ABORTION AND THE CRISIS OF LIBERAL JUSTICE: GEORGE GRANT ON THE MEANING OF *ROE. V. WADE*

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AS AMERICAN UNIVERSITY FACULTY united in your opposition to abortion, one incidental benefit of meeting with your less numerous Canadian counterparts ought to be the chance to see what is happening to this issue in another jurisdiction in a society and culture much like your own, though under quite different constitutional and legal arrangements. As a Canadian I must confess that what we have to show you can afford us scant grounds for pride. A few years ago, Mary Ann Glendon could write that the legal limits upon abortion in the United States under the terms of *Roe v. Wade* were less restrictive than anywhere else in the Western world. In Canada there are now no legal restrictions whatever upon abortion. The very permissive law established by Canada's Parliament in 1969 was ruled unconstitutional in 1988, and no law has been enacted to replace that law.[i] The political effort to change this situation seems to have faltered, if not collapsed, and the various anti-abortion groups in Canada have had to summon all of their courage merely to survive. Mostly, the only flickers of hope in this very dark scene emanate from your side of the border.

Yet, if we can provide little by way of advice or example in the political and legal struggle to restore legal protection to the unborn, we may have something to offer by way of understanding what abortion tells us about our society or civilization. In any case, I want to recommend to your attention what we can learn about abortion and about the moral condition of our society–in the Western and especially the English-speaking world–through looking at what a Canadian philosopher, George Grant, wrote and said about them.

Speaking to an audience containing a number of Americans at a conference of an association with members from both sides of the 49th parallel, I need to say a little about who the man was whom I mean to

recommend to your attention. George Grant was often called a public philosopher. Partly this means that he was not an academic philosopher in the usual sense of the term. Although he did once chair a philosophy department, he came to that job with no formal academic training in philosophy. He never taught at any of our most prestigious universities. Mostly he taught in a department of religious studies at a university you are not likely to have heard of. Grant was the author of a handful of quite short books, and none of them were scholarly in the ordinary sense. Three of them were first broadcast as public lectures on the radio and later published in book form.[ii] Two of them were collections of occasional essays whose topics included political philosophy and the public role of religion, the French novelist Celine and the French religious writer Simone Weil, and abortion.[iii] One of his books, the most influential, was a defense of Canadian nationalism; most of it was an attack upon the United States as the most complete and therefore the most dangerous expression of what Grant called "technological society."[iv] Only a couple of these books made their way across the border when Notre Dame University Press published American editions of them at the urging of Alasdair MacIntyre and Stanley Hauerwas.

And yet, for the last twenty-five years of his career as a writer and teacher, and even in the years following his death in 1989, it would be impossible to name anyone teaching in a Canadian university who has had a larger presence outside the university or commanded the attention of the young within our universities to the same extent. Grant's admirers across the political spectrum from far left to far right have been variously moved by his nationalism, his pacifism, or his critique of secular liberalism. Gatherings of those admirers–of which there have been several before and since his death–were often marked by doubt, or at least by curiosity about what it was that linked Grant with the others who were present at the same gathering. Can one locate some single common thread that drew these diverse admirers to George Grant? If there is any such thing, it seems to me that it could only be their shared belief that among our contemporaries none had looked into the meaning of the society which we inhabit in the second half of the twentieth century with the same combination of intransigent clarity or rigor, on the one hand,

and passionate commitment to the cause of justice, on the other.[v]

Grant wrote about abortion in various essays and in one book. In that book, called *English-Speaking Justice*, Grant concluded a critical analysis of John Rawls's *A Theory of Justice* with a powerful meditation on the crisis for our civilization and for our understanding and practice of justice that was constituted by what was then just beginning to be said and done about abortion. His meditation was primarily in the form of a reflection upon the argument of Justice Blackmun in *Roe v. Wade*. Grant's analysis of the crisis for liberal justice constituted by abortion is the subject of my remarks.[vi]

According to Grant, what is manifest in the jurisprudence and public policy of abortion is the collapse of liberal justice. In the words of Mr. Justice Blackmun we hear two things. The first is what Grant takes to be a perfect, or undiluted, expression of liberal reasoning–what Grant sometimes called the "contractualist" understanding of justice. We hear this in Blackmun's denial that any conception of the good can restrict our right and in his insistence upon the priority of rights to any other considerations. The second thing which we discover in the Justice's reasoning is an "ontological" questioning that undermines the basis of justice, whether understood as equality of right or in any other way. Judge Blackmun raises what Grant calls the "ontological question" when he asks what it is about any being that makes justice that being's due. Blackmun thereby asks a question that cannot be answered affirmatively within the assumptions of liberalism. And yet liberalism is, according to Grant, the only moral understanding that has any authority within our own civilization at this time. For Grant, the Supreme Court's decision is not merely or primarily objectionable because it departs from the letter or spirit of the American Constitution–an exercise of "raw judicial power," as Byron White called it–nor as a corruption or betrayal of liberalism. Rather, the court's reasoning constitutes a development of liberalism, or at least of that wider Western understanding out of which liberalism developed that Grant prefers to call "technology." On the other hand, according to Grant, several important contradictions within our society's understanding of justice are revealed in and through the court's decision in *Roe v. Wade*.

Contractual liberalism begins by rejecting all ontological reasoning, including such reasoning about human nature as would make some members of our species less fully human than others. According to contractual liberalism, as set out by its original exponents, Hobbes and Locke, we are all equal and free by nature. Yet, *Roe v. Wade* shows that the securing or enhancing of the rights of free and equal individuals–say, the rights that would make those individuals truly autonomous–requires ontological reasoning. Contractual liberalism says that no moral issue may be resolved at the level of law or social policy except as a matter of individual rights, but that there is no way to resolve the issue of abortion while acknowledging, on the one hand, the rights of women who might want abortions and, on the other, the rights of those who will be eliminated through abortion. The rights of abortion victims must be set aside. But how? This can only be done, Grant argues, by removing from those who might have a right to life violated by abortion what makes it possible for anyone to possess a right–human personhood. And this can only be done by the kind of reasoning which Grant calls "ontology."[vii]

The U.S. Supreme Court's decision and the present policies on abortion of our two societies also reveal the contradiction between our moral and natural science, between liberalism and technology. The founders of modernity and those who have carried out the work of building our modern world assumed that political liberalism–as a realm of individual freedom, equality, and government by consent–was supported and would continue to be supported by the new natural science devoted to the relief of man's estate through the conquest of nature. The founders of the new natural and moral sciences were often the same men–Francis Bacon, Thomas Hobbes, and John Locke, for example–and it would be difficult to say whether it was liberal politics or the conquest of nature that had priority for them. But what those men and their followers assumed, that political freedom and the new natural science supported each other, has become increasingly doubtful, as Grant argues in *English-Speaking Justice*. What the abortion decision of the U.S. Supreme Court reveals, for Grant, is that technology is the enemy of liberal justice conceived of as equality of right.

What is revealed by the court in *Roe v. Wade* is the moral vacuum at the

core of liberal contractualism. That this truth did not become clear until the second half of our century results from the fact that the leading political defenders (if not the philosophical devisers) of the liberal understanding and of the technological hopes that accompanied that understanding were themselves still held by various forms of Christianity, and especially by the Calvinist understanding of revelation. Those Christians took the authors of the liberal understanding as allies in their struggle against the synthesis of classical philosophy and scholastic theology which they associated with Rome. Only gradually did the critique of revelation that belonged to the liberal understanding undermine the faith of these public champions of liberalism. Finally, what is revealed through this process, for Grant, is the truth of Nietzsche's observation that the equality of right which liberalism takes to be the content of justice depends upon a God whose authority and existence are no more.

At its deepest level, the decision of the court in *Roe v. Wade* reflects a contradiction at the heart of Western civilization, a contradiction within what Grant calls the "primal affirmations" upon which that civilization is based. The collapse of our laws against abortion is fundamentally a result of the inconsistency of these "primal affirmations." Our justice–liberal justice and the justice that preceded liberalism in our civilization–its content and our commitment to justice as something beyond considerations of convenience–all these, according to Grant, derive from the Greek or Platonic account of the good of contemplation. Our technology, on the other hand, is rooted in the Biblical insistence on the primacy of will and charity. The legal triumph of abortion, Grant argues, is the victory of a secularized version of the Christian understanding of charity over the ancient account of contemplation.

To many people, the implications that Grant finds for our civilization in Justice Blackmun's argument have seemed excessive, and the interpretation upon which they are based, unnecessary. Those critics find in Blackmun's decision neither the ontology which Grant identifies nor its implications. Writing in the *University of Toronto Law Journal*, Clifford Orwin argued that the basis of Blackmun's decision is much narrower than Grant claims.[viii] The basis of the court's reasoning, Orwin argues, is

not the ontology which Grant attributes to it but rather that, on the one hand, it cannot find a vindication of legal personhood for the unborn child in precedent decisions and, on the other, that it is willing to stretch what an emerging school of thought within the court has named the "right of privacy" to encompass a right to abortion. To be sure, the court did deny the legal personhood of the fetus, but in doing so, it merely followed precedent. What the court did that was novel was to discover or to invent a constitutional right to privacy that included the right to abortion. In fact, the court's opinion is chiefly based on this newly discovered right and is thus not so much a denial of the right to life to a group that had previously possessed that right, but an expansion of the rights of women as bearers of children. Indeed, according to Orwin, liberals have no interest in posing the ontological question which Grant thinks that Blackmun asks, for they dislike its undemocratic implications as much as anyone does. Essentially, the court's decision was not meant to restrict the rights of the unborn but to expand those of one class of the living–pregnant women. On the other hand, Orwin concedes, Grant is right to call the court's decision nakedly contractarian–it is a dangerous assault upon the family because it denies the naturalness of relations within the family and treats all human beings, including the unborn child and that child's parents, as natural adversaries.

Does the decision in *Roe v. Wade* derive, as Orwin claims, from an expansion of the rights of individuals, or from the ontological reasoning which Grant claims to be operative? My own analysis of the court's decision leads to a conclusion similar to Grant, but my view arises out of a quite different interpretation than his or Orwin's. That interpretation begins by noticing that most of Blackmun's actual argument addresses neither the claim that we can find in the Constitution a right to privacy and that it is broad enough to include a right to abortion–limited or not–nor that we can find there a claim about the status of the fetus in terms of potential life or personhood. As almost all commentators on *Roe v. Wade* have observed, Blackmun is remarkably casual about identifying the constitutional source of the right to privacy and about the vague limits of this right. (He even embraces a much earlier decision that upheld the right of the state to sterilize the mentally handicapped.)

Rather, most of his argument is devoted to showing that the prohibition of abortion has been less traditional or uniform than is commonly supposed and that laws restricting abortion have been concerned more to protect the health of women than to safeguard the lives of the unborn. And yet Blackmun knows that the criminal prohibition of abortion has been widespread, if not universal or uniform, and that this prohibition has in fact reflected an understanding of the status of the unborn child that is inconsistent with the conclusion which he means to reach. The question becomes whether Blackmun must resort to what Grant calls "ontological reasoning" in order to overcome this threat.

Let us consider the judge's argument more closely. Blackmun's argument entails these three steps. First, he insists that one can defend, or at least explain, those laws that have restricted abortion as reflecting the state's legitimate interest in potential life. As intended by Blackmun, this locates no absolute or inalienable right–indeed, no right at all–in the unborn. Potential life, as Blackmun understands it, is something of interest to the state to the extent that it wants to increase its own population. Potential life is thus a variable state-interest–the state "may" wish to protect potential life, but it is under no strict duty to do so, as it is, for example, to provide for the security of its citizens against criminal assaults. Indeed, state action to protect potential life must depend upon the often questionable legitimacy of a pro-natalist policy.

Second, Blackmun must treat the two questions that now confront him–whether there is a basis in precedent for attaching legal personality to the unborn child and when life begins–as if those two questions were entirely unrelated. Third, he must show, and he does try to show, that the last question–when life begins–has been differently answered and cannot be answered satisfactorily, and therefore that no answer to that question must ever be the basis for legislative action. Because this question is ruled unanswerable, the failure to find any clear precedent for legal personhood becomes decisive. What is thus critical to the effectiveness of the right to abortion as derived from the qualified right of privacy is Blackmun's denial that the question of when life begins can ever be answered, and what is clear from the text is that no scientific evidence can ever undermine this denial. Indeed, scientific evidence is not even

relevant to the question as Blackmun frames it. What we find here is what Grant calls the "ontological reasoning" that threatens liberal justice.

If we examine the arguments advanced in the literature of academic philosophy for abortion, we find further confirmation for Grant's claim. What we find here are three sorts of arguments. First are those of Judith Jarvis Thompson and her descendants, that even if we acknowledge a possible right to life in the unborn child, this need not entail a corresponding duty that would forbid abortion on the part of the one whose womb the child inhabits. Secondly, we have the argument of Peter Singer and others that invokes exactly the sort of ontological argument which Grant has in mind by distinguishing more or less meaningful qualities of life or capacities for personhood. And, more recently, we have the argument that, although abortion may be killing, killing can be a kind of caring and that the objection to it belongs to a peculiarly masculinist kind of reasoning.

The question to which we finally return on Grant's analysis is whether the contemporary understanding and practice of abortion demonstrates the impossibility of preserving justice within the liberal understanding that rules in our world, or indeed within the wider assumptions that have shaped our Western civilization.

First, I have to say that Grant seems to me to be correct about the insufficiency of the moral understanding of liberalism to maintain justice. The denial that relations within the family have any moral significance as natural relationships that Orwin identifies in Blackmun's argument seems to me to be implicit in the writings of the great founders of the liberal understanding. It is enough to recall Hobbes's insistence that we can have no obligations or duties other than those which we impose upon ourselves by our contractual agreements, or Locke's account of the obligations of parents to children and of children to parents. But is it true that the impossibility of maintaining justice against claims of convenience arises out of the deepest assumptions of our civilization as founded upon will and charity within Biblical revelation? This seems to me far less certain, but an adequate response to Grant's argument would go beyond what is possible in this essay. I can only attempt a more superficial reply.

I began by suggesting that there is something which those unfamiliar with it might learn from the Canadian George Grant's powerful analysis. I want to conclude by speaking of an American from whose understanding and practice, as the greatest of democratic statesmen, we all have much still to learn. I refer, of course, to Lincoln. Two lessons from Lincoln seem to me to be of fundamental importance to our question. The first was Lincoln's reading of the words of the Declaration of Independence–"all men are created equal"–as demanding the recognition of the equality of all members of our species as the necessary foundation of democracy itself. He took those words are thereby identifying slavery to be at best a necessary evil whose elimination must be the task of democratic statesmanship. What seems to distinguish Lincoln's reading of the continuing importance and meaning of these words from that of most of the framers of the Constitution or from the understanding of Locke was the fact that the conclusion of equality continues to be linked to the premise of divine creation. If justice prevails, the argument for it continues to link philosophic understanding and revelation.

The second lesson is Lincoln's understanding of what it is about the nature of moral opinion that makes this necessary. What Lincoln observed again and again was that an institution like slavery could never be justified indefinitely–as it had been justified by the framers of the Constitution–merely as a necessary evil despite its political and legal guarantees. Those who benefitted from it needed to justify themselves in their own and their neighbors' eyes, and they could only justify themselves by erecting a positive justification for that institution. So the institution of slavery, whatever its origins in human greed or sloth, came to be founded upon what Grant calls an "ontological argument," one that finally denied the equality of humankind or the humanity of those in slavery.

It seems to me that we see something like this in the instance of abortion. Its supporters may win the day in our courts, but they can never rest until none dare condemn it. And so the case for abortion must continue to expand. It is at this point that we encounter what Grant calls the ontological argument in its various forms. But here too, it seems to me–in the fact that the issues can never be resolved as our foes hope–is

the greatest hope for our cause. The moral insufficiency of liberalism as manifested in the crisis for liberal justice posed by abortion compels us to search out the principles in our tradition upon which the struggle for justice might be maintained. That we are not silent, that George Grant was not silent, in the fact of this challenge seems to me of incalculable importance.

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i. The attempt to enact a new law that would have treated abortion as a wrongful act when not medically justified while making its medical justification depend entirely upon the judgment of any physician willing to perform it failed in Canada's Senate where it faced a coalition of those who objected to the proposed law that it treated at least some abortions as wrong and those who objected that it did nothing to stop any of them.

ii. *Philosophy in the Mass Age* (Toronto: Copp Clark, 1959); *Time as History*, Massey Lectures, 9th Series (Toronto: Canadian Broadcasting Corporation, 1969); *English-Speaking Justice* (Toronto and South Bend: House of Anansi and Univ. of Notre Dame Press, 1985).

iii. *Technology and Empire: Perspectives on North America* (Toronto: House of Anansi, 1969); *Technology and Justice* (Toronto: House of Anansi, 1986).

iv. *Lament for a Nation* (Toronto: McClelland and Stewart, 1965).

v. Grant's opposition to abortion, it must be confessed, embarrassed many of his admirers. A well-known feminist and pacifist once excused him on the ground that he had been unable to free himself from the opinion of his powerful "Catholic" wife. And Grant himself once mused about how long his standing at the university where he taught would survive his public condemnation of abortion. He suspected that the "shelf life" of a colleague who was an equally vehement foe of abortion and a world-class physicist–later he won a Nobel prize–would probably exceed his own by a wide margin.

vi. For a more complete statement of some of the argument that follows, see my "Reason, Revelation, and Justice: Reflections on George Grant's Analysis of

Roe v. Wade" in *The Canadian Journal of Political Science* (Sept. 1986) 443-66.

vii. The Supreme Court of Canada avoided the ontological question which Grant attributes to Justice Blackmun by explicitly setting aside the question of the status and rights of the unborn. The Canadian Court, or at least the majority of the majority that struck down our existing legislation, did not claim that there was a right to abortion, and it postponed as irrelevant to the case before the court any possible claim on behalf of the unborn. Rather, our court argued that under any law prohibiting abortion there must be, as there was not under our existing law, equal access to avoiding the criminal penalty for abortion. Later the same court refused even to consider a case that argued that the unborn were persons with rights not protected under our old (1969) abortion law by pointing out that–thanks to the court's own previous decision–there was no longer any law left to challenge.

viii. *University of Toronto Law Journal* 30 (1980).