

REVISIONS

A Series of Books on Ethics

General Editors:

Stanley Hauerwas and Alasdair MacIntyre

**English-Speaking
Justice**

GEORGE PARKIN GRANT

UNIVERSITY OF NOTRE DAME PRESS
Notre Dame, Indiana 46556

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United States Edition 1985 by
University of Notre Dame Press
Notre Dame, Indiana 46556
Printed in the United States of America

TO ALEX COLVILLE and DENNIS LEE
two artists who have taught me about justice

Library of Congress Cataloging in Publication Data

Grant, George Parkin, 1918-
English-speaking justice.

Reprint. Originally published: Sackville, N.B.,
Canada : Mount Allison University, 1974.
Includes bibliographical references.

1. Justice—Addresses, essays, lectures. 2. Liberalism
—Addresses, essays, lectures. I. Title.
JC578.G7 1985 320.5'1 84-40293
ISBN 0-268-00914-7
ISBN 0-268-00915-5 (pbk.)

that justice, because they were enfolded more than they knew in long memories and hopes. They were so enfolded even as they ridiculed the beliefs that kept those memories alive among the less articulate. Intellectual oblivion of eternity could not quickly kill that presence of eternity given in the day to day life of justice. The strength of those very memories held many intellectuals from doubting whether justice is good, and from trying to think why it is good in the light of what we have been told about the whole in modern science. This combination of the public successes of liberalism with these memories and hopes inhibited the thought which asks if justice is more than contractually founded, and whether it can be sustained in the world if it be considered simply a chosen convenience. The very decency and confidence of English-speaking politics was related to the absence of philosophy.

Part IV

English-speaking contractualism lies before us in the majority decision of the U.S. Supreme Court in "Roe vs. Wade". In that decision their highest court ruled that no state has the right to pass legislation which would prevent a citizen from receiving an abortion during the first six months of pregnancy. In that decision one can hear what is being spoken about justice in such modern liberalism more clearly than in academic books which can be so construed as to skim questions when the theory cuts. Theories of justice are inescapably defined in the necessities of legal decision.

Mr. Justice Blackmun begins his majority decision from the principle that the allocation of rights from within the constitution cannot be decided in terms of any knowledge of what is good. Under the constitution, rights are prior to any account of good. Appropriately he quotes Mr. Justice Holmes to this effect, who, more than any judge enucleated the principle that the constitution was based on the acceptance of moral pluralism in society, and that the pluralism was finally justified because we must be properly agnostic about any claim to knowledge of

moral good. It was his influence in this fundamental step towards a purely contractual interpretation of their constitution that has above all enshrined him in American liberal hagiography.²² In the decision, Blackmun interprets rights under the constitution as concerned with the ordering of conflicting claims between 'persons' and legislatures. The members of the legislature may have been persuaded by conceptions of goodness in passing the law in question. However, this is not germane to a judge's responsibility, which is to adjudicate between the rights of the mother and those of the legislature. He adjudicates that the particular law infringes the prior right of the mother to control her own body in the first six months of pregnancy. The individual who would seem to have the greatest interest in the litigation, because his or her life or death is at stake,—namely the particular foetus and indeed all future U.S. foetuses—is said by the judge not to be a party to the litigation. He states that foetuses up to six months are not persons, and as non-persons can have no status in the litigation.

The decision then speaks modern liberalism in its pure contractual form: right prior to good; a foundational contract protecting individual rights; the neutrality of the state concerning moral 'values'; social pluralism supported by and supporting this neutrality. Indeed the decision has been greeted as an example of the nobility of American contractarian institutions and political ideology, because the right of an individual 'person' is defended in the decision against the power of a majority in a legislature.

Nevertheless, however 'liberal' this decision may seem at the surface, it raises a cup of poison to the lips of liberalism. The poison is presented in the unthought ontology. In negating the right to existence for foetuses of less than six months, the judge has to say what such foetuses are not. They are not persons. But whatever else may be said of mothers and foetuses, it cannot be denied that they are of the same species. Pregnant women do not give birth to cats. Also it is a fact that the foetus is not merely a part of the mother because it is genetically unique 'ab initio'.²³ In adjudicating for the right of the mother to choose whether another member of her species lives or dies, the judge is required to make an ontological distinction between members of the same species. The mother is a person; the foetus is not. In deciding what is due in justice to beings of the same species, he bases such differing due on ontology. By calling the distinction ontological I mean simply that the knowledge which the judge has about mothers and foetuses is not scientific. To call certain beings 'persons' is not a scientific statement. But once ontological affirmation is made the basis for denying the most elementary right of traditional justice to members of our species, ontological questioning cannot be silenced at this point. Because such a distinction between members of the same species has been made, the decision unavoidably opens up the whole question of what our species is. What is it about any members of our species which makes the liberal rights of justice their due? The judge unwittingly looses the terrible question: has the long

tradition of liberal right any support in what human beings in fact are? Is this a question that in the modern era can be truthfully answered in the positive? Or does it hand the cup of poison to our liberalism?

This universal question is laid before us in the more particular questions arising from the decision. If foetuses are not persons, why should not the state decide that a week old, a two year old, a seventy or eighty year old is not a person "in the whole sense"? On what basis do we draw the line? Why are the retarded, the criminal or the mentally ill persons? 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 are beings so valuable as to require rights, just because they are capable of this calculation? What has happened to the stern demands of equal justice when it sacrifices the right to existence of the inarticulate to the convenience of the articulate? But thought cannot rest in these particular questionings about justice. Through them we are given the fundamental questions. What is it, if anything, about human beings that makes the rights of equal justice their due? What is it about human beings that makes it good that they should have such rights? What is it about any of us that makes our just due fuller than that of stones or flies or chickens or bears? Yet because the decision will not allow the question to remain silent, and yet

sounds an ambiguous note as to how it would be answered in terms of our contemporary liberalism, the decision "*Commends th' ingredients of our poison'd chalice / To our own lips.*"

The need to justify modern liberal justice has been kept in the wings of our English-speaking drama by our power and the strengths of our tradition. In such events as the decision on abortion it begins to walk upon the stage. To put the matter simply: if 'species' is an historical concept and we are a species whose origin and existence can be explained in terms of mechanical necessity and chance, living on a planet which also can be explained in such terms, what requires us to live together according to the principles of equal justice?

For the last centuries a civilisational contradiction has moved our western lives. Our greatest intellectual endeavour — the new co-penetration of 'logos' and 'techné' — affirmed at its heart that in understanding anything we know it as ruled by necessity and chance. This affirmation entailed the elimination of the ancient notion of good from the understanding of anything. At the same time, our day-to-day organisation was in the main directed by a conception of justice formulated in relation to the ancient science, in which the notion of good was essential to the understanding of what is. This civilisational contradiction arose from the attempt of the articulate to hold together what was given them in modern science with a content of justice which had been developed out of an older account of what is.

It must be emphasised that what is at stake in this contradiction is not only the foundations of justice, but more importantly its content. Many academics in many disciplines have described the difference between the ancient and modern conceptions of justice as if it were essentially concerned with differing accounts of the human situation. The view of traditional philosophy and religion is that justice is the overriding order which we do not measure and define, but in terms of which we are measured and defined. The view of modern thought is that justice is a way which we choose in freedom, both individually and publicly, once we have taken our fate into our own hands, and know that we are responsible for what happens. This description of the difference has indeed some use for looking at the history of our race,—useful both to those who welcome and those who deplore the change of view. Nevertheless, concentration on differing 'world views' dims the awareness of what has been at stake concerning justice in recent western history. This dimming takes place in the hardly conscious assumption that while there has been change as to what can be known in philosophy, and change in the prevalence of religious belief among the educated, the basic content of justice in our societies will somehow remain the same. The theoretical differences in 'world views' are turned over to the domain of 'objective' scholarship, and this scholarship is carried out in protected private provinces anaesthetised from any touch with what is happening to the content of justice in the heat of the world. To feel the cutting edge of what

is at stake in differing foundations of justice it is necessary to touch those foundations as they are manifested in the very context of justice.

The civilisational contradiction which beset Europe did not arise from the question whether there is justice, but what justice is. Obviously any possible society must have some system of organisation to which the name 'justice' can be given. The contradiction arose because human beings held onto certain aspects of justice which they had found in the ancient account of good, even after they no longer considered that that account of good helped them to understand the way things are. The content of justice was largely given them from its foundations in the Bible (and the classical philosophy which the early Christians thought necessary for understanding the Bible), while they understood the world increasingly in terms of modern technological science.

The desire to have both what was given in the new knowledge, and what was given us about justice in the religious and philosophical traditions, produced many conscious and unconscious attempts at practical and theoretical reconciliations. It is these attempts which make it not inaccurate to call the early centuries of modern liberal Europe the era of secularised Christianity. It is an often repeated platitude that thinkers such as Locke and Rousseau, Kant and Marx were secularised Christians. (Of the last name it is perhaps better to apply the not so different label—secularised Jew.) The reason why an academic such as Professor Rawls has been singled out for attention in this writing is as an example of how

late that civilisational contradiction has survived in the sheltered intellectual life of the English-speaking peoples.

Indeed the appropriateness of calling modern contractualism 'secularised Christianity' may be seen in the difference between modern contractualism and the conventionalism of the ancient world. Although the dominant tradition of the ancient world was that justice belonged to the order of things, there was a continuing minority report that justice was simply a man-made convention. But what so startlingly distinguishes this ancient conventionalism from our contractualism is that those who advocated it most clearly also taught that the highest life required retirement from politics. According to Lucretius, the wise man knows that the best life is one of isolation from the dynamism of public life. The dominant contractualist teachers of the modern world have advocated an intense concern with political action. We are called to the supremacy of the practical life in which we must struggle to establish the just contract of equality. When one asks what had been the chief new public intellectual influence between ancient and modern philosophy, the answer must be western Christianity, with its insistence on the primacy of charity and its implications for equality. Modern contractualism's determined political activism relates it to its seedbed in western Christianity. Here again one comes upon that undefined primal affirmation which has been spoken of as concerned with 'will', and which is prior both to technological science and to revolution.

This public contradiction was not first brought into the light of day in the English-speaking world. It was exposed in the writings of Nietzsche. The Germans had received modern ways and thought later than the French or the English and therefore in a form more explicitly divided from the traditional thought. In their philosophy these modern assumptions are most uncompromisingly brought into the light of day. Nietzsche's writings may be singled out as a Rubicon, because more than a hundred years ago he laid down with incomparable lucidity that which is now publicly open: what is given about the whole in technological science cannot be thought together with what is given us concerning justice and truth, reverence and beauty, from our tradition. He does not turn his ridicule primarily against what has been handed to us in Christian revelation and ancient philosophy. What was given there has simply been killed as given, and all that we need to understand is why it was once thought alive. His greatest ridicule is reserved for those who want to maintain a content to 'justice' and 'truth' and 'goodness' out of the corpse that they helped to make a corpse. These are the intellectual democrats who adopt modern thought while picking and choosing among the ethical 'norms' from a dead past. Justice as equality and fairness is that bit of Christian instinct which survives the death of God. As he puts it: "The masses blink and say: 'We are all equal. — Man is but man, before God — we are all equal.' Before God! But now this God has died."

Particularly since Hume, the English moralists had

pointed out that moral rules were useful conventions, but had also assumed that the core of English justice was convenient. Hume's 'monkish virtues'—the parts of the tradition which did not suit the new bourgeoisie—could be shown to be inconvenient; but the heart of the tradition could be maintained and extended in the interests of property and liberty. It could be freed from its justification in terms of eternity, and its rigour could be refurbished by some under the pseudo-eternity of a timeless social contract. But Nietzsche makes clear that if the 'justice' of liberty and equality is only conventional, we may find in the course of an ever changing history that such content is not convenient. He always puts the word 'justice' in quotation marks to show that he does not imply its traditional content, and that its content will vary through the flux of history. The English moralists had not discovered that realm of beings we moderns call 'history', and therefore they did not understand the dominance of historicism over all other statements. Their social contract was indeed a last effort to avoid that dominance, while they increasingly accepted the ways of thought that led ineluctably to historicism. The justice of liberty and equality came forth from rationalists who did not think 'historically'. For whom is such justice convenient when we know that the old rationalism can no longer be thought as 'true'?

However, it is Kant who is singled out by Nietzsche as the clearest expression of this secularised Christianity. Kant's thought is the consummate expression of wanting it both ways. Having understood

what is told us about nature in our science, and having understood that we will and make our own history, he turned away from the consequence of those recognitions by enfolding them in the higher affirmation that morality is the one fact of reason, and we are commanded to obedience. According to Nietzsche, he limited autonomy by obedience. Because this comfortable anaesthetising from the full consequences of the modern was carried out so brilliantly in the critical system, Nietzsche calls Kant 'the great delayer'. Kant persuaded generations of intellectuals to the happy conclusion that they could keep both the assumptions of technological secularism and the absolutes of the old morality. He allowed them the comfort of continuing to live in the civilisational contradiction of accepting both the will to make one's own life and the old content of justice. He delayed them from knowing that there are no moral facts, but only the moral interpretation of facts, and that these interpretations can be explained as arising from the historical vicissitudes of the instincts. Moral interpretations are what we call our 'values', and these are what our wills impose upon the facts. Because of the brilliance of Kant's delaying tactics, men were held from seeing that justice as equality was a secularised survival of an archaic Christianity, and the absolute commands were simply the man-made 'values' of an era we have transcended.

Nietzsche was the first to make clear the argument that there is no reason to continue to live in that civilisational contradiction. Societies will always

need legal systems — call them systems of 'justice' if you like the word. Once we have recognised what 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? As we move into a society where we will be able to shape not only non-human nature but humanity itself, why should we limit that shaping by doctrines of equal rights which come out of a world view that 'history' has swept away. Does not the production of quality of life require a legal system which gives new range to the rights of the creative and the dynamic? Why should that range be limited by the rights of the weak, the uncreative and the immature? 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? Once we have recognised 'history' as the imposing of our wills on an accidental world, does not 'justice' take on a new content?²⁴

Against this attack on our 'values', our liberalism so belongs to the flesh and bones of our institutions that it cannot be threatened by something as remote as ontological questioning. The explicit statements of the American constitution guard their system of justice; the British constitution guards the same shape of rights in a less explicit but in a more deeply rooted way. These living forces of allegiance protect the common sense of practical men against the follies of ideologues. Anyway, did not the English-speaking

peoples win the wars against the Germans, and win them in the name of liberalism, against the very 'philosophy' that is said to assail that liberalism?

It is also argued that the very greatness of American pluralism, founded upon the contract, is that out of it have come forth continuous religious revivals which produce that moral sustenance necessary to the justice of their society. Is it not a reason for confidence that in the election of 1976 the two candidates competed in allegiance to the traditions of religion, and that there is a renewed interest in religion among the young in the contractual society? Where is the atheism of the right in the United States? Does not the greatness of the American constitution lie in the fact that the general outlines of social cooperation are laid down and maintained by a secular contract, while within those general rules the resources of religious faith can flourish, as long as such faiths do not transgress that general outline? The greatness of the system is that the tolerance of pluralism is combined with the strength of religion. God has not died, as European intellectuals believed; it is just that our differing apprehensions of deity require that the rules of the game are not defined in terms of any of them. The rules of the game are defined in terms of the calculation of worldly self-interest; beyond that, citizens may seek the eternal as they see fit.

Indeed, any sane individual must be glad that we face the unique event of technology within a long legal and political tradition founded on the conception of justice as requiring liberty and equality. When

we compare what is happening to multitudes in Asia who live the event of technology from out of ancient and great traditions, but without a comparable sense of individual right, we may count ourselves fortunate to live within our tradition. Asian people often have great advantages over us in the continuing strength of rite; our advantage is in the continuing strength of right. Also our liberalism came from the meeting of Christian tradition with an early form of modern thought, so that our very unthinking confidence in that liberalism has often saved us from modern political plagues which have been devastating in other western societies. At the practical level it is imprudent indeed to speak against the principles, if not the details, of those legal institutions which guard our justice.²⁵

Nevertheless, it must be stated that our justice now moves to a lowered content of equal liberty. The chief cause of this is that our justice is being played out within a destiny more comprehensive than itself. A quick name for this is 'technology'. I mean by that word the endeavour which summons forth everything (both human and non-human) to give its reasons, and through the summoning forth of those reasons turns the world into potential raw material, at the disposal of our 'creative' wills.²⁶ The definition is circular in the sense that what is 'creatively' willed is further expansion of that union of knowing and making given in the linguistic union of 'techné', and 'logos'. Similar but cruder: it has been said that communism and contractual capitalism are predicates of the subject technology. They are ways

in which our more comprehensive destiny is lived out. But clearly that technological destiny has its own dynamic conveniences, which easily sweep away our tradition of justice, if the latter gets in the way. The 'creative' in their corporations have been told for many generations that justice is only a convenience. In carrying out the dynamic convenience of technology, why should they not seek a 'justice' which is congruent with those conveniences, and gradually sacrifice the principles of liberty and equality when they conflict with the greater conveniences? What is it about other human beings that should stand in the way of such convenience? The tendency of the majority to get together to insist on a contract guaranteeing justice to them against the 'creative' strong continues indeed to have some limiting power. Its power is, however, itself limited by the fact that the majority of that majority see in the very technological endeavour the hope for their realisation of 'the primary goods', and therefore will often not stand up for the traditional justice when it is inconvenient to that technological endeavour. The majority of the acquiescent think they need the organisers to provide 'the primary goods' more than they need justice.

In such a situation, equality in 'primary goods' for a majority in the heartlands of the empire is likely; but it will be an equality which excludes liberal justice for those who are inconvenient to the 'creative'. It will exclude liberal justice from those who are too weak to enforce contracts—the imprisoned, the mentally unstable, the unborn, the

aged, the defeated and sometimes even the morally unconfirming. The price for large scale equality under the direction of the 'creative' will be injustice for the very weak. It will be a kind of massive 'equality' in 'primary goods', outside a concern for justice. As Huey Long put it: "When fascism comes to America, it will come in the name of democracy". We move to such a friendly and smooth faced organisation that it will not be recognised for what it is. This lack of recognition is seen clearly when the President of France says he is working for 'an advanced liberal society', just as he is pushing forward laws for the mass destruction of the unborn. What he must mean by liberal is the society organised for the human conveniences which fit the conveniences of technology.

As justice is conceived as the external convenience of contract, it obviously has less and less to do with the good ordering of the inward life. Among the majority in North America, inward life then comes to be ordered around the pursuit of 'primary goods', and/or is taken in terms of a loose popular Freudianism, mediated to the masses by the vast array of social technicians.²⁷ But it is dangerous to mock socially the fact of contradiction. The modern account of 'the self' is at one with the Nietzschean account. This unity was explicitly avowed by Freud. With its affirmation of the instrumentality of reason, how can it result in a conception of 'justice' similar to that of our tradition? In such a situation, the majorities in the heartlands of the empires may be able to insist on certain external equalities. But as justice

is conceived as founded upon contract, and as having nothing to do with the harmony of the inward life, will it be able to sustain the inconveniences of public liberty?

In the western tradition it was believed that the acting out of justice in human relationships was the essential way in which human beings are opened to eternity. Inward and outward justice were considered to be mutually interdependent, in the sense that the inward openness to eternity depended on just practice, and just practice depended on that inward openness to eternity. When public justice is conceived as conventional and contractual, the division between inward and outward is so widened as to prevent any such mutual interdependence. Both openness to eternity and practical justice are weakened in that separation. A. N. Whitehead's shallow dictum that religion is what we do with our solitude aptly expresses that modern separation. It is a destructive half-truth because it makes our solitude narcissistic, and blunts our cutting edge in public justice.

Above all, we do not correctly envisage what is happening when we take our situation simply as new practical difficulties for liberalism, arising from the need to control new technologies, themselves external to that liberalism. Such an understanding of our situation prevents us from becoming aware that our contractual liberalism is not independent of the assumptions of technology in any way that allows it to be the means of transcending those technologies. Our situation is rather that 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. In so far as the contemporary systems of liberal practice hold onto the content of free and equal justice, it is because they still rely on older sources which are more and more made unthinkable in the very realisation of technology. When contractual liberals hold within their thought remnants of secularised Christianity or Judaism, these remnants, if made conscious, must be known as unthinkable in terms of what is given in the modern. How, in modern thought, can we find positive answers to the questions: (i) what is it about human beings that makes liberty and equality their due? (ii) why is justice what we are fitted for, when it is not convenient? Why is it our good? The inability of contractual liberals (or indeed Marxists) to answer these questions is the terrifying darkness which has fallen upon modern justice.

Therefore, to those of us who for varying reasons cannot but trust the lineaments of liberal justice, and who somehow have been told that some such justice is due to all human beings and that its living out is, above all, what we are fitted for, — to those of such trust comes 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. The great theoretical achievements of the modern era have been quantum physics, the biology of evolutionism, and the modern logic. (All other modern theoretical claims, particularly those

in the human sciences, remain as no more than provisional, or even can be known as simply expressions of that oblivion of eternity which has characterised the coming to be of technology.) These are the undoubtable core of truth which has come out of technology, and they cry out to be thought in harmony with the conception of justice as what we are fitted for.

The danger of this darkness is easily belittled by our impoverished use of the word 'thought'. This word is generally used as if it meant an activity necessary to scientists when they come up against a difficulty in their research, or some vague unease beyond calculation when we worry about our existence. Thought is steadfast attention to the whole. The darkness is fearful, because what is at stake is whether anything is good. In the pretechnological era, the central western account of justice clarified the claim that justice is what we are fitted for. It clarified why justice is to render each human being their due, and why what was due to all human beings was "beyond all bargains and without an alternative". That account of justice was written down most carefully and most beautifully in "The Republic" of Plato. For those of us who are Christians, the substance of our belief is that the perfect living out of that justice is unfolded in the Gospels. Why the darkness which enshrouds justice is so dense—even for those who think that what is given in "The Republic" concerning good stands forth as true—is because that truth cannot be thought in unity with what is given in modern science concerning necessity

and chance. The darkness is not simply the obscurity of living by that account of justice in the practical tumult of the technological society. Nor is it the impossibility of that account coming to terms with much of the folly of modernity, e.g. the belief that there is a division between 'facts' and 'values'; nor the difficulty of thinking its truth in the presence of historicism. Rather it is that this account has not been thought in unity with the greatest theoretical enterprises of the modern world. This is a great darkness, because it appears certain that rational beings cannot get out of the darkness by accepting either truth and rejecting the other. It is folly simply to return to the ancient account of justice as if the discoveries of the modern science of nature had not been made. It is folly to take the ancient account of justice as simply of antiquarian interest, because without any knowledge of justice as what we are fitted for, we will move into the future with a 'justice' which is terrifying in its potentialities for mad inhumanity of action. The purpose of this writing has been to show the truth of the second of these propositions. In the darkness one should not return as if the discoveries of modern science had not taken place; nor should one give up the question of what it means to say that justice is what we are fitted for; and yet who has been able to think the two together? For those of us who are lucky enough to know that we have been told that justice is what we are fitted for, this is not a practical darkness, but simply a theoretical one. For those who do not believe that they have been so told it is both a practical and

theoretical darkness which leads to an ever greater oblivion of eternity.

In the task of lightening the darkness which surrounds justice in our era, we of the English-speaking world have one advantage and one great disadvantage. The advantage is practical: the old and settled legal institutions which still bring forth loyalty from many of the best practical people. The disadvantage is that we have been so long disinterested or even contemptuous of that very thought about the whole which is now required. No other great western tradition has shown such lack of interest in thought, and in the institutions necessary to its possibility. We now pay the price for our long tradition of taking the goods of practical confidence and competence as self-sufficiently the highest goods. In what is left of those secular institutions which should serve the purpose of sustaining such thought—that is, our current institutions of higher learning—there is little encouragement to what might transcend the technically competent, and what is called 'philosophy' is generally little more than analytical competence. Analytical logistics plus historicist scholarship plus even rigorous science do not when added up equal philosophy. When added together they are not capable of producing that thought which is required if justice is to be taken out of the darkness which surrounds it in the technological era. This lack of tradition of thought is one reason why it is improbable that the transcendence of justice over technology will be lived among English-speaking people.

Part IV

22. Blackmun's appeal to Holmes illustrates the uncertainties in current American usage of the words 'liberal' and 'conservative'. His decision about abortion has been put in the 'liberal' column, when it is in fact based on a strict construction of contractualism which is generally put in the 'conservative' column. It is well to remember that Blackmun is a Nixon appointee, and tends in his interpretation of the constitution towards 'strict constructionism', and away from that interpretation according to the changing consensus of a progressing people, which characterised the Warren Court. Nixon consistently advocated over many years that the progressive historicism which dominated the Warren Court should be rectified by the appointment of justices who followed the theory of strict constructionism. This involved that their constitution be conceived as a foundational contract which established certain rights unaffected by the passage of time. But the difference concerning judicial interpretation does not alter the fact that both sides to it appeal to a contractual view of the state, related to the acceptance of the consequences of moral pluralism in society. A foundational contract which is viewed as timeless may seem less oblivious of eternity than an historically developing contract; but in both views justice is considered contractual. Indeed, what is meant in the U.S. by 'conservative' is generally a species of modern 'liberal'. 'Conservatives' want to hold onto certain consequences of the earlier tradition of our liberalism which more modern 'liberals' are willing to scrap in the interest of the new and the progressive. It is this usage which can be so confusing to people from other countries who may identify 'conservatism' with those who have some memories from before the age

of progress. But the indigenous memories in the U.S. are never from before the age of progress. Thus American 'conservatives' can advocate the most modern technological proposals in the name of 'conservatism'. At the judicial level, this strange usage led certain progressivists to call Mr. Justice Frankfurter a 'conservative' when he became the clearest advocate of strict constructionism on their court.

23. In discussing this case I am not concerned to elucidate the complex question of justice in abortion, whether in individual conduct or positive law. If I were so concerned, I would have to expound these facts of embryology.

24. To put the matter politically: the early public atheism of Europe generally came from 'the left'. Its adherents attacked the traditional religion while taking for granted almost unconsciously that 'the right' would continue to live within its religious allegiances. 'The left' could attack religion partially because it relied on 'the right' having some restraint because of its religion. Philosophers cannot be subsumed under their political effects, but with Nietzsche the atheism of 'the right' enters the western scene. One definition of national socialism is a strange union of the atheisms of 'the right' and of 'the left'.

25. It is well to remember that the greatest contemporary philosopher, Heidegger, published in 1953 "An Introduction to Metaphysics" in which he wrote of National Socialism: "the inner truth and greatness of this movement (namely the encounter between global technology and modern man)". One theoretical part of that encounter was the development of a new jurisprudence, which explicitly distinguished itself from our jurisprudence of rights, because the latter belonged to an era of

plutocratic democracy which needed to be transcended in that encounter. Such arguments must make one extremely careful of the ontological questioning of our jurisprudence, even in its barest contractual form.

26. See M. Heidegger *Der Satz Vom Grund*, Pfullingen, 1957.

27. We are fortunate these days when the social technicians are controlled by something as human as popular Freudianism. Whatever its defects, popular Freudianism is surely superior to the 'new brutality' of behaviour modification carried out by behaviourist techniques.

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A Series of Books on Ethics

General Editors:

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English-Speaking
Justice

GEORGE PARKIN GRANT

UNIVERSITY OF NOTRE DAME PRESS
Notre Dame, Indiana 46556

(1985)

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United States Edition 1985 by
University of Notre Dame Press
Notre Dame, Indiana 46556
Printed in the United States of America

TO ALEX COLVILLE and DENNIS LEE
two artists who have taught me about justice

Library of Congress Cataloging in Publication Data

Grant, George Parkin, 1918-
English-speaking justice.

Reprint. Originally published: Sackville, N.B.,
Canada : Mount Allison University, 1974.
Includes bibliographical references.

1. Justice—Addresses, essays, lectures. 2. Liberalism
—Addresses, essays, lectures. I. Title.

JC578.G7 1985 320.51 84-40293

ISBN 0-268-00914-7

ISBN 0-268-00915-5 (pbk.)

that justice, because they were enfolded more than they knew in long memories and hopes. They were so enfolded even as they ridiculed the beliefs that kept those memories alive among the less articulate. Intellectual oblivion of eternity could not quickly kill that presence of eternity given in the day to day life of justice. The strength of those very memories held many intellectuals from doubting whether justice is good, and from trying to think why it is good in the light of what we have been told about the whole in modern science. This combination of the public successes of liberalism with these memories and hopes inhibited the thought which asks if justice is more than contractually founded, and whether it can be sustained in the world if it be considered simply a chosen convenience. The very decency and confidence of English-speaking politics was related to the absence of philosophy.

Part IV

English-speaking contractualism lies before us in the majority decision of the U.S. Supreme Court in "Roe vs. Wade". In that decision their highest court ruled that no state has the right to pass legislation which would prevent a citizen from receiving an abortion during the first six months of pregnancy. In that decision one can hear what is being spoken about justice in such modern liberalism more clearly than in academic books which can be so construed as to skim questions when the theory cuts. Theories of justice are inescapably defined in the necessities of legal decision.

Mr. Justice Blackmun begins his majority decision from the principle that the allocation of rights from within the constitution cannot be decided in terms of any knowledge of what is good. Under the constitution, rights are prior to any account of good. Appropriately he quotes Mr. Justice Holmes to this effect, who, more than any judge enucleated the principle that the constitution was based on the acceptance of moral pluralism in society, and that the pluralism was finally justified because we must be properly agnostic about any claim to knowledge of

moral good. It was his influence in this fundamental step towards a purely contractual interpretation of their constitution that has above all enshrined him in American liberal hagiography.²² In the decision, Blackmun interprets rights under the constitution as concerned with the ordering of conflicting claims between 'persons' and legislatures. The members of the legislature may have been persuaded by conceptions of goodness in passing the law in question. However, this is not germane to a judge's responsibility, which is to adjudicate between the rights of the mother and those of the legislature. He adjudicates that the particular law infringes the prior right of the mother to control her own body in the first six months of pregnancy. The individual who would seem to have the greatest interest in the litigation, because his or her life or death is at stake, — namely the particular foetus and indeed all future U.S. foetuses — is said by the judge not to be a party to the litigation. He states that foetuses up to six months are not persons, and as non-persons can have no status in the litigation.

The decision then speaks modern liberalism in its pure contractual form: right prior to good; a foundational contract protecting individual rights; the neutrality of the state concerning moral 'values'; social pluralism supported by and supporting this neutrality. Indeed the decision has been greeted as an example of the nobility of American contractarian institutions and political ideology, because the right of an individual 'person' is defended in the decision against the power of a majority in a legislature.

Nevertheless, however 'liberal' this decision may seem at the surface, it raises a cup of poison to the lips of liberalism. The poison is presented in the untold thought ontology. In negating the right to existence for foetuses of less than six months, the judge has to say what such foetuses are not. They are not persons. But whatever else may be said of mothers and foetuses, it cannot be denied that they are of the same species. Pregnant women do not give birth to cats. Also it is a fact that the foetus is not merely a part of the mother because it is genetically unique 'ab initio'.²³ In adjudicating for the right of the mother to choose whether another member of her species lives or dies, the judge is required to make an ontological distinction between members of the same species. The mother is a person; the foetus is not. In deciding what is due in justice to beings of the same species, he bases such differing due on ontology. By calling the distinction ontological I mean simply that the knowledge which the judge has about mothers and foetuses is not scientific. To call certain beings 'persons' is not a scientific statement. But once ontological affirmation is made the basis for denying the most elementary right of traditional justice to members of our species, ontological questioning cannot be silenced at this point. Because such a distinction between members of the same species has been made, the decision unavoidably opens up the whole question of what our species is. What is it about any members of our species which makes the liberal rights of justice their due? The judge unwittingly looses the terrible question: has the long

tradition of liberal right any support in what human beings in fact are? Is this a question that in the modern era can be truthfully answered in the positive? Or does it hand the cup of poison to our liberalism?

This universal question is laid before us in the more particular questions arising from the decision. If foetuses are not persons, why should not the state decide that a week old, a two year old, a seventy or eighty year old is not a person "in the whole sense"? On what basis do we draw the line? Why are the retarded, the criminal or the mentally ill persons? 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 are beings so valuable as to require rights, just because they are capable of this calculation? What has happened to the stern demands of equal justice when it sacrifices the right to existence of the inarticulate to the convenience of the articulate? But thought cannot rest in these particular questionings about justice. Through them we are given the fundamental questions. What is it, if anything, about human beings that makes the rights of equal justice their due? What is it about human beings that makes it good that they should have such rights? What is it about any of us that makes our just due fuller than that of stons or flies or chickens or bears? Yet because the decision will not allow the question to remain silent, and yet

sounds an ambiguous note as to how it would be answered in terms of our contemporary liberalism, the decision "*Comments th' ingredients of our poison'd chalice / To our own lips.*"

The need to justify modern liberal justice has been kept in the wings of our English-speaking drama by our power and the strengths of our tradition. In such events as the decision on abortion it begins to walk upon the stage. To put the matter simply: if 'species' is an historical concept and we are a species whose origin and existence can be explained in terms of mechanical necessity and chance, living on a planet which also can be explained in such terms, what requires us to live together according to the principles of equal justice?

For the last centuries a civilisational contradiction has moved our western lives. Our greatest intellectual endeavour—the new co-penetration of 'logos' and 'techné'—affirmed at its heart that in understanding anything we know it as ruled by necessity and chance. This affirmation entailed the elimination of the ancient notion of good from the understanding of anything. At the same time, our day-to-day organisation was in the main directed by a conception of justice formulated in relation to the ancient science, in which the notion of good was essential to the understanding of what is. This civilisational contradiction arose from the attempt of the articulate to hold together what was given them in modern science with a content of justice which had been developed out of an older account of what is.

It must be emphasised that what is at stake in this contradiction is not only the foundations of justice, but more importantly its content. Many academics in many disciplines have described the difference between the ancient and modern conceptions of justice as if it were essentially concerned with differing accounts of the human situation. The view of traditional philosophy and religion is that justice is the overriding order which we do not measure and define, but in terms of which we are measured and defined. The view of modern thought is that justice is a way which we choose in freedom, both individually and publicly, once we have taken our fate into our own hands, and know that we are responsible for what happens. This description of the difference has indeed some use for looking at the history of our race, — useful both to those who welcome and those who deplore the change of view. Nevertheless, concentration on differing 'world views' dims the awareness of what has been at stake concerning justice in recent western history. This dimming takes place in the hardly conscious assumption that while there has been change as to what can be known in philosophy, and change in the prevalence of religious belief among the educated, the basic content of justice in our societies will somehow remain the same. The theoretical differences in 'world views' are turned over to the domain of 'objective' scholarship, and this scholarship is carried out in protected private provinces anaesthetised from any touch with what is happening to the content of justice in the heat of the world. To feel the cutting edge of what

is at stake in differing foundations of justice it is necessary to touch those foundations as they are manifested in the very context of justice.

The civilisational contradiction which beset Europe did not arise from the question whether there is justice, but what justice is. Obviously any possible society must have some system of organisation to which the name 'justice' can be given. The contradiction arose because human beings held onto certain aspects of justice which they had found in the ancient account of good, even after they no longer considered that that account of good helped them to understand the way things are. The content of justice was largely given them from its foundations in the Bible (and the classical philosophy which the early Christians thought necessary for understanding the Bible), while they understood the world increasingly in terms of modern technological science.

The desire to have both what was given in the new knowledge, and what was given us about justice in the religious and philosophical traditions, produced many conscious and unconscious attempts at practical and theoretical reconciliations. It is these attempts which make it not inaccurate to call the early centuries of modern liberal Europe the era of secularised Christianity. It is an often repeated platitude that thinkers such as Locke and Rousseau, Kant and Marx were secularised Christians. (Of the last name it is perhaps better to apply the not so different label—secularised Jew.) The reason why an academic such as Professor Rawls has been singled out for attention in this writing is as an example of how

late that civilisational contradiction has survived in the sheltered intellectual life of the English-speaking peoples.

Indeed the appropriateness of calling modern contractualism 'secularised Christianity' may be seen in the difference between modern contractualism and the conventionalism of the ancient world. Although the dominant tradition of the ancient world was that justice belonged to the order of things, there was a continuing minority report that justice was simply a man-made convention. But what so startlingly distinguishes this ancient conventionalism from our contractualism is that those who advocated it most clearly also taught that the highest life required retirement from politics. According to Lucretius, the wise man knows that the best life is one of isolation from the dynamism of public life. The dominant contractualist teachers of the modern world have advocated an intense concern with political action. We are called to the supremacy of the practical life in which we must struggle to establish the just contract of equality. When one asks what had been the chief new public intellectual influence between ancient and modern philosophy, the answer must be western Christianity, with its insistence on the primacy of charity and its implications for equality. Modern contractualism's determined political activism relates it to its seedbed in western Christianity. Here again one comes upon that undefined primal affirmation which has been spoken of as concerned with 'will', and which is prior both to technological science and to revolution.

This public contradiction was not first brought into the light of day in the English-speaking world. It was exposed in the writings of Nietzsche. The Germans had received modern ways and thought later than the French or the English and therefore in a form more explicitly divided from the traditional thought. In their philosophy these modern assumptions are most uncompromisingly brought into the light of day. Nietzsche's writings may be singled out as a Rubicon, because more than a hundred years ago he laid down with incomparable lucidity that which is now publicly open: what is given about the whole in technological science cannot be thought together with what is given us concerning justice and truth, reverence and beauty, from our tradition. He does not turn his ridicule primarily against what has been handed to us in Christian revelation and ancient philosophy. What was given there has simply been killed as given, and all that we need to understand is why it was once thought alive. His greatest ridicule is reserved for those who want to maintain a content to 'justice' and 'truth' and 'goodness' out of the corpse that they helped to make a corpse. These are the intellectual democrats who adopt modern thought while picking and choosing among the ethical 'norms' from a dead past. Justice as equality and fairness is that bit of Christian instinct which survives the death of God. As he puts it: "The masses blink and say: 'We are all equal.—Man is but man, before God—we are all equal.' Before God! But now this God has died."

Particularly since Hume, the English moralists had

pointed out that moral rules were useful conventions, but had also assumed that the core of English justice was convenient. Hume's 'monkish virtues'—the parts of the tradition which did not suit the new bourgeoisie—could be shown to be inconvenient; but the heart of the tradition could be maintained and extended in the interests of property and liberty. It could be freed from its justification in terms of eternity, and its rigour could be refurbished by some under the pseudo-eternity of a timeless social contract. But Nietzsche makes clear that if the 'justice' of liberty and equality is only conventional, we may find in the course of an ever changing history that such content is not convenient. He always puts the word 'justice' in quotation marks to show that he does not imply its traditional content, and that its content will vary through the flux of history. The English moralists had not discovered that realm of beings we moderns call 'history', and therefore they did not understand the dominance of historicism over all other statements. Their social contract was indeed a last effort to avoid that dominance, while they increasingly accepted the ways of thought that led ineluctably to historicism. The justice of liberty and equality came forth from rationalists who did not think 'historically'. For whom is such justice convenient when we know that the old rationalism can no longer be thought as 'true'?

However, it is Kant who is singled out by Nietzsche as the clearest expression of this secularised Christianity. Kant's thought is the consummate expression of wanting it both ways. Having understood

what is told us about nature in our science, and having understood that we will and make our own history, he turned away from the consequence of those recognitions by enfolding them in the higher affirmation that morality is the one fact of reason, and we are commanded to obedience. According to Nietzsche, he limited autonomy by obedience. Because this comfortable anaesthetising from the full consequences of the modern was carried out so brilliantly in the critical system, Nietzsche calls Kant 'the great delayer'. Kant persuaded generations of intellectuals to the happy conclusion that they could keep both the assumptions of technological secularism and the absolutes of the old morality. He allowed them the comfort of continuing to live in the civilisational contradiction of accepting both the will to make one's own life and the old content of justice. He delayed them from knowing that there are no moral facts, but only the moral interpretation of facts, and that these interpretations can be explained as arising from the historical vicissitudes of the instincts. Moral interpretations are what we call our 'values', and these are what our wills impose upon the facts. Because of the brilliance of Kant's delaying tactics, men were held from seeing that justice as equality was a secularised survival of an archaic Christianity, and the absolute commands were simply the man-made 'values' of an era we have transcended.

Nietzsche was the first to make clear the argument that there is no reason to continue to live in that civilisational contradiction. Societies will always

need legal systems—call them systems of 'justice' if you like the word. Once we have recognised what 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? As we move into a society where we will be able to shape not only non-human nature but humanity itself, why should we limit that shaping by doctrines of equal rights which come out of a world view that 'history' has swept away. Does not the production of quality of life require a legal system which gives new range to the rights of the creative and the dynamic? Why should that range be limited by the rights of the weak, the uncreative and the immature? 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? Once we have recognised 'history' as the imposing of our wills on an accidental world, does not 'justice' take on a new content?²⁴

Against this attack on our 'values', our liberalism so belongs to the flesh and bones of our institutions that it cannot be threatened by something as remote as ontological questioning. The explicit statements of the American constitution guard their system of justice; the British constitution guards the same shape of rights in a less explicit but in a more deeply rooted way. These living forces of allegiance protect the common sense of practical men against the follies of ideologies. Anyway, did not the English-speaking

peoples win the wars against the Germans, and win them in the name of liberalism, against the very 'philosophy' that is said to assail that liberalism?

It is also argued that the very greatness of American pluralism, founded upon the contract, is that out of it have come forth continuous religious revivals which produce that moral sustenance necessary to the justice of their society. Is it not a reason for confidence that in the election of 1976 the two candidates competed in allegiance to the traditions of religion, and that there is a renewed interest in religion among the young in the contractual society? Where is the atheism of the right in the United States? Does not the greatness of the American constitution lie in the fact that the general outlines of social cooperation are laid down and maintained by a secular contract, while within those general rules the resources of religious faith can flourish, as long as such faiths do not transgress that general outline? The greatness of the system is that the tolerance of pluralism is combined with the strength of religion. God has not died, as European intellectuals believed; it is just that our differing apprehensions of deity require that the rules of the game are not defined in terms of any of them. The rules of the game are defined in terms of the calculation of worldly self-interest; beyond that, citizens may seek the eternal as they see fit.

Indeed, any sane individual must be glad that we face the unique event of technology within a long legal and political tradition founded on the conception of justice as requiring liberty and equality. When

we compare what is happening to multitudes in Asia who live the event of technology from out of ancient and great traditions, but without a comparable sense of individual right, we may count ourselves fortunate to live within our tradition. Asian people often have great advantages over us in the continuing strength of rite; our advantage is in the continuing strength of right. Also our liberalism came from the meeting of Christian tradition with an early form of modern thought, so that our very unthinking confidence in that liberalism has often saved us from modern political plagues which have been devastating in other western societies. At the practical level it is imprudent indeed to speak against the principles, if not the details, of those legal institutions which guard our justice.²⁵

Nevertheless, it must be stated that our justice now moves to a lowered content of equal liberty. The chief cause of this is that our justice is being played out within a destiny more comprehensive than itself. A quick name for this is 'technology'. I mean by that word the endeavour which summons forth everything (both human and non-human) to give its reasons, and through the summoning forth of those reasons turns the world into potential raw material, at the disposal of our 'creative' wills.²⁶ The definition is circular in the sense that what is 'creatively' willed is further expansion of that union of knowing and making given in the linguistic union of 'techné', and 'logos'. Similar but cruder: it has been said that communism and contractual capitalism are predicates of the subject technology. They are ways

in which our more comprehensive destiny is lived out. But clearly that technological destiny has its own dynamic conveniences, which easily sweep away our tradition of justice, if the latter gets in the way. The 'creative' in their corporations have been told for many generations that justice is only a convenience. In carrying out the dynamic convenience of technology, why should they not seek a 'justice' which is congruent with those conveniences, and gradually sacrifice the principles of liberty and equality when they conflict with the greater conveniences? What is it about other human beings that should stand in the way of such convenience? The tendency of the majority to get together to insist on a contract guaranteeing justice to them against the 'creative' strong continues indeed to have some limiting power. Its power is, however, itself limited by the fact that the majority of that majority see in the very technological endeavour the hope for their realisation of 'the primary goods', and therefore will often not stand up for the traditional justice when it is inconvenient to that technological endeavour. The majority of the acquiescent think they need the organisers to provide 'the primary goods' more than they need justice.

In such a situation, equality in 'primary goods' for a majority in the heartlands of the empire is likely; but it will be an equality which excludes liberal justice for those who are inconvenient to the 'creative'. It will exclude liberal justice from those who are too weak to enforce contracts—the imprisoned, the mentally unstable, the unborn, the

aged, the defeated and sometimes even the morally uninforming. The price for large scale equality under the direction of the 'creative' will be injustice for the very weak. It will be a kind of massive 'equality' in 'primary goods', outside a concern for justice. As Huey Long put it: "When fascism comes to America, it will come in the name of democracy". We move to such a friendly and smooth faced organisation that it will not be recognised for what it is. This lack of recognition is seen clearly when the President of France says he is working for 'an advanced liberal society', just as he is pushing forward laws for the mass destruction of the unborn. What he must mean by liberal is the society organised for the human conveniences which fit the conveniences of technology.

As justice is conceived as the external convenience of contract, it obviously has less and less to do with the good ordering of the inward life. Among the majority in North America, inward life then comes to be ordered around the pursuit of 'primary goods', and/or is taken in terms of a loose popular Freudianism, mediated to the masses by the vast array of social technicians.²⁷ But it is dangerous to mock socially the fact of contradiction. The modern account of 'the self' is at one with the Nietzschean account. This unity was explicitly avowed by Freud. With its affirmation of the instrumentality of reason, how can it result in a conception of 'justice' similar to that of our tradition? In such a situation, the majorities in the heartlands of the empires may be able to insist on certain external equalities. But as justice

is conceived as founded upon contract, and as having nothing to do with the harmony of the inward life, will it be able to sustain the inconveniences of public liberty?

In the western tradition it was believed that the acting out of justice in human relationships was the essential way in which human beings are opened to eternity. Inward and outward justice were considered to be mutually interdependent, in the sense that the inward openness to eternity depended on just practice, and just practice depended on that inward openness to eternity. When public justice is conceived as conventional and contractual, the division between inward and outward is so widened as to prevent any such mutual interdependence. Both openness to eternity and practical justice are weakened in that separation. A. N. Whitehead's shallow dictum that religion is what we do with our solitude aptly expresses that modern separation. It is a destructive half-truth because it makes our solitude narcissistic, and blunts our cutting edge in public justice.

Above all, we do not correctly envisage what is happening when we take our situation simply as new practical difficulties for liberalism, arising from the need to control new technologies, themselves external to that liberalism. Such an understanding of our situation prevents us from becoming aware that our contractual liberalism is not independent of the assumptions of technology in any way that allows it to be the means of transcending those technologies. Our situation is rather that 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. In so far as the contemporary systems of liberal practice hold onto the content of free and equal justice, it is because they still rely on older sources which are more and more made unthinkable in the very realisation of technology. When contractual liberals hold within their thought remnants of secularised Christianity or Judaism, these remnants, if made conscious, must be known as unthinkable in terms of what is given in the modern. How, in modern thought, can we find positive answers to the questions: (i) what is it about human beings that makes liberty and equality their due? (ii) why is justice what we are fitted for, when it is not convenient? Why is it our good? The inability of contractual liberals (or indeed Marxists) to answer these questions is the terrifying darkness which has fallen upon modern justice.

Therefore, to those of us who for varying reasons cannot but trust the lineaments of liberal justice, and who somehow have been told that some such justice is due to all human beings and that its living out is, above all, what we are fitted for, — to those of such trust comes 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. The great theoretical achievements of the modern era have been quantum physics, the biology of evolutionism, and the modern logic. (All other modern theoretical claims, particularly those

in the human sciences, remain as no more than provisional, or even can be known as simply expressions of that oblivion of eternity which has characterised the coming to be of technology.) These are the undoubtable core of truth which has come out of technology, and they cry out to be thought in harmony with the conception of justice as what we are fitted for.

The danger of this darkness is easily belittled by our impoverished use of the word 'thought'. This word is generally used as if it meant an activity necessary to scientists when they come up against a difficulty in their research, or some vague unease beyond calculation when we worry about our existence. Thought is steadfast attention to the whole. The darkness is fearful, because what is at stake is whether anything is good. In the pretechnological era, the central western account of justice clarified the claim that justice is what we are fitted for. It clarified why justice is to render each human being their due, and why what was due to all human beings was "beyond all bargains and without an alternative". That account of justice was written down most carefully and most beautifully in "The Republic" of Plato. For those of us who are Christians, the substance of our belief is that the perfect living out of that justice is unfolded in the Gospels. Why the darkness which enshrouds justice is so dense — even for those who think that what is given in "The Republic" concerning good stands forth as true — is because that truth cannot be thought in unity with what is given in modern science concerning necessity

and chance. The darkness is not simply the obscurity of living by that account of justice in the practical tumult of the technological society. Nor is it the impossibility of that account coming to terms with much of the folly of modernity, e.g. the belief that there is a division between 'facts' and 'values'; nor the difficulty of thinking its truth in the presence of historicism. Rather it is that this account has not been thought in unity with the greatest theoretical enterprises of the modern world. This is a great darkness, because it appears certain that rational beings cannot get out of the darkness by accepting either truth and rejecting the other. It is folly simply to return to the ancient account of justice as if the discoveries of the modern science of nature had not been made. It is folly to take the ancient account of justice as simply of antiquarian interest, because without any knowledge of justice as what we are fitted for, we will move into the future with a 'justice' which is terrifying in its potentialities for mad inhumanity of action. The purpose of this writing has been to show the truth of the second of these propositions. In the darkness one should not return as if the discoveries of modern science had not taken place; nor should one give up the question of what it means to say that justice is what we are fitted for; and yet who has been able to think the two together? For those of us who are lucky enough to know that we have been told that justice is what we are fitted for, this is not a practical darkness, but simply a theoretical one. For those who do not believe that they have been so told it is both a practical and

theoretical darkness which leads to an ever greater oblivion of eternity.

In the task of lightening the darkness which surrounds justice in our era, we of the English-speaking world have one advantage and one great disadvantage. The advantage is practical: the old and settled legal institutions which still bring forth loyalty from many of the best practical people. The disadvantage is that we have been so long disinterested or even contemptuous of that very thought about the whole which is now required. No other great western tradition has shown such lack of interest in thought, and in the institutions necessary to its possibility. We now pay the price for our long tradition of taking the goods of practical confidence and competence as self-sufficiently the highest goods. In what is left of those secular institutions which should serve the purpose of sustaining such thought—that is, our current institutions of higher learning—there is little encouragement to what might transcend the technically competent, and what is called 'philosophy' is generally little more than analytical competence. Analytical logistics plus historicist scholarship plus even rigorous science do not when added up equal philosophy. When added together they are not capable of producing that thought which is required if justice is to be taken out of the darkness which surrounds it in the technological era. This lack of tradition of thought is one reason why it is improbable that the transcendence of justice over technology will be lived among English-speaking people.

Part IV

22. Blackmun's appeal to Holmes illustrates the uncertainties in current American usage of the words 'liberal' and 'conservative'. His decision about abortion has been put in the 'liberal' column, when it is in fact based on a strict construction of contractualism which is generally put in the 'conservative' column. It is well to remember that Blackmun is a Nixon appointee, and tends in his interpretation of the constitution towards 'strict constructionism', and away from that interpretation according to the changing consensus of a progressing people, which characterised the Warren Court. Nixon consistently advocated over many years that the progressive historicism which dominated the Warren Court should be rectified by the appointment of justices who followed the theory of strict constructionism. This involved that their constitution be conceived as a foundational contract which established certain rights unaffected by the passage of time. But the difference concerning judicial interpretation does not alter the fact that both sides to it appeal to a contractual view of the state, related to the acceptance of the consequences of moral pluralism in society. A foundational contract which is viewed as timeless may seem less oblivious of eternity than an historically developing contract; but in both views justice is considered contractual. Indeed, what is meant in the U.S. by 'conservative' is generally a species of modern 'liberal'. 'Conservatives' want to hold onto certain consequences of the earlier tradition of our liberalism which more modern 'liberals' are willing to scrap in the interest of the new and the progressive. It is this usage which can be so confusing to people from other countries who may identify 'conservatism' with those who have some memories from before the age

of progress. But the indigenous memories in the U.S. are never from before the age of progress. Thus American 'conservatives' can advocate the most modern technological proposals in the name of 'conservatism'. At the judicial level, this strange usage led certain progressivists to call Mr. Justice Frankfurter a 'conservative' when he became the clearest advocate of strict constructionism on their court.

23. In discussing this case I am not concerned to elucidate the complex question of justice in abortion, whether in individual conduct or positive law. If I were so concerned, I would have to expound these facts of embryology.

24. To put the matter politically: the early public atheism of Europe generally came from 'the left'. Its adherents attacked the traditional religion while taking for granted almost unconsciously that 'the right' would continue to live within its religious allegiances. 'The left' could attack religion partially because it relied on 'the right' having some restraint because of its religion. Philosophers cannot be subsumed under their political effects, but with Nietzsche the atheism of 'the right' enters the western scene. One definition of national socialism is a strange union of the atheisms of 'the right' and of 'the left'.

25. It is well to remember that the greatest contemporary philosopher, Heidegger, published in 1953 "An Introduction to Metaphysics" in which he wrote of National Socialism: "the inner truth and greatness of this movement (namely the encounter between global technology and modern man)". One theoretical part of that encounter was the development of a new jurisprudence, which explicitly distinguished itself from our jurisprudence of rights, because the latter belonged to an era of

plutocratic democracy which needed to be transcended in that encounter. Such arguments must make one extremely careful of the ontological questioning of our jurisprudence, even in its barest contractual form.

26. See M. Heidegger *Der Satz Vom Grund*, Pfullingen, 1957.

27. We are fortunate these days when the social technicians are controlled by something as human as popular Freudianism. Whatever its defects, popular Freudianism is surely superior to the 'new brutalism' of behaviour modification carried out by behaviourist techniques.