INJUNCTIONS IN CRIMINAL LAW: AN ANGLO-AUSTRALIAN ANALYSIS

DR KUMAR AMARASEKARA* **AND KEITH AIKERS****

I INTRODUCTION

Whilst it has often been stated by both commentators[1] and the judiciary[2] that there is no legal basis for courts of equity to enforce the criminal law, some case law[3] and legal writing[4] contradict that view. In the recent case of *Pell v The Council of the Trustees of the National Gallery of Victoria*[5] the applicant, Archbishop Pell, sought an injunction to restrain the National Gallery of Victoria from displaying an allegedly indecent or obscene photograph in contravention of various statutory[6] and common law[7] offences. *Pell's Case* therefore raises some significant issues relating to the granting of injunctive relief by civil courts to restrain the commission of existing or future criminal acts. Unfortunately, the civil courts have often disagreed as to the origins of, rationale for, standing in relation to, and criteria for, granting or refusing, injunctive relief in criminal matters.

It is the authors' four-pronged thesis that (1) injunctive relief in criminal law is not a modern phenomenon only, as its roots go back to the thirteenth or fourteenth century in England; (2) despite the arguments against using such relief in criminal

* Senior Lecturer, Faculty of Law, Monash University; Clayton, Victoria, Australia, 3168 or kumar.amarasekara@law.monash.edu.au

** Senior Research Assistant, Faculty of Law, Monash University.

[1] See John Rice, 'Injunction of Crimes without Statutory Authority' (1959) 23 *Albany Law Review* 361, 374–7; Fredrick W Maitland, *Equity*, 19, quoted in Harold G. Hanbury, *Modern Principles of Equity* (5th ed., 1949) 663.

[2] See the judgment of Lord Eldon in *Gee v Pritchard* (1818) 2 Swan 402, 413; *Commonwealth of Australia v John Fairfax & Sons Ltd* (1980) 147 CLR 39, 49-50; *Ramsay v Aberfoyle Manufacturing Company (Australia) Pty Ltd* (1935) 54 CLR 230, 246–50; *A-G v Sheffield Gas* (1853) 3 De G M & G 304, 320.

[3] *A-G v Huber* [1971] 2 SASR 142

[4] Harold G. Hanbury, *Essays in Equity* (1934) 109.

[5] [1998] 2 VR 391 (*Pell's Case*). A more detailed version of the facts in *Pell's Case* is given at the commencement of part VII of this article.

[6] The exhibiting or displaying of an indecent or obscene representation in a public place under the *Summary Offences Act 1966* (Vic) s 17(1)(b).

[7] The common law misdemeanour of publication of blasphemous libel.

cases there are equally, if not more, persuasive arguments for its usage in such circumstances; (3) even though the decision as to whether or not an injunction is invoked is made on a case by case basis without the constraints of rigid rules due to its being both a discretionary and an equitable remedy, several grounds have been cited so pervasively in UK and Australian equity courts that they form a solid set of criteria which these courts ought to be able to apply consistently; and (4) in *Pell's Case* the court showed a reluctance to apply these well known criteria.

As a consequence, this article attempts (1) to define the term 'injunction' in the context of this article (see part II of this article below); (2) to give a very brief *Anglo-Australian* history of the use of injunctions in criminal matters (see part III); (3) to discuss some of the arguments for and against their usage that have appeared in the case law and secondary literature, though these arguments do not necessarily represent the particular views of the authors (parts IV & V); (4) to list and briefly discuss the main grounds or criteria that have been applied by recent Australian and English courts of equity when deciding upon applications for injunctions in such matters (part VI); (5) to juxtapose the specific facts of *Pell's Case* against these criteria and other policy considerations to see if the court in *Pell's Case* was correct in refusing to grant injunctive relief (part VII) and (6) to offer some concluding remarks.

Regrettably, limits on word length have prevented the authors from addressing two other important issues which often arise in applications for injunctive relief in criminal matters, namely the standing of the applicant and the various jurisprudential aspects of 'rights'.[8] Perhaps these omissions are, however, understandable because (a) the issue of 'standing' in this context is almost a cliché[9] in the literature, (b) standing was not raised in *Pell's Case*[10] and (c) other aspects of the rights issue are discussed elsewhere in this article.[11] Some may feel there are methodological limitations in this article, with its partial reliance on a case study approach to critically examine the efficacy or otherwise of many of the criteria used previously by equity courts when considering an application for injunctive relief in criminal cases. Not only are there space limitations with articles of this nature, however, but the authors feel that they have in this article critically examined many other criminal

[8] As the issue of 'rights' relates to both the standing of the applicant for injunctive relief and to some of the criteria under which the equity courts may choose to grant or refuse such relief, the thoughts of Dworkins and other 'rights' based legal theorists would have added an interesting dimension to this article.

[9] For example *Gouriet v Union of Postal Workers* [1984] AC 435. The standing issue, along with its associated public and private rights element, is almost a cliché in the literature associated with injunctions in criminal law — see John Duns, 'Enjoining Breaches of Criminal Legislation' (1990) 14 *Criminal Law Journal* 5; David Feldman, 'Injunctions and the Criminal Law' (1979) 42 *Modern Law Review* 369; Geoffrey Flick, 'Relator Actions: the Injunction and the Enforcement of Public Rights' (1978) 5 *Monash University Law Review* 133; Ken Rewell, 'The Relator Injunction' (1979) 8 *Sydney Law Review* 706. Therefore despite the relevance of the standing issue to this article in the context of ensuring the court is not overloaded with frivolous actions and its link to relator actions and the public rights and private rights dichotomy, the authors decided it would add little to the knowledge in this area if this article included another expose of the law of standing in relation to injunctions in criminal law.

[10] The defendant in *Pell's Case* agreed to allow the applicant, a private citizen, to proceed with his application without contesting his right to bring it before the court — *Pell's Case* [1998] 2 VR 391, 392.

[11] See Parts IV, VI and VII below.

cases other than just *Pell's Case* in relation to injunctive relief (see part VI of the article).

II WHAT IS MEANT BY AN 'INJUNCTION' IN THE CONTEXT OF THIS ARTICLE ?

This article examines situations in which a criminal act or acts have been threatened and/or performed and the applicant has applied to a civil court to exercise its equitable jurisdiction by granting an injunction to restrain the continuing, or future, performance, of those acts. Whilst the distinction between a 'civil offence' and a 'criminal offence' is often blurred,[12] the authors have interpreted a 'crime' in the context of this article as a legal wrong[13] that may or does lead to criminal proceedings, which in turn may or do result in a statutory or common law penalty of a punitive nature[14] being invoked if the accused is found guilty.[15]

In applications of this kind, equity judges often have to confront four different steps, namely (1) to decide whether or not the applicant has standing to seek injunctive relief in a criminal matter; (2) to see if the threshold tests for granting any injunction in any matter have been met; (3) to consider if the tests for the particular type of injunction sought by the applicant have been satisfied and (4) as the particular application relates to a criminal matter, to ascertain whether the judge should exercise his/her discretion based on the various criteria set down by case law. In this article the authors will *only* address in detail judicial step (4) because that is the issue which makes the discussion of injunctive relief unique, as compared with the use of injunctions in other areas of equity. This means that the authors will NOT discuss in any detail the threshold tests[16] in step 2 above, or any of the tests for granting specific types of injunctions (e.g. mandatory,[17] interlocutory,[18] punitive,[19]

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[12] Freiberg differentiates between a 'civil' and a 'criminal' offence on the basis of five different criteria: the role of the state, punishment and its purpose, sanctions, liability and culpability and quality and attributes of the conduct: Ari Freiberg, *The Civil Offence,* (LLM Thesis, Monash Law Faculty, 1984) Chapters II to VI.

[13] Glanville Williams, *Textbook of Criminal Law* (2nd ed, 1983) 27.

[14] E.g. a fine and/or imprisonment — *Tinline v White Cross Insurance Association Ltd* [1921] 3 KB 327, 331.

[15] Hanbury, above n 1, 665.

[16] These threshold tests include whether or not (a) another remedy is available at law, in particular an adequate award of damages; (b) there has been an infringement of proprietary rights; (c) the injunctive relief will be futile; (d) the injunction causes hardship to the defendant or third parties, etc. — see Gino Dal Pont and Don Chalmers, *Equity and Trusts in Australia and New Zealand* (1995) 573–576.

[17] In *King v Goussetis* (1986) 5 NSWLR 89, 94 the court held that a tenant has sufficient special interest to justify seeking mandatory injunctive relief to compel the owner of his building to comply with fire safety requirements.

[18] For example, the tests for granting an interlocutory injunction include factors such as (a) a serious question to be tried and (b) balance of convenience which includes such criteria as the availability of alternative remedies, any undertaking as to damages, the effect on the defendant's business, whether the injunction is prohibitory or mandatory, the effect on third parties, delay, public interest and justice of the case and (c) the probability of obtaining final relief. See Gino Dal Pont and Don Chalmers, above n 16, 573–593 and *Elliott v Seymour* (1993) 119 ALR 1, 4 (Gaudron J).

[19] 'Punitive injunctions' require a defendant not only to carry out certain behaviour, but also to do it in some punitively demanding way — Brent Fisse, *Howard's Criminal Law* (5th ed, 1990) 597 fn 54.

quia timet[20] or any other form[21] of injunction) involved in step 3 above. Nor are the authors concerned with the requirements for showing that the defendant is guilty of criminal contempt of court[22] for breaching the conditions of an injunction. Discussion of judicial step 1 has been omitted from this article for reasons outlined in the Introduction.[23]

III A BRIEF ANGLO-AUSTRALIAN HISTORY OF THE USE OF INJUNCTIONS IN CRIMINAL MATTERS

Although judicial authority from Lord Wilberforce[24] and Mason J,[25] as well as academic support from Professor Flick,[26] suggests that the use of equity to enforce the criminal law is a *modern* phenomenon, an eminent legal historian claims that the English Court of Chancery issued injunctions for such a purpose early in its history.[27] This apparent inconsistency in historical interpretation is worth examining.

Remedies similar to injunctions preceded the establishment in the late fourteenth century of the Court of Chancery,[28] the main, but not the only, English court with equitable jurisdiction.[29] In the first century of its operation, however, the form of injunctive relief granted by the new Court of Chancery was mainly confined to matters of real and personal property, tort and contract, particularly where the known common law remedies were inadequate.[30] In the sixteenth and seventeenth centuries,[31] and perhaps even a little earlier,[32] the Court of Chancery granted in-

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[20] *Quia timet* injunctions often impliedly arise in this article in relation to whether or not they can be invoked to prevent future criminal behaviour. The tests for such injunctions are a strong probability that what the defendant proposes to do will cause imminent and substantial damage to the plaintiff's property or business and that there is a causative nexus between the alleged wrongful behaviour of the defendant and the inevitable loss to the plaintiff — see Dal Pont and Chalmers, above n 16, 594. A *quia timet* injunction was invoked by the single judge and the majority of the Full Court in *A-G ex rel Daniels, Steward & Wells v Huber* [1971] 2 SASR 142 to prevent the planned performance of *Oh Calcutta.* See also the discussion of threatened or future criminal acts at parts IV and V of this article.

[21] There is a brief discussion of the various categories of injunctions in Roderick Meagher, et al. *Equity: Doctrines and Remedies* (3rd ed, 1984) para 2102.

[22] For a discussion of the use of injunctions in cases of criminal contempt of court, see *Waterhouse v Australian Broadcasting Corporation (ABC)* (1986) 6 NSWLR 716, 725.

[23] See the introduction to this article.

[24] *Gouriet v Union of Postal Workers* [1978] AC 435, 481.

[25] *Commonwealth of Australia v John Fairfax& Sons Ltd* (1980) 147 CLR 39, 49.

[26] Flick, above n 9, 153.

[27] William Holdsworth, *A History of English Law* (7th ed, 1956) Vol. 1, 405–6.

[28] Raack claims that forerunners or ancestors of injunctions can be seen in the Interdict of ancient Rome, some of the writs of English Kings immediately after the Norman Conquest and the writs of the early English common law courts of the thirteenth century: David W. Raack, 'A History of Injunctions in England before 1700' (1985) 61 *Indiana Law Journal* 539, 540–550. Raack's views are supported by Joseph Story, *Commentaries on Equity Jurisprudence* (8th ed, 1861) Chap. XXIII.

[29] In the fifteenth and sixteenth centuries the Court of Exchequer, the Court of Requests and the local courts also had the power to grant injunctions, though they mainly dealt with relief in property rights or restraint of suits. Geoffrey Radcliffe and Lord Cross of Chelsea, *The English Legal System* (6th ed, 1977) 122; Raack, above n 28, 561–2.

[30] Raack, above n 28, 555; Story, above n 28, Chap. XXIII.

[31] William Holdsworth, *A History of English Law* (2nd ed, 1956) Vol. 5, 289–90. Holdsworth's examples

junctive relief to restrain criminal acts or offences including assaults, affray, forgery, piracy and even witchcraft.[33] Some historians, whilst not disagreeing with the view that injunctions were used to restrain the commission of criminal acts, claim that this practice had ceased entirely by as early as the end of the fifteenth century.[34]

The Court of Star Chamber, which operated from 1487 to 1641, acted in part as a 'court of criminal equity'.[35] Whilst that court's various jurisdictions[36] offered a speedy and effective restraint of offenders,[37] it was arguably not a 'conscious analogy with the civil equity of the Court of Chancery'.[38]

According to Maitland, there was a hiatus[39] in the use of injunctive relief in English criminal matters between the end of the seventeenth century and the beginning of the nineteenth century.[40] Other writers claim that whilst the English law of equity was solidifying during that same period, amongst equity's many attributes was the use of injunctions to restrain wrongful acts.[41] It is not entirely clear, however, if these 'wrongful acts' included those of a criminal nature.

By the early to mid-nineteenth century, particularly following the rebirth of the use of injunctive relief in Lord Eldon's term of office[42] in the English Court of Chancery, we see some willingness by English and Scottish courts of equity to grant such relief to prevent crimes like libel,[43] public nuisance,[44] criminal conspiracy[45] and

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of the use of equity to restrain prohibited criminal matters were taken from *Selected Cases in Chancery, Proceedings in Chancery* & Martin, *Archaeologia.*

[32] Young J claims that '[u]p until the time of Queen Elizabeth I [1558–1603] it was quite clear that the Equity Court intervened over and over again in the public interest for protecting people against crimes...' — *NSW Egg Corporation v Peek* (Unreported, Supreme Court of NSW Equity Division, Young J, 21 May 1986) 2.

[33] Potter also refers to the use of injunctive relief to restrain a defendant from enchantment, witchcraft and sorcery: Harry Potter, *Potter's Historical Introduction to English Law and its Institutions* (4th ed, 1962) 628.

[34] Edwin S Mack, 'The Revival of Criminal Equity' (1903) 16 *Harvard Law Review* 390, 391 quoted in Rice above n 1, 362.

[35] Hanbury, above n 4, 27.

[36] The Court of Star Chamber had both a criminal and a civil jurisdiction, as well as a supervisory jurisdiction over criminal law courts.

[37] Hanbury, above n 4, 27; W. Windeyer, *Lectures on Legal History* (1949) 190–1.

[38] Hanbury, above n 4, 27.

[39] This was allegedly a result of the fact that '...as society grew more stable, instances of the exercise of the [equitable] jurisdiction [in criminal matters] became less and less' — *NSW Egg Corporation v Peek* (Unreported, Supreme Court of NSW Equity Division, Young J, 21 May 1986) 2.

[40] '[S]ince the destruction of the Star Chamber [and up until the nineteenth century], English law ... had no criminal equity' — Frederick W. Maitland. *Equity;* also *The Forms of Action at Common Law.* (1932) 19.

[41] Potter, above n 33, 629; Holdsworth, above n 27, Vol. 1, 466.

[42] Potter, above n 33, 629. Eldon, with the exception of a brief period, held the position of Chancellor from 1801 to 1827.

[43] Even though today libel is prosecuted as a civil action, in the nineteenth century injunctive relief was granted to restrain libel as a crime — see Hanbury, above n 1, 663–4.

[44] For a discussion of the use of injunctive relief in relation to the crime of public nuisance see *Water house v Australian Broadcasting Corporation (ABC)* (1986) 6 NSWLR 716, 723; *Southport Corporation v Esso Petroleum Co.* [1954] 2 QB 182, 196–7 and Hanbury, above n 1, 664–5.

[45] Hanbury, above n 1, 667.

other areas,[46] despite reservations being expressed about that practice later[47] in the same century. In 1875 it was decided that common law courts had the power under the *Common Law Procedure Act 1854* to grant an injunction to restrain the publication of a libel. The English High Court was considered therefore to have the power, when it considered it just and convenient to do so, to grant such an injunction before, or at, the trial.[48] Injunctive relief was granted to restrain a crime and the rules on standing were broadened to permit private citizens to seek such relief.[49]

In Australia, during the 1920s[50] and the 1930s,[51] there was also a shift towards granting injunctive relief in criminal matters. By the early 1960s[52] it was accepted that private citizens could be successful in such actions even where no proprietary interests were involved. From the 1970s[53] onwards it was more common for injunctive relief to be granted in criminal matters, though it was first necessary to satisfy various criteria[54] and rules of standing.

In summary, it is the authors' contention that whilst there may be some disagreement among legal historians as to the exact date on which injunctive relief was first granted by the English Court of Chancery to restrain criminal offences and when that practice subsided or enjoyed its renaissance, there is a sufficient weight of historical evidence for us to state confidently that the practice of English equity courts granting injunctive relief in criminal matters is/was *more* than just a twentieth century phenomenon. This is due to the fact that the practice of civil courts granting injunctive relief in criminal matters (a) began as early as the fifteenth or sixteenth century in England, (b) may have undergone a lull in the late seventeenth and eighteenth centuries, but (c) certainly recommenced in the nineteenth century and (d) has continued on unchecked from the late nineteenth and early twentieth centuries in England, and from the 1960s in Australia.

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[46] See the dicta of Lord Eldon in *Gee v Pritchard* (1818) 2 Swan 402, 413; 36 ER 670, 674 [injunction restraining crimes against a child]; *Moncrieff v Arnott* (1828) 6 Sc RR (Ct of Sess) 530; 2 Scots Review Reports 501 (Court of Sessions) [restraint of illegal poaching]; *Emperor of Austria v Day* (1861) 3 De Gex & Jones Reports, Chancery 217; 45 ER 861 [restraint of forgery]; *Springhead Spinning v Riley* (1868) 6 LR Equity Law Reports 551 [restraint of unionists preventing plaintiff hiring labour].

[47] Lindley LJ in *Holmes v Millage* [1893] 1 QB 551, 555 said it was a fundamental mistake to assume that courts of equity would grant injunctions to prevent legal or equitable wrongs.

[48] Maitland, above n 40, 260.

[49] *Boyce v Paddington Borough Council* [1903] 1 Ch 109, 114.

[50] Council of the Shire of Hornsby (*Hornsby SC) v Danglade & anor* (1929) 29 SR (NSW) 118.

[51] Even though injunctive relief was denied by the High Court of Australia in *Ramsay v Aberfoyle Manufacturing Company (Australia) Pty Ltd* (1935) 54 CLR 230, there were positive dicta from McTiernan J (259) and Starke JJ (248-254) favouring private citizen's standing for injunctive relief in criminal matters.

[52] *Cooney v The Council of the Municipality of Ku-ring-gai* (1965) 114 CLR 582.

[53] Some of the key Australian cases from this time period in which injunctive relief was granted in criminal matters were *A-G ex rel Daniels, Steward and Wells v Huber* (1971) 2 SASR 142 (Huber's Case); *Zimitat v Douglas* [1979] Qd R 454, *Peek v NSW Egg Corporation* (1986) 6 NSWLR 1 and *John Fairfax Publications Pty Ltd v Doe* (1994-95) 37 NSWLR 81.

[54] See part VI of this article.

IV ARGUMENTS *IN FAVOUR* OF GRANTING INJUNCTIONS IN CRIMINAL LAW.

A *An injunction often overcomes the limitations of normal criminal law remedies*

A good example[55] of this justification is the case of *Re Legal Research Pty Ltd*,[56] where the penalty for failing to provide information to the appropriate government department with regard to student fees and records under s 5 of *the Overseas Students Refunds Act 1990* (Cth) was $3,000. The defendant, despite being convicted twice previously for the same offence, still refused to comply with the requirements of s 5. The Supreme Court of Queensland granted an injunction which ordered the defendant to provide the required information within 14 days.

B *Injunctions can prevent or restrain* future *criminal acts.*

The above argument was used by Walters and Wells JJ in *Huber's Case*[57] and by Williams J in *Re Legal Research Pty Ltd.*[58] There are at least four good reasons for using injunctive relief to restrain threatened criminal conduct in the future, namely (1) it would be absurd to seek an injunction to restrain criminal conduct that has already occurred; (2) the injunction may prevent costly and traumatic criminal procedures and trials if the matter is nipped in the bud; (3) the law of attempts validates the notion of the criminal law intervening in situations where an offence has not been fully completed and (4) it overcomes the limitations of the criminal law where the offence must be committed before the state will intervene.[59]

Arguably, there are alternatives to this remedy. The court could simply ask the potential defendant to give an undertaking not to commit the particular act in the future.[60] Whilst this option has the appeal of being a quick and cheap remedy for the courts, it raises other new problems such as the logistical difficulties of enforcement. Instead it may be just as expeditious to issue injunctive relief immediately,

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[55] Walters J also offered this particular argument in favour of injunctive relief in criminal matters in *Huber's Case (A-G v Huber)* (1971) 2 SASR 142, 176.

[56] (1992) 59 A Crim R 200, 203.

[57] (1971) 2 SASR 142, 180, 198–9.

[58] '[T]he penalty [for breaches of the *Overseas Students (Refunds) Act* 1990 (Cth) s 5] merely punishes for a past failure to comply with the law [but] it does not enforce compliance with the continuing obligation to do the positive act required by the terms of the statute. In such a case, the grant of an injunction is not an additional penalty aiding the enforcement of the criminal law; it is rather a means of enforcing the statutory obligation to do the particular act.' *Re Legal Research Pty Ltd* (1992) 59 A Crim R 200, 206.

[59] The case of *Onus & anor v Alcoa of Australia Ltd* (1981) 149 CLR 27 is a good example of the advantage of injunctive relief where the intervention of the criminal law would have been far too late. In that matter, by granting injunctive relief, the court was able to prevent damage to sensitive archaeological relics, whereas prosecution under the *Archaeological and Aboriginal Relics Preservation Act 1972* (Vic) s 26 was only possible *after* the damage had actually occurred.

[60] See *A-G (Qld) v Twelfth Night Theatre* (1969) 62 Qd R 319, and *Civil Aviation Authority v Repacholi* (1990) 102 FLR 261.

knowing that the threat of a penalty for criminal contempt of court is a persuasive deterrent against that act being committed in the future.

C *It allows civil courts to be adaptable and relevant to contemporary societal needs.*

Whilst the more conservative view of the role of equity is that it should not create rights for plaintiffs simply because there is no other legal remedy for them in the existing common and statutory criminal law, the courts need to move beyond the confines of their existing jurisdiction in order to adapt to the contemporary demands of the public. In the past equity has shown an ability to move laterally in order to satisfy the public's needs. For example until the 1930s in England[61] and the 1960s in Australia,[62] equity courts followed the classical approach of insisting that injunctive relief would only be available to private citizens without ex relator assistance from the Attorney-General if their proprietary interests[63] had been impaired. After those dates, however, equity courts met society's changing needs by broadening the rules of standing to negate the need for the applicant to demonstrate that his/her/its proprietary interests were at stake.

Other examples of lateral shifts by the law of equity are the inclusion of the equitable remedies of specific performance and injunctions into the common law areas of contract. There are also examples of where the legislature has been willing to merge equity, civil common law and criminal law, e.g. the substantive rules and remedies in the area of misleading and deceptive conduct in s 80 of the *Trade Practices Act 1974* (Cth).

D *It overcomes some of the shortcomings of the criminal process*

In granting injunctive relief in a criminal matter, a court of equity may act with greater expedition than if the same matter were subjected to a committal hearing and/or criminal trial. Criminal proceedings before a judge alone are not likely to be terminated more quickly than before a single judge in a court of equity, and an injunction may still be necessary if the criminal sanction is inadequate.[64]

Whilst there are sound reasons for the long history of the division between the civil and criminal courts, the use of equitable relief by the civil courts in matters which involve, or potentially involve, criminal offences is a lateral way of overcoming the deficiencies in that somewhat artificial dichotomy. A good example is where a breach of the peace is threatened by the beginning or continuance of a criminal act.

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[61] *A-G v Sharp* [1931] 1 Ch 121, 134. In the 1935 Australian High Court decision of *Ramsay v Aberfoyle Manufacturing Company (Australia) Pty Ltd* (1935) 54 CLR 230, 250, the dissenting judgment of Starke J also advocated the move away from the requirement of proprietary interest for injunctive relief in criminal matters.

[62] *Cooney v The Council of the municipality of Ku-ring-gai* (1965-66) 114 CLR 582.

[63] *A-G (Vic) & Lumley v Gill* [1926] ALR 223, 227.

[64] *Hanbury's Modern Equity* (6th ed, 1952) 644 used as authority by Walters J in *Huber's Case* (*A-G v Huber)* (1971) 2 SASR 142, 181.

By granting injunctive relief in such instances, the civil courts can prevent much social disruption. If the same incident were to give rise to a criminal prosecution, the delay entailed with the criminal process could see the incident develop into an unpleasant situation which would be expensive to remedy through the criminal process.

E *It facilitates respect for the law*

Respect for, and obedience to, the criminal law is reinforced by granting injunctions in criminal cases. Judicial authority for this proposition exists in England and Australia,[65] while academic support claims that injunctive relief to restrain breaches of the criminal law will deter people from 'openly flouting it and appearing to get away with it'.[66]

F *It is more efficient*

Injunctions are a rapid and cost-effective remedy compared to sanctions imposed by a criminal court, for the former can be invoked so quickly[67] that they can prevent the occurrence of a crime that has yet to be committed. This means that the demand on the public purse is less because, by preventing the crime occurring, the injunction has obviated the need for an expensive criminal investigation, trial and enforcement.

G *It is rights-based*

Injunctive relief in criminal matters is very much based on various public, private, legal and equitable rights. Even given the problems associated with the vague nature of these terms, the founding of remedies upon such rights may ensure a higher quality of justice in criminal matters.

V ARGUMENTS *AGAINST* GRANTING INJUNCTIONS IN CRIMINAL LAW

A *Diminishing of the Criminal Trial Process*

It has been suggested by academic commentators[68] and judges[69] that the specialised nature of the criminal process will be impaired by the intervention of civil courts. In

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[65] *Gouriet v Union of Postal Workers* [1978] AC 435, 454, 457; *A-G v Premier Line Ltd* [1932] 1 Ch 303, 313 (Eve J); *Re Legal Research Pty Ltd* (1992) 59 A Crim R 200, 204. (Williams J felt that the injunction would force the defendant to comply with his statutory obligation to provide information on student fees to the relevant government department.)

[66] Feldman, above n 9, 371.

[67] Hanbury, above n 1, 666.

[68] See also S G 'Equity-Injunction-Enforcing the Criminal Law' (1959) 25 *Brooklyn Law Review* 340, 342; Rice, above n 1, 364-5 and Michael Evans, *Outline of Equity and Trusts* (3rd ed, 1996) para 23.24.

Gouriet v Union of Post Office Workers[70] Lord Wilberforce claimed that (1) a civil court would use a lesser standard of proof when hearing an injunction application than would a criminal court if it heard the same factual matters in the form of criminal charges and (2) if a civil court granted the injunction, the defendant would have been effectively 'convicted' without the prescribed criminal trial with its more rigorous standard of proof.[71] Viscount Dilhorne offered a similar argument in the same case by stating that if an injunction in criminal matters is granted *prior* to the commission of an offence, (1) the civil court, without a jury, is effectively trying the defendant before he/she has committed the crime and (2) if the defendant subsequently does commit the crime, the earlier civil hearing without a jury will prejudice the later trial by jury in the criminal court.[72]

B *Loss of Control over Criminal Proceedings*

Similar reasoning underlies Sheppard J's view that '[c]ourts exercising criminal jurisdiction have control over their own proceedings . . . The fact that [the] jurisdiction of the criminal courts exists and is regularly exercised constitutes the principal reason why ... the primary judge's conclusion that there should be no interlocutory relief was unquestionably correct.'[73]

Sykes offers an interesting compromise as regards equity courts becoming involved in the criminal process. He argues that the 'sanctions of the criminal law should [be] first... tried and found wanting...before the injunction is granted and that the injunction should only be used in cases where the primary sanction of the criminal law is a pecuniary penalty'.[74]

Kirby P in *Peek v NSW Egg Corporation*[75] observed that injunctive relief in criminal cases has been opposed because the legislature would have provided for injunctive relief with the particular statutory offence if it had thought it necessary, thereby reiterating the rule of '*expressio unius est exclusio alterius*'.

C *Equity Courts' Modification of Penalties set by Parliament*

Opposition to injunctive relief in criminal matters has also been advanced on the ground that penalties imposed by a court of equity may exceed those set by Parliament. This argument is perhaps best explained by the following hypothetical example namely (a) the penalty for committing a particular *statutory* offence is a small

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[69] The case of *Civil Aviation Authority v Repacholi* (1990) 102 FLR 261, 271, is an example of a case where the court held that 'it would be unduly interfering with the ordinary processes of the criminal court to grant an injunction', even though the Authority was having great difficulty enforcing the Air Navigation Rules in relation to the defendant.

[70] *Gouriet v Union of Post Office Workers* [1978] AC 435.

[71] Ibid 481.

[72] Ibid 490–1, 521.

[73] *Jarrett v Seymour* (1993) 119 ALR 45, 63.

[74] Edward Sykes, 'The Injunction in Public Law' (1953) 2 *Queensland University Law Journal* 114, 144.

[75] (1986) 6 NSWLR 1, 3, 5; see also Rice above n 1, 364, 374.

fine; (b) the defendant has indicated that he/she is going to commit that offence but in so doing he/she will cause some detriment to the plaintiff; (c) the plaintiff then applies to the equity court for injunctive relief and is granted it in the form of a court order restraining the defendant from committing the particular offence; (d) the defendant goes ahead and commits the crime but in so doing has breached the conditions of injunction or court order; (e) in failing to comply with the equity court order the defendant is in contempt of court; (f) the punishment for contempt of court[76] is imprisonment which means (g) the equity court could invoke a harsher penalty than the small fine set by Parliament for breaches of that statutory offence

In such instances it has been said the civil courts will be reluctant to grant an injunction,[77] because that court will be seen as modifying the role of Parliament as the legitimate body for setting sanction levels.[78] Also there is a 'long standing reluctance by courts to interfere at any stage of the parliamentary process',[79] this reluctance being perhaps due to problems of justiciability or separation of powers.

D *Problems with Double Jeopardy and Excessive Litigation*

The possibility of double jeopardy[80] with granting injunctive relief in criminal matters may be illustrated as follows. Assume that an applicant approached the equity court for an injunction restraining the defendant from committing a particular crime (e.g. a serious breach of a public health statute) in the immediate future. In the resulting civil hearing, i.e. the *first* trial, the equity court grants the injunction. Later on, the defendant actually commits the particular crime and is charged for breaching the particular public health statute. In the meantime, however, the equity court convenes again and holds another civil trial, i.e. the *second* trial, and finds the defendant guilty of contempt of court for breaching the conditions of the injunctive order. The equity court then penalises the defendant accordingly. At a later date, the criminal charges in relation to the contravention of the public health statute are heard by a criminal court in what is the *third* trial, a criminal one. The criminal court tries the accused, perhaps with a jury, for committing the original criminal offence, finds him guilty and punishes him accordingly. This scenario seems to result in double jeopardy for the defendant, who has been tried twice in relation to his breaches of the public health statute. Some may argue, however, that in the

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[76] Lord Fraser has stated that the use of injunctions in criminal matters adds the possibility of criminal penalties for contempt of court, whereas Parliament may have already fixed its own, and different, penalties for contravention of the particular offence — *Gouriet v Union of Post Office Workers* [1978] AC 435, 521.

[77] *Stoke-on-Trent City Council (CC) v B & Q (Retail) Ltd* [1984] AC 754 discussed in Harold Hanbury and Jill Martin, *Modern Equity* (15th ed, 1997) 798.

[78] Lord Herschell in *Institute of Patent Agentsand ors v Joseph Lockwood* [1894] AC 347, 361–2.

[79] *Beck and ors v Porter and ors* (1980) 48 FLR 470, 475 — Zelling J, in refusing to grant injunctive relief in relation to alleged misleading election advertising.

[80] Hanbury and Martin, above n 77, 742. See also *John Fairfax Publications v Doe* (1995) 37 NSWLR 81, 102 and Justice Kirby in *Peek v NSW Egg Corporation* (1986) 6 NSWLR 1, 3 where His Honour asserts the allied objection to excessive litigation.

second trial he was punished for contempt of court whereas in the third trial he was sanctioned for breaching a public health statute.

E *Equity and Criminal Courts Have Different Purposes*

In *Gouriet's* case[81] Viscount Dilhorne expressed the view that equity and criminal law are two separate areas of law which were never intended to overlap. Moreover, the classical jurisdiction of courts of equity is the 'protection of [proprietary or] property interests; the enforcement of criminal law is not within the purview of equitable relief'.[82]

A reluctance to grant injunctions in criminal cases is also attributable to a perception that these will be used to advance personal notions of morality where public prosecutions may not be launched.[83] Gibbs J observed that there are 'limits to the extent to which the law should intrude upon personal liberty and personal privacy in the pursuit of moral and religious aims'.[84] Accordingly, injunctive relief will be denied to a moral crusader who has paid to see an allegedly obscene play, though an innocent passer-by who is exposed to obscenity falls into a different category.

F *Prejudging Potential Criminality*

An unwillingness to prejudge future criminality is an additional reason for judicial reluctance to grant injunctions. For example, in *A-G (Qld) ex rel Kerr v T*, an unmarried father sought an injunction to restrain the mother of his unborn child from having the foetus aborted. Under the *Criminal Code* (Qld) s 225 there was a maximum penalty of seven years' imprisonment if an abortion was performed in other than exceptional circumstances. Gibbs J however refused to grant an injunction because, inter alia, he said that '[i]t would seem to me quite unjustifiable, in the circumstances of the present case, to assume that the respondent would be convicted by a jury of an offence against s 225 of the Code if she proceeded to have an abortion, and on that assumption to interfere in the most serious way with her liberty of action'.[85] As Sykes observed, 'one does not obtain an injunction against a would be burglar'.[86]

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[81] 'The criminal law is enforced in the criminal courts by the conviction and punishment of offenders, not in the civil courts. The jurisdiction of the civil courts is mainly .... the determination of disputes and claims. They are not charged with the responsibility for the administration of the criminal courts.' *Gouriet v Union of Postal Workers* [1978] AC 435, 490.

[82] John Rice, above n 1, 363.

[83] *A-G (Qld) ex rel Kerr v T* (1983) 57 ALJR 285, *John Fairfax Publications v Doe* (1995) 37 NSWLR 81, 101, *Huber's Case (A-G v Huber)* (1971) 2 SASR 142, 165.

[84] *A-G (Qld) ex rel Kerr v T* (1983) 57 ALJR 285, 286.

[85] *A-G (Qld) ex rel Kerr v T* (1983) 57 ALJR 285, 286; in *Huber's Case (A-G v Huber)* (1971) 2 SASR 142, 165 Bray CJ stated that injunctions should not be granted to prevent behaviour that may be committed in the future and be criminal.

[86] Sykes, above n 74, 115.

G *Problems of Enforcement*

The difficulty with enforcing criminal injunctions partly accounts for the reluctance to grant them. A good example of this shortcoming is the case of *A-G (ACT) ex rel Olaseat Pty Ltd v ACT Minister for the Environment, Land and Planning*[87] where the applicants sought to restrain traders in a local trash and treasure market from contravening the *Trading Hours Act 1962* (ACT) ss 6 and 7. The Full Court of the Federal Court of Australia, in denying the injunction on the grounds that it had been brought against the wrong persons, also said that there was a distinct problem in supervising the injunction if it were granted, as it 'would require the respondents to become supervisors of the criminal law [and therefore] to be not only policemen but judge and jury as well'.[88]

In similar vein, the court[89] has sometimes expressed its concern that in granting injunctive relief, the civil courts may be improperly telling the police how to do their job or providing an indirect stimulus to the police to do what they would ordinarily be doing anyway. Accordingly, injunctive relief may be as ineffective as the criminal penalty in dealing with breaches of the particular crime.[90]

VI GROUNDS OR CRITERIA FOR GRANTING INJUNCTIONS IN CRIMINAL MATTERS

Equity courts are under no general duty[91] to enforce the criminal law and are often reluctant to grant injunctive relief to restrain criminal activity,[92] partly because there is a 'primary rule that the criminal law is enforced by appropriate procedures in the criminal courts'. [93] When equity courts do consider invoking their jurisdiction in such matters, not only do they do so with great delicacy and caution, [94] but they use some of the criteria discussed by the authors below.

In relation to these criteria below, it should also be said that (a) this is not an exhaustive list, (b) one particular criterion may be considered by one court to be important[95] whereas another court may be of the opposite opinion, or judges within

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[87](1993) 43 FCR 329.
[88]Ibid 342–3.
[89]*Corvisy v Corvisy* [1982] 2 NSWLR 557, 561.
[90]Rice above n 1, 365.
[91] *Peek v NSW Egg Corporation* (1986) 6 NSWLR 1, 2 (Kirby J). See also *Ramsay v Aberfoyle Manufacturing Company (Australia) Pty Ltd* (1935) 54 CLR 230, 239; *Institute of Patent Agents v Joseph Lockwood* [1894] AC 347, 361–2 (Lord Herschell); *Gouriet v A-G & others* [1978] AC 435, 481, 490.
[92] 'Old fashioned views upon the jurisdiction of Courts of equity find the growth of the use of the injunction in the field of law more repugnant than satisfying'. *Ramsay v Aberfoyle Manufacturing Company (Australia) Pty Ltd*(1935) 53 CLR 230, 245 (Rich J). See also Patrick Parkinson, *The Principles of Equity* (1996) 633; *Commonwealth of Australia v John Fairfax & Sons Ltd* (1980) 147 CLR 39, 49-50; *A-G (Qld) ex rel Kerr v T* (1983) 57 ALJR 285.
[93] *Peek v NSW Egg Corporation* (1986) 6 NSWLR 1.
[94]*Gouriet v Union of Postal Workers* [1978] AC 435, 481 (Lord Wilberforce).
[95] See *Stoke-on-Trent City Council v B & Q (Retail) Ltd* [1991] 4 All ER 221, 238 cf *City of London Corporation v Bovis Construction* (1988) 86 Local Government Reports 660, 682 for variations in

the same court in the same hearing[96] may differ as to the relative merits of a particular criterion, (c) one criterion alone may be insufficient to invoke injunctive relief without the addition of another criterion;[97] (d) these criteria are `discretionary'[98] in their exercise, i.e. equity courts are not bound to apply any particular criterion or even if the court should choose to consider a specific criterion, evidence of that criterion by the plaintiff does not necessarily mean that injunctive relief will be granted and (e) the formulation by equity courts of specific criteria for invoking injunctions is made more difficult by their tendency not to be 'rule' driven and to judge each case according to its own particular circumstances.

A *The particular criminal penalty or civil remedy is inadequate*

This criterion was suggested by Lord Wilberforce in the seminal case of *Gouriet v Union of Post Office Workers.*[99] It has since been recognised by several other key English and Australian cases[100] and also by various critics.[101] In attempting to gauge what penalties are 'inadequate' it may be instructive to examine instances of where the equity court has granted injunctive relief because the penalty was inadequate and then to consider examples of the reverse situation.

In *Re Legal Research Pty Ltd*[102] the penalty under the *Overseas Students (Refunds) Act 1990* (Cth) s 5 for failing to provide information regarding refunds was $3,000, the defendant had already been convicted twice, but continued to ignore departmental requests for further information. In the NSW case of *John Fairfax Publications v Doe,*[103] the maximum fine for a breach of the *Telecommunications (Interception) Act 1979* (Cth) s 63 in relation to the publication of phone-tapped private conversations was two years' imprisonment if the matter was tried as an

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interpretation by two different courts to the same criterion for injunctive relief, i.e. continuous flouting of the law.

[96] See the variation of opinion in *Gouriet v A-G & ors* [1978] AC 435, 500, Lord Diplock stated that injunctions in criminal law should only be granted where that law had manifestly failed or where there was a grave risk of harm, whereas Viscount Dilhorne at 491 rejected confining the equitable jurisdiction to these two instances.

[97] For example, Sykes argues that a mere threat to the public interest may not be enough to invoke an injunction, though if the criminal offence involved also contains a penalty then that relief may be granted — Sykes, above n 74, 128.

[98] Spry argues that when a court exercises its discretion as to whether or not it will grant injunctive relief in criminal matters it will take into consideration factors such as the degree of probability that the illegal act will take place, the degree of injury likely to be caused to the public by those acts, the extent to which resort to criminal remedies has been made, the likely efficacy of those remedies and the hardship likely to be caused to the defendant by the injunction — Ian Spry, *The Principles of Equitable Remedies* (5th ed, 1997) 342.

[99] [1978] AC 435, 481.

[100] For example *Commonwealth of Australia v John Fairfax & Sons Ltd* (1980) 147 CLR 39, 50, *Stoke-on-Trent City Council v B & Q (Retail) Ltd* [1991] 4 All ER 221, 238 and *City of London Corporation v Bovis Construction* (1988) 86 Local Government Reports, 660, 682.

[101] Flick, above n 9, 149.

[102] *Re Legal Research Pty Ltd (t/a Modern English Language College of Australia)* (1992) 59 A Crim R 200.

[103] (1995) 37 NSWLR 81, 102.

indictable offence or six months if tried summarily. The majority of the Supreme Court felt that these fines were insufficient to deter the newspaper from publishing a 'scoop' which contained those conversations. Another Australian example is *Onus v Alcoa of Australia Ltd*[104] where the criminal penalty of $1,000 or three years' imprisonment, or both, for a breach of the *Archaeological and Aboriginal Relics Preservation Act 1972* (Vic) s 21 was thought to be insufficient to protect an aboriginal site or relic.

Another good example of where the civil court granted injunctive relief in a criminal matter because of the inadequacy of the available civil remedy is *Peek v NSW Egg Corporation*[105] where the court found that damages for conversion was an inadequate remedy to restrain the defendant from selling eggs from unlicensed premises.

There are also interesting examples of where the court considered the penalty was inadequate because the defendant simply paid the cost of the fine out of the profits made from various contraventions of the law, e.g. in *Stoke-on-Trent City Council (CC) v B & Q (Retail) Ltd*[106] the defendant paid his fines out of the profits gained from illegal Sunday trading. *A-G v Sharp*[107] and *A-G v Premier Line*[108] are similar examples of where the defendants simply 'scoffed' at the light penalty and continued to operate their business illegally.

A novel nuance of the 'inadequate penalty' issue is the court's dictum in *Corvisy v Corvisy*[109] where the court refused injunctive relief in relation to an apprehended assault partly because the deterrent effect of contempt of court for failing to comply with the injunction was not likely to be materially greater than the criminal sanctions for this conduct.

As for instances of where the court refused injunctive relief because it felt that the penalty was already adequate, the Full Court of the Queensland Supreme Court in *Kerr's Case*[110] refused an application by an unmarried father to restrain the mother of his unborn child from having an abortion because the court felt the penalty of seven years' imprisonment under the *Criminal Code* (Qld) s 225 would be a sufficient deterrent should the mother be seriously thinking of proceeding with the abortion.

In *A-G (WA) v Barrington*[111] the local authority increased the penalty for breaches of its zoning laws from a maximum of £20 to £50 with a maximum daily penalty of

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[104] (1981) 149 CLR 27; the fine was originally $200 in 1972 but it was raised to $1,000 in October 1980.
[105] (1986) 6 NSWLR 1, 7, 9. See also *Gouriet v Union of Postal Workers (Gouriet's Case)* [1978] AC 435, 500.
[106] [1991] 4 All ER 221, 238. The penalty under the *Shops Act 1950* (UK) s 47 for illegal Sunday trading had originally been £5 for a first offence and £20 for subsequent offences, then in 1972 it became £50 and £200 and in 1982 it seems to have become just £200 pounds when additional penalties for subsequent offences were abolished.
[107] [1932] 1 Ch 303.
[108] [1931] 1 Ch 121.
[109] [1982] 2 NSWR 557, 561.
[110] *A-G (Qld) ex rel Kerr v T* [1983] 1 Qld R 404, 406.
[111] [1963] WAR 78, 81.

£5. The respondents were convicted for breaches of those laws under the old lower penalty but had not been prosecuted since the new higher penalties came into force. The court refused the applicant's request for an injunction because it was assumed that the newly increased penalties were adequate and that the respondent would not defiantly flout those laws. Also in *Commonwealth of Australia v John Fairfax & Sons Ltd*, Mason J[112] stated that the various penalties for breaches of s 79 of the *Crimes Act 1914* (Cth), which ranged from six months to seven years' imprisonment depending on the seriousness of the breach, were sufficiently substantial to prevent breaches of that provision (though the injunction was granted on another ground, namely infringement of copyright).

In *Civil Aviation Authority v Repacholi*[113] Wallwork J offered a different approach to the problem of continued serious safety breaches by the defendant of the *Air Navigation Regulations* and the *Civil Aviation Regulations*, the penalties[114] for which were non-custodial. Despite the seriousness of these breaches and the difficulties faced by the authority in enforcing regulations in an airspace as vast as Western Australia, Wallbank J refused to grant an injunction. The judge based his refusal partly on his view that the Commonwealth Parliament had the power to impose more severe penalties (including imprisonment one assumes) for breaches of those Rules if it thought that was appropriate.[115]

Injunctive relief may not be available regardless of the gravity of the sanction. This issue was addressed by Wells J in *Huber's Case (A-G v Huber)* where he stated that the 'availability of penalties or sanctions other than the injunction sought ... is not decisive against the existence of the [equitable] jurisdiction'. [116] It has also been said that if a particular statute expressly or impliedly provides that the penalty is to be the *sole* penalty for the offence, then injunctive relief cannot be granted to restrain that offence. [117]

B *Continuous Flouting of the Law by the Defendant*

Evidence of this criterion can be found in many Australian and English cases. For example, in *Huber's Case*[118] the defendant stated that he intended to present, and continue to offer for performance, the play *Oh Calcutta*, despite being in breach of s 23, and possibly s 7, of the *Police Offences Act 1953* (SA) each time the play was performed due to the many alleged acts of indecent behaviour in the play. In *Peek v NSW Egg Corporation*[119] the defendant sold, and intended to continue to sell, eggs

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[112] (1980) 147 CLR 39, 50.
[113] (1990) 102 FLR 261. The defendant had been convicted on 34 previous occasions for breaches of the *Civil Aviation Regulations* and *Air Navigation Regulations*.
[114] The penalty was a maximum of $5,000 if the matter was tried by indictment but less if tried summarily.
[115] *Civil Aviation Authority v Repacholi* (1990) 102 FLR 261, 271.
[116] *Huber's Case (A-G v Huber)* (1971) 2 SASR 142, 198.
[117] Hanbury, above n 4, 111.
[118] *Huber's Case* (1971) 2 SASR 142, 145, 185–6.
[119] (1986) 6 NSWLR 1, 7.

from an unlicensed premises in breach of s 32 of the *Egg Industry Act 1983* (NSW). In *City of London Corporation v Bovis Construction*[120] the defendant construction company continued to operate above the requisite noise levels outside normal working hours despite having been served with 18 informations by the local government authority.

The obvious question is how many contraventions of the particular criminal offence are required before the court will consider that behaviour to be 'continual flouting' of the law? Unfortunately there is no set answer to this question because the number of prior contraventions of the relevant law can be as high as 142 and 95[121] or as low as two,[122] yet the court has still granted injunctive relief because the defendants have continued to flout the law. 'Continual flouting' can also include the refusal to remedy one ongoing breach of the law, such as refusing to demolish an illegally constructed building despite the council's various orders to do so,[123] or ignoring the particular council warnings to desist from operating a business from unregulated premises.

Evidence that this particular criterion is discretionary, and that proof of it will NOT automatically lead to injunctive relief, lies in cases like *Civil Aviation Authority v Repacholi*.[124] In that case the defendant had been convicted on 34 prior occasions of breaches of the *Civil Aviation Regulations* and the *Air Navigation Regulations* but injunctive relief was refused by the court because the defendant promised not to act as a flight crew member of any plane in Australia until he had regained his pilot's licence and breach those Rules in any other way in future. This means that before the civil courts grant injunctive relief on the basis of a long history of past breaches of the law, they will examine the intention of the defendant in relation to any possible future flouting of the same law. *A-G v Twelfth Night Theatre*[125] is another example of this line of judicial reasoning, as the court denied injunctive relief because the defendants stated that 'the moment that there is a conviction or an injunction, they will cease to use the words to which the objection is taken'.[126]

Civil courts vary in their opinion as to the relative importance of this criterion. In *Brisbane City Council (CC) v Georgeray Contracting Pty Ltd*[127] proof of the above criterion was considered by the court to be fundamental to an application for an

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[120] (1988) 86 Local Government Reports 660.

[121] In *A-G v Harris* [1961] 1 QB 74, an injunction was granted because the defendant flower sellers continued to obstruct a footway despite the male defendant to the application being convicted and fined on 142 occasions and his wife on 95 occasions for breaches of the *Manchester Police Regulations Act 1844*.

[122] In *Re Legal Research Pty Ltd (t/a Modern English Language College of Australia)* (1992) 59 A Crim R 200, the injunction was granted even though the defendant had only been convicted *twice* under the *Overseas Students (Refunds) Act 1990* (Cth) s 5 for failing to provide information requested by the Dept. of Employment, Education and Training regarding various student complaints regarding their inability to obtain a refund of their fees.

[123] *Hornsby Shire Council (SC) v Danglade* (1929) 29 SR NSW 118, 119.

[124] (1990) 102 FLR 261.

[125] [1969] Qd R 319. The applicant sought an injunction to restrain the defendants from continuing with the performance of a play called *Norm and Ahmed* in which the term – 'fuckin' boong' was being used.

[126] Ibid 328.

[127] (1995) 79 *A Crim R* 265, 272.

injunction in criminal matters. In *City of London Corporation v Bovis Construction,* however, the court held that

> the essential foundation for the exercise of the court's discretion to grant an injunction is not that the offender is deliberately and flagrantly flouting the law but the need to draw the inference that the defendant's unlawful operations will continue unless and until effectively restrained by the law and nothing short of an injunction will be effective to restrain them.[128]

On the related issue of when the breaches should occur in order to be actionable, the better view is that they should take place prior to the application for an injunction.[129] In relation to *future* offences 'the court will be more ready to grant an injunction when the offence has not yet been committed'.[130]

C *Risk of Breaches of the Law*

The significant risk of widespread breaches of the law has been used as a criterion[131] for granting injunctive relief in criminal matters, thus demonstrating the civil courts' desire to prevent a disrespect for the rule of law.

D *Where an Emergency Arises*

Civil courts vary in their interpretation of the term 'emergency' in the context of granting an injunction in a criminal matter. Sometimes these courts interpret an 'emergency' situation to be a combination of seriousness and immediacy as in *John Fairfax Publications v Doe.*[132] In that case the defendant, a newspaper company, had already published the contents of a phone-tapped private conversation illegally[133] and there was a distinct possibility that they were going to publish it again in the near future. This planned future publication, however, could have well interfered with the applicant's fair trial in forthcoming criminal proceedings.

'Emergency' has also been used in the 'police, fire and ambulance' context as in *A-G v Chaudry & anor.*[134] Here the emergency situation which justified the granting of injunctive relief was the need to restrain the use of premises as a hotel when those premises did not have a fire certificate and the hearing in relation to the certificate could not take place for several weeks.

In some 'emergency situations', however, the court has refused to grant an injunction. For example, in *Civil Aviation Authority v Repacholi*[135] the defendant had a

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[128] (1988) 86 Local Government Reports 660, 682.
[129] *AG v Premier Line* [1932] 1 Ch 303, 313; *A-G v Sharp* [1931] 1 Ch 121, cf *A-G v Shrewsbury (Kingsland) Bridge Company* (1882) 21 Ch D 752, 756 , see Menzies J in *Mutal Home Loans Fund of Australia Ltd and NSW Mortgage Discounting Co Ltd v A-G (NSW)* (1973) 2 ALR 241, 246.
[130] Peter Baker, 'Stop the charge I want to get off', (1983) 59 *Law Institute Journal* 313, 316.
[131] *Peek v NSW Egg Corporation* (1986) 6 NSWLR 1, 5 (Kirby J) and *Stafford Borough Council v Elkenford Ltd* [1977] 1 WLR 324, 327.
[132] (1995) 37 NSWLR 81.
[133] In contravention of the *Telecommunications (Interception) Act 1979* (Cth) s 63.
[134] [1971] 1 WLR 1614.
[135] (1990) 102 FLR 261, 271.

long history of serious breaches of the Air Navigation Regulations and the Civil Aviation Regulations which involved important safety issues, e.g. flying without a pilot's licence, and flying a plane which had not been properly maintained. The large size of the airspace in Western Australia made it impossible for the authorities constantly to check on the miscreant defendant to see that his illegal behaviour did not endanger the lives of passengers in the planes he flew or of persons on properties when he was crop spraying. The judge did not, however, consider that this was an emergency of sufficient magnitude to grant injunctive relief.

E *Exceptional or Special Circumstances*

The circumstances of the case must be 'exceptional' before a court is empowered to supplant a statute by granting an injunction thereby exposing a defendant to unlimited sanctions, including imprisonment.[136] The civil courts, however, have offered such a heterogeneous range of circumstances as being sufficiently 'exceptional' in order to grant an injunction in a criminal matter, that one judge has said that 'it is not particularly helpful to say that 'special' or 'exceptional' circumstances must be established' before granting such relief. [137]

Proof of this heterogeneity lies in the fact that the following four vastly different fact situations have all been seen by the civil courts as sufficiently 'exceptional or special' to justify granting injunctive relief, namely (1) the need to restrain building construction to within business hours due to noise levels affecting local residents;[138] (2) the failure of the defendant to supply the information on student fee repayments as required by statute;[139] (3) the restraint of criminal proceedings against the applicant whilst a constitutional challenge relating to the matter was heard by the High Court of Australia;[140] and (4) the laying of criminal charges was a result of a conspiracy, improper purposes or some other form of mala fides behaviour by the prosecutor. [141]

Light is shed on the criterion of 'exceptional or special circumstances' by instances of where the courts have denied injunctive relief on that ground. Neither threatened domestic assault in both NSW and the ACT,[142] nor a week's delay in the applicant's mail to South Africa due to a union boycott[143] were considered 'exceptional or special circumstances' sufficient to justify the granting of injunctive relief.

Inconsistencies in the judicial interpretation of the phrase 'exceptional or special circumstances' are seen in conflicting decisions on trading outside legalised hours. An English court granted injunctive relief owing to an emergency or special situa-

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[136] Flick, above n 9, 153. See also *A-G v Blake* [1998] 1 All E R 833, 849.
[137] *Peek v NSW Egg Corporation* (1986) 6 NSWLR 1, 4 (Kirby J).
[138] *City of London Corporation v Bovis Construction* (1988) 86 Local Government Reports 660, 682.
[139] *Legal Research Pty Ltd* (1992) 59 A Crim R 200, 207.
[140] *Polyukhovich v Commonwealth of Australia* (1990) 95 ALR 502.
[141] *Jarrett v Seymour* (1993) 119 ALR 10, 36.
[142] *Corvisy v Corvisy* [1982] NSWLR 557, 561.
[143] *Gouriet v Union of Postal Workers* [1978] AC 435, 481, 489, 491.

tion[144] while a Tasmanian court denied that remedy because the circumstances were not special or exceptional.[145]

F *Domestic Violence*

The need to restrain domestic violence has been a fertile ground for issuing injunctions. Such relief is more likely to be granted in relation to particular criminal offences such as molestation of, or apprehended criminal or quasi-criminal acts against, a spouse,[146] and because of the Supreme Court's inherent *parens patriae* jurisdiction.[147]

Some civil courts have refined their discretionary jurisdiction in these domestic assault situations by listing heads of power[148] that can be invoked is such situations. Merely because a case involves domestic assault does not, however, mean that injunctive relief is automatically granted. [149]

Section 114 of the *Family Law Act 1975* (Cth) gives the Family Court of Australia power to grant an injunction arising out of a marital relationship,[150] but according to Denmark J in *The Marriage of Mills,* 'events which raise issues of criminal law, industrial law or fiscal law cannot be brought within the "marital relationship" simply because the circumstances involve a husband and wife and their children'.[151] Injunctions, however, are often issued under s 114 to restrain husbands from assaulting their wives and children.[152] There is also a similar provision in the *De Facto Relationships Act 1984* (NSW) s 53 that restrains the de facto partner from entering the property of the other partner and from harming that partner or children from the relationship.

G *The relevant statute expressly or impliedly provides for injunctive relief*

Apart from the two statutory provisions discussed immediately above, there are other examples of statutes that *expressly* provide for injunctive relief in potentially criminal matters. For example the *Corporations Law* s 1324(1) (referring to persons whose interests have been, or would be, affected by the conduct of the particular corporation);[153] s 67A of the *National Health Act 1953* (Cth) (which empowers the Federal Court to hear and determine applications for an injunction to restrain any

[144] *Stoke-on-Trent City Council v B & Q (Retail) Ltd* [1991] 4 All ER 221, 238.
[145] *A-G (Tas) v Woolworths* (Unreported, Supreme Court of Tasmania, 28 January 1994).
[146] *Huber's Case* (1971) 2 SASR 142, 176; *Zimitatu v Douglas* [1979] Qd R 454, 456; *Egan v Egan* [1975] Ch 218; *Daley v Martin (No. 1)* [1982] Qd R 23.
[147] *Parry v Crooks* (1981) 27 SASR 1, 9–10, 21.
[148] *O'Kane v Fogarty* (1985) 2 NSWLR 649, 650 lists three heads of power that the equity courts may use when determining whether or not to grant injunctive relief in threatened assault cases.
[149] *Parry v Crooks* (1981) 27 SASR 1, 9–10, 21.
[150] *R v Dovey* (1978–79) 141 CLR 526, 532–3.
[151] (1976) 25 FLR 433, 435.
[152] *Re C* (1981) 3 A Crim R 146.
[153] The use of this provision to issue an injunction is discussed in *Australian Agricultural Company & ors v Oatmont Pty Ltd & Others* (1992) 106 FLR 314.

unregistered organisation from carrying on a health insurance business)[154] and s 80 of the *Trade Practices Act 1974* (Cth).[155]

Some statutes may impliedly provide for an injunction in criminal matters. For example, a provision which penalises the disclosure of confidential information may be enforceable by an injunction, especially when it appears that the statute, in addition to creating a criminal offence, is designed to provide a civil remedy to protect the government's right to confidential information.[156] On the other hand, a statute may expressly exclude injunctive relief,[157] or do so impliedly, by providing an exhaustive statement of all remedies.[158]

H *Statutory provision made for public benefit or public interest*

While the value-laden notion of 'public interest' lends itself to difficulties of definition, it also has an innate flexibility. The definition of the term 'public interest' as a 'balance between a mass of conflicting private or group interests'[159] shows what a vague concept it is. [160] In the context of injunctive relief in criminal cases, 'public interest or public benefit' has been used in several broad categories[161] of situations namely (1) for alleged breaches of public health legislation,[162] (2) for breaches of safety legislation[163] and (3) to protect moral values.

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[154] *Australian Health Insurance Association v Esso Australia Ltd* (1993) 41 FCR 450, 480.

[155] It has been said, however, that whilst s 80 does deal with injunctive relief in many different legal situations, it does not involve criminal law — *Sterling v Trade Practices Commission* (1980-81) 51 FLR 1, 7–8. See David Mossop, 'Interlocutory Injunctions in Public Law' (1995) 11 *Australian Bar Review* 59, 68–9 for a note and list of statutory provisions enabling individuals to seek injunctive relief.

[156] *Commonwealth of Australia v John Fairfax & Sons Ltd* (1980) 147 CLR 39, 50 (Mason J).

[157] *Ramsay v Aberfoyle Manufacturing Company (Australia) Pty Ltd* (1935) 54 CLR 230, 256 (McTiernan J): *Stevens v Chown* [1901] 1 Ch 894, 904–5.

[158] See LBC *Laws of Australia.* Chap.2 Perpetual Injunctions, Part A.3. Injunctions in Aid of Statutory Rights para 13 and fn 11.

[159] Feldman, above n 9, 379.

[160] Michael W. Mills, 'Case note on *Huber's Case*' (1972) 4 *Adelaide Law Review* 457, 461. Feldman, above n 9, 379.

[161] Lord Diplock in *Gouriet's Case (Gouriet v. Union of Postal Workers)* stated that injunctive relief in criminal matters should be confined to situations involving legislation whose prime purpose is the promotion of health, safety and welfare of the public — [1978] AC 435, 500 discussed in Spry, above n 98, 342.

[162] In *Hornsby Shire Council (SC) v Danglade* (1929) 29 SR NSW 118, 124 the defendant built and refused to demolish a building for which the Hornsby Shire Council had refused an initial permit and then, upon erection of the building by the defendant, had issued orders to demolish because of the risk of disease from an unsanitary building. In *Brisbane City Council (CC) v Georgeray Contracting Pty Ltd* (1995) 79 A Crim R 265, 273–4 no injunction was granted because the dumped building material was not a danger to public health. See also *Cooney (Vic) & anor v Ku-ring-gai Municipal Council* (1963) 114 CLR 582, 605 and Hanbury and Martin, above n 77, 798 in relation to injunctions in the public interest.

[163] In *D-G Department of Transport v Viemar* (1993) 18 *Motor Vehicle Reports* 289 an interlocutory injunction was granted to restrain the respondent from operating without the proper crash helmet. In *Civil Aviation Authority v Repacholi* (1990) 102 FLR 261, however, even though the object of the Regulations being breached was 'safety', the court would not grant an injunction to restrain any further serious breaches of those Regulations because the defendant gave an undertaking to act in a lawful way in future.

Inconsistency characterises the third of these, the protection of moral values. In both *Huber's Case* and *A-G v Twelfth Night Theatre* injunctions were sought to restrain the performance of plays which involved language and/or conduct which might offend the moral values of some citizens. [164] In *Huber's Case* an injunction was granted by the majority of the court (Bray CJ dissenting) [165] partly on the grounds that the

> language of the script and production will offend the ordinary contemporary standards of decency and propriety and will result in the commission, at each performance, of offences against s 23 of the *Police Offences Act*.[166]

The court in *A-G v Twelfth Night Theatre*,[167] however, refused to grant injunctive relief because Hart J ruled that the conduct of the defendants did not indicate an intention continually to flout the law and the issue of whether the term in question (i.e. 'fucking boong') was obscene should be left to the relevant tribunal. In another case, *A-G v Mercantile Investments Ltd*,[168] no injunction was granted because even though the lottery under dispute was illegal, it apparently did not interfere with the moral well-being of the community.

In relation to moral values, Baker[169] and Hanbury[170] distinguish between cases which involve moral wrongs (or *malum in se)* and those which relate to public wrongs (*malum prohibitum*). They argue that courts have not granted injunctions for situations related to moral wrongs, but that they often do grant them for breaches, or planned breaches, of public control-related wrongs. Wells J in *Huber's Case*,[171] however, cast doubts on the existence of this distinction when granting injunctions by referring to the decision in *A-G v Mercantile Investment*, where Harvey J did not exclude the possibility of intervention in cases related to laws based on morality.[172] Also Walters J in *Huber's Case* said that whilst injunctive relief could not be granted in crimes based on *mala in se*, such relief could be granted in criminal cases involving anti-social acts made quasi-criminal by statute.[173]

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[164] *Huber's Case* (1971) 2 SASR 142, related to the play *Oh Calcutta* which contained nude scenes, simulated sexual acts and discussion of those acts, whilst in *A-G v Twelfth Night Theatre* [1969] Qd R 319, related to the play *Norm and Ahmed* in which the term 'fuckin' boong' was used.

[165] Bray CJ, though in a dissenting judgment, refused an injunction to prevent the performance of *Oh Calcutta* because (a) the acts complained of had not yet been committed, (b) no civil right nor material interest of any individual or the public was alleged to be affected, (c) any alleged indecent behaviour could be dealt with effectively by the criminal law and (d) the producers should not be deprived of their performance if it was done in a legal manner — *Huber's Case* (1971) 2 SASR 142, 161, 165. See also Current Topics, 'Injunctions to Decency' (1971) 45 *Australian Law Journal* 705-6.

[166] *Huber's Case* (1971) 2 SASR 142, 185.

[167] [1969] Qd R 319, 328.

[168] (1921) 21 SR NSW 183.

[169] Baker, above n 130. It may be that Baker's conclusions are only based on breaches of statutory rules in which there are concurrent proceedings in an inferior administrative tribunal and criminal proceedings in a Magistrates Court.

[170] Hanbury, above n 1, 665.

[171] (1971) 2 SASR 142, 212.

[172] (1921) 21 SR NSW 183.

[173] (1971) 2 SASR 142, 181. See also Hanbury, above n 1 at 665.

The civil courts have added extra tests that must be met before injunctive relief will be granted in these 'public interest/benefit' criminal matters. First, the mere threat to the public interest *alone* is NOT sufficient to invoke injunctive relief as there must also be some criminal law with an accompanying penalty involved. [174] Second, the 'public interest' issue may often have to be matched against other competing ethical considerations[175] when the court exercises its discretion regarding injunctive relief in criminal matters.

I *Where the Statute is Not Exhaustive*

In *A-G v Huber*[176] the majority, in granting an injunction to restrain the proposed performances of *Oh Calcutta*, held that the relevant legislation, the *Police Offences Act 1953* (SA) ss 4, 7 and 23, did not exhaustively cover the field in relation to the offence and penalties for indecent or obscene behaviour in a public place. In the same case it was stated that where 'a set of laws (be they parliamentary or subordinate) [are] so comprehensive that they must be read as an exhaustive code, [they] may accordingly exclude the Attorney-General's remedy [an ex relator injunction] altogether'.[177] The case of *Ramsay v Aberfoyle Manufacturing Company (Australia) Pty Ltd*[178] is a good example of where the court refused injunctive relief because the particular laws involved did provide an exhaustive code. The High Court of Australia in *Ramsay* held that the particular by-law in relation to the illegal construction of buildings set out (1) minimum and maximum penalties for breaches of the by law, (2) procedures for the council to send a written notice to the offender, (3) penalties for continuing offences after the receipt by the offender of that notice, (4) procedures by which the council could hear submissions from the owner or builder and (5) authority for the council to demolish the illegal construction.

J *Infringement of a Right*

If the defendant's conduct infringes a public, private or legal right, the court will more readily grant an injunction in a criminal case.[179] In summary (1) equity has jurisdiction if the breaches or threatened breaches of the criminal law involve both a public right and the criminal law,[180] but it cannot be invoked for criminal breaches

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[174] Edward Sykes, above n 74, 128.

[175] For example in *Grofam v KPMG Peat Marwick* (1993) 43 FCR 396, 400 there is an interesting discussion of the competing forces of confidentiality and the public interest. In that case an injunction was sought, and granted, to restrain some of the respondents from releasing confidential information in relation to the applicant as it was thought the police may be investigating the applicant. The same issues were raised in *A & ors v Hayden & ors* (1984) 156 CLR 532 but in that case the High Court refused to grant an injunction to protect the confidentiality of contracts of employment of the applicants because public interest demanded otherwise.

[176] *Huber's Case* (1971) 2 SASR 142, 199 (Wells J).

[177] Ibid 198 (Wells J). See also Meagher, above n 21, para 2135, n 85.

[178] (1935) 54 CLR 230, 240–1.

[179] Meagher, above n 21, para 2135.

[180] *Hornsby Shire Council v Danglade* (1929) 29 SR NSW 118. (A mandatory injunction was issued to demolish an illegally constructed building despite the availability of criminal sanctions.)

alone;[181] (2) injunctions may be granted if, as a consequence of the breach of a public right, there is also interference with a private right;[182] and (3) courts of equity feel more confident in granting an injunction if the applicant's legal rights[183] are at stake.

K *Mere Infringement is Inadequate*

English authority supports the criterion that there must be a threatened or actual breach of the criminal law, as in *City of London Corporation v Bovis Construction.*[184] Some courts have even said there must be grave and irreparable harm.[185] There are, however, contradictory views on this criterion. Some argue that the harm need only be very small, as long there is some recognisable harm done by the defendant,[186] whilst others say that 'damage does not need to be proved in ... a public injunction'.[187] Some courts have also said that if no such injury is suffered, then no injunction will be granted.[188]

The requirement of damage should be juxtaposed with cases where an injunction may be granted to prevent a crime, even where there has not been an actual infringement.[189] A threat of serious harm may suffice.

L *The criminal penalties have been exhausted*

The exhaustion of criminal penalties was used as a criterion by Bridge LJ in *Stafford Borough Council v Elkenford Ltd* because it was only where

> those remedies have been invoked and have proved inadequate that one can draw the inference which is the essential foundation for the exercise of the court's discretion to grant an injunction, that the offender is...deliberately and flagrantly flouting the law.[190]

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[181] *A-G v Mercantile Investments Ltd* (1921) 21 SR NSW 183. (An injunction was refused to prevent the conducting of an illegal lottery).

[182] *Parry v Crooks* (1981) 27 SASR 1, 7–8 (King CJ).

[183] Compare the judgments of Donaldson LJ with Slade LJ in *Chief Constable of Kent v V* [1983] QB 34, in which the former did his utmost to create a 'legal right' for the applicant in order to grant injunctive relief, whereas the latter confined himself to a very strict and legalistic view of legal rights in order to refuse the injunction.

[184] (1988) 86 Local Government Reports 660, 682 (Bingham LJ); *Stoke-on-Trent City Council v B & Q (Retail) Ltd* [1984] AC 754, 767, 776 and *Wychoven DC v Midland Enterprises* (1987) 86 Local Government Reports 83, 87.

[185] *Gouriet's Case (Gouriet v. Union of Postal Workers)* [1978] AC 435, 500 and *A-G v Chawdrey* [1971] 1 WLR 1614.

[186] George W. Keeton and Leonard A. Sheridan, *Equity* (2nd ed, 1976) 348-9; Spry, above n 98, 342.

[187] Evans, above n 68, para. 23.24.

[188] *A-G v Birmingham Tame & Rea District Drainage Board* [1910] 1 Ch 48, 61; *A-G v Bastow* [1957] 1 QB 514, 520; *A-G v Harris & ors* [1960] 1 QB 31; 74. Spry argues that the degree of harm that the public is likely to suffer pursuant to the acts of the defendant is a discretionary criterion that the court exercises when deciding whether to grant injunctive relief in criminal matters —Spry, above n 98, 342.

[189] For example, Walters and Wells JJ in *Huber's Case* (1971) 2 SASR 142, 180, 198–9 and Williams J in *Re Legal Research* (1992) 59 A Crim R 200. Baker argues that 'the court will be more ready to grant an injunction when the offence has not yet been committed' — Baker, above n 130, 316.

[190] [1977] 1 WLR 324, 330.

Harper J followed this reasoning in *Pell's Case*.[191]

There is, however, a slight nuance to this criterion in that if the remedies have not been exhausted, injunctive relief might be still invoked if the circumstances of the particular case are 'special'.[192] This criterion also overlaps with other grounds already discussed in this article, e.g. the inadequacy of the penalty, deliberate flouting of the law, special circumstances and an exhaustive code.

M *To Restrain or Intervene in Criminal Proceedings*

Comment has been made[193] on the reluctance of courts of equity to restrain criminal proceedings, including committals.[194] Such restraints may, however, be imposed in the following circumstances.[195] First, where both the civil and criminal proceedings are based on the same facts and have the same object;[196] secondly, where the criminal proceedings raise the same question as is before the civil courts;[197] and thirdly, where there are 'extraordinary or special[198] circumstances'.[199] An injunction to restrain proceedings will not be granted if the application is shown to be an abuse of process or the litigant is vexatious.[200] Also the civil court has no jurisdiction to restrain the sentence of death.[201]

This reluctance is partly attributable to the criminal courts having their own remedies to deal with abuse of process,[202] such as issuing an order for a stay of proceedings. Also the applicant may make a submission to the DPP to withdraw the prosecution. Moreover, superior courts have powers under orders to review and prerogative writs to intervene in criminal proceedings in lower courts.

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[191] [1998] 2 VR 391, 395.
[192] *Perry v NSW Egg Corporation* (1986) 6 NSWLR 1, 8 (Glass AJ).
[193] Story, above n 28, Vol. 2, para 893.
[194] In *Re Harry* (1985) 20 A Crim R 63, 72, the Supreme Court of South Australia said it 'did not wish it to be assumed that the institution of proceedings in the Supreme Court will result automatically in the interruption of committal proceedings.'
[195] In *Stoke-on-Trent City Council v B & Q (Retail) Ltd* [1984] AC 754 the House of Lords granted an interlocutory injunction to restrain the defendants from continuing to breach shopping hour provisions even though criminal proceedings had not been completed.
[196] *Halsbury's Laws of England* (4th ed, 1991) Vol 24, para 948, William Kerr, *A Treatise on the Law and Practice of Injunctions* (5th ed, 1914) 8. See Baker, above n 130, where Baker argues that in certain circumstances, injunctions can be granted in equity courts to restrain criminal proceedings where the same fact situation has given rise to concurrent proceedings in both civil and criminal courts. See also Sykes, above n 74 at 142–3 for a discussion of the use of injunctions against judicial process.
[197] Keeton and Sheridan, above n 186, 329–330, n 31, citing *York v Pilkington* (1742) 2 Atkyn's Reports, Chancery, 302, *Re Connolly Brothers Ltd* [1911] 1 Ch 731 and *Thames Launches Ltd v Trinity House Corporation* [1961] Ch 197.
[198] In *Polyukhovich v Commonwealth of Australia* (1990) 95 ALR 502 an interlocutory injunction was granted due to special circumstances, i.e. to restrain criminal proceedings against the applicant whilst a constitutional challenge relating to the matter was heard by the High Court.
[199] *Nolan v Curry* (Unreported, NSW Court of Appeal, 11 December 1995) 9.
[200] *Re Lessur-Millar* (1990) 47 A Crim R 111.
[201] *Ryan v A-G (Vic)* [1967] VR 514.
[202] *Nolan v Curry* (Unreported, NSW Court of Appeal, 11 December 1995) 9–11: *Elliott v Seymour* (1993) 119 ALR 1 (Gaudron J).

There are several interesting corollaries that result from this criterion, namely (1) the power of equity courts to force the police to release property in their possession on the basis that it is either required as evidence in a pending or proposed prosecution[203] or was illegally obtained;[204] (2) injunctions to restrain the prosecution from interviewing witnesses for a committal proceeding;[205] (3) the granting of an interlocutory injunction to restrain a lawyer from representing a statutory authority in an action against a defendant whom the lawyer had previously advised;[206] and (4) injunctions to restrain the passing on of confidential information to the police.[207]

There is also the reverse situation, where civil proceedings are restrained because criminal proceedings are being, or may be, initiated. In *Lee v Naismaith & ors*[208] the Supreme Court of Victoria refused to grant an injunction to restrain the investigation of a pharmacist by the Pharmacy Board because there was no evidence that criminal charges were likely to be laid against the pharmacist/applicant.

N *Breaches of Statutory or Common Law Crimes*

It was initially considered that a particular crime must be of a statutory nature before injunctive relief could be granted because a statute prima facie involved a public right.[209] Whilst most of the successful applications for such relief do involve an actual or threatened breach of a statutory crime, 'the jurisdiction goes wider than merely to restrain contravention of a statute'.[210]

O *The need to freeze the assets from crime*

As with domestic violence cases, the use of injunctions to freeze the assets of a crime is based more on an archetypal case than on principle. *Chief Constable of Kent v V*[211] is one of the best known cases of this type. The police sought an injunction to stop a criminal from taking his proceeds from a crime out of a bank account and spending them. The Court of Appeal held that an injunction could be

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[203] See *Ghani v Jones* [1970] 1 QB 693; *Rowell v Larter* (1986) 24 *A Crim R* 222, 232–3.

[204] In *Shaw & ors v Coco* (1991) 54 A Crim R 128, the Full Court of the Supreme Court of Queensland refused to intervene in criminal proceedings by ordering that the police should release evidence that was illegally obtained by a listening device.

[205] In *Reid v A-G (Cth)* (1995) 133 ALR 428 the High Court of Australia refused to grant an injunction to restrain the Commonwealth Director of Public Prosecutions from examining witnesses for a committal proceeding.

[206] *Mallesons v KMPG Peat Marwick* (1990) 4 WAR 357.

[207] *Grofam Pty Ltd v KMPG Peat Marwick* (1993) 43 FCR 396, 403. (Injunctive relief was granted to prevent the release of confidential information unless it was relevant to police investigations in relation to an apprehended offence).

[208] (1989) 45 A Crim R 271.

[209] *Peek v NSW Egg Corporation* (1986) 6 NSWLR 1, 5.

[210] *Waterhouse v Australian Broadcasting Corporation* (1986) 6 NSWLR 716, 721 (Young J).

[211] [1982] 3 WLR 462. Also in *A-G v Blake* the court wished to prevent Blake from receiving royalties from a crime committed almost 40 years earlier — [1998] 1 All E R 833.

granted even to freeze an intangible asset such as money in a bank account. No injunction is available in relation to profits made from loans obtained by fraud.[212]

VII SHOULD THE COURT HAVE GRANTED AN INJUNCTION IN *PELL'S CASE*?

A *The Facts in* Pell's Case

The National Gallery of Victoria, as part of the Melbourne Festival, had planned to open an exhibition of the works of the international artist Andres Serrano on 10 October 1997. Amongst these works was a photograph entitled *Piss Christ* which depicted a crucifix immersed in Serrano's urine, giving the photograph a misty golden/red haze. Serrano, who was a Roman Catholic, claimed that the use of urine in the photograph humanised Christ. In the September prior to the opening of this exhibition, officials of the Gallery began to receive abusive phone calls and death threats and late in that same month, the Catholic Archbishop of Melbourne, Dr Pell, with the support of leaders of other religions and denominations, approached the Gallery Director (Dr Potts) with a request that this particular photograph be removed from the exhibition. Dr Potts refused this request, which resulted in Dr Pell seeking in the Supreme Court of Victoria an injunction restraining the Gallery from publicly exhibiting the *Piss Christ* photograph on the grounds that such an act would be contrary to s 17(1)(b) of the *Summary Offences Act 1966* (Vic) and would constitute the common law offence of blasphemous libel. On the day before the exhibition opened, Harper J issued his judgment which effectively refused the injunctive relief sought by Dr Pell.

B *An Analysis of* Pell's Case *Against Some of the more Pertinent Grounds or Criteria for Granting Injunctions in Criminal Matters*

1 *Was there a threatened or actual breach of the criminal law that was more than a mere infringement?*

There was evidence that the trustees of the National Gallery of Victoria threatened to commit blasphemous libel and to contravene s 17(1)(b) of the *Summary Offences Act 1966* (Vic), which proscribes the display of an indecent or obscene representation.

The following definition of the common law offence of blasphemous libel is a composite of various sources.[213]

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[212] Hanbury and Martin, above n 77, 743 — quoting the cases of *Chief Constable of Leicestershire v M* [1989] 1 WLR 20 cf *Securities and Investments Board v Pantell SA* [1990] Ch 426.

[213] Kenny, 'The Evolution of the Law of Blasphemy' (1922) 1 *The Cambridge Law Journal* 127; *Ogle & anor v Strickland & ors* (1987) 13 FCR 306, 317; *R v Gott* (1922) Crim AR 87, 89–90; Brett Harris,

> The publication of words [or other representations] concerning the Christian religion which are so scurrilous and offensive as to pass the limits of decent controversy and to be calculated to outrage the feelings of any sympathiser with, or believer in, Christianity. Such a publication must also be likely to cause a breach of the peace.[214]

The mental element of the offence of blasphemous libel requires the prosecution to prove an intention by the accused to publish material which is in part blasphemous, but it does *not* require proof of an intention to blaspheme.[215] The physical element of the crime is confined to the Christian religion, which means other religions like Islam[216] are excluded from the offence of blasphemous libel.

In addressing this English common law misdemeanour, Harper J impliedly asked three questions, namely (1) did this English law apply in Victoria; (2) if it did apply, was the photograph likely to cause a breach of the peace; and (3) was this offence committed by the Gallery? Harper J answered 'yes' to the first question, but 'no' to the other two. The authors submit that the answer to all three questions should have been in the affirmative.

On the first question Harper J[217] expressed initial reservations about such a crime being part of Victorian law because (1) the multicultural and pluralistic nature[218] of Australian society would mean that most people would not take offence at jibes or criticisms of their religion; (2) the nexus between church and state in England does not apply in Australia because s 116 of the *Constitution of the Commonwealth of Australia* prohibits[219] the Australian Federal Parliament from making laws establishing any religion; and (3) there has been only one prosecution in Victoria this century for that offence. Despite these reservations Harper J eventually concluded that 'the ancient misdemeanour [of blasphemous libel] ... may have survived transportation to the colonies' because of the precedential case of *Ogle v Strickland*[220] and because s 469AA of the *Crimes Act 1958* (Vic), which deals with seizure and destruction of documents containing libel, is based on the English *Criminal Libel Act 1819*. The authors agree with Harper J that the common law offence of blasphemous libel does apply in Victoria.

In relation to the second and third questions, the authors argue that a serious breach of the peace was threatened by the display of the *Piss Christ* photograph at the

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'Should Blasphemy be a Crime? The 'Piss Christ' Case and Freedom of Expression' (1998) 22 *Melbourne University Law Review* 217, 218–9.

[214] There is some conjecture as to whether 'breach of the peace' is part of the definition of blasphemous libel as two members of the court in *Whitehouse v Lemon; Whitehouse v Gay News Ltd* [1979] AC 617, 656 & 662 claimed that it was NOT part of the definition as compared with the opposite view held by the court in *Bowman & ors v Secular Society Ltd* [1917] AC 406, 446, 447; and *R v Gott* (1922) Crim AR 87, 89-90. See discussion of this issue in Harris, above n 213, 218–9.

[215] *Whitehouse v Lemon; Whitehouse v Gay News Ltd* [1979] AC 617, 665.

[216] In *Regina v Chief Metropolitan Stipendiary Magistrate; Ex parte Choudhury* [1991] 1 QB 429 the prosecution failed to broaden the scope of blasphemy to cover the Islamic religion.

[217] See Harper J's references to Lord Scarman's judgment in *Whitehouse v Lemon; Whitehouse v Gay News Ltd* [1979] AC 617 and to Kenny, above n 213 cited in *Pell's Case* [1998] 2 VR 391, 393.

[218] *Pell's Case (Pell v NGV)* [1998] 2 VR 391, 393.

[219] Ibid 394.

[220] (1987) 13 FCR 306, 317.

Gallery. This is because s 469AA of the *Crimes Act* 1958 (Vic) is evidence of how Victoria has borrowed directly from the English common law offence of blasphemous libel and, given the definition of that crime,[221] the strong Christian presence in Victoria and the title, background and subject matter of the *Piss Christ* photograph, it was more than likely that public display of the photograph at the NGV would have been scurrilous to the point of both offending Christians and causing a breach of the peace.

It is noteworthy that the term 'breach of the peace' applies to 'any public situation in which there is a danger to person or property without necessarily involving general disorder'.[222] Harper J in *Pell's Case* observed that there was 'no evidence of any unrest of any kind following or likely to follow the showing of the photograph in question'.[223] With respect, His Honour was wrong on both counts. There were numerous complaints in writing to the Director of the National Gallery, death threats and abusive phone calls to the Gallery and serious concerns aired in all forms of the mass media prior to the ruling. Subsequent to the ruling there were demonstrations, a substantial increase in threatening letters and phone calls to the Gallery, bomb threats against works by Rembrandt, a break-in, vandalism[224] and damage to Gallery property. These protests led eventually to the closure of the exhibition containing the *Piss Christ* photograph.

Also Harper J's finding that unrest was unlikely was inconsistent with his earlier ruling that the photograph in question was '... offensive, scurrilous and insulting at least to a very large number of Christians including a very large number of Catholics and has outraged their feelings'.[225] It was acknowledged by Harper J that 'the outrage is generated as much by the knowledge that [Serrano's] work is being exhibited in public within the Archdiocese, and in a Gallery of which the State is very proud, as it is by viewing the picture itself'.[226] If as many people felt outraged, offended or insulted as His Honour perceived, then a breach of the peace would have been a likely result of the public display of the photograph.

The authors themselves disagree with Harper J's conclusion that the Gallery did not commit blasphemous libel, because there was ample evidence that the photograph was a blasphemous publication, that it was likely to cause, or had already caused, a breach of the peace, and that therefore the Gallery had committed that misdemeanour.

The debate as to whether or not the Gallery contravened the *Summary Offences Act 1966* (Vic) s 17(1)(b) hinges on two issues, namely whether or not the photograph

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[221] See the beginning of part VII above.
[222] NSW Law Reform Commission, *Blasphemy,* Report No. 74 (November 1994) para 2.22.
[223] *Pell's Case (Pell v NGV)* [1998] 2 VR 391, 395.
[224] There were two physical attacks on the photograph after the *Pell* hearing, the first involved a man tearing the photograph from the wall, kicking it and damaging the frame and the second involved two teenagers attacking the Serrano photograph with a hammer — see Julie Eisenberg, 'Censorship by Brute Force' (Nov 1997) No 138 *Communication Update* 4.–5.
[225] *Pell's Case (Pell v NGV)* [1998] 2 VR 391, 392.
[226] Ibid.

Piss Christ was indecent or obscene and whether the exhibition containing that photograph was to be held or was held in a 'public place'.

It was felt by Harper J that the Gallery did not contravene s 17(1)(b) of the *Summary Offences Act 1966* because the photograph was neither 'indecent' nor 'obscene'. The salient words of s 17(1) in that context are as follows:

> .... Any person who in or near a public place or within the view or hearing of any person being or passing therein or thereon —
>
> . . .
>
> (b) writes or draws exhibits or displays an indecent or obscene word figure or representation;
>
> . . .
>
> shall be guilty of an offence.
>
> Penalty: 10 penalty units or imprisonment for two months;
>
> For a second offence — 15 penalty units or imprisonment for three months;
>
> For a third or subsequent offence — 25 penalty units or imprisonment for six months.
>
> . . .

According to Harper J, the terms 'indecent' and 'obscene' both had a sexual or lewd, but not a religious, connotation. The authors disagree with Harper J's conclusion because a broader and more reasonable interpretation of those two terms would have led to the conclusion that the photograph in question was in fact indecent and/or obscene.

To elaborate, Harper J, in finding that the words 'indecent' and 'obscene' had more to do with lewdness than blasphemy, used the definition of those two terms from Butterworth's *Australian Legal Dictionary* (1997). This dictionary, however, also defines both terms in the context of offending against 'the common sense of decency' and 'common propriety'.

It is submitted that lewdness is not exhaustive of what is offensive to common decency. Blasphemous libel or a gross insult to a sacred icon is 'offensive to common propriety' and 'an act which right minded persons would consider to be contrary to community standards or decency'. 'Common propriety' is not confined to sexual matters as what is proper conduct ranges over many forms of behaviour. The definition of 'indecent act' in the extract cited by Harper J in *Pell's Case* stipulates 'decency' as an alternative to 'sexual modesty'. If an 'indecent act' was confined to lewdness and sexual misbehaviour, there was no need for the alternative limb of 'community standards of decency', nor was there a need to have alternative definitions of 'indecent' as (1) 'unbecoming or offensive to common propriety' and (2) 'an affront to modesty'.

A community's sense of decency may well be outraged by a gross insult to religion no less than by offensive sexual behaviour. A community's respect for religious leaders is as worthy of protection as social perceptions of sexual misconduct.

Harper J also referred to the two definitions of 'indecent' in the *Macquarie Dictionary*, namely (1) 'offensive to modesty or decency, inciting to lust or sexual depravity, lewd' and (2) 'abominable, disgusting, repulsive'. The fact that this dictionary has set out two different meanings for this term suggests that they are disjunctive and are meant to be based on different concepts which are wide enough to protect fundamental interests other than just sexual matters. Account must, within this two pronged definition of 'indecent', be given to insults to race or religion.

Harper J felt that the indecent or obscene quality of the photograph 'came not from the image as such but from its title and the viewer's knowledge of its background'.[227] This attempt to separate quality from history is artificial. The viewer's knowledge of the photograph came from its title and the media releases. It is natural to expect the title and its antecedents to influence a viewer's judgment in any art work. The test is not only whether the photograph is intrinsically indecent or obscene but whether the cumulative effect of the presentation, including its title, provenance and subject matter, is 'abominable, disgusting or repulsive'.

Harper J went on to argue that because current Victorian society was multicultural, partly secular, permissive and largely tolerant, it was not easy to decide whether or not a religious photograph was indecent or obscene. These assumptions about the nature of current society, however, do not necessarily mean that such a photograph will not offend religious or spiritual feelings. In fact the granting of injunctive relief in *Pell's Case* may well have avoided further infliction of gratuitous hurt to many, including non-Christians.[228]

An alleged breach of s 17(1)(b) must be executed in a 'public place' and that term is variously defined in s 3 of the *Summary Offences Act 1966* (Vic). Whilst many different locations are listed in s 3 as being a 'public place' for the purposes of that Act, those listed at sub paragraphs (i) and (o) of s 3 seem to be the most relevant to *Pell's Case,* as is seen from these extracts from that provision:

> (i) any public hall theatre or room while members of the public are in attendance at, or are assembling for or departing from, a public entertainment or meeting therein;
>
> . . .
>
> (o) any open place to which the public whether upon or without payment for admittance have or are permitted to have access.

Given the above definitions of a 'public place', the authors feel that it can be reasonably assumed that (1) the *Piss Christ* photograph was displayed in a 'public place' given that the photograph was to be exhibited at the National Gallery of

[227] *Pell v NGV* [1998] 2 VR 391, 395.

[228] It is worth noting that leaders of non-Catholic and non-Christian religions supported Archbishop Pell in his protestations about the *Piss Christ* photograph.

Victoria as part of the Melbourne Festival, (2) persons wishing to see such exhibitions normally pay at least a fee to enter the Gallery and often pay an extra fee to enter special exhibitions and (3) the very broad definition of 'public place' in paragraph (o) of s 3 of the *Summary Offences Act 1966* includes an admittance payment to an open place and the narrower definition in paragraph (i) covers a public hall or room where members of the public are in attendance.

In relation to this second offence the authors therefore believe that the Gallery did contravene s 17(1)(b) of the *Summary Offences Act 1966* because broader interpretations of the terms 'indecent' and 'obscene' than those given by Harper J would have led to the conclusion that the photograph in question was either indecent or obscene or both and because the photograph was to be displayed in a public place.

It is important to decide whether the above breaches of the law were, in both a qualitative and a quantitative sense, more than a mere infringement of the law. To this end, proof of the qualitative or serious nature of the infringements of the offence of blasphemous libel could be seen in the fact that various religious leaders and their followers[229] were deeply offended by the *Piss Christ* photograph. Evidence of the quantitative nature of the infringement can be seen in the large number of examples[230] of breaches of the peace surrounding the public display of that photograph.

In summary, the authors contend that there was a threatened or actual breach of the criminal law of Victoria and that breach was more than a mere infringement.

2 *Were the penalties or civil remedies for those breaches inadequate?*

The penalty for a first offence against s 17(1)(b) of the *Summary Offences Act 1966* (Vic) was 10 penalty units or two months' imprisonment; for a second offence it was 15 units or three months' imprisonment and for a third and subsequent offences it was 25 units or six months' imprisonment. The custodial sanctions look adequate but there may have been a problem in enforcing them, as the offenders were a group of persons, i.e. the Trustees of the National Gallery of Victoria. As a penalty unit is the equivalent of $100, the sanctions are minimal.

The adequacy of these statutory penalties also depends on whether the remedies were what the applicant had sought. All these remedies related to breaches of s 17(1)(b) that had already been committed, whereas Archbishop Pell was seeking to prevent the actual performance of the offence. To this end, injunctive relief was far more appropriate because it could have restrained or prevented the performance of the offence of displaying indecent or obscene material in a public place *before* it was committed.

The exact penalties for committing the common law offence of blasphemous libel, are unclear. Archbold merely states that this offence is 'punishable by way of fine

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[229] *Pell's Case* [1998] 2 VR 391, 392.

[230] See the discussion of the various incidents involving breaches of the peace in part VII above.

and/or imprisonment'.[231] The NSW Law Reform Commission claims that the penalty for blasphemous libel is not limited by statute and

> [i]n theory this means that a person convicted of blasphemy could receive a sentence of anything up to life imprisonment ... At common law, however, blasphemy was classified as a misdemeanour rather than a felony, so this would be a restraining effect [on the size of the penalty] in practice..[232]

Some idea of the actual penalty for committing the offence of blasphemy or blasphemous libel can be gleaned from the few reported convictions for those offences. In the 1977 English case of *R v Lemon; R v Gay News Ltd* the trial judge, King-Hamilton QC, sentenced the editor of *Gay News* to nine months' imprisonment suspended for 18 months plus a fine of £500, as well as imposing a fine of £1,000 on the company that owned that publication. The suspended sentence was quashed by the Court of Appeal,[233] though the court did uphold the fines imposed by the trial judge. In the 1922 case of *R v Gott*[234] the defendant was sentenced to nine months' hard labour for blasphemous libel.

Given the above it is a little difficult for the authors to make a judgment as to the adequacy of such penalties other than to say that a fine of several thousand dollars would appear very lenient but that several months incarceration would be more apt.

2 *Did the relevant statutes form a complete code for the alleged offence/s*

Whilst s 17(1)(b) of the *Summary Offences Act 1966* (Vic) does provide adequate details of the actus reus and sanctions for the offence of displaying indecent and obscene matter in a public place, it is limited in that it is confined to conduct that has been committed. For Pell's purposes however, s 17(1)(b) is NOT a complete code because it does not provide the remedy he was seeking, i.e. to restrain an offence that had not yet been committed.

4 *Did the threatened or actual breaches of the relevant laws also relate to public rights?*

The definition of a 'public right' encounters the twin dichotomies of 'public' vs 'private' and 'rights' vs 'non-rights'. That difficulty is illustrated in a divergence of judicial views on the application of the term 'public rights'. If we were to apply the reasoning of the majority in *Huber's Case*[235] to an interpretation of s 17(1)(b) of the *Summary Offences Act 1966* (Vic), that provision does seem to involve public rights because it protects people from the display of indecent or obscene representations in public. In applying Bray CJ's dissent in *Huber's Case* [236] or Harvey J's judgment in

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[231] *Archibold: pleading, evidence and practice in criminal cases* (1999) para 27-6.
[232] NSW Law Reform Commission. *Blasphemy.* Discussion Paper No. 24 (Feb. 1992) paras 4.56 and 4.57.
[233] [1979] QB 10.
[234] (1922) 16 Crim AR 87.
[235] (1971) 2 SASR 142.
[236] Ibid 165.

Mercantile Investments to the facts in *Pell's Case*,[237] however, public rights were not affected because members of the public who expected to be offended need not have attended the exhibition at the National Gallery. The latter view, however, disregards those who attended the exhibition ignorant of what they would see and who were repulsed by what they saw.

5 *Were the relevant laws created for the public benefit or in the public interest?*

There is little doubt s 17(1)(b) of the *Summary Offences Act 1966* (Vic) was created for the public benefit in that it is aimed at protecting people from public displays of obscenity or indecency. Similarly, the aim of averting a breach of the peace by proscribing blasphemous libel was also in the public interest.

6 *Was the application made in an 'emergency' situation?*

If an 'emergency situation' denotes a need to resolve a serious problem immediately, it certainly applies to the Pell application. First, there had already been serious threats made by sections of the public against the Gallery and the planned exhibition. Secondly, Archbishop Pell was seeking to prevent further breaches of the peace by having the Court restrain the Gallery from opening that exhibition with the offending photograph included in it. Thirdly, the urgency of the application is exemplified by the fact that the exhibition was to open on 10 October, the day after judgment in relation to Pell's application was due to be given by Harper J.

7 *Were the circumstances of the case 'exceptional'?*

If in this context 'exceptional' meant unique, rare or very unusual, then the fact that there has been only one case in Victoria this century on the common law crime of publication of blasphemous libel indicates that the Pell application was indeed 'exceptional'.

8 *Were all the available sanctions exhausted?*

This criterion was central in Harper J's refusal to grant injunctive relief.[238] As no criminal prosecution had commenced against the Gallery trustees or director, all available sanctions clearly had not been exhausted. Injunctive relief, however, has been granted in the past even where all sanctions have not been exhausted because of the need to find a quick and efficient solution to the dilemma faced by the court and to avoid impending crimes. In this particular instance, Harper J had an excellent opportunity to prevent what was later to become a much larger breach of the peace, and an embarrassing stand off between the religious and art worlds, by granting injunctive relief.

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[237] (1921) 21 SR NSW 183.

[238] 'But I am also mindful of the reasons why the civil courts have thought it proper to exercise restraint in providing injunctive relief where the legislature or the common law provide criminal sanctions which have not been exhausted' — *Pell v NGV* [1998] 2 VR 391, 395.

C Policy Issues in Pell's Case

In a case such as *Pell v NGV* the following public policy or philosophical issues inevitably arise: freedom of expression or speech, particularly freedom of religious and artistic expression, censorship, religious vilification or religious sensitivities, the church/state debate and the law as a reflection of society's current values.

1 Freedom of Expression

Arguably the enforcement of the offence of blasphemous libel limits the free discussion[239] of abstract belief systems within Christianity and if Harper J had granted injunctive relief in *Pell's Case* unreasonable constraints would have been placed on freedom of artistic and religious expression.[240] It would have prevented the artist Serrano from displaying his genuine, if somewhat underdeveloped,[241] artistic expression in the form of the *Piss Christ* photograph, and the Roman Catholic Serrano from displaying his perception of Christ as a very human[242] person.

Such arguments overlook the fact that the offence of blasphemous libel does not prohibit all bona fide criticisms of Christianity.[243] It applies only to literary and artistic works which use offensive, insulting and scurrilous ridicule of the Christian religion. The offence proscribes the manner rather than the substance of the anti-Christian expression.[244]

Australia does not have a Bill of Rights which sets out political rights and freedoms, but freedom of expression is protected at common law, and an injunction to prevent blasphemous libel is arguably a restriction of that freedom, verging on censorship.[245]

The obvious response to that view is that freedom of expression is not and cannot be absolute. It is limited by laws against defamation, racial and ethnic vilification, pornography, sedition, criminal conspiracy and incitement. These laws protect sensitivities and interests which are as significant as artistic expression. If the limits placed by these laws are not censorship, consistency requires that religious vilification be subject to the same constraints. To justify the protection accorded to sensitivities in areas of gender, sexual preference, reputation and ethnicity but not to religious susceptibilities is discriminatory. Worse still, it is likely to provoke a breach of the peace.

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[239] *Finis Africae of Blasphemers, Infidels, False Prophets and Artistic Diuresis.* <http://www.screenmedia.com/Excursus/Articles/Piss.htm.>

[240] Harris, above n 213, 227.

[241] The famous art critic Robert Hughes referred to Serrano's artistic works as 'opportunistic shock hustling' quoted in Eisenberg, above n 224, 4.

[242] It was argued by Serrano that the immersion of the crucifix in urine necessarily 'humanises Christ' — *Finis Africae,* above n 239.

[243] Kenny, above n 213, quoted by Lord Scarman in *Whitehouse v Gay News* [1997] AC 617, 658.

[244] *Stephen's Digest of Criminal Law* (9th ed) art 214 quoted by Lord Scarman in *Whitehouse v Gay News* [1979] AC 617, 665.

[245] *Right to Life Association (NSW) Inc v Secretary, Department of Human Services and Health* (1995) 128 ALR 238, 270 and *Lange v Australian Broadcasting Corporation* (1997) 145 ALR 96, 110 arguably illustrate this common law protection of freedom of expression —Harris, above n 213, 227.

2 *Religious sensitivities and the prevention of religious vilification*

Harper J claimed that 'a plural society such as contemporary Australia operates best where the law need not bother with blasphemous libel' and that such a pluralistic society has a 'respect across religion and cultures . . . a capacity to absorb the criticisms or even jibes of others..[as well as]..an intention not to give or take deep offence'.[246] The events surrounding the exhibition containing the *Piss Christ* photograph demonstrated a more unforgiving side of such a society when it came to offending religious sensitivities.

The offence of blasphemous libel may be inappropriate to prevent religious vilification when anti-discrimination laws and tribunals provide relief.[247] The availability of civil and criminal sanctions, however, is a greater deterrent than civil or administrative relief alone. It has been argued that, as a legally enforceable concept, vilification can relate to individuals but not to doctrines, ideas, practices and icons.[248] This distinction is artificial. Ideas and doctrines do not exist in a vacuum but are the result of human perception and cerebral processes. To desecrate a defenceless icon is likely to provoke the wrath of some believers. They may revere a sacred object more than an abstract and relatively unintelligible doctrine.

Artistic sensitivities can be as deeply offended as religious ones. The debate over the photograph was in part a battle over cultural hegemony and whether artistic values should prevail over religious ones. The high moral ground was actively sought by both contenders.[249]

3 *The Church/State distinction*

In Australia, the clear separation of church and state is evidenced by the lack of an established religion by law, the legal prohibition[250] on the Commonwealth of Australia making laws in relation to religion and by the fact that most recognised churches operate under their own canon law. The grant of an injunction in litigation between a church leader and a secular official is not, however, a law establishing a religion.

Moreover, s 469AA of the *Crimes Act 1958* (Vic) demonstrates that the offence of blasphemous libel was part of the non-religious laws of the state, in this case the State of Victoria. This offence was rightly a matter for the state because its aim was to prevent a breach of the peace and maintain good public order.

Two issues emerge in considering whether the law reflects societal values in this context. Is the offence of blasphemous libel obsolete? If it is not obsolete, should that offence only relate to Christianity?

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[246] *Pell v NGV* [1998] 2 VR 391, 393.
[247] Harris, above n 213, 223.
[248] Ibid 224. *Finis Africae,* above n 239.
[249] *A Take on Piss Christ* <http://www.shootthemessager.com/au/u-jan-98/life/1-pisschrist.htm.>
[250] *Australian Constitution,* s 116.

4 *Is the offence of blasphemous libel obsolete and should that offence be confined to Christianity?*

The pluralistic nature of contemporary Australian society, [251] and the paucity of prosecutions, namely seven in England since 1883,[252] a successful one in NSW,[253] and only one in Victoria,[254] suggest that the offence of blasphemous libel in its present 'Christianity only' form is obsolete. There are strong arguments, however, for the creation of a more general offence of blasphemy or blasphemous libel which would protect followers of *any* religion (Christian or non-Christian[255]) from injury caused by affronts to their particular religious sensitivities. The laws of defamation and against racial vilification are telling examples of the need for legal regulation to safeguard deeply held feelings.

If the offence is extended to non-Christian religions a definitional problem arises as to what is a 'religion' and what is 'offensive' to a particular religion.[256] While it is customary for the courts to resolve that kind of problem, it is discriminatory to protect the sensitivities of the followers of one religion alone and for judges and legislators to remain oblivious to the outrage of others.

D *Judicial Reasoning in Pell's Case*

Unfortunately Harper J's reasoning in *Pell's Case* was flawed in many different ways. First, despite the availability of many criteria upon which to exercise his discretion as to whether or not to grant injunctive relief in criminal cases like the one before him, Harper J chose to be very selective in his choice of such criteria.[257] Secondly, his selection of definitions of the key terms 'obscene' and 'indecent' was equally narrow and self-serving. Thirdly, Harper J's assessment of the evidence before him in relation to actual and potential breaches of the peace was faulty.[258] Finally, his express reliance on legalism[259] meant that the jurisprudential issues of

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[251] The 'limited scope of the offence [of blasphemy] is, without doubt, anachronistic in a pluralistic society' — *Finis Africae,* above n 239.

[252] *Whitehouse v Lemon; Whitehouse v Gay News* [1977] AC 617; *R v Gott* (1922) 16 Crim AR 86 (and 5 others between 1883 and 1922) — *Archbold Criminal Pleading,* above n 231, para 27-1.

[253] *Queen v Jones* Judgement of the Parramatta Quarter Sessions, 18 February 1871, reported briefly in the *Sydney Morning Herald* 20 February 1871 and reproduced in the NSW Law Reform Commission Report, *Blasphemy,* No 74 (Nov. 1994) Appendix A.

[254] This prosecution was withdrawn before the trial — cited in Peter Coleman, *Obscenity, Blasphemy, Sedition: 100 Years of Censorship in Australia* (2nd ed, 1974) 72–73.

[255] Section 156(a) of the Indonesian *Criminal Code* forbids conduct which affronts *any* recognised religion in Indonesia, i.e. Islam, Buddhism, Hinduism, Catholicism or Protestantism. Sections 295A & 298 of the Indian *Penal Code* together make it an offence to outrage or wound the religious feelings of *any* class of Indian citizen by written or spoken means.

[256] *Finis Africae,* above n 239.

[257] Whilst Harper J did refer to Kirby P's eclectic judgment in *Peek's* case in which the latter discussed many different criteria for NOT granting injunctive relief in criminal matters, Harper J limited his analysis to a brief allusion to only three of Kirby's criteria — *Pell's Case (Pell v NGV)* [1998] 2 VR 391, 395–6.

[258] 'There was no evidence to me of any unrest of any kind following or likely to follow the showing of the photograph in question' — ibid 395.

[259] Ibid 393.

limits on the freedom of artistic expression and its tension with the competing interests of religious susceptibility were treated superficially.

If Harper J had been more eclectic in his reasoning, choice of precedents and evidence and had executed a more comprehensive and rigorous matching of the known law to the facts in *Pell's Case*, he would have found sound authority for granting injunctive relief to prevent the crimes of displaying obscene material in a public place where the penalty is minimal, and blasphemous libel where it causes breaches of the peace.[260]

To be fair to Harper J, in attempting to reach a final decision he was in some ways caught on the horns of a dilemma from which he could not appease all conflicting parties or freedoms. If he had refused injunctive relief in *Pell's Case*, he would have been praised for assisting freedom of artistic expression and ensuring that the court was not perceived as a censor, but, in turn would have been criticised for allowing both religious vilification and breaches of the peace. Conversely, if he had granted injunctive relief, the court might have been seen as a censor of artistic freedoms by the art world, but Christians and 'law and order' devotees might well have praised his attempts to prohibit both religious vilification and prevent breaches of the peace.

VIII CONCLUSION

The authors hope to have shown in relation to injunctive relief in criminal matters that: (1) it is more than just a 'modern day phenomenon' in English, and to a lesser extent Australian, legal history; (2) there are just as many credible arguments in favour[261] of such relief as there are against[262] its usage in criminal matters and (3) a more complete and rigorous matching of the known law to the facts in *Pell's Case* might well have led a different judge to grant the injunction.

The authors are of the opinion that injunctive relief should continue to be offered as a discretionary remedy in criminal matters because it is a quick, efficient, cheap and lateral means of preventing potential or ongoing crime, though the time has come for the courts of equity to spell out more clearly the grounds or criteria for exercising their discretion[263] in such matters, to invoke these criteria when necessary and to attempt to be consistent in applying them. Equity lawyers and judges may argue that it is a misconception to argue for greater consistency and transparency from equity courts considering an application for injunctive relief in a criminal matter because the injunction is a discretionary remedy to be applied case by case and as an equitable remedy it does not contain the rigidity of common law rules. Even

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[260] As stated previously, the behaviour of some members of the public before, during and immediately after the application was made by Archbishop Pell proved that some action was needed to prevent breaches of the peace in relation to the exhibition of the *Piss Christ* photograph.

[261] See part IV of this article above.

[262] See part V of this article above.

[263] Some of the grounds like 'rights', 'exceptional', 'special' or 'emergency' need further elaboration by the courts.

given the persuasive nature of these arguments, surely justify what appears to be a failure to either apply the relevant well known criteria in the appropriate cases (as in *Pell's Case*) or to apply them consistently in very similar fact situations. Why, for example, is there such a variation in the outcomes of the *A-G v Twelfth Night Theatre*[264] and *Huber's Case*[265] when the key issues are very similar?. The prevention of crime and the avoidance of its consequences for victims, state and community are more desirable aims than the unyielding preservation of the traditional division of courts and their associated remedies into civil and criminal categories. It is submitted that legislators and judges should fashion, refine and deploy a versatile remedy such as an injunction to transcend legal divisions in an effort to reduce conflict in the community.

[264] [1969] Qd R 319.
[265] [1971] 2 SASR 142.