

Michigan Law Review

Volume 87 | Issue 6

1989

Mother-Love and Abortion: A Legal Interpretation

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Recommended Citation

Darleen Darnell, *Mother-Love and Abortion: A Legal Interpretation*, 87 MICH. L. REV. 1377 (1989).

Available at: <https://repository.law.umich.edu/mlr/vol87/iss6/16>

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MOTHER-LOVE AND ABORTION: A LEGAL INTERPRETATION. By Robert D. Goldstein. Berkeley: University of California Press. 1988. Pp. xii, 240. \$19.95.

All human life on the planet is born of woman. The one unifying, incontrovertible experience shared by all women and men is that months-long period we spent unfolding inside a woman's body. Because young humans remain dependent upon nurture for a much longer period than other mammals, . . . most of us first know both love and disappointment, power and tenderness, in the person of a woman.¹

Mothers are at the center of Robert D. Goldstein's² book, *Mother-Love and Abortion*. Goldstein's premise is that the symbiotic unit of mother and fetus — what he calls the “dyad” — is central to the abortion decision because “the fetus and then infant, utterly and helplessly dependent, lacks an identity and existence apart from its relationship with the mothering one who chooses to care for it” (p. 2). The usual terms of the abortion debate, which describe the fetus and the woman as entirely separate,³ ignore that fundamental relationship — and, by so doing, fail to explain adequately why one's rights should trump the other's.

Goldstein is anxious to set up an alternative to the individualistic rhetoric on both sides of the abortion debate because it “leads to a troubling denigration of mother-infant attachment” (p. 3). He seeks not only to restore proper respect for the mother-fetus relationship, but to provide a more satisfying justification for the pro-choice position, based on the premise that “[a]n abortion prohibition would . . . constitute an exploitation of a woman's mother-love.”⁴

1. A. RICH, *OF WOMAN BORN: MOTHERHOOD AS EXPERIENCE AND INSTITUTION* 11 (10th anniversary ed. 1986).

2. Acting Professor of Law, University of California, Los Angeles.

3. P. 2. The classic example of a pro-choice argument based on the rhetoric of individual rights is that of Judith Jarvis Thomson, which likens the pregnant mother to a kidnapped woman forced to be the life-support system for a dying world-class violinist. Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFF. 47, 48-49 (1971). Anti-abortion advocates typically start from the premise that the fetus has a right to life and then argue for or against an abortion prohibition according to their theory of when, if ever, it is morally permissible for one person to take another's life. Thus, for example, some would deny abortion because of fetal innocence, even where the mother's life is in jeopardy, arguing that “the right to life protects a person so long as he is morally innocent of putting another's life at serious risk.” P. 11. Others argue that it is morally permissible to preserve one's own life against those who would threaten it, however innocently (the fetus as “technical aggressor”). Pp. 11-12. As Goldstein points out, these sorts of arguments refer to the woman and fetus “as if they were living in two separate worlds — except that they inhabit the same space.” P. 12.

4. P. x. The relevance and timeliness of Goldstein's inquiry are beyond question. The possibility that the Supreme Court will soon overturn or modify *Roe v. Wade* has increased even since Goldstein's book was published early in 1988. See *Reproductive Health Services v. Webster*, 851 F.2d 1071 (8th Cir. 1988), cert. granted, 109 S. Ct. 780 (1989), argued, 57 U.S.L.W. 3736 (U.S. Apr. 26, 1989) (No. 88-605) (involving a Missouri statute, held unconstitutional in the lower

Drawing from the insights of political philosophy, feminism, psychoanalysis, and infant development, Goldstein provides an absorbing account of the mother-fetus relationship and a persuasive alternative argument for abortion choice. His critique of the individual rights approach is utterly convincing. Unfortunately, in what seems an effort to depoliticize the abortion debate,⁵ he lends anti-abortion advocates too much credibility and distances himself from some feminist arguments that would advance his position. While he devotes a good deal of energy to distinguishing his arguments from the rhetoric of individual rights, he shies away from direct confrontation with those who use the primacy of motherhood to argue *against* abortion choice. In failing to distinguish fully his own motherhood ideal from that of his anti-abortion opponents, he leaves that ideal far too open to its destructive potential.

I. A PRO-CHOICE ARGUMENT BASED ON MOTHER-LOVE

Goldstein begins with a discussion of the predominant terms of the philosophical and legal debate. According to Goldstein, the philosophical debate concerns two great questions: "When, if ever, does a fetus become a person and, accordingly, . . . a bearer of a right to life?" and "To what does this right, if it exists, entitle the fetus?" (pp. 5-6).

Goldstein recounts various theories that purport to describe when a fetus becomes a person by relying on a number of psychological and biological milestones (pp. 6-10). He notes that the placenta, amniotic sac, and umbilical cord receive little attention in this literature, "as if the individualistic category of personhood directs the attention of regulator and deregulator alike away from fetal interconnectedness with the woman" (p. 10). Even when the interconnection is noted, the woman may be likened to a life-support machine for a critically ill patient, an analogy that "not only suppresses the woman's existence and autonomy, [but] misses the human offspring's indebtedness to and involvement with progenitors, an indebtedness not experienced toward machines" (p. 111 n.15).

As Goldstein rightly points out, it is the second question, regarding what entitlements accompany a fetal right to life, that has required more extensive attention from theorists. What duties does that right impose on the pregnant woman? Must she preserve the life of the fe-

courts, that severely restricts women's access to legal abortion). Further, whether or not *Roe* is overturned, the way we argue about abortion affects the way we talk about other issues involving mothers and children, especially as technology continually changes the legal landscape and drives the debate over the "rights" of the fetus, the role of the state, and the rights and obligations of pregnant women. See pp. viii-ix, 49-52, 165-68.

5. For example, Goldstein, "[t]o avoid the usual phrases," refers to anti-abortion advocates as "regulators" and to pro-choice advocates as "deregulators." P. 1. He apparently means to distance himself from the heated rhetoric of the traditional debate, attributing the "lack of common ground" to a masking of shared reality. P. 2; see also *infra* text following note 22.

tus at the expense of her own? Various theories of self-defense have been offered: Some argue that the moral innocence of the fetus precludes abortion even in defense of maternal life, while others view the fetus as a "technical aggressor" against whom self-defense is morally permissible⁶ or argue, under the doctrine of double effect, that the woman may incidentally bring about fetal death in a pure effort to save her own life (pp. 11-12). Others approach the problem from a different angle, focusing on whether the woman can be said to have a "good samaritan obligation" to the fetus. Some deny that a good samaritan obligation exists at all;⁷ others derive the obligation from the woman's having engaged in sexual intercourse, thereby intentionally or negligently creating the conditions that placed the fetus in its dependent condition.⁸ Finally, Goldstein briefly recounts the debate over various other proposed exceptions to an abortion prohibition, such as exceptions for incest, fetal abnormality, and poverty and other family conditions, along with the anti-abortion allegation that women typically have abortions for inconsequential reasons (pp. 18-19).

Goldstein finds this last claim implausible and, more important, notes that "where a woman offers what appears to some as a trivial explanation, she is simultaneously expressing one of the weightiest of reasons: she does not love the potential within" (p. 19). Here is early reinforcement of an important contrast between his view and those of traditional advocates: Goldstein places primary importance on the mother-fetus relationship and, especially, the commitment that relationship requires from the mother, while traditional arguments describe a zero-sum game in which the mother's and fetus' rights are in mortal combat.

Much current legal analysis reflects this atomistic reasoning, although the *Roe v. Wade*⁹ regime of choice pits the woman's rights not against fetal rights directly but against the state's interest in the potential life of the fetus. The controversy over *Roe* centers on the Court's finding that the state's interest is insufficient to trump the woman's fundamental privacy interest until fetal viability.¹⁰ Justice Sandra Day O'Connor's criticism of *Roe*, in particular, has focused on the shortcomings of the trimester approach.¹¹ That approach, according

6. See *supra* note 3.

7. Thomson supports this argument by noting that "no state in this country [compels] any man . . . by law to be even a Minimally Decent Samaritan to any person . . ." Thomson, *supra* note 3, at 63.

8. Pp. 12-18. Those arguing for a rape exception counter that no obligation exists where the woman has not voluntarily undertaken the responsibilities resulting from intercourse.

9. 410 U.S. 113 (1973).

10. P. 23. For synopses of the criticisms of *Roe*, see G. GUNTHER, CONSTITUTIONAL LAW 517-49 (11th ed. 1985); G. GUNTHER, CONSTITUTIONAL LAW 119-22 (F. Schauer rev. 11th ed. Supp. 1988); W. LOCKHART, Y. KAMISAR, J. CHOPER & S. SHIFFRIN, CONSTITUTIONAL LAW 483-508 (1986).

11. See *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 452

to Justice O'Connor, is "on a collision course with itself"¹² because of technological developments that are gradually moving the date of viability back into the second trimester. O'Connor appears to believe that the impending collapse of the trimester approach will erode *Roe*'s balancing of interests altogether: she argues that the viability approach was arbitrary to begin with, and that there is no logical point other than the beginning of pregnancy at which to assume that the state's interest in fetal life becomes compelling.¹³

Goldstein finds the potential results of O'Connor's approach quite troubling. If the state interest were to be deemed compelling at conception, the state could regulate abortion throughout pregnancy subject only to the minimal requirement that regulations bear a rational relationship to protecting potential life (pp. 26-27). O'Connor, he believes, might even accept a return to the pre-*Roe* days of an absolute abortion prohibition, "[with] that former regime's exceedingly troubling procedural and equality problems" (pp. 27-28). Most disturbing to Goldstein is the prospect that "if technology were to eclipse *Roe*'s trimester system, it could . . . create the conditions . . . for a regime not of abortion but of elective separation and fetal incubation in the hospital," a regime which the commentary on *Roe* increasingly sees as an alternative.¹⁴ Goldstein's desire to avoid this "technological nightmare" (p. 31), with its attendant prospects for denigrating mother-fetus attachment, fuels his efforts to find an alternative justification for abortion choice.

Goldstein attempts to replace the rights-based categories of traditional abortion rhetoric with an approach that adequately accounts for "the constitutive attachments within and through which fetuses become . . . rights-bearing citizens" (p. 34). He places this effort in the context of recent work by political philosophers, feminists, and developmental psychologists who have attempted to "locate the person within his or her relationships in a preexisting community" (p. 34). The mother-and-fetus dyad is the "primary community" here, and

(1983) (O'Connor, J., dissenting); *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 814 (1986) (O'Connor, J., dissenting).

12. *Akron*, 462 U.S. at 458.

13. 462 U.S. at 461. In light of a comprehensive review of the medical literature (pp. 24-26, 129-38), Goldstein refutes O'Connor's conclusions as "overly eager and unappreciative of the biological limitations on the current technology"; his reading of this literature suggests that "*Roe*'s trimester scheme remains robust." P. 25. Even assuming that O'Connor's factual assumptions someday prove correct, most abortion decisions made today (usually in the first trimester) would continue to be protected. P. 26. Moreover, Goldstein sees the trimester approach as more functionally than factually correct: it is simply "a convenient way to think about the outcome of the balance that *Roe* struck" (p. 138 n.64) between the state's interest in fetal life and the woman's right to a reasonable period of choice. See *infra* note 20 and accompanying text.

14. Pp. 29-30. Goldstein cites, for example, the following commentaries: G. CALABRESI, *IDEALS, BELIEFS, ATTITUDES, AND THE LAW: PRIVATE LAW PERSPECTIVES ON A PUBLIC LAW PROBLEM* 113, 198-99 n.396 (1985); B. NATHANSON & R. OSTLING, *ABORTING AMERICA* 282-83 (1979); Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269, 297-98 (1975).

Goldstein attempts to describe the mother and fetus in relation to each other¹⁵ and to the larger communities with which they interact.¹⁶

Unlike any other kind of interdependence that law might recognize, "respect for the nature of the fetus-infant requires recognition of the dyadic unit of which it is a fused part" (p. 54). The fetus needs more than "privacy," "the right of the individual to be let alone";¹⁷ it needs "a personal and prolonged devotion of care amounting to love" (p. 54). And the law of abortion choice, according to Goldstein, is not about the right of the woman herself to be let alone, or simply a matter of bodily autonomy; it protects "the right to determine whether she will enter into a physical and emotional symbiosis with the fetus-infant and, more generally, into a love relationship of parenting."¹⁸

The state interest in regulating abortion has generally been defined as an interest in protecting potential life. But Goldstein wisely encourages serious thinking about the nature of that interest: Is it the kind of interest that the government can further through coercion? Through divorce restrictions, the state formerly compelled people to stay married, although it could not compel husbands and wives to love each other (pp. 57-58). But putting aside the inhumanity of forcing people to stay in personal relationships, unhappy husbands and wives can survive without love by finding nurturance elsewhere; as Goldstein notes, infants do not have such strength and flexibility. Without the care they need, they may grow weak in mind and body. Some may die, while others who appear to survive may suffer inside or grow up to "inflict the lovelessness of their origins on others" (p. 58).

The state "cannot assure the survival and growth of infants any more than it can command good poetry. There must be an intervening

15. In Goldstein's terms, this means exploring the fetus' dependence on the mother, as well as what the relationship requires of the mother: "[This] method must . . . explain what maternity requires of a woman, and inquire into the conditions under which she may appropriately provide what is needed." P. 34; *see also* p. x. Goldstein is only partially successful at achieving this goal. *See infra* notes 43-58 and accompanying text.

16. "Since membership in a family and citizenship in the state are determined primarily by who, having once been part of her same body, emerges from the womb of one of the women members, the questions of abortion and communal membership are closely linked." Pp. 34-35; *cf. supra* note 1 and accompanying text.

Goldstein derives his theory of the mother-fetus relationship from the object-relations school of psychoanalysis. He describes at length how the experience of treating severe pathologies led analysts to conclude that the child's first symbiotic relationship with its mother is essential to psychological health. Pp. 40-47, 149-62. In fact, for some patients, traditional psychotherapy is unavailing; the patient can only be reached by attempting to recreate in the analytic setting that earliest mother-infant relationship. Pp. 45-46. Goldstein's description of the analyst's provision of "primary love" (p. 46) is powerfully suggestive of the sacrifice of motherhood; he concludes that "[o]ur particular individuality exists because . . . some caregiver, sufficiently unambivalent, chose to care for us and merge with us and let us merge with her." P. 47 (footnote omitted).

17. Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 205 (1890).

18. P. 54; *cf.* p. 46 (the analyst's provision of primary love requires her "full consent and participation," while the patient "takes for granted the extreme efforts of the analyst to meet his needs").

act of human grace and creativity" (p. 58). Of course, not every child who would have been aborted will be abused, neglected, or harmed — many, if not most, women care for the children they are compelled to bear.¹⁹ But if the state decides to force women to nurture their unborn children, it will be using its power to exploit mothers, not to protect potential life. That power is the mother's alone (p. 59).

Since the woman's right, as defined by Goldstein, is to decide whether to commit herself to the mothering relationship — to make a "procreative decision" on behalf of the dyad (p. 59) — he portrays *Roe's* fetal viability standard as serving primarily to establish a reasonable period in which the woman can make that choice. Goldstein argues that, while the first trimester affords a sufficient period of choice for the overwhelming majority of women,²⁰ a longer period encompassing the second trimester is necessary to assure that the state does not unjustly discriminate against certain women in its protection of the mother-right.²¹

Goldstein urges those who have difficulty accepting the woman as the appropriate decision maker to take comfort in the interpersonal decisionmaking process that *Roe* set up (pp. 79-85). Even if the physician-patient dialogue the Court envisioned does not take place, the woman makes her decision in a social context that inhibits her ability to make an isolated decision based solely on her personal needs. Moreover, studies of abortion decision making suggest that women can and do engage in inner dialogue to examine what is best for the dyadic unit.²²

II. MASKED REALITIES

Goldstein's book is motivated by a sense that the current abortion debate has denied and masked an important reality: "the centrality to human existence of mother-love and the love for the mother" (p. 2). He suggests that "[a]n unmasking [of shared realities] might facilitate a reclamation of shared understandings among ongoing disputants" (p. 2). Yet in his effort to facilitate this reconciliation, Goldstein does

19. In a strictly legal sense, women are not currently compelled to bear unwanted children; *Roe v. Wade* makes abortion choice a constitutional right. In reality, however, the state does not assure women this right: for women who are indigent, for example, abortion may not be an option. See *Harris v. McRae*, 448 U.S. 297 (1980) (the right to privacy does not require that Medicaid fund medically necessary abortions); see also C. MACKINNON, *Privacy v. Equality: Beyond Roe v. Wade*, in *FEMINISM UNMODIFIED* 92, 101 (1987) ("The women in *Harris* . . . needed something to make their privacy effective."). Women may also feel compelled to bear unwanted children because of spousal or societal pressure against abortion.

20. More than 90% of all abortions occur within the first trimester. Pp. 60, 174-75 n.59.

21. See pp. 60-62 (some women, such as the very young, the emotionally stressed, the poor, the poorly educated, and women with irregular menses, may be unable to make a procreative decision until the second trimester).

22. P. 86; see, e.g., Gilligan, *In a Different Voice: Women's Conceptions of Self and of Morality*, 47 HARV. EDUC. REV. 481, 489-509 (1977).

some masking of his own, covering over some of the hard realities of women's lives that contribute to the fear and anger many women feel at the threat of losing abortion choice.

A. *The Reality of Sex*

Some anti-abortion advocates see themselves, much like Goldstein sees himself, as offering an alternative to the atomistic individual rights rhetoric of pro-choice advocates. They base their argument on sex: the pregnant woman, because she has freely engaged in sexual intercourse, owes a duty to her fetus that she would not owe to a famous violinist to whom she had been hooked up as life support.²³ Goldstein responds by noting that this argument implies that "what the offspring needs the woman can simply be coerced to give" (p. 33). But this response is not enough; anti-abortion advocates might argue that they, unlike pro-choice advocates, do recognize a special relationship between mother and fetus — a relationship they would simply characterize differently than would Goldstein.

Goldstein's response is to argue for a more *realistic* characterization of women's experience: a legitimate good samaritan duty for pregnant women toward their fetuses is not possible without "an acceptable theory of the nature, rights, and obligations of sexuality" (pp. 14-15). However, he gives the problem only passing attention, simply outlining his view of what such a theory would look like:

- (1) It would have to "justify, in light of a long history of abuse, the resulting double standard in which the burdens of procreation are imposed substantially on women."
- (2) "It should acknowledge the instinctuality that makes sexuality driven and the natural and necessary contribution sexuality makes to intimate association, personal identity, and the pleasure of life."
- (3) It should "distinguish contraception from abortion."
- (4) It ought to account for "a woman's different knowledge and capacities for consent to intercourse and procreation at different stages of her life."
- (5) It should "excise the punitive motivation of those who would exploit and use children by treating them as a means to punish sexually active women . . ." (p. 15.)

While the concerns on Goldstein's wish list are valid, his cursory treatment leaves them open to dismissal. For example, many anti-abortion advocates have justified unequal imposition of the burdens of

23. The violinist analogy is derived from Judith Jarvis Thomson's celebrated defense of abortion choice. See *supra* note 3. For a pro-choice argument that Thomson's analogy is misframed, see C. MACKINNON, *supra* note 19, at 98-99 ("No woman who needs an abortion — no woman, period — is valued, no potential a woman's life might hold is cherished, like a gender-neutral famous violinist's unencumbered possibilities. The problems of gender are thus underlined here rather than solved, or even addressed.").

procreation by pointing to the special role of motherhood. The idea is that men and women are “intrinsically different,” that “men are best suited to the public world of work, and women are best suited to rear children, manage homes, and love and care for husbands.”²⁴ It is only fitting, under this view, that women should bear the burdens of child-rearing; men have other work to do. Additionally, anti-abortion advocates might dismiss Goldstein’s list on the grounds that none of his concerns matter compared to the value of human life (that is, the fetus’ life),²⁵ especially since the place of some of the items on his list is neither explained nor readily apparent.

Moreover, Goldstein’s wish list only partially accounts for the reality of sex for women. It is not enough, for example, to argue that the motive for each act of intercourse does not always, or even often, include a “deep, complex, and realistic wish for and commitment to a child” (p. 57) — the woman’s motive may not even have been to engage in sexual intercourse. Setting aside the question of rape as traditionally perceived²⁶ or even as legally defined,²⁷ sex in this society, as Catharine MacKinnon has aptly explained, takes place under conditions of gender inequality. Society — and the law — tell women that their motives are unimportant:

Feminism has found that women feel compelled to preserve the appearance — which, acted upon, becomes the reality — of male direction of sexual expression. . . . [This] is much of what men want in a woman. . . . Rape . . . is adjudicated not according to the power or force that the man wields, but according to the indices of intimacy between the parties. The more intimate you are with your accused rapist, the less likely a court is to find that what happened to you was rape. . . . If “no” can be taken as “yes,” how free can “yes” be?²⁸

Goldstein’s list suggests that problems of “consent to intercourse and procreation” are all a matter of age and ability to understand implications (p. 15). But more and better statutory rape laws will not

24. K. LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD 159-60 (1984) (exploring the differing world views of abortion activists). This, of course, raises the issue of how easily Goldstein’s motherhood ideal can be perverted. See *supra* notes 43-68 and accompanying text.

25. See, e.g., K. LUKER, *supra* note 24, at 161 (abortion is “intrinsically wrong because it takes a human life”); J. NOONAN, A PRIVATE CHOICE: ABORTION IN AMERICA IN THE SEVENTIES 171 (1979) (“the liberty of abortion . . . consists in a freedom to knife, poison, starve, or choke a human being”).

26. This is rape committed by “the armed stranger jumping from the bushes.” S. ESTRICH, REAL RAPE 8 (1987).

27. “A man commits rape when he engages in intercourse . . . with a woman not his wife; by force or threat of force; against her will and without her consent.” *Id.*

28. C. MACKINNON, *supra* note 19, at 95; see also MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635, 650 (1983) [hereinafter MacKinnon, *Toward Feminist Jurisprudence*]:

Women are socialized to passive receptivity Sexual intercourse may be deeply unwanted — the woman would never have initiated it — yet no force may be present. . . . If sex is normally something men do to women, the issue is less whether there was force and more whether consent is a meaningful concept.

solve the problem of women's lack of power over their sexual lives. Sixteen-year-old girls may or may not be especially helpless, but "they — and women as a group — are systematically dominated by men as a group."²⁹ Statutory rape laws may then be part of our society's tendency to pretend that "sexual intercourse is normally equal."³⁰

Disappointingly, Goldstein summarily dismisses these arguments: The "strong claim" that "heterosexual intercourse under patriarchy may not be deemed the free will of the woman . . . does not and will not win broad assent . . ." (pp. 13-14). Why the controversial nature of these feminist arguments justifies ignoring them is unexplained — unless they are simply too politically loaded to fit into Goldstein's conciliatory effort. His dismissal of such an important aspect of feminist theory, in contrast to his generally respectful attitude toward women, calls into question his commitment to "explain what maternity requires of a woman" (p. 34); surely the burdens of mothering are exacerbated where children are conceived under conditions of female powerlessness and ambivalence.³¹ The societal belief that good sex "just happens" — at the direction of the man³² — inhibits women from taking control over their sexual encounters. A woman may feel unable even to interrupt sex to insert a diaphragm,³³ much less express a wish not to have sex at all. Under these conditions, finding out she is pregnant may turn the woman's confusion and ambivalence into despair. Whether the man stands by her or not, the woman is faced with a range of socially weighted choices: abortion, suicide, adoption,³⁴ or rearing a child alone.³⁵

Goldstein appears to miss the ways in which the feminist construction of sexuality might support his arguments for a reasonable period of choice. MacKinnon's "strong claim" in fact leads to the same conclusion that Goldstein reaches in concern for the dyad: that the wo-

29. Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEXAS L. REV. 387, 428 (1984).

30. *Id.* Olsen's article contains an interesting analysis of the ways in which statutory rape laws may both help and hurt women. *Id.* at 401-32.

31. See generally A. RICH, *supra* note 1, at 11-12, 256-80. Rich notes that "where women always entered heterosexual intercourse willingly . . . there would be no 'abortion issue.' And in such a society there would be a vast diminishment of female self-hatred — a psychic source of many unwanted pregnancies." *Id.* at 269.

32. See text accompanying note 28.

33. MacKinnon notes that women often do not use birth control because "[u]sing contraception means acknowledging and planning the possibility of intercourse, accepting one's sexual availability, and appearing nonspontaneous." C. MACKINNON, *supra* note 19, at 95. But "[s]ex doesn't look a whole lot like freedom when it appears normatively less costly for women to risk [abortion,] an undesired, often painful, traumatic, dangerous, sometimes illegal, and potentially life-threatening procedure than to protect themselves in advance." *Id.*

34. Goldstein's book contains a valuable discussion of the sacrificial love required of women who give their children up for adoption after the nine-month-long nurturing relationship of pregnancy. See pp. 63-70.

35. See A. RICH, *supra* note 1, at 12.

man is the relevant decisionmaker regarding abortion. In a world in which women do not control the conditions of sex — or of mothering³⁶ — what women really need is for the state to assure them a real choice in the matter.³⁷ The various proposed exceptions to an abortion prohibition³⁸ are therefore problematic: If the state cannot be trusted to determine when a woman has been raped,³⁹ it likewise cannot be trusted to determine when the conditions of her pregnancy justify the choice of abortion. Thus, Goldstein's view that the state is not in a position to make a decision on behalf of the fetus is bolstered by the feminist argument that the state is not in a position to make a decision on behalf of the woman — and yet he ignores this argument.

To the extent that our sensibilities are offended by the prospect of late abortions (because the woman has, inadvertently or otherwise, fostered the fetus-infant's reliance on her care), Goldstein's arguments against denying women second-trimester abortions suggest that the humane solution is not to prohibit later abortions entirely, but to empower women to choose early in their pregnancies.⁴⁰ Likewise, feminists suggest that if society is worried about women using abortion as contraception, it ought to make adequate and accessible contraception a "genuine social priority."⁴¹ Here again, feminist explorations of women's lack of control over sexuality reinforce Goldstein's arguments: If the state is concerned about the wisdom of women's abortion decisions, it must empower them to make wise decisions, not make their

36. See Ruddick, *Maternal Thinking*, 6 FEMINIST STUD. 342, 343-44 (1980).

37. MacKinnon argues that the privacy doctrine as construed in the abortion decisions fails to secure real reproductive choice for women because it reaffirms and reinforces the public/private split, in which personal and family choices are considered completely separable from the public world of work and government. See generally C. MACKINNON, *supra* note 19; Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983). The liberal ideal of privacy operates on the assumption that, as long as the public sphere does not intrude, autonomous individuals interact freely and equally in the private sphere. "In this view, no act of the state contributes to — hence should properly participate in — shaping the internal alignments of the private or distributing its internal forces." C. MACKINNON, *supra* note 19, at 99-100. Thus, the right to privacy is "the right to be let alone." See *supra* note 17 and accompanying text. But in practice, "letting women alone" very often leaves them without reproductive choice. The right of privacy then ends up being "a right of men 'to be let alone' to oppress women one at a time." C. MACKINNON, *supra* note 19, at 102. Goldstein criticizes the traditional conception of privacy as similarly insensitive to the needs of the fetus. See *supra* text accompanying notes 17 & 18.

38. See *supra* text accompanying note 7.

39. No one expresses this better than MacKinnon:

Most women get the message that the law against rape is virtually unenforceable as applied to them. . . . [W]e have not "really" been raped if we have ever seen or dated or slept with or been married to the man, if we were fashionably dressed or are not provably virgin, if we are prostitutes, if we put up with it or tried to get it over with Even women who know we have been raped do not believe that the legal system will see it the way we do. We are often not wrong.

MacKinnon, *Toward Feminist Jurisprudence*, *supra* note 28, at 651.

40. Pp. 59-62, 176-77 n.62.

41. A. RICH, *supra* note 1, at 269. For a discussion of the ways in which society discourages women from using contraception, see *supra* note 33.

decisions for them.⁴²

B. *The Reality of Motherhood*

In order to "accord[] the pregnant woman a privileged position as dyadic representative," Goldstein says he must claim "a privileged status for biological motherhood in human procreation" (p. 65). He derives this status, in part, from "the reinforcing support of the religious, mythological, and group-psychological history of our culture, which creates special maternal meanings . . . and commits women (as it commits men) to certain social uses" (p. 65). But these meanings have been oppressive to women, as revealed by the uses to which they have put women as compared to men.⁴³ If Goldstein's view requires that we enshrine the historical meanings of motherhood, abortion rights will depend on the continuance of gender oppression. Goldstein never sufficiently defines these meanings to account for this possibility, nor does he distinguish his motherhood ideal from that of the anti-abortion movement.

Goldstein's insensitivity to this problem is evident on many fronts. For instance, he identifies the 1973 Supreme Court as a champion of an "integrated and whole view of motherhood," which he says "is consistent with the idea of 'mother' that, as a general matter in health, we tend to hold — and hold our mothers to."⁴⁴ This "integrated and whole view" identifies the burdens of pregnancy and child care as "a unitary concept" (p. 66), inevitably interconnected. But if these are the meanings to which Goldstein is hearkening, his theory is very dangerous indeed. The burdens of pregnancy and child care *are* tied together in this society — but not toward an integrated and whole view of motherhood. This sacred calling of patriarchy — women's "natural role,"⁴⁵ — has required women to remain "essentially unquestioning and unenlightened"⁴⁶ and rendered them largely powerless to control the conditions in which their children grow.⁴⁷ As Sara Ruddick has explained, "Children confront and rely upon a powerful maternal presence only to watch her become the powerless woman in front of the father, the teacher, the doctor, the judge, the landlord — the

42. Cf. *infra* text accompanying notes 52-53.

43. A good introduction to this history, should one be needed, can be found in A. RICH, *supra* note 1.

44. P. 66 (footnote omitted). MacKinnon has a somewhat different interpretation of what the Supreme Court had in mind in *Roe*: "Reproduction is sexual, men control sexuality, and the state supports the interest of men as a group. . . . [Abortion was legalized because] the interests of men as a social group converged with the definition of justice embodied in law in what I call the male point of view." C. MACKINNON, *supra* note 19, at 97.

45. See, e.g., K. LUKER, *supra* note 24, at 160-63 (anti-abortion activists believe that the traditional emotional and social division of labor is both "appropriate and natural").

46. A. RICH, *supra* note 1, at 43.

47. Ruddick, *supra* note 36, at 343.

world."⁴⁸

Our culture idealizes the stresses of mothering as if they were inevitable.⁴⁹ But in reality, a mother's unavoidable powerlessness against the dangers of illness and death is exacerbated by "avoidable social powerlessness,"⁵⁰ which Adrienne Rich eloquently describes:

[T]he absence of social benefits for mothers; the inadequacy of child-care facilities in most parts of the world; the unequal pay women receive as wage-earners, forcing them often into dependence on a man; the solitary confinement of "full-time motherhood"; the token nature of fatherhood, which gives a man rights and privileges over children toward whom he assumes minimal responsibility; . . . the burden of emotional work borne by women in the family — all these are connecting fibers of this invisible institution [of motherhood]⁵¹

Much of the selflessness required of mothers is imposed not by their children but by a society that, for all its talk of the glories of motherhood, doesn't give mothers much help.⁵² The sufferings of poor women are particularly heartbreaking: "The state makes it easier for a mother on welfare to obtain a sterilization than to keep warm in winter, find child care, or provide nourishing meals for her children."⁵³ If we hold to the societal myth that motherhood is not a matter of choice, but is a high calling imposed on women by natural law and physiology, then we can rest easy; these problems are not our concern. But then we are left to wonder whether we can trust women to their "mere unaided virtue" (p. 73). What about aiding their virtue? If we want women to *choose* to be mothers, then we must take some responsibility for why women get abortions, and make it easier for them to choose motherhood. This would require a true reverence for what mothers do, and a collective recognition of responsibility for minimizing the sacrifices of motherhood since, as Goldstein points out, "[t]he larger community's interest in the next generation is realized through the woman's decision . . . to bear her child" (p. x).

Of course, motherhood as traditionally perceived is not without its joys — the love and trust of one's child, the feeling of accomplishment that comes with nurturing her growth, the shared pleasure with other women, the gratitude and pride of one's mate.⁵⁴ Nor is it without utility: as Goldstein points out, it does assure the child that someone will make his care a primary concern (p. 66). But at what cost? Goldstein worries that analyzing too closely why motherhood deserves a

48. *Id.*

49. A. RICH, *supra* note 1, at 276.

50. Ruddick, *supra* note 36, at 343.

51. A. RICH, *supra* note 1, at 276-77.

52. *See infra* notes 59-65 and accompanying text.

53. T. SHAPIRO, POPULATION CONTROL POLITICS: WOMEN, STERILIZATION, AND REPRODUCTIVE CHOICE 189 (1985).

54. *See* Ruddick, *supra* note 36, at 344; *cf. infra* note 68.

privileged position will somehow induce "a mistaken belief that one can immediately constitute an alternative system that would equally assure offspring a continuity of committed care" (p. 197 n.91). But such statements suggest that he, like anti-abortion activists, is ultimately concerned about the interests of offspring, regardless of the costs to women. At the very least, he is shutting his eyes to the dangers of his view. Some rethinking of society's view of motherhood is surely necessary, and is well within Goldstein's reach.

Goldstein's few attempts to deal with this problem are unsatisfying. He claims at one point not to be idealizing motherhood at all, noting that "it is exceedingly hard and often unrewarding work" (p. 69), yet his appeal to broad cultural meanings contradicts this claim.⁵⁵ He criticizes the substantial disparity of the pre-*Roe* regime's imposition of good samaritan duties on women as compared to men (pp. 15, 28), yet fails to note that in many people's minds, this is part of the glory of motherhood.⁵⁶

Moreover, Goldstein's attempts to anticipate anti-abortion opposition to his appeal are infected with a tendency to build bridges at inappropriate times. His characterization of abortion clinic protestors as attempting to "represent" the silent fetus in the decision-making process and to "encourage" the woman's "generative potential" (p. 87) glosses over the violence of their intrusions on women's private pain and the broader, more troubling implications of their appeals to the ideal of motherhood.⁵⁷ He blandly characterizes those who worry that no line can be drawn between abortion and infanticide⁵⁸ as seeking to deny or repress "human ambivalence." Goldstein's response is dispassionate: the most sensible way to deal with ambivalence is to give people a reasonable period in which to make a decision, and then to hold them to that decision. After all, "there does not appear to be a substantial basis for crediting the anxiety that maternal hostility is so uncontrolled and so without affirmative and counterbalancing love as to require the most rigid repression" (p. 71).

Goldstein's gentlemanly response to infanticide alarmists again obscures the oppressiveness of their appeal to the motherhood ideal: The idea that motherhood means "absolute dedication to each and every

55. P. 65. Idealizing motherhood need not mean claiming that it is all rewards and no work. In fact, the traditional ideal of motherhood speaks vaguely of its "joys and pains" — without questioning the origin of the "pains." A. RICH, *supra* note 1, at 276.

56. *See id.* at 43, 168-69.

57. *See, e.g.*, K. LUKER, *supra* note 24, at 163 ("pro-life people . . . see tenderness, morality, caring, emotionality, and self-sacrifice as the exclusive province of women; and if women cease to be traditional women, who will do the caring, who will offer the tenderness?"); J. NOONAN, *supra* note 25, at 190 (the exercise of abortion liberty is "a betrayal of the most paradigmatic of trusts, that which entrusts to a mother the life of her helpless child").

58. Abortion and infanticide are said to be indistinguishable under the view that motherhood must mean "absolute dedication to each and every child." P. 71 (quoting 3 B. HARING, *THE LAW OF CHRIST* 209 (1966)).

child" has made many mothers feel like failures.⁵⁹ He also obscures the misogyny and matriphobia inherent in their arguments. The implication is that women cannot be trusted with abortion choice because we fear they are *not* as selfless as we expect mothers to be — in other words, the motherhood ideal of complete selflessness is supposedly "natural," yet it must be enforced. Thus, on the one hand, women are the villains of the abortion debate because they are violating their true nature, refusing to embrace their sacred role, and, on the other hand, Surgeon General Everett Koop has asked, as if the answer were self-evident, "I wonder how many of us would be here today if someone had the option of not feeding us as newborns?"⁶⁰

Such rhetoric reflects a deep societal ambivalence stemming from the realization that each of us has been dependent on women for our very existence. Adrienne Rich has noted that "[t]here is much to suggest that the male mind has always been haunted by the force of the idea of *dependence on a woman for life itself*; the son's constant effort to assimilate, compensate for, or deny the fact the he is 'of woman born.'"⁶¹ Sara Ruddick traces the problem to the conjunction of maternal power and powerlessness: "A child's rageful disappointment in its powerless mother, combined with resentment and fear of her powerful will, may account for the matriphobia so widespread in our society as to seem normal."⁶² One way of dealing with this fear and resentment is to tell women — as does the anti-abortion movement — "You *owe* life to your children," just as we tell our mothers, "You *owe* us unconditional love."⁶³

59. The burden of maternal guilt plagues women, who feel they can never measure up to the ideal: "Am I doing what is right? Am I doing enough? Am I doing too much?" A. RICH, *supra* note 1, at 223. Recalling her days as the mother of three small children, Adrienne Rich remembers being "haunted by the stereotype of the mother whose love is 'unconditional' . . ." *Id.* at 23. She recounts a conversation about this with her now-adult son, who marveled that "You seemed to feel you ought to love us all the time. But there *is* no human relationship where you love the other person at every moment." Rich explained to her son that "women — above all, mothers — have been supposed to love that way." *Id.*

60. P. 71 (quoting Koop, *The Road to Auschwitz*, in R. REAGAN, *ABORTION AND THE CONSCIENCE OF THE NATION* 59 (1984)).

61. A. RICH, *supra* note 1, at 11. Rich notes that we know less about the effect on culture of this realization among women, since women have had less control over the makings of patriarchal culture. *Id.*

62. Ruddick, *supra* note 36, at 343.

63. The trial court opinion in the *Baby M* "surrogate mother" case is a stunning example of the motherhood ideal's potential to betray women. Mary Beth Whitehead undertook the surrogate mothering contract out of a desire to "[give] the most loving gift of happiness to an unfortunate couple," and then found that she could not bear the thought of giving up her child. *In re Baby M*, 525 A.2d 1128, 1142 (N.J. Super. 1987). In her battle to keep the child, she naively argued that she ought to win custody because, after all, she was the child's mother. 525 A.2d at 1147. And what mother would not die rather than entrust the care of her child to a stranger? Nevertheless, the trial court repeatedly characterized her behavior as obsessive, and terminated her parental rights. 525 A.2d at 1151-56, 1167-70. "Mrs. Whitehead loved her children too much . . . Too much love can smother a child's independence." 525 A.2d at 1168. In the words of the appellate court (which affirmed the ruling of custody to the father but overruled the termi-

The distrust of women that lies behind arguments that they should be denied abortion choice represents society's unwillingness to accept responsibility for the oppressive conditions of motherhood. In extreme cases, these conditions drive women to violence. Adrienne Rich has recounted the example of Joanne Michulski, whose muffled pleas for help in dealing with the stresses of raising eight children, basically without the support of her husband, were ignored until she slaughtered her two youngest children with a butcher knife.⁶⁴ The newspapers speculated after the fact that the incident was the result of a failure of county mental health services. But Rich wonders if the real problem is that the *expectations* laid on Joanne Michulski and countless other mothers are "insane." "Instead of recognizing the institutional violence of patriarchal motherhood, society labels those women who finally erupt in violence as psychopathological."⁶⁵ If the motherhood ideal of complete selflessness is "natural," women like Joanne Michulski are simply freaks of nature. Their failures do not implicate us in any way.

Goldstein never admits that anti-abortion advocates idealize motherhood, and because he does not go to any real lengths to distinguish his motherhood ideal from theirs, one cannot know how such idealization can lead to two such different results. Are Goldstein and the anti-abortion activists simply reaching different conclusions from the same ideal, or is there a difference in the content of Goldstein's ideal that leads him to argue for, not against, abortion choice?

One can read *Mother-Love and Abortion* to favor a motherhood ideal that is more respectful of women, particularly since Goldstein recognizes throughout that the sacrificial love required of mothers means that society cannot force this commitment on women. Such a recognition is integral to an alternative motherhood ideal, as is an appreciation of the miracle that so many women *do* choose to make sacrifices for their children, even in this imperfect society.⁶⁶ The ideal should also account more satisfactorily for the place of fathers in the lives of their children.⁶⁷ And it should treat motherhood as not *just* a

nation of Mrs. Whitehead's parental rights), "[A] perfectly fit mother was expected to surrender her newly born infant, perhaps forever, and was then told she was a bad mother because she did not." *In re Baby M*, 109 N.J. 396, 459, 537 A.2d 1227, 1259 (1988). That was what "unconditional love" required of this mother.

64. A. RICH, *supra* note 1, at 256-58.

65. *Id.* at 263; *see also id.* at 277-78.

66. *Cf.* p. 59 ("many women, although not all, tend to care for the children they are compelled to bear"). Sara Ruddick has taken heart in the fact that, "despite the inevitable trials and social conditions of motherhood, [mothers] are often effective in their work." Ruddick, *supra* note 36, at 344.

67. Ruddick's vision of this is particularly compelling:

On that day, there will be no more "Fathers," no more people of either sex who have power over their children's lives and moral authority in their children's world, though they do not do the work of attentive love. There will be mothers of both sexes who live out a transformed maternal thought in communities that share parental care — practically, emotion-

selfless act, but as a commitment to a relationship that optimally ought to benefit the mother as well as the child.⁶⁸

Goldstein defends his alternative argument for abortion choice on the grounds that it better accounts for the unique meanings of pregnancy, birth, and infant care. "Whether such meanings are biological, psychological, or cultural in origin, and whether they are natural or imposed, they appear to exist. Our society, for the social end of reproduction, reinforces and exploits — and therefore ought to respect — these meanings" (p. 70). But if society "exploits" these meanings, what would they look like unexploited? Goldstein never answers this question. He fails to realize that, for women's reproductive freedom to be truly secure, the meanings themselves must be questioned and reclaimed. The motherhood ideal must be consciously rethought in a way that accords women genuine respect and explicitly rejects the view that women owe mother-love to society by natural law. One can only hope that *Mother-Love and Abortion* will provide impetus for that project.

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ally, economically, and socially. Such communities will have learned from their mothers how to value children's lives.

Id. at 362; see also A. RICH, *supra* note 1, at 216-17.

68. Ruddick hearkens to the pleasures of motherhood — the sense of well-being and competence when one's children flourish, of pride in the function of one's reproductive processes — which manage to survive even in a "relatively indecent society." Ruddick, *supra* note 36, at 344. In a more decent society, women (and men) could take real pleasure in these rewards of mothering rather than being driven by guilt that they are not "doing enough." See *supra* note 59.