

David Daleiden's Criminal Show Trial in California will Drag Into the Light More of Planned Parenthood's Dark Criminality.

The saga of David Daleiden and the Center for Medical Progress continues to shed new light on the dark criminality of Planned Parenthood and its political accomplices. The filing of criminal charges in California on March 28 against Mr. Daleiden and Sandra Merritt opened a new window on the abortion empire, further revealing how tightly some politicians on the left are locked in the grip of Big Abortion.

The new Attorney General of California, Xavier Becerra, has received campaign funds from Planned Parenthood's deep pockets and was publicly acclaimed by Planned Parenthood when he recently was appointed. In less than two months after taking office as the A.G., he filed 15 felony counts against the individuals who last year exposed Planned Parenthood's criminality.

I am a former federal prosecutor and served as the chief of one of the criminal divisions of the U.S. Attorney's Office in Phoenix. From a law-enforcement perspective, A.G. Becerra's move makes no sense. No serious prosecutor would have filed these charges. Only a politician would.

Perspective: A Statute Used Only to Persecute the Politically Disfavored

Let me put this into perspective. Mr. Daleiden's alleged "crime" is that he recorded abortionists discussing their activities without them knowing they were being recorded. Abortionists – at least those on the tapes that have been made public -- were recorded discussing the process of dismembering infants in the womb and then selling their body parts for a profit. If proven in court, each instance would be a federal felony under 42 U.S.C. § 289g-2.

Even if the California Attorney General could prove his case of improper recording against Mr. Daleiden and Ms. Merritt, this would be a minor and dubious offense at worst. Under the laws of 38 other states the District of Columbia, as well as under federal law, it would not be a crime at all. In most of the United States, people are free to record their own conversations with others without obtaining consent. California is one of the few states requiring "all parties to a confidential communication" to consent before the conversation can be filmed or recorded.

Even in California, this anti-recording law is honored in its breach. Journalists in California routinely conduct undercover video stings and are not charged with crimes. For instance, David Goldstein, a highly accomplished investigative journalist with Los Angeles' CBS affiliate, regularly does undercover video investigations. He has never been prosecuted, which is no surprise to anyone.

Likewise, a well-known animal-protection group called Mercy for Animals regularly sends undercover videographers, using aliases, to expose conduct of which it disapproves. In one of its many undercover videos, the group's undercover videographer gained access to a goat slaughterhouse by posing as a prospective meat buyer. After the videotape was publicized,

California law-enforcement authorities prosecuted the goat slaughterer for animal cruelty and did not prosecute the undercover reporter.

So what is the moral of the story?: if you are an undercover reporter against goat slaughtering, you get applauded and not prosecuted; if you are an undercover reporter against slaughtering human children and the trafficking in their body parts, you yourself get prosecuted, while those slaughtering and trafficking do not.

Note also that A.G. Becerra had the option to file the charges under this statute either as misdemeanors or as felonies. (In California, such statutes are known as “wobblers.”) He chose to file them as felonies. That tells you a lot about Mr. Becerra’s motives. He cannot claim with a straight face these alleged privacy intrusions were so heinous that only the more threatening felony penalties would suffice. The alleged privacy intrusions in this case all involved educated professionals talking with strangers in public places. It is hard to imagine any expectation of privacy at all. Rather, Mr. Becerra’s choice to charge felonies can only be explained by the involvement in this case of abortion, which is venerated in liberal political circles.

Apparently in California, you only get prosecuted for undercover video stings if you hold views disfavored by the political elite, and particularly when you embarrass Planned Parenthood, the money-flush, politically powerful Goliath of abortion. This prosecution against Mr. Daleiden and Ms. Merritt amounts to a remarkably heavy-handed violation of the First Amendment known as “viewpoint discrimination.” At some point, the California Attorney General should find himself in a very awkward position trying to explain how these charges possibly could be fair.

Unintended Consequences

Then there also is the problem for the Attorney General that even the statute under which Mr. Daleiden and Ms. Merritt are charged, Cal. Penal Code §632, provides an array of strong defenses. For instance, recording conversations is only illegal if those conversations were “reasonably” expected to be private. Also, the statute specifically “excludes a communication made in a public gathering.” Yet the conversations in question took place in public areas such as restaurants and networking receptions. The Attorney General will have a tall order to persuade a jury “beyond a reasonable doubt,” which is the standard every prosecutor must meet in any criminal case.

And a related statute, Cal. Penal Code §633.5, declares it is a complete defense to this alleged crime if the recording was “for the purpose of obtaining evidence reasonably believed to relate to ... any felony involving violence against the person, including ... human trafficking.” That of course was one of the purpose for these undercover videos: to obtain evidence of dismemberment baby “persons” and trafficking of human body parts. Thus, the facts fit the defense.

Expect to hear the abortionists’ predictably irrational quibbling about the human personhood of the baby *in utero*. But no one can quibble that the body parts being trafficked were human. In fact, the great irony of Mr. Daleiden’s expose’ of Planned Parenthood is that the parts being trafficked have monetary value -- even to the abortionists -- *solely* because they are human. From

a trial lawyer's perspective, the cross-examination at trial of the abortionists in this case – and whether these trafficked parts were “human” -- should be exquisite.

And since one factual issue will be whether Mr. Daleiden “reasonably believed” he would collect evidence about “violence against a person” -- out of the womb persons this time, for the quibblers -- there can be no credible argument to exclude evidence at trial about Big Abortion's criminality in delivering live, intact babies, which later died and were sold. Whole babies, rather than torn-apart ones, are particularly valuable to the trafficking industry, because their entire bodies can be dissected and parted-out to efficiently increase the abortionists' bottom lines.

In fact, on the same day as A.G. Becerra paraded the phony criminal charges, Mr. Daleiden and CMP deftly and defiantly released a new video of a Phoenix abortionist calmly discussing the delivery of intact babies, and how their treatment after delivery (life or death) depended entirely on “who's in the room.” She previously had been a longtime abortionist at Planned Parenthood-Los Angeles and had been trained by Dr. Deborah Nucatola, who also introduced her in the video segment. That is the same Dr. Nucatola, Planned Parenthood's chief medical officer, who was heard in the now infamous initial CMP video, while munching salad and swilling wine at lunch, discussing how she “crunched above...crunched below” while dismembering babies in the womb in a way to tear out and preserve the most profitable parts for sale. I am imagining A.G. Becerra and his staff at the upcoming criminal trial squirming mightily as they try to minimize the effect of these two witnesses' blood-curdling cross-examinations.

As horrible as it is for A.G. Becerra to threaten some of California's citizens with a political show trial – and that is all these criminal charges amount to -- there also is an upside. The longer the spotlight is kept on Planned Parenthood and the National Abortion Federation, the more the public will be exposed to the sheer gruesomeness of dismembering infants, in or out of the womb, and selling their human parts. And the more unfair this prosecution is revealed to be, the more clear it will become that Big Abortion has much more to hide from the light. Ultimately, the jury in this case will be so revolted, they will do the right thing by Mr. Daleiden and Ms. Merritt, and agree that Planned Parenthood and the National Abortion Federation are the only criminals here.

No Serious Prosecutor Would Bring These Charges.

There are many other reasons a serious prosecutor would never bring charges like these. For instance, Planned Parenthood and the National Abortion Federation already have engaged two of the nation's largest, most well-heeled law firms to try to crush Mr. Daleiden and Ms. Merritt in civil law suits. When private parties already are suing for their own interests in civil cases (that is, money damages, not jail), criminal prosecutors almost never waste taxpayers' resources simply to pile on for no apparent purpose.

What is A.G. Becerra's excuse for piling on? In his press release announcing the California persecution (sic) of Mr. Daleiden and Ms. Merritt, he stated, “The right to privacy is a cornerstone of California's Constitution, and a right that is foundational in a free democratic society.” Is he tone-deaf? Did the irony of this press release never occur to anyone in his office: that this state

privacy right is in direct conflict in this prosecution with the freedom of press, written in black-and-white text in the First Amendment to the U.S. Constitution?

Even the hyper-liberal *L.A. Times* editorial board found A.G. Becerra's move to be ominous: "It's disturbingly aggressive for Becerra to apply this criminal statute to people who were trying to influence a contested issue of public policy... ." Other media liberals—*Slate's* Mark Joseph Stern and *Mother Jones's* Kevin Drum, who have no sympathy for anti-abortion activists -- also have strongly criticized Becerra's vendetta. Drum wrote: "This was a legitimate investigation, and no level of government should be in the business of chilling it."

As another reason this is not a legitimate law enforcement pursuit, any career prosecutor would know to stay away from the significant complications caused by "parallel proceedings:" that is, a criminal case going forward at the same time as a civil case. For instance, in the civil case, NAF obtained a gag order (preliminary injunction) to keep Mr. Daleiden from releasing further videos exposing NAF members. (Yes there are even more such videos, but the public is not being allowed to see them due to this preliminary injunction.) How will that gag order operate in light of this new prosecution? Surely Mr. Daleiden will be able defend himself in criminal court, but how does he do that fully in light of the gag order? And will Mr. Daleiden be allowed to explore whether NAF and A.G. Becerra's office already have been in collusion?

Expect the interplay between the jostling civil and criminal cases to sow confusion repeatedly. Pity the poor judges who will have to sort through the ensuing mess. While I expect Mr. Daleiden and Ms. Merritt to be acquitted outright, the issues clouding their right to a fair trial are already lining up, sure to provide the safety net of a strong appeal if necessary.

Perhaps A.G. Becerra assumes Mr. Daleiden might grow weak in the knees. That is not an uncommon assumption for some prosecutors – although clearly unethical in this context -- expecting a defendant to take a plea to lesser charges to avoid the threat of jail. If so, A.G. Becerra only needs to remember Mr. Daleiden's take-no-prisoners response to a similarly abusive Texas prosecution, which he successfully fought with relish. He and his current defense team are energized by these unjust California charges and expect them eventually to be dismissed like those in Texas.

In Texas, the ugly collusion between Planned Parenthood and politically motivated prosecutors in Houston is what ultimately led to the dismissal of that foolhardy prosecution. The ugliness of that case also was a factor in the Harris County prosecutor subsequently being voted out of office. You would think the California A.G. would have learned a lesson from the Texas fiasco. Apparently not.

A Head-Shaker

There are so many problems with bringing a prosecution like this one, that many observers are left shaking their heads. What could A.G. Becerra possibly be thinking?

Perhaps he is betting on his filing of these charges in San Francisco, one of the most wildly liberal jury pools in the country. And perhaps he is assuming if he draws the right judge in such a liberal area, he can avoid getting the case dismissed and maybe get a ruling excluding the most ghoulish and stomach-turning evidence against the abortion behemoth. If so, these are cynical calculations.

Make no mistake: this will not be an easy case to defend in the current political climate. But it is not difficult because of the evidence; it is only difficult because of the climate.

It also should send out an alarm to the public: certain politicians apparently feel safe to openly and unabashedly use the heavy club of law enforcement to attempt to crush individual citizens who have the courage to stand up against political power -- in this case, the abortion industry.

And that is why this most recent twist in the Daleiden saga is an eye-opener. It reminds me of an idea, loosely paraphrased, attributed to our patron saint at the Thomas More Society: if you cut down the laws in order to destroy your political opponents, what will remain to protect the culture left standing from unbridled political power?

Perhaps Mr. Becerra should think about that.

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