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FEARLESS COUNSEL: BEING AN ATTORNEY FOR THE CIVIL DISOBEDIENT

MAURA C. DOHERTY*

The pro-life movement has rediscovered a key tactic of the civil rights movement of the 1960s. Emotionally charged demonstrations, sit-ins, and the participants — on either side of the abortion battle — can present moral complications for an attorney. Bewilderingly, an attorney counselling civil disobedients is not free to exercise her professional skills and judgment as a counselor, nor may she follow her moral convictions without penalty from the legal profession. This article addresses the sensitive ethical tension in which an attorney finds herself when counselling clients who plan a civilly disobedient tactic;¹ specifically, abortion clinic protests conducted by Operation Rescue groups.²

Part I of the article will define civil disobedience, argue the justification for its use, and respond to its classic criticisms. Hypothetical trespass scenarios involving two clients in Part II provide background mechanics of the pro-life protest and highlight aspects of the Operation Rescue movement which an attorney may face during her practice. An ensuing analysis and weighing of merits in Part III attempts to provide the attorney who wishes to counsel would-be civil disobedients with guidelines for active counsel. Part IV urges the modification of MRPR 7-102(A)(7), which prohibits a lawyer from encouraging or counselling such conduct. Since the ethical function of the Model Rules are concerned with regulatory, technical sanctions,³ retaining and enforcing attorney sanctions for such advice chills the attorney-bar association relationship, under-

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1. Compare this with the ethical latitude for an attorney advising disobedience of a court ruling. An attorney in good faith and within the framework of the law can challenge the correctness of a ruling of a tribunal. See ABA Code of Professional Responsibility, EC 7-22. See also Note, *Liability of the Attorney who Advises Disobedience*, 6 J. OF THE LEGAL PROF. 333 (1981).

2. This article neither condemns nor endorses the pro-life or abortion rescue movements.

3. Shaffer, *The Legal Ethics of Radical Individualism*, 65 TEX. L. REV. 963 (1987).

mines the moral thrust of the Model Rules, and ultimately thwarts reform of unjust legislation.

I. CIVIL DISOBEDIENCE IN CONTEXT

A. *Definition of Responsible Civil Disobedience*

An attorney's decision to counsel two hypothetical clients depends first upon what broad sentiments she harbors regarding the issue of civil disobedience; how civil disobedience is defined, justified, and distinguished from illegal conduct will influence her performance as counsel.

Defining responsible civil disobedience is difficult; its multifaceted history, scope, and criticism lends it to many interpretations, and thus, applications. A succinct definition of civil disobedience, in the context of a hypothetical trespass action, would be one where a given act is a deliberate, open violation of the law or binding public norm, with the intent either 1) to publicly protest a social, moral, or political wrong, or 2) to improve the social order, while working within the framework of the current political form of government, or both.⁴ For purposes here, three more elements are necessary to complete a working definition of civil disobedience. Responsible disobedient action must additionally include: first, a participant willing to notify the proper authority of his violation of the law and to accept legal sanctions (nonevasion); second, a nonviolent character, i.e., a refusal to respond with violence to provocations (excluding a minimal amount of resistance to arrest); and lastly, a primary commitment to educate or persuade the majority or to improve society.⁵ While other scholars have posited similar

4. See Keeton, *The Morality of Civil Disobedience*, 43 TEX. L. REV. 507, 508-11 (1964).

5. E. ZASHIN, CIVIL DISOBEDIENCE AND DEMOCRACY 110 (1972).

Keeton's definition of what constitutes a civil disobedient act segregates principled or true or responsible acts of civil disobedience from unprincipled conduct. For purposes of the article, this definition must not have inherent prejudices against a particular cause, nor biases for another. This is tested by situations such as the Ku Klux Klan membership who burn crosses in the yards of those who disagree with their position. As under Keeton's definition, the KKK's actions qualify as civil disobedience — assuming their conduct is open and deliberate, and its members are willing to suffer the legal penalties involved, and their motive is to "better society." That the KKK complies with Keeton's definition does not render the definition incomplete or faulty, but instead points to the great elasticity needed in the definition and in the revision of MRPR 7-102(A)(7). See DiSalvo, *The Fracture of Good Order: An Argument for Allowing Lawyers to Counsel the Civilly Disobedient*, 17 GA. L. REV. 109, 139-40 (1982).

definitions of civil disobedience,⁶ or have categorized the types of disobedience,⁷ or simply criticized it as illegal,⁸ this definition will serve as a foundation for this article.

B. *Justification of Civil Disobedience*

An attorney who contemplates counselling or representing a civilly disobedient client should comprehend the justifications of civil disobedience, as well as realize the impending disciplinary sanctions which could accompany her advice.⁹ Civil disobedience is neither "right nor good in and of itself; it is both beneficial and right under certain conditions."¹⁰ The debate concerning the justification of civil disobedience ultimately focuses upon the motivation of the individual who believes that a law is morally unjust and thus morally unenforceable. After weighing the political obligation to obey the law versus the responsibility of conscience, the civil disobedient individual makes the conscientious decision not to obey the unjust law.

That moral obligations outweigh an individual's legal obligations is often justified by a natural rights understanding of the law.¹¹ Some natural law thinkers posit that "natural law" follows divine or eternal law, as manifested through Biblical scripture.¹² Others suggest that secular documents, such as the

6. Rawls defines civil disobedience as "[A] public, non-violent and conscientious yet political act contrary to law usually done with the aim of bringing about a change in the law or policies of a government." J. Rawls, *The Justification of Civil Disobedience*, in *MORAL PROBLEMS: A COLLECTION OF PHILOSOPHICAL ESSAYS* 132 (Rachel's ed. 1970).

7. See R. Dworkin, *Civil Disobedience and Nuclear Protest*, in *A MATTER OF PRINCIPLE* 109, 111 (1985).

8. See Schlesinger, *Civil Disobedience: The Problem of Selective Obedience to Law*, 3 *HASTINGS CONST. L.Q.* 947 (1976).

9. Sanctions may range from disbarment, suspension, public censure and probation by the state supreme court, to private reprimand by state disciplinary boards. See, e.g., Pa. R.D.E. 204(a) PA. RULES OF COURT (1984).

10. Keeton, *supra* note 4, at 511.

11. The essence of a natural law understanding, according to Lord Lloyd, "lie[s] in the constant assertion that there are objective moral principles which depend upon the nature of the universe and which can be discovered by reason. These principles constitute the natural law." L. LLOYD & M. FREEMAN, *LLOYD'S INTRODUCTION TO JURISPRUDENCE* 93 (5th ed. 1985) [hereinafter *LLOYD*].

12. See SAINT THOMAS AQUINAS, *SUMMA THEOLOGICA*, Pt. I-11, QQ. 90-97 (trans. Fathers of the English Dominican Province) (1947-48). Aquinas proposed that, in the case of Human Law which violated Divine Law or Holy Scripture, "Laws of this kind must in no wise be observed." *Id.* at Q. 96, Art. 4. Thus it appears that if a law directly violates "scripture" Aquinas would agree that one has no duty or obligation to obey it. See Weber, *Towards a*

Declaration of Independence in American law, also qualify as reflecting this higher, natural law.¹³

One aspect of this natural law view is secular; grounded in a notion of fair play and mutual respect, it stresses the value of participation and democratic equality. Another aspect of natural law is theological. It presumes a mystical, loving communitarian union where eternal and natural law are "fulfilled by the end of separation between human beings."¹⁴ The dual view of natural rights, which includes a strict adherence to democratic procedures as an approach for civil disobedient conduct,¹⁵ is best embodied by Martin Luther King.¹⁶ King explained why he was willing to disobey a court order prohibiting a march while continuing to urge white obedience to the Supreme Court's desegregation orders: "[T]here are two types of law: just and unjust One has not only a legal but a moral responsibility to obey just laws. Conversely, one has a moral responsibility to disobey unjust laws. I would agree with St. Augustine that 'an unjust law is no law at all.'"¹⁷ Thus, one is not obligated to comply when the law is unfair, and for King, the law is unfair when it cannot be understood as generally beneficial.¹⁸

For some civil disobedients,¹⁹ who oppose a particular law which protects morally offensive conduct, the solution is sim-

Theory of Civil Disobedience, 13 CATH. LAW. 198, 202-10 (1967); Lloyd, *supra* note 11, at 152.

13. Natural law principles are reflected in the words, "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable rights, that among these are Life, Liberty, and the Pursuit of Happiness . . . [t]hat whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or abolish it" The Declaration of Independence, para. 2 (U.S. 1776). See generally E. CORWIN, THE "HIGHER LAW" BACKGROUND OF AMERICAN CONSTITUTIONAL LAW (1955).

14. Luban, *Difference Made Legal: The Court and Dr. King*, 87 MICH. L. REV. 2152, 2203 (1989).

15. This classic argument is embodied in two articles. See Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958); Fuller, *Positivism and Fidelity to Law — A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958).

16. Luban, *supra* note 14, at 2201-05.

17. M. L. King, *Letter from Birmingham Jail*, in WHY WE CAN'T WAIT 84 (1963).

18. For discussions of the fair play argument, see J. Rawls, *Legal Obligation and the Duty of Fair Play*, in LAW AND PHILOSOPHY 3, 9-10 (S. Hook ed. 1964), and Hart, *Are There Any Natural Rights?*, 64 PHIL. REV. 175, 185 (1955).

19. Particularly those in Operation Rescue or similar pro-life groups. See also *infra*, note 41.

ple: obedience to God supersedes obedience to the civil law. For others, it is not essential that the disobedience be religious, as long as it is grounded in the moral framework of a civil sense of justice. In this way, the community's subjective sense of justice contributes to justifying civil disobedience.²⁰

In contrast, utilitarian principles, another fundamental justification for civil disobedience, emphasize that moral duties override the legal or political obligation to obey the law because the government exists by the consent of the governed.²¹ Thus the "political" law is devoid of any divine strength which would compel obedience; human-promulgated law which governs the social life of citizens may contradict law which does not contain a divine force of its own. Civil disobedience is appropriate and justified, for example, in the context of a Nazi authority, where no individual of conscience could obey such law today.²²

C. *Responses to Criticism of Civil Disobedience*

Whether the justification for civil disobedience is grounded in a broad natural law or utilitarian view, the attorney must distinguish the civil disobedient from the law evader, the rebel, and the anarchist²³ in order to respond to the classic criticisms of civil disobedient action. A common criticism of civil disobedience is that the protester hides from his deserved punishment; evasion of legal sanctions is frequently confused with a pure civil disobedient act. Visibility of the violation alone is insufficient to meet the requirement of non-evasion in civil disobedience. Public demonstrators, who seek to overturn what they regard as an unjust law or unjust application of the law by their actions, yet who intend to avoid punishment, are law evaders, not civil disobedients. On the other hand, a citizen who readily accepts legal sanctions for participating in an expression of his conscience responsibly underscores the importance of legal order in society. Such protesters may be motivated to take an opportunity to make a direct impact on

20. J. RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 262-75 (1979).

21. See generally Greenblatt, *Defense of the Civilly Disobedient*, 13 N.C. CENT. L.J. 158 (1982); Note, *The Disciplinary Dilemma Confronting Attorneys Seeking to Counsel Civil Disobedients*, 23 DUQUESNE L. REV. 715, 718 (1985) [hereinafter Note].

22. In a 1967 poll, a number of scholars agreed that civil disobedience was justified in appropriate circumstances. N.Y. Times, Nov. 26, 1967, § 6 (Magazine), at 27.

23. Keeton, *supra* note 4, at 508-11.

law and upon policymakers, believing that their action is necessary to maintain the "integrity" of the legal system.²⁴

Another criticism is that civil disobedience is so destructive as to resemble civil rebellion.²⁵ Civil disobedient conduct is often misconstrued as an act done to undermine law and order.²⁶ This misdirected criticism fails to distinguish between the intent of the civilly disobedient person and the results of his or her conduct. The civilly disobedient person does not intend to engender lawlessness even where that is in fact the result. Although the device by which law and order is interfered with, such as a sit-in, for example, is a temporary disruption used for a purpose other than interference itself, care to avoid the encouragement of lawlessness is one of the obligations of responsible civil disobedience²⁷ and an important criterion for the attorney counselling the disobedient client to remember.

One spinoff criticism to the lawlessness argument is that a civil disobedient individual acts to incite violence despite the fact that other legal alternatives exist.²⁸ Actually, civil disobedience may prevent chaos by providing an outlet for rebellion, but not encourage revolution.²⁹ As Cohen argues, a protester's behavior frequently signifies respect for the system of law and a good faith effort to improve it, rather than contempt for it.³⁰ In response to those who contend that civil disobedience leads to an ultimate breakdown of respect for the law in the community, Cohen replies that directing community attention to the subject of the protest, as well as to the content, and

24. Lippman, *Civil Disobedience: The Dictates of Conscience Versus the Rule of Law*, 26 WASHBURN L.J. 233, 235 (1987).

25. Keeton, *supra* note 4, at 509.

26. See generally Schlesinger, *supra* note 8.

27. Keeton, *supra* note 4, at 510.

28. Schlesinger, *supra* note 8, at 955.

29. H. ZINN, *DISOBEDIENCE AND DEMOCRACY: NINE FALLACIES ON LAW AND ORDER* 18 (1968). See *contra* A. FORTAS, *CONCERNING DISSSENT AND CIVIL DISOBEDIENCE* (1968). In comparison, Rawls contends that the threat of anarchy is non-existent as long as citizens generally agree on a concept of justice and respect the fact that other citizens resort to civil disobedience. J. RAWLS, *A THEORY OF JUSTICE* 390 (1971). However, Rawls does not deny that the possibility of chaos nevertheless exists. *Id.* When anarchy or chaos does result from civil disobedience, Rawls places the onus of responsibility on those whose abuse of power warranted the disobedience, and not on the protesters. *Id.* at 390-91.

30. C. COHEN, *CIVIL DISOBEDIENCE: CONSCIENCE, TACTICS, AND THE LAW* 133 (1971).

importance of law in general, is more likely to have a beneficial, rather than an adverse, effect upon the community.³¹

Moreover, most protesters choose civil disobedience as a last resort.³² Usually protesters do not randomly jump into an illegal sit-in. Typically they take issue with a single, "immoral" law instead of opposing all laws.³³ Cohen claims that most civil disobedients have a history of organized campaigning on behalf of their cause. Only when the letters, marches, and prayer vigils fail, do protesters seriously consider disobedience to law as an alternative.³⁴

To conclude, civil disobedience

is not aimed toward overthrow of law and order. On the contrary, it works within the framework of the legal system to rectify specific wrongs. Where the wrongs pertain to the processes of that system itself, the civil disobedient intends not to render the over-all system inoperative with respect to his own act. He may, in fact, want by his act to render their absurdity and injustice more patent.³⁵

Thus, there is a fundamental difference between the draft dodger and the conscientious objector; the arsonist who bombs an abortion clinic and then avoids due process, and the abortion clinic protestor who willingly accepts legal punishment. Neither the draft dodger nor arsonist seek to persuade or instruct; their conduct is evasive, criminal and dangerous.

In the legal profession, however, there currently is no recognized difference between the attorney who colludes with a client in a criminal objective and a lawyer who advises a civil disobedient protestor to participate in a civil disobedient action. The difference, however, is a real one; it is the difference which distinguished such attorneys as John Adams, Edward Bennett Williams, and Atticus Finch.³⁶ The remainder

31. *Id.* at 153.

32. *Id.* at 167.

33. Freeman, *Moral Preemption Part 1: The Case for the Disobedient*, 17 HASTINGS L.J. 425, 433, 434 (1966).

34. Tierney, *Civil Disobedience as the Lesser Evil*, 59 U. COLO. L. REV. 911, 971 (1988). In comparison, Rawls disagrees with the notion that legal alternatives need be exhausted prior to engaging in civil disobedience. Though he labelled civil disobedience as a "last resort" that should be used only when necessary, he recognized that additional legal means could be pursued contemporaneously. J. RAWLS, *supra* note 29, at 373.

35. Keeton, *supra* note 4, at 509.

36. Adams defended British soldiers involved in the Boston Massacre; Williams defended, among others, Jimmy Hoffa and Senator McCarthy, and Finch, a fictitious attorney in H. LEE, *TO KILL A MOCKINGBIRD* (1960), defended a black man wrongly accused of raping a white woman in Georgia.

of this article addresses this difference in terms of a hypothetical trespass scenario. From this hypothetical, the article discusses guidelines for an attorney's ensuing counselling session and historical examples of attorney disciplinary sanctions following similar encouragement and counselling. The article then concludes with a suggestion for the revision of the disciplinary rule which mandates such sanctions.

II. THE PRO-LIFE MOVEMENT AND CIVIL DISOBEDIENCE: A HYPOTHETICAL

Consider Steven Wach and Linda Brace, two potential abortion clinic protesters.³⁷ Steven is a financial analyst in a downtown firm; Linda is a graduate student at the local state university. Both have become interested in participating in an upcoming sit-in at a newly opened abortion clinic in the area. The son of one of your respected clients, Steven has never participated in such activity, but wants advice on whether or not he should participate. Linda, however, has participated in many demonstrations and is currently on probation for earlier disobedient conduct in a neighboring town. She is concerned about possible repercussions, should she participate, given her probationary status. Although both state they are willing to accept whatever sanction may arise as a result of their potential actions, they have come to you, a practicing attorney in the area, for advice concerning their potential conduct.

The strategy of the pro-life movement and its many branches, which utilize massive demonstrations or sit-ins has militantly succeeded in nationally dramatizing the abortion issue as previous efforts have not.³⁸ Although there are a variety of actions indigenous to a particular organization, such as the characteristic "rescue" conduct of Operation Rescue, the mechanics and philosophy of the pro-life network are assumed, for the sake of argument, to be similar.³⁹

37. Hypothetical protesters and their responses are based upon interviews with former student protesters involved in the pro-life and Operation Rescue movements. Similarity in identity, names or decisions is unintentional.

38. Operation Rescue alone has attracted several notable public figures to its platform, including Rev. Jerry Falwell, Mark Bavaro of the New York Giants, Anglican Bishop James Mote of Denver, Roman Catholic Bishop Austin Vaughan of New York. Rice, *Some Issues Raised by the Abortion Movement*, Donahue Lecture, presented at Suffolk University Law School, Boston, Mass., Nov. 3, 1988, at 2 [hereinafter Donahue Lecture].

39. For a representative article, see Carlson, *Please Don't Kill Your Baby*, Wash. Post, Mar. 20, 1988 (Magazine), at 24-30.

A. *Pro-life Protest Mechanics*

When abortion clinic protesters opt to trespass on land belonging to another, they know they are in violation of the law. They disregard the law, believing that their action instructs others as to an alternative moral judgment,⁴⁰ and stimulates public debate regarding what they believe are serious issues, in order to affect change in government policies.⁴¹

The mechanics of a particular protest vary in tactics, participants, number and intensity. Some protesters gain entrance to clinics illegally to attempt to dissuade patients from having abortions.⁴² A more recent tactic is to hold sit-ins to block entrances to the clinics.⁴³ Some protesters have even gone to the extent of chaining themselves to entrance doors and examination tables.⁴⁴ Usually, the clinics contact the police, who arrest the protesters for criminal trespass. Depending upon the intensity of the protest, availability of finances, and the number of participants, medical clinics targeted for persistent protests seek permanent injunctions and/or damages.⁴⁵

40. Protesters of abortion clinics typically attempt to avoid criminal liability for trespass by convincing the court that abortion constitutes the taking of human life. *City of St. Louis v. Klockner*, 637 S.W.2d 174, 176 (Mo. Ct. App. 1982); *Commonwealth v. Wall*, 372 Pa. Super. 534, 539-42, 539, A.2d 1325, 1327-29 (1988). Abortion clinic protesters trespass to encourage others to avoid the "killing" of fetuses, which they believe is murder. *Sigma Reproductive Health Center v. State*, 297 Md. 660, 467 A.2d 483 (1983).

41. J. RAWLS, *supra* note 29, at 364. Cohen, *Law, Speech and Disobedience*, in *CIVIL DISOBEDIENCE: THEORY AND PRACTICE* 176 (H. Bedau ed. 1969).

42. See, e.g., *People v. Krizka*, 92 Ill. App. 3d 288, 416 N.E.2d 36 (1981), where demonstrators placed themselves between patients and clinic employees about to operate, and *Klockner*, 637 S.W.2d at 174, where defendants sat in a doorway after unsuccessful attempts to discourage patients from entering.

43. See, e.g., *Gaetano v. United States*, 406 A.2d 1291 (D.C. 1979); *City of Dayton v. Drake*, No. 11815, Ct. App. Ohio (1990); *City of Akron v. Detwiler*, No. 14385, Ct. App. Ohio, (1990); *Oregon v. Clowes*, 100 Ore. App. 266, 785 P.2d 1071 (1990) (sit-in at abortion clinics); *People v. Stiso*, 93 Ill.App.3d 101, 416 N.E.2d 1209 (1981) (protesters barred access to operating rooms).

44. See, e.g., *Cleveland v. Municipality of Anchorage*, 631 P.2d 1073 (Alaska 1981) (two appellants chained themselves to door of operating room); *Gaetano*, 406 A.2d at 1292 (organized defendants chained themselves to tables).

45. Pursuant to 18 U.S.C. § 1962(c)-(d) (1988). See Note, *Necessity as a Defense to a Charge of Criminal Trespass in an Abortion Clinic*, 48 U. CIN. L. REV. 501, 502 n.11 (1979), discussing *Ohio v. Rinear*, No. 78CRB-3706, Mun. Ct. Hamilton County, Ohio (*dismissed* May 2, 1978); *Northeast Women's Center v. McMonagle*, 665 F. Supp. 1147 (E.D. Pa. 1987). For recent cases at the time of this note on permanent injunctions and civil damages, see *New York State NOW v. Terry*, 732 F. Supp. 388 (S.D.N.Y. 1990); *Roe v. Operation*

Protesters have unsuccessfully attempted to utilize the necessity defense⁴⁶ and the choice of evils defense as means of justifying and defending their conduct in protesting abortion clinics. At trial, defendants generally raise the necessity defense, where they claim that the harm they caused by trespassing is outweighed by the harm they sought to avoid, namely the killing of fetuses,⁴⁷ or the choice of evils argument, in which the evil of the illegal trespass was less than the evil resulting from the killing of life.⁴⁸ Clinic protesters' lack of success in raising either defense can be attributed to two reasons. First, the current legality of abortion negates an abortion clinic protester's necessity argument that the killing of a fetus is a harm greater than trespass.⁴⁹ Following *Roe v. Wade*,⁵⁰ abor-

Rescue, 919 F.2d 857 (3d Cir. 1990); *Town of West Hartford v. Operation Rescue*, 915 F.2d 92 (2d Cir. 1990). For additional reading on the application of civil RICO in this context, see Note, *The Use of Civil RICO Against Antiabortion Protesters and the Economic Motive Requirement*, 90 COLUM. L. REV. 1341 (1990); Canan & Pring, *Studying Strategic Lawsuits Against Public Participation: Mixing Quantitative and Qualitative Approaches*, 22 LAW & SOC. REV. 385 (1988).

46. By invoking the necessity defense, protesters hope to force a court to carve out exceptions to the law, exceptions whose qualifying criteria exempt a certain category of defendants from liability. In the case of *Operation Rescue*, this exemption is grounded in moral duty. While some courts have granted abortion protesters this exception (see *Northern Va. Women's Medical Center v. Horan*, No. 78-94-A (E.D. Va. June 23, 1978), (abortion protesters acquitted), cited in Note, *Justified Nuclear and Abortion Clinic Protest: A Kantian Theory of Jurisprudence*, 21 N.E. L. REV. 725, 727, n.11 (1986)), more frequently, courts disallow the necessity defense fearing the consequences of allowing too many exceptions, which would nullify the applicable law. In abortion protest cases, courts generally deny the necessity defense. See *Gaetano*, 406 A.2d at 1291; *Northeast Women's Center*, 665 F. Supp. at 1147; *Stiso*, 416 N.E.2d at 1209; *Sigma Reproductive Health Center*, 467 A.2d at 483; *Klocker*, 637 S.W.2d at 174; *Cleveland*, 631 P.2d at 1073; *Bobo v. State*, 757 S.W.2d 58 (Tex. Ct. App. 1988); *People v. Smith*, 161 Ill. App. 3d 213, 514 N.E.2d 211 (1987); *Commonwealth v. Markum*, 373 Pa. Super. 341, 541 A.2d 347 (1988); *Wall*, 539 A.2d 1325 (1988); *Hoppert v. State*, 686 S.W.2d 259 (Tex. Ct. App. 1985). See also *Griffin v. United States*, 447 A.2d 776 (D.C. 1982) (necessity defense unavailable to protesters who entered and opened churches to the homeless).

47. *Gaetano*, 406 A.2d 1291 (D.C. 1979) (abortion clinic protesters believed their conduct was necessary to save human life); *Krizka*, 416 N.E.2d 36 (1981) (defendants believed they would save fetuses by peaceably interposing themselves between patients and clinic employees); *Klocker*, 637 S.W.2d 174 (protesters claimed harm avoided by trespass was the "killing of human life" by aborting fetuses).

48. Protesters predicate their conduct on the definition that a fetus is a "life" despite the Supreme Court's position that a fetus has no recognized legal protection; see generally *Roe v. Wade*, 410 U.S. 113 (1973).

49. "Under *Roe*, an abortion . . . is not a legally recognizable injury, and

tion is not illegal; such conduct is legally protected.⁵¹ Second, the balance of evils test is similarly denied since the trespass interfered with a fundamental and constitutional right. Therefore the trespasser did not choose the lesser evil. In either case, the trespass is legally unjustified.⁵²

B. *Philosophy of Operation Rescue*

Operation Rescue advocates sit-in "rescues" because they manifest the philosophy underlying the Movement: "Legalized abortion, a product of the secularized, contraceptive society which makes man rather than God the arbiter of life, is Satanic."⁵³ Randall E. Terry, founder of Operation Rescue, describes the characteristics of the movement and its motivation for pursuing an avenue of civil disobedience, in terms resembling Keeton's rationale for warranting civil disobedience:

"To state our position concisely: Rescue missions are saving babies and mothers today in such a way that stimulates political change tomorrow It's a kind of passive resistance. We go limp — there is no violence, no yelling. The rescues are very peaceful, very prayerful

"Going to jail is probably the best statement we can make at this time. We've had over 1,000 people go to jail in the past three months. People see us and they say, my goodness these people are willing to sacrifice their freedom as they stand up for these babies and mothers people . . . make more sacrifices, and it makes the people who are going to jail . . . courageous" Our short-term goal is to end the killings *now*; our long-term goal is to end the child killing permanently by a constitutional amendment."⁵⁴

therefore, defendant's trespass was not justified by reason of necessity." *Krizka*, 416 N.E.2d at 37.

50. 410 U.S. 113 (1973).

51. *Cleveland v. Municipality of Anchorage* argued that the protesters could not satisfy the illegal element of the defense because abortion was, in fact, legal. 631 P.2d at 1078-79, n.10.

52. The current constitutional validity of abortion most effectively short circuits clinic protesters' defense since it negates their justification for their illegal conduct.

53. Rice, *Webster: An Opportunity, Not a Victory*, THE WANDERER, July 13, 1989, at 3, 12.

54. THE NEW AMERICAN, Nov. 7, 1988, at 19, *quoted in* Rice, *Operation Rescue*; THE WANDERER, Jan. 19, 1989, at 1-2 (emphasis in original).

C. *Criticism of the Operation Rescue Movement*

The Operation Rescue movement has come under intense criticism from the pro-choice advocates as well as from some pro-life supporters.⁵⁵ Individual women and proprietors of abortion facilities are pressing criminal prosecutions and individual and class actions in tort and civil suits.⁵⁶ Additionally, the prospect of or enforcement of jail terms removes political leadership from the movement,⁵⁷ and lack of financial support may shortchange the Movement's activity.⁵⁸ Moreover, costs in terms of time, inconvenience, and expense of a protester's criminal and civil legal defense are formidable.

Pro-life protesters as well as their opponents argue that the existence of alternatives other than civil disobedience "rescues" render the movement's conduct imprudent; the rescues are not an efficient response compared to those which disrupt

55. For example, the Rev. Charles Stanley, pastor of First Baptist Church in Atlanta, denounced abortion as "an abomination before God" but opposed the disobedience tactics. *Enemy of Abortions is Also Taking Issue with Protest Tactics*, N.Y. Times, Aug. 31, 1988, at A14, col. 1. Of Operation Rescue, Stanley said, "Where does it stop? If blocking an entrance is permitted, then why not physical restraint . . . or even destruction of those who are performing the procedure . . . ? Anarchy and chaos will ultimately result." *Id.*

56. See *infra* note 45. See, e.g., Maher, *Abortion Protesters Barred from Clinic*, PA. L.J. REP. June 15, 1987, at 1, col. 1. (discussing *Northeast Women's Center Inc. v. McMonagle*, 868 F.2d 1342 (1989)) (federal court jury decided protesters had violated civil anti-racketeering laws by creating a climate of fear at the center); *In Streets and Courts, Two Groups Struggle Over Abortion Issue*, NAT'L L.J., Nov. 13, 1989, at 32, col. 2. See also *Feminist Women's Health Center v. Roberts*, C86-1612 (W.D. Wash. 1989) (federal grand jury convicted three people on RICO charges, and the judge awarded treble damages amounting to over \$900,000. One of the racketeers firebombed an abortion clinic; the other two conspired to drive the clinic out of business by repeatedly making false medical appointments and as many as 700 telephone hang-up pranks daily).

57. At the time of writing this note, Terry, convicted on misdemeanor charges of trespassing during a 1988 Atlanta clinic protest, was recently released from jail, where he spent four months on a chain gang, rather than pay a \$1,000 fine in trespass and unlawful assembly. Bails, *Abortion: Rescue Bails Out*, TIME, Feb. 12, 1990, at 29. Some 1,200 anti-abortion activists demonstrated outside clinics throughout Atlanta during the 1988 Democratic National Convention. Sherman, *Courts Deal Blockaders Big Setbacks*, NAT'L L.J., Nov. 13, 1989, at 30, col. 2.

58. Operation Rescue, headquartered in Binghamton, New York, closed its doors due to a \$50,000 lawsuit filed by the National Organization of Women. Antiabortion activists privately concede that Terry's move is tactical and say Operation Rescue activities will be supported by satellite and legally autonomous chapters nationwide. Bails, *supra* note 57, at 29.

the work performed at the abortion clinics in alternative manners.⁵⁹

III. ADVISING THE CIVIL DISOBEDIENT-TRESPASSER

As of October, 1988 more than 7,000 persons have been arrested for their participation in rescues throughout the country.⁶⁰ Protests and the cases arising from them have brought the abortion battle and its legal fallout to at least 14 states.⁶¹ From 1977 to 1985, 231 clinics were invaded and 224 were vandalized.⁶²

*

Steven Wach and Linda Brace, now seated in your office, present the extent of their commitment and participation. Steven explains his motivations for participating in the demonstration; abortion, to him, "is the work of Satan. Rescue missions are saving babies in a way that prayer vigils can't." Admittedly, the prospect of going to jail is frightening — which is one of the reasons he has sought you out. In speaking with you, he states that participating in the demonstration "is probably the best statement to make — it gives credibility to our work."

Linda, chiming in, states that the abortion issue requires publicity and the moral mobilization which a rescue effort affords, because political institutions in need of change are too slow. She expects this demonstration, like others she has participated in, will be one in which she and her fellow students sit

59. Donahue Lecture, *supra* note 38, at 37-38. "Moreover, all the arguments in favor of disruptive abortion rescues apply as well to outright destruction of the abortuaries by bombing or arson. Indeed, bombing or arson can put the place permanently out of business which the non-violent rescuers cannot do." *Id.*

Some prolife advocates believe that Operation Rescue protesters are willing to intervene up to the point that it does not involve violence, following pacifist tactics of the 1960s. Some disagree. According to some Operation Rescue extremists, since saving life is the objective of the rescue, and abortion is murder, it would be morally justifiable to shoot the person performing the abortion or to blow up the clinic. While the author of this note advocates an attorney's right to counsel and even to encourage civil disobedient action, she does not advocate this extreme position. Civil disobedience does not encourage or condone violence; no attorney should encourage such action, regardless of his or her personal feelings on the subject.

60. Wash. Times, Oct. 31, 1988, at A3, col. 4.

61. Sherman, *supra* note 57, at 30.

62. Fauldi, *The Antiabortion Crusade of Randall Terry*, Wash. Post, Dec. 23, 1989, at C2, col. 1.

passively, either in front of the clinic or inside the "abortuary" itself. Linda explains she will not resist arrest, but will go "limp" when carried off by police. With Steven, Linda declares her plan is to sit passively, or chant, depending "on the mood" of the situation.

*

A. *What to Consider Regarding Hypothetical Clients*

The initial reaction of the average attorney to two such hypothetical clients, Steven and Linda, is most likely to be hesitation. The attorney's decision to commit herself to her clients' claims and conduct is contingent upon a threshold judgment of whether this conduct qualifies as civil disobedience or lawlessness; it must also include an assessment of the clients' conduct in relation to the merits of the claims and conduct of others.⁶³ Additionally, the attorney may have a variety of other considerations, which may affect her willingness to become involved, the quality of her advice, and depending upon whether or not she fears disciplinary sanctions, her willingness to offer encouragement.

In advising Steven and Linda, the attorney will consider her financial interests, including impact upon current and future clients. Additionally, the lawyer may and should worry about the social consequences to herself, her spouse, and her family.⁶⁴ Adverse reaction from the professional community as well as from the community at large may accompany an attorney who is counselling, although not defending, potentially unpopular clients.⁶⁵ In order to effectively counsel Steven and Linda, who are potential demonstrators contemplating trespass, the attorney must fall on one side of the proverbial abortion fence. A lawyer's attempt "to rationalize engaging upon a distasteful course chosen by a client on the ground that what is

63. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1093 (1988).

64. Pollitt, *Counsel for the Unpopular Cause: "The Hazard of Being Undone,"* 43 N.C.L. REV. 9, 17 (1964).

65. Justice William O. Douglas wrote of the 'black silence of fear' hovering above the lawyer contemplating the defense of an individual accused of Communist association and activity: "Lawyers have talked to me about it. Many are worried. Some could not volunteer their services, for if they did they would lose clients and their firms would suffer. Others could not volunteer because if they did they would be dubbed 'subversive' by their community and put in the same category as those they would defend. This is a dark tragedy." Douglas, *The Black Silence of Fear*, N.Y. Times, Jan. 13, 1952, § 6 (Magazine), at 37-38.

to be done is the client's decision and [lawyers] are but tools" is futile.⁶⁶ In other words, if the attorney is professionally involved with her clients, the public or professional community may perceive she is emotionally or morally involved with their cause — for better or worse.

Lastly, the attorney may try to insulate herself from adverse reaction by refusing to take a fee for her services. Pollitt contends that such refusal typically backfires, because it is perceived that the attorney who takes a case without demanding a fee is sympathetic to the cause.⁶⁷

B. *Guidelines for Counselling*

If the attorney decides to counsel clients like Steven and Linda, she must identify any practical alternatives and discuss legal and non-legal consequences in order to advise the two would-be protesters whether to participate or not in the upcoming demonstration.

Typically, the lawyer advising a client outlines the various alternatives available to the client, including time, inconvenience, and expense of trial, settlement and possible withdrawal from the controversy. Raising alternative strategies to a client who has decided to pursue a course of particular action is a delicate task; the attorney needs to respect, not ignore, the beliefs of the clients with sensitivity.

In her counselling session, the attorney needs to address the non-legal and legal repercussions of a civil disobedient act. Such non-legal consequences could include the loss of employment, and social ostracism by friends and/or family. The attorney should remind the protesters what are already "legal" actions in which to participate;⁶⁸ lawful alternatives available in this situation include prayer vigil, peaceful march, and sidewalk counselling. The attorney should also ask if either client, Stephen or Linda, perceive additional alternatives available.

The lawyer also needs to completely analyze legal consequences of the proposed action and each alternative involved in this demonstration, in order to emphasize to her clients the significance of the severity of the proposed disobedient action.

66. Lehman, *The Pursuit of a Client's Interest*, 77 MICH. L. REV. 1078, 1080 (1979). See also Cihlar, *Client Self-Determination: Intervention or Interference*, 14 ST. LOUIS U.L.J. 604 (1970); Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1066 (1976).

67. Pollitt, *supra* note 64, at 20-21.

68. It is also "legal" for the attorney to advise these alternatives in the sense that the attorney is not violating any Model Rule or Model Code provisions.

Penalties for protesters at abortion clinics include hefty fines, permanent injunctions, and jail sentences, depending upon whether the clinic chooses to apply certain prosecution strategies.⁶⁹ The attorney should also inform Linda, a client previously involved in civil disobedient conduct, that her contemplated participation could jeopardize the probation sentence she presently carries.⁷⁰

The attorney cannot make the would-be disobedients reach a conclusion, but she can facilitate the process and structure the argument, for or against such conduct, and highlight social, political, psychological consequences. She should consider how deeply conscience is involved in the protester's potential actions, then weigh it against the importance of the law to be broken, the disruption caused by the protest⁷¹ and the cost to the community as a result of the disobedience.⁷² Finally the attorney must allow Steven and Linda to decide whether their actions are justified.

C. *Weighing the Merits: Arriving at a Conclusion*

If satisfied with her counselling session, the attorney must weigh the merits of Steven and Linda's primary reasons which morally warrant their proposed civil disobedience.⁷³ The attorney's conclusion results from an analysis of six proposals which test and evaluate the merits of her clients' strength of commitment, legal understanding and involvement during the discussion.

First, Steven and Linda both believe that the services of the abortion medical facility present a serious injustice for the fetus; they perceive their proposed trespass as a major opportunity for influencing, if not overturning the law(s) which is to be reviewed by the state legislature in the next few months.

Second, both potential protesters lack a reasonable prospect of obtaining a remedy through recourse of due process of law; their petitions to state legislators have gone unanswered.

69. *Preserving the Right to Choose: How to Cope with Violence and Disruption at Abortion Clinics*, Reproductive Freedom Project of the American Civil Liberties Union 34 (1986). See also Sherman, *supra* note 57, at 30. For use of RICO in abortion clinic settings, see *supra* note 45; see also Note, *The Scope of NOERR Immunity for Direct Action Protestors: Antitrust Meets the Anti-Abortionists*, 89 COLUM. L. REV. 662 (1989).

70. See DiSalvo, *supra* note 5, at 145-46.

71. R. Dworkin, *Civil Disobedience*, in *TAKING RIGHTS SERIOUSLY* 220 (1978).

72. Cohen, *supra* note 30, at 298.

73. Keeton, *supra* note 4, at 509.

Steven agreed with Linda that he believes "there is no other alternative" but to demonstrate, and trespass, i.e., violate the law.

Third, the would-be protesters perceive the unavailability of effective, non-legal options that are less hazardous and less costly than civil disobedience: the students conclude sidewalk counselling is minimally successful; the medical clinic usually counters such efforts by providing escorts for patients.

Fourth, the tactics and strategy of the proposed sit-in demonstration would only minimally infringe upon other rights and the social order. An experienced protester, Linda stressed the importance of nonviolent, passive resistance for the sit-in for the duration of the protest. However, neither Steven nor Linda could promise the attorney not to make threatening phone calls.⁷⁴ Although they would not take responsibility for other students, Steven and Linda assured the attorney that they would employ sufficient caution not to incite violence on the part of others.⁷⁵ Steven adamantly insisted he would do nothing to harass, assault, or damage the property of those people entering the clinic. Linda made similar promises, and said that she understood that the women escorted to the "abortuary" are under no obligation to engage in conversation with her, to accept leaflets, or red rose corsages, a symbol of the anti-abortion movement.

Fifth, the conviction that Steven and Linda feel with respect to their moral compulsion to act must be strong. Here, for example, when Steven and Linda were asked by their attorney whether they were willing to universalize the moral principles on which they proposed to act,⁷⁶ they agreed that their opponents would be morally entitled to employ similar tactics in pursuit of their objectives. On the advice of their attorney, Steven and Linda agreed to give advance notice of their planned acts of civil disobedience to the authorities if in fact they decided to participate in a sit-in.⁷⁷ Linda, furthermore,

74. See *supra* note 56.

75. The difficulty in assuring this in advance, Keeton correctly notes, is that violence can be accomplished without a protester contacting or lifting a finger — for example, by undermining someone's self-respect. Keeton, *supra* note 4, at 516. If the typical abortion clinic demonstration — usually a throng of people singing, chanting, waving signs and shouting abusive epithets — materializes, Steven and Linda will tread a precarious line in accomplishing what Keeton defines as "violence" or participate in what Operation Rescue terms educational or converting conduct.

76. Keeton, *supra* note 4, at 514-19.

77. Notice of an intended sit-in has become critical in assessing remedies in civil RICO suits; see, e.g., *Roe v. Operation Rescue*, 919 F.2d 857,

promised to contact the organizers of the sit-in to ask that the student participants in the group take measures to clearly communicate the purpose of the protest to bystanders, as well as to opponents. Finally, the stress that Steven and Linda place on the moral basis for their conduct might make a positive impression on the thinking of neutral bystanders.

Sixth, the attorney must assess whether the contemplated act of civil disobedience is an effective means of achieving the ends sought by her clients.⁷⁸ Stephen and Linda feel that the fact they approached the attorney indicates that they respect the system and look to it as a vehicle of change.

Thus satisfied with her clients' arguments, the attorney concludes the counselling session. Although she does not condone violence, the attorney supports the students' planned disruption. In the end, she encourages Steven and Linda to participate in the sit-in, and violate the law.

IV. DISCIPLINARY RULES & THE ATTORNEY'S MORAL DILEMMA

A. *The Code of Professional Responsibility*

The Code of Professional Responsibility has been adopted by the majority of states as the official standard of conduct for lawyers. In 1977, the ABA decided to rework the Code, which produced the ABA Model Rules of Professional Conduct, a document designed to replace the Code and to become a new model for individual states to follow. A growing minority of states adopted the Rules, following the ABA's adoption of the Rules in 1983. The remaining various states face a choice to adopt the Rules or remain with the Code, or create a hybrid disciplinary process.

The Code of Professional Responsibility was divided into three levels, in descending order of significance and weight: as Canons, Ethical Considerations (EC), and Disciplinary Rules (DR). The Canons are the general overriding principles and standards governing lawyer conduct. The Ethical Considerations are "aspirational"⁷⁹ objectives to which members of the profession should strive; the Disciplinary Rules outline the

862-63 (3d Cir. 1990) (reversing dismissal for lack of standing of those clinics not blockaded by defendants "because Operation Rescue insists on keeping secret which clinics it had targeted," which added to the threatened danger that the clinics will suffer real and immediate injury).

78. Keeton, *supra* note 4, at 514.

79. Sutton, *How Vulnerable is the Code of Professional Responsibility?*, 57 N.C.L. REV. 497 (1978).

"minimum" level of conduct below which no attorney must fall without being subject to disciplinary action.⁸⁰

A lawyer may not aid her client in criminal behavior. Under the ABA Model Code, this duty is expressed in Disciplinary Rule 7-102 which counters its call for the exercise of zeal within the bounds of the law. The Model Code provides further that it is a professional violation for a lawyer to assist a client in conduct that is "illegal." DR 7-102(A)(7) of the Code of Professional Responsibility states that an attorney "shall not . . . counsel or assist his client in conduct that the lawyer knows to be illegal . . ."⁸¹ The ABA Model Rules modify this obligation of the lawyer by prohibiting a lawyer from counseling or assisting a client in conduct that is "criminal or fraudulent."⁸² The pertinent Ethical Considerations explain the rationale of this rule as "to prevent collusion between the attorney and the client to perpetrate criminal or fraudulent acts."⁸³

While no cases exist in which an attorney has been sanctioned for her involvement as counselor to civilly disobedient behavior, it is clear from the rule and case law that a lawyer may not assist in or render advice that would encourage a client to engage in illegal or fraudulent behavior.⁸⁴ Yet the language of

80. *Id.* See also Sutton, *The ABA Code of Professional Responsibility: An Introduction*, 48 TEX. L. REV. 255 (1970).

81. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(7) (1989). There is no substantial difference in adopting the ABA's rules; it has a similar proscription against a lawyer counselling a civil disobedient prior to the commitment of the act. Model Rule 1.2(d) provides, "a lawyer shall not counsel or assist a client in conduct the lawyer knows is criminal." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(d) (1983).

82. ABA Model Rule 1.2(d).

83. *ABA/BNA Lawyer's Manual on Professional Conduct* EC 7-1, 7-10 (1989). It is improper for a lawyer to assist in a client's criminal objectives. See, e.g., *In re Siegel*, 99 A.D.2d 87, 471 N.Y.S.2d 591 (Sup. Ct. App. Div. 1984) (corporate counsel suspended for engaging in fraudulent scheme involving unrecorded cash sales of corporate merchandise with corporation president and chairman of the board); Committee on Legal Ethics of the West Virginia State Bar v. Harman, 367 S.E.2d 767 (W.Va. 1988) (attorney disciplined for receiving two five-dollar bills from inmate client to buy marijuana). Nor may an attorney agree to provide representation for employees of an organization that is engaged primarily in criminal activity without facing disciplinary sanction. See, e.g., *People v. Morley*, 725 P.2d 510 (Colo. 1986) (lawyer violated DR 7-102(A)(7) when he counselled undercover FBI agents to set up an illegal prostitution scheme).

84. See *Davis v. Goodson*, 276 Ark. 337, 635 S.W.2d 226, cert. denied, 459 U.S. 1154 (1983) (lawyer advised client not to obey court order); *In re Masters*, 91 Ill.2d 413, 48 N.E.2d 187 (1982) (lawyer advised client to comply with extortion demand and aided client in doing so); Committee on Prof. Ethics and Conduct of the Iowa State Bar v. Cray, 245 N.W.2d 298 (Iowa

rule DR 7-102(A)(7) provides sufficient latitude for disciplinary action by state bar associations against attorneys who encourage or advise a client to engage in responsible civil disobedience,⁸⁵ making the actions of our hypothetical attorney a violation.

Since the ethical function of the Model Rules are concerned with regulatory, technical sanctions, and are unconcerned with insight or conscience,⁸⁶ an attorney can be subject to disciplinary sanction for advising the client to pursue civilly disobedient conduct. An act of civil disobedience, according to our earlier definition, must include a public act and a knowing violation of a technically valid law. Since the defiance of the law is open and public, and frequently made known to authorities in advance to avoid disorder, it is reasonable that an attorney would possibly have contact with protesters prior to the civil disobedient act. Although not a participant in the action, the attorney may be subject to disciplinary and possibly criminal sanctions because she has encouraged or counselled those involved in such conduct.⁸⁷ Indeed, attorneys counselling clients whose sentiments do not follow contemporary points of view often find their actions severely scrutinized by state bar associations and disciplinary boards.⁸⁸

An early study conducted by Jerome Carlin investigated the correlation between the notoriety of an attorney's conduct and the disciplinary sanctions which followed. Carlin concluded that the

organized bar through the operation of its formal disciplinary measures seems to be *less* concerned with scrutinizing the *moral integrity* of the profession than with forestalling public criticism and control Further evidence that the organized bar is *responding primarily* to a concern for preserving its *public image* is the considerable importance of the visibility of the offense to the general community in the handling of disciplinary cases.⁸⁹

1976) (lawyer's license revoked for advising client to disobey judicial decree and permitting client to make false statements during a deposition); *Wright v. Roberts*, 573 S.W.2d 468 (Tenn. 1978) (lawyer suspended for advising client to violate restraining order). See also *ABA/BNA Lawyers' Manual on Professional Conduct* 31:702 (1990).

85. Note, *supra* note 21, at 730.

86. See Shaffer, *supra* note 3, at 963.

87. Note, *supra* note 21, at 730.

88. Lyman, *State Bar Discipline and the Activist Lawyer*, 8 HARV. C.R.-C.L. L. REV. 235 (1973).

89. J. CARLIN, *LAWYERS' ETHICS: A SURVEY OF THE NEW YORK CITY BAR* 161-62 (1966) (emphasis added).

Although there are no cases in which an attorney has been sanctioned for her role as advisor to a civilly disobedient client, there are several examples of activist lawyers subject to disciplinary sanction for their personal involvement in an unpopular cause.⁹⁰ One particularly dramatic example underscores the conservatism of the state bar associations. James Gilliland, a North Carolina attorney, decorated WWII veteran, and local American Legion officer, advocated the policies underlying the then recent *Brown v. Board of Education*⁹¹ decision which required desegregation of public schools. Concomitantly, Gilliland represented eleven alleged communists before a regional session of the House Committee on Un-American Activities, and boldly suggested that the committee leave his clients alone and instead pursue school officials who refused to acknowledge the desegregation decision.⁹² After losing his social memberships and civic positions in the community, Gilliland was disbarred by the North Carolina State Bar Counsel for "irregularities" in two later divorce suits.⁹³ He was later reinstated.⁹⁴

The potential repercussions from enforcement of the current Disciplinary Rule on attorneys and those attorneys involved already with potential civil disobedients are enormous.⁹⁵ Regardless of whether disciplinary boards pursue the

90. See *In re Arctander*, 110 Wash. 296, 188 P. 380 (1920) (lawyer disbarred for openly aiding clients to resist the draft); *In re Smith*, 133 Wash. 145, 233 P. 288 (1925) (attorney disbarred for publicly associating with International Workers of the World (IWW) and encouraging strike and sabotage); *In re O'Connell*, 184 Cal. 584, 194 P. 1010 (1920). See also *In re Margolis*, 269 Pa. 206, 112 A. 478 (1921) (attorney disbarred for his public association with IWW people and admission that he was an anarchist). *Id.* at 210, 112 A. at 479. The trial court found Margolis advocated the use of force if necessary to carry out his objectives." *Id.* at 210, 112 A. at 480. Thus, his conduct does not fall within the parameters of civil disobedience as discussed in this note. For further reference and criticism on the Margolis case, see Note, *supra* note 21, at n.73.

91. 347 U.S. 483 (1954).

92. Pollitt, *supra* note 64, at 9-10. The author provides many examples of lawyers who received harsh sanctions from their respective state bar disciplinary boards after either counseling unpopular clients or clients with unpopular causes. See *id.* at 22-23.

93. *Id.* at 10.

94. Following an appeal to the North Carolina Supreme Court [*In re Gilliland*, 248 N.C. 517, 103 S.E.2d 807 (1958)], he was reinstated. See generally Pollitt, *supra* note 64, for less dramatic examples of attorney discipline and state bar myopia.

95. Compare MODEL CODE, EC 2-27, which states that the "lawyer should not decline representation because a client or a cause is unpopular or community reaction is adverse."

active prosecution of these or related pro-life protest claims, the chilling effect on attorneys sought by clientele predisposed to civil disobedience is inescapable. While the chance of discovery of prohibited conduct on the part of the attorney is small, the penalty is great — ranging from formal reprimand to disbarment — and the proscription alone is sufficient to prevent the counselling behavior from occurring at all.⁹⁶

Moreover, there is a related fear that since state bar associations are not entirely unbiased, their political affiliations would permit the selective enforcement of the rule as against more outspoken or unpopular attorneys involved in unpopular causes. The Model Code, according to DiSalvo, treats the lawyer's power of moral judgment as nonexistent or, at best, irrelevant.⁹⁷ When a lawyer represents those who approach her concerning a specific matter or complainant, she is assumed to set aside any personal belief or bias she may harbor about the morality of the actions of which she is advising. There is no requirement in the Model Code that the attorney identify with her client's moral position,⁹⁸ nor could it hold the lawyer morally accountable for decisions to represent or not to represent clients and their causes.⁹⁹ The Disciplinary Rules do not authorize an attorney to dispense advice grounded in her personal morality to a client. Justice Black stressed the significance of attorney discretion:

A bar composed of lawyers of good character is a worthy objective but it is unnecessary to sacrifice vital freedoms in order to obtain that goal. *It is also important both to society and the bar itself that lawyers be unintimidated — free to think, speak, and act as members of an Independent Bar.*¹⁰⁰

Respective state bar associations and the legal profession should allow the attorney greater freedom to assess the legal

96. DiSalvo, *supra* note 5, at 135. See generally first amendment "chill" cases, including *Baird v. State Bar of Arizona*, 401 U.S. 1 (1971); *Branzburg v. Hayes*, 408 U.S. 665 (1972); *Friedman v. Rogers*, 440 U.S. 1, 10-11, & n.9 (1979). But see *Laird v. Tatum*, 408 U.S. 1 (1972) (proponent of first amendment chill effect unsuccessful). For "chill" arguments involving attorneys, see *Keller v. State Bar of California*, 47 Cal.3d 1152, 767 P.2d 1020 (1989); *Falk v. State Bar of Michigan*, 411 Mich. 63, 305 N.W.2d 201 (1981).

97. DiSalvo, *supra* note 5, at 136.

98. A. KAUFMAN, PROBLEMS IN PROFESSIONAL RESPONSIBILITY 817-21 (2d ed. 1984).

99. See Shaffer, *The Legal Ethics of the Two Kingdoms*, 17 VAL. U.L. REV 3 (1983).

100. *Konigsberg v. State Bar of California*, 353 U.S. 252, 273 (1957) (emphasis added).

and moral ramifications of the client's proposed, albeit illegal, behavior.

B. *The Need for Revision*

The Disciplinary Rule(s) require revision to support moral conduct of attorneys who counsel clients to pursue true acts of civil disobedience.

1. Construction of New Rule

DR 7-102(A)(7) should be amended to specifically exclude from its scope those attorneys who encourage or counsel a client to engage in civil disobedience actions. It is not necessary to eliminate the entire Disciplinary Rule from the Code; its present form provides a powerful and important deterrent for those attorneys engaging in collusion with clients.

One suggestion proposed that DR 7-102(A)(7) be read as "In . . . [the] representation of a client, a lawyer shall not . . . counsel or assist . . . [a] client in conduct that the lawyer knows to be illegal or fraudulent except that a lawyer may counsel . . . [the] client prior to acts of conscientious civil disobedience." (The proposed revision would be supplemented with relevant Ethical Considerations to avoid confusion as to what acts constitute "conscientious civil disobedience.")¹⁰¹

Another commentator calls for a similar amendment. DiSalvo's proposed amendment states, "A lawyer shall not . . . counsel or assist his client in conduct that the lawyers knows to be illegal, except that a lawyer may counsel his client in acts of civil disobedience. An act of civil disobedience, for the purpose of this rule, is an act of deliberate and open violation of the law with the intent, within the framework of the prevailing form of government, to protest a wrong or to accomplish some betterment in society."¹⁰² Again, supplementary Ethical Considerations would have to be devised in order to make it clear that the civil disobedients are ready to accept willingly the appropriate legal penalty.

The DiSalvo proposal is a better construction for the proposed amendment because it defines what constitutes civil disobedience for purposes of the amendment. Although, at the very least, Ethical Considerations are required to amplify the definition of civil disobedience, there must be no singular ideological understanding of what constitutes a civilly disobedient

101. Note, *supra* note 21, at 731.

102. DiSalvo, *supra* note 5, at 141-42.

act. To do so might accidentally eliminate other equally viable applications of the revision by simply not including them. Nor do we need to expand the definition of civil disobedience any further than DiSalvo's proposed wording; we run the risk of diluting the potency of the Rules and the law upon which civil disobedience is measured.

However, bar associations need to realize that undesirable causes need to be included under this disciplinary umbrella, since counselling such would-be disobedients provides at least an opportunity for people advocating particular views to examine the moral basis of their intended actions.¹⁰³ In addition, the status of the complainant (a private citizen, another attorney, judge, or law firm) who brings the charge to the disciplinary board should not be heavily considered in this process.

2. Benefits of Revision

This proposal will have its critics; not everyone will agree that an attorney should escape disciplinary action for encouraging or advising civil disobedient conduct, most likely due to the legal, political and financial disruption which accompanies it. However, the benefits from revising this particular Rule clearly outweigh the costs.

Acceptance of the amended version of the Disciplinary Rules would produce several benefits. A revision would eliminate the chilling effect implicit in the present Rules and would mitigate the corollary fear of selective enforcement of the rule by biased disciplinary bar agencies against activist attorneys.¹⁰⁴ Secondly, the revision would similarly eliminate the moral dilemma for a lawyer when the Rules require that she sever personal sympathies from professional rules of conduct which govern the profession.

Several policy recommendations accompany the adoption of one of the proposed revisions. First, revising the old Disciplinary Rules and incorporating the application into the increasingly popular Model Code would eliminate the detrimental effect of the lawyer's use of moral judgment. When an attorney does exercise her discretion on controversial, national issues which she considers personally or morally important, she should not fear being sanctioned for encouraging or advising a

103. Keeton's definition is also sufficiently broad to encompass challenges to both policy and the law. Thus it would cover Operation Rescue "missions" as well as rescuers' forcible and often aggressive tactics in blockading abortion clinics.

104. Note, *supra* note 21, at 731; DiSalvo, *supra* note 5, at 137.

client in a similar vein. Additionally, as with the growing use of alternative dispute resolutions, a type of counseling workshop or instruction for such activist attorneys could be established for the profession and by respective state bar associations. Third, the revision would pre-empt or at least lessen political controversies involving the state bar associations and activist members of the bar. Bar associations need to recognize the benefits of flexibility, particularly in light of the increasing popularity of the abortion issue — regardless of position — and of other issues which involve civil disobedience in the public eye.¹⁰⁵ Lastly, the revision serves to ground the Moral Code in a moral foundation, as its founders intended.

V. CONCLUSION

Responsible civil disobedience can exist in the current social order today; it provides an effective and constructive moral power on national issues. Whether it is right, beneficial, or morally warranted to engage in civil disobedience in a particular situation is a complex decision. A solitary sit-in at an abortion clinic alone may not effect the desired change which an Operation Rescue Movement seeks; however, as a microcosm of civil disobedience today, it exposes the need for change, promotes public debate on a national issue and encourages citizen involvement in the law and policy making process.

As attorneys, we should not discourage this conduct, nor penalize fellow professionals who can prudently advise or exercise some control over a civil disobedient situation. The decision to participate in civil disobedient action can and should involve an attorney; her involvement with potential protesters in making the decision to participate demands freedom from disciplinary sanction and compels acceptance from fellow professionals. An attorney must be able to render compassionate, morally justified, and sanction-free advice. Currently, the adoption of civil disobedient tactics by Operation Rescue and the intensity of the abortion debate underscores the need for

105. Recent examples of civil disobedience not involving abortion clinics include: *Andrews v. People of Colorado*, 800 P.2d 607 (Sup. Ct. Colo. 1990) (nuclear weapons protest); *Federov v. United States*, 580 A.2d 600 (D.C. 1990) (homeless persons); *Hemmati v. United States*, 564 A.2d 739 (D.C. 1989) (unlawful entry to Sen. Robert Byrd's chambers); *New York v. Levi*, No. 90N059390 N.Y. Misc. (Crim. Ct. N.Y. 1990) (Aids Coalition to Unleash Power "ACT-UP" protest); *In re T.K.*, 462 N.W.2d 893 (S.D. 1990) (juvenile trespass in cemetery); *Wisconsin v. Ostensen*, 150 Wis.2d 656, 442 N.W.2d 501 (1989) (sabotage to a U.S. Navy submarine base).

defining the attorney's possible role in it as counsellor. Lawyers who advise such potential civil disobedient clients to pursue illegal conduct need protection from disciplinary sanction meted out by state bar associations at the risk of stagnating future legislative and professional growth.