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Birth Rights and Wrongs Extended

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I. INTRODUCTION

Dov Fox's *Birth Rights and Wrongs*[1] offers a largely compelling argument for expanding the scope of legal actions and remedies available to those whose reproductive choices are wrongfully frustrated by the actions of others. The dominant focus of the book is individuals who, due to the negligence and/or malice of medical professionals, suffer harms arising from reproduction imposed, denied, or confounded.[2] A serious examination of these kinds of injuries is certainly appropriate given that medical professionals are increasingly involved in individuals' reproductive plans and that serious harms may arise when desired medical interventions are improperly implemented. I will not take issue with the general framework developed by Fox for addressing these kinds of harms. My focus here will be to show that Fox's arguments have consequences for two kinds of cases that lie beyond the scope of those he explicitly acknowledges. The first is instances of reproductive wrongs that occur outside the confines of the patient/medical practitioner relationship. The second is claims made by children for harms suffered in virtue of being denied contact with their biological parents and/or access to identifying information about their biological parents.

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

2. By *reproduction confounded*, Fox means cases in which preferences about the traits one's offspring will possess are frustrated as a result of a wrongdoing.

In discussing the first kind of case, I will argue that the reason offered by Fox for limiting legal actions to instances of professional malpractice does not succeed. I take this to be a friendly criticism of the overall project. Removing this limitation would, I argue, provide an avenue of redress for serious wrongs. The discussion of the second kind of case raises more questions than answers. The main thrust of the argument is a parity claim. Fox enumerates multiple reasons for legal recognition of the harm suffered to adults deprived of a relationship with *biological* offspring. I show that in many cases these same justifications (or their close analogues) apply to children deprived of a relationship with *biological* parents. This raises worries about current donor anonymity practices, and perhaps donor assisted reproduction more generally. A natural initial response is to point to the non-identity problem as a means for rendering moot any concerns that might arise as a result of this parity claim. But I will offer two reasons for why this appeal does not suffice. First, there are cases in which the relevant chain of events does not affect the identity of the child who subsequently lacks a relationship with their biological parents. Second and more controversially, appeals to the non-identity problem might not suffice for rendering null the obligations biological progenitors have towards their offspring. I say "might" advisedly. Much will depend on one's view of the standing and content of causal procreative responsibilities. Policy considerations might also push in the opposite direction. For instance, the degree of harm suffered by offspring and the weight of countervailing goods might push against recognizing such responsibilities in law and policy, notwithstanding their theoretical basis. It is beyond the scope of this paper to discuss in detail exactly how policy ought to respond in light of these competing concerns. In the interests of transparency I will put my cards on the table and state that I find uncompelling arguments defending a general right of donor conceived individuals to access identifying information about their progenitors.[3] Nevertheless, what I wish to establish is that Fox's move to explicitly recognize the harm of being denied a relationship with biologically related children opens a Pandora's box of questions that lies at the at the heart of law, policy, and morality governing assisted reproduction.

II. PRIVATE REPRODUCTIVE WRONGS

Fox's discussion of reproductive wrongdoings that occur outside the confines of a professional setting or in the absence of a formal contractual

3. For a discussion of some of the justifications given for recognizing such a right, see Vardit Ravitsky, *Autonomous Choice and the Right to Know One's Genetic Origins*, 44 HASTINGS CTR. REP. 36, 36–37 (2014).

agreement—what I will call private reproductive wrongs—is brief. After a short discussion of competing views, Fox settles on the absence of a formal duty of care as the best justification for exempting private reproductive wrongs from his proposed tort schema.[4] Fox is correct that the standard of care owed by medical professionals or others who have entered into a formal contractual agreement is greater than the standard of care owed by private parties engaging in consensual sexual activity. This heightened standard of care does indeed broaden what constitutes actionable negligence in the professional context. Consider an individual who, despite a good faith effort misinforms a sexual partner about the chances of transmitting a congenital disorder to potential offspring. We might think that this misrepresentation does not rise to the level of negligence. However, a similar misrepresentation made by a genetic counsellor during a medical visit might very well constitute negligence. Similarly, an individual whose improper storage of a contraceptive contributes to its failure might not act negligently, even though a pharmacist who acts similarly might. But accepting that professionals have a heightened duty of care does not establish that 'caveat emptor' is the correct legal response to claims of private reproductive wrongdoing. Concerns about justice and consistency provide strong reasons for recognizing private reproductive wrongs. As will be outlined below, this is clearest in cases of intentional wrongdoing such as fraud and contraceptive sabotage that result in reproduction imposed. While I will focus most attention on this kind of case, I will briefly explain why analogous arguments apply to cases of reproduction confounded as well.

In many circumstances the absence of a formal duty of care does not preclude private parties from duties to each other. Homeowners have duties toward their guests to maintain their property in adequate repair and are liable for injuries that result from negligently failing to do so. Individuals who create a risk of harm to others have a duty to warn others of the risks imposed. Failure to provide adequate warning or failure to take reasonable steps to minimize the risks renders one liable for damages. And more closely analogous to the matter at hand, fraudulent misrepresentation of risks vitiates consent that would otherwise insulate an actor from liability for damages. In law this true even in certain cases where 'lovers lie.' Fraudulently concealing a sexually transmitted infection vitiates consent and makes the perpetrator liable for sexual battery. This is true even in cases

4. FOX, BIRTH RIGHTS AND WRONGS, at 29.

in which there was no intent to transmit the disease,[5] and in cases where no disease was in fact transmitted.[6]

What is at stake here is autonomy. It is a clear violation of autonomy to mislead someone about the risks engendered by an activity in order to secure their participation. Individuals have the right to judge for themselves what risks are worth what benefits and act accordingly. Deception and fraud about risks rob individuals of this opportunity, and in so doing violate autonomy. In this regard, decisions about sexual intimacy are no different. While individuals have very weighty privacy, dignity and bodily integrity interests in choosing whom to engage in intimate contact with and what shape that intimate contact will take, the matter of "who" is not the whole story. Part of these decisions is surely based on the risks posed by different intimate activities and the manner in which they are conducted. An individual with little knowledge of a potential partner's sexual history might reasonably insist on using contraceptive methods that reduce the likelihood of disease transmission in the absence of a clean bill of health. Fraudulently misrepresenting one's health status or surreptitiously removing a contraceptive device wrongly exposes an intimate partner to risks they did not consent to, thus vitiating consent to the sexual act. The actor engaging in the deception is rightfully liable for damages that arise as a consequence of this deception, even in the absence of a formal duty of care. Indeed, the Restatement of Torts (Second) uses a similar example to illustrate battery following consent induced by misrepresentation.[7]

While it may seem crass to compare unwanted procreation with contracting a disease, given Fox's arguments it is unclear why a similar analysis ought not apply in the case of private reproductive wrongdoing. Concerns about the possibility of unwanted procreation frequently plays an important role in determining the form sexual contact will take, including what contraceptive measures are material to consent. This is because unwanted procreation is accompanied by considerable costs. Indeed the costs resulting from unwanted procreation are in many cases more burdensome than the less serious sexually transmitted disease for which damages may be awarded when consent is vitiated by fraud or deception. In the U.S. the cost of raising a child from birth to 17 is upwards of 230,000 dollars.[8] Beyond the financial costs, procreation generally requires a large scale shift in the way

5. Johnson v. Jones, 269 Ore. App. 12 (Ore. Ct. App. 2015).
6. *Id.* at n.7.
7. RESTATEMENT (SECOND) OF TORTS, § 892B.
8. U.S. DEPT. OF AGRICULTURE. 2015 EXPENDITURES ON CHILDREN BY FAMILIES, NO. 1528-2105 (2017), https://www.cnpp.usda.gov/sites/default/files/expenditures_on_children_by_families/crc2015.pdf [https://perma.cc/7WTR-ETYH]. This is a statistic that Fox relies upon as well.

individuals lead their lives. Additionally, becoming responsible for the care of children can negatively impact earning potential, career advancement, and one's ability to pursue higher education. Notably, these effects are generally more pronounced for women. Fox adeptly demonstrates that arguments purporting to show that the benefits of procreation more than offset these kinds of costs do not succeed. Indeed, as Fox and others gave demonstrated, such arguments are in tension with standard ways offsetting benefits are determined in cases not involving reproduction.[9] We thus have good reason to think that reproduction imposed carries substantial costs. If fraudulent misrepresentation about the risks of sexually transmitted diseases occurring within the bounds of personal relationships renders individuals liable for damages, it is unclear why fraudulent misrepresentation about the risks of procreation arising in similar circumstances does not. Simply pointing to the absence of a formal duty of care will not do.

One may point to the interests of a third party, the child that is created, as an important disanalogy when comparing fraud resulting in disease transmission with fraud resulting in procreation. It is certainly true that the interests of the resulting child are critically important, and this is a concern that does not arise in disease cases. However, it is unclear whether the presence or absence of a formal duty of care affects these interests in a way that would permit a parent to seek damages in the former case but preclude it in the latter. Otherwise put, if Fox believes that the child- centric reasons for dismissing damages in cases of medical malpractice do not succeed[10] (a view I endorse), it is unclear why they would fare better when raised in response to private reproductive wrongdoings. To illustrate this point, consider a few of the child-centric reasons courts have offered for denying plaintiffs damages following the birth of a healthy child. One reason courts have given is that it would be damaging to a child to learn that their parent(s) considered it an injury to raise them.[11] A second reason is that it may be injurious to the parent-child relationship for the child to learn that their parent(s) is in essence being paid by a third party to care for them. It is not at all apparent how the nature of these supposed harms changes in the absence of a formal duty of care. In both cases the alleged harm arises as a result of the child's (possible) perception that in seeking

9. FOX, BIRTH RIGHTS AND WRONGS, at 119.
10. *Id.* at 141–64.
11. Wilbur v. Kerr, 628 S.W.2d 568, 571 (Ark. 1982); C.S. v. Nielson, 767 P.2d 504, 514 (Utah 1988).

damages the parent is indicating that the child's presence in the parent's life constitutes a harm and is thus unwanted. But this perception seems unaffected by the identity of the defendant or whether that defendant was under a formal duty of care to prevent conception from occurring. I cannot see why a child would be injured by the discovery that a parent had sought damages for wrongful conception from a sexual partner who had lied about using a condom, but not suffer similar harm when damages are sought against a doctor who had lied about having performed a successful tubal ligation.[12] More work would be needed in order to show that child-centric reasons justify carving out an exception for private reproductive wrongs.

However, even if one is convinced children may suffer emotional harm as a result, it is not at all clear whether this suffices to bar legal recognition of private reproductive wrongs. The interests of children, as important as they are, do not always take precedence over the interests of adults. As others including Fox have noted, we do not extinguish the parental rights of the willing biological parents of a newborn on the grounds that some other party is also interested in parenting the same child and is likely to do a better job. In some cases allowing an adult to recover losses suffered due to fraudulent misrepresentation might also take precedence over the wellbeing of a child. Indeed, recognizing such cases is not without precedent.

Normally equitable estoppel precludes a father from contesting paternity after he has welcomed a child into his home, held the child out as his own, and formed an emotional bond with the child. The justification for this principle is to protect the interests of minor children. But some courts have ruled that if the father's actions that would normally give rise to estoppel were they the result of fraudulent misrepresentations about his paternity, the principle of paternity by estoppel can be set aside even after a relationship has formed.[13] In justifying this decision one court stated that, "there is a strong public policy against permitting a party who has acted in reliance upon a misrepresentation to suffer harm."[14] These cases are disanalogous from 'reproduction imposed' in that there is no biological relationship between the individual seeking remedy for fraud and the child that stands to suffer as a result. But unless we are willing to commit to the claim that biological ties result in a stronger form of parental standing than that formed as a result of emotional bonds that form as a results of actual

12. Some courts have allowed for recoveries for child-rearing costs in these cases. E.g., Nelson v. Davidson, 456 N.W.2d 674 (Wis. 1990); Lovelace Medical Ctr. v. Mendez, 805 P.2d 603 (N.M. 1990).

13. N.C. v. M.H., 923 A.2d 499 (Penn. 2007); McConnell v. Berkheimer, 781 A.2d 206 (Penn. 2001); Gebler v. Gatti, 895 A.2d 1 (Penn. 2006).

14. *Id.*

parenting (a view that we have plenty of reason to reject) then this disanalogy should not detract from the force of the example.

Failing to recognize private reproductive wrongdoings can also result in a striking injustice. Consider the following hypothetical case. Sandra and James are "friends with benefits." Sandra would like to have children, but James does not. Sandra proposes that she and James enter into a gamete donation arrangement whereby James will provide Sandra sperm for use in an artificial insemination procedure that she would administer herself. Per the agreement, James would be a mere sperm donor and would have no obligations toward the child. James declines, stating that he would inevitably feel obliged to have a role in the child's life, and that is a responsibility he wants to avoid. Nevertheless, Sandra fraudulently acquires James' sperm, inseminates herself, and has a child.

Since artificial insemination occurred in the absence of a gamete donation agreement, James is now liable for child maintenance obligations. This result is striking because had James agreed to the sperm donation agreement, he would be free of such obligations. We thus have a situation whereby individuals can divest themselves of legal parental obligations when voluntarily making their gametes available for reproductive use, but cannot do so when their gametes are fraudulently accessed for reproductive purposes. Matters are made worse when we switch the roles of the parties in the example. Imagine that James requests that Sandra donate ova for use in a surrogacy, but Sandra declines. James then surreptitiously inseminates Sandra during an intimate act in which insemination is not a "natural outcome." Not only does Sandra acquire weighty legal obligations she would not accrue had she agreed to donate ova, but she also suffers the physical and emotional harm of undergoing an unwanted pregnancy. But the additional harms are not constrained to the burdens of pregnancy and childbirth. There is also strong evidence suggesting that motherhood has a larger impact on an individual's interests (career advancement, education, etc.) than fatherhood does.

One option may be to change the way legal parental status and its constitutive obligations are ascribed, and indeed elsewhere I have argued that some changes in this domain of law are in order.[15] But as a sole solution, this is not entirely satisfactory. As Fox notes, some individuals may feel they have obligations to their biological offspring regardless of whether such obligations are mandated by the state. And echoing Fox's

15. Reuven Brandt, *Sperm, Clinics, and Parenthood*, 30 BIOETHICS 618 (2016).

rejection of adoption as means of mitigating damages, we might also think that requiring individuals to forgo legal parental status and hence a protected parental relationship with their offspring in order to mitigate costs is an unreasonable requirement. A better way for rectifying this injustice would be to extend Fox's reproductive torts into the private sphere.

This discussion has focused on reproduction imposed, but similar arguments can be made in cases of reproduction confounded and reproduction denied. The likelihood of creating offspring with serious illness informs individuals' decisions about who to reproduce with, and what precautions to take in order to minimize the risks of creating a child with severe illness. For instance, some communities that are affected by Tay Sachs disease employ widespread screening and registries to minimize the risks of creating offspring who will suffer from this debilitating disease. Deceiving a partner about the result of a screening test vitiates consent in a similar manner to deceiving an individual about the risk of contracting a sexually transmitted infection. While the particular interest at stake is different, concerns about the needs of future offspring are surely material to consent in reproductive matters. It is further worth noting that such concerns need not rest on the pernicious view that the lives of individuals with certain disabilities are of lesser value. A potential parent may be concerned about their ability to fulfill the needs of offspring born with certain disabilities. Seeking compensation for these costs neither explicitly nor implicitly rests on the view that those born with disabilities are of lesser value.[16]

One further point worth mentioning is that it may not be necessary to create novel torts in order to redress the wrongs illuminated by Fox. In the case of private reproductive wrongs, it seems that expanding the scope of sexual battery might suffice. In cases involving medical professionals we might think that a similar expansion of medical negligence and battery might also suffice. On this matter I have no settled view. However, one advantage of creating a new domain of torts is that doing so would emphasize the special importance of reproductive harms.

III. Biological Connections and Harm

This second line of commentary is more speculative than the first. Here I will argue that legally recognizing a distinct harm in being denied the opportunity to raise biological offspring raises conceptual problems that lie at the heart of debates about donor assisted reproduction and donor anonymity. What is at stake is the importance, if any, of causal connections when attributing moral responsibilities for ensuring the wellbeing of children

16. Some cases reproduction denied may fall under this rubric as well—for instances cases in which a concealed sexually transmitted infection results in infertility.

and the value of biological ties. The 'thin edge of the wedge' into this broader debate is a parity claim about the justification for recognizing harms suffered by adults when they are denied biological children. Similar concerns apply to children denied a connection with biological parents. My analysis will focus on ethical matters, and I will leave open what this implies about law and policy. I will emphasize at the outset that this argument is controversial in two important respects. First, it relies on a causal account of procreative responsibilities that, while not without support in the ethics literature,[17] remains contentious. Second, the argument relies on a controversial claim about the limits of the non-identity problem.

Fox argues that alternative means of becoming a parent do not eliminate the harm of being denied the opportunity to parent a biological child. Fox's explicit focus is on adoption, but the reasons offered extend to use of donor gametes and surrogacy as well. Fox makes two central claims about the inadequacy of alternatives. The first is that these alternatives are not without their own associated costs. Adoption, as well as gamete donation and surrogacy arrangements, are often expensive, time consuming, and involve non-trivial invasions of privacy—the latter is especially true in the case of adoption. Indeed many have called for reforming the current system that places extra scrutiny on individuals seeking to become parents through non-traditional means.[18] In the absence of such reform however, we might think that there is a fairly straightforward solution. Individuals could be compensated for both the financial costs and the invasion of privacy that may be required in order to become a parent following a relevant reproductive wrong. The second inadequacy raises deeper questions. Fox suggests that the loss of biological ties with offspring is itself an injury in need of redress. The reason Fox gives is that many parents in fact do yearn for a biologically related child. The reasons for this preference are diverse.

17. *See* Giuliana Fuscaldo, *Genetic Ties: Are They Morally Binding?*, 20 BIOETHICS 64 (2006); Rivka Weinberg, *The Moral Complexity of Sperm Donation*, 22 BIOETHICS 166 (2008); Lindsey Porter, *Why and How to Prefer a Causal Account of Parenthood*, 45 J. SOC. PHIL. 182 (2014); James L. Nelson, *Special Responsibilities of Parents Using Technologically Assisted Reproduction, in Family-Making*, CONTEMPORARY ETHICAL CHALLENGES (Françoise Baylis & Carolyn McLeod eds., 2014); Reuven Brandt, *The Transfer and Delegation of Responsibilities for Genetic Offspring in Gamete Provision*, 34 J. APP. PHIL. 665 (2017); Don Hubin, *Procreators' Duties*, *in* OXFORD HANDBOOK OF REPRODUCTIVE ETHICS (Leslie Francis, ed., 2008).

18. Carolyn Mcleod & Andrew Botterell, *"Not for the Faint of Heart:" Assessing the Status Quo on Adoption and Parental Licensing"*, *in* FAMILY-MAKING: CONTEMPORARY ETHICAL CHALLENGES (Françoise Baylis & Carolyn McLeod eds., 2014).

As Fox notes, biological ties lie at the heart of many individuals' conception of the family and indeed have a privileged place in law. Some prospective parents place importance on having offspring that will resemble them. For others, genetic ties are of important cultural significance, and continuing a genetic line might be a central impetus behind their desire to reproduce.

However, if we recognize this second kind of concern as genuine, we are faced with a problem. These same sources of harm may impact children created via donor gametes who lack a connection with their biological parents. While many individuals conceived by anonymous donor conception report no psychological distress, some do. Those that do often report that biological ties are central to their conception of family, and so feel a loss in not knowing their 'real family'. Some discover that they are not of the same ethnicity as their social/legal parents, and as result lack a sense of belonging and feel deprived of a connection with their 'true' ethnic group. In support of recognizing such harms, David Velleman argues that being raised apart from one's biological relations places donor-conceived individuals at a disadvantage. According to Velleman, close genetic relatives provide children with a kind of mirror on themselves which enables self knowledge, and provides an individual with a connection to their ancestry that helps children orient themselves in the world.[19] If we are prepared to legally acknowledge similar harms in the case of adults who are deprived a biological tie with their offspring, we have a prima facie reason to recognize these harms when they arise in children. At a minimum, this raises serious questions about the permissibility of donor anonymity.

A. The Appeal to the Non-Identity Problem

One way to sidestep this problem is to appeal to the non-identity problem. The non-identity problem is one of the most vexing problems in reproductive ethics. The problem highlights a tension between plausible moral principles and what they seem to permit. It thus forces us to give up on deeply held principles, or else accept behavior that seems intuitively morally problematic. The problem is best illustrated through a slightly modified version of one of Derek Parfit's examples.[20]

Imagine a 14 year old couple who decide to have a child. Because of their young age, their child has a poor start to life. This poor start has detrimental effects on the child throughout their life. The child's life, while hard, is still well above the threshold of 'a life worth living'. Had the couple waited a few years they would have had a child with a much better start to life.

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19. J. David Velleman, *The Gift of Life*, 36 PHIL. & PUB. AFF. 245 (2008).
20. DEREK PARFIT, REASONS AND PERSONS (1984).

Many think that the couple's decision not to wait is wrong. But justifying this response is challenging. The trouble arises when we recognize that had the couple waited, they would have had a different child. This is because the child that the couple would have had if they had waited would have been the product of a union between different sperm and ova. The couple's choice is not between having child A with a poor start in life and the same child A with a better start. The choice is between having child A with a poor start in life and child B with a better start in life.

That we are comparing different possible children poses a problem because we normally think that an action is wrong only if someone is wronged by it. Furthermore, we normally think that someone is harmed only if they are made worse off than they otherwise would be. If we reflect on the case of the young child it is hard to see how child A was wronged or harmed. Had the parents waited, A would not exist at all. Since A's life is worth living, it is hard to see how the parents have wronged A. After all, they gave A a worthwhile life and A's only alternative was no life at all. Similarly, the parents have seemingly not harmed A. The decision to forgo waiting to conceive did not make A worse off than they otherwise would be. Had the parents waited, A would not exist at all. Since A's life is worth living, coming into existence did not make A worse off than they otherwise would be. If the couple's choice does not harm or wrong A, then it's hard to see why the action is wrong, assuming no one else is harmed or wronged by the decision, which we will stipulate for the sake of argument.[21]

This argument has been applied to the question of donor anonymity in order to show that donor-conceived offspring are not harmed or wronged by policies that sever ties between them and their biological progenitors. For instance, I. Glenn Cohen argues that changing policy to abolish donor anonymity cannot be justified on the grounds that the status quo causes harm. This is because if the policy would have been different, in all likelihood different donor-conceived children would have been created. This is because the pool of gamete donors willing to have their identity accessible by their biological offspring is different from those who do not. Similarly, those willing to make use of non-anonymous donor gametes is different from those willing to make use of anonymous donor gametes. Cohen thus concludes that individuals conceived via anonymous donor gametes are not harmed,

21. This stipulation is fairly standard in discussion of the non-identity problem. This is because normally we are primarily interested in whether the child created has been harmed or wronged, and so we put aside the interests of other who may be affected.

as had the policies been different they would not exist at all. Had policies been different, other donor-conceived individuals would exist in their place.[22]

At first blush, this argument seems to provide a way out of the problem. Since donor anonymity neither harms nor wrongs anybody, we need not worry about the interests donor-conceived individuals may have in having relationships with their biological relations. However, I will show that on reflection this appeal to the non-identity problem to sidestep worries about harm to children arising from severed ties with biological relations. First, the appeal to the non-identity problem will not apply to all cases in which a child alleges wrongdoing with respect to severed biological ties. Assuming genetic essentialism about identity, cases where embryos are swapped by a clinic will not raise non-identity concerns. Thus at least in this relatively small subset of cases, there are grounds for harm to offspring. But more controversially, I will show that the preceding argument is a misapplication of the non-identity problem. The argument fails because it presumes that gamete providers have no moral obligations toward their offspring. Before making the case that gamete providers have moral obligations toward their offspring, I will first show why recognizing such obligations deflates the force of the non-identity problem in this case.

At its core, the non-identity problem forces us to reckon with the possibility that certain actions which may intuitively appear harmful or wrong may not indeed be so. If the non-identity problem succeeds this may indeed have implications for what obligations individuals acquire. This because prior harming and wronging are important sources of obligations. In fact Seana Shiffrin has argued that procreation does harm children and that this harm grounds parental duties more generally.[23] Agreement is another source of obligations. If A promises to water B's flowers while B is on holiday then A acquires that obligation. Of course anonymous gamete donors do not agree to make information about themselves available to their biological offspring or to be open to a relationship with them. But neither prior harming nor agreement are necessary for the acquisition of moral responsibilities. Philosophers are apt to recognize a range of duties that arise in their absence. Examples include the duty of easy rescue, the duty of beneficence, the duty of gratitude, and a host of special duties to promote the interests of our friends and family. I will call these obligations non-voluntary obligations. While the law is less inclined to impose such non-voluntary obligations one glaring exception is the case of children. Parents have affirmative duties to promote the interests of their children regardless

22. I. Glenn Cohen, *Sperm and Egg Donor Anonymity: Legal and Ethical Issues*, *in* OXFORD HANDBOOK OF REPRODUCTIVE ETHICS (Leslie Francis ed., 2015).

23. Seana Valentine Shiffrin, *Wrongful Life, Procreative Responsibility, and the Significance of Harm*, 5 LEGAL THEORY 117 (1999).

of whether they voluntarily accept these duties and even though procreation generally does not harm children. These obligation are manifest in various ways including child maintenance obligations, the duty to provide children with the necessaries of life, and the tort duty to protect children from harm.

Presume for the moment that gamete donors have some such moral obligations toward their offspring to promote their interests—I will say more about that below. If we accept this, then pointing to the fact that gamete donors' prior actions neither harmed nor wronged their offspring and that they foreswore such duties will not suffice to get them 'off the hook.' This is because the obligations in question do not arise by virtue of them having harmed anyone, wronged anyone, or agreed to them. Arguments about what does or does not constitute prior harm or wrongdoing are thus irrelevant, as are questions of prior agreement. Consider the following analogy. Imagine that two friends, X and Y, discuss going on a bike ride together on a demanding cycle route. X is hesitant because, owing to her medical skills, she sometimes ends up having to stop and help injured cyclists, and finds doing so terribly annoying. She eventually agrees on the condition that they not stop regardless of whether anyone needs their aid. Partway along the route they come across another cyclist in dire need of medical aid. Performing the aid would inconvenience X, but would not be overly burdensome. Those who accept the moral duty of easy rescue would not conclude that X has been relieved of it on account that ignoring this duty was a precondition of going on the ride. This is true even though the decision to go on the ride did not harm the injured cyclist and X foreswore rendering such aid. If we think that gamete donation results in duties to advance the interests of one's biological offspring then, much like the duty of easy rescue, pointing to the absence of prior harm is no defense.[24]

To be clear, the argument here is not a solution to the non-identity problem. It will not allow us to escape all the counter-intuitive consequences the problem raises. The range of cases this argument covers is in fact quite narrow. It will not for example resolve "classic" non-identity cases in which reproducers opt to have children with congenital impairments rather than different children without such impairments. This because a feature of

24. *Cf.* Robert Noggle, *Impossible Obligations and the Non-Identity Problem*, 176 PHIL. STUD. 2371 (2019). While Noggle makes a similar argument, he applies it to cases of congenital impairments, which as will be explained below, is an importantly different kind of case.

such cases is that there is no subsequent action available to the procreator that will eliminate the impairment.

Returning to the question at hand, we can now see why problems arise for gamete donor anonymity. Fox accepts that the interests adults have in forming a parent-child relationship with biological offspring is deserving of legal protection and that compensation is owed when this interest is frustrated. But the reasons for recognizing adults' interest in this kind of relationship apply also to children's interest in having a relationship with their biological parents. Presumably there is a case for some legal protection for these interests as well. Perhaps gamete donors ought to be obligated to make identifying information about themselves available to their biological offspring. As noted earlier, the law is apt to make exceptions to its general hesitance to recognize affirmative duties when the well-being of children is at stake. There are of course multiple ways the law could respond. At one extreme the law could declare unenforceable contracts protecting the identity of gamete donors on the grounds that such contracts are contrary to the interests of children, and require clinics to release their records. Such a move would be in line with the unenforceability of other kinds of agreements between adults that courts find detrimental to the interests of children, like prenuptial agreements settling custody matters, or agreements between sexual partners that one will not seek child support from the other in the event of pregnancy. On the other hand, we could decide that public policy precludes protecting the interests donor-conceived individuals have in accessing information about their biological progenitors. We might think that a policy prohibiting donor anonymity would reduce the supply of gametes, making it harder for same-sex couples, single people, and infertile couples to become parents. We might think that the social good gained by allowing such individuals to become parents outweighs the harms some donor-conceived individuals may face. I cannot adjudicate this matter here. What I hope to have shown is that Fox's endorsement of this kind of reproductive wrong forces a reckoning about how to handle analogous child-centric interests. If we want to accept Fox's view and the regulatory status quo, then we are forced into discounting the interests of children created via donor gametes for the sake of adults who wish to make use of donor-assisted reproduction.

An alternate route, and one that may be preferable, is to deny the importance of biological ties to the family. Some philosophers have argued that the preference for biologically related offspring is a harmful social construct that we would be better off without. On this view, the harms individual suffer as result of leading lives in tension with these norms are socially constructed. This in not to say that socially constructed harms do not count as harms. It is just to say that we would be better off if we eliminated harmful social norms, and one way to go about doing so is

reduce their purchase by refusing to give them formal recognition.[25] My sympathies lie in this direction. This approach implies that the loss of the ability to have biologically related children in itself ought not be grounds for special compensation.

B. Causal Procreative Responsibilities

Of course the preceding argument rests heavily on the view that those causally implicated in procreation accrue obligations towards their biological offspring. While the law tends to eschew any such obligations in the case of gamete donors, within the ethics literature this is not an uncontentious position. Indeed, Fox relies on the existence of such obligations in defending the view that individuals suffer harm in cases of reproduction imposed even in the absence of legally mandated obligations. Citing Niko Kolodny, Fox notes that individuals in such circumstance suffer the harm of having obligations to others that they are not in a position to fulfill.[26] It is worth noting that among the obligations Kolodny recognizes is the duty on the part of gamete donors to be available to their biological offspring and willing to answer potentially painful questions.[27]

More generally, causal views about procreative responsibilities align best with our intuitions and social practices regarding obligations in reproduction. We generally believe that men in one-night-stand cases have obligations toward any offspring that result regardless of their reproductive intent, the precautions taken, or the nature of the relationship with their reproductive partner. What seems to be doing the work here is the view that since these men engaged in activity that risked bringing into existence being who would suffer in the absence of support, these individuals have an obligation to fulfill those needs. This is true even is a life without such support would still be a 'life worth living,' all things considered.

Consider for example Don Hubin's defense of this approach to procreative responsibilities.[28] Hubin asks us to imagine a scientist who engages in a project to create a human being from raw materials and succeeds. Surely

25. Sally Haslanger, *Family, Ancestry and Self: What is the Moral Significance of Biological Ties?*, 2 ADOPTION & CULTURE 91 (2009).

26. Niko Kolodny, *Which Relationships Justify Partiality? The Case of Parents and Children*, 38 PHIL. & PUB. AFF. 37 (2010).

27. Hubin, *supra* note 17.

28. Sally Haslanger, *Family, Ancestry an Self: What is the Moral Significance of Biologial Ties?*, 2 ADOPTION & CULTURE 91 (2009).

the scientist has some responsibilities towards the new life she has created. Simply leaving the being to perish seems impermissible. This is true even if the short life the being would lead in the absence of aid from the scientist would be better than no life at all. Part of what makes Hubin's case a convincing example lies in the fact that the scientist knowingly and avoidably chooses to involve herself in a project that has the creation of a person as its aim. All things being equal, an account that did not ascribe responsibilities in such cases would be overly narrow. Gamete donors are like Hubin's scientist, at least in this respect. Gamete providers freely and avoidably choose to engage in a project that has the creation of a new person as its end. This gives rise to a strong prima facie case for ascribing to them procreative responsibilities. Of course the view that gamete donors acquire responsibilities toward their offspring need not entail that donors have a duty to parent. We might think that so long as donors ensure someone adequately parents their biological offspring, they fulfill the lion's share of their obligations.[29] But we might also think that certain obligations cannot be delegated in this manner because no stand-in is possible. If we are wed to the idea that some form of relationship with one's biological relations serves important interests, being open to such a relationship might well be one responsibility that cannot be divested to others. We might think that at a minimum, there is a duty on the part of gamete donors to provide offspring with some autobiographical information. But this is contingent on the importance of contact with or information about one's biological ancestors to wellbeing. As noted earlier, one way to avoid imposing these demands on gamete donors is to reject the normative importance of biological ties.

IV. Conclusion

In this paper I have discussed how Fox's arguments extend to two kinds of cases not explicitly included in his analysis. The first is private reproductive wrongs. Here I have argued that Fox's view ought to extend to these cases in spite of his argument to the contrary. This is a friendly criticism in that it shows that his view has larger reach than initially anticipated and could redress reproductive wrongs beyond those initially envisaged. The second kind of case involves the concerns of donor-conceived individuals who lack information about their biological progenitors. Here I argued that by insisting that being deprived of the opportunity of having biologically related offspring is harm deserving of redress, Fox inadvertently raises questions about the permissibility of donor anonymity. This is because the concerns Fox appeals to in justifying this harm apply to offspring denied

29. For a discussion, see Brandt, *supra* note 17.

a relationship with their biological progenitors. This consequences gives us strong reason to reconsider whether the interest in having biologically related offspring is weighty enough to warrant legal protection. If we insist that it is, then we are left with difficult questions about potential harm to donor-conceived children who are cut off from their biological relations.