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No Place to Stand: The Incoherent Legal World of J. K. Rowling

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No Place to Stand: The Incoherent Legal World of J. K. Rowling

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I. Introduction

It is astonishing, when one thinks of it, that a series of children's books is so crammed with law. Not one of the seven Harry Potter novels fails to explore difficult issues law, interpretation and especially the relationship of the state to the individual. From practically the first page of *Harry Potter and the Sorcerer's Stone* (SS) we ponder issues of child custody, fosterage and adoption;¹ before Harry even gets to Hogwarts we have heard about crime and punishment,² legal control over the use of magic,³ monetary policy,⁴ and Wizarding government.⁵ Before the series is complete we have witnessed five different judicial or quasi-judicial proceedings, three changes

¹ See J. K. ROWLING, HARRY POTTER AND THE SORCERER'S STONE 13-17 (1997) (hereinafter SS)

² See *id.*, at 59.

³ See *id.*, at 59, 80.

⁴ See *id.*, at 63, 75.

⁵ See *id.*, at 64-65.

in government, and the enactment and repeal numerous statutes and regulations. Rowling could easily have written her spiritual, moralistic adventure series without these trappings. Why are they there?⁶

Further, when one examines the legal universe contemplated in these novels, one finds that the laws are radically inconsistent and incoherent, in many places rising to the level of caricature or absurd contradiction. One could ascribe these apparent "errors" to carelessness on the part of the author, as in the case of Rowling's errors in astronomy and chronology. But the incoherence and inconsistency in law is too systematic and flagrant for this; it bears the marks of having been considered carefully, in places with a sort of perverse glee.⁷

I suggest that this deliberate incoherence is a commentary on the reliability and value of rules and institutions generally and of political and legal institutions in particular. Rowling, I shall argue, uses the law as a backdrop against which to show the absolute dependence of the world on individual virtue and morality. Institutions, rules, procedures cannot help us; only the good, moral man or woman, exercising free, individual choice, can do that.

II. The Law & Literature Lens

In this paper I will be viewing the Harry Potter novels through one of the lenses of the so-called "Law and Literature" movement. This movement, which is generally thought to have begun with the publication of James Boyd White's *The Legal Imagination*,⁸ is actually a collection of related, overlapping, but incongruent strands of thought.⁹ While I have, elsewhere, described these different threads in great detail,¹⁰ here I should like to focus on two I think are relevant. These are what Phillip N. Meyer calls "homiletics" and "ethnography."¹¹

⁶ There are already several published articles concerning the legal issues in the Harry Potter novels. They include Michael Barton, *Harry Potter and the Half-Crazed Bureaucracy*, 104 MICH. L. REV. 1523 (2006); 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 (2003); William P. MacNeil, "Kidlit" As "Law-and-Lit": *Harry Potter and the Scales of Justice*, 14 LAW & LITERATURE 545 (2002); Aaron Schwabach, *Harry Potter and the Unforgivable Curses: Norm-Formation, Inconsistency, and the Rule of Law in the Wizarding World*, 11 ROGER WILLIAMS U. L. REV. 309 (2006); *Symposium: The Power of Stories: Intersections of Law, Literature and Culture: Harry Potter and the Law*, 12 TEX. WESLEYAN L. REV. 427 (2005) (hereinafter Tex. Wesleyan Symposium).

⁷ One can only imagine the pleasure with which Rowling described the careful and painstaking process of appeal, recordkeeping and formal procedure for the destruction of an animal, juxtaposed in adjacent chapters to the unilateral, abrupt, process-free decision to rip a man's soul out of his body with the Dementor's Kiss. See J. K. ROWLING, *HARRY POTTER AND THE PRISONER OF AZKABAN* 217-18, 222, 247, 291-93, 400-402 (1999) (U.S. Edition) (hereinafter (PoA)).

⁸ JAMES BOYD WHITE, *THE LEGAL IMAGINATION: STUDIES IN THE NATURE OF LEGAL THOUGHT AND EXPRESSION* (1973).

⁹ Kenneth L. Schneyer, *Hooting: Public and Popular Discourse About Sex Discrimination*, 31 MICH. J.L. REFORM 551, 561 (1998), citing James Boyd White, *Law and Literature: "No Manifesto"*, 39 MERCER L. REV. 739 (1988) and Robin L. West, *The Literary Lawyer*, 27 PAC. L.J. 1187, 1187-88 (1996).

¹⁰ Schneyer, *supra* note 9, at 560-563 and accompanying notes.

¹¹ Phillip N. Meyer, *Convicts, Criminals, Prisoners & Outlaws: A course in Popular Storytelling in the Law School Curriculum*, 42 J. LEGAL EDUC. 129, 130 (1992).

"Homiletics" is the branch of legal-literary studies that looks for the lessons lawyers and judges can learn from literature. The assertion is that literature, which looks to what events and words mean to individual hearts and souls, has much to teach law, which focuses so much on formal causes, effects and guidelines. Lawyers and judges act as if human behavior and motivation worked in a certain way; literature shows us that human beings are more subtle, complicated and perverse than the law acknowledges; the law should take these things into account.¹²

"Ethnography" is the branch that looks for representations of law *in* literature. The assertion here is that lawyers and judges do not understand how laypersons think or feel about law, or what law *means* to those people. The "majestic equality"¹³ of the law, in Anatole France's famous phrase, can mean objectivity and evenhandedness for some, while it means perpetuation of inequality and abuse for others. What law means in the trenches, what it means to the litigants, what it means to bystanders and witnesses, is typically far removed from what it means to lawyers. Literature, by showing us how writers of fiction see legal institutions, can tell us what they mean to "real people."¹⁴

To examine Rowling's work we need both of these tools. Of course we are examining representations of law in literature, that is, the way law and legal institutions appear in Rowling's work. But Rowling does not purport to show us genuine laws or legal institutions; she has created imaginary institutions and allowed them to interact; consequently we are also looking at the way human beings "really" interact, or are likely interact, in the context of rules and principles.

¹² See, e.g., John Denvir, "Deep Dialogue" -- James Joyce's Contribution to American Constitutional Theory, 3 CARDOZO STUD. L. & LITERATURE 1 (1991); Carolyn Heilbrun & Judith Resnik, *Convergences: Law, Literature and Feminism*, 99 YALE L.J. 1913, 1936 (1990); Dmitry N. Feovanov, *Luna Law: The Libertarian Vision in Heinlein's The Moon is a Harsh Mistress*, 63 TENN. L. REV. 71 (1995); Norman J. Finkel, *Achilles Fuming, Odysseus Stewing, and Hamlet Brooding: On the Story of the Murder/Manslaughter Distinction*, 74 NEB. L. REV. 742 (1995); Vanessa Laird, *Dueling Narratives in An American Tragedy and the Criminal Law*, 59 TENN. L. REV. 131 (1991); Amy R. Mashburn & Dabney D. Ware, *The Burden of Truth: Reconciling Literary Reality with Professional Mythology*, 26 U. MEM. L. REV. 1257 (1996); Martha Minow, *Stripped Down Like a Runner or Enriched by Experience: Bias and Impartiality of Judges and Jurors*, 33 WM. & MARY L. REV. 1201, 1214-18 (1992); Martha Minow, *Identities*, 3 YALE J.L. & HUMAN. 97 (1991); Martha Minow, *Words and the Door to the Land of Change: Law, Language and Family Violence*, 43 VAND. L. REV. 1665, 1687-88 (1990); Amy D. Ronner, *Amathia and Denial of "In the Home" in Bowers v. Hardwick and Shahar v. Bowers: Objective Correlatives and the Bacchae as Tools for Analyzing Privacy and Intimacy*, 44 U. KAN. L. REV. 263 (1994); Elizabeth Tobin, *Imagining the Mother's Text: Toni Morrison's Beloved and Contemporary Law*, 16 HARV. WOMEN'S L.J. 233 (1993).

¹³ "La majestueuse égalité des lois, qui interdit au riche comme au pauvre de coucher sous les ponts, de mendier dans les rues et de voler du pain." ("[T]he majestic equality of the laws forbid rich and poor alike to sleep upon the bridges, to beg in the streets, and to steal their bread.") ANATOLE FRANCE, *THE RED LILY* 95 (Winifred Stephens trans., 1908).

¹⁴ See, e.g., RICHARD WEISBERG, POETHICS: AND OTHER STRATEGIES OF LAW AND LITERATURE 51-92 (1992); Alan D. Boyer, *Formalism, Realism and Naturalism: Cross-Currents in American Letters and Law*, 23 CONN. L. REV. 669 (1991); Michael H. Hoffheimer, *Artistic Convention and Natural Law: Didactic Treatment of Justice and Authority in the Works of Fielding, Hawthorne, and Fritz Lang*, 63 TEMP. L. REV. 483 (1990); Nancy E. Johnson, *Women, Agency, and the Law: Mediations of the Novel in the Late Eighteenth Century*, 19 HARV. WOMEN'S L.J. 269 (1996); Penelope Pether, *Jangling the Keys to the Kingdom: Some Reflections on The Crucible, on an American Constitutional Paradox, and on Australian Judicial Review*, 8 CARDOZO STUD. L. & LITERATURE 317 (1996); Paul Joseph & Sharon Carton, *The Law of the Federation: Images of Law, Lawyers and the Legal System in "Star Trek: The Next Generation"*, 24 U. TOL. L. REV. 43 (1992); Larry Wertheim, *Law as Frolic: Law and Literature in A Frolic of His Own*, 21 WM. MITCHELL L. REV. 421 (1995) (reviewing WILLIAM GADDIS, *A FROLIC OF HIS OWN* (1994)).

III. Laws and Law Making

In Anglo-American law, there are typically three different types of lawmaking.

- Common law rules derive from pre-Norman tradition and are expanded, contracted and otherwise modified through court decisions and precedent. A surprising proportion of legal issues in the common law countries are still matters of Common Law.
- Statutes (also called "codes" or "acts") are enacted by legislatures, which are typically elected by popular vote and subject to recall. Statutes have the advantage of precision and comprehensiveness that common law rules lack.
- Administrative regulations are promulgated by executive agencies created to deal with specialized areas of law. For example, in the U.S. the Internal Revenue Service has numerous regulations governing the reporting of income.

Additionally, in the U.S. (and separately in its individual states) there is a single written Constitution that overrides all other forms of lawmaking. Most of the federal constitution dates from 1787, but amendments can be made through a laborious and politically difficult process which has succeeded only seventeen times since the original document was created.

In the Anglo-American system all forms of law are subject to "common-law reasoning," which means argument from precedent. The meaning of a statute, regulation or constitutional provision can be inferred from the way it was previously interpreted in an earlier case.

In the current context, one should probably mention executive orders as well. These are decisions of the chief executive, and are generally held to be subservient to statutes.

There are numerous references in the Harry Potter stories to various types of law. They all seem to be statutes, administrative regulations, or possibly executive orders, although there are few indications that there is any distinction between these types. Some are unnamed, while others carry specific designations such as codes, statutes or decrees. Some named laws include the Muggle Protection Act,¹⁵ the Decree for the Reasonable Restriction of Underage Sorcery of 1875,¹⁶ the International Confederation of Warlocks' Statute of Secrecy¹⁷ (of 1689),¹⁸ the Guidelines for the Treatment of Non-Wizard Part-Humans,¹⁹ the Code of Wand Use,²⁰ the Ban on Experimental Breeding,²¹ the Decree for Justifiable Confiscation,²² the International Ban on

¹⁵ J. K. ROWLING, HARRY POTTER AND THE CHAMBER OF SECRETS 51 (1999) (U.S. Edition) (hereinafter CoS).

¹⁶ *Id.* at 21.

¹⁷ *Id.*

¹⁸ J. K. ROWLING, HARRY POTTER AND THE DEATHLY HALLOWS 318 (2007) (U.S. Edition) (hereinafter DH). This is, of course, the date of the Glorious Revolution in England.

¹⁹ J. K. ROWLING, HARRY POTTER AND THE GOBLET OF FIRE 147 (2000) (U.S. Edition) (hereinafter GoF).

²⁰ *Id.* at 132.

²¹ J. K. ROWLING, HARRY POTTER AND THE ORDER OF THE PHOENIX 129 (2003) (U.S. Edition) (hereinafter OotP).

²² DH, *supra* note 18, at 123.

Dueling,²³ the Werewolf Code of Conduct of 1637,²⁴ the Wizengamot Charter of Rights,²⁵ and various Educational Decrees enacted by the Minister of Magic, notably Educational Decrees 22 and 23.²⁶

Nowhere, however, are we given any notion how these laws are enacted. We know that they are created by the Ministry of Magic, the only form of government wizarding Britain has. We know that various Ministry employees work on these laws and presumably champion their enactment, as in the case of Arthur Weasley's Muggle Protection Act,²⁷ Pius Thickness's specific bans on transportation to Privet Drive,²⁸ and Dolores Umbridge's presumed hand in Educational Decrees 22 and 23. We know that, at least in the case of Educational Decree 23, the enactment had to be "formalized" by the Ministry, although we do not know how this was accomplished.²⁹ We know, too, that Lucius Malfoy is able to use his influence with the Minister to "delay laws he doesn't want passed".³⁰

It does seem that, at least in some contexts, common law reasoning applies to wizarding law. When working to save Buckbeak the hippogriff from being killed, Hermione looks for previous cases that can act as precedents in Buckbeak's favor.³¹ This is the way a lawyer would argue interpretation of the law in the Anglo-American system: find a precedent and argue by analogy. But notably this is the *only* time when an argument from prior decisions is made. Throughout the rest of the series, statutes and regulations are followed to the letter, and only exceptions in the text of the law itself are relevant.

One thing is clear, however. The Minister of Magic has the authority to create, approve and revoke statutes and regulations. There is no one who supersedes him and no procedure to override him.

Curiously, in this lengthy narrative with hundreds of legal references, there is only one explicit reference to lawyers or other professional advocates. When Hermione exposes Rufus Scrimgeour's dishonest manipulation of the Decree for Justifiable Confiscation, he asks her whether she's considering a career in Magical Law.³² She retorts, "No, I'm not . . . I'm hoping to do some good in the world."³³ When Harry is on trial before the Wizengamot, he is effectively (and skillfully) represented by Albus Dumbledore, but technically Dumbledore appears only as a witness³⁴. In the three judicial proceedings observed through the Pensieve, there are no

²³ GoF, *supra* note 19, at 425.

²⁴ SS, *supra* note 1, at 263.

²⁵ OotP, *supra* note 21, at 142.

²⁶ *Id.* at 307.

²⁷ CoS, *supra* note 15, at 51.

²⁸ DH, *supra* note 18, at 46.

²⁹ OotP, *supra* note 21, at 307.

³⁰ *Id.* at 155.

³¹ PoA, *supra* note 7, at 221-22, 274, 292.

³² DH, *supra* note 18, at 123.

³³ *Id.*, at 124. Yet it is only Hermione who displays anything like the interpretive logical thought required by common law reasoning. It is she who examines old precedents to find grounds for preventing the extermination of Buckbeak. It is she who argues that the Decree for Justifiable Confiscation should be limited to its legislative intent. DH, *supra* note 32 at 123.

³⁴ OotP, *supra* note 21, at 139.

advocates for the defense, and it is unclear whether Barty Crouch Sr., who is essentially the prosecutor, is acting as an "advocate" or (as would be the case in some Civil Law countries) in his capacity as a judge in the court.³⁵

We have, then, a world with "laws" but no lawyers, courtrooms but no advocates, regulation but no public process for commenting or changing them. The word "law," in this case, begs the question. If laws say whatever a particular government employee wants them to say, are enforced only when the executive feels like enforcing them, and do not provide for experts or advocates to advise ordinary people who run afoul of them, in what way are they "laws" at all? As William P. MacNeil puts it, this society displays not the Rule of Law, but the "worst features of the Rule of Man and its capricious, arbitrary and erratic "palm tree justice."³⁶

IV. Contracts and Legal Obligation

The phrase that originally instigated this paper was "binding magical contract."³⁷ Under the common law of both England and the United States, contracts are formed and enforced by a specific set of rules, familiar to every first-year law student. A contract turns an ordinary promise into an obligation the law will enforce by sanctions such as an award of damages. But for a promise to achieve contract status, several specific things must happen.

One of these is consent, or agreement. Parties cannot be held liable for a contract unless there is persuasive evidence that they voluntarily, genuinely entered into a binding agreement. Since the court cannot read the parties' minds, evidence that would convince an ordinary, reasonable person that an agreement was genuinely intended is normally sufficient. Typically we look for evidence of an offer (one person's attempt to form a contract) and an acceptance (the other party's timely, voluntary agreement to the offeror's terms). The point, however, is that no one is to be bound to a contract unless he or she gave every reasonable sign of agreeing to it.

But in *Harry Potter and the Goblet of Fire* (GoF), Harry is held to a "binding magical contract" to which he never consented. He never put his name in the Goblet of Fire and never agreed to compete in the hazardous Triwizard Tournament, but is bound to do so because his name appeared there. It is significant, in this regard, that Dumbledore believes Harry's protestations, and the reader knows them to be true, even if Karkaroff and others scoff.³⁸ We know he did not agree. Nonetheless he is bound, endangering his life, a result that runs contrary not only to Anglo-American legal traditions, but to fundamental fairness.³⁹

Similarly, in *Harry Potter and the Chamber of Secrets* (CoS), we learn that manumission of a house-elf is achieved when the elf's master presents him or her with clothes.⁴⁰ Manumission upon presentation of clothing occurs even when the elf does not wish to be freed, as in the case

³⁵ GoF, *supra* note 19, at 585-96.

³⁶ MacNeil, *supra* note 6, at 550.

³⁷ GoF, *supra* note 19, at 256, 278.

³⁸ *Id.*, at 276-77.

³⁹ *See id.* at 278-80.

⁴⁰ CoS, *supra* note 15, at 177.

of Winky.⁴¹ Yet when Harry tricks Lucius Malfoy into throwing a sock at Dobby, Dobby is freed, even though Lucius had no intent to free Dobby and no real awareness of what he was doing.⁴² Even if we did not know Lucius's intent, the objective facts do not lend themselves to the interpretation that he intended to set Dobby free; the act was obviously an inadvertent error. Again, this is incoherent.

The issue of consent in the freeing of house-elves becomes even more complicated when one considers Hermione's attempts to free the house-elves at Hogwarts, against both their own wills and (presumably) the will of the school administrators, by leaving garments as booby-traps throughout Gryffindor Tower.⁴³ As Timothy S. Hall puts it:

...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 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 the Malfoy's service by simply giving him a sock himself...?⁴⁴

Yet the house-elves studiously avoid the knitted hats Hermione leaves out, even to the point where they neglect cleaning Gryffindor Tower altogether.⁴⁵ This implies that the elves (who militantly object to manumission) fear that they actually will be freed if they touch the clothing. But do house-elves avoid touching all clothing in wizard homes? Do owners of manors with house-elven servants do all their own laundry to prevent releasing the elves?

Under common law, minors are unable to form binding contracts. Or, to be precise, if a minor chooses to *disaffirm* a previously made contract, the contract is then considered void, and all obligations under it are excused. This is a rule designed to protect minors from their own incapacities -- the same purpose for which the Age Line was put in place around the Goblet of Fire.⁴⁶ Yet despite the Age Line, despite Harry's contractual incapacity, and despite the fact that a fourteen-year-old is likely to be killed in such a hazardous activity, and despite the probability that someone put his name into the Goblet for precisely that purpose, Harry remains bound to compete. Thus the contractual rules conflict *even with the rules of the Tournament to which they apply*.

In this context we should mention the Unbreakable Vow. The process by which Snape binds himself to his specific promises to Narcissa in *Harry Potter and the Half-Blood Prince* (HBP) looks more like common-law contract formation than any other agreement we have seen. It is

⁴¹ GoF, *supra* note 19, at 138.

⁴² CoS, *supra* note 40, at 338.

⁴³ OotP, *supra* note 21, at 255.

⁴⁴ Timothy S. Hall, *Magic and Contract: The Role of Intent*, in Tex. Wesleyan Symposium, *supra* note 6, at 466-67.

⁴⁵ OotP, *supra* note 21, at 385. It could be, of course, that the house-elves, perceiving Hermione's intent in leaving the clothing, have ceased cleaning the Tower out of mere anger. As Dobby says, "they finds them insulting, sir." *Id.* But this, too, is incoherent; house-elves love their work above all other things.

⁴⁶ GoF, *supra* note 37, at 188, 256.

entered into formally, with a witness (the Bonder) and a series of questions and answers that give objective evidence of consent.⁴⁷ On the other hand, under common law a contractual promise must usually be supported by *consideration* -- that is, a bargained-for exchange having legal value -- in order to be binding. Narcissa gives Snape nothing in exchange for his promise, so that under Anglo-American contract law it probably would not be binding. This particular nonconformity is minor, however; in some contemporary contracts the binding consideration is more a matter of empty formality than anything else.

But of course the Unbreakable Vow is self-enforcing; a promisor in breach of the Vow dies.⁴⁸ It may be that the "binding magical contract" imposed by the Goblet of Fire has a similar enforcement mechanism. Dobby's manumission, similarly, appears to be instantaneous, requiring no formal confirmation; it is the magic that has changed, not the law.

Thus, there are a number of "contracts," "vows" or other binding obligations that exist in the magical world -- but they are all created and enforced by magic, not by rules of formation or procedure. The normal rules of contract formation, which are designed to protect the expectations of the parties and to prevent fundamentally unjust things from happening, are absent from these obligations. Instead, a person who knows the right kind of magic can create such an obligation, even for a promisor manifestly incapable of either understanding or keeping such a promise, such as the five-year-old Ron Weasley.⁴⁹ It is as if a person of great economic power essentially forced someone with no such power into a binding agreement; arguably such is the case with a number of boilerplate agreements in commercial settings, such as software End User License Agreements and credit card terms; but all of these, at least nominally, are still subject to the rules of contract law (they would not, for example be enforced against minors). Power overcomes procedures and rules.

The rules of obligation by consent in the wizarding world, such as they are, are neither consistent nor organic. Trickery and subterfuge can bind persons to obligations they never sought, and such enforcement mechanisms as exist will enforce these obligations regardless of fairness or public policy.

V. Crime and Punishment

In Anglo-American law, crimes were traditionally defined by common law, which indicated both a forbidden act (the *actus reus*) and criminal intent (the *mens rea*). In the last few centuries, an increasing number of crimes are defined by statute. This is a lengthy process, involving consideration before a legislative body that takes months, sometimes years, to make a decision; these legislative bodies are all subject to election, however, so that popular will can change statutes by changing the legislature that enacts them. Further, many states in the U.S. allow new laws to be made by plebiscite, so that a criminal law could theoretically be enacted by popular vote. All of these criminal acts, however, are perceived to create some sort of danger to public

⁴⁷ J. K. ROWLING, HARRY POTTER AND THE HALF-BLOOD PRINCE 36-37 (2005) (U.S. Edition) (hereinafter HBP).

⁴⁸ *Id.* at 325-26.

⁴⁹ *See id.*

health, safety, property or morals. There are relatively few strictly regulatory crimes, and the sanctions for these are comparatively slight.

Numerous acts in the wizarding world are defined as crimes. Apart from such obvious matters as murder,⁵⁰ physical attacks (at least attacks on Muggles)⁵¹ and theft,⁵² a wide variety of acts unknown to us Muggles are crimes. The possession of Dark artifacts,⁵³ changing events through time-travel,⁵⁴ dragon breeding,⁵⁵ any sort of experimental breeding of magical animals,⁵⁶ "any magical activity that risks notice by [Muggles],"⁵⁷ use of magic outside of school by wizards under the age of seventeen,⁵⁸ and of course the Unforgivable Curses⁵⁹ are all criminal acts, as well as a host of others. The logic behind many of these offenses is obvious, but also appears that the Ministry of Magic is able to define new criminal acts at will, entirely for reasons of convenience or politics. In DH, for example, Pius Thicknesse, then the Head of the Department of Magical Law Enforcement, makes it an imprisonable offense "to connect [the Dursleys' residence] to the Floo Network, place a Portkey here, or Apparate in or out."⁶⁰ During the first war against Voldemort, passing information to his supporters was a criminal offense.⁶¹ After the coup in which Voldemort takes control of the Ministry numerous other acts are defined as crimes, but by that time all pretense of procedure has vanished.

Criminal punishments in the U.S. can range from execution, in some states, to prison sentences of varying length in different varieties of penal institutions (higher and lower security, some involving labor, others not), probation, fines, restitution, assignment to transitional institutions, treatment programs, active monitoring, to some creative judicial sanctions tailored by the individual judge. There is always, however, some attempt at proportionality. In general, the severity of the punishment is supposed to reflect the severity of the crime, coupled with aggravating and mitigating circumstances. In many states and until recently in the federal system, there are or were a series of guidelines designed to ameliorate differences in punishment between different judges.

The range of punishments available for criminal behavior in the wizarding world, however, is limited. While in the setting of school discipline, Hogwarts teachers deduct House points and assign a creative variety of unpleasant detentions, the Ministry's legal sanctions appear to include only three things: imprisonment in Azkaban for varying lengths, confiscation and destruction of the convict's wand, and the Dementor's Kiss. Only in one instance do we see the alternative sanction of a fine, imposed on Arthur Weasley for bewitching a Muggle car,⁶² and it is not clear whether he would have received a different sanction had he not been a Ministry employee; that

⁵⁰ See, e.g., PoA, *supra* note 7, at 37-38.

⁵¹ DH, *supra* note 18, at 564.

⁵² See, e.g., OotP, *supra* note 21, at 86-87.

⁵³ CoS, *supra* note 15, at 51.

⁵⁴ PoA, *supra* note 7.

⁵⁵ SS, *supra* note 1, at 230.

⁵⁶ OotP, *supra* note 21, at 129.

⁵⁷ CoS, *supra* note 15, at 20-21.

⁵⁸ *Id.*, at 20-21.

⁵⁹ GoF, *supra* note 37, at 217.

⁶⁰ DH, *supra* note 18, at 51.

⁶¹ GoF, *supra* note 37, at 292.

⁶² CoS, *supra* note 15, at 221.

is, this may be an administrative penalty exacted within the Ministry rather than a criminal sentence.

Apart from the fines, the severity of these punishments is alarming. Azkaban is no ordinary prison, but a place where the dementors' corrosive influence is a living hell for all inmates, who relive and relive the worst moments of their lives, typically losing their sanity or starving themselves to death while incarcerated.⁶³ All but the shortest sentences there amount to a sentence of death or permanent incapacitation.⁶⁴ The Dementor's Kiss destroys the soul of the victim, amounting to not merely death, but (in spiritual terms) timeless nonexistence.⁶⁵ The confiscation and destruction of a wand renders the victim unable to perform magic, which, in a community that revolves around the practice of magic, makes him or her a permanent exile. There appear to be few, if any, minor sanctions in the wizarding world. Punishments are severe - although there does appear to be some rough attempt at proportionality. For example, Morfin Gaunt receives a longer sentence in Azkaban than his father Marvolo, because of his prior "record of Muggle attacks."⁶⁶

It could be argued that the extremity of these punishments -- especially the dementor-ridden Azkaban and wand-snapping -- are necessary because of the magical abilities of the convicts. What, realistically, could one *do* to a wizard that he could not undo? Without the confiscation of the wand, the convict could escape most ordinary prisons, and might be able to do so even without a wand if his powers were strong enough. Although somehow Nick was successfully decapitated (albeit after 45 strokes of a blunt axe),⁶⁷ mundane execution attempts against other witches and wizards were so ineffectual that they became a hobby and pastime for some, such as Wendelin the Weird.⁶⁸ Nevertheless, here common humanity militates against employing so harsh a punishment.

We hear a great deal about deliberate killing, both official and unofficial, in the Harry Potter novels. Consider, though, the following strange contrasts:

1. Use of the Killing Curse on another human being is one of the Unforgivable acts that results in a life sentence in Azkaban.⁶⁹
2. Killing a dangerous animal like a hippogriff requires a hearing before the Committee for the Disposal of Dangerous Creatures,⁷⁰ which can be appealed⁷¹ and which is apparently

⁶³ GoF, *supra* note 19, at 529.

⁶⁴ Morfin Gaunt, who spent three years in Azkaban, returned with his sanity apparently intact -- at least he was able to carry on a conversation with his nephew. HBP, *supra* note 47, at 211-12, 363-65. One could argue that Morfin was not fully sane to begin with, and he was badly dissipated when young Riddle met him.

⁶⁵ PoA, *supra* note 7, at 247.

⁶⁶ HBP, *supra* note 47, at 211-12.

⁶⁷ CoS, *supra* note 15, at 125.

⁶⁸ PoA, *supra* note 7, at 2.

⁶⁹ GoF, *supra* note 19, at 217.

⁷⁰ PoA, *supra* note 7, at 218.

⁷¹ *Id.* at 291-92.

subject to arguments from precedent;⁷² once so ordered, the destruction of the animal requires two witnesses and a signed document.⁷³

3. Administration of the Dementor's Kiss, an act which consumes the soul of the victim, a fate worse than death that apparently precludes the afterlife that the Killing Curse may allow, is performed entirely at the whim of the Minister of Magic,⁷⁴ or even his Undersecretary.⁷⁵
4. Killing of a house-elf, a sentient being, is performed at the whim of the wizard family the elf serves.⁷⁶

Even if one were to ascribe an astonishing level of sloppiness to Rowling (a sloppiness her work does not otherwise display), this kind of dissonance must be deliberate. Destruction of an animal requires two levels of appeal and a document, but the destruction of a human soul requires no procedure whatsoever? This is obviously not meant to imply that a hippogriff is deemed by the wizarding community to be more important than a human soul. Instead, I think we are supposed to be appalled at the caprice of the law, where trivial things involved red tape and procedural niceties, but catastrophic things are done on a whim.

This procedural reversal is also evident in in CoS, where we learn, within the space of four pages, of both Hagrid's temporary imprisonment in Azkaban and Dumbledore's removal as Headmaster.⁷⁷ The suspension of Dumbledore requires the signatures of the members of the Governors on a written document; while Fudge orders the imprisonment of Hagrid with no procedural safeguards of any kind. The contrast is immediate, deliberate, extreme and absurd. As Aaron Schwabach puts it, "Apparently wizarding law provides more protection for Dumbledore's job than for Hagrid's freedom."⁷⁸

Criminal law is the most basic underpinning of a civilization. It proscribes and prevents conduct that endangers the welfare and safety of others, and allows society to exist and continue. If it is not predictable, consistent, fair and in accord with the values of the polity, the state cannot endure. But in the area of criminal law and punishment as we see them in the wizarding world, there reversal of priorities and a disregard of consequences. Trivial things are punished severely and the criminal meaning of killing varies wildly. The center cannot hold.

VI. Due Process of Law

Fundamental to notions of Anglo-American legal fairness is the concept of due process of law. In the U.K. this tradition traces its way back at least to Magna Carta; in the U.S., it is enshrined

⁷² *See id.* at 221-22.

⁷³ *Id.* at 400-401.

⁷⁴ PoA, *supra* note 7, at 247; GoF, *supra* note 19, at 702-03.

⁷⁵ OotP, *supra* note 21, at 747.

⁷⁶ Similar observations have been made by Aaron Schwabach. Schwabach, *supra* note 6, at 329-30.

⁷⁷ CoS, *supra* note 15, at 260-264.

⁷⁸ Schwabach, *supra* note 6, at 315.

in the Fifth Amendment of the federal Constitution. We believe, most of us, that no other legal protections matter unless this one is enforced.

Briefly the notion of due process is this: the government can't take anything away from me unless I have a chance to defend myself. By "the government" we include any judge or jury, any government department, every government agency of any kind. By "take anything away from me" we include my life, my freedom and my property. By "a chance to defend myself," we mean that I have enough notification of the government's intent that I have a chance to make a defense, and that I have the opportunity to challenge the evidence against me and prove that it is wrong or inapplicable. Thus, for example, if you want to sue me for breach of contract, you must notify me of the lawsuit by giving me papers that explain it, and you must allow me the chance to challenge your evidence and present my own in court, before an impartial decision-maker who will decide based on the strength of the evidence. Typically this also includes the right to be represented by counsel, so that I can make the best defense possible. Were a court to order a judgment against me without these protections, the order would be invalid and unenforceable.

Without these protections, we believe, government officials and litigants will be able to harm others at will, with impunity.

But in wizarding Britain, things are different. Sirius Black is sentenced to life in Azkaban without a trial.⁷⁹ Neither Barty Crouch, Jr., Ludo Bagman nor Igor Karkaroff has representation or any apparent opportunity to present witnesses.⁸⁰ Hagrid is locked up in Azkaban on mere suspicion, with no chance to defend himself⁸¹. Hapless, silly Stan Shunpike is imprisoned with essentially no evidence against him.⁸² Harry, an inexperienced minor, although he does receive several days' notice of his hearing, is subjected to a full criminal trial at an abruptly changed time and place, and is successful (indeed, receives a hearing instead of summary punishment) only because Dumbledore, a powerful and respected man, intervenes on his behalf.⁸³ (True, the Wizengamot Charter of Rights says that "the accused as a the right to present witnesses for his or her case",⁸⁴ but nobody tells Harry this, and only Dumbledore's intervention prevents Fudge from simply railroading the boy.) Once Dolores Umbridge takes charge of Hogwarts, students are subjected to torture, violence and the threat of the illegal Cruciatius Curse with apparently no recourse whatever.⁸⁵ Indeed, throughout the entire series the "defendant" provided with the greatest due process is Buckbeak the hippogriff!

When Voldemort takes over the Ministry of Magic in *Harry Potter and the Deathly Hallows* (DH), all semblance of due process vanishes. People are rounded up without warning, subjected to summary process that is essentially an inquisitorial interview in which the language of the questions makes exculpatory evidence impossible to hear, and deprived of their rights (specifically, Muggleborn wizards and witches are deprived of their wands and summarily

⁷⁹ GoF, *supra* note 19, at 526.

⁸⁰ *Id.*, at 585-96.

⁸¹ CoS, *supra* note 15, at 260-64.

⁸² HBP, *supra* note 47, at 221.

⁸³ OotP, *supra* note 21, at 26-33, 134-53.

⁸⁴ *Id.*, at 142-43.

⁸⁵ *Id.*, at 624-37, 651-747.

convicted of "stealing" magic from "real" wizards).⁸⁶ That Voldemort himself would take these steps surprises no one; what is surprising is that the Ministry and its legal apparatus convert so easily to this set of procedures. Indeed, with very few exceptions, the persons who carry out these Nazi-like interrogations are recognizable former employees of the Ministry, such as Dolores Umbridge and Mafalda Hopkirk.⁸⁷

As Paul Joseph and Lynn Wolf put it:

Rowling has created a legal system without lawyers and the result is a Kafkaesque nightmare in which the individual is often helpless. Throughout the Harry Potter books, we noticed that the wizards caught up in the system have no idea how to answer charges against them, are often unclear about how the rules that govern decisions made about them or the procedures that are to be used, and do not know how to find precedents to support their positions or how and to whom to make their arguments.⁸⁸

Here, again, we see a rule of "law" that is nothing of the kind. If decisions are determined by law, rather than by power, then individuals within the system must have realistic opportunities to defend themselves and to put forth the best arguments in their favor. Without this, law favors only those who are already in positions of power and influence. In Rowling's world, law does, in fact, serve power, but the appearance of law exists as a prop on which the powerful can rest claims of legitimacy. By its absence, she shows us what is necessary for a system of justice to thrive.

VII. Property, Wills and Inheritance

The right to own and control private property, to buy it and sell it, and to leave it to others upon one's death, is one of the most ancient rights in the Western world. It forms the backbone of much of our legal system. Common law gave owners nearly absolute rights to decide how their property would be used or conveyed. One can sell all of the rights in one's property, or subdivide those rights many times so that each buyer owns only one aspect of the property. For example, in the case of land I own, I can sell one person the right to live there for a certain time period, another person the right to construct buildings there for an overlapping time period, and a third person the right to mine for gold there for the same time period, while a fourth person obtains these rights after those time periods have expired. In the case of my death, I can devise a will that conveys these rights in the same way that selling them would; if I leave no will, then the law decrees that the property will go to my "heirs at law" -- typically my spouse, followed by my children, followed by my parents, etc.

There are some restrictions on an owner's right to use and convey. For example, normally a married person cannot bequeath his or her property so as to give the surviving spouse nothing at all. Under a rule of common law that is nowadays very seldom honored, it was possible to

⁸⁶ DH, *supra* note 18, at 208-10, 241-67

⁸⁷ *Id.*, at 246-47. Mafalda Hopkirk is the employee of the Improper Use of Magic Office who notifies Harry of his two violations of law for performing magic in front of the Dursleys. CoS, *supra* note 15, at 20-21; OotP, *supra* note 21, at 26-27.

⁸⁸ Joseph and Wolf, *supra* note 6, at 201.

convey land in "fee tail," ensuring that it would go to the biological descendants (sometimes only the male descendants) of the owner, regardless of the owner's wishes.⁸⁹ Rights of one's neighbors may restrict one's use of property, and public concerns such as environmental protection may severely limit them. In the case of a compelling public use, the sovereign may take private property through the process of eminent domain, so long as the owner is compensated for the lost property.

Given the sharp differences between wizarding law and ordinary common and statutory Anglo-American law in so many other areas, what is most striking about the wizarding law of property is its apparent similarity to our own Muggle law. Harry inherits all of his parents' property and money,⁹⁰ is the sole devisee of Sirius's will,⁹¹ and receives specific bequests in Dumbledore's will.⁹² Further, the bequest of the Sword of Gryffindor fails because Dumbledore was not the owner of the property and consequently cannot convey it.⁹³

Interestingly, wizarding law has something very much like the "fee tail" although, as in the case of Muggle entailment, it is possible, in modern times, to override it. Discussing Sirius's bequest of his house to Harry, Dumbledore says:

"Black family tradition decreed that the house was handed down the direct line, to the next male with the name of 'Black.' Sirius was the very last of the line as his younger brother, Regulus, predeceased him and both were childless. While his 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 someone other than a pureblood."

... "I bet there has," [Harry] said.

"Quite," said Dumbledore. "And if such an enchantment exists, then the ownership of the house is most likely to pass to the eldest of Sirius's living relatives, which would mean his cousin, Bellatrix Lestrange."⁹⁴

Thus, although it is not a legal rule *per se*, it is possible for wizards to "entail" their property in much the same way that English landowners of the 18th century could do. It turns out, however, that Sirius's will supersedes this tradition or enchantment, and that Harry is the true owner of the house.⁹⁵ It is also noteworthy that Dumbledore uses the sort of terminology one sees in the Muggle law of trusts and estates, such as the word "predeceased."

The most significant difference concerning property inheritance is that, under wizarding law, one inherits house-elves along with the house. They appear to be magically linked, so that the rightful owner of the house acquires the instant ability to command the house-elf. This is how

⁸⁹ Many of Jane Austen's dramatic premises are based on this legal principle, which she called an "entailment." *See, e.g.,* JANE AUSTEN, PRIDE AND PREJUDICE (1813); JANE AUSTEN, SENSE AND SENSIBILITY (1811).

⁹⁰ SS, *supra* note 1, at 63, 202.

⁹¹ HBP, *supra* note 47, at 48-53.

⁹² DH, *supra* note 18, at 126-29.

⁹³ *Id.*, at 129.

⁹⁴ HBP, *supra* note 47, at 50.

⁹⁵ *Id.*, at 52-53.

Dumbledore determines that Harry has actually become the owner of Twelve Grimmauld place; his ability to command Kreacher is the only test required.⁹⁶

In the barbaric past of American law before the enactment of the Thirteenth Amendment, it was possible to inherit a slave. But I am not aware of any slaves who were considered fixtures to real estate; they were treated, rather, as tangible goods.

The wizarding world also has restrictions on the use and possession of dangerous property. The Ministry is able to confiscate Dark objects from the home of the wealthy and influential Lucius Malfoy,⁹⁷ and Scrimgeour is able to invoke the Decree for Justifiable Confiscation to delay the transfer of Dumbledore's bequests for thirty-one days.⁹⁸ This same law apparently allows all wills to be reviewed by the Ministry.⁹⁹

When one thinks of it, it is natural that a strong protection for private property would be the only wizarding law that matches Muggle law. Private property is the chief means by which wealthy and powerful people maintain their differentiation from (and control over) their less fortunate compatriots. Governments that wish to ameliorate these differentiations of rank often begin by taking away certain rights of private property, in extreme cases eliminating it altogether. In the wizarding world, where wealth, family connections and magical ability count for nearly everything, it stands to reason that private property would be well protected.

VIII. Tort Law Gone Missing

Tort law is the means by which individuals enlist the aid of the courts in obtaining compensation for wrongs committed by others. If my neighbor damages my land or injures me through his carelessness, or through some other wrongful act such as slander, invasion of privacy or trespass, then I can ask a court to order my neighbor to compensate me for the loss I suffered. The ability to receive compensation in tort is an old common law right, and occupies much of the attention of contemporary civil courts.

Tort law is distinguished from criminal law (which also deals with wrongful behavior) in the following way. While tort law describes a relationship between the perpetrator of the wrong and the victim (you must compensate me because you hurt me), criminal law describes a relationship between the perpetrator and the state (you must be punished because you offended public order). In some cases the same physical action (battery, for example, or fraud) can give rise to both a civil tort lawsuit and a criminal prosecution, because two different interests (the interest of the victim and the interest of the community) have been offended.

But while there is plentiful criminal law in the wizarding world, so far as I can determine it is utterly devoid of tort law. Rita Skeeter and the *Daily Prophet* regularly publish false statements accusing people of mental instability, professional impropriety or even crime; such statements

⁹⁶ HBP, *supra* note 47, at 51-53.

⁹⁷ CoS, *supra* note 15, at 224.

⁹⁸ DH, *supra* note 18, at 123-24.

⁹⁹ *Id.*, at 202.

are clearly libel under common law, but there is no indication that anyone has ever attempted to receive compensation for it.¹⁰⁰ Wizards engage in risky and even reckless behavior with some frequency, occasionally causing harm to others in the process; again, there is no indication that anyone has tried to hold anyone liable in court for such behavior.

What is remarkable is not that there is no tort law (one could easily imagine a society without it), but that tort law is absent in a context where so many other kinds of law (contracts, property, criminal law, consumer regulation) are so prevalent.

But such a regime is consistent with the legal structures Rowling builds elsewhere. The last thing the wizarding legal system would do would be to help an individual recover from wrongs done to him. It is not a system designed to help individuals -- or rather, it is not designed to help any individuals who are not able to manipulate the strings of power and influence. Tort law, which gives the wronged a way to hold those who wrong them accountable, has no place here. Criminal law does, because criminal law maintains the *status quo* and makes sure that the existing order is not altered. But laws to help individuals are absent.

IX. Equal Justice Under Law

Equality under the law is one of the cornerstones of Anglo-American justice. The requirement of an impartial judge or "jury of peers," the insistence on proportionality and predictable application of rules, all point to this principle. One of the reasons people in our civilization are willing to tolerate some of the gross inequities of wealth, influence and personal power is that we have, at least in theory, radical equality before the law and the polity. Anatole France's cynical comment¹⁰¹ notwithstanding, most people believe in, or yearn for, the "majestic equality of the law."

There is nothing remotely resembling equality under law in Rowling's world. The most gross and obvious demonstration of this fact is the way non-humans, part-humans, altered humans and Muggles are treated by law.

Non-humans, even magical non-humans, are forbidden by law to carry a wand;¹⁰² the secret of wand-making is closely guarded by wizards, and even the highly intelligent and powerful goblins are not permitted to have them, a matter of bitter dispute between the two races for centuries.¹⁰³ A measure of the esteem in which goblins are held by wizard institutions may be seen in the fact that the Goblin Liaison Office is part of the Department for the Regulation and Control of Magical Creatures, the same department that handles pest control.¹⁰⁴ Attacks by non-human or part-humans on witches or wizards are legally distinct from attacks on humans by one another.¹⁰⁵ Giants are hunted down, killed or exiled to settlements abroad that are not natural to them and

¹⁰⁰ See, e.g., GoF, *supra* note 19, at 437-40, 511-12; OotP, *supra* note 21, at 73-74.

¹⁰¹ See *supra* note 13.

¹⁰² GoF, *supra* note 19, at 132.

¹⁰³ DH, *supra* note 18, at 488-89.

¹⁰⁴ OotP, *supra* note 21, at 130.

¹⁰⁵ *Id.*, at 754.

will lead to their eventual extinction, to the point where they attack at the mere sight of a wand.¹⁰⁶ House-elves, as noted above, are property. From all appearances wizards use legal measures to ensure their privileged position among magical beings.

Muggles are treated as so thoroughly different that a great deal of wizarding law and government is designed to maintain the separation between them.¹⁰⁷ Hiding magic from Muggles is such a high priority that doing magic in front of them is a crime that can result in the permanent loss of one's legal right to perform magic,¹⁰⁸ which, as noted above, is the equivalent of exile. Mentally infirm wizards and witches are locked up to avoid giving the presence of magic away to Muggles.¹⁰⁹ All this is putatively in the interests of Muggles as well as wizards ("Blimey, Harry, everyone'd be wantin' magic solutions to their problems"),¹¹⁰ but Schwabach has pointed out:

[I]f magic could cure Muggle ills, it seems selfish of the wizarding world to deny the Muggles the benefit of their assistance. Madame Pomfrey, the Hogwarts school healer, can regrow missing bones overnight, and could probably save the lives of millions of Muggles. To provide a moral justification for keeping Madame Pomfrey at Hogwarts healing minor Quidditch injuries, rather than in Africa saving Muggle children from malaria and AIDS, something more compelling is needed. A mere desire to be left alone is not enough.¹¹¹

Among wizards themselves, the division between Muggle-borns and supposedly "pure blood" wizards is social and political, not legal, at least until Voldemort takes over the Ministry. Prior to that time the bigoted supremacism of the Malfoys and their ilk causes unpleasantness, ridicule and cruelty for Muggle-born wizards, but the law does not reflect that bigotry.

Once Voldemort does take over the Ministry, a breathtaking variety of laws and procedures are enacted overnight to segregate, take wands from, torture and imprison Muggle-born witches and Wizards, under the auspices of the newly-created Muggle-born Registration Commission.¹¹² Again, as noted above, what is striking about this development is not that Voldemort or his Death Eaters would create such laws, but that they were so easy to create and that they were followed with such alacrity. It is true that some Muggle-borns and their families resist by fleeing, some spontaneously as in the case of Ted Tonks and Dean Thomas,¹¹³ some at the urging of Harry and his friends.¹¹⁴ But it seems that the majority cooperate, and much of the pure-blood community seems happy to help.

Selective enforcement of the law appears to be the rule rather than the exception. Ministry employees are able to insert loopholes into statutes in order to allow their own private pursuits.¹¹⁵ Fudge exempts Harry from the restriction on underage magic when it suits him,¹¹⁶ then, two

¹⁰⁶ *Id.*, at 426-31.

¹⁰⁷ SS, *supra* note 1, at 64-65.

¹⁰⁸ OotP, *supra* note 21, at 26-27.

¹⁰⁹ DH, *supra* note 18, at 564.

¹¹⁰ SS, *supra* note 1, at 65.

¹¹¹ Schwabach, *supra* note 6, at 332.

¹¹² DH, *supra* note 18, at 209, 246-67.

¹¹³ *Id.*, at 295.

¹¹⁴ *Id.*, at 264.

¹¹⁵ CoS, *supra* note 15, at 39.

¹¹⁶ PoA, *supra* note 7, at 45.

years later, vigorously prosecutes him for violating exactly the same law;¹¹⁷ in both cases his reasons are political. When he feels threatened by Dumbledore, Fudge puts a number of provisions in place specifically aimed at curtailing Dumbledore's power and influence.¹¹⁸ Ludo Bagman escapes sanction for suspected Death Eater activity less because of his actual innocence and more because of his fame as a Quidditch star.¹¹⁹ Pius Thicknesse puts transport restrictions on the Privet Drive residence that do not apply anywhere else.¹²⁰ Rufus Scrimgeour selectively employs a statute designed to stop the conveyance of Dark object in order to try to unlock the secrets of Dumbledore's plan to fight Voldemort.¹²¹ In the area of school rules (which are not laws, but which mirror them symbolically and functionally) Snape is notoriously unfair in his enforcement of rules, even inventing them on the spot when it suits him,¹²² and even McGonagall, repeatedly described in the text as "very fair," exempts Harry from the ban on first-year students owning broomsticks so that he can win the Quidditch Cup for Gryffindor.¹²³

Unfortunately this easy willingness to cooperate with divisiveness, inequality and evil familiar to us. Throughout our history we have seen despots alter laws to suit their need to oppress their political enemies or others they despise, and we have seen populations easily cooperating with those changed rules. If the despots are later overthrown, ordinary citizens who cooperated say they did so out of fear for their safety or the safety of their families. Perhaps this is true. But it is also true that there is nearly always a resistance, someone willing to risk harm in order to restore what they perceive to be justice. So it is in the Harry Potter novels.

X. The Ministry of Magic

Law is inextricably linked with the institutions of government. Legislatures create laws and are, in some cases, created by them. The executive carries out and enforces these laws, while the judiciary interprets their meaning -- although in the common law system, the judiciary does a certain amount of "law making" of its own. In modern democracies the legislative and highest executive officers stand for popular election; in the U.S. they are elected separately, while in the U.K. the elected party leaders of the legislative branch are also the heads of the executive branch. The judiciary is sometimes elected, sometimes appointed for lengthy terms.

In most democracies of any scale, there is also a bureaucracy of permanent government employees who oversee the day-to-day business of the government. They tend to focus on details, rules and consistency, and especially at the lower levels, may fail to see the larger policy issues at all. But they work for elected officials who do at least attempt to further larger policy goals; the interaction between these two -- the policy end and the detail end -- is what makes government function.

¹¹⁷ OotP, *supra* note 21, at 137-51.

¹¹⁸ *Id.*, *passim*.

¹¹⁹ GoF, *supra* note 19, at 593.

¹²⁰ DH, *supra* note 15, at 46.

¹²¹ *Id.*, at 123.

¹²² SS, *supra* note 1, at 182.

¹²³ *Id.*, at 164.

Benjamin H. Barton has suggested that in Rowling's world, there is no government other than bureaucracy.¹²⁴ Certainly there are no elections, but everyone seems to be a detail-oriented, rather than a policy-oriented, employee. Consider the different branches of the Ministry of Magic:

- Department of Magical Games and Sports:
 - British and Irish Quidditch League Headquarters
 - Official Gobstones Club
 - Ludicrous Patents Office
- Department of Magical Transport:
 - Floo Network Authority
 - Broom Regulatory Control
 - Portkey Office
 - Apparition Test Center
- Department of International Magical Cooperation:
 - International Magical Trading Standards Body
 - International Magical Office of Law
 - International Confederation of Wizards, British Seats
- Department for the Regulation and Control of Magical Creatures:
 - Beast, Being and Spirit Divisions
 - Goblin Liaison Office
 - Pest Advisory Bureau
- Department of Magical Accidents and Catastrophes:
 - Accidental Magic Reversal Squad
 - Obliviator Headquarters
 - Muggle-Worthy Excuse Committee
- Department of Magical Law Enforcement:
 - Improper Use of Magic Office
 - Auror Headquarters
 - Wizengamot Administration Services¹²⁵
- Minister of Magic and Support Staff¹²⁶

Some of these departments, such as Magical Transport and Magical Law Enforcement, seem familiar. The Department of Magical Cooperation is something like the Foreign Office or the Department of State. But apart from that, one is struck by the level of trivia on this list. There is no department concerned with the welfare of children, public health, sanitation, land use, monetary policy (except for the Goblin Liaison Office), employment, agriculture, industry, domestic commerce. (Come to think of it, there's no taxing authority -- how are these employees *paid*?) There are Apparition tests,¹²⁷ Animagi must register,¹²⁸ and apparently one

¹²⁴ Benjamin H. Barton, *Harry Potter and the Miserable Ministry of Magic*, in *Tex. Wesleyan Symposium*, *supra* note 6, 441-43., at 441.

¹²⁵ OotP, *supra* note 21, at 129-30

¹²⁶ DH, *supra* note 18, at 245.

¹²⁷ HBP, *supra* note 47, at 58.

¹²⁸ PoA, *supra* note 7, at 351.

needs a license to trade in magical artifacts.¹²⁹ Yet there is an entire floor devoted to games and sports, and employees in the Department of Magical Cooperation devote effort to determining the best thickness for imported cauldron bottoms.

The Ministry is organized, in other words, to focus on details and not on the big picture.

The Minister of Magic occupies an absurd and self-contradictory position in the Wizarding legal universe. He is clearly a chief executive, overseeing such offices as Magical Law Enforcement, and International Magical Cooperation and having direct authority over the main penal institution, Azkaban. At the same time he has legislative authority, enacting "decrees," "regulations," "codes" and other statutory laws (indeed, even his junior officers such as Arthur Weasley¹³⁰ and Dolores Umbridge¹³¹ apparently have significant law-drafting roles). He appears also to have judicial authority, as he serves as a presiding member of the Wizengamot, Wizarding Britain's high court.¹³² Consequently there is no separation of powers, no "checks and balances" on the Minister's authority.

Yet we are left completely in the dark as to how Ministers are selected or removed from office. There is no election process we can see, no committee for selection of the Minister, no political parties to elect a party leader, no "kingmakers," no Praetorian Guard to install a Minister by force. The selection of the Minister, indeed, is always expressed in the passive voice. We know when it is done, but never who does it or how they do it.¹³³

We hear that Dumbledore was repeatedly "offered" the post of Minister (by whom?) but turned it down in favor of his duties at Hogwarts.¹³⁴ Sirius reports that the ambitious and fanatical Barty Crouch, Sr. actively sought the position of Minister of Magic and "it looked like only a matter of time until Crouch got the top job",¹³⁵ but was blamed publicly for the failures of his son, so that Cornelius Fudge "got the top job."¹³⁶ Fudge, a weak-willed, bigoted, manipulative incompetent, retains the position in the face of numerous failures for fifteen years, "pelt[ing] Dumbledore with owls every morning, askin' fer advice,"¹³⁷ until he is finally "sacked", the Wizarding community having "scream[ed] for [his] resignation" following the disclosure of Voldemort's return.¹³⁸ Who sacks him, how he is sacked, and how Rufus Scrimgeour is put in his place, is never explained.¹³⁹ After Scrimgeour's assassination, Pius Thicknesse, under the control of Voldemort, occupies the office, although, again, the mechanism for this is not explained.¹⁴⁰ Finally, after the

¹²⁹ DH, *supra* note 18, at 222.

¹³⁰ CoS, *supra* note 15, at 39.

¹³¹ *Id.*, at 306-308.

¹³² OotP, *supra* note 21, at 138.

¹³³ Barton, *supra* note 124, at 441.

¹³⁴ SS, *supra* note 1, at 64-65; DH, *supra* note 18, at 717-18.

¹³⁵ GoF, *supra* note 19, at 527.

¹³⁶ *Id.*, at 530.

¹³⁷ SS, *supra* note 1, at 65.

¹³⁸ HBP, *supra* note 47, at 15.

¹³⁹ *Id.*, at 16.

¹⁴⁰ DH, *supra* note 18, at 208.

fall of Voldemort, Kingsley Shacklebolt is "named" temporary Minister of Magic before the night is out.¹⁴¹ He seems to have been fighting at Hogwarts the whole time; who "named" him?

How can someone with so much authority, authority that apparently is impossible to gainsay in any executive or legislative matter and difficult to gainsay even in the judiciary, how can such a person have no control over retaining his own job? How is it that the mechanism for appointing someone so powerful is not understood? Clearly the method of selection does not matter to Rowling; once the Minister is in place, he begins to act in his own political interests.

The Ministry of Magic is an ineffectual government even though it has no checks on its power. It is obsessed with trivia even though there are urgent matters at hand. Its leader has near-unilateral authority but no control over his own job. There is power, but no effectiveness. Is this what Rowling believes government, at root to be? Or is she giving us a different message, that for the lessons she is trying to convey an effective government is irrelevant?

XI. But What Does It All Mean?

The point, it seems to me, is the arbitrariness of human rule-making. If rules and procedures are made by humans, they are subject to the same irrationalities and prejudices to which humans themselves are prone, and they solve nothing. We cannot place our faith in rules, institutions or procedures, because all of these things are made and applied by human beings with human failings. Any rule or institution, no matter how well conceived, is subject to our own weaknesses and love of power and domination. No civilized regime can survive the apathy of its citizens.

Part of Rowling's message is exactly this. Our institutions of law, government and justice survive only so long as we say they do. We exist in society of laws, rather than of powerful men, only because we choose to do so from day to day. The instant that we lose our determination to do this, all façade of due process, equality, fairness and justice vanish. Laws are mere words, like the words of a spell. Unless there is someone who puts his or her magic behind the spell, it has no effect.

But in a greater sense, in Rowling's world the formal rules of law and government are almost irrelevant. She would have us consider the purity and wholeness of the human soul. Again and again she tells us that killing is destructive to the killer -- more ultimately destructive, indeed, than to the victim. Voldemort's repeated murders to ensure his own immortality render him fragmented and spiritually maimed. Harry intervenes to save Pettigrew from the other Marauders, not for Pettigrew's sake, but to protect Lupin and Sirius from the spiritual violence *they* would experience through committing such an act. The acts that ultimately matter throughout the series are acts of self-sacrifice. Harry repeatedly disregards rules and laws in the interests of what he believes to be right -- indeed, his teachers comment on this. But Harry, not Hermione, is the hero of the story.

¹⁴¹ *Id.*, at 745.

Human choices are good or bad in and of themselves. A backdrop of regulation, statute or court decision does not render them more or less virtuous. Formal norms cannot tell us the choices to make; only we can do that.