BIRTH RIGHTS AND WRONGS: REPLY TO CRITICS

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The pandemic hasn't spared reproductive freedom. School closures and clinic restrictions make birth control and fertility treatment harder to get, while new regulations put abortion, surrogacy, and genetic testing out of reach for many in need.[1] *Birth Rights and Wrongs*[2] charts the landscape of harms like these and hundreds of other less familiar ones scattered across American jurisprudence—from lab accidents to contraceptive sabotage. I mine this cross-cutting body of law and organize it into three discrete categories. Some cases, like botched vasectomies, *impose* unwanted pregnancy. Others *deprive* people of the baby they long for—take the recent spate of IVF freezer meltdowns. Lastly are the examples involving donor mix-ups that *confound* parents' hopes for a baby born free of disease or one who shares their DNA. The book traces a moral culture and political economy that resists meaningful regulation of the shoddy practices that leave couples with empty cradles or turn them into parents against their will. Reproductive injuries like these can upend people's core identities and lived experiences. Yet they fall through the cracks of available contract, property, and tort protections in the United States. The Tennessee Supreme Court summed things up in a 2015 case, explaining that the "law does not recognize disruption of family planning either as an independent cause of action or element of damages."[3]

When reproduction goes awry, courts almost always let doctors, pharmacists, and sperm banks off the hook. Even when there's no question that the defendant is at fault, judges are rarely willing to grant that the plaintiff was harmed. Some say: Babies are blessings. Others insist: You can't always get what you want. Or: No physical intrusion? No property loss? No damages. And: It'd open the floodgates to fraud.[4] The result is a legal system resigned to treat these

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[1] *Cf.* Melissa S. Kearney & Phillip Levine, *Half a Million Fewer Children? The Coming COVID Baby Bust*, BROOKINGS INST. (June 15, 2020), https://www.brookings.edu/research/half-a-million-fewer-children-the-coming-covid-baby-bust/ [https://perma.cc/J798-WB72] (predicting that economic recession associated with spread of coronavirus could dramatically reduce birthrates in United States and around the world).

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

[3] Rye v. Women's Care Ctr. of Memphis, MPLLC, 477 S.W.3d 235, 238-39, 271-72 (Tenn. 2015).

[4] For discussion of a similar but distinct objection, see Gregory C. Keating, *Response to Fox: Impaired Conditions, Frustrated Expectations, and the Law of Torts*, 117 COLUM. L.

transgressions as inevitable or natural, and at any rate unworthy of recognition or remedy.

Birth Rights and Wrongs diagnoses this problem and tries to solve it. The book introduces actions for "procreation imposed," "procreation deprived," and "procreation confounded"—each with its own liabilities, defenses, and implications for doctrine and policy. It also details sound measures to evaluate the severity of these reproductive harms and translate them into hard-and-fast dollar awards.[5] I'm grateful to the *Boston University Law Review* for bringing together such an exceptional and diverse panel of scholars to wrestle with these ideas.[6] I owe a debt to Professors Appleton, Cahill, Dolgin, Robertson, and Ziegler for their critical engagement and searching insights. Each appraises the book from a unique and rich lens: philosophy, sociology, politics, economics, and history. I'm humbled by what good they find in the book. My reply here will focus on their challenges—sometimes by clarifying the themes I'd developed; other times by taking this occasion to revise or elaborate on them.

I begin with three animating principles to vindicate the reproductive interests that existing U.S. law fails to protect. The first is to affirm the meaning and significance of those interests in this far-reaching domain of life. Another is to advance equal standing for people who are already disadvantaged by their need for help to pursue or avoid parenthood. The most obvious reason is to reduce the incidence of reproductive wrongdoing. That's not my chief goal; but trying to prevent harmful misconduct certainly matters too.[7] So Chris Robertson does well to ask how (or even whether) adopting my proposed remedies will stop procreation from being wrongfully imposed, deprived, or confounded. He is skeptical these tort actions will deter such offenses.

> The current empirical literature comparing states with higher and lower levels of malpractice liability . . . suggests that higher liability exposure may be associated with only small, or perhaps no, improvements in patient safety. That may be explained in part by the ubiquity of malpractice insurance and by . . . a diffuse defensive medicine . . . uncalibrated to the precise level of risk that [doctors] actually face in their jurisdiction.[8]

In the absence of reliable data, I can't say how effectively my procreation rights would ward off avoidable mistakes—or have the unwelcome effect of

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REV. ONLINE 212, 214 (2017), https://columbialawreview.org/wp-content/uploads/2017/10/Keating_Impaired-Conditions-1.pdf [https://perma.cc/Q8M5-YJFE] (arguing that ways in which "reproductive negligence interferes with its victims' pursuit of their projects differs from the interferences with which tort law is characteristically concerned").

[5] *See* FOX, *supra* note 2, at 87-98.

[6] In the throes of social upheaval, quarantine orders, and remote teaching, no less.

[7] *Id.* at 84 ("Fewer errors—as long as they didn't come at too great an expense to basic access of reproductive care—would certainly be a welcome byproduct of remedies for reproductive negligence. But that's not their main point.").

[8] Christopher Robertson, *Is Tort Law the Tool for Fixing Reproductive Wrongs?*, 100 B.U. L. REV. ONLINE 143, 146 (2020) (footnote omitted).

discouraging specialists from providing valuable reproductive services. Besides, the cost of payouts to negligence victims would be passed along to others who require medical assistance to avoid pregnancy or pursue parenthood. Even the fear of big damage awards could invite health care professionals to implement gratuitous safeguards that drive up prices and cut back access for people who can't afford it. These limits and trade-offs are real.[9] On the other hand, at least tort relief spreads these losses more widely, rather than simply concentrating them all on the shoulders of injured parties. After-the-fact liability has three other things going for it too. First, individual plaintiffs are motivated to get justice. Ad-hoc juries are also immune to partisan or administrative capture. And high-profile verdicts can be a catalyst that spurs further action by alerting society and its political leaders to the need for structural change.[10] More than this sketch is needed, however, to conclude the torts that I advance are preferable to three other responses that Robertson suggests: regulation, insurance, and contracts. The question is a comparative one: Would those institutions do a better job, on balance, at minimizing errors, maximizing access, and promoting innovation?

First is regulatory oversight—not just voluntary industry guidelines but government-enforced rules. I agree with Robertson on this much: Rules that "revoke the license of a [badly behaving] reproductive services provider, or even brand it as rogue in the market, might have a greater deterrent effect than tort liability."[11] The special powers that lawmakers have to investigate facts, hold hearings, and consult experts equip them better than courts to analyze the relative merits of incremental precautions. This is indeed a problem that deserves the attention of legislatures and agencies. The stakes are high—more than a quarter of American women use some form of long-term contraception, while one in every fifty kids born in the United States today is conceived in a fertility clinic or petri dish.[12] And yet oversight has long remained shockingly low.[13] Robertson alludes to this regulatory vacuum in his closing thoughts.[14] Barber shops, granola bars—pretty much every other service or product you can think of is better regulated. It's been that way since the invention of test tube babies

[9] *See* FOX, *supra* note 2, at 70-71.

[10] *See id.* at 57-58.

[11] Robertson, *supra* note 8, at 146.

[12] *See Contraceptive Use*, CTRS. FOR DISEASE CONTROL & PREVENTION: NAT'L CTR. FOR HEALTH STATISTICS (Mar. 21, 2019), http://www.cdc.gov/nchs/fastats/contraceptive.htm [https://perma.cc/6TQY-633B]; Saswati Sunderam et al., *Assisted Reproductive Technology Surveillance—United States, 2015*, MORBIDITY & MORTALITY WKLY. REP, Feb. 16, 2018, at 1, https://www.cdc.gov/mmwr/volumes/67/ss/pdfs/ss6703-H.pdf [https://perma.cc/WAX2-FT69].

[13] *See* FOX, *supra* note 2, at 26-28.

[14] Robertson, *supra* note 8, at 147.

in the late 1970s.[15] Other developed countries closely regulate reproductive advances and the risks of providing them without due care.[16] But in the United States, this brave new world was coming on the heels of the abortion wars around *Roe v. Wade*.[17] Sterilization, surrogacy, and embryo selection waded into even murkier ideological terrain, sparking hard new questions—questions that cut across partisan divides—about when life begins, and what makes a family.[18] So lawmakers threw up their hands while lobbying forces subvert periodic calls for Congress, the FDA, or state governments to regulate.[19]

Robertson asks why private insurance hasn't rushed in to fill the void.[20] It's true that hospitals and physicians carry coverage for adverse outcomes in most areas of medicine. But fertility is different. It isn't just that carriers shy away from exposure to the high costs and moral hazard that typify reproductive care.[21] Consumers would have to demand a system of insurance in the first place; pressure for its development would in turn require that doctors see the benefit of buying protection against reproductive negligence. But to find that worthwhile, they'd have to know something about the probability of preventable human error in these endeavors: they'd need this information. Yet there's no system of warnings, disclosures, or disclaimers about adverse reproductive events in the United States.[22] The absence of any such reporting mandate or monitoring regime makes it difficult for people to acquire the information necessary to agitate for new forms of regulation and insurance alike.[23] This lack of reliable

[15] *See* FOX, *supra* note 2, at ix, 25, 29 (explaining how free-market origins of infertility treatment continue to insulate it from funding-associated surveillance that federal government usually conducts over medical research).

[16] *See id.* at 6, 44.

[17] 410 U.S. 113 (1973).

[18] These tensions obscure the electoral risks of regulating reproductive negligence, even in jurisdictions that are reliably Republican or Democrat. For example, progressive feminists go up against the disability-rights advocates they usually agree with when it comes to abortion protections related to fetal misdiagnosis of genetic abnormality. Bungled IVF, meanwhile, fragments much of the conservative coalition that celebrates the blessing of having children, especially for straight married couples. *See* FOX, *supra* note 2, at 25, 29-30.

[19] *See id.* at 25-26; *see also, e.g.*, 138 CONG. REC. 8211 (1992) (statement of Rep. Ron Wyden) ("[S]everal members and staff from professional societies and consumer groups worked hard with me to perfect this legislation over the past several weeks, particularly [members] of the American Fertility Society."); Dov Fox, *Safety, Efficacy, and Authenticity: The Gap Between Ethics and Law in FDA Decisionmaking*, 2005 MICH. ST. L. REV. 1135, 1142-43, 1193-96.

[20] Robertson, *supra* note 8, at 145.

[21] *See* FOX, *supra* note 2, at 71 (explaining that insurers call it a "triple risk activity" that can harm not just the patient, but a partner and offspring too, any of whom could pursue claims for non-economic harms atop any medical bills or lost wages).

[22] *See id.* at 28.

[23] *See id.* at 30-31.

measures to track, collect, and register comprehensive data about reproductive injuries also hamstrings Robertson's final alternative: enforced bargains.

Robertson observes that patients engage directly with the facilities and clinics with whom they sign agreements about treatment for (in)fertility. He wonders whether this interface "makes contract law arguably a better fit than tort law."[24] This regime would let both sides negotiate for the things they want, and hold each other to the terms of their arrangement. In theory, providers of the same reproductive service could adjust their prices according to the quality assurances they offer. Robertson paints a picture of what this market in liquidated damages might look like:

> Suppose one urologist says, "If I negligently perform your vasectomy, and it causes you to someday become an involuntary father, I will not even refund the costs of the procedure," but another urologist says, "I'll refund my fee," while a third offers a fee refund plus $150,000, if the worst-case scenario materializes. The consumer might take such a commitment as a sign of quality. And, even better, if he chose the provider with a substantial contingency payment, the contract might deter that provider from being negligent.[25]

If this sounds far-fetched, it's because doctors today almost never make these kinds of promises about particular outcomes.[26] In every other field, tort law imposes professional standards on health care specialists, whether they agree to them or not. That's why malpractice protections don't require patients to secure assurances for competent care.[27] Even if comparison shopping were to pop up in the reproductive sphere, there's still information asymmetry about the risks of injury and optimism bias about one's own chance of being harmed.[28] Then there's contract law's "cramped conception of damages, which generally excludes emotional harm."[29] A final obstacle that Robertson picks up on from the book is how "providers of reproductive services now exploit the contractual setting to demand waivers providing them complete immunity, and even indemnification."[30] Unless these conditions change, I remain doubtful that courts could suitably resolve reproductive malfeasance purely as a matter of broken promises.

Other critics shy away from the transactional-style approach to righting reproductive wrongs. Janet Dolgin is wary of policing procreation—not because it could limit *who* gets to form families, and *how*—but when it sounds in the

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[24] Robertson, *supra* note 8, at 146.

[25] *Id.*

[26] *See* FOX, *supra* note 2, at 37-38.

[27] *See id.* at 40-42; *see also id.* at 56-57 (discussing evolution of products liability law from contract to torts).

[28] *See* Robertson, *supra* note 8, at 146.

[29] *Id.*

[30] *Id.*

register of dollars and cents. Dolgin worries about how haggling over consumer prices and jury awards could creep into the way that people think about making babies. It's unnerving enough, she believes, when parents pay for egg donors or embryo testing in the hope of having a kid who's smart or attractive. Even when these exchanges work out as intended, Dolgin argues they signal a "readiness to define the creation . . . of the parent-child relationship through marketplace values" that imperils "interaction within families, specific relationships, and understandings of personhood."[31] At least that can be chalked up to idiosyncratic family preferences, she says; it's another thing altogether, in her view, to declare frustrated expectations for a child with a high IQ or good looks a harm worthy of redress. These are people who wanted a child, after all, and got one—a child who makes their lives better. So what are they complaining about?[32]

I see what Dolgin is saying. Part of being a parent is being open to the unexpected and accepting the child you get, no matter what. But is there *anything* that's okay to want in a potential kid you don't yet have? And if so, is it limited to ten fingers, ten toes? What about good looks? Or perfect pitch? At what point does it cross a line from wanting the best for the kid you'll have, to designing a baby to suit your tastes?[33] Dolgin expresses "ambivalence and uncertainty" that paying for a child of a particular type could leave families "diminished, despite parents' presumptive love for any child" they have "whether or not the child satisfie[s] the couple's pre-conception wishes" to have one who is "tall and smart," for example.[34] Dolgin's fear that market choice and control will crowd out parental love no doubt resonates with many people. I sympathize with this disquiet.[35] But it reflects a contested vision of family life—and it isn't unreasonable for people to think that parental love is resilient enough to allow for offspring selection before birth.[36] Even if it *were* wrong to pick and

[31] Janet Dolgin, *Response to* Birth Rights and Wrongs, 100 B.U. L. REV. ONLINE 139, 140 (2020).

[32] *See id.* at 141-42.

[33] These are indeed questions I have examined in my own work. *See, e.g.*, Dov Fox, *Interest Creep*, 82 GEO. WASH. L. REV. 273, 333-34 (2014); Dov Fox, *Parental Attention Deficit Disorder*, 25 J. APPLIED PHIL. 246, 249-50, 257-58 (2008) (arguing that parental love for a prospective child is less about pre-conception wishes than that she "comes to occupy that special role within the parent-child relationship, regardless of whether or not the child's attributes are ones that the parents ever wished for").

[34] Dolgin, *supra* note 31, at 140-41.

[35] *See, e.g.*, Dov Fox, *Silver Spoons and Golden Genes: Genetic Engineering and the Egalitarian Ethos*, 33 AM. J.L. & MED. 567, 570-71, 578-79 (2007); *see also* Dov Fox, *Paying for Particulars in People-to-Be: Commercialisation, Commodification and Commensurability in Human Reproduction*, 34 J. MED. ETHICS 162, 165-66 (2008) (making case that trait-stratified market in sperm, eggs, and embryos "reduces offspring characteristics to a scalar metric . . . of fungible value" that becomes "exchangeable, tradable, and rankable").

[36] *See* Dov Fox, *Reproductive Negligence*, 117 COLUM. L. REV. 149, 231-33 (2017).

choose kids for high IQ and stature, that wouldn't mean you assume the risk of having your doctor negligently block those efforts.[37]

Susan Frelich Appleton is troubled by more than *Gattaca*-style quality control over offspring.[38] Her concern runs deeper. Appleton resists my compensation scheme for frustrated efforts to choose a child who is healthy or genetically related, let alone the nominal remedies I'd allow in cases involving racial matching or sex selection. She thinks redressing blocked efforts imparts implicit approval of stubborn biases. Even worse, she says, authorizing those claims would endorse entrenched inequalities that drive people to want a certain kind of kid in the first place. Appleton maintains that compensating parents who try to select for race or sex would "simply concede 'the social tax of being Black in America' or the assumptions that parents might associate with gender,"[39] rather than "seek[ing] ways to dismantle structural racism and entrenched gender stereotypes, no matter how heavy a lift."[40] Appleton likewise decries damages for thwarted attempts to choose heredity and health. When it comes to negligence that disrupts people's attraction to "the allure of genetic affinity,"[41] she would refuse awards to "challenge the outsize significance of biology 'in American family life and law.'"[42] And for foiled efforts to have a child free of disability: "[W]hy not call for a world in which attitudes, preferences, and state supports could be different?"[43]

I'm not sure whether to take Appleton's critique as a frontal rebuke or friendly amendment. I share her commitment to social and economic conditions that let people "to choose parenthood, to have healthy pregnancies and births, and to rear one's children in a safe environment with good housing and educational opportunities."[44] That is why the book argues that

> the greatest value of family planning has less to do with choices than consequences. More important than reproductive autonomy is how making these decisions helps a person live well. Procreation matters most for its practical impact on the person's health, education, employment, social standing, intimate relationships, and other critical features of well-being.[45]

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[37] *See* Dov Fox, *Making Things Right When Reproductive Medicine Goes Wrong: Reply to Robert Rabin, Carol Sanger, and Gregory Keating*, 118 COLUM. L. REV. ONLINE 94, 104-08 (2018), https://columbialawreview.org/wp-content/uploads/2018/04/Fox_Making-Things-Right-When-Reproductive-Medicine-Goes-Wrong.pdf [https://perma.cc/8PRG-Q6LQ].

[38] Susan Frelich Appleton, *Accountability, Eugenics, and Reproductive Justice*, 100 B.U. L. REV. ONLINE 134, 138 (2020).

[39] *Id.* (footnote omitted) (quoting FOX, *supra* note 2, at 157).

[40] *Id.* (footnote omitted).

[41] *Id.* at 137 (quoting FOX, *supra* note 2, at 110).

[42] *Id.* at 137 (quoting FOX, *supra* note 2, at 111).

[43] *Id.* at 138.

[44] *Id.* at 136.

[45] FOX, *supra* note 2, at 15.

This conviction is why I'd reform social norms and institutions to accommodate the diversity of human variation.[46] It's what leads me "to blunt the expressive sting of judicial insults" by framing remedies in ways that don't "trade on dubious assumptions" about people's differences or risk implying "their very existence amounts to a legal harm."[47] That conviction is also why for mix-ups where race is salient, I propose to "limit[] recovery, with explicit caveats" designed to blur hierarchies and "affirm[] the worth" of disfavored groups.[48] Still, Appleton says I don't take these risks seriously enough. She doesn't abide even the baseline remedies I'd provide for the wrongful confounding of prenatal interests in selecting for non-medical characteristics.[49] This is where she and I part ways. Closing the courthouse door to plaintiffs whose age, health, or sexual orientation left them unable to realize their plans on their own only exacerbates that reproductive disadvantage. You can frown on attempts to choose *this* donor or *that* embryo but still protect those choices—however regrettable—against unauthorized obstruction. I stand with Appleton squarely on the side of reproductive justice; but I wouldn't sacrifice civil justice on its altar.

Mary Ziegler is on board with my proposal that courts remedy deprived, imposed, and confounded procreation—in the same way that they recognized new rights of privacy in the early twentieth century.[50] But she doubts these changes are likely to be adopted when it comes to reproductive rights. Ziegler argues I have "underestimated the obstacles to reform" in the face of modern abortion politics.[51] The book doesn't ignore this context. I mapped the history of tort actions for prenatal malpractice, from the time those lawsuits "gained traction after the U.S. Supreme Court legalized abortion in 1973" until half the states banned so-called wrongful birth suits.[52] What I missed is Ziegler's alertness to how the pro-life movement has "increasingly depended on the stigmatization of [claims for] procreation confounded."[53] Her analysis reveals that after antiabortion groups were forced to abandon a personhood amendment in the 1980s, they doubled down on contentions that "*Roe* recognized only a right to end pregnancies for socially acceptable reasons" like rape, incest, or threats to a woman's health.[54] The reach of the resulting restrictions play out to this day. Remember those wrongful birth laws, designed to bar civil remedies for fetal misdiagnosis? Now, federal circuit and state supreme courts across the

[46] *See id.* at 148-51, 153-59.

[47] *Id.* at 142-43.

[48] *Id.* at 160. For discussion, see Dov Fox, *Race Sorting in Family Formation*, 49 FAMILY L.Q. 55, 66-71 (2015).

[49] *See* Appleton, *supra* note 38, at 136.

[50] FOX, *supra* note 2, at 74.

[51] Mary Ziegler, *Birth Rights at War*, 100 B.U. L. REV. ONLINE 148, 148 (2020).

[52] FOX, *supra* note 2, at 43.

[53] Ziegler, *supra* note 51, at 150.

[54] *Id.* at 149.

country are weighing whether these malpractice carve-outs foreclose suits for misconduct that takes place prior to conception—for example, when a fertility clinic implants a strangers' embryos or when a sperm bank negligently fails to disclose a donor's heritable disease.[55]

Ziegler also spotlights how efforts to "stigmatize parental preferences for a particular kind of offspring" figure centrally in laws that prohibit abortions on the basis of presumed traits about the fetus that would become a baby.[56] She underscores the U.S. Supreme Court decision in *Box v. Planned Parenthood of Indiana & Kentucky, Inc.*,[57] handed down just as *Birth Rights and Wrongs* was coming out. The law at issue in that case made it a crime to end a pregnancy, even at its earliest stages, if the main reason has to do with the expected child's sex, race, or disability. The Seventh Circuit struck down that provision as an "undue burden" on a woman's right to terminate her pregnancy.[58] On appeal, a seven-justice majority of the Supreme Court declined to register any view on the merits, punting that constitutional question until other lower courts had a chance to weigh in.[59] Justice Clarence Thomas wrote a twenty-page concurrence, pressing states to enact similar bans—and a future Court majority to sustain them—lest it "constitutionalize the views of the 20th-century eugenics movement" by letting "prenatal screening tests and other technologies" become a "disturbingly effective tool" to "eliminate children with unwanted characteristics."[60] Ziegler sees his concurring opinion as evidence of the opposition ready to greet my proposed protection of parental interests in trying to have a kid of a certain type—whether healthy, genetically related, or otherwise.[61] The right I advance against confounded procreation could indeed provoke the resistance that Ziegler predicts. But unelected judges and unnamed juries might be willing to move the law in directions that is unrealistic to expect from other decisionmakers who are more beholden to the voters. Even if jurists feel this pressure too, new ways of thinking and talking about reproductive

[55] *See, e.g.*, Doherty v. Merck & Co., 892 F.3d 493, 495 (1st Cir. 2018); Simms v. United States, 839 F.3d 364, 366 (4th Cir. 2016); *see also* Oral Argument at 38:55, Norman v. Xytex Corp., No. S19G1486 (Ga. argued May 21, 2020), https://www.gasupreme.us/watch/oa-05-21-2020/ [https://perma.cc/XAK6-LZKW] ("Just to be clear, what you're asserting: a sperm bank can completely misrepresent everything about the sperm it's selling and charge whatever amount of money based on those representations and completely lie to every customer it has. And nobody can do a thing about it?"); *see id*. at 39:15 ("I think we're looking at the value of the child and that is a traditional wrongful birth type situation.").

[56] Ziegler, *supra* note 51, at 150.

[57] 139 S. Ct. 1780 (2019) (per curiam).

[58] Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of Ind. State Dep't of Health, 888 F.3d 300 (7th Cir. 2018).

[59] *Box,* 139 S. Ct at 1781-82.

[60] *Id*. at 1784, 1790, 1792 (Thomas, J., concurring).

[61] Ziegler, *supra* note 51, at 150.

interests can still help to set the terms of discourse about which kinds are legitimate and worth fighting to preserve.

Ziegler isn't the only commentator who discerns parallels to Justice Thomas's concurring opinion in *Box*. Appleton too connected themes from the book to his defense of the selective abortion ban that is likely to see another day in Court. Her analysis bears replicating at length:

> Just as Fox's book does, this opinion recalled the history of eugenics in America, including the Supreme Court's 1927 decision upholding the application of compulsory sterilization laws. But then, Justice Thomas veered out of his way to blur distinctions that Fox seeks to emphasize—not only between involuntary and voluntary limits on reproduction but also between contraception and abortion and between the types of restrictions that the Court has previously invalidated and those it has permitted. . . .
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> The contrast in the two approaches could not be sharper. Fox grapples, as he must, with the impact of the earlier eugenics movement on what we think today should be a "birth right" and a "birth wrong." He displays sensitivity, nuance, and modesty in addressing questions of disability and race, as well as culture and gender. He carefully considers counterarguments, but adheres to his bottom line of accountability. Justice Thomas, all blunderbuss, pulled no such punches. His opinion exploited the eugenics movement to expound on an issue he admitted did not need resolution now, while ignoring conspicuous distinctions and, in effect, prioritizing provocation over thoughtful reasoning.
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> Despite how Fox's approach diverges from Justice Thomas's when it comes to eugenics, the two share a common shortcoming. Both pay inadequate attention to . . . [how] society, including culture and law, shape individual and family decisionmaking. . . . [T]hat is, how factors like health, education, [and] employment . . . often determine how one will exercise reproductive autonomy . . . [in ways that] should at least prompt skepticism about whether what Fox calls "voluntary, individualistic, and state-neutral" reproductive choices can fully live up to those adjectives.[62]

I appreciate the generous ways in which Appleton distinguishes my approach. But the partial comparison she draws toward the end of this passage surprises me. Justice Thomas cherry-picks facts to make unsubstantiated claims about modern-day Black genocide, "widespread sex-selective abortions," and the two-thirds of pregnancies terminated following a diagnosis of Down syndrome.[63] I try to place the best available data in the relevant context, for example, when most women turn to abortion in response to unplanned pregnancy. I find no reliable evidence that Black women are any different, as Justice Thomas suggests—whether trying to keep Black children from being born or being

[62] Appleton, *supra* note 38, at 135-38 (footnotes omitted) (quoting FOX, *supra* note 2, at 162).

[63] *Box,* 139 S. Ct. at 1784, 1791 (Thomas, J., concurring).

unwittingly manipulated to have abortions against their will.[64] I also make clear that sex selection exacerbates alarming patriarchies and gender imbalances in parts of the world where cultural and economic privileges accrue to having sons. These disparities are far less urgent in the United States, where stable sex ratios fall within population norms, and fertility clinics report four out of five sex-selecting parents are trying to have a girl.[65]

Disability selection is different. It's sad and true that systemic ignorance and indifference leads many Americans to see people with disabilities as a burden or tragedy. When would-be parents end otherwise wanted pregnancies on account of fetal anomaly, that practice can be profoundly hurtful to people who have those impairments.[66] But forcing women to give birth isn't the answer to this unfortunate state of affairs. Nor does the influence of underlying biases and bad information make abortion "eugenic" in the pejorative sense that Justice Thomas invokes the term. Our eugenics in the past past denied people control over their lives.[67] When reproductive medicine today is delivered competently, it empowers individuals to do what is right for them: the student who isn't ready to have a baby; the married same-sex couple who desperately want one; or the different-sex couple at risk of passing on a debilitating disorder. Their choices reflect the ways in which society is structured, to be sure, but personal values and circumstances too. For most people who had wanted to have a child but opt against one with a disability, they're not trying to weed out people with that condition, let alone enact some vision to propagate a superior race. They're making heartrending decisions about whether their family has the wherewithal to care well for a child they expect to have significant medical needs. I'd educate them about what it's really like to raise a child with a disability and certainly invest greater resources to make that prospect less daunting.[68] These are measures I assume Appleton supports. But I'd also remedy the wrongful interference with reproductive interests to choose differently nonetheless.

Courtney Cahill criticizes the book from another angle. She doesn't have any inherent issue with my call for tort law to stop singling out reproductive injuries

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[64] *See* FOX, *supra* note 2, at 11, 103-04, 154-57.

[65] *See id*. at 148-49.

[66] *See id*. at 142-43.

[67] Thirty-three states imposed blueprints for what sorts of people there should (not) be—no sick, poor, or disfavored: from "indigents" and "epileptics" to "paupers" and "perverts." Dov Fox*, The Illiberality of 'Liberal Eugenics*,*'* 20 RATIO 1, 2 (2007); *see also* Dov Fox, *Selective Procreation in Public and Private Law*, 64 UCLA L. REV. DISCOURSE 294, 311 (2016). Eugenic appeal swept across the ideological spectrum during this era and didn't spare opponents of reproductive rights. Abortion bans were designed to keep native-born white women from ending their pregnancies amidst fear that immigrants were having more children. As even Justice Thomas recognizes, however, "the preferred solution for many classes of dysgenic individuals" was to forcibly sterilize them, not make them terminate their pregnancies. *Box,* 139 S. Ct. at 1784, 1786 (Thomas, J., concurring).

[68] *See* Dov Fox & Christopher L. Griffin, Jr., *Disability-Selective Abortion and the Americans with Disabilities Act*, 2009 UTAH L. REV. 845, 893.

as non-compensable.[69] Nor does she object to letting plaintiffs pursue actions for procreation deprived, imposed, and confounded in the absence of satisfactory claims under ordinary negligence, informed consent, and emotional distress.[70] Her problem is with how "*Birth Rights* reinscribes" what she sees as its own form of reproductive exceptionalism that treats *alternate* procreation differently from having a kid the old-fashioned way.[71] Cahill objects that my proposed rights apply mainly to lab technicians, pharmacists, and other clinical actors that tort law holds accountable to the people they serve—while exempting non-specialists whose bad acts can deprive, impose, and confound procreation for their intimate partners. Cahill acknowledges that I'd still remedy negligence *victims* whether they reproduce sexually or enlist help from a donor or surrogate. She focuses on the fact that I don't insist courts discipline people who lie to the people they're in relationships with about whether or not they're in fact sterile,[72] using birth control,[73] or pregnant.[74] Cahill explains:

> Fox excludes "lovers who lie" from his proposal, and supports the law's refusal "to enforce bedroom vows" on the ground that . . . "[i]ntimate partners don't owe each other a formal kind of obligation of the kind that medical specialists do to those they serve." Unlike "sperm bank operators, fertility doctors, and OB/GYNs," he says, intimate partners do not "breach any duty of reproductive care" when they deceive . . . each other in matters pertaining to reproduction.[75]

Cahill is dubious about why I consign reproductive (mis)conduct and (mal)practice to scrutiny only when it gets a hand from medicine or technology. She finds my "reliance on the duty/non-duty distinction to distinguish" redressable reproductive injuries from nonredressable ones "brief—and incomplete."[76] Cahill suspects there is something else that moves me to treat these contexts differently. She looks for clues for that ulterior motive in my

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[69] *See* Courtney Megan Cahill, *Reproductive Exceptionalism in and Beyond* Birth Rights, 100 B.U. L. REV. ONLINE 152, 154 (2020) (acknowledging my argument that reproductive injuries "aren't so different from other kinds of intangible harms" about "future risk and disrupted expectations" that courts already redress in other areas of law (quoting FOX, *supra* note 2, at 64, 87)).

[70] *See id*.

[71] *See id.* at 152.

[72] *See, e.g.*, Conley v. Romeri, 806 N.E.2d 933, 935-39 (Mass. App. Ct. 2004); Murphy v. Myers, 560 N.W.2d 752, 753 (Minn. Ct. App. 1997).

[73] *See, e.g.*, Wallis v. Smith, 22 P.3d 682, 682-83 (N.M. Ct. App. 2001); Desta v. Anyaoha, 371 S.W.3d 596, 598-99 (Tex. App. 2012).

[74] *See, e.g.*, R.A. v. O.A.-H., No. CN08-05726, 2009 WL 5697871, at *3 (Del. Fam. Ct. Dec. 31, 2009); *In re* Adoption of S.K.N., No. COA10-1515, 2011 WL 2848751, at *1 (N.C. Ct. App. July 19, 2011).

[75] Cahill, *supra* note 69, at 155 (footnotes omitted) (quoting FOX, *supra* note 2, at 77, 79).

[76] *See id*.

earlier writings.[77] But Cahill is wrong to surmise from this survey that I think high-tech or third-party forms of procreation less meaningful or valuable.[78] That isn't why I focus on wrongs at the hands of duty-bound specialists and not deceptive partners. I just wanted to shore up the doctrinal credentials of the three new rights and remedies I propose. That seemed brazen enough as it applies to actors already bound by duties of contract exchange or professional torts. A step too far, I figured, to consider imposing those special obligations where—for now, anyway—the law doesn't yet outside of consumer markets and health care.

I understand if this tactical explanation for acquiescing to manifest wrongdoing isn't satisfying. What makes less sense to me is why Cahill thinks drawing the line here threatens to "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."[79] What bothers Cahill isn't the access disparities I mentioned earlier.[80] Recall that this is my anxiety that liability risks could raise already-high fees of IVF, surrogacy, or egg donation to the point at which it prices out the sexual minorities and single or infertile people who rely on those services to have children.[81] This equality objection is crucial. But that's not Cahill's concern; her concern is that unless protections apply in similar ways to misconduct in the bedroom, then vindicating interests in the competent provision of assisted reproduction disparages non-traditional families or the means of forming them. Cahill isn't the only scholar to protest the book along these lines either.[82] But I confess this charge of exceptionalism confuses me. Why shouldn't courts remedy many if not all of the wrongs visited disproportionately upon those whose reproductive plans require help from third parties—doctors or donors, pharmacists or surrogates? I don't get the importance of treating professional negligence on equal legal footing with intimate lies. Cahill is indeed principled about this bottom line: She ultimately declines any view about whether these two categories of misconduct should stand or fall, so long as they stand or fall together. She is "agnostic" about whether "the law recognize[s] a duty of reproductive care" at all.[83] I am not.

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[77] *See, e.g.*, Fox, *supra* note 36, at 158 n.47; Dov Fox, Note, *Racial Classification in Assisted Reproduction*, 118 YALE L.J. 1844, 1882-83 (2009).

[78] *See* Courtney Megan Cahill, *Reproduction Reconceived*, 101 MINN. L. REV. 617, 638-42 (2016).

[79] Cahill, *supra* note 69, at 157.

[80] *See supra* note 9 and accompanying text.

[81] *See* FOX, *supra* note 2, at 27, 35-36, 70-71, 110.

[82] *See* Kaiponanea Matsumura, *Reproductive Exceptionalisms*, JOTWELL (July 3, 2020), https://family.jotwell.com/reproductive-exceptionalisms/ [https://perma.cc/LD9J-EQB2] (reviewing FOX, *supra* note 2) ("Distinctions [between duty-bound specialists and others] effectively redraw, rather than dismantle, the boundary between the spheres that makes Fox's proposal so necessary in the first place.").

[83] Cahill, *supra* note 69, at 157.

Yes, practitioners accept fiduciary duties to provide competent reproductive care to the patients or consumers they agree to help in matters of procreation.[84] But this legal obligation is about more than just what professionals voluntarily assume. It also comes from the characteristic centrality of decisions about having children to people's opportunities and experiences.[85] On reflection, I'm open to courts applying that duty against not only market negligence but also domestic deception that betrays trust and disrupts lives just the same. It's true that keeping the threat of liability outside the home can leave valuable space for intimacy to flourish—room to experiment with what is true about our life stories might even be part of figuring out who we really are.[86] But when that public/private divide operates to shelter exploitation, it's inadequate for the law to respond: "With relationships and reproduction, you make your bed, and get what you get." Victims should not be blamed for believing a partner who deceives them any more than for placing their faith in an OB/GYN or embryologist who cuts corners. Birth wrongs should not automatically be condoned just because they take place between intimates.

This reassessment would break down longstanding walls between "public" and "private"—walls that even the leading critics of that barrier would maintain. Professor Jill Hasday wrote the book on why the law should defend sexual partners and family members against each other's harmful lies to the extent that it does a stranger's fraud, misrepresentation, or intentional infliction of emotional distress.[87] Yet even Hasday would give a pass to deception about contraception or fertility that might inflict "significant harm on [any resulting children] by conveying and publicizing the message that [a parent] considered himself injured by their existence."[88] The reproductive context is one of just two in which Hasday wouldn't allow claims for intimate lies. Her reason is "the likelihood that permitting tort suits for such deception would harm the children in question" by being made to think that the people who raised them wished they hadn't been born.[89] Child welfare is obviously a compelling reason to limit any generally available right or action. It isn't as if a child's interests can't be reduced to those of his parents, after all. What is good for parents can be bad for their child. But I think that externality will often carry less weight in this context. A child may be confident enough in his parents' love by the time he becomes aware of any legal issues about how he came into the world. And any self-doubt he

[84] *See* FOX, *supra* note 2, at 40.

[85] *See id.* at 15.

[86] *See* E-mail from Kaiponanea Matsumura, Assoc. Professor of Law, Sandra Day O'Connor Coll. of Law, to author (July 6, 2020, 14:47 PST) (on file with author) ("[W]e deceive ourselves all the time in ways that are revealed to us over time. Or we cling to narratives we know on some level to be false because we want to believe them; or we decide that short-term lies are fine in furtherance of long-term truths.").

[87] *See* JILL ELAINE HASDAY, INTIMATE LIES AND THE LAW (2019).

[88] *Id.* at 219.

[89] *Id.* at 221.

might suffer may be less bad for him, on balance, than not having his medical or education needs met by whatever financial relief his parents are entitled to.[90] One Rhode Island judge suggested it "may in fact alleviate" any such insecurity to learn that "someone other than the parents" was covering special costs associated with his care.[91] Besides, absent evidence of abuse or neglect, parents are presumed to know (and care about) what is best for their child.[92] I'd let parents make the call whether to sue.

Professors Appleton, Cahill, Dolgin, Robertson, and Ziegler adopt the architecture of procreation deprived, imposed, and confounded to rethink reproductive controversies from abortion funding to gene editing. Today's plaintiffs missed the heyday of personality torts. It's been more than a century since courts last flexed their common-law muscles to establish new torts like slander, privacy, and defamation. But lost embryos, bungled birth control, and switched sperm samples give reason to recover that muscle memory. These mix-ups seem like "first world" problems, especially in the midst of a public health crisis that has transformed even parts of our lives we used to take for granted. But reliable health and child care have never mattered more than since stay-at-home orders, broken supply chains, and clinic restrictions have further stymied dreams for family life. Advances in medicine and technology promise to deliver us from the vagaries of the genetic lottery. Hard questions remain about expanding access to these innovations so that fewer people need to resign themselves to the fate of spontaneous miscarriage or unplanned pregnancy. Our legal system should no longer turn a blind eye to the reproductive trespasses that leave victims to pick up the pieces. These are not innocent lapses or harmless errors. They are wrongs in need of rights. This book, for all of its flaws, provides a starting place to vindicate them.

[90] FOX, *supra* note 2, at 142.

[91] Emerson v. Magendantz, 689 A.2d 409, 422 (R.I. 1997) (Bourcier, J., concurring in part and dissenting in part).

[92] *See* FOX, *supra* note 2, at 22-23. I am setting aside the conceptual complications I discuss in the book about welfare comparisons between some present state of affairs and the alternative of non-existence. These difficulties with establishing causation and legal harm arise from the fact of reproductive wrongs that involve a child who never would have been born had it not been for the very misconduct at issue. *See id.* at 13, 22, 43.