

WHITHER JUSTICE? THE COMMON PROBLEMATIC OF FIVE MODELS OF "ACCESS TO JUSTICE"

by
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Introduction

The tradition of "access to justice" studies makes an implicit, sometimes explicit, postulate about legal reality. The boundaries of this legal reality, like the pillars of a building, are set out in a structure. The structure may be institutional—with courts, legislatures, subordinate agencies and government officials who, together, are interwoven into a whole—or metaphysical in the sense of being a cohesive, inter-related system of concepts. The concepts are known as doctrines, rules, principles, policies and other categorical things of the mind.

The boundaries of the structure separates the reality from an "ought" or non-legal realm.¹ The latter is unanalyzable. The paradigm within which the tradition of "access to justice" has evolved is that justice is composed from analysable units. If an object is unanalysable, then it is unknowable from within the structure. Justice dwells in such a non-legal world. Judges, jurists, lawyers, law teachers and law students have often differed as to what are the analysable units of the structure (sometimes, only rules have been considered analysable; sometimes, principles and policies; sometimes, statements about legislative acts of will; sometimes, social conventions; sometimes, moral-political arguments, sometimes, socio-legal claims). Jurists and judges have also differed as to what is excluded from the structure. Should we reject as legally unreal, for example, other academic disciplines, the divine, nature, unwritten customs, morality, religion generally, and justice? More generally, jurists and officials are united in their belief that law is confined to a reality constituted from a structure and that justice lies exterior to that structure.

I intend to briefly outline five models of access to justice. Each model has postulated a structure which separates valid legal rules/principles from a non-law. The latter is often referred to as "morality." With each model, officials understand each other through a special language of the structure. Justice is projected as external to the language of the analysable units of the structure. The consequence has been to render justice inaccessible to the language of the structure. Justice has been postulated as a radical other to the language. Access to justice is an access to an invisible source or *arche*, which, like the inner sanctum of the Castle of Law in Kafka's *The Trial*, is closed even to the expert knower of the language of the structure. Access to Justice is an access to a possibility only. Faith, not reason, links the structure

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¹ This issue was raised in a study of the instrumental reason of officials in Conklin, "The Legal Theory of Horkheimer and Adorno" in (1985) 5 *Windsor Y.B. Access Just.*: 230-57.

to justice. I shall suggest that, if one wishes to address an access to justice as a contingency, rather than an access to justice as an invisibility, one needs to un-conceal justice from inside the official language of the structure.

1. Pure Proceduralism

The first model of access to justice permeates virtually every area of legal discourse to this day. Here, justice is associated with a pure procedure. According to pure proceduralism, there is no substantive criterion of justice independent of, and logically prior to, the procedure of reaching a decision itself. Rawls' example is a gambling procedure where the outcome is considered just if the procedure of throwing the dice is fair. If the procedure is fair, the postulate assumes, then all subjects gain an access to justice where the just outcome results from the throw of the dice.

Mediation to a great extent assumes the viability of pure procedural justice. The function of the mediator is to ensure an equality of bargaining power as the mediator hears both sides, re-states the sides and attempts to open the parties to the story of the other. The procedure, not some independent criterion of justice which goes to the substantive content of the outcome, produces justice. Who wins matters little to the official as mediator. The justice of the mediation process lies in the fairness of the procedure.

Pure proceduralism focusses upon legal method or legal process. The procedure determines who should win a dispute, what goods ought to be produced, how much ought to be produced, what goals ought to be sought, and by what means. The open and fair procedure resolves the outcome of these issues. So long as the procedure is fair, the presumption goes, so too will the outcome be just. The fairness of the procedure translates itself into the outcome. Lawyers are not unfamiliar with due process. It is important. And it has permeated the common law institutions since the seventeenth century.

The access to justice issue for pure proceduralism is "what ought to be the background conditions necessary for a fair procedure?" Generally, for example, there are three conditions in a liberal theory of procedural justice: first, that the outcome results from the majority's will; second, that freedom of expression characterize the deliberative process; and third, that participants in the deliberative process share a political equality. The *Secession Reference* privileged such conditions and added three others: a respect for minority rights, legalism (and the rule of law) and constitutionalism. These conditions precede the possibility of a just outcome in any particular case. The Supreme Court of Canada considered the conditions "fundamental", yet non-justiciable. So long as courts actively protect the conditions, they fulfil their role entertained by the pure proceduralism model of access to justice. In addition to examining how such conditions translate into an institutional context, access to justice studies have examined the empirical conditions which construct obstacles to such conditions.² All scholarly and

² See, e.g., J.A. Epp, "The Role of the Judiciary in the Settlement of Civil Actions: a survey of Vancouver Lawyers" in (1996) 15 *Windsor Y.B. Access Just.*: 82-120; P. Finkle & D. Cohen, "Consumer Redress through Alternative Dispute Resolution and Small Claims Court: Theory and Practice" in (1993) 13 *Windsor Y.B. Access Just.*: 81-116; J.F. Handler, "The Politics of Structure: Decentralization and Empowerment" in (1993) 13 *Windsor*

judicial activity should be oriented towards the institutional conditions for such a fair procedure. Empirical evidence going to a group's systemic exclusion from the institutional procedures goes to show that the group, of which the individual is a member, has been disadvantaged *vis-a-vis* the institutional procedure and that, therefore, the outcome—whatever the outcome—is unjust. Claims of systemic discrimination can be understood in the sense of pure proceduralism. "Access to justice" here insists that the political and legal process remains neutral *vis-a-vis* the outcome over time. A subject(s) gains an access to justice if s/he possesses an access to the institutions which make decisions impacting upon the individual or group.

The problem is that, given our social contingencies and human capacities, all procedures are imperfect. Even if we were agreed as to what abstract background conditions would produce a just outcome in both the mediation and the constitutional realm, social contingencies and human frailties render the fulfilment of the conditions difficult. Political favouritism and social privilege, for example, undermine political equality. The costs of electoral success or the costs of mediation, like the extraordinary costs of adversarial litigation, are another. The differential effects of the ethnic, gender, racial, or class composition of the personnel of the institutions may also give the appearance that the background conditions cannot be instituted because of the ethnic, gender, racial and class acculturated pre-judgments in one's deliberations. A fair procedure requires that all persons, whatever the ethnic, gender, or class background, gain access to the legal/political process, including the decision-making institutions of the process. All persons should be able to compete for power without fear or threat. So, whatever the intent of a statute or precedent, an individual is

Y.B. Access Just.: 239-63; L. Sossin, "Welfare State Crime in Canada: The Politics of Tax Evasion in the 1980's" in (1992) 12 *Windsor Y.B. Access Just.*: 98-27; C. Wydrzynski, K. Hildebrandt & D. Blonde, "The CAW Prepaid Legal Service Plan: A Case Study of An Alternative Funding and Delivery Method for Legal Services" in (1990) 10 *Windsor Y.B. Access Just.*: 22-78; C. Baar, "The Zuber Report: The Decline and Fall of Court Reform in Ontario" in (1988) 8 *Windsor Y.B. Access Just.*: 105-49; I. Greene, "The Zuber Report and Court Management" in (1988) 8 *Windsor Y.B. Access Just.*: 150-89; J.W. Meeker, J. Dombink & E. Schumann, "Attitudes Towards the Legal Profession: The Poor and the Undocumented" in (1986) 6 *Windsor Y.B. Access Just.*: 141-59; P. McCormick, "Judicial Councils for Provincial Judges in Canada" in (1986) 6 *Windsor Y.B. Access Just.*: 160-93; B.D. Holman, "Pace and Patterns of Civil Litigation Prior to Placement on the Trial List: An Empirical Study of the Niagara North County Court and Discussion of Ontario's Reformed Rules of Civil Procedure" in (1986) 6 *Windsor Y.B. Access Just.*: 194-235; J.D. Wilson, "Attorney Fees and the Decision to Commence Litigation: Analysis, Comparison and An Application of the Shareholders' Derivative Action" in (1985) 5 *Windsor Y.B. Access Just.*: 142-80; K. Hildebrandt, B. McNeeley & P. Mercer, "The Windsor Small Claims Court: An Empirical Study of Plaintiffs and Their Attitudes" in (1982) 2 *Windsor Y.B. Access Just.*: 87-123; I. Greene, "The Politics of Court Administration in Ontario" in (1982) 2 *Windsor Y.B. Access Just.*: 124-151; E. Noam, "Resource Allocation and Access to Criminal Courts: An Economic Model" in (1982) 2 *Windsor Y.B. Access Just.*: 208-223; E. Renner & A.H. Warner, "The Standard of Social Justice Applied to An Evaluation of Criminal Cases Appearing Before the Halifax Courts" in (1981) 1 *Windsor Y.B. Access Just.*: 62-80; M. Cappelletti & B. Garth, "Access to Justice as a Focus of Research" in (1981) 1 *Windsor Y.B. Access Just.*: ix-xxv; also see the many other empirically oriented studies in past volumes of the *Yearbook*.

denied access to justice, according to pure proceduralism, if the statute or precedent negatively impacts upon the conditions of a just procedure. Further, political equality is a mirage because in our representative system of government, political representatives are expected to exercise far more serious power in decision-making than do ordinary electors. Further, with the evolution of parliamentary government, the cabinet members exercise far more power than do ordinary representatives. Political equality is especially imperfect in the court structure in that a premium is given to the knowers—the lawyers and judges—rather than to an equality of preferential voting by the citizenry as in the case, for example, of the “jury” of the Greek *polis*. So too, great weight is given to the mediator as the expert knower of the skills of mediation. Further, what we consider freedom of expression, another background condition of a fair procedure, is open to debate as to its scope. Further, even majority rule, as a background condition, is open to scrutiny due to the power and privileges of senior officials in a political party, particularly a ruling party, and the power and importance of campaign financing in a contemporary election in the West.

What is critical to realize here, though, is that, postulating the possibility and the need for background conditions of a fair procedure, the justice of the substantive content of the legislative or judicial decision or mediated outcome is irrelevant to the access to justice issue. Indeed, so long as the focus upon the procedure is consistently maintained, the substantive content of the outcome of the procedure need not matter. Because the procedure is believed to be pure, the outcome is presupposed to be just. The justice or injustice of the substantive content of the outcome is irrelevant. A formalism permeates legal reasoning, a formalism which discards the social intent of the framers of the institutions or rules and which uproots an abstract reasoning from its phenomenal context. The historical context is immaterial. So too, the intent of the author as a non-judicial subject, is immaterial. So too is any conception of the Good life or any independent notion of social justice. An independent criterion of justice is external to the due process of the legal structure. An examination of the substantive content of the outcome is unnecessary in pure proceduralism. Indeed, the proceduralism model is consistent with the manner in which one in fact treats a dog. But are not human subjects more deserving than a dog? Do we not deserve, as an issue of justice, more than a formalism in deliberative reasoning, in the interpretive act and in the posit of a rule? The focus of “access to justice” scholars is to identify obstacles to a pure procedure or to offer empirical evidence of a tilted procedure in favour of one ethnic/class/gender group over another, and then to devise institutional procedures which shift the power relations of one group to another with respect to a more equitable procedure.

2. The Sources Thesis

The second model of access to justice also excludes an examination of the substantive content of the rules, principles and other standards of the legal structure. Here, though, what is important is not the procedure which leads to an outcome but the institutional source of the outcome: is the out-

come a decision of the appropriate institutional source on a structure of institutions and has that institutional source acted within its jurisdiction?³ The source authors the decision. The author which concerns the access to justice critic here is not a novelist or scholar or poet but an official or institution who possesses legal authority. Each official gains its authority to posit or enforce a rule from some source higher in the institutional hierarchy. Authority lies in the appropriate institutional author in a structure of institutions. If a rule is posited by the appropriate author, then the rule is just, it is presumed. With this model, access to justice is gained when one reaches the intent of the author of the rule and when the right author in an institutional hierarchy has posited the rule.

Thomas Aquinas believed that there was an ultimate author who created the whole of nature from a grand plan. The principles of that Author were "indemonstrable", to use Aquinas' term. So too, the immediate laws of the Author, the eternal laws, were known only to the invisible Author. We jurists and judges had to accept the fact that there was such a final Author, according to Aquinas, for otherwise, the trace of authority from one institutional author to another up the hierarchic ladder of authority would continue *ad infinitum*. The Author was an unmoved mover. The Author self-originated the natural world. The Author preceded the human construction of institutions.

So too, an important moment in the history of access to justice arises when creatures acquire a language. Thomas Hobbes, for example, describes this moment. When creatures can speak with each other through shared signs, they are able to make contracts for they know what their words and sentences signify. Upon acquiring a language, authors of expression decide to assign their authority to "a mortal god", a Leviathan, who retains total authority to create institutions and to enact binding laws. Binding, because all authors—or a majority of them—have agreed to accept the decisions of the Leviathan. Once the authors who have newly acquired a language, assign their authority to the Leviathan's institutions, they cannot retrieve their delegation to actors if they should change their mind. Instead, the leviathan may construct subordinate institutions. The authority of the actors is comprehensive so long as the actors act *intra vires*. Indeed, the authority of the structure is *total vis-a-vis* all possible human behaviour.

John Locke, Jean Jacques Rousseau and John Austin also took up this notion of an author as the source of legal authority. Legal authority rested with institutional sources. A democratically elected legislature was the

³ See generally J. Raz, *The Concept of a Legal System: An Introduction to the Theory of the Legal System* (Oxford: Clarendon, 1970; 1980, 2d); *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon, 1979); *Practical Reason and Norms* (Princeton: Princeton University Press, 1990, 2d); *Ethics in the Public Domain, Public Domain: Essays in the Morality of Law and Politics* (Oxford: Clarendon, 1994); "On the Authority and Interpretation of Constitutions" in L. Alexander, ed., *Constitutionalism: Philosophical Foundations*, 152-93 (Cambridge: Cambridge University Press, 1994). For a critical perspective, see J. Vining, "Justice and the Bureaucratization of Appellate Courts" in (1982) 2 *Windsor Y.B. Access Just.*: 3-15.

most important such institution. The legislature represented the will of the people and that will was situated external to the structure. Once again, it is not the content of the outcome that matters to the legality of a rule: it is the link of such a rule to an externality, the will of the people and justice rests in that externality to the legal structure. The habits of the people, in Austin's theory, are located outside the legal structure. Their actual empirical wishes are unenforceable despite the fact that the authority of a legal rule rests with the habits of the people. The habits of the people, though fundamental to the authority of rules properly so called, are rules improperly so called.

The critical shared point about Hobbes and Austin, for our purposes, is that institutionally posited rules constrain officials. Once again, the substantive content of the rules is immaterial to the binding quality of the rules. All that matters is that a rule is rationally linked to the appropriate source on the institutional structure. Even the will of the people is irrelevant to the authority of a rule. The ultimate source—the institutional authors who have just acquired the conventions about the significations of words and the people whose will is the rhetorical referent of the legislature—is *exterior* to the legal structure. Justice is said to lie in the will of the people and yet, justice lies beyond our control. Justice is unenforceable. Justice is inaccessible because we may only enact and enforce rules which are posited by institutions located on the structure. Officials will only recognize the language of such institutional sources as valid or authoritative. Justice remains external to the legal reality. Unlike Aquinas, the source is satisfied with human constructions. It discards the possibility of an invisible Author, a Judaeo-Christian God, as the ultimate author of laws properly so called. Only the historical sources posit analyzable units which officials can consider units of a legal existence. The authors which concern us are legislatures and courts and officials of a secular state. The most important such historical author is the democratically elected legislature. With the secularized version of the sources thesis, it matters less whether the author proceeds out of respect for procedural conditions than that, whatever the procedure, the rule has been posited by the appropriate secular author or, alternatively, that the institutional source of the rule can be rationally linked to the final author, parliament.

So too, Joseph Raz privileges the given-ness of a state's institutions when he addresses "why is a rule binding?" Raz distinguishes between two issues: first, what factors does a judge incorporate into legal reasoning. Secondly, why is a rule binding? Here, a rule, once posited by the appropriate institution in the state's bureaucracy, is binding. The posit of such a rule excludes a re-consideration of the many different factors which enter into the enactment or elaboration of the rule in the deliberative stage of reasoning.

Access to justice, according to the second model, then, leaves the justice of the substantive content of the rules to the side. If we can trace the enactment of a regulation or the posit of a judicial decision to its institutional source and that source to its source and if we can be assured that each authorial source makes the decision within its allocated jurisdiction, then

all is well.⁴ We have attained access to justice. Stop asking questions about God or the Good life or "what is the Right or the Wrong action?" Stop evaluating the substantive content of rules in the light of such transcendental outside criteria of justice. Just ensure that a particular rule or decision is consistent with the *will* of the appropriate author and that author within its institutional jurisdiction. But have we attained access to justice? The substantive content of laws properly so called is immaterial. Access to binding laws? Yes. Access to justice? No.

But a formalism permeates this sense of access to justice too in that it is not the actual intent of the authors—what real human beings intended—which matters nor the social/historical context surrounding the author in its posit of a rule. The actual members may well have a complexity of conflicting interests and values and desires of what ought to be the rule or decision. The actual members of the institutional source may well have not considered the actual problem before they had to enact, adjudicate or enforce the rule. The will of the author intellectually transcends the actual desires of the members of institutional source. The will of the author is a unified rational abstraction which can be signified in a few words which officials will recognize as the will. So, the access to justice scholar has a duty, under this model of access to justice, to clarify the scope of a rule, to trace its authority to its institutional source, to ensure that that source acted within the pre-assigned boundaries of the source, to trace that source to its authority in a higher institutional source on a pyramidal hierarchy of institutions. This hierarchy, a structure of inter-related institutions, is the ultimate referent of access to justice analysis.

History begins, in this second model of access to justice, with the institutional structure. Legal history is a-historical. For the social events which may well have led to the creation of an institution are excluded as "oughts" or political. The institutional structure is a "given" for access to justice analysis. Why the institutional structure is there: this is an ought question

4 See, e.g., M.D. Lepofsky, "The Charter's Guarantee of Equality to People with Disabilities—How Well is it Working?" in (1998) 16 *Windsor Y.B. Access Just.*: 155-214; S. van Praagh, "Faith, Belonging, and the Protection of 'Our' Children" in (1994) 14 *Windsor Y.B. Access Just.*: 154-203; D. Schulze, "Obstacles to Equity: An Analysis of the Taxation of Disability Income in Canada and Proposals for Reform" in (1994) 14 *Windsor Y.B. Access Just.*: 135-61; M.D. Lepofsky, "The Trial—*R. v Duras Golgamek*" in (1994) 14 *Windsor Y.B. Access Just.*: 350-93; A. Forest, "Organizing Eaton's: Do the Old Laws Still Work?" in Disability Income in Canada and Proposals for Reform" in (1994) 14 *Windsor Y.B. Access Just.*: 190-213; C. Gora, "Jury Trials in the Small Communities of the Northwest Territories" in (1993) 13 *Windsor Y.B. Access Just.*: 156-81; S. McIntyre, "Above and Beyond Equality Rights: *Canadian Council of Churches v. The Queen*" in (1992) 12 *Windsor Y.B. Access Just.*: 293-320; R. Cairns Way, "The Charter, the Supreme Court and the Invisible Politics of Fault" in (1992) 12 *Windsor Y.B. Access Just.*: 128-78; S. Fairley & G.P. Crann, "Is First-Use of Nuclear Weapons Contrary to the Law of Nations?" in (1991) 11 *Windsor Y.B. Access Just.*: 3-45; E. Kallen, "Never Again: Target Group Responses to the Debate Concerning Anti-Hate Propaganda Legislation" in (1991) 11 *Windsor Y.B. Access Just.*: 46-73; E.J. Shilton & A.S. Derrick, "Sex Equality and Sexual Assault: in the Aftermath of *Seaboyer*" in (1991) 11 *Windsor Y.B. Access Just.*: 107-24; P. Zylberberg, "Who Should Make Child Protection Decisions for the Native Communities?" in (1991) 11 *Windsor Y.B. Access Just.*: 74-103.

which takes one beyond the legitimate scope of access to justice. The institutional structure, as the ultimate referent of access to justice analysis, conditions the options available to legal analysis. The access to justice scholar who postulates the sources thesis analyzes the units which the institutional sources posit. The analytic method concentrates on the means in reaching the wills of the institutional authors. The social historical context of the means is immaterial. The trace of authority of the means to the intent of the historical author, once the author has spoken, excludes a re-consideration of the substantive content of the author's decision or rule. The institutional decision, not the content of the decision, becomes the end of legal analysis. And the justice of the content of the decision is lost in the analysis.

Of course, the will of the institutional source is an intellectual abstraction which "makes sense" or is signified when situated in the context of the statutes and precedents of other institutional sources. The jurist retro-spectively intellectualizes *about* the intent of the institutional source as if access to justice lay in that intent. That retro-spective analysis of the will of the legislature or of the court, though, is constrained by the logically pre-existing structure of institutional sources. The institutional structure is ready-made "out there" in some pre-existing reality beyond the control, it is believed, of legal officials. What lies beyond the structure—some transcendent notion of Goodness or a will of the founding fathers or the will of the people—is considered legally non-real, as non-existent, as an "ought", or so this second model of access to justice postulates. What is real or legally existent is the analyzable units posited by the institutions on the structure. If some other institution—a church or decree by an organized crime leader, for example—posits a rule, such a rule is unanalyzable as a unit of the legal structure and, as such is legally non-existent. The sources thesis postulates an access to justice critic who is constrained by the *vires* or boundaries of the rationally coherent institutional sources which function as the final referent of access to justice analysis. The access to justice analyst proceeds as if s/he can access justice by analyzing the concepts or "thought-plan" which the institutional source represents. Thus, justice enters the access to justice analysis indirectly at the moment when the analyst retrospectively retrieves the will of the institutional source and then complains that the contemporary interpretations or social effects of a statute or a precedent or a doctrine contradict that will.

Here, in the source model, the analyst pretends that he or she is inside the standpoint of the original intent of the institutional source—the legislature or court. Situating her/himself through the eyes of that source, the analyst gazes onto social problems as if he or she represents justice. This distanced standpoint requires that the analyst, like a scientist, excludes her/his personal views of the matter from legal analysis. The social enters legal reasoning at the "start" of a genealogical trace to some one legislature or founding father or court.

On close inspection, though, we know that a great deal of empirical evidence about the actual intent of the members of an institutional author is excluded in the process of articulating the will of the institutional author—the legislative will, the will of the writer of a precedent, the founding

fathers of a constitution—as the grounding of a social critique. Further, however we try, we officials tend to bring our own beliefs, feelings and experiences *into* our interpretation of the will of the author. Enough has been written *about the interpretive act not to pretend otherwise*. We intellectualize *about* the intent of an author as we claim to represent the will of the author. We do so retrospectively. Accordingly, the author becomes a mirror of what *we* officials believe ought to be the will. And, in the act of representation, we abstract from the context-specific meanings which actual human beings may have brought into their words as they drafted, amended, elaborated, stated and authorized, some doctrine or institutional structure which we now consider suspect as a violation of access to justice, or which we now consider worthy of privileging because a contemporary rule seems to violate the original intent. The consequence is that we officials forget the indigenously experienced context-specific meanings of the concrete human authors as we exclaim access to justice in their names.

As with the procedural model, the trace of authority of a rule to its institutional source excludes a scrutiny of the substantive content of the rule. Again, it is not the substantive independent content of the rule which is associated with justice. It is the certainty that a rule has been posited by a particular institution in an institutional structure with parliament at the apex of the structure. Once the rational nexus of the rule with the institutional source is made, the analyst is excluded from a reconsideration of the factors which make for the institution's decision. This is not to say that the institution, during its deliberation about a rule, may not incorporate "ought" claims about some notion of the Good or Right conduct into the rule. It is to deny that the institutional source, once it has made a decision or a rule, is precluded from opening up an inquiry into the substantive content of the rule. For the sources thesis postulates that justice lies, not in the substantive content of the rule, but in the linkage of the rule to some one distinct and assignable institutional source in the structure. All that matters is that the institution possesses the proper jurisdiction to enact the rule. Within that jurisdiction, the institution may deliberate about whatever content it desires for the rule. The institutional structure embodies what the access to justice critic presumes to be legal reality. Access to justice dwells inside that reality—or so it is postulated.

3. The Semiotic Model

This takes me to a third model of access to justice. Here, the structure of rules is constituted from the signs which represent cognitive objects. Access to justice involves an access to a special legal language with a complex vocabulary and grammar.⁵ Here, what is important is the sign. The sign represents the thought of the institutional source or author. At an early stage, an institutional author expresses its will through a chain of signs and these, in turn, gain their signification from a special language with a special

⁵ See Conklin, "Access to Justice as Access to a Lawyer's Language" in (1990) 10 *Windsor Y.B. Access Just.*: 454-67. Also see Conklin, *The Phenomenology of Modern Legal Discourse* (Aldershot: Ashgate/Dartmouth, 1998), esp Intro and Ch 1.

vocabulary and grammar which professional knowers will recognize. With the advent of legal semiotics, the actual intent is immaterial, for the sign is immersed in a play of signs which precedes the author's meant intent.⁶ What happens in the signification of a concept or event is that the concept/event is absent from the sign and, in the situating of the sign in a configuration of other signs, the intended concept is lost, forgotten, or transformed. The signification becomes an event itself, though not the indigenously experienced event by the persons who may have been harmed. The signification represents the latter experience. The latter experience is re-situated in a play of signs. The officials recognize the sign. Though the signification invariably is phrased in terms of the intent of the author of the configuration—the legislature which authored the statute or the court which authored the precedent—the signification only takes place as interpreters re-situate the verbiage into chains of signs which make sense to the interpreter as a professional knower of legal signs. What is important is not the original intent of the first author (legislature, court) of the sign but the recognition of the sign in a thread of inter-dependent signs.

So, for example, the call of a loan by a financial institution is recognized as a harm if the officials can signify the call as an unreasonable amount of time to repay the loan. The sign, "reasonable time", becomes the relevant term. But that term has a very special signification in legal language. The sign is placed in a chain of other signs—called precedents—which are recognized by other knowers as relevant and authoritative as analyzable units. The latter are part of a genre which possesses its own special vocabulary, grammar, style of writing and verbal expression, assumptions about what is real, and the like. The chain of signs, when re-situated within the genre, take on a narrative structure with a plot and continuity which lacks a beginning or an ending. It is the narrative structure which delimits what is legally existence and authoritative. Ronald Dworkin is probably the foremost access to justice theorist who has privileged the narrative structure as the true-real for the official.

The consequence of the semiotic model is that the experienced event is enclosed within a narrative structure which makes sense to the interpretive community of professional knowers. One configuration of signs represents another configuration. The configurations become the legal event. The significations constitute the social. But because the signifiatory act is a cognitive project—or perhaps more correctly, because legal signification is preoccupied with the retrospective intellectual reading of a social event in a secondary chain of signs. The embodied *meaning* which someone initially experienced is re-presented. Sometimes, the transformed expressed intent is said to be an "intelligible fact", to use Raz's term.⁷ At other times, it is considered a "brute fact", as was the case with the Scandinavian realists such as Alfred Ross. The professional knowers make legal sense of the meant or experienced events and of the concepts which they associate with

⁶ For the distinction between a meaning and a signification, see Conklin, *Phenomenology*, *ibid.* 11-26, 51-102.

⁷ These are Raz's terms.

their signs. This is not to say that the officials themselves, as interpreters, do not possess their own experiential meanings of the signs. It is just that because the signifiatory event is a cognitive project of connecting one representation with another representation, the experiential bodies with the accompanying meanings of both the claimant and of the professional knower are excised as non-law. The experienced meanings are signified in a language which makes sense for the knower. Access to justice involves an access to such a language, a language which is so complex and intricate that only long years in the signifiatory project qualifies the knower as a professional knower. At that point in time, of course, the knowledge of signs is a commodity. The commodity takes on a very high price in the capitalist enterprise of allotting a simple sign (a dollar value) to the reputation of a knower.

As with the procedural and the sources models of the access to justice studies, the consequence of the semiotic model of access to justice is that a reality is created for the officials. For the knowledge of signs (that is, the knowing of the vocabulary, grammar and genre) constructs a legal reality. All else is political or moral. What is excluded from the reality is illegitimate. It is non-real. Legally non-existent. The legal reality is not the social reality of the social critic nor of the anthropologist. Not the psychological. Rather, legal reality, according to the semiotic model, is constituted from the structure of signs. That semiotic structure, best elaborated and explained in the works of Bernard Jackson, becomes the referent of "what is a social event?" for legal officials.⁸ Officials recognize the signs as binding. Do not question why they do so—that is a problem for the social critic or the professional philosopher. But the latter discourses are illegitimate avenues of inquiry for they are exterior to the enforceable language of the structure.

The semiotic reality is what Hans Kelsen described as an *ideal* existence as opposed to a real existence.⁹ What is important, Kelsen writes, is a norm. He defines a norm as a *statement* about an author's will. That statement or norm is situated in a structure of other norms with a basic norm or *Grundnorm* as its foundation. As with the sources thesis, the will is a rational reconstruction of the expression of actual members of an institution. Unlike the sources thesis, though, the law is not self-starting in some author. Rather, it is the author's *signs* which matter—not the absent doctrines or categories which the signs represent—and these signs take on a signification only when they are related to the pre-existing structure of other signs, not when they are uttered. Accordingly, the *ideal* existence of the structure of norms takes on a reality which is "pure" in the sense of

⁸ B. Jackson, *Making Sense in Law: Linguistic, Psychological and Semiotic Perspectives* (Liverpool: Deborah Charles, 1995); *Law, Fact and Narrative Coherence* (Merseyside, UK: Deborah Charles, 1988). Also see A.J. Greimas, *The Social Sciences: A Semiotic View*, F. Fabbri & P. Perron, Forew; Perron & Frank H., Collins trans. (Minneapolis: University of Minnesota Press, 1990): 102-38.

⁹ See Kelsen, *General Theory of Norms*, M. Harvey trans. (Oxford: Clarendon, 1991), "Note 7," 278. This interpretation of Kelsen is worked out in a chapter in Conklin, *The Structuralism of Analytical Jurisprudence* (forthcoming).

being entirely separate from the social, moral and political context from which the will was initiated. Put differently, the statement about the will of a legislature or court or other institutional author is a mere scriptive fragment until the fragment is related to the structure of signs which precede the posit of the will. The scriptive fragment is made "rational" or coherent when it is re-situated in a signficatory context of other signs (norms). It is this nexus between sign and narrative structure which signifies the fragment. In a sense, this structure of signified categories displaces the indigenously experienced event as the true/real. A new "is" displaces the brute facts of an experienced or empirically measureable world.¹⁰

The consequence of the signification of an author's expression, like the procedural and sources models of access to justice, is that justice is excluded as beyond the real. The experiential body is forgotten as the social event is transformed into a reified structure of recognizable signs. Justice dwells in the multiplicity of voices which the play of signs re-presents. Put more correctly, to the extent that the experiential body constitutes the social and to the extent that the social is an important part of justice: to that extent justice is left "out there" in some unanalyzable world which no longer can be considered (legal) reality. Since the signs, familiar to the legal profession, represent categorical objects, the displaced and forgotten experiences of the body are now situated in an object-less realm. The official works within a transformed and transforming reality. Legal signification becomes independent of the formerly experienced harm which may well be recognized as a familiar legal sign such as "reasonable time." The concrete experienced event is not subsumed *under* the categorical boundaries which the legal sign represents. Rather, the sign takes on a "life" of its own, as it were, for the legal sign depends upon a differentiation with other signs, already recognized, in the legal discourse.

Like the procedural and sources models of access to justice, the critic forgets the justice of the multiplicity of voices except as an "ought" beyond legal reality. The critic forgets the indigenously experienced harm in this third model of access to justice despite the postulate of the analyst to analyze reality. Although the access to justice rhetoric may well focus upon the rights of the person harmed, those rights are significations which have displaced and then may have forgotten the social event which it is the function of the signification to represent. All the while that the access to justice rhetoric claims to be accessing justice, justice becomes inaccessible once one appreciates that justice is associated with the voice of the other, the experienced meanings which officials and non-officials alike claim to re-present in a cluster of signs. Once again, as with the procedural and the sources models, justice is excluded, discarded, an impossibility, forgotten and then inaccessible. Legal rhetoric takes on the aura of a reality which is then enforced upon the bodies of all subjects, including the bodies of officials, all under the rhetoric of access to justice. Access to justice becomes an

¹⁰ See generally, Kelsen, *General Theory of Law and State*, A. Wedberg trans. (New York: Russell and Russell, 1961), 35; *Pure Theory of Law*, M. Knight trans. (Berkeley: University of California Press, 1970), 2. *General Theory of Norms*, "Note 33," 296-97.

access to a language, a very special language which expert knowers alone lay claim to know and to enforce against non-knowers.

The model of access to justice as access to a professional language of significations externalizes justice in a second manner. For it is not any significations which matter when one is analyzing access to justice. The network of signs must possess a grounding or foundation in some one basic document, say the *Charter of Rights and Freedoms*, or in some one presumption which all signs or which legal reasoning shares. Kelsen called such an assumption as the *Grundnorm* or Basic Norm. The important point here is twofold. First, the basic assumption is adapted to the prior structure of signs and not the signs to the basic assumption. That is, one must first have posited signs before one can have a presupposition.

Second, the access to justice as a language reinforces the existing semi-otic structure. All the while that the critic believes that s/he is gaining clarity and precision to the grounding of the structure of signs, the grounding slips beyond the horizon of the analyzable. Access to justice once again becomes an access to the inaccessible.

Third, and most importantly, for the signs to possess authority, they must possess a grounding in some authorizing origin which is fundamentally different from ordinary rules and principles as signified through familiar and recognizable legal signs. That requires, though, that the grounding be external to such signs. For, if only an ordinarily posited sign—posited by a judicial or legislative institution, that is—the final sign will not finalize any trace of signs. The foundation of the significations of categories, to be a foundation, must be radically other to the language of the structure. It must be neither perceptible, nor verbalized, nor written down as a sign (for if it were, it would no longer be a foundation but rather, an ordinary sign like all the others). If justice lies in the basic foundation of a legal structure—in the *Charter* or, even more basic, in the belief that we ought to follow the *Charter*—and if the structure is understood as the network of signs which represent legal doctrines, rules and principles, then justice remains a transcendent externality to the legal structure, an "ought" in contrast to the "is" of a legal reality, an inaccessible "ought" which, being unanalyzable, exists only on faith. Once again, access to justice rhetoric, under the second model, is an access to a mystical non-reality.

4. The Social Convention Model

Let us turn to a fourth model of access to justice. Here, justice is associated with the unspoken social practices of a community. The social practices emulate a deep bonding between official and convention and between non-official and convention. Trust and friendship exemplify such a bonding. The social convention is unspoken and unwritten. To that end, access to justice has sometimes the role of articulating and analyzing the scope of unspoken practices of an institution or a structure of institutions. Access to justice here involves an access to the "law in practice" as opposed to the "law in books", it is sometimes said.

Studies have gone a long way to asking whether the signs and thoughts of officials actually coincide with the trust of the social conventions. A lack of

such a nexus with the social conventions de-legitimizes a group of rules or legal practices. Proposals for reform follow. For example, some studies claim to identify the empirical social practices of the police in order to expose how radically the practice departs from the expectations and assumptions of the general public or, of the law enforcers. To the extent that the unwritten practices (or, for that matter, the written formal rules) depart from the foundational unwritten social conventions expected of the police: to that extent, the police practices undermine and contravene access to justice. The social conventions lie hidden behind the articulation of procedures and rules and decisions of institutional authors and officials. As the Supreme Court of Canada has emphasized in the *Patriation Reference*¹¹ and in the *Secession Reference*,¹² the unwritten and unspoken conventions are more fundamental than the wills of the institutional authors as expressed in written codes and judicial decisions. Such unwritten conventions found or ground legality. And yet, the Court has advised, such conventions are unenforceable by a court. Why the unwritten social conventions to which we are bonded are excluded from legal existence becomes the critical issue for this model of access to justice.

This issue, the issue of the exclusion of the moment of bonded-ness from legal existence, is the critical issue for the social conventions model of access to justice. For justice is understood to be constituted from the social conventions. But the conventions, to be conventions, are unwritten and unspoken. If articulated as a rule, the articulated rule is no longer a social convention but a signified object in legal consciousness. It is in writing. As a written rule, the rule is enforceable as part of the legal structure. The rule sets out the articulatable grounding of the legal structure. The representation of the convention as a rule intercedes between the official's consciousness and the unwritten social convention. At best, there is a reflective *Sittlichkeit* which has lost the immediacy or presence which characterizes the unwritten bonded-ness of official to a social convention such as exists in a social relationship of trust between two friends. Only the written rules—the statutes, regulations and written judgments which may or may not codify social conventions—are recognized as analyzable units in the legal structure. H.L.A. Hart distinguished between the two when he claimed that secondary rules, of which the rule of recognition was the most important, could only “approximate” the “unspoken judicial practices” which founded the legal structure of a modern state. Hart characterized the unspoken judicial practices as a bonding between official and practice. But the practice was outside the system of enforceable legal rules. The social conventions, being unspoken and unwritten, dwelled in a “pre-legal” realm. The rule of recognition, that is, “recognized” the bonding. But, once recognized, the convention became an articulated rule which was enforceable as part of the legal structure.¹³

11 [1981] 1 S.C.R. 753.

12 [1998] 2 S.C.R. 217.

13 This interpretation of Hart is elaborated in Conklin, *The Invisible Origins of Legal Positivism* (Dordrecht:Kluwer, 2001), chap. 8.

The consequence for access to justice as a subject of analysis, then, is that, once again, justice is inaccessible. For justice is associated with the unspoken judicial convention. But the convention can only be re-presented or approximated through a secondary rule. One can only access the written rule, not the social convention which the rule represents. Once again, justice is an "ought", absent from the legal structure. Justice is even absent from the foundation of the structure if one associates the foundation with the written constitution rather than with the social convention which the rule represents. Access to justice is an access to the inaccessible. Being inaccessible, justice is invisible. Access to justice is a possibility, not a reality as the "social convention" model understands legal reality. Access to justice, once again, "exists" on faith.

5. The "Law and..." Model

There is one final model of access to justice. This has been what has been called the "law and..." model. Access to justice scholars have gleaned whatever they could learn from ethics, feminism, economics, psychoanalytic theory, history, political theory, french social theory, literary criticism and perhaps even some yet to be uncovered discipline. The *Access to Justice Yearbook* has sometimes exemplified this endeavour, particularly by privileging theories of justice as elaborated in the philosophic discourses of ethics and political theory.¹⁴ The importance of the latter disciplines has been manifested in professional law schools in the usual requirements that each student take at least one "perspective" course during their law school career. In addition, the professoriate has created grand national and international associations such as law and society, law and literature, the sociology of law, law and psychiatry and many others. When one turns to the "law and..." perspective of legal pedagogy, one implicitly claims that the "and society", "and literature" and "and economics" element of the binary is exterior to legal reality. The "and literature" and "and society" and "and economics" perspective offers an external transcendent *situs* from which to re-interpret the legal structure which is postulated as the true/real. Once

¹⁴ See, e.g., the important essays about the Hepatitis C moral scandal in Canada in C. Brown, "Eight Questions About No-Fault Compensation for Blood-Product Harm" in (2000) 18 *Windsor Y.B. Access Just.*: 217-225 and B.M. Dickens, "Justice, Compensation and Hepatitis C" in (2000) 18 *Windsor Y.B. Access Just.*: 226-32; K. Neilson, "Rights-Based Ethics: A Critique and Replacement" in (1994) 14 *Windsor Y.B. Access Just.*: 162-94; D. Newman, "Individual, Subnational, and International Identity: a Critique of Dworkin's Conception of Community" in (1999) 17 *Windsor Y.B. Access Just.*: 86-01; "Justice and Ideology: Ideology as Justice" in (1981) 1 *Windsor Y.B. Access Just.*: 165-78; P. Hughes, "Feminist Theory: A New World View" in (1985) 5 *Windsor Y.B. Access Just.*: 39-101; R. Nordahl, "The Place of Community in Dworkin's Jurisprudence" in (1992) 5 *Windsor Y.B. Access Just.*: 263-92; S.V. LaSelva, "Does the *Canadian Charter of Rights and Freedoms* Rest on a Mistake?" in (1988) 8 *Windsor Y.B. Access Just.*: 217-33. An intriguing analysis of women "outside of economic theory" and women "in legal theory", offers insightful reforms of the legal structure at the same time that it reinforces the "is" reality of a legal structure in D.M. Eansor, "The Federal/provincial/territorial Family Law Committee's Report and Recommendations on Child Support: Charting a New Journey with Obsolete Maps" in (1994) 14 *Windsor Y.B. Access Just.*: 397-419.

again, the legal structure is accepted as the Real and all access to justice accepts the true/real as the referent for "law and..." analysis. The point, once again, is that in institutionalizing the "law and..." perspective, we have postulated that justice dwells outside the legal structure. That is, if only we examined law through literature or feminism in the "other" disciplines, then, we would gain access to justice. Literature or psychiatry or analytic philosophy or some other discipline may provide the archimedean point from which to analyze the hidden assumptions and claims of legal discourse. Justice is assumed to dwell in this external archimedean point.

Once again, though, justice is projected as outside the legal structure, as unreal, as an "ought" or an ideal. Like the earlier models of access to justice, the "law and..." model reinforces the belief that legal existence lies in a structure. The boundary of that structure separates the Real from the Unreal. The given reality is the referent of the "law..." perspective. There is no necessity, only a hope, that law be different from its present metaphysical or institutional structures. Of course, literature and jurisprudence and economics and psychiatry and perhaps analytic philosophy provide an opportunity to be more enlightened in the good sense of the term. But the "law and..." approach assumes a gap between the "is" and the "ought." The "law and..." perspective offers the "ought" and the existing structure of legal doctrines and institutions constitutes the "is". The "is" is constructed from a humanly-constructed structure which constrains the options before an official. The structure is the ultimate referent which counts as a legal reality. Justice, represented by the "law and..." perspective, is exterior to such a legal existence. Access to justice, once again, becomes an access to something beyond legal reality. That absent object, represented by the non-law discipline, locates justice. The best we can do is to critique the legal structure from the viewpoint of the "outsider" discipline. Access to justice becomes a censorial jurisprudence. The aim of the critic is to change the legal structure so as to make it correspond with the archimedean point of view in literature or psychiatry which the law and the model itself postulates as unreal.

Access to justice analysis, then, postulates a reality constituted from a structure which excludes an "ought" world. Unlike the sources thesis or the social convention thesis, though, the "law and..." model entertains that it is possible to get on the other side of the fence, to understand the "ought" world of non-law, to analyze it, and to even be able to retrieve such a non-law world to the legal reality. But the "law and..." model takes the structure for granted. Even if the connection is made and even if the legal structure incorporates some insights about justice offered in a literary classic or a philosophic treatise or a psychiatric method: even then, justice remains external to the revised legal structure and the latter is a "given". In such a situation, justice is assimilated into legal discourse. Despite this incorporation, there is a remainder, an unincorporated justice which the legal structure excludes. Access to justice remains an access to the external untold stories embedded in literature and psychiatry and the like. Our reforms reinforce the possibility that access to justice remains an access to something outside the legal structure, beyond legal reality. Access to justice is

access to the inaccessible and that inaccessible is a mere possibility which we officials accept on faith.

The key here is that literature, economics, feminism or any other "non-legal" perspective provides the vantage point from which to identify the analytic units, to analyze them and to critique them. Taking the separation of the legal structure and justice for granted, the "external" disciplines are considered absent from the legal structure. The absence of the absent "outside" discipline drives the access to justice critic to continually reappraise the legal structure from "the outside" as it were. The traditional absence of rich materials in legal analysis has long since encouraged legal scholars to incorporate these outside disciplines into their analyses. A formalist legal reasoning has been de-stabilized when the works of Foucault or Lacan or Derrida have been retrieved. We now begin to appreciate that the legal doctrines, institutions and reasoning could be other than they are. Justice is considered best represented by the shared conclusions about justice in literature, economics, political theory, feminism, critical legal studies or the like. The latter offer an absent source from which the legal "ought" can be derived and from which the access to justice critic can critique the doctrines, procedures and institutions.

And yet, this very appeal to the externally situated discipline ironically reinforces the legitimacy and "given-ness" of the legal structure as separate from justice. The "law and..." movement is built upon just such an externalization of justice from the Reality of the legal structure. The structure functions like a fence separating two properties. The boundary separates law from non-law. But in order to know what is law, one must implicitly claim to know what is on the other side of the fence, the justice side, despite the exclusion of the latter from legal reality. The "law and..." model makes that claim explicit. And yet, it accepts the is/ought, the Real/Unreal dichotomy as the paradigm of legal analysis.

Conclusion

My point, then, is that each important model of access to justice is immersed within the language of a structure which is considered separate from justice. We have endeavoured to make our research socially relevant. We feel good when we have contributed to the cause of access to justice. But we have been chasing after the unknowable when we worked within the is/ought, Real/Unreal paradigm. We have been doing so in each of the models which our analysis has presupposed. The consequence may well be that we have functioned ideologically for we have reinforced the given-ness of the legal structure at the very moment that we implicitly accepted the is/ought division of legal reality from the locus of justice in a non-reality.

This separation has occurred at the risk of concealing the experiential bodies in concrete circumstances. The body, not the cognitive act of analysis of the structure, *experiences*. Legal curiosity may well be an experience. The experience, though, affects the body, not the mind. In the analytic project, a legal person displaces the concrete subject who, before being categorized, had possessed a biography in socially contingent circumstance. My point is that the displacement takes place *inside* the language of the

legal structure as the legal knower signifies a reported event into a net of signs which other lawyers and judges will recognize as authoritative. The signifiatory project *produces* a legal event and this event conceals the indigenous experiences which the concrete subject voices before lawyers take over and before they transform the voices into the singular voice of a professional language.

In sum, the legal signification of a social event or of a text displaces the non-knower's embodiment of their meanings with their past experiences and expectations. Their bodies are assimilated into the invisible boundaries of the legal categories which only the knowers can recognize because the categories are signified by the knower's secondary discourse. The legal categories come to be recognized as the true/real. Lawyers call these legal categories "practical" and the enforcement of their categories as "legal practice". The structure of such categories is analyzed. Contrary to the five models of access to justice, justice is not expelled as outside the structure. Rather, justice is concealed inside legal language.

It is important, as an access to justice issue, that what is concealed is the experiential body. This is not the physical-chemical body which Galileo, Newton or Descartes described. It is not the body composed of physio-chemical forces which impact upon one another. It is not the body which our surgeons carve up or our family physicians diagnose, invade, excise or toxify. It is not the body which nurses and interns name as "the difficult case", the "ulcer case" or the "Room 373" case. Such a physio-chemical body is a passive object which, to use Spinoza's distinction, is "acted on" by the legal structure which is postulated as exclusive of legal reality.

So, the five models of access to justice have postulated the location of justice as external to the legal structure. The access to justice movement expels justice as unreal, as impractical, as inaccessible to the language of the officials, as unreal, as conquerable though unreal until our analysis conquers it. This access to justice reinforces the given-ness of the boundaries of what is analyzable. The shared commonality of access to justice analysis has been the acceptance that laws are signified inside a sovereign legal structure. The language of this structure has been considered written in the form of statutes, ordinances, judicial precedents, and other forms of legal writing. What is unwritten is usually admitted to be fundamental to the legal structure. And yet, the acceptance of the structure constituted from writing expels the unwritten as pre-legal, primitive, savage, barbaric, unrecognizable, and alien to the rule of law. What is unwritten is excluded as non-law, as outside the legal structure, as impractical. The conventions and tastes and many voices of diverse ethnic groups are associated with this pre-legal. To the extent that indigenous diverse languages are recognized by the language of jurists, judges and lawyers, that recognition takes place inside the network of legal signs which define the legal structure and, therefore legal reality. That is, if recognized, the languages of ethnic groups are assimilated into the dominant language of the professional expert knowers. Such knowers possess a complex, scientised vocabulary and grammar which is alien to the everyday languages of the non-knowers. Not unlike the medieval guilds, special law societies protect, enforce and regulate the knowers' control of

the professional language. Such societies also exclude whomever they consider a non-knower such as a political scientist who has spent her/his life studying constitutional law or an empirical sociologist who has studied the actual legal practices of a particular social behaviour. Even though constitutional, international and administrative human rights codes speak in the language of the non-lawyer, it is only a matter of time before the expert knowers of the vocabulary take over. The non-knowers cannot respond except through re-presenters of the special language. The legal discourse becomes monological *vis-a-vis* the non-knowers and dialogic amongst the knowers. The legal discourse of the legal structure of a modern state is ultimately violent against the embodied meanings lost in the analytic project. And any group which insists upon maintaining the authority of its own language (which includes the religious and social conventions of the persons who live through such indigenous languages) is subject to the violent exclusion from the state. The exclusion takes the form of torture, ethnic cleansing, disappearance of citizens, mass murder, banishment and all the subtle forms of exclusion which marked the twentieth century. The exclusion also takes the form of analytic distinctions.

Against this background, one can appreciate the cultural imperialism which we progressive activists in the West have imposed upon others who do not know nor share our signified structures. We have claimed a Kantian universalism to our human rights codes. Ours has been a language of *Recht* where officials of the state have posited a rational, written, transcendental human rights over and above all indigenous languages. Not all ethnic groups in the world accept such a rational written configuration of signs. Inarticulated bodily rituals and symbols – not signs which represent or signify categories—are important expressions of a modern trial as much as a pre-European tribal order. The most important of everyday languages—the bodily gestures and symbols—are excluded as pre-legal, affective, irrational and alien to the rule of law. The language of *Recht* is a monological language where the non-knower cannot respond to the expert knowers except through representatives who know the language and except through their scientized vocabulary and grammar. A monological language of professional knowers is superimposed upon and slowly assimilating radically different everyday languages—over 6000 such languages (and cultures). We officials judge all indigenous languages through the rationally coherent structure of international, constitutional and commercial writing.

Contemporary public international human rights law exemplifies the problem. International rules first recognize the sovereignty of the state and its own chains of legal signs as the ultimate source of social practice. The international rules have then been posited above the hierarchy of authoritative rules *inside* the structure of rationally coherent concepts which access to justice practitioners take as their referent for analysis and argument. All that human rights laws have done, that is, is to recognize and then to reinforce the sense of legal authority associated with the sovereign state since roman times. International human rights norms have reinforced, that is, the quest for a singular *arche* or origin or grounding. But a quest for a singular origin is peculiar to only one manner of organizing international rela-

tions.¹⁵ Such a quest plays with categories of the mind as if such categories alone constituted the true/real.

But such a quest has been an intellectual quest which conceals—no, cognitively de-capitates—the experiential body of jurist and addressee alike. We have sought a cognitive order with new international norms. But this cognitive order has sought a rational completeness and holism which can only come if we excise the experiential body associated with diverse ethnic languages. We have constructed a legal reality which externalizes justice as outside our legal structure. Justice is considered unreal, impractical, an “ought”, inaccessible from within the reality which officials take as a “given”. We access to justice analysts have, that is, continued the European project all in the name of a universalism and humanism which conceals the very pain and suffering of those who cannot speak or write in the universalist language of lawyers and judges. We have called our rationalist project “global justice” and yet the language of the “global justice” is a concealing and violent justice which assimilates and expels as non-law the indigenous experiences which ethnic groups and the officials themselves bring *into* their languages. A global justice would address the latter. But by addressing the experiential body of the other, global justice would undermine the legal language of cognitive structures which we have privileged for two millenia.

By privileging the concepts of the mind and accepting the true/real as a structure which demarcates an “is” from an “ought”, apologists of access to justice have been misdirected in their analyses. Access to justice has been an access to the lawyer’s language which conceals the bodily meanings which the non-knower brings into her/his own signs. Instead of directing access to justice analysis towards the procedural, institutional, semiotic, conventional, and multi-disciplinary character of an assumed legal structure, it is about time that we began to retrieve the experiential meanings which such a structure and its language conceal.¹⁶ I cannot offer a blueprint for such a disclosure. Indeed, to do so would entrap me in the very positivism which it is the aim of access to justice, I have just suggested, to undo. I can, though, offer the questions which access to justice scholars are encouraged to ask if they wish to un-conceal the layers and layers of bodily meanings which our analytic thought has heretofore done so well to conceal despite our obvious contrary desire of doing so.

15 See, e.g., A. Bozeman, *Politics and Culture in International History: From the Ancient Near East to the Opening of the Modern Age* (Princeton: Princeton University Press, 1960; New Brunswick, USA: Transaction Publications, 1994).

16 See especially, A. Sarat, “Pain, Powerlessness, and the Promises of Interdisciplinary Legal Scholarship: an idiosyncratic, autobiographical account of conflict and continuity” in (2000) 18 *Windsor Y.B. Access Just.*: 187-212; P. Lancaster, “Omaminomowayak: Anishinaabe Justice in Muskrat Dam First Nation” in (1994) 14 *Windsor Y.B. Access Just.*: 331-49; R. Devlin, “Law, Postmodernism & Resistance: Rethinking the Significance of the Irish Hunger Strike” in (1994) 14 *Windsor Y.B. Access Just.*: 3-81. For other literature see Conklin, “Alternatives to the Study of Legal Texts: An Annotated Bibliography of Legal Phenomenology and Legal Semiotics” in (1998) 14 *Current Legal Theory*: 3-61. The general theory of the retrieval of a dialogic and embodied act is explained in Conklin, *The Phenomenology of Modern Legal Discourse*, chaps 3, 7 & 8. For an example of how the monologic legal discourse conceals embodied meanings see Conklin, “The Transformation of Meaning: Legal Discourse and Canadian Internment Camps” in (1996) *Intern'l J. for the Semiotics of Law*: 227-56.