

# FORMATIVE PROJECTS, FORMATIVE INFLUENCES: OF MARTHA ALBERTSON FINEMAN AND FEMINIST, LIBERAL, AND VULNERABLE SUBJECTS

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## INTRODUCTION

Martha Albertson Fineman is a truly generative scholar. She generates significant and transformative scholarship, causing people to think in new ways about keywords like “dependency,” “autonomy,” and “vulnerability,” and basic institutions such as family and state. She also generates conversations (uncomfortable<sup>1</sup> and otherwise, crossing disciplinary and other boundaries) and, in so doing, sparks the generation of new scholarship by others, through her founding and directing of (since the 1980s) the Feminism and Legal Theory (FLT) Project and (in the last decade) the Vulnerability and the Human Condition Initiative. I count myself among those who have benefitted from both forms of her generativity.<sup>2</sup> It is fitting and timely that the editors of *Emory Law Journal* honor her with this tribute issue. I am grateful for the opportunity to contribute to it.

This Essay reflects on Professor Fineman’s generative scholarship by revisiting my engagement with her work over the years. Such revisiting is, in a sense, an intellectual autobiography, since I trace the shifting areas of concern in my scholarship and the role of various formative influences upon it. Often those influences were in evident, but productive, tension, such as with feminism and liberalism. In this revisiting, I also observe some critical shifts in Fineman’s own scholarly projects, such as from dependency to vulnerability and from a gender lens to a skepticism about a focus on identities. Another formative influence I discuss in this Essay is Fineman’s enormously generative contribution to the development of scholarship by creating spaces for sharing

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<sup>1</sup> I refer here to Professor Fineman’s development of the “Uncomfortable Conversation” as a way to frame workshops on contentious topics.

<sup>2</sup> This opening paragraph borrows from the language of an e-mail I sent to the members of the Association of American Law Schools’ Section on Women in Legal Education upon the announcement (by Chair Rebecca E. Zietlow) that Professor Fineman won the section’s Ruth Bader Ginsburg Lifetime Achievement Award for 2017. Posting of Linda McClain, Professor, Boston University School of Law, support@lists.aals.org, to SECTWO.aals@lists.aals.org (Sept. 27, 2016) (on file with author).

and critiquing scholarship, through the FLT Project and, more recently, the Vulnerability and the Human Condition Initiative.

## I. FEMINIST AND LIBERAL FORMATIVE INFLUENCES

### A. *The Geography of Influence*

When I began my career as a law professor, I lived on the Upper West Side of Manhattan, equidistant (more or less) from two law schools—Columbia University and N.Y.U. That geographical positioning had both practical and symbolic significance. In the 1990s, my initial work as a feminist legal scholar argued for the merits of liberal feminism, despite pervasive feminist critiques of liberal legal and political theory and liberalism. In my first law review article, I argued that prominent strands of feminist jurisprudence presented a caricatured picture of liberalism as “exalt[ing] rights over responsibilities, separateness over connection,” justice over care, “and the individual over the community.”<sup>3</sup> I focused particularly on relational feminism, or “difference feminism,” often inspired by Carol Gilligan’s *In A Different Voice* and articulated by such feminist legal scholars as Robin West and Suzanne Sherry.<sup>4</sup> Challenging the model of “atomistic man” attributed to liberalism and feminist critiques of such liberal ideals as autonomy, I examined the liberal theories of political philosopher John Rawls and legal philosopher Ronald Dworkin to illustrate common ground between liberal theory and relational feminist theory around issues like the relationship between justice and care.<sup>5</sup> Alongside those efforts to show affinities in bodies of “grand theory,” my early work also focused on concrete issues like privacy rights, reproductive rights and responsibilities, and welfare reform.<sup>6</sup>

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<sup>3</sup> Linda C. McClain, “Atomistic Man” Revisited: Liberalism, Connection, and Feminist Jurisprudence, 65 S. CAL. L. REV. 1171, 1174 (1992) [hereinafter McClain, “Atomistic Man” Revisited].

<sup>4</sup> CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN’S DEVELOPMENT* (1982); see Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543, 581–84, 591 (1986) (contrasting “masculine” and “feminine” paradigms and arguing that “the development of the nation’s ideology has paralleled individual moral development in the male pattern,” and, thus, “distorted” our legal system); Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 3 (1988) (advancing the “separation thesis” and the “connection thesis” to explain men’s and women’s different experiences and arguing that the legal system and modern jurisprudence reflect the former). For discussion of these theories, see McClain, “Atomistic Man” Revisited, *supra* note 3, at 1180–84.

<sup>5</sup> See McClain, “Atomistic Man” Revisited, *supra* note 3, at 1203–28.

<sup>6</sup> See, e.g., Linda C. McClain, *Inviolability and Privacy: The Castle, the Sanctuary, and the Body*, 7 YALE J.L. & HUMAN. 195 (1995); Linda C. McClain, “Irresponsible” Reproduction, 47 HASTINGS L.J. 339 (1996) [hereinafter McClain, “Irresponsible” Reproduction]; Linda C. McClain, *Rights and Irresponsibility*, 43 DUKE L.J. 989 (1994); Linda C. McClain, *The Poverty of Privacy?*, 3 COLUM. J. GENDER & L. 119 (1992) [McClain, *The Poverty of Privacy?*].

Two significant spaces in which I wrestled with these tensions between feminism and liberalism were Professor Fineman's FLT Project, newly relocated to Columbia University,<sup>7</sup> and the Colloquium on Law, Philosophy, and Political Theory (the Colloquium), convened by legal philosopher Ronald Dworkin and philosopher Thomas Nagel at N.Y.U. As an LL.M. student at N.Y.U. I took that Colloquium, which provided the chance to deepen my understanding of liberal political and legal theory and to wrestle with bringing feminist perspectives to bear on such theory. As a new professor, I continued to attend the Colloquium and enjoyed the intellectual community it afforded. On the recommendation of Professor Sylvia Law, I first met Professor Fineman while I was a student at N.Y.U.<sup>8</sup> At our first meeting, Martha listened patiently to some of my embryonic ideas for future scholarly articles, and generously invited me to participate in FLT Project workshops and conferences.

Both of those spaces—the FLT Project and the Colloquium—nurtured my development as I attempted to elaborate my own liberal feminist approach. The first academic conference in which I presented my work as a new law professor was Professor Fineman's FLT workshop "Reproductive Issues in a Post-Roe World,"<sup>9</sup> which, coincidentally, was also the first FLT Project workshop held under the auspices of the project's new home at Columbia University. That workshop, held in November 1991, took place in the wake of the U.S. Supreme Court's recent upholding of new restrictions on abortion (in *Webster v. Reproductive Health Services*) and as the Court considered (in what became *Planned Parenthood of Southern Pennsylvania v. Casey*) a fresh set of state restrictions challenging *Roe*'s framework.<sup>10</sup>

The workshop exemplified several remarkable features of the FLT Project and why participating in such workshops was so exciting and valuable. First, the topic itself was timely and, as Professor Fineman explained, "urgent," in light of "the changing political shape of the United States Supreme Court."<sup>11</sup> Second, the workshop defined "reproductive issues" broadly, looking not only at the immediate issue of abortion rights but also at issues such as the impact of

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<sup>7</sup> Professor Fineman first founded the FLT Project in 1984 while at the University of Wisconsin–Madison. See *The Feminism and Legal Theory Project: History*, EMORY L., <http://law.emory.edu/faculty-and-scholarship/centers/feminism-and-legal-theory-project.html> (last visited Apr. 9, 2018).

<sup>8</sup> Professor Sylvia Law, with whom I studied at N.Y.U., supervised what became my first law review article in feminist jurisprudence (McClain, "Atomistic Man" Revisited, *supra* note 3).

<sup>9</sup> The workshop resulted in a symposium in the *Columbia Journal of Gender and Law*, to which I contributed. See McClain, *The Poverty of Privacy?*, *supra* note 6.

<sup>10</sup> See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992); *Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1989).

<sup>11</sup> Martha Albertson Fineman, *Introduction*, 3 COLUM. J. GENDER & L. 1, 1 (1992).

assisted reproductive technology on women and the regulation of midwifery.<sup>12</sup> Third, in both the selection of papers and presenters and in its attendees, the workshop crossed disciplinary, global, and generational lines.<sup>13</sup> Feminist lawyers and scholars involved in *Roe* and other reproductive rights efforts shared their insights with new feminist scholars. Fourth, the valuable conversations the workshop generated took place not only in the formal context of presenting and commenting on papers but also during breaks, lunches, and dinner. Further, as would often be the case in years to come, that workshop generated published scholarship: in this instance, a symposium in the newly formed *Columbia Journal of Gender and Law*. In this way, Professor Fineman's FLT Project inspired law students and engaged them in the production of feminist legal scholarship, while also facilitating the feminist scholarship itself.<sup>14</sup> For example, being included as a paper presenter allowed me to turn a seminar paper written at N.Y.U.<sup>15</sup> into a law review article (*The Poverty of Privacy?*) that argued for the continuing importance of the right to privacy in a "revised *Roe*" world, critiqued the near-disappearance of privacy in the joint opinion of *Planned Parenthood of Southern Pennsylvania v. Casey*, and cautioned about some of the risks—in light of this disappearance and *Casey*'s vision of women's decision making—of feminist calls to focus more on responsibility than on privacy and rights in justifying reproductive freedom.<sup>16</sup>

In the ensuing years, sharing my work in the FLT Project's various workshops and conferences provided regular occasions for constructive engagement and critique. Even when I was not presenting work, attending these events provided the pleasure of feminist companionship and of learning from an ever-expanding circle of scholars from different disciplines—and countries—tackling a wide range of issues. Professor Fineman also tackled—and sought to make accessible to us—methods and forms of discourse often seen as in tension with feminist inquiry or goals. For example, she convened more than one FLT Project event to focus on the prominent influence of economic theory and methodology in law ("law and economics") and to consider feminist criticisms

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<sup>12</sup> *Id.*

<sup>13</sup> The workshop, held from November 15 to 16, 1991, included reproductive rights attorneys and activists, as well as junior and senior scholars, and scholars from the United States, Canada, and Australia. The published symposium, see *infra* note 14, captures some of that diversity.

<sup>14</sup> See Fineman, *supra* note 11 (noting that this issue of the *Columbia Journal of Gender and Law* was dedicated to the workshop). For another example, see Symposium, *Discrimination and Inequality: Emerging Issues*, 85 CORNELL L. REV. 1181 (1999–2000), discussed *infra* Part II.

<sup>15</sup> I wrote the initial paper in a class on Women and the Law, taught by then-adjunct professor and NOW Legal Defense and Education Fund lawyer Sally Goldfarb, who is now a professor at Rutgers University.

<sup>16</sup> See McClain, *The Poverty of Privacy?*, *supra* note 6 (discussing and critiquing proposals by Ruth Colker and Robin West).

and responses, including enlisting economic concepts and rhetoric to feminist ends. That critical engagement resulted in an interdisciplinary edited volume, *Feminism Confronts Homo Economicus*, to which I was fortunate to contribute.<sup>17</sup> Similarly, some years later, Professor Fineman convened an illuminating “Uncomfortable Conversation” about the increasing prominence of sociobiology and evolutionary psychology (sometimes enlisted to explain sex inequality and women’s and men’s different choices), and feminist legal theory’s engagement with such approaches.<sup>18</sup> These are just a few examples of the way that Professor Fineman encouraged feminist legal scholars to confront and engage with different forms of discourse. Over the years, it was my pleasure to contribute to some of the edited volumes that Professor Fineman produced as the fruit of many of those workshops and uncomfortable conversations at Columbia and, subsequently, Cornell Law School and Emory University School of Law.<sup>19</sup>

As I traveled between the FLT Project and the Colloquium, however, I often experienced a sense of cognitive dissonance as I confronted the tensions between the distinct theoretical conversations and preoccupations of the two communities. In the Colloquium, as liberal luminaries presented works in progress in liberal political or constitutional theory, it often fell to feminist voices in the room to raise “the woman question” or to ask how gender mattered to the problem with which the author grappled.<sup>20</sup> I found myself, for example, introducing relevant feminist perspectives and scholarship to liberal theorists.<sup>21</sup>

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<sup>17</sup> See, e.g., Linda C. McClain, *Deterring “Irresponsible” Reproduction Through Welfare Reform*, in *FEMINISM CONFRONTS HOMO ECONOMICUS: GENDER, LAW, AND SOCIETY* 225 (Martha Albertson Fineman & Terence Dougherty eds., 2005).

<sup>18</sup> Emory University School of Law Uncomfortable Conversation: Sociobiology, Evolutionary Psychology, and Feminist Legal Theory (Dec. 1–2, 2006). At that conversation, I presented a paper, *Social Cooperation Between Men and Women: A Universal? On What Terms?*. I presented a more developed version, *Feminist Law Reform as Social Engineering?*, at “Transcending the Boundaries of Law: Feminism and Legal Theory Project’s Twenty-Fifth Anniversary Conference,” held at Emory University School of Law from November 6 to 8, 2008. That paper was later published. See Linda C. McClain, *What’s So Hard About Sex Equality?: Nature, Culture, and Social Engineering*, in *TRANSCENDING THE BOUNDARIES OF LAW: GENERATIONS OF FEMINISM AND LEGAL THEORY* 67 (Martha Albertson Fineman ed., 2011) [hereinafter McClain, *What’s So Hard About Sex Equality?*].

<sup>19</sup> See McClain, *Deterring “Irresponsible” Reproduction Through Welfare Reform*, *supra* note 17; McClain, *What’s So Hard About Sex Equality?*, *supra* note 18; Linda C. McClain, *Child, Family, State, and Gender Equality in Religious Stances and Human Rights Instruments: A Preliminary Comparison*, in *WHAT IS RIGHT FOR CHILDREN?: THE COMPETING PARADIGMS OF RELIGION AND HUMAN RIGHTS* 19 (Martha Albertson Fineman & Karen Worthington eds., 2009) [hereinafter McClain, *Child, Family, State and Gender Equality*].

<sup>20</sup> One such prominent voice was Drucilla Cornell, then at Benjamin N. Cardozo School of Law. To be sure, the philosopher Frances Kamm frequently participated, although not from a distinctly feminist perspective.

<sup>21</sup> For example, I had such conversations about relevant feminist arguments with Ronald Dworkin when he presented draft chapters of his book on abortion rights. See *RONALD DWORKIN, LIFE’S DOMINION: AN*

At FLT Project workshops and conferences, feminist presenters often delivered critiques of liberalism—and sometimes liberal feminism—that stung but also challenged me to formulate a response. Even so, as I continued to define my liberal and liberal feminist orientation and draw on those traditions in my work, Professor Fineman was always welcoming.<sup>22</sup> Looking back, I realize that the liberalism targeted in some of those critiques was not the liberal political and constitutional theory with which I engaged, which supported various affirmative governmental obligations. Instead it was the neoliberalism prominent in political discourse, used to justify neoclassical economics, with a focus on free markets and “efficiency,” and to criticize social welfare programs, with a focus on economic redistribution and reducing inequality.<sup>23</sup> Indeed, in the mid-1990s, I allied with Professor Fineman and various feminist and progressive scholars in publicly opposing the congressional attack on Aid to Families with Defendant Children (AFDC) in the name of “personal responsibility” and “welfare reform.”<sup>24</sup>

### B. *Generative Ideas*

Turning to the influence of Professor Fineman’s work itself, in my early career this influence was both methodological and substantive. On the point of method, Fineman cautioned against both overly abstract and categorical grand theory—ungrounded in the particular realities of women’s lives—and overly particular narratives, urging instead for a “mid-level” theory.<sup>25</sup> Eschewing either-or answers about sameness and difference, formal or substantive equality, Fineman argued that women live “gendered lives,” revealed not by essentialist

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ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM 50–60 (1994) (discussing, in the section on “Feminism,” arguments by Catharine MacKinnon and Robin West about abortion). I was also in conversation with John Rawls, a frequent presenter in the Colloquium, about feminist critiques of his political liberalism. See John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765 (1997) (citing McClain, “Atomistic Man” Revisited, *supra* note 3, as one of several works that had “encouraged [him] to think that a liberal account of equal justice for women is viable”).

<sup>22</sup> I recall at an FLT Project event Martha joked that she still had hope for me.

<sup>23</sup> See, e.g., Martha T. McCluskey, *The Politics of Economics in Welfare Reform*, in FEMINISM CONFRONTS HOMO ECONOMICUS, *supra* note 17, at 193, 194.

<sup>24</sup> Professor Fineman, Professor Matthew Diller, Professor Kendall Thomas, and I worked on a statement by law professors opposing the draft Personal Responsibility Act. *Contract with America—Welfare Reform: Hearing Before the Subcomm. on Human Res. of the H. Comm. on Ways and Means*, 104th Cong. 1488–89 (1995) (joint statement of Matthew Diller, Fordham University School of Law; Martha Albertson Fineman, Columbia University School of Law; Linda C. McClain, Hofstra University School of Law; and Kendall Thomas, Columbia University School of Law).

<sup>25</sup> See, e.g., Linda C. McClain, *The Liberal Future of Relational Feminism: Robin West’s Caring for Justice*, 24 LAW & SOC. INQUIRY 477, 494 (1999) (citing Martha L. Fineman, *Challenging Law, Establishing Differences: The Future of Feminist Legal Scholarship*, 42 FLA. L. REV. 25, 25–28 (1990) [hereinafter Fineman, *Challenging Law*]).

claims about “all women” or “all men,” but by investigation of women’s experience, and that such experience provides a basis for cooperation.<sup>26</sup>

Professor Martha Fineman’s substantive work on the ideology of motherhood was a major influence when I wrote a lengthy law review article—presented in a timely FLT Project workshop “Women, Children, and Poverty”<sup>27</sup>—critically evaluating the welfare debates that culminated in the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) of 1996.<sup>28</sup> My article, “*Irresponsible*” *Reproduction*, evaluated the rhetoric of irresponsible reproduction in congressional debates and other public discourse, arguing that such rhetoric “reveals three paradigmatic models of irresponsibility—the single mother, the welfare mother, and the teen mother—and three corresponding aspects of irresponsibility—immorality, unaccountability, and incapacity.”<sup>29</sup> Like many others, I enlisted Fineman’s critique, set forth powerfully in her book *The Neutered Mother, the Sexual Family and Other Twentieth-Century Tragedies*, of the idea of the “single mother” as “deviant” because of her singleness and her deft analysis of how images of single mothers as pathological featured in public discourse about poverty.<sup>30</sup> My article also called for “[e]nriching [p]ublic [d]iscourse [a]bout [r]eproduction and [r]esponsibility,” by injecting “feminist analysis” to counter the “reductive stories about motivation and rationality” and “problematic gender ideology” that were “advanced to support efforts to eliminate irresponsibility.”<sup>31</sup>

Looking back on that article now, I am confident that Professor Fineman’s insightful analysis of keywords, such as “welfare,” “dependency,” and “single

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<sup>26</sup> See, e.g., McClain, “*Atomistic Man*” *Revisited*, *supra* note 3, at 1188 n.73 (citing Fineman, *Challenging Law*, *supra* note 25, at 37–41); Linda C. McClain, *Toleration, Autonomy, and Governmental Promotion of Good Lives: Beyond “Empty” Toleration to Toleration as Respect*, 59 OHIO ST. L.J. 19, 38 n.56 (1998) [hereinafter McClain, *Toleration, Autonomy, and Governmental Promotion of Good Lives*] (arguing against equality as “gender neutrality” and instead using alternative approaches focused upon the “unequal ‘reality’ of many women’s lives” (quoting MARTHA ALBERTSON FINEMAN, *THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM* 175 (1991) [hereinafter FINEMAN, *THE ILLUSION OF EQUALITY*])).

<sup>27</sup> I presented the draft article, “*Irresponsible*” *Reproduction*, at “Women, Children, and Poverty, Feminism and Legal Theory Workshop,” held at Columbia Law School from June 6 to 10, 1995. I still remember some of the incisive comments participants gave on the draft, particularly questions about how feminists should respond to attacks on single mothers, e.g., whether to distinguish among types of single mothers (affluent mothers like Murphy Brown—criticized by Vice President Dan Quayle as a bad role model—and poor mothers receiving AFDC).

<sup>28</sup> McClain, “*Irresponsible*” *Reproduction*, *supra* note 6.

<sup>29</sup> *Id.* at 342.

<sup>30</sup> MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* 101–42 (1995) [hereinafter FINEMAN, *NEUTERED MOTHER*] (analyzing “[t]he [c]onstruction of [m]aternal [d]eviancy in [p]overty [d]iscourses”).

<sup>31</sup> McClain, “*Irresponsible*” *Reproduction*, *supra* note 6, at 419.

mother,” and of the rhetoric employing such words encouraged me to undertake my own analysis of the rhetoric of “irresponsibility.” Also aiding my analysis were Fineman’s arguments about society’s positioning of the family—and within the family, mothers—as the site to address the “inevitable dependency” of human beings (particularly children and the elderly) and about the “derivative dependency” resulting from such caretaking.<sup>32</sup> My article enlisted Fineman’s argument about how the state has relied upon the private (marital) family (of male provider/female caretaker) to meet the burdens of inevitable dependency and has subsidized it in various ways to do so.<sup>33</sup> To counter the irresponsibility critique of families who rely on “public sources . . . to meet these burdens of dependency,” I drew on Fineman’s argument that the dependency of single mothers “stems from the difficulty of engaging in the caretaking that women do within the two-parent family and in acquiring the economic resources to do so.”<sup>34</sup> I argued that Fineman’s analysis “strengthen[ed] arguments” that society has a public (collective) responsibility to address the burdens of inevitable dependency.<sup>35</sup> Observing that Fineman proposed “that we eliminate any special status afforded marriage, redefine the basic family unit as the mother-child caretaking unit, and redistribute to it the social and economic subsidies now provided to the married family,” I expressed my own preference to expand, rather than eliminate the legal category of marriage to include “other intimate relationships, such as gay and lesbian marriage.”<sup>36</sup> I also expressed concern over whether Professor Fineman’s use of the “mother-child dyad”—albeit as a metaphor—to connote the basic family paradigm meriting support would nonetheless “inadvertently reforc[e] gender norms about who should do caretaking work.”<sup>37</sup> Regardless, I concluded:

Whether or not one endorses Fineman’s proposal with respect to marriage, her proposed redefinition of the family valuably highlights the vital task of meeting the burdens of “inevitable dependency” as a component of social reproduction and the way in which proponents of reproductive responsibility fail to address the role of collective responsibility in meeting those burdens.<sup>38</sup>

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<sup>32</sup> *Id.* at 417–19 (citing FINEMAN, NEUTERED MOTHER, *supra* note 30, at 161–76) (discussing Fineman’s analysis of “inevitable dependency” and “derivative dependency” as “powerful” and illustrating that “one of society’s most vital tasks is meeting the need of its ‘dependent’ members”).

<sup>33</sup> *See id.* at 418 (citing FINEMAN, NEUTERED MOTHER, *supra* note 30, at 161–69, 226–27).

<sup>34</sup> *Id.* (citing FINEMAN, NEUTERED MOTHER, *supra* note 30, at 164–66).

<sup>35</sup> *See id.* at 417.

<sup>36</sup> *Id.* at 418 & n.329 (citing FINEMAN, NEUTERED MOTHER, *supra* note 30, at 226–36).

<sup>37</sup> *Id.* at 418 n.329.

<sup>38</sup> *Id.* at 418 (footnote omitted) (citing FINEMAN, NEUTERED MOTHER, *supra* note 30, at 226–36).



Fineman's critique of "the rhetoric of fathers' rights and responsibilities" informed my critical analysis of the rhetoric of "responsible fatherhood" evident in some calls for welfare reform and for shoring up men's roles as fathers and husbands.<sup>39</sup> I evaluated arguments that family breakdown stemmed from "women's failure to engage successfully in their proper cultural task of domesticating men or 'taming' men into marriage, monogamous commitment, and paternal support of children."<sup>40</sup>

Finally, Professor Fineman's analysis of motherhood played a key role in my article's exploration of the interplay of agency and constraint in women's reproductive lives. I acknowledged Martha's challenge to feminists to view single motherhood as a deliberate choice, a "practice resistive to patriarchal ideology."<sup>41</sup> I observed that Dorothy Roberts (referencing Fineman) similarly suggested "that feminists should consider whether 'deviant' (single) mothers might offer a glimpse of 'liberated motherhood.'"<sup>42</sup> I argued for the need to bring that perspective on single motherhood into conversation with other feminist analyses that identify male irresponsibility and unaccountability "as a cause of unwanted pregnancy, abortion, single motherhood, family poverty, and family violence," and that critique "the ways that law permits or perpetuates such irresponsibility."<sup>43</sup>

On the one hand, I argued that "'[d]eliberate choice' may seem a strong word to apply to women's reproductive and mothering decisions, especially if such choices flow from or are affected by male irresponsibility or dominance."<sup>44</sup> Yet, given that Professor Fineman herself "describes motherhood as a 'colonized' concept to stress the ways that patriarchal ideology of motherhood shapes women's experiences," I reasoned that "Fineman's stance is certainly not incompatible with recognizing constraints on choice."<sup>45</sup> Drawing on efforts by feminist legal theorists to grapple with the interplay of choice and constraint in models of the self and agency, I argued for developing a "[c]ontinuum [m]odel of [a]gency and [r]esponsibility" as a useful framework for thinking about issues

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<sup>39</sup> *Id.* at 389–93 (citing FINEMAN, NEUTERED MOTHER, *supra* note 30, at 201–04).

<sup>40</sup> *Id.* at 387 (first citing William Raspberry, *Women Taming Men*, WASH. POST, Nov. 24, 1993, at A17; then citing David W. Murray, *Countdown for the Family*, SACRAMENTO BEE, May 1, 1994, at F1).

<sup>41</sup> *Id.* at 430–32 (discussing FINEMAN, NEUTERED MOTHER, *supra* note 30, at 125).

<sup>42</sup> *Id.* at 431 (citing Dorothy E. Roberts, *Racism and Patriarchy in the Meaning of Motherhood*, 1 AM. U. J. GENDER & L. 1, 28–29 (1993)).

<sup>43</sup> *Id.* at 423–24 (first citing Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 996–97 (1984); then citing Nancy E. Dowd, *Stigmatizing Single Parents*, 18 HARV. WOMEN'S L.J. 19, 60–62 (1995); and then citing PATRICIA HILL COLLINS, *BLACK FEMINIST THOUGHT* 116 (1991)).

<sup>44</sup> *Id.* at 431.

<sup>45</sup> *Id.* (citing FINEMAN, NEUTERED MOTHER, *supra* note 30, at 124–25).

of sex, reproduction, abortion, and motherhood and for better informing public-policy debates.<sup>46</sup>

Professor Fineman's analysis of the role of the family as a site of caretaking and of how society privatizes dependency continued to shape my work, in the years that followed, on care as a public value, the gendered economy of care, and the vital role of families in carrying out the task of social reproduction (or what Fineman called "societal preservation").<sup>47</sup> Similarly, in my critical evaluation of various social movements calling for shoring up the family (i.e., the marital family) as a "seedbed of civic virtue," such as the civil society movement and the marriage movement, I continued to enlist Fineman's work as a valuable resource.<sup>48</sup> At the same time, as I explain below, her critique of the sexual (marital) family and her provocative proposal—further developed in her subsequent book, *The Autonomy Myth: A Theory of Dependency*—to shift the focus of family law and the economic and social subsidies tied to marriage "to a new family core connection—that of the caretaker-dependent"<sup>49</sup>—posed a challenge to my own efforts to offer a liberal feminist account of the "place of families" that retained marriage but embraced equality both within and among families.

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<sup>46</sup> *Id.* at 432–34 (discussing Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304 (1995) and Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990)).

<sup>47</sup> See, e.g., Linda C. McClain, *Care As a Public Value: Linking Responsibility, Resources, and Republicanism*, 76 CHI.-KENT L. REV. 1673, 1710 (2001) [hereinafter McClain, *Care As a Public Value*] (discussing Fineman's analysis of "inevitable dependency" in FINEMAN, NEUTERED MOTHER, *supra* note 30, at 161–66, 226–36, and her analysis of "subsidy" in Martha Albertson Fineman, *Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency*, 8 AM. U. J. GENDER SOC. POL'Y & L. 13 (1999)).

<sup>48</sup> See, e.g., Linda C. McClain & James E. Fleming, *Some Questions for Civil Society-Revivalists*, 75 CHI.-KENT L. REV. 301, 330–31 (2000) (pointing out that while "[f]atherless families are viewed by most revivalists [such as David Blankenhorn] as the leading indicator (and a cause) of the crisis in civil society," on "some feminist views, fatherless families might seem to offer an alternative to patriarchy," such as Fineman's call to subsidize the "Mother/Child dyad" (citations omitted)); *id.* at 330–33 (arguing: "Focusing upon the family as an important site of social reproduction and caregiving could afford an important opportunity to argue that supporting the work of social reproduction is a public responsibility, and to attempt to instantiate care as a public value. (Indeed, this could be a common goal shared by civil society-revivalists and many feminists and liberals.)"). At my invitation, Professor Fineman contributed an essay to the symposium that James Fleming and I co-edited on calls to renew civil society. See Martha Albertson Fineman, *The Family in Civil Society*, 75 CHI.-KENT L. REV. 531 (2000). On the marriage movement, see *infra* Part II.

<sup>49</sup> MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* 123 (2004) [hereinafter FINEMAN, *THE AUTONOMY MYTH*].

## II. FORMATIVE PROJECTS

Beginning in the late 1990s, a central focus of my scholarship was developing the idea of a formative project of fostering the capacities of individuals for democratic and personal self-government. That effort was synthetic and drew on civic republican, feminist, and liberal ideas. A spur to my work on the importance of such a formative project was various civic republican, feminist, and even liberal critiques that liberalism lacked the resources for such a project because of its supposed commitment to neutrality and to a model of toleration that left individuals alone in the name of autonomy, without attention to supporting the preconditions for meaningful self-government.<sup>50</sup> My concern focused on the big picture, that is, on the respective roles of the family, other institutions of civil society, and the state (in its various manifestations) in fostering such capacities. The role of the family, specifically, became the focus of my first book, *The Place of Families: Fostering Capacity, Equality, and Responsibility*.<sup>51</sup>

Geography, once again, was a tangible marker of my positioning in different, although sometimes overlapping, feminist and liberal intellectual conversations. By the late 1990s, Professor Fineman and the FLT Project had moved to a new venue, Cornell Law School. Fortunately, I was able to hone my thinking about this formative project, its evolving dimensions, and the place of families in such a project as I shared pieces of it in workshops and Uncomfortable Conversations hosted by Fineman's relocated FLT Project. Glimmerings of the contours of the formative project featured in a paper I gave in a workshop, in 1999, "Discrimination and Inequality,"<sup>52</sup> which grew into the article, *Toward a Formative Project of Securing Freedom and Equality*,<sup>53</sup> published in a *Cornell Law Review* symposium inspired by the workshop.<sup>54</sup> In an Uncomfortable Conversation, "Children: Public Good or Individual Responsibility?," I tested out my efforts to enlist and synthesize civic republican, feminist, and liberal

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<sup>50</sup> See McClain, *Toleration, Autonomy, and Governmental Promotion of Good Lives*, *supra* note 26.

<sup>51</sup> LINDA C. MCCLAIN, *THE PLACE OF FAMILIES: FOSTERING CAPACITY, EQUALITY, AND RESPONSIBILITY* (2006) [hereinafter MCCLAIN, *THE PLACE OF FAMILIES*].

<sup>52</sup> I presented the paper *Some Thoughts About Facts, Sex/Gender Equality, and Constitutional Theory* at the Discrimination and Inequality, Feminism and Legal Theory Workshop, held at Cornell University School of Law from June 17 to 19, 1999.

<sup>53</sup> Linda C. McClain, *Toward a Formative Project of Securing Freedom and Equality*, 85 *CORNELL L. REV.* 1221 (2000).

<sup>54</sup> The *Cornell Law Review* held a live symposium from October 22 to 23, 1999, at which a number of the panelists from the FLT Workshop presented their work. Symposium, *Discrimination and Inequality: Emerging Issues*, 85 *CORNELL L. REV.* 1181 (2000).

ideas to argue for recognizing and supporting care as a “public value.”<sup>55</sup> I was able to develop my liberal feminist approach to sex education and sexual responsibility and contrast it with conservative approaches (such as PRWORA’s funding of “abstinence only until marriage” education), at both an Uncomfortable Conversation at Cornell, “Sexuality and Feminist Theory,”<sup>56</sup> and at the FLT Project—The 20th Summer Workshop, held at the University of Wisconsin–Madison (the first home of the FLT Project).<sup>57</sup>

During these years, another formative influence was constructive conversations with liberal and liberal feminist political theorists and legal scholars about reconstructing key liberal ideals (such as autonomy and privacy), the contours of a formative project, and the role of families.<sup>58</sup> Those conversations took place in various settings, including during a sabbatical year at the Harvard University Center for Ethics and the Professions.<sup>59</sup> Presenting my critique of the marriage movement and of governmental marriage promotion as a tool of welfare policy in the Dworkin–Nagel Colloquium at N.Y.U. provided

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<sup>55</sup> That Uncomfortable Conversation took place from November 19 to 20, 1999 at Cornell Law School. The resulting article was McClain, *Care as a Public Value*, *supra* note 47, which appeared in a symposium, “The Structures of Care and Care Work,” edited by (my future colleague at Boston University School of Law) Katharine Silbaugh.

<sup>56</sup> My paper was *Conservative Versus Feminist Sexual Economies: Beyond Abstinence?*, presented at “An Uncomfortable Conversation—Sexuality and Feminist Theory: Road Blocks, Detours and New Directions,” held at Cornell Law School from November 15 to 16, 2002. I also helped Martha organize that Conversation.

<sup>57</sup> That paper was *Struggles over Teaching Sexual and Reproductive Responsibility: Beyond ‘Abstinence Only’ and Women as Gatekeepers?*, presented at “Feminism and Legal Theory Project—The 20th Summer Workshop,” held at the University of Wisconsin–Madison from June 26 to 28, 2003.

<sup>58</sup> One example is helpful conversations with my then-colleague and neighbor Amy Baehr, a liberal feminist philosopher at Hofstra; at her invitation, I presented work to the New York Society for Women in Philosophy (*A Liberal Feminist Approach to Associations*, presented on November 5, 2004 at the CUNY Graduate Center) and contributed a chapter to her volume on feminist liberalism. See Linda C. McClain, *The Domain of Civic Virtue in a Good Society: Families, Schools, and Sex Equality*, in VARIETIES OF FEMINIST LIBERALISM 207 (Amy R. Baehr ed., 2004). Liberal feminist scholar Mary Lyndon Shanley and I debated marriage live (on MSNBC) and in print. See *Should States Abolish Marriage?*, LEGAL AFF.: DEBATE CLUB (May 16, 2005), [http://legalaffairs.org/webexclusive/debateclub\\_m0505.msp](http://legalaffairs.org/webexclusive/debateclub_m0505.msp) (online debate with Mary Lyndon Shanley). I had the opportunity to engage Professor Anita Allen’s influential liberal feminist account of privacy at the conference “Reconstructing Liberalism,” held at William & Mary School of Law from April 3 to 4, 1998. See Linda C. McClain, *Reconstructive Tasks for a Liberal Feminist Conception of Privacy*, 40 WM. & MARY L. REV. 759 (1999). Professor Allen also included me in a volume assessing the work of communitarian/civic republican political theorist Michael Sandel. See James E. Fleming & Linda C. McClain, *The Right of Privacy in Sandel’s Procedural Republic*, in DEBATING DEMOCRACY’S DISCONTENT: ESSAYS ON AMERICAN POLITICS, LAW, AND PUBLIC PHILOSOPHY 248 (Anita L. Allen & Milton C. Regan Jr. eds., 1998).

<sup>59</sup> The Center is now called the Edmond J. Safra Center for Ethics. While at Harvard, I had fruitful conversations with liberal feminist political theorist Tamara Metz, who was also working on family and marriage (what would become TAMARA METZ, *UNTYING THE KNOT: MARRIAGE, THE STATE, AND THE CASE FOR THEIR DIVORCE* (2010)). I also had the opportunity to meet with liberal political philosopher John Rawls, with whom I had previously corresponded.

instructive liberal perspectives.<sup>60</sup> Conferences on constitutional and political theory at nearby Fordham University School of Law, organized by liberal constitutional theorist James Fleming, were another venue for productive conversations about rights, responsibilities, and critiques of liberal political and constitutional theory,<sup>61</sup> and for articulating a liberal feminist approach to such matters as the dual authority of parents and schools for educating children and fostering civic virtue.<sup>62</sup>

*The Place of Families* took shape during the multiple conversations facilitated by the FLT Project and by constructive engagement in liberal and other venues.<sup>63</sup> In that book, I argued that “[d]espite sustained concern over the state of families, the question of the place of families in our constitutional and political order has received insufficient attention,” and asserted that “underlying the common impulse to link the state of families to the state of the nation is an important idea: families have a place in the project of forming persons into capable, responsible, self-governing citizens.”<sup>64</sup> My argument was that “[s]ociety depends upon such a formative process, but sharp points of disagreement have arisen about its contours.”<sup>65</sup> Beyond my acknowledged debt to the FLT Project for so many “constructive exchanges”<sup>66</sup> as I worked on the book and the impact of wrestling with Professor Fineman’s ideas on this book, I am also indebted to Martha for another reason. As a first-time book author, I had the enormous good fortune that the acquisitions editor at Harvard University Press turned (not surprisingly, given the proposed book’s topic and Professor Fineman’s stature) to Martha for a review of the book proposal; Martha also provided a generous book-jacket blurb.

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<sup>60</sup> On October 10, 2002, I presented the paper, *Marriage and Social Health: Marriage Promotion, Marriage (E)quality, and Welfare Reform*, at the Colloquium in Legal, Political, and Social Philosophy, held at N.Y.U. School of Law.

<sup>61</sup> For example, the conference “Rawls and the Law,” held at Fordham University School of Law from November 7 to 8, 2003, was memorable because I was on a panel with liberal feminist political philosopher Susan Moller Okin and engaged with Okin’s critique of Rawls’s evolving position on the family. See Linda C. McClain, *Negotiating Gender and (Free and Equal) Citizenship: The Place of Associations*, 72 *FORDHAM L. REV.* 1569 (2004).

<sup>62</sup> See, e.g., Linda C. McClain, *The Domain of Civic Virtue in a Good Society: Families, Schools, and Sex Equality*, 69 *FORDHAM L. REV.* 1617 (2001) (first presented at the conference, “The Constitution and the Good Society,” held at Fordham University School of Law, from September 22 to 23, 2000).

<sup>63</sup> See McCLAIN, *THE PLACE OF FAMILIES*, *supra* note 51.

<sup>64</sup> *Id.* at 3.

<sup>65</sup> *Id.*

<sup>66</sup> See *id.* at ix (“I am especially indebted for the opportunity to present early drafts of several chapters of the book in workshops sponsored by Martha Albertson Fineman’s Feminism and Legal Theory Project, in its former venues at Columbia University and at Cornell Law School and at the 20th Summer Workshop, held at University of Wisconsin-Madison. I am grateful to the many participants in those events for constructive exchanges.”).

In writing *The Place of Families*, I found myself both embracing and resisting features of Professor Fineman's analysis. Readily embraced from the book's opening pages was her diagnosis of "the indispensable, but underappreciated, role of care in meeting the needs of human dependency and the disproportionate role of women (both as paid and unpaid caregivers) in meeting those needs."<sup>67</sup> The role of care was central in my argument about the place of families in the task of social reproduction, part of the task of "fostering capacity."<sup>68</sup> So, too, I drew on Fineman's tackling of "the autonomy myth" in my call for a social contract that recognized public responsibility to support care.<sup>69</sup> At the same time, her criticism of the autonomy myth and of liberalism posed challenges to my liberal feminist orientation and my positioning of fostering the capacity for democratic and personal self-government (i.e., autonomy) as a central aim of a formative project that melded key liberal, feminist, and civic republican commitments. By way of response to this and other feminist critiques of autonomy, I argued that "[a]utonomy does not imply atomism," and adopted "a notion of autonomy that recognizes that the self is socially situated and develops in the context of, rather than independent of, society and relationships."<sup>70</sup> Such a model, I argued, was "in harmony with feminist models of relational autonomy," and was particularly apt with respect to an analysis of family law and the place of families.<sup>71</sup> "It is by virtue of a person's participation in relationships of nurture and care, initially within families and eventually in other forms of association, that he or she is able to develop the capacity for autonomy."<sup>72</sup>

Fineman's critique of the autonomy myth went less to atomism, though, than to the foundational myth of independence underlying the approach to "policy-making regarding family and poverty" in the United States<sup>73</sup>: we mistakenly conceptualize family as independent of the state both in the sense of existing apart from legal regulation and in the sense of existing independent of public support. My book drew on both parts of Fineman's critique, even while

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<sup>67</sup> *Id.* at 5 (first citing FINEMAN, THE AUTONOMY MYTH, *supra* note 49; then citing EVA FEDDER KITTAY, LOVE'S LABOR: ESSAYS ON WOMEN, EQUALITY, AND DEPENDENCY (1999)). I should note that Fineman herself refers to "caretaking" rather than "caregiving."

<sup>68</sup> *See id.* at 85–114.

<sup>69</sup> *See id.* at 21 ("Families are assigned primary—if not sole—responsibility for providing this kind of care. However, Fineman contends, clinging to the 'myth' of autonomy as self-sufficiency keeps our social institutions, laws, and policies from valuing such care and recognizing a collective responsibility to provide for dependency." (citing FINEMAN, THE AUTONOMY MYTH, *supra* note 49)).

<sup>70</sup> *Id.* at 18.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> FINEMAN, THE AUTONOMY MYTH, *supra* note 49, at 7.

attempting, in my reconstruction of civic republican ideals like independence, to recast them “in a way that will be more supportive of care as a public value.”<sup>74</sup> With respect to the first dimension, I explained: “It is inaccurate to think of the family as ‘independent’ of the state, since law sets the boundaries of what constitutes a family, of what are parental rights and responsibilities, and of what state interests justify intervening in family life.”<sup>75</sup> And I concurred with Fineman that regarding the family as “‘independent’ in the sense of being a self-sufficient unit of caregiving meriting no support by government or other institutions or civil society . . . represents a serious stumbling block to formulating a sound family policy,” as illustrated in “the ongoing debates over welfare reform.”<sup>76</sup>

I found myself resisting Professor Fineman’s analysis, however, as I wrote my chapters on the place of marriage. In particular, I struggled with her widely discussed contention, in *The Autonomy Myth*, that “for all relevant and appropriate societal purposes, we do not need marriage and we should abolish it as a legal category” and, instead, “should transfer the social and economic subsidies and privilege that marriage now receives to a new family core connection—that of the caretaker-dependent.”<sup>77</sup> *The Autonomy Myth* also sketched, as a thought experiment, the advantages of abolishing marriage as a legal category and, instead, using contracts and contract rules to regulate adult–adult intimate relationships.<sup>78</sup> As I wrote *The Place of Families*, the hardest chapter was “Beyond Marriage?,” which opened with the above quote from Professor Fineman as well as a quote from the Law Commission of Canada’s report, *Beyond Conjugalit*y: “[Marriage] is no longer a sufficient model to respond to the variety of relationships that exist in Canada today.”<sup>79</sup> Wrestling with the question, “why marriage?,” I critically considered two distinct meanings of that question: “why *only* marriage?” (as in *Beyond Conjugalit*y) and “why legal marriage at all?” (as in Fineman’s proposal). Responding to both forms of that question helped me to develop my own “marriage plus” approach that answered the question, “[s]hould society (and family law and policy) move beyond marriage?,” with “yes and no.”<sup>80</sup> With respect to the yes part of my answer, consonant with my argument that fostering equality should be a core

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<sup>74</sup> MCCLAIN, *THE PLACE OF FAMILIES*, *supra* note 51, at 91.

<sup>75</sup> *Id.* (citing Martha A. Fineman, *What Place for Family Privacy?*, 67 GEO. WASH. L. REV. 1207, 1207–09 (1999)).

<sup>76</sup> *Id.*

<sup>77</sup> FINEMAN, *THE AUTONOMY MYTH*, *supra* note 49, at 123.

<sup>78</sup> *Id.* at 133.

<sup>79</sup> MCCLAIN, *THE PLACE OF FAMILIES*, *supra* note 51, at 191 (alteration in original) (quoting LAW COMM’N OF CAN., *BEYOND CONJUGALITY: RECOGNIZING AND SUPPORTING CLOSE ADULT PERSONAL RELATIONSHIPS* 113 (2001)).

<sup>80</sup> *Id.* at 193.

aim of family law and policy, I contended that “[o]ne appropriate move beyond traditional marriage . . . is to embrace more fully the public value of sex equality, and thus equality within families, as a principle relevant to the regulation of family life and to governmental support of marriage.”<sup>81</sup> I also “argued that a second valuable move, in the direction of equality among families, is to recognize and support same-sex marriage.”<sup>82</sup> In the chapter “Beyond Marriage?,” I argued “for a third move beyond traditional marriage, also in the direction of greater equality among families: extending governmental support and recognition to other forms of family that foster some or all of the values and goods associated with marital families.”<sup>83</sup>

It was the “no” part of my answer that most centrally engaged with Fineman’s challenge. I argued: “Focusing family law on the caretaking-dependent relationship, as Fineman proposes, has the considerable merits of directing society’s attention to the important task of orderly social reproduction and of fostering governmental support—rather than opprobrium—for single-parent and other nonmarital families.”<sup>84</sup> At the same time, “it has the demerit of removing—and treating primarily as a matter of private contract—another valuable dimension of families: the intimate, committed bonds between adults and the role that such relationships play in fostering goods as well as interdependencies.”<sup>85</sup> Instead, I argued “for a kinship registration system that would offer governmental recognition and support to forms of intimate, committed relationships other than marriage,” building on “the basic idea that public recognition and support of committed intimate relationships may contribute to their security and stability.”<sup>86</sup> I drew on *Beyond Conjugal* “as an instructive guide to the rationales for such a scheme and its possible contours.”<sup>87</sup> For example, in identifying what relationships beyond marriage might be helped by such a scheme, I identified unmarried cohabitants (many of whom had children in their households); complex family forms (such as where “more than two persons [are] acting in a parenting capacity toward children” or are in a sexual affiliation); and the “‘close adult personal relationship’ that is not conjugal” (i.e., sexual), such as between “two siblings, a parent and an adult child, a caretaker and a care recipient, or two close friends” (the subject of

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<sup>81</sup> *Id.* (referring to Chapter 4, “Marriage Promotion, Marriage (E)quality, and Welfare Reform”).

<sup>82</sup> *Id.* (referring to Chapter 5, “Recognizing Same-Sex Marriage”).

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* (discussing LAW COMM’N OF CAN., *supra* note 79).



*Beyond Conjuality*).<sup>88</sup> I observed that such a registration model could help “various intergenerational relationships centered around caregiving, such as a grandparent and child,” and also relationships beyond formal family ties.<sup>89</sup> As an example, I mentioned “the close adult personal relationship . . . formed between two chefs, an eighty-seven-year old African American woman and a forty-year-old white gay man who lives with and takes care of her,” quoting a reporter’s observation that “this pair has ‘forged a genuine family, with a devotion too rarely seen among blood relations.’”<sup>90</sup>

As I worked on the “Beyond Marriage?” chapter, a critical juncture was bringing Professor Fineman, along with many other scholars, to Hofstra Law School (where I taught at the time) for an interdisciplinary conference I helped organize, “Marriage, Democracy, and Families,” held in 2003.<sup>91</sup> Two years earlier, Martha had published her provocative essay *Why Marriage?*,<sup>92</sup> issuing the challenge later articulated in her book *The Autonomy Myth*. Thus, we framed the final roundtable around the topic “Intimate Affiliation and Democracy: Beyond Marriage?” and regarded Professor Fineman as a crucial participant.<sup>93</sup> We asked participants to consider such questions as: “Is government right to focus on the marital relationship or should it focus on a broader range of forms of intimacy, such as the parent-child/caretaker-dependent bond, the bonds of extended family, and the bonds of friendship?”<sup>94</sup> To the question, “[s]hould family law and policy move beyond marriage?,” answers ranged from an emphatic “no” from conservative legal scholar Lynn Wardle and the theologian and marriage movement leader Don Browning to Professor Fineman’s emphatic

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<sup>88</sup> *Id.* at 197–98.

<sup>89</sup> *Id.* at 198.

<sup>90</sup> *Id.* at 209 (quoting Alex Witchel, *Savoring the Chemistry of Southern Cooking*, N.Y. TIMES, May 7, 2003, at F1).

<sup>91</sup> The conference took place from March 14 to 15, 2003. My co-organizers were James Herbie DiFonzo, Joanna L. Grossman, and John DeWitt Gregory. For the published symposium, see Symposium, *Conference on Marriage, Families, and Democracy*, 32 HOFSTRA L. REV. 23 (2003), and Rachel F. Moran, *Love with a Proper Stranger: What Anti-Miscegenation Laws Can Tell Us About the Meaning of Race, Sex, and Marriage*, 32 HOFSTRA L. REV. 1663 (2004).

<sup>92</sup> Martha Albertson Fineman, *Why Marriage?*, 9 VA. J. SOC. POL’Y & L. 239 (2001).

<sup>93</sup> In my own contribution to that symposium, I cited to Fineman’s *Why Marriage?*, *id.*, as representative of criticism of “marriage’s privileged place” and observed that the roundtable mentioned in text brought together participants who offered “a rich diversity of perspectives on the question, ‘should family law and policy move beyond marriage?’” including Martha Fineman’s “call to abolish marriage as a state-sponsored institution (relegating adult intimate relationships to the realm of private contract) and to center family law around the parent-child, or caretaker-dependent relationship.” Linda C. McClain, *Intimate Affiliation and Democracy: Beyond Marriage?*, 32 HOFSTRA L. REV. 379, 379, 382 (2003) [hereinafter McClain, *Intimate Affiliation and Democracy*].

<sup>94</sup> Jordan Leigh Santeramo, *Foreword*, 32 HOFSTRA L. REV. 23, 25 (2003) (quoting Brochure, Hofstra University School of Law, A Conference on Marriage, Families, and Democracy).

“yes.” In between were answers that would retain marriage (opened up to same-sex couples) but insist on more room—and respect—for greater family pluralism (for example, from sociologist Judith Stacey and law professor Martha Ertman).<sup>95</sup>

Writing an article for the published symposium, in which I evaluated that spectrum of responses, aided me in sorting out my position on how equality within and among families should inform family law and policy and tackling the “beyond marriage” question in *The Place of Families*.<sup>96</sup> That conference was also personally significant because, after so many years of benefitting from participating in events hosted by Professor Fineman, I was able to host her at an event. Happily, it would not be the last time.

### III. BEYOND IDENTITIES AND THE ANTIDISCRIMINATION PARADIGM?

In reflecting upon Martha Fineman’s generative scholarship and its intersection with my own work, it is striking that, as she has urged in the last decade that we move beyond identities and an antidiscrimination paradigm as a way for law to address inequality to focus more on shared vulnerability and the obligations of a responsive state, my own work seems increasingly—and even stubbornly—focused on identity and discrimination. One reason is my focus on controversies involving rights in evident conflict. Even so, I believe that Professor Fineman and I share parallel concerns for securing autonomy and equality, although our vocabularies and frameworks differ. Moreover, we both have a keen interest in institutional design, that is, on the place of the state and the various components of civil society (including the family) in, as Professor Fineman would put it, fostering “resilience,”<sup>97</sup> or, as I would put it, fostering “capacity.”<sup>98</sup> In this Part, I mention Professor Fineman’s development of vulnerability theory and its intersection with my own ongoing projects.

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<sup>95</sup> Lynn Wardle, Don Browning, and Judith Stacey published articles based on their live presentations in the published symposium. Symposium, *supra* note 91. Fineman’s paper for the symposium became part of her book, *The Autonomy Myth*. FINEMAN, THE AUTONOMY MYTH, *supra* note 49; see McClain, *Intimate Affiliation and Democracy*, *supra* note 93, 382 n.15. “[P]anelist Suzanne Goldberg cautioned that skepticism may be in order about positing any significant relationship between forms of intimate self-government and democratic self-government.” McClain, *Intimate Affiliation and Democracy*, *supra* note 93, at 382.

<sup>96</sup> See McClain, *Intimate Affiliation and Democracy*, *supra* note 93; see also MCCLAIN, THE PLACE OF FAMILIES, *supra* note 51.

<sup>97</sup> “Resilience” is a key concept on which Fineman draws in her vulnerability theory. See, e.g., Martha Albertson Fineman, *Vulnerability, Resilience, and LGBT Youth*, 23 TEMP. POL. & C.R. L. REV. 307, 320–28 (2014).

<sup>98</sup> “Fostering capacity” is a key theme I develop in *The Place of Families*. MCCLAIN, THE PLACE OF FAMILIES, *supra* note 51, at 15–114.

A. *Beyond “Gender Equality” to Vulnerability?*

When I finished *The Place of Families*, I wanted to develop further my argument that part of government’s formative project should be fostering and promoting sex equality as a public value and constitutional commitment. Why, I wanted to investigate, was sex equality so hard to achieve? Why did such a gap remain between the formal commitment to equality and ongoing practices of inequality? What obstacles hindered achieving the various dimensions of women’s free and equal citizenship? What rationales justified inequality?

The FLT Project proved, once again, a fruitful setting to explore these questions, since equality was a recurring topic. First in an Uncomfortable Conversation on sociobiology, evolutionary psychology, and feminism (mentioned in Part I), and then at a conference celebrating the twenty-fifth anniversary of the FLT Project in 2008, I was able to expound and critically evaluate appeals to “nature” and hard-wired gender differences to rationalize forms of sex inequality and criticize efforts to address such problems as the gendered division of labor for caretaking as misguided feminist “social engineering.”<sup>99</sup> I also traced the role of appeals to evolutionary psychology in judicial opinions to defend traditional marriage and oppose same-sex marriage. My efforts resulted in a chapter that Professor Fineman included in the edited volume, *Transcending the Boundaries of Law: Generations of Feminism and Legal Theory*.<sup>100</sup>

When my colleague Joanna Grossman and I decided to plan a conference to address the problem of the gap between a formal commitment to gender equality and the equal citizenship of men and women and ongoing problems of gender inequality, Professor Fineman was the obvious choice to deliver the keynote address.<sup>101</sup> After all, her still-influential book *The Illusion of Equality* identified

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<sup>99</sup> See *supra* note 18 and accompanying text.

<sup>100</sup> See McClain, *What’s So Hard About Sex Equality?*, *supra* note 18. In asking why equality was so hard, I was also interested in examining religious teachings about gender roles in the family, gender equality, and the relative positioning of child, family, and state. At another FLT Project workshop, I was able to start that investigation by assessing religious objections to the United States’ ratifying two human rights instruments, the Convention on the Elimination of All Forms of Discrimination Against Women and the Convention on the Rights of the Child. I presented the paper, *Child, Family, and State in Religious Stances and Human Rights Instruments: A Preliminary Comparison*, at the FLT Workshop “Competing Paradigms of Rights and Responsibility? Children in the Discourses of Religion and International Human Rights,” held at Emory University School of Law from April 15 to 17, 2005. The revised paper became a chapter in *What Is Right for Children?*. See McClain, *Child, Family, State, and Gender Equality*, *supra* note 19.

<sup>101</sup> That conference, “Dimensions of Women’s Equal Citizenship,” took place at Hofstra University School of Law from November 3 to 4, 2006. See *Scholarly Commons at Hofstra Law*, HOFSTRA L., <https://scholarlycommons.law.hofstra.edu/dwec/> (last visited Mar. 3, 2018). We subsequently published a

problems with the goal of formal equality and her subsequent work, such as *The Autonomy Myth: A Theory of Dependency*, importantly explored the relationship between autonomy and equality.<sup>102</sup> Further, we admired Martha's leadership in facilitating, through the FLT Project and various edited volumes, significant work on law and gender and feminist theory, and viewed our conference as a modest effort inspired by that model.

Imagine our surprise, then, at the prescription offered in Professor Fineman's keynote address, *Equality: Still Illusive After All These Years*, delivered in the fall of 2006: it is time to move "beyond gender"! Specifically, Professor Fineman proposed that "one way to render equality less illusive is to move beyond gender and build a more comprehensive framework on the concept of universal human vulnerability."<sup>103</sup> By that time, Fineman had begun a new scholarly project as a fruitful way to wrestle with problems of inequality and the relationship between equality and autonomy, shifting from her focus on "dependency" as a keyword to focusing on the concept of "vulnerability."<sup>104</sup> Specifically, Professor Fineman urged attention to the "inevitable and universal vulnerability inherent in the human condition and the societal institutions that have grown up around them, most notably the family and the state."<sup>105</sup> Gender, she explained, was a "door through which [she] enter[s] the discussion about equality – not the entire focus of [her] inquiry."<sup>106</sup> The inquiry would focus "on privilege as well as discrimination and reflect[] on the benefits allocated through the organization of society and its institutional structures."<sup>107</sup> Doing so, Professor Fineman argued, "could move us closer to securing substantive equality and social rights in the United States."<sup>108</sup>

### B. *Building Resilience or Fostering Capacity?: The Role of the State*

Despite my initial surprise at Professor Fineman's shift to vulnerability theory, and some lingering resistance, I have come to appreciate the benefits of

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volume growing out of the conference proceedings. See GENDER EQUALITY: DIMENSIONS OF WOMEN'S EQUAL CITIZENSHIP (Linda C. McClain & Joanna L. Grossman eds., 2009).

<sup>102</sup> See, e.g., FINEMAN, THE AUTONOMY MYTH, *supra* note 49; FINEMAN, THE ILLUSION OF EQUALITY, *supra* note 26.

<sup>103</sup> The lecture is published, in a revised form, as Martha Albertson Fineman, *Equality: Still Illusive After All These Years*, in GENDER EQUALITY, *supra* note 101, at 251, 251 [hereinafter Fineman, *Equality: Still Illusive After All These Years*].

<sup>104</sup> See, e.g., Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J. L. & FEMINISM 1 (2008) [hereinafter Fineman, *The Vulnerable Subject*].

<sup>105</sup> Fineman, *Equality: Still Illusive After All These Years*, *supra* note 103, at 257.

<sup>106</sup> *Id.* at 266.

<sup>107</sup> *Id.* at 251.

<sup>108</sup> *Id.*

this new theoretical framework. Although our frameworks and vocabularies are distinct, I also see some parallels between Professor Fineman's analysis of vulnerability and her keen focus on institutions and my own ongoing examination of the respective roles of civil society and the state in a formative project of fostering persons' capacities for self-government. To be sure, Professor Fineman critiques the "liberal subject" and replaces it with the "vulnerable subject"; I resist attributing to liberalism—rather than to, say neoliberalism or to truncated visions of autonomy—certain features of that liberal subject. However, both of our projects take an interest in the big picture, that is, in institutional design. The vulnerability paradigm focuses on the role of institutions: how they allocate resources, privilege, benefits, and burdens, and how they themselves may be vulnerable.<sup>109</sup> Professor Fineman argues for a more responsive state that "recognizes the universality and constancy of vulnerability, as well as the need for providing for mechanisms for building resilience."<sup>110</sup> "Resilience," as Professor Fineman recently wrote, "is the essential, but incomplete antidote to our vulnerability."<sup>111</sup> "Resilience is what provides an individual with the means and ability to recover from harm or setbacks," and "[t]he degree of resilience an individual has is largely dependent on the quality and quantity of resources or assets that he or she has at their disposal or command."<sup>112</sup>

The language of resilience features in influential work on the ecology of human development.<sup>113</sup> Thus, one promising feature of Professor Fineman's turn to vulnerability theory is its invitation to focus on such ecology. In thinking about the formative project that government and the institutions of civil society should undertake, I have been attracted to the idea of social ecology and have begun to explore, for example, what form a feminist social ecology might take. For example, how might a more ecological approach inform family law? What resources might we retrieve from prior feminist—or maternalist—visions about a more responsive state and its relationship to civil society, such as those of Jane Addams and other Progressive-era reformers?

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<sup>109</sup> See Fineman, *The Vulnerable Subject*, *supra* note 104, at 12–15; Martha Albertson Fineman, *The Vulnerable Subject and the Responsive State*, 60 EMORY L.J. 251, 256 (2010).

<sup>110</sup> Martha Albertson Fineman, *Introduction to PRIVATIZATION, VULNERABILITY, AND SOCIAL RESPONSIBILITY: A COMPARATIVE PERSPECTIVE* 1, 4 (Martha Albertson Fineman et al. eds., 2017).

<sup>111</sup> Martha Albertson Fineman, *Vulnerability, Resilience, and LGBT Youth*, *supra* note 97, at 320.

<sup>112</sup> *Id.*

<sup>113</sup> See, e.g., URIE BRONFENBRENNER, *THE ECOLOGY OF HUMAN DEVELOPMENT: EXPERIMENTS BY NATURE AND DESIGN* (1979). Professor Fineman's colleague Barbara Bennett Woodhouse has applied ideas of social ecology and vulnerability in her work on a child-centered perspective in family law. See Barbara Bennett Woodhouse, *A World Fit for Children Is a World Fit for Everyone: Ecogenerism, Feminism, and Vulnerability*, 46 HOUS. L. REV. 817 (2009).

Examining the idea of social ecology in relationship both to vulnerability theory and a formative project remains, at this writing, a work-in-progress. Fortunately, I have had a chance to share my preliminary ideas on this topic in FLT Project workshops, including a workshop in 2013, marking the Project's thirtieth anniversary.<sup>114</sup> The next year, Professor Fineman provided another opportunity under the auspices of the Vulnerability and the Human Condition Initiative, when I worked with her to organize a workshop, "Theorizing the State: The Resources of Vulnerability Theory."<sup>115</sup> In the law review article that grew out of that workshop paper, I asked: "Is it finally time for a shift from 'family policy' to 'family ecology'?"<sup>116</sup> The impetus for my question was family law scholar Clare Huntington's book, *Failure to Flourish: How Law Undermines Family Relationships*, which urged that family law should do more to foster "strong, stable, positive relationships" and pay more heed to the social contexts of how relationships develop.<sup>117</sup> I pointed out that Huntington's focus on social environments and on Urie Bronfenbrenner's work on the ecology of human development had parallels to earlier work by family law scholars.<sup>118</sup> Mary Ann Glendon, I noted, argued that public deliberation on families should focus on "interconnected environments" and how, "[j]ust as individual identity and well-being are influenced by conditions within families, families themselves are sensitive to conditions within surrounding networks of groups—neighborhoods, workplaces, churches, schools, and other associations."<sup>119</sup> Observing that calls for an ecological approach to family law, or even "a shift

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<sup>114</sup> These ideas were included in the papers *Toward a Feminist "Social Ecology,"* presented at "Vulnerability, Resilience, and the State, A Feminism Legal Theory Project Workshop," held at Emory University School of Law from March 19 to 20, 2010 and *The Family and the State: Muddles, Methods, and Materials for a Feminist/New Progressive Social Ecology,* presented at the "Feminism and Legal Theory Project at 30: A Workshop on the Transformation of the Family and the Recognition and Regulation of Intimate Lives," held at Emory University School of Law from December 6 to 7, 2013.

<sup>115</sup> Also helping to organize this workshop, held at Emory University School of Law from December 5 to 6, 2013, were Kathryn Abrams, June Carbone, and Eileen McDonagh, participants in the 2013 workshop on the FLT Project at 30. At the workshop, I presented the paper *Is There a Way Forward in the "War Over the Family"?*

<sup>116</sup> See Linda C. McClain, *Is There a Way Forward in the "War Over the Family"?*, 93 TEX. L. REV. 705, 717 (2015) [hereinafter McClain, *Is There a Way Forward in the "War Over the Family"?*] (omitting capitalization) (reviewing CLARE HUNTINGTON, *FAILURE TO FLOURISH: HOW LAW UNDERMINES FAMILY RELATIONSHIPS* (2014)).

<sup>117</sup> HUNTINGTON, *supra* note 116, at 5–25.

<sup>118</sup> See McClain, *Is There a Way Forward in the "War Over the Family"?*, *supra* note 116, at 717–18 (discussing MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1991) and Woodhouse, *supra* note 113); *id.* at 718 n.100 (noting Huntington's praise "of a reformer deeply influenced by Urie Bronfenbrenner's idea of 'human ecology and the networks that form among parents and others who care for children'" (quoting HUNTINGTON, *supra* note 116, at 166)).

<sup>119</sup> *Id.* at 717–18 (alteration in original) (internal quotation marks omitted) (quoting GLENDON, *supra* note 118, at 130).

from family law to family ecology,” had a long history,<sup>120</sup> I also related Huntington’s calls to enlist what she calls “the pervasive state” to help families to flourish to Maxine Eichner’s argument for a “supportive state” and Professor Fineman’s argument for a “responsive state.”<sup>121</sup> I concluded that Huntington’s “arguments about how to deploy the pervasive state—and family law—to foster flourishing relationships are a useful complement to other theories of the state, such as Fineman’s vulnerability theory, focused on the role of societal institutions in providing resources and building resilience and of the state in bringing into being and maintaining those institutions.”<sup>122</sup> Citing Fineman, I argued: “Moving forward, both the relational and institutional focus are vital and, in a sense, are another way to think about the channeling function of law in creating and supporting social institutions that allow realization of important goods or ends.”<sup>123</sup> I hope to have further conversations with Professor Fineman on these questions of institutional design and the role of the state and civil society.

### C. *Beyond Identities and Antidiscrimination Law?*

#### 1. *Rights in Conflict?*

Around the time that Professor Fineman was elaborating vulnerability theory, I joined the faculty at Boston University School of Law. I would, once again, have a chance to host Martha when our workshop committee invited her to deliver Boston University School of Law’s 2011–2012 Annual Distinguished Lecture. In that lecture and resulting published article, *Beyond Identities: The Limits of an Antidiscrimination Approach to Equality*, Professor Fineman articulated how vulnerability theory could address some of the problems with the existing paradigm of antidiscrimination law.<sup>124</sup> As a more promising path to

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<sup>120</sup> *Id.* at 717 (internal quotation marks omitted) (quoting GLENDON, *supra* note 118, at 130).

<sup>121</sup> *Id.* at 716 (first citing HUNTINGTON, *supra* note 116, at 63; then citing MAXINE EICHNER, THE SUPPORTIVE STATE: FAMILIES, GOVERNMENT, AND AMERICA’S POLITICAL IDEALS 4–9 (2010); and then citing Fineman, *The Vulnerable Subject and the Responsive State*, *supra* note 109, at 262–63, 273–75).

<sup>122</sup> *Id.* at 741 (emphasis omitted) (citing Martha Albertson Fineman, *Equality, Autonomy, and the Vulnerable Subject in Law and Politics*, in VULNERABILITY: REFLECTIONS ON A NEW ETHICAL FOUNDATION FOR LAW AND POLITICS 13, 20–26 (Martha Albertson Fineman & Anna Grear eds., 2013)).

<sup>123</sup> *Id.* at 741 & n.260 (“The state is always at least a residual actor in the formation and functioning of society and should accept some responsibility in regard to the effects and operation of those institutions it brings into being and helps to maintain.” (quoting Fineman, *Equality, Autonomy, and the Vulnerable Subject in Law and Politics*, *supra* note 122, at 25)).

<sup>124</sup> Martha Albertson Fineman, *Beyond Identities: The Limits of an Antidiscrimination Approach to Equality*, 92 B.U. L. REV. 1713 (2012).

equality, she urged a move beyond identities and toward a new approach opened up by vulnerability theory's focus on a more universal approach to identity.<sup>125</sup>

Over the last decade, a central focus in my work has been how to justify rights and how to resolve conflicts involving rights—not only constitutional rights but also rights arising under antidiscrimination law. Thus, Professor James Fleming and I developed a framework that, in our book *Ordered Liberty: Rights, Responsibilities, and Virtues*, we called “constitutional liberalism.”<sup>126</sup> This project took me back to some of my earliest engagements with liberalism: in response to charges that the U.S. constitutional system exalts individual rights over responsibilities, virtues, and the common good, Fleming and I developed and defended a civic liberalism that takes responsibilities and virtues—as well as rights—seriously. In addressing controversies involving rights in evident conflict, we proposed a framework of mutual adjustment of basic liberties. For example, one emerging conflict concerned, on the one hand, the constitutional right of same-sex couples to marry and the protection of LGBT persons under state antidiscrimination law and, on the other, First Amendment rights to the free exercise of religion on the part of persons opposed, based on religious belief, to same-sex marriage or to facilitating such marriages in any way.<sup>127</sup> In *Ordered Liberty*, we offered a preliminary framework for thinking about the issue of religious exemptions.

For the last several years, I have continued to write about the evident clash between religious liberty and other constitutional and civil rights, both in the context of reproductive health (objections to the Affordable Care Act)<sup>128</sup> and of the liberty and equality of LGBT persons (including civil marriage equality).<sup>129</sup> *Obergefell v. Hodges*'s holding that same-sex couples have the fundamental right to marry in every state and the right to state recognition of such marriages intensified the latter evident conflict.<sup>130</sup> Spurred by the strong rhetoric of the dissenting opinions in *Obergefell* that Justice Kennedy's majority opinion “disparage[d]” as “bigoted” those “who, as a matter of conscience, cannot accept

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<sup>125</sup> *Id.*

<sup>126</sup> JAMES E. FLEMING & LINDA C. MCCLAIN, *ORDERED LIBERTY: RIGHTS, RESPONSIBILITIES, AND VIRTUES* (2013).

<sup>127</sup> *Id.* at 169–76. The idea of “mutual adjustment of basic liberties” draws on Rawls.

<sup>128</sup> See Linda C. McClain, *Corporate Conscience and the Contraceptive Mandate: A Dworkinian Reading*, 30 J.L. & RELIGION 136 (2015) (book review).

<sup>129</sup> See Linda C. McClain, *Civil Marriage for Same-Sex Couples, “Moral Disapproval,” and Tensions Between Religious Liberty and Equality*, in RELIGIOUS FREEDOM AND GAY RIGHTS: EMERGING CONFLICTS IN THE UNITED STATES AND EUROPE 87 (Timothy Samuel Shah et al. eds., 2016).

<sup>130</sup> 135 S. Ct. 2584 (2015).



same-sex marriage,”<sup>131</sup> and that such religious believers risk being labeled and treated as “bigots” if they dare to “repeat [their] views in public,”<sup>132</sup> I have been focused on the deployment of the rhetoric of bigotry and conscience in such conflicts. The spike in the rhetoric of bigotry surrounding the 2016 presidential campaign and in the first year of the Trump Administration was a further spur to this project. My book in progress, *Bigotry, Conscience, and Marriage: Past and Present Controversies*, addresses a number of puzzles about bigotry, such as its relationship to conscience. I examine how the rhetoric features in past and present controversies over marriage—interracial, interfaith, and same-sex—as well as over the scope of antidiscrimination law.<sup>133</sup> I have been analyzing competing appeals to the civil rights past and what lessons that past teaches for present-day struggles over civil rights and the scope of antidiscrimination law. What does it mean, for example, to assert that a public official or a state wants to be on the “right” rather than the “wrong side” of history—and of the law?<sup>134</sup> Competing appeals to the civil rights past and disagreement about the force of analogies between race and sex discrimination, on the one hand, and sexual orientation and gender identity discrimination, on the other, are pervasive in controversies over the expansion of state antidiscrimination laws to protect LGBT persons and the assertion of “conscience” and sincere religious belief as grounds for exemptions from such laws.<sup>135</sup> Thus, the keywords at the core of my own current work are “bigotry” (and its synonyms) and “conscience.”

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<sup>131</sup> *Id.* at 2626 (Roberts, C.J., dissenting).

<sup>132</sup> *Id.* at 2642–43 (Alito, J., dissenting).

<sup>133</sup> See LINDA C. McCLAIN, *BIGOTRY, CONSCIENCE, AND MARRIAGE: PAST AND PRESENT CONTROVERSIES* (forthcoming 2019).

<sup>134</sup> See, e.g., Timothy Williams & Trip Gabriel, *Virginia’s New Attorney General Opposes Ban on Gay Marriage*, N.Y. TIMES (Jan. 23, 2014), <https://www.nytimes.com/2014/01/24/us/new-virginia-attorney-general-drops-defense-of-gay-marriage-ban.html> (reporting that Virginia Attorney General Mark Herring said Virginia “had too often been on the ‘wrong side’ of justice on civil rights matters” and had asked a federal court to invalidate Virginia’s Defense of Marriage law, citing as cases in which Virginia’s leadership had failed: *Brown v. Board of Education*, *Loving v. Virginia*, and *United States v. Virginia*); see also Eyder Peralta, *Virginia’s New Attorney General Will Not Defend Gay-Marriage Ban*, NPR (Jan. 23, 2014, 12:17 AM), <http://npr.org/sections/thetwo-way/2014/01/23/265050444/virginias-new-attorney-general-will-not-defend-gay-marriage-ban> (quoting Virginia Attorney General Mark Herring, in NPR interview about his decision not to defend Virginia’s Defense of Marriage Act, noting that Virginia had been on “the wrong side of history” and of “the law” in key landmark cases on the past, and this time would be on the “right side of history” and the law).

<sup>135</sup> I illustrate this *infra* while discussing the closely watched case, *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, now before the U.S. Supreme Court. 370 P.3d 272 (Colo. App. 2015), *cert denied sub nom.* *Masterpiece Cakeshop, Inc. v. Colo. Civil Rights Comm’n*, No. 15SC738, 2016 WL 1645027 (Colo. Apr. 25, 2016) (en banc), *cert. granted sub nom.* *Masterpiece Cakeshop Ltd. v. Colo. Civil Rights Comm’n*, 137 S. Ct. 2290 (June 26, 2017).

## 2. *The Rhetoric of “Vulnerability” in Conflicts over Public Accommodations Laws*

How might these issues—in which arguments about identity and discrimination are prominent—look through the lens of vulnerability theory? A few years ago, I had the opportunity to share some preliminary thoughts on such questions in a workshop, “Reproductive and Sexual Justice,” co-sponsored by the Vulnerability and the Human Condition Initiative and Northeastern University School of Law.<sup>136</sup> I focused on the deployment of the language of vulnerability in controversies over marriage “conscience protection” laws proposed or enacted after *Obergefell* and over state bans on offering sexual orientation change effort therapy to minors.<sup>137</sup> This is, however, an unfinished conversation that I hope to continue.

For example, I do know that, while Professor Fineman urges a move beyond identities and antidiscrimination law, she also affirms that “specific identity categories, such as sexuality, gender, and race have an important place in vulnerability theory.”<sup>138</sup> In the recent article, *Vulnerability, Resilience, and LGBT Youth*, Fineman theorizes that, while “vulnerability is a fundamental and universal part of the human condition, it is also necessary to simultaneously recognize that vulnerability must be understood as particular, varied, and unique on the individual level.”<sup>139</sup> Thus, “[i]mpermissible bias and discrimination based on sexuality, race and gender differences must continue to be addressed in law and policy.”<sup>140</sup> Fineman adds: “It is also critical to recognize the ways in which differences can be the basis for community building and a source of strength and resilience for individuals.”<sup>141</sup> Using the helpful image of the “[g]eography of [v]ulnerability” to refer to “[t]he places and spaces where young people must build their resilience,” Fineman then explains how those primary “places and spaces”—family, community, and school—“are failing many LGBT youth.”<sup>142</sup>

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<sup>136</sup> See *Workshop on Reproductive and Sexual Justice*, NE. U. SCH. L. (Apr. 29–30, 2016), <http://www.northeastern.edu/law/news/events/2016/rj-workshop/index.html>.

<sup>137</sup> See Linda C. McClain, *Comparative Vulnerability and (Equal) Protection from Discrimination: Framing (and Resolving) Conflicts Between Religious Liberty and Equality*, presented at A Workshop on Reproductive and Sexual Justice, Northeastern University School of Law (Apr. 29–30, 2016). Regrettably, Martha Fineman was not able to attend the workshop, and so I was unable to discuss these issues with her at that event, although we had some fruitful e-mail exchanges on the question prior to the workshop.

<sup>138</sup> Fineman, *Vulnerability, Resilience, and LGBT Youth*, *supra* note 97, at 316–17.

<sup>139</sup> *Id.* at 317.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 321–22.

During its 2017–2018 term, the Supreme Court will rule on *Masterpiece Cakeshop v. Colorado Civil Rights Commission*,<sup>143</sup> in which the baker (self-described “cake artist”) Jack Phillips, owner of Masterpiece Cakeshop, asks the Court to decide “[w]hether applying Colorado’s public-accommodation law to compel artists to create expression that violates their sincerely held religious beliefs about marriage violates the Free Speech or Free Exercise Clauses of the First Amendment.”<sup>144</sup> Phillips appeals the ruling by the Colorado Court of Appeals, affirming the Colorado Civil Rights Commission (CCRC) decision that he violated the public accommodations provision of the Colorado Antidiscrimination Act (CADA)—which (since 2008) prohibits discrimination on the basis of sexual orientation—when, citing his religious beliefs about marriage, he declined to bake a cake for a celebration of Charlie Craig and David Mullins’s wedding ceremony.<sup>145</sup> The Colorado court held that denying Phillips an exemption from CADA did not violate his First Amendment rights.<sup>146</sup> The court concluded that CADA “creates a hospitable environment for all consumers,” which “prevents the economic and social balkanization prevalent when businesses decide to serve only their own ‘kind.’”<sup>147</sup>

One lens that I employ elsewhere to evaluate this high-stakes case is to look at how the parties and their amici (friends of the court) deploy the rhetoric of bigotry and conscience and enlist—or distinguish—past civil rights struggles.<sup>148</sup> In this section, I look through a different lens—how the parties and their amici employ the rhetoric of vulnerability. This is a first step to consider how Professor Fineman’s vulnerability theory might evaluate this rhetoric and, ultimately, the best resolution of the case.<sup>149</sup>

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<sup>143</sup> *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272 (Colo. App. 2015), *cert denied sub nom. Masterpiece Cakeshop, Inc. v. Colo. Civil Rights Comm’n*, No. 15SC738, 2016 WL 1645027 (Colo. Apr. 25, 2016) (en banc), *cert. granted sub nom. Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 137 S. Ct. 2290 (June 26, 2017).

<sup>144</sup> Brief for Petitioners at i, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, No. 16-111 (Aug. 31, 2017).

<sup>145</sup> *Craig*, 370 P.3d 272.

<sup>146</sup> *Id.* at 294.

<sup>147</sup> *Id.* at 293.

<sup>148</sup> For such an analysis, see Linda C. McClain, *The Rhetoric of Bigotry and Conscience in Battles over “Religious Liberty v. LGBT Rights,”* in RELIGIOUS FREEDOM, LGBT RIGHTS, AND THE PROSPECTS FOR COMMON GROUND (William S. Eskridge Jr. & Robin Fretwell Wilson, eds., forthcoming 2018), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3144478](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3144478).

<sup>149</sup> The analysis in the next few paragraphs draws on Linda C. McClain, *POV: SCOTUS Should Not Permit “Boycott of Same-Sex Marriage,”* BU TODAY (Dec. 19, 2017), <http://www.bu.edu/today/2017/pov-in-scotus-wedding-cake-case-kennedys-opinion-key/>.

Jack Phillips and his amici describe the plight of sincere Christians, like Phillips, simply trying to live out their faith—indeed, their identity—in the public square, but forced by overzealous civil rights commissioners applying—some further argue—overly expansive civil rights laws to violate their conscience or face significant loss of business and civil penalties.<sup>150</sup> Another brief discounts any vulnerability on the part of Craig and Mullins, asserting that the case at hand does not involve a “persecuted and vulnerable same-sex couple oppressed by a Christian business[,]” but rather, a Christian business “being targeted for no reason other than [its] moral and religious views.”<sup>151</sup>

Amici contrast the genuine governmental concern with discriminating based on *identity*—with race discrimination being the paradigm case—and refusing to create a customized good because of an offensive *message* such a good would send (here, the approval of a same-sex marriage).<sup>152</sup> This is not about discriminating based on identity, that is, sexual orientation, but about living out one’s own identity and not violating conscience. The amicus brief filed in support of Phillips by “479 [c]reative [p]rofessionals” contends that “the harm inflicted on vulnerable creative professionals [like Phillips] is forcing them to promote causes they do not support as an unwilling mouthpiece of the State.”<sup>153</sup> A brief filed by International Christian Photographers stresses how applying Colorado’s public accommodations law to Phillips “jeopardizes the right of many other citizens who desire to act and speak consistent with their sincerely held religious beliefs;” they add that “[p]hotographers, in particular, are vulnerable to the same conflict in this case: namely, the use of public accommodation laws to force creative professionals to speak and act against their beliefs.”<sup>154</sup>

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<sup>150</sup> See Brief for Petitioners, *supra* note 144; Brief for Liberty Counsel as Amicus Curiae Supporting Petitioner Seeking Reversal at 16–30, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, No. 16-111 (Sept. 7, 2017) [hereinafter Brief for Liberty Counsel].

<sup>151</sup> Brief for Public Advocate of the United States et al. as Amici Curiae Supporting Petitioners at 8, *Masterpiece Cakeshop*, No. 16-111 (Sept. 7, 2017); see also Brief for Liberty Counsel, *supra* note 150, at 22–25 (contrasting Congress’s “reasoned response” of imposing duties of nondiscrimination, in the Civil Rights Act of 1964, in the face of “a combination of public abuse of essential facilities and private violence [which] posed a mortal threat to the individual liberties of vulnerable citizens, often on grounds of race,” with the overly expansive scope of state public accommodations laws, such as Colorado’s (citing Richard A. Epstein, *Public Accommodations Under the Civil Rights Act of 1964: Why Freedom of Association Counts as a Human Right*, 66 STAN. L. REV. 1241, 1290 (2014))).

<sup>152</sup> See Brief for Liberty Counsel, *supra* note 150, at 17–18; Brief for the States of Texas et al. as Amici Curiae Supporting Petitioners at 3, *Masterpiece Cakeshop*, No. 16-111 (Sept. 7, 2017).

<sup>153</sup> Brief for 479 Creative Professionals as Amici Curiae Supporting Petitioner at 27, *Masterpiece Cakeshop*, No. 16-111 (Sept. 7, 2017) (citing *R.J. Reynolds Tobacco Co. v. FDA*, 845 F. Supp. 2d 266, 272 (D.D.C. 2012), *aff’d*, 696 F.3d 1205 (D.C. Cir. 2012)).

<sup>154</sup> Brief for International Christian Photographers and Center for Arizona Policy as Amici Curiae Supporting Petitioners at 4–5, *Masterpiece Cakeshop*, No. 16-111 (Sept. 7, 2017).

On the other hand, amici for the CCRC and for the couple denied service, Craig and Mullins, stress that prior to CADA's amendment to include "sexual orientation," previous "pitched, public, state-wide battles" over the status of LGBT Coloradans left them "vulnerable, subject to discrimination and public scorn."<sup>155</sup> In contrast to Phillips's amici minimizing the injury Craig and Mullins experienced, they stress the "dignitary and emotional injuries," as well as "tangible repercussions," "from being told one is not worthy of being served on equal footing with others."<sup>156</sup> The brief filed by LAMBDA Legal Defense and Education Fund argues that discrimination against LGBT persons is "[p]ervasive in [o]ur [s]ociety" and is a "widespread problem that permeates nearly every aspect of public life."<sup>157</sup> LGBT people never know when they might confront a denial of service, and Phillips's refusal makes them aware that "even those living in places with protections [like CADA] must confront the reality that they remain vulnerable."<sup>158</sup> Amici enlist historical analogies to landmark federal public accommodations laws to explain the core purposes of state public accommodations law and resist a line drawing that would make race a special case, arguing that, then as now, the Court should reject the argument that a business owner's First Amendment rights warrant an exemption from such laws.<sup>159</sup>

A few briefs warrant attention for their use of the ideas of vulnerability, since they may have some resonance with Fineman's argument that, while vulnerability is universal, it is also specific and particularized. For example, the American Psychological Association asserts that "homosexuality remains stigmatized" in the United States and documents that the LGBT population remains "disproportionately vulnerable to physical violence and hate crimes."<sup>160</sup> As does Fineman's article on LGBTQ youth, the brief details that sexual minority youth are at "heightened risk," for example, in schools.<sup>161</sup>

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<sup>155</sup> Brief for Colorado Organizations and Individuals as Amici Curiae Supporting Respondents at 2, *Masterpiece Cakeshop*, No. 16-111 (Oct. 30, 2017).

<sup>156</sup> Brief for Lambda Legal Defense and Education Fund, Inc. et al. as Amici Curiae Supporting Respondents at 24, *Masterpiece Cakeshop*, No. 16-111 (Oct. 30, 2017).

<sup>157</sup> *Id.* at 4.

<sup>158</sup> *Id.* at 38–39.

<sup>159</sup> Brief for Massachusetts et al. as Amici Curiae Supporting Respondents at 2, 7–11, *Masterpiece Cakeshop*, No. 16-111 (Oct. 30, 2017); Brief for NAACP Legal Defense & Educational Fund, Inc. as Amicus Curiae Supporting Respondents at 2–3, *Masterpiece Cakeshop*, No. 16-111 (Oct. 30, 2017).

<sup>160</sup> Brief for American Psychological Ass'n et al. as Amici Curiae Supporting Respondents at 13–14, *Masterpiece Cakeshop*, No. 16-111 (Oct. 30, 2017) (first citing PEW RESEARCH CTR., A SURVEY OF LGBT AMERICANS: ATTITUDES, EXPERIENCES AND VALUES IN CHANGING TIMES 41 (2013); then citing G.M. Herek et al., *Psychological Sequelae of Hate-Crime Victimization Among Lesbian, Gay, and Bisexual Adults*, 67 J. CONSULTING & CLINICAL PSYCHOL. 945, 948 (1999)).

<sup>161</sup> *Id.* at 16–17.

Some briefs detail the particular vulnerability to discrimination of subpopulations of LGBT persons. An amicus brief filed by Services and Advocacy for Gay, Lesbian, Bisexual and Transgender Elders and the American Society on Aging details numerous forms of discrimination in public accommodations experienced by LGBT older adults, ranging from senior housing to funeral homes and cemeteries.<sup>162</sup> The brief argues (enlisting language from *Obergefell*): “This case will determine whether LGBT people, including millions of vulnerable LGBT older adults, will be ‘consigned to an instability many’ of their contemporaries ‘would deem intolerable in their own lives.’”<sup>163</sup> Another brief explains that, “[a]s a class, transgender people are especially vulnerable to discrimination and harassment in their everyday lives,” and then details this pervasive discrimination in “restaurants, mass transit, hotels, health clinics, and other public spaces.”<sup>164</sup> The amicus brief filed by the National LGBTQ Task Force does not explicitly refer to vulnerability, but highlights that LGBTQ persons of color already experience “multiple layers of discrimination” and allowing business owners to refuse goods and service based on their beliefs could “open the door to intersectional discrimination against LGBTQ people of color” based on a combination of characteristics.<sup>165</sup>

How is the rhetoric of vulnerability deployed in *Masterpiece Cakeshop* the same or different from Fineman’s rhetoric? Is this the kind of “vulnerable populations” rhetoric Fineman argues is “pernicious” and “stigmatizing,”<sup>166</sup> or does it point toward the responsive state’s obligation to ensure that society’s institutions play a role in building resilience? How might Fineman intervene in the very framing of these conflicts between rights in collision? Law, after all, is a resource that people need, and both constitutional law and antidiscrimination law allocate benefits and impose burdens. Antidiscrimination law aims to make different kinds of resources—goods and services—available free from arbitrary refusals based on identity categories, that is, because of who someone is. To return to Fineman’s image of the “geography of vulnerability,” the “places and spaces” in which to foster resilience, one amici argued that excluding “LGB

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<sup>162</sup> Brief for Services and Advocacy for Gay, Lesbian, Bisexual and Transgender Elders and American Society on Aging as Amici Curiae Supporting Respondents at 3–21, *Masterpiece Cakeshop*, No. 16-111 (Oct. 26, 2017).

<sup>163</sup> *Id.* at 24 (quoting *Obergefell v. Hodges*, 135 S. Ct. 2584, 2601 (2015)).

<sup>164</sup> Brief for Transgender Legal Defense and Education Fund as Amicus Curiae Supporting Respondents at 3, 6–7, *Masterpiece Cakeshop*, No. 16-111 (Oct. 30, 2017) (citing JAIME M. GRANT ET AL., NAT’L GAY & LESBIAN TASKFORCE & NAT’L CTR. FOR TRANSGENDER EQUALITY, INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 124–35 (2011)).

<sup>165</sup> Brief for National LGBTQ Task Force et al. as Amici Curiae Supporting Respondents at 6, 9, *Masterpiece Cakeshop*, No. 16-111 (Oct. 30, 2017).

<sup>166</sup> See Fineman, *Vulnerability, Resilience, and LGBT Youth*, *supra* note 97, at 315–16.

people” from the protection of such laws “can cause adverse outcomes for health and well-being for LGB people,” while, in regions in the United States “where LGB people have better social and legal conditions, they also have better health and lesser health disparities compared with heterosexuals.”<sup>167</sup>

As usual, Justice Kennedy is likely to be the crucial vote in deciding *Masterpiece Cakeshop*. At the oral argument, he expressed concern both about the impact of a religious exemption on the “gay community” and about the baker, whose religious beliefs had not been treated by the CCRC with mutual tolerance and respect.<sup>168</sup> “[T]olerance,” he admonished, “is essential in a free society” and should be “mutual.”<sup>169</sup>

What would mutual tolerance and respect look like? How might vulnerability theory contribute to such a concept?

I hope that there will be opportunities for further and deeper conversations with Martha Fineman on these and other questions about the limits of—and alternatives to—an antidiscrimination model.

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<sup>167</sup> Brief for Ilan H. Meyer, PhD and Other Social Scientists and Legal Scholars Who Study the LGB Population as Amici Curiae Supporting Respondents at 9, 26, *Masterpiece Cakeshop*, No. 16-111 (Oct. 30, 2017) (first citing Mark L. Hatzenbuehler et al., *State-Level Policies and Psychiatric Morbidity in Lesbian, Gay, and Bisexual Populations*, 99 AM. J. PUB. HEALTH 2275 (2009); then citing Mark L. Hatzenbuehler et al., *The Impact of Institutional Discrimination on Psychiatric Disorders in Lesbian, Gay, and Bisexual Populations: A Prospective Study*, 100 AM. J. PUB. HEALTH 452 (2010)). Notably, Adam P. Romero of the Williams Institute, is an author of this brief. *Id.* at cover page. The brief also responds to an argument made in Mark Regnerus’s amicus brief for the petitioner that challenged the model of “minority stress” because of the resilience some LGB have in the face of adversity. *Id.* at 33 (“While research has found that some LGB people are resilient in the face of adversity, others succumb to adverse health effects of minority stress.” (critiquing Brief for Mark Regnerus et al. as Amici Curiae Supporting Petitioners, *Masterpiece Cakeshop*, No. 16-111 (Sept. 7, 2017))). Romero has been a participant in Professor Fineman’s FLT Project workshops and Uncomfortable Conversations and is co-editor with her of a book that grew out of some of those workshops. FEMINIST AND QUEER LEGAL THEORY: INTIMATE ENCOUNTERS, UNCOMFORTABLE CONVERSATIONS (Martha Albertson Fineman et al. eds., 2009).

<sup>168</sup> See Transcript of Oral Argument at 62, *Masterpiece Cakeshop*, No. 16-111 (Dec. 5, 2017).

<sup>169</sup> *Id.* The Court issued an opinion on June, 4, 2018 when this Essay was in final page proofs. Justice Kennedy, in a 7-2 opinion, narrowly ruled for Phillips on the ground that the Commission’s “hostility” toward his religious beliefs violated the First Amendment. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 584 U.S. \_\_\_ (2018) (slip op., at 18). Kennedy’s conclusions echoed his concerns at the oral argument: “the Commission’s consideration of Phillips’ case was neither tolerant nor respectful of Phillips’ religious beliefs,” and going forward: “these disputes must be resolved with tolerance, without undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market.” *Id.* at \_\_\_ (slip op., at 17, 18).