Faith *v.* Faith

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This is the "good faith" issue, and that's a phrase we know well. It's a big tent covering candor to the court and adversaries, fair and honest dealing, and so on. More deeply, as lawyers, we live and breathe "faith in the system." That is, confidence the legal process will give us a fair hearing with a neutral arbiter and, at least if a judge is deciding, a defensibly reasoned result.

But think like a regular person, and "faith" means something else: religious conviction, belief in the unprovable, conscience. What adherents call "a higher law."

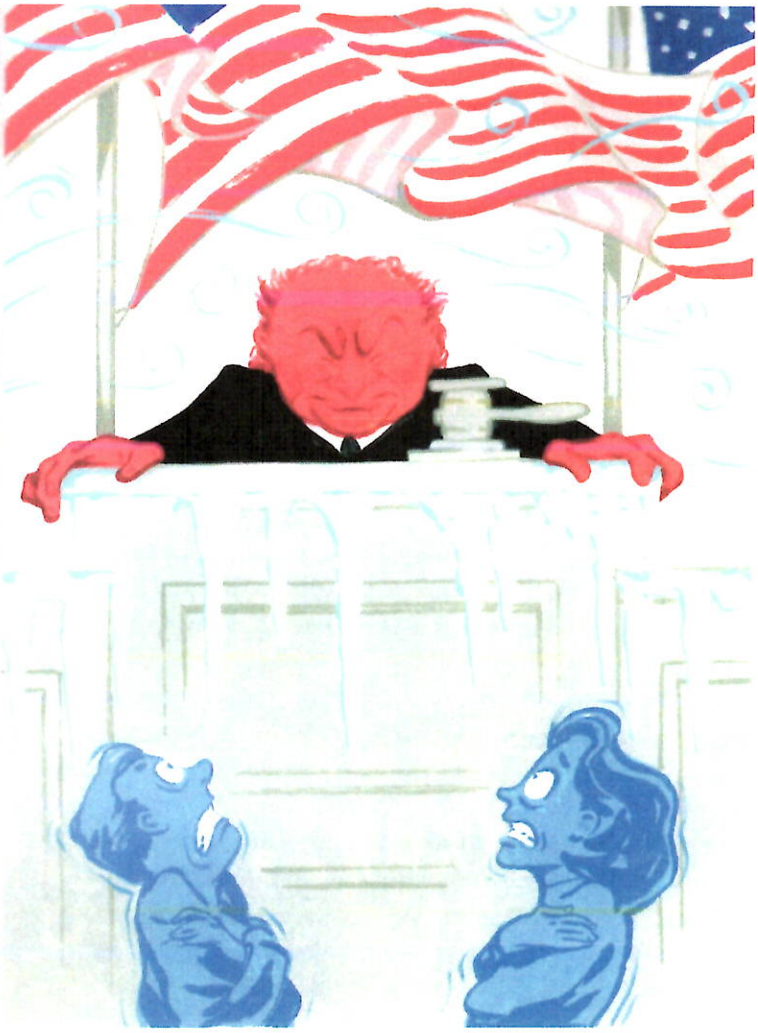
What happens when the two kinds of faith and law collide?

Twenty-five years ago, in a case I was handed as a newly minted government lawyer, they did. The case was probably the weirdest one I'll ever have, but it taught me useful, everyday lessons in how to frame arguments; deal with difficult judges; and in the end, accept defeat. More interestingly, it illustrated the uneasy compromises that occasionally crop up between faith in earthly justice and faith in the Almighty.

The case had its roots in the anti-abortion group Operation Rescue, which staged mass blockades of women's health clinics in the late 1980s and early 1990s. Those disruptions and more violent incidents, including the assassination of doctors and the bombing of clinics, led Congress to enact the Freedom of Access to Clinic Entrances Act (FACE), 18 U.S.C. § 248, in 1994. FACE created federal civil and criminal liability for people who obstruct access to reproductive health clinics.

Two veterans of Operation Rescue, a retired auxiliary bishop named George Lynch and a young Franciscan novice named Christopher Moscinski, sat in the driveway of a clinic in suburban Dobbs Ferry, New York, in 1995. They blocked the facility's driveway for 45 minutes before local police arrested and removed them. It wasn't the most egregious interference imaginable, but Lynch and Moscinski prevented several patients from entering the clinic. And it wasn't their first attempt to stop abortions there and elsewhere. They'd obstructed that facility several times before, once forcing their way inside, and participated in earlier, larger blockades of other clinics with Operation Rescue. A few days now and then in county jail and temporary restraining orders weren't having any effect, and that was precisely why the federal statute had been enacted.

I was happy to get the case. I'd gone to the U.S. Attorney's Office wanting to do civil rights work but, like all new assistants, spent my first few months getting my feet wet defending the government in small tort cases and the like. Judge Jed Rakoff is a leading voice in securities and business law, but surely he also remembers my first trial, in which I defended a Drug Enforcement Administration agent sued for causing a fender bender. At some



point, I objected to my seasoned adversary's leading question, probably a dumb thing to do in a minor bench trial, leading Judge Rakoff to look at me sympathetically and say: "I think I can tell when the form of the question will start to interfere with our search for the truth." He overruled the objection.

So we filed our complaint against Lynch and Moscinski for violating FACE in federal court in Manhattan, and that's when the fun began. Roy Cohn supposedly used to say, "I don't care what the law is, tell me who the judge is," and while his point seems obvious enough, this was my first time experiencing it personally. The clerk spun the wheel, then still a manual exercise, and we drew Judge John E. Sprizzo.

The Difficult Judge

First in his class at St. Johns College in Queens and then first again at St. Johns Law School, former mob prosecutor in Washington and assistant U.S. attorney (AUSA) in Manhattan, member of the famous Knapp Commission on police corruption, defense lawyer for Watergate conspirator John Dean, law professor at Fordham, he'd been appointed by President Reagan 14 years earlier. He was generally conservative and a tough sentencer, but that didn't endear him to our office. Judges who've been prosecutors often fall into two camps: those for whom the government can do no wrong, and those incredulous that the government now has to rely on the poor slob in front of him when, back in his day, the public's business was actually in capable hands. Judge Sprizzo was one of the latter. Years earlier, he'd reamed out an AUSA for failing to include an extra charge that might have saved an indictment against seven men charged in a sensational gang prosecution, noting in a riff that made the newspapers: "If these drug dealers are walking free it's because you people are not competent."

In the old Manhattan courthouse, he dominated his drafty, fluorescent realm like the Kingsfield-esque law professor he'd been in a previous life, only at higher decibels. It was drafty because, despite being 30 stories high, the 1936 building's windows opened, and Judge Sprizzo insisted on making sure everyone knew that they did by keeping them open, even in the dead of winter. Once or twice I saw some clueless lawyer enter the courtroom for a pretrial conference when the judge wasn't there yet, rub his hands together for warmth, realize with stupefaction that the windows were open, and close them. Then Judge Sprizzo would enter and, if his coordinator hadn't already caught the mistake, demand to know who'd touched his windows. You wouldn't have wanted to be the hapless offender.

When dealing with lawyers, Judge Sprizzo was sure he was the smartest guy in the room. The fact that he usually was didn't make the experience any more enjoyable. He'd ask a question, let the lawyer start a sentence or two, cut the lawyer off, fire off a follow-up question suggested by the lawyer's inadequate and frightened half-answer, and repeat the cycle. If the lawyer stuck to his guns too long, Judge Sprizzo's voice would start rising; and if it was a particularly bad day, some explosion or personal attack might follow. He didn't always yell or lose his temper, but after a while you understood there was a fuse and a powder keg, and it was a waste of your time trying to predict when the thing might blow. Even his former law partner, a man located to say nice things about him in his *New York Times* obituary, allowed that Sprizzo "didn't suffer fools gladly." Now I was the next fool up.

The case should have been a slam dunk, both because there was no way to deny that Lynch and Moscinski had blocked the clinic driveway and because they weren't going to try. Inspired by their faith to try to prevent abortions, they admirably had no interest in pretending otherwise in court. Instead, they and their lawyers raised a single defense: that "natural law" justified their disregard of federal law.

Most judges would have shut that kind of nonsense down immediately, to save time if nothing else, and Judge Sprizzo didn't buy it either. But boy, did he love talking about it. "I understand natural law," he said enthusiastically at one point. "I was trained in it." I'd read *A Man for All Seasons* in high school or college, but nothing prepared me for the endless forays into

Illustration by Tim Bower

Thomas More that were to consume our mornings. Such as, "I am as well versed in theology as most people are, and as well versed in the moral theology as most people are [*actually he was much better versed than most*], and I am very well acquainted with that great Catholic lawyer, Sir Thomas More, who never said that the law should not be the law because he had a moral position." That was followed by navel-gazing on Nazi genocide, *Korematsu*, *Buck v. Bell*, the Lincoln-Douglas debates, and so on—and that was all at the first appearance. Later on, we would get to Gandhi, Martin Luther King, Thomas More again, John Brown, *Inherit the Wind*, Blackstone, the Ten Commandments, President Clinton's antiwar protests, and more More.

Amateur philosophizing aside, it was apparent in the first few minutes that Judge Sprizzo didn't like FACE. He made us brief whether it was valid under the Commerce Clause—the Supreme Court had just decided *United States v. Lopez*, 514 U.S. 549 (1995)—though the defendants never claimed it wasn't. He wondered why Congress had federalized what he saw as plain old trespass law and whether it was criminalizing the time-honored tradition of passive civil disobedience. Congress had been "foolish" to include nonviolent, short-term obstruction along with things like threats and arson, he announced.

By the next time we showed up, Lynch had blocked the clinic again, but that didn't matter much. Judge Sprizzo had thought of other constitutional questions. Could Congress sanction protest on a topic like abortion without violating the First Amendment? "You don't remember the sixties," he lectured correctly, given that I was four years old when they ended. "I do. We had people out here during the 1964 demonstration chaining themselves to pillars, we had people blocking private buildings and public buildings, occupying universities, all of which were covered by a trespass law. . . . No one suggested that the federal power ought to be brought to bear on those people because of the particular reasons why they were protesting."

I tried arguing that blocking cars in a clinic driveway wasn't protected speech, but he wasn't buying. "You say that Congress has the right to be pro-abortion? That *surely* violates the First Amendment." And he questioned whether FACE served any public interest: "If polls are correct, about 35 or 40 percent of the people don't believe *Roe v. Wade* was correctly decided, and about 80 percent don't believe you are entitled to abortion on demand. If you want to talk about the people, what people are you talking about? It depends who gets elected, doesn't it?" All this stuff was briefed, too.

Eventually Judge Sprizzo dropped the facial constitutional objections, which was no great victory because, by then, several other courts had upheld the law. He also squashed the "natural law" defense once and for all, recognizing it "would lead to a theocracy." He told the defendants at one point:

> The public in a pluralistic society is entitled to a free and independent judiciary that enforces the law, not the judge's private view of what is right and wrong. That is what I owe the public. My private conscience is irrelevant. . . . If my private conscience were so offended by what I am required to do as a federal judge, I could resign or recuse myself from this case. But it wouldn't justify the imposition of my private morality upon the rest of the body politic. That is the problem with your argument. What I see in your argument is chaos and disorder, and I will not accept it.

He denied our request for damages under the statute and issued a simple injunction ordering them not to obstruct the Dobbs Ferry Clinic again. It wasn't much, but we thought he might care more if they did it again because then it was his order they would be flouting.

And sure enough, we were back in Judge Sprizzo's courtroom six weeks later after Lynch returned to the clinic and blocked access. But despite the new incident, the judge wouldn't add a buffer zone to his injunction or impose damages in the statutorily prescribed amount of $5,000 per violation, adding helpfully, "I do not know why you ever came here in the first place." We were starting to wonder, too. He called our request for damages disingenuous ("that is the way your office seems to function these days"), said we were just trying to make an example of the defendants ("don't lie to me about that"), and found Lynch in civil contempt but imposed no penalty. Perplexingly, though, he invited a prosecution for criminal contempt for the next violation, saying it gave him more flexibility.

Criminal Contempt

We took him up on that, though we could have charged their next obstruction a few months later as a separate crime under FACE and thereby gotten a different judge. A big mistake, in hindsight, but we'd been lulled by his references to criminal contempt and his acknowledgement that he had to apply the law regardless of his personal feelings. And we thought he would finally be mad that the defendants kept making a mockery of his injunction.

We scheduled a bench trial for the criminal contempt charge for a few weeks later. There wouldn't be a jury given that it was only a petty offense—imprisonment for less than six months or a fine under $5,000. Judge Sprizzo also asked about alternative punishments, "places that I can send them to do community service that would not offend their conscience," which was something we hadn't considered ("Once and a while, it would help to think a little and not let me do all your work for you.").

At trial, our cautious optimism quickly evaporated. Judge Sprizzo intervened in the defense lawyer's questioning and asked whether women had told Lynch in the confessional that

they regretted their abortions and whether Lynch believed he was "acting in defense of human life" when he blockaded clinics. These elicited the intended answers.

Then he mused about the justification defense. Could Lynch and Moscinski be acquitted because they reasonably believed they had to violate the injunction in order to prevent murder? Whether abortion could reasonably be seen as murder depended on federal constitutional law and New York's murder statute, I offered, but that went nowhere. "The state is in no position to define when life begins or whether an unborn child is human or not," Judge Sprizzo rejoined. "I would have to be convinced that a belief which is shared by . . . perhaps 80 million people in this country, that the unborn child is human, is objectively unreasonable." Great—more briefing. And a sinking feeling about what was coming.

Bench Trial Nullification

What came a few weeks later was an acquittal. An acquittal, that is, in a nearly uncontested bench trial. The defendants had admitted their offense—embraced it, actually—but somehow I'd still managed to lose. Neat trick, I thought glumly. As an AUSA on the civil side, this was my only criminal prosecution, and to this day, I remain 0–1 as a prosecutor.

In an opinion he delivered in open court and later published, *see United States v. Lynch*, 952 F. Supp. 167 (S.D.N.Y. 1997), Judge Sprizzo started with the justification defense. Innumerable other courts had rejected that concept in abortion cases, but he disagreed: "Were a person to have violated a court order directing the return of a runaway slave when *Dred Scott* was the law, would a genuinely held belief that a slave was a human person and not an article of property be a matter the Court could not consider in deciding whether that person was guilty of a criminal contempt charge?" And didn't we prosecute the Nazis at Nuremberg for obeying unjust German laws? He wondered whether "international treaties on human rights . . . could conceivably, at some time, put United States positive laws relating to abortion and the judges who implement them at variance with and in violation of a future international consensus on that issue." *Id.* at 170 n.3.

But Judge Sprizzo ultimately bypassed the justification defense because he found we hadn't proved the willfulness element of criminal contempt:

> Lynch's and Moscinski's sincere, genuine, objectively based and, indeed, conscience-driven religious belief, precludes a finding of willfulness. Willful conduct, when used in the criminal context, generally means deliberate conduct done with a bad purpose either to disobey or to disregard the law. *See Black's Law Dictionary* (5th ed. 1979). That kind of conduct is not present here.

Id. at 170.

This was a willful misconstruction of willfulness. Willfulness requires only an intent to commit the act in question—in our case, to obstruct the clinic. The defendant doesn't need a "bad purpose," and motive is irrelevant. Judge Sprizzo undoubtedly knew this, something he signaled by citing a double jeopardy case unrelated to the definition of willfulness: *United States v. Sisson*, 399 U.S. 267 (1970). Think what you want, he seemed to be saying, you can't appeal.

But then he went much further:

> However, even assuming arguendo that the Court were satisfied that the Government's proof established the requisite willfulness, the Court would still find the defendants not guilty. The facts presented here both by sworn testimony and a videotape depicting an elderly bishop and a young monk quietly praying with rosary beads in the Clinic's driveway, clearly call for . . . that exercise of the prerogative of leniency which a fact-finder has to refuse to convict a defendant, even if the circumstances would otherwise be sufficient to convict. The Court has been cited to no authority by the parties that the Court, when it sits as a fact-finder, does not have that same prerogative of leniency and the Court's own research has disclosed none.

Lynch, 952 F. Supp. at 171.

To this he added a footnote extolling the "prerogative of leniency" as having "for centuries proven most effective in both England and America in resisting attempts at government oppression," and he discussed the famous case of John Peter Zenger. *Id.* at 171 n.4. Curiously, he didn't mention more recent examples, like white jurors who refused to convict obviously guilty white defendants in the Jim Crow South.

Thus, for what I think remains the first and only time, a federal judge expressly adopted the practice of "jury" nullification in a bench trial, assuming the defendants' guilt under the law but refusing to convict. Not that federal judges haven't nullified. No doubt it had happened before—a judge here or there who thought a prosecutor had overreached or who simply didn't want to tarnish an otherwise upstanding person's life with a conviction. No doubt guilty defendants during Prohibition and Vietnam were let off by judges unhappy with the laws they had to enforce. But proudly acknowledging it in the *Federal Reporter* and trumpeting the practice as a curb on government oppression was something else.

Finally, when Judge Sprizzo finished reading his decision in court, he looked down at us and said wearily: "For the government's benefit, I will accept no further violations of my order as a related case. I have disposed of it once. I do not expect to dispose of it again and again and again. Should there be a new violation, I have done my duty by this case, and I don't want to make it a

career." That was kind of sad, I thought, still stunned from the acquittal. Not that I wanted to see the man again—I really didn't. But sad because, underneath it all, the case had vexed him to the point where he had to make sure he never faced its dilemmas again. The instruction doesn't appear in his published opinion.

As he had to have known it would, Judge Sprizzo's opinion caused an uproar. "A dangerous abortion protest ruling," the *New York Times* editorialized. "How long will it be before the killer of an abortion doctor walks into court armed with this ruling?" the *Daily News* asked. "I find the decision very troubling," then mayor Rudolph Giuliani (and former U.S. attorney for the Southern District of New York) told reporters.

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But Judge Sprizzo had his defenders, too. Michael McConnell, the eminent constitutional and religion scholar and later a judge on the Tenth Circuit, acknowledged in an opinion piece that the decision was legally wrong and that Judge Sprizzo should simply have convicted and suspended the sentence. But still he saw the acquittal as an "act of courage" one had to admire because he thought FACE's scope and penalties excessive. Prosecuting Lynch and Moscinski was "repression of political dissent," he claimed, likening them to MLK.

Despite what Judge Sprizzo assumed about double jeopardy, the case wasn't quite over. We had a decent argument that, unlike the usual acquittal, this one was appealable because the court had actually found all the facts necessary to convict but had simply acquitted after engrafting an extra, unnecessary element onto the offense: bad motive. In those circumstances, some authority suggested, an appellate court could direct a conviction based on the facts already found without the need for a retrial, consistent with the Fifth Amendment.

We lost that argument, but narrowly. *See United States v. Lynch*, 162 F.3d 732 (2d Cir. 1998). The court of appeals produced three different opinions and split 2–1 on whether the acquittal was appealable, with all judges agreeing that Judge Sprizzo's definition of willfulness was erroneous. Then the court split 6–6 on whether to rehear the case en banc, leaving the acquittal in place. *See United States v. Lynch*, 181 F.3d 330 (2d Cir. 1999). No judge defended nullification in bench trials, not surprisingly, and the opinion dissenting from the denial of rehearing en banc called Judge Sprizzo's championing of the practice "dangerous" and a "lawless usurpation of power." *See id.* at 337–38 (Cabranes, J., dissenting).

Because the court of appeals had divided so closely, we gave thought to seeking certiorari. I had loony fantasies of the solicitor general graciously waiving his role of arguing the United States' cases in the Supreme Court for some reason—why he would do this, exactly, I never quite worked out—and assigning the job to me, still a relatively new government lawyer in a different office. But the U.S. attorney had had enough of this misdemeanor prosecution gone south, understandably, and we dropped it. The bizarre case was over.

Lessons

Did it produce any lessons? I don't know—mostly frustrations. It did dramatize the importance of tailoring arguments to the specific decision maker at hand. I'd assumed we couldn't lose, even with a judge who chafed against the underlying law. Maybe I didn't hunt creatively enough for some argument even Judge Sprizzo might have found persuasive instead of relying too mechanically on his duty to carry out the statute, whether he liked it or not.

The case also provided pointers in handling difficult judges—the yellers, the ones who never let you finish, those given to personal attacks. The more I was before Judge Sprizzo, the more I found that raising my own voice and dropping some of the usual politeness and deference got him to retreat a little. That approach, which I became more comfortable with as the case went on, managed to restore a little control over what I was trying to accomplish and helped me redirect the argument or finish a point. In life, after all, that's eventually how you'd treat a bully—and I found it worked in court, too. But does that mean it would work with someone else? Who knows.

Finally, the case helped me with an important and practical truth I remember reading from Warren Christopher in an article sometime after the 2000 election, when he was asked about handling defeat when the stakes were so high. As a lawyer, he said simply, he'd learned how to lose a case a long time ago. I was dismayed that Judge Sprizzo was going to get away with openly and knowingly flouting the law, but before long I regained perspective, and I too learned how to lose a case. Accepting the mysterious judgments of judges and the unaccountable verdicts of juries is

essential if your work consists of moving serially through other people's problems, one after another after another. There will be other and better days in court, other worthy clients, other cases you want to win just as badly.

More than any practical takeaways, the case struck me as an illustration of the sometimes awkward fit between law and religion or conscience, good faith and good faith. The defendants had deliberately broken the law out of religious conviction and were prepared to take the consequences. But what's a judge supposed to do when his conscience conflicts with the law? Recuse, of course, but it isn't always that easy. Judge Sprizzo expressly recognized he couldn't impose his "private morality" in court, but then a lightbulb went on and he hit on what he apparently saw as an ingenious compromise—a way around the problem. He could acquit as a kind of juror without the imprimatur of a court. He said of nullification at one point, "A judge can't do that; a jury can. *I guess a judge can do it too if he is sitting as a trier of fact.* In a criminal case, the court of appeals doesn't have the power to review anything I do on a clearly erroneous standard or otherwise." He could stay on the case *and* indulge his personal views.

This was a willful misconstruction of willfulness.

Felix Frankfurter wrote that, "as judges we are neither Jew nor Gentile, neither Catholic nor agnostic." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 647 (1943) (Frankfurter, J., dissenting). But everyone knows religious or other personal belief sometimes creeps in, consciously or not. "I don't check my faith at the door when I walk into this institution," one especially forthright judge said. "I bring my human wisdom, my experience, my knowledge. And, yes, I bring my Bible with me. It's my compass. It's my sense of right and wrong." Mark B. Greenlee, *Faith on the Bench: The Role of Religious Belief in the Criminal Sentencing Decisions of Judges*, 26 U. DAYTON L. REV. 1 (Fall 2000) (quoting Judge Melba Marsh). Other judges openly advocate using religious precepts in decision making and have described specific cases in which their decisions were influenced by their beliefs. *See, e.g.*, Raul A. Gonzalez, *Climbing the Ladder of Success—My Spiritual Journey*, 27 TEX. TECH. L. REV. 1139 (1996). Their view has occasionally been endorsed by legal scholars, though more often it's rejected. *See, e.g.*, Stephen L. Carter, *The Religiously Devout Judge*, 64 NOTRE DAME L. REV. 932 (1989).

More quantitatively, one study found that state supreme court justices identifying as Evangelical Christians were more likely than others to uphold death sentences and obscenity restrictions and affirm denials of gender discrimination claims. *See* Donald R. Songer & Susan J. Tabrizi, *The Religious Right in Court: The Decision Making of Christian Evangelicals in State Supreme Courts*, 61 J. POL. 507 (1999). Members of liberal denominations, or those with certain strongly held secular views, presumably tilt the other way in some kinds of cases. All these judges think they've found acceptable balances or accommodations between their private consciences and their public responsibilities. And, of course, we all accept that perfect objectivity isn't possible.

First Amendment law is an equally muddy mishmash of compromises. Giant crosses and Ten Commandments displays are permissible if they've been around a long time and, even better, include some secular goal like commemorating fallen soldiers, but putting up new ones is suspect. Students have the right to pray in public schools and even proselytize to some degree, but not if teachers are involved. States can pay for religious schools' playgrounds and subsidize their scholarships through circuitous tax credit programs, but they can't directly finance sectarian instruction. Good luck trying to rationalize all this.

Yet, these kinds of ad hoc reconciliations by individual judges and in the doctrine itself are probably inevitable in a large and infinitely diverse society. No one will be satisfied by them all the time, but we seem to muddle through tolerably well, case by case. They only blow up when, as in my case all those years ago, the balance is so obviously and grossly out of whack—when a judge or a decision so brazenly subordinates the law to something more personal.

One final postscript: While the Lynch and Moscinski case was pending, there was another clinic obstruction in our district. This time, 10 people barricaded themselves inside a Manhattan facility using bike locks and blocked access for three hours. We sued them under FACE, and, coincidentally, the complaint was filed three weeks after Judge Sprizzo's acquittal. This new lawsuit was unconnected to the Lynch and Moscinski case, and we didn't designate them as related when filing. Thus, we could have randomly been assigned any one of some 50 district judges in the Southern District of New York. Do you know whom we got? That's right, John E. Sprizzo.

But this time was different. Stung, I think, by all the bad press and admittedly facing a more serious obstruction, he did his job, and with a minimum of unpleasantness in court. After a jury found the defendants liable, he entered an injunction and imposed modest but not negligible civil penalties. It wasn't the most stringent enforcement we might have found in the courthouse, but it was well within the range of standard outcomes. This time, his personal compromise was much closer to the mean. And no one objected. ▪