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Carolyn Grose

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NOTES

“PUT YOUR BODY ON THE LINE:” CIVIL DISOBEDIENCE AND INJUNCTIONS

INTRODUCTION

The issue of abortion is one of the most divisive facing American society today. Both sides include among their ranks people almost fanatically devoted to views that are themselves diametrically opposed: the supporters of unrestricted abortion see the question as one that cuts to the heart of women's rights and bodily autonomy. Those who support restrictions on or criminalization of abortion see the question as one of life and death.

It is no wonder that in the context of this heated and seemingly unresolvable issue, civil disobedience has taken on renewed prominence as a form of political expression. The opponents of abortion have been using civil disobedience for several years to blockade health care clinics that provide, among other services, abortions. More recently, supporters of abortion rights have begun using civil disobedience symbolically to register their disapproval of Supreme Court and other political decisions regarding abortion by staging sit-ins and other demonstrations. At first glance, it would seem that the two groups engage in the same kind of civil disobedience and, thus, that they should be treated equivalently. As both a matter of law and policy, however, the two kinds of protest are different. This Note examines examples of civil disobedience from each camp and considers why and how the two should be distinguished.

In 1987, disruptions took place throughout the New York

area when Operation Rescue, a national pro-life¹ group, blockaded health care clinics by sitting down in front of the clinic doors, effectively closing the facilities down.² Hundreds of people gathered in the chilly dawn, praying, chanting, waving rosaries and sprinkling holy water. Police came out in force, arresting the protesters and trying to separate screaming pro-lifers from screaming pro-choicers, who escorted nervous clients into the clinic. These acts of civil disobedience were part of Operation Rescue's on-going national campaign to stop women from having abortions.

On July 2, 1992, a group of pro-choice activists sat down in front of the Holland Tunnel, effectively closing down both the Tunnel and surrounding streets for approximately one hour.³ Horns blared and police lined the streets two deep on all sides. Legal observers—volunteers who are trained to keep track of arrests and police behavior—ran after people being arrested while the arrestees screamed their names and affinity groups. Supporters of the protestors crowded around the police, shouting "no choice, no peace." This act of civil disobedience arose in protest of the Supreme Court's recent decision in *Planned Parenthood v. Casey*,⁴ which severely restricted a woman's

¹ This Note will use the term "pro-choice" to describe those in favor of a woman's right to have an abortion and the term "pro-life" to describe those in favor of regulating or criminalizing abortion. The debate over terminology captures the very essence of the debate over abortion, as the "pro-choice" side asserts that issue is a question of choice, while the "pro-life" side sees it is a question of life. Each side calls the other by its own label, that is the pro-choicers refer to their opponents as "anti-choice," while the pro-lifers call their opponents "anti-life" or "pro-abortion." Thus, this Note's choice of terms reflects the preferences of each group.

² Operation Rescue is a radical pro-life group. It has organized and engaged in clinic blockades all over the country. See Nadine Brozan, *503 Held in Abortion Protest on East 85th St.*, N.Y. TIMES, May 3, 1988, at B1 (describing Operation Rescue); Larry Martz, *The New Pro-Life Offensive*, NEWSWEEK, Sept. 12, 1988, at 25 (same).

³ The group involved in the Holland Tunnel blockade called itself an "Ad-Hoc Coalition of Pro-Choice, AIDS, and Lesbian/Gay Activists." The names of the organizers and supporting groups involved were never known, though the Women's Health Action Mobilization ("WHAM") was a named defendant in the injunction that prohibited the protest. The New York City chapter of the National Lawyers Guild and the Women's Action Coalition provided legal support and defense of the so-called "Holland Tunnel 48" who were arrested in the demonstration. The group is no longer in existence; it came together only to plan and carry out this action.

⁴ 112 S. Ct. 2791 (1992). *Casey* involved a challenge on substantive due process grounds to the constitutionality of 1988 and 1989 amendments to the Penn-

right to obtain an abortion. In both of these situations, courts had issued injunctions to stop the planned civil disobedience.⁵

This Note examines the 1987 and 1992 acts of civil disobe-

sylvania abortion statute. In its decision, the Supreme Court held that

(1) the doctrine of stare decisis requires reaffirmance of *Roe v. Wade's* essential holding recognizing a woman's right to choose an abortion before fetal viability; (2) the undue burden test, rather than the trimester framework, should be used in evaluating abortion restrictions before viability; (3) the medical emergency definition in the Pennsylvania statute was sufficiently broad that it did not impose an undue burden; (4) the informed consent requirements, the 24 hour waiting period, parental consent provision, and reporting and recordkeeping requirements of the Pennsylvania statute did not impose an undue burden; and (5) the spousal notification provision imposed an undue burden and was invalid.

Id.

⁵ Port Authority v. Women's Health Action and Mobilization a.k.a. WHAM, No. 42950/92 (1st Dep't July 2, 1992) (resulting in the injunction against the Holland Tunnel action).

Clinics, patients and women's rights organizations have brought numerous suits against Operation Rescue, both to recover damages and to stop the clinic blockades. This Note refers principally to a New York case, *New York State Org. for Women v. Terry*, 704 F. Supp. 1247 (S.D.N.Y.) (granting injunction against Operation Rescue), *aff'd*, 886 F.2d 1339 (2d Cir. 1989), *cert. denied*, 495 U.S. 947 (1990), and a Virginia case, *National Org. for Women v. Operation Rescue*, 726 F. Supp. 1483 (E.D. Va. 1989), *aff'd*, 914 F.2d 582 (4th Cir. 1990), *cert. granted sub nom. Bray v. Alexandria Women's Health Clinic*, 498 U.S. 1119 (1991), *rev'd in part and vacated in part*, 113 S. Ct. 753 (1993). Other cases in which injunctions have been issued include: *Volunteer Medical Clinic, Inc. v. Operation Rescue*, 948 F.2d 218 (6th Cir. 1991) (on remand to determine whether issuance of injunction is appropriate remedy); *Aradia Women's Health Ctr. v. Operation Rescue*, 929 F.2d 530 (9th Cir. 1991); *Roe v. Operation Rescue*, 919 F.2d 857 (3d Cir. 1990); *Lewis v. Pearson Found., Inc.*, 908 F.2d 318 (8th Cir.), *reh'g granted*, 917 F.2d 1077 (8th Cir. 1990), *cert. denied*, 113 S. Ct. 1250 (1993); *Northeast Women's Ctr. v. McMonagle*, 868 F.2d 1342 (3d Cir.), *cert. denied*, 493 U.S. 901 (1989); *Portland Feminist Women's Health Ctr. v. Advocates for Life, Inc.*, 859 F.2d 681 (9th Cir. 1988); *North Virginia Women's Medical Ctr. v. Balch*, 617 F.2d 1045 (4th Cir. 1980); *Town of Brookline v. Operation Rescue*, 762 F. Supp. 1521 (D. Mass. 1991); *Planned Parenthood Ass'n v. Holy Angels Catholic Church*, 765 F. Supp. 617 (N.D. Cal. 1991); *Town of West Hartford v. Operation Rescue*, 726 F. Supp. 371 (D. Conn. 1989); *Armes v. City of Philadelphia*, 706 F. Supp. 1156 (E.D. Pa. 1989); *Cousins v. Terry*, 721 F. Supp. 426 (N.D.N.Y. 1989); *Planned Parenthood v. Wilson*, 234 Cal. App. 3d 1662 (Cal. Ct. App. 1991); *Chico Feminist Women's Health Ctr. v. Scully*, 208 Cal. App. 3d 230 (Cal. Ct. App. 1989); *Planned Parenthood League v. Operation Rescue*, 550 N.E.2d 1361 (Mass. 1990); *State v. Friberg*, 435 N.W.2d 509 (Minn.), *aff'd*, 435 N.W.2d 509 (Minn. 1989); *Ryan v. Moreland*, 653 S.W.2d 244 (Mo. Ct. App. 1983); *Parkmed Co. v. Pro-Life Counselling, Inc.*, 91 A.D.2d 551, 457 N.Y.S.2d 27 (1st Dep't 1982); *OBGYN Ass'ns v. Birthright of Brooklyn and Queens*, 64 A.D.2d 894, 407 N.Y.S.2d 903 (2d Dep't 1978); *Planned Parenthood Ass'n v. Project Jericho*, 556 N.E.2d 157 (Ohio 1990); *Dayton Women's Health Ctr. v. Enix*, 555 N.E.2d 956 (Ohio 1990), *cert. denied*, 498 U.S. 1047 (1991).

dience in light of the role of injunctions and the methodology of courts' granting them, particularly in the context of balancing constitutional rights. This Note concludes that in the balance of equities between the defendants' interest in freedom of political expression and plaintiffs' concern about the inadequate legal remedy for their injuries, Operation Rescue's 1987 civil disobedience risked causing the kind of imminent and probable irreparable harm required for the issuance of an injunction, while the 1992 Holland Tunnel action did not. As such, a legal remedy would have been an insufficient response to the clinic blockades, while it would have been an adequate response to the Holland Tunnel blockade.⁶ In addition, there was a strong governmental interest in enjoining the Operation Rescue actions, while there was no comparably strong governmental interest in preventing the Holland Tunnel action from going forward. As a result, the courts properly issued injunctions against Operation Rescue but improperly against the Holland Tunnel action.⁷

Part I of this Note considers the role of civil disobedience in American life, the definition and purpose of an injunction and the relationship of the First Amendment to both civil disobedience and injunctions. Part II then examines the elements that determine whether and when injunctions should be issued. Next, Part III balances the defendants' and plaintiffs'

⁶ A legal remedy or remedy at law is an award of money damages to compensate for a lost interest. An equitable remedy is one that requires a defendant to perform or refrain from performing a certain act either to restore plaintiff to her situation before the lawsuit, or to prevent her from suffering further harm at the hands of that defendant.

⁷ The injunction issued against the Holland Tunnel action was preliminary, while that against Operation Rescue was permanent. For the purposes of this Note, both will be considered permanent injunctions.

For an in-depth analysis of the procedural and substantive differences between the two types of orders, see 11 CHARLES A. WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* §§ 2941-46 (1973). Briefly, preliminary injunctions and permanent injunctions are similar in their effect

since they require a party either to do or to refrain from doing some act. However, they differ in that [Federal Rule of Civil Procedure 65] specifies special procedural requirements for . . . preliminary injunctions and the timing, as well as the duration, of each of the . . . orders varies. . . . A preliminary injunction is effective *pendente lite* until a decision has been reached at a trial on the merits. A permanent injunction will issue only after a right thereto has been established at a trial on the merits.

11 *id.* § 2941, at 361.

interests in the Operation Rescue and Holland Tunnel acts. Finally, Part IV examines the governmental interest implicated by these two situations and seeks to balance competing constitutional rights—the right to political protest against the right to travel and the right to have an abortion.

I. BACKGROUND

A. *Civil Disobedience and American Political Culture*

Civil disobedience⁸ has been part of the American political culture since before the American Revolution.⁹ It may be argued, in fact, that American political, social and ethical attitudes encourage civil disobedience, and that democracy itself spawns this particular form of protest. As stated by Ronald Dworkin,

Civil disobedience is a feature of our political experience, not because some people are virtuous and other wicked, or because some have a monopoly of wisdom and others of ignorance. But because we disagree, sometimes profoundly, in the way independent people with a lively sense of justice will disagree about very serious issues of political morality and strategy.¹⁰

Other societies have looked to American intellectuals to ex-

⁸ Black's Law Dictionary defines civil disobedience as "a form of lawbreaking employed to demonstrate the injustice or unfairness of a particular law and indulged in deliberately to focus attention on the allegedly undesirable law." BLACK'S LAW DICTIONARY 245 (6th ed. 1990). For the purposes of this Note, civil disobedience is illegal nonviolent expressive conduct practiced in an open, non-secretive way by people who are prepared to accept the consequences of their illegal actions. The most common kind of civil disobedience today—and the civil disobedience engaged in by the two defendants under consideration in this Note—is the sit-in, as practiced, for example, by the civil rights activists who sat in at Woolworth lunchcounters, or by AIDS activists who sit in at the National Institutes of Health. See Bruce Ledewitz, *Civil Disobedience, Injunctions, and the First Amendment*, 19 HOFSTRA L. REV. 67 (1990).

⁹ It is beyond the scope of this Note to detail the history of civil disobedience. For a thorough discussion of the history and role of civil disobedience in American political culture, see DAVID R. WEBER, *CIVIL DISOBEDIENCE IN AMERICA* (1978). See also LYNN BUZZARD & PAULA CAMPBELL, *HOLY DISOBEDIENCE* 14 (1984); HENRY D. THOREAU: PEOPLE, PRINCIPLES AND POLITICS 35 (Milton Meltzer ed., 1963).

¹⁰ RONALD DWORKIN, *A MATTER OF PRINCIPLE* 105-06 (1985); see also Harrop A. Freeman, *A Remonstrance for Conscience* 106 U. PA. L. REV. 806, 813 (1958) ("[T]he Judeo-Christian religion has always maintained the duty to obey God speaking through conscience as superior to any civil law.").

plain civil disobedience, recognizing that "civil disobedience has been much canvassed in . . . the Anglo-American tradition,"¹¹ and asking Americans to "describe the shape the discussion has taken in Britain and the United States."¹²

Largely because of this organic tradition of protest Americans of today accept that civil disobedience has a legitimate if informal place in the political culture of their community. Few Americans now either deplore or regret the civil rights and antiwar movements of the 1960s. People in the center as well as on the left of politics give the most famous occasions of civil disobedience a good press, at least in retrospect. They concede that these acts did engage the collective moral sense of the community. Civil disobedience is no longer a frightening idea in the United States.¹³

Rather, Americans recognize that their civilly disobedient predecessors, far from being outlaws to be reviled, instead "make up a rich national heritage of conscientious dissent," very much in keeping with the principles on which the nation was founded.¹⁴

A brief examination of American civil disobedience suggests three general traditions of protest.¹⁵ The first consisted of struggles for religious liberty in the American colonies. In the mid-seventeenth century, for example, Quakers and Baptists in the Massachusetts Bay Colony refused to comply with the legal requirement to choose and support a Congregational minister. These dissenters were hanged and whipped, but the dissidents "doth absolutely refuse to do what the law in that case Requires."¹⁶ A century later, Isaac Backus preached and engaged in civil disobedience in the form of withholding religious taxes to force a separation of church and state, and to bring about legislation that would protect the religious prac-

¹¹ DWORKIN, *supra* note 10, at 104 ("This discussion of civil disobedience was prepared for a conference on the subject organized by the Social Democratic Party of Germany. . . . The idea is a new one for most German audiences.").

¹² *Id.*

¹³ *Id.* at 105; see also Ledewitz, *supra* note 8, at 68 ("[C]ivil disobedience . . . has become an established part of American political life. 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.").

¹⁴ WEBER, *supra* note 9, at 11.

¹⁵ WEBER, *supra* note 9.

¹⁶ 1 WILLIAM G. MCLOUGHLIN, NEW ENGLAND DISSENT 1630-1833: THE BAPTISTS AND THE SEPARATION OF CHURCH AND STATE 169 (1971).

tices of New England Baptists.¹⁷ "American civil disobedience begins, then, with resistance to specifically religious persecution or harassment, rather than with opposition to injustice conceived in broader or more secular terms."¹⁸

The next phase of civil disobedience can be described as one in which individuals refused to obey laws that they considered immoral. The most famous practitioner of the mid-nineteenth century civil disobedience was Henry David Thoreau, and the most common target was slavery. In particular, the Fugitive Slave Law of 1850, which made it a crime for Northerners to help escaped slaves avoid the slavecatchers, spawned a generation of civil disobedience: "many people violated that law because their consciences would not permit them to obey it."¹⁹

Finally, the twentieth century saw the rise of mass civil disobedience as a tactic to achieve social or legal change. This civil disobedience has "tended to be inspired less by a vision of individual innocence maintained in opposition to state decree than by a determination to influence the state and society both—either to restrain them from doing evil or to lead them into a process of active regeneration."²⁰ These protests targeted the segregated armed forces in the 1940s and 1950s, the unequal treatment of women at the turn of the century and in the 1970s, Jim Crow laws in the 1960s, U.S. involvement in Vietnam in the 1960s and 1970s and in Central America in the 1970s and 1980s, and the nuclear arms race. The civil disobedience of this era "forced everyone to look at what the majority could no longer, for a variety of reasons, ignore."²¹ This is the sort of civil disobedience in which both sides of the abortion debate have engaged in the past decade.

As revealed in this brief examination, "the advocates of civil disobedience in our history have been numerous, influential, and extraordinarily varied—in their group identities, their professions, their religious affiliations, their values and objectives."²² This "wise minority," to borrow Henry David

¹⁷ WEBER, *supra* note 9, at 49.

¹⁸ *Id.* at 20.

¹⁹ DWORKIN, *supra* note 10, at 104.

²⁰ WEBER, *supra* note 9, at 27.

²¹ DWORKIN, *supra* note 10, at 110.

²² WEBER, *supra* note 9, at 11.

Thoreau's characterization of himself and fellow disobedients, has usually been a small percentage of the population, but it has been a "felt presence in American thought and life out of all proportion to its numbers."²³ By virtue of that presence, civil disobedience has raised issues that have "become a characteristic and revealing part of American intellectual and moral experience."²⁴

B. *Injunctions*

An injunction is a drastic remedy that should issue only in extraordinary circumstances.²⁵ It is an equitable order "consisting of a command by the court . . . that the party to whom it is directed do, or refrain from doing, some specified act."²⁶ As such, it has the unique dual purpose of "prevent[ing] a wrong from occurring in the future,"²⁷ and "allow[ing] plaintiff to enjoy her substantive rights."²⁸ Thus, when a court issues an injunction rather than allowing defendants to engage in the behavior and be punished after the fact, it effectively converts a civil suit for damages into "a personalized criminal statute,"²⁹ thereby subjecting the defendant to the risk of criminal

²³ *Id.* at 18.

²⁴ *Id.*

²⁵ See 11 WRIGHT & MILLER, *supra* note 7, § 2942, at 364-70.

²⁶ *McQueen v. Lustine Realty Co.*, 547 A.2d 172, 176 (D.C. 1988); see also *United Bonding Ins. Co. v. Stein*, 410 F.2d 483, 486 (3d Cir. 1969) ("An injunction is a prohibitive writ issued by a court of equity forbidding a party-defendant from certain action"); *Inhabitants of Town of Lincolnville v. Perry*, 104 A.2d 884, 887 (Me. 1954) ("An injunction has been well described as a judicial process whereby a party is required to do or refrain from doing a particular thing."); *Cutten v. Latshaw*, 344 S.W.2d 257, 262 (Mo. Ct. App. 1961) ("An injunction is a writ framed according to the circumstances of the case commanding an act which the court regards as essential to justice, or restraining an act which it esteems contrary to equity and good conscience." (quoting 43 C.J.S., *Injunctions* § 1, at 405)).

²⁷ OWEN M. FISS, *THE CIVIL RIGHTS INJUNCTION* 8 (1978). Fiss's thesis in this treatise is that an injunction, although unique, should not be "disfavored as a remedy" and, thus, "subject to restrictions not applied to other remedies." *Id.* at 6. Fiss urges that the traditional view of the injunction as a drastic tool of equity, to be used only in extraordinary circumstances, should "give way to a nonhierarchical conception of remedies, where there is no presumptive remedy, but rather a context-specific evaluation of the advantages and disadvantages of each form of relief." *Id.* Though an interesting viewpoint, this is not one courts generally have adopted. For the purposes of this Note, then, an injunction is appropriate only in the absence of an adequate legal remedy.

²⁸ OWEN FISS & DOUG RENDLEMAN, *INJUNCTIONS* 59 (2d ed. 1984).

²⁹ Doug Rendleman, *The Inadequate Remedy at Law Prerequisite for an Injunc-*

contempt beyond civil penalties. Because of the extreme nature of this tool of equity, courts are stringent about granting injunctions. And although Federal Rule of Civil Procedure 65 provides some guidelines for plaintiffs who seek preliminary injunctive relief and temporary restraining orders,³⁰ that rule is merely procedural and does not offer "a comprehensive or detailed . . . framework for seeking injunctive relief."³¹ Therefore, it is up to courts to determine if and when they should issue an injunction.

Courts make the determination to grant injunctions by engaging in a practice alternatively labelled "balancing equities" or "balancing hardships." As Chief Justice Burger noted, "[i]n equity, as nowhere else, courts eschew rigid absolutes and look to the practical realities and necessities inescapably involved in reconciling competing interests."³² In doing so, courts take a number of steps. First, they consider whether the defendant has any overriding interests that require that the contested action go forward. Next, courts assess the risk that without the injunction, the illegal act would be likely to cause damage such that the traditional legal remedy would be inadequate to compensate the plaintiff.³³ The court then balances

tion, 33 U. FLA. L. REV. 346, 358 (1981).

³⁰ Federal Rule of Civil Procedure 65 provides, in pertinent part:

(a) Preliminary Injunction

(1) Notice. No preliminary injunction shall be issued without notice to the adverse party.

(2) Consolidation of Hearing with Trial on Merits. Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application.

(b) Temporary Restraining Order. . . . A temporary restraining order may be granted without written or oral notice to the adverse party or that party's attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant.

FED. R. CIV. P. 65.

³¹ 11 WRIGHT & MILLER, *supra* note 7, § 2941, at 362.

³² *Lemon v. Kurtzman*, 411 U.S. 192, 201 (1973). This case involved payments to church-related schools under the non-public Elementary and Secondary Education Act for services performed or costs incurred. The Supreme Court determined that permitting payment of allocated funds for the school year would not substantially undermine the constitutional interest at stake, while denial of payment would have serious financial consequences on private schools that relied on state's agreement. The Court held, therefore, that funds allocated to reimburse non-public schools for services rendered during the school year could be paid. *Id.* at 192-93.

³³ *Younger v. Harris*, 401 U.S. 37 (1971). Considering the question of when the

the equities between the party seeking the injunction and the party seeking to perform the act to determine whether it would be harder for the defendant to live with the injunction than for the plaintiff to live without it.³⁴ After performing this balancing, a court may consider any government interests implicated by the contested behavior or by the proposed injunction. If a court deems those interests to be important, the public policy considerations may tip the scale one way or the other.³⁵

C. *Injunctions, Civil Disobedience and the First Amendment*³⁶

An injunction as a remedial tool stops contested activity before it happens, rather than punishing the actors after the

federal government should interfere with state court actions, this case stands for the basic proposition that where state criminal proceedings are involved, federal courts should be reluctant to interfere. Thus, the Supreme Court denied an injunction, the main purpose of which was to prevent the enforcement of a state criminal statute. *Id.* at 53-54; see Foreword, *Younger v. Harris—Limitation on the Power of Federal Courts to Enjoin State Criminal Prosecutions—Two Views*, 1972 UTAH L. REV. 1. On the other hand, where exceptional circumstances create a threat of great and immediate irreparable injury, federal injunctive action against a state criminal statute may be warranted. See *Dombrowski v. Pfister*, 380 U.S. 479 (1965).

³⁴ See *Detroit Newspaper Publishers Ass'n v. Detroit Typographical Union*, 471 F.2d 872 (6th Cir. 1972) ("The fatal defect[] in the decision of the District Court [to grant an injunction] w[as] . . . its failure to weigh the equities between the parties and to determine whether the . . . [defendant] would suffer more from the granting of the injunction than the . . . [plaintiff] from its denial.").

Courts also have considered various defenses against issuance of an injunction, even if the plaintiff has met all the standards for such relief. Generally, a court may be reluctant to grant equitable relief of any kind if the plaintiff/movant has acted in bad faith in bringing the transaction before the court. This defense stems from the maxim "he who comes into equity must enter with clean hands." 11 WRIGHT & MILLER, *supra* note 7, § 2946, at 413. Similarly, "equity aids the vigilant, not those who slumber in their rights." *Id.* at 417. Thus, a movant who is guilty of laches—who has not moved quickly to assert her rights—may not be granted equitable relief. Neither of these defenses provide an absolute bar on the court's granting equitable relief; rather, they are additional factors a court might weigh to determine whether to issue an injunction. See *generally id.* at 411-22.

³⁵ This Note seeks to perform that balancing in the context of civil disobedience to provide some guidelines for future consideration of whether to enjoin particular acts of civil disobedience. See *infra* Part III.

³⁶ The First Amendment states, in pertinent part, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

fact. As a preemptive measure, an injunction of political protest is a prior restraint on speech.³⁷ In *Nebraska Press Association v. Stuart*, the Supreme Court invalidated a judicial decree that prohibited the press from reporting or broadcasting accounts of a controversial criminal trial.³⁸ The Court noted that "prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights."³⁹ As a result, the Supreme Court has found prior restraints on speech constitutionally permissible only in "exceptional cases."⁴⁰ In *Near v. Minnesota*, for example, the Court held unconstitutional an injunction against the publication of a newspaper that had engaged in repeated anti-semitic references to the mayor and police commissioner.⁴¹ In addition to these references, statements in the newspaper threatened violence and violence had accompanied the newspaper's publication. In holding the injunction invalid, Chief Justice Hughes, writing for the Court, explained that the exceptional cases justifying a prior restraint on speech include: (1) restraints during wartime to prevent the disclosure of military deployments or obstruction of the military effort; (2) enforcement of obscenity laws, and (3) enforcement of laws against incitement to acts of violence or revolution.⁴²

More recently, in *New York Times Co. v. United States* (commonly referred to as the Pentagon Papers case), the Supreme Court reiterated *Bantam Books v. Sullivan's* warning against prior restraints.⁴³ The Court held that the First Amendment prevented enjoining the newspaper's publication of the Pentagon Papers, despite the government's claim that such publication would pose "grave and irreparable" injury to the

³⁷ "[A] system of prior restraint is any scheme which '[gives] public officials the power to deny use of a forum in advance of actual expression.'" *Sixteenth of September Planning Comm., Inc. v. City and County of Denver*, 474 F. Supp. 1333, 1338 (D. Colo. 1979) (quoting *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975)).

³⁸ 427 U.S. 539, 570 (1976).

³⁹ *Id.* at 559; see also *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) ("Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity").

⁴⁰ LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-36, at 1045 (2d ed. 1988).

⁴¹ 283 U.S. 697 (1931).

⁴² *Id.* at 716.

⁴³ 403 U.S. 713, 714 (1971).

public interest"⁴⁴ and "a serious threat to national security."⁴⁵ Finally, in explaining its holding in *Nebraska Press*, the Court observed that a prior restraint "has an immediate and irreversible sanction. If it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' it at least for the time."⁴⁶

In order to pass constitutional muster, a prior restraint on expressive activity must meet the standards set out by the Court in the *Pentagon Papers* case⁴⁷ and reaffirmed in *Nebraska Press*.⁴⁸ These cases require that a party seeking to enjoin expressive activity prove that such activity will "surely" or "inevitably" result "directly" and "immediately" in "irreparable" injury to the nation.⁴⁹ Commenting in *Nebraska Press*, Justice Brennan further suggested that "only governmental allegation and proof that . . . [the contested expressive activity] must inevitably, directly and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea can support even the issuance of an interim restraining order."⁵⁰

The showing must be particularly compelling where political speech is at stake. In *Carroll v. President and Commissioners of Princess Anne*, an injunction issued against the National States Rights Party, a white supremacist organization, preventing the group from holding rallies or public meetings for ten days following the injunction's issuance.⁵¹ As a result, a scheduled rally did not take place. The Court held that the injunctive order, having been issued *ex parte*, without notice to the National States Rights Party, violated the First Amendment. The Court reasoned that because political expression

⁴⁴ *Id.* at 732.

⁴⁵ *Id.* at 754.

⁴⁶ 427 U.S. at 559.

⁴⁷ 403 U.S. at 713.

⁴⁸ 427 U.S. at 539.

⁴⁹ *Id.* at 593. (Brennan, J., concurring). Justice Brennan's concurrence reflected the majority rule in *New York Times v. Sullivan*. See *infra* note 50 and accompanying text.

⁵⁰ *New York Times*, 403 U.S. at 726-27. Justice Brennan's analogy to the transport at sea is a reference to *Near v. Minnesota*, where the Court reasoned that "No one would question but that a government might prevent . . . the publication of the sailing dates of transports or the number and location of troops." 283 U.S. at 716.

⁵¹ 393 U.S. 175 (1968).

was at stake, the delay caused by a prior restraint "of even a day or two may be of crucial importance."⁵² Short of a showing of extreme necessity, an injunction of expression would be constitutionally impermissible.

The peculiar problem raised by this kind of injunction, indeed, is whether it can be contested in time to engage in the intended political protest. In *Walker v. Birmingham*, the Circuit Court of Jefferson County, Alabama, granted a temporary injunction against the petitioners, who had planned to participate in mass street parades and processions without a permit.⁵³ Requests for the permit had been denied. The petitioners made no further requests for permits, nor did they challenge the injunction. Rather, they encouraged and participated in civil rights marches conducted one and three days after they had been notified of the injunction. They were found guilty of contempt. Both the Circuit Court and the Supreme Court of Alabama affirmed their convictions and refused to consider their constitutional attacks on the injunction.

Walker's so-called "collateral bar" rule dictates that an injunction cannot be violated and then challenged: although "[t]he breadth and vagueness of the injunction itself would also unquestionably be subject to substantial constitutional question[,] . . . the [proper] way to raise that question . . . [is] to apply to the . . . courts to have the injunction modified or dissolved."⁵⁴ This holding, the Supreme Court explained,

⁵² *Id.* at 182 (citing *A Quantity of Books v. Kansas*, 378 U.S. 205, 224 (1964)). For an opposing view on the danger of prior restraints of political speech, see William T. Mayton, *Toward of Theory of First Amendment Process: Injunctions of Speech, Subsequent Punishment, and the Costs of the Prior Restraint Doctrine*, 67 CORNELL L. REV. 245, 270 (1982). The author argues that subsequent punishment "necessarily results in a significant social loss, consisting of speech that judicial review might save," while an injunction

must first be tested by adversarial processes, with the government carrying the burden of showing the court that the requested suppression is the narrowest possible under the circumstances, and that the circumstances warranting such suppression are urgent. The order itself can, and must, be specific: "pinpointed" as to persons and conduct. In this way, the cost to speech of erroneous suppression is minimized.

Id. (citations omitted). The fallacy in this reasoning is that injunctive orders themselves are often overbroad and suppress speech that should be protected by the First Amendment. See *infra* note 61.

⁵³ 388 U.S. 307 (1967).

⁵⁴ *Id.* at 317.

reflects a belief that in the fair administration of justice no man can be judge in his own case, however exalted his station, however righteous his motives, and irrespective of his race, color, politics or religion. This Court cannot hold that the petitioners were constitutionally free to ignore all the procedures of the law and carry their battle to the streets.⁵⁵

To maintain the integrity of the judiciary in the public's mind, the Court forfeited the rights of protesters to challenge patently unconstitutional injunctions in time to go ahead with their protest.⁵⁶

The effect of the doctrine of collateral bar, which remains good law,⁵⁷ is that when a court issues an injunction against a disfavored political protest, it effectively silences that expression until after the injunction has been challenged. This is prior restraint of speech at its most dangerous, as the government can seek injunctions against political protests as a means of automatically preventing those protests from going forward. It is for this reason that the balancing of equities is so impor-

⁵⁵ *Id.* at 320-21.

⁵⁶ Compare *Walker v. Birmingham* with *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969), which permitted protesters to challenge a facially unconstitutional city ordinance worded very similarly to the state injunction at issue in *Walker*. The *Walker* Court placed great emphasis on maintaining the integrity of the judiciary by forcing people to obey court orders. 388 U.S. at 307. On the other hand, legislatures—being elected and representative bodies—do not require the same deference from people; thus legislative ordinances can be disregarded and later challenged, while court orders cannot.

For analysis of the legal and practical issues raised by *Walker*, see THOMAS I. EMERSON, *THE SYSTEM OF FREE EXPRESSION* (1970); Vince Blasi, *Prior Restraints on Demonstrations*, 68 MICH. L. REV. 1482 (1970); ; Joel L. Selig, *Regulation of Street Demonstrations by Injunction: Constitutional Limitations on the Collateral Bar Rule in Prosecutions for Contempt*, 4 HARV. C.R.-C.L. L. REV. 135 (1968); Valerie Tarzign, Note, *Parades and Protest Demonstrations: Punctual Judicial Review of Prior Restraints on First Amendment Liberties*, 45 IND. L.J. 114 (1969); Sheldon Tefft, *Neither Above the Law Nor Below It: A Note on Walker v. Birmingham*, 1967 SUP. CT. REV. 181.

⁵⁷ *In re Providence Journal*, 820 F.2d 1342, 1344 (1st Cir. 1986), *cert. denied*, 485 U.S. 693 (1988), is a Rhode Island case that modifies the *Walker* holding: "[a] party subject to an order that constitutes a transparently invalid prior restraint on pure speech may challenge the order by violating it." This case is not relevant to the situations under consideration as the injunctions in question are not, for the sake of this argument, transparently invalid. Even if they were, moreover, there is no argument that the contested conduct—civil disobedience—is pure speech.

For a more thorough treatment of the collateral bar doctrine, see Richard E. Labunski, *The "Collateral Bar" Rule and the First Amendment: The Constitutional-ity of Enforcing Unconstitutional Orders*, 37 AM. U. L. REV. 323 (1988).

tant. The injunction is essentially a control mechanism on political expression. Based on the importance of civil disobedience as legitimate political expression, courts should be particularly reluctant to issue injunctions against political protest of any kind without a clear showing that the equities tip against the actors' right to political expression. At the same time, however, courts must act if such a showing is made.

II. WHEN SHOULD AN INJUNCTION BE ISSUED: BALANCING THE EQUITIES

A. *Defendants' Interest*

In balancing the equities between the parties to determine whether an injunction should issue, a court must examine the nature and significance of the defendants' asserted interest in engaging in the contested behavior. In both the WHAM and the Operation Rescue cases, the defendants had an interest in employing civil disobedience to express their political views.⁵⁸ Because any injunction inevitably will curtail free expression, however, courts must consider very carefully the impact injunctions would have on these expressions.

Indeed, at issue in the two injunctions under consideration is behavior that has traditionally been "widely regarded as a legitimate form of political protest."⁵⁹ There is no question that the conduct of the chanters, prayers, singers and screamers constituted protected speech that should not be affected by an injunction against civil disobedience.⁶⁰ Instead, the injunc-

⁵⁸ When assessing whether government regulation of symbolic conduct is permissible, the courts use a four-part test established in *United States v. O'Brien*, 391 U.S. 367 (1968). The regulation is permissible if: (1) the regulation was within the constitutional power of the government; (2) it furthers an "important or substantial governmental interest" which is (3) "unrelated to the suppression of free expression;" and (4) the "incidental restriction" on First Amendment freedoms is "no greater than is essential to the furtherance of the governmental interest." *Id.* at 368. For practical purposes this test boils down to a rule that regulations aimed at the message of the conduct usually are impermissible, while a regulation aimed at the conduct itself may be permissible. With both the injunction against WHAM and the injunctions against Operation Rescue, the government sought to stop the conduct of the groups—the civil disobedience blockades—regardless of the message either group sought to relay. These injunctions thus passed the *O'Brien* test.

⁵⁹ Ledewitz, *supra* note 8, at 72-73.

⁶⁰ Though not "pure speech" in the sense of being spoken words with no ac-

tions were ostensibly directed only at those engaging in the illegal acts of sitting down in front of the clinic doors and the Tunnel entrance.⁶¹

While determining whether civil disobedience should be included as expression protected by the First Amendment is beyond the scope of this Note,⁶² the analysis proceeds on the presumption that both defendants had a strong interest in political expression, and that their chosen form of political expression was one that a significant minority of Americans

companying activity, this mixture of political speech and conduct that has great expressive content falls squarely under the protection of the First Amendment. See *Sixteenth of September Planning Comm., Inc. v. City and County of Denver, Colo.*, 474 F. Supp. 1333, 1338 (D. Colo. 1979) ("While parades and marches are not as strictly insulated from regulation as so-called 'pure speech,' they nonetheless receive significant constitutional protection as an established form of First Amendment expression.").

⁶¹ Many injunctions are overbroad and do, in fact, reach these protected activities. See Amicus Brief for Appellant at 8, *Trump v. Trump* (1st Dep't Apr. 16, 1992) (prior restraint injunctions "suffer the danger of sweeping too broadly and of restricting speech which may well be entitled to remain unfettered."). In fact, the injunction originally obtained by plaintiffs in *Port Authority v. WHAM* was not limited to illegal conduct. It also enjoined activities that most likely were entitled to constitutional protection, such as advocacy. As noted in a New York *Newsday* article about the Holland Tunnel action, "[e]ven people who weren't going to the demonstration were to be muzzled. . . . Not only couldn't people break the law and block the tunnel, but others couldn't help them with Xerox machines for the fliers." Jim Dwyer, *More Than Just a Choice*, *Newsday*, July 24, 1992, at 2. The Port Authority has obtained similar injunctions against political speech that were not narrowly confined to purely illegal conduct. Rather, these extended beyond the conduct to include advocacy in such a way that the advocates' rights to free expression were unconstitutionally curtailed. See, e.g., *Port Authority v. Broome County Urban League*, No. 00958/88 (Sup. Ct. Queens Co. 1988); *Port Authority v. S.S.T. Concord*, 90 Misc. 2d 295, 394 N.Y.S.2d 364 (Sup. Ct. Queens Co. 1977).

⁶² See Ledewitz, *supra* note 8, for an in-depth discussion on the issue of First Amendment protection for civil disobedience. The author argues that the First Amendment should provide limited protection for civil disobedience: "the protest would be non-violent and the protestors would be subject to normal criminal sanctions. But within those limits, protestors would be free to engage in civil disobedience." *Id.* at 69; see also Harrop A. Freeman, *The Right of Protest and Civil Disobedience*, 41 *IND. L.J.* 228, 242-46 (1966) (suggesting that the extent to which civil disobedience should be protected by the First Amendment depends on whether the law the disobedients violated injures a third person).

The overlap of the abortion issue and the First Amendment has spawned numerous articles and legal analyses. See, e.g., Luke T. Cadigan, Note, *Balancing the Interests: A Practical Approach to Restrictions on Expressive Conduct in the Anti-Abortion Protest Context*, 32 *B.C. L. REV.* 835 (1991); Bonnie E. Sweeney, Note, *Bering v. Share: Accommodating Abortion and the First Amendment*, 38 *CASE W. RES. L. REV.* 698 (1988).

have utilized with varying degrees of success and support throughout American history. The question this Note seeks to answer is not which of these two acts of civil disobedience was worthy of First Amendment protection or worthy of greater support. The only question is: in the balance between defendants' right to express their political views and the rights of other citizens to enjoy their liberties, whose right dominates? A court must balance these two competing rights to determine whether an injunction should issue.

B. *Plaintiffs' Interest*

After determining that the defendants have an interest in going ahead with the contested behavior and accepting the consequences thereof, courts should not issue an injunction without a clear showing of its necessity. The Supreme Court in *Younger v. Harris*⁶³ stated that "a basic doctrine of equity jurisprudence [is] that courts of equity should not act . . . when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief."⁶⁴ An injunction should not be granted in the absence of a showing that the "danger of irreparable loss is both great and immediate."⁶⁵ To justify the issuance of an injunction, a plaintiff must show both that the contested activity will cause harm for which there is no adequate legal remedy, and that such harm will occur imminently and with great probability.

⁶³ 401 U.S. 37 (1971).

⁶⁴ *Id.* at 43-44.

⁶⁵ *Id.* at 45; see also 11 WRIGHT & MILLER, *supra* note 7, § 2942, at 369 (quoting Justice Baldwin in *Bonaparte v. Camden & Amboy R.R.*, 3 F. Cas. 821, 827 (C.C.D.N.J. 1830) (No. 1617):

There is no power the exercise of which is more delicate, which requires greater caution, deliberation, and sound discretion, or more dangerous in a doubtful case, than the issuing [of] an injunction; it is the strong arm of equity, that never ought to be extended unless to cases of great injury, where courts of law cannot afford an adequate or commensurate remedy in damages. The right must be clear, the injury impending or threatened, so as to be averted only by the protecting preventive process of injunction. . . . It will be refused till the court are satisfied that the case before them is of a right about to be destroyed, irreparably injured. . . .

1. Inadequate Remedy at Law

The first limiting principle in deciding whether to enjoin is the requirement that there be no adequate remedy at law.⁶⁶ Courts have defined a legal remedy as adequate if it is "as complete, practical and efficient as that which equity could afford."⁶⁷ Three principles guide a court's discretion in determining when and whether a legal remedy is adequate: (1) whether there is a threat of irreparable injury; (2) whether there is a threat of repeated violation that would require the plaintiff to engage in a multiplicity of actions in order to get relief; and (3) whether the nature of the interest and extent of the injury is such that damages would be insufficient compensation. The existence of any of these three factors justifies the issuance of an injunction based on a showing of inadequate legal remedy.

The first factor that a court should consider in deciding whether there is an adequate legal remedy is whether the plaintiff has made a showing of irreparable harm.⁶⁸ This showing is not a simple one, as it is not entirely clear what "irreparable harm" means.⁶⁹ Courts have found irreparable

⁶⁶ *Harris Stanley Coal & Land Co. v. Chesapeake & O. Ry.*, 154 F.2d 450, 453 (6th Cir.), *cert. denied*, 329 U.S. 761 (1946) ("[T]he legal remedy must not only be plain, speedy and adequate, but as adequate to meet the ends of justice as that which the restraining power of equity is competent to grant.").

⁶⁷ *Terrace v. Thompson*, 263 U.S. 197, 214 (1923); *see also* Douglas Laycock, *Injunctions and the Irreparable Injury Rule*, 57 TEX. L. REV. 1065 (1979). Professor Laycock states there is a well-settled rule that "[e]quity will not act if there is an adequate remedy at law . . . [where an] [a]dequate remedy means a remedy as complete, practical, and efficient as the equitable remedy." *Id.* at 1071. In other words, "[p]laintiff is entitled in all cases to the most complete, practical, and efficient remedy. . . . If a legal and an equitable remedy are equally complete, practical, and efficient, the legal remedy shall be used." *Id.*

⁶⁸ "[T]he requirements that government . . . show the irreparable nature of the harm that would occur if a [pre-action] restraint were not imposed . . . sharply delimit the areas in which [pre-action] restraints can ever be justified." *TRIBE*, *supra* note 40, at 1051.

Courts require an independent showing of irreparable harm before issuing a preliminary injunction. For issuance of a permanent injunction, however, such a showing is only one means of proving that there is no adequate legal remedy. *See* *Lewis v. S.S. Baune*, 534 F.2d 1115, 1124 (5th Cir. 1976). Because this Note addresses issues raised by the issuance of permanent injunctions, the irreparable injury showing will be considered as only one possible means of showing that there is no adequate legal remedy.

⁶⁹ *Black's Law Dictionary* defines "irreparable injury" as not

harm to exist based on a range of asserted injuries. In *Studebaker Corp. v. Gittlin*,⁷⁰ the Second Circuit, noting that "[r]ecitation of [irreparable injury] generally produces more dust than light," held that to show he will suffer irreparable injury, a plaintiff "is not required to show that otherwise rigor mortis will set in forthwith; all that 'irreparable injury' means . . . is that unless an injunction is granted, the plaintiff will suffer harm which cannot be repaired."⁷¹ Under that standard, for example, the Supreme Court has found that substantial business losses and possible bankruptcy justified issuance of an injunction.⁷² At the other extreme, in *MacBeth v. Utah*, a district court found that the great inconvenience that suspension of plaintiff's driving privilege would cause him was not a sufficient showing of irreparable harm.⁷³ By the same token, the Sixth Circuit held that "a probable loss of overtime" was not an adequate showing of irreparable harm.⁷⁴ Rather than a concrete definition, courts have found irreparable injury to exist on a spectrum with "rigor mortis" at one extreme and "inconvenience" at the other; the inquiry remains extremely fact-sensitive.

After examining the possible irreparable harm, courts may judge a legal remedy to be inadequate when it does not suffi-

such an injury as is beyond the possibility of repair, or beyond possible compensation in damages, or necessarily great damage, but includes an injury, whether great or small, which ought not to be submitted to, on the one hand, or inflicted, on the other; and which, because it is so large or so small, or is of such constant and frequent occurrence, or because no certain pecuniary standard exists for the measurement of damages, cannot receive reasonable redress in a court of law. Wrongs of a repeated and continuing character, or which occasion damages that are estimated only by conjecture, and not by any accurate standard, are included. The remedy for such is commonly in the nature of injunctive relief. 'Irreparable injury' justifying an injunction is that which cannot be adequately compensated in damages or for which damages cannot be compensable in money.

BLACK'S LAW DICTIONARY 786 (6th ed. 1990).

⁷⁰ 360 F.2d 692 (2d Cir. 1966).

⁷¹ *Id.* at 698.

⁷² *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975) (Court upheld the issuance of an injunction preventing the enforcement of a town ordinance proscribing topless dancing).

⁷³ *MacBeth v. Utah*, 332 F. Supp. 1191 (D. Utah 1971).

⁷⁴ *Detroit Newspaper Publishers Ass'n v. Detroit Typographical Union*, 471 F.2d 872, 877 (6th Cir. 1972) (court declined to enjoin a newspaper from using electronic editing equipment), *cert. denied*, 411 U.S. 967 (1973).

ciently deter the threat of repeated violation.⁷⁵ If it is likely that an award of damages to plaintiff will not deter the same defendants from violating her rights again,⁷⁶ and will merely force plaintiff to engage in another suit involving the same issues, the remedy at law is inadequate.⁷⁷ Accordingly, an injunction should issue.

Thus, the early New York case of *Exchange Bakery & Restaurant, Inc. v. Rifkin*⁷⁸ held that an injunction may be granted to "prevent repeated violations, threatened or probable, of the complainant's property rights."⁷⁹ In that case, plaintiff sought an injunction against union members who instigated a strike by several of plaintiff's employees. After the initial disruption of work in plaintiff's restaurant, defendants had no further contact with plaintiff. The court refused to grant an injunction against the strikers, choosing to leave "to the law redress for single or isolated wrongs."⁸⁰ The court went on to explain that had there been a danger that defendants would repeat their disruptive actions, issuance of an injunction may have been appropriate: "The theoretical basis of this power has been said to be the avoidance of a multiplicity of actions. . . . [and] the probability of such interference in the future."⁸¹

⁷⁵ Laycock, *supra* note 67, at 1074 (An "injunction is appropriate only when plaintiff will suffer additional harm in the future—when the total accrued loss as of Tuesday will be greater than it is on Monday—and when it is possible to prevent that additional harm from happening."); *see also* Rendleman, *supra* note 29, at 349 (Courts should issue an injunction in a case where, "[i]f the court simply awards monetary damages, the defendant will probably continue his actions.").

⁷⁶ The threat of repeated violation falls on a spectrum from possibility to probability of recurrence. *See* Farmland Indus., Inc. v. Kansas-Nebraska Natural Gas Co., 349 F. Supp. 670, 681 (D. Neb. 1972) (Nothing suggested the "likelihood of recurrences of past behavior," making injunctive relief unnecessary.); *Johnson v. Mansfield Hardwood Lumber Co.*, 143 F. Supp. 826, 834-35 (W.D. La. 1956) (showing that multiple suits "could or would be required" was enough to show that plaintiffs did not have an adequate legal remedy.).

⁷⁷ *See* Independent Tape Merchant's Ass'n v. Creamer, 346 F. Supp. 456, 459 (M.D. Pa. 1972) ("[T]he exercise of equitable discretion to avoid a multiplicity of litigation is restricted to cases in which there would otherwise be a necessity for numerous suits between the same parties involving the same issues; it does not ordinarily extend to cases involving numerous parties in which the issues between them . . . are not necessarily identical.").

⁷⁸ 245 N.Y. 260, 157 N.E. 130 (1927).

⁷⁹ *Id.* at 265, 157 N.E. at 133.

⁸⁰ *Id.*

⁸¹ *Id.*

The injunction, therefore, acts as a deterrent against future harm. The rationale behind this idea of the injunction as a deterrent is that "[m]ost defendants obey injunctions" because of the risk of criminal contempt.⁸² When a court issues an injunction, it does so with the hope that this risk "may persuade the defendant to become a better citizen" and refrain from engaging in the prohibited behavior.⁸³

The third factor courts consider in determining whether a remedy at law is inadequate is the nature of the injury expected. The courts' analysis of this factor involves a consideration of the plaintiff's threatened interest and whether it is of such importance that damages would not compensate for its loss. "[C]ourts have identified a class of interests which are too important to sanction continued injury by merely imposing money damages."⁸⁴ This class includes "cases involving school segregation, prison and hospital mistreatment, and ecological injury."⁸⁵ These interests, the courts have determined, are "so basic that . . . people deserve to enjoy them in fact."⁸⁶ Courts thus will grant relief where movants seek an injunction to protect those interests. Moreover, where a court determines that the injury sought to be prevented by an injunction is so large or complex that it is unmanageable through civil litigation alone, it will issue an injunction.⁸⁷ And finally, where a computation of damages would be speculative or inadequate to compensate plaintiff, a court will issue an injunction.⁸⁸

⁸² Rendleman, *supra* note 29, at 358.

⁸³ *Id.*

⁸⁴ *Id.* at 352; see also FISS & RENDLEMAN, *supra* note 28, at 59 ("When objective damages fail to compensate for the legally recognized impairment, judges enjoin to recognize that uncompensated, but legally recognized impairment.").

⁸⁵ D. LOUISELL & G. HAZARD, CASES AND MATERIALS ON PLEADING AND PROCEDURE 109 (4th ed. 1979); see STORY, COMMENTARIES ON EQUITY JURISPRUDENCE AS ADMINISTERED IN ENGLAND AND AMERICA §§ 925, 926 (1843):

[W]here [for example] loss of health, loss of trade, destruction of the means of subsistence, or permanent ruin to property, may or will ensue from the wrongful act . . . in every such case Courts of Equity will interfere by injunction. . . . The injury is material, and operates daily to destroy or diminish the [exercise of rights of the plaintiff].

⁸⁶ Rendleman, *supra* note 29, at 352.

⁸⁷ See Laycock, *supra* note 67, at 1069 ([N]o one has ever suggested that money alone would be an adequate remedy for segregated and inferior education.").

⁸⁸ See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, (1952). In this case, commonly called the "Steel Seizure" case, the Supreme Court held that an injunction against government seizure of steel mills may be appropriate because

In the civil rights context, for example, courts frequently issued injunctive orders requiring desegregation.⁸⁹ In those cases, the rationale of courts in issuing the injunctions reflected their consideration of the three factors mentioned above. First, the busing cases clearly involved interests too important to be lost, even if courts could award substantial money damages. Money alone would hardly be an adequate remedy for "segregated and inferior education, for loss of voting rights, or for the rest of the complex web of discrimination that has created a continuing black underclass in the United States. Money alone cannot undo a harm so complex and pervasive."⁹⁰ Second, more than suits for damages, injunctions provided the necessary legal instrument to deal with the enormity of the problem of school segregation. Only an injunction could reach beyond those named in the underlying school desegregation suits to prevent *everyone*, not just the named defendants, from obstructing black children's attendance of formerly all white schools. Finally, the school desegregation cases presented enormous problems of computation of legal remedies. "Proof of causation and quantification of damages would be monstrously difficult; immunity defenses would pose problems; the risk of jury nullification would be high."⁹¹ Any computation of damages would be speculative at best and, even then, probably inadequate to compensate the plaintiffs. Courts thus determined that a remedy at law would have been inadequate due to the importance of the interests at stake, the enormity of the

"seizure and governmental operation of [steel companies] were bound to result in many present and future damages of such nature as to be difficult, if not incapable, of measurement." *Id.* at 585; see also Rendleman, *supra* note 29, at 346 ("[p]laintiffs' injury is irreparable by money when it cannot be measured, compensated, restored, or repaired").

⁸⁹ See *Griffin v. County School Bd.*, 377 U.S. 218 (1964), where the Supreme Court granted an injunction against the County School Board of Prince Edward County and others to prevent them from refusing to operate an efficient public school system in the County and to prevent payment of public funds to help support private schools that excluded students based on their race. See also *Goss v. Board of Educ.*, 373 U.S. 683 (1963); *Northcross v. Board of Educ.*, 302 F.2d 818 (6th Cir.), *cert. denied*, 370 U.S. 944 (1962); *Davis v. East Baton Rouge Parish School Bd.*, 214 F. Supp. 624 (E.D. La. 1963).

It is beyond the scope of this Note to address the issues raised by injunctions and desegregation. For a detailed analysis of this area of injunctive law, see FISS, *supra* note 27; and Laycock, *supra* note 67.

⁹⁰ Laycock, *supra* note 67, at 1069-70.

⁹¹ *Id.* at 1068.

injury and the impossibility of computing accurate damages. Accordingly, they granted injunctions.

In general, then, a remedy at law is inadequate if it is not as effective—speedy, efficient or practical—as an equitable remedy. More specifically, damages are inadequate if the threatened injury is irreparable; if such damages fail to deter the defendants from repeating offensive conduct, requiring plaintiff to sue repeatedly; or, if the plaintiff's interest is so important and the threatened injury so complex that damages would be an inappropriate compensation. When a court determines that any of these three factors is present, it should conclude that a legal remedy is insufficient and that equity should control.

2. Imminence and Probability that Injury will Occur

Having determined that a legal remedy would be inadequate, courts have to ask the next question: how likely is it that the threatened injury will occur?⁹² The Second Circuit has addressed this question squarely and provided some significant guidelines. In *New York v. Nuclear Regulatory Commis-*

⁹² See FISS & RENDLEMAN, *supra* note 28, at 59 (party seeking an injunction must show "that there is an imminent threat of harm and that the threatened harm is 'irreparable'").

There is a range of findings regarding the imminence and probability of irreparable harm. See *Connecticut v. Massachusetts*, 282 U.S. 660, 674 (1931) ("Injunction issues to prevent existing or presently threatened injuries. One will not be granted against something merely feared as liable to occur."); *Rogers v. Scurr*, 676 F.2d 1211, 1214 (8th Cir. 1982) ("[C]ourts should not get involved unless either a constitutional violation has already occurred or the threat of such a violation is both real and immediate."); *Carter v. Fort Worth*, 456 F.2d 572, 576 (5th Cir.), *cert. denied*, 409 U.S. 877 (1972) (Irreparable injury was "purely speculative" and therefore no injunction issued.); *MacBeth v. Utah*, 332 F. Supp. 1191, 1192 (D. Utah 1971) ("Plaintiff's evidence fails to show that the injury caused by the State's action in this case is certain to cause irreparable damage, a fact necessary before an injunction can issue. . . . An injunction, being an extraordinary writ, requires . . . an adequate showing of clear and imminent danger of irreparable harm."); *First Nat'l Bank in Billings v. First Bank Stock Corp.*, 197 F. Supp. 417, 428 (1961) ("There must be at least a reasonable probability that the injury will be done if no injunction is granted and there must be more than mere fear or apprehension."); *Association of Professional Eng. Personnel v. Radio Corp. of Am.*, 183 F. Supp. 834, 839 (D.N.J. 1960) ("[T]o warrant the granting of an injunction on ground that irreparable injury is threatened, the injury contemplated must be real, not fancied; actual not prospective; and threatened, not imagined."), *rev'd on other grounds*, 291 F.2d 105 (3d Cir.), *cert. denied*, 368 U.S. 898 (1961).

sion,⁹³ the court refused to grant an injunction where the movant had failed "to meet its heavy burden of clearly establishing the threat of irreparable harm."⁹⁴ In that case, the movant sought to enjoin the transport by air of plutonium and other nuclear material, alleging that the risk of crashes or terrorist attacks could result in environmental disasters.⁹⁵ The court analyzed these allegations by examining various factors that, when considered sequentially, illustrate the patent improbability of the risk:

Let us assume for purposes of argument that the following extremely remote possibilities occur simultaneously: 1) an aircraft crashes; 2) the aircraft is one of the minuscule number carrying plutonium; 3) the aircraft is damaged so severely that the cargo is subjected to stresses; and 4) the container protecting the plutonium is unable to withstand the applied forces and it cracks. . . . [W]e think it is already eminently obvious that the threat of harm from an accidental air crash is indeed extremely remote.⁹⁶

The court concluded that such risks were too remote to warrant the granting of an injunction.

In reaching this conclusion, the Second Circuit explained that the "drastic remedy" of an injunction is inappropriate where the action sought to be enjoined "is by no means certain to produce" the irreparable harm the movants fear.⁹⁷ Rather, the threat of irreparable harm must be "more than possible; it [must be] certain and imminent."⁹⁸ A court should use its equitable power only with a showing that the threats of irreparable harm "are not remote or speculative but are actual and imminent. . . . The dramatic and drastic power of injunctive force may be unleashed only against conditions generating a presently existing actual threat; *it may not be used simply to eliminate a possibility of a remote future injury.*"⁹⁹

The NRC court achieved its result by distinguishing the movants' case from earlier cases involving environmental despoliation where circuit courts had granted injunctions.¹⁰⁰

⁹³ 550 F.2d 745 (2d Cir. 1977).

⁹⁴ *Id.* at 753.

⁹⁵ *Id.* at 746-47.

⁹⁶ *Id.*

⁹⁷ *Id.* at 754.

⁹⁸ *Id.* at 755 (citations omitted).

⁹⁹ *Id.* (second sentence quoting *Holiday Inns of Am., Inc. v. B & B Corp.*, 409 F.2d 614, 618 (3d Cir. 1969)).

¹⁰⁰ *Id.* at 753-55; see *Environmental Defense Fund v. Tennessee Valley Auth.*,

In *Environmental Defense Fund v. Tennessee Valley Authority*, for example, the Sixth Circuit relied on specific findings by the district court that the "activities relating to irreparable defacement of the environment were continuing."¹⁰¹ Such a showing convinced the court that future defacement would occur with the requisite probability to issue an injunction. In *Scherr v. Volpe*, moreover, the Seventh Circuit upheld an injunction on findings by the district court that the "immediate effects" of the contested activity would cause irreparable environmental damage.¹⁰² Such findings led the court to conclude that the threat of irreparable harm was imminent and probable. In these two cases, the *NRC* court explained, the plaintiffs had made specific showings that the defendants' actions would have caused "immediate, demonstrable and irreparable damage"¹⁰³ and, therefore, injunctive relief had been appropriate. In the case before the Second Circuit, however, the plaintiffs had made no such specific showing of imminent harm. As a result, the court concluded that, because the defendants' actions were "by no means certain to produce the cataclysmic consequences appellant fears will ensue,"¹⁰⁴ injunctive relief was inappropriate.¹⁰⁵

Although courts have never provided concrete definitions of "inadequate legal remedy" and "imminent, probable threat," they appear willing to recognize a range of situations that

468 F.2d 1164 (6th Cir. 1972) (affirming injunction of defendant's dam and reservoir project based on showing by plaintiffs that they would suffer irreparable harm from continuation of defendant's construction activities which were permanently defacing the natural environment); *Scherr v. Volpe*, 466 F.2d 1027 (7th Cir. 1972) (injunction granted to prevent further construction or development of a highway project that would alter natural wildlife habitats, strip forest land causing erosion, and cause other alterations in the environment).

¹⁰¹ *Environmental Defense Fund*, 468 F.2d at 1183.

¹⁰² *Scherr*, 466 F.2d at 1029.

¹⁰³ *New York v. Nuclear Regulatory Comm'n*, 550 F.2d 745, 754 (2d Cir. 1977).

¹⁰⁴ *Id.*

¹⁰⁵ In *Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc.*, 596 F.2d 70 (2d Cir. 1979), the court denied a distributor's motion for an injunction against a manufacturer to prevent him from supplying certain products to certain customers. In so doing, the court explained that "[a]s to the kind of irreparable harm that the party seeking an injunction must show, the language of some past cases has suggested to some a spectrum ranging from possible to probable." *Id.* at 72 (footnote omitted). The opinion went on to note, however, that in *New York v. Nuclear Regulatory Commission*, "the panel uses the probability formulation, expressly reject[ing] mere possible injury as a sufficient basis for an injunction. *Id.*

meet these standards. The one firm requirement is that both elements be present. In the *NRC* case, the plaintiffs had clearly shown a risk of irreparable harm for which there would be no adequate legal remedy. That showing alone, however, did not convince the Second Circuit to issue an injunction. Without the second showing that the irreparable harm was probable and imminent, no injunction would issue. In *Environmental Defense Fund* and *Scherr*, on the other hand, the plaintiffs made both showings, and the courts issued the injunctions. Thus, courts must find that both factors are present before determining that the balance has tipped in favor of the movant's attempt to prevent the contested behavior. Otherwise, the balance should tip against the movant and the court should allow the behavior to go forward.

III. APPLYING THE STANDARDS

A. *Defendants' Interests: Civil Disobedience*

As examined in Part I, the importance of civil disobedience stems from its symbolic expression of protest. The Holland Tunnel action was just that: people sitting down in front of the Tunnel to protest a restrictive Supreme Court decision on abortion. They did not target the drivers whose cars were slowed down in the traffic; nor did they target the Port Authority itself. They chose the Holland Tunnel because it was highly visible and likely to attract the kind of attention to the pro-choice cause the protesters were seeking.

On the other hand, Operation Rescue's blockades were not purely symbolic expressions of protest against laws allowing abortion, but rather well-coordinated attempts to interfere with those laws. Randall Terry, the Operation Rescue leader who directs the demonstrations and blockades, has said, "Operation Rescue is not about protest or civil disobedience. It is about saving the lives of babies scheduled to be murdered."¹⁰⁶ As

¹⁰⁶ *Enemy of Abortions Is Also Taking Issue With Protest Tactics*, N.Y. TIMES, Aug. 31, 1988, at A14; see also Lynn Paltrow, Operation Rescue: Civil Disobedience or Religious Fanaticism? (unpublished manuscript on file with the *Brooklyn Law Review*) ("Operation Rescue blockades are not acts of nonviolent civil disobedience any more than were 'the jeering white supremacists who blockaded the school doorways to African American children in Little Rock in the 1950's.'").

such, some have argued that this kind of interference—without the concomitant political protest—is not expressive conduct rising to the level of importance that has led Americans to accept civil disobedience as holding a “legitimate if informal place in the political culture of their community.”¹⁰⁷ Rather, it is destructive behavior that leads to violence and greater disruption, closer to a revolutionary conspiracy than a national campaign of political protest.¹⁰⁸

This distinction is particularly well exemplified by the murder of Dr. David Gunn. In March 1993, an anti-abortion protester shot and killed Dr. Gunn, a doctor who performed abortions in three Southern states, during an anti-abortion demonstration and blockade outside the doctor's clinic.¹⁰⁹ In the days and weeks before the murder, Operation Rescue had distributed a “Wanted” poster at rallies and blockades that featured a picture of Dr. Gunn, his regular itinerary and his phone numbers. It read, “We need your help to stop Dr. David Gunn.”¹¹⁰ Dr. Gunn's murder was the first and to-date the only of its kind, but there has been a rise in violence against clinics in general, and doctors and clinic staff in particular. A national pro-choice organization that represents clinics said that reports of vandalism have more than doubled from 1991 to 1992, and that cases of arson against clinics tripled from four in 1990 to twelve in 1992.¹¹¹ Furthermore, health care workers have been hospitalized after chemicals were sprayed into their clinic,¹¹² and twenty-seven incidents of violence against providers were reported in the first two months of 1993.¹¹³

While anti-abortion groups like Operation Rescue were quick to disclaim any connection with Dr. Gunn's admitted

¹⁰⁷ Larry Rohter, *Doctor is Slain During Protest Over Abortions*, N.Y. TIMES, Mar. 11, 1993, at A1.

¹⁰⁸ The Supreme Court recently held in *National Org. for Women v. Scheidler*, 114 S. Ct. 798 (1994), that RICO may be applied to Operation Rescue and other anti-abortion groups, as part of a nationwide conspiracy to shut down abortion clinics through a pattern of racketeering activity. See *infra* note 208.

¹⁰⁹ Rohter, *supra* note 107, at A1.

¹¹⁰ Felicity Barringer, *Abortion Clinics Preparing for More Violence*, N.Y. TIMES, Mar. 12, 1993, at A1, A17 (picture accompanying article).

¹¹¹ Rohter, *supra* note 107, at A1, B10.

¹¹² *Id.*

¹¹³ *Id.* at A1, B10 (chart accompanying article).

killer, Michael Griffin, they were not so quick to denounce wholeheartedly the slaying. The national director of Rescue America, the group that organized the protest outside Dr. Gunn's clinic, said, "While Gunn's death is unfortunate, it's also true that quite a number of babies' lives will be saved."¹¹⁴ The regional director of the group, Reverend John Burt, told the press immediately after the murder, "[n]o babies will die for the next three or four weeks. It's something good coming out of something bad."¹¹⁵ Randall Terry concurred: "While we grieve for [Dr. Gunn] and for his widow and for his children, we must also grieve for the thousands of children that he has murdered."¹¹⁶ He further reminded a reporter that "David Gunn was a mass murderer. . . . What Michael [Griffin] did was absolutely not justifiable. However, what David Gunn has been doing for years is also absolutely not justifiable."¹¹⁷ Many anti-abortion groups say that harassment of doctors who perform abortion has become one of their most effective tactics. Randall Terry crowed, "We've found the weak link is the doctor. We're going to expose them. We're going to humiliate them."¹¹⁸

These attitudes seem to create an atmosphere of tolerance for, if not outright encouragement of, the violence. Bill Price, who is the head of Texans United for Life, admitted that "there has been a philosophical or even moral groundwork laid for assassinating abortionists by certain people in the pro-life movement, and I think they bear some of the blame."¹¹⁹ While the blocking of clinics itself may be civil disobedience that rises to the level of symbolic expression worthy of heightened protection, it leads to violence and disruption that is inherently inapposite to the First Amendment. This is not the kind of civil disobedience that Americans have come to accept as holding a legitimate place in their spectrum of political expression.

¹¹⁴ *Id.* at A1, B1.

¹¹⁵ Keran Houppert, *John Burt's Holy War: One Minister's Dangerous Battle to Save the Unborn*, VILLAGE VOICE, Apr. 6, 1993, at 27, 28.

¹¹⁶ Barringer, *supra* note 110, at A1, A17.

¹¹⁷ *All Things Considered: Randall Terry Labels Slain Doctor "Mass Murderer"* (National Public Radio broadcast, Mar. 11, 1993).

¹¹⁸ Rohter, *supra* note 107, at A1, B10.

¹¹⁹ Barringer, *supra* note 110, at A1, A17.

B. *Plaintiffs' Interests*

1. *Port Authority v. WHAM*¹²⁰

Two hundred activists sitting down in front of the Holland Tunnel created a traffic jam, frustrated pedestrians and forced the city to pay its police force overtime to clear the street. This action was annoying and probably not beneficial to the activists' cause.¹²¹ That was not enough, however, to meet the standards for the issuance of an injunction. First, in this case there was a perfectly adequate remedy at law: the harm alleged was not irreparable; there was no threat of repeated violation; and the nature of the threatened interest and extent of the threatened injury were not such that damages would be inadequate compensation. Moreover, although the movant in *Port Authority v. WHAM* showed that some injury was imminent, that injury did not rise to such a level that a legal remedy would be inadequate. Furthermore, movant's allegations that did rise to such a level did not reach the requisite level of imminence and probability. Movant failed, therefore, to make both showings required for the issuance of an injunction and, accordingly, the court erred in issuing one.

a. *Inadequate Remedy at Law*

In moving to enjoin the Holland Tunnel action, plaintiff first sought to show that the planned civil disobedience would cause irreparable injury. In its complaint, the plaintiff, Port Authority, alleged three kinds of "irreparable injury:" traffic

¹²⁰ No. 42950/92 (1st Dep't July 1, 1992) (order granting preliminary injunction).

¹²¹ In the aftermath of the Holland Tunnel action, there was some press and public reaction to the protest suggesting that although people sympathized with the cause, they did not necessarily approve of the tactics. See, e.g., Catherine S. Manegold, *Abortion-Rights Backers Protest at Holland Tunnel*, N.Y. TIMES, July 3, 1992, at B3:

Most of the several hundred onlookers said they essentially supported the protesters' cause. But some were less than charitable about the tactics. "I live in Woodbridge, N.J., and I want to go home," said a construction worker. "This place is no good for this sort of thing. I've been wanting to get home since 3 o'clock." When asked about the abortion rights issue, he waved his hand dismissively.

jams, environmental pollution and interference with emergency vehicles. Affidavits attached to the Port Authority's complaint alleged that the planned action to blockade the Holland Tunnel would "impede the normal and reasonable flow of traffic, block vehicular traffic,"¹²² and "cause severe and extreme congestion in the roadways of the Holland Tunnel and undoubtedly the surrounding New York City Streets."¹²³ Moreover,

vehicular traffic at the Holland Tunnel on [July 2] will be heavy with people beginning a long holiday weekend and others using the tunnel to attend, among other things, the fireworks display in Manhattan on the East River. . . . Generally, any delays in traffic flow increase tension on the part of drivers, and if the planned act to close the Holland Tunnel were permitted, an increase in confrontations between drivers, vehicles, and protestors could very well ensue, causing injuries.¹²⁴

In addition, the New York Post ran a brief article warning motorists about possible congestion over July 4th weekend.¹²⁵ The article, entitled *Drivers Beware: Nightmare on Canal St.*, warned, "[m]otorists trying to make an early getaway on the Fourth of July weekend can expect a traffic nightmare because protestors plan to blockade the Holland Tunnel while the Brooklyn Bridge is shut for a fireworks display."¹²⁶

There is no question that the proposed civil disobedience would cause inconvenience and annoyance. The blockade would no doubt cause problems for the police, city residents and travellers, creating a generally unpleasant beginning for the long July 4th weekend. However, a showing of inconvenience—even great inconvenience—did not justify the use of the powerful tool of equity. The legal remedy in this case was adequate: police would arrest those blockading the Tunnel and clear the streets as quickly as possible. Traffic would then resume its normal flow (if there is such a thing as a normal traffic flow in New York City) and people would get themselves out of New York as planned, even if a little later than expected. That is not irreparable harm. If traffic jams and commuters desperate

¹²² Affidavit of Edward M. Conover at ¶¶ 10-11, *Port Authority* (No. 42950/92).

¹²³ Affidavit of Benjamin Smith at ¶ 3, *Port Authority* (No. 42950/92).

¹²⁴ Affidavit of Edward M. Conover at ¶¶ 10-11, *Port Authority* (No. 42950/92).

¹²⁵ Don Broderick, *Drivers Beware: Nightmare on Canal St.*, N.Y. POST, June 19, 1992, at 8.

¹²⁶ *Id.*

to get out of New York were a sufficient showing of "irreparable harm," courts would issue injunctions every rush hour and holiday weekend. On the weekend in question, for example, the organizers of the fireworks display who arranged to have the Brooklyn Bridge shut down should have been enjoined from putting on the show. This first allegation thus did not meet the heavy burden of showing irreparable harm.

The Port Authority's second and third allegations arguably did meet the requirement that the contested activity threatened to cause irreparable harm. Movants alleged that "resultant gridlock on the streets outside the Tunnel would increase the amount of auto emissions, including carbon monoxide, spewed into the air, increasing the risk of illness to individuals with respiratory problems in the area."¹²⁷ They further alleged that "there is a serious risk that the planned obstruction of traffic at the Holland Tunnel or other Port Authority facilities will endanger public safety by slowing the progress of emergency vehicles, including ambulances, fire fighting equipment and police vehicles."¹²⁸ A person who contracted lung cancer or whose asthma is exacerbated as a result of increased pollution generated by excess traffic, created, in turn, by the blockade of the Holland Tunnel, has been irreparably harmed. Similarly, a person delayed in arriving at a hospital because the ambulance she was riding in was stalled in traffic caused by the Holland Tunnel blockade may well have been irreparably injured. Thus, on their face, these allegations met the required showing of irreparable harm.

In addition to showing the irreparable harm the contested behavior might cause, movant could have alleged that the danger of recurring injury would render inadequate an award

¹²⁷ Affidavit of Benjamin Smith, at ¶ 5, *Port Authority* (No. 42950/92); see also Affidavit of Edward M. Conover at ¶¶ 7-8, 12, *Port Authority* (No. 42950/92):

Interference with traffic flows into and out of the tunnel . . . place the Public at serious risk. Emergency Response teams would have serious problems attempting to get to individuals in need of assistance anywhere in the vicinity of the tunnel because of gridlock. Further, vehicles and individuals inside the tunnel itself and in need of assistance would also be severely affected. . . . [G]ridlock on the streets surrounding the entrances and exits at the Holland Tunnel would increase the amount of auto emissions including carbon monoxide, spewed into the air, increasing the risk of illness to those with respiratory problems in the area.

¹²⁸ Plaintiffs Complaint at ¶ 6, *Port Authority* (No. 42950/92).

of damages. Courts frequently use the injunction as a means of deterring future anti-social behavior by defendants. Thus, a showing that such behavior was likely to recur absent the equitable order would have justified its issuance. Plaintiff Port Authority failed to allege such a danger, however, because no such threat could be inferred from the planned civil disobedience. It was clear from the flyers and phone messages advertising the Holland Tunnel action that it was a one-time event.¹²⁹ Whatever harm Port Authority would suffer from the planned civil disobedience would be confined to the one action; there was no threat that "the total accrued loss as of Tuesday [would] be greater than it [was] on Monday."¹³⁰ The group that planned the blockade was an "ad-hoc coalition," organized specifically for this one demonstration. Therefore, the risk that the defendant civil disobedients would ignore the law repeatedly and force plaintiffs to fight multiple legal battles in order to be compensated was minimal. The police would drag the protesters away and the city would resume its normality—there would be no on-going or recurring injury. Thus, the use of an injunction as a deterrent for future, recurring harm was unnecessary.

Finally, movant sought to show that the interests at stake were so important and the extent of the injury threatened so great that a legal remedy would be inadequate. Clearly, the Port Authority's first allegation did not rise to the level of significance envisioned by the court when granting injunctions based on the importance of the interest. The interest in keeping Port Authority's facilities free of traffic jams cannot be analogous to the interest in protecting against "school segregation, prison and hospital mistreatment, and ecological injury."¹³¹ Those are interests whose loss is irreparable—a child denied an education; a prisoner beaten and badly fed; a family exposed to contaminated air and water. Society does not have the same interest in preventing a bottle-neck in Lower Manhattan as in providing decent schooling, habitable prisons and clean air and water. The nature of the interest in Port

¹²⁹ See, e.g., Affidavit of Peter Thomas Caram at ¶¶ 6, 7, 8, Exhibit A, *Port Authority* (No. 42950/92).

¹³⁰ Rendleman, *supra* note 29, at 349.

¹³¹ LOUISELL & HAZARD, *supra* note 85, at 109.

Authority's first allegation thus did not rise to the requisite level of significance to justify an injunction.

Moreover, the arrest of two hundred protestors in a matter of one or two hours is not analogous to untangling complex systems of segregation, environmental pollution or administrative bureaucracy. There was no danger that people other than those arrested at the Holland Tunnel would seek to tie up traffic, contrasted with the danger that people other than those named in desegregation law suits would seek to block desegregation efforts. Thus the scope of the injury the Port Authority described in its first allegation would not have been unmanageable through civil litigation alone. Finally, damages would be impossible to compute because the injury itself was mere inconvenience. If motorists or the Port Authority could be compensated for time spent tied up in traffic, the quality of New York City life would be different indeed. This was not what the courts envisioned when reasoning that an injunction was appropriate due to the speculative or inadequate nature of a damage award. The first allegation, therefore, did not show that the nature of the interest or extent of injury was such that no legal remedy would be adequate.

The second and third allegations—the risk of environmental pollution and stalling of emergency vehicles—arguably did approach the level of significance and extent of loss envisioned by the courts in these cases. The interests in keeping the environment clean and in facilitating transport to hospitals are analogous to the interest in desegregated schooling and ecological safety. These are interests the Port Authority had the right to insist on allowing people to enjoy in fact, interests too important “to sanction continued injury by merely imposing money damages.”¹³² And, while the scope of the problem—the one-time blockade of the Holland Tunnel—was not as daunting as an entire segregated school system, damages to compensate for loss of health or life due to the increased pollution or the stalling of emergency vehicles would be difficult to compute. Any damage award would necessarily be speculative and would risk being inadequate. An argument could be made, therefore, that the nature of the interests and extent of the injuries contained in allegations two and three rose to the level necessary

¹³² Rendleman, *supra* note 29, at 352.

to show that a legal remedy would be inadequate.

b. *Imminence and Probability of Injury*

It is well settled that a showing of the mere possibility that the threatened harm might occur is not enough to enjoin the contested behavior.¹³³ Here, there was no showing of a "real danger that the act complained of will actually take place,"¹³⁴ but rather an allegation of remote and possible harm. In this sense, *Port Authority v. WHAM*¹³⁵ is analogous to *New York v. Nuclear Regulatory Commission*,¹³⁶ in which the court refused to grant an injunction based on the remoteness of the threatened harm.¹³⁷ Accordingly, an injunction should not have issued against the Holland Tunnel action.

Only two of plaintiffs' allegations rose to the requisite level of irreparable injury, and plaintiff failed to demonstrate any real danger that these alleged injuries would come to pass. First, plaintiffs alleged that the increased pollution caused by the traffic jam would raise the chances that bystanders, pedestrians and area residents would develop respiratory and lung problems. This allegation involves a very complex chain of causation from the planned civil disobedience to the development of lung problems. As such, it hardly rose to the level of imminence and probability envisioned by the Second Circuit in *NRC*.

Port Authority's second allegation, that the proposed civil disobedience risked slowing down emergency vehicles, also fell short of the Second Circuit's probability standard. As planned, the action was to block only the New Jersey-bound side of the Tunnel, leaving the east-bound side open for cars in the Tunnel to use as an exit. Moreover, ambulances and emergency vehicles rarely use the tunnel; it is an interstate highway and generally ambulances do not travel out of state.¹³⁸ In order

¹³³ See *supra* notes 92-105 and accompanying text.

¹³⁴ *New York State Nat'l Org. for Women v. Terry*, 704 F. Supp. 1247, 1262 (S.D.N.Y. 1989), *aff'd*, 886 F.2d 1339 (2d Cir. 1989).

¹³⁵ No. 42950/92 (1st Dep't July 2, 1992) (ordering a preliminary injunction).

¹³⁶ 550 F.2d 745 (2d Cir. 1977).

¹³⁷ *Id.* at 755-56.

¹³⁸ According to the Health and Hospitals Corporation, which is in charge of all New York City ambulances, public ambulances do not use the Holland Tunnel. In

for the alleged irreparable harm to have occurred, the following would have had to transpire: (1) the blockade went forward and actually succeeded in blocking one lane of the Holland Tunnel; (2) an emergency vehicle was in the Tunnel when the blockade occurred; (3) the emergency vehicle was unable to turn around in the free lane and get out of the New Jersey side of the Tunnel; and (4) the extra number of police—who generally outnumber protestors by two to one—were unable to clear the opening of the Tunnel in time for the emergency vehicle to get out. Because of the infrequency of use of the Tunnel by emergency vehicles, the ample warning, as exhibited by the *New York Post* story,¹³⁹ of the potential traffic tie-ups making such use even more unlikely and the efficiency of the police in clearing away civil disobedients, it was very unlikely that all of those events would come to pass. This allegation, therefore, while possible, did not rise to the probability of occurrence required by federal courts for the issuance of an injunction.

Because of the drastic nature of the injunctive remedy, courts must consider both the required showings—that a legal remedy is inadequate and that the threatened harm is imminent and probable—in determining whether an injunction should issue. Absence of one or the other renders issuance of the injunction inappropriate. Movant Port Authority's first allegation arguably rose to the level of imminence and probability of occurrence required for the issuance of an injunction. It was fairly certain and probable that a traffic jam would result from the planned civil disobedience. However, that allegation of harm did not rise to the requisite level of significance

response to the question, "Do ambulances use the Holland Tunnel?," Specialist Ida Locascio, in HHC's Emergency Medical Services Department, replied, "None of ours do. We operate in the five boroughs. We don't go out of state. New Jersey has its own ambulances." Telephone Interview with Ida Locascio (Dec. 1, 1992). Moreover, there is little evidence that many private ambulances use the Holland Tunnel. Any ambulance or emergency vehicle that uses an interstate highway would do so only with a police escort. While the Port Authority does not keep statistics on the kinds of vehicles that use their facilities, the New York Police Department would have records of all significant activity of N.Y.P.D. cars and personnel while on the job. Joanne Scutero, the reference librarian at the Municipal Reference Library, which maintains all N.Y.P.D. statistics, indicated that there were no statistics whatsoever on use of the Holland Tunnel by emergency vehicles, noting that "obviously it doesn't happen often enough that anyone would bother to keep statistics on it." Telephone Interview with Joanne Scutero (Dec. 1, 1992).

¹³⁹ See *supra* note 125.

to render a legal remedy inadequate. The other two allegations, which arguably did show the risk of irreparable harm for which there was no adequate legal remedy, failed to rise to the level of probability required. Therefore, the court in *Port Authority v. WHAM* should have followed the Second Circuit¹⁴⁰ and, in balancing the equities, found that the scales tipped in favor of the right to political protest. Accordingly, an injunction should not have issued.

2. Operation Rescue

Two hundred activists sitting down in front of an urban health clinic created traffic jams, frustrated pedestrians and forced the city to pay its police force overtime to clear the street and sidewalk. In addition, however, the protesters threatened and intimidated patients and disrupted doctors and nurses. One of Operation Rescue's lawyers acknowledged that "[h]arassment" is an appropriate term even for those, like myself, who sympathize with the tactics of these protests."¹⁴¹ On various occasions, movants have successfully shown that the Operation Rescue blockades have created a risk of harm for which there was no adequate legal remedy, and that the threatened injury was imminent and probable, not merely possible and remote.¹⁴² Courts, therefore, have properly issued injunctions against Operation Rescue's clinic blockades.

a. *Inadequate Remedy at Law*

The first standard that the plaintiffs had to meet was that there would be no adequate remedy at law for the injuries that the contested behavior threatened to cause. Movants against Operation Rescue have shown that the injury threatened by the blockades would be irreparable; that Operation Rescue's behavior was likely to recur; and that the nature of the interest was of such importance that damages would be an insufficient remedy. Thus, injunctions have been necessary and ap-

¹⁴⁰ *NRC*, 550 F.2d at 745; *Jackson Dairy, Inc., v. H.P. Hood & Sons, Inc.*, 596 F.2d 70 (2d Cir. 1979); see *supra* notes 86-98 and accompanying text.

¹⁴¹ Ledewitz, *supra* note 8, at 89.

¹⁴² See cases cited *supra* note 5.

appropriate to prevent the harm.

In the context of the clinic blockades, allegations of irreparable harm have included both physical and emotional injury. The Ninth Circuit held that injunctions were properly issued against Operation Rescue's clinic blockades to protect "the ability of the clinic to provide medical services free from interference that may endanger the health and safety of its patients."¹⁴³ More specifically, a district court in Virginia recognized the risk that certain medical procedures that are not completed in a timely manner may result in "infection, bleeding and other potentially serious complications."¹⁴⁴ Finally, a Pennsylvania district court found the risk of irreparable harm to exist based on the emotional suffering patients may experience as a result of the blockades:

Women entering and leaving clinics have been verbally harassed; the effect of such harassment has been to increase the level of anxiety a woman feels and to exacerbate any emotional problems associated with the abortion decision and procedure which in turn may have an adverse effect on the medical procedure itself and on the patient's psychological well-being thereafter.¹⁴⁵

In addition, anecdotal evidence shows that the clinic blockades have lead to harassment and violence which, in turn, has forced doctors and health care workers to stop performing abortions. Following the slaying of Dr. Gunn in Pensacola, Florida, two doctors at the only abortion clinic in Brevard County quit.¹⁴⁶ Dr. Curtis Boyd, a doctor who has performed abortions for twenty-five years all over the Southwest, expressed his concern that the blockades would discourage pro-

¹⁴³ *Portland Feminist Women's Health Ctr. v. Advocates for Life, Inc.*, 859 F.2d 681, 686 (9th Cir. 1988).

¹⁴⁴ *National Org. for Women v. Operation Rescue*, 726 F. Supp. 1483, 1489 (E.D. Va. 1989).

¹⁴⁵ *American College of Obstetricians & Gynecologists v. Thornburgh*, 613 F. Supp. 656, 666 (E.D. Pa. 1985), *aff'd*, 476 U.S. 747 (1986). In this case, action was brought by physicians, a physicians' professional organization, several clinical providers of first-trimester abortions and members of the clergy and an individual, challenging the constitutionality of Pennsylvania's Abortion Control Act. Considering the constitutionality of the same Act, the Supreme Court in *Casey v. Planned Parenthood*, 112 S. Ct. 2791 (1992), overruled *Thornburgh's* requirement that the state must have a compelling interest in order to regulate abortions in the first trimester. The language quoted, however, remains good law.

¹⁴⁶ Sara Rimer, *Abortion Foes in Boot Camp Mull Doctor's Killing*, N.Y. TIMES, Mar. 19, 1993, at A12.

viders from continuing to offer services: "I think many other health care providers [have concerns] also—not just physicians. I think both counselors, administrators, nurses, medical technicians have all been subject to this harassment, and objects of the violence at times."¹⁴⁷

These allegations of irreparable harm fall squarely within the spectrum of showings that courts have recognized as constituting irreparable injury. The allegations of physical and emotional injury are not analogous to the inconvenience suffered for the loss of a driver's license¹⁴⁸ or the loss of overtime,¹⁴⁹ for which the courts would not issue an injunction. Rather, the potential for physical injury and emotional suffering is analogous, at the very least, to the substantial business losses and possible bankruptcy threatened in *Doran v. Salem Inn*,¹⁵⁰ where the Supreme Court affirmed the issuance of an injunction. In the Operation Rescue cases, even if police could clear up the demonstration in a matter of hours, the irreparable harm to the women seeking medical care would have already occurred. Thus, the legal remedy would be inadequate to protect against the alleged harm.¹⁵¹

In addition to showing irreparable harm, movants could seek to show that defendants intended to continue inflicting the threatened injury and, therefore, that a legal remedy would be inadequate. One of the injunction's primary purposes is to act as a deterrent against future harm to plaintiffs by defendants. Movants against Operation Rescue have successfully shown that such a deterrent is necessary to prevent future attacks on clinics. Recently, in *New York State National Organization for Women v. Terry*, the court issued an injunc-

¹⁴⁷ *All Things Considered: Doctor Who Performed Abortions Stoically Continues Work* (National Public Radio, Mar. 11, 1993).

¹⁴⁸ See *supra* note 73 and accompanying text.

¹⁴⁹ See *supra* note 74 and accompanying text.

¹⁵⁰ 422 U.S. 922, 932 (1975) (finding that the threat of bankruptcy is the type of injury that sufficiently meets the standards for granting interim relief).

¹⁵¹ Courts have found that interference with the decision of whether to have an abortion constitutes irreparable harm. In *Kennan v. Warren*, 328 F. Supp. 525 (W.D. Wis. 1971), *aff'd without opinion*, 404 U.S. 1055 (1972), the Supreme Court affirmed a district court's holding that state interference with a doctor's right to perform an abortion and with a pregnant woman's right to decide whether to have an abortion risked allowing those rights to be lost irreparably. The court granted an injunction against such interference to protect those rights.

tion based in part on the fact that "defendants have repeatedly forcibly denied access to abortion facilities in the New York area, and they intend to continue to do so."¹⁵² Moreover, in affirming the district court, the Second Circuit explained that "defendants' stated intent to continue the blockades—withstanding the specter of serious legal and financial consequences—and to act in spite of the district court's orders show that the harm will be of a continuing nature absent an injunction."¹⁵³

Thus, unlike in *Exchange Bakery v. Rifkin*, where there was no threat that defendants would repeatedly cause injury to the plaintiffs,¹⁵⁴ in the Operation Rescue cases, the possibility that violations would recur and cause repeated injury is great. Arresting the particular group of people blockading the clinic on one given day would not prevent them, or others from Operation Rescue, from blockading the clinic the next day. Keeping in mind the role of an injunction as a deterrent, issuance in the case of Operation Rescue's clinic blockades was not only appropriate, but necessary to prevent protestors from continuing to violate the law.

Finally, movants have sought to show that the nature of the interest or the extent of the injury threatened were such that money damages would not compensate the injured parties. In the Operation Rescue cases, movants sought to protect the patients' access to health care. Such an interest is analogous to the rights of African-American children to attend desegregated schools, or the rights of citizens to live free of ecological disaster. Society's interest in safeguarding access to health care is comparable to its interest in safeguarding access to education and to a clean and safe environment. These are rights people should be able to enjoy in fact, not merely compensated later for their loss.

Moreover, the scope of the Operation Rescue blockades of clinics is such that civil litigation alone would not be sufficient to safeguard access to health care. A suit for damages against a few named leaders of a blockade would not protect the clinics

¹⁵² 704 F. Supp. 1247, 1260 (S.D.N.Y.), *aff'd*, 886 F.2d 1339 (2d Cir. 1989).

¹⁵³ New York State Nat'l Org. for Women v. Terry, 886 F.2d 1339, 1362 (2d Cir. 1989).

¹⁵⁴ 245 N.Y. 260 (1927) (refusing to grant injunction against striking workers); see *supra* notes 78-79 and accompanying text.

from those not named in the suit. The footsoldiers and faithful would be out in force, even as their leaders were jailed. Only an injunction would encompass everyone seeking to block the clinics. Finally, as the Second Circuit in *Terry* explained, "those women denied access cannot be compensated by money damages; injunctive relief alone can assure them the clinics' availability."¹⁵⁵ By showing the importance of their interest and extent of the threatened injury, movants successfully achieved the third means of showing that a legal remedy would be inadequate. On this basis, injunctions have been properly issued.

b. *Imminence and Probability of Injury*

In addition to showing that there was no adequate remedy at law for the threatened harm, movants successfully showed that this harm was not remote and merely possible. Rather, Operation Rescue's clinic blockades presented imminent and probable threats of irreparable harm. In *Terry*, the Second Circuit considered the harm that had resulted from Operation Rescue's blockades in the past, "including the medical risks and the denial of constitutionally guaranteed rights."¹⁵⁶ Based on those findings, the court concluded that the risk of irreparable harm from defendants' activities was "real and threatens to continue."¹⁵⁷ Like the Sixth Circuit in *Environmental Defense Fund*, the Second Circuit found sufficient probability of harm to exist, based on the continuing nature of the defendants' activities and resulting injury, to warrant the issuance of an injunction.

Moreover, in *Operation Rescue v. NOW*, the Fourth Circuit followed the Seventh Circuit's reasoning in *Scherr* by issuing an injunction based on the "immediate effects" of the defendants' activities.¹⁵⁸ A blockade that closed down the clinic would force patients "requiring the laminaria removal procedure or other vital medical services [to] either postpone the required treatment and assume the attendant risks or seek the

¹⁵⁵ *Terry*, 886 F.2d at 1362.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ 726 F. Supp. 1483 (E.D. Va. 1989)

services elsewhere."¹⁵⁹ Like the immediate environmental despoliation threatened by defendants' activities in *Scherr*, the irreparable harm to these patients would occur as soon as defendants began their blockade. Based on those findings of imminence, the court issued an injunction.

Rather than creating a possibility of harm—a standard rejected by the Second Circuit as insufficient for the granting of an injunction¹⁶⁰—the risk of irreparable harm in the Operation Rescue cases rose to the necessary probability to warrant such a remedy. That probability, coupled with the showing that legal remedies would be inadequate, tipped the scales in favor of protecting women from irreparable harm and against Operation Rescue's right to political protest. As the Second Circuit noted in *Terry*, "[i]nsofar as appellants' rights of free speech were exercised in close proximity to individual women entering or leaving the clinics so as to . . . assault or harass them, appellants' rights ended where those women's rights began."¹⁶¹ Accordingly, courts have concluded correctly that injunctive relief was appropriate against Operation Rescue's civil disobedience.

IV. GOVERNMENT INTERESTS AS A FINAL FACTOR IN THE INJUNCTION EQUATION

After courts consider the plaintiff's interest in having the behavior enjoined and the defendant's interest in going forward with the contested behavior, they have considered the interest of the public either in enjoining the contested activity, or in allowing it to take place.¹⁶² If the challenged conduct

¹⁵⁹ *Id.* at 1489.

¹⁶⁰ See *supra* notes 86-98 and accompanying text.

¹⁶¹ *Terry*, 886 F.2d at 1343. See also *Operation Rescue v. Women's Health Center*, 626 So. 2d 664 (Fla. 1993), cert. granted sub nom. *Madsen v. Women's Health Center*, 114 S. Ct. 907 (1994). Upholding an injunction, the Florida Supreme Court held that restrictions on certain activities against a clinic, patients and staff were content-neutral, narrowly tailored to serve a significant government interest, left open ample alternative channels of communication and not overbroad or unconstitutionally vague. The Supreme Court heard oral argument in this case on April 28, 1994.

¹⁶² 11 WRIGHT & MILLER, *supra* note 7, § 2942, at 376; see also WILLIAM Q. DE FUNIAK, HANDBOOK OF MODERN EQUITY § 18 (2d ed. 1956); Rendleman, *supra* note 29, at 347 ("If social and procedural policy support the decision to enjoin . . . equity's 'strong arm,' the injunction forbids the wrong instead of compensating for

seriously impinges on matters of public policy, then the court may decide to grant relief. If not, however, the court may decide to let the conduct go forward. When weighing the public and governmental interest, courts necessarily have to consider the actual rights at stake. In the cases under consideration, on one side of the scale was the importance of political expression, and, particularly, the importance of civil disobedience. In the WHAM case, the rights on the other side of the scale did not implicate government or public interest with sufficient weight to tip the balance in favor of an injunction. In the Operation Rescue cases, on the other hand, the rights asserted by the movants were of sufficient public and governmental interest to outweigh Operation Rescue's asserted interest, and courts have justifiably enjoined their behavior.

A. *The Rights at Stake*

Injunctions are essentially a remedy for behavior that has not occurred, but which threatens to cause harm to people or interests if it did occur. Although "[r]emedial doctrine does not concern itself with defining substantive interests but, instead, concerns itself with the proper method of vindicating interests that wrongdoers have injured,"¹⁶³ it is important to understand what substantive rights and interests are at stake. In both cases under consideration, the threatened substantive right was characterized by the plaintiffs as the right to travel. The Holland Tunnel protesters allegedly infringed on the right to travel of anyone wishing to go through the Tunnel, and of area residents to move freely. The Operation Rescue protesters allegedly infringed on the right of patients, their families, doctors and other workers to enter and exit health clinics freely and to seek and deliver medical care. Moreover, these protesters infringed on women's right to have an abortion.

At first glance, it would seem that the government had an equal interest in protecting the rights of both groups of plaintiffs against the contested civil disobedience. On closer examination, however, it becomes clear that the right to travel is more than constitutional protection for free movement of traffic

its occurrence.").

¹⁶³ Rendleman, *supra* note 29, at 346.

across state lines; it has become a catch-all protection for many rights, including, most recently, the right to have access to health care, free of obstruction. Thus, the interference with the "right to travel" in the Operation Rescue cases—meaning, really, the interference with people's access to health care—implicated the constitutional protection more significantly than WHAM's blockade of the Holland Tunnel. In addition, Operation Rescue's blockades interfered with women's right to have abortions. Therefore, the government had a strong interest in enjoining this civil disobedience, while such an interest did not exist in the Holland Tunnel case.

1. The Right to Travel

The right to travel has been part of the bundle of rights Americans have taken for granted since the beginning of our history as a country. The Articles of Confederation provided that "The people of each State shall have free ingress and regress to and from any other State."¹⁶⁴ The right appears to find its constitutional roots in three places: the Commerce Clause,¹⁶⁵ the Privileges and Immunities Clause of Article Four¹⁶⁶ and the Privileges and Immunities Clause of the Fourteenth Amendment,¹⁶⁷ though it does not appear explicitly anywhere in the Constitution. The Supreme Court has suggested that the omission can be explained by understanding that

a right so elementary was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created. . . . The constitutional right to travel from one State to another, and necessarily to use the highways and other instrumentalities of

¹⁶⁴ ARTICLES OF CONFEDERATION art. IV.

¹⁶⁵ U.S. CONST. art. I, § 8: "The Congress shall have Power . . . to regulate Commerce . . . among the several States . . ." See also *Edwards v. California*, 314 U.S. 160, 177 (1941) (holding that a California statute prohibiting the "bringing" or transportation of indigent persons into the state was an unconstitutional barrier to interstate commerce); *Gloucester Ferry Co. v. Commonwealth of Pennsylvania*, 114 U.S. 196, 203-04 (1885) (finding that the transportation of passengers upon ferry boats between states to be a form of interstate commerce).

¹⁶⁶ U.S. CONST. art. IV, § 2 ("The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.").

¹⁶⁷ U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.").

interstate commerce in doing so, occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized. . . . All have agreed that the right exists. . . . We reaffirm it now.¹⁶⁸

There is no question that the right to travel is a well-established and important one which the government must and should seek to protect.

In addition to its long and well-accepted presence as an implicit guarantee to Americans, this right is important because it is one of the few rights that can actually be violated by private actors. Although cases that have interpreted the Constitution to guarantee the right have involved "governmental interference with the right of free interstate travel, their reasoning fully supports the conclusion that the constitutional right of interstate travel is a right secured against interference from any source whatever, whether government or private."¹⁶⁹ State action, therefore, is not required to invoke governmental protection of citizens whose right to travel has been violated.¹⁷⁰

Finally, courts have interpreted the right to travel to protect a range of people from a range of regulations. Courts have invalidated a state law that impeded the free interstate passage of the indigent,¹⁷¹ and a tax on every person leaving the State by railroad or stagecoach.¹⁷² In *Shapiro v. Thompson*,

¹⁶⁸ *United States v. Guest*, 383 U.S. 745, 757-59 (1966) (holding that the right to travel protected "Negroes" from a conspiracy to prevent them from using interstate commerce facilities and instrumentalities.); *see also* Chief Justice Taney in *Smith v. Turner*, *Norris v. City of Boston*, ("The Passenger Cases"), 48 U.S. 283 (1849) ("For all the great purposes for which the Federal government was formed, we are one people, with one common country. We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own states."); *Twining v. State of New Jersey*, 211 U.S. 78, 97 (1908) ("right to pass freely from State to State [is] among the rights and privileges of national citizenship . . .").

¹⁶⁹ *Guest*, 383 U.S. at 759 n.17.

¹⁷⁰ *See Griffin v. Breckenridge*, 403 U.S. 88, 105 (1971). This case involved an action to recover damages from a conspiracy to deprive plaintiffs of their civil rights by stopping their cars on public highways and physically attacking them. The Court held that the "right to interstate travel is constitutionally protected, does not necessarily rest on the Fourteenth Amendment, and is assertable against private as well as governmental interference." *Id.*

¹⁷¹ *Edwards v. California*, 314 U.S. 160, 177 (1941).

¹⁷² *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35, 48-49 (1867).

the Supreme Court held unconstitutional a District of Columbia provision that denied welfare assistance to state residents who had not resided within its jurisdiction for at least a year before applying for the benefits.¹⁷³ Justice Brennan, writing for the majority, explained that "[t]his Court long ago recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement."¹⁷⁴ Courts have read the right as a broad one, encompassing more than simply the right to physically pass from state to state. The right to travel has evolved to encompass the rights of citizens to choose where and how to live and travel based on their needs and desires, not their residency.

2. The Right to an Abortion

The right to obtain an abortion is a newer one in the nation's history, but one that nevertheless deserves government protection. In the 1973 decision *Roe v. Wade*,¹⁷⁵ the Supreme Court extended a right of privacy that had been established by *Griswold v. Connecticut*¹⁷⁶ and *Eisenstadt v. Baird*¹⁷⁷ to include a woman's right to terminate her pregnancy, a right that the Court recognized as fundamental.¹⁷⁸ As such, states could regulate abortions during the first trimester of pregnancy only by showing a compelling state inter-

¹⁷³ 394 U.S. 618 (1969).

¹⁷⁴ *Id.* at 629.

¹⁷⁵ 410 U.S. 113 (1973).

¹⁷⁶ 381 U.S. 479 (1965). *Griswold* involved a Connecticut law that forbade the use of contraceptives. The defendants prosecuted under the law were the director of a local Planned Parenthood and its medical director. Both were charged with having counselled married people in the use of contraceptives. The Court, in multiple opinions, held that the Constitution guaranteed the right to marital privacy, and that the Connecticut law impermissibly infringed on that right. Seven years later, *Eisenstadt v. Baird*, 405 U.S. 438 (1972), extended that right to privacy to single people, holding that a Massachusetts statute that permitted distribution of contraceptives only to married people discriminated against the unmarried and, thus, was unconstitutional.

¹⁷⁷ 405 U.S. 438 (1972).

¹⁷⁸ 410 U.S. at 113 (holding unconstitutional a Texas statute that all but criminalized abortion).

est.¹⁷⁹ During the second trimester, the state could regulate abortions only to protect the health of the pregnant woman.¹⁸⁰ And during the third trimester, after the fetus had become viable, the state could regulate only to protect the health of the pregnant woman or the fetus.¹⁸¹ All the way through the pregnancy, the choice to have an abortion remained with the woman and could be regulated only for these specific reasons.

Since 1973, the Supreme Court has narrowed its understanding of the right to an abortion. Nevertheless, despite restrictions on funding, increased requirements for parental consent and when, where and how abortions can be performed,¹⁸² current law maintains the central holding of *Roe*. *Casey v. Planned Parenthood of S.E. Pa.* reaffirmed a woman's right to choose an abortion before fetal viability, holding that government can regulate abortion at any time during a woman's pregnancy as long as the regulation does not "unduly burden" the woman's right to terminate the pregnancy.¹⁸³

¹⁷⁹ *Id.* at 164.

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 164-65.

¹⁸² The fundamental premise of *Roe* was reaffirmed in *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416 (1983), where the Court went out of its way to reject contentions that it had erred in *Roe*, asserting that "the right to privacy, grounded in the concept of personal liberty guaranteed by the Constitution, encompasses a woman's right to decide whether to terminate her pregnancy." *Id.* at 420. The Court in *Bellotti v. Baird*, 443 U.S. 622 (1979), however, held that a statute requiring parental consent for a minor to obtain an abortion did not unconstitutionally interfere with that minor's right to have an abortion. Moreover, in *Maher v. Roe*, 432 U.S. 464 (1977), the Court held that government refusal to fund medically non-lethal abortions did not impermissibly undermine a woman's right to an abortion. In *Harris v. McRae*, 448 U.S. 297 (1980), the Court held that refusal to fund even medically necessary abortions was not unconstitutional. Finally, in *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 517-21 (1989), a plurality of the Court rejected the trimester system set up in *Roe*, while refusing to overrule the prior decision. According to *Webster*, the fundamental right to an abortion remains up until the fetus becomes viable, at which point, if a state can show a rational basis for its regulation, such regulation is not unconstitutional. *Id.*

¹⁸³ 112 S. Ct. 2791 (1992). What "undue burden" means remains to be tested. In *Casey*, the Court held that only one of the requirements of the Pennsylvania Abortion Control Act—the spousal notification provision—created an undue burden on a woman's right to an abortion, and was thus unconstitutional. *Id.* at 2826-29. The informed consent requirements, the 24 hour waiting period and parental consent provisions, and the reporting and recordkeeping requirements did not impose an undue burden. And the medical emergency definition, under which compliance with all the other requirements would be waived, was deemed sufficiently broad

The central premise of *Roe* thus remains: a woman has a fundamental right to terminate her pregnancy. Any government restriction that interferes with the right to such a degree that it cannot be exercised creates an undue burden. Logically, therefore, the government has a strong interest in protecting against burdens on a woman's right to choose imposed by private groups such as Operation Rescue.

B. Port Authority v. WHAM

Does tying up traffic on a major interstate highway implicate the constitutional right to travel? At first glance, it would seem to do so: the blockade of the Holland Tunnel would have limited if not entirely abrogated people's freedom to pass from New York to New Jersey. Thus their right to interstate travel was violated. However, the Supreme Court's holdings in *Shapiro v. Thompson*¹⁸⁴ and *United States v. Guest*¹⁸⁵ read the right to travel as encompassing more than simply the right to pass physically from state to state. The Port Authority's allegations did not rise to the level of significance envisioned by the Supreme Court in these cases. Thus, the government interest in protecting the right to pass through the Holland Tunnel was not compelling enough to enjoin the planned civil disobedience.

Plaintiffs in *Port Authority v. WHAM* did not explicitly plead that the right to travel was at stake. However, an affidavit attached to the complaint noted that "the Supreme Court has . . . indicated that obstructive conduct which is unreasonable [and] interferes with ingress and egress to a public place is not entitled to Constitutional protection."¹⁸⁶ Moreover, the memorandum of law in support of plaintiff's order to show cause claimed that the proposed action "will interfere with interstate commerce."¹⁸⁷ These allegations implied that the proposed blockade of the Holland Tunnel impermissibly would interfere with the constitutional right to travel, thereby implying a strong governmental interest in enjoining the action.

that it did not impose an undue burden. *Id.* at 2822.

¹⁸⁴ 394 U.S. 618 (1969).

¹⁸⁵ 383 U.S. 745 (1966).

¹⁸⁶ Affidavit of Keith Harris at 4, *Port Authority* (No. 42950/92).

¹⁸⁷ Memorandum of Law at 2, *Port Authority* (No. 42950/92).

However, it is a stretch at best to suggest that an action that threatened to tie up traffic for an hour was analogous to a conspiracy physically to prevent African-Americans from using highways,¹⁸⁸ or to a welfare plan that excluded otherwise eligible beneficiaries based solely on where they live.¹⁸⁹ To conclude otherwise would be to reduce the constitutional right to travel to little more than a mandate for traffic control. Constitutional rights cannot be rendered so insignificant. Given the absence of a strong governmental interest in protecting the right to travel in the Holland Tunnel action, the court should have recognized the overriding importance of the defendants' interest in political expression. An injunction, therefore, should not have been issued.

C. *Operation Rescue*

1. Right to Travel

In the context of Operation Rescue blockades, on the other hand, the right to travel was directly and explicitly implicated. The Supreme Court has held that the right to travel "must protect persons who enter [a state] seeking the medical services that are available there."¹⁹⁰ In the Operation Rescue cases, the planned civil disobedience directly threatened the rights of people entering a state to seek medical services. Thus, the government interest in protecting that right must outweigh Operation Rescue's asserted right to political protest, and injunctions have properly issued.

The right to travel across state lines to receive medical care without interference¹⁹¹ is analogous to the rights of Afri-

¹⁸⁸ *Guest*, 383 U.S. at 748 n.1. In that case, six named defendants conspired to "injure, oppress, threaten, and intimidate Negro citizens" in their "free exercise and enjoyment" of "the right to travel freely to and from the State of Georgia and to use highway facilities and other instrumentalities of interstate commerce within the state of Georgia." *Id.* at 757. Part of the conspiracy included shooting, beating, and killing African-Americans. *Id.* at 748 n.1.

¹⁸⁹ *Shapiro v. Thompson*, 394 U.S. 618 (1969).

¹⁹⁰ *Doe v. Bolton*, 410 U.S. 179, 201 (1973). This case, decided at the same time as *Roe v. Wade*, held unconstitutional a statute that imposed severe restrictions on the availability of abortions.

¹⁹¹ Implicit in the right to interstate travel is the right to move freely within a state. Residents who live in New York and who seek access to health care in New

can-Americans to travel without fear for their lives on the interstate highways,¹⁹² and to the rights of people who have lived in a state for under a year to collect welfare benefits if they are otherwise eligible.¹⁹³ In *Doe v. Bolton*,¹⁹⁴ the Supreme Court recognized that access to health care falls under what Justice Brennan in *Shapiro* called "our constitutional concepts of personal liberty" that require "that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement."¹⁹⁵ Consistent with this holding, district courts have found Operation Rescue's clinic blockades to be in violation of the right to travel, noting that "the undisputed facts establish that defendants' activities obstruct access to medical facilities to women who have traveled from out-of-state."¹⁹⁶ Moreover, a circuit court considered findings that

[w]omen referred by out-of-state clinics often travel to New York City seeking its superior medical services. Patients residing in other states . . . sometimes must undergo a two-day procedure for second trimester abortions. . . . "[U]nexpected closure of [a clinic] would be particularly acute for our out-of-state clients, whose travel, work, childcare and financial problems would be greater because they would be more difficult to resolve when some distance from home."¹⁹⁷

The court concluded, based on these findings, that the government interest in protecting these clients' right to travel was very strong and that injunctions were appropriate to safeguard those rights.

York should also be protected from the interference caused by the Operation Rescue blockades.

¹⁹² *Guest*, 383 U.S. at 745.

¹⁹³ *Shapiro*, 394 U.S. at 618.

¹⁹⁴ 410 U.S. at 179.

¹⁹⁵ *Shapiro*, 394 U.S. at 629.

¹⁹⁶ *New York State Nat'l Org. for Women v. Terry*, 704 F. Supp. 1247, 1259-60 (S.D.N.Y. 1989), *aff'd*, 886 F.2d 1339 (2d Cir. 1989).

¹⁹⁷ *New York State Nat'l Org. for Women v. Terry*, 886 F.2d 1339, 1360 (2d Cir. 1989) (quoting the testimony of a counselor at one of the clinics).

2. Right to an Abortion

A second substantive right was implicated in the clinic blockades—the right to obtain an abortion. In *Casey v. Planned Parenthood* the Supreme Court affirmed that a woman has the right to terminate her pregnancy before viability.¹⁹⁸ Any state regulation that “has the purpose or effect of placing a substantial obstacle in the path” of a woman seeking to exercise her fundamental right constitutes an undue burden and is unconstitutional.¹⁹⁹ Thus, the government has a strong interest in protecting her from such interference by private actors such as Operation Rescue, in order to safeguard a constitutional right.

Accordingly, the question then becomes: did Operation Rescue’s blockades of clinic doors amount to an undue burden? The *Casey* Court recognized that requiring a woman to notify her spouse that she was seeking an abortion constituted an undue burden.²⁰⁰ The Court also has invalidated as unduly burdensome requirements that both parents be notified of a minor’s intent to have an abortion if there was no opportunity for a judicial bypass of such notice.²⁰¹ Without a doubt, physically denying a woman access to the facility that performs abortions unduly burdens her right to have an abortion. Operation Rescue’s blockades thus clearly infringe on a woman’s constitutional right to terminate her pregnancy.²⁰²

¹⁹⁸ 112 S. Ct. 2791 (1992).

¹⁹⁹ *Id.* at 2820.

²⁰⁰ *Id.* at 2829; see also *Planned Parenthood v. Danforth*, 428 U.S. 52, 69 (1976) (invalidating a spousal consent requirement).

²⁰¹ *Hodgson v. Minnesota*, 497 U.S. 417 (1990).

²⁰² The Supreme Court recently held that the “Anti-Klan Act,” 42 U.S.C. § 1985(3) (1988), which prohibits conspiracies to deprive groups of people of their civil rights, is not applicable to Operation Rescue. *Bray v. Alexandria Women’s Health Clinic*, 61 U.S.L.W. 4080 (Scalia, Circuit Justice, 1993). The Court reasoned that by the particular language of that statute, women seeking abortions do not comprise a class, and thus Operation Rescue did not act with animus against that class. *Id.* However, both the President and members of Congress have expressed their determination to craft legislation offering women and clinics protection from Operation Rescue’s blockades. On the day of Dr. David Gunn’s shooting, the White House released a statement that “[t]he violence against clinics must stop. We cannot allow violent vigilantes to restrict the rights of American women. No person seeking medical care and no physician providing that care should have to endure harassment, threats and intimidation.” *All Things Considered: Abortion Rights Advocates Call for Federal Protection* (National Public Radio, Mar. 11, 1993).

Operation Rescue's supporters concede that their goal "is to shame or disturb women seeking abortions so that they change their minds,"²⁰³ and to "make the exercise of that right [to obtain an abortion] unpleasant."²⁰⁴ According to one of Operation Rescue's leading activists, John Cavanaugh O'Keefe, "there is no such thing as a disproportionate response to abortion short of trying to stop it with nuclear weapons."²⁰⁵ Operation Rescue succeeded in interfering with women's access to abortion by impeding access to clinics, intimidating patients, frightening prospective patients and preventing clinic personnel—nurses, doctors and administrators—from doing their jobs. In order to safeguard women's right to obtain abortions, then, as long as the central holdings of *Roe v. Wade*²⁰⁶ and *Casey v. Planned Parenthood*²⁰⁷ remain intact, the government had a strong interest in enjoining Operation Rescue's clinic blockades.²⁰⁸

In addition, on March 23, 1993, Senator Edward Kennedy and twenty cosponsors introduced the Freedom of Access to Clinic Entrances Act of 1993, which would effectively reverse *Bray* by giving women denied access to abortion services a civil cause of action for injunction and damages. S. 636, 103d Cong., 1st Sess. § 3(E)(1)(A) (1993). It also allows a court to fine offenders up to \$15,000 for the first violation and \$25,000 for any subsequent violation. *Id.* § 3(B). Resting on Congress' power under the Commerce Clause and the Fourteenth Amendment, the Bill aims "to protect and promote the public health and safety by prohibiting the use of force, threat of force or physical obstruction to injure, intimidate or interfere with a person seeking to obtain or provide abortion services . . ." *Id.* § 2B. Senator David Dinenberg from Minnesota, who opposes the Supreme Court cases upholding a woman's right to abortion, nonetheless supports the legislation. He explained that it "strikes the right balance between protecting clinic patients and protecting the legitimate rights of clinic protestors. No one will be jailed for gathering in front of a clinic, picketing, praying, chanting, shouting, holding signs, waving banners or sidewalk counseling." But, he said, "I cannot stand here and condone the harassment, violence and blockades against women and doctors who are exercising or attempting to exercise their constitutional right, even though I may disagree with them." *Senate Passes Abortion-Clinic Crime Bill*, N.Y. TIMES, Nov. 17, 1993, at A16. The Senate overwhelmingly passed the bill on November 16, 1993, and the House adopted a similar bill two days later. Final action on both bills is expected early in the 1994 session. Until Congress passes this law, however, women must rely on the equitable powers of the courts to ensure that groups such as Operation Rescue do not deprive them of their constitutional rights to obtain an abortion.

²⁰³ Ledewitz, *supra* note 8, at 89.

²⁰⁴ *Id.*

²⁰⁵ Paltrow, *supra* note 106.

²⁰⁶ See *supra* notes 175-83 and accompanying text.

²⁰⁷ See *id.*

²⁰⁸ A governmental interest in upholding state and federal statutes may also be

present in the Operation Rescue cases. On the state level, both the Holland Tunnel and Operation Rescue demonstrations violated New York state trespass laws. See, e.g., *Terry v. New York State Nat'l Org. for Women*, 704 F. Supp. 1247, 1261 n.18 (S.D.N.Y.) ("Defendants have repeatedly blocked the doorways to abortion facilities in the past, and threaten to block access to plaintiff facilities. A blockade is an intentional, unlawful act which clearly interferes with plaintiffs' right to possession of the facility. Damages to the target facility and to the women who attempt to use the facility are direct consequences of the blockade. Accordingly, plaintiffs have established the elements of their trespass claim . . . and are entitled to summary judgment on that claim."), *aff'd*, 886 F.2d 1339 (2d Cir. 1989). In addition, however, Operation Rescue's blockades also violated New York's anti-harassment statute, which provides, in pertinent part, "A person is guilty of harassment when, with intent to harass, annoy or alarm another person . . . he engages in a course of conduct or repeatedly commits acts which alarm or seriously annoy such other person and which serve no legitimate purpose." N.Y. PENAL LAW § 240.25(5) (McKinney 1988). While both the Holland Tunnel actors and members of Operation Rescue engaged in behavior that served the "legitimate purpose" of expressing a political view, Operation Rescue did so with the intent to interfere with particular people—women seeking abortions and doctors and nurses performing abortions. The Holland Tunnel blockade certainly had an impact on drivers and pedestrians and residents of the area, but the defendants' intent was not to harass those particular people; their intent was simply to blockade the Tunnel. Their action was targeted at no one in particular, while Operation Rescue's action was targeted very specifically at a group of people. Thus, Operation Rescue's blockades violated the anti-harassment statute.

Moreover, a bill is pending in the New York State legislature that would expand the definition of aggravated disorderly conduct to include "not only the disruption or disturbance of a religious services [sic], but also the obstruction of access to and exit from a health care facility." A-11895, An Act to Amend the Penal Law, November 24, 1992. Clearly, if enacted, this amendment would prohibit Operation Rescue's clinic blockades, implicating another governmental interest in enjoining such behavior.

Various attempts to prosecute Operation Rescue under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-68 (1989) have been successful. See *National Org. for Women v. Scheidler*, 114 S. Ct. 798 (1994); *Northeast Women's Ctr., Inc. v. McMonagle*, 868 F.2d 1342, 1348-57 (3d Cir. 1989) (affirming application of civil RICO to action of abortion protestors, allowing damages and attorney's fees under RICO claim and finding that clean hands doctrine would not bar injunctive relief under RICO claim), *cert. denied*, 493 U.S. 901 (1989), *on remand*, 745 F. Supp. 1082, 1083 (E.D. Pa. 1990) (granting injunctive relief under successful civil RICO claim); see also John Henn & Maria Del Monaco, *Civil Rights and RICO: Stopping Operation Rescue*, 13 HARV. WOMEN'S L.J. 251 (1990); Kelly L. Faglioni, Note, *Balancing First Amendment Rights of Abortion Protestors with the Rights of their "Victims"*, 48 WASH. & LEE L. REV. 347 (1991).

For other possible governmental interests in enjoining Operation Rescue, see Cadigan, *supra* note 62, at 893-97. The author suggests that courts "adopt a significant governmental interest, that of protecting clinics from conduct that hinders medical treatment, as the basis upon which to fashion injunctions that restrict expressive activity." *Id.* at 837.

CONCLUSION

When courts balance the equities and consider public policy interests to determine whether equitable relief is appropriate, no one factor precludes or mandates that they issue an injunction. Rather, the combination of a threat of imminent and probable harm for which there is no adequate legal remedy with a showing of a strong governmental interest should tip the balance in favor of those seeking the injunction against the asserted interests of those seeking to proceed with the contested behavior. Where, as in Operation Rescue's blockades of clinics, such showings were made, the civil disobedience at stake crossed the line from "harmless," nonviolent civil disobedience to behavior that interfered too heavily with the rights of others. Such interference should outweigh even the very strong interest of the defendant in going forward with the civil disobedience.²⁰⁹ Accordingly, injunctions have properly issued against Operation Rescue. On the other hand, where such showings were not made and the contested behavior did not implicate a strong governmental interest, an injunction was not appropriate. In the case of the Holland Tunnel blockade, either the harm alleged would have been remedied through an award of damages, or that harm was merely possible or remote. Further, the governmental interest in preventing the planned action did not outweigh the defendants' right to political protest. Thus the injunction was neither necessary nor

²⁰⁹ On December 10, 1989, a coalition of AIDS activists, including members of WHAM, disrupted a mass in Saint Patrick's cathedral. See, e.g., Jason DeParle, *111 Held in St. Patrick's AIDS Protest*, N.Y. TIMES, Dec. 11, 1989, at B3; *Protesters Disrupt Mass by Cardinal*, N.Y. DAILY NEWS, Dec. 11, 1989, at 12. On July 14, 1992, a group of pro-choice activists, members of the New York Clinic Defense Task Force, tried to disrupt a mass at Saint Agnes church by blocking the church's entrance. Affidavit of Patrick Mahoney, at ¶ 3, *Mahoney v. New York Clinic Defense Task Force*, 92 Civ. 5277 (S.D.N.Y. 1992). The group allegedly planned to repeat the blockade the following day. *Id.* ¶ 6. Both actions could have been properly enjoined. Plaintiffs could have shown that a legal remedy would be inadequate, based on irreparable harm to the churchgoers, both physical and emotional; based on the probability of recurrence; and based on the importance of the churchgoers' interest in worshipping in peace. Moreover, plaintiffs could have shown that the threatened harm was imminent and probable. Finally, the government clearly had an interest in protecting the worshippers from the disturbance, which interfered directly with the First Amendment's Free Establishment clause, and Freedom of Association guarantee. Thus, injunctions could well have issued, even against the protesters' right to protest.

appropriate and should not have issued.

This Note sets out standards to help a court in the task of balancing equities in seemingly ambiguous situations. The standards defined reflect not which political protest is worthy of being heard; rather, they are neutral limiting principles for employing what all regard as an extraordinary and drastic tool of equity. Consideration of the limiting principles set out in this Note becomes even more essential when there is a question of enjoining political protest. Because of *Walker's* collateral bar rule, in those cases, courts cannot be too careful as they weigh the equities of the two sides.

There are arguments that the kind of protest under consideration in these two cases did not rise to the level of significance envisioned by the First Amendment, and that, therefore, the government interest in preserving a certain quality of life free from the disruption caused by these demonstrations outweighed the defendants' right to engage in the civil disobedience. However, curtailing the right to protest—even if this particular brand of protest is not explicitly protected by the First Amendment—in order to preserve that quality of life is too dangerous. No one suggests that the protesters should go unpunished; they should certainly be arrested and serve their time in jail, pay their fines or both. But only where plaintiffs can show a specific threat of irreparable injury and a deprivation of important rights of citizens not involved in the protest should the scales tip in favor of those citizens, against the asserted freedom of expression interests of the protesters. Where there is no such showing, the protestors must be allowed to go forward, however unpopular or inconvenient their action might be, because their right to express themselves outweighs the inconvenience such expression might cause.

Carolyn Grose