
Equity's Role in the War on Organized Crime

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has granted and protected the rights of employees and unions. Extending such protection to its own employees will not result in any breakdown of government. On the contrary, granting the public employee a voice in the determination of the conditions under which he works will promote better managerial techniques and make for more, not less, efficient government.

Herbert Hoffman

EQUITY'S ROLE IN THE WAR ON ORGANIZED CRIME

The beast of organized crime is not a thing of the past. Nor is it tamed. It remains a powerful foe with which we must be concerned for many years to come.¹

Organized crime is a cancerous threat to the entire fabric of American society. Its tentacles reach out across the nation, seizing upon every conceivable opportunity to expand its illicit operations. Through a myriad of illegal activities the criminal organization is able to diffuse itself into virtually every community; and though gambling, narcotics, prostitution and loan-sharking are undoubtedly the most widely publicized of crime syndicate ventures, they by no means exhaust the list. Like the giants of commerce and industry, diversification is the key; and, as with these vast corporate entities the financial yields are staggering.²

One might well pause to reflect upon the effectiveness of society's response. We have witnessed endless hearing upon hearing conducted by both federal and state investigatory bodies, but the menace remains. There has been legislation upon legislation, both proposed and enacted, yet the enemy still does battle. Nor has the response been limited to the public arena alone, for private organizations have answered the call as well.³ Though these efforts are, of course, to be commended, it is submitted that the overall results to date have been minimal. Perhaps, then, in our zeal to develop new and untried methods of attack, we have overlooked a weapon which has long lain dormant—the inherent power of equity to stem the advance of this enemy from within.

¹ Kennedy, *Proposals for Meeting the Challenge of Interstate Organized Crime*, 38 NOTRE DAME LAW. 637, 640 (1963).

² Hoover, *The War on Organized Crime*, 13 DE PAUL L. REV. 195 (1964); Hundley, *The Nature of Interstate Organized Crime and Problems in Law Enforcement*, 38 NOTRE DAME LAW. 627 (1963); King, *The Control of Organized Crime in America* 4 STAN. L. REV. 52 (1961).

³ Atypical among these are the Association of Attorneys General, the International Association of Chiefs of Police, and the recently conceived National District Attorney's Association discussed in Scott, *Organized Law Enforcement v. Organized Crime*, 51 A.B.A. J. 932 (Oct. 1965).

It is the purpose of this paper to examine the feasibility of such an approach. In the course of this examination consideration will first be given to determine whether there is existing within our framework of jurisprudence a sound basis for the exercise of equitable jurisdiction. Attention will then be directed to the practicalities involved in the deployment of this weapon; and lastly, to meeting the objections which would be likely to be invoked should this concept prove workable.

THE JURISDICTIONAL QUESTION

Basic to any sound understanding of equitable law enforcement is an appreciation of our Anglo-American system of jurisprudence, with its three-fold divisions into the criminal law, common law, and equity. As to the nature of the latter, Professor Langdell has observed that, ironically, equitable relief is based almost exclusively upon those measures of compulsion and coercion which the common law, like numerous other systems, has rejected.⁴

It is in these attributes of compulsion and coercion that the value of equitable law enforcement is manifested. Langdell aptly laid the foundation for such deployment in his observation of the manner in which equity accomplishes its purpose:

[T]he court first ascertains and decides what, if anything, the person complained of ought to do or refrain from doing; then by its order or decree it commands him to do or refrain from doing . . . and finally, if he refuses or neglects to obey the order or decree, it punishes him by imprisonment for his disobedience.⁵

Turning now to a consideration of equitable jurisdiction over criminal acts, it has long been recognized that the Chancellor will neither undertake to enforce the criminal law, nor will he enjoin the commission of a crime as such.⁶ Though the foregoing statement indisputably represents the status of the law today, it should be understood that this rule has not always obtained. On the contrary, there is ample precedent to support the view that during an earlier and more turbulent period of English history, the Chancellor often invoked the strong arm of equity to restrain the commission of public wrongs.⁷

⁴ Langdell, *A Brief Survey of Equity Jurisdiction*, 1 HARV. L. REV. 111 (1887).

⁵ *Id.* at 117.

⁶ *Heber v. Portland Gold Mining Co.*, 64 Colo. 352, 172 Pac. 12 (1918); *People v. Prouty*, 262 Ill. 218, 104 N.E. 387 (1914); *Commonwealth v. Stratton Finance Co.*, 310 Mass. 469, 38 N.E.2d 640 (1941); *People ex rel. Bennett v. Laman*, 277 N.Y. 368, 14 N.E. 2d 439 (1938). See also 4 POMEROY, EQUITY JURISPRUDENCE § 1347 (5th ed. 1941).

⁷ Maloney, *Injunctive Law Enforcement: Leaven or Secret Weapon*, 1 MERCER L. REV. 1 (1949); 1 STORY, EQUITY JURISPRUDENCE § 48 (1836).

Such was the case in an early bill addressed to the Chancellor during the last years of Richard II,⁸ wherein the suppliant complained of a breach of the King's Peace by one Roger de Wanderford, who:

[P]ut in wait many persons, unknown and of ill fame, collected and assembled from divers parts, armed also with habergines, palettes, iron gloves, as well as with plate and divers other armour [who] . . . against the peace of our Lord The King . . . did ambush themselves to kill and murder the said suppliant.⁹

Blackstone, in commenting on bills of this nature, noted that mention of this ancient practice could be found as early as the laws of Edward The Confessor.¹⁰ The rationale employed by the Chancellor in invoking his jurisdiction was predicated upon the belief that the common law courts were overawed by the power of local barons, and were thus unable to provide an adequate remedy for breaches of the public peace.¹¹ The power of equity to entertain such causes unquestionably continued well into the Tudor Era, but with the rise of the Star Chamber, its criminal jurisdiction became gradually obsolete.¹²

Though the tyrannical usurpations of the Star Chamber ended with its abolition in the reign of Charles I,¹³ chancery never ceased to protect land or incorporeal hereditaments from irreparable injury—notwithstanding the fact that the act complained of was also a crime.¹⁴ The criminality of a particular act thus came to be viewed as a neutral factor which would neither confer jurisdiction nor oust what was otherwise valid.¹⁵

Chancery's jurisdiction over acts which possessed this sort of "dual capacity" is most clearly seen in connection with the subject of public nuisances. It should become readily apparent that within this fruitful area

⁸ 1377-1399.

⁹ 10 SELECT CASES IN CHANCERY (Selden Society) 5 (1397).

¹⁰ 4 BLACKSTONE, COMMENTARIES § 252 (3rd ed. 1768).

¹¹ "No doubt the great majority of the cases in which relief was sought because of failure of relief at law in the latter half of the fourteenth century were cases of outrage arising out of the state of civil war and lack of law enforcement which characterized the period." WALSH, EQUITY § 3 (1930).

¹² Mack, *The Revival of Criminal Equity*, 16 HARV. L. REV. 389 (1903).

¹³ 16 Car I c.10 (1640).

¹⁴ "A court of equity has no criminal jurisdiction, but it lends its assistance to a man who has . . . a right of property, and . . . makes out that an action at law will not be a sufficient remedy . . ." Lord Mansfield in *Macaulay v. Shackell*, 1 Bligh N.S. 96, 127, 4 Eng. Rep. 809, 820 (1827). *Accord*, *United States v. American Bond & Mortgage Co.*, 31 F.2d 448 (N.D. Ill. 1929); *Village of Spillertown v. Prewitt*, 21 Ill. 2d 228, 171 N.E.2d 582 (1961); *Burden v. Hoover*, 9 Ill. 2d 114, 137 N.E.2d 59 (1956); *People v. City of St. Louis*, 10 Ill. 351 (1848).

¹⁵ See Note, 28 FORDHAM L. REV. 161 (1959). *Accord*, *In re Debs*, 158 U.S. 564 (1895); *Allis Chalmers v. Reliable Lodge*, 111 Fed. 264 (N.D. Ill. 1901); *Cella v. People*, 112 Ill. App. 376 (1904).

of the law, lies the genesis for the modern development of "criminal equity." Although the concept of public nuisances may have well evolved today to a point which renders it incapable of definition, at common law they were considered to be:

[O]ffenses against the public, by either doing a thing which tends to the annoyance of all the King's subjects, or by neglecting to do a thing which the common good requires.¹⁶

Clearly then, at common law the public nuisance was viewed as an offense against society at large. The range of activities encompassed within this broad category of public wrongs was significant even in Blackstone's day. Included therein were purpuestures, or interferences with the King's highway, lotteries, offensive trades and manufacturers, eavesdroppers, common scolds, and disorderly public places consisting of "disorderly inns or ale houses, bawdy houses, . . . stages for rope-dancers, mountebanks and the like."¹⁷

The manner of contending with these public wrongs has been as varied as the range of activities themselves. In Coke's Reports it appears that there were two recognized ways to address a nuisance in that day: (1) by action, damages and removal; and (2) by self-help.¹⁸ Where the nuisance was of the public variety, it was early established that the Crown could proceed directly by indictment in King's Bench,¹⁹ or, in exceptional cases, by an information brought by the Attorney General.²⁰ Injunctive relief was obtainable as well, even during the reign of Elizabeth, and though such wrongs were first enjoined in the Court of Exchequer,²¹ Chancery's jurisdiction later became supreme.²² In addition to the foregoing, summary proceedings were later prescribed by statute, furnishing the People with an additional remedy in certain specified instances. Typical among these are the provisions contained in the Illinois Nuisance Act which provide for the enjoining and abatement of numerous public nuisances including houses of prostitution,²³ as well as narcotics establishments.²⁴

¹⁶ 2 RUSSELL, CRIMES 1691 (8th ed. 1923).

¹⁷ 4 BLACKSTONE, *op. cit. supra* note 10, § 167.

¹⁸ *Baten's Case*, 9 Co. 53b, 77 Eng. Rep. 810 (K.B. 1609). See also *James v. Hayward*, Cro. Car. 184, 79 Eng. Rep. 761 (K.B. 1631), wherein it was held that erecting a gate across the highway constituted a public nuisance, and that any of the King's subjects passing by might tear it down.

¹⁹ *Rex. v. Medlor*, 2 Show. K.B. 36, 89 Eng. Rep. 777 (K.B. 1677).

²⁰ 2 RUSSELL, CRIMES 1692 (8th ed. 1923).

²¹ *Bond's Case*, Moore 238, 72 Eng. Rep. 553 (Ex. 1587).

²² *Mayor of London v. Bolt*, 5 Ves. Jun. 129, 31 Eng. Rep. 507 (Ch. 1799); *Coulson v. White*, 3 Atk. 21, 26 Eng. Rep. 816 (Ch. 1743).

²³ ILL. REV. STAT. ch. 100½, § 1 (1965).

²⁴ ILL. REV. STAT. ch. 100½, § 15 (1965).

It will be recalled that though the so-called "criminal jurisdiction" of equity ceased with the advent and rise of the Star Chamber, the Chancellor never ceased to invoke his jurisdiction where injury was threatened to property.²⁵ Justifiable concern over property rights led to an artificial restriction upon equity's jurisdiction at an early date in this country. The origins of this narrow interpretation are clearly viewed in the case of *Attorney General v. Utica Insurance Company*,²⁶ where the State of New York sought to restrain the business pursuits of an unincorporated banking association, which were being carried on in violation of a penal statute. In refusing the injunction the eminent Chancellor Kent declared:

If a charge be of a criminal nature, or an offense against the public, and does not touch the enjoyment of property, it ought not to be brought within the direct jurisdiction of this court. . . . It is an extremely rare case, and may be considered, if it ever happened, as an anomaly, for a court of equity to interfere at all, and much less, preliminarily, by injunction, to put down a public nuisance which did not violate the rights of property, but only contravened the general policy.²⁷

While it is true that the earlier English authorities relied upon by the Chancellor might superficially, at least, suggest this interpretation, upon closer examination, the thesis appears to have little merit.²⁸ The contention that equity should extend its strong arm only where property rights were concerned had been rejected unequivocally by Lord Hardwicke some sixty-five years earlier when he recognized that in cases of public nuisance, equitable jurisdiction was "not confined to the particular property of the plaintiff, because it (a public nuisance) is in the nature of a terror to diffuse itself in a very extensive manner."²⁹

Notwithstanding the criticism which issued as a result of the Chancellor's holding,³⁰ this decision admittedly did have considerable influence on later American cases, and resulted, on occasion, in an unwillingness by chancellors to enjoin as public nuisances situations which, though violative of the public order, were absent of any vestiges of property

²⁵ *Supra* note 14.

²⁶ 2 Johns. Ch. 371 (N.Y. 1817).

²⁷ *Id.* at 378, 380.

²⁸ A thorough analysis of the precedents cited by Chancellor Kent may be found in *State v. Mobile*, 5 Porter 279 (Ala. 1837). See also Caldwell, *Injunctions Against Crime*, 26 ILL. L. REV. 259 (1931).

²⁹ *Anon.* 3 Atk. 750, 26 Eng. Rep. 1230 (Ch. 1752).

³⁰ *Supra* note 28. Possibly the most absolute of rejections appears in *State v. Crawford*, 28 Kan. 518, 524 (1882) where the court declared: "Now, with all due deference to the vast learning and the eminent ability of the great chancellor, and with all proper veneration for his memory and his name, we cannot follow this decision to its full and entire extent; for, unquestionably, the great weight of authority, as well as of reason, is against the doctrine seemingly enunciated therein."

rights.³¹ In such cases the courts were content to view the subject of nuisances with this artificial and restricted gloss.

However, the growth and development of the public nuisance concept was not to be retarded by such a narrow interpretation, for the cases rejecting the property right requirement are legion. In order to promote a better perspective it might be wise to consider these holdings in a compartmentalized manner. In examining these cases it becomes readily apparent that the underlying rationale for invoking jurisdiction is based upon either the rights of the public at large or upon the inherent attributes of sovereignty. In reality, though, these two groups overlap considerably and thus the distinctions are oftentimes blurred.

Turning first to the public right theory, it is evident that in this approach the courts are referring to little more than the police power of the states. In determining whether a public right has been invaded it is not necessary that the entire community be touched; rather, it is sufficient that the act complained of interferes with those who came into contact with it in the exercise of common rights. Thus, where there are violations of the public health,³² morals,³³ safety,³⁴ and welfare,³⁵ the courts will *ipso facto* consider these as public wrongs and enjoined as such.

Considering now those cases which predicate equitable jurisdiction upon the presence of sovereign rights, the fundamental concept which obtains is a clear recognition of the state as a juristic person. In the landmark case of *In re Debs*,³⁶ an injunction was granted against the officers of the American Railway Union commanding them to cease and desist from boycotting the Pullman Car Company in Chicago. Following subsequent violations of the injunction, the defendants were held in contempt

³¹ *Dean v. State*, 151 Ga. 371, 106 S.E. 792 (1921); *Sheridan v. Colvin*, 78 Ill. 237 (1875); *State ex rel. Wood v. Schweickardt*, 109 Mo. 496, 19 S.W. 47 (1891).

³² *People ex rel. Kerner v. Huls*, 355 Ill. 412, 189 N.E. 346 (1934); refusal to submit cattle for tuberculin test; *Gay v. State*, 90 Tenn. 645, 18 S.W. 260 (1891); keeping a hogpen.

³³ *State ex rel. Sullivan v. Phoenix Sav. Bank & Trust Co.*, 68 Ariz. 42, 198 P.2d 1018 (1948); illegal gambling; *People ex rel. Thrasher v. Smith*, 275 Ill. 256, 114 N.E. 31 (1916); maintaining a bawdy house; *Stead v. Fortner*, 255 Ill. 468, 99 N.E. 680 (1912); operation of tavern in violation of antisaloon law; *City of Aurora v. Warner Bros. Picture Dist. Corp.*, 16 Ill. App. 2d 273, 147 N.E. 2d 694 (1958); obscene motion picture.

³⁴ *City of Chicago v. Larson*, 31 Ill. App. 2d 450, 176 N.E.2d 675 (1961); refusal to permit inspection of a multiresidential building; *Commonwealth v. McGovern*, 116 Ky. 212, 75 S.W. 261 (1903); holding of an illegal prize fight. *King v. Kline*, 6 Pa. 318 (1847); harboring a vicious animal. *State ex rel. Crow v. Canty*, 207 Mo. 439, 105 S.W. 1078 (1907); illegal bullfight.

³⁵ *State ex rel. Smith v. McMahon*, 128 Kan. 772, 280 Pac. 906 (1929); *Commonwealth ex rel. Grauman v. Continental Co.* 275 Ky. 238, 121 S.W. 2d 49 (1938); *State ex rel. Goff v. O'Neil*, 205 Minn. 366, 286 N.W. 316 (1939); usurious practices.

³⁶ 158 U.S. 564 (1895).

and imprisoned for a period of six months. In denying the prisoners' petition for habeas corpus, the United States Supreme Court was singularly impressed by the great public injury which was likely to ensue. Though the Court hinted at the existence of the government's property right in the mails, instead, it chose to bottom its decision upon the theory that the exercise of such inherent attributes of sovereignty were basic to the very existence of government.

The concept of sovereign rights became more deeply entrenched in the years that followed *Debs*. In *People v. Tool*,³⁷ the state sought to enjoin certain election commissioners from engaging in a conspiracy which would inevitably result in a "pollution of the ballot box." The court, in granting the relief, recognized that the state, while acting in its sovereign capacity as *parens patriae*, had the right to invoke the power of equity to protect those citizens who were unable to act on their own behalf. The court then proceeded to comment:

[W]hile the writ of injunction may not be employed to suppress a crime as such, yet when the acts, though constituting a crime, will interfere with liberties, rights, and privileges of citizens, the state not only has the right to enjoin the commission of such acts, but it is its duty to do so.³⁸

A similar line of reasoning was advanced by the California Supreme Court in the case of *In re Wood*.³⁹ There, the injunction had issued against the Independent Workers of the World to enjoin threatened violations of the Criminal Syndicalism Act. In rejecting the petitioners' argument that the injunction was invalid, the court, in recognizing the unique position of the state, declared "the government can obtain an injunction to restrain a public nuisance without showing any property right in itself."⁴⁰

Having traced the development of the public wrong concept to its present expanded version, from the cases one may clearly discern a marked trend toward greater liberality in affording equitable relief. The broadening of the nuisance theory to include conduct which threatens public rights as well as acts which infringe upon the inherent attributes of sovereignty, has laid a sound basis for deployment of the injunctive weapon yet one step further. Considering the present boundaries of our chancery courts, it is submitted that it would be no drastic departure to invoke equity's jurisdiction in those cases where a concert of action exists by members of the criminal organization to defy the state or the public at large. The propriety of this proposition is founded upon well established precedents. The way is open; all that remains is a willingness to wake a slumbering giant.

³⁷ 35 Colo. 225, 86 Pac. 224 (1905).

³⁹ 194 Cal. 49, 227 Pac. 908 (1924).

³⁸ *Id.* at 237, 86 Pac. at 227.

⁴⁰ *Id.* at 55, 27 Pac. at 910.

PRACTICALITIES OF DEPLOYMENT

Having thus established that a sound jurisdictional basis for equitable law enforcement does indeed exist through the public wrong channel, it remains now to demonstrate that the injunction provides a practical solution to the threat of organized crime. In fashioning a workable theory, one must bear in mind that the nature of the criminal organization is such that alternative tactics are likely to be required to deal effective blows against the several echelons of syndicate personnel.⁴¹ What is likely to be effective against those who are mere expendable troops, could well be utterly unavailing when directed against the generals.

Considering first those at the lower rungs of the syndicate ladder, it is clear that the strong arm of equity may be used to restrain such individuals from engaging in acts which are encompassed in the expanded public nuisance concept. Should they choose to ignore the order of the court, summary punishment would be readily available after the contempt is established. True, in jurisdictions such as Illinois this summary mode of relief is available pursuant to statute,⁴² but even under our Nuisance Act, gambling operations escape completely the sanctions set forth therein. Certainly here lies a fruitful area for deployment of the injunctive weapons, and even though the individuals staffing such outposts will inevitably be but mere underlings in the criminal hierarchy, the impact will be keenly felt. Disruptions in the day to day gambling activities would impose economic sanctions by stopping the flow of illegal dollars, as well as requiring manpower additions to replace those whose activities had been enjoined.⁴³

The management levels of organized crime, however, pose a different sort of problem altogether—the problem of dealing with those individuals who are physically far removed from the situs of illicit operations. If the virtual immunity of the principals is to be negated, a theory must be employed which will link these individuals with those activities sought to be enjoined. Recognizing that any successful syndicate operation requires a concert of action among those who seek to defy the state's authority, the key to effective relief might very well lie in utilization of the conspiracy concept. The great public injury would still constitute the gravamen of the action,⁴⁴ but by adding to it the conspiracy element, an effective weapon would be on hand to bring to justice those who have long been regarded as untouchable.

⁴¹ Johnson, *Organized Crime: Challenge to the American Legal System*. 53 J. CRIM. L. 399 (1962).

⁴² *Supra* note 22.

⁴³ *Supra* note 41.

⁴⁴ *Revert v. Hesse*, 184 Cal. 295, 193 Pac. 943 (1920); *Phelan v. Atlantic National Bank of Boston*, 301 Mass. 463, 17 N.E.2d 697 (1938); *Roche v. Blair*, 305 Mich. 608, 9 N.W.2d 861 (1943).

To accomplish this result would involve a relatively simplified procedure. Once the Attorney General, State's Attorney, or other proper public official has determined that sufficient grounds exist, a verified complaint would be filed in chancery seeking injunctive relief against the particular public wrong. In the case of gambling houses the complaint would name not only the premises, but all who are suspected, even minutely, of any connection with such illicit operations. A similar form of complaint could be utilized against the juice racketeers, except here there would be little likelihood of sighting in on any particular premises. In any event, as long as specific facts are set out which constitute the conspiracy, the complaint would not, in this writer's opinion, be open to attack.⁴⁵

Should the defendant fail to file an answer or any plea, the issuance of a temporary injunction could be determined solely upon the sufficiency of the complaint.⁴⁶ It is well settled that an applicant for a temporary injunction is not required to make out a case that in all events will entitle him to ultimate relief; it is sufficient that the party seeking such relief merely raise a fair question of the existence of such right.⁴⁷ Furthermore, in those jurisdictions which have verification requirements similar to that contained in the Illinois Civil Practice Act,⁴⁸ where the complaint is verified every subsequent pleading must be verified as well unless excused by the court.⁴⁹

Assuming, as is likely, that the defendant files his answer and a hearing on the merits follows, this being a civil action, the plaintiff would be required to prove his case by a mere preponderance of the evidence, rather than beyond a reasonable doubt.⁵⁰ Unlike a criminal proceeding there would be no presumption of innocence to aid the offender, and the law traditionally affords great latitude in the admission of circumstantial evidence tending to establish a conspiracy.⁵¹

Faced then with a less stringent burden of proof requirement, the state's

⁴⁵ *Mendenhall v. Stewart*, 18 Ind. App. 262, 47 N.E. 943 (1897); *Wells v. Houston*, 23 Tex. Civ. App. 629, 57 S.W. 584 (1900).

⁴⁶ *Dunne v. County of Rock Island*, 273 Ill. 53, 112 N.E. 342 (1916).

⁴⁷ *Nestor Johnson Mfg. Co. v. Goldblatt*, 371 Ill. 570, 21 N.E.2d 723 (1939); *Weingart v. Weingart*, 23 Ill. App. 2d 154, 161 N.E.2d 714 (1959).

⁴⁸ ILL. REV. STAT. ch. 110, § 35 (1965).

⁴⁹ *Capital Records, Inc. v. Vee Jay Records, Inc.*, 47 Ill. App. 2d 468, 197 N.E. 2d 503 (1964).

⁵⁰ 9 WIGMORE, EVIDENCE § 2498 (3rd ed. 1940). See also, *State v. Froelich*, 316 Ill. 77, 146 N.E. 733 (1925); *Chase v. Proprietors of Revere House*, 232 Mass. 88, 122 N.E. 162 (1919).

⁵¹ *Clune v. United States*, 159 U.S. 590 (1895); *United States v. General Electric Co.*, 82 F. Supp. 753 (D. N. J. 1949); *Rent-a-Car Co. v. Globe and Rutgers Fire Ins. Co.* 161 Md. 249, 156 Atl. 847 (1931).

prospects of obtaining the desired relief would be greatly enhanced. Where proceeding, for example, against a house of prostitution, the general reputation of the establishment as a house of ill fame is sufficient to warrant the issuance of the injunction. Specific acts of lewdness or prostitution need not be introduced by the People.⁵² In proving the conspiracy element the state would be aided considerably by the rule which allows admissions of co-conspirators to be used against each other.⁵³ Tangible evidence such as books, records, etc., might be obtained through ordinary discovery methods,⁵⁴ and their production could not be thwarted by a reliance upon the fifth amendment, except in certain restricted circumstances.⁵⁵

The speed with which the injunctive weapon may issue would serve to cause no small degree of apprehension in the hearts of the offenders. There would, of course, be no expectation of a prolonged jury trial, nor would there be any protection forthcoming from those constitutional provisions which apply to criminal prosecutions.⁵⁶ Should the injunction fail to deter the defendants from engaging in the conduct proscribed, contempt proceedings would be commenced. Since the contempt would be founded upon the defendant's refusal to obey the lawful command of the Chancellor it would be of a civil nature.⁵⁷ Thus, this second stage would be absent as well as any requirement of jury trial,⁵⁸ or proof of guilt beyond a reasonable doubt.⁵⁹

From the foregoing analysis it may be seen that the Chancellor is placed in the rather unique position of being able to distribute preventative justice by enjoining threatened acts, as well as those currently in progress. As the able Justice Story once observed: "[B]y a perpetual injunction the remedy is made complete through all future time. . . ."⁶⁰ To accomplish this result would require only that certain illicit acts be approached as

⁵² *Balch v. State*, 65 Okla. 146, 164 Pac. 776 (1917).

⁵³ 4 WIGMORE, EVIDENCE § 1079 (3rd ed. 1940). See also *United States v. Lev*, 276 F.2d 605 (2nd Cir. 1960), *cert. denied*, 363 U.S. 812 (1961).

⁵⁴ ILL. REV. STAT. ch. 110, § 101.17 (1965).

⁵⁵ Though the privilege against self-incrimination would apply where an individual is required to produce records which incriminate him, the privilege would not likely extend to the other representatives of a collective group. 8 WIGMORE, EVIDENCE § 2259(b) (3rd ed. 1940).

⁵⁶ See Black, *The Expansion of Criminal Equity Under Prohibition*, 5 WISC. L. REV. 412 (1930), wherein the author lists six federal constitutional guarantees, in addition to the right of trial by jury, which are bypassed through the deployment of "criminal equity."

⁵⁷ *Shillitani v. United States*, 384 U.S. 364 (1966).

⁵⁸ *Ibid.*

⁵⁹ *People ex. rel. Hook v. Buconich*, 277 Ill. 290, 115 N.E. 185 (1917).

⁶⁰ 2 STORY, EQUITY JURISPRUDENCE § 924 (1836).

public nuisances rather than as crimes. The tactical change suggested appears to be amply justified in light of the potential yield. The weapon is ready and available; all that is needed is a willingness to use it.

MEETING THE OBJECTIONS LIKELY TO ENSUE

Since objections to the deployment of the injunctive weapon would be legion, the remaining section of this paper will be devoted to meeting the criticism likely to develop from its use. Considering first those objections which might be viewed as jurisdictional in nature, some will no doubt voice alarm in what has been labelled a revival of "the ancient grudge between Coke, the common law incarnate, and Ellesmere, the Keeper of the King's Conscience."⁶¹ The argument will be advanced that the expansion of the public nuisance concept constitutes an unwarranted intrusion into the area of criminal law.⁶² In reply to this sort of objection, it will be recalled that in the first section of this paper, the jurisdictional foundations were clearly laid, with care taken to show that in the case of public wrongs the criminality of a particular act has achieved a neutral status. Therefore, the argument has little merit; for to permit this neutrality to oust jurisdiction which is otherwise valid, surely seems as objectionable as allowing it to confer jurisdiction.

The contention will also be made that traditionally equity does not become embroiled in matters of this nature, and that its well recognized boundaries must be respected. Objections of this sort have their origin in the rather static interpretation of equity announced nearly a century and a half ago by Lord Eldon, when he declared:

The doctrines of this Court ought to be as well settled and made as uniform almost as those of the common law, laying down fixed principles, but taking care that they are to be applied according to the circumstances of the case.⁶³

The question thus arises as to whether equity should be bound rigidly by a strict adherence to the doctrine of *stare decisis*, or allowed to develop new remedies to meet the demands of a society far removed from the England of Lord Eldon's day. When equity is viewed in its proper perspective it is difficult indeed to ignore its historical justification which looked to the chancery as a means of alleviating the rigidity and technicalities inherent in the common law. Certainly, the day for making precedents has not passed; for were this to be so, the value of equity would be more imagined than real.

⁶¹ *Supra* note 56, at 412.

⁶² In Simpson, *Fifty Years of American Equity*, 50 HARV. L. REV. 171, 228 (1936), the author criticized what he interprets as "a spurious expansion of the public nuisance concept. . . ." See also, *Hedden v. Hand*, 90 N.J.Eq. 583, 107 Atl. 285 (1919).

⁶³ *Gee v. Pritchard*, 2 Swans. 302, 414, 36 Eng. Rep. 670, 674 (Ch. 1818).

Is this to suggest then, that equity's jurisdiction knows no bounds other than the Chancellor's subjective interpretations of the *jus naturale*? Notwithstanding that propositions of this sort have been regarded as bordering upon blasphemy by commentators such as Story,⁶⁴ support for this thesis may be found in no less an authority than the esteemed Professor Chafee.⁶⁵ It is the contention of Chafee that equity jurisdiction is not truly jurisdictional in nature, but is merely a conglomeration of self-imposed rules which should be treated merely as reasons for coming into equity—and nothing more. In arriving at this conclusion heavy emphasis is placed upon the “single court theory” wherein the merger of law and equity is viewed as obliterating the historical jurisdictional distinctions between Chancery and King's Bench. Regarding the separate court of chancery as “extinct as the separate estate of a married woman,”⁶⁶ Chafee argues that an enlightened judge should:

[A]bandon the notion that the two sides of Westminster Hall survive in his courtroom. It is like saying that he has power to decide the dispute when he crosses his left leg over his right, and no power at all when his right leg is on top. Either the court has power or it does not; and if it has power it has it all day long, regardless of the label put on the particular suit.⁶⁷

Though the learned professor is quick to admit that his position is clearly opposed to distinguished authority, he is able to formulate a cogent argument in support of his stand. This is best seen in his analysis of the traditionally accepted rule that equitable jurisdiction will not obtain where the aggrieved party may secure an adequate remedy at law. Chafee forcefully contends that an examination of the authorities points to no instance where the adequacy of a legal remedy was held to make a decree for equitable relief void on collateral attack.⁶⁸ The conclusion reached is that as long as the court has jurisdiction of the subject matter and over the parties, nothing further is required.

Admittedly, the Chafee thesis represents the minority view and would

⁶⁴ “If, indeed, a Court of Equity in England did possess the unbounded jurisdiction, which has been thus generally ascribed to it . . . freeing itself from all regard to former rules and precedents, it would be the most gigantic in its sway, and the most formidable instrument of arbitrary power, that could well be devised.” 1 STORY, EQUITY JURISPRUDENCE § 19 (1836).

⁶⁵ CHAFEE, SOME PROBLEMS OF EQUITY 296–380 (1950). The material to which reference is made was originally delivered by the professor in conjunction with the Thomas M. Cooley Lectures at the University of Michigan Law School. Additional support for this thesis may be found in CLARK, EQUITY § 8 (1919).

⁶⁶ CHAFEE, *op. cit. supra* note 65, at 306.

⁶⁷ *Id.* at 339.

⁶⁸ Support for this proposition is found in *Stout v. Cook*, 41 Ill. 447 (1866), where the court held that failure to raise the adequacy of legal remedy objection at the onset, resulted in a waiver.

be most unpalatable among those who subscribe to the traditionalist school. It should be understood, however, that one need not embrace this extreme position in order to disarm the jurisdictional arguments. On the contrary, such attacks may be met even where the absence of an adequate remedy at law is viewed as the ultimate test of equity jurisdiction.

Satisfaction of the inadequate remedy at law requirement may be easily accomplished through several alternate channels. One avenue available to the People is the persistent offender doctrine which capitalizes upon the defendant's continued defiance of the law. This theory was employed by the state in *People ex rel Dyer v. Clark*,⁶⁹ where the defendant had been convicted and fined on numerous occasions for the maintenance of a bawdyhouse. Recognizing that the defendant's illicit callings would continue indefinitely upon mere payment of a token fine, it was held that no effective remedy at law existed. The Illinois Supreme Court poignantly expressed its opinion of constant offenders in the later case of *People ex rel Kerner v. Hulls*,⁷⁰ wherein the state sought injunctive relief against a recalcitrant farmer who repeatedly refused to submit his cattle for mandatory tuberculin tests. Unimpressed by the availability of criminal sanctions, the court said:

This court has never regarded a criminal prosecution which cannot prevent the continuance of a nuisance as a complete and adequate remedy for a wrong inflicted on the people.⁷¹

The absence of an adequate legal remedy might secondly be established upon a showing that a multiplicity of suits would be required at law in the event equity's jurisdiction did not obtain. This theory found acceptance by the Minnesota Supreme Court in *State v. Red Owl Stores, Inc.*⁷² In this case the defendant corporation had urged its numerous retail outlets and subsidiaries to engage in wilful violation of a statute which prohibited unlicensed sales of drugs and patent medicines. In awarding injunctive relief the court advanced the proposition that an adequate legal remedy could hardly be said to exist where upwards of two-hundred separate actions would be necessary to enforce this public health measure.

Finally, the third available approach is centered in the irreparable damage theory which puts in issue the likelihood of imminent public injury "before the tardiness of the law could reach it."⁷³ Utilization of this theory was successfully made by the Attorney General in *United States v.*

⁶⁹ 268 Ill. 156, 108 N.E. 994 (1915).

⁷⁰ 355 Ill. 412, 189 N.E. 346 (1934).

⁷¹ *Id.* at 417, 189 N.E. at 349.

⁷² 253 Minn. 236, 92 N.W.2d. 103 (1958).

⁷³ *City of Georgetown v. Alexandria Canal Co.*, 37 U.S. (12 Pet.) 91, 98 (1838).

*American Bond & Mortgage Co.*⁷⁴ Here, an injunction issued to restrain the defendant from making unlicensed radio broadcasts. The court in this case was understandably impressed by the fact that the long arm of justice would not attach until the mischief had long been accomplished.

In concluding this matter of adequate legal remedy, it should be understood that this jurisdictional test is not at all synonymous with the problem of inadequate modes of law enforcement. Specifically, it has been held to be of no jurisdictional consequence that local authorities refuse to enforce the law;⁷⁵ that local juries fail to convict;⁷⁶ or that criminal courts do not seek to impose heavy penalties.⁷⁷

A second possible ground of objection concerns the effectiveness of equitable relief in relation to the evil we seek to abate. It has been suggested that the injunctive weapon provides no additional sanction in that the criminal law already forbids the identical act which forms the basis for the intervention of equity.⁷⁸ This nearsighted approach overlooks the fact that through the injunction a personal message is conveyed to the offender. Whereas the criminal law as such addresses itself to all of society, the injunction singles out the defendant and speaks in unmistakable terms to him alone.

The third group of objections is most clearly viewed in reference to those constitutional and procedural safeguards which traditionally afford protection to the criminally accused. The charge no doubt would be made that the expansion of equity's jurisdiction serves to further erode our cherished rights of jury trial. Hopefully, this question was answered above;⁷⁹ but, in the event any doubts remain, it should be emphasized once again that the constitutional right of trial by jury does not extend to matters which are cognizable in chancery.⁸⁰

Considering now the matter of punishment, admittedly the spectre of double punishment is no bogeyman. It is entirely within the realm of pos-

⁷⁴ 31 F.2d 448 (N.D. Ill. 1929).

⁷⁵ *State v. O'Leary*, 155 Ind. 526, 58 N.E. 703 (1900); *Powers v. Flansburg*, 90 Neb. 467, 133 N.W. 844 (1911); *Vera v. Robinson*, 16 S.W. 2d 860 (Tex. 1929). A contra view obtains in Illinois where "if ordinary methods are ineffective or officials disregard their duties and refuse to perform them, the court ought to apply the strong and efficient hand of equity and uproot the evil." *Stead v. Fortner*, 255 Ill. 468, 479, 99 N.E. 680, 684 (1912).

⁷⁶ *People ex rel. Bennett v. Laman*, 277 N.Y. 368, 14 N.E.2d 439 (1938).

⁷⁷ *Attorney General v. Harris*, (1959) 2 All E.R. 393 (Ch.).

⁷⁸ 6 B.U.L. REV. 128, 131 (1926).

⁷⁹ *Supra* notes 56 and 58.

⁸⁰ "A man charged with the commission of a crime has a constitutional right to a trial by jury, but a man who has not yet acted, but who merely proposes to commit an act which is not only criminal in its character, but also flagrantly offensive as a public nuisance, has no constitutional right to commit the act in order that he may thereafter enjoy the constitutional right of trial by jury." *State ex rel. Crow v. Canty*, 207 Mo. 439, 460, 105 S.W. 1078, 1085 (1907).

sibility that an indictment will follow close upon the punishment for contempt. Should a conviction result in the criminal proceeding no violence would be done to the double jeopardy provisions of the Constitution.⁸¹ Conversely, if the People had proceeded in the first instance by indictment, an acquittal would not justify a subsequent plea of *res judicata*.⁸² Though the threat of double punishment may tend to make some wary of the injunctive weapon, it should be recognized that within the traditional framework of our common law system the same threat has been ever present. One need only to consider the crime of battery—taking notice, of course, of the civil implications as well. Double punishment, so to speak, has long been imposed here, for an award in damages will scarcely bar the state from invoking the aid of the criminal courts.

The final objection warranting mention is the apprehension among sincere libertarians, that if equity were to move more energetically into the public nuisance field, the ominous threat of government by injunction would be ever present. Such was the fear of Chancellor Kent nearly one hundred and fifty years ago, when, in refusing to grant equitable relief, he said of the injunction:

It is the strong arm of the court; and to render its operation benign and useful, it must be exercised with great discretion, and when necessity requires it.⁸³

Understandably, there is considerable merit in arguments of this sort. Restraint is oftentimes necessary lest the pendulum swing back to the England which existed in the era of the Star Chamber. At the same time, however, it is equally objectionable to dismiss in a cavalier manner, the unique nature of the menace which threatens from within.

CONCLUSION

From the foregoing it is apparent that it is a balance for which we must aim. A balance which not only respects the rights of individuals, but recognizes the rights of society as well. Perhaps the time has come to reverse a pendulum which has "swung too far in favor of affording rights which are abused and misused by criminals."⁸⁴ Not, surely back to the day of the Tudors, but perhaps just far enough to insure that a healthy equilibrium be maintained. The People are in desperate need of a new weapon to do effective battle against organized crime. The injunction could well be the answer.

Michael P. Toomin

⁸¹ *Lewinsohn v. United States*, 278 Fed. 421 (7th Cir. 1921); *Ex parte Allison*, 99 Tex. 455, 90 S.W. 870 (1906).

⁸² *Murphy v. United States*, 272 U.S. 630 (1926).

⁸³ *Attorney General v. Utica Insurance Company*, 2 Johns. Ch. 371, 379 (N.Y. 1817).

⁸⁴ *AM. BAR NEWS*. 16 (January 15, 1965).