

Winter 2006

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Aaron Schwabach

*Thomas Jefferson School of Law*

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### Recommended Citation

Schwabach, Aaron (2006) "Harry Potter and the Unforgivable Curses: Norm-formation, Inconsistency, and the Rule of Law in the Wizarding World," *Roger Williams University Law Review*: Vol. 11: Iss. 2, Article 2.

Available at: [http://docs.rwu.edu/rwu\\_LR/vol11/iss2/2](http://docs.rwu.edu/rwu_LR/vol11/iss2/2)

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# Articles

## Harry Potter and the Unforgivable Curses: Norm-formation, Inconsistency, and the Rule of Law in the Wizarding World

Aaron Schwabach<sup>†</sup>

### I. INTRODUCTION

The Big Thing in popular literature in the 1980s and the early 1990s was cyberpunk, and academics loved it:<sup>1</sup> *Neuromancer*<sup>2</sup> was dark. It was serious. It dripped Weltschmerz from every page. But the essential nihilism of the genre, so delightful to cultural scholars, offered little for lawyers.

No one could have predicted, back then, that the Next Big

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<sup>†</sup> Professor of Law, Thomas Jefferson School of Law. J.D., 1989, Boalt Hall; B.A., 1985, Antioch College, aarons@tjssl.edu. I'd like to thank my daughters Veronica and Jessica Schwabach, my sisters Karen and Jennifer Schwabach, and my wife 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. © Aaron Schwabach. Readers of this article may copy it without the owner's permission, if the author and publisher are acknowledged in the copy and copy is used for educational, not-for-profit purposes.

1. See, e.g., FREDRIC JAMESON, POSTMODERNISM: OR, THE CULTURAL LOGIC OF LATE CAPITALISM 419 n.1 (1991).

2. WILLIAM GIBSON, NEUROMANCER (1984).

Thing would be a skinny eleven-year-old English kid with glasses. But Harry Potter has reached more readers, more deeply, than any fictional character in modern literary history; his world is familiar to hundreds of millions of people in every part of our Muggle world, and Harry Potter has sparked a renaissance in children's literature, especially children's fantasy literature.

For legal scholars this is good news. Harry's story is a story about law. Harry's world is governed by a detailed and deeply flawed legal regime.<sup>3</sup> Law, laws and legal structures appear in nearly every chapter. Conflicts and imperfections abound, providing Harry and his companions with the opportunity to ponder moral choices and readers with the opportunity to ponder the nature of law. For millions of readers, especially younger readers, the legal regime of Harry's world will form expectations about legal regimes in Mugglespace. These readers have created an entire body of secondary and interpretive texts, mostly online, to discuss these and other issues;<sup>4</sup> this article is my own small contribution. While the article is deeply critical of the legal regime of the wizarding world, this is not one of those articles, written either by snobbish academics who miss their cyberpunk or by intolerant prudes who haven't actually read any of the books, bashing Harry Potter. If you like Harry Potter, I hope you'll like the article.<sup>5</sup> If you don't like Harry Potter, go away and read something else.

The law of Harry's world is important to our world for at least two reasons. First, Harry's world provides an entirely constructed

3. On this regime and its flaws, see generally 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 (Giselle Liza Anatol ed., 2003).

4. See, e.g., The Akashic Record, <http://www.m5p.com/%7Epravn/hp/index.html>; Dark Mark, <http://www.darkmark.com/c.c?!=home&t=The%20Daily%20Prophet>; Enchanted Socks, <http://www.harrypotter.magical-mystical-diamond.co.uk/>; Fiction Alley, <http://www.astronomytower.org/>; The Harry Potter Automatic News Aggregator, [www.hpana.com](http://www.hpana.com/); Harry Potter for Grown-Ups, <http://groups.yahoo.com/group/HPforGrownups/>; The Harry Potter Lexicon, <http://www.hp-lexicon.org/>; The Pensieve, <http://www.thepensieve.org/>; Schnoogle.com, <http://www.schnoogle.com/>; The Three Broomsticks, <http://frogmorton4.tripod.com/> (last visited Nov. 21, 2005). In addition to traditional commentary, the sites contain filk, fanfic, slash, and other derivative works, including a genre that has provided the English language's worst recent new word and concept, Weasleycest.

5. If you haven't read the books yet, what are you waiting for?

universe, a laboratory in which legal thought-experiments can be conducted without real-world consequences. Second, literature shapes law:<sup>6</sup> For every real-life model of advocacy, adjudicative, and rule-making roles that the average first-year law student has, there are a hundred fictional models, from Atticus Finch to, well, Albus Dumbledore. The readers of Harry Potter will internalize its portrayals, particularly the uncertain quality of justice in a lawyerless society, and someday bring them to the practice of law.

This article focuses on one particular inconsistency, or apparent inconsistency, in the legal regime governing the British wizarding world: the Unforgivable Curses, the use of which on humans is absolutely prohibited by the law of the wizarding world. The three Unforgivable Curses are the Cruciatius Curse, which causes unbearable pain; the Imperius Curse, which allows the user to control the actions of the victim; and the Killing Curse, which causes instant death. The use of any of these curses on a human being is punishable by life imprisonment in Azkaban, the exceptionally grim wizards' prison.<sup>7</sup> Yet there are inconsistencies both in the application of this law and in the selection of certain curses as Unforgivable.

Why has the wizarding world chosen to outlaw certain spells and not others? What values do these choices reflect, both for Harry's world and for ours? What does it mean for a society to choose to punish some offenses more seriously than others, or not to punish at all? The same question is often asked in our world: Why, for example, are minor drug offenses punished more harshly than crimes considered by many to be more serious?<sup>8</sup> The most

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6. See generally, e.g., RICHARD H. WEISBERG, *THE FAILURE OF THE WORD: THE PROTAGONIST AS LAWYER IN MODERN FICTION* (1984). There is ongoing pressure within the law and literature movement to focus more attention on works from outside the canon, new or old. See, e.g., Elizabeth Villiers Gemmette, *Law and Literature: Joining the Class Action*, 29 VAL. U. L. REV. 665, 692 (1995). Surely children's literature, traditionally ignored by academics of all political leanings, is especially worthy of attention, as by its very nature it will have a greater influence on its intended audience's worldview than will books read by adults. See, e.g., William P. MacNeil, "Kidlit" as "Law-and-Lit": *Harry Potter and the Scales of Justice*, 14 L. & LIT. 545 (2002).

7. J.K. ROWLING, *HARRY POTTER AND THE GOBLET OF FIRE* 217 (2000) [hereinafter *GOBLET OF FIRE*].

8. See, e.g., Margaret P. Spencer, *Sentencing Drug Offenders: The Incarceration Addiction*, 40 VILL. L. REV. 335, 381 (1995); Judge Stanley

extreme penalties wizarding law has to offer—the Dementor’s Kiss and life imprisonment in Azkaban—are handed out arbitrarily. In spite, or perhaps because of, this arbitrariness, the denizens of the wizarding world seem to ignore or violate the law quite a bit.

This article attempts to explore, and perhaps answer, some of these questions. It looks at the Unforgivable Curses and their Forgivable companions, the Dementor’s Kiss and the Memory Charm, and examines the legal treatment of these spells under the Ministry’s regime as well as under relevant British (Muggle) and international law.

## II. THE UNFORGIVABLE CURSES

Barty Crouch Jr., a Death Eater impersonating former Auror Mad-Eye Moody, explains and demonstrates the nature and illegality of the three Unforgivable Curses to Harry Potter’s fourth-year Defense Against the Dark Arts class, and thus to the reader. Crouch first demonstrates the Curses on three spiders, although one spider would have sufficed.<sup>9</sup>

Crouch comments that the Ministry doesn’t want him to demonstrate the curses until the sixth year.<sup>10</sup> This is interesting for a couple of reasons: It shows that the educational use of these curses, on spiders or perhaps other small animals, is not absolutely prohibited, and it suggests that Dumbledore has authority to override the Ministry’s guidelines as to when the Unforgivable Curses should be taught. Crouch might be lying, of course, but it seems more likely that he’s telling the truth. He is teaching at Hogwarts in order to carry out an unnecessarily complex plan to revive Lord Voldemort, and his success depends on not being detected as an impostor.<sup>11</sup> If he were to lie about

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Sporkin & Congressman Asa Hutchinson, *Debate: Mandatory Minimums in Drug Sentencing: A Valuable Weapon in the War on Drugs or a Handcuff on Judicial Discretion?*, 36 AM. CRIM. L. REV. 1279, 1299 (1999).

9. Crouch is actually a good teacher. It is a common enough fictional conceit, no doubt frustrating to many professional teachers, that persons thrown into the role with no prior training or experience, like John Kimble (Arnold Schwarzenegger) in *KINDERGARTEN COP* (Universal 1990), turn out to be better teachers than many who have devoted their entire adult lives to the profession.

10. *GOBLET OF FIRE*, *supra* note 7, at 211.

11. Lord Voldemort, as if you didn’t know, is the arch-villain of the series. His revival requires a small quantity of Harry’s blood; to this end Crouch arranges for Harry to enter and win the Triwizard Tournament, a year-long

something that could so easily be checked, someone—probably Hermione Granger—might catch him in the lie.

### 1. *The Cruciatus Curse*

Barty Crouch Jr. has first-hand knowledge of the Unforgivable Curses and their legal penalties: He is a Death Eater sentenced to life in Azkaban for use of the Cruciatus Curse. He demonstrates this curse for the students:

Moody raised his wand again, pointed it at the spider, and muttered, “Crucio!”

At once, the spider’s legs bent in upon its body; it rolled over and began to twitch horribly, rocking from side to side. No sound came from it, but Harry was sure that if it could have given voice, it would have been screaming.

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“Pain,” said Moody softly. You don’t need thumbscrews or knives to torture someone if you can perform the Cruciatus Curse. . . That one was very popular once too.<sup>12</sup>

The Cruciatus Curse presents the easiest case for Unforgivability: Torture is universally recognized as a crime,<sup>13</sup> and there is no legitimate use for a curse that does nothing other than cause pain and, in some cases, insanity. Crouch was imprisoned for using the Curse to torture Frank and Alice Longbottom, the parents of Harry’s friend Neville. Fifteen years later the Longbottoms remain institutionalized, with no hope of recovery. Harry and his friends meet them, in one of the series’

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competition, so that at the end he may touch the Triwizard Cup, which Crouch has turned into a Portkey and which will transport Harry to the graveyard where Voldemort’s father’s body (another necessary component of the revival spell) is buried. Throughout the year Crouch has ample opportunity to render Harry unconscious and extract his blood or kidnap him, or simply turn some everyday object into a Portkey and trick Harry into touching it. The reason why he does not take this simpler route may, perhaps, be explained in the final volume.

12. *GOBLET OF FIRE*, *supra* note 7, at 214-15.

13. 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. See *infra* notes 155-64, and accompanying text.

most emotionally affecting scenes, while visiting their former professor Gilderoy Lockhart, also institutionalized.<sup>14</sup> Frank and Alice Longbottom 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 bubble gum wrappers.<sup>15</sup>

The Cruciatus Curse also provides disturbing insights into Harry's character and his links to the Dark Side. 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>16</sup> Later, after Bellatrix Lestrange kills Sirius Black, Harry pursues her and, catching up with her, actually *uses* the curse: "Bellatrix screamed. The spell had knocked her off her feet, but she did not writhe and shriek with pain as Neville had – she was already on her feet again, breathless, no longer laughing."<sup>17</sup>

No one except Bellatrix witnesses Harry's use of the curse, so he is spared a life sentence in Azkaban – but it's interesting that he chose that particular curse rather than one that would have rendered her unconscious or, for that matter, killed her.<sup>18</sup> This parallels his reaction to Malfoy's insults after he defeats Malfoy at Quidditch:

He had completely forgotten the fact that all the teachers were watching: All he wanted to do was cause Malfoy as much pain as possible. With no time to draw out his wand, he merely drew back the fist clutching the Snitch and sank it as hard as possible into Malfoy's

14. See *infra* notes 93-98, and accompanying text.

15. J.K. ROWLING, HARRY POTTER AND THE ORDER OF THE PHOENIX 512-15 (2003) [hereinafter ORDER OF THE PHOENIX].

16. GOBLET OF FIRE, *supra* note 7, at 300 (ellipses in original). He also attempts to use the curse on Severus Snape after Snape kills Dumbledore. J. K. ROWLING, HARRY POTTER AND THE HALF-BLOOD PRINCE 602 (2005) [hereinafter HALF-BLOOD PRINCE].

17. ORDER OF THE PHOENIX, *supra* note 15, at 810.

18. The same is true of his attempt to use the Cruciatus Curse on the fleeing Snape. See *supra* note 16. In both cases he is motivated more by a desire to punish the murderer than to prevent him or her from escaping (thus preventing future crimes). See generally MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 129-31 (Alan Sheridan trans., 2d ed. 1995) (1977); Erik Luna, *Punishment Theory, Holism, and the Procedural Concept of Restorative Justice*, 2003 UTAH L. REV. 205, 216 (2003).

stomach . . . .<sup>19</sup>

The Cruciatus Curse presents the easiest case in legal terms, but an especially difficult moral question for young readers: If Harry uses the curse, knowing that it is 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?

## 2. *The Imperius Curse*

The Imperius Curse subordinates the will of its victim to the will of the attacker:

Moody<sup>20</sup> jerked his wand, and the spider rose on to two of its hind legs and went into what was unmistakably a tap dance.

Everyone was laughing – everyone except Moody.

“Think it’s funny, do you?” he growled. “You’d like it, would you, if I did it to you?”

The laughter died away almost instantly.

“Total control,” said Moody quietly as the spider balled itself up and began to roll over and over. “I could make it jump out of the window, drown itself, throw itself down one of your throats . . . .”<sup>21</sup>

Crouch also subjects each of the students in turn to the Imperius Curse; although this is a use on a fellow human being, apparently either Crouch as a Hogwarts professor or at least 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 on a fundamental matter:

But – but you said it’s illegal, Professor,” said Hermione uncertainly as Moody cleared away the desks with a sweep of his wand, leaving a large clear space in the

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19. ORDER OF THE PHOENIX, *supra* note 15, at 413.

20. Actually Crouch, but Harry, the viewpoint character, doesn’t know this yet.

21. GOBLET OF FIRE, *supra* note 7, at 213.



middle of the room. “You said – to use it against another human was –”

“Dumbledore wants you taught what it feels like,” said Moody, his magical eye swiveling onto Hermione and fixing her with an eerie, unblinking stare.<sup>22</sup>

Again, Crouch might be lying, but given the danger to his plan such lying would entail, it seems more likely that Dumbledore actually has agreed to Moody’s demonstration of the Curse. It becomes clear later, however, that the Ministry was not informed of this in advance and would not have approved had it known: “It is my understanding that my predecessor not only performed illegal curses in front of you, he actually performed them *on you*[.]”<sup>23</sup>

It turns out that the Imperius Curse, unlike the Killing Curse and, apparently, the Cruciatu Curse, can be overcome—but not by everyone. There’s a disturbing subtextual message here, too—some wizards’ wills may be stronger than others’.

The Curse is not completely effective on Harry the first time Crouch uses it, and by the end of a single class session he is able to resist it completely.<sup>24</sup> Later, he successfully resists the Curse when Voldemort uses it against him.<sup>25</sup> Barty Crouch Sr., also placed under the Imperius Curse by Voldemort,<sup>26</sup> eventually manages to escape.<sup>27</sup> But Broderick Bode, a Ministry employee, struggles unsuccessfully against an Imperius Curse placed on him by Lucius Malfoy.<sup>28</sup> An unsuccessful Imperius Curse apparently has the potential to do lasting harm: When the brains of a Muggle named Herbert Chorley are addled by “a poorly performed Imperius Curse,” the Muggle Prime Minister asks Fudge’s replacement as Minister of Magic, Rufus Scrimgeour, “He’ll be all

22. *Id.* at 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., 2002).

23. *ORDER OF THE PHOENIX*, *supra* note 15, at 243 (Dolores Umbridge) (emphasis in original).

24. *GOBLET OF FIRE*, *supra* note 7, at 232.

25. *Id.* at 661.

26. *Id.* at 688.

27. *Id.* at 690.

28. *ORDER OF THE PHOENIX*, *supra* note 15, at 585.

right, won't he?" Scrimgeour responds with a shrug.<sup>29</sup>

The Ministry's preference, at least while Fudge is Minister, would be to have Defense Against the Dark Arts taught as an entirely theoretical subject. During the year that Dolores Umbridge, a Ministry stooge, teaches the course, her course aims are:

Understanding the principles underlying defensive magic.

Learning to recognize situations in which defensive magic can legally be used.

Placing the use of defensive magic in a context for practical use.<sup>30</sup>

The moral logic behind the Unforgivability of the Imperius Curse is equally straightforward, but it exposes one of the internal moral and legal contradictions of the Ministry of Magic's legal regime. It comes as no surprise to anyone familiar with the wizarding world that the Ministry is incompetent, unjust, corrupt, and occasionally brutal, and these problems have been addressed elsewhere.<sup>31</sup> The question remains, however, what logic underlies the classification of these three curses as Unforgivable and the exclusion of two others, the Memory Charm and the Dementor's Kiss, from that classification.

The Imperius Curse is an offense against free will; it enslaves the victim, and enslavement is universally recognized as a crime<sup>32</sup> and has been illegal in England for centuries.<sup>33</sup> The Ministry, however, openly tolerates the enslavement of house-elves.<sup>34</sup>

29. HALF-BLOOD PRINCE, *supra* note 16, at 17-18.

30. ORDER OF THE PHOENIX, *supra* note 15, at 240 (Dolores Umbridge). Alas, Professor Umbridge's preferred text, WILBERT SLINKHARD'S DEFENSIVE MAGICAL THEORY, is unavailable to Muggles; it would have made this article much easier to write.

31. See, e.g., Benjamin Barton, *Harry Potter and the Half-Crazed Bureaucracy*, 104 MICH. L. REV. \_\_\_\_ (forthcoming 2006); Jeffrey E. Thomas et al., *Harry Potter and the Law*, 12 TEX. WESLEYAN L. REV. \_\_\_\_ (forthcoming 2006); 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, 195-96 (2003); MacNeil, *supra* note 6, at 549-50; Hall, *supra* note 3.

32. See, e.g., International Covenant on Civil and Political Rights, art. 8, Mar. 23, 1976.

33. See *Sommersett v. Stuart*, 20 How. St. Tr. 1, 81 (granting a slave habeas relief because slavery was not recognized in England).

34. 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*

Although the characters are often moved by factors beyond their control or knowledge, free will is sacred in Harry's universe (except, perhaps, for house-elves). Dumbledore says "It is our choices, Harry, that show what we truly are[.]"<sup>35</sup> Yet Dumbledore, too, makes either a conscious or an unconscious exception for 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>36</sup> This seems to undermine Dumbledore's earlier assertion. Dobby, after all, has not chosen to harm anyone, while Kreacher has chosen to ally himself with Death Eaters, to injure Buckbeak, and to betray Sirius to his death.<sup>37</sup> To blame wizarding society for Kreacher's crimes seems to deny the validity of his choices.

### 3. *The Killing Curse*

The third of the Unforgivable Curses, and the least convincing in its Unforgivability, is the Killing Curse: "*Avada Kedavra!*" Moody roared. There was a flash of blinding green light and a rushing sound, as though a vast, invisible something was soaring through the air— instantaneously the spider rolled over onto its back, unmarked, but unmistakably dead."<sup>38</sup>

It's less clear what makes *Avada Kedavra* Unforgivable. The illegality of murder is, of course, even more widely recognized than the illegality of torture and enslavement. But not all killings are murder, and the wizarding world apparently acknowledges the

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*Potter and the Construction of Authority, in THE IVORY TOWER AND HARRY POTTER: PERSPECTIVES ON A LITERARY PHENOMENON* 159, 181 (Lana A. Whited ed. 2004). The apparent consent of most house-elves to their enslavement leads to further moral complexity. Harry tricks Lucius Malfoy into freeing Dobby the house-elf, but Dobby wants to be freed. When Hermione tries to trick house-elves into accepting clothes she's made, thereby (perhaps) becoming free, Ron is appalled. *ORDER OF THE PHOENIX*, *supra* note 15, at 255. Ron is wrong about many things, including house-elves, but in this case it's hard not to feel that he has a point: It's one thing to offer freedom to those who want it, and quite another to trick those who do not want it into taking it anyway. (Of course, Hermione is not the master of Hogwarts' house-elves, and may not be able to free them.)

35. J.K. ROWLING, *HARRY POTTER AND THE CHAMBER OF SECRETS* 333 (1998) [hereinafter *CHAMBER OF SECRETS*].

36. *ORDER OF THE PHOENIX*, *supra* note 15, at 832 (Albus Dumbledore).

37. The free will of house-elves is subtly emphasized by the ability of both Dobby and Kreacher to work against their masters' interests.

38. *GOBLET OF FIRE*, *supra* note 7, at 215-16.

legality of some killings.<sup>39</sup> The Ministry's Aurors kill on occasion; their ultimate goal is "to find and kill Voldemort."<sup>40</sup> The real Mad-Eye Moody makes a wry comment to Dumbledore regarding Moody's part in killing a Death Eater named Rosier,<sup>41</sup> and other Aurors apparently rack up an even higher body count than the sinister Moody: Harry's godfather Sirius Black (an escapee from Azkaban, where he had been sent by Barty Crouch Sr. for murder, without a trial<sup>42</sup>) tells Harry that Moody, in apparent contrast to some other Aurors, "never killed if he could help it."<sup>43</sup> In passing, Sirius also mentions another Death Eater, Wilkes, being killed by Aurors,<sup>44</sup> and Ron tells Harry that "loads [of giants] got themselves killed by Aurors."<sup>45</sup>

Sirius, Moody and Ron do not explain how the Aurors killed these giants and Death Eaters. Perhaps they are licensed by the Ministry to use the Killing Curse, in an analogue of 007's "license to kill" in the regrettable James Bond fantasies. This seems unlikely, though; if they were permitted to do so, surely the Aurors Kingsley Shacklebolt and Nymphadora Tonks would have used the curse in their battle with a large group of Death Eaters near the end of the fifth volume.<sup>46</sup>

There are many other ways to kill people; the Death Eater Peter Pettigrew manages to kill a dozen Muggles with a single curse by causing an explosion.<sup>47</sup> A wizard named Benjy Fenwick "copped it too, we only ever found bits of him. . ."<sup>48</sup> Whatever killed Benjy Fenwick, it wasn't the Killing Curse, which leaves its

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39. In addition to the killings described here, the Ministry also imposes the death penalty on magical beasts and uses the Dementor's Kiss on magical beings. *See infra* notes 63-82 and accompanying text. The lives of house-elves may apparently be terminated at the whim of their masters. *See infra* note 82.

40. HALF-BLOOD PRINCE, *supra* note 16, at 104.

41. GOBLET OF FIRE, *supra* note 7, at 589.

42. *Id.* at 526.

43. *Id.* at 532.

44. *Id.* at 531.

45. *Id.* at 430.

46. ORDER OF THE PHOENIX, *supra* note 15, at 801-03.

47. J.K. ROWLING, HARRY POTTER AND THE PRISONER OF AZKABAN 208, 363 (1999) [hereinafter PRISONER OF AZKABAN].

48. ORDER OF THE PHOENIX, *supra* note 15, at 174 (Mad-Eye Moody) (ellipses in original).

victims “unmarked, but unmistakably dead.”<sup>49</sup> Giants kill each other by purely physical means,<sup>50</sup> and centaurs use bows and arrows that do not appear to be magical.<sup>51</sup> At the age of thirteen, Harry threatens to kill Sirius Black, a threat that everyone, including Black, seems to find credible.<sup>52</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>53</sup> Hermione, as a first-year student, is able to set Snape’s clothes on fire.<sup>54</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>55</sup> and, disguised as a gift, is successfully used to murder Broderick Bode in the Closed Ward at St. Mungo’s.<sup>56</sup> Magical creatures, like Salazar Slytherin’s basilisk, can be used to kill.<sup>57</sup> A snake possessed by Voldemort bites and nearly kills Arthur Weasley.<sup>58</sup> Sirius Black is apparently killed when an otherwise non-lethal spell knocks him through the veil of death in the Department of

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49. GOBLET OF FIRE, *supra* note 7, at 216.

50. *See, e.g.*, ORDER OF THE PHOENIX, *supra* note 15, at 430.

51. *Id.* at 759.

52. PRISONER OF AZKABAN, *supra* note 47, at 341-43.

53. HARRY POTTER AND THE SORCERER’S STONE 189-91, 288-89 (1997) [hereinafter SORCERER’S STONE]. Quirrell’s plan fails first because Snape utters a countercurse, and then because Hermione knocks Quirrell over while rushing to set Snape on fire, believing that Snape is the one bewitching Harry’s broom. Snape-watchers may wonder why Snape did not later inform Dumbledore that Quirrell had tried to kill a student – surely grounds for termination even by Dumbledore’s rather lax standards. In fact, nearly all of Harry’s Defense Against the Dark Arts teachers make attempts to kill or seriously harm him; in addition to Quirrell’s murder attempt, Professor Lockhart tries to erase his memories, Professor Lupin (as a wolf) tries to attack the group of which Harry is a part, Barty Crouch Jr. (as Professor Moody) turns Harry over to Voldemort, and Professor Umbridge (before classes begin) sends two dementors to Little Whinging to attack Harry. Snape himself is the significant exception; when Harry attacks him after Snape has killed Dumbledore, Snape seems to go to some effort to avoid harming Harry, giving rise to much online speculation as to whose side Snape is actually on.

54. *Id.* at 191. Even a less-skilled wizard than Snape could probably have dealt with this danger by performing a Flame Freezing Charm (*see infra* note 132, and accompanying text), but Hermione’s flame is potentially lethal.

55. *Id.* at 277.

56. ORDER OF THE PHOENIX, *supra* note 15, at 546.

57. CHAMBER OF SECRETS, *supra* note 35, at 317-20.

58. ORDER OF THE PHOENIX, *supra* note 15, at 463.

Mysteries.<sup>59</sup>

The focus in determining the illegality of killing another human being is not on the *mens rea* as it is in the Muggle world, but rather on the method employed.<sup>60</sup> There is some sense to this. 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 or *mens rea*. In California, for example, murder committed by explosive device is first-degree murder<sup>61</sup> and carries a mandatory sentence of either death or life without parole.<sup>62</sup> Certain instrumentalities are deemed too dangerous. 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>63</sup>

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59. *Id.* at 805-06. There is some ambiguity as to whether Sirius dies because he falls through the veil, or falls through the veil because he is dead. Whichever is the case, though, his killer (his cousin Bellatrix Lestrange) did not use the Killing Curse.

60. *See generally, e.g.,* Hall, *supra* note 3. 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, *supra* note 16, at 123 (Remus Lupin). And Barty Crouch Jr. tells Harry's class that "Years back, there were a lot of witches and wizards being controlled by the Imperius Curse. . . Some job for the Ministry, trying to sort out who was being forced to act, and who was acting of their own free will." GOBLET OF FIRE, *supra* note 7, at 213. When Viktor Krum and later Madame Rosmerta commit crimes while under the Imperius Curse (and Katie Bell attempts to do so), there is no apparent sanction imposed upon them. *See id.* at 626-27; HALF-BLOOD PRINCE, *supra* note 16, at 517, 588. But this defense may be unavailable to house-elves. Susan Hall points out that Amos Diggory's interrogation of Winky the house-elf 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)? Hall, *supra* note 3, at 155-56; GOBLET OF FIRE, *supra* note 7, at 133-38.

61. Cal. Penal Code § 189.

62. Cal. Penal Code § 190.2(4).

63. GOBLET OF FIRE, *supra* note 7, at 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.

Although there is a not inconsiderable amount of killing and attempted killing in the novels,<sup>64</sup> the Killing Curse 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 Bertha Jorkins<sup>65</sup> and a Muggle named Frank Bryce,<sup>66</sup> and attempts to use it to kill Harry.<sup>67</sup> Barty Crouch Jr., posing as Mad-Eye Moody, uses it on a spider.<sup>68</sup> Wormtail uses Voldemort's wand and the Killing Curse to kill Cedric Diggory.<sup>69</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>70</sup> Barty Crouch Jr. kills his father, although we don't learn how.<sup>71</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.

The use of *Avada Kedavra* and other spells, dangerous or otherwise, is restricted to humans by clause three of the Code of Wand Use: "*No non-human creature is permitted to carry or use a wand.*"<sup>72</sup> As with "beings" and "beasts," however,<sup>73</sup> the boundaries of the "human" category are a bit fuzzy. Hagrid, Madame

64. 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 (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 (Elizabeth E. Heilman ed. 2003).

65. *GOBLET OF FIRE*, *supra* note 7, at 655-66. Conceivably Jorkins could have been killed by Wormtail using Voldemort's wand, as Cedric was.

66. *Id.* at 15, 666.

67. 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. *Id.* at 663; *ORDER OF THE PHOENIX*, *supra* note 15, at 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.

68. *GOBLET OF FIRE*, *supra* note 7, at 215-16.

69. *Id.* at 638.

70. *ORDER OF THE PHOENIX*, *supra* note 15, at 787-813. One Death Eater attempts to use the Killing Curse on Hermione, but Harry and Neville prevent him from completing the spell. *Id.* at 789.

71. *GOBLET OF FIRE*, *supra* note 7, at 690.

72. *Id.* at 132.

73. See *infra* note 221.

Maxime, and Fleur Delacour, all part-human, are permitted to carry wands, although Hagrid's is later broken when he is expelled from Hogwarts.<sup>74</sup>

### III. FATES WORSE THAN DEATH: THE DEMENTOR'S KISS AND MEMORY CHARMS

It's also surprising, even disturbing, that one more spell is not Unforgivable: The innocuous-sounding Memory Charm. And the Dementor's Kiss, which is not a spell and can only be performed by a dementor, is considerably more horrific than the Killing Curse: It sucks out the victim's soul.

#### 1. *Memory Charms*

The Memory Charm can erase or modify memories. The Ministry of Magic routinely dispatches Obliviators to modify the memories of Muggles who have witnessed magical events.<sup>75</sup> 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.<sup>76</sup> Apparently, to paraphrase Doctor Who, a Muggle may be the sum of his or her memories, but a wizard is even more so.<sup>77</sup>

A relatively privileged group of Muggles—relatives of wizards, plus the Muggle Prime Minister—seem to enjoy some immunity from the Ministry's rather cavalier use of Memory Charms.<sup>78</sup> For

74. Madame Maxime and Fleur Delacour are not British, of course, but they carry their wands in Britain, where they are presumably subject to British wizarding law. Madame Maxime is concealing her non-human ancestry at the time, but for social rather than legal reasons. The implications of this are discussed not only in the novels themselves but also in Whited & Grimes, *supra* note 22, at 193.

75. In addition to the Obliviators and the Accidental Magic Reversal Squad, the Department of Magical Accidents and Catastrophes includes a Muggle-Worthy Excuse Committee. ORDER OF THE PHOENIX, *supra* note 15, at 130.

76. CHAMBER OF SECRETS, *supra* note 35, at 297-98, 303, 324, 331.

77. Dr. Who, *The Five Doctors* (BBC television broadcast, Nov. 25, 1983) (The Fifth Doctor (Peter Davison)).

78. This does not mean that they are altogether immune; the talking portrait that announces Fudge's arrivals tells the Prime Minister (either



example, when Harry blows up his Aunt Marge while she's visiting the Dursleys, Obliviators erase Marge's memory of the event—but not the Dursleys'.<sup>79</sup> The Dursleys already know that Harry is a wizard, and apparently this, or their relationship to Harry, or some combination of the two, makes their memories less vulnerable to casual Obliviation.

Other Muggles, however, have their memories erased or modified at the whim of the Ministry's Obliviators, or even of ordinary wizards. The right to use Memory Charms against Muggles is not limited to the Ministry's Obliviators. Among the memories to be erased are memories of having seen magical creatures:

When the worst happens and a Muggle sees what he or she is not supposed to see, the Memory Charm is perhaps the most useful repair tool. The Memory Charm may be performed by the owner of the beast in question, but in severe cases of Muggle notice, a team of trained Obliviators may be sent in by the Ministry of Magic.<sup>80</sup>

Sometimes this use of the Memory Charm can be justified as necessary to prevent immediate loss of life: In 1932 a wizarding family used memory charms on beachgoers at Ilfracombe “when a rogue Welsh Green dragon swooped down upon a crowded beach.”<sup>81</sup> The Memory Charms prevented a panic that could have cost lives; although other spells might have accomplished the same result, the situation did not allow for sober reflection as to

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Tony Blair or John Major, depending on chronology) that the call he is waiting for, from the president of some other country, “can be rearranged. . . . We shall arrange for the president to forget to call. He will telephone tomorrow night instead.” HALF-BLOOD PRINCE, *supra* note 16, at 3. A call for which the British Prime Minister is waiting is surely an important matter; lives – Muggle lives – may hang in the balance. (There is a tendency on the part of American readers to assume that the Prime Minister is waiting for a call from the American president, but this may be mere cultural chauvinism. There are many other presidents, from Afghanistan's Hamid Karzai to Zimbabwe's Robert Mugabe, whose call might be important to the British Prime Minister but whom he might nonetheless think of as “the wretched man.” *Id.* at 1.)

79. PRISONER OF AZKABAN, *supra* note 47, at 44 (Cornelius Fudge).

80. NEWT SCAMANDER, FANTASTIC BEASTS & WHERE TO FIND THEM xx (2001).

81. SCAMANDER, *supra* note 80, at xvi.

the least intrusive spell to use.<sup>82</sup>

This use of Memory Charms to protect Muggle interests directly is rare, however. More often the Charms are used out of what often seems a merely reflexive desire, characteristic of so many governments, for secrecy for its own sake. The Muggle witnesses to Peter Pettigrew's mass murder have their memories of the event erased after their statements are taken.<sup>83</sup> Perhaps, had their memories been left intact and had the witnesses been questioned at greater length, the Ministry might have discovered that Pettigrew, not Black, was the murderer; instead, it took the statements, erased the memories, and sent Black to Azkaban without a trial.<sup>84</sup> The use of the Memory Charms thus prevents justice from being done and indirectly leads to Voldemort's return, much as Fudge's too-hasty use of the Dementor's Kiss on Barty Crouch Jr. sets the Ministry on the wrong path for a full year and allows Voldemort time to gather strength and unite his followers. When young, Voldemort himself deliberately used Memory Charms to send innocent persons to Azkaban and to conceal his own guilt, although only Harry and Dumbledore (and later Ron and Hermione) are aware of this.<sup>85</sup>

The Ministry's use of Memory Charms on Muggles also prevents Muggles from participating in the discourse regarding the punishment of their magical assailants. When, for example, Voldemort's uncle Morfin magically assaults Tom Riddle, the Muggle who will later become Voldemort's father, Morfin dismissively tells an investigating Ministry employee, "I expect you've wiped the Muggle's filthy face clean for him, and his memory to boot[.]"<sup>86</sup> By wiping Riddle's memory, the Ministry has

82. At least one Muggle escaped the spell. "[a] Muggle bearing the nickname 'Dodgy Dirk' holds forth in bars along the south coast on the subject of a 'dirty great flying lizard' that punctured his lilo." SCAMANDER, *supra* note 80, at xvi n.7. Few Americans reading this sentence for the first time are likely to know that a "lilo" is an air mattress. I certainly didn't.

83. PRISONER OF AZKABAN, *supra* note 47, at 40, 208.

84. GOBLET OF FIRE, *supra* note 7, at 526. (Sirius Black).

85. HALF-BLOOD PRINCE, *supra* note 16, at 367 (Voldemort modifies Morfin's memory to make Morfin believe that he has killed the Riddles; Morfin later dies in Azkaban); *id.* at 438-39 (Voldemort modifies the memory of Hokey the house-elf to make her believe that she has accidentally poisoned her mistress, Hepzibah Smith; Hokey is subsequently "convicted by the Ministry" of this accidental crime).

86. *Id.* at 208.

defined Riddle as an object of wizarding law, like a dragon or an enchanted doorknob, with no part in the structuring of the ongoing legal discourse. To Riddle, though, the Ministry's modification of his memory might seem a more serious assault than the hives inflicted on him by Morfin's curse.

The sentencing of Sirius and Hagrid is in sharp and apparently deliberate contrast to the way such matters are handled in the Muggle world. While the Muggles we see the most of are grotesques out of *Jane Eyre* as it might have been written by Roald Dahl, the Muggle authorities are apparently conscientious about fact-finding and justice: When a Muggle named Frank Bryce is wrongly suspected of the murder of Voldemort's father and grandparents (who in fact have been killed by Voldemort himself), he is detained and questioned but eventually released. Even though Frank's neighbors continue to believe him guilty, the evidence connecting him to the crime is as tenuous as that against Hagrid; in the Muggle world, that is not enough to lead to imprisonment.<sup>87</sup>

The Obliviators are sent in because of their expertise, not because the use of Memory Charms is dangerous. Yet it *is* dangerous. Mr. Roberts, the Muggle owner of the land on which the Quidditch World Cup takes place, cannot help noticing that his tenants are wizards, and his memory is modified repeatedly: "Needs a Memory Charm ten times a day to keep him happy."<sup>88</sup> Later, Roberts and his family are captured by Death Eaters and tossed high in the air for some time.<sup>89</sup> The next day, as Harry, Hermione and the Weasleys are leaving,

Mr. Roberts had a strange, dazed look about him, and he waved them off with a vague "Merry Christmas."

"He'll be all right," said Mr. Weasley quietly as they marched off onto the moor. "Sometimes, when a person's memory's modified, it makes him a bit disorientated<sup>90</sup> for a while . . . and that was a big thing they had to make

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87. GOBLET OF FIRE, *supra* note 7, at 3-4.

88. *Id.* at 78 (unnamed Obliviator).

89. *Id.* at 119-21.

90. Another disconcerting word for American readers, who are likely to feel a bit disoriented when they see it.

him forget.<sup>91</sup>

We never see Roberts again, so it's not clear whether Mr. Weasley was correct or merely trying to reassure the children. But we know that Memory Charms can cause permanent memory damage: When the witch 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>92</sup>

Memory Charms used against wizards seem to be taken more seriously than Memory Charms used against Muggles. Gilderoy Lockhart is a credit-stealer; he claims credit for the evil-fighting accomplishments of other wizards. To make sure that his thefts remain undiscovered, he uses Memory Charms to erase his victim's knowledge of their own accomplishments.<sup>93</sup> This is wrong on several levels, and is presented as evidence of Lockhart's bad character. Not only does Lockhart deprive his victims of memory, wealth and fame, but also of the sense of self-worth that comes from having overcome an evil and dangerous opponent for the benefit of the community as a whole.

Later, Lockhart attempts to use Ron Weasley's damaged wand to erase Harry's and Ron's memories; the wand explodes in his hand, and Lockhart's memory is completely erased.<sup>94</sup> He does not recover; two-and-a-half years later Harry, Ron and Hermione visit him in the Closed Ward at St. Mungo's Hospital for Magical Maladies & Injuries, and he remains an amnesiac. Not only does he not remember events before the Memory Charm; he seems to have difficulty forming new memories,<sup>95</sup> although the healer in charge of the ward does express the perhaps overly optimistic opinion that "Gilderoy does seem to be getting back some sense of himself[,]"<sup>96</sup> and he does show slight signs of recognizing Harry.<sup>97</sup>

91. *Id.* at 145 (Arthur Weasley).

92. *Id.* at 685. Breaking Memory Charms, while possible in some cases, is also damaging; see *id.* at 655: "When I had extracted all useful information from her, her mind and body were both damaged beyond repair." (Lord Voldemort)

93. CHAMBER OF SECRETS, *supra* note 35, at 297-98.

94. *Id.* at 303-04.

95. See ORDER OF THE PHOENIX, *supra* note 15, at 509-11.

96. *Id.* at 511.

97. *Id.* at 509.

His basic personality is not destroyed, however, as it would have been after a Dementor's Kiss: He remains amiable, conceited and utterly self-centered, as always.

Sharing the closed ward with Lockhart are Frank and Alice Longbottom, Neville's parents, who were severely tortured with the Cruciatus Curse and as a result are in no better mental shape than Lockhart.<sup>98</sup> The parallel seems obvious, yet the Memory Charm, perhaps because of its usefulness to the Ministry, is not Unforgivable.<sup>99</sup>

Memory Charms are not only useful to the self-serving Ministry, however; the good guys use Memory Charms, too.<sup>100</sup> 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.<sup>101</sup> 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>102</sup> Yet at the end of the scene Dumbledore speaks approvingly, even admiringly, of Shacklebolt's modification of Ms. Edgecombe's memory, and asks Professor McGonagall to thank Shacklebolt.<sup>103</sup>

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>104</sup> She apparently recovers later, although we don't see enough of her to be certain.

This use of Memory Charms by the good guys is not unique to the wizarding world; it is a well-worn SF trope. In the movie *Men in Black*, the eponymous characters (played by Will Smith and Tommy Lee Jones) use a "flashy-thing" to erase the memories of

98. *Id.* at 513-14, 544.

99. The Cruciatus Curse, on the other hand, is of no use to the Ministry even if it wished to disregard British and international law and use it to extract information from prisoners, as Umbridge attempts to do to Harry. See *infra* note 119, and accompanying text. Information extracted under torture is far less reliable than information extracted under Veritaserum.

100. So do the bad guys. See *supra* note 85.

101. ORDER OF THE PHOENIX, *supra* note 15, at 615, 617, 621.

102. *Id.* at 616.

103. *Id.* at 621.

104. *Id.* at 617.

Earthlings who've seen an unmistakable alien<sup>105</sup>—a use identical to the Ministry's use of Memory Charms.<sup>106</sup> The Men in Black are the Ministry of Magic, with "Earthlings" substituted for "Muggles" and "aliens" for "magical beings and creatures."

Memory erasure is dismissed even more casually in *Revenge of the Sith*, the third entry in the execrable new *Star Wars* trilogy. At the end of the movie Senator Bail Organa (Jimmy Smits), one of the good guys, off-handedly gives instructions that "the protocol droid's mind is to be wiped." C-3PO's memories are erased, and R2's left intact, to patch over an inconsistency between the new trilogy and the original.<sup>107</sup>

Other SF works take memories more seriously, using erasure of memory either as a dangerous form of therapy, with serious consequences for individual identity,<sup>108</sup> or as a punishment for serious crimes. In the latter case some works treat a "brain-wipe" as something equivalent to a Dementor's Kiss, completely erasing the original identity and making the body available for occupancy by a new identity or soul.<sup>109</sup> Others take the view that the soul survives, even without memories,<sup>110</sup> or discuss the possibility of conflict between imperfectly erased memories and a newly implanted artificial personality.<sup>111</sup>

## 2. *The Dementor's Kiss*

The Dementor's Kiss is even worse than the full-erasure Memory Charm performed by Gilderoy Lockhart on himself. It sucks out the victim's soul, leaving an empty shell without memory or personality.<sup>112</sup> It is a punishment worse than the

105. MEN IN BLACK (Columbia 1997)

106. SCAMANDER, *supra* note 80.

107. The viewer is also supposed to accept that for the next twenty years or so R2 never mentions any of their previous experiences to his friend, but in a galaxy that can be traversed from center to rim in fifteen minutes, anything's possible.

108. See, e.g., Walter Jon Williams, *Lethe*, in NEBULA AWARDS SHOWCASE 2000 165, 179 (2000); EDWARD BRYANT, CINNABAR 27-41 (1977)

109. See, e.g., PHILLIP C. JENNINGS, THE BUG LIFE CHRONICLES (1989).

110. Cordwainer Smith (Paul Linebarger), *The Dead Lady of Clown Town*, in THE BEST OF CORDWAINER SMITH 117 (1975). This seems to be what has happened to Lockhart.

111. See, e.g., ROBERT SILVERBERG, THE SECOND TRIP (1972)

112. 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

death penalty; there are many hints of an afterlife, or various sorts of afterlives, in the wizarding world, but none whatsoever for those whose souls are sucked out by dementors. Yet the Ministry inflicts it without requiring any legal process whatsoever, let alone the intricate process required for the execution of Buckbeak the hippogriff.

The Dementor's Kiss is not a spell; it can only be performed by dementors, not by wizards. However, dementors perform, or attempt, the Kiss at the direction of wizards: Cornelius Fudge sends dementors to perform the Kiss on Sirius Black<sup>113</sup> and a dementor accompanying Fudge performs the Kiss on Barty Crouch Jr., with Fudge's apparent consent.<sup>114</sup> Dolores Umbridge sends dementors to Little Whinging to perform the Kiss on Harry; they nearly suck out Dudley's soul, but Harry manages to save himself and his cousin with the Patronus Charm.<sup>115</sup> For this use of magic Harry undergoes a criminal trial before the Wizengamot.<sup>116</sup>

Professor Umbridge, a Ministry employee closely allied to Fudge, seems to feel completely above the law. Her crimes, including dispatching the dementors, lead to no legal sanction more severe than loss of her teaching position at Hogwarts; she then returns to her work at the Ministry.<sup>117</sup> Similarly, her physical torture of Harry Potter and Lee Jordan is surely illegal, yet she makes no particular attempt at secrecy.<sup>118</sup> She even threatens to use the Cruciatus Curse on Harry before a dozen witnesses—one of whom is the overtly ambitious Draco Malfoy, who could be expected to use such information to his advantage.<sup>119</sup>

Harry, a realist, 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 . . ." <sup>120</sup> When Sirius is later captured,

OF THE PHOENIX, *supra* note 16, at 34.

113. PRISONER OF AZKABAN, *supra* note 47, at 416.

114. GOBLET OF FIRE, *supra* note 7, at 702-03.

115. ORDER OF THE PHOENIX, *supra* note 15, at 17-19.

116. *Id.* at 137-51.

117. See HALF-BLOOD PRINCE, *supra* note 16, at 345, 642.

118. Umbridge's method of torture is Kafka-lite. She forces Harry to write with a pen that carves "I will not tell lies" into the back of his hand. See FRANZ KAFKA, THE METAMORPHOSIS, IN THE PENAL COLONY, AND OTHER STORIES (1995) (as *In Der Strafkolonie* 1919).

119. ORDER OF THE PHOENIX, *supra* note 15, at 746.

120. PRISONER OF AZKABAN, *supra* note 47, at 404 (ellipses in original). The use of the Dementor's Kiss on Sirius has been pre-authorized by the

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."<sup>121</sup>

Apparently the wizarding world, too, has its share of people who agree with Uncle Vernon, and Fudge is pandering to this audience: "When will they *learn*," said Uncle Vernon, pounding the table with his large purple fist, "that hanging's the only way to deal with these people?"<sup>122</sup>

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.<sup>123</sup>

The situation of house-elves is, not surprisingly, even worse. Apparently their enslavement gives their masters the power of life and death over them: "dear Aunt Elladora . . . she started the family tradition of beheading house-elves when they got too old to carry tea-trays . . ." <sup>124</sup>

#### IV. THE LAW OF THE WIZARDING WORLD

The wizarding world of Great Britain, and probably Ireland as well,<sup>125</sup> is governed by the Ministry of Magic. In Harry's first five years at Hogwarts, the Minister of Magic is Cornelius Fudge, a "[b]ungler if there ever was one."<sup>126</sup> The Ministry is apparently part of the British government, although one whose existence is not publicized: eleven-year-old Harry is surprised to learn of its existence,<sup>127</sup> as is his much older Uncle Vernon, four years later:

Ministry, however. *See id.* at 247.

121. *Id.* at 416-17 (Fudge to Snape).

122. *Id.* at 17.

123. GOBLET OF FIRE, *supra* note 7, at 703-04. The interrogation of Crouch by Snape and Dumbledore presents the only effective use of Veritaserum, a magical truth serum that should, logically, be enormously useful in criminal cases. But then, as Hermione points out, "A lot of the greatest wizards haven't got an ounce of logic[.]" SORCERER'S STONE, *supra* note 53, at 285.

124. ORDER OF THE PHOENIX, *supra* note 16, at 113 (Sirius Black).

125. *See infra* notes 167-73, and accompanying text.

126. SORCERER'S STONE, *supra* note 53, at 65.

127. *Id.* at 64. The exact relationship between the Ministry and the



"*Ministry of Magic?*" bellowed Uncle Vernon. "People like you in *government?* Oh this explains everything, everything, no wonder the country's going to the dogs . . ." <sup>128</sup>

This secrecy from the Muggle population as a whole is apparently required by Britain's obligations under international law, particularly the International Statute of Wizarding Secrecy of 1692.<sup>129</sup> The maintenance of this secrecy seems to be the primary reason for the Ministry's existence: Hagrid tells Harry that "their main job is to keep it from Muggles that there's still witches an' wizards up an' down the country."<sup>130</sup> When Harry asks why such secrecy is necessary, Hagrid tells him "Blimey, Harry, everyone'd be wantin' magic solutions to their problems. Nah, we're best left alone."<sup>131</sup> This answer is not particularly satisfying; if 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.

There are three more compelling possible justifications: Secrecy may be necessary to protect wizards from Muggles, to protect Muggles from each other, and to protect Muggles from wizards. The first of these is given little attention. On an individual basis, wizards have little to fear from Muggles. One of Harry's school books explains that medieval witch-burnings were "completely pointless" because

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Muggle government is not clear, but the Ministers of Magic seem to treat the Muggle Prime Minister not as a superior or even an equal, but a subordinate. We do see one example of a requirement that the Ministry report to the Muggle government, but Fudge treats it dismissively: "Oh, and I almost forgot. . . We're importing three foreign dragons and a sphinx for the Triwizard Tournament, quite routine, but. . . it's down in the rule book that we have to notify you if we're bringing highly dangerous creatures into the country." HALF-BLOOD PRINCE, *supra* note 16, at 9.

128. ORDER OF THE PHOENIX, *supra* note 15, at 29

129. See CHAMBER OF SECRETS, *supra* note 35, at 21; SCAMANDER, *supra* note 80, at xvi; KENNILWORTHY WHISP, QUIDDITCH THROUGH THE AGES 16 (2001).

130. SORCERER'S STONE, *supra* note 53, at 65.

131. *Id.* at 51.

On the rare occasion that [Muggles] did catch a real witch or wizard, burning had no effect whatsoever. The witch or wizard would perform a basic Flame Freezing Charm and then pretend to shriek with pain while enjoying a gentle, tickling sensation. Indeed, Wendelin the Weird enjoyed being burned so much that she allowed herself to be caught no less than forty-seven times in various disguises.<sup>132</sup>

Wendelin is played strictly for laughs, but there are hints of “the dark days that preceded the wizards’ retreat into hiding.”<sup>133</sup> While the potential for individual Muggles to harm individual wizards is slight, words like “retreat” and “hiding” suggest a fear for the safety of the wizards rather than of the Muggles. Wizards are not immune to harm from Muggle weapons, and Muggles greatly outnumber wizards, so one reason for the International Statute of Wizarding Secrecy may be fear of persecution.

The consequences of a false accusation of witchcraft, even in today’s Britain, can be dangerous and even fatal.<sup>134</sup> In past centuries tens of thousands, perhaps hundreds of thousands, of innocent<sup>135</sup> people, mostly women and girls, died in Europe’s medieval witch-hunts, in one of the strangest of the continent’s

132. BATHILDA BAGSHOT, *A HISTORY OF MAGIC* (1947), quoted in PRISONER OF AZKABAN, *supra* note 47, at 2.

133. SCAMANDER, *supra* note 80, at xv (citing BAGSHOT, *supra* note 131). See also CHAMBER OF SECRETS, *supra* note 35, at 150 (At the time of the founding of Hogwarts, “witches and wizards suffered much persecution.” (Professor Binns.))

134. These consequences are too unpleasant to relate in an article like this one; see, e.g., The Victoria Climbié Inquiry <http://www.victoria-climbié-inquiry.org.uk/> (a child thought to be possessed is killed by neglect and maltreatment); John Eekelaar, *Children Between Cultures*, 18 INT’L J.L. POL’Y & FAM. 178, 189-90 (2004). Victoria Climbié’s case, sadly, is not an isolated one. In a similar case, three persons were recently convicted of the severe torture of another eight-year-old girl suspected of witchcraft; only the timely intervention of a street warden prevented the girl from being murdered as well. BBC News, ‘Witch’ Child Cruelty Trio Guilty June 3, 2005, <http://news.bbc.co.uk/go/pr/fr/-/1/hi/england/london/4607435.stm>. See also BBC News, *Boys ‘Used for Human Sacrifice,’* June 16, 2005, <http://news.bbc.co.uk/go/pr/fr/-/1/hi/uk/4098172.stm>; BBC News, *Crucified ‘Exorcism’ Nun Buried,* June 20, 2005, <http://news.bbc.co.uk/go/pr/fr/-/1/hi/world/europe/4112568.stm>.

135. All were necessarily innocent of witchcraft, even those who believed themselves to be witches; in our world, unlike Harry’s, there is no witchcraft.

many historical outbreaks of mass murder.<sup>136</sup> The wizarding world acknowledges that the Muggle fear of witches is more dangerous to Muggles wrongly suspected of witchcraft than to actual witches:

If any Muggle is unwise enough to confide in another that he has spotted a Hippogriff winging its way north, he is generally believed to be a drunk or a "loony." Unfair though this may seem on the Muggle in question, it is nevertheless preferable to being burnt at the stake or drowned in the village duckpond.<sup>137</sup>

There is another reason for keeping the two worlds as separate as possible: Wizards have the capability, and many have the inclination, to harm Muggles. With the Unforgivable Curses they can torture, enslave and kill Muggles, who are powerless to resist. With ordinary, everyday magic they can also torture and kill, as well as steal, play practical jokes, and cheat Muggles in business. And, judging from the number of people of Harry's parents' generation who have died violent deaths, the British wizarding world is far more violent than the United Kingdom as Muggles know it.<sup>138</sup>

There is a strong supremacist element in the wizarding world; this finds its fullest expression in the Death Eaters, for whom the physical abuse and murder of Muggles is a form of entertainment: "Harry, that's their idea of fun. Half the Muggle killings back when You-Know-Who was in power were done for fun."<sup>139</sup> Voldemort's Death Eaters are not the only wizards who seem to view Muggles as game animals: Sirius Black's mother's cousin

136. See generally CHARLES MACKAY, EXTRAORDINARY POPULAR DELUSIONS AND THE MADNESS OF CROWDS 462-564 (2d ed. 1852) (1932); ALAN C. KORS & EDWARD PETERS, WITCHCRAFT IN EUROPE 1100-1700: A DOCUMENTARY HISTORY (1972).

137. SCAMANDER, *supra* note 80, at xvii.

138. See, e.g., ORDER OF THE PHOENIX, *supra* note 15, at 173-74 (This is the scene in which Mad-Eye Moody (the real one) shows Harry a picture of the original Order of the Phoenix. Of the nineteen people Moody identifies in the photo, seven have since died violent deaths, one has disappeared and is presumed dead, and two have been tortured into insanity. Moody himself has sustained serious injuries. Three more (Sirius Black, Emmeline Vance and Dumbledore) die by violence within the next year. (This count assumes that Fabian Prewett, mentioned by Moody, is actually in the photo. The text is ambiguous on this point.))

139. GOBLET OF FIRE, *supra* note 7, at 143 (Arthur Weasley).

Araminta Meliflua “tried to force through a Ministry Bill to make Muggle-hunting legal.”<sup>140</sup> And, of course, “[w]e are all familiar with the extremists who campaign for the classification of Muggles as ‘beasts’.”<sup>141</sup>

The evil Lucius Malfoy plots to sabotage Arthur Weasley’s attempt to pass a Muggle Protection Act,<sup>142</sup> and Arthur sees even practical jokes (regurgitating toilets, for instance) as a symptom of this attitude: “[I]t’s not so much having to repair the damage, it’s more the attitude behind the vandalism, Harry. Muggle-baiting might strike some wizards as funny, but it’s an expression of something much deeper and nastier[.]”<sup>143</sup> This not merely patronizing but dangerously callous attitude toward Muggles is of a piece with (human) wizard attitudes toward other magical beings such as giants and, especially, house-elves.

But for all the wizarding world’s aloofness, the Ministry of Magic seems willing to coordinate with the Muggle authorities when necessary to further its own interest in secrecy. When “magical catastrophes or accidents are simply too glaringly obvious to be explained away by Muggles without the help of an outside authority,” as in the case of the “Loch Ness kelpie,” the Ministry’s “Office of Misinformation will . . . liaise directly with the Muggle Prime Minister to seek a plausible non-magical explanation[.]”<sup>144</sup> And when Sirius Black escapes from Azkaban, Fudge “inform[s] the Muggle Prime Minister of the crisis.”<sup>145</sup> At the time Black is believed to have killed thirteen people, twelve of them Muggles, so his escape is definitely a “crisis.”<sup>146</sup> Yet even this limited cooperation between the wizarding and Muggle elements of the British government may violate the International Statute of Wizarding Secrecy: Fudge’s action leads to “critic[is]m” by some members of the International Federation of Warlocks.<sup>147</sup>

The Prime Minister is in on the secret of the wizarding world’s existence, as are the close Muggle relatives of wizards like

140. ORDER OF THE PHOENIX, *supra* note 15, at 113 (Sirius Black).

141. SCAMANDER, *supra* note 80, at xiii.

142. CHAMBER OF SECRETS, *supra* note 35, at 336.

143. ORDER OF THE PHOENIX, *supra* note 15, at 153.

144. SCAMANDER, *supra* note 80, at xx.

145. PRISONER OF AZKABAN, *supra* note 47, at 37 (“Black Still at Large,” article in the Daily Prophet); HALF-BLOOD PRINCE, *supra* note 16, at 7-9.

146. *See, e.g.*, PRISONER OF AZKABAN, *supra* note 47, at 38, 208.

147. *Id.* at 37 (“Black Still at Large,” article in the Daily Prophet.)

the Dursleys and Hermione's parents. Fudge has "the Prime Minister's assurance that he will not breathe a word of Black's true identity to anyone. And let's face it—who'd believe him if he did?"<sup>148</sup> Fudge says more or less the same thing to the Muggle Prime Minister: "My dear Prime Minister, are *you* ever going to tell anybody?"<sup>149</sup>

### 1. *The British Wizarding World and International Law*

The laws and customs governing the wizarding folk of other countries differ from those of the British wizarding world. Durmstrang, wherever it is located, teaches the Dark Arts, while Hogwarts only teaches Defense Against the Dark Arts.<sup>150</sup> Different wizarding cultures produce different laws; flying carpets, for instance, are legal in (at least) Bangladesh, India, Iran, Mongolia and Pakistan,<sup>151</sup> but have apparently been illegal in Britain for several decades, although there is pressure to repeal the ban.<sup>152</sup>

Just as in the Muggle world, these different legal systems interact, when necessary, through international law. Wizards have their own structures of international law, which have adopted rules such as the International Statute of Wizarding Secrecy. International human rights law, however, seems to mean little more to the Ministry of Magic than does British Muggle law. Executions, let alone executions ordered by administrative officials without any judicial determination of guilt, are forbidden by Protocol 6 to the European Convention on Human Rights, to which the United Kingdom became a party in 1999.<sup>153</sup> While (depending on which chronology is accepted<sup>154</sup>) Protocol 6 might not have been in effect for the United Kingdom at the time of the

148. *Id.* at 38 ("Black Still at Large," article in the Daily Prophet); *see also* HALF-BLOOD PRINCE, *supra* note 16, at 6.

149. HALF-BLOOD PRINCE, *supra* note 16, at 6.

150. GOBLET OF FIRE, *supra* note 7, at 165 (Draco Malfoy).

151. WHISP, *supra* note 129, at 46.

152. GOBLET OF FIRE, *supra* note 7, at 91.

153. Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty art. 1, Apr. 28, 1983, Europ. T.S. No. 114.

154. Similar chronology problems exist with the Human Rights Act of 1998, which incorporated the protections in the European Convention on Human Rights into British law.

execution of Crouch (assuming that soul-destruction falls within the definition of execution), the more general provisions of the International Covenant on Civil and Political Rights would still have prevented execution without due process and by such cruel means.<sup>155</sup>

If the Ministry of Magic is in some sense a separate sovereignty not subject to United Kingdom law, it is unlikely to be a party to any Muggle international agreements. Nonetheless, certain of those agreements and the principles they embody have attained the status of international custom or even *jus cogens*—peremptory norms from which no derogation is permitted, even for the Ministry of Magic.

Torture has long been outlawed by conventional international law.<sup>156</sup> The United Kingdom has been a party to the European Convention for the Prevention of Torture<sup>157</sup> since it entered into force in 1989, and to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment<sup>158</sup> since 1988. These treaties thus apply to most of the acts described in the text regardless of which chronology is used. While the Ministry of Magic may feel that it has done its bit to comply with Article 4 of the latter treaty by outlawing the use of the Cruciatus Curse,<sup>159</sup> it continues to operate the prison at Azkaban, where the prisoners are subjected to constant mental torment by dementors, driving most mad.<sup>160</sup> This may be torture within the meaning of Article 1 of the treaty, which provides that:

155. See *infra* note 166, and accompanying text.

156. See, e.g., International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), art. 7 (Dec. 16, 1966); Universal Declaration of Human Rights, G.A. Res. 217A (III), art. 5 (Dec. 10, 1948). Both declare in identical terms that “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”

157. European Convention for the Prevention of Torture and Inhuman or Degrading Treatment, Nov. 26, 1987, Europ. T.S. No. 126.

158. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.

159. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 4(1), Dec. 10, 1984, 1465 U.N.T.S. 85: “Each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.”

160. See GOBLET OF FIRE, *supra* note 7, at 529.

For the purposes of this Convention, the term “torture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.<sup>161</sup>

Not only is the United Kingdom a party to various anti-torture treaties that would seem to outlaw the use of dementors at Azkaban, but the prohibition against torture has come to be accepted as a *jus cogens* norm of international law—one from which no derogation is permissible.<sup>162</sup> In other words, even if the United Kingdom were to withdraw from all of the anti-torture treaties to which it is a party, international law would still forbid it to authorize torture.<sup>163</sup> The same is true of slavery; even were the UK to withdraw from all of the anti-slavery treaties to which it is a party, the enslavement of the house-elves would continue to violate international law.<sup>164</sup>

There is no *jus cogens* norm forbidding the death penalty; if the Ministry is not bound by Britain’s treaties, nothing in international law prohibits it from executing prisoners—but only after they have been afforded due process of law, and not by the

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161. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 1, Dec. 10, 1984, 1465 U.N.T.S. 85.

162. See Vienna Convention on the Law of Treaties, art. 53, May 22, 1969, 1155 U.N.T.S. 331. Under U.S. law, at least, violation of the *jus cogens* norm against torture does not necessarily create a private right of action, because of sovereign immunity. See *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993).

163. See, e.g., DAVID J. BEDERMAN, *INTERNATIONAL LAW FRAMEWORKS* 98 (2001); WILLIAM R. SLOMANSON, *FUNDAMENTAL PERSPECTIVES ON INTERNATIONAL LAW* 12-13, 45-46 (3d ed. 1999) (quoting Committee of U.S. Citizens Living in Nicaragua v. Reagan, 859 F.2d 929 (1988)).

164. See, e.g., BEDERMAN, *supra* note 163, at 98 (2001) (prohibition against slavery is a *jus cogens* norm).

Dementor's Kiss, which is probably torture.<sup>165</sup> Muggle international law has not had the opportunity to address memory modification and erasure, probably because Muggles lack the ability to do these things.

## 2. *British Law - Magic and Muggle*

All of the students that we meet at Hogwarts appear to be British. Some, such as Cho Chang, Lee Jordan, the Patil sisters, and Dean Thomas, are presumably the descendants of immigrants, but the only character who acts at all "foreign" is Seamus Finnigan, the token Irish character.<sup>166</sup> In the wizarding world, however, Ireland does not appear to be independent; at the Quidditch World Cup we meet the Bulgarian Minister of Magic ("Vell, it vos very funny") but no Irish Minister of Magic.<sup>167</sup> Instead, Ireland seems to be represented by Cornelius Fudge, Britain's Minister of Magic.

The wizards of a great many other former British colonies, from the United States<sup>168</sup> to Uganda,<sup>169</sup> have apparently gained their independence, but there is no suggestion of either an independent Ireland or an Irish partition. In the earlier stages of the Quidditch World Cup, England "Went down to Transylvania, three hundred and ninety to ten," said Charlie gloomily. "Shocking performance. And Wales lost to Uganda, and Scotland was slaughtered by Luxembourg."<sup>170</sup> The comparison to soccer's World Cup is obvious.<sup>171</sup> Yet in our world, Northern Ireland has a World Cup soccer team, and Transylvania does not.<sup>172</sup> In Harry's world,

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165. "This penalty can only be carried out pursuant to a final judgement rendered by a competent court." *See supra* note 156, art. 6(2). "Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence." *Id.* at art. 6(4). Severus Snape tells Sirius Black in the movie version of PRISONER OF AZKABAN, but not in the book, that the Dementor's Kiss "is said to be nearly unbearable to watch - but I'll do my best." The movies, of course, are not canon.

166. Cormac McLaggen seems very British; his family is well-connected to the Ministry elite, and he is distinguishable from the other students only by his unpleasantness.

167. GOBLET OF FIRE, *supra* note 7, at 114-15.

168. WHISP, *supra* note 129, at 44-45.

169. *Id.* at 42-43; GOBLET OF FIRE, *supra* note 7, at 63.

170. GOBLET OF FIRE, *supra* note 7, at 63 (Charlie Weasley).

171. *See also infra* note 231.

172. FIFA World Cup Teams: Germany 2006, <http://fifaworldcup.yahoo>.



Northern Ireland does not enter a separate team in the Quidditch World Cup; if it did, Charlie Weasley would have included it in his litany of catastrophe.<sup>173</sup> The political divisions of the wizarding world, insofar as they can be inferred from the sports pages of the Daily Prophet, evidently differ somewhat from our own.

There are apparently wizarding schools in many countries; we only see two of these other schools, and those at a distance, but at least one of them appears to be somewhat less monocultural than Hogwarts. Each represents a British stereotype of Europe, taking that stereotype to the point of caricature and thus denying it. Effete Beauxbatons, apparently in France, is more refined and less effectual than Hogwarts. Its champion, Fleur Delacour, places last in the Triwizard Tournament, as might be expected of the over-civilized Continentals one encounters from Calais on south.<sup>174</sup>

Harsh Durmstrang is an amalgam of German and Russian grimness—the characteristics of Europe's center and east, still seen by many Britons as the Land of Mordor.<sup>175</sup> The name is derived from Sturm and Drang, the gloomy Romantic eighteenth-century literary movement based on the play of the same name.<sup>176</sup> The

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com/06/en/t/team/index.html (last visited Nov. 21, 2005).

173. This is not to say that there are no Quidditch teams in the north of Ireland; there is at least one, the Ballycastle Bats. See GOBLET OF FIRE, *supra* note 7, at 393. In Quidditch Through the Ages, however, Kenilworthy Whisp makes no distinction between the Bats and teams in what Muggles know as the Republic of Ireland, such as the Kenmare Kestrels, or other teams in the British & Irish League. WHISP, *supra* note 129, 31-38. It's worth noting, though, that even among Muggles the Republic of Ireland and Northern Ireland share a single cricket league, and the Gaelic Athletic Association organizes island-wide competitions in traditional sports such as hurling (not what it sounds like) and Gaelic football. See *Border? What Border?*, THE ECONOMIST, Aug. 6, 2005, at 45. The Quidditch teams of Great Britain and Ireland are administered by the Ministry: "Level seven, Department of Magical Games and Sports, incorporating the British and Irish Quidditch League Headquarters, Official Gobstones Club, and Ludicrous Patents Office." ORDER OF THE PHOENIX, *supra* note 15, at 129.

174. It's more than a bit disturbing that Fleur Delacour is also the only female champion.

175. These not infrequent depictions of central and eastern Europe in British literature might be seen as "highly stylized simulacra, elaborately wrought imitations of what a live [central and eastern Europe] might be thought to look like[.]" See EDWARD W. SAID, ORIENTALISM 88 (New York: Vintage Books, 1979) (1978). But in this case it's probably just parody.

176. See generally, e.g., DAVID HILL, LITERATURE OF THE STURM UND DRANG

students may be from a variety of countries; Viktor Krum, we know, is Bulgarian, but Durmstrang is not in Bulgaria. Its location is a secret; Viktor lets slip to Hermione that

Vell, ve have a castle also, not as big as this, nor as comfortable, I am thinking . . . Ve have just four floors, and the fires are lit only for magical purposes. But ve have grounds larger even than these – though in vinter, ve have very little daylight, so we are not enjoying them. But in summer ve are flying every day, over the lakes and mountains – <sup>177</sup>

The reference to “very little daylight”—even by Hogwarts standards, apparently—suggests that Durmstrang lies to the north of Scotland. Not many inhabited places in Europe are north of Scotland and have mountains and lakes. If one accepts the rather forgiving British definition of “mountain,” Russia’s Kola Peninsula fits the description, as do parts of Scandinavia. One fan theory places Durmstrang in Latvia,<sup>178</sup> which is at about the same latitude as Scotland and has lakes but nothing that could properly be called a mountain.

We also learn that Draco Malfoy’s father considered sending him to Durmstrang instead of Hogwarts.<sup>179</sup> So Durmstrang, located perhaps in Russia or Scandinavia, has at least one Bulgarian student and could conceivably have accepted a British student. The language of instruction may be English; there is no sign that Draco speaks any other language, and the Durmstrang students converse with their headmaster, Karkaroff, in English. Karkaroff himself also seems to be English.<sup>180</sup> Unlike his

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2-3 (David Hill ed. 2003). One unfortunate side effect of this choice of name may turn out to be a renewed wave of interest among teenagers in *THE SUFFERINGS OF YOUNG WERTHER* and its ilk.

177. *GOBLET OF FIRE*, *supra* note 7, at 417.

178. Heidi Tandy, *Geography*, HPfGU Fantastic Posts, Oct. 26, 2002, available at <http://www.hpfgu.org.uk/faq/geography.html#Durmstrang> (last visited June 13, 2005).

179. *GOBLET OF FIRE*, *supra* note 7, at 165.

180. Many of the interpretations here are my own and may come as a shock to those deeply immersed in HP fandom. With two of these, in particular, I’m bracing myself for a flood of e-mail: The assertion that the wizarding Ireland is not independent, and the assertion that Karkaroff is not Russian. Now that Karkaroff is deceased, however, the latter point may be moot. And at least I have more sense than to venture into the Shipping

students, who speak with thick accents (“Professor, *I* vood like some vine”), Karkaroff’s English is apparently flawless (“I notice you have dribbled food all down the front of your robes again, disgusting boy –”).<sup>181</sup> Despite his Russian given name (Igor) and his Russianesque, presumably coined surname, Karkaroff seems, in speech and manner, to be as British as Dean Thomas. Karkaroff was also a Death Eater, and all of the other Death Eaters seem to be British.<sup>182</sup> The Death Eater insurrection was dealt with by the British Ministry of Magic; if Voldemort’s Death Eaters were part of a global conspiracy, we haven’t yet heard about it, although Voldemort certainly made news outside of Britain: the Bulgarian Minister of Magic recognizes Harry’s scar, “gabbling loudly and excitedly.”<sup>183</sup>

If the Ministry is subject to British law, its actions in sending Black, and especially Hagrid, to prison without a trial are questionable, and Fudge’s *de facto* summary execution of Barty Crouch Jr. is an extremely serious crime. The British government has some latitude to imprison suspected terrorists for limited periods without a trial, and while the definition of “terrorism” is slippery indeed, Death Eaters certainly fall within it.<sup>184</sup> Hagrid, however, is suspected of an ordinary crime (sending a monster to attack students), not of being a Death Eater.

The calendar question becomes somewhat significant here; depending on which chronology is accepted, the Ministry’s acts may be governed by the Prevention of Terrorism (Temporary Provisions) Act of 1974 and its periodic updates,<sup>185</sup> or by the Terrorism Act of 2000<sup>186</sup> and the Anti-Terrorism, Crime and Security Act of 2001.<sup>187</sup> Again, however, the answer makes little difference; while the Muggle authorities in Britain can detain suspected terrorists on the authority of the Secretary of State (or, presumably, the Minister of Magic), the period of such detentions

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Wars.

181. GOBLET OF FIRE, *supra* note 7, at 257.

182. The same arguments apply to Antonin Dolohov.

183. GOBLET OF FIRE, *supra* note 7, at 100.

184. *See, e.g.*, CLIVE WALKER, THE PREVENTION OF TERRORISM IN BRITISH LAW 4-6 (1986).

185. Prevention of Terrorism (Temporary Provisions) Act, 1974, ch. 56 (Eng.).

186. Terrorism Act, 2000 (Eng.)

187. Anti-terrorism, Crime and Security Act, 2001 (Eng.)

is limited to a maximum of five days under the 1984 version of the Temporary Provisions Act;<sup>188</sup> from 1975 on, the government had not had the power to intern suspects for long periods without trial even in Northern Ireland itself.<sup>189</sup> Black is detained for over a decade. The 2000 Act, like the various preceding Temporary Provisions Acts, includes no provision for internment without trial.<sup>190</sup> The 2001 Act, however, provides for the possibility of long-term detention of suspected foreign (but not British) terrorists.<sup>191</sup> Under the 2001 Act over a dozen persons, presumably suspected terrorists, have been detained, some for many years, at Belmarsh prison – Britain’s Guantánamo.<sup>192</sup> Regardless of which Harry Potter chronology one accepts, Sirius was imprisoned before 2001 and in any event is British, not foreign. However, the current Muggle government in Britain is apparently willing to disregard the civil rights of some of its residents to the same degree as the Ministry of Magic.

The action of Barty Crouch Sr. in sending Sirius Black to Azkaban without a trial was not exceptional, nor was it peculiar to Crouch. Over a decade later, Cornelius Fudge does the same to Hagrid, even though he does not appear to be convinced of Hagrid’s guilt:

“Look at it from my point of view,” said Fudge, fidgeting with his bowler. “I’m under a lot of pressure. Got to be seen to be doing something. If it turns out it wasn’t Hagrid, he’ll be back and no more said. But I’ve got to take him. . .”

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“Not a punishment, Hagrid, more a precaution. If

188. Prevention of Terrorism (Temporary Provisions) Act, 1984, ch. 8 §§ 12(4), 12(5) (Eng.).

189. CLIVE WALKER, BLACKSTONE’S GUIDE TO THE ANTI-TERRORISM LEGISLATION 217 (2002).

190. WALKER (BLACKSTONE’S), *supra* note 189, at 217.

191. Anti-terrorism, Crime and Security Act, 2001 §§ 21-23 (Eng.).

192. See Denise Winterman, *Belmarsh - Britain’s Guantánamo Bay?* BBC News, Oct. 6, 2004, available at <http://news.bbc.co.uk/1/hi/magazine/3714864.stm> (visited June 13, 2005); see also Philip A. Thomas, *Emergency and Anti-Terrorist Powers: 9/11: U.S.A. and U.K.*, 26 FORDHAM INT’L L.J. 1193 (2003).

someone else is caught, you'll be let out with a full apology –"<sup>193</sup>

Although Dumbledore disapproves and disagrees, he seems to believe that Fudge is acting legally, if incorrectly. On the next page Dumbledore himself is suspended as Hogwarts headmaster—a step that seems to require more in the way of legal formalities than sending someone to prison, possibly for life: “‘Dreadful thing, Dumbledore,’ said Malfoy lazily, taking out a long roll of parchment, ‘but the governors feel it’s time for you to step aside. This is an Order of Suspension – you’ll find all twelve signatures on it.’”<sup>194</sup>

Apparently wizarding law provides more protection for Dumbledore’s job than for Hagrid’s freedom. And Fudge’s replacement as Minister of Magic, Rufus Scrimgeour, shows no greater respect for due process: His government arrests Stan Shunpike, a conductor on the Knight Bus, on extremely flimsy evidence and holds him for many months, with no indication of any plan to release him.<sup>195</sup>

Most suspected Death Eaters do receive a trial of sorts, though: In Dumbledore’s Pensieve, Harry witnesses the trials of several such suspects, including Barty Crouch Jr., Ludo Bagman, and Igor Karkaroff.<sup>196</sup> To adult readers the McCarthyesque aspect of these proceedings, especially Karkaroff’s (Karkaroff is pressured to incriminate others, and granted clemency when he does so) provides a protracted political pun: witches and wizards conducting a witch-hunt.<sup>197</sup> Ludo Bagman is acquitted,

193. CHAMBER OF SECRETS, *supra* note 35, at 261. See also *supra* note 121, and accompanying text. Hagrid has fallen under suspicion of opening the Chamber of Secrets, endangering students, because fifty years earlier he was also suspected of opening the Chamber. Ron and Harry later learn that Hagrid was innocent of opening the Chamber, but that he had been raising an extremely dangerous monster, Aragog the giant spider, in the school: “Ron gave a loud snort. Evidently, hatching Aragog in a cupboard wasn’t his idea of being innocent.” *Id.* at 281.

194. CHAMBER OF SECRETS, *supra* note 35, at 262. The twelve signatures are those of the Hogwarts board of governors, who have voted for Dumbledore’s suspension. *Id.* at 263.

195. HALF-BLOOD PRINCE, *supra* note 16, at 221, 331, 346, 649.

196. GOBLET OF FIRE, *supra* note 7, at 585-96.

197. Interesting parallels could be drawn between the witch-trials in THE CRUCIBLE and in Harry’s world, and hopefully will be – but not in this article.

apparently rightly; although he passed information to a Death Eater named Rookwood, there seems to be no evidence that he knew that Rookwood was a Death Eater. (“I thought I was collecting information for our side!”)<sup>198</sup> The main factor in his acquittal, however, is not the evidence but his popularity as an athlete: “We’d just like to congratulate Mr. Bagman on his splendid performance for England in the Quidditch match against Turkey last Saturday,’ the witch said breathlessly.”<sup>199</sup>

The acquittal of a popular athlete is nothing unusual in the Muggle world, either. The series is in constant dialogue with the Muggle world and its texts, usually unobtrusively. During the Triwizard Tournament’s Second Task, for example, Cedric Diggory and (especially) Moaning Myrtle teach Harry to hear the merpeople singing.<sup>200</sup> Grown-up readers are likely to be reminded of *The Love Song of J. Alfred Prufrock*, especially given the nature of the Second Task: the rescue of four sleeping hostages from the merpeople’s village beneath the Hogwarts lake before human voices wake them, and they drown.<sup>201</sup> From there the grown-up reader’s mind wanders both forward and back: forward to movies like *Till Human Voices Wake Us*,<sup>202</sup> *I Have Heard the Mermaids Singing*<sup>203</sup> and *Eat the Peach*,<sup>204</sup> and backward to Eliot’s source,

198. GOBLET OF FIRE, *supra* note 7, at 592-93.

199. *Id.* at 593.

200. *Id.* at 461-64.

201. Shall I part my hair behind? Do I dare to eat a peach?  
I shall wear white flannel trousers, and walk upon the beach.  
I have heard the mermaids singing, each to each.  
I do not think that they will sing to me.  
I have seen them riding seaward on the waves  
Combing the white hair of the waves blown back  
When the wind blows the water white and black.  
We have lingered in the chambers of the sea  
By sea-girls wreathed with seaweed red and brown  
Till human voices wake us, and we drown.

T.S. ELIOT, “The Love Song of J. Alfred Prufrock” (excerpt), in PRUFROCK AND OTHER OBSERVATIONS (2001).

202. TILL HUMAN VOICES WAKE US (Globe/Paramount 2003); *see also* LEWIS SHINER, “Till Human Voices Wake Us,” in THE EDGES OF THINGS (1991).

203. I’VE HEARD THE MERMAIDS SINGING (Miramax 1987); *see also, e.g.*, MRS. STEVENS HEARS THE MERMAIDS SINGING (Mrs. Stevens Productions 2004); THE MERMAIDS SINGING (New Films International, forthcoming 2006).

204. EAT THE PEACH (Bórd Scannán na hÉireann/Strongbow 1986). None of this is particularly productive, perhaps, but such, often, is intertextuality.

John Donne's *Song*,<sup>205</sup> which is also the first thing younger readers are likely to be reminded of – not only because John Donne is as much a middle-school staple as Eliot is a high school and beginning college English class cliché, but also because the poem plays such a large part in the 1986 children's novel *Howl's Moving Castle*.<sup>206</sup>

Barty Crouch Jr. and his co-conspirators were convicted before the Wizengamot in a trial at which Barty Crouch Sr., despite the glaring conflict of interest inherent in participating in the trial of his own son, acted as a sort of combination of prosecutor and sentencing judge.<sup>207</sup> Again, the result turned out, in retrospect, to have been correct; the defendants had in fact committed the crime of which they were accused. However, the irregularities in the proceedings are worrisome.

Years later Harry is tried in the same courtroom, before the full Wizengamot, for "a simple matter of underage magic[.]"<sup>208</sup> He sits in the same seat where he has seen the accused Death Eaters sit, although on this occasion "the chains clinked rather threateningly but did not bind him."<sup>209</sup> Some of the irregularities in this proceeding disturb even the wizards. The time of the hearing is changed with no effective notice, apparently to prevent the participation of witnesses for Harry's defense. The venue of the trial, and the participation of the full Wizengamot, shock Arthur Weasley.<sup>210</sup> Dumbledore comments that:

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205. Go, and catch a falling star,  
Get with child a mandrake root,  
Tell me, where all past years are,  
Or who cleft the devil's foot,  
Teach me to hear mermaids singing,  
Or to keep off envy's stinging,  
And find  
What wind  
Serves to advance an honest mind.

John Donne, "Song" (excerpt), in THE OXFORD BOOK OF ENGLISH VERSE: 1250–1900 (Arthur Quiller ed. 1919), available at <http://www.bartleby.com/101/196.html> (last visited June 10, 2005, the U.S. release date of Hayao Miyazaki's animated film version of HOWL'S MOVING CASTLE (Studio Ghibli 2004)). See also *infra* note 206.

206. DIANA WYNNE JONES, HOWL'S MOVING CASTLE 134 (1986).

207. GOBLET OF FIRE, *supra* note 7, at 594-96.

208. ORDER OF THE PHOENIX, *supra* note 15, at 149.

209. *Id.* at 138.

210. *Id.* at 134-35, 153.

“In your admirable haste to ensure that the law is upheld, you appear, inadvertently I am sure, to have overlooked a few laws yourself.”

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“[Y]ou 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>211</sup>

When Dumbledore says this, “[a] few of the wizards . . . shift[] uncomfortably in their seats.”<sup>212</sup>

To Muggles, however, even more irregularities appear. Harry is not represented by counsel; Arthur Weasley is not even permitted to accompany him to the hearing. Dumbledore shows up as a witness and ends up acting as an advocate for Harry, calling another witness<sup>213</sup> and offering to call a third.<sup>214</sup> But this is not because Harry has a right to counsel; it is just something that Dumbledore, very fortunately for Harry, does – despite Fudge’s efforts to prevent him. Harry’s trial highlights what has been evident throughout the series: Without lawyers, there can be no rule of law. Adequate representation makes all the difference for Harry, as it might have for Buckbeak and even, perhaps, Sirius Black—especially if an attorney for Sirius could have prevented or delayed the mind-wiping of the Muggle witnesses.

Not every irregularity is to Harry’s disadvantage; one that has no effect on the outcome but is nonetheless perplexing is that Harry—the *defendant*—is permitted to take his wand to the hearing. The wand is inspected by a security guard at the entrance to the Ministry, who then returns it to Harry, permitting the accused to go armed to his own trial.<sup>215</sup>

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211. *Id.* at 149.

212. *Id.* at 149.

213. *Id.* at 143 (Arabella Figg).

214. *Id.* at 148. (Dobby the House-Elf).

215. *Id.* at 128.



3. "Do your lot have the Death Penalty?"<sup>216</sup>

It is not completely clear that the wizarding world has followed the lead of the rest of the United Kingdom in abolishing the death penalty. Certainly a regime that has managed to overlook such a relatively large fact as the independence of Ireland might have managed to miss some or all of the various stages in Britain's abolition process. Parliament enacted a five-year suspension of the death penalty for murder in Great Britain in 1965.<sup>217</sup> This suspension was made permanent for Great Britain in 1969, although other parts of the United Kingdom retained it: The death penalty was abolished in Northern Ireland in 1973,<sup>218</sup> while at least one self-governing community, the Isle of Man, retained it until 1993, although from 1973 to 1993 all Isle of Man death sentences were commuted by the Home Office.<sup>219</sup> The wizarding world, although not territorially distinct like the Isle of Man, is perhaps even more self-governing; the Prime Minister is not the only official of the Muggle government authorized to be aware of the Isle's existence.

The death penalty on the Isle of Man was ultimately abolished by the local government, not by diktat from London.<sup>220</sup> The wizarding world could perhaps also have retained the death penalty had it wished to do so. It retains a *de facto* death penalty, and a particularly horrible one at that: the Dementor's Kiss. It also retains the right to execute at least some non-human magical creatures, even when those creatures are sentient and free-willed.<sup>221</sup> Buckbeak the hippogriff, after inflicting a minor injury

216. "Well?" said Uncle Vernon. . . "What now? Have they sentenced you to anything? Do your lot have the death penalty?" he added as a hopeful afterthought. *Id.* at 33.

217. Murder (Abolition of Death Penalty) Act 1965; 793 H of C Official Report (5th series) 16 December 1969 col. 1297; 306 HL Official Report (5th Series) 18 December 1969 col. 1321.

218. Amnesty International, *UK Abolishes Death Penalty Completely and Signs up to a Permanent Ban*, n.d., <http://www.amnesty.org.uk/action/camp/dp/intro/uk.html> (last visited Nov. 21, 2005).

219. Peter W. Edge, *The Law and Practice of Capital Punishment in the Isle of Man*, Lancashire Law School Occasional Papers (1998), available at <http://www.uclan.ac.uk/facs/class/legalstu/occpprs/edge1.htm> (last visited Nov. 21, 2005).

220. *Id.*

221. The distinction between "beings" and "beasts" is, by the wizarding world's own admission, arbitrary. See, e.g., SCAMANDER, *supra* note 80, x-xiii,

on a human,<sup>222</sup> is given both a trial<sup>223</sup> and an appeal.<sup>224</sup> An executioner (Macnair) attends the appeal and is then sent to behead Buckbeak;<sup>225</sup> the Minister, Fudge, accompanies him to read the official notice of execution, which Hagrid (Buckbeak's "owner") must sign.<sup>226</sup>

The trial of Buckbeak forms a subplot running through the third novel; Buckbeak, an animal, seems to receive far more in the way of due process than the humans we see sent to Azkaban. It does no good, though, perhaps in part because his legal team consists only of Hagrid, Ron, and the brilliant but inexperienced Hermione. Buckbeak loses both at trial and on appeal, and escapes execution only with the (unlawful) aid of Harry and Hermione.

In the United Kingdom, the death penalty for ordinary offenses was effectively abolished before Harry was born. From 1965 until 1998, the death penalty could be imposed, theoretically, for certain wartime offenses: Serious Misconduct in Action, Communicating with the Enemy, Aiding the Enemy or Furnishing Supplies, Obstructing Operations or Giving False Air Signals, and Mutiny, Incitement to Mutiny or Failure to Suppress a Mutiny.<sup>227</sup> The wizards' war between the Ministry and Voldemort provides opportunities to commit these offenses, raising the thorny question of Harry Potter chronology. There are two contending schools of thought; one dates all events in the books from Nearly Headless Nick's 500<sup>th</sup> deathday party in Harry's second year.<sup>228</sup> The cake at Nick's party reads:

SIR NICHOLAS DE MIMSY-PORPINGTON  
DIED 31ST OCTOBER, 1492<sup>229</sup>

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1-2, 6, 25, 28-29, 39.

222. PRISONER OF AZKABAN, *supra* note 47, at 118.

223. *Id.* at 290-92.

224. *Id.* at 292, 316, 323, 325.

225. This startles Hermione, whose expectations of justice may be Muggle-influenced: "They're bringing the executioner to the appeal! But that sounds as if they've already decided!" *Id.* at 316.

226. *Id.* at 400-01.

227. Amnesty International, *UK Abolishes Death Penalty Completely and Signs up to a Permanent Ban*, undated, <http://www.amnesty.org.uk/action/camp/dp/intro/uk.html> (last visited Nov. 21, 2005).

228. CHAMBER OF SECRETS, *supra* note 35, at 129.

229. *Id.* at 133.

If Harry is a second-year student in 1992, the reasoning goes, he must be a sixth-year student in 1996. The ghosts' calendar skills are called into question, however, by Nick's comment to Harry when they first meet: "I haven't eaten for nearly four hundred years[.]"<sup>230</sup> An alternate approach is to assume that the ghosts are incorrect (or that a few years more or less, out of five centuries, make little difference to them) and to date everything from the year of publication of the first volume (1997), in which case Harry begins his sixth year in 2002.<sup>231</sup> Emotions can grow heated in discussions of the topic, but in this case it can be sidestepped. Nothing in the books suggests that any of the characters are subject to military law, or that the Ministry possesses any military force or military courts. The Ministry's elite police force, the Aurors, are law enforcement officers, not soldiers. But extrajudicial killings, not just of Beasts but of Beings and even of humans, seem disturbingly frequent.

#### V. CONCLUSION

Harry Potter's story is not just about law, but about a society trying to establish a rule of law. The Ministry of Magic is not a dictatorship, but it is not a democracy, either; it's a sort of muddling misrule that has grown out of the first war against Voldemort's Death Eaters. Under that stress, the Ministry regime adopted an ad hoc and inconsistent approach to justice, just as some Muggle governments have done under similar stress. The Ministry never recovered, or perhaps there was never a rule of law in the wizarding world in the first place; in the years of peace since Voldemort's downfall, it has failed to build working legal structures. Now the Ministry is under stress again, and even the good guys—Dumbledore's Order of the Phoenix and Harry's school friends—seem to follow personalities rather than rules.

These failings of the Ministry and the Order are not glossed over; they are presented with concern. An entire generation, perhaps many generations, of future lawyers, litigants,

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230. *SORCERER'S STONE*, *supra* note 53, at 123.

231. A more eclectic approach dates events from the Quidditch World Cup just before the beginning of Harry's fourth year, on the assumption that parallels between the Quidditch World Cup and the 1994 football (soccer) World Cup mean that the former also took place in 1994. See Hall, *supra* note 3, 161-62 n.32.

lawmakers, judges, jurors and citizens is confronting these questions. What is the rule of law? Should it be absolute? What limits should be placed on government and private power? When is it right to disobey not only unjust laws, but just ones? Will the author present us with answers in the final volume, or only with more questions? The latter will almost certainly be more useful to the reader than the former; we have already seen that the Ministry's regime is not one to emulate, but ultimately each society, and perhaps each generation, must re-create the rule of law for itself.

