

# Toward a Feminist Theory of the Rural

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# Toward a Feminist Theory of the Rural

The (con)fusion between women's situation and women's identity pervades public discourse.<sup>1</sup>

Judith Baer (1999)

Given the pervasiveness of the rural/urban opposition and its related significance in the construction of identity, it is remarkable that the explosion of scholarly interest in identity politics has generally failed to address the rural/urban axis. The resulting representation of social distinctions primarily in terms of race, class, and gender thus masks the extent to which these categories are inflected by place identification.<sup>2</sup>

Barbara Ching and Gerald Creed (1997)

Feminist scholars have long lamented law's inattentiveness to and misunderstanding of the day-to-day realities of women's lives.<sup>3</sup> Anti-essentialists have argued that feminism must look beyond gender as the sole site of subordination to other factors, such as race, class, and sexual orientation, which shape women's lives, including their encounters with law. I draw on both arguments in this article as I call attention to rural women as a distinct population, differentiated by place. I argue that the social, political and economic realities that shape rural women's lives are largely ignored in many legal contexts. In the rare cases when they are acknowledged, the role that this

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<sup>1</sup> JUDITH BAER, *OUR LIVES BEFORE THE LAW* 63 (1999). "If we fail to discuss what has been done to women, we leave out a huge part of reality. We limit the insights we can reach about people who do these things and about a society that lets them do it and teaches them how." *Id.* at 62.

<sup>2</sup> *KNOWING YOUR PLACE: RURAL IDENTITY AND CULTURAL HIERARCHY* 3 (Barbara Ching & Gerald Creed, eds., 1997). Professors Ching and Creed have also argued that "[t]he rural/urban distinction underlies many of the power relations . . . ." and that "the city remains the locus of political, economic and cultural power." *Id.* at 17.

<sup>3</sup> *See generally* CATHARINE A. MACKINNON, *WOMEN'S LIVES, MEN'S LAWS* 6, 34 (2005) (arguing that we "should analyze the legal issues in terms of the real issues, and strive to move law so that the real issues are the legal issues"); BAER, *supra* note 1, at 40-67 (advocating "situation jurisprudence," which focuses on women's situation and what has been done to women and criticizing "character jurisprudence," which emphasizes "essential gender distinctions").

critical factual context plays in defining women's choices is often downplayed or dismissed in relation to the legal issue at hand.

I discuss below the relevance of place to rural women's situation in three different contexts: domestic violence, termination of parental rights, and abortion. With respect to each of these, I assess whether and how the relevant legal doctrines sufficiently accommodate information about the lived realities of rural women. I reveal, for example, that legal analyses of domestic violence and termination of parental rights often ignore or discount the added vulnerability and hardship that rural women often experience by virtue of their rural setting. In the abortion context, I illustrate how courts have consistently dismissed or denied the structural barriers that prevent many rural women from exercising their constitutional right to an abortion.

In Part I, I detail the rural milieu, to the extent that it can be generalized across regions, with particular focus on the structural disadvantages under which rural people labor. These disadvantages stem from poor economic and educational opportunity generally, as well as inadequate housing, transportation, and child care, specifically. While a great deal of the information I present as a foundation to my argument relates to the socioeconomic disadvantage that marks rural people and places, my argument is not merely based upon class.<sup>4</sup> It is also about other characteristics of rural America, such as spatial isolation, lack of anonymity within communities, and social norms that value men's autonomy and women's dependency.

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<sup>4</sup> See Ann R. Tickamyer, *Public Policy and Private Lives: Social and Spatial Dimensions of Women's Poverty and Welfare Policy in the United States*, 84 KY. L. J. 721 (1995-96) (discussing the feminization of poverty). See also Diane Pearce, *The Feminization of Poverty: Women, Work and Welfare*, 11 THE URBAN & SOCIAL CHANGE REV. 28, 29 (1978) (citing D.S. Knudsen, *The Declining Status of Women: Popular Myths and the Failure of Functionalist Thought*, SOCIAL FORCES, 1969) (noting that the higher the percentage of workers who are female in a given occupation, the lower the occupation's average income).

In Part II, I provide a theoretical framework for conceptualizing rural women's differences as disadvantage and for arguing that place merits attention in our analysis of many gender issues. Drawing on the work of Catharine MacKinnon, I assert that we must attend to the details of women's lives – that we should “strive to move law so that the real issues are the legal issues.”<sup>5</sup> Based on the work of Judith Baer, I argue that we must focus on women's situation rather than on their character.<sup>6</sup> In this regard, I reveal the aggravated disadvantage and multi-faceted vulnerability that rural women experience by virtue of place and the spatiality of social relations. Building on anti-essentialist scholarship, I argue that geography matters, just as race, sexual orientation, and other factors do. Rurality is highly relevant to many legal analyses, even though law has rarely recognized it. Being a rural woman may thus represent a significant component of identity. Just as being a woman of color is a greater element of identity than being white,<sup>7</sup> being a rural woman can be a critical aspect of how one sees oneself, even though being an urban woman may not be.

Part III discusses three different contexts in which courts have had an opportunity to consider how characteristics of rural areas influence adjudication of cases: domestic abuse, termination of parental rights, and abortion. In discussing each of these, I illustrate law's ignorance of – or indifference to – rural realities. I also contrast law's

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<sup>5</sup> MACKINNON, *WOMEN'S LIVES, MEN'S LAWS* *supra* note 3, at 34.

<sup>6</sup> BAER essentially renames dominance theory, associated with radical feminists, situation theory. She explains that “the implication that dominance is a universal feature of women's lives is contentious, the assertion that women's situation has been a subject one is incontrovertible.” She thus refers to theories that emphasize dominance as theories of women's situation. “Situation theory (jurisprudence) holds that what makes law male is the fact that men use it to subordinate women.” BAER, *supra* note 1, at 41.

<sup>7</sup> Angela Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 604 (1990) (anecdote of West Coast fem critics meeting at which all women were asked to pick two or three words to describe themselves; none of the white women mentioned race, while all of the women of color did). In each pairing, black/white and rural/urban, the former is the outsider, the minority, while the latter represents the default or the norm. It is thus the former about which society must be educated and sensitized.

typically insensitive responses to these women-specific issues with more empathic judicial handling of non-gendered legal issues that similarly implicate the spatial isolation and lack of anonymity characteristic of rural areas.

While law has many definitions of the term “rural,”<sup>8</sup> I use it in this article primarily to connote sparsely populated places.<sup>9</sup> But rural places have more in common than low population density, and I also use the term to refer to the conglomeration of characteristics generally associated with rural areas: close-knit community where residents tend to be familiar with one another, more tradition-bound and conservative thinking, the spatial isolation created by low population density, and socioeconomic disadvantage.

By my claim “toward a feminist theory of the rural,” I do not purport to articulate “epic theory”<sup>10</sup> as MacKinnon did in her germinal text under a similar title.<sup>11</sup> Rather, my aim is to theorize how rural women have been disadvantaged by law’s ignorance of – or callousness about – the practical realities that shape their lives. In positing how law’s urban presumption and bias have undermined rural women, I re-conceptualize the significance of rurality to women’s lives, particularly as those lives encounter the law.

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<sup>8</sup> See Lisa R. Pruitt, *Rural Rhetoric*, CONN. L. REV. (forthcoming 2006) at Part II.

<sup>9</sup> The distances typical of rural areas go hand in hand with the fact that “all rural areas share one common characteristic: relatively low population densities.” BRUCE A. WEBER, GREG J. DUNCAN & LESLIE A. WHITENER, RURAL DIMENSIONS OF WELFARE REFORM: WELFARE, FOOD ASSISTANCE AND POVERTY IN RURAL AMERICA 7, 456 (2002).

<sup>10</sup> CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE *x* (1989) (citing Sheldon Wolin, *Political Theory as a Vocation*, 63 AM. POLITICAL SCIENCE REV. 1087-80 (1967)).

<sup>11</sup> *Id.*

## I: Rural Women, Rural Realities

Rural scholars warn that diversity among the country's rural places makes it difficult to generalize accurately about the rural populace.<sup>12</sup> Yet, studies of women in areas ranging from Appalachian Kentucky to rural Michigan reveal some similarities. Rural women's lives are shaped by conservative views, including those regarding the proper roles of women.<sup>13</sup> Their educational attainment is relatively low,<sup>14</sup> and they are often under-employed.<sup>15</sup>

### A. Political and Social Trends.

Some social and cultural differences between rural and urban areas dissipated or disappeared with the decline of the family farm and the corresponding decrease in rural population.<sup>16</sup> Family size and birth rates are now similar in rural and urban areas,<sup>17</sup> and advances in transportation and communication have reduced rural isolation.<sup>18</sup> Despite some blurring between rural and urban in recent decades, however, rural individuals still tend to hold more traditional beliefs than those who live in cities.<sup>19</sup> Sociologists attribute this, at least in part, to the types of relationships rural people form as a result of decreased

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<sup>12</sup> Cynthia B. Struthers & Janet L. Bokemeier, *Myths and Realities of Raising Children and Creating Family Life in a Rural County*, 21 J. OF FAMILY ISSUES 17, 41 (2000). See also *infra* note 306.

<sup>13</sup> Public Opinion Strategies and Greenberg Quinlan Rosner Research, Report for the W.K. Kellogg Foundation, *Election 2002: Rural Voter and Rural Issues*, 37 (2002), available at [http://www.wkrf.org/DesktopModules/WKF\\_DmaItem/ViewDoc.aspx?fld=PDFFile&CID=4&ListID=28&ItemID=43791&LanguageID=0](http://www.wkrf.org/DesktopModules/WKF_DmaItem/ViewDoc.aspx?fld=PDFFile&CID=4&ListID=28&ItemID=43791&LanguageID=0). "Rural women are actually stronger GOP partisans than their male counterparts, are more supportive of conservative religious groups, [and] are more conservative than non-rural men on self-reported ideology..." *Id.*

<sup>14</sup> *Id.* at 24. Forty-two percent of rural women have attained a high school education or less compared with 24 percent of urban women. Twenty-six percent completed some college, as opposed to 30 percent of urban women; 32 percent graduated from college or went beyond, compared with 45 percent of metro women.

<sup>15</sup> J. Brian Brown & Daniel T. Lichter, *Poverty, Welfare, and the Livelihood Strategies of Non-metropolitan Single Mothers*, 69 RURAL SOC'Y 282, 295 (2004).

<sup>16</sup> Don E. Albrecht & Carol Mulford Albrecht, *Metro/Non-metro Residence, Nonmarital Conception, and Conception Outcomes*, 69 RURAL SOC'Y 430, 433 (2004).

<sup>17</sup> *Id.* at 435.

<sup>18</sup> *Id.* at 433.

<sup>19</sup> *Id.* at 449-50.

population size and density: the closer interaction among people within a rural community leads to “greater levels of consensus on important values and morals.”<sup>20</sup>

The conservative views of so-called non-metro<sup>21</sup> residents are evident in rural voting tendencies. Until the latter part of the 20<sup>th</sup> century, rural voters aligned themselves with Democratic candidates who “tapped into the economic concerns of rural districts.”<sup>22</sup>

But the 2002 elections marked the fifth consecutive election in which rural voters overwhelmingly supported Republican candidates,<sup>23</sup> and President Bush carried the vast

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<sup>20</sup> *Id.* at 435.

<sup>21</sup> I use the word “non-metro” to indicate “rural” when the study cited uses the Office of Management and Budget’s designations of metro and non-metro, which are defined slightly differently than the U.S. Census Bureau’s “rural.” Housing Assistance Council, *Taking Stock: Rural People, Poverty, and Housing at the Turn of the 21st Century*, December 2002, at 11, available at <http://ruralhome.org/pubs/hsganalysis/ts2000/index.htm> (last visited Sept. 3, 2006) [hereinafter *Taking Stock*]. The U.S. Census Bureau uses the term rural to mean “all territory, population, and housing units located outside of urbanized areas and urban clusters with a population of 2,500 or less.” It defines urban as including all territory, population, and housing units located within an “urbanized area” or “cluster.” U.S. Census Bureau, Census 2000 Urban and Rural Classification, available at [http://www.census.gov/geo/www/ua/ua\\_2k.html](http://www.census.gov/geo/www/ua/ua_2k.html) (last visited Sept. 1, 2006). This definition delineated the boundaries of “urbanized areas” and “urban clusters” to encompass densely settled territory, which consists of: (1) “core census block groups or blocks that have a population density of at least 1,000 people per square mile, and (2) surrounding census blocks that have an overall density of at least 500 people per square mile.” *Id.*

The Office of Management and Budget (OMB) uses the terms metropolitan (metro) and non-metropolitan (non-metro) to refer to essentially the same dichotomy. Non-metro areas are outside metropolitan areas and have no cities of 50,000 or more. Metro areas, on the other hand, are those with at least 50,000 residents or with an urbanized area of 50,000 or more and total area population of at least 100,000. Metro areas thus include suburbs and other areas near them that are socially and economically integrated. Office of Management and Budget: Standards for Defining Metropolitan and Micropolitan Statistical Areas (December 27, 2000), available at <http://www.census.gov/population/www/estimates/00-32997.pdf> (last visited Sept. 1, 2006). Some scholars have pointed out that the definition of non-metro areas is a narrow one that excludes 29 million people who live in small towns with fewer than 2500 residents or in open territory, but who are classified as metro because they are within a metro county. RURAL DIMENSIONS OF WELFARE REFORM, *supra* note 9, at 19, n.4. I nevertheless treat the terms as essentially synonymous for my purposes because both refer to sparsely populated areas that are removed from urban centers. See also Rural Rhetoric, *supra* note 8 (analyzing complexities of rural classification).

<sup>22</sup> Gregory L. Giroux, *Recalibrating the Rural Voter’s Place*, CQ Weekly, June 23, 2005.

<sup>23</sup> W.K. Kellogg Foundation, *Cultural Issues in Rural America Gave Republicans a Wide Margin of Success in Recent Election: Gender Gap Narrower among Rural Voters, Rural Voter Study Shows* (2002), available at [http://www.wkkf.org/DesktopModules/WKF\\_DmaItem/ViewDoc.aspx?fld=PDFFile&CID=4&ListID=28&ItemID=43792&LanguageID=0#search=%22rural%20voters%20\(%22tabid%3D101%22%20OR%20%22ViewDoc.aspx%22%20OR%20%22tabid%3D55%22\)%22](http://www.wkkf.org/DesktopModules/WKF_DmaItem/ViewDoc.aspx?fld=PDFFile&CID=4&ListID=28&ItemID=43792&LanguageID=0#search=%22rural%20voters%20(%22tabid%3D101%22%20OR%20%22ViewDoc.aspx%22%20OR%20%22tabid%3D55%22)%22) (last visited Sept. 2, 2006).

majority of rural districts in both the 2000 and the 2004 Presidential races.<sup>24</sup> This change has been attributed to conservative views espoused by Republicans on topics that rural voters feel strongly about, including gun control, abortion, and religion.<sup>25</sup> When rural communities do elect Democrats to Congress, their voting records are more conservative than those of urban Democrats.<sup>26</sup>

As for rural women, they tend to marry younger and at a greater rate than urban women.<sup>27</sup> Rural women also have a tendency toward more traditional views about women, believing that their primary role is to bear, raise and protect children.<sup>28</sup> Non-metro women's views about abortion are generally more conservative than those of their urban counterparts, with rural women significantly more likely to support pro-life rather than pro-choice candidates.<sup>29</sup> A study of nonmarital conceptions among rural and urban women found that those in rural areas were more likely to carry a fetus to term and to marry before the baby's birth.<sup>30</sup>

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<sup>24</sup> CQ Weekly, *Who Represents the Different Demographics* (2005). In 2000, Bush beat Gore in 47 of the 61 rural districts, and in 2004 he beat Kerry in 51 districts. Gore carried 70 of the 90 urban districts in 2000. In 2004, Kerry won in 65.

<sup>25</sup> *Id.*

<sup>26</sup> Giroux, *supra* note 22, at 1724. "In most cases, rural-district Democrats have voting records in line with their conservative-leaning constituencies but at odds with their party's more liberal leaders. As of Memorial Day, four of the five House Democrats who had the lowest 'party unity' scores so far this year—meaning that they often voted with the Republicans and against most fellow Democrats on mainly party-line votes—came from rural districts..." *Id.*

<sup>27</sup> Struthers & Bokemeier, *supra* note 12, at 34.

<sup>28</sup> JUDITH IVY FIENE, *THE SOCIAL REALITY OF A GROUP OF RURAL, LOW-STATUS, APPALACHIAN WOMEN*, 41 (1993). See also Struthers & Bokemeier *supra* note 12, at 28.

<sup>29</sup> Public Opinion Strategies and Greenberg Quinlan Rosner Research, *supra* note 13, at 36-37. Forty-four percent of rural women would vote for a pro-life candidate; only 29 percent would vote for a pro-choice candidate. Thirty-four percent of urban women would vote for a pro-life candidate while 45 percent would vote pro-choice.

In addition, rural women surveyed in New York and Kentucky voiced extreme anti-abortion sentiments. See JANET FITCHEN, *POVERTY IN RURAL AMERICA: A CASE STUDY* (1981) (indicating strong opposition to abortion among New York women interviewed); FIENE, *supra* note 28, at 44-45 (indicating Kentucky women's rejection of abortion even when the pregnancy results from rape).

<sup>30</sup> Albrecht & Albrecht, *supra* note 16, at 444, 447.

## B. Poor Economic Opportunities, Major Structural Disadvantages

More than 55 million people – almost 20% of Americans – live in non-metro areas.<sup>31</sup> Of the 14.6 percent of these living in poverty,<sup>32</sup> women, children and people of color represent a disproportionate share.<sup>33</sup> Indeed, about one-third of non-metro, female-headed households live in impoverished conditions.<sup>34</sup>

Myriad reasons account for rural women's poverty, among them the limited economic opportunities and deficits in human capital that plague rural communities. While the 2000 census reported a median household income in metro areas of \$44,755, the median income in non-metro areas was only \$33,687, about three-quarters of the metro level.<sup>35</sup> Indeed, non-metro workers earn, on average, 28 percent less than their metro counterparts.<sup>36</sup> This is no doubt related to the fact that only 15 percent of non-metro residents have at least a bachelor's degree, compared to 25 percent of all U. S.

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<sup>31</sup> Housing Assistance Council, *Taking Stock: Rural People, Poverty, and Housing at the Turn of the 21st Century*, December 2002, at 9, available at <http://ruralhome.org/pubs/hsganalysis/ts2000/index.htm> (last visited Sept. 3, 2006).

<sup>32</sup> *Id.* at 20. According to the 2000 Census, 14.6% of the non-metro population were poor, while the poverty rate nationwide was 12.4% and the rate in metro areas was 11.8%. *Id.* See also Rural Poverty Research Center, *Place Matters: Addressing Rural Poverty*, 3 (April 2004), available at <http://www.rprconline.org/synthesis.pdf> (last visited Sept. 5, 2006). Eighty-four percent of U.S. counties with poverty rates above the national average are non-metro. *Taking Stock, supra* note 21, at 20.

<sup>33</sup> *Taking Stock, supra* note 21, at 21-22. The HAC lists housing problems, low wages (especially compared to wages earned by men), and a shortage of adequate child care as some of the factors that contribute to the severity of non-metro women's poverty. *Id.* at 21.

<sup>34</sup> *Id.* at 21-22. In 1995, 50.8 percent of rural female-headed families with children lived in poverty compared to 40.1 percent of their urban counterparts. Linda K. Cummins, *Homelessness Among Rural Women*, in *THE HIDDEN AMERICA: SOCIAL PROBLEMS IN RURAL AMERICA FOR THE TWENTY-FIRST CENTURY* (Robert M. Moore III, ed. 2001) at 63 (citing Housing and Assistance Council).

<sup>35</sup> *Taking Stock, supra* note 21, at 20.

<sup>36</sup> *Id.* at 19. See also Struthers & Bokemeier, *supra* note 12, at 42 (noting that poverty results not only from not wanting to work but also from inability to find employment that allows parents to support their families); David A. Cotter et al. *Gender Inequality in Non-metropolitan and Metropolitan areas*, 61 *RURAL SOCIOLOGY* 272, 282 (1996). *But see* Georgeanne M. Artz & Peter Orazem, *Reexamining Rural Decline: How Changing Rural Classifications and Short Time Frames Affect Perceived Growth*, Office of Social and Economic Trend Analysis, Technical Report 06-014, Iowa State University (January 2005), at 9-10 (arguing that income and employment growth in rural areas over past thirty years is significantly greater than reported by 2000 Census, due to change in Census definition of "rural").

residents.<sup>37</sup> Despite the more traditional nature of rural culture, metro and non-metro women are employed at equal rates.<sup>38</sup> Yet, rural women earn only about half of what men in rural areas are paid for similar jobs,<sup>39</sup> a ratio close to that between urban women and urban men. Women residing in rural areas are thus at a significant economic disadvantage relative to all metro workers, as well as to rural men.

Changed rural employment opportunities have affected both male and female workers in recent decades. Historically, rural economies were grounded in so-called extractive industries, including farming, mining, logging, and fishing.<sup>40</sup> Manufacturing and service jobs have more recently become staples of rural economies.<sup>41</sup> Consumer service jobs comprise one-third of non-metro employment.<sup>42</sup> In addition, rural people are more likely than urban people<sup>43</sup> – and rural women more likely than rural men (73 percent to 39 percent) – to work in manufacturing.<sup>44</sup> Both categories of jobs have drawbacks. The former are subject to market whims and overseas relocation, thus providing little security.<sup>45</sup> While the flexibility of service jobs can accommodate a mother’s schedule, it may also mean fewer hours, lower earnings, and poor benefits.<sup>46</sup> In

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<sup>37</sup> *Taking Stock*, *supra* note 21, at 16.

<sup>38</sup> Cotter et al., *supra* note 36, at 280, 282.

<sup>39</sup> Cummins, *supra* note 34, at 86 (citing A. Bushy, “Rural Women: Lifestyle and Health Status,” 28 *Rural Nursing* 187-97 (1993)). Nevertheless, male to female earnings ratios are similar in rural and urban areas. Cotter et al., *supra* note 36, at 280, 282.

<sup>40</sup> Robert M. Gibbs, *Rural Labor Markets in an Era of Welfare Reform* in *RURAL DIMENSIONS OF WELFARE REFORM*, *supra* note 9, at 51, 56. Rural economics are typically not diversified. The economy of a given rural area traditionally concentrates on one means of supporting the community, usually by farming, mining, timber, and manufacturing. ROBERT M. MOORE III, *THE HIDDEN AMERICA: SOCIAL PROBLEMS IN RURAL AMERICA FOR THE TWENTY-FIRST CENTURY* 59 (2001).

<sup>41</sup> See Gibbs, *supra* note 40, at 56.

<sup>42</sup> *Taking Stock*, *supra* note 21, at 19. This number has risen seven percentage points since 1990. *Id.*

<sup>43</sup> In 2000, manufacturing accounted for 18 percent of all jobs in non-metro areas but 14 percent nationwide. *Taking Stock*, *supra* note 21, at 18. Thirteen percent of non-metro women worked in manufacturing, compared to 10% of metro women. Gibbs, *supra* note 40, at 59.

<sup>44</sup> Gibbs, *supra* note 40, at 59; *Taking Stock*, *supra* note 21, at 19.

<sup>45</sup> *Taking Stock*, *supra* note 21, at 18.

<sup>46</sup> Gibbs, *supra* note 40, at 59.

sum, women tend to be employed in “low-wage, unstable, secondary-sector,” gender-segregated jobs.<sup>47</sup>

Rural women frequently rely on elaborate, carefully balanced social networks for support and assistance, and to supplement their incomes.<sup>48</sup> Rather than turning to social service agencies, women often look to each other for help with child care, transportation, and even occasionally paying bills.<sup>49</sup> In return, they offer the same services to others within their networks, either as payment for assistance given or as a down payment, of sorts, for a future favor.<sup>50</sup> By utilizing a combination of these networks and informal work, rural women are sometimes able to avoid welfare and maintain their independence.

The broad economic picture of rural America is thus disheartening, but the situation of women within it is even more so. In the following sections, I discuss transportation, child care, and housing. These represent structural obstacles that weigh very heavily on the rural female population, who have even fewer resources than rural men to devote to them.<sup>51</sup>

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<sup>47</sup> Barbara Wells, *Women’s Voices: Explaining Poverty and Plenty in a Rural Community*, 67 RURAL SOCIOLOGY 235, 236 (2002).

<sup>48</sup> FIENE, *supra* note 28, at 64-66; MARGARET K. NELSON, THE SOCIAL ECONOMY OF SINGLE MOTHERHOOD 63-92 (2005) (examining the attitudes toward welfare of women who receive it).

<sup>49</sup> Nelson, *supra* note 48, at 75.

<sup>50</sup> FIENE, *supra* note 28, at 65; Nelson, *supra* note 48, at 81. Women tend to request only as much as they are willing to give, knowing they may otherwise be expelled from the network. Nelson, *supra* note 48, at 77. One woman described the relationship as: “like the checking account—first you put the money in and then you make the withdrawal and there’s no problem. It’s when you do it the other way around [that] there’s red ink.” *Id.* at 67.

<sup>51</sup> Rural women likely face greater pressure related to housing and other problems than do rural men because of the lower earnings of the former. Wendy Boka, *Domestic Violence in Farming Communities: Overcoming the Unique Problems Posed by the Rural Setting*, 9 DRAKE J. AGRIC. L. 389, 399 (2004). The extremely high poverty rates among female-headed families in rural areas and the shortage of housing in rural areas leave rural women very vulnerable to homelessness. *Id.*

**1. Transportation.** The long distances that typically separate rural residents from jobs, services, and other people make reliable transportation a necessity.<sup>52</sup> It is thus not surprising that rural Americans spend a higher percentage of their income on transportation than do urban ones.<sup>53</sup> In light of those expenditures, it is ironic that more rural counties than urban ones have a high rate of car-lessness.<sup>54</sup> Indeed, while rural residents are more reliant upon public transportation than their urban counterparts, they have fewer public transport options.<sup>55</sup> Indeed, less than a tenth of all federal funding for public transportation goes to rural areas,<sup>56</sup> and only about 60% of rural counties offer it.<sup>57</sup> Of those using rural public transportation, 62% are women.<sup>58</sup> Such transportation

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<sup>52</sup> Katherine Porter, *Going Broke the Hard Way: The Economics of Rural Failure*, 2005 WISC. L. REV. 969, 1001. See also Signe-Mary McKernan, Robert Lerman, Nancy Pindus, & Jesse Valente, *Impact of Welfare Policy on the Employment of Single Mothers Living in Rural and Urban Areas*, in RURAL DIMENSIONS OF WELFARE REFORM, *supra* note 9, at 262.

<sup>53</sup> Porter, *supra* note 52, at 1008 (citing a Bureau of Labor Statistics report entitled Consumer Expenditures in 2001). In 2001, rural households spent 25% of their income on transportation, whereas urban households spent only 19%. The average transportation expenditure for a rural household exceeded that of its urban counterpart by almost \$1000 more. *Id.*

<sup>54</sup> United States Department of Agriculture, Agriculture Information Bulletin Number 795, *Rural Transportation at a Glance*, at 1 (January 2005), available at [http://www.ers.usda.gov/publications/AIB795/AIB795\\_lowres.pdf](http://www.ers.usda.gov/publications/AIB795/AIB795_lowres.pdf) (last visited Sept. 3, 2006) [hereinafter *Rural Transportation at a Glance*]. A high rate of car-lessness is at least twice the average rate of carlessness. *Id.* According to the USDA, more than 1.6 million rural households have no car. Nevertheless, in 2000 rural households had access to a car at a slightly higher rate (92.7%) than urban ones (88.9%). *Id.* at 3.

<sup>55</sup> See also Porter, *supra* note 52, at 1026; Susan Murty, *Regionalization and Rural Service Delivery* 207 in THE HIDDEN AMERICA, *supra* note 34; MOORE, THE HIDDEN AMERICA, *supra* note 34, at 27. But see USDA, *Rural Transportation at a Glance*, *supra* note 54, at 1 (stating that recent increases in federal funding and greater state and local control have led to improvements in rural roads and public transportation).

<sup>56</sup> *Rural Transportation at a Glance*, *supra* note 54, at 3. In this report the USDA relies on the OMB definition of rural. *Id.* at 6. Nevertheless, rural public transportation services grew in the 1990's. Non-metro providers offered 62 percent more passenger trips, 93 percent more miles traveled, and 60 percent more vehicles (vans and buses) available." *Id.* at 3.

<sup>57</sup> *Id.* at 3. Twenty-eight percent of these counties offer only limited services, meaning fewer than 25 trips per carless household, per year. *Id.*

<sup>58</sup> *Id.* at 4. Thirty-one percent of users were elderly, and 23 percent were disabled. *Id.* Rural residents, particularly those in high poverty areas, are more reliant on public transportation than their urban counterparts. *Id.* at 3.

challenges put rural residents at a disadvantage for getting access to employment, health care, child care, and other services.<sup>59</sup>

**2. Child care.** The nature of rural job markets and the omnipresent issue of distance mean that rural residents have fewer child care options than urban ones.<sup>60</sup> Because there are fewer child care centers per capita in rural areas,<sup>61</sup> only 25 percent of rural children under age five are cared for in such centers, compared to 35 percent nationwide.<sup>62</sup> For poor rural families, the federally-funded Head Start program may be the only tenable center-based child care option,<sup>63</sup> but it may not offer all-day programs that permit women to work full time.<sup>64</sup>

Seventy-five percent of rural children in child care are in private residences other than the child's home.<sup>65</sup> Known as "kith and kin" arrangements,<sup>66</sup> these offer the

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<sup>59</sup> Services are often located in the county seat or some other distant regional location. See Murty, *supra* note 55, at 204-05.

<sup>60</sup> A lack of child care resources creates an added obstacle for mothers who are trying to find work or leave abusive relationships. Wendy Boka, *Domestic Violence in Farming Communities: Overcoming the Unique Problems Posed by the Rural Setting*, 9 DRAKE J. AGRIC. L. 389, 397 (2004).

<sup>61</sup> Laura J. Colker & Sarah Dewees, *Child Care for Welfare Participants in Rural Areas*, Rural Welfare Issue Brief, Macro International Inc. (November 2000), at 2. Also, rural child care providers "tend to be less educated and trained than their metropolitan counterparts," resulting in lower quality care. *Id.* at 2 (citing the Rural Policy Research Institute, *Rural America and Welfare Reform: An Overview Assessment*, 1999, available at <http://www.rupri.org/pubs/archive/old/welfare/p99-3>).

<sup>62</sup> Colker & Dewees, *supra* note 61, at 2 (citing Carpizzano et al., *Child Care Arrangements for Children under Five: Variation Across States*, The Urban Institute, 2000, and Beach, *Perspectives on Rural Child Care*, ERIC Clearinghouse on Rural Education and Small Schools, ERIC Digest, EDO-RC-96-9, 1997).

<sup>63</sup> Colker & Dewees, *supra* note 61, at 3. Head Start, created under the U.S. Department of Health & Human Services, is a child development program serving children up to the age of five. Head Start programs "have the overall goal of increasing the school readiness of young children in low-income families." To participate, families must meet low-income eligibility. U.S. Department of Health & Human Services, Administration for Children and Families, available at <http://www.acf.hhs.gov/programs/hsb/about/index.htm> (last visited Sept. 1, 2006).

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

<sup>65</sup> *Id.* at 3-4 (citing Beach, 1997, and Atkinson, "Rural and Urban Families' Use of Child Care," in 43 *Family Relations* 16-22 (1994)). Nationally, 15 percent of preschool children are cared for in the homes of licensed child care providers. *Id.* (citing Casper, "Who's Minding Our Preschoolers?" in *Current Population Reports Household Economic Studies*, P70-62, U.S. Department of Commerce, 1997).

<sup>66</sup> "Kith" are friends and neighbors and "kin" are relatives. *Id.* One study found that rural residents are twice as likely as urban dwellers to use kith and kin arrangements. Low-income families are 50 percent more likely to use it than their wealthier counterparts. Colker & Dewees, *supra* note 61, at 4 (citing Beach,

advantages of flexibility<sup>67</sup> and low cost, and may feature informal payment schemes.<sup>68</sup>

The quality of care is inconsistent, however, and may prove unreliable.<sup>69</sup>

Finding adequate, quality child care is thus a great challenge for rural parents who work outside the home. This burden surely falls more heavily on women because they are even more likely than their urban counterparts to be responsible for child care, given the traditional views of rural communities. As a consequence, rural women often work part-time or engage in informal employment activities so that they can care for their young children.<sup>70</sup>

**3. Housing.** While the past several decades have seen many improvements in rural housing,<sup>71</sup> almost 30 percent of non-metro residents still face housing problems,<sup>72</sup> the most common being affordability.<sup>73</sup> About 5.5 million rural households pay in excess of 30 percent of their monthly income for housing.<sup>74</sup> Worse yet, housing costs consume more than half of the incomes for another 2.4 million.<sup>75</sup> Housing quality presents another challenge in non-metro areas, where 1.6 million units are moderately or severely

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1997, Atkinson, 1994); Collins & Carlson, *Child Care by Kith and Kin: Supporting Family, Friends, and Neighbors Caring for Children*, National Center for Children in Poverty, Columbia University, 1998).

<sup>67</sup> This flexibility includes options for drop-in child care and extended hours. *Id.* at 3.

<sup>68</sup> These may include bartering, or trading services, but most are on a fee-paying basis. *Id.* at 4.

<sup>69</sup> *Id.* at 3-4. Local regulations governing licensure in rural areas are typically not as stringent as metropolitan ones. *Id.* at 3 (citing Beach, 1997).

<sup>70</sup> See e.g., Struthers & Bokemeier, *supra* note 12 at 25 (stating that rural women believe parenting is “their most important job” and that household work is often based on “a gendered division of labor”); Tickamy, *supra* note 4, at 738 (noting that “women with young children are more likely to engage in productive (economic) activities close to their reproductive (childrearing and household) responsibilities). *But see* Katherine MacTavish and Sonya Salamon, *What do Rural Families Look Like Today?* in CHALLENGES FOR RURAL AMERICA IN THE TWENTY-FIRST CENTURY, 77 (pointing out that many older rural children “may find themselves in latchkey situations” due to parental employment outside the community).

<sup>71</sup> *Taking Stock*, *supra* note 21, at 24.

<sup>72</sup> *Id.* at 31. “Over 6.2 million non-metro households have at least one major problem ... [and about] 662,000 rural households have two or more housing problems.” *Id.* “Problems” include affordability issues, substandard quality, and crowding. *Id.*

<sup>73</sup> *Id.* at 31.

<sup>74</sup> *Id.* at 28.

<sup>75</sup> *Id.* at 28.

substandard.<sup>76</sup> As one example, while rural homes comprise only one-fifth of the nation's total housing units they account for over 30 percent of houses with inadequate plumbing.<sup>77</sup>

Sixty-eight percent of the nation's households are owner-occupied, an all-time high in home ownership.<sup>78</sup> While non-metro residents enjoy an even higher rate of homeownership, at 76 percent,<sup>79</sup> this does not necessarily indicate greater wealth, well-being or stability.<sup>80</sup> The higher rate of rural home ownership is due in part to manufactured homes, which are twice as common in non-metro areas as they are nationwide.<sup>81</sup> But manufactured homes are not as beneficial to consumers as conventional single-family homes because the former tend to depreciate in value<sup>82</sup> and are financed with higher-rate, personal property loans.<sup>83</sup> Rural housing assets also tend to

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<sup>76</sup> *Id.* at 30. This represents 6.9 percent of non-metro units. Additionally, people of color in non-metro areas are almost three times more likely to live in substandard housing than their white counterparts. *Id.*

<sup>77</sup> *Id.* at 30.

<sup>78</sup> *Taking Stock, supra* note 21, at 24-25.

<sup>79</sup> *Id.* at 25.

<sup>80</sup> The national median value of a home is \$120,000, while that of a non-metro home is \$80,000. *Taking Stock, supra* note 21, at 32.

<sup>81</sup> *Id.* at 24. Although non-metro areas have less than a quarter of the nation's housing units, these areas have over half of manufactured homes. *Id.* at 27. While the quality of manufactured homes has improved in recent years, more than a third of non-metro mobile home residents live in units at least 20 years old. *Id.* at 26. Manufactured housing is the fastest growing segment of rural housing stock, accounting for 38 percent of homes built between 1996 and 2001. Ezra Rosser, *Rural Housing and Code Enforcement: Navigating Between Values and Housing Types*, 13 GEO. J. ON POVERTY L. & POLICY, at 18 (2006) (citing 2001 National Housing Survey).

<sup>82</sup> *Taking Stock, supra* note 21, at 26, 32. Manufactured homes depreciate at a rate of 1.5 percent annually compared to an annual appreciation rate of 4.5 percent for conventionally constructed single-family homes. Further, manufactured homes in rural areas appreciate less than those in urban settings. *Id.* This is particularly troubling considering that a "home is the most valuable asset most Americans will ever own." *Id.* at 32. The median purchase price of a new manufactured home in non-metro areas is approximately \$41,000, compared to \$130,000 for a new single-family home. *Id.* at 26.

<sup>83</sup> *Taking Stock, supra* note 21, at 26, 32. One factor is the type of financing used to purchase manufactured homes. Most new manufactured homes are financed with personal property loans. *Id.* This type of loan is less beneficial for the consumer than conventional housing loans because of higher interest rates and shorter terms. *Id.* at 26. About one-tenth of non-metro owners with a mortgage pay an interest rate of 10 percent or more. This is nearly double the proportion of metro owners who pay such high rates. *Id.* at 32.

be less liquid because rural home owners are often tied to their specific location.<sup>84</sup>

Finally, recent shifts in emphasis by federal housing programs have reduced the amount of assistance available to the significant number of rural households that rely upon it.<sup>85</sup>

### **C. Conclusion**

Rural America, then, is an economically depressed place that offers few opportunities to enhance human capital. The people who reside there are faced with particular structural obstacles, often related to the physical distances that separate them from services. While gender specific data were not available for each of these, it is reasonable to surmise that because rural women earn substantially less than rural men, they are less likely to own a vehicle or to be in a stable housing situation. Rural women are, in fact, one of the poorest groups of people in the United States.

The social and political portrait of rural America also lends insights into expectations of the women who live there. Rural residents tend to hold more conservative political views, and their expectations of women's roles tend to be more traditional and more rigid. These factors, like economic and structural ones, severely limit women's opportunities, as well as their day-to-day choices.

## **II: A Role for Place in Feminist Theory**

At least two strands of feminist thought accommodate or facilitate theorizing about rural women and what distinguishes their situation from those of other groups of

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<sup>84</sup> Rosser, *supra* note 81, at 14. Farmers often make their living from the land on which their homes are located, and non-farmers "are limited by the fact that these small towns cannot support a commercial rental market except on a very small scale." *Id.*

<sup>85</sup> *Taking Stock, supra* note 21, at 34. Federal assistance is crucial for many households, as indicated by a USDA Economic Research Service study that found that ninety percent of rural borrowers would probably not have been able to afford their homes without federal assistance. *Id.* at 33. The shifts have been to indirect subsidies such as loan guarantees and tax incentives. However, only 3 percent of guaranteed loans, as opposed to 44 percent of the program's direct loans, served very low-income households in FY 2003. *Id.* at 34.

women. Radical feminism's focus on power disparities is useful for conceptualizing how rural women's differences not only from men, but also from urban women, operate to their disadvantage. Anti-essentialism scholarship acknowledges the complexity of each woman's identity and circumstances. Such multiple perspectives thinking can and should also attend to the role of place in women's lives.<sup>86</sup>

Radical feminist Catharine MacKinnon's work centers on the experiences of women and the operation of power in society.<sup>87</sup> She asserts that "[w]omen have systematically been subjected to physical insecurity; targeted for sexual denigration and violation; depersonalized and denigrated; deprived of respect, credibility and resources; and silenced – and denied public presence, voice and representation of their interests."<sup>88</sup>

For rural women, these deprivations and denials, as well as the vulnerability and hardship they beget, are often aggravated by their geographical circumstances.<sup>89</sup> Their low socioeconomic status aggravates their physical insecurity and denies them credibility and resources. So do the practical challenges they face in accessing child care, educational opportunity, good jobs and even government assistance. Rural women's physical distance from those who can assist or rescue them aggravates their vulnerability to physical violence by intimates and others.<sup>90</sup> Further, in their more traditional communities, rural women are more definitively relegated to the private sphere of hearth

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<sup>86</sup> See generally Tickamyer, *supra* note 4 (arguing for greater attention to spatial issues in research and theorizing about women and poverty).

<sup>87</sup> Catharine A. MacKinnon, *Points Against Postmodernism*, 75 CHI-KENT L. REV. 687 (2000).

<sup>88</sup> See, e.g., MACKINNON, *FEMINIST THEORY OF THE STATE*, *supra* note 10, at 160.

<sup>89</sup> Of course, many others have criticized MacKinnon for focusing solely on the role of gender in these social hierarchies while overlooking other markers of identity. See, e.g., Harris, *supra* note 7 (arguing that MacKinnon and Robin West had inadequately accounted for race, placing white women at the center of their work); Pat Cain, *Feminist Jurisprudence: Grounding the Theories*, 4 BERKELEY WOMEN'S L.J. 191 (1989-90) (arguing that MacKinnon and West had excluded the lesbian experience from their theorizing).

<sup>90</sup> See generally Boka, *supra* note 60.

and home. Their only “public” presence, typically, is in low-wage, dead-end employment.

In a similar vein, radical feminist Judith Baer advocates what she calls situation jurisprudence, arguing that feminist legal theory must “develop analyses that will separate situations from the people experiencing them.”<sup>91</sup> She asserts that failure “to discuss what has been done to women . . . leave[s] out a huge part of reality.”<sup>92</sup> Baer distinguishes between situation jurisprudence and what she calls character jurisprudence, which focuses on the nature or character of women.<sup>93</sup> Situation jurisprudence, on the other hand, disputes liberalism’s presumption of autonomy because our sexist society denies it to women.<sup>94</sup>

In support of her argument against this presumption of autonomy and her focus on women’s situation, Baer calls attention not only to women’s vulnerability, but also to the responsibility and duty they bear, particularly in relation to care-giving. She acknowledges that MacKinnon “captures the objectification, the danger, and the vulnerability” of being a women, but argues that MacKinnon overlooks or discounts the work, the demands, and the domestic burdens heaped on women.<sup>95</sup> Of women’s duty,

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<sup>91</sup> BAER, *supra* note 1, at 68.

<sup>92</sup> *Id.* at 62.

<sup>93</sup> *Id.* at 40-67. Baer writes:

Critiques of situation jurisprudence fall into the same trap as character jurisprudence: they let men and institutions off the hook while focusing women’s attention on themselves. Whereas character jurisprudence threatens to trap women in gender-role expectations, critical reaction to situation jurisprudence threatens to frustrate gender-role expectations, critical reaction to situation jurisprudence threatens to frustrate gender-role change. Character theory has produced an ethic of burden and obligation; situation theory has been read as an insult to women.

*Id.* at 62.

<sup>94</sup> BAER, *supra* note 1, at 55. Baer notes that a rights conceptualization as problematic because “they isolate individuals in theory when they are not independent of one another in reality.” *Id.* (quoting Wendy Brown, *Reproductive Freedom and the Right to Privacy: A Paradox for Feminists*, in *FAMILIES, POLITICS, AND PUBLIC POLICY* 331 (Irene Diamond, ed. 1983)).

<sup>95</sup> *Id.* at 57.

Baer writes: “It’s not only the lying down that oppresses, but the jumping up: the expectation that one is available to meet others’ needs is a crucial component of the women’s situation.”<sup>96</sup> This, too, is part of gendered power.

Baer discusses another way in which law (and scholars of character jurisprudence, in particular) uses the theme of responsibility against women: the “popular idea” that people are responsible for their own trouble. She notes the specific examples of blaming victims of domestic violence and poverty for bringing those problems onto themselves.<sup>97</sup> Baer refutes the accuracy of these claims, suggesting that holding victims responsible for their problems is a “useful conservative tool.”<sup>98</sup> She notes that it is easier to oppose policies that might reduce poverty and abuse if individuals are held responsible.<sup>99</sup> Taking battered women as an example, Baer writes that “the abuse belongs to her, not to the abuser or the society in which the abuse occurs. The term ‘battered woman’ itself incorporates this premise; society defines the problem in terms of victims, not in terms of violent husbands and lovers.”<sup>100</sup>

Baer’s attention to women’s situation in all of its complexity can obviously serve the interests of rural women, who are literally *situated* in physical isolation from each other, as well as from services, educational and economic opportunity, and more. Both aspects of “responsibility” that Baer discusses are also highly relevant to rural women. While women tend to bear greater responsibility for child and other dependent care than

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<sup>96</sup> *Id.* at 57-58.

<sup>97</sup> *Id.* at 63.

<sup>98</sup> *Id.* at 65.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 66. Baer asserts that the battered woman’s situation “may not be her fault in the sense of causation, but it is her fault in the sense of being her misfortune.” *Id.* The phenomenon Baer describes is illustrated in the judicial opinion of *Swails v. State*, discussed *infra* notes 115-116 and accompanying text, where the court uses the passive voice in writing that “Connie Landers was beaten by her boyfriend, Kevin Swails.”

do their male partners,<sup>101</sup> rural women appear even more burdened than their urban counterparts, due in large part to the more rigid and traditional gender role expectations of rural communities. The poor educational and employment opportunities available to rural women, coupled with the dearth of quality child care, further constrain those who seek employment outside the home in lieu of – or in addition to – fulfilling these traditional roles.<sup>102</sup>

As for the phenomenon of viewing women as responsible for their own woes, it is evident, too, in law’s responses to rural women. Law too often fails to appreciate the strength of the structural barriers that constrain rural women’s choices, instead blaming them for their unfortunate circumstances and consequences. I return to a discussion of this phenomenon below in relation to judicial adjudication of parental rights and domestic violence questions.<sup>103</sup> Judicial assumptions of individual responsibility – for both the consequences of having sex and of living in an inconvenient place – also loom large in the abortion context.<sup>104</sup>

Next, my analysis draws on anti-essentialist scholarship to argue for inclusion of the critical context that place – and the rural milieu in particular – can represent in both theorizing women’s subordination and responding to it. Anti-essentialists have long maintained that gender is not the sole basis of women’s disempowerment. As scholars have drawn attention to the intersection of gender and race, or gender and sexual

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<sup>101</sup> See, e.g., JOAN WILLIAMS, UNBENDING GENDER (2000); see also W. Jean Yeung et al., *Children’s Time With Fathers in Intact Families*, 63 J. OF MARRIAGE AND FAMILY 136, 148 (2001) (looking at the amount of time fathers spend with their children and finding, based on analyses collected in 1997, that “the relative time fathers in intact families were directly engaged with children was 67% that of mothers’ on weekdays and 87% that of mothers’ on weekends”); Tickamyer, *supra* note 4, at 725 (referring to agreement among feminists that women’s disproportionate responsibility for reproductive labor and care-giving contribute to high poverty among women).

<sup>102</sup> See *supra* notes [ ] and accompanying text (discussing the employment patterns of rural women).

<sup>103</sup> See *infra* Parts III (a) and (b).

<sup>104</sup> See *infra* Part III (c).

orientation (among others), I assert the need for attention to the intersection of gender and place. I maintain that a rural setting is legally relevant to more issues than the law currently acknowledges and that it is relevant, in particular, to many women-specific issues.

In her landmark 1990 article on anti-essentialism, Angela Harris explained that gender essentialism was dangerous because “experiences of women perceived as different are ignored or treated as variations on the (white) norm.”<sup>105</sup> In the rare cases when law has seen and engaged rural women, recognizing them in relation to place, it has viewed these women simply as variations on an urban norm. Frequently, however, law has not seen or identified rural women as such; rather, it has looked right past their rural circumstances. This phenomenon is reflected by rural scholars who have remarked, “[w]e are an urban society now, one that is pretty sure we know what ‘urban’ is, but not at all sure we know what ‘rural’ is.”<sup>106</sup>

Just as Sylvia Law defined “heterosexism” as the “pervasive cultural presumption and prescription of heterosexual relationship,”<sup>107</sup> I query whether law functions under a pervasive cultural presumption of urbanism. But place – like race, sexual orientation, and class – is inextricably linked to the experiences of rural women as they encounter law. To illustrate this, I introduce here some of the stories of rural women, as reflected in judicial narratives, putting them in context and bringing them into the broader conversation about women and law.<sup>108</sup>

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<sup>105</sup> Harris, *supra* note 7, at 615.

<sup>106</sup> Elizabeth Beeson & Marty Strange, Why Rural Matters: The Need for Every State to Take Action on Rural Education (Aug. 2000), at <http://www.ruraledu.org/streport/summary.html>.

<sup>107</sup> Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 195.

<sup>108</sup> See Harris, *supra* note 7, at 585 (writing that she introduces the voices of black women to destabilize and subvert the unity of MacKinnon’s and West’s “woman”).

### **III: Rural Women in the Presence of Law**

I discuss in this Part judicial (in)attention to the realities of rural women in the contexts of domestic violence, termination of parental rights, and abortion. The first two of these are somewhat similar in that the relevant legal doctrines accommodate a multi-factor, contextual analysis that ultimately assesses the appropriateness of a woman's actions. That is, adjudication of domestic violence cases usually involves passing judgment on whether a woman was justified in defending herself or whether she acted under duress in responding to intimate abuse. Decisions to terminate parental rights are also multi-faceted, involving a comprehensive assessment of a parent's behavior.

The legal inquiry regarding abortion is somewhat narrower: What constitutes an undue burden on a woman's right to terminate her pregnancy? While applying this test theoretically involves a fact-intensive analysis of the consequences of the regulation in question, courts have been very miserly about deeming regulations to constitute undue burdens, even in the face of highly compelling factual records. In several cases, the U. S. Supreme Court and other federal courts have disregarded the structural realities of rural women's lives which, in combination with abortion regulations, prevent those women from exercising their right to an abortion.

#### **A. Domestic Violence.**

Bring sanity to bear on the notion that a woman victimized by a physically abusive man must go to an outdoor toilet for refuge and cannot seek that refuge in her [car] where the doors lock and the victim has mobility to further escape if necessary.

-Cynthia Hage,  
Victim of domestic violence charged with DUI  
*State v. Hage* (Minn. 1999)

Intimate abuse is part of the factual background in many legal contexts, including those that adjudicate the assault, battery, or death of a battered woman or her abusive partner. Whether a woman's behavior was appropriate or reasonable may become an issue, for example, if she harms or kills her assailant. A woman's perception of the threat to her, as well as her firmness in the face of that threat, may become issues if she acquiesces to become her abuser's partner in crime. Lenore Walker, who coined the term "battered women's syndrome," brought to light the complexity of an abused woman's psychological condition.<sup>109</sup> Like Walker, many have criticized law's unease with or incapacity to accommodate appropriately the battered woman scenario.<sup>110</sup> Some calling for reform have proposed the substitution of a reasonable woman<sup>111</sup> or a reasonable battered woman<sup>112</sup> standard. Others have called for a move away from the imminence standard, endorsing instead a jury determination of when deadly force is necessary.<sup>113</sup>

In this section, I consider how a woman living in a rural area, or merely present in one, may experience aggravated vulnerability based on spatial isolation from others, in particular from sources of aid. I look in detail at several cases in which a woman in a rural area claimed that she responded under duress to intimate abuse. The decisions in

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<sup>109</sup> See, e.g., LENORE E. WALKER, *THE BATTERED WOMAN SYNDROME* (1984); LENORE E. WALKER, *TERRIFYING LOVE, BATTERED WOMEN WHO KILL: PSYCHOLOGICAL SELF DEFENSE AS LEGAL JUSTIFICATION* 23-40 (1987) (arguing that the behavior of battered women who kill needs to be understood as normal, not crazy); see also ANGELA BROWNE, *WHEN BATTERED WOMEN KILL* 127-30 (1987) (identifying some predictive factors for when women kill their abusers).

<sup>110</sup> See, e.g., Walter Steele & Christine Sigman, *Reexamining the Doctrine of Self Defense to Accommodate Battered Women*, 18 AM. J. CRIM. L. 169, 175-76 (1991); Laura Reece, *Women's Defense to Criminal Homicide and the Right to Effective Assistance of Counsel: The Need for Relocation of Difference*, 1 UCLA WOMEN'S L.J. 53, 55 (1991); Stephen J. Schulhofer, *The Gender Questions in Criminal Law*, 7 SOC. PHIL. & POL'Y 105, 127 (1990); CYNTHIA K. GILLESPIE, *JUSTIFIABLE HOMICIDE: BATTERED WOMEN, SELF DEFENSE, AND THE LAW* (1989).

<sup>111</sup> See Phyllis L. Crocker, *The Meaning of Equality for Battered Women Who Kill Men in Self Defense*, 8 Harv. Women's L.J., 121, 152 (1985).

<sup>112</sup> See Kit Kinports, Comment, *Defending Battered Women's Self-Defense Claims*, 67 OR. L. REV. 393, 416 (1988).

<sup>113</sup> See Richard A. Rosen, *On Self-Defense, Imminence, and Women Who Kill Their Batterers*, 71 N.C.L. REV. 371 (1993).

these cases reflect a lack of understanding of the quandary faced by victims of such crimes, particularly when their dilemma is heightened by physical distance from those who could render assistance.<sup>114</sup>

In *Swails v. State*,<sup>115</sup> the Texas Court of Appeals upheld a trial court's refusal to instruct the jury regarding the defense of duress to murder. The refused instruction came in the face of the female defendant's argument that she had been terrorized by her boyfriend, who initiated the murder plan. The majority opinion in the case recited these facts:

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<sup>114</sup> A rural setting is sometimes relevant to the outcome of a domestic violence case for reasons other than enhanced vulnerability. Specifically, low population density sometimes often fosters lack of anonymity among those in a rural community, and that familiarity may be legally relevant. See generally Boka, *supra* note [ ]. A 2004 decision of the Connecticut Superior Court is a good example of a court's understanding the lack of anonymity that marks rural communities and applying the law in light of that reality. The court held that the estate of a woman murdered by her ex-boyfriend could sue in negligence the small municipality in which she lived for failing to protect her. *Florence v. Town of Plainfield*, 48 Conn. Supp. 440, 849 A.2d 7 (2004). The decedent had repeatedly sought protection from police, who failed for several weeks to execute an arrest warrant against the former boyfriend. Indeed, the trial court found it "hard to imagine what more a desperate woman could do to reach out for police protection . . . and to construct a situation of such delay and failure of police to appreciate the gravity of the situation and act accordingly." *Id.* at 453, 849 A.2d at 21. The court suggested that because the parties lived in a small town, the police department would be expected to have working knowledge of such ongoing situations, making its failure to act even more inexcusable. The court wrote that the police department in this rural area knew or should have known of the defendant and "his antisocial and criminal propensities by reputation if not by personal contact." *Id.* at 444, 849 A.2d at 10. Somewhat offensive was the court's effort to distinguish the case at hand from other domestic violence situations, the significance of which it dismissed. The court wrote:

[T]his was not simply one of those, regrettably routine, calls for domestic violence assistance. Situations are presented to police departments daily where two ordinarily law-abiding citizens may be involved in an intrafamilial disturbance marked by threats or scuffling brought on my momentary anger or intoxication. There are many levels of complaints which require judgment and discretion on the part of the police officers engaged in the stressful daily pursuit of their duties. This was not an ordinary case of domestic violence.

*Id.* at 451, 849 A.2d at 14.

The South Carolina Supreme Court reached the contrary conclusion in a somewhat similar case. In *Arthurs v. Aiken County*, the court held the sheriff's department not liable for failure to protect Deborah Munn from her husband, who threatened her and her family three times on the day he killed her. Munn declined sheriff deputies' suggestions that she go to a safe house. 346 S.C. 97, 551 S.E.2d 579 (2001). The court noted that because the husband was not present at the scene when the deputies responded, he was not subject to immediate arrest. The court concluded that the officers neither owed nor breached a duty to Munn. *Id.* at 107, 551 S.E.2d at 584.

<sup>115</sup> 986 S.W.2d 41 (Texas App. 1999).

One evening in 1994, Connie Landers was beaten by her boyfriend, Kevin Swails, because she had no money to give him. Later the couple went driving. During the drive, Kevin told Connie they were going to rob and kill an old man because Kevin wanted his money and guns. After this conversation, the couple drove to Waldo Blanke's house and parked their car in front of his door. While Connie sat in the car, Kevin knocked on the door. Blanke answered, and Connie heard Kevin telling Blanke "we're going to play a game old man" and then saw Kevin shock Blanke with a 2000 volt stun gun and begin pushing and hitting him repeatedly. Connie, still in the car, heard Blanke saying "oh God, Kevin, oh God."

At first, when Kevin yelled at her to come inside, Connie did nothing. But then Kevin yelled that he would kill her if she did not come inside. Connie walked inside and, when Kevin told her to get something with which to strangle Blanke, she gave him a radio she found on a nearby table. As Connie watched, Kevin hit Blanke in the head with the radio, pushed him onto the couch, and fell with him onto the floor. Connie then saw Kevin put the radio cord around Blanke's neck and pull on one end of the cord. Connie held the other end with her knee.<sup>116</sup>

Kevin and Connie then took Blanke's guns, jewelry and money to their car. They married several days later.<sup>117</sup>

Connie asserted the defense of duress in response to the State's capital murder charges. She argued that Kevin presented a threat of death or serious bodily injury to her and that he had previously threatened, stalked, and physically assaulted her. Expert testimony supported her argument that a person of reasonable firmness might not have been able to resist Kevin's efforts to force her participation in the crimes. The trial court nevertheless rejected Connie's request for jury instructions regarding duress, and the jury found her guilty of capital murder.<sup>118</sup>

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<sup>116</sup> *Id.* at 42.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 43.

The Texas Court of Appeals upheld the trial court’s decision not to instruct the jury regarding duress because the defense “was not raised by the evidence.”<sup>119</sup> The court explained that a “defendant is ‘compelled’ to engage in proscribed conduct ‘only if the force or threat of force would render a person of reasonable firmness incapable of resisting the pressure.’”<sup>120</sup> Further, “the threatened death or serious bodily injury is ‘imminent’ only if it will occur in the present, not in the future.”<sup>121</sup> Finally, the court explained, for duress to apply, the defendant must not have “intentionally, knowingly, or recklessly [placed herself] in a situation in which it was probable that [s]he would be subjected to compulsion.”<sup>122</sup>

The court did not see Kevin’s threats to kill Connie as evidence that she was “*compelled* to enter the house by a threat of *imminent* death or serious bodily injury.”<sup>123</sup> It noted that, to the contrary, Connie knew of Kevin’s intent to rob and kill Blanke, and she knew that he entered the house with “only a stun gun,” an apparent reference to the fact he was not a serious threat to her. The court observed that Connie “sat alone in the car —outside the reach of Kevin,” for “some period of time,”<sup>124</sup> suggesting that she should have taken “this opportunity to leave the scene.”<sup>125</sup> Because she instead entered the house,<sup>126</sup> the court found that if “Kevin’s threat is construed to mean he would hunt Swails down and kill her if she did not go inside Blanke’s house, it was a threat of future, not imminent, harm.”<sup>127</sup>

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<sup>119</sup> *Id.* at 45.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 45-46 (citing Tex. Pen. Code Ann. §8.05(d)).

<sup>123</sup> *Id.* at 46 (double emphasis original).

<sup>124</sup> *Id.*

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

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

It was dissenting Judge Alma L. López who pointed out the relevance of the rural setting to the determination of whether sufficient evidence supported Connie's argument of duress. After reciting the history between Connie and Kevin, Judge López noted that "Kevin yelled, screamed and terrorized Connie and told her he would kill her, too" as they drove away from the murder scene.<sup>128</sup> She noted that Connie had "visibly observed Kevin killing the victim" and that he had threatened her, too, if she did not assist him. Judge López thus concluded it was "logical" that "Connie felt threatened and compelled to help Kevin or risk losing her life."<sup>129</sup> He had, after all, killed Blanke while armed only with a stun gun. She took issue with the majority's implication that Connie was "necessarily free to leave the scene during the murder," arguing that no evidence supported this assumption. In doing so, Judge López revealed some facts that the majority had omitted.

The scene of the murder is located in rural Bandera County. Although the photographic exhibits suggest other lake homes in close proximity to the Blanke home, there is no testimony that any of these homes were occupied at the time of the offense so as to serve as an immediate source of aid or sanctuary.<sup>130</sup>

Noting that the car they had driven was parked "next to the front door, just a few steps from where Kevin was yelling his threats of violence to Connie," Judge López also commented on the lack of evidence as to who controlled the car keys. She concluded: "Would a person of reasonable firmness, who had suffered three beatings that very day from him, have considered Kevin's threats and commands to present only future danger to her under these circumstances? I think not."<sup>131</sup>

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<sup>128</sup> *Id.* at 47-48 (Lopez, J., dissenting).

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

Judge López thus picks up on the enhanced vulnerability that women may experience when threatened in rural areas. Because they are physically removed from others who might rescue them or render assistance, these women are at even greater risk than those who are otherwise similarly situated. The majority's assumption that Connie was not under duress as a result of Kevin's threats depends, in part, upon her ability to escape to a place where he could not reach her. Yet Judge López disputes the majority's inference that because Kevin carried "only a stun gun," he did not present an imminent threat to Connie so long as she was not within arms' reach. While the majority appears to assume that Connie could outrun Kevin and make her way to a safe place with even 20-yards' head start, Judge López is doubtful that Connie could escape Kevin and that a safe place existed. She notes the rural locale in support of her conclusion that the jury should have been permitted to determine whether Kevin was an imminent threat to Connie, and not merely a future one.

While scholars have argued for a legal standard other than imminence in cases of intimate abuse, Professor Holly Maguigan's research indicates that the real problem in cases where battered women kill is not existing law.<sup>132</sup> The legal standard of imminence is less the problem, she concludes, than judges' interpretation of the law in ways that do not permit the question to get to the jury. The Texas courts' handling of *Swails* supports Maguigan's argument.

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<sup>132</sup> See Holly Maguigan, *Battered Women and Self Defense: Myths and Misconceptions in Current Reform Proposals*, 140 Pa. L. Rev. 370, 382-87, 457-58 (1991) (arguing that the real problem in cases where battered women kill is not existing law, but judges' interpreting the law in such a way that self-defense instructions rarely get to the jury).

In *State v. Hage*,<sup>133</sup> a jury did get the opportunity to consider the reasonableness of a battered woman's actions. The jury found she was not under duress when she used her car as refuge from her abusive boyfriend. The Minnesota Supreme Court, on appeal in this 1999 decision, showed no more empathy for her plight, upholding her conviction for being in physical control of a motor vehicle while under the influence of alcohol.

On the day in question, Cynthia Hage's boyfriend became violent with her after they argued. He had been physically abusive to her in the past, and on this occasion he slammed her hand into a table with force sufficient to draw blood. She left their trailer home and took refuge in her car.<sup>134</sup> A law enforcement officer responded to a report from Cynthia's boyfriend that she was drunk and sitting in her car. The officer, who had responded to a domestic disturbance call there in the past month,<sup>135</sup> found Cynthia sitting in the driver's seat. The car was not running, but the keys were in the ignition. Whether Cynthia had driven the car from their home to the county road or whether it had been parked there all day was disputed.<sup>136</sup> Both field sobriety and breathalyzer tests confirmed Cynthia's intoxication, and she was charged with driving under the influence of alcohol.<sup>137</sup>

The court denied Cynthia's request for an instruction on "self defense/retreat" and instead instructed the jury on the defense of necessity.<sup>138</sup> Specifically, it instructed

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<sup>133</sup> 595 N.W.2d 200 (Minn. 1999)

<sup>134</sup> *Id.* at 202.

<sup>135</sup> *Id.* at 203.

<sup>136</sup> *Id.* at 202. Because of record flooding in the area at the time, the property on which they and some of their neighbors lived was isolated from the surrounding area by flood waters for 31 days. Although a gravel driveway led from County Road 93 to their home, some evidence indicated that it was not passable on the day in question. *Id.*

<sup>137</sup> *Id.* at 203.

<sup>138</sup> *Id.* at 203.

the jury that Hage bore the burden of proof to show that her actions were necessary because of an emergency situation “where the peril is instant, overwhelming and leaves no alternative but the conduct in question.”<sup>139</sup> After the jury found Cynthia guilty, she moved for a judgment of acquittal on the basis that the jury had failed to consider adequately her emergency circumstances. She argued specifically “that the court bring sanity to bear on the notion that a woman victimized by a physically abusive man must go to an outdoor toilet for refuge and cannot seek that refuge in her [car] where the doors lock and the victim has mobility to further escape if necessary.”<sup>140</sup> The trial court denied her motion. It noted that “other options were available to Hage besides seeking refuge” in the driver’s seat of her car,<sup>141</sup> but it did not specify what these options were. The issue on appeal was whether the jury had been properly instructed, and the Minnesota Supreme Court found no error.

It is difficult to squabble with a jury determination on an instruction such as the one given in *Hage*. The argument can be made, of course, that as a matter of policy, the burden of proof that Cynthia was not facing an emergency should lie with the state. But the real lesson from cases like *Hage* may be one for defense lawyers. Perhaps Cynthia’s plea on her motion for judgment notwithstanding the verdict, had it been made to the jury in closing argument, would have resulted in a different outcome. The jury might have empathized if focused more upon the predicament Cynthia faced that day: remain in the trailer with an abusive man, hide in an outhouse, or sit in a car with locking doors. It is thus imperative that defense lawyers present these situations to juries in all relevant detail, playing the “rural card,” if you will.

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<sup>139</sup> *Id.* at 203-04.

<sup>140</sup> *Id.* at 204.

<sup>141</sup> *Id.* at 204.

Insensitivity to the peril of the female defendant in opinions such as *Swails* and *Hage* is ironic in light of judicial recognition elsewhere of the added vulnerability – even helplessness – associated with rural places.<sup>142</sup> Judicial narratives in criminal cases, for example, often suggest the greater susceptibility of rural residents to crime, a vulnerability stemming from their physical distance from those who could thwart a criminal act or render assistance in its wake.<sup>143</sup> In a 1979 decision, for example, the Alaska Supreme Court upheld the maximum sentence for an escapee who fled to a remote fishing camp where he committed several thefts and broke into some smokehouses. The court based its decision on the vulnerability of rural residents, even though the defendant injured no one there.<sup>144</sup> By way of explanation, the court wrote that the residents “don't have the assurance that people in the more developed areas and communities might have that they can secure some protection by picking up the phone and calling a police officer from a nearby police station who can quickly get over to that area in a car. People are simply much more on their own and simply don't have that kind of security.”<sup>145</sup> Thus, the court concluded, the escapee’s actions “must be considered as a very serious offense against the public.”<sup>146</sup>

As a related matter, judicial narratives often note that the defendant took his

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<sup>142</sup> Courts sometimes expressly recognize that rural residents’ isolation exposes them to other perils, too. In a 1987 Mississippi case, for example, the court repeatedly noted the vulnerability of an elderly, rural woman whose phone service was wrongfully disconnected. *South Central Bell v. Epps*, 509 So. 2d 886 (Miss. 1987). The court suggested that the phone company’s injury to her was aggravated because she was such a vulnerable customer, and their wrongdoing left her unserved, without the lifeline she needed. *Id.* at 893-94.

<sup>143</sup> *See, e.g.*, *Idaho v. Olson*, 806 P.2d 963, 964 (Idaho 1991) (alleged shooting occurred on “a rural mountain road in Latah County”); *McElmurry v. State*, 60 P.3d 4 (Okla. 2002) (defendant approached victim’s rural house through the woods in order not to be seen); *Furman v. Georgia*, 408 U.S. 238 (1972) (defendant “entered the rural home of a 65-year-old widow” while she slept and raped her); *Stein v. New York*, 346 U.S. 156 (1953) (robbery and murder occurred on “lonely country roads”).

<sup>144</sup> *One v. Alaska*, 592 P.2d 1193 (Alaska 1979).

<sup>145</sup> *Id.* at 1194.

<sup>146</sup> *Id.* at 1195.

victim to a rural area, suggesting he could thereby evade detection.<sup>147</sup> Indeed, the vulnerable position in which some victims are put when taken to rural areas leads to conviction of a more serious offense. In a 2002 Texas case, the defendants kidnapped, sexually assaulted, and then released their victim in a rural area.<sup>148</sup> They argued on appeal that they should not have been convicted of aggravated kidnapping, but rather of a lesser offense, because they had released the victim in a “safe place.”<sup>149</sup> The appellate court agreed with the trial judge that the victim had not been released in a safe place, noting testimony that the place was “in the country,” “mainly fields and that sort of thing” with a few trailer houses and a bait shop.<sup>150</sup>

Similarly, the U.S. Supreme Court found sufficient the jury instructions in a 1977 case in which the defendants kidnapped and robbed their victim before abandoning him, without his trousers, boots, coat or glasses, “on an unlighted, rural road.”<sup>151</sup> In poor visibility from blowing snow, and a temperature near zero,<sup>152</sup> the victim was struck and killed by a speeding pick-up truck 20 minutes later. The defendant argued that he could

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<sup>147</sup> See, e.g., *Lingar v. Bowersox*, 176 F.3d 453 (8th Cir. 1998) (defendant drove young male victim to rural area, ordered him to disrobe and masturbate before shooting him); *Ponder v. State*, 713 S.W.2d 178 (Tex. 1986) (defendant kidnapped female law enforcement officer and drove her into a rural area where he repeatedly sexually assaulted her under a bridge, leaving her handcuffed there); *State v. Fosnow*, 240 Wis.2d 699, 624 N.W.2d 883 (Wis. App. 2d 2000) (defendant kidnapped woman, took her to a “home in rural Crawford County” where he sexually assaulted her); *Pilkinton v. State*, 2005 Tex. App. LEXIS 2879 (defendant “drove back roads” while beating his girlfriend for 10 hours); *Anderson v. Hopkins*, 113 F.3d 825 (8th Cir. 1997) (victim tricked into going to a rural place where he was then killed); *Fitzgerald v. Greene*, 150 F.3d 357 (4th Cir. 1998) (defendant took 13-year-old girl to rural area where he raped her).

<sup>148</sup> *Sherell v. Wray*, Nos. 03-01-00625-CR, 03-01-00627-CR, 03-01-00628-CR, 2002 WL 31525288 (Tex. App. Nov. 15, 2002).

<sup>149</sup> *Id.* at \*2 (citing Tex. Pen. Code Ann. § 20.04(d) (West Supp.2002)).

<sup>150</sup> *Id.* at \*3. The court continued:

CP had been sexually assaulted by two strangers, and the examining nurse later found thirty-six areas of acute physical trauma to her body. CP was clothed but barefoot, was still under the influence of alcohol, and did not know where she was. She was afraid that her assailants, who she believed were armed, would return. It was before dawn, and CP was unable to rouse the residents of the trailer houses in the area. Eventually, a passing car stopped and its occupants summoned help.

*Id.*

<sup>151</sup> *Henderson v. Kibbe*, 431 U.S. 145 (1977).

<sup>152</sup> *Id.* at 147.

“not have anticipated the fatal accident.”<sup>153</sup> The judge advised the jury that “a person acts recklessly with respect to a result or to a circumstance . . . when he is aware of and consciously disregards a substantial and unjustifiable risk that such result will occur or that such circumstance exists.”<sup>154</sup> The perilous situation in which the defendants left the victim – including the rural location – thus supported the finding of “a substantial and unjustifiable risk” of death.

While most cases in which the vulnerability stemming from spatial isolation has influenced a legal outcome do not involve gender issues, a few do. In a 2004 decision, for example, the Indiana Court of Appeals upheld an administrative law judge’s ruling that an employer had sexually harassed two women who worked in his home, which served as the office for his elevator installation business.<sup>155</sup> The court determined that the employer, sole proprietor of the business, harassed two secretaries who worked for him for consecutive periods. Among the allegations were that he appeared before them semi-clad (no shirt) and finished dressing in their presence; showed pictures of himself and his prior girlfriend skinny dipping; said his bathtub was large enough for two; called them into his bedroom to see something on television; and told them that he should put golden arches, standing for “2,000 served” over his bed.<sup>156</sup> The court quoted the ALJ’s findings of fact (endorsed by the Indiana Civil Rights Commission), with respect to each woman, that the woman and her employer “worked in a house, with nobody else present, subject to visitors rarely and only by appointment and that the house was located in a rural,

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<sup>153</sup> *Id.* at 148.

<sup>154</sup> *Id.* at 149.

<sup>155</sup> *Zeller Elevator Co. v. Slygh*, 796 N.E.2d 1198 (Ind. App. 2004).

<sup>156</sup> *Id.* at 1202-05.

sparsely populated area.”<sup>157</sup> In upholding the decisions below, the court cited Seventh Circuit precedent for the proposition that the “presence or absence of other persons and other aspects of context” are relevant to the determination of harassment.<sup>158</sup> The opinion emphasized the rural location of the employer’s home-based business – noting it three additional times.<sup>159</sup> The court thus clearly saw the rural setting – because it connoted the absence of the other persons – as critical context in assessing sexual harassment.

Similarly, some intimate abuse cases have also acknowledged the aggravated vulnerability associated with presence in rural areas. The Nebraska Court of Appeals in 2001, for example, cited a woman’s situation in a rural area as justification for shooting her husband. The court held that the sentencing judge had abused his discretion by imposing an excessive sentence on the woman.<sup>160</sup> He explained that she was “in a rural area with an intoxicated and angry person with a history of physical abuse who had only moments earlier abused her.”<sup>161</sup> In another case, an abusive husband’s frequent threat while beating his wife, that “no one would ever hear a gun shot coming from their rural residence,” was cited in justification of a \$340,000 damages award for intentional infliction of emotional distress.<sup>162</sup> These decisions, as well as those in other criminal contexts that recognize the enhanced vulnerability attendant to distance from sources of

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<sup>157</sup> *Id.* at 1203 (Finding of Fact No. 24); 1204-05 (No. 55).

<sup>158</sup> *Id.* at 1213 (quoting *Baskerville v. Culligan Int’l Co.*, 50 F.3d 428 (7<sup>th</sup> Cir. 1995)).

<sup>159</sup> *Id.* at 1213 (“rural location”); 1215 (“rural, isolated area”); 1216 (“rural, isolated office”).

<sup>160</sup> *State v. Oldenburg*, 10 Neb. App. 104, 628 N.W.2d 278 (2001).

<sup>161</sup> *Id.* at 120, 628 N.W.2d at 120. The court continued: “These facts are not disputed. Kurt’s claim that he was ‘incensed’ at having a gun pointed at him in his own home is a ridiculous excuse for charging at Charlene while she held a gun. It can only mean that he intended to take that gun away from her. No reasonable person in Charlene’s position, given the history of spousal abuse, would expect that Kurt would stop at merely taking the gun from her. Kurt’s rights in his own home can be no greater than Charlene’s right to be free from physical abuse in her own bedroom.” *Id.* The concurring judge offered an even more emphatic opinion reversing the trial judge.

<sup>162</sup> *Moyer v. Moyer*, 2005 Tex. App. LEXIS 6966 (3d Dist. 2005).

assistance, are good models for appropriate legal responses to rural women facing intimate abuse.

### **B. Termination of Parental Rights**

The reservation is in a very rural area and commuting to Las Vegas is fifty plus miles. And, we had at that time no suitable day care at the reservation. He was an infant. We had Head Start, but there was no way for her to leave him.

Social worker testifying about obstacles to employment facing mother, whose parental rights were at stake.

*In re Bow* (Nevada 1997)

The same structural barriers that contribute so significantly to rural poverty – poor educational and job opportunities, lack of child care and transportation, among others – frequently shape the situations that put rural mothers at risk for termination of their parental rights. Procedures and substantive law regarding termination of parental rights vary somewhat from state to state, but they usually involve a fact-intensive inquiry that scrutinizes the given parent’s behavior. Courts frequently discuss not only the parent’s history of interaction with the child(ren), but also her employment record, education level, and other factors, such as tolerance of domestic violence.<sup>163</sup> While some courts show considerable empathy for the particular challenges a rural parent has faced, others appear oblivious to the realities confronting her.

In some cases, the very decision to live in a rural area is held against a mother. In such cases, the rural locale of the mother’s home appears to be the proverbial last straw,

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<sup>163</sup> Indeed, in many jurisdictions, domestic violence is included on a list of factors to be considered in making the determination re: parental rights. Exposure to domestic violence may support a state’s case for termination of parental rights. *See, e.g.,* *In re Eventyr J.*, 120 N.M. 463,468, 902 P.2d 1066, 1069, 1071 (1995) (supporting decision to terminate parental rights with a statement that the mother “had exposed the children to domestic violence....Respondent admitted that, after a dispute with her boyfriend, she once brandished her shotgun in the presence of the children because she was afraid the boyfriend might return”).

as other factors already weigh against her. In a 2001 Iowa decision, for example, the court opined that the mother had “not demonstrated that she can act in the best interests of her children.”<sup>164</sup> The court cited as an example the fact that she “was living in a trailer park in a rural area, isolated from services, shopping, or neighborhood resources.”<sup>165</sup> It noted both the mother’s lack of transportation and the lack of services within walking distance,<sup>166</sup> having already recited the mother’s history of abusive relationships, as well as her job and housing insecurity while her case was pending.<sup>167</sup>

A 2002 Delaware decision held against the mother her decision to live with her mother, the child’s grandmother, “in rural New Castle County along Route 13 away from regular lines of public transportation,” which made her dependent on others to get to work.<sup>168</sup> While the court listed a number of other factors in support of its decision to terminate the mother’s parental rights,<sup>169</sup> it also noted that the mother had rejected the option of relocating to a shelter where she could “receive services and live with her daughter.”<sup>170</sup>

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<sup>164</sup> In the Interest of A.H., 2001 Iowa App. LEXIS 832 (2001).

<sup>165</sup> *Id.* at \*7.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.* at \*6-7.

<sup>168</sup> Division of Family Services v. Lxxxxx and Cxxxxx, 801 A.2d 12, 21 (Del. Fam Ct. 2002). The court also wrote:

Residing in Grandmother’s home may provide Mother with temporary shelter, but at what cost. Living there subjects Mother to complete dependence upon maternal Grandmother for food, transportation and the ability to be employed in addition to shelter. Grandmother’s residence lacks sufficient number of bedrooms, Mother having indicated that if Kxxxx were returned to her there, Mother would sleep in the living room; it provides no access to public transportation which Mother requires in light of Mother’s inability to drive and the expressed reluctance by maternal Grandmother to assist Mother in gaining driving experience through the use of Grandmother’s automobile; and ultimately residing there would place Kxxxx back in an environment with an established history of interpersonal conflict as well as physical and emotional abuse.

*Id.* at 25.

<sup>169</sup> *Id.* at 25.

<sup>170</sup> *Id.*

While these courts recognized the added transportation challenges and attendant isolation from services that rural parents face, they appear not to see that the given parent has few housing options other than those in the rural locale. By judging women harshly for living in rural areas and suggesting that they move to more populous ones, these decisions go beyond the remedial actions dictated in other contexts. That is, in the workers' compensation and disability settings, for example, courts have held that rural residents need not re-locate to a larger job market in order to secure replacement employment. They are allowed to receive benefits while continuing to live in rural areas where the limited labor market leaves them without appropriate employment options.<sup>171</sup>

By suggesting a woman should have moved to the city or should do so now, these parental rights cases also imply that places are fungible. In so doing, they overlook another rural reality: the greater attachment to place that many rural residents feel.<sup>172</sup> As discussed in Part I, many rural women are reliant on the networks they have accrued in their home community, and abandoning them would represent a significant loss.<sup>173</sup> By telling these women to move to the city, courts reveal their urban bias.

Other judges are more attuned to the realities of rural living and sensitive to its consequences. A dissenting judge in a 1997 Nevada case, *In Re Bow*, showed particular sensitivity to the burdens stemming from spatial isolation from educational options and foster homes, as well as the limited job opportunities available to rural parents.<sup>174</sup> The Native American mother whose rights were at stake, Adrina Recodo, was living with her

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<sup>171</sup> See *infra* notes [ ] (discussing decisions that do not penalize rural residents for the limited job market and which do not require the residents to move in order to secure replacement employment).

<sup>172</sup> See Rosser, *supra* note 81, at 14; *Taking Stock*, *supra* note 21, at 16 (rural residents are less likely to move than their urban counterparts); Karen Anijar, *Reframing Rural Education—Through Slippage and Memory*, in *THE HIDDEN AMERICA*, *supra* note 34, at 236 (most of population for study of students in rural South were born in area of residence).

<sup>173</sup> See *infra* Part I (B).

<sup>174</sup> 930 P.2d 1128 (Nev. 1997).

grandparents in rural Southern Nevada when she gave birth to her son Michael.<sup>175</sup> When Michael was 14 months old, Recodo voluntarily placed him in foster care because she was unable to care for him.<sup>176</sup> She and the tribe's social worker made a six-month plan whereby Recodo would complete her GED, look for employment in Las Vegas on weekdays, and care for Michael on weekends.<sup>177</sup>

During this time Recodo struggled to get into Las Vegas everyday. She drove her grandfather's car until she was unable to afford gas, and then she stayed with friends or studied and slept in her car. According to the case report, "Recodo also testified that at this point her financial situation was so bad that often she would not eat for days just so she could afford to drive to Las Vegas to attend school and to try to find a job."<sup>178</sup>

Eventually, Recodo no longer had access to a car, but she rode her bike or tried to get rides with friends into Las Vegas.<sup>179</sup> Conflicting evidence was presented regarding the frequency of Recodo's visits to her son, but a trial judge determined that she saw him only three times during one 15-month period.<sup>180</sup> She held two jobs during part of that period but lost both because of insubordination.<sup>181</sup>

A judge terminated Recodo's parental rights to Michael following a hearing in May, 1995, and the Nevada Supreme Court upheld the decision.<sup>182</sup> Justice Springer disagreed, offering this alternative summation of facts in dissent:

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<sup>175</sup> Recodo had four other children at the time of the hearing. Three lived with her former husband, who had beaten her during their marriage, and a daughter lived with Recodo at her grandmother's house. *Id.* at 1129.

<sup>176</sup> *Id.* at 1129. Justice Springer disputed the voluntary nature of the placement. *Id.* at 1137.

<sup>177</sup> *Id.* at 1130.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* at 1131.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.* at 1134. The appellate court found sufficient evidence to support the decision, and it concluded that she had not been denied her due process rights.

Adrina Recodo was the victim of an abusive domestic relationship, and she sought the help of a social worker on the Paiutes Reservation, stating that she was having problems taking care of her son after she got out of the relationship. She told her case worker that she had no income, no place to live, and no transportation. In need of money, food and a place to live, the State's response was to send Ms. Recodo to a psychologist. The State also decided to take her son away from her and to place him in foster care. Ms. Recodo was destitute; and on many occasions she was faced with the choice of eating or spending the money on transportation that would take her to school or to try and find a job.<sup>183</sup>

He said Ms. Recodo had “*tried*” to better her situation so that she could keep her son, and he criticized the State for its position that they held no responsibility for helping her.<sup>184</sup>

He quoted the appellant’s social worker, who recognized that transportation and child care were major problems in light of Recodo’s rural home:

The reservation is in a very rural area and commuting to Las Vegas is fifty plus miles. And, we had at that time no suitable day care at the reservation. He was an infant. We had Head Start, but there was no way for her to leave him.<sup>185</sup>

Justice Springer concluded by characterizing the obstacles put in the way of Ms. Recodo as “almost insurmountable.”<sup>186</sup> He thus offered not only a much more empathic vignette; he expressly discussed the particular burden that spatial isolation cast upon this rural mother.

Like Justice Springer’s dissent in *Bow*, other judges have been more sensitive to the particular structural barriers that rural parents face. One court lauded rural parents specifically for making bi-monthly visits to their children, “despite the hardships attendant to living in a rural area without private transportation.”<sup>187</sup> Another court

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<sup>183</sup> *Id.* at 1137.

<sup>184</sup> *Id.* at 1137-38 (emphasis original). Justice Springer expressed disapproval of the majority’s statement that “the [Welfare] Division cannot be expected to get Recodo a job, a home, and to provide financial stability.” *Id.*

<sup>185</sup> *Id.* at 1138.

<sup>186</sup> *Id.* at 1137-38.

<sup>187</sup> In re: PAB, MEB, MAB, 391 Pa. Super. 79, 81, 570 A.2d 522, 523 (1990).

reversed the termination of parental rights of a woman who left her daughter with a relative and did not re-claim her for several weeks.<sup>188</sup> That court excused the mother's actions because she had taken refuge from her abusive husband (who had recently sexually abused their other daughter) in a rural locale where she had no transportation or telephone.<sup>189</sup>

Though none of these decisions turned solely on the rural setting, the locale is highly relevant – and indeed integrally linked – to the structural challenges these parents faced. Indeed, the spatial isolation and attendant transportation challenges that characterize rural living aggravate disadvantage that would otherwise simply reflect socioeconomic class. Further, long-time rural residents' attachment to place means that the place – the rural setting – should be central to assessing the parents' choices and behavior. As a critical piece of context, it will very often represent a mitigating factor.

### **C. Abortion**

While traveling seventy miles on secondary roads may be inconsequential to my brethren in the majority who live in the urban sprawl of Baltimore, as the district court below and I conclude, such is not to be so casually addressed and treated with cavil when considering the plight and effect on a woman residing in rural Beaufort County, South Carolina.

Dissenting Judge Hamilton  
*Greenville Women's Clinic v. Bryant*  
(4<sup>th</sup> Cir. 2000)

Abortion is perhaps the only legal context in which the particular realities of rural women have been an explicit focus – if only barely and briefly – in making law. Several decisions have closely examined facts detailing the obstacles that informed consent and

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<sup>188</sup> *Robinette v. Keene*, 2 Va. App. 578, 580, 582, 584, 347 S.E.2d 156, 157-58, 160 (1986).

<sup>189</sup> *Id.* at 580, 582, 584, 347 S.E.2d at 157-58, 160.

waiting period requirements represent for rural women seeking abortions. While such consideration has not led to success in securing a less restricted abortion right, it has put rural women on the radar screens of feminists as a distinct population of women who share some significant challenges.<sup>190</sup> In the following sections, I scrutinize judicial responses to evidence about hardships which, collectively, are unique to rural women.<sup>191</sup> I conclude that in the abortion context as in several others, the law has turned a blind eye to the very real plight of this population.

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<sup>190</sup> See, e.g., Gillian E. Metzger, *Unburdening the Undue Burden Standard: Orienting Casey in Constitutional Jurisprudence*, 94 COLUM. L. REV. 2025, 2038 (1994) (noting that regulations unconstitutional in Pennsylvania might not be in more rural or poorer states); Valerie Pacer, *Salvaging the Undue Burden Standard—is it a Lost Cause?*, 73 WASH. U. L. Q. 295, 310 (1995) (arguing that undue burden standard has a disparate impact on women who are poor, young, battered, and/or rural); Caitlin E. Borgmann, *Winter Count: Taking Stock of Abortion Rights after Casey and Carhart*, 31 Fordham Urb. L.J. 675, 716 (2004) (arguing that individual restrictions on abortion “pile up” especially for poor and rural women).

<sup>191</sup> Prior to *Planned Parenthood v. Casey*, a few abortion decisions explicitly considered the situation of rural women. In *Planned Parenthood League v. Belotti*, the First Circuit Court of Appeals in 1981 struck down a Massachusetts law that imposed a 24-hour waiting period. The court wrote that the burdens in terms of time, money, travel and work schedules would be “substantial,” especially for the “poor, the rural, and those with pressing obligations.” 641 F.2d 1006, 1015 (1st. Cir. 1981).

The federal district court in *Hodgson v. Minnesota*, for example, grappled with the realities of rural women’s lives – both in terms of spatial isolation from services and lack of anonymity. 648 F. Supp. 756, 770, 779 (D. Minn. 1986). The court wrote:

In view of the logistical obstacles facing Minnesota women who live in counties without a regular provider of abortion services, the court believes a 48 hour waiting period is excessively long. Travel to an abortion provider, particularly in winter from a rural area in Minnesota, can be a very burdensome undertaking. A requirement that a minor either bear this burden twice or spend up to three additional days in a city distant from her home cannot be justified by the State's interests in encouraging parental consultation, because a shorter waiting period would effectuate that interest as completely.

*Id.* at 779. The Eighth Circuit Court of Appeals reversal of the decision did not mention rural women. 853 F.2d 1452 (8<sup>th</sup> Cir. 1988). Only Justice Brennan, dissenting from the Supreme Court’s affirmation of the Eighth Circuit, again briefly acknowledged rural women. He noted that because judges in some counties refuse to hear bypass procedures, women must travel to judges who will. He wrote that the burden of doing so, which often requires “an overnight stay in a distant city is particularly heavy for poor women from rural areas.” 497 U.S. 417, 476 (Brennan, J. dissenting).

In the 1977 decision in *Poelker v. Doe*, 432 U.S. 519 (1977), the U.S. Supreme Court held that a city hospital’s refusal to perform abortions for indigent women, even though it provided full prenatal care to those carrying babies to term, was not an equal protection violation. Justice Brennan, writing for three dissenters, called the unavailability of abortion in public hospitals an “insuperable obstacle” and noted that the decision would be “felt most strongly in rural areas, where the public hospital will in all likelihood be closed to elective abortions” and where demand for a separate abortion clinic will be insufficient. *Id.* at 524 (citing Sullivan, Tietze & Dreyfoos, *Legal Abortion in the United States*, 1975-76, 9 FAMILY PLANNING PERSPECTIVES 116, 121, 128 (1977)).

**1. Casey and the Undue Burden Test.** In its 1992 decision, *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>192</sup> the U.S. Supreme Court reaffirmed the basic holding of *Roe v. Wade*:<sup>193</sup> every woman has a fundamental right to obtain an abortion prior to fetal viability. But, the *Casey* Court altered the legal analysis by developing the undue burden test for determining the constitutionality of laws restricting abortion.<sup>194</sup> The Court applied the test to several restrictions in a Pennsylvania law: a spousal notification requirement, a parental notification requirement, and a mandatory informed consent provision that included a 24-hour waiting period. The Court explained that “[a] finding of undue burden is shorthand for the conclusion that a state regulation has the purpose or effect of placing a *substantial obstacle* in the path of a woman seeking an abortion of a nonviable fetus.”<sup>195</sup> The joint opinion in *Casey* did not, however, provide much instruction about how lower courts should determine whether a regulation’s purpose is to impose an undue burden.<sup>196</sup>

At first blush, the undue burden inquiry appears to be a fact-intensive one. Indeed, the *Casey* Court’s analysis of the so-called spousal notification provision,<sup>197</sup>

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<sup>192</sup> 505 U.S. 833 (1992).

<sup>193</sup> 410 U.S. 113 (1973).

<sup>194</sup> See, e.g., Ruth Burdick, *The Casey Undue Burden Standard: Problems Predicted and Encountered, and the Split over the Salerno Test*, 23 HASTINGS CONST. L.Q. 825 (1995-1996); Sandra Lynne Tholen & Lisa Baird, *Con Law Is As Con Law Does: A Survey of Planned Parenthood v. Casey in the State and Federal Courts*, 28 LOY.L.A.L REV. 971 (1994-1995).

<sup>195</sup> *Casey*, 505 U.S. at 877 (emphasis added).

<sup>196</sup> See *Okpalobi v. Foster*, 190 F.3d 337, 354 (5th Cir. 1999).

<sup>197</sup> The state law required a woman to produce a signed statement certifying that she had notified her husband of her intent to have an abortion. *Id.* at 887-898. The spousal notification provision contained some narrow exceptions, including for situations where the woman certified that her spouse was not the father of her child; she could not find her spouse; the pregnancy was the result of a sexual assault by her spouse which she reported; or she had reason to believe that notifying her spouse would cause him, or another, to inflict bodily injury upon her. *Id.* at 908-909. A physician who performed an abortion without obtaining the required statement would have her license revoked and be liable to the woman’s husband for damages. *Id.* at 887-88.

which it declared an undue burden, was fact driven.<sup>198</sup> The plurality devoted twelve pages to discussing this provision, examining both the trial court’s extensive findings of fact,<sup>199</sup> and an American Medical Association summary of research about domestic violence.<sup>200</sup> The court acknowledged that between two and four million women are victims of severe domestic violence each year, with the worst abuse sometimes associated with pregnancy.<sup>201</sup> The Court determined that the spousal notification provision “was likely to prevent a significant number of women from obtaining an abortion.”<sup>202</sup> Because many instances of domestic violence (*i.e.*, unreported marital sexual assault, psychological abuse, spousal infliction of harm upon a woman’s family members) did not fall within the relatively narrow exceptions to the spousal notification requirement, it would not simply make abortions more difficult to procure, but would actually deter some women entirely, thus imposing an undue burden.<sup>203</sup> Although the Court found that the provision imposed no burden on the vast majority of women seeking an abortion, it analyzed whether the provision was an undue burden only in relation to the admittedly very small population of women it would affect: those who were unwilling to share their decision with their spouse for fear of retaliatory violence.<sup>204</sup>

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<sup>198</sup> *Id.* at 887-99.

<sup>199</sup> The District Court found that “[t]he vast majority of women consult their husbands prior to deciding to terminate their pregnancy,” but it also determined that “[a] wife may not elect to notify her husband of her intention to have an abortion for a variety of reasons...” *Id.* at 888. The spousal notification requirement would “...force women to reveal their most intimate decision-making on pain of criminal sanctions,” but “the confidentiality of these revelations could not be guaranteed, since the woman’s records are not immune from subpoena...” *Id.* at 889.

<sup>200</sup> *Id.* at 888-91.

<sup>201</sup> *Id.*

<sup>202</sup> *Id.* at 894.

<sup>203</sup> *Id.*

<sup>204</sup> Even though the spousal notification requirement would affect less than one percent of women seeking an abortion, the *Casey* Court decided that “the proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant.” *Id.*

Aside from the spousal notification provision, though, the *Casey* Court offered little close factual examination of obstacles created by other aspects of the Pennsylvania law. It upheld the law’s parental notification provision for minors by stating simply, “[w]e have been over this ground before.”<sup>205</sup> The Court reaffirmed prior decisions holding that a law requiring a minor seeking an abortion to get parental consent is constitutional, so long as it includes an adequate judicial bypass procedure.<sup>206</sup>

The *Casey* Court’s handling of the waiting period requirement is more complicated because of conflicts between the district court’s factual findings and those the Third Circuit chose to examine. The district court found that “for those women who have the fewest financial resources, those who must travel long distances, and those who have difficulty explaining their whereabouts to husbands, employers, or others, the 24-hour waiting period will be ‘particularly burdensome.’”<sup>207</sup> It then concluded that the waiting period *would* require every woman to make two trips to an abortion provider and that 42 percent of women would have to travel more than an hour just to get to the nearest clinic.<sup>208</sup>

The Third Circuit retreated, finding that the waiting period “*may*” require two visits to a clinic.<sup>209</sup> That court went on to conclude that “the wait does not prevent any

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<sup>205</sup> *Id.* at 899.

<sup>206</sup> *Id.*

<sup>207</sup> *Id.* at 886.

<sup>208</sup> The district court noted that in 1988, 58% of women getting abortions in the state had resided in just five of Pennsylvania’s counties, meaning women living in any of the “other 62 counties must travel for at least one hour, and sometimes longer than three hours, to obtain an abortion from the *nearest* provider.” 744 F. Supp. 1323, 1351 (E.D. Pa. 1990).

<sup>209</sup> *Id.* at 706 (emphasis added). “[T]his means that the overall cost of an abortion to her may increase by a significant percentage.” *Id.* Planned Parenthood’s petition for certiorari discussed this problem, noting that the Third Circuit had “substituted for the record actually developed here a factual finding implicitly adopted in a different case involving completely distinct issues.” 1992 WL 551419 at 49-50. Planned Parenthood argued that if undisputed factual findings could be discarded so cavalierly, the undue burden test was “truly meaningless.” *Id.* The Supreme Court, however, never touched on the substituted factual record, and seems to have accepted the Third Circuit’s version of it.

women from having an abortion.”<sup>210</sup> Rather than adhering to the factual findings below, the appellate court seems to have altered them slightly to support a different result. Although the Supreme Court purported to analyze the district court’s findings of fact, referring to some of them as “troubling in some respects,”<sup>211</sup> it played a semantic game with the district court’s conclusions. The Supreme Court said the trial judge had not concluded “that the increased costs and potential delays amount to substantial obstacles,”<sup>212</sup> the term it used to define “undue burden.” The plurality continued:

We also disagree with the District Court's conclusion that the "particularly burdensome" effects of the waiting period on some women require its invalidation. A particular burden is not of necessity a substantial obstacle. Whether a burden falls on a particular group is a distinct inquiry from whether it is a substantial obstacle even as to the women in that group. And the District Court did not conclude that the waiting period is such an obstacle even for the women who are most burdened by it. Hence, on the record before us, and in the context of this facial challenge, we are not convinced that the 24-hour waiting period constitutes an undue burden.<sup>213</sup>

From the beginning, then, the undue burden standard was applied inconsistently.

## **2. Waiting Periods and Rural Women under *Casey*.**

Because my elected task is to reconsider the burden that abortion restrictions place on rural women, I return to the district court’s detailed findings of fact regarding the waiting period. In addition to determining that the waiting period would force all women seeking abortions in Pennsylvania to make at least two visits to an abortion provider, the court found that the waiting period would cause “delays far in excess of 24 hours,” from 48 hours to two weeks because most clinics and physicians do not perform

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<sup>210</sup> *Id.* The Third Circuit also wrote that “possible overinclusiveness of the provision does not render it irrational, especially given the serious and irreversible consequences of a hasty and ill-considered abortion decision.”

<sup>211</sup> *Id.* at 886

<sup>212</sup> *Id.*

<sup>213</sup> *Id.* at 886-87.

abortions every day.<sup>214</sup> Because the mandatory wait would require women to double their travel time or stay overnight near an abortion facility, the court noted that many would not only incur added expenses for transportation, lodging, child care and food, but would also “lose additional wages or other compensation” if forced to miss work twice.<sup>215</sup> Further, the court noted, delays associated with the waiting period would push some patients into the second trimester, thus substantially increasing the cost and risks of the procedure.<sup>216</sup>

The court concluded: “Finally, *women living in rural areas* and those women that have difficulty explaining their whereabouts, such as school age women, battered women, and working women without sick leave, will also experience significant burdens in attempting to effectuate their abortion decision, if a mandatory 24-hour waiting period were in place.”<sup>217</sup> Although the district court did not utilize the undue burden standard, its findings indicate that the waiting period imposes significant burdens on some women. It specifically enumerated rural women as one such group.

Two organizations that filed amicus briefs with the Supreme Court on behalf of Planned Parenthood also closely examined the effects of the 24-hour waiting period and expressed concern for rural women. The American Psychological Association’s brief highlighted the district court’s findings regarding travel distances.<sup>218</sup> The brief observed that “[i]n many geographic areas of the country, women live long distances, even

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<sup>214</sup> 744 F. Supp. 1323, 1351 (emphasis added)

<sup>215</sup> *Id.*

<sup>216</sup> *Id.* at 1351-52 (emphasis added).

<sup>217</sup> *Id.* at 1379 (emphasis added).

<sup>218</sup> 1992 WL 12006399 (U.S., Mar. 06, 1992). These included the fact that one clinic was the primary abortion provider for eighteen counties, and that among another clinic’s patients, 909 traveled at least 100 miles to reach the clinic. *Id.* at 29.

hundreds of miles, from the nearest abortion provider.”<sup>219</sup> It also cited research showing that the greater a woman’s distance from a provider, the less likely she is to procure an abortion.<sup>220</sup>

The NAACP’s also filed an amicus brief, which focused in part on the waiting period’s impact on low-income urban women,<sup>221</sup> and also called special attention to the “acute” problem for rural women. It cited data and examples from rural states, including the fact that not a single physician residing in North Dakota performs abortions, and only one South Dakota physician does so. The sole abortion clinic in northern Minnesota serves 24 counties.<sup>222</sup> The brief highlighted the fact that 82% of all U.S. counties – home to one-third of all reproductive-age women – had no abortion provider as of 1985 and that even more non-metro counties – 90% – have no provider.<sup>223</sup> The NAACP thus argued that the mandatory waiting period would effectively prohibit abortion for poor

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<sup>219</sup> *Id.* at 29.

<sup>220</sup> *Id.* at 28-29 (citing Shelton, Brann & Shultz, *Abortion Utilization: Does Travel Distance Matter?*, 8 J. FAM. PLANNING PERSPECTIVES 260 (1976); Henshaw & VanVort, *Abortion Services in the United States, 1987 and 1988*, 22 J. FAM. PLANNING PERSPECTIVES 102, 105 (1990)). In non-metro areas, 93% of counties have no provider, and 83% of (non-metro) women live in those counties. Henshaw & VanVort at 106.

<sup>221</sup> 1992 WL 12006401 (U.S., Mar. 06, 1992). It noted that women with family incomes under \$11,000 are almost four times more likely to have an abortion than those with family incomes over \$25,000. *Id.* at 17-18 (citing Radecki, *A Racial and Ethnic Comparison of Family Formation and Contraceptive Practices Among Low-Income Women*, 106 Pub. Health Rep. 494, at n. 32, 33 (Sept./Oct. 1991)). “At least one study indicates that for women below the poverty level, six out of ten births are unintended, i.e., unwanted or mistimed, compared to three out of ten births to women above 200% of the poverty level.” *Id.* The brief attributed the higher rate of unintended pregnancies among poor women to the greater incidence of contraceptive failure and their preference for fewer children. *Id.*

<sup>222</sup> *Id.* at 20-21. The brief noted the particular plight of Native American women, who often live in rural areas:

In particular, poor Native American women face some of the largest obstacles, since the Indian Health Services, which may be the only familiar provider of health care and the only health service available for hundreds of miles, is prohibited from performing abortions even if women can find the monetary resources to pay for the procedure themselves.

*Id.*

<sup>223</sup> *Id.* at 20. The brief cited as an example the Women's Health Services (WHS) clinic in Pittsburgh which serves 34 counties in Pennsylvania, portions of Ohio, West Virginia, Maryland and New York. That agency's Executive Director stated that women often travel three or four hours to reach the clinic, sometimes much longer if they travel by bus. *Id.*

women because of the increased cost of obtaining an abortion,<sup>224</sup> as well as “barriers of distance and mobility.”<sup>225</sup>

In their arguments to the Supreme Court, both Planned Parenthood and *amici curiae* thus highlighted the plight of rural women as a group or class, with further emphasis on the aggravated burden for *poor* rural women. Yet the Justices in the *Casey* plurality were unmoved by evidence of these burdens. The Court concluded that while the increased cost and inconvenience to women might make it difficult for them to get abortions, it would not actually deter them. Indeed, in spite of the district court and plaintiffs’ attention to rural women, the word “rural” appears only once in 168 pages of *Casey* opinions: Justice Blackmun’s separate opinion quoted the district court’s finding that the waiting period “would pose especially significant burdens on women living in rural areas and those women that have difficulty explaining their whereabouts.”<sup>226</sup>

When a majority of Justices in *Casey* concluded that the threat of domestic violence from the spousal notification provision would deter women, but that the 24-hour waiting period would merely inconvenience them, it set up a dichotomy between violence (or the threat of it) on one hand, and economic disaster (or the threat of it) on the other.<sup>227</sup> The Court essentially assumed that women will forego abortion to avoid the former but not the latter. This assumption, however, is unfounded. While I do not dismiss or

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<sup>224</sup> *Id.* at 22.

<sup>225</sup> *Id.* at 20. “Because most poor women have access only to county clinics, they often must wait weeks for an appointment; at a crowded city clinic in New York, the wait time for an appointment was 4-15 weeks.” *Id.*

<sup>226</sup> *Casey*, 505 U.S. 833, 937 (Blackmun, J.) (citing *Casey I*, 744 F.Supp. 1323, 1378-79 (E.D.Pa. 1990)). The plurality, however, did quote the district court as having found “that for those women who have the fewest financial resources, those who must travel long distances, and those who have difficulty explaining their whereabouts to husbands, employers, or others, the 24-hour waiting period will be ‘particularly burdensome.’” *Id.* at 886 (quoting *Casey I*, 744 F. Supp. at 1352).

<sup>227</sup> See *infra* text accompany notes [ ] (discussing threat of violence by anti-abortion protesters, if it existed, as a reason to re-examine the two-trip requirement under Indiana law); *infra* notes [ ] (discussing the constitutionality of FACE).

downplay the significance and severity of physical abuse, it bears noting that many victims of intimate abuse remain with their abusers for financial reasons.<sup>228</sup> Women sometimes opt not to leave, for example, because without the male breadwinner they do not have the financial resources to support themselves and their children. They endure violence in order to avoid poverty. Ironically, the plurality in *Casey* recognized this phenomenon in analyzing the spousal notification provision, and it cited empirical research in support of it.<sup>229</sup> The plurality nevertheless elsewhere held that waiting periods do not constitute undue burdens – not even on rural women. The Court believed that waiting periods will simply be an inconvenience to some women, whereas fear of intimate abuse will altogether prevent them from pursuing an abortion.

But survival is about more than avoiding a beating. If a woman will endure violence in order to be able to feed herself and her family, the chances are also good that she will forego an abortion in order to do so. Thus, the *Casey* Court was only half right about self-preservation in relation to abortion. It was correct about women’s likely response to the spousal notification provision, but it ignored the connection between the perils of physical violence on the one hand and economic disaster on the other. If, as even the *Casey* plurality recognized, women will endure physical violence to prevent financial ruin, they will forego abortion for the same purpose.

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<sup>228</sup> There is support for the proposition that women engage in a cost-benefit analysis before deciding to leave an abusive partner. Financial concerns, particularly when children are involved, make the final decision to leave more difficult. See, e.g., Kristina Coop Gordon et al., *Predicting the Intentions of Women in Domestic Violence Shelters to Return to Partners: Does Forgiveness Play a Role*, 18 J. OF FAMILY PSYCH. 331 (2004) (suggesting that lack of personal income and low potential for securing employment are factors that weigh in favor of staying in the relationship); Helen M. Hendey et al., *Decision to Leave Scale: Perceived Reasons to Stay in or Leave Violent Relationships*, 27 PSYCH. OF WOMEN Q. 162, 163 (2003) (stating that women are “more reluctant to leave violent relationships when they have investments of time, marriage, money, children or emotional attachment”).

<sup>229</sup> *Casey*, 505 U.S. at 891-92 (citing Herbert, Silver & Ellard, *Coping with an Abusive Relationship: How and Why do Women Stay?* 53 J. MARRIAGE & THE FAMILY 311 (1991); Aguirre, *Why Do They Return? Abused Wives in Shelters*, 30 J. NAT. ASSN. OF SOCIAL WORKERS 350, 352 (1985) (abused women may return to their abusers because they have no other source of income)).

**3. Post-Casey Decisions.** The *Casey* Court explicitly stated that it was deciding only the case before it, leaving the door open for other challenges to the provisions it upheld.<sup>230</sup> Subsequent courts have nevertheless been reluctant to deviate from *Casey*'s holdings. As Gillian Metzger observes, “regulations that are not burdensome in Pennsylvania may well be burdensome in other states where there are fewer abortion providers or a more rural and poorer population.”<sup>231</sup> By and large, however, courts have been unwilling to examine in detail the particular burdens on the women in a state whose abortion regulations are challenged. Yet states continue to enact regulations that prevent at least some women – including those living some distance from an abortion provider – from exercising their right to an abortion. These regulations not only impose waiting period and informed consent requirements, some also involve parental consent for minors.

**a. Mandatory Waiting Periods, Informed Consent Laws and Spatial Isolation.** *Utah Women’s Clinic v. Leavitt*<sup>232</sup> is an excellent example of the tendency of post-*Casey* courts to assess constitutionality based more on a provision’s text than on the factual record.<sup>233</sup> The plaintiffs in *Leavitt* argued that because Utah is larger than

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<sup>230</sup> *Id.* at 887.

<sup>231</sup> Metzger, *supra* note [ ], at 2038.

<sup>232</sup> 844 F.Supp 1482, 1491 (D. Utah 1994).

<sup>233</sup> *Karlin v. Foust* is another good example. 188 F.3d 446, 486 (7th Cir. 1999). The plaintiffs there similarly presented evidence of “factual and demographic differences between Pennsylvania and Wisconsin” focusing on “the geographic distribution and scarcity of abortion providers in relation to the female population of Wisconsin.” The court was not convinced, however, concluding that “the demographic differences between the two states were not significant enough to suggest that Wisconsin women are quantitatively more burdened” by the Wisconsin law than Pennsylvania women had been by the mandatory wait in *Casey*. *Id.* at 486. The court also went into a detailed discussion of the plaintiffs’ argument, based on a study of a Mississippi abortion regulation that had arguably caused a sharp decline in the number of abortions in that state. The plaintiffs argued that Wisconsin and Mississippi were analogous, but the Seventh Circuit, like the district court, found the Mississippi study methodologically flawed. The court said the study had not controlled for the “persuasive effect of the law.” *Id.* at 487. That is, the court speculated that the number of abortions in Mississippi might have declined not because the waiting period

Pennsylvania and has only one metropolitan area, a 24-hour waiting period would be more burdensome in that state than an equivalent regulation in Pennsylvania. Because the Utah regulation was less restrictive than the provision upheld in *Casey*, however, the federal district court concluded that it must be constitutional. Finding no significant differences either between the Utah and Pennsylvania laws or in how they would affect women in their respective states,<sup>234</sup> the court went as far as to call the plaintiffs' argument a "red herring."<sup>235</sup>

The *Leavitt* judge reasoned that all women seeking abortions must travel to a clinic for the procedure, but that because the "travel burden is not a factor of state law," "getting to a clinic has absolutely nothing to do with the constitutional inquiry here."<sup>236</sup>

The court offered this hypothetical by way of explanation for its logic:

A woman in Alaska, for example, could be required to travel 800 miles to get to an abortion clinic merely because she lives in one place and the nearest abortion clinic is on the other side of the state. But that certainly doesn't constitute anything even approaching an undue burden. *Roe v. Wade* may have established a constitutional right to an abortion, but it did not require that a state provide abortion clinics in close proximity to every woman's home. On the other hand, a waiting period which may require two visits to a clinic imposes an additional burden. For some women, this burden will require that they double their travel time by making a second trip to the clinic. For other women, in a worst-case scenario where the distance is such that it is impracticable to make a return visit, the burden will require an overnight stay at a location near the clinic.<sup>237</sup>

Thus, the district court in Utah saw the regulation's greatest burden on any woman – no matter where she lived in proximity to an abortion provider – as being an overnight stay

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made getting an abortion more difficult, but because the materials presented as part of the informed consent law convinced women not to get abortions. *Id.*

<sup>234</sup> *Id.* at 1491.

<sup>235</sup> *Id.* at 1491, n. 11.

<sup>236</sup> *Id.* at 1491, n. 11.

<sup>237</sup> *Id.* at 1491, n. 11.

near that provider. It dismissed the possibility that some women would have to make two trips and therefore never considered that multiple trips might each be several days long. Because the *Casey* Court had not viewed that overnight stay as an undue burden, *Leavitt* reasoned that the Utah provision also did not constitute one.<sup>238</sup>

Other judges in the post-*Casey* era have shown greater empathy for the plight of rural women seeking abortion in the face of mandatory waiting periods. These judges, however, have been federal district judges who were subsequently overruled or dissenters from the decisions of Courts of Appeals. They have nevertheless called attention to the circumstances of rural women despite colleagues in the majority who, like the district judge in *Leavitt*, disregarded details of the obstacles facing rural women, or who saw the obstacles as being “merely” financial.

Although the Mississippi Supreme Court in 1998 upheld state regulations that imposed a mandatory 24-hour waiting period,<sup>239</sup> Justice Sullivan’s dissent highlighted the “undue burden on low-income women living in rural areas.”<sup>240</sup> Disputing the chancellor’s characterization of this burden as “mere inconvenience,” Justice Sullivan argued that the plaintiffs successfully demonstrated that the restrictions would preclude “a substantial number of women from obtaining abortions altogether, and creat[e] an undue burden due to travel and lodging expenses, child care costs, loss of wages, and other compensation, and health risks.”<sup>241</sup> Noting that only two Mississippi counties had abortion providers, Justice Sullivan argued that the law was unconstitutional even if it

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<sup>238</sup> *Id.* The court thus concluded that rural Utah women will not necessarily have to make two trips. *Id.*

<sup>239</sup> *Pro-Choice Mississippi v. Fordice*, 716 So.2d 645 (Miss. 1998). The majority opinion did not use the word “rural.”

<sup>240</sup> *Id.* at 667 (Sullivan, J., dissenting).

<sup>241</sup> *Id.*

created an undue burden only for low-income women and those living in rural areas.<sup>242</sup> He also pointed to plaintiffs' evidence that the number of Mississippi women obtaining abortions had decreased by 13 percent since the law went into effect, suggesting that the waiting period was actually preventing at least a tenth of the state's women from terminating their pregnancies.<sup>243</sup>

The Seventh Circuit in *A Women's Choice-East Side Clinic v. Newman*,<sup>244</sup> similarly upheld an Indiana informed consent law that required that a woman be given information in the presence of her doctor 18 hours before obtaining an abortion. This 2002 case was decided on probably the best developed factual record in the post-*Casey* era. Yet the evidence presented swayed only Judge Diane Wood, in dissent, to agree with the federal district court that the law constituted an undue burden.

The district court, relying in part on an updated version of the Mississippi study cited in *Fordice*, struck down the Indiana law as unconstitutional.<sup>245</sup> It found that the supplemented study adequately demonstrated that the Mississippi law caused a 10 to 13 percent decrease in abortions among that state's residents, as well as a significant

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<sup>242</sup> *Id.* (citing *Casey*, 505 U.S. at 887-98, holding that spousal consent law was unconstitutional based on the small number of women with abusive husbands, for whom it would create an undue burden). Justice Sullivan also pointed to plaintiffs' evidence that the number of Mississippi women obtaining abortions had decreased by 13% since the law went into effect, indicating that it was in fact preventing many women from obtaining an abortion. This study was later discredited in *Karlin*, *supra* note [ ], but supplemented prior to *A Woman's Choice*, discussed *infra* at notes [ ] and accompanying text.

<sup>243</sup> *Id.* at 667. The study also indicated that the number of second-trimester abortions in Mississippi had risen by 18% since the law went into effect.

<sup>244</sup> 305 F.3d 684 (7th Cir. 2002). The decision also debated the burden represented by a so-called "presence" requirement. The Indiana statute required information given to the women seeking the abortion and that the information is given to the woman in the "presence" of the physician or physician's assistant. *Id.* at 685. Information about abortions could therefore not be given in a pamphlet, by telephone, or through a web site. *Id.* The "presence" requirement thereby required the pregnant woman to make two trips to the clinic—one for the information and the other to receive the abortion. *Id.* The court held that the presence requirement did not create an undue burden on a woman's right to abortion. *Id.* at 693.

<sup>245</sup> 132 F.Supp.2d 1150, 1173-74 (S.D.Ind.2001). The plaintiffs in *Karlin v. Foust* relied on the same study, but the court in that case questioned its validity. It was supplemented before the trial in *A Women's Choice*, correcting several aspects that had been criticized.

increase in more expensive, more dangerous second-trimester abortions.<sup>246</sup> Based on these findings and on those of a similar study conducted in Utah, the court concluded that the waiting period would also cause the number of abortions performed in Indiana to decrease by 10 to 13 percent. The court further determined that this decline was due, not to the persuasive nature of the materials, but rather to obstacles imposed by the waiting period.<sup>247</sup>

But two of three members of the Seventh Circuit panel viewed the factual evidence differently. Judges Easterbrook and Coffey refused to accept the district court's assessment of the study because the plaintiffs failed to demonstrate that Indiana and Mississippi were similar and that the consequences of the Mississippi law were likely to be manifest in Indiana. They believed that the 10 percent decline in abortions, rather than representing a practical consequence of the two-visit requirement, was simply a consequence of the persuasive effect of the information. One asserted that Indiana should have its law "evaluated in light of experience *in Indiana*."<sup>248</sup> Echoing *Casey*'s elevation of concerns about violence against women over other concerns about their well-being, he suggested that a two-trip requirement would constitute an undue burden only if it deterred women by increasing the possibility of violence against them. Judge Easterbrook referred specifically to the "threat or actuality of violence at the hands of those tipped off by a preliminary visit," and said if evidence of such violence came to light in Indiana, it would require reconsideration of informed consent laws across the nation.<sup>249</sup>

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<sup>246</sup> *Id.* at 1173. The court also found that the Mississippi law caused a significant increase in the number of that state's residents who traveled out of state to obtain abortions and a significant decrease in the number of other states' residents who came to Mississippi for abortions. *Id.*

<sup>247</sup> *Id.*

<sup>248</sup> *Id.* at 692-693.

<sup>249</sup> *Id.*

Judge Coffey, also in the majority, openly flouted the hardships and concerns of the 10 to 13 percent of women who might be unable to obtain an abortion by noting that legislation which poses no substantial obstacle for 87 to 90 percent of a state's women, “and may have the incidental effect of reducing the demand for abortions by merely 10 to 13 percent, is reasonable, sensible, and lawful.”<sup>250</sup> He apparently disregarded the fact that those women deterred from getting an abortion by the mandatory waiting period (as many as 13%) were, in fact, unduly burdened by it. Rather than seriously evaluating the evidence that substantiated the argument that waiting periods create undue burdens for some women, both Easterbrook and Coffey determined that because the waiting period would probably not increase violence against women, it was constitutional.

Once again, it was the dissenting judge who attended to the concerns of rural women as a class. Judge Wood wrote that Indiana, “like all states” has “significant rural areas and significant numbers of people living far from a reproductive health services facility.”<sup>251</sup> She cited statistics indicating that Indiana, with 11 abortion providers, had one “for almost every 3,300 square miles.”<sup>252</sup> These clinics, which are not “distributed with perfect geographical regularity,” are most likely concentrated in cities, Judge Wood observed, meaning that women in rural Indiana lived “substantial distances from the nearest facility.”<sup>253</sup>

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<sup>250</sup> *Id.* at 704.

<sup>251</sup> *Id.* at 711 (Wood, J., dissenting).

<sup>252</sup> *Id.* at 711.

<sup>253</sup> *Id.* Judge Wood continued:

At most, the details the majority demands might suggest that more Indiana women can withstand the burdens of the Indiana statute than their counterparts in Mississippi could. But the question is not, for example, whether Indiana women as a group live closer to abortion clinics. It is whether an Indiana woman living 60 miles away from a clinic in Indiana who cannot afford (either financially, socially, or psychologically) to make two visits, will respond the same way a Mississippi woman living 60 miles away from a clinic in Mississippi with similar constraints did. To repeat, *Casey* made it clear that the set of

The majority contingent in each of these opinions, like the federal district judge in *Leavitt*, overlooked or denied the realities of many rural women. They also ignored a critical aspect of *Casey*'s undue burden analysis of the spousal notification requirement: the relevant group of women with respect to whom the requirement was to be assessed. Informed consent and waiting period provisions do, in fact, have a greater impact upon – and are in fact a greater deterrent to abortion for rural women. They are an even greater burden upon, and deterrent to, low-income rural women.

I return to *Leavitt* and the geography of Utah to illustrate my point. A working class woman in Salt Lake City who enjoys little work schedule flexibility would likely have difficulty securing time off to go through both the informed consent meeting and again to have the abortion. She could, however, arrange the two different appointments on different days of the same week or on subsequent weeks, depending on her schedule. If she is without a vehicle but lives in the Salt Lake metro area, she will have some public transportation options to facilitate the journeys. Making two trips will likely be inconvenient, even burdensome to her, and it may significantly increase the cost of the abortion if she must schedule her second appointment in the second trimester. Still, the burden of the waiting period on her is unlikely to be as great as that on a woman living in southern Utah, as far as 300 miles from Salt Lake City.

Consider, for example, a woman in Boulder, Utah, in the shadow of Grand Staircase-Escalante National Monument and 15 miles from Utah state highway 12. She

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women we must consider are those who are burdened by the law, and it found 1% enough to justify striking down the spousal notification rule. Maybe 10% of the women in Mississippi have that problem and "only" 3% of women in Indiana do. No matter. The district court was quite reasonable to find that women in Indiana are like all other people and that their responses will be the same as those of women elsewhere.

*Id.* at 711-12.

is 327 miles (7 hours) from Las Vegas,<sup>254</sup> 367 miles (7 hours and 55 minutes) from Flagstaff,<sup>255</sup> 381 miles (7 hours and 58 minutes) from Aspen, Colorado,<sup>256</sup> and a mere 261 miles (5 hours and 29 minutes) from Salt Lake City,<sup>257</sup> the locations of the four nearest abortion providers. These one-way travel times assume the woman has access to private transportation. If she does not and must rely on public transportation, her situation is even more dire. Boulder, Utah has no public transportation services. The nearest Greyhound bus stop is 143 miles (3 hours and 40 minutes) away<sup>258</sup> in Parowan, Utah.<sup>259</sup> A woman without a car who lives in Boulder would thus have to borrow a car or hitch-hike to Parowan and then take the bus to reach an abortion clinic.<sup>260</sup>

Again, if we assume a working class woman with little work schedule flexibility, the woman in rural Utah may be unable to schedule her informed consent meeting and her abortion on consecutive days. If, as *Leavitt* assumes, she is able to secure consecutive days off from work, her burden may nevertheless be greater than an overnight hotel stay. If she must travel several hours to reach the bus station and several more by bus to reach

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<sup>254</sup> See

[http://maps.yahoo.com/dd\\_result?newaddr=&taddr=&csz=boulder+utah&country=us&tcsz=las+vegas+nevada&country=us](http://maps.yahoo.com/dd_result?newaddr=&taddr=&csz=boulder+utah&country=us&tcsz=las+vegas+nevada&country=us) (last visited August 30, 2006).

<sup>255</sup> See

[http://maps.yahoo.com/dd\\_result?newaddr=&taddr=&csz=boulder+utah&country=us&tcsz=flagstaff+arizona&country=us](http://maps.yahoo.com/dd_result?newaddr=&taddr=&csz=boulder+utah&country=us&tcsz=flagstaff+arizona&country=us) (last visited August 30, 2006).

<sup>256</sup> See

[http://maps.yahoo.com/dd\\_result?newaddr=&taddr=&csz=boulder+utah&country=us&tcsz=aspen+colorado&country=us](http://maps.yahoo.com/dd_result?newaddr=&taddr=&csz=boulder+utah&country=us&tcsz=aspen+colorado&country=us) (last visited Sept. 4, 2006).

<sup>257</sup> See

[http://maps.yahoo.com/dd\\_result?newaddr=&taddr=&csz=boulder+utah&country=us&tcsz=salt+lake+city+utah&country=us](http://maps.yahoo.com/dd_result?newaddr=&taddr=&csz=boulder+utah&country=us&tcsz=salt+lake+city+utah&country=us) (last visited August 30, 2006).

<sup>258</sup> See <http://maps.google.com/maps?oi=map&q=Parowan,+UT> (last visited Sept. 2, 2006). See generally Eli Sanders, *As Greyhound Cuts Back, The Middle of Nowhere Means Going Nowhere*, N.Y. TIMES, Sept. 6, 2004, at A10 (discussing the impact on rural America of Greyhound's dramatic cuts in service).

<sup>259</sup> See <http://www.greyhound.com/home.asp> (last visited Sept. 2, 2006). Parowan is located in Iron County, which is the county nearest to Boulder that has a public transportation network. See [http://www.apta.com/links/state\\_local/ut.cfm](http://www.apta.com/links/state_local/ut.cfm) (last visited Sept. 2, 2006).

<sup>260</sup> Greyhound offers two buses a day from Parowan, Utah to Salt Lake City, one leaving at 2:50am and another leaving at 11:05am. Each trip lasts four hours. Buses from Salt Lake City to Parowan leave twice a day, at 8:30am and 6:00pm. See <http://www.greyhound.com/scripts/en/TicketCenter/Step3.asp> (last visited Sept. 5, 2006).

the abortion provider, and again to return home, and if bus schedules are very limited, she may need three or more consecutive days off work – as well as several nights’ hotel stay – to accomplish the sought-after termination. Also contrary to the *Leavitt* court’s assumption, the burden on a rural woman seeking an abortion may be greater than assumed in *Casey* because, in fact, she is unable to take several consecutive days off work. Women in this situation will not only have to make two return journeys to Salt Lake City by whatever means are available, each of those journeys may require multiple days. Thus, the worst-case scenario may not be merely an overnight stay. It may be several days’ stay. It may, in fact, require two journeys, each lasting several days.

An even more dramatic example could be generated from the geography of Alaska, with its dearth of abortion services, which the *Leavitt* court facetiously used to illustrate its position that there is no constitutional right to convenience in procuring an abortion.<sup>261</sup> But *Casey* made accessibility relevant by adopting the undue burden standard, and at some point, even the *Leavitt* court might concede, waiting periods constitute an undue burden for the most isolated, most disadvantaged women. My aim is thus not to identify the most extreme example of hardship created by waiting periods. It is, rather, to demonstrate that courts have not seriously considered the practical obstacles confronting rural women. As Judge Wood wrote in *A Woman’s Choice*, the undue burden question “is whether an Indiana woman living 60 miles away from a clinic in Indiana who cannot afford (either financially, socially, or psychologically) to make two visits” will be deterred from exercising her fundamental right.<sup>262</sup> It is not only about the

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<sup>261</sup> *Leavitt*, 844 F. Supp. at 1491, n. 11.

<sup>262</sup> *A Woman’s Choice*, 305 F.2d at 711. Specifically, at this point in the opinion, Wood was arguing that the Mississippi study had shown that the state’s informed consent law had deterred Mississippi women from pursuing abortion.

woman who is worst-situated for getting an abortion; it is about all those who will be deterred by the regulation.

Certainly, some women in rural areas will be better situated to secure abortions than others, even in states with mandatory waiting periods. Women with job flexibility and security, access to a car, child care and – of course – money, will find it easier to overcome the obstacles. But the *Casey* Court said that, for the purposes of analyzing any regulation, “[t]he proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant.”<sup>263</sup> Further, the *Casey* Court found sufficient the mere 1% of all women who would be deterred by the Pennsylvania spousal notification requirement. So, even taking *Casey*’s parsimonious approach to the undue burden test as the starting point, courts applying the standard have not only not been sensitive, they have not even been realistic about the very real barriers that regulations put in the way of rural women seeking abortion.

While *Leavitt* may be correct that *Roe v. Wade* did not guarantee the right to convenience in procuring an abortion, at some point, waiting periods create so much “inconvenience” that they impede some women’s access to that right. That is, they effectively preclude it. This is surely the case for many rural women who live literally hours from the nearest abortion provider. Their hardship is exacerbated by the specific circumstances that mark many of their lives: inadequate transportation, limited or nonexistent child care, lack of job flexibility and security, and overall economic vulnerability. Each of these circumstances aggravates the burden that the mandatory waiting period imposes on a given rural woman.

In contrast to these abortion decisions, precedents in other areas of the law

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<sup>263</sup> *Casey*, 505 U.S. at 894.

acknowledge the reality, as well as the legal relevance, of the hardships created by spatial isolation from centers of commerce and the services located there.<sup>264</sup> In disability, workers compensation, and insurance coverage settings, for example, courts recognize that those who live in rural areas are at a disadvantage in seeking replacement employment, in receiving appropriate rehabilitation, and even in obtaining medical care.<sup>265</sup> These judicial decisions appropriately accommodate the reality that many rural residents must travel significant distances for access to such services and opportunities.

A trilogy of Colorado workers' compensation cases is illustrative.<sup>266</sup> The Colorado Supreme Court held in these consolidated cases that rural workers who could not secure replacement employment because of their limited rural labor markets could nevertheless receive benefits.<sup>267</sup> Each of the cases involved a rural-dwelling worker with relatively few skills,<sup>268</sup> and each had reached "maximum medical improvement." The

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<sup>264</sup> In a rare civil procedure case addressing the practical effect of rural locale, a federal district court held that, because they "live in rural areas and lack resources and access to transportation," migrant workers seeking to opt-in to a class action need not have their consents authenticated because it "could well present a heavy burden, if not an insuperable obstacle" to their participation. *Roebuck v. Hudson Valley Farms*, 239 F.Supp.2d 234, 240 (N.D.N.Y. 2002).

<sup>265</sup> See, e.g., *Brodsky v. City of Phoenix Dept. Ret. System Bd.*, 900 P.2d 1228, 1232 (Ariz. 1995)(police officer with knee injury was still capable of "reasonable range of duties" in urban police department and thus not eligible for disability, although court recognized that a similarly disabled officer in a rural setting with smaller force might not be able to perform a reasonable range of duties for his department).

In a 2001 decision, the Court of Appeals for the District of Columbia held that a former custodian with the transit authority who sued under the Americans with Disabilities Act (ADA) was not "substantially limited" in his ability to work because his back injury did not prevent him from finding alternate employment. *Duncan v. Washington Metropolitan Area Transit Authority*, 240 F.3d 1110 (D.C.Cir. 2001). Concurring, Judge Randolph complained of the "geographic disparity" that would result from this rule. He observed that if identical individuals with identical impairments worked for the same company, the one working in a rural area would "wind up being classified as disabled under the ADA more readily" than one in a "major metropolitan area where more jobs are available." *Id.* at 1118.

<sup>266</sup> *Weld County School District v. Bymer*, 955 P.2d 550 (Colo. 1998).

<sup>267</sup> *Id.*

<sup>268</sup> These were two laborers with limited English skills who had completed the 4<sup>th</sup> grade in Mexico and a custodian whose injury prevented her from driving long distances. *Id.* at 551-52. In the first two cases, the court of appeals had affirmed the ALJs' consideration of "the claimant's commutable labor market" in deciding "permanent and total disability" PTD. *Id.* at 552-53. In the third case, however, the court of appeals reversed, declaring "disability is a function of impairment, not geography or job availability." *Id.* at 553. In all three cases, both administrative law judges and administrative appellate bodies had declared the

crux of the inquiry, the court said, was whether employment is “reasonably available to the claimant given his or her circumstances.”<sup>269</sup> Because it was not the fault of these rural workers that the rural economy provided them no job opportunities, they could receive benefits. They were not required to commute long distances or to move in order to secure replacement employment.<sup>270</sup>

Other courts have been similarly empathic regarding the practical consequences of rural residents’ spatial isolation, holding, for example, that an insurer must pay the transportation costs associated with obtaining necessary treatment.<sup>271</sup> As one court expressed it, “for citizens living miles from our cities the inability to obtain compensation for transportation expenses may result in life sustaining medical treatment being unavailable.”<sup>272</sup> In another matter, the Colorado Supreme Court held that an insurer should reimburse a claimant’s wife for providing home health care services, which had been prescribed by his physician, when home health care services were unavailable in his

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workers to be permanently and totally disabled, but the Colorado Court of Appeals had reached inconsistent results.

<sup>269</sup> *Id.* at 557. In *Parsons v. Employment Security Commission*, 71 N.M. 405, 379 P.2d 57 (1963), a woman who had worked as a grocery clerk quit her job and moved with her husband, who had been laid off, to property they owned in a rural community with only one grocery store. The woman was unable to secure work at the grocery store, or at either of the two stores within commutable distance. She did not want to work as a waitress or secretary and was therefore unable to secure employment. The Commission found that her voluntary unemployment made her ineligible for benefits, but the New Mexico Supreme Court reversed, finding that she had made reasonable efforts to secure employment. *Id.* at 411, 379 P.2d at 61. See also *Wood Mosaic Co. v. Brown*, 199 S.W.2d 433, 434 (Ky.Ct. App. 1947) (finding 64-year-old laborer who had worked as a carpenter, blacksmith, and coal miner to be permanently disabled when he injured his arm; court noted that in rural area where he lived, alternative “vocational opportunities” were restricted to very few fields).

<sup>270</sup> While the court never explicitly mentioned the claimants’ spatial isolation, it recognized the rural job market realities in its decision to uphold their status as permanently and totally disabled. Indeed, the court wrote that considering a claimant’s access to employment is both reasonable and consistent with the “Act’s purpose of assisting injured workers who are unable to secure employment.” *Id.* at 557. Dissenting Justice Kourlis explicitly mentioned the rural nature of the claimants’ locales, stating that they “may have to move in order to find work, just as someone who is laid off may need to move.” *Id.* at 561. He argued vigorously that “access to employment within the labor market where a claimant resides is not an appropriate factor to consider” in awarding PTD benefits. *Id.*

<sup>271</sup> See, e.g., *Allstate Insurance Company v. Smith*, 902 P.2d 1386, 1387 (Colo. 1995)

<sup>272</sup> *Id.* at 1388.

rural community.<sup>273</sup> In a similar vein, the Alabama Supreme Court ruled that an insurer must pay for a physician-prescribed hot tub in the claimant's home when the rural locale in which he lived made travel to a health club unfeasible.<sup>274</sup>

Cases such as these demonstrate judicial empathy for the hardships – including financial costs – associated with spatial isolation, a hallmark of rural life. They also recognize that such hardships aggravate the economic vulnerability that is a constant for many rural residents. Such decisions stand in stark contrast to the lack of understanding judges have shown about these hardships and vulnerability in relation to abortion access, as well as other issues with particular impact on rural women.

**b. Judicial Bypass Procedures and Lack of Anonymity.** Rural women have also been acknowledged in abortion litigation challenging judicial bypass procedures for minors. The issues in these cases have been both the spatial isolation associated with rural places and the lack of anonymity people experience there. The 1999 decision of the Sixth Circuit Court of Appeals in *Memphis Planned Parenthood v. Sundquist* is a case in point.<sup>275</sup> *Sundquist* examined a Tennessee law that permitted minors to seek judicial bypass of the parental consent requirement, but which imposed several restrictions on the process. The minor was required, for example, to file her petition in either the county in which she resided or in which the abortion was sought, and to swear that she consulted

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<sup>273</sup> *Suetrack USA v. Industrial Claim Appeals Office*, 902 P.2d 854, 855-56 (Colo. 1995)

<sup>274</sup> *Continental Casualty Ins. Co. v. McDonald*, 567 So.2d 1208 (Ala. 1990). The insurer in that case was found liable for intentional infliction of emotional distress for unreasonably delaying payments to the claimant's health care providers, causing some of them to deny him services and pain medication. *Id.* at 1210. With respect to the hot tub, the insurer had challenged the doctor's recommendation, repeatedly asking him to justify it. *Id.* at 1214-15. The insurer then took the position that the unavailability of a health club was due to "McDonald's own decision to live in a rural area and that CNA would not want to pay for an expensive hot tub and then have to install another one if McDonald moved." *Id.* at 1215. The appellate court upheld the intentional infliction of emotional distress judgment.

<sup>275</sup> 175 F.3d 456 (6<sup>th</sup> Cir.1999).

with a physician about the abortion before seeking the bypass.<sup>276</sup> The majority upheld the law as constitutional.<sup>277</sup>

Judge Keith, in dissent, discussed at length the particular hurdles faced by rural minors seeking to use the procedure. He focused on both transportation and confidentiality problems. With regard to the former, he noted the lack of trains and the fact that even “buses do not reach the rural areas.”<sup>278</sup> With respect to the latter, Judge Keith observed that a “minor’s actions can easily be detected by relatives and friends in rural areas.”<sup>279</sup> He included in his opinion numerous detailed anecdotes from the testimony of officials at Memphis’ and Knoxville’s abortion providers. The director of counseling at the Knoxville Center for Reproductive Health testified about problems arising from the law’s venue restriction:

The areas surrounding Knoxville where many of our patients come from *are very rural. It is next to impossible to go to any public place completely undetected.* One minor patient told us she couldn't pursue a waiver from the local court because her aunt worked there. Another tried to pursue a waiver in her home county, only to discover the judge assigned to her case was her former Sunday school teacher. She was so afraid of appearing in front of someone who knew her and her parents that she left and did not pursue the waiver.<sup>280</sup>

While lack of anonymity prevented minors from applying for judicial bypass in their home counties, the director also expounded on the difficulties created by the alternative: traveling to the county where the abortion provider is located to apply for judicial bypass there. Noting that some patients must travel as far as six hours to reach Knoxville for an

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<sup>276</sup> *Id.* at 459-60.

<sup>277</sup> *Id.* at 461.

<sup>278</sup> *Id.* at 474 (quoting declaration of Judy G. Stogner, Director of Clinical Services at Memphis Planned Parenthood)

<sup>279</sup> *Id.* at 476. “Minors who do not have cars, which are most of our clients, must arrange transportation with a friend or a trusted relative. Often rides do not show up and they have to re-schedule.” *Id.* (quoting Declaration of Connie Simpson, Director of Counseling at the Knoxville Center for Reproductive Health).

<sup>280</sup> *Id.* at 485 (emphasis original).

abortion, the director testified that most minors can only get there once – for the medical procedure.<sup>281</sup>

The Director of the Memphis Center for Reproductive Health similarly touched on the confidentiality and transportation issues that plague minors living in rural areas. She shared the anecdote of a patient who was reluctant to get from her local bank a money order made payable to the abortion clinic. The woman had feared that the tellers, who knew her, might disclose her activities to others.<sup>282</sup> The director attested to the particular difficulties minors have in going undetected because the lack of public transportation in rural Tennessee leaves them relying on friends or extended family for transportation, while also factoring in as much as four hours of travel time each way.<sup>283</sup>

Judge Keith responded to this evidence with a compelling and compassionate summation of the situations faced by many young women seeking abortions. He gave special attention to the additional challenges facing those who live in rural areas:

Sitting in its "ivory tower," the majority ignores the realities of the situation and claims that making phone calls over a forty-eight hour period cannot be characterized as a substantial burden, thereby mocking the plight of these young girls for whom making a single telephone call, particularly during the court's business hours, may mean walking a long distance in a rural area to make a toll call from a public telephone, all without arousing suspicion or having her conversation overheard and her confidentiality destroyed.

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Furthermore, in the case of small rural towns where this type of bypass may most likely be sought, the minors may feel that their confidentiality and anonymity are also at stake if they have to contact a law office where a relative or acquaintance may be employed as support staff.<sup>284</sup>

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<sup>281</sup> *Id.*

<sup>282</sup> *Id.* at 486-87.

<sup>283</sup> *Id.* at 486-87.

<sup>284</sup> *Id.* at 478.

Judge Keith thus took seriously the hardships the Tennessee law created – because of spatial isolation and lack of anonymity – for young rural women in particular.

But judicial responses to lack of anonymity in other contexts have been more realistic and empathic than the majority in *Sundquist*. As is the case with spatial isolation, courts outside the abortion context have held the lack of anonymity with which rural residents live to be legally relevant. That rural residents are aware of community events and each others' lives is noted in both civil and criminal decisions.<sup>285</sup> One court assumed, for example, that an informant was more credible because the “basis of his knowledge sprang . . . from rural soil rather than from the faceless anonymity of an urban swarm.”<sup>286</sup> The court characterized reputation in a rural place as “better substantiated.”<sup>287</sup> The lack of anonymity associated with rural communities arises most often in relation to whether a defendant can get a fair trial in a rural venue.<sup>288</sup> A North

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<sup>285</sup> See, e.g., *Roberts v. Dutton*, 368 F.2d 465, 470 (5th Cir.1966) (taking judicial notice that in a rural county “information concerning witnesses and events is more generally known than in large cities”) cited in *Foxworth v. Florida*, 267 So.2d 647, 651 (Fla. 1972); *State v. Havlena*, 1998 WL 939628 (Neb. App. 1998) (circumstances of convict ordered to pay restitution not a “deep secret” in rural community).

<sup>286</sup> *Stanley v. State*, 19 Md. App. 507, 521 n.7, 313 A.2d 847, 856, n. 7 (1974) (citing *United States v. Harris*, 403 U.S. 573 (1971)).

<sup>287</sup> *Id.* See also *Idaho v. Missamore*, 114 Idaho 879, 880-881 (1988) (police officer stopped defendant driver based on his personal knowledge that defendant had no drivers license).

<sup>288</sup> See, e.g., *State v. Brown*, 4 Kan. App. 2d 729, 734 (1980)(exercise of peremptory challenges in chambers is acceptable in rural areas because jurors are often known to parties and counsel); *State v. Hunter*, 241 Kan. 629, 636 (1987) (suggesting jury selection should be more closely scrutinized in rural areas where it is “inevitable that members of jury panel will be acquainted with trial participants or victims”); *Knapp v. Leonardo*, 46 F.3d 170, 181 (2d Cir. 1995)(Oakes, J., dissenting)(arguing for grant of habeas petition because 83% of 1417 members of jury pool were disqualified for cause from “emotionally super-charged” trial in rural New York).

Mere acquaintance by jurors with party or attorney is often insufficient to justify a change in venue or to constitute error. See, e.g., *Jernigan v. State*, 475 S.W.2d 184, 185-86 (Tenn. Crim. App. 1971) (“many cases are tried in rural areas wherein all of the jurors know all of the lawyers, litigants and witnesses” and this is not necessarily grounds for mistrial); *Peyton v. State*, 897 So.2d 921, 953-54 (Miss. 2003) (“not unusual for potential jurors to know parties and witnesses in trials” in rural areas, but where jurors assure courts they can be impartial, no error to permit them to serve on jury); *Toyota Motor Corp. v. McLaurin*, 642 So.2d 351, 359-61 (Miss. 1994)(McRae, dissenting) (“in our rural state the situation where most citizens of a county have had someone in their family represented by either party’s counsel occurs more often than not”); *State v. Brooks*, 563 P.2d 799, 801 (Utah 1977)(“almost impossible, in some of our rural counties, to choose a jury who did not know witnesses and did not know the parties or something about the parties”; knowledge alone insufficient to disqualify from jury service); *Dupuy v. Allara*, 457

Carolina decision, for example, held that the defendant could not have gotten a fair trial in a "small, rural and closely-knit county where the entire county was, in effect, a neighborhood."<sup>289</sup>

The issue of possible bias also arises in civil cases. A Mississippi trial judge in 1985 referred to "these rural counties that we have in Mississippi where the people know each other."<sup>290</sup> The North Dakota Supreme Court wrote in 1994 that "in nearly all counties in our state . . . most jurors know something about every person in the county, their families, or their businesses."<sup>291</sup> Judges refer to "gossip"<sup>292</sup> or "word-of-mouth publicity,"<sup>293</sup> that may interfere with a defendant's ability to get a fair trial in a rural locale.<sup>294</sup>

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S.E.2d 494, 499 (W.Va. 1995)("fact of life that in many rural jurisdictions" local physicians are likely to have contacts with prospective jurors); *Keyes v. Amundson*, 343 N.W.2d 78, 86-87 (N.D. 1983) (noting unavoidability of jurors viewing accident scenes in rural counties).

<sup>289</sup> *State v. Jerrett*, 309 N.C. 239, 256, 307 S.E. 2d 339, 348 (1983). The court overturned the conviction and granted a new trial to defendant who had been tried in a county with fewer than 10,000 inhabitants. The victim in that case was "a well-known and respected dairy farmer," and a third of potential jurors had "acknowledged familiarity" with him or some member of his family. *State v. Vereen*, 312 N.C. 499, 510, 324 S.E.2d 250 (1985) (distinguishing case at bar from facts of *Jerrett*). *Cf. State v. McKisson*, 2003 WL 21649214, at \*6 (N.C.App.) (unpublished case) (upholding denial of change of venue where jurors did not personally know victims or their families, in spite of defendant's arguments that crime had "rocked" rural county and pretrial publicity had "infected" jury pool).

<sup>290</sup> *Great American Surplus Lines Ins. Co. v. Dawson*, 468 So.2d 87, 90-91 (Miss. 1985).

<sup>291</sup> *State v. Brooks*, 520 N.W.2d 796, 802 (N.D. 1994) (Meschke, J., concurring) (justifying N.D. Rev. 606(b) which does not permit affidavits, evidence, or testimony by a juror about the jury's discussion, even when a juror discloses to the others some personal knowledge about a party). *See also Farmers Union Grain Terminal Ass'n v. Nelson*, 223 N.W.2d 494 (1974) (noting difficulty in finding a family in a rural community that had not done business with defendant-owned or operated facility, but this would not indicate a direct relationship that should disqualify from jury service).

<sup>292</sup> *See, e.g., People v. Nesler*, 66 Cal.Rptr.2d 454, 476 & n.1 (Cal. 1997) ("hometown trial" in rural community "entailed the strong chance that jurors would hear gossip about the case and about defendant"; court referred to "likelihood of local gossip, rumor, and discussion of the case within this close-knit community"); *State v. Breeding*, 526 N.W.2d 465, 468-469 (N.D. 1995) (defendant argued that "rumor, gossip, and speculation 'small community living generates as a matter of course' should have been sufficient alone" to support his motion for change of venue but court refused, noting that to accept argument would require change of venue in every serious criminal prosecution in rural county).

<sup>293</sup> *State v. White*, 311 N.C. 238, 242, 316 S.E.2d 42, 44 (1984).

<sup>294</sup> *See, e.g., Wolfe v. Brigano*, 232 F.3d 499, 500-04 & n.1 (6<sup>th</sup> Cir. 2000)(Wellford, J., concurring) (trial judge acknowledged "we're in a small community and you hear matters, and . . . you read things"); *Roberts v. C.W. Adams & Son Co.*, 110 S.W.314, 316 (Ky. App. 1908)(describing rural neighborhood "where everybody knows in a general way everybody's business").

In light of judicial recognition, in a range of legal contexts, of the familiarity or lack of anonymity that characterizes rural areas, judicial failure to take seriously this reality as it relates to abortion regulations is especially unfortunate. In an early essay on *Roe v. Wade*, MacKinnon argued that most women do not control the conditions under which they have sex. She asserted, for example, that women may be reluctant to use birth control because of its social meaning – specifically signaling a woman’s sexual availability.<sup>295</sup> A related argument applies to rural women, who may be less likely to use contraceptives because of their lack of anonymity in seeking such services in their communities. If this is true regarding contraceptives, it is surely also true regarding abortion, particularly given the more conservative attitudes rural residents hold on this subject.<sup>296</sup> This is all the more reason rural women may be deterred from abortion by judicial bypass procedures that so casually risk their anonymity.

#### **4. Conclusion**

Given that abortion is the sole legal context in which courts have been confronted with realities of rural women as a class, it is an understatement to say that the response has been disappointing. *Casey* and its progeny have consistently discounted or denied the impact that spatial isolation and lack of anonymity have on rural women who seek to exercise their constitutional right to procure an abortion. Suggesting that physical distance, lack of transportation, and economic vulnerability are insufficient to deter women from pursuing an abortion – that they are not substantial obstacles – is callous and insulting. This is particularly so when those deciding sit, as Judge Hamilton put it,

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<sup>295</sup> Catharine A. MacKinnon, *Privacy and Equality: Beyond Roe v. Wade* (1983) in FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 93-102 (1987), *discussed in* MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 48 (2d ed. 2003).

<sup>296</sup> See *supra* notes [ ] and accompanying text.

amidst an urban sprawl, with myriad services and public transportation.<sup>297</sup>

These decisions are especially disappointing in light of law's recognition elsewhere of the hardships associated with this aspect of rural living. Indeed, ironically, federal judges in another abortion context have called attention to the plight of rural women. In contrast to the lack of empathy the same courts have shown to rural women in relation to application of the undue burden test, courts upholding the constitutionality of the Freedom of Access to Clinic Entrance Act ("FACE") have relied on the needs of rural women to justify their decisions. In the 2000 decision in *United States v. Gregg*, for example, the Third Circuit upheld FACE, concluding that the misconduct it proscribes exacerbates the "shortage of abortion-related services exists in this country."<sup>298</sup> The court noted that 83 percent of all U.S. counties have no abortion provider, and that the shortage is particularly acute in rural areas because reproductive health clinics tend to be "located primarily in metropolitan areas."<sup>299</sup> Ironically, this is the same Court of Appeals which, in *Casey*, dismissed a statistic demonstrating that 82 percent of counties have no provider. "In a rural community," the Third Circuit wrote in *Gregg*, "only one provider usually exists in a large geographical area, thus making it a preferred target for anti-abortionists because elimination of that provider eliminates abortion services for all

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<sup>297</sup> See *supra* notes [ ] and accompanying text (discussing *Casey*'s core holding regarding waiting period).

<sup>298</sup> 226 F.3d 253, 264 (3d Cir. 2000) (citing legislative record). See also *United States v. Bird*, No. 95-20792, 1997 U.S. App. LEXIS 33988 (5th Cir. Sept. 24, 1997) (upholding constitutionality of FACE, relying on Congress's commerce clause power; among supporting facts was that only abortion provider in South Dakota commutes from Minnesota); *United States v. White*, 893 F. Supp. 1423 (C.D. Cal. 1995) (finding that violent attacks on abortion facilities "sharply curtail access to health care for many women, particularly women living in rural areas"). Indeed, *Terry v. Reno* discusses how abortion violence in some rural areas forced medical clinics to "... stop providing not only abortions, but other reproductive services as well, including pre and post natal care." 101 F.3d 1412, 1416 (D.C. Cir. 1996).

<sup>299</sup> *Gregg*, 226 F.3d at 264.

women in that area.”<sup>300</sup>

While *Gregg* and other FACE decisions have acknowledged rural realities associated with physical distance in the context of concluding that an interstate market for abortion services exists, courts applying the undue burden test have stubbornly downplayed this fact and the gravity of the obstacles it creates for rural women. *Gregg* observed that the closure of an abortion provider would “eliminate abortion services for all women” in a rural area that had a single abortion provider. But *Casey* and its progeny have assumed that rural women will be able to get abortions regardless of the distance they must travel to an abortion provider, even if they must make the trip twice. Current “undue burden” precedents – in sharp contrast to *Gregg*’s “elimination” language – conclude that rural women will simply experience inconvenience in exercising this fundamental right.

#### **IV. Conclusion**

No law addresses the deepest, simplest, quietest, and most widespread atrocities of women’s everyday lives. The law that purports to address them . . . does not reflect their realities or . . . is not enforced. It seems either the law does not exist, does not apply, is applied to women’s detriment, or is not applied at all. The deepest rules of women’s lives are written beneath or between the lines, and on other pages.<sup>301</sup>

Catharine A. MacKinnon (2005)

Angela Harris argued almost two decades ago that, “to energize legal theory, we need to subvert it with narratives and stories, accounts of the particular, the different, the

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<sup>300</sup> *Id.* at 264 (citing H.R.Rep. No. 103-306, at 8, U.S.C.C.A.N., at 705). The cases do not discuss what the Senate considers to be “rural”; they do, however, mention particular states that are considered rural, such as Wisconsin. H.R. Conf. Rep. No. 103-488, 103d Cong., 2d Sess. 1994, 1994 WL 168882 (May 2, 1994).

<sup>301</sup> MACKINNON, WOMEN’S LIVES, MEN’S LAWS, *supra* note 3, at 34 (2005).

hitherto silenced.”<sup>302</sup> I have begun here to do precisely that: to energize feminist legal theory by surfacing the stories of rural women, one group who have been overlooked, misunderstood and thus silenced. Rural women have been silenced not only because of the lack of power that stems from their socioeconomic disadvantage, but also because of their physical distance from public places, from centers of power, from services, and from opportunity of all sorts. The deepest atrocities of their every day lives have often gone unseen, without legal redress due in part to that same isolation, but also because of our society’s pervasive urban presumption. The vulnerability and hardship with which they live have been discounted – or simply held against them as their fault – as their children have been taken away, and as they have been faulted for their acts of self-preservation. The fundamental right to abortion has been denied to many of them as restrictions on that right have been upheld as inconsequential, even as evidence has shown how heavily the restrictions weigh upon them.

Judges in many of the cases I have discussed may not understand that rural women generally have less economic, social, cultural and political power than both urban residents and rural men. They may not understand that spatial isolation and lack of anonymity, for example, limit these women. But if legal decision-makers do in fact understand these realities, they are foolish to assume that these women are free, equal and responsible when they fail to hold a job, contact their children, simply walk away from an abusive relationship, or get an abortion in the face of very real obstacles.<sup>303</sup>

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<sup>302</sup> Harris, *supra* note 7 at 615.

<sup>303</sup> I analogize here to a statement by Catharine MacKinnon, who wrote: “The assumption is that women can be unequal to men economically, socially, culturally, politically, and in religion, but the moment they have sexual interactions, they are free and equal.” The Guardian, Interview with Catharine MacKinnon Are Women Human? (April 12, 2006), available at <http://www.guardian.cog.uk/gender/story/0,,1751983,00.html>.

Rural women are not playing on the same field that urban women do any more than women of color are playing on the same field on which white women play. We no longer presume that the same laws that will serve the interests of women in the United States will necessarily serve the interests of women in Azerbaijan or Norway or Mozambique.<sup>304</sup> We understand that laws do not apply in a cultural vacuum. Just as we have become sensitive to culture,<sup>305</sup> we must become sensitive to place, to spatiality, to geography. We must become sensitive to rurality, and we can only begin to do that by acknowledging its very existence, by learning to see it.

I have written in this article of rural women as a group, and I have claimed that they have many common concerns, although I am acutely aware of the differences among rural communities,<sup>306</sup> as well as among rural women. But “[e]ven a jurisprudence based on multiple consciousness must categorize,” for without categorization, each individual is isolated, and moral responsibility and social change are impossible.<sup>307</sup> I thus name the category “rural women,” even while agreeing with Angela Harris that such categories should be “explicitly tentative, relational, and unstable.”<sup>308</sup>

We must begin – and continue – to investigate the intersection between gender and spatiality, including its impact on autonomy and moral agency, the complexities of women’s productive and reproductive roles, and the web of connections that links these

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<sup>304</sup> See, e.g., Convention on the Elimination of All Forms of Discrimination against Women, G.A. Res. 34/180, 34 U.N. GAOR Supp (No. 46), at 193, U.N. Doc A/34/46 (Dec. 18, 1979).

<sup>305</sup> See, e.g., Leti Volpp, *Feminism v. Multiculturalism*, 101 COLUM L. REV. 1181 (2001); Madhavi Sunder, *Piercing the Veil*, 112 YALE L. J. 1399 (2003).

<sup>306</sup> A common expression among rural scholars is, “When you’ve seen one rural area, you’ve seen one rural area.” See *Place Matters: Addressing Rural Poverty*, *supra* note 32, at 3. See also J. Dennis Murray and Peter A. Keller, *Psychology and Rural America: Current Status and Future Directions*, 46 AM. PSYCHOL. 220, 222 (March 1991) (noting diversity in cultures, occupations, wealth, lifestyles, and physical geography across rural America); Charles Fluharty, *Refrain or Reality: A United States Rural Policy*, 23 J. LEGAL MED. 57, 58 (2002) (that rural areas are so diverse is a public policy challenge).

<sup>307</sup> Harris, *supra* note 7, at 586.

<sup>308</sup> *Id.*

with societal and community expectations.<sup>309</sup> Like any other aspect of one's situation or any marker of identity, living in a rural area or "being a rural woman" does not exist in isolation. Literary theorists Creed and Ching, in arguing for scholarly attention to the rural-urban dichotomy, have observed that "contemporary discussions of the fragmentation and recombination of identities locate this process almost exclusively in the city."<sup>310</sup> This must change if the law is to do justice in the lives of rural women.

While I have begun the task of theorizing the rural, practical lessons should also be taken from my analysis and critique.<sup>311</sup> First, it does not pay for advocates to be subtle about rural realities. Lawyers litigating cases such as those I have discussed must be willing to explain how the rural context alters the power dynamics and limits actors' options, whatever the legal right or issue at stake. Judges and other legal decision-makers must be taught how rurality constrains autonomy and choice.

Second, the use of this word "rural" may disserve rural women. I have characterized as "rural" many of the situations and settings I have discussed, just as the litigants, attorneys or judges did. Rural women as litigants, however, might be wiser to use terms such as spatial isolation or lack of anonymity to focus upon the precise rural characteristic that is relevant to the inquiry. Doing so should help moderate the rhetorical potency of the term "rural," which so often carries positive, even idyllic associations.<sup>312</sup> Those associations and the notion that rural hardships are ameliorated by the scenic and

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<sup>309</sup> See Tickamyer, *supra* note 4, at 723 (calling for inquiry into the "complexities of the relationship between women's productive and reproductive roles and activities, the ways these link to other societal and community roles and responsibilities, and notably, the intersection between gender and spatial dimensions of poverty and welfare").

<sup>310</sup> KNOWING YOUR PLACE, *supra* note 2, at 3. Professors Ching and Creed have also argued that "the city remains the locus of political economic and cultural power." *Id.* at 17.

<sup>311</sup> BAER, *supra* note 1, at 80. "While we claim to derive theory from experience, the human mind cannot make sense of experience without some sort of theory, however rudimentary . . . it is misleading to say that theory comes from practice; they reinforce each other." *Id.*

<sup>312</sup> See *Rural Rhetoric*, *supra* note 8, at Part I (manuscript pages 12-15).

serene aspects of rural living may obscure or disguise the challenges the rural resident is facing.<sup>313</sup>

As Judith Baer has observed, “[f]acts do not interpret themselves.”<sup>314</sup> Judges and juries apply law to facts and, in so doing, give legal meaning to those facts and determine their legal significance. Those who care about the well-being of women – all women – must find new ways to help legal decision-makers understand the facts that comprise the context in which rural women live and make decisions. Catharine MacKinnon has written that it is an “aspiration indigenous to women across place and across time” to be “no less than men . . . not to lead a derivative life, but to do everything and be anybody at all.”<sup>315</sup> Rural women share that aspiration, and feminist theory can inform practice to help them realize it.

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<sup>313</sup> Rural sociologists have observed the “largely nostalgic and romantic image of rural living” along with the myth of “country living and family life as simple, pure, and wholesome; slower paced; free from pressures and tension; and surrounded by pastoral beauty and serenity.” Raymond T. Coward & William R. Smith, Jr., *Families in Rural Society*, in *RURAL SOCIETY IN THE U.S.: ISSUES IN THE 1980S* 77 (Don A. Dillman & Daryl J. Hobbs eds., 1982). Rural communities are commonly envisioned as “safer, friendlier, better places to raise children, as having a simpler lifestyle, cleaner environment, and as being closer to outdoor recreation.” Andrew J. Sofranko, *Transitions in Rural Areas of the Midwest and Nation*, in *RURAL COMMUNITY ECONOMIC DEVELOPMENT* 21, 34 (Norman Walzer ed., 1991). See also W.K. KELLOGG FOUND., *THE MESSAGE FROM RURAL AMERICA 2004 VS. 2002* at 1 (2004), available at [http://www.wkkf.org/Pubs/FoodRur/Media\\_Coverage\\_of\\_Rural\\_America\\_00253\\_04093.pdf](http://www.wkkf.org/Pubs/FoodRur/Media_Coverage_of_Rural_America_00253_04093.pdf) (77% of terms media used to describe rural America in 2004 had a positive tone, including praise for residents’ behavior, e.g., “good values,” “strong work ethic,” and aesthetic judgments such as “picturesque” and “pastoral” while only 23% were negative).

<sup>314</sup> BAER, *supra* note 1, at 80.

<sup>315</sup> Catharine A. MacKinnon, *Whose Culture? A Case Note on Martinez v. Santa Clara Pueblo*, in *FEMINISM UNMODIFIED*, *supra* note 295, at 63, 67-68.