



SCHOOL OF LAW
TEXAS A&M UNIVERSITY

Texas A&M University School of Law
Texas A&M Law Scholarship

Faculty Scholarship

1-2010

Who Wants to Be a Muggle? The Diminished Legitimacy of Law as Magic

Mark Edwin Burge

Texas A&M University School of Law, markburge@law.tamu.edu

Follow this and additional works at: <https://scholarship.law.tamu.edu/facscholar>



Part of the [Legal Education Commons](#), [Legal Profession Commons](#), and the [Legal Writing and Research Commons](#)

Recommended Citation

Mark E. Burge, *Who Wants to Be a Muggle? The Diminished Legitimacy of Law as Magic*, in *The Law and Harry Potter* 333 (Jeffrey E. Thomas & Franklin G. Snyder eds., 2010).

Available at: <https://scholarship.law.tamu.edu/facscholar/577>

This Book Section is brought to you for free and open access by Texas A&M Law Scholarship. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Texas A&M Law Scholarship. For more information, please contact aretteen@law.tamu.edu.

Who Wants to be a Muggle?

The Diminished Legitimacy of Law as Magic

Mark Edwin Burge

In the Harry Potter books, J.K. Rowling has fashioned a parallel world based on our own, but with a fundamental difference: a separate magical society is grafted onto it. In Rowling's fictional version, the magical population lives among the non-magical Muggle population, but we Muggles are largely unaware of them. This secrecy is by elaborate design and is necessitated by centuries-old hostility to wizards by the non-magical majority. The reasons behind this hostility, when combined with the similarities between Harry Potter-style magic and American law, make Rowling's novels into a cautionary tale for the legal profession.

Lawyers as Wizards

Law has long been compared to magic.¹ This state of affairs originated, in substantial part, in the formalist era that gave rise to our modern system of legal education. As most law professors are aware, today's American law school curriculum traces its origins back to Christopher Columbus Langdell, the dean of the Harvard Law School who famously hypothesized in the 1870s that law is a science that, when correctly applied, should lead to an objectively "correct" resolution of a legal dispute. The postulates of Langdell's science were to be derived from judicial opinions, and Langdell's principal method of legal training, accordingly, was to direct students to plow through judicial opinions

1. See, e.g., JEROME FRANK, *COURTS ON TRIAL* 37–79 (1949) (discussing "Modern Legal Magic" and "Wizards and Lawyers").

that they may independently and rigorously derive proper legal rules and reasoning.² The process of questioning students rather than lecturing to them remains dubbed the “Socratic method,” despite numerous protestations that Socrates himself would have scorned the method.³

Langdell’s idea of legal science is no longer widely held, but his education system is widespread today, in large part because of its effectiveness in teaching critical thinking.⁴ The process of legal education has in fact developed an initiation mystique that exceeds the boundaries of the law school and has found its way into popular culture. Many law students now come to task fully immersed in what we might style “Law School Apocalyptic Literature,” a genre that includes Scott Turow’s *One-L* and John Jay Osborn’s *The Paper Chase*.⁵ In the popular mind—both within and outside the law student population—Osborn’s novel has perhaps been eclipsed by the 1973 film version of *The Paper Chase*, where John Houseman portrayed the archetype of a harsh Socratic instructor, Professor Kingsfield.⁶ The sense of initiation, even borderline hazing, is common to these stories. The intensity and hostility of Kingsfield’s questioning is thus such that he provokes the hapless “Mr. Hart” into after-class vomiting a scant few minutes into the film version. Socratic questioning of law students by their professors, albeit substantially toned down from the Kingsfield model, is still the most popular method of legal instruction.

As students, future lawyers are, in a sense, “initiated” into a realm of knowledge and skills of which it is implicitly understood that the world-at-large has no part. So are students at Hogwarts. In this arena, Professor Snape could be more than an adequate substitute for Professor Kingsfield. Consider Harry’s first Potions class:

“You are here to learn the subtle science and exact art of potion-making,” he began. He spoke in barely more than a whisper, but they caught every word—like Professor McGonagall, Snape had the gift

2. See generally M. H. Hoeflich, *Law & Geometry: Legal Science from Leibniz to Langdell*, 30 AM. J. LEGAL HIST. 95, 119–21 (1986).

3. See, e.g., Richard K. Neumann, Jr., *A Preliminary Inquiry into the Art of Critique*, 40 HASTINGS L.J. 725, 729 (1989); William C. Heffernan, *Not Socrates but Protagoras: The Sophistic Basis of Legal Education*, 29 BUFF. L. REV. 399, 415 (1980).

4. See David S. Romantz, *The Truth About Cats and Dogs: Legal Writing Courses and the Law School Curriculum*, 52 U. KAN. L. REV. 105, 118–20 (2003); Michael Vitiello, *Professor Kingsfield: The Most Misunderstood Character in Literature*, 33 HOFSTRA L. REV. 955, 979–86 (2005).

5. SCOTT TUROW, *ONE L* (1977); JOHN JAY OSBORN, JR., *THE PAPER CHASE* (1971).

6. *THE PAPER CHASE* (Twentieth Century Fox Film Corp. 1973).

of keeping a class silent without effort. “As there is little foolish wand-waving here, many of you will hardly believe this is magic. I don’t expect you will really understand the beauty of the softly simmering cauldron with its shimmering fumes, the delicate power of liquids that creep through human veins, bewitching the mind, ensnaring the senses.... I can teach you how to bottle fame, brew glory, even stopper death—if you aren’t as big a bunch of dunderheads as I usually have to teach.”

More silence followed this little speech. Harry and Ron exchanged looks with raised eyebrows. Hermione Granger was on the edge of her seat and looked desperate to start proving she wasn’t a dunderhead.⁷

This momentous (and to the student, somewhat frightening) sense of initiation conveyed by Snape is more than a little like law school. Each year, as a new One-L class begins its studies, a law school crackles with excitement. The initiation is underway. The culture, history, and even mystery of law school create a mixture of terror and wonder for the initiates. When a few hundred Hermione Grangers roam the halls, eager to prove to themselves and their peers that they, too, are not “dunderheads,” the experience can be mind-altering, or at least worldview-altering.

The methods of instruction and concepts taught add to the mix, reinforcing the sense that the law student is being initiated into an ancient and elite order. This order is somewhat Gnostic, in the sense that the general public does not share in the *gnosis*, the special knowledge being imparted. Though all people must live within and deal with the law, members of the order perceive themselves as understanding the *real* functioning of the law in a way that the rest of the world does not. Thus begins the process, the student becoming a wizard while those outside of the Gnostic order remain Muggles.

Beyond the methods of their training, however, lawyers are also wizards as to their practices, specifically in their use of words. Law has its specialized vocabulary, and these words are magical in more than a figurative sense. In the world of Harry Potter, certain words properly spoken by a wizard can, in and of themselves, change the surrounding world. Consider a few examples from the novels: *Wingardium Leviosa* causes an object to levitate; *Expelliarmus* disarms an opponent; *Expecto Patronum* creates a patronus, a temporary guardian; *Morsmordre* invokes the “Dark Mark,” Voldemort’s evil wizarding sign.

Throughout the series words like these cause events. Only a minor stretch of imagination is necessary to substitute legal terms as magic words.

7. *Sorcerer’s Stone* 136–37.

“*Res judicata!*” shouted Malfoy, shooting a blast of sparks towards Harry’s Amended Complaint.

But Harry responded almost instinctively. “Waiver!” he cried, deflecting Malfoy’s spell harmlessly to the floor of the courtroom.⁸

Or again:

“We’re doomed,” said Ron, as Harry glumly looked on. “We have absolutely no direct evidence of causation.”

Hermione simply glared at them. “Oh, honestly! Am I the only person to have read *Torts: A History?*” She deftly flicked her wand. “*Res ipsa loquitur,*” she said, and the causation gap in the summary judgment response appeared to mend itself.⁹

Indeed, some magic words in American law have even made the jump into being taught as a dark art against which to defend:

“*Lochner!*” cried Voldemort, striking the bakery workers with a bolt of green light. The gag stifled Harry’s gasp as he remained tied to the tombstone. Harry had seen Professor Moody demonstrate the Unforgivable Doctrines, but nothing in the classroom prepared him to see substantive due process used on human beings.¹⁰

The wizard-like practices of lawyers are not confined to magic words, which seem to fit most closely in the context of litigation. Transactional lawyers—those who in popular parlance are in the business of “doing deals”—are more akin to the potion-brewing wizards Snape alluded to in Harry’s first year. Consider Hermione Granger’s research in *The Chamber of Secrets* on how to brew Polyjuice

8. The doctrine of *res judicata* (i.e., “the thing has already been decided”) prevents someone who has lost on a particular issue in court from raising it in a subsequent claim. The doctrine can be waived, however, if the other party fails to raise it in a timely manner.

9. The doctrine of *res ipsa loquitur* (i.e., “the thing speaks for itself”) is a doctrine of tort law under which a plaintiff need not prove that someone was negligent if the facts are such that the harm suffered could only have been the result of someone’s negligence, as when a passer-by is hit in the head by a safe that someone has dropped out a window, or a surgeon accidentally amputates the wrong leg.

10. This is a reference to the line of cases exemplified by *Lochner v. New York*, 198 U.S. 45 (1905), in which the U.S. Supreme Court struck down a law limiting the number of hours bakers could work on grounds that it interfered with the constitutional rights of employers and employees to freely agree about hours worked. The *Lochner* variety of “substantive due process” was subsequently repudiated by the Court. See, e.g., *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (affirming the constitutionality of a state minimum wage law).

Potion. Our imaginations will not be taxed¹¹ if we imagine Hermione as a driven associate at transactional law firm:

“I’ve never seen a deal this complex before!” gasped Hermione as she reviewed the proposal. “It will take at least a month to scratch the surface on due diligence alone.”

“A month?” said Ron darkly. “Mr. Malfoy will be sure we’ve each clocked 300 billable hours by then.” But Hermione’s eyes narrowed dangerously, and he added swiftly, “But it’s our best chance for making partner, so full steam ahead, I say.”

With an “initiation” system of education and practices that involve magic words and transactional brewing, lawyers may quite reasonably be viewed as wizards. This may be amusing, but, as the Harry Potter books can teach us, there are potential problems when a small group in society has exclusive access to the magic.

The Separate World

Wizarding separateness and secrecy in the Harry Potter narrative establish the background for the uneasy Muggle-wizard relationship. The lengths to which the magical community has gone to achieve secrecy are almost epic. The worldwide wizarding community requires secrecy far more elaborate than any immense conspiracy that Senator Joseph McCarthy ever alleged in the United States government.¹² Wizards and magical creatures have a documented existence at least as far back as ancient Egypt, but, due to wizard efforts, that history is largely unknown to Muggles.

In the world where Harry lives today,¹³ wizards have developed a complete society with institutions helping to ensure that regular interaction with Muggles is largely unnecessary. The magical population certainly has its own system of schools. Though Hogwarts is the most prominent wizarding school in

11. And rightly so. Good transactional lawyers always seek to avoid taxation.

12. See generally DAVID M. OSHINSKY, *A CONSPIRACY SO IMMENSE: THE WORLD OF JOE MCCARTHY* (1983).

13. I mean “today” in only a very general sense, as the events recounted in Rowling’s novels actually occurred several years ago. Harry’s first year at Hogwarts seems to have been 1991–92, and his final confrontation with Voldemort in *The Deathly Hallows* would have occurred in 1998. A timeline of Harry’s history can be found at the *Harry Potter Lexicon*, available at <http://www.hp-lexicon.org/timelines/essays/timeline-facts.html> (last visited July 22, 2008).

the novels, there are others, like Beauxbatons Academy, the Durmstrang Institute, and the Salem Witches Institute. Although Harry and Muggle-born wizards like Hermione attended ordinary English Muggle schools prior to age eleven, the wizard-born must go somewhere else, because they seem to have only the haziest idea of Muggle ways. Nor do the novels suggest that a wizard would ever re-enter the Muggle educational system once leaving Hogwarts. Indeed, Professor McGonagall's career-counseling session with Harry in *The Order of the Phoenix* strongly suggests otherwise, as does Hermione's observation on reading a Muggle Relations recruiting pamphlet: "You don't seem to need many qualifications to liaise with Muggles."¹⁴ The idea that a properly-trained wizard might go on to attend Oxford or Cambridge is apparently unknown. The wizarding educational system is quite self-contained, and quite separate from non-magical education.

Wizarding government is also a separate enterprise. The Ministry of Magic has its own bureaucracy and is not subject to the Muggle Prime Minister's government. In *The Half-Blood Prince* we learn that in dire situations the Minister of Magic will confer with his Muggle counterpart, the Prime Minister, who does not dare tell anyone lest his sanity be questioned.¹⁵ Though both the Minister of Magic and the Prime Minister are British, governing British subjects, their spheres of authority clearly do not overlap. Even communication between them is rare. Most wizards can accordingly avoid dealing with Muggles completely. Government officials like Fudge and lower-level minions like Arthur Weasley take care of that work. Notably, even the Muggle-loving Mr. Weasley's interactions with the Muggle population are rare enough that he has great difficulty even using and calculating the value of "Muggle money" — British pounds.

Another area in which the wizarding world is separate from the Muggle world is that of public infrastructure. The magical world has its own currency and banking system — run by goblins, no less — and therefore has no need to

14. *Order of the Phoenix* 656–57.

15. Shortly after the July 2005 release of *The Half-Blood Prince*, then-Prime Minister Tony Blair refused to admit to any conversations with the Minister of Magic, when he told the House of Commons:

The Harry Potter brief in my file is somewhat thin, which only shows that my officials' sense of importance is not what it should be. I was told by someone, however, that in the first chapter of the new book the Minister of Magic comes out of a picture to confront the Prime Minister. I am still searching for the Minister. *The United Kingdom Parliament, House of Commons Debates for 20 July 2005*, reprinted at <http://www.publications.parliament.uk/pa/cm200506/cmhansrd/cm050720/debtext/50720-03.htm> (last visited July 22, 2008).

use our Muggle banks and Muggle money.¹⁶ They have their own transit system. Many wizards can magically “apparate” from place to place. If this is uncomfortable or impractical, they may solicit (and pay for) a ride to certain destinations on the Knight Bus, as Harry does in *The Prisoner of Azkaban*, or make use of the Floo Network, a system allowing for travel and communication through fireplaces, or use a Portkey. Wizard shopping also appears to be completely separate from Muggle shopping. A wizard purchasing goods or services in Diagon Alley (or the more sinister Knockturn Alley) has no need ever to visit Harrods, only a very few wizards visiting the famous department store would have any idea how to make a purchase there anyway.

With separate schools, a separate government, and a separate public infrastructure, the magical community in Rowling’s novels is able to avoid interaction with most of the non-magical population, and they do precisely that. The Muggles, being the vast majority of the world, constitute a population from whom the very existence of wizards is a carefully guarded secret. The existence of a separate community, elaborately kept secret from the world-at-large, makes us wonder, Why all the secrecy? The separateness and secrecy are symptoms of a problematic instability inherent in Muggle interactions with wizards and magic. The nature of the wizard-Muggle relationship is instructive for the legal profession.

Causes of Conflict

“Are you planning to follow a career in Magical Law, Miss Granger?” asked Scrimgeor.

“No, I’m not,” retorted Hermione. “I’m hoping to do some good in the world!”¹⁷

If difficult-to-comprehend law can be like incomprehensible magic—with lawyers as wizards applying it—and if Muggles have fear and disdain for wizards and their craft, we can quite reasonably view Harry Potter as a cautionary tale for the legal profession. The warning to the legal profession is one regarding comprehensibility—the capability for legal texts to be understood by the general population. If legal texts are not understandable by those who are subject to them, legitimate law risks descent into the illegitimacy of law as

16. For discussions of these topics, see Chapters 15 and 16 by Eric Gouvin and Heidi Mandanis Schooner and Eric Gouvin in this volume.

17. *Deathly Hallows* 123–24.

magic. The statement above by Hermione Granger suggesting that lawyers are distrusted even within the wizarding world strengthens the parallel. Even wizards disdain a mysterious magician class within their own ranks.

The backstory for Rowling's novels, some of which the author disclosed in the two "Harry's Books" paperbacks released for charity in 2001, includes history establishing that things do not go well for wizards when Muggles learn of their nature and existence. Harry's miserable life with the Dursleys is the most vivid example of the relational problem, but the Muggle-wizard chasm is far larger than that. Despite their powers, wizards apparently cannot in the end defeat a hostile and much larger Muggle population. Consider the following passage from one of the charity books:

Imperfect understanding is often more dangerous than ignorance, and the Muggles' fear of magic was undoubtedly increased by their dread of what might be lurking in their herb gardens. Muggle persecution of wizards at this time was reaching a pitch hitherto unknown and sightings of such beasts as dragons and Hippogriffs were contributing to Muggle hysteria.

It is not the aim of this work to discuss the dark days that preceded the wizards retreat into hiding.¹⁸

The Muggle persecution, we are told in the same text, was a "particularly bloody period of wizarding history," and it ultimately culminated in the International Statute of Wizarding Secrecy of 1692. An excerpt from Bathilda Bagshot's *A History of Magic* likewise recounts how "wizards went into hiding for good" at about this time and "formed their own small communities within a community" following enactment of "the International Statute of Secrecy in 1689."¹⁹ By the time of Harry's story, secrecy has been the law for some three hundred years, and the wizard population has largely mastered the task of secrecy. Harry himself falls victim to the harsh (and in his cases, unjust) enforcement of wizard secrecy in both *The Chamber of Secrets* and *The Order of the Phoenix*.

Fear of magic, only partially understood, seems to be the basis for the intense dislike of wizards by Muggles. Human history is rife with prejudices—whether justified or not—that arise from fear of something that those living in the fear

18. NEWT SCAMANDER, *FANTASTIC BEASTS AND WHERE TO FIND THEM* xv (2001).

19. *Deathly Hallows* 318. Do the 1689 and 1692 dates reflect disagreement between esteemed textbook authors Newt Scamander and Bathilda Bagshot? Perhaps each is referring to separate but related pieces of wizarding legislation. Maybe one of the two is wrong. Alas, resolution of such intriguing minutiae is beyond the scope of this essay—not that it wouldn't be fun, though.

do not understand. In the case of magic, fear of the unknown is especially acute. Not only do Muggles have an “imperfect” understanding of magic, but most aspects of magic are entirely unknowable to them. Harry’s Aunt Petunia learned of this exclusivity to great dismay in her youth, first begging for admission into Hogwarts, but then disparaging it as a “special school for freaks” following Dumbledore’s “very kind” letter denying her admission.²⁰ In the Harry Potter universe, it matters not how much study or effort a Muggle might put into the effort to learn magic, the knowledge cannot be learned unless one has the genetic gift. A non-magical Squib (one who has wizard parents yet cannot perform magic) like Hogwarts caretaker Argus Filch can live in the very center of magical education, but magic is unknowable even to him, who instead lives with futile hope of learning magic through a “Kwikspell” correspondence course. For Muggles, garden-variety fear of the unknown is greatly exacerbated in the case of magic. Magic is not only unknown, but it is unknowable. While the young protagonist of a Horatio Alger story might, by effort and determination, ascend from mailroom-boy poverty to the executive echelons of wealth, the same character with the same character traits in the world of Harry Potter can never be more than a Muggle.

Lack of understanding and—far worse—the *impossibility* of understanding lie at the root of Muggle disdain for wizards where Muggles are aware of the magical population. However, the wizards also do themselves no favors by the approach many of them take to Muggle-relations. By this statement, I do not refer to the obvious fact that dark wizards are unlikely to win Muggle friends by perpetrating violence upon them, such as where the villain of *The Prisoner of Azkaban* is said to have murdered thirteen Muggles with a single curse. Rather, the more widespread and subtle problem is the condescending attitude of wizards who deal with Muggles. The most detailed example of wizard condescension Rowling provides is in her telling of meetings between Minister of Magic Cornelius Fudge and the British Prime Minister. The Muggle leader’s reaction when Fudge has suddenly and inconveniently appeared in his office is telling:

“Ah . . . Prime Minister,” said Cornelius Fudge, striding forward with his hand outstretched. “Good to see you again.”

The Prime Minister could not honestly return this compliment, so said nothing at all. He was not remotely pleased to see Fudge, whose occasional appearances, apart from being downright alarming in themselves, generally meant that he was about to hear some very bad news.²¹

20. *Deathly Hallows* 669–70.

21. *Half-Blood Prince* 4.

On this particular visit, the Prime Minister is surprised to learn that Fudge has been dealing with the very same disasters and debacles that have plagued his own government over the past week:

“You—er—your—I mean to say, some of your people were—were involved in those—those things, were they?”

Fudge fixed the Prime Minister with a rather stern look. “Of course they were,” he said. “Surely you’ve realized what’s going on?”

“I . . .” hesitated the Prime Minister.

It was precisely this sort of behavior that made him dislike Fudge’s visits so much. He was, after all, the Prime Minister and did not appreciate being made to feel like an ignorant schoolboy. But of course, it had been like this from his very first meeting with Fudge on his very first evening as Prime Minister.²²

The put-upon Prime Minister is surely not alone in disdaining “being made to feel like an ignorant schoolboy.” No person, even one fully aware of his ignorance, appreciates having a lack of knowledge thrown in his face. The magical world that Fudge represents is, to a large extent, outside the realm of the Prime Minister’s understanding. Still, that fact does not require Fudge to make the situation worse by his condescension, yet the tendency is one that even the nobler wizards in Rowling’s world cannot avoid. Albus Dumbledore is derided in his old age as a “friend of Muggles,” but he shared the superiority complex of a would-be ruling class in his youth. Writing to villain-in-the-making Gellert Grindelwald, young Dumbledore muses:

*Your point about Wizard dominance being FOR THE MUGGLES’ OWN GOOD—this, I think, is the crucial point. Yes, we have been given power and yes, that power gives us the right to rule, but it also gives us responsibilities over the ruled. . . . We seize control FOR THE GREATER GOOD.*²³

Dumbledore thus illustrates a troubling ultimate outcome of wizard condescension, a trait that was arguably a mere boorish annoyance in the hands of Cornelius Fudge.

The Muggles in Rowling’s novels fear wizards first because they are intrinsically incapable of understanding them and their magic, a fact which is regrettably immutable. The magical community makes the situation worse, even in its limited interaction with Muggles by condescending words and actions. The Mug-

22. *Half-Blood Prince* 4–5.

23. *Deathly Hallows* 357.

gle fear, despite its roots in prejudice, is unfortunately justified. A Grindelwald, a Voldemort, or—disturbingly—even a well-meaning Dumbledore represent a very real danger to Muggles of having a magical ruling class imposed upon them.

The Undervalued Value: Who Wants to Be a Muggle?

Fudge's interaction with the Prime Minister forcibly reminds those of us who have practiced law of the interaction between some lawyers and their clients. Clients, like the Prime Minister, do not and perhaps cannot understand the intricacies. Their fate may hinge on what the wizards or the lawyers do. Yet even the most intelligent and experienced lay person may be entirely unable even to read the statutes they are asked to comply with or the contracts they are asked to sign. And too often they are patronized by those lawyers, the vast majority of whom I would credit as being in the well-meaning category with Dumbledore.

From its founding documents, American democracy is based on an assumption of a general competence of the populace to govern itself,²⁴ albeit within systems designed to temper the will and whims of the majority.²⁵ The system further assumes a general submission by that populace to a legal system based on the premise that the system is—on balance—just.²⁶ Understanding of the legal system among the population-at-large is not only normatively preferable, but it is prudentially critical to the political health of a democracy. Absent public comprehension of the law and how it operates, democracy risks turning into oligarchy—with lawyers as the hated oligarchs.

Comprehensibility—as a self-contained, normative value in the enactment, interpretation, and practice of law—is given short shrift by the legal profession. It deserves a far higher place of honor in the law of a liberal republic than it holds today, and lawyers above all ought not to underestimate the importance of this value.

24. See, e.g., U.S. CONST. pmb. (“We the People of the United States ... do ordain and establish this Constitution...”); THE DECLARATION OF INDEPENDENCE para. 2 (“We hold these Truths to be self-evident, that ... it is the Right of the People ... to institute new Government, laying its Foundation on such Principles and organizing its Powers in such Form, as to them shall seem most likely to effect their Safety and Happiness.”); THE FEDERALIST No. 55, at 346 (James Madison) (Clinton Rossiter ed., 1961) (stating that despite the existence of “a degree of depravity in mankind,” a republican system “presupposes the existence” of qualities making humans capable of self-government).

25. THE FEDERALIST No. 10 (James Madison).

26. See, e.g., THE FEDERALIST No. 51 (James Madison) (“Justice is the end of government. It is the end of civil society.”).

Comprehensibility is an essential value in law because law and the legal profession are fundamentally different from other fields requiring technical expertise, such as engineering, medicine, or physics. The difference arises from the fact that positive law (setting aside any theories of “natural law”) is a human construct. All of us must live within the laws of physics, and it is not offensive to learn that there are formulas and reasons for physical phenomena that a solid majority of us will not understand. Likewise, no one is truly offended by the proposition that only a skilled surgeon might understand the nuances of a heart transplant procedure. Some of us cross suspension bridges and work in tall skyscrapers without giving serious thought to the idea that we need to understand structural engineering. But contrast these laws of science with the enacted laws of society. Imagine a moderately educated member of the public being told any of the following things: (1) “You are not capable of understanding the reason for the Supreme Court’s ruling.” (2) “Do not bother to read what the legislature has enacted; it is quite beyond you.” (3) “The court of appeals has reversed your \$50,000 judgment, but the reasons why are unfathomable.” Such statements—even if actually true—would be condescending at best, and patently offensive at worst in a way that would not occur if the subject of the discussion were chemistry. Why?

Law is different.

In a republican democracy, law is supposed to be made and changed by the will of the public. All are supposed to have available a participatory role in building and operating the machinery of law, even if that role never becomes more than theoretical. Perhaps the best analogy here is to voting rights. Is the mere *right* to vote of any value to one who never or seldom votes? Certainly. The widespread ability to participate in the political arena has value independent of actual participation. This ability is what makes an election fairly determined by ten percent voter turnout of equal legitimacy with an election determined by ninety percent of the voters. The ten percent did not engage in a *coup d'état*; they merely availed themselves of the voting right as the ninety percent might likewise have done. Law that can be understood by the Muggle population-at-large gains similar legitimacy. Incomprehensibility of a governing legal text to the public at large is ultimately offensive to democracy.

Fortunately, the analogy between law and magic breaks down on a major point. While Muggles can never truly understand and be a part of magical society—and wizards cannot help them to do so—non-lawyers are not genetically barred from understanding legal text. Lawyers have both an ethical and a prudential obligation to bridge this gap in understanding. While one possible “solution” to the increased illegitimacy of law-as-magic would be to send all of the Muggles to law school, the questionable utility of such a proposal is obvious, I suspect.

Short of that, the legal profession has tools at its disposal provided by what is usually called the plain language (or plain English) movement in law. Richard Wydick, author of one of the best-known texts on the subject, describes the premise of plain language legal writing as being “that good legal writing should not differ, without good reason, from ordinary well-written English.”²⁷ Put another way, “Plain English does mean that legal documents should be intelligible to nonlawyers, with exceptions for legitimate terms of art and justifiable technical terms. . . .”²⁸ The movement has already had some successes, with greater clarity in consumer documents, such as warranties and leases. Comprehensibility, as I advocate it here, is certainly a value championed by the plain language movement.²⁹ But far more is at stake than a mere question of style. Comprehensibility of governing legal texts—drafting that further removes such texts from being “magic” in their application—has a legitimizing function that extends beyond even immediate readership.

Some of the greatest reluctance to accept the role of plain language has been in the area where I contend that comprehensibility is systemically the most important—in legislation and judicial opinions. The legal profession does not fully appreciate the value of comprehensibility because of a flawed fundamental premise that the comprehensibility of a legal text matters only to those who will actually read it. Dru Stevenson has argued, for example, what others in the profession assume: that although statutory “obfuscation, anachronisms, or unrestrained prolixity” are indefensible, an effort to rewrite any set of statutes in plain language (as the plain English movement seeks to do) is futile.³⁰ The reason for the futility is that the statutory law “is not addressed to the citizenry as a whole,” but rather to “agency officials, judges, law enforcement officers, and perhaps lawyers.” Stevenson does not defend cumbersome language and unnecessary technical terms as such, but he concludes that it “does not harm our democracy” for technical vocabulary to outstrip the abilities of the intelligent layman. Brian Hunt, of the Irish Office of Parliamentary Counsel to the Government, makes a similar point, dismissing the importance of the use of plain language in legislation:

27. RICHARD C. WYDICK, *PLAIN ENGLISH FOR LAWYERS* 4 (5th ed. 2005).

28. Wayne Schiess, *What Plain English Really Is*, 9 *SCRIBES J. LEGAL WRITING* 43, 66 (2004).

29. See, e.g., BRYAN GARNER, *LEGAL WRITING IN PLAIN ENGLISH* 91 (2001) (advocating clear drafting of statutes, but not asserting increased legitimacy as a reason for such drafting).

30. Drury Stevenson, *To Whom is the Law Addressed?*, 21 *YALE L. & POL'Y REV.* 105, 149 (2003).

If it were shown that legislation was widely read by ordinary citizens, I have no doubt that the style of drafting would be altered so as to take account of that audience.... Those who advocate the use of plain language in legislative drafting are making one very large, and I suggest, unwise assumption. That assumption is that members of the public are interested in reading raw legislation.... In the absence of substantive evidence that such public interest in legislation exists, I believe that the arguments in favour of plain language legislative drafting are very weak indeed.³¹

This logic appears unassailable on the surface. Why, after all, should the comprehensibility of a statute or a court opinion matter to a person who will never read either of them, and indeed generally has no interest in so doing?

Yet general comprehensibility to Jane Q. Public matters a great deal, and it matters regardless of whether she ever reads the particular statute or opinion. Comprehensibility does not require that the law actually *be* comprehended, but instead that it be *capable* of comprehension by those who want to know. The issue is one of legitimacy, as legal comprehensibility promotes legal legitimacy. By my use of the term “promotes,” please note that I do not suggest the existence of a bright dividing line between legitimacy and illegitimacy of a governing text, though the concept of comprehensibility is clearest at the extremes. In a nation where—to use Lincoln’s terms—government is conceived as “of the people, by the people, for the people,”³² no one would dispute that a governing legal text capable of being understood by only one person is illegitimate. Expanding that number to nine people—the number of Supreme Court justices—does not greatly ameliorate the situation, though that is a separate issue I will not address here. At the other extreme, a governing legal text capable of understanding by all has, if duly enacted, a far greater claim to legitimacy. Ancient civilizations rules had good reason to post their codes in public places like markets, even though few of their subjects could actually read them.

The comprehensibility value, then, runs along a continuum. The more who are capable of reading and understanding a legal text in a republican democracy, the greater is the claim of the text to legitimacy. The smaller the audience that is capable of understanding such a text, the more diminished is the legal text’s legitimacy.

31. Brian Hunt, *Plain Language in Legislative Drafting: An Achievable Objective or a Laudable Ideal?* 24 STATUTE L. REV. 112, 115 (2003).

32. Abraham Lincoln, *Address Delivered at the Dedication of the Cemetery at Gettysburg on November 19, 1863* (quoted in GARRY WILLS, *LINCOLN AT GETTYSBURG* 263 (1992)).

Lest there be misunderstanding: I do *not* suggest that comprehensibility is the only or even highest value in ascribing legitimacy to law; I argue only that comprehensibility of a governing text is important, that comprehensibility is today an undervalued value, and that the importance of comprehensibility extends to those who will never read it. To adapt an ancient metaphor: It matters to the ninety-nine sheep whether the one who is lost has at least the fair opportunity to find its way.³³

Unlike the Harry Potter world, where magic and its machinations are permanently beyond the capacity of the non-magical, lawyers can make governing legal texts such that they can be understood by a sizable majority of non-lawyers. Most non-lawyers will never read most texts. But some will. The cumulative effect of non-lawyer interactions with comprehensible legal texts will be to enhance the legitimacy of those texts and of the legal system as a whole. Representative democracy ultimately requires no less. Law becomes more “magical” in appearance as its incomprehensibility to the non-lawyer increases. Law as magic will ultimately degrade within the imagination of society, and legitimacy—both actual and perceived—will suffer accordingly.

In the end, it behooves all in the legal wizards’ craft to make more concerted efforts in writing and in drafting of governing legal texts to aid the non-lawyer public in understanding them. The ease with which such understanding can occur—comprehensibility—is an important and underestimated value. Who wants to be a Muggle? No one, really. The ongoing and critical task of the legal profession is to ensure that governing legal texts and lawyers’ treatment of them do not suffer the vices that “make” people into Muggles.

33. *Cf. Luke 15:4–7.*