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A Coleridgean Dystopia:
Formalism and the Optics of Judgment

Introduction

Among the great contributors to the philosophy of imagination is the poet and philosopher Samuel Taylor Coleridge (1772-1834). In this chapter we seek to demonstrate how Coleridge's accounts of the 'Imagination' and its opposite faculty, the 'Fancy', provide us with the conceptual tools to uncover and engage with a modern legal problem: the increasing prevalence of 'unitary judgments'.

Unitary judgments occur when a multi-member judicial panel – usually an appellate court – produces a single, joint judgment with which all the judges are in agreement. This practice stands in opposition to that of producing multiple judgments – where individual judges on the panel produce their own, separate judgments (which may be concurring or dissenting). We focus on the UK's highest court – the Supreme Court (formerly the House of Lords) – because since its official formation, replacing the House of Lords in October 2009, it has been a significant institutional proponent of the unitary judgment practice. But the point that we make has wider implications for the practice of appellate judging not just in the UK, but across the common law world (and, in all likelihood, also across the civil law world).

Coleridge enables us to identify the practice of unitary judgments as founded in a strongly formalist mode of thinking. An examination of recent unitary judgments from the Supreme Court suggests that senior judges are going about their business in crude ways that Coleridge would immediately recognise as an expression of Fancy's only limitedly helpful influence. Coleridge's account of the Fancy facilitates, in this chapter, a critique of the unitary judgement practice and of the formalism that informs it. Dealing in 'fixities and definites', the Fancy provides stable images and limited concepts, which tend to minimise or erase complexity in search of a simplified clarity. This is an ever-present danger.

The optics of producing unitary judgments seem, at first, to be desirable; unitary judgments give the appearance of certainty, clarity and authority as the court is perceived to be acting with absolute, unequivocal unanimity and consensus. Judges and lawyers like unitary judgments, which in the 2010s has returned to a level of prominence not seen since the 1980s, because of the certainty they (supposedly) provide. The maintenance of legal certainty, through the achievement of clarity in judgments, is a core aim of legal formalism.[1] But Coleridge's account of the Fancy undermines this impression, revealing it to be deeply misleading. The clarity that the practice appears to give is of a very particular type; a reductionist, simplistic sort of clarity that prioritises the elimination of doubt and ambiguity over the accurate and realistic representation of complex, often messy, matters.

By creating a false image of clarity and certainty, the unitary judgment practice misleads by masking matters of disagreement and controversy with a glossy veneer of consensus. This veneer also lends unitary judgments a particular air of authority; they appear to provide a clear, definite, unequivocal statement of law. Moreover, this takes place not only within individual cases, but at an institutional level; the practice reduces the incidence of multiple judgment cases, which in turn

[1] When we talk of formalism, in this chapter, we broadly refer to a school of legal thinking that insists that law both can and should provide clear answers to legal questions. Whilst we do not focus our attention on any single formalist scholar in particular, we can exemplify the sorts of matters with which we are concerned through the work of Joseph Raz. The key theme of Raz's account of the judicial obligation is the idea that the central function of law is the provision of authoritative guidance by which the law's addressees may regulate their conduct, and by which courts may judge that conduct. See *The Authority of Law* (OUP 1979), and *Practical Reason and Norms* (Princeton University Press 1990).

reduces the opportunities for multiple judicial perspectives to be brought transparently to bear on matters of controversy. This is of particular significance in the Supreme Court, which only hears appeals on cases in which there is considerable public interest in the substantive point of law under consideration.

A sceptic would ask whether we have cause to believe that the alternative practice of issuing multiple judgments is preferable to that of unitary judgments. Our answer is that Coleridge gives us cause. The Fancy's simplistic clarity 'flatter[s]' what Oliver Wendell Holmes Jr. identified as 'that longing for certainty and for repose which is in every human mind', encouraging us to ignore the illusory, superficial nature of such appeals to certainty.[2] Coleridge seeks to acknowledge and oppose this tendency of the Fancy, by asserting the essential role of the Imagination (or 'completing power'[3]). The imagination releases the mind from its passive attraction to fixity to reveal, and to revel in, complexity and plurality. An imaginative approach to the law, then, acknowledges rather than suppresses the *disruptive* nature of the law itself. In the words of Gerald Bruns, 'Legal tradition is…an always highly charged environment of intersecting (bisecting and dissecting) dialogues in which the very idea of law itself is in constant revision', 'contested, irreducible, resistant to conceptual determination, always in question, open to unforeseen contextualisations'.[4]

The practice of issuing multiple judgments, where members of the court produce their own, individual judgments, is disruptive in character. It encourages dissenting, and also differently-reasoned-yet-concurring, judgments. It thus encourages the sort of plurality that Coleridge associates with the Imagination. This gives us reason to think that the production of multiple judgment is preferable to the unitary judgment practice.

We proceed as follows. In the first section, we elaborate Coleridge's notions of the Imagination and the Fancy. In the next, we examine the unitary judgment practice in two ways: first, through incidence statistics (giving us a broad overview of the practice), and, second, through a (brief) examination of three unitary judgment cases that highlight the practice's failings. Thereafter, we link the unitary judgment practice explicitly to formalism, using Coleridge's accounts as a framework. Finally, we sketch out how Coleridge's account of the disruptive character of Imagination supports a multiple, rather than unitary, practice of judgment-production.

Coleridge on the Imagination and the Fancy

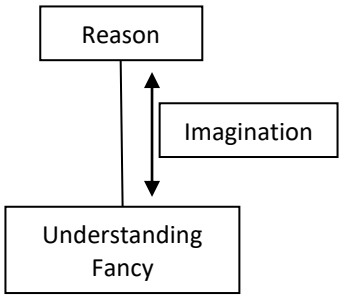
(i) Introducing Coleridge's Theory of Imagination and Fancy

In a lecture of 1818 Coleridge declared the Imagination the faculty responsible for the continued development of the human mind and human society, 'the distinguishing characteristic of man as a progressive being'.[5] Imagination guarantees improvement; it is the means by which we move beyond the already known towards the possible. The risks of devaluing the Imagination could scarcely be greater, yet Coleridge was deeply preoccupied by the concern that just such a debasement of the Imagination was taking place.[6] Coleridge's philosophy, politics, and poetry is, as Richard Fogle points out, 'organically one with' his concept of psychology, which identifies 'faculties like reason, understanding, and imagination' as 'fictions' 'necessary' to 'know the mind'.[7] This mental structure that Coleridge deduces becomes the foundation of his wider thinking. As Timothy Michael observes, for Coleridge, 'the structure of the mind itself determines both political organisation and the

[2] Oliver Wendell Holmes Jr, 'The Path of the Law' (1897) 10 (8) Harv LR 457, 466.
[3] Samuel Taylor Coleridge, *Statesman's Manual* in *Lay Sermons*, (RJ White (ed) Princeton University Press 1972) vol 1, 69. (Hereafter '*LS*').
[4] Gerald L Bruns, *Tragic Thoughts at the End of Philosophy: Language, Literature, and Ethical Theory* (Northwestern University Press 1999) 65.
[5] Samuel Taylor Coleridge, *Lectures, 1818-1819 on the History of Philosophy* (JR de J Jackson (ed), Princeton University Press 2000), vol 2, 193. (Hereafter *'LHP'*).
[6] See John Barrell, *Imagining the King's Death: Figurative Treason, Fantasies of Regicide, 1793-1796* (OUP 2000) 5-46.
[7] Richard Harter Fogle, *The Idea of Coleridge's Criticism* (University of California Press 1962) vol 1, 7.

constitution of political knowledge':[8] '[t]hat, which we find in ourselves, is (gradu mutato) the substance and the life of *all* our knowledge […] The human mind is the compass, in which the laws and actuations of all outward essences are revealed'.[9] For Coleridge, following Kant, the structure of knowledge was to be found within the mind itself. The Imagination is the cornerstone of his conception of this structure.

Coleridge's concept of the mind's structure depends on the identification of faculties: the Fancy, Understanding, Imagination, and Reason, in ascending hierarchical order. The Reason provides the 'intellectual or spiritual' pole of the mind's structure while Understanding and Fancy belong at the phenomenal pole, providing concepts and images available to the senses.[10] The Fancy, which is of particular relevance to our concerns in this chapter, is characterised by 'fixities and definites', providing 'materials' from the world-as-it-is for the Understanding to form into stable concepts.[11] (We will return to the Fancy in more detail later.) By contrast, the Imagination operates between the Reason's abstract ideas, and the lower faculties operating at the opposite pole: the Fancy and Understanding.



The Imagination opposes the fixity provided by the Fancy. It oscillates 'inexhaustibly re-ebulliant' between the two poles of material and ideal, connecting the mind to the absolute principles of the Reason and to the material actuality of the phenomenal world. It is 'a middle state of mind [...] hovering between two images: as soon as it is fixed <on one> it becomes understanding and when it is waving between them attaching itself to neither it is imagination'.[12] The Fancy and Understanding produce Images or fixed concepts, 'proper pictures', or 'the external object'.[13] By contrast, the Imagination depends on a betweenness that eschews fixity to allow an intuition, beyond the limitations of the world as it is, of the possibilities opened by Reason through the Imagination's disruptive influence.

(ii) Coleridge's Theory of Imagination

Coleridge's most developed discussion of Imagination comes in his 1817 *Biographia Literaria,* where he distinguishes between two aspects of the faculty: Primary and Secondary. In his writing Coleridge was influenced by German idealist philosophy and the writings of 18th century theorists of Imagination and Fancy (the Earl of Shaftesbury, among others).[14] He was also deeply preoccupied at

[8] Timothy Michael, *British Romanticism and the Critique of Political Reason* (John Hopkins University Press, 2016) 140.
[9] *LS* (n 3) vol 1, 78.
[10] Dillon Struwig, 'Coleridge's Two-Level Theory of Metaphysical Knowledge and the Order of the Mental Powers in the *Logic*' in Peter Cheyne, *Coleridge and Contemplation* (OUP 2017) 207.
[11] Samuel Taylor Coleridge, *Biographia Literaria or Biographical Sketches of My Literary Life and Opinions* (James Engell and W Jackson Bate (eds) Princeton University Press, 1983) vol 1, 305. (Hereafter '*BL*'.)
[12] Samuel Taylor Coleridge, *Lectures 1808–1819 On Literature* (R. A. Foakes (ed) Routledge 1987) vol 1, 311. (Hereafter *'LLects*').
[13] Samuel Taylor Coleridge, *Table Talk Recorded by Henry Nelson Coleridge and John Taylor Coleridge* (Carl Woodring (ed) Routledge 1990), vol 1, 271.
[14] As James Engell and Walter Jackson Bate point out: 'His concepts are not original in their basic scheme (although no one made exactly the same distinctions or brought together the same terms in doing so), but they

the time by the 'the moral and philosophical, no less the social and economic crisis of the "condition of England"' in the aftermath of Waterloo.[15] As Kir Kuiken argues, 'the deduction of imagination' in *Biographia Literaria* can be understood as 'in dialogue' with the political texts that Coleridge was writing, revising and having published at the time: *The Statesman's Manual* (1816) and *The Friend* (1818).[16] His attempt to provide an extended treatment of the functioning of Imagination is a response to political, as much as to literary, concerns. In these works, he expresses a profound concern about the risks of the rising dominance of a mode of thinking limited to the Fancy, and a limited concept of the mind based on the devaluing of Imagination and Reason. This, he warned, would change the 'status' of fundamental 'principles' and the law, politics, the national character itself would be deformed. In 'the case of Coleridge's theory of the imagination', as Kuiken argues, the phrase 'political imagination' 'could very well be considered a tautology'.[17]

In Chapter 13 of *Biographia*, Coleridge defines the Primary Imagination as 'the living Power and prime Agent of all human Perception, and as a repetition in the finite mind of the eternal act of creation in the infinite I am'.[18] The Primary Imagination is a creative faculty, connecting the finite mind and the absolute, through what Schelling termed a 'primordial intuition',[19] a process so essential to the mind's functions that it happens before the intervention of consciousness or the will.[20] Coleridge makes no attempt to limit the Primary Imagination to an artistic function, asserting instead that it is 'the prime Agent of all human Perception'.[21] The Primary Imagination is, then, the fundamental[22] source of both intellectual and physical awareness.[23]

The Secondary Imagination, Coleridge defines as 'an echo of the former, co-existing with the conscious will, yet still [...] identical with the primary in the *kind* of its agency, and differing only in *degree*, and in the *mode* of its operation'.[24] While the 'prime' faculty of the Primary Imagination connects the mind, beyond the reaches of its conscious control, to the unconditional, the Secondary Imagination echoes the process to a different '*degree*',[25] accessible by consciousness (of which the Primary Imagination is the source) and the will. It is inherently productive and disruptive: 'It dissolves, diffuses, dissipates, in order to re-create; or where this process is rendered impossible, yet still at all events it struggles to idealise and to unify. It is essentially *vital*, even as all objects (*as* objects) are essentially fixed and dead'.[26] The Secondary Imagination is, like the Primary, a 'living power', characterised by vitality, process, and transformation, and opposed to fixity and

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are perennially significant because they suggest so much about the relationship between perception, art, and philosophy, and unify these through the idea of the imagination as one kind of power' *BL* (n 11) lxxxv.

[15] Pamela Edwards, 'Coleridge on Politics and Religion: *The Statesman's Manual, Aids to Reflection, On the Constitution of Church and State*', in Frederick Burwick (ed), *The Oxford Handbook of Samuel Taylor Coleridge* (OUP 2012) 237.

[16] Kir Kuiken, *Imagined Sovereignties: Toward a New Political Romanticism* (Fordham University Press 2014) 70.

[17] Ibid, 69.

[18] *BL* (n 11) vol 1, 304.

[19] Friedrich Wilhelm Joseph von Schelling, *System of Transcendental Idealism* (Part 6 1800), quoted in Nigel Leask, *The Politics of Imagination in Coleridge's Critical Thought* (Macmillan 1988) 135. Coleridge's debt to Schelling as well as to Kant, Tetens, Fichte, and others, is significant and widely acknowledged. See James Engell and Walter Jackson Bate, 'Editor's Introduction', in *BL* (n 11), vol 1, cxix-cxxii and James Engell, '*Biographia Literaria*', in Lucy Newlyn (ed), *The Cambridge Companion to Samuel Taylor Coleridge* (CUP 2002) 68.

[20] *BL* (n 11) vol 1, 304. See also Leask (n 19) 136.

[21] *BL*, ibid.

[22] 'prime, adj (and int) and adv' (*OED Online*, OUP September 2019) <www.oed.com/view/Entry/151295> accessed 12 September 2019.

[23] 'perception, n' (*OED Online*, OUP September 2019) <www.oed.com/view/Entry/140560> accessed 12 September 2019.

[24] *BL* (n 11) vol 1, 304.

[25] The question of whether the Primary or Secondary Imagination should be considered to occupy a higher place in Coleridge's hierarchy of faculties is addressed by Jonathan Wordsworth in 'The Infinite I AM: Coleridge and the Ascent of Being' in Richard Gravil, Lucy Newlyn and Nicholas Roe (eds), *Coleridge's Imagination: Essays in Memory of Pete Laver* (CUP 1985).

[26] *BL* (n 11) vol 1, 304.

objectification. It poses a direct challenge to what Coleridge saw as the reified, deathly fixity of the Fancy, rooted in an empiricist ideology, the consequences of which he considered were to be felt throughout the spheres of social and intellectual life.

The Imagination is a unifying force, the '*modifying*, and *co-adunating* Faculty', joining or shaping into one.[27] As Perry argues, 'the Imagination promises rich and irreproachable bringings-together, which bestow a powerful affirmative magic not only on the unity it creates but also on the empirical particularity of the elements it takes up'.[28] The unity achieved by the Imagination is, for Coleridge, one that affirms both unity and plurality; it is 'a faculty devoted at once to unifying *and yet* to particularising'.[29] The Imagination is a process which unites apparently disparate plurality within a subjective experience of 'human feeling', or what Coleridge terms, 'life'. Instead of the lifeless objecthood of the fixed image or words on the page, the Imagination provides unity as a progressive, fluid subjective awareness: it 'is a kind of life, bringing a vital unity to the senses' meaningless chaos; and so fulfilling the sublime precedent of Genesis […] causing order to spring forth from confusion'.[30] As such, the Imagination provides a unity that does not reduce plurality into a single uniformity but which brings together plurality within an unstable, progressive interconnection, which Coleridge compares to 'life', 'tone' and 'spirit'. Just as creation is not an act of singleness or uniformity but contains vast diversity within a complex order, so Coleridgean imaginative unity depends on coherent, progressive interconnection. Profoundly meaningful, it is opposed to chaos, but is 'inexhaustibly re-ebullient',[31] 'overflowing' with feeling and energy.[32] Imaginative unity promises coherence as well as transformation or the essential balance of 'permanence and progression'.[33]

In *Biographia*, Coleridge presents the unifying energies of the Imagination as characterised by 'tension and resistance'[34] as part of their very nature and as a process that may at times be met with failure. The Secondary Imagination *struggles* 'to idealise and to unify' and encounters occasions where this 'process is rendered impossible'.[35] As Nigel Leask suggests, this resistance can be seen to represent 'the stubborn resistance of established cultural and political forms' to the expansion of norms (which takes place within what we might conceptualise as a normative space) made possible by the Imagination.[36] The process of progress and refinement that the Imagination makes possible is one that can be met with resistance, particularly as it disrupts and opposes stability and certainty in the familiar, the authoritative, the already known. (In this way, the Imagination presents a challenge to, *inter alia*, legal formalism.) For Coleridge, it is the Imagination which, when responding to 'a space of possibles, a horizon formed by […] conventions and constraints'[37] or the range of possible interpretations of a piece of positive law (e.g. a statutory provision or a precedent), realises that horizon as 'dynamic', fluid, capable of change.

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[27] Samuel Taylor Coleridge, *The Notebooks of Samuel Taylor Coleridge*, vol 3 (Kathleen Coburn (ed) Princeton University Press 1973) 4176: 'How excellently the German Einbildungskraft expresses this prime & loftiest Faculty, the power of co-adunation, the faculty that forms the many into one, *in eins Bildung*'. (Hereafter '*CN vol 3*'.) 'Co-adunation' is defined by the Oxford English Dictionary as 'joining together into one'. See 'coadunation, n' (*OED Online*, OUP September 2019) <www.oed.com/view/Entry/35006> 10 September 2019.

[28] Seamus Perry, *Coleridge and the Uses of Division* (OUP 1999) 34.

[29] ibid.

[30] ibid 130.

[31] *BL* (n 11) vol 1, 300.

[32] 'ebulliency, n' (*OED Online*, OUP December 2019) <www.oed.com/view/Entry/59214> accessed 10 November 2019.

[33] Samuel Taylor Coleridge, *On the Constitution of Church and State* (John Colmer (ed) Princeton University Press 1976) 24n.

[34] Leask (n 19) 140.

[35] *BL* (n 11) vol 1, 304.

[36] Leask (n 19) 140. On normative space, see Richard Mullender, 'Judging and Jurisprudence in the USA' (2012) 75(5) MLR 914, 921. Benjamin Cardozo talks of judging proceeding in a 'field' in *The Nature of the Judicial Process* (reprinted, Feather Trail Press 2009) 43.

[37] Margaret Cohen, *The Sentimental Education of the Novel* (Princeton University Press 1999) 17. See also Joseph Slaughter, *Human Rights, Inc: The World Novel, Narrative Form, and International Law* (Fordham University Press 2007) 10-11: '[L]iterary and cultural forms (like legal forms) do not simply reflect the social world. They in some ways also constitute and regulate it "when they respond to … [and] resolve […] the space of possibles"; they help shape how the social order and its subjects are imagined, articulated, and effected'.

Coleridge asserts the value of a kind of thinking (which he terms 'Method') that depends on contemplating 'not *things* only, or for their own sake alone, but likewise and chiefly the *relations* of things, either their relations to each other, or to the observer, or to the state and apprehension of the hearers'.[38] Such an awareness of complex interconnection emerges from the Imagination, which provides a 'pleasurable sense of the Many […] reduced to unity by the correspondence of all the component parts to each other & the reference of all to one central Point'.[39] From this emerges the possibility of '*progressive transition*'[40] 'as all Method supposes a principle of unity with progression'[41]. This can be contrasted with a concept of language dominated by the Fancy, which acknowledges only a limited, tightly constrained normative space of a sort that appeals to formalists but denies the realist observation of a more transformative, unstable quality (in, for example, legal judgments).

Coleridge developed this notion of unity in multeity, provided by the Imagination, in *Biographia*, where he describes the Imagination as a 'synthetic and magical power', that creates a 'tone, and spirit of unity, that blends, and (as it were) *fuses*, each into each'.[42] Coleridgean unity is provided by a tone or spirit, not by visual fixity or stability. At the same time, the ambiguity in his language implies that the Imagination possesses the power to connect *individuals* 'each into each' in a new 'spirit of unity'.[43] This subjective, affective unity suggests a sympathetic connection, a recognition of an essential unconditional personhood. As Coleridge explains in a notebook, Imagination is 'the power by which one image or feeling is made to modify many others, & by a sort of *fusion to force many into one* … or it acts by impressing the stamp of humanity, of human feeling, over inanimate Objects'.[44] While, as we shall see, the Fancy operates by fixing and objectifying phenomena, the Imagination infuses them with 'life', uniting apparently disparate plurality within a progressive, fluid unity.

Crossing from the limited Understanding, bounded by the phenomenal, into the realm of feeling, intellect, and higher intuition is the role of Imagination. It is the source of the unity that spreads over phenomena and releases them from fixity into an organic, progressive, destabilising unity; it is also what which connects us to ourselves and to each other in morality and civic harmony. This kind of unity Coleridge also saw underlying the community of a nation.[45] Coleridge's commitment is to the plurality and diversity of community, to what Perry terms 'the felt world's discrete, divided-up particulars'.[46] By contrast, the Fancy (to which we now turn) seeks homogeny or singleness, threatening a failure to recognise this sort of pluralism. In law, this core attribute of the Fancy is made manifest by the school of thought known as legal formalism.

(iii) Coleridge's Theory of the Fancy

Coleridge describes the Fancy as the 'image-forming' power, which fixes the plurality of thoughts and images into coherence. Without it, the subject would be unable to achieve 'fixation' in 'distinct perception or conception' – understanding would be impossible.[47] But the Fancy is fundamentally limited by its capacity – its need – to fix and objectify. As such, it is comparable to 'the Gorgon Head, which looked death into every thing'.[48] In creating fixity, it renders thoughts and phenomena stable and deathly, removing the subjective emotion, complex interconnection and contextual nuance that

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[38] Samuel Taylor Coleridge, *The Friend* (Barbara Rooke (ed) Routledge 1969) vol 1, 451. (Hereafter '*Friend*'.)
[39] *LLects* (n 12) vol 1, 35.
[40] *Friend* (n 38) vol 1, 457.
[41] ibid, 476.
[42] *BL* (n 11) vol 2, 16.
[43] Ibid.
[44] *CN vol 3* (n 27) 3290.
[45] *Friend* (n 38) vol 2, 323: 'here, where the powers and interests of men spread without confusion through a common sphere, like the vibrations propagated in the air by a single voice, distinct yet coherent, and all uniting'.
[46] Perry (n 28) 4.
[47] Ibid.
[48] *CN vol 3* (n 27) 4066.

comprise their 'life'. The Fancy transforms the processes of thought to objectified stability to leave meaning 'essentially fixed and dead' like 'all objects (as objects)'.[49]

Coleridge identifies the Fancy as 'the Fetisch & Talisman of all modern Philosophers (the Germans excepted)', 'worshipped on account of its supposed inherent magical powers'.[50] The magic of the Fancy lies in its ability to provide a sense of order and stability to a society beset by instability (such as that which Coleridge himself lived in, for example, a time of profound constitutional change). For the Fancy's magic gives rise to the belief that every mystery can be solved by the Understanding, reduced to its limited scope. The fetish or 'material idol of'[51] empiricist, materialist philosophies, Coleridge identifies the Fancy as producing a 'primitive religion',[52] whose proponents are metaphorically dazzled into a failure to recognise the limitations of the Fancy's fixed concepts, worshipping the image as the deity itself.[53] The stable notions that the Fancy produces share the 'inherent power'[54] of the image to capture and limit the attention of the viewer, failing to engage the higher faculties to recognise that the fixed concepts provided the Fancy are merely tools for the operations of the Imagination and Reason. The key point is this: the materialist concept of meaning that emerges from this reliance on the Fancy reduces the 'idea' to a minimised state. An '*Idea'*, Coleridge reminds us, 'is equidistant in its signification from Sensation, Image, Fact, and Notion' – 'it is the antithesis, not the synonyme, of εἴδωλον' or 'idol'.[55]

The Fancy, though necessary, can only be a *precursor* to the higher faculties of Reason and Imagination, which mediates between the two poles of thought identified earlier (between the fixed and the fluid, the concrete and the abstract, the real and the ideal). To stop at the fixed concepts of the Understanding, is to fail to think beyond the confines of the already-known; the 'gross idolatry', of making 'that the goal & end which should only be a means of arriving at it'.[56] Without the Imagination (the 'completing power'[57]), we are limited to forms of thinking governed by the Fancy and the related faculty of Understanding, which 'forms for itself general notions and terms of classification for the purpose of comparing and arranging phenomena', prising 'clearness' over 'depth'.[58] Unlike the faculties of Reason and Imagination, the Understanding 'contemplates the unity of things in their *limits* only, and is consequently a knowledge of superficies without substance'.[59] It seeks clarity, stability, definition and classification, and achieves these at the expense of nuance and depth, concerning itself with superficial categorisations and connections. The Fancy, thus understood, has clear links with legal formalism – a mode of thinking that prioritises (apparent) clarity and certainty, and which seeks to expunge often complex and messy realities from the legal realm. This is the resulting danger. As Coleridge warns, a society dominated by such limited thinking as its 'idol' is dazzled by the image of certainty at the expense of genuine knowledge, overburdened with bureaucracy at the expense of profound thinking, tending to 'exclude the great' and 'magnify the little'.[60]

Having explored Coleridge's theories of the Imagination and the Fancy, we can critique the practice of issuing unitary judgments by linking the formalism that underpins it with the Fancy's emphasis on appearances and clarity as fixity rather than transparency. Before we do so, however, we must first set out the evidence of the increased use of unitary judgments, and examine the effects that

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[49] *BL* (n 11) vol 1, 304.
[50] 'fetish, n', (*OED Online*, OUP September 2019) <www.oed.com/view/Entry/69611> accessed 12 September 2019.
[51] WJT Mitchell, *Iconology: Image, Text, Ideology* (University of Chicago Press 1986) 190.
[52] Ibid.
[53] 'idol, n', (*OED Online*, OUP September 2019) <www.oed.com/view/Entry/91087> accessed 12 September 2019.
[54] Samuel Taylor Coleridge, *The Collected Letters of Samuel Taylor Coleridge*, (Earl Leslie Griggs (ed) OUP, 1956–71) vol 4, 641. (Hereafter '*CL*').
[55] *LS* (n 3) 101.
[56] *CN vol 3* (n 27) 4066.
[57] *LS* (n 3) 69.
[58] Ibid.
[59] Ibid.
[60] *Friend* (n 38) vol 1, 47.

unitary judgments have. We will do so by focusing on the highest courts of their eras in the United Kingdom: the House of Lords and its successor, the Supreme Court.

Unitary Judgments

(i) The Statistics

The judicial practice whereby multi-member panels issue single judgments (either written by a single judge and agreed by all, or contributed to by some or all members of the panel) is not a new one. There seems to be no agreed nomenclature for these judgments, with descriptors such as 'single', 'combined', 'joint' and 'composite' being used interchangeably by academics and the judiciary. For clarity, and as an umbrella term encompassing all judgments upon which the entirety of the court's panel is agreed (both in terms of conclusion and reasoning), we will call these 'unitary' judgments. (We will call cases in which multiple judgments are issued 'non-unitary' cases.)

Despite not being a new practice, the issuance of unitary judgments has, in recent years, taken on a new prominence in the United Kingdom. Following the creation of the Supreme Court (which replaced the House of Lords as the UK's highest court on 1 October 2009), there has been a clear preference for the issuing of unitary judgments by it. The Court's former president, Lord Neuberger, was a particularly outspoken proponent of unitary judgments,[61] and his successor, Lade Hale, has taken a similar line.[62] Likewise Lord Carnwath, who has sat on the Supreme Court since 2012, spoke out in favour of the House of Lords and Supreme Court issuing unitary judgments repeatedly during his time as at the Court of Appeal.[63] Both Brice Dickson,[64] who has published statistics on the Supreme Court's judgments every year from its formation, and Alan Paterson[65] demonstrate that its issuing of unitary judgments has been commonplace since.[66]

Unitary judgments had been issued by the House of Lords at a rate of less than 20% of its total workload consistently between 2001-2009.[67] When the Supreme Court replaced it and had its first full

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[61] Lord Neuberger, 'No Judgment – No Justice', First Annual BAILII Lecture, 20 November 2012; and 'Sausages and the Judicial Process: the Limits of Transparency', Annual Conference of the Supreme Court of New South Wales, Sydney, 1 August 2014.

[62] 'On the first two issues, Lord Hoffmann's view is shared by a majority. The least said by the rest of us who take the same view, therefore, the better. There should be no doubt, and no room for argument, about what has been decided and why. Any perceived inconsistency between what I say and what he says is to be resolved in favour of the latter. Indeed, there would be much to be said for our adopting the practice of other supreme courts in having a single majority opinion to which all have contributed and all can subscribe without further qualification or explanation. There would be less grist to the advocates' and academics' mills, but future litigants might thank us for that.' *OBG v Allan* [2007] UKHL 21, [2008] 1 AC 1, [303] (Lady Hale).

[63] See eg *Doherty v Birmingham City Council* [2006] EWCA Civ 1739, [2007] HLR 32, [62]; *Grundy v British Airways Plc* [2007] EWCA Civ 1020, [2008] IRLR 74, [45]. See also his extra-judicial writing: Robert Carnwath, 'Devil We Know or New Start?' *Counsel*, June 2008, 6.

[64] Brice Dickson, 'Year End' (2008) 158 NLJ 170; 'A Supreme Year?' (2012) 162 NLJ 257; 'Supreme Confidence' (2013) 163 NLJ 170; 'A Supreme Education' (2014) 164 NLJ 17; 'A Steady Ship' (2015) 165 NLJ 26; 'Reigning Supreme' (2016) 166 NLJ 19; 'Supreme Justice' (2017) 167 NLJ 20; 'In the Line of Duty' (2018) 168 NLJ 17; 'Supreme Justice: a Year in Review' (2019) 169 NLJ 18. NB: each of Dickson's articles gives statistics from the Supreme Court's caseload from the preceding year.

[65] Alan Paterson, '*Final Judgment* revisited' (2015) 21(1) European Journal of Current Legal Issues (online). Professor Paterson kindly shared with us some of the raw data upon which he relied in producing the tables that he published in that article. We are grateful to him for this.

[66] It is worth noting that Dickson and Paterson's methodologies for compiling their data appear to have differed slightly, in that they have produced slightly different results. It is also worth noting that, without more detail on their methodologies, it is not possible to determine precisely how each has defined the category of 'single' judgments they are considering. However, the variation in their results is within 1-2 percentage points and is insignificant for our purposes.

[67] Paterson (n 65) figure 1.

year of casework in 2010, this percentage leapt to 38%.[68] From there, it has increased, hitting a high point of 68% in 2016[69] and remaining well above 60% in 2017 and 2018.[70]

These percentages are high, but not the highest. Paterson's statistics go back to 1981. From these we can see that the percentage of unitary judgments issued by the House of Lords reached its highest point in the last forty years in 1993, running at 70%.[71] Indeed, the percentage is generally high from the mid-1980s to the early 1990s, averaging around 60%. Nonetheless, given that there was a marked reduction in the percentage of unitary judgments from the mid-1990s through to the late 2000s, where the percentage ultimately reduced to less than a quarter of the heights it had hit in 1993,[72] the return to an average of over 60% in very recent times is clearly significant.

The percentage of unitary judgments in the House of Lords/Supreme Court's case load becomes more significant still when we view it alongside another statistic: the percentage of cases in which one or more judges writes a dissenting judgment. In the mid-1980s, when the percentage of unitary judgments was high, the average percentage of cases in which there was dissent was low, at less than 10%.[73] (In other words, even in cases where multiple judgments were issued, dissenting judgments – those that reach a different conclusion to the majority in the case – occurred less than a quarter of the time.) This suggests a broad alignment of views between the judges; because they agree much of the time, so there is relatively little dissent. It might be taken to indicate the presence of broad consensus on many of the legal issues coming before the court. That said, it must also be acknowledged that the size of the judicial panels involved in those cases is significant. In the 1980s, owing to the lack of space available for judicial hearings in the House of Lords, panels generally comprised no more than five judges. (Indeed, in 1981 and 1985, not a single case in the House of Lords was heard by more than five judges.)[74] With smaller panels, the likelihood of consensus-based reasoning is higher because there are, quite simply, fewer voices from which dissent may be drawn. (The new Supreme Court sits in specially-designed courtrooms that can accommodate panels of up to 11 justices, and so this problem has fallen away.)

In the first decade of the Supreme Court's existence, however, things differ considerably. The unitary judgment rate is again high, but so is the dissent rate, which reaches nearly 40% in 2011 and thereafter averages in the high teens.[75] Moreover, consider that this dissent rate represents the presence of at least one dissenting judgment per case across *all* cases, *including* the unitary judgment cases (in which there obviously is no dissent). Once one removes the unitary judgment cases from the equation (cases in which, by definition, there can be no dissent), the dissent rate amongst the remaining cases is extraordinarily high. For example, in 2014, dissenting judgments were issued in 15 of the Supreme Court's 68 cases. This amounts to just 22% of all cases that year but 47% – nearly half – of the non-unitary cases. In 2016, dissenting judgments occurred in 18% of all Supreme Court cases, but a whopping 52% of non-unitary cases. Put simply, dissenting judgments are roughly twice as prevalent in non-unitary Supreme Court cases in the 2010s as they were in the House of Lords in the 1980s.

The presence of this high level of dissent in non-unitary cases paints a muddled picture. For whilst the unitary judgment rate suggests, on its face, a high degree of consensus, the dissent rate tells us that there is also a high frequency *and degree* of disagreement. Moreover, since it is clear that the Supreme Court has made a concerted effort to work as more of a team than the House of Lords (one of the factors underlying the increase in the unitary judgment rate), the fact that such a significant dissent rate remains suggests the presence – in around a quarter of all cases and around half of non-unitary cases – of disagreements so serious and fundamental that they could not be ironed out in

[68] Ibid.
[69] Dickson 2017 (n 64).
[70] Dickson, 2018 and 2019 (n 64).
[71] Paterson (n 65) figure 1.
[72] Ibid. In 2008, just 13% of the House of Lords' cases featured unitary judgments. The highest percentage between 2002-2009 was 18% (in 2005).
[73] Paterson, ibid, figure 5.
[74] Ibid. In 1981, dissent registered in four of the 31 cases heard by the House of Lords (13%). In 1985, dissent featured in just two cases out of 24 (8%).
[75] Ibid.

discussions between the judges.[76] These may well have been matters upon which there was less disagreement between the judges than in non-unitary cases, but the data we have revealed hardly suggests a court operating with a consistently high degree of agreement across the board. Moreover, even where there is agreement between the judges as to the most appropriate conclusion for the case at hand, this does not equate to a lack of controversy. Simply because one panel of judges happens to reach a consensus does not mean that the consensus they reach deals adequately with all of the controversial issues that the case may raise. It simply means that the issues have been minimalized.

Quantitative data of this sort is, undeniably, a blunt instrument. But it at least highlights the distinct possibility that, within the unitary judgment cases, matters of acute controversy are being resolved in a manner that cloaks points of disagreement. Paterson characterises this feature of unitary judgments as giving rise to a lamentable lack of transparency.[77] James Lee concurs, noting that '[t]he veneer of univocality afforded by single judgments may on occasion be at best disingenuous in so far as it suggests that the court was harmonious when in reality the need to provide a decision has produced the least unsatisfactory solution for all parties to the decision.'[78] In order to demonstrate the credibility of this criticism, we turn now to three examples of cases in which unitary judgments have been issued, and in which these unitary judgments mask matters of acute controversy.

(ii) The Cases

Unitary judgments encourage the overlooking of tensions between wholly or partly incompatible interests that are in play within a case. They do a job akin to sweeping matters of acute controversy under the carpet. A veneer of clarity covers up unacknowledged turmoil. In this section we will consider three examples.

a. *R v R*

In the 1991 case of *R v R*, the House of Lords finally overturned the centuries-old anachronism in English and Welsh law that prevented a man from being found guilty of raping his wife.[79] With Parliament having never gotten around to dealing with this sorry state of affairs, despite numerous legislative opportunities to do so, the House issues a unitary judgment doing so. Undoubtedly, this has considerable appeal; the old law, based on the doctrine of coverture, was demeaning and wholly failed to protect women from sexually violent spouses.[80] It is this appealing sentiment that finds expression in a unitary judgment, which is given by Lord Keith (and with which the other Law Lords agree).

What does not find expression in the judgment, however, is the tension between the normative appeal of doing away with this anachronism and significant countervailing concerns about the impact of doing so on the rule of law. Removing the anachronism by legislation would be one thing, because Parliament acts prospectively and the law's addressees have (at least constructive) notice of the change. But, unlike Parliament, when a court alters the law, it does so retrospectively. This puts the House of Lords in *R v R* on a collision course with an accepted legal convention – namely that the courts will not retrospectively create new criminal offences.[81] (Today that element of the rule of law is also enshrined as a human right under Art.7 of the European Convention on Human Rights, which has direct applicability in the UK under the Human Rights Act 1998.) The crux of the matter is this: only

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[76] Ibid, section 2.
[77] Ibid.
[78] James Lee, 'A defence of concurring speeches' [2009] Public Law 305.
[79] [1992] 1 AC 599.
[80] As William Blackstone put it in *Commentaries on the Laws of England*, vol 1, (1765) (ECCO) 430:
'By marriage, the husband and wife are one person in law; that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and *cover*, she performs every thing; and is therefore called, in our law-french a *feme-covert*; is said to be *covert-baron*, or under the protection of her husband, her *baron*, or lord; and her condition during her marriage is called her *coverture*.'
[81] Legal commentators have produced a range of different conceptualisations of the rule of law, but a rule against retrospective criminalisation is generally common throughout them. See eg Raz, *The Authority of Law* (n 1); Tom Bingham, *The Rule of Law* (Penguin 2011).

by retrospectively criminalising the appellant's actions could the House alter the law and protect not only his victim, but unknown, future victims.

In the common law, there has been a long-running argument about whether the courts ever really create new law or whether they merely recognise existing legal rules that have hitherto gone unrecognised. The latter position, known as the 'declaratory theory' of law, is – as one might imagine – popular with formalists, and widely derided by realists. In relatively recent times, leading judicial figures in England and Wales have come out against the declaratory theory, with one prominent jurist declaring it a 'fairy tale' that no-one believes in anymore.[82] But the declaratory theory is precisely what underpins Lord Keith's judgment in *R v R*, as he elaborates a detailed, doctrinal, highly legalistic analysis from which he ultimately concludes that the House is not, in fact, making new law but merely recognising a change in the common law that has already occurred, at some non-specific point in the preceding decades.[83] This is despite the fact that the lower courts were still applying the exemption just months before the House heard the appeal in *R v R*.[84] It is a textbook example of law's 'amazing trick' – its capacity to change dramatically whilst simultaneously insisting, mantra-like, to onlookers that nothing has changed.[85]

The argument between formalists and realists as to whether the declaratory theory is valid or not is clearly of relevance in *R v R*, but that argument finds no expression in the unitary judgment. The judgment simply adopts the declaratory (formalist) position. Likewise, there is clear scope for normative arguments on either side of the retrospective criminalisation debate. That is, even without taking a larger legal-philosophical view on whether a formalist or realist understanding of the adjudicative process should be regarded as reflecting the true state of the common law, there are valid positions that may be taken on either side of the debate as to whether criminalising the appellant's actions in this instance was the 'just' thing to do. But these positions find no expression in the unitary judgment either. What we are left with is a judgment that is highly controversial and which deals with a number of messily interrelated matters but which presents as if it is a simple and straightforward question of law to which there is a single, clear, simple and straightforward answer. The tensions we have pointed up are glossed over by this veneer of clarity and certainty. To a complex, equivocal question, we are given an apparently simple, univocal answer.

It is surely likely that, if more of the judges had produced judgments, one at least might have flagged up the rule of law concerns that weigh in against the decision to abolish the marital rape exemption, or pointed up the flaws in the declaratory theory of law. Even if the House still decided, on balance, to abolish the exemption – which was undoubtedly the morally appealing thing to do – it could usefully have articulated the values that were in tension with one another, so that the law's addressees might have confidence that this significant change in the law was effected only after due consideration of the impact it would have on those values. As it is, Lord Keith's judgment is so one-sided that it might be thought of more as a piece of rhetoric than a detailed examination and consideration of the relevant legal principles.[86]

b. *Lee v Ashers*

[82] Lord Reid, 'The Judge as Law Maker' (1972) 12 Journal of the Society of Public Teachers of Law 22.

[83] Whilst the exemption had arguably been watered down by some decisions, it still clearly persisted. In *R v Steele* (1976) 65 Cr App R 22, the court held that the fact that the spouses were living apart, and that the husband had given an undertaking (which has binding effect, akin to an injunction) not to molest his wife, meant that the wife's consent to intercourse had effectively been withdrawn. Yet in other cases, even in the early 1990s, the marital rape exemption was still enabling husbands to avoid criminal liability for raping their wives. (See *R v Sharples* [1990] Crim LR 198; *R v J* (Rape: Marital Exemption) [1991] 1 All ER 759.)

[84] See *Sharples* and *J*, ibid.

[85] Stanley Fish, 'The Law Wishes to Have a Formal Existence' in *There's No Such Thing As Free Speech* (OUP 1994), 170, borrowing the term 'amazing trick' from Harry Scheiber, 'Public Rights and the Rule of Law in American Legal History' (1984) 72 California Law Review 217, 236-7.

[86] Indeed, the appearance of law's 'amazing trick' would, to Stanley Fish, indicate that the judgment is squarely rhetorical. See Fish, ibid.

In 2017, the case of *Lee v Ashers Baking Company Ltd* reached the Supreme Court.[87] This was a discrimination case that originated in Northern Ireland, which is the only constituent nation of the UK in which same-sex marriage has not been legalised. Ashers Bakery offered a bespoke cake-decorating service. Mr Lee was a gay man who ordered a cake from the bakery, bearing the words 'Support Gay Marriage'. The owners of the bakery, a married, heterosexual couple – the McArthurs – who identified as practising Christians, refused the order (revoking an initial acceptance of it), on the basis that their religious beliefs did not permit them, in good conscience, to produce a cake bearing this message.

Mr Lee's claim alleged unlawful discrimination on grounds both of his sexual orientation and his political beliefs (the latter being a ground of discrimination specifically challengeable in Northern Ireland). The McArthurs responded that, if the law required them to accept his order and produce the cake, it would be forcing them to manifest religious and political beliefs that they did not hold, and would therefore be incompatible with their rights under Arts 9 (freedom of thought, conscience and religion) and 10 (freedom of expression) of the European Convention on Human Rights (ECHR). Mr Lee's claim succeeded in the County Court and the Court of Appeal. Thereafter, the McArthurs appealed to the Supreme Court, which produced a unitary judgment overturning the lower courts and finding in their favour.[88]

The case raises a politically sensitive issue – the tension between the legal rights of LGBTQ+ people to freedom from discrimination, and the (formally) equally significant rights of religious adherents to manifest their religious beliefs (which may conflict with the interests of the LGBTQ+ community). The judgment purports to bring clarity to the matter at hand. The lower courts' decisions are overturned on two grounds. First, the lower courts were wrong as a matter of law to conclude that Mr Lee had suffered direct discrimination on the basis of his sexual orientation. Second, whilst it was arguable that Mr Lee had been discriminated against on the basis of his political beliefs, the legislative provisions protecting those beliefs had to be read compatibly with Arts.9 and 10 ECHR. There was insufficient justification to compel the McArthurs to act in a way that would contravene their own religious beliefs, and so the legislative provisions should not be read as requiring them to do so.

On the surface, then, the case appears to give clarity and provide certainty for the law's addressees. But there are legally and contextually relevant matters with which the Supreme Court does not engage, that might well – if properly considered – have led to a different conclusion.

First, whilst the Supreme Court was entirely justified in concluding that no direct discrimination had taken place, it is unclear why, on the facts of the case, it did not find Mr Lee to have been the victim of *indirect* discrimination.[89] Whilst it may be the case that the bakery would have refused anyone's order for a pro-same-sex marriage cake, irrespective of the order-placer's sexual orientation, it is surely obvious that doing so will disproportionately impact upon members of the LGBTQ+ community. For support for political campaigns aiming to enhance LGBTQ+ rights, whilst present within the heterosexual community, has a much higher incidence within the LGBTQ+ community. So *Lee* appears, *prima facie*, to be a classic instance of indirect discrimination. Yet this possibility does not feature at all in the Supreme Court's judgment.

The second, and perhaps trickier, issue is this. Mr Lee's claim was brought not just against the McArthurs, but against the bakery, Ashers Baking Company Ltd. The company is a separate legal entity from its owners. Its existence shelters its owners and shareholders from personal liability for the company's wrongdoing behind something known, in legal jargon, as the 'veil of incorporation'.[90]

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[87] [2018] UKSC 49, [2018] 3 WLR 1294.

[88] The judgment comprises sections (dealing with different issues) written by two justices: Lady Hale and Lord Mance. All five justices agree with both sections of the combined, unitary judgment.

[89] Indirect discrimination occurs when, despite the defendant treating different persons in the same way (thus avoiding direct discrimination), one or more of those persons is disadvantaged because he or she belongs to a class that is disproportionately negatively impacted by the treatment.

[90] Incorporating a business as a company has a number of distinct advantages. Quite apart from the various tax benefits it can accrue, the most obvious and best-known advantage is that, in a limited company, the liability of shareholders/directors is 'limited' to a particular sum. In other words, the company may accrue liability, but this liability does not transfer to the shareholders.

By incorporating as a business, the McArthurs benefit from this veil of incorporation. It protects them from being personally liable for its debts if the company fails, for example, or from liability in damages if the company acts wrongfully. But the flip-side of this incorporation is that the company – a body corporate – is its own legal entity, with a legal personality that is very different in character to that of a human. Most obviously, a company has no human rights. At least, it has no human rights in the same sense that humans have human rights. There are certain protections for companies that may arise under the ECHR.[91] But it has no claims in respect of rights that may only accrue to natural – human – persons, such as the right to freedom of thought, conscience and religion under Art.9.[92] It will have common law rights, and some statutory rights. And some of these rights might resemble the things we call 'human rights' in terms of their substance. But the company has these rights not because they are fundamental matters of human dignity but because various policy matters have combined to convince law-makers (and, in the case of common law rights, judges) that companies should have these rights.[93] Incorporation as a limited company has given the McArthurs certain protections, by removing their human-ness from the picture and hiding it behind the veil of incorporation. Yet by arguing that their Art.9 and 10 rights would be violated if the law required them to produce a cake bearing a pro-same-sex marriage message, they are seeking to rely on that human-ness once again. If we may be forgiven the pun, they are trying to have their cake and eat it.

This raises an important issue to which, just like the indirect discrimination point, the Supreme Court gives no attention. Put simply, can the veil of incorporation be raised and lowered at will by the company's owners? Unfortunately, at no point in the Supreme Court's judgment (nor, indeed, in the Court of Appeal's) does the court distinguish between the company and the owners; they are treated as one and the same. The question thus not only goes unanswered, but unasked.

c. *R (on the application of Miller) v The Prime Minister*

The case of *Miller* came before the Supreme Court as a matter of urgency in September 2019.[94] The UK Prime Minister had sought a prorogation (suspension) of the UK Parliament that would, if

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[91] Vanessa Wilcox, *A Company's Right to Damages for Non-Pecuniary Loss* (CUP 2016) ch 3.

[92] Wilcox makes clear that, whilst companies have been granted standing to make some claims under other parts of the ECHR, they have no rights under Article 9 (ibid, 49). See also *Company X v Switzerland* (decision) 27.02.1979, no. 7865/77, in which the European Commission of Human Rights concluded that 'a limited company given the fact that it concerns a profit-making corporate body, can neither enjoy nor rely on the rights referred to in Article 9, paragraph 1, of the Convention'. See further *X and Church of Scientology v Sweden* (decision), 05.05.197, no. 97806/77, § 2. Wilcox contrasts the Strasbourg jurisprudence with a different approach taken in England and Wales in *Exmoor Coast Boat Cruises Ltd v Revenue and Customs Commissioners* [2014] UKFTT 1103 (TC), in which it was suggested that a company could have Article 9 rights in circumstances where it was the 'alter ego' of its human owner, such that the two were in effect indistinct. However, this approach was taken in a tribunal by a County Court judge, cited no authority for the proposition outlined, and has only been cited in one subsequent judgment (also of the first-tier tribunal, and by the same judge). Moreover, English and Welsh law generally takes the same stance on the scope of ECHR rights as the Strasbourg court, as it must pay due regard to Strasbourg decisions under s.2 of the Human Rights Act 1998. There is no indication that the Supreme Court in *Lee* was made aware of either the Strasbourg cases or the *Exmoor* decision (suggesting its reasoning on this point may have been made *per incuriam*).

Companies may bring claims under Art.10 of the ECHR, and have had Art.10 interests protected in a range of cases – most notably as a defence to defamation and/or privacy claims brought against media corporations by individuals. However, the Art.10 interest in such cases derives not from the inherent dignity of the company (because it is not a human being), but from the public interest in receiving information pertaining to a matter of general public importance. The Art.10 rights of companies, therefore, derives from an intensely human interest – the interest of the broader community in receiving newsworthy information. See *Jameel v Wall St Journal Europe Ltd* [2006] UKHL 44, [2007] 1 AC 359.

[93] In *R v Broadcasting Standards Commission, ex parte British Broadcasting Corporation* [2001] QB 885, Lord Mustill rejected the notion that a body corporate could claim a right to privacy as a human right. Whilst the case is not conclusive on the issue (Lord Woolf takes the opposite view, whilst Hale LJ equivocates), Lord Mustill's reasoning on the point (at [48]-[49]) is the most developed.

[94] [2019] UKSC 41, [2019] 3 WLR 589.

lawful, have become the longest such prorogation in over half a century.[95] The Prime Minister insisted that prorogation was both entirely normal and a necessary precursor to the government setting out a new legislative agenda. It was relevant that the session of Parliament being brought to an end had itself been unusually long (at just over two years). The applicant, Gina Miller, however, was concerned that the Prime Minister's true motive in proroguing Parliament was that it would enable him to press on with controversial plans in respect of the UK leaving the European Union (the process known as 'Brexit') without the hindrance of Parliamentary scrutiny. As such, the applicant sought judicial review of the legality of the Prime Minister's formal advice on prorogation to the Queen (which is the mechanism by which, under the UK's constitutional arrangements, prorogation is sought).

The case is, constitutionally, the latest in a series of decisions where the courts have had to determine the lawful extent of the government's residual 'prerogative powers' (powers once exercised by the sovereign monarch, now *de facto* exercised by the government). Judicial review of the exercise of prerogative powers by the executive is highly controversial. Since the UK constitution is uncodified, the legal background concerning the nature and extent of these powers is often rather opaque; their exercise is traditionally controlled by convention rather than legal rules as such, but these conventions rely upon governments adhering voluntarily to established practice. In the tense political climate in which the UK currently finds itself, where successive governments have, through their behaviour, eroded the effect of constitutional conventions, Miller argued that the courts should step in and regulate the use of this prerogative power through the establishment of a novel legal rule.

Both the lower courts and the Supreme Court had to grapple with three constitutionally significant questions. The first was whether the application was barred by statute – namely Article IX of the Bill of Rights 1688, which provides that 'proceedings in Parliament ought not to be impeached or questioned in any Court'. The second question was whether, if the Bill of Rights did not bar the application, the issue of prorogation was justiciable. Third, if the issue was justiciable, the question became whether the Prime Minister had acted lawfully. Implicit in the third question was a sub-question concerning the standards that the court would apply in order to determine legality.

The English Divisional Court had rejected Miller's application at first instance, finding that the matter was non-justiciable. However, the Inner House of the Court of Session in Scotland (Scotland's highest appellate court) had allowed a similar application by another applicant, Joanna Cherry, declaring the prorogation of Parliament unlawful.[96] In the Supreme Court, appeals from both these cases were joined together.

The Supreme Court unanimously held that the Bill of Rights did not preclude the Court from considering the case, and that, as a matter of common law, the legality of prorogation was justiciable. Having done so, it further found that the prorogation was unlawful since no good reason – indeed, no reason at all – had been advanced by the government as justification for the exceptional length of the prorogation.[97] Key to the Court's ruling was its creation of a novel legal rule governing prorogation: where prorogation has the effect (whether intended or not) of stymieing Parliamentary scrutiny of the executive, that prorogation will not, without justification, be lawful.

The judgment (separate sections of which are drafted by Lady Hale and Lord Reed) is, as one would expect, written eruditely and gives the impression of being an uncontroversial statement of clear legal principles on the matters at hand. It has been hailed, in some quarters, as vindicatory; representing the triumph of legality over politics. As the former Court of Appeal judge, Sir Stephen Sedley, has said: as much by its unanimity … as by its reasoning, has re-lit one of the lamps of the United Kingdom's constitution: that nobody, not even the Crown's ministers, is above the law'.[98] Thus Sedley suggests that the unitary-ness of the judgment is what lends it its authority.

But as with the other two example cases we have considered, all is not as it seems. *Miller* is an enormously controversial judgment. The main areas of controversy are pointed up expertly by Martin

[95] Prorogation is a period of suspension that marks the end of one Parliamentary session and, when the prorogation ends, the commencement of a new session.
[96] *Cherry v Advocate General* [2019] CSIH 49.
[97] *Miller* (n 94) [61].
[98] Stephen Sedley, 'In Court: The Prorogation Debacle' (2019) 41(19) London Review of Books 16.

Loughlin.[99] Central to his critique of the judgment is his assertion that it represents a paradigmatic shift in the way that the Court conceives of the British constitution. '[The judgment] claims that, rather than consisting of a set of rules and practices, the British constitution rests on some overarching framework of constitutional principles of which the Court acts as guardian.'[100] This, in his view, begs the question: the triumph of the legal constitution over the political (or politico-legal) one assumes the existence of the legal constitution in the first place. Loughlin is adamant that the highly legalised vision of the constitution that the Court has invoked in *Miller* represents a paradigmatic shift away from the politico-legal understanding of the constitution that has prevailed (albeit with various less radical shifts in emphasis) for decades.

Thus Loughlin's analysis drives home the point that we are making in this chapter: the *appearance* of cogency that a unitary judgment creates is not necessarily reflective of *actual* cogency. Rather than grappling with the complexities of the constitution conceived as a politico-legal artefact, where lawyers must struggle with the essentially political nature of the value judgments they are making when interpreting the constitution, the Supreme Court reconceptualises the constitution as an essentially *legal* artefact. As a legal artefact, the constitution appears far less complex. The standards involved in interpreting it cease to appear political and instead appear legal; they become cold, lifeless standards, easily applied to the matter at hand. In this way, the Court holds with remarkable swiftness and sureness of footing that the Prime Minister has given no legally recognisable reason (let alone a good one) for the length of the prorogation which he sought. Moreover, the Court presents this reconceptualization not as if it was a reconceptualization, but instead as if it was the clear and obvious way to conceptualise the constitution. In other words, it performs law's 'amazing trick' once again. The Court pursues simultaneously the two narratives that Fish tells us are integral to this trick, which is central to formalist legal method.[101] These are, first, a tendentious narrative in which authority (precedent) is cited and (re)interpreted in such a way as to dispose of the case at hand in a novel fashion, in a way that fundamentally alters the shape of the law in this field. Second, a parallel narrative is pursued that disavows the radicalism inherent in the first narrative. In this way, the Court effects a paradigmatic shift (according to Loughlin) whilst simultaneously claiming not to.

Our aim here is not to take sides over an intensely politically controversial matter. Instead, we simply say that *Miller* purports to be clear and straightforward, but it is in fact neither. It is acutely controversial. In *extremis*, it may be said – as Loughlin insists – to have paradigmatically shifted our understanding of the nature of the British constitution. At the very least, there are major questions as to the nature of the constitution, upon which a range of different views can legitimately be held and defended, that go wholly unaddressed in the judgment. To the extent that constitutional matters are addressed, only one perspective on them is offered.

The judgment itself thus gives no real sense of the degree of controversy surrounding the issue that the Court has been tasked with deciding. But, before we leave the case, we should mention one further feature of note. The judgment deploys a highly visual metaphor in order to communicate the effect of its judgment to its addressees. The order that had led to the prorogation after it was introduced into Parliament is said to be 'null and of no effect', 'as if the Commissioners had walked into Parliament with a blank piece of paper.'[102] The metaphor is significant because it is visuocentric in exactly the way we associate with the Fancy. It purports to encapsulate the key elements of the Court's reasoning in a single image. The simplicity offered is obviously attractive; everyone can comprehend that a blank sheet of paper contains no valid instruction. But it belies the reality – that there is another, competing conceptualisation of the constitution (as a politico-legal artefact), according to which the Commissioners did not walk into Parliament with something akin to a blank piece of paper but instead with an entirely valid Order in Council for prorogation. Thus we see again, this time laid bare, that the clarity and certainty that the Court purports to give us is beguiling, but misleading. In truth, the constitutional terrain upon which this decision sits is highly controversial, inescapably political and not amenable to the quick and easy treatment that the unitary judgment tries to impress upon us.

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[99] Martin Loughlin, 'The Case of Prorogation' (Policy Exchange 2019) 6. <https://policyexchange.org.uk/wp-content/uploads/2019/10/The-Case-of-Prorogation.pdf> 15 December 2019.
[100] Ibid.
[101] Fish (n 85).
[102] *Miller* (n 94) [69].

(iii) Clarity and Certainty?

The unitary judgments in *R v R*, *Lee v Ashers* and *Miller* purport to give us certainty and clarity. *R* tells us that a man can indeed be guilty of raping his wife. *Lee* tells us that a couple who identify as Christians cannot be required by law to produce a cake bearing a pro-same-sex marriage message that they feel is contrary to their religious beliefs. *Miller* confirms that the Prime Minister cannot prorogue Parliament for so long that its function as a check on the executive is undermined.

R v R is a remarkably short judgment, running to just eight pages, in which no mention is made of the retrospective nature of what the court is doing, nor of any potential impact upon the rule of law. *Lee* is longer, running to thirty pages. This adds to the impression that it is a detailed, considered statement of the law, and increasing the confidence with which many will treat it. But it, too, contains significant flaws. It leaves wholly unanswered – even unrecognised – issues of acute controversy, including one (the issue of whether companies can exercise human rights) that sits in tension with statements from the same court on the same issue (albeit in a slightly different context). *Miller*, meanwhile, deals with its acutely politically and legally controversial constitutional conundrum in a brisk 71 paragraphs, unfolding across just 24 pages. (For comparison, an earlier *Miller* case, in which the applicant successfully challenged the government's asserted power to trigger the UK's departure from the European Union under Article 50 of the Treaty on the Functioning of the EU, led the Supreme Court to issue multiple judgments – including three dissents – to the tune of 283 paragraphs across 98 pages.) But in its briskness, the real controversies underlying the constitutional question before the court are seriously downplayed. As such, the only clarity and certainty provided by these cases is of a limited, simplistic, reductionist type. It is more apparent than real; more fanciful than reflective of the real complexity of the matters at hand.

Someone sceptical of our argument might well ask, at this point, whether the three cases upon which we have dwelt are really representative of common flaws in unitary judgments, or whether they are just memorable outliers. To such an objection, two points may be made. First, we do not say that all unitary judgments are, or are likely to be, flawed in this way. But we do say that there is a greater likelihood of these sorts of flaws going uncorrected if only one, unitary judgment is produced. This first point leads to a second. Flaws in individual judgments are, of course, not ideal. But the real problem here is the more frequent adoption of a practice that is designed to give the appearance of a level of certainty that is simply not achievable. Whilst we can point out flaws in individual cases – and we could give examples *ad nauseam* – of far larger concern is the return to systemic prominence of an approach to judging that, rather than acknowledging the difficulties in achieving genuine clarity and certainty, actively promulgates the misleading impression that they are eminently achievable. We develop this point in the next section, in which we link Coleridge's account of visuocentrism to the pursuit of certainty inherent in legal formalism.

Formalism and the Fancy

Those who express a preference for unitary judgments overwhelmingly do so by making the argument (or, perhaps more commonly, the bald claim) that this type of univocal judicial utterance provides greater clarity and certainty than judgments featuring multiple voices (whether in concurrence or dissent).[103] Baroness Hale (as she then was) expressed such sentiments in *OBG v Allen*, saying that '[t]here should be no doubt, and no room for argument, about what has been decided and why.'[104] This was certainly the motivation behind Carnwath LJ's (as he then was) calls for the House of Lords and Supreme Court to produce more unitary judgments, and fewer multiple ones.[105] The Court of Appeal itself has made use of unitary judgments as its default approach for a number of years, on the basis that the practice 'reduces the material that has to be read, avoids the

[103] See eg Neuberger (n 61).
[104] *OBG* (n 62).
[105] n 63.

opportunity for differences of opinion and provides greater clarity.'[106] The kind of clarity aimed at in such formalist thinking is of a particular kind, one related to the definition of 'clear' as '[e]asy to understand, fully intelligible, free from obscurity of sense' and 'free from doubt'.[107] In other words, a reductionist, simplistic notion of clarity, prioritising a lack of ambiguity over the recognition of complexity. As such, it ignores an alternative sense of clarity as transparency – as the presentation of the totality of a phenomenon in all its messy complexity.

Pursuit of a simplistic, formalist type of clarity and certainty provides a link between the unitary judgment practice and one of the core aims of legal formalism. For formalism assumes that it is possible to lay down legal pronouncements with absolute clarity (of this 'fully intelligible, free from doubt' sort). (Upon this presumption, formalism further counsels that doing so is desirable.) But Coleridge warns us to suspect claims to stability or clarity as limited and illusory, concealing a more complex truth. As such, Coleridge's work aligns broadly with core themes in the school of legal thought that arose in opposition to formalism and which counsels attentiveness to law's context, impact and particularity: (American) legal realism. This should not surprise; Coleridge's accounts of the Imagination and the Fancy are broadly realist in nature.[108]

Clarity as transparency – focusing on understanding the totality of a phenomenon – is something that Coleridge tells us can be achieved only with the Imagination. It is only by rigorous commitment to detail that knowledge can be achieved: 'In order to understand a thing we must know all its component parts, and to be certain that we understand it, we must be certain that all the parts that belong to the thing are present to our mind, and that no others are imagined to be there'.[109] Unitary judgments undermine clarity as transparency in their pursuit of clarity as elimination of doubt.

The unity that Coleridge tells us the Imagination achieves is committed in its pursuit of unity in multeity to clarity as transparency. As such, we can link the Imagination to the pursuit of this more realist, non-formal type of clarity. For the Imagination is, as we noted earlier, 'a faculty devoted at once to unifying *and yet* to particularising', thereby achieving a unity that does not reduce plurality into a single uniformity but brings together plurality within an unstable, progressive interconnection.[110]

As John Beer observes, Coleridge's 'ultimate gift to human thinking' was a 'gift for double perception, for thinking at more than one level'[111] (a skill also cultivated by lawyers for whom the 'talent for being beforehand with' their 'critics in analysing' themselves is also desirable).[112] Coleridge aspired, as Seamus Perry observes, 'to the very greatest and most comprehensive kind of coherence',[113] yet his commitment to a 'strenuous and self-scrutinising imaginative life'[114] leaves him 'principally divided between the rival attractions of unity and division themselves'.[115] This complexity extended to his political thought. As David Erdman observes, 'he is never single-sided or single-minded but always both Jacobin and anti-Jacobin, Radical and Tory, poet and moralist, intermingled'.[116] Coleridge demonstrates the limitations of aspiring to unity as uniformity as a means

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[106] Lord Phillips (Master of the Rolls), *Review of the Legal Year* 2001-02. See also Roderick Munday, '"All for one and one for all": the rise to prominence of the composite judgment within the Civil Division of the Court of Appeal' (2002) 61 CLJ 321.

[107] 'clear, adj, adv, and n' (*OED Online*, OUP December 2019) <www.oed.com/view/Entry/34078> accessed 15 December 2019.

[108] Michael John Kooy points out that Coleridge can be seen to display an affinity with realist political thought in the work that he (Coleridge) undertook drafting legal provisions for Malta in 1805. Kooy finds this affinity in Coleridge's willingness to manipulate rule of law principles in order to draft controversial provisions for reasons of political expediency. See 'Coleridge and the Rule of Law' in Barry Hough and Howard Davis, *Coleridge's Laws: A Study of Coleridge in Malta* (OpenBook Publishers 2009) xvi, xxiv.

[109] Samuel Taylor Coleridge, *Logic* (JR de J Jackson (ed) Princeton University Press 1981) 215.

[110] Perry (n 28) 34.

[111] John Beer, *Romantic Influences: Contemporary—Victorian—Modern* (Palgrave Macmillan 1993) 165.

[112] Perry (n 28).

[113] ibid 2.

[114] ibid 1.

[115] ibid 4.

[116] David Erdman, 'Introduction', in Samuel Taylor Coleridge, *Essays on his Times* (David Erdman (ed) Princeton UP, 1978) vol 3, lxv.

to achieve authority, providing a model instead of a committed intellectual rigour, not content to omit or minimise in order to achieve an appearance of clarity.

Bruns argues that the law 'can only emerge in a space that is logically anarchic … a place of "open indeterminacy" where the thing is suddenly otherwise than we thought'.[117] As such, he compares it to *Hamlet* – 'whatever makes us think, or anyhow think twice'.[118] The Imagination is capable of capturing this disruptive quality in the law, reflecting not a fanciful, formalist appeal to the appearance of stability and authority but expressing the instability inherent in the law itself, closer to the Imagination in its disruptive processes than to the reductive stability and fixity associated with the Fancy. As the recently-retired President of the Supreme Court, Lady Hale, observes extra-judicially (somewhat ironically, given her own proclivity, as President, for producing unitary judgments), without a full impression of the diversity within the court's decision (the multiple perspectives and means of reaching a judgment, and acknowledgment of the complex points of law addressed) 'something distinctive would be lost'.[119] The word 'distinctive' is suggestive; derived from the Latin '*distinguĕre*' to 'separate, divide',[120] it deftly captures the need to acknowledge the separate opinions of individual judges. It facilitates a recognition that what makes the court itself 'distinctive', what lies at the basis of its authority, is the ability of its expert judges to achieve consensus, while at the same time taking individual 'responsibility for his or her own decision' according to the judicial oath.[121] In the court as in society at large, 'a living *whole*' can only be achieved if each individual unites 'with the whole' but 'shall yet obey himself only and remain as free as before'.[122]

Coleridge's division between Imagination and Fancy has implications for language itself, revealed as he demonstrates the formal workings of the Fancy by analogy with written language: 'Life may be *inferred,* even as intelligence is from black marks on white paper—but the black marks themselves *are truly "the dead letter"*'.[123] Only in coadunation with 'life' and 'spirit' can the written word be freed from its objectified death and released from a restricted 'space of possibles' into one more attuned to principles, to human feeling, and to context.[124] In contrast to the limited, tightly constrained normative space provided by the Fancy, the Imagination reveals that texts (both legal and literary) are open to interpretative possibilities always already available to the reader in practice.[125] Coleridge's thought thus leaves open the possibility of a transition from the reified formal written law to the organic, unfolding manifestation of the state, the *living* law. The state is comprised, Coleridge argues, of 'two antagonist powers or opposite interests [...] those of permanence and progression'; 'the interest of permanence is opposed to that of progressiveness; but so far from being contrary interests,

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[117] Bruns (n 4) 65.
[118] ibid.
[119] Baroness Hale, 'Judgment Writing in the Supreme Court' (Supreme Court First Anniversary Seminar, 30 September 2010) < https://www.supremecourt.uk/docs/speech_100930.pdf> accessed 1 November 2019.
[120] 'distinct, adj and n' (*OED Online,* OUP September 2019) <www.oed.com/view/Entry/55670> accessed 2 November 2019.
[121] Ibid.
[122] *Friend* (n 38) vol 1, 192.
[123] *CN vol 3* (n 27) 4066.
[124] The phrase, the '*dead letter*', invokes a longstanding theological debate around the terms of 2 Corinthians 3:6: 'the letter killeth but the spirit giveth life', and suggests the influence of John Milton, who argued that the Reformation had been necessary because 'men came to scan the scriptures by the letter, and in the covenant of our redemption, magnified the external signs more than the quickening power of the Spirit'. Similarly, for Coleridge, the distinction between letter and spirit is not 'between a carnal letter and a spiritual mystery hidden in allegories' but 'Calvin's distinction between outward, formal knowledge and inward, living apprehension' (Hugh MacCallum, 'Milton and the Figurative Interpretation of the Bible', in Mary Nyquist and Feisal G Mohamed (eds), *Milton and Questions of History: Essays by Canadians Past and Present* (University of Toronto Press 2012) 64). See Milton's *Tetrachordon*: 'Men of most renowned vertu have sometimes by transgressing, most truly kept the law; and wisest Magistrates have permitted and dispenc't it; while they lookt not peevishly at the letter, but with a greater spirit at the good of mankinde, if alwayes not writt'n in the characters of law, yet engrav'n in the heart of man by a divine impression' (The John Milton Reading Room, Dartmouth University <https://www.dartmouth.edu/~milton/reading_room/tetrachordon/genesis/text.shtml> accessed 5 April 2019).
[125] See Mullender (n 36).

they, like the magnetic forces, suppose and require each other'.[126] The permanence of principle and the formal law combines with the progressive exercise of the free will to create a harmony of continuity and improvement that preserves continuity while ensuring progress and improvement. At this point of interpretation, law is released from the words on the page, the formal shape given by the Fancy to the concepts of the understanding.

Here we see Coleridge's realist leanings. Echoing his distinction between spirit and letter, he asserted in 1814 that principle is the 'Aim, Rule, and Guide' of the law, a 'spirit' that provides continuity between former ('our ancestors') and current interpreters of the law. It is not inherent in the formal law so the law in practice depends on its application: 'Principle on its application to Practice must be limited & modified by circumstance, our Reason by our Common Sense'.[127] More boldly, in *The Friend,* Coleridge asserted that 'the wisdom of Legislation consists in the adaptation of Laws to circumstances' meaning that circumstances may arise where 'the spirit of the statute interpreted by the intention of the Legislator would annul the letter of it'.[128] As Holmes put it: 'The life of the law has not been logic; it has been experience':[129]

> The language of judicial decision is mainly the language of logic … But certainty generally is an 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.[130]

For Holmes, like Coleridge, the source of 'moral truth' lies 'in the creative and unconscious processes of the individual mind',[131] as implied in his acknowledgement of the 'inarticulate and unconscious judgment' that occurs 'Behind the logical form'. This resonates with Coleridge's suggestion that what matters is the law in practice – the interaction between codified rules, their underlying principles, the specific circumstances of the case at hand, and feelings profoundly connected to morality. It is in the practice of the law that its 'life' or 'spirit' is found. Yet unitary judgments, in pursuit of clarity as elimination of doubt, seek to obscure these inarticulate and unconscious judgments taking place behind the logical form, or at least to reduce them so that only one such behind-the-form judgment might be discerned. The law's life is removed by the (Fancy-driven) determination to fix it, death-like, within a simplified form.

Despite these sorts of objections to its fanciful claims and aims, formalism nonetheless persists and is, today, resurgent. Its resurgence is made possible in part because the certainty and stability that it appears to provide – clarity as elimination of doubt – are persuasive and beguiling. The Fancy is

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[126] Samuel Taylor Coleridge, *On the Constitution of Church and State* (John Colmer (ed), Routledge & Kegan Paul 1976) 24.
[127] *CL* (n 54) vol 3, 537-8.
[128] *Friend* (n 38) 246.
[129] Oliver Wendell Holmes, Jr, *The Common Law* (Little Brown 1881) 1. Anne Dailey notes that Wendell Holmes, Jr was a frequent reader of Romantic writers, 'notably, Wordsworth, Coleridge, Carlyle and Goethe' (Anne C Dailey, 'Holmes and the Romantic Mind' (1998), 48 (3) Duke Law Journal 429, 431 <https://www.jstor.org/stable/1373058> accessed 2 October 2019). Dailey suggests that Holmes's definition of law as 'The prophecies of what the courts will do in fact, and nothing more pretentious' (Oliver Wendell Holmes Jr, 'The Path of the Law' (1897) 10 (8) Harv LR 457, 461) is underpinned by 'a view of human nature strongly reminiscent of eighteenth-century Romantic literature and philosophy' (Dailey 431). She observes that Holmes 'asserted the existence of such fundamental and nonempirical psychological concepts as unconscious motivations, instinctual desires, inner conflict, irrationality, imagination and transcendent faith in "the infinite"' (431); 'For Holmes, heroic greatness inhered in the lawyer's ability to harness his imaginative powers in pursuit of transcendent insight' (434). In highly Coleridgean fashion, Holmes's thought is, Dailey argues, animated by a 'conflict in his thought', a 'struggle to develop a satisfying empirical approach to law that also accounted for the depth and complexity of human nature' (437). He 'rebelled against what he called the "insufficiency of *facts*"' suggesting Coleridge's criticism of 'matter-of-factness' as an attachment to stability and objectification – the products of the Fancy.
[130] Wendell Holmes, Jr, 'The Path of the Law' ibid.
[131] Dailey (n 129) 431.

attractive in the simplified version of mind it supplies and the apparently secure, fixed version of meaning it provides.

Because of its reliance on printed words, law is inherently highly susceptible to the attractions of the Fancy. When those words are used in such a fashion as to give an impression – an appearance – of clarity and certainty, masking those issues which remain unclear and uncertain, formalism's idol looms into view. Legal formalism arises, in no small part, out of the empiricism against which Coleridge firmly set his stall and which he saw as rooted in the 'magical' lure of the Fancy. The empirical bias of the Fancy drives a determination to taxonomize and to codify legal norms, treating 'law' as a body of authoritative rules that is essentially distinct from the broader socio-political context out of which it emerges. Law, in short, is thought of – in the eyes of formalists – to exist in its own world: a world of legal norms. This enables – and requires – formalists to draw sharp distinctions between, for example, matters of law and matters of politics (as the Supreme Court explicitly purports to do in *Miller*).[132]

Unitary judgments from our highest court attempt to separate both law from politics and law from judges (by removing their individuality), positing the appearance and therefore the possibility of an objective, univocal, fixed authority in the law. This is a practical manifestation of the formalist Fancy. Moreover, it exerts considerable influence, since it emanates from a place of authority and results in judgments that will generally be regarded, regardless of their merits or content, as binding statements of law.[133] When the Court speaks with one voice, the image of clarity and certainty that this creates is one that onlookers are given every incentive to believe is an accurate one.

There is also a clear link between the Fancy's drive towards simplification – attempting to fix and reduce ideas within minimised states – and a correlative thrust in the unitary judgment practice. Unitary judgments are designed to reduce matters of controversy within them to univocal states by fixing the *range* of matters deemed relevant. This can be achieved simply by not mentioning matters that, on a less minimised view, would indeed have relevance to the decision at hand. Consider: in *R v R*, the House of Lords fixed the issues at play as relating solely to existing precedent on the question as to whether the ancient common law exemption for husbands from rape charges was still effective. In so doing, it limited the scope by removing from consideration the rule of law concerns to which we have drawn attention. Similarly, in *Lee v Ashers*, the Supreme Court fixed the case as one concerning individuals and their rights, minimalizing by not considering whether the company, separately to its owners, might be in breach of statutory provisions on discrimination. Something similar happens in respect of constitutional controversy in *Miller*. Attempts to limit the materials of the law are an expression of the '(formalist) hope' that words can be ordered 'in such a way as to constrain what interpreters can then do with them'.[134] Purporting to provide certainty by omission is really an admission that certainty can only be provided by leaving things out. This reveals such 'certainty' to be illusory. It asserts the necessity of clarity, not as elimination of doubt, but as transparency.

Coleridge's Imagination presents a challenge to resurgent formalist orthodoxy. For he reminds us – perhaps uncomfortably – that the appearance of clarity is just that: an image provided by the Fancy that can only be achieved by minimising or simply ignoring the full intellectual complexity at play. This challenge should spur us to ask penetrating questions of unitary judgments, and – just perhaps – to reconsider the practice of issuing them itself.

Escaping the Coleridgean Dystopia: the Disruptive Imagination

The rise of the unitary judgment practice in the first decade of the UK Supreme Court's existence has links to a resurgent formalism that is profoundly resonant with a worldview dominated by the Fancy. Coleridge's promotion of the Imagination as a corrective to this may be particularly fruitful if we can link it to an alternative legal practice. The obvious practice in which to seek such links is the practice of issuing multiple judgments (including both concurring and dissenting judgments).

[132] See, eg, *Miller* (n 94) [1].
[133] By mainstream legal positivists, at least.
[134] Fish (n 85) 147.

For Coleridge, the Imagination provides a corrective to the Fancy's emphasis on fixity and certainty. It 'unfixes' the objects of the Fancy - 'dissolves, diffuses, dissipates, in order to re-create'.[135] A part of the Imagination's creative nature is thus, necessarily, disruptive in character.

The presence of multiple judgments in a case makes plain points of disagreement between the judges. This promotes transparency and undermines the misleading, idolatrous image of certainty and clarity promoted by the unitary judgment practice. But in highlighting points of disagreement at least as much as it does points of concurrence, the practice of issuing multiple judgments is disruptive. It is, of course, this disruptiveness to which legal formalists, committed as they are to the notion that all legal disputes have a single 'right' answer, are opposed. Yet Coleridge tells us fixed concepts are only ever simplified versions of concepts that can only truly be understood when disrupted by the Imagination, which releases them from certainty into an unstable process connected to context, subjective feeling, and unwritten principles. The American legal realists of the 20th century were committed to the notion that the law should not be some abstract, detached set of rules but should connect, in a very real fashion, to the lives of its addressees, and to the social, political and cultural context of the day.[136] Assuming this is indeed desirable, a case can be made for returning the practice of issuing multiple judgments to prominence, by drawing on the importance of the Imagination as a corrective to the profound limitations of the Fancy, as elaborated by Coleridge.

Only once the mind has become freed from the limitations of the fancy can it achieve knowledge of things 'in their essential powers', in relation 'to other powers' and in their unity, 'distinct yet indivisible'.[137] This further suggests the possibility that such mental emancipation can allow the individual to experience their subjectivity in relation to others in a harmonious community. The Imagination melts the image which had become the idol of contemporary philosophy and transforms it into something fluid, released from its finite boundaries, to reveal a 'living' meaning: it is 'the fusing power, that fixing unfixes, & while it melts & bedims the Image, still leaves in the Soul its living meaning'.[138] Meaning as transformative and re-creative can only be realised, not in the black marks on white paper, the formal stability of language printed on the page, but in the productive oscillatory instability of the Imagination. It is revealed only when objective fixity melts and recedes.

Within what he conceived as an organic process of interpretation and precedent, Coleridge reinforces his belief that knowing must be a process: 'Thought formed not fixed – the molten Being never cooled into a Thing'.[139] In an 1817 letter to Lord Liverpool, he complained that, while the 'ancients' were concerned with 'the birth of things', 'the self-subsistence, yet interdependence, the difference yet Identity of the forms' or '*acts* of the world', materialist philosophy limited knowing to a static, fixed visualisation of phenomena as *already made*. Under the supremacy of the Fancy, 'all fixed principles, whether grounded on reason, religion, law or antiquity, were to be undermined' by applying to them the 'criterion of the mere understanding, disguising or concealing the fact, that the rules which alone they applied, were abstracted from the objects of the senses, and applicable exclusively to things of quantity and relation'.[140] That this 'habit of thinking' influences the whole 'mass of our principles' suggests the risk of producing an inactive, unreformed public ripe for exploitation and liable to be moved by populism, converting thinking individuals to a 'mass'.

Kuiken argues that the theory of Imagination that Coleridge provides in *Biographia* further reveals the political risks he conceived in empirical thinking. He argues that Coleridge's division of Imagination into Primary and Secondary aspects represents an act of 'withdrawal',[141] whereby the Imagination can be enacted and yet also withdrawn from the space of representation.[142] This, he asserts, is connected to Coleridge's concept of Reason as similarly characterised by withdrawal, so that it cannot be mistakenly identified with a specific sovereign (the people or the monarch), giving

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[135] *BL* (n 11) vol 1, 304.
[136] Karl Llewellyn, 'Some Realism about Realism' (1931) 44 Harvard LR 1222.
[137] *LHP* (n 5) vol 1, 193.
[138] *CN vol 3* (n 27) 4066.
[139] Samuel Taylor Coleridge, *The Notebooks of Samuel Taylor Coleridge*, vol 2 (Kathleen Coburn (ed) Routledge & Kegan Paul 1962) 3159.
[140] *Friend* (n 38) vol 1, 439.
[141] Kuiken (n 16) 89.
[142] Kuiken (n 16) 97.

that sovereign absolute power as the embodiment of absolute reason.[143] Such a confusion in the collective Imagination emerges from the idolatry of the visual, mistaking the conditional embodiment of the unconditional for its absolute manifestation, the letter for the spirit of the law and the representative of sovereignty for its absolute ground. Thus, Coleridge's critique of the Fancy in the phrase the 'despotism of the eye'[144] invokes not only its tyranny over the mind, but the potential this power has to encourage political absolutism by attempting to posit the sovereign as the embodiment of Reason. Underlying such an assumption is the belief that the principles underlying the law and politics can be embodied, reflected in Coleridge's robust objection to a written constitution, which would break the link between permanence and progression, and suggest that the complexity of the constitution can be defined, limited, fixed.[145] Coleridge argues in *The Friend* that the National Assembly had 'intoxicated' the people of France with 'high-sounding phrases' ('the *inalienable sovereignty* of the people') and led them on to the 'wild excesses and wilder expectations' of the Revolution and Terror, which, disappointing their expectations, prepared the way for 'military despotism'.[146]

This is the emergent dystopia Coleridge could foresee. And there are indications that it is coming to pass today. Populism is on the rise across the globe. In the face of the troubled times in which we live, people demand certainty, even as they vote for policies destined to provide instability (of which the UK's referendum on EU membership in 2016 is a prime example). Short, sharp, inaccurate (and sometimes entirely meaningless) political slogans succeed in attracting votes where more detailed, albeit more accurate, statements fail to land. During troubled times such as these, support for policies likely to deliver instability is nevertheless related closely to a desire for certainty. The desire has its roots in a human tendency to seek out tighter social norms when faced with social instability.[147] The nationalism underpinning the pro-Brexit vote, for example, and the election of the overtly nationalist 45th President of the United States, are manifestations of this desire.

The Supreme Court came into being in 2009, in the immediate aftermath of a global financial crisis and with the UK embroiled in two major military conflicts (in Afghanistan and Iraq). Throughout its first decade in existence, major political turmoil has unfolded within the UK (two general elections failing to deliver a majority government and a referendum on EU membership with profound constitutional implications). Undoubtedly the Court has been living, as has everyone in the UK, through troubled times. Against that background – that context – it is no surprise that the Court should adopt a practice with the aim of providing greater certainty. For, as the American realist jurist and scholar Benjamin Cardozo observed, judges are no more able to escape that instinctive 'stream of tendency' within each of us 'which gives coherence and direction to thought and action' than other mortals.[148] To seek out tighter social norms – providing greater certainty and stability – in troubled times has been shown to be a natural psychological reaction.[149] But the formal certainty – the clarity as elimination of doubt – that the unitary judgment practice achieves is seriously lacking in substance. It is a lifeless abstraction, a fixed image of certainty which seeks to rest the authority of the court on visual idols rather than a recognition that its power lies in its operation, in the collective expertise of its judges *as individuals* in practice.

Coleridge tells us that, exceeding the operation of the aggregative Fancy and the conceptualising Understanding, the mind must embrace the instability of the Imagination's mediation between subjective and objective – its capacity to move beyond the fixed and the known. Relying on the

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[143] Kuiken (n 16) 103-4.
[144] *BL* (n 11) vol 1, 107.
[145] Samuel Taylor Coleridge, *On the Constitution of Church and State* (John Colmer (ed) Princeton University Press 1976).
[146] Ibid, vol 1, 194. See Kuiken (n 16) 107-8.
[147] Michele J Gelfand et al, 'Differences Between Tight and Loose Cultures: A 33-Nation Study' (2011) 332 Science 1100; Michele Gelfand, *Rule Makers, Rule Breakers: How culture wires out minds, shapes our nations and drives our differences* (Robinson 2018), 69-72. Gelfand helpfully summarises her research in 'Here's the science behind the Brexit vote and Trump's rise' (*The Guardian*, 17 September 2018) <https://www.theguardian.com/commentisfree/2018/sep/17/science-behind-brexit-vote-trump> accessed 15 December 2019.
[148] Benjamin N Cardozo, *The Nature of the Judicial Process* (Yale University Press 1991) 12.
[149] See Gelfand et al, and Gelfand (n 147).

appearance of consensus, unitary judgments eliminate (or at least hide) this mediating process from the courts' output, leaving fixity in its place. The practice shifts attention away from the realities of dissent (and differing but concurring reasons) as part of the achievement of consensus, and of disunity as part of an Imaginative approach to unity. In so doing, it obscures the very source of its authority in an attempt to secure its fixity and certainty.[150] The unitary judgment becomes a depersonalised, collective, expression of a formal consensus; a stability that inheres only in those words on the page. Meanwhile, by omitting alternative lines of argument (both concurring and dissenting), the practice prevents the law's addressees from seeing – and consequently from understanding – the continuity of the law as organic progress. Coleridge argues in his *Lay Sermons* that the 'antidote' to the exaggeration of the powers of the Fancy 'must be sought for in the collation of the present with the past'.[151] We must be Janus-faced, capable of achieving progress alongside continuity. Without 'antecedent knowledge', as he explains in *The Statesman's Manual*, 'Experience itself is but a cyclops walking backwards, under the fascination of the past'.[152]

Conclusion

We do not say that all unitary judgments are individually problematic. There are certainly instances in which, despite the fact that they cannot provide absolutely certainty or clarity, they are helpful in giving a relatively firm sense of direction to the law's addressees. Nor is it our intention to advocate disagreement for disagreement's sake; where judges are genuinely able to find consensus, they should express that consensus. Our concern with the unitary judgment practice is that the seductiveness of its false promises to secure clarity and certainty may see it rise, unchecked, to a position of dominance within the judicial landscape. For whilst the impact of suppressed disagreement within a single case may not be widely felt, its impact across the body of cases affected by this resurgent practice is likely to be profound. Just as judges must be free to express consensus, so they must be free also to express not only strong dissent but also minor disagreement, even if only as to the route by which one reaches an agreed conclusion. The alternative is that the institutional pressure to produce unitary judgments insidiously stifles debate, which – as we have seen – can lead to important legal issues going not only unanswered, but wholly unrecognised. This does a disservice to all. But it will be most keenly felt by the law's addressees, who will have to live in the sort of visuocentric, formalist dystopia that Coleridge foresaw. Fortunately, he bequeathed to us an account of the tools needed to comprehend the need to escape it, and to prosecute that escape. It is up to the judiciary now to use them.

[150] Lee (n 78) makes an argument in defence of concurring judgments that raises a similar point about the usefulness of concurring judgments in buttressing a majority conclusion.
[151] *LS* (n 3) 10.
[152] *LS* (n 3) 43.