2010

Converging Trajectories: Interest Convergence, Justice Kennedy, and Jeannie Suk's "The Trajectory of Trauma"

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COLUMBIA LAW REVIEW
SIDEBAR

VOL. 110 OCTOBER 13, 2010 PAGES 63–72

CONVERGING TRAJECTORIES: INTEREST CONVERGENCE, JUSTICE KENNEDY, AND JEANNIE SUK'S "THE TRAJECTORY OF TRAUMA"

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Although Jeannie Suk's "The Trajectory of Trauma: Bodies and Minds of Abortion Discourse"[1] is primarily descriptive rather than normative, it has an undercurrent of criticism of feminist advocacy, suggesting that feminist efforts to seek the law's protection have yielded excessive paternalism. Before accepting this critique, readers should consider other pieces of the puzzle, especially other forces behind the law's inclination to paternalism and the opportunities for feminists to use that inclination strategically.

Suk identifies two related strands of feminist analysis that have made their way into legal doctrine: first, skepticism about the voluntariness of women's choices under conditions of gender subordination; second, sympathy for psychological trauma, with relatively low thresholds for what might be traumatic.[2] She describes how these two strands have manifested themselves in rape law reform[3] and aggressive prosecution of domestic violence.[4] Beyond those areas, however, Suk argues that feminists are responsible for legitimizing a paternalistic attitude toward women that came home to roost in the infamous passage in *Gonzales v. Carhart* (*Carhart II*): "While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained. Severe depression and loss of esteem can follow."[5]

Justice Kennedy, writing for the Court, treated this possibility of regret as a justification for banning a particular abortion procedure known as intact dilation and evacuation (D&E) or, more controversially,

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1. 110 Colum. L. Rev. 1193 (2010).

2. Id. at 1237–52.

3. See id. at 1204–05 ("Rape trauma played a key role in legal reform.").

4. See id. at 1209–11 ("[Battered Women Syndrome] has had broad legal impact, especially in the criminal context . . . .").

5. 550 U.S. 124, 159 (2007) (internal citations omitted). *Carhart I* was Stenberg v. Carhart, 530 U.S. 914 (2000), which struck down Nebraska's ban on partial-birth abortion.

partial-birth abortion.

Are feminists to blame for this paternalism? Suk places her thesis in opposition to Reva Siegel's argument that Justice Kennedy's paternalism is traceable to outdated norms of the patriarchy. Suk lays the blame instead at the door of modern feminism.[6] While Suk is cautious about her claims of causation,[7] she argues that old-fashioned paternalism would be unexpected from Justice Kennedy—the Justice Kennedy "of *Casey*'s plurality opinion"[8]—and that modern, feminist-legitimized paternalism is the better explanation.

Suk tells a story of feminism's influence on the law, but before drawing conclusions we must also consider the law's influence on feminism. Feminist causes, such as the battered women's movement, have at times engaged in paternalism that other feminists have judged misguided and even harmful.[9] But if those critics are correct, an important piece of the explanation for the mistakes is likely to be that feminist advocacy has been shaped by patriarchal culture, rather than, or in addition to, the reverse. Feminism, in other words, did not only legitimate paternalism; paternalism and other social forces helped to legitimate some feminist reforms. Suk's critique of feminist paternalism needs to be supplemented with a discussion of traditional paternalism and its influence on how feminist advocacy enters the law.

This Essay suggests that Derrick Bell's theory of interest convergence[10] provides a useful framework for telling a different story about the cultural, legal, and rhetorical evidence adduced by Suk. In Part I, I point out that feminist claims about choice and trauma have been incorporated into law selectively, and I suggest that the pattern of selectivity might be explained by interest convergence. Feminists have strategically used the law's existing norms and biases to win feminist goals. The legal culture, in turn, has shaped the boundaries of acceptable argument and has changed in ways that are at times consistent with feminist goals but that are also influenced by other interests, biases, and agenda. In Part II, I turn to the abortion cases as examples of interest convergence at the micro level. Following Suk, I use the example of *Casey* and its holding that Pennsylvania's husband-consent requirement was unconstitutional.[11] I argue that this holding did not rest solely on a paternalistic view of women as victims. That the

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6. Suk, supra note 1, at 1234–35.

7. Cause and effect cannot be clear cut when the question is what influence a pervasive cultural trope has had on a particular event, and Suk refers to feminist paternalism as, for example, a "cultural influence" that provided "fertile soil" for the abortion trauma argument, rather than making strong claims of cause and effect. Id. at 1246, 1252.

8. Id. at 1243.

9. Suk acknowledges many of these oppositional voices within the feminist movement. See id. at nn. 24–25 and accompanying text (collecting citations to feminist scholarship critical of trauma narratives).

10. Derrick A. Bell, Jr., *Brown v. Board of Education* and the Interest-Convergence Dilemma, 93 Harv. L. Rev. 518, 523 (1980).

11. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 833 (1992).

Court *emphasized* a logically weak, paternalistic rationale at the expense of a stronger rationale grounded in sex equality may have had less to do with feminist success than with Justice Kennedy's status as the swing vote. Similarly, *Carhart II*'s continuity with old-fashioned paternalism and sexism is revealed by its impulse to control rather than empower women—that is, to protect women from the mental trauma claimed to result from their abortion choices but simultaneously to reject the risk of uterine perforation as significant enough to trigger a constitutionally required health exception.

Suk sets feminist arguments next to antifeminist arguments and convincingly argues that they partake of the same cultural milieu. Choice, however, is constrained not just for victims but for everyone, including feminist lawyers and reformers. Before passing judgment on the paths our predecessors trod, we should take a broader view of the choices, constraints, and tradeoffs they faced.

I. SELECTIVITY AND INTEREST CONVERGENCE

That trauma has deleterious effects on rational decisionmaking is not a new idea in the law. Traditionally, though, the law had more sympathy for the trauma of a cuckold than for that of a battered woman. His use of violence was comprehensible, and potentially justifiable, to the law in a way that hers was not.[12] Convincing the law to see the constraints that explain "why she stayed," to see things from the perspective of a rape victim who fails to resist to the utmost, to see the sex discrimination in sexual harassment—these are major accomplishments.

The feminist critique of choice and consent, however, has gone mainstream only selectively. Law and culture remain radically devoted to choice when it comes to, for example, work-family conflicts.[13] Perhaps, as Suk suggests, a presumption of coercion arises more readily in matters related to women's sexual bodies.[14] Even in that context, however, one finds an inconsistent patchwork of paternalism and autonomy. When there is money to be made in infertility treatment or surrogacy contracts, honoring women's choices usually trumps

12. See generally North Carolina v. Norman, 378 S.E.2d 8 (N.C. 1989) (finding battered woman's killing of her husband was not justified by perfect or imperfect self-defense); Katherine T. Bartlett & Deborah L. Rhode, Gender and Law: Theory, Doctrine, Commentary 344–63 (5th ed. 2010) (excerpting and discussing California v. Berry, 556 P.2d 777 (Cal. 1976)); Donna K. Coker, Heat of Passion and Wife Killing: Men Who Batter/Men Who Kill, 2 S. Cal. Rev. L. & Women's Stud. 71 (1992) (arguing men who claim adultery as provocation for killing their wives receive lower sentences than those who do not).

13. See, e.g., Joan Williams, Gender Wars: Selfless Women in the Republic of Choice, 66 N.Y.U. L. Rev. 1559, 1560–62 (1991) (analyzing rhetoric of choice in abortion and "working mother" debates).

14. See Suk, supra note 1, at 1228–29 (noting "influential questioning of the meaningfulness of sexual consent . . . tends to prove too much when extended").

preventing psychic trauma.[15] Courts are also prone to reminding women of the many choices they had in the past as justification for judicial control of their reproductive bodies in the present, such as by forcible cesarean section.[16] The rhetoric of choice and the rhetoric of constraint are both readily available to serve either feminist or nonfeminist ends.

The law's embrace of feminist analysis is more likely *selective* than random. That is, feminist arguments are more likely to be accepted when their logic, methods, and goals correspond to those of players with power in the legal system.[17] This is Derrick Bell's theory of interest convergence, which he offered to explain *Brown v. Board of Education*.[18] Bell argued that *Brown's* outcome was not the result of an enlightened judiciary that realized the injustice of Jim Crow. Rather, it happened because the persistence of segregation was hurting the United States in the Cold War.[19] The system changed when the interests of the powerful needed it to change; justice, if it occurred, was a collateral benefit.

According to this theory, feminist paternalism will find greater success in law when its goals coincide with other interests of the larger society. For example, it is notable that the main examples of feminist success described by Suk are in the field of criminal law. As Aya Gruber has shown, rape law reforms and aggressive prosecution policies for domestic violence are consistent with the values and goals of a punitive society engaged in a "war on crime."[20] In addition, as Cynthia Lee has described, interest convergence can take the form of "cultural convergence," in which novel legal arguments succeed in part because they resonate with the biases of the dominant culture.[21] Thus, paternalistic arguments for feminist causes are especially likely to be successful because they resonate with pre-existing attitudes toward women.

Interest convergence is not just a cynical theory of social change; it

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15. See Unif. Parentage Act § 801, 805 (2002) (authorizing surrogacy contracts and providing mechanisms to ensure their enforceability).

16. See Beth A. Burkstrand-Reid, The Invisible Woman: Availability and Culpability in Reproductive Health Jurisprudence, 81 U. Colo. L. Rev. 97, 140–146 (2010) (describing cases in which courts have ordered women to undergo cesarean sections).

17. I do not mean to deny that feminist actors have power in the legal system. The "players with power" can include feminists.

18. Bell, supra note 10, at 518–19 (arguing "the interests of [whites and blacks] converged to make the *Brown* decision inevitable").

19. Id.

20. Aya Gruber, The Feminist War on Crime, 92 Iowa L. Rev. 741, 792–801 (2007) (discussing conservatives' involvement in domestic violence reform); Aya Gruber, Rape, Feminism, and the War on Crime, 84 Wash. L. Rev 581, 584–86 (2009) (discussing societal criminalization of domestic violence and increased punishment of rapists).

21. Cynthia Lee, Cultural Convergence: Interest Convergence Theory Meets the Cultural Defense, 49 Ariz. L. Rev. 911, 914 (2007). Lee studied cases in which criminal defendants raised "cultural defenses," claiming that their cultural background explained or excused what would otherwise appear to be unjustifiable. She found that cultural defenses were more successful when the claimed "foreign" cultural influence—often a cultural belief about gender roles—was similar to traditional views in American society. Id. at 939–41.

also offers a strategic framework for advocates.[22] Consider, for example, the use of victims' sexual history against them in cases of alleged rape. One might believe that in most cases, past consent to sex is irrelevant to whether the complainant consented in the case at hand and then falsely charged rape.[23] Because legal actors traditionally deem sexual history relevant, however, a good advocate marshals additional arguments. An argument about protecting innocent victims from further trauma is more likely to sway a fence sitter than an argument about women's right to sexual liberty. Moreover, because having one's sexual history paraded through a courtroom as justification for rape surely is traumatic in some sense, the argument has the added advantage of being sincere. The availability of a paternalistic argument for protecting women can support a legal reform that has additional reasons for being on the feminist agenda.

II. ABORTION RIGHTS ADVOCACY AND MICRO-INTEREST CONVERGENCE

With the rape and domestic violence examples as background, Suk argues that the Supreme Court's abortion cases sustain a continuous thread of paternalism from *Roe* to *Casey* to *Carhart II*.[24] Focusing on *Casey*, I propose a different account, in which strategic advocacy resulted in deflecting the paternalist impulse away from control of women and toward empowerment. The feminist interest in the right to abortion converged with the cultural interest in gender paternalism.

Suk writes that *Casey* struck down the husband notification requirement because women were vulnerable to abuse by their husbands.[25] As I read the relevant section of *Casey*, however, this victim rationale competes for primacy with a sex equality rationale. Admittedly, the victim rationale wins—it leads and dominates the discussion—but the victory is not total, primarily because the victim rationale cannot

22. Joan Williams, for example, proposes tailoring feminist arguments about abortion and working mothers in ways that will be most acceptable to prevailing social views. See Williams, supra note 13, at 1588–94.

23. Excluding sexual history on this basis would not require a change in the Rules of Evidence: Irrelevant and unduly prejudicial evidence is already inadmissible. Fed. R. Evid. 402, 403. If one does not trust judges to make this assessment, a rape shield rule might be preferable to case-by-case adjudication of relevance. See Fed. R. Evid. 412 (restricting admissibility of evidence offered to prove victim's sexual predisposition). Many legal actors, however, will perceive the shield rule as a paternalistic exception to the rule of relevance rather than a codified application of it.

Similarly, paternalism towards victims is not the only possible reason for mandatory arrest and "no drop" prosecution policies in domestic violence cases. Such policies also reduce the discretion exercised by police and prosecutors. See Leigh Goodmark, Autonomy Feminism: An Anti-Essentialist Critique of Mandatory Interventions in Domestic Violence Cases, 37 Fla. St. U. L. Rev. 1–3 (2009) (stating reduction of police discretion was primary motivation for mandatory arrest policies).

24. Suk, supra note 1, at 1243 ("The gender paternalism is found not merely in antiabortion advocates' strategies, but more thoroughly in legal argument and discourse about women over the past four decades.").

25. See id. at 1228 ("On this reasoning, *Casey* struck down a husband notification requirement as unconstitutional.").

distinguish husband notification from parent notification.[26] If anything, parents have far greater ability to become obstacles to abortion than husbands do. If judicial bypass is adequate to protect minors, surely it is adequate to protect adult women. Yet no one reading *Casey* would conclude that more broadly worded exceptions or a bypass procedure would have saved husband notification.

Why not? Because although children may not realize they will benefit from the parents' involvement, "[w]e cannot adopt a parallel assumption about adult women."[27] Because such assumptions about women "are no longer consistent with our understanding of the family, the individual, or the Constitution."[28] And because "[a] State may not give to a man the kind of dominion over his wife that parents exercise over their children."[29] That is what a feminist argument looks like.

This section of *Casey* has the hallmarks of a sex equality argument that played the victim card for a vote—Justice Kennedy's vote. As we now know, the *Casey* dissenters had originally drafted a majority decision, but Justice Kennedy was persuaded to embark on the Joint Opinion with Justices O'Connor and Souter.[30] In light of the paternalism of his *Carhart II* opinion, it is plausible that he, or the need for his vote, played a substantial role in the paternalistic tone of *Casey*'s section on husband notification.[31]

As *Casey* came to the Supreme Court, the most obvious paternalistic argument *supported* the husband notification rule. *Roe* had relied on paternalistic arguments for allowing abortion when the woman was guided by her doctor;[32] Pennsylvania proposed to replace the doctor with the husband. The *Casey* dissent argued that husband notification would protect women because "some married women are initially inclined to obtain an abortion . . . because of *perceived* problems . . . that may be obviated by discussion prior to the abortion."[33] The lawyers who attacked the law, and the Justices who sought a fifth vote to strike it down, prevailed in part by developing an alternative narrative of female trauma. Their portrait of women as victims dominates the rhetoric of the opinion, with sex equality popping in to move the reasoning along. This is not to say that abuse is not a real concern; it is to say that abuse and victimization were not the only problems with the Pennsylvania statute.[34] By focusing on one very narrow category of victim, *Casey*

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26. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 895–96 (1992).

27. Id. at 895.

28. Id. at 897.

29. Id. at 898.

30. Linda Greenhouse, Becoming Justice Blackmun: Harry Blackmun's Supreme Court Journey 203–04 (2005).

31. Recall that this was the only provision in the Pennsylvania Abortion Control Act that was struck down in *Casey*, other than an ancillary record-keeping requirement. *Casey*, 505 U.S. at 833–34.

32. Roe v. Wade, 410 U.S. 113, 153, 163, 165–66 (1973).

33. 505 U.S. 833, 974–75 (1992) (Rehnquist, C.J., dissenting) (emphasis added).

34. As Planned Parenthood's lawyer briefly tried to explain at oral argument, the husband notification rule in fact affected every married woman seeking an abortion, not

prevented untold numbers of married women from having to certify that they had paid proper obeisance to their husbands before seeking medical care. That looks like interest convergence on a micro level.

While the potential trauma of a small number of women in *Casey* supported a holding that protected many more women's equality, the potential trauma of a small number of women in *Carhart II* supported limits on all women's liberty. The solicitude for women's trauma in the first part of *Carhart II*, upholding the ban on intact D&E, stands in stark contrast to the second part of the opinion, upholding Congress's refusal to qualify the ban with a health exception. As I have argued elsewhere, this refusal was a salvo in an upcoming battle over the scope of the required health exception—namely, whether it must include all increased risks or only "significant" ones and whether it must include mental health.[35]

The primary benefit of intact D&E touted by Dr. Carhart and others is that it minimizes the use of sharp instruments inside the uterus.[36] The arguments against the ban focused on the women for whom a slip of the knife is especially risky: women with, for example, bleeding disorders, clotting problems, or sepsis.[37] By holding that the lack of health exception could only be challenged as applied to such women, the Court effectively held that the mere increased risk of a perforated uterus or lacerated cervix in an otherwise healthy woman was not "significant" enough to trigger the health exception.[38] Moreover, the Court also ignored that one of the clinical indications for intact D&E is abortion of a wanted pregnancy in which the parents desire an intact fetus to hold, grieve, and bury.[39]

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only those who did not want to notify their husbands. Transcript of Oral Argument at 22, 51, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (Nos. 91-744, 91-902).

35. See Jennifer S. Hendricks, Body and Soul: Equality, Pregnancy, and the Unitary Right to Abortion, 45 Harv. C.R.-C.L. L. Rev. 329, 347–48 (stating Partial Birth Act contains life exception, but not health exception because proponents did not want a "minor health exception—i.e. anything short of death—to be used to invoke the health exception").

36. See *Carhart II*, 550 U.S. 124, 177 (2007) (Ginsburg, J., dissenting) ("According to the expert testimony plaintiffs introduced, the safety advantages of intact D&E are marked for women with certain medical conditions, for example, uterine scarring, bleeding disorders, heart disease, or compromised immune systems."); Carhart v. Ashcroft, 331 F. Supp. 2d 805, 926–29 (2004) (summarizing arguments that D&E is medically safer). The nature of this risk suggests that the relative risk between the two procedures depends in part on the skill of the physician, which might explain some of the expert disagreement over whether intact D&E is ever "necessary."

37. *Carhart II*, 550 U.S. at 177; *Carhart v. Ashcroft*, 331 F. Supp. 2d at 926–29.

38. Although the Court's holding is couched in terms of deferring to Congress, future plaintiffs in as-applied challenges will have an especially difficult time overcoming the Court's newfound deference to Congress's medical expertise: The fact that the procedure is now completely banned will make it impossible to produce new evidence regarding relative safety, except by using data from other countries.

39. See Maureen Paul et al., A Clinician's Guide to Medical and Surgical Abortion 125 (1999) ("Grieving is important for the parents of an anomalous fetus, and seeing and holding the fetus are important components of healing. Their needs may be better met with an intact fetus (intact D&E procedure)."); see also *Carhart v. Ashcroft*, 331 F. Supp. 2d

In *Carhart II*, the potential for a woman to be traumatized by her failure or refusal to mother received pride of place, despite its manifest irrelevance to the question presented, while the potential trauma of a perforated uterus was dismissed. In light of this contrast, it is difficult to perceive Justice Kennedy as committed to sex equality but open to paternalistic arguments because feminists have legitimized them. To the extent that Suk posits second-wave feminism as responsible for Justice Kennedy's paternalism in *Carhart II*, she gives Justice Kennedy too much feminist credit just for participating in the *Casey* joint opinion.[40] The fault line here is not sympathizing with women's trauma and the constraints under which they live; it is responding to those realities with control rather than empowerment.

CONCLUSION

Whether Justice Kennedy's paternalism in *Carhart II* was old-fashioned and regressive or modern and feminist is not a strictly either/or question. *Roe*'s paternalism is plainly of the old-fashioned kind. *Casey*'s serves a feminist goal, but its outcome is more likely to have been the result of feminist strategy to appeal to a paternalist than of Supreme Court Justices adopting paternalism because the feminists did. As for *Carhart II*, if it walks like a duck and it quacks like a duck, we should not discount the very strong possibility that it is a duck.

Should feminists regret their own paternalism? For feminists offended by *Carhart II*, Suk's "Trajectory" highlights the opportunity to refine our analysis of how the law should treat questions of limited agency, particularly in traumatic contexts. Perhaps we need a more sophisticated vocabulary for talking about constrained choices in a way that distinguishes overt, criminal level coercion from structural constraints that warrant reform, and that distinguishes both from the inherent constraints of any life. Seeing the tools of feminist analysis wielded by political opponents may also highlight places where feminist analysis has gone astray. Suk argues that a common thread in the abortion cases from *Roe* to *Carhart II* is the habit of "inferring from

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at 904 ("In the fetal indication procedure, . . . these are pregnancies, generally, that were planned and very much wanted, and the patient and family are going through a very stressful time and frequently want the opportunity to say good-bye to the fetus, to be able to hold it and examine it."). There, I've done it—invoked a competing trauma narrative. See how tempting it is?

40. Justice Kennedy's record on gender issues cannot be characterized as feminist, even before *Carhart II* and regardless of *Casey*. He voted to strike down the Family and Medical Leave Act in Nevada Department of Human Resources v. Hibbs, 538 U.S. 721, 744 (2003), and the civil rights remedy of the Violence Against Women Act in United States v. Morrison, 529 U.S. 598, 627 (2000). He also voted to sustain the archaic sex classification that governs U.S. citizenship for children born abroad in Nguyen v. INS, 533 U.S. 53, 73 (2001). In the latter case, he proposed that the United States had a legitimate interest in avoiding citizenship claims by the unacknowledged children of male American soldiers and businessmen who travel and procreate abroad. See Jennifer S. Hendricks, Essentially a Mother, 13 Wm. & Mary J. Women & L. 429, 468–70 (2007) (discussing *Nguyen*).

potential psychological harm the state's interest in protecting women from said harm."[41] *Roe* and *Casey*, however, ultimately put the woman in charge of assessing the potential harm and deciding what to do about it, while *Carhart II* claimed a state interest in protecting women against their own will. That is not a trivial distinction, but if it is the one on which feminist criticism of *Carhart II* rests, then we must reconsider, for example (and as many feminists have argued), the victim-disregarding approach to mandatory domestic violence prosecutions.[42] On the other hand, feminists should regret neither their underlying critique of consent and choice nor their efforts to honor the ways in which women suffer. Efforts to understand and improve the human condition should not be avoided just because some of the tools of analysis can be misused, whether intentionally or unintentionally.

The harder questions about this kind of feminist advocacy are whether, when, and how an advocate should try to use interest convergence to her advantage. This dilemma is familiar to all litigators but especially to those involved in impact or cause litigation. Choosing between the principled but risky argument and the less palatable but safer one requires a clear assessment of priorities: the short term or the long term? The cause or the client? There is no one-size-fits-all answer, but "Trajectory" provides a valuable case study for thinking about the ramifications of these strategic questions. Its sweep, however, takes in only one slice of the full trajectory of feminist ideas in the law. We need to consider the additional slices highlighted in this Essay before drawing conclusions about the past or lessons for the future.

Preferred Citation: Jennifer S. Hendricks, *Converging Trajectories: Interest Convergence, Justice Kennedy, and Jeannie Suk's "The Trajectory of Trauma"*, 110 COLUM. L. REV. SIDEBAR 63 (2010), http://www.columbialawreview.org/assets/sidebar/volume/110/63_Hendricks.pdf.

41. Suk, supra note 1, at 1223.

42. See, e.g., Goodmark, supra note 23, at 5–14 (explaining mandatory arrests and "no drop" prosecution in domestic violence cases); cf. Jody Lynee Madeira, Common Misconceptions: Reconciling Legal Constructions of Women in the Infertility and Abortion Contexts 4–6 (Mar. 5, 2010) (unpublished manuscript), available at http://ssrn.com/abstract=1565172 (on file with the *Columbia Law Review*) (arguing feminist legal scholars adhere to rhetoric of liberty and choice with respect to abortion while adopting rhetoric of protectionism with respect to women seeking treatment for infertility).