Texas A&M Law Review

Volume 10 | Issue 4

5-1-2023

Fineman Speaks to Dobbs

Deborah Dinner

FINEMAN SPEAKS TO *DOBBS*

*by: Deborah Dinner**

I. Introduction

It is an honor to comment on the scholarship of the preeminent legal theorist Martha Fineman. Throughout her pioneering career, she has challenged liberal feminist ideals grounded in anti-discrimination principles. She shows how sex neutrality and formal equality in law and policy fail to realize justice for women and children. In the last few decades, she has broadened her analysis to a critique of autonomy as a foundational ideal in law. In its place, she offers an account of the state's obligation to respond to universal human vulnerability. As an entirety, I have found Fineman's scholarship important to my own work because it offers a formidable normative argument for affirmative entitlements for caregivers and caretaking. Her specific analyses have ranged across diverse socio-legal arenas from divorce law and child custody, to the structure of the workplace, to public assistance and welfare policies.

In this Essay, I explore the import of Fineman's ideas for a pressing feminist issue upon which neither of us have focused in our scholarship: abortion. Given her longstanding focus on the social debt owed to mothers (including men who perform the labor of mothering), it is interesting that Fineman has not specifically spoken to the importance of women's freedom from motherhood. In this Essay, however, I argue her ideas offer a critique of *Dobbs v. Jackson Women's Health Organization* and a theoretical foundation for abortion access. I hope this nascent exploration offers new insight into both the range and power of Fineman's scholarship and productive paths forward for the reproductive justice movement.

II. *Dobbs* and *The Illusion of Equality*

The *Dobbs* majority deploys the logic of formal equality to vitiate women's reproductive rights.[1] Justice Samuel Alito argues that the advent of sex discrimination law means that pregnancy is no longer a burden.[2] Accordingly, he concludes, the reversal of *Roe v. Wade*[3] does not implicate constitutional equality values.[4] In support, he cites the federal Pregnancy Discrimination Act of 1978 ("PDA") and paral-

DOI: https://doi.org/10.37419/LR.V10.I4.11

* Deborah Dinner is the Dorothea S. Clarke Professor of Law, Cornell Law School. I am grateful to Teemu Ruskola for his helpful comments. I also thank the staff of the *Texas A&M Law Review* for their excellent editing.

1. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2258–59 (2022).
2. *Id.*
3. Roe v. Wade, 410 U.S. 113 (1973).
4. *Id.*

lel state laws, the Family and Medical Leave Act of 1993 ("FMLA"), and health insurance coverage for maternity mandated by the Affordable Care Act.[5] This vein of argument makes a mockery of the feminist insight that abortion rights are critical to women's ability to participate as equals in education, employment, and other civic endeavors.[6]

Fineman has long warned that equal treatment under law has the capacity to undermine gender justice. In her first book, *The Illusion of Equality: The Rhetoric and Reality of Divorce Reform*, she argued that equal treatment of husbands and wives in divorce proceedings disadvantaged women.[7] The book responded to the advent of no-fault divorce as well as sex neutrality and formal equality during the 1970s and 1980s.[8] In Fineman's account, liberal feminists were primary drivers of divorce reform.[9] Embracing a partnership theory of marriage, they argued that each spouse should receive half of a couple's monetary assets.[10] Fineman argued that this approach was harmful because few women could afford to act as "housewives."[11] An equal stake in the marital assets did not account for the double shift most women performed.[12] Furthermore, half of the marital estate was often insufficient to meet the needs of women whose caregiving responsibilities disadvantaged them in the labor market.[13] Last, women often bargained away property and child support in exchange for sole custody.[14] Fineman challenged dominant feminist legal thought in arguing that law should place women's needs ahead of any sex equality principle.[15]

The conservative movement to eliminate women's abortion rights does not pose the same dilemmas as divorce reform. While formal equality arguably yielded substantive inequality at divorce, the PDA and FMLA certainly did not yield the result in *Dobbs*. In this instance, the problem is not formal legal equality per se but its manipulation by Justice Alito to create the legal fiction that pregnancy and motherhood do not pose burdens. Yet the model of sex neutrality and equal treatment built into these laws might play a role in sustaining that legal fiction.

---

5. *Dobbs*, 142 S. Ct. at 2258–59 nn.42–44.

6. *See* Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 376–77 (1992) (surveying early court cases).

7. MARTHA ALBERTSON FINEMAN, THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM 2 (1991).

8. *Id.* at 2–3.

9. *Id.* at 3.

10. *Id.* at 4.

11. *Id.*

12. *Id.*

13. *Id.* at 4–5.

14. *Id.* at 5.

15. *Id.* at 20–22.

Here, Fineman's insights in *The Illusion of Equality* are helpful. To start, we might consider the insight that formal equality does not account sufficiently for reproductive labor. The PDA requires only that employers treat pregnancy the same as other temporarily disabled workers.[16] Although disparate impact is a recognized theory of liability under the statute, courts are notoriously reluctant to recognize such claims.[17] Accordingly, the PDA's prohibition on pregnancy discrimination grants only a comparative right and not entitlement to either leave or benefits.[18] As in the case of divorce reform, women experience the limits of formal equality along class lines. Working-class women are far less likely than professional women to enjoy employment in workplaces that offer sick leave and disability benefits.[19] In addition, we might heed Fineman's call to consider what the pursuit of sex equality causes women, or the feminist movement more broadly, to give up. In the case of historical advocacy for pregnancy nondiscrimination in the 1970s, feminists gave up earlier claims to affirmative maternity-related entitlements.[20] Only now is the movement returning to such claims in pursuing the Pregnant Workers Fairness Act in Congress and analog state laws.[21] In the case of advocacy for family leave, some argue that feminists gave up the claim to paid maternity leave to win unpaid, albeit gender neutral, leave for pregnancy *and* medical leave.[22]

My point is not only that the PDA and FMLA are limited in their capacity to realize equity for women in the labor market. I want to suggest that they, too, contain the kind of illusion of which Fineman warned: formal equality cannot account for reproductive labor—biological and social. It is perhaps the pretense that equal treatment realizes substantive equity which allows Alito, with a straight face, to claim that such laws mean childbearing women are on a level playing field.[23] Law is constitutive of social understanding. Perhaps, the legal regulation of pregnancy and mothering according to formal equality

16. Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (codified as amended at 42 U.S.C. § 2000e(k)).

17. *See, e.g.*, Troupe v. May Dep't Stores Co., 20 F.3d 734, 738 (7th Cir. 1994); Deborah Dinner, *The Costs of Reproduction: History and the Legal Construction of Sex Equality*, 46 HARV. C.R.-C.L. L. REV. 415, 436, 478–79 (2011).

18. *See Troupe*, 20 F.3d at 738.

19. Ann O'Leary, *How Family Leave Laws Left Out Low-Income Workers*, 28 BERKELEY J. EMP. & LAB. L. 1, 7–8 (2007).

20. *See* Dinner, *supra* note 17, at 442–43, 447.

21. H.R. 1065, 117th Cong. § 2 (1st Sess. 2021).

22. Julie C. Suk, *Are Gender Stereotypes Bad for Women? Rethinking Antidiscrimination Law and Work-Family Conflict*, 110 COLUM. L. REV. 1, 4, 7, 17, 40–41, 47–48 (2010) (discussing how advocates did not obtain guaranteed paid maternity leave, but they obtained unpaid maternity and paternity leave by associating pregnancy to medical leave in a gender neutral manner).

23. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2258–59 (2022) (discussing the opinions of individuals who believe the current laws ensure adequate equality, which suggests that Justice Alito agrees with these views).

models allows for the fiction that such law is fully responsive to women's needs.

Of course, feminist scholars and advocates, as well as women workers, know that pregnancy and motherhood continue to limit women's equality in the market and civic realms. The law on the ground differs from the law in action.[24] Pregnancy discrimination remains rampant.[25] Pregnant workers lack entitlements to accommodation under the PDA.[26] The restrictive eligibility criteria of the FMLA means that it fails to cover 40% of the U.S. workforce.[27] Because it is unpaid, even eligible workers are often unable to exercise their rights under the statute.[28] Women continue to take more leave to care for others under the FMLA, and men take more leave to care for themselves.[29]

In *The Illusion of Equality*, Fineman called for affirmative action for women in family law. She chided feminists for failing to advocate equality of result in the family, as they did in the labor market, for fear of reinforcing gender stereotypes.[30] Confronted with the logic of a Supreme Court opinion that uses formal equality of opportunity to eliminate women's right to abortion, we might well consider affirmative action for pregnant persons. Perhaps the intermediate scrutiny standard under the Equal Protection Clause might allow for this possibility, in contrast to the Court's recent opinion striking down race-based affirmative action.[31] What might affirmative action for pregnant persons look like? It would certainly begin with entitlements to paid maternity leave and health insurance coverage.

III. ABORTION AND *THE NEUTERED MOTHER*

Even as Justice Alito argued that the PDA was evidence that women did not need to have control over their own bodies, he also cited the Court decision that the PDA reversed. In 1974, *Geduldig v. Aiello* held that the exclusion of pregnancy from an otherwise comprehen-

24. *See* Hendrik Hartog, *Pigs and Positivism*, 1985 WIS. L. REV. 899, 916, 918, 922, 924–25 (1985) (indicating the law can clash with customs and society can, at times, appear to completely ignore established law).

25. Natalie Kitroeff & Jessica Silver-Greenberg, *Pregnancy Discrimination Is Rampant Inside America's Biggest Companies*, N.Y. TIMES (Feb. 8, 2019), https://www.nytimes.com/interactive/2018/06/15/business/pregnancy-discrimination.html?mtrref=perma.cc&gwh=BE5996AB3A2490CDE8F019B1C3B322F0&gwt=Pay&assetType=PAYWALL.

26. Young v. United Parcel Serv., Inc., 135 S. Ct. 1338, 1362 (2015).

27. Deborah Dinner, *Beyond "Best Practices": Employment-Discrimination Law in the Neoliberal Era*, 92 IND. L.J. 1059, 1110 (2017).

28. *Id.* at 1111.

29. *See* Dinner, *supra* note 17, at 441–42. *But see* JANE HERR ET AL., GENDER DIFFERENCES IN NEEDING AND TAKING LEAVE 3 (2020), https://www.abtassociates.com/files/insights/reports/2021/whd_fmlagendershortpaper_january2021.pdf [https://perma.cc/2MQH-UP4U] (indicating "women and men take leave for the same reasons," but women leave for a longer period than men to care for their own illnesses).

30. FINEMAN, *supra* note 7, at 23–25.

31. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2245–46 (2022).

sive disability insurance scheme did not violate the Equal Protection Clause.[32] The opinion concluded that the distinction between pregnant and non-pregnant persons was not one on the basis of sex.[33] The *Dobbs* majority concludes that under *Geduldig*, state regulation of abortion does not violate the Equal Protection Clause.[34] Constitutional scholars explain why this conclusion is wrong. The passage of the PDA, the Court's 1996 decision in *United States v. Virginia*, and the 2003 decision in *Nevada Department of Human Resources v. Hibbs* together affirm that pregnancy-based classifications rooted in gender stereotypes violate the Equal Protection Clause.[35] At the same time as it flouts stare decisis by overturning *Roe* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[36] *Dobbs* thus revives discredited precedent to assert an absurdly formalist and abstracted interpretation of constitutional sex equality.

The invocation of *Geduldig* in *Dobbs* is the perverse culmination of the legal trends that Fineman criticized in her groundbreaking 1995 book, *The Neutered Mother*. Fineman argued that the rise of sex neutrality divested the legal category of "motherhood" of its substantive gender content.[37] "Mother" was neutered by abstraction and decontextualization.[38] These processes both undermined mothers' specific protections under law and deprived caretaking of the socio-political power required to claim public subsidy.[39] Rather than supporting caretakers, law both "idealized" those mothers who conformed to middle-class, white gender norms and "demonized" those that deviated from these norms.[40] *The Neutered Mother* thus explains how liberalism reinforces patriarchy.

This same dynamic is replicated in the *Dobbs* majority's appeal to *Geduldig*. As I explain in other work, the Court's 1974 decision represented the culmination of a neoliberal interpretation of sex equality advanced by business groups, insurance executives, and state officials. Linking free-market ideology to reproductive privacy, they argued that the legalization of birth control and abortion made pregnancy an individual responsibility.[41] There was a cynical dimension to this argument, as employers and governments had vociferously resisted feminist advocacy for paid maternity leave and benefits in the post-World

32. Geduldig v. Aiello, 417 U.S. 484, 497 (1974).
33. *Id.* at 496 n.20.
34. *Dobbs*, 142 S. Ct. at 2245–46.
35. *See* United States v. Virginia, 518 U.S. 515, 533 (1996); Nev. Dep't of Hum. Res. v. Hibbs, 538 U.S. 721, 728–30 (2003).
36. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).
37. MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES 67 (1995).
38. *Id.*
39. *Id.*
40. *Id.* at 68.
41. Deborah Dinner, *Strange Bedfellows at Work: Neomaternalism in the Making of Sex Discrimination Law*, 91 WASH. U. L. REV. 453, 480 (2014).

War II period.[42] Thus, the neoliberal argument against pregnancy discrimination law did not advocate a new welfare regime in response to constitutional change. Rather, it sought to reinforce an entrenched feature of American liberalism: women's private responsibility for the costs of reproduction. At first glance, *Dobbs* differs from *Geduldig.* In lieu of a privatizing logic, it asserts state control over reproduction. On closer inspection, however, *Dobbs* and *Geduldig* share a similarity beyond their doctrinal conclusions that the legal regulation of pregnancy lies beyond the reach of the Fourteenth Amendment. The decisions reinforce flip sides of patriarchy: the dearth of state support for reproductive labor coupled with state-enforced motherhood.[43]

The appeal to the logic of *Geduldig*—that pregnancy discrimination is not sex discrimination[44]—abstracts the fetus's existence from the bodily experience of pregnancy. Even as the Court enlists women in "reproductive servitude,"[45] it renders invisible the gendered labor of the pregnant woman. Sherry Colb, who offered comments on a draft text of *The Neutered Mother* nearly three decades ago, wrote passionately about this subject in the wake of *Dobbs*.[46] Men remain "impregnable" because the law protects their bodily autonomy, including but not limited to their contraceptive rights.[47] Yet a woman, even when she is forced to conceive by her rapist, "no longer enjoys any constitutional right to remove the unwanted matter invading and colonizing her body."[48] Colb explains that *Dobbs* treats pregnant people as if they simply host the developing fetus rather than actively helping to turn the zygote into an embryo, into a fetus, and, ultimately, into an infant, following birth.[49] In dismissing the unequal part played by men and women in biological reproduction, the *Dobbs* Court ignores that women "endure forty weeks of some combination of nausea and vomiting, difficulty sleeping, difficulty breathing, the risk of gestational diabetes, the risk of life-threatening pre-eclampsia, the potential need to experience bed rest (which is anything but restful), [and]

42. *See* DOROTHY SUE COBBLE, THE OTHER WOMEN'S MOVEMENT: WORKPLACE JUSTICE AND SOCIAL RIGHTS IN MODERN AMERICA 5–6, 25 (William Chafe et al. eds., 2005).

43. Melinda Cooper argues that "family values" intertwine neoliberalism and social conservatism. MELINDA COOPER, FAMILY VALUES: BETWEEN NEOLIBERALISM AND THE NEW SOCIAL CONSERVATISM 111 (2017).

Neoliberalism, which shifts responsibility for social welfare from the state to the household, thus depends upon the enforcement of patriarchal family obligations. *See id.* at 8–9.

44. Geduldig v. Aiello, 417 U.S. 484, 496–97 (1974).

45. Sherry F. Colb, *"Pro-Life": Delta Variant*, JUSTIA (July 26, 2022), https://verdict.justia.com/2022/07/26/pro-life-delta-variant [https://perma.cc/Q35U-GMGM].

46. Sherry F. Colb, *Impregnable*, JUSTIA (July 12, 2022), https://verdict.justia.com/2022/07/12/impregnable [https://perma.cc/5LKM-LDMT].

47. *Id.*

48. *Id.*

49. *Id.*

the most physically painful experiences at the end . . . ."[50] *Dobbs* "disembodie[s]" the pregnant woman and thus neuters the mother even as it imposes the condition of motherhood.[51]

Dobbs further neuters the mother by rendering her "de-raced" and "de-classed," to use Fineman's foundational terms.[52] As Attorney General Merrick Garland stated, the decision will impose "the greatest burdens . . . [on] people of color and those of limited financial means."[53]

IV. FETAL RIGHTS AND *THE AUTONOMY MYTH*

The idea that fetal and women's rights conflict with one another is a historical construct. In the 1970s, amidst a deepening anxiety that a quarter-century of affluence was ending, political culture came to case rights as a zero-sum game.[54] In this context, the anti-abortion movement advanced the idea that fetuses needed state protection from mothers who threatened to exercise their own rights with disregard for fetal well-being.[55] The notion of competing rights treats both fetus and pregnant person as autonomous from one another.[56] This notion erases the harm of a forced relationship between the two. It further obfuscates the reality that women have long reasoned about abortion not as isolated individuals but in the context of their relationships.

In *The Autonomy Myth*, published in 2004, Fineman developed her critical analysis of social contract theory into a full-fledged critique of liberalism.[57] Fineman argued that law and policy should respond to the dual forms of dependency essential to the reproduction of society.[58] Biological dependency is an inevitable fact of the human condition.[59] It is most evident during early childhood, periods of sickness and injury, and in very old age, but it is also constant, as we all depend on others for sustenance and face the potential for more direct and intensive dependence. Derivative dependency is that of caretakers

50. Sherry F. Colb, *All Hail Justice Coathanger*, DORF ON L. (May 5, 2022, 7:30 AM), http://www.dorfonlaw.org/2022/05/all-hail-justice-coathanger.html [https://perma.cc/3DEW-XCTX].

51. FINEMAN, *supra* note 7, at 68.

52. *Id.* at 67.

53. Press Release, Merrick B. Garland, Att'y Gen., U.S. Dep't of Just., Attorney General Merrick B. Garland Statement on Supreme Court Ruling in *Dobbs v. Jackson Women's Health Organization* (June 24, 2022), https://www.justice.gov/opa/pr/attorney-general-merrick-b-garland-statement-supreme-court-ruling-dobbs-v-jackson- [https://perma.cc/SEL3-DQGY].

54. *See* SARA DUBOW, OURSELVES UNBORN: A HISTORY OF THE FETUS IN MODERN AMERICA 113 (2011).

55. *See id.*

56. *Id.* at 154.

57. *See* MARTHA ALBERTSON FINEMAN, THE AUTONOMY MYTH: A THEORY OF DEPENDENCY XXI (2004).

58. *Id.* at 53–54.

59. *Id.* at 34–35.

who need societal resources to perform caregiving tasks.[60] Parents, for example, require external sources of support so that they may provide for the physical, emotional, and cognitive needs of their developing children. Fineman argues that because unpaid care work subsidizes much of society, the state should offer material resources to caretakers.[61]

Fineman's critique of autonomy may support alternative feminist legal and theoretical frameworks in which to understand abortion. Jennifer Hendricks calls for a "relationship model" of pregnancy that integrates biological reproduction with the social dimensions of motherhood.[62] This model helps to overcome the limitations of both autonomy-based and equality-based arguments for abortion rights. Hendricks argues that the autonomy approach manifested in the health exception mandated by *Casey* narrowed women's rights to bodily integrity to the narrowest understanding of physical survival.[63] This motivated the turn to equality-based arguments, but those, too, are insufficient to account for women's experiences and needs. Hendricks is prescient in her recognition that equality-based arguments, rooted in the socio-economic disadvantages that burden mothers, are subject to the kind of "sunset-clause" arguments we saw mobilized in Alito's *Dobbs* opinion.[64] The relationship model, by contrast, recognizes that forced pregnancy coerces a woman into an "intimate relationship" between herself and the fetus that may develop into a future child.[65] Accordingly, a pregnant person's judgment regarding that relationship deserves state respect and deference.[66]

When we dismantle the liberal ideal of autonomy, we can see that most women make abortion decisions as mothers. Prior to *Dobbs*, 60% of women obtaining abortions in the United States were already mothers.[67] Regardless of whether they already have children, access to abortion gives women, as Priscilla Smith argues, "more control over the conditions in which they care for children."[68] Feminist advocates often shied away from emphasizing this quality of pregnant women's decision-making respecting abortion for fear of essentializing women

60. *Id.* at 35–36.

61. FINEMAN, *supra* note 57, at 48–50.

62. Jennifer S. Hendricks, *Body and Soul: Equality, Pregnancy, and the Unitary Right to Abortion*, 45 HARV. C.R.-C.L. L. REV. 329, 332 (2010).

63. *Id.* at 342.

64. *Id.* at 357.

65. *Id.* at 362.

66. *See id.* at 368.

67. Margot Sanger-Katz et al., *Who Gets Abortions in America?*, N.Y. TIMES (Dec. 14, 2021), https://www.nytimes.com/interactive/2021/12/14/upshot/who-gets-abortions-in-america.html.

68. Priscilla J. Smith, *Responsibilities for Life: How Abortion Serves Women's Interests in Motherhood*, 17 J.L. & POL'Y 97, 144 (2008).

as mothers.[69] In addition, the liberal right itself obscures women's engagement in profound moral decision-making respecting abortion.[70]

It is important to emphasize that decentering autonomy does not itself romanticize pregnancy. The anti-abortion movement appropriated and distorted the relational qualities of pregnancy to impose speech on physicians aimed at discouraging abortion. Fineman's writing may help feminists to rebuild and defend arguments for state support of women's own judgment about the content of their relationships with potential life.

V. Reproductive Justice and the "Vulnerable Subject"

Feminists have long conceptualized abortion access as more than a negative right against state interference. Rather, they have located abortion within a broader struggle for reproductive justice that includes pregnant persons' health and the capacity to bear and raise healthy children, as well as to terminate pregnancies. After *Dobbs*, the locus of political contest in many states will necessarily shift toward winning public health and financial support for pregnant women.[71] Such supports are sorely lacking. Sara Matthiesen analyzes how the neoliberal politics and policies of the last half century, which intensified "state neglect" as much as cut back on welfare spending, made "family making" on the margins even harder.[72] Those jurisdictions which most severely restrict abortion also fail to support pregnant persons' capacity to bear healthy children.[73] Fineman's theory of human vulnerability and the corresponding state obligation to promote resilience may aid reinvigorated struggles for reproductive justice.

Vulnerability theory helps to build an argument for a public social infrastructure supportive of pregnant women. By suggesting that the law should respond to human "embodiment," vulnerability theory challenges the anti-abortion notion that state interest in protecting fetal life can exist independent of state responsibility toward pregnant people.[74] Embodiment as a heuristic returns attention to the biologi-

69. *Id.* at 145–46.

70. *Id.* at 150 (citing Robin West, *Taking Freedom Seriously*, 104 Harv. L. Rev. 43, 81 (1990)).

71. I do not mean to suggest that advocates *should* make this transition. Rather, I take as a given that *Dobbs* and the broader political context of opposition to abortion rights in many states has, at least for the moment, forced such a transition.

72. *See* Sara Matthiesen, Reproduction Reconceived: Family Making and the Limits of Choice *After Roe v. Wade* 83–85 (2021).

73. Reva B. Siegel, *ProChoiceLife: Asking Who Protects Life and How—and Why It Matters in Law and Politics*, 93 Ind. L.J. 207, 213–16 (2018).

74. Siegel explores the constitutional implications of this asymmetry, involving protection for fetal life when it restricts, but not when it supports, women's reproductive autonomy. *Id.* at 224–28 (arguing that courts should scrutinize the assertion of pro-life rationales for restricting women's abortion access, in the absence of other state supports for life, to investigate whether such rationales act as smokescreens for gender stereotyping ideas about women, sex, and families).

cal facts of the fetus's gestation not only *within* but *dependent upon* the body of the pregnant person. The theory's emphasis on universal physical and biological vulnerability across the life course might combat the state's unique legal regulation of pregnant people, via the imposition of extraordinary public obligations,[75] criminal liabilities,[76] and restricted decision-making respecting medical care.[77] Instead, the theory might place pregnancy within a broader temporal spectrum respecting health and life. This would begin with the health of both the biological mother and father prior to conception, include the intertwined health of the pregnant person and fetus, and continue to both maternal and infant health outcomes. Thus, the idea of "embodiment," as conceptualized in Fineman's theory of human vulnerability, might help challenge abortion regulation that exists independent of a robust public infrastructure supportive of health.

In addition, vulnerability theory's focus on the individual's "embeddedness" within social relations might help win greater supports for reproduction—biological and social. Scholars and advocates have long drawn attention to the fact that financial need shapes women's decisions respecting pregnancy.[78] Poor and low-income women comprise 75% of those who seek abortions.[79] As Reva Siegel argues, a broader conception of state responsibility to protect life would include universal insurance coverage for pregnancy and prenatal care, job accommodations for pregnant workers, improved medical care, and financial support for low-income families.[80]

Last, vulnerability theory is consistent with the reproductive justice movement's focus on the particular struggles of women of color to mother their children. Although Fineman emphasizes the universality of human vulnerability, she is attentive to the fact that it manifests differently for individuals as a result of particularized social, economic, and political conditions.[81] Important historical scholarship documents how eugenics shaped U.S. law as well as the actions of doctors,

75. Andrew Koppelman, *Forced Labor, Revisited: The Thirteenth Amendment and Abortion* 1–2, 4 (Nw. U. Sch. of L., Working Paper No. 32, 2010), https://doi.org/10.2139/ssrn.1544503.

76. Dorothy E. Roberts, *Unshackling Black Motherhood*, 95 MICH. L. REV. 938, 939 (1997) (concerning the criminalization of pregnancy).

77. Brittany D. Chambers et al., *Clinicians' Perspective on Racism and Black Women's Maternal Health*, 3 WOMEN'S HEALTH REPS. 476, 477 (2022), https://doi.org/10.1089/whr.2021.0148.

78. Siegel, *supra* note 73, at 218–21.

79. *Id.* at 218 (citing *United States Abortion Demographics*, GUTTMACHER INST., https://www.guttmacher.org/united-states/abortion/demographics [https://perma.cc/7PWC-2GVG]).

80. *Id.* at 228–32.

81. Janet Delgado Rodriguez, *The Relevance of the Ethics of Vulnerability in Bioethics*, 12 LES ATLIERS DE L'ETHIQUE [ETHICS F.] 154, 156, 164 (2017) (Can.), https://doi.org/10.7202/1051280ar.

hospitals, researchers, and businesses.[82] Control over Puerto Rican women's reproductive capacity was both central to U.S. imperialism and a mechanism that veiled its violence.[83] From the Progressive Era through the early Cold War, U.S. scientists and corporations demonized Puerto Rican mothers, depicting their fertility and overpopulation as the source of their communities' poverty.[84] These scientists and corporations used the island as a laboratory for the development of the birth control pill.[85] On the mainland, 31 states passed sterilization laws that targeted immigrants, poor whites, people with disabilities, Indigenous people, and Blacks.[86] State-sanctioned sterilizations were most common in the 1930s and 1940s and continued into the 1960s.[87] North Carolina, the state with the third-highest rate, sterilized 7,600 people from 1929 to 1973.[88] After desegregation, Black women were sterilized at three times the rate of white women and twelve times the rate of white men.[89] Even after the end of most state-imposed sterilization, women continued to face coercion into unwanted operations.[90] In the 1970s, industrial corporations deployed the idea of conflicting fetal and maternal rights to implement so-called "fetal protective" policies.[91] They required women in jobs that involved exposure to teratogens, such as lead, to obtain sterilization as a condition of ongoing employment.[92] The legacy of these public and private practices, which constructed gender and racial differences through reproductive policy, is evident in ongoing disparities in maternal death and fetal well-being as well as the state-imposed separation of incarcerated women and their children.[93]

Despite its potential, vulnerability theory also holds political and legal risks for advocates of reproductive justice. At least one of these risks is external to Fineman's framework, while others might stem from within the theory itself. To start, the Christian Right uses the

82. *See, e.g.*, LAURA BRIGGS, REPRODUCING EMPIRE: RACE, SEX, SCIENCE, AND U.S. IMPERIALISM IN PUERTO RICO 108 (Earl Lewis et al. eds., 2002).

83. *Id.*

84. *Id.*

85. *Id.* at 108, 112.

86. Alexandra Minna Stern, *Forced Sterilization Policies in the US Targeted Minorities and Those with Disabilities—and Lasted into the 21st Century*, Conversation (Aug. 26, 2020, 8:20 AM), https://theconversation.com/forced-sterilization-policies-in-the-us-targeted-minorities-and-those-with-disabilities-and-lasted-into-the-21st-century-143144 [https://perma.cc/CA2Q-TW63].

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. Rachel A. Morello-Frosch, *The Politics of Reproductive Hazards in the Workplace: Class, Gender, and the History of Occupational Lead Exposure*, 27 INT'L J. HEALTH SERVS. 501, 502 (1997), https://doi.org/10.2190/CXKQ-1RTB-QP9H-QRPT; Stern, *supra* note 86; MATTHIESEN, *supra* note 72, at 72.

notion of the "vulnerable fetus" to advocate state bans on abortion.[94] For the reasons explained above—including the abstraction of the fetus from the pregnant person's gestational labor and the willful blindness to vulnerability across the life-course—this use of "vulnerability" is distinct from Fineman's theory.[95] Nonetheless, capacious terms have the tendency toward cooptation and distortion. Despite the possibility of political manipulation, however, it might be the goal, or even the obligation, of scholars to invest in more precise language with specific content and explore the applicability of theoretical language to specific legal contexts.

The deeper and perhaps more interesting question centers on the relationship between vulnerability theory and feminism in arguments for reproductive justice. An initial question is whether gender neutral language and, by extension, conceptual frames neuter the abortion issue. Throughout this Essay, I have used the phrase "pregnant persons" in recognition of the fact that some individuals assigned "male" at birth get pregnant. Transgender women have particular and unmet needs for medical care and social support as a result of deep institutional discrimination.[96] Yet, the phrase also obscures the historical and ongoing regulation of women's sexuality, life paths, and familial roles at the heart of both abortion restrictions and state neglect of support for reproductive labor. It is particularly troubling to offer a gender neutral critique of *Dobbs*. Justice Alito's opinion openly relies on misogynistic legal authorities and an interpretation of the Fourteenth Amendment fixed in 1868, prior to women's franchise, employment rights, or judicial recognition of women's rights under the Equal Protection Clause.[97] It seems to me necessary to express outrage about the consequences of the decision for women, as a group, even as we acknowledge that not all pregnant persons identify as such.

The correlative question is whether vulnerability theory, which offers a universal account of the human condition, is sufficient to realize reproductive justice. Is it possible to challenge *Dobbs* without a feminist account of the way in which state-imposed restrictions on abortion access subordinate women? This is one of many questions I hope to have the continued pleasure of Professor Fineman's wisdom in considering.

---

94. Jia Tolentino, *Is Abortion Sacred?*, NEW YORKER (July 16, 2022), https://www.newyorker.com/culture/essay/is-abortion-sacred.

95. *See supra* notes 74–80 and accompanying text.

96. Ethan C. Cicero et al., *Healthcare Experiences of Transgender Adults: An Integrated Mixed Research Literature Review*, ADVANCES NURSING SCI. 123, 124 (2019), https://doi.org/10.1097/ANS.0000000000000256.

97. Deborah Dinner, *Dr. Deborah Dinner: Originalism and the Misogynist Distortion of History in* Dobbs, L. & HIST. REV., https://lawandhistoryreview.org/article/dr-deborah-dinner-originalism-and-the-misogynist-distortion-of-history-in-dobbs%EF%BF%BC/ [https://perma.cc/VFJ5-GZ6L].

VI. Conclusion

In this Essay, I have argued that Martha Albertson Fineman's oeuvre offers a searing rebuke of the *Dobbs* decision. Over the course of a pathbreaking career, Fineman has argued for law that begins with an empirical understanding of the human condition and, especially, with women's experience and needs. Her earlier scholarship helps to expose the Court's resort to illusory formal equality as justification for reproductive control and its neutering of mothers to enforce patriarchy. Her scholarship of the last two decades helps to construct a normative argument for abortion grounded in relationship rather than autonomy and to build a case in favor of robust welfare state supports for reproductive justice. In total, Fineman's ideas are critical to efforts of feminist and other progressive scholars to combat the neo-fascism that has emerged from neoliberalism.