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Thursday, November 29, 2007

Charles M. Walters, Chief
Gwinnett County Police
770 Hi Hope Road
Lawrenceville, Ga 30044

re: Display of Pro-life Posters on "Truth Truck"

subj: Incidents of Interference with Federally Protected Rights by GCPD

Dear Chief Walters:

Together with the American Center for Law and Justice, Inc., I represent Troy Newman, Operation Rescue and related entities, including the corporate owner of the so-called "Truth Trucks." By way of introduction, the ACLJ is a nonprofit, public interest law firm, with offices around the United States, including our office on 2nd Street NE. Our firm practices in the area of federal constitutional law and civil rights, with a particular focus on legal issues related to public demonstrations and speech activities. For purposes of this matter, I am associated with a member of the Georgia Bar, our Chief Counsel, Jay Alan Sekulow.

I write to you today to communicate the demands of our clients – demands fully justified on the basis of the facts and the law. Now, the time has come for the Major, and the Department to "man up" to that wrong and to make right the wrongs done. To be quite specific, our clients demand the following:

that GCPD make a speedy return to them of their confiscated materials;

that GCPD and the responsible officers make a forthright apology to them for the wrongful impounding and damaging of their property,

that GCPD communicate an appropriate assurance no future arrests and wrongs will occur, based on mere ownership and operation of the Truth Truck on the public streets, sidewalks and ways of Gwinnett County, despite threats made by one of your officers, and

Letter to Hon. Charles M. Walters, Chief
Gwinnett County Police Department
Thursday, November 29, 2007
Page 2

that a firm commitment be made by Gwinnett County Police Department to pay for the repairs to our clients property.

As you will discover by reviewing this correspondence, a grievous constitutional violation took place as a consequence of Major Bardugon's actions on November 23, 2007.

FACTS GIVING RISE TO SEIZURE OF OUR CLIENTS' PROPERTY

On Friday, November 23, 2007, Gwinnett County Police Department officers, including Major Bardugon arrested Robert Roethlisberger, a Missouran who was driving one of our client's "Truth Trucks." Gwinnett Police spokeswoman, Illana Spellman, subsequently explained the basis of the arrest:

Preliminary investigation indicated there was a citizen who called police about a panel truck traveling in the area which, according to the caller, displayed "bloody" and "gory" images of aborted fetuses. The panel truck was located and Major Bardugon made contact with the driver, later identified as Mr. Roethlisberger. He was advised that he was stopped because citizens had called police regarding the photographs on his truck. The two banners on either side of the truck measure approximately 14 feet long by 7 feet tall. The banner on the rear of the truck measured approximately 7 feet tall by 6 feet wide. The images on the banner included the headless and bloody torso of an aborted fetus and the partially crushed head of an aborted fetus being held in forceps.

The Major advised Mr. Roethlisberger that the area was very crowded with mall shoppers and children who were exposed to the photographs. Major Bardugon gave him the option to display his other anti-abortion banners without the graphic photographs. Mr. Roethlisberger refused.

See "Media Release," Gwinnett County Police Department, dated Nov. 27, 2007.

The "Truth Truck" impounded Friday, November 23, 2007, is one of several that are owned by our clients and are used to foster awareness of the nature of abortion and sensitivity to legalized abortion's wantonly destructive methods. Our clients brought that particular truck to the Atlanta area for the purpose of delivering it as a gift to a minister that will be attending an event in Atlanta this weekend. I have included with this letter three photographs of the Truth Truck for purposes of identifying with certainty the kind and character of the displays at issue.

The included photographs show that there are both visual images and text display on each of three sides of the truck. The images include the outcomes of abortion, including dismembered fetal remains and fetal remains evidencing the consequences of chemical abortion burns. The images also include a health child and a grieving adult woman. The textual matters are as follows: "One Dead One Wounded;" "Abortion: God Have Mercy on us!" "Hate what is EVIL. Cling to what is GOOD ~Romans 12:9;" "www.operationrescue.org;" "(800) 705-1175."

When our clients' vehicle was recovered from impound, the panel posters had been destroyed, the mounting hardware for the panel posters had been damaged, and additional posters not on display had been removed from the truck and not returned.

Although there might be some disagreement over facts at the margins, for purposes of this letter and the demands our clients make only, we accept as true the facts alleged in the Media Release by the GCPD. Our review of the law that governs public displays of political speech, such as speech opposing legalized abortion, leads us to conclude that Major Bardugon made serious errors in judgment by arresting Mr. Roethlisberger, by impounding our clients' truck, by damaging the truck, by seizing the additional posters not displayed on the truck, and by threatening to arrest Troy Newman if he drives another such truck in "his jurisdiction."

LEGAL ANALYSIS

Major Bardugon and the GCPD directly trenched on precious, fundamental rights guaranteed to our clients. Relevant decisional analysis makes that conclusion evident.

THE SIGNS, INCLUDING BOTH THEIR TEXT AND THEIR IMAGES ARE PROTECTED SPEECH UNDER THE CONSTITUTION

As an initial matter, the governing constitutional principles are indisputable. Under those principles, the First and Fourteenth Amendment interests of our clients are clearly established.

First, the areas in dispute, public roads and ways within Gwinnett County (or at least within Major Bardugon's "jurisdiction") are quintessential "traditional public forum" properties, within which the right to freedom of speech is at its apex and the power of the government to restrict is closely limited. There is no place in Gwinnett County, or in Georgia, or in the country as a whole, in which it is more commonplace, protected or expected that citizens will express their thoughts and opinions, than in the public streets, sidewalks, and parks. *See Hague v. CIO*, 307 U.S. 496 (1939) ("Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied").

Second, the sign displays on the Truth Trucks are protected by the First Amendment. The fact that the messages conveyed by those communications may be offensive to their recipients does not deprive them of constitutional protection. *See Boos v. Barry*, 485 U.S. 312 (1988) ("As a general matter, we have indicated that in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms

protected by the First Amendment. A dignity standard, like the outrageousness standard that we rejected in *Hustler*, is so inherently subjective that it would be inconsistent with our longstanding refusal to [punish speech] because the speech in question may have an adverse emotional impact on the audience”) (internal quotation marks and citations omitted).

Third, content-based exclusions of protected speech in the traditional public forum is subject to strict scrutiny under the compelling government interest test. In traditional public fora, “the government’s ability to permissibly restrict expressive conduct is very limited.” *United States v. Grace*, 461 U.S. 171, at 177 (1981) (citations omitted). This conclusion results from the constitutional axiom that “[o]ne who is rightfully on a street [or steps] open to the public ‘carries with him there as elsewhere the constitutional right to express his views in an orderly fashion.’” *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 810 (1984) (quoting *Jamison v. Texas*, 318 U.S. 413, 416 (1943)) (additional citation omitted). In fact, “[r]egulation of speech activity on governmental property that has been traditionally open to the public for expressive activity, such as public streets and parks, is examined under strict scrutiny.” *United States v. Kokinda*, 497 U.S. 720, 726 (1990) (plurality).

Here, the police response to the Truth Truck fails strict scrutiny.

**THE CHARGE OF USING OBSCENE AND VULGAR OR PROFANE LANGUAGE
IN THE PRESENCE OF OR BY TELEPHONE TO A PERSON
UNDER THE AGE OF 14 SIMPLY IS INAPPLICABLE**

The Media Alert sent out by GCPD on Monday, November 27, 2007, indicates that Mr. Roethlisberger has been charged with a misdemeanor criminal offense under OCGA § 16-11-39(4), disorderly conduct. Because that section has been specifically identified as the basis of the arrest and seizures, I set it out here:

Disorderly conduct

(a) A person commits the offense of disorderly conduct when such person commits any of the following:

* * * * *

(4) Without provocation, uses obscene and vulgar or profane language in the presence of or by telephone to a person under the age of 14 years which threatens an immediate breach of the peace.

(b) Any person who commits the offense of disorderly conduct shall be guilty of a misdemeanor.

To determine whether or not Major Bardugon acted appropriately, it is necessary to draw from the statute its essential elements and determine whether there was probable cause to believe that these elements were established here. The elements of an offense under this particular provision of the statute are as follows:

- 1) a person acting without provocation
- 2) uses language
- 3) which threatens an immediate breach of the peace
- 4) in the presence of a person under 14 years of age or by telephone to such a person
- 5) when that language is both
 - A) obscene *and*
 - B) either vulgar *or* profane.

“Without Provocation”

The Truth Truck is a message on the value of human life before birth, and on the degrading horror and wrong of abortion. As you may know, the Georgia legislature is currently considering legislation (the Human Life Amendment) that is directly relevant to the status of legal abortion in Georgia. Consequently, our clients decided to send the Truth Truck to Georgia for the purpose of fostering respect for the value of human life and to emphasize the degrading inhumanity of legalized abortion. As such, the Truth Truck sign displays were “provoked” by current circumstances.

“Uses . . . Language”

It should, at this moment, be perfectly clear how wrong-headed Major Bardugon’s actions were. The statute restricts the use of obscene language. Not the display of obscene images. There is a difference. The American Heritage Dictionary offers the following definition of the statutory term “language”:

1. Communication of thoughts and feelings through a system of arbitrary signals, such as voice sounds, gestures, or written symbols.
2. Such a system including its rules for combining its components, such as words.
3. Such a system as used by a nation, people, or other distinct community; often contrasted with dialect.

Other dictionaries offer the same basic definitions. Plainly, under the commonly accepted meaning of the term “language,” the statute is irrelevant to the graphic images displayed on the

Truth Truck's posters. Those graphic, even disturbing, images are just that, images, not language.

Of course, the posters on the Truth Truck did include "language." The "language" used in the posters on the Truth Truck was no more and no less than this:

"One Dead One Wounded;"

"Abortion: God Have Mercy on us!"

"Hate what is EVIL. Cling to what is GOOD ~Romans 12:9;"

"www.operationrescue.org;"

"(800) 705-1175."

In the present circumstances, without ever having to draw into question the facial constitutionality of OCGA § 16-11-39, it is clear that the arrest of Roethlisberger, the impounding and damaging of the Truth Truck, and the seizure of printed posters inside the truck was not ever warranted under the statute.

Of course, there are those graphic, disturbing images displayed on the Truth Truck signs.

Those images simply cannot be the basis for a prosecution under OCGA § 16-11-39 because the statute is directed to *language*. The images are not *language*. If it is the disturbing or offensive *images* that led to the arrest of Roethlisberger, the confiscation of the Truth Truck, the destruction of the signs and of the truck's sign mounting fixtures and the seizure of additional signs stored inside the truck, then a patently stupid application of an irrelevant statute has exposed Major Bardugon and the GCPD to civil liabilities.

"Uses Obscene . . . Language"

Second, there is nothing "obscene" about the photographic displays on the Truth Truck. That they may be disturbing to some or troubling we do not dispute. But the statute does not prohibit the uttering of disturbing or troubling words. The prohibition is on words that are both obscene and either vulgar or profane. Of course, "obscene speech" may be banned because it is outside the First Amendment's protection. The Supreme Court has outlined the required, proper standards for defining obscenity in *Miller v. California*, 413 U.S. 15 (1973), and its progeny. According to *Miller*, obscenity is determined by applying a three-pronged analysis, each prong of which must be satisfied to justify the conclusion of obscenity. Under Georgia statute law, obscenity is determined by the presence of these factors:

(1) To the average person, applying contemporary community standards, taken as a whole, it predominantly appeals to the prurient interest, that is, a shameful or morbid interest in nudity, sex, or excretion; and,

(2) The material taken as a whole lacks serious literary, artistic, political, or scientific value; and

(3) The material depicts or describes, in a patently offensive way, sexual conduct specifically defined in subparagraphs (A) through (E) of this paragraph:

(A) Acts of sexual intercourse, heterosexual or homosexual, normal or perverted, actual or simulated;

(B) Acts of masturbation;

(C) Acts involving excretory functions or lewd exhibition of the genitals;

(D) Acts of bestiality or the fondling of sex organs of animals; or

(E) Sexual acts of flagellation, torture, or other violence indicating a sadomasochistic sexual relationship.

See O.C.G.A. § 16-12-80. See also *Miller*, 413 U.S. at 24 (setting out the so-called *Miller* standards).

Major Bardugon's determinations regarding the Truth Truck signs fails the common *Miller* test and the Georgia statutory test of obscenity on all counts: there is no appeal to prurient interest (morbid interests in sex or excretion), the signs taken together, including their images and their text, have clear merit as core political expression on an issue of keenly relevant debate in Georgia, and the signs do not depict acts of sexual intercourse, acts of masturbation, acts of excretion or of the lewd exhibition of the genitals, acts of bestiality, or acts of flagellation, torture, or other violence indicating a sadomasochistic sexual relationship.

The depiction of dismembered fetuses is not prurient. That is, there is no evidentiary basis for asserting that the average person would find that the posters, taken as a whole appeal principally to the interest in sexual or excretory functions. Nor do the Truth Truck signs depict or describe *at all* "sexual conduct specifically defined by" Georgia law. These are, frankly, graphic images of aborted fetuses. They disturb because we recognize in them the denied humanity of the victims of abortion. They offend because we prefer not to notice the fruits of our acquiescence. But they most certainly do not "depict or describe . . . sexual conduct." The day has not yet come when it is said to be "sexual conduct" to die from an abortion. If you look at Photo 1, you will note that the poster includes a "black box" that covers what may other wise

have been exposed human genitalia. That step was taken as an overabundance of caution, even though the omission of the box would not have resulted in a "lewd exhibition of genitals."

"Uses . . . Vulgar or Profane Language"

Not only must an offending communication be obscene, it must also either consist of vulgar or profane language. But the language used in the Truth Truck posters is neither vulgar or profane.

While the charged statute addresses the use of obscene language in the presence of persons under age 14, the statute does not raise the question of whether these materials are "obscene to minors." This statutory provision does not prohibit the communication of words that are "obscene to minors." But even if the statute were construed to prohibit the uttering of words to minors that are "obscene to minors," the signs displayed on the Truth Trucks are not obscene to minors. To qualify as "obscene to minors," the signs on the Truth Truck would necessarily have to have, as their predominant point of appeal, the unwholesome sexual interests of minors. The signs would have to be, as well, patently offensive to the prevailing standards of the adult community as to what is suitable for minors. And, the signs would have to be devoid of any serious value for minors. Plainly the claim that the Truth Truck's anti-abortion, graphic signs is "obscene" or "obscene to minors" is utterly devoid of sense or merit.

Even if the images on the Truth Truck signs were equated for purposes of the statute with language, the signs are not vulgar or profane language. This is not one of the cases that involve repeated use of the "F" word, disparagements of motherhood, invitations to perform impossible physical acts on oneself, or any of the other many instances in which actual words that really were vulgar or profane were used in the presence of persons under age 14.

CONCLUDING THOUGHTS

Over a decade ago, I stood in an Atlanta courtroom as the wreckage of a failed criminal prosecution fell around the feet of a young prosecutor tasked with trying trumped up charges against a group of pro-life activists who were arrested while praying on a public sidewalk. Then, after having granted a directed verdict for our clients, the trial judge, in open court, asked the young prosecutor, "Johnny, what have you learned today?" When the attorney had no satisfactory answer, the judge remonstrated, "No, Johnny, today you learned that you cannot save a sinking ship with water wings."

Major Bardugon dove into the deep end of the Constitution on Friday.

Now, it appears that he is having the assistance of the GCPD to survive his very poorly reasoned decision to do so. As our analysis shows, his dive was made without consideration for the language of the statute, the facts presented, or the constitutional rights of those harmed by his decision. Unlike "Johnny," Major Bardugon dove in without water wings.

Letter to Hon. Charles M. Walters, Chief
Gwinnett County Police Department
Thursday, November 29, 2007
Page 9

The First Amendment is a tonic to the wrongful arrest of Bob Roethlisberger, the wrongful seizure of the Truth Truck, and the wrongful arrest threats directed by Major Bardugon to Troy Newman. While the bitter medicine of acknowledging that the Major acted inappropriately may be difficult stuff to swallow, it is the right treatment, and the proper cure, for these constitutional ills.

Upon investigation, I hope that you will agree that the individuals affected are owed an apology, at a minimum, and that Major Bardugon and the other police officials that may be involved would be well served by additional training to inform them of the constitutional limitations on their police powers and on the constitutional dimensions of speech and sign displays directed to the core constitutional right of freedom of speech.

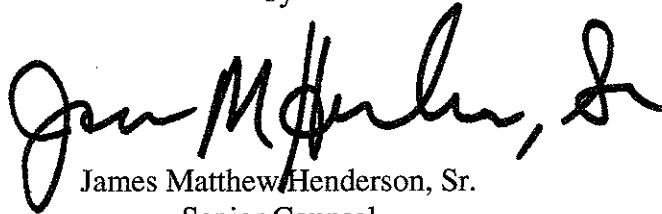
This matter must be resolved, and with dispatch. At present, as we understand the circumstances, our clients are suffering an ongoing constitutional violation due to the seizure of their materials, which effectively prevents them from publication of their signs. In addition, of course, there is the matter of the stupidly undertaken destruction of private property, apparently in a manner that did not even take into account the need to preserve the signs as evidence.

Troy Newman and Operation Rescue demand an apology for the damage done to the Truck, return of all wrongfully seized signs, and replacement/repair costs for the damaged truck. Please advise whether their demands will be satisfied.

Very truly yours,

The American Center for Law and Justice, Inc.

by

A handwritten signature in black ink, appearing to read "James M. Henderson, Sr.", written in a cursive style.

James Matthew Henderson, Sr.
Senior Counsel

Copy to:

Hon. Rosanna Szabo, Gwinnett County Solicitor (via email)

Photo 1: Rear Panel Poster

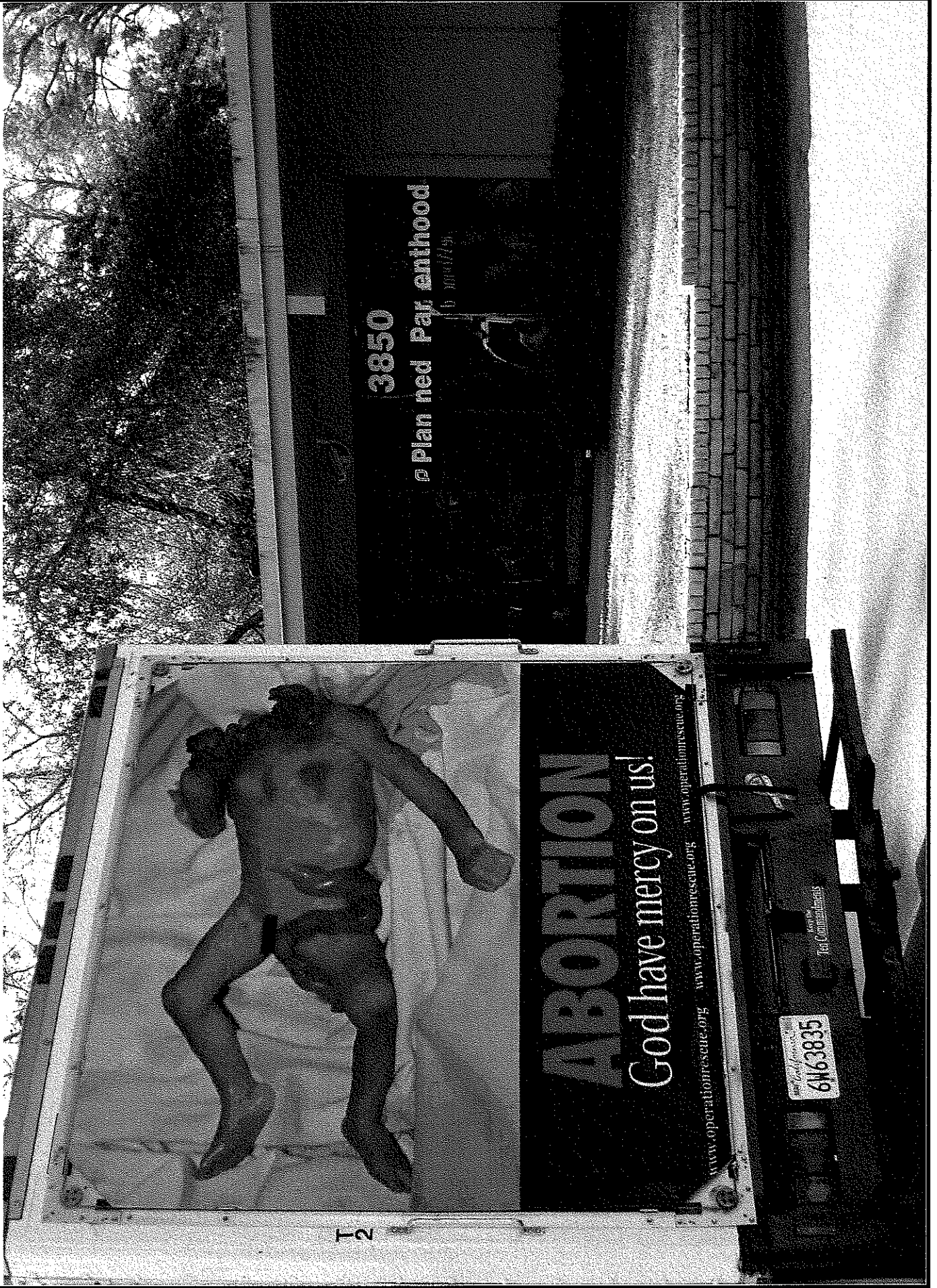


Photo 2: Driver-side Panel Poster



Photo 3: Passenger-side Panel Poster

