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THE FEDERAL ANTI-RIOT ACT AND POLITICAL CRIME:
THE NEED FOR CRIMINAL LAW THEORY

MARVIN ZALMAN

I. INTRODUCTION

THE MEANING OF POLITICAL CRIME, as well as its impact,
is of interest to criminologists, criminal law scholars, andconcerned citizens. In this article, the 1968 Federal Anti-Riot Act
(Anti-Riot Act, Act) will provide the focal point for an analysis of
the contemporary state of political crime. Specifically, this article will

† Assistant Professor, School of Criminal Justice, Michigan State University;
B.A., Cornell University, 1963; J.D., Brooklyn Law School, 1966; M.A., School of
Criminal Justice, State University of New York at Albany, 1971; Ph.D. Candidate,
State University of New York at Albany.

1 Since political criminals are not often regarded to be “ordinary” criminals,
categorization becomes of great psychological and practical importance to those persons
directly, or even peripherally, involved in prisons, ordinary crime, or political crime.
The ordinary crime-political crime dichotomy is often polemic, with some conserva-
tives denying the existence of any such category and some radicals claiming that
every prisoner in America is a political prisoner. Compare Nizer, What To Do When
The Judge Is Put Up Against The Wall, N.Y. Times, April 5, 1970, § 6 (Magazine),
at 30, with E. Cleaver, Soul On Ice (1968). These extremes, however, are usually
denied by observers who are sympathetic to persons tried or convicted for political
beliefs. See, e.g., C. Goodey, Political Prisoners in America 10-11 (1973);
Political Trials IX–XVI (T. Becker ed. 1971). Criminologists also note the dis-
tinction between political and other criminals, Criminal Behavior Systems 177–246
(M. Clinard & R. Quinney eds. 1967) [hereinafter cited as Clinard & Quinney],
although determining the precise dividing line is a most difficult task. See Schafer,
The Concept of The Political Criminal, 62 J. Crim. L.C. & P.S. 381 (1971) (intro-
ducing the phrase “convictional criminal”).

(a) (1) Whoever travels in interstate or foreign commerce or uses any facility
of interstate or foreign commerce, including but not limited to, the mail, telegraph,
telephone, radio, or television, with intent—
(A) to incite a riot; or
(B) to organize, promote, encourage, participate in, or carry on a riot; or
(C) to commit any act of violence in furtherance of a riot; or
(D) to aid or abet any person in inciting or participating in or carrying on
a riot or committing any act of violence in furtherance of a riot;
and who either during the course of any such travel or use or thereafter performs
or attempts to perform any other overt act for any purpose specified in sub-
paragraph (A), (B), (C), or (D) of this paragraph—
Id. § 2101(a)(1).
outline those problems currently raised by the application of criminal law to politically dissident factions; section II will present the background necessary to understand how political crime historically has been formulated, including a recent history of legal repression within the United States; section III offers an in-depth examination of the Anti-Riot Act, and suggests that the considerations which traditionally have given rise to the use of the criminal law as a political tool, are still extant; in section IV the argument will be advanced that traditional criminal law theory—a based primarily on the limitations imposed by the “rule of law”—should function as a safeguard against legislation which threatens the political freedoms contemplated by the Constitution, and in this regard, several theories of social control which ignore elements of traditional criminal law theory will be critically evaluated.

In addition to the goal of analyzing a standardization of political crime, this article also has a scientific aim. Criminologists have long and fruitlessly debated whether crime can be defined apart from law. The position taken here is that law and crime are inseparable and that one vital task of criminology is not to attempt to isolate law as an independent variable but rather to explain the ways in which law and crime interact. Since the definition of political crime is but a component of the larger problem of defining crime in general, a discussion of the former will preface a discussion of the latter. The article will attempt to show that all criminal law theory, which is the conceptual basis for the definition of crime, has political implications which cannot be ignored by criminologists or lawyers.

Initially, two problems which require explanation may confront the reader. The first is whether a normative and scientific (value-free) study can be combined. Though not an answer, it should be noted that the idea of a value-free social science is being abandoned by a growing number of criminologists. In this, as in other areas, they have been preceded by Jerome Hall, who said that a descriptive theory of criminal law must find significance and verification in normative factors as well as in simplicity, comprehensiveness and the ability to stimulate research. The only thing that the scientist or legal scholar can do in the face of this imperative is to recognize his or her biases, present competing arguments as fairly as possible, and use all available tests of reliability and validity in assessing data.

3. For a discussion of traditional criminal law theory and competing theories, see text accompanying notes 159-219 infra.
5. Id.
Second, this article is aimed at a combined audience of criminologists and legal scholars. Gresham Sykes, in summarizing the current status of criminological thought, succinctly stated the oft-noted separation of the disciplines of law and criminology.\(^6\) By appealing to diverse audiences on their own respective terms, the article may appear to be two articles in one. The brief excursion into legal history, the legislative history of the Act, the criticism of its draftsmanship, and the analysis of its review by appellate courts may not seem germane to the questions of new versus traditional criminal law theory and the use of the deviance concept in criminology; but it is submitted that they are. The author agrees with Jerome Hall's reflection that criminology and substantive criminal law are but two aspects of the same subject matter.\(^7\) Unfortunately, scholars from the two fields do not speak the same language so this article at times will seem a crude adhesion of two separate areas of thought.\(^8\) Sections III and IV of this article will attempt to form a link between the concerns of lawyers and criminologists. These sections will focus on the author's suggestion that the idea of legal repression, borrowed from a political scientist, the late Otto Kirchheimer,\(^9\) is a manifest result of the Anti-Riot Act. It is submitted that a common concern among all citizens with the form and scope of the potential power of their government forms a natural link between the legal and criminological analyses of political crimes.

In law, political crime is restricted to offenses affecting sovereignty, national security or governmental functions.\(^10\) Treason and sedition head the list of those crimes that pose a direct threat to the sovereign state in maintaining its "claim to the exclusive regulation of the legitimate use of physical force in enforcing its rules within a given territorial area."\(^11\) Treason has always been considered the most serious crime against state interests — so serious that at English common law conviction for treason resulted in horrible punishment.\(^12\) However, treason "shades imperceptibly into sedition and other political offenses,"\(^13\) and any functional analysis of this area must be sensi-
tive to the possibility that crimes not ordinarily thought of as being political will be defined in such a manner. 14

It is submitted that the Anti-Riot Act was designed to stifle internal political dissent, a function traditionally served by treason and sedition laws. While this political use of treason and sedition law has been limited by American courts, American legislatures in the 20th century have assumed a repressive and constitutionally suspect approach, particularly in periods of internal crisis when attempts are made to dispose of those in the seat of power. American history shows that due to the narrow construction and limited use made of the treason clause, the criminal law has been utilized as an indirect means to repress particular political views. As suggested in the conclusion to this article, greater legislative recognition and comprehension of traditional criminal law theory would serve as a shield against legislation which undermines the constitutional principle of limited government restriction of political dissent.

II. HISTORY AND BACKGROUND

A. History of Treason in England and the United States 15

While the law of treason had its origins in Anglo-Saxon times, it was not until the development of a more powerful and centralized state following the Norman Conquest that treason, and criminal law in general, matured. 16 It has been noted that the development of treason in early Norman times was based on at least four ideas: treachery, breach of feudal bond, breach of duty to the King, and a blend of ideas gleaned from the Roman law of laesa majestas. 17 From the period of the Norman Conquest to the middle of the 14th century, treason was

14. See generally Mouledous, Political Crime and the Negro Revolution, in Clinard & Quinney, supra note 1, at 217. For example, bigamy was functionally a political crime when applied to the Mormons in the 1880's. See, e.g., Murphy v. Ramsey, 114 U.S. 15 (1885) (upholding a federal statute depriving polygamists of the right to vote). Prior to this, Mormon leaders had been prosecuted for treason in both state and federal actions. See J. Hurst, The Law of Treason in the United States 264 (1971).

15. Only a brief and focused sketch will be offered. For an excellent treatment of the development of the American law in colonial and post-colonial times, see J. Hurst, supra note 14. See also R. Perkins, supra note 10, at 441-48 for an analysis of the elements of treason in the United States. The most comprehensive treatment of the early English law of treason is J. Bellamy, The Law of Treason in England in the Later Middle Ages (1970).


17. 3 Holdsworth, supra note 16, at 287-89. Laesa majestas was an element of Roman law which labeled as treasonable not only those practices which were an offense against the "peace of the state" but also certain forms of forgery. Id. at 289.
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vaguely defined, enabling the King's judges to expand its operative scope for political and non-political reasons, to include some improbable circumstances.\(^\text{18}\)

In 1351 the English Parliament passed the Statute of Treasons,\(^\text{19}\) upon which the American constitutional definition of treason was based. Although this statute has been frequently praised as a bulwark of British liberty,\(^\text{20}\) Sir James Stephen observed that it was not foisted upon an unpopular King by barons at the point of rebellion against tyranny. Rather:

The fact that the Statute of Treasons was passed at the moment when Edward III was at the very height of his power, more securely seated on the throne and in the enjoyment of greater popularity and more undisputed authority than was the lot of any other English sovereign for a great length of time, must be borne in mind in considering the provisions of the Statute of Treasons. It enumerates the only crimes likely to be committed against a popular king who has undisputed title, and as to the limits of whose legal power there is no serious dispute.\(^\text{21}\)

Thereafter, the Statute of Treasons was to have more symbolic than real significance as a check on the desires of those in possession of the power of the kingdom. The subsequent history of the English law of treason is filled with statutory expansion in times of strife—the most notorious being those of Henry VIII.\(^\text{22}\) Coupled with these expansions were judicial interpretations which tended to fill the gaps and expand the coverage of the statute. After each period of statutory expansion, the more flagrant treasons were abolished due to the return of political

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18. \*Id.\* at 289-91.
19. 25 Edw. 3, Stat. 5, c.2 (1351). This statute specified seven categories of high treason, summarized by Holdsworth as follows: 1) to encompass or imagine the death of the King, Queen, or his eldest son; 2) to violate the Queen, or the King's eldest unmarried daughter, or the wife of the King's eldest son; 3) to levy war against the King; 4) to adhere to the King's enemies; 5) to counterfeit the King's seal or money; 6) to bring false money knowingly into the realm; and 7) to slay the chancellor or any of the judges while performing their duties. \*HOLDSWORTH, supra\* note 16, at 449. \*See also\* J. \*BELLAMY, supra\* note 15, at 59-101.
20. \*See, e.g., C. \*KENNY, OUTLINES OF CRIMINAL LAW § 401 (17th ed. J. \*Turner 1958).\*
21. 2 \*J. \*STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 250 (1883) [hereinafter cited as \*STEPHEN\*]. Bellamy's analysis does not contradict that of Stephen, but goes into great detail regarding the legal, political, and economic background and implications of the English treason statute. \*Compare J. \*BELLAMY, supra\* note 15, at 59-101.
22. \*See \*STEPHEN, supra\* note 21, at 250-83. \*See generally \*HOLDSWORTH, supra\* note 16, at 287, 450; Thornley, \*Treason By Words in the Fifteenth Century, 32 ENG. HIST. REV. 556 (1917). For a description of the transformation of treason from a personal crime against the King to a crime against the state, see Russell, \*The Theory of Treason in the Trial of Stafford, 80 ENG. HIST. REV. 90 (1965). \*See also J. \*BELLAMY, supra\* note 15, at 212-13.
stability, good sense, a fear of the consequences of the expanded definitions of treason, and the peculiar English affinity for tradition. Perhaps the most important function of the Statute of Treasons was that it acted as a model for moderate political tolerance to which the state could return in periods of political stability. However, it should be emphasized that it only functioned as a stabilizing force in times of political peace, and that it did not serve to moderate governmental response in times of political turmoil.

In a thorough analysis of the American colonial history of treason, Professor Hurst indicated that while the colonies borrowed from English law to frame treason statutes, "[t]he striking characteristic of all the pre-Revolutionary legislation in the colonies [was] the evident emphasis on the safety of the state or government, and the subordinate role of any concern for the liberties of the individual." This was in sharp contrast to the approach of the Constitution; however, it can be easily understood in view of the precarious existence of early colonial settlements.

With regard to the approach of the 1787 Constitutional Convention, Hurst stated:

The basic policy of the treason clause written into the Constitution emerges from all the evidence available as a restrictive one. Everyone took for granted that, since a new sovereignty was being created, its authority must be given protection. The matter which dominated all references to the subject, however, was not the establishment of this protection, but its careful limitation to the minimum necessary to safeguard the community.

This restrictive approach resulted in a treason clause which was used by supporters of ratification to allay fears that the new government might revert to the oppression extant during the colonial period. The restrictive intent of the constitutional fathers is evidenced by their attempt to carefully define treason, by their establish-

24. J. Hurst, supra note 14, at 75.
25. Id.
26. Id. at 126.
27. The treason clause of the United States Constitution provides:

Treason against the United States, shall consist only in levying War against them, or in adhering to the Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attained.

U.S. Const. art. III, § 3.
28. See J. Hurst, supra note 14, at 136-38.
ment of evidentiary requirements for the offense, and by the limitations they placed on the punishment of those convicted. It would appear that the constraints imposed upon the treason clause manifested the framers’ concern with political liberty:

[T]he data suggest that the fear most in mind was of abuse of "treason" for the building or upholding of domestic political faction, rather than its vindicative use under wartime hysteria against "enemies" . . . .

What is suggested is that the historic policy restrictive of the scope of "treason" under the Constitution was most consciously based on the fear of extension of the offense to penalize types of conduct familiar in the normal processes of the struggle for domestic political or economic power.

This concern for political liberty resulted not only in a restrictive treason clause, but also in a history of executive restraint in the use of prosecutions for the offense, as well as a judicial policy against unduly expanding the definition of the clause. The effect of this constrictive attitude toward the treason clause was "that after the nineteenth century the executive and legislative branches no longer considered the treason charge as the principle bulwark of state security." From an analysis of judicial decisions, Professor Hurst has culled three reasons to explain this continuing policy: 1) "the inherent danger, if the contours of the crime are vague and ill-defined, of abuse of treason prosecutions by the authorities and the resulting intimidation of citizens"; 2) "perversion by established authority to repress peaceful political opposition; and [3)] conviction of the innocent as the result of perjury, passion, or inadequate evidence". It is apparent that these reasons have operated throughout the history of the United States not only to limit judicial overreaction, but also to restrain unwarranted prosecutions.

However, the limited use of the Constitution’s treason clause does not mean that political dissent in times of strife has not been

29. See id. at 211-18.
30. Id. at 141.
31. As Hurst stated:
There have been less than two score treason prosecutions pressed to trial by the Federal government; there has been no execution on a federal treason conviction; and the Executive has commonly intervened to pardon, or at least mitigate the sentence of those convicted.

Id. at 187.
32. Id.
33. Id. at 188.
34. Id. at 188, quoting Cramer v. United States, 325 U.S. 1, 27 (1945).
stifled by other means. It will be seen that English courts have utilized a concept of “constructive treason” to expand the scope of conduct encompassed by treason, while the American Congress has used the criminalization of conduct to achieve the same end.

B. Constructive Treason

In 1883, Sir James Stephen, while characterizing the Statute of Treasons as crude and clumsy, stated that the existing law of treason cannot be “said to be a bad one, except insofar as the levying of war has been interpreted to extend to great riots for a political object.” 36 This point is crucial to an understanding of the proposition that the Anti-Riot Act functions as an emergency treasons and sedition law, since riotous conduct and treasonous conduct are sufficiently similar to justify their identical treatment.

It is curious to note that, although the close connection between treason and riot is not deemed significant in American treatises, 37 the English authorities dwell at length thereon. 38 Although treason by “levying war” seems to merely indicate “war” in the international law sense, the term has been interpreted to have a much broader meaning.39 With the exceptions of the American Revolution, Shay’s Rebellion, Aaron Burr’s adventures, 40 and the American Civil War, 41 treason by levying war has been virtually unknown in the United States. The English decisions prior to the middle of the 18th century extended to the concept in concluding that riotous assemblies for any non-private purpose amounted to a constructive levying of war. 42

36. Stephen, supra note 21, at 283 (footnotes omitted).

37. No reference to this is found in W. Clark & Marshall, Crimes (1967), and R. Perkins, supra note 10, at 451–52, gives this point only brief mention.

38. See, e.g., 4 Radzinowicz, supra note 12, at 105–57 (1968).

39. As one commentator has noted: “War,” here, is not limited to the true “war” of international law, but will include any forcible disturbance that is produced by a considerable number of persons, and is directed at some purpose which is not of a private but of a “general” character . . . .

C. Kenny, supra note 20, § 406. See also United States v. Greiner, 26 F. Cas. 36, 38–39 (No. 15,262) (D.C.E.D. Pa. 1861).

40. See Ex parte Bollman, 8 U.S. (4 Cranch) 75 (1807); United States v. Burr, 25 F. Cas. 201 (No. 14,694a) (C.C.D. Va. 1807).

41. See, e.g., United States v. Greiner, 26 F. Cas. 36 (No. 15,262) (D.C.E.D. Pa. 1861).

42. See J. Hurst, supra note 14, at 196.
of some official act. Sir James Stephen, in a more speculative vein, suggested that the line dividing treason and riot is indistinct, and noted:

It often happens, however, that the public peace is disturbed by offences which without tending to the subversion of the existing political constitution practically subvert the authority of the Government over a greater or less local area for a longer or shorter time. . . . No definite line can be drawn between insurrections of this sort, ordinary riots, and unlawful assemblies. The difference between a meeting stormy enough to cause well-founded fear of a breach of the peace, and a civil war the result of which may determine the course of a nation's history for centuries, is a difference of degree. Unlawful assemblies, riots, insurrections, rebellions, levying of war, are offences which run into each other, and are not capable of being marked off by perfectly definite boundaries.

In any event, the English authorities agree that the dissimilarity, if any, between riot and treason lies not in the peculiar nature of the act itself, but in the intent of the actors. Hence:

[.A]ny amount of violence, however insignificant, directed against the king will be high treason, and as soon as violence has any political object, it is impossible to say that it is not directed against the king, in the sense of being armed opposition to the lawful exercise of his power.

It is important to note that the expansive meaning given "levying war" is not immediately apparent from the language of the Statute of Treasons or its American counterpart in the Constitution. In England, treason by levying war was defined in its natural sense as levying war with intent to depose the king, or to compel legislation by force and terror, and was only extended by judicial construction, to "great riots for political objects." Constructive treason — judicial interpretation of treason to encompass political riots — was a component of the English law of treason at the time of the drafting of the American Constitution, and was recognized by the framers of that document. As Professor Hurst noted:

Grievances over oppressive prosecutions for treason or other offenses did not form one of the causes which brought the Federal

43. Id.
44. Stephen, supra note 21, at 242.
45. Id. at 269. For other authorities supporting this proposition, see C. Kenny, supra note 20, at 385; J. Smith & B. Hogan, Criminal Law 571 (1965).
46. See Stephen, supra note 21, at 281.
47. Id. at 271-80.
Convention together in 1787. But once the outlines of a really strong government were sketched, the political liberalism which marked this conservative body made it logical to consider necessary curbs upon abuse of the new power created . . .

. . . [T]here can be no doubt that the restrictive policy was intended . . . to limit judges and to curb the creation of novel treasons by construction. 48

It is submitted that Hurst's reading that the historical climate of the treason clause produced a cautious and restrictive use is correct. For example, he points to the lack of use of treason in the labor wars of the late 19th and early 20th centuries, in spite of pressure placed on the Government to prosecute union leaders for treason. 49 However, this narrow focus on the absence of treason prosecutions overlooks the possibility of achieving the same result by other means; hence, the price paid for the restrictive use and scope of treason may well have been the utilization of other laws for political purposes. 50

There are numerous examples of the use of legal procedure for political ends. In the prosecution of Eugene Debs, 51 the Billings-Mooney affair, 52 the Sacco-Vanzetti trial 53 and others, 54 the fusion of

48. J. Hurst, supra note 14, at 126, 138.
49. Id. at 226 n.44, 264–65.
50. Political crime consists of violations which occur in the course of the attempt to protest, express belief about, or alter in some way the existing social structure . . . be they in violation of laws created for the suppression of such behavior or be they in violation of laws created for other purposes . . . but enforced for political reasons . . .
Cland & Quinney, supra note 1, at 178.
53. See generally F. Frankfurter, The Case of Sacco and Vanzetti (1927).
54. Cases which involved prosecutions for opposition to conscription during World War I and the "Red Scare" that followed can be interpreted merely as aberrations of justice, but the political context serves to explain, if not to condone, those cases. See generally F. Allen, Only Yesterday (1959); Roche, The Red Hunt, in Cland & Quinney, supra note 1, at 190. Several of the political trials against Communists during the "McCarthy era" were reviewed by the Supreme Court. E.g., Stack v. Boyle, 342 U.S. 1 (1951); Dennis v. United States, 341 U.S. 494 (1949).
55. Recently, the United States has experienced another spate of political trials, spawned in part by the opposition to the Vietnamese war and by the unfounded apprehensions of the Nixon administration. See J. Schultz, Motion Will Be Denied (1972) (The "Chicago 7" trial); N.Y. Times, April 6, 1972, at 1, col. 2; id., Sept. 6, 1972, at 1, col. 1; id., Nov. 6, 1972, at 1, col. 5 (conviction, sentence and parole of Daniel Berrigan); id., June 5, 1972, at 1, col. 2 (acquittal of Angela Davis); id., May 19, 1972, at A, col. 6 (acquittal of Daniel Ellsberg). See generally C. Goodell, supra note 1.
political hysteria and legal repression was so great that American political justice developed its own functional alternatives to constructive treason.

C. Sedition

English law recognizes no general crime of sedition, but uttering seditious words, publishing seditious libels, and engaging in seditious conspiracies are common law misdemeanors which all require a similar criminal intent. Although treated as a separate offense, sedition is properly a preliminary step to treason, as the ultimate objective of both treason and sedition is injury to established government. The primary distinction between the two is one of preparation or progress toward that objective.

The American definition of sedition is similar to the British model, in its emphasis upon communication which promotes disaffection for government and tends to cause its overthrow. While one federal law labeled as a sedition law encompasses only seditious conspiracies, it is suggested that several laws enacted in this century are the equivalent of seditious utterance laws. It has been stated that these laws have all been the product of moments of national crisis in which survival itself has seemed at stake. Their genesis in desperation has not often been conducive to careful weighing of the large

55. See J. SMITH & B. HOGAN, supra note 45, at 577-80. See also C. KENNY, supra note 19, at 397.
56. See J. SMITH & B. HOGAN, supra note 45, at 577.
58. Professor Packer offered this definition: [Sedition is] “advocacy by word of mouth, publication, or otherwise which incites discontent and contempt for the present form of government, causing persons to flout its laws and tending to destroy the government itself. It includes advocacy which incites to overthrowing the existing government, by force and violence, to bring into contempt the form of government, its public officers, its military forces, flags, and other symbols.” Packer, supra note 13, at 81, quoting W. GELLEHORN, THE STATES AND SUBVERSION 397 (1952).
59. 18 U.S.C. § 2384 (1970). The section provides in part: If two or more persons in any State or Territory, or in any place subject to the jurisdiction of the United States, conspire to overthrow, put down, or to destroy by force the Government of the United States, or to levy war against them, or to oppose by force the authority thereof, or by force to prevent, hinder, or delay the execution of any law of the United States, or by force to seize, take, or possess any property of the United States contrary to the authority thereof, they shall be fined not more than $20,000 or imprisoned not more than twenty years, or both.
60. Section 2384 is a provision of the Smith Act, passed by Congress in 1940. See notes 64-67 & 69-72 and accompanying text infra.
competing interests involved. The results have often seemed inconsistent with libertarian values.\textsuperscript{60}

For example, in response to the assassination of President McKinley in 1902, New York made it a criminal offense to advocate the violent overthrow of organized government.\textsuperscript{61} Subsequently other states passed laws criminalizing the advocacy of violence as a means of changing industrial ownership or control.\textsuperscript{62} During World War I the Congress passed espionage legislation with a view towards restraining

\begin{quote}
whoever . . . shall willfully obstruct or attempt to obstruct the recruiting or enlistment service of the United States, and whoever . . . shall willfully utter, print, write, or publish any disloyal, profane, scurrilous, or abusive language about the form of government in the United States . . . .
\end{quote}

In 1940, Congress passed the Smith Act,\textsuperscript{64} portions of which make it a federal offense to advocate the overthrow of the Government by force or violence.\textsuperscript{65} Each of the above laws, passed in response to political activity during crisis periods, has rested upon the premise that seditious groups posed a direct threat to the Government and therefore were justifiably repressed. Each of these laws was upheld by the Supreme Court,\textsuperscript{66} although, more recently the Court has tempered its support of

\footnotesize{60. Packer, \textit{supra} note 13, at 82.}


\footnotesize{63. Act of May 16, 1918, ch. 75, § 3, 40 Stat. 553 (repealed 1921).}


\footnotesize{65. 18 U.S.C. 2385 (1970). The section provides in part:

\begin{quote}
Whoever knowingly or willfully advocates, abets, advises, or teaches the duty, necessity, desirability, or propriety of overthrowing or destroying the government of the United States or the government of any State, Territory, District or Possession thereof, or the government of any political subdivision therein, by force or violence, or by the assassination of any officer of any such government . . .
\end{quote}

\begin{quote}
. . . shall be fined not more than $20,000 or imprisoned not more than twenty years, or both . . . .
\end{quote}

\textit{Id.}

the Smith Act and has overruled earlier decisions regarding criminal syndicalist laws.\textsuperscript{67}

D. Recent History of Legal Repression in the United States

Whether our judicial and prosecutorial agencies are, in the main, independent and fearless of narrow political control and whether our laws tend to promote human equality rather than uphold the concerns of particular interest groups and factions are questions which can be answered only by reference to history and the personal predilections of the observer. All that can be said with some measure of conviction is that Congress has recently acted in rather disquieting ways toward dissident political groups.

Professor Kirchheimer has listed a number of different governmental approaches for dealing with dissident political groups:

Within the framework of democratic institutions, three distinct answers have been prominent in recent times: (a) full equality granted hostile groups; (b) formal equality with various kinds of limitations on the groups' participation in public life; and (c) suppression of the groups and prohibition of assimilated activity.\textsuperscript{68}

Arguably Congress has chosen forceful suppression through the passage of laws which tend to bear harsh results, although recent events such as the cold war, the Korean conflict, and the McCarthy period may explain this choice. The legal order was swept along with this irrational tide, instead of withstanding it. For example, the Smith Act reintroduced seditious utterances and seditious libel into American law after its ignominious exit a century and a half earlier. The inherent danger in this legislation is that a principle carelessly transformed into law for a specific purpose "may gradually so affect legislative opinion that it comes to pervade a whole field of law."\textsuperscript{69} Legal repression was an unfortunate example of this inherent danger. Professor Kirchheimer has stated this point clearly:

No such specific withdrawal of constitutional protection [from extremist parties] was envisaged in the Constitution of the United States.


\textsuperscript{68} O. KIRCHHEIMER, supra note 9, at 135.

\textsuperscript{69} RADZIWOWICZ, supra note 12, at 18-19.
States, and punitive statutes — so-called sedition laws, for example — have been objected to as violations of freedom of speech guaranteed by the Constitution. More recent repressive legislation, especially the 1954 Communist Control Act, may be legally vulnerable on other grounds, too. A preliminary decision on the validity of sedition legislation was reached in the Dennis case in 1951, the Supreme Court refusing by a 7-2 vote to invalidate Section II of the Smith Act of 1940, which makes it unlawful to advocate or teach overthrow of the government by violence, or to organize groups for such purposes. Without this court decision, the later, more far-reaching security legislation blocking off Communist inspired activity, and in particular the crowning enactment of 1954, would have been difficult to pass.\footnote{70}

Thus, the legislative repression of politically dissident groups has become the Congressional reflex response to extremism, even when the extremist groups do not pose an immediate or serious threat to the stability of the Government.\footnote{71} When the political anxiety of the early 1950's subsided, the Supreme Court took some of the sting out of the Smith Act,\footnote{72} and in 1961 Professor Kirchheimer could comment that “it is too early to say whether the [Communist] party will still be able to hold conventions and publish and distribute literature.”\footnote{78} Given the status of the Communist Party at that time, however, the question was moot. What really mattered was the developing Congressional habit of overreacting in a repressive manner to political activity which deviated from the establishment-approved path.\footnote{74} As the legislative history of the Federal Anti-Riot Act will show,\footnote{75} this habit was continued in the late 1960’s by a law designed not to quell riots, against which there were adequate state laws, but to discourage legitimate political dissent.

\footnote{70. O. KIRCHHEIMER, supra note 9, at 136 (footnotes omitted). In Dennis v. United States, 341 U.S. 494 (1951), the United States Supreme Court affirmed the convictions, under the Smith Act, of certain Communist Party leaders. In doing so, the Court upheld the constitutionality of sections 2(a) (1), 2(a) (3) and 3 of the Act, both on their face and as applied. Id. at 516.}

\footnote{71. O. KIRCHHEIMER, supra note 9, at 150.}

\footnote{72. In Yates v. United States, 354 U.S. 298 (1957), the Supreme Court held that the Smith Act was not violated by the advocacy of forcible overthrow of the Government as an intellectual or abstract doctrine; rather, the Act applied only where there occurred advocacy of illegal action toward forcible overthrow. Id. at 312-27. Similarly, in Scales v. United States, 367 U.S. 203 (1961), the Court stated that the membership clause of the Smith Act proscribed only “active” membership in an organization whose goal was the forcible overthrow of the Government, and where there existed a specific intent to further this illegal goal. Id. at 221-24.}

\footnote{73. Id. at 149.}

\footnote{74. See C. GOODELL, supra note 1, at 12.}

\footnote{75. See text accompanying notes 76-103 supra.}
III. THE 1968 FEDERAL ANTI-RIOT ACT

A. Political Background and Legislative Intent

In the late 1960's, members of Congress could not agree upon the best approach to solve the problem of the numerous incidents of rioting in the nation's cities. Liberals contended that the only effective solution to civil disorder was a multifaceted attack on such alleged causes as substandard housing, poverty, unemployment, and racial discrimination. On the other hand, conservatives believed that "the recent riots should more realistically and more immediately be viewed as a result of criminal activity fomented by individuals and organizations not necessarily concerned with the aspirations or well-being of the rioters." With the Nation unable or unwilling to mobilize the massive funds and programs needed to test the liberal hypothesis, it is submitted that the less ambitious and more conservative approach of criminalizing riotous conduct was adopted to solve the problem.

The politics involved during the movement of this legislation through Congress contained some curious twists. As early as 1966, the House of Representatives adopted an anti-riot measure, introduced by Representative William Cramer, "which sought to augment the large number of state and local anti-riot statutes presently in force." The Cramer bill was reintroduced in 1967, and was passed by the House, but failed to clear the Senate Judiciary Committee. By the 1968 congressional session, riots had attained the status of a major political issue and it was generally regarded as probable that some form of federal anti-riot statute would emerge from the 90th Congress. Indeed, President Johnson promised action in this area in his State of the Union Message in January 1968, and appeared to take an approach calculated to appease both liberals and conservatives.

76. Editors, Controversy Over Proposed Federal Anti-Riot Legislation — Pro and Con, 47 CONG. DIG. 99 (1968) [hereinafter cited as Controversy].

77. Congressional reaction to the immediacy of the problem was summarized as follows:
Response in the Congress, meanwhile, as expressed in anti-riot measures adopted by both Houses has tended to concentrate initial attention on the immediate problem of maintaining order and assisting State and local governments in their efforts to prevent or control any new outbreaks of violence.

Id.

78. Id.

79. 113 CONG. REC. 19434 (1967). The passage of this controversial measure was preceded by pressure to force the bill out of committee and an opposing attempt to shelve it by the Chairman of the House Judiciary Committee, Emanuel Celler, a liberal Democrat from New York. Controversy, supra note 76, at 104.

80. Controversy, supra note 76, at 104.

81. President Johnson stated the following considerations:
We cannot make progress only by attacking the causes of violence and only where there is a civil order founded on justice. Today we are helping local officials
an anti-riot measure, offered as an amendment to the 1968 Civil Rights bill and similar to the Cramer proposal, was introduced in the Senate by Senators Lausche and Thurmond, both conservatives. On March 5, 1968, while the Senate was considering the Lausche-Thurmond plan, the United States Department of Justice forwarded to Congress the previously announced Administration anti-riot bill. However, the Administration's more temperate recommendations were largely ignored by Congress, and the Lausche-Thurmond amendment was adopted.

The anti-riot bill functioned as a source of compromise which led to the passage of the 1968 Civil Rights Act. That Act contained strong and controversial open housing provisions, and had been delayed by a filibuster earlier in 1968. It also included a proposal to make it a federal crime to injure or intimidate blacks and civil rights workers engaged in such activities as voting enrollment, government programs, juries, schooling, employment, travel, and the use of public accommodations. Throughout February of 1968 attempts to invoke cloture and end the filibuster failed. A test vote indicated strong Senate support for the open housing measure, although it was recognized that a compromise was necessary in order to muster the strength to invoke cloture. On March 4, cloture was voted 65–32, most likely as a result of informal agreements made for mutual support of the proposed amendments, i.e., the anti-riot bill and the provision to protect civil rights workers. This legislative package, which included provisions satisfactory to both liberals and conservatives, passed the Senate on March 11, 1968; however, it quickly became entangled in the more conservative House, which balked at the open housing provisions. Then, in early April of 1968, the civil rights activist, Dr. Martin Luther King, Jr., was assassinated, precipitating some of the worst rioting of the decade. With a pall of smoke still hanging over Washington, D.C., and with troops ringing the Capitol, the House of Representatives passed the 1968 Civil Rights bill, which included the Anti-Riot Act rider.

improve their capacity to deal promptly with disorder. Those who preach disorder and violence must know that local authorities are able to resist them swiftly, sternly, and decisively.

State of the Union Address by President Lyndon B. Johnson, Jan. 17, 1968.
82. 114 Cong. Rec. 5033 (1968).
83. Id. at 5212-13.
84. Id. at 5214.
85. See Controversy, supra note 76, at 97-98.
86. Id. at 97.
As would be expected, the bill resulting from such social unrest and legislative compromise of two diametrically opposed philosophies was far from a model of draftsmanship.

Not only was the Anti-Riot Act poorly drafted, but many also claimed that it was redundant legislation in that existing federal and state laws were adequate to deal with civil disturbances. However, legislation may have symbolic as well as substantive importance. The political content of the Anti-Riot Act reflects this symbolic importance. As Representative Elmer J. Holland declared:

Member after Member will ... denounce riots, as though there was something controversial — as though there were two sides to the question of rioting and violence. We will probably pass H.R. 421, and congratulate ourselves on having “done something” about riots and violence — just as though there were not laws against criminal behavior on the statute books of every State and every municipality in the country — laws which are perfectly efficacious in dealing with riots and violence. And we will probably adjourn with the satisfied feeling that comes only to a legis-

88. See 113 Cong. Rec. 19347-434. Representative Celler, speaking in opposition to the bill, stated:
   I might say that I differ with the author of this bill .... My political philosophy and his political philosophy are as wide apart as the poles. The way he thinks on these matters, and the way I think on these matters are as different as a horse chestnut is to a chestnut horse, and they are quite different.

Id. at 19352.

Representative Bray, speaking in support of the bill, stated: "How would the 'liberal left' stop riots, with cream puffs?" Id. at 19379.

Representative Shadeberg stated in favor of the bill:
   It should be evident in the face of the continuing crisis, that those in power cannot see reality because they are blinded by ideology. Only such ideologues would persist in the course of meeting every human crisis with a material answer. To the problem of crime, they say spend more money, blame society, or liberalize the criminal procedure. Riots? Their answer is to replace broken promises with more unfillable promises of a vast social uplift. We build bridges to communism, while Communists help other extremists to burn out cities.

Undoubtedly, these ideological liberals resent what I am saying: after all they are marching toward perfecting society and man. They cannot be bothered by the burning cities or by enemies who just might mean what they say, when they proclaim and reiterate their support for wars of national liberation. Those facts which do not fit into their ideology, they simply dismiss.

So, we have the bitter harvest of a social welfare policy that has given us social welfare. Urban renewal sometimes has meant only urban removal. This social policy promised so much and gave so little, except to the poverty fighters, many of whom behaved more like mercenaries than soldiers. No wonder that there is a growing cynicism among the poor toward the integrity of the U.S. Government.

Id. at 19393.

89. See text accompanying notes 115-20 infra.
90. See Controversy, supra note 76, at 102-03, 128, for a list of federal and state laws covering all conceivable riot-related crimes.
lator when he has courageously and straightforwardly done something that cannot possibly cost him any votes. As Thurman Arnold has pointed out, the success or failure of any large undertaking by government depends not so much on the technical ability to carry it through, but on the ability of those in power to stimulate the citizenry into action or acceptance by the proper appeal to values, ideals and symbols. Despite their awareness of the trite maxim that morality cannot be legislated, the backers of the Anti-Riot Act understood the strong support that legislation gives to a particular moral position and the potential for utilization which a statute possesses. Representative Albert W. Watson, in urging passage of the Anti-Riot bill in 1967, recognized this when he stated:

My principal concern with this bill is that the Justice Department will not actively prosecute its provisions.

Many of us have urged the Justice Department to enforce the criminal statutes in this country and curtail the purveyors of violence but, alas, our only response is either a hollow promise or some vague definition of their activities by the Justice Department.

The only way to curtail crime in this country is by a get tough policy. This bill is a step in that direction.

As I said before, this bill will not necessarily eliminate violent civil disturbance, but its passage is a beginning. It is a response to the needs and wishes of the overwhelming majority of American people, and it is our solemn duty to those we represent to pass this bill and put this body foursquare in favor of law and order.

92. 113 Cong. Rec. 19395 (1967).
94. Jerome Hall added this comment upon the problem of judicial attempts to determine the notion of what is "wrong in itself" apart from what is wrong with the law:

Is the forbidden behavior "wrong in itself," i.e., would it be immoral entirely apart from and irrespective of its prohibition in positive law, or is it wrong merely because forbidden by positive law? This test, it is submitted, purports to require what, as a matter of fact, is quite impossible to be done. For it assumes that we can eradicate from our value-judgments the centuries-old influence of the positive criminal law. Such a suggested separation of positive law and moral principle also ignores the facts (a) that criminal law is at least as old as ethics; (b) that our ethical principles are in great measure the product of positive law; and (c) that positive law itself provides principles of ethics, indeed, in a great many cases, no extra-legal ethical principle exists.

95. 113 Cong. Rec. 19373 (1967).
It is readily apparent that even if the Act has no immediate practical effect it may nevertheless satisfy a substantial constituency that something is being done. This statement, however, is misleading in one important respect. Congressman Watson’s “get tough” position was not the unquestioned choice of the overwhelming majority, but instead was a hotly contested issue with strong liberal opposition. When men represent a faction instead of a majority, they must resort to every device available in their attempt to gain power. One such device is to brand the opposition as traitors. As Chief Justice Marshall stated in United States v. Burr:

As this [treason] is the most atrocious [sic] offence which can be committed against the political body, so is it the charge which is most capable of being employed as the instrument of those malignant and vindictive passions which may rage in the bosoms of contending parties struggling for power.

However, after two centuries of narrow, careful, and restricted use, the treason charge has become an unfashionable and impractical political weapon, likely to boomerang and expose the user as a political opportunist and demagogue. Thus, it is politically wiser to take behavior, believed to be direct political crime and to criminalize it in such a way as to render it an indirect political crime.

There is evidence that the conservative supporters of the Anti-Riot Act viewed it as being a disguised treason and sedition law. Certainly some of them thought that the activities of the rioters and protesters approached treason and sedition. Representative William G. Bray, for example, stated:

Internal peace and stability is essential to the life of any nation; without it, the descent into chaos and anarchy is swift and certain.

96. There is a hint that such a law could become practically effective under a different administration. This has been evidenced in the administration of the Anti-Riot Act, which, although arguably a dead letter under former Attorney General Ramsey Clark, was activated in the “Chicago Seven” case under a different administration pursuing a different political program and implementing different political values. See R. Harris, Justice 59-65, 170 (1970).

97. See 113 Cong. Rec. 19373 (1967). As Representative Watson stated:
The American people want this bill; they need its protection. No area of this country is safe from the overt acts of violence which are increasing at an alarming rate. I know that my people in South Carolina want this bill. In a recent questionnaire, about 92 percent said that they would favor the bill.

98. See J. Hurst, supra note 14, at 140-41; O. Kirchheimer, supra note 9, at 62-76.


100. See J. Hurst, supra note 14, at 198-200.
The banners of what has the appearance of a deliberate reign of terror are borne by a group of malcontents and would-be revolutionaries whose potential for danger goes far beyond their numerical strength. They preach and promote a nightmarish, nihilistic tide of thought that calls for either immediate change or immediate destruction. They, and their kind, have arisen under the disastrous and ill-advised doctrine of permissiveness.

We are told these riots — and crime in general — are due to poverty and social deprivation. This is not so.

Talk of dynamite, Molotov cocktails, breaking heads, and "burn, baby, burn" is certainly creating a clear and present danger.

... It is time to bring the full weight of the law to bear on those who would destroy us from within as surely as foreign enemies would destroy us from without.¹⁰²

In addition, the treasonous aspects of the rioting were seen to be evidenced by the alleged allies and instigators of the rioters. The fear that a national conspiratorial group was behind the rioting had a certain appeal, and statements such as the following were not uncommon: "There is no longer any doubt that the leaders of the mobs who are attacking our policemen and innocent victims are allied with the Communists."¹⁰³

In sum, it is submitted that the legislative history of the Anti-Riot Act manifests an intent on the part of a legislative faction to destroy what was believed to be a close-knit group of outside agitators fomenting disorder. Although some legislators believed that certain individuals and groups were communist inspired traitors, they could not muster the strength to directly repress their conduct by branding them as traitors. The Congressmen seeking to discourage these political dissidents were hamstrung not only by liberal political opposition, but also by history which reflected limited use of the treason clause, and supported free political activity. The only method to legally repress these groups was indirectly through the use of the American counterpart of constructive treason — criminalize their behavior behind the screen of a measure overtly attempting to deal with the problem of massive urban rioting.¹⁰⁴

¹⁰². 113 Cong. Rec. 19379 (1967).
¹⁰³. Id. at 19373 (remarks of Rep. Albert W. Watson).
B. Formal Analysis of the Anti-Riot Act by Means of the Rule of Law

Before the Anti-Riot Act can be analyzed in-depth, some standard must be adopted against which the Act can be measured. For purposes of an analysis of the Act as a contemporary example of legislative overreaction in a time of political turmoil, that measure will be the "rule of law." Therefore, the principles contemplated by the rule of law must first be understood. In general, these principles are: 1) The absence of arbitrary power; 2) The subjection of the State and its officers to the ordinary law; and 3) The recognition of basic principles superior to the State itself."¹⁰⁵ These principles converge with the concept of constitutional limitations on state power and this convergence is basic to democratic government. However, the two idea sets are not identical. The rule of law appears to be a natural law concept,¹⁰⁶ sharing the dynamism and lack of precision of many such concepts. On the other hand, specific constitutional limitations on the police power of the state, while not a static area of law, have more precise boundaries shaped by judicial opinions.¹⁰⁷

The rule of law implies a political system with both institutional means of checking state power and a psychological willingness on the part of officials to utilize such institutions. It may seem illogical that a state would allocate part of its resources to checking its own power but such self-restraint is essential if governmental lawlessness is to be prevented.¹⁰⁸ Such restraints range from investigations of the highest levels of government¹⁰⁹ to the customary task of a trial judge ruling against the state on a question of criminal evidence.

In substantive criminal law, the rule of law presupposes that penal statutes will adhere to certain standards. Lon Fuller, for example, in identifying "eight ways to fail to make law,"¹¹⁰ indicates the following areas in which statutes may fail to measure up to the rule of law: 1) failure to make rules at all, 2) failure to publicize rules, 3) retroactivity, 4) unclear rules, 5) contradictory rules, 6) rules that require conduct beyond the power of affected parties, 7) too

¹⁰⁶ See generally L. FULLER, THE MORALITY OF LAW 96-106 (1964); J. HALL, supra note 4, at 27-69.
¹⁰⁷ The rule of law may be broader than the operation of courts, since it "refers to and requires not only a body of legal precepts but also supporting institutions, procedures, and values." J. HALL, supra note 4, at 27.
¹⁰⁹ See 28 C.F.R. § 0.37, 0.38 (1974) (Office of Watergate Special Prosecutor).
¹¹⁰ L. FULLER, supra note 101, at 33.
frequent changes in rules, and 8) failure of congruence between rules as announced and their administration. 111 Not all of these standards are wholly absent from our statutory law. Retroactivity in criminal law is specifically forbidden by the Constitution, 112 but ill-defined laws are legally improper only when they amount to a violation of due process under the void-for-vagueness doctrine. 113 The failure of government officials to administer the laws as enacted may provide cases of injustice, but this is not in itself a constitutional violation. 114

In light of the foregoing, it is submitted that the Anti-Riot Act violates the rule of law in several ways. Admittedly, not every violation discussed in this context is a violation in the purely legal sense. However, to the extent that legal doctrines draw on inchoate concepts of justice, it is urged that the Act cannot be justified.

The Anti-Riot Act is a questionable piece of legislation because, inter alia, it is vague. As one noted author has stated:

The desideratum of clarity represents one of the most essential ingredients of legality ....

[I]t is obvious that obscure and incoherent legislation can make legality unattainable by anyone, or at least unattainable without an unauthorized revision which itself impairs legality. 115

The Act is an unclear and confused measure, difficult to read and interpret. It has been suggested that excessive obscurity is in itself grounds for striking down a law, without regard to due process considerations in that, “[n]ot all collocations of words, even after subject to the process of construction, can be said to lay down a rule, which after all, is the very essence of a law.” 116

The confusion of the Anti-Riot Act is manifested by the various requirements of intent and conduct, and combinations of the two, necessary for a conviction under the Act. A model criminal statute is a clear and specific statement alerting the reader to exactly which acts

111. Id. at 33-91. The meaning of the rule of law in substantive criminal law is not necessarily limited to the considerations listed by Lon Fuller. Thus, the narrow construction of penal laws may also be seen as part of the rule of law.


115. L. Fuller, supra note 106, at 63.

116. Aigler, Legislation In Vague or General Terms, 21 Mich. L. Rev. 831, 850 (1923). In this article, the author examined early cases where legislation was invalidated for vagueness not amounting to a constitutional infirmity. Legislation was not enforced simply because it presented “no ascertainable rule of conduct” which the court could apply. Id. at 843. Although he did not coin the phrase, it appears the author was using a common law vagueness test, where the standard applied would be the understanding of the mythical person of ordinary intelligence. Id. at 850-51.
coalesce with which states of mind to constitute a violation. It is worthwhile to contrast this ideal with the provisions of the Act, which can be bisected in terms of conduct and state of mind, as follows:

I. 1) Travel in interstate commerce, or 2) travel in foreign commerce, or 3) use any facility of interstate or foreign commerce, including but not limited to:
   (i) mail, or (ii) telegraph, or (iii) telephone, or (iv) radio, or (v) television with the intent to do any act listed in column II, AND, during or after such travel or use, do any overt act for the purpose of:

II. A. inciting a riot, or B. (i) organizing a riot, or (ii) promoting a riot, or (iii) encouraging a riot, or (iv) participating in a riot, or (v) carrying on a riot, or C. committing any act of violence in furtherance of a riot, or D. aiding or abetting any person in
   (i) inciting a riot, or (ii) participating in a riot, or (iii) carrying on a riot, or (iv) committing any act of violence in furtherance of a riot. 117

A violation of the Act must include one item from Column I and one from Column II. Column I contains from 3 to 12 acts, (depending on how inclusively section I(3) is read) while Column II contains from 4 to 11 acts. Thus, the Act prohibits anywhere from 12 to 132 distinct classes of conduct. Column II also defines the criminal intent required in 4 to 11 different ways. Since, generally, both a specific act and state of mind are necessary to constitute a crime, simple multiplication dictates that the statute creates at best 1,452 separate offenses. It should be noted that this does not include attempts to commit the prohibited conduct nor does it include the additional elements introduced by section 2101(b), 118 a subsection even more complex than section 2101(a). 119

It is submitted that the Act is confounding and intimidating to those who read it and to those who enforce it, 120 and that its vagueness suggests a dragnet purpose.

118. Id. § 2101(b).
119. See note 117 supra.
120. See Radzinowicz, supra note 12, at 5-6.
Additionally, the Anti-Riot Act treats those who attempt to commit the offense, and aiders and abettors, as principals for purposes of disposition. It would appear that by treating those arguably less culpable as principals, the Act violates the rational and humane policy that lesser involvement should not be punished as severely as the primary offense. While it can be argued that, since the penalty is not fixed, lesser participants can be punished with a lesser penalty, this would depend upon the discretion of the court. However, in political trials, the proper use of judicial discretion can never be guaranteed. Furthermore, by casting the same punishment and moral aspersion upon peripheral actors as is cast upon the principals, the legislature is effectively giving notice that the only safe course to follow would be total noninvolvement with conduct approaching, but not violating, the substantive terms of the Act. Similarly, punishing attempts as severely as the primary offense does not comport with the established state practice of grading of offenses. To avoid the established course of penalizing attempts less severely than the completed crime reflects an unyielding, retributive attitude that often characterizes political crimes.

In addition to the Anti-Riot Act's excessive confusion and its harsh treatment of nonprimary offenders, it is flawed in that it may lack the traditional requirement of the concurrence of mens rea and actus reus. This shortcoming was pointed out by Representative Emanuel Celler, then Chairman of the House Judiciary Committee, when he stated:

The bill violates the due process clause in providing that intent and act do not coincide.

The bill makes it a crime for an individual to cross a State line or to go from a foreign country to a State or to mail a letter with a certain intent to incite or encourage a riot. Afterward, even though he no longer has that same intent, if he commits some overt act that could be construed as encouraging or promoting a riot or other public disturbance, he will have violated the law, although his crossing of the State line may have occurred months or even years before. This violates a basic requirement of criminal law that the intent and the criminal act must be contemporaneous.

It is clear the bill does not require any specific intent at the time of the overt act — only at the time of the crossing of the State line. How a jury could possibly establish this intent unrelated to a contemporaneous act is impossible to fathom.

121. Id. at 51-57.
122. See J. HALL, supra note 4, at 563, where the author notes that the law of treason was "the most important ... influence [preceding decisions of the Court of Star Chamber] on the development of the law of criminal attempts ...."
NEED FOR CRIMINAL LAW THEORY

In general, the principle of concurrence of act and intent operates to insure that a person is not criminally punished unless that person engaged in some sort of morally significant conduct.\(^{124}\) In the area of political crimes, the significance of this principle is obvious; it prevents the government from unfairly using the force of the criminal law on its political and ideological enemies.

Finally, a comparison of the Anti-Riot Act, as passed, with the bill proposed by the Johnson Administration serves to highlight the problems of overbreadth and vagueness which plague the Act.

The bill proposed by the Johnson Administration had as its only purpose the deterrence of riots. In his special message to Congress on February 7, 1968, President Johnson proposed a federal anti-riot law which would have made it a felony "for any person to incite or organize a riot after having traveled in interstate commerce with the intention to do so."\(^{125}\) As the President correctly commented, "[t]his is a narrow and carefully drawn bill."\(^{126}\) Such a law would appear to adhere to all the common law principles associated with criminal law,\(^{127}\) as it clearly stated the requirements of intent and a proscribed act, and carefully specified the need for their concurrence. Even more important, the proposed statute adhered to the philosophy of the rule of law in a fundamental and simple way for it was designed to be clearly understood by all who read it.

C. Judicial Response to the Act

Despite a reference to the Anti-Riot Act as an "obtuse and obscure provision,"\(^{128}\) the constitutionality of the Act has been uniformly upheld.\(^{129}\) Initially, the courts which reviewed the Act gave scant attention to its constitutional ramifications. The court in National Mobilization Committee v. Foran,\(^{130}\) disposed of the first amendment argument by stating:

[T]he First Amendment does not protect rioting and the incitement for riot. The protections afforded by the First Amendment do not reach a person who urges or instigates others to riot.

\(^{124}\) See J. HALL, supra note 4, at 185–86.

\(^{125}\) 114 CONG. REC. 5213 (1968).

\(^{126}\) Id.

\(^{127}\) See text accompanying note 166 infra.

\(^{128}\) United States v. Dellinger, 472 F.2d 340, 364 (7th Cir. 1972).


\(^{128}\) United States v. Dellinger, 472 F.2d 340, 364 (7th Cir. 1972).


\(^{130}\) 297 F. Supp. 1 (N.D. Ill. 1968), aff’d, 411 F.2d 934 (9th Cir. 1969).
any more than it covers the now famous theater-goer who falsely shouts "Fire!" and causes a panic.\textsuperscript{131}

The Seventh Circuit Court of Appeals, affirming the district court opinion in \textit{Foran}, agreed that the constitutional questions raised were not sufficiently substantial to require the impaneling of a three-judge district court.\textsuperscript{132} Without closely examining the actual words of the Act, the court of appeals found that the statute, "[g]iven a normal and natural construction,"\textsuperscript{133} was not overbroad nor vague, nor could innocents be swept within its scope since a criminal intent had to be present when section 2101 violators crossed state lines.\textsuperscript{134}

The Act was thereafter challenged in \textit{In re Shead},\textsuperscript{135} a case which concerned several Black Panthers who were ordered to testify before a grand jury investigating alleged violations of the Anti-Riot Act. The district court would have summarily agreed with the \textit{Foran} decision\textsuperscript{136} but for the Supreme Court's decision in \textit{Brandenburg v. Ohio}.\textsuperscript{137} The \textit{Brandenburg} Court held that an Ohio criminal syndicalism statute, as applied, punished mere advocacy of a proscribed action, and therefore fell within the condemnation of the first and fourteenth amendments.\textsuperscript{138} The Court in \textit{Brandenburg} found that the freedoms of speech and press do not permit a state to forbid advocacy of the use of force or of civil disobedience except where such advocacy is directed to incite or produce imminent lawless action and is likely to invite or produce such action.\textsuperscript{139} Thus, the \textit{Brandenburg} decision caused the \textit{Shead} court

\textsuperscript{131} 297 F. Supp. at 4.
\textsuperscript{132} 411 F.2d at 936.
\textsuperscript{133} Id. at 938.
\textsuperscript{134} Id. at 938–39.
\textsuperscript{135} 302 F. Supp. 560 (N.D. Cal.), aff'd sub nom. Carter v. United States, 417 F.2d 384 (9th Cir. 1969).
\textsuperscript{136} 302 F. Supp. at 564–65.
\textsuperscript{138} Id. at 449. The Ohio statute stated in pertinent part:
No person shall by word of mouth or writing, advocate or teach the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform; or print, publish, edit, issue, or knowingly circulate, sell, distribute, or publicly display any book, paper, document, or written matter in any form, containing or advocating, advising or teaching the doctrine that industrial or political reform should be brought about by crime, sabotage, violence, or unlawful methods of terrorism; or openly, wilfully, and deliberately justify, by word of mouth or writing, the commission or the attempt to commit crime, sabotage, violence, or unlawful methods of terrorism with intent to exemplify, spread or advocate the propriety of the doctrines of criminal syndicalism; or organize or help to organize or become a member of, or voluntarily assemble with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism.

\textsuperscript{139} 395 U.S. at 447–49.
to take a closer look at the Act, particularly its exclusion of advocacy of ideas in section 2101(b). The court rejected both the defense and prosecution interpretations of the Act and superimposed upon the subsection a caveat suggested by Brandenburg that advocacy of violence is illegal only where such advocacy produces or is likely to produce imminent lawlessness.

In United States v. Dellinger, a federal court was finally forced to give careful scrutiny to the constitutionality of the Anti-Riot Act, but only because the trial, involving the “Chicago Seven,” was given great public exposure and was generally regarded as a “political” trial. The Act, whose constitutionality was previously upheld in Foran, and even then almost in passing, now required 10 pages of explanation to justify the same conclusion. The Dellinger court initially found that the Act did relate to expression, reasoning that in the past riots have invariably occurred in relation to protests and “may well erupt out of an originally peaceful demonstration.” The dispositive “removal question” — whether the expressive conduct is so commingled with the constitutionally unprotected action that the expression is therefore carved away from the protection of the first amendment — was also answered in the affirmative, thus sustaining the constitutionality of the Act’s application. Finally, the court considered the problem of section 2102(b) — the phrase “not involving advocacy of any act or acts of violence or assertion of the rightness of, or the right to commit, any such act or acts” — without referring to the Shead solution of simply adding a “Brandenburg brake” onto this section. The Dellinger court assumed that Congress included the phrase in order to forestall those who earnestly intend to incite a riot from claiming that the speech in question was a mere academic exposition of the propriety of violence, positing that section 2102(b) was added only out of overcautiousness.

Judge Pell, dissenting in Dellinger, properly attacked the confusing nature of the Act. His view that the Anti-Riot Act is flawed in the most basic way — it is incomprehensible — is of more lasting value than the point-for-point refutation of the majority opinion which he also

140. 302 F. Supp. at 566.
141. Id. at 566-67.
142. 472 F.2d 340 (7th Cir. 1972).
143. Id. at 354-64.
144. Id. at 359.
145. Id. at 358, 359-62.
147. 472 F.2d at 363.
148. Judge Pell stated: "[T]he legislation as finally passed was something less than a model of draftmanship [as] illustrated by the disappearance of 18 U.S.C. § 2102(b)." Id. at 411. (Pell, J., dissenting).
offers. Although it is difficult, if not impossible, to bifurcate the doctrines of first amendment overbreadth and due process void-for-vagueness, judicial restraint would seem to compel a void-for-vagueness scrutiny before examining a statute on the basis of an established constitutional freedom. Consequently, an unanswered question appears to be whether the familiar constitutional standard — that a statute is vague when "men of common intelligence must necessarily guess at its meaning and differ as to its application," has become a mere form behind which the courts make legislative decisions. It is submitted therefore that there exists a substantial threat to political freedom where legislatures are permitted to enact ambiguously-worded statutes, and courts are given the opportunity to selectively enforce those statutes.

IV. CRIMINAL LAW THEORY AS A BRAKE ON LEGAL REPRESSION

A. The Idea of Legal Repression

The Act, it is submitted, falls into a category of laws which can be labeled as legal repression. It is further submitted, on the basis of the formal analysis of the Act, that one reason for such legal repression is the failure of legislators to adhere to traditional principles of criminal law. New criminal law theories pose political risks which threaten to destroy fundamental American values.

Professor Kirchheimer analyzed the types of treatment applied by established regimes to hostile groups, and "the various formulas and techniques for controlling . . . hostile minorities — whether small dissident groups or larger movements — as well as the motives guiding their [majority governments] respective policies." He suggested the paradoxical nature of legal repression when he stated:

Our subject is the repression of political group activities by regimes subscribing to the rule of law and at least professedly adverse to arbitrary suppression of political opponents. Espousing the supremacy of law does not automatically rule out discrimination and inequality of treatment; nor does acceptance of binding legal standards preclude arbitrariness, faithful companion of inequality. However, the emphasis here is on the legal character of the repressive system. Disquieting, perturbing questions are on all our minds. Can repression of political activity be legitimate? In

151. See notes 104-24 and accompanying text supra.
152. See notes 159-203 and accompanying text infra.
153. O. Kirchheimer, supra note 9, at 119.
depriving some individuals and associations of rights guaranteed to all, does it not deny the very essence of law? Is it not bound to sap the foundations of democratic government? On the other hand, is not legal repression, with appropriate safeguards, an acceptable price to pay to escape lawless suppression and arbitrary reprisals?\textsuperscript{154}

Since all criminal laws are inherently repressive, the legitimacy of political criminal laws depends upon the legitimacy of the value sought to be preserved\textsuperscript{155} and the legitimacy of the political system enforcing the laws. Several tests of the legitimacy of repression exist. First, there is a political test premised upon what might happen to the dominant political ideology at a given time. In the United States, political equality, even if unattained, is a vital ingredient in the general belief in our system of representative democracy. Joseph Mouledous has stated:

It is held that behavior can be judged to be politically legitimate or politically criminal by whether it is oriented toward making law an instrument serving one segment of society through the exclusion of others from the political community, or whether it is directed toward the creative reinterpretation and extension of law consistent with the presuppositions of political dignity and human equality.\textsuperscript{156}

Second, Professor Kirchheimer suggests a test based upon the objective and fair operation of the judicial system:

Repression cannot be legal unless there is a framework of substantive and procedural norms binding upon and serviceable to both the government and the governed, a single standard for the public prosecutor and those he hails into court. The state's efforts to penalize opponents must be subject to freely usable control by a third agency that does not take orders from the government, is committed to enforcing an established set of norms, and is exposed to a modicum of public criticism.\textsuperscript{157}

Related to the test suggested by Professor Kirchheimer are the two most basic tests for determining the legitimacy of repression: first, the Constitution looms as a formal standard by which the courts may measure legislation; and second, there is the principle of legality — the rule of law — representing the law's intrinsic morality and thus operating as a test at a more remote, more philosophical level.\textsuperscript{158}

\textsuperscript{154} Id. at 120.  
\textsuperscript{155} See J. Hall, supra note 4, at 215–17.  
\textsuperscript{156} Mouledous, supra note 14, at 219.  
\textsuperscript{157} O. Kirchheimer, supra note 9, at 120.  
\textsuperscript{158} See notes 105–14 and accompanying text supra.
B. Traditional Criminal Law Theory — A Restraint Upon Government Power

Political power manifests itself in a variety of ways and one of the most common is law. If abused, it is clear that the criminal law can be a dangerous weapon against personal liberty since penal policy is often closely connected to political policy. As Jerome Hall stated:

In democratic countries the political significance of criminal law had been almost forgotten when the impact of twentieth century dictatorship, with its unvaried immediate seizure of the punitive legal apparatus, revived a startled realization of the dependence of civil liberty on criminal law. By a sure and unconscionable instinct, the forces of repression cut straight to the heart of the traditional institution — the principle of legality.159

Thus legitimacy becomes as important a matter for criminal law as for other conduits of political power; there must be limits placed upon the power of government to control citizens by criminalization of behavior.

The need for a substantive theory of criminal law is ultimately political. Without a substantive theory, we would be left with the hollow shell of a “formal” or “positive” definition of crime. As one court has stated:

Criminal law connotes only the quality of such acts or omissions as are prohibited under appropriate penal provisions by authority of the State. The criminal quality of an act cannot be discovered by intuition; nor can it be discovered by reference to any standard but one: Is the act prohibited with penal consequences?160

This definition is tautological: crime is what the state outlaws, or whatever the state outlaws is crime. Although this answer may be sufficient for the lawyer or judge who must accept a criminal statute as at least the starting point, it is inadequate from a legislator’s viewpoint in determining what conduct ought to be criminalized. Without theoretical parameters we are all potentially at the mercy of the power of the state. This problem was eloquently stated by Professor Al Katz, a critic of traditional law theory:

There are no “natural” limitations on the uses of the criminal law. At best there are a few constitutional limitations, but beyond that the criminal law is bounded only by political possibilities. Of course there may exist within the inherited morality of the culture a certain sense of limitation, but it is hard to believe that this sense is either sufficiently strong or articulate to counteract

159. J. HALL, supra note 4, at 64.
intellectual knowledge of the absence of limits. In theory, then, any mode of behavior may be designated as criminal if such designation is backed by a sufficient political force. It is this political character of all criminal codes that allows for development and change as well as repression and rigidity.

... 

[The absence of inherent limits on the uses of the criminal law tends to breed the feeling that someday anyone's ordinary modes of behavior may be designated as criminal.]

Contrary to Professor Katz's belief, it is suggested that there are historical limits to the power of the state to criminalize behavior. They lie in the rule of law and other principles of criminal law. According to Jerome Hall, "In a very wide sense, the principle of legality — the 'rule of law' — refers to and requires not only a body of legal precepts but also supporting institutions, procedures, and values." It would appear that in a political system which is tolerant enough to allow real political dissent, prosecution of government officials, the operation of free trials, and constitutional limits on the gathering of evidence, the theoretical and substantive content of the criminal law makes a great difference in the amount and kind of control exercised by the government over the lives of its citizens. Therefore, since the content of criminal law is determined in part by the existence of criminal law theory, criminal law theory operates as an effective check upon state power.

As has been indicated, the principle of legality (or rule of law) is generally viewed as essential to the guarantee of personal liberties. Equally important is the requirement of mens rea and the concomitant opposition to strict liability offenses. The late Herbert Packer argued that the element of conduct is the primary blockade to state invasion into the private lives of its citizens. Jerome Hall, on the other hand, identified seven ultimate notions which form the basic principles of criminal law: 1) mens rea, 2) act (effort), 3) the concurrence (fusion) of mens rea and act, 4) harm, 5) causation, 6) punishment,


162. J. HALL, supra note 4, at 27 (footnote omitted).

163. See note 159 and accompanying text supra. Lon Fuller, in a strong essay in support of the principle of legality, claimed that "the internal morality of the law [the principle of legality] is not something added to, or imposed on, the power of law, but is an essential condition of that power itself." L. FULLER, supra note 106, at 155. But see G. WILLIAMS, CRIMINAL LAW, THE GENERAL PART 576 (2d ed. 1962).


These seven elements form a synergistic doctrinal web. A focus on one or another of these elements may depend upon which agency of government is most feared. For example, Professor Packer's emphasis on conduct appears to be connected with his concern about victimless crimes and unwarranted police activity with respect to social deviants. Those concerned with manifest totalitarianism would consider the notion of legality first, while those concerned with attempts to create social security through the device of strict liability may consider mens rea, and perhaps the element of harm, as the significant principles of criminal law. There does not appear to be a one-to-one correlation between a specific form of state encroachment upon liberty and an opposing specific principled argument. It is therefore not very useful to give serious thought as to which doctrine is prima intra pares in acting to delimit the power of the state.

C. Recent Attacks Upon Traditional Criminal Law Theory

Recently, two commentators have challenged traditional criminal law theory and have made suggestions that alternative theories would better serve the various purposes of the criminal law. Professor Katz, while seeking to limit that which would be considered criminal, actually extended the scope of criminal law by replacing traditional criminal law theory with a "radical reconstruction" based on dangerousness. He restated John Stuart Mill's philosophy by asserting that "dangerous conduct should be limited to that which presents a direct threat to the person or property of others." However, Professor Katz viewed dangerousness subjectively, as conduct which creates fear rather than merely anxiety. He stated, for example:

The concept of fear denotes an individual response to a threat which is proximate in time and space. Threats which are proximate in this sense are objectified by the perceiving individual, and fear is in general, the response. On the other hand, threats which are remote in time or space remain diffuse and conceptual; the threat gives rise only to anxiety.

One problem with Professor Katz' analysis is that there is no indication how individual subjective responses will be translated into
legislation. Will there be a national or state referendum on certain fear-producing properties, or will legislators decide when an act is fear-creating? It is submitted that the problem of what behavior should be subject to criminal sanction is not aided by this analysis.

Professor Katz also suggested that under a revised application of criminal law, treatment or imprisonment will be required only after a bifurcated trial to 1) decide whether the defendant committed (was "historically involved in") the crime ("datum-conduct") in question, and 2) determine "the sense in which and the extent to which the particular defendant is dangerous." However, Katz failed to explain how this will extricate criminal law from the practice of proscribing "anxiety-producing" behavior. Professor Katz' analysis was based upon an uneasiness with the fact that the state's power to criminalize conduct under traditional criminal law theory is inherently limitless, and thus, is politically dangerous. This discomfort leads him to attempt to create a verbal bulwark ("fear-anxiety") against the power of the state, based upon psychological principles. Yet, it is difficult to see why a penal code based upon psychological principles should any more limit the state's power than a traditional penal code. When faced with an unprincipled and dictatorial government intent of securing and furthering their political ideology, no words, however noble or clever, will stand in the path of its power.

One might reasonably sympathize with Professor Katz' fear of the possible consequences of the present formal definition of crime — what is bad is criminal and what is criminal is bad. However, to go one step further and assert that under traditional criminal theory any mode of behavior may be designated as criminal if such designation is backed by a sufficient political force (with the concomitant implication that this is the normal course of affairs) is a highly selective position which ignores two important limitations imposed by traditional criminal theories. First, the limitation which the formal legal processes impose upon political action is an important part of our political justice. As Professor Kirchheimer remarked:

Having denigrated political justice, we should now state its benefits: 1) Its alternative, political arbitrariness without benefit of access to courts, is appalling; 2) As long as political justice puts the stamp of official confirmation on the results of a prior defeat, it is neither more nor less painful than the defeat itself . . . 3) If used to produce new images rather than confirm previous political or military results, it is one of the more civilized political games.

171. Id. at 11.
172. See text accompanying note 161 supra.
173. O. KIRCHHEIMER, supra note 9, at 429-30.
Second, as has been stated, the doctrinal web of traditional criminal law theory acts internally and inherently as a check on political power. If it is followed by conscientious legislators, legislation will not avoid the principles of, inter alia, mens rea, actus reus, and concurrence. If laws are not compatible with these principles, they are open to attack: strict liability for lack of mens rea, the Anti-Riot Act for lack of concurrence, and various victimless crimes for lack of harm are some examples. Finally, in a criminal prosecution the prosecutor must prove these elements beyond a reasonable doubt. The relationship between the trial and the substantive criminal law is an inherent limit on the state — a limit which is lacking in the bifurcated trial suggested by Professor Katz.

A second attack on traditional criminal law theory was launched, through a series of articles, by Professor Henry W. Seney. He stated that "the categories of crime and their supporting theoretical bases are themselves a primary source of inequality." Professor Seney advocated the elimination of mens rea, its replacement with strict liability, and the removal of act and causation as a basis for criminal liability. Furthermore, he would dispense with all traditional rationales for punishment — retribution, special deterrence, general deterrence, rehabilitation — and accept the impulses of criminals as natural, and focus efforts upon providing more socially tolerable ways of using such impulses. Instead of penalties, "deprivors" would compensate "deprivees" for breaches of positive duties.

The crux of Professor Seney's attack seemed to focus upon the principle of harm. Here, a confusing analysis emerges. Seney inveighed heavily against the ethical content of the harm principle with the apparent feeling that the present moralistic content of criminal law is biased in favor of dominant interest groups. His tone is flavored

174. This, of course, is not always the case. See notes 76-124 and accompanying text supra.
175. See, e.g., J. Hall, supra note 4, at 3, 342-51; Hart, supra note 164, at 422-36.
176. See, e.g., J. Kaplan, supra note 91.
178. Seney, Moral Obsolescence, supra note 177, at 793.
179. Id. at 810-23.
180. Id. at 824-31.
181. Id. at 831-44.
182. Id.
183. Id. at 844-53.
184. Criminal law would be replaced by controlling "those institutions, groups and individuals with strategically placed power to affect the major factors contributing to any identified harm. . . ." Id. at 821.
by anger, even bitterness, at the ruling classes, whom he feels unfairly avoid the consequences of the harm which they cause others. He would move theories of crime and tort closer together and perhaps even merge these two categories.\textsuperscript{188}

However, Professor Seney did state some interesting points which do not conflict with this article's thesis. First, his main thrust is that the state, through its criminal law, should be concerned with harm, and not with danger or dangerousness.\textsuperscript{186} This suggestion certainly corresponds to the view of all critics of so-called victimless crimes and the libertarian views of political crimes. Second, Professor Seney's work is valuable in detailing the ways in which the Model Penal Code (as representative of criminal law generally) extends harm to include danger and dangerousness and excludes harms perpetrated by or in the name of powerful interest groups.\textsuperscript{187}

Finally, it should be pointed out that it is not at all clear that Professor Seney sees political liberty as a desideratum. Unlike Professor Katz,\textsuperscript{188} or Jerome Hall,\textsuperscript{189} Seney gave no indication that near-totalitarian state controls are inherently evil. While his position regarding the harm concept does not lead to this conclusion, his support of strict liability\textsuperscript{180} and his views favoring large scale social engineering over individual punishments\textsuperscript{191} suggests disagreement with the Katz and Hall stance. If so, then the focus of this article, on the dangerous expansion of political crimes, will be of no concern to Professor Seney. However, if he does fear laws such as the Anti-Riot Act, then it is suggested that the most effective method to preserve libertarian values is by strengthening the principles of traditional criminal law.

D. Deviance, Values, and the Uses of Criminal Law Theory

The focus of this article is not on unbridled police activity, unprincipled judges, or on an executive whose devotion to the rule of law is questionable,\textsuperscript{192} but rather it concerns itself with a particularly questionable legislative product, the Anti-Riot Act. The legislative role
in the definition of crime is intertwined with the other branches of government, and therefore quite complex results sometimes occur. Legislative formulations of crime are directed not only to the actions of citizens but also to courts, prosecutors, and administrators as notice of the extent of their discretion. However, the legislature has, or should have, a pre-eminent, or at the very least, a prior role in the definition of crime.193 Although it is impossible for a legislature to define crimes beyond all ambiguity,194 a legislature cannot justify such an ambiguous and overly complex criminal statute as embodied in the Anti-Riot Act.

Lawmaking bodies face a difficult task in formulating a substantive definition of crime.195 In viewing the legislative process, the issues of criminal legislation appear technical; however, when a legislature considers whether or not to decriminalize abortion or consenting homosexuality, or to outlaw the Communist Party, questions of the most fundamental type arise. What kind of society are we trying to build and maintain? Where do we draw the line between freedom and security? The traditional criminal law approach is to answer such questions on the basis of the principle of harm. As Jerome Hall explained:

It is the relation of harm to criminal conduct, i.e., to conduct expressing a mens rea, that merits particular attention. Since the principle of mens rea has ethical significance, the plain inference is that the end sought or hazarded is a harm, a social disvalue.196

It is readily apparent that it is not enough for a legislature to criminalize all social dysfunctions, but only those which are sufficiently significant to require the expenditure of scarce resources — money and manpower — to control the harmful behavior.197 This latter consideration is where substantive criminal law and basic morality diverge. The harm principle in criminal law theory has broader connotations than mere physical injury... As Jerome Hall stated: "Penal harm, accordingly has certain normative-empirical references. It is a complex of fact, valuation and interpersonal relations — not an observable thing or effect, as is sometimes assumed."198

Harm can also be viewed in terms of "deviation from public attitudes."199 In recent years the concept of deviance has attracted wide

193. See id. at 73.
195. "Law is the enterprise of subjecting human conduct to the governance of rules." L. FULLER, supra note 106, at 106.
196. See J. HALL, supra note 4, at 213–14.
198. Id. at supra note 4, at 217.
199. Id. at 214.
attention in the literature of criminology and the conclusions of sociologists who have examined the problem of deviance have important implications for this article. As Kai Erikson stated:

There are no objective properties which all deviant acts can be said to share in common — even within the confines of a given group. Deviance is not a property inherent in any particular kind of behavior; it is a property conferred upon that behavior by the people who come into direct or indirect contact with it. The only way an observer can tell whether or not a given style of behavior is deviant, then, is to learn something about the standards of the audience which responds to it.

For criminologists, the deviance concept is superior to the harm concept in that it lends itself to measurement and mathematical manipulation. However, the spreading realization that certain groups are subjected to the criminal laws merely because they are politically or ideologically deviant has brought an attack upon lawmakers — a phenomenon prompted by the widely held belief that deviance and criminal harm are indeed separate considerations. If we focus on political crime, we can show the important similarities and differences between the harm principle and the deviance principle. Focusing on political groups, the question becomes: which political groups, if any, should be subject to sanctions of criminal law? Employing a scientific deviance theory approach, the problem can be more efficiently analyzed from hindsight. Those groups which have been sanctioned can be examined; the process of their being sanctioned, the actions of the political entrepreneurs who led the process, and the social reaction and effect of the process can be explained. Moving one step closer to the legislative process, the congruence or incongruence between stated political ideals and legislation can be demonstrated. Following this technique of reasoning, the murder of Communist Party officials by a fascist state, or vice versa, is logical, although such action by a nation professing libertarian toleration would appear to be discordant.

From the foregoing, it becomes apparent that a criminal law theory which gives no consideration to value content can more easily facilitate any result desired by lawmakers than one which contains a heritage of social and political values. The deviance theory is a useful

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201. K. Ericson, supra note 200, at 5–6 (emphasis in original).

scientific theory in that it stimulates research hypotheses which lend themselves to proof or disproof, allows measurement, and provides a unifying explanation of diverse facts.\textsuperscript{203} It also serves the nonscientific, but socially useful, task of pointing out the incongruity between traditional American political and social ideals of tolerance, and certain highly intolerant conduct on the part of legislatures. As with all scientific theories, neither ethics nor ideals are an inherent part of the deviance theory. Yet, although the theory has ethical implications, this is due to the fact that social scientists have at times made these implications clear. In short, the lack of intrinsic ethical content makes the deviance theory a poor criminal law theory because one purpose of criminal law theory — to provide limits on criminalization — is not an inherent factor.

V. CONCLUSIONS AND SUGGESTIONS

The Anti-Riot Act is a questionable statute because its latent political purpose is overshadowed by its more highly visible public-order goal.\textsuperscript{204} In order for this result to obtain the Act must necessarily be unclear and violate the rule of law. The legislative history of the Act shows that its proponents intended it to function as a treason and sedition law.\textsuperscript{205} However, the Constitution and the political history of the United States manifest the impropriety of using the criminal law as an instrument to inhibit political dissent or to destroy political factions.\textsuperscript{206}

Congress should reaffirm its adherence to basic legal values by repealing the Anti-Riot Act.\textsuperscript{207} In the future, proposed criminal legislation should be scrutinized for violations of the rule of law. In this regard, legislative draftsmen have a responsibility to assure that criminal laws are not excessively ambiguous or complex.\textsuperscript{208} This is more

\textsuperscript{203.} Id. at 35-44.
\textsuperscript{204.} As Lon Fuller stated:

But a recognition that the internal morality of law [i.e., rule of law] may support and give efficacy to a wide variety of substantive aims should not mislead us into believing that any substantive aim may be adopted without compromise of legality. L. FULLER, supra note 106, at 153 (emphasis in original). \textit{See also} J. HALL, supra note 4, at 64-69, for examples of correlations between the rule of law and political repression.

\textsuperscript{205.} \textit{See} notes 76-103 and accompanying text \textit{supra}.

\textsuperscript{206.} \textit{See} notes 15-66 and accompanying text \textit{supra}.


\textsuperscript{208.} See, e.g., \textit{Dickenson, Professionalizing Legislative Drafting: A Realistic Goal?}, 60 A.B.A.J. 562, 563-64 (1974).
than a technical consideration since confusing acts may also disguise improper substantive aims, as is the case with the Anti-Riot Act.

Admittedly, appeals to a legislative sense of justice and jurisprudential acumen will be of limited efficacy in times of perceived danger, as proven by ancient and recent history. Thus, as a check on the legislature, it is recommended that courts adopt adjudicative tools in order to prevent a reoccurrence of a statute like the Anti-Riot Act. It is submitted that appellate courts should utilize the due process void-for-vagueness doctrine in a narrow, restrictive way to insure that legislation is understandable. This approach would not directly prevent "legal repression" but would make such results more difficult because the aims of such legislation would necessarily be more apparent.

Thus, the characterization of the Anti-Riot Act as an obscure provision should be grounds for a declaration of unconstitutionality and not merely a descriptive gloss. In taking such a step the courts would merely be performing a basic judicial function of insuring that current legal rules adhere to the rules of the game — the basic presuppositions of our legal system — without which a truly legal order would be impossible.

The above analysis has criminological significance. First, it supports the current acknowledgment of criminologists that in defining crime, "[t]he socially endorsed stipulations of the criminal codes are vital." Second, it reinforces the insight of criminologists that between the category of clearly known political crimes such as treason and most other crimes, which are nominally political only in that they are ordinary manifestations of state power, there is a hybrid category

209. See notes 22-23 and accompanying text supra.
211. Furthermore, such an approach would get the courts out of dilemma of having to uphold such laws or appear to act as a superlegislature in striking them down. Indeed, one of the thorniest problems of recent American constitutional law has been the reappearance of "substantive due process" in other guises. See A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS (1970); Comment, Legislative Purpose, Rationality and Equal Protection, 82 YALE L.J. 123 (1972); Note, The Decline and Fall of the New Equal Protection: A Polemical Approach, 58 VA. L. REV. 1489 (1972).
214. Most commentators on political crimes maintain this reasonable distinction and refuse to categorize all crime as political crime merely because "it is characterized by politicality." Compare Clinard & Quinney, supra note 1, at 177, with Schafer,
of "ordinary" crimes used for political purposes.\textsuperscript{215} It also reinforces a currently popular proposition that crime and political crime may be attributed to governments as well as to citizens.\textsuperscript{216}

Finally, to return to the question of the meaning of political crime, criminologists must be sensitive to current trends in legislation, possible motives not apparent from the express wording of statutes, and the impact that legislation has on criminological categories.\textsuperscript{217} In an attempt to deny political opponents the psychological benefits of claiming "political prisoner" status, legislatures have tried to obliterate the distinction between ordinary and political crime. It is submitted that this was the covert purpose of the Anti-Riot Act.\textsuperscript{218} Criminologists should accept the legal definition of crime as part of their concerns, but they also must remain vigilant since the fluid nature of legislative definitions can be designed to subvert traditional categories. In such cases the task of criminologists should be to describe the process, note the effect that legislation has on the behavior of officials and on potential lawbreakers, and last but not least, note any incongruities between established values and the values underlying the changes. Such activity does not require the criminologist to accept either the old or the new value system. It does require him to acknowledge the fact that law, and therefore crime, is a phenomenon involving social and private values.

While criminologists have come to accept the established parameters of our legal system, some legal scholars have sought radical revisions of the basic premises of criminal law.\textsuperscript{219} This desire to modify substantive criminal law was based not on a desire for scholastic tidiness but on certain hoped-for consequences. Traditional criminal law theory, developed over a long period by the common law of crimes and expounded on by scholars such as Jerome Hall, is intertwined with a system of liberal democracy. Its internal restraints are best suited to control the overtly political excesses on the part of legislative and

\textsuperscript{supra} note 1, at 381. For an attempt to categorize various types of political trials, see POLITICAL TRIALS (T. Becker ed. 1971).

\textsuperscript{215} See Mouledous, supra note 14, at 220–22.

\textsuperscript{216} See J. Lieberman, supra note 108, at 20–24.

\textsuperscript{217} For good examples of studies along these lines, see, e.g., H. Becker, supra note 200; J. Kaplan, supra note 91; Mouledous, supra note 14.

\textsuperscript{218} Alexander Solzhenitsyn made the same point concerning the Soviet Criminal Code of 1926:

Article 58 was not in that division of the Code dealing with political crimes; and nowhere was it categorized as "political." No. It was included, with crimes against public order and organized gangsterism, in a division of "crimes against the state." Thus the Criminal Code starts off by refusing to recognize anyone under its jurisdiction as a political offender. All are simply criminals.

\textsuperscript{A. Solzhenitsyn, The Gulag Archipelago 1918–1956: An Experiment in Literary Investigation 60 (1973).}

\textsuperscript{219} See text accompanying notes 159–67 supra.
executive branches of government. It is submitted that substitution of traditional criminal law theory with radical revisions based on social science concepts will have harmful consequences to a system of liberal democracy.

Criminal law is a product infused with human values and goals. Any theory which fails to account for those values in a dynamic way, and not merely as an external given, loses its proscriptive utility. Unlike so-called "laws of nature," whose formulation can have no direct effect on the physical world, a theory of law can have great impact on legislators. Criminal law theory, of course, can be used to support demogogic legislation. But to do so, the demagogue must overcome arguments concerning the rule of law and its corollaries such as the rules against vagueness or ex post facto laws, the requirement of mens rea, conduct, harm, etc.

In a sound political system, other safeguards to liberty exist, such as a system of libertarian constitutional principles, a vigilant bench and bar, a morally aware citizenry, and a free press. Criminal law theory is only one bulwark of civil liberty and perhaps not the most important. Yet, as one part of the arsenal of liberty, it should neither be quickly disparaged nor subject to broadside attack without the soundest of reasons.