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THE PATRIOT MOVEMENT: REFRESHING THE TREE OF LIBERTY WITH FERTILIZER BOMBS AND THE BLOOD OF MARTYRS¹

Even [political turbulence] is productive of good. It prevents the degeneracy of government, and nourishes a general attention to the public affairs. I hold it that a little rebellion now and then is a good thing, and as necessary in the political world as storms in the physical.—Thomas Jefferson²

I. INTRODUCTION

A group of angry citizens, most calling themselves militiamen, demand to be freed from oppressive federal taxes and regulation. Out of frustration, they decide to take up arms against agents of the federal government. Believing that they are victims of an oppressive government that does not represent them or their concerns, the militiamen disrupt local government activities by engaging in vigilante justice, even going to the extreme measures of taking over the local courthouse to mock the judicial system.³

This scenario has occurred many times in American history. The year could be 1770 and the disturbance could be caused by the Regulator movement of colonial North Carolina;⁴ or the year could be 1786-1787 and the uprising could be Shays' Rebellion, a minor insurrection in early America under the

1. Title is adapted from a quote by Thomas Jefferson: "What signify a few lives in a century or two? The tree of liberty must be refreshed from time to time with the blood of patriots and tyrants. It is its natural manure." Letter from Thomas Jefferson to Col. William S. Smith (Nov. 13, 1787), in MARGARET MINER & HUGH RAWSON, *AMERICAN HERITAGE DICTIONARY OF AMERICAN QUOTATIONS* 434 (1997); MERRILL D. PETERSON, *THOMAS JEFFERSON: WRITINGS* 910-12 (1984); *THE COLUMBIA DICTIONARY OF QUOTATIONS* 397 (2d ed. 1995). Jefferson was referring to Daniel Shays' rebellion of poor farmers in Massachusetts. *Id.* Writing from Paris, Jefferson was the only American leader not alarmed by news of the revolt. *Id.*

2. Letter from Thomas Jefferson to James Madison (Jan. 30, 1787), in 11 *THE PAPERS OF THOMAS JEFFERSON* 92, 93 (J. Boyd ed. 1955); MINER & RAWSON, *supra* note 1, at 433. Jefferson was referring to Shays' Rebellion. *Id.* Jefferson went on to say that "unsuccessful rebellions . . . establish the encroachments on the rights of the people . . . which have produced them. An observation of this truth should render honest republican governors so mild in their punishment of rebellions, as not to discourage them too much. It is a medicine necessary for the sound health of government." PETERSON, *supra* note 1, at 882.

3. Vignette adapted from Jim Lynch, *Angry Patriots Inland Northwest Emerges as Home to a Growing Anti-Government Movement*, *THE SPOKESMAN REV.*, Dec. 3, 1995, at H1.

4. *THE REGULATORS IN NORTH CAROLINA: A DOCUMENTARY HISTORY, 1759-1776*, at xxi (William S. Powell et al. comp. & ed., 1971) [hereinafter *THE REGULATORS*].

Articles of Confederation;⁵ or, possibly, the year could be 1794 and the illustration could describe the Whiskey Rebellion shortly after the ratification of the United States Constitution.⁶ However, the vignette is not describing any of these important events in American history. Rather, the year is 1996, and the vignette describes the events surrounding the "Freemen" standoff against federal agents in Montana.⁷

A "Patriot" movement,⁸ similar to the one found in Montana, is spreading like wildfire across the plains of America.⁹ This Note addresses this movement, discusses the specific problems the movement is generating, and proposes a legislative response to these problems. Law enforcement agencies at the local, state, and federal levels are struggling to understand the Patriot movement and to develop effective solutions to the problems it causes.¹⁰ In the opinion of Ohio Chief Justice Thomas Moyer, the Patriot movement is the greatest threat to the federal government since the Civil War.¹¹ Alma Wilson, Chief Justice of the Oklahoma Supreme Court, characterized the Patriot

5. AMERICAN HERITAGE, *THE AMERICAN HERITAGE HISTORY OF THE MAKING OF THE NATION 1783-1860*, at 28 (1968) [hereinafter AMERICAN HERITAGE, HISTORY].

6. *Id.* at 52-53; LELAND D. BALDWIN, *WHISKEY REBELS: THE STORY OF A FRONTIER UPRISING* (1939).

7. Wynn Miller, *Right-Wing Militants Mix Political Fantasy, Violence*, CHRISTIAN SCI. MONITOR, Apr. 26, 1995, at 19. On March 3, 1995, four armed men attempted to enter the Musselshell, Montana county courthouse. *Id.* The men were attempting to file papers protesting the seizure of Freemen leader Rodney Skurdal's house by the Internal Revenue Service. *Id.* On January 27, 1994, 36 Freemen entered the Garfield County Courthouse in Montana. *Nature and Threat of Anti-Government Groups in America, Hearing of the Subcomm. on Crime of the Comm. on the Judiciary*, 104th Cong. 150 (1995) (statement of Nickolas C. Murnion, Garfield County Attorney, Jordan, Montana) [hereinafter *Militia Hearing*]. The Freemen took over the Garfield County Courthouse for about one hour and tried to set up the "Supreme Court of Garfield County Comitatus." *Id.* The "common law court" set up by the Freemen issued writs of attachment against lawyers and judges that were involved in one of the Freemen's divorce proceedings. *Id.*

8. The Patriot movement is not easily defined. SOUTHERN POVERTY LAW CENTER, *FALSE PATRIOTS 4* (1996) [hereinafter FALSE PATRIOTS]. The Patriot movement may generally be defined as a collection of groups and individuals who harbor deep mistrust in the government and who are willing to resort to extra-legal activities to manifest that mistrust. *Id.*

9. Michelle Cole, "Courts of Justice" *Spring up Across State*, IDAHO STATESMAN, Dec. 15, 1995, at 1A. In Idaho, common law courts have been set up and members of the Patriot movement have filed liens against public officials. *Id.* Participants declare themselves to be American nationals who are beyond the jurisdiction of the traditional court system. *Id.*

10. *Militia Hearing*, *supra* note 7, at 2 (statement of Rep. Bill McCollum (R-FL)). Rep. McCollum states that militias are a topic for federal discussion because some federal laws are being broken, federal employees are being threatened, and certain types of theft are under federal jurisdiction. *Id.* Also, state and local law enforcement lacks the resources to address a violent Patriot group that has purposely located itself in a rural area because law enforcement is minimal. *Id.*

11. Peter Larsen & Teri Sforza, *Common-Law Believers Go Their Own Way*, ORANGE COUNTY REGISTER, May 18, 1996, at A1.

movement as a “very important challenge” to the state’s legal system.¹² The Patriot movement is allegedly tied to horrifying acts of domestic terrorism such as the bombing of the Alfred P. Murrah Federal Building in Oklahoma City, Oklahoma.¹³ Patriot activities have touched off a firestorm of debate in state legislatures, and Congress has held hearings on the Patriot movement to discuss possible solutions.¹⁴ Public officials such as county recorders, judges, prosecutors, police, and employees of federal agencies have been harassed, intimidated, beaten, and even gunned down by members of the Patriot movement.¹⁵ Patriots have called for revolution against the federal government, and it has become painfully clear that the Patriot movement cannot be ignored.¹⁶ All state governments, as well as the federal government, must take heed of the brewing anti-government sentiment in American society and implement effective solutions.¹⁷

12. *Vigilante Court Condemned*, TULSA WORLD, July 19, 1996, at A12. Wilson stated that people who want change must work within the system and not thrust themselves into an illegitimate legal system. *Id.*

13. FALSE PATRIOTS, *supra* note 8, at 3. Militia of Montana spokesman Bob Fletcher warned the government to “expect more bombs” after the Oklahoma City bombing. *Id.* Timothy McVeigh and Terry Nichols are the lead suspects in the Oklahoma city bombing. *Id.* at 22. Reports indicate that the two suspects had significant ties to Patriot groups. *Id.*

14. *Militia Hearing*, *supra* note 7, at 1; Thomas Edwards, *State Works to Counter Republic of Texas Actions*, SAN ANTONIO EXPRESS-NEWS, Sept. 3, 1996, at 1A. Texas is drafting legislation that would make it a criminal violation to file a false lien. *Id.* Missouri and Illinois have passed laws and are enforcing them, making it a crime to simulate legal process. *Putting a Stop to Phony Liens*, ST. LOUIS POST-DISPATCH, June 7, 1996, at 6B. Missouri has taken an aggressive stance in the government fight against common law activists. Judy L. Thomas, *Hard-Line Approach Used on Extremists: Common-Law Lien Becomes Felony for 15 of “Missouri 20,”* KANSAS CITY STAR, Aug. 18, 1997, at A1. Missouri Attorney General Jay Nixon has declared “war” on common law groups, and Missouri has made the offense of tampering with a judicial official a Class C Felony. *Id.*

15. FALSE PATRIOTS, *supra* note 8, at 27. In 1994, a sniper shot a Missouri state trooper after the officer participated in an arrest of area Patriots. *Id.* Karen Mathews, a court recorder from California, refused to file bogus legal documents and was pistol-whipped by local Patriots in 1994. *Id.* Bureau of Land Management agents have stopped enforcing some laws because they are afraid that they will be gunned down. *Id.* In Burns, Oregon, some local businesses display signs that read, “This establishment doesn’t serve federal employees.” *Id.* Montana Attorney General Joe Mazurek has received threats saying that his agents will be sent home in body bags if they do not begin to listen to the people. *Id.* Martha Bethel, a city judge in Hamilton, Montana, has received death threats from local Patriots. *Id.*

16. Rob Eure, *Would-Be Patriots Make Own Law in Oregon*, PORTLAND OREGONIAN, Apr. 8, 1996, at A1. Gary Raymond Harvey openly admits that he is “a revolutionary.” *Id.* Gladys Pearl Grant, a Patriot, believes that submitting to government licenses is the equivalent to submitting to government oppression. *Id.* Accordingly, she has declared herself to be a Sovereign American National. *Id.*

17. FALSE PATRIOTS, *supra* note 8, at 42-43.

Patriot groups meet in bingo parlors, local restaurants, churches, and living rooms across the country.¹⁸ For the participants, Patriot groups are a way to act out dreams of legal revolution.¹⁹ Patriots believe in social contract theory,²⁰ popular sovereignty,²¹ an individual's right to bear arms, the right to revolt, and strict interpretation of the Constitution.²² The movement

18. Eure, *supra* note 16, at A1. The Freeman's Supreme Court of Wasco County Oregon meets in the Culver, Oregon Fire Hall. *Id.* The group meets at the same place as the Lions Club and acts on grievances they have against the government. *Id.* They argue that the United States exists in the District of Columbia and U.S. Territories such as Guam and Puerto Rico because the IRS does not include any other geographical references in its definition of United States and U.S. citizens. *Id.*

19. Stephen Braun, *Their Own Kind of Justice; The Common Law Movement's Rogue Courts Let Those Alienated by America's Legal System Play Judge and Jury for a Night. Radical Members Use the Sessions to Torment the Government*, L.A. TIMES, Sept. 5, 1995, at A1. The Common Law court of Ohio, Our One Supreme Court, meets in a bingo parlor in Columbus, Ohio. *Id.* Disgruntled citizens come to the common law court to declare themselves sovereigns and rescind their relationship with the federal government. *Id.* Michael Hill was chief justice of the common law court. *Id.* He was killed by a police officer in 1995 when he was pulled over for a routine traffic stop. *Id.* Since then, he has become a martyr for the Ohio common law court as well as for the entire Patriot movement. See T.C. Brown, *Martyr for the Cause*, PLAIN DEALER, June 23, 1996, at 6.

20. Black's Law Dictionary provides a useful definition of social contract:

SOCIAL CONTRACT, OR COMPACT: In political philosophy, a term applied to the theory of the origin of society associated chiefly with the names of Hobbes, Locke and Rousseau, though it can be traced back to the Greek Sophists. Rousseau (Contract Social) held that in pre-social state man was unwarlike and timid. Laws resulted from the combination of men who agreed, for mutual protection, to surrender individual freedom of action. Government must therefore rest on the consent of the governed.

BLACK'S LAW DICTIONARY 1561 (4th ed. 1951) [hereinafter BLACK'S]; See also JOHN LOCKE, TWO TREATISES OF GOVERNMENT (Peter Laslett ed., Cambridge Univ. Press 1988) (1698); SIR ERNEST BARKER, SOCIAL CONTRACT: ESSAYS BY LOCKE, HUME, AND ROUSSEAU (1966).

21. Popular sovereignty is the combination of two terms. BLACK'S, *supra* note 20. Popular refers to the "multitude." *Id.* at 1322. Black's Law Dictionary defines sovereignty as:

The supreme, absolute, and uncontrollable power by which any independent state is governed; supreme political authority; paramount control of the constitution and frame of government and its administration; the self-sufficient source of political power, from which all specific political powers are derived; the international independence of a state, combined with the right and power of regulating its internal affairs without foreign dictation; also a political society, or state, which is sovereign and independent.

Id. at 1568. Sovereign is defined as "[a] person, body, or state in which independent and supreme authority is vested." *Id.*

Patriot groups recognize varying definitions of sovereignty. Their definition is strongly individual in nature because they believe that every person is a sovereign being. Larsen & Sforza, *supra* note 11, at A1. Common law activist Marvin Robey declares that "[e]very man is a free man, basically, under the common law . . . He is a King." *Id.* Patriots also believe that people may form collective bodies or groups and use their sovereign power in that capacity. *Id.*

22. Thomas Heath & Connie Leslie, *A Law of Their Own*, NEWSWEEK, Sept. 25, 1995, at 75. The movement also incorporates the Bible and Magna Carta into their bizarre interpretations of history and the law. *Id.* Patriot leaders contend that the depression era "bank holiday" edict of 1933, which temporarily shut down the nation's banks, robbed the country of protection from

includes a diverse group of people such as white supremacists, anti-semites, African-Americans, farmers, teachers, chemists, policemen, and state legislators.²³ Whether called “freemen” or “sovereigns,” they are all members of the Patriot movement.²⁴

Common law courts²⁵ are only an important aspect of the Patriot movement.²⁶ These vigilante courts use many tactics to make their presence known and to attempt to disrupt the traditional legal system.²⁷ These tactics

tyranny. *Id.*

23. Susan Brynes, *Local Bomb Suspects Had Shared Ideas—United by a Deep Mistrust of Government, Their Paths Crossed at Potlucks, Meetings*, THE SEATTLE TIMES, Aug. 2, 1996, at A1. A group in Washington consisted of a house painter, a mason, two Boeing workers, an unemployed mechanic, an unemployed businessman, a handyman, and a religious teacher. *Id.* The group was arrested and charged with a bomb making plot after meeting regularly to discuss how to make pipe bombs. *Id.* While most Patriot groups consist of white people, a North Carolina group of Freemen are black. Staff, *Militias, Fringe Groups Not Just for Whites*, THE HERALD, Aug. 4, 1996, at 4B. The African American Freemen operate out of a downtown Kinston, N.C. storefront where it is posted: “PUBLIC NOTICE. Our One Supreme Court Common Law Venue meets here. Public Invited.” *Id.* California state Sen. Don Rogers has been tied to the Patriot movement. Ed Mendel, *Tax Ploy Colors Opinions of Lawmaker Rogers Has Defenders Despite Far-Right Move*, SAN DIEGO UNION-TRIB., Apr. 21, 1996, at A-1. Rogers used court documents to avoid paying taxes. *Id.* In the documents, Rogers claimed to have “white man’s citizenship.” *Id.* Rogers also attempted to file common law liens against the property of two IRS agents in an attempt to avoid paying \$147,000 in back taxes, penalties and interest. *Id.* Indianapolis policeman James Heath is the leader of the Johnson County, Indiana Militia. ANTI-DEFAMATION LEAGUE, ADL SPECIAL REPORT: THE MILITIA MOVEMENT IN AMERICA (1995).

24. Susan Hansen, *A Rule of Their Own*, AMER. LAWYER, May, 1996, at 52. The United Sovereigns of America conduct seminars on how to set up a common law court. *Id.* at 53. At their “Common Law & You Seminar & School,” they claim that the gold seals in federal courtrooms depict Egyptian vultures instead of American bald eagles. *Id.* Also, Patriots contend that the roadway in Washington, D.C., that surrounds the White House, the Congress, and the Supreme Court is shaped like the devil’s skull. *Id.*

25. A common law court is a group of Patriots who meet regularly to conduct themselves in a manner that attempts to mimic and mock the traditional legal system. FALSE PATRIOTS, *supra* note 8, at 69. Common law is “a renegade ‘legal system’ comprised of selected Biblical passages, the Magna Carta, the Articles of Confederation, the Bill of Rights, and obscure legal citations.” *Id.* The participants believe in the legitimacy of their activities and use the activity as a political statement. *Id.*

26. *Id.* at 28. The Iowa attorney general’s office receives correspondence from a common law court at least once per week. Staff, “Common-law” Courts, DES MOINES REG., Sept. 5, 1995, at 10. Common law court activities often lead to vigilante justice. *Id.*

27. T.C. Brown, *Justice, Militia Style: In Common-Law Courts, Outlaw Juries Mete out “Soft Terror” and the Government Is Always Guilty*, PLAYBOY, Sept. 1, 1996, at 62. James George, an Ohio common law activist, filed liens against Ohio Supreme Court Justice Thomas Moyer and U.S. District Judge John Holschuh. *Id.* The \$100 million liens were drafted as an attempt to ruin the public officials’ credit after George failed to pay taxes and had tax liens filed against his property. *Id.*

are collectively known as "paper terrorism."²⁸ Typically, common law court members issue judgments against people and file liens against property in an attempt to enforce the judgments. Sometimes, these bogus liens are little more than a nuisance.²⁹ Other times, the liens wreak havoc on their victims by clouding title to property, and it is often expensive to have these bogus liens removed.³⁰ Members of the Patriot movement also set up shadow governments³¹ with their own officers and officials as a form of revolt against the federal government.³² For example, the freemen of Montana formed "Justus Township" and appointed their own "public" officials.³³ Patriots who attempt to print their own currency and pass bogus checks³⁴ feel that their own

28. Katherine M. Skiba, *Extremists Take up the Gavel: Common-Law Courts Issue Subpoenas, Liens and Threats, Officials Say*, MILWAUKEE J. SENTINEL, Oct. 29, 1995, at 1. Paper terrorism refers to the multitude of illegitimate documents that Patriots file with courts and attempt to pass off as legitimate. *Id.*

29. *Id.*

30. Thomas Watts, *Common Law Courts on Rise Malcontents Naming Their Own Judges*, SUNDAY GAZETTE MAIL, May 5, 1996, at 11A. The A.H. Belo Corp. had to spend six months and \$12,500 in legal fees to have a \$1 billion lien removed that had been processed through the Common Law Court of Pleas in Arlington, Texas. *Id.* In Noble County, Indiana, Dennis Fahlsing filed a \$7 million lien against county officials after refusing to obtain a building permit. David DeCamp, *Common-Law Lien Rejected by Judge*, THE JOURNAL GAZETTE, Feb. 25, 1997, at 1C. Even though the lien was completely without merit and took a short time to remove, it still required \$5,648 in legal fees. *Id.* In Texas, Rusty Wofford was forced to spend over \$100,000 to defend land that has been in her family for four generations. Mark Potok, *Texas Fighting a "Paper Terrorism"*, USA TODAY, Feb. 21, 1997, at 3A. After common law activists targeted her property for paper terrorism, it required a thirteen year court battle to have the liens removed. *Id.*

31. A shadow government is a separate government set up by a revolutionary faction in order to overthrow the federal government. A shadow government may also be a government that lacks official status. The Republic of Texas has set up their own government complete with an embassy and ambassadors. Potok, *supra* note 30, at 11A. The group claims that Texas is a captive nation that was annexed illegally in 1845 after ten years as the independent Republic of Texas. *Id.* Officials of the self proclaimed Republic of Texas are attempting to collect \$93 trillion in war reparations from the federal government. *Id.* On May 3, 1997, the Republic of Texas ended a week-long standoff with federal, state, and local officials. Sue Anne Pressley, *Peaceful End Achieved in Texas Siege: Group Relinquished Weapons, Two Flee*, WASH. POST, May 4, 1997 at A1. Criminal charges are pending against the Republic of Texas members involved in the May 1997 standoff. *Id.* However, the Republic of Texas has continued to remain active. Staff, *Republic Members Arrested*, AUSTIN AMERICAN-STATSMAN, Aug. 30, 1997, at B15. Two Republic of Texas members were arrested in late August of 1997 when they attempted to serve summonses of a common law court, called "civil federal summonses." *Id.*

32. Potok, *supra* note 30, at 11A.

33. Lynch, *supra* note 3, at H1. The Freemen picked their own judge and, in October 1995, seized \$67,000 worth of camera equipment from an ABC News crew at gunpoint. *Id.*

34. Rogers Worthington, *Message of Anti-Government "Freemen": Don't Tread on Us Holed up in Log Cabin, Tax Protestors Issue Own Money, Intimidate Officials*, CHI. TRIB., Sept. 17, 1995, at A2. Tom Klock, the mayor of Cascade, Montana, tried to deposit \$20 million worth of Freemen money orders into the town's bank account. *Id.* The action indicates that the mayor may have been involved in the scheme. *Id.* Klock said that "it would have been nice if the town of Cascade got the interest off \$20 million." *Id.*

government is legitimate and that they can back their currency by their own faith and credit in the same manner as does the United States government.³⁵

In addition to the "paper terrorism" tactics of the common law courts, a second and more violent aspect of the broad Patriot movement involves the citizen militias³⁶ that have been formed in recent years.³⁷ While many of these militia groups act independent of common law courts,³⁸ many others act in concert with common law court groups and have emerged as the enforcement arm of this vigilante judicial system.³⁹ Reports indicate that more than 800 active Patriot groups operate in all fifty states.⁴⁰ Alarming, militia groups have been traced to criminal activity across the nation including the April 19, 1995, bombing of the Alfred P. Murrah Federal Building in Oklahoma City, Oklahoma.⁴¹ Patriot militias are a very real and present problem and create significant challenges for local, state, and federal law enforcement officials.⁴²

35. *Id.* The Freemen of Montana created almost everything necessary to form a government. *Id.* Freemen attempted to create their own currency by using a closed bank account and forging money orders. *Id.* The Freemen attempted to back the money orders with the false liens that they filed against the property of their enemies. *Id.*

36. Citizen militias are groups of people that assemble together for the purpose of military training with no authority from state or federal government. FALSE PATRIOTS, *supra* note 8, at 4-5. They may also be called the unorganized militia. *Id.* The Southern Poverty Law Center defines militias when used in this context as: "Private paramilitary forces, as distinguished from the state-sponsored militias (now National Guards) sanctioned by the Second Amendment." *Id.* at 70. *But see* STEPHEN P. HALBROOK, *THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT* (1984) (discussing the significant debate about whether or not the Second Amendment confers an individual right to organize a militia or if the right is an exclusive right of the various states).

37. Hansen, *supra* note 24, at 57-58.

38. Michael Janofsky, *Home-Grown Courts Spring up as Judicial Arm of the Far Right*, N.Y. TIMES, April 17, 1996, at A1. Many common law courts do not have an enforcement mechanism. *Id.* Many Patriots admit that documents produced by common law courts are ignored. *Id.*

39. *Id.* Robert Crawford says that "since the middle of [1995], the trend we have seen the most is common-law courts using militias as their enforcement arm." *Id.* For example, a common law court that was founded in June of 1995 announced that their "special terms" would "be enforced by militia protections *vi et arms*." Hansen, *supra* note 24, at 53. "*Vi et arms*" is Latin for "by means of force and arms." *Id.*

40. Janofsky, *supra* note 38, at A1.

41. David C. Williams, *The Militia Movement and Second Amendment Revolution: Conjuring with the People*, 81 CORNELL L. REV. 879, 879 (1996). Oklahoma City bombing suspect Terry Nichols practiced many common law court tactics before his arrest. Stephen Braun, *Courts Are a Law unto Themselves: Growing Underground Justice Movement Feeding on Anti-Government Sentiment*, DALLAS MORNING NEWS, Sept. 10, 1995, at 1A. In 1992, Mr. Nichols told a Sanilac County judge that he could issue his own worthless check to pay \$17,800 in credit card bills. *Id.* Mr. Nichols stated that it was "a right under the common law." *Id.*

42. FALSE PATRIOTS, *supra* note 8, at 42-43.

Recently, legislation has been proposed and some states have adopted legislation to address the problems associated with the Patriot movement.⁴³

Modern Patriot groups are rooted in a thicket of conspiracy theories that tangle their legal arguments and fuel the fire of their anti-government sentiment.⁴⁴ Some groups say that the United Nations is part of a conspiracy to establish a one-world government called the New World Order.⁴⁵ Others suggest that a Jewish group called the Illuminati has infiltrated the United States and has established a Zionist Occupational Government.⁴⁶ Not surprisingly, almost all of the conspiracy theories produced by the Patriot movement are without merit and have no basis in fact.⁴⁷ However, the conspiracy theories are a useful tool for the Patriot movement to gain membership among the distrusting and to justify claims that the United States government is no longer

43. ANTI-DEFAMATION LEAGUE, COMMON LAW COURTS: A LEGISLATIVE RESPONSE 5 (1996) [hereinafter COMMON LAW COURTS]. The Anti-Defamation League has proposed a model statute to restrict the activities of common law courts. *Id.*

44. FALSE PATRIOTS, *supra* note 8, at 9; Braun, *supra* note 19, at A1. Common law adherents study conspiracy and constitutional theories vigorously. *Id.* Some common law activists claim that the Constitution is missing the original Thirteenth Amendment which would have outlawed lawyers. *Id.* Also, Americans are divided between sovereign citizens and Fourteenth Amendment citizens. *Id.* Fourteenth Amendment citizens are subject to the federal government while sovereign citizens are not. *Id.* Patriots also argue that American courts only have jurisdiction in maritime cases because most courts have a fringed flag in the courtroom. *Id.*

45. CATHERINE MCNICOL STOCK, RURAL RADICALS: RIGHTEOUS RAGE IN THE AMERICAN GRAIN 173 (1996). Many evangelists blame America's financial problems on international bankers. *Id.* In Pat Robertson's 1995 book, *The New World Order*, the evangelist identifies an international conspiracy that is threatening the United States. *Id.* In her book, *Rural Radicals*, Stock explores the premise that rural people tend to be more radical than the general population. *Id.* at 2-4. Stock contends that five elements come together among rural Americans and create an atmosphere that promotes radicalism. *Id.* at 7-13. The five elements are frontier life, class, race, gender, and evangelism. *Id.* While the book is useful in analyzing the Patriot movement, the premise of the book is flawed. Stock ignores the fact that there is no evidence to support the conclusion that radicals appear in rural settings any more than they do in urban settings. For a criticism of Stock's book, see James Coates, *America's Storied Agrarian Culture May Explain Why Rural Radicals Go Against the Grain*, CHI. TRIB., Feb. 21, 1997, at 5:1-2.

46. STOCK, *supra* note 45, at 2-4. Other conspiracy theories include: The United Nations has already invaded the country and is using black helicopters to set up a system of martial law. FALSE PATRIOTS, *supra* note 8, at 4. The government implants electronic monitoring devices in newborn babies. *Id.* There are a system of secret codes on the back side of road signs that will guide an enemy invasion force. *Id.* at 9-10. "Someone" is controlling our weather. *Id.* at 9. The federal government invoked martial law on the American people when the Federal Emergency and War Powers Act was passed in 1933. *Id.* at 29. Patriots contend that this act has never been repealed and is evidence that America is already under martial law. *Id.* All American citizens have been implanted with computer chips that keep track of data for the government. *Id.* at 9. There are many other conspiracy theories associated with Christian identity. *Id.* at 11. Among them are that Jewish people and blacks are "mud people" and "descendants of Satan." *Id.*

47. Scott Blake, *Cause Built on Conspiracy Fears Militias Driven by Hatred of Federal Government*, U.N. INTERFERENCE, FLA. TODAY, Dec. 3, 1996, at A2.

legitimate.⁴⁸ Patriot groups, which claim that the United States government has become a tyranny,⁴⁹ argue that when a government has become a tyranny it is no longer legitimate, and therefore, citizens have a right to revolt and to free the sovereign people from the yoke of oppression.⁵⁰

It is unlikely that the Patriot movement will gain enough federal, state, and local momentum to succeed in overthrowing the federal government.⁵¹ However, governments must find ways to minimize the harm that the Patriot movement will cause.⁵² Patriot groups have proven they are capable of and willing to commit devastating acts of domestic terrorism.⁵³ Ultimately, resolution of the issues implicated by the Patriot movement requires a balancing of First and Second Amendment constitutional rights against governmental interests of insuring public health and safety, promoting efficient operation, and discouraging insurrection.⁵⁴ This Note proposes comprehensive legislation designed to respond to the Patriot movement's⁵⁵ full gamut of activity. Any legislation aimed at the Patriot movement implicates First and Second Amendment concerns. The First Amendment may protect some of the speech and associational activities of common law courts.⁵⁶ The Second Amendment may confer an individual right to keep and bear arms and, at least arguably, a collective right of "The People" to form citizen militias in order to protect itself against oppressive and tyrannical government practices.⁵⁷ By combining the respective rights enumerated in the First and Second Amendments, Patriot groups arguably have the constitutional right to associate and to engage in armed

48. FALSE PATRIOTS, *supra* note 8, at 11.

49. *Id.* A Patriot newsletter called BEHOLD! characterizes the federal government as "the true aggressor." Robert W. Wangrud, *The True Aggressor*, BEHOLD! (Milwaukie, OR), Mar. 1988, at 1. The article points out how big the federal government has become. *Id.* The District of Columbia started out as ten square miles and now the federal government owns a significant portion of the land within the United States. *Id.*

50. FALSE PATRIOTS, *supra* note 8, at 8-9.

51. *Id.* at 42.

52. *Id.*

53. *Id.*; Hector Castro, *Charges Link 8 to Anti-U.S. Scheme; Government Alleges Arms Conspiracy*, NEWS TRIB., July 30, 1996, at A1. In July 1996, a possible terrorist bombing was avoided when eight "freemen" were arrested. *Id.* The eight suspects are charged with conspiracy to make and possess explosive devices. *Id.* The federal government charges that the Patriot group was gathering weapons and building bombs for a future confrontation with the U.S. government or the United Nations. *Id.* In addition to the Oklahoma City Bombing, Patriot groups have been linked to other acts of domestic terrorism. FALSE PATRIOTS, *supra* note 8, at 31. On October 9, 1995, saboteurs in Arizona derailed an Amtrak passenger train. *Id.* The group responsible for the derailment left behind an anti-government message. *Id.*

54. COMMON LAW COURTS, *supra* note 43, at 5-6.

55. See *infra* notes 667-70 and accompanying text.

56. COMMON LAW COURTS, *supra* note 43, at 5.

57. R.J. Larizza, *Paranoia, Patriotism, and the Citizen Milita Movement: Constitutional Right or Criminal Conduct?*, 47 MERCER L. REV. 581, 584 (1996).

activities, so long as their activities are not otherwise unlawful.⁵⁸

Sections II and III of this Note will examine the history of significant vigilante groups in America from the Colonial period to the present.⁵⁹ Patriot groups are a form of vigilante activity, so vigilante groups provide a useful comparison for historical analysis. The focus will be on Vigilantes that are not reactionary in nature, that engage in political activity, and that believe in popular sovereignty.⁶⁰ Section IV discusses the modern Patriot movement,⁶¹ focusing on its development as well as its impact.⁶² Then, Section V analyzes the underlying reasoning and ideology supporting the formation of Patriot groups, and the conduct these beliefs produce.⁶³ Section VI discusses the conduct of Patriot groups and examines the reasons why the Patriot movement poses a problem for law enforcement.⁶⁴ Section VII of this Note discusses legislation that has been proposed or enacted by some states to respond to the Patriot movement.⁶⁵ Finally, Section VIII proposes a comprehensive legislative response to the Patriot movement that recognizes the diverse groups that make up the Patriot movement and the different conduct engaged in by each group.⁶⁶ Enacting legislation to curb the activities of Patriot groups is essential to prevent further disruption of the judicial system as well as to minimize further criminal activity.⁶⁷

II. THE ROOTS OF VIGILANTE GROUPS IN AMERICA

*The tree of liberty must be refreshed from time to time with the blood of patriots and tyrants. It is its natural manure.—Thomas Jefferson*⁶⁸

Patriot groups are a form of vigilante activism,⁶⁹ and modern Patriot activity is strikingly similar to conduct that was engaged in by historical

58. *Id.*

59. *See infra* notes 68-227 and accompanying text.

60. Reactionary mob and racial violence are beyond the scope of this Note.

61. *See infra* notes 228-61 and accompanying text.

62. *Id.*

63. *See infra* notes 262-392 and accompanying text.

64. *See infra* notes 393-465 and accompanying text.

65. *See infra* notes 466-665 and accompanying text.

66. *See infra* notes 666-70 and accompanying text.

67. FALSE PATRIOTS, *supra* note 8, at 42.

68. MINER & RAWSON, *supra* note 1; PETERSON, *supra* note 1; COLUMBIA DICTIONARY, *supra* note 1.

69. Bartholemew Sullivan, *Vigilante Justice: Man's Defense Is the Common Law*, COM. APPEAL, Nov. 23, 1995, at 1A. "The Common Law courts, dispensing a form of vigilante justice, have been cropping up across the West and Midwest in recent months" *Id.*

vigilante groups.⁷⁰ Accordingly, an analysis of historical vigilante and colonial Patriot groups is useful to understand the mentality and development of modern Patriot groups.⁷¹

Vigilantism is commonly defined as “taking the law into one’s own hands.”⁷² Certainly, since the beginning of ordered society, citizens have attempted to enforce their own systems of order when legitimate forms of government and order have broken down.⁷³ A more formal definition of vigilantism states that it “consists of acts or threats of coercion in violation of the formal boundaries of an established sociopolitical order which, however, are intended by the violators to defend that order from some form of subversion.”⁷⁴ However vigilantism is defined, it has divergent interpretations

70. STOCK, *supra* note 45, at 4. Stock contends that the recent rise in rural radical and Patriot groups should not have been a surprise. *Id.* Radical groups have existed in America since as early as 1676 and have deep roots in our culture. *Id.* “Modern rural radicalism is thus hardly a new-fangled idea or a fly-by-night phenomenon. Instead, it follows an abundant, meaningful, and ‘all-American’ heritage.” *Id.* at 5.

71. *Id.* at 4-5.

72. H. Jon Rosenbaum & Peter C. Sederburg, *Vigilantism: An Analysis of Establishment Violence*, VIGILANTE POLITICS 3, 4 (1976). Other definitions imply that vigilance or vigilante activity may be completely appropriate and within the law. BLACK’S, *supra* note 20, at 1740. Black’s law dictionary defines vigilance as “watchfulness; precaution; a proper degree of activity and promptness in pursuing one’s rights or guarding them from infraction, or in making or discovering opportunities for the enforcement of one’s lawful claims and demands.” *Id.* This definition suggests that the definition of vigilantism has evolved over time to reflect lawless activity as opposed to proper activity. *Id.* Webster’s defines vigil as “alertly watchful especially to avoid danger.” WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY 1315 (1983) [hereinafter WEBSTER’S]. This dictionary also provides a separate definition for vigilante. *Id.* “Vigilante: A member of a volunteer committee organized to suppress and punish crime summarily (as when the processes of law appear inadequate).” *Id.* Note that older definitions of vigilantism do not appear to carry with them the negative connotations of lawless action as the modern usage of the word implies. *Id.* Also, the 1983 definition of vigilante requires that a person must be a member of a volunteer committee to be a vigilante. *Id.* In other words, individual action is not vigilantism, but merely lawless action. *Id.* Also, the definition suggests that a true vigilante acts only when the processes of law appear inadequate, as opposed to slow or inefficient. *Id.* It would perhaps be useful to analyze the development and etymology of the word “vigilantism,” however, that study is beyond the scope of this Note.

73. JAMES ELBERT CUTLER, LYNCH-LAW 1-5 (1905). The words “Lynch-law” and “vigilante” have become virtual synonyms. Writing in 1905, Cutler examined the etymology of the words “Lynch” and “Lynch-law” which are closely associated with vigilante activity. *Id.* at 13. There are many competing theories for the origin of the term “Lynch.” *Id.* Cutler concluded that “sometime between 1780 and 1817 the term Lynch’s law became a localism in Virginia in the region of James River.” *Id.* at 39. After that, the phrase caught on and became more widely used. *Id.*

74. Rosenbaum & Sederburg, *supra* note 72, at 4. This definition is “considerably more inclusive than summary ‘justice’ dispensed by” mob violence. *Id.* Vigilantism may be characterized as establishment violence. *Id.*

ranging from being viewed as dangerous mob violence by some, to representing a useful tool for ordering society and invoking political change to others.⁷⁵

Throughout American history, groups have used incidents of vigilante activity for a variety of reasons.⁷⁶ Some, if not most, of these incidents can be characterized as socially destructive mob violence.⁷⁷ At times, vigilante activity is a driving force behind political or social change.⁷⁸ At other times, vigilante activity has acted as a safety net for society.⁷⁹ When government breaks down and does not function properly, society risks falling into a state of anarchy or, at least, a period of lawlessness.⁸⁰ Sometimes, vigilantes act in order to enforce a system of order and to prevent the further deterioration of society.⁸¹ The roots of vigilante activity in America may be traced to the pre-Revolutionary colonial period, when groups worked toward the overthrow of the oppressive British government.⁸²

75. Richard Maxwell Brown, *The History of Vigilantism in America*, VIGILANTE POLITICS 79, 94 (1976). Brown identifies two models of vigilantism: the socially constructive and the socially destructive. *Id.* Organized vigilante movements dealt directly with a disorder problem and then "disbanded after an increase of social stability within the community." *Id.* These vigilante movements were socially constructive. *Id.* A socially destructive vigilante movement was flawed from the outset, or encountered local opposition, and the usual "result was an anarchic and socially destructive vigilante war." *Id.* at 94-95.

76. *Id.* at 79-80.

77. Edward Stettner, *Vigilantism and Political Theory*, VIGILANTE POLITICS 64, 69 (1976). Stettner contends that the vigilante is driven by self interest. *Id.* The vigilante does not recognize a need to restrain his assertion of this self interest or to compromise with others. *Id.* The means employed to further a vigilante groups' self interest knows no limitation. *Id.* A secretive violence is a way for a vigilante group to maintain its political position. *Id.*

78. *Id.* at 75. At times, vigilantism may be a broad response meant to supplement or even replace normal political operations, which may be working too effectively. *Id.* For example, a vigilante group may act out because it feels that the American legal system offers too much due process for criminals.

79. Rosenbaum & Sederberg, *supra* note 72, at 4. "[Some vigilante violence] is designed to maintain the established socio-political order." *Id.*

80. Brown, *supra* note 75, at 81. The danger of sinking into anarchy or at least a period of lawlessness was particularly strong in frontier America. *Id.* Pioneer vigilantes were effective in establishing order and stability in newly settled areas. *Id.* Disorderly inhabitants received a clear warning from vigilantes that the established framework of civilization could not be eroded by the newness of the settlement. *Id.* The values of life and property were deeply cherished and vigilante activity was a violent and hypocritical sanctification of these values. *Id.*

81. *Id.*

82. STOCK, *supra* note 45, at 4.

A. Colonial American Vigilantes

One of the first major outbreaks of vigilantism in colonial America occurred in 1767-1769⁸³ with the Regulator movement in the North and South Carolina back country.⁸⁴ In colonial North Carolina the inhabitants were dissatisfied because an assembly which contained no representative of the people drafted oppressive laws.⁸⁵ Government officials were often corrupt and collected fees higher than they were authorized to collect, in order to supplement their income.⁸⁶ Citizens of the colony objected to these practices by creating disturbances that had only temporary effects on the corrupt practices of government officials,⁸⁷ and soon government officials would return to their extortionate fees.⁸⁸ The citizens felt that "as soon as counties were organized on the frontier, sheriffs, clerks, registrars, and lawyers [would swoop] down upon the defenseless inhabitants like wolves."⁸⁹

In 1767, a group of citizens formed a company of Regulators.⁹⁰ They called themselves Regulators because they had a desire "to regulate" their own affairs.⁹¹ The Regulators were loosely organized and could be characterized as a citizen militia or a vigilante group.⁹² Consistent with their loose

83. Bacon's Rebellion in 1677 was probably the first major outbreak of vigilantism in America. However, it occurred well before the American Revolution and is beyond the scope of this note. For discussion of Bacon's Rebellion, see generally LAMAR MIDDLETON, *REVOLT U.S.A.* (2d ed. 1968).

84. Brown, *supra* note 75, at 79.

85. THE REGULATORS, *supra* note 4, at xv.

86. *Id.*

Settlers in the back country felt particularly oppressed by the laws drawn up by an assembly largely composed of eastern landowners. Local officials in many counties, particularly in the west, were not local men at all. Friends of the royal governor appointed, not elected, to these positions, they often yielded to the temptation to collect higher fees than the law authorized or to divide a single service into two or more parts and require a fee for each. Lawyers who followed the judges about the colony wherever courts were held also fell into the same habit.

Id.

87. *Id.* Citizens of Anson, Orange, and Granville counties led the Regulator movement in 1764. *Id.* The people mostly complained about illegal fees, and the disturbances resulted in a proclamation issued by Governor Arthur Dobbs that prohibited the taking of illegal fees. *Id.*

88. *Id.* at xvi.

89. *Id.* In her book, *Rural Radicals*, Catherine McNicol Stock explores the idea that rural producers tend to dislike people like lawyers whom they consider non-productive. STOCK, *supra* note 45, at 30. That is, unlike farmers and rural folk, lawyers do not produce anything. *Id.* The Regulators "assailed in particular those they considered nonproductive, especially merchants and lawyers." *Id.* (quoting Marvin L. Michael Kay, *The North Carolina Regulation, 1766-1776: A Class Conflict*, in THE AMERICAN REVOLUTION 84 (Alfred F. Young ed., 1976)).

90. THE REGULATORS *supra* note 4, at xvi.

91. *Id.*

92. STOCK, *supra* note 45, at 29-32.

organizational structure, a single leader did not emerge during the North Carolina Regulator movement.⁹³ James Hunter is often referred to as the “general” of the Regulator movement; however, he declined to take command of the group, stating that the Regulators were all freemen, and that every one of them must command himself.⁹⁴ The Regulators’ stated purpose was to assemble themselves for conference to regulate public grievances and abuses of power.⁹⁵ Specifically, they opposed unlawful taxes and fees.⁹⁶

On October 9, 1769, the Regulators petitioned the assembly for a redress of their grievances.⁹⁷ In the petition, the Regulators contended that they were oppressed by excessive taxation and that lawyers and the legal system had become a nuisance.⁹⁸ The Regulators supported these allegations with charges that the legal system was unfair, that the intentions of laws were evaded, exorbitant fees were extorted, and that the victims of the legal system were left with no remedy from the oppressive government.⁹⁹ The Regulators also detailed the relief that they were requesting, but like most colonial concerns, the

93. THE REGULATORS, *supra* note 4, at xvi.

94. *Id.* Hermon Husband came close to being a leader of the Regulator movement. *Id.* However, his role was more of an agitator than leader. *Id.* Husband received political pamphlets of a patriotic character, reprinted them and circulated them among the people in order to rally public sentiment to effect reform. *Id.* Husband left the Regulator movement when it became violent in nature. *Id.* The actions of Husband are similar to some modern Patriot propagandists who resemble agitators more than leaders. The statement by Hunter is remarkably similar to the concept of leaderless resistance which is advocated by the modern Patriot groups. See FALSE PATRIOTS, *supra* note 8, at 24. Leaderless resistance is an underground leadership strategy advocated by some modern Patriot leaders. *Id.* The strategy calls for the formation of underground “phantom cells” which become small independent units which may instigate insurrections against the government without coordinating plans with any central leadership. *Id.* The cell system allows independent modern Patriot groups to act quickly in response (or proactively) to events that occur on a local level without exposing the movement to destruction through the arrest or death of its leaders. *Id.* For further discussion of the concept of leaderless resistance, see *infra* notes 658-62 and accompanying text.

95. THE REGULATORS, *supra* note 4, at xviii. *Id.* The Regulators also provided for attendance at meetings and the paying of dues, and majority rule was to govern all disputes within the organization. *Id.*

96. *Id.*

97. Petition of the Inhabitants of Anson County, North Carolina (Oct. 9, 1769), in HENRY STEELE COMMAGER, DOCUMENTS OF AMERICAN HISTORY 68 (1948).

98. *Id.*

99. *Id.* at 69. “Lawyers, Clerks, and other pentioners . . . are becoming a nuisance, as the business of the people is often transacted without the least degree of fairness, the intention of the law evaded, exorbitant fees extorted, and the sufferers left to mourn under their oppressions.” *Id.* The right to petition the government for redress of grievances was an affirmative and remedial right. It was enumerated in the First Amendment to the Constitution. U.S. CONST. amend. I. For further discussion of the right to petition the government for redress of grievances, see generally Stephen A. Higginson, Note, *A Short History of the Right to Petition Government for the Redress of Grievances*, 96 YALE L.J. 142 (1986).

British government failed to respond effectively to the grievances.¹⁰⁰

As the Regulators grew in numbers and the public became sympathetic with their cause,¹⁰¹ the militant group became more bold in its activity, and, in September of 1770, it broke into the superior court at Hillsborough, North Carolina.¹⁰² A group of 150 Regulators forced the presiding judge to leave the bench and attacked several attorneys.¹⁰³ They dragged the lawyers through the streets and burned a home.¹⁰⁴ In addition, they set up their own mock court as a form of protest against government officials.¹⁰⁵ The colonial legislature responded by passing a riot act which allowed the attorney general to prosecute anyone causing a riot in a superior court in any province.¹⁰⁶ The riot act authorized the governor to assemble a militia, if needed, to enforce the law.¹⁰⁷

The Regulators continued to gain strength and reached approximately 2,000 in number.¹⁰⁸ The colonial governor called out a militia to crush the

100. Letter from Governor William Tryon to the Regulators (Aug. 13, 1768), in THE REGULATORS, *supra* note 4, at 158-160. "The various matters of Complaint in your Petition to me delivered . . . are of so extraordinary and unusual a nature, that they require the consultation of His Majesty's Council which are far distant from me, at present." Letter from Governor William Tryon to Inhabitants of Anson County (Aug. 16, 1768), in THE REGULATORS, *supra* note 4, at 160.

101. THE REGULATORS, *supra* note 4, at xx.

102. *Id.* at xxi. Hermon Husband and James Hunter, among others, led the mob of Regulators. *Id.*

103. *Id.* The Regulators were armed with sticks and switches. *Id.* They attempted to strike Judge Richard Henderson and forced him to leave the bench. *Id.* At the time, William Hooper was an assistant attorney general, and he was "dragged and paraded through the streets, and treated with every mark of contempt and insult." *Id.* Later, Hooper became a participant in the American Revolution and was a signer of the Declaration of Independence. *Id.*

104. *Id.* The Regulators whipped many others as they rioted. *Id.* Windows were broken and the inhabitants of the town were generally terrorized. *Id.*

105. *Id.* at xx.

106. *Id.* at xxii. The riot act carried a harsh penalty. *Id.* Anyone charged with riot that avoided summons for 60 days was declared an outlaw and liable to be killed with impunity. *Id.* In, 1995, the Freemen of Montana broke into the Garfield County, Montana, Courthouse. Hansen, *supra* note 24, at 53. The incident was free of violence; however, the Freemen set up their own mock tribunal and issued their own judgments. *See supra* notes 32-34 and accompanying text.

107. THE REGULATORS, *supra* note 4, at xxii.

108. *Id.* at xxiii. However, the Regulators lacked adequate leadership, a clear purpose, efficient organization, and were vastly outarmed. *Id.* Presumably, the Regulators believed that a display of force could pressure Governor Tryon into meeting their demands. *Id.* at xxiv. Many of the Regulators did not seem to realize the seriousness of their actions. *Id.* Some of the Regulators captured Colonel John Ashe and Captain John Walker of Governor Tryon's troops and whipped them. *Id.* However, many of the Regulators were opposed to this action and threatened to abandon the cause. *Id.*

Regulators, considering them to be in "a state of War and Rebellion."¹⁰⁹ A battle occurred at Alamance, and the Regulators were decisively defeated by the well-conducted British troops.¹¹⁰ The governor executed a prisoner to make an example and issued a proclamation offering to pardon all citizens with a few exceptions, who would submit to the colony and take an oath of allegiance to the British government.¹¹¹

The Battle of Alamance marked the end of the Regulator movement in North Carolina.¹¹² However, it was outside the colony of North Carolina that the movement had its greatest effect.¹¹³ In other colonies, the press gave extensive coverage to the Regulator movement and the plight of oppressed North Carolinians.¹¹⁴ This attention was an important factor in arousing public sympathy and common feelings of discontent which were gaining momentum as the colonies moved toward the American Revolution.¹¹⁵

B. Shays' Rebellion

After the Revolutionary War, the American people were still predisposed to lash out against the government because of disturbing social conditions.¹¹⁶ In 1785-1786 a commercial depression affected Massachusetts with particular

109. *Id.* at xxiv. "You will embody the Forces Ordered to be raised from the Wake Regiment of Militia at Major Theophilus Hunters by the thirtieth of the Month, and wait with them at that place until you receive further Orders." Letter from Governor William Tryon to Colonel John Hinton (Apr. 4, 1771), in *THE REGULATORS*, *supra* note 4, at 394.

110. *Id.* at xxv. Their comrades deserted many Regulators. *Id.* Governor Tryon's artillery was effective in the disbanding of the Regulators. *Id.* Many were killed or wounded. *Id.* Governor Tryon took about fifteen prisoners and executed one on the spot for the purpose of sending a message to the Regulators. *Id.*

111. *Id.* at 477. Oaths of allegiance were common in the American colonies. *Id.* By July 4, 1771, more than 6000 North Carolina citizens had taken the oath of allegiance. *Id.* at xxv. A common form for an oath of allegiance read:

I, A.B., do sincerely promise and swear that I will bear true allegiance to His Majesty King George the Third.—So help me God.

I, A.B., do sincerely and faithfully promise and swear that I will with Heart & Hands, Life and Goods, maintain and defend His Majesty's Government and the Laws and Constitution of the Province of North Carolina, against all persons whatsoever who shall attempt to alter, obstruct or prevent the due administration of the Laws & the Public Peace and Tranquility of the said Province. So help me God.

Association Oath Taken by Principal Officers of Government and Inhabitants in Orange County (Aug. 1768), in *THE REGULATORS*, *supra* note 4, at 146.

112. *Id.* at xxvi.

113. *Id.*

114. *Id.*

115. *Id.*

116. STOCK, *supra* note 45, at 38, 41. The unfulfilled promises of the Revolution contributed to Shays' Rebellion. *Id.* The size of Shays' Rebellion shocked the American leaders. *Id.* At the height of the insurrection in 1786, Shays' Rebellion involved more than 9000 militants. *Id.*

severity.¹¹⁷ Farm prices fell sharply, the people were heavily taxed, and the West India trade stopped.¹¹⁸ People at town meetings demanded direct reforms or action.¹¹⁹ Many farm mortgages were foreclosed, which led to immense hostility toward lawyers and courts.¹²⁰ In the fall of 1786, a minor rebellion broke out under the leadership of Captain Daniel Shays.¹²¹ Mobs of people broke up the meetings of the courts and threatened to attack the armory at Springfield, Massachusetts, and at Northampton, Massachusetts.¹²²

Like the North Carolina rebels, the group of disgruntled farmers called themselves Regulators.¹²³ Wearing hemlock sprigs in their hats, they rode through the Berkshire mountains and threatened judges, sheriffs, and creditors.¹²⁴ Shays' Regulators blocked the sitting of any court that "should attempt to take property by distress."¹²⁵ The efforts of the governor eventually broke up the group of Regulators; however, news of the rebellion traveled throughout the confederation.¹²⁶

117. COMMAGER, *supra* note 97, at 126. At the time, people were put in debtor's prison. MIDDLETON, *supra* note 83, at 158. In 1786, the jail at Concord, Massachusetts, had as many men in jail for unpaid debt as the total of all other convictions. *Id.* Debtor's prison compounded the problem because farmers found it difficult to pay creditors from inside a debtor's prison. STOCK, *supra* note 45, at 38. A farm organizer that was jailed in 1783 wrote that he was "alive and that is all as I am full of boils and putrified [sic] sores all over my body and they make me stink alive, besides having some of my feet froze which makes it difficult to walk." DAVID P. SZATMARY, SHAYS' REBELLION: THE MAKING OF AN AGRARIAN INSURRECTION 34 (1980).

118. COMMAGER, *supra* note 97, at 126. The eight year struggle with England was followed by an inevitable post-war depression. MIDDLETON, *supra* note 83, at 157.

119. COMMAGER, *supra* note 97, at 126. Delegates of farmers held meetings to draft petitions and discuss suits for debt. MIDDLETON, *supra* note 83, at 158. After electing a presiding officer, the usual procedure was to "resolve that the meeting [was] constitutional." *Id.* at 158-59. A Bristol County Massachusetts convention agreed to employ force to combat all courts from hearing suits for debts because these trials were involving "a great part of the people in beggary and misery." *Id.*

120. COMMAGER, *supra* note 97, at 126.

121. *Id.*; MIDDLETON, *supra* note 83, at 155-60; STOCK, *supra* note 45, at 38-42.

122. COMMAGER, *supra* note 97, at 126; MIDDLETON, *supra* note 83, at 156. Breaking up the meetings of courts is similar to the behavior of the Regulators of North Carolina and the Freeman of Montana. Both groups have broken into courthouses and set up their own popular tribunals. See Hansen, *supra* note 24, at 52; THE REGULATORS, *supra* note 4, at xxi. See *supra* notes 31-35 and accompanying text. See also *supra* notes 101-07 and accompanying text

123. AMERICAN HERITAGE, HISTORY, *supra* note 5, at 27.

124. *Id.* at 27-28. The insurgents rode into Great Barrington, eight hundred strong. MIDDLETON, *supra* note 83, at 160. The group made it impossible for the courts to sit and released all prisoners that were held for debt. *Id.*

125. AMERICAN HERITAGE, HISTORY, *supra* note 5, at 28.

126. *Id.*

Jefferson commented that "a little rebellion now and then is a good thing,"¹²⁷ but to other leaders, the rebellion proved, that the weak Articles of Confederation were not adequate to preserve a union of states.¹²⁸ The Virginia Legislature passed a resolution calling for a convention to discuss the regulation of interstate commerce.¹²⁹ On the same day that the group met, Shays' Regulators rode into Concord and kept the court from holding session.¹³⁰ The group proposed a subsequent convention to be held in Philadelphia to revise the confederacy itself.¹³¹ Shays' Rebellion is considered a key event that facilitated the Philadelphia convention that resulted in the drafting of the United States Constitution.¹³² However, not even the new Constitution was enough to prevent other extra-legal groups from acting out when their members became dissatisfied with the government.¹³³

C. The Whiskey Rebellion

The Whiskey Rebellion tested the newly-formed United States of America and determined whether its Constitution would be more effective than the Articles of Confederation in dealing with insurrection.¹³⁴ An excise tax upon distilled spirits and stills, passed on March 3, 1791, was the event that triggered the Whiskey Rebellion.¹³⁵ This tax had a great impact on the agrarian inhabitants of Western Pennsylvania and Virginia.¹³⁶ Farmers turned corn into whiskey because that process was the only economical way to transport corn to

127. MINER & RAWSON, *supra* note 1, at 433; PETERSON, *supra* note 1, at 882; AMERICAN HERITAGE, HISTORY, *supra* note 5, at 28.

128. AMERICAN HERITAGE, HISTORY, *supra* note 5, at 28; MIDDLETON, *supra* note 83, at 181-82. A tablet is inscribed at Petersham, Massachusetts, where Shays was finally defeated, stating that "this victory for the forces of government influenced the Philadelphia Convention which three months later met and formed the Constitution of the United States." *Id.* at 181.

129. AMERICAN HERITAGE, HISTORY, *supra* note 5, at 28.

130. *Id.*

131. *Id.*

132. *Id.* at 31. MIDDLETON, *supra* note 83, at 181-82; STOCK, *supra* note 45, at 42-43. This period of American history and the drafting of the new Constitution to replace the Articles of Confederation is sometimes referred to as the "second revolution." *Id.* at 41.

133. STOCK, *supra* note 45, at 43. Especially for many settlers in the western United States, the ratification of the Constitution increased anxieties about federal power. *Id.* For further discussion of the Constitution of the United States and its ratification, see generally C. PRITCHETT, THE AMERICAN CONSTITUTION (1959).

134. MIDDLETON, *supra* note 83, at 192. President Washington realized that the lack of authority in the federal government during Shays' rebellion could not recur with the Whiskey Rebellion. *Id.* The ability to suppress insurrection and to secure obedience was critical to the success of the new government. *Id.*

135. COMMAGER, *supra* note 97, at 163; MIDDLETON, *supra* note 83, at 185. To frontiersmen, the internal tax was exactly like the taxes that the British government had imposed on the colonies in the 1770's. STOCK, *supra* note 45, at 48.

136. COMMAGER, *supra* note 97, at 163.

sea ports.¹³⁷ Dissatisfaction with government was so intense that it led to a general flouting of the law accompanied by some violence.¹³⁸ President George Washington called out the militia to suppress actions that he considered to be acts of rebellion and treason.¹³⁹

While most of the attention was focused on the Whiskey Rebellion in Pennsylvania, the Whiskey Rebellion in Kentucky, was equally important and has been called one of the earliest examples of civil disobedience.¹⁴⁰ The Rebellion involved almost the entire population of Kentucky.¹⁴¹ Like their counterparts in Pennsylvania, the people of Kentucky were adamantly opposed to the tax on stills and distilled spirits.¹⁴² When citizens were charged with nonpayment of the tax, juries routinely refused to convict their neighbors for non-compliance.¹⁴³ The events of the Whiskey Rebellion in Kentucky are examples of massive, passive resistance to the law,¹⁴⁴ and was as much a political movement as a vigilante movement.¹⁴⁵ Eventually, government became frustrated in its efforts to collect the tax and repealed the statute.¹⁴⁶ The Whiskey Rebellion is an important example of civil disobedience and vigilante activity used by the populace to alter political events and promote the popular will.

137. *Id.* Alexander Hamilton underestimated the importance of whiskey to the Appalachian culture. STOCK, *supra* note 45, at 47. Besides being easier to transport to market, whiskey was used as a medium of exchange. *Id.* Also, instead of having a few large distilleries, there were many small stills that were used to convert the corn into whiskey. *Id.* Groups of families would operate the stills cooperatively which meant that almost everybody was subject to the tax. *Id.* In addition, settlers believed that the federal government primarily benefited merchants and landowners, and it should be their responsibility to carry the burden of the bulk of taxation. *Id.* at 48.

138. COMMAGER, *supra* note 97, at 163.

139. *Id.*

140. Mary K. Bonsteel Tachau, *The Whiskey Rebellion in Kentucky: A Forgotten Episode of Civil Disobedience*, 2 J. OF THE EARLY REPUBLIC 239 (1982).

141. *Id.*

142. *See generally id.*

143. *Id.* at 255.

144. *Id.* at 259.

145. *See id.*

146. *Id.* However, the story does not end when the statute was repealed. *Id.* The government quickly discovered that the revenue collectors were as delinquent as the distillers had been. *Id.* The revenue collectors were charged with the delinquency, and, not surprisingly, juries had no trouble convicting them. *Id.*

III. THE RISE OF POPULAR SOVEREIGNTY AND ITS EFFECT ON VIGILANTE ACTIVITY

*We should be men first, and subjects afterward.—Henry David Thoreau*¹⁴⁷

A comparison of the events of Shays' Rebellion and the Whiskey Rebellion shows that, even though the new government was effective in stopping insurrection,¹⁴⁸ citizens were not always content to rely on the democratic process to invoke social change.¹⁴⁹ While the expanding frontier made people increasingly aware of the limits of a new and growing government, frontier life also made them aware that the ultimate authority of government rests with the consent of the governed and their underlying sovereignty.¹⁵⁰

A. Jacksonian Politics and the Expanding Frontier

When Andrew Jackson was President of the United States, Americans harbored a deep mistrust of the courts.¹⁵¹ The Jacksonian strategy was to limit the power of the federal government as much as possible.¹⁵² Jackson promoted the idea that the successful operation of the federal government could only be preserved if it was limited to the enumerated powers that the federal government was designed to have.¹⁵³

147. MINER & RAWSON, *supra* note 1, at 200 (quoting HENRY DAVID THOREAU, CIVIL DISOBEDIENCE (1849)).

148. See MIDDLETON, *supra* note 83, at 213. The cost of the campaign to crush the rebellion was approximately \$800,000. *Id.* However, it may have been a small price to pay to demonstrate that the federal government was the supreme law of the land. *Id.* In a sense, it was a vindication of Hamilton's view of government and a blow to Jefferson's. *Id.*

149. See STOCK, *supra* note 45, at 50. Playing by the rules left many people unsatisfied. *Id.*

150. For example, an unpublished manuscript dated November 27, 1807, at Medfield, Massachusetts reveals the limits of government and one group's solution to those limits. Letter addressed to the honourable Senate and House (Nov. 27, 1807) (on file with author). Sixteen people who were petitioning to form themselves into a "body politic" to be called a "Detecting Society" signed the letter. *Id.* The letter reveals that the area was plagued for some time by horse thefts and the stolen horses were not recovered. *Id.* The petitioners state that "it seemed necessary for the better security of [horses], that [enforcement] more energetic than had been generally adopted should be put into operation." *Id.*

151. See Major L. Wilson, *The "Country" Versus the "Court": A Republican Consensus and Party Debate in the Bank War*, 15 J. OF THE EARLY REPUBLIC 619 (1995).

152. See Richard P. McCormick, *The Jacksonian Strategy*, 10 J. OF THE EARLY REPUBLIC 10 (1990).

153. *Id.* "[T]he successful operation of the federal system can only be preserved by confining it to the few and simple, but yet important, objects for which it was designed." *Id.* Jackson also declared that:

[T]he government's true strength consists in leaving individuals and States as much as possible to themselves—in making itself felt, not in its power, but in its beneficence; not

Vigilantes, closely related to colonial Patriots and the forerunners of modern Patriot groups, were also active during the Jackson presidency.¹⁵⁴ Although individual riots and upheavals were relatively minor, they were part of a larger pattern that occurred across America.¹⁵⁵ After a generation of utilizing the democratic process, America returned to the older tradition of "politics-out-of-doors."¹⁵⁶ The riots of the 1830's demonstrate that American society was in a state of crisis that was underscored by a dynamic political and social process.¹⁵⁷ Jackson waged war against the Second Bank of the United States and characterized its existence as a direct attack on the supremacy of the popular will,¹⁵⁸ and the citizenry found inspiration in President Jackson and his assault on the Second Bank of the United States.¹⁵⁹ In response to the suggestion that "The People" may "seek redress by force," Jackson exclaimed that "if violence be your game, come on with your armed Bank mercenaries, and by the Eternal! I will hang you around the Capitol on gallows higher than Haman's."¹⁶⁰

In opposition to the Second Bank of the United States, Jackson observed that in England before the Glorious Revolution, the danger to liberty was the result of "prerogative authority" and "standing armies."¹⁶¹ In contrast, after the Glorious Revolution, liberty was threatened by the "corrupt influence" of

in its control, but in its protection; not in binding the States more closely to the center, but leaving each unobstructed in its proper orbit. To suppose that because our Government has been instituted for the benefit of the people it must therefore have the power to do whatever may seem to conduce to the public good is an error into which even honest minds are the apt to fall.

Id.

154. Carl E. Prince, *The Great "Riot Year": Jacksonian Democracy and Patterns of Violence in 1834*, 5 J. OF THE EARLY REPUBLIC 1 (1985).

155. *Id.* Race riots and labor unrest were common. *Id.* Also, election riots in New York and Philadelphia occurred often. *Id.* at 2. Finally, the rise of vocal abolitionists brought with it anti-black and anti-reform mobs. *Id.*

156. *Id.* at 2. Nat Turner's insurrection, occurring in 1831, also contributed to the unrest of the times. MIDDLETON, *supra* note 83, at 236. Nat Turner was a slave that led a revolt in Southampton County, Virginia. *Id.* at 215-36. The insurgents killed several people, and news of the revolt spread fear of slave revolts across the country. *Id.* at 220-36. Some historians believe that Nat Turner's Insurrection may have delayed the freeing of the slaves by as much as a generation. *Id.* at 215.

157. Prince, *supra* note 154, at 2.

158. *Id.* President Jackson also linked farmers and workers as equals in the nation's productive life. STOCK, *supra* note 45, at 53. Jackson argued that all workers were the "bone and sinew of our country." *Id.*

159. Prince, *supra* note 154, at 2. Jackson also appealed to the common man. STOCK, *supra* note 45, at 53. Besides taking on Congress and the Second Bank of the United States, Jackson also argued against monopolies and argued for westward expansion at any cost. *Id.* Manifest Destiny was the rallying cry, and Jackson's vision helped expand the new land from coast to coast. *Id.*

160. Prince, *supra* note 154, at 4.

161. Wilson, *supra* note 151, at 627-28.

banks and fiscal policies in Parliament.¹⁶² Jackson argued that, even though the “forms of a free Constitution remained,” the government was controlled by a moneyed aristocracy that was represented by the Bank.¹⁶³ The rhetoric of the war against the Bank replicated the revolutionary sense that America was facing a crisis.¹⁶⁴ As with the American Revolution leaders, Jackson’s fight to defeat “the hydra” that was the the Bank, instilled into the people an urgent need for action and a sense of crisis.¹⁶⁵ These popular sentiments, coupled with the limits of federal government in an expanding frontier, may have contributed significantly to vigilante activity between 1820 and 1860.

B. The San Francisco Vigilance Committee

The Gold Rush caused rapid growth in California and brought with it a diverse population that was often in conflict.¹⁶⁶ Because of the rapid growth, the people established a system of government quickly enough, and courts could not keep pace.¹⁶⁷ The new territory was in a state of lawlessness and social irresponsibility.¹⁶⁸

The vigilante movement in the West was the most organized and effective under the San Francisco Committees of Vigilance of 1851 and 1856.¹⁶⁹ Two San Francisco Vigilance Committees were organized by a group of citizens in an effort to restore order to the San Francisco area.¹⁷⁰ Each of the committees

162. *Id.* Jackson developed a conspiracy theory that would make modern Patriots proud. Jackson saw a conspiracy of Clay, Calhoun and the bank, stating that “the misnamed American System is this British system of corrupt influence in Embryo.” *Id.* He saw the bank as a threat to legitimate power because it controlled the entire money supply. *Id.* The sovereign power of the bank over money enabled the bank to control wages, prices, and property values. *Id.* With this power, the bank was able “to defeat the will of the people.” *Id.* Jackson contended that it was a conspiracy and the bank’s “vast machinery” was directed by “the secret order of a committee of Directors at Philadelphia.” *Id.* Modern Patriots use similar conspiracy theories. For further discussion of conspiracy theories used by modern Patriots, see *supra* notes 44-48 and accompanying text.

163. Wilson, *supra* note 151, at 627-28. Jackson stated that “the Bank of the United States is itself a Government.” *Id.* at 628.

164. *Id.* at 646.

165. *Id.*

166. CUTLER, *supra* note 73, at 132.

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.* At this time, there were a great number of vigilance committees in other parts of the country. *Id.* at 133. These “popular tribunals” were active in Utah, Nevada, Oregon, Washington, Idaho, Montana, Arizona, New Mexico, and Colorado. *Id.* For a fascinating account of the vigilantes of Montana and the capture of Henry Plummer’s Notorious Road Agent Band, see generally THOMAS H. DIMSDALE, *THE VIGILANTES OF MONTANA* (Univ. of Okla. Press 1968). For further discussion of other California vigilante movements, see generally STANTON A. COBLENTZ,

hanged four men and banished about thirty.¹⁷¹ The 1856 Committee, however, also focused on political immorality.¹⁷² A sympathetic population felt that prompt, severe, extra-legal punishment accomplished an ultimate good and that the radical action was necessary to remove unscrupulous politicians and their criminal tendencies.¹⁷³ The Rev. S.H. Wiley said:

It looked then as if the immense preponderance of opinion in favor of the Committee was an effort to regain the reality of law and order, while those who stood by its forms were mainly those who had got those forms into their hands and used them to defeat justice.¹⁷⁴

The actions of the vigilance committees achieved a great reduction in the number of violent crimes committed not only in San Francisco, but the entire state.¹⁷⁵ Historians have paid tribute to the crucial role that the Committees of Vigilance played in establishing order in a lawless and volatile area.¹⁷⁶ Josiah Royce, an historian who condemned much in the progress of California society, said that the vigilance committees were the "expression of a pressing desire so to reform the social order that lynch law should no longer be necessary,"¹⁷⁷ and what they accomplished was "not the direct destruction of a criminal class, but the conversion of honest men to a sensible and devout local patriotism."¹⁷⁸

VILLAINS AND VIGILANTES (NY: Thomas Yoseloff 1957) (1936).

171. CUTLER, *supra* note 73, at 132.

172. *Id.* at 133; MARY FLOYD WILLIAMS, HISTORY OF THE SAN FRANCISCO COMMITTEE OF VIGILANCE 1851, at 323 (1921).

173. *Id.* at 411.

174. S.H. WILEY, THIRTY YEARS IN CALIFORNIA 49 (1879). Mr. Wiley reported that there was greater church attendance for the four or five years after the actions of the Committee of 1856. *Id.* The editor of *The Pacific*, a pioneer religious weekly, stated that most clergymen and church members approved of the extra-legal actions of the second vigilance committee. WILLIAMS, *supra* note 172, at 412 n.12 (citing unknown author, THE PACIFIC, Oct. 9 1856, at 2/1).

175. *Id.* at 323.

176. *Id.* at 414 (citing SAINT-AMANT, VOYAGES 138, 408-411; AUGER, VOYAGE EN CALIFORNIA, 209-19; H.H. BANCROFT, POPULAR TRIBUNALS I (1887)).

177. Lynch law refers generally to vigilante justice. CUTLER, *supra* note 73, at 16-17. A formal definition provides that: "Lynch law in some of its manifestations is a form of private initiative in the enforcement of law, where the ordinary official machinery for its enforcement has broken down or is manifestly inefficient, though this method of law enforcement is . . . at the same time a violation of the law." WILLIAMS, *supra* note 172, at 433 n.8 (citing MATHEWS, STATE ADMINISTRATION 414). For a detailed discussion of the origin of the term and variations over time see CUTLER, *supra* note 73, at 13-40.

178. WILLIAMS, *supra* note 172, at 415 (quoting JOSIAH ROYCE, CALIFORNIA 407, 465). Royce refers to the frontier vigilantes as "local patriots." *Id.* Many militia and common law court members view themselves as modern patriots and most of them operate on a particularly local level. FALSE PATRIOTS, *supra* note 8, at 4-5. Also, the leaderless resistance strategy calls for independent cells to operate on a local level. *Id.* at 24. See *infra* notes 658-62 and accompanying text.

Many people today would quickly condemn the actions of the San Francisco Vigilance Committee.¹⁷⁹ However, the vigilante actions in the San Francisco vicinity must be viewed in the context of California during the Gold Rush.¹⁸⁰ The area was in a state of lawlessness and perhaps anarchy or, at least, in danger of sinking into a state of anarchy.¹⁸¹ Undoubtedly, the Vigilance Committee trampled on the individual rights of its victims.¹⁸² However, the individual rights may have been sacrificed to achieve the common good of ordered society.¹⁸³ When viewed in the context of the times, the San Francisco Committee of Vigilance was a societal safety net that acted in order to prevent society from reverting to a state of anarchy.¹⁸⁴ However, the West was not the only area of the country that resorted to vigilante activity during the antebellum period.¹⁸⁵

C. *The Northern Indiana Regulators and the Hanging of Gregory McDougle*

The State of Indiana recognized its limits as a government and its inability to protect its citizens from criminal elements within the state.¹⁸⁶ In 1852, the Indiana legislature passed a most unusual "Act to Authorize the formation of companies for the detention and apprehension of Horse Thieves and other felons, and defining their power."¹⁸⁷ This Act gave private associations the rights and privileges of law enforcement officials because the lawful authorities were so inept at restraining crime.¹⁸⁸ This experiment in private associations proved to be dangerous, for the volunteer posses exceeded their authority to enforce laws and often inflicted summary justice on suspected criminals.¹⁸⁹ This historical occurrence serves as a remarkable example of how small groups of people justify vigilante activity through the doctrine of popular sovereignty.

Under this Act, several companies were formed and many more private associations were formed without bothering to fulfill the formal requirements of the law.¹⁹⁰ These local associations called themselves Regulators, Spies,

179. WILLIAMS, *supra* note 172, at 5.

180. *Id.* at 8, 19.

181. *Id.* at 84. Laws or rules set up by individual mining camps were also a method of establishing order in frontier California. *Id.*

182. *Id.* at 414.

183. *Id.* at 415.

184. *Id.*

185. Antebellum refers to the period of time before the Civil War. WEBSTER'S, *supra* note 72, at 89.

186. WILLIAMS, *supra* note 172, at 416.

187. IND. ACTS, chap. 51, tit. 1-10 (1852).

188. WILLIAMS, *supra* note 172, at 416.

189. *Id.*

190. JOHN MARTIN SMITH, HISTORY OF DEKALB COUNTY INDIANA 295, 299 (1992).

Reconnoiters, Rangers, Police, Horse Thief Detectives, Guards, Sharpers, and Invincibles.¹⁹¹ The vigilantes described themselves as “minute men and ready for service at a minute’s warning.”¹⁹² The reference to minute men is a comparison to colonial minute men who belonged to the colonial militia.¹⁹³ The statement reveals that the Northern Indiana Regulators thought of themselves as a militia or militia-like group. On January 8, 1858, several of these companies formed a Central Committee to coordinate their activities.¹⁹⁴ The area had been besieged with criminal activity and was “a favorable site for the organization of a gang of felons.”¹⁹⁵ At the meeting, the Central

191. *Id.* at 305.

192. M.H. MOTT, HISTORY OF THE REGULATORS OF NORTHERN INDIANA 67 (1859). It is not conclusive that Mott was the author of this book. The book does not credit any author, but simply states that the book was “published by order of the Central Committee.” *Id.* at cover page. However, its commentary and legalism suggests that a member of the bar wrote it. SMITH, *supra* note 190, at 302. In addition, M.H. Mott was listed as secretary of the Central Committee and his advertisement as attorney at law appears on the back cover. *Id.* One thing is clear: the book was published as an effort to justify the actions of the Regulators and perhaps to legitimize them. *Id.* Also, other authorities on vigilantism have credited the book to Mott. See Brown, *supra* note 75, at 84 n.15; WESTON A. GOODSPEED & CHARLES BLANCHARD, COUNTIES OF WHITLEY AND NOBLE, INDIANA: HISTORICAL AND BIOGRAPHICAL 33-37, 63-73 (1882).

193. A minuteman was “a member of a group of armed men pledged to take the field at a minute’s notice during and immediately before the American Revolution.” WEBSTER’S, *supra* note 72, at 757.

194. SMITH, *supra* note 190, at 295. The Regulators of Northern Indiana seemed to believe in the right of “The People” to reclaim their sovereign power. Could the Central Committee of Regulators be considered “The People”? The diverse associations united to form one homogenous group for the purpose of establishing order and banishing the criminals from the area. Note that the associations were from several different counties and a great distance from each other for the time, yet they banded together to form the Central Committee so that they could accomplish what they perceived as a common good. Many authors at the time also felt that the actions of the Central Committee were accomplished in the name of the common good. Lawrence J. Swanson, An Examination of Local Newspaper Accounts of the Regulator Activities in Northern Indiana During the First Three Months of 1858, at 13 (July 2, 1976) (unpublished manuscript, on file with the author). For example, the *Elkhart County Times* reported that the hanging was justified because every attempt to stop the illegal activity through legal means had failed. *Id.* (citing ELKHART COUNTY TIMES). *But see id.* (quoting the GOSHEN IND. DEMOCRAT, Feb. 3, 1858, which stated, “Even at this short distance from the scene of these awful proceedings, we are utterly unable to comprehend the condition of affairs, which . . . are deemed to require the application of such summary and startling retribution.”). For further discussion of collective action and “The People,” see *infra* notes 370-98 and accompanying text.

195. MOTT, *supra* note 192, at 6. Noble County Indiana was particularly suited to the formation of a gang of criminals. *Id.* Mott described that:

[N]ew countries seem to present the most favorable opportunities and the greatest facilities for carrying on the blackleg [criminal] business of any. Retired from the gazing multitudes of populous cities, domiciled in the midst of the unsuspecting settlers, where law is comparatively a stranger, and where they are secreted from the eye of vigilance, affording advantages which the sagacity of such men is not slow to perceive. While it is true that our cities and towns are seldom, if ever, entirely free from the contaminating influences of such lawless wretches, loitering about the groceries and

Committee planned its strategy to rid the area of the bandits.¹⁹⁶ The Regulators felt that the system of government had failed to rid the country of the bandits, and it had the right to reclaim the sovereign power that the people had delegated to the government.¹⁹⁷

The most significant aspect of the meeting was the adoption of a resolution. As an historical document, the resolution is very important because it states the reasons and justifications for the vigilante path upon which the Central Committee of Regulators was about to embark.¹⁹⁸ The resolution stated in part:

We are believers in the *doctrine of popular sovereignty*; that the people of this country are the real sovereigns, and that whenever the laws, made by those to whom they have delegated their authority, are found inadequate to their protection, it is the right of the people to take the protection of their property into their own hands, and deal with these villains according to their just desserts¹⁹⁹

other haunts of iniquity, or stealthily pacing the streets at the dead hour of night, to satiate their hellish desires by the commission of crime, it is a notorious fact in the history of all criminal associations, that the nucleus has been formed in some sequestered spot, remote from the settlements of civilization, or in some den or cave of the earth. Hence Noble county, [Indiana] in a very early day, presented a very favorable site for the organization of a gang of felons.

Id.

196. *Id.* at 16.

197. *Id.*

198. *Id.* at 15-18.

199. *Id.* at 16. The resolution is an amazing declaration of the reasons for vigilante action.

The Resolution states in part:

Whereas, The counties of Lagrange and Noble are infested with blacklegs, burglars and petty thieves, to such a degree, that the property of our citizens is very insecure

Whereas, We have reason to believe that the said B.F. Wilson is an accomplice of these villains, protecting them as far as lies in his power; securing them, and aiding and abetting them; and

Whereas, There has been counterfeit money passed

Whereas, We are believers in the doctrine of popular sovereignty; that the people of this country are the real sovereigns, and that whenever the laws, made by those to whom they have delegated their authority, are found inadequate to their protection, it is right of the people to take the protection of their property into their own hands, and deal with these villains according to their just deserts; and

Whereas, It is notorious that the civil laws are totally inadequate to the protection of the property of our citizens against the depredations of the vampires, who curse the earth with their presence, living upon the plunder taken from the honest, the industrious, and often the indigent portion of the community; and

Whereas, The citizens of other States have set us an example in this matter, taking the protection of their property into their own hands, and whenever they take these villains, offer them up as a tribute to humanity; therefore

A posse of Regulators was assembled, and they proceeded to arrest individuals that were suspected of criminal activity.²⁰⁰ The posse arrested certain individuals, interrogated them, and held trials.²⁰¹ Some charges were dismissed, and prisoners were released for lack of evidence to convict.²⁰² Others were released to the legitimate law enforcement officials for prosecution.²⁰³ However, one of the individuals arrested by the Central Committee, Gregory McDougle, was convicted by the Regulators and sentenced to death.²⁰⁴

Gregory McDougle was a bandit of particular notoriety in the area who had committed many crimes.²⁰⁵ When Gregory McDougle was informed of his fate, he began to ramble and made a confession.²⁰⁶ He confessed to several crimes and sent for his wife and child. The Central Committee followed through with their sentence and executed Gregory McDougle near Ligonier, Indiana, on January 26, 1858.²⁰⁷

The actions of the Northern Indiana Regulators were not reactionary in nature.²⁰⁸ Unlike mob violence which reacts to a particular incident.²⁰⁹ The Regulators were proactive in the sense that a group of citizens felt that government had failed them, and they assembled together to formulate a plan to restore order.²¹⁰ The actions of the Regulators were a sustained effort to rid the area of criminals while being as fair as possible.²¹¹ Simple judicial-type procedures were followed, and the Regulators held trials like a court.²¹² The trial process was somber and lengthy, and at no time did the group become a mob.²¹³

Resolved, That we will use our utmost exertions to bring these villains to justice, by assisting to take them wherever they may be found and that, when taken, we will deal with them in such a manner as to us may seem just and efficient

Id. at 16-17.

200. SMITH, *supra* note 190, at 296.

201. MOTT, *supra* note 192, at 19-21, 44-45, 47-66.

202. *Id.* at 18.

203. *Id.* at 57-58.

204. MOTT, *supra* note 192, at 21; SMITH, *supra* note 190, at 298.

205. MOTT, *supra* note 192, at 22.

206. *Id.* at 24.

207. *Id.* at 21.

208. SMITH, *supra* note 190, at 299.

209. *Id.*

210. MOTT, *supra* note 192, at 16-17; SMITH, *supra* note 190, at 299.

211. MOTT, *supra* note 192, at 65.

212. SMITH, *supra* note 190, at 297-98.

213. *Id.* at 299.

The hanging of Gregory McDougale is a shocking example of vigilante activity in the pre-Civil War popular sovereignty era.²¹⁴ The participants clearly stated in their resolution that hanging a person was justified by the doctrine of popular sovereignty.²¹⁵ The Central Committee declared that the people of America are the real sovereigns.²¹⁶ It is apparent from the resolution that the Central Committee felt that when the people delegate power to the government and the government fails them, they have the right to reclaim their sovereign power and enforce their own system of order.²¹⁷ In explaining the actions of the Northern Indiana Regulators, M.H. Mott, Secretary of the Central Committee stated that:

Whenever [a country is faced with unlawful acts] it is not only a right which every man holds by virtue of the Declaration of Independence, which forms the grand basis of our National Government, to defend himself and family against such invasions, but it is a right which he holds also by the charter given him by the God of the universe [All law starts with the will of the people and the will of the mass is the law of the land] whether it be by legislative enactment, or by the spontaneous outburst of indignation against a combined force that are plotting the ruin of the country.²¹⁸

This rationalization, as well as the resolution passed by the Central Committee, are shocking declarations of sovereign power by the people.²¹⁹ Although the Indiana Act of 1852 gave the associations of vigilantes known as the Central Committee the color of legal authority, the Act clearly did not contemplate such gross action or usurpation of government authority.²²⁰ However, the conditions of the time suggest that the Northern Indiana area was

214. *Id.* at 295.

215. *Id.* at 16. In addition, Mott makes a further attempt to justify the actions of the Regulators of Northern Indiana. SMITH, *supra* note 190, at 302. The publishing of the history by the order of the Central Committee is evidence of an attempt to rationalize their actions. *Id.*

216. MOTT, *supra* note 192, at 16.

217. *Id.*

218. MOTT, *supra* note 192, at 9-10. Mott goes on to state:

[W]henever a people, or community, feel themselves thus aggrieved and imposed upon by such a gang of felons, they have a right to demand redress; and if the civil authorities fail to come to the rescue with a sufficient force to meet the wants and wishes of the people, then, and not until then, it becomes the right and duty of a community to speak with that stentorian voice which must be heard. "All wholesome law" says a venerable statesman, "has its origin in the expressed will of the governed," and if that sentiment be true, the will of the mass is the law of the land

Id.

219. SMITH, *supra* note 190, at 295.

220. *Id.* at 299.

in a state of lawlessness and in danger of slipping toward anarchy.²²¹ Like the San Francisco Vigilance Committee, the Northern Indiana Regulators acted as a societal safety net and were useful in the restoration of order to the general community.²²² The hanging of Gregory McDougale is a chilling example of vigilante activity during the height of popular sovereignty.²²³ Because the incident was so well recorded by the participants, it is a unique incident which provides valuable insight into vigilante groups and their beliefs.²²⁴

After the Civil War, America witnessed many other incidents of vigilante activity.²²⁵ However, in the 1970's a new breed of protestors, vigilantes, and people that characterized themselves as "Patriots" began to emerge.²²⁶ This new breed of vigilante, the new breed of Patriot, may have been the most dangerous and volatile ever.²²⁷

IV. THE RISE OF THE MODERN DAY PATRIOTS

*Expect more bombs.—Bob Fletcher, Militia of Montana*²²⁸

Modern Patriots are disgruntled citizens who distrust the federal government and act out their dreams of legal revolution.²²⁹ They may be classified as a type of vigilante movement because they resort to extra-legal action and refuse to use legitimate channels to achieve reform.²³⁰ The Patriot movement has grown out of a group called the Posse Comitatus,²³¹ a radical anti-tax group that existed in the 1970's and 1980's.²³² Posse Comitatus members believed that the county was the highest level of government authority.²³³ Their ideas about income tax evasion appealed to many Midwestern farmers who blamed the government for their troubles during the

221. See MOTT, *supra* note 192, at 6.

222. *Id.* at 66.

223. See SMITH, *supra* note 190, at 299.

224. *Id.*

225. STOCK, *supra* note 45, at 90-142.

226. *Id.* at 163.

227. *Id.* at 181.

228. FALSE PATRIOTS, *supra* note 8, at 3.

229. *Id.* at 4-5.

230. STOCK, *supra* note 45, at 5.

231. "Posse Comitatus" literally means "the power of the county." STOCK, *supra* note 45, at 171. The County Rule movement and the militias share an ideological kinship, revolving around the idea, long popular in far-right circles, that the county is the supreme level of government and the sheriff the highest elected official. Diana Baldwin & Ed Godfrey, "Craziness" of Common-Law Courts Concerns Officials, DAILY OKLAHOMAN, May 13, 1996, at A2.

232. FALSE PATRIOTS, *supra* note 8, at 38; Worthington, *supra* note 34, at A2.

233. FALSE PATRIOTS, *supra* note 8, at 38.

farm foreclosures of the 1980's.²³⁴

Most significantly, the Posse Comitatus added a martyr to the Patriot movement.²³⁵ Gordon Kahl, a North Dakota farmer, was active in the Posse Comitatus.²³⁶ Kahl killed three law enforcement officers and wounded four others in 1983 when the officers attempted to arrest him. Later that year, Kahl died in a gun battle with federal and state agents.²³⁷

After the death of Kahl, further deaths and convictions took their toll on the Posse Comitatus and led to its demise in the late 1980's.²³⁸ However, the death of the Posse Comitatus brought the beginning of the Patriot movement.²³⁹ In the late 1980's, the Patriot movement kept a low profile but was gaining momentum.²⁴⁰ In 1992, Bo Gritz, an ex-green beret and highly popular figure in the Patriot movement, ran for President of the United States.²⁴¹ In his campaign, he called for citizen militias.²⁴²

In late 1992 and early 1993, two events occurred that added fuel to the fire of the Patriot movement and reinforced its suspicion about a government conspiracy to oppress the American people.²⁴³ First, in 1992, a standoff between federal agents and Randy Weaver occurred at Ruby Ridge, Idaho.²⁴⁴ The standoff left a Deputy United States Marshall dead, along with Randy Weaver's wife and thirteen-year-old son.²⁴⁵ This event confirmed the suspicions of the Patriot movement that the government had become tyrannical.²⁴⁶ Second, in 1993, the standoff at the Branch Davidian compound in Waco, Texas, occurred.²⁴⁷ After a fifty-one day siege, agents from the Department of Alcohol, Tobacco, and Firearms stormed the compound.²⁴⁸ A

234. STOCK, *supra* note 45, at 171.

235. FALSE PATRIOTS, *supra* note 8, at 38.

236. *Id.*

237. *Id.*

238. *Id.* at 40. In 1988, Posse Comitatus leader William Potter Gale and others were convicted in a plot to kill IRS officials and a federal judge in Nevada. *Id.*

239. Baldwin & Godfrey, *supra* note 231, at A2.

240. Jim Gallagher & Tim Bryant, "Common-Law Courts" Grow from Conviction, ST. LOUIS POST-DISPATCH, Apr. 14, 1996, at A2; Eure, *supra* note 16, at A1.

241. FALSE PATRIOTS, *supra* note 8, at 41.

242. *Id.*

243. See Deeann Glamser, *3 Armed Men Defy Government: Sheriff Doesn't Want to Make Them Martyrs*, USA TODAY, May 17, 1995, at 3A.

244. FALSE PATRIOTS, *supra* note 8, at 41.

245. *Id.*; STOCK, *supra* note 45, at 145.

246. FALSE PATRIOTS, *supra* note 8, at 9, 39; STOCK, *supra* note 45, at 146.

247. FALSE PATRIOTS, *supra* note 8, at 9, 39.

248. *Id.*

fire broke out, and eighty people died in the conflagration.²⁴⁹ These two events confirmed the paranoid delusions and fears of the Patriot movement.²⁵⁰ Thus, Patriots have become convinced that the federal government is the enemy and that they must organize themselves to defend the American people and the Constitution of the United States.²⁵¹

More recently, in April 1995, the Alfred P. Murrah Federal Building in Oklahoma City, Oklahoma, was bombed.²⁵² In June 1997, Timothy McVeigh was convicted and sentenced to death for this bombing that killed 168 people.²⁵³ Timothy McVeigh and his suspected accomplice, Terry Nichols, have significant ties to the Patriot movement.²⁵⁴ McVeigh and Nichols both actively participated in citizen militias as well as common law courts.²⁵⁵

At the same time, conspiracy theories abound within Patriot groups, and the Patriot movement has blamed the federal government for the bombing.²⁵⁶ This

249. *Id.*

250. *Id.*; STOCK, *supra* note 45, at 146.

251. STOCK, *supra* note 45, at 146; Blake, *supra* note 47, A2. Mike Morrell, an Air Force Veteran, believes that corrupt officials in the United States government are conspiring to create a "New World Order" that would be controlled by the United Nations. *Id.*

252. FALSE PATRIOTS, *supra* note 8, at 41; STOCK, *supra* note 45, at 1.

253. Tom Kenworthy & Lois Romano, *Jury Condemns McVeigh to Death: "It's Okay," Oklahoma Bomber Whispers to Family in Court*, WASH. POST, June 14, 1997, at A1. For further information concerning the Oklahoma City bombing trial, see generally *United States v. McVeigh*, 964 F. Supp. 313 (D. Colo. 1997); *United States v. McVeigh*, 958 F. Supp. 512 (D. Colo. 1997); *United States v. McVeigh*, 955 F. Supp. 1281 (D. Colo. 1997); *United States v. McVeigh*, 955 F. Supp. 1278 (D. Colo. 1997); *United States v. McVeigh*, 954 F. Supp. 1454 (D. Colo. 1997); *United States v. McVeigh*, 954 F. Supp. 1441 (D. Colo. 1997); *United States v. McVeigh*, 169 F.R.D. 362 (D. Colo. 1996); *United States v. McVeigh*, 944 F. Supp. 1478 (D. Colo. 1996); *United States v. McVeigh*, 940 F. Supp. 1571 (D. Colo. 1996); *United States v. McVeigh*, 940 F. Supp. 1541 (D. Colo. 1996); *United States v. McVeigh*, 931 F. Supp. 756 (D. Colo. 1996); *Nichols v. Reno*, 931 F. Supp. 748 (D. Colo. 1996); *United States v. McVeigh*, 931 F. Supp. 753 (D. Colo. 1996); *United States v. McVeigh*, 923 F. Supp. 1310 (D. Colo. 1996); *United States v. McVeigh*, 918 F. Supp. 1467 (D. Colo. 1996); *United States v. McVeigh*, 918 F. Supp. 1452 (D. Colo. 1996); *Nichols v. United States Bureau of Prisons*, 895 F. Supp. 6 (D.D.C. 1996); *United States v. McVeigh*, 896 F. Supp. 1549 (W.D. Okla. 1995); *United States v. Nichols*, 897 F. Supp. 542 (W.D. Okla. 1995).

254. FALSE PATRIOTS, *supra* note 8, at 53, 54. Mr. Nichols' trial is scheduled for the fall of 1997. Jo Thomas, *Double Setback for Defense in Bomb Trial*, N.Y. TIMES, Aug. 29, 1997, at A4.

255. *Id.* See also Braun, *supra* note 19, at A1.

256. William F. Jasper, *Did Federal Agents Have Prior Knowledge*, NEW AMERICAN, Dec. 11, 1995, at 5. See also, Staff, *McVeigh's Actions Set Back Militias Membership in Paramilitary Groups Drops, Though Conspiracy Theories Remain*, MILWAUKEE JOURNAL SENTINEL, June 15, 1997, at 3. One common law activist is selling an "Oklahoma City Bombing Fact Pak" through a site on the internet. *Id.* The publication includes alternative conspiracy theories for the Oklahoma City Bombing alleging that bombs were planted on the inside of the building, and an "electromagnetic pulse weapon" was used. *Id.* See generally William Norman Grigg, *I Am Not a UN Soldier*, NEW AMERICAN, Oct. 2, 1995, at 3; John F. McManus, *Steps Toward Tyranny*, NEW AMERICAN, Apr.

is typical of the tangled web of conspiracy theories that the Patriot movement weaves.²⁵⁷ Whenever an event occurs, the Patriot movement conjures up another government conspiracy theory to explain and interpret an event in a manner that serves their interests.²⁵⁸ The conspiracy theories of the Patriot movement are mixed with other, more mainstream, ideology, creating a concoction that is as volatile as a fertilizer bomb.²⁵⁹ This volatile mixture has proven that it can explode and cause devastating acts of terrorism.²⁶⁰ To understand the Patriot movement, it is necessary to understand the underlying ideology that drives the movement.²⁶¹

V. THE IDEOLOGY OF THE PATRIOT MOVEMENT: SOCIAL CONTRACT,²⁶²
POPULAR SOVEREIGNTY,²⁶³ AN INDIVIDUAL
RIGHT TO BEAR ARMS, AND THE RIGHT TO REVOLT²⁶⁴

If this country doesn't change armed conflict is inevitable. Who is the enemy? Anyone who threatens us.—Norman Olson, Michigan Militia²⁶⁵

The ideology of the Patriot movement is a tangled thicket that eludes analysis, but analysis is necessary to address the problems associated with the movement.²⁶⁶ When the Patriot movement is examined as a whole, it is difficult to recognize any common themes.²⁶⁷ Many of the groups are racist in nature; many are not.²⁶⁸ Others seem to be harmless study groups who

3, 1995, at 15. *New American* is a publication that is popular among John Birch Society members. *Id.* The John Birch Society is a conservative organization, and many of its members may sympathize with the Patriot movement. STOCK, *supra* note 45, at 165-67.

257. Braun, *supra* note 19, at A1.

258. *Id.*

259. Blake, *supra* note 47, at A2.

260. FALSE PATRIOTS, *supra* note 8, at 4-5.

261. *Id.* at 8.

262. For a definition of social contract, *see supra* note 20.

263. For a definition of popular sovereignty, *see supra* note 21.

264. There are many other ideologies associated with the Patriot movement. FALSE PATRIOTS, *supra* note 8, at 11. For example, Christian Identity theory and religion is a large part of many Patriot groups. *Id.* However, Christian Identity may be readily dismissed as an illegitimate and unfounded racist theory and religion. As a result, Identity religion will not be discussed at length. This note focuses on Patriot theories that are at least *arguably* sound. For further discussion of Christian Identity theory and how it relates to the Patriot movement, see generally STOCK, *supra* note 45, at 163-76.

265. FALSE PATRIOTS, *supra* note 8, at back cover page.

266. STOCK, *supra* note 45, at 3.

267. FALSE PATRIOTS, *supra* note 8, at 4.

268. *Id.* at 5.

review the Constitution and the works of the Founding Fathers.²⁶⁹ One Patriot has described the movement as nothing more than grown-up boy scouts.²⁷⁰ Many claims made by Patriots are wholly without merit and may be dismissed with a few minutes of research or a good dose of common sense.²⁷¹

This Note does not discuss the conspiracy theories of paranoid Patriot groups, does not discuss Patriot groups that are strictly racist in nature, and does not address other theories that are completely devoid of merit. Instead, this Note focuses on the socio-political theories of Patriot groups that are at least arguably legitimate. Four socio-political theories are useful when analyzing the Patriot movement: social contract, popular sovereignty, the constitutional right to bear arms, and the constitutional right to revolt against a tyrannical government.

A. Social Contract Theory

Social contract theory is a concept set forth in John Locke's *Second Treatise of Government*.²⁷² While Thomas Hobbes and other theorists thought of man as existing in a "state of anarchy" when existing in a "state of nature,"²⁷³ Locke did not make this assumption.²⁷⁴ Locke believed in natural law and proposed that most men in a state of nature will adhere to an established order that is based on natural law.²⁷⁵ Of course, some people will not adhere to any social order, specifically the "[c]riminal, who having renounced reason . . . hath by unjust Violence and Slaughter he hath committed upon us, declared War

269. Sarah Hanson, *Disgruntled Citizens Turn to Common Law Court; Kosciusko County Venue "Indicts" Office-Holders, Alleging Current Oaths of Office are Not on File*, INDIANAPOLIS STAR, July 29, 1996, at B01.

270. Sean Piccoli, *Patriot Groups Vary from Studying Constitution to Girding for War*, WASH. TIMES, Apr. 11, 1996, at A9.

271. FALSE PATRIOTS, *supra* note 8, at 9. At times, the literature of the Patriot movement resembles a supermarket tabloid. *Id.* Among the myths are claims that: black helicopters are being used to spy on American citizens; salt mines near Detroit, Michigan, are being maintained to house Russian troops; police officers from Hong Kong are being trained in Montana to disarm Americans; fuel air bombs have been developed by the government that can vaporize people; federal agents are trained in the use of laser weapons to be used against Patriots; secret codes on the back of road signs will be used to guide a United Nations invasion force; there are surveillance cameras on the top of many light posts; Patriot resisters will be placed in concentration camps that are being built by the government; the government has built large crematoriums in Minneapolis, Indianapolis, Kansas City, and Oklahoma City; and the eye above the pyramid on the back of U.S. dollar bills is the sign of the Illuminati, a secret Jewish sect that was founded in 1776 that is plotting a world takeover. *Id.* at 9-10.

272. LOCKE, *supra* note 20. See also BARKER, *supra* note 20.

273. Stettner, *supra* note 77, at 64.

274. *Id.*

275. *Id.*

against all mankind"²⁷⁶

According to Patriots, a social contract is based on "The People" delegating power to the government for their mutual protection and common good.²⁷⁷ Members of the Patriot movement see the delegation of sovereign power as a social contract.²⁷⁸ They believe that, because a social contract is derived from the sovereign power of "The People," the contract may be renounced at any time,²⁷⁹ and patriot groups use common law courts to renounce a social contract with government.²⁸⁰ Patriots simply appear before a common law court and reclaim sovereignty from the government²⁸¹ by revoking their Social Security Accounts, birth certificates, marriage licenses,²⁸² driver's licenses, and automobile registrations.²⁸³ Patriots believe that this process relieves a sovereign citizen from paying any portion of the federal debt, income taxes, FICA,²⁸⁴ gift taxes, estate taxes, license fees, and registration fees.²⁸⁵ Patriots declare that "many of us have been duped into giving up our sovereignty by means of 'implied contracts' with the federal government, thereby becoming federal subjects unwittingly"²⁸⁶ [A citizen has] the right to declare [himself] to be a sovereign state citizen and to take other actions to free [himself] from bondage."²⁸⁷

276. LOCKE, *supra* note 20, at 314.

277. Colette Baxley, *Common-law Activist Says He Wants Justice*, POST COURIER, Apr. 6, 1996, at A1.

278. Bartholemew Sullivan, *Vigilante Justice*, COM. APPEAL, Nov. 23, 1995, at 1A.

279. Dexter Filkins, *Federal Government Lacks Power to Tax, Protester Says*, L.A. TIMES, May 15, 1996, at B4. Patriot activists declare that they are sovereign people. *Id.* Patriot Catherine Keddie explained that "[she has] removed [herself] from the system. [Patriots] are letting the powers know that our sovereign is our lord and our creator." *Id.*

280. Larsen & Sforza, *supra* note 11, at A1. Typically, common law courts refer to this as an action to quiet title. *Id.* An action to quiet title is a declaratory judgment in a common law court that a sovereign Patriot no longer has any relationship with the federal government. *Id.*

281. An organization named BEHOLD! in Oregon City, Oregon, publishes a rescission kit that includes all of the documents necessary to become a sovereign. *Rescission Documents*, BEHOLD! (June 1989) (unpublished document on file with the author). The kit contains fill in the blank forms for rescinding various types of government relationships. *Id.* The kit also contains an order blank for other publications that are available from the group. *Id.* The order form lists all prices in silver. *Id.* Federal Reserve Notes are discouraged as a form of payment, however, if paper money is used, the ounce price of silver at the date of purchase multiplied times the number of ounces of silver listed in the price list will determine the correct price. *Id.*

282. Rescinding a marriage license does not dissolve the marriage. Larsen & Sforza, *supra* note 11. Patriots believe that it simply dissolves any contractual arrangement that there may have been with a state regarding the marriage. *Id.* Contracts entered into with private individuals are still valid. *Id.*

283. *Id.*

284. FICA is an abbreviation for the Federal Insurance Contribution Act.

285. Larsen & Sforza, *supra* note 11, at A1.

286. *Id.*

287. *Id.*

Consistent with Locke's social contract theory, the Patriot movement has not attempted to return to a state of anarchy by reclaiming its sovereignty.²⁸⁸ They believe in having an ordered society.²⁸⁹ However, they believe that once the social contract with the government is broken, they are free to determine their own destiny by ordering society in their own particular fashion.²⁹⁰

B. Popular Sovereignty Theory

A related, but distinct theory provided by the Patriot movement is the doctrine of popular sovereignty.²⁹¹ In Colonial America, sovereign power was in the hands of the King of England or Parliament.²⁹² When the Framers developed the political theories on which the new government would be founded, sovereignty presented them with a particular problem.²⁹³ They resolved the problem by placing sovereignty in the hands of "The People."²⁹⁴ The Declaration of Independence is based on a mixture of social contract and the sovereign power of "The People."²⁹⁵ The premise of the Declaration of Independence is that "Governments are instituted among Men, deriving their just power from the consent of the governed."²⁹⁶

Sovereign power involves the right to determine order.²⁹⁷ Patriots believe

288. Henry J. Cordes, *Common-Law Backers Eye New Justice*, OMAHA WORLD HERALD, Nov. 5, 1995, at 1B.

289. *Id.* Common law supporter Terry Rowse states that Patriot groups should not be classified as anti-government. *Id.* He states that "we're pro-government. We've got to have government. What we're against is fraudulent government." *Id.* This statement indicates that common law activists do not want to return to a state of anarchy. Instead, they want to extensively modify the American system of order that has developed.

290. Theresa Myers, "Common Law" Advocates Support Laws-Their Laws, DENVER POST, Apr. 21, 1996, at B-01.

291. Christopher Smith, *A Tangled Web Fraud Case Against Freemen May Take Months to Unravel Freemen: Fraud Case Is Complicated*, SALT LAKE TRIB., Mar. 28, 1996, at A1.

292. THE DECLARATION OF INDEPENDENCE (U.S. 1776).

293. Horst Dippel, *The Changing Idea of Popular Sovereignty in Early American Constitutionalism: Breaking away from European Patterns*, 16 J. OF THE EARLY REPUBLIC 40 (1996).

294. *Id.* Dippel describes sovereignty that is vested in the people as divided. *Id.* Individual sovereignty is inferior to the Constitution while sovereignty multiplied by the numerical strength of the majority is superior to the Constitution. *Id.*

295. THE DECLARATION OF INDEPENDENCE (U.S. 1776).

296. *Id.* The capitalization of the word "Men" may suggest that Jefferson was referring to a collective body of men rather than a few or a small group.

297. Dippel, *supra* note 293, at 31. In political terms, the word "constitution" describes the way a state is organized or a system according to which a body politic is governed. *Id.* at 23. Sovereign people have the right to determine the constitution. *Id.* at 31. Therefore, sovereignty involves the right to determine order. *Id.* At the time of ratification, many Americans rejected the new Constitution because they believed that it did not provide enough protection for popular sovereignty. *Id.* at 38. A Boston newspaper wrote in 1790 that the "The rights and privileges of

that every person has the power of sovereignty within himself,²⁹⁸ which includes the power to determine his own destiny and to be a freeman.²⁹⁹ Sovereign power is an endowment that is delegated to government and, therefore, is the source of all legitimate governmental power.³⁰⁰ Without the delegation of sovereign power from people to the federal government, the government is nothing but a hypothetical entity.³⁰¹ Stated differently, any sovereign power that the federal government has flows directly to the government from "The People."³⁰² Thus, "The People" are the basis or "lifeblood" of all sovereign power.³⁰³

The claim of modern Patriots that they possess sovereign power, at least arguably, has some merit.³⁰⁴ Legal authority and many writings endorse the concept that people have sovereign power which a group of people may reclaim if government has failed to function properly.³⁰⁵ Although the authority is mostly historical anecdote and of little precedential value, some judges have endorsed this concept.³⁰⁶ For example, in 1836, after a man was lynched and burned to death, a grand jury convened to consider the actions of a group of vigilantes.³⁰⁷ In the jury instruction, the judge stated:

I have reflected much on this matter, [the issue is whether] the destruction of [the deceased] was the act of the "few" or the act of the "many." If . . . you shall be of opinion that it was perpetrated by a definite, and, compared to the [general] population . . . , a small number of individuals, separate from the mass, and evidently taking upon themselves, as contra distinguished from the multitude, the responsibility of the act, my opinion is that you ought to indict them all. . . .

If on the other hand, the destruction of the [the victim] was the

the People" had given way to "Checks and Balances." *Id.*

298. Gallagher & Bryant, *supra* note 240, at A2. Common law activist Marvin Robey believes that every man is a king under the common law. Larsen & Sforza, *supra* note 11, at A1.

299. *Id.*

300. Myers, *supra* note 290, at B-01.

301. However, many Patriots also believe that states enjoy a heightened degree of sovereignty. *Id.* Presumably, Patriots believe that states enjoy a higher degree of sovereignty because states pre-existed the Constitution.

302. Dippel, *supra* note 293, at 26.

303. *Id.*

304. Generally, the assertion that ultimate sovereignty rests with the people is undisputed. The question becomes: What are the ways that individuals or groups of people may express their sovereignty? *Id.* at 29.

305. CUTLER, *supra* note 73, at 109.

306. *Id.*

307. *Id.*

act as I have said, of the many—of the multitude, in the ordinary sense of words—not the act of numerable and ascertainable malefactors, but of congregated thousands, seized upon and impelled by that mysterious, metaphysical, and almost electric phrenzy, which, in all nations and ages, has hurried on the infuriated multitude to deeds and death and destruction—then, I say act not at all in the matter—the case then transcends your jurisdiction—it is beyond the reach of human law.³⁰⁸

The jury instruction suggests that a collective body may act outside of the law by reclaiming its sovereign power that had been delegated to the government.³⁰⁹ Of course, the act was committed by a small and ascertainable number of people rather than by the entire population of the city.³¹⁰ However, the judge definitely felt that the action was justified if the mob was acting on the wishes of a collective body of people.³¹¹

Further, many governmental leaders have endorsed the concept of sovereign power with “The People” that may be reclaimed when “The People” deem it necessary.³¹² For example, in reviewing the actions of a group of Montana vigilantes,³¹³ a later state court chief justice, Theodore Brantley, felt that the necessity of the times justified the actions of the vigilantes.³¹⁴ Justice Brantley stated:

Much casuistry may be indulged in as to the right and necessity of [the vigilantes'] doings. We must remember, however, that the arm

308. *Id.* at 109-110 (quoting LIBERATOR, June 25, 1836 (6:102)). Judge Lawless wrote the jury instruction. *Id.* at 109. Many commentators have remarked that the Judge was appropriately named. *Id.*

309. *Id.*

310. *Id.* The incident involved a particularly gruesome vigilante act:

A colored man was arrested on board a boat by a deputy sheriff and a constable. Another colored man, a free mulatto, assisted him to escape, and the officers immediately arrested the mulatto. He, however, turned upon the officers, drew a knife and stabbed Deputy Sheriff Hammond, killing him instantly, and also seriously wounded Mr. Mull, the constable. He was finally captured, however, and locked up in the jail. Later the people assembled and, after threatening to tear down the jail if he was not delivered to them, secured the prisoner, conducted him to the outskirts of the city, placed a chain round his neck and a rope around his body, and thus fastened him to a tree a few feet from the ground. A fire was then placed round the tree and he was roasted alive.

Id.

311. CUTLER, *supra* note 73, at 109.

312. WILLIAMS, *supra* note 172, at 419.

313. For a historical account of the vigilantes of Montana, see generally DIMSDALE, *supra* note 170.

314. WILLIAMS, *supra* note 172, at 419.

of the law was not strong enough to extend to the people who needed protection, and that, wherever it is a question, as it was then, whether peace and order shall prevail over crime and lawless spoliation, society may act in its own defense, by the use of whatever means may be necessary to preserve its life by protecting or insuring personal safety and individual rights. Necessity knows no law. Whatever wrongs or mistakes may have been committed by the men constituting this organization, its existence was justified by the necessities of the times, and the salutary results accomplished by it, must stand as its vindication.³¹⁵

In addition to these statements by judges, two United States Presidents have endorsed the reclamation of sovereign power through vigilante action.³¹⁶ Andrew Jackson once advised residents of Idaho to punish a murderer by Lynch Law.³¹⁷ The young young Teddy Roosevelt sought to join a group of vigilantes in 1884 and endorsed their actions throughout his career.³¹⁸ In addition, in 1915, Teddy Roosevelt drew a favorable parallel between frontier vigilantes and his taking of the canal zone away from Panama.³¹⁹

The ideology of vigilantism, with its focus on popular sovereignty, attracted

315. *Id.* (citing MONTANA HISTORICAL SOCIETY, CONTRIBUTIONS IV, at 109-21 (1903). It is peculiar that the judge based his premise on the doctrine of necessity, even though necessity is generally not recognized as a defense in criminal cases. At least one common law court group may have discovered the reasoning in Brantley's statement. The Common Law Court of Necessity meets in a motel in York, Nebraska. Cordes, *supra* note 288, at 1B. Also, the statement endorses the Machiavellian theory that "the ends justify the means." For further discussion of Machiavellian political theory, see generally MACHIAVELLI, THE PRINCE (Time-Life 1972). In addition, the statement indicates that society (The People) may act out to insure safety or preserve individual rights.

316. WILLIAMS, *supra* note 172, at 419. See also Brown, *supra* note 75, at 177, 192-95, which details vigilantes of notoriety and their backgrounds. *Id.* Others who expressed approval of vigilantism were H.L. Hosmer (Chief Justice, Montana, 1864-68), Henry T. Lewis (Associate Justice, Georgia Supreme Court, 1897-1903), and Walter Clark (North Carolina Supreme Court, 1889-1924). *Id.* Two associate Justices of the United States Supreme Court, David J. Brewer (1890-1910) and Joseph P. Bradley (1882), expressed qualified approval of Lynch Law, and another, Stephen J. Field, had adopted extralegal methods while serving as a young judge in California. *Id.* Five became United States Senators: Alexander Mouton, Louisiana (1837-42); Francis M. Cockrell, Missouri (1875-1905); Leland Stanford, founder of Stanford University, California (1885-93); William J. McConnel, Idaho (1890-91); and Wilbur Fisk Sanders, Montana (1890-93). *Id.* Note that in 1890 four vigilantes were serving in the Senate at the same time. *Id.* Eight former vigilantes became governors of states or territories: Alexander Mouton, Louisiana (1843-46); Augustus C. French, Illinois (1846-53); Leland Stanford, California (1861-63); William J. McConnel, Idaho (1893-96); John E. Osborne (1893-95); Fennimore Chatterton, Wyoming (1903-05); Miguel A. Otero (1897-1906); and George Curry (1907-1911), New Mexico. *Id.*

317. Brown, *supra* note 75, at 105.

318. *Id.*

319. *Id.*

mass allegiance by the people.³²⁰ The underlying ideology of vigilantism was that the people had a right to reclaim their sovereign power when they became dissatisfied with government.³²¹ Reclamation of sovereign power through vigilantism was to be used with restraint and not resorted to until it had become apparent that the legitimate government had broken down and was not functioning properly.³²² Reclaiming sovereign power through vigilantism trampled on individual rights; however, most people felt that such action was for the common good.³²³ The public had the feeling that, because vigilantes were usually right, victims of vigilante justice were not punished unfairly because the victims received what they deserved.³²⁴

Reclamation of sovereign power is a driving force behind the Patriot movement.³²⁵ Patriots believe that if sovereign power resides within the people, Patriots or Patriot groups may reclaim that power.³²⁶ Once reclaimed, the power may be expressed through vigilante activity or through any other form of expression that a Patriot group wants to use in order to achieve its goals. Reclamation of sovereign power is fueling the fire of the Patriot movement and is appealing to a broad group of people who are dissatisfied with the government

320. *Id.* at 104.

321. *Id.*

322. WILLIAMS, *supra* note 172, at 419.

323. Brown, *supra* note 75, at 106-07.

324. *Id.* at 106 (citing ERIC F. GOLDMAN, CHARLES J. BONAPARTE: PATRICIAN REFORMER: HIS EARLIER CAREER 32 (Baltimore: John Hopkins Press 1943)). In an address to the Yale law School class of 1890, Bonaparte declared that "Judge Lynch may make mistakes . . . but if the number of failures of justice in his Court could be compared with those in our more regular tribunals, I am not sure that he need fear the result. I believe that very few innocent men are lynched." *Id.*

325. FALSE PATRIOTS, *supra* note 8, at 29.

326. *Id.*

and are looking for an answer to what they perceive is an oppressive federal government,³²⁷ that has infiltrated the lives of Patriots through a plethora of regulation and intervention.³²⁸

C. *An Individual Right to Bear Arms*

There is much debate about whether the Second Amendment confers an individual right to keep and bear arms, or whether the right to bear arms belongs to state governments which may maintain arsenals and a military force.³²⁹ Strong arguments can be made on both sides of the issue.³³⁰ The modern Patriot movement believes firmly in an individual right to keep and bear arms as well as to form citizen militias.³³¹

The text of the Second Amendment states: "A well regulated Militia, being necessary to the security of a free State, the right of the People to keep and bear Arms, shall not be infringed."³³² To further complicate the analysis, many state constitutions have a militia clause that confers a right to keep and bear arms.³³³ For example, the Ohio Constitution and the Ohio Revised Code mention an unorganized militia.³³⁴ As a result, strong constitutional arguments can be made that support the premise of a federal, state, and individual right to keep and bear arms.³³⁵ To understand the Patriot movement's belief in an individual right to bear arms, it is necessary to examine the Second Amendment and its history.³³⁶

327. *Id.* at 30.

328. Lynch, *supra* note 3, at H1. Patriot groups object strongly to the size of the federal government. *Id.* The number of home schooled children in Eastern Washington doubled from 1991 to 1995 as parents rejected government-driven curriculum. *Id.* Patriots believe that government wants to micro-manage lives. *Id.* A national poll taken in May 1995 revealed that 55% of Americans believe that government has gotten so big that it threatens individual freedoms. *Id.* In 1950, the *Federal Register* had 12,000 pages, and today it has nearly 100,000. *Id.* While the United States Constitution has only 4543 words, a regulation controlling the sale of cabbage has 27,000. *Id.* The Patriot movement has not welcomed the administrative state. *Id.* Common law activist J.D. Anderson asks, "[C]ould it be that the nuts are right?" *Id.*

329. STEPHEN P. HALBROOK, *THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT* ix (1984).

330. *Id.*

331. Blake, *supra* note 47, at A2. Mike Morrell, a former gun shop owner, started the 19th Regiment Brevard County Militia in 1994 to preserve constitutional rights, especially the right to keep guns. *Id.*

332. U.S. CONST. amend. II.

333. *Militia Hearing*, *supra* note 7, at 134 (outlining the statement of Ted Almay, Ohio Bureau of Criminal Identification and Investigation).

334. *Id.* All citizens between the ages of 18 and 65 were contemplated to be part of the unorganized militia. *Id.*

335. HALBROOK, *supra* note 329, at ix.

336. *Id.* at x.

The history of the Second Amendment indicates that the Framers intended to confer an individual right to keep and bear arms.³³⁷ The concept of a militia arises out of English citizen armies.³³⁸ English citizen armies were important in the development of individual rights because they acted as a check to keep the monarchy from becoming oppressive.³³⁹ Any King that became a tyrant would have to deal with the threat of physical force from the armed citizenry.³⁴⁰

The volatile Stuart period had a great influence on the development of political theories by our Founding Fathers.³⁴¹ King Charles II sought to create a standing army and to disarm the population.³⁴² Gaming laws were passed that restricted the right to hunt and made it illegal to possess a firearm if a person was not one of the select few who were allowed to possess a firearm for hunting purposes.³⁴³ These gaming laws were unpopular among British subjects, and Parliament sought to limit the power of the monarchy by passing a Declaration of Rights.³⁴⁴ This Declaration of Rights included a right to possess arms in order to resist tyranny.³⁴⁵ The Declaration of Rights was part of the English Republican view of government that had a profound effect on the American revolutionary leaders.³⁴⁶

The right to possess arms in order to resist government tyranny was impressed upon the minds of our Founding Fathers and was evident during the ratification process.³⁴⁷ Federalists³⁴⁸ and Anti-federalists³⁴⁹ both believed

337. David E. Vandercoy, *The History of the Second Amendment*, 28 VAL. U. L. REV. 1007, 1038 (1994).

338. *Id.* at 1009.

339. *Id.* at 1011.

340. *Id.*

341. *Id.*

342. *Id.* at 1015.

343. HALBROOK, *supra* note 329, at 51; Vandercoy, *supra* note 337, at 1016; 22 & 23 Car. 2, Ch. 25 (1671).

344. Vandercoy, *supra* note 337, at 1017.

345. Joyce Lee Malcolm, *The Right of the People to Keep and Bear Arms: The Common Law Tradition*, 10 HAST. CONST. L.Q. 285, 307 (1983).

346. Vandercoy, *supra* note 337, at 1022. It appealed to the founding fathers that republican philosophy was based on English and classical history. *Id.* This history showed them that the power of the people to possess arms was essential to the preservation of individual rights and a republican form of government. *Id.* at 1021. See Robert E. Shalhope, *The Ideological Origins of the Second Amendment*, 69 J. AM. HIST. 599 (1982).

347. Vandercoy, *supra* note 337, at 1027.

348. A Federalist was "an advocate of a federal union between the American colonies after the Revolution and of the adoption of the U.S. Constitution." WEBSTER'S, *supra* note 72, at 454.

349. An Anti-federalist was "a member of a group that opposed the adoption of the U.S. Constitution." *Id.* at 91.

that the ultimate check on a tyrannical government was an armed population.³⁵⁰ Many states qualified their ratification by making it clear that the people had a right to keep and bear arms.³⁵¹ In addition, they found that the militia included all people who had the capability to bear arms and was not to be limited to a select few.³⁵² Therefore, the original intent³⁵³ of the Second Amendment was to confer an individual right to keep and bear arms as a check on government.³⁵⁴ The Patriot movement subscribes to this individual rights view of the original intent of the Second Amendment.³⁵⁵ In addition, Patriot groups believe that the original intent of the Second Amendment should control when Second Amendment issues arise.³⁵⁶ Patriot groups adamantly believe in the individual right to bear arms and organize themselves into a militia.³⁵⁷ One recent event that has touched off concern among the Patriots was the passing of the Brady Bill,³⁵⁸ which requires waiting periods for handgun purchases.³⁵⁹ Patriots view the passage of this bill as a sure sign that the government has become a tyranny and is acting to disarm the citizenry in order to oppress the people through martial law.³⁶⁰ Modern Patriots call the Brady Bill a slave law and view it in conjunction with the incidents at Waco and Ruby Ridge.³⁶¹ Patriots see these acts as the equivalent of the Intolerable Acts that were passed by Britain to oppress the colonists.³⁶²

350. Vandercoy, *supra* note 337, at 1027.

351. *Id.* at 1029.

352. 1 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, at 327-31 (Jonathon Elliot ed., 2d ed. 1836).

353. While reaching his conclusions on the original intent of the Second Amendment, Professor Vandercoy makes no attempt to argue that original intent should be the controlling factor. Vandercoy, *supra* note 337, at 1008.

354. *Id.* at 1038-39. See generally *Lewis v. United States*, 445 U.S. 55 (1980); *United States v. Miller*, 307 U.S. 174 (1939); *Quilici v. Village of Morton Grove*, 695 F.2d 261 (7th Cir. 1982).

355. FALSE PATRIOTS, *supra* note 8, at 13.

356. *Id.*

357. Larizza, *supra* note 57, at 604. Some Patriots believe that the Bill of Rights is based on divine directives of biblical truths. FALSE PATRIOTS, *supra* note 8, at 13. Larry Pratt, executive director of Gun Owners of America, explains, "What I see in scripture is not that we have a right to keep and bear arms, but that we have a responsibility to do so." *Id.*

358. 18 U.S.C. § 922(s) (1988). The Brady Handgun Violence Prevention Act is an amendment to the gun control act of 1968. *Printz v. United States*, 854 F. Supp. 1503 (D. Mont. 1994). In 1995, an NRA fundraising letter declared that "jack-booted government thugs" in "Nazi bucket helmets" have "the government's go ahead to harass, intimidate, even murder, law abiding citizens." FALSE PATRIOTS, *supra* note 8, at 41.

359. See 18 U.S.C. § 922(s)(1)(A)(i)(I), (i)(IV), (ii) (1988). The Act requires that before a handgun dealer can sell a handgun, he must transmit a copy of a statement from the buyer to the chief law enforcement officer in the jurisdiction. *Id.* Then, the dealer must wait for approval from the officer or the lapse of five days, whichever occurs first. *Id.*

360. STOCK, *supra* note 45, at 147.

361. FALSE PATRIOTS, *supra* note 8, at 39.

362. *Id.*

An individual right to bear arms and to form a citizen militia is the rallying cry of the militia segment of the Patriot movement.³⁶³ Patriots view these rights as vital to freedom, and when government seeks to limit these rights, Patriots perceive these limitations as signs of oppression.³⁶⁴ When an individual right to bear arms and the right to form a citizen militia are coupled with the right to revolt, the Patriot movement has all the theoretical tools necessary to revolt against the federal government.³⁶⁵

D. *The Right to Revolt v. The Right to Rebel*

Patriots believe that the time has come for the American people to revolt against the federal government.³⁶⁶ Many of them have gone beyond the planning stage and consider themselves in active revolt.³⁶⁷ Gary Harvey, the clerk of the Freeman's court in Wasco County, Oregon, openly admits that "[he is a] revolutionary."³⁶⁸ The Patriot movement is based on a perceived constitutional right to revolt against the government.³⁶⁹

What many Patriot groups fail to recognize is that a difference between rebellion and revolution³⁷⁰ exists that is often hard to distinguish.³⁷¹ Generally, any rebellion has the potential to evolve into a revolution if the movement gains enough momentum and enough adherents. The difference between a rebellion, a revolution, and a tyranny lies in who initiates the movement.³⁷² A faction of people makes a rebellion to achieve selfish desires; "The People" begin a revolution for the common good; and officeholders make a tyranny to achieve their own selfish desires.³⁷³ The Constitution implies that "The People," as a collective body, have greater constitutional rights than the individual,³⁷⁴ but it is unclear as to whether it is necessary for "The People" to act through their respective states, or if "The People" may be a collective body of individuals regardless of what jurisdiction in which they happen to reside.³⁷⁵ Several factions of people that are not united can never carry out

363. *Id.* at 12-13.

364. *Id.* at 12.

365. *Id.* at 12-13.

366. Eure, *supra* note 16, at A1.

367. FALSE PATRIOTS, *supra* note 8, at 16. A militia manual advises, "You need to be organized, equipped, trained, and coordinated So arm yourself. Organize yourselves, And prepare to fight if you have to." *Id.* at 12.

368. Eure, *supra* note 16, at A1.

369. FALSE PATRIOTS, *supra* note 8, at 12-13.

370. Williams, *supra* note 41, at 905.

371. *Id.*

372. *Id.*

373. *Id.*

374. U.S. CONST. preamble. The Constitution begins with the words "We the People." *Id.*

375. Williams, *supra* note 41, at 905-06.

a revolution.³⁷⁶ Rather, several factions of people acting independently constitute a civil war, or at best an insurrection.³⁷⁷ If "The People" share common concerns for the common good and act to overthrow a tyrannical government, then the movement becomes a revolution. It is not necessary for people to live together in a state to carry out these actions.³⁷⁸ Rather, "The People" is an "organic entity, with enough commonality and self-awareness to engage in united revolutionary action."³⁷⁹ Without a homogeneous entity of "The People," there can be no legitimate revolutions, only rebellions and civil war.³⁸⁰

Modern Patriot groups believe that they make up "The People," and they have a right to instigate a revolution against the federal government because it has become a tyranny.³⁸¹ They contend that all citizens are members of a nationwide militia strictly by virtue of their common law citizenship.³⁸² Patriots argue that an armed citizenry was contemplated by our Founding Fathers, and through the Second Amendment our Founding Fathers ensured an armed citizenry.³⁸³ Modern Patriots believe that an armed citizenry is a force that retains a watchful eye on government and is always willing to throw off the yokes of oppression.³⁸⁴ If government does become oppressive, the armed citizenry or militia can organize itself into "The People" and act as our Patriotic Forefathers did to restore our God-given fundamental rights.³⁸⁵

What today's citizen militia groups fail to realize is that they do not constitute "The People."³⁸⁶ Militia documents conclude that the right to revolution belongs to their private armies that are composed of a random group of volunteers who have many diverse interests.³⁸⁷ These random groups of

376. *Id.* at 905.

377. *Id.*

378. *Id.*

379. *Id.* at 906.

380. *Id.* at 905.

381. FALSE PATRIOTS, *supra* note 8, at 12-13.

382. Dave Skinner, *In Defense of the Militia*, USA TODAY MAGAZINE, July 1996, at 16. Mr. Skinner argues that the unorganized militia consists of all the people as counterbalance against government tyranny. *Id.* He quotes George Mason, who said at the Constitutional Convention of 1787: "I ASK, sir, what is the militia? It is the whole people." *Id.* Patriots point to many state constitutions that contain broad language concerning who is a member of the militia. For example, the Indiana Constitution provides that the militia "shall consist of all persons over the age of seventeen years" IND. CONST. art XII, § 1.

383. *Id.*

384. *Id.* The concept is similar to the watchful eye of a vigilance committee. *See supra* notes 166-85 and accompanying text.

385. *Id.*

386. *Talk Back Live* (CNN television broadcast, July 3, 1996).

387. *Id.*

volunteers are not yet a sufficiently unified group that amounts to "The People," and because they are not "The People," they have no constitutional right to revolution.³⁸⁸ Perhaps citizen militias have the potential to gain enough momentum and unification to become "The People."³⁸⁹ However, today's militia groups are far from this stage and will probably fragment into further diversified interests.³⁹⁰ Arguably, Patriots may be correct in their conclusion that the U.S. Constitution recognizes a right to revolt, but they are incorrect that the time is now and that they have sufficiently united themselves into a collective body acting for the common good known as "The People."³⁹¹ Undoubtedly, so long as Patriot groups continue to act as though they represent "The People" revolting against the federal government, they will continue to create unique and special problems for law enforcement.³⁹²

VI. WHY IS THE PATRIOT MOVEMENT A PROBLEM FOR LAW ENFORCEMENT?

*Go up and look legislators in the face, because some day you may have to blow it off.—Sam Sherwood, United States Militia Association*³⁹³

Law enforcement and public officials across the country are in a dilemma when faced with an active or violent Patriot group.³⁹⁴ Patriots often act unpredictably, making convoluted legal arguments and refusing to cooperate with police or legitimate courts.³⁹⁵ In addition, many Patriot groups have declared war on the government and the people who work for the government.³⁹⁶ American law enforcement and public officials are not accustomed to dealing with people who are at war with and in active revolt against their own government.³⁹⁷ Patriot revolutionaries are often irrational and not open to reasonable discourse.³⁹⁸ Of course, the First Amendment allows Patriot

388. Williams, *supra* note 41, at 910.

389. *Id.* at 911. It is doubtful whether this is even possible in the diverse America that exists today. *Id.* American citizens cannot agree decisively on any issue, let alone, whether the time has come for a revolution. *Id.*

390. FALSE PATRIOTS, *supra* note 8, at 14. To date, Patriot groups have been able to set aside minor ideological differences to embrace the broad anti-government agenda. *Id.* The Patriot movement views its diversity as its strength. *Id.*

391. Williams, *supra* note 41, at 910.

392. FALSE PATRIOTS, *supra* note 8, at 42.

393. *Id.* at back cover page.

394. *Id.* at 42-43.

395. See Judy Thomas, *Kangaroo-Style Courts Spring up, Worrying Law Enforcers Across U.S.*, COM. APPEAL, Mar. 31, 1996, at 14A.

396. See FALSE PATRIOTS, *supra* note 8, at 6-7.

397. *Id.* at 42.

398. *Id.* at 4-5.

groups to say whatever they want about the government,³⁹⁹ but, Patriot groups often cross the line from speech into conduct as a method of making their point.⁴⁰⁰ Patriot groups engage in a variety of conduct and activity,⁴⁰¹ some of which is already illegal, while other activity is not only legal but may be constitutionally protected.⁴⁰² In an effort to respond to the Patriot movement, it is necessary to examine the conduct and activities of Patriot groups.⁴⁰³

A. Common Law Courts

A common law court is a group of Patriots meeting regularly that attempts to mimic the traditional and legitimate legal system.⁴⁰⁴ These common law courts convene juries, hold trials, issue indictments, issue judgments, and sentence people whom they have convicted.⁴⁰⁵ These activities are quite similar to a role playing game or to moot court functions that are engaged in by law schools.⁴⁰⁶ The difference is that the participants take themselves very seriously and actually believe that their edicts have the force of law.⁴⁰⁷ This fact itself presents a problem to law enforcement because Patriots are convinced of their own legitimacy, making them almost impossible to reason with.⁴⁰⁸ However, the more significant and dangerous problem arises when these self-proclaimed common law courts attempt to enforce their proclamations.⁴⁰⁹

Common law courts use a variety of methods in an attempt to enforce their "law."⁴¹⁰ Collectively, these methods have become known as "paper terrorism."⁴¹¹ One of the most common tactics of paper terrorism is to place a lien on property.⁴¹² In most county courthouses, liens are accepted without

399. U.S. CONST. amend.

400. See Miller, *supra* note 7, at 19.

401. *Id.*

402. See COMMON LAW COURTS, *supra* note 43, at 4.

403. *Id.*

404. See FALSE PATRIOTS, *supra* note 8, at 28.

405. See Braun, *supra* note 19, at A1.

406. Staff, *supra* note 26, at 10.

407. Watts, *supra* note 30, at 11A.

408. Staff, *supra* note 26, at 10.

409. Hansen, *supra* note 24, at 52.

410. Janofsky, *supra* note 38, at A1. Common law courts have been described as "very prolific producers of lots of paper." *Id.*

411. *Id.* A California high school principal was summoned to a common law court after suspecting that the son of a local Freemen member had illegal drugs. *Id.* The common law court was held at a local restaurant. *Id.*

412. Ron Shawgo, *Newspaper Sues over Common Law Claims*, THE J. GAZETTE, Jan. 7, 1997, at 1B. A common law activist from Indiana filed liens against a local newspaper in retaliation for running a story about her and the common law group that she is involved in. *Id.* The liens demanded \$10 million. *Id.*

question if the paperwork is correct.⁴¹³ For example, a typical scenario is that a Patriot will have a "run in" with a public official,⁴¹⁴ perhaps a local police officer who pulled him over for speeding, a county attorney, or anyone else that the Patriot wants to target.⁴¹⁵ The Patriot will bring charges against the individual in a common law court.⁴¹⁶ The common law court will subpoena the public official to appear before the court for a trial.⁴¹⁷ These illegitimate subpoenas are almost always ignored, so the defendant is not present at the trial.⁴¹⁸ Then, the common law court issues a default judgment against the public official and usually awards a large dollar amount in damages.⁴¹⁹

In an attempt to collect the damages, a lien is often filed on the public official's property.⁴²⁰ The lien typically goes unnoticed for a long period of time until the public official does something that requires a title search on his or her property.⁴²¹ Then, the lien will be disclosed, and the public official will have to go through the hassle and expense of removing the lien.⁴²²

413. *Nightline* (ABC television broadcast, Feb. 26, 1997).

414. Gallagher & Bryant, *supra* note 240, at A2. David Baugh refused to pay a \$25 ticket after he took off his car's license plate and replaced it with a sign that read, "Sovereign American Citizen, Liberty or Death." *Id.* At his trial, he made many common law claims and was sentenced to 27 months in prison. *Id.*

415. FALSE PATRIOTS, *supra* note 8, at 27. Martha Bethel, a judge, is among many public servants who have received death threats from Patriots. *Id.* Ms. Bethel takes Patriot groups very seriously. *Id.* She told a Senate committee that she "lay[s] awake at night and wonder[s] if they are going to come and get me. I hope blood is not shed before someone takes them seriously." *Id.*

416. *Id.*

417. Worthington, *supra* note 34, at A2. The Freemen of Montana set up their own "supreme court" and demanded the appearance of officials and judges that had violated their orders. *Id.*

418. Thomas G. Watts, *Waging Legal War: Common-Law Courts Tangle Judicial System in Texas, Other States*, DALLAS MORNING NEWS, May 3, 1996, at 1A. The Republic of Texas common law group has ordered the Internal Revenue Service to leave Texas. *Id.* It also has ruled that state officials have not responded to its orders and issued judgments ordering Governor Bush to turn over the government and its assets to Republic officials. *Id.* The Texas state government has consistently ignored these judgments. *Id.* For further discussion of the Republic of Texas, see *supra* notes 14 and 31.

419. Thomas Watts, *Common Law Courts on Rise Malcontents Naming Their Own Judges*, SUNDAY GAZETTE MAIL, May 5, 1996, at 11A. A Texas common law court issued a judgment of \$93,492,827,008,096 against the United States, the Federal Reserve Board, the International Monetary Fund, and the Holy See of the Catholic Church. *Id.* See *supra* notes 14, 31, and *infra* note 424 for further discussion of common law groups that are active in Texas.

420. Dave Knopp, *Noble Judge Strikes down \$7 Million Lien*, EVENING STAR, Feb. 25, 1997, at A1.

421. FALSE PATRIOTS, *supra* note 8, at 30. Liens often sit in court files like "a time bomb waiting to go off." *Id.*

422. *Id.*

Removal of a false lien can be more than an inconvenience.⁴²³ Even the removal of a lien that is completely without merit can often cost thousands of dollars.⁴²⁴

Patriots also attempt to pass bogus checks and create their own money.⁴²⁵ They contend that these bad checks are "backed" by the liens that they have placed on property.⁴²⁶ Patriots argue that the full faith and credit of the federal government backs American currency.⁴²⁷ Because the American government has become illegitimate, U.S. dollars are worth nothing, and because the Patriots have set up their own government, they may back their own currency.⁴²⁸ Of course, this argument is nonsense.⁴²⁹ Nevertheless, Patriot groups have passed millions of dollars in bad checks and will probably continue to do so.⁴³⁰ At the same time, their methods are likely to become more sophisticated as they embrace new technology.⁴³¹

423. *Id.*

424. Knopp, *supra* note 420, at 11A. A false lien that required a few months to remove resulted in \$5648 in legal fees. *Id.* A federal judge says that liens filed by the Republic of Texas have cost Texans at least \$450,000. Mark Potok, *Texas Fighting a "Paper Terrorism,"* USA TODAY, Feb. 21, 1997, at 3A. See *supra* notes 14, 31, and 418 for further discussion of the Republic of Texas.

425. Staff, *Freeman Convicted in North Carolina*, THE J. GAZETTE, Feb. 22, 1997, at 3A. In February 1997, a Montana Freeman was convicted in a North Carolina court as the result of a scheme to buy vehicles with bogus financial instruments that were issued by the group. *Id.*

426. Eure, *supra* note 16, at A1.

427. *Id.* Gary Harvey, a common law activist claims that the checks that he writes are backed by liens and are legitimate negotiable instruments. *Id.* He sees them as "a tool to put a stop to the harassment and illegal activity carried on by the government." *Id.*

428. Valerie Alvord, *Bogus Money Case Nets Probation: San Diegan Says He Thought It Was Real*, SAN DIEGO UNION-TRIB., Nov. 23, 1996, at B1. Patriots contend that, as sovereign citizens, they may issue their own currency. *Id.* For example, when a Patriot's mortgage was in foreclosure, a sheriff's sale was ordered. *Chapman v. Shatzer et al.*, No. 57C01-9401-CP-003 (1994) (unpublished pleading on file with author). The Patriot came to the foreclosure sale, and in response to an \$80,000 bid from the bank, he bid five dollars in gold coins. *Id.* He stated that the five dollars in gold coins is worth more than \$80,000 in U.S. currency that is not backed by anything but the faith and credit of an illegitimate government. *Id.* The Patriot contended that he was a resident alien in the State of Indiana and was a sovereign citizen of the Indiana state republic. *Id.*

429. Although merely a scheme for revolution, it does give the Patriots at least an argument for issuing their own currency.

430. *Id.*

431. FALSE PATRIOTS, *supra* note 8, at 16. The computer may be the most vital part of a Patriot group's arsenal. *Id.* Many Patriot groups are online and maintain websites. *Id.* By January 1996, more than 70 World Wide Web pages catered to anti-government extremists. *Id.* One fake bank draft for \$97,809.48 looked so real that a bank clerk began to process it. Alvord, *supra* note 434. The supervisor at the bank noticed that the draft looked suspiciously like a sample counterfeit draft that had been faxed to the bank by the U.S. Treasury Department. *Id.*

The temperament of the people that have been attracted to the Patriot movement means that they often get arrested,⁴³² and these arrests may or may not be associated with their Patriot activity.⁴³³ When Patriots are arrested, it is predictable that they will flood the court with many frivolous motions and convoluted legal arguments.⁴³⁴ There are few reported legal opinions on Patriot arguments made in court.⁴³⁵ Presumably, the strange arguments are so utterly without merit that they seldom get past a motion to dismiss at the trial level and are seldom appealed. However, one case from the United States District Court for the Northern District of Texas illustrates how Patriots use paper terrorism in an attempt to disrupt the legal system.

In *United States v. Greenstreet*,⁴³⁶ the defendant had filed five UCC-1 financing statements against three Department of Agriculture employees naming them as debtors.⁴³⁷ The employees were never indebted to Mr. Greenstreet, but the government had foreclosed upon his land.⁴³⁸ The financing statements were filed against the employees as a form of retaliation for foreclosing on the mortgage. Mr. Greenstreet filed numerous documents with the court.⁴³⁹ He asserted that "Our One Supreme Court, Republic of Texas, in and for Dallas County" retained jurisdiction over the case.⁴⁴⁰ He claimed that he was of

432. FALSE PATRIOTS, *supra* note 8, at 36.

433. *Id.*

434. *Id.* at 28-29.

435. An unpublished memorandum decision from Indiana reveals the strange arguments made by common law adherents. Pamela Kay., *Straessle v. State*, No. 17D01-9506-CM-389 (on file with author). Ms. Straessle recognizes "Pamela Kay., Straessle" as the correct spelling of her name. *Id.* Apparently, she believes the different spelling of her name denotes her as a sovereign citizen. Ms. Straessle was stopped by a police officer because she did not have a valid license plate on her car. *Id.* She was convicted of driving without a license plate and then appealed the decision to the Indiana Court of Appeals. *Id.* She represented herself and made three basic arguments to the court. *Id.* First, the State of Indiana could not regulate the operation of vehicles on public roads. *Id.* Second, the arresting officer did not have a proper oath of office on file. *Id.* Third, the UCC provides a defense. *Id.* The court rejected all three arguments. *Id.* Straessle described herself as a "free born American National and sovereign citizen of Indiana of the American Republic." *Id.* She contended that she had exempted herself from any government relationship pursuant to the UCC and therefore was not subject to government regulation while driving her car. *Id.* The court found that Straessle's reliance on the UCC was misplaced. *Id.*

436. 912 F. Supp. 224 (N.D. Tex. 1996).

437. *Id.* at 225.

438. *Id.*

439. *Id.*

440. *Id.* For further discussion of the Republic of Texas, see *supra* notes 14, 31, 418, 419, 424. In 1992, a Texas court held that the Common Law Court for the Republic of Texas did not exist. *Kimmell v. Burnet County Appraisal Dist.*, 835 S.W.2d 108, 109 (Tex. App. 1992). The court observed in a footnote that the Republic of Texas adopted the English common law on March 16, 1840, and Texas became a state on February 16, 1846. *Id.* at n.2. Thus, the Republic of Texas existed during the intervening six years. *Id.* As a result, if the Common Law Court for the Republic of Texas ever existed, it ceased to exist when Texas became a state. *Id.* at 109.

“Freeman Character” and “of the white Preamble Citizenship and not one of the 14th Amendment legislated enfranchised De Facto colored races.”⁴⁴¹ Perhaps the most bizarre argument made was that any flag that has fringe signifies a court of admiralty.⁴⁴² Because the courtroom had a flag with fringe on it, the judge felt compelled to respond to this argument.⁴⁴³ The court dismissed the argument as frivolous and cited authority for its conclusion. The court concluded that “tactics such as declaring oneself a sovereign, turning to common law courts, and contending that federal reserve notes are not legal tender are favorites among these litigants.”⁴⁴⁴ The judge continued, saying, “Such arguments, however, are too time consuming for courts to process and routinely futile.”⁴⁴⁵

Common law court Patriot groups often engage in this kind of disruptive and economically damaging conduct.⁴⁴⁶ Some of this activity is already illegal, but current laws have not been successful in limiting the conduct of common law Patriot groups.⁴⁴⁷ When it is coupled with militia groups, the conduct creates a larger and more dangerous problem for law enforcement.⁴⁴⁸

B. Citizen Militias

If law enforcement simply had to address the paper terrorism tactics of common law courts, law enforcement would probably be able to deal with Patriot groups.⁴⁴⁹ However, militia groups often act in concert with common law courts to offer a formidable enforcement arm of this shadow judicial and government system.⁴⁵⁰ Many times, common law courts and militia groups will have several members that overlap and participate in both activities. At other times, a militia group may act on its own in enforcing a common law court proclamation.⁴⁵¹ In any event, when militia groups become involved, the conduct becomes significantly more dangerous.⁴⁵²

441. *Greenstreet*, 912 F. Supp. at 228.

442. *Id.* at 229.

443. *Id.*

444. *Id.* at 224.

445. *Id.* at 230.

446. FALSE PATRIOTS, *supra* note 8, at 28-29.

447. *Id.* at 42.

448. Hansen, *supra* note 24, at 53.

449. Janofsky, *supra* note 38, at A1.

450. *Id.*

451. Hansen, *supra* note 24, at 52.

452. *Id.* Kenneth Toole of the Montana Human Rights Council says that “if we see common law courts beginning to direct the activities of militias, then watch it. I think you’re going to see some of these wacky warrants enforced.” *Id.*

Paramilitary training is a basic function of most citizen militias.⁴⁵³ Militia groups meet to discuss survival techniques, exchange information, and engage in training exercises.⁴⁵⁴ Patriot groups circulate an underground network of books and manuals.⁴⁵⁵ Linda Thompson, a Patriot from Indianapolis, Indiana, has produced many videos on militias and government conspiracies.⁴⁵⁶ Green Beret Lieutenant Colonel, and 1992 Presidential candidate, Bo Gritz conducts survival and paramilitary training programs nationwide.⁴⁵⁷ Most citizen militia groups are heavily armed and are preparing for a confrontation with the federal government.⁴⁵⁸ The arrest of members of the Viper Militia in Arizona shows that Patriot groups are capable of keeping a low profile while amassing weapons and conducting paramilitary training.⁴⁵⁹

Paramilitary training gives militia groups the knowledge and skills to accomplish devastating acts of terrorism.⁴⁶⁰ Many militia groups have declared that they are at war with the federal government and are preparing for armed confrontation with federal agents.⁴⁶¹ While some militia groups state that they are defensive in nature only and are not training for an offensive strike against the government,⁴⁶² others are training for the purpose of an offensive strike against the government or to create some other kind of civil disorder.

Militia groups have been linked to the bombing of the Alfred P. Murrah building in Oklahoma City, Oklahoma, and are suspected in the October 1995 derailling of an Amtrak passenger train in Arizona.⁴⁶³ These two terrorist attacks show that militia groups are capable of inflicting unprecedented acts of domestic terrorism.⁴⁶⁴ Accordingly, militia groups pose a very important

453. FALSE PATRIOTS, *supra* note 8, at 20.

454. *Id.*

455. *Id.* at 26.

456. FALSE PATRIOTS, *supra* note 8, at 57.

457. *Id.* at 51. Gritz charges ten dollars admission to attend his speeches, \$1200 to participate in his Specially Prepared Individuals for Key Events (SPIKE) seminars, and sells videotapes for \$562.50. *Id.* Gritz also has started a 200 acre "covenant community" called Almost Heaven as a special community for Patriots. *Id.* Gritz publishes the *Center for Action* newsletter. *Id.* at 51.

458. *Id.* at 8-9.

459. *The NewsHour with Jim Lehrer* (PBS television broadcast, July 5, 1996). The Viper Militia only had twelve members and was able to amass a large arsenal. *Id.* More than 100 guns were found at the home of one of its members. *Id.* Federal agents also found over 400 pounds of bomb making materials. *Id.* The discovery of the Viper Militia confirms the suspicion that some militia groups have gone underground and are still preparing for a confrontation with the government. *Id.*

460. FALSE PATRIOTS, *supra* note 8, at 20.

461. *Id.* at 8.

462. *Id.*

463. *Id.* at 22.

464. *Id.*

challenge to our legal system and system of government.⁴⁶⁵ With this background of the Patriot movement in mind, alternative legislative responses and their implications may be examined.

VII. LEGISLATIVE RESPONSES: ALTERNATIVES AND ANALYSIS

The [Patriot movement] is the greatest threat to the government since the Civil War.—Ohio Chief Justice Thomas Moyer⁴⁶⁶

Any statute that is drafted to curb the activities of the Patriot movement must balance three competing concerns.⁴⁶⁷ First, the statute must not violate constitutional guarantees.⁴⁶⁸ Any statute dealing with the phenomenon of the Patriot movement raises, in particular, First and Second Amendment concerns.⁴⁶⁹ Second, the statute should deal directly with the full spectrum of Patriot activities. Third, a statute should be drafted carefully, so that it is not overbroad, thus reaching lawful activities. For example, legitimate use of the courts and legal process, study groups, assemblage of persons in political groups, and other similar activities should be beyond the reach of any statute.⁴⁷⁰ The Patriot movement is so volatile that it may require legislative intervention at both the state and federal levels.⁴⁷¹

Many compelling reasons support the conclusion that the Patriot movement warrants federal intervention.⁴⁷² First, Patriot groups break federal laws.⁴⁷³ Second, state and local law enforcement officials often lack the resources to deal with the sudden presence of a violent Patriot group. Third, Patriot groups often form in rural areas where police protection is minimal, and the groups often greatly outnumber and are better armed than local law enforcement.⁴⁷⁴ Fourth, the communications network that Patriots utilize is national, and Patriots use interstate recruiting to find new members.⁴⁷⁵ Fifth, many Patriot leaders travel extensively, and such movement helps them evade the efforts of local law

465. *Vigilante Court Condemned*, *supra* note 12, at A12.

466. *Larsen & Sforza*, *supra* note 11, at 7.

467. COMMON LAW COURTS, *supra* note 43, at 5.

468. *Id.*

469. *Id.*

470. *Id.*

471. FALSE PATRIOTS, *supra* note 8, at 42-43.

472. *Militia Hearing*, *supra* note 7, at 2 (statement of Rep. Bill McCollum (R-FL)).

473. *Id.*

474. *Id.*

475. FALSE PATRIOTS, *supra* note 8, at 16.

enforcement to monitor their activities.⁴⁷⁶ Finally, Patriot groups have displayed a propensity for very dangerous and bold acts of domestic terrorism that merits federal involvement.⁴⁷⁷

Apart from the federal concerns, many states are faced with the problem of extremely active Patriot groups.⁴⁷⁸ These states need a legislative response that allows local prosecutors to reach these groups before they cause real harm.⁴⁷⁹ Local law enforcement and prosecutors are in close contact with these groups and probably have had extensive dealings with their members.⁴⁸⁰ Unfortunately, states usually lack laws that allow prosecution, or they have laws that may allow prosecution but only provide for nominal punishment.⁴⁸¹ Accordingly, states with active Patriot groups should pass legislation that empowers local prosecutors to prevent the harmful activities of Patriot groups.⁴⁸²

Three groups of laws have emerged that may be an effective response to the Patriot movement:⁴⁸³ statutes aimed at the conduct of common law court groups, criminal syndicalism statutes, and anti-militia/anti-paramilitary training statutes.⁴⁸⁴ The best response to the Patriot movement may be a law that comprehensively addresses all types of Patriot conduct and that incorporates the best features of these three groups of statutes.⁴⁸⁵

A. Common Law Court Statutes

In 1996, the Anti-Defamation League (ADL) proposed model state legislation that would restrict the activities of the Patriot movement and, in particular, common law courts.⁴⁸⁶ The ADL model statute would make it illegal to impersonate public officers or simulate legal process.⁴⁸⁷ The ADL proposed the model statute because many states do not have laws that are a "full response" to the Patriot movement.⁴⁸⁸ When analyzing the constitutionality

476. *Id.* at 14. Many Patriots travel with gun shows and use them for recruiting. *Id.*

477. *Id.* at 3.

478. *Id.* at 34-35.

479. *Militia Hearing*, *supra* note 7, at 148 (statement of Nick Murnion, Garfield County Attorney, Jordan, Montana).

480. *Id.*

481. COMMON LAW COURTS, *supra* note 43, at 4.

482. FALSE PATRIOTS, *supra* note 8, at 42.

483. COMMON LAW COURTS, *supra* note 43, at 7-8; FALSE PATRIOTS, *supra* note 8, at 42-43.

484. COMMON LAW COURTS, *supra* note 43, at 7-8; FALSE PATRIOTS, *supra* note 8, at 42-43.

485. COMMON LAW COURTS, *supra* note 43, at 7-8; FALSE PATRIOTS, *supra* note 8, at 42-43.

486. COMMON LAW COURTS, *supra* note 43, at 7-8.

487. *Id.* at 7.

488. *Id.* at 5.

of the ADL model statute, it is necessary to balance the competing interests of the First and Second Amendments of the Constitution in relation to state interests in maintaining an efficient system of government that is free from disruption.⁴⁸⁹

The First Amendment provides that "Congress shall make no law . . . abridging freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."⁴⁹⁰ Patriot groups engage in many speech activities.⁴⁹¹ They publish documents, hold rallies, and assemble together as a group,⁴⁹² and most Patriot speech is political in nature.⁴⁹³ As a result, it is difficult to enact any valid law that restricts the ability of Patriot groups to engage in political speech.⁴⁹⁴

The ADL model statute addresses the actions of common law courts only.⁴⁹⁵ It is not aimed at citizen militia activity.⁴⁹⁶ It has been carefully drafted so that it proscribes conduct only and not speech.⁴⁹⁷ The statute is not content-based because it is not concerned with the reasons why a group engages in any of the listed activities.⁴⁹⁸ The model statute has been drafted narrowly so that any infringement on First Amendment rights will be outweighed by a compelling (or substantial) government interest.⁴⁹⁹

If challenged, the ADL model statute would probably be considered government regulation of conduct that has an incidental effect on speech.⁵⁰⁰

489. Analysis of legislative alternatives raise questions not only about freedom of speech, but also about the right of assembly. The cases used in this note are primarily analyzed as freedom of speech cases because the assemblies or associations at issue were designed for the purpose of organizing future speech activity.

490. U.S. CONST. amend. I.

491. FALSE PATRIOTS, *supra* note 8, at 15. Patriots "spread their message through cable television; mainstream and shortwave radio; videos; CDs and audio tapes; fax networks; online bulletin boards; Internet newsgroups, and; World Wide Web sites." *Id.*

492. *Id.* at 4-5.

493. *Id.* at 6, 7, 15.

494. COMMON LAW COURTS, *supra* note 43, at 6.

495. *Id.* at 7-8.

496. *Id.*

497. *Id.* at 6.

498. *Id.* at 7-8.

499. *Id.* at 6.

500. See generally NOWAK ET AL., CONSTITUTIONAL LAW 970 (3d ed. 1986) (discussing reasonable time place and manner restrictions on speech, without regard to content).

Accordingly, it would be judged under intermediate scrutiny⁵⁰¹ as set forth in *United States v. O'Brien*.⁵⁰² In *O'Brien*, a man entered a courthouse and burned his draft card as a form of protest to the Vietnam War.⁵⁰³ He was charged and convicted under a statute which made it a crime to willfully and knowingly destroy a draft card.⁵⁰⁴ The appellate court reversed the decision of the trial court and declared the statute unconstitutional.⁵⁰⁵ The Supreme Court reversed the appellate court and upheld the statute as constitutional.⁵⁰⁶ The Court reasoned that activities have "speech" and "nonspeech" elements.⁵⁰⁷ It flatly rejected the idea that a "limitless variety of conduct can be labeled speech whenever the person engaging in the conduct intends to express an idea." The Court felt that the proscription against burning the draft card was aimed at conduct only, even though O'Brien intended the burning of the draft card to convey a symbolic message.⁵⁰⁸ For this reason, the statute was not content-based.

The Court held that a government regulation is sufficiently justified if it is within the constitutional power of the government, if it furthers an important or substantial government interest, if the governmental interest is unrelated to the suppression of free expression, and if the incidental restriction on alleged First Amendment freedom is no greater than what is essential to the furtherance of that interest.⁵⁰⁹ O'Brien had been punished for his conduct only and not for his speech activities.⁵¹⁰ There was a substantial government interest in the smooth and proper functioning of the selective service system, and the burning of the draft card "frustrated this governmental interest."⁵¹¹ Also, the statute was narrowly tailored, and its restriction on First Amendment freedoms was no greater than essential to the furtherance of that interest.⁵¹² Therefore, the Court concluded that the statute was constitutional.⁵¹³

501. Three basic levels of scrutiny are used when analyzing constitutional issues. *Id.* First, the rational basis test merely requires the government have a rational basis for the restriction. *Id.* Second, intermediate scrutiny requires a substantial state interest and a law that is narrowly tailored. *Id.* Third, strict scrutiny requires a compelling state interest and a law that is narrowly tailored. *Id.*

502. 391 U.S. 367 (1968).

503. *Id.* at 369.

504. *Id.* at 370.

505. *Id.* at 367.

506. *Id.* at 377.

507. *United States v. O'Brien*, 391 U.S. 367, 376 (1968).

508. *Id.*

509. *Id.* at 377.

510. *Id.*

511. *Id.* at 381-82.

512. *Id.* at 382.

513. *United States v. O'Brien*, 391 U.S. 367, 383 (1968).

When the *O'Brien* test is applied to the ADL model statute, the conduct and speech of common law courts must be analyzed.⁵¹⁴ Common law courts are engaging in a form of speech.⁵¹⁵ Indeed, it may be considered political speech, one of the most protected forms of speech.⁵¹⁶ Common law court activities often mock the American judicial system and government.⁵¹⁷ They constitute an ongoing satire that provides the participants with an outlet for their political frustrations⁵¹⁸ because, much like an ongoing drama, the participants act like legitimate public officials.⁵¹⁹ Some participants actually believe that they have authority to act as public officials.⁵²⁰ Members of common law courts intend to convey a message of political dissatisfaction with American courts and government.⁵²¹ Also, it is easy for an observer to understand the message that is being communicated.⁵²² Therefore, most actions of common law courts are expressive in nature.⁵²³

The government interest in restricting the activities of common law courts lies in stopping the disruption of our judicial system and in preventing the harassment of public officials.⁵²⁴ Most courts would probably agree that these represent substantial government interests.⁵²⁵ Having found a substantial government interest, the restrictions of the model statute must be no greater than essential to the furtherance of that interest.⁵²⁶ The model statute is aimed at the conduct portion of the activities of common law courts;⁵²⁷ however, Section A.(1) makes it a crime to impersonate or falsely act as a public officer.⁵²⁸ It is possible, but unlikely, that this section of the statute would be

514. COMMON LAW COURTS, *supra* note 43, at 5 ("The statute must deal directly with the full spectrum of activities in which 'common law courts' might engage.").

515. FALSE PATRIOTS, *supra* note 8, at 28-29.

516. *Id.*

517. Thomas, *supra* note 395, at 14A.

518. Braun, *supra* note 19, at A1.

519. *Id.* Braun describes common law courts as "little more than clubs for the disaffected, a chance to play judge and jury for a night." *Id.*

520. *Id.* The most radical activists of the Patriot movement have honed their tactics of harassment by using the tribunals to interfere in genuine legal cases. *Id.* Common law courts do this by issuing dubious claims that plague the judicial system with thousands of pages of baseless filings. *Id.*

521. Thomas, *supra* note 395, at 14A. They do not recognize federal law. *Id.*

522. *Id.*

523. COMMON LAW COURTS, *supra* note 43, at 5.

524. *Id.* at 4.

525. *Id.* at 6.

526. United States v. O'Brien, 391 U.S. 367, 377 (1968).

527. COMMON LAW COURTS, *supra* note 43, at 6.

528. *Id.* at 7.

considered overbroad because it has the potential to proscribe many protected speech activities like moot court activities and other legal dramas or courtroom reenactments.⁵²⁹ Many states have statutes which make it illegal to impersonate a public official, and these statutes are routinely upheld.⁵³⁰

For example, suppose a group of law students assemble and decide that they want to indict the President and prosecute him for treason. They appoint someone to act as judge, prosecutor, and defendant's counsel. The students convene a jury of twelve law professors to decide the case. The law professors find the President guilty of treason. The "judge" then issues an order finding the President guilty, urging voters not to re-elect him, and posts the order on the school bulletin board. All of the participants believe that they have the power to decide the issue because they are sovereign citizens and the President is their elected official. This exercise would be a useful learning experience for the students, and the twelve law professors would probably be amused that they have found the President guilty of treason. Under the ADL model statute, these participants in a mock trial may be charged with a crime. Therefore, it is possible that the ADL model statute may proscribe speech that is and should be constitutionally protected.⁵³¹

Furthermore, the ADL model statute is woefully inadequate as a complete legislative response to the Patriot movement.⁵³² It addresses only the problem of common law courts and ignores the problem of citizen militias.⁵³³ Citizen militias are a large part of the Patriot movement and represent the most dangerous and violent segment.⁵³⁴ Any legislation that has the goal of restricting the activities of the Patriot movement must address citizen militias.⁵³⁵ Therefore, the ADL model statute does not provide a

529. See NOWAK ET AL., *supra* note 500, at 840. "An overbroad statute is one that is designed to burden or punish activities which are not constitutionally protected, but the statute includes within its scope activities which are protected by the First Amendment." *Id.* See also *Hill v. City of Houston*, 764 F.2d 1156, 1161, n.16 (5th Cir. 1985) (Rubin, J.).

530. COMMON LAW COURTS, *supra* note 43, at 4.

531. While it is extremely unlikely that a prosecution of this sort would ever take place, courts have struck down many statutes because they might apply to others who may engage in protected activity, which the statute appears to outlaw. NOWAK ET AL., *supra* note 500, at 840.

532. A complete legislative response to the Patriot movement must address not only common law courts, but militia activity as well. Other groups included in the broad Patriot movement are tax resisters, and, in its most extreme form, zealots committed to using terrorism to achieve their ends.

533. COMMON LAW COURTS, *supra* note 43, at 3.

534. FALSE PATRIOTS, *supra* note 8, at 20.

535. *Id.* at 42-43.

comprehensive response to the problems generated by the Patriot movement.⁵³⁶ A more complete legislative response is needed.⁵³⁷

B. Criminal Syndicalism Statutes

Criminal syndicalism statutes are the second group of laws that have shown promise as a method of prosecuting members of Patriot groups.⁵³⁸ In Montana, the Garfield County Prosecutor revived a criminal syndicalism statute⁵³⁹ to successfully prosecute several members of the Freemen Patriot group.⁵⁴⁰ The statute makes it unlawful to advocate crime, damage, violence, or terrorism as a method of accomplishing industrial or political ends.⁵⁴¹ While the statute has provided recent convictions in a Montana state court, it is open to a constitutional challenge because it proscribes mere advocacy of violence and does not contain an imminency requirement.⁵⁴²

536. To be fair to the ADL, the ADL model statute is only intended to respond to common law courts. COMMON LAW COURTS, *supra* note 43, at 4. It was not the intention of the ADL to address citizen militias in the model statute. *Id.* However, the ADL was attempting to respond to the Patriot movement, and the ADL model statute is inadequate as a complete response to the Patriot movement.

537. For a comprehensive legislative response, see *infra* notes 666-70 and accompanying text.

538. Hansen, *supra* note 24, at 60.

539. MONT. CODE ANN. § 45-8-105 (1997).

540. Hansen, *supra* note 24, at 60.

541. MONT. CODE ANN. § 45-8-105(1).

542. MONT. CODE ANN. § 45-8-105. The text of the statute reads as follows:

45-8-105 Criminal syndicalism.

(1) "Criminal syndicalism" means the advocacy of crime, malicious damage or injury to property, violence, or other unlawful methods of terrorism as a means of accomplishing industrial or political ends.

(2) A person commits the offense of criminal syndicalism if he purposely or knowingly:

(a) orally or by means of writing, advocates or promotes the doctrine of criminal syndicalism;

(b) organizes or becomes a member of an assembly, group, or organization which he knows is advocating or promoting the doctrine of criminal syndicalism; or

(c) for or on behalf of another whose purpose is to advocate or promote the doctrine of criminal syndicalism, distributes, sells, publishes, or publicly displays any writing advocating or advertising such doctrine.

(3) A person convicted of the offense of criminal syndicalism shall be imprisoned in the state prison for a term not to exceed 10 years.

(4) Whoever, being the owner or in possession or control of any premises, knowingly permits any assemblage of persons to use such premises for the purpose of advocating or promoting the doctrine of criminal syndicalism shall be fined not to exceed \$500 or imprisoned in the county jail for a term not to exceed 6 months, or both.

Id.

1. Development of the Clear and Present Danger Standard

If challenged, the Montana criminal syndicalism statute would probably be reviewed under the clear and present danger/imminent lawless action standard first explored in *Schenck v. United States*⁵⁴³ and refined in *Scales v. United States*,⁵⁴⁴ *Brandenburg v. Ohio*,⁵⁴⁵ and other cases.⁵⁴⁶ In *Schenck*, the defendants were convicted of violating the 1917 Espionage Act for distributing a pamphlet opposing conscription to persons accepted for military service.⁵⁴⁷ The Supreme Court affirmed the convictions.⁵⁴⁸ Justice Holmes conceded that the pamphlet called for only peaceful actions to oppose the draft. The sole statement of unlawful advocacy in the pamphlet stated that persons who had been drafted should assert their rights and that everyone "must maintain, support, and uphold the rights of the people of this country."⁵⁴⁹ The Court held that even these mild statements could be punished due to the danger of disrupting the war effort because these leaflets attempted to convince soldiers that conscription was unlawful. There was, however, no evidence of any actual harm that was caused by the leaflet.⁵⁵⁰

Justice Holmes announced the test to be used in advocacy of illegal action cases.⁵⁵¹ Where advocacy of illegal action is concerned, the test was whether the words of the speaker created a "clear and present danger" of harm.⁵⁵² In applying the test, the Court said that, if the tendency and the intent of the speech creates a clear and present danger of harm, it would be groundless to say that success of the speech is the only way to make the act a crime. Therefore, speech that creates a clear and present danger of harm may be prohibited.⁵⁵³

543. 249 U.S. 47, 52 (1919).

544. 367 U.S. 203, 228-30 (1961).

545. 395 U.S. 444, 447-49 (1969).

546. For discussion of the advocacy of violence or other illegal conduct, see generally NOWAK ET AL., *supra* note 500, at 853.

547. *Schenck*, 249 U.S. at 49.

548. *Id.* at 51.

549. *Schenck v. United States*, 249 U.S. 47, 51 (1919).

550. *Id.*

551. *Id.* at 52.

552. *Id.*

553. *Id.* The *Schenck* opinion is probably best remembered for the example of the man falsely shouting fire in a crowded theater. *Id.* Holmes used an extreme example to illustrate his point that the First Amendment does not protect all speech. *Id.* For a criticism of the example and its limited usefulness in First Amendment analysis, see THOMAS KALVEN, A WORTHY TRADITION 133-134 (1988).

One week later, in *Debs v. United States*,⁵⁵⁴ Justice Holmes and the Supreme Court applied the new clear and present danger test.⁵⁵⁵ Eugene V. Debs, a popular political figure,⁵⁵⁶ was convicted under the Espionage Act as a result of giving an anti-war speech at a Socialist Party convention.⁵⁵⁷ The speech promoted socialism and, in general terms, encouraged people to oppose the government's commitment to the war.⁵⁵⁸ The Court upheld the conviction.⁵⁵⁹ In applying the clear and present danger test, the Court reasoned that the words used in the speech must have had the natural tendency and reasonably probable effect of obstructing the war effort.⁵⁶⁰ In addition, Debs had to have the specific intent to obstruct the government's commitment to the war effort.⁵⁶¹

2. McCarthy Era Criminal Syndicalism: Revision of Clear and Present Danger

The next group of cases that examined advocacy of illegal action are the communism cases of the McCarthy era.⁵⁶² In *Dennis v. United States*,⁵⁶³ the defendants were charged with conspiring to organize the Communist Party of the United States of America and advocating the duty and necessity of overthrowing the United States government by force or violence.⁵⁶⁴ The defendants contended that it was extremely unlikely that they could ever succeed in actually overthrowing the government and, as a result, should not be convicted.⁵⁶⁵ After finding that the group taught and advocated the overthrow of the government,⁵⁶⁶ the Supreme Court upheld the convictions.⁵⁶⁷ The Court rejected the idea that success or probability of success of overthrowing the government should be the sole criterion; however, it was still part of the

554. 249 U.S. 211 (1919).

555. *Id.* at 220.

556. WILLIAM B. LOCKHART ET AL., *CONSTITUTIONAL LAW* 648 (7th ed. 1991). Debs ran for President of the United States several times. *Id.* While in prison, at the 1920 presidential election, Debs ran again and received over 900,000 votes as the Socialist candidate. *Id.*

557. *Debs*, 249 U.S. at 212.

558. *Id.*

559. *Id.* at 213.

560. *Id.* at 216.

561. *Id.* Many commentators suggest that *Schenck* and *Debs* must be read together. Harry Kalven, Jr., *Ernst Freund and the First Amendment Tradition*, 40 U. CHI. L. REV. 235, 236-38 (1973). Holmes offered no discussion about clear and present danger in his *Debs* opinion. *Id.* Also, Holmes did not comment on the factual differences between *Schenck* and *Debs*. *Id.*

562. NOWAK ET AL., *supra* note 500, at 859.

563. 341 U.S. 494 (1951).

564. *Id.*

565. *Id.* at 512.

566. *Id.* at 508-11.

567. *Id.* at 517.

test.⁵⁶⁸ After all, very little probability exists that any rebellion or insurrection would actually succeed in overthrowing the government.⁵⁶⁹ In doing so, the Court hinted that the organized system of overthrowing the government that was represented by the communist group may merit more restriction than an individual speaker or small group that advocates the same idea.⁵⁷⁰ In deciding the case, the Court used the clear and present danger test, but weakened it.⁵⁷¹

In 1954, the United States Senate punished Senator Joseph McCarthy for acting contrary to its ethics and impairing its dignity.⁵⁷² By the time the next case reached the Supreme Court, McCarthy had died and so had McCarthyism.⁵⁷³ Accordingly, the political climate had changed significantly when the next round of Communist Party cases reached the Supreme Court.⁵⁷⁴

In *Yates v. United States*,⁵⁷⁵ the Supreme Court reversed the convictions of fourteen communist party officials.⁵⁷⁶ In doing so, the Supreme Court retreated from the broad doctrine represented by the *Dennis* decision.⁵⁷⁷ The Court noted that the essence of the *Dennis* holding was that teaching and preparing for immediate violent action are not constitutionally protected, if it is reasonable to believe that the action or revolution will occur.⁵⁷⁸ Writing for the majority, Justice Harlan concluded that the statements in *Yates* involved a philosophy and did not incite action.⁵⁷⁹ In the absence of actual action or a possibility of action, the Court would not affirm the convictions.⁵⁸⁰

However, the *Yates* opinion was not the end of the McCarthy-era cases.⁵⁸¹ In *Scales v. United States*,⁵⁸² the Court affirmed the conviction of members of the communist party on the basis of their membership in the party.⁵⁸³ The

568. *Id.* at 510.

569. *Dennis v. United States*, 341 U.S. 494, 510 (1951).

570. *Id.* at 511. The court stated: "It is the existence of the conspiracy which creates the danger. The formation of a highly organized conspiracy, with disciplined members and effective leaders creates a dangerous threat to the government." *Id.* at 510-11.

571. *Id.* at 515.

572. LOCKHART, *supra* note 556, at 678.

573. *Id.* McCarthyism refers to the Communist inquiries that were conducted by Senator McCarthy in the late 1940's and early 1950's. *Id.*

574. *Id.* at 679.

575. 354 U.S. 298 (1957).

576. *Id.* at 327.

577. *Id.*; NOWAK ET AL., *supra* note 500, at 860.

578. *Yates*, 354 U.S. at 324; NOWAK ET AL., *supra* note 500, at 860-61.

579. *Yates*, 354 U.S. at 318.

580. *Id.*

581. NOWAK ET AL., *supra* note 500, at 861.

582. 367 U.S. 203 (1961).

583. *Id.* at 203.

trial court had found that the petitioners were active members of the Communist Party who advocated violent revolution and overthrow of the government "as speedily as circumstances would permit." The Court reasoned that the applicable statute under which the petitioners were convicted was interpreted to reach only "active" members who had a guilty knowledge and intent.⁵⁸⁴ With this interpretation, the statute would not provide convictions for members who merely expressed sympathy for a cause if the sympathy was unaccompanied by any significant action to achieve the end.⁵⁸⁵ Therefore, the conviction of the communist party members was consistent with the Constitution.⁵⁸⁶

3. Current Status of the Clear and Present Danger Doctrine

After the *Dennis*, *Yates*, and *Scales* decisions, the Court rejected the *Schenck* clear and present danger test to a great extent.⁵⁸⁷ To many people at the time, the Cold War and the threat of a communist takeover was a very real possibility.⁵⁸⁸ The clear and present danger test was refined during the late 1960's as the Court focused on protecting the advocacy of unpopular ideas.⁵⁸⁹

In *Brandenburg v. Ohio*,⁵⁹⁰ a Ku Klux Klan leader arranged for a television station to film a Klan rally in rural Ohio.⁵⁹¹ The Klan leader delivered a speech in which he said that if our President, our Congress, and our Supreme Court, continues to suppress the white, Caucasian race, it is possible that "there might have to be some revengeance taken."⁵⁹² The Klan leader was convicted under Ohio's criminal syndicalism statute for "'advocat[ing] . . . the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform' and for 'voluntarily assembl[ing] with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism.'"⁵⁹³

584. *Id.* at 228.

585. *Id.* Justice Douglas dissented to this theory, arguing that the "essence of the crime . . . is merely belief, and the conviction was a "sharp break with traditional concepts of First Amendment rights." *Id.* at 262-65.

586. *Id.* at 228.

587. NOWAK ET AL., *supra* note 500, at 861.

588. *Id.*

589. *Id.* at 862.

590. 395 U.S. 444 (1969) (per curiam).

591. *Id.* at 445.

592. *Id.* at 446. The Klan leader also suggested returning Blacks to Africa and Jews to Israel. *Id.* at 447.

593. *Id.* at 444-45.

In a *per curiam* opinion, the Court overturned the conviction and held the Ohio criminal syndicalism statute unconstitutional.⁵⁹⁴ While the Court did not refer to the clear and present danger test by name, it apparently incorporated the test by finding the standard to be that “the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”⁵⁹⁵ The Court reasoned that it was entirely too attenuated to believe that the words of the speaker had created any immediate danger.⁵⁹⁶ The audience would have had to take off its Klan regalia and drive somewhere to carry out the speaker’s call for “revengeance.” The statute proscribed a plethora of speech activities that fell short of causing imminent danger. Therefore, the Ohio criminal syndicalism statute was unconstitutional.

Moreover, the Court stated that, when a speaker uses speech to cause unthinking, immediate lawless action, the marketplace of ideas is insufficient to correct the errors of the original speech before harm occurs.⁵⁹⁷ In other words, because the speech has resulted in incitement to imminent action, there is not enough time to correct any errors of the original speech.⁵⁹⁸ Thus, under *Brandenburg*, the state must prove that the speaker subjectively intended incitement and, when viewed in context, the words used were likely to produce imminent lawless action.⁵⁹⁹ *Brandenburg’s* new formulation of the clear and present danger test offered broad new protection for strong advocacy. The main focus of the *Brandenburg* test is on the inciting language of the speaker—that is, on the objective words. In addition, the state must show that the speech is directed to produce immediate, unthinking lawless action and the situation makes this purpose likely to be successful.

The *Brandenburg* test imposes a higher standard on the government’s ability to limit the freedom of speech than the old clear and present danger test.⁶⁰⁰ Accordingly, it should provide greater First Amendment protection. The Supreme Court has decided few recent cases that reveal whether or not the Court will continue to apply the *Brandenburg* test and, if so, how strictly.⁶⁰¹

594. *Id.* at 449.

595. *Id.* at 447.

596. *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969).

597. *NOWAK ET AL.*, *supra* note 500, at 863.

598. *Id.*

599. *Id.* at 864.

600. *Id.* at 865.

601. *Id.* See generally *Hess v. Indiana*, 414 U.S. 105 (1973). In *Hess*, the Court struck down a conviction under an Indiana disorderly conduct statute. *Id.* at 109. The petitioner was a participant in an anti-war demonstration when he said “we’ll take the fucking street later (or again).” *Id.* at 106-07. The Court concluded that Hess had not advocated action that would produce

However, any criminal syndicalism statute that is passed in response to the Patriot movement needs to be carefully analyzed under the *Brandenburg* test.⁶⁰²

4. Application of the *Brandenburg* Test to a Modern Criminal Syndicalism Statute

The Montana criminal syndicalism statute, under which some of the Montana Freemen have been convicted, is similar to the Ohio criminal syndicalism statute that the Supreme Court struck down in *Brandenburg*.⁶⁰³ Like the Ohio statute, the Montana statute punishes advocacy of criminal syndicalism by punishing anyone who communicates syndicalist ideas.⁶⁰⁴ The statute has never been amended to incorporate a *Brandenburg*-type imminency requirement.⁶⁰⁵ While the statute has provided recent convictions in a Montana state court, the statute is open to constitutional challenge.⁶⁰⁶ For this reason, the statute needs revision.⁶⁰⁷ States that have enacted criminal syndicalism statutes should amend them to incorporate an imminency requirement that is consistent with the Supreme Court's analysis in *Brandenburg*.⁶⁰⁸ In addition, states that do not have criminal syndicalism

imminent disorder. *Id.* at 108. At best, the statement could be interpreted as a call for present moderation and at worst, the statement could be interpreted as advocacy of illegal action at some indefinite future time. *Id.*

602. See generally NOWAK ET AL., *supra* note 500, at 863. With the emphasis on incitement, imminent, unthinking, lawless action, and the objective words of the speaker, the *Brandenburg* test should provide strong First Amendment protection. *Id.*

603. *Brandenburg v. Ohio*, 395 U.S. 444, 448-49 (1969) (per curiam); MONT. CODE ANN. § 45-8-105 (1995); see *supra* note 598 and accompanying text.

604. MONT. CODE ANN. § 45-8-105(2)(a) (1997).

605. *Id.* The statute punishes advocacy in the abstract with no requirement that the advocacy be done under circumstances that create a danger of imminent lawless action. *Id.*

606. Hansen, *supra* note 24, at 52.

607. It is not clear whether or not any constitutional challenges were made when the Freemen of Montana were prosecuted under the statute. Typically, Patriots represent themselves *pro se*. Jules Loh, *Groups on America's Fringes Rail Against a Vague "New World Order,"* ASSOC. PRESS, June 19, 1995, at 1 available in 1995 WL 4395474.

608. Not surprisingly, the state of Ohio has revised their criminal syndicalism statute. OHIO REV. CODE ANN. § 2917.01. It now reads:

§ 2917.01 Inciting to violence.

(A) No person shall knowingly engage in conduct designed to urge or incite another to commit any offense of violence, when either of the following apply:

(1) The conduct takes place under circumstances that create a clear and present danger that any offense of violence will be committed;

(2) The conduct proximately results in the commission of any offense of violence.

(B) Whoever violates this section is guilty of inciting to violence. If the offense of violence that the other person is being urged or incited to commit is a misdemeanor, inciting to violence is a misdemeanor of the third degree. If the offense of violence that the other person is being urged or incited to commit is a felony, inciting to violence is

statutes should pass criminal syndicalism statutes that incorporate a *Brandenburg*-type imminency requirement. Criminal syndicalism statutes that can withstand constitutional scrutiny are a powerful tool for prosecutors to use to disband a Patriot group before it gains enough strength and organization to become dangerous.⁶⁰⁹

C. *Anti-Militia and Anti-Paramilitary Training Statutes*

The third group of statutes that have shown promise as a response to the problems generated by the Patriot movement are anti-militia⁶¹⁰ and anti-paramilitary⁶¹¹ training laws.⁶¹² Anti-militia laws have already been enacted in twenty-four states and are the most comprehensive laws aimed at militia groups because they ban all private military organizations except those authorized by the state.⁶¹³ Other states have enacted anti-paramilitary training laws which restrict private, paramilitary training with weapons or explosives when done with the knowledge or intent that the training will be used in a civil disorder.⁶¹⁴ Many of these laws have proven to be constitutional and effective

a felony of the third degree.

Id.

609. *Id.*

610. Anti-militia laws are slightly more comprehensive than anti-paramilitary training laws. FALSE PATRIOTS, *supra* note 8, at 42. Anti-militia laws ban all private military organizations except those authorized by the state. *Id.*

611. Anti-paramilitary training laws "prohibit private paramilitary training with weapons or explosives when carried out with the knowledge or intent that the training will be used in a civil disorder." *Id.*

612. *Id.*

613. *Id.* Some states have both anti-militia and anti-paramilitary training laws: See FLA. STAT. ANN. §§ 870.06, 790.29 (West 1997); GA. CODE ANN. §§ 38-2-277, 16-11-150 to 152 (1997); IDAHO CODE §§ 46-802, 18-8101 to 8105 (1997); 20 ILL. COMP. STAT. ANN. ch. 1805, 94-95 (West 1997); N.Y. MIL. LAW § 240 (McKinney 1997); N.C. GEN. STAT. §§ 127A-151, 14-288-20 (1996); R.I. GEN. LAWS §§ 30-12-7, 11-55-1 to 3 (1996). Other states have anti-militia laws only. See ALA. CODE § 31-2-125 (1996); ARIZ. REV. STAT. ANN. § 26-123 (1997); IOWA CODE § 29A.31 (1996); KAN. STAT. ANN. § 48-203 (1996); KY. REV. STAT. ANN. § 38.440 (Banks-Baldwin 1997); ME. REV. STAT. ANN. tit. 37-B, § 342.2 (West 1996); MD. CODE ANN. art. 65, §35 (1995); MASS. GEN. LAWS ch. 33, § 129-32 (1997); MINN. STAT. § 624.61 (1996); MISS. CODE ANN. § 33-1-31 (1996); NEV. REV. STAT. § 203.080 (1995); N.H. REV. STAT. ANN. § 111:15 (1995); N.D. CENT. CODE § 37-01-21 (1997); TEX. GOV'T CODE ANN. § 431.010 (West 1995); WASH. REV. CODE § 38.40.120 (1996); W.VA. CODE § 15-1F-7 (1997); WYO. STAT. ANN. § 19-1-106 (Michie 1997).

614. States that have enacted anti-paramilitary training laws only include: ARK. CODE ANN. § 5-71-302 (Michie 1995); CAL. PENAL CODE § 11460 (West 1996); COLO. REV. STAT. § 18-9-120 (1997); CONN. GEN. STAT. § 53-206b (1997); LA. REV. STAT. ANN. § 117.1 (West 1996); MICH. COMP. LAWS § 750.528a (1997); MO. REV. STAT. § 574.070 (1997); MONT. CODE ANN. § 45-8-109 (1995); NEB. REV. STAT. § 28-1480 to 1482 (1995); N.J. REV. STAT. § 2C:39-14 (1997); N.M. STAT. ANN. § 30-20A-1 to 4 (Michie 1997); OKLA. STAT. ANN. tit. 21, § 1321.10 (West 1997); OR. REV. STAT. § 166.660 (1996); 18 PA. CONS. STAT. ANN. § 5515 (West 1997); S.C. CODE ANN. § 16-8-10 to 30 (Law Co-op 1996); TENN. CODE ANN. § 39-17-314 (1997); VA. CODE ANN.

in restricting citizen militia groups.⁶¹⁵ However, these laws are not as effective as they could be because they are seldom enforced.⁶¹⁶

In 1968, Congress enacted an anti-paramilitary training statute called the Federal Civil Obedience Act.⁶¹⁷ The statute was passed during the Vietnam era to limit civil unrest.⁶¹⁸ The statute, in its current form limits itself by punishing only those who teach or demonstrate paramilitary techniques to others "knowing or having reason to know or intending that the same will be unlawfully employed for use in, or in furtherance of, [various types of] civil disorder[s]."⁶¹⁹ The statute fails to punish people who receive paramilitary training when they have the same knowledge or intent to create a civil disorder.⁶²⁰

1. First Amendment Concerns

The first major decision to consider the constitutionality of the Federal Civil Obedience Act was *National Mobilization Commission to End the War in Vietnam v. Foran*.⁶²¹ In that case, several plaintiffs, who had been indicted for violating the Federal Civil Obedience Act and other federal statutes arising from their activities during the 1968 Democratic National Convention,⁶²² brought an action seeking a declaratory judgment that the Federal Civil Obedience Act was unconstitutional.⁶²³ The plaintiffs argued that the Obedience Act could reasonably be interpreted to prohibit constitutionally protected activities such as "techniques of self-defense or sporting activities" and, as a result, that the statute was unconstitutionally vague and overbroad. The district court rejected this contention by dismissing the complaint, and the Seventh Circuit affirmed. The Seventh Circuit held that the "knowing or having reason to know or intending" language of the statute "narrows the scope of the enactment by exempting innocent or inadvertent conduct from its description."⁶²⁴

§ 18.2-433.1 to 433.3 (Michie 1997).

615. FALSE PATRIOTS, *supra* note 8, at 42.

616. *Id.* at 21.

617. 18 U.S.C. § 231-33 (1988).

618. ANTI-DEFAMATION LEAGUE, THE ADL ANTI-PARAMILITARY TRAINING STATUTE: A RESPONSE TO DOMESTIC TERRORISM (1996) [hereinafter ADL STATUTE].

619. 18 U.S.C. § 231(a)(1) (1988).

620. *Id.*

621. 411 F.2d 934 (7th Cir. 1969).

622. *Id.* at 936.

623. *Id.* at 935.

624. *Id.* at 937.

In *United States v. Featherston*,⁶²⁵ the Fifth Circuit provided a more complete analysis of the First Amendment implications of the Civil Obedience Act.⁶²⁶ In May 1970, members of the Black Afro Militant Movement were instructed on how to make and assemble explosive and incendiary devices with the express purpose of preparing for "the coming revolution."⁶²⁷ The Fifth Circuit determined that the effect of the statute was to require the government to make a showing of a "clear and present danger" in order to obtain a conviction.⁶²⁸ The court held that "if government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and commit them to a course whereby they will strike when the leaders feel the circumstances permit, action by the government is required."⁶²⁹

In *Vietnamese Fisherman's Ass'n v. Knights of the Ku Klux Klan*,⁶³⁰ the plaintiffs sued for a permanent injunction prohibiting the continued operation of the Texas Emergency Reserve, the military unit of the Texas Ku Klux Klan. The Texas Emergency Reserve was a private army that sought to intimidate and harass Vietnamese fishermen.⁶³¹ The group conducted a variety of military-style training exercises and participated in a boat ride while displaying their weapons.⁶³² During the boat ride, an effigy of a Vietnamese fisherman was hung from a rear deck rigging.⁶³³ The court issued a permanent injunction against the Texas Emergency Reserve, prohibiting them from associating, parading, or training as a paramilitary organization.⁶³⁴

625. 461 F.2d 1119 (5th Cir. 1972).

626. *Id.* at 1122.

627. *Id.* at 1121.

628. *Id.* at 1122. Under traditional First Amendment analysis, the government cannot prohibit speech that is constitutionally protected unless that speech constitutes a "clear and present danger." See *Schenck v. United States*, 249 U.S. 47, 51 (1919). See also *supra* notes 543-61 and accompanying text.

629. *Featherstone*, 461 F.2d at 1122. The court relied upon language from *Dennis v. United States*, 341 U.S. 494, 507 (1951) for its conclusion that the clear and present danger test does not require the government to wait for an event to occur where the evidence shows that the group was ready to strike transportation, communication, and law enforcement targets at a moment's notice. *Featherstone*, 461 F.2d at 1122. The court also noted that that the Black Afro Militant Movement was a "cohesive, organized group . . . [consisting of] a force regularly trained in explosives and incendiary devices." *Id.* The court subsequently held that "there was a sufficient showing of clear and present danger to justify governmental intervention . . ." *Id.* at 1123. See also *United States v. Mechanic*, 454 F.2d 849, 852 (8th Cir. 1971); *United States v. Banks*, 368 F. Supp. 1245, 1247 (D.S.D. 1973); *United States v. Hoffman*, 334 F. Supp. 504, 509 (D.D.C. 1971).

630. 543 F. Supp. 198 (S.D. Tex. 1982).

631. *Id.* at 202.

632. *Id.* at 203.

633. *Id.* at 202-07.

634. *Id.* at 219. The Texas Emergency Reserve was also enjoined from engaging in any other activities that could lead to the use or threatened use of military force in violation of the plaintiff class. *Id.*

The court used several factors to reach its decision.⁶³⁵ First, the court considered the following language of the Texas statute: "a body of persons other than the regularly organized state military forces . . . or the troops of the United States may not associate as a military company or organization or parade in public with firearms in a municipality of the state."⁶³⁶ The court held that the statute prohibited a body of men from associating themselves together as a military company or organization, as well as parading in public with firearms.⁶³⁷

Second, the court concluded that the actions of the Texas Emergency Reserve were outside the scope of First and Second Amendment protections.⁶³⁸ The court reasoned that the activities involved minimal communication and grave interferences with the public peace.⁶³⁹ The court further noted that, even if the actions were considered speech, they would not be protected.⁶⁴⁰ The nature of the threats initiated by the Texas Emergency Reserve were "classic examples" of fighting words and were not worthy of constitutional protection.⁶⁴¹

Third, the court held that the military training activities were outside the scope of the freedom to associate because such a right is not a defense to conspiracy or breach of the peace. The Texas Emergency Reserve could express their views as long as they did so without the threat of military force. The court reasoned that the existence of the armed camp was militarily threatening because it could intimidate potential opponents of the Texas Emergency Reserve. The existence of a private army was enough by itself to prevent our democratic form of government from functioning constitutionally.⁶⁴² The court further reasoned that the Second Amendment applied only to a well-regulated militia organized by the state.⁶⁴³

635. *Id.*

636. TEX. STATE MILITARY FORCES AND VETERANS CODE ANN. 5780(6)(1987). Renumbered and currently codified under TEX. STATE MILITARY AND VETERANS CODE ANN. 431.010 (1990). Cf. GA. CODE ANN. 38-2-277(a) (1985).

637. *Vietnamese Fisherman's Ass'n v. Knights of the KKK*, 543 F. Supp. 198, 217 (S.D. Tex. 1982).

638. *Id.*

639. *Id.* at 219.

640. *Id.* at 218.

641. *Id.* at 208. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (stating that fighting words are utterances that, in and of themselves, inflict injury or incite immediate breaches of the peace).

642. *Vietnamese Fisherman's Ass'n*, 543 F. Supp. at 209-10.

643. *Id.* at 210 (citing *United States v. Miller*, 307 U.S. 174, 178 (1939)).

2. Second Amendment Concerns

The Federal Civil Obedience Act and other anti-paramilitary training statutes may also be attacked under the Second Amendment.⁶⁴⁴ The Second Amendment provides that “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”⁶⁴⁵ Unfortunately, the most recent Supreme Court case addressing the Second Amendment is a 1939 case, *United States v. Miller*.⁶⁴⁶ However, in their interpretation of the Second Amendment, lower federal courts have strayed away from *Miller*.⁶⁴⁷ Given the recent prominence of the Patriot movement, it would be prudent to define the scope of the Second Amendment.⁶⁴⁸ However, until the Supreme Court does so, *United States v. Miller* is the controlling law.⁶⁴⁹

In *Miller*, the Court considered whether or not a sawed-off shotgun was a “militia weapon” protected by the Second Amendment.⁶⁵⁰ The Court remanded the case with instructions for the court below to determine if a sawed-off shotgun has some “reasonable relationship to the preservation or efficiency of a well-regulated militia.”⁶⁵¹ This holding suggests that the states do not have an exclusive right to form militias.⁶⁵² Rather, the holding suggests that individuals also have a right to form a militia.⁶⁵³ If the Supreme Court wanted to endorse the idea that only the states may form militia, it would have been easy for it to do so.⁶⁵⁴ The only necessary inquiry would have been to ask

644. U.S. CONST. amend. II.

645. *Id.*

646. 307 U.S. 174 (1939).

647. Larizza, *supra* note 57, at 603.

648. *Id.* at 603. Several questions concerning the Second Amendment need to be answered: (1) what is a militia?; (2) what does it mean to be well regulated?; (3) what is the right of the people?; (4) what does it mean to “keep and bear arms”?; and (5) what sort of infringements on the right to bear arms are prohibited. *Id.* Many writers have attempted to provide an answer to these questions. See generally Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461 (1995).

649. *Miller*, 307 U.S. at 174.

650. *Id.*

651. *Id.* at 178.

652. *United States v. Miller*, 307 U.S. 174, 178 (1939).

653. *Id.*

654. Larizza, *supra* note 57, at 606.

whether Mr. Miller was a state.⁶⁵⁵ Thus, the most recent analysis of the Second Amendment by the Supreme Court suggests an individual right to form a militia.⁶⁵⁶

Since the Federal Civil Obedience Act punishes only instructors, the ADL has proposed that the statute be amended to include students who receive paramilitary instruction.⁶⁵⁷ Given the nature of the organizational structure of the Patriot movement, this amendment is warranted.⁶⁵⁸ Punishing only the instructors may not be an effective method of curtailing the Patriot movement because leaderless resistance is the driving organizational structure.⁶⁵⁹ Leaderless resistance calls for independent cells of Patriot groups that are loosely organized and working toward a common goal.⁶⁶⁰ Leaderless resistance may allow the movement to continue and flourish even while the government is successfully prosecuting a few of the paramilitary instructors.⁶⁶¹ Therefore, students as well as instructors should be subject to prosecution under any anti-paramilitary training laws.⁶⁶²

In addition, like laws addressing only common law courts, anti-militia and anti-paramilitary training laws are not a complete response to the full spectrum of problems associated with the Patriot movement.⁶⁶³ The statutes punish some of the most dangerous conduct that Patriots engage in, but law enforcement authorities need a more comprehensive response.⁶⁶⁴ A complete response to the Patriot movement needs to recognize all segments of Patriot conduct and address all concerns.⁶⁶⁵

655. *Id.* at 607.

656. *But see* United States v. Cruikshank, 92 U.S. 542 (1875) (holding that the right to bear arms rests solely with the state); United States v. Hale, 978 F.2d 1016 (8th Cir. 1992) (holding that the Second Amendment does not protect individual possession of military weapons); United States v. Oakes, 564 F.2d 384, 387 (10th Cir. 1977) (holding that the Second Amendment was adopted to preserve the effectiveness and assure the continuation of the state militia); United States v. Warin, 530 F.2d 103 (6th Cir. 1976) (holding that Second Amendment guaranteed collective rather than individual rights).

657. ADL STATUTE, *supra* note 618.

658. FALSE PATRIOTS, *supra* note 8, at 24.

659. ADL STATUTE, *supra* note 618.

660. FALSE PATRIOTS, *supra* note 8, at 24.

661. *Id.*

662. *Id.*

663. *Id.* at 42-45.

664. *Id.*

665. ADL STATUTE, *supra* note 618.

VIII. A COMPREHENSIVE LEGISLATIVE RESPONSE TO THE PATRIOT MOVEMENT

Those who make peaceful revolution impossible will make violent revolution inevitable.—John F. Kennedy⁶⁶⁶

This Note proposes a comprehensive response to the Patriot movement that incorporates the best parts of the ADL Common Law Court model statute, criminal syndicalism statutes, and anti-militia/anti-paramilitary training statutes. The comprehensive statute is divided into five sections. Section I provides working definitions of specific terms used in the statute. Section II addresses the problems of common law courts and is aimed at the conduct associated with that segment of the Patriot movement.⁶⁶⁷ Section III addresses criminal syndicalism by making illegal the advocacy of criminal syndicalism under circumstances that create a clear and present danger where imminent harm will result.⁶⁶⁸ Section IV addresses the militia segment of the Patriot movement by making illegal the participation in paramilitary training for the purpose of causing a civil disorder.⁶⁶⁹ Section V limits the applicability of the comprehensive statute by making it clear that the statute does not apply to lawful authorities or legal process and that nothing in the Act prohibits individuals from freely assembling.

The comprehensive statute carefully balances the competing interests that are associated with the Patriot movement and has three primary objectives. First, the statute must not prohibit any First or Second Amendment constitutionally protected activity. Accordingly, the Act proscribes conduct and not speech or association. Second, the statute must address the full range of conduct which has been displayed by Patriot groups. Incomplete responses to the Patriot movement will not address the danger of violence and disruption of the American legal system that the Patriot movement can generate. Third, the statute was reviewed carefully so that it does not proscribe legitimate and lawful activities.

State and federal governments should adopt this comprehensive statute as a response to the Patriot movement. The statute gives prosecutors all the tools they need to charge Patriots with a crime. Successful prosecutions have proven to be a powerful tool in the battle against right-wing extremist groups. When faced with prosecution, it is likely that most members of Patriot groups will

666. John F. Kennedy, remarks to Latin American diplomats at the White House (Mar. 13, 1962), in MINER & RAWSON, *supra* note 1, at 435.

667. Section II is based on the ADL Common Law Court Statute.

668. Section III is based on the Montana Criminal Syndicalism Statute and the Ohio Incitement to Violence Statute.

669. Section IV is based on the ADL Model Anti-Paramilitary Training Statute.

become tired of acting like public officials and realize that better ways exist for them to act on their political frustrations. Next, the text of the comprehensive statute, as well as comments and analysis to each section, are discussed.

A. *Section I: Definitions*

A. (1) *The term "legal process" means a document or order issued by a court, filed with a court or recorded for the purpose of exercising jurisdiction or representing a claim against a person or property, or for the purpose of directing a person to appear before a court or tribunal, or to perform or refrain from performing a specified act. "Legal process" includes, but is not limited to, a summons, lien, complaint, warrant, injunction, writ, notice, pleading, subpoena, or order.*

(2) *The term "person" means an individual, public or private group, incorporated or otherwise, legitimate or illegitimate legal tribunal or entity, informal organization, association, partnership, limited liability company, official or unofficial agency or body, or any assemblage of individuals.*

(3) *"Criminal syndicalism" means the advocacy of crime, malicious damage or injury to property, violence, or other unlawful methods of terrorism as a means of accomplishing political or industrial ends.*

(4) *The term "civil disorder" means any public disturbance involving acts of violence or imminent harm by assemblages of one or more persons, which causes an immediate danger, causes a threat of imminent harm, or results in damage or injury to person(s) or property.*

(5) *The term "firearm" means any weapon that is designed to or may readily be converted to expel any projectile by the action of an explosive, or the frame or receiver of any such weapon.*

(6) *The term "explosive or incendiary device" means dynamite and all other forms of high explosives, any explosive bomb, grenade, missile or similar device, including, but not limited to, any device which:*

(a) *consists of or includes a breakable container containing a flammable liquid or compound, and a wick composed of any material which, when ignited, is capable of igniting such flammable liquid or compound, which can be carried or thrown by one individual acting alone; or*

(b) *consists of any explosive and volatile mixture of chemicals including but not limited to fertilizer mixed with fuel or other such chemical mixtures.*

(7) *The term "law enforcement officer" means any officer or*

employee of the United States, any state, any political subdivision of a state or the District of Columbia, and such term shall specifically include, but shall not be limited to, members of the National Guard, as defined in section 101(9) of Title 10, United States Code, members of the organized militia of any state or territory of the United States, the Commonwealth of Puerto Rico, or the District of Columbia, not included within the definition of National Guard as defined by such section 101(9), and members of the Armed Forces of the United States.

Commentary

Section I includes definitions for terms used in all five sections of the statute. These definitions should control if there is any dispute about the meaning of a term used in this statute.

B. Section II: Illegitimate Courts/Simulated Legal Process

A. (1) Any person or group of persons that intentionally impersonates, falsely acts, or purports to act as a public officer or tribunal, public employee or utility employee, including but not limited to judges, magistrates, prosecutors, court personnel, sheriffs, deputies, or any other law enforcement officer;

(2) Any person who simulates legal process including, but not limited to, actions affecting title to real or personal property, indictments, subpoenas, warrants, injunctions, liens, orders, judgments or any legal documents or proceedings or the basis for any action to be fraudulent;

(3) Any person who, while acting falsely under color of law, takes any action against person(s) or property; or

(4) Any person who falsely, under color of law, attempts in any way to influence, intimidate or hinder a public official or law enforcement officer in the discharge of his or her official duties by means of, but not limited to, threats of or actual physical abuse, harassment, or through the use of simulated legal process shall be guilty of disruption of the judicial system and fined not more than \$____ or imprisoned not more than ____ years, or both. Disruption of the judicial system shall be designated a Class ____ misdemeanor or a Class ____ Felony.

Commentary

Section II has been carefully drafted so that its language does not violate the First or Second Amendments, it responds to the conduct of common law court groups and it does not prohibit any activities of legitimate courts. Accordingly,

the statute is aimed at conduct and not at speech or association. If challenged, Section II should satisfy legal scrutiny. A substantial or compelling government interest should dramatically outweigh any infringement on constitutional rights. For example, a defendant may argue that the statute violates her First Amendment freedom of speech by punishing her for filing a false lien against someone's property as a form of protest against government tyranny. A court would probably consider this activity a form of expression. However, the statute is not content-based because it is aimed at the conduct of filing a false lien. The government does not care what the message is or whether the defendant is filing a false lien as a form of political protest or as a form of harassment. Since the statute is not content-based, but still may have an incidental effect on speech, it should be judged under intermediate scrutiny.⁶⁷⁰ Intermediate scrutiny requires a substantial government interest as well as a law that is narrowly tailored. The substantial, if not compelling, government interests are the efficient operation of its judicial system and the prevention of harassment. The law is narrowly tailored because it is aimed at conduct and limits no more speech than necessary to achieve its purpose. The government interest outweighs any incidental restriction of constitutional rights. Therefore, if Section II of the comprehensive statute were challenged, it is unlikely that a court would find that it violates any constitutional guarantees.

C. Section III: Criminal Syndicalism

A. (1) A person commits the offense of criminal syndicalism if he purposely or knowingly:

(a) orally or by means of writing, advocates or promotes the doctrine of criminal syndicalism under circumstances that create a clear and present danger that imminent harm or violence will be committed;

(b) organizes or becomes a member of any assembly, group or organization which he knows is advocating or promoting the doctrine of criminal syndicalism under circumstances that create a clear and present danger that imminent harm or violence will be committed; or

(c) for or on behalf of another person whose purpose is to advocate or promote the doctrine of criminal syndicalism, publishes, distributes, sells or publicly displays any writing advocating or advertising such doctrine under circumstances that create a clear and present danger that imminent harm or violence will be committed.

670. United States v. O'Brien, 391 U.S. 367 (1968). See *supra* notes 500-13 and accompanying text.

(2) A person convicted of the offense of criminal syndicalism shall be fined not more than \$_____ or imprisoned not more than _____ years, or both. Criminal syndicalism shall be designated a Class _____ misdemeanor or a Class _____ Felony.

Commentary

Section III is the heart of the comprehensive statute. Criminal syndicalism statutes that withstand constitutional scrutiny show significant promise as a way for prosecutors to disband a Patriot group before it does any real harm. Section III of the statute makes it a crime for anyone to purposely or knowingly promote the doctrine of criminal syndicalism under circumstances that create a clear and present danger of imminent harm. Section III is content-based, but has been narrowly drafted so that it does not limit any more speech than necessary. The statute uses both the “clear and present danger” language of *Schenck v. United States* and the “imminent” language of *Brandenburg v. Ohio* because of the debate about the status of the clear and present danger test of *Schenck* and the age of the *Brandenburg* decision. The statute makes it clear that the only speech that is proscribable is the advocacy of criminal syndicalism under circumstances that create a clear and present danger that imminent harm or violence will be committed. In addition, the statute incorporates the language of *Scales* by requiring that the person accused of criminal syndicalism do so purposely or knowingly. This requirement avoids punishment of any innocent speech or conduct. Section III of the statute punishes not only speech, but also the proscribable action of incitement to riot.

For example, a Patriot group is formed in a rural area and calls itself the Clay County Regulators. The Regulators gain membership and print materials stating that their purpose is to oppose taxes and overthrow the federal government when they achieve enough members and support to “make an impact.” If the Regulators take any active steps toward the overthrow of the government, a prosecutor should be able to show that they represent a clear and present danger of imminent harm. In addition, the Regulators will be subject to prosecution under the statute when they achieve enough membership and support to be capable of “making an impact” on the government. Because their stated purpose is to overthrow the government, if a prosecutor can show that they are capable of “making an impact,” and their stated purpose is to strike when they have achieved that capability, a clear and present danger of imminent harm exists. Accordingly, prosecutors may take action against the group under Section III of the statute.

In the example, showing that the Patriot group has the capability to “make an impact” at a very early time in its life should be possible for a prosecutor because Patriot groups have proven that they may cause great harm and “make

an impact” with few people and limited weapons or bomb-making materials. The Patriots intend for their words to produce incitement, and the words are likely to produce imminent lawless action because the group is a cohesive unit formed for the purpose of overthrowing the government.

Moreover, when words are spoken under circumstances that create a clear and present danger of imminent harm, the marketplace of ideas does not have the time or opportunity to respond to or to correct erroneous speech. Normally, when speech is false, erroneous, or even violent, the government may not restrict it. Rather, the government must rely on more speech in the marketplace of ideas to correct any errors or to call for moderation. However, when the speech is introduced into the marketplace of ideas under circumstances that create a clear and present danger of imminent harm, the speech must be restricted before it does any actual harm. Therefore, if Section III of the comprehensive statute is challenged, it is likely that a court would find that it is constitutional as well as consistent with *Schenk v. United States* and its progeny.

D. Section IV: Paramilitary Training

A. (1) *Whoever teaches or demonstrates to any other person the use, application, or making of any firearm, explosive, or incendiary device, or technique capable of causing injury or death to persons or property, knowing, or having reason to know, purposely, or intending that such instruction will be unlawfully employed for use in, or in furtherance of, a civil disorder-*

(2) *Shall be fined not more than \$_____ or imprisoned not more than _____ years, or both. Paramilitary instruction for the purpose of causing a civil disorder shall be designated a Class _____ misdemeanor or a Class _____ Felony.*

B. (1) *Whoever assembles with one or more persons for the purpose of training with, practicing with, or being instructed in the use of any firearm, explosive or incendiary device, or technique capable of causing injury or death to persons or property, intending to employ unlawfully the same for use in, or in furtherance of, a civil disorder-*

(2) *Shall be fined not more than \$_____ or imprisoned not more than _____ years, or both. Receiving paramilitary instruction for the purpose of causing a civil disorder shall be designated a Class _____ misdemeanor or a Class _____ Felony.*

Commentary

Section IV is aimed at the militia segment of the Patriot movement. This section makes it illegal to instruct or to participate in military training for the purpose of causing or furthering civil disorder. Section IV is conduct-based and

implicates no speech activities. It is possible that a defendant may challenge the statute under the theory that it limits his right to bear arms. However, most courts subscribe to the states' rights theory of the Second Amendment that confers the exclusive right to bear arms on a well-regulated state militia. Section IV(A)(1) of the statute requires that instructors know, have reason to know, or intend that the training be used in the furtherance of a civil disorder. In contrast, Section IV(B)(1) requires that a participant actually intend that the training be used in the furtherance of a civil disorder. This higher requirement of intent for participants protects people who do not know, or perhaps are too naive to know, that the purpose of the instruction is to further a civil disorder. The requirement of intent for participants does provide a defense for participants if they may claim that they did not know the purpose of the training. However, the intention requirement ensures that the law is narrowly tailored, and also ensures that people who do know the purpose of the training are punished more severely than those who do not.

For example, if the Clay County Regulators develop a paramilitary training program, it will have instructors and participants. The Regulators may train for any purpose, so long as it is not to further a civil disorder. Instructors have committed a crime if they know, have reason to know, or intend that the training be used in the furtherance of a civil disorder. Students of the training have committed a crime if they intend that the training will be used in the furtherance of a civil disorder. Any student who does not know the purpose of the training or does not intend that the training be used in the furtherance of a civil disorder has not committed a crime. Extrinsic evidence may be used to determine knowledge, intent, or reason to know.

E. Section V: Inapplicability

A. (1) Nothing in this Act shall make unlawful any action of any law enforcement officer or legal tribunal which is performed under lawful authority.

(2) Nothing in this Act shall prohibit individuals from assembling freely to express opinions or designate group affiliation or association.

(3) Nothing in this Act shall prohibit or in any way limit a person's lawful and legitimate access to the courts or prevent a person from instituting or responding to legitimate and lawful legal process through the legitimate legal system.

Commentary

Section V of the comprehensive statute is divided into three parts. Its purpose is to ensure that the statute does not apply to lawful activities of law enforcement officers or legal tribunals and that the statute is narrowly tailored.

Section IV has been drafted to eliminate the misuse of the statute by litigants that would claim that Section II of the statute may apply to legitimate courts. In addition, Section V(A)(2) makes it clear that the statute does not limit the right of persons to freely assemble to express opinions or to designate group affiliation. These rights may be limited only if the requirements of Section III (criminal syndicalism) are met and the expression or group affiliation is done under circumstances that create a clear and present danger that imminent harm will be committed. Finally, Section V(A)(3) has been drafted so that persons seeking to avoid the actions of a legitimate tribunal may not misuse the statute. By stating specifically what the statute does not apply to, Section V provides an additional safeguard because it is drafted as narrowly as possible. This makes it unlikely that the statute will inhibit any constitutionally-protected rights.

The comprehensive statute does not restrict the right to peaceful revolution. The United States of America is a representative government that provides for change through the democratic process. The comprehensive statute is an effective response to the Patriot movement and the danger that it represents to the American system of government.

IX. CONCLUSION

Those who would give up essential liberty to purchase a little temporary safety deserve neither liberty nor safety.—Benjamin Franklin⁶⁷¹

Throughout American history, vigilante groups have gained power in times of political turmoil. Patriot-style vigilante groups were active before the American Revolution and re-emerged in the pre-civil war era of popular sovereignty. Political analysts have hypothesized that a significant rise in vigilante and Patriot activity is a precursor to a revolution or civil war. If so, the modern phenomena of the Patriot movement is certainly cause for alarm. In the last several years, America has seen an unprecedented, meteoric rise in vigilante activity that has manifested itself in the Patriot movement. Many members of the Patriot movement advocate revolution and overthrow of the federal government. Fortunately, it is unlikely that the Patriot movement will actually gain enough momentum to achieve its goals. Instead, it is likely to fragment and die a slow death as neo-nazis, anti-semites, and other racists

671. Benjamin Franklin, speech to the Pennsylvania Assembly (Nov. 11, 1755), in MINER & RAWSON, *supra* note 1, at 199.

infiltrate it.⁶⁷² However, it is uncertain how much damage the Patriot movement will cause before its demise. Thus, the states and the federal government should act quickly to enact the comprehensive legislation proposed by this Note that empowers prosecutors and addresses the unique problems associated with the Patriot movement.

For the more mainstream followers of the Patriot movement (not the racists, anti-semitics, neo-nazis, etc.), the development of the movement suggests that the Constitution is alive and well. In relation to the Constitution is the power of "The People," for that is what gives the Constitution and the American government the power that it has today. Whereas the United States Constitution is based on a distrust of centralized power, the federal government presently enjoys more power than it ever has had by intruding into the life of every American citizen on almost a daily basis.⁶⁷³ Americans distrust powerful centralized government, and the Patriot movement is a graphic representation of this deeply-rooted distrust that is apparent from our earliest childhood history lessons. The Patriot movement has generated a keen awareness of these intrusions of government. Large segments of "The People" have kept a watchful eye on our federal government like the watchful eye of a vigilance committee, and many of them do not like what they see.

The ultimate warning by the Patriot movement to public officials is that their power, as well as the power of the United States Constitution, rests in the confidence of "The People." Government leaders should not enact the comprehensive legislation proposed by this Note without reflection and deep thought. Enacting legislation to respond to the Patriot movement without thought shows a lack of understanding of the Patriot movement and the warning that it represents. Public officials should take heed of this warning and be cognizant of the fact that any power of their offices and the root of their authority rests in the confidence of "The People." Accordingly, public officials should examine the reasons behind the loss of confidence in our system of government. Without the confidence of "The People," the Constitution becomes nothing more than an historical document.

Thompson Smith

672. The demise of the Patriot movement is likely to be similar to the demise of the Ku Klux Klan in Indiana. At the height of Klan popularity in Indiana, the KKK was not unlike a secret society or masonic lodge. It was only after the arrest of popular political figure and Klansmen D.C. Stephenson that people began to see the Klan for what it really was. For further discussion about the rise and fall of the Ku Klux Klan in Indiana, see generally LEONARD J. MOORE, *CITIZEN KLANSMEN: THE KU KLUX KLAN IN INDIANA, 1921-1928* (1991).

673. Although *United States v. Lopez*, 115 S.Ct. 1624 (1995) calls into question the broad power that the federal government has enjoyed for several years, it is doubtful that the power of the federal government will be reduced significantly by this decision alone.

