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ABORTION AND CONSENSUS: THE FUTILITY OF SPEECH, THE POWER OF DISOBEDIENCE

CHARLES R. DiSALVO*

“It is better to allow our lives to speak for us than our words.”¹

—Gandhi

“Abortion is the most difficult moral and legal issue of our time, arousing deep emotions on both sides.” Enough law review articles opening with words to that effect now have been published that, if they fueled a power plant, there would be enough energy to supply all the homes in Philadelphia for a year.

We do not need another article to lay out the moral and legal issues for us. The fact is that under current conditions continued discussion of the abortion issue is a dead end, a waste of time, a pointless exercise in chest-beating. No amount of verbal swordplay, rational debate, or moral argumentation between the sides can resolve the issue. Abortion, to borrow a phrase from Harvard’s Gene Sharp, is a fundamental, “no-compromise” issue.²

At bottom the abortion issue is not about the law. No court decision, certainly not *Webster*³ nor even any of *Webster*’s progeny, can quiet the passions abortion arouses. The abortion issue is about something more fundamental than law. It is about deciding what levels of life are worthy of protection.

Thus, the only possible way to end the abortion debate is to achieve consensus on the underlying moral issues. If one side can change the moral *feelings* that underlie and fuel the larger debate, law, politics, and religion will mimic the change. Consequently, the side that changes these feelings will be the side that wins. Moral feelings about abortion, however, cannot be changed with words.

Enter civil disobedience.

When words fail to resolve fundamental, no-compromise issues, an open society has two choices: political violence or civil disobedience. Political

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1. GANDHI: ALL MEN ARE BROTHERS 55 (K. Kripalani ed. 1986).

2. See G. SHARP, SOCIAL POWER AND POLITICAL FREEDOM 118 (1980).

3. *Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (1989).

violence coerces the opponent through force into acquiescence. Civil disobedience, properly understood and practiced, leads the opponent into areas that make productive discussion possible.

Because abortion remains a constitutionally protected right, only one side can employ civil disobedience. The pro-life movement, largely through Operation Rescue, has taken advantage of this opportunity. As a result, I address myself here to the pro-life movement. In the post-*Webster* future there may be occasion to apply some of the principles articulated here to the pro-choice movement.

THE FUNCTIONS OF CIVIL DISOBEDIENCE

In the past, civil disobedience has given American society a way out of no-compromise situations. At the turn of the century, women found that they could not obtain the right to vote in federal elections through the normal democratic channels. They resorted to civil disobedience. In mid-century, blacks found that voting and lobbying were ineffective for putting teeth into Supreme Court decisions condemning segregation. They resorted to civil disobedience. And just two decades ago, many Americans of good conscience found no way in the traditional political system to disengage their country from an immoral Vietnam War. They too resorted to civil disobedience.

Of these episodes in civil disobedience history, the disobedience of the civil rights movement is the best paradigm for demonstrating the two essential functions of civil disobedience that make it a substitute for political violence. The civil rights movement shows that disobedience, used properly, can (1) *advance debate on no-compromise issues* and (2) *promote curative, institutional action on those same issues* when normal democratic procedures fail.

Because it has these two uses, civil disobedience can have substantial impacts upon public debate and opinion—so substantial, at times, as to create new public policies, new social attitudes, and even new law.

Two facets of the civil rights movement illustrate the effective use of civil disobedience tactics: the lunch counter sit-ins and the Freedom Rides.

The sit-ins were aimed at eating places that had been segregated by custom and, in a few instances, by ordinances or statutes that expressly prohibited blacks from eating in restaurants with whites.

Acting somewhat impulsively, four courageous college students engaged in the first sit-in in early 1960. The movement quickly spread and regular *en masse* arrests of would-be diners for breach of the peace, disorderly conduct, and trespass began. Three thousand six hundred persons were arrested during the twenty months following the first sit-in. Many of those arrested were subjected to the taunts and fists of white toughs.

This phase of the civil rights disobedience campaign was a ringing success. Sit-ins gave black leaders the leverage they needed to negotiate equal access to many places of business. According to historian Louis Sobel, by September 1961, "eating facilities in one or more establishments in 108

. . . cities had been desegregated as a result of the sit-ins."⁴ In the process, the attitudes of some toward the race question began to soften, and Jim Crow laws fell by the wayside.

The sit-ins resulted in changes in the policies of entrepreneurial establishments throughout much of the South and the border states. The Freedom Rides, by contrast, resulted in the creation of new regulatory law. Just as blacks were forbidden to eat at public lunch counters, so too were they prohibited from using eating and restroom facilities at bus stations throughout the southern and border states. The Freedom Rides challenged the customs and Jim Crow laws that held this kind of segregation in place. The Congress of Racial Equality (CORE), the group that organized the first Freedom Ride, also aimed at forcing the Kennedy administration into a stronger pro-civil rights posture.

The first Freedom Ride was a difficult experience. The trip was slated to run from Washington, D.C. to New Orleans. The first arrest occurred on May 8, 1961, when one Rider was arrested for attempting to get his shoes shined in a white barber shop in a bus terminal. The first violence occurred the next day when two Riders were beaten while attempting to use a "white only" waiting room. Serious violence took place in Anniston, Alabama when the Riders were greeted by a mob carrying chains, sticks, and iron bars. The Riders were beaten while the police looked on. Later, the mob chased the bus down the road, smoke-bombed it, trapped the passengers in smoke and flame, and beat the passengers again as they fled. Eventually the Ride proceeded to Montgomery, and then to Jackson, where James Farmer, a CORE organizer, and the remaining Riders (many of whom were new recruits replacing the injured original Riders) were arrested and jailed for violating Jim Crow laws banning integration. Here the original Freedom Ride ended, but duplicates quickly sprang up all around the South as hundreds of new disobedients put their lives at risk for desegregation.

Before the Freedom Rides came to an end hundreds were arrested on a variety of charges. These acts of civil disobedience produced national media attention and with it pressure upon the Kennedy administration to seek relief from the Interstate Commerce Commission (ICC), the body with jurisdiction over the bus terminals. Acting on the request of Attorney General Robert Kennedy, the ICC issued a variety of rules disallowing racial segregation in the operation of interstate buses and terminals. In addition, the ICC prohibited interstate carriers from using segregated terminals. Finally, the ICC's stricture against racially segregated seating was ordered printed on all interstate tickets.

In this instance, the political pressure produced by the civil disobedience of the Riders resulted in the enactment of regulatory law, backed by the enforcement powers of the federal government.

The history of the civil rights movement teaches us that civil disobedience can alter the debate and forcefully advance discussion of no-compromise

4. L. SOBEL, *CIVIL RIGHTS, 1960-1966* 79 (1967).

issues. When blacks found that quiet pleas for the enforcement of their rights went unanswered, they found that arrests and beatings at the hands of the police and the public worked to create a national debate on the race question. The disobedients caused public discussion to focus upon issues of vital importance that the normal democratic processes had ignored or refused to address.

The action-promoting function of civil disobedience builds upon and extends the work of the debate-advancing function. Civil rights disobedience provides a paradigm of the specific dynamics of that disobedience which is effective in promoting curative institutional reaction.

The first element making civil rights disobedience successful was the voluntary suffering the disobedients endured while challenging the status quo. Their suffering aroused a public which asked, "Why are these blacks being beaten?" "Why are these disobedients suffering with such patience and not responding with anger or violence?" By being led to ask such questions, the public was made to perceive a connection between the disobedients' suffering and the evil under protest.

Suffering led to the second element, sympathy. Suffering enabled the public to focus on the heart of the disobedients' grievances and, as a consequence, to sympathize with the disobedients' sincere efforts to set things right.

Sympathy set in motion the forces that resulted in the third element in this chain reaction, conversion. Politicians, business people, and others felt the pressure of a popular sympathetic response and reacted by changing their positions.

Finally, the lunch counter sit-ins and the Freedom Rides each forced an institutional response that effectively ended the crises those disobedience movements had created. The customs and laws that required segregated dining atrophied. The Kennedy administration, through the ICC, enacted new regulatory law that prohibited segregation in interstate bus transportation. In each case, civil disobedience led to social change. In each case, the same process was at work; the disobedients endured suffering; the public raised questions, then sympathized with the disobedients; the opponent experienced some form of conversion; and finally, curative societal or institutional action occurred.

OPERATION RESCUE

Each side of the abortion controversy has deeply held moral, social, and political views. If anything in the abortion debate can be a matter of common agreement, it is that each side has, at least until now, been unsuccessful at creating a broad and deep public consensus for its own views.

In an apparent reaction to this failure to create consensus by use of traditional democratic methods, the pro-life movement has turned to civil disobedience. Participants in "Operation Rescue" typically block abortion facilities while singing and praying. Despite being instructed not to do so,

participants sometimes engage pregnant women and pro-choice advocates in discussion and debate. Rescuers are often arrested for trespass, disorderly conduct, and similar charges. When arrested, participants go limp, and, therefore, sometimes also are charged with resisting arrest. Defendants often refuse to identify themselves, and when tried, they erect defenses, including the necessity defense.

Let us examine the effectiveness of this civil disobedience.

A. *The Movement Has Advanced the Debate*

Has pro-life disobedience advanced the abortion debate? The campaign has received moderately good coverage in the secular and religious media at both the national and local levels. As a consequence, for a time public discussion centered not on the pro-choice movement and its concerns, but on the pro-life movement and its concerns. This focus shifted following *Webster*, but for some time disobedience gave its practitioners control of the debate agenda. It is fair to say, therefore, that insofar as the debate-advancing function of disobedience is concerned, the anti-abortion civil disobedience campaign has had its successes.

The effectiveness of pro-life disobedience for creating the conditions necessary for a curative societal or institutional response, however, is another question altogether. The movement faces a large number of serious obstacles blocking its way to success.

B. *Anatomy of the Movement's Failure to Produce a Curative Response*

Operation Rescue's failure to produce a curative response to its disobedience is due to the movement's failure to comply with the traditional requirements of effective civil disobedience, the movement's paradoxical failure to adjust old tactics to a new situation, and the failure of the movement to gain credibility with the American public. In this section of this essay I will analyze each of these failures.

1. The movement has failed to meet the traditional requirements of effective civil disobedience.

a. An absence of connections

The ability of any act of civil disobedience to evoke sympathy depends in part on the closeness of the connection between the evil being protested and the act of disobedience. In this respect there are two characteristics of the current disobedience campaign that limit its effectiveness. These characteristics have to do with the identity of those being arrested and the charges on which they are arrested.

In the civil rights movement those whose rights were at stake were those arrested. But in anti-abortion disobedience those arrested are not those whose rights are at risk. Fetuses are at risk. The use of adults as surrogates weakens the movement's evocative abilities. But it is not just a question of

having adult surrogates. The use of adult *men* in anti-abortion disobedience weakens the evocative possibilities further. Just as whites had a legitimate interest in integration, men also have a legitimate interest in abortion. But because of the special interests of women in the abortion controversy, the use of adult *male* surrogates puts an unnecessary drag on the movement's evocative capacity. The public's ability to perceive a connection between the disobedience and the evil protested is weakened.

A second type of connection concerns the act of disobedience itself. The closer the connection the act itself has to the evil being protested, the more evocative the disobedience is. The Freedom Rides offer the classic illustration of this principle. The Riders were arrested and beaten nearly to death for doing *exactly* that which they were forbidden to do and which they claimed a right to do.

By contrast, anti-abortion disobedients are being arrested for trespass, disorderly conduct, and the violation of injunctions. None of these charges is related directly to the destruction of prenatal life. There is nothing inherent in the nature of any of these charges that relates to an abortion. Consequently, the public has some trouble relating the disobedient act to the evil being protested.⁵

b. Depersonalizing the opponent

To be disobedient requires a vast amount of self-confidence. An excess of self-confidence, however, easily leads to an attitude that leaves no room for respect for the opponent, an intolerance of ambiguity, and a failure to recognize one's own fallibility. To avoid arrogance, self-confidence must be tempered by the realization that the opponent, though wrong, may be acting in good faith and the further, but related, realization that the disobedient may be the one who is wrong. It was for this reason that Gandhi put such great stress on nonviolence:

[If nonviolence] is used in a cause that is unjust, only the person using it suffers. He does not make others suffer for his mistakes. Men have before now done many things which were subsequently found to have been wrong. No man can claim that he is absolutely in the right or that a particular thing is wrong because he thinks it is so, but it is wrong for him so long as that is his deliberate judgment. It is therefore meet that he should not do that which he knows to be wrong, and suffer the consequence whatever it may be. This is the key to the use of soul-force.⁶

Participants in Operation Rescue have given no sign to the public of the humility of which Gandhi so eloquently wrote. Indeed, if there is one

5. This weakness in anti-abortion disobedience is shared by environmental disobedients who are arrested for scaling power plant fences and antimilitary disobedients who are arrested on burglary charges for entering military establishments.

6. M. GANDHI, *INDIAN HOME RULE*, quoted in K. Kripalani, *supra* note 1, at 81.

thing that is true of Operation Rescue, it is that there is no recognition of the existence of others' moral claims.⁷ In particular, Rescue disobedients have demonstrated an inability to recognize that the pro-choice side is making a moral claim about the autonomy of women. Operation Rescue has thus created an image of itself that is unappealing to a public that appreciates the complexity of the abortion issue.⁸ The image Operation Rescue has created is an image of arrogance and moral superiority. In this way Operation Rescue has made it harder on itself to create public sympathy for its cause.

Beyond this damage it has done to itself, Operation Rescue's lack of modesty in asserting moral claims has prevented it from seizing a rare opportunity to make substantial progress toward consensus in the abortion debate. Operation Rescue's failure to recognize the existence of pro-choice moral claims is to treat the opponent without respect, as alien to the debate, as "other." By contrast, recognizing the existence of others' claims (as distinct from recognizing their validity) would cause the public to view Operation Rescue as a reasonable endeavor and to listen more attentively and sympathetically to its claims. Operation Rescue's disobedience has failed to get a sympathetic audience, however, because, in part, it is conducted with no admission of fallibility.

As long as Operation Rescue continues to depersonalize pro-choice advocates, there is no possibility of winning the public's ear in such a way as to cause a movement toward consensus. The public senses quite clearly what Operation Rescue does not: that all of us, pro-life and pro-choice, live in community. Successful communities operate on shared values. One essential shared value is respect for the dignity of all. Because Operation Rescue shows no respect for its opponents, it cannot make a contribution to community life except by coercion. When contributions are made by coercion, they must be maintained by coercion. Such changes are not long lasting and, therefore, not welcome.

Changes achieved in a context of respect last. This understanding was at the root of Gandhi's insistence that his followers love their opponents. When General Jan Smuts imprisoned Gandhi in South Africa, Gandhi presented the General with a pair of sandals he had made for him while in prison. King, Gandhi's spiritual disciple, preached vigorously that the black man could overcome racism only in a context of love for the white man.⁹ Now it is incumbent upon pro-life disobedients, if they wish to be successful,

7. It can just as easily be said that pro-choice extremists fail to recognize the existence of the claims of the pro-life forces.

8. See, e.g., Saletan, *There's No Pro-Choice Majority Either*, Wall St. J., June 27, 1990, at A-12 (reporting that the public opinion on abortion is "complex and ambivalent").

9. "[N]on-violent resistance does not seek to defeat or humiliate the opponent, but to win his friendship and understanding. . . . The end is redemption and reconciliation. The aftermath of nonviolence is the creation of the beloved community, while the aftermath of violence is tragic bitterness." M. L. KING, *A TESTAMENT OF HOPE* 7-8 (J. Washington ed. 1986).

to find ways of giving modern expression to the tactical and moral imperative that they love their enemies. At the moment, pro-life disobedients are acting as if they can conquer their opponents by shouting a little louder, producing catchier slogans, massing larger crowds, and mounting more compelling legal and scientific arguments. This is a road to futility. No one is listening.

Pro-life disobedients should instead make every effort to love their opponents—women and men who advocate abortion rights, women who abort, doctors who perform abortions, clinic and hospital administrators, and politicians who enact and defend permissive abortion laws. Such love is always a surprise. Our society conditions us to expect no-holds-barred hate and the head-on collision of views. Love takes us by surprise, opens our hearts, and then our minds. Love is disarming to the opponent. Love gives the lover credibility. Love opens doors.

One manner of loving the opponent and reducing alienation is through redemptive suffering. At the moment, the noise of the movement speaks of arrogance. Redemptive suffering speaks of modesty, respect, and love.

c. Refusing to engage in redemptive suffering

The abortion debate is not going to be won by any side that limits its tactics to intellectualized argumentation or exhortations to believe in certain moral, religious, or political principles.

Civil disobedience can move people when argumentation and exhortation fail. But not all disobedience is so capable. Only civil disobedience that is characterized by sacrificial, redemptive, suffering is effective. Without such suffering a disobedient cannot generate public sympathy. If there is no sympathy, there are no conversions. If there are no conversions, there is no action.

But a disobedient with genuine love for her sisters and brothers on the other side of this debate is a disobedient whose suffering can be sacrificial. The disobedient who loves is a disobedient who endures taunts without response, who suffers physical violence without complaint, who is not angry, who allows arrest to come without resistance, who mounts no legal defense but welcomes punishment, who, with her sisters and brothers, gladly fills the jails—this disobedient generates public sympathy.

In contrast is the disobedient who has no love. This disobedient is one who is angry, who hurls epithets at the other side, who has to be dragged away from the arrest site and into court, who refuses to identify himself, who defiantly pleads not guilty, who complains of imprisonment—this disobedient generates no public sympathy.

The difference between these two types is all-important. The first disobedient *wants* to go to jail and says “I believe so strongly in my cause that I will sacrifice my liberty and, indeed, my body for it.” That type of disobedience—redemptive disobedience—is the type of disobedience that causes the public to sit up and take notice. When the public asks, “Why are these gentle, sincere people suffering?”, the channels of communication are open, free, and clear for the disobedient’s message to come through to

the public. And the way is then open for the other phases of consensus building—sympathy and conversion—to take place and lead to action.

By contrast, the second disobedient projects animosity, intolerance, and self-righteousness. As a consequence, the channels of communication with the public buzz with static, distortion, and noise. There is no room for the disobedient's ideas or feelings to get a hearing.

With a few notable exceptions, neither side in the abortion debate understands the need, source, or place for redemptive, sacrificial suffering in the resolution of no-compromise issues. While it is true that pro-life activists such as Joan Andrews have suffered in defense of the unborn (Andrews has undergone a lengthy imprisonment), their example and message largely have gone unreplicated. The great majority of Operation Rescue disobedients are no friends of redemptive suffering. They self-righteously chant and sing at their demonstrations, they sometimes press their moral claims by confronting incoming pregnant women, they resist arrest, they give pseudonyms to the police, they erect the necessity defense. The injuries suffered by pro-life disobedients at the hands of the arresting police—some serious¹⁰—have been a tragic waste. They have failed to generate sympathy precisely because the media—admittedly no friends of the pro-life movement to begin with—are alienated by the arrogance of Rescuers.

The failure of Operation Rescue to generate sympathy is happening in large part because pro-life supporters appear to have placed their trust in disobedience detached from sacrificial suffering.

This is all the more disappointing because as between the two competing movements it is the pro-life movement that professes to be acting out of a selfless love¹¹ and because it is the pro-life movement that has adopted a classic nonviolent tactic. The entire point of nonviolence is a refusal to engage in a *process* that is antithetical to the goal. Otherwise there is nothing to distinguish nonviolent and violent movements when each possesses admirable goals. If the goal of the nonviolent pro-life movement is love for the fetus, then love must characterize its means. A movement seeking a loving end betrays itself when it employs nonloving means. The use of nonloving means in a movement assures that under the new order that nonloving means will be an acceptable way of doing business by both the new regime and its opponents. A movement that employs nonloving means creates the seeds of its own destruction. The use of nonloving means signals to the outside world the true values held by the reformist movement.

I suggest that pro-life disobedients who profess to act from love, often employ nonloving means. Inferring moral superiority by singing and praying aloud, shouting at the opponent, and attempting to shame incoming women are nonloving means.¹² The press recently carried a picture of pro-life,

10. See Allen, *Police Brutality—But No Outrage*, Wall St. J., August 18, 1989, at A-6.

11. In the pro-life movement it is love for the unborn that is accented, while in the pro-choice movement the empowerment of women is accented.

12. "I have seen professed believers in Jesus bang on the car windows of women patients,

"consistent ethic,"¹³ disobedients presenting a fruit basket to the administrator of a hospital that performs abortions. This photograph is striking because it demonstrates what is so infrequently found in the movement: kindness extended to the opponent. Under the usual circumstances disobedients pray and sing aloud in a way that treats the opponent as the other, an object of pity, as one in need of the help of a superior, as one with no moral claim. What response to such tactics other than rejection can be expected from the public and the opponent? Far from being converted, opponents and the public are alienated by the disobedients' distancing themselves from the opponent in this way.

The lesson Operation Rescue must learn from the use of nonloving tactics is that arrogance alienates. It is love that converts.

d. Failing to accept punishment cheerfully

The optimal result of pro-life civil disobedience would be the focusing of public attention on the extinction of the fetus' existence as an insensitive act inconsistent with the respect our society shows for life in other contexts. This result would be optimal on the assumption, which I make, that this focusing of the public's attention would move the public to sympathy for the unborn. This must be an assumption those engaged in pro-life disobedience logically share.

Any tactic that detracts from this attention, therefore, reduces the chances that the public will sympathize with the unborn. I submit that the erection of defenses to the criminal charges that follow upon disobedience detracts from a focus on the extinction of the fetus and, therefore, makes it less likely that the public will feel itself sympathetic.

Contrast two possible scenarios. In the first scenario, one that Operation Rescue participants and similar activists repeat almost weekly, the disobedients resist arrest by going limp.¹⁴ They are dragged to police vans and taken to jail. Once there they refuse to give their names, saying that doing so identifies them with the nameless unborn. They plead not guilty and their cases are set for trial.

Such a scenario plays into the hands of the unsympathetic and sensation oriented popular media. The media love a show. Given the choice of covering the conflict involved in resisting arrest or tackling the infinitely harder issue of the morality of extinguishing the fetus, the media will pick the conflict

screaming at them, calling them "sluts" for wanting abortions. I heard one professed Christian holler out to a woman leaving the clinic "Is your baby dead yet?" causing her to burst into tears." Ravinsky, *Letter to Editor*, WITNESS, April, 1990, at 2-3.

Operation Rescue officially counsels against such behavior telling its participants that they "must refrain from any outbursts." OPERATION RESCUE ATLANTA, RULES OF RESCUE (August 1988).

13. For a description of the consistent ethic position, see *infra* note 20 and accompanying text.

14. Operation Rescue requires participants to pledge to go limp when arrested. See OPERATION RESCUE LOS ANGELES, OPERATION RESCUE LOS ANGELES: MARCH 22-25 (1989).

every time. The underlying substantive issue will be given little or no treatment.

A similar dynamic occurs at trial. A trial is, by definition, a conflict. The media love the drama created by the conflict of a trial. Attention focuses on *voir dire*, the personalities of the prosecutor, the judge, and the defense counsel, the clashes that inevitably arise during cross-examination, the return of the verdict—almost always guilty—and on the shouting matches that often occur outside the courthouse between opponents and supporters of the disobedients. These things are grist for television news. The substantive message again gets little or no treatment.

Contrast this with a second scenario in which a silence and peacefulness born of modesty dominate. The disobedients (all women) blockade a clinic in total silence. There is no praying, no singing, no talking to each other, no conversation of any sort with pregnant women or with pro-choice counter-protestors.¹⁵ When a disobedient is arrested she cooperates with the arresting officer. When the disobedient is booked, the disobedient gives her name. When the disobedient is taken before a judge, she cheerfully pleads guilty, asks for the maximum sentence, and cheerfully goes to jail.¹⁶

What do the public and media focus on in this scenario? There is nothing to focus on—except the message! The behavior of the disobedients in this scenario is disarming. There is no juvenile conflict to report. There is only the clash of pro-life and pro-choice beliefs to report. Into the silence created by the disobedients will rush the questions of the public. “Why are these gentle people sacrificing themselves? Why are they willingly going to jail? What beliefs do they have that would motivate such brave submission to punishment? Shouldn’t I stop and think about this for myself? Just what is going on here?”

This is one of the wonderful virtues of redemptive suffering—that it brings the public and the opponent into new areas of thought. Professor Sharp has described this process better than anyone:

15. While Operation Rescue requires its participants not to “yell out to anyone,” OPERATION RESCUE, JOIN US IN OPERATION RESCUE: APRIL 30-MAY 7, 1988 (1988), it also requires participants to sing and pray as a group. *Id.* The movement also has used side-walk counselors to confront pregnant women. Wills, *Save the Babies*, TIME, May 1, 1989, at 27.

16. Gandhi says: “[T]he law of non-violence says that violence should be resisted not by counter-violence but by non-violence. . . . This I do by breaking the law and by peacefully submitting to arrest and imprisonment.” GANDHI ON NON-VIOLENCE 71 (T. Merton ed. 1964). Elsewhere he says, “Non-violence implies voluntary submission to the penalty for the non-cooperation with evil.” M. Gandhi, *quoted in* J. MURPHY, CIVIL DISOBEDIENCE AND VIOLENCE 93 (1971).

Gandhi took his own advice when in 1922 he was prosecuted by the British for sedition. At the trial, known now as “the Great Trial,” Gandhi made the following remarks to the Court:

I do not ask for mercy. I do not plead any extenuating act. I am here, therefore, to invite and cheerfully submit to the highest penalty that can be inflicted upon me for what in law is a deliberate crime and what appears to be the highest duty of a citizen.

L. FISCHER, THE LIFE OF MAHATMA GANDHI 202 (1950).

The example of people willing to undergo penalties and hardships for their conscientious dissent may lead increasing numbers of people to think about the issues for the first time. This thus encourages policies to be chosen consciously, rather than accepted passively. It may even result in the minority becoming the majority.¹⁷

This is precisely the dynamic that occurred in the lunch counter sit-ins. There was no appreciable speaking, singing, or shouting by the diners. When the police came, the diners willingly submitted to arrest. They did not hide their identities. While some erected legal defenses, they did so with the knowledge that many federal courts would be sympathetic to their constitutional and other claims, a situation that manifestly does not exist in the abortion controversy. They filled the jails and thus brought attention to the substantive merits of their cause.

By contrast Operation Rescue disobedients are their own worst enemy, standing in the way of their own message when they invoke their rights to legal process. A more loving approach characterized by a modesty about the superiority of the movement's views may succeed where arrogance has failed.

2. The failure to adjust old tactics to new times.

One of the ways, though not the exclusive way, that civil disobedience works to create sympathy for the disobedients' cause in the public mind is through a process in which the disobedience extracts evil from the opponent and demonstrates that evil to the public. The public usually acts with appropriate horror at the display of evil and, in reaction, embraces the cause of the disobedient. The lunch counter sit-ins and the Freedom Rides worked so well because, in part, they were effective in drawing out and making public the repulsive evil of racism. The nonviolence of the disobedients succeeded in creating the opportunity for white racists to act in ways consistent with their racism. Thus, when white thugs nearly beat to death unresisting disobedients, the public charged white racism with that evil. There was nothing good that could be said about white racism. In reaction, the media and the public embraced the disobedients.

The current crisis created by abortion disobedience is not analogous. Whereas there was no legitimate moral claim to support white racism, there *is* a good faith moral claim in favor of abortion rights (regardless of whether Operation Rescue recognizes it), namely the autonomy of women over their own bodies. Those who defend abortion rights eventually may be judged misguided, but possessing a colorable moral claim, they cannot in good faith be said to be consciously evil.¹⁸ Consequently, when pro-life disobe-

17. G. SHARP, *supra* note 2, at 127.

18. What pro-life forces may be able to say about pro-choice advocates is that they are selfish and insensitive to the human life within them. But they cannot say successfully that pro-choice advocates are evil.

dience takes place the usual chain reaction—nonviolence/manifestation of evil/creation of public sympathy—does not take place.¹⁹

An absence of evil, however, does not equate with an absence of civility. It is possible, of course, to be free of evil but to act without prudential judgment. In the controversy surrounding anti-abortion civil disobedience, this has been true of both sides, each of which appears convinced that the argument will be won by the party that bellows louder. This lack of civility creates a modest opening for pro-life disobedience. A refusal to engage in the shouting match at Rescues (a refusal to engage in song, prayers, and shouts to aborting women and their supporters) will force pro-choice activists to decide whether to continue their aggressive and uncivil behavior or to respond with equal kindness. Suppose they make the unwise choice, opting for continued stridency. The contrast in the two approaches will tell the public something about the two sides. While the reaction of the public to a one sided display of incivility and abrasive conduct will not be nearly as strong as the reaction it would have to a one sided display of evil, the contrast in behavior in this case cannot but assist the pro-life forces in focusing attention on their message, as opposed to their tactics.

An absence of evil in the opponent also does not equate to an absence of evil in the practice opposed. Silence on the part of pro-life disobedients, especially in the face of continued stridency on the part of pro-choice advocates, will help focus public attention on the evil being protested—insensitivity to fetal life—rather than on the personalities of pro-choice advocates.

3. Operation Rescue's credibility gap

A disobedience movement must be taken seriously by the public if it is to have any chance of earning the public's sympathy for its cause. The civil disobedience of Operation Rescue lacks the strength of disobedience that flows from an integrated and consistent philosophical position. The majority of Operation Rescue participants seem to hold views that are inconsistent with their pro-life stance against abortion. Most oppose other pro-life causes such as nuclear disarmament and abolition of the death penalty. This inconsistency raises questions about the real motives of Operation Rescue participants and stands in sharp contrast to that minority segment of the movement known for its opposition to capital punishment, nuclear weapons, euthanasia, *and* abortion.

These disobedients embrace what they call a "consistent ethic of life." Their actions are a response to what they say is an "interlocking directorate

19. This is not to say the disobedients have not been the targets of violence. Indeed, they have been the victims, again and again, of police brutality. Police violence, however, has failed to generate sympathy for the disobedients principally because police violence is a side-show, an evil that is politically unconnected with the evil of abortion. The police do not appear to be acting violently out of hostility to the disobedients' views. In this case the police, unlike Bull Connor's police, are simply third parties who apparently have gotten carried away with their power.

of death that binds the whole culture, that is an unspoken agreement that we will solve our problems by killing people, a declaration that certain people are expendable."²⁰ Such disobedients, to make their point, will often be arrested at nuclear weapons facilities and abortion clinics on the same day. Rare as these persons are in the movement, they have much greater credibility with the public than do the majority of Operation Rescue participants. There is no questioning of motives here.

The logical inconsistency in the views of the majority of Rescue activists, however, causes the public to question the motives of pro-life disobedients: is there present a crass political agenda directed not at protecting fetal life, but at extinguishing women's rights? Is there anything principled in the opposition of Operation Rescue to abortion? As a consequence of all this, the pro-life movement is deprived of its best argument, the public treats pro-life disobedients with reduced seriousness, and the movement's ability to evoke sympathy suffers.

A LAST CHANCE FOR CONSENSUS

Operation Rescue offers the country an opportunity for drawing out the feelings of all sides such that a moral, and then a political and legal, consensus eventually might be reached. The movement will fail in this, however, unless it stops to learn the lessons its forerunners can teach.

Let Operation Rescue hear the voice of Martin Luther King, Jr., in these words he wrote in 1958:

One may well ask: "What is the nonviolent resister's justification for this ordeal to which he invites men? . . . The answer is found in the realization that unearned suffering is redemptive. Suffering, the nonviolent resister realizes, has tremendous educational and transforming possibilities."²¹

King quotes Gandhi:

"Things of fundamental importance to people are not secured by reason alone, but have to be purchased with their suffering. . . . Suffering is infinitely . . . powerful . . . for converting the opponent and opening his ears which are otherwise shut"²²

King understood that the ability to suffer in a way that evokes sympathy comes from the sufferer's decision to love the other. He says:

Agape is disinterested love. It is a love in which the individual seeks not his own good, but the good of his neighbor. (1 Cor. 10:24) *Agape* does not begin by discriminating between worthy and unworthy persons. It begins by loving others *for their sakes*. It . . .

20. Windsor, *Abortion and War No More*, National Cath. Rep., June 2, 1989, at 7.

21. M. L. KING, *supra* note 9, at 18.

22. *Id.*

discovers the neighbor in every person it meets. Therefore, *agape* makes no distinction between friends and enemy; it is directed toward both. . . . [T]he best way to assure oneself that love is disinterested is to have love for the enemy-neighbor from whom you can expect no good in return, but only hostility and persecution.²³

King continues:

[A]gape . . . springs from the *need* of the other person—his need for belonging to the best in the human family. The Samaritan . . . was “good” because he responded to the human need that he was presented with. God’s love . . . fails not because man needs his love. . . . [T]he loving act of redemption was done “while we were . . . sinners”—that is, at the point of our greatest need for love. Since the white man’s personality is greatly distorted by segregation, and his soul is greatly scarred, he needs the love of the Negro. The Negro must love the white man, because the white man needs his love to remove his tensions, insecurities, and fears.”²⁴

Translate King into the present tense. Do pro-choice advocates *need* the love of pro-life advocates to remove their tensions, insecurities, and fears? Do pro-life advocates *need* the love of pro-choice advocates to remove *their* tensions, insecurities, and fears? Does *each* side somehow need the love of the other? Is either side of this debate capable of a sacrificial love or of redemptive suffering?

A question somewhat more easily answered is: in what ways could the pro-life movement engage in redemptive sacrificial suffering as a way of building public understanding and perhaps even public consensus for its views?

The answer is to continue Operation Rescue, but with a different spirit. It is not enough to love the fetus. That is admirable, but it converts no one. It is the pro-choice doctor, the pro-choice nurse, and—above all—the pro-choice woman whom the movement must genuinely love. It is *their* hearts the movement must convert.

A change in spirit means a change in tactics. Noisy song and prayer filled demonstrations, insults hurled at opponents, confrontations of pregnant women, resistance to arrest, the erection of ornate necessity defenses, and disrespectful exchanges with prosecutors and judges—all these tactics do nothing but hurt the pro-life cause. They do not create conditions for redemptive suffering and they deflect attention from the pro-life message.

The movement’s real allies are modesty, cooperation with the police at the point of arrest and with the judge and prosecutor at the point of trial, and an uncomplaining, even welcoming, submission to punishment. These

23. *Id.* at 19.

24. *Id.*

are the tools for communicating the movement's suffering and message on open lines to the public.

These, then, are some of the possibilities open to the pro-life movement for advancing the abortion debate, a debate attended by more division than the debate brought on by Vietnam, a debate more emotion laden than the debate over women's suffrage, a debate more pervasive than even the civil rights debate, for this debate stretches into every legislature, every community, every church, every neighborhood, every family, every person, every woman.

It is a no-compromise debate. It is about fundamental notions of autonomy, motherhood, career, family, life. It will not be resolved by rational discussion. What is called for is a truly radical solution.

What is called for is love.

Whoever can provide love, sacrifice, and suffering may very well open the way to the consensus America so desperately needs.