Fall 1982

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Recommended Citation

Lee W. Potts, Criminal Liability, Public Policy, and the Principle of Legality in the Republic of South Africa, 73 J. Crim. L. & Criminology 1061 (1982)

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CRIMINAL LAW

CRIMINAL LIABILITY, PUBLIC POLICY, AND THE PRINCIPLE OF LEGALITY IN THE REPUBLIC OF SOUTH AFRICA

LEE W. POTTS*

I. INTRODUCTION: AN OVERVIEW OF THE REGIME MAINTENANCE FUNCTION OF THE SOUTH AFRICAN CRIMINAL LAW

Contemporary public policy frequently uses criminal law as a tool of social engineering. Many countries, including South Africa, have introduced laws carrying penal sanctions in order to supplant traditional modes of social regulation or to provide programmed social change.¹ Yet of all the South African efforts to utilize this method of altering society by means of the criminal law, only those concerning apartheid have received attention outside the country.² The international legal community should realize that the South African government also applies this method of social engineering to the problem of regime maintenance. The race laws of apartheid exemplify direct intervention of governmental power into societal processes. The regime-maintenance laws serve to assure power holders that countervailing political power

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¹ For some leading works on law and social change, see V. AUBERT, *SOCIOLOGY OF LAW, SELECTED READINGS* (1969); S. NAGEL, *LAW AND SOCIAL CHANGE* (1970); Dror, *Law and Social Change*, 33 *TULANE L. REV.* 787 (1959); Merryman, *Comparative Law and Social Change: On the Origins, Style, Decline & Revival of the Law and Development Movement*, 25 *AM. J. COMP. L.* 457 (1977); Zimring & Hawkins, *The Legal Threat as an Instrument of Social Change*, in *LAW, JUSTICE, AND THE INDIVIDUAL IN SOCIETY; PSYCHOLOGICAL AND LEGAL ISSUES* (J. Trapp & F. Levine ed. 1977).

² *INTERNATIONAL COMMISSION OF JURISTS, SOUTH AFRICA AND THE RULE OF LAW* (1960); *UNESCO, APARTHEID: ITS EFFECT ON EDUCATION, SCIENCE, CULTURE AND INFORMATION* (1972).

cannot be mounted to effectively challenge the social engineering program.

When the National Party came to power in South Africa in 1948, the traditional system of racial segregation had been breaking down under the influence of industrialization and mass urbanization.³ The new government inaugurated a policy of apartheid aimed at expanding and strengthening separatism and *baaskaaip* (white domination).⁴ The government introduced a series of laws dealing with residential segregation, race classification, miscegenation, and social mobility of non-whites.⁵ At the same time, the government implemented another series of laws intended to facilitate social engineering by blocking effective opposition to the apartheid legislation.

It is this second category of laws which is the focus of this article. For the most part, the laws in this group are not racially discriminatory. Instead, their primary purpose is to bolster the social engineering program by preserving the dominance of the Afrikaner-Nationalist regime. These laws are essentially derived from or often incorporate Anglo-American criminal law. They differ from the laws of other common law jurisdictions, however, in the types of conduct made criminal under the laws. Offenses such as seditious conspiracy, sabotage, terrorism, and incitement are not unknown to other common law jurisdictions. What distinguishes South African criminal law is the generality of the laws and the removal of many of the safeguards against their unfettered use which generally exist in the other countries.

South African criminal law provides the regime with a veil of legality hiding the use of penal sanctions as partisan devices of domination and repression. While much of the form of common law criminal procedure is retained, the substance has been compromised. While South Africa appears to adopt the traditional common law view of the criminal law, because, for example, it uses the same names for similar antigovernment offenses, the shift in the kinds of conduct made criminal under these laws enables the regime to take punitive and preemptive actions against opponents. While the laws are enforced against all racial groups,⁶ the effect is preservation and promotion of white-domination.

³ Hellman, *Urban Areas*, in HANDBOOK ON RACE RELATIONS IN SOUTH AFRICA 229 (F. Hellman ed. 1949).

⁴ For a summary of the National Party Program, see DR. MALAN'S POLICY FOR SOUTH AFRICA'S MIXED POPULATION (1948); SABRA (South African Bureau of Racial Affairs), INTEGRATION OR SEPARATE DEVELOPMENT? (1952); SABRA, BANTU EDUCATION: OPPRESSION OR OPPORTUNITY (1955).

⁵ Potts, *Law as a Tool of Social Engineering: The Case of the Republic of South Africa*, 5 B.C. INT'L & COMP. L.J. 1 (1982).

⁶ The Population Registration Act No. 30 of 1950, S. AFR. STAT. § 1, officially designates four population groups: white, coloured, asiatic and black. Black individuals are further

A member of any race who threatens this goal may find himself held criminally liable under the laws.

This article focuses on the process through which the National Party regime has manipulated the basic common law concept of due process of law to shift the emphasis of criminal law from the protection of individual rights to the maintenance of a white-dominated regime. Toward this end, the article contrasts South African laws with similar laws in other common law societies. The principle of legality will serve as the basic point of reference throughout this comparative analysis.

This article will briefly discuss (1) the applicability of the traditional common law model to South Africa, and (2) the components of the principle of legality. It will then use the constituent elements of the principle of legality to analyze the divergence of South African criminal liability from that of other common law jurisdictions.

II. COMMON LAW AND THE PRINCIPLE OF LEGALITY

A. THE ENGLISH COMMON LAW AND THE SOUTH AFRICAN LEGAL SYSTEM

1. *The Transfer of English Common Law to Territorial Jurisdictions*

The expansion of English common law in to a multitude of nations is one of the most enduring legacies of the British Empire. The version of the common law adopted in each territorial jurisdiction was not, however, the same as that adopted in other jurisdictions. This discrepancy resulted both from the fact that English law was not adopted *in toto* in each territory and from the continual development of the law of England after its incorporation into each territory.

Early in the seventeenth century, Lord Chief Justice Coke stated that the nature of the prevailing religion in a new territory determined the extent of incorporation of common law.⁷ If it were a Christian territory, its laws would remain in effect until explicitly changed.⁸ If it were an infidel territory, its laws would be abrogated insofar as they conflicted with Christian values and the principles of natural justice.⁹ This simple distinction was sufficient for an earlier era, but it failed to ac-

classified by tribe. Coloured and asiatic individuals are similarly classified by subgroup. The white European population is not officially subdivided but consists of two major groups distinguished chiefly by language. The Afrikaner group accounts for approximately 56% of the white population. The English speaking group makes up almost all of the other 44% of the white population.

⁷ Calvin's Case, 7 Coke 2a, 77 Eng. Rep. 377 (1608).

⁸ *Id.* at 17b-18a, 77 Eng. Rep. at 397-98.

⁹ *Id.* In either case, "[T]he laws of a conquered country continue in force, until they are altered by the conqueror" Campbell v. Hall, 1 Cowp. 204, 209, 98 Eng. Rep. 1045, 1047 (1774).

count for the dawning age of expansion into the New World. In 1693, therefore, the King's Bench added another category of common law transference: In uninhabited countries settled by English subjects, all laws then in force in England would become law in the colony.¹⁰ Even then, however, the incorporation of English common law was not complete. Only law suitable to the new place was deemed to be brought by the settlers.¹¹ After the dependent territory established a legislature, English statutes would have local effect only if English legislation specifically named the colony, or if the laws had local usage or were expressly readopted.¹²

In Old World colonies, for the most part, the policy of Dual Mandate¹³ meant that there was only limited incorporation of English law. In the territories which experienced large scale British immigration, the incorporation was more complete. In the American colonies, for example, the settlers believed that English law in effect prior to a specified date such as 1607¹⁴ or the date of the first emigration¹⁵ applied with full force to them.¹⁶ The issue was not so clear, however, in a territory secured by conquest which already had a European population. In Canada, for example, there was irresolute imposition of the common law. English law was imposed in 1763,¹⁷ but French civil law governed nine years later.¹⁸ When the province was divided¹⁹ into predominately English Upper Canada and predominately French Lower Canada, now Ontario and Quebec, respectively, Upper Canada was allowed to reinstitute common law civil jurisdiction.²⁰

In the Cape Colony, the English did not impose common law as had been done in Quebec, but they initially left intact the preexisting

¹⁰ *Blankard v. Galdry*, 2 Salk. 411, 91 Eng. Rep. 356 (1693).

¹¹ *See Kielly v. Carson*, 4 Moore. 63, 85-86, 13 Eng. Rep. 225, 233 (1842). *See also In re Cape Breton*, 5 Moore. 259, 13 Eng. Rep. 489 (1846).

¹² For the opinion of Attorney General Yorke, see Chalmers, *Opinions of Eminent Lawyers on Various Points of English Jurisprudence* 196 (1814), cited in E. BROWN, *BRITISH STATUTES IN AMERICAN LAW, 1776-1836* 12 (1964).

¹³ LUGARD, *THE DUAL MANDATE IN TROPICAL AFRICA* (1965).

¹⁴ For such an ordinance passed by the Virginia Assembly in 1776, see 9 *STATUTES AT LARGE OF VIRGINIA* 127 (Hening ed. 1821), cited in E. BROWN, *supra* note 12, at 113.

¹⁵ E. BROWN, *supra* note 12, at 95.

¹⁶ This position was not adhered to universally. In New York, for example, most believed that statutes passed before emigration were a governing part of American law. *See Bogardus v. Trinity Church*, 4 Paige Ch. 178 (1833). The Pennsylvania position, by contrast, was that statutes passed before emigration were of no effect in America. *See Morris's Lessee v. Vanderen*, 1 U.S. (1 Dall.) 64, 67 (1782).

¹⁷ Royal Proclamation for Royal Province of Quebec, 1763, 3 Geo. 3, ch. 1.

¹⁸ Quebec Act, 1774, 14 Geo. 3, ch. 83. The Quebec Proclamation of 1763 was voided by section four. English criminal law was continued in effect by section eleven.

¹⁹ Constitution Act, 1791, 31 Geo. 3, ch. 31, § 2.

²⁰ *Id.* § 33.

legal system.²¹ The native criminal law consisted of Roman-Dutch criminal procedure established in 1570 under an ordinance issued by Philip II of Spain, and Dutch East Indies statutory law.²² Subsequently, a search of public and private sources in the Netherlands revealed "no collection of Statutes and Laws" in force in the Dutch East Indies.²³ As a consequence English criminal law was introduced to the Cape Colony by the Charters of Justices.²⁴

When the English claimed Natal, the colony adopted Roman-Dutch law in every area outside of the criminal sphere.²⁵ Afrikaner trek-ers who resisted British rule established their own republics in the northern interior areas of present day South Africa.²⁶ The organic law of the Orange Free State and that of the South African Republic²⁷ incorporated Roman-Dutch law.²⁸ Thus before unification of South Africa in 1910, its civil law was generally uniform, but there were two major types of criminal law.

2. *Common Law Principles Agreed Upon in Diverse Territorial Jurisdictions*

It may appear from the foregoing that instead of essential agreement among common law jurisdictions there was fundamental disparity under the shared rubric of "common law." Such a conclusion is premature. Each country has developed in its own way to some extent but as Pound pointed out, the important distinction between common law and other legal systems is the way of thinking about the law and the legal process.²⁹ For this reason the influence of the principles of the common law is not to be gauged by the rejection of English statutes or the persistence of pre-English civil procedure. In spite of the vagaries of history, the countries to be discussed have each accepted the principles of common law, even though they differ greatly in their adherence to the precise tenets of English law.

²¹ Cape Articles of Capitulation, Art. 8 (1806), cited in Van Zyl, *The Batavian and the Cape Plakaten* 24 S. AFR. L.J. 132, 133 (1907).

²² Sachs, *Law Enforcement and Race Attitudes in a Slaveowning Society: The Dutch Settlement at the Cape, 1652-1795*, in JUSTICE IN SOUTH AFRICA 17-31 (1973).

²³ Letter from the British Colonial Office to Acting Governor of the Cape Major-General Bourke (Sept. 1, 1827), cited in Stock, *The New Statutes of India at the Cape*, 32 S. AFR. L.J. 328, 329 (1915).

²⁴ CHARTER OF JUSTICE 1827, reprinted in 32 RECORDS OF THE CAPE COLONY 274 (G. Theal ed. 1897); CHARTER OF JUSTICE 1832, reprinted in SELECTED CONSTITUTIONAL DOCUMENTS ILLUSTRATING SOUTH AFRICAN HISTORY 1795-1910 114 (G. Eybers ed. 1918).

²⁵ Cape Colony Ordinance 12 (1845).

²⁶ See H. GAILEY, *HISTORY OF AFRICA FROM 1800* 65-92 (1972).

²⁷ The South African Republic is now known as the "Transvaal Province."

²⁸ See Bodenstein, *English Influences on the Common Law of South Africa* 32 S. AFR. L.J. 337, 341 (1915).

²⁹ R. POUND, *THE SPIRIT OF THE COMMON LAW* 1 (1963). See also O. W. HOLMES, *THE COMMON LAW* (1881).

The American colonies, for example, lacked agreement on the applicability of English statutes,³⁰ but they did agree that Americans were entitled to "all the rights, liberties, and immunities" of the common law of England.³¹ Accordingly, although there is no common law of the United States distinct from that of the several states,³² the general principles of common law are part of our birthright.³³ Absent statutory provisions, the federal courts, for example, resort to the common law for guidance in the construction of legal terms and phrases.³⁴ State courts in jurisdictions that adopted English law when they were first settled also interpret statutory terms according to their common law usage.³⁵ Even in a state such as California, which had a Spanish-based legal system before annexation by the United States the courts are directed to follow the common law as the rule of decision insofar as it is not inconsistent with the Constitution of the United States or the constitution or laws of the State of California.³⁶

In the United States case law drew from the English common law since the status of statutory law was a matter of contention. Chief Justice Marshall stated that our common law includes the decisions of English courts prior to our separation from England.³⁷ Indeed, judicial decisions and usages adopted only in England and not recognized by American legislation nevertheless remained in force here unless explicitly rejected by post-Revolutionary state governments.³⁸ Legislation to limit or ban the use of English precedents was passed in three states, but the prohibitions applied only to English cases decided after July 4, 1776.³⁹ All three of these states repealed their prohibitory laws within about twenty-five years.⁴⁰

When the Dominion of Canada was formed, the organic law failed

³⁰ See *supra* note 16.

³¹ DECLARATION OF RIGHTS, 1 JOURNALS OF THE CONTINENTAL CONGRESS, 1774 68 (1904), cited in E. BROWN, *supra* note 12, at 21.

³² See *Wheaton v. Peters*, 33 U.S. 8 (Pet.) 591, 657-58 (1834).

³³ See *Van Ness v. Pacard*, 27 U.S. (2 Pet.) 137, 143 (1829).

³⁴ See *United States v. Outerbridge*, 27 F. Cas. 390, 391 (D. Cal. 1868) (No. 15,978); *In re Greene*, 52 F. 104, 111 (C.C.S.D. Ohio 1892).

³⁵ See *State v. De Wolfe*, 67 Neb. 321, 93 N.W. 746 (1903). For a detailed discussion of the constitutional, statutory, and case law background to the incorporation of common law in states which had been under British sovereignty, see E. BROWN, *supra* note 12, at 47-156.

³⁶ Cal. Stat. 1850, ch. 95, CAL. CIV. CODE. § 22.2 (West 1981).

³⁷ See *Cathcart v. Robinson*, 30 U.S. (5 Pet.) 264, 280 (1831).

³⁸ See *Respublica v. Mesca*, 1 U.S. (1 Dall.) 73, 77 (1782).

³⁹ The legislation was passed in New Jersey in 1799, in Kentucky in 1808, and in Pennsylvania in 1810. See E. BROWN, *supra* note 12, at 41.

⁴⁰ New Jersey repealed its law in 1819, and Pennsylvania did the same in 1836. See *id.* In Kentucky, the courts effectively repealed the legislation by holding that English precedents could not have binding authority. *Id.* at 132.

to provide for a uniform legal system.⁴¹ Criminal law and criminal procedure, however, were placed under exclusive authority of the national government.⁴² In 1950 the Supreme Court of Canada ruled that criminal liability was to be determined only by statutes and criminal case precedent.⁴³ This position was formalized by Parliament's decree in the Criminal Code of 1955 that no person shall be convicted of an offense at common law.⁴⁴ Again, as in the United States, this proscription of common law crimes did not entail the rejection of the principles of the common law.⁴⁵

In Australia and New Zealand the populations are far more predominately British than in Canada or South Africa, and, unlike the United States, there was no sudden break with Britain. One would therefore expect that their legal systems would be closer to the English legal system. This is clearly the case in Australia. As recently as 1943, the High Court of Australia ruled that decisions of the English House of Lords were binding upon Australia, even if they conflicted with Australian precedents.⁴⁶ It was not until 1962 that the Australian Courts explicitly rejected a House of Lords decision.⁴⁷ In spite of this break with English authority, the Australian Supreme Courts have subsequently decided that decisions of the House of Lords on widely applicable matters of common law are still binding when the High Court of Australia is silent.⁴⁸ This in effect means that Australia continues to apply common law principles.⁴⁹

New Zealand has followed a course analogous to that of Canada. Its Crimes Act states that no one shall be convicted of any offense at common law.⁵⁰ According to case law, this means that if a crime is not made a crime by statutory law, it is not recognized as such in New Zealand.⁵¹ As in Canada, this does not imply the rejection of those common

⁴¹ British North America Act, 1867, 30 & 31 Vict., ch. 3., § 92(13) gives the Provinces exclusive jurisdiction in property and civil rights matters and section 92(14) does the same for civil procedural matters. Section 94 provides that Parliament may make uniform laws on these subjects, but these laws only have effect in Provinces which reenact them.

⁴² *Id.* § 91(27). Section 129 provides that all laws in force at the time of confederation were to remain in force.

⁴³ *Frey v. Fedoruk*, 3 D.L.R. 513 (1950).

⁴⁴ Criminal Code, 1953-54, 2 & 3 Eliz. 2, ch. 51, § 8(a).

⁴⁵ *See, e.g.*, Criminal Code, CAN. REV. STAT. ch. C-34, § 7(3) (1970).

⁴⁶ *Piro v. Foster*, 68 C.L.R. 313 (1943-44).

⁴⁷ *Parker v. The Queen*, 111 C.L.R. 610, 632 (1962-63).

⁴⁸ *See, e.g.*, *The Queen v. Evans and Gardiner*, [1976] Vict. R. 517.

⁴⁹ Except for the fact that English decisions are viewed as binding authority in Australia, Australia's position with regard to the common law closely parallels that of the United States. *See supra* notes 34-39 and accompanying text.

⁵⁰ Crimes Act, No. 43 of 1961, 1 N.Z. REPR. STAT. § 9 (1979). *See* Criminal Code, CAN. REV. STAT. ch. C-34, § 8(a) (1970).

⁵¹ *The King v. Buckland & Sons* [1925] N.Z.G.L.R. 275. *Cf.* *Frey v. Fedoruk*, 3 D.L.R.

law principles which protect the basic rights of citizens.⁵²

3. *The Incorporation of English Common Law in the Republic of South Africa*

As a result of the unique development of British rule in Southern Africa,⁵³ the path by which the common law was incorporated into South Africa is more complex than in the societies established by English immigrants. Before unification of the four current provinces, there were two different systems of laws. The coastal colonies, Cape Colony and Natal, had English criminal law and Roman-Dutch civil law, while the organic laws of the interior territories, the Orange Free State and the South African Republic, prescribed the application of Roman-Dutch law.⁵⁴ In fact, however, there were fewer differences between the coastal and interior systems than it would at first appear. The first chief justices of the Orange Free State and the South African Republic were recruited from the Cape Colony Bar, and, for the most part, the judicial systems they inaugurated were greatly influenced by English styles, procedures, and rules of evidence.⁵⁵ When the four provinces were united, there was still no clear conceptual agreement upon the tenets of Roman-Dutch criminal law⁵⁶ and no consensus as to which activities were to be criminal.⁵⁷ Therefore, the law adopted legal definitions similar to those of the English law.⁵⁸ The judges, advocates (barristers) and attorneys (solicitors) of the Cape, Transvaal, Orange Free State and Natal were generally born and educated in the Cape Colony and were in agreement on the need to maintain English styles and procedures in court.⁵⁹ As a result, the English common law served as a model when a uniform code of criminal procedure was enacted for the entire Union.⁶⁰

513 (1950) (both case law and statutes were accepted as valid sources of criminal liability in Canada).

⁵² Crimes Act, No. 43 of 1961, 1 N.Z. REPR. STAT. § 20(1) (1979). See Criminal Code, CAN. REV. STAT. ch. C-34, § 7(3) (1970).

⁵³ In addition to the territories which later formed the Union of South Africa, British sovereignty extended over Bechuanaland (Botswana), Basutoland (Lesotho), Swaziland, and Southern Rhodesia (Zimbabwe). In an October, 1922, referendum Southern Rhodesia voted against joining the Union. After initially agreeing to turn over the other three territories, the British later refused to allow South African annexation of them. R. HYMAN, *THE FAILURE OF SOUTH AFRICAN EXPANSION: 1908-1948* (1972).

⁵⁴ See *supra* notes 25-29 and accompanying text.

⁵⁵ See Sachs, *supra* note 22, at 72-73.

⁵⁶ See *supra* text accompanying note 24.

⁵⁷ See Bodenstein, *supra* note 28, at 355.

⁵⁸ *Id.*

⁵⁹ See Sachs, *supra* note 22, at 123.

⁶⁰ Criminal Procedure and Evidence Act 31 of 1917. Amendments to this Act were consolidated in the Criminal Procedure Act 56 of 1955, which in turn has been replaced by the Criminal Procedure Act 51 of 1977.

B. COMMON PERSPECTIVES ON THE RULE OF LAW

1. *The meaning of due process*

The preceeding section illustrates the process through which the major common law countries accepted the basic tenets of English common law in spite of disparate patterns of political development. It is necessary to establish this foundation in order to preclude criticisms that each country's legal system is *sui generis* and that universalistic prescriptions about the rule of law are inappropriate.⁶¹ The common law has sufficiently broad application to make it a useful standard of comparison in those countries with a common law tradition. The most salient feature of the criminal law in common law jurisdictions is its adversarial approach to adjudication. To the layman, the heart of the adversarial system is exemplified by the image of two attorneys arguing before a jury and a judge, who acts as an umpire controlling the flow of the contest. The defendant and the state are each represented by an attorney attempting to prove or disprove the allegations against the defendant. This conception of the adversarial system, which is reinforced by the popular media, unfortunately mistakes form for substance. The courtroom maneuvering of lawyers is only the most visible aspect of the adversarial process. There are also philosophical safeguards inherent in the adversarial process which extend further than the judicial confrontation.

In the common law adversarial system the law is founded upon respect for certain absolute rights of individuals: The right of personal security, the right of personal liberty, and the right to private property.⁶² As Blackstone noted, the primary role of English laws "is, or ought always to be, to explain, protect, and enforce such rights."⁶³ Since related political theories have held that these rights are derived from nature, the common law requires that they be protected from infringement by the state as well as from the assaults of other individuals.

To that end, the common law has long rested upon the ideal of due process of law. A. V. Dicey argues that the English formulation of the Rule of Law means that "no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land."⁶⁴ Implicit in Dicey's theory is the requirement that the application of the

⁶¹ For examples of universalistic formulations of the rule of law, see INTERNATIONAL COMMISSION OF JURISTS, *THE RULE OF LAW IN A FREE SOCIETY* (1959); *Universal Declaration of Human Rights*, UNITED NATIONS YEARBOOK ON HUMAN RIGHTS 1948 466-68 (1950).

⁶² 1 W. BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 129 (1783).

⁶³ *Id.* at 124.

⁶⁴ A. DICEY, *LAW OF THE CONSTITUTION* 174 (1885).

law itself is subject to lawful regulation. "Ordinary legal manner" presupposes the existence of standards by which to evaluate the legal process. The dictate in the Magna Carta that no one would be seized or imprisoned except according to the law of the land, presupposed common law principles acting as guidelines for lawful arrest and imprisonment.⁶⁵ The scope of rights then protected by the "law of the land" was far narrower than the contemporary construction of due process of law. Yet implicit in the phrase "law of the land" is an idea that transcendent principles of common law exist to monitor the application of criminal sanctions, and a requirement that those principles should be followed.

Supreme Court Justice Felix Frankfurter observed that the "history of liberty has largely been the history of observance of procedural safeguards."⁶⁶ In the United States, for example, the concept of due process serves as such a procedural safeguard. Due process of law demands that the government afford an individual accused of crime all reasonable opportunities to challenge the state's allegations and prevents the government from taking the liberty of an individual without cause. As a result, the United States Supreme Court in the 1960's held that the right to legal counsel—the most apparent prerequisite of the adversarial system—attaches not only at trial but as soon as the prosecution focuses its attention on a specific individual.⁶⁷

If procedure were all that due process of law means in the common law context, the government of South Africa could justifiably claim that it upholds due process within the meaning of the English Rule of Law. This South African government has asserted:

The Rule of Law may mean different things to different people, but there is general agreement that it requires that a person on trial be accused in open court; be given an opportunity of denying the charge and of defending himself; and, that he be given the choice of a counsel. These rights are at all times assured by the South African courts.⁶⁸

The precise dimensions of the Rule of Law's demand for due process are, of course, impossible to ascertain in the abstract. It may well be that due process is best defined as treatment "according to the legal

⁶⁵ Chapter 39 of Magna Carta states that "No free man shall in any way be taken, or imprisoned, or exiled, or in any way destroyed except by the lawful judgement of his peers or by the law of the land." The English government legislated *confirmatio cartarum* that certain provisions in the Magna Carta were to be incorporated in the common law. *Confirmatio cartarum*, 1354, 28 Edw. 3, ch. 3. The phrase "law of the land" has been replaced by "due process of the law."

⁶⁶ *McNabb v. United States*, 318 U.S. 332, 347 (1943).

⁶⁷ *Escobedo v. Illinois*, 378 U.S. 478 (1964). *Escobedo* was augmented by *Miranda v. Arizona*, 384 U.S. 436 (1966).

⁶⁸ S. AFR. DEP'T OF FOREIGN AFFAIRS, SOUTH AFRICA AND THE RULE OF LAW 47 (1968).

processes recognized by Parliament and the courts"⁶⁹ and that the courts should not adopt "any specific definition" of the term.⁷⁰ Still, the requirement that "every person has the right to be represented in court by a legal advisor"⁷¹ cannot be accepted as the sine qua non of adversarial procedure.

Due process of law is not simply a procedural matter. The common law system also demands that substantive due process be honored. This means that the laws imposing criminal liability are themselves subject to the requirements of due process. Procedural fairness is important, but if criminal liability is imposed for unjust reasons, the result is injustice.⁷² Substantive due process directly tests the nature of the criminal laws and the judiciary's response to them by reference to the principle of legality.

2. *The Principle of Legality*

In order to analyze the extent of the South African commitment to the principle of legality, it is necessary to articulate the fundamental elements of substantive criminal law in the common law tradition. Primary reliance may be placed upon Hall's discussion of the principles of the common law criminal law.⁷³ According to Hall, the "principles" of the law are the most abstract of the propositions which comprise criminal law. They are the ultimate norms of penal law and therefore stand outside of the law.⁷⁴ Less abstract than the "principles" are the "doctrines" and the "rules." Doctrines express the common material of crimes,⁷⁵ i.e., they provide the legal factors determining whether broad categories of acts are or are not crimes.⁷⁶ Rules, in turn, express what is distinct about each specific crime.⁷⁷ The principles and the doctrines set out the basis for imposing criminal liability and so define criminal law

⁶⁹ *Curr v. The Queen*, [1972] 26 D.L.R. 3d 603, 607.

⁷⁰ *Id.* at 606.

⁷¹ S. AFR. DEP'T OF FOREIGN AFFAIRS, *supra* note 68, at 12.

⁷² "Once you institute a prosecution against a person, even though he may subsequently be acquitted, you have done that person irreparable harm." Yutar, *The Office of the Attorney-General in South Africa*, in 1 S. AFR. J. OF CRIM. L. & CRIMINOLOGY 135, 136 (1977).

⁷³ J. HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* (2d ed. 1960). Hall's work has long been the most authoritative American treatment of the principles underlying common law criminal liability. He was the first American legal scholar to set out systematically the primary elements of the principle of legality as integral to criminal liability and to extend the rule of law beyond constitutional issues. *See* A. DICEY, *THE LAW OF THE CONSTITUTION* 183-205 (10th ed. 1945); LOCKE, *TREATISE ON GOVERNMENT* ch. 11 (1690); Pound, *Justice According to Law*, 13 COLUM. L. REV. 696 (1913).

⁷⁴ J. HALL, *supra* note 73, at 18-19.

⁷⁵ *Id.* at 17-18.

⁷⁶ Hall provides examples of doctrines concerning insanity, mistake, coercion, attempt, solicitation, and complicity. *Id.* at 17.

⁷⁷ *Id.* at 18.

generally.⁷⁸ The rules, in contrast, define specific crimes.⁷⁹

Hall identifies seven general principles of the law: (1) *mens rea*; (2) act; (3) concurrence or fusion of *mens rea* and act; (4) harm; (5) causation; (6) punishment; and (7) legality.⁸⁰ The principle of legality is most germane to the inquiry into substantive due process. Hall treats 'legality' as synonymous with "rule of law."⁸¹ He also states that it is in some ways the most fundamental of the principles since it "qualifies the meaning of both crime and punishment and is, thus presupposed in all of criminal theory—except, of course, where it is itself the subject of inquiry."⁸²

Dicey's Rule of Law, in contrast, has three elements,⁸³ one of which concerns the substantive issue of legality. His distinct "breach of law" is "established in the ordinary manner before the ordinary courts,"⁸⁴ and contains the essence of contemporary Anglo-American formulations of the principle of legality.

It may well be, as Williams contends, that there is no absolute unanimity on what constitutes the principle of legality,⁸⁵ but that does not mean that there is no agreement on any of the tenets of the principle. Hall discusses the three basic elements of the principle of legality which fall under the maxim *nulla poena sine lege*.⁸⁶ The maxim demands, first, that no conduct may be held criminal unless it is precisely defined in a penal law. A corollary of this element is the requirement that penal statutes be strictly construed. Finally, the maxim commands that penal laws are not to be given retroactive effect.⁸⁷ These requirements are subsumed under the proposition that: "The citizen must be able to ascertain beforehand how he stands with regard to the criminal law."⁸⁸ The three subpropositions of the principle of legality amount to a requirement of fair notice of what the law is and what will happen if an individual violates the law.⁸⁹

These three guidelines—precise definition, strict construction, and non-retroactivity—will be used to determine whether the principle of

⁷⁸ G. WILLIAMS, CRIMINAL LAW: THE GENERAL PART, preface (2d ed. 1961).

⁷⁹ J. HALL, *supra* note 73, at 18-21.

⁸⁰ *Id.* at 18.

⁸¹ *Id.* at 12. Hall also equates "precise legality" with the "rule of law." *Id.* at 4.

⁸² *Id.* at 25.

⁸³ See *supra* note 64 and accompanying text.

⁸⁴ *Id.*

⁸⁵ J. WILLIAMS, *supra* note 78, at 575.

⁸⁶ J. HALL, *supra* note 73, at 27.

⁸⁷ *Id.* at 28. For Williams, legality requires essentially the same elements: (1) certainty in draftsmanship; (2) accessible and intelligible laws; (3) no extension of the law by analogy nor judicial creation of new punishments; and (4) non-retroactivity.

⁸⁸ G. WILLIAMS, *supra* note 78, at 575.

⁸⁹ See generally *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820).

legality has been honored in South Africa. Since each proposition involves the idea of fair notice, there will be some overlap in the analysis. Nevertheless, this article will treat each component as largely separable. It will examine, in order, vagueness in statutes, ex post facto liability, and judicial interpretation of the law in favor of defendants. As each proposition and group of statutes and cases is analyzed, the article will compare the state of the law in South Africa with that in the other major common law countries.

III. THE PRINCIPLE OF LEGALITY AND SOUTH AFRICA'S REGIME MAINTENANCE LAWS

A. PRECISION IN THE SPECIFICATION OF CRIMINAL BEHAVIOR

1. Introduction

The rationale for holding vague laws invalid is closely linked with that for the rule demanding strict construction of statutes. In both cases it is assumed that it is not the task of the courts but rather that of the legislature to define crimes and ordain punishments.⁹⁰ Even in England, courts have long held that it is their function to administer the law, not to make it.⁹¹ When a law is vague, however, it is up to the court to determine the scope of the law. In the United States the validity of a law challenged for vagueness depends upon whether citizens "must necessarily guess at its meaning."⁹² A court can narrowly construe a law that is merely ambiguous;⁹³ it must strike down as invalid, however, a law which is so vague that it is not clear what is proscribed.⁹⁴

In spite of international disapproval of vague criminal laws, the South African National Party has enacted a number of laws which do not provide precise guidelines as to what constitutes the illegal activity. These laws are intended to protect the regime and to maintain the social

⁹⁰ See, e.g., *Harnett v. Fisher*, [1927] 1 K.B. 402, 424; *Baylis v. Bishop of London*, [1913] 1 Ch. 127, 137.

⁹¹ See, e.g., *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926), *quoted in* *Winters v. New York*, 333 U.S. 507, 518 (1948).

⁹² J. HALL, *supra* note 73, at 41-42.

⁹³ In countries outside the United States the void for vagueness doctrine can be justified on common law grounds alone: "The great leading rule of criminal law is that nothing is a crime unless it is plainly forbidden by law." *The Queen v. Price*, 12 Q.B.D. 247, 256 (1884). In the United States the doctrine is derived from the Constitution. The United States Supreme Court has held that vague laws violate the fifth amendment due process clause and the sixth amendment right to be informed of the nature of charges. *United States v. Cohen Grocery Co.*, 255 U.S. 81, 89 (1921). Williams implies that such laws could also violate the eighth amendment prohibition of cruel and unusual punishment. G. WILLIAMS, *supra* note 78, at 575.

⁹⁴ Internal Security Act, No. 44 of 1950, S. AFR. STAT., § 1 (1980).

order by controlling so-called subversive organizations and seditious activities, as well as African mobility.

2. *The Suppression of Communism Act*

The Internal Security Act,⁹⁵ originally entitled the Suppression of Communism Act,⁹⁶ was the earliest vague regime maintenance statute. As initially passed it was ostensibly directed against organizations engaging in efforts to further or accomplish the goals of communism.⁹⁷ The wording of the Act shows that its purpose was much broader. The Act defines "communism" not only as the doctrine espoused by Marx, Lenin, and Trotsky, but also as "any related form of that doctrine."⁹⁸ While the Act's definition of "communism" may not be overly broad, a wide net is cast when the Act defines a "communist" as anyone who has advocated achievement of *any object* of communism.⁹⁹ Since the Communist Manifesto promotes, for example, a progressive income tax, a more equal distribution of population over the country, free education for children in public schools, and the abolition of child labor,¹⁰⁰ it would seem that almost any political party or social welfare organization could be defined as "communist" within the meaning of the Act.¹⁰¹

The Act also provides for an expansive reading of the crime of "furthering communism." Promoting or advocating any object of communism may be indirect or unintentional since one can be found guilty of promoting communism by engaging in activities which simply *may* further communism.¹⁰² Furthering the objectives of communism also includes advocacy of any doctrine which "aims at encouragement of hostility between the European and non-European races of the Republic."¹⁰³ By a 1963 amendment, the scope of the Act was extended still further by providing capital punishment for any South African resident, current or past, who "advocated, advised, defended or encouraged the

⁹⁵ The Internal Security Amendment Act, No. 79 of 1976, S. AFR. STAT. 921-23 (1980), changed the short title to its current form.

⁹⁶ Act No. 44 of 1950, S. AFR. STAT. § 1 (1980).

⁹⁷ *Id.*

⁹⁸ *Id.* The law permits the imposition of capital punishment for anyone convicted of receiving or providing training or information useful in achieving or furthering the aims of Communism. *Id.* § 11(6).

⁹⁹ K. MARX & F. ENGELS, MANIFESTO OF THE COMMUNIST PARTY (1848) (Part II).

¹⁰⁰ For example, the South African Defense and Aid Fund was declared a banned organization under the Act even though its only plausible connection to promoting communism was that legal aid may be provided to defendants who were communist. *South African Defense and Aid Fund v. Minister of Justice*, [1967] 1 S.A. 263 (A.D.).

¹⁰¹ Act No. 44 of 1950, S. AFR. STAT. § 10(iii) (1980).

¹⁰² *Id.* § 1(d).

¹⁰³ *Id.* § 11(b) (added by General Law Amendment Act No. 37 of 1963, S. AFR. STAT. § 5(a) (1980)).

achievement by violence or forcible means" of any object directed at bringing about fundamental social, economic, or political change in South Africa through cooperation with "any foreign government or any foreign or international body or institution."¹⁰⁴

The Suppression of Communism Act banned the Communist Party of South Africa¹⁰⁵ and gave the State President power to ban any other organization which advocated "communism" within the meaning of the Act.¹⁰⁶ All real and movable property held by a condemned organization is subject to confiscation under the Act.¹⁰⁷ A liquidator, appointed by the State President to oversee the dissolution of such an organization, may enter any premises, seize or demand production of documents, and question persons in regard to the dissolution at any time and without notice.¹⁰⁸ Even property not owned by the condemned organization may be confiscated without compensation if the liquidator finds that its owner knowingly allowed his premises or property to be used by the organization.¹⁰⁹

Individuals deemed by the Minister of Justice to be members of proscribed organizations are subject to significant restrictions. Members may be removed from public office and forbidden from holding public office in the future.¹¹⁰ They are expressly banned from the practice of law,¹¹¹ may be prohibited from attending any gathering,¹¹² and may be subject to specific restrictions on movement, such as forced relocation or even house arrest.¹¹³

3. *The Unlawful Organizations Act*

While the original Suppression of Communism Act was broad in scope, its coverage has been expanded even further in the intervening years. In 1953 the leaders of the African National Congress were convicted under the Act for furthering "communism" by organizing protests against the Pass Laws.¹¹⁴ The court reasoned that their efforts to abolish laws setting different rules of conduct for Europeans and non-Europeans was an attempt to bring about fundamental political, social,

¹⁰⁴ *Id.* § 2(1).

¹⁰⁵ *Id.* § 2(2).

¹⁰⁶ *Id.* § 3(1)(b).

¹⁰⁷ *Id.* § 4(12).

¹⁰⁸ *Id.* §§ 13(1), 11(e).

¹⁰⁹ *Id.* § 5.

¹¹⁰ *Id.*

¹¹¹ *Id.* § 9. The Supreme Court has defined the term "gathering" to include "any number of persons from two upward." *State v. Wood*, [1976] 1 S.A. 703, 707 (A.D.).

¹¹² Act No. 44 of 1950, S. AFR. STAT. § 10 (1980).

¹¹³ *Regina v. Sisulu*, [1953] 3 S.A. 276 (A.D.).

¹¹⁴ *Id.* at 284.

and economic change.¹¹⁵ When extensive nationwide protests organized by the African National Congress and the Pan African Congress in 1960 led to violent confrontations, such as the Sharpeville Massacre,¹¹⁶ the government considered additional action necessary. The legislature passed the Unlawful Organizations Act as a supplement to the Suppression of Communism Act.¹¹⁷ Rather than relying upon the diffuse criterion of "promoting communism," the Unlawful Organizations Act banned organizations "threatening the safety of the public or the maintenance of public order."¹¹⁸

The Unlawful Organizations Act requires only that the State President be satisfied that the activities of an organization threaten public order.¹¹⁹ There is no requirement of anything similar to a clear and present danger test. The President can dissolve any organization which directly or indirectly carries on the activities of the African National Congress or the Pan African Congress.¹²⁰ Under the Act, such an organization is *ipso facto* a threat to the maintenance of public peace. The Act also stipulates that the provisions of the Suppression of Communism Act apply to those organizations and individuals covered by the Unlawful Organizations Act.¹²¹

4. *The Internal Security Amendment Act*

Just as the Sharpeville incident triggered the expansion of the Suppression of Communism Act, the disturbances of the summer of 1976 caused the South African government to pass still more restrictive legislation.¹²² The Internal Security Amendment Act of 1976 authorized the Minister of Justice to detain any person who "engages in activities which endanger or are calculated to endanger the security of the State or the maintenance of public order."¹²³ This amendment extends the scope of the Suppression of Communism and Unlawful Organizations

¹¹⁵ UNION OF SOUTH AFRICA, SUMMARY OF THE REPORT OF THE COMMISSION OF ENQUIRY INTO AND TO REPORT ON THE EVENTS WHICH OCCURRED IN THE DISTRICTS OF VEREENIGING AND VANDERBIJL PARK ON THE 21ST DAY OF MARCH, 1960 (1960).

¹¹⁶ Unlawful Organizations Act, No. 34 of 1960, S. AFR. STAT. 711-715 (1960).

¹¹⁷ *Id.* § 1(1).

¹¹⁸ *Id.*

¹¹⁹ *Id.* § 1(2).

¹²⁰ *Id.* § 2.

¹²¹ Urban civil disorders in the summer of 1976 resulted in the death of at least 575 people and property damage of over 45,000,000 rands, the equivalent of \$51,750,000 according to the Report of the Cillie Commission of Inquiry released on February 29, 1980. General findings of the commission on the causes of the disturbances are presented in CILLIE COMM. OF INQUIRY, SURVEY OF RACE RELATIONS IN SOUTH AFRICA, 1980 234-36, 352-53, 389, 501-02 (1981).

¹²² Act No. 44 of 1950, S. AFR. STAT. § 10(iv) (1980) (added by Internal Security Amendment Act 79 of 1976, S. AFR. STAT. § 4 (1980)).

¹²³ Act No. 44 of 1950, S. AFR. STAT. (1980).

Acts to individuals qua individuals. No connection to any organization must be alleged. Purely autonomous violence or common criminal offenses can fall under the coverage of the Internal Security Amendment Act, if they are deemed to threaten public safety or state security.

South Africa is not alone in utilizing criminal law in an attempt to break the power of subversive organizations. In 1950, the year South Africa passed the Suppression of Communism Act, the United States Congress also passed its Internal Security Act.¹²⁴ The Internal Security Act declared that there exists a world communist movement¹²⁵ which presents a clear and present danger to the security of the United States.¹²⁶ It created a Subversive Activities Control Board to identify communist front organizations and their members,¹²⁷ and it required those organizations¹²⁸ and individuals¹²⁹ to register with the United States Attorney General. It made criminal any knowing combination, conspiracy, or agreement with any other person to perform any act which would substantially contribute to establishment of a dictatorship.¹³⁰ Other legislation specifically identified the Communist Party of the United States of America as a clear and present danger to American security, and deprived it of the rights, privileges, and immunities available to other organizations.¹³¹ This legislation also made it a crime to organize or to attempt to organize a group dedicated to overthrow of the United States government or of any of its political subdivisions.¹³²

Similarly, in the United Kingdom it is a criminal offense to organize or train members of an organization trained or equipped in the use of violence in promoting political objectives.¹³³ More importantly, the Home Secretary is authorized to proscribe organizations¹³⁴ if they are connected with terrorism¹³⁵ or with the promotion or encouragement of terrorism.¹³⁶ An individual commits a criminal offense if he (1) belongs to a proscribed organization, or (2) solicits support or knowingly makes or receives contributions for it, or (3) addresses or arranges any meeting of three or more people knowing that the meeting supports or furthers

¹²⁴ 50 U.S.C. 781 (1976).

¹²⁵ *Id.* § 781(1).

¹²⁶ *Id.* § 781(15).

¹²⁷ *Id.* § 791.

¹²⁸ *Id.* § 786.

¹²⁹ *Id.* § 787.

¹³⁰ *Id.* § 783(a). The statute deemed the goal of the Communist movement to be the establishment of totalitarian dictatorships. *Id.* § 781(1).

¹³¹ *Id.* §§ 841, 842.

¹³² 18 U.S.C. § 2385 (1976).

¹³³ Public Order Act, 1936, 1 Edw. 8 & 1 Geo. 6, ch. 6, § 2(1).

¹³⁴ Prevention of Terrorism Act, 1976, 24 & 25 Eliz. 2, ch. 8, § 1(3).

¹³⁵ "Terrorism" is the use of violence for political ends. *Id.*

¹³⁶ *Id.*

the activities of the proscribed organization.¹³⁷ Additionally, it is an offense to wear or display any article indicating support of or membership in a proscribed organization.¹³⁸

Superficially, these American and British laws are quite similar to the South African laws against subversive organizations. There are, however, very important differences reflecting the greater concern for the principle of legality in England and the United States.

While the definition of "communism" under the South African Internal Security Act is expansive,¹³⁹ the term is even more vague under the American statute since that Act does not define "communism" at all.¹⁴⁰ The courts in both the United States and South Africa have upheld the legality of these anti-communism laws. The United States Supreme Court has given Congress great discretion in the area of national security.¹⁴¹ The Court upheld the convictions of leaders of the Communist Party under the Smith Act¹⁴² for organizing the Party.¹⁴³ The Court also upheld the legality of the McCarran Act¹⁴⁴ making criminal the failure to register as a member of the Communist Party.¹⁴⁵

While both countries have accepted communist control laws, there are important differences in what has been accepted. The South African government continues to give an expansive reading to its laws controlling communism. The United States, by contrast, has narrowed the scope of such laws. Under South African law, liability accrues simply from membership in a proscribed organization.¹⁴⁶ Under American law, simple membership is not sufficient to support a conviction,¹⁴⁷ and the Supreme Court has ruled that a member of a proscribed organization cannot be compelled to register.¹⁴⁸

In South Africa, an individual may face criminal liability for performing any act which may further the achievement of any object of a

¹³⁷ *Id.* § 1(1).

¹³⁸ *Id.* § 2(1).

¹³⁹ See *supra* notes 97-103 and accompanying text.

¹⁴⁰ 50 U.S.C. § 781(1) (1976) merely asserts the existence of a world communist movement, describes its *modus operandi*, and states that its goal is the establishment of communist totalitarian dictatorships.

¹⁴¹ *Ulman v. United States*, 350 U.S. 422 (1955). A state law which describes a subversive organization as one teaching, advocating, or abetting overthrow of the state government is, however, unconstitutionally vague. *Dombrowski v. Pfister*, 380 U.S. 479 (1965).

¹⁴² 50 U.S.C. § 2385 (1976).

¹⁴³ *Dennis v. United States*, 341 U.S. 494 (1951).

¹⁴⁴ 50 U.S.C. § 786 (1976).

¹⁴⁵ *Communist Party of United States of America v. Subversive Activities Control Board*, 367 U.S. 1 (1961).

¹⁴⁶ See *supra* notes 109-12 and accompanying text.

¹⁴⁷ *Noto v. United States*, 367 U.S. 290 (1961); *Scales v. United States*, 367 U.S. 203 (1961); *Hellman v. United States* 298 F.2d 810 (9th Cir. 1962).

¹⁴⁸ *Albertson v. Subversive Activities Control Board*, 382 U.S. 70 (1965).

proscribed organization,¹⁴⁹ or participating in any way in organized activities of a proscribed organization.¹⁵⁰ In the United States, the government must prove a specific intent to further the aims of a proscribed organization.¹⁵¹ The expression of views cannot be punished¹⁵² and the presence of an individual's name on the membership roll of an organization alone cannot make him liable for either the actions or the goals of the organization.¹⁵³ Similarly, in Britain an individual may not be convicted under the 1976 Prevention of Terrorism Act if he became a member of the proscribed organization before it was banned and has not taken part in its activities since.¹⁵⁴ One cannot be convicted for the crime of making or receiving contributions to an outlawed organization or of taking part in its meetings without proof that the action was done knowingly to support the organization.¹⁵⁵

The South African government has also expanded the scope of its Internal Security Act through amendment¹⁵⁶ and through enactment of parallel legislation.¹⁵⁷ The United States judiciary, in contrast, has narrowed the scope of similar American legislation.¹⁵⁸ A United States District Court held, for example, that the Logan Act's¹⁵⁹ prohibition against seeking outside cooperation to bring about change in the United States is unconstitutionally vague.¹⁶⁰ Congress itself has restricted the scope of the Internal Security Act by repealing those sections requiring the registration of members of suspect organizations¹⁶¹ and those authorizing their arrest and detention during Internal Security Emergencies.¹⁶²

¹⁴⁹ Act No. 44 of 1950, S. AFR. STAT. § 11(a) (1980).

¹⁵⁰ *Id.* § 11(c).

¹⁵¹ *Healy v. James*, 408 U.S. 169 (1972). 18 U.S.C. § 2385 (1976) specifically requires intent to overthrow the government as an element of the crime of organizing a proscribed organization.

¹⁵² *See Healy v. James*, 408 U.S. 169; *Noto v. United States*, 367 U.S. 290; *Scales v. United States*, 367 U.S. 203.

¹⁵³ *United States v. Robel*, 389 U.S. 258 (1967).

¹⁵⁴ Prevention of Terrorism Act, 1976, § 1(6).

¹⁵⁵ *Id.*

¹⁵⁶ The most notable additions include the Riotous Assemblies and Suppression of Communism Amendment Act 15 of 1954, S. AFR. STAT. (1980), the General Law Amendment Act 76 of 1962, § 3-7, the General Law Amendment Act 37 of 1963, § 406, the Suppression of Communism Amendment Act 24 of 1967, the Suppression of Communism Amendment Act 2 of 1972, and the Internal Security Amendment Act 79 of 1976.

¹⁵⁷ *See e.g.*, Unlawful Organizations Act 34 of 1960, S. AFR. STAT. (1980).

¹⁵⁸ *See supra* notes 147, 148, 151-53 and accompanying text.

¹⁵⁹ 18 U.S.C. § 953 (1976) states that it is illegal for an American citizen to carry on correspondence with a foreign government to influence or defeat measures of the United States.

¹⁶⁰ *Waldron v. British Petroleum*, 231 F. Supp. 72, 89 (S.D.N.Y. 1964).

¹⁶¹ 50 U.S.C. §§ 786, 787, *repealed by* Act of Jan. 2, 1968, 81 Stat. 766.

¹⁶² 50 U.S.C. §§ 811-26, *repealed by* Act of Sept. 25, 1971, 85 Stat. 348.

5. *The Criminal Law Amendment Act*

Control of seditious activities is the second major area in which South Africa has applied vague regime maintenance laws. "Sedition" as a general concept can cover a wide range of actions and subsumes several specific offenses. When comparing South African regime maintenance laws with similar laws in other common law countries, the term will be used loosely to mean the raising of disturbances, including revolt against legal authority.¹⁶³

In 1951, a decade before it was banned, the African National Congress¹⁶⁴ launched a defiance campaign in concert with the South African Indian Congress, the South African Coloured People's Organization, and the South African Congress of Democrats, an organization of whites dedicated to social and political change.¹⁶⁵ During the course of the campaign thousands of people offered themselves for arrest for violating a large number of racially restrictive laws carrying small penalties.

The government effectively broke the campaign by enacting the Criminal Law Amendment Act of 1953.¹⁶⁶ This Act imposed a maximum penalty of three years imprisonment or a fine of six hundred rands for those convicted of violating a law in order to protest the enforcement of a given statute or as part of a campaign aimed at the repeal, modification, or limitation of a statute or ordinance.¹⁶⁷ It provides more severe penalties for incitement to violate a law by way of protest.¹⁶⁸ A fine of one hundred rands or imprisonment up to five years may be imposed against individuals who encourage others to violate a law or to take part in a campaign of protest by law violation.¹⁶⁹

The Internal Security Act¹⁷⁰ and the Unlawful Organizations Act¹⁷¹ were directed against formal organizations. The Criminal Law Amendment of 1953 extended criminal liability to more spontaneous activities. The former laws make it a crime to promote certain doctrines and are concerned with organizational objectives, even though these

¹⁶³ This definition was applied in *Arizona Publishing Co. v. Harris*, 20 Ariz. 446, 181 P. 373 (1919). A fuller discussion of the dimensions of sedition will be undertaken in section III *infra*.

¹⁶⁴ See *supra* note 119 and accompanying text.

¹⁶⁵ For a description of the Defiance Campaign, see L. KUPER, *PASSIVE RESISTANCE IN SOUTH AFRICA* (1957).

¹⁶⁶ Act No. 8 of 1953, S. AFR. STAT. (1980).

¹⁶⁷ *Id.* § 1.

¹⁶⁸ *Id.* § 2.

¹⁶⁹ *Id.* These penalties also apply to those assisting such a campaign. *Id.* § 3.

¹⁷⁰ Act No. 44 of 1950, S. AFR. STAT. (1980).

¹⁷¹ Act No. 34 of 1960, S. AFR. STAT. (1980).

objectives are not explicitly articulated.¹⁷² The Criminal Law Amendment made illegal any incitement to riot, sabotage, or terrorism, although these acts are not necessarily related to organizations or campaigns.

6. *The Riotous Assemblies Act*

The Riotous Assemblies Act¹⁷³ is exceptionally broad in scope. Under this Act the government can prohibit the publication or dissemination of any document which promotes feelings of hostility between European and non-European sectors of the population.¹⁷⁴ Even when the Act outlaws "riot" as it is more commonly understood, acts of public violence, the scope of its coverage is open to a great amount of interpretation. It deems that an individual has incited public violence when he has acted or spoken or published words in such a manner that others could reasonably be expected to commit violence.¹⁷⁵ The State need not prove that actual violence resulted nor must it demonstrate that violence was imminent.¹⁷⁶

7. *Other Regime Maintenance Laws Preventing Effective Political Opposition*

a. *The General Law Amendment Act*

Two other very broad statutes created new capital offenses. The General Law Amendment Act of 1962¹⁷⁷ created the crime of sabotage. The Terrorism Act of 1967¹⁷⁸ created the crime of "participation in terrorist activities."¹⁷⁹

Each of these statutes covers such a variety of activities that almost any conduct the South African government perceives as a threat may fall under them. Under the General Law Amendment Act sabotage consists of any wrongful and willful act which "injures, damages, destroys, renders useless or unserviceable, puts out of action, obstructs, tampers with, pollutes, contaminates or endangers": (a) the health or safety of the public; (b) the maintenance of law and order; (c)-(e) the supply or distribution of light, power, fuel, foodstuffs or water, sanitary, medical, fire extinguishing, postal, telephone or telegraph, radio transmitting, broadcasting or receiving services; (f) the free movement of traffic "on land, at sea or in the air"; or (g) any property of any person or

¹⁷² See *supra* notes 98, 101-03 & 119 and accompanying text.

¹⁷³ Act No. 17 of 1956, S. AFR. STAT. (1980).

¹⁷⁴ *Id.* § 3. See Act No. 44 of 1950, S. AFR. STAT. § 1(1)(d) (1980).

¹⁷⁵ *Id.* § 17.

¹⁷⁶ *Regina v. Radu*, [1953] 2 S.A. 245 (E); *Regina v. Maxaulana*, [1953] 2 S.A. 252 (E).

¹⁷⁷ Act No. 76 of 1962, S. AFR. STAT. § 21 (1980).

¹⁷⁸ Act No. 83 of 1967, S. AFR. STAT. (1980).

¹⁷⁹ *Id.* § 2.

the State.¹⁸⁰ An individual is also guilty of sabotage if he enters "any land or building or part of a building in contravention of any law."¹⁸¹

b. The Terrorism Act

The Terrorism Act¹⁸² is even more encompassing than the Sabotage Act. The Sabotage Act outlaws wrongful and willful acts. The Terrorism Act can make one criminally liable for "any act," wrongful or otherwise, committed in the Republic or elsewhere.¹⁸³ Terrorism is any act which: (a) hampers or deters any person from assisting in the maintenance of law and order; (b) promotes any object by intimidation; (c) causes or promotes general dislocation, disturbance or disorder; (d) cripples any industry or undertaking or the distribution of commodities or foodstuffs; (e) causes, encourages or furthers an insurrection; (f) encourages achievement of any political aim by violence or through foreign intervention; (g) causes serious bodily injury to or endangers the safety of any person; (h) causes financial loss to any person or the State; (i) causes or encourages hostility between whites and other groups; (j) interferes with the distribution or supply of light, power, or foodstuffs; (k) obstructs free movement of traffic; or (l) embarrasses the State administration.¹⁸⁴

The Terrorism Act outlaws not only these activities, but makes illegal any incitement or advice to commit the forbidden acts.¹⁸⁵ It also provides penalties for anyone who harbors, conceals, or renders assistance to a terrorist.¹⁸⁶ The mandatory minimum penalty for any of these offenses is five years imprisonment.¹⁸⁷

c. Treason

Any comparative analysis of the South African sedition laws must discuss the common law offense of treason. Both seditious activities and treason attack public authority and, by extension, peace, order, and good government. American law defines sedition as attempts by words, deeds, or writing to promote public disorder or to induce riot, rebellion,

¹⁸⁰ General Law Amendment Act No. 76 of 1962, S. AFR. STAT. § 21(1) (1980).

¹⁸¹ *Id.*

¹⁸² Act No. 83 of 1967, S. AFR. STAT. (1980).

¹⁸³ *Id.* § 2(1)(a).

¹⁸⁴ *Id.* § 2(2).

¹⁸⁵ *Id.* § 2(1)(a).

¹⁸⁶ *Id.* § 3. An individual may be convicted of the crime of misprision if he has information he knows or believes is material to the prevention of terrorism or to the apprehension, prosecution or conviction of a terrorist, and he fails to notify authorities of that information as soon as possible. *Id.* § 11(1).

¹⁸⁷ See Act No. 76 of 1962, S. AFR. STAT. § 21(1) (1980); Act No. 83 of 1967, S. AFR. STAT. § 2(1) (1980); Act No. 83 of 1967, S. AFR. STAT. §§ 3, 11 (1980).

or civil war. If these attempts are accomplished by "overt acts" the law may view them as treason.¹⁸⁸ It thus appears that under the American view sedition is a preparatory or preliminary form of treason. In South Africa, similarly, Parliament equates sabotage with the common law offense of treason by imposing the death penalty for it.¹⁸⁹

The law of treason throughout the common law world is based on the original fourteenth century English Treason Statute.¹⁹⁰ That statute bifurcated the law into crimes of treason and high treason. The American law on treason is derived from the offense of high treason.¹⁹¹ American law differs from that of other common law countries insofar as it does not include the English high treason offense of killing, wounding, causing bodily harm to, imprisoning, or restraining the Sovereign.¹⁹² The other English high treason offenses are recognized by all common law countries: the offense of levying war against one's country¹⁹³ and the offense of assisting the enemies of one's country.¹⁹⁴

South Africa has replaced the common law offense of treason with the statutory offenses discussed in the previous sections.¹⁹⁵ To compare South African law to that in other common law jurisdictions, it is necessary to set various provisions of the South African statutes alongside parallel provisions of other countries criminal codes.

The primary elements of the South African offense of sabotage are damage or destruction of property and endangerment of public health or safety.¹⁹⁶ The primary element in the offense of terrorism is the endangerment of the maintenance of law and order.¹⁹⁷ There is accord-

¹⁸⁸ *State v. Sheperd*, 177 Mo. 205, 76 S.W. 79 (1903).

¹⁸⁹ *State v. Alexander*, [1965] 2 S.A. 818 (Cape Provincial D.) held that Parliament equated sabotage with the common law offense of treason when it legislatively permitted the imposition of the death penalty for the former crime. This reasoning presumably also applies to the Terrorism Act.

¹⁹⁰ Treason Act, 1351, 25 Edw. 3, ch. 2.

¹⁹¹ *United States v. Kawakita*, 108 F. Supp. 627 (S.D. Cal. 1952).

¹⁹² 11 HALSBURY'S LAWS OF ENGLAND 478, ¶ 811 (4th ed. 1976); Crimes Act, No. 43 of 1961, 1 N.Z. REPR. STAT. § 73(a) (1979); Criminal Code, CAN. REV. STAT. ch. 34, § 46(1)(a) (1970). This is inapplicable in a republic, but it is said to be the basis for the prohibition in 18 U.S.C. § 871 (1976), against threatening the life of the President. *Watts v. United States*, 394 U.S. 705, 709 (1969) (Douglas J., concurring).

¹⁹³ U.S. CONST. art. III, § 3(1); 18 U.S.C. § 2381 (1976); Crimes Act, No. 43 of 1961, 1 N.Z. REPR. STAT. § 73(b) (1979); Criminal Code, CAN. REV. STAT. ch. 34, § 46(1)(b) (1970).

¹⁹⁴ U.S. CONST. art. III, § 3(1); 18 U.S.C. § 2381 (1976); Crimes Act No. 43 of 1961, 1 N.Z. REPR. STAT. § 5.73(c) (1979); Criminal Code, CAN. REV. STAT. ch. 34, § 46(10)(c) (1970).

¹⁹⁵ Because common law treason involves *lese majesty*, it arguably should be inapplicable in South Africa since the establishment of the Republic under the Republic of South Africa Constitution Act, No. 32 of 1961. The law of treason has not been applied frequently since the case *R. v. Adams*, [1959] 3 S.A. 753 (A.D.). The treason trial is discussed in SACHS, *supra* note 22 at 214-17.

¹⁹⁶ See *supra* notes 177 & 180-81 and accompanying text.

¹⁹⁷ See *supra* notes 178 & 182-84 and accompanying text.

ingly a high degree of interpenetration between these two offenses, and, to a lesser extent, among these two and the offenses under the Riotous Assemblies Act.¹⁹⁸

Under the law of Canada¹⁹⁹ and the law of New Zealand,²⁰⁰ it is treason to use force or violence in an attempt to overthrow the government. Similarly, the United States defines "seditious conspiracy" as the conspiring between two or more persons to overthrow, put down, or destroy by force, the government of the United States.²⁰¹ The offense of sedition can be committed without overt acts;²⁰² once these actions have been taken, the crime becomes one of treason.²⁰³ Most common law jurisdictions, therefore, restrict the crime of treason to conspiracy or actual attempts to overthrow the government. South African law, by contrast expands the definition of "treason" to include not only attempts to overthrow the government, but the use of violence for any political aim, including social and economic change.²⁰⁴ Only the English Prevention of Terrorism Act of 1976 expands the concept of terrorism to an analogous extent by defining "terrorism" as use of violence for political ends.

d. Espionage

Common law jurisdictions generally recognize as an offense the transmission of national security information to a foreign power. In America, espionage is the crime of communicating information about national defense with the knowledge that it may be injurious to the United States.²⁰⁵ It is treason in Canada to communicate to a foreign power information that may be used for purposes prejudicial to safety or defense,²⁰⁶ while in England it is an offense to obtain information which may be of direct or indirect use to an enemy²⁰⁷ or a potential enemy.²⁰⁸

¹⁹⁸ See *supra* notes 173-75 & 176 and accompanying text.

¹⁹⁹ Criminal Code, CAN. REV. STAT. ch. C-34, § 46(1)(d) (1970). Section 46(1)(d) imposes a mandatory sentence of life imprisonment or death for the crime of high treason.

²⁰⁰ Crimes Act, No. 43 of 1961, 1 N.Z. REPR. STAT. § 73(e) (1979). This statute does not differentiate between degrees of treason.

²⁰¹ 18 U.S.C. § 2384 (1976). It should be noted that the states themselves may make laws against the overthrow or destruction of state and local governments, under authority of the tenth amendment. *People v. Epton*, 19 N.Y.2d 496, 227 N.E.2d 829, 281 N.Y.S.2d 9 (1967); *State v. Levitt*, 246 Ind. 275, 203 N.E.2d 821 (1965).

²⁰² *Bryant v. United States*, 257 F. 378, 387 (5th Cir. 1919).

²⁰³ *State v. Shepherd*, 177 Mo. at 222, 76 S.W. at 84.

²⁰⁴ Terrorism Act, No. 83 of 1967, S. AFR. STAT. § 2(2)(f) (1980). General Law Amendment [Sabotage] Act, No. 76 of 1962, S. AFR. STAT. § 21(2)(e) (1980).

²⁰⁵ 18 U.S.C. § 792-99 (1970).

²⁰⁶ Criminal Code, CAN. REV. STAT. ch. C-34, § 46(1)(e) (1970). This subsection is nearly identical to Crimes Act, No. 43 of 1961, 1 N.Z. REPR. STAT. ch. C-34, § 78 (1979), which creates an offense separate from that of treason.

²⁰⁷ Official Secrets Act, 1911, 1 & 2 Geo. 5, ch. 28, § 1(1)(c).

²⁰⁸ *Rex v. Parrott*, 8 Crim. App. 186 (1913).

In contrast, South African law makes the mere communication with a foreign government or organization to secure cooperation in furthering any political aim a capital offense.²⁰⁹ The communication need not be with an enemy nor need it be prejudicial to the safety of the state.²¹⁰

e. Sabotage

There are also striking differences between the South African law of sabotage and similar law in other common law countries. American sabotage statutes make it a crime to willfully injure or destroy war material, defense premises, or war related utilities.²¹¹ "Sabotage" in Canada is the destruction of property or impairment of the efficiency of machinery for purposes prejudicial to safety or defense.²¹² New Zealand includes in the crime of sabotage acts damaging or destroying property necessary to public health.²¹³ In contrast, the South African Sabotage Act is not restricted to property damage which impairs national defense or threatens public safety and health.²¹⁴ The Terrorism Act, moreover, makes criminal acts harming any industry or causing substantial financial loss to any person or the State.²¹⁵

f. Incitement

The common law countries all outlaw the inciting of violence. At common law an "unlawful assembly" consists of three or more people intending to commit a crime or to pursue an act which causes reasonable people to fear breach of the peace.²¹⁶ "Riot" occurs when such an unlawful assembly begins to tumultuously disturb the peace.²¹⁷ When twelve or more people are involved in such activity, they may be dis-

²⁰⁹ Terrorism Act, No. 83 of 1967, S. AFR. STAT. § 2(2)(f) (1980).

²¹⁰ South Africa does have laws relating to military security. Interestingly, neither the Official Secrets Act, No. 16 of 1956, S. AFR. STAT. § 2 (1980), which makes criminal acts of espionage, nor the Defense Act No. 44 of 1957, §§ 118, 127, provide for the severe penalties for disclosure of military information that the Terrorism Act does for 'cooperation.' Under the Official Secrets Act, a criminal can be imprisoned for up to fifteen years, and under the Defense Act, fined up to 1,000 rands and imprisoned up to five years.

²¹¹ 18 U.S.C. §§ 2153-56 (1976). These laws also make criminal acts of sabotage during peacetime. *Gorin v. United States*, 312 U.S. 19, 28 (1941); *United States v. Achtenberg*, 459 F.2d 91, 94 (8th Cir. 1972).

²¹² Criminal Code, CAN. REV. STAT. ch. C-34, § 52 (1970).

²¹³ Crimes Act, No. 43 of 1961, 1 N.Z. REPR. STAT. § 79(1) (1979).

²¹⁴ General Law Amendment [Sabotage] Act, No. 76 of 1962, S. AFR. STAT. § 21(1)(g) (1980), refers to "any property."

²¹⁵ Terrorism Act, No. 83 of 1965, S. AFR. STAT. §§ 2(2)(d), 2(2)(h) (1980).

²¹⁶ 11 HALSBURY'S LAWS OF ENGLAND, *supra* note 192, at 509. Criminal Code, CAN. REV. STAT. ch. C-34, § 64(1) (1970); Crimes Act, No. 43 of 1967, 1 N.Z. REPR. STAT. § 86 (1979).

²¹⁷ 11 HALSBURY'S LAWS OF ENGLAND, *supra* note 192, at 506; Criminal Code, CAN. REV. STAT. § 65; Crimes Act, No. 43 of 1961, 1 N.Z. REPR. STAT. § 87 (1979).

persed by force if they fail to obey an order to disperse.²¹⁸ The American Federal Riot Act prohibits the use of any facility of interstate commerce to incite or further a riot.²¹⁹ The Act defines a "riot" as acts of violence by at least one person in a group of three or more which present a clear and present danger of damage or injury to persons or property.²²⁰

Incitement may also fall under the crime of sedition at common law, where it is defined as the bringing about of change in government through unlawful means.²²¹ In Canada and the United States "incitement" includes the promotion of the use of force or violence to change, overthrow, or destroy the government.²²² Under an eighteenth century American sedition law²²³ it was an offense to incite people to oppose, resist, or defeat any law.²²⁴ South African incitement to violence laws facially differ little from those in the other common law countries. Both the South African Sabotage and Terrorism Acts proscribe the promotion of general disorder,²²⁵ and the encouragement of insurrection.²²⁶

g. Promoting Disaffection

The weakest form of common law sedition is the stirring up of dissatisfaction or disaffection. Sedition *qua* disaffection is the generation of antipathy toward institutions or personnel of government. In Britain and New Zealand this category is defined as the causing of hatred, contempt, or disaffection toward the Sovereign, the government, or the administration of justice.²²⁷ Old American laws made criminal acts bringing the government into contempt, acts reproaching the government, or acts exciting the hatred of the "good people of the United States."²²⁸ South Africa similarly prohibits the embarrassment of the ad-

²¹⁸ The English Riot Act, 1714, 1 Geo. 1, ch. 5; Criminal Code, CAN. REV. STAT. ch. C-34 §§ 68, 69 (1970); Crimes Act, No. 43 of 1961, 1 N.Z. REPR. STAT. §§ 88, 89 (1979).

²¹⁹ 18 U.S.C. §§ 2101-02 (1970).

²²⁰ *Id.* § 2102(a).

²²¹ 11 HALSBURY'S LAWS OF ENGLAND, *supra* note 192, at 485; Crimes Act, No. 43 of 1961, 1 N.Z. REPR. STAT. § 81(1)(b) (1979).

²²² Criminal Code, CAN. REV. STAT. ch. C-34, § 60(4) (1970); 18 U.S.C. § 2385 (1970).

²²³ Sedition Law Act, ch. 74, 1 STAT. 596 (1798).

²²⁴ *Masses Publishing Co. v. Patten*, 246 F.2d, 29 (2d Cir. 1917).

²²⁵ Terrorism Act, No. 83 of 1967, S. AFR. STAT. § 2(2)(c) (1980); General Law Amendment [Sabotage] Act, No. 76 of 1962, S. AFR. STAT. § 21(2)(a) (1980).

²²⁶ Terrorism Act, No. 83 of 1967, S. AFR. STAT. § 2(2)(e) (1980); General Law Amendment [Sabotage] Act, No. 76 of 1962, S. AFR. STAT. § 21(2)(d) (1980).

²²⁷ 11 HALSBURY'S LAWS OF ENGLAND, *supra* note 192, at 485; Crimes Act, No. 43 of 1961, 1 N.Z. REPR. STAT. § 81(1)(a) (1979).

²²⁸ Sedition Law Act, ch. 74, 1 STAT. 596 (1798); Act of May 16, 1918, ch. 75, 40 STAT. 553 (1918). The history of American sedition law is discussed in *New York Times v. Sullivan*, 376 U.S. 254, 273-76 (1964).

ministration of the State.²²⁹

Sedition qua dissatisfaction is the promotion of ill will and hostility among different groups of the population.²³⁰ In the United Kingdom it is a criminal offense to intentionally stir up hatred against any section of the public distinguished by color, race, ethnic or national origin, through the use of language.²³¹ It is similarly a criminal offense in Canada to incite hatred against an identifiable racial, ethnic, or religious group in a public place where the incitement is likely to lead to a breach of the peace.²³² These laws correspond closely to provisions of the South African Riotous Assemblies,²³³ as well as relating to elements of the Terrorism,²³⁴ and Sabotage²³⁵ Acts.

h. Conclusion

The foregoing comparison of the laws of various common law countries shows, first, that South Africa stands alone in making all forms of sedition, from acts of high treason down to acts embarrassing the State, capital offenses. Second, South Africa includes in its definitions of "terrorism" and "sabotage" many activities which are not deemed seditious in the other common law countries. These activities include obstruction of the free flow of traffic,²³⁶ trespass,²³⁷ possession of a weapon,²³⁸ interference with the maintenance of law and order,²³⁹ aggravated assault,²⁴⁰ creation of financial loss,²⁴¹ and promotion of any object by intima-

²²⁹ Terrorism Act, No. 83 of 1967, S. AFR. STAT. § 2(2)(l) (1980); General Law Amendment [Sabotage] Act, No. 76 of 1962, S. AFR. STAT. § 21(2)(j) (1980). It is also unlawful to violate the dignity or injure the reputation of the State President. Republic of South Africa Constitution Act, No. 32 of 1961, S. AFR. STAT. § 13 (1980).

²³⁰ *Regina v. Burns*, 16 Cox C.C. 355 (Central Crim. Ct. 1886).

²³¹ Race Relations Act, 1965, 13 & 14 Eliz. 2, ch. 73, § 6. The terms "race" and "national origin" are discussed in *Ealing London Borough Council v. Race Relations Board*, [1972] 1 All E.R. 105.

²³² Criminal Code, CAN. REV. STAT. ch. C-34, § 218.2 (1970).

²³³ Riotous Assemblies Act, No. 17 of 1956, S. AFR. STAT. § 3 (1980).

²³⁴ Terrorism Act, No. 83 of 1967, S. AFR. STAT. § 2(2)(i) (1980).

²³⁵ General Law Amendment [Sabotage] Act, No. 76 of 1962, S. AFR. STAT. § 21(2)(h) (1980).

²³⁶ Terrorism Act, No. 83 of 1967, S. AFR. STAT. § 2(2)(k) (1980); General Law Amendment [Sabotage] Act, No. 76 of 1962, S. AFR. STAT. § 21(1)(f) (1980).

²³⁷ General Law Amendment [Sabotage] Act, No. 76 of 1962, S. AFR. STAT. § 21(1) (1980).

²³⁸ Terrorism Act, No. 83 of 1967, S. AFR. STAT. § 2(1)(c) (1980); General Law Amendment [Sabotage] Act, No. 76 of 1962, S. AFR. STAT. § 21(1) (1980).

²³⁹ Terrorism Act, No. 83 of 1967, S. AFR. STAT. § 2(2)(a) (1980); General Law Amendment [Sabotage] Act, No. 76 of 1962, S. AFR. STAT. § 21(2)(c) (1980).

²⁴⁰ Terrorism Act, No. 83 of 1967, S. AFR. STAT. § 2(2)(g) (1980); General Law Amendment [Sabotage] Act, No. 76 of 1962, S. AFR. STAT. § 21(2)(f) (1980).

²⁴¹ Terrorism Act, No. 83 of 1967, S. AFR. STAT. § 2(2)(h) (1980); General Law Amendment [Sabotage] Act, No. 76 of 1962, S. AFR. STAT. § 21(2)(g) (1980).

tion.²⁴² While such acts may be criminal, it is difficult to argue that they are subversive of the political and social order.

8. *The mens rea requirement*

Not only are many of the provisions of the South African seditious activities statutes vague, such as those outlawing the promotion of feelings of hostility²⁴³ or the interference with the maintenance of law and order,²⁴⁴ but some of them are broad enough to ensnare almost any opponent of the regime. The statutes outlaw, for example, causing or promoting general dislocation, disturbance, or disorder,²⁴⁵ furthering or encouraging the achievement of any political aim,²⁴⁶ or promoting by intimidation the achievement of any object.²⁴⁷ The sweep of such laws is even broader than these subsections imply, for they define liability extremely broadly.

a. The Sabotage Act

The Sabotage Act creates liability for "wrongful" and "willful" acts. The statute on its face thus misleadingly appears to comport with the fundamental common law requirement of *mens rea*. The element of *mens rea* has been called "the ultimate evaluation of criminal conduct" and is said to have a "paramount role in penal theory."²⁴⁸ Hall quotes Justice Devlin's statement that *mens rea* consists of the two elements of intent to do an act and knowledge of the circumstances which make the act a crime.²⁴⁹ Under the common law, criminal liability may generally be imposed only where there is either (1) an intention to do a bad act, or (2) recklessness as to the consequences of one's actions.²⁵⁰

Since *mens rea* is a basic element of common law,²⁵¹ it may appear that the inclusion of the word "willfully" in the description of a common law crime is redundant.²⁵² While there may be merit to this observa-

²⁴² Terrorism Act, No. 83 of 1967, S. AFR. STAT. § 2(2)(b) (1980).

²⁴³ *Id.* § 2(2)(i); General Law Amendment [Sabotage] Act, No. 76 of 1962, S. AFR. STAT. § 21(2)(h) (1980); Riotous Assemblies Act, No. 17 of 1956, S. AFR. STAT. § 3 (1980).

²⁴⁴ Terrorism Act, No. 83 of 1967, S. AFR. STAT. § 2(2)(a) (1980); General Law Amendment [Sabotage] Act, No. 76 of 1962, S. AFR. STAT. § 21(2)(f) (1980).

²⁴⁵ Terrorism Act, No. 83 of 1967, S. AFR. STAT. § 2(2)(c) (1980); General Law Amendment [Sabotage] Act, No. 76 of 1962, S. AFR. STAT. § 21(2)(a) (1980).

²⁴⁶ General Law Amendment [Sabotage] Act, No. 76 of 1962, S. AFR. STAT. § 21(2)(e) (1980).

²⁴⁷ Terrorism Act, No. 83 of 1967, S. AFR. STAT. § 2(2)(b) (1980).

²⁴⁸ J. HALL, *supra* note 73, at 70.

²⁴⁹ *Id.* at 71.

²⁵⁰ G. WILLIAMS, *supra* note 78, at 31.

²⁵¹ The United States implicitly makes *mens rea* an element of all serious offenses. *Morisette v. United States*, 342 U.S. 246, 250-52 (1952).

²⁵² *Fields v. United States*, 164 F.2d 97 (D.C. Cir. 1947).

tion, it seems clear that *mens rea* will be an element of any crime, common law or otherwise, when the word "willfully" is explicitly included in its statutory definition.²⁵³ South Africa thus ignores both the common law tradition and the meaning of the word "willfully" when it imposes criminal liability without *mens rea* under the Sabotage Act. The word "willful" in the Act means simple volition, not criminal intent,²⁵⁴ and the word "wrongful" is defined broadly to include civil wrongs and breach of contract.²⁵⁵ Under the Act the accused is left with the burden of proving that he did not intend to perform a deed in violation of the Act.²⁵⁶ Not surprisingly, the government takes a similar approach to the offense of using language or acting in a manner "calculated" to cause another person to violate a law by way of protest.²⁵⁷ Most common law countries would interpret the element "calculated to" to require design, either because of the plain meaning of the words or because of the traditional requirement of *mens rea*.²⁵⁸ Under the South African Criminal Law Amendment Act,²⁵⁹ however, "calculated to" means simply "likely to."²⁶⁰ It differs little from the "could reasonably be expected to result" provision in the Riotous Assemblies Act.²⁶¹

b. The Terrorism Act

The South African Terrorism Act represents a further departure from common law principles. Criminal participation in terroristic activities is defined to include any act intending to endanger the maintenance of law and order in the Republic. Intent is presumed where the action is likely to have any of the effects enumerated in the Act.²⁶² Yet, these effects are often defined imprecisely.²⁶³ Terrorism also includes

²⁵³ *Betts v. Stevens*, [1910] 1 K.B. 1, 8.

²⁵⁴ *State v. Xakana*, [1966] 1 S.A. 733 (O.P.A. 1965). This construction parallels the common law position in civil actions, as in *In Re Young and Harston's Contract* where "willful" was defined as "nothing more than this, that he knows what he is doing, and intends what he is doing, and is a free agent." 31 Ch. D. 1, 168, 175 (1885). It is clearly out of line with criminal case precedent. The United States Supreme Court in *Felton v. United States*, 96 U.S. 699, 702 (1877) adopted the Massachusetts position that "willfully" in statutes means not merely intentional or voluntary but with bad purpose. *Id.* (quoting *Commonwealth v. Kneeland*, 37 Mass. (20 Pick.) 206, 220 (1836)). In Canada, "willful" means acting with knowledge of the probable consequences, at least when property offenses are at issue. Criminal Code, CAN. REV. STAT. ch. C-34, § 386(1) (1970). See also *The Queen v. Carker*, 1967 S.C.R. 114.

²⁵⁵ *State v. Alexander* [1965] 2 S.A. 818, 820-21 (Cape Provincial D. 1964).

²⁵⁶ General Law Amendment [Sabotage] Act, No. 76 of 1962, S. AFR. STAT. § 21(2) (1980).

²⁵⁷ Criminal Law Amendment Act, No. 8 of 1953, S. AFR. STAT. § 2 (1980).

²⁵⁸ See G. WILLIAMS, *supra* note 78, at 66.

²⁵⁹ See *supra* notes 166-69 and accompanying text.

²⁶⁰ *State v. Nathie*, [1964] 3 S.A. 588 (A.D.).

²⁶¹ Riotous Assemblies Act, No. 17 of 1956, S. AFR. STAT. § 17 (1980).

²⁶² Terrorism Act, No. 83 of 1967, S. AFR. STAT. § 2(1)(a) (1980).

²⁶³ *Id.* § 2(2).

undergoing or consenting to undergo training which could be of use to any person intending to endanger the maintenance of law and order.²⁶⁴ The vagueness of the phrase "could be of use" is possibly exceeded only by the phrase "any act." Furthermore, the Act applies to any person anywhere.²⁶⁵ Because South African law on treasonous activities is replete with indefinite terms and ignores the *mens rea* requirement, it is difficult to conceive of a statute which deviates further from the principles of the common law.

Other common law countries accept only two of the many facets of the South African law of treason. These countries agree with South Africa that the normal presumption against extra-territorial criminal liability does not apply to crimes as adherence to enemies and treasonable intent whether the acts complained of were performed within the country or outside of it.²⁶⁶ Similarly, both South Africa²⁶⁷ and the other common law countries penalize to the same extent those who commit acts of treason and those who merely assist such traitors. Under American law, for example, anyone who aids or abets treason, to the even most remote degree, is subject to the full penalty.²⁶⁸ Apart from these two areas of agreement, however, the law of treason in South Africa shares nothing in common with the law of treason in other common law countries.

South African statutes are extremely broad and vague, and therefore open to almost unchecked application to any regime opponent. The laws of the other common law countries in common are very restrictive. In such countries, treason has extraterritorial application only because the offense is a breach of loyalty.²⁶⁹ If there is no obligation owed to a state a person cannot commit treason against it.²⁷⁰ Moreover, "any

²⁶⁴ *Id.* § 2(1)(b).

²⁶⁵ *Id.* § 2(1)(a).

²⁶⁶ See *Burgman v. United States*, 188 F.2d 637 (D.C. Cir. 1951); *Gillars v. United States*, 182 F.2d 962 (D.C. Cir. 1950); *Chandler v. United States*, 171 F.2d 921 (1st Cir. 1948); *Joyce v. Director of Public Prosecutions*, [1946] 1 All E.R. 186; *The King v. Casement*, [1917] All E.R. 214 (Crim. App.); *The King v. Lynch* [1903] 1 K.B. 444.

²⁶⁷ Act No. 83 of 1967, S. AFR. STAT. § 3 (1980).

²⁶⁸ *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 126 (1807). Section 76 of the New Zealand crimes act makes criminal the lesser offenses of being an accessory after the fact to treason and of failing to report or otherwise prevent treason. Crimes Act, No. 43 of 1961, 1 N.Z. REPR. STAT. §§ 76(a)-76(b).

²⁶⁹ According to *Halsbury's*, "[t]he essence of the offense of treason lies in the violation of the allegiance owed to the Sovereign." HALSBURY'S LAWS OF ENGLAND, *supra* note 192, at 479. Cf. Crimes Act, No. 43 of 1967, 1 N.Z. REPR. STAT. § 73 (1979); Criminal Code, CAN. REV. STAT. § 46(2) (1970) (these acts explicitly hold to the requirements of treason law, every one owing "allegiance to Her Majesty [the Queen]").

²⁷⁰ A former naturalized citizen cannot commit treason against a country when he resides outside of it. *D'Aquino v. United States*, 192 F.2d 338, 348-49 (9th Cir. 1951). A resident alien living under the protection of a state may be found guilty of treason against it if he does

act" cannot constitute treason,²⁷¹ as liability requires an overt act which is specifically intended to betray one's country.²⁷² Even the crime of misprision of treason requires an overt act.²⁷³ The common law approach is so restrictive that some cases have resulted in acquittal, even when there have been overt acts and breaches of loyalty, because of superficial deviations from the well established elements of treason.²⁷⁴

9. *The Expansive Concept of Intent*

Another crucial distinction between South African law and that of other common law countries is the concept of intent. While South Africa generally imposes criminal liability for actions which *could* incite violence or *could* result in harm to the state or social order,²⁷⁵ the prevailing common law approach requires a clear connection between the act and its possible or probable effect. Common law treason requires not only proof of intent to betray the country, and proof of overt acts toward that end, but also corroboration of the overt acts.²⁷⁶ The crime of sabotage

things which would be treasonous had a citizen done them. *Radich v. Hutchins*, 95 U.S. 210 (1877); *Carlisle v. United States*, 83 U.S. (16 Wall.) 147 (1872); *De Jager v. Attorney-General of Natal*, [1907] A.C. 326 (P.C.). By extension of the foregoing, an English Court of Appeals held that a non-resident alien who possessed and relied upon a British passport for international travel was under protection of the Crown and thereby owed it allegiance. *Joyce v. Director of Public Prosecutions*, [1946] 1 All E.R. 186.

²⁷¹ U.S. CONST. art. III, § 3(1); Crimes Act, No. 43 of 1961, 1 N.Z. REPR. STAT. § 336 (1979); 3 E. Coke, *INSTITUTES OF THE LAWS OF ENGLAND* 12 (1644).

²⁷² *Cramer v. United States*, 325 U.S. 1, 31 (1945); *Best v. United States*, 184 F.2d 131, 137 (1st Cir. 1950).

²⁷³ Misprision of felony in the United States requires an "affirmative act toward the concealment . . . [not] mere silence after knowledge" *United States v. Farrar*, 38 F.2d 515, 517 (D. Mass. 1930), *aff'd* 281 U.S. 624 (1930). Similarly, in Canada it is not an offense when one merely fails to report treasonous activity after it occurs, but it is an offense to fail to report that a person is about to commit treason. Criminal Code, CAN. REV. STAT. ch. C-34, § 50(1) (1970). To be an accessory after the fact, one must intend to assist in the escape of a traitor, commit an act towards that end, and do so with the knowledge that the person aided was a party to the crime. *The Queen v. Vinette*, [1975] 2 S.C.R. 222 (1974).

²⁷⁴ In an American case, a man joined a body of troops thinking them to be British, but was found to be innocent of treason because they were in fact revolutionaries. *Respublica v. Malin*, 1 U.S. (1 Dall.) 33 (1778) (the crime alleged was common law high treason because it occurred before ratification of the Constitution). In an English case, a British subject employed as a German consul helped German nationals escape from the United Kingdom after the outbreak of the First World War. While this was clearly an overt act in aid of enemies during wartime, the conviction was overturned on the ground that the defendant's intent was to perform his job as consul. *The King v. Ahlers*, [1915] 1 K.B. 616.

²⁷⁵ See *supra* notes 254-65 and accompanying text.

²⁷⁶ At least two witnesses to the same overt act are generally required. U.S. CONST. art. III, § 3(1); Crimes Act, No. 43 of 1961, 1 N.Z. REPR. STAT. § 75 (1979); Criminal Code, CAN. REV. STAT. ch. C-34, § 47(2) (1970). The United States Constitution does not require these witnesses, however, when there is confession in open court, and New Zealand and Canada do not require them in cases involving personal injury, homicide or unlawful restraint against the monarch. Canada and New Zealand also allow material evidence as corroboration of the testimony of one witness.

also requires the proof of a specific intent to interfere with or injure the national security.²⁷⁷ Similarly, criminal communication of military or scientific information to foreign powers must involve intent to prejudice national safety, security, or defense,²⁷⁸ or the knowledge of its potential harm.²⁷⁹

Traditionally common law jurisdictions also require proof of intent in criminal prosecutions for seditious speech offenses.²⁸⁰ When proving the crime of advocating, advising, or teaching the duty or desirability of overthrowing the government, the prosecution must show that the defendant was advocating action, not doctrine²⁸¹ with the intent to incite violence.²⁸² A seditious conspiracy to oppose the law of the United States also requires a specific intent and an overt act in furtherance of the conspiracy.²⁸³

The constitutionality of the United States Federal Riot Act has been upheld, in spite of its apparently vague provisions,²⁸⁴ on the ground that the law controls behavior rather than speech.²⁸⁵ While the reasoning of such decisions has been tenuous at times,²⁸⁶ a direct connection between the speech or writing and actual consequent or probable future violence has been consistently required.²⁸⁷ State sedition laws have, however, often struck down on either first amendment or

²⁷⁷ *United States v. Melville*, 309 F. Supp. 774, 780 (S.D.N.Y. 1970). Criminal Code, CAN. REV. STAT. ch. C-34, § 52 (1970); Crimes Act, No. 43 of 1961, 1 N.Z. REPR. STAT. § 79 (1979).

²⁷⁸ Official Secrets Act, 1911, 1 & 2 Geo. 5, ch. 28; Crimes Act, No. 43 of 1961, 1 N.Z. REPR. STAT. § 78 (1979).

²⁷⁹ 18 U.S.C. § 792 (1976); Criminal Code, CAN. REV. STAT. ch. C-34, § 46(2)(b) (1970).

²⁸⁰ *Regina v. Burns*, 16 Cox C.C. 364 (1886); Criminal Code, CAN. REV. STAT. ch. C-34, § 60(4) (1970); Crimes Act, No. 43 of 1961, 1 N.Z. REPR. STAT. §§ 81-85 (1979).

²⁸¹ *Healy v. James*, 408 U.S. 169, 192 (1972).

²⁸² *Yates v. United States*, 354 U.S. 298, 320 (1957). *Wellman v. United States*, 253 F.2d 601, 605 (6th Cir. 1958). *Boucher v. The King*, 1951 S.C.R. 265. *But cf.* *Wallace-Johnson v. The King*, 1940 A.C. 231 (incitement to violence is not a necessary ingredient).

²⁸³ *Reeder v. United States*, 262 F.36 (8th Cir. 1919).

²⁸⁴ The law is "obtuse and obscure" but not unconstitutionally vague. *United States v. Dellinger*, 472 F.2d 340, 364 (7th Cir.), *cert. denied*, 410 U.S. 970 (1972).

²⁸⁵ The Act is designed to prevent riots that "may well erupt out of an originally peaceful demonstration," *United States v. Dellinger*, 472 F.2d at 340, and the first amendment "does not protect rioting and the incitement to riot." National Mobilization Committee to End the War in Vietnam v. Foran, 297 F. Supp. 1, 4 (N.D. Ill. 1968), *aff'd*, 411 F.2d 934 (7th Cir. 1969).

²⁸⁶ Even though speech may not have the capacity to provoke proscribed conduct, it can still meet the incitement requirement through connections with other speeches. *United States v. Dellinger*, 472 F.2d at 340. Evidence of learning or teaching the use of firearms or explosives may amount to evidence of intent to promote riot. *In Re Shead*, 302 F. Supp. 569, 572 (N.D. Cal.), *aff'd*, 417 F.2d 384 (9th Cir.), *cert. denied*, 399 U.S. 935 (1969).

²⁸⁷ *Providence Washington Insurance Co. v. Lynn*, 492 F.2d 979 (1st Cir. 1974).

vagueness grounds.²⁸⁸ The constitutionality of federal sedition laws has never been addressed by the Supreme Court, but they probably would be declared unconstitutional.²⁸⁹ The South African laws on seditious activities thus clearly violate the common law prohibition against vagueness, as articulated in the statutes and case law on treason and sedition in other common law jurisdictions.

10. *Regime Maintenance Laws Directed Specifically at Blacks*

The South African laws discussed in the preceding sections apply to members of all racial groups.²⁹⁰ There are also a number of extremely vague regime maintenance laws which are explicitly directed toward control of the African population.²⁹¹ These statutes supplement and reinforce the laws which provide for racial segregation and for restrictions on the freedom of movement of Africans.

The earliest of the vague regime maintenance laws intended to preclude effective opposition from blacks was the Natal Code of Native Law which made the Governor of Natal the Supreme African Chief of the colony.²⁹² The Code empowered the Governor to assume nearly autocratic power over Africans when necessary to preserve peace and order. The Code originally allowed the Governor to order the detention of any African he determined to be a danger to public peace.²⁹³ The Natives Administration Act of 1927²⁹⁴ expanded this power by authorizing the Governor General of South Africa to exercise similar powers on a national basis.²⁹⁵

The amendment also broadened the class which can be affected. The Natives Administration Act, for example, authorizes the State Pres-

²⁸⁸ *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *Stanford v. Texas*, 379 U.S. 476 (1965); *Stromberg v. California*, 283 U.S. 359 (1931); *Fiske v. Kansas*, 274 U.S. 380 (1926).

²⁸⁹ The 1798 Act expired in 1801. Those who had been convicted under it were pardoned and had their fines refunded. *New York Times Co. v. Sullivan*, 376 U.S. 254, 276 (1964). In 1970, the United States Supreme Court declared that a law making it a crime to wear United States military apparel in a production that discredits the armed forces violates the first amendment. *Schacht v. United States*, 398 U.S. 58 (1970).

²⁹⁰ See *supra* note 6 and accompanying text.

²⁹¹ The terms "African" and "black" will be used interchangeably. "Black" is the current official designation, but the laws to be discussed employ a variety of terms.

The Bantu Laws Amendment Act of 1964 changed the words "native," "Native," "natives," and "Natives" in all previously enacted laws, ordinances, and proclamations to the word "Bantu." Act No. 42 of 1964, S. AFR. STAT. § 100 (1980). The Plural Relations and Development Act of 1978 in turn changed the word "Bantu" to the word "black." Act No. 102 of 1978, S. AFR. STAT. § 17 (1980).

²⁹² Law 19 of 1891. The provisions of this law were given national effect through the Black Administration Act § 8 of 1927, § 1.

²⁹³ *Id.* § 8.

²⁹⁴ Black Administration Act No. 38 of 1927, S. AFR. STAT. (1980).

²⁹⁵ *Id.* § 1.

ident to order a tribe, some portion of a tribe, or an individual, to move from one place to another in the general public interest.²⁹⁶ He need not provide advance notice before making such an order,²⁹⁷ nor must he give reasons to support his belief that removal is in the public interest.²⁹⁸ Affected persons have no right to appeal the order.²⁹⁹

The South African government has made it a criminal offense for a non-African to enter or remain in an African area without official permission.³⁰⁰ The State President may order the removal of non-Africans from black areas if they have encouraged feelings of hostility between different population groups.³⁰¹ An individual convicted of encouraging hostility may be barred from specified areas of the Republic³⁰² and, if an alien, may be deported.³⁰³ It is also an offense for a landowner outside an African area to allow blacks to "congregate" on his land without official permission.³⁰⁴

The foregoing provisions of the Act apply primarily to rural areas.³⁰⁵ They are complemented by legislation which applies to cities and suburban areas. This supplemental legislation provides that an African may remain in an urban area for more than seventy-two consecutive hours only if he (a) has resided in the area continuously since birth; or (b) has worked for the same employer continuously for ten years; or (c) has lawfully resided in the area for at least fifteen years; or (d) is a dependent of someone who falls under (a), (b), or (c); or (e) receives a special work permit.³⁰⁶ An individual accused of violating this legislation is presumed guilty until proved innocent.³⁰⁷ If convicted, the accused faces the possibility of a fine or imprisonment³⁰⁸ and repatriation³⁰⁹ to his homeland.³¹⁰

²⁹⁶ *Id.* § 5.

²⁹⁷ *Id.*

²⁹⁸ If reasons are provided and they turn out to be untrue, the order is not thereby nullified. *Mabe v. Minister for Native Affairs*, [1958] 2 S.A. 506.

²⁹⁹ Black Administration Amendment Act No. 42 of 1956, S. AFR. STAT. (1980).

³⁰⁰ Development Trust and Land Act No. 18 of 1936, S. AFR. STAT. § 24 (1980).

³⁰¹ Black Administration Act 38 of 1927, S. AFR. STAT. § 29(1) (1980). *See* Riotous Assemblies Act No. 17 of 1956, S. AFR. STAT. § 3 (1980).

³⁰² Black Administration Act 38 of 1927, S. AFR. STAT. § 29(3) (1980).

³⁰³ *Id.* § 29(5).

³⁰⁴ Development Trust and Land Act No. 18 of 1936, S. AFR. STAT. § 24 (1980).

³⁰⁵ The authority of the State President to order the removal of Africans under the Black Administration Act No. 38 of 1927, S. AFR. STAT. (1980) extends to urban as well as rural areas. *Lengisi v. Minister of Native Affairs*, [1956] 1 S.A. 786.

³⁰⁶ Black [Urban Areas] Consolidation Act No. 25 of 1945, S. AFR. STAT. § 10(1) (1980).

³⁰⁷ *Id.* § 10(5).

³⁰⁸ *Id.* § 10(4).

³⁰⁹ *Id.* § 14.

³¹⁰ The "homeland" referred to is the area designated for his tribe in the land set aside for exclusive African ownership under the Black Land Act No. 27 of 1913, S. AFR. STAT. (1980) and the Black Trust and Land Act No. 18 of 1936, S. AFR. STAT. (1980).

Other South African laws empower the authorities to fine, imprison, remove, and restrict the activities of legal residents on less than probable cause. One such provision enables the local authorities to remove an idle and undesirable person without a warrant whenever they merely have reason to believe the person is idle or undesirable.³¹¹ This "reason to believe" standard is lower than probable cause. Moreover, those arrested as "idle" or "undesirable" are committed not to the criminal courts but to local Black Affairs Commissioners who determine if the accused is in fact "idle" or "undesirable" as defined by the Act.³¹² "Idle" persons are essentially those chronically unemployed or those who cannot give a satisfactory account of their means of subsistence.³¹³ "Undesirable" persons are those convicted of various common criminal and security offenses.³¹⁴

To further the control of urban Africans, local Black Commissioners are also empowered to expel Africans if their presence is "detrimental to the maintenance of peace and order."³¹⁵ As with other regime maintenance laws, the decision that there is a threat to the maintenance of peace and order does not require any objective support whatsoever.³¹⁶ Under these provisions, individuals who have committed no crime, are gainfully and legally employed, and are lawfully residing in their location may still be repatriated to their homeland.³¹⁷ If expelled from an urban area on these grounds more than once in five years, a person may be barred from returning to specified areas for any length of time.³¹⁸

Africans lawfully in urban areas can also be expelled for curfew violations,³¹⁹ for residence in places not specifically designated for

³¹¹ Black [Urban Areas] Consolidation Act No. 25 of 1945, S. AFR. STAT. § 29(1) (1980). According to the Minister of Co-operation and Development, the number of Africans removed from urban areas as idle or undesirable in 1978 was:

<u>Urban Area</u>	<u>Idle</u>	<u>Undesirable</u>
Cape Town	15	—
Pretoria	235	—
Bloemfontein	34	—
Witwatersrand	—	11

SOUTH AFRICAN INSTITUTE OF RACE RELATIONS, SURVEY OF RACE RELATIONS IN SOUTH AFRICA, 1979 432 (1980).

³¹² *Id.*

³¹³ *Id.* § 29(2).

³¹⁴ *Id.* § 29(3).

³¹⁵ Black [Urban Areas] Consolidation Act No. 25 of 1945, S. AFR. STAT. § 29 (1980).

³¹⁶ *Regina v. Rampai*, [1957] 4 S.A. 561.

³¹⁷ Black [Urban Areas] Consolidation Act No. 25 of 1945, S. AFR. STAT. § 29 (1980). Fine and imprisonment are also possible. *Id.*

³¹⁸ *Id.*

³¹⁹ Black [Urban Areas] Consolidation Act No. 25 of 1945, S. AFR. STAT. § 11 (1980).

blacks,³²⁰ for lack of identity papers,³²¹ and for exceeding the terms of work permits.³²² As is the case in rural areas, gatherings of Africans can be banned on grounds of possible nuisance³²³ or because there is reason to believe the maintenance of law and order will be endangered.³²⁴ Attendance at a banned meeting is subject to penalty under both the Urban Areas Act³²⁵ and the Riotous Assemblies Act.³²⁶

The singling out of South African blacks for specific legal liabilities inapplicable to other population groups is grossly out of step with contemporary common law. Equal protection of the law is guaranteed by the American Constitution,³²⁷ the English Race Relations Act,³²⁸ and the Canadian Bill of Rights.³²⁹ While these legal requirements have not always been enforced, most common law countries have at least made a formal commitment to the principles of equal protection. Because racial differentiation is the *raison d'être* of the South African regime, by contrast, its race specific laws are unsurprising.³³⁰ Still, it could be argued that racist laws do not violate the principle of legality so long as they are explicit, uniformly enforced, adjudicated in regularly constituted tribunals according to due process, and interpreted in line with recognized rules.³³¹

The overbreadth and vagueness of the laws nevertheless remain unjustified. As the earlier discussion showed, the laws applying specifically to South African blacks authorize penal sanctions for being idle or undesirable³³² and allow prior restraint of gatherings on grounds of nuisance.³³³ It is important to note that it is not only the status of being idle and undesirable that is at issue in these statutes. These statutes also

³²⁰ *Id.* § 9(1). A single night alone is sufficient grounds for punishment. *State v. O'Brien*, [1970] 3 S.A. 405.

³²¹ Black [Abolition of Passes and Coordination of Documents] Act No. 67 of 1952, S. AFR. STAT. § 15 (1980).

³²² Black [Urban Areas] Consolidation Act No. 25 of 1945, S. AFR. STAT. § 10(2) (1980).

³²³ *Id.* § 9(7).

³²⁴ General Law Further Amendment Act No. 92 of 1970, S. AFR. STAT. § 15 (1980).

³²⁵ Black [Urban Areas] Consolidation Act No. 25 of 1945, S. AFR. STAT. § 44 (1980).

³²⁶ Riotous Assemblies Act No. 17 of 1956, S. AFR. STAT. (1980).

³²⁷ U.S. CONST. amend, XIV, § 1.

³²⁸ Race Relations Act, 1976, ch. 74.

³²⁹ Canadian Bill of Rights, 1960, 8 & 9 Eliz. 2, ch. 44.

³³⁰ The government has certainly applied facially neutral laws in a racist manner in the United States, and this country's processes and procedures sometimes have a disproportionately negative impact on minorities. What is notable about the South African system is that the racially disadvantageous aspects of criminal liability and criminal procedure are built into the structure of the law itself.

³³¹ Even if such laws do not violate the principle of legality, they may still violate principles of human rights. *Universal Declaration of Human Rights*, *supra* note 61, at art. 2 (equal rights and freedoms without respect to race), art. 8 (equal protection of the law).

³³² Black [Urban Areas] Consolidation Act No. 25 of 1945, S. AFR. STAT. § 29 (1980).

³³³ *Id.* § 9(7).

require blacks alone to give good and satisfactory account of their activities and means of support.³³⁴ Provisions paralleling these have been characterized in the United States as "blunderbuss" statutes.³³⁵

Historically such vague laws were well accepted in many common law countries, but they are currently being looked upon with disfavor. It is true that the Vagrancy Act is still in effect in England,³³⁶ and that laws similar to the English Vagrancy Act were once common in the United States and other common law countries.³³⁷ The Canadian Code also still prohibits supporting oneself by gaming without having a legally recognized profession³³⁸ and prohibits loitering or wandering around a school or a park by persons previously convicted of sex offenses.³³⁹ As long ago as 1939, however, the United States Supreme Court found unconstitutional a New Jersey statute making it a felony for ex-criminals to be members of a gang.³⁴⁰ Vagrancy and similar laws have been repeatedly overturned because they fail "to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by statute."³⁴¹ The United States Supreme Court, for example, overturned on grounds of vagueness a law defining a "suspicious person" as one who "is found abroad at late or unusual hours in the night without any visible or lawful business and who does not give satisfactory account of himself."³⁴²

Similarly, in Canada the Vagrancy Act is narrowly defined and prosecutions have been rare or nonexistent Canadian nuisance provisions explicitly require a showing of danger to the public or actual harm

³³⁴ *Id.* § 29.

³³⁵ *Recks v. United States*, 414 F.2d 1111 (D.C. Cir. 1968).

³³⁶ Vagrancy Act, 1927, 5 Geo. 4, ch. 83. The Vagrancy Act recognizes three degrees of the offense. An idle and disorderly person is someone who practices a trade without a license, a common prostitute, or a beggar. *Id.* § 3. A rogue and vagabond is someone previously convicted of being idle and disorderly or someone who is guilty of aggravated idle and disorderly conduct. *Id.* § 4. An incorrigible rogue is someone previously convicted of being a rogue and vagabond, someone who resists arrest, or breaks confinement, for being a rogue and vagabond. *Id.* § 5.

³³⁷ A Florida law, for example, listed twenty-one types of vagrants which included: rogues and vagabonds; beggars; gamblers; jugglers, pipers, and fiddlers; drunkards; night-walkers; thieves and dealers in stolen property; lewd, wanton, lascivious persons; keepers of gambling houses; common railers, brawlers and frequenters of houses of ill-fame and gaming houses; persons who neglect their employment or remain unemployed without providing for the support of themselves and their families; loafers and idle and disorderly persons; and persons wandering or strolling around without any lawful purpose or object. *See Lazarus v. Faircloth*, 301 F. Supp. 266 (S.D. Fla. 1969), *vacated sub nom.*, *Shevin v. Lazarus*, 401 U.S. 987 (1971).

³³⁸ Criminal Code, CAN. REV. STAT. ch. C-34, § 175(1)(d) (1970).

³³⁹ *Id.* § 175(1)(e).

³⁴⁰ *Lanzetta v. New Jersey*, 306 U.S. 451 (1939).

³⁴¹ *United States v. Harriss*, 347 U.S. 612, 617 (1954).

³⁴² *Palmer v. Euclid*, 402 U.S. 544 (1971).

to a person³⁴³ and those which apply to loitering on private property require proof of some wrongful intent beyond mere "hanging about."³⁴⁴ A provision of the Canadian Code making it an offense for a common female prostitute or nightwalker to be found in a public place, and, when requested, to fail to give a good account of herself, was found to violate the Canadian Bill of Rights.³⁴⁵ In England, the Vagrancy Act has not been revoked,³⁴⁶ but its scope has been restricted to avoid its use by police for the detention of persons against whom there is no other valid charge.³⁴⁷ In comparison with other common law countries, then, the vagueness and overbreadth of the South African vagrancy and nuisance laws applying only to blacks are clearly at odds with accepted standards of lawmaking.

B. EX POST FACTO CRIMINAL LIABILITY

1. *The Common Law Principle*

The prohibition of retroactive legislation is another fundamental feature of the common law. While the principle that laws should not be passed with retroactive effect is not unique to the common law tradition,³⁴⁸ it is clearly a cornerstone of that jurisprudence. Criminal laws in the Anglo-American system cannot stand when "the dividing line between what is lawful and unlawful" is "conjecture."³⁴⁹ "All are entitled to be informed as to what the state commands or forbids."³⁵⁰ Bentham wrote that "[i]t is the true spirit of liberty which inspires the English with so much horror for what is called an ex post facto law."³⁵¹ Blackstone also agrees that "[a]ll laws should be made to commence *in futuro*." An individual cannot know to abstain from innocent actions which are only later proscribed, "and all punishment for not abstaining must of consequence be cruel and unjust."³⁵²

³⁴³ Criminal Code, CAN. REV. STAT. ch. C-34 § 176(1) (1970).

³⁴⁴ *Id.* § 173. See *The Queen v. Andsten and Petrie*, 128 Can. Crim. Cases 311, 317 (1960).

³⁴⁵ *The Queen v. Viens*, 10 Crim. Rep. (New Series) 363 (1970).

³⁴⁶ *Miles v. Clovis*, [1980] Q.B. 195; *Regina v. Jackson*, [1974] Q.B. 517 (C.A.).

³⁴⁷ *Rex v. Dean*, 18 Crim. App. 133 (1924).

³⁴⁸ "There has probably been no more widely held value-judgment in the entire history of human thought than the condemnation of retroactive penal law." J. HALL, *supra* note 73, at 59. Hall also adds, however, that the value judgment is more frequently espoused than put into actual practice. *Id.*

The Universal Declaration of Human Rights includes the provision:

No one shall be held guilty of any penal offense on account of any act or omission which did not constitute a penal offense, under national or international law, at the time when it was committed, nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offense was committed.

³⁴⁹ *Connally v. General Construction Co.*, 269 U.S. 385, 393 (1926).

³⁵⁰ *Lanzetta v. New Jersey*, 306 U.S. at 453.

³⁵¹ 1 J. BENTHAM, WORKS 326 (1843).

³⁵² W. BLACKSTONE, *supra* note 62, at § 46.

The drafters of the United States Constitution³⁵³ and the Canadian Criminal Code³⁵⁴ recognized the importance of the prohibition of ex post facto laws and included guarantees against them. While neither document explicitly defines ex post facto laws, in 1798 the United States Supreme Court held that an ex post facto law is one which: (1) makes criminal an innocent action completed before the passing of the law, and punishes such action; or (2) increases the severity of the nature of a crime after it is committed; or (3) increases the punishment for a crime after it is committed; or (4) alters the rules of evidence to make it easier to convict a defendant.³⁵⁵

The Supreme Court's definition shows that an individual's right to fair treatment cannot be circumvented by changing the rules to his detriment after he has committed an act. It follows from this that an individual cannot be held criminally liable for acts in violation of an unconstitutional statute, when these acts were performed after the law had been nullified. A subsequent higher court finding that the law is valid is irrelevant to the individual's culpability, under the doctrine against ex post facto laws.³⁵⁶ Although ignorance of the law is not an excuse for violating it, the authorities must allow reasonable time to learn of new legal requirements.³⁵⁷ The prohibition against ex post facto laws also commands that the legislature correct judicial misinterpretation of a Statute by rescuing only future cases from the erroneous interpretation.³⁵⁸

2. *South African Ex Post Facto Laws*

In South Africa both criminal statutes and the vaguely drawn laws discussed in the previous sections have been given retroactive effect. The Terrorism Act,³⁵⁹ for example, was approved by the State President on June 12, 1967, but was given retroactive effect to June 27, 1962.³⁶⁰

³⁵³ U.S. CONST. art. I, § 9, cl. 3, § 10, cl. 1.

³⁵⁴ Criminal Code, CAN. REV. STAT. ch. C-34, § 15 (1970).

³⁵⁵ *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798).

³⁵⁶ *State v. O'Neil*, 147 Iowa 513, 126 N.W. 454 (1910).

³⁵⁷ *Johnson v. Sargant & Sons*, [1918] 1 K.B. 101, 103-04; *Burns v. Nowell*, 5 Q.B.D. 444, 454 (1880).

³⁵⁸ *Dash v. Van Kleeck*, 7 Johns. 477, 488, 4 N.Y. Common L. 391, 395 (1811). This is clearly different than saying that retroactivity is valid when expressly or implicitly authorized by the legislature. See *Phillips v. Eyre*, 6 Q.B. 1, 23 (1870); *Master Ladies Tailors Organization v. Minister of Labour*, [1950] 2 All E.R. 525; *The Queen v. Griffiths*, [1891] 2 Q.B. 145, 148; *Shanahan v. Coulson*, [1913] 32 N.Z.L.R. 905, 909. The devastating implications of this latter position are clear from a very old English case. In *Rex v. Thurston*, 1 Lev. 91, 83 E.R. 312, 313 (1659), a man was on trial for the murder of a bailiff making an illegal arrest. Parliament subsequently enacted a law validating the defective warrant, and the court thereby found the man guilty of murder. *Id.*

³⁵⁹ No. 83 of 1967, S. AFR. STAT. 781 (1980).

³⁶⁰ *Id.* § 9(1).

Ex post facto jurisdiction was used most extensively under the Internal Security Act.³⁶¹ The General Law Amendments Act of 1963,³⁶² for example, inserted additional provisions into section eleven of the Act. Section 11(b) *bis* makes it an offense to advocate or encourage fundamental change through foreign intervention.³⁶³ Section 11(b) *ter* makes it an offense to receive or provide training or information useful in futhering the aims of communism or the aims of "any body or organization which has been declared to be unlawful."³⁶⁴ Both of these amendments were made retroactive to the effective date of the Suppression of Communism Act, July 17, 1950.³⁶⁵ Although all three of these crimes are capital offenses, their retroactive application was upheld by the Supreme Court in *State v. Fazzie*, which affirmed a conviction for military training undergone before the passage of the 1963 Act.³⁶⁶

The Unlawful Organizations Act permits even more bizarre ex post facto appliations.³⁶⁷ Under the Act the State President can declare an organization to have been banned as of a prior specified date.³⁶⁸ The President need only be satisfied that the organization is a continuation of a previously banned organization³⁶⁹ or that it is promoting objectives similar to such an organization.³⁷⁰ Members of the newly banned organization are automatically deemed members of the previously banned organization.³⁷¹ They are there by made criminally liable for prior acts and omissions of the earlier banned organization.³⁷² The only statute of limitations for this type of liability is April 8, 1960, the effective date of the Act.³⁷³ By the authority of this statute, the government proclaimed the South African Communist Party, organized in 1960,³⁷⁴ to be the Communist Party of South Africa, which had been banned in 1950.³⁷⁵

³⁶¹ No. 44 of 1950, S. AFR. STAT. 71 (1980)..

³⁶² No. 37 of 1963, S. AFR. STAT. 221 (1980).

³⁶³ *Id.* § 5(a). "*Bis*" indicates that the new section is the second provision of section 11(b).

³⁶⁴ *Id.* "*Ter*" indicates that the new section is the third provision of section 11(b).

³⁶⁵ No. 50 of 1951, S. AFR. STAT. 113 (1980). The Suppression of Communism Act is now referred to as the "Internal Security Act No. 44 of 1950."

³⁶⁶ [1964] 4 S.A. 673, 680 (A.D.) The appellate division did find, however, that the gravity of the offense was mitigated by the fact that the training took place before the law was amended. The court accordingly reduced the sentence from twenty to twelve years imprisonment.

³⁶⁷ No. 34 of 1960, S. AFR. STAT. 711 (1980).

³⁶⁸ *Id.* § 1(3).

³⁶⁹ *Id.* §§ 2, 1(3)(a)(ii).

³⁷⁰ *Id.* § 2(d), amended by General Law Amendment Act No. 37 of 1963, S. AFR. STAT. § 15 (1980).

³⁷¹ Unlawful Organizations Act No. 34 of 1960 S. AFR. STAT. § 1(3)(c) (1980).

³⁷² *See id.* § 1(3)(c).

³⁷³ *See id.* § 1(3).

³⁷⁴ *State v. Arenstein*, [1967] 3 S.A. 366, 373-74 (A.D.).

³⁷⁵ The Communist Party of South Africa was declared an unlawful organization by the

A South African Communist Party organizer was accordingly sentenced to four years imprisonment for furthering the aims of "communism" as defined in the Internal Security Act.³⁷⁶

Under the American definition of *ex post facto* laws, the courts proscribe not only the creation of offenses with retroactive criminal liability, but also any legislative increase in the penalties for existing statutory offenses.³⁷⁷ The United States Supreme Court was held that "[t]he Constitution forbids the application of any new punitive measure to a crime already consummated, to the detriment or material disadvantage of the wrongdoer."³⁷⁸ American courts have accordingly refused to permit retroactive changes from fixed to indeterminate sentences,³⁷⁹ or the added punishment of solitary confinement before execution.³⁸⁰ The South African judiciary, in contrast, finds retroactive increases in punishment to be acceptable. The Criminal Law Amendment Act of 1953 provides an example of retroactive authorization for increasing penalties.³⁸¹ A South African court held that since the Act applies to "punishment only," retroactiveness alone did not justify finding the law invalid.³⁸²

C. STRICT STATUTORY INTERPRETATION

1. Introduction

The two elements of the principle of legality so far discussed, the void for vagueness doctrine and the prohibition of *ex post facto* laws, are essentially legislative tests of substantive due process. They involve precision of draftsmanship in legislation and the temporal relationship be-

Internal Security Act No. 44 of 1950, S. AFR. STAT. § 2(1) (1980). *See* State v. Arenstein, [1967] 3 S.A. at 371, 373-74.

³⁷⁶ Appellant was convicted of violating section 11(a) of the Internal Security Act No. 44 of 1950, S. AFR. STAT. 71 (1980), by performing "any act which is calculated to further the achievement of any of the objects of communism." State v. Arenstein, [1967] 3 S.A. at 379-82.

³⁷⁷ The Constitutional proscription of bills of attainder has a similar history to that of *ex post facto* laws. U.S. CONST. art. I, § 9, cl. 3, § 10, cl. 1. An act of attainder imposes punishment for named individuals without regard to the punishment provided in existing law. They were last used in England in 1696. G. WILLIAMS, *supra* note 78, at 580.

³⁷⁸ Lindsey v. Washington, 301 U.S. 397, 401 (1937); Eason v. Dunbar, 367 F.2d 381 (9th Cir. 1966). *See* United States v. Hall, 26 F. Cas. 84, 86-87 (D. Pa. 1809) (No. 15,285) ("a law may be *ex post facto* in some respects, and not so in others").

³⁷⁹ Lindsey v. Washington, 301 U.S. 397 (1937); State v. Fisher, 126 W.V. 117, 125, 27 S.E.2d 581, 585 (1943).

³⁸⁰ In re Medley, 134 U.S. 160 (1890). It is permissible, however, to mitigate the punishment retroactively. Malloy v. South Carolina, 237 U.S. 180 (1915); Rooney v. North Dakota, 196 U.S. 319 (1905). A retroactive tax levy is not, however, an *ex post facto* criminal penalty, Kentucky Union Co. v. Kentucky, 219 U.S. 140 (1911), nor does it violate the fourteenth amendment. *Id.* at 161; League v. Texas, 184 U.S. 156, 161-62 (1901).

³⁸¹ Act No. 8 of 1953, S. AFR. STAT. 211 (1980).

³⁸² Regina v. Sesidi, [1953] 4 S.A. 634, 636 (Griqualand West).

tween the time an offense and its punishment are created, and the time the proscribed deed is committed.

A third element of the principle of legality involves the method of judicial interpretation. According to Hall, the principle of legality requires strict interpretation of penal statutes.³⁸³ Hall argues that judges must avoid enlarging the scope of criminal statutes by giving expression to the general policy of a statute, and must instead interpret laws narrowly in a manner most favorable to the accused.³⁸⁴ Williams, however, disputes the primacy of strict interpretation, and insists instead that the principle of legality requires avoidance of analogical extensions of penal statutes.³⁸⁵ In spite of this difference, Hall and Williams both agree with the fundamental tenet that the principle of legality serves as a check upon the interpretation of Statutes.³⁸⁶

Since the time of Lord Coke, the common law has demanded that criminal statutes are to be interpreted so that no innocent person may be "punished or endamaged".³⁸⁷ Accordingly, nothing is a crime unless it is plainly forbidden by law³⁸⁸ since no one may be required at peril of life, liberty, or property to speculate as to the meaning of penal statutes.³⁸⁹ If there are reasonable doubts about the parameters of an offense, then the courts are to resolve such doubts in favor of defendants.³⁹⁰

Unlike the void for vagueness doctrine, the canon of strict construction is not a principle of due process. Chief Justice Marshall found that it is based upon the "tenderness of the law for the rights of individuals."³⁹¹ This respect for individual rights alone justifies a court's decision to resolve the ambiguities in criminal statutes in a defendant's favor,³⁹² including the ambiguities in statutes setting out the punishment for crimes.³⁹³ The separation of powers doctrine, however, provides a separate justification for such a construction. It is not a judicial

³⁸³ J. HALL, *supra* note 73, at 35.

³⁸⁴ *Id.* at 37-38.

³⁸⁵ G. WILLIAMS, *supra* note 78, at 586.

³⁸⁶ J. HALL, *supra* note 73, at 28. Hall emphasizes strict construction in a section entitled "Analogy, Ambiguity and Vagueness." *Id.* at 36. Williams also places stress upon the proscription of making crimes by analogy in a section entitled "Strict Construction." G. WILLIAMS, *supra* note 78, at 586.

³⁸⁷ *See* *Margate Pier Co. v. Hannam*, 3 B. & Ald. 266, 270, 106 Eng. Rep. 661, 663 (1819).

³⁸⁸ *The Queen v. Price*, 12 Q.B.D. 247, 256 (1884).

³⁸⁹ *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939). *Cf.* *London & Northeast Railway v. Berriman*, 1946 A.C. 278, 313 ("A man is not to be put in peril upon an ambiguity").

³⁹⁰ *United States v. Bass*, 404 U.S. 336, 348 (1971).

³⁹¹ *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 96 (1820).

³⁹² *Bell v. United States*, 349 U.S. 81, 83 (1955).

³⁹³ *London & Northeast Railway v. Berriman*, 1946 A.C. at 313.

but a legislative function to create crimes and their punishments.³⁹⁴ Accordingly, the legislature abdicates its responsibility when it creates all-encompassing crimes and leaves it to the courts to determine what action is illegal under the law.³⁹⁵

The canon of strict construction obviously does not license courts to ignore the clearly articulated will of the legislature. It does require, however, that the courts refrain from straining the words of an ambiguous statute on the belief that it was enacted to prevent some sort of mischief.³⁹⁶ In *McBoyle v. United States*, Justice Holmes set forth the principle that a statute must give a fair warning of the activities it makes criminal in words that the world can understand.³⁹⁷ The *McBoyle* Court decided that the theft of an airplane was not made criminal by the National Motor Vehicle Theft Act. The language of the Act was limited to land vehicles and the Court decided that this language could not be extended simply because a similar policy might apply to airplanes or because the legislature might have used broader language if it had considered the possibility of such a theft.³⁹⁸

Judicial extension of legislative language would violate the void for vagueness and the non-retroactivity elements, of the principle of legality. Judicial enlargement of crimes violates the "fundamental concept of the common law that crimes must be defined with appropriate definiteness."³⁹⁹ Such enlargement also would be tantamount to retroactive legislation and so would violate the prohibition on ex post facto laws.⁴⁰⁰

Only the United States adheres to the doctrine of judicial review as a final check upon legislative compliance with the principle of legality.⁴⁰¹ In other common law jurisdictions the legislature's word is final. The South Africa Constitution, for example, explicitly provides that: "no court of law shall be competent to inquire into or to pronounce upon the validity of any Act passed by Parliament."⁴⁰²

South Africa has, however, created at least a formal balance between the requirements of the canon of strict construction and the doctrine of parliamentary supremacy. In accordance with the common law

³⁹⁴ *United States v. Wiltberger*, 18 U.S. at 93.

³⁹⁵ *United States v. Reese*, 92 U.S. 214, 221 (1875).

³⁹⁶ *Remington v. Larchin*, [1921] 3 K.B. 404, 409; *The King v. Chapman*, [1931] 2 K.B. 606, 609.

³⁹⁷ *McBoyle v. United States*, 283 U.S. 25, 27 (1931).

³⁹⁸ *Id.*

³⁹⁹ *Pierce v. United States*, 314 U.S. 306, 311 (1941).

⁴⁰⁰ *Bouie v. City of Columbia*, 378 U.S. 347, 353 (1964).

⁴⁰¹ The Canadian Bill of Rights does command, however, that laws are to be construed so as not to abrogate provisions of the Bill of Rights. Canadian Bill of Rights, CAN. REV. STAT. (1970) (Appendix III).

⁴⁰² Republic of South Africa Constitution Act No. 32 of 1961, S. AFR. STAT. § 59(2) (1980).

tradition, the South African courts are to settle questions of statutory application *in favorem libertatis*: "The right of personal liberty . . . is always guaranteed by courts of law as one of the most cherished possessions of our society."⁴⁰³ Parliament however, remains free to "make any encroachment it chooses upon the life, liberty, or property of any individual subject [and] . . . [i]t is the function of the courts of law to enforce its will."⁴⁰⁴ In order to balance these conflicting imperatives, the courts are directed that "if the liberty of the subject is to be suppressed, it is to be suppressed by the legislature and not by the courts."⁴⁰⁵ The South African courts accomplish this balancing by following the common law assumption that rights exist unless explicitly denied and that the duty of the court is to protect the liberty of the individual: "The rules of procedure of this court are devised for the purpose of administering justice and not of hampering it and where the rules are deficient, I shall go as far as I can in granting orders which would help to further the administration of justice."⁴⁰⁶

2. *South Africa Regime Maintenance Laws and Use of Analogy*

As Williams has argued, the principle of legality also requires that courts refrain from creating crimes by analogy to already existing crimes. To make something criminal solely because it is similar to something else already made criminal runs directly contrary to the common law principle that things similar to illicit things are not themselves illicit until made so by statute.

The common law, as judge-made law, does permit one sort of judicial lawmaking by analogy, the "all-but-unnoticed bringing up to date of old terms, so that, filled with new construction, they refer more adequately to the changed conditions."⁴⁰⁷ It rejects as "dangerous indeed" the theory that "a case which is within the reason or mischief of a statute, because it is of equal atrocity, or of a kindred character with those which are enumerated" is itself covered by the statute.⁴⁰⁸ However, the Russian Soviet Federated Socialist Republic Criminal Code of 1924 authorized this very method of judicial interpretation. It empowered judges to reason by analogy when confronted with offenses not specified in the Code by applying the Code article most similar to the instant offense.⁴⁰⁹ Similarly, a 1935 German Act provided that: "any person

⁴⁰³ *Mpanza v. Minister of Native Affairs*, [1946] W.L.D. 225, 229.

⁴⁰⁴ *Sachs v. Minister of Justice*, [1934] A.D. 11, 37.

⁴⁰⁵ *Rex v. Bunting* [1916] T.P.D. 578, 584.

⁴⁰⁶ *Ncoweni v. Bezuidenhout* [1927] C.P.D. 130.

⁴⁰⁷ J. HALL, *supra* note 73, at 49.

⁴⁰⁸ *United States v. Wiltberger*, 18 U.S. at 96.

⁴⁰⁹ For a discussion of analogy in Soviet law from the revolution to the death of Stalin, see P. SOLOMON, *SOVIET CRIMINOLOGISTS & CRIMINAL POLICY* 22-27 (1978).

who commits an act . . . deserving of penalty according to the fundamental conceptions of a penal law . . . shall be punished under the law of which the fundamental conception applies most nearly to the said act.⁴¹⁰

The South African government appears to be satisfied that analogizing to create crimes rather than strict construction of penal statutes is in the best interest of the State. The vagueness of the South African laws discussed above, in a sense, incorporates analogy into the statutes themselves.⁴¹¹ At the same time, a number of the laws allow analogy by precluding *any* judicial review of governmental actions. While the Internal Security Act, for example, requires the Minister of Justice to appoint a review committee to investigate the detention of prisoners held on grounds of threatening law and order, it permits the Minister to ignore the committee's conclusions and prohibits court review of any heeded committee recommendations.⁴¹²

Similarly, the State President can have any non-citizen deemed by him to be a communist taken into custody and summarily deported.⁴¹³ The courts also have no jurisdiction to review the validity of proclamations issued under the Unlawful Organizations Act,⁴¹⁴ or upon the validity of detention orders issued against suspected terrorists or persons believed to have information about terrorists or terrorism.⁴¹⁵ An individual banned from an area by the Minister of Justice on grounds of promoting racial hostility, as authorized by the Riotous Assemblies Act,⁴¹⁶ has no right to a hearing and may not appeal the decision to a court. Finally, the South African courts may not stay the execution of removal orders served on Africans.⁴¹⁷

The regime's concern that courts may uphold the legality principle is demonstrated by these statutory provisions precluding judicial inquiry into law enforcement actions. On several occasions the South African courts have attempted to mitigate the impact of broad and ambiguous laws, but such judicial initiatives are often overturned by legislation. For example, one court ruled that the offense of promoting racial hostility

⁴¹⁰ Criminal Code Amendment Act, 1 REICHS GAZETTE BULLETIN 839 (1935); Criminal Procedure and Court Jurisdictions Amendment Act, 1 REICHS GAZETTE BULLETIN 844 (1935).

⁴¹¹ See *supra* notes 94-122 & 163-87 and accompanying text.

⁴¹² See generally Act No. 44 of 1950, S. AFR. STAT. § 10(1)(a) (1980).

⁴¹³ *Id.* § 14(1). The Admission of Persons to the Republic Regulations Amendment Act No. 6 of 1979, S. AFR. STAT. (1980), extended the power of summary deportation to anyone who violated security, drug, immorality or obscenity laws.

⁴¹⁴ Act No. 34 of 1960, S. AFR. STAT. § 1(3)(c) (1980).

⁴¹⁵ Act No. 83 of 1967, S. AFR. STAT. § 6(5) (1980).

⁴¹⁶ Act No. 17 of 1956, S. AFR. STAT. § 3(5) (1980).

⁴¹⁷ Black [Prohibition of Interdicts] Act No. 64 of 1956, S. AFR. STAT. § 2 (1980).

ity between Africans and Europeans required a specific intent to cause hostility toward Europeans in general.⁴¹⁸ The government then changed the applicable law to make it an offense to encourage feelings of hostility between different population groups.⁴¹⁹ Courts have also ruled that the authority to penalize members of banned organizations⁴²⁰ did not cover individuals who had ceased being members before the banning.⁴²¹ In response, the law was amended to allow retroactive liability.⁴²² Finally, the courts have attempted to limit the authority of the State President to ban any organization deemed a continuance of an outlawed organization⁴²³ by requiring proof of a connection between the older and newer bodies.⁴²⁴ Again the law was amended in response to require only that the banned and the later organizations share similar objectives.⁴²⁵

On other occasions court decisions favoring the accused have been judicially invalidated. The General Law Amendment Act of 1963 authorized up to ninety days of detention for individuals reasonably suspected of having information about sabotage or about offenses under the Internal Security and Unlawful Organizations Acts.⁴²⁶ The Durban Provincial Division of the Supreme Court held that the detention could be extended beyond the initial ninety days only if a new offense were alleged or new material information discovered.⁴²⁷ The Appellate Division overruled the decision and held that an extension only required a change in the situation upon which the detention was based.⁴²⁸ In a more serious challenge to the state's use of arbitrary laws, the Appellate Division held that the "any act" language of the Terrorism Act⁴²⁹ was too broad.⁴³⁰ It ruled that there must be a direct connection between the actions specified in the indictment and "terrorism" as defined in the Act, i.e., an "intent to endanger the maintenance of law and order in the Republic."⁴³¹ Although accepted as precedent in a later case,⁴³² the deci-

⁴¹⁸ *Rex v. Nkatlo*, [1950] 1 S.A. 26(C); *Rex v. Sutherland*, [1950] 4 S.A. 66(T). The act so construed was the Black Administration Act No. 38 of 1927, S. AFR. STAT. § 29(1) (1980).

⁴¹⁹ General Law Amendment Act No. 94 of 1974, S. AFR. STAT. § 1 (1980).

⁴²⁰ Internal Security Act No. 44 of 1950, S. AFR. STAT. § 5 (1980).

⁴²¹ *State v. Ranta*, [1969] 4 S.A. 142. Just such a position is explicitly included in the English Prevention of Terrorism Act, 1976, ch. 8, § 2(1). In the United States membership per se is not actionable. See *supra* note 147 and accompanying text.

⁴²² Suppression of Communism Amendment Act No. 2 of 1972, S. AFR. STAT. § 1 (1980).

⁴²³ Unlawful Organizations Act No. 34 of 1960, S. AFR. STAT. § 1(2) (1980).

⁴²⁴ *State v. Nokwe*, [1962] 3 S.A. 71 (T.P.D.).

⁴²⁵ General Law Amendment Act No. 37 of 1963, S. AFR. STAT. § 15 (1980).

⁴²⁶ Act No. 37 of 1963, S. AFR. STAT. § 17 (1980).

⁴²⁷ *Mbele v. Minister of Justice*, [1963] 4 S.A. 606.

⁴²⁸ *Loza v. Police Station Commander, Durbanville*, [1964] 2 S.A. 545 (A.D.).

⁴²⁹ Act No. 83 of 1967, S. AFR. STAT. § 2(1)(a) (1980).

⁴³⁰ *State v. French-Beytagh*, [1972] 3 S.A. 430, 457 (A.D.).

⁴³¹ *Id.*, at 457-58.

sion itself was effectively overruled by *State v. Hosey*.⁴³³

These judicial reversals do not indicate that the South African courts are powerless to strictly construe statutes in favor of the accused. Rather, they show that the courts often take seriously their duty to ensure legislative clarity and to narrowly construe statutes so as to protect individual liberty.⁴³⁴ South Africa's disregard for the principle of legality must be ascribed more to the legislative enactment of vague and ex post facto laws than to judicial failure to narrowly construe laws.

IV. CONCLUSION: THE PRINCIPLE OF LEGALITY AND SUBSTANTIVE DUE PROCESS OF LAW IN SOUTH AFRICA

While the history of liberty may well be "the history of observance of procedural safeguards,"⁴³⁵ if the legal infrastructure does not impose restrictions on the scope of criminal liability even the most equitable procedures will be of little avail in protecting liberty. Dicey saw little conflict between Parliamentary supremacy and the Rule of Law. He assumed that the English spirit of liberty itself would effectively block abuse of legal processes.⁴³⁶ This protection does not aid South African citizens, however, for although the country has acquired English criminal procedure, the Afrikaner elite has never accepted the ideal of equality before the law which is the foundation of due process.

When the Nationalists came to power in 1948, the South African legal culture had already sanctioned racial discrimination. In 1934, the then Acting Judge of Appeal Gardiner dissented from an opinion in which the majority upheld the Postmaster General's decision to provide separate postal facilities for whites and non-whites.⁴³⁷ Judge Gardiner argued that the Court had rejected the "fundamental principle of our law that in the eyes of the law all men are equal."⁴³⁸ Two of the three judges in the majority did not dispute his point concerning legal equality but nevertheless upheld the Postmaster General's actions because of the separate but equal doctrine.⁴³⁹ The remaining member of the majority, Judge Beyers, explicitly rejected Gardiner's position. He argued that whites and non-whites had never been equal before the law in the

⁴³² *State v. Essach*, [1974] 1 S.A. 1 (A.D.).

⁴³³ *State v. Hosey*, [1974] 1 S.A. 667 (A.D.).

⁴³⁴ See e.g., *Nxasana v. Minister of Justice*, [1976] 3 S.A. 745, 748 (A.D.).

⁴³⁵ See *supra* note 66 and accompanying text.

⁴³⁶ See *supra* note 64 and accompanying text. Accordingly, Williams claims that it is inconceivable that Parliament would enact measures of absolute prohibition against such matters as the disclosure of official secrets or treason. G. WILLIAMS, *supra* note 78, at 257-58.

⁴³⁷ *Minister of Posts and Telegraphs v. Rasool*, [1934] A.D. 167.

⁴³⁸ *Id.* at 187 (Gardiner, J., dissenting).

⁴³⁹ *Id.* at 175, 182.

Transvaal,⁴⁴⁰ and that white public opinion demanded that the inequality remain.⁴⁴¹

When the Nationalists took over the government in 1948 they were not therefore introducing an entirely new climate by enacting highly discriminatory legislation dealing with major aspects of social life. The Nationalists manipulated criminal sanctions to secure their newly won control of the government. Substantive due process meant little in a regime dedicated to self-perpetuation and discrimination.

It is beyond the scope of this article to evaluate the government's claim that South African trial procedures conform with adversarial principles.⁴⁴² Assuming, *arguendo*, that they do, there is still good reason to question the government's commitment to due process of law, since the government compromises the basic foundation of due process, the principle of legality. Its ambiguous, vague and *ex post facto* laws compromise the principle that "all are entitled to be informed about what the state commands or forbids".⁴⁴³ The South African regime has decided that this fundamental protection for the rights of individuals is expendable. Perpetuating itself and the prevailing social structure are the regime's paramount interests.

⁴⁴⁰ *Id.* at 176-78.

⁴⁴¹ *Sachs v. Minister of Justice*, [1934] A.D. 11, 37.

⁴⁴² *See supra* note 68 and accompanying text.

⁴⁴³ *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939).