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**Legal Studies**

*Research Paper No. 829344*

**Harry Potter and the Law**

**Jeffrey Thomas**

*University of Missouri-Kansas City School of Law*

**Danaya C. Wright**

*University of Florida Levin College of Law*

**James Charles Smith**

*University of Georgia Law School*

**Aaron Schwabach**

*Thomas Jefferson School of Law*

**Joel Fishman**

*Duquesne University*

**Daniel Austin Green**

*Liberty Fund, Inc.*

**Timothy S. Hall**

*University of Louisville - Louis D. Brandeis School of Law*

**Andrew P. Morriss**

*University of Illinois College of Law; PERC - Property and Environment Research Center; George Mason University - Mercatus Center*

**Benjamin Barton**

*University of Tennessee, Knoxville - College of Law*

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2005 Research Paper Series

# *Harry Potter and the Law*

Jeff Thomas, Danaya Wright, James Charles Smith, Aaron Schwabach, Joel Fishman, Daniel Austin Green, Timothy S. Hall, and Andrew P. Morriss, Benjamin Barton, *Harry Potter and the Law*, TEXAS WESLEYAN L. REV. (forthcoming 2006)

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## Harry Potter and the Law

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### Introduction: the Significance of Harry Potter (Jeffrey E. Thomas)

J.K. Rowling's *Harry Potter* novels are narratives befitting the conference on *The Power of Stories: Intersections of Law, Culture & Literature*, co-sponsored by Texas Wesley University School of Law. While not directly about legal themes, Rowling creates a "magical world" complete with laws and legal institutions.<sup>1</sup> Hundreds of millions of readers have immersed themselves in this world. As of April 2005, more than 270 million copies of the *Harry Potter* books had been sold worldwide.<sup>2</sup> The books have been translated into 62 languages<sup>3</sup> and sold in 200 countries.<sup>4</sup> More than 10 million copies of the most recent installment, *Harry Potter and the Half-Blood Prince*, were printed for the first printing, which may be the largest first edition printing ever for a general interest hardcover book.<sup>5</sup> And apparently, children are reading these books. Some 60% of American children between the ages of 6 and 17 have read at least one of the *Harry Potter*

<sup>1</sup> See, e.g., Susan Hall, *Harry Potter and the Rule of Law: the Central Weakness of Legal Concepts in the Wizard World*, in *READING HARRY POTTER: CRITICAL ESSAYS* at 147-62 (Giselle Liza Anatol, ed. 2003) (Contributions to the Study of Popular Culture, Number 78); Joseph, Paul R. and Lynn E. Wolf, *The Law in Harry Potter: A System Not Even a Muggle Could Love*, 34 U. TOL. L. REV. 193 (2003); William P. MacNeil, "Kidlit" as "Law-and-Lit": *Harry Potter and the Scales of Justice*, 14 L. & LIT. 545 (2002).

<sup>2</sup> Sara Nelson, *We've Got Harry's Number*, Pub. Weekly, April 4, 2005, at 4. Of that number, approximately 102 million copies are in print in the U.S. Carol Memmott, "Potter" Print-Run Record Goes "Poof!", USA Today, Mar. 31, 2005, at \_\_\_\_.

<sup>3</sup> Memmott, *supra* note 1.

<sup>4</sup> Nancy Gibbs, *The Real Magic of Harry Potter*, Time, June 23, 2003, at 60.

<sup>5</sup> Edward Wyatt, *They're Just Wild About Harry*, N.Y. Time, Mar. 31, 2005, at E2. USA Today reported that this was a record, which was more than 4 million more copies than the previous record set by the first-run print for the fifth book, *Harry Potter and the Order of the Phoenix*. See Memmott, *supra* note 1. The N.Y Times apparently tried to verify this claim, but found that there were "few authoritative sources." Wyatt, *supra*.

books.<sup>6</sup> These numbers led *Time* to declare the Harry Potter books “the most popular series ever written.”<sup>7</sup>

The sheer size of the Harry Potter phenomenon is enough to make it worthy of consideration, but its cultural significance is more than its numbers. While children’s literature may be discounted by some law and literature scholars (this conference being a notable exception), children’s literature is culturally significant because children are in the process of developing their moral selves, and therefore may be more influenced by stories than would adults.<sup>8</sup> Moreover, there are millions of adults who are devoted Harry Potter fans as well. Eighteen percent of American adults have read at least one Harry Potter book.<sup>9</sup> Fans, adults and children alike, were so devoted that they bought nearly 5 million copies of *Harry Potter and the Order of the Phoenix* (the fifth book) within the first 24 hours of its release.<sup>10</sup>

This collection of essays about the law and Harry Potter explores the intersections between law, culture and the Harry Potter stories. The collection begins with a group of essays that, consistent with some of the previous legal literature,<sup>11</sup> are about the limitations of law and legal institutions as depicted in the Harry Potter narratives. The essays by James Charles Smith<sup>12</sup> and Danaya Wright<sup>13</sup> begin by considering the depiction of families in the narratives, and show the limited role of law for family relationships. The essay by Benjamin H. Barton<sup>14</sup> considers a more legalistic institution, the Ministry of Magic, an institution depicted with major failings. The essay by Aaron Schwabach<sup>15</sup>

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<sup>6</sup> *How Things Add Up For Harry Potter*, Baltimore Sun, June 6, 2004, 2F.

<sup>7</sup> Gibbs, *supra* note 2.

<sup>8</sup> See Lana A. Whited, with M. Katherine Grimes, *What Would Harry Do? J.K. Rowling and Lawrence Kohlberg’s Theories of Moral Development*, in *THE IVORY TOWER AND HARRY POTTER*, at 182-208 (2003) (exploring the way that the Harry Potter narratives allow children to explore the stages of moral development in the model developed by Harvard psychologist Lawrence Kohlberg). For one reader’s description of “growing up” with Harry Potter, see Kaavya Viswanathan, *Growing Up With a Dose of Magic*, N.Y. TIMES, July 31, 2005, at 4.

<sup>9</sup> *How Things Add Up For Harry Potter*, *supra* note 5.

<sup>10</sup> Wyatt, *supra* note 4; see also *How Things Add Up for Harry Potter*, *supra* note 5.

<sup>11</sup> See Susan Hall, *supra* note 1; Joseph, Paul R. and Lynn E. Wolf, *supra* note 1.

<sup>12</sup> John Byrd Martin Professor, University of Georgia School of Law. Email: jim@uga.edu. B.A. 1974, Saint Olaf College; J.D. 1977, University of Texas. I would like to thank my daughters, Nicole and Kristin, for encouraging me to read the first book in the series, *The Sorcerer’s Stone*. After that, I was hooked.

<sup>13</sup> Professor of Law, University of Florida Levin College of Law, Gainesville, Florida. I would like to thank Jeffrey Thomas for his hard work putting together this symposium and the Levin College of Law for its support of my work in this and related areas.

<sup>14</sup> Associate Professor of Law, University of Tennessee College of Law. B.A. 1991, Haverford College; J.D. 1996, University of Michigan. The author gives special thanks to Indya Kincannon, Tom Galligan, Glenn Reynolds, the participants of faculty forums at The University of Tennessee College of Law, and the Law and Literature Conference, Gloucester, UK, 2005, the University of Tennessee College of Law for generous research support, and the Honorable Diana Gribbon Motz.

<sup>15</sup> Professor of Law, Thomas Jefferson School of Law. J.D., 1989, Boalt Hall; B.A., 1985, Antioch College. I’d like to thank my daughters Veronica and Jessica Schwabach, my sisters Karen and Jennifer Schwabach, and my spouse Qienyuan Zhou for their patience with this project and many long discussions on arcane points of Potter lore, and I’d especially like to thank Jeffrey Thomas for coming up with the whole mad scheme in the first place and seeing it through. Harry himself couldn’t have been more dedicated.

looks at the operation of the legal system through the lens of the “unforgivable curses” and contends that they show an arbitrariness contrary to the rule of law. Similarly, Joel Fishman’s<sup>16</sup> essay explores the arbitrariness of punishment in the narratives. A second essay by James Charles Smith takes an interesting middle ground. It explores the legal status and wizarding conventions applicable to house elves, and points out the ambiguity in the narratives as to whether the treatment of house elves is good or bad. Likewise, the essay by Daniel Austin Green<sup>17</sup> uses the narratives to explore the roles of excuse and justification in their relationship with legal authority and rule of law.

The next several essays find some positive aspects to the depiction of law and legal institutions in the narratives. A second essay by Timothy S. Hall<sup>18</sup> shows how the rule used to free Dobby the house elf can be used as a pedagogical tool to illustrate the importance of intent in contract law. The essay by Jeffrey E. Thomas<sup>19</sup> suggests that the negative and satirical depictions of law and legal institutions helps readers to focus on the importance of individual accountability in making moral decisions. The essay by Andrew Morriss<sup>20</sup> also examines moral decisions. He contends that in spite of legal and institutional limitations, the wizarding world allows for individual moral choice, which is a recognition of the importance of individual liberty.

This group of essays concludes by returning to one of the themes of the *Power of Stories* conference, the Dick Whittington story.<sup>21</sup> A second essay by Timothy S. Hall<sup>22</sup> compares the Harry Potter narratives to the Dick Whittington story, which reflects an interesting cultural evolution from Tudor to modern time.

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<sup>16</sup> Assistant Director for Lawyer Services, Duquesne University Center for Legal Information/Allegheny County Law Library, Pittsburgh, PA; M.A., Ph.D., University of Wisconsin-Madison, 1969, 1977; M.L.S., Queens College (CUNY), 1973

<sup>17</sup> B.S., 2001, University of Tennessee at Chattanooga; M.A., 2005, The New School for Social Research; J.D. *expected* January 2006, Benjamin N. Cardozo School of Law.

<sup>18</sup> Associate Professor of Law, Louis D. Brandeis School of Law at the University of Louisville.

<sup>19</sup> Vice Provost for Faculty Affairs, Associate Dean for Academic Affairs, and Professor of Law, University of Missouri – Kansas City School of Law. Email: [thomasje@umkc.edu](mailto:thomasje@umkc.edu). B.A., 1983, Loyola Marymount University; J.D., 1986, University of California, Berkeley (Boalt Hall). I am grateful to my family, who are all Harry Potter fans, for their input and assistance. I also wish to thank for research assistance Lawrence MacLachlan, Associate Director, and Nancy Morgan, Manager of Public Services, both of the Leon E. Bloch Law Library.

<sup>20</sup> Galen J. Roush Professor of Business Law and Regulation and Director, Center for Business Law & Regulation, Case Western Reserve University School of Law. Email: [andrew.morriss@case.edu](mailto:andrew.morriss@case.edu). A.B. 1981, Princeton; J.D., M. Pub. Aff. 1984, University of Texas at Austin; Ph.D. (Economics) 1994, Massachusetts Institute of Technology. Thanks to Olivia Odell for able research assistance, to Dean Gerald Korngold for research support, and to Julia Morriss for setting me straight about a number of details of the Harry Potter novels. This article draws its basic theme from Andrew P. Morriss, *Why Classical Liberals Should Love Harry Potter*, 50 IDEAS ON LIBERTY 12 (November 2000) and *Calibrating Moral Choice: A Classical Liberal Reading of the Role of Law in the Harry Potter Series* (unpublished manuscript on file with author).

<sup>21</sup> The conference was held in Gloucester, England, where the Dick Whittington story originated some 400 years ago. For more about the Dick Whittington story, see [cross reference to articles in the symposium – e.g. Hershoff]

<sup>22</sup> Associate Professor of Law, Louis D. Brandeis School of Law at the University of Louisville.

### Family Wealth and Moral Character (James Charles Smith)

The *Harry Potter* series opens in the first book, *The Sorcerer's Stone*, with a picture of family life in the Muggle world. Harry has lived with his relatives, the Dursleys on Privet Drive, since he was orphaned in infancy at the hands of Lord Voldemort. It is summer, and Harry must endure life with the Dursleys awhile longer before he may leave to attend Hogwarts, the wizarding school. Each subsequent book starts at the same scene, one year later, preceding another Hogwarts school year.

A large part of the humor of the series is seeing how poorly the Dursleys treat Harry. Their mistreatment of Harry is highlighted by a contrast. The Dursleys are raising another son, their biological son, Dudley, who appears close to Harry in age. They lavish attention, praise, and wealth on Dudley. Harry on the other hand is mostly ignored. When the parents do notice him, they mete out criticism and punishment to a boy who is kind hearted and basically well behaved.

In their shabby treatment of Harry, do the Dursleys observe or violate recognized norms of family life? Behavioral norms are of many types, and they have multiple sources.<sup>23</sup> One often-used classification distinguishes legal norms from cultural and societal norms that are extralegal.<sup>24</sup> Today most parents who raise multiple children follow, or attempt to follow, an ethic of equal or equitable treatment.<sup>25</sup> Few parents strive for “strict equality,” recognizing that each child is unique and different, with needs and desires not necessarily identical to those of siblings.<sup>26</sup> Also, parenting strategies evolve over time as parents gain experience (i.e., the kids “break them in”) and their circumstances change.<sup>27</sup> For this reason, a first child’s handling is usually not precisely the same as that afforded subsequent children.<sup>28</sup> Nevertheless, most parents generally seek to apportion fairly their attention, encouragement, and resources among the children.<sup>29</sup> From this standpoint, the Dursleys plainly violate widely shared norms. Most parents would not treat Harry the way they do, even if he has entered the family not as a biological child but as a nephew, adopted through an informal mechanism. This explains Dumbledore’s justifiable outrage in *The Half-Blood Prince* when he visits the Dursleys to retrieve Harry.

Harry’s mistreatment by his Muggle family does not amount to a legal wrong. Notice that Dumbledore did not threaten the Dursleys with legal proceedings, either in Muggle or Wizard tribunals. The ethic of equitable treatment is societal and lacks a legal basis in Anglo-American family law.<sup>30</sup> Family law has many facets; it is an amalgam of legal

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<sup>23</sup> 16 International Encyclopedia of the Social and Behavioral Sciences, Norms 10714-10720 (2001).

<sup>24</sup> E.g., Robert Ellickson, Of Coase and Cattle: Dispute Resolution among Neighbors in Shasta County, 38 Stan. L. Rev. 623 (1986).

<sup>25</sup> Benjamin Spock, The Common Sense Book of Baby and Child Care (1946).

<sup>26</sup> NO NOTE IS NECESSARY HERE.

<sup>27</sup> See id.

<sup>28</sup> NO NOTE IS NECESSARY HERE.

<sup>29</sup> See Jeffrey P. Rosenfeld, Disinheritance and Will Contests, in FAMILY SYSTEMS AND INHERITANCE PATTERNS 77 (Judith N. Cates & Marvin B. Sussman eds., 1982).

<sup>30</sup> Ira Mark Ellman, et al., Family Law: Cases, Text, Problems 459-475 (4<sup>th</sup> ed. 2004).

rules and principles.<sup>31</sup> My focus is the lens of property law – in particular, family property norms – although it is plain that the Dursleys also have not violated non-property-based family law norms.

*Harry Potter* gives an illustration of how parents distribute property within a family. What Mr and Mrs Dursley do is legal, but unfair. The law does not have an equality principle when it comes to how parents choose to spend money on their children. Dudley is given everything. Harry is given little property -- he wears old clothes and sleeps in a cupboard under the stairs.

The *Harry Potter* books give us a reason why Harry is given so little. The Dursleys refuse to accept him because he's not their natural child. He's a nephew, who they feel has been thrust upon them as a consequence of his parents' poor choices, which led to their deaths.<sup>32</sup> But the legal rule is the same. The Dursleys could choose to treat Dudley much better than Harry, even if both boys were their biological sons. The English doctrine of inheritance known as primogeniture<sup>33</sup> illustrates the point. Primogeniture epitomized classic English favoritism to the eldest son, who inherited the parent's real property to the exclusion of all other siblings.<sup>34</sup> England did not abolish primogeniture until 1925.<sup>35</sup> Since then, the social attitudes that had sanctioned the practice have withered, but have not evaporated completely.<sup>36</sup> Today parents may disinherit children, treating them differently after death,<sup>37</sup> just as they may treat them differently during life.

The only limit the law places on parents' freedom to discriminate in allocating resources unevenly is the duty of support. Here the Dursleys comply with that standard, as it's commonly interpreted. He has clothes, food, and a place to sleep inside. That's all he needs. It doesn't matter how much Dudley gets.

Rowling employs a common literary theme in portraying Harry and Dudley. Dudley is the favored son, but the neglected, discriminated-against child turns out to be the winner.

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<sup>31</sup> See generally *id.* at 3-20.

<sup>32</sup> This fits the story into the classic literary mold of the orphan, who receives scant care and attention but fights to overcome all the odds. See Timothy S. Hall, *Harry Potter and Dick Whittington: Similarities and Divergences*, *infra* at \_\_\_\_.

<sup>33</sup> See Mark A. Senn, *English Life and Law in the Time of the Black Death*, 38 *Real Prop. Prob. & Tr. J.* 507, 558-60 (2003).

<sup>34</sup> From our modern perspective, primogeniture strikes us as harsh and unfair. Perhaps it was, but the practice served economic and social needs of the society that followed it. Primogeniture certainly does not prove that families did not love and nurture their other children. Didn't most English families seek to provide suitable opportunities for all other children? For younger sons, the traditional channel was military service and clergy. For daughters, obtaining proper marriages was the norm. FRANCES GEIS & JOSEPH GEIS, *MARRIAGE IN THE FAMILY IN THE MIDDLE AGES* 142-45 (1987).

<sup>35</sup> *Administration of Estates Act, 1925*, 13 *Halsburg's Statutes of Eng.* 38, 70 (3d ed. 1969).

<sup>36</sup> See Karen Rowlingson & Stephen McKay, *Attitudes to Inheritance in Britain* (2005); Deborah A. Batts, *I Didn't Ask To Be Born: The American Law of Disinheritance and a Proposal for Change To a System of Protected Inheritance* 41 *Hastings L.J.* 1197, 1215-1216 (1990).

<sup>37</sup> Judith G. McMullen, *Father (Or Mother) Knows Best: An Argument Against Including Post-Majority Educational Expenses in Court-Ordered Child Support*, 34 *Ind. L. Rev.* 343, 354-62 (2003).



Harry follows in the footsteps of Dick Whittington<sup>38</sup> and fictitious characters such as Oliver Twist,<sup>39</sup> Jane Eyre,<sup>40</sup> and Cinderella.<sup>41</sup> The years of misery inflicted upon Harry by the Dursleys helped to forge Harry's character and humble nature. In contrast, the Dursleys showered Dudley with everything. Yet one almost feels sorry for the spoiled brat. His corpulence is a manifestation of excessive wealth. Family wealth does not build character. Rather, it has the opposite effect, leading to sloth and decadence.

**Collapsing Liberalism's Public/Private Divide: Voldemort's War on the Family.  
(Danaya Wright)**

Were I a sociologist,<sup>42</sup> I would spend a great deal of time expounding upon the different types of families that J.K. Rowling has created in her Harry Potter series,<sup>43</sup> from the uptight middle-class Dursleys, to the interracial families of Hagrid and Lord Voldemort, to the upper-crust Black family, and to the chaotic working-class Weasley family. But as a legal scholar setting out to explore themes of law in Harry Potter, I am acutely aware of the absence of family law conflicts<sup>44</sup> in these different family structures and relationships. There is no divorce, there is no wrangling over custody of children, and there is no apparent legal intervention in the inter-generational transfer of wealth. If there is marriage, it is something that has occurred in the past and either resulted in successful couples like the Weasleys, the Malfoys, the Dursleys, and the Potters, or it resulted in unsuccessful relationships that ultimately ended long before the books began, as with the marriages of Voldemort's parents the Riddles (which ended by death), and Hagrid's parents (which ended by separation). Yet the series begins with an event that is quintessentially legal: the placement of the orphaned Harry with his aunt and uncle Dursley.

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<sup>38</sup> See Timothy S. Hall, *Harry Potter and Dick Whittington: Similarities and Divergences*, *infra* at \_\_; Stephen Alton, *Rags to Riches Stories*, \_\_ *Tex. Wesleyan L. Rev.* \_\_ (2005); Helen Hershkoff, *The Dick Whittington Story: Theories of Poor Relief, Social Ambition, and Possibilities for Class Transformation*, \_\_ *Tex. Wesleyan L. Rev.* \_\_ (2005).

<sup>39</sup> Charles Dickens, *Oliver Twist* (1838).

<sup>40</sup> Charlotte Brontë, *Jane Eyre* (1847).

<sup>41</sup> The fairy tale *Cinderella* has multiple versions, dating back at least to China in 860 A.D. Modern culture identifies most closely with the Disney classic animated movie, *Cinderella* (1950). Prior to Disney, the best known versions was French author Charles Perrault, *Cendrillon* (*Cinderella*) (1697).

<sup>42</sup> I am not a sociologist, but my partner is, so I feel that enough of sociology's methodology has rubbed off that I can allege all sorts of wild conclusions about what sociologists might do. Sociology, according to a friend, is the process of "taking the obvious and putting it into impenetrable prose." I can only hope that legal scholarship isn't even more impenetrable than sociological scholarship.

<sup>43</sup> There are currently six, out of a proposed seven, books in the series: *Harry Potter and the Sorcerer's Stone* (1997) (hereafter SS), *Harry Potter and the Chamber of Secrets* (1998) (hereafter CS), *Harry Potter and the Prisoner of Azkaban* (1999) (hereafter PA), *Harry Potter and the Goblet of Fire* (2000) (hereafter GF), *Harry Potter and the Order of the Phoenix* (2003) (hereafter OP), and *Harry Potter and the Half-Blood Prince* (2005) (hereafter HBP).

<sup>44</sup> Although in other sources I critique the single-minded focus of family law on the marriage/divorce, property, and child custody triad, even more remote areas of family law, like health care coverage, housing, elder care, adoption, inheritance, and the like are rarely explicitly raised in the Harry Potter books. While the books are rife with criminal law and contract law issues, there are very few even tangential family-law issues raised by the events of the novels. See Danaya C. Wright, "'Well Behaved Women Don't Make History:' Rethinking English Family, Law, and History," 19 *Wisc. Women's Law Journal* 211 (2004).

Rowling's obvious fascination with different family structures and her relatively strong sense of an isolated, private sphere that is free of state intervention seems in keeping with traditional liberal values of the public/private divide.<sup>45</sup> Yet her rejection of state interference in the private sphere of the family does not correspond to an autonomous state that is focused on the public sphere. Where liberalism separates the private world of the family from the public world of the state, Rowling has created strong families and a weak state which seems to be subsumed into a series of family dynasties. Thus, while she does not have family law – i.e. state intervention in the family – she instead has created a family-based state. In exploring this collapsed public/private divide we begin by considering the relation between families and family law in these books.

Book I begins with Harry's placement with the Dursleys. Here we have an infant child whose parents have been killed by Lord Voldemort left on the doorstep of his aunt and uncle's house, just like countless orphans in nineteenth-century English literature.<sup>46</sup> But unlike nineteenth-century England, the muggle world of Harry Potter has rigid procedures for the placement and adoption of orphans.<sup>47</sup> Although the law might presume that placement with blood relatives would be in the best interests of an orphaned infant, there would be home visits, trips to the judge, and reams of paperwork before Harry would spend his first night with the Dursleys in muggle England today.<sup>48</sup> But in Rowling's world, a single wizard, Professor Albus Dumbledore, even without the imprimatur of the Ministry of Magic, and before most people even knew of the Potters' deaths, makes a unilateral decision that Harry should be taken to his aunt and uncle, that "[t]hey're the only family he has left now" and, most important, that "[i]t's the best place for him."<sup>49</sup> That decision, moreover, is not transmitted through a court document, nor are any instructions for Harry's upbringing given to his new caregivers. As Dumbledore explains: "I've written them a letter."<sup>50</sup>

This event sets the tone for the remainder of the books: family law, at least the family law of the muggle world, is noticeably absent from the wizarding world Rowling has created. But in the absence of family law, how do intra-familial decisions get made? For instance:

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<sup>45</sup> See traditional political and feminist theory on the rhetoric of the public and private spheres. See e.g. Linda Kerber, "Separate Spheres, Female Worlds, Women's Place: The Rhetoric of Women's History," 75 J. Am. Hist. 9 (1988); Wright, id. at 234-239.

<sup>46</sup> Rowling is clearly alluding to the wealth of nineteenth-century orphan novels in the *Bildungsroman* genre. *Jane Eyre*, *Emma*, *The Mill on the Floss*, *Oliver Twist*, *Great Expectations*, *Wuthering Heights*, *Tristram Shandy*, and many many other nineteenth-century novels are coming-of-age stories of young children, mostly orphans, raised by relatives, strangers, institutions, and the streets. Rowling has created the same kind of Dickensian world for Harry Potter as existed for David Copperfield and Oliver Twist.

<sup>47</sup> Although England was a late entry into the adoption arena, an orphaned child like Harry would be evaluated by experts, processed through the judicial system, and placed with his relatives only if they made the effort to adopt him.

<sup>48</sup> See Adoption, 5(3) Halsbury's Laws of England (4<sup>th</sup> ed.), 501-700 (2001) amended by Adoption of Children Act of 2002.

<sup>49</sup> *Sorcerer's Stone*, 16. Moreover, we learn in *Half Blood Prince* that it is the best place for Harry because Dumbledore has bewitched the house, not because there is some inherent protective force there, or because blood relatives are in the best interests of children. Rather, Dumbledore has artificially made it the best place for Harry. See *HBP*, 55

<sup>50</sup> *Id.*

## Harry Potter and the Law

- What law requires each wizard child to attend wizarding school at age 11?
- Children are signed up to attend Hogwarts at birth. By whom? Parents or the Ministry or the Headmaster?
- Does Harry have gold in Gringotts because someone liquidated his parents' estates? Who? – Muggles or the Ministry of Magic?
- Do house-elves have families other than the ones they work for?
- Did Hagrid's parents get divorced or did they informally separate?
- Is there any official state involvement in Neville Longbottom's living arrangement with his grandmother? Why doesn't Harry live with his grandparents? Does he have any?
- Do adult wizards marry? What kind of ceremony (religious or civil)?
- Although a parent or guardian's signature is needed before a child can visit Hogsmeade, why is no signature required to send a child to Hogwarts? Harry's decision to attend did not involve the approval of the Dursleys.
- Could Harry have chosen to live with his godfather, Sirius Black, had Sirius not been in hiding?

These questions, and many more, suggest that the wizarding world is fundamentally different from the muggle world in its use of state intervention in family relationships and family structure. Does a wizard child exist in the wizard world like a child in a village,<sup>51</sup> where village elders simply make decisions about appropriate family arrangements, such as what happens to the Potters' wealth upon their death, Harry's placement with his aunt and uncle, and whether Hagrid would stay with his muggle father or go off to France with his giant mother? The apparent absence of state action forces us ask even more fundamental questions about the relationship between the family and the state: namely, to what extent does the presence of wizardry and magic alter the family? And conversely, to what extent does wizardry and magic affect the state?

Because of limited space in this collection of essays, I only have time to highlight certain themes and events that help us see how Rowling has essentially flipped the public/private divide on its head. First, I would suggest that many authors, and female authors in particular, are uncomfortable with state intervention in family disputes.<sup>52</sup> In many of the classic English novels of the nineteenth century, a genre Rowling is clearly alluding to in

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<sup>51</sup> See Hillary Rodham Clinton, *It Takes A Village and Other Lessons Children Teach Us*, arguing that children today are raised better by a wide network of family and community adults.

<sup>52</sup> In my previous research on the development of English family law I was struck by a noticeable distinction between how female authors treat state intervention in the family and how male authors treat it. See Danaya C. Wright, "The Crisis of Child Custody: A History of the Birth of Family Law in England," 11 Colum. J. of Gender and the Law 175 (2002). For instance, throughout most of the nineteenth century, female authors like Anne Brönte (*The Tenant of Wildfell Hall*), Elizabeth Gaskell (*Wives and Daughters*), Margaret Oliphant (*The Marriage of Elinor*), and Mrs. Henry Wood (*East Lynne*), to name just a few, created plots involving family discord among husband and wife, all of which ended in informal, non-legal solutions. Male authors, on the other hand, including Thomas DeQuincey (*The Household Wreck*), Charles Dickens (*Bleak House*), and Anthony Trollope (*He Knew He Was Right*), often used lawyers, courts, and legal rules to create family tension and to sometimes resolve it. The assertion of legal rights to their child is the focal point of Trollope's *He Knew He Was Right*, even though final resolution occurred through the death of the father.

many of the scenes and events of her books, state intervention in family affairs is virtually unknown. Instead, novelists used dramatic plotting to create and solve family tensions. Often, an offending husband died by falling through a weak tread on the stairs, or an errant wife slowly died of brain fever. Death is a novelist's easy solution to discord, especially in a world in which critics decried depictions of family discord because it was believed to encourage family rupture, and therefore social instability, in the world of the readers.

Though Rowling is not writing in nineteenth-century England, her world of wizardry and magic evokes a very different type of social structure from the twenty-first century Muggle world. It is very much a world in which state power is weak and families tend to their own business. For instance, as we learn in *Half-Blood Prince*, Harry inherits No. 12 Grimmauld Place from his godfather because of Sirius' self-executing will. Unlike muggle wills, which require extensive probate and administration procedures, and which cannot guarantee that the true "will" of the deceased will be done, in the wizarding world a spell identifies who the true beneficiary will be. Dumbledore tells Harry while Kreacher is loudly exclaiming that he "won't, won't, won't" go to "the Potter brat," to "Give him an order." "If he has passed into your ownership, he will have to obey. If not, then we shall have to think of some other means of keeping him from his rightful mistress."<sup>53</sup>

Fortunately, Kreacher does obey Harry's order to "shut up," Harry is so identified as the true beneficiary, and thus No. 12 Grimmauld Place will not fall into the hands of Bellatrix Lestrange, Sirius' closest relative and murderer. But had Harry's order not worked, because Sirius' will was defective, the house would have passed not by wizarding laws of intestacy, but by "Black family tradition." Dumbledore explains that

the house was handed down the direct line, to the next male with the name of 'Black.' . . . While [Sirius'] will makes it perfectly plain that he wants you to have the house, it is nevertheless possible that some spell or enchantment has been set upon the place to ensure that it cannot be owned by anyone other than a pureblood.<sup>54</sup>

It would seem that "dead hand control"<sup>55</sup> is far more alive and well in the wizarding world than in the muggle world.<sup>56</sup> But more important than dead hand control is the fact that wizarding families exist as autonomous institutions that, in many respects, make their own rules and solve their own problems without oversight by a bureaucratic or

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<sup>53</sup> HBP, 52.

<sup>54</sup> Id. at 50.

<sup>55</sup> Dead Hand Control is a common theme in property and trusts law for exploring the appropriateness of legal rules that permit deceased landowners to control the disposition, use, and alienation of land long after their deaths.

<sup>56</sup> This is just one example of many in which Rowling has bypassed the opportunity for state intervention in family matters in favor of the benevolent intervention of Albus Dumbledore, or in favor of self-executing spells that insure the orderly disposition of family matters. For example, Harry's notice to attend Hogwarts, Dumbledore's defense of Harry's use of underage magic, and the emancipation of Dobby by tossing him a sock are all events with legal significance that do not entail formal legal intervention.

therapeutic state. It's not clear whether there is no divorce because the presence of magic insures that wizards don't make mistakes in choosing spouses, or because the presence of magic provides a mechanism interior to the family structure for fixing mistakes of this sort. But in any event, magic has apparently made the family unit more autonomous than is true in the muggle world.

At the same time, the strength of the wizarding family is mirrored by a weak and ineffectual state. As explored by other participants in this collection,<sup>57</sup> Rowling has created her incompetent and somewhat corrupt Ministry of Magic as a scathing critique of state institutions. Is it any wonder, given the weak, pompous, and easily-swayed Minister Cornelius Fudge, the pedantic bureaucrat Percy Weasley, the dictatorial counselor Dolores Umbridge and the empty-headed Barty Crouch that Rowling does not involve the state in matters of family creation or family breakdown? When the state does become involved, as it does in the operation of Hogwarts in Book 5, we see not only distrust, but downright corruption as Dolores Umbridge invokes a new ministry directive every time she feels thwarted by the power of the headmaster or the lack of cooperation by the students. The ministry dominates the press and attempts to dominate the educational system in order to control public opinion and academic freedom. Throughout all six books, Rowling has created a state that cannot be trusted with the simplest of matters, much less with the all-important decisions like the custody of the orphaned Harry.

In *Half Blood Prince*, however, Rowling evinces a dramatic shift from her incompetent state in the first five books, to a state that is exquisitely unsuited to fighting the new war being waged by Lord Voldemort. It is perhaps most telling that Rowling begins Book 6 with a meeting of the Muggle Prime Minister and the new Minister of Magic, rather than with the usual depiction of Harry's tedious, miserable life on Privet Drive. The shift from the private realm of the Dursley family to the public realm of the state signals a change in emphasis from the relatively isolated and autonomous spheres of family and state to a brave new world in which the private and public worlds merge over a new type of war: a private war against families. Lord Voldemort is not training an army to fight on a battlefield for a nationalistic cause. Instead, he is striking strategically at the heart of individual families in a targeted war against the tenuous power of a weak state made up of independent wizarding families held together only by their common characteristic – magic. The public/private divide that we are accustomed to in the modern Anglo-American world is clearly not Harry's world in which Voldemort's murderous powers are aimed at the individual families of numerous Hogwarts students and Rufus Scrimgour himself asks Harry to become a spokesperson for the Ministry only because his family has made the ultimate familial sacrifice. In the wizard world, power resides in the individual family units and not in the state.

But while it might be easy to understand Rowling's personal objections to state interference in the family from her history as a "welfare mother," her incompetent state becomes downright destructive of the social order by Book 6 when it cannot keep wizarding families safe. Consider the ridiculous instructions the Ministry distributes to

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<sup>57</sup> See Ben Barton's piece in this Symposium

families to develop codes to identify the person they are letting into their home as truly a family member. The absurdity of asking each other pre-established secrets rather reminds one of the U.S. government's admonition to buy plastic sheeting and duct tape in preparation for another terrorist attack.<sup>58</sup> As the evil effects of Voldemort's power strikes not at the Ministry but at individual families, the state's inability to battle the diffuse and personalized attacks of Voldemort's war highlights the incongruity of the public/private divide in the wizarding world.

Rowling has rejected family law, i.e. the interference of the state in the private sphere, partly because the state is corrupt and incompetent, but also because such interference is dangerous. When the Ministry is actually protecting Lord Voldemort, and Lucius Malfoy has the Minister's ear, the reader realizes that the only way to protect one's family and loved ones is through private action and personal courage. Despite the many references to Voldemort's prior rise to power as essentially fomenting a war between good wizards and Voldemort's death eaters, we quickly realize that this war is not like military operations between feuding nations. Rather, it is a series of personalized, private attacks in which success comes from essentially private actions: Lily's sacrificing her life for Harry's, Barty Crouch Jr's mother giving up her life for her son, and Draco's mother extracting an unbreakable vow from Snape to protect her son. People are killed not as soldiers in a traditional war, but as vendettas against muggle fathers, inter-family feuds (Bellatrix Lestrange and Sirius), and warped notions of the master-servant relations by the sycophantic Nagini and Wormtail. Power lies not in the traditional liberal state, but in the autonomous building blocks of social order – the family.

Rowling has flipped the traditional feminist mantra, "the personal is the political,"<sup>59</sup> in which personal decisions and personal relations are seen as fundamental expressions of public ordering, to "the political is the personal." In Rowling's world, the war the Ministry is fighting is an upside down attack on private families. Thus, just as she has rejected the fallible state in favor of a naturalized ordering in the wizarding world that, through spells and community acceptance, makes the private world of the family a thoroughly separate realm from the public world of the state, she has made the public state a tool in the war of private, inter-familial power struggles.

Rowling's rejection of state intervention in family disputes clearly comes from a profound distrust of the state's motives as well as a rejection of state authority to intervene in the personal realm of family decisionmaking. Certain things occur in Rowling's world almost by nature, as though it's just a matter of cosmic law that wizard children would be signed up for Hogwarts at birth. Others are structured by consensus among the relevant parties, as the spells over the Black family home that would keep it in the bloodline. And other matters, like Harry's placement with the Dursleys, is a matter of almost-divine intervention by a benevolent bystander. The state not only can do no right,

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<sup>58</sup> Mary Delach Leonard, "Yellow Alert: Are You Prepared for a Terrorist Attack? Do You Know where your Flashlight is?" *Everyday Magazine*, *St. Louis Post-Dispatch* (February 15, 2004).

<sup>59</sup> The "personal is the political" is a common feminist slogan, explored in depth by Catherine MacKinnon in "Privacy v. Equality: Beyond Roe v. Wade," in *Feminism Unmodified* 93, 100 (1987) (noting that "[t]he private is the public for those for whom the personal is the political.")

and therefore must be kept away from the important realm of family autonomy, but it actually does harm within the private realm of the family by having become a tool for the personal war Voldemort has waged. Traditional liberalism sees the family as the building block of social order. In the wizarding world the family unit is the locus of power and consequently the target of Voldemort's attacks. To a great extent, the state has become a pawn in Voldemort's war to destroy the family. Voldemort's war logically focuses on attacking individual families because his fear of weakness and dependence makes him challenge the strongest magical power, the power he constantly overestimates, which is the love of family.<sup>60</sup>

### Harry Potter and the Half-Crazed Bureaucracy (Benjamin H. Barton)

As perhaps the best selling and most influential children's novels of all time,<sup>61</sup> it is well worth considering what Rowling's vision of the wizarding world tells us about our own culture? In this essay I briefly discuss some of what Rowling tells us about government in the Harry Potter novels through her depiction of the Ministry of Magic.<sup>62</sup> In a nutshell, Rowling has very little use for central government, and through satire and later, darker commentaries, draws a portrait of government as a non-democratic, inefficient, and frequently flatly dishonest, bureaucracy.

There are several notable features of Rowling's portrait of the Ministry of Magic. The first is what the Ministry is not. The Ministry is not democratic. At no point in any of the six Harry Potter books is an election mentioned. To the contrary, in Book Six Cornelius Fudge is replaced as Minister of Magic with a reference to his being "sacked," all with no reference to an election.<sup>63</sup> In conjunction to suggestions that Dumbledore had been recruited to be minister of magic at one point,<sup>64</sup> and had later been fired from the Wizengamot,<sup>65</sup> Rowling has repeatedly skipped over opportunities to have elections.

The Ministry is not a classic executive, legislative, or judicial body.<sup>66</sup> There does appear to be a law-making function, but the descriptions of that process sound more like administrative rule-making than any kind of deliberative or democratic legislative action. Similarly, there is a "Minister of Magic" that heads up the various departments of the ministry, but the minister resembles an agency head more than a President or Prime Minister.

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<sup>60</sup> There are many similarities in the orphan status of Voldemort and Harry, but Harry has found substitute family in Sirius, the Weasleys, and Professor Dumbledore, where Voldemort found none. I predict that the fatherly love Dumbledore bestowed on Harry will give him the magical power to defeat Voldemort.

<sup>61</sup> See *supra* notes 1-6. For a discussion on the influence of these novels, see **cross reference to other essays**.

<sup>62</sup> This essay assumes a baseline of Harry Potter knowledge. The uninitiated may wish to consult The Leaky Cauldron, at <http://www.the-leaky-cauldron.org/>.

<sup>63</sup> See J.K. ROWLING, HARRY POTTER AND THE HALF-BLOOD PRINCE 15-18 (2005).

<sup>64</sup> See J.K. ROWLING, HARRY POTTER AND THE SORCERER'S STONE 64-65 (1997).

<sup>65</sup> See J.K. ROWLING, HARRY POTTER AND THE ORDER OF THE PHOENIX 95 (2003).

<sup>66</sup> The Wizengamot, where Harry is tried in book five, appears to be the main adjudicatory body in the wizarding world.

These statements of what the Ministry is not help us to hone in on what Rowling's Ministry of Magic most closely resembles: a modern, western bureaucracy. The interesting thing about Rowling's depiction is that she conflates government and bureaucracy to the point that in the wizarding world there is no government outside of bureaucracy. Given the general unpopularity of bureaucrats and bureaucracy, this choice alone is quite striking.

When we consider Rowling's portrait of the bureaucrats themselves, however, we see a truly dark vision of central government. The most obvious example is Cornelius Fudge, a classic "self-interested" bureaucrat if there ever was one.<sup>67</sup> When we first meet Fudge he is a caricature of a politician/bureaucrat. He grants Harry special treatment in both Books 3 and 4 based on his fame, but overall seems to be a genial "bungler."<sup>68</sup> A dark side to Fudge's favoritism is also suggested: the access and power of the Malfoy family. The end of Book Four, and then Book Five, show a substantially different picture. Fudge transforms from a mocking portrait into an out-of-control dictator: he marginalizes Dumbledore and does everything in his power to destroy and discredit Harry. Much of these actions are out of a paranoid fear that Dumbledore and Harry want to depose him. It is clear that all that matters to Fudge is his own power. He sees every new development in light of that goal.

Similarly, Delores Umbridge is another power-hungry bureaucrat. Umbridge's rule over Hogwarts is both hilarious and disturbing. She changes the rules with impunity, and is willing to do anything to increase her prestige within the ministry and her control over Hogwarts. The most glaring examples are her torturing of Harry for lying, and the decision to set dementors loose in Little Whinging.

Probably the saddest bureaucrat is Percy Weasley. He starts the books as a flawed, but likable social climber and rule-lover, but as a Weasley we have a natural affinity and sympathy for him. By Books five and six, however, he has abandoned his friends and family in the blind pursuit of prestige and power. Since he is a character we originally root for, the transition is a particularly stark vision of what government does to those who join too wholeheartedly.

Lastly, consider the "good" bureaucrat, Arthur Weasley. He cares about his work and is honest. We are told that he is very low in the pecking order, that he is poorly paid, and that his office is all the way down a dead end hall. The symbolism is clear: there is no quicker route to a dead end in government than being honest and decent.

Not only does Rowling criticize bureaucracy and government, she strips away many of the modern defenses of the bureaucratic state. First and foremost defenders of

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<sup>67</sup> The study of the self-interested bureaucrat began, in earnest, with WILLIAM A. NISKANEN, BUREAUCRACY: SERVANT OR MASTER? 22 (1973); *see also* WILLIAM A. NISKANEN, JR., BUREAUCRACY AND REPRESENTATIVE GOVERNMENT 36-42 (1971). For a short version of the public choice work on self-interested bureaucrats since Niskanen, *see* Benjamin H. Barton, *an Institutional analysis of Lawyer Regulation: Who Should Control Lawyer Regulation – Courts, Legislatures or the Market?*, 37 GA. L. REV. 1167, 1183-84 (2003).

<sup>68</sup> *See* SORCERER'S STONE, *supra* note \_\_\_, at 65.



bureaucracy tend to rely upon democratic institutions and elected officials to check any self-interested behavior within government.<sup>69</sup> Rowling defeats this notion by eliminating any elections.

Another defense disagrees that bureaucrats tend to be self-interested, and argues that bureaucrats tend to naturally care about the areas they govern.<sup>70</sup> Rowling's portrait of bureaucrats themselves, however, bars this defense.

Lastly, the wizarding world lacks even the potential check of a free press. In Book Five Rowling makes clear that the Daily Prophet is at least heavily influenced (if not flatly controlled) by the Ministry of Magic. The Daily Prophet is a willing participant in trashing the reputations of Harry and Dumbledore and suppressing the idea that Voldemort had returned. The lack of a free press is quite important: there is no way for the public to even really discover governmental abuses.

In short, Rowling presents a uniquely dark vision of central government. Since I assume that the wizarding world is a method of commenting upon our current government and society I find this portrait somewhat disturbing. There is obviously a great deal of modern skepticism about government, but Rowling presents a relatively extreme version of the libertarian critique of government.

As for the ramifications, it is always hard to tell. That being said, do not be surprised to find a substantial uptick of distrust of government and libertarianism as the Harry Potter generation grows into adulthood.

### **Unforgivable Curses and the Rule of Law (Aaron Schwabach)**

Harry's story is a story about law, and about a society trying to establish a rule of law. The Ministry of Magic's muddling misrule is not quite dictatorship, but it is not fair and just, either. Under the stress of the first war against Voldemort's Death Eaters the Ministry regime, like some Muggle governments in similar circumstances, adopted an ad hoc and inconsistent approach to justice.<sup>71</sup> In the years of peace since Voldemort's first downfall, it failed to build working legal structures. Now the Death Eaters are placing the Ministry under stress again, and even the good guys seem to follow personalities rather than rules.

One inconsistency in the Ministry's legal regime is the treatment of the Unforgivable Curses. The use of any of these curses on a human being is punishable by life

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<sup>69</sup> See, e.g., Daryl J. Levinson, *Empire-Building in Constitutional Law*, 118 HARV. L. REV. 915, 933-34 (2005) (noting political oversight as a check on self-interested bureaucracies).

<sup>70</sup> See, e.g., ANTHONY DOWNS, *INSIDE BUREAUCRACY* 50-84 (1989).

<sup>71</sup> See, e.g., Paul R. Joseph & Lynn E. Wolf, *The Law in Harry Potter: A System Not Even a Muggle Could Love*, 34 U. TOLEDO L. REV. 193 (2003); William P. MacNeil, "Kidlit" as "Law-and-Lit": *Harry Potter and the Scales of Justice*, 14 L. & LIT. 545 (2002); Susan Hall, "Harry Potter and the Rule of Law: The Central Weakness of Legal Concepts in the Wizard World," in *READING HARRY POTTER: CRITICAL ESSAYS* 147, (Westport, CT: Giselle Liza Anatol ed., Praeger 2003).

imprisonment in Azkaban.<sup>72</sup> The three Unforgivable Curses are the Imperius Curse, which allows the user to control the actions of the victim; the Cruciatus Curse, which causes unbearable pain; and the Killing Curse, which causes instant death. Yet these spells are not necessarily worse, from a moral perspective, than Memory Charms or the Dementor's Kiss.

*The Imperius Curse*

Barty Crouch Jr., a Death Eater impersonating Hogwarts professor Mad-Eye Moody, demonstrates the Unforgivable Curses to Harry's fourth-year Defense Against the Dark Arts class. At first he uses spiders, not humans, as subjects for all three curses, thus complying with the prohibition against the use of the curses on humans – but later he demonstrates the Imperius Curse on the students. Apparently either a Hogwarts professor or Dumbledore as Hogwarts headmaster has the authority to authorize this use of the curse for educational purposes, or else Dumbledore has chosen to disregard wizarding law. "Dumbledore wants you taught what it feels like," Crouch says.<sup>73</sup> Crouch might be lying, but he is teaching at Hogwarts under false pretenses as part of an absurdly elaborate plan to restore Lord Voldemort, and being caught in a lie would expose him; to lie unnecessarily would be a foolish risk. It seems more likely that Dumbledore has actually agreed to Moody's demonstration of the Curse.<sup>74</sup>

Unlike the Cruciatus and Killing Curses, the Imperius Curse can be overcome by its victim. The Curse is not completely effective on Harry the first time Crouch uses it, and by the end of a single class session Harry is able to resist it completely.<sup>75</sup> Later, he successfully resists the Curse when it is used against him by Voldemort.<sup>76</sup> Crouch has escaped his own father's Imperius Curse, and Barty Crouch Sr. in turn manages to escape Voldemort's Imperius Curse.<sup>77</sup> But Broderick Bode, a Ministry employee, struggles unsuccessfully, against an Imperius Curse placed on him by Lucius Malfoy.<sup>78</sup> There is a disturbing subtextual message here: Some wizards' wills are stronger than others.

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<sup>72</sup> J.K. ROWLING, HARRY POTTER AND THE GOBLET OF FIRE 217 (New York: Scholastic 2000)[hereinafter GOBLET OF FIRE]. The presumably coined name "Azkaban," with its vaguely Turkic or Arabic sound, raises disturbing echoes of Orientalism in other works of British children's literature, most notably the codedly Islamic Calormenians in C.S. Lewis's Narnia stories. On Orientalism generally, see Edward Saïd, Orientalism (New York: Vintage Books, 1979).

<sup>73</sup> GOBLET OF FIRE 230; see also Lana A. Whited & M. Katherine Grimes, "What Would Harry Do? J.K. Rowling and Lawrence Kohlberg's Theories of Moral Development," in THE IVORY TOWER AND HARRY POTTER: PERSPECTIVES ON A LITERARY PHENOMENON 182, 194 (Lana A. Whited ed., U. of Missouri Press 2002)(paragraph ending with "Hermione is destined to be Head Girl.")

<sup>74</sup> The Ministry, however, was apparently not informed of this in advance and would not have approved: The ministry stooge Dolores Umbridge, who takes over the class in Harry's fifth year, says "It is my understanding that my predecessor not only performed illegal curses in front of you, he actually performed them on you[.]" J.K. ROWLING, HARRY POTTER AND THE ORDER OF THE PHOENIX 243 (New York: Scholastic 2003)[hereinafter ORDER OF THE PHOENIX](emphasis in original).

<sup>75</sup> GOBLET OF FIRE 232, 661.

<sup>76</sup> GOBLET OF FIRE 661.

<sup>77</sup> GOBLET OF FIRE 688.

<sup>78</sup> ORDER OF THE PHOENIX 585.

The moral logic behind the Unforgivability of the Imperius Curse is straightforward: the Imperius Curse is a crime against free will. What is surprising is not that the Imperius Curse is Unforgivable, but that the Ministry so openly tolerates other crimes against free will, particularly the enslavement of house elves,<sup>79</sup> although enslavement is universally recognized as a crime<sup>80</sup> and has been illegal in England for centuries.<sup>81</sup>

Dumbledore places free will at the apex of his value system: “It is our choices, Harry, that show what we truly are[.]”<sup>82</sup> A number of philosophical reactions to this statement are possible: The characters, most of whom are children, are often moved by forces beyond their control or knowledge; and many philosophers, from fundamentalists to postmodernists, question the very existence of free will.<sup>83</sup> But for lawyers what is more worrying is that Dumbledore, like the Ministry he sometimes opposes, also discriminates against house-elves: “Kreacher is what he has been made by wizards, Harry,” said Dumbledore. “Yes, he is to be pitied. His existence has been as miserable as your friend Dobby’s.”<sup>84</sup>

This soft racism undermines Dumbledore’s earlier assertion. Dobby, despite his suffering, has not chosen to harm anyone, while Kreacher has, despite other options, chosen to ally himself with Death Eaters, to injure Buckbeak, and to betray Sirius to his death. To place all of the blame for Kreacher’s crimes on wizarding society seems to deny the validity of Kreacher’s choices. Just as the Ministry’s message is “Everyone should have the freedom to choose their actions – except house-elves,” Dumbledore’s is “Everyone is responsible for the consequences of their exercise of free will – except house-elves.”<sup>85</sup>

### *The Cruciatus Curse*

Crouch next demonstrates the Cruciatus Curse, which causes pain.<sup>86</sup> He knows the illegality of this spell particularly well – he was sentenced to Azkaban for life, in a “trial”

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<sup>79</sup> Much has been written elsewhere about the house-elves, whose plight and narrative treatment present one of the most disturbing aspects of the wizarding world. See, e.g., Farah Mendlesohn, “Crowning the King: Harry Potter and the Construction of Authority,” in *THE IVORY TOWER AND HARRY POTTER: PERSPECTIVES ON A LITERARY PHENOMENON* 159, 181 (Columbia, MO: University of Missouri Press, Lana A. Whited ed. 2004).

<sup>80</sup> See, e.g., International Covenant on Civil and Political Rights, art. 8, G.A. Res. 2200A (XXI), Dec. 16, 1966, in force Mar. 23, 1976.

<sup>81</sup> See *Sommerset v. Stuart*, 12 George III A.D. (1771-1772) Lofft, 20 How. St. Tr. 1.

<sup>82</sup> *CHAMBER OF SECRETS* 333.

<sup>83</sup> See, e.g., GIANNI VATTIMO, *THE END OF MODERNITY: NIHILISM AND HERMENEUTICS IN POSTMODERN CULTURE* (Baltimore: Johns Hopkins University Press, 1991)

<sup>84</sup> *ORDER OF THE PHOENIX* 832 (Albus Dumbledore).

<sup>85</sup> Yet the fact that house-elves *do* have free will and choose the consequences of their actions is shown when both Dobby and Kreacher, for very different reasons, choose to act against their masters’ wishes and interests.

<sup>86</sup> *GOBLET OF FIRE* 214-15. One incident involving the Cruciatus Curse demonstrates the degree to which the Ministry apparently feels exempt from its own rules: In Harry’s fifth year Dolores Umbridge threatens to use the Cruciatus Curse on Harry before a dozen witnesses – one of whom is the ambitious Draco Malfoy, who could be expected to use knowledge of Umbridge’s commission of such a serious crime to his advantage. *ORDER OF THE PHOENIX* 746.

at which, despite the glaring conflict of interest, his own father acted as a sort of combination of prosecutor and sentencing judge, for using the Cruciatus Curse on Frank and Alice Longbottom (the parents of Harry's friend Neville).<sup>87</sup>

The Cruciatus Curse presents an easy case for Unforgivability. Like slavery, torture is universally recognized as a crime,<sup>88</sup> and there is no legitimate use for a curse that does nothing other than cause pain and, in some cases, insanity: The Longbottoms are permanently incapacitated. In the following year Harry and his friends meet them, in one of the series' most emotionally affecting scenes, while visiting their former professor Gilderoy Lockhart in the Closed Ward at St. Mungo's Hospital for Magical Maladies & Injuries. The Longbottoms are barely able to communicate with, let alone relate to, their son Neville or his grandmother, Frank's mother. Neville's mother attempts to reach him by giving him candy bar wrappers.<sup>89</sup>

Rather than legal questions, the Cruciatus Curse provides questions about Harry himself. Harry wishes that "he knew how to do the Cruciatus Curse... he'd have Snape flat on his back like that spider, jerking and twitching..."<sup>90</sup> Later, after Bellatrix Lestrange kills Sirius Black, Harry actually *does* use the Curse on her.<sup>91</sup> No one except Bellatrix witnesses Harry's use of the Curse, so he is spared a life sentence in Azkaban – but his choice of that particular curse rather than one that would have rendered her unconscious (or even killed her) raises a serious question here, especially for younger readers: If Harry used the Curse, knowing that it was both wrong and illegal, is Harry still good? And if he's flawed – if he has a touch of evil in his personality – is it still okay to root for him?

### *The Killing Curse*

The third of the Unforgivable Curses, and the least convincing in its Unforgivability, is the Killing Curse (*Avada Kedavra*). The illegality of murder is even more universally recognized than the illegality of torture and enslavement. But not all killings are murder, and the wizarding world apparently acknowledges the legality of some killings; the Ministry's regime even seems to have a death penalty. The Ministry's Aurors kill on occasion: The real Mad-Eye Moody makes a wry comment to Dumbledore regarding Moody's part in killing a Death Eater named Rosier,<sup>92</sup> and other Aurors apparently rack up an even higher body count than the grim Moody: Sirius Black (sent to Azkaban,

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<sup>87</sup> GOBLET OF FIRE 594-96.

<sup>88</sup> The United Kingdom is a party to numerous treaties forbidding torture, including the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment, Nov. 26, 1987, Europ. T.S. No. 126; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85; International Covenant on Civil and Political Rights, *supra* note 80; *see also* Universal Declaration of Human Rights, art. 5, G.A. Res. 217 A (III), Dec. 10, 1948.

<sup>89</sup> ORDER OF THE PHOENIX 512-515.

<sup>90</sup> GOBLET OF FIRE 300 (ellipses in original). We see other evidence of Harry's capacity for cruelty: "All he wanted to do was cause Malfoy as much pain as possible." ORDER OF THE PHOENIX 413. And Harry attempts, unsuccessfully, to use the curse on Snape after Snape kills Dumbledore. J.K. ROWLING, HARRY POTTER AND THE HALF-BLOOD PRINCE 602 (New York: Scholastic 2005)[hereinafter HALF-BLOOD PRINCE].

<sup>91</sup> ORDER OF THE PHOENIX 810.

<sup>92</sup> GOBLET OF FIRE 589.

without a trial, by Barty Crouch Sr.<sup>93</sup>) tells Harry that Moody, in apparent contrast to some other Aurors, “never killed if he could help it.”<sup>94</sup> In passing Sirius also mentions another Death Eater, Wilkes, being killed by Aurors.<sup>95</sup> Ron tells Harry that “loads [of giants] got themselves killed by Aurors.”<sup>96</sup>

Sirius, Moody and Ron, however, do not explain how the Aurors killed these giants and Death Eaters. Perhaps they are licensed by the Ministry to use the Killing Curse, although if they were permitted to do so, surely the Aurors Kingsley Shacklebolt and Nymphadora Tonks would use the curse in their battle with a large group of Death Eaters near the end of the fifth volume.<sup>97</sup>

On the other hand, there are many other ways to kill people, with and without magic. The Death Eater Peter Pettigrew manages to kill a dozen Muggles with a single curse, by causing an explosion.<sup>98</sup> A wizard named Benjy Fenwick is found in pieces;<sup>99</sup> whatever killed him, it wasn't the Killing Curse, which leaves its victims “unmarked, but unmistakably dead.”<sup>100</sup> Giants kill each other by purely physical violence;<sup>101</sup> centaurs use apparently non-magical bows and arrows.<sup>102</sup> In Harry's first year at Hogwarts Professor Quirrell tries to kill him by casting a spell on his broom, hoping that Harry will fall off.<sup>103</sup> Hermione, as a first-year student, is able to set Snape's clothes on fire, another potentially lethal spell.<sup>104</sup> In his third year Harry threatens to kill Sirius Black, a threat that everyone, including Black, seems to find credible,<sup>105</sup> while in his sixth year he nearly kills Draco Malfoy with a dangerous but not Unforgivable curse, Sectumsempra.<sup>106</sup> Devil's Snare, a magical plant that strangles its victims, can be used for murder: It endangers Harry, Ron and Hermione in their first year,<sup>107</sup> and, disguised as a gift, is successfully used to murder Broderick Bode in the Closed Ward at St. Mungo's.<sup>108</sup> Magical creatures, like Salazar Slytherin's basilisk, can be used to kill.<sup>109</sup> A snake possessed by Voldemort bites and

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<sup>93</sup> GOBLET OF FIRE 526.

<sup>94</sup> GOBLET OF FIRE 532.

<sup>95</sup> GOBLET OF FIRE 531.

<sup>96</sup> GOBLET OF FIRE 430.

<sup>97</sup> ORDER OF THE PHOENIX 801-03.

<sup>98</sup> J.K. ROWLING, HARRY POTTER AND THE PRISONER OF AZKABAN 208, 363 (New York: Scholastic 1999)[hereinafter PRISONER OF AZKABAN].

<sup>99</sup> ORDER OF THE PHOENIX 174.

<sup>100</sup> GOBLET OF FIRE 216.

<sup>101</sup> See, e.g., ORDER OF THE PHOENIX 430.

<sup>102</sup> ORDER OF THE PHOENIX 759.

<sup>103</sup> HARRY POTTER AND THE SORCERER'S STONE 189-91, 288-89 (New York: Scholastic 1997)[hereinafter SORCERER'S STONE].

<sup>104</sup> SORCERER'S STONE 191.

<sup>105</sup> PRISONER OF AZKABAN 341-43.

<sup>106</sup> HALF-BLOOD PRINCE 522-23. Draco's life is saved by the timely intervention of Snape.

<sup>107</sup> SORCERER'S STONE 277.

<sup>108</sup> ORDER OF THE PHOENIX 546.

<sup>109</sup> J.K. ROWLING, HARRY POTTER AND THE CHAMBER OF SECRETS, e.g. 317-20 (New York: Scholastic 1998)[hereinafter CHAMBER OF SECRETS].

nearly kills Arthur Weasley.<sup>110</sup> Sirius Black is apparently killed when a spell knocks him through the veil of death in the Department of Mysteries.<sup>111</sup>

The killing of another human being is Forgivable in some instances, apparently,<sup>112</sup> but not when the method used is the Killing Curse. There is some sense to this, when extremely dangerous instrumentalities are involved. At common law and in many jurisdictions today, murder committed in certain ways, such as by the use of bombs or poison, is treated as first-degree murder regardless of intent. In California, for example, murder committed by explosive device is first-degree murder<sup>113</sup> and carries a mandatory sentence of either death or life without parole.<sup>114</sup> The Killing Curse may be banned for the same reason bombs are banned: Not because it can kill, but because, for those able to use it, it makes killing too easy. However, there is considerable evidence that the Killing Curse is difficult to use: Barty Crouch Jr. tells Harry's class that "*Avada Kedavra's* a curse that needs a powerful bit of magic behind it – you could all get your wands out now and say the words, and I doubt I'd get so much as a nosebleed."<sup>115</sup>

Although there is a not inconsiderable amount of killing and attempted killing in the novels,<sup>116</sup> the Killing Curse, in fact, is used relatively rarely. Voldemort uses it to kill Harry's parents in a scene often revisited throughout the series; he also uses it to kill Frank Bryce, a Muggle,<sup>117</sup> and Bertha Jorkins, a witch,<sup>118</sup> and attempts to use it to kill Harry.<sup>119</sup> Barty Crouch Jr., posing as Mad-Eye Moody, uses it on a spider.<sup>120</sup> Wormtail

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<sup>110</sup> ORDER OF THE PHOENIX 463.

<sup>111</sup> ORDER OF THE PHOENIX 805-06.

<sup>112</sup> See generally, e.g., Hall, *supra* note 71. Certain affirmative defenses may be accepted, however: Lupin tells Harry that "The law's on your side... Even underage wizards are allowed to use magic in life-threatening situations." ORDER OF THE PHOENIX 123 (Remus Lupin). And Barty Crouch Jr. implies that acting under the control of another (such as via the Imperius Curse) is a defense. GOBLET OF FIRE 213. This defense is apparently unavailable to house-elves. Hall, *supra* note 71 at 155-56, points out that Amos Diggory's interrogation of Winky the house-elf (GOBLET OF FIRE 133-38) misses the crucial question: Was Winky acting of her own free will, or under orders (which, as a house-elf, she would have been unable to disobey)?

<sup>113</sup> Cal. Penal Code § 189.

<sup>114</sup> Cal. Penal Code §190.2(4).

<sup>115</sup> GOBLET OF FIRE 217. Crouch might be wrong; two of his students might succeed. Harry shows a natural aptitude for the Dark Arts, and Hermione is an exceptionally skillful witch.

<sup>116</sup> In addition to the examples above, see also Jann Lacoss, "Of Magicals and Muggles: Reversions and Revulsions at Hogwarts," in THE IVORY TOWER AND HARRY POTTER: PERSPECTIVES ON A LITERARY PHENOMENON 67, 80 (Columbia, MO: University of Missouri Press, Lana A Whited ed. 2004); Anne Hiebert Alton, "Generic Fusion and the Mosaic of Harry Potter," in HARRY POTTER'S WORLD: MULTIDISCIPLINARY CRITICAL PERSPECTIVES 141, 143 (New York: RoutledgeFalmer, Elizabeth E. Heilman ed. 2003).

<sup>117</sup> GOBLET OF FIRE 15, 666.

<sup>118</sup> GOBLET OF FIRE 655, 666. (Jorkins could have been killed by Wormtail using Voldemort's wand, as Cedric was.)

<sup>119</sup> In addition to his oft-discussed failure to kill Harry as a baby, Voldemort uses the Killing Curse against Harry in Harry's fourth and fifth years. GOBLET OF FIRE 663; ORDER OF THE PHOENIX 813. In the first instance Harry is saved by his own quick reaction and the fact that his wand is linked to Voldemort's; in the second he is saved by Dumbledore.

<sup>120</sup> GOBLET OF FIRE 215-16.

uses Voldemort's wand and the Killing Curse to kill Cedric Diggory.<sup>121</sup> And Snape kills Dumbledore with the Killing Curse.<sup>122</sup>

The Killing Curse is most often used by Voldemort; Pettigrew performs it with Voldemort's wand, even though he presumably has another wand – the one taken from Bertha Jorkins. In the battle at the Department of Mysteries, the Death Eaters use many spells against Harry's gang, but none uses *Avada Kedavra* except, at the end, Voldemort.<sup>123</sup> It may be that the Killing Curse is too difficult, or takes too much out of its user, to make it useful in combat by any but the most skilled wizards – in which case outlawing it seems less necessary, but makes moral sense in that it protects the weaker wizards from the stronger.

### *The Dementor's Kiss and Other Executions*

While the illegality of the Imperius and Cruciatus Curses makes both legal and moral sense, and the illegality of the Killing Curse might at first seem to be justified by its extreme dangerousness, the Ministry's use of the Dementor's Kiss and Memory Charms undermines whatever logic there is to the Unforgivable Curses regime.

The Dementor's Kiss sucks the soul from the victim's body, leaving an empty shell without memory or personality.<sup>124</sup> The Kiss is not a spell; it can only be performed by dementors, not by wizards. However, dementors perform the Kiss at the direction of wizards: Cornelius Fudge sends dementors to perform the Kiss on Sirius Black<sup>125</sup> and a dementor accompanying Fudge performs the Kiss on Barty Crouch Jr., with Fudge's apparent consent.<sup>126</sup> Dolores Umbridge sends dementors to Little Whinging to perform the Kiss on Harry.<sup>127</sup>

The Dementor's Kiss is a de facto death penalty, yet the Ministry inflicts it on wizards without due process, for reasons of political expedience.<sup>128</sup> The situation of house-elves is, not surprisingly, even worse. Not only do they have no right to due process; their

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<sup>121</sup> GOBLET OF FIRE 638.

<sup>122</sup> HALF-BLOOD PRINCE 596.

<sup>123</sup> ORDER OF THE PHOENIX 787-813.

<sup>124</sup> The effects are unmistakable: "'Of course they didn't get his soul, you'd know if they had,' said Harry [to Aunt Petunia], exasperated." ORDER OF THE PHOENIX 34.

<sup>125</sup> PRISONER OF AZKABAN 416.

<sup>126</sup> GOBLET OF FIRE 702-03.

<sup>127</sup> They nearly suck out Dudley's soul, as well, but Harry manages to save himself and his cousin with the Patronus Charm. ORDER OF THE PHOENIX 17-19. For this use of magic Harry undergoes what appears to be a criminal trial before the Wizengamot. *Id.* at 137-51.

<sup>128</sup> Harry has no faith in the Ministry's commitment to due process: "I bet you anything Fudge would've told Macnair to murder Sirius on the spot..." PRISONER OF AZKABAN 404 (ellipses in original). When Sirius is later captured, Fudge does, in fact, have Macnair bring dementors to suck out Sirius' soul. As with the Barty Crouch Jr. affair, Fudge's concern seems to be for appearances rather than justice: "This whole Black affair has been highly embarrassing. I can't tell you how much I'm looking forward to informing the Daily Prophet that we've got him at last." *Id.* at 416-17 (Fudge to Snape). Later, when the Death Eater Barty Crouch Jr. is captured, Fudge himself brings a dementor into Hogwarts to suck out Crouch's soul, thus preventing Crouch from giving testimony that might have been politically embarrassing to Fudge. GOBLET OF FIRE 703-04.

execution apparently does not even require the authorization of the Ministry. Their enslavement gives their masters the power of life and death over them: Sirius tells Harry about his “dear Aunt Elladora [who] started the family tradition of beheading house-elves when they got too old to carry tea-trays[.]”<sup>129</sup>

### *Memory Charms*

Similarly, the use of memory charms undermines the logic of the Unforgivable Curses. It’s surprising, even disturbing, that the innocuous-sounding Memory Charm, which can erase or modify memories, is not Unforgivable. The Ministry of Magic routinely dispatches Obliviators to modify the memories of Muggles who’ve witnessed magical events. This rather cavalier attitude toward Muggles is presented without evident disapproval, as part of the ordinary work of the Ministry. The pompous Gilderoy Lockhart’s use of Memory Charms against other wizards and witches, however, is presented as skullduggery, and he gets his comeuppance when his own Memory Charm backfires and wipes out his memories.

Memory Charms are dangerous. Mr. Roberts, the Muggle owner of the land on which the Quidditch World Cup takes place, cannot help noticing that his clients are wizards; his memory is modified repeatedly.<sup>130</sup> Later, Roberts and his family are captured by Death Eaters and tossed high in the air for some time. The next day, as Harry, Hermione and the Weasleys are leaving, Roberts has “a strange, dazed look about him, and he wave[s] them off with a vague ‘Merry Christmas.’”<sup>131</sup> Arthur Weasley assures the children that Roberts will recover, but we don’t find out whether he is correct because we never see Roberts again. But when Bertha Jorkins discovers that Barty Crouch Sr. is concealing his son, the Death Eater Barty Crouch Jr., in his home, Crouch Sr. uses such a powerful Memory Charm that Jorkins’ memory is permanently damaged.<sup>132</sup>

Despite the dangers, the use of Memory Charms against Muggles is not limited to the Ministry’s Obliviators. “When the worst happens and a Muggle sees [a magical beast], the Memory Charm is perhaps the most useful repair tool. The Memory Charm may be performed by the owner of the beast in question....”<sup>133</sup>

The good guys use Memory Charms, too. Kingsley Shacklebolt, an Auror and member of Dumbledore’s secret Order of the Phoenix, surreptitiously modifies the memory of a student, Marietta Edgecombe, to prevent her from incriminating Harry. During the multi-character confrontation in which this takes place, both Shacklebolt and Dumbledore intervene to prevent a teacher, the evil Dolores Umbridge, from shaking Ms. Edgecombe.<sup>134</sup> Yet Dumbledore speaks approvingly, even admiringly, of Shacklebolt’s modification of Ms. Edgecombe’s memory; Dumbledore shows no awareness of the hypocrisy inherent in protecting the student from mild physical abuse while applauding

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<sup>129</sup> ORDER OF THE PHOENIX 113 (Sirius Black).

<sup>130</sup> GOBLET OF FIRE 78 (unnamed Obliviator.)

<sup>131</sup> GOBLET OF FIRE 145 (Arthur Weasley).

<sup>132</sup> GOBLET OF FIRE 685.

<sup>133</sup> SCAMANDER, *supra* note **ERROR! BOOKMARK NOT DEFINED.**, at xx.

<sup>134</sup> ORDER OF THE PHOENIX 616.



the violation of her mind. The modification of Ms. Edgecombe's memory is not harmless, however: Harry sees her "clutching her robe up to her oddly blank eyes, staring straight ahead of her."<sup>135</sup> She apparently recovers later, although as with Roberts we don't see enough of her to be certain.

The Ministry is obligated under international wizarding law require it to keep the wizarding world secret from the Muggle population as a whole.<sup>136</sup> The Ministry's post hoc use of Memory Charms is a sloppy way to fulfill this obligation and, arguably, does not actually fulfill it at all: By the time the Memory Charm is used, the breach of the Statute of Secrecy has already occurred.

The inconsistencies in the Ministry's Unforgivable Curses policy are self-serving; spells very dangerous to the public (both Muggle and magical) but useful to the Ministry are not banned, while spells useful to the Ministry's opponents and not particularly useful to the Ministry are banned. At present the Ministry is serving itself rather than any broader constituency; the interests of wizards might be better served by permitting the use of the Killing Curse in self-defense, and would certainly be better served by banning the Dementor's Kiss. The interests of Muggles are not taken into account at all; their memories are erased and tampered with at will to cover up sloppy work by the Ministry. It remains to be seen whether the next year will bring about any improvement in the Ministry's rule, let alone a genuine rule of law.

### Punishment in the Harry Potter Novels (Joel Fishman)

J. K. Rowling depicts punishment both by Hogwarts teachers and to a lesser extent governmental criminal punishment in the Harry Potter novels.<sup>137</sup> The narratives, however, neither define nor explain how or why certain punishments are determined. Given that a wide range of philosophical arguments for and against punishment (retribution vs. non-retributivist; consequential vs. non-consequential philosophies),<sup>138</sup> one might expect some level of consistency in the narratives. However, the narratives are anything but consistent in the use of punishment,<sup>139</sup> which leaves the reader uneasy about

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<sup>135</sup> ORDER OF THE PHOENIX 617.

<sup>136</sup> International Statute of Wizarding Secrecy of 1692. See CHAMBER OF SECRETS 21; SCAMANDER, *supra* note **Error! Bookmark not defined.**, at xvi; KENNILWORTHY WHISP, QUIDDITCH THROUGH THE AGES 16 (London: WhizzHard Books 2001). Only a few Muggles are privileged to know of the wizarding world's existence; this group includes the Prime Minister and immediate relatives of wizards. See SCAMANDER, *supra* note **Error! Bookmark not defined.**, at xx; PRISONER OF AZKABAN 37-38, 44, 208.

<sup>137</sup> When students first enter Hogwarts before they enter the Great Hall for the sorting, Professor McGonagall informs them: "your triumphs will earn your house points, while any rule breaking will lose house points." (SORCERER'S STONE, 114). The giving and taking away of points are consistently discussed throughout the books because of the need to see who will win the House Cup at the end of the year. The use of criminal punishment is limited to books 3 to 6, but only in certain scenes that relate to Azkaban prison, the trials of the Death Eaters, and a couple of isolated incidents like Morfin receiving three years in Azkaban for his attack upon Muggles (HALF-BLOOD PRINCE, 210-11) and then later a life sentence for killing the Riddles (*Id.*, 367).

<sup>138</sup> A READER ON PUNISHMENT (R. A. Duff and David Garland, eds. Oxford University Pr., 1994); LUCIA ZEDNER, CRIMINAL JUSTICE, ch. 6 (Oxford U. Pr. 2004) (Clarendon Law Series).

<sup>139</sup> Rowling does not explain how sentencing in the criminal justice system is meted out to criminals except for the Unforgivable Curses which results in lifetime imprisonment. It is unclear if there are any other

punishments in the wizarding world, and perhaps questioning punishment in contemporary society.

The narratives extensively portray the use of punishment within the school setting. Like most boarding school stories,<sup>140</sup> rewards and punishments play an important role in how students relate to each other as shown in the inter-house rivalries, Quidditch, and the competition for the annual House Cup. The students are awarded points for good behavior and points taken away for bad behavior. There appears to be no specific code or guidelines for punishment within Hogwarts School. Teachers are permitted to give or take away points for good work, misbehavior, or for no apparent reason, usually ranging from one to sixty points, depending on the seriousness of the infraction or the bias of the teacher. Professor Snape constantly takes points away from Harry, Ron, and Hermione (although she is always winning points from other teachers for her smartness); even Prof. McGonagall as head of Gryffindor gives and takes points away as needed to the main protagonists, e.g., 150 points taken away in *Sorcerer's Stone* for being caught out after dark;<sup>141</sup> while Dumbledore gives back 170 points at the end of the volume for Gryffindor to win the House Cup.

Detention also plays a part in the punishments, such as Ron Weasley's having to polish armor without using magic in *Chamber of Secrets*, Harry's having to write his sentences in his own blood for Dolores Umbridge in Book 5, or James Potter and Sirius Black's double detention for using an illegal hex upon another student in *Half-Blood Prince*.

Dolores Umbridge is an example of a particularly mean and biased teacher from the standpoint of Harry and his friends. Harry receives at least two weeks of detention from her causing him to miss his Quidditch matches: "I think it a rather good thing that you are missing something that you really like to do. It ought to reinforce the lesson I am trying to teach you." Her imposing of "writing lines" using a pen that drew blood as ink served as a punishment for both Harry and other students who talked back to her.<sup>142</sup> This results in scar in the back of his hand, "I will not tell lies" after a period of time. Unknowing the type of punishment he was receiving, Hermione, at one point, says "At least it is only lines...It's not as if it's a dreadful punishment, really...."<sup>143</sup> Harry knew if he told them he would see a "look of horror" upon their faces. Even worse, from Harry's point of view, is Umbridge's punishment of lifetime banishment from the Quidditch team for Harry and the Weasley twins for fighting Malfoy and other Slytherins.<sup>144</sup> (Lifetime is, of course, in the eye of the beholder. Once Umbridge is gone, Harry is back on the team as captain in

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wizards imposing criminal sentences except for the Minister of Magic and the wizengamot, the types of crimes for which sentences are handed out, and the various types of sentence imposed.

<sup>140</sup> Deborah De Rosa, *Wizardly Challenges to and Affirmations of the Initiation Paradigm in Harry Potter*, HARRY POTTER'S WORLD: MULTIDISCIPLINARY CRITICAL PERSPECTIVES 163-84 (Elizabeth E. Heilman, ed. 2003).

<sup>141</sup> J. K. ROWLING, HARRY POTTER AND THE SORCERER'S STONE 243-44 (1997).

<sup>142</sup> J. K. ROWLING, HARRY POTTER AND THE ORDER OF THE PHOENIX 248, 266-67 (2003).

<sup>143</sup> *Id.* 269.

<sup>144</sup> *Id.* 416-17.

book six.)

Outside of school, the narratives portray the criminal justice system as arbitrary, but also sometimes as incompetent. The Ministry of Magic can recognize when illegal use of magic occurs, but cannot determine always who has done it. This leads to unfair punishment for Harry in two important instances. In *Chamber of Secrets*, Dobby's use of the hover charm results in Harry's receiving a warning letter from the Ministry forbidding underage wizards to use magic and also a violation of section 13 of the International Confederation of Warlocks' Statute of Secrecy.<sup>145</sup> In *Order of the Phoenix*, at the Harry's trial, Minister Fudge does not give credit to Harry's claim that a house-elf had committed the crime until Dumbledore offers to have Dobby appear as a witness. Nor did the Ministry know that he had used magic to counter the appearance of dementors in Little Whinging until Harry pointed this out rather forcefully and Dumbledore effectively defends him.

Punishment for crimes can lead to prison, but only a few examples are portrayed in the novels. There appears to be only one prison to send those found guilty of crimes, Azkaban Prison. Morfin Gaunt gets three months for attacking Muggles, while Mundungus Fletcher gets a lesser sentence for stealing. Fudge's sending Hagrid in *Chamber of Secrets* and Scrimgeour sending Stan Shunpike to Azkaban Prison in *Half-Blood Prince*, when both men know they do not deserve punishment, is capricious in an effort to show that the Ministry is doing something against Voldemort. There is no recourse for them. Hagrid eventually is released, but Shunpike is still in prison at the end of book 6. Voldemort's use of memory charms to have Morfin admit to a murder he did not commit and then be placed in Azkaban is unfair as well.

The use of the Unforgivable Curses automatically sends people for life to Azkaban Prison. Death Eaters, like Bellatrix Lestrange or Barty Crouch, Jr., who are loyal followers of Voldemort's are punished for both their past criminal behavior and to prevent future crimes. Lifetime imprisonment protects the community from their escaping and returning to aid their evil master. At first it appears that Sirius Black's escape poses a direct danger to Harry, but only later do we find out that he has been imprisoned wrongly by showing Peter Pettigrew actually committed the killing of the Muggles, but Black is still wanted by the Ministry. Underage wizards' testimony will not be accepted by the Ministry for proof of his innocence. In our own society, we see prisoners obtaining releases from prison based on DNA evidence proving they were falsely convicted.<sup>146</sup>

The dementors' role as the Prison's guards also serves to administer the ultimate punishment: death. Attempts to escape will result in the "dementor's kiss" that leaves the person worse than dead, an empty body without a soul.<sup>147</sup> Although they sided with

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<sup>145</sup> J. K. ROWLING, HARRY POTTER AND THE CHAMBER OF SECRETS 20-21 (1998).

<sup>146</sup> Attorney Barry Scheck's Innocence Project has been used by a number of law and journalism schools to investigate individual criminals to prove their innocence of the crime they were convicted of. *See generally* ACTUAL INNOCENCE.

<sup>147</sup> J. K. ROWLING, HARRY POTTER AND THE GOBLET OF FIRE 703 (2000).

Voldemort in the first war, the ministry will not believe that they will go back to Voldemort once he returns; but they do.

Two other crimes that result in punishment are part of the magical world. First, the killing of a unicorn, as Voldemort did in *Sorcerer's Stone* to keep alive, results in a cursed life: "Only one who has nothing to lose, and everything to gain, would commit such a crime. The blood of unicorn will keep you alive, even if you are an inch from death, but at a terrible price. You have slain something pure and defenseless to save yourself, and you will have but a half-life, a cursed life, from the moment the blood touches your lips."<sup>148</sup> For Voldemort, who is trying to gain immortality, the killing of the unicorn is secondary to keeping himself alive. Second, the Unbreakable Vow, as taken by Snape to Narcissa Malfoy, cannot be broken or the person suffers death, as Ron tells Harry about such an episode when he was younger.<sup>149</sup>

Lesser crimes for which punishments are not specified include the failure to sign with the Ministry as an Animagus and the use of veritaserum. It is interesting, however, that Dumbledore uses veritaserum to get the truth from Barty Crouch, Jr., while Dolores Umbridge unsuccessfully uses it upon Harry to get information about Dumbledore.<sup>150</sup> The Ministry apparently did not have knowledge of their use, or doesn't object, because charges are never brought against them.

In conclusion, the Harry Potter narratives portray a system that attempts to limit misbehavior through both rewards and punishments. The application of these rewards and punishments, however, is quite arbitrary. Teachers have enormous discretion in giving punishments and rewards. In the criminal realm, the Minister of Magic can follow or bend the law depending on how he relates to specific people. The use of magic may be punished depending on who the person is who commits a particular illegal act. Thus, readers come to understand that rule-breaking or criminal behavior may or may not be punished because of an unfair administration of justice by those in charge of the system. Such a portrayal leaves the reader open to questioning today's criminal justice system as well.

### **Status, Rules and the Enslavement of the House-Elves (James Charles Smith)**

House-elves, magical creatures with enormous eyes and bat-like ears, are enslaved to one wizarding family for the elf's entire life. These family-elf relationships can span generations. Elves generally have great devotion and loyalty to their wizard families. Their code includes keeping family secrets, and never saying anything critical about the family to outsiders. They dress in rags and do not own real clothing. Although elves are not wizards, they communicate and express emotions in human ways. Elves who misbehave are physically punished, sometimes by themselves without their masters' intervention.

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<sup>148</sup> HARRY POTTER AND THE SORCERER'S STONE 258.

<sup>149</sup> J. K. ROWLING, HARRY POTTER AND THE HALF-BLOOD PRINCE 35-37, 325-26 (2005).

<sup>150</sup> HARRY POTTER AND THE GOBLET OF FIRE 517, 683.

Two of the books have elf emancipation stories. In *The Chamber of Secrets*, we meet house-elf Dobby, a servant to the villainous Malfoy family. Dobby surreptitiously aids Harry by warning him of a grave threat, earning his gratitude. Harry subsequently engineers Dobby's freedom, taking advantage of a custom, enshrined in Wizard law, that a master's gift of clothing to an elf signifies emancipation. During a heated confrontation involving Harry, Dumbledore, and Lucius Malfoy, Harry tricks Malfoy into tossing a sock in Dobby's direction, which Dobby takes up.<sup>151</sup>

Every system of property law has a set of transfer rules.<sup>152</sup> Often but not always those rules are formal.<sup>153</sup> The gift-of-clothing custom represents a formal transfer rule. It is a symbolic act with legal consequences. Although it has no real-world antecedent of which I am aware, it fits within our social and legal traditions. Socially, historically and today, specialized clothing often shows a person's employment status, or shows membership in a particular trade or occupation. Members of medieval guilds wore particular clothing.<sup>154</sup> Epaulets displayed rank.<sup>155</sup> In colonial America, landowners with particular quantity of landholding were allowed to dress a certain way.<sup>156</sup> Perhaps this is the base of the saying, "Clothes make the man." Thus, a change in garb logically shows a change in status as slave or servant.

Legally, the elf emancipation custom fits within the traditional use of a symbol, or a symbolic ceremony, to transfer or validate property. Throughout history, the law has required acts other than, or in addition to, the mere expression of intent to accomplish property transfers.<sup>157</sup> Ownership transfers of goods and lands required delivery.<sup>158</sup> For land, medieval England required a symbolic delivery, known as livery of seisin, in which the owner handed a clump of sod to the grantee.<sup>159</sup> A wizard's handing over of clothing to an elf is not so different. Modern law has tended to replace formal rules involving symbols with formal rules requiring a writing,<sup>160</sup> but that is just replacing one type of symbol with another.

When it comes to the manumission of slaves, various slave-holding societies followed different methods. Nineteenth-century U.S. slave law generally used paper records for

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<sup>151</sup> Tim Hall discusses this episode from the perspective of contract intent. See \_\_\_\_.

<sup>152</sup> Certain property rights are sometimes made inalienable. See, e.g., Guido Calabresi & A. Douglas Melamed, Property Rules, Liability Rules, and Inalienability: One View of the Cathedral, 85 Harv. L. Rev. 1089 (1972). No system of property law, as we know it, could possibly exist if all rights were inalienable.

<sup>153</sup> NO CITATION NEEDED HERE – THIS IS A GENERAL PROPOSITION.

<sup>154</sup> Costumes and courtiers: garments and fashion ideas in late medieval Western Europe, available at: <http://www.ceu.hu/medstud/manual/SRM/costumes.htm>

<sup>155</sup> Id.

<sup>156</sup> Linda Baumgarten, Colonial Dress Codes, Colonial Williamsburg Journal CW Journal (Winter 03-04), available at <http://www.history.org/Foundation/journal/Winter03-04/clothing.cfm>

<sup>157</sup> NO CITATION NEEDED HERE – CITE IN NEXT SENTENCE HANDLES THIS.

<sup>158</sup> Cornelius J. Moynihan & Sheldon F. Kurtz, Introduction to the Law of Real Property 26-27 (3d ed. 2002).

<sup>159</sup> Id. at 204-05.

<sup>160</sup> For example, modern statutes of frauds requires a writing for certain transactions. See Robin Paul Malloy & James Charles Smith, Real Estate Transactions: Problems, Cases, and Materials 131-135 (2d ed. 2002).

slave transactions, not only manumission but sales and mortgages.<sup>161</sup> One symbolic act that sometimes had legal significance was the slave's movement to another jurisdiction,<sup>162</sup> especially when accomplished by the master or with the master's consent.<sup>163</sup> Transportation to a new place was the badge of emancipation.<sup>164</sup> In the famous 1772 case of *James Somerset*, Lord Mansfield held that a slave transported from West Indies to England, became free the instant the slave breathed the English air.<sup>165</sup> The infamous *Dred Scot* decision raised the same issue: Did the relocation of *Dred Scot* from Missouri to the territory of Minnesota effect his freedom?<sup>166</sup>

In *The Goblet of Fire*, emancipation moves beyond the individual, raising a challenge to the institution. Dobby is now a free elf, but what of all the others? Hermione becomes sensitized to the plight of the house-elves through a house-elf named Winky. Upon investigation, she is shocked to learn that Hogwarts has scores of house-elves, who cook and clean for the students. She promptly launches a crusade, forming the Society for the Promotion of Elfish Welfare (S.P.E.W.), but gets virtually no support from her fellow students at Hogwarts.

Is elfin bondage morally justified, or is it as evil as the human institution of slavery? Rowling shows Hermione as a crusader, as an abolitionist. Yet as narrator Rowling does not interject a moral judgment. The reader is left to decide whether Hermione's cause has great merit, is half-cocked, or is somewhere in between. Ambiguity arises for two reasons.

First, the proper position of elves in society is unclear. Who are elves, after all? What is their proper relationship with "people" or "wizards."<sup>167</sup> Modern property law freely recognizes property rights in living things.<sup>168</sup> The law sanctions the ownership of plants and animals, both in their natural state<sup>169</sup> and in genetically modified forms.<sup>170</sup> The law also allows the ownership of property related to human beings.<sup>171</sup> For example, organs,

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<sup>161</sup> William Goodell, *The American Slave Trade in Theory and Practice* 44-62 (original 1853; 1968 reprint).

<sup>162</sup> DELETE – THIS SENTENCE NEEDS ONLY ONE FN AT ITS END.

<sup>163</sup> See Paul Finkelman, *An Imperfect Union: Slavery, Federalism, and Comity* (1981).

<sup>164</sup> DELETE – THIS SENTENCE IS MY CONCLUSION, WHICH FOLLOWS FROM THE PRIOR SENTENCE AND ITS AUTHORITY

<sup>165</sup> *Somerset v. Stewart*, 98 Eng. Rep. 499 (K.B. 1772).

<sup>166</sup> *Dred Scott v. Sanford*, 60 U.S. (19 Howard) 393 (1857).

<sup>167</sup> Wizard families own house-elves, and so do wizard institutions, such as Hogwarts School. Muggles apparently never own house-elves. Indeed, there is no evidence that they can see, or are allowed to see, elves. In *Harry Potter*, both Muggles and Wizards are "people." Not only are they similar in appearance, they can reproduce. That's why we have "half-bloods," with attendant racial conflicts between those of mixed parentage and "purebloods." The standard biologist's definition of what makes one species is the ability to reproduce. Conversely, there is no evidence in the books that elves can reproduce with Wizards or Muggles (but after all, these are children's books; the author may not have told us everything). So elves are a separate species. But are they on a lower plane?

<sup>168</sup> See James Charles Smith, Edward J. Larson, John Copeland Nagle & John A Kidwell., *Property: Cases and Materials* 311-349 (2004).

<sup>169</sup> *Id.* at 311-320.

<sup>170</sup> *Id.* at 320-328.

<sup>171</sup> *Id.* at 328-349.

body tissue, blood, and reproductive materials are the subjects of property.<sup>172</sup> Modern law, however, draws the line with respect to property in human beings at what we call slavery.<sup>173</sup>

Slavery, as we understand it, relates solely to the enslavement of human beings by other human beings.<sup>174</sup> Fantasy fiction permits a fuzzing that we don't have in the real world (or that at least most people do not perceive). In Rowling's fictional world, are we to treat wizards and elves as equals? Are they a different species? Elves do exhibit a number of what characteristics that we would call human. They speak; they reason; they have emotions. If elves are not wizards, then perhaps they are not on the same moral plane as wizards. If this is true, then slavery is not the issue. Instead, animal rights perspectives may inform the mistreatment of elves by wizards.<sup>175</sup>

The second form of ambiguity relates to the elves' behavior when confronted by the S.P.E.W. agenda. Winky and most of the other elves are singularly unwilling to embrace Hermione's call for liberation. What should we make of the elves' acceptance of their station as servants? Is Hermione pressing for a reform that the elves do not want? Is she trying to impose her lifestyle preferences upon them? Are the elves happy? Perhaps they are really employees under long-term contracts, working under conditions that are a bit unusual. Or are the elves, as Hermione believes, brainwashed? Are they akin to human victims of domestic violence?<sup>176</sup> If Hermione is right, when and if the elves are liberated, they'll have a better life, and they shall come to realize the value of freedom. We await the finale, Book number 7.

### Excuse, Justification, and Authority (Daniel Austin Green)

*"Laws can be changed," said Fudge savagely.*

*"Of course they can," said Dumbledore, inclining his head. "And you certainly seem to be making many changes, Cornelius. Why, in the few short weeks since I was asked to leave the Wizengamot, it has already become the practice to hold a full criminal trial to deal with a simple matter of underage magic!"<sup>177</sup>*

While laws can indeed be changed, they are generally expected to be followed, even when in need of change or recently changed, regardless of their merit. This is some formulation of the rule of law. Yet the righteous indignation that drives Harry and his

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<sup>172</sup> Id. at 333-349.

<sup>173</sup> U.S. Constitution, 13<sup>th</sup> amendment.

<sup>174</sup> Black's Law Dictionary (8th ed. 2004), slavery ("one person has absolute power over the life, fortune, and liberty of another").

<sup>175</sup> In the history of U.S. slavery, there was a pronounced tendency of slavery apologists to portray African-Americans as subhuman. This attitude persisted to a significant degree after the Civil War into the Jim Crow era. See Alfred L. Brophy, *Reconstructing the Dreamland: The Tulsa Race Riot of 1921, Race Reparations, and Reconciliation* (2002).

<sup>176</sup> It is sometimes difficult to explain why some domestic violence victims stay in abusive relationships, when it seems to outsiders that they could readily exit. Perpetrators of domestic violence on occasion seek to justify their acts by asserting that their victims enjoy their maltreatment.

<sup>177</sup> J.K. ROWLING, *HARRY POTTER AND THE ORDER OF THE PHOENIX* 149 (2003).

friends (adult and adolescent alike) doesn't strike the reader as something "wrong." Indeed, we want to see it, we yearn for their revolution. But what makes Harry – and even the reader – morally justified? Jeremy Waldron's work on the authority of law very convincingly argues that even "bad" laws must be followed, insofar as following bad law is the only way to truly establish any authority.<sup>178</sup> Since we will always follow "good" laws, even those of a regime with no legitimate authority, following the bad laws of a just regime – subjecting ourselves to the government itself – is the only way to prove it has authority.<sup>179</sup> If we are to believe Waldron, this certainly complicates our justification of Harry.

But Harry is facing more than just a bad law, or even laws that are unfair in their application. He is subjected to an inquisition – and one that is occurring under a regime that is daily changing the way they operate and trying to sever from society all those that call for accountability. The trial that opens *Order of the Phoenix* is the prelude to the question that Harry and his friends must face throughout their fifth year: when is it just to act outside of the law?

Harry's full-fledged trial is for a "crime" that is rarely prosecuted. Moreover, Harry committed the act in order to save human life – his own and that of his muggle cousin, Dudley Dursley.<sup>180</sup> We know of many instances of magic performed outside of Hogwarts by underage wizards, both in current times and in stories of what has happened in past years. Yet we know of no wizard that has actually been expelled from Hogwarts for such acts, much less subjected to a Wizengamot hearing. Still, the trial takes place *under the law*. What, then, makes Harry's trial anything more than an appropriate, selective prosecution, especially considering that Harry *has* violated this law before?

The answer is complex, and, at least as a piece of literature, probably hinges largely on our sympathy for Harry. But there's a better answer, a jurisprudential answer: natural rights and laws can vindicate the violation of positive law. We afford leeway to even the poorest of enactments by a government that generally upholds the natural rights of its citizens. This is where Waldron's argument is most applicable. But a just government also provides its citizens with at least *some measure* of equality in voice and impact.<sup>181</sup> This, however, is exactly what the Ministry of Magic fails to do.

With the vesting of government in its constituents also comes the notion that people know what "good" law is. Yet most people don't go around writing – or even citing to – positive law. They are guided by their own perceptions of what rights are naturally afforded them. And the vested interest in making, or at least participating, in the law also compels people to reject positive law that opposes natural law – that is, natural law *as they perceive it*.<sup>182</sup> Although Harry makes it through the trial unscathed, without

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<sup>178</sup> See Jeremy Waldron, *Legislation, Authority, and Voting*, 84 GEORGETOWN L. J. 2185, 2195-97 (1996).

<sup>179</sup> *Id.*

<sup>180</sup> See Chapter 1, J.K. ROWLING, *HARRY POTTER AND THE ORDER OF THE PHOENIX* (2003).

<sup>181</sup> See generally Ronald Dworkin, *What is Equality? Part 4: Political Equality*, 22 U.S.F. L. REV. 1 (1987).

<sup>182</sup> Professor Finnis thus framed the moral question an individual faces when "one is confident that the legal institutions of one's community will not accept that the law in question is affected by the injustice one discerns in it... : Given that legal obligation presumptively entails a moral obligation, and that the legal



violating more laws, many will be violated in the remaining pages of *Order of the Phoenix*. The boundaries of just how great the asymmetry between positive and natural law must be in order to compel breaking the law may be unclear, but what is unambiguous is the moral justification – perhaps even the requirement – to do so.

At the end of *Prisoner of Azkaban*, Harry and Hermione save Buckbeak the hippogriff<sup>183</sup> and Sirius Black<sup>184</sup> from their death sentences. In saving Black and Buckbeak, charges along the lines of obstruction of justice and likely much more could presumably be brought if Harry and Hermione were caught. Harry and Hermione are in this scene vigilantes of a sort, as they frequently are, taking into their own hands the administration of justice. Of course, we know the death sentences of Black and Buckbeak to be, in fact, a miscarriage of justice. But does the presence of miscarriage warrant sidestepping the law in order to effectuate true justice?

Morally, yes. This is why Harry and Hermione remain and indeed elevate their status as heroes among the readers. But were Harry and Hermione free of guilt themselves, or have they transgressed, such that they should face some sort of punishment? Before even trying to operate through the proper channels, they took matters into their own hands, subverting the established and generally well-functioning justice system. Likely, Dumbledore was right in his assessment that three thirteen year-old wizards would not be believed by those in authority,<sup>185</sup> but nobody knows this to be true. And Dumbledore, at this time, still commands a great deal of authority in the wizarding world.<sup>186</sup>

The scene is *seemingly* complicated but, I maintain, actually simplified by the fact that time travel played such an integral role in the rescue.<sup>187</sup> Precisely because time travel is available, our heroes should have exhausted every possible alternative before embarking on their path that so flagrantly disregarded the legal establishment. Had they not been successful in this avenue, they could have ultimately resorted to time travel to prevent the miscarriage of justice. Black would have been in no danger. Just as in the case of Buckbeak, Black's death would not have occurred, because Harry and Hermione of the future would have prevented the death in the present.

So, although morally compelled in their actions, I will say that Harry and Hermione acted unethically. Perhaps a somewhat artificial distinction, what I mean to say is that Harry and Hermione took actions that, while moral, cannot be considered normatively acceptable by a society, lest everyone begin to act in such a way. I'm not saying that any determination of guilt they were to face should not be considered in light of the mitigating factors, but I am saying that to normatively condone their behavior is to

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system is by and large just, does a particular unjust law impose upon me any moral obligation to conform to it?" JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 357 (1980).

<sup>183</sup> The mythical griffin (lion, eagle), horse.

<sup>184</sup> Sirius Black is Harry's godfather, but has been falsely imprisoned for the death of Harry's parents, framed by a traitorous friend of the Potters.

<sup>185</sup> J.K. ROWLING, HARRY POTTER AND THE PRISONER OF AZKABAN 392 (1999).

<sup>186</sup> Later, in *Order of the Phoenix*, Dumbledore is stripped of much of his authority (in the Wizengamot and elsewhere), but he is still in good standing at this point.

<sup>187</sup> See Chapter 21, J.K. ROWLING, HARRY POTTER AND THE PRISONER OF AZKABAN (1999).

undermine the rule of law. Natural law can provide the basis of justification for violations of positive law, but to justify these actions of Harry and Hermione crosses the limits of natural law or human rights justifications, confusing them with moral justifications.

Harry and Hermione's actions are legally unjustifiable. They are, however, legally excusable. This old distinction provides that justified acts are those that, although an exception to the normal rule, are acts that a society condones and wants, or at least expects, to see again and again.<sup>188</sup> Excusable acts, on the other hand, are those that society, while finding the acts to be deplorable, will forego part or all of the typical punishment based on the specific circumstances.<sup>189</sup> An old example of the distinctions compares the public hangman, *justified* in carrying out a court's sentence, to an *excused* killing in misadventure.<sup>190</sup>

So what? Harry and Hermione may be *merely* excused in their actions, but what difference does this make – they were right, right? No. Justifications sanction the choices of the actor, while excuses remedy an asymmetry between the circumstances at hand and the purpose of the law.<sup>191</sup> In this case, the asymmetry comes about in that laws against aiding in prison breaks are not intended to punish those that save an innocent from an unjust death. But precisely because the behavior is *merely excusable*, there is no sanctioning of Harry and Hermione's *choices*, rather a new, *ex post* determination of justice says that they acted properly.

What I have endeavored to do is to separate the explanation for why we identify with Harry and Hermione, and approve of their actions, from the explanation for why they do not deserve to go to jail. These are not the same. That is why the excuse-justification distinction also provides that excused acts alone require knowledge of the circumstance, but justifiable acts are still justified when performed in ignorance to the circumstances at hand.<sup>192</sup>

Because Harry and Hermione's actions are unjustifiable, the question of culpability specifically abstains from the issue of the motives, which are indeed moral. I'm basing this determination of morality on underlying natural law,<sup>193</sup> natural rights,<sup>194</sup> or **human rights** notions<sup>195</sup> – any construction of the bundle of ineffable rights each of us has an entitlement to as a human being—in this case, the highest right, life itself. But I'm also saying that protecting one of these rights is not necessarily sufficient to legally justify

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<sup>188</sup> Wendy J. Gordon, *Excuse and Justification: Transaction Costs Have Always Been Only Part of the Story*, 50 J. COPYRIGHT SOC'Y U.S.A. 149, 156 (2003).

<sup>189</sup> *Id.*

<sup>190</sup> J.C. SMITH, JUSTIFICATION AND EXCUSE IN THE CRIMINAL LAW 7-8 (1989).

<sup>191</sup> "Usually, an 'excuse' arises because of some kind of institutional lack of fit between the circumstances and what the applicable law seeks to accomplish." Gordon, *supra* note 188, at 156.

<sup>192</sup> SMITH, *supra* note 190, at 8.

<sup>193</sup> See generally *id.*

<sup>194</sup> See Lloyd L. Weinreb, *A Secular Theory of Natural Law*, 72 FORDHAM L. REV. 2287, 2289-90 (2004) (describing natural rights theorists as essentially formulating a secular version of natural law).

<sup>195</sup> *Id.* at 2295 (noting that "human rights" is simply the new name for "natural rights").

violating laws without also being an act that, normatively, our society wants to encourage; it must also be carried out in a manner that society sees as acceptable behavior. This is to be distinguished from the many violations of law in *Order of the Phoenix*, where the actions of Harry and company are justified, in a legal sense, because they not only advance this class of liberty, but are also acts that society wants to encourage, notwithstanding their supposed illegality.

The authority of the Ministry of Magic deteriorates in *Order of the Phoenix*, culminating in the removal of Cornelius Fudge, the Minister of Magic. But *why* does it happen at that stage, and not sooner? At what point does a once-legitimate regime cross the line of legitimacy, changing from a just government occasionally issuing bad edicts to a completely unjust government?

The turning point, I believe, is when the government – the Ministry of Magic – begins punishing *justifiable* “crimes.” Were Harry and Hermione to be punished for their acts in saving Buckbeak and Black, the government would still maintain its legitimacy. Although punishment might also be *excused*, in part or in full, because their actions were not *justified*, excuse is, in a sense, only a privilege. Excused acts are not unlike acts of civil disobedience; they are morally justified or even compelled, but the actor may face the consequences for their actions.<sup>196</sup> But legally justifiable acts *entitle* their actors to the fruits of justification: no punishment.<sup>197</sup>

But in *Order of the Phoenix* Harry and Hermione are subjected to punishment for violating laws that they were *justified* in violating. While excuse and justification are both exceptions to the general law, justifications, since they are acts society wishes to see repeated, *entitle* their actors to avoid punishment, while avoiding punishment is merely a *privilege* or *possibility* for acts that are potentially excusable, because these acts, since they are not acts society wishes to see repeated, require an individual determination of actions.

While it is easy to see that the Ministry of Magic has lost its claim to rightful authority into *Order of the Phoenix*, the point at which this happens – or begins to happen – is difficult to identify. The excuse-justification distinction in punishment, however, can help us identify when the loss of legitimacy in authority begins – in both the wizarding world and our own mundane muggle world.

### **Magic and Contract: The Role of Intent (Timothy S. Hall)**

I have used scenes from Harry Potter to introduce first-year law students to the role of intent and assent in contract formation. Many of these students come to law school with a concept of law as something that is imposed on individuals from outside; that is, their concept of law is better suited for a course in Criminal Law or Torts than for the course in

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<sup>196</sup> Recall that justification sanctions an actor’s choices, dispensing with punishment, while excuse abstains from endorsing the actor’s choices, perhaps leaving some part of the now-mitigated punishment intact. See Gordon, *supra* note 144, at 156; SMITH, *supra* note 146, at 7-9.

<sup>197</sup> *Id.*

Contracts, where duties are not imposed, but are instead assented to. The usefulness of the Harry Potter excerpts arises from an analogy between contract formation and the magical effects produced in the books. Both contract and magic require an expression of intent in order to “make the magic happen.” I find that exploring the uses, and limits, of intent in both Contracts doctrine and in Harry Potter excerpts is an enjoyable and productive exercise for my classes.

The first exercise illustrating the importance of intent is based on the termination of the master-house elf relationship. In *Harry Potter and the Chamber of Secrets*, the house-elf Dobby, at risk of great personal harm, comes to Harry before his second year at Hogwarts to warn him that someone intends to kill him during the school year, but Dobby cannot reveal the identity of the culprit. House-elves are servants of magical families and institutions.<sup>198</sup> One of the terms of the relationship is that house-elves do not own clothing, dressing instead in rags. If given clothing, the master-servant relationship is severed, and the house-elf is “freed.” After Harry defeats Lord Voldemort, Harry and Dumbledore receive a visit from the villainous Lucius Malfoy, accompanied by Dobby, in Dumbledore’s office. Harry realizes, with hints from Dobby, that Malfoy is behind the attacks, and develops a plan to reward Dobby for his efforts. The dissolution of the master-servant relationship comes about when the master makes a gift of clothing to the house-elf.<sup>199</sup> Harry hides one of his socks in a book belonging to Malfoy, and returns the book to him.<sup>200</sup> Upon finding the sock, Malfoy tosses it aside, where it is caught by Dobby. Dobby is released, and no longer bound by Malfoy’s orders. In fact, Dobby uses his new freedom to protect Harry from Malfoy’s rage at having “lost [his] servant.” However, the act of giving the sock was not, from Lucius’ point of view, intended to signify his intent to terminate Dobby’s servitude.<sup>201</sup> How is it that it nonetheless carries sufficient weight to affect that result?

On the one hand, this privileging of (objective) act over (subjective) intent might be seen as consistent with the common law of contract. In the case of *Lucy v. Zehmer*,<sup>202</sup> studied by many first-year law students, a seller’s allegedly “joking” delivery of a promise to sell real estate is held to constitute a binding acceptance of the buyer’s offer to purchase,

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<sup>198</sup> Although others analyze the house-elf relationship as akin to slavery, and that is certainly a reasonable reading of the text, the status of the house-elf seems to lack certain incidents of property. For instance, I do not believe that there is any indication that house-elves are alienable or transferable between magical families (at least, until Dobby is freed from the Malfoys’ service and enters into a freely bargained contract with Hogwarts). I will thus treat the house-elf’s employment as a type of contract, although certainly a morally questionable one - perhaps a form of indentured servitude.

<sup>199</sup> This is reminiscent of a prisoner receiving a new suit of clothes before being released to make his way in free society. See *The Shawshank Redemption*, \_\_\_\_.

<sup>200</sup> This is the scene as depicted in the movie. See [Movie citation, perhaps with chapter reference from DVD]. In the book narrative, the journal is placed *inside* the sock. When Mr. Malfoy receives the sock, he removes the journal and tosses the sock aside. [What effect, if any, does this have on the intent analysis?]

<sup>201</sup> This is more clear in the film than in the book. In the book, Lucius opens the diary to find the sock before tossing it aside, where it is caught by Dobby. In the film, Lucius simply tosses the diary aside, without knowing that it contains a sock. In either case, the fact that it makes its way into Dobby’s hands is merely coincidental from Lucius’ point of view.

<sup>202</sup> 84 S.E.2d 516 (Va. 1954)

regardless of the seller's true, subjective intent.<sup>203</sup> It is an elementary principle of contracts that the relevant intent is the objective, expressed intent of the actor, not his secret, subjective intent.<sup>204</sup> Since all of the actors in this scene know that the delivery of a sock constitutes release of the house-elf from his servitude, the act itself is perhaps sufficient for Dobby to reasonably conclude that Malfoy intends to free him.

On the other hand, an objective expression of intent must be reasonably readable as assent to be bound before it may be legally acted on by the other party.<sup>205</sup> An "offer" which is obviously made in jest, in anger or by mistake cannot be "snapped up" by the other party to his advantage.<sup>206</sup> This seems to be applicable to the Dobby facts,<sup>207</sup> and would thus give Malfoy a "defense" to Dobby's claim to freedom.<sup>208</sup>

Emphasis of act over intent is seen in other aspects of the Harry Potter mythology as well. In another house-elf plotline, in *Goblet of Fire* Hermione seeks to "free" the house-elves working at Hogwarts. She knits small articles of clothing which she then conceals in the student dormitory, hoping that the elves will find them and be "freed." In this case, problems arise with the intent expressed by both Hermione and the elves. First, although Hermione clearly intends to grant the house-elves their freedom, how does she act as an agent of Hogwarts in this manner? She clearly does not have express authority to act for Hogwarts, which depends greatly on house-elves for domestic chores, and it is difficult to see how she could have an implied authority to release the elves, as no reasonable person would think that a student would be empowered to make personnel decisions for a school. Perhaps the author means to imply that the mere objective act of giving clothes creates the magical effect of granting freedom, without regard to the intent of the donor or her authority to make the gift. But if this is so, why could Harry not free Dobby from Malfoy's service by simply giving him the sock himself, rather than staging the elaborate deception at the end of *Chamber of Secrets*?

Second, it turns out that, unlike Dobby, the majority of the elves working at Hogwarts do not want to terminate their relationship with the school. To avoid the risk of finding an article of clothing, they refuse to clean the student dorms, forcing Dobby, who is working

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<sup>203</sup> 84 S.E.2d 516 at 521-22 ("The mental assent of the parties is not requisite for the formation of a contract. If the words or other acts of the parties have but one reasonable meaning, his undisclosed intention is immaterial.")

<sup>204</sup> E. Allan Farnsworth, *Contracts* §3.6 (4<sup>th</sup> ed. 2004).

<sup>205</sup> See *Lucy v. Zehmer*, 84 S.E.2s 516 (Va. 1954) ("a person cannot set up that he was merely jesting, when his conduct and words would **warrant a reasonable person in believing** that he intended a real agreement." (emphasis added)).

<sup>206</sup> *First Baptist Church of Moultrie v. Barber Construction Co.*, 377 S.E.2d 717 (Ga. App.1989) ("If, before acceptance, the offeree knows, or has reason to know, that a material error has been made, he is seldom mean enough to accept; and if he does accept, the courts have no difficulty in throwing him out. He is not permitted 'to snap up' such an offer and profit thereby."); *Wender Presses, Inc. v. United States*, 343 F.2d 961, 963, 170 Ct.Cl. 483 (1965) ([An offeree] will not be permitted to snap up an offer that is too good to be true; no agreement based on such an offer can ... be enforced by the [offeree].")

<sup>207</sup> How is the master to have laundry done by the house-elf if he cannot convey articles of clothing to it without signifying the termination of the relationship?

<sup>208</sup> Of course, in magic, unlike the law, there is no appeal from the effects of a spell or action. In this way, the "laws" of magic are more akin to the laws of physics than to social laws.

for Hogwarts as an employee rather than an indentured house-elf, to do all the work himself. Are we to conclude that the master<sup>209</sup> has the power to terminate the relationship at will?<sup>210</sup> Could the elves not refuse to accept the clothing, and continue as indentured servants at Hogwarts, a role they evidently find palatable?<sup>211</sup> Or, again, is the author's meaning that the act of receiving clothing has magical effect independent of the subjective intent of either the donor or the recipient of the gift?

Finally, we see this privileging of objective over subjective intent in the selection process for the Triwizard Tournament in *Goblet of Fire*. Although Harry has not entered his name into the Goblet, his name nonetheless emerges from the Goblet as one of the Hogwarts Champions. Dumbledore tells Harry that he must compete, as the selection of his name has created a binding "magical contract." Of course, since a contract requires the assent of both parties, how can it be that Harry is bound to compete?<sup>212</sup>

From these texts, it would appear that in the Potter universe, magic depends solely on the satisfaction of certain formalities - the delivery of an item of clothing to a house-elf, or the appearance of one's name from a list of candidates, suffice to bind the actor regardless of intent.<sup>213</sup> On the surface, this would appear to be consistent with the objective theory of contract formation. However, a closer look at both worlds reveals

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<sup>209</sup> Or its agent, see *id.*

<sup>210</sup> This may be true, since in *Order of the Phoenix*, Hermione suggests that the Order deal with the treacherous house-elf Kreacher, who obeys orders from the portrait of Sirius Black's dead mother rather than from Sirius, his living master, is to "free" him. Sirius responds that freedom would kill Kreacher, but does not deny that he would have the power to end the elf's servanthood unilaterally.

<sup>211</sup> This is also in keeping with the increasing "darkness" in the HP world. The reluctance of the house-elves to be freed, and Ron's (and others') arguments that they enjoy their indentured servitude status, reminds the reader of similar arguments made in the American Civil War that slavery was in fact in the best interests of the African slaves, as they would be unable to competently live in freedom and enjoyed the security of slavery. William W. Fisher III, *Ideology and Imagery in the Law of Slavery*, in *Slavery and the Law* (Paul Finkelman, ed.) at 52-53 ("The key to [paternalist justifications of slavery] was the depiction of Southern society as a whole as ... humane. [] Inferiors obey and respect their superiours and are rewarded with support and sustenance. ... Many planters thought of themselves as patriarchs, who controlled but were also responsible for their families and slaves, and sought in various ways to play the role of feudal gentry[.]"); William E. Wiethoff, *A Peculiar Humanism: The Judicial Advocacy of Slavery in High Courts of the Old South, 1820-1850* at 39 ("Freedom to [slaves] is a benefit rather in name than in fact, and in truth, upon the whole, their condition is not thereby improved ... While they remain in what is here their original status, provided for as they are in infancy, old age and infirmity, they are exempt from the cares and anxieties of a precarious subsistence, and the wretchedness of actual want[.]" (citing *Peter v. Hargrave*, 5 Grattan 12, 22 (Va. 1848))).

<sup>212</sup> One answer might be that competing is a term (perhaps implied) of the contract between Harry and Hogwarts. I tell my students that their selection for Socratic questioning in class binds them to participate, regardless of whether they have expressed an intent to participate (by, for example, raising their hands), because that is part of the ground rules of law school, and they accept those rules by enrolling in law school and being assigned to (or, for upperclass courses, voluntarily enrolling in) my class. However, despite what some first-year students may believe, class participation is rarely a life-threatening exercise, and participation in the Triwizard Tournament seems a bit too material an obligation to hang on an implied duty.

<sup>213</sup> Lucius Malfoy did not intend to free Dobby by presenting him with clothing; and the Hogwarts house-elves would not have intended to be freed by inadvertently picking up one of Hermione's hidden items of clothing. Nonetheless, we are told that the act of delivery is magically binding.

that this is not the entire story. Much of the law of contract formation exists to deal with the shadowy boundary of expression of intent.<sup>214</sup> Doctrines of mistake,<sup>215</sup> misunderstanding,<sup>216</sup> fraud<sup>217</sup> and others provide exceptions to the basic rule of objective intent.<sup>218</sup> Thinking about these aspects of the Harry Potter stories can provide useful justifications for these exceptions to a strict rule of objective intent; in large part because the magical world of Harry Potter does not seem to allow for such examples. Examination of these scenes can reveal the harshness of the rule of objective intent taken to extremes, and can illuminate for the law student and for the reader the necessity of these amelioration doctrines that the law has developed.

### Rule of Man (or Wizard) in the Harry Potter Narratives (Jeffrey E. Thomas)

While J.K. Rowling's depiction of law and the legal institutions is negative,<sup>219</sup> and may be some kind of indictment of the legal system in the real world, it also provides an important and interesting context within which to consider the moral role of the individual. This predominance of the individual over law or legal rules is a theme that runs throughout the individual Harry Potter narratives. It starts at the beginning with Dumbledore's decision to place Harry with his Aunt and Uncle.<sup>220</sup> Although the average reader or viewer may not really think much about this, this scene shows the central role and power of Dumbledore as an individual from the outset of the various Harry Potter narratives. Though not cloaked in any official legal authority, he apparently makes a sensible legal determination subjected only to the most modest kind of review. (Basically, Professor McGonagall, a person who is subordinate to Dumbledore and certainly has no greater legal authority, questions the decision and then accedes to Dumbledore's decision.)<sup>221</sup>

Dumbledore's central role in the narrative is an example of a positive depiction of "rule of man."<sup>222</sup> While the "rule of law" and the "rule of man" are generally considered as in opposition with one another,<sup>223</sup> and in Western culture the "rule of law" is the ideal,<sup>224</sup>

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<sup>214</sup> E. Allan Farnsworth, *Contracts* 114 (4<sup>th</sup> ed. 2004) ("This question [of assent] provoked one of the most significant doctrinal struggles in the development of contract law[.]")

<sup>215</sup> Farnsworth, *supra* note \_\_\_, at §9.4

<sup>216</sup> *Raffles v. Wichelhaus*, 1569 Eng. Rep. 375 (Court of the Exchequer 1864)

<sup>217</sup> Farnsworth, *supra* note \_\_\_, at §4.10

<sup>218</sup> Farnsworth, *supra* note \_\_\_, at §3.6

<sup>219</sup> See *supra* note 11, as well as essays by Schwabach, *supra* text accompanying notes \_\_-\_\_, and Fishman, *supra* text accompanying notes \_\_ - \_\_, which are part of this article.

<sup>220</sup> *SORCERER'S STONE*, *supra* note \_\_\_, at 15-17.

<sup>221</sup> *Id.* at 13-14.

<sup>222</sup> Although the term "man" is inherently gendered, I use the term generically. The phrase "rule of man" has been used historically, and carries connotations of arbitrariness and whim that are objected to by those arguing in favor of rule of law. See Richard H. Fallon, Jr., "The Rule of Law" as a Concept in *Constitutional Discourse*, 97 COLUM. L. REV. 1, 3 n.10 (1997).

<sup>223</sup> As Professor Fallon notes, any discussion of Rule of Law "should begin with the familiar distinction between 'the Rule of Law' and 'the rule of men [sic].'" Fallon, *supra* note \_\_\_, at 2-3. This distinction was drawn in the historic case of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) ("The government of the United States has been emphatically termed a government of laws, and not of men.").

<sup>224</sup> "The Rule of Law is a much celebrated, historic ideal." Fallon, *supra* note \_\_\_, at 2.

my thesis is that Dumbledore's activities throughout the Harry Potter narratives demonstrate the importance of the individual's pursuit of truth and justice as predominant over law. While law will often support truth and justice, this is not always the case. Dumbledore's leaving Harry with the Dursleys does not put law in opposition to truth or justice, it just ignore the role of law. It is Dumbledore's decision as an individual (albeit with great wisdom and experience) that is shown as the right thing to do even though it is sometimes difficult regardless of the legal niceties.

In *Prisoner of Azkaban*, Dumbledore suggests that Harry and Hermione use the time turner to save Buckbeak and Sirius Black from an unjust, but certain, death.<sup>225</sup> This suggestion creates a direct conflict between the characters as individuals and the "rule of law." By using the time turner to circumvent the legal process, Harry and Hermione are undoubtedly committing crimes of their own for aiding and abetting and probably for misuse of the time-turner. Nevertheless, these risks and actions are justified by the higher moral value of "justice." And who can really disagree in this individual case.

The "rule of law" response, of course, is that we would have chaos and anarchy if everyone determined to take the law into their own hands in pursuit of their perceived version of justice. While this is surely correct, that really isn't the point. Rather, in a sort of deconstructionist way,<sup>226</sup> the point is that the rule of law is *fallible* and that when it fails, *the moral thing is to take action to address it*. Does that mean that we should resort to breaking the innocent out of jail? Perhaps not, though in the right circumstances that may be justified. The pairing<sup>227</sup> of law and injustice requires the reader or viewer to grapple with the moral dilemma and to explore its implications. Law does not always lead to justice, and justice sometimes requires that we break or circumvent the law.

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<sup>225</sup> PRISONER OF AZKABAN, *supra* note \_\_\_, at 393. The book is more explicit on this point than the movie. In the book, Dumbledore comments, "what we need . . . is more *time*." *Id.* Hermione then understands he is referring to the Time-Turner and suggesting that they go back in time. Dumbledore then tells them where Sirius is being imprisoned, and implies that they should also save Buckbeak by saying, "If all goes well, you will be able to save more than one innocent life tonight." *Id.*

In the movie, by contrast, Dumbledore makes a more veiled suggestion. He says: "A mysterious thing, time. Powerful. And when meddled with, dangerous." *Harry Potter and the Prisoner of Azkaban*. After telling them where Sirius is being detained, Dumbledore then says, "you know the laws, Miss Granger, you must not be seen." *Id.* Although this implies, rather than suggests the use of the Time-Turner, the implication is still quite strong. Dumbledore's final statement in the movie is in a passive tense, which is consistent with the more implied suggestion of the movie: "If you succeed tonight, more than one innocent life may be saved." *Id.*

<sup>226</sup> "Deconstruction" is a technique that grew out of literary criticism. It takes an associational hierarchy and "deconstructs" that hierarchy by turning it upside down for analysis. See Jeffrey E. Thomas, *Legal Culture and the practice: A Postmodern Depiction of the Rule of Law*, 48 UCLA L. REV. 1495, 1500-01 (2001). In modern legal culture, Rule of Law is typically paired with and put above Rule of Man in an associational hierarchy. A deconstructionist way of analyzing Rule of Law therefore would switch the hierarchy and ask what things would be like if Rule of Man were predominant over Rule of Law. My contention here is that Dumbledore, as an embodiment of the Rule of Man, allows us to consider that reversed hierarchy.

<sup>227</sup> By "pairing" I mean to refer to the associational hierarchy that places Rule of Law above and in opposition to Rule of Man. See *supra* note \_\_\_ [presently 168]. This "pairing" is used for a deconstructionist analysis by inverting the hierarchy and putting Rule of Man above Rule of Law. See *supra* note 171.



While this opposition of law and justice is artificially sharp in this particular example, there are many grey areas of law that permit extra-legal moral decisions. Consider, for instance, prosecutorial discretion. Prosecutors have considerable power and discretion in the criminal justice system.<sup>228</sup> The decision to prosecute sometimes sets an entire “machine” into motion that can have enormous legal and personal consequences.<sup>229</sup> The pairing of law and injustice may give the prosecutor the moral fortitude to choose not to prosecute even when the evidence technically would permit it.<sup>230</sup>

This particular pairing<sup>231</sup> also focuses on the role of the *individual*. While we live within a legal system, we act as individuals. Dumbledore, as an individual, has the wisdom to know when to follow the rule or to ignore it. While he does not make it a point to break the law or act extra-legally, he doesn’t seem too concerned about law either. He goes along to the trial of Buckbeak,<sup>232</sup> but when it goes awry, he allows Harry and Hermione to intervene. He also allows Hagrid to be wrongfully accused of opening the Chamber of Secrets, which results in his unjust and immediate imprisonment in Azkaban,<sup>233</sup> but that error is corrected in due course when the true culprit is discovered. (At least it is corrected the second time; though not corrected the first time, Dumbledore allows Hagrid to become gamekeeper at Hogwarts thereby diminishing the impact of the injustice.)

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<sup>228</sup> See, e.g., Leslie C. Griffin, *The Prudent Prosecutor*, 14 GEO. J. LEGAL ETHICS 259 (2001); Andrew B. Loewenstein, Note, *Judicial Review and the Limits of Prosecutorial Discretion*, 38 AM. CRIM. L. REV. 351 (2001); Ellen S. Podgor, *Symposium: The Ethics And Professionalism Of Prosecutors In Discretionary Decisions*, 68 FORDHAM L. REV. 1511 (2000); Robert Heller, Comment, *Selective Prosecution And The Federalization Of Criminal Law: The Need For Meaningful Judicial Review Of Prosecutorial Discretion*, 45 U. PA. L. REV. 1309 (1997); William T. Pizzi, *Understanding Prosecutorial Discretion in the United States: The Limits of Comparative Criminal Procedure as an Instrument of Reform*, 54 OHIO ST. L.J. 1325 (1993); Wayne R. LaFave, *The Prosecutor's Discretion in the United States*, 18 AM. J. COMP. LAW 532 (1970). For some empirical studies of prosecutorial discretion, see Lisa L. Miller and James Eisenstein, *The Federal/State Criminal Prosecution Nexus: A Case Study in Cooperation and Discretion*, 30 LAW & SOC. INQUIRY 239 (2005); Joseph R. McCarthy, *Implications Of County Variance In New Jersey Capital Murder Cases: Arbitrary Decision-Making By County Prosecutors*, 19 N.Y.L. SCH. J. HUM. RTS. 969 (2003); Herman J. Hoving, *A Positive First Step: The Joint Legislative Audit and Review Commission's Review of Virginia's System of Capital Punishment*, 14 CAP. DEF. J. 349 (2002) (describing an empirical study of the use of prosecutorial discretion in Capital Punishment cases in Virginia).

<sup>229</sup> For a description of several stages of criminal proceedings where the prosecutor exercises discretion, see Podor, *supra* note \_\_\_, at 1515-24. Prosecutors’ power is considerable at each of these stages. See Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393 (1992). The decisions to investigate, charge, and prosecute all have consequences of taking time, causing considerable inconvenience, and requiring financial resources, even if the person is innocent. These consequences are worsened when the discretion is used in racially discriminatory way, which is sometimes the case. See P.S. Kane, Comment, *Why Have You Singled Me Out? The Use of Prosecutorial Discretion for Selective Prosecution*, 67 TUL. L. REV. 2293 (1993). Ultimately, the exercise of prosecutorial discretion can play a role in whether a criminal defendant is subjected to the death penalty. See Hoving, *supra* note \_\_\_; McCarthy, *supra* note \_\_\_.

<sup>230</sup> See Griffin, *supra* note \_\_\_, at 303-07 (suggesting that prosecutors should exercise “public moral judgment”); Podgor, *supra* note \_\_\_, at 1530-35 (arguing for education of prosecutors as a way to encourage proper use of discretion).

<sup>231</sup> See *supra* note 172.

<sup>232</sup> See PRISONER OF AZKABAN, *supra* note \_\_\_, at 399.

<sup>233</sup> *Id.* at 261.

Dumbledore is engaged in training at least some of the students at Hogwarts to reach this higher moral plane. He is quite aware of Harry's persistent rule-breaking,<sup>234</sup> and even facilitates it by giving him the invisibility cloak,<sup>235</sup> but seems to allow this experimentation as part of Harry's education. If Harry is caught, he has to suffer the punishment,<sup>236</sup> but sometimes the risk or the costs are worth the objective.<sup>237</sup> Hermione, who starts out as prudishly committed to the rules,<sup>238</sup> gradually moves into this more complex and ambiguous moral space.<sup>239</sup> The pairing of law and injustice allows the readers and viewers, as individuals, to explore this same space.<sup>240</sup>

That is not to say that rules are irrelevant or to be entirely ignored. Dumbledore recognizes Longbottom's attempt to prevent Harry, Ron and Hermione from breaking the rules as very heroic and worth a reward that earns Gryffindor the House Cup.<sup>241</sup> (Dumbledore, of course, is also trying to build Longbottom's stature with the other students and his self-esteem, again showing his great wisdom). Similarly, there are numerous instances where rule-breaking is punished at the school,<sup>242</sup> and justifiable instances of punishment in the wizarding criminal justice system.<sup>243</sup> Thus, the rules are

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<sup>234</sup> For example, Dumbledore knew that Harry was visiting the Mirror of Erised after curfew, and even met him at the mirror in Harry's third visit. See *SORCERER'S STONE*, *supra* note \_\_, at 212. Yet Dumbledore did not object or impose any punishment.

<sup>235</sup> See *SORCERER'S STONE*, *supra* note \_\_, at 299.

<sup>236</sup> For instance, Harry, Ron and Hermione were caught by Filch after getting rid of Norbert, Hagrid's dragon, in the middle of the night from the North Tower. Professor McGonagall gave them detention and fined them fifty points each. See *SORCERER'S STONE*, *supra* note \_\_, at 242-44.

<sup>237</sup> Although Harry, Ron and Hermione get detentions for being out in the middle of the night, the objective was to protect Hagrid, a friend, from getting caught with a young dragon. This objective has some moral value to it, and was considered to be at least worth the risk of getting caught, if not worth the price that they ultimately paid.

<sup>238</sup> Hermione reluctantly participates in the late-night outing to find out what is behind a mysterious door. After a narrow escape from the three-headed dog, she comments, "I hope you're pleased with yourselves. We could all have been killed --- or even worse expelled." See *SORCERER'S STONE*, *supra* note \_\_, at 162.

<sup>239</sup> Hermione is the one who suggests Polyjuice Potion as a way to impersonate some Slytherins to get access to their common room and find out if Malfoy really is the Heir of Slytherin. While this is not necessarily in direct violation of the rules, it requires that they contrive a way to get access to the Restricted Section of the library. See *CHAMBER OF SECRETS*, *supra* note \_\_, at 159-60. By the fifth book, Hermione is much more comfortable with rule-breaking. Although she tries to talk Harry out of going to the Ministry of Magic to confront Voldemort in order to save Sirius Black, she suggests that they lure Umbridge out of her office a second time to use her fire to try to confirm whether Sirius has left his home. Her hesitation about going to the Ministry is not out of any concern for the rules, but rather is out of concern for Harry's safety. See *ORDER OF THE PHOENIX*, *supra* note \_\_, at 731-37. Once that plan goes awry, Hermione concocts a story (that is, she *lies* to a teacher, a representative of the Ministry and the High Inquisitor, though none of them trust or respect her) to lure Umbridge into the forest where she is taken by the Centaurs, allowing she and Harry to escape. See *id.* at 748-56.

<sup>240</sup> Lana Whited and Katherine Grimes make a similar point by suggesting that the Harry Potter narratives allow children to explore Lawrence Kohlberg's stages of moral development. See Lana A. Whited, with M. Katherine Grimes, *supra* note 8.

<sup>241</sup> "'There are all kinds of courage,' said Dumbledore, smiling. 'It takes a great deal of bravery to stand up to our enemies, but just as much to stand up to our friends. I therefore award ten points to Mr. Neville Longbottom.'" *SORCERER'S STONE*, *supra* note \_\_, at 306.

<sup>242</sup> See, e.g., *supra* note \_\_ [was 181, about McGonagall giving them detention for Norbert]

<sup>243</sup> The examples of justifiable criminal punishment are for those who were followers of Voldemort when he was in power. For example, the Lestranges were sentenced to life imprisonment in Azkaban for

generally to be followed, with an exception for instances where a higher moral requirement provides some justification.

What we are left with, then, is system of rules and laws that is rather porous, with many instances of justifiable violations. While this is probably far from ideal for any society, the point of the Harry Potter narratives isn't really to create or describe social arrangements. Instead, it is an opportunity for the youthful reader to have an imaginary adventure in which he or she will, through character surrogates, face many perils, including moral dilemmas. Through the exploration of these dilemmas, the characters, and through them the readers, begin to understand the power and accountability of individuals. While "rule of man" is not the ideal, these narratives show that individual choice can be used to temper the injustices that are bound to exist in any legal system.

### Making Legal Space for Moral Choice (Andrew P. Morriss)

Prof. Tyler Cowen, one of the leading voices on the economics of culture, suggests that economists can add value by considering novels as models.<sup>244</sup> In the Harry Potter novels, we have a good example of what Cowen terms a "calibration model."<sup>245</sup> That is, Rowling is not "play[ing] out the implications of . . . her underlying worldview. . . . [which reflects her] understanding of society, psychology, and human behavior" as in a "novelistic estimation"<sup>246</sup> but instead asking the reader to judge the validity of her underlying model of human behavior when faced with the choice between good and evil.

Rowling attempts to provide an internally consistent world in which magic "works" much as science "works" in our world.<sup>247</sup> The interesting question about such a world is not "what would we do differently if magic worked," since magic does not work and will not work regardless of the choices we make. As lawyers, I do not think we need concern ourselves with the details of imported cauldron regulation or even the due process available in Wizangamot hearings. These are novels (and novels aimed primarily at children). In such circumstances, in Judge Posner's memorable phrase, "[a]rt trumps due process."<sup>248</sup> What is interesting is using the idea of functioning magic to address the moral choices about our equivalent "magic," since we must make choices about how to

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torturing the Longbottoms, Neville's parents, to the point of insanity. See *ORDER OF THE PHOENIX*, *supra* note \_\_, at 137; *GOBLET OF FIRE*, *supra* note \_\_, at 594-96, 602-03.

<sup>244</sup> Tyler Cowen, *Is a Novel a Model?* (unpublished working paper, Department of Economics, George Mason University, September 12, 2003) (copy on file with author) at 5 ("We can recognize that novels stand on their own as works of art, while still wishing to focus on how novels fit into rational choice categories. My account seeks to add to the value of novels, rather than explain that entire value in reductionist terms, or force all of that value into the boxes of rational choice social science.") Cowen has written widely on culture and economics and so is well-qualified, perhaps uniquely among economists, to consider literary analysis. See TYLER COWEN, *CREATIVE DESTRUCTION: HOW GLOBALIZATION IS CHANGING THE WORLD'S CULTURES* (2002) and TYLER COWEN, *IN PRAISE OF COMMERCIAL CULTURE* (1998).

<sup>245</sup> This point is more fully developed in Morriss, *Calibrating Moral Choice*, *supra* note 244.

<sup>246</sup> Cowen, *Model*, *supra* note 244, at 14-15.

<sup>247</sup> Alan Jacobs, *Harry Potter's Magic*, 99 *FIRST THINGS* 35 (2000) available at <http://www.firstthings.com/ftissues/ft0001/reviews/jacobs.html> (last visited August 9, 2005).

<sup>248</sup> RICHARD A. POSNER, *LAW AND LITERATURE* 166 (REV. ED. 1998).

use the enormous power technology grants us over the world.<sup>249</sup> We can evaluate the choices characters make using our introspective abilities<sup>250</sup> – and so can children, Rowling’s primary intended readership. The text itself supports the characterization of the stories as calibration. In a key passage in the second novel,<sup>251</sup> Harry questions Albus Dumbledore about whether Harry belongs in Slytherin House, as the Sorting Hat initially suggested, rather than in Gryffindor. Dumbledore responds that the difference between Harry and Voldemort is that Harry asked to not to be in Slytherin. “It is our choices, Harry, that show what we truly are, far more than our abilities.”<sup>252</sup> Individual choice is central to the moral dilemmas faced by the characters at many junctures.<sup>253</sup> The centrality of individual moral choices at critical points in the novels provides the reader with the opportunity to evaluate Rowling’s claims about the nature of moral choice,<sup>254</sup> exactly the function of a calibration model.

Creating a calibration model requires Rowling to make some choices about the society in which Harry lives. Consider the Ministry of Magic, for example. Some legal commentary is critical of Rowling’s portrayal of bureaucracy.<sup>255</sup> To some extent this may merely reflect general social attitudes toward law and government.<sup>256</sup> Some is simply necessary to advance the plot. For example, the removal of Dumbledore and Hagrid from Hogwarts just before the climax of *Chamber of Secrets*<sup>257</sup> is necessary to set up the final

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<sup>249</sup> See, e.g., Jacobs, *supra* note 247, (“The fundamental moral framework of the Harry Potter books, then, is a familiar one to all of us: it is the problem of technology.”)

<sup>250</sup> Cowen notes that

many readers judge the plausibility of novels by using their introspection. If we believe that self-deception is rife in human affairs . . . this test is not in every way a good one. We will tend to like those novels that affirm what we think we already know, and reject novels that provide disconfirming messages. Novels also can mislead when introspection provides no guide to truth. It is easy to point to novelistic simulations (just about any novelistic utopia will do, from Thomas More to Edward Bellamy) that are plain, flat-out wrong about how individual human behavior translates into social outcomes. Readers are nonetheless attracted by the emotional resonance of the story. An introspective test may be able to distinguish true and false propositions about human behavior, but certainly it cannot judge factual claims about the world very well.

Cowen, *Model*, *supra* note 244, at 17.

<sup>251</sup> I am reassured that this is in fact a key passage by the fact that Alan Jacobs also identified it as central.

See Jacobs, *supra* note 247.

<sup>252</sup> J.K. ROWLING, HARRY POTTER AND THE CHAMBER OF SECRETS 245 (1998).

<sup>253</sup> Others have made a similar point. See Paul R. Joseph & Lynn E. Wolf, *The Law in Harry Potter: A System Not Even a Muggle Could Love*, 34 U. TOL. L. REV. 193, 194 (2003) (Harry Potter “books present a classic tale of good versus evil and the maturation of the central hero, who must brave many dangers and make fateful choices about who he is and who he wants to become.”)

<sup>254</sup> See, e.g., Cowen, *Model*, *supra* note 244, at 17 (“a constructed story, by its nature, sheds light on the author’s underlying worldview. The plausibility of the story allows us to ‘test’ the plausibility of the author’s framework. . . . this use of fiction gives us insight into our abstract constructions behind the fictions.”)

<sup>255</sup> See, e.g., Joseph & Wolf, *supra* note 253, at 195 (“This unelected bureaucracy [the Ministry of Magic] is portrayed as heavy-handed, corrupt, and incompetent.”)

<sup>256</sup> See, e.g., Lawrence M. Friedman, *Law, Lawyers, and Popular Culture*, 98 YALE L. J. 1579, 1592 (1989) (“The trend toward suspicion of authority is of course another reflex of our special brand of individualism—a form of consciousness which literally stresses the individual, and which is deeply distrustful of whatever is large-scale, organized, governmental; not to mention what comes clothed in traditional trappings of authority”).

<sup>257</sup> ROWLING, CHAMBER OF SECRETS, *supra* note 252, at 195.

confrontation between Harry and Tom Riddle in the Chamber. If either was on site, it would be difficult to explain why Harry did not seek advice, at least, from one or the other. Leaving Harry to his own resources (and those of Ron and Hermione, of course) is critical to the plot – books in which Harry simply discovers Voldemort's latest disguise and reports it to Dumbledore would be rather uneventful.

Indeed a central feature of the climaxes of each of the Harry Potter books is that Harry is left alone to face Voldemort and his allies. This, in itself, is not novel. Children's literature regularly features the abandonment of children to their own devices in the face of varying degrees of peril.<sup>258</sup> In the Potter books, Harry's need to fight alone is essential to the theme of moral choice. Harry is left to battle Voldemort, rather than rescued by Dumbledore or other adults not because the adults are inept (although some are) but because Dumbledore trusts Harry to make the right choices.

In the Harry Potter stories, thus far anyway, Harry and many others have made the right choices. Dumbledore trusts many who others do not trust, including Hagrid, Prof. Lupin, Sirius Black (after the truth about his role in the death of Harry's parents comes out), Ron, Hermione, the Durmstrang students in *Goblet of Fire* even after their headmaster has fled, and, most notably, Severus Snape. We are told repeatedly of such trust, and Harry and others are asked to trust even people they have every reason to fear and hate such as Snape, based solely on Dumbledore's confidence that the trusted individuals will make the right choices.<sup>259</sup> Moreover, we rarely see Dumbledore, the lynch-pin of the defense of the world against Lord Voldemort, give others explicit instructions on how to battle Voldemort. Dumbledore provides his allies with information and assistance but he does not spell out the details of how they are to fight Voldemort.<sup>260</sup>

With this in mind, let us examine a pivotal scene from *Goblet of Fire*. Sirius Black, Prof. Remus Lupin, Harry, Ron and Hermione have unraveled some of the book's central plot devices during their encounter in the Shrieking Shack in Hogsmeade. They have unmasked Peter Pettigrew, who has been masquerading as Ron's pet rat Scabbers since the beginning of the series. Black, who Harry has just learned is not a crazed killer

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<sup>258</sup> For example, C.S. Lewis's *The Chronicles of Narnia* are "an adventure tale of self-sufficient children, with their parents conspicuously absent." Mark Oppenheimer, *What They're Reading at the Kitchen Table*, W.S.J. (Sept. 2, 2005) at W11. Similarly Lyria, the heroine of Philip Pullman's *His Dark Materials* Trilogy, has been abandoned by her parents before the story begins; when she eventually encounters her parents, she discovers that they are moral monsters. In a more popular vein, the Lemony Snicket books open with the death of the hero's and heroines' parents, the destruction of their home and wealth, and their being turned over to an evil relative by an incompetent guardian. There are countless other examples.

<sup>259</sup> For example, Dumbledore repeatedly insists that Prof. Snape is trustworthy, despite the misgivings of others. Whether Dumbledore was right to trust Snape is, after *Half-Blood Prince*, a hotly debated question. As Dumbledore himself told Harry, "I make mistakes like the next man. In fact, being – forgive me – rather clever than most men, my mistakes tend to be correspondingly huger." J. K. ROWLING, *HARRY POTTER AND THE HALF-BLOOD PRINCE* 197 (2005).

<sup>260</sup> J. K. ROWLING, *HARRY POTTER AND THE SORCERER'S STONE* 302 (1997) ("He's a funny man, Dumbledore. I think he sort of wanted to give me a chance. I think he knows more or less everything that goes on here, you know. I reckon he had a pretty good idea we were going to try, and instead of stopping us, he just taught us enough to help. I don't think it was an accident he let me find out how the mirror worked. It's almost like he thought I had the right to face Voldemort if I could . . .").

responsible for the deaths of Harry's parents, confronts Pettigrew, who we also just learned *is* the person responsible for James and Lilly Potter's deaths, with his treachery and Pettigrew responds "'Sirius, Sirius, what could I have done? The Dark Lord . . . you have no idea . . . he has weapons you can't imagine . . . I was scared, Sirius, I was never brave like you and Remus and James. I never meant it to happen . . . He-Who-Must-Not-Be-Named forced me –'" Black rejects Pettigrew's excuses, "bellowing" that Pettigrew had gone over to Voldemort long before and been spying for him. Pettigrew responds "'He – he was taking over everywhere!' . . . 'Wh – what was there to be gained by refusing him?'" Black then makes the crucial moral point:

'What was there to be gained by righting the most evil wizard who has ever existed?' said Black, with a terrible fury in his face. 'Only innocent lives, Peter!'

'You don't understand!' whined Pettigrew. 'He would have killed me, Sirius!'

'THEN YOU SHOULD HAVE DIED!' roared Black. 'DIED RATHER THAN BETRAY YOUR FRIENDS, AS WE WOULD HAVE DONE FOR YOU!'"<sup>261</sup>

This scene captures how the novels offer a chance for moral calibration. What would the reader do if in Pettigrew's situation? Black, and by implication Lupin and the Potters, would have chosen death at Voldemort's hands rather than betraying friends and cooperating with evil. Pettigrew chose differently. Thus far, however, the scene is not particularly noteworthy among children's or adult literature. Faced with a choice between "the most evil wizard who ever lived" and one's friends, most readers will, I hope, conclude that Pettigrew made the wrong choice. And Pettigrew's animagus form as a rat seems particularly apt given his bad choices. With this clear a choice and signal about Pettigrew's character, however, we haven't learned much.<sup>262</sup>

The key is what happens next. Black and Lupin are prepared to kill Pettigrew to avenge Harry's parents. "'You should have realized,' said Lupin quietly, 'if Voldemort didn't kill you, we would.'"<sup>263</sup> Hermione, rarely at a loss for words, turns her face away but does nothing to attempt to stop the killing, seemingly accepting that Lupin and Black are right to kill Pettigrew. But Harry intervenes and he stops the killing by placing himself between Pettigrew and Black and Lupin.<sup>264</sup> Why? Not for Pettigrew, who Harry tells "I'm not doing this for you." Harry does it "because – I don't reckon my dad would have wanted them [Black and Lupin] to become killers – just for you."<sup>265</sup>

Harry's choice is extraordinary. Who could blame him if he wanted Pettigrew's death, as he had wanted Black's a few moments before when he believed Black had killed his

<sup>261</sup> J. K. ROWLING, *HARRY POTTER AND THE PRISONER OF AZKABAN* 376 (1999).

<sup>262</sup> As Posner notes in his commentary on *The Brothers Karamazov*, unless evil is given its "due," i.e. allowed to appear attractive in some respects, the case for good is unconvincing. POSNER, *LAW AND LITERATURE*, *supra* note 248, at 178.

<sup>263</sup> ROWLING, *PRISONER*, *supra* note 261, at 376.

<sup>264</sup> ROWLING, *PRISONER*, *supra* note 261, at 374-375.

<sup>265</sup> ROWLING, *PRISONER*, *supra* note 261, at 376.

parents?<sup>266</sup> Not only had Pettigrew denied Harry his family, the thing he desires most, but Pettigrew condemned Harry to a miserable childhood with the Dursleys. At this pivotal moment, Harry chooses law over vengeance – “He can go to Azkaban . . . but don’t kill him.”<sup>267</sup>

Harry doesn’t choose law because he’s internalized the value of due process. He doesn’t suggest that Pettigrew deserves a lawyer or is presumed innocent. He doesn’t even choose a trial over vengeance. Pettigrew *will* go to Azkaban if he is taken back to Hogwarts and turned over to Dumbledore, a terrible fate for the guilty, and we have no reason to believe that Pettigrew’s trial will have any more procedural safeguards than did those Harry saw in the Pensieve. (It doesn’t really matter whether Pettigrew’s trial would, since he’s confessed and the only issue is the appropriate punishment.) Harry doesn’t choose law out of mercy either, saying “if anyone deserves [Azkaban], he [Pettigrew] does . . .”<sup>268</sup> Harry chooses law over vengeance because he does not want his parents’ friends to act immorally to avenge his parents. This is a mature choice, one that many adults would be hard pressed to make. It is also a critical choice, since “law grows out of revenge.”<sup>269</sup> Rowling’s readers are invited to compare their own reaction to Harry’s and test themselves against his choice. Black and Lupin question Harry about his choice, making a good case for vigilante justice, but Harry remains firm.<sup>270</sup>

To make this scene work as a calibration, several things are necessary. First, Harry must end up in the Shrieking Shack with, at a minimum, Pettigrew and Sirius, so that he can make the choice.<sup>271</sup> Second, adult authorities cannot burst upon the scene and take Pettigrew away. Third, it must be a real choice: Black and Lupin must be able to actually kill Pettigrew. All of these elements in turn require that the Ministry of Magic be unable to capture Black, despite months of its massive manhunt; that Black have been previously wrongfully convicted of the Potters’ deaths; that Black and Lupin be willing to violate the law and kill Pettigrew themselves; that Harry violate school rules and go to the Shrieking Shack; as well as number of other plot details. Allowing Harry the space to make his choice at the climax thus dictates a number of elements of the novel, including crucial legal details (which reinforces the need to be cautious about putting weight on those details in a legal analysis of the books.)

Confirming the centrality of the Shrieking Shack scene to the novel, Harry and Dumbledore discuss Harry’s choice at the novel’s end. Seeing that Harry is unhappy, Dumbledore asks him why, noting ““You should be very proud of yourself after last

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<sup>266</sup> ROWLING, PRISONER, *supra* note 261, at 213 (When, early in *The Prisoner of Azkaban*, Harry learns what he believes is the truth about Sirius Black, that Black betrayed and killed Harry’s parents, he develops an intense hatred for Black, which Rowling describes as follows: “[a] hatred such as he had never known before was coursing through Harry like poison.”).

<sup>267</sup> ROWLING, PRISONER, *supra* note 261, at 375.

<sup>268</sup> ROWLING, PRISONER, *supra* note 261, at 376.

<sup>269</sup> POSNER, LAW AND LITERATURE, *supra* note 248, at 49.

<sup>270</sup> ROWLING, PRISONER, *supra* note 261, at 376-377.

<sup>271</sup> Getting Sirius there and providing credible support for his story brings Lupin into the scene; Ron and Hermione accompanying Harry enables Rowling to place Pettigrew on the scene. The Scabbers-Crookshanks conflict provides a humorous and playful means of foreshadowing Scabbers’ dual nature.

night.” Harry responds “bitterly” that “It didn’t make any difference,” because “Pettigrew got away.” Dumbledore rejects this: “‘Didn’t make any difference?’ said Dumbledore quietly. ‘It made all the difference in the world, Harry. You helped uncover the truth. You saved an innocent man [Black] from a terrible fate.’”<sup>272</sup>

The key point here is that the result of structuring the plot to bring Harry to the climactic moral choice is to create a society in which the state is largely absent. The Ministry of Magic regulates cauldron bottoms, organizes wizard tournaments, and is run by the bumbling and officious Cornelius Fudge. It does not catch, or even seem to slow down, Lord Voldemort’s many attempts to return to power. Indeed, it does not seem to perform *any* functions critical to everyday life.<sup>273</sup>

More importantly, the state is not even an essential ally in the battle against evil. At the end of *Azkaban*, Dumbledore calls upon Fudge, who has been refusing to accept the idea that Voldemort has returned, to act against the Dark Lord. Fudge is shocked by the request that he authorize a mission to recruit the giants to the fight, which he sees as a threat to his career.<sup>274</sup> In a passage that could easily have been written by a public choice theorist,<sup>275</sup> Dumbledore rebukes Fudge.

‘You are blinded,’ said Dumbledore, his voice rising now, the aura of power around him palpable, his eyes blazing once more, ‘by the love of the office you hold, Cornelius! You place too much importance, and you always have done, on the so-called purity of blood! You fail to recognize that it matters not what someone is born, but what they grow to be! Your dementor has just destroyed the last remaining member of a pure-blood family as old as any – and see what that man chose to make of his life! I tell you now – take the steps I have suggested, and you will be remembered, in office or out, as one of the bravest and greatest Ministers of Magic we have ever known. Fail to act – and history will remember you as the man who stepped aside and allowed Voldemort a second chance to destroy the world we have tried to rebuild!’”<sup>276</sup>

Fudge is clearly not up to the task Dumbledore sets for him; indeed Fudge counters with a vague threat to assert authority over the school if Dumbledore “is going to work against me –.” Dumbledore replies “The only one against whom I intend to work . . . is Lord

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<sup>272</sup> ROWLING, PRISONER, *supra* note 261, at 425.

<sup>273</sup> The money supply is a precious metals-based one; the prison has been privatized to the dementors; Hogwarts is effectively a charter school run by Dumbledore and a board; and so forth. See Morriss, *Why Classical Liberals Should Love Harry Potter*, *supra* note **Error! Bookmark not defined.**

<sup>274</sup> J.K. ROWLING, HARRY POTTER AND THE GOBLET OF FIRE 708 (2000) (“‘You – you cannot be serious!’ Fudge gasped, shaking his head and retreating further from Dumbledore. ‘If the magical community got wind that I approached the giants – people hate them, Dumbledore – end of my career –’”).

<sup>275</sup> The ideas could have been communicated by a public choice theorist. Other than Russell Roberts, however, I do not know of any public choice theorists with the literary talent to write at Rowling’s level. See RUSSELL ROBERTS, THE INVISIBLE HEART: AN ECONOMIC ROMANCE (2002); Andrew P. Morriss, *Families and Economics: Tying the two together in fiction and nonfiction*, BOOKS & CULTURE (January/February 2005) (available at <http://www.christianitytoday.com/bc/2005/001/12.26.html> (last visited August 9, 2005)) (reviewing Roberts).

<sup>276</sup> ROWLING, GOBLET OF FIRE, *supra* note 274, at 708.



Voldemort. If you are against him, then we remain, Cornelius, on the same side.”<sup>277</sup> Note that Dumbledore does not seek to have Fudge replaced or appear to believe Fudge’s official assistance is critical to the fight – he merely asks Fudge to choose sides.

Finally, consider the concluding assessment of Harry’s choice in *Azkaban*. Harry feels he has made the wrong choice because Pettigrew escaped. But Dumbledore corrects him – Harry’s choice “made all the difference in the world” because he saved one innocent man from the Dementor’s Kiss, “a terrible fate.” Thus even though Voldemort’s ally is free, which has terrible consequences in *Goblet of Fire*, Dumbledore weighs Harry’s actions and concludes that they are praiseworthy for saving a single life.<sup>278</sup> There is no utilitarian calculus here, simply an unadorned moral choice focused on the individual making the choice.

A world which allows moral calibration is a world in which individuals are free. They are not able to rely on the state or grownups to solve their moral dilemmas for them nor can they put problems off on others. One crucial thing readers can thus learn from the Harry Potter books is that moral choices require liberty.

### **Harry Potter and Dick Whittington: Similarities and Divergences (Timothy S. Hall)**

Harry Potter and Dick Whittington, although separated in time by nearly 400 years,<sup>279</sup> display remarkable similarities in form.<sup>280</sup> However, a closer reading of the stories reveals different social and worldviews underlying each of the stories. This essay will first explore the formal similarities between the two stories before exploring their underlying differences.

Both stories are in the subgenre of children’s literature consisting of orphan stories- also called “rags to riches” stories. Harry is orphaned when his loving parents are killed by the evil Lord Voldemort,<sup>281</sup> while we are simply told that Dick’s parents died when he was very young.<sup>282</sup> Harry is raised by his mother’s sister and her family, the Dursleys, an aggressively non-magical family who persecute Harry for his perceived identification,

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<sup>277</sup> ROWLING, *GOBLET OF FIRE*, *supra* note 274, at 709.

<sup>278</sup> Dumbledore does hedge a bit, noting that Harry’s mercy toward Pettigrew “create[d] a bond between” the two, for which “the time may come when you will be very glad you saved Pettigrew’s life.” ROWLING, *PRISONER*, *supra* note 261, at 427.

<sup>279</sup> The Dick Whittington story was first recorded in 1604; the first Harry Potter novel was published in 1998.

<sup>280</sup> Cite to Steve Alton contribution to the symposium volume.

<sup>281</sup> *Harry Potter and the Sorcerer’s Stone* at 12-13

<sup>282</sup> *Dick Whittington* at 11. Although the Dick Whittington children’s story diverges in major respects with what is known of the actual life of Richard Whittington, including but not limited to whether Whittington ever in fact actually owned a cat [cite to Stephen Johansen’s essay if included in volume], this essay takes as its text the children’s story rather than the historical figure. [I am using as a text the version of the Whittington story printed in the program to the conference – and those page numbers, which are obviously not original. If there is a version of the story being used by other conference participants, then this can be modified to standardize on one version].

even as an infant, with the magical world.<sup>283</sup> Dick is raised by a “poor old woman” until her death,<sup>284</sup> when he sets off for London and is taken in by the merchant Fitzwarren. There, he is persecuted by the Fitzwarren’s cook,<sup>285</sup> but treated kindly by Fitzwarren and his daughter. Because Dick’s rooms are “infested with rats and mice”<sup>286</sup> due to the malice of the cook, he purchases a cat to kill the mice. In addition to the cat’s usefulness at mousing, she is also Dick’s companion until Dick is forced to send her as goods on a merchant ship owned by Fitzwarren.

Upon reaching the age of eleven, Harry is given a place at Hogwarts School of Witchcraft, where he forms the relationships that will create the core of the stories. Dick’s fortune arrives when the merchant ship returns to England, the captain having sold the cat’s offspring in “a wealthy kingdom of Africa” as a valuable rarity. Dick’s newfound wealth is hailed as “a just reward granted by Heaven for his patience under hard trials, and for his good conduct and industry.”<sup>287</sup>

In both Harry Potter and Dick Whittington, as in the paradigmatic orphan rags to riches story, the orphans grow up to be wealthy leaders of their societies.<sup>288</sup> In both stories, this power and leadership comes at a high cost. In both cases, this cost involves the loss of an important relationship (Harry - parents; Dick - pet) in childhood. The loss of this relationship provides the impetus for the meteoric rise to fortune that follows. The rarity of Dick’s cat leads to its value as a trading good; and the death of Harry’s parents at the hands of Voldemort gives Harry special powers not enjoyed by his peers (and sometimes his teachers) at Hogwarts. Thus, at first glance, Harry Potter seems to be a retelling of the classic orphan story, updated for an audience four centuries past Whittington’s time.

Rags to riches stories are sometimes known colloquially as “Horatio Alger” stories, after the popular 19<sup>th</sup> century American author of such tales.<sup>289</sup> The success of Alger’s tales

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<sup>283</sup> Harry is made to live in the closet under the stairs, and given only the hand-me-downs from the Dursley’s biological son, Dudley. Does this foreshadow the house-elf story – Harry is given his freedom from the Dursleys when Hagrid helps him purchase, among other things, a set of wizard’s robes in preparation for his life at Hogwarts. *Sorcerer’s Stone* at 76-79.

<sup>284</sup> Dick Whittington at 11. Dick is thus twice orphaned before the age of majority.

<sup>285</sup> Id.

<sup>286</sup> DW at 11.

<sup>287</sup> DW at 13.

<sup>288</sup> The exact nature of Harry’s post-Hogwarts adult life has, of course, not yet been revealed, however, if the story arc of the seventh book follows the classic children’s/fantasy form, he will vanquish the evil Voldemort in the final book. I think it is safe to say, even with the story incomplete, that Harry has already achieved notoriety and a leadership role within his world – he is recognized by strangers in pubs (*Sorcerer’s Stone* at 69), and the Ministry of Magic has sought his endorsement as a way to raise morale in the wizarding world (*Half-Blood Prince* at 344-347).

<sup>289</sup> Steven L. Winter, *The Cognitive Dimension Of The Agony Between Legal Power And Narrative Meaning*, 87 Michigan L. Rev. 2225, 2268 (“Once an extensive oeuvre of over forty very specific novels and short stories written by the nineteenth-century author Horatio Alger, the concept of an “Horatio Alger story” has become a schematized “rags to riches” folk model ...”) (footnotes omitted). In another law and literature link, Alger was the private tutor of a young Benjamin Cardozo, helping him prepare for the rigorous entrance exam to Columbia University. Andrew L. Kaufman, *Cardozo* at 25-26 (1998).

shows both the enduring popularity of the orphan story,<sup>290</sup> and is also reflective of the social Darwinism of the 19<sup>th</sup> century.<sup>291</sup> Horatio Alger heroes universally achieve success through hard work and industry.<sup>292</sup> The Dick Whittington tale closely resembles an Alger story. The most salient difference is undoubtedly the source of Dick's wealth, which is at one point described as a "speculation."<sup>293</sup> However, the role of chance in Dick's success is downplayed when his eventual fortune is described as "a just reward granted by Heaven for his patience under hard trials, and for his good conduct and industry." The story seems to take pains to link hard work and fortune, and to make clear that Dick's wealth is self-made, and not the result of mere capricious fate. In this, Whittington's wealth is reconciled with the 19<sup>th</sup> century social Darwinist ethos.<sup>294</sup> In numerous other places in the story, Dick's hard work and industry are repeatedly emphasized. First, when Dick tires walking to London, he asks for a ride on a passing cart "until he was sufficiently rested to allow him to walk again." The emphasis is clear that Dick did not ask to be entirely relieved from the task of walking to London, and that his success is not due to the charity of the passing driver. Similarly, we are told that Fitzwarren and his daughter "agreed Dick should remain in the house if he would make himself useful." Again, pains are taken here to avoid the implication of welfare. Finally, for purposes of illustration, Dick wins the admiration of, and eventually marriage to, Fitzwarren's daughter for his "modesty ... his correct conduct, his respectful demeanor and his love of truth." With this emphasis on individuality, hard work and just rewards, the Dick Whittington story can be seen as a forerunner of the 19<sup>th</sup> century capitalist fairy tales of Alger and others.

In contrast to the social Darwinism of the Dick Whittington/ Horatio Alger story, the Harry Potter stories are primarily about the community that Harry surrounds himself with at Hogwarts. Even when Harry feels most alone, his protection and salvation come from his relationships with his mentor, his friends, his deceased parents, and even his Muggle family.<sup>295</sup> There are many instances which show the interdependence of the three central

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<sup>290</sup> Perry Nodelman, *The Pleasures of Children's Literature* 91 (1992) ("[t]he main characters in many children's stories and novels are orphans.") Alger was certainly aware of the Dick Whittington story, and even incorporated it into one of his works. See Horatio Alger, *Ragged Dick* at \_\_\_\_.

<sup>291</sup> Richard Hofstadter, *Social Darwinism in American Thought* (1944).

<sup>292</sup> Stuart Biegel, *Reassessing The Applicability Of Fundamental Rights Analysis: The Fourteenth Amendment And The Shaping Of Educational Policy After Kadrmas V. Dickinson Public Schools*, 74 Cornell L. Rev. 1078 (1989) (describing the "The Horatio Alger Dream" as "an optimistic vision of a land where limitless opportunities and great personal happiness await those who diligently embrace the traditional work ethic," and noting that "Horatio Alger's highly popular nineteenth-century novels all embody a similar story line.")

<sup>293</sup> DW at 12. The phrase "try his luck" is also used, reinforcing the idea of chance at work.

<sup>294</sup> Lisa C. Ikemoto, *Traces Of The Master Narrative In The Story Of African American/Korean American Conflict: How We Constructed "Los Angeles"*, 66 S.Cal.L.Rev. 1581, 1587 n.26 ("Horatio Alger rags-to-riches stories ... echoed the prevailing theory of Social Darwinism which, in simplistic terms, assumed as truth an American industrial meritocracy and asserted that the wealthy industrialists deserved their success and the poor deserved their fate.")

<sup>295</sup> In fact, Voldemort is the individualist in the HP stories. His relationships are based on utilitarianism, not on love. His goals are self-directed, rather than other-directed. Rowling consistently contrasts the self-interest of Lord Voldemort against the communitarian spirit and strength of Harry and his friends, teachers and colleagues.

characters, as well as others, in the HP stories.<sup>296</sup> A complete catalog of these is prohibited by space limitations, but a few examples will suffice.

In the first novel, *Harry Potter and the Sorcerer's Stone*, we are told that Voldemort could not kill Harry at birth, and that he is still protected today from the weakened Voldemort, because of the power of his mother's love for him, rather than any innate qualities Harry himself may possess.<sup>297</sup>

In the second novel, *Harry Potter and the Chamber of Secrets*, Harry's relationship with and loyalty to Dumbledore bring the phoenix Fawkes to him in the climactic battle under the sewers, saving him from the basilisk's bite and enabling him to again defeat Voldemort and his assistant.<sup>298</sup>

In *Harry Potter and the Goblet of Fire*, Harry departs from his assigned task in the Triwizard Tournament to save his competitor Fleur from a perceived threat.<sup>299</sup> He is criticized by the "official" judges, but clearly the reader is not meant to take this criticism seriously, and this is meant to demonstrate his loyalty to his fellow students, even at the expense of his own advancement in the games.

In *Harry Potter and the Order of the Phoenix*, we are told that Harry is protected so long as he is at the Dursley's home. Even this attenuated relationship adds strength to Harry.<sup>300</sup>

Finally, in the most recent Potter novel as of this writing, *Harry Potter and the Half-Blood Prince*, Voldemort sets a trap that neither Harry nor Dumbledore could bypass alone; however, they succeed together.<sup>301</sup> Dumbledore tells Harry – "I am not worried; I am with you."<sup>302</sup>

The HP stories are more communitarian, despite the surface similarities, than the prior "orphan stories" of Dick Whittington and Horatio Alger.<sup>303</sup> What does all this tell us (if anything) about commercial custom and law in society? In a more interdependent, globalised society, Rowling has given us a more interdependent, community-reliant hero.

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<sup>296</sup> At the very least, it is clear that Harry could not succeed academically at Hogwarts without the assistance and skills of Hermione Granger.

<sup>297</sup> *Sorcerer's Stone* at 299.

<sup>298</sup> *Chamber of Secrets* at 315-322.

<sup>299</sup> *Goblet of Fire* at 499-503.

<sup>300</sup> *Order of the Phoenix* at 40-41; 835-36, 568-577.

<sup>301</sup> *Half-Blood Prince*, at 568-577.

<sup>302</sup> *Half-Blood Prince*, at 578.

<sup>303</sup> To the extent that Professor Edward Phillips of Greenwich is correct in his comment yesterday that the DW story represents an earlier, "good capitalist" version of the orphan story, rather than the later "bad capitalist" 19<sup>th</sup> century literature, then this may represent a return to this sense of community, and the progression from Dick Whittington to Harry Potter may be more one of return to roots rather than departure from norms.