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Accountability, Eugenics, and Reproductive Justice

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ACCOUNTABILITY, EUGENICS, AND REPRODUCTIVE JUSTICE

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Dov Fox's *Birth Rights and Wrongs*[1] makes a compelling case for a specific form of reproductive justice: Tort law should hold specialists in reproductive medicine accountable for their negligence, just as it would other health care providers. In pressing this thesis, Fox offers both an innovative taxonomy of varied ways that reproductive interventions can go astray,[2] inflicting lasting harm on individuals and families, and an effective critique of the myriad dodges used by courts to avoid imposing liability. Along the way, Fox recounts engaging, sometimes heartbreaking stories that bring his analyses to life.

On many measures, Fox succeeds in his call for a meaningful standard of care in reproductive medicine and for legal remedies when practitioners fail to meet it. Put simply, it is hard to dispute Fox's bottom line, namely that courts should not ignore negligence in reproductive health care, that such negligence causes real and legally cognizable injuries,[3] and that damage awards are appropriate.[4] This commentary looks beneath the surface of Fox's successful argumentation to explore two intersecting fault lines that underlie the book's otherwise smooth topography—the legacy of the now reviled eugenics movement and lessons from the reproductive justice movement. The recent concurring opinion of Justice Clarence Thomas in an abortion case provides a foil that helps to expose these fault lines and, in turn, illuminates both strengths and weaknesses in *Birth Rights and Wrongs*.

Fox explicitly confronts the first of these fault lines: the specter of the eugenics movement. Near the beginning of the book, he provides a brief history of "progressive eugenics" in early twentieth-century America.[5] Later, he revisits this history when he advocates for legal recognition of claims based on "reproduction confounded"—cases in which health care providers' negligence resulted in a child who differs from the child the parent(s) had sought to create. Such differences might concern unwanted health problems or risks, racial or

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

[2] *Id.* at 6-7, 97.

[3] *See id.* at 55-71.

[4] *See id.* at 87-95.

[5] *Id.* at 11.

ethnic characteristics, sex/gender, or various matters of physical appearance. Fox concedes that this area is "the most controversial" of those that he examines,[6] and he does not shy away from connecting such controversy to "the slippery slope to eugenics"[7] that "choosiness gone awry"[8] is likely to evoke. When the smoke clears, however, Fox concludes the goals of "deter[ing] professional misconduct and vindicate[ing] broader interests in parental selection of offspring particulars"[9] should carry the day, despite policy objections that we might trace to our repudiation of eugenics.[10]

Fox's position rests on his distinction between what some scholars have called "public eugenics," on the one hand, and "private eugenics," on the other.[11] Although he does not use this terminology, Fox makes plain how government-imposed eugenics programs, which now elicit widespread condemnation, fundamentally differ from "voluntary, individualistic, and state-neutral" efforts by which "discrete families . . . make these decisions—for single offspring, rather than gene pools of broader groups."[12]

Certainly, a failure to draw this distinction can make a mess of the constitutional jurisprudence of reproductive self-determination. Justice Thomas's recent concurring opinion in *Box v. Planned Parenthood of Indiana & Kentucky, Inc.*[13] illustrates this point. The case stemmed from a challenge to an Indiana law prohibiting abortions based on fetal race, sex, or disability, including specifically Down syndrome. A lower court had blocked the law, and the Supreme Court declined to consider whether such laws can survive constitutional review. Justice Thomas agreed with that result for the present, writing that separately that "further percolation"[14] could help resolve the question later.

Although such percolation usually refers to litigation in the lower courts, which might hear various arguments and try different approaches, Justice Thomas wasted no time in jump-starting the process himself, staking out a position immediately in his concurring opinion. 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.[15] 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

[6] *Id.* at 127.

[7] *Id.* at 162.

[8] *Id.* at 161.

[9] *Id.* at 141.

[10] *See id.* at 162-64.

[11] *See, e.g.*, John A. Robertson, *Abortion and Technology: Sonograms, Fetal Pain, Viability, and Early Prenatal Diagnosis*, 14 U. PA. J. CON. L. 327, 380 (2011).

[12] FOX, *supra* note 1, at 162.

[13] 139 S. Ct. 1780, 1782 (2019) (Thomas, J., concurring).

[14] *Id.*

[15] Buck v. Bell, 274 U.S. 200 (1927).

reproduction but also between contraception and abortion and between the types of restrictions that the Court has previously invalidated and those it has permitted. To this concoction, Justice Thomas added data about abortions arranged after prenatal testing reveals fetal anomalies and sex-selection abortions among certain cultural groups. Most of all, however, Justice Thomas cited the disproportionate number of abortions chosen by African Americans to assert that abortion, with its "potential for eugenic manipulation,"[16] has become a tool for racist population control.

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.

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 the insights of the movement for "reproductive justice"—and here I use this term in its broad sense, which encompasses far more than tort reform to allow remedies for the negligent practice of reproductive medicine, as Fox urges, or even reproductive autonomy as it emerges in classic contraception and abortion precedents.[17]

Led by women of color, the movement for reproductive justice widens the lens beyond abortion, contraception, and other prerogatives of reproductive autonomy to include also the ability 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.[18] This holistic understanding recognizes that society, including culture and law, shape individual and family decisionmaking. It would never suffice, from a reproductive-justice perspective, to say, as Justice Thomas did in his concurring opinion: "*Whatever the reasons* for these disparities, they suggest that, insofar as abortion is viewed as a method of 'family planning,' black people do indeed 'tak[e] the brunt of the 'planning.'"[19] Indeed, for proponents of reproductive justice, reasons mean everything.

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[16] *Box*, 139 S. Ct. at 1784.

[17] *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992); Eisenstadt v. Baird, 405 U.S. 438 (1972).

[18] *See generally* DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY (1999); LORETTA ROSS & RICKIE SOLINGER, REPRODUCTIVE JUSTICE: AN INTRODUCTION (2017).

[19] *Box*, 139 S. Ct. at 1791 (emphasis added) (citations omitted).

Accordingly, an analysis grounded in reproductive justice would contextualize the high abortion rates in communities of color by noting, for example, income inequality and its race-based determinants, states' refusal to expand Medicaid, the imposition of family caps on public assistance, dismal public education where many Blacks live, difficulties in access to birth control, rampant gun violence, and racial disproportionality in the criminal justice and child welfare systems, along with evidence that living in a racist society helps explain the shockingly high maternal and infant mortality rates for African Americans.[20] Reproductive justice dares to imagine that we can meaningfully transform the status quo.

For his part, Fox appreciates context—to an extent. He writes:

> [T]he greatest value of family planning has less to do with choices than with consequences. More important than reproductive autonomy is how making these decisions helps a person live well. Procreation matters for most for its practical impact on the person's health, education, employment, social standing, intimate relationships, and other critical factors of wellbeing. . . . Contraception and genetic testing isn't [sic] just about a person's lifestyle—it's about his life.[21]

Yet, Fox underplays how causation and consequences can flow the other way—that is, how factors like health, education, employment, and the others he lists often determine how one will exercise reproductive autonomy. Moreover, he expressly joins the Supreme Court in eschewing "the functional version [of autonomy] that would grant reproductive access to women of limited means."[22]

I wish Fox had pushed the envelope more. True, the economic remedies that Fox advocates should make it easier for families affected by negligent reproductive medicine to live in a possibly unsupportive society, while these remedies also perform a valuable expressive function with the potential to reshape norms.[23] With an even more ambitious agenda, however, Fox's project might pose additional questions about why individuals and families suffer a wrong from "reproduction confounded," for example. Reproductive justice could invite deeper interrogation of the legal and social underpinnings of "the allure of genetic affinity,"[24] even when it becomes purely a matter of physical appearance,[25] and could challenge the outsize significance of biology "in American family life and law."[26] Likewise, reproductive justice would not

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[20] *See, e.g.*, Linda Villarosa, *Why America's Black Mothers and Babies Are in a Life-or-Death Crisis*, N.Y. TIMES (April 11, 2018), https://nyti.ms/2GRP4if.

[21] FOX, *supra* note 1, at 15; *see also id.* at 14 ("Real reproductive autonomy is about clearing away barriers to choice whether legal (e.g., state restrictions), economic (e.g., insurance coverage), or social (e.g., group pressure).").

[22] *Id.* at 15.

[23] *See id.* at 83.

[24] *Id*. at 110.

[25] *See id.* at 152-55 (discussing *Harnicher* case).

[26] *Id.* at 111.

simply concede "the social tax of being Black in America"[27] or the assumptions that parents might associate with gender, but would seek ways to dismantle structural racism and entrenched gender stereotypes,[28] no matter how heavy a lift. Even if such offspring characteristics "aren't merely social constructs,"[29] as Fox writes about disability, why not call for a world in which attitudes, preferences, and state supports could be different?

These insights should at least prompt skepticism about whether what Fox calls "voluntary, individualistic, and state-neutral"[30] reproductive choices can fully live up to those adjectives. Certainly, Justice Thomas goes too far in collapsing private and public eugenics, but Fox could expand his notion of reproductive justice to probe the legal and social norms that channel decision-making, instead of treating them as givens.

[27] *Id.* at 157.

[28] *Id.* at 149.

[29] *Id.* at 143.

[30] *Id.* at 162; *see supra* note 12 and accompanying text.