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"From Tool to Weapon: The FACE Act and the Dangers of Federalizing Criminal Law"

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It is a matter of historical record that on October 30, 1967, Dr. Martin Luther King, Jr. was arrested in the City of Birmingham, Alabama for disobeying, along with Rev. Ralph Abernathy, a patently unconstitutional state court injunction, granted four years earlier to City officials, prohibiting all protests against the City's segregation laws. Dr. King spent eight days in a Birmingham jail cell before posting bail, after which he and Rev. Abernathy were convicted of contempt of court.

Following their unsuccessful appeal, Dr. King and the Rev. Abernathy both returned to Birmingham to serve out an additional five-day jail sentence for contempt.[1] It was during his unjust imprisonment that Dr. King penned his famous Letter from a Birmingham Jail in which he stated essence of the motive for the great American tradition of non-violent civil disobedience: that when human law conflicts with God's law we must obey God, not man.

Dr. King was imprisoned because he dared to engage in what the injunction he violated called "'*sit-in' demonstrations*, '*kneel-in' demonstrations*, mass street parades, *trespass on private property* after being warned to leave the premises by the owners of said property…"[1]

We know that non-violent civil disobedience, including sit-ins and kneel-ins, resulted in radical change for the good in America, as the remnants of Jim Crow laws in the Democrat-controlled Solid South fell one by one—I note that George Wallace's Democrat wife was governor of Alabama at the time Dr. King was jailed.

But in 1994, Congress committed the monumental blunder of enacting the Freedom of Access to Clinic Entrances Act, 18 USC § 248. The effect of this pernicious law has been a nationwide regime of restrictions on prolife advocacy at abortion clinics that makes the injunction Dr. King violated look reasonable by comparison.

FACE purports to punish only the intentional use of force, threats of force, and physical obstruction at abortion clinics. And the law includes a disclaimer of any intent to limit First Amendment-protected activity, while

[1] *See*, *Wyatt Tee WALKER, Martin Luther King, Jr., Ralph*..., 1967 WL 129599 (1967)(Appellate Brief).

providing a patina of neutrality by including prolife pregnancy centers in its definition of the term "facility."

But no one was fooled. This was a law that targeted only one social justice movement—the prolife movement—for an absolutely unprecedented array of federal restrictions and punishments, both civil and criminal.

As for the isolated instances of violence at abortion clinics around the time FACE was enacted, these were duly prosecuted under local law without any need of FACE—for example the capital punishment of Paul Hill under Florida statutes in 2003.

Over the years since FACE's enactment—particularly in the hands of both federal and state attorneys general—courts have imposed injunctive restrictions on non-violent prolife activism that would never be tolerated in the context of any other social justice movement: speech-free buffer zones, bubble zones, and even floating bubble zones.

These unprecedented injunctions under FACE reflect what Justice Scalia famously described in *McCullen v. Coakely* as "an entirely separate, abridged edition of the First Amendment applicable to speech against abortion."[2]

[2] McCullen v. Coakley, 573 U.S. 464, 497, (2014)

I have been litigating FACE cases on the defense side for more than 25 years, and I have watched how, with dreary predictability, the terms "physical obstruction," "force" and "threat of force" in the statute have become so elastic as to reach even the most trivial conduct—conduct that would not even warrant a desk appearance ticket under local law.

For example, "physical obstruction" has been found:

- when two prolife advocates engaged in a sit-in by occupying two chairs in a large waiting room until the police carried them out of the premises.[3]
- standing in front of a door even when nobody was trying to enter the door.[4]
- preventing a door from being closed, rather than preventing a door from opening.[5]
- blocking only one entrance to a clinic.[6]
- remaining in front of the clinic until police ordered the prolife advocates to move.[7]

As for the term "force" under FACE, "force" has been found based on *de minimis* physical contact, such as allegedly pressing one's body into an escort momentarily. There the Court held that "there is no exception for

[3] New York by James v. Red Rose Rescue, 771 F. Supp. 3d 311, 331 (S.D.N.Y. 2025)
[4] United States v. Dugan, 450 F. App'x 20, 22 (2d Cir. 2011)
[5] United States v. Gregg, 32 F. Supp. 2d 151, 154 (D.N.J. 1998), *aff'd*, 226 F.3d 253 (3d Cir. 2000).
[6] United States v. Soderna, 82 F.3d 1370, 1377 (7th Cir. 1996)
[7] FemHealth USA, Inc. v. Williams, 2022 WL 4241269, at *4 (M.D. Tenn. Sept. 14, 2022)

fleeting and *de minimis* contact…"[8]

One decision by the Second Circuit is a virtual roundup of every trivial finding found to constitute a FACE violation. In that case, a finding of "physical obstruction" was based on:

- merely placing signs so that they spanned two-thirds of a sidewalk with plenty of room to walk by the signs;
- prolife advocates merely approaching patient and her escorts from various angles as they attempted to enter the facility;
- merely walking directly in front of patient to hand her pamphlet and attempting to engage her in conversation.[9]

That decision was later vacated by the very panel that issued it, **but not because the panel admitted it was wrong,**

In the same vacated decision, the Second Circuit found true threats in violation of FACE from statements to the effect that those involved in abortions "never know when you're going to die"—an obvious reference to divine judgment at death, which as the Bible says can come like a thief in the night. That is not a threat to kill anybody.

The motive provision of FACE virtually invites viewpoint

[8] New York ex rel. Spitzer v. Cain, 418 F. Supp. 2d 457 (S.D.N.Y. 2006).
[9] New York v. Griepp, 991 F.3d 81 (2d Cir.), reh'g granted and opinion vacated sub nom. People v. Griepp, 997 F.3d 1258 (2d Cir. 2021), and on reh'g sub nom. New York by James v. Griepp, 11 F.4th 174 (2d Cir. 2021)

discrimination and selective prosecution.

FACE prohibits the use of force or threat of force or physical obstruction against a person **only** if the acts against a person are committed "because that person is or has … been obtaining or providing reproductive health services."[10]

So, for example, if you stand in front of an abortion clinic worker outside an abortion clinic and cause her delay by demanding payment of money you are owed, that's not a crime under any law.

But it's a FACE violation if you delay the same abortion clinic worker in order to offer prolife literature and discuss alternatives to abortion.

The most pernicious aspect of FACE is its provision for federal criminal prosecution.

Under FACE, trivial conduct like that I have just described is subject to up to six months federal in prison for a first offense and a year in prison for a second so-called offense.

Worse, one could be subject to multiple years in a federal penitentiary if one acts with even one other person in a so-called conspiracy against rights under 18 U.S.C. § 241, which turns a misdemeanor first-offense under FACE into a federal felony when charged together with a FACE violation.

[10] 18 U.S.C. § 248(a)(1).

The most outrageous application of FACE has to be the preposterous federal prison terms handed out to pro-life advocates who engaged in an abortion clinic sit-in in violation of FACE but were also charged with "conspiracy against rights" under 18 U.S.C. § 241.

What "rights" were conspired against? The non-existent "right" to abortion supposedly secured by the FACE Act.

Here are some of the sentences handed out to non-violent, religiously motivated senior citizens, including grandmas, for acts of non-violent civil disobedience during a sit-in at a Washington, DC abortion clinic that should have been a matter of local trespass law. The pretext for these absurdly harsh sentences was that one of the participants allegedly caused one of the clinic workers to sprain her ankle, so that all were guilty of a crime of a "crime of violence" as aiders and abettors:

- Joan Bell – 27 months in federal prison for a 77 yr old grandmother.
- Jean Marshall – 24 months in federal prison for a 77 year-old retired nurse.
- Paulette Harlow – 24 months under house arrest for a 77 year-old grandmother with serious health issues and a husband who has cancer.
- Heather Idoni – 24 months in federal prison for a 61 year-old grandmother.

Also, in a different case out of Tennessee, we have:

- Chet Gallagher – 16 months in federal prison for a 76 year-old former police officer.

And then there was the sentence of Bevelyn Beatty in the Southern District of New York for a supposed crime of violence involving no significant physical injury whatsoever: **41 months in federal prison** for the mother of a two-year-old girl because a clinic worker's hand was allegedly injured by a closing door.

Bevelyn would not have been sentenced this harshly under local law had she committed involuntary manslaughter!

These outrageous sentences, all obtained by the Biden Justice Department, were not only an intolerable injustice to these good Americans but an embarrassment to this nation before the world.

But, thank God, President Trump pardoned every one of these people and many more who were victims of the Biden Justice Department's weaponization of FACE and its blatant misapplication of the conspiracy against rights statute to non-violent prolife advocates.

As we know from the Trump Justice Department's massive report on the Biden Administration's Weaponization of the FACE Act, prolife advocates were targeted for prosecution in case-after-case based on alleged non-violent offenses, while little or nothing was done about the nationwide wave

of vandalism and firebombing of **prolife** pregnancy centers as part of the radical Left's violent temper tantrum following the *Dobbs* decision.

Merrick Garland reactivated the "National Task Force on Violence Against Reproductive Health Care Providers," but that only became a vehicle for targeting prolife activists and monitoring their First Amendment-protected activity in collusion with pro-abortion groups.

Those groups funneled information about the activities of prolife advocates as fodder for selective prosecutions and civil actions based on alleged FACE violations that would constitute, at most, minor offenses under local law.

The same Report also finds that Biden administration prosecutors knowingly withheld exculpatory evidence in prosecutions of prolife advocates, advocated for more charges and harsher sentences for non-violent prolife advocates than for violent pro-abortion fanatics, and also "disparaged defendants' religious beliefs, Catholic judges, and defense counsel" while seeking to "exclude religious jurors."[11]

The Report further reveals that in the case of *United States v. Jastrow* the Biden DOJ revealed its ongoing collusion with pro-abortion groups to bring FACE prosecutions against prolife advocates:

[11] *Report* at 20.

> The Clinic and their corresponding national Non-Governmental Organizations (NGO) ***stakeholders are very committed to pursuing a federal prosecution***. . . . Similarly, NGOs, including the National Abortion Federation and Feminist Majority Foundation, ***have on several occasions contacted federal authorities and expressed their and the Clinic's strong interest in the Department of Justice pursuing a federal FACE Act prosecution here***.[12]

In the *Jastrow* case, one Biden DOJ prosecutor lamented that "Unfortunately, we ended up with ***a very Catholic magistrate*** on duty this week and he was very particular about the bond conditions and not infringing on their first amendment rights. At the end, we ended up with overly lawyered bond conditions that would be difficult to enforce!"[13]

Here we see the Biden Administration's anti-Catholic bigotry on full display in the course of one of its many vindicative FACE prosecutions.

In conclusion, it could not be clearer: What was supposed to be a viewpoint-neutral clinic access law quite predictably became a legal bludgeon for use in crushing **non-violent** prolife activism in opposition to the mass murder of human beings in the womb—activism no different in kind than the activism in which Martin Luther King and the civil rights movement of the 1960s engaged in opposition to the Jim Crow regime of the Democrats' Solid South.

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[12] Report at 24.
[13] *Id*. at 26.

Before FACE was enacted this country had never, absolutely never, seen a federal law that subjected non-violent social activists to federal criminal prosecution and abusive civil lawsuits by federal and state attorneys general.

For the sake of the abortion industry and the non-existent right to abortion, Congress wrongly enacted what is in effect an unconstitutional attempt to establish a general federal police power over conduct that is none of the federal government's business and is, at most, a matter of local law involving petty misdemeanors or violations, not ridiculous injunctions, felony charges and years of federal prison time.

It is time to remove this stain on the American justice system.

For the sake of freedom and justice in America, the FACE Act must be repealed.