Sir John Beverley Robinson: Bone and Sinew of the Compact, by Patrick Brode, Toronto: University of Toronto Press, 1984. Pp. *x*, 326. $45.00 (hardcover), $14.95 (paperback)

English-Speaking Justice, by George Parkin Grant, Toronto: House of Anansi Press, 1985. Pp. *xi*, 104. $5.95 (paperback)

Duff: A Life in the Law, by David Ricardo Williams, Vancouver: University of British Columbia Press, 1984. Pp. *xiii*, 311. $34.95 (hardcover)

"It is ironic that a study which in part grows out of and seeks to reinforce a concern about the absence of historical and jurisprudential legal scholarship in Canada should itself be essentially ahistorical."[1] But *Law and Learning*, the report of the federal Consultative Group on Research and Education in Law, could not itself purport to be other than presentist in its orientation. The reason — contemporary Canadian jurists have remained disturbingly silent about the foundations of justice in our society.

What is being spoken by that silence? Or as the philosopher George Grant asks in *English-Speaking Justice*, "Why is it that liberalism remains the dominating political morality of the English-speaking world, and yet is so little sustained by any foundational affirmations?".[2] Sir John Beverley Robinson (1791-1863), Upper Canada's foremost judge and statesman, anticipated both this question and Grant's response a century and a half ago when he wrote, "Surely no man but a modern philosopher would for a moment contend that in England and Scotland the moral state of society is not to be mainly attributed to their national churches which, supported as they are [by the state], ensure the blessings of religious instruction to all classes".[3] Grant's diagnosis is similar in outline to Robinson's. Grant argues that the "fundamental political vacuum at the heart of contractual liberalism was hidden for generations by the widespread acceptance of Protestantism".[4] Thus, the modern follower of Locke who affirms "that justice is contractual, not natural", and that it "arose from the calculations necessary to our acceptance of the social contract", is unable to account for the pursuit of justice in English-speaking regimes even in the face of inconvenience.[5] This evidence of "uncalculated justice" attests to the continuing influence of that "other" tradition of justice

[1] *Law and Learning: Report to the Social Sciences and Humanities Research Council of Canada* (Ottawa: SSHRC, 1983) 63.

[2] G.P. Grant, *English-Speaking Justice* (Toronto: House of Anansi Press, 1985) 48. First published in 1974 by Mount Allison University, the text is based on the Josiah Wood Lectures delivered in that year at Mount Allison.

[3] C.W. Robinson, *Life of Sir John Beverley Robinson* (Toronto: Morang, 1904) 173.

[4] *Supra*, footnote 2 at 62.

[5] *Ibid.*, at 17-19.

as "what we are fitted for" (not something we bargain for or make).[6] That "other" tradition is rooted in the Bible and Greek philosophy, and given to us in the interstices in Protestantism. But this "other" tradition has been all but erased from our "self-definition", which suggests to Grant that we are in the twilight of our justice.

This introduction to the points of congruence between Robinson's and Grant's reflections on justice is indicative of an indigenous core of wisdom. Patrick Brode and the Osgoode Society are to be commended for giving us access to this wisdom by publishing a life of Robinson. The Osgoode Society was also the principal force behind the publication of David Williams' recent biography of Sir Lyman Poore Duff. Thus the state of historical and jurisprudential legal scholarship in Canada is changing rapidly: an absence has been converted into a presence. The purpose of this review is to evaluate that change from a perspective akin to George Grant's. My argument will be that we risk misrepresenting our history to ourselves if we do not heed Grant's discourse.[7]

Brode's *Sir John Beverley Robinson: Bone and Sinew of the Compact* is a well-balanced piece of writing which brings into focus many different aspects of the Chief Justice's life and times. The author documents how Robinson adhered to the prescriptions of "the gentle code" instilled in him by his boyhood teacher, the Anglican priest John Strachan. He also shows how much of Robinson's early life was taken up with adding imperial connections to his colonial contacts. These connections were vital because personal loyalties determined not only careers but the course of public events as well. For example, during the 1820s the Assembly was "still too parochial in its outlook to consider the advancement of the entire colony", according to Brode, and thus resisted the highway, canal and immigration projects which Robinson proposed. Yet Robinson was not daunted by this opposition. He persisted in believing and acting as if the "authority to implement his vision was not based on popular support, but flowed from the prerogatives of the imperial system".[8]

Many contemporaries regarded Robinson as "the embodiment of the loyalist tradition". But as the influence of that tradition waned, as "the pillars of loyalist society — a frontier oligarchy, an established Church, and a docile yeomanry — eventually succumbed to the impact of British liberalism and American democracy",[9] Robinson lost interest in politics as such. He appears to have accepted the chief justiceship with a certain relief. Occupying this position, however, seems only to have sharpened his sense of the necessity of containing the reformist tendencies that had been unleashed. In Robinson's opinion the most dangerous of these tendencies was "mob rule". Brode traces the

[6] *Ibid.*, at 65.

[7] For an excellent account of the whole of Grant's discourse see J.E. O'Donovan, *George Grant and the Twilight of Justice* (Toronto: University of Toronto Press, 1984).

[8] P. Brode, *Sir John Beverley Robinson: Bone and Sinew of the Compact* (Toronto: University of Toronto Press, 1985) 154, 164.

[9] *Ibid.*, at 270.

source of Robinson's aversion to "mobocracy" to his having been a spectator at the Spa Fields meeting in London, England in 1816. That meeting, called in aid of parliamentary reform, degenerated into a riot. This spectacle convinced Robinson that "social unrest was caused by 'despicable declaimers' playing upon the wretchedness of the poor". As Brode astutely observes, the "distribution of wealth and the hierarchical social structure were not [perceived to be] at fault".[10]

This is a significant example of the historical biographer's perception of events transcending the limits of his subject's faculties. But what are the conditions for this apperception on the part of the historian? Surely one of the preconditions is a grasp of the inner meaning of the subject's utterances, and in this respect there appears to be a series of deficiencies in Brode's understanding of Robinson's discourse. The point of Robinson's claim about "moral states" (England and Scotland), for example, was not, as Brode would have it, that the "moral force of religious belief had to be linked to the temporal power of the government" for order to be maintained. No such link had to be forged. It was already given. Religion encompassed politics: "Nothing else we most fondly venerate — not the glorious flag of England, nor the great Charter of our liberties — has from its antiquity so strong a claim to our devotion as our Church".[11] For Robinson, the basis of civil authority rested not in the delegation of powers to a sovereign by a mob of free agents desirous of quitting the state of nature, but in the devolution of powers from on high.

Brode's apparent difficulty in thinking through the diarchic (as opposed to deistic) thrust of Robinson's conception of governance as a unity of powers (spiritual — temporal) is characteristic of those of us reared in the heartlands of liberalism, for whom religion belongs to the private, not the public, realm. Equally mysterious to us, schooled as we are in the doctrine of the separation of powers, is the fact that when Robinson was appointed Chief Justice in 1829, he became *ex officio* Speaker of the Legislative Council and President of the Executive Council of the government of Upper Canada. Thus, he united all three branches of the administration of the province in his person.

To recollect the unities and, equally important, the separations constitutive of the 19th-century legal mind involves thinking across a watershed. As Blaine Baker's intriguing study of discontinuities in the development of the Ontario bench and bar so well shows, the period from 1890 to 1920 practically effaced what had been accomplished previously.[12] Robinson, for example, was obliged by Upper Canada's *Property and Civil Rights Act* (1792) to canvass the judgments of the courts of England for the "rule of decision" in all cases involving property or civil rights. Yet one finds in his judgments as many references to the principles of American case law and treatises as to the principles of continental (French) and Quebec *doctrine*, evidencing a marked poly-

[10] *Ibid.*, at 35.

[11] *Supra*, footnote 3 at 350. See further A.B. McKillop, "So Little on the Mind" (1981), 19 *Royal Society of Canada, Proceedings and Transactions* 183.

[12] G.B. Baker, "The Reconstitution of Upper Canadian Legal Thought in the Late-Victorian Empire" (1985), 3 *Law and Hist. Rev.* 165.

jurality, or as Baker calls this tendency, a "principled eclecticism". It would appear that the "open and erudite posture" — the principled borrowing of ideas — reflected in these decisions and in the heterogeneous contents of Ontario's law libraries during Robinson's era "fostered careful structuring of the indigenous core or identity against which choices for enrichment or refinement were made among external theories and doctrine".[13] In fact, on occasion even English cases could appear external, not "precisely in point, because in England the same circumstances cannot occur" — to quote Robinson. There exist few more forceful statements of judicial law un-making. A detailed examination of such assertions is essential to the task of rediscovering the "indigenous core". Yet in his discussion of this phenomenon Brode merely concludes that "Robinson made no attempt to define those classes of cases that were inapplicable to Upper Canada".[14] This judgment will not suffice. Surely the point of departure for any historical inquiry into the unities of a particular mentality is precisely that point at which the historical subject's thought leaves off.

To resume Baker's account, the turn-of-the-century witnessed the dispersion of the cosmopolitan contents of Ontario's law libraries (mostly in the direction of the United States). Newly-emptied shelves were immediately restocked with all manner of imperial legal literature and local editions of English sources. Appeals to the Judicial Committee of the Privy Council, once negligible, now proliferated as notions of "the Rule of Law" and "Empire" in their late-Victorian incarnation took root. A veritable "celebration of precedent and particulars" (case law and fact patterns) replaced the thoughtful exposition of principles characteristic of Robinson and his cohort. This shift in literary preferences and judicial style about 1890-1920 marked what Baker calls a transition "from nation to colony". It was an epoch of deflection from the foundations, of historical forgetting. This forgetfulness is continued in the presentism and "inarticulate legal liberalism" of today's bench and bar.[15] Perhaps this suppression of the alterity — or what Baker regards as the "venerable ethos" — of the 19th century, is the *sine qua non* of legitimacy in the 20th century.

Given the dissociations described above, it is apparent that in order to be conversant with the culture of argument in Old Ontario, the historian needs to develop skills analogous to those of a translator. The meanings of many words then in use are lost to us now. This is particularly evident in Brode's rendition of what Robinson meant by "the law of the Land" and "a love of Order" as "the rule of Law".[16] We owe the expression "The Rule of Law, and Not of Men" to Albert Venn Dicey, whose *Introduction to the Study of the Law of the Constitution* is perhaps the most indelible black-letter treatise of English-speaking justice.[17] Dicey sought to reformulate the British legal system so as

[13] *Ibid.*, at 234.

[14] *Supra*, footnote 8 at 238.

[15] *Supra*, footnote 12 at 221, 285-91.

[16] *Supra*, footnote 8 at 175, 275.

[17] A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (London: Macmillan Press, 1885).

"to maximise the 'self-regarding' behaviour of individuals consistent with the 'self-regarding' behaviour of other individuals".[18] That is, he attempted to represent the system in a manner concordant with the individualistic liberalism of John Stuart Mill's *On Liberty*.[19] Of course this was possible only if one excluded "Man" and regarded individuals abstractly as autonomous rights-bearing entities. Compare Robinson:

> When we behold an indifference to the observance of the Laws and a restless diligence to evade them — a want of reverence to Magistrates & Superiors, a disrespect to stations, offices, ranks, and orders of persons ... we may consider these as symptoms fatal to the true liberty of that country... . Everyone carves out his own method of redress, and prosecutes his designs by the dictates of his own corrupt will — To prevent these evils a love of Order becomes necessary by which we are induced to conform to the laws and to promote the welfare of the community.[20]

Such was Robinson's conception of the good, a kind of vertical mosaic. It was a conception animated by a love of difference (or hierarchy) and interdependence, and a revulsion toward sameness (or equality) and independence. Thus, when Brode invokes the concept of "the rule of Law" to communicate his sense of Robinson's impartiality or "fairness" as a judge, he creates in us a false sense of historical understanding.

Robinson was just (in his time), but this was precisely because he did not believe in such abstractions as "the rule of Law" or "the individual". Rather, he believed in the rule of men, albeit men with "intelligence, respectability and property". The other side of this disposition was his tendency to take attacks on his public office personally, and his lament that "there is no longer confidence in being supported by the King's Government & public virtue seems to be barred from public counsels".[21]

It was the "Alien" debates of the 1820s that precipitated this loss of confidence in imperial appointees. In 1824 an English court decided that all persons who remained in the United States after 1783 had ceased to be British subjects. As attorney-general, Robinson was called upon to decide what rights could be granted to the American settlers who came to Upper Canada after 1783 since, legally, they had none. He concluded that their land titles could be confirmed, but that the *Constitutional Act* (1791) barred the province from granting them the right to vote or hold office unless duly naturalized. According to Brode, it was "a grave miscalculation on Robinson's part to believe that

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[18]D. Sugarman, "The Legal Boundaries of Liberty: Dicey, Liberalism and Legal Science" (1983), 46 *Mod. Law Rev.* 102 at 108. Dicey's views on the value of "the individual" were an inversion of Robinson's views. Perhaps the finest account of this inversion is L. Dumont's in *Homo Hierarchicus: The Caste System and Its Implications* (London: Paladin, 1972) 44: "In modern society ... the Human Being is regarded as the indivisible, 'elementary' man, both a biological being and a thinking subject. Each particular man in a sense incarnates the whole of mankind. He is the measure of all things (in a full and novel sense). The kingdom of ends coincides with each man's legitimate ends, so the values [of traditional society] are turned upside down. What is still called 'society' is the means, the life of each man is the end. Ontologically, the society no longer exists, it is no more than an irreducible datum, which must in no way thwart the demands of liberty and equality."

[19]J.S. Mill, *On Liberty* (1859).

[20]*Supra*, footnote 8 at 176.

[21]*Ibid.*, at 158-59.

a mere guarantee of property rights could satisfy the American settlers", for the confirmation had the appearance of simultaneously disfranchising them.[22]

Given that Robinson was of Loyalist parentage, fought in the War of 1812, encouraged canal building and British immigration as "means of internal defense", and about the time of the Alien debates proposed a "grand scheme of a *British-American anti-republican confederacy*" involving all of Britain's remaining North American colonies,[23] it seems pertinent to ask whether his decision was not a calculated one. There can be no doubt as to his sentiments. And lest it be thought that the confirmation of property rights was a sign of benevolence, it should be remembered that the English court's decision "cast doubt on the legitimacy of virtually all of the land transactions that had occurred in Upper Canada", since so many had involved Americans. Security of title was, moreover, the cornerstone of Robinson's idyllic vision of a graduated social order comprised of a docile yeomanry and a virtuous landed aristocracy. The agitation for "responsible government" on the part of the liberal reformers who had sided with the American settlers represented an obvious threat to the *grounding* of that vision.

Even in the face of all this evidence, however, Brode rejects any suggestion that Robinson's motives in reaching his decision were "essentially political": "That analysis presumes that John Robinson, a cool, methodical lawyer, reached an important constitutional decision using something other than legal reasoning".[24] In this respect Brode is perfectly correct. But if we accept this proposition then we must reject the idea that any of Robinson's judgments were calculated (or miscalculated) and search for other explanations. What Robinson resisted in the context of the Alien debates was the coming to be of a liberal democratic society. As Grant notes in *English-Speaking Justice*, the central axiom of that society is "right prior to good", because of its agnosticism, or moral pluralism, with respect to the good: "We can think what we like metaphysically or religiously (if we have a taste for that kind of thing) as long as we recognise that these thoughts are our private business, and must have no influence in the world of the state".[25] Of course, Robinson was as "High" a statesman as he was a Churchman, and what was given to him in his understanding of the good did not exclude what the American settlers represented in politics and religion, but it did seek to contain them. By granting them property rights they were circumscribed.

The other side of liberalism's agnosticism, according to Grant, is the modern understanding of ourselves as autonomous; that is, we believe ourselves the makers of our own laws. It is from this presupposition that the importance attached to voting privileges in the modern era follows. The Upper Canadian Reformers expressed this conviction — this definition of themselves as "will" — when they passed resolutions declaring the Americans to be British subjects. But Robinson knew otherwise. It exceeded the powers of the

[22] *Ibid.*, at 129.

[23] *Ibid.*, at 110.

[24] *Ibid.*, at 130.

[25] *Supra*, footnote 2 at 37.

Assembly to redefine aliens as subjects since, as Brode makes clear, the *Constitutional Act* "provided that only British subjects by birth or a 'subject naturalized by act of the British Parliament' could exercise civil rights".[26] Robinson's unyielding stance in the context of the Alien debates accords with what Grant has described as the "view of traditional philosophy and religion", namely, "that justice is the overriding order which we do not measure and define, but in terms of which we are measured and defined".[27] Call it "legal conservatism" if you will.

The conception of a just society manifested in the writings of Robinson and Grant is distinctly Canadian. In fact, it is so Canadian that when the historian of ideas traces this system of thought back to its source — the writings of the Ionian philosopher Anaximander — he must use terms descriptive of the structure of the Canadian society in order to evoke it. "We are to think of a system of provinces, coexisting side by side, with clearly marked boundaries."[28] Within such an order of ideas, to encroach on another is an injustice; to "keep within bounds" is to be just.

Having grasped this matrix of ideas, we can begin to appreciate more clearly why Robinson came to hold certain convictions and not others. That Robinson was able to conceive of a confederation as early as 1824, that he abhorred Lord Durham's union proposal, that he attempted to circumscribe the influence of the American settlers, and that he was continually occupied promoting "means of *internal* defense" may all be accounted for by the hypothesis that he was predisposed by his cultural background to embrace the idea of a "unity of you and I", but could not countenance the notion of a "unity of we" (as in "We the People of the United States...").[29] The "unity of we" abolishes distinctions. Robinson's life was committed to preserving them; hence his "love of Order", his polyjurality and his public speeches in defence of such religious minorities as Methodists and Roman Catholics. Perhaps the closest one can come to "enucleating" (as Grant would say) Robinson's mentality is by conceptualizing it in terms of the notion of a "rational federalism" of opinion.[30]

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[26] *Supra*, footnote 8 at 122-30.

[27] *Supra*, footnote 2 at 74.

[28] F.M. Cornford, *From Religion to Philosophy: A Study in the Origins of Western Speculation* (New York: Harper & Row, 1957) 17, 55-63. See also G. Thomson, *Aeschylus and Athens: A Study in the Social Origins of Drama* (London: Lawrence & Wishart, 1973) 77-78; D.H. Turner, *Life Before Genesis: A Conclusion* (New York: Peter Lang, 1985). We could also think of the painting "Couple on Beach" by Alex Colville with the perfectly delimited contours of its figures. *English-Speaking Justice* is dedicated to Colville and to the poet Dennis Lee, who are said to have "taught me about justice". See further A. Kroker, *Technology and the Canadian Mind: Innis/McLuhan/Grant* (Montreal: New World Perspectives, 1984) 20-24.

[29] See J.B. White, *When Words Lose Their Meaning: Constitutions and Reconstitutions of Language, Character, and Community* (Chicago: University of Chicago Press, 1984) 240-41. The American propensity to think in terms of "we" is deeply ingrained and the term itself appears to have become a kind of universal signifier. We (you and I) think of the song *We Are the World* in aid of famine relief in Ethiopia. The corresponding Canadian song, *Tears Are Not Enough*, contains the lines: "If we take a stand, *Every woman, child, and man*, We can make it work ..." (emphasis added). Both songs mobilized massive outpourings of funds, but they did so by invoking different unities.

[30] See L. Armour and E. Trott, *The Faces of Reason: An Essay on Philosophy and Culture in English Canada, 1850-1950* (Waterloo: Wilfrid Laurier University Press, 1981).

This "federalism" found its purest expression in Robinson's decisions as chief justice. It is instructive to compare Robinson's legal reasoning with that of his American counterparts, as indeed Brode does. But had Brode pushed this analysis to its logical conclusion he would have found that Robinson's reasoning was not merely "significantly different" from that of America's antebellum judiciary;[31] it was diametrically opposed. This contrariety may be conceptualized in terms of the opposition between a *just* decision and a *justified* one. This opposition turns on the question of when the reasoning in issue takes place. If the reasoning occurs before the decision is reached it is rational; the decision is "arrived at". If the reasoning takes place afterwards (that is, if the decision is motivated by extra-judicial considerations) it is instrumental; the decision is "result-oriented". For example, one of the central preoccupations of America's antebellum judiciary was the question of how to sanction encroachments on the property of another in circumstances which seemed to increase productivity and thus promote economic progress. Reflection on this problem led to the formulation of the doctrine of "reasonable use", which made for fuzzy boundaries, and thus enabled the judiciary to accommodate the contingencies of America's rapidly expanding economy. Robinson, on the other hand, viewed the "reasonable use" doctrine as a perversion of justice.[32] But the truth of the matter is that whether one views this doctrine as just or unjust depends on whether one regards justice as rooted in contract or in nature.

Brode's biography of Chief Justice Robinson fails, therefore, to elucidate the elementary structure of its subject's mentality. Nevertheless Brode has provided us with a meticulously researched, intensely readable and highly informative account of the thought and times of one of Canada's most illustrious judges. It is particularly heartening that this contribution should have come from a lawyer (Brode practises law in Windsor), for this suggests that the presentism of today's legal profession may yet be eclipsed by an impetus which stems from within its own ranks.

David Williams, another practising lawyer, already has a reputation as a biographer. But the reader familiar with his earlier works will find this one, *Duff: A Life in the Law,* a profound disappointment. Sir Lyman Poore Duff (1865-1955) played a prominent role in the affairs of the British Columbia Liberal Party before being appointed to the Supreme Court of Canada in 1906. He remained on the bench until 1944. He was the most talented Canadian judge of his time, but recognition (the chief justiceship) came late (1933) because of concern about his alcoholism. During this period he also sat on various royal commissions; but it was his role as a privy councillor beginning in 1918 that brought him international repute. Holmes, Birkenhead and Haldane, all major luminaries in the common law world, regarded him as a peer.

The main problem with Williams' book is that he presents us with a barrage of facts but makes little or no attempt to connect them. Normally, a

[31] *Supra,* footnote 8 at 244-47.

[32] See D. Howes, "Property, God and Nature in the Thought of Sir John Beverley Robinson" (1985), 30 *McGill L.J.* 365 at 376-84, 407-13.

lawyer resorts to arguing the facts only when he is losing a case (when he is winning he argues law). Williams was unable to discern any pattern — any "law" — to Duff's life, which is ironic in view of the book's opening: "the theme of my book as it was the theme of Duff's life" is "that the law is close to the heart of any orderly society".[33] At one point Williams does suggest that Duff's generally favourable disposition toward accused persons may have had "unconscious origins", but in the Epilogue even this rather tenuous hypothesis is retracted.[34] The Epilogue, in fact, presents Duff as having been a man of contradiction. One wonders if this is not simply a rationalization for Williams' inability to find Duff's "mainspring", as he puts it. Alternatively, one could read this biography as a depiction of the soul of man under liberalism, in that Duff was a public figure who was unable to inhabit the public realm "except for dashes into it followed by dashes out" (to use Grant's words)[35], but this would be exceeding Williams' purview in writing the book.

Duff wrote many important constitutional decisions; but the question of how he arrived at his interpretations is a problematic one. As Williams correctly points out, Duff saw Canada "as a federal state and not a legislative union, an alliance among equals rather than a unitary state controlled from the centre".[36] It is to be noted that on this view the whole is not greater than its parts, but on a par with them. But how is such a view possible given that, on the whole, the *British North America Act*'s centripetal tendencies far outweigh the centrifugal tendencies? I would suggest that such a view can be maintained only from a position outside the system — the vantage point of a privy councillor sitting in London. It is only before an external tribunal that the federal and provincial governments could have appeared to be on an equal footing. Thus, we owe the way in which we read our constitution, even today, to the fact that at first it was interpreted from afar. Lord Watson and Sir Montague Smith laid the groundwork for that reading not by interpreting the constitution strictly, but by remaining true to their position outside the system and reproducing that perspective in their judicial decisions. Duff was also a privy councillor, and so it makes sense that he should have internalized this external perspective, this view (of ourselves) from afar. Moreover, the fact that Duff was a Canadian gave this perspective "respectability".[37]

If we enquire further into how the intentions of the Fathers of Confederation — who envisioned a unitary state — were subverted, two factors appear to figure foremost: the hardening of the notion of precedent into a doctrine of judicial infallibility in the late 19th century, and a particular view of language.

As Williams remarks of Duff's "entrenchment" of the Privy Council's interpretation of the constitution, "even had he not been convinced of its correctness, he would still have been obliged to support it; the decisions were bin-

[33]D.R. Williams, *Duff: A Life in the Law* (Vancouver: University of British Columbia Press, 1984) *xi*.

[34]*Ibid.*, at 73, 275.

[35]*Supra*, footnote 2 at 12.

[36]*Supra*, footnote 33 at 25.

[37]*Ibid.*, at 77.

ding on the Supreme Court by the rule of precedent, and Duff was a firm believer in the utility of that rule".[38] This statement accounts in part for the perpetuation of the rulings. What is more interesting is how they originated. It was declared by Lord Watson, among others, "that the British North America Act must be interpreted like any other statute: by looking at the plain meaning of the words, without regard to the supposed political intentions of their sponsors".[39] As should be apparent, a judge is able by means of this view of language to substitute his reasoning for that of the legislature without acknowledging personal responsibility for his interpretation, since this is said to be objective. Within the framework of this positivist view of language words are reified; once cut loose from their human mooring they become like any other commodity — susceptible of many different appropriations. This abstract conceptualism is *the* defining characteristic of legal liberalism. Duff called it "intellectual honesty", the "faculty of seeing things as they are, unmoved by bias or passion or excitement".[40] It could also be called the art of dissimulation.

What a judge looks for in a statute, therefore, is not the "political intent" but the so-called "legislative intent" of Parliament. Duff was never a legislator, unlike Robinson who, as chief justice, was called on to interpret and apply many of the provincial statutes he himself had written. Perhaps it was to compensate for this lack that Duff passed so many afternoons pacing "back and forth in the upper lounge [of Ottawa's Rideau Club] ... engaged in a most animated discussion with some unseen companion"[41] — a judge in search of his *ratio*. Whatever the case may be, the key to Duff's mentality, and indeed the key to legal liberalism, is the influence of a particular conception of language on legal reasoning. No words have ever been as "plain" as Duff tried to make them sound. How could the word "person", for example, not include women, as he once maintained?[42]

Historical legal scholarship is gaining ground in Canada, but it is doing so at the expense of history because of the inability of authors like Brode and Williams to think outside modern assumptions. Historiography should reveal what the assumptions of the modern era are by disclosing those of other eras; Brode's anachronisms conceal them. Williams' discovery of Duff's "inner torments" should have led him to a critique of the system — modernity — that engendered them; he merely chronicles. If Canadian legal history is to be scholarly, therefore, it must also be critical. A "critical" legal studies tradition does exist in the United States,[43] but has not yet been able either to escape or to develop a convincing alternative vision to the legal liberalism it is bent on

[38] *Ibid.*, at 78.

[39] *Ibid.*, at 77.

[40] *Ibid.*, at 70.

[41] *Ibid.*, at 167.

[42] *Ibid.*, at 144-48.

[43] For an account of this tradition see A.C. Hutchinson and P.J. Monahan, "Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought" (1984), 36 *Stanford L. Rev.* 199.

"trashing".[44] George Grant does possess an alternative vision. From his perspective on the western tradition he has subjected liberalism to an awesome critique. He does so not by "trashing" but by "enucleating" the core of "what is being spoken about human beings in that liberalism", and holding this up against the horizon of "eternity".[45]

Most lectures tend to be monologues, but the four lectures which make up *English-Speaking Justice* must have sounded dialogical. In them Grant attempts to articulate two understandings: the truth which is given in the ancient account of justice and the truth which emerges from technology.

According to Grant, the ancient account of justice as natural "cannot be thought in unity with what is given in modern science concerning necessity and chance".[46] The reason for this apparent impasse is that the idea that justice is "what we are fitted for" was derived from the account of nature given in ancient science. In that account, "the notion of good was essential to the understanding of what is", and in that "view of nature, human beings were understood as directed to a highest good under which all goods could be known in a hierarchy of subordination and superordination".[47]

But if this teleological view of nature no longer holds true — if nature and human existence "can be explained in terms of mechanical necessity and chance", as modern science affirms — then "what requires us to live together according to the principles of equal justice"?[48] Who is to say what is good? This is a terrible question; the fact that we can even think to ask it enshrouds our justice in darkness. "This is a great darkness, because it appears certain that rational beings cannot get out of the darkness by accepting either truth [the truth of natural justice or the truth of modern science] and rejecting the other."[49] Yet Grant implores us to heed "the call from that darkness to understand how justice can be thought together with what has been discovered of truth in the coming to be of technology".[50]

How can one "think together" that which "cannot be thought in unity"? Has Grant led us into paradox? I think not, since that for which he calls is precisely a "rational federalism" of opinion. In a sense, he is simply exhorting us to raise to consciousness the elementary structure of the Canadian imagination as described earlier in our discussion of the form of Robinson's ratiocination. There can be no synthesis (no "unity of we") as between justice and technology because "the two domains of thought are nearly always mutually exclusive: one must be fully within the spirit of technology to reach its truth

[44]See S. Levinson, "Escaping Liberalism: Easier Said Than Done" (1983), 96 *Harv. L. Rev.* 1466. Perhaps the one critical legal scholar to escape Levinson's critique is Roberto Unger, whose writings are almost as passionate as Grant's.

[45]*Supra*, footnote 2 at 13.

[46]*Ibid.*, at 87.

[47]*Ibid.*, at 17, 73.

[48]*Ibid.*, at 72.

[49]*Ibid.*, at 88.

[50]*Ibid.*, at 80.

and fully within the spirit of justice to reach its truth".[51] But one can think of justice and technology *as a diathesis* (a "unity of you and I"), just as Robinson, a common law judge, could embrace in his mind both the civil and common law traditions when disposing of a given legal problem.[52]

It could be argued that the reason that the diathetical, anti-Hegelian tendencies in Grant's thought run so deep is that he has internalized a structure of discourse which has always sought "to suggest ways of combining apparently contradictory ideas".[53] As Armour and Trott have shown in *The Faces of Reason*, this tradition of federal or "public reasoning" has characterized Canadian philosophy from its inception. As they go on to state, "Only rarely is [reason] used as an intellectual substitute for force" in the Canadian philosophical tradition. Such is not the case in the United States, however, where what could be called the tradition of public calculating prevails, at least according to Grant.

John Rawls is the foremost exponent of the contractarian wisdom embodied in the tradition of public calculating. The better part of *English-Speaking Justice* is devoted to elucidating the implications of taking Rawls' *A Theory of Justice*[53a] to heart. In *A Theory of Justice*, from behind his "veil of ignorance", "calculating as if he were everybody", Rawls produced an account of justice in terms of certain "primary goods" (having abjured knowledge of "the highest good") and principles (liberty and progressive equality), in which we would all be interested.[54] On this account, "justice" is a real bargain, the kind one finds only in a convenience store, since it consists of little more than "a certain set of external political arrangements", which have the appearance of being the most useful means for the "realisation of our self-interests".[55] The presentism of Rawls' "original position" and his inclination toward abstraction bear the unmistakable mark of legal liberalism.

According to Grant, there can be no debate as to the goodness of the content of liberal justice, or "justice as liberty and equality". But as he demonstrates with agonizing clarity, justice "as equality and fairness is that bit of Christian instinct which survives the death of God" as pronounced by the great undertaker of the western tradition, Friedrich Nietzsche.[56] It most certainly cannot be derived from the "calculation of self-interest in general";[57]

[51] D.R. Heaven, "Justice in the Thought of George Grant" (1985), 11 *Chesterton Rev.* (George Grant Special Issue) 167 at 169.

[52] There exist traces, if only sporadic ones, of this intellectual propensity among contemporary jurists. Witness the reasoning of the late Bora Laskin C.J. in *Harrison* v. *Carswell* (1975), 62 D.L.R. (3d) 68, or the opinions of Dickson C.J. and Wilson J. in *Perka et al.* v. *The Queen* (1985), 13 D.L.R. (4th) 1 (a rare example of "principled eclecticism in the 20th century).

[53] *Supra*, footnote 30 at 4. For an excellent account of Grant's renunciation of Hegel see, *supra*, footnote 3 at 47 *et seq.*

[53a] J. Rawls, *A Theory of Justice* (Cambridge, MA.: Harvard University Press, 1971).

[54] *Supra*, footnote 2 at 35.

[55] *Ibid.*, at 44-45.

[56] *Ibid.*, at 77.

[57] *Ibid.*, at 43.

nor would it appear that it can be sustained in the face of the technological imperative. For does not "the production of quality of life require a legal system which gives new range to the rights of the creative and dynamic"?[58] This, of course, was the question posed and answered in the affirmative by the doctrine of "reasonable use". As will be recalled, that doctrine permits some incursions on the property of another, some "injustices", to go unrectified in the interests of "quality of life". The court, it is said, "balances the interests" of the litigants; but the outcome is always an imbalance (a gain at someone else's expense), never that return to balance that makes the scales the emblem of natural justice. Instrumental reason breeds immoderate success, a success which knows no bounds. It is manifest in a legal context in what is known as "judicial activism". Natural or federal reason instills respect for boundaries, a sense of categorical limit; "judicial conservatism".

It is impossible to be a judicial activist without some faith in progress. One of the further manifestations of this faith according to Grant is the widely held belief in an "identity of technological advance and liberalism". But the technology once supposed to be "a means of actualising" human freedom is "now increasingly directed towards the mastery of human beings": witness "behaviour modification, genetic engineering, population control by abortion".[59] Furthermore, as Grant beseeches us to recognize, "the assumptions underlying contractual liberalism and underlying technology both come from the same matrix of modern thought, from which can arise no reason why the justice of liberty is due to all human beings, irrespective of convenience".[60] If this be the case, then our situation is hopeless. However, at an earlier point Grant postulates that the "identity" of liberalism and technology "may not be given in the nature of reason itself".[61] This is another of his seeming paradoxes: how can liberalism and technology "both come from the same matrix" if their identity is not also given in that matrix?

There is a metalepsis, a shift in levels of reference, involved here, which is difficult to articulate. Perhaps the most direct way to get at this shift is to quote Richard Hooker as Grant does: "They [the Calvinists] err who think that of the will of God to do this or that, there is no reason beside his will".[62] It is this notion of reason literally "beside" will and the notion of reason pervading will (both implicit in the above quotation) that, when thought together *as a diathesis*, enables us to grasp the metalepsis at the core of what Grant describes as the "civilisational contradition" that beset the western tradition when it turned modern. This metalepsis is clearest in Grant's discussion of the philosophy of the great trickster of the western tradition, Immanuel Kant. According to Grant, Kant "persuaded generations of intellectuals to the happy conclusion that they could keep both the assumptions of technological

[58] *Ibid.*, at 80

[59] *Ibid.*, at 9.

[60] *Ibid.*, at 85.

[61] *Ibid.*, at 6.

[62] *Ibid.*, at 64.

secularism and the absolutes of the old morality".[63] Indeed, Kant was as much responsible for articulating the "naturalistic fallacy", or fact/value distinction, as he was for "sacralis[ing] the contractarian teachings" in what he wrote concerning the "good will". "According to Kant," Grant writes, "in our ability to will justly we are both timelessly rational, outside the world *where everything is relatively good* and *where reasoning is simply calculation*; we are also entirely in the world of time where we make history, where what happens matters absolutely and depends upon our autonomous willing"[64] (emphasis added).

On Kant's account, then, "our free moral self-legislation [is] participation in the very form of reason itself".[65] This way of thinking is what differentiates Kant's (and Grant's) "rational beings" from Rawls' "adult calculators"; the latter are not "rational" in the timeless sense, not "open to eternity". There may be an appearance of sameness to the manner in which "rational beings" and "adult calculators" voluntarily will the principles of their association (the social contract). However, whereas for Kant "morality is the one fact of reason" and "the good will is that which wills the universal moral law", for Rawls "there can be no fact of reason", no absolute morality, since *"everything is relatively good"* (if that).[66] According to Grant, this lowering of sights on Rawls' part is pregnant with consequences; for if there are no absolute standards to reason by, and if "some humans can calculate better than others [:] Why then should they not have fuller legal rights than the poor calculators?".[67]

The chronic inability of contractual liberals like Rawls, whose *"reasoning is simply calculation"*, to state "what human beings in fact are" or why they deserve respect, recurs in Grant's discussion of *Roe* v. *Wade*[68]. In that case, the United States Supreme Court upheld a pregnant woman's right to abortion on the ground "that foetuses up to six months are not persons, and as non-persons can have no status in the litigation".[69] This decision may be regarded as instating a regime of "differing dueness" with respect to "what is due in justice to beings of the same species".[70] It contradicts, according to Grant, "the central western account of justice", namely, that "justice is to render each human being their due".[71] Evidently, there are some human beings (less than six-month-old foetuses) to whom nothing is due under the new dispensation. In other words, the decision of the United States Supreme Court was

[63] *Ibid.*, at 65-66.

[64] *Ibid.*, at 26.

[65] *Ibid.*, at 32.

[66] *Ibid.*, at 29.

[67] *Ibid.*, at 33.

[68] 410 U.S. 113 (1973)

[69] *Ibid.*, at 70.

[70] *Ibid.*, at 71.

[71] *Ibid.*, at 87.

timely, not timeless, and that decision raises questions which go to the very heart of liberalism:

> What is it which divides adults from foetuses when the latter have only to cross the bridge of time to catch up with the former? Is the decision saying that what makes an individual a person, and therefore the possessor of rights, is the ability to calculate and assent to contracts? ... Why should the liberation of women to quality of life be limited by restraints on abortion, particularly when we know that the foetuses are only the product of necessity and chance?"[72]

There is no doubt what kind of justice Grant would dispense were he on the bench. That justice would be harsh; *i.e.*, the opposite of convenient, or what is conventional. But for Grant it is more important to live justly than to sit in judgment. To live justly is to act in accordance with the ancient account of justice. On this account, "justice is not a certain set of external political arrangements which are a useful means of the realisation of our self-interests; it is the very inward harmony of human beings in terms of which they are alone able to calculate their self-interest properly ... . For justice is the inward harmony which makes a self truly a self ... a soul truly a soul."[73]

The "inward harmony" of which Grant speaks, or what Robinson called "public virtue", is the participation of human reason in the "form of reason itself" (divine reason). As will be recalled, according to the ancient account which saw justice as natural, contemplation of the order of things, the goodness of which was never placed in doubt, was thought to give human beings knowledge of "a highest good under which all goods could be known in a hierarchy of subordination and superordination". But as "willing" (to obey the universal moral law) came to be understood as autonomy or freedom (to create our own laws) with the secularization of Protestantism, the focus of attention shifted away from "the whole" to the calculation of self-interest. This shift, this lowering of sights, is reflected in Rawls' theory of justice. "Justice" on his account is secondary, a calculated convenience, the means by which we realize our consumption of the "primary goods". For Rawls, then, "rationality is analytic instrumentality" and not, as it is for Grant, "openness to eternity".[74] What is more, once reason has been supplanted by calculation pure and simple, once "we have recognized that we can now will to create through our technology, why should we limit such creation by basing our systems of 'justice' on presuppositions which have been shown to be archaic by the very coming to be of technology?"[75]

Whereas Grant is able to resist this presumption (Nietzsche's challenge), Rawls has no platform independent of the assumptions of technology from which to speak, for "what is given about the whole in technological science"[76] is the whole story for Rawls, but not for Grant. For Grant the whole is not greater than its parts, but on a par with them (just as it was for Duff). This

[72] *Ibid.*, at 72.

[73] *Ibid.*, at 44-45.

[74] *Id.*

[75] *Ibid.*, at 80.

[76] *Ibid.*, at 45.

equality of the whole and its parts may be regarded as the condition in fact for the continuity in the modern era of the content of justice that was given in the ancient account of the good.

It is difficult to offer a critique of Grant's writing from "within", since most criticisms may be deflected by showing that they are based on modern assumptions. Nevertheless, it may be said that Grant's tendency to polarize the points of view which it is possible to take on a given moral or legal issue sometimes prevents him from seeking out the "middle ground"; *i.e.*, following Aristotle's advice that we be moderate in our reasoning. For example, Grant opposes "foetuses up to six months" and "adults" in his discussion of *Roe* v. *Wade*; what of the seven-month-old foetus? Similarly, in a footnote Grant states that there "seems to be no current positive word which expresses the opposite of equality", and blames this vacuum on "our liberal language" which has desecrated "hierarchy" and thus turned it into a negative word.[77] There is a third word, however. That word is "heterarchy". We have yet to think its implications through in detail, but it would seem to involve departing from the monistic view of justice, which is as much Grant's as Rawls', and beginning to think of justice in terms of spheres (education, family, market welfare and the like), each with its own logic of distribution appropriate to the goods contained within its limits.[78]

The most serious objection to Grant's account of justice does not have to do with the nature of justice, though. Rather, it concerns the epistemological question of how we as human beings are to know where to draw the line. To put the matter bluntly, is Grant's account of justice with a cutting edge, which reflects his love — like Robinson's — for hard lines and clear categories, the only true account there can be of "what we are fitted for"? In the words of Robert Kroetsch, one of our finest storytellers, "Perhaps we tell a blurred story because the story is blurred".[79] What these remarks are meant to suggest is that we must reflect at even greater length on what it means to live in what Kroetsch has called a "borderland".

While it may be possible to criticize Grant's writings, it would be more prudent to adopt them as a guide, especially in these heady days when the *Canadian Charter of Rights and Freedoms*[80], with its odd juxtaposition of liberal (individual) and illiberal (group) rights, has become a realising actuali-

[77] *Ibid.*, at 94.

[78] See the author's review of M. Walzer, "Spheres of Justice: A Defense of Pluralism and Equality" (1984), 29 *McGill L.J.* 750. The question whether justice as neither natural nor contractual but plural is a conception which comes "from within the spirit of justice" does not admit of easy resolution.

[79] Cited in R. Lecker, "Bordering On: Robert Kroetsch's Aesthetic" (1982), 17 *Journal of Canadian Studies* 124 at 124. As a rejoinder to Kroetsch, Grant would probably quote the following lines from William Blake's "The Ghost of Abel": "Nature has no outline: but Imagination has. Nature has no tune: but Imagination has. Nature has no Supernatural, and dissolves: Imagination is Eternity": *Prose and Poetry of William Blake* (New York: Doubleday, 1970) 268. Grant's ideas on justice are inseparable from his aesthetics. As noted previously, Alex Colville is said to have "taught me about justice". It would be interesting to know the response which the paintings of the Québec artist (and author of *Refus global*) Paul-Emile Borduas evoke in Grant. Borduas made the same point in his paintings that Kroetsch makes in his poetry and prose. His style was diametrically opposed to Colville's.

[80] Part I, *Constitution Act, 1982* which is Schedule B, *Canada Act 1982*, 1982 (U.K.) c. 11.

ty. It is important to note that the *Charter* does not affirm our liberty and equality unequivocally (see sections 1, 6(4), 15(2), 29 and 33). The curiously illiberal wording of the *Charter* may, therefore, indicate the persistence of certain supra-individual "values" — one hesitates to call them truths — which bodes well. But it could also signify the crudescence of what Grant has styled a "society organised for the human conveniences which fit the conveniences of technology",[81] which bodes ill. The *Charter* also recognizes a plurality of voices (English/French/aboriginal), which speaks well. But what becomes of those voices will be determined by whether the courts remain faithful to the spirit of that "rational federalism" of opinion that has always characterized our best "reasoning together" as Canadians, and which is so finely exemplified in Grant's writings. There may well be other truths than those dreamt of in contractarian teaching embodied in our new constitution. By heeding Grant it may yet prove possible to attend to them.

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[81] *Supra*, footnote 2 at 84.

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