disagreement in contemporary political philosophy. It is in observing each Law Lord's location on such fault-lines that we can understand the "public law values" at the heart of this article.

### *1 European versus British Justice: Who has Authority over the Definition of Rights?*

One of the recent developments in United Kingdom public law is the emergence of Strasbourg jurisprudence as a powerful source of authority in human rights cases. This is partly a result of s 2 of the HRA, which requires courts to take into account decisions of the European Court of Human Rights. However, in spite of this statutory injunction, the reputation of the European Court of Human Rights remains fragile. Hence, unsurprisingly, the Law Lords in the period 2004–2009 come to various views on the weight of Strasbourg decisions.

Lord Hoffmann is often critical of the European Court, a position that aligns with his extra-judicial views.<sup>35</sup> In *JJ*, his Lordship notes that it is "not easy to discover" a concrete criterion against which to assess breaches of liberty from the leading Strasbourg decision on liberty, *Guzzardi v Italy*.<sup>36</sup> In *Belmarsh*, Lord Hoffmann says, just slightly disparagingly, "I

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35 See Lord Hoffmann "The Universality of Human Rights" (2009) 125 LQR 416, where Lord Hoffmann makes extensive criticism of the fact that a Slovenian judge can have the power to determine British law. See also: Lord Hoffmann "Human Rights and the House of Lords" (1999) 62 MLR 159, where at 166, his Lordship notes that "the jurisprudence of the Strasbourg court ... seems to me to have passed far beyond its original modest ambitions and is seeking to impose a Voltairian uniformity of values upon all member States. This I hope we shall resist."

36 *JJ*, above n 5, at [39].

would not like anyone to think that we are concerned with some special doctrine of European law”.<sup>37</sup> Then, in *F*, a decision in which the House accepted that a Strasbourg decision called on the House to essentially roll back its earlier judgment in *MB*, his Lordship is even less delicate: “I think that the decision of the ECtHR was wrong”, his Lordship writes, “and that it may well destroy the system of control orders which is a significant part of this country’s defences against terrorism”.<sup>38</sup> Of course, in fairness to Lord Hoffmann, it should be noted that the fact that he was willing to be bound by the European Court’s judgment in *F*, though section 2(1)(a) of the HRA requires judges only to “take into account” the European Court’s decisions, reflects at least a grudging respect for Strasbourg on his part.

There have been other murmurings of discontent, too: in *JJ*, Lord Carswell claims that in no European Court of Human Rights cases “is there any analysis which would give real assistance in determining the proper ambit of deprivation of liberty”, implying a certain impoverishment in the European Court of Human Rights’ reasoning.<sup>39</sup> In *Torture Evidence*, as well, while Lord Bingham reels through international conventions and European precedents to justify his refusal to allow a court to admit evidence procured through torture, Lord Carswell states, “I do not find it necessary to explore [the United Nations Convention against Torture or the Convention], which are not without their difficulties”.<sup>40</sup> This subtle brush-aside also implies a latent disrespect for European and international rulings. Lord Brown is more moderate, but emphasises that Strasbourg decisions should be avoided as factual precedents in *JJ*, showing a reluctance to accept such decisions wholesale.<sup>41</sup>

However, Law Lords have shown a favourable perspective at other points towards Strasbourg. The negativity towards the European Court’s decision in *F* is understandable, as the House of Lords’ own reasoning had been challenged, yet certain Law Lords are more muted in their criticism, with Baroness Hale even noting that Strasbourg had reached a “proper and principled conclusion”.<sup>42</sup> In *JJ*, Lord Carswell stresses that the House should not depart from the “current” of European Court of Human Rights decisions.<sup>43</sup> Meanwhile, in *MB* and *Belmarsh*, Lord Bingham traverses a range of Strasbourg rulings (alongside his extensive quotation of international law), using their statements of principle in a manner that underlines his respect for Strasbourg jurisprudence.<sup>44</sup> He also makes a point of quoting the Council of Europe Commissioner for Human Rights to support his conclusions in

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37 *Belmarsh*, above n 3, at [88].

38 *F*, above n 7, at [70].

39 *JJ*, above n 5, at [80].

40 *Torture Evidence*, above n 4, at [151].

41 *JJ*, above n 5, at [101]–[102].

42 *F*, above n 7, at [106].

43 *JJ*, above n 5, at [83].

44 See, for instance, *MB*, above n 6, at [28]–[32].

*Torture Evidence*, *JJ*, and *MB*.<sup>45</sup> On the whole, there is much agnosticism amongst the House on the value of European judgments: whilst Baroness Hale and Lord Bingham show support for European reasoning, Lord Hoffmann is clearly hostile to it, and Lords Carswell and Brown offer brief statements that could be placed in either camp.

Predictably, perhaps emerging out of these views on the European Court's judgments, several of the judges demonstrate a loyalty to British law as a source of authority. Thomas Poole calls this a "turn to the local."<sup>46</sup> Lord Hoffmann is most prominent in taking this turn, claiming in *Belmarsh* that freedom from arbitrary arrest and detention is "a quintessentially British liberty",<sup>47</sup> and praising the United Kingdom for being a nation "tested in adversity".<sup>48</sup> In the *Torture Evidence* decision, where the Law Lords consider the admissibility of evidence obtained through torture, his Lordship claims that the United Kingdom's history of resisting torture "has a constitutional resonance for the English people".<sup>49</sup> But Lord Hoffmann is not alone: in *Torture Evidence*, Lord Carswell cites a poem of Tennyson's to illustrate the importance of the British common law.<sup>50</sup> Lord Brown also talks in somewhat patriotic terms: in *Torture Evidence*, his Lordship talks of "the good name of British justice",<sup>51</sup> and in *MB*, warns against "bringing British justice into disrepute".<sup>52</sup> Lord Bingham is the only Law Lord to accentuate international protections of human rights at any length, even where such protections have not been incorporated into binding law,<sup>53</sup> and to point out the United Kingdom's own patchy history of rights protection. For instance, in *Torture Evidence*, Lord Bingham corrects Lord Hoffmann's romanticised portrait of the British past by saying, "it is clear from the historical record that torture was practised in England".<sup>54</sup> Most of the judges, then, view invocations of Britain's constitutional past as effective rhetorical devices to buttress their conclusions, but some are keener to adopt this mindset than others.

These views on the weight of European Court of Human Rights authority and the extent to which justice should be British in provenance lead the House of Lords into the debate on constitutional comparativism that has been raging elsewhere, particularly in the United States of America and, to a lesser extent, in Australia.<sup>55</sup> This debate queries whether foreign

45 See *Torture Evidence*, above n 4, at [44]; *JJ*, above n 5, at [22]; *MB*, above n 6, at [41].

46 Thomas Poole "Harnessing the Power of the Past? Lord Hoffmann and the *Belmarsh Detainees Case*" 32 *Journal of Law and Society* 534 at 541. See also Matthew Zagor's interesting discussion of how the House of Lords' invocation of national identity rhetoric in *Belmarsh* and *Torture Evidence* is in stark contrast to the High Court of Australia's more mechanical approach to questions of constitutional values in administrative detention cases: Matthew Zagor "Judicial Rhetoric and Constitutional Identity" (2008) 19 *PLR* 270.

47 *Belmarsh*, above n 3, at [88].

48 *Ibid*, at [96].

49 *Torture Evidence*, above n 4, at [83].

50 *Ibid*, at [152].

51 *Ibid*, at [174].

52 *MB*, above n 6, at [91].

53 *Belmarsh*, above n 3, at [63].

54 *Torture Evidence*, above n 4, at [12].

55 See Adrienne Stone "Comparativism in Constitutional Interpretation" [2009] *NZ L Rev* 45.

materials of any sort can be considered in constitutional interpretation. None of the Law Lords' judgments goes as far as the localist perspective advocated by Scalia J in the United States and Heydon J in the High Court of Australia;<sup>56</sup> in some ways, this would be unthinkable, given that the Law Lords are interpreting rights originating in a Europe-wide document that has been interpreted elsewhere. Whilst some of the Law Lords privilege a conception of British justice, all of the judges (including Lord Hoffmann) cite foreign case law without contesting the legitimacy of some kind of transnational judicial conversation.<sup>57</sup> All use Strasbourg materials, albeit with varying degrees of enthusiasm. The ultimate point to be made is that, despite a degree of dispute on whether the source of rights is British law or overseas authority, the dispute only occurs above and beyond a minimum level of comparativism on which all of the Law Lords appear to agree.

## *2 Two Concepts of Liberty (and Two Concepts of Human Rights): "Open" and "Closed" Interpretations of Rights*

In addition to the above question of authority over rights, there has been division amongst the House of Lords in counter-terrorism cases on the *interpretation* of those rights, with some Law Lords opting for a circumscribed conception of individual rights (what will be called a *closed* conception of rights), and others preferring a broad and expansive view (or *open* conception of rights). The split is even, with Lord Bingham and Baroness Hale seeing rights as relatively open-textured; Lords Hoffmann and Carswell clearly delineating how far rights should extend; and Lord Brown being somewhere in the middle.

This rupture in approach is visible in *JJ* and *MB*, cases concerning the consistency of control orders with rights to liberty and a fair trial respectively. In *JJ*, Lord Bingham and Baroness Hale are willing to give the right to liberty a flexible definition in concluding that the 18 hour curfew imposed is a violation of art 5 of the Convention. Lord Bingham notes that asking whether a situation is analogous to imprisonment or arrest is helpful, but not determinative. Deprivation of liberty, in his words:<sup>58</sup>

... may take numerous forms. The variety of such forms is being increased by developments in legal standards and attitudes, and the Convention must be interpreted in the light of notions prevailing in democratic states.

Baroness Hale similarly favours consideration of a "range of criteria"<sup>59</sup> and, in adjudicating on whether there has been a deprivation of liberty,

<sup>56</sup> *Ibid.*, at 46–49.

<sup>57</sup> This phrase is taken from Anne-Marie Slaughter "A Global Community of Courts" (2003) 44 *Harv Intl LJ* 191.

<sup>58</sup> *JJ*, above n 5, at [15].

<sup>59</sup> *Ibid.*, at [58].

uses a somewhat imprecise reference point, continually returning to the extent to which the lives of the individuals were controlled by the control orders.<sup>60</sup> The same pair of Law Lords interprets the right to a fair trial liberally in *MB* to find a violation, with Lord Bingham refusing to reduce the right to a pithy definition and Baroness Hale talking in broad terms of the need to apply “ordinary principles of judicial inquiry”.<sup>61</sup> Lord Bingham also shows his willingness to view rights in a flexible way in *Belmarsh* when, in arguing that the International Covenant on Civil and Political Rights prohibits discrimination on the grounds of immigration status, his Lordship observes that the “language is broad enough to embrace nationality and immigration status”, in spite of there being no express mention of immigration status in the Covenant.<sup>62</sup> Further, in *Torture Evidence*, Lord Bingham resists a closed definition of torture, noting that “[i]t would ... be wrong to regard as immutable the standard of what amounts to torture”.<sup>63</sup> A preference for flexibility in definition on the part of Lord Bingham is evident in these passages.

In contrast, Lords Hoffmann and Carswell clarify the precise parameters of the rights engaged in *JJ*. Both find that the right to liberty had not been violated (and repeat this analysis in *MB* when confronted with a similar claim).<sup>64</sup> Lord Hoffmann does this in two ways: first, by viewing liberty as only being violated in a situation akin to imprisonment; and secondly, by homing in on the need for there to be a “deprivation” of liberty, and not merely “serious inroads” into the right.<sup>65</sup> An “over-expansive interpretation” of both elements of the right must be avoided, says his Lordship, and his use of analogy to restrict the scope of liberty (an approach that Lord Bingham twice expressly warns against in his judgment)<sup>66</sup> as opposed to open-textured evaluative factors is indicative of a desire to narrow the scope of the liberty right to a limited number of factual scenarios.<sup>67</sup> Lord Carswell issues a similar judgment and emphasises the absence of any comparable Strasbourg case where a violation of liberty had been found.<sup>68</sup> Like Lord Hoffmann, Lord Carswell refuses to extract and apply deeper principles; indeed, even specifically warning against the temptation to “take the phrase [the right to liberty] out [of] its context”.<sup>69</sup> This statement evinces a constrained approach to interpreting rights.

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60 *Ibid.*

61 *MB*, above n 6, at [59].

62 *Belmarsh*, above n 3, at [69].

63 *Torture Evidence*, above n 4, at [53].

64 *MB*, above n 6, at [47] per Lord Hoffmann and at [78] per Lord Carswell.

65 *JJ*, above n 5, at [46].

66 *Ibid.*, at [13], where Lord Bingham writes that it is “perilous to transpose the outcome of one case to another where the facts are different”. At [19], his Lordship again notes: “[i]t is inappropriate to seek to align this case with the least dissimilar of the reported cases”. Both comments appear to be thinly-veiled criticisms of the approach adopted by Lords Hoffmann and Carswell.

67 *Ibid.*, at [44].

68 *Ibid.*, at [83].

69 *Ibid.*, at [79].

Lord Brown's perspective on the ambit of rights is less easy to pin down. His Lordship's eagerness to invoke s 3 of the HRA in *MB* to read the Prevention of Terrorism Act 2005 (UK) consistently with the right to a fair trial displays a desire to stretch the reach of rights where possible.<sup>70</sup> However, in *JJ*, whilst Lord Brown differs from Lords Hoffmann and Carswell in finding that the control order regime did breach the right to liberty, his Lordship echoes their reasoning in his desire to define "liberty" concretely. Whereas Lords Hoffmann and Carswell demonstrate a closed conception of rights by allowing the right to liberty only to be expanded through restrictive analogical reasoning, Lord Brown advances a narrow conception of rights in a different way: by being very prescriptive and specific in detailing when the right to liberty is engaged. Lord Brown argues that a 16 hour curfew is an "acceptable limit" on the right to liberty and is content to use this specified period of time as a blunt threshold to determine when liberty is violated, regardless of other factors; indeed, his Lordship "remain[s] unrepentant" about being so specific.<sup>71</sup> Unlike Baroness Hale and Lord Bingham, who consider other factors aside from the length of the curfew, Lord Brown believes that the value of consistency in interpretation outweighs the need to be flexible across cases and, in this sense, his Lordship broadly follows Lords Hoffmann and Carswell in their restrictive approaches to rights.

It should not be thought that these cases are definitively representative of their Lordships' views on rights in every instance. Some might argue that the Law Lords' preferences for breadth or narrowness in these cases merely reflect the peculiarities of counter-terrorism cases, or the idiosyncrasies of the particular rights engaged in these cases. Nonetheless, it is worth noting that the disagreement in American constitutional theory on the flexibility of rights jurisprudence is echoed by the division in the House of Lords, at least in these judgments. Whilst the House of Lords has not had to contend with American arguments over originalism or the intent of the Convention's drafters, Lord Bingham's claim in *JJ* that "developments in legal standards and attitudes" require a constant reappraisal of the right to liberty<sup>72</sup> mirrors the Dworkinian "chain novel" approach to constitutional interpretation.<sup>73</sup> Lady Hale appears to corroborate this interpretation in an extra-judicial speech, in which she notes (echoing the American jurisprudence) that "the European Convention is a 'living instrument' which develops as common European standards develop; there is no place for originalism."<sup>74</sup> One should not press this parallel between House of Lords perspectives and the debate over American constitutional interpretation too far. But it is useful to be aware that the fault-line on which the Law Lords differ is one that also splits appellate courts in other jurisdictions.

70 *MB*, above n 6, at [91].

71 *JJ*, above n 5, at [105] and [108], respectively.

72 *Ibid*, at [15].

73 Ronald Dworkin *Law's Empire* (Belknap Press, Cambridge, Mass, 1986) at 228–238.

74 Brenda Hale "Human Rights in the Age of Terrorism: The Democratic Dialogue in Action" (2008) 39 *Geo J Intl L* 383 at 386.

It might also be inferred that whether each Law Lord prefers an open or closed definition of a right turns on the individual Law Lord's approach to issues of indeterminacy. The Law Lords who are uncomfortable with open-textured rights language, Lords Hoffmann and Carswell, may be more wedded to the value of predictability and consistency in these cases than Lord Bingham and Baroness Hale, both of who seem more accepting of a degree of indeterminacy around the definition of rights. Building on this distinction, we might suggest that Lords Hoffmann and Carswell (and to a lesser extent, Lord Brown) are more formalistic than the other Law Lords.<sup>75</sup> Lord Carswell seems to invite this conclusion in *Torture Evidence*, when claiming, "I am conscious of the importance of laying down a clearly defined and workable rule".<sup>76</sup> Again, though, the extent of this formalism and whether it extends into other fields of adjudication is a matter of some speculation; at most, one can say that there are varied weightings across the bench in favour of certainty as opposed to flexibility.

### 3 *Policies and Principles: the Weight Given to Individual Rights*

The previous discussion of how an individual right is conceived by each Law Lord is distinct from the question of the importance placed by the House of Lords on rights in the overall decision-making calculus. To a certain extent, all five of the cases under analysis involve the Law Lords undertaking a balancing act that considers a right to be one factor amongst many. The doctrine of proportionality, which some of the Law Lords consider in *Belmarsh*, demands a weighing up of the objective of legislation against the right being infringed, and all of the judges concede that the public interest in preventing terrorism is important. However, within the bounds of this discourse of balancing, there remains a spectrum of value judgments in decisions where collective and individual interests appear to collide, and on this spectrum, a judge can show a tendency to privilege the public interest at one end of the spectrum (the *utilitarian* position) or an inclination towards individual rights at the other (the *rights-based* approach).<sup>77</sup> Each Law Lord is settled on a different point on this spectrum and has an implicit political philosophy that gives peculiar weighting to the two classes of argument articulated by Dworkin: "policies" (social goals

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75 David Feldman advances this claim in a recent case comment, at least in relation to Lord Brown's judgment. Feldman notes that Lord Brown's reasoning in *JJ* represents an example of a judge "searching for a degree of certainty among the multiplicity of relevant factors": David Feldman "Case and Comment: Deprivation of Liberty in Anti-Terrorism Law" (2008) 67 CLJ 4 at 6.

76 *Torture Evidence*, above n 4, at [153].

77 Scholars have inferred different brands of utilitarian political philosophy from judges' reasoning in other jurisdictions. See Janet McLean's excellent attempt to do this in the New Zealand context: Janet McLean "The Impact of the Bill of Rights on Administrative Law Revisited: Rights, Utility, and Administration" [2008] NZ L Rev 377.

that advance the interests of the collective) and “principles” (valuable individual interests).<sup>78</sup>

The most obvious distinction to draw from the reasoning in the judgments is between Lord Brown and Lord Hoffmann. Lord Brown marshals a robust defence of absolute individual rights in several notable passages. In *MB*, his Lordship states:<sup>79</sup>

I cannot accept that a suspect’s entitlement to an essentially fair hearing is merely a qualified right capable of being outweighed by the public interest in protecting the state against terrorism ... [I]t seems to me not merely an absolute right but one of altogether too great importance to be sacrificed at the altar of terrorism control.

In *Torture Evidence*, Lord Brown claims unequivocally that “torture is an *unqualified* evil. It can *never* be justified.”<sup>80</sup> Further, in *JJ*, his Lordship proclaims: “Article 5 represents a fundamental value and is absolute in its terms.”<sup>81</sup> In short, for Lord Brown, rights (at least, the rights implicated in these cases) are trumps, rather than merely significant interests that should be played off against collective goals.<sup>82</sup>

Lord Hoffmann has a different conception of rights, although his Lordship does not explicitly acknowledge this. In *F*, Lord Hoffmann adopts quintessentially utilitarian reasoning to justify limits on fair trial rights (though the right to a fair trial has no internal qualification in the European Convention): “[t]he figures matter”, writes Lord Hoffmann, before declaring that “[a] system of justice which allowed a thousand men to go free for fear of convicting one innocent man might not adequately protect the public”.<sup>83</sup> Elsewhere, Lord Hoffmann emphasises that the gravity of the threat should dictate how far a right can be restricted: in *MB*, his Lordship suggests that there is “no public interest which is more weighty than protecting the state against terrorism”.<sup>84</sup> To be sure, one should not caricature Lord Hoffmann’s position: in *Belmarsh*, he clings to the right to be free from arbitrary arrest and detention.<sup>85</sup> On the whole, though, Lord Hoffmann’s dominant position is that rights are only one factor in the calculus of competing considerations.

The other Law Lords are less open in their views on the degree to which the individual’s interest can be sacrificed for the collective. Generally,

78 Ronald Dworkin *Taking Rights Seriously* (Duckworth, London, 1977) at 90–93. The validity of this distinction has, of course, been questioned: policies may have an impact on principles, and vice-versa. Nonetheless the terms help to render vivid the different philosophical positions taken by the Law Lords in the five cases under analysis.

79 *MB*, above n 6, at [91].

80 *Torture Evidence*, above n 4, at [160] (emphasis added).

81 *JJ*, above n 5, at [107].

82 Ronald Dworkin “Rights as Trumps” in Jeremy Waldron (ed) *Theories of Rights* (Oxford University Press, Oxford, 1984) 153.

83 *F*, above n 7, at [74].

84 *MB*, above n 6, at [54].

85 *Belmarsh*, above n 3, at [86]–[87].

however, Lord Bingham and Baroness Hale opt for positions consistent with Lord Brown's rights-based perspective, whilst Lord Carswell inclines towards a utilitarian approach. Lord Bingham's sweeping tour through international human rights documents in *Belmarsh* reflects a belief that the right to be free from discrimination should be prized above most conflicting goals,<sup>86</sup> and in *MB* he notes that the right to a fair trial includes within it "a core, irreducible minimum of procedural protection".<sup>87</sup> Baroness Hale also upholds the individual in *Belmarsh*, citing Thomas Jefferson for the proposition that "the will of the majority cannot prevail if it is inconsistent with the equal rights of minorities".<sup>88</sup> Yet both show signs of a flexible position. In *MB*, Lord Bingham concedes that a fair hearing could be "limited in the interests of national security",<sup>89</sup> and Baroness Hale departs from Lord Bingham's concept of an irreducible core in the right to a fair trial in *MB*, noting that the right is not absolute.<sup>90</sup> Lord Carswell is similar in the sense that his Lordship leans in one direction (towards Lord Hoffmann's philosophy), but at times is persuaded by the opposing view. In *MB*, Lord Carswell invokes faintly utilitarian language;<sup>91</sup> however, he comes to a different view from Lord Hoffmann in *MB*, finding (with Baroness Hale and Lord Carswell) a violation of the right to a fair trial and a need to use s 3 of the HRA to read the statute consistently with the right — an endpoint that hints that his utilitarian inclinations are constrained by respect for individual rights.<sup>92</sup> For these three Law Lords, then, the balance to be struck between collective and individual interests is far more dependent on context than for Lords Brown and Hoffmann.

One should be careful in conclusively regarding any of the Law Lords as inflexible utilitarians or absolute protectors of individual rights, given the small sample of cases analysed here. Nonetheless, it is fair to say that a picture emerges of a bench with one strong advocate for each polarized position (Lord Hoffmann supporting the utilitarian position, and Lord Brown favouring an individualist perspective), and three Law Lords placed more towards the middle of the spectrum.

When stepping back, it cannot be said that the House of Lords as an institution advocates fearlessly for individual rights in these five cases, despite the initial promise of *Belmarsh*. Indeed, by the end of 2009, the House is forced to admit in *F* that it had not gone far enough in *MB* in protecting the right to a fair trial and adjusts its approach after being prompted by the Grand Chamber's decision in *A v United Kingdom*.<sup>93</sup> This

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86 *Ibid*, at [57]–[62].

87 *MB*, above n 6, at [43].

88 *Belmarsh*, above n 3, at [237].

89 *MB*, above n 6, at [30].

90 *Ibid*, at [62].

91 *Ibid*, at [80].

92 *Ibid*, at [87].

93 *A v United Kingdom* (2009) 49 EHRR 29 (Grand Chamber, ECHR). See an explanation of the procedural history in *F*, above n 7, at [111]–[116].

is a period of fluctuating commitment to individual rights amongst the majority of judges, as Lords Hoffmann and Brown stand by their more principled positions at either end of the spectrum.

#### *4 Deference: Constitutional and Practical Considerations in Adjudication of Human Rights Claims*

The final matter on which one finds division across the bench of the House of Lords is to what extent, even after positions have been taken on the definition, conception, and weight of individual rights, there ought to be any additional considerations relating to the relationship between branches of government that encourage a finding in favour of the executive or legislative branch. Certainly, dispute about deference does not just arise in these counter-terrorism cases. Since the passage of the HRA, there has been much commentary on the appropriate level of caution that judges ought to exercise when dealing with acts of the executive and legislative branch — and a conceptual framework for analysing deference has begun to coalesce.<sup>94</sup> But these cases offer a particularly stark insight into the perspective adopted by each Law Lord on issues of deference, since an argument around the separation of powers is raised in almost every one of the five cases. Surprisingly, despite the fact that questions of deference are live in these cases, none of the members of the House of Lords adopts a structured approach to deference and, instead, the judges invoke different factors in a selective way. This allows certain public law values to fill the vacuum left by the absence of concrete criteria.

Only Lord Carswell is consistent in his approach to deference, but even he is sketchy in how much explanation he gives for his position. In *Torture Evidence*, he emphasises that their Lordships should not reach a conclusion that would “severely disrupt the course of work in SIAC” (the Special Immigration Appeals Commission), although he ultimately rules that evidence procured through torture should not be admitted.<sup>95</sup> Then, in *JJ*, his description of the genesis of the control orders regime implies a certain sympathy to the executive that leans towards deference: his Lordship notes that the executive’s 2001 approach to counter-terrorism “foundered” following the *Belmarsh* decision and he observes how the “Government turned to the idea” of control orders, seemingly compelled by judicial intransigence.<sup>96</sup> This sympathy also reveals itself in Lord Carswell’s account of the purpose of control orders — they operate, writes his Lordship, by “making it easier for the security services to keep a close

94 See, for example, Laws LJ’s criteria in *International Transport Roth GmbH v Secretary of State for the Home Department* [2002] EWCA Civ 158, [2003] QB 728. For commentary on deference, see Jeffrey Jowell “Judicial Deference: Servility, Civility or Institutional Capacity?” [2003] PL 592; Conor Gearty “Reconciling Parliamentary Democracy and Human Rights” (2002) 118 LQR 248; Lord Woolf “Judicial Review — The Tensions Between the Executive and the Judiciary” (1998) 114 LQR 579.

95 *Torture Evidence*, above n 4, at [154].

96 *JJ*, above n 5, at [67] and [68], respectively.

watch on what [the controlled persons] are doing and inhibiting their participation in terrorist conspiracies".<sup>97</sup> The language of Lord Carswell's narrative (the fact that he presumes that these controlled persons are about to participate in terrorist conspiracies and his reassuring opinion that control orders just make things "easier" for the authorities) hints at a deferential mode of thinking. It is a useful example of how subtly the Law Lords' public law values can be expressed: it is no stretch to say that the Law Lords' tone and choice of words, as well as their discussion of the core issues in a case, can shed light on underlying philosophies.

The other Law Lords are more variable in their views on deference: no other judge has a fixed position across the cases. Lord Hoffmann castigates Strasbourg judges for not being sufficiently deferential to the United Kingdom government in *F*;<sup>98</sup> and mentions the need for the judiciary not to hamstring the powers of the state in *MB*, *JJ*, and *Torture Evidence*, saying in *MB*, "I do not think that we should put the Secretary of State in such an impossible position". He highlights in *Torture Evidence* that it "is not the function of the courts to place limits upon the information available to the Secretary of State".<sup>99</sup> Yet, after all of this, he is the most interventionist judge in *Belmarsh* in questioning whether there was even a "threat to the life of the nation" justifying the derogation order from the Convention.<sup>100</sup> Lord Bingham and Baroness Hale are outspoken about the supervisory role of the courts in *Belmarsh*,<sup>101</sup> but defer to the executive in *Belmarsh* on the point concerning the justification for the derogation order, on which Lord Hoffmann refused to defer.<sup>102</sup> Finally, Lord Brown, in his ferocious defence of rights in *JJ* and *MB*, gives little consideration to the impact of his decision on the executive and legislature, but does provide several cryptic comments that show that deference is at least a passing concern: for instance, saying in *JJ* that the merits of control orders are a matter for "the House in its legislative capacity", and being careful to dispel the myth that his ruling of inadmissibility in *Torture Evidence* would be a "significant setback" to the work of the executive.<sup>103</sup> Overall, the Law Lords, Lord Carswell aside, are concerned with over-stepping their role in adjudicating counter-terrorism claims, but reach different conclusions on deference because no judge articulates what that role should be.

How might we rationalise these ostensibly inexplicable judgments? The most fruitful line of argument is that each Law Lord finds different types

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97 *Ibid.*, at [68].

98 *F.*, above n 7, at [70].

99 *MB*, above n 6, at [54]; *JJ*, above n 5, at [44]; *Torture Evidence*, above n 4, at [93]. Lord Hoffmann has reiterated extra-judicially that he was driven to a narrow definition of liberty in *JJ* by his concerns about unduly limiting executive discretion: see Lord Hoffmann "Liberty and Terror" (Australian National University College of Law Public Lecture, Canberra, 30 July 2008).

100 *Belmarsh*, above n 3, at [95]–[96].

101 *Ibid.*, at [42] per Lord Bingham and [226] per Baroness Hale. Lord Bingham insists, at [42], despite the Attorney-General's submissions, that the courts' ability to interpret and apply the law is "a cornerstone of the rule of law".

102 *Belmarsh*, above n 3, at [26]–[29] per Lord Bingham and [226] per Baroness Hale.

103 *JJ*, above n 5, at [86]; *Torture Evidence*, above n 4, at [171].

of reasons compelling when reaching a conclusion on deference, and that this explains the varied outcomes across the cases. For Lord Bingham and Baroness Hale, it is primarily the shortcomings of the court's institutional competence that creates a need for deference: in *Belmarsh*, Lord Bingham points out that courts cannot make factual predictions,<sup>104</sup> whilst Baroness Hale accepts that "any sensible court ... recognises the limits of its own expertise".<sup>105</sup> This is a *practical* guidepost for when deference becomes relevant (in the sense that it is related to what the courts are capable of doing in practice), but both Law Lords are reluctant to allow *constitutional* barriers to prevent the court from inquiring into a decision or Act: Lord Bingham defends the democratic legitimacy of the judiciary in *Belmarsh*,<sup>106</sup> and Baroness Hale notes in the same case that the courts must do more than "rubber-stamp" actions of the executive.<sup>107</sup> In contrast, Lord Hoffmann and to a lesser extent, Lords Brown and Carswell, believe that deference is a consideration whenever a court's decision will *in substance* reduce the powers of government. In *JJ*, Lord Hoffmann's narrow definition of liberty is driven by a deferential conviction, grounded in a theory of the need for a robust executive: without a ring-fenced conception of liberty, says Lord Hoffmann, "the law would place too great a restriction on the powers of the state".<sup>108</sup> Lord Brown raises the concern, too, in *Torture Evidence* that rendering evidence obtained by torture inadmissible will tie the hands of the state, and he spends some time explaining why the concern is overstated.<sup>109</sup> For these Law Lords, the question of when the courts should defer turns on the extent to which a judicial decision will restrict the state's powers, rather than on the court's institutional ability.

If this interpretation is accepted, the dissonance of the *Belmarsh* decision (when compared to later judgments) could be explained as follows: Lord Bingham and Baroness Hale defer to the executive on the issue of whether there was a "threat to the life of the nation", as this involves considering secret evidence that is beyond the court's expertise, but refuse to defer on the issue of discrimination, as this matter of legal rights is within the court's competence. In contrast, Lord Hoffmann does not defer, arguably because his Lordship believes that the effect of this intervention would not be an unreasonable fetter on the powers of the state. (Note that Lord Brown did not sit in *Belmarsh*; Lord Carswell issued only a one paragraph judgment in *Belmarsh* that endorses Lord Bingham's reasons.)<sup>110</sup>

However, this can only be a partial explanation for the inconsistencies, and even after the attempt has been made at reconciling the views above,

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104 *Belmarsh*, above n 3 at [29].

105 *Ibid.*, at [226].

106 *Ibid.*, at [42].

107 *Ibid.*, at [226].

108 *JJ*, above n 5, at [44].

109 *Torture Evidence*, above n 4, at [166]–[171].

110 *Belmarsh*, above n 3, at [240].

one is left with a residual discomfort about some contradictory views. If nothing else, it is arguable that these contradictions merely prove that the Law Lords' public law values discernible across the cases are not always coherent and logically consistent. Perhaps, then, the material pertaining to deference in the cases serves as a salutary reminder of the sheer complexity and occasional impenetrability of the public law values lurking beneath the judgments.

### III IMPLICATIONS AND CONCLUSIONS

Baroness Hale notes in *MB* that “[d]oing justice means not only arriving at a just result but arriving at it in a just manner”.<sup>111</sup> Whilst this is a comment on the value of a right to a fair trial, the remark could be interpreted as summarising the broader obligation on the members of the House of Lords in the five cases under the spotlight in the period 2004–2009. The Law Lords had to come to fair and reasonable conclusions, but the outcomes also had to be well-reasoned and reached in a “just manner”. The preceding analysis has aimed to provide a mere sketch of how the Law Lords attempted to arrive at a result in a just manner — a sketch that could form the basis of a normative assessment of whether the House of Lords lived up to its obligations in this regard. As with David Feldman's original article on the House of Lords between 1981 and 1990, no explicit critical perspective has been taken in this article, excepting several passing comments. Instead, the aim has been to clarify, to rationalise and to categorise the Law Lords' reasoning in counter-terrorism cases in a way that allows scholars to discern more quickly points of difference and similarity, and to formulate more nuanced points of criticism.

The analysis has entailed not merely a transcription of the Law Lords' views — and indeed, some tentative lessons might be drawn from the exploration of judicial values in the five cases analysed. The close reading of the judgments contributes in small part, perhaps, to the emerging field of judicial biography by providing if not a polished portrait, then at the very least a rough snapshot of some of the judicial characters that served in the final years of the House of Lords. In the five cases under scrutiny, patterns do emerge in each Law Lord's reasoning and one is left with certain strong impressions: for instance, of Lord Brown's fierce support of individual rights, and Lord Hoffmann's deference and faith in utilitarian ends. It is telling that an analysis of these cases reveals no canonical list of “public law values” that the House of Lords exhibited as a body, but rather numerous public law values that become visible in each Law Lord's judgment. These values are rarely stable across the judgments:

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<sup>111</sup> *MB*, above n 6, at [57].

that Lord Carswell and Lord Brown are at times both for and against Lord Hoffmann's positions highlights that the judges tend to avoid following conventional political philosophies, and defy easy categorization into political camps. The most one can say is that these cases offer a glimpse of some of the trends in thinking amongst these top judicial minds. For a fuller picture of each judge's judicial identity, it would be necessary to consider further a larger pool of cases.

This article is not just judicial biography, but also biography of judicial institutions (becoming more common)<sup>112</sup> and the analysis adds modestly to the body of writing on the House of Lords as an institution. The discussion reveals that, just as the House was heterogeneous in 1990, so too the Law Lords were heterogeneous in their approaches to counter-terrorism from 2004 until 2009.<sup>113</sup> While some remarks have been offered on the House of Lords as an institution, it has been illustrated that the institution is best viewed as a collection of individual judges with certain personal convictions. These personal inclinations sometimes overlap: there are clear affinities of thinking between the judges, with Lords Hoffmann and Carswell often adopting similar positions, and Baroness Hale and Lord Bingham frequently resorting to similar lines of reasoning. But the groupings are also frequently disrupted (in the *Torture Evidence* case, Lord Hoffmann adopts Lord Bingham's reasons, and Lord Carswell disagrees with Lord Hoffmann, with whom he ordinarily agrees), and it is clear the House of Lords cannot be neatly split up into wings of "liberals" and "conservatives" as might be possible with the United States Supreme Court. The House of Lords, as a whole, cannot be said to be uniform in its position either: the court presents no monolithic view on counter-terrorism between 2004 and 2009, being at times deferential, at other times interventionist, and never conforming to one single ideology. This casts doubt on Griffith's somewhat reductionist reading of judges as invariably being attached to class interests.<sup>114</sup> In addition to casting light on these insights about the nature of the House of Lords, the close analysis of the Law Lords' reasoning acts as an important historical record of some of the last high-profile decisions made by the House of Lords as a court before it was replaced by the United Kingdom Supreme Court in late 2009.

For studies of jurisprudence, the article has illustrated what Feldman already foreshadowed in 1990: that certain personal values, particularly in public law, can shape (if not determine) a judge's conclusion on a legal question. In addition to echoing Feldman's findings, these insights accentuate the enduring theoretical relevance of legal realists' views on judicial reasoning, outlined in the second part of this article. Judges do not seem to be driven merely by the application of doctrine and rules, at

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112 See, for instance, Louis Jacques Blom-Cooper, Brice Dickson, and Gavin Drewry (eds) *The Judicial House of Lords: 1876-2009* (Oxford University Press, Oxford, 2009).

113 Feldman, above n 2, at 275.

114 Griffith, above n 25, at 198.

least on the basis of the judgments surveyed here. Discretion and personal intuitions would appear to have a role to play in the reasoning and outcome of adjudicative decisions; this article has suggested specifically that judges pivot on certain values when elaborating their reasons. It should be noted that that theoretical finding, like many jurisprudential conclusions, may have real value for practice: practitioners would do well to understand the values held by judges when framing their submissions.

The Law Lords themselves accept some of these conclusions in the cases discussed above. In *Torture Evidence*, Lord Carswell states: “[w]e have long ceased to give credence to the fiction that the common law consists of a number of pre-ordained rules which merely require discovery and judicial enunciation.”<sup>115</sup> Meanwhile, in *JJ*, Lord Brown observes that there is “no particular logic” in determining at what point liberty is deprived: the decision turns on judicial discretion and his Lordship twice observes that this is all “a matter of pure opinion”.<sup>116</sup> The frank denial of the supremacy of logic by Lord Brown is reminiscent, perhaps, of Oliver Wendell Holmes’ account of judicial reasoning that is so neatly endorsed by an analysis of the House of Lords’ judgments. Holmes debunks the reign of logic in law in the following way:<sup>117</sup>

The language of judicial decision is mainly the language of logic. And the logical method and form flatter that longing for certainty ... which is in every human mind. But certainty is generally illusion, ... . Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding.

Of course, it might be argued that the realist conclusions reached about judicial reasoning as a consequence of the preceding analysis ought to be limited to the sphere of counter-terrorism case law. Certainly, to test how widely the insights of descriptive realism apply, further application of the realist model would be needed to decisions in other fields of law and other jurisdictions. But there are indications in these judgments that the espousal of a “rejuvenated realism” would be justified, to use Thomas’s words,<sup>118</sup> in order to contend against the orthodoxy that has been resurrected by “the Counter-Reformation” of formalist thinkers about the methods of judicial adjudication.<sup>119</sup> Continued integration of work from psychology

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115 *Torture Evidence*, above n 4, at [152].

116 *JJ*, above n 5, at [104] and [102], respectively.

117 OW Holmes “The Path of the Law” (1897) 10 Harv L Rev 457 at 465–466.

118 EW Thomas *The Judicial Process: Realism, Pragmatism, Practical Reasoning and Principles* (Cambridge University Press, Cambridge, 2005) at 314.

119 Kirby, above n 26, at 43.

on decision-making and bias might bolster the case for such a “rejuvenated realism”, which accepts the multi-layered nature of judicial reasoning.<sup>120</sup>

With only Lord Brown and Baroness Hale having moved forward to the new United Kingdom Supreme Court, this study probably has only marginal predictive value in helping to ascertain future decisions. But perhaps the theoretical conclusions reached about the nature of judicial decision-making are of greater value than any simplistic formula for forecasting how upcoming cases might be decided. It is through bringing out what Holmes calls the “inarticulate and unconscious judgment[s]” lying beneath the House of Lords’ decisions that we can reflect more deeply not just on the forces acting upon the Law Lords in these cases (from doctrines of law, public policy arguments, history, the community and other sources), but also on the nature of the judicial process itself.<sup>121</sup> By drilling down carefully beneath the legalese, the precedents and the doctrines, we may be able to just make out “the root and nerve of the whole proceeding” — those fundamental philosophical fault-lines that divide the judicial landscape and that push to the surface the judicial values that have been discussed above.<sup>122</sup>

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<sup>120</sup> The work has already been started. See, for instance, Keith Mason “Unconscious Judicial Prejudice” (Speech given to New South Wales Supreme and Federal Courts Judges’ Conference, January 2001).

<sup>121</sup> Holmes, above n 117, at 466.

<sup>122</sup> *Ibid.*