Civil Disobedience, Injunctions, and the First Amendment

Bruce Ledewitz
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INTRODUCTION

Classic First Amendment law divides the world of expressive conduct into two parts: that which is protected by the Constitution and that which is not.1 Expressive conduct protected by the First Amendment generally cannot be prohibited by the government,2 though it may be regulated with reference to what is called time, place and manner.3 Expressive conduct that is not protected by the First Amendment can be prohibited by the government to precisely the same extent as any other kind of conduct. Indeed, the Supreme Court has upheld severe penalties for non-protected expressive conduct.4

Civil disobedience is not a relevant category in this bi-polar world. Civil disobedience, if it is more than the setting up of a test case for constitutional litigation,5 is expressive conduct even the par-

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1. See Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) (discussing the two-level theory of the First Amendment); see also L. Tribe, AMERICAN CONSTITUTIONAL LAW § 12-8, at 832 (2d ed. 1988) (noting that the two-level theory "differentiate[s] between expression protected by the First Amendment and expression which is regulable as long as minimal due process requirements have been met.").

2. Under the two-level theory, government restriction of "speech" must be justified by a showing that the restriction "is necessary to further a 'compelling state interest.'" L. Tribe, supra note 1, § 12-8, at 833.

3. This truncated description both overstates and understates the government's power to regulate speech. Time, place and manner regulations apply to the public forum. See Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45-46 (1983). Other fora carry differing potential for regulation. See, e.g., id. at 46 (noting that a public school's "interschool mail system is not a traditional public forum.").


5. The courts do sometimes refer to test cases as civil disobedience. See United States v.
Participants admit is not protected by the First Amendment.\textsuperscript{6} The classic example of civil disobedience—a sit-in—is conduct the government has traditionally prohibited. In recent years, thousands of protestors for various causes have been prosecuted under local trespass laws for sit-ins and similar actions. The law views such protestors, in the recent words of Justice Stevens, as simply “a class of persons who have persistently and repeatedly engaged in unlawful conduct.”\textsuperscript{7}

Though not understood as protected by the First Amendment,\textsuperscript{8} civil disobedience nevertheless has become an established part of American political life.\textsuperscript{9} Certainly since the 1960's, but even before then, many groups seeking political reform have used civil disobedience either as a tactic to bring their message to the attention of the public or as an expression of non-cooperation with policies they oppose.\textsuperscript{10}

With the growth of Operation Rescue,\textsuperscript{11} sit-ins and civil disobedience in general have become more intrusive and more controversial. Rescues at abortion clinics are not the same as traditional civil disobedience. They are sustained rather than sporadic. Though usually and predominantly non-violent, rescues are more forceful than,

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\textsuperscript{6} Aanerud, 893 F.2d 956, 958, 962 (8th Cir. 1990); Lear Siegler, Inc., Energy Prods. Div. v. Lehman, 842 F.2d 1102, 1126 n.17 (9th Cir. 1988).

\textsuperscript{7} Hirsh v. City of Atlanta, 110 S. Ct. 2163 (1990) (Stevens, J., concurring).

\textsuperscript{8} See United States v. Albertini, 472 U.S. 675 (1985) (holding that the First Amendment does not prevent conviction for reentry at a military base from which an individual had been barred).

\textsuperscript{9} See R. Dworkin, A Matter of Principle 105 (1985) (stating that “[i]f we think of civil disobedience in [a] general way . . . we can say something now [that] we could not have said three decades ago: that Americans accept that civil disobedience has a legitimate if informal place in the political culture of their community.”).

\textsuperscript{10} This statement does not mean that no one any longer questions the legitimacy of illegal political protest. It means only that such questioning does not undermine the message of the protestor in the mind of the public the way it did in the 1960's. One commentator who still criticizes civil disobedience in theory is former Vice President Spiro Agnew. See Agnew, Democracy Doesn't Need Picketers, Wall St. J., Nov. 1, 1989, at A14, col. 3. The comedy of a criminal criticizing illegal protest is apparently lost on him, though I suppose it was not lost on the editors of the Wall Street Journal.

for example, the occupation of the office of a college president. And unlike sit-ins that are mainly a nuisance, rescues threaten constitutional rights. Operation Rescue has raised again the issue of the proper place of civil disobedience in American political life.

The most obvious result of Operation Rescue, and the immediate occasion of this Article, is a recent wave of injunctions issued against illegal protests. This Article contends that the First Amendment should be interpreted to prohibit these sorts of injunctions. The constitutional protection for civil disobedience would be limited: the protest would be non-violent and the protesters would be subject to normal criminal sanctions. But within those limits, protesters would be free to engage in civil disobedience.

The main support for this proposal is the positive role that civil disobedience has played in American history. In Part I of this Article some of that history is outlined. In Part II, the negative consequences that will follow from a sustained judicial campaign to suppress civil disobedience by the issuance of injunctions are discussed. In the final section of this Article, an attempt is made to support a limited First Amendment protection by reference to sources and arguments that have been used in the past to justify constitutional prohibitions. Admittedly, these latter references are no more than available analogies for a judge already leaning toward refusing injunctive relief in a civil disobedience case. Current caselaw cannot be shown to actually support protection of civil disobedience. The goal of this Article is the more modest one of convincing the reader that enjoining civil disobedience is a bad idea that could easily be prevented through reasonable constitutional interpretation.

I. THE PLACE OF CIVIL DISOBEDIENCE IN AMERICAN POLITICAL LIFE

A. What Is Civil Disobedience?

Because the purpose of this Article is to argue for a limited First Amendment protection for civil disobedience, it is necessary to define the term "civil disobedience" in order to clarify the sort of expressive conduct that would be protected. Disputes over definitions of civil disobedience abound.12 There is not even agreement about

12. See Attorney Grievance Comm'n v. Kerpelman, 288 Md. 341, 420 A.2d 940 (1980) (suspending attorney's claims that parental child-snatching constituted a form of civil disobedience), cert. denied, 450 U.S. 970 (1981). Professor Charles DiSalvo has reminded me that the classic exchange between Justice Abe Fortas and Howard Zinn concerning civil disobedi-
whether the conduct in question must ultimately be held to have been illegal in order to qualify as civil disobedience. Professor Hugo Bedau argues that a subsequent court ruling that the law the protestor violated was invalid does not affect the designation "civil disobedience." 13 All that matters for Professor Bedau is that at the time of the violation there is a law or custom that a government official stands ready to enforce against the protestor. 14

Rather than attempt to clarify these controversies, I will be content to utilize a restricted definition of civil disobedience. First, because the purpose here is to limit the reach of court orders, the conduct in question obviously must be found by at least one judge to be illegal. Of course, with most instances of civil disobedience, the requirement of illegality is unambiguously satisfied. Second, the conduct must be predominately nonviolent. While the distinction between coercion, which civil disobedience inevitably involves to some extent, and violence is not always clear, 15 it is the more or less peaceful sit-in model with which this Article will deal. Some minor violence is often present even in peaceful protest, so this requirement

ence was in part a debate over the proper definition of civil disobedience. Compare A. Fortas, Concerning Dissent and Civil Disobedience (1968) with H. Zinn, Disobedience and Democracy (1960).


14. See id. at 198.

15. Professor Kent Greenawalt tries to capture the distinction between illegal protests that are appeals to justice and those that constitute the creation of inconvenience and embarrassment for the majority. K. Greenawalt, Conflicts of Law and Morality 233-34 (1987). Repeated arrests and enduring campaigns of civil disobedience are certainly expensive and cumbersome for the majority. Such tactics may wear down the majority rather than persuade them. Professor Greenawalt observes that this tactic can become "a sophisticated method of force." Id. at 233. A sit-in could be coercive and still be called non-violent, however, if violence is defined as the direct infliction of physical harm. Attempting to impede a woman seeking an abortion by stepping in front of her on the sidewalk is closer to the violence line than the pure sit-in in front of the clinic door. Though there will be disputes concerning whether a particular action qualifies as non-violent under my definitions, such disputes are reasonably resolvable.

One type of conduct that is outside my definition of civil disobedience is the deliberate destruction of valuable property. See Commonwealth v. Markum, 373 Pa. Super. 341, 541 A.2d 347, 351-52 (1988) (concluding that a defiant trespasser's destruction of abortion clinic property is an activity excluded from the definition of civil disobedience); cf. State v. Ostensen, 150 Wis. 2d 656, 442 N.W.2d 501 (Cl. App. 1989) (convicting defendant of sabotage for extensive damage to a submarine facility). The reason such intentional destruction of property is excluded from my definition is because unlike the sit-in, the arrest does not restore the object of the protest to his former condition. Certainly, the protestor is unlikely to have the assets to do so by way of a damage action. Incidental minor property damage, on the other hand, is something that is inevitably a part of almost all protests.
cannot be absolute. Third, the conduct must be open. The protestor must intend that the community take notice of the illegal action. Finally, the protestor must be willing to accept punishment. I am not proposing that subsequent punishment be precluded by the First Amendment. I suggest only that the hand of equity should be stayed.

These definitions do not distinguish between what are known as direct and indirect civil disobedience. That is, the law violated by the protestor may either be the object of protest or may be a law that is unobjectionable in itself but is used to dramatize the protestor's opposition to society's policies. The typical indirect act of civil disobedience involves some type of trespass. This example of civil disobedience—the sit-in—has been by far the dominant mode of civil disobedience in the United States. The sit-in model will serve in this Article as the classic example of the illegal protest that may be punished but should not be enjoined.

Confining civil disobedience in these ways excludes a great deal of conscientious protest. Abolitionists in the pre-Civil War period, for example, employed both violence and secrecy in illegally opposing slavery. This is not meant to suggest that such resistance is never justified. But violent conspiracies, whether morally justified or not, lie outside the realm of tolerance in any society. In contrast, American society has learned, most of the time at least, to tolerate the sit-in with equanimity. Sit-ins are a common part of the political context of a variety of issues.

B. Civil Disobedience Is An Established Form of Political Protest in American Life

On Monday, September 25, 1989, more than one hundred protestors, many in wheelchairs, occupied portions of the Richard B. Russell Federal Building in Atlanta to protest the failure of Transportation Secretary Samuel Skinner to order wheelchair lifts on all

17. See A. Fortas, supra note 12, at 63. The legitimacy of indirect civil disobedience has been more controversial than that of direct civil disobedience. Justice Abe Fortas, for example, argued that indirect civil disobedience could not be justified. Id. (arguing that a violation of a law unrelated to the dissent is never "truly defensible as a matter of social morality."). This position is convincingly disputed in Greenawalt, A Contextual Approach to Disobedience, 70 Colum. L. Rev. 48, 67-69 (1970).
18. Direct civil disobedience raises issues of conscience that may prompt society to grant exemption from compliance in certain cases. One obvious example of such treatment was the conscientious objector exemption from the military draft. Society could not easily function if indirect civil disobedience were treated in a similar fashion.
The demonstrators blocked entrances and exits by chaining themselves to doors or blocking movement with their wheelchairs. Government officials began ejecting the demonstrators Monday night, but stopped when President Bush ordered that the demonstrators be allowed to stay. The demonstrators had vowed that if ejected they would continue to protest by demonstrating outside in the rain. The protest ended without arrests on Tuesday after a compromise was reached. Though the protestors did not achieve their goal of an immediate executive order for the lifts, federal transportation officials agreed to submit proposed legislation to Congress mandating better access for the handicapped to public transportation.

What is remarkable about this story is that there is nothing particularly unusual about it, except perhaps for the public relations skill of the protestors. A small group of people claiming to represent many others wished to dramatize a situation they felt represented a fundamental injustice. They did so by breaking laws protecting property rights. In addition to committing trespass, they no doubt inconvenienced and annoyed innocent bystanders—people who could not get to work or had trouble getting home. They ran a small risk of significant harm to others—a fire could have broken out while the exits were blocked, for example. Yet, despite the obvious illegality, President Bush not only did not have them arrested, he ordered negotiations even while the building and the people in it were "held hostage," at least to a small extent. Most significantly, the fact that the protestors sought to further their political goals by resorting to trespass did not seem to decrease public sympathy for their aims.

Is this incident a special case because many of the protestors were in wheelchairs? On the public relations level, the answer is obviously yes. If the demonstrators had been a peace group, a hunger group or a pro-life group, chances are the police would have arrested them rather than negotiated with them. But that difference goes to the likely success of the protest. In terms of the form of the wheelchair protest, the absence of public outrage over its open illegality suggests a political culture in which the sit-in is widely regarded as a


legitimate form of political protest.

The Atlanta protestors were not particularly justified in resorting to illegal protest. In fact, the rights of the handicapped have been protected by a variety of legislative initiatives. The particular dispute that triggered the Atlanta protest was not whether special modifications would be introduced to assure better access to public transportation, but simply what methods would be used and how much they would cost. These sorts of disputes are the subject of everyday politics. They are not usually the domain of illegal demonstrations. That a sit-in would be used in a context like this shows the extent to which this society accepts the use of illegal protest. This acceptance is grounded in history.

Illegal protest in America did not begin in 1846 with Henry David Thoreau’s famed one night in jail for refusing to pay the Massachusetts Poll Tax. The United States of America began its independent political life in acts of illegality. But illegal protest, even in the beginning, was not confined to the great act of revolution. In 1755, the Mennonites refused to pay war taxes for the French and Indian War; Massachusetts churches refused to submit to taxation for religious purposes; and throughout the Colonial and Revolutionary Period, several churches refused to file required certificates of minority church affiliation. Nevertheless, despite a long history, illegal protest became a widespread phenomenon only in the pre-Civil War struggle over slavery.

From the first, illegal action was a part of the slavery abolition movement. As early as 1847, Francis Wayland voiced a higher law doctrine of passive resistance to the encroachment of the slave power. Nor was illegal abolition activity always open. In 1848, Thomas Garrett received such a large fine for surreptitiously aiding the escape of slaves that he became bankrupt.


22. See infra notes 24-79.


27. E. Madden, Civil Disobedience and Moral Law in Nineteenth-Century American Philosophy 37 (1968).

28. L. Buzzard & P. Campbell, supra note 24, at 64.
Ultimately, the abolition movement developed a theory of natural law that promoted illegal conduct short of armed resistance. The abolitionists apparently did not feel the need to claim that the Constitution "really" supported the abolition position. William Lloyd Garrison spoke for many in his readiness to dispense with the Constitution: "Which shall we obey—our dead fathers? or our living God?" Wendell Phillips, Garrison's close associate and himself an influential anti-slavery advocate, called for judges who would "laugh in defiance of Congress."

These defenses of illegal action went beyond the theoretical. Resistance, at least passive, was widespread. The Fugitive Slave Law of 1850 required assistance on the part of the public in the capture of runaway slaves. The refusal to cooperate with this law, which was eventually upheld as constitutional by the United States Supreme Court, was nearly complete in the North.

Although the abolition movement as a whole never endorsed vi-

29. Of course, there were always what Robert Cover called "constitutional utopians," R. Cover, Justice Accused 154-58 (1975), who did make just such a claim. But most abolitionists accepted the interpretation that slavery was constitutional and the underground railroad thoroughly illegal.

30. L. BUZZARD & P. CAMPBELL, supra note 24, at 62.

31. Id.

32. 60 Stat. 462 (1850) (repealed 1864).

33. Id. at 463. Section 5 of the Act provided in part as follows:

[A]nd the better to enable the said commissioners, when thus appointed, to execute their duties faithfully and efficiently, in conformity with the requirements of the Constitution of the United States and of this act, they are hereby authorized and empowered, within their counties respectively, to appoint, in writing under their hands, any one or more suitable persons, from time to time, to execute all such warrants and other process as may be issued by them in the lawful performance of their respective duties; with authority to such commissioners, or the persons to be appointed by them, to execute process as aforesaid, to summon and call to their aid the bystanders, or posse comitatus of the proper county, when necessary to ensure a faithful observance of the clause of the Constitution referred to, in conformity with the provisions of this act; and all good citizens are hereby commanded to aid and assist in the prompt and efficient execution of this law, whenever their services may be required, as aforesaid, for that purpose; and said warrants shall run, and be executed by said officers, any where in the State within which they are issued.


olence, forceful rescues of captured slaves were commonly attempted. In 1856 in Boston, for example, the slave Shadrach was spirited right out of a federal courtroom.\(^{36}\) Forceful resistance always carried a risk of injury. In 1851, in Pennsylvania, a slaveholder was killed and his son injured attempting to recapture a slave.\(^{37}\) In 1854, a man was killed in an "unsuccessful assault on the courthouse" where a runaway slave, Anthony Burns, was kept.\(^{38}\) Toward the end of the 1850's, abolitionist sympathy for rebellion increased,\(^{39}\) culminating in an ambiguous response to the raid by John Brown on Harper's Ferry.\(^{40}\) Thoreau defended the right to interfere by force with slavery.\(^{41}\) The raid itself had been financed with abolitionist funds.\(^{42}\)

The abolition experience permanently shattered whatever national consensus may have existed against breaking the law for the purpose of political protest. Since abolition, civil disobedience has played a part in most social protest movements. Three major examples—the three movements that most clearly articulated an understanding of civil disobedience—are the Suffrage Movement, the Civil Rights Movement and the various manifestations of the Anti-War Movement.

One of the most famous arguments in the history of civil disobedience is Susan B. Anthony's statement to the court, delivered in 1873 after her conviction for illegal voting.\(^{43}\) Although Anthony argued that the Fourteenth Amendment already gave women the right

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36. See R. Cover, supra note 29, at 218; L. BUZZARD & P. CAMPBELL, supra note 24, at 63.
37. L. BUZZARD & P. CAMPBELL, supra note 24, at 63.
38. T. MORRIS, supra note 35, at 166.
40. See H. THOREAU, ANTI-SLAVERY AND REFORM PAPERS 67-68 (1890).
42. M. DILLON, supra note 35, at 229-30.
43. Statement of Susan B. Anthony to the Court (1873), reprinted in D. Weber, supra note 39, at 185-88. Susan B. Anthony, in her statement, vehemently protested that:
Your denial of my citizen's right to vote is the denial of my right of consent as one of the governed, the denial of my right of representation as one of the taxed, the denial of my right to a trial by a jury of my peers as an offender against law, therefore, the denial of my sacred rights to life, liberty, property . . . .

_Id._ at 186.
to vote, this appeal to law does not remove Anthony's action from the
category of civil disobedience. She was obviously aware that the
courts in 1873 would not agree with her argument about the Four-
teenth Amendment. With no reasonable prospect of vindication in
the courts in the near future, Anthony's reference to the Fourteenth
Amendment amounted to a utopian argument. Any protestor who
anticipates vindication by history may honestly claim that the law
will eventually be interpreted to support the protestor's position.
That does not alter the illegality of the protest.

Another instance of civil disobedience in the history of the suf-
frage movement was the organized picketing in Washington, D.C. in
1917.44 This episode was ambiguous from the perspective of civil diso-
bedience because the courts subsequently ruled in favor of the right
of protest and dismissed the prosecutions.45 Nevertheless, this judi-
cial vindication was not at first anticipated.

In contrast to suffrage protests, many civil rights protestors
clearly did expect and argue for vindication in the courts. In his
1965 "Address to the American Jewish Committee," Martin Luther
King, Jr. denied that the civil rights movement was practicing civil
disobedience.46 Protestors were arrested and jailed, but Dr. King ar-
gued that the laws that were violated were local laws violative of
federal law.47

These claims of legality, however, were never regarded as neces-
sary to vindicate protest.48 Dr. King consistently supported civil diso-
bedience as justified in the case of a law that "is out of harmony
with the moral law."49 In 1968, shortly before his assassination, Dr.
King called for "mass civil disobedience" that would cause general
societal interruption in order to dramatize a host of social ills: ra-
cism, poverty, and unemployment.50

44. See D. Weber, supra note 39, at 195.
45. Id. at 195-97 (recounting the campaign and its outcome).
46. Address by Martin Luther King, Jr. to the American Jewish Committee (1965),
47. This would still be civil disobedience according to Hugo Bedau, because local gov-
ernment officials did stand ready to enforce local norms. See Bedau, supra note 13, at 198; see
also supra notes 13-14 and accompanying text.
48. Dr. King defended civil disobedience in 1961 in King, Love, Law and Civil Disobedi-
49. King, Letter from Birmingham City Jail, reprinted in Revolution and the Rule
of Law 12, 17 (E. Kent ed. 1971) (agreeing with Saint Augustine that "[a]n unjust law is
no law at all" and stating that "[a]ny law that degrades human personality is unjust.").
222-25.
Obviously, there were others in the civil rights movement more closely identified with law violation than was Dr. King. In 1948, A. Philip Randolph publicly urged African-Americans to refuse induction into the segregated armed forces. Senator Wayne Morse threatened Randolph with prosecution for treason. Randolph’s tactic was designed to pressure President Truman to issue an executive order desegregating the armed forces, which Truman ultimately did.\(^{51}\) Later, Stokely Carmichael and others in the “Black Power” movement of the 1960’s also defended and practiced law violation as a form of social protest.\(^{63}\)

Anti-war movements have existed from the beginning of American political life, and have often promoted law violation as a form of political protest. There were several celebrated episodes of illegal draft resistance in World War I.\(^{58}\) The War Resisters League actively promoted illegal war resistance prior to World War II.\(^{64}\) Additionally, there were sporadic refusals to register or to be drafted during World War II.\(^{65}\)

After World War II and before the Vietnam War, anti-war protests centered around the American nuclear arsenal. In one action that foreshadowed many such efforts in the 1970’s and 1980’s, Albert Bigelow attempted to sail his ship, the Golden Rule, into a Pa-

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51. This episode is chronicled in D. Weber, supra note 39, at 205-10.
53. Prosecutions for some of the efforts to oppose the draft and the war led to several famous Supreme Court decisions that would no doubt today be deemed violations of the First Amendment. See, e.g., Schenck v. United States, 249 U.S. 47, 52 (1919) (upholding convictions for distributing leaflets urging drafted men to refuse to report for active duty and stating that while such speech may be protected by the First Amendment during peace-time, the words here were “used in such circumstances and are of such a nature as to create a clear and present danger that will bring about the substantive evils that Congress has a right to prevent.”); Frohwerk v. United States, 249 U.S. 204 (1919) (upholding a conviction for preparing and distributing twelve newspaper articles as part of a conspiracy to obstruct military recruiting, citing the principles enunciated in Schenck, supra); Debs v. United States, 249 U.S. 211 (1919) (upholding a conviction for delivery of a speech which was intended to obstruct the recruiting and enlistment service of the military). Of the decision in Debs, Professor Kalven wrote, “it is somewhat as though George McGovern had been sent to prison for his criticism of the [Vietnam] war.” Kalven, *Ernst Freund and the First Amendment Tradition*, 40 U. Chi. L. Rev. 235, 237 (1973).
cific Atomic Bomb Test Area in 1958. Bigelow was, however, jailed for violating a court order prior to reaching his destination.

Illegal anti-Vietnam War protests, including draft resistance, were quite widespread during the period from 1965-1972. Three controversial criminal proceedings involving charges of civil disobedience occurred during this period: those of Benjamin Spock, and others, for counselling draft resistance; those of the Chicago Eight; and those of the Catonsville Nine. Additionally, several incidents of large scale civil disobedience were attempted in Chicago in 1968 and in Washington, D.C., in 1969-1971. Although the dominant mode of these illegal protests was of the sit-in or road-blocking type, there were also a number of violent acts that occurred during these illegal protests. For example, the Catonsville Nine were prosecuted not just for trespass but also for destruction of selective service papers.

Since the end of the Vietnam War, civil disobedience has become a very common form of social protest, as the story of the Atlanta occupation illustrates. Of course, compared to the anti-war protests of the 1960's, the overall level of protest is not high, or at least was not high until the organization of Operation Rescue in the 1980's. Other recent examples of sustained civil disobedience include the continuing campaign against the South African Embassy in Washington, D.C., continuing efforts to close down certain nu-

57. Id. This incident is recounted in A. Bigelow, The Voyage of the Golden Rule: An Experiment With Truth (1959), reprinted in D. Weber, supra note 39, at 256-60.
58. See United States v. Spock, 416 F.2d 165 (1st Cir. 1969).
64. See supra notes 19-20 and accompanying text.
65. See supra note 11 and accompanying text.
66. The civil disobedience campaign against the Embassy began on Thanksgiving Eve in 1984, with the arrests of three anti-apartheid demonstrators: Randall Robinson, Mary Frances Berry and Walter E. Fauntroy, and has now gone on for over five years. See Gilliam, Climbing the Next Mountain, Wash. Post, Mar. 7, 1988, at B3, col. 4.
clear power plants, including Diablo Canyon; and anti-nuclear weapons protests. The Sanctuary Movement, which aids Central American refugees, though now diminished, certainly represented widespread illegality, though the illegal activities were not usually open.

Lynn Buzzard and Paula Campbell argue in their book, Holy Disobedience, that an important difference between illegal protest in the 1980's and that of prior periods is the emergence of civil disobedience in the protests of socially, politically, and religiously conservative people—the sort of people who traditionally believed in obedience to all law. Their book is an impressive listing of just such actions. One example of socially/politically conservative civil disobedience is Operation Rescue itself. Another example, or series of examples, concerns efforts to keep government from regulating aspects of church life. Pastors have been jailed for refusing to use state-certified teachers in church schools, for refusing to pay social security taxes on church employees, and for providing uncertified church day care. Similarly, parents have provided home schooling

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for their children despite state licensing requirements.\textsuperscript{78}

From all of the above, one cannot necessarily justify civil disobedience. But the presence of civil disobedience in American history is indeed common.\textsuperscript{79}

C. Civil Disobedience Is a Justifiable and Beneficial Aspect of American Political Life

The prior section suggests the venerable aspect of civil disobedience. But one may then ask: What does it mean if civil disobedience is an established part of American political life? Age, by itself, does not make civil disobedience a positive phenomenon. After all, racism and sexism are also well established in American political life. Thus, civil disobedience must be justified on grounds other than mere widespread occurrence.

Nevertheless, the existence of a tradition of civil disobedience is definitely an argument in its favor. The acceptance of non-violent, illegal political protest is an expression of a true American political genius. Civil disobedience represents a compromise between mere argument and revolution. By channeling even illegal protest into the stylized pattern of civil disobedience, Americans have brought the energy and ideas of those extremely dissatisfied with the status quo into the political process. The idea that this compromise, the legacy of 140 years of social protest,\textsuperscript{80} should have no place in constitutional theory just because it is illegal, represents an unthinking preference for the forms of law over the value of a rich political life with which the law, and the First Amendment in particular, should be concerned. No one can prove that civil disobedience has filled an important political need in American history. But because civil disobedience did evolve, the assumption that it did fulfill such a need is a plausible one. Certainly that assumption is more plausible than its alternative—that we could now dispense with civil disobedience

\textsuperscript{78} See, e.g., Blount v. Department of Educ. & Cultural Servs., 551 A.2d 1377, 1380 (1988) (labeling the behavior of educating children at home as a form of civil disobedience).

\textsuperscript{79} Another example of the acceptance of civil disobedience in American life are cases rejecting convictions for civil disobedience as a basis for denying a license to practice law. See Hallinan v. Committee of Bar Examiners, 65 Cal. 2d 447, 421 P.2d 76, 55 Cal. Rptr. 228 (1966); cf. Siegel v. Bar Examiners, 10 Cal. 3d 156, 514 P.2d 967, 110 Cal. Rptr. 15 (1973) (ordering the state bar committee to certify plaintiff as qualified to be an attorney notwithstanding his deliverance of certain anti-establishment speeches while in law school).

\textsuperscript{80} See supra notes 23-70 and accompanying text.
without weakening our politics.

The suggestion that constitutional law take its cue from the traditions of American political life is not a radical innovation. From substantive due process in *Bowers v. Hardwick* to the Eighth Amendment in *Penry v. Lynaugh*, the United States Supreme Court, in recent years, has been trying to find "objective evidence" of historical and contemporary values upon which to structure constitutional jurisprudence. This search for consensus has its weaknesses, but there is no mistaking its great strength, which is that law and social custom are linked.

A limited First Amendment protection for civil disobedience would serve the best instincts of this jurisprudential approach. One of our traditions, and one the courts could legitimately recognize, is that the protestor have his forum and his say and then be arrested and punished. This result is not anyone's "personal view." The practice of civil disobedience is as much an objective aspect of contempo-

81. 478 U.S. 186 (1986) (holding that a criminal sodomy statute did not per se violate the Constitution).
82. 109 S. Ct. 2934 (1989) (holding that the Eighth Amendment does not prohibit execution of mentally retarded persons).
83. Id. at 2953.
84. See *Bowers v. Hardwick*, 478 U.S. 186, 192-94 (1986) (finding that "ancient roots" of proscriptions against homosexuality and prevalence of legislative prohibitions preclude holding that the practice of consensual sodomy is a fundamental right); *Penry v. Lynaugh*, 109 S. Ct. 2934, 2953-58 (1989). (stating that legislative enactments and jury sentences are insufficient to demonstrate national consensus that would render execution of mentally retarded persons cruel and unusual punishment).
85. In his dissent in *Rutan v. Republican Party*, 110 S. Ct. 2729 (1990), a case that held certain political patronage hiring practices unconstitutional, Justice Scalia reflected upon the appropriate relationship between constitutional interpretation and engrained political practices. Scalia stated that:
[A] venerable and accepted tradition is not to be laid on the examining table and scrutinized for its conformity to some abstract principle of First Amendment adjudication devised by this Court. To the contrary, such traditions are themselves the stuff out of which the Court's principles are to be formed. They are, in these uncertain areas, the very points of reference by which the legitimacy or illegitimacy of other practices are to be figured out. When it appears that the latest "rule," or "three-part test," or "balancing test" devised by the Court has placed us on a collision course with such landmark practice, it is the former that must be recalculated by us, and not the latter that must be abandoned by our citizens. I know of no other way to formulate a constitutional jurisprudence that reflects, as it should, the principles adhered to, over time, by the American people, rather than those favored by the personal (and necessarily shifting) philosophical dispositions of a majority of this Court.
*Id.* at 2748 (Scalia J., dissenting) (emphasis in original). One need not endorse Justice Scalia's application of this understanding of the judicial role to appreciate the importance, to some extent at least, of American political practice for constitutional law.
rary values as anything a court is ever likely to find. Recognition of civil disobedience to the limited extent proposed here would aid in a social and political accommodation that is already customary.

Aside from the existence of the tradition of civil disobedience as evidence of its positive role, can the justification for civil disobedience be shown more directly? Limited First Amendment protection can be supported in all cases as long as civil disobedience is sometimes justifiable, sometimes beneficial, and *never* unacceptably harmful. The reason such a large consequence flows from such a modest showing is that if civil disobedience can ever be enjoined, it probably can *always* be enjoined. It is certainly problematic to suggest that executive officials, or the courts, be permitted to distinguish good civil disobedience from bad based upon the soundness of the underlying political message of the protestor.86 If it is then to be all or nothing, the proponent of the injunction must show that society would be better off with injunctions against civil disobedience in every case. Therefore, this Article will argue that civil disobedience is justified at least some of the time and will show that civil disobedience is never likely to be unacceptably harmful, including in the Operation Rescue cases.

The most persuasive justification for the political custom of civil disobedience, and its major claim of benefit to society, is the existence of unjust law and the historical role of civil disobedience in changing such law.87 Was it not beneficial that protestors refused to

86. To the extent that Professor Frances Olsen is suggesting precisely that role for judges, *see* Olsen, *supra* note 60, I can only disagree with any confidence Olsen expresses in judges. In any event, I am dealing here not with legalization of civil disobedience, but only with a limited degree of tolerance. At this level, there may be no need for substantive judicial evaluation, even from Olsen's perspective.

There are distinctions among types of civil disobedience other than those based on substantive merits, several of which will be mentioned below. *See infra* notes 196-97 and accompanying text. But any toleration of civil disobedience by the legal order would represent such a dramatic shift from the current approach that there is no need to examine distinctions closely.

87. In proceeding to the general social benefits arguably gained from the practice of civil disobedience, I downplay the major approaches used by legal scholars in recent years to justify civil disobedience. *See generally* Soper, *Legal Theory and the Obligation to Obey*, 18 Ga. L. Rev. 891 (1984); Sartorius, *Political Authority and Political Obligation*, 61 Va. L. Rev. 3 (1981). Their dominant argument is that civil disobedience is justified because there is no obligation to obey an unjust law in the first place or that one's obligation is outweighed by the presence of unjust law. *See, e.g.*, Soper, *supra*, at 896 & n.18 (stating that "[a]lmost no one seems to think that the obligation to obey the law, if any, would be absolute."). Such arguments leave to one side whether a particular act of civil disobedience is justified. That question could be answered only by reference to the law or custom that is the object of the protest.

While I agree that the obligation to obey, if any, can be outweighed, that argument would not do as the foundation of a legal rule applicable to all instances of civil disobedience.
be inducted to fight in Vietnam? Was it wrong that Susan B. Anthony attempted to vote? Would it not have been better to block the roads to the camps for Japanese Americans in World War II? And, was it not best to violate the Fugitive Slave Act of 1850 by refusing to join a posse to recapture the runaway slave?

If, on balance, the practice of civil disobedience has hastened the abolition of unjust laws, why should the practice be abolished? Certainly, one cannot persuasively argue that despite the benefits of illegal protest in instances of unjust law, the violation of law is itself always wrong. Few legal thinkers would suggest today that a law must always be obeyed because it is law.88

Ironically, it was the triumph of legal positivism that doomed total-obedience-to-law theories. Once we grant that power alone makes law, once we admit that that which should not be law can be made law, we must reserve the right to disobey. This concept was made clear by Professor Hart, the most noted legal positivist of our time, in the famous Hart/Fuller debate.89

One problem, however, with justifying civil disobedience in general by reference to changing immoral law is that, as a practical matter, many illegal protests occur challenging laws that may or may not be unjust. It takes arrogance for the protestor to believe that he is right and the government, and especially the majority in a democracy, is wrong. No doubt, history will more often judge the majority to have been right. But instances of unjustified civil disobe-

88. Indeed, in two major law review symposia concerning the duty to obey the law that appeared in the 1980's, serious discussion centered on whether there was even a prima facie duty to obey. See Symposium, 67 VA. L. REV. 3 (1981); The Duty to Obey the Law, 18 GA. L. REV. 727 (1984).

89. See H. Hart, Positivism and the Separation of Law and Morals, 71 HARV. L. REV. 593, 616-17 (1958). Professor Hart acknowledged that the positivist vision of Austin and Bentham—that even evil law is still law—was "strong, indeed brutal." Id. at 616. Additionally, Professor Hart, quoting Austin, noted that "[a]n exception, demurrer, or plea, founded on the law of God was never heard in a Court of Justice, from the creation of the world down to the present moment." Id. Despite the incapacity of morality to encompass law, the saving grace of positivism was, for Professor Hart, its capacity to uphold resistance to law in the name of morality. "[W]e must remember that [the above words] went along . . . with the conviction that if laws reached a certain degree of iniquity then there would be a plain moral obligation to resist them and to withhold obedience." Id. at 616-17.
Because civil disobedience is not violent and is controllable, the harm directly caused by civil disobedience in support of unjust causes is not great. Nor, historically, has such civil disobedience persuaded society to pursue immoral policies.

Another difficulty with justifying the practice of civil disobedience by its effect on great political issues is the lack of certain knowledge. It is usually assumed that civil disobedience actually did help to change the laws and practices it was used to oppose. Thus, the moral question becomes one of simply balancing the benefit of ending an immoral practice with the harm of encouraging lawlessness. Civil disobedience tends to appear quite beneficial in such a weighing process. There is no evidence that the American tradition of civil disobedience has led to a lessening of obedience to law outside of the context of political protest itself. Nor has the practice of illegal political protest grown to the point of threatening serious disruption to society.

But the assumption that civil disobedience has done any good may be mistaken. No one can show that civil disobedience actually hastened the end of segregation, helped win women the vote, or helped bring an end to the Vietnam War. And many people believe that Operation Rescue has backfired politically. The most obvious response to this possibility is that social protest movements would not be so consistently obtuse in their choice of tactics as to choose a

90. There is certainly civil disobedience in immoral causes. See, e.g., Person v. Miller, 854 F.2d 656 (4th Cir. 1988), cert. denied, 109 S. Ct. 1119 (1989) (involving an injunction against activities of the Ku Klux Klan). Some people include Operation Rescue in that category; admittedly, the whole range of protest must be taken into account in evaluating even a limited First Amendment protection for civil disobedience.

91. See infra notes 98-110 (discussing the limited harm that civil disobedience actually causes).

92. Certainly the three classic instances of civil disobedience in American history — the Suffrage Movement, the Civil Rights Movement and the Anti-War Movement — discussed at supra notes 43-63 and accompanying text, would not be classified by most Americans as pushing the country in the direction of immoral policies (unless one wishes to argue that the country should have continued fighting in Southeast Asia). The most widespread instance of immoral resistance, although often not open, might be that against the dictates of Brown v. Board of Educ., 347 U.S. 483 (1954) (holding that segregation in public schools is violative of the Fourteenth Amendment). See generally Carter, The Warren Court and Desegregation, 67 Mich. L. Rev. 237 (1968). Nevertheless, such resistance did not persuade society.

93. Practitioners of civil disobedience have traditionally responded, at least in part, in an empirical mode to the charge that civil disobedience undermines needed respect for law. See D. Weber, supra note 39, at 21. The tradition maintains that conscientious civil disobedience will not undermine law and/or that obedience to unjust law itself has such an effect. See id.
tactic that harms their causes. It is much more likely that civil disobedience helps the political movements that practice it, if only in continuing to attract the eye of the public. In any event, I am content with the assumption that this is so, even though I recognize that my argument of social benefit is premised on somewhat uncertain ground.

Even in the context of judging the general merit of civil disobedience, it might be said that just as the positive value of civil disobedience should not lead to legalization (total tolerance), neither should its positive quality protect it from an injunction. This Article will analyze the difference between punishment after the fact, which would be permitted, and an injunction, which generally would be prohibited under the proposal contained in this Article. One difference between the two is that the purpose of a court order is to halt illegal conduct. The practices of equity enforcement are designed to accomplish that goal. Thus, injunctions imply rejection. Conversely, at least within certain parameters, the normal processes of criminal punishment usually lead to much greater tolerance for civil disobedience.

There is one harm that the practice of civil disobedience is said to foster that merits separate treatment. Before the Watergate Committee, Jeb Magruder argued that civil disobedience by protestors helped mislead government officials into lawless acts. Partisans of Oliver North might well make the same argument. If true, this disastrous consequence would have to be considered in evaluating civil disobedience.

On the face of it, this claim—analogizing as it does the powerless protestor with the official acting with the power of the government—seems absurd. In any event, the claim is inapplicable in terms of the categories in this Article. For purposes of this Article, civil disobedience requires an open act. It is an appeal to society as well as an act of private conscience. The government official, in contrast, breaks the law in secret and then covers his tracks elaborately.

Nor is this difference a matter of arbitrary definition. The Jeb Magruders and Oliver Norths of this world wish to rule without democratic restraints because they no longer have a commitment to democracy. In contrast, the protestor sees himself as attempting to persuade the majority. When particular illegal acts are done in se-

94. See infra notes 157-90 and accompanying text.
95. See Testimony of Jeb Magruder before the Senate Select Committee on Presidential Campaign Activities (June 1973), reprinted in D. Weber, supra note 39, at 294-95.
cret to prevent arrest—such as the underground railroad or the Central America Sanctuary Movement—this may be less true. But certainly the sit-in represents attempted persuasion. Civil disobedience may be anti-democratic in the sense that it does not proceed through the electoral process, but it is not so in intent or effect.98 Open civil disobedience is always an appeal to the public.

The justification of civil disobedience that relies on its role in efforts to change unjust law considers civil disobedience only as a general phenomenon. Nevertheless, and despite the danger of trying to distinguish among civil disobedience campaigns in considering the place of civil disobedience in law, at least one distinction can be made that does not rely on the merits of the protestor's underlying position. The classic image of civil disobedience involves primarily the individual protestor and the government. This is obviously so in most cases of direct disobedience to a law believed unjust—for example, refusing to be drafted for service in Vietnam. Another such example was the attempt by Greenpeace in July 1989 to disrupt the launching of a Navy missile from a submarine.97 These are classic instances of civil disobedience. Such acts interfere with significant government interests, but those interests are protected sufficiently by the arrest of the protestor. Even in a situation similar to that of the Atlanta protest referred to above, the innocent government office workers were inconvenience only slightly.

But what if the rights of other private parties are interfered with significantly?98 This, of course, is the charge laid against Operation Rescue. It is a charge clearly not applicable to most past campaigns of civil disobedience. It is this concern for the rights of the objects of the protest that leads former defenders of civil disobedience, and former practitioners, to condemn civil disobedience now.99

96. Cf. Bedau, supra note 13, at 199.
97. See Norton, Green Giant, Wash. Post, Sept. 3, 1989, (Magazine), at 25, 26, col. 2 (stating that “four Greenpeace vessels halted the Navy's attempt to test-launch a Trident II missile from a submarine off Cape Canaveral.”).
99. Part of the dispute about Operation Rescue involves not the sit-in itself, but charges that pro-life protests go beyond the peaceful sit-in. See, e.g., Note, The Scope of Noerr Immunity for Direct Action Protestors: Antitrust Meets the Anti-Abortionists, 89 COLUM. L. REV. 662, 687 (1989) (author by Dinah R. Pokempner) [hereinafter Noerr Immunity] (stating that “[a]nti-abortion direct-action protests have often been marked by tortious actions, such as physical and verbal harassment of patients and employees, defiant trespass, and destruction of
How beneficial can civil disobedience be when the protestor threatens constitutional rights?

To understand this criticism, we must see that the protestor and society differ radically over the legitimacy of the alleged right at stake. The protestor denies that significant rights are endangered by the protest. It would have made no sense to point out to the abolitionist that, by refusing to join the fugitive slave posse, he was indirectly interfering with the slave owner's property rights. Similarly, the pro-life protestor does not care that his acts might deprive a woman of the right to choose abortion because he views abortion as murder. By definition, murder can never be a personal or private right.

Despite this radical disagreement, civil disobedience that arguably interferes with the legitimate rights of others can still be considered relatively harmless. This seems clear when the interest of the victim of the protest is merely commercial.

Injunctions often issue at the behest not of the poor and disadvantaged, but of organized economic interests—for example, the owner of a nuclear power plant site attempting to prevent protestors from trespassing, a bank that is the object of a civil rights protest, and a corporation seeking to clear striking workers from its plant gates. Even in the abortion protest cases, clinics are able to obtain relief on the basis of a right to do business unimpeded, a right upon which any business could rely.

Economic life is important, to be sure. But the right to do busi-
ness unimpeded is not sufficiently vital to risk the loss of the rich political tradition of civil disobedience. That is particularly so because the police are available to clear the demonstrators every day. Not only do arrests end the day's protest, the prospect of arrest may actually improve the business's situation, compared to continuing legal protest. In most cases of protest against a business, financial losses are caused even if the protest is legal. A peaceful, but persistent, picket line on the sidewalk is going to cost most businesses money, despite the fact that such First Amendment protected expression can be neither enjoined nor punished after the fact. Civil disobedience per se is not a threat to commercial life. Commercial cases are a weak justification for prohibiting civil disobedience.

The more difficult case is that of interference with the rights of another person. This is just what is claimed about the civil disobedience campaign of Operation Rescue.

104. An example of this is a protest aimed at publicizing and criticizing some aspect of a business' past behavior and encouraging some government regulatory action. Cf. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 908-09 (1982) (stressing that nonviolent picketing in support of a consumer boycott and aimed at "grievances against governmental and business policy," is protected by the First Amendment). Unfortunately, there is a dispute about whether consumer boycotts are lawful when aimed at coercing businesses to refrain from conduct, which, though legal, the protestors deem objectionable. Compare Note, Now or Never: Is There Antitrust Liability for Noncommercial Boycotts?, 80 COLUM. L. REV. 1317, 1329-30 (1980) (authored by Jane W. Meisel) (stating that consumer boycotts do not undermine the goals of the Sherman Act) and Harper, The Consumer's Emerging Right to Boycott: NAACP v. Claiborne Hardware and Its Implications for American Labor Law, 93 YALE L.J. 409, 429 (1984) (stating that only a consumer "boycott that asks the targeted business to adjust its social decisions deserves protection.") with Noerr Immunity, supra note 99, at 689 (stating that "[w]hile the unilateral decisions of consumers not to deal are not themselves offenses, a collective refusal to deal may amount to a usurpation of government's regulation of the market." (citations omitted)). It seems perverse that a person would have a First Amendment right to boycott General Motors to get the government to ban trade with South Africa but not to force General Motors to stop doing business there. Why should corporate America be immune from political protest? Some courts have upheld peaceful picketing against businesses even if the goal of the protest is to put the company out of business. See, e.g., Franklin Chalfont Assoc's. v. Kalikow, 392 Pa. Super. 452, 573 A.2d 550 (1990) (upholding the right to picket under both federal and state constitutions).

105. If the intention of the sit-in is the immediate closing of the business, the arrests and criminal proceedings will always cause the effort to fail. If the intention is simply to make life difficult for the object of the protest, to "make a statement" and to remind the public of some underlying issue, the disruption is not too high a price to pay for the benefits we have gained from civil disobedience. Of course, the protest might go beyond the peaceful sit-in or the police might not be able to handle the situation. As this Article indicates, that would be a different case.

106. Kate Michelman, Executive Director of the National Abortion Rights Action League, has called Operation Rescue a "domestic terrorist organization" and has described it as follows:
The criticism that Operation Rescue threatens personal rights would be significant if the argument here were for full constitutional protection for civil disobedience. But civil disobedience in practice inevitably leads to arrest, whether for a crime or for violation of a court order. This pattern regularly occurs in illegal abortion protests.\textsuperscript{107} Given the reality of police response to abortion rescues, it is hard to see how any pro-life protests could deprive women of the right to an abortion, albeit protest might make the exercise of that right unpleasant. Far from depriving women of abortions, it is not clear that civil disobedience has had any effect on the actual numbers of abortions performed.\textsuperscript{108} Whether that is so or not, the police will today ensure that any woman who wants an abortion can get one, illegal protest or not.

Assault, on the other hand, is a harm the legal system cannot tolerate. If women seeking abortions are physically attacked—punched, kicked, or even just grabbed—the protest has moved into the realm of violence. It is no longer civil disobedience. I do not suggest that anyone should have to endure assault. Nor am I suggesting that the legal system should refrain from measures, including narrowly drawn injunctions, to prevent assault. The question, however, is whether civil disobedience is harmful, not whether that is true of violence.

There is one sense in which even peaceful pro-life protests cause great personal harm to pregnant women. Undeniably, pro-life protests proceed through harassment. "Harassment" is an appropriate term even for those, like myself, who sympathize with the tactics of these protests. The major tactic of such protests—legal or not—is to shame or disturb women seeking abortions so that they change their minds. Naturally, the resulting pain to pregnant women, including

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Like the segregationists who blocked the doors of schools to keep out people of color, Randall Terry and Operation Rescue violate the civil rights of women by blocking the doors to abortion clinics . . . . As someone who has escorted women into clinics Operation Rescue has targeted, I can tell you it's scary, the intimidation and verbal abuse and religious zealotry.


107. Indeed the reality of certain police response is so predictable that one observer has labelled the strategy of Operation Rescue as "first block the clinics, then clog the courts." Barringer, Abortion Foes Clog Vermont Courts, N.Y. Times, May 7, 1990, at A12, col. 1.

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the women who go ahead with the abortion, is resented by pro-choice advocates.

But this pain is not caused by the civil disobedience. It is caused primarily by large crowds of people milling around yelling "baby killer" at the women who are seeking abortions. Expressive conduct of that sort is not civil disobedience and would even seem to be protected by the First Amendment. It is not the civil disobedience of Operation Rescue that creates this harm. As long as the underlying legal right is vindicated despite the civil disobedience, as it always has been in the context of pro-life protests, civil disobedience, though inconvenient, should be easily tolerated for its good consequences even by those committed to the right to abortion.

The above arguments are basically utilitarian appeals to those who may be unsympathetic to the protestor's underlying position. Because there do appear to be positive consequences overall from the practice of civil disobedience, utilitarianism is not a bad argument for civil disobedience. But utilitarian justifications are incomplete. There is more to the practice of civil disobedience than its consequences.

This society claims to be one that is committed to the integrity of the individual. An aspect of that integrity is conscientious protest. Tolerating some degree of civil disobedience is a way of respecting the conscience of a citizen who feels he cannot go along with

109. The scope of First Amendment protection for protest is beyond the scope of this Article, which concerns limited protection for expressive conduct clearly not fully protected by the First Amendment. Nevertheless, the government "has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us." Cohen v. California, 403 U.S. 15, 25 (1971). Even Bering v. Share, 106 Wash. 2d 212, 721 P.2d 918, 932 (1986), cert. denied, 479 U.S. 1050 (1987), which upheld an injunction against the words "murder" and "kill" and their derivatives in the context of pro-life protests, was premised on the presence of young children who were patients at the medical building and were exposed to these words. This is not to say, of course, that Bering is good First Amendment law. The point is that government may not ban the protesters' idea that the pregnant woman about to have an abortion is killing her baby. It is hearing that idea, not its particular expression or the presence of a sit-in, that causes pain to women who are addressed at these protests. The sit-in itself is easily avoided by waiting until police clear the area.

110. There is one other criticism of civil disobedience that is based on negative consequences. Illegal protests are said to be expensive. Municipalities today increasingly seek remuneration for the costs of arrest and processing. See infra note 149 and accompanying text. I do not know how expensive civil disobedience campaigns really are; nevertheless, it seems preposterous to premise tolerance for political practices primarily on expense.

111. As Edward Madden's book shows, 19th century American justifications for civil disobedience emphasized theories of higher law, as opposed to utilitarianism. See E. MADDEN, supra note 27.
majority. We ought to respect the sincerity and passion of the protestors even when we disagree with them. Allowing protestors to break a law they feel they must break—or another law in protest—before arresting them and then punishing them by the relaxed standards of ordinary criminal law enforcement is not too onerous a burden on the rest of us. It is not just that blowing off this steam of protest is better for society in the long run than attempts to suppress the protest—though this is surely the case. Rather, by tolerating civil disobedience as much as we can, we encourage citizens to keep faith with themselves.

In theory, the injunction issued against a campaign of civil disobedience is not necessarily inconsistent with respect for the protestors and tolerance for civil disobedience. The injunction might represent simply the occasion for the arrest after the illegal protest takes place. Sanctions for the violation of the court order might be kept mild. Judges and attorneys might come to expect civil disobedience campaigns to continue despite court orders.

But this is so only in theory. The following comment by Justice Lamar in 1911 suggests that judges feel an obligation to take necessary steps to vindicate their orders.

[If, upon the examination of the record it should appear that the defendants were in fact and in law guilty of the contempt charged, there could be no more important duty than to render such a decree as would serve to vindicate the jurisdiction and authority of courts to enforce orders and to punish acts of disobedience. For while it is sparingly to be used, yet the power of courts to punish for contempts is a necessary and integral part of the independence of the judiciary, and is absolutely essential to the performance of the duties imposed on them by law. Without it they are mere boards of arbitration whose judgments and decrees would be only advisory.

If a party can make himself a judge of the validity of orders which have been issued, and by his own act of disobedience set them aside, then are the courts impotent, and what the Constitution now fittingly calls the "judicial power of the United States" would be a mere mockery.]

112. Direct civil disobedience has the more compelling claim for some degree of tolerance, and indeed in some contexts, conscience is respected to the extent of freeing some citizens from burdens shared by others. But even in indirect civil disobedience, the protestors are bearing witness to his view of good and evil.

Judges could be taught to take a more relaxed attitude toward court orders, but there would have to be a significant reeducation of the judiciary.

II. Injunctions Should Not Be Used To Control Civil Disobedience

In the prior section, I argued that civil disobedience is an established and positive feature of American political life. Obviously, this position, if persuasive, suggests that the law should accommodate civil disobedience to some extent. The accommodation proposed here is that injunctions not be used to respond to civil disobedience campaigns. Civil disobedience must, of course, be limited somehow, but the normal processes of criminal prosecution are sufficient and superior for that task. Injunctions against civil disobedience are detrimental both to the country and to the legal system itself. In order to appreciate the problems that come with injunctive relief, it is first necessary to show how easy it is for plaintiffs to obtain injunctive relief against civil disobedience campaigns.

A. The Availability of Injunctions Against Civil Disobedience

While civil disobedience is an established practice in American political life, case law suggests, ironically, that no one who is the object of a campaign of civil disobedience needs to put up with it. There have been cases in a variety of contexts in which acts of civil disobedience have been enjoined.114 It may be, of course, that these

N.Y.S.2d 920, 927 (Ithaca City Ct. 1968) (stating that “[i]n this day of civil unrest [and] disobedience,” respect for courts is of the utmost importance), and Beth-El Hospital, Inc. v. Davis, 231 N.Y.S.2d 635 (Sup. Ct. 1962) (finding that contempt citations were needed to “bring such civil disorder and disobedience to an end.”), aff’d., 18 A.D.2d 1138, 239 N.Y.S.2d 535 (1963).


The numerous injunctions against Operation Rescue and allied pro-life protest groups is-
court orders were routinely disobeyed. The concern in this section is with the availability of equitable relief, not its practicality.

The reason that civil disobedience may be enjoined so readily is the modern view that continuing acts of trespass are sufficient to justify injunctive relief. Because the courts view a sit-in as nothing more than sustained trespass, courts are very likely to order relief when asked for an injunction against the likelihood of continuing sit-ins.

There is nothing logically necessary about enjoining trespass and, historically, views have differed as to the availability of injunctive relief in such cases. Justice Story found this basis for equity sufficient, but Chancellor Kent did not, unless destruction of the land occurred. Such destruction often will not be present in civil disobedience situations.

sued nationwide constitute another example. See, e.g., New York State Nat'l Org. for Women v. Terry, 886 F.2d 1339, 1343 (2d Cir. 1989); Northeast Women's Center, Inc. v. McMonagle, 868 F.2d 1342 (3d Cir.), cert. denied, 110 S. Ct. 261 (1989); Portland Feminist Women's Health Center v. Advocates for Life, Inc., 859 F.2d 681 (9th Cir. 1988); Dayton Women's Health Center v. Enix, 52 Ohio St. 3d 67, 555 N.E.2d 956 (1990); Roe v. Operation Rescue, 123 F.R.D. 500 (E.D. Pa. 1988); see also Rebuffed by Courts, Anti-Abortion Chief Regroups, N.Y. Times, Mar. 5, 1990, at B2, col. 3 (discussing the use of an injunction by a Broome County abortion clinic to keep protestors off its premises). Ann Baker, Director of The 80% Majority Campaign, a pro-choice group that tracks anti-abortion protests, estimates that 12-18 federal injunctions against Operation Rescue have been issued, a few state court injunctions and some injunctions against anti-abortion protests before Operation Rescue was organized. Telephone interview with Ann Baker, Director of the 80% Majority Campaign (June 19, 1990).

115. See Rosenthal, supra note 114, at 747; see also Lucy Webb Hayes Nat'l Training School for Deaconesses and Missionaries v. Geoghegan, 281 F. Supp. 116, 117 (D.D.C. 1967) (stating that "equity will enjoin a continuing trespass or a series of repeated trespasses where an action for damages would not be an adequate remedy."). References to nuisance in classic equity sources, see infra note 117, should not obscure the reality that today it is continuing trespass that entitles the plaintiff to relief.

116. See E. RE, CASES AND MATERIALS ON REMEDIES 414-16 (1982) (identifying three distinct historical approaches: a willingness of chancery to grant relief prior to the Eighteenth Century, a "[g]reat reluctance" to do so in the Eighteenth and early Nineteenth Centuries, and a present favorable view of such relief); see also H. McClinock, EQUITY §133, at 361-62 (2d ed. 1948).

117. 2 J. STORY, COMMENTARIES ON EQUITY JURISPRUDENCE §925, at 602 (14th ed. 1817) (explaining that "It has been said that every common trespass is not a foundation for an injunction, where it is only contingent, fugitive, or temporary. But if it is continued so long as to become a nuisance, in such a case an injunction ought to be granted to restrain the person from committing it."). Notice that, for Story, continuing trespass, by definition, represents the sort of injury equity should remedy by injunctive relief.

118. Jerome v. Ross, 7 John Ch. R. 315 (1823).

119. Robert Rosenthal makes the point, however, that the facts of some cases actually granting injunctive relief do involve more than trespass. See Rosenthal, supra note 114, at 747-48. No doubt the level of violence differs from civil disobedience campaign to civil disobe-
Generally, the courts do not explain why trespass may be enjoined. Presumably, it is because there is no adequate remedy at law when repeated arrests do not end the disruptions, and/or that continued episodes of trespass constitute an irreparable injury by definition.120

Trespass is, of course, a crime and so might seem to fall under the maxim that equity does not enjoin a crime.121 If this saying ever had efficacy, however, that efficacy had long since withered by the time the federal courts set out to break the Pullman strike, leading to the decision in In re Debs.122 It was in the context of labor strikes that Professors Frankfurter and Greene suggested that some types of social strife could be left to the criminal law to deal with.123 The above-noted maxim about enjoining crime might have meant just that, that certain social disruptions are part of an ongoing political adjustment with which the courts should not deal. But all this saying has come to mean is that equity does not enjoin crimes per se—that is, equity does not enjoin crimes simply because they are crimes.124 Rather, equity enjoins conduct according to its own lights and is unconcerned about whether the conduct in question constitutes a crime or not. It is sufficient, to gain injunctive relief, that the conduct interferes with rights equity recognizes.

One right equity recognizes is that of going about one's lawful pursuits without disruption.125 Equity's emphasis on disruption ex-
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plains why injunctions against civil disobedience are often so broad. In effect, once a plaintiff convinces a judge that a business, government office or any other institution is being disrupted by protest, the plaintiff is entitled to relief from the disruption itself. Only the First Amendment, which is not currently interpreted to protect civil disobedience, limits the scope of the injunction. Thus, in Pickens v. Okolona Municipal Separate School District,126 noise from demonstrators that distracted students in a school was a factor in moving pickets away from the school. The same noise considerations have been noted in abortion cases.127

Allegations of violations of federal law in general or constitutional rights in particular are unnecessary—even irrelevant—to the availability of injunctive relief. The owners of the Seabrook Nuclear Power Plant, for example, have obtained injunctions against sit-ins based on their right to conduct a business unimpeded.128 Other businesses have fared just as well in the face of illegal protests.129 Of course a violation of federal law can justify an injunction.130 But, as we have seen, so can an allegation of a violation of ordinary state trespass law.

Controversial issues of federal law do arise in the Operation Rescue cases, for example whether economic gain is necessary to satisfy RICO131 or the extent to which § 1985(3) reaches private action.132 But these federal law issues arise in deciding whether a federal court has jurisdiction of the case133 or the extent and nature of damages. All that is needed for an injunction in these cases is a state-law trespass claim brought by the clinics to eliminate disrup-

§ 32, at 59. This was a broad protection from disruption, which became even broader as the idea of property has been gradually extended to "rights of substance," id. at 30, including personal rights. Id. at 122-48.
126. 594 F.2d 433 (5th Cir. 1979).
127. Noise was a factor, for example, in Portland Feminist Women's Health Center v. Advocates for Life, Inc., 859 F.2d 681 (9th Cir. 1988).
130. See Action v. Gannon, 450 F.2d 1227 (8th Cir. 1971) (involving an injunction against disruption of religious services based on violation of 42 U.S.C. § 1985(3)).
132. See Northeast Virginia Women's Medical Center v. Balch, 617 F.2d 1045 (4th Cir. 1980).
133. See, e.g., id. at 1049 (noting that the substantial 42 U.S.C. § 1985 claim gives pendent jurisdiction over state law claims for injunctive relief).
tion of an ongoing business.\textsuperscript{134}

Similarly, allegations of violence and destruction of property are typical in abortion cases.\textsuperscript{138} However, while violence is persuasive evidence of disruption, there is no requirement of proving violence before an injunction may issue.\textsuperscript{138}

One further reason exists for readily enjoining civil disobedience. A court may issue an injunction because of the mere threat of disruption.\textsuperscript{137} Civil disobedience cannot easily be organized without public statements. Sometimes, perhaps as an organizing tool, such statements exaggerate the realistic threat the proposed protest represents. A similar situation occurred a few years ago regarding threats to close Kennedy Airport in New York.\textsuperscript{138} In deciding on the appropriateness of relief, a judge may credit such statements despite their implausibility.\textsuperscript{139}

The issuance of an injunction is often said to be a matter of discretion, rather than of right.\textsuperscript{140} Even upon a showing of disruption of an ongoing business, a trial judge perhaps would not commit reversible error if an injunction were refused on policy grounds. A judge might hold that in view of the political struggle over abortion or nuclear power (or whatever the subject of protest), the courts should not become closely involved in the dispute, especially through


\textsuperscript{135} \textit{See}, e.g., Northeast Women's Center, Inc. v. McMonagle, 868 F.2d 1342, 1347-48 (3d Cir.), \textit{cert. denied}, 110 S. Ct. 261 (1989); \textit{supra} note 99.

\textsuperscript{136} Douglas Aircraft Co. v. Local Union 379 of the Int'l Bhd. of Elec. Workers, 247 N.C. 620, 626, 101 S.E.2d 800, 805 (1958) (stating that "the power of a court of equity to enjoin is not exhausted merely because violence is not present.").

\textsuperscript{137} \textit{See}, e.g., Curtis v. Tozer, 374 S.W.2d 557 (Mo. App. 1964) (indicating that a TRO was issued before a sit-in actually occurred); \textit{cf.} Commonwealth v. Roth, 366 Pa. Super. 575, 531 A.2d 1133 (1987) (explaining that demonstrators were arrested for disorderly conduct and failure to disperse before attempting to invade a church).

\textsuperscript{138} Port Authority v. SST Concorde Alert Program, 90 Misc. 2d 295, 295, 394 N.Y.S.2d 364, 365 (Sup. Ct. 1977) (stating that protesters were "alleged to have threatened 'to shut down JFK Airport in a massive demonstration'").

\textsuperscript{139} \textit{See id. at} 297-98, 394 N.Y.S.2d at 367.

the medium of property rights. This is apparently what Felix Frankfurter and Nathan Greene had in mind in proposing to leave contending labor disputants to their criminal law remedies. 141

However, whatever the word discretion is meant to encompass, for most judges the simple recognition of a social/political context to disruptive protest is apparently not included. 142 Ironically, the First Amendment protections accorded to political protest may be part of the reason that civil disobedience is not considered by judges to be an important value that is balanced against the interests and rights of the plaintiff. It would be easy for a judge to believe that if a protest had the sort of value a court should recognize, the protest would be protected by the First Amendment. Conversely, if a form of protest were not protected by the First Amendment—as sit-ins have not been—then whatever political significance the protest might have, it would not be the sort of value of which a court should take cognizance. Judicial criticisms of civil disobedience 143 do not necessarily mean that judges are oblivious to its historic role. The judges may simply be reacting to the historic reality that the rite of civil disobedience in American life often has been played out through punishment in the courts. 144 But whether they value civil disobedience in a general sense or not, judges feel no need to use their discretion to avoid injunctions against civil disobedience.

The ease by which injunctions can be obtained against civil disobedience is illustrated not only by reference to substantive analysis, such as the nature of interests equity protects, but also by reference

141. See F. Frankfurter & N. Greene, supra note 123, at 200.
142. See RESTATEMENT (SECOND) OF TORTS §§ 933-943, 949 (1979) (discussing considerations in judging the appropriateness of an injunction against torts).
143. See, e.g., Board of Higher Educ. v. Rubain, 62 Misc. 2d 978, 980, 310 N.Y.S.2d 972, 975 (Sup. Ct. 1970) (recognizing that at a certain point “the individual must give ground in the interests of the entire . . . community.”); Beth-El Hospital, Inc. v. Davis, 231 N.Y.S.2d 635, 639 (Sup. Ct. 1962) (describing civil disobedience as “a declaration of war against society.”), aff’d, 18 A.D. 2d 1138, 239 N.Y.S.2d 535 (1963); see also United States v. Grose, 687 F.2d 1298, 1299-1300 (10th Cir. 1982) (holding that a jury instruction that civil disobedience leads to chaos is not reversible error).
to procedural and technical issues. Three issues arise in cases concerning injunctions against civil disobedience: 1) who may request the injunction; 2) who will be enjoined and 3) what sanctions are available for violations. The answers tend to be: 1) anyone, 2) anyone and 3) anything.

In terms of who may request the injunction, obviously the property owner whose land or business is disrupted has standing to seek relief. Moreover, at least in the context of abortion, the owner—here the clinic—may also assert the rights of its customers.\textsuperscript{146}\n
Apart from the property owner, who may request an injunction? In recent years the government has asserted authority to seek injunctive relief against unlawful conduct.\textsuperscript{146} The federal courts have shown a remarkable antipathy to allowing the Federal Executive Branch to sue for relief for the violation by the states of individuals' constitutional rights.\textsuperscript{147} On the other hand, local governments, without judicial comment, have been allowed to sue to enjoin illegal mass demonstrations.\textsuperscript{148} While the government might not be permitted to sue to enjoin a trespass on private land, certainly the blocking of sidewalks would provide the basis for relief. Thus, government officials may enjoin acts of civil disobedience.

The significance of suits by public officials is that, increasingly, local governments are reacting against the costs associated with continuing civil disobedience, especially Operation Rescue.\textsuperscript{149} Injunctions at the behest of cities and counties are likely to become more common. It may be that even if the target of the protest decides not to seek an injunction, or even opposes its issuance, the government may still sue for injunctive relief.

\textsuperscript{145} See New York State Nat'l Org. for Women v. Terry, 886 F.2d 1339, 1346-48 (2d Cir. 1989).

\textsuperscript{146} See infra note 147.

\textsuperscript{147} See Ledewitz, The Power of the President to Enforce the Fourteenth Amendment, 52 Tenn. L. Rev. 605, 648-69 (1985).

\textsuperscript{148} New York State Nat'l Org. for Women v. Terry, 704 F. Supp. 1247 (S.D.N.Y.), modified and aff'd, 886 F.2d 1339 (2d Cir. 1989) (holding that the City of New York had standing to intervene in a suit against protestors).

\textsuperscript{149} See, e.g., Town of West Hartford v. Operation Rescue, 726 F. Supp. 371 (D. Conn. 1989) (discussing the town's attempt to seek damages against various defendants for the expenses of illegal demonstrations aimed at abortion clinics); Town of Brookline v. Operation Rescue, Inc., No. CA 89-0805-MA (D. Mass. filed April 13, 1989) (seeking expenses from illegal demonstrators); cf. County of San Luis Obispo v. Abalone Alliance, 178 Cal. App. 3d 848, 223 Cal. Rptr. 846 (1986) (finding that there was no authority for local government to sue to recover costs incurred in breaking up an illegal demonstration absent statutory authorization); see also Califa, RICO Threatens Civil Liberties, 43 Vand. L. Rev. 805, 831 (1990) (discussing West Hartford).
In terms of who is enjoined, it is widely accepted that one may not "enjoin the world."\(^\text{150}\) But in the context of illegal protests, enjoining the world is just what a court order tends to do. Once a civil disobedience campaign begins and an injunction issues, anyone engaging in civil disobedience very likely will be presumed to be acting in concert with the original defendants. Notice of a court order can be accomplished through a bullhorn at a demonstration.\(^\text{161}\) Thus, even if a demonstrator is blocking a power plant's construction for some motive other than opposition to nuclear power—a failure to hire minority workers, for example—he is in danger of being held in contempt of court. Certainly, if this demonstrator is inspired by the original defendants, though he had no contact with them, he will be held in contempt.

What penalties will the protestor face if held in contempt? As the recent case of Dr. Elizabeth Morgan illustrates,\(^\text{162}\) there are no theoretical limits to the sanctions of equity.\(^\text{155}\) There have been certain limits on equity sanctions imposed by statutes,\(^\text{164}\) and the United States Constitution requires a jury trial if imprisonment for more than six months is contemplated in criminal contempt.\(^\text{156}\) Neverthe-

\(^{150}\) Alemite Mfg. Corp. v. Staff, 42 F.2d 832, 832 (2d Cir. 1930) (stating that "no court can make a decree which will bind any one but a party; a court of equity is as much so limited as a court of law; it cannot lawfully enjoin the world at large, no matter how broadly it words its decree.").


\(^{152}\) Dr. Morgan remained in jail 25 months rather than tell a court the whereabouts of her daughter. Dr. Morgan sought to prevent unsupervised visits by the child's father, whom she accused of sexually molesting the child, a charge the father denied. See Parents See Girl In Custody Fight, N.Y. Times, Mar. 19, 1990, at A16, col. 6. Dr. Morgan's case was a celebrated instance of the essentially unlimited coercive sanctions of civil contempt. See Morgan v. Foreitch, 528 A.2d 425 (D.C. 1987).

\(^{153}\) See Uphaus v. Wyman, 360 U.S. 72, 81-82 (1959) (holding that incarceration for civil contempt until an order to produce documents is obeyed is not unconstitutional). For a criticism of such use of civil contempt, see R. Goldfarb, The Contempt Power 48-49, 60-61, 260-63 (1971).

\(^{154}\) For example, Dr. Morgan was freed when publicity over her case caused Congress to pass the District of Columbia Civil Contempt Imprisonment Act of 1989, Pub. L. No. 101-97, §§ 2(2), 2(b), 103 Stat. 633, 633-34 (codified in D.C. Code §§ 11-741(b)(2), 11-944(b)(2) (Supp. 1990)), which amended the District of Columbia Code to limit civil contempt in child custody cases to a maximum of 18 months. Another traditional limit on civil contempt is that the contemnor is to be released when the civil coercion has failed to gain obedience. See, e.g., Lambert v. Montana, 545 F.2d 87, 91 (9th Cir. 1976) (holding that where a substantial likelihood exists that a contemnor's confinement is no longer coercive, continued confinement denies due process). That accepted rule did not avail Dr. Morgan, however, even after many months. See Morgan v. Foreitch, 546 A.2d 407, 414 (D.C. 1988), cert. denied, 488 U.S. 1007 (1989).

\(^{155}\) See Bloom v. Illinois, 391 U.S. 194, 201-02 (1968) (holding that criminal contempt
less, one who violates an injunction may be held in civil contempt and jailed or fined until one gives a promise to obey the court order.\textsuperscript{156} Violation of an injunction may also lead to charges of criminal contempt followed by jail or a fine designed to punish for however long or much the judge decides is necessary to protect the honor of the court. An injunction against trespass in essence rewrites that criminal statute with vastly more severe penalties.

\section*{B. The Differences Between an Injunction and a Crime}

In 1930 Professors Nathan Greene and Felix Frankfurter could write the following about labor injunctions with a sense that the contrast would be considered obvious: "To make the infraction of a criminal statute also a contempt of court is essentially an invention to evade the safeguards of criminal procedure and to change the tribunal for determining guilt."\textsuperscript{157} The distinction between equity and criminal law enforcement, so weighty to them, is perhaps not so clear today.

A considerable part of Professor Owen Fiss's imposing reputation is owed to his insight that injunctions are quite similar to criminal statutes.\textsuperscript{158} A defendant can violate either a statute or a court order and subsequently be punished for disobedience. Professor Fiss's observation helped further a reevaluation of the field of prior restraints in First Amendment cases—a field premised on supposed

\begin{footnotesize}
\textsuperscript{156} The opinion in \textit{In re Dougherty}, 429 Mich. 81, 97-103, 413 N.W.2d 392, 398-400 (1987), presents a strong argument that coercive civil sanctions should not be premised on a party's refusal to promise to avoid future behavior that is prohibited. According to that opinion, civil contempt should be reserved to coerce one to carry out a court order and as such, should only be imposed on one who is currently in violation of the court's order. \textit{Id.} at 99-100, 413 N.W. 2d at 398-99. Punishment for assumed future violation of a prohibition, in contrast, is punitive. The following quote from Professor Fiss's book shows that the Michigan Supreme Court's understanding is not universally shared. The most common form of civil contempt is the conditional order: the injunction prohibits the defendant from doing X (e.g., dumping waste in the river), the defendant does X once (e.g., he dumps one load in the river), and, as a form of civil contempt, the defendant is jailed until he stops doing X or until the court is thoroughly satisfied through promises, etc. that he will not do X.


It obviously did not occur to Professor Fiss that jailing someone to coerce a promise to refrain from doing an act is not civil contempt. The proposal by the Michigan Supreme Court may be a sound idea—indeed it would alleviate some of the problems this Article addresses. But it is a proposal, not a settled distinction.

\textsuperscript{157} F. Frankfurter \& N. Greene, supra note 123, at 107.

\textsuperscript{158} See generally O. Fiss, supra note 156, at 72-74.
\end{footnotesize}
differences between injunctions and crimes.\textsuperscript{159} Traditionally, lawyers assumed that court orders, unlike statutes, could not or would not be disobeyed. Recent thinking about prior restraint deals much more carefully with the distinctions between crimes and injunctions.\textsuperscript{160}

One implication of the prior restraint controversy is that it should not be assumed that once a court order is entered, a campaign of civil disobedience will end, whereas without an injunction, the campaign would have continued indefinitely. The protestor faces some of the very same issues in terms of violating a court order that he would face in violating a criminal statute: Am I willing to go to jail? Am I willing to pay a fine? For how long or how much?

Nevertheless, there are important differences between injunctions and crimes. One difference between criminal statutes and injunctions is how people feel about violating them.\textsuperscript{161} An order issued

\textsuperscript{159} Although Professor Fiss does discuss the prior restraint doctrine in his book, his major subject is the injunction itself. O. Fiss, supra note 156. Professor Fiss attempts to protect the gains occasioned by Brown v. Board of Educ., 347 U.S. 483 (1954) by keeping “[r]eactionary forces . . . [from] return[ing] the injunction to a subordinate place in the remedial hierarchy.” O. Fiss, supra note 156, at 5-6.


\textsuperscript{161} See Blasi, supra note 160. Professor Blasi makes the following observation concerning the attitude toward an injunction:

Certainly injunctions appear to have in the minds of many citizens a mystique that engenders compliance. Potential speakers who would think nothing of violating criminal laws in order to test their constitutionality or even as exercises in civil disobedience are reluctant to disobey injunctions. The personalized nature of the law's command seems to cast a spell.

\textit{Id.} at 41.

Even Professor Fiss, at pains to show that injunctions are not a greater deterrent than is subsequent punishment, is reduced to surmising that the citizen intent on civil disobedience may be willing "to flout the mystique." O. Fiss, supra note 156, at 71. It is unfortunate that twelve years after Professor Fiss' discussion of the deterrent effects of injunctions and crimes, little more is known about what actually occurs in civil disobedience situations. Much of Professor Fiss' "rational calculator model" argument against the deterrent effect of injunctions relies on the assumption that the sanctions for contempt will be less severe than the sanctions for criminal violations. See \textit{id.} at 72. For some crimes this may be true. It may be true, for example, for the obscenity statutes that the prior restraint doctrine often deals with. But the typical acts of trespass involved in the classic sit-in are not serious crimes. Professor Fiss notes that to avoid a jury in criminal contempt, the judge must "confine himself to petty punishments." \textit{Id.} at 73. But a "petty" punishment of days and weeks—or a few months—in jail is a much more severe punishment than the criminal law would typically impose for trespass.

Unfortunately, the needed empirical study has not been undertaken. But this much is certain: The pro-choice movement is pursuing vigorously an injunction strategy against civil disobedience at abortion clinics. See Justices Bar Clinic Blocking in N.Y., Pitts. Post-Gazette, May 22, 1990, at 2, col. 3 (reporting statement attributed to Molly Yard, President of the
by a judge and directed to a party represents the rule of law in a more compelling way than a general statutory formulation does. That may be why people, and lawyers in particular, assumed for a long time that court orders would always be obeyed. Contemplating the violation of an order certainly seems more significant than violating the same rule embodied only in the statute book.

One surprising illustration of this "feeling" difference was the admission by the publishers of the New York Times that, if a court order had been issued by the federal courts against publication of the Pentagon Papers,\textsuperscript{162} the Times would have obeyed the court order.\textsuperscript{163} Yet the New York Times published despite a real possibility, as Justice White pointed out in his concurrence, that publication of the Pentagon Papers might be found to have been illegal.\textsuperscript{164} Nothing in the Supreme Court opinions in the case shielded the Times and the Washington Post from subsequent criminal prosecution. A similar feeling of deference to court orders pervaded the civil rights community around the Walker v. Birmingham\textsuperscript{165} case. People who routinely went to jail were not certain about violating a court order.\textsuperscript{166}

Professor Fiss may be right in suggesting that the admitted deference of the New York Times might have been an ill-advised mistake, and pointing out that the commitment was subsequently repudiated.\textsuperscript{167} He may also be right that the positive record of the federal courts in the area of civil rights had a "tranquilizing power" leading


\textsuperscript{163} Kalven, Foreword: Even When A Nation Is at War, 85 Harv. L. Rev. 3, 34 & n.156 (1971). For an example of a newspaper that chose to publish despite a court order, see In re Ithaca Journal News, Inc., 57 Misc. 2d 356, 292 N.Y.S.2d 920 (Ithaca City Ct. 1968).

\textsuperscript{164} See New York Times, 403 U.S. at 740 (stating that the United States could choose to institute criminal proceedings against the publishers).

\textsuperscript{165} 388 U.S. 307 (1967). In Walker, defendants' contempt convictions were upheld based on an arguably unconstitutional ex parte trial court prohibition of a march. See R. Hall, The Morality of Civil Disobedience 110 (1971); see also Carrol v. President & Comm'rs, 393 U.S. 175, 180 (1968) (holding unconstitutional an ex parte restraining order of a planned rally).

\textsuperscript{166} Prior to disobeying the court order, the organizers of the Birmingham Good Friday March issued a public statement in which they felt compelled to state that they had obeyed federal court orders in the past. See R. Hall, supra note 165, at 110; see also Walker, 388 U.S. at 310.

\textsuperscript{167} O. Fiss, supra note 156, at 71.
to a tendency to obey federal injunctions. The point is not, however, that the tendency to obey injunctions is so strong that it cannot be overcome. The reason to distinguish between injunctions and subsequent criminal prosecution is that there is a stronger tendency to obey injunctions than statutes.

The reason for this emotional commitment to court orders is hard to pinpoint. Why should someone care that a judge has embodied in a court order a statute that he had been willing to violate before the court order was issued?

In part, the answer to that question might be certainty about what the law is. Before the issuance of the court order, the protestor could say honestly that his acts might not be held to be illegal. The court order, however, represents the view of at least one judge that he is in fact breaking the law. Nor would the protestor be allowed to raise a First Amendment defense in the contempt proceeding. Perhaps this certainty is why the New York Times would obey a court order, but not a criminal statute of arguable application.

I do not believe certainty is a major factor, however, in the context of civil disobedience. No one engaged in a sit-in can believe that trespass is legal. And even if the necessity defense to a trespass charge were allowed to be argued to a jury, the protestor would be

168. Id.

169. This limit on defenses in contempt proceedings was established definitively in Walker v. Birmingham, 388 U.S. 307, 314-15, 320-21 (1967); see also sources cited infra note 217.

170. The importance of certainty is greater in the traditional prior restraint context. As Professor Martin Redish argues, one justification for court orders in cases of arguably protected speech is that the court order defines and, thereby, fosters protected speech. See Redish, The Proper Role of the Prior Restraint Doctrine in First Amendment Theory, 70 Va. L. Rev. 53, 70-71 (1984).

171. In recent years, the use of the necessity and justification defenses in trespass cases has been greatly restricted. See, e.g., Cleveland v. Municipality of Anchorage, 631 P.2d 1073 (Alaska 1981) (holding that the necessity defense was unavailable to defendants who attempted to prevent abortions); Commonwealth v. Averill, 12 Mass. App. 260, 262, 423 N.E.2d 6, 8 (1981) (holding that the necessity defense deals with "obvious and generally recognized harms, not those which are . . . the subject of legislation and government regulation."); State v. Dansinger, 521 A.2d 685 (Me. 1987) (holding that the justification defense was unavailable for acts of civil disobedience); Commonwealth v. Capitolo, 324 Pa. Super. 61, 73, 471 A.2d 462, 474 (1984) (distinguishing between justification and civil disobedience), rev'd, 508 Pa. 372, 498 A.2d 806 (1985); see also Note, Necessity As a Defense to a Charge of Criminal Trespass in an Abortion Clinic, 48 U. Cin. L. Rev. 501 (1979) (authored by Debb A. Levin); Note, Justification Defense By Antinuclear Demonstrators—Commonwealth v. Capitolo, 59 Temp. L.Q. 643 (1986) (authored by Thomas M. Glavin). For an argument in favor of the necessity defense in certain civil disobedience contexts, see DiSalvo, Necessity's Child: The Judiciary, Disobedience and the Bomb, 41 U. Miami L. Rev. 911 (1987). For a suggestion that the First Amendment should be interpreted to permit protestors to raise the necessity
aware that the jury could reject the defense. The protestor who sits-in should expect to be convicted of a crime of some sort.

There are other differences between injunctions and criminal enforcement besides certainty. The judge is likely to be more committed to obedience to his order than to punishing a violation of a criminal statute. The judge’s ego is involved with his order. For this reason, and because of the nature of equity enforcement, the sanction may be more severe. Also, enforcement procedures will be streamlined in the case of contempt. I will discuss some of these differences below. But none of these differences go to the heart of the psychological reality of a special reverence for court orders.

Unwillingness to violate a court order may come from the same sense of personal insult—affront—to the judge that the law of contempt makes manifest. The statute book has no face. But to violate a court order, the protestor must deal with an actual human being. Any of us would hesitate to offend the honor of the judge. As Professor Kalven puts it, we respond to the “direct, personal command of the injunction.”

The ignoble way of describing the unwillingness to disobey is that we are intimidated and fearful. We are in awe of the ceremony of the court, and afraid that the angry, powerful person in charge will punish us. Suddenly we lose our nerve. A nobler version would state that we respect the office of judge and the role of law and we do not wish even to appear to hold either in contempt. Perhaps the truth is between the two. Whatever the explanation, one difference between criminal statutes and injunctions is the way we feel about violating each of them.

A second and related difference between injunctions and criminal statutes is one of emphasis on how conduct is discouraged. The purpose of a criminal sanction is ultimately to prevent certain types of conduct from occurring. We make murder a crime to discourage murder, for example. Obviously, prevention is at the heart of an injunction as well.

But the two systems, criminal law and equity, pursue prevention in different ways. The criminal law, in the main, prevents conduct indirectly, by punishing current violators. That is, criminal law is


172. Kalven, supra note 163, at 34 n.156.

173. There is, of course, an aspect of incapacitation in criminal law enforcement that prevents future criminal conduct directly, by restrictions on the liberty of the defendant. But it
organized around the concept of "violation." Conversely, equity prevents conduct by convincing particular potential violators not to commit an act. Equity is organized around individual prevention.\(^{174}\)

It would be claiming too much to say that even for the typically minor infractions involved in civil disobedience, the criminal law permits violations. It does not permit them. The criminal law punishes violations. And it punishes repeated violations of even minor criminal laws in a way that may come to resemble the sanctions for violating court orders.\(^{176}\) In one episode, a trial judge in Allegheny County conditioned probation for convicted pro-life protestors on a promise to refrain from trespass in the future. For these defendants, there was no longer much distinction between equity and criminal prosecution.\(^{176}\)

While, as this episode illustrates, the criminal law does not literally accept violations, it does, nevertheless, tend to tolerate, even expect, a large amount of illegal conduct with regard to minor crimes. A great deal of trespass, blocking of sidewalks, overtime parking and the like goes on every day. Society has no intention of stamping out, or even attempting to stamp out, all such behavior.\(^{177}\) For this rea-

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174. This is a particular instance, in the context of preventing conduct, of the general notion that equity acts in personam. See H. McClintock, supra note 116, § 34, at 84-86 (stating that "[o]rdinarily, equity will issue a decree in the form of a command and will enforce it by coercing obedience.").

175. See Koski v. Samaha, 648 F.2d 790 (1st Cir. 1981) (upholding a six month jail sentence for trespass as justified to deter defendant who had engaged in numerous acts of civil disobedience); State v. Wentworth, 118 N.H. 832, 395 A.2d 858 (1978) (upholding a six month jail sentence for trespass imposed to deter civil disobedience). Even cases in which severe sanctions are meted out for minor criminal violations do not, however, demonstrate an equivalence of equity enforcement and criminal prosecution. A protestor may sit-in numerous times and be convicted of summary or other minor offenses and be given minor punishment before the machine of criminal law enforcement grinds out severe sanctions. In contrast, the tendency will be in the future—if it is not already—for one illegal protest of an unfolding civil disobedience campaign to lead to an injunction and the second violation to lead to contempt proceedings.

176. For an account of the sentencing, see Abortion Protesters Sign Form, Pitts. Press, Feb. 6, 1988, at B3, col. 1. In another episode which may be representative of a common practice, bail was revoked pending the sentencing of a veteran pro-life activist when she refused to promise to refrain from illegal conduct in the future. Ackerman, Abortion Protester Jailed for Refusing to Quit, Pitts. Post-Gazette, Aug. 8, 1990, at 4, col. 2.

177. Cf. O. Fiss, supra note 156, at 75 (discussing the view of welfare economists that "individuals should be free to do whatever they want provided they are made to pay the full costs of their action."). But see van den Haag, in Civil Disobedience and the Law, 21 Rutgers L. Rev. 27, 41 (1966) (suggesting that sanctions that do not deter are licenses, not penalties).
son, criminal sanctions for such acts are minor. The protestor, whose
count is of an entirely different sort, and whose challenge to ex-
esting authority is quite real, gains the benefit of the general lethargy
of the criminal justice system.

Thus, the judge's action in conditioning probation upon a prom-
ise of compliance with the law is not characteristic of the criminal
justice system. On the other hand, such a condition would be typical
of a civil contempt proceeding in equity. 178

This difference in approach to deterrence between criminal law
and equity is important for civil disobedience. One of the commonly
held perspectives about civil disobedience is that the protestor
manifests respect for law by accepting punishment. 179 As James Ad-
ams put it, expressing a common view, the protestor "aims to diso-
bey within a legal framework." 180 Professor Ernest van den Haag
correctly points out that flagrant law violation is not a form of re-
pect. 181 Nevertheless, this common view is understandable. Each
side in criminal court—the judge on the one hand, the protestor on
the other—can respect the conscientious action of the other party. 182
The criminal court judge need not attempt to end illegal protest.

The different emphasis in equity tends to upset this loose ac-
commodation. Few judges would grant the protestor the same re-
spect for conscience in the violation of a court order as in the viola-
tion of a statute. And the very existence of the unlimited potential
sanction of civil contempt, directed as it is to coercing assent to the
judge's order, pushes the judge toward direct confrontation with the
conscience of the protestor.

178. See, e.g., Neshaminy Water Resources Authority v. Del-Aware Unlimited, Inc.,
332 Pa. Super. 461, 468, 481 A.2d 879, 882 (1984) (stating that the lower "court allowed any
person held in contempt to purge himself or herself of that contempt by merely making
a statement that he or she agreed to abide by the order in the future." ). Professor Fiss calls this
type of contempt, "conditional-order civil contempt" as contrasted with "compensatory dam-
age civil contempt." O. Fiss, supra note 156, at 34-35, 73-75.
179. See, e.g., Cohen, in Civil Disobedience and the Law, 21 Rutgers L. Rev. 1, 6
(1966) (arguing that the proper culmination of civil disobedience is the acceptance of the law's
punishment); see also Hook, Social Protest and Civil Disobedience, in Civil Disobedience
and Violence 59 (J. Murphy ed. 1971) (arguing that civil disobedients "are duty bound to
accept the legal sanctions and punishments imposed by the laws."). But see M. Perry, supra
note 16, at 118-19 (1988) (arguing that the position that a civil disobedient must accept pun-
ishment is unacceptable).
180. Adams, Civil Disobedience: Its Occasions and Limits, in Political and Legal
181. See van den Haag, supra note 177, at 41 (criticizing the exchange theory of penal
law).
182. See L. Buzzard & P. Campbell, supra note 24, at 15.
The difference in emphasis between prevention of proscribed conduct and punishment that fits the crime is obvious in the different sanctions in the two systems. Often, and this is particularly true of the minor trespass of the sit-in, the sanctions of the criminal law are dwarfed by those of equity. Not only is this so in comparing the sanctions that are authorized, but the inequality is even greater than is apparent because of the seriousness with which each system regards violations. For the criminal law, trespass is a minor transgression compared to other violations. But to equity, deliberate violation of a court order is a serious matter no matter how minor the conduct.\textsuperscript{185} Thus, the protestor can be fairly assured that a sit-in will result in, at most, a small fine in criminal court and perhaps even a suspended sentence—at least for the first few offenses. In contrast, even the first violation of a court order is likely to result in a serious, and perhaps severe, sanction.

Obviously, this difference in sanctions is not absolute, but only a tendency. Civil disobedience can involve a serious crime—for example, draft evasion\textsuperscript{184}—for which one would be sent to jail. Serious sanctions could also result from requiring future compliance as a condition of bail pending trial, or of probation afterward. But these criminal law outcomes are only possibilities. In contrast, in equity, the illegal protestor is very likely to find himself in civil contempt, obliged to foreswear future civil disobedience or face a severe sanction.

A third distinction between criminal law and equity is the nature of the procedures for enforcement. There are fewer procedural protections in contempt than in a criminal prosecution. This is particularly true in civil contempt, which is characterized by a standard of proof less stringent than proof beyond a reasonable doubt, and no right to trial by jury.\textsuperscript{185} In most criminal contempt proceedings, how-

\textsuperscript{183} See infra notes 223-24 and accompanying text; supra note 113 and accompanying text.

\textsuperscript{184} See United States v. Kerley, 838 F.2d 932 (7th Cir. 1988) (failing to register for selective service).


In a related context, Professor Thomas Emerson described the procedural differences between prior restraint and criminal prosecution as follows: "The presumption of innocence, the heavier burden of proof borne by the government, the stricter rules of evidence, the stronger objection to vagueness, the immeasurably tighter and more technical procedure—all these are
ever, formal procedural protections are present.\footnote{188}

But criminal contempt also fails to provide essential procedural protections in regard to speed and neutrality. A criminal contempt proceeding convenes within a relatively short time after the alleged violation of the court order.\footnote{187} The criminal justice system, in contrast, generally takes many months to begin the trial portion of a prosecution. Speed is not usually thought of as a matter of procedural protection. But given the generally simple factual questions presented in the trial for criminal contempt,—viz., did the defendant sit-in?—a quick trial may give everyone, including the jury, the impression that there is nothing to do but return a conviction and go home.

A related procedural matter is the absence of a truly independent and neutral judge in the contempt proceeding. In the average criminal prosecution, the judge will have no interest at stake but conscientious participation in his professional role. But in criminal contempt, the judge, especially if it is the same judge who issued the underlying order,\footnote{188} is vitally interested in the dignity of the court and the jury is certain to know it. The atmosphere in a criminal contempt proceeding is quite different from that of a criminal prosecution.\footnote{189}

\footnote{not on the side of free expression when its fate is decided." Emerson, The Doctrine of Prior Restraint, 20 LAW & CONTEMP. PROBS. 648, 657 (1955).

186. \textit{See, e.g.,} Ryan v. Moreland, 653 S.W.2d 244 (Mo. App. 1983) (holding that "one charged with criminal contempt is entitled to essentially the same rights of procedural due process as a defendant in a criminal case."). For a discussion of the time-honored difference between criminal and civil contempt, essentially punishment versus coercing obedience, see H. McCleINTOCK, supra note 116, § 17, at 35-37. The distinction between direct and indirect contempt is not important to the context of this article, except to note that disobedience to court orders in a place distant from the court represents classic indirect contempt. \textit{See R. Goldfarb, supra} note 153, at 64.

187. The author does not refer here to summary criminal contempt proceedings that may be invoked for conduct occurring in the presence of the court. \textit{See, e.g.,} Fed. R. CRIM. P. 42(a). But even indirect contempt will tend to be punished through streamlined procedures. \textit{See, e.g.,} Fed. R. CRIM. P. 42(b) (providing for prosecution "on notice . . . allowing a reasonable time for preparation of the defense.").

188. Fed. R. CRIM. P. 42(b), for example, provides for disqualification of the trial judge in criminal contempt "[i]f the contempt charged involves disrespect to or criticism of . . . [that] judge." Simple violation of a court order would not usually force recusal under this rule. See United States v. Rylander, 714 F.2d 996, 1004 (9th Cir. 1983) (holding that recusal was not required where a contempt charge did not involve criticism of the judge), cert. denied, 467 U.S. 1209 (1984).

189. There are other reasons for a difference in atmosphere. Injunctions are often issued, and contempt proceedings begun, in federal court. That is generally where abortion clinics have brought their cases. \textit{See, e.g.,} sources cited supra note 114. In contrast, criminal prosecution for trespass will likely take place in state court. Insofar as this is so, and it will not always
The differences between equity and criminal proceedings—equity's greater symbolic weight, its emphasis upon compliance, greater sanctions and the procedural ease of prosecution—in turn lead to consequences for the decision to rely on one system or the other in dealing with civil disobedience. First, for all of these reasons, equity is likely to be a greater deterrent to civil disobedience—particularly for minor crimes like trespass. Second, the obtaining of court orders and the use of contempt proceedings commit the prestige of the judiciary to ending a campaign of civil disobedience to a vastly greater extent than do a series of criminal prosecutions. Finally, the enforcement of court orders will likely result in simpler, quicker and less politically charged trials than would enforcement through the criminal law. In the next section, these differences will be critically assessed.

C. Reasons Why Injunctions Should Not Be Issued Against Civil Disobedience Campaigns

The differences between equity and criminal law described above render equity inappropriate as a mode for regulating campaigns of civil disobedience. For several reasons, it would be better to leave civil disobedience to the usual processes of the criminal law.

1. The Injunction Might Work.—In most instances, equity is a more effective deterrent than is criminal law enforcement. This be true, state judges or criminal prosecutors may be less committed to punishment for the trespass and ending the illegal protests than are federal judges in equity enforcement. First of all, there are likely to be more state judges, so the trespass prosecutions may take place before several judges, none of whom feels a special involvement. In contrast, one federal judge, or perhaps one other in certain contempt cases, will hear all of the cases arising out of the court order. Second, the state judges and prosecutors may be subject to greater popular control—future retention or election for example. While popular control can both moderate and exacerbate sanctions, in the case of an established political movement, the tendency will be to lessen the sanction. Third, sanctions may be less severe in state court because all results may tend to be less significant there. If state courts are a bit of a backwater, that could aid the protestor.

190. These important differences between criminal law and equity distinguish the argument presented here from proposals to apply the justification defense to acts of civil disobedience. Banning injunctions is not an attempt to give the protestor "the best of both worlds; to disobey, yet to be absolved of punishment for disobedience." Northeast Women's Center, Inc. v. McMonagle, 868 F.2d 1342, 1351 (3d Cir.) (quoting United States v. Malinowski, 472 F.2d 850, 857 (3d Cir.), cert. denied, 411 U.S. 970 (1973)), cert. denied, 110 S. Ct. 261 (1989). There will be punishment, but in the criminal law forum.

191. Here is what one pro-life leader, the Rev. J. Lee Simmons of Syracuse, New York, was quoted as saying about enforcement of a federal injunction against blockading an abortion clinic:

There's a small handful determined to carry on no matter what. But for the average
observation makes manifest the ambiguity with which reasonable people must contemplate legal efforts to suppress civil disobedience. Insofar as it is granted that civil disobedience is a valuable aspect of American political life, we presumably do not wish it to be eliminated. Criminal law enforcement, unlike equity, does not tend to eliminate civil disobedience. Criminal law enforcement restricts civil disobedience by the arrest and by its—usually—minor sanctions that may increase in severity as the civil disobedience campaign continues. But civil disobedience campaigns often thrive in such a context.\footnote{192}

If equity threatens to be effective in suppressing civil disobedience, however, the political/legal accommodation that has permitted illegal protest to exist might be ended. Civil disobedience campaigns, from abortion to nuclear power to apartheid, might disappear. The American political system would be impoverished by such a change.

It could be responded that relief in equity is not automatic. The objects of a civil disobedience campaign—abortion clinics, power plants, the U.S. Navy, or the Embassy of South Africa—might not request an injunction. Furthermore, the state and local governments that are usually involved in keeping the sidewalks clear might not seek injunctions in order to avoid the appearance of taking sides in a controversial political dispute. Civil disobedience would then survive because of the tolerance of some potential plaintiffs.

But leaving the choice to enjoin civil disobedience to the opposing party is not a reliable protection for civil disobedience in the long run. It is true that, until the present time, most objects of civil disobedience campaigns have not sought injunctions. Even the Justice Department of President Richard Nixon did not seek to enjoin organized attempts to close the streets in Washington, D.C. in the

\footnote{192. Although not my topic here, the implication of this argument is that if criminal law enforcement did threaten to suppress civil disobedience, constitutional limits would have to be placed on it as well. I acknowledge the logic of that implication but I doubt it will ever be necessary to address it. Ordinary criminal courts do not work that efficiently. In any event, criminal prosecution of civil disobedience is necessary at some point, whereas injunctions are not. \textit{But cf.} Califa, \textit{supra} note 149 (criticizing the application of RICO's severe civil sanctions to political protest).}
early 1970's protests against the Vietnam War. Such an injunction would certainly have been issued.

But the reason that injunctions have not been resorted to is probably that many potential plaintiffs did not realize how easy injunctions would be to obtain. The more active and usually successful litigation efforts undertaken against Operation Rescue will no doubt come to the attention of counsel for business and government. Unless there is a change in the law's attitude, attempts to enjoin civil disobedience campaigns are likely to increase.

Of course, the criticism that injunctions will eliminate civil disobedience is in a sense unreal. Court orders have been issued against civil disobedience campaigns without ending the illegal protests completely. The implications of the failure of equity to curtail civil disobedience will be discussed below.

What if, however, equity is a somewhat greater deterrent to civil disobedience than is criminal law enforcement? Perhaps equity, while a more effective deterrent than is criminal law enforcement, is not a sufficiently great deterrent to end civil disobedience altogether.

The possibility of a somewhat greater deterrent effect suggests that equity might have a role in restricting the overall level of civil disobedience. After all, civil disobedience is illegal, and inconvenient, and can be even worse. Even if, on balance, the tradition of civil disobedience is a positive political phenomenon, we would still not want it to get out of hand. We might rely on equity in order to ensure that, while there is some illegal protest, there is not too much.

This approach to the use of equity makes sense. Perhaps in silence this is the compromise that courts in fact have worked out. But this unacknowledged compromise would require a degree of flexibility and sophistication on the part of trial judges that they have not been taught and I doubt have learned. In order for this hypothetical compromise to work, judges would have to expect court orders to be disobeyed to some extent. Judges then would be bound not to try too hard to force full compliance. Judges do not act this way now.

193. It may even be that equity is relatively ineffective in ending illegal protest. I will examine the implications of that possibility in the following section. See infra notes 198-209 and accompanying text.

194. The history of American political protest does not suggest that civil disobedience becomes ever more disruptive. Even under the relatively gentle pressure of criminal law enforcement, mass civil disobedience campaigns run out of steam.

And if the compromise did work, the consequence would be that injunctions would be routinely disobeyed. This theoretical justification for reliance on equity has little relevance to the way equity is used today.

Another way to accommodate equity's greater deterrent effect while ensuring some continuation of civil disobedience, would be to limit resort to equity to certain types of civil disobedience campaigns. Although injunctions are only supposed to issue because of irreparable injury, this requirement has not meant very much in civil disobedience cases. If irreparable injury were interpreted to refer not to ending disruption but to keeping disruption within tolerable levels, a workable formula for issuing an injunction could be found. An injunction then would issue, for example, if the police were unable to clear areas dependably. Under this approach, few injunctions would issue against civil disobedience campaigns. But those orders that did issue could be enforced harshly against a movement's leadership without threatening civil disobedience generally. Under this view, equity would not need to be excluded from regulation of civil disobedience. Again, however, this is not the law today.

No doubt some pro-choice supporters would suggest a different accommodation for civil disobedience. They might maintain that injunctions be resorted to only if the interests threatened were more significant than property rights. Thus, nuclear power plant owners could not obtain injunctions against civil disobedience, but abortion clinics representing pregnant women could obtain relief.

Such an approach would certainly be an improvement over current law. However, reservations about this approach exist since constitutional rights do not seem to be at stake where the police are able to effect the arrested of protestors. For the purpose of this Article, however, this proposal need not be evaluated in detail. Current caselaw allows injunctions to issue to protect almost any kind of legal interest. Restricting the interests that equity could protect would represent a mammoth, and positive, change. Barring these or similar

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196. See supra notes 115-120 and accompanying text; infra note 274 and accompanying text.

changes, however, and assuming equity really is a significantly greater deterrent than is criminal law enforcement, the practice of issuing injunctions against civil disobedience has negative consequences for American political life.

2. *The Injunction Might Not Work.*— It is possible that injunctions are not much of a threat to civil disobedience. Despite *In Re Debs,* there is no reason to think that widespread injunctions against civil disobedience campaigns have had much effect. In *Jailbird,* Kurt Vonnegut captures many lawyers’ unreal belief in the efficacy of law in his account of a fictional labor confrontation in 1894. A large crowd has gathered outside a factory in support of strikers who have been displaced by newly hired workers. Trouble is expected by the authorities. The Cleveland Chief of Police reads the Ohio Riot Act to the crowd; the Act requires the dispersal of any unlawful assembly of twelve persons or more within an hour of notice of the provisions of the Act. Vonnegut then puts the following words into the mind of an observer of the scene.

What was about to happen below, he realized, was not majestic. It would be insane. There was no such thing as magic, and yet his father and his brother and the governor, and probably even President Grover Cleveland, expected this police chief to become a wizard, a Merlin—to make a crowd vanish with a magic spell.

“It will not work,” he thought. “It cannot work.”

It did not work.

The chief cast his spell. His shouted words bounced off the buildings, warred with their own echoes, and sounded like Babylonian by the time they reached Alexander’s ears.

Absolutely nothing happened.

The chief climbed down from the scaffold. His manner indicated that he had not expected much of anything to happen, that there were simply too many people out there.

Injunctions can fail in reality, also. An episode of *Eyes on the Prize,* a recent series that chronicles the late 1960’s civil rights movement, showed footage of the student occupation of the Adminis-
tration Building at Howard University in 1968. A spokesperson for the students announced—to whom is unclear—that if the administration obtained an injunction, the students would ignore it. The administration did not do so; thus the students were not put to the test. But why should anyone doubt that at least some of the students—all of whom were already breaking the law by occupying the building—would indeed have violated any court order? Obedience of court orders is not the only possible outcome.

Actual results of the issuance of court orders also suggest that injunctions against civil disobedience may be fairly ineffective. This is the teaching of *Walker v. City of Birmingham* in which an exceedingly law regarding group, as protest movements go, violated a court order against a protest march. Similiarly, the anti-war movement was not stymied by injunctions, though it may be that few injunctions issued. A major recent example of ineffective injunctions is Operation Rescue, which has violated various types of court orders.

It would not be surprising if injunctions were shown to be unable to end a determined campaign of civil disobedience. While some participants in a civil disobedience campaign may be only willing to spend a few days in jail or pay a small fine, others no doubt would be willing to accept greater hardships for their cause. A court order might scare off some or even many protestors, but would leave a committed core, and might even galvanize some of those only meekly committed.

As courts increasingly issue injunctions against campaigns of civil disobedience, it is also to be expected that protestors will more easily overcome whatever residual compunctions they may have against violating court orders. In the 1960's, an underlying respect for the federal courts as allies in the struggle for social justice might

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204. See supra notes 165-66 and accompanying text.
205. The protestors could not be sure they would be punished for disobeying an arguably unconstitutional court order; that was, after all, the issue *Walker* decided definitively. See infra note 217. Nevertheless, the protestors must have known that they could lose the case and thus incur punishment.
206. See supra note 11.
207. There is likely to be an empirical dispute about the effectiveness of injunctions against Operation Rescue. It seems obvious that the injunctions have not ended illegal protests at abortion clinics. On the other hand, it is difficult to deny the organizational effect of massive fines and serious jail sentences. For the purposes of this Article, the question does not need to be resolved. If injunctions have been effective either in ending civil disobedience or in curtailing it substantially, then the criticism contained in the prior section applies.
have ensured that court orders would, by and large, be obeyed.\footnote{208} Perhaps today injunctions would not be obeyed as readily.

Injunctions are likely to be futile if their goal is to end campaigns of civil disobedience. This mode of protest did not grow to its current accepted political status because lawyers permitted it to. The acts of lawyers and judges will not eliminate it. If, on the other hand, the goal of the injunction is something less than the elimination of civil disobedience, certainly criminal law enforcement is an adequate alternative.

The traditional instinct of the legal system has been to avoid situations of disobedience to court orders.\footnote{209} Because legal rights are not really at stake in most civil disobedience cases—that is, the police will end the illegal conduct by arrest—the violation of injunctions in such cases is a consequence the legal system need not endure. If legal rights were realistically threatened, an injunction could be justified. But that is the case so infrequently in civil disobedience campaigns that a strong presumption against court orders should certainly be the rule.

3. \textit{Equity Imposes Too Great a Sanction On the Protestor.}—It has been proposed that violations of the criminal law that are motivated by sincere belief should result in a mitigated sanction\footnote{210} or, sometimes, in no punishment at all.\footnote{211} This view is controversial;\footnote{212}

\footnote{208} One of the marchers in \textit{Walker} stated at a press conference before the march, "[t]hat they had respect for the Federal Courts, or Federal Injunctions, but in the past the State Courts had favored local law enforcement." \textit{Walker}, 388 U.S. at 310.

\footnote{209} See \textit{Restatement (Second) of Torts} § 943 comment a (1979) (determining the appropriateness of injunctive relief). I imagine that most lawyers would agree with Justice Frankfurter's description of the effect of ongoing disobedience on court orders: "[T]here is nothing judicially more unseemly nor more self-defeating than for this Court to make \textit{in terrorem} pronouncements, to indulge in merely empty rhetoric, sounding a word of promise to the ear, sure to be disappointing to the hope." \textit{Baker v. Carr}, 369 U.S. 186, 270 (1962) (Frankfurter, J., dissenting).


\footnote{211} See generally K.\textit{ Greenawalt}, \textit{supra} note 15, at 271-81 (discussing the legal system and its response, in terms of criminal punishment, to civil disobedience).

\footnote{212} Ernest van den Haag, for example, suggests that the intentional flaunting of authority in civil disobedience should lead to an increased sanction. See van den Haag, \textit{supra} note 177, at 41. Some judges follow this idea. \textit{See, e.g.}, \textit{State v. Wentworth}, 118 N.H. 832, 395 A.2d 858 (1978) (upholding a 6 month imprisonment for trespass because a lighter sentence would not deter future civil disobedience).
but even if one believes that a normal sanction is warranted, the question of the appropriateness of extreme sanctions remains.

Many acts of civil disobedience involve minor crimes, such as trespass or disturbing the peace.\textsuperscript{213} Of course, the legal interests at stake in such crimes is greater insofar as the violations are recurrent. Nevertheless, such crimes usually lead to light sanctions in the criminal system.\textsuperscript{214}

In contrast to the criminal law, equity regards violations of all court orders as more or less equivalent and as serious.\textsuperscript{215} All violations of court orders challenge the dignity of the issuing court. Equity may assign a severe sanction of imprisonment or monetary penalty for the same violation that would yield a minor sanction in a criminal prosecution.\textsuperscript{216} Thus, the question is not whether a sentence for conscientious violation should be mitigated, nor even whether the sentence should be somewhat harsher than otherwise would be the case; the difference between equity and criminal prosecution is whether the legal system should reserve some of its harshest sanctions for protesters who engage in civil disobedience.

Unless one is committed to the view that civil disobedience should be stamped out, the answer to that question is obviously no. Practitioners of civil disobedience are typically some of our nation's most thoughtful and concerned citizens. Even when their cause is unjust, as many believe to be the case with Operation Rescue, grudging admiration should be granted for the protesters' integrity and willingness to take risks which possibly might lead to their arrests. Especially because of the trivial conduct usually involved, which is always ended by arrest anyway, protesters do not deserve thousands of dollars in fines or months in jail—or worse.

Aside from the personal qualities of the protesters, harsh punishment for what is a political protest risks alienating a potentially sizeable protest movement. Harsh penalties may create martyrs for a political movement, weaken the legitimacy of the government in the eyes of political supporters and generally reduce the likelihood of social adjustment and political compromise in areas of deep political division. Harsh sanctions are thus usually counterproductive in addi-

\textsuperscript{213} See supra notes 114-56 and accompanying text.

\textsuperscript{214} For a comparison of the difference between equity and criminal law in this regard, see supra notes 173-84 and accompanying text.

\textsuperscript{215} For a classic statement of this attitude, see supra text accompanying note 113. See also infra note 224.

\textsuperscript{216} See supra notes 173-84 and accompanying text.
tion to representing a warped moral judgment. Civil disobedience should be punished, but equity tends toward sanctions that serve neither useful social purposes nor justifiable moral theory.

4. *Equity Severs the Link Between Protest and Politics.*—From the rule in *Walker v. City of Birmingham*,\(^{217}\) to the simplicity of procedure, to the judicial fact finder, enforcement in equity emphasizes purely formal issues. In contrast, criminal law enforcement involves politically sensitive actors such as prosecutors, police officials and, often, lower level judges—magistrates versus trial judges or elected state judges versus appointed federal judges. Of course, the involvement of the jury in criminal law enforcement is enormously important in this regard. Even though the use of the justification defense in criminal trials of civil disobedience is being curtailed,\(^{218}\) such appeals to the jury are still made in argument\(^{219}\) or at least are hinted at by counsel. The result is the occasional undeserved acquittal or hung jury.\(^{220}\)

The importance of political appeals in these cases goes beyond acquittals and mistrials. The political theater of the courtroom is an important aspect of civil disobedience itself. Non-disobedient supporters can be mobilized to petition the mayor, the police chief and the prosecutor to soften efforts at prosecution.\(^{221}\) The uncommitted observer can be reached through the drama of calls for nullification at a jury trial. All of this can be done in equity enforcement as well.

\(^{217}\) 388 U.S. 307 (1967) (holding that the unconstitutionality of a court order is no defense in a contempt proceeding); see *State v. American Amusement Co.*, 71 Mich. App. 130, 246 N.W.2d 684 (1976) (holding that the terms of a court order may not be challenged in contempt proceedings). This rule predates *Walker*. See *Cox, The Void Order and the Duty to Obey*, 16 U. Chi. L. Rev. 86 (1948) (reviewing federal court decisions to illustrate under what circumstances an invalid order must be obeyed).

\(^{218}\) Generally, defenses of necessity and/or justification are not allowed. See, e.g., sources cited *supra* note 171.

\(^{219}\) See *People v. Williams*, 60 Ill. App. 3d, 529, 377 N.E.2d 367 (1978) (reversing a conviction for resisting arrest arising out of the disruption of a construction site, because an overbroad in limine order prevented a meaningful opening statement).

\(^{220}\) See, e.g., Jones & McGraw, *5 Anti-Abortionists Acquitted on 24 Counts*, L.A. Times, Sept. 14, 1989, (Part I), at 1, col. 2 (discussing the acquittal last year of Terry Long and others in Los Angeles). Of course, there is no way to be certain that specific actions by juries are legally unjustified. Trespass at large demonstrations is hard to prove.

One example of the politicization of abortion trespass cases is described in *Northern Virginia Women's Medical Center v. Balch*, 617 F.2d 1045 (4th Cir. 1980). In *Balch*, the local prosecutor suspended trespass prosecutions against pro-life demonstrators because two county judges frustrated the prosecutions, apparently because of their opposition to abortion. *Id.* at 1048-49.

\(^{221}\) See generally K. GREENAWALT, *supra* note 15, at 349-68 (discussing various instances where legal officials ameliorate the force of law).
but the very fact that the victim, prosecutor and judge are essentially one person, and that one person is learned in law and trained to disdain politics and, further, that this person might even punish lawyers for "political" argument, renders the political side of equity less significant. Indeed, one respected source has suggested that community opposition to some aspect of the legal system has been a reason for resorting to equity.\textsuperscript{222} Losing the political opportunity of the courtroom reduces the opportunities for positive political debate concerning important and divisive issues.

5. Criminal Process Is Superior to Equity In Controlling Escalations in Civil Disobedience.—One of the difficult challenges to law enforcement during a campaign of civil disobedience is the possibility that acts of violence may increase as the campaign continues. Trespass sometimes flows into destruction of property and property destruction into assault. These latter crimes might still reflect relatively minor criminal acts, such as breaking a glass door or some pushing and shoving. But at some point the legal system will begin to fear a tendency to acts of serious violence. Further, even petty violence directed against others should not be tolerated in the political realm.

Criminal prosecution is capable of coping with escalations from civil disobedience to violence and in distinguishing between violent illegality and non-violent illegality. Statute books set forth gradations of crimes and sanctions based on the seriousness of the harm.

In contrast to criminal law, the typical injunction issued against a campaign of civil disobedience prohibits all illegal conduct to precisely the same extent. It would be a rare and sensitive plaintiff who sought to enjoin, or judge who enjoined, only violence.\textsuperscript{223} Once an injunction is issued against all illegal conduct, both civil and criminal contempt will respond to disobedience itself. The nature of the disobedience—whether violent or non-violent—might be taken into

\textsuperscript{222} See H. McClintock, supra note 116, § 164, at 445. Professor McClintock states that:

The superior effectiveness of the injunction over the criminal prosecution as a means of enforcing laws defining crimes, particularly where those crimes were not regarded as wrongful by a large section of the community so that it was difficult to obtain a jury which would convict, has led to a large amount of legislation authorizing the use of the equitable remedy.

\textit{Id.} (citations omitted). Though this passage pertains to the jury/non-jury enforcement issue, the same point could be made about the insulation of equity from politically responsible officials, such as elected prosecutors or locally appointed chiefs of police.

\textsuperscript{223} For example, none of the injunctions adverted to in supra note 114 enjoined only violence or seriously harmful conduct.
account by a particular judge, but it has no obvious and general relevance.\textsuperscript{224}

The equity response thus tends to be all or nothing once a court order is violated. Later violations that might encompass more serious conduct may be met by identical sanctions because of the felt need to coerce an obedience that is threatened equally by violent or non-violent resistance. The gradations of criminal law enforcement represent a more flexible tool in distinguishing among different types of illegal protest.

6.\textit{ Equity Involves the Courts in Divisive Political Controversies}.—One of the ideas behind the political question doctrine was that the courts should not enter the "political thicket."\textsuperscript{225} There has always been an ambiguity about what the "political thicket" refers to. In her concurrence in \textit{Davis v. Bandemer},\textsuperscript{226} Justice O'Connor, joined by Chief Justice Burger and Justice Rehnquist,\textsuperscript{227} apparently meant by the term "political thicket,"\textsuperscript{228} that the Court should not interfere with the workings of "political institutions."\textsuperscript{228} On the other hand, outside observers have looked at the doctrine historically as a way for the federal judiciary "to avoid judicial entanglement in controversial subjects about which serious dispute as to fundamental principles exists."\textsuperscript{230} Since \textit{Baker v. Carr},\textsuperscript{231} the political question doctrine has not served an important role in avoiding controversial subjects. Nevertheless, the potential for inappropriate judicial involvement in political disputes remains real.

Even United States Supreme Court decisions concerning controversial disputes do not raise the concern of improper political involvement to the same extent as civil disobedience cases. \textit{Roe v.}

\textsuperscript{224} A typical case in this regard is \textit{Ryan v. Moreland}, 653 S.W.2d 244 (Mo. App. 1983). In \textit{Ryan}, petitioners challenged sentences for indirect criminal contempt in state habeas corpus proceedings. Petitioners had continued to block entrances to an abortion clinic after issuance of the injunction. Apparently there was no violence. The opinion by Judge Stephan did not note the peaceful methods, only the continuing trespass: "Such stubborn repetition of contemptuous acts in the face of repeated warnings constitutes a special element of contumacy." \textit{Id.} at 254.

\textsuperscript{225} \textit{See Colegrove v. Green}, 328 U.S. 549, 556 (1946) (Frankfurter, J.).

\textsuperscript{226} 478 U.S. 109 (1986) (holding that a challenge to political gerrymandering is justiciable under the Equal Protection Clause).

\textsuperscript{227} \textit{Id.} at 144.

\textsuperscript{228} \textit{Id.} at 146.

\textsuperscript{229} \textit{Id.} at 145.


\textsuperscript{231} 369 U.S. 186 (1962) (stating that the failure of the state legislature to reapportion does not present a political question).
Wade,\textsuperscript{232} the decision legalizing abortion, did not transgress the political question doctrine. Nor, for that matter, did \textit{Brown v. Board of Education},\textsuperscript{233} around which civil disobedience still takes place. Such substantive decisions help to set the political framework within which protest takes place. Cases enjoining civil disobedience, however, place courts in the context of, and in opposition to, political protest itself.

In civil disobedience cases, a court is summoned by one side of a political dispute to restrict the illegal protests of the other side. There is a real danger in such cases—and this in fact occurred in the labor disputes of the early 20th century\textsuperscript{234}—that the courts will become identified in the minds of the public and the protestors as allied with the plaintiff who obtains relief. This identification is damaging to the legal system, which purports to have no interest in the outcome of political disputes.

To a certain extent, judicial involvement in civil disobedience cases is unavoidable. The objects of civil disobedience are threatened by the loss of legal rights. But the issuance and enforcement of injunctions intensifies the courts’ role in the political dispute. Each sit-in after the injunction is issued will be followed the next day or so with a hearing before the same judge. The media will speculate as to what the judge will do to stop the protests. The judge probably will attempt conscientiously to do just that.

It is true that judges can also use criminal prosecutions as weapons against political movements. When judges hand out heavy prison sentences for illegal protest,\textsuperscript{235} the courts stain themselves with an inappropriate partnership against the protester’s point of view. But at least the arrests and prosecutions in such criminal cases occur within the criminal courts, with their many participants. An injunction, on the other hand, inevitably sets the judge against the protestors at the behest of the other party. An injunction is a highly symbolic act of judicial participation in a political dispute of the day.

\textsuperscript{232} 410 U.S. 113 (1973) (holding state criminal anti-abortion statutes unconstitutional).

\textsuperscript{233} 347 U.S. 483 (1954) (holding state school segregation statutes unconstitutional).

\textsuperscript{234} For a statement of the attitude of labor toward the federal courts, see Chafee, \textit{Book Review}, 36 \textit{Harv. L. Rev.} 503 (1923) (reviewing \textit{J. FREY, THE LABOR INJUNCTION: AN EXPOSITION OF GOVERNMENT BY JUDICIAL CONSCIENCE AND ITS MENACE} (1922)).

As Professors Frankfurter and Greene put it in a different era, the injunction "employs the most powerful resources of the law on one side of a bitter social struggle." 236

III. POSSIBLE SOURCES OF FIRST AMENDMENT PROTECTION AGAINST INJUNCTIONS BANNING CIVIL DISOBEDIENCE

It does not necessarily follow from the negative consequences of enjoining civil disobedience that such injunctions violate the First Amendment. Constitutional prohibition of such injunctions is particularly problematic because civil disobedience is not protected generally by the First Amendment. That is, criminal prosecution for trespass is not unconstitutional. Nevertheless, because of the pivotal role civil disobedience has played in campaigns for political reform, the First Amendment should be interpreted to provide breathing space for civil disobedience.

A. INJUNCTIONS PROHIBITING CIVIL DISOBEDIENCE ARE BAD POLICY

For all the reasons stated in Part II, enjoining civil disobedience is a bad idea. In particular, such injunctions threaten an important political tradition. These injunctions, if effective, limit a safety valve for seriously disaffected political groups. They undermine attempts by unpopular or unknown groups to gain community attention. Injunctions interfere with expression of the fervor with which political views may be held.

Nor do the corresponding benefits of successful injunctions justify such costs. Because injunctions can issue at the behest of a property owner, the injunction often protects only property rights. Furthermore, the injunction protects these rights when they are threatened not with complete elimination but with only disruption. The police and the criminal justice system can almost always accomplish a satisfactory degree of enforcement.

The benefits of injunctions really are even less than they appear because, as a practical matter, the injunction may not end the disruption of the property owner's repose. The civil disobedience campaign may and probably will continue, albeit perhaps at a reduced rate.

The harm injunctions cause is also greater than just their effect on civil disobedience. Injunctions and their enforcement lead to the personal tragedy of severe sanctions inflicted on some of the nation's...
most conscientious citizens. These citizens will not forget this, nor will the members of their political movements.

All of these problems suggest that injunctions in this context are not worthwhile. If law is a practical endeavor, the disadvantages of enjoining civil disobedience are sufficiently great that some way ought to be found to prevent such injunctions from issuing.

Certainly, there are other accommodations that could be undertaken with respect to civil disobedience aside from the First Amendment protection I am proposing. Some of them have already been averted to herein.\textsuperscript{327} The First Amendment is the most appropriate choice, however. First Amendment protection is national—it would not be subject to the peculiarities of local attitudes toward protest. Interpretation of the First Amendment is less susceptible to manipulation caused by the unpopularity of the protesting group than are, for example, rules of equity. Finally, the First Amendment is the traditional guarantee of free, robust political debate. Thus, assuming that civil disobedience should not be enjoined, First Amendment protection is the appropriate source of the protection.

B. \textbf{Injunctions Prohibiting Civil Disobedience Threaten First Amendment Values}

In \textit{Cohen v. California},\textsuperscript{328} the United States Supreme Court acknowledged that how something is said is intimately related to what is said.\textsuperscript{329} In \textit{Cohen}, the Court reviewed the conviction of a person who wore a jacket with the phrase “Fuck the Draft” on the back. Justice Harlan’s opinion recognized that putting “Fuck the Draft” on a sweatshirt is not the same as displaying the words, “I oppose the draft.”\textsuperscript{330}

In much the same way, sitting-in is not the same as picketing. Sitting-in illustrates depth of commitment by the minority—a factor the majority should wish to consider in setting policy. Sitting-in

\begin{itemize}
\item \textsuperscript{237} See supra notes 196-97 and accompanying text.
\item \textsuperscript{238} 403 U.S. 15 (1971).
\item \textsuperscript{239} Id. at 26. Justice Harlan stated that:
\begin{quote}
Much linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated.
\end{quote}
\item \textsuperscript{240} See id. at 25.
\end{itemize}
grabs the attention of the majority, thus promoting debate and lessening public apathy. Because of these communicative aspects, civil disobedience should be viewed as speech.

While there is "speech" involved, civil disobedience is not what the law calls "pure speech." Civil disobedience is considered speech plus conduct and for this reason it may be regulated, even criminalized, by the State. But the U.S. Supreme Court has never said that "speech plus" has no First Amendment value. Speech plus conduct is not the same as, for example, obscenity or fraudulent advertising. Speech plus conduct can sometimes be prohibited because the harm of the conduct outweighs the value of the speech. But, implicitly, the speech aspect retains First Amendment value.


242. See Kalven, The Concept of the Public Forum: Cox v. Louisiana, 1965 Sup. Ct. Rev. 1, 22-23 (discussing the difference between the concepts of protected "speech pure" and unprotected "speech plus").

243. "This Court has held that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." United States v. O'Brien, 391 U.S. 367, 376 (1968). This approach is now so well established that when Justice White recently referred to the O'Brien quote, he added the word "often" to the first line before beginning the actual quotation. FW/PBS, Inc. v. Dallas, 110 S. Ct. 596, 614 (1990) (White, J., joined by Rehnquist, C.J., dissenting in part).

Picketing, even aside from trespass, is a classic example of speech plus conduct: "[T]his Court has noted that picketing involves elements of both speech and conduct . . . and has indicated that because of this intermingling of protected and unprotected elements, picketing can be subjected to controls that would not be constitutionally permissible in the case of pure speech." Amalgamated Food Employees Union v. Logan Valley Plaza, 391 U.S. 308, 313 (1968) (citations omitted). Amalgamated was later overruled on other grounds by Hudgens v. NLRB, 424 U.S. 507 (1976).

244. See, e.g., Miller v. California, 413 U.S. 15 (1973) (holding that obscene material is unprotected by the First Amendment).

245. See Central Hudson Gas and Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980) (holding that commercial speech is protected by the First Amendment only when it concerns a lawful activity and is not misleading).

246. See Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 588 n.5 (1980) (stating that "where the connection between expression and action is perceived as . . . tenuous, communicative interests may be overridden by competing social values.") (Brennan, J., concurring in judgment).

247. The Court made this point in the non-controversial context of peaceful picketing in Amalgamated Food Employees Union v. Logan Valley Plaza, 391 U.S. 308 (1968). Having noted that picketing can be regulated in ways that pure speech cannot, see supra note 243, Justice Marshall's opinion stated that "no case decided by this Court can be found to support the proposition that the nonspeech aspects of peaceful picketing are so great as to render the provisions of the First Amendment inapplicable to it altogether." Amalgamated, 308 U.S. at 314. Amalgamated was subsequently overruled on state action grounds not relevant to the
Clearly, the harm of civil disobedience generally outweighs its benefits. That is why sit-ins are properly illegal. We could hardly live in a society in which people were free to disrupt the activities of others whenever they had a political statement to make. But the fact that legalized civil disobedience would be intolerable does not mean that any amount of civil disobedience is intolerable—and indeed we do now tolerate a great deal of civil disobedience.

The First Amendment should be interpreted to protect civil disobedience to this extent: The speech that is a part of civil disobedience, and a clearly substantial and important part, should not be eliminated altogether by an injunction. Instead, criminal prosecution should ensue after civil disobedience has occurred. In this way, the social accommodation that has tolerated civil disobedience in the past and which now is unthinkingly endangered, can be retained.

Some have disputed whether civil disobedience is really speech at all. Ernest van den Haag, for example, has argued that in political protest there is an important distinction between persuasion and coercion and that certain forms of civil disobedience are in fact coercion. But in this society, any communication designed to show how deeply a minority opposes a policy is either an attempt to persuade or an act of revolution. In a situation in which the majority firmly controls the army, and in which political institutions are thoroughly stable, it is not realistic to speak of "coercion." Unlike an illegal strike in which needed skills cannot always be replaced, civil disobedience campaigns require only an act of majority will for suppression to take place. The majority is being forced only to take account of opposition. That is a part of persuasion. As Ronald Dworkin has put it, civil disobedience protesters "remain democrats at heart."

One purpose of the First Amendment that is universally acknowledged is to keep channels of public discussion open. This ought to imply that we have as much speech as we can stand in as many forms as we can stand. Unlimited sit-ins and trespass we cannot stand. But sit-ins and trespass subject to criminal prosecution we

context of this Article by Hudgens v. NLRB, 424 U.S. 507 (1976).

248. van den Haag, supra note 177, at 37. van den Haag notes that:
A man who "sits in" a draftboard does not just protest conscription—this can be done by writing or speaking—nor does he just himself refuse to serve—this does not require sitting in. He wishes to coerce a modification of the law made by the representatives elected by the majority.

Id.

249. R. DWORKIN, supra note 9, at 110.
can usually stand. Or, to put it another way, we can usually tolerably protect all interests involved in civil disobedience without an injunction. If there is a chance that civil disobedience will be threatened by injunctions, the First Amendment should protect it to the extent possible. This would include a no-injunction rule—or at least no injunctions unless absolutely necessary.

It may be that injunctions do not actually threaten civil disobedience. No one can test this hypothesis. Nor is there any reason to test it. If court orders do not eliminate civil disobedience, we certainly can do without them from any perspective.

There is another, and one would expect more, controversial aspect to a First Amendment preference for criminal prosecution as opposed to equitable enforcement. Criminal trials present opportunities for further political debate that contempt proceedings do not.

What is surely controversial about this assertion is not that judges will keep the merits of the underlying dispute out of contempt hearings—they do this now with great effect. The controversial assertion would be that criminal trials differ very much from contempt hearings. The recent movement toward banning the justification and necessity defenses in political protest trials is a trend that limits the political theater aspect of criminal trials.251 Undoubtedly, criminal trials are not as politically robust as they used to be—nor as they ought to be. But they still are more of a political moment than the usual prompt and curt contempt hearing.252

Two other traditional First Amendment values should be noted in this discussion. Justice Brandeis's well-known concurrence in Whitney v. California253 identified two purposes of the First Amendment in addition to the goal of "the discovery and spread of political truth."254 These two are the promotion of stable government255 and self-fulfillment.256

The choice between equity and criminal prosecution in regulat-

251. See supra note 218 and accompanying text.
252. See Comment, supra note 171, at 915-18 (suggesting that the First Amendment should be interpreted to permit protestors to raise the necessity defense).
253. 274 U.S. 357 (1927). Whitney was overruled on grounds not relevant to this discussion by Brandenburg v. Ohio, 395 U.S. 444 (1969).
254. Whitney, 274 U.S. at 375 (Brandeis & Holmes, JJ., concurring).
255. Id. Justice Brandeis stated that "fear breeds repression; that repression breeds hate; that hate menaces stable government." Id.
256. Id. Justice Brandeis noted that "[t]hose who won our independence believed that the final end of the State was to make men free to develop their faculties . . . . They valued liberty both as an end and as a means." Id.
ing civil disobedience probably does not affect the stability of government. I presume that protestors would disregard court orders before they would begin revolutionary activity.

Self-fulfillment is a different matter. A proper respect for free speech requires that society respect minority points of view that are sincerely held. It might be said that the civilly disobedient protestor himself does not respect others. In a sense this is true. The protestor would probably coerce his opponents if he could. But in practice, the protestor is arrested before the protested-against activity is stopped. Thus, while civil disobedience might in theory disrespect others, it is, in practice, powerless to accomplish that result. The State, on the other hand, can succeed in preventing, by force, the protestor's act. The State really does threaten the value of self-fulfillment.

Self-fulfillment is not an absolute value. Someone determined to interfere with the lawful pursuits of others must be prevented from doing so. And the protestor will be stopped regardless of what mode of regulation is used, whether in equity or criminal law. But the model of criminal prosecution has more room for recognition of conscience than does equity. In criminal enforcement there will tend to be both expression impelled by conscience and punishment. In equity, perhaps there will be only obedience. Insofar as the First Amendment encourages respect for the protestor's conscientious acts, equity enforcement is inconsistent with it.

C. The Maxims of Equity Do Not Favor Injunctions Prohibiting Civil Disobedience

Combining traditional equity considerations and constitutional principles is not without precedent. The most notable example of this connection is *Younger v. Harris*\(^ {257} \) in which Justice Black's majority opinion borrowed both from "Our Federalism"\(^ {258} \) and the equity requirement of "irreparable injury"\(^ {259} \) to hold that federal courts may not issue injunctions against ongoing state criminal prosecutions absent "unusual situations."\(^ {260} \) Justice Black argued that because of federalism concerns, the normal showing of irreparable injury needed to justify an injunction is not sufficient in the context of state court criminal prosecutions. To justify an injunction in that situa-

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258. Id. at 44.
259. Id. at 46.
260. Id. at 54.
tion, the irreparable injury must be "both great and immediate." 261

In similar fashion, the First Amendment could be interpreted to require a heightened showing of actual loss of legally protected interests—property interests or fundamental rights—before an injunction against civil disobedience could be issued. Specifically, continued recourse to the criminal justice system might be considered a constitutionally adequate remedy unless the police were consistently unable to end interference with the plaintiff's legitimate, ongoing activities. Several equity maxims are relevant to this suggestion, some of which are similar to irreparability as analyzed in Younger, 262 and some of which are unique to the context of civil disobedience.

The most significant equity consideration in the context of civil disobedience is that equity is said not to enjoin crimes. 263 Clearly this rule has eroded in recent years, if indeed it ever meant what it seems to imply. 264 Injunctions against crimes are issued today, despite this traditional rule, 265 and they were in the past as well. 266

Nevertheless, even if not usually observed, this maxim emphasizes the difference between equity and the criminal law. Equity was

261. Id. at 46 (quoting Fenner v. Boykin, 271 U.S. 240, 243 (1926)).
262. See supra notes 259-61 and accompanying text.
263. See W. De Funiak, supra note 120, § 39, at 73 (stating that "[e]quity does not enjoin an act merely because its commission will constitute a crime."); supra notes 121-24 and accompanying text. Justice Brewer acknowledged this established maxim of equity in his opinion in In re Debs, 158 U.S. 564, 593 (1895) when he stated that "[i]t is objected that it is outside of the jurisdiction of a court of equity to enjoin the commission of crimes. This, as a general proposition, is unquestioned. A chancellor has no criminal jurisdiction." Of course, Justice Brewer went on to distinguish the maxim. See id.
264. See H. McClintock, supra note 116, § 164, at 443. Professor McClintock noted that:
   A court of equity will not enjoin a crime as such, but, where the act injures the property of the state, or amounts to a public nuisance, the injunction will issue, even though it is also a crime; there is a tendency to extend, both by statute and judicial decision, the conception of public nuisances which may be enjoined.
   Id. A private individual may sue to enjoin an act that is a nuisance to him. Id. § 165, at 449-50; see also Debs, 158 U.S. at 593 (stating that an injunction may be obtained against a nuisance even when that nuisance is also a crime).
265. All that is left of the maxim today is a cursory nod.
   The enforcement of the criminal laws is ordinarily left to be effectuated by criminal procedure. But where the commission of a criminal act will cause irreparable injury to property or property rights or substantial rights having a pecuniary value which are considered in the nature of property, and the criminal proceeding will only be effective to impose punishment for the criminal act after its commission, equity will interpose to prevent its commission and the consequent irreparable injury.
   W. De Funiak, supra note 120, § 42, at 78. In the early part of the 20th century, there was substantial agreement, however, that at least "the serious common-law offenses" could not be enjoined. H. McClintock, supra note 116, § 164, at 447.
266. See H. McClintock, supra note 116, § 164, at 447.
never intended to function as a substitute for criminal prosecution. In non-recurring instances of law violation, this is obvious. In such cases, parties are relegated to criminal court.\footnote{267} No doubt repeated crimes do pose a different problem and render criminal law remedies inadequate in a sense. But this is so only if repose is law's highest value.

Repose is important. That is why, in \textit{Frisby v Schultz},\footnote{268} the Supreme Court upheld a statute prohibiting focused picketing. But a valid ordinance, such as the one involved in \textit{Frisby}, is sufficient to protect the citizen against continuous picketing. If the picketers picket in violation of the ordinance, the police arrest them and they are prosecuted.\footnote{269} This is a fair compromise between upholding the right of protest and respecting the right of privacy.

The criminal law process is certainly awkward and time-consuming compared to the simplicity of a court order. But the time and steps involved in criminal prosecution are themselves a part of political debate. Equity's intervention is not needed because, to paraphrase \textit{Younger}, the irreparable injury of recurrent criminal prosecutions is not "great."\footnote{270}

The equity maxim against enjoining crimes also counsels against pointless injunctions. Determined criminal conspiracies do not yield to court orders. Justice Brewer recognized in \textit{In re Debs} the inappropriateness of enjoining General Lee's army.\footnote{271} But injunctions against civil disobedience, if entered routinely, will eventually have as little effect on civil disobedience as a national political phenomenon as an injunction against the Civil War.

Another, and related, maxim of equity applicable to civil disobedience is that "Equity, like Nature, does nothing in vain."\footnote{272} Though this principle is not literally applicable in the civil disobedience context, it is relevant.

Just as the certain continuation of murder does not make pass-

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\footnote{267. This is perhaps another reason for the tendency to retain the rule for serious crimes. See \textit{supra} note 265.}  
\footnote{268. 487 U.S. 474 (1988).}  
\footnote{269. \textit{Id.} at 477 (noting that the protestors ceased picketing when faced with the "threat of arrest and prosecution."). If committed to civil disobedience, the protestors would return, but the picketing would not be continuous as long as the police were willing and able to enforce the ordinance.}  
\footnote{270. \textit{Younger v. Harris}, 401 U.S. 37, 46 (1971).}  
\footnote{271. \textit{See In re Debs}, 158 U.S. 564, 597 (1895) (stating that "it may be, as said by counsel in argument, that it would savor somewhat of the puerile and ridiculous to have read a writ of injunction to Lee's army during the late civil war."}).}
ing a homicide statute a vain act, the prediction that a defendant will violate an injunction is not the same as describing the injunction as a vain act. This maxim of equity traditionally applies to court orders that may be defeated without violation of the court order—for example the unavailability of specific performance for a partnership that was to be at will, because the unwilling partner would then have a right of dissolution.273

Similarly, the reality of repeated invasions of legal rights is just the sort of “recurring grievance” or “oppressive and vexatious litigation” that equity is designed to suppress.274 Legal remedies are said to be inadequate if all that can be promised is repeated arrests and prosecutions.

But the underlying wisdom of the prohibition against “in vain” injunctions seems to condemn injunctions against campaigns of civil disobedience. It is true that equity assumes that injunctions will be obeyed. But that assumption can be subject to revision. The California Court of Appeals in In re Farr,275 for example, recognized that after some length of time, incarceration for contempt ceases to be civil—that is, the incarceration has no likelihood of compelling obedience—and becomes punitive—a punishment for refusing to obey the order of the court. So, in theory, a court in equity is capable of concluding that there is no point to further civil contempt proceedings. Viewing futility as included in acting “in vain” would mean that, before issuing an injunction, the judge would consider the likelihood of compliance, which in cases involving civil disobedience, is typically low.

The prohibition against “in vain” injunctions also counsels against the symbolic use of equity. A party is not entitled to an injunction unless he will actually gain some advantage. It is not enough, in other words, to be in the right.276

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273. Id. at 243.

274. O. Fiss, INJUNCTIONS 25 (1972) (quoting Story, Commentaries on Equity Jurisprudence as Administered in England and America §§ 924, 925 (1843)).

275. 36 Cal. App. 3d 577, 111 Cal. Rptr. 649 (1974). In Farr, a newspaper reporter was denied state habeas corpus relief for refusing to obey a court order to identify the source of a news leak. Id. at 580, 111 Cal. Rptr. at 651. The California Court of Appeals stayed the judgment of contempt for further proceedings to determine whether there was a substantial likelihood that the incarceration imposed would serve its purpose of coercing obedience. Id. at 584, 111 Cal. Rptr. at 654. If there is no such likelihood, the contempt is not civil but criminal—for the purpose of punishment—and is subject to a statutory limit of five days incarceration. Id. at 584, 111 Cal. Rptr. at 653; see also supra note 154.

Injunctions against civil disobedience campaigns, however, may sometimes be part of a plaintiff’s political strategy. This may be the case to some extent with regard to injunctions against Operation Rescue. These injunctions may be sought not only in order to attempt to end the illegal protests, which they often do not, but also because pro-life protestors violating a court order will be viewed as extremists by the public.\textsuperscript{277} This use of equity is not literally “in vain.” It can be quite effective. But it is not an appropriate political involvement for the courts.

One objection that can be made to this line of argument is that injunctions in fact are effective in curtailing civil disobedience. Operation Rescue has been hurt by the issuance of injunctions. One can also point to the historic example of \textit{In re Debs}.\textsuperscript{278}

In \textit{Debs}, the federal judiciary broke the Pullman strike of 1894. Contempt proceedings in that case halted the unified actions of thousands of railroad workers in a strike that previously had proved effective despite corporate power and army troops. Eugene Debs himself, in testimony before the United States Strike Commission, left no doubt as to the effectiveness of the combination of injunctions plus contempt proceedings.\textsuperscript{279} Debs stated that:

\begin{quote}
It was not the soldiers that ended the strike; it was not the old brotherhoods that ended the strike; it was simply the United States courts that ended the strike . . . . Our headquarters were temporarily demoralized and abandoned, and we could not answer any messages. The men went back to work, and the ranks were broken, and the strike was broken up by the Federal courts of the United States, and not by the Army, and not by any other power, but simply and solely by the action of the United States courts in restraining us from discharging our duties as officers and representatives of the employees.\textsuperscript{280}
\end{quote}

Injunctions against illegal protest have been effective.

\textsuperscript{277} Molly Yard, President of the National Organization for Women was quoted by the Associated Press as follows, in reaction to the denial of a petition for a writ of certiorari in New York State Nat’l Org. of Women v. Terry, 886 F.2d 1339 (2d Cir. 1989), \textit{cert. denied}, 110 S. Ct. 2206 (1990): “It’s a humdinger . . . . couldn’t be better . . . . they were breaking the law.” \textit{Pitts. Post-Gazette}, May 22, 1990, at 2, col. 4.

\textsuperscript{278} 158 U.S. 564 (1895).


\textsuperscript{280} \textit{Id.}
I think Debs is not a model the courts should adopt, however. Opposition to federal injunctions against strikes eventually led to the enactment of the Norris-LaGuardia Act of March 23, 1932,281 which restricted the authority of the courts of the United States to issue injunctions "in a case involving or growing out of a labor dispute."282 In his textbook on Injunctions, Professor Fiss recalls the comment of Harvard Professor Ernst Brown to the effect that "Debs was the darkest day in Supreme Court history."283 Obviously, those who value civil disobedience and expect compliance with orders should oppose such orders. Still, the injunction in Debs was not "in vain," which is the point at issue here.

Debs perhaps has fostered an illusion of judicial omnipotence. Debs may actually have been a situation uniquely vulnerable to a court order. The success of the injunctions in breaking the Pullman strike may have been a result of the peculiar way the American Railway Union had organized the strike, as demonstrated in Debs' testimony.

That injunction was served simultaneously, or practically so, by all of the courts embracing or having jurisdiction in the territory in which the trouble existed. From Michigan to California there seemed to be concerted action on the part of the courts in restraining us from exercising any of the functions of our offices. That resulted practically in the demoralization of our ranks. Not only this, but we were organized in a way that this was the center, of course, of operations. It is understood that a strike is war; not necessarily a war of blood and bullets, but a war in the sense that it is a conflict between two contending interests or classes of interests. There is more or less strategy resorted to in war, and this was the center in our operations. Orders were issued from here, questions were answered, and our men were kept in line from here.284

Obviously a less well-organized movement, one similar to the protests against the Vietnam War, would be relatively unaffected by contempt proceedings against a key leadership group. Even a movement somewhat hierarchical, such as Operation Rescue, apparently can continue to field protestors for the fairly simple strategy of sit-
ting in, despite court orders.

The success of court orders in the future might be reduced also by the continued practice of disobedience itself, as that practice grows. The railroad workers did not decide ahead of time to disobey the courts. Some protestors today certainly do so. At the very least, if the context is such that the success of Debs is not likely to be repeated, the courts should consider the futility of the injunction and avoid a vain act.

D. Injunctions Prohibiting Civil Disobedience Can Be Viewed As Prior Restraints

In his concurrence in the Pentagon Papers Case,\(^285\) Justice White drew a distinction between conduct that could be enjoined and conduct that could be criminally prosecuted after publication, stating that:

[T]erminating the ban on publication of the relatively few sensitive documents the Government now seeks to suppress does not mean that the law either requires or invites newspapers or others to publish them or that they will be immune from criminal action if they do. Prior restraints require an unusually heavy justification under the First Amendment; but failure by the Government to justify prior restraints does not measure its constitutional entitlement to a conviction for criminal publication. That the Government mistakenly chose to proceed by injunction does not mean that it could not successfully proceed in another way.\(^286\)

Justice White was apparently quite serious that the newspapers might be successfully prosecuted if they continued publication. With due warning that he was not prejudging the case,\(^287\) Justice White discussed several criminal provisions under which the newspapers might be subject to prosecution.\(^288\) At the very least, there was no doubt in Justice White’s mind that a distinction could be drawn between prior restraint and subsequent prosecution. Because of the First Amendment, even “speech” that will turn out to be criminal, rather than protected, must be allowed to occur.

The core content of the prior restraint bar is that general licens-

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\(^{286}\) Id. at 733.

\(^{287}\) Id. at 740 (stating that Congress “has apparently been satisfied to rely on criminal sanctions and their deterrent effect on the responsible as well as the irresponsible press.”).

\(^{288}\) Id. at 735-40.
ing regimes are unconstitutional. \textsuperscript{289} "Advance screening" \textsuperscript{290} by the government is the harm to be avoided. The injunction format, as opposed to subsequent punishment, is not necessarily the issue in prior restraint cases. Those cases that find prior restraints seemingly because the judicial act was an injunction—a case like \textit{Near v. Minnesota} \textsuperscript{291}—may rest on the unconstitutionality of the underlying standard supporting the issuance of the injunction, rather than the fact of injunction itself.\textsuperscript{292} The importance of the underlying standard probably explains why the injunction in \textit{Kingsley Books, Inc. v. Brown} \textsuperscript{293} was upheld, an injunction quite indistinguishable from that in \textit{Near, except}, crucially, for the underlying standard applied.\textsuperscript{294}

If injunctions are not by definition prior restraints, injunctions against ongoing campaigns of civil disobedience are not especially likely to be viewed as such. Even if the prior restraint bar could be invoked to protect expressive conduct that is mostly conduct and only partly "speech," the injunction would issue only after the first expression—much as the newspapers in the \textit{Pentagon Papers} Case were allowed to publish their material once, but then faced possible prosecution. The prior restraint rule would then prohibit only injunctions against the threat of civil disobedience.\textsuperscript{296} Currently, injunctions against civil disobedience usually issue after the demonstration has already taken place;\textsuperscript{296} and there is little doubt in civil disobedience cases that the future expressive conduct—the next sit-in—will be very much like the prior conduct. Thus, there is no problem of abstraction.\textsuperscript{297}

\begin{footnotes}
\footnotetext{289. Lovell v. City of Griffin, 303 U.S. 444 (1938) (holding a city ordinance which required permission before written material could be distributed, unconstitutional).}
\footnotetext{290. Emerson, \textit{supra} note 185, at 648.}
\footnotetext{291. 283 U.S. 697 (1931) (invoking a statute which authorized a permanent injunction against a person operating a "malicious" newspaper).}
\footnotetext{292. \textit{See Jeffries, supra} note 160, at 416-17. \textit{But see} Emerson, \textit{supra} note 185, at 652-55.}
\footnotetext{293. 354 U.S. 436 (1957) (upholding a limited injunctive remedy against obscenity).}
\footnotetext{294. \textit{Id.} at 445 (distinguishing \textit{Near} because the statute in \textit{Kingsley Books} enjoins only obscenity).}
\footnotetext{295. \textit{See supra} notes 137-38 and accompanying text (discussing cases where injunctions were issued due to the mere threat of disruptions).}
\footnotetext{296. \textit{But see} \textit{id.}}
\footnotetext{297. \textit{See Blasi, supra} note 160, at 49. Adjudication in the abstract occurs when the adjudication precedes dissemination of the disputed communication, because the communication can't be judged by its actual consequences; the courts must speculate. This speculation can affect the court's decision in several ways. \textit{Id.} The Pennsylvania Superior Court recently reversed the issuance of an injunction against ongoing peaceful picketing of a business, as a prior restraint. \textit{See} Franklin Chalfont Assoc. v. Kalikow, 392 Pa. Super. 452, 573 A.2d 550}
\end{footnotes}
Nevertheless, there are two considerations that link the prior restraint tradition to injunctions against civil disobedience. First, there is less opportunity for public involvement than in the case of subsequent punishment. Second, there is likely a greater chilling effect on protected conduct.

Classic prior restraints limit public involvement in two senses. First, because the speech in question is never disseminated, the public never has a chance to judge whether government officials, including judges, are overreacting in banning the speech. This concern is not particularly relevant in civil disobedience cases because the public has seen sit-ins before, and their unprotected status is clearly established.

But the public is also excluded in prior restraint cases since the traditional check of the jury is often eliminated entirely, as is usually the case in enforcement of civil contempt. The jury, acting as the conscience of the community, has always had an impact in politically charged trials. However, in cases of prior restraint, even if a jury is used, the imprimatur of the original judicial order reduces the role a jury is likely to assume in judging the justice of the underlying charge. Additionally, the public is unavailable to as great an extent to mediate enforcement by pressuring politically sensitive officials. These failings are exacerbated because equity subjects the abortion protestor or the anti-war activist to a very different enforcement process—a process where even the hint of jury nullification is nonexistent.

(1990). This may be another case that purports to strike down a form of regulation but is actually concerned with the substantive standard involved.


299. See Emerson, supra note 185, at 657. Professor Emerson described the difference between criminal prosecution and prior restraint as follows:

[T]he initial decision rests with a single government functionary rather than with a jury. Those who framed the First Amendment placed great emphasis upon the value of a jury of citizens in checking government efforts to limit freedom of expression. While the jury probably plays less of a role in this age of popular conformity, it, nevertheless, still continues to furnish an important safeguard against the abuses of officialdom.

Id. (citation omitted).


301. See supra notes 221-22 and accompanying text.
There is room for dispute about the degree to which jury nullification is likely to matter. No one knows how common jury nullification is, either as complete dismissal or as conviction on lesser charges. Nullification is probably rare. Nevertheless, the potential for acquittal by juries or non-prosecution by politically sensitive prosecutors brings the public into what ought to be seen as a political context. Equity enforcement, in contrast, seeks to portray a more technical context, in which the general rule of law is at issue rather than the issue involved in the protest. The attempt by judges to depoliticize civil disobedience will be true also in criminal prosecution, but to a lesser degree.

The First Amendment should nurture political controversy even outside strictly legal confines as long as subsequent punishment occurs. After all, the prior restraint rule represents an acknowledgement that sometimes illegal expressive conduct should be allowed to take place before it is prosecuted. Prohibiting injunctions against civil disobedience would simply expand the occasions on which this occurs. As long as the constitutional rights of victims of protest are protected by the police, injunctions are not necessary.

The second link between prior restraint and injunctions against civil disobedience is the chilling effect of censorship. Not only does licensing lead to official abuse but it may also lead to self-censorship. Under a regime of censorship, some protected expression will never even be submitted to the censor.

Injunctions against civil disobedience can create the same sort of self-limitation where protected expressive conduct is concerned. Once a court order is issued, not only will some protestors avoid civil disobedience who would have engaged in it—surely the very purpose of the injunction—but the fear of equity sanctions will lead some people who would have protested vigorously but legally to limit their protests.

The chilling effect of equity stems in part from the vastly greater sanctions equity utilizes than would the law for the minor criminal offenses present in most civil disobedience campaigns. Be-

302. Cf. Oakes, Copyrights and Copyremedies: Unfair Use and Injunctions, 18 Hofstra L. Rev. 983, 992-97 (1990) (discussing situations where an injunction did not issue although the use of copyrighted work may have been deemed an infringement); supra notes 162-64 and accompanying text.

303. City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 757 (1988) (stating that "the mere existence of the licensor's unfettered discretion, coupled with the power of prior restraint, intimidates parties into censoring their own speech, even if the direction and power are never actually abused.")
cause the line between political demonstrations protected by the First Amendment and non-protected conduct is not always clear—sit-ins some distance away from a clinic door for example—protestors who do not wish to break the law must decide how far to go. Their evaluation may include the consequences of making a mistake as to the reach of the First Amendment. If the punishment is minor, as it is for non-violent trespass, they may be more willing to push the boundaries. But even incidentally violating a court order is a serious matter.304

The related threat to the would-be legal protestor is the anger of the judge in a contempt proceeding. The perceived affront to the honor of the court may enhance the sanction and cloud fact-finding. Thus, it is safer to stay very far away from contempt.

The chilling effect of equity enforcement became apparent to me on an occasion when I suggested to lawyers who were part of an Operation Rescue defense team that the defendants individually named in a certain court order should stay across the street during a sit-in by others. Not only would this tend to protect the individuals against an adjudication of contempt, but, whatever others did, the attempted partial compliance with the injunction might have mollified the judge somewhat in any later contempt proceedings against other protestors. This was not a bad strategy. But in retrospect, it was a suggestion that these named individuals give up much of their obviously protected First Amendment rights.

There is one other source of equity's chilling effect: a simple mistake about the terms of the order. An injunction can be easily misconstrued to suggest that protected conduct is also prohibited. Sometimes, of course, injunctions really do invade protected conduct, in which case the problem is the time, effort and resources needed to overturn the order. All of this effort must take place while the overbroad order is in effect, for the collateral bar rule prevents challenges to the validity of the injunction during a contempt proceeding.305 But even if the order is not overbroad, it will be interpreted overbroadly by some potential protestors, thus chilling protected activity.

But why would this chilling effect be stronger than that of the

304. See, e.g., Neshaminy Water Resources Auth. v. Del-Aware Unlimited, Inc., 332 Pa. Super. 461, 481 A.2d 879 (1984) (holding that persons not parties to an injunction must still obey it when such persons are aware of the injunction and are within the class intended to be restrained).

305. See sources cited supra note 217.
underlying criminal offense, which also presumably chills protected conduct? Professor Martin Redish has argued that “[j]udicially imposed prior restraints” are superior to both administrative censorship and subsequent punishment because the judge focuses on “particular activities,” thus allowing other forms of expression to go forward.308 But this is true only if the sanctions for violation are equivalent and only if each protested examines closely the terms of the order and has great confidence in his interpretation. No matter how focussed the order, language is not able to pinpoint the universe of protest. An order against “blocking the door” of an abortion clinic may frighten people away from acts that make entry to the clinic more difficult. And if the protesters are only generally aware that some order has been issued, the effect may be magnified. Since the penalties are harsher and the judge more determined than is the case with many—though not all—criminal statutes, the chilling effect is likely to be greater as well. The same attributes that make the injunction potentially a greater deterrent to civil disobedience renders it as well a greater threat to First Amendment protected expression.

E. A Restriction on Injunctions Prohibiting Civil Disobedience Is Akin to the Partial Protection Afforded Some Types of Speech

All speech may not be equal. For example, one widely-used constitutional law casebook even has a section entitled, “Is Some Protected Speech Less Equal Than Other Protected Speech?”307 Certainly commercial speech would be placed in a less protected category after Posadas De Puerto Rico Associates v. Tourism Co.308 Even before that case, the accepted authority of the State to ban misleading commercial communication309 makes it apparent that commercial speech is not protected to the same extent as political speech. Another field commonly considered less than fully protected by the First Amendment is sexually explicit, though not obscene, communication.310

306. Redish, supra note 170, at 93.
308. 478 U.S. 328 (1986) (upholding regulations prohibiting casino advertising aimed at residents of Puerto Rico, but permitting such advertising aimed at tourists).
310. See Young v. American Mini-Theatres, Inc., 427 U.S. 50, 70 (1976) (plurality opinion) (noting that “few of us would march our sons and daughters off to war to preserve the
There is some doubt about the Court’s commitment to the concept of less-than fully-protected speech. In City of Renton v. Playtime Theatres, Inc., the Court upheld zoning restrictions on adult movie theaters. Justice Rehnquist’s opinion did not hold that sexually explicit speech was less protected by the First Amendment. In fact, the opinion used the same time, place, and manner test that has been used in the area of political speech. Nevertheless, Justice Rehnquist quoted the language of the earlier plurality opinion in Young v. American Mini-Theatres stating that “society’s interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammelled political debate.”

The Court’s tentative approach to these categories of speech is similar to the suggestion here about injunctions and civil disobedience. In Young and Renton, the Court allowed the State to restrict the availability of sexually explicit material by zoning limits, though not to ban the category altogether. Civil disobedience certainly does have some value—even substantial value—though that value is deemed to be outweighed by its harm. If we analogize the prohibited banning of less-protected speech to the proposed prohibitions of the injunction against civil disobedience, we can see the link between the two areas. Prohibiting injunctions, but allowing criminal punishment, would restrict civil disobedience without banning it altogether.

F. A Limited First Amendment Protection For Civil Disobedience Is An Amelioration of Sanction

In much the same way that Justice Black used, in part, the maxims of equity to define the constitutional reach of our Federalism

citizen’s right to see ‘Specified Sexual Activities’ exhibited in the theaters of our choice.”). Certain types of expression can be prohibited in the government workplace, see, e.g., Connick v. Myers, 461 U.S. 138 (1983) (holding that the termination of an employee for distributing a questionnaire did not offend the First Amendment), but these cases may have more to do with the forum than with the content of the speech, see also Rankin v. McPherson, 483 U.S. 378 (1987) (holding that an employee could not be terminated for having a conversation with a coemployee in which she wished that any future attempt to assassinate the President succeeded).

312. Id.
313. Id. at 46-49.
314. 427 U.S. 50 (1976) (prohibiting adult establishments within 1,000 feet of other regulated uses does not violate First Amendment).
315. Renton, 475 U.S. at 49 n.2.
in Younger v. Harris,\textsuperscript{316} Chief Justice Burger’s plurality opinion relied on the historical practice of open criminal trials to set the foundation of a First Amendment public right of access to criminal proceedings in Richmond Newspapers, Inc. v. Virginia.\textsuperscript{317} The Chief Justice’s opinion suggests that criminal law may be a valid source of First Amendment innovation.

Unlike the open criminal trial, amelioration of sanction in civil disobedience cases is not an openly adopted practice. Amelioration in such cases is, however, a recurrent issue.\textsuperscript{318} Amelioration of sanction is at least a respectable position in criminal law discourse for consideration under the heading of the First Amendment.

There are various forms of amelioration in criminal law. Sometimes, the executive branch does not investigate a possible case. Sometimes obvious violations of the law are ignored. Often, sanctions are reduced. It is the latter that is relevant to civil disobedience cases. Prosecutors and judges may seek and impose minor punishment for trespass or related violations.

Amelioration of sanction in the case of civil disobedience convictions is a sound policy. Insofar as it is adopted, it helps create a freer and healthier society. But amelioration is a subterranean phenomenon, a sort of back door. Reduced sanctions represent a compromise between the demands of law and conscience. Perhaps the hidden quality of amelioration is necessary to allow such compromise to exist. Amelioration of criminal sanction occurs, but is not formally acknowledged.

Equity seems incapable of such a socially useful subterfuge. In general, once an injunction is issued, a judge will try at all costs to enforce the order. The subtle adjustments that Professor Greenawalt celebrates are difficult for equity to acknowledge. The protestor really is not at war with society. The criminal law does not always view him as such. Equity, unfortunately, tends to view the protestor in that light and therefore has no proper role to play in run-of-the-mill civil disobedience cases. The First Amendment can become the legal agency that enforces that conclusion.

IV. Conclusion

These days, one cannot discuss civil disobedience without dis-

\textsuperscript{316} 401 U.S. 37 (1971); see supra text accompanying notes 257-61.


cussing abortion. For that matter, one cannot discuss any aspect of constitutional theory without discussing Roe v. Wade. Roe and abortion have become, for recent generations of law students and faculty, what Brown v. Board of Education and segregation were for earlier generations—a symbol of hopes and fears about the constitutional tradition.

In such a charged atmosphere, I do not expect the subject of civil disobedience to be addressed independently of the struggle over abortion. But such linkage is unfortunate. The pro-choice movement, and its allies on the civil liberties left, forget the likelihood that pregnant women and their supporters may soon seek recourse to illegal acts of protest against anti-abortion laws. Roe v. Wade may, after all, be overruled.

Indeed, the pro-choice movement arose out of experience with violations of laws deemed unjust. Illegally obtained abortions were common in the years before Roe. And the pro-choice movement often predicts large numbers of illegal abortions—and maternal deaths—if anti-abortion laws are again passed. To be pro-choice is thus historically and pervasively to accept illegality in the face of unjust laws. For the pro-choice movement to seek injunctions against civil disobedience is to forego accepted principles for temporary tactical advantage.

Before Operation Rescue was heard of, there were doctors who viewed their practice of illegal abortions as within the tradition of civil disobedience. One such doctor wrote:

I have come to believe that women with unwanted pregnancies are the most discriminated against segment of our society. Not only are they deprived of a fundamental right, that to own their bodies and to decide if a pregnancy should continue or not, they are exposed to the dangers of losing their lives in an attempt to get rid of the pregnancy, to being injured and exploited, and to being taken advantage of by shady characters . . . . I claim that every woman on whom I have performed an abortion with good results was in danger of life at the hands of an incompetent abortionist. This is the line I intend to take if ever I am prosecuted for performing abortions. And I intend to go all the way to the Supreme Court before I give up this fight.

I consider my attitude as one of civil disobedience to a cruel and immoral law. I do not believe we should disobey all laws. I am

sure there is an element of danger in every citizen's deciding for himself which law is good or bad and which one he will obey or disobey. But poor and unjust laws do exist, and laws can be changed and have been changed before . . . 321

It is impossible to know who will be the establishment, and who the protestor, in the future. We should have a care, then, to elevate obedience to law to too high a place. Even when we think them wrong, protestors are a great strength in America's political tradition.
