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Love and Chicken Soup for Free: Goldstein's *Mother-Love and Abortion*

Elizabeth B. Clark

ROBERT GOLDSTEIN, *Mother-Love and Abortion: A Legal Interpretation*.
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In 1904 the Carnegie Hero Fund Commission set out its criteria for awarding medals for heroism: an unpaid actor must have voluntarily risked life and limb to rescue a victim to whom he or she was unrelated by any family tie.¹ Such behavior toward family members was expected. In these days of perilous family life the performance of obligations associated with ongoing family relations is no longer taken for granted but has taken on new, heroic dimensions. The volunteer mother, who renders her services to her child amply and without reward, is the hero of Robert Goldstein's new book, *Mother-Love and Abortion*.²

Goldstein's essay and extended footnotes are an effort to find new, more solid ground on which to rest the result in *Roe v. Wade*.³ He argues that the psychoanalytic tradition, particularly the school of object relations, has developed a body of work on mother and child which, if taken seriously as a determinant of law and public policy, could recast the abortion debate. The argument has two parts and many implications.

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1. J. Phillipe Rushton, "Altruism and Society: A Social Learning Perspective," 92 *Ethics* 425, 425 (1982).

2. Although "mother" is a gendered term, relational theorists have used it to describe any person to whom an infant is primarily bonded; to the extent that Goldstein is referring to bonding during gestation, the mother would be female.

3. 410 U.S. 113 (1973), 93 S. Ct. 705, 35 L. Ed. 2d 147.

First, the author sees attempts to attribute "rights" to the fetus or autonomy to the potential mother as misguided. Object relations theorists, moving away from Freud's emphasis on the formative Oedipal stage, stress instead the primacy of infancy and the period of mother-child bonding in the child's development. During gestation and for some time afterward mother and child function not as separate beings but as a dyad, a single reciprocally sustaining unit. Classic Freudian theory highlights the narcissistic, grasping, goldfish orality of the infant, a dependent but instinctual bundle of conflicts at odds with all the world, including its mother. Goldstein, relying on the work of theorists like Alice and Michael Balint, D. W. Winnicott, Erik Erikson, and Nancy Chodorow, substitutes instead an infant fused with its mother, capable of love, attachment, and a "primary and fundamental sociality."⁴ In the earliest weeks of its life the infant has no ego, is not an "I" separate from its mother, whose breast represents not just milk but the relationship that constitutes the child's being.⁵

This bonding performs a critical social and psychological function. Participation in the dyad teaches the child the capacity for intimacy; separation or rebuff by its maternal partner will damage the child's ability to form good intimate and social relations later in life. In Goldstein's view, if it develops properly, the infant will grow up to become an autonomous individual. But in this early symbiotic stage of nonindividual existence, rights—a liberal's notion of the perfect baby gift—are without meaning. Neither the mother-to-be nor the fetus has the requisite autonomy to have their "rights" with regard to each other assessed separately.⁶

In the second part of the argument Goldstein moves from psychoanalytic theory about the mother-child relationship to the legal regulation of it. He appoints the pregnant woman as the representative of the dyad, with full power to make decisions on behalf of the "supraindividual unit." Her authority includes the decision to end or continue the pregnancy. As the author predicts, the rationale for this allocation of power will be the sticking point for many people on both sides of the issue.⁷ One argument—that the woman's status as decision maker for the dyad rests on her ability to "interpret the meaning of fetal silence"⁸ (at x)—seems disingenuous, certainly for those pregnant women who are overwhelmed by circumstances and acting out of desperation. But Goldstein's more compelling claim is that "good enough mothering," a psychoanalytic term of art

4. This phrase is actually from Nancy Chodorow's *The Reproduction of Mothering* 63 (Berkeley: University of California Press, 1978) ("Chodorow, *Reproduction*").

5. Chodorow, *id.* at 65, calls this "the social relations of feeding."

6. As Goldstein makes clear, this would not affect the rights of either against a third party who harms the fetus.

7. I intend here to scrutinize Goldstein's argument, not to argue with its result.

8. Or in current academic jargon, "listening to what the fetus does not say."

meaning the level of emotional as well as physical maternal giving necessary to produce a healthy child, is critical to the reproduction of society. It is something the state cannot buy, coerce, nor itself provide, since as Goldstein notes, "[L]ove is generally thought to be outside the competence of the state" (at 55). The state can force a mother to feed, to clothe, but not to love; the spontaneous emotional quality of good mothering can spring only from a voluntary decision, a "commitment of love [which] belongs to the realm of freedom" (at 4). Therefore, when it comes to procreative decisions, the state had better let well enough alone.

Mother-Love and Abortion raises four main categories of questions for me: the appropriateness of psychoanalytic theory in this context; how successfully Goldstein develops his "liberal relational" scheme; what the book's implications are for a broader social theory of voluntarism; and how well this argument grafts onto the existing theoretical structure underlying family law, such as it is.

A first, critical question that crops up on reading *Mother-Love and Abortion* is whether psychoanalytic theory is an appropriate basis for legislation or judicial action. Goldstein discusses some of the (many) schisms within the field of psychoanalysis itself but takes a rather slapdash approach to them. The fundamental disagreement between classical Freudians and object relations school analysts over such matters as human nature, for example, "maintains a critical tension between a respect for individuality and a protection of commonality" (at 39). A few pages on he suggests that "these disputes ought not to be prematurely resolved, for psychoanalysis has the distinct theoretical advantage of containing two competing visions of personhood, which jointly serve to keep important issues of self and other in dialectical interaction."⁹ Unfortunately, a law regulating abortion lacks the distinct theoretical advantage of containing two competing visions of personhood, at least on its face. The object relations school on which Goldstein relies probably serves as a better basis for normative rules than classical Freudian theory; it is more hopeful in seeing the infant's problem arising from flawed relations, possible to redress, rather than from instinctual conflicts. Still, if the field of psychoanalysis itself can't produce a coherent theory of personhood, how can we have confidence in normative judgments based on its theory?

In addition to internal schisms, the "queen of sciences" is currently besieged by detractors on the outside who seriously question the field's identification as a "science" in light of its failure to produce empirical validation of its measures.¹⁰ Goldstein himself seems sympathetic to those

9. Goldstein in chap. 3 n.29, at 159; this note gives an account of the relevant conflicts within the field.

10. E.g., Frederick Crews, *Skeptical Engagements* (New York, 1986).

who would not hold psychoanalysis to an empirical standard but find its value in the moral and spiritual realm. He describes relational theory as used in the book for "illustrative" purposes, a "metaphorical attempt to take certain questions about procreation seriously" (at 3, 40). Without a claim to "scientific" knowledge, though, how can we see the mother-right as rooted in anything more authoritative than a particular set of cultural stereotypes, moral preferences, or common sense about the infant's need for love?

Or perhaps these are better grounds for public policy than axioms labeled as science. Analytic "rules" are themselves relational: vital constructs in the dynamic context of an ongoing relationship between therapist and patient, they become banal and flabby when stretched into behavioral norms. As Stephen Morse has suggested, "expert" testimony in some instances is just a way for law to wash its hands of hard questions whose answers actually depend "largely on social and moral values and goals" well within the psychological layperson's sphere.¹¹ Perhaps rule makers should rely on relational theory, not in its "scientific" capacity, but as a valuable body of descriptive data on the needs of mothers and children that points toward certain social courses of action.¹² Goldstein has made a good case for considering the body of work on primary love in the context of the abortion debate in some fashion. But the broader question of whether psychoanalytic theory as a "science" is an appropriate basis for law should trouble every reader.¹³

Goldstein announces his project early on as an attempt to put forward a "liberal relational" theory, certainly a worthy goal in this heyday of

11. Stephen J. Morse, "Crazy Behavior, Morals, and Science: An Analysis of Mental Health Law," 51 *S. Cal. L. Rev.*, 527, 611 (1978).

12. Morse has made this point—that what experts have to offer instead of theories may be detailed accounts of behavior, or "thick description." "Failed Explanations and Criminal Responsibility: Experts and the Unconscious," 68 *Va. L. Rev.* 971, 1045, 1059–83 (1982).

13. Stangely enough, Goldstein makes no reference to Joseph Goldstein et al., *Beyond the Best Interests of the Child* (New York, 1973), the premier instance of a work which successfully put forward a family law doctrine (custody to go to the psychological parent) founded on object relations theory. (*Beyond the Best Interests* itself makes little reference beyond two discreet footnotes to its origins in the work of relational theorists, far less than Goldstein's book.) The career of the psychological parent concept in custody law, however, shows how capriciously family law changes: the rule that the psychological parent gets custody has been shunted aside in many districts in favor of a preference for joint custody, on rather dubious grounds. See Martha Fineman, "Dominant Discourse: Professional Language and Legal Change in Child Custody Decisionmaking," 101 *Harv. L. Rev.* 727 (1988). Recently a new rule granting custody to the "primary caretaker parent" has cropped up in some jurisdictions; the primary caretaker is identified by quotidian criteria (clothing, feeding, nursing, arranging social gatherings) which exclude psychological factors completely, although the underlying assumption may be that the psychological relationship grows out of the physical one; see Richard Neely, "The Primary Caretaker Parent Rule: Child Custody and the Dynamics of Greed," 21 *Trial* 18 (1985).

the tiresome dichotomy between austere individualism and sappy communitarianism. He labels the woman's power of decision "mother-right," a phrase which, although he distinguishes it from a right to privacy or autonomy, reveals the argument's indebtedness to rights theory. He likens mother-right most closely in constitutional terms to a "right of intimate association," derived from the first amendment right of association and upheld in the line of privacy cases which includes *Griswold*¹⁴ and *Eisenstadt*.¹⁵ But in Goldstein's view mother-right protects intimate association, not just for its expressive and self-defining qualities, but because of the "commitment made necessary by association, the fidelity that the commitment requires, and the inner resources that it demands" (at 55). The mother is not an autonomous but a "relational" individual whose rights spring from the performance of her maternal role. For many even on the pro-choice side, *Roe*'s privacy argument is unappealing and fails to address the sense that getting an abortion is different from other ways in which the liberal individual manages her body or her goods.¹⁶ *Mother-Love and Abortion* opens discussions aimed at moving beyond *Roe* and incorporating nonprivacy arguments into a pro-choice stance.

Unfortunately, the seams show. The effort to fuse discrete bodies of thought—legal and psychoanalytic, liberal and relational—result in real paradoxes dissolving into confusion rather than new, transcendent forms. From the first the author makes clear his ongoing commitment to the existing social and political framework of liberalism, characterizing it as defective only in this brief biological season of gestation and early motherhood. For Robert Goldstein, abortion is a glitch in the liberal scheme, and mother-right protects a "relational field through which the infant may eventually emerge as an autonomous rights bearer" (at 3).¹⁷ But the project of "establishing a rights-based regime which takes account of that relational understanding" (at 37) is like having your cake, eating it, and asking for more. Law is better with rules than with exceptions; by Goldstein's own account, gestation and early motherhood are limbo states, a unique period in human experience, not well described either as a piece of, nor as a glitch in, a liberal rights scheme.

Goldstein uses the liberal world as a referent and liberal theory as a

14. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

15. *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

16. See Wendy Brown, "Reproductive Freedom and the Right to Privacy: A Paradox for Feminists," in Irene Diamond, ed., *Families, Politics, and Public Policy: A Feminist Dialogue on Women and the State* (New York, 1983).

17. To make things more confusing, what Goldstein actually suggests here is that it is *Roe*'s privacy doctrine that works to protect the "relational field," although without attributing intent to do so. Elsewhere he suggests that the Court in *Roe* "tacitly recognized and accepted this privileged status and the centrality of biological motherhood to procreation" and that "the integrated and whole view of motherhood . . . may be imputed to the Court" (at 65, 66).

yardstick in other ways that flaw the argument as well. Using the autonomous rights bearer as the child's developmental goal is at odds with the thrust of anti-individualist thought in the works Goldstein relies on. Scholars of object relations theory, relational psychology, and communitarian political theory are not making minor adjustments in liberal theory but challenging its central tenet—the isolated individual.¹⁸ And while infancy is the period where relational intimacy is most crucial, the successful adult in these schools of thought is not simply a rights bearer but one who can also associate, participate, love. The mother/infant relationship may be the most intensely dyadic in human experience, but surely if “relational” rights are a valid construct in the abortion context, this opens the definition of other rights to question, as well. An unreflective reversion to liberal individualism as the goal of childhood undercuts the force of the book's argument.

Goldstein's use of free will, another liberal construct, is confusing here as well. The voluntary choice to mother is a pillar of his argument. “That love belongs to the realm of freedom is ontological and definitional: it arises from the nature of love” (at 56). Again, however, “choosing” to parent is more complicated than choosing to vote or buy a new car in ways which Goldstein doesn't discuss. “Will” itself seems almost misapplied in a unit as fully dyadic as the one Goldstein describes, where a common identification of interests means that to gratify one's child is to gratify oneself. Nancy Chodorow, for example, on whose work Goldstein relies heavily, gives a much more nuanced account of the socialization into parenting. While she rejects a pure social control explanation for why women learn mothering skills, her model shows the internalization of powerful practices and norms, so that “social reproduction comes to be independent of individual intention and is not caused by it.”¹⁹ On the basis of Goldstein's account of primary love, it seems just as likely that love grows out of a relation—that we relate and so we love as that we choose to love and so relate.

Although Goldstein's larding of a relational theory with straightforward liberal categories is confusing, his method does point up the frequent failure of rights arguments within the family context.²⁰ At the outset he

18. On this point Goldstein cites *inter alia* Nancy Chodorow's essay “Toward a Relational Individualism: The Mediation of Self Through Psychoanalysis,” in Thomas C. Heller et al., eds., *Reconstructing Individualism: Autonomy, Individuality, and the Self in Western Thought* (Stanford, Cal., 1986). This volume, which defines individualism in the West as “contingent and paradoxical,” addresses challenges to the “fundamental and once seemingly necessary propositions about the unity and autonomy of human individuals” which need to be “rethought in the wake of the severe criticisms which have been directed against” them (at 2, 3).

19. Chodorow, *Reproduction* 34.

20. Hegel was an early skeptic on the value of rights in intimate relationships, *Philosophy of Right* secs. 158–64 (Oxford, 1952). A more recent look at the development and use of

rejects the dismal process used in the current debate of identifying the mother and/or fetus as discrete rights bearers and weighing their respective rights (at 2). Such a process misrepresents both parties as autonomous and results in pitting their interests against each other when in fact the dyadic interest is not severable. He cites Ferdinand Schoeman's work to the effect that rights language, when used between parents and children, permits harmful state intrusions and may foster in parents a limited notion of their own obligations to children, not as intimate and unstinting but as quasi-contractual, abstract, and public.²¹

At the same time, having gotten rid of rights leaves a series of interests floating around whose impact in Goldstein's scheme is unclear, all of which must fall to the mother-right by the logic of the argument. Goldstein assumes an unwarranted harmony of interests between pregnant woman and fetus, as well as between mother and child, on the basis of object relations theory's model of harmonic love. This harmony of interests argument is made more difficult by the fact that, for the analogy with primary love to work, Goldstein must romanticize the fetus as a sentient being, capable of love, mutuality, and participation in a dyadic community. The sentient fetus, closer to the anti-abortionists' fetal person than to liberal feminism's lump of tissue, is nonetheless made to acquiesce willingly every time in the pregnant woman's decision.²² The unity of the book's central theme, the dyadic mother-child relationship, is at its most compelling in the image of the mother breastfeeding her child. But it seems strained at the point where a pregnant girl or woman decides to abort, a clear statement of conflict between the two entities not easily accommodated in the object relations model of "primary love."

rights in the family context is Martha Minow, "We, the Family: Constitutional Rights and American Families," 74 *J. Am. Hist.* 959 (1987), esp. 979-80.

21. Ferdinand Schoeman, "Rights of Children, Rights of Parents, and the Moral Basis of the Family," 91 *Ethics* 6 (1980). Schoeman's article relies on Lon Fuller's work contrasting relationships based on "shared commitment" with those based on "formal legal" ties, finding that increased formality makes relationships more distant and abstract. Stewart Macaulay's work on business relationships ("Non-contractual Relations in Business: A Preliminary Study," 28 *Am. Soc. Rev.* 55 (1963)) found that despite the presence of formal legal categories, most businessmen conduct informal relationships within categories of their own construction, which suggests that people may not be as constrained by the presence of a legal relationship as Fuller supposes. Although Macaulay's work cannot necessarily be used to understand behavior within the family, Marjorie Maguire Schultz in "Contractual Ordering of Marriage: A New Model for State Policy," 70 *Cal. L. Rev.* 204 (1982), explores the same doubts as Schoeman about the effect of public ordering of private relationships (at 241-43) but goes on to develop an argument dismissing them in the rest of the article.

22. This theory of dyadic representation is reminiscent of Bentham's rationale for the father's mastery over the child. The interests of both, Bentham claimed, are "easily reconciled in the person of the father, on account of his natural affection, which leads him much rather to make sacrifices on account of his children, than to avail himself of rights for his own advantage." Jeremy Bentham, 1 *Theory of Legislation* 252-53 (1840), quoted in Goldstein, *Beyond the Best Interests of the Child* 156 n.4 (cited in note 13). Bentham went on to say that despite the father's presumed good will, checks on paternal power were necessary.

In addition, Goldstein throughout fudges the problem of basing a theory of abortion on a postpartum theory of mother-child relations. The analogy is not exact, and the reader must assume the Schoeman theory with an extra remove: that the existence of regulated abortion would have a chilling effect on maternal relations after birth.

Even if we accept the analogy between gestation and motherhood, the "harmony of interests" view of motherhood overlooks a huge feminist literature on maternal-child conflict, including at its extreme the death-dealing mother, who in dreams or in the flesh vents her violent maternal rage against her offspring in what Chodorow calls "the inextricable linkage of motherhood, blood, gore, destruction, and death."²³ This other face of primary love suggests the need for a more complex psychological account of the maternal relation.

Others' interests in the abortion debate remain unreconciled as well. The woman chooses to abort or not "in consultation with a physician whose presence tests her procreational decision in interpersonal dialogue" (at x)—is this a check on her power? A "larger community's interest" in social reproduction is also realized by her decision (*id.*). And Goldstein suggests at one point that the dyad may be expandable to the biological father, should the woman choose to "share her office as dyadic representative with him" (at 68).²⁴ Although he leaves this suggestion hanging, it is a step away from whatever psychoanalytic basis object relations theory has and toward simple rules of etiquette for the liberated family. Defining everyone's stake but the mother's as an "interest" moves away from rights theory, which despite its inadequacies is more able to handle conflict, and forces Goldstein to construct an artificial coincidence of interests between fetus, mother, father, doctor, and the community at large.²⁵

On the relational side, the picture of the intense, monogamous mother-child relation on which Goldstein bases the mother-right is a powerful primary image, one rooted in our collective cultural brain. He strikes a delicate balance, pressing for women's decision-making power in part because the relation itself is crucial to the community. The long-term gains of good mothering are healthier, more stable adults, capable of

23. Not to mention irritation. Nancy Chodorow, *Feminism and Psychoanalytic Theory* 86 (New Haven, Conn., 1989) ("Chodorow, *Feminism*"); pp. 85–87 are devoted to a discussion of this literature. Much of this writing exposes fantasies rather than actual behavior (although no less important for that); the difficult subject of mother's physical abuse of children remains largely unexplored, one exception being Linda Gordon, *Heroes of Their Own Lives: The Politics and History of Family Violence, Boston, 1880–1910* (New York, 1988).

24. It is unclear why it is the biological father who qualifies for office here and not any mate prepared to enter into a caretaking relationship with the infant; this is characteristic of the sketchy way the role of biology is handled throughout.

25. Goldstein also fails to consider the possible detrimental effects of "family privacy" or "family protection" policies, which "risk[s] hiding the conflicts within the family" and enhancing abusive parental authority over children; see Minow, 74 *J. Am. Hist.* at 981 (cited in note 20).

meaningful intimacy and social relations, who have learned good parenting skills from their own upbringing rather than from their analysts and can pass them along to their children. Goldstein shows well that a woman's relation to her child can be at once the most personal and intimate exchange and the basis for social reproduction. Its value to the community is another aspect of mothering that privacy arguments don't reach, and an important one in a society that criminally undervalues the work of child care.

Many would argue, however, that primary love as described by object relations analysts is a social construct and not a universal. *Mother-Love and Abortion* is concerned, not with actual interactions, but with an idealized type of mother love, and so runs the considerable risk of normative stereotyping. Despite its biological continuity, "motherhood" as we think of it in America is in large part a cultural construct of 19th-century industrial society. Parental love did not need to be invented; but the middle-class notion of mothering as involving large blocks of intimate time mothers give to the care and education of their children did. The expanded leisure time of industrial America's nonproducer middle-class woman fit the new, long period of dependent childhood: only then did the intense, dyadic nature of child rearing become mythologized.²⁶ A flurry of romantic propaganda touted the mother's influence at home and abroad, anticipating relational psychology in its belief in the almost mystical power of the mother to shape the child, so that "one tone like a mother's voice might have wholly changed [the child's] earthly destiny."²⁷ Psychological gains notwithstanding, it is also clear that the new bonding of mother and child was the most economically feasible child-care arrangement when more and more fathers began to work outside the home.

The mother-child dyad, minus some sentimental trappings, has persisted into the 20th century. Despite its career in psychoanalytic thought where it is largely treated as a universal, it remains for many scholars a social construct. Object relations theory's insight into primary love itself arose out of a particular historical circumstance. Many of the field's founders were themselves caught up in the social dislocation accompanying World War II. To those like Anna Freud who worked in the ranks of abandoned, orphaned, and separated children, the importance of mother-

26. Ruth H. Bloch, "American Feminine Ideals In Transition: The Rise of the Moral Mother, 1785-1815," 2 *Feminist Stud.* 100 (1978). For historical discontinuities in the construct of motherhood see also Elisabeth Badinter, *Mother Love, Myth and Reality, Motherhood in Modern History* (New York, 1981); and Ann Dally, *Inventing Motherhood: The Consequences of an Ideal* (New York, 1982) ("Dally, *Inventing Motherhood*"). Note also that many working-class women were casual or full-time laborers either inside or outside the home and performed their mothering tasks in quite different fashion from that prescribed by the powerful middle-class norm.

27. Quoted in Kathleen McCarthy, *Charity and Cultural Philanthropy in Chicago, 1849-1920* at 17-18 (Chicago, 1982).

love stuck out wildly.²⁸ This emphasis marked a departure from the views of Sigmund Freud, who focused largely on a different set of problems rooted in his own generation. Goldstein pays little attention to the contingent, generational nature of analytic theory; and he ignores the fact that the proliferation of working mothers has prompted some re-revisions. The evidence seems clear that constant, intimate care is necessary for children to grow in a healthy way, but Nancy Chodorow and others have suggested that the child may flourish equally with one or a few caretakers. The importance of exclusive mothering may be not to the child but to society, as fitting into a particular structure of family and economic life.²⁹

The dyadic mother—here usually seen through infant eyes—seems in many ways the child's dream mother, the unpaid, all-giving, ever present parent.³⁰ It can be argued (persuasively) that glamorizing the unpaid nature of woman's domestic work further demeans it, a possibility Goldstein sidesteps. Wittingly or not, *Mother-Love and Abortion* contributes to the kind of June Cleaver cultural hype aimed at getting the mothers of America to whitewash Tom Sawyer's fence.³¹ The emphasis on psychological type creates a universal mother, taking little account of women's different styles, needs, or aptitudes. Primary love is a spacious enough term to accommodate some individual differences, but there is a normative vision here nonetheless. Even though it is employed in the service of a negative liberty to free women from state intervention, the question arises, what consequences flow from the employment of a normative, essentialist form, even one used for "liberal" purposes? If legal snapshots of relationships become templates for the relationships themselves, as Schoeman suggests, how would institutionalizing this romantic vision of the dyadic mother affect us?

Certainly Goldstein's description does nothing to mitigate the price women pay for being mothers. The mother is a figure of terrifying power in an infant's life, and in this light it is understandable why legal rights in children have so often been granted to fathers: to consolidate so much psychic and social power in one person is unthinkable.³² Despite the enor-

28. Ann Dally, *Inventing Motherhood* 97–103, suggests that another influential relational theorist, John Bowlby, was influenced by his war experiences and also by his own upbringing as a member of the British upper class, a group that institutionalized maternal deprivation by shipping their children off to public schools at an early age.

29. Chodorow, *Reproduction* 73–76 (cited in note 4).

30. Chodorow, *Feminism* chap. 4 (cited in note 23), points out that a large portion of the work on mothering is written from the child's-eye view, with the child's needs and wants as the baseline for critiques of mothering.

31. Carol Sanger suggested this analogy.

32. Alice Balint, "Love for the Mother and Mother Love," in Michael Balint, ed., *Primary Love and Psycho-analytic Technique* 100 (New York, 1965), speaks of father right "as a limitation on archaic maternal right"; Dorothy Dinnerstein suggests that the model of paternal authority is acceptable as "a sanctuary from maternal authority," *The Mermaid and the Minotaur* 176 (New York, 1976). Thanks to Carol Weisbrod for this cite.

mous benefits, holding such power makes women especially vulnerable to ambivalence, abuse, and rejection—from their own children and, in their symbolic role, from society at large.³³ Infants may fare poorly here, too: an infant who develops intimate relations with several caretakers may avoid in later life the legacy of ambivalence left by the painful processes of incorporation of, and separation from, the exclusive mother.³⁴ In focusing on the dyad, then, Goldstein is elevating one strain of psychoanalytic thought with important normative implications over another.

For Goldstein, relational psychology seems to lead effortlessly into communitarian political philosophy, and while he doesn't deal at length with the latter, his dyad clearly functions in a communitarian and not an atomistic context (at 75–79). He even suggests that it is early bonding with the mother that promotes later ties to “the fundamental associations of a community” (at 224 n.17). The figure of the volunteer mother in theory fits into a communitarian mold exactly because of the voluntary nature of her “work.” Many historians and other academics yearn for a lost community, personified in part by the gossip busybody with a heart of gold who brings you chicken soup in bed while everyone else is out in the fields or the factories. A good part of the homesickness for community reeks of nostalgia for women's labor; unpaid, unscheduled, and unstinting. Reading the literature on primary love suggests that the root of these feelings is the wish that our mothers love us not in expectation of any return or remuneration but only for ourselves—the gift outright. Goldstein's argument taps into a large reservoir of belief in the inalienability of mother love.³⁵

In this country, indeed, there is no remuneration. The state's sometime disbursement of mothers' pensions go to the needy, and signal no general entitlement or recognition of the mother's work as “labor.” And despite the manifest injustice of denying the economic value of domestic work, the “wages for housework” campaign has so far been a signal failure, in large part because of a psychological hurdle, a sense that the family is not a commercial enterprise, and that within the family work should be done for love, not cash.³⁶

But again the seamless line Goldstein draws from the community of

33. Chodorow, *Reproduction* 83; *Feminism* chap. 4. Statistics on spousal abuse show that almost half of violent incidents are directed at pregnant women. At least one feminist writer sees America's diet craze as a direct assault on the rounded maternal body; see Susan Bordo, “Reading the Slender Body,” in Mary Jacobus et al., eds., *Body/Politics: Women and the Discourse of Science* (New York, 1990).

34. Chodorow, *Reproduction* 78–79, esp. n. 4.

35. See Margaret Radin, “Market Inalienability,” 100 *Harv. L. Rev.* 1849 (1987). Outrage over the attempt to commercialize parental love was directed at both sides in the “Baby M” case.

36. One law professor's six-year-old son was shocked to discover that his long-time baby sitter got paid for taking care of him, asking “Doesn't she love me?” As a good mother as well as law professor, she explained that of course his sitter loved him, but that she gave

mother and child to the community of the whole fails to account for potential conflicts. The same historical period saw the rise of the nuclear family with its sense of "privacy" and the decline of the constant, neighborly sociability of the small, preindustrial town: Might there not be an inverse relation between a tight family and a wider sociability? Virtually all 19th-century utopian communities tinkered with the structure of the nuclear family, in many cases breaking it up entirely. Defusing the intense loyalties of dyadic bonds (husband-wife and/or parent-child) served to release those energies toward communal life. The essay assumption that dyadic relations tend toward a communitarian society is unwarranted.

Ultimately it seems that the role of "dyadic representative" runs the risk of functioning only as a reallocation of rights to the mother: the "liberal relational" scheme too easily breaks down into a rights-bearing mother and a connected, dependent fetus/infant. *Mother-Love and Abortion* has not succeeded in constructing a theory that could transcend the powerful, constraining duality between the autonomous and the fused individual that has paralyzed much recent social theory; this despite the fact that almost every daily life including the social theorist's is made up of acts chosen from along the continuum that ranges between the autonomous and the dependent.³⁷

Working at a level beyond the accepted theoretical categories, however—at the level of descriptions of human experience—Goldstein's vision may have the potential to break down the isolating privacy of *Roe* in favor of a more social approach to child rearing, one that takes positive aspects of mothering into account. If a need for a mother's love freely given is part of our psychological makeup, can we understand it within the family structure in a benign way? Goldstein could have used the literature on altruism, particularly work on gift relations, to good advantage here to highlight and support his arguments.³⁸ Although most of the work on the gift and gift economies examines social and not familial relations, some principles seem relevant. The gift, in contrast with the sale, is not a closed, completed transaction. The relationship between buyer and seller is formally over the moment the goods have been passed and the debt squared

up the chance to earn money at a job because she chose to take care of him—opportunity costs.

37. Many communitarian proposals put forward from the liberal side today cross traditional theoretical boundaries by incorporating liberal precepts, advocating polite or warm ongoing interaction with others bounded by principles of autonomy like a ban on violence or privacy safeguards (see, e.g., one proposal for cooperative housing reported in the *New York Times*, 27 Sept. 1990, sec. C at 1). The problem here is that the product of such a merger does not fit well into existing legal categories.

38. There is an extensive literature on gift relations, starting with Marcel Mauss's seminal work *The Gift* (trans. London, 1954). Other influential works have been Richard Titmuss, *The Gift Relationship: From Human Blood to Social Policy* (New York, 1971); and Lewis Hyde, *The Gift: The Imagination and the Erotic Life of Property* (New York, 1979) ("Hyde, *The Gift*").

away. The gift by contrast—although the first gift is voluntary—sets up an ongoing chain of reciprocal relations. No gift is matched instantly by another of exactly equal proportions; rather, ongoing relations of indebtedness bind people to each other in powerful networks of obligation. In the family, as in the gift relationship, the debt will not be paid in full immediately, or even in one generation, but may depend on the contribution of future generations. Gift theory discounts the atomistic claim for individual satisfaction in favor of intergenerational unfolding, the gift from parent to child to child to child.

Such a construction underscores Goldstein's point about the cyclical nature of reproduction, one which liberal individualism's take on abortion neglects entirely, and which legislation and judge-made law with its "case in controversy" requirement fail to address. It also underscores the strong connection between the gift and traditional women's work (mothering, domestic work, teaching, healing), which falls into the "gift" category in two senses: it is not adequately remunerated but also "cannot be undertaken on a pure cost-benefit basis because the products are not commodities, not things we easily price or willingly alienate."³⁹

Freely giving or "volunteer" work, of course, has its own place in the annals of the women's movement. Reminiscent of the days when many fewer women were employed, it meant work outside the home—sometimes serious and productive, sometimes makework—in the guise of benevolence. Historically the role itself grew out of the split, new to industrial society, between wage labor (male) and domestic labor and leisure (female). It coincided with an explosion of information by 19th-century women writers on the art of "mothering" which, as fathers left domestic governance to women, grew into a field of its own whose principles could be deduced and applied outside the home. The role of the idealized mother gave women a kind of power within American society, and the volunteer role was modeled on the maternal. "Organized mother love," as one voluntary association labeled its cause, extended women's caretaking function into society at large.

At her stereotypical worst, the volunteer was a leisured lady do-gooder, officious now instead of neighborly, who chastened the working classes with pamphlets on how to make soup. But the post-Civil War period was also a time when women's volunteer activities coalesced into a number of large groups with openly political agenda and considerable clout. The Woman's Christian Temperance Union, for example, organized in 1875, grew to 200,000 members strong. They made common cause

39. Hyde, *The Gift* 107–8, points out that "to labor with gifts" is still seen as "a school thing, a skirt thing, a church thing" (quoting from Saul Bellow, *Humboldt's Gift*). His point is that while the injustice to women workers must be addressed, "we must not convert all gift labors into market work lest we wake one day to see that universal market in which all our actions earn a wage and all our goods and services bear a price."

with populists, progressives, trade unionists, and Christian socialists, pursuing a variety of social justice concerns as well as prohibition. Their work on behalf of a maternal state—a nascent welfare state—was a clear statement of the political implications of mothering.

These developments coincided with the criminalization of abortion in many states, although earlier it had been largely unregulated. The regulation of abortion resulted from a number of complex factors.⁴⁰ But one was a conservative backlash against divorce, abortion, suffrage, and women's movements of all kinds as perils besetting the middle-class family. Even the moderate woman's club movement was attacked by Grover Cleveland as "a threat to 'the integrity of our homes and the benign disposition and character of our wifeness and motherhood.'"⁴¹ Politicized motherhood—the "volunteer" mother—was certainly one target of the early opponents of abortion.

Goldstein's book raises, although it does not address, the relationship between abortion regulation and voluntarism in the home and outside it. His point is that, like volunteer work, mothering does not fit easily into a legal rights/duties paradigm. Law may compel a mother to feed an infant, or punish her for failing to do so; but caretaking acts themselves are not the essence of "good enough mothering," a quality of heart that the state can neither coerce nor buy elsewhere. What the intimate association between mother and child and voluntary associations in the public sphere have in common is that both fall outside the arc of describable, enforceable rights and duties. Both differ from contractual voluntarism as well in that neither involves an explicit bilateral (and therefore enforceable) promise, but is a unilateral undertaking conditioned on no explicit promise that may be cut back at any time. American law doesn't deal well with volunteers, but hovers between imposing certain standards on voluntary undertakings and protecting the volunteer from prosecution as a way of encouraging spontaneous helpful acts—recognition of the fragile quality of the volunteer's participation.

40. See Linda Gordon, *Woman's Body, Woman's Right: A Social History of Birth Control in America* (Harmondsworth, Eng., 1977); and James C. Mohr, *Abortion in America* (New York, 1978). Diverse factors from micro to macro influencing those lobbying for regulation included the American Medical Association's desire to establish professional supremacy over health policy and eliminate competition from "irregulars" like midwives; fears that, in the context of the rising levels of immigration, abortion permitted Anglo-Americans to commit "race suicide"; concerns about an available labor force; as well as moral concerns about the status of marriage and the family. One problem with the regulation of reproduction is that psychological theory is lost in a crowd of competing social, moral, demographic, political, and economic factors that influence abortion policy; one Reagan administration official expressly opposed funding for abortions in Third World countries on the grounds that underdeveloped areas needed expanding pools of consumers to fuel the growth of market economies.

41. Quoted in Wendy Kaminer, *Women Volunteering: The Pleasure, Pain, and Politics of Unpaid Work from 1830 to the Present* 42 (New York, 1984) ("Kaminer, *Women Volunteering*").

What is the importance of maintaining a sphere of voluntary activity that falls outside the reach of legal sanctions?⁴² If, as Schoeman argues, the fact of describing relationships in legal terms limits or casts a pall over them, the benefits of an unregulated sphere could be great. By rights this argument in the current political climate should have a broad appeal. The idea that love and energy (and perhaps some forms of creativity) flourish best free of state supervision is currently at home both in Chicago and Cambridge.⁴³ Conservatives have persistently tolled the merits of voluntarism; the idea that care is outside the competence of the state is at the heart of the conservative agenda. Many liberals, too, with the broken promise of the welfare state, tacitly admit that depending on government has not worked. As more on the left try to think globally but act locally, voluntary associations take on new significance as seedbeds of participatory democracy.⁴⁴

In one way Goldstein has produced a theory that cuts across traditional political lines to reach a point of some agreement: that voluntary activities and associations provide a space for creative endeavor that can benefit both the individual and society as a whole.

Unfortunately what seems most likely is that, in the polarized climate of the current abortion debate, this will be seen as a conservative argument in the service of a liberal result and orphaned on both sides. Historically, as today, groups from across the political spectrum have participated in voluntary associations as a third sector, but with different attitudes toward the state.⁴⁵ Progressive voluntarism, the dominant strain of the later 19th century, was not antistatist; rather, it sought to supplement weak and ineffective governmental powers, anticipating and encouraging the growth of the modern bureaucratic state.⁴⁶ The current strain of liberal voluntarism too has flourished in response to failures of government, not as a challenge to the state's legitimacy; it has been antistatist only in serving as a focus for political opposition to the regime in power.⁴⁷

42. There is a literature on the importance of voluntary associations in American life which suggests that, in addition to providing individual fulfillment, groups act to protect individuals from the state and also to supply substantive moral content to public life, a role the liberal state theoretically eschews; and that for these reasons group activities deserve a high degree of deference. See, e.g., Frederick Mark Gedicks, "Toward a Constitutional Jurisprudence of Religious Group Rights," 1989 *Wis. L. Rev.* 99.

43. Ben and Jerry's has acknowledged this kinship by establishing a grass-roots activist-of-the-month award, "One Thousand Pints of Lite," recently delivered to Gray Panther Maggie Kuhn.

44. See Sara M. Evans & Harry C. Boyte, *Free Spaces: The Sources of Democratic Change in America* (New York, 1986), esp. 17-18 & chap. 6.

45. See *id.* at 85-87.

46. A more conservative strain of benevolent and charity work which made little or no effort to expand the functions of government existed side by side with its more progressive twin throughout the 19th century.

47. In fact, Republican administrations moved to dismantle organizations like VISTA and Head Start when they became too successful in enlisting popular participation or dis-

Voluntarism as an ideology, however, seems to have been captured by the right wing in the 1980s, which turned a variety of functions over to the private sector in an explicit attempt to savage the regulatory infrastructure of the welfare state, itself a product of progressive voluntarism. Under the Reagan right, women's volunteer work became a symbol of a traditional rather than a progressive approach: "volunteering as a career choice came to stand for the primacy of the family—the two-parent, one-income dream family."⁴⁸ "Community service" was Reaganese for women's charitable and benevolent work as a desirable alternative to a paid job, thereby keeping the uneven balance of power in the traditional family intact—an inequality enhanced by limits on abortion. Far from embracing this kind of service as a political opportunity, white feminists in the 1970s and 1980s scorned it as they fought to establish their place in the work force—a quest to which abortion rights seemed crucial.⁴⁹

Although theories of voluntary association are common across the spectrum, then, they may represent a tenuous and perhaps largely rhetorical point of meeting. Anti-abortion activists will not likely be swayed, nor agree to analogize the mother-child dyad to other voluntary social activities. This is so despite the fact that in other areas—spousal and child abuse, for example—sections of the right have resisted state intervention with arguments about family autonomy and privacy that sound very much like those Goldstein uses.⁵⁰ Still, despite disagreements over when and what kind of state intervention is desirable in the private sphere, Goldstein's argument could appeal to a core of extra-statism common to pro-choice advocates and liberal Republicans alike.⁵¹

I would rather have Robert Goldstein as my therapist—or better yet my mother—than as my lawyer on the basis of this book. Yet the sense that the book raises critical issues to the level of debate in an innovative

content—exactly the kind of voluntary activity the grassroots left has in mind. See Kaminer, *Women Volunteering* 14; Lucie E. White, "The Meanings of Participation in Project Head Start: The Interplay of Race, Gender, and Bureaucracy in a Day Care Program" (unpublished paper presented at "Women and the Welfare State" conference, Madison, Wis., June 1989).

48. Kaminer, *Women Volunteering* 2.

49. The group whose career aspirations caused them to distance themselves so thoroughly from volunteer service was composed largely of white, middle-class feminists; as one black feminist said, "The right to work wasn't a relevant issue to us. We had always been working." In fact, the level of service volunteering in the black women's community has been and remains very high. *Id.* at 7–8.

50. Another hollow commonality between left- and right-wing family policy is that both express a preference for a deregulated family zone with an exception for violence, which they define very differently. Conservatives tend toward the regulation of abortion, which they class as violence against children, while many take a more cautious approach to the regulation of child and spousal abuse as an unnecessary challenge to paternal authority. Liberals are likely to switch these positions.

51. In fact, such pro-choice Republicans as William Weld, 1990 Republican candidate for governor of Massachusetts, are beginning to develop family privacy arguments against state intervention in reproduction.

way but is not "good law" is unsettling. What is good law—or good enough law—in the family law setting? Something that will fly in front of the Supreme Court? Robert Goldstein's thesis will not be argued in front of the Supreme Court any time soon. But, then, maybe it's time to give the Court a rest.

The difficulty of translating primary love into good law points in part to the lack of a coherent theory of family law. The field of domestic relations has suffered more than other branches from the epistemological crises of modernism. Once it unabashedly proclaimed itself an expression of common moral sensibilities, largely informed by Christian precepts. One of the less well-known aspects of church-state separation as it has continued over the 19th and 20th centuries has been the disintegration of the moral and religious basis of family regulation, leaving a discipline whose theoretical structure has eroded beneath it.⁵² Now, even for those who continue to tout its moral educative function, baseline truths are hard to come by. Much family regulation has given up the pretense of moral governance altogether and is "'in the process of learning to survive without the certitudes that launched it.'" ⁵³ The law itself has become atomistic, arranging what Carl Schneider calls a wholesale "transfer of many moral decisions from the law to the people the law once regulated."⁵⁴

What Lee Teitelbaum calls "the teleological view of morality" in domestic relations law has also been undermined by the changing structure of the family.⁵⁵ That view depended on a universal type, a family that served first as an economic unit, enmeshed in the larger community of like-functioning (and so regulable) families. But by the turn of the last century, he points out, education and production, the family's two most important functions, were largely taken over by institutions external to the home. This left a psychological family whose function—affective support—shifted with the disparate needs of its individual members, and for which there was no clear normative model.⁵⁶ As the family changed from a productive economic unit to a psychological one, its members' duties and obligations became less tangible, less easily described and enforced by legislatures and courts. In Blackstone's day rights and duties were the more easily enforced as they could be described as mutual, paired obligations, in the law "Of Master and Servant," "Of Husband and Wife," "Of

52. Carl E. Schneider, "Moral Discourse and the Transformation of American Family Law," 83 *Mich. L. Rev.* 1803 (1985); *id.*, "The Next Step: Definition, Generalization, and Theory in American Family Law," 18 *U. Mich. J.L. Reform* 1039 (1985).

53. Clifford Geertz, *Local Knowledge: Further Essays in Interpretive Anthropology* 217 (1983), cited in Carol Weisbrod, "On the Expressive Functions of Family Law," 22 *U.C. Davis L. Rev.* 991, 1006 (1989).

54. Schneider, 83 *Mich. L. Rev.* at 1808.

55. Lee E. Teitelbaum, "Moral Discourse and Family Law," 84 *Mich. L. Rev.* 430, 434 (1985).

56. *Id.* at 434–35.

Parent and Child.”⁵⁷ By the later 19th century, open-ended individual rights language, positive and negative, had replaced reciprocal categories of duty and obligation in the argot of family law.

Goldstein attempts to return a measure of interdependence and reciprocity to his description of maternal relations in the family setting. Neither the existing family law nor constitutional framework serves him well; both are easier with rights than needs,⁵⁸ and easier with unilateral than reciprocal rights. Goldstein may have hurt his own case by eschewing “duty” and refusing to try to reform a paired category of contingent rights and duties here, although his reluctance to engage the concept by name is understandable. Prenatal “duties” in the hands of ambitious prosecutors have proven extremely dangerous to women’s autonomy, and it is a category most feminists feel is better left for dead. But, in fact, in Goldstein’s rendering the mother-right is actually conditioned on obligation: “the nature of the activity of associating is of greater salience here than the expressive and self-defining aspect. . . . It is thus especially important to focus on the commitment made necessary by association, the fidelity that commitment requires, and the inner resources that it demands” (at 55). The mother-right accrues as a result of the work mothers do collectively to care for infants. Few caretaker-parents would label their experience in caring for their children after birth purely “voluntary” as Goldstein does in theory; it represents a more complex mixture, at best an ongoing obligation freely undertaken.

Prenatal caretaking too has taken on new importance in light of the growing recognition of the danger various kinds of parental actions may pose to the development of a fetus. The new eugenics has created a hysterical atmosphere in which individual pregnant women—single black mothers come to mind, although the cases are mixed—are prosecuted for fetal abuse. This is itself an abuse of prosecutorial power that feminists have decried. Nonetheless, the obligation to guard a fetus from harm is not simply a pernicious invention of the medicolegal establishment to control women, although it can be used that way. The damaging consequences of some parental behaviors are real: middle-class women as a group have themselves become extremely conscious of monitoring their behavior while pregnant, not because they are dupes of a sham therapeutic norm but because they feel the same obligation to do well by their children that is the basis of care after birth. A visibly pregnant woman drinking or smoking at a Cambridge cocktail party would raise eyebrows around the

57. See William Blackstone, 1 *Commentaries on the Laws of England* (Chicago, 1979).

58. Nancy Fraser has elaborated a “politics of need interpretation” in “Talking About Needs: Interpretive Contests as Political Conflicts in Welfare-State Societies,” 99 *Ethics* 291 (1989). But moving out of the realm of policy and into that of adjudication means forcing “needs”—a category with little legal clout—into a liberal rights skin, where it doesn’t easily fit.

room; yet talk of "duty" or obligation to the fetus is largely taboo, for fear of legal consequences.

The concept of "duty" today is a fossil whose primary content is legal sanctions. In the 19th century, by contrast, duty was a living form at the heart of social and political interactions; individuals derived notions of duty first from their moral and religious understandings rather than from the law.⁵⁹ Many early feminists conceived of rights as the tools enabling them to fulfill their obligations to family and community, and rights and duties as fully reciprocal.⁶⁰ Duty also lay at the root of 19th-century voluntarism. Voluntary associations represent a contractual reordering, a move away from legally imposed social roles; at the same time, the thrust of social voluntarism was toward the fulfillment of a vision of duty derived from the moral rather than the legal world, from religious language about paired rights and duties as between individuals, with duty as an internalized standard beyond the competence of the state. Perhaps Goldstein should have tried to take back the concept of duty from the legal sphere, and explored duty within mother-child relations not as a lever for state intervention but as a category describing a relationship in which the state could not intervene. The better story here may not be of a constitutionally cognizable mother-right, but of a sphere of individual love, competence, and obligation where the law's writ does not run.⁶¹

There seems little place in the current legal framework of abortion for the questions of social reproduction, psychological well being, and intergenerational giving Robert Goldstein is raising. Family regulation arises out of a mishmash of competing moral, economic, psychological, and political concerns; certainly something as fundamental as mother-love deserves its place. I can't help thinking that *Mother-Love and Abortion* is actually a better or at least more provocative essay than the sum of my quarrels with it suggests. In the end, if primary love can't be factored into good law, it may not be Robert Goldstein's problem but ours.

59. In America religious thought has traditionally been the source for much of the thinking about duties, certainly an easier job in the 19th century with its common (although not universal) moral language. Religion is unlikely to play the same role today: there is nothing like a common Christian cultural consensus, and even the mainline Protestant churches have themselves abdicated notions of duty in favor of an a la carte or voluntarist approach to questions of doctrine and teachings; see Wade Clark Roof & William McKinney, *American Mainline Religion: Its Changing Shape and Future* (New Brunswick, N.J., 1987).

60. See Elizabeth B. Clark, "Religion, Rights, and Difference in the Early Woman's Rights Movement," 3 *Wis. Women's L.J.* 29, 50-51 (1987).

61. Thanks for Martha Minow's comments here.