Reproductive Exceptionalisms

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Dov Fox, **Birth Rights and Wrongs: How Medicine and Technology are Remaking Reproduction and the Law** (2019).

Over the past four decades, people have increasingly turned to reproductive technologies to form their families. As technologies such as egg freezing, in-vitro fertilization, and pre-implantation genetic diagnosis have developed and improved, processes that were once left to chance are now subject to human control. As a result, what were once hopes—for instance, deferring childbearing until some point in the future, or having a male or female child—have transformed into expectations on the part of technology users.

Yet expectations are sometimes dashed because of avoidable human error, like mislabeling a sperm sample or failing to check liquid nitrogen levels in high-capacity freezers. As Dov Fox shows in his comprehensive new book, *Birth Rights and Wrongs*, courts have largely been unsympathetic to lawsuits stemming from these types of errors. Fox convincingly argues that courts should redress thwarted expectations about reproduction through the tort of reproductive negligence.

The book, an expanded and refined version of Fox's already-influential *Columbia Law Review* essay, *Reproductive Negligence*, makes a compelling case for the recognition of a new family of torts centered around expectations about reproduction. Fox notes that some reproductive wrongs, like freezer failures, deprive people of the pregnancy or parenthood that they want. (Pp. 99-100.) Other wrongs result in the imposition of pregnancy or parenthood, for instance, because of an improperly performed sterilization. (Pp. 113-14.) Still other wrongs prevent people from having a particular type of child, like one with a desired trait or without a heritable disease. (P. 127-28.) Much like privacy torts, which have been broken into discrete claims, Fox argues that reproductive negligence takes the form of three claims: procreation deprived; procreation imposed; and procreation confounded. (Pp. 75-76). And just as the recognition of privacy torts expanded the notion of judicial redress beyond physical injury to "intangible harms to emotional tranquility or reputation," (P. 55), so too should tort law expand to recognize interference with reproductive expectations.

But traditional conceptions of privacy torts are compatible with the bifurcated logic of the separate spheres, the assumption that the market structures economic life and the family structures affective life.[1] They declare that certain facts and details, often associated with domestic life, should be kept away from the general public or should not be subject to financial exploitation. (Pp. 57-58.) Thus, they maintain the line between private and public, and reinforce the distinction between the home and the market. Reproductive negligence, by contrast, draws courts into the domestic realm to decide questions like whether the desire for a boy rather than a girl, or a white child instead of a mixed-race one, is legitimate and compensable. Given the well-documented hesitancy of courts to extend contract and tort law into the domestic sphere, it is unsurprising that courts have discounted reproductive injuries as arbitrary or fanciful (Pp. 59-62) and have deemed them impossible to value. (Pp. 141-64.)

Viewed in this light, Fox's proposal is nothing less than an assault on the law's exceptionalization of the family.[2] Fox makes a compelling case that from a doctrinal perspective, the only thing distinguishing a botched vasectomy from a botched hip replacement, or a freezer failure at a fertility clinic from a similar failure at a wine storage facility, is that the former examples involve the creation or avoidance of familial relationships. And he disassembles common objections, for instance that babies are always blessings (Pp. 114-15), or that parents should love any child unconditionally (P. 132), showing that they do little more than assume that family relationships are somehow different and impervious to mainstream legal doctrines. This is not to say that other grounds to deny recovery for reproductive wrongs do not exist.

Recognizing harms based on trait selection, for instance, may give rise to negative externalities such as stigmatizing disability or validating sex stereotypes. These harms may weigh against recovery under certain circumstances. But, at a minimum, Fox challenges the reader to come up with objections that are not the product of exceptionalism or to justify which forms of exceptionalism are valid.

That said, Fox exhibits ambivalence about the prospect of abandoning exceptionalism altogether. To emphasize the stark inadequacy of the current legal regime, Fox notes that "[f]ew other decisions or undertakings [aside from reproduction] so shape who a man is, how he spends his days, and how he wants to be remembered." (P. 15.) Perhaps this is true, but sentiments about the specialness of reproductive choices tend to justify differential treatment. He also recognizes that it's not just professionals who engage in conduct that may interfere with the other's reproductive expectations. Intimate partners may lie about or misuse contraception, or conceal heritable traits that the other might have wanted to avoid. (Pp. 77-78.) The acts could result in similar deprivations of reproductive control. Yet Fox would set these acts aside because "[i]ntimate partners don't owe each other a formal kind of obligation of the kind that medical specialists do to those they serve": they do not owe each other a "duty of reproductive care." (P. 79.) But why shouldn't they? Distinctions such as these effectively redraw, rather than dismantle, the boundary between the spheres that makes Fox's proposal so necessary in the first place. They take the acts that constitute reproductive negligence outside of the family sphere and place them in the economic sphere rather than questioning the division to begin with. The result is a smaller but equally robust zone in which the law does not enter.

Limiting the cause of action to professionals produces an additional type of impact. Given that the costs of involving medical professionals and other fertility experts in one's reproductive decisions can easily run in the tens, if not hundreds of thousands of dollars, one's ability to vindicate reproductive expectations still depends on economic status. Those without the money to hire professionals will be unable to assert cognizable harms. To be clear, limiting the cause of action to professionals with formal obligations may be both doctrinally defensible and pragmatic. Moreover, the inequality it produces is not a fatal argument against recognizing reproductive negligence: one could address it by subsidizing access to reproductive technologies for all. What this particular line drawing reveals, however, is that recognizing the tort could either be a beginning or an end. It could pave the way for a broader conception of reproductive rights, or it could retrench privilege, which is what the separation of the spheres accomplished in the first place.

1. *See, e.g.*, Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 **Harv. L. Rev.** 1497, 1498 (1983).
2. *See* Janet Halley & Kerry Rittich, *Critical Directions in Comparative Family Law: Genealogies and Contemporary Studies of Family Law Exceptionalism*, 58 **Am. J. Comp. L.** 753, 754 (2010) (noting as a descriptive matter that families are treated as exceptional in numerous areas of the law, and that this exceptionalism produces a variety of distributional effects).

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