PANEL 5: THE LIBERAL DEMOCRATIC STATE, JUDICIAL REVIEW AND (NO) ACCESS TO JUSTICE

"ACCESS TO JUSTICE" AS ACCESS TO A LAWYER'S LANGUAGE*

by
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1. Legal Language

J-u-s-t-i-c-e. R-i-g-h-t-s. E-q-u-a-l-i-t-y. L-i-b-e-r-t-y. L-i-b-e-r-a-l-i-s-m. D-e-m-o-c-r-a-c-y. T-h-e J-u-d-i-c-i-a-r-y. T-h-e D-i-s-a-d-v-a-n-t-a-g-e-d. Each of these words or set of marks is said to "signify" or mean something. The meaning of the marks is in that something else. That something else is independent of the marks on the page. It is an "in itself". Thus, the meaning of the marks — j-u-s-t-i-c-e, the d-i-s-a-d-v-a-n-t-a-g-e-d, d-e-m-o-c-r-a-c-y, or the like — is severed from the marks and sounds of a particular language. We are said to share the independent meanings as constituents of a culture. For example, even though Quebecois use different word sounds from English speaking Canadians and vice versa, the meaning of the word sounds or marks are said to remain the same so long as the word sounded stands for the same "in itself". The former mark or sound is called a signifier, and the latter concept for which the mark stands is called a signified.

Now, a *Charter of Rights*, for example, is a set of marks on a page. So too, is a statute or regulation or judicial decision. But these marks stand for ideas or concepts which we have just called signifieds. By themselves, the ideas are universal, artificial, and empty in content. All these characteristics flow out of the paradox that we cannot reach the signifieds, nor will we ever be able to do so, because they are invisible.

In order to give content to the invisible signifieds which the marks on the statute books represent, the lawyer goes to the author's intent or, as Ronald Dworkin suggests, a constructive intent of an implied author. The lawyer legitimizes his/her opinion by stating that his/her opinion is authorized or within the bounds of the express or implied intent of the founding fathers, the legislature, or the judge as the legitimating source of the signified. S/he does so because the "author" is thought to be nearest to or have the best understanding of the meaning of the signified. Reflective of Hobbes' focus upon the Author as the source of authority for a definition in the *Leviathan* and of Rousseau's justification of the general will in terms of

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authorship in *The Social Contract*,[1] the representative theory of language which lawyers have inherited presupposes that the author constitutes the authority for the signified. Given that presupposed author-ity in an author, the modern lawyer is preoccupied in discovering the limits within which one may legitimately coerce an Other into the signifieds which one accepts. Conversely, if lawyers go outside or beyond the author's intent in order to find the content of the signified — if, for example, they go beyond the limits of an accepted author or if they go to the intent of an unacceptable author (such as a poet or an out-law) when the latter uses the same marks or sounds — they have gone beyond the legitimate author-ity. If a poet insists that his/her content should prevail over the founding fathers' or the legislature's, then s/he is imposing his/her will upon the marks/sounds when, in hindsight, his/her signified may not legitimately coerce addressees. The poet's imposition of his or her meaning is illegitimate or without authority.

The relationship between the signified and the author of the marks signifying the signified is crucial in appreciating why one person's content to the invisible signified is legitimate whereas another's is not. This relationship also provides some insight as to why lawyers sometimes believe that a judge is imposing his/her will (signifieds) upon the the marks on a page entitled *The Canadian Charter of Rights and Freedoms* when a legislature — the supposed legitimate author of the marks — is believed to give content to a signifier, content which contradicts the judge's content. The judge's content is believed to be not unlike a poet's who, under the threat of physical or financial force, imposes his or her signified upon the same word or marks/sounds. Lawyers call this illegitimate imposition of signifieds as judicial legislation, judicial activism, politics, policy, or the penumbra of meaning.

Then, to what does a citizen have access? One has access to the author's signifiers and invisible signfieds which mediate between the author and the "outside world". The lawyer tries to discover what the author meant (that is, the author's signifieds associated with his signifiers). The signifieds are invisible. They are artificial, abstract, universal (contextless) and unwritten. They are *absent* from the mark on a page. A signifier signifies or means an invisible concept. But one can never reach this invisible "in itself" precisely because it is invisible. The nearest which one can come to the "real" world "out there" is to possess an *image* of it.[2] Paradoxically, the image will be more real than the natural object in that the natural world is never reached immediately whereas the image is a product of a human organism's experiences. I make an image of the "factual" world *for* myself or *for* you. I bring myself *into* the marks on a page in order to give meaning to the marks.

[1] Thomas Hobbes, *Leviathan*, C.B. Macpherson, ed., (1968), ch. 1, 4, 26, 33; Jean-Jacques Rousseau, *The Social Contract*, Maurice Cranston, transl. (1968), esp. 83.

[2] William E. Conklin, *Images of a Constitution* (1989), see esp. ch. 1.

Being invisible, a representation is a sign for something else. And yet, as lawyers, we believe in our capacity to represent the objective world in our process of constituting meaning. Because of the importance of the invisible signified, in the meaning constitutiong process, some group in any society (any society, that is, for which the signifieds are important) will claim the privilege of "knowing" them, interpreting them, judging particular disputes in the light of them, and enforcing them. Lawyers, doctors, engineers, scientists and all other "specialists" claim that privilege for their disciplines. They claim to be nearer to the signifieds of their professions and disciplines. Or, at least, they claim to be nearer to the signifieds than are the non-specialists. They even sometimes enunciate as if the signifieds constitute the whole of social reality. The lawyer's self-proclaimed monopoly over the meaning (signifieds) of his/her marks/sounds differs from that of other professions, however, in that the lawyer/judge may en-*force* his/her meanings. Although a member of another genre may en-force his/her signifieds (such as a Doctor's involuntary detention of a patient in a mental institution), the other genre gains its authority for enforcement from the prior author-ity of the legal genre.

Ironically, although the legal practitioner claims to be dealing with practice, that practice of law is caught up in an "actuality" of transcendental signifieds associated with the genre's mark images (signifiers). This is a very strange "practice" in that it is impossible to reach the lawyer's signifieds in that they are invisible and one can reach the images only with long periods of assimilation. The juridical world is *constructed* from signifieds. The signifiers of a right, a duty, a corporation, a fee simple: all of the sound/marks of a lawyer stand for invisible signifieds which the lawyer believes to constitute his/her juridical reality. The law, that is, lies in his/her language. Although the factual world is considered "reality" or "practical", the facts do not exist except to the extent that lawyers can fit the "facts" into their juridical world of signifiers and signifieds. Indeed, there is a sense in which a crime is impossible because a judge judges the concrete circumstances surrounding an alleged violence in terms of invisible signifieds (for example, the *concepts* of mens rea, actus rea, life) which, as concepts, are unreachable. We never see or hear the signified, arrive at it, or present it. Our access to a signified such as "life" or "justice" or "access to justice" is continually deferred — at least until death, if Plato is right. The citizen is equal *before* and *under* the law, although the law is never presented before us nor can it ever be presented over us except through the sound/marks on a page and the invisible signifieds which they represent. The signified can only be *re-presented*, although there will be no first time that it is ever presented.

If one believes in the reality of a lawyer's language (and there is much to think it real once it is en-*forced*), though, it becomes crucial that one defer to *the author* of marks/sounds because the author is presumed to be nearest to the meaning of the mark/sounds. The author's intent is believed to give content to the mark/sounds, since the mark/sounds, by themselves, have no content. The author's express or constructive intent is believed to constrain a lawyer's discourse. It precedes the reader's interpretation of the marks, or so it is thought. The signifieds of the author dwell before, beyond and after a lawyer's interpretation of the author's marks/sounds. The author's signifieds constitute the author-ity for a later interpretation of the marks on a page. The author of a statute — a legislature — is considered an authority in the same way that the author of a work is considered an authority. The legislature's words gain in authority and in meaning as they are re-interpreted over time. They take on mythical or second-level re-constituted meanings. The question arises "Who is the author?". Is it the legislature, the judges, law professors, the lawyers, or the people? Is the "author" the contemporary lawyer who is reading the original author's marks on the page? If the latter, then "a Noble Lie" may be necessary as Ronald Dworkin has so force-fully argued in *The Law's Empire*.[3] The "author's" signifieds associated with the marks/sounds constitute the authority to en-*force* an ordinance, however re-constructed that "author's" signifieds. Such an imposition would not be unlike the poets who, upon threat of penalty, would impose their poems upon social conduct and require that others change their social conduct accordingly. The supposed relationship of the author to the invisibles associated with his/her marks/sounds is traditionally considered to be fundamental in determining the legitimacy of one author's speech over another's.

2. *Access to a Lawyer's Language*

It is crucial in all this that the rulers cloak the author's signifiers with a legitimacy so that it is easier to en-force the signifieds associated with the signifiers. This process of legitimacy is aided if the rulers can inculcate the belief that the ruled are really enacting the signifiers: that is, that the ruled are really the authors of the signifiers which represent the signifieds. In Canada, those who have possessed knowledge (signifieds) associated with the signifiers (that is, lawyers and judges) have held out that the elected legislature authored the signifiers. Lawyers have appealed to the legislative intent as the source of legal author-ity for a particular meaning (signified) which a lawyer may then en-force upon the ruled.

The assumption in all this is that the invisibles can be reached by an identifieable explicit or implied author, whether by the legislature or a judge or a law professor or a lawyer or the people. The invisibles are taken as real. But paradoxically, as Derrida points out, the signified, once pronounced as a signifier, defers the moment of realising any actual object or what is called a referent. "Access

[3] Ronald Dworkin, *The Law's Empire* (1986). Dworkin retains the myth of the author as the legitimating source of legal/political authority, although he argues in support of a reconstructed author named Hercules who would, as a contemporary judge, re-construct the author's intent with a wide-ranging plethora of rhetorical skills.

to justice" is such a signifier associated with invisible signifieds. Again and again, scholars in this *Yearbook* have assumed that society could reach "access to justice" if only legislators or lawyers followed certain action. But the signifier "access to justice" defers the moment of ever reaching justice, or access to justice, for example. Even the signifiers — parliament, the judiciary, the professorate or the people —, once pronounced, defer the moment of ever reaching the legislature, the judge, the law professor or the people in fact. Life is lost in the continual deferring of the moment for gaining access to the invisibles. Judicial decisions become moments in the continual deferral in reaching the invisibles. One signified is given meaning in terms of its opposite: justice in terms of injustice, rules in terms of policy, activism in terms of passivism, negligence in terms of strict liability, and on it goes. One concept can be defined only in terms of its binary, not in terms of the originary social experience which gave rise to the en-actment of a set of signifiers such as the mark images "access to justice". There is no doubt that a scholar or lawyer or judge brings in his own life experience in his interpretation of the marks of a page called "access to justice" or *The Canadian Charter of Rights*. But in the process of seeking meanings "out there" — whether they be the meanings of legislature's marks, or of a judge's marks arising out of the interpretation of the legislature's marks —, the phenomena are lost or forgotten in the shuffle.

Once the judge does make a decision, s/he appeals to a signified in doing so. S/he can do so only by distinguishing his/her signified from other signifieds. Once pronounced, his/her signified becomes a sign in the never ending and pre-existing interlocking signs (signifier plus signified) which we call legal language. The lawyers' and the judges' role is to learn the sound/mark images just as if they were learning a new language. Learned in a language of interlocking signs, the original meaning of an author's mark drops out of focus, as do the meanings of the marks of a constructive author such as Hercules. The lawyers and judges can project an aura of impartiality and apolitical character by sustaining a continued reference to the marks of an identifiable author. This impartiality and apolitical character imbues to the circumstances surrounding the aura of the originary author — in our case, the author of the text named *The Canadian Charter of Rights*. When the lawyer approaches a new concrete social circumstance, s/he reinterprets the latter in the light of the pre-existing signs. In a sense, then, the legal fraternity is a bureaucracy which masters a language and which super-imposes that language upon social circumstances. The language incorporates a rational order in that a coherent and encyclopedic system of interlocking (binary) signifieds, each defined in terms of the other, brings order to otherwise heterogeneous social circumstances although the fraternity appeals to the originary marks on a page called *The Canadian Charter of Rights and Freedoms* as author-ity for the order.

Similarly, the social function of a law professor is to teach the language, something which has been accomplished quite well in the post-war Canadian law school. Law professors are the teachers and scientists of a language. They spend their lives learning the interlocking signifiers and their associated signifieds. The law professor, having learned the language, realizes that s/he alone has had the privilege of knowing the language. S/he wants to be officially recognized as knowledgeable in the signifiers of a modern bureaucratic university, for example.[4] Law professors or self-styled lawyers inside a modern university have learned the second order meanings associated with the signifiers which characterize student/teacher and teacher/bureaucrat relations. The language which dominates those relationships at the end of the day (that is, when force is used) is *juridical* language. Law professors have mastered that language as *their* expertise. The old signifiers of the Good Life have become concealed in a system of pre-existing juridical signifiers which dominate the discourse of a modern university.[5]

So too, for example, a handful of law professors and former law professors succeeded in authoring a short letter during the middle of a constitutional crisis, which letter claimed to offer the proper denotative meaning of a signifier ("a distinct society") at issue. Their letter carried such sufficient "author-ity" or legitimacy to help resolve the crisis, at least for the moment.[6] The author-ity of the authors' opinion was, of course, their knowledge (signifieds) of what the contested clause meant in the light of the pre-existing juridical sign system. They brought to bear upon the marks inscribed as "a distinct society", a hidden code of concepts or signifieds which interrelated with each other in a binary fashion and to which they, as legal scholars, were privileged to possess access.

In this world of interlocking abstractions or signifieds, what has happened to the phenomena of human experience? In particular, what has happened to the phenomena of pain and suffering which we should recognize as the genesis of a legal dispute? Evidence of the phenomena is considered relevant only to the extent that it can be incorporated into the pre-existing legal language of signifiers and signifieds. That is, the legal language, constituted by marks and fictions, pre-censors the entry of the phenomena into "the law".

[4] Why else would so many law professors aspire to become recognized as bureaucrats inside a modern university "community". The modern university "community" is dominated by juridical signifiers and signifieds.

[5] Of which the legal professorate alone claims to possess the hidden meanings (signifieds). A handful of law professors may dominate the proceedings of university or faculty members unless or until other faculty members become learned in the signifiers and associated signifieds through which the legal professorate has been trained.

[6] I am referring, of course, to a letter signed by four legal scholars during the Meech Lake constitutional crisis of May, 1990.

3. *Charter Language as a Lawyer's Language*

We have seen how juridical language conceals social phenomena with respect to the "experience" of the entry of the *Charter of Rights* into the language of lawyers. It has been argued, amongst other things, that, immediately after being enacted, the *Charter of Rights* was destabilizing for the lawyers and judges in the lower courts of Canada, as well as in the Supreme Court of Canada.[7] There were new marks such as f-r-e-e-d-o-m, f-r-e-e s-p-e-e-c-h-, e-q-u-a-l b-e-n-e-f-i-t of the law, etc. These new marks presumably had signifieds attached to them. That is, the framers — itself a concept or signified — brought meaning into the marks when they inscribed the marks onto paper. Lawyers scurried about attempting to find the meanings of these new marks (signifiers). Within a few months, many volumes had been published setting out the contents of the signifieds which lawyers were expected to associate with the new marks on the page called *The Canadian Charter of Rights and Freedoms*. A *Charter* industry quickly arose. Experts were suddenly considered "author-ities". The marks on the paper became a part of an interlocking system of signifiers with the result that the words became scientized. The more specialized the language, the more expensive it became for individuals to seek access to the lawyers' images of the invisible signifieds. Not surprisingly, an extraordinary number of litigants in *Charter* cases were financially successful corporations which (not who) could afford the litigation.

Sometimes, of course, legal commentators have idealized the pre-*Charter* days and urged a return to the good, old "legislative supremacy" approach to a constitution. This symposium has not been without such advocates, with their shrill "repeal the Charter" clamour. One is led to believe, by some "repeal the Charter" advocates, that a return to legislative supremacy would allow lawyers to escape from legal language and to return to the General Will (as represented by the legislature) for the source of inevitably political judgments presently made by judges (and lawyers). What Dworkin calls "the semantic sting" preoccupies their politics. There is believed to be a core meaning of the marks, which core meaning is said to constitute law. All the rest — the penumbra — is believed to be political.

How naive and idealized. Repeal of the *Charter* would not repeal the lawyer's language. Juridical signifiers and the associated meanings are essential to "unify" and "administer" a modern bureaucratic state. Instead of the "rights talk" of individuals and of identifiable linguistic or ethnic groups, there would be the "provincial rights talk" of a "division of powers" analysis. The signs of sections 91 and 92 would replace the signs of the *Charter*. Or, some other signs would replace sections 91 and 92. After the repeal, though, those signifiers (mark/images) with which the lawyer is most familiar (some of which are mentioned below) would be retained. A juridical

[7] William E. Conklin, *supra* note 2, ch. VI & VII.

language would remain. The lawyer would identify issues, construe social facts, argue principles and negotiate positions *through* a language whose mark/images and concepts s/he had begun to assimilate during the first week of a professional law school. To change the signifiers from "rights" to "division of powers" or to some other super signifiers might well work to obscure the political character of the signifieds associated with the latter and to sanitize the violence of their impact. But the change would not do away with signifieds nor with the lawyer's privileged position of "knowing" which signifieds are associated with which signifiers. Repeal of *Charter* language would not repeal the lawyer's language. Nor would a repeal of *Charter* language suddenly erase the lawyer's privileged access to the legal meta-language.

Indeed, the very alternative with which "repeal the *Charter*" advocates wish to replace "rights language" — the democratically elected majority as represented by the legislature — is itself seeped in the very abstract, contextless, universals which are said to characterize rights talk. More particularly, "legislative supremacy" prior to the *Charter*'s enactment had itself been a mythical author which lawyers had used to "authorize" the enclosure of social phenomena within juridical language. Indeed, the legislature had not been the supreme political institution in the body politic since at least the early 20th Century. Statutes and even moreso, the statutory instruments made thereunder, were no longer the direct expression of elected politicians. Prior to the *Charter*, non elected, "non-author-ized" institutions had overtaken the former role which elected representatives had played in the legislative process during the late 19th century. Party organizations dominated the choice of political leaders with both positive and negative sanctions against dissidents (e.g., through patronage, withdrawal of election funds, withdrawal of *de facto* support during elections, re-classification of an M.P.'s body to the back-benches, appointment to unimportant legislative committees, and the like). Political parties influenced the voting patterns of elected officials as well as the type of candidate likely to stand for election. A closely knit coterie of advisers surrounding the Prime Minister chose what issues should become important during election campaigns. Advertising and media control helped them in this process. Major initiatives in legislative policy were initially made by a cabinet meeting in secret (after the 1880's) and eventually by a large, complex, secretive bureaucracy (after World War II). To the extent that elected representatives, other than the cabinet members, voiced legislative policy, it was in the secret weekly meetings of caucus, not the open forum of a legislature. By the time the *Charter* was enacted, if not before, the cabinet member's role in legislation had been restricted to the approval of various legislative alternatives presented to him/her.[8] Unelected

[8] Not surprisingly, the decision to send naval and air force support to the Iraq — American crisis was made during August 1990 by a Prime Minister who is reported as not even having consulted his Cabinet, let alone the House of Commons, on the issue.

senior public servants determined the issues and articulated what they considered to be the realistic alternatives. And they did so through the legal language which pre-existed their own and their superior's expression. After all, most appointed and elected representatives had been legally trained. A common, universal language was needed for a complex bureaucracy in a modern state. A lawyer's signifiers and associated signifieds constituted such a language. The *Charter of Rights* merely fed that language with more signifiers.

One is left, then, with a dominant professionalized and scientized language from which it is difficult for lawyers to escape in a modern bureaucratic state. It is not enough to wish to do away with the abstractions which accompany a *Charter of Rights*. One must ask whether it is ever possible for lawyers to break out of the abstractions in which they are assimilated through their training in a scientized meta-language. Alternatively, if one wishes to institutionalize a legal order which *emanates from*, rather than encloses, concrete experiences — as does Professor Harry Glasbeek in this symposium issue, for example — then one must reconsider the very manner in which the legal meta-language conceals those experiences. More, one must question whether a legal language which recognizes the language of an Other in his/her concrete experiences would even resemble the dominant legal language as it has been known during the modern era.

4. Access to the Charter Language

Access to justice, then, is an access to an interlocking code of signifiers associated with invisible signifieds to which lawyers are privileged to gain entry. They gain access to the sign system through the images of "what constitutes a constitution" which they have assimilated through years of indoctrination. Because the signifiers gain their meaning (signifieds) out of a continuous interplay of binary oppositions and because justice is one such signified (its binary being injustice), access to justice is a metaphysical project in a meta-language or second-level language. Lawyers generally interpret a statute as only a first level code with denotative meanings. Its marks and the author's (that is, legislature's) signifieds associated with the marks are situated within a pyramidal rational order of invisible signifieds to which the lawyer is presumed to have access. It is not without coincidence that Plato, the author of a philosophy of signifieds, also wanted a rational order both in the soul and in the state, and that he insisted in *The Laws* and in *The Statesman* that the laws are a second best because we will never reach the invisibles of justice in this world.[9] Justice as a rational metaphysical order associated with marks called signifiers constitutes what counts as a social reality for the competent lawyer.

The role of lawyers, judges and law professors should be understood in terms of their belief in this rational construction of

[9] *Statesman* 300e — 301a; *Laws* Book IV.

invisibles out of familiar marks. The lawyer learns how to make distinctions between one signified and another, because meaning projected onto a mark can have content only in the binary opposition of the meaning vis-à-vis another signified. Further, lawyers, judges and law professors learn how to apply the signifieds to social phenomena or, more accurately, to reintegrate social phenomena into a pre-existing system or code of legal signifieds. This is called "legal analysis". Finally, lawyers learn how to find other words or marks with which the signifieds can be associated through legal research and writing. Canadian law students, law professors, lawyers and judges seem to have performed this social function very well.[10]

Once the marks called *The Canadian Charter of Rights and Freedoms* were inscribed on a page, lawyers sought out signifieds associated with the word marks. They gave the word marks a very primitive meaning in some cases, a very complex meaning in others. As time has passed, the meanings associated with the marks (or signifiers) have become more complex and more specialized. As a consequence, a specialized group of lawyer/scientists (called Charter experts) of the word/marks have gained in social professional prestige. But, because the pyramidal code of meanings is invisible, access to justice has been "measured" and "understood" through the pre-existing and interlocking code of signifier/signifieds with which lawyers were already familiar. The author-ity of the signifiers collapsed into the author-ity of *the knowledge* (or signifieds) of the word marks or signifiers. This process was aided in that the author "parliament" or "the crown in parliament" was itself a transcendental signified — a contextless, artificial concept, as judges have acknowledged for at least one and a half centuries. In the process of interpreting the marks, the originary author's intent — the crown in parliament — became lost. The author of the signifiers was reconstructed. More importantly, a "knowledge" of the signifieds associated with the marks on a page entitled *The Canadian Charter of Rights and Freedoms* gave the knowers (the charter experts — lawyers — judges) a privileged position vis-à-vis the "non-knowers" of the marks.

I believe that this was the case with respect to the interpretation of the marks called the *Charter* during the first five years after their inscription in writing. The word/marks provided that the signifieds in the document — the rights and freedoms — could only be restricted in circumstances where there were reasonable limits which could be "demonstrably justified" in a "free and democratic society". If one read the words in the text denotatively, the most important marks in the text seem to be these very words, "free and democratic society", because other signifieds are to be read in the light of "f-r-e-e-d-o-m" and "d-e-m-o-c-r-a-c-y" as

[10] Harry Arthurs acknowledged this in his Consultative Group on Research and Education in Law, *Law and Learning: Report* (Ottawa: Information Division of Social Sciences and Humanities Research Council of Canada, 1983).

set out in section one. A search of the legislative proceedings published during the previous fifteen years leading up to the *Charter*'s enactment would reveal that very little, if any, meaning had been projected into the marks "f-r-e-e a-n-d d-e-m-o-c-r-a-t-i-c s-t-a-t-e". In a sense, the previous legislative history was silent with respect to the meaning of the marks. Given the background of a fictitious author — the crown in parliament — which had rarely spoken (indeed, as a fiction, it could not speak even as an originary author) with respect to the meaning of the words/marks "f-r-e-e and d-e-m-o-c-r-a-t-i-c s-o-c-i-e-t-y", it is not surprising that the institutional role of giving content to the marks would be diverted to another institution: the legal profession in the courts. It is even less surprising that the other institution — the legal profession in courts — would not resist the magnetism of the pre-existing signifiers and associated signifieds with which lawyers were already familiar prior to the enactment of the text called *The Charter of Rights and Freedoms.* Very few judges — or presumably lawyers — during the first five years of the inscription of the marks of the *Charter* made an effort to project content into the marks "f-r-e-e a-n-d d-e-m-o-c-r-a-t-i-c s-t-a-t-e". The few efforts have been identified and discussed elsewhere.[11] Although Dickson went some distance to give content to the marks, nowhere did he explicitly do so himself. Nor, for that matter, did Wilson or any other member of the Supreme Court.[12] The original signifieds which were believed to be associated with the signifiers "free and democratic society" remained empty, unreachable, forgotten and lost in the web of lawyers' signifiers and signifieds which constituted an implicit meta-language.

In contrast, "new" signifieds were attached to the signifiers "reasonable limits" and "demonstrable evidence". In a sense, the new signifieds were actually old signifieds with which lawyers were already familiar: "objective tests of validity", "comparative legislation of other acknowledged free and democratic societies", "fair minded member of the public", "reasonable member of the public", the "balancing of values" which includes such signifieds as "permissible limits of a government" and "legislative means which are carefully designed to achieve legislative purposes", "values", "a living tree", "teleological", "goals", "the interests", "interest balancing", "significant interests", "governmental interests", "substantial interests", and the like. These signifieds were already part of the common law language. The (re-)creation of these new/old mark images as well as their associated signifieds were superimposed upon the originary marks in the *Charter of Rights.* Intricate legal tests evolved over time. Precedents were created. The new/old signifieds became associated with new names (signifiers). The name of a precedent, such as *Oakes*, for example, itself became a signifier with its own associated legal tests (or signifieds). The legal language of the originary marks called *The Canadian Charter of Rights and*

[11] See Conklin, *supra* note 2, 252.

[12] *Id.*, ch. VII.

Freedoms became increasingly intricate, specialized and complex. There ensued a dependency upon personnel who had an intricate knowledge of the word/marks as well as the latest signifieds which the marks were supposed to represent. Further, such a personnel learned how to apply or, at least, to incorporate social phenomena in terms of the signifieds and the word/marks. The signifiers "freedom" and "democracy", which initially had seemed to be the most important signifiers in the document, collapsed into the never ending chain of legal signs of which lawyers alone possessed knowledge.

The lawyer became indispensable. Lawyers alone were given the privileged position of projecting meaning (signifieds) into the marks on the page. Their own signifieds became so complex and "foreign" to the non-lawyer in, oh, so short a time. In order for a non-lawyer to bring meaning into the marks, one had to incur extraordinary financial and psychic costs. *Charter* law, as a language, quickly became the language of the rich. And it had to become such, the more scientized and the more refined that the interrelationships between signifiers/signifieds became.

All the while, the interlocking signifieds associated with the word/marks in the *Charter* text worked to conceal the suffering in social phenomena. This is partly because the signifieds, being products of the mind, lopped off the human body. The signifieds were cognate of objects, although the lawyer may well have brought meaning through his or her body, as Merleau Ponty would have suggested.

Suffering was concealed, in addition, because legal language was not a multi-language. Lawyers spoke the same marks/sounds. The lawyer's language was unilingual and univocal in that it comprised an encyclopedic totality of sameness. Although one concept was understood only in terms of another binary opposite, the concept was a unity, a universal, opposed to the multiplicity of social phenomena which it enclosed. Legal language excluded heterological voices beyond, before and under the signifieds. There was no Other possible within the *Charter* language. Even human subjects or groups of human subjects which were excluded from the "operation" of the *Charter*'s signifieds were excluded by being included within the juridical language. Suffering was concealed because a living subject was lost in a system of signifiers associated with an implicit juridically defined code of signifieds attached. The lawyer constructed a subject out of that system.

In a sense, there was a human subject only during the first few months after the *Charter*'s promulgation. It has been noted how an enormous anxiety plagued judges, law professors and lawyers during those first few months after the marks called *The Charter* were inscribed.[13] The word/marks in the *Charter*'s text were anxiously believed to be "outside" the pre-existing legal language which lawyers had inherited from the past. As judge Eberle noted in *Re R. and Potma*, "The *Charter* was not passed in *a vacuum*. This

[13] See *id.*, ch. VI, 101.

country has a well developed and long established system of laws. . . . We have a whole body of legal principles and concepts [signifieds]. . . . It cannot be thought that the intent of the provisions of the *Charter* that are in issue in this case, is to undermine and bring to the ground the whole framework of law and the legal system of the country at the stroke of a pen, even if it be a royal pen."[14] Similarly, in a passage continuously quoted by other Canadian judges, Judge Zuber explained his failure "to find" any new meaning (signifieds) in the marks of the text called a *Charter of Rights* in his concluding paragraph to *R. v. Altseimer*:

> In view of the number of cases in Ontario Trial courts in which *Charter* provisions are being argued, and especially in view of some of the bizarre and colourful arguments being advanced, it may be appropriate to observe that *the Charter does not intend a transformation of our legal system or the paralysis of law enforcement.* Extravagant interpretations can only trivialize and diminish respect for the *Charter* which is a part of the supreme law of this country.[15]

American constitutional scholars and their works were essential to this all-inclusive process in that they briefed Canadian lawyers of the generally accepted language of signifier/signifieds associated with the words on the page inscribed as *The Charter*. The words were interpreted in the light of that code. The code became an end in itself. And the lawyer's quest to reach the end of the code's totality was never satisfied. Over the months, the desire to reach the invisible signifieds of some fictitious author — "the crown in parliament" — was submerged by the desire to scientize the signs associated with the word/marks called *The Charter*. Lawyers aspired to construct a total, all-encompassing, rational order with magic mark/sounds to which they alone had access.

Further, the lawyer's language concealed suffering because of the role of precedent. Precedent was crucial not because judges projected new signifieds into the signifiers. That sometimes happened. But the signifieds, once pronounced, became signifiers in a pre-existing system of signifiers. Precedent introduced concepts but thereafter, those concepts became marks/sounds, just as had occurred with the original marks inscribed as *The Charter of Rights*. That is, the concept "balancing of values" or any other concept became a mark-image which another mark, such as "freedom of speech" or "equality before the law", triggered. Each mark was given meaning. That meaning re-presented the concept of a prior precedent.

The mark/sound could do no more than *re-present* because the signified itself was invisible. Once pronounced, the signified of the precedent became incorporated into the prior sign system. The original author — the Crown in Parliament — was lost. The concept

[14] (1982), 1 C.R.R. 298, 304; 37 O.R. (2d) 189, 199; 136 D.L.R. (3d) 69, 75. Judge's emphasis.

[15] (1983), 38 O.R. (2d) 783, 788; 2 C.R.R. 119, 124. Emphasis added.

represented by a case name enclosed, if not submerged, the originary social experience of the litigants who had brought the case before the judges. Social phenomena became a mere case name, a thing, an object, a series of letters constituting a name. Lawyers consumed the names and the tests as commodities. Names re-presented invisibles. Names could not *present* a social experience which had triggered litigation leading up to the name.

Finally, the lawyer's language concealed suffering because the practitioner of the *Charter* was a practitioner of metaphysics. The "good" practitioner was the ultimate metaphysician in that s/he knew well how to use the word/marks in the sign system. In addition, though, the "good" litigator "discovered" the latest signifier/signifieds associated with the word/marks in the lawyer's discourse. The legitimacy of the lawyer/linguist was reinforced not just because s/he possessed the meanings of the word noises and marks associated with the *Charter of Rights* but also because his or her enterprise was perceived as a *practise* of law. The lawyer became unattackable.

And yet, the lawyer was a theorist in that s/he had knowledge of the meanings (signifieds) of the word/marks. These meanings were theoretical in the sense of being abstract, artificial, contextless and universal. What could be more theoretical than an abstract, universal, contextless, empty signified? The lawyer, not the philosopher, became the king of a bureaucratic state, although it would be a mistake to believe that the word/marks inscribed as *The Charter* actually caused this bureaucratic state to form. The lawyer became the king because s/he alone possessed knowledge (the signifieds) of the signifiers (word/images) — or so it was believed. The lawyer alone possessed access to the language of the word/marks on the page called *The Charter*. S/he was the Founder of the just society — a society which s/he did not and could not perceive but concerning which s/he alone was believed to be qualified to deliberate and to preserve. The lawyer's signifieds (meanings) counted. The lawyer's determined appeal to an identifiable author as the source of the signifieds — the Crown in Parliament — legitimized the en*forcement* of the lawyer's signifier/signifieds as opposed to a doctor's, an engineer's, a poet's, a labourer's, a merchant's, or anyone else's. Notwithstanding her/his privileged position, the lawyer was caught up in a social reality constructed and constricted by her/his own language. Legal language defined who counted as a person, who could make claims, who could be left out and who was silenced. And all this occurred in the name of a practice of metaphysics. The *Charter* lawyer was entrapped in a scientistic practice of metaphysics. And yet, s/he believed that access to justice was possible.

That access was an access to a juridical meta-language.

It was an access for the lawyer alone.