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Introduction to Symposium on Birth Rights and Wrongs, by Dov Fox

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I am privileged and delighted to write a brief introduction to this fine group of articles assessing Professor Dov Fox's recent book, *Birth Rights and Wrongs*.[1] It is a special pleasure for me because as a teacher of Professor Fox in a Yale Law School seminar (on an unrelated subject), I had the opportunity to observe him at an inflection point in his arc between his work for the president's bioethics council and his dawning career in the legal academy. The Yale faculty awarded Fox the prize for the best paper on law and the life sciences in each of his three years at the law school. It was there that he began integrating the burgeoning fields of reproductive technology, bioethical normativity, and legal regulation to find better solutions to the conflicts thrown up by their convergence. *Birth Rights and Wrongs* is the rich, nourishing fruit of that long-gestating ambition.

This symposium consists of four essays by leading academic commentators developing their distinctive takes on the book, followed by a conclusion by Professor Fox containing detailed responses to each of them. This introduction provides a very brief, largely descriptive *tour d'horizon* of the commentators' essays.

Robin West, after sympathetically summarizing Fox's argument, discusses the fact that tort law fails to protect social interests that are more important than some interests that it does protect—and considers some of the reasons why courts resist protecting the former. But while accepting Fox's analysis on its own terms, she devotes most of her paper on two "qualms" that she

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

harbors about his analysis. The first, which she associates with Roberto Unger's critical theory, is that Fox conducts his analysis without really questioning, much less subverting, the social context that we inhabit and take for granted. Invoking Ungerian conceptions, she challenges Fox's "truncating of critique." The second, which follows directly from this, is the "legitimation cost" that this truncation of vision entails. West then develops these critiques by arguing that Fox's implicit celebration of planning and intention in our procreation choices echoes and perhaps even reinforces American society's commitments to consumerism, careerism, and individualism. Fox, she writes, implies both "that this is the kind of procreating we should do, and that this kind of procreating is in turn an activity that should be protected by law against negligence." To West, these assumptions have some appeal but are not adequately articulated or defended, and are "problematic." At the risk of exceeding a symposium introducer's limited role, I shall add that I find this part of her analysis itself problematic, even implausible. She hopes to cast doubt on the notion that the law may legitimately place its thumb on the normative scale in favor of reflective reproductive conduct and choice. This doubt seems particularly misplaced when the plaintiff is simply seeking to shift to negligent providers the potentially enormous costs of their negligence which they could have avoided with due care. Whatever one's view of Unger's social vision, reproductive tort law is a singularly inapt tool for pursuing that vision, especially since Fox's reforms would better promote that vision than today's remedial lacunae.

The contribution of David Wasserman, a bioethicist at the National Institutes of Health, focuses on the moral costs imposed by compensating parents for the then-unwanted children whom the defendant provider's negligence foisted on them but whom they now love. His analysis raises important questions about different categories of damages that the law might treat differently, and the circumstances under which the state should be the costs of caring for such children. Wasserman describes three philosophical accounts of how the parents might welcome the child's existence while still pressing for compensation that might imply that the child's birth should have been prevented. And he urges that the law compromise competing moral considerations in light of the financial and other constraints that may burden parents who are obliged by defendants' negligence to raise children whom they did not want or expect: "Adopting a morally awkward posture," Wasserman suggests, "may be a small price for securing the resources needed to adequately support a severely disabled child. It would be presumptuous to insist that such parents forego needed resources rather than press claims that are inconsistent with unqualified acceptance and love. Indeed, the tort regime Fox proposes may be fully

justified in a decidedly non-ideal world where the support for raising disabled children is woefully inadequate."

Reuven Brandt's paper mostly explores two categories of cases that he thinks Fox has ignored. The first is what Brandt terms "private reproductive wrongs" which occur outside of the patient/provider relationship—a category that includes deceptive conduct or communications that violate norms of fair, responsible, good faith behavior toward a sexual partner or mate/ spouse. Such behaviors might trigger tort liability—for example they might be treated as tortious batteries—but then again they might not for certain doctrinal or other reasons. Brandt thinks that they should be tortious and that Fox should have included them in his analysis. In addition, Brandt wants to expand the universe of rights-holders to the children who by reason of defendants' negligence are deprived of a relationship with their biological progenitor. His analysis goes on to consider several controversial issues—for example, the value of donor anonymity and the incentives to donate one's sexual material—that would arise under such a child-centered legal regime.

Richard Epstein's contribution is consistent with his work in the vast number of fields in which he has labored so productively. He agrees with Fox's assessment of the values that the emergent reproductive technologies implicate, and he seems to think that conventional tort doctrines, suitably adjusted to take account of the kinds of probabilistic risks and intangible harms that such adjudications would entail, could remedy the three types of wrongs—procreation deprived, imposed, and confounded—that Fox explores. But Epstein then speculates about why tort law has resisted providing the kinds of remedies that Fox advocates for these wrongs—in contrast with, say, the expansion of medical malpractice liability (until and unless limited by statute). Epstein devotes most of his commentary to developing two explanations for tort law's hesitancy here. First, the interactions that Fox analyzes are consensual; the market for reproductive technologies consists of a direct exchange between a consumer seeking medical intervention to facilitate or prevent child-bearing, and a professional who agrees to provide those services. Second, technological advance in this area under the largely hands-off legal regime that Fox criticizes has been remarkably swift and successful. Fox's desired tort reforms, Epstein suggests, are inconsequential where, as here, a huge market for innovation exists that benefits both consumers and providers. Epstein argues, in opposition to Fox, that, importing tort liability into this market would threaten many of these gains, making almost everybody worse off.