HUMAN RIGHTS, LANGUAGE AND LAW: A SURVEY OF SEMIOTICS AND PHENOMENOLOGY*

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In this survey, the author suggests that individual experience — ostensibly that which informs and provides continuous momentum for legal action — is actually subsumed within the language of law. A sanitization of the pain suffered by human rights victims occurs when lawyer's 're-present' the circumstances of the violations to which they were subject in the 'magic terms' of human rights enactments. This is at odds with the notion that human rights are universally shared and independent of posited laws. This notion is seen in Kant, whose analysis of human rights is predicated on a setting aside of empirical considerations and an apportioning of human dignity to a noumenal realm. Though a Kantian spirit informs provincial human rights codes and constitutional bills of rights, the process through which the legal system abstracts intermediate concepts from the basic concept of human dignity creates a knowledge distinct from the situation giving rise to the complaint. Such knowledge becomes the province of experts and focusses on the concept of the legislator's intention, rather than the circumstances of the living subject, whose suffering initiated the litigation.

The 'juridification' of experience is also problematic because language in general is not a transparent conduit of experience. Lawyers, judges, and other legal 'experts' have different associations for legal 'magic terms' than do non-expert lay people. A legal metalanguage is thus created which masks the underlying experience of the subject, simultaneously (seemingly) authoritative for resolving dispute and divorcing 'juridical' activity from the very subject whose pain is the prime motivator for that activity.

This survey examines the effect of the creation of these 'magic terms' in the

Dans cette étude, l'auteur laisse entendre que l'expérience personnelle — apparemment celle qui informe l'action juridique et lui donne une impulsion soutenue — est en fait subsumée sous la langue du droit. On aseptise la douleur éprouvée par les victimes de violations de droits de la personne, quand un avocat ou une avocate évoque les circonstances de ces violations dans les « termes magiques » des textes de loi relatifs aux droits de la personne. Ce résultat va à l'encontre de l'idée que les droits de la personne sont universels et indépendants des lois adoptées et posées en principe. Cette idée est avancée par Kant, dont l'analyse des droits de la personne est fondée sur la mise à l'écart des considérations empiriques et l'inclusion de la dignité humaine dans un domaine nouménal. Bien que l'esprit kantien informe les codes provinciaux des droits de la personne et les chartes des droits de la personne enchâssées dans une constitution, le processus grâce auquel le système juridique extrait des concepts intermédiaires du concept fondamental de dignité humaine crée un savoir distinct de la situation qui a donné lieu à la plainte. Ce savoir devient le domaine des spécialistes et se concentre sur le concept de l'intention du législateur, au lieu de la situation dans laquelle se trouve l'être humain, dont la souffrance est à l'origine du litige.

En outre, la « juridification » de l'expérience est problématique parce que la langue n'est pas, règle générale, un véhicule de l'expérience qui est transparent. Les avocats, les avocates, les juges ainsi que d'autres spécialistes du droit associent ces « termes juridiques magiques » à d'autres choses que ce à quoi les non-spécialistes les associent. Ainsi on crée un métalangage juridique qui occulte l'expérience sous-jacente du sujet et qui, par la même occasion, a le pouvoir (apparemment)

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constitutional sphere in general — drawing on both actual and hypothetical examples — and in more specific human rights contexts and law reform proposals. It draws on an extensive body of academic discourse on language in general, and legal language in particular.

de régler les différends et de dissocier l'activité juridique du sujet même, dont la douleur est la principale motivation de cette activité.

L'auteur examine l'effet de la création de ces « termes magiques », aussi bien sur le domaine constitutionnel en général — en donnant des exemples réels et hypothétiques — que sur les contextes touchant plus précisément les droits de la personne et les propositions de réforme du droit. Il puise dans un vaste ensemble de discours universitaires sur la langue en général, et sur la langue du droit en particulier.

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I. INTRODUCTION

'Human rights' has become a magic name in a scientized language. Constitutional and statutory enactments claim to 'guarantee' human rights. Lawyers evaluate the circumstances of a case in terms of the standards articulated in such enactments. At first sight, all seems well. Lawyers write their letters, draft their facta, examine witnesses and articulate arguments using the enacting words as their reference points. But at the very moment that lawyers re-present circumstances in terms of the words of human rights enactments, the circumstances are transformed into a network of terms which sanitize the pain which citizens incur during the events leading to the prosecution of a human rights violation.

The provincial human rights Acts and the *Canadian Charter of Rights and Freedoms*,[1] for example, suggest that living beings universally share human rights, independent of posited laws. The concepts enacted in the human rights statutes and constitutional texts are said to 'trump' all actions which conflict with human rights. In Canada, the 'constitutional' protection of most rights may only be overtly overridden if a legislature prefaces its limitation with special words ("notwithstanding the *Canadian Charter of Rights and Freedoms*") and explicitly states that it is overriding particular concepts represented in the *Charter*. The constitutional amending process enacted in the *Constitution Act, 1982*,[2] makes it very difficult for appropriate institutions to change the 'trumping' character of the words in the *Charter*.

Much has been written about the universal character of human rights. Immanuel Kant elevated this universalism by apportioning human dignity to a noumenal realm immunized from the contingent considerations of empirical inclinations. Within the empirical or natural world, the existence of beings depends upon their relative value as a means to others' ends, according to Kant. Within a world purged of all empirical conditions, however, beings are objective ends: they exist as 'ends in themselves'. From this distinction, Kant draws out the 'practical imperative' that one should "act in such a way that you treat humanity, whether in your own person or in the person of another, always at the same time as an end and never simply as a means."[3] Kant calls the regime where all beings are treated as ends, 'the Kingdom of Ends'. This Kingdom is not the civil society of human rights codes and constitutional bills of rights; it is abstracted from the personal differences of living beings. The center of such a Kingdom is a rational person who is systematically 'united' with all other rational persons. One cannot allot a market price to such a rational person. For a price can only replace one object with another as its equivalent. All rational persons, being purged of all empirical particulars in the Kingdom of Ends, admit of no price because they are ends in themselves, intrinsic rather than instrumental ends. Such persons possess dignity.

The Kingdom of Ends is not a 'real' world by Kant's own admission. He conditions the dignity of all rational persons with "whoever, then, holds morality to be something real, not a chimerical idea without any truth."[4] That is, the dignity of all persons hinges upon an 'if' clause: namely, *if* we wish to be moral, *then* we must purge ourselves of all

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[1] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

[2] Being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

[3] I. Kant, *Grounding for the Metaphysics of Morals*, trans. J.W. Ellington (Cambridge: Hackett Publishing Co., 1981) line 429 [hereinafter *Grounding*].

[4] *Ibid.* at line 445.

inclination and transfer our claims to duties or 'oughts' when we return to the realm of human beings. At one point, indeed, Kant suggests that the perfectly pure will is divine or holy. In the civil society, imbued as it is with social and economic contingencies, we can only tirelessly aspire to reach the Kingdom by transcripting the principles of morality into duties which we ought to fulfil. The dignity of each and all rational beings is one such formulation of the categorical imperative. Each rational person is self-legislating or autonomous in that he or she is an intrinsic 'end in itself' in the Kingdom of Ends. At the moment of transcription, our categorical imperative becomes practical, in contrast with a teleological view of morality which projects happiness as beyond the determinate actions of practical reason. Constitutional bills of rights and human rights statutes aid in rendering the moral law practical, Kant believed — and he has not been alone in this belief.

II. The Loss of Pain

The Kantian story is far more complex and majestic than I have indicated. The important point is that the words of our provincial human rights codes and constitutional bills of rights ring with the Kantian spirit. Most of us would agree, I hope, that we ought to treat each other with respect — not an appraisal respect which measures the merits of our actions vis-à-vis a market price, but a respect which recognizes each and all as an 'end in itself', irrespective of all empirical contingencies and all civil laws. Most of us would agree that social institutions, including corporations, unions and the family, possess moral duties to encourage and protect the dignity of individuals and groups. To that end, juridical officials — legislators, judges, lawyers, bureaucrats, police and the like — posit and interpret laws. Juridical officials attempt to analytically draw intermediate concepts from the basic concept of the dignity of rational persons. These intermediate concepts are analyzed and distinguished. Legal 'tests' are said to represent or stand for their application. Judges and scholars string them together into more 'permanent' doctrines. A *knowledge* of the intermediate concepts associated with the basic concept of dignity becomes a knowledge for experts because the expert claims to 'know' those concepts represented by the special terms in human rights acts and constitutional charters. The expert knower strives to intellectually grasp the concepts of the constitutional code, the statute or the doctrine, by reaching for the concept(s) which some author — the Legislature or the 'Founding Fathers' — had 'in mind' when he or she represented that concept or those concepts in posited laws. In the process, the living subject, whose pain initiated litigation, is forgotten except in name.

Let me offer some examples of how this loss is manifested through the interpretation of codes and doctrines which allegedly appeal to individual and collective human rights.

A. *A Story about Magic Terms*

The human rights language of constitutional experts, I believe, plays an important role in the constitutional crisis which Canada presently faces. Let me recount the story about the words, 'right of self-determination', as they relate to the constitutional recognition of the aboriginal peoples of Canada.

Representatives of the aboriginal community have sought to have their culture and customs recognized in the authoritative text called the *Constitution Act, 1982*. The text of an agreement signed by the eleven governments in Canada on August 28th, 1992

(known as the *Charlottetown Agreement*), for example, provided in section 41 that "the Constitution should be amended to recognize that the Aboriginal peoples of Canada have the inherent right of self-government within Canada."[5] Aboriginal governments were to be recognized as "one of three orders of government in Canada."[6] Section 47 of the *Charlottetown Agreement* then provided:

> A law passed by a government of Aboriginal peoples, or an assertion of its authority based on the inherent right provision may not be inconsistent with those laws which are essential to the preservation of peace, order and good government in Canada.

But these very clauses would have had to be interpreted in the years ahead. The *concepts* with which judges associated the magic term or signifier, 'the inherent right of self-government', would have had to be expressed through words or, more correctly, signifiers which lawyers recognized as meaningful and authoritative. For example, the inherent right was stated to be limited by laws 'essential to the preservation of peace, order and good government in Canada'. Juridical officials have interpreted the words 'peace, order and good government' for over 125 years, these being the magic signifiers in the declaratory clause of section 91 of the formerly named *British North America Act*.[7] Because they were already familiar with the concepts associated with the magic phrase, 'peace, order and good government', the 'inherent right of self-determination' for Aboriginal peoples was not placed on a *tabula rasa* for the lawyer. The right was already embedded in chains of signifiers — a whole world of magic terms such as the 'emergency doctrine', the 'national dimensions test', the 'uniformity of legislation test', and the like. Without much ado, the expert knowers of the phrase 'peace, order and good government' would soon incorporate other words such as 'emergency doctrine' and 'national dimensions test' into their interpretation of 'the inherent right of self-determination' in section 47 of the *Charlottetown Agreement*. Whatever the signatories' original intent of the phrase 'the inherent right of self-determination' and whatever the meaning which Aboriginal peoples — drawing from their own experiences — would bring *into* the phrase, the right would be read by expert 'knowers' through the concepts associated with chains of signifiers with which the *experts*, not the signatories and Aboriginal peoples, were familiar. Ironically, instead of being freed from the chains of federal statutes, the Aboriginal peoples would find it difficult to escape from the *language* of the expert knowers of the magic term 'inherent right of self-determination'.

B. *A Story about the Magic of Repatriation*

Let us assume another scenario relevant at the moment of writing: in the struggle surrounding Quebec independence, the federal government offers to 'repatriate' the Constitution to Quebec so that authority concerning education, language, the arts, the economy and social legislation would be recognized in a Quebec government entrenched

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[5] A similar provision was also included in the Joint Parliamentary Report on a Renewed Canada. See *The Report of the Special Joint Committee of the Senate and the House of Commons: A Renewed Canada* (Ottawa: Queen's Printer, February 1992)(Co-chairs: G. Beaudoin & D. Dobbie). The *Renewed Canada* report recommended at page 29 "the entrenchment in section 35 of the *Constitution Act, 1982* of the inherent right of aboriginal peoples to self-government within Canada."

[6] *Consensus Report on the Constitution*, Charlottetown, (Final Text: August 28, 1992) [also known as the *Charlottetown Agreement*] s. 47.

[7] Now the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3.

with a 'special status' in a loosely held confederation called Adanac. Indeed, various Quebec government *Reports* wrote in the spirit of such a proposal during the 1980's. The *Reports* emphasized the need for the repatriation to the Province of Quebec of the posited sources of legislative authority which were believed indispensable to the preservation of Quebec culture.[8] The repatriation, it would seem, would be interpreted in terms of the collective right of Quebecois to live generally according to their own laws, customs, educational values and culture.[9] Not unlike the judiciary's re-reading of the *Charter* during the 1980's,[10] the entrenchment of the 'special status' of Quebec in the basic text of Adanac's Constitution would not be an original or new act immunized from the constitutional discourse of the former regime called 'Canada'. The constitutional discourse of Canada has already used similar magic terms with special concepts which constitutional experts can claim to 'know': for example, in the *Parsons* and *Local Prohibition* cases,[11] Quebec's special status was recognized as a bulwark against the uniformity of legislation; in *Liquidators of the Maritime Bank of Canada*,[12] the Provinces were held to possess the residuary of legislative authority; in *Re Board of Commerce Act, 1919*, the Provinces were described as possessing "quasi-sovereign authority";[13] and the Supreme Court Justices in *Re Regulation and Control of Aeronautics* appealed to "the original contract" surrounding the creation of the state of Canada. One term of such a contract was said to be "the preservation of minorities."[14] In response to this 'collective right', the *Charlottetown Agreement* provided that the Constitution should recognize and clarify "the exclusive provincial jurisdiction" over various

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[8] See especially Commission on the Political and Constitutional Future of Quebec, *Report* (known as the Belanger/Campeau Report) (March, 1992); and Quebec Liberal Party, *Report: A Quebec Free to Choose* (January 28, 1991).

[9] For a discussion of this 'collective right' see G. Lafrance, ed., *Ethics and Basic Rights* (Ottawa: University of Ottawa Press, 1989) c. 5.

[10] See generally W.E. Conklin, *Images of a Constitution* (Toronto: University of Toronto Press, 1989, 1993) [hereinafter *Images*] c. 6, 7; and W.E. Conklin, "Teaching Critically in a Modern Legal Genre" (1993) 8:2 Can. J. of Law & Society 33 [hereinafter "Teaching Critically"] at 48-50. In the latter, I argue that lawyers had to read "a free and democratic society" of the *Charter*, in terms of the pre-existing chain of signifiers which lawyers — not philosophers, doctors, journalists, or non-professional citizens — recognized as authoritative. When lawyers turned to their chains, they discovered that, with exceptions such as in India, common law lawyers had not elaborated a chain of signifiers for "a free and democratic society" as they had for "reasonable limits." As a result, freedom and democracy collapsed into the pre-existing web of signifiers associated with "reasonable limits." The secondary language overcame the meanings which non-lawyers might have given to the signifiers 'free' and 'democratic'. The meanings of non-lawyers became enclothed, concealed, hidden. For the non-lawyer, *Charter* language evolved into a dead language although, for lawyers, *Charter* language became alive. The greater the intensity with which lawyers could bring meaning into the signifiers "reasonable limits" by differentiating between pre-existing signs which lawyers already recognized as part of their language, the more alive was the 'original' text for lawyers.

[11] *Citizens Insurance Co.* v. *Parsons* (*sub nom. Queen Insurance Co.* v. *Parsons*) (1881), 7 App. Cas. 96, 8 C.R.A.C. 406 (P.C.), Sir Montague Smith; *Ontario (A.G.)* v. *Canada (A.G.)*, [1896] A.C. 348, 11 C.R.A.C. 222 (P.C.), Lord Watson.

[12] *Maritime Bank (Liquidators of)* v. *Canada*, [1892] A.C. 437, 10 C.R.A.C. 180 (P.C.), Lord Watson.

[13] *In Re the Board of Commerce Act, 1919, and the Combines and Fair Prices Act, 1919*, [1922] 1 A.C. 191, (*sub nom. Canada (A.G.)* v. *Alberta (A.G.)*) (1921) 60 D.L.R. 513 (P.C.), Lord Haldane.

[14] *Re Regulations and Control of Aeronautics (1931)*, [1932] A.C. 54, (*sub nom. Re Aerial Navigation*) [1932] 1 D.L.R. 58 (P.C.), Lord Sankey.

subject-matters.[15] The entrenchment of the special status of Quebec would be immersed in a pre-existing discourse which had already associated special concepts with the special magic signifiers in Adanac's new Constitution. The opening offered by Adanac's new text would be enclosed by the language of the expert knowers or, at least, those who would claim to be expert knowers. Paradoxically, at the very moment that the Confederation's new Constitution, through a written text called the "Constitution," recognized the repatriation of Quebec's political and cultural autonomy, this very recognition would be juridicalized so as to assimilate indigenous cultural values into the chains of signifiers which experts claimed to 'know' and 'practise'.

Even if a new sovereign state of Quebec were created, independent from the juridical language of Canada, the phenomenon which I am describing would not terminate. As Heidegger and Derrida suggest, one just cannot escape from language. Language exists before I enter the world. I express my thoughts and beliefs through language. I teach concepts through a language. I even think to myself through unexpressed words which gain their meaning through their relation with other words in my everyday language.

But I am not writing here about any language. I am writing about the language of experts who claim to know what the concepts associated with magic terms or names — such as 'freedom of speech', 'equal benefit of the laws', 'without discrimination', 'race', 'religion', 'colour', 'freedom', 'democracy' and many other words in a modern state — mean. It so happens that the expert 'knowers' whom I am considering are lawyers, rather than doctors or engineers or bankers. This is the tragedy of both old and newly independent modern states: at the very moment when the language of the state recognizes that human conduct and laws should conform with universal human rights, the expert 'knowers' of the concepts associated with those rights will incorporate the rights into magic words with their own special associated concepts. Only the expert 'knowers' can claim to 'know' authoritatively; that is, with authority. The experts *re*-present the magic names of a reformed and amended Constitutional text into a web of magic terms with which the experts *alone* are familiar. This re-presentation shifts the original pain of being offended (for example, through discrimination) from the pain of the living being who has suffered to the magic words and their associated concepts — an alien language which the pained individual or group does not and cannot recognize.

Recent studies of the Ontario Human Rights tribunal suggest that the pained individual is overwhelmed by the distant language of the experts. The expert's language cannot recognize the pain and suffering which any one individual or group has previously experienced without *re*-presenting the pain through signifiers which experts alone can 'know'. The magic names and their associated concepts become the important constitutents of human rights law. But they are the names and concepts of experts. To the extent that a reformed Constitution with a 'repatriated' Quebec were successful (through the juridification process of an existing or a new state) — to that extent — the pain and the idealism which motivated Quebecois to press for independence would have

[15] In particular, "labour market development and training" (s. 28), "cultural matters within the province" (s. 29), "forestry" (s. 30), "mining" (s. 31), "tourism" (s. 32), "housing" (s. 33), "recreation" (s. 34), and "municipal and urban affairs" (s. 35). Provincial legislatures are to have "the authority to constrain federal spending" that is "directly related" to these subject-matters. However, according to the *Charlottetown Agreement*, *supra* note 6, this authority was to be "accomplished through justiciable intergovernmental agreements".

to be assimilated into the juridical language. This is the paradox of the legal language of a modern state, not just of human rights law.

C. *A Story about the Juridification of Private Social Relations*

Let me refer to a third example of the juridification of social relations, this one from the private law area. The usual contract between a financial institution and a businessperson authorizes the secured creditor to place the borrower in receivership if the latter allegedly violates the terms of the contract. Expert knowers of the 'field' read such a demand note against the juridical requirement that the debtor be given 'reasonable time' to obtain alternate financing before the creditor can seize the assets through the appointed receiver. Now, the words 'reasonable time', in turn, are words which possess magic for expert knowers. The experts associate with the words, the concept that a relatively few minutes are sufficient to satisfy the requirement of 'reasonable time'. The words 'reasonable time' offer an appearance of procedural fairness at the same moment that they conceal the suffering of employees, small communities and owners who do not and cannot participate in the search for alternate financing. The magic term, 'reasonable time', recognizes the suffering of debtors only at the cost of assimilating the debtors into a chain of other magic names which the experts (and non-experts) take as authoritative of the Law.[16]

D. *A Story about the Juridification of Job Discrimination*

Let me take a further example, this one from the words believed to be supposedly fixed in the *Ontario Human Rights Act*.[17] From June 1974 to May 1978, Ms Bhadauria had applied for ten openings on the teaching staff at Seneca College.[18] A Court reported that she was "a highly educated East Indian woman" holding degrees of Bachelor of Arts, Master of Arts, and a Doctorate of Philosophy in Mathematics. She was qualified to teach in the Province of Ontario and had had seven years teaching experience. All positions for which she had applied had been publicly advertised. She was not granted an interview for any of the openings. Now, what is interesting is that all of us can

[16] For a further discussion of the assimilative character of the language of the experts, see especially W.E. Conklin, "A Contract" in R. Devlin, ed., *Canadian Perspectives on Legal Theory* (Toronto: Emond Montgomery, 1991) [hereinafter *Canadian Perspectives*] 207. For an analysis of the justice issues surrounding the juridification of economic pain see W.E. Conklin & J. Morison, "Public Issues in a Private Law World: The Case of the Appointment of a Receiver" (1987) 26 Osgoode Hall L.J. 45.

[17] R.S.O. 1990, c. H-19, as am. by S.O. 1993, c. 27 & c. 35. See generally the testimony before the Ontario Legislature concerning the general distancing of the Human Rights Commission and aggrieved subjects in *Hansard* (2nd sess., 35th Parliament, 25 May 1992) at 1519; *Hansard* (2nd sess., 35th Parliament, 26 May 1992); Government of Ontario Task Force, *Report: Achieving Equality: A Report on Human Rights Reform* (Toronto: Queen's Printer, 1992), especially s. 5, 7, 11, 13; Ontario Human Rights Code Task Force, *Getting Human Rights Enforced Effectively: An Issues Paper* (Toronto: The Task Force, 1990); Standing Committee on Government Agencies, *Report on the Ontario Human Rights Commission* (2nd sess., 34th Parliament, 1990); K. Norman, "Practising What We Preach in Human Rights: A Challenge in Rethinking for Canadian Courts" (1991) 55 Sask. L. Rev. 289; H. Kopyto, "The Bhadauria Case: the Denial of the Right to Sue for Discrimination" (1981) 7 Queen's L.J. 144.

[18] *Bhadauria* v. *Seneca College*, [1981] 2 S.C.R. 181, 124 D.L.R. (3d) 193, Laskin, C.J.C., rev'g (1979), 27 O.R. (2d) 142, 105 D.L.R. (3d) 707 (C.A.), Wilson J.A., rev'g the decision of Callaghan J. (unreported).

appreciate the feeling of emptiness and worthlessness when we have received a rejection letter in the mail for a job which we believed we were qualified to obtain. Indeed, it is difficult to put the felt experience of humiliation and self-doubt as marks on paper. After the initial feeling of inferiority, one might become angry or one might deny the experience of inferiority by rejecting the prospective employer as unworthy of one's professional or work experience and qualifications. Ms Bhadauria surmounted such initial feelings of pain. She applied ten times to ten different advertised openings at Seneca. Finally, she decided to go to a lawyer who launched a civil action, alleging that she had been discriminated against on the grounds of her ethnic origin.

The trial judge granted the lawyer's application as disclosing a reasonable cause of action, although the judge dismissed the action with a brief endorsement that Ms Bhadauria's situation was covered by the typification in another case. In the latter case, the judge had rejected a civil suit where a woman had alleged that she had been dismissed from her job on the grounds of her sexuality. The precedent provided that one should proceed with a complaint under the *Ontario Human Rights Code* rather than to proceed before the common law courts. The *Code* proceedings, however, allowed for substantially less damages. Further, the Board administrators alone, rather than the complainant, could decide whether a case should proceed. If they so decided, the Board, not the complainant, would guide the proceeding. The complainant would slide into the background.

The Ontario Court of Appeal held that the trial judge had wrongly typified Ms Bhadauria's circumstances as an 'Ontario Human Rights' case rather than as a matter of common law for the common law courts. The Supreme Court of Canada held that the Ontario Court of Appeal had wrongly typified Ms Bhadauria's situation, returning to the view of the trial court judge that she fell under the Ontario Human Rights situation rather than a civil law typification.

Now, what is striking about the reported reasons given by the Ontario Court of Appeal and the Supreme Court of Canada is that the higher Courts transformed her experience from an experience which *meant* something to Ms Bhadauria, into a typification which expert lawyers alone could recognize. This transformation took place *in the name of* Ms Bhadauria. It occurred at the very moment that the expert knowers of the *Human Rights Code* interpreted the magic term, 'discrimination on grounds of ethnic origin'. As the Supreme Court held, "the facts alleged in the statement of claim are to be taken, therefore, as provable according to their recitation."[19] The expert knowers took the discrimination against Ms Bhadauria as a 'fact'. The judges understood their whole project in terms of typifying her 'facts' correctly. To that end, the judges set out magic terms with proper names such as '*Christie* v. *York*' (1940), '*Re Wren*' (1945), '*Ashby* v. *White*' (1703), 'Fleming (5th ed., 1977)' and '*Human Rights Code*'. The judges searched for a category or typification common to these magic terms: namely, that the remedies in the *Human Rights Code* could (not) preclude the classification of 'facts' under ordinary civil actions (Court of Appeal) or that the remedies in the *Code* precluded such typification in non-*Code* actions (Supreme Court of Canada).

During this typification process, Ms Bhadauria was transformed into a juridical person who was purged of all experiential inclinations just as Kant urged for all moral acts. No expert mentions her felt experiences in the initial rejections of her applications.

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[19] *Ibid.* at 183.

Nothing is written about her initial felt experiences of humiliation, indignity, loss of self-respect, bitterness or anger when she received the ten letters of rejection. No mention is made of the workings of the hiring process at institutions of higher learning in Ontario: the networking; the perceived hierarchy of graduate schools; the contacts which members of recruitment committees make with the referees and supervisors of some applicants; the loyalties which faculty members retain to their *alma mater*; their unconscious projection of their own self-images or idealized self-images in the process of differentiating amongst applicants; the desire of some committee members to hire more people in their own fields; the desire of other members to perceive a faculty weakness in their own field or the fears/speculations with which faculty members may picture an applicant who has been assigned a magic signifier, such as 'feminist', 'gay' or 'won't stay here', even before a decision is made whether or not to invite the applicant for an interview. An identification and examination of such factors in this case was unnecessary because the lawyers and judges categorized Ms Bhadauria's 'facts' through typifications which our professional peers, present and future, would recognize as authoritative. This typification, the outcome of 'reason', excludes the experiences of pain unless they are *re*-presented through a chain of magic signifiers which the *expert knowers* alone know.

E. *A Story about the Silence of Suffering*

One final example: during the winter of 1993, the Canadian media uncovered a community which had hitherto been invisible to both provincial and federal governments in Canada; that is, the human rights language of all levels of government had not recognized the community juridically. Eight children of a small village on the Newfoundland coast, ranging from the ages of two to twelve, had attempted a group suicide. One week later, two more children attempted suicide. The media uncovered that: almost all of the adults were or had been alcoholics; very few were employed; they had no police or social services living in the village; they were without running water or publicly supported sewage; and their one source of livelihood, fishing, had been undermined by the provincial government which had prohibited the use of, among other things, the public dock. This village, it was discovered, had been moved from the Arctic during the early 1950's by the federal government with the promise to the community's leaders that the re-location would be temporary.

Why had the village of Davis Inlet remained invisible before 'the eyes of the Law'? First, the federal government did not recognize any special duty to the villagers because, when the elders 'consented' to the move in the 50's, they had refused to sign into the *Indian Act*'s[20] protection. The elders had explained that such an acknowledgement of the supremacy of the *Indian Act*, a federal statute, would undermine the claim of the community as an independent nation. In an earlier day, treaties between the villagers and the British government had recognized special land and cultural rights as inhering in the re-located residents of Davis Inlet. Although two brothers from Davis Inlet had passed through the training and exams of the federal police, they had not fulfilled their grade 12 requirement to be police officers and, as a result, they were not authorized to act legally except for whatever rights to which they may have been entitled to as citizens. The (then) federal government believed it had no special duties — moral or legal — to

[20] R.S.C. 1985, c. I-5.

ensure that the Davis Inlet residents possess a minimum standard of social services or even a transfer of the promised land. The residents, as a consequence, slipped through the cracks of the network of authorized magic names with which the experts were learned. The provincial government, in turn, did not recognize the villagers as a visible community in 'the eyes of the Law' because the community did not qualify as a 'municipality' within the language of the magic text, *The Municipalities Act*[21] of Newfoundland. Not being recognized as falling within the typification associated with the magic names in the *Act*, the Davis Inlet residents, as human beings who lived — and who lived through their own everyday language — did not exist juridically speaking. Their suffering could not even be *re*-presented.

The villagers were caught in a 'chiasm', to use Merleau Ponty's term, of a 'no-man's land': though living beings with painful experiences, they were juridically unrecognized as a group which might be entitled to the fulfilment of duties undertaken by earlier representatives of the Canadian state. Indeed, the villagers were so invisible before 'the eyes of the Law' that it was unlikely that they would ever return to the social cohesion and pride which they had shared as an Inuit tribe in an earlier day before the 'White Man' came. The residents could not retrieve their language and culture even if the governments began to offer support (which they verbally did) or honoured the Agreement of re-location (which they did not).

Now, it would seem that the invisibility of this Inuit village before 'the eyes of the Law' is somehow connected to (in)justice. The contemporary deontological moral philosopher would have a field-day, as would the consequentialist theorist of corrective or distributive justice. The modern state seems undisturbed by the claims of Truth and Justice because 'the eyes of the Law' are preoccupied with the *authority* of Juridical action. The written texts of statutes, regulations, and judges' 'reasons for judgement' are believed to constitute the closest approximation to the will and voice of authority. Such texts are considered to *constrain* the subsequent juridical official. This constraint emanates from the earlier authors of the 'Law'. The linkage of any expert's interpretive acts to an *author*-ized text is believed to *author*-ize the interpretive act of a judge or lawyer.

Lawyers, judges and other juridical officials desperately strive to reach the authoritative will of the 'Law'. If the moment ever arose when juridical officials realized the phantom-like character of the 'Law' in whose name we act, the possibility would be recognized that legal discourse conceals a heterology of embodied subjects whose own voices, the voices of particular others, constitute the just. The villagers of Davis Inlet possessed such concealed voices. The voices of the residents were not heard, nor could they be heard, because their voices were un-*author*-ized. The villagers were un-*author*-ized to receive any benefits or social support under the federally enacted *Indian Act* because their forebearers had refused to acknowledge the supremacy of that *Act* over the treaties which their earlier forebearers, in turn, had enacted. The signifiers of treaties, the Inuit believed, represented a closer approximation to the will of the 'Law' than did the posited imperatives of the *Indian Act*. Even the legally trained voices of the two Inuit brothers could not be traced to the *author*-ity of the 'Law'. The expert's typification transforms the *meaning* of a suffering being into magic terms which the expert can recognize as authoritative. Such a transformation transcends the particular experiences

[21] R.S.N. 1990, c. M-23, s. 3(1)(a).

of particular beings. Such a typification also translates suffering into a sanitizing language, highly distanced from the everyday language of the Inuit.

F. *A Story about Law Reform and the Juridification of Social Relations*

Now, there was a sense in which the Canada Law Reform Commission acknowledged the juridification of suffering as the central issue of law reform. In its study, *Towards a Codification of Canadian Criminal Law*, the Commission writes that, after discovering the moral and social principles which ground penal law, the Commission should aim to bridge the gap between those principles and reality.[22] 'Law' should reflect society.[23] The Commission followed up this theme in *Our Criminal Law* where it urges that "the true role of criminal law" is to reaffirm essential values necessary to society.[24] In three brief pages the Commission describes the devastating departure of written principles from what it calls "reality".[25] The source of the problem, according to the Commission, is that we simply possess too many statutes, regulations and offences: that is, too much writing.[26] As a consequence, "we have too many acts qualifying as crimes, too many criminal charges, too many criminal cases in our courts, too many people in our prisons."[27] Social reality, not the juridification of social reality, should found the criminal law, the Commission affirmed again and again.

Notwithstanding this desire to break through the mediation of writing to richer and more 'real' social relations, the Commission fails to do so in its reports. Instead, reform is understood in terms of the consistency, coherence and efficiency of representations of those social relations. The study paper, *Towards a Codification of Canadian Criminal Law*,[28] for example, urges that the signs or magic names representing social reality educate personal conscience and even community morality in general. Reform is understood in terms of the reform of the magic names representing social relations. The signs compose "a whole network of procedural and evidentiary rules", the Commission reported in *Our Criminal Procedure*.[29] In order to reform the criminal law, legislators must reform the network of signs.[30] The signs must be constantly revised and consolidated,[31] and according to the Commission, such revision would amount to changes in social structure. So, for example, in the more specific working paper, *Crimes Against the Foetus*,[32] the shortcomings of the present criminal law are suggested to lie in the interrelation of signs which represent the 'Law'. These signs are considered unduly complex, lacking in clarity, inconsistent, incomplete, and inadequately responsive

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22 Law Reform Commission of Canada, *Towards a Codification of Canadian Criminal Law* (Ottawa: Information Canada, 1976) at para. 3.41.

23 *Ibid.* at para. 3.47.

24 Law Reform Commission of Canada, *Our Criminal Law* (Ottawa: Information Canada, 1976) at 16.

25 *Ibid.* at 11-13.

26 *Ibid.* at 17.

27 *Ibid.*

28 *Supra* note 22 at para. 3.22.

29 Law Reform Commission of Canada, *Our Criminal Procedure* (Report #32) (Ottawa: The Commission, 1987) at 10.

30 *Ibid.* at 54.

31 *Ibid.* at 55.

32 Law Reform Commission of Canada, *Crimes Against the Foetus* (Working Paper #58) (Ottawa: The Commission 1989).

to medical and ethical values. Similarly, in the report *Sexual Offences*,[33] the Commission complains that the existing signs representing the 'Law' offer a disparate compilation of inconsistent views in a language which the Commission considers "outmoded" and "archaic". Accordingly, a newer language must be substituted for the words representing an old offence.[34] So too, the Commission believes that the crime of intrusion may be reformed by re-*naming* the crime.[35] When the Commission deals with the medical treatment of inmates, it recommends new signs which represent the ethics of medical treatment and these new signs are to possess "the force" of a regulation.[36]

Of course, the Commission did not always consider the reform of criminal law in terms of the recodification of signs which juridify social relations. Even in such circumstances, however, the Commission advocated an enhanced education of the principal interpreters of prior signs. The prime tool of re-education becomes, not surprisingly, the influx of 'newer' signs "reaching from the Attorney General down to the individual enforcement officer or administrative official in the field."[37] New signs will ensure the overall consistency within the existing network of magic names deemed authoritative by lawyers.

Even the subject of 'privacy' — the one concept which one should consider immunized from the juridification of an embodied being — was implanted within magic names which lawyers would recognize and consider authoritative. Legal authority would be erased, for example, once the signs representing writs of assistance were erased. If magic terms represented that police could enter into premises, then the police would be so authorized. The grant of authority to police to conduct themselves according to a certain fashion "must be statutorily structured and confined."[38] In order to ensure that police would intercept and record private conversations legally, judges merely had to insert 'terms and conditions' or subsidiary signs upon the previous signs. The result of all this is that the Commission assumes that privacy is constructed from signs which represent indigenous lived conduct. Privacy exists to the extent that the signs, which legal experts know, recognize privacy. A lived experience, immunized from the juridification of one's life-world and dwelling in phenomena 'out there' (to use the Commission's term) is abandoned, lost, illusionary, denied and uncoded. Nothing is left — nothing, that is, except networks of magic terms which expert knowers, called lawyers, can recognize as authoritative.

III. The Quest for Concepts through Transparent Language

The quest for the intent of a human rights code or of any other authoritative text is believed to represent two endeavours: first, if one can trace a concept to the intent of the author who originally signified the concept through a name which lawyers recognize as authoritative, the original intent of the name is believed to ground a judge's present

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[33] Law Reform Commission of Canada, *Sexual Offences* (Report #10) (Ottawa: Information Canada, 1978) at 5.

[34] *Ibid.* at 12.

[35] Law Reform Commission of Canada, *Criminal Intrusion* (Working Paper #48) (Ottawa: The Commission, 1986) at 20.

[36] Law Reform Commission of Canada, *Behaviour Alteration and the Criminal Law* (Working Paper #43) (Ottawa: The Commission, 1985) at 43.

[37] *Our Criminal Procedure*, *supra* note 29 at 55-56.

[38] *Ibid.* at 41.

interpretation as authoritative; second, by analyzing concepts in terms of their logic and all that comes with logic — consistency, clarity, purity, consequences and the like — the Kantian moral law is believed to be made practical. As a result of the first endeavour, expert knowers are immunized from complaints that they are acting politically or morally as they interpret the terms in the *Human Rights Act* or constitutional *Charter*. The expert knowers frame their interpretation(s) in terms of the will of the author(s) who had enacted the human rights statute — even though, as we all realize once we study law for a few months, the true will of the actual historical author(s) is displaced for a reconstruction of that will. As Kelsen and many others in the dominant tradition of legal positivism have suggested, the truthfulness of an interpretation is less important than — indeed, unimportant compared to — the will of the historical author of an authoritative text. The second endeavour lends an ideological fervour to the interpretation, which makes it all the more difficult for one to question the righteousness of the juridical act.

Concepts are what Ernst Weinrib has characterized as 'forms'.[39] When the human rights project is understood in terms of concepts, then the key determinant of the authority of an interpretation becomes the historical *author's* will associated with the words in the text. We usually take the historical author in a liberal democratic society to be the Legislature. The historical author's will is inaccessible unless one can picture or imagine what the author intended. But a picture is a representation of an inner essence, in this case the intent of an historical author. The concept — indeed, any concept — of the historical author needs special words to signify or represent the concept. Juridical officials 'know' the human rights statute by associating concepts or forms with the statute's words. The words carry a magic with them. The juridical official need only repeat the words: 'reasonable limits', '*Oakes*', '*Bhadauria*' or 'POGG'. Pictures with even more magic words — 'onus of proof', 'jurisdiction', 'emergency doctrine' and many more — flash through the mind of the juridical official. The concepts of human

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[39] Analytical jurisprudence has identified and refined concepts considered foundational to the legal order. Intermediate principles have been drawn from the founding concepts and then translated to diverse posited circumstances. Hans Kelsen, for example, elaborated a self-proclaimed "pure theory of law" grounded in a *Grundnorm*. All other legal norms rationally drawn from the *Grundnorm*, were authoritatively posited. Although Kelsen writes of an objectivity of facts, his 'pure' theory of law treats the signifiers which represent norms as objective referents. Accordingly, he can shift his focus from 'Who authored the signs of the legal concepts?' to 'What is the presupposed *Grundnorm* of all other posited norms in legal reasoning?': H. Kelsen, *The Pure Theory of Law* (Berkeley: University of California Press, 1970).

H.L.A. Hart aspired to clarify "the foundations" of "the *concept* of law" in a founding "rule of recognition" which he believed would ground the primary day-to-day rules and secondary rules shared by juridical officials: H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961). The exception to those preoccupied with signifiers, to the undervaluing of signifiers, of course, is Ronald Dworkin who, along with Stanley Fish, introduces the narratology of the sign to legal theory. However, Dworkin similarly connects the "sword, shield and menace" to the *constructive rational* arguments about juridically accepted practices, assumptions, beliefs and principles: R. Dworkin, *Law's Empire* (Cambridge, Mass: Harvard University Press, 1986) at *vii*. According to Dworkin, a fully rational theory of law speaks to "the grounds" and to "the force" of one particular argument over another.

E. Weinrib has pushed the analytic tradition further by claiming a general theory of law as form. See especially by E. Weinrib: "Aristotle's Forms of Justice" (1989) 2 *Ratio Juris* 211; "Law as Myth: Reflections on Plato's *Gorgias*" (1989) 74 Iowa L. Rev. 787; "Professor Brudner's Crisis" (1990) 11 Cardozo L. Rev. 549; "Legal Formalism: on the Imminent Rationality of Law" (1989) 97 Yale L.J. 949; "Right and Advantage in Private Law" (1989) 10 Cardozo L. Rev. 1283; "Law as a Kantian Idea of Reason" (1987) 87 Colum. L. Rev. 472.

rights and the will of the legislators of human rights codes are not situated alone in a noumenal realm purged of all experience. Words represent the concepts. Over time, appellate judges' elaborate legal tests represent the 'meaning' for the enacting words. Appellate judges coin magic names for the legal tests. The legal tests, in turn, are differentiated and elaborated in terms of still further magic names. Legal scholars write treatises about the magic terms. Sometimes, the original words of the human rights codes are forgotten.[40] The newly coined magic words of judges overtake the original words. Sometimes, each word is believed to represent one concept. A concept is distinguished from another by associating it with a different magic term. Chains of words become important to the protection of human rights. The human rights specialists become 'knowers' of the magic terms.

One of the two 'authors' of the philosophy of language,[41] Ferdinand de Saussure,[42] called the concept a 'signified'. The magic word which signifies or represents the concept is called a 'signifier'.[43] Each signifier is taken as signifying or re-presenting something. The lawyer searches for that 'something else'. Because that 'something else' — what Kant called an 'in itself' or what Ernst Weinrib calls a 'form' — is invisible behind the signifier, the lack of a form drives the lawyer to search for knowledge.

A signifier represents a concept about a referent, that is, a signifier *refers* to an object. The object/referent may be a physical object — such as a 'tree'. Sometimes, however, the object may be another concept or another signifier itself. In the latter

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[40] Such as "free and democratic society" in section 1 of the *Charter*, *supra* note 1. See *Images*, *supra* note 10 at c. 6, 7.

[41] The other being Charles S. Peirce. See especially R. Kevelston, *Peirce, Paradox, Praxis: The Image, the Conflict, and the Law* (Berlin: Mouton de Gruyter, 1990); and R. Kevelston, *The Law as a System of Signs* (New York: Plenum Press, 1988). Kevelston has held annual 'Roundtables' on legal semiotics since the mid 1980's. Although one sometimes wonders how some of the conference papers relate to legal semiotics, the papers are heavily influenced by Peirce, directly or indirectly. The papers are published in R. Kevelston, ed., *Law and Semiotics*, vol. 1-3 (New York: Plenum Press, 1987-89); and R. Kevelston, ed., *Semiotics and the Human Sciences*, vol. 1ff (New York: Peter Lang).

Of course, Brian A. Langille and others whom he cites in the Critical Legal Studies Movement consider Ludwig Wittgenstein to be important. See B.A. Langille: "Interpretation, Scepticism and the Rule of Law" in F.E. McArdle, ed., *The Cambridge Lectures 1987* (Montreal: Yvon Blais, 1989) 333 [hereinafter "Interpretation, Scepticism"]; "Revolution Without Foundation: Scepticism and the Grammar of Law" (1988) 33 McGill L.J. 451; "The Jurisprudence of Despair, Again" (1989) 23 U.B.C. L. Rev. 549; "Political World" (1990) 3 Can. J. Law & Jur. 139 [also reprinted in Patterson, ed., *Wittgenstein and Legal Theory* (Boulder, Col.: Westview, 1992)].

[42] F. De Saussure, *Course in General Linguistics*, ed. by C. Bally *et al.*, trans. W. Baskin (New York: McGraw-Hill, 1959).

[43] The signifier/signified relationship is briefly discussed by Rosemary J. Coombe in "'Same as It Ever Was': Rethinking the Politics of Legal Interpretation" (1989) 34 McGill L.J. 603, although she identifies the signified with a referent whereas Husserl considers that the signifier (what he calls the sign) may represent a mental object as well as a natural object. See E. Husserl, *Logical Investigations*, vol. 2 (London: Routledge & Kegan Paul, 1970) at footnote 1. Richard Moon of the Windsor Law School has also examined the signifier/signified relationship in a definitive essay on freedom of expression and symbolic speech. See R. Moon, "Lifestyle Advertising and Classical Freedom of Expression Doctrine" (1991) 36 McGill L.J. 76 [hereinafter "Lifestyle Advertising"]. Professor Moon could have differentiated a sign from a symbol. According to Riceour, a sign *represents* an object whereas a symbol *presents* an experience; that is, there is no object or signified for a symbol. See especially Moon's discussion in "Lifestyle Advertising" at 97-98. See also R. Moon, "Drawing Lines in a Culture of Prejudice: *R.* v. *Keegstra* and the Restriction of Hate Propaganda" (1992) 26 U.B.C. L. Rev. 99.

situation, a magic term represents another magic term and that, in turn, represents another magic term. We call the latter, a signified object. The signifying relation of signifier and signified is sometimes said to constitute the whole of the language, the referent being lost within a web of signifiers. The initial commentators of legal language — André-Jean Arnaud,[44] Algirdas Greimas,[45] and Bernard Jackson[46] — argued that legal signifying relations are entirely self-referring.[47] De Saussure and one of his foremost contemporary followers, Jacques Derrida (at least in his earlier writings), considered the relationship between a signifier and a signified as constitutive of the whole of a language. For Derrida, all signifieds and referents collapse into signifiers, because thought cannot exist before the signifiers which represent concepts, and because a signified, represented as a written signifier, becomes another signifier. As a consequence, it is only a short move for Derrida, following Heidegger, to suggest that language is the house of being.[48]

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[44] A.-J. Arnaud: *Essai d'analyse structurale du Code civil français: la règle du jeu dans la paix bourgeoise,* (Paris: Librairie générale de droit et de jurisprudence, 1973); "Fact as Law" in D. Carzo and B.S. Jackson, eds., *Semiotics, Law and Social Science* (Rome: Gangemi/ Liverpool L. Rev) 129; *Critique de la Raison Juridique I,* (Paris: Librairie générale de droit et de jurisprudence, 1981); "Une méthode d'analyse structurale en histoire du droit" in J.M. Scholte, ed., *Vorstudien zur Rechtshistorik* (Frankfurt-am-Main: Klostermann, 1977) 263; "Du bon usage du discours juridique: analyses et methodes" (1979) 53 *Languages* 197; "La paix bourgeoise" in M. Troper, ed., *Le droit trahi par la philosophie* (Bibliothèque du centre d'études des systèmes politiques et juridiques de Rouen, 1977) 51.

[45] A.J. Greimas, "The Semiotic Analysis of Legal Discourse: Commercial Laws That Govern Companies and Groups of Companies" in *The Social Sciences: A Semiotic View,* trans. P. Perron and F.H. Collins (Minneapolis: University of Minnesota Press, 1990) 102.

[46] See by B.S. Jackson: *Semiotics and Legal Theory* (London: Routledge & Kegan Paul, 1985) [hereinafter *Semiotics*]; *Law, Fact and Narrative Coherence* (Merseyside, U.K.: Deborah Charles Press, 1988).

[47] For an excellent overview of the history of the discourse about legal language see generally R. Carrion-Wam, "Semiotics Juridica" in D. Carzo and B.S. Jackson, *supra* note 44, 11. See also S. W. Tiefenbrun, "Legal Semiotics" (1986) 5 Cardozo Arts & Ent. L.J. 89; P. Goodrich, *Languages of Law: From Logics of Memory to Nomadic Masks* (London: Weidenfeld & Nicolson, 1990); *Legal Discourse: Studies in Linguistics, Rhetoric and Legal Analysis* (New York: St Martin's Press, 1987); "Symposium: Semiotics, Dialectics, and the Law" (1985-86) 61:3 Ind. L.J. 315 at 331.

[48] Recently translated German and French texts emphasize the importance of language through which concepts are learned and communicated. Jürgen Habermas, for example, although his major work on law has yet to be translated into English, aspires to elaborate a communicative action which goes to show how the ultimate concepts of law are consensually shared through dialogue. See by J. Habermas: *The Theory of Communicative Action,* 2 vols., trans. T. McCarthy (Boston: Beacon Press, 1987); "Towards a Communication — Concept of Rational Collective Will-Formation. A Thought-Experiment" (1989) 2 *Ratio Juris* 144; "Law and Morality" in M.C. Murrin, ed., *The Tanner Lectures on Human Values,* vol. 8 (Salt Lake City: University of Utah Press, 1988) 217; *The Philosophical Discourse of Modernity: Twelve Lectures,* trans. F. Lawrence (Cambridge, Mass: MIT Press, 1987), c. 2, 11.

French philosophers have also contributed much to this area. See *e.g.* by Michel Foucault: "Two Lectures" in C. Gordon, ed., *Power/Knowledge,* (New York: Pantheon, 1980); *Discipline and Punish: The Birth of the Prison* (New York: Vintage, 1979); *The History of Sexuality,* vol. 1 (New York: Vintage, 1980). And see the work of Jean-François Lyotard: with J.-L. Thébaud, *Just Gaming: Theory and History of Literature,* vol. 20 (Minneapolis: University of Minnesota Press, 1985); *The Differend: Phrases in Dispute, Theory and History of Literature,* vol. 46 (Minneapolis: University of Minnesota Press, 1988) [hereinafter *The Differend*]; and *Peregrinations: Law, Form, Event* (New York: Columbia University Press, 1988). See also the work of Jacques Derrida: "The Force of Law: the 'Mystical' Foundation of Authority" (1990) Cardozo L. Rev. 919; *Du droit à la philosophie* (Paris: Galilée, 1990). These authors have made important efforts to show that it is a lawyer's access to the signifiers or sound

Now, the claim that the signifying relation between signifier and signified represents the whole of language misses the embodiment of a signifier with the interpreter's own experiences. A language does not concern words. A word is a mere physical-chemical mass. It can be perceived as a set of marks or of sounds. Such a set of marks or sounds is meaningless. When a lawyer perceives a physical sound through her or his ears or when a lawyer perceives a physical mark through her or his eyes, the lawyer brings a phoneme *into* the sound or mark.[49] The lawyer possesses a phonemetic image of the sound. The source of the phonemetic image is the lawyer's experience before he or she has even read or heard the mark or sound. The phonemetic image is precisely what I myself had in mind when I claimed that constitutional discourse collapses into competing images of a constitution.[50] The experiential character of the meaning-constituting act can hardly suggest that an image is a form abstracted from experience.[51] Richard Moon of the Windsor Law School quite rightly describes this experiential input into the mark or sound as 'intentionality', although he describes intentionality as pre-linguistic (and considers *that* meaning "as not simply a matter of [one's] pre-linguistic intentions").[52]

Once one brings this concept of the phonemetic image into one's analysis of language, one realizes that law, let alone legal language, cannot be studied as if it were the object of a science. Physics cannot analyze a phoneme nor can lawyers analyze texts as if the texts were a physical-chemical mass to be quantified in an encyclopædic manner. Science cannot render meaning by examining the physical components of a sound or mark on a page entitled 'The *Human Rights Act*'. Put again another way, a mark or sound by itself is meaningless. What gives a word meaning is the phonemetic image or graphemetic image which, drawn from her or his past and expected experiences, the lawyer brings *into* the sound or mark. Although he certainly did not privilege the subject as we do, Aristotle certainly had the meaningless project of mechanical jurisprudence in mind when he so facetiously described rhetoricians as lawyers who think that they can select the best laws, "as though the selection did not demand intelligence, and as though *right* judgement were not the greater thing as in matters of music".[53]

De Saussure suggested that the fusion of the signifier and the signified constitutes a sign. Such a fusion fails, however, to explain why the signifier takes on different meanings for different lawyers. Lawyers bring different meanings (and concerns) to the same sound because the *meaning* element of the sound — the phoneme — is something prior to and independent of a sound or mark. As a consequence, laypersons and lawyers

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images associated with concepts which empowers the legal profession. Law is a discourse which excludes signifier/signified relationships as much as it includes such relationships.

[49] F. De Saussure, *supra* note 42.

[50] *Images*, *supra* note 10.

[51] However, see A. Hutchinson, *Waiting for Coraf* (Toronto: University of Toronto Press, 1995), in his reconstruction of my claim.

[52] "Lifestyle Advertising", *supra* note 43 at 100. At another point, Professor Moon writes about the extension of the scope of freedom of expression "beyond the spoken and written word," referring to "self-expression" and "self-development" as synonymous with this pre-speech and pre-writing phenomenon. It is unclear to this reader whether Professor Moon is referring to intentionality or to some pre-linguistic presentative experience. Of course, Jacques Derrida and others would insist that such an experience does not exist before language and that there is no speech, only writing. See especially J. Derrida, *Of Grammatology*, trans. G.C. Spivak (Baltimore: John Hopkins University Press, 1974).

[53] Aristotle, *Nicomachean Ethics*, trans. W.D. Ross, in J. Barnes, ed., *The Complete Works of Aristotle*, vol. 2 (Princeton: Princeton University Press, 1984) seg. 1181a at lines 17-18.

understand sounds and read marks differently. They 'come at' the words in a statute with different assumed experiences. That is, they bring different phonemes and graphemes *into* the signifiers, drawing from their different experiences. The phoneme and grapheme are relevant to meaning in oral and written language in that the phonemic constitution of sounds and the graphemic constitution of marks differentiate amongst sounds and marks. With her or his phonemes, the lawyer em-*bodies* oral and written expressions. That is, the lawyer brings his or her experiences (or experiential body), not her or his ideas abstracted from experience, *into* marks and sounds. This embodiment of the marks and sounds differentiates one person's interpretation from another's. Whereas the semiotic tradition, particularly the Greimasian strain and the later analytic view of Wittgenstein, has privileged the signifier/signified relationship, the phenomenological tradition has privileged the phonemetic and graphemetic constitution (that is, intentionality) of language.[54] H. Taylor Buckner in "Transformations of Reality in the Legal Process"[55] and Michael Salter in "Towards a Phenomenology of Legal Thinking"[56] have made major break-throughs in their examination of the meaning-constituting act which a lawyer brings into a sign. Thus, the social function of a professional law school of a modern state can be better understood, I believe, once one appreciates the role of the phonemetic and graphemetic image which the culture of a professional law school inculcates into the student/lawyer.[57]

Several elements differentiate a language: a physical mark on a page or a physical sound in the air, a signified (or form), a signifier, and a phoneme/grapheme.[58] I believe the human rights tradition in Canada, has privileged only one element of the constitution of legal language, namely, the signified (or concepts/doctrines/principles/rules) of human rights. The discourse of human rights has presupposed that the texts called 'Human Rights Acts' and 'Charters of Rights' are enunciated through a transparent medium called words. The task for the student of human rights becomes an easy one: namely, to compile principles and rules in a hierarchic order with emphasis on some rules and exceptions to other rules. Much like the Yellow Pages of a telephone book, lawyers need only let their fingers do their thinking as they trace one magic name to another. As the interrelations of the concepts become ever more complex, lawyers can call themselves experts and consider themselves indispensable to the resolution of disputes. The only hurdle is for the human rights experts to 'know' what concepts are associated with which marks or sounds. Indeed, the concepts come to be represented by short forms, such as 'due process', 'section one analysis', 'section 15', 'equality before

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[54] Wittgenstein considered language a 'game' where one learns the background practices and context which give meaning to a signifier. Brian Langille points out that, for Wittgenstein (and himself), "private language" is impossible and the intentional meaning which an interpreter brings *into* a signifier is irrelevant. See B.A. Langille, "Interpretation, Scepticism" *supra* note 41 at 345-46. For the phenomenological approach to intentionality, the starting point is E. Husserl, *Logical Investigations*, vol. 2 (New York: Humanities Press, 1970) [This includes investigations III, IV, V, and VI in Volume II of the German edition]. It is difficult not to notice the absence of a close study of the phenomenology of a professional language in the works of Alfred Schutz and his students. See *e.g.* T. Luckmann, "The Constitution of Language in the World of Everyday Life" in L.E. Embree, ed., *Life-World and Consciousness: Essays for Aron Gurwitz* (Evanston, Ill.: Northwestern University Press, 1972) 469.

[55] (1970) 37 *Social Research* 88.

[56] (1992) 23:2 *Journal of the British Society for Phenomenology* 167.

[57] "Teaching Critically", *supra* note 10.

[58] See *supra* note 48.

the law' and the like. Some concepts were even granted proper names, such as '*Drybones*', '*Burnshine*' and '*Oakes*'.

No doubt because of the heavy influence of Kant and of legal positivism, human rights experts identify human rights concepts with the original intent of the historical authors of the human rights acts. The experts aspire to reach the original author's or authors' intent believed to lie concealed within human rights statutes and constitutional bills of rights and draw concepts from this. The effort to reach the concepts assumes that signifiers, which represent the concepts, are transparent conduits for those concepts. The transparency of the medium through which the concepts are expressed ensures an objective taint to the expert's interpretation, so long as the expert is situated in the 'hierarchic pyramid of norm-positing officials', to use Kelsen's phraseology. This focus upon the *knowledge* of concepts is not surprising, given the Kantian heritage and its effort to rationally *ground* or *found* moral duties in principles, particularly the concept of the dignity or intrinsic worth of rational beings in the Kingdom of Ends. The focus of the human rights expert upon a *knowledge* of concepts is also not surprising, given the association of legal authority with the tracing of transparent signifiers to their founding source in a legislature, constitutional act, imperial parliament and elsewhere. Until one reaches the works of H.L.A. Hart, the assumption of transparent signifiers is taken for granted in the tradition of legal positivism.[59] Bernard Jackson goes so far as to

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[59] See especially by T. Hobbes: *Leviathan*, ed. by C.B.Macpherson (London: Penguin, 1968) c. 1; *A Dialogue between a Philosopher and Student of the Common Laws of England*, ed. J.Cropsey (Chicago: University of Chicago Press, 1971) at 55-61, 99. For J. Austin's view of the transparency of the sign see generally, *The Province of Jurisprudence Determined and the Uses of the Study of Jurisprudence* (London: Weidendeld & Nicolson, 1952) and *Lectures on Jurisprudence*, vol. 2 (New York: Burt Franklin, 1971) at Lecture 29. For J. Bentham's view, see especially: H.L.A. Hart, ed., *Of Laws in General* (London: The Athlone Press, 1970); "Essay on Language" in J. Bowring, ed., *The Works of Jeremy Bentham*, vol. 8 (New York: Russell, 1962) 295; and C.W. Everett, ed., *The Limits of Jurisprudence Defined, Being Part Two of An Introduction to the Principles of Morals and Legislation* (Westport, Conn.: Greenwood Press, 1945) 248. Regretfully, the extended contemporary commentary concerning authority has also concentrated on the *concept* of authority to the omission of the signs which represent the concept. See *e.g.* H. M. Hurd, "Challenging Authority" (1991) 100 Yale L.J. 1611; J. Vining, "Authority and Responsibility: The Jurisprudence of Deference" (1991) 43 Admin. L. Rev. 135; L. Henderson, "Authoritarianism and the Rule of Law" (1991) 66 Ind. L.J. 379; L. Green, *The Authority of the State* (Oxford: Clarendon Press, 1988); K. Greenawalt, *Conflicts of Law and Morality* (Oxford: Clarendon Press, 1987); J.R. Pennock and J.W. Chapman, eds., *Authority Revisited* (New York and London: New York University Press, 1987); H.L.A. Hart, *Essays on Bentham: Studies in Jurisprudence and Political Theory* (Oxford: Clarendon Press, 1982) at c. 6 & 9; J. Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980) c. 9; J. Raz, *The Authority of Law* (Oxford: Clarendon Press, 1979) at 3-33; J.R. Pennock and J.W. Chapman, eds., *Anarchism* (New York: New York University Press, 1978).

H.L.A. Hart takes legal positivism through a linguistic turn. Ludwig Wittgenstein and J.L. Austin claim, according to Hart, that logically closed concepts do not subsume phenomena: H.L.A. Hart, *Essays in Jurisprudence and Philosophy* (Oxford: Clarendon Press, 1983) at 271 [hereinafter *E.J.P.*]. Legal concepts can never eliminate unforseen events. Legal concepts are not fixed or closed in the sense that one may define them exhaustively or that one may apply them to empirical circumstances with certainty: *E.J.P.* at 269. Hart takes from Austin the view that words function performatively in that they bring about certain changes rather than merely describe the empirical world. Stated words bring other words into operation. In his earlier writings, Hart draws heavily from the speech-act theory: H.L.A. Hart, "The Ascription of Responsibility and Rights" in (1948-9) 49 *Proceedings of the Aristotelian Society* 171. This speech-act character of his analysis shifts to the 'internal point of view' analysis of the Concept of Law. So, for example, a statement that one has a duty entails the claim that one 'ought' to act in a certain manner. This means or entails, in turn, that there is a *reason* for one to

suggest that once one realizes the importance of the signifier, and the deep structure underling any signifying system (it *is* a *system* for Jackson), the traditional positivist concern with the concept of authority is displaced.[60] Legal positivism considers law authoritative if one can trace juridical concepts to a foundation or grounding. And authority is meant as a source, foundation, grounding or 'arche' of a chain of concepts.[61]

Such preoccupation of the lawyer with a knowledge of concepts misses the role of the phonemetic and graphemetic images in the meaning-constituting act as well as the referents to which the signs refer, whether the referents be embodied subjects or juridical persons signified as objects in the signifying relation. More than concepts constitute laws. The legal order is a *language* which is constituted from graphemetic and phonemetic images which one lives as one experiences. Words are not a transparent medium for the transmission of forms from one judge to the next, or one legislature to the next.[62] Phonemes and graphemes overlay the words which represent the concepts. The phonemes and graphemes vary with the interpreter of the words because the phonemes and graphemes vary with the experiences through which the interpreter reads those words. The graphemes and phonemes bring *life* into the meaning-constituting process because they emanate *from* the embodied experiences of the interpreter rather than from the referent presumed to be posited 'out there', beyond the meaning-constituting act in a posited world. Accordingly, the meaning which lawyers bring into magic names may well impede, rather than channel, the will of the original historical author(s) of a human rights statute. The sign may 'obstruct' the historical author's (or authors') will because the sign addresses a subject who may bring a very different

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act in that way. This reason is independent of the will of an historical author who initially posited the duty. It draws from the *statement* itself rather than from the willed concept of an historical author. See H.L.A. Hart, *Essays on Bentham: Jurisprudence on Bentham* (Oxford: Clarendon Press, 1982) at 157 [hereinafter *E.B.*].

Joseph Raz discusses Hart's analysis of internal and external statements in "The Purity of the Pure Theory" in R. Tur and W. Twinning, *Essays on Kelsen* (Oxford: Clarendon Press, 1986) at 79-97, especially at 85-86. The inferred reasons for action possess an objective character. The reasons flow from the *statement*, not from the historical author's categories. Hart describes his theory of duty as a "non-categorical" theory, in contrast to Raz's *E.B.* at 160.

Hart contrasts this performative function of words with the earlier tradition of legal positivism, initiated by Bentham and Austin, which understood legal authority in terms of the *will* of an author: *E.J.P.* at 273. Hart identifies the command theory in terms of 'Who authors the command?'. Law is "an expression by one person of the desire that another person should do or abstain from some action, accompanied by a threat of punishment which is likely to follow disobedience.": H.L.A. Hart, "Positivism and the Separation of Law and Morals" in F.A. Olafson, ed., *Society, Law and Morality; Readings in Social Philosophy from Classical and Contemporary Sources* (Englewood Cliffs, N.J.: Prentice-Hall, 1961) 439 at 447 [hereinafter *P.S.L.M.*] [also published in (1958) 71 Harv. L. Rev. 593]. Hart rejects the claim that a historical author commands concepts: *P.S.L.M.* at 467. Hart replaces the historical author with a linguistic theory of the 'statement' that such and such is law. The crucial issue is whether the focus upon the 'statement' distracts from the search for an extrinsic *arche* so characteristic of *auctoritas* in modern legal positivism.

[60] See *Semiotics*, *supra* note 46.

[61] In her excellent study, Hannah Arendt suggests that this view of authority as a foundation or grounding first saw the light with Roman lawyers. See H. Arendt, "What is Authority" in *Between Past and Future: Six Exercises in Political Thought* (New York: Meridian, 1961) 91. Michel Foucault describes identification of authority with a foundation as the 'royalty model of sovereignty' in "Two Lectures", *supra* note 48 at 91-97. Interestingly, Foucault suggests that the geneology of the royalty model rests with the resurrection of the Roman legal edifice in the twelfth century.

[62] This is the common theme of Richard Moon's essays, *supra* note 43.

meaning *into* the signifier, however intended by the legislative author of the statute. Language is not a transparent medium to express a concept. The forms of an *author* collapse into signs for which readers bring different meanings. If the living experiences of the professional knowers bring meaning *into* signs which represent associated forms, then legal authority would seem to end with the very interpreters of the historical author(s), all the while that the interpreters presuppose the 'End's' 'existence'.[63] Whereas the interpreter may encourage the addressee to believe in the fixed will of the historical author(s), the interpreter herself or himself constructs the intent of human rights statutes and constitutional codes through what he or she may well take as the continuous rediscovery of the intent of the author(s) of the enactments. The forms being invisible, the signifiers or graphemetic images of the historical author(s) offer the closest proximity to which an interpreter can reach the will of the foundational author(s) of a basic constitutional text. Even then, these signifiers are an inert physical-chemical mass until the contemporary *interpreter* brings meaning *into* that mass called a 'mark' which, in turn, is said to represent the historical author's (or authors') intent. The interpreter's own experiences, rather than the 'existence' of some fixed will of the author(s) of the human rights codes, become indispensable to the protection of the human rights drawn from Kant's Kingdom of Ends.

Now, the reader may well have concluded that I have created my own language which has little bearing on the language familiar to human rights activists and even less for the lawyer and law student trained to believe that one understands law by identifying 'ratios' in the Aristotelian manner described above. If that is so, it is appropriate for me to exemplify how human rights law is a language rather than a series of concepts or forms which the expert claims to 'know'.

IV. Stanley Fish's Analysis of Legal Language

One legal scholar stands out for his effort to describe the language-like character of laws — Stanley Fish.[64] The ramification of Fish's works for human rights is clear: there is no hidden set of concepts associated with human rights statutes and constitutional codes. Whereas human rights presuppose that there is a *noumenal* realm where all rational beings are 'ends in themselves', Fish insists that such a belief in the rational grounding of laws is erroneous. The expert already finds himself or herself within values, assumptions, gestures, a style of argument, an etiquette and other factors which the expert takes for granted — although the non-expert does not. These 'unwritten' factors help mould the images which lawyers have of signifiers — those very signifiers which pre-exist the expert and dominate the interpreter *before* the interpreter ever begins to read the *Human Rights Act*. The effort to institutionalize Kantian moral duties is naive at best and self-deluding at worst, according to Fish.[65] Laws, more generally, are "the

[63] See generally, W.E. Conklin, "The End of Judicial Review" (1992) 10:1 *Current Theory* 1 [reprinted in a slightly revised version in B. van Roermund, ed., *Constitutional Review Verfassungsgerichtsbarkeit Constitutionele Toetsing: Theoretical and Comparative Perspectives* (Deventer/Boston: Kluwer Law & Taxation Publishers, 1993) 33]. See also W.E. Conklin, "The Invisible Author of the Modern Legal Genre" in (1996) 23 *Law and Critique* (forthcoming).

[64] S. Fish, "Wrong Again" in *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (Durham, N.C.: Duke University Press, 1989) 103. In the same volume, see also "*Fish* v. *Fiss*" (at 120) and "Working on the Chain Gang: Interpretation in Law and Literature" (at 87).

[65] *Ibid.* at 114.

norms, standards, criteria of evidence, purposes, and goals"[66] of the shared enterprise of lawyering. Fish would agree with Heidegger and Derrida's general view that one cannot escape from the signifiers of legal language.

Fish expands upon the inescapable character of legal language in "Fish v. Fiss"[67] where he argues that different *readers* of a text called "the Constitution", not the text called "the Constitution" itself, 'provoke' debate about rights. Readers share different assumptions about different 'circumstances' depending upon "the very senses one has of what the Constitution is *for*."[68] Professional training of an expert inculcates these distinctions in the future professional; it acts to pre-select how lawyers will choose signifiers as authoritative.

A constitutional bill of rights does not posit such authoritative meanings. In a sense, on their 'face', statutes and constitutional codes which claim to guarantee human dignity are meaningless. Meaning arises from the web of signifiers which pre-exists a statute.[69] This web lops off the intentionality associated with an interpreter's graphemes. Human rights experts are no different from any other expert: all gain their authority, according to Fish, from the shared "priorities, agreed-upon needs, and long- and short-term goals of an ongoing social and political project."[70] Once such a shared understanding, "largely tacit, of an enterprise's general purpose...[exists,] everything else follows."[71] The signifying relations of human rights statutes are self-generating.[72]

V. Legal Discourse as a Metalanguage

I believe Fish's error, ironically, is to take legal discourse as posited. After Fish privileges the sanitizing signifiers, a force nakedly en-forces them. The error of Fish, along with many other legal theorists who have attempted to understand law 'as a semiotics',[73] is that as the language of *experts* becomes more and more entrenched in a modern state, other languages — which have been *lived* through the meanings which non-experts have brought *into* their signifiers — are displaced. Particular individuals implant context-specific *meanings* into signifiers which experts take over as their own within a genre of writing with its own assumptions, goals, values, images and constraints. The meanings of the experts displace the former lived meanings of subjects who have experienced pain. Fish fails to describe how the signifying relations of expert knowers conceal these meaning-constituting acts of citizens in their concrete social relations.

As observed in my "Law Reform" example above, the experts presuppose that social relations exist before the experts take over, and yet the experts paradoxically act as if their own signifying relations constitute the whole of social reality. As the early

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66 *Ibid.*

67 *Ibid.* at 120.

68 *Ibid.* at 129.

69 *Ibid.* at 135-36.

70 *Ibid.* at 133.

71 *Ibid.* at 136.

72 *Ibid.* at 522.

73 See *e.g.* D. Kennedy, "A Semiotics of Legal Argument" (1991) 42 Syracuse L. Rev. 75; J. Paul, "The Politics of Legal Semiotics" (1991) 69 Tex. L. Rev. 1779; J.M. Balkin, "The Promise of Legal Semiotics" (1991) 69 Tex. L. Rev. 1831. I would add, though, that Fish, at least, recognizes that signifieds or concepts collapse into signifiers; lawyers try to express the signifieds. The contributors cited here fail to realize that the binaries of which they talk are binaries of signifiers, not signifieds. The consequence is that, notwithstanding their protests, the above contributors idealize legal language.

Roland Barthes explains,[74] a sign (understood in de Saussure's sense of a signifier/ signified relation) in one chain becomes a signifier in a metalanguage. Mikhail Bakhtin calls the latter a 'secondary genre', although Bakhtin insists upon the retrieval of the lived meanings of primary genres through dialogic relations.[75] Thus, in a metalanguage which is composed by expert knowers (of the forms associated with the signifiers in the chains of the metalanguage), the expert speaks *about* the first chain of signifiers.

Each narrative of the legal process speaks about the signifiers of the previous story. The judge attempts to ground her or his narrative, not in the client's original experience, but through the play which counts: the lawyer's play of authoritative signifiers. As the secondary genre takes its' hold of our consciousness, we citizens begin to believe that we are 'governed' by the 'rule of law'. Order is believed to ensue. That order is chains of signifiers which *re*-present the non-expert's utterances into a structure which experts will recognize as meaningful. An older essay by H.T. Buckner, little known amongst legal scholars, describes this "transformative" semiotic process with deep insight.[76] More recently, Samuel Weber examines how the "sense of professionalism" adds to this transformative process.[77]

VI. Sanitizing Harm

During the transformation of pain into a lawyer's secondary signs, seemingly (politically) neutral universals displace contingent experiences. The lawyer describes the witness's experiences as *fact*. Often, one hears lawyers say they deal "with the facts, not the law". The facts are taken as natural, as a 'given'. But, as Fish suggests, such a positivist view of reality is naive and unrealistic, for as I have just noted with the stories outlined above, the 'facts' are transposed into signifying relations which the lawyer can *mean*. Further, these relations exclude some of the original signifiers as 'irrelevant' or of little 'weight' or as authored by someone with little credibility. *The bodily experiences* in the client's story become sanitized, sometimes even unrecognizable to the client.

The distinction between denotation and connotation also helps to understand the transformation of a legal text from a set of words into an object of a meaningful discourse amongst experts. 'Denotation' means what a language actually says. 'Connotation' constitutes a meaning other than what was actually said.[78] Through connotation, the

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[74] R. Barthes, *Mythologies* (Paris: Éditions du Seuil, 1957) at 215-268. See also Barthes': "From Work to Text" in J.V. Harari, ed., *Textual Strategies: Perspectives in Post-Sructuralist Criticism* (Ithaca, N.Y.: Cornell University Press, 1979); and "Theory of the Text" in R. Young, ed., *Untying the Text: A Post-Structuralist Reader* (Boston: Routledge & Kegan Paul, 1981) 31.

[75] A secondary genre parasitically lives from primary genres. One of the more original and insightful essays published in English in recent years is M.M. Bakhtin, *The Dialogic Imagination: Four Essays*, M. Holquist, ed., trans. C. Emerson and M. Holquist (Austin: University of Texas Press, 1981). See also his essay "The Problem of Speech Genres" in C. Emerson and M. Holquist, eds., *Speech Genres and Other Late Essays,* trans. V.W. McGee (Austin: University of Texas Press, 1986) 60.

[76] H.T. Buckner, "Transformations of Reality in the Legal Process" (1970) 37 *Social Research* 88. See also the more recent essay by M. Salter, "Towards a Phenomenology of Legal Thinking" (1992) 23 *Journal of the British Society for Phenomenology* 167. Before coming across these essays I described the transformation of students' discourses into a professional language in "Teaching Critically" *supra* note 10.

[77] S. Weber, "Institution and Interpretation" in *Theory and History of Literature*, vol. 31 (Minneapolis: University of Minnesota Press, 1987) 18.

[78] I use the terms as elaborated in the works of the early Barthes. As developed in Hjelmslev's work, denotation and connotation relate to de Saussure's double axes of relation, those of substitution

authority of the victim of racism or social discrimination dissipates in favour of the authority of the modern state. A denoted word, Barthes remarks, is always entangled with a contingent utterance and an inter-textual play of differences and, therefore, does not have a transcendental signified upon which to draw its meaning.[79] Once a universalist signified encloses an utterance, connotation takes over because a *second*-order meaning is involved. Even when a lawyer merely describes a context-specific event as if it were a 'fact', he or she joins the event to the second-order code of signifying relations, which takes on a very different context. Although the client and lawyer use the same signifiers, the lawyer reads the words in terms of a different ensemble of signifieds associated with the signifiers. What was a signifier/signified relation for the client becomes a signifier for the lawyer who must thereupon integrate the relation into a second order code of representations. The connoted code rationalizes, distinguishes, brackets and sublimates parts of the denoted code so as to construct a lawyer's reality, all in the name of the victim's reality. The 'facts' become 'clear' at the very moment that they are transformed into the lawyer's metalanguage.

VII. The Ideological Character of the Juridifying Metalanguage

Notwithstanding the seeming sanitation of pain and suffering, the lawyer's signifieds have an important ideological function[80] (this is the point where the lawyer's prejudgments involving class, gender and race come into play). That function lies behind the anger of Marguerite Ritchie's reaction to Elmer Driedger's explanation for the masculine gender in legislative drafting.[81] The question is, why is it so 'fundamentally unjust' for draftspersons to use only the masculine gender?

One response lies in the view that the reader associates signifieds with the magic names 'him' and 'he', and that a large segment of society is acculturated to believe that these signifieds, though particular to only one, admittedly large social group, represent the signifieds which all persons associate with the the names. An early important essay

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and of combination. See L. Hjelmslev, *Prolegomena to a Theory of Language*, trans. F.J. Whitfield, (Madison: University of Wisconsin Press, 1961) especially at 114-25. Connotation relates to Jakobson's distinction between metaphor and metonymy. Metonymy is a figure of speech where a part is considered the whole. Jakobson argues that metaphor and metonymy represent two different language operations in the brain. See R. Jakobson, "Closing Statement: Linguistics and Poetics" in R.E. Innis, ed., *Semiotics: An Introductory Anthology* (Bloomington: Indiana University Press, 1985) 145.

[79] R. Barthes, "Rhetoric of the Image" in *Semiotics: An Introductory Anthology*, *ibid.* 190. Indeed, one could argue that a denoted word does not have any signified if it is fully contextualized.

[80] Of course, Derrida claims that de Saussure's retention of the signifier/signified distinction continues the metaphysical tradition. See generally, text *infra* part VIII, A & B and J. Derrida, *Positions*, trans. A. Bass, (Chicago: University of Chicago Press, 1981) at 19-24. I believe that Derrida is in error to dismiss anything outside of play, at least in the context of the authoritative play of lawyers. What follows implicitly critiques Derrida's association of play with social/cultural practice in that I am suggesting that the signified, as distinguished from a signifier, in authoritative play 'plays' an extremely important social function. See also W.E. Conklin, "The Trace of Legal Idealism in Derrida's Grammatology" in *Philosophy and Social Criticism* (forthcoming) [hereinafter "Trace of Legal Idealism"].

[81] M.E. Ritchie initially focused on the issue in "Alice Through the Statutes" (1975) 21 McGill L.J. 685. E.A. Driedger's view is set out in "Are Statutes Written For Men Only?" (1976) 22 McGill L.J. 666. In "The Language of Oppression — Alice Talks Back" (1977) 23 McGill L.J. 535 at 537, Ritchie expresses that "the problem here is one of a fundamental injustice extending far beyond words."

in this respect is Peter Gabel's "Reification in Legal Reasoning."[82] Gabel shows with perceptive insight, how legal reasoning becomes a synthetic and thing-like process which freezes experience. Isaac Balbus continues with an analysis of the semiotic character of the autonomous legal system in "Commodity Form and Legal Form: An Essay on the 'Relative Autonomy' of Law."[83] Balbus shows how terms familiar to the expert of human rights — equality, individuality and community — encode reality. The encoding so permeates legal culture that lawyers grasp after the terms as if they were a fetish. During the early 1980's, Balbus extended this analysis to genderized signifiers.[84]

In some respects, much of what has been written in Canadian and American law reviews since Gabel's and Balbus' contributions is a footnote to their efforts. This rests in part because these essays usually accept the dominant view of ideology as a network of *concepts* which shape and filter out how lawyers perceive the world. This view of ideology, once again, assumes that chains of signifiers are transparent and that the important elements in ideology are the concepts shared amongst power holders. The language element of ideology — the phonemetic and graphemetic image which one brings into a sign, and which in turn represents a concept — is ignored. The import of Gabel's and Balbus' essays has been lost to a generation of legal scholars. For example, Patrick Macklem takes up the ideological functioning of law in the context of the role of the *Charter*. Without setting out how the signifying relations of legal texts can be avoided, by-passed, transcended or denied, Macklem believes it is possible to "free our constitutional imaginations from the ideological and argumentative constraints."[85] That is, Macklem believes it is possible for expert knowers to actually write without an ideologically saturated language. Similarly, without examining the importance of the signifier in law, Patrick Devlin seems to suggest that, in Northern Ireland, any belief in a law freed of ideology works to disguise the *de facto* hegemonic character of law itself. In the politics and law of Northern Ireland, Devlin argues, law has affected non-lawyers to such a point that non-lawyers consent to the current state of affairs and existing social relations.[86] The latter's consent, he argues, suggests that some class or group has attained hegemony through law. Law ideologically functions as a conceptual apparatus so as to depoliticize and to legitimize existing social relations, thereby revising the relation of

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[82] (1980) 3 *Research in Law and Sociology* 25. Also see his article "The Phenomenology of Rights Consciousness" (1984) 62 Tex. L. Rev. 1563.

[83] (1977) 11 *Law and Society Review* 571.

[84] I.D. Balbus, *Marxism and Domination: A Neo-Hegelian, Feminist, Psychoanalytic Theory of Sexual, Political and Technological Liberation* (Princeton, N. J.: Princeton University Press, 1982).

[85] P. Macklem, "Constitutional Ideologies" (1988) 20 Ottawa L. Rev. 117 at 121-22. See also his article "Property, Status, and Workplace Organizing" (1990) 40 U.T.L.J. 74 where Macklem exposes the property and status assumptions in Canadian labour law.

[86] See by R. Devlin: "The Rule of Law and the Politics of Fear: Reflections on Northern Ireland" (1993) 4 *Law and Critique* 155 at 164-67 [hereinafter "The Rule of Law"]; "Demanding Difference (But Doubting Discourse): A Review Essay" (1994) 7 C.J.W.L. 156. In his essay, "Law, Postmodern & Resistance: Rethinking the Significance of the Irish Hunger Strike" (1994) 14 Windsor Y.B. Access Just. 3, Devlin combines a masterful grasp of the social/political circumstances with an extremely fascinating analysis so as to tell the Northern Ireland story in deconstructive detail, and to interrogate the political potential of postmodernism.

C. Strange shows, even though judicial decisions or jury verdicts may rule in favour of women and even though lawyers might re-state 'the law' so as to give a signal that women possess the right to be free from sexual assault, the lawyers' stories may reconfirm the men's presupposed prerogative to defend weaker beings in their representation of female clients: C. Strange, "Wounded Womanhood and

law to the social: instead of people understanding law to come *after* the social, law is believed to create the social. Civil disobedience thereby becomes difficult, and the violence of the law towards all residents is disguised through concepts. Douglas Hay similarly exemplifies the role of hegemonic concepts of class in the evolution of English Law.[87]

Gabel's and Balbus' essays suggest that the crucial factor in ideology is the lawyer's network of signifiers, not the signifieds. For example, a series of symposia in American law reviews have elaborated theories about the promise of legal semiotics without escaping from the influence of Peirce's pragmatism and his belief that language refers to a referent beyond the signifying relation.[88] The *lawyer's* signifiers count, not the victim's. A professional law school, one might add, needs three years to familiarize the future lawyer with such signifieds.

Recent essays concerning the representative character of legal language depart from the sense of ideology as traditionally understood by liberal legal theorists. Traditionally, legal and political theorists have described 'ideology' as the severence of a signified from the social or natural referent to which the signifier refers. That is, we have claimed that the expert's *concepts* have been severed from social relations. The Canada Law Reform Commission deferred to such a characterization when it urged that criminal law be returned to 'social reality'. Georg Lukács shared such a view of ideology too, calling it "reification".[89] Legal *concepts* become estranged from the presupposed face-to-face relations in concrete circumstances, he suggested. As such, the meaning of the *concepts*, independent of concrete, context-specific experiences, is believed to overtake the concrete. Following along the lines of Michel Foucault and a wider strain of scholarship, however, ideology comes to be understood as the very (re)*production* of signifiers as a relation of power. Chains of signifiers enclose silences, ruptures and gaps. That is, the signifier of a witness or party to litigation becomes the lawyer's referent. The signifier takes on the aura of social reality, yet it is not even the witness's signifier. More correctly, it may be the same word as a witness has uttered, but that word takes on a *meaning* for the expert within a network of other signifiers which the expert considers relevant, weighty, authoritative and the like. A relevant signifier already departs from

Dead Men: Chivalry and the Trials of Clara Ford and Carrie Davies" in F. Iacocelta & M. Valverde, eds., *Gender Conflicts* (Toronto: University of Toronto Press, 1992) 149.

87 See especially D. Hay, "Property, Authority and Criminal Law" in D. Hay *et al.*, eds., *Albion's Fatal Tree: Crime and Society in Eighteenth-Century England* (New York: Random House, 1975) 17.

88 See *e.g.* "Symposium: Law and Economics and the Semiotic Process" (1991) 42 Syracuse L. Rev. 1; "Symposium: Semiotics, Dialectics, and the Law" (1985-86) 61 Ind. L.J. 315. See especially D. Kennedy, "A Semiotics of Legal Argument" (1991) 42 Syracuse L. Rev. 75. See also the essay by his student, J. Paul, "The Politics of Legal Semiotics" (1991) 69 Tex. L. Rev. 1779; and J.M. Balkin, "The Promise of Legal Semiotics" (1991) 69 Tex. L. Rev. 1831.

Kennedy admits to being unhappy with the loss of a referent in de Saussure's semiotics. Both Kennedy and Paul privilege the arbitrariness of binary relations. Yet, they understand binaries in terms of opposed doctrines, principles, rules and other *concepts*. They fail to realise that the binary arises from opposed signifiers and, therefore, they idealize the binary by lopping off the experiential graphemetic image which the lawyer brings into a sign. Although this seems to be such a retraction of the vibrant drive to displace the ideologies of legal personnel which one gains from Kennedy's contribution to "Roll over Beethoven" as discussed above, one can also detect Kennedy's critique of Gabel as a critique which presupposes the inevitable enclosure of the signifieds of law to the exclusion of the role of the graphemetic image (in contrast with Gabel).

89 G. Lukács, *History and Class Consciousness: Studies in Marxist Dialectics*, trans. R. Livingstone (London: Merlin Press, 1971) at 83.

the concrete experience of the witness who can only *re*-present the experience after the phenomenon has occurred. Moreover, the expert knowers privilege some re-presentations and exclude others. Some original utterances win and others are forgotten. Even the statute to which an expert knower may appeal in her or his categorization of a witness's utterance excludes as well as includes. The professional training of the expert aids in such a project. The end result is that social reality is believed to be constituted by the networks of signs whose signifieds the experts claim to know, just as the Canada Law Reform Commission acknowledged again and again.

The expert knowers insist, of course, that they are objective and impartial in their re-presentation of the stories of witnesses. Bias and prejudice are anathema to the legal culture of Western liberal regimes. The judgments of legal experts reflect an ideological innocence which the non-expert might find surprising. The project of the expert knower is to learn what concepts are associated with what signifiers. Political struggle is forgotten and an objective 'rule of law' prevails. All this occurs at the very moment that the expert knower transforms social relations into chains of authoritative signifiers. This might help us to appreciate what role the signified plays in the ideological transformation of concrete social relations.

Louis Althusser began the project of reassessing the language-character of ideology in his important essay, "Ideology and Ideological State Apparatuses."[90] A signified/signifier relation is not real in the sense of pertaining to the *existence* of particular individuals. Rather, Althusser suggests, the signifying relation constitutes an *imaginary* relationship to a concrete living situation. Althusser calls this imaginary relationship "ideology".[91] A lawyer's consciousness contains signifieds (or concepts) *about* the signifieds of human rights from what one might describe as Kant's *noumenal* realm. Human rights are 'practised' as lawyers inscribe the authoritative signifiers with concepts or signifieds. "Reality" takes on what Althusser calls "a mirror structure".[92] Through the nexus between such signifieds and conduct, the expert believes that theory and practice are united or synthesized. But this unity is constituted within *imaginary* relations which are believed to surround the signified. Human rights language is no exception to the phenomenon of the mirror structure.[93]

Two scholars take up the ramifications of Althusser (although not addressing his works directly), and by doing so, continue the efforts which lapsed with the writings of Gabel and Balbus: Peter Goodrich[94] and Dragan Milovanovic[95] make important efforts

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[90] L. Althusser, "Ideology and Ideological State Apparatuses (Notes towards an Investigation)" in L. Althusser, ed., *Lenin and Philosophy and Other Essays*, trans. B. Brewster (New York: Monthly Review Press, 1971) 127.

[91] *Ibid.* at 165.

[92] *Ibid.* at 180.

[93] For Althusser, only the Communist Party escapes ideology.

[94] See by P. Goodrich: *Languages of Law: From Logics of Memory to Nomadic Masks* (London: Weidenfeld & Nicolson, 1990); *Legal Discourse: Studies in Linguisitics, Rhetoric and Legal Analysis* (New York: St. Martin's Press, 1987). Goodrich has several more recent essays in the *International Journal for the Semiotics of Law*. These essays draw upon Lacan and Legendre in order to mount a stronger critique of legal discourse. For Goodrich's view of rhetoric, see "Traditions of Interpretation and the Status of the Legal Text" (1986) 6:1 *Legal Studies* 53; "The Antinomies of Legal Theory: An Introductory Survey" (1983) 3:1 *Legal Studies* 1; "The Role of Linguistics in Legal Analysis" (1984) 47 Mod. L. Rev. 523.

[95] D. Milovanovic, *Postmodern Law and Disorder: Psychoanalytic Semiotics, Chaos and Juridic Exegesis* (Liverpool, U.K.: Deborah Charles, 1992).

to expose how the imaginary is taken as the real.[96] Drawing from Jacques Lacan and Lacan's follower, Pierre Legendre, Milovanovic argues that the ultimate foundation of legal language is not the 'rule of law', with which law students have been trained to believe as constitutive of a liberal-democratic order, but an absent nothing (in Sartre's sense) which one cannot experience as existing. This absent nothing is Lacan's 'phallic symbol', Levinas' 'invisible Author', Kant's 'in itself', or Derrida's '*arche*' (centre of any language). Peter Goodrich traces this belief in an absent symbol back to the period of the glossators — indeed, to the modern legal order's first professional law school in Italy. The consequence of the imaginary character of analytic legal reasoning, Goodrich suggests, is that it inevitably becomes estranged from the concrete. Goodrich believes that rhetoric will return lawyers to the concrete, for rhetoric is embedded in social/ cultural history. In an extremely strong attack upon Goodrich's *Languages of Law*, Anna Pintora asks whether it is possible for common English lawyers to use a different language than the legal jargon which laypersons cannot understand. If not, how can the legal elite redirect laypersons from dealing with legal agencies and legal institutions so that their real intentions are not betrayed by unfaithful translations into legal jargon?[97] One can find a rich series of essays which raise precisely Pintore's issue in the *Windsor Yearbook of Access to Justice*.[98]

The works of Lacan, Levinas, and Derrida bear directly upon human rights for the following reason: the human rights expert may well imagine the victim as a unique and absolute 'end in itself' whose dignity cannot be compared with any market price, just as Kant urged. By discursing through chains of signifiers which experts recognize as possessing authority, lawyers mutually recognize each other as expert knowers. If the expert and victim alike believe that the expert is impartially and objectively applying the 'Law' to the 'Facts', it is difficult for the expert, victim and scholar to understand this representation of the expert's enterprise as a make-believe world. This double mirroring of concrete social relations is not a minor problem because, as Bert van Roermund argues, "legalism is nothing other than representationalism in the context of the law."[99] Indeed, van Roermund suggests that the judge's narrative renders the multiplicity of representations coherent.[100]

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[96] See also Y. Hachamovitch, "One Law on the Other" (1990) 3:8 *International Journal for the Semiotics of Law* 187. I discuss D. Cornell's work, relevant in this respect, below. See also S. Benhabib and D. Cornell, "Introduction: Beyond the Politics of Gender" in S. Benhabib & D. Cornell, eds., *Feminism as Critique* (Minneapolis: University of Minneapolis Press, 1987) 1; and D. Cornell, *The Philosophy of the Limit* (New York: Routledge, 1992). See also "Trace of Legal Idealism", *supra* note 80.

[97] A. Pintore, "Law and Hypocrisy" (1991) 4:2 *International Journal for the Semiotics of Law* 191. In the same journal issue at 205 Goodrich makes an equally devastating reply in "Deaf Memories: A Response to Anna Pintore".

[98] See *e.g. infra* notes 99 & 141.

[99] B. van Roermund, "Narrative Coherence and the Guises of Legalism" in P. Nerhot, ed., *Law, Interpretation and Reality: Essays in Epistemology, Hermeneutics and Jurisprudence* (Dordrecht, Netherlands: Kluwer Academic Publishers, 1990) 310 [hereinafter "Narrative Coherence"]. Also see his article "Justice, Rights and Human Dignity: Some Aspects of Coherence in the Legal Concept of a Person" (1988) 7 Windsor Y.B. Access Just. 46.

[100] See "Narrative Coherence", *ibid.* See also by the same author: "On 'Narrative Coherence' in Legal Contexts" in C. Faralli and E. Pattaro, eds., *Reason in Law: Proceedings of the Conference Held in Bologna, 12-15 December 1984*, vol. 3 (Milano: Dott. A. Giuffrè Editore, 1988) 159.

One might add that as the narratives of witnesses, lawyers, trial judges and appellate judges unfold, the client becomes a victim who, as the presupposed center of the experts' discourse, aspires to illustrate his or her concrete social situation by representing her or his pain within chains of signifiers which possess meaning *for* that victim, but not necessarily the same meaning for the lawyers who have their own narratives to reconstruct. The experts then re-present the victim's own signifiers into networks of signifiers which the experts mean. That is, the victim's embodiment of signs is displaced by the lawyers' and judges' own embodiments of the same words used by the victim. The female who, having been harmed, enters legal discourse through her representative, is arguably further disembodied because the meanings which lawyers have brought into chains of authoritative signifiers have responded to the way men, acculturated as men, mean those signifiers. Judith E. Grbich's "The Body in Legal Theory" goes to this point.[101] Indeed, the universalist pretentions of human rights discourse induces the human rights specialist to believe that the legal discourse is truthful and just, whereas as André-Jean Arnaud has shown, that discourse projects merely a bourgeois peace.[102] Moreover, a pietism characterizes this rational, impartial and allegedly pure discourse of experts.[103] Precisely because there is a gap between both: (a) the victim's representations to her or his lawyer or the court and her or his concrete living experience(s) which had brought on a harm; and (b) between her or his representation to a legal official and the imaginary signifying relations of the human rights lawyer situated in a secondary metalanguage, the lawyer's signifieds doubly function ideologically.

Just as I observed with respect to the stories outlined in section two above, any signified — client's or lawyer's — abstracts from a multiplicity of experiences so as to situate experience at a fixed point. With such fixity, expert knowers master, control, and manipulate a concrete experience as a 'means' rather than as an 'end in itself'. The concrete experience of the pained victim is treated as a 'means' within chains of signifiers which the human rights experts take as authoritative. A human rights 'judgment' is 'practical' in that it offers a *meaning* for an expert, by an expert, *about* a non-expert's story. The judgment finalizes, freezes and utilizes the victim's signifiers within further signifying relations of the metalanguage. The expert *makes* the world.

VIII. Efforts to Break from the Ideology of the Metalanguage

I have elaborated the above general theory of a metalanguage because Anglo-American legal theorists have made magnanimous efforts to retrieve the person-to-person relations which are believed to pre-exist the signifying relations of the expert. This effort to retrieve a humanism from the metalanguage has passed through several moments. First, expanding upon his "Reification in Legal Reasoning",[104] Peter Gabel elaborated how the legal metalanguage reifies everyday languages and how it is essential

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[101] J.E.Grbich, "The Body in Legal Theory" in M. Albertson Fineman & N. Sweet Thomadsen, eds., *At the Boundaries of Law: Feminism and Legal Theory* (New York: Routledge, 1991).

[102] See especially A.-J. Arnaud, "La paix bourgeoise" (1973) 2 *Quaderni fiorentini per la storia del pensiera giu* 14. Also see his article "Du bon usage du discours juridique" (1979) 53 *Languages* 117; and his excellent scholarly study *Critique de la raison juridique: où va la sociologie du droit?* (Paris: Librairie générale de droit et de jurisprudence, 1981).

[103] K. Burke, *Permanence and Change, an Anatomy of Purpose* (Los Altos, Cal.: Hermes, 1954) at 74. Piety attempts "to round things out and to fit experience together into a unified whole."

[104] (1980) 3 *Research in Law and Sociology* 25.

that lawyers return to the humanism of intersubjective relations. During a second movement, largely beginning in the early 80's, feminist legal theorists demonstrated how the signifieds of the metalanguage presuppose the values and ideals which male sexuality alone experiences in Western culture and how the experiences of women could radically transform the reified metalanguage. A third movement, described as 'critical race' theory, turned feminist legal theory on itself by claiming to show how the *concepts* of feminist legal theory manifested the particular experiences of white middle-class women. A fourth movement, particularly emanating from Canadian scholars, has focused upon the institutional context; the metalanguage, it is claimed, results from the shift of authority from legislatures to courts. In each movement, the scholar realizes that the metalanguage is the source of social alienation and each assumes that it is possible for experts to return to the concrete social relations of victims.

A. *The Retrieval of Unreified Relations*

Richard Michael Fischl, in his recent review of Critical Legal Studies' works, as well as in a commentary of some reviews of the movement, suggests that what "killed" Critical Legal Studies was the issue raised again and again by liberal critics: namely, Critical Legal Studies did not offer an alternative program to legal formalism even if its analyses of the indeterminacy of law were on the right track.[105] My own reading of one of the movement's 'founding' initiators, Peter Gabel, suggests that liberal scholars have simply not looked close enough at some of the writings of the movement. Critical Legal Studies did and does offer an alternative to liberal legalism. This alternative goes to the retrieval of face-to-face social relations which legal forms are said to enclose and reify. In a series of essays published during the 1980's,[106] Peter Gabel elaborated this alternative. Perhaps, it was best identified by his dialogic partner as the theory of 'intersubjective zap'. Gabel called the alternative a theory of 'unalienated relatedness'.

Gabel claimed, in the (in)famous dialogue "Roll Over Beethoven",[107] that the Critical Legal Studies project aimed "to realize the unalienated relatedness that is imminent within our alienated situation."[108] Intersubjective zap does not achieve a unity through abstractions. Rather, 'zapness' em-*bodies* an unalienated relatedness[109] which he characterizes as "authentic".[110] Gabel insisted that we cannot describe our "existential reality at the level of reflection."[111] Influenced by Althusser whom he cited in his bibliographies, Gabel attributed social alienation to representations which *re*-presented

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[105] R.M. Fischl, "The Question that Killed Critical Legal Studies" (1992) 16 *Law & Social Inquiry* 779. See also a critical comment of his review by C.R. Massey in "The Faith Healers" (1992) 16 *Law & Social Inquiry* 821; and Fischl's rebuttal in "Privileged Positions" (1993) 17 *Law & Social Inquiry* 831.

[106] See *e.g.* P. Gabel's articles: "The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves" (1984) 62 Tex. L. Rev. 1563; "Reification in Legal Reasoning" (1980) 3 *Research in Law and Sociology* 25; "Intention and Structure in Contractual Conditions: Outline of a Method for Critical Legal Theory" (1977) 61 Minn. L. Rev. 601.

[107] D. Kennedy and P. Gabel, "Roll Over Beethoven" (1984) 36 Stanford U. L. Rev. 1.

[108] *Ibid.* at 1. Both Gabel and Kennedy recognized that structural reformulations, in conceptual categories and principles in legal consciousness posed the obstacle to unalienated conditions.

[109] *Ibid.* at 3.

[110] *Ibid.* at 30.

[111] *Ibid.* at 10.

past experiences.[112] Such representations displaced "the immediacy of connection";[113] institutional roles overcame humanist social relations.[114] In contrast, intersubjective zap 'overcame' this representative knowledge. Gabel believed that his project could best be considered as descriptive rather than analytic.[115]

Gabel's effort to transform the juridical metalanguage into face-to-face social relations is problematic though, as is the work of later feminist scholars and Canadian scholars who are both concerned about the undemocratic character of judicial interpretation (discussed below), and wish to retrieve an unreified 'womyn's' or citizen's concrete experience in legal discourse.

First, returning to the ideological role of the signified as explained by Althusser, Gabel fails to account for face-to-face relations which do not possess signifieds or concepts. This apparent inability to break from the role of forms (or signifieds) leads Richard Devlin to suggest in another context, for example, that juridical violence is "endemic" — "an imperative" of legal activity in contemporary society.[116]

Second, even if Gabel were to describe face-to-face relations without signifieds, he fails to account for the phenomenon of representation through the juridical act. That is, however one describes face-to-face relations, the metalanguage privileges the signifieds associated with the experts' representations (signifers). Once again, violence — in this case an ideological violence — permeates a transforming juridical discourse. The signifieds which experts claim to 'know' enclose — and necessarily enclose — allegedly 'signifiedless' face-to-face social relations.

Third, Gabel remained within a paradigm of *knowledge*. That is, Gabel failed to account for the *language* character of reified social relations. This aspect of Gabel's predicament is not unlike that which has characterized other efforts by legal theorists to retrieve the face-to-face relations of subjects who experience suffering. In this respect, Michael Fischl's consternation surrounding the liberal critics' question "what is the alternative to Critical Legal Studies?" also fails to go far enough, for it is apparent that there is an alternative to legal liberalism embedded in Critical Legal Studies. However, this alternative questions the existence of the modern state itself and whether the laws of face-to-face relations are even possible for expert knowers who represent the language of a modern state.

B. *Early Feminist Legal Theory*

An early strain of feminist legal theory also reconsidered the juridifying relations of a modern state. This strain suggested that the signifieds of the legal metalanguage represent male signifieds.[117] Even legal theory was held to silence 'womyn's' concrete

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[112] *Ibid.* at 2.

[113] *Ibid.* at 6.

[114] *Ibid.*

[115] *Ibid.* at 4.

[116] See especially "The Rule of Law" *supra* note 86. See also R. Devlin, "Solidarity or Solipsistic Tunnel Vision? Reminiscences of a Renagade Rapporteur" in K.E. Mahoney and P. Mahoney, eds., *Human Rights in the Twenty-first Century* (Dordrecht, Netherlands: Kluwer Academic Publishers, 1993) 991 at 997-99.

[117] See *e.g.* H.R. Wishik, "To Question Everything: The Inquiries of Feminist Jurisprudence" (1985) 1 Berkeley Women's L.J. 64; A.C. Scales, "The Emergence of Feminist Jurisprudence: An Essay" (1986) 95 Yale L.J. 1373 at 1374-80 & 1402-03 [hereinafter "Feminist Jurisprudence"].

experiences.[118] Because the experts had hitherto been men, the early legal feminists concluded that to be a competent lawyer, one had to *know male concepts* (signifieds).[119] Gender differences were understood to be *categorical.*[120] Traditional legal analysis was described in categorical terms.[121] Some commentators even understood 'Law' as a rational set of beliefs or forms.[122] Moreover, 'man's' view of the world is reduced to 'man's' *mind.* Indeed, generality and universalism characterized form-alism, thereby divesting people of "real individual life."[123] The forms were said to make actual social relations invisible. Accordingly, it was claimed, a feminist outlook required a *knowledge* of female *concepts.* Prominent feminist legal theorists asserted that such concepts should replace, or at least be added to, the existing (male) legal consciousness.[124]

Once again, an effort had been made to understand 'Law' as a network of *concepts,* all the while assuming that those concepts can be understood through transparent chains of signifiers.[125] For Ann Scales, "law, like the language which is its medium, is a system of classification."[126] When Robin West advocates a "reconstructive jurisprudence", she believes that it is possible to institutionalize a "direct language that is true to our experience and our own subjective lives."[127] Janet Rifkin takes male signifieds as a transparent vehicle for male authority.[128] The male signifieds are general, universal and

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[118] R. West, "Jurisprudence and Gender" (1988) 55 U. Chi. L. Rev. 1.

[119] *Ibid.* See also the admittedly early writing on feminist legal theory in E.C. DuBois *et al.*, "Feminist Discourse, Moral Values, and the Law — A Conversation" (1985) 34 Buff. L. Rev. 11; C.A. MacKinnon, "Feminism, Marxism, Method, and the State: An Agenda for Theory" (1982) 7:3 *Signs* 515; and C.A. MacKinnon, "Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence" (1983) 8:4 *Signs* 635.

[120] Martha Minow has emphasized that this focus on the categorical underlies traditional feminist analysis of difference. See M. Minow, "The Supreme Court 1986 Term, Forward: Justice Engendered" (1987) 101 Harv. L. Rev. 10 [hereinafter "Justice Engendered"]. See *e.g.* C. MacKinnon's chapter entitled "Difference and Dominance: On Sex Discrimination" in *Feminism Unmodified* (Cambridge. Mass.: Harvard University Press, 1987) 40.

[121] "Justice Engendered", *ibid.* at 35 & 76-78.

[122] J. Rifkin, "Toward a Theory of Law and Patriarchy" (1980) 3 Harv. Women's L.J. 83.

[123] M. Stubbs, "Feminism and Legal Positivism" (1986) 3 *Australian Journal of Law and Society* 63.

[124] Ann Scales refers to "Standards to Help us Make Connections Among Norms" in "Feminist Jurisprudence", *supra* note 117. Robin West advocates that legal *doctrines* should take women's lives seriously: R. West, *supra* note 118 at 60 & 70. Also see M.E. Becker, "Prince Charming: Abstract Equality" [1987] Sup. Ct. Rev. 201. Katherine Bartlett states the need for "consciousness-raising" in "feminist knowing in law" so as to extend the horizons of male legal forms: "Feminist Legal Methods" (1990) 103 Harv. L. Rev. 829 at 849, 881-82. Martha Minow calls for a dialogue with an openness to new forms of knowledge: "Justice Engendered", *supra* note 120 at 68-70; and "Interpreting Rights: An Essay for Robert Cover" (1987) 96 Yale L.J. 1858 at 1904. Margo Stubbs urges a praxis which continually links the (male) forms with concrete experiences and thereby addresses the significance of the *form* of law in regulating the oppression of women in capitalist society, to use words similar to her own: *supra* note 123. M. J. Matsuda admits to a utopian vision of legal doctrines which replace abstraction with the actual contextualized lives of suffering individuals: "Liberal Jurisprudence and Abstracted Visions of Human Nature: A Feminist Critique of Rawls' Theory of Justice" (1986) 16 N.M. L. Rev. 613 [hereinafter "Liberal Jurisprudence"].

[125] See M. Minow, "Feminist Reason: Getting It and Losing It" (1988) 38 J. Legal Educ. 47 [hereinafter "Feminist Reason"]; and P. Cain, "Feminist Jurisprudence: Grounding the Theories" (1989) 4 Berkley Women's L.J. 191.

[126] "Feminist Jurisprudence", *supra* note 117 at 1386.

[127] *Supra* note 118 at 70.

[128] See especially J. Rifkin, *supra* note 122.

inclusive of particular experiences whereas the voices of *particular* 'womyn' are described as concrete and personal to those 'womyn'.[129] It seems almost as if 'womyn's' experiences are signified-less or at best, unmediated through signifiers which obstruct such particular experiences.

C. *Critical Race Theory*

A third movement in the effort to retrieve an unreified humanism occurred through critical race theory. Here, feminist legal theory itself was considered a network of representations which entrenched the ideologically saturated signifieds of white women, especially white middle-class women.[130] The by-product of feminist legal theory was held to be the silencing of the voices of women of colour — indeed, of the voices of male scholars of colour as well.[131]

D. *The Institutional Moment*

A further movement in the effort to retrieve unreified face-to-face relations has been manifested in the writings of Canadian legal theorists. This movement has concentrated upon the institutional context, in particular, the relations between unelected, highly privileged judges on the one hand, and elected legislators on the other. Allan C. Hutchinson, probably more than any other writer in English-speaking law reviews, has emphasized the need to consider the wider institutional ramifications of the reification of juridical discourse. During the 1980's and 1990's, Hutchinson restates the earlier appeal of Gabel and feminist legal theory — what he calls the "personal meaning and social knowledge in the situated particulars of embedded experiences."[132] Once again, a writer advocates concrete experiences as both the lost center of the legal metalanguage and the future center for a transformative legal politics. Hutchinson characterizes such a retrieval as constitutive of post-modernism.[133] He writes that such an experientialist view of politics (*i.e.* law) contrasts with the grand theories of History associated with

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[129] As Matsuda believes, see "Liberal Jurisprudence", *supra* note 124. See also Minow in "Feminist Reason", *supra* note 125: the concrete and particular experiences of 'womyn' would be disclosed "after the [male] law".

[130] P. Cain, *supra* note 125; M. Kline, "Race, Racism and Feminist Legal Theory" (1989) 12 Harv. Women's L.J. 115; K. Crenshaw, "Demarginalizing the Intersection of Race and Sex: a Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics" [1989] U. Chi. Legal F. 139.

[131] See *e.g.* R. Delgado, "Storytelling for Oppositionists and Others: A Plea for Narrative" (1989) 87 Mich. L. Rev. 2411; R. Delgado, "When a Story is Just a Story: Does Voice Really Matter?" (1990) 76 Va. L. Rev. 95; R. Delgado, "The Imperial Scholar Revisited: How to Marginalize Outside Writing, Ten Years Later" (1992) 140 U. Pa. L. Rev. 1349; M. Matsuda, "Public Response to Racist Speech: Considering the Victim's Story" (1989) 87 Mich. L. Rev. 2320; M. Matsuda, "Looking to the Bottom: Critical Legal Studies and Reparations" (1987) 22 Harv. C.R.-C.L. L. Rev. 323; A.M. Johnson, "Racial Critiques of Legal Academia: A Reply in Favor of Context" (1990) 43 Stan. L. Rev. 137.

[132] *Waiting for Coraf, supra* note 51 at 27. See also by A. Hutchinson: "Democracy and Determinacy: An Essay on Legal Interpretation" (1989) 43 U. Miami L. Rev. 541; "Inessentially Speaking (Is There Politics After Postmodernism?)" (1991) 89 Mich. L. Rev. 1549; "Identity Crisis: the Politics of Interpretation" (1992) 26 New Eng L. Rev. 1173. Hutchinson brings the themes and analysis of these and many other essays into his *Waiting for Coraf.*

[133] A. Hutchinson, "Doing the Right Thing? Toward a Postmodern Politics" (1992) 26 *Law & Society Review* 773 [hereinafter "Postmodern Politics"].

Kant, Hegel, Fukuyama and Joel Handler, the past President of the American Law and Society Association. In two recent essays,[134] Hutchinson identifies his transformative approach to law with what he takes to be all of post-modernism, deconstruction, critical hermeneutics, critical consciousness, and the political.[135] In another series of essays, noted below, he urges that Wittgenstein be ushered in to support the retrieval.

To take only one of these traditions which is brought in to support a return to the concrete, Hutchinson writes that "the ambition [of postmodernism] is not to fix an all-encompassing Truth or Justice in a distant metaphysical realm, but to pay constant attention to the multiple truths and contextual details of engaged living."[136] Postmodern politics does not provide "an integrated or finished program for political action."[137] Instead, he offers, postmodern politics "involves face-to-face, localized confrontations."[138]

Knowledge is, at best, tentative and provisional. Hutchinson identifies post-modernism with deconstruction. Against his desire to return law to the particular, he critiques the 'rights' thesis for pigeon-holeing particular social experiences within a metaphysics of rights. Hutchinson's essays, in general, work through the writings of liberal political theorists and of prominent (and some not-so-prominent) contemporary legal theorists who, he believes, play to formalism and objectivism. In this critique, as I read his recent works, Hutchinson desperately wishes to break from the metaphysics of rights, and indeed he believes that such a return to particular social experiences is possible for law in a modern state. Of course, this very issue is contestable because of both the character of *language* — the phonemes and graphemes brought into signifiers — of law in a modern state and the secondariness of that *language* character vis-à-vis primary everyday languages through which non-lawyers live.[139] This issue is separate from whether Hutchinson succumbs to a metaphysics of his projected adversaries or even to a metaphysics of his own self.[140]

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[134] *Ibid.*; "Identity Crisis: The Politics of Interpretation" (1992) 26 New Eng. L. Rev. 1173 [hereinafter "Identity Crisis"]; "Les Miserables Redux: Law and the Poor" (1993) 2 S. Calif. Interdisciplinary L.J. 199 [hereinafter "Redux"]. See also *Waiting for Coraf, supra* note 51.

[135] I wonder, as I read these and his earlier essays, whether post-modernism is not more dependent upon modernism than Hutchinson seems to suggest and, if so, the extent to which there is such a dependence in the context of law. It is also unclear whether the different traditions, aims and analysis of the several approaches which are ushered in support of the retrieval of the particular, are not contradictory and, indeed, embedded in the very metaphysics from which Hutchinson and those cited earlier wish to escape. See *e.g.* "Identity Crisis", *ibid.* at 1187, where it is suggested that there are gradations of postmodernism, treating Foucault's "What is an Author?" as "more postmodern" than Roland Barthes' *The Pleasure of the Text* (New York: Hill, 1982). It is also unclear whether the appeal to the lived, particular experiences owes more to the phenomenological concerns of Husserl and M. Ponty, than from postmodernism.

[136] *Waiting for Coraf, supra* note 51 at 227.

[137] *Ibid.* at 227.

[138] *Ibid.* at 228.

[139] See especially W.E. Conklin, "A Contract" in R. Devlin, ed., *Canadian Perspectives, supra* note 16 at 207, and "Teaching Critically", *supra* note 10.

[140] See *e.g.* Hutchinson's projection of one of my own essays (*Images, supra* note 10) as "visionary formalism", notwithstanding the phenomenological aims and close distinction made between an "image" and a "conception". An image, because of its em-bodied, lived character, may break from the objective/subjective dichotomy upon which metaphysics is dependent. Compare especially the "Preface" and Chapters 1 and 13 with Chapter 3 of Hutchinson's *Waiting for Coraf, supra* note 51.

IX. The Problem with the Return to Concrete Social Relations

The problem with the above efforts to expose how law violates particular experiences rests, I believe, less with whether the scholars correctly describe their efforts as 'postmodern', 'deconstructive' or 'Wittgensteinian' (rather than, say, phenomenological) than it has to do with the paradigm of *knowledge* within which each scholar has worked.[141] The continental, as much as the analytic, tradition has worked within this paradigm of knowledge in commentaries about law. For example, Georg Lukács claims that the legal consciousness of a modern judicial community is highly reified.[142] He assumes that signifieds constitute law. Further, Lukács offers that a radical shift in legal consciousness would liberate the legal order. Even members of the Frankfurt School presupposed that the source of legal oppression in a modern state lies in the forms which expert knowers claim to know.[143] Similarly, drawing from his studies of Hegel, Gadamer tries to 'rehabilitate' the authority of texts by deferring to the expert or the 'knower' of concepts who continually questions her or his prejudices.[144] Notwithstanding his focus on the importance of language, there are suggestions in Gadamer's works that authority in scholarship conceptually grounds political authority. Indeed, at one point, Gadamer offers that the 'knower' of *concepts* embodies political authority.[145] Authority is said to rest with the educator, the expert, the 'knower' of the prejudices of society. Even scholars of the phenomenology of law have been preoccupied with the typification process of legal reasoning to the exclusion of the language through which the lawyer/judge expresses the typifications.[146]

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[141] Only by way of an example, Hutchinson suggests that a paradigm of political consciousness should replace liberal political theory and rights talk. For a similar approach adopted by this writer at an early moment, see W.E. Conklin, "The Legal Theory of Horkheimer and Adorno" (1985) 5 Windsor Y.B. Access Just. 230. In "Redux", *supra* note 134 at 217, Hutchinson attributes the inadequacies of law to "rights talk". Here, he advocates that rights' talk must be capable of deriving concrete responses to particular situations from its abstract statements of principle, as he puts it. The history of liberal political theory and legal practice fail in this respect. In this essay, though, Hutchinson limits his preferred alternative to "rights talk" in the raising of a critical consciousness of lawyers so that they become "more sensitive to the debilitating effect of the extended involvement of courts in civic life" and, secondly, that they take on a "'strategic skepticism' toward the efficacy of even limited use of litigation in the struggle for social justice": at 224. Also see especially his sections at 229-42.

[142] See G. Lukács, "Reification and the Consciousness of the Proletariat" and "Legality and Illegality" in *History and Class Consciousness*, trans. R. Livingstone (London: Merlin Press, 1971); also see generally G. Lukács, *Soul and Form*, trans. A. Bostock (London: Merlin Press, 1974).

[143] For the role of the paradigm of knowledge in the works of Horkheimer and Adorno, see generally the argument and references to their works in W.E. Conklin, *supra* note 141. See also W. Benjamin, "The Critique of Violence" in P. Demetz, ed., *Reflections* (New York: Schocken Books, 1978) 277. Horkheimer and Adorno trace the paradigm of knowledge to the Enlightenment project and to Hegel's articulation of the gulf between the subject and the object.

[144] H.-G. Gadamer, *Truth and Method*, 2d ed. (New York: Crossroad, 1989).

[145] See especially H.-G. Gadamer, "The Discrediting of Prejudice by the Enlightenment" in K. Mueller-Vollmer, ed., *The Hermeneutic Reader* (New York: Continuum, 1985) 257; and *Truth and Method*, *ibid.* at 245-49.

[146] See *e.g.* W. Friedmann, "Phenomenology and Legal Science" in M. Natanson, *Phenomenology and the Social Sciences*, vol. 2 (Evanston, Ill.: Northwestern University Press, 1973)[hereinafter *Phenomenology and the Social Sciences*] 343; M. Franklin, "The Mandarism of Phenomenological Philosophy of Law" in *Phenomenology and the Social Sciences* 451; P. Amselek, "The Phenomenological Description of Law" in *Phenomenology and the Social Sciences* 367; W.L. McBride, "Towards a Phenomenology of International Justice" in G. Hughes, ed., *Law, Reason and Justice* (New York: New

X. Law as Conversation

In reviewing relatively recent scholarship in Anglo-American legal periodicals as they relate to law, language and human rights, one finds that strains of feminist legal theory have found the paradigm of knowledge to be particularly problematic for understanding law. Martha Minow and Elizabeth Schneider, for example, have suggested that rights offer a *situs* for conversation,[147] and Lucinda Finley recognizes the problem of an engendered *discourse*, although she urges that 'we lawyers' widen the patriarchal legal language so that more women's perspectives, experiences and voices be brought *into* the discourse[148] — women are presupposed to live *outside* legal discourse. Further, many contemporary feminist legal theorists passionately believe that legal discourse excludes just as it can be transformed to incorporate a multiplicity of women's lived experiences. One is left to speculate as to how this transformation is possible if phonemes and chains of signifiers cloud the otherwise transparent language. Further, would not a transformed (feminist) legal language succumb to the character of a metalanguage (with all its monological ramifications for non-experts), as does the existent legal language of a modern state? Would not the transformed language simultaneously *conceal* the lived experiences of 'womyn' who do not 'know' the new language's signifieds because they are only the privilege of lawyers? For, the analytic tradition within which lawyers work induces a sense of continuity, linear time and causal connections amongst the experts' signifieds. The self-generating analytic logic forecloses our ever addressing, let alone reaching, particular 'womyn's' experiences. And this very analytic experience of a lawyer re-presents and re-interprets the lived experiences of pained individuals *through* the familiar signifiers of an *authoritative* discourse, not the discourse of a particular 'womyn'.

How is it possible for lawyers of any gender to connect a legal language with the language of non-lawyers, when the lawyers live, professionally at least, through a secondary metalanguage? Indeed, is legal language a conversation between those who 'know' the signifieds associated with its signifiers and those who seek recognition of their pain? Is it possible for a lawyer — feminist or non-feminist — to address someone who does not 'know' the signifieds associated with authoritative signifiers without superimposing the latter signifying relations upon the non-expert? Is it possible for a lawyer to experience the pain of an aggrieved individual as the latter experiences her or

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York University Press, 1969) 137; D. Schiff, "Phenomenology and Jurisprudence" (1982) 4 Liverpool L. Rev. 5; H.J. van Eikema Hommes, *Major Trends in the History of Legal Philosophy* (Amsterdam: North-Holland, 1979); W. Luijpen, *Existential Phenomenology* (Pittsburgh: Duquesne University Press, 1960) c. 3 & 6; W. Luijpen, *Phenomenology of Natural Law* (Pittsburgh: Duquesne University Press, 1967).

But, see J. Broekman, "Law, Anthropology and Epistemology" in E. Bulygin, J.-L. Gardies & I. Niiniluoto, eds., *Man, Law and Modern Forms of Life* (Dordrecht, Netherlands: D. Reidel, 1985) 15.

147 M. Minow, *supra* note 124; M. Minow, *Making All the Difference: Inclusion, Exclusion and American Law* (Ithaca, N.Y.: Cornell University Press, 1990); E.M. Schneider, "The Dialectic of Rights and Politics: Perspectives from the Women's Movement" (1986) 61 N.Y.U. L. Rev. 589 at 622-23. For an excellent review of Minow's book, *Making All the Difference: Inclusion, Exclusion and American Law*, see R. Devlin, "Demanding Difference (But Doubting Discourse): A Review Essay" (1994) 7 C.J.W.L. 156. Devlin also reviews I.M. Young, *Justice and the Politics of Difference* (Princeton: Princeton University Press, 1990) in the same essay.

148 L.M. Finley, "Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning" (1989) 64 Notre Dame L. Rev. 886.

his own pain? If not, why not? Lawyers categorize. But to categorize any particular experience conceptualizes, homogenizes and thereby conceals the heterology of everyday languages through which such classified individuals live.[149]

XI. 'WOMYN'S' TIME

Drawing primarily from Lacan, Derrida, and Levinas, Drucilla Cornell critiques the binary logic endemic to analytic jurisprudence.[150] When one accepts one normative interpretation, one necessarily delegitimizes a competing interpretation.[151] In place of a rational vision of right and wrong conduct, the 'Good' or Hegel's 'Law of Law', a proliferation of "true difference"[152] exists, according to Cornell. Feminine negativity dwells within this true difference or "inter-space".[153] Such difference exceeds the limits of a genderized subject imminent within the concepts of masculine and feminine.[154]

Cornell's analysis, of course, leaves unaddressed how such difference beyond the limits of categories is applicable to a professional language which parasitically feeds from primary everyday languages. For, because of the phonemes and graphemes which enter *into* signifiers from an interpreter's experiences, the same signifiers will have different signifieds attributed to them by the professional and the non-expert. Interestingly, Cornell responds to this issue by falling back upon the 'nitty-gritty' of analytical positivism: "legal principles".[155]

Principles constitute a shared social reality, according to Cornell. In a possible departure from Ronald Dworkin's sense of principles[156] though, she believes that principles disseminate an opening rather than a self-enclosed rational totality.[157] She calls this opening 'justice'. Although 'new worlds' of ethical *alternatus* dwell *before* the trace of representations, Cornell admits that the *alternatus* of which she writes lies within the *nomos*. Cornell fails to realize, it seems, that the face-to-face social relations of the 'opening' are presented, if at all, only for lawyers *inter-se* within the principles of *nomos*. And Cornell admits that the lawyer cannot escape from the categorization, identification and analysis of the categories which violate difference.[158] As Cornell herself suggests, "theoretical overreliance on the 'polyvocality' of the female body" risks becoming "a utopia for the reappropriation of power" where one essentializes and thereby reifies the historically contingent form of the feminine.[159]

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149 R.L. Kennedy, "Racial Critiques of Legal Academia" (1989) 102 Harv. L. Rev. 1745 at 1784. See also T.T. Minh-ha, *Woman, Native, Other: Writing Postcoloniality and Feminism* (Bloomington: Indiana University Press, 1989) at 76.

150 See especially *Feminism as Critique*, *supra* note 96; and D. Cornell, *Philosophy of the Limit*, *supra* note 96. See also J. Kristeva, "Word, Dialogue and Novel", "Women's Time", and "The True-Real" in T. Moi, ed., *The Kristeva Reader* (Oxford: Basil Blackwell, 1986) 34, 187, 214.

151 See *The Philosophy of the Limit*, *supra* note 96 at 103-04 where Cornell discusses this point in the context of Levinas' philosophy of law.

152 *Feminism as Critique*, *supra* note 96 at 13.

153 *The Philosophy of the Limit*, *supra* note 96.

154 D. Cornell and A. Thurschwell, "Feminism, Negativity, Subjectivity", in *Feminism as Critique*, *supra* note 96, 157.

155 *The Philosophy of the Limit*, *supra* note 96 at 105-07.

156 His view of principles is examined in W.E. Conklin, *In Defence of Fundamental Rights* (Alphen aan den Rijn, Netherlands: Sijthoff & Noordhoff, 1979) at 232.

157 *The Philosophy of the Limit*, *supra* note 96 at 110.

158 *Ibid.* at 105-11.

159 D. Cornell and A. Thurschwell, *supra* note 154 at 151.

XII. The Language of the Concrete Other

Seyla Benhabib addresses this very issue in a well known essay, "The Generalized and the Concrete Other".[160] Benhabib suggests that the analysis of legal rules, principles and other standards generalizes and categorizes particular experiences which she calls 'concrete'. The subject of laws — the victim of violence, the contractee, the beneficiary, the accused, the harmed — is generalized. The generalized 'other' is an ideal typified person who transcends all contingent difference. Posited rights and duties generalize all particular persons who are entitled to those rights and duties. The equality of which lawyers speak is a generalized formal equality abstracted from each person's "concrete history, identity, and affective-emotional constitution."[161] Within the generalized other, there rests a silenced concrete being whose language is excluded, silenced and disembodied from the generalized other.

Benhabib is not alone in her belief in the transformative potential of a professional metalanguage. We observed above that Peter Gabel also shared the claim that concrete experiences lie embedded within legal signifieds. Iris Marion Young has also urged that "heterogeneous public life" emerge from the metalanguage.[162] The modern conception of the public, she claims, "creates a conception of citizenship which excludes from public attention most particular aspects of a person."[163] Similarly, Judith Butler has argued that the conception of a disembodied and transcendental autonomy, which characterizes the modern view of citizenship, generalizes about men.[164] Butler claims that 'womyn' are 'becoming' rather than 'being', for becomingness invents possibility into their experience(s). At a less abstract level, Ruthann Robson suggests that precisely because the signifier 'family' is enclosed with signifieds which connote a traditional nuclear, heterosexual relationship, lesbians should resist reforms which aim to assimilate lesbians into laws granting benefits to the lesbian family.[165] Robson's concern is magnified once one differentiates between a professional scientistic language and the everyday languages of the non-expert who does not 'understand' or infuse the same

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[160] S. Benhabib, "The Generalized and the Concrete Other: *The Kohlberg-Gilligan Controversy and Moral Theory*" in *Feminism as Critique, supra* note 96, 77; also reprinted in S. Benhabib, *Situating the Self: Gender, Community and Postmodernism in Contemporary Ethics* (Cambridge: Polity Press, 1992) 148.

[161] *Ibid.* at 87.

[162] I.M. Young, "Impartiality and the Civic Public: Some Implications of the Feminist Critique of Moral and Political Theory" in *Feminism as Critique, supra* note 96, 57. See also M. Markus, "Women, Success and Civil Society" in *ibid.* 96 at 106-07.

[163] I.M. Young, *ibid.* at 74.

[164] See J. Butler, "Variations on Sex and Gender: Beauvoir, Wittig and Foucault" in *Feminism as Critique, supra* note 96, 141.

[165] R. Robson, "Resisting the Family: Repositioning Lesbians in Legal Theory" (1994) 19:4 *Signs* 975.

For other efforts to deal with the assimilative character of the signifieds associated with traditional family vis-a-vis lesbian relationships see generally B. Cossman, "Family Inside/Out" (1994) 44 U.T.L.J. 1; K. Arnup, "'We are Family': Lesbian Mothers in Canada" (1991) 20:3/4 *Resources for Feminist Research* 101.

For the problems arising from the signifier 'family' in child custody law see S. Boyd, "Some Postmodernist Challenges to Feminist Analyses of Law, Family and State: Ideology and Discourse in Child Custody Law" (1991) 10 Can. J. Fam. L. 79.

images into the magic signifiers with which the professional works.[166] Is it possible for a situated critic to uncover the effects for a concrete other when the critic works within the professional metalanguage, as Cornell assumes? Is it possible for law to exist in a modern state and not generalize about a concrete other?

Recognizing the importance of language in the construction of signifying differences, Drucilla Cornell and Seyla Benhabib are clearly trying to break from the semiotic and Wittgensteinian traditions which understand language in terms of the signifier/signified relationship to the exclusion of the intentionality of embodied subjects. The 'opening' of which Cornell writes, though, may well be only an opening for the expert knowers who may bring their intentional meanings *into* authoritative chains of signifiers, all the while that the intentionalities of non-lawyers become concealed within the language games of professionals. There is a series of recently published works, though, which recognizes this problem more generally, if only implicitly. These works draw from the personal experiences of the writers. They reveal the extraordinary gap, or what François Lyotard calls a "differend",[167] which dwells between the language of the professional and the language of the particular other. Indeed, I find it very difficult to represent the works, for to represent them — let alone to represent them as a white, middle class 'expert knower' of the signifier/signified relations in the academic discourses of semiotics, phenomenology and constitutional law — already counters the writers' desire to see the world (and authority) *presentatively*. The richness of the authors' experiences with legal discourse speaks for itself.

With the fear of already excluding worthy examples, such as Andrea Timoll's excellent article "*Antigone*, Irigaray, and the Archetypical Problematic: The Classical Opposition of Human and Divine Law",[168] as well as examples of which I am unfamiliar, let me privilege two such works.[169]

Of the essays and books surveyed in this study, there is one which comes closest to identifying the gap between a professional metalanguage and the everyday languages through which a non-lawyer lives. In "The Obliging Shell: An Informal Essay on Formal Equal Opportunity",[170] Patricia Williams describes her experience of reading a series of concrete incidents through the mutiplicity of voices through which she lives her day-to-day life. To some extent, Williams' essays manifest why narratives are so important to understanding law from the viewpoint of the particular other.[171] She describes how

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166 In her exposition of Hegel's view of law and women, for example, Benhabib correctly points out that the subject in the Hegelian system is always restored to selfhood through arguments which assimilate the other into the subject: Benhabib, *supra* note 160 at 256. The juridification of women as women into a legal-juridical person aids in this assimilation.

167 *The Differend*, *supra* note 48.

168 (1994) 19 Queen's L.J. 583.

169 See especially M. Clech Lam, "Feeling Foreign in Feminism" (1994) 19:4 *Signs* 865; T.T. Minh-ha, *supra* note 149; P. Monture-Okenee, "Ka-Nin-Geh-Heh-Gah-E-Sa-Nonh-Yah-Gah" (1986) 2 C.J.W.L. 159; P.A. Monture, "Reflecting on Flint Women" in R. Devlin, ed., *Canadian Perspectives*, *supra* note 16, 351.

170 P. Williams, "The Obliging Shell: An Informal Essay on Formal Equal Opportunity" (1991) 87 Mich. L. Rev. 2128 [hereinafter "The Obliging Shell"]. Her essays are published as *The Alchemy of Race and Rights* (Cambridge, Mass.: Harvard University Press, 1991).

171 For excellent studies of narrotology and law, see B. van Roermund: "Narrative Coherence", *supra* note 99; and "The Guises of Legalism" in P. Nerhot, ed., *Law, Interpretation and Reality* (Dordrecht, Netherlands: Kluwer Academic Publishers, 1990) 310.

formal juridical equality excludes socially and historically contingent circumstances. Williams offers as an example, the American Supreme Court decision of *City of Richmond* v. *J.A. Croson Co.*[172]

The city of Richmond had aimed to award 30% of the city construction contracts to minority-owned businesses. The Supreme Court struck down the program because, according to the Court, the city had failed to establish "a compelling interest" for the awarding of the contracts on the grounds of race. To accept the city's program would "open the door" for similar claims "for every disadvantaged group". The Court had indicated that it shared "the dream of a Nation of *equal citizens* in a society where race is irrelevant to personal opportunity and achievement." The claims of past wrongs were "inherently unmeasureable." "The letter and spirit" of the equal protection clause possessed a "central command" that the Court not weigh "the extent of the prejudice and consequent harm suffered by various minority groups" because such would require the Court to identify "some level of tolerability". Williams restates the Court's use of such general phrases as "too amorphous", "quotas", the "simple" legislative assurances of legislative intention, the description of statistics supporting the need for such a program as "generalizations" and the like. Williams' concern is that the Court employs "interpretive artifice alone"[173] and "rhetorical devices"[174] to *generalize* "a backdrop of richly textured facts and proof on both local and national scales."[175] She describes the act of categorizing as "this lawyerly language game of exclusion and omission."[176] If Patricia Williams is correct in her insights through and about legal language, then one issue remains.

On the one hand, like Peter Gabel, Alfred Schutz and others, Williams seems to believe that one can interpret without doing all the categorizing which lawyers routinely do. For example, in her address to the jury in her first case as a lawyer, her notes record that she urged the jury "to revolt against the tyranny of definition-machines", "to name what your senses well know", and to describe what the jury *perceived* "to be *the limits* of sausage-justice."[177] On the other hand, Williams objects to the totalizing character of legal discourse. She says 'phantom words' (or what de Saussure calls 'signifiers') characterize juridical discourse; they 'label'. The definition machine itself is a '*thing*' (her emphasis). Lawyers are said to 'devour' meanings, just as sausage machines devour everything placed into them. The devouring filters out differences and thereby "defaces" or disembodies an experiencing subject.[178] Juridical definitions "conceal from any consideration — legal or otherwise — a range of serious but 'extrinsic' harms felt by the decisionmakers".[179]

The categorization of Beethoven as white skinned, for example, redefined Western culture generally and German culture in particular. Such a categorization posited a

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See also the series of articles "Legal Storytelling", forward by K.L. Scheppele (1989) 87 Mich. L. Rev. 2073; D.A. Farber and S. Sherry, "Telling Stories Out of School: An Essay on Legal Narratives" (1993) 45 Stan. L. Rev. 807; and T. Morawetz, "Ethics and Style: The Lessons of Literature for Law" (1993) 45 Stan. L. Rev. 497.

172 109 S. Ct. 706 (1989).

173 *The Alchemy of Race and Rights*, *supra* note 170 at 106.

174 *Ibid.*

175 *Ibid.*

176 "The Obliging Shell", *supra* note 170 at 2130.

177 *The Alchemy of Race and Rights*, *supra* note 170 at 107-08.

178 Just as Fred, and Stanford University in general, subtly concealed humiliation, even torture, through their "word boxes": *ibid.* at 110-15.

179 *The Alchemy of Race and Rights*, *supra* note 170 at 112.

boundary — the boundary of a category. The boundary 'fragments' and 'dehumanizes' to the point of constituting violence. Indeed, the boundary marginalizes to the point of demeaning, masking, nullifying, obliterating, colonializing or, at best, penalizing the human being who ends up being extrinsic to the boundary. Justice dwells 'beyond the limit', to use Cornell's and Derrida's term, before the moment of conceptualization through phantom words.

Lawyers must retrieve what Patricia Williams calls the 'extrinsic' (or what Drucilla Cornell calls the 'real difference', Julia Kristeva the 'phenomenal space' or Duncan Kennedy 'the inter-space') beyond the signifieds associated with authoritative signifiers. Williams describes such a just world as "the ambivalent, multivalent way of seeing" which "has to do with a fluid positioning that sees back and forth across boundar[ies]".[180] The authority of such multivalent discourses is a presentative, rather than representational, authority. In a fascinating and richly documented essay, Bernard J. Hibbitts identifies how such a presentational authority has been manifested in "performance cultures."[181] The problem of Patricia Williams' phenomenology brings me to the second outstanding contribution theme of "human rights, language and law."[182]

The second richly textured work which I wish to privilege goes to the fundamental 'differend' between the juridical language of the 'White Man' (English and French), and the languages of indigenous peoples associated with the territory called 'Canada' at the time of writing. In an invigorating and challenging essay, "Aboriginal Peoples and the Canadian Charter: Interpretive Monopolies, Cultural Difference",[183] Mary Ellen Turpel shows how the professional juridical language through which we lawyers are trained and sometimes educated assimilates, neutralizes, manages, manipulates and — I would add — conceals the living languages of aboriginal peoples. What I gain from Turpel's important essay is that there is more to the phenomenon of juridical language than the language games which lawyers play.[184] That is, there is more to juridical language than the signifiers and signifieds which lawyers consider authoritative. Juridical language transforms and conceals the *intentional meanings* which non-experts — whatever their everyday languages through which they *live* their meanings — bring *into* the world.

Turpel argues that there are several cultures in Canada, not just one or two.[185] Language plays an integral role in the identity and integrity of each culture. The

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[180] *Ibid.* at 130.

[181] B.J. Hibbitts, "'Coming to our Senses': Communication and Legal Expression in Performance Cultures" (1992) 41 Emory L.J. 873.

[182] What is 'The Law' anyways? Is it invisible in the sense of being unreachable? If so, how can law professors, lawyers, judges, and writers (such as myself) even pretend to 'know' the subject of 'Human Rights, Language and The Law'? Why would the editors of this Review even believe that there would be such an 'expert' if at least 'The Law' part of the title is inaccessible, as beyond us in some invisible realm? Perhaps, my only response — and the response which Althusser and many others discussed earlier suggest — can be that I have been 'certified' for 'knowing' the signifiers (not the signifieds) associated with the signifiers 'human rights, language and the law'. If that is so, then this Survey sets out the key signifiers — and the names of the authors cited, unfortunately, become signifiers if the reader sticks to my representation — of a language about language instead of revolting at the horror of human misery which unfolds before our eyes as we read our daily newspapers.

[183] M.E. Turpel, "Aboriginal Peoples and the Canadian Charter: Interpretive Monopolies, Cultural Differences" in R. Devlin, ed., *Canadian Perspectives, supra* note 16, 503.

[184] Notwithstanding B. Langille's deference to L. Wittgenstein.

[185] M.E. Turpel, *supra* note 183. Also see M.E. Turpel, "Patriarchy and Paternalism: The Legacy of the Canadian State for First Nations Women" (1993) 6 C.J.W.L. 174.

traditional liberal paradigm, within which Canadian constitutional lawyers have worked, has been insensitive to cultural differences. For example, institutional materials with which constitutional lawyers teach, argue and write, claim that Canada was constituted from two 'founding' nations. Working within such materials, the student, lawyer or judge necessarily excludes the 'meanings' (my term) which aboriginal peoples bring *into* any chain of signifiers. Moreover, the chains of signifiers — metaphysical for the constitutional lawyer (recall the role of the signified) and bodily for the aboriginal communities and lawyers (in Merleau Ponty's sense) — are radically different for the Anglo-French expert knower than the Aboriginal peoples. Turpel slowly works through the 'master's language' in important textual provisions of the *Charter* and as reflected in the 'rights as trump' thesis. She shows how the master language — here speaking of the language of the professional (what I earlier called the metalanguage) — is insensitive to other languages. The master language, of which law professors are the spokespersons and masters, tries to "tame...subcultures"[186] which append to 'constituent cultures'. The European culture "continues presumptively to set the terms of tolerance for collective differences."[187]

Juridical discourse — surely one of the identifying marks of European culture since the Romans — defines what issues can and cannot be placed before the courts. Juridical discourse does so in the name of the authority and legitimacy of the modern state. Legal discourse thereby 'manages' all cultural differences as racial differences. Quoting from Lyotard, Turpel (to whom I have referred earlier in this Survey), explains the subtle hegemonic enterprise of such juridical discourse. The rights discourse is one such political-juridical tool of hegemony over cultures without the private or exclusionary spheres of social life. It would seem from Turpel's analysis that even to solicit and write a survey of scholarship on the subject of "Human Rights, Language and Law" would suggest a framework which seeks to describe — and therefore to evaluate, as the Frankfurt School so insightfully showed — language and law in terms of their fit with the human rights paradigm. That paradigm incorporates the exclusivity and privateness characteristic of a right, according to Turpel. And that exclusivity characterizes European, not aboriginal cultures. In this respect, Turpel's focus upon what one might characterize as a 'differend' between European discourses and Aboriginal discourses, ambiguously returns to the problem of the universal forms of rights discourse to which my brief discussion above of Allan Hutchinson's essays alludes. That is, Turpel's essay begins within the paradigm of language, only to shift into the paradigm of knowledge (of concepts, consciousness, forms, doctrines, rights. or metaphysics) with which lawyers are more familiar.

XIII. Conclusion

The problem of both human rights and law is whether, to use Patricia Williams' term, an 'ambi-valent, multi-valent' language can be *authoritative*. How can a professional metalanguage of a modern state hear the multiplicity of voices which it must represent at the same moment that it claims to be authoritative? Indeed, the juridical language of a *modern* state may well invariably exclude or conceal "the ambivalent, multivalent way of seeing"[188] which Patricia Williams and Mary Ellen Turpel believe juridical language

[186] This term she draws from a prominent essay of a contemporary law professor.

[187] M.E. Turpel, *supra* note 183 at 511.

[188] *The Alchemy of Race and Rights*, *supra* note 170 at 130.

should aspire to. Expert knowers authorize that exclusion through the signifying relations which the expert, to be considered an expert, alone knows.

The paradigm of language has slowly and subtly displaced the paradigm of knowledge which the discourse of 'human rights and law' has presupposed. A knowledge of signifieds (or forms) assumes that the forms are represented through transparent signifiers. Once one appreciates that signifiers are not transparent conduits for signifieds, however, the possibility arises that law is a metalanguage whose signifieds the experts claim to 'know' even though the non-expert may 'know' a different signified to be associated with the same signifiers because of her or his radically different life experiences (Lyotard's 'differend').

The paradigm of knowledge inadequately explains the practice of human rights in that a language — and its disjuncture with lived languages — (re)produces the suffering which called for the Kantian recognition of the equal respect of persons. Immersed within the metalanguage of law, the professional cannot respond to the indignities and terror experienced by non-experts except through the chains of signifiers which the professional *means* and which other professionals can 'understand'. The professional's meaning *re*-presents the experience of the other. Indeed, it would seem that the laws of a modern state are unavoidably representational.[189] Such a metalanguage is monologic in that professional experts cannot respond to the particular other, except through the representations which possess authority for the professional. The problem of 'human rights, language and the law' is the problem of the authority of the modern state itself.

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189 "Narrative Coherence", *supra* note 99.