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Suzanna Sherry, Women's Virtue, originally published in 63 Tul. L.
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WOMEN'S VIRTUE

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Michael Perry's thoughtful jurisprudential musings in *Morality, Politics, and Law*¹ get most things just right. His framework of moral knowledge and a constitution of aspirations resonates with much of the best of contemporary moral philosophy and constitutional jurisprudence. When Perry turns to specifics, however, his reasoning weakens considerably. In particular, his discussion of abortion is fundamentally flawed.

Perry draws two conclusions about abortion: (1) That the extremely restrictive Texas statute at issue in *Roe v. Wade*²—which permitted abortion only to save the woman's life³—was unconstitutional; and (2) that the Supreme Court went too far when it invalidated virtually all restrictions on pre-viability abortions.⁴ Perry argues that the Court should have required all anti-abortion laws to contain three exceptions. Abortion must be permitted if the woman's health is endangered by continuing the pregnancy, if the fetus's life would be short and painful because of a genetic defect, or if the pregnancy was the result of rape or incest.⁵ Professor Perry's first conclusion is indisputable. It is the second conclusion—that elective⁶ abortions should be restricted—with which I take issue in this Essay.

Perry's conclusions appear to depend primarily on two assumptions: (1) That the value of fetal life is the central issue in determining whether elective abortions may be outlawed, and

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1. M. PERRY, *MORALITY, POLITICS, AND LAW* 174-75 (1988).

2. 410 U.S. 113 (1973).

3. *See id.* at 117-18.

4. M. PERRY, *supra* note 1, at 175; *see Roe*, 410 U.S. at 164-66.

5. M. PERRY, *supra* note 1, at 175.

6. Perry uses the words "elective" and "non-therapeutic" interchangeably, implying that an abortion performed for reasons other than the direct physical health of the woman or the fetus is not therapeutic, *i.e.*, not helpful to the woman's well-being. Since I reject that implication, I will use the word "elective" to distinguish abortions that are performed for reasons other than the ones Perry lists. It is ironic that terminating a pregnancy that is the result of rape or incest is generally considered (and apparently considered by Perry) to be "therapeutic" or "non-elective," or at least analogous to physically therapeutic abortions. Such a view recognizes the psychological harm that can come from carrying *some* unwanted fetuses, and the therapeutic value of abortion in those circumstances, but fails to recognize the psychological harm that results from carrying *any* unwanted fetus.

(2) that the Texas statute probably would not have been enacted without the discriminatory undervaluing of women's well-being. I will suggest in this Essay that the first assumption is simply incorrect, and that the second assumption does not support the second, restrictive conclusion that Perry reaches. This restrictive conclusion, moreover, is inconsistent with several of the fundamental theses of the book as a whole. In short, on the abortion issue, Perry has simply gotten it wrong.

Perry's first assumption—that the value of fetal life is the central issue—leads him to an erroneous criticism of *Roe v. Wade*. Perry states that an absolute ban on outlawing pre-viability abortions necessarily depends on the premise that “the protection of fetal life is not a good of sufficient [or ‘more than trivial’] importance” and that this premise is “widely contested in American society.”⁷ He concludes that the Supreme Court should not have relied on such a premise.⁸ But the holding in *Roe* does not depend on such a premise. Indeed, Perry's formulation is merely a more moderate restatement of a widespread mistaken belief: that the validity of abortion laws depends wholly or primarily on whether the fetus is a human life. That issue, despite its galvanizing rhetorical effect, is irrelevant. Even if the fetus is not a human life (or is of only “trivial importance”), there may be reasons for discouraging abortion.⁹ More importantly, even if the fetus is a human life (or is of more than “trivial importance”), there may be justifiable reasons for permitting abortion.

Once we conclude that there may be reasons for or against abortion independent of the importance or humanity of the fetus, then the Court's decision to choose the woman over the fetus must be defended or attacked on grounds other than Perry's argument that the Court relied on a disputable premise. Before I turn to those possible other grounds (which in fact comprise Perry's second assumption), I must of course defend my

7. M. PERRY, *supra* note 1, at 174-75.

8. *Id.* at 175.

9. For example, we prohibit the inhumane destruction of kittens. We also prohibit conduct that, although it does not involve the taking of human life, we view as detrimental to the actor, such as prostitution or the use of some addictive drugs. Finally, there may be circumstances under which we wish to increase population by prohibiting both birth control and abortion. I do not mean to suggest that any of these laws (real or potential) are necessarily constitutional; I only note that a conclusion that a fetus is not a human life (or is of only “trivial importance”) does not end the inquiry.

contention that elective abortion may be justified even if the fetus is a human life (or of more than "trivial importance").

The best argument is Judith Jarvis Thomson's. She suggests an analogy: Imagine that in the middle of the night you, a music-hater, are kidnapped, and your circulatory system is plugged into that of a famous, critically ill violinist. Without your blood supply, the violinist will die. You are assured that after nine months the violinist will have recovered, and you may be unplugged. Thomson then asks whether it is "morally incumbent on you to accede to this situation."¹⁰ Although the violinist is of at least as much importance as any fetus, no law requiring you to stay plugged into him—criminalizing your decision to pull out the connecting tubes—would or should be considered compatible with our traditional notions of liberty.

The persuasiveness of the analogy depends on the recognition that in both cases the real question is not the importance of the dependent life involved. Rather, it is whether you (or the pregnant woman) may be compelled to provide the aid without which the violinist (or the fetus) will die. And it is clear that in our society, there is a widely shared moral consensus that while providing aid to others may be morally commendable, it is neither morally nor legally required. In short, we do not recognize a general principle (the Good Samaritan principle) that requires people to aid others, even at little cost to themselves. There are no other circumstances under which we impose a moral duty to aid another when the cost to the Good Samaritan is nine months of various physical disabilities followed by either a lifetime of responsibility or a permanent psychological trauma. We do not, in circumstances outside the context of abortion, require even parents to render necessary aid to their children. It is neither immoral nor illegal, for example, for a parent to fail to run into a burning building to rescue his or her child. The absence of a generalized Good Samaritan principle for parents is even better illustrated by an example that does not implicate a risk of parental death: It is neither immoral nor illegal for a parent to refuse to donate a kidney or bone marrow to a dying child. It may be morally laudable to render the aid, but that does not make the failure to do so immoral.

What I have suggested so far, then, is that remaining pregnant, like remaining attached to the violinist (or saving one's

10. Thomson, *A Defence of Abortion*, 1 PHIL. & PUB. AFF. 47 (1971).

child from a burning building), is a supererogatory act. No one has a moral duty to perform such an act, but doing so may in some circumstances be a moral virtue. Moreover, part of the web of our traditions is to leave supererogatory acts to the discretion of the individual and not to coerce such acts by means of legislation.¹¹

The standard responses to the arguments made above are (1) that the pregnant woman, unlike the kidnapped music-hater, has in some sense volunteered to help the fetus and thus cannot abandon it later; and (2) that our morality of aspirations suggests that we ought to have a more generalized Good Samaritan principle and thus that rather than decriminalizing abortion, we ought to extend the principle of requiring aid to others.

By definition, a woman who wants an abortion is not voluntarily pregnant. The most that can be said is that the woman voluntarily engaged in sexual intercourse.¹² Thus, the first response reduces to an argument that a woman who engages in sexual intercourse—however careful she may have been about contraception—has thereby volunteered to aid any resulting fetus. Such a contention strikes me as equivalent to suggesting that anyone who walks outside at night has volunteered to be mugged, or that anyone who drives on the highway has volunteered to become the victim of a drunken driver. At least in some places, the odds are about the same. And yet we do not expect people to refrain from engaging in these activities, nor do we penalize or otherwise condemn them should they be unlucky enough to suffer harm.¹³ Only when a woman engages in intercourse do we hold her legally and morally responsible for the unwanted consequences of her innocent and very human

11. As I will suggest in a moment, coercing supererogatory acts is in fact antithetical to Perry's notions of self-criticism and moral flourishing. Other questions must be addressed first, however.

12. She may also have been negligent or even reckless, by misusing or not using contraception. However, there is no effective way to distinguish between a pregnant woman whose conscientiously used contraception failed and one who was negligent or reckless in the matter of contraception. Indeed, such a distinction may be illusory in the case of young girls who lack sufficient knowledge about contraception (or about their own bodily functions) to be deemed reckless. Thus, the standard for judging any law prohibiting elective abortions must be how it affects women who did everything they could to avoid getting pregnant.

13. Significantly, the only analogous circumstance in which there is any generalized tendency to blame the victim of the crime is when a woman is raped. *See, e.g., S. BROWN MILLER, AGAINST OUR WILL: MEN, WOMEN AND RAPE* (1975); *S. ESTRICH, REAL RAPE* (1987).

actions.¹⁴

Similarly, the second response—to generalize the Good Samaritan principle—is suspect because only women (and potentially almost all women) would be subject to the Good Samaritan principle. Given the pervasive sexism of our society, it is questionable to begin creating a generalized Good Samaritan principle by imposing a substantial duty only on women. As Guido Calabresi has noted, “Compelled life saving is easier to enact (and for that very reason constitutionally suspect) when disfavored groups are forced to do the life saving.”¹⁵ Skepticism is especially warranted in light of the length of time that abortion has been prohibited without any further development of a generalized Good Samaritan principle,¹⁶ and in light of the disproportion between what we demand of pregnant women (donating their bodies for nine months) and what we even contemplate demanding of other proposed Good Samaritans.

Both of the standard responses to Thomson’s violinist analogy thus depend on imposing on women unique responsibilities not imposed on men in analogous circumstances.¹⁷ This anom-

14. The fact that technically we also hold men responsible for fathering children is not very significant. Many fathers avoid responsibility either because they are unknown, because paternity cannot be proven, or because child support obligations are widely unenforced. *See, e.g.*, D. CHAMBERS, *MAKING FATHERS PAY: THE ENFORCEMENT OF CHILD SUPPORT* (1979). Moreover, the financial obligations imposed on both parents are qualitatively different from requiring a woman to lend her body to the fetus. Our laws recognize a vast difference between requiring monetary payments and requiring personal physical acts. *See* E. FARNSWORTH, *CONTRACTS* § 12.7, at 835-36 (1982); Regan, *Rewriting Roe v. Wade*, 77 *MICH. L. REV.* 1569, 1583-88 (1979).

15. G. CALABRESI, *IDEALS, BELIEFS, ATTITUDES, AND THE LAW: PRIVATE LAW PERSPECTIVES ON A PUBLIC LAW PROBLEM* 103 (1985).

16. Indeed, when we do require persons to render aid, it is virtually always on the theory that by their actions they have explicitly entered into a special relationship with the victim. *See, e.g.*, *RESTATEMENT (SECOND) OF TORTS* §§ 314, 323 (1965); W. PROSSER & P. KEETON, *THE LAW OF TORTS* 378-82 (5th ed. 1984); Regan, *supra* note 14, at 1593-1603. Thus, to the extent that we have a modified Good Samaritan principle, the principle depends on whether one consented to a special relationship. This poses a problem essentially identical to that posed by the first response to Thomson’s analogy, *see supra* note 10 and accompanying text. Occasional attempts to require any more generalized principles of Good Samaritanism have attached only minimal punishments to egregious failures to act when there was no danger whatsoever to the actor. *See* Farber, *Book Review*, 3 *CONST. COMMENTARY* 282, 287 & n.18 (1986).

17. The argument that there are no analogous circumstances depends on the original assumption that in the abortion debate, the most important—and thus unique—question is the status of the fetus. Once we discard that question, there are many analogous circumstances, as suggested in the text. It is also possible to argue that the relationship between the woman and the fetus is unique. That approach is also likely to fail, as there is nothing unique about one entirely innocent being requiring the assistance of another in order to live. Any attempts to distinguish a pregnant woman from other innocent beings

ally implicates Perry's second assumption about *Roe*: That the Texas statute is unconstitutional because in the absence of the discriminatory undervaluing of women's well-being, such a restrictive statute would never be passed.¹⁸ Here Perry is absolutely correct, but he fails to recognize the full implications of his assumption. The arguments in favor of prohibiting elective abortions—as I have distilled them to their essences—are arguments that are only made against women's lives and choices, and not against men's. Thus, in the absence of discriminatory undervaluing of women's well-being, it is highly likely that anti-abortion laws would not exist (or, as Perry puts it, "that conclusion seems . . . more plausible than any other").¹⁹

Perry's second, restrictive conclusion, then, does not follow from his two assumptions. That conclusion, moreover, is inconsistent with a basic theme of his earlier chapters: that morality, or flourishing, necessarily entails living the most deeply satisfying life one can, which itself requires "the exercise of self-critical rationality."²⁰ In order to live a moral life, "[a] person should be concerned to discover . . . how she . . . can do better—how she can live in a more deeply satisfying way."²¹ Moreover, coercive legislation is disfavored to the extent that it frustrates individual "capacity for self-critical rationality."²² The subtext of Perry's argument here is that persons ought to strive continually to improve their ability to exercise moral choices.²³ Restrictive

whose assistance is necessary to the survival of others is likely to become tangled in the equality questions raised in the text.

18. M. PERRY, *supra* note 1, at 175-76.

19. *Id.* at 176. Although some women support anti-abortion laws, this conclusion is not undermined. Even Perry agrees that people may mistake the conditions necessary for their own flourishing and well-being. *Id.* at 78-82.

20. *Id.* at 30.

21. *Id.* at 49.

22. *Id.* at 99.

23. Unlike my colleague Dan Farber, *see* Farber, *The Man Who Mistook His Life for a Plant*, 63 TUL. L. REV. 1445 (1989), I read into Perry's description of morality a commitment to maintaining flourishing communities—in other words, a commitment to at least some forms of altruism. As Richard Eldridge states, "others matter fundamentally to the development and exercise of our capacities for self-understanding and for flourishing." R. ELDRIDGE, *ON MORAL PERSONHOOD: PHILOSOPHY, LITERATURE, CRITICISM AND SELF-UNDERSTANDING* [ms. at 3] (Univ. of Chicago Press forthcoming 1989). Moreover, implicit in Perry's descriptions of both moral knowledge and flourishing is a notion that living a deeply satisfying life means living the best human, and rational, life. Living a moral life is approaching the ideal of what Alasdair MacIntyre has called "human-nature-as-it-could-be-if-it-realized-its-*telos*." A. MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* 51 (1981). Thus, while Perry does not specify—except in particular contexts—the content of living such a life, I believe he intimates that moral discourse is

anti-abortion laws deprive women of this moral opportunity.

If remaining pregnant, like remaining plugged into the violinist, may be considered a supererogatory act, then the choice between abortion and childbirth, although not morally mandated, is not morally neutral. While we do not require supererogatory acts, we do consider them morally praiseworthy. Just as we would not condemn the music-hater who unplugs herself from the violinist, we ought not condemn the woman who terminates an unwanted pregnancy. And just as we would praise the music-lover who gives up nine months of her life for the sake of the violinist, we might praise a woman who becomes pregnant under difficult circumstances but decides to make whatever sacrifices are necessary for the fetus and later the child. Moreover, the context of the woman's choice affects our view of its morality: a woman who chooses not to abort a child with Down's Syndrome is more morally praiseworthy than a woman who chooses not to abort a child of the "wrong" sex.

Anti-abortion laws deprive women of the opportunity to choose freely among these discretionary moral choices, and hence of the opportunity to exercise and improve their capacity for moral knowledge and moral choice.²⁴ Such laws coerce women's moral decisions, stifling their ability for growth through self-criticism. Anti-abortion laws thus interfere with what Perry describes as the basic aspects of human morality and human flourishing. Furthermore, to the extent that a moral choice is coerced, the actor is less likely to accept responsibility for that choice. The coercion of anti-abortion laws discourages women from developing the moral sensibilities that come from making moral choices and accepting responsibility for them. It keeps them, in short, from becoming virtuous.

If Perry's constitution of aspirations is to mean anything, it must mean that the government presumptively may not interfere with individual development and exercise of rational self-criti-

communal discussion of what it means for individuals in a community, and the community itself, to flourish. Indeed, this intimation is almost made explicit in Perry's acknowledgment that feminist theory is one of the "bright spot[s] on the horizon of political-moral theory." M. PERRY, *supra* note 1, at 183. One of the prime distinguishing features of feminist theory is its attention to connectedness to others.

24. For an elaboration of the relationship between making moral choices and developing moral sensibilities, see, e.g., Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293, 301 (1988). Studies suggest that most women do view the decision whether to terminate a pregnancy as a profoundly moral choice. See R. GOLDSTEIN, *MOTHER-LOVE AND ABORTION: A LEGAL INTERPRETATION* 86-87, 212 n.124 (1988).

cism, or with individual attempts to flourish (as he defines it) and to become morally virtuous. Anti-abortion laws interfere with both, and thus a strong justification for such laws is necessary to overcome their presumptive unconstitutionality. The Court's insistence that the state provide a compelling interest in support of anti-abortion laws is therefore exactly what Perry's theory of the Constitution requires.