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MOTHER-LOVE AND ABORTION

A Legal Interpretation

ROBERT D. GOLDSTEIN

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Preface

Justice Powell announced his retirement from the United States Supreme Court as I write this. His vote had provided the bare majority of five justices who, in the past few years, were firmly and expressly committed to upholding *Roe v. Wade.* In that 1973 case, the Supreme Court, then with only two dissenters, established the constitutional liberty of women to choose to abort their pregnancies until the fetus becomes viable. This same majority has been equally committed to upholding those cases, following *Roe,* that substantially limit the power of government to restrict this liberty through burdensome, costly, and discouraging regulation of the time, manner, and place in which the medical profession may provide abortion services.[1] This bare majority contained the four oldest men on the Court, including Justice Powell. In the year of his departure, the remaining members of this group ranged from 79 to 81 years of age.[2] However, other and younger justices on the Court would overrule *Roe* and return to the states the power to outlaw abortion altogether or, at a minimum, to regulate it so substantially as to make legal abortion unavailable as a practical matter to many, especially to those who are young and not wealthy.

What will happen to *Roe v. Wade* and the constitutional liberty of choice turns on the vagaries of the age and health of the remaining justices; on whom the President nominates to fill vacancies; on what standard of review the Senate applies in determining whether to consent to those nominees;[3] and, finally, on the decisions new justices make once the responsibility of judgment is theirs, giving due regard to the procreational choice *Roe* protects, its place in the canons of privacy cases, and the obligations of the doctrine of *stare decisis.*

But how a newly constituted Supreme Court may in the next few years treat existing precedent is not of consequence to the arguments of this essay. For this is not a book on the constitutional legitimacy and longevity of *Roe*. Rather, it is an exploration and interpretation of the legal regime of choice that began in some states in the 1960s and that *Roe* extended across the nation and attempted to explain. Thus, when *Roe* is referred to in this volume, it is only as an exemplification of the law of abortion-choice, albeit the one that has shaped the terms of the abortion debate for the last fourteen years. Were *Roe* to be overruled, an understanding of the current legal regime would become crucial, because battles over the status of abortion would then be fought, year after year, in multiple legislative bodies and in far more numerous political campaigns. Were the regime of *Roe* to remain unchanged in the coming decade, then the continuing task of understanding it would remain. Indeed, the duty of explicating the law of abortion to our youth would be especially important, because those who come to sexual maturity, even now, may fail to understand the constraints on abortion—and indeed contraception—that existed not very many years ago; and they may, accordingly, fail to comprehend the liberty that is now theirs.

Any interpretation of the law of abortion occurs against rapidly changing landscapes of life and death, and life's reproduction. With technological virtuosity, men and women can translate age-old wishes into reality. Women may abort pregnancies safely and cheaply, and with an effectiveness that unfortunately surpasses our contraceptive capability. Gone is an earlier time when for many the intention to induce the menses or end a pregnancy remained in the realm of wish; or, even if certain primitive steps were taken, a resulting abortion might nonetheless be felt not to have been fully intended, or, if intended, procured at a price amounting to punishment. In other circumstances, where before there was barrenness, couples may now conceive or otherwise have children through the use of fertility drugs, artificial insemination, embryonic implantation, and surrogate mothers. The premature infant may be successfully, indeed perfectly, sustained; and the handicapped newborn, who once would have

quickly died, may now be treated through means ranging from the extraordinary and heroic to the routine. Because of the rapidly developing capacity for early fetal observation and diagnosis, a fetus may be delivered prematurely for medical care, or treated *ex utero* and returned to the womb, or, in other cases, aborted.

But each technical advance requires more explicit and refined ethical analysis. Debates attempting to clarify these changing landscapes continue insistently in legislatures, in prosecutors' offices, in courtrooms, in houses of worship, and in the journals. The asserted obligation of pregnant women to follow the prenatal advice of their physicians has become the impetus for a criminal prosecution, for findings of child abuse, and for civil injunctions empowering physicians to control pregnancy by compelling a blood transfusion or a caesarian delivery against the woman's wishes.[4] Parental consent to medical treatment of premature or handicapped neonates has become the subject of federal regulation and scrutiny. Lawsuits pit surrogate mothers against genetic fathers for custody, and court decrees send children shuttling among a variety of caretakers. The legal uncertainty physicians confront about life's beginnings, about when late second trimester fetuses may be aborted and when they instead become patients, is matched by their uncertainty about life's departures, about when those who have lost all potential for consciousness may be relieved of their living organs that another near death may be revived.

In these varied forums the debates alternate between substantive criteria and procedural solutions, between valuing private choice and public control, between the rhetoric of rights and individual liberation and of duties and communal obligation, between emphasizing a woman's equality in the public arena and her special family role in procreation, and, finally, between the foolishness of human narcissism and its boldness, and the deadly constrictions of guilt and its animating virtues.

The technological and social changes that underlie these developments appear to validate the individualistic categories in which the abortion debate has been conducted, as it contrasts a woman's right to equality and autonomy with a fetal right to

life. For is not the fetus observable and treatable, a patient—whether person or not—in its own right? And is not its location in any particular womb a happenstance that our doctors may alter and social arrangements, such as surrogate mothering, may adjust?

Against such trends that disaggregate begetting, bearing, and rearing from each other, I intend to mount an old-fashioned interpretation and defense of procreational choice and the privacy of that first and most basic community of woman and fetus. The analyses of abstract and universal rights—to self-determination and to life—require supplementation for they omit the particularity of mother-love and the love for the mother that conjunctively define the identity of a woman and her offspring. I propose a number of fundamental themes in support of this defense of procreational choice: The privacy and autonomy that *Roe* protects belong not only to the woman as an individual but also to the dyadic, indeed symbiotic, unit of woman and fetus. This dyad constitutes the relevant community for understanding the abortion decision. The woman is the decision maker with respect to this community, in consultation with a physician whose presence tests her procreational decision in interpersonal dialogue. The larger community's interest in the next generation is realized through the woman's decision whether to bear her child. The state is, as a matter of fact, otherwise unable to protect the fetus except through a caretaker's intervening determination to love her offspring. An abortion prohibition would therefore constitute an exploitation of a woman's mother-love. And, finally, the impersonal efforts of others to represent the fetus are unavailing because it is the woman who can best interpret the meaning of fetal silence. This essay no doubt has implications for some of the aforementioned biomedical issues; but the question of abortion is more than enough to occupy the present volume.

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To preserve the essay form, I have reserved much material for the notes, trusting that the interested reader will not be deterred

after completing the essay from turning to those notes that are pertinent. In addition to standard citations, the notes serve to guide readers to the relevant literature; afford a flavor of the work of those on whom I rely, as I am prone to giving extensive quotations for that purpose; provide a detailed account of the current state of Supreme Court decisions on abortion; and allow for extended discussions of such topics as the potential demand for adoptive infants, the psychological meaning of abortion, the current age of viability, the demographics of abortion, the relationship of psychoanalytic object-relations theory to infant research, and so forth.

The invaluable encouragement of my wife and the supportive openness of the Law School of the University of California at Los Angeles have enabled me to move from an idea to its expression. My colleagues have helped by asking more questions than each successive draft answered. These readers, some of whom may dissent from this work, include: Richard Abel, Alison Anderson, William Forbath, Carole Goldberg-Ambrose, Kenneth Karst, Christine Littleton, Carrie Menkel-Meadow, Herbert Morris, Fran Olsen, Arthur Rosett, Gary Schwartz, Murray Schwartz, Steve Shiffrin, Jonathan Varat, and Stephen Yeazell. Drs. Justin Call, Spencer Eth, Milton Greenblatt, Bernard Towers, and Louis J. West have also provided useful advice for which I am most appreciative. The staff of the UCLA Law Library, and in particular Jan Goldsmith, Myra Saunders, and Eric Wade, have been most helpful in responding to my numerous requests. Defeating successive software problems, Philip Trull and Rita Saavedra typed the manuscript with a good cheer that was beyond the call of duty. For financial support, I would like to thank the UCLA Academic Senate, Dean Susan Prager, and the Law School Dean's Fund. Students Sandra Segal, David Kaplan, and Hallie Hochman checked citations for accuracy, and Lisa Hauser and Judith Wilson performed other research tasks as well. To those who have taught me the method of mother-love, a more private appreciation is due than can appropriately be expressed here.

Even in the dreams of men, a book may appear as a child being born, even a book about abortion. I hope that what follows

bears a fair relationship to the actual procreational experiences of at least some women, and that it has developed sufficiently to be of service to those who—privately in internal and familial colloquy and publicly in their professional lives—take upon themselves, for whatever personal reasons, the unhappy burden of carrying on the abortion debate.

Los Angeles, June 1987

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Introduction

As the subject of abortion passed beyond the whispers of women into the public realm, it occasioned an outpouring of philosophical, legal, and political debate. Dwelling on this debate disturbs. Treating the matter abstractly, the philosophical literature elaborates and educates, without advancing resolution. The political essays from each side of the debate inhabit different worlds. The case studies of abortion clinics leave one troubled to the core about the hardness of many women's lives.[1] Whether that leaves one as troubled as the annual number of abortions or the at-risk children born to inadequate, uncommitted, overextended, or ambivalent parents is a matter of some individual difference.

This intense, vigorous, repetitious, vile, sometimes intelligent, sometimes crazy—even criminal—abortion debate does not now appear susceptible to an intellectual or political solution[2] satisfactory to both the groups that would regulate market access to abortion and the groups that support its continued deregulation. (To avoid the usual phrases, I shall refer to those who would prohibit or substantially regulate the availability of abortion as "regulators," and those who substantially favor the present regime of lawful elective abortion as "deregulators."[3])

In his sustained criticism of *Roe v. Wade* and the abortion liberty, John Noonan, Jr., the leading regulator among the legal professoriat and now a federal judge, argues that *Roe* represents the triumph of a positivist and totalitarian position: that personhood is solely a construct of the law. As it gives, so the state may take away that personhood—and with it the right to life. Drawing upon his work on slavery and the manner in which the law dehumanized slaves by treating them as chattel, Noonan asserts that deregulators mask the existing human fetus behind the

forms of the law and, by thus avoiding plain facts, look away from the realities of the practice of abortion.[4]

Such a masking of a shared reality, by one side or the other, could of course account for the lack of common ground in the debate. An unmasking, accordingly, might facilitate a reclamation of shared understandings among ongoing disputants.

This essay is motivated by a sense that a different reality is denied and masked. What is denied is that 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. What is masked is the centrality to human existence of mother-love and the love for the mother.[5]

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In exploring this claim, it will first be helpful to get our bearings by reviewing and clarifying, at some substantial length in chapter 1, the parameters of the abortion debate in certain of the philosophical and legal literature. Because the particular resolution of the abortion issue in *Roe v. Wade* may become vulnerable to the changed composition of the Supreme Court, it is especially important to understand these parameters, for they set, in the current discourse, the legitimate limits on alternative abortion policies.

But the primary purpose of this extended review is to understand the way in which the debate treats the relationship of fetus and woman. In the literature, the permissibility of abortion turns on identifying rights-bearers, specifying the rights they bear, and resolving conflicts among these rights; this literature first describes persons and then, secondarily, the minimalist duties they owe each other. Thus the fetus is typically treated as a creature entirely separate from the woman who carries it. Their interaction is structured by absolute negative rights, in one account, and, in another, by affirmative obligations of a good samaritan nature. In both versions, the rhetoric is individualistic: woman and fetus stand as strangers apart, in arm's length opposition to each other, the bonds between them, their commonality, slighted. But such atomistic assumptions prove

inadequate for comprehending human procreation. This approach, especially when combined with the current technological mentality that sees in the potential development of artificial placentas a means of resolving the abortion controversy, leads to a troubling denigration of mother-infant attachment, for it is governed by a logic of separateness.[6]

This review prepares the way, in chapter 2, for a search for an alternative and less atomistic description of procreation that would focus attention first and foremost on the relationship of attachment between the fetus and the woman carrying it. Such an account would locate the personhood of an offspring in its developing and constitutive relationship with its mother and would describe the rights and duties of each in terms appropriate to that unique dyad. Current work in political philosophy, feminist theory, and psychology encourage this project.

Then, in chapter 3, this essay describes one human developmental theory to demonstrate how such a relational approach can illumine the law of abortion. The theory used here for illustrative purpose derives from psychoanalysis, especially from those investigations conducted by its object-relations school. While not without problems, it has the virtue, among others, of giving a most careful and respectful account of the development of self from its relationship with others. That body of work can be used to describe the fetus in relational terms as a constituent part of a dyadic whole; for, in this theory's view, infantile existence cannot be disentangled from the infant's relationship with a caregiver and from her vital commitment to it, her mother-love.

This perspective affords an interpretation and defense of the legal regime of procreative choice that *Roe v. Wade* reflects. The law's privacy doctrine, upon which it built, protects this relational field, through which the infant may eventually emerge as an autonomous rights-bearer. By offering her a reasonable period of time in which to make her maternal choice, the law also protects the woman's decision of whether to commit herself to the intensity and life-changing identity of motherhood and respects her judgment of whether she is then ripe for this symbiotic relationship. In our society, a woman's commitment of

love belongs to the realm of freedom: the state cannot coerce and ought not exploit her love by denying to her a meaningful period of choice.

In closing, this essay will briefly consider, from the competing perspectives of chapters 1 and 3, claims about the kind of society that countenances abortion and the manner in which the silent fetus may find representation in that society. It will do so by reflecting upon two historical comparisons, which some draw, between antebellum slavery and totalitarianism and our present regime of procreative choice.

1

Individual Rights and the Logic of Separateness

THE PREDOMINANT PHILOSOPHICAL AND LEGAL ANALYSES IN THE secular abortion debate attempt to explain who are rights-bearers and to define the rights that they bear; then, to the extent made necessary by their answers, they seek to work an accommodation between the rights of the woman and fetus. The individualistic and atomistic assumptions about personhood that underlie these efforts pave the way for the recent appearance of arguments that see in the technological possibilities of early separation of woman and fetus a means of resolving the conflicting interests of the two. This chapter will explore the structure of the philosophical and legal debate in order to clarify its understanding of the relationship of woman and fetus and its resulting logic of separateness.

THE PHILOSOPHICAL ARGUMENT

In the philosophical debate, two great questions dominate analysis and delimit the strategies of argument. Their resolution shapes, or at least rationalizes, the author's position on abortion. The first question is, When, if ever, does a fetus become a person and, accordingly, a being with moral standing and a bearer of a right to life? The second question is, To what does this right,

if it exists, entitle the fetus? This latter question may be recast as, What is the nature of the relationship between fetus and woman?[1]

The Nature of the Fetus: Who Holds a Right to Life?

Some assert that abortion is permissible because during many or all of its gestation the fetus lacks a right to life. It lacks that right because it is not the kind of living being, indeed not the kind of living *human* being, that has moral standing as a rights-bearer. Although alive and although a form of human life, as ova and sperm are forms of human life, it is not yet a person. Analysis then requires the elaboration of the criteria by which we come to include living organisms in the class of "persons" or rights-bearers.[2]

The multiplicity of answers as to when personhood arises and which criteria define it, and the inability of philosophers to put forward compelling reasons for preferring one answer over another, lead some to reject the relevance of the following inquiry altogether.[3] Yet, the question of personhood returns and returns again in the literature, in the political debate, and in the consciousness of women and men, shaping or at least providing an opportunity for the coalescing of their attitudes on abortion.

Some refer to cognitive psychological qualities to determine the personhood of the fetus. Among philosophers, Michael Tooley has taken the cognitive criteria to their outer limit by adopting particularly restrictive requirements for admission into the class of rights-bearers. A being, according to this perspective, must have a continuity of consciousness of itself as having wants or purposes, before it can have a right to a life in which it can further those purposes and before it can be said that its death is a harm to a person. That point arises sometime after birth, according to Tooley's reading of the cognitive psychological literature.[4]

Not consciousness of self and purposes but *sentience*, or the "capacity for feeling or affect," is the essential characteristic of a rights-bearing creature, argues the philosopher L. W. Sumner in his useful book on the morality of abortion.[5] Since the best esti-