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Abortion and Violence

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ABORTION AND VIOLENCE

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> The Federal Bureau of Investigation (FBI) estimates that domestic violence touches up to 25% of all American families, and that more than 33% of the women murdered in America are killed by their husbands or boyfriends ....[1]
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> [Domestic violence] is the single largest cause of injury to women in the United States—more common than automobile accidents, muggings, and rapes combined.[2]
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> Pregnancy does not exempt women from being abused. From 4% to 8% of women going to prenatal clinics were abused during pregnancy.[3]

When I was taking my baby for a walk in the stroller one morning, a woman passed me on the sidewalk wearing a t-shirt that read, "Abortion is Murder" and displayed a large picture of a fetus. Such t-shirts, which have become commonplace in my community since Operation Rescue visited for several weeks in the summer of 1992, typify the excellent job that the anti-choice movement has done in presenting an image of pregnant women who choose abortions as murderers. What the public, unfortunately, does not always realize is that restrictions on abortion and the harassing tactics of groups like Operation Rescue actually increase the level of violence and coercion against pregnant women in society in both the private and public spheres. Although all women face violence in their lives, I will argue in this article,

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* Professor of Law, University of Pittsburgh. I would like to thank Carole Chervin at Planned Parenthood Federation of America and Deborah Ellis at NOW Legal Defense and Education Fund for their assistance in helping me develop the materials that I cite in this essay. I would also like to thank the faculty at the University of North Carolina Law School for providing me with excellent feedback when I delivered this paper at a faculty workshop. Finally, I would like to thank the librarians at Tulane Law School who, as always, helped me with my many research requests.

This article is based on chapters four and five of my recently published book: RUTH COLKER, PREGNANT MEN: PRACTICE, THEORY, AND THE LAW (1994).

1. Antonia C. Novello & Lydia E. Soto-Torres, *Women and Hidden Epidemics: HIV/AIDS and Domestic Violence*, THE FEMALE PATIENT, Jan. 1992, at 17, 22.

2. *Id.* at 23.

3. Antonia C. Novello, *Section: From the Surgeon General, United States Public Health Service*, 267 JAMA 3132 (1992).

applying an anti-essentialist perspective,[4] that young and poor pregnant women who are disproportionately African American receive the least judicial protection from such violence.

Violence against women presents a serious health threat to women. "It is the single largest cause of injury to women in the United States," affecting up to one-fourth of all families.[5] The former Surgeon General of the United States took a major step forward in understanding the seriousness of this problem by issuing the following bold statement:

> Today, we face two major public health epidemics that represent particular dangers to women. One is the human immunodeficiency virus (HIV) epidemic, and the other is domestic violence. Although these two epidemics might seem unrelated, they are intertwined in ways that pose serious challenges to the health care community.... The living situations of both groups of at-risk women are often identical—poverty, decreased access to primary medical care, and relationships with men that are adversarial and demeaning.[6]

Moreover, she noted that pregnancy does not exempt women from being abused; in some instances, it may even exacerbate that abuse.[7]

Despite the statement of the former Surgeon General, little progress is being made to use the health care system to detect pregnant women who experience domestic violence. Rather than improve access to reproductive health services, many states' policies continue to block access or create barriers to reproductive health services. In addition, groups like Operation Rescue succeed in intimidating and harassing pregnant women, as well as physically blocking access to abortion clinics. These actions cause public violence against women and put women at risk of losing their confidentiality, thereby subjecting them to violence in the private sphere.

Although all women—regardless of race, class, and age—are at risk for facing violence in their lives, restrictions on abortion and harassment at abortion clinics have a disproportionate impact

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4. Gender essentialism is "the notion that a unitary, 'essential' women's experience can be isolated and described independently of race, class, sexual orientation, and other realities of experience." Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585 (1990).

5. Novello & Soto-Torres, *supra* note 1, at 22-23.

6. *Id.* at 17, 22.

7. Novello, *supra* note 3, at 3132.

on young and poor pregnant women, because these individuals have few options for choosing an abortion provider. As I will discuss below, a waiting period rule, for example, is a much more stringent restriction for a pregnant teenager who must surreptitiously schedule an appointment for an abortion (as well as a trip to a judge if there is a parental consent requirement) because of her fear of domestic violence than for an older, middle-class pregnant woman whose decision is supported by her husband. Similarly, harassment by anti-abortion protestors is much more serious for that same teenager who can afford to have an abortion only at the local clinic that is the site of abortion protests than for the middle-class woman who can afford the privacy of her doctor's office for her abortion. Unfortunately, the pregnant teenager may try to self-induce the abortion, have an illegal abortion,[8] or even commit suicide rather than try to schedule two doctors' appointments at a clinic that may not be able to guarantee her privacy. Nevertheless, the courts have demonstrated a systematic disregard for the violence and coercion in the lives of young and poor pregnant women while purporting to protect women from domestic violence.

For the first time, the Supreme Court started to make a connection between restrictions on abortion and private violence against pregnant women in *Planned Parenthood v. Casey* with its decision to overturn the spousal notification requirement.[9] By upholding the waiting period requirement, however, the Court demonstrated its limited understanding of the connection between private violence against pregnant women and abortion restrictions. As I will argue in this article, the Court understood the problem of violence in the private sphere for pregnant, married women who are disproportionately older, white, and middle-class, but did not understand this problem for pregnant, unmarried women, who are disproportionately younger, African American, and poor. This blindness on the part of the Court, I will argue, is a reflection of the essentialist perspective that the Court uses when considering the reality of women's lives.

The connection between public violence against pregnant women and abortions was not at issue in *Casey*. This problem arose in

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8. Studies have found that illegal abortion, rather than childbirth, is the most likely result in countries in which safe or legal abortions are not available. *See* Nolwandle Nozipo Mashalaba, *Commentary on the Causes and Consequences of Unwanted Pregnancy from an African Perspective*, 3 INT'L J. GYNECOLOGY OBSTETRICS 15, 17 (1989).

9. 112 S. Ct. 2791 (1992).

Bray v. Alexandria Women's Health Clinic.[10] In the *Bray* decision, the Court held that pregnant women and their supporters do not have the right to use the Ku Klux Klan Act[11] to protect themselves from the public violence of anti-abortion protestors, such as Operation Rescue, or to protect themselves from attempts by these protestors to breach their confidentiality, thereby exposing them to private violence.[12] Young and poor women, who are more likely to use abortion clinics rather than doctors' offices to procure abortions, are the women most likely to be disadvantaged by the adverse decision of the Supreme Court in *Bray*. The Court's decision, once again, demonstrated its essentialist perspective, a perspective that leaves the most disadvantaged women in society unprotected by the courts.

This article will discuss the phenomenon of violence and coercion in the lives of pregnant women who desire to terminate their pregnancies. It will argue that judicial protection is most lacking for the most disadvantaged women in society because of the courts' essentialist consideration of women's lives. In Part I, I will discuss the anti-essentialist critique to provide the theoretical framework for this essay. In Part II, I will discuss the courts' failure to protect disadvantaged women from domestic violence, focusing on the *Casey* decision and the Fifth Circuit's 1992 abortion decision in *Barnes v. Moore.*[13] Finally, in Part III, I will discuss the importance of the *Bray* decision in leaving women unprotected from private and public violence when they seek reproductive health services.

I. ANTI-ESSENTIALISM

A. Introduction

Although this essay proceeds from an anti-essentialist perspective, I do not agree with the way in which anti-essentialism has been propounded by some theorists. In particular, I am concerned that some versions of anti-essentialism make it impossible to talk about women's treatment "as women." Because I believe that it is critical to speak about women's treatment as

10. 113 S. Ct. 753 (1993).
11. 42 U.S.C. § 1985(3) (1988).
12. *Bray*, 113 S. Ct. at 756.
13. 970 F.2d 12 (5th Cir.), *cert. denied*, 113 S. Ct. 656 (1992).

women in order to gain greater social recognition of the problem of violence against pregnant women, I try to use an anti-essentialist perspective in this essay that considers the diversity of women's lives while also considering the treatment of women as women. I will discuss the work of Angela Harris to gain insight on what it means to write from an anti-essentialist perspective.

Angela Harris, who has done pathbreaking work on the anti-essentialist perspective, questions our ability to speak about women's treatment as women. She argues that when feminist theorists, such as Catharine MacKinnon and Robin West, have referred to women's treatment as women, often they have been actually referring to white, heterosexual, and economically privileged women's treatment as women.[14] Harris criticizes the following propositions that she associates with gender essentialism and feminist theory: "[w]omen can be talked about as 'women'.... [and w]omen's situation can be contrasted to men's."[15]

Although Harris is correct to insist that we consider the diversity of women's lives while discussing women's treatment in society as women, her critique overstates our inability to use the phrase "as a woman." Harris seems to recognize the overstatement of her critique of the use of categories because she does not entirely dismiss the importance of categorization. She says:

> I do not mean in this article to suggest that either feminism or legal theory should adopt the voice of Funes the Memorious, for whom every experience is unique and no categories or generalizations exist at all. Even a jurisprudence based on multiple consciousness must categorize; without categorization each individual is as isolated as Funes, and there can be no moral responsibility or social change. My suggestion is only that we make our categories explicitly tentative, relational, and unstable, and that to do so is all the more important in a discipline like law, where abstraction and "frozen" categories are the norm.[16]

Harris must acknowledge the usefulness of categories because she uses the category "black women" in her own scholarship. Moreover, her own use of categories would seem to be essen-

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14. Harris, *supra* note 4, at 585-88.

15. *Id.* at 588 n.29 (quoting ELIZABETH V. SPELMAN, INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT 165 (1988)).

16. *Id.* at 586.

tialist. For example, when Harris refers to "black women," she seems to be exclusively referring to *poor* black women. One could therefore criticize Harris for holding a unitary view of black women that is similar to the problem of theorists holding a unitary view of women. Rather than abandon categories, it appears that the important task is to find accurate ways to employ the use of categories. Unfortunately, Harris does not provide the reader with much assistance in understanding when categories are useful rather than problematic; she only suggests that we should be "tentative" in our use of categories without explaining what she means by "tentative."

B. Anti-Essentialism Reconsidered

To the extent that some feminists have been essentialists, I believe that Harris has not correctly identified who those feminists are. Feminist essentialists have a unitary view of women that is based entirely on analysis of the lives of white women in a way that is not at all inclusive of various subgroups of women. Thus, as bell hooks points out, Betty Friedan's *The Feminine Mystique*[17] was essentialist in its treatment of women.[18] Friedan discussed the special problems of middle-class housewives with husbands and children and who did not have careers outside the home. Her words meant little to poor women who have always worked outside the home and who often have raised children without the assistance of a husband. Similarly, Susan Faludi's recent book, *Backlash*,[19] focuses on the problems of middle-class career women. In a sense, she updates Friedan's observations by following how society has treated these middle-class women once they entered careers outside the home. Lesbians, poor women, African American women, and handicapped women, for example, are as invisible in Faludi's presentation as in Friedan's. And, not surprisingly, both books have sold well and received acclaim from the mainstream press[20] because they fit well into the dominant discourse about white, middle-class women.

What these two examples show is that feminist theory is often best accepted by the public (as measured by how many copies

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17. BETTY FRIEDAN, THE FEMININE MYSTIQUE (1963).

18. BELL HOOKS, FEMINIST THEORY: FROM MARGIN TO CENTER 2 (1984).

19. SUSAN FALUDI, BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN (1st ed. 1991).

20. Susan Faludi's book was on the New York Times Best Seller List and received the 1991 National Book Critics Circle Award for nonfiction. *See* Gail Caldwell, *Book Critics Honor Smiley, Faludi*, BOSTON GLOBE, Feb. 17, 1992, at 28.

sell) when it is essentialist in its portrayal of women. I suggest that that is because dominant actors in society (as represented by the book-buying public) have a unitary view of women. Feminist theory that plays into that image is therefore credible, even when that theory purports to criticize society. As feminists, then, we need to be aware of how our critique of society may have been molded by what the dominant groups in society want to hear. Essentialist accounts of women will not be challenged by those dominant groups even though they may be challenged by other feminists.

I suggest that in order to discuss the category "woman" in a meaningful way we need to make three distinctions. First, we must distinguish between how society acts upon a category that it perceives to be "woman" and how women themselves respond to those actions. Law and society often are essentialist, by which I mean that they have a narrow, unitary view of women in mind when they create policies and programs. Women, in fact, are quite diverse. Law and society's failure to see that diversity creates different kinds of problems for different women, depending upon how closely they fit law and society's false image of women. Thus, we should ask ourselves the following crucial question in constructing feminist theory: What view of women does law and society have in mind when it creates various policies and programs? If that view is static and unitary then it is an essentialist view and should be described as such. The fact that feminists may identify society's view of women as essentialist does not make feminist theory itself essentialist. In addition, identifying society's essentialist view of women may help us to understand how policies affect different women in different ways.

Second, we need to distinguish between biological arguments and essentialism. Feminist theorists may rely on women's biological differences from men to explain some aspects of women's subordination in society without being essentialists. Their biological arguments will not be essentialist so long as they refer to the biological variation among women as well as to the different ways that society treats the same biological traits within women. Some theorists, such as Catharine MacKinnon,[21] suggest that one is essentialist only if one relies on biological arguments in constructing feminist theory. Such a view cannot be correct within feminist theory because it prevents us from discussing the bio-

21. *See, e.g.*, Catharine A. MacKinnon, *From Practice to Theory, or What is a White Woman Anyway?*, 4 YALE J.L. & FEMINISM 13 (1991).

logical differences between women and men. By definition, women and men do differ biologically—that difference is the basis upon which society assigns people to the categories "male" and "female." By insisting that feminists entirely ignore such differences, feminists are being as essentialist as their critics. In other words, by denying categorically that the differences between men and women are relevant to feminist theory (and society), one is being rigid, unitary, and universal—the purported evils of essentialism. Rather than avoiding biological arguments entirely, the challenge for feminists is to sort out innate biological differences between men and women that have some bearing on women's position in society and those purported differences that have been exaggerated by society; moreover, we should examine differences among women in terms of their biology as well as differences among women in terms of how society treats their biology.[22]

Finally, when we talk about a policy's impact on "women," we do not have to feel compelled to describe a unitary effect of that policy on women. Some women may experience a heightened effect of the policy while other women may experience an opposing effect. All of these women are acted upon by society but they can be acted upon in quite different ways. We are essentialist when we assume *a priori* that certain subgroups such as African American women or lesbians will experience a heightened version of white, heterosexual women's experience.

Rather than examining an author's use of biological arguments to determine whether she is an essentialist, I would prefer to look at what stories the author tells. Feminists must read voraciously about the lives of as many women as possible, because none of us can know all women through our daily experiences. And because we are more likely to know women who are like us, it is especially important that we read about women who are quite different from ourselves in race, class, physical ability, sexual orientation, etc. Only by being constantly vigilant and curious can we think about and talk about all women as we try to understand the nature of women's subordination in society. When authors are *not* inclusive, we should be quick to criticize. But when an author, such as Catharine MacKinnon, consistently tells stories about many different kinds of women in her schol-

22. *See generally* Ruth Colker, *Pregnant Men*, COLUM. J. GENDER & L. (1993) (discussing biological arguments in order to show that society treats women differently because of their ability to become pregnant, and how biology perpetuates women's subordination in society).

arship, we should read those stories and try to learn from them. Of course, we might disagree with her interpretation of her stories. Storytelling, by itself, is not sufficient. We need to reflect closely on the stories that are told. Why are those particular stories told rather than others? Are other interpretations of those stories available? Do counternarratives also exist?

In Parts II and III, I will examine the stories that the Supreme Court and the Fifth Circuit are willing to consider to determine the appropriate role of the courts in preventing violence in the lives of pregnant women. I will suggest that they are more willing to protect white, middle-class pregnant women than poor, young pregnant women from violence, thereby being attentive to the concerns of only some women in society.

II. Domestic Violence Against Women During Pregnancy

A. The Problem

Although violence against women is dangerous to both a woman and her fetus during pregnancy, pregnant women face substantial domestic violence in their lives. In a recent article in the *Journal of the American Medical Association*, Dr. Judith McFarlane and her colleagues found that seventeen percent of women reported abuse during pregnancy.[23] The researchers also found that abused women were twice as likely as non-abused women to postpone prenatal care until the third trimester of pregnancy.[24] The authors explained this phenomenon by noting that the abused women had learned "forced avoidance" from health care.[25]

McFarlane's statistics show rates of abuse during pregnancy that are about twice as high as those recorded in some other studies.[26] The difference in results appears attributable to her research methodology. Rather than being asked about abuse on a standard medical history intake form, the women in this study were asked about abuse directly by their health care providers.[27] In a related study, about eight percent of women reported abuse when surveyed through a standard medical history form, whereas

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23. Judith McFarlane et al., *Assessing for Abuse During Pregnancy*, 267 JAMA 3176, 3176 (1992).

24. *Id.* at 3177.

25. *Id.*

26. *Id.* at 3177-78.

27. *Id.* at 3178.

twenty-nine percent of these same women reported abuse when asked directly by a health care provider.[28] McFarlane's research strategy therefore seems to produce more reliable results than strategies used in previous studies.

McFarlane's findings replicate the findings of a 1985 study by the National Family Violence Survey. According to the 1985 study:

> 154 out of every 1000 pregnant women were assaulted by their mates during the first four months of pregnancy, and 170 per 1000 women were assaulted during the fifth through the ninth months. Approximately 37% of obstetric patients, across class, race, and educational lines, are physically abused while pregnant. Such assaults can result in placental separation, antepartum hemorrhage, fetal fractures, rupture of the uterus, liver, or spleen, and preterm labor.[29]

Moreover, the 1985 study found that pregnant women's risk of abusive violence was 60.6% greater than that of nonpregnant women,[30] although that difference appears to be attributable to age rather than pregnancy.[31] Finally, the Second National Family Violence Survey found that the nature of abuse may change during pregnancy, with pregnant women suffering increased blows to the abdomen.[32]

Although studies have found that health care providers may have an inclination to perceive that women most at risk of abuse during pregnancy are African American,[33] McFarlane's study reached the opposite conclusion. White women were found to be most at risk, followed by Hispanic women, and then followed by African American women.[34] These findings confirm previous find-

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28. *Id.*

29. Council on Scientific Affairs, American Medical Association, *Violence Against Women: Relevance for Medical Practitioners*, 267 JAMA 3184, 3186-87 (1992) (citing Richard J. Gelles, *Violence and Pregnancy: Are Pregnant Women at Greater Risk of Abuse?*, 50 J. MARRIAGE & FAM. 841 (1988)).

30. Eli H. Newberger et al., *Abuse of Pregnant Women and Adverse Birth Outcome: Current Knowledge and Implications for Practice*, 267 JAMA 2370, 2370 (1992) (citing Gelles, *supra* note 29, at 844).

31. *Id.* (citing Gelles, *supra* note 29) (but noting that increased risk for pregnant women is probably attributable to age "because women under 25 years of age were more likely both to be pregnant and to be abused by husbands and partners").

32. *See* Gelles, *supra* note 29, at 846 (1988).

33. *See, e.g.*, Nancy Kathleen Sugg, *Primary Care Physicians' Response to Domestic Violence: Opening Pandora's Box*, 267 JAMA 3157, 3158-60 (1992).

34. McFarlane, *supra* note 23, at 3177.

ings that reported physical abuse was three and one-half times higher among white than Hispanic or black women.[35]

Dr. Anne Flitcraft criticizes McFarlane's conclusions concerning race because she claims that McFarlane is insufficiently attentive to "severity of physical abuse."[36] She points out that homicide data show that African American women are at greater risk of being killed by their partners.[37] She suggests that it is important to analyze potential male abusers' threats with and access to a weapon because of the greater likelihood that such situations may result in death.[38] Flitcraft writes of McFarlane's data: "An alternative interpretation may be that severity of abuse differs little across ethnic groups and that threats with and access to a weapon should be ranked in a category with a high probability of significant injury, predictive of severe abuse."[39] The important point to gather from the McFarlane and Flitcraft studies is that all women are at risk of domestic abuse, but that the most common form of abuse may differ depending upon the woman's race and ethnicity. White women may suffer disproportionate amounts of domestic abuse, whereas African American women may face the disproportionate likelihood of paying the ultimate price of death during an episode of domestic violence. Both problems—frequency and severity—deserve our serious attention. Clearly, health care providers who believe that their white, middle-class patients are immune from domestic violence are sadly mistaken.

Another important aspect of McFarlane's findings is that women who delay obtaining prenatal care until the third trimester are more likely to face domestic violence than those who seek such care earlier.[40] Barriers to reproductive health services, including abortion-related restrictions such as gag rules, waiting period requirements, and other abortion restrictions, as well as Medicaid restrictions on health care services, further contribute to this problem of abused women who fail to seek timely prenatal care. In the name of "life," the "pro-life" movement has unfortunately harmed the lives of pregnant women and their fetuses. We have always known that failure to seek prenatal care correlates with

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35. *Id.* (citation omitted).

36. Anne H. Flitcraft, *Violence, Values and Gender*, 267 JAMA 3194, 3194 (1992).

37. *Id.* (citing James A. Mercy & Linda E. Saltzman, *Fatal Violence Among Spouses in the United States, 1976-85*, 79 AM. J. PUB. HEALTH 595 (1989)).

38. *Id.* at 3194-95.

39. *Id.* at 3195.

40. *See* McFarlane, *supra* note 23, at 3177.

harm to the fetus;[41] we now know that it correlates with harm to the pregnant woman as well.

Our failure to detect and eliminate domestic abuse harms both pregnant women and their fetuses. In calling for a renewed effort by gynecologists to detect abuse of pregnant women, the President of the American College of Obstetricians and Gynecologists (ACOG) has stated that obstetricians and gynecologists have "a double reason for addressing the problem. The first is to protect our patients themselves. The second is to protect the unborn children during pregnancy, because, as brutal as it seems, recent studies show that pregnancy itself may incite violence by the husband or partner."[42]

Reproductive health services could make an important contribution to the detection of domestic violence if prenatal care were more universally available and widely used. The ACOG has begun to recognize the importance of gynecologists in determining the existence of domestic violence in women's lives. They recently sent their members information about battered women to help them recognize domestic abuse problems.[43] This information points out that the most important attribute for physicians to use in detecting domestic violence is *sensitivity*. When asked directly, most women will answer honestly so long as the batterer is not present.[44] When doctors talk with women about suspected or even admitted incidents of violence, sensitivity to their needs at that moment and the ability to provide concrete assistance are critical.[45] Barriers to reproductive health care service make it difficult for those sensitive discussions to occur and help cause domestic violence to remain undetected.

B. The Courts' Responses

1. The Casey *Decision*

Despite the problem of abuse to women during pregnancy, the Supreme Court has done little to protect the most disadvantaged

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41. *See* Ruth Colker, *An Equal Protection Analysis of United States Reproductive Health Policy: Gender, Race, Age, and Class*, 1991 DUKE L.J. 324, 338-40.

42. Teri Randall, *ACOG Renews Domestic Violence Campaign, Calls for Changes in Medical School Curricula*, 267 JAMA 3131, 3131 (1992).

43. *Id.*

44. *See id.*

45. *See* McFarlane, *supra* note 23, at 3178.

women from such abuse. In *Planned Parenthood v. Casey*,[46] the United States Supreme Court considered the constitutionality of a Pennsylvania statute which, among other things, required that pregnant women notify their husbands of their desire to obtain an abortion and make two doctor visits separated by at least twenty-four hours in order to procure an abortion.[47] The Court upheld the waiting period requirement but overturned the spousal notification requirement because of a purported sensitivity to the problems of domestic violence. In assessing the constitutionality of these requirements, the Court applied an "undue burden" standard under which it tried to examine the impact of these provisions from the perspective of the women most affected by them—asking whether the regulations posed a "substantial obstacle in the path of a woman seeking an abortion."[48] The Supreme Court considered the findings of fact of the district court to determine whether an undue burden existed with respect to each of the requirements imposed by the Pennsylvania statute. The district court had entered extensive findings documenting the

46. 112 S. Ct. 2791 (1992).

47. The Pennsylvania statute contains the following requirements:

§ 3209. Spousal Notice.

(a) Spousal notice required.—In order to further the Commonwealth's interest in promoting the integrity of the marital relationship and to protect a spouse's interests in having children within marriage and in protecting the prenatal life of that spouse's child, no physician shall perform an abortion on a married woman, except as provided in subsections (b) and (c), unless he or she has received a signed statement, which need not be notarized, from the woman upon whom the abortion is to be performed, that she has notified her spouse that she is about to undergo an abortion. The statement shall bear a notice that any false statement made therein is punishable by law.

(b) Exceptions.—The statement certifying that the notice required by subsection (a) has been given need not be furnished where the woman provides the physician a signed statement certifying at least one of the following:

(1) Her spouse is not the father of the child.

(2) Her spouse, after diligent effort, could not be located.

(3) The pregnancy is a result of spousal sexual assault as described in section 3128 (relating to spousal sexual assault), which has been reported to a law enforcement agency having the requisite jurisdiction.

(4) The woman has reason to believe that the furnishing of notice to her spouse is likely to result in the infliction of bodily injury upon her by her spouse or by another individual.

Such statement need not be notarized, but shall bear a notice that any false statements made therein are punishable by law.

(c) Medical emergency.—The requirements of subsection (a) shall not apply in case of a medical emergency.

18 PA. CONS. STAT. ANN. § 3209 (Supp. 1993).

48. *Casey*, 112 S. Ct. at 2821.

extent to which the spousal notification requirement might endanger the psychological and physical well-being of women and their children.

The defendants tried to counter that evidence by pointing out that the statute imposed almost no burden at all for the vast majority of women seeking abortions, because only about twenty percent of the women who seek abortions are married and about ninety-five percent of those women voluntarily notify their husbands of their intention to procure an abortion.[49] Thus, the defendants argued that only about one percent of the women seeking abortions would be affected by the statute's notice requirements.[50] They suggested that the impact on "women" should be measured by the impact on the vast majority of women.[51]

The Supreme Court, however, did not accept the defendants' attempt to define women by majoritarian standards. Instead, the Court made the bold statement: "The analysis does not end with the one percent of women upon whom the statute operates; it begins there. Legislation is measured for consistency with the Constitution by its impact on those whose conduct it affects."[52] The Court's analysis began with the fact that the spousal notice requirement was intended to affect married women who did not qualify for one of the statutes' exceptions and who did not wish to notify their husbands of their intention to procure an abortion. Looking at the lives of those women, the Court concluded that the statute operated as a substantial obstacle to a woman's choice to undergo an abortion. The Supreme Court concluded that "the spousal notification requirement is ... likely to prevent a significant number of women from obtaining an abortion. It does not merely make abortions a little more difficult or expensive to obtain; for many women, it will impose a substantial obstacle."[53]

At first glance, the Court's application of its undue burden standard seemed quite sensitive to the lives of disadvantaged women. It focused its inquiry on the women whose conduct was affected by the statute and recognized that these women faced substantial risk of injury. Unfortunately, even as the Court made those broad pronouncements, it also narrowly applied them to the case at hand. The Court's application of those standards to

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49. *Id.* at 2829.
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*

the waiting period requirement left unprotected the most disadvantaged women—unmarried poor women who face domestic violence.

The Court did not overturn the waiting period requirement although the district court had made numerous findings concerning the impact that that requirement would have on young, poor women who are at risk of domestic violence as well as harassment by anti-abortion protestors. The trial court had found:

> Two trips to the abortion provider would subject many women to the harassment and hostility of anti-abortion protestors ....
>
> ... For the majority of women in Pennsylvania, delays will range from 48 hours to two weeks.
>
> ... Women who live in any of ... 62 counties must travel for at least one hour, and sometimes longer than three hours, to obtain an abortion from the nearest provider.
>
> ....
>
> The ... waiting period will be particularly burdensome to those women who have the least financial resources, such as the poor and the young, those women that travel long distances, such as women living in rural areas, and those women that have difficulty explaining their whereabouts, such as battered women, school age women, and working women without sick leave.
>
> In some cases, the delays caused by the 24-hour waiting period will push patients into the second trimester of their pregnancy substantially increasing the cost of the procedure itself and making the procedure more dangerous medically.
>
> A delay of 24 hours will have a negative impact on both the physical and psychological health of some patients, as well as increase the risk of complications.[54]

Although these findings appear to parallel the findings regarding spousal notification, the Supreme Court concluded that the waiting period might be "particularly burdensome" to a particular group of women yet not be a substantial obstacle even as to the women in that group. Using the semantic distinction between a particular burden and a substantial obstacle, the Court upheld the waiting period requirement but invalidated the spousal notification requirement.

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54. Planned Parenthood v. Casey, 744 F. Supp. 1323, 1351-52 (E.D. Pa. 1990) (citations omitted).

One is therefore left wondering why the waiting period requirement was less problematic than the spousal notification requirement. The Supreme Court found that the spousal notice requirement affected women who would not voluntarily choose to notify their husbands of their desire to have an abortion. These are likely to be women who fear domestic violence. Similarly, who are the women who would not voluntarily choose to wait twenty-four hours after visiting an abortion provider to have an abortion? Married, middle-class women would typically visit a doctor, receive a pregnancy test, and schedule an abortion at a later time. Unmarried poor women, who feared domestic violence if their partner or family knew of their pregnancy, however, would not voluntarily wait twenty-four hours. Fearful that they could not afford to surreptitiously visit an abortion clinic twice, they would want to have the abortion at the same time as they obtained the positive pregnancy test. The Court, however, could not see that their reasons for failing to comply voluntarily with the statute's waiting period requirement were as compelling as those of the women who did not voluntarily want to notify their spouse.

I suggest that it was the Court's essentialism that prevented it from seeing the equivalent burdens on these two groups of women. The Court could imagine and sympathize with the burdens on middle-class married women imposed by the spousal notification requirement but could not imagine and sympathize with the burdens on young, poor women who are disproportionately African American. The difference in the Court's sympathies, I would suggest, was governed by the class and race of the groups that would be most affected by the requirements. The notification requirement only applied to married women. Because middle-class women are more likely to marry than poor women,[55] the spousal notification requirement would arguably affect middle-class women more than poor women. By contrast, the waiting period requirement would most strongly impact poor women who were already paying for their abortions with rolls of nickels and dimes and who could not afford the extra costs associated with the waiting period requirement.

The Court openly used a class-based analysis when it contrasted the two requirements. After affirming the waiting period requirement, although acknowledging that it might increase the

55. E. Douglass Williams & Richard H. Sander, *The Prospects for "Putting America to Work" in the Inner City*, 81 GEO. L.J. 2003, 2005 (1993).

costs of the procedure for some women, the Court stated that the spousal notification requirement was invalid, because "it does not merely make abortions a little more difficult or expensive to obtain ...."[56] The significant word in the above quotation is "merely." Why is an obstacle that prevents a woman from obtaining an abortion "merely" an inconvenience rather than a substantial obstacle? For a woman who cannot afford an abortion because of the increased costs of the waiting period requirement, the restriction is as much of an obstacle as for the woman who cannot procure an abortion because of her inability to obtain spousal notification. It is "merely" an inconvenience rather than a substantial obstacle to a court that is determinedly uninterested in considering class-based impacts of legal requirements. Thus, despite the Court's assertion that it would examine the burdens of the statute from the perspective of the women most impacted by them, some women's burdens appear not to count. They are a mere inconvenience rather than a substantial obstacle.

Not only did the Court openly state that it was not interested in protecting poor women, its ruling will also impact African American women disproportionately. Although it is true that poor people are less likely to marry than middle-class people, it is also true that race is a very important variable in understanding those marriage patterns. "Low-income white fathers ... [are] two and one-half times more likely to marry than low-income" African American fathers whose girlfriends bear children out of wedlock.[57] Similarly, upper-income white fathers are twice as likely to marry as upper-income African American fathers whose girlfriends bear children out of wedlock.[58] Class, however, is an important countervailing variable. Employed African American men whose girlfriends bear children out of wedlock, for example, are ninety-three percent more likely to marry than unemployed black men.[59]

The Court's holding can be described in two ways from an anti-essentialist perspective. One could say that the Court was essentialist in that it was blind to the impact on young, poor women who are disproportionately African American. Alternatively, one could say that the Court was quite aware of the

56. *Casey*, 112 S. Ct. at 2829.

57. Patrick T. Reardon, *Reasons Sought for Dip in Rate of Black Marriages*, CHI. TRIB., Nov. 17, 1991, at C1.

58. *Id.* at C1.

59. *Id.* at C7.

impact of its decision on the lives of young, poor women but it did not choose to protect them from domestic violence. Under the second explanation, the Court is not actually essentialist; instead, it is simply uncaring or vindictive. The application of an anti-essentialist perspective, however, allows us to see the uncaring or vindictive attitude of the Court toward young, poor women. In this article, I have generally used the first explanation to describe the Court's action because it is a "gentler" description; however, I can empathize with the reader who finds the second explanation to be more accurate. The important point for the purposes of this article is that the Court's decision left poor women and African American women unprotected from domestic violence.

2. *Post*-Casey: *Mississippi*

It would appear that the undue burden standard is a fact-intensive standard, not lending itself easily to importation from one state to another. In practice, however, courts are likely to overlook the fact-intensive nature of the undue burden standard. Rather than accept the possibility that a particular requirement is valid in one state but invalid in another, courts are likely to look for broad rules such as "waiting period requirements are valid and spousal notification requirements are invalid." These broad rules are likely to perpetuate the insensitivity of the *Casey* decision. The first indication of the courts' search for firm rules that are not fact-intensive occurred in the 1992 Fifth Circuit decision in the Mississippi case *Barnes v. Moore*.[60]

The statute challenged in *Barnes* was similar to the one challenged in *Casey*.[61] For example, like the Pennsylvania statute, it contained a twenty-four hour waiting period requirement.[62] Whereas Pennsylvania is a relatively prosperous industrial state, Mississippi is the poorest state in the United States.[63] If the Fifth Circuit had been truly willing to explore the impact of the waiting period requirement on the women in Mississippi most affected by it, the court should have concluded that that burden constituted a substantial obstacle despite the Supreme Court's ruling in *Casey*.

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60. 970 F.2d 12 (5th Cir.) (vacating the district court's preliminary injunction), *cert. denied*, 113 S. Ct. 656 (1992).

61. MISS. CODE ANN. § 41-41-31 (1972).

62. *Id.*

63. *Census Findings: South Central Region*, WASH. POST, July 22, 1992, at A17.

As discussed below, the waiting period requirement in Mississippi increases the health risk of an abortion, raises its costs, and imposes transportation, housing, and child care difficulties on women.[64] Such burdens make it nearly impossible for many women to effectuate their reproductive choices. These burdens are most directly imposed on women who are least represented in the political process and most in need of improved access to health care. I will focus on the effects on poor women and women who are in abusive relationships because these waiting period requirements will increase the level of violence in their lives.

Mississippi is the poorest state in the United States. *Twenty-five percent* of the persons in the state live below the poverty line—more than twice the national average and the highest percentage in the United States.[65] The median household income in Mississippi is the lowest in the United States.[66] Welfare payments are also very low in Mississippi. For example, the maximum monthly Aid to Families with Dependent Children benefit for a family of three in 1989 was $120 per month—the second lowest in the United States.[67]

Among the poor of Mississippi, women—particularly young women and African American women—are the poorest. Overall, twenty-one and one-half percent of the family households in the state are headed by females;[68] these households are disproportionately poor. In fiscal year 1991, for example, females constituted nearly seventy-five percent of all of the people in the state on Medicaid.[69] In addition, children under the age of twenty constitute fifty-five percent of the Medicaid recipients.[70] Seventy-one percent of Medicaid recipients are African American.[71] Unfortunately, extreme poverty, combined with a shortage of affordable and accessible health care providers, places Mississippi

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64. *See infra* notes 74-90 and accompanying text.

65. U.S. DEP'T OF COMMERCE, MEDIAN INCOME OF HOUSEHOLDS AND PERCENT OF PERSONS IN POVERTY BY STATE (1988-90).

66. Mississippi's median household income is $20,414. The next lowest is Alabama's, at $22,610. *Id.*

67. *See* AILEEN WHITFALL, THE HEALTH OF AMERICA'S SOUTHERN CHILDREN 34 tbl. 3.1 (1989).

68. U.S. DEP'T OF COMMERCE, 1990 CENSUS OF POPULATION AND HOUSING: MISSISSIPPI 60 tbl. 6 (1990).

69. *See* MISSISSIPPI MEDICAID MANAGEMENT INFO. SYS., STATISTICAL REPORT ON MEDICAL CARE: ELIGIBLES, RECIPIENTS, PAYMENTS, AND SERVICES § D(2) (1991).

70. *See id.*

71. *See id.*

at or near the bottom of all states in accessibility of both abortion services[72] and prenatal care.[73]

The mandatory delay in the Mississippi abortion statute increases both the medical risk and the cost of abortions. Because of work, school, or family responsibilities, many poor women can go to a clinic only on Saturdays; the waiting period requirement, therefore, will delay their abortions by at least one week.[74] Rates of morbidity increase by thirty percent with each week of delay beyond the eighth week of pregnancy.[75]

Delays of one week can raise the cost of an abortion by fifty to two hundred dollars,[76] which can be prohibitive for a poor woman. As established in the district court in *Barnes*, many women pay for their abortions in rolls of dimes, nickels, and pennies.[77] Poor women already unduly delay their abortions as they scrape together the money to pay for them.[78] The additional

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72. Medicaid does not cover the cost of an abortion for a poor woman. Women in Mississippi carry to term quite frequently and have few abortions. Mississippi ranks 49th in its abortion occurrence rate. ABORTION SERVICES IN THE UNITED STATES, EACH STATE & METROPOLITAN AREA, 1984-1985, at 17 tbl. 3 (Stanley K. Henshaw and Jennifer Van Vort eds., 1988). Mississippi ranks 45th in the number of adolescents who obtain abortions. ALAN GUTTENMACHER INSTITUTE, SELECTED FACTS ABOUT TEENAGE PREGNANCY: MISSISSIPPI 1989, at 12 (1991).

73. In 1987 Mississippi had 12.5 doctors per 10,000 people, the second lowest ratio in the United States. *See* U.S. DEP'T OF HEALTH AND HUMAN SERVICES, HEALTH UNITED STATES: 1990, at 161 tbl. 87 (1991). Mississippi ranked 36th in the United States for its lack of timely provision of prenatal care from 1984-86. 1 SUSHEELA SINGH ET AL., PRENATAL CARE IN THE UNITED STATES: A STATE AND COUNTY INVENTORY 20 tbl. 2.2 (1989). Mississippi has the dubious distinction of having the highest percentage of low birthweight babies; 8.7% of all babies in Mississippi were born at low birthweights in 1986. MELBA CARR ET AL., REPORT ON MINORITY HEALTH IN MISSISSIPPI 19 (1990). "Mississippi's 1989 infant mortality rate was 11.6 infant deaths per 1,000 live births. The national rate for infant mortality was 9.7." *Id.*

74. Declaration of Joseph Mitchell, M.D., at ¶ 34 (May 31, 1991), Barnes v. Moore, No. J91-0245(W) (S.D. Miss.), *vacated*, 970 F.2d 12 (5th Cir. 1991), *cert. denied*, 113 S. Ct. 656 (1992) [hereinafter Mitchell Decl.].

75. Declaration of Stanley K. Henshaw, Ph.D., at ¶ 17 (May 30, 1991), *Barnes*, No. J91-0245(W) [hereinafter Henshaw Decl.].

76. At Mississippi Women's Medical Center, the cost of an abortion increases $205 between the 11th and 12th week of pregnancy, an additional $50 at week 15, and an additional $100 beyond week 16. Declaration of Lisa Brown at ¶ 5 (May 31, 1991), *Barnes*, No. J91-0245(W) [hereinafter Brown Decl.].

77. Brown Decl., *supra* note 76, at ¶ 6.

78. In one study, 60% of women having abortions after 15 weeks attributed the delay to their need for "time to raise money" for the abortion. Aida Torres & Jacqueline Darroch Forrest, *Why Do Women Have Abortions?*, 20 FAM. PLAN. PERSP. 169, 174 (1988). *See also* Declaration of Joseph Booker, Jr., M.D., at ¶¶7-8 (May 31, 1991), *Barnes*, No. J91-0245(W); Brown Decl., *supra* note 76, at ¶ 6; Declaration of J. Edward Hill, M.D., at ¶¶ 9, 11, 14 (June 4, 1991), *Barnes*, No. J91-0245(W) [hereinafter Hill Decl.]; Declaration of Karen Jenkins at ¶¶ 16-19 (May 31, 1991), *Barnes*, No. J91-0245(W) [hereinafter Jenkins Decl.]; Mitchell Decl., *supra* note 74, at ¶ 38; Declaration of Thomas Walter Tucker, II, M.D., at ¶¶ 7-10 (May 31, 1991), *Barnes*, No. J91-0245(W).

complication and delay resulting from the statute, therefore, hits poor women particularly hard because the increase in cost per week is steeper in the second trimester than in the first trimester.

In addition, Mississippi's serious transportation problems exacerbate the burdens of the mandatory delay in three ways. First, the difficulty of procuring transportation adds to the delay. This, in turn, increases the cost of the abortion. Finally, making two trips instead of one to the abortion provider, at a minimum, doubles the cost of transportation itself.

Two of the three abortion providers in the state are located in Jackson. Of the eighty-two counties in Mississippi, seventy-nine have no known abortion providers, although nearly three thousand women from these counties obtained abortions in 1989.[79] Nearly half of all abortion patients travel one hundred miles or more for abortion-related services. For example, Lisa Brown stated in her Declaration in *Barnes*: "The average patient travels approximately 2 hours to obtain an abortion at the Clinic, but some travel much longer to arrive at the Clinic. Over 650 of our patients in 1990 traveled over 100 miles total to obtain abortion services."[80]

Poor women living in remote rural areas of the state must often travel two hundred miles to obtain an abortion in Jackson. Families living in poverty are likely to be female-headed households in remote rural areas of the state.[81] Six of the seven Mississippi counties in which more than thirty percent of the families live below the poverty line are located in the northwest region of the state.[82]

Poor women seeking abortions are dependent upon an inadequate public transportation system. For example, at trial, Dr. Morrison testified:

> One case recently had to come from Clarksdale, and you might think that's not a far journey, but if you have to take the Trailways bus you have to go to Memphis. Then you have—to catch the bus you have to leave at 4:00 o'clock in the morning, get the bus to Memphis, then come to Jackson, get here at 12:00. Then that woman would have to go back the same route, get in at midnight, turn around and come back

79. Henshaw Decl., *supra* note 75, at ¶ 8.
80. Brown Decl., *supra* note 76, at ¶ 7.
81. *See supra* note 68 and accompanying text.
82. *See* GINA STONE, HANDBOOK OF SELECTED DATA FOR MISSISSIPPI 71 (1989).

> the next morning. And I think that puts a burden on that woman and on me as a physician that would be ridiculous and onerous and certainly is true of no other medical condition.[83]

Virtually no women on welfare own an automobile and exceedingly few have access to a reliable one.[84] Travel expenses to a clinic range from approximately thirty-five to fifty dollars; for a woman who has to make two trips, these expenses will be seventy to one hundred dollars.[85]

The waiting period requirement will often necessitate an overnight stay in Jackson. Poor women, however, will find it very burdensome to bear the extra expenses of an overnight stay,[86] along with the expenses of an unpaid absence from work and the increased child care costs attendant to an absence from their home. Some women will have no alternative but to spend the night on the street in order to comply with the waiting period requirement.[87]

These burdens will be further exacerbated for poor women who face domestic violence because they cannot afford the risk of their partner discovering that they have visited an abortion clinic. One visit to the doctor's office is already a dangerous task for them; two trips will often be extremely dangerous or impossible. Unfortunately, many pregnant women live in abusive relationships in which they cannot inform their partner of their pregnancy and of their desire to obtain an abortion. Studies indicate that there is a correlation between pregnancy and battering; for example, some men beat their wives *only* when they know that their wives are pregnant.[88] For such women, even one

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83. Trial Transcript at 108, Barnes v. Moore (No. J91-0245(W)). *See also* Trial Transcript at 44, *Barnes* (No. J91-0245(W)).

84. Only 3.6% of the families receiving Aid to Families with Dependent Children in Mississippi in 1989 owned a car. *See* U.S. DEP'T OF HEALTH AND HUMAN SERVICES, CHARACTERISTICS AND FINANCIAL CIRCUMSTANCES OF AFDC RECIPIENTS, FY 1989, at 71 tbl. 47 (1989). *See also* Hill Decl., *supra* note 78, at ¶ 12; Jenkins Decl., *supra* note 78, at ¶ 19.

85. Declaration of Rims Barber at ¶ 6 (May 29, 1991), *Barnes*, No. J91-0245(W).

86. The cost of lodging near the various clinics ranges from $22.50 to $43.00 per night. *Id.* at ¶¶ 8-9.

87. For example, Dr. Hill stated in his Declaration:

> If my patients are required to stay overnight in Jackson they will most likely sleep in the car, if they can get the other person [who gave them the ride] to stay overnight, or outside the clinic in the street. None of my patients have ever stayed in a hotel that I know of, and I don't believe they could afford to do so.

Hill Decl., *supra* note 78, at ¶ 14.

88. *See* MILDRED D. PAGELOW, FAMILY VIOLENCE 314-15 (1984).

unexplained visit to a doctor may be quite dangerous. For example, Lisa Brown stated in her Declaration in the *Barnes* case: "I fear for the health of battered women who need abortions. Battered women seeking abortions already have to reschedule several times because it is difficult for them to get away from their batterers. The Act would only further thwart their attempts to obtain high quality health care."[89] Requiring such women to visit a doctor twice, and possibly to incur an overnight stay away from home, may make the "choice" of an abortion impossible. Although these women's lives or health may be threatened if their partners discover that they are seeking an abortion, the medical emergency exception in the Mississippi statute does not apply to their situation.[90]

It is impossible to overstate the importance of confidentiality to women who face domestic abuse. Although a spousal notification requirement is one way that women can lose their confidentiality, waiting period rules also pose a serious risk of loss of confidentiality for many women. Planned Parenthood, for example, goes to enormous lengths to protect women's confidentiality when they go to *one* office visit, not necessarily for an abortion. The organization sends letters to women in "code" in unmarked envelopes and does not leave telephone messages at women's homes. Despite these efforts, a woman faces domestic violence when her male partner calls the post office to find out the source of a postal frank, learns of an unidentified caller's telephone number through special telephone features, or is informed by an anti-choice advocate that his partner's car was seen in an abortion clinic parking lot.[91] Each time a woman must visit an abortion clinic office she takes a serious risk of loss of confidentiality.

Many women will be forced to choose illegal abortions because they will not be able to afford either the increased costs or the risks caused by the waiting period requirement. While few abortion-related deaths presently occur, the higher incidence of illegal abortions can be expected to increase abortion-related mortal-

89. Brown Decl., *supra* note 76, at ¶ 10.

90. *See, e.g.*, Mitchell Decl., *supra* note 74, at ¶¶ 11-22. The Mississippi statute defines a medical emergency as a "condition which, on the basis of the physician's best clinical judgment, so complicates a pregnancy as to necessitate an immediate abortion to avert the death of the mother or for which a twenty-four hour delay will create grave peril of immediate and irreversible loss of major bodily function." MISS. CODE ANN. § 41-41-31 (1972).

91. These examples are drawn from discussions with my friends who work for Planned Parenthood or local abortion clinics.

ity—particularly for the poor and disadvantaged. Mishandled criminal abortions were the principal cause of maternal deaths in the 1960s, when most abortions were performed illegally.[92] Women of color, who are disproportionately poor, suffered the most from the lack of safe, legal abortions; they accounted for sixty-four percent of the deaths associated with illegal abortions in this country in 1972.[93] The mortality rates for African American women were nine times higher than for white women.[94] We can expect the statute to cause poor women, who are disproportionately African American, to find it difficult to choose a lawful abortion and to face increased rates of death from mishandled illegal abortions.

The waiting period requirement will act coercively in the lives of poor women by placing them at increased risk of losing their confidentiality and increasing the health risks of abortion procedures. Loss of confidentiality will increase the risk of domestic violence. Women will also be less likely to seek reproductive health services, which in turn, will place them at higher risk for domestic violence that will go undetected.

III. Public Violence Against Pregnant Women

A. The Problem

Abortion-related violence is not limited to domestic violence. Some women seeking abortions face public violence and harassment through the actions of organizations such as Operation Rescue. These groups physically block access to abortion clinics, expose women to violence and harassment as they seek access to abortion providers, and attempt to breach the confidentiality of women seeking abortions, thereby exposing them to violence and harassment elsewhere. Because poor and young women are more likely to use abortion clinics, which offer the lowest cost abortion services, and middle-class, older women are more likely to use private abortion providers who typically escape the wrath

92. Kenneth R. Niswander, *Medical Abortion Practices in the United States*, *in* Abortion and the Law 53 (Smith ed. 1967).

93. Willard Cates, Jr., & Roger Rochat, *Illegal Abortions in the United States: 1972-1974*, 8 Fam. Plan. Persp. 86, 87 (1976).

94. Edwin M. Gold et al., *Therapeutic Abortions in New York: A 20 Year Review*, 55 Am. J. Pub. Health 964-65 (1965).

of Operation Rescue,[95] this public violence disproportionately impacts poor and young women. The most disadvantaged women in society therefore need protection from the harassment of groups like Operation Rescue.

The Ku Klux Klan Act[96] was enacted in 1871 to provide federal assistance to state and local authorities to assure that private mobs do not destroy the ability of vulnerable groups to enjoy an equal right to live under the rule of law. In the *Bray* case, the Supreme Court decided that the Ku Klux Klan Act is inapplicable to protect pregnant women from anti-abortion protestors.[97] The Ku Klux Klan Act prohibits conspiracies

> for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, or for the purpose of preventing or hindering the constituted authorities ... from giving or securing to all persons ... the equal protection of the laws.[98]

When women use the statute successfully, it enables them to obtain injunctions against Operation Rescue, thereby keeping clinics open and minimizing the impact of Operation Rescue's harassing and violent tactics.[99]

1. Loss of Confidentiality

Operation Rescue organizes its tactics so as to make women fear a loss of confidentiality. Illustrations of this and other tactics come from a brief filed in the Supreme Court by the National Abortion Rights Action League (NARAL).[100] The brief's appendix contains dozens of letters from women active in the pro-choice movement. Excerpts from these letters describe the effect that such loss of confidentiality may have on women:

> As an escort I have observed anti-abortion picketers photographing all people who enter clinics. I know of one particular

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95. These generalizations are made on the basis of my own experience in Louisiana defending abortion clinics from Operation Rescue.

96. 42 U.S.C. § 1985 (1988).

97. Bray v. Alexandria Women's Health Clinic, 113 S. Ct. 753 (1993).

98. 42 U.S.C. § 1985(3) (1988).

99. *See infra* notes 134-35 and accompanying text.

100. Amicus Brief in Support of Respondents by Organizations Committed to Women's Health and Women's Equality, *Bray*, 113 S. Ct. 753 (No. 90-985) [hereinafter NARAL brief].

> instance in which an anti[-abortion protestor] recorded the license plate number, got the name of the owner and called to preach on the evils of abortion. Sadly, the person who owned the car was the mother of a woman who had not confided her pregnancy to her family.
>
> Everything worked out fine but temporarily destroyed the relationship between mother and daughter. The daughter had been impregnated by the mother's boyfriend. While the patient did not consider her pregnancy a result of rape, she maintained that the mother's boyfriend had taken advantage of her when she arrived home in a drunken state. The incident was the only sexual contact of any sort for the patient in months.[101]

> [ ]writes down the license tag numbers from all the cars parked in the clinic parking lot. Some of the clients who come from small towns are intimated [sic] by this.[102]

> The protestors stand on the stairs where there is little room to pass. One of them usually has a camcorder and videotapes patients. This is one of the most intrusive and upsetting things I have seen so far. The patients are afraid that they will see themselves on television, maybe the evening news![103]

These tactics harm women's health while also exposing them to domestic violence through breach of their confidentiality.

Applying the Ku Klux Klan Act against Operation Rescue, a federal judge in New York found that Operation Rescue used videocameras as an offensive weapon to intimidate women from having abortions:

> [T]he evidence clearly shows that defendants use cameras as offensive weapons to harass and intimidate patients entering the clinics. Defendants have even pointed the cameras directly into the faces of patients seeking access to the clinics. They have also videotaped patient vehicles and their license plates as they enter the medical facilities. Defendants are well aware that women seeking abortions, especially younger women, are often terrified at the prospect of anyone, especially family members, finding out that they are having an abortion, and that the presence of cameras increases patients' fear that their identities might be revealed.[104]

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101. *Id.* at app. B, letter C3.
102. *Id.* at app. B, letter C37.
103. *Id.* at app. B, letter C62.
104. Pro-Choice Network v. Project Rescue, 799 F. Supp. 1417, 1426 (W.D.N.Y. 1992).

Similarly, the Georgia Supreme Court in *Hirsh v. City of Atlanta*[105] found that Operation Rescue violated state law by its intimidating use of videocameras:

> A clinic executive director testified that the protestors' activities caused patients much anxiety, that those who did gain access were visibly upset and some emotionally distraught. Patients' blood pressure and pulse rates were elevated by the impediments they had had to overcome to gain entry, subjecting the women to additional health risk should an abortion, performed under local anesthesia, be done while the patient was in such a shaken state.[106]

2. *Harassment, Intimidation, and Violence*

Although Operation Rescue may describe itself as "pro-life," its verbal and physical tactics are anything but peaceful.

a. *Disrespect for Life*

Excerpts from the letters from NARAL's brief describe the "anti-life" hostility of the Operation Rescue demonstrators.

> These fanatics reveal their true agenda. They demonstrated their disregard of women's health and well being. This becomes evident when they shout to a women [sic] in the driveway "You should die, not your baby."[107]

> From the very beginning of my escort work and continuing to this day, I have been subjected to many types of harassment. Verbal assault consists of being called "murderer, butcher, garbage of society, vulture" etc. as well as comments about my personal appearance (hairstyle, clothing) and my lifestyle (the size of my home, the car I drive, etc.). There were numerous verbal threats made about my daughter, who was 24 years old. Comments such as "we know where your daughter is, we know where she lives." They also learned the identity of her fiancee [sic] and in June, 1988 when she was planning to be married, the demonstrators threatened to "publicly embarrass" [sic] me by appearing at her wedding, forcing me to

105. 401 S.E.2d 530 (Ga.), *cert. denied*, 510 U.S. 1221 (1991).
106. *Id.* at 532.
107. NARAL brief, *supra* note 100, at app. B, letter C5.

have police officers at the church and at my home where the reception was held.[108]

I was standing near the entrance of the clinic, helping people coming into the clinic from the street. I was face to face with the anti [abortion] protestors.... A man was standing by the fence, with 2 young children. The girl was maybe 6 and the boy no older than eight. They stood on either side of this man, just watching everything. I assumed the man was their father. I was wearing a hat for protection from the sun and had taken it off to wipe my forehead. The man yelled out, to me and especially his children, "See that red head? If you ever see her on the street you can kill her, because she's no good and she kills babies." I'll never forget those words. He said it with such force, that for a moment I was scared. I had never been threatned [sic] before and I was nervous. In that one moment this man was teaching his children to hate and kill anyone who differs from their opinion. As my knees shook, I stood there, knowing there was nothing I could say.[109]

b. Violence and Harassment

The NARAL letters also demonstrate the harassment, threats of violence, and actual violence perpetrated by Operation Rescue:

Physical intimidation and verbal assault are the primary tools employed against women by anti-abortion groups. They refrain from accosting men on public streets to demand personal information on pregnancy states [sic], marital status, religion, or his sex life. Instead they assail women. A woman approaching a clinic is first surrounded by anti-choice demonstrators who shout at her to be heard over one another. If she tries to get away from them or says that she is not interested they persist in following, pressing themselves on her, and blocking her every step in order to continue their rebuke and deluge of contempt. Recently I witnessed a so called 'pro-lifer' hiss at a woman who was trying to extricate herself from a group of blockaders, "Murderer, Murderer, Murderer. Kill, Kill, Kill."[110]

A man in his late 50's or early 60's, about 6'1" or 6'2", wearing a clerical collar approached me and stood very, very close to me. He was carrying some sort of rolled up cloth

108. *Id.* at app. B, letter C29.
109. *Id.* at app. B, letter C79.
110. *Id.* at app. B, letter C14.

which I assumed was a sign and wooden stakes to drive the sign into the ground ....

He continued to breathe heavily, as though he were barely restraining himself from hitting me and to move very close to me, within 9" of my body. He said, "You had better get out of here, miss." ... He said again, "I'm warning you, miss. Leave now." I did not. He then took one of the wooden stakes, which seemed, from my peripheral vision, to be about a foot long made from rough lumber with a point at the end and a metal sheet in the middle, out of his bundle and into his free hand. It was trembling. He brought it up to my left eye, a little to the left of the center of my eye, and about 2 or 3 inches away from my face. He began to twist the stake slowly from side to side, not saying anything, but breathing heavily. Then he said, "Get out of here!" and he jabbed the stake toward my eye on each syllable.

I did not move, looking back on it, probably because I was too frightened to move. Then a group of escorts came by me and when he saw the orange T-shirts, he slipped back into the crowd and I did not follow him ....

The incident also angered me greatly. It was the first time in my life that I had been physically threatened. He was taking advantage of the fact that he was a foot taller than I, at least 100 lbs. heavier, and, for all practical purposes, armed.[111]

The windows in the clinic have been shot out three different times during the night and it is also frightening to arrive in the morning to find windows shattered by bullets and bullets lodged in the walls.[112]

In another incident, a carload of "Operation Rescue" members failed to respond to a police order to stop their car at the mobilization site for a "rescue" attempt in December of 1989. The "Operation Rescue" members actually drove their car into the police officer who was dressed in plain clothes. He got on the front hood of their car while they continued to drive on. All the time he was yelling "Stop, I'm a police officer" and flashing his badge.[113]

Thursday evening I met my partner at the [ ] metro stop, and we headed over to where Operation Rescue was lodged during the D.C. Project II weekend. Our assignment was to photograph people involved with Operation Rescue to update our files. We were making our way through the parking lot when

111. *Id.* at app. B, letter C16.
112. *Id.* at app. B, letter C29.
113. *Id.* at app. B, letter C39.

> we saw two men approaching us. I agreed with my partner that I should photograph the one on the left, and she, the one on the right. I took my subjects [sic] photo, while my partner focused in on her's [sic]. As I lowered my camera, I saw my partner's subject—a man that we have identified as "Ed", one of Randall Terry's body guards—rush my partner, picking her up, and slamming her against the brick wall of the hotel. She got up off the ground, whereupon, "Ed" rushed her again, forcing her to the ground, kicking her in the stomach, back, face, and breasts. "Ed" then pulled out his metal flashlight and began clubbing my partner on the head and neck with the instrument. During this time, my partner had curled up in a ball, attempting to protect her head and body. I was photographing the entire incident. All the while, "Ed" was screaming at my partner that he was "going to kill her", calling her a "murderous bitch", "cunt", "whore" and "slut". I attempted to intercede, and "Ed" turned towards me with his raised flashlight, until my partner's movements brought his attention back to her, and he continued to beat her. I ran to get help, and upon my return "Ed" had fled off into the parking lot somewhere.[114]

In issuing an injunction against Operation Rescue in Buffalo, New York, United States District Judge Arcara made findings supporting many of the examples cited above.[115] During physical blockading, he found that the demonstrators "trespass on the clinic property and sit or lay in the entrances of the clinic in an attempt to block access to and egress from the clinic."[116] Constructive blockading includes "demonstrating and picketing around the entrances of the clinics, and ... harassing patients and staff entering and leaving the clinics."[117] The court also found that Operation Rescue's actions include

> frequently and routinely congregat[ing] in or near the driveway entrances to the facility parking lots in order to impede and obstruct access to the facilities ... yell[ing] at patients, patient escorts and medical staff entering and leaving the health care facilities ... [and] crowd[ing] around people trying to enter the facilities in an intimidating and obstructing manner, and

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114. *Id.* at app. B, letter C43.
115. Pro-Choice Network v. Project Rescue, 799 F. Supp. 1417 (N.D.N.Y. 1992).
116. *Id.* at 1423.
117. *Id.* at 1424.

grab[bing], push[ing] and shov[ing] the patients, patient escorts and staff.[118]

c. Impact on Disadvantaged Women

As with the *Casey* decision, it was the most disadvantaged women in society who were adversely affected by the Court's decision in *Bray*—the women who face both public harassment by Operation Rescue and domestic violence through their loss of confidentiality. The NARAL letters document this impact on young and poor women who are disproportionately racial minorities.

In the summer of 1990, we received a call from the [ ] clinic located in East L.A.; a primarily low-income Hispanic neighborhood. These neighborhoods are favorite targets of Operation Rescue due to the fact that their residents have few health-care options available to them ....

One Saturday ... a woman in the company of her two children approached the clinic [to take her children to a dentist in the same building who donated his services to children on Saturdays]. They were met by a frenzy of hostile picketers who shoved at them photographs of what they claimed were aborted fetuses and screamed at the mother, "Don't kill your baby!"

... [O]nce inside, the children were hysterical, crying out, "Mommy, don't kill us!"

... The situation at the clinic continued on this way for several months with little help from the local police. It finally ended when the priest and his church group decided to move on to another clinic. Currently, they are harassing women at a health care facility located in [ ], another low-income Hispanic area.

... Most importantly, consider the people who are made to suffer the greatest; the poor and disadvantage [sic] of our community who have so few options to choose from, and who utilize women's health care facilities for the variety of services they provide.[119]

I remember one young Hispanic couple in particular who came in last December. The woman was carrying a fetus which,

118. *Id.*

119. NARAL brief, *supra* note 100, at app. B, letter C8.

through amniocentesis, was determined to be without kidneys. Their doctor told them that the fetus probably would not survive delivery, but would definitely not be able to survive on its own. Because protestors were sitting in front of our doors, myself and another staff member pulled the couple over the protestors and through the doors. You could see the shock and dispair [sic], especially on the husband's face, who by now, was in tears. They told me that they wanted to have children, but under the circumstances, felt terminating the pregnancy at that point was the best thing. The people blocking the doors just made a very difficult experience even more traumatic.[120]

N [ ] concentrates on the youngest and most vulnerable looking clients. She tells the young men, "If you love her, you'll get her out of there. She could die. That clinic isn't safe. If she dies, it will be your fault."[121]

The instances of verbal abuse to patients are nearly endless. One of the hardest things I have to do as a volunteer is to keep the men who come in with patients from assaulting the protestors. In one instance, a 17 year-old came in with his girlfriend. The protestors started with the normal "Don't let her kill her baby", "Be a man—that's your baby she's going to kill", "God made her a mother for a reason" nonsense. The patient burst into tears and the boy finally turned to the crowd and screamed, "Let her alone. She was raped!" One protestor shouted, "How do you know it's not your baby she's killing?" The boy replied, "Because I love her too much to sleep with her before we're married."[122]

The husband of a young black woman was also shouting back at the "protestors" telling them that they did not understand the difficulty of raising, supporting, emotionally supporting and giving enough love to the four children he and his wife already had at home. He told the "protestors" how the government was already having to help them financially and that this decision, made by he and his wife, was their personal right giving the "protestors" no right to interfer [sic].

... These women are trying the best way they know how to make the most difficult decision of their lives at a time when they are already emotionally stressed by their situation. Before they enter our clinic, they have already had many family discussions and disputes over the situation they are in. This is especially true of parents with young girls who have been

120. *Id.* at app. B, letter C26.
121. *Id.* at app. B, letter C37.
122. *Id.* at app. B, letter C38.

> on drugs and feel that it is better for a decision to be made now.[123]
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> A patient [] told us that she had six children at home and wouldn't be able to get back to the clinic since she lived 2 1/2 hours away and didn't have a car. She had been able to get a ride this time but couldn't get one again. Abortion is no longer available in her community because doctors who did them were picketed and harassed until they stopped doing them.[124]

B. Importance of the Bray *Decision*

As the Ku Klux Klan Act has been interpreted to protect African American travelers from the assault of a white mob,[125] it should protect women from the mob violence of anti-abortion demonstrators. The tactics of Operation Rescue fit perfectly into the conspiracy requirement of the Ku Klux Klan Act.[126] As a conspiracy, it has a media spokesperson and national mailings announcing, for example, its "Summer of Purpose." Its leaders decide exactly what abortion facilities to target; they do not disclose their plans to anyone, including their followers. They then arrange for their followers to board a bus that they drive to an undisclosed location where demonstration activity occurs. Their followers make no tactical decisions. All such decisions are made by the leaders of the conspiracy. The statute's class-based animus requirement is met, because Operation Rescue is engaged in a systematic course of unlawful conduct aimed at preventing women—and only women—from enjoying a legal right that can be exercised by women—and only women.

Nevertheless, the plaintiffs could not establish the required class-based animus in *Bray*. In Justice Scalia's words in the *Bray* decision:

> Respondents' case comes down, then, to the proposition that intent is legally irrelevant; that since voluntary abortion is an activity engaged in only by women, to disfavor it is *ipso facto* to discriminate invidiously against women as a class. Our cases do not support that proposition. In *Geduldig v. Aiello* we

123. *Id.* at app. B, letter C59.
124. *Id.* at app. B, letter C64.
125. Griffin v. Breckenridge, 403 U.S. 88, 102-03 (1971).
126. 42 U.S.C. § 1985(3) (1988).

> rejected the claim that a state disability insurance system that denied coverage to certain disabilities resulting from pregnancy discriminated on the basis of sex in violation of the Equal Protection Clause of the Fourteenth Amendment .... The same principle applies to the "class-based, invidiously discriminatory animus" requirement of § 1985(3).[127]

Applying that test to the *Bray* case, Justice Scalia readily concluded that the plaintiffs could not meet the gender-based animus requirement. In Scalia's words: "Whether one agrees or disagrees with the goal of preventing abortion, that goal in itself (apart from the use of unlawful means to achieve it, which is not relevant to our discussion of animus) does not remotely qualify for such harsh description, and for such derogatory association with racism."[128]

Although the dissent disagreed with Scalia's analysis of the gender-based requirement, the dissent did not understand the particular impact that this statute would have on the most disadvantaged women in society. For example, the dissent stated:

> Petitioners, however, are not mere opponents of abortion; they are defiant lawbreakers who have engaged in massive concerted conduct that is designed to prevent all women from making up their own minds about not only the issue of abortion in general, but also whether they should (or will) exercise a right that all women—and only women—possess.[129]

The conduct of Operation Rescue, however, is not designed to prevent *all* women from making up their own minds. Instead, Operation Rescue targets the most disadvantaged women in society and tries to make abortion entirely unavailable to them. Operation Rescue is not likely to change these women's minds about abortion, but it is likely to make abortion physically unavailable to them. That fact is the essence of Operation Rescue's illegal activity that is not described by the majority or the dissent.

Congress recently passed a statute, the Freedom of Access to Clinics Entrance Act of 1994[130] (FACE), to protect women from

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127. Bray v. Alexandria Women's Health Clinic, 113 S. Ct. 753, 760-71 (1993) (citations omitted).

128. *Id.* at 762.

129. *Id.* at 798 (Stevens, J., dissenting).

130. 18 U.S.C. § 248 (1994).

abortion clinic violence. FACE was passed, at least in part, as a response to the death of Dr. Gunn, a Florida physician who performed abortions and was killed by an abortion protestor earlier in 1994.[131] This statute is very important because it represents the first time that Congress has corrected a Supreme Court decision in the abortion area through legislation. The effectiveness of this statute will partly depend on whether the courts rule that it violates the First Amendment rights of abortion protestors.[132]

The Supreme Court's recent decision that the Racketeer Influenced and Corrupt Organization laws (RICO) can be applied to organizations that are not seeking economic gain through their activities has caused some people to believe that a new weapon is now available to challenge anti-abortion violence at clinics.[133] I am skeptical of this new hope because I believe it is equally likely that this decision will be used against pro-choice demonstrators. When I was working against Operation Rescue in 1992, many of my clients received threatening letters from Operation Rescue saying that the organization was planning to file RICO charges against pro-choice demonstrators. At that time, I was able to tell my clients not to take that harassment seriously because the legal precedent did not support such an allegation. But now, I cannot be so glib. In other words, RICO may simply be another harassing weapon available to anti-choice demonstrators. Moreover, because Operation Rescue does an excellent job of hiding its assets, it is unlikely that RICO could ever achieve a destructive monetary effect against Operation Rescue. Thus, I am skeptical that RICO will be an effective weapon for pro-choice activists; it is more likely to be another irritant with which we will have to contend.

Statutes such as FACE and RICO are not the only options available to deter clinic violence. For example, the President has the authority to send federal marshalls to assist local police if Operation Rescue and their supporters overwhelm the resources

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131. *See* 140 CONG. REC. § 5595, 5596 (1994) (statement of Sen. Kassebaum); *see also* William Booth, *Doctor Killed During Abortion Protest*, WASH. POST, Mar. 11, 1993, at A1 (reporting that Michael F. Griffin killed Dr. David Gunn by shooting him three times in the back outside of the Pensacola Women's Medical Services Clinic).

132. *See* American Life League, Inc. v. Reno, 855 F. Supp. 137 (E.D. Va. 1994) (upholding the constitutionality of the Freedom of Access to Clinics Entrances Act); *see also* Madsen v. Women's Health Ctr. Inc., 114 S. Ct. 2516 (1994) (considering whether restrictions on abortion protestors violated the First Amendment).

133. NOW v. Scheidler, 114 S. Ct. 798, *reh'g denied*, 114 S. Ct. 1340 (1994).

of local police forces. Rather than go to federal court, in the future women may go to the United States Attorney's office and request federal assistance. Under either scenario—seeking federal court assistance or executive branch assistance—women are dependent upon the changing politics of the judicial or executive branches of government. No solution appears to be permanent or longlasting. An amendment to the Ku Klux Klan Act to specifically protect women from anti-abortion violence, or a separate statute to this effect, would have the most long-term, beneficial results.

I did not appreciate the importance of the Ku Klux Klan Act to women's lives until Operation Rescue arrived in Louisiana during the summer of 1992. Through mass mailings, Operation Rescue publicly stated that it would target the only abortion clinic in Baton Rouge, Louisiana, and suggested that it would also come to New Orleans for protest activity at the dozen or so clinics in the New Orleans area. Working with the National Organization for Women (NOW) Legal Defense and Education Fund as well as with a coalition of Louisiana lawyers, I tried to obtain court injunctions to limit Operation Rescue's tactics in both cities. Because we could not meet the jurisdictional requirements of the Ku Klux Klan Act in Baton Rouge, we proceeded in state court under state trespass law.[134] Despite the fact that Operation Rescue was encamped around the Baton Rouge clinic, we could not get an elected state court judge to enter an injunction; in the judge's opinion, neither the clinic nor its patients were in imminent danger.

By contrast, in New Orleans, we were able to proceed in federal court.[135] Despite the fact that Operation Rescue was over sixty miles away in another city, we were able to obtain an injunction within twenty-four hours of filing our pleadings. The result was that the Baton Rouge clinic was practically a war zone with Operation Rescue demonstrators blockading, harassing, pushing and shoving patients, as well as surreptitiously taking some patients to fake abortion clinics. The New Orleans clinics were never targeted; the police told me that the injunction intimidated Operation Rescue from entering the New Orleans area. Thus, like African Americans after the Civil War, women unfortunately cannot count on the protection of the state courts.

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134. NOW v. Operation Rescue Nat'l, No. 382, 750 (19th Jud. Dist. La. July 8, 1992) (Brown, J.).

135. NOW v. Operation Rescue Nat'l, No. CIV.A.92-2289, 1992 WL 165715 (E.D. La. July 9, 1992).

IV. CONCLUSION

Two hours after the oral argument in the *Barnes*[136] case, the Fifth Circuit rendered its decision upholding the Mississippi statute, finding it indistinguishable from the Pennsylvania statute upheld in *Casey*[137] and denying plaintiffs' request for a factual hearing in the district court to set forth the impact of the waiting period requirement on women's lives. It is hard to know what to hope for next. I could hope that women face horrible acts of violence because of the loss of their confidentiality so that we could present those facts to the court in an "as applied" challenge. But, of course, that would mean that women's lives would be sacrificed to achieve a challenge to an abortion statute—not something that I could ever desire. Or I could hope that we do not hear of any such violence so we will not have any stories to report to the court. But, unfortunately, the fact that we do not hear of such stories does not mean that they do not exist. Women who have faced violence in their lives have always been invisible; their continued invisibility would be no victory.

The problem of violence against women is not likely to disappear tomorrow. But maybe we can, at least, start to break down the myth about women who choose abortions and the women who experience violence. All women in society are at risk of experiencing violence in their lives. Neither wealth, age, marital status, nor pregnancy immunizes women from violence. Although all women who experience or are at risk of experiencing violence may need judicial protection, that protection is not equally available to all women. Instead, poor, young women who are disproportionately African American receive the least judicial protection from violence. Moreover, despite attempts by the so-called "pro-life" movement to create distorted images of women in society, pregnant women who seek abortions are not murderers. Instead, they are often victims both of private and public violence. We need to start to value their lives, young or old, rich or poor, white or black.

136. Barnes v. Moore, 970 F.2d 12 (5th Cir.), *cert. denied*, 113 S. Ct. 656 (1992).
137. Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992).