REPRODUCTIVE EXCEPTIONALISM IN AND BEYOND *BIRTH RIGHTS*

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The law is no stranger to reproductive exceptionalism—the idea that reproduction is unique and that its uniqueness justifies laws that treat reproduction differently from other kinds of human behavior. In *Birth Rights and Wrongs: How Medicine and Technology Are Remaking Reproduction and the Law*,[1] Professor Dov Fox takes aim at reproductive exceptionalism in the law of tort, which, Fox argues, fails to remedy reproductive harm on the mistaken belief that reproductive harm is different in kind from the sort of harm that tort law ordinarily captures. Like all good scholarship, *Birth Rights* raises questions that scholars will—and should—debate for years, including this one: Does *Birth Rights* run the risk of repeating the very error that it seeks to correct, namely, exceptionalizing reproduction, or at least a certain variety of it?

Part I shows that *Birth Rights* challenges reproductive exceptionalism in the law of tort, much as other scholars have challenged reproductive exceptionalism in the laws of abortion and sex equality. Part II argues that *Birth Rights* reinscribes a different kind of reproductive exceptionalism—even as it challenges another—by arguing for increased legal oversight of alternative but not of sexual reproduction because of presumed differences between the two. Part III questions whether reproductive exceptionalism in this area is descriptively coherent given the similarities between sexual procreation and its so-called alternative form. Part IV concludes by considering what is at stake when proposals for legal reform are framed in ways that assume essential differences between sexual and alternative reproduction.

I. REPRODUCTIVE EXCEPTIONALISM CHALLENGED

Examples of reproductive exceptionalism abound in the law. In abortion law, reproductive exceptionalism is offered as a reason to regulate abortion more stringently than other constitutional rights.[2] In sex-equality law, reproductive

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[1] DOV FOX, BIRTH RIGHTS AND WRONGS: HOW MEDICINE AND TECHNOLOGY ARE REMAKING REPRODUCTION AND THE LAW (2019).

[2] *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851-52 (1992) (plurality opinion) (recognizing that while "[o]ur law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education[,] . . . [a]bortion is a unique act" because of its impact on potential life).

exceptionalism is offered as a reason to justify sex discrimination.[3] In tort law, reproductive exceptionalism is offered as a reason to exempt reproduction from any regulation at all. Other scholars have challenged the first two kinds of reproductive exceptionalism mentioned above,[4] but it is this third kind of reproductive exceptionalism that preoccupies Fox, who argues that tort law mistakenly sees reproductive harm as exceptional and therefore beyond tort law's reach.

The fertility industry has exploded in recent years, and with it story upon story of what Fox refers to as procreation deprived, procreation imposed, and procreation confounded. Fox's taxonomy of reproductive harm is praiseworthy for its breadth, depth, and granularity. Much as Professor Glenn Cohen refined the otherwise monolithic idea of a "right not to procreate" in light of modern reproductive technology,[5] Fox refines the otherwise monolithic idea of "procreative injury" in light of the harms that modern reproductive technology can inflict. Procreative injury, he submits, on its own fails to capture the panoply of interests and injuries at stake when individuals suffer long-lasting harm by the very hands in which they entrust their family planning and reproductive health.

Fox argues that the law has failed to redress these procreative injuries—indeed, has failed to regulate alternative reproduction generally—despite an obvious remedial solution: the law of tort. While Fox at times exaggerates states' failure to regulate alternative reproduction—more on which below—he meticulously summarizes the reasons offered by courts and commentators when rejecting tort law as a solution to the underregulation problem. Those reasons are numerous, but many of them distill to this: reproductive harm is simply too different from the kind of harm that typically falls within tort law's ambit. Some critics of Fox's proposal maintain that procreative injuries constitute "intangible aspirations,"[6] and that tort law is concerned with tangible loss rather than with dashed expectations—including dashed reproductive and familial expectations.[7] Others argue that "reproductive losses" are too "nebulous" and "too arbitrary

[3] *See, e.g.*, Michael M. v. Superior Court, 450 U.S. 464, 471-73 (1981) (upholding sex-specific statutory rape law after recognizing uniqueness of pregnancy); State v. Lilley, 204 A.3d 198, 207 (N.H. 2019) (upholding public nudity ban exempting male but not female breasts by reasoning that "the female body" has unique aspects "intimately associated with the procreative function" (quoting City of Seattle v. Buchanan, 584 P.2d 918, 921 (Wash. 1978) (en banc)).

[4] *See, e.g.*, Courtney Megan Cahill, *The New Maternity*, 133 HARV. L. REV. 2221, 2233-53 (2020); Gillian E. Metzger, *Abortion, Equality, and Administrative Regulation*, 56 EMORY L.J. 865, 898 (2007); Katharine T. Bartlett, Comment, *Pregnancy and the Constitution: The Uniqueness Trap*, 62 CALIF. L. REV. 1532, 1532 (1974).

[5] *See generally* I. Glenn Cohen, *The Constitution and the Rights Not to Procreate*, 60 STAN. L. REV. 1135 (2008).

[6] FOX, *supra* note 1, at 61.

[7] *See id*. at 59.

and prone to abuse,"[8] and that recognizing them would require judges and juries in some cases to do the impossible: "weigh the value of life against the utter void of nonexistence."[9]

Fox's consistent response to these objections is "not so." Reproductive injuries like sperm mix-ups (procreation confounded), embryo freezer malfunctions (reproduction deprived), and botched vasectomies (procreation imposed) "aren't so different from other kinds of intangible harms that judges and juries appraise every day,"[10] he argues. "Courts allow medical malpractice grievances for future risk and disrupted expectations" in other areas, and tort law "redresses certain blocked benefits that injured parties didn't have yet"[11]—as long as those "blocked benefits" are not of the reproductive variety. In addition, "[r]eproductive negligence erodes personal agency and self-determination" in ways that approximate losses for which tort law already permits recovery,[12] and "[i]ndeterminancy and incommensurability complicate remedies for reproductive harms, but not uniquely . . . so."[13] Having made the case for the unexceptionality of reproductive loss, Fox concludes that there is no good reason for tort law to dismiss it.

II. REPRODUCTIVE EXCEPTIONALISM REINSCRIBED

Birth Rights exposes the non-uniqueness of the very thing that tort law insists is exceptional, but then engages in its own form of reproductive exceptionalism in Chapter 5, where Fox argues that tort law should recognize reproductive negligence committed by professionals, but not "otherwise similar transgressions at the hand of intimate partners."[14] Fox recognizes that procreation can be imposed, deprived, and confounded in sexual relationships at least as often as in alternative reproduction.[15] Some partners have removed condoms "without consent."[16] Others have concealed their sterility.[17] Yet others have failed to disclose the presence of an inheritable medical condition.[18]

[8] *Id.* at 68.

[9] *Id.* (internal quotation omitted) (quoting Gleitman v. Cosgrove, 227 A.2d 689, 692 (N.J. 1967)).

[10] *Id.* at 87.

[11] *Id.* at 64.

[12] *Id.* at 62.

[13] *Id.* at 69; *see also id.* at 115 (arguing that claims that reproductive losses are too elusive to quantify fails to account for fact that "these challenges aren't all that different from similar ones that courts manage to figure out and move on from all the time when they award damages for tentative losses like future income, or amorphous ones like pain and suffering").

[14] *Id.* at 77.

[15] Indeed, reproductive losses are likely far more common in sexual than in alternative reproduction given that most reproduction falls into the first category.

[16] *Id.* at 78.

[17] *Id.*

[18] *Id.*

Nevertheless, Fox excludes "lovers who lie"[19] from his proposal, and supports the law's refusal "to enforce bedroom vows"[20] on the ground that sexual and alternative reproduction differ in this essential sense: "Intimate partners don't owe each other a formal kind of obligation of the kind that medical specialists do to those they serve."[21] Unlike "sperm bank operators, fertility doctors, and OB/GYNs," he says, intimate partners do not "breach any duty of reproductive care" when they deceive (or are negligent) with each other in matters pertaining to reproduction.[22]

Fox's reliance on the duty/non-duty distinction to distinguish between alternative reproductive harm (redressible) and sexual reproductive harm (not redressible) is brief—and incomplete. Of course, intimates *do* have duties toward each other, even if they do not currently have a "duty of reproductive care." Tort law allows intimates to sue each other for assault, battery, and the communication of sexual diseases, among other injuries.[23] In addition, marriage law has traditionally imposed duties on spouses, including sexual duties, even if courts have been loath to enforce them directly.[24]

But even if it were true that the law imposes no "bedroom duties" on intimates or that "bedroom duties" were so unlike patient/doctor duties as to defy comparison, one wonders why. That is, simply recognizing that the law generally fails to impose duties on intimates in the realm of reproduction begs the question as to why that might be so.

Birth Rights says little about this topic, but Fox has elsewhere suggested that sexual and alternative reproduction differ enough *in fact* to justify different treatment in law—including, presumably, in tort law.[25] For instance, Fox has suggested that constitutional law might apply different standards to sexual and alternative reproduction because the latter is ostensibly less intimate and less private than the former. "Constitutionally protected interests in romantic intimacy may . . . lose some of their purchase when procreation moves from

[19] *Id.* at 77.

[20] *Id.* at 79.

[21] *Id.*

[22] *Id.*

[23] *Id.* (recognizing that "courts don't hesitate to impose liability on people who fail to disclose known risks of sexually transmitting diseases like herpes or genital warts"); *see also* JILL ELAINE HASDAY, INTIMATE LIES AND THE LAW 214 (2019) (recognizing that "[m]arriage no longer immunizes people from the reach of tort law"). Hasday's book, published the same year as *Birth Rights*, exhaustively reviews and criticizes the law's refusal to hold intimates liable in tort for deception, including procreative deception.

[24] *See* Twila L. Perry, *The "Essentials of Marriage": Reconsidering the Duty of Support and Services*, 15 YALE J.L. & FEMINISM 1, 8-15 (2003).

[25] *See, e.g.*, Dov Fox, *Choosing Your Child's Race*, 22 HASTINGS WOMEN'S L.J. 3, 10-11 (2011); Dov Fox, *Reproductive Negligence*, 117 COLUM. L. REV. 149, 157 n.47 (2017) [hereinafter Fox, *Reproductive Negligence*]; Dov Fox, Note, *Racial Classification in Assisted Reproduction*, 118 YALE L.J. 1844, 1882-83 (2009).

bedroom to laboratory,"[26] Fox has argued, and the "involvement of reproductive practitioners, donors, or surrogates might . . . give some reason to think that the interests associated with the intimacy involved are implicated differently in assisted reproduction than in sexual reproduction."[27]

Other scholars have also endorsed this view, arguing for intrusive state interventions of alternative but not of sexual reproduction on the ground that the two "are, in fact, different, and different enough to satisfy any level of constitutional scrutiny."[28] On this account, the state is free to regulate alternative reproduction in ways from which sexual reproduction is exempt because alternative reproduction "require[s] the involvement of someone outside the family, a third party who is not within the protected sphere of sexually intimate conduct."[29]

If privacy and intimacy are doing the work to distinguish between sexual and alternative reproduction for constitutional purposes, they might be doing the work in *Birth Rights* to distinguish between sexual and alternative reproduction for tort purposes. That is, Fox's argument elsewhere that sexual and alternative reproduction have distinctive and unique traits that support their differential treatment in constitutional law might explain why *Birth Rights* supports their differential treatment in tort law. But if that is right, then *Birth Rights* appears to subscribe to one kind of reproductive exceptionalism even as it dismantles another. While it pushes against the idea that reproductive and non-reproductive losses are characteristically and therefore legally distinct, it embraces the idea that sexual and non-sexual reproduction are characteristically and therefore legally distinct.[30]

III. UNSETTLING THE SEX/NON-SEX BINARY

One might respond at this point that *Birth Rights*'s distinction between sexual and alternative reproduction for tort purposes, unlike the law's distinction between reproductive and non-reproductive losses for tort purposes, is defensible because sexual and alternative reproduction are, in fact, different. While it makes little sense to treat reproductive and non-reproductive losses differently given their similarities, it makes a lot of sense to treat sexual and alternative reproduction (in and beyond tort) differently given their differences. On this view, the kind of reproductive exceptionalism to which *Birth Rights* subscribes is perfectly reasonable, required even.

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[26] *See* Fox, *Reproductive Negligence*, *supra* note 25, at 157 n.47.

[27] *Id.*

[28] Naomi Cahn, *Do Tell! The Rights of Donor-Conceived Offspring*, 42 HOFSTRA L. REV. 1077, 1106 (2014).

[29] *Id.*

[30] In this, *Birth Rights* is by no means alone, as tort law regularly takes "for granted" that the same duties and rules that apply to non-intimate relationships do (and should) not apply to intimate partners. *See* HASDAY, *supra* note 23, at 137.

In prior articles, I have questioned the descriptive coherence of this variety of reproductive exceptionalism, arguing that sexual and alternative reproduction are more alike than the sex/non-sex binary presupposes.[31] Commentators have justified differential treatment of sexual and alternative reproduction on the ground that the former, unlike the latter, is intimate, private, and non-commercial.[32] But those sorts of arguments overlook the factual similarities between sexual and non-sexual reproduction—including the facts that alternative reproduction often is private, intimate, and non-commercial,[33] and sexual reproduction often is not.[34]

In addition, the law *has* regulated alternative reproduction more than *Birth Rights* suggests, and one way that it has done so is by imposing the norms and ideals surrounding sexual reproduction onto alternative reproduction.[35] Take, for instance, some states' requirement that the intended parents to a surrogacy agreement bear a genetic relationship to the child for the surrogacy agreement to be valid.[36] As with other regulations of alternative reproduction, the genetic relatedness requirement for surrogacy agreements appears to be using sexual reproduction as the norm or paradigm for alternative reproduction. On this reading, sexual reproduction—or what I have called *imagined* or *idealized* sexual reproduction—is the benchmark for laws that regulate alternative reproduction.[37] One problem with this kind of regulation is that it molds alternative reproduction to conform to norms surrounding sexual procreation but many times exempts sexual procreation from those same norms.

Viewed in this light, sexual and alternative reproduction are less exceptional vis-à-vis each other than large swathes of the law—including legal reform efforts like *Birth Rights*—assumes. *Birth Rights* faults tort law for treating two similar things (reproductive and non-reproductive losses) differently, but itself does the same.

CONCLUSION: FRAMING LEGAL REFORM

This review is agnostic on *Birth Rights*'s proposal that the law recognize a duty of reproductive care. It takes issue, however, with the way in which Fox frames that proposal by drawing a distinction between sexual and alternative reproduction and by limiting a duty of care to the latter. Its principal contention

[31] *See, e.g.*, Courtney Megan Cahill, *After Sex*, 97 NEB. L. REV. 1, 52-63 (2018) [hereinafter Cahill, *After Sex*]; Courtney Megan Cahill, *Reproduction Reconceived*, 101 MINN. L. REV. 617, 655-71 (2016) [hereinafter Cahill, *Reproduction Reconceived*].

[32] For a summary of these arguments, see Cahill, *Reproduction Reconceived*, *supra* note 31, at 638-42.

[33] *See id.*

[34] *See id.*

[35] *See generally* Cahill, *After Sex*, *supra* note 31.

[36] *See id.* at 30.

[37] *See id.* at 20-26 (defining and describing this phenomenon as "sexual supremacy" in law of alternative reproduction).

has been that *Birth Rights* engages in one kind of reproductive exceptionalism even as it criticizes another. In concluding, I would like briefly to consider what is at stake when regulatory proposals assume that the law can turn on what procreation looks like and on who is engaging in it.

The law has long relied on procreative method as a reason to discriminate on the basis of sexual orientation and nontraditional family formation. Consider just two examples. Before marriage for same-sex couples was constitutionalized in the 2015 decision *Obergefell v. Hodges*,[38] courts around the country upheld same-sex marriage restrictions by drawing a distinction between sexual and alternative reproduction, reasoning that marriage was linked not just to procreation but to sexual procreation specifically.[39] According to that argument, which persisted for years, same-sex couples did not need the protections that marriage affords because of the way in which they reproduced, namely, through alternative reproductive methods like artificial insemination and surrogacy.

More recently, the State Department has refused to treat the children of married same-sex couples born overseas equally to the children of married opposite-sex couples born overseas because of the manner in which each group presumptively reproduces.[40] The Department has applied a sexual procreative presumption to the children of opposite-sex couples but not to the children of same-sex couples—a presumption that makes United States citizenship automatic for the children of sexual (heterosexual) procreators but not for the children of alternative (nonheterosexual) procreators. As it once did with marriage, the government today justifies discrimination against sexual minorities and non-traditional families in the law of citizenship by drawing a distinction between sexual and alternative reproduction.

To be clear, this review is not suggesting that *Birth Rights* draws distinctions that reflect the kind of discrimination just described. To the contrary, *Birth Rights* supports and celebrates alternative reproduction for sexual minorities and non-traditional families, opening and closing with the stories of reproductive injury suffered by same-sex couples and featuring many more in between. This review's concern, rather, is whether calls for regulatory reform of alternative reproduction—even calls as thoughtful as Fox's—will perpetuate the idea that sexual and alternative reproduction are essentially different, exacerbating existing inequalities between those two modes of procreation and the people who use them.

[38] 576 U.S. 644 (2015).

[39] *See* Courtney Megan Cahill, *The Genuine Article: A Subversive Economic Perspective on the Law's Procreationist Vision of Marriage*, 64 WASH. & LEE L. REV. 393, 401-10 (2007) (summarizing these arguments).

[40] For a description of the policy, see Dvash-Banks v. Pompeo, No. 18-cv-00523, 2019 WL 911799, at *1-2 (C.D. Cal. Feb. 21, 2019).