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Recommended Citation

Robert A. Whitebloom, *Equitable Law Enforcement and the Organized Crime Control Act of 1970 - United States v. Cappetto*, 25 DePaul L. Rev. 508 (1976)

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EQUITABLE LAW ENFORCEMENT AND THE ORGANIZED CRIME CONTROL ACT OF 1970— UNITED STATES V. CAPPETTO

INTRODUCTION

During the 1950's and 1960's organized crime¹ accumulated vast sums of money by means of syndicated gambling activities.² In order to enhance its power and wealth, organized crime began to divert these cash accumulations to various legitimate business enterprises.³ These new

1. The term "organized crime" refers to individuals who supply illicit goods and services (e.g., drugs, gambling, loan sharking and prostitution) in order to gain control of various business enterprises. See PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: ORGANIZED CRIME 1 (1967). [hereinafter cited as TASK FORCE REPORT]. See also SEN. SPECIAL COMM. TO INVESTIGATE ORGANIZED CRIME IN INTERSTATE COMMERCE, 3d INTERIM REP., S. REP. No. 307, 82d Cong., 1st Sess. 150 (1951) [hereinafter cited as SENATE SPECIAL COMM. REPORT]; 83 YALE L.J. 1491 n. 1 (1974).

2. H.R. Doc. No. 105, 91st Cong., 1st Sess. 1 (1969) [hereinafter cited as HOUSE DOC.]. There is considerable documentation indicating that gambling constitutes the main source of income of organized crime. The President's Commission on Law Enforcement and the Administration of Justice reported that revenue derived from illicit gambling activities is estimated between seven and fifty billion dollars annually. TASK FORCE REPORT, *supra* note 1, at 3. See also Johnson, *Organized Crime: Challenge to the American Legal System* 1, 53 J. CRIM. L.C.& P.S. 399, 402 n. 22 (1962).

3. The adverse consequences of organized criminal activity on legitimate businesses will affect the free market system in the same manner that price fixing, restraint of trade and market boycotts have done in the past. These practices resulted in enactment of the Sherman Act, 15 U.S.C. §§1-7 (1970), Clayton Act, 15 U.S.C. §§12-27 (1970), Robinson-Patman Act, 15 U.S.C. §13c (1970) and the Robinson-Patman Price Discrimination Act, 15 U.S.C. §§13,13a,13b,21a (1970).

See SENATE SPECIAL COMM. REPORT, *supra* note 1, at 170-71. Some of the legitimate business enterprises which organized crime has infiltrated include advertising, communications, florist shops, automobile agencies, football, insurance, real estate agencies, shipping and banking. SENATE COMM. ON THE JUDICIARY, REPORT ON ORGANIZED CRIME CONTROL ACT OF 1969, S. REP. No. 617, 91st Cong., 1st Sess. 76-77 n. 2 (1969) [hereinafter cited as SENATE REPORT].

A report of the Antitrust Section of the American Bar Association noted:

Organized crime . . . is a major threat to the proper functioning of the American economic system, which is grounded in freedom of decision. When organized crime moves into a business, it customarily brings all the techniques of violence and intimidation which it used in its illegal businesses. The effect of competitive or monopoly power attained this way is even more unwholesome than other monopolies because its position does not rest in economic superiority.

Hearings on S. 30, S. 974, S. 975, S. 976, S. 1623, S. 1624, S. 1861, S. 2022, S. 2122 and S. 2292 Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary, 91st Cong., 1st Sess. 556 (1969). The primary methods by which organized crime are able to gain financial control of business enterprises involve extortion, invest-

investments were made for a variety of purposes, including, the anticipation of favorable consideration from public officials;⁴ the acquisition of capable managerial personnel to oversee the interests of organized crime investments; and the retention of the services of a select group of attorneys and accountants.⁵ Because the Government was ill-equipped to deal with the mounting influence of criminal activities⁶ and the shift of organized crime operations into the legitimate business sector, Congress was moved to enact the Organized Crime Control Act of 1970.⁷

The Organized Crime Control Act of 1970 (OCCA-70) provides a broad jurisdictional base enabling the Attorney General to investigate and prosecute persons engaged in racketeering activities. Title VIII of the Act authorizes the Government to institute actions upon the showing of the existence of racketeering activity,⁸ while Title IX enables the Justice Department to initiate a variety of actions in order to counteract organized crime's control of business enterprises.⁹ Additionally, the Act empowers the Attorney General to ascertain the financial backing of

ment of gambling proceeds, loan sharking, bankruptcy and securities fraud, and the acceptance of business interests as payment for gambling debts. SENATE REPORT, *supra*, at 77; TASK FORCE REPORT, *supra* note 1, at 190.

4. *Hearings on S. 30 and Related Proposals Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 91st Cong., 2d Sess., Ser. 27 at 105 (1970) (Statement of Senator John L. McClellan).

5. See TASK FORCE REPORT, *supra* note 1, at 4 n.49.

6. See Organized Crime Control Act of 1970, §1, 84 Stat. 922 (Statement of Findings and Purposes); see also SENATE REPORT, *supra* note 3, at 78.

7. 84 Stat. 922. [hereinafter cited as OCCA-70]. There are seven criminal procedural provisions included in the Act: Title I of OCCA-70, 18 U.S.C. §§3331-34 (1970) (special federal grand juries); Title II, 18 U.S.C. §§ 6001-05 (1970) (immunity); Title III, 28 U.S.C. §1826 (1970) (sanctions for refusal to testify under grant of immunity); Title IV, 18 U.S.C. §1623 (1970) (perjury); Title V, 84 Stat. 933 (security measures for witnesses); Title VI, 18 U.S.C. §3503 (1970) (depositions); Title VII, 18 U.S.C. §3504 (1970) (limits the retroactivity of *Alderman v. United States*, 394 U.S. 165 (1969)). Of the remaining six sections, three concern substantive provisions: Title X, 18 U.S.C. §§3575-78 (1970) (increases sentences for dangerous special offenders); Title XI, 18 U.S.C. §§841-48 (1970) (regulation of explosives); Title XII, 84 Stat. 960 (establishment of a National Commission on Individual Rights).

8. 18 U.S.C. §§1511, 1955 (1970).

9. *Id.* §§ 1961-68. To enforce the provisions of section 1962, sections 1963, 1964 and 1968 were enacted. Section 1963 provides criminal penalties for violation of section 1962. Section 1964 gives the Attorney General authority to commence civil proceedings to restrain violations of section 1962. Also, the United States district courts have jurisdiction to order divestiture, reorganization and/or dissolution of any gambling operation and/or to impose reasonable restrictions on future gambling activities or investments. See note 12 *infra*. Section 1968 provides for civil investigative demand which authorizes the Attorney General to order production of any documentary materials to assist in the investigation of racketeering activities even before court action is initiated.

legitimate businesses suspected of being infiltrated by organized crime figures.¹⁰ Significantly, the Act authorizes both criminal¹¹ and civil,¹² including equitable, remedies in the combat against organized crime. It is the exercise of the civil authority which provides the Government with the far-reaching powers to attempt the successful eradication of organized criminal activities. Also this civil avenue of equitable prosecution provides for the more interesting and controversial legal problems inherent in OCCA-70.

THE JURISDICTION OF A COURT OF EQUITY IN ENJOINING CRIMINAL ACTIVITY

It has long been a fundamental maxim that a court of equity should not use its powers to enforce a criminal statute or enjoin the commission of a criminal offense.¹³ This maxim was considered to be implied in the more general rule that equity should not intervene where adequate remedies at law exist.¹⁴ The ability of the law courts to punish those who

10. 18 U.S.C. §1962 (1970).

11. *Id.* §1963. For example, any party engaged in racketeering activities shall be fined, upon conviction, not more than \$25,000, imprisoned for not more than 20 years, or both, and forfeit any interest the party has acquired or maintained in violation of Title IX.

12. *Id.* §1964. Under section 1964(a) of the Act, the Attorney General may petition a district court seeking an order to enjoin an individual or group from investing or even participating in racketeering activities and the Attorney General may request divestiture, reorganization or dissolution of the business involved in the racketeering operations. Under section 1964(b) the district court is authorized to enter temporary restraining orders or prohibitions pending final determination of the case. Also, section 1964(c) gives any owner of any business who may have been adversely affected as a result of violations of section 1962 the right to initiate suit for treble damages against persons engaged in racketeering activity.

The civil provisions of the Act will be an effective impetus in effectuating the policies of the Act for two reasons: the prevention of monopolistic and illegal activities by organized crime infiltration into legitimate business, and the allowance of private parties to initiate suit against organized crime figures. See Note, *Organized Crime Control Act of 1970: Title IX—Racketeer Influenced and Corrupt Organizations*, 4 U. MICH. J.L. REFORM, 546, 625 n. 19 (1971).

13. 4 J. POMEROY, EQUITY JURISPRUDENCE, § 1347 (5th ed. Symons, 1941); 1 J. STORY, EQUITY JURISPRUDENCE, §3 n.1 (14th ed., 1918); Caldwell, *Injunctions Against Crime*, 26 ILL. L. REV. 259 (1931) [hereinafter cited as Caldwell]. Originally, the Court of Chancery had jurisdiction for administration of both the criminal and civil laws. Mack, *The Revival of Criminal Equity*, 16 HARV. L. REV. 389, 390-91 (1903). In England, criminal equity courts were extremely unpopular because of the lack of trial by jury. By the end of the fifteenth century courts of equity were no longer involved in the administration of the criminal laws. See Maloney, *Injunctive Law Enforcement: Leaven or Secret Weapon*, 1 MERCER L. REV. 1, 3 (1949) [hereinafter cited as Maloney]. See also *In re Sawyer*, 124 U.S. 200 (1888); *Lord Montague v. Dudman*, 28 Eng. Rep. 253, 254 (Ch. 1751) (dictum).

14. In *Attorney-General v. Brown*, 24 N.J.Eq. 89 (Ch. 1873) the court noted:

[T]he jurisdiction of equity to redress the grievance of the public nuisance by

would violate the criminal law has generally been recognized as adequate protection of the community interest.¹⁵ Nevertheless, if it can be shown that the legal remedy is inadequate, the court of equity may exercise its power and frame the required injunctive or declaratory relief.¹⁶ The inadequacy of the criminal remedy is established by showing any of the following: (1) that irreparable harm will be suffered before criminal proceedings can be initiated; (2) that the criminal activity cannot be effectively suppressed through criminal procedures;¹⁷ or (3) the criminal activity will continue in spite of the success of a criminal prosecution.¹⁸ Thus, the equity court will generally not intervene until there has been some attempt to make use of the criminal processes;¹⁹ however, the mere ineffectiveness or failure of the criminal law is not a sufficient basis for equitable intervention in a majority of jurisdictions.²⁰

Recently, the courts have been more inclined to make use of equity jurisdiction to restrain criminal conduct.²¹ This phenomenon has been most noticeable in the realm of nuisance law wherein the courts are likely to enjoin conduct which constitutes a public nuisance.²² Injunctions against public nuisances are often issued even without regard to

injunction is undoubted and clearly established; but it is well settled that, as a general rule, equity will not interfere, where the object sought can be as well attained in the ordinary tribunals.

Id. at 91-92. *State v. O'Leary*, 155 Ind. 526, 58 N.E. 703 (1900); *State v. Diamond Mills Paper Co.*, 63 N.J.Eq. 111, 51 A. 1019 (Ch. 1902). See Caldwell, *supra* note 13, at 271-72.

15. Note, *Developments in the Law—Injunctions*, 78 HARV. L. REV. 994, 1016 (1965) [hereinafter cited as *Developments*].

16. See Caldwell, *supra* note 13, at 272 nn.67-68.

17. Oliff, *Equitable Devices for Controlling Organized Vice*, 48 J. CRIM. L.C. & P.S. 623, 616 (1958) [hereinafter cited as Oliff].

18. See, e.g., *Meyer v. Seifert*, 216 Ark. 293, 225 S.W.2d 4 (1949); *State v. Red Owl Stores, Inc.*, 253 Minn. 236, 92 N.W.2d 103 (1958); *Town of Linden v. Fischer*, 154 Minn. 354, 191 N.W. 901 (1923). See also *Corte v. State*, 259 Ala. 536, 67 So.2d 782 (1953); *State v. Nelson*, 189 Minn. 87, 248 N.W. 751 (1933); *Bennett v. Laman*, 277 N.Y. 368, 14 N.E.2d 439 (1938).

19. See Oliff, *supra* note 17, at 626; *State v. Crawford*, 28 Kan. 726 (1882).

20. See Caldwell, *supra* note 13, at 273. See also *Widmer v. Fretti*, 95 Ohio App. 7, 116 N.E.2d 728 (1952); *State v. Patterson*, 14 Tex. Civ. App. 465, 37 S.W. 478 (1896). But see *Stead v. Fortner*, 255 Ill. 468, 99 N.E. 680 (1912).

21. See Caldwell, *supra* note 13. *Dunbar, Government by Injunction*, 13 L. Q. REV. 347 (1897); *Gregory, Government by Injunction*, 11 HARV. L. REV. 487 (1898); *Leflar, Equitable Prevention of Public Wrongs*, 14 TEXAS L. REV. 427 (1936) [hereinafter cited as *Leflar*]; *Ralston, Government by Injunction*, 5 CORNELL L. Q. 424 (1920); Note, *Will Equity Enjoin the Repeated Violation of a Penal Statute?* 1953 WIS. L. REV. 163. For an excellent discussion of the criticisms of equity's jurisdiction over criminal conduct see generally *Maloney, supra* note 13, at 13-17.

22. Because of the numerous, albeit general definitions of public nuisance, the conduct

the question of whether or not a specific crime has been committed²³ and

to be enjoined may involve almost any offense against the community at large. One treatise describes nuisance as follows:

A public or common nuisance is an offense against the public order and economy of the State, by unlawfully doing any act or by omitting to perform any duty which the common good, public decency or morals, or the public right to life, health, and the use of property requires, and which at the time annoys, injures, endangers, renders insecure, interferes with, or obstructs the rights or property of the whole community

J. & H. JOYCE, LAW OF NUISANCES §5(1906) [hereinafter cited as JOYCE].

Board of Health v. Vink, 184 Mich. 688, 151 N.W. 672 (1915); State *ex rel* Gibson v. Chicago, B. & Q. R. Co., 191 S.W. 1051 (Mo. K.C. App. 1917). See Baker, *An Equitable Remedy to Combat Gambling in Illinois*, 28 CHI.-KENT L. REV. 287, 298-300 (1950) [hereinafter cited as Baker]. At common law, houses of prostitution and gambling were considered to be public nuisances. It was necessary only to prove their existence in order to have standing to request injunctive relief. See State v. Ellis, 201 Ala. 295, 78 So. 71 (1918); Respass v. Commonwealth, 131 Ky. 807, 115 S.W. 1131 (1909); King v. Dixon, 88 Eng. Rep. 753 (K.B. 1692).

Moreover, nuisance is classified as nuisance *per se*, or at law, and nuisance *per accidens*, or in fact. A nuisance *per se* is

an act, occupation, or structure which is a nuisance at all times and under any circumstances, regardless of location or surroundings, while a nuisance in fact or *per accidens* is one which becomes a nuisance by reason of circumstances and surroundings.

66 C.J.S. Nuisances §3 (1950). See Engle v. Scott, 57 Ariz. 383, 114 P.2d 236 (1941); Asphalt Products Co. v. Marable, 65 Ga.App. 877, 16 S.E.2d 771 (1941); People v. City of Chicago, 260 Ill. 150, 102 N.E. 1039 (1913); Greene v. Spinning, 48 S.W.2d 51 (Mo. App. Ct. 1931).

When the nuisance is not classified as *per se* the courts of equity have been less inclined to issue an injunction if other, less restrictive, relief can be ordered. Morton v. Superior Court, 124 Cal.App.2d 577, 582, 269 P.2d 81, 85 (1954), commented on the unusual remedy of enjoining a nuisance *per se*:

An injunction against operating property for the only lawful purpose for which it is fitted is an unusual . . . remedy. It should only be employed where no other means of protecting the complaining public exists. Whether the attempt to regulate be by ordinance or by injunction the approach must be reasonable.

The law is well settled to the effect that, when the defendant's business is not a nuisance *per se*, the injunction should be limited in scope so as to not enjoin the defendant's entire business if a less measure of restraint will afford the relief to which the plaintiff is entitled.

Professor Caldwell states that the test for issuance of injunctive relief to restrain criminal conduct should not be that the conduct is a public nuisance but rather, whether the defendant's activities interfere or threaten to interfere with some interest of the state or of the public at large, to which an injunction will afford more adequate protection than the law courts can give. If they do, it is a proper case for equity . . . regardless of whether or not such activities . . . amount to a public nuisance.

Caldwell, *supra* note 13, at 269.

23. See *In re Debs*, 158 U.S. 564 (1895) (injunction against strike); State *ex rel.* Moore

without considering criminal prosecution. In these cases, however, it is necessary to demonstrate the inadequacy of the possible legal remedies.²⁴ Moreover, the claimant must establish that he has standing to sue,²⁵ that his interest is one that can be protected by a court of equity,²⁶

v. Gillian, 141 Fla. 707, 193 So. 751 (1940)(usury); *State ex rel. Smith v. Mahon*, 128 Kan. 772, 280 P.906 (1929)(usury); *Commonwealth v. Stratton Fin. Co.*, 310 Mass. 468, 38 N.E.2d 640 (1941) (usury); *State ex rel. Burgum v. Hooker*, 62 Neb. 639, 87 N.W.2d 337 (1957) (usury); *State ex rel. Lyon v. Columbia Water Power Co.*, 82 S.C. 181, 63 S.E. 884 (1909)(water pollution); *Attorney General v. Birmingham*, 70 Eng. Rep. 220 (1858)(water pollution); *Attorney General v. Richards*, 145 Eng. Rep. 980 (1794)(water pollution); *Baker*, *supra* note 22, at 298-99 (gambling). *But see State ex rel. Boykin v. Ball Inv. Co.*, 191 Ga. 382, 12 S.E.2d 574 (1940).

24. *See* notes 21 and 22 *supra*. Usually an injunction will not be granted, however, except where it can be shown that no relief can be obtained through criminal prosecution and that punishment of the crime will not abate the nuisance or cease to do irreparable harm to an individual. When attempting to enjoin criminal activities a problem arises with respect to the degree to which the plaintiff must first attempt to seek adequate relief through a court of law. *See* JOYCE, *supra* note 22, §§415, 416; 2 J. STORY, EQUITY JURISPRUDENCE §1251 (14th ed. 1918).

Where the claimant may suffer injury before initiation of criminal proceedings, or where the conduct cannot be abated under the criminal law, a court of equity will order an injunction. At common law a property owner may have the operation of a bawdy house enjoined even without any attempt to utilize the criminal laws. *See Cranford v. Tyrrell*, 128 N.Y. 341, 28 N.E. 514 (1891). Oliff, *supra* note 17, at 626 n.24.

25. The power of equity jurisdiction to restrain criminal activity which adversely affects public interests is limited because of the usual requirement that a public prosecutor must initiate the action. Oliff, *supra* note 17, at 627. However, state statutes which authorize private citizens to initiate suits on behalf of the state have been upheld as constituting matters for legislative determination. *People v. Casa Co.*, 35 Cal.App. 194, 169 P. 454 (1917); *People ex rel. Thrasher v. Smith*, 275 Ill. 256, 114 N.E. 31 (1916). *But see People ex rel. L'Abbe v. District Court*, 26 Colo. 386, 58 P. 604 (1899). In order for a private party to initiate suit he must allege special damages. This usually refers to interference with the personal or property rights of an individual. *See, e.g., Everett v. Harron*, 380 Pa. 123, 110 A.2d 383 (1955). Oliff, *supra* note 17, at 627.

Judicial enforcement of injunctive remedies has been seen as part of the court's responsibility to protect property. Originally, a court of equity would issue injunctive relief only on the basis of interference with property rights; thus, some courts will not issue an injunction on the basis of a public nuisance without the showing of a property interference. *People v. Lim*, 18 Cal.2d 872, 118 P.2d 472 (1941); *State v. Vaughan*, 81 Ark. 117, 98 S.W. 685 (1906); Oliff, *supra* note 17, at 624-25. It was not long, however, before courts extended their authority to enjoin conduct which affected the public health or morals even though property rights were not involved. *See Columbian Athletic Club v. State ex rel. McMahan*, 143 Ind. 98, 40 N.E. 914 (1895); *Board of Health v. Vink*, 184 Mich. 688, 151 N.W. 672 (1915); *State ex rel. Board of Milk Control v. Newark Milk Co.*, 118 N.J. Eq. 504, 179 A. 116 (Ch. 1935). The courts have also been inclined to issue injunctions against the illegal practice of certain professions. *See, e.g., Dworken v. Apartment House Owners Ass'n*, 38 Ohio App. 265, 176 N.E. 577 (1931)(practice of law); *Sloan v. Mitchell*, 113 W. Va. 506, 168 S.E. 800 (1933)(practice of medicine).

26. *See* Oliff, *supra* note 17, at 624-25.

and that the acts complained of and the relief sought are within the scope of equitable jurisdiction.²⁷

The rationale for the exercise of equitable jurisdiction under these circumstances is readily apparent. The prosecution of a defendant for statutory crimes in the criminal courts does not afford adequate legal or economic redress for third parties who may have been injured as a result of the criminal conduct of the defendants. Normally, the only recourse such third parties have is to proceed alone in separate civil actions for their own specific injuries.²⁸ Thus equitable jurisdiction assists when the conduct presents an injury which can be characterized as offending the common good. Under such conditions an injured party, or the state, need not wait until the wrongdoer completes the criminal act, but may instead seek immediate enjoinder of the threatening conduct.²⁹ Here the court concerns itself not only with the common good or with the enforcement of the criminal law as such, but it also seeks to protect the rights of individuals from immediate and irreparable injury. Injunctive relief may be granted even though the same defendants are subject to criminal prosecution for the same or related conduct.³⁰

In the absence of specific statutory authority the courts are traditionally reluctant to expand their use of equitable power to enjoin criminal

27. See Caldwell, *supra* note 13; Oliff, *supra* note 17, at 623 nn.5&6.

28. See, e.g., *Jones v. Van Winkle Gin*, 131 Ga. 336, 62 S.E. 236 (1908). See also JOYCE, *supra* note 22, §§415, 416; Oliff, *supra* note 17, at 623 nn.5&6; note 24 *supra*.

29. Caldwell, *supra* note 13, at 259. See also Oliff, *supra* note 17, at 623:

Although the claimant may be entitled to damages in a court of law, there are many situations where a money judgment will not completely vindicate his rights or interests. Such situations arise where serious injury will occur before a court of law can act or where the defendant's activities involve a continuous course of conduct. With respect to the latter case, a legal remedy can compensate only for past injury and can neither directly abate the defendant's conduct nor compensate for future injuries. It has been held that equity may offer relief in these situations despite the fact that the conduct complained of is also subject to criminal sanctions. Thus, the fact that certain activities are crimes does not preclude equitable relief.

30. The time honored equitable maxim that equity will not enjoin the commission of criminal conduct stems from the adequacy of the criminal remedy at law. *Staub v. Mayor of Baxley*, 211 Ga. 1, 83 S.E.2d 606 (1954); *People ex rel. Barrett v. Fritze*, 316 Ill.App. 217, 45 N.E.2d 48 (1942); *Pitman v. State*, 234 S.W.2d 436 (Tex. Civ. App. 1950). Over the course of equity's history this maxim has become the exception rather than the rule. See, e.g., *State v. Mahon*, 128 Kan. 772, 280 P. 906 (1929); *People ex rel. Bennett v. Laman*, 277 N.Y. 368, 14 N.E.2d 439 (1938). See generally 1 J. POMEROY, EQUITY JURISPRUDENCE §§ 1-42a (5th ed. 1941). For an excellent discussion of the role of equity in enjoining criminal activity see *Developments*, *supra* note 15, at 1014-27. Equitable jurisprudence enlarged as it became apparent that the law courts remained recalcitrant in enlarging their own powers where a remedy at law was inadequate. *Id.*

conduct which cannot ordinarily be characterized as nuisance.³¹ Given Congressional or other legislative grant, however, the courts are not shy in effectuating the intent of the lawmakers.³² By reason of specific legislative enactment the public injury (nuisance), which might otherwise appear to be lacking, is presumed to exist and appropriate equitable relief is readily granted.³³ Thus, from the historical perspective, the use of equity to enjoin criminal conduct, while limited in scope, will not be denied when such exercise of power is capable of being gleaned from specific or implied legislative intent.³⁴

31. Nevertheless, statutes have supplemented the equitable maxims and have undercut the reluctance of the law courts. *See generally* Note, *Statutory Extension of Injunctive Law Enforcement*, 45 HARV. L. REV. 1096 (1932). For the meaning of "nuisance" *see* note 22 *supra*.

32. *See generally* Note, note 31 *supra*. *But see* Hedden v. Hand, 90 N.J.Eq. 583, 107 A. 285 (Ct. Err. & App. 1919), wherein Justice Kalisch commented,

[I]t is clear that the effect of making such [maintenance of a disorderly house] a crime punishable . . . in the Court of Chancery is to deprive a defendant of his constitutional right to have an indictment preferred against him by a grand jury . . . and a trial by jury. It is idle to entertain the thought . . . that the Legislature can change the nature of an offense by changing the forum in which it is to be tried.

Id. at 596, 107 A. at 291.

33. The courts theorize that because of the specific legislative enactment there already has been a determination of the public injury and the appropriateness of the restraining order. *See* Caldwell, *supra* note 13, at 276-78. Where a statute specifically sets forth certain conduct as violative of the public interests an injunction will issue without proof of irreparable injury or the showing of an inadequate remedy at law. *State v. Diamond Mills Paper Co.*, 63 N.J. Eq. 111, 115-16, 51 A. 1019, 1021 (Ch. 1902).

34. While developed in common law times, *Knight v. Knight*, 24 Eng. Rep. 1088-89 (Ch. 1734), equity jurisdiction finds expression in the Constitution and thus is exercised as an inherent power of the federal courts. Article III reads in pertinent part: "The judicial powers shall extend to all cases, in law and equity arising . . . under the laws of the United States . . ." U.S. Const. art. III, §2 (emphasis added). *Cf. Hecht Co. v. Bowles*, 321 U.S. 321 (1944). In *Bowles*, Justice Douglas, in commenting upon the authority of the Administrator under §205(a) of the Emergency Price Control Act of 1942 to request injunctive relief, noted:

[t]he essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims.

Id. at 329-30. *See also* *Gilbertville Trucking Co. v. United States*, 371 U.S. 115, 130 (1962); *Meredith v. Winter Haven*, 320 U.S. 228, 235 (1943). The doctrine of federal equity jurisdiction is pointed out in *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946) wherein the Court noted:

Unless otherwise provided by statute, all the inherent equitable powers of the

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Given this framework, and the specific provisions of OCCA-70, the Government, in the exercise of its equitable authority under section 1964,³⁵ and pursuant to jurisdiction under section 1345 of Title 28 of the United States Code,³⁶ filed a complaint³⁷ in the United States District Court for the Northern District of Illinois requesting an injunction

District Court are available for the proper and complete exercise of that jurisdiction. And since the public interest is involved in a proceeding of this nature, those equitable powers assume an even broader and more flexible character than when only a private controversy is at stake [T]he court may go beyond the matters immediately underlying its equitable jurisdiction . . . and give whatever other relief may be necessary under the circumstances

Moreover, the comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. 'The great principles of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction.'

Id. at 397-98. Although *Porter* makes reference to the equitable jurisdiction of article III in relation to the Emergency Price Control Act of 1942, 56 Stat. 23, 33, one can argue by inference its application to the OCCA-70. The *Porter* Court applied broad equitable powers under a statute granting to the federal courts injunctive jurisdiction "or other order," and applied the equitable doctrine not only because of the "other order" language but also because of the "traditional equity powers of a court." *Id.* at 400. One could, therefore, argue, as was persuasively done in *Porter* that,

Congress has utilized . . . the broad equitable jurisdiction that inheres in courts and where the proposed exercise of that jurisdiction is consistent with the statutory language and policy, the legislative background and the public interest.

Id. at 403. Under section 1964(a) the federal district court has authority to issue "appropriate orders, including, but not limited to . . ." This broad mandate of the Act, with its emphasis on broad equity powers, is consistent with the Act's legislative history. For an excellent analysis of *Porter* and other decisions regarding the constitutionally inherent power of the federal courts see Comment, *The Food and Drug Administration's Recall Power after United States v. C.E.B. Products, Inc.: The Need to Amend the Food, Drug, and Cosmetic Act*, 69 Nw. U.L. Rev., 936, 950-57 (1975).

35. 18 U.S.C. §1964 (1970).

36. 28 U.S.C. §1345 (1970). The Government contended that even if Congress had not enacted section 1964 there would, nevertheless, be jurisdiction under section 1345 which provides:

Except as otherwise provided by Act of Congress, the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States, or by any agency or officer thereof expressly authorized to sue by Act of Congress.

See *In re Debs*, 158 U.S. 564, 599-600 (1895); *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 342-43 (1897).

37. *United States v. Cappetto*, Civil No. 74C-503 (N.D. Ill., filed Feb. 22, 1974).

against certain defendants³⁸ alleged to be participating in illegal racketeering activities in violation of sections 1955 and 1962 of Title 18 of the United States Code.³⁹ The court entered a temporary restraining order⁴⁰ prohibiting the defendants from continuing their gambling activities.⁴¹ Notice of depositions was served on the defendants who chose to ignore subsequent orders to appear and also failed to respond to requests for admissions.⁴² The district court entered an order compelling the defendants to respond to discovery and, upon their continued failure to do so, entered a default judgment which found the material allegations of the Government's complaint to be true⁴³ and adjudged the defendants to be in contempt of court for failure to comply with the orders compelling discovery.⁴⁴ The appeal of the defendants to the United States Court of

38. The Government named as defendants Leonard Cappetto, the owner of the gambling premises; Joseph Corabi, Thomas Wilson and Stanley Mikolajczak, all of whom received and transmitted wagering information over the telephone; Joseph Mantia, George Musteikas and Nicholas Pidone and other unknown defendants, all of whom placed wagers with defendants Corabi, Mikolajczak and Wilson. Defendant Pidone permitted his residence to be used for the illicit gambling activities. Complaint for Injunction at 5-9, *United States v. Cappetto* 502 F.2d at 1354-55.

39. See notes 8 and 10 and accompanying text *supra*.

40. The temporary restraining order was requested *ex parte* by the government under FEDERAL RULE OF CIVIL PROCEDURE 65(b) on the basis "that unless it were granted the gambling would continue, and that the defendants are likely to avoid service of process and this order if notified thereof in advance." Brief for Appellants at 6-8, *United States v. Cappetto*, 502 F.2d 1351 (7th Cir. 1974). Rule 65 (b) of the Federal Rules of Civil Procedure provides in pertinent part:

No temporary restraining order shall be granted without notice to the adverse party unless 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 before notice can be served and a hearing had thereon.

FED. R. CIV. P. 65(b).

41. *United States v. Cappetto*, 502 F.2d 1351, 1355 (7th Cir. 1974), *cert denied*, 420 U.S. 925 (1975).

42. The district court directed the defendants to respond to the Government's Requests for Admissions, filed pursuant to FEDERAL RULE OF CIVIL PROCEDURE 36(a), no later than five days after service thereof. Defendants filed objections to the Government's Requests for Admissions which were denied by the district court. Brief for Appellees at 4-5, *United States v. Cappetto*, 502 F.2d 1351 (7th Cir. 1974).

43. The order was issued pursuant to FEDERAL RULE OF CIVIL PROCEDURE 37(b) directing, by reason of the failure of the defendants to comply with court-ordered discovery, that the material allegations of the Government's complaint were to be taken as true. 502 F.2d at 1355. See note 44 *infra*.

44. Because the action was a civil proceeding the Government was entitled to civil discovery proceedings and to request compliance with court-ordered discovery. FEDERAL RULE OF CIVIL PROCEDURE 30, 37.

The defendants challenged the district court's contempt order which was entered after the defendants refused to appear for court-ordered depositions and after defendant Corabi

Appeals for the Seventh Circuit concluded with the opinion of the court⁴⁵ upholding the authority of Congress to grant the Attorney General and the courts the broad equitable relief provided for in section 1964 of OCCA-70.

*United States v. Cappetto*⁴⁶ reaffirms certain basic guidelines and principles to assist the Justice Department in seeking equitable decrees for the protection of public interests.⁴⁷ Moreover, the decision firmly recognizes the use of the injunction as a constitutionally permissible and alternative means by which the Government might expeditiously and practically combat the forces of organized crime.

Cappetto can also be viewed as a brief primer on the exercise of federal equitable jurisdiction as an adjunct to the criminal processes. Indeed, the case responds to the usual objections to equitable enforcement of criminal statutes by establishing the constitutionality of the OCCA-70. Traditionally, the reluctance of courts to enjoin criminal conduct has resulted from the restriction of certain procedural and substantive rights which defendants would otherwise enjoy in a criminal prosecution.⁴⁸ While illicit activity is the basis for injunctive or other equitable relief, such relief is not sought for the violation of the criminal statute *per se*. *Cappetto* notes that Congress may provide for both civil

refused to testify despite a grant of immunity under 18 U.S.C. §§6002, 6003 (1970). Additionally, the district court ordered the named defendants to disclose the identification of all unnamed individuals whose identities were known only by certain nicknames. Brief for Appellees at 5, *United States v. Cappetto*, 502 F.2d 1351 (7th Cir. 1974).

The court of appeals in considering defendant Corabi's fifth amendment privilege in refusing to testify despite the grant of immunity, stated that if use immunity is granted, as it was to Corabi, it is coextensive with the grant against self-incrimination and may be invoked only in criminal proceedings. Testimony illicitly by an individual in a civil proceeding under a grant of use immunity can be used against that party in the civil case, but the testimony cannot be used against that party in a subsequent criminal case. 502 F.2d at 1359.

45. *United States v. Cappetto*, 502 F.2d 1351 (7th Cir. 1974), *cert denied*, 420 U.S. 925 (1975) (before Tone, Stevens, Sprecher, JJ.; the unanimous opinion was written by Judge Tone). Because the district court did not decide the issues raised by the Government's requests for divestiture of the gambling premises and that the named defendants be required to file with the Attorney General, for a 10 year period, quarterly reports concerning their business activities, these questions were not before the seventh circuit. *Id.* at 1359.

46. 502 F.2d 1351 (7th Cir. 1974).

47. The extent of Congress' authority to regulate and prohibit conduct which affects the public interest coincides with the limits of the commerce clause. U.S. CONST. art. I, §8, cl. 3; *Caminetti v. United States*, 242 U.S. 470 (1917); *United States v. Cappetto*, 502 F.2d 1351, 1356 (7th Cir. 1974). Injunctive regulation in this regard has been established since *In re Debs*, 158 U.S. 564 (1895).

48. See, e.g., *Developments, supra* note 15, at 1016.

and criminal remedies; Judge Tone, therefore, specifically recognized that an injunctive proceeding does not rise to a criminal prosecution merely because the acts complained of "also are punishable as crimes."⁴⁹

In evaluating the civil/criminal dichotomy *Cappetto* rejects the reasoning offered by the defendants that analogous equitable authority in federal antitrust⁵⁰ and pure food⁵¹ legislation should not be followed insofar as they serve purposes "totally different from the *purely criminal thrust* of the Organized Crime Control Act."⁵² Distinguishing the case of *Boyd v. United States*,⁵³ upon which the defendants relied for their rationale, the court states that *Cappetto* is not a case "in which the procedure 'though technically a civil proceeding, is in substance and effect a criminal one.'"⁵⁴

It may have been argued that the equitable enforcement of criminal laws unconstitutionally subjects a defendant to the possibility of double jeopardy: he may be prosecuted in the criminal courts on the basis of the same or related acts for which equitable relief has already been decreed.⁵⁵ Consequently, some courts have denied injunctive relief on the basis of multiple prosecution consideration.⁵⁶ Nevertheless, most courts, including *Cappetto* by implication, have held that the double jeopardy bar is inapplicable when the successive prosecutions are not both criminal in character.⁵⁷

Another fundamental right of criminal procedure which is denied defendants in equitable proceedings, including those under the OCCA-70, is that of trial by jury. Under the Constitution this right is mandated

49. 502 F.2d at 1357.

50. *Id.* See 15 U.S.C. §§1 *et seq.* (1970).

51. 502 F.2d at 1357. See Federal Food, Drug and Cosmetic Act, 21 U.S.C. §§321-34 (1970).

52. 502 F.2d at 1357 (emphasis added).

53. 116 U.S. 616 (1886) (forfeiture proceedings pursuant to 18 Stat. 186 are criminal and not civil even though brought in rem.)

54. *Id.* at 634; 502 F.2d at 1357.

55. See *Developments, supra* note 15, at 1018.

56. See, e.g., *Schur, Inc. v. City of Santa Monica*, 47 Cal.2d 11, 18-19, 300 P.2d 831, 836 (1956); *People v. Lim*, 18 Cal.2d 872, 880, 118 P.2d 472, 476 (1941)(dictum).

57. Double jeopardy results if there are multiple prosecutions for identical conduct and the offenses are the same both in law and in fact. However, double jeopardy does not exist where one is charged with multiple or different offenses even though these offenses may arise from the same or similar acts. See, e.g., *State v. Johnson*, 60 Wash.2d 21, 24, 371 P.2d 611, 612 (1962); *State v. LaPorte*, 58 Wash.2d 816, 818, 365 P.2d 24, 26 (1961); *State v. Harris*, 2 Wash.App. 272, 283, 469 P.2d 937, 944 (1970). Prosecution for the material allegations of the complaint and subsequent prosecution for contempt of court do not meet the aforementioned test. If the same act is a violation of different provisions of the criminal code, there may be separate prosecutions since the offenses are not the same.

only in criminal trials⁵⁸ and in trials of civil actions known to common law at the time of the enactment of the Constitution.⁵⁹ Not only is the defendant in an injunctive proceeding pursuant to the OCCA-70 subject to civil liability without benefit of a jury, but, as *Cappetto* indicates, there is the great possibility that those involved in organized crime will be non-cooperative and thus subject to incarceration for contempt of court.⁶⁰ Thus the Government is able to score well without the procedural necessity and delays of jury trial when it chooses to prosecute civilly.⁶¹ Moreover the burden of proof which is required in a civil case enables the Government to establish liability by a preponderance of the evidence,⁶² rather than by proof beyond a reasonable doubt which applies to criminal cases.⁶³ Thus the conclusion of the court of appeals that the injunctive procedures under the OCCA-70 require only the lesser standard of proof will provide further impetus to the Government's choice of remedies.⁶⁴

Finally, the civil remedies provided by the Act enable the granting of relief even prior to the completion of the criminal acts which are to

58. U.S. CONST. amend. VI. The jury trial provision of the sixth amendment was held applicable to the states in *Duncan v. Louisiana*, 391 U.S. 145 (1968).

59. U.S. CONST. amend. VII:

In suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

Mr. Justice Story established the basic meaning of the seventh amendment when he commented:

The phrase 'common law,' found in this clause, is used in contradistinction to equity, and admiralty, and maritime jurisprudence By *common law*, [the framers of the amendment] meant . . . not merely suits, which the *common law* recognized among its old and settled proceedings, but suits in which *legal* rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered In a just sense, the amendment then may well be construed to embrace all suits which are not of equity and admiralty jurisdiction, whatever might be the peculiar form which they may assume to settle legal rights.

Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 446-47 (1830).

60. See *Developments*, *supra* note 15, at 996, 1086-90. Failure to comply with an injunctive decree can result in either civil contempt or criminal contempt if there is a specific intent to disobey the court order. See *NLRB v. Whittier Mills Co.*, 123 F.2d 725, 727 (5th Cir. 1941); *Atlanta Printing Union v. Zell*, 215 Ga. 732, 733, 113 S.E.2d 401, 403 (1960).

61. See *Leflar*, *supra* note 20, at 429. For an excellent discussion of the right to trial by jury in contempt proceedings see *Developments*, *supra* note 15, at 1088-90. See also *State v. Howat*, 109 Kan. 376, 198 P. 686 (1921).

62. See, e.g., *Davis v. Auld*, 96 Me. 559, 53 A. 118 (1902).

63. See *Holt v. United States*, 218 U.S. 245 (1910).

64. See 502 F.2d at 1357.

be enjoined.⁶⁵ The basis for the grant of equitable relief rests upon the likelihood of future violations of the statute,⁶⁶ and need not await the actual commission of the crime.⁶⁷ Furthermore, the court's decree of injunction may be granted *ex parte* upon the filing of a complaint by the Government,⁶⁸ unlike the case in a criminal proceeding where relief must await the final determination of guilt.⁶⁹

Having disposed of the constitutional objections the court of appeals justified its interpretation of the statute on the basis of the recorded Congressional intent.⁷⁰ The court recognized that Congress, cognizant of racketeering activities, their adverse effects on American society, and the inadequacy of criminal sanctions, enacted the OCCA-70 to be an effective remedy⁷¹ against organized crime and thus gave effect to the statute as a primary weapon in the enforcement of this national policy.

CONCLUSION

Congress, by enactment of the OCCA-70, has attempted to further extend the scope of injunctive relief. In upholding the constitutionality of section 1964 the *Cappetto* decision purports to broaden the powers of the federal government in curtailing organized crime's intrusion into legitimate businesses through racketeering activities. Thus, while *Cappetto* authorizes additional statutory remedies it does so with the inherent benefit of common law principles and federal constitutional authority.

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65. See Oliff, *supra* note 17, at 627-28.

66. See, e.g., *United States v. W.T. Grant Co.*, 345 U.S. 629 (1953); *Swift & Co. v. United States*, 276 U.S. 311 (1928); *United States v. Richberg*, 398 F.2d 523, 530 (5th Cir. 1968); *Bowles v. Lentin*, 151 F.2d 615, 620 (7th Cir. 1945).

67. See Oliff, *supra* note 17, at 627.

68. *Id.*

69. *Id.* at 628.

70. See notes 2,3 and 6 *supra*.

71. The *Cappetto* defendants also argued that the Government had not established the presence of irreparable harm nor the inadequacy of legal remedies; nevertheless, the court concluded,

It was plainly the intention of Congress in adopting Section 1964 to provide for injunctive relief against violations of Section 1962 without any requirement of a showing of irreparable injury other than that injury to the public which Congress found to be inherent in the conduct made unlawful by Section 1962. It is also obvious that Congress did not intend to require a showing of inadequacy of the remedy at law.

502 F.2d at 1358-59.