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Border Vigilantism and Comprehensive Immigration Reform

*Christopher J. Walker**

We must begin by recognizing the problems with our immigration system. For decades, the United States has not been in complete control of its borders . . . We're a nation of laws, and we must enforce our laws. We are also a nation of immigrants, and we must uphold that tradition, which has strengthened our country in so many ways. These are not contradictory goals. America can be a lawful society and a welcoming society at the same time. We will fix the problems created by illegal immigration, and we will deliver a system that is secure, orderly, and fair. So I support comprehensive immigration reform that will accomplish five clear objectives.

—President George W. Bush,
Address to the Nation, May 15, 2006¹

INTRODUCTION

Anyone who has picked up a newspaper or tuned into a cable news program knows the U.S.-Mexico border is a hot topic in immigration law and policy and in the fight against terrorism. Indeed, the image of the border has been and will continue to be at the forefront of public consciousness until some comprehensive measure is taken to solve the problem that President Bush reframed in an address to the nation in May 2006.²

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Thanks are due to Professor Jayashri Srikantiah of Stanford Law School and Professor Juliette Kayyem of Harvard's Kennedy School of Government for their guidance and feedback on previous drafts, as well as to my colleagues in the Stanford Immigrants' Rights Clinic for their comments. This Article is the result of my work in the Stanford Immigrants' Rights Clinic and my corresponding fieldwork at the U.S.-Mexico border with the ACLU of Northern California and the San Diego Legal Observer Coalition Border Vigilante Project. Shani Moore, my colleague at Stanford and partner in this work at the border, was instrumental in this research.

¹ President George W. Bush, Address to the Nation on Immigration Reform (May 15, 2006), <http://www.whitehouse.gov/news/releases/2006/05/20060515-8.html>.

² *Id.* In this address, President Bush outlined five prongs for comprehensive immigration reform, starting with the top priority of securing the border:

1. The United States Must Secure Its Borders;
2. To Secure Our Border, We Must Create A Temporary Worker Program;

In November 2005, President Bush made a visit to the border to hold a press conference and outline plans for more walls, fences, and border patrol officials, as well as increasing expedited deportation if undocumented migrants still are not kept out.³ The House quickly responded by passing H.R. 4437, the Antiterrorism and Illegal Immigration Control Act, which would further militarize the U.S.-Mexico border and felonize undocumented border-crossing.⁴ In response, pro-immigrant protestors mobilized in cities throughout the United States with rallies, for instance, of hundreds of thousands in Washington, D.C., and over a half million in Los Angeles.⁵ While the House called for felonization of undocumented border-crossing and illegal presence, the Bush Administration put forward a temporary guest-worker program and 6000 National Guardsmen at the border. Some pro-immigrant protestors have even pushed for a blanket amnesty—something that has not been granted in two decades since the Reagan Administration did so in 1986.⁶

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3. We Need To Hold Employers To Account For The Workers They Hire;
 4. We Must Deal With The Millions Of Illegal Immigrants Who Are Already Here; and
 5. We Must Honor The Great American Tradition Of The Melting Pot.

For more information on Bush's proposal, see Press Release, Office of the Press Secretary, Fact Sheet: Comprehensive Immigration Reform (May 15, 2006), <http://www.whitehouse.gov/news/releases/2006/05/20060515-10.html>.

³ Press Release, Office of the Press Secretary, Fact Sheet: Securing America Through Immigration Reform (Nov. 28, 2005), <http://www.whitehouse.gov/news/releases/2005/11/20051128-3.html>; see also Press Release, Dep't of Homeland Security, DHS Expands Expedited Removal Authority Along Southwest Border (Sept. 14, 2005), http://www.dhs.gov/xnews/releases/press_release_0750.shtm (quoting Secretary Chertoff: "The use of [expedited removal] authority will allow DHS the ability to gain greater control of our borders and to protect our country against the terrorist threat.>").

⁴ Antiterrorism and Illegal Immigration Control Act, H.R. 4437, 109th Cong. (2005), available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:h.r.04437>; see also Carolyn Lochhead, *House Passes Major Clampdown on Illegal Immigration; Debate on Bill Exposes Rifts in Both Parties*, S.F. CHRON., Dec. 17, 2005, at A5; F. James Sensenbrenner & Peter King, Border Protection, Antiterrorism, and Illegal Immigration Control Act, available at <http://judiciary.house.gov/media/pdfs/immbillsection.pdf>. The Senate passed a milder version of this legislation in May 2006. See Comprehensive Immigration Reform Act of 2006, H.R. 4437, 109th Cong. (2005), available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:SN02611>.

⁵ See, e.g., Dan Balz & Darryl Fears, "We Decided Not To Be Invisible Anymore": Pro-Immigration Rallies Are Held Across Country, WASH. POST, Apr. 11, 2006, at A1 ("Hundreds of thousands of pro-immigration demonstrators mobilized on the Mall and in scores of cities across the country yesterday in a powerful display of grass-roots muscle-flexing that organizers said could mark a coming-of-age for Latino political power in the United States."); Teresa Watanabe & Hector Becerra, *The State: 500,000 Pack Streets To Protest Immigration Bills*, L.A. TIMES, Mar. 26, 2006, at A1 ("Attendance at the [Los Angeles] demonstration far surpassed the number of people who protested against the Vietnam War and Proposition 187, a 1994 state initiative that sought to deny public benefits to undocumented migrants but was struck down by the courts.>").

⁶ See Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended at 8 U.S.C. § 1255a) (providing "adjustment of status of certain entrants before January 1, 1982, to that of person admitted for lawful residence").

The 109th House and Senate failed to reach consensus on comprehensive immigration reform, though they did pass the Secure Fence Act of 2006—the purpose of which is evident from its name.⁷ However, the mid-term elections caused a changing of the guard in Congress, leaving the nation back at square one with respect to comprehensive immigration reform. But the problem at the border remains, and so do our perceptions about its source. Both the Bush Administration's proposal and H.R. 4437 purport to address fears of a festering national security threat at the border. However, a closer look at the issue reveals that the picture of a border primed for terrorism is greatly exaggerated.⁸

So why do policymakers, as well as the public more generally, view U.S.-Mexico border protection as a critical national security priority? The answer is that we now operate in a post-September 11 climate, in which we have experienced a devastating attack on our home soil by foreigners. Today the foreign-born are viewed with suspicion by both government and many local communities. This climate is exacerbated by the fact that citizens witness the effects of a porous border virtually every day and in practically every city—with the undocumented migrant population now above 11 million and spread across the continental United States.⁹

While many actors and conditions contribute to the problems at the border, one set of actors has been left largely unaddressed by the literature and policy analysis: border vigilantes.¹⁰ These vigilantes have painted the border as a dangerous locus of criminal and terrorist activity, necessitating concerned citizen sentinels. They have blitzed the public with press releases, blog posts, and mass e-mails about the number of migrants crossing the border illegally and the need for law enforcement to increase border protection. Their message is powerful because they back their rhetoric with action: these individuals camp out near popular desert border-crossing points, document the rate of undocumented migration, and even turn away migrants and/or turn them in to the U.S. Border Patrol and local law enforcement. These groups have reportedly even begun to build fences along the border, without permission or sanction from the U.S. Border Patrol,

⁷ Secure Fence Act of 2006, Pub. L. No. 109-367, 120 Stat. 2638 (“An Act to establish operational control over the international land and maritime borders of the United States.”).

⁸ This claim of national security concern is arguably not just a post-September 11 phenomenon. Representative Zoe Lofgren (D-Cal.) argues that since the early 1990s, conservatives have pushed for immigration law reform under the guise of national security. See U.S. Rep. Zoe Lofgren, *A Decade of Radical Change in Immigration Law: An Inside Perspective*, 16 STAN. L. & POL'Y REV. 349 *passim* (2005).

⁹ See JEFFREY S. PASSEL, PEW HISPANIC CTR., *THE SIZE AND CHARACTERISTICS OF THE UNAUTHORIZED MIGRANT POPULATION IN THE U.S.: ESTIMATES BASED ON THE MARCH 2005 CURRENT POPULATION SURVEY 1-2* (2006), available at <http://pewhispanic.org/files/reports/61.pdf>.

¹⁰ These groups have stated they are not vigilantes because they follow the laws and are merely trying to protect the border and uphold the rule of law. See *infra* Part I.B (describing these groups). In this Article, “border vigilantes” will be used as shorthand for these groups; “minutemen” will also be used interchangeably.

in areas where undocumented migrants are known to cross.¹¹ Border vigilantes claim to do the work that the government is unwilling, or at least unable, to do effectively: protect America from the security threat of a permeable border and preserve the rule of law.

Print and broadcast media supplement the vigilante campaign with around-the-clock coverage—bringing more legitimacy to their message. Indeed, one researcher finds that the number of print news stories on the Minuteman Project, one of the most-publicized vigilante groups, peaked at 592 in January 2005, with over 1,750 total stories published in 2005.¹² Furthermore, popular TV shows such as *Law and Order*¹³ and *The West Wing*¹⁴ have caught onto the border vigilantes' fight to "protect" America. Based on the vigilantes' media exposure, one might imagine hundreds of vigilantes camping out at the border. Some of the vigilante groups claim upwards of 1000 members and declare to have captured over 5000 migrants. For example, the Barnett Boys, vigilante ranchers from Arizona, boast that the thousands of migrants they catch prove the effectiveness and importance of border enforcement.

However, the true situation at the U.S.-Mexico border belies popular culture's depiction of border vigilantism. An average day at the California border reveals fewer than half a dozen vigilantes sporting fatigues and clutching binoculars. And they very rarely encounter migrants of any kind. In the other border states—Arizona, New Mexico, and Texas—less than 500 total vigilantes have even seen the border—except perhaps from their personal homes as they browse pictures on the Internet. Arizona features the most activity: up to forty people turn up weekly to turn border cities into migrant-watching posts. In California, Texas, and New Mexico, vigilante numbers seldom reach over a dozen per night.¹⁵

Scarcity in numbers should not deceive one into assuming that vigilantes' impact, either physically at the border or at the ballot box, is in-

¹¹ See Posting of Anderson Cooper to Anderson Cooper 360, <http://www.cnn.com/CNN/Programs/anderson.cooper.360/blog/2006/05/minutemen-build-fence-along-southern.html> (May 1, 2006, 12:40 PM EST).

¹² See Leo R. Chavez, *Spectacle in the Desert: The Minuteman Project on the U.S.-Mexico Border*, in GLOBAL VIGILANTES: ANTHROPOLOGICAL PERSPECTIVES ON JUSTICE AND VIOLENCE (David Pratten & Atreyee Sen eds., forthcoming 2007).

¹³ See *Law & Order: New York Minute* (NBC television broadcast Nov. 16, 2005) (centering on an anti-immigration group called the Countrymen Border Watch of America, a civilian border patrol group that reports illegal alien activity to the authorities).

¹⁴ See *The West Wing: Message of the Week* (NBC television broadcast Oct. 9, 2005) (including interaction with the vigilantes at the Texas-Mexico border and a cameo appearance by Chris Matthews with the conservative presidential candidate on *Hardball* to discuss border politics).

¹⁵ These observations are based on personal experience at the U.S.-Mexico border as a student in the Stanford Immigrant Rights' Clinic under the direction of Professor Jayashri Srikantiah. Many thanks to Mariana Bustamante of the ACLU Immigrants' Rights Project and Juan Gallegos and Claudia Smith of the San Diego Legal Observer Coalition for their insiders' perspective. See also Chavez, *supra* note 12 (providing quantitative and qualitative descriptions of border vigilantism).

consequential. Vigilantes have not only affected the policymaking process; their influence at the border is real, and so is the risk of citizen's arrests of undocumented migrants going awry. Migrants often cross the border in the dark hours of the night and in the most remote areas, so vigilantes also do most of their work then and there, when and where law enforcement is less likely to be present. For this reason, it is imperative to define clearly the rights and responsibilities of vigilante groups at the border—to balance their ability to freely associate and patrol the border with the basic human rights, dignity, and safety of migrants crossing the border.

In this Article, border vigilantism will be put under the microscope. Part I explores the history and current state of the border and the role of vigilantes in promoting reform and preventing undocumented migrants from crossing. Part II looks at the vigilantes' legal rights to conduct their minutemen-like operations at the border—in particular, their rights to detain migrants under state citizen's arrest laws. These laws are particularly important in light of current “comprehensive immigration reform” proposals; i.e., an inadvertent byproduct of felonizing border-crossing and illegal presence, as Part II details, is that such further criminalization would open the floodgates for vigilantes to arrest any border crossers under any circumstances. Part III proposes reforms—including both legislative approaches and private initiatives—to balance the border vigilantes' expressive rights with the American value to “treat others with dignity.”¹⁶

I. THE STATE OF THE BORDER

Between 1970 and 1999, the U.S. Census estimates that over 20 million people immigrated to the United States. Of those immigrants, half have been Spanish speakers, and almost 70% of these Spanish-speaking migrants are from Mexico or Central America. The vast majority of these migrants—over 7 million total—arrived in the country by crossing the U.S.-Mexico border.¹⁷ Consequently, today the catch phrase “crossing the border” evokes images of poor Mexicans illegally entering the country through desert paths. However, it should be noted that not all of this border-crossing is illegal: Mexican immigrants compose the largest immigrant group that is *legally* admitted into the United States.¹⁸ Yet, the Mexican migrant has

¹⁶ Dana Bash, *Bush, Senators Seek Common Ground on Immigration*, CNN.COM, Apr. 25, 2006, <http://www.cnn.com/2006/POLITICS/04/25/bush.immigration/index.html>. (“It is important that we reform a system that is not working. It's important that we uphold the values of the United States of America. It's important that we treat people with dignity. I strongly believe that we have a chance to get an immigration bill that is comprehensive in nature to my desk before the end of this year.”) (quoting President Bush at an immigration summit).

¹⁷ *ILLEGAL IMMIGRATION IN AMERICA: A REFERENCE HANDBOOK* 399 (David W. Haines & Karen Rosenblum eds., 1999) [hereinafter *ILLEGAL IMMIGRATION IN AMERICA*].

¹⁸ LISA MAGANA, *STRADDLING THE BORDER: IMMIGRATION POLICY AND THE INS* 74

become the poster child for undocumented immigration—the “illegal alien.” Indeed, “[p]erhaps the most disfavored immigrant category is the [mainly Mexican] undocumented migrant population.”¹⁹

Categorical moral judgments often dictate U.S. immigration policy. As Professor Jayashri Srikantiah notes, “[W]e must situate these judgments in the larger moral framework of our nation’s immigration history—a framework characterized not only by xenophobic impulses but also by inclusive, progressive policies in line with our international responsibilities.”²⁰ Part of this realization is that Mexican immigration is different from all other immigration because of the unique history and conditions at the U.S.-Mexico border. And yet, U.S. policymakers have not always made this distinction. For instance, Walter Ewing of the American Immigration Law Foundation remarks:

Even in the case of Mexico—with which the United States shares a two-thousand-mile border, a hundred-year history of labor migration, and two decades of purposeful economic integration—the U.S. government tries to impose the same arbitrary limits on immigration as it does on a country as remote as Mongolia. Moreover, while the global trade of goods, services, and capital is regulated through multilateral institutions and agreements, U.S. policymakers persist in viewing immigration as primarily a matter of domestic law enforcement.²¹

This Part further examines how this perception of Mexican migrants has emerged. Part I.A briefly outlines the history of U.S.-Mexico relations, the relevance of the border that separates them, and how migration across that border has been regulated or neglected across time. Part I.B then analyzes the effect of the terrorist attacks of September 11, 2001, on border politics and immigration more generally. Finally, Part I.C examines the vigilantes at the border—their mission, practices, and impact on border policies and practices.

A. A Cycle of Inclusion and Exclusion

The border that connects the United States and Mexico was not fixed until 1848. After a series of wars, the Treaty of Guadalupe Hidalgo established the current 2062-mile border. Under this treaty, Mexico sold Ari-

(2003).

¹⁹ Jayashri Srikantiah, *Introduction to Symposium: Globalization, Security & Human Rights: Immigration in the Twenty-First Century*, 16 STAN. L. & POL’Y REV. 317, 320 (2005).

²⁰ *Id.* at 321–22.

²¹ Walter A. Ewing, *From Denial to Acceptance: Effectively Regulating Immigration to the United States*, 16 STAN. L. & POL’Y REV. 445, 445 (2005).

zona, California, New Mexico, and Texas to the United States for \$15 million.²² To this day, many Mexicans believe that “[t]he pain of this territorial amputation continues to lacerate the soul of the Mexican nation.”²³ After that border was established, the United States alternated between fluid and strict entry—disrupting a potentially symbiotic relationship between the two countries. The ability for Mexican migrants to work and live in the states often fell victim to the economic and political climates of nation-wide policies. A cycle of inclusion and exclusion ensued.

It should be briefly noted, however, that the first anti-immigrant movement emerged long before the twentieth century. In the 1850s, the Know-Nothing Party was formed on a national platform against immigrant workers and Catholics.²⁴ The Know-Nothings argued that immigrants and Catholics had an adverse effect on the cultural strength of the country.²⁵ The political clout of the Know-Nothings eventually disappeared after the close of the Civil War. Between 1870 and 1920, approximately 26 million people came to the United States, during which a romanticized image of the noble immigrant emerged.²⁶ These immigrants, however, emigrated mostly from Europe and came through Ellis Island; the positive national perception of immigrants did not transfer when the migrants began arriving from America’s southernmost border. For instance, some 600 Mexicans were lynched between 1848 and 1928 by American vigilantes.²⁷

Yet, some policies proved more welcoming to Mexican migrants—at least as far as the migrants could provide cheap labor. In response to the United States’ labor shortage of 1918, Mexican migrants were invited into the country to work in the railroad and agricultural sectors. About 621,000 Mexicans came to the United States during the 1920s,²⁸ despite rising anti-immigrant sentiment and the creation of the U.S. Border Patrol in 1924.²⁹ Following World War I, a wave of anti-immigrant opinion infiltrated public sentiment, as many believed that the Mexican migrants were stealing jobs from U.S. citizens.

Based on these concerns, Congress enacted the Quota Limit Laws in 1921 and 1924, which marked the onset of specific restrictions toward cer-

²² Jessica Conaway, Comment, *Reversion Back to a State of Nature in the United States Southern Borderlands: A Look at Potential Causes of Action To Curb Vigilante Activity on the United States/Mexico Border*, 56 *MERCER L. REV.* 1419, 1422 (2005).

²³ Jorge A. Vargas, *U.S. Border Patrol Abuses, Undocumented Mexican Workers, and International Human Rights*, 2 *SAN DIEGO INT’L L.J.* 1, 5 (2001).

²⁴ See TYLER ANBINDER, *NATIVISM AND SLAVERY: THE NORTHERN KNOW NOTHINGS AND THE POLITICS OF THE 1850’S* 103–26 (1992).

²⁵ *See id.*

²⁶ MAGANA, *supra* note 18, at 14.

²⁷ William D. Carrigan & Clive Webb, *The Lynching of Persons of Mexican Origin or Descent in the United States, 1848 to 1928*, 37 *J. SOC. HIST.* 411, 413 (2003).

²⁸ Jorge Durand et al., *Mexican Immigration to the United States: Continuities and Changes*, 36 *LAT. AM. RES. REV.* 107, 109 (2001).

²⁹ *See, e.g.*, DOUGLAS S. MASSEY ET AL., *BEYOND SMOKE AND MIRRORS: MEXICAN IMMIGRATION IN AN ERA OF ECONOMIC INTEGRATION* 33 (2002).

tain groups entering the United States.³⁰ The Great Depression and citizens' desperation for work put great pressure on the federal government,³¹ and the government responded by deporting those of Mexican descent, including many legal residents and American citizens. Some 453,000 Mexicans were deported by 1937.³² Furthermore, the California legislature enacted a law making it illegal to hire undocumented Mexican migrants.³³ As a result of these laws, more than one-third of Mexican migrants in the United States were either deported or voluntarily repatriated.³⁴ An unintended consequence of these policies was increased illegal border-crossing, and both Mexicans and Europeans took advantage of the 2000-mile U.S.-Mexico border for illegal entry.³⁵ In response, Congress established the U.S. Border Patrol, consisting of immigration officers that patrolled both the Mexican and Canadian borders on horseback.³⁶

During World War II, the Mexican immigration cycle continued, as a second labor shortage led to new demand for cheap Mexican labor to work on farmlands and in factories. The United States, in conjunction with the Mexican government, began the now-infamous Bracero program, a temporary worker program agreed upon by both governments in an effort to satisfy the labor shortage. Under the Bracero Program, which officially lasted from 1942 to 1964, more than 4.5 million Mexican migrants were legally hired to work in the United States.³⁷ This program, however, was not devoid of the corruption and brutality that had marked U.S.-Mexico relations.³⁸ Bracero workers' freedom of movement was drastically restricted, and they were required to return to Mexico at the end of their labors.

The initiation of Operation Wetback in 1954³⁹—"one of the darkest and most dangerous examples of what can occur because of anti-Mexican

³⁰ MAGANA, *supra* note 18, at 16.

³¹ GEORGE J. SANCHEZ, *BECOMING MEXICAN AMERICAN: ETHNICITY, CULTURE AND IDENTITY IN CHICANO LOS ANGELES, 1900-1945* 211-13 (1993). In fact, President Herbert Hoover insisted that Mexican immigrants were responsible for the Great Depression because they took jobs from American citizens. *Id.* at 213.

³² Durand et al., *supra* note 28, at 109.

³³ MAGANA, *supra* note 18, at 16.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* However, native migration from Mexico was not strictly monitored because many of the workers did not permanently immigrate to the United States. *Id.*

³⁷ For more information on the Bracero Project, see KITTY CALAVITA, *INSIDE THE STATE: THE BRACERO PROGRAM, IMMIGRATION, AND THE I.N.S.* (1992). The term is derived from the Spanish word for arm, *brazo*; "bracero" was meant to refer to a manual laborer.

³⁸ Durand et al., *supra* note 28, at 111; see also MASSEY ET AL., *supra* note 29, at 34-41.

³⁹ See Kiera LoBreglio, Note, *The Border Security and Immigration Improvement Act: A Modern Solution to a Historic Problem?*, 78 ST. JOHN'S L. REV. 933, 937 (2004) ("The 'Wetback Act' . . . aimed to discourage illegal Mexican immigration by criminally sanctioning anyone who smuggled or harbored aliens who had not been inspected and legally admitted. In 1954 alone, the United States deported 300,000 Mexicans under this Act.").

sentiment⁴⁰—provided another example of the negative public sentiment toward Mexican migrants. Under Operation Wetback, millions of Mexican nationals were unceremoniously deported, including some of the same individuals who were invited into the country as inexpensive labor under the Bracero Program.⁴¹ Operation Wetback became the “first large-scale, systematic implementation of military strategy and tactics by the INS against Mexican immigrants.”⁴²

The 1960s and the burgeoning civil rights movement spurred a slight acknowledgement of the rights of immigrants. This public goodwill lasted for over two decades. The 1965 Immigration Act, for instance, made it easier for immigrants to sponsor family members for immigration,⁴³ and the 1986 Immigration Control and Reform Act legalized undocumented immigrants who were living in the United States.⁴⁴ Congress and President Reagan justified this amnesty on the theory that blanket legalization was preferable to mass deportation.⁴⁵ Between 1965 and 1986, about 28 million undocumented Mexicans entered the United States. The vast majority, 23 million, returned to Mexico after several years of work.⁴⁶

As Representative Zoe Lofgren (D-Cal.) asserts, sentiment toward immigrants changed in 1995 when Newt Gingrich gained control of the House and began his Contract with America.⁴⁷ Speaker Gingrich turned his attention to the Immigration and Naturalization Act (INA)⁴⁸ and appointed a Congressional Task Force on Immigration Reform, which was expected to report to the Speaker and congressional committees within months.⁴⁹ The results of this Task Force were two laws that cut back immigrant rights and privileges: the Antiterrorism and Effective Death Penalty Act (AEDPA)⁵⁰ in April 1996, and the Illegal Immigration Reform

⁴⁰ MAGANA, *supra* note 18, at 18. *See generally* James F. Smith, *A Nation That Welcomes Immigrants? An Historical Examination of United States Immigration Policy*, 1 U.C. DAVIS J. INT'L L. & POL'Y 227, 246 (1995).

⁴¹ JUAN RAMON GARCIA, OPERATION WETBACK: THE MASS DEPORTATION OF MEXICAN UNDOCUMENTED WORKERS IN 1954 229 (1980).

⁴² TIMOTHY J. DUNN, THE MILITARIZATION OF THE U.S.-MEXICO BORDER, 1978-1992 52 (1996).

⁴³ Pub. L. No. 89-236, 79 Stat. 911 (codified as amended at 8 U.S.C. § 1152(a)).

⁴⁴ Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended at 8 U.S.C. § 1255a).

⁴⁵ OTIS L. GRAHAM, UNGUARDED GATES: A HISTORY OF AMERICA'S IMMIGRATION CRISIS 108 (2004). *See generally* JoAnne D. Spotts, *U.S. Immigration Policy on the Southwest Border from Reagan Through Clinton, 1981-2001*, 16 GEO. IMMIGR. L.J. 601 (2002).

⁴⁶ MASSEY ET AL., *supra* note 29.

⁴⁷ *See* Lofgren, *supra* note 8, at 350-53; *see also* Republican Members of the U.S. House of Representatives, *Contract with America*, available at <http://www.house.gov/house/Contract/CONTRACT.html>.

⁴⁸ Immigration and Nationality Act of 1952, 8 U.S.C. §§ 1101-1537 (2006).

⁴⁹ *See* H.R. REP. NO. 104-469, at 512 (1996) (comment by Rep. Elton Gallegly) (explaining the Immigration Task Force set up by Speaker Gingrich).

⁵⁰ Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of 8, 18, 28, 40 & 42 U.S.C.).

and Immigrant Responsibility Act (IIRIRA)⁵¹ in September 1996. According to the House, AEDPA was passed to “update certain criminal statutes and amend immigration law so as to respond to the serious and growing threat of terrorism. The legislation [was] intended to strengthen the ability of the United States to deter terrorist acts and to punish those who engage in terrorism.”⁵² Similarly, IIRIRA was passed to bring about

a fundamental re-orientation of immigration policy in the direction of the national interest...In short, our immigration laws should enable the prompt admission of those who are entitled to be admitted, the prompt exclusion or removal of those who are not so entitled, and the clear distinction between these categories.⁵³

While AEDPA and IIRIRA were aimed at curbing illegal immigration and bolstering national security, Lofgren argues that “many provisions went well beyond these goals and had nothing to do with the stated purposes.”⁵⁴ Among the provisions that specifically affected border-crossing, the 1996 laws provided stricter penalties for smuggling activities, introduced additional factors that could lead to deportation eligibility, created three- and ten-year bans on immigration benefits for certain unlawful presence offenses, and increased manpower and resources for border areas.

During the 1990s, the executive branch also took measures to control the border. In 1994, President Clinton’s Operation Gatekeeper constructed a ten-foot wall along a fourteen-mile stretch of the California-Mexico border⁵⁵—a wall that the Secure Fence Act of 2006 extended for hundreds of miles along the U.S.-Mexico border.⁵⁶ The wall diverted aspiring migrants to

⁵¹ Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (1996) (codified in scattered sections of 8 U.S.C. & 18 U.S.C.).

⁵² H.R. REP. NO. 104-383, at 37 (1995).

⁵³ H.R. REP. NO. 104-469(I), at 110-11 (1995).

⁵⁴ Lofgren, *supra* note 8, at 350-53; *see also* Kevin R. Johnson, *The Antiterrorism Act, the Immigration Reform Act, and Ideological Regulation in the Immigration Laws: Important Lessons for Citizens and Noncitizens*, 28 ST. MARY’S L.J. 833 (1997); Sara A. Martin, *Postcards from the Border: A Result-Oriented Analysis of Immigration Reform Under the AEDPA and IIRIRA*, 19 B.C. THIRD WORLD L.J. 683 (1999). *See generally* AM. BAR ASS’N, AMERICAN JUSTICE THROUGH IMMIGRANTS’ EYES (2004), available at <http://www.abanet.org/publicserv/immigration/americanjusticethroughimmigeeyes.pdf>; ROGER DANIELS, GUARDING THE GOLDEN DOOR: AMERICAN IMMIGRATION POLICY AND IMMIGRANTS SINCE 1882 (2004); BILL ONG HING, DEFINING AMERICA THROUGH IMMIGRATION POLICY (2004); MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA (2005).

⁵⁵ Conaway, *supra* note 22, at 1424.

⁵⁶ Secure Fence Act of 2006, Pub. L. No. 109-367, § 3, 120 Stat. 2638, 2638-39; *see also* Carl Hulse & Jim Rutenberg, *Senate Votes to Extend Fence Along Border*, N.Y. TIMES, May 17, 2006 (describing how the Senate and House have passed separate bills to build hundreds of miles of fencing along the U.S.-Mexico border), available at <http://www.nytimes.com/2006/5/17/world/17end-immig.html?ei=5094&en=54341238e05426f&hp=&ex=1147924800&partner=homepage&pagewanted=print>. *See generally* BLAS NUÑEZ-NETO & STEPHEN VIÑA, CONG. RESEARCH SERV., BORDER SECURITY: BARRIERS ALONG THE U.S. INTERNATIONAL BORDER, CRS REP. NO. RL33659 (2006), available at <http://www.fas.org/sgp/crs/homesecc/>

vast swaths of desert where many succumbed to dehydration, heat exhaustion, exposure, and death. Lofgren summarizes additional effects of Operation Gatekeeper on the U.S.-Mexico border:

Operation Gatekeeper began in 1994 in response to the large number of undocumented immigrants coming across the southern border in San Diego, California. In 1994, there were only 980 U.S. Border Patrol agents working in San Diego. As a result of Operation Gatekeeper, that number more than doubled to 2,264 by June 1998. In addition, the number land border inspectors [sic] in San Diego increased from 202 in 1994 to 504 in 1998. Overall, the number of U.S. Border Patrol agents increased from 4,139 in 1992 to 7,982 in 1998. Nevertheless, borders remained underpatrolled and the necessary technology to enhance U.S. Border Patrol efforts was not a focus of the congressional initiatives.⁵⁷

In March 2000, Amnesty International passed a resolution stating that Operation Gatekeeper was an abuse of human rights because it maximized the risk to migrants' lives—forcing them to cross the border either by swimming west around the fence or crossing further east in the hot and barren deserts of Arizona and New Mexico.⁵⁸

Local movements toward immigrant regulation proved no less restrictive than their federal counterparts. For instance, California's Proposition 187, which was introduced in 1994 but later deemed unconstitutional, sought to deny undocumented immigrants social services, health care, and public education opportunities.⁵⁹ In sum, the physical U.S.-Mexico border is just a minor part of a much larger historical border between the two countries.

B. September 11, 2001 and the Threat of Terrorism

By 2000, Gingrich's Contract with America had expired, America had sent another Bush to the White House, and public consciousness had shifted away from the border—that is, until the terrorist attacks on September 11, 2001. The al-Qaeda attacks on the Pentagon and the World Trade Towers

RL33659.pdf.

⁵⁷ See Lofgren, *supra* note 8, at 352–53 (internal citations omitted); see also U.S. CITIZENSHIP & IMMIGR. SERVS., OPERATION GATEKEEPER: NEW RESOURCES, ENHANCED RESULTS (1998), http://www.rapidimmigration.com/www/news/news_70.html (last visited Nov. 14, 2006). For a critique of Operation Gatekeeper, see Bill Ong Hing, *The Dark Side of Operation Gatekeeper*, 7 U.C. DAVIS J. INT'L L. & POL'Y 121 (2001).

⁵⁸ Anna Marie Gallagher, *The Situation of Undocumented Migrants in the United States*, 05-06 Immigr. Briefings 1, 6 (2005).

⁵⁹ See 1994 Cal. Legis. Serv. Prop. 187 (West) (approved on Nov. 8, 1994); see also Ruben J. Garcia, *Critical Race Theory and Proposition 187: The Racial Politics of Immigration Law*, 17 CHICANO-LATINO L. REV. 118 (1995); see also Alfred R. Hernandez, *The Economic, Social and Political Impacts of Proposition 187*, 1 U.C. DAVIS J. INT'L L. & POL'Y 179 (1995).

caused the greatest-ever loss of American life by foreign actors on American soil.⁶⁰ Once again, security threats forced the public and policymakers to address immigration and America's permeable borders. In response, President Bush appointed the 9/11 Commission to investigate the attacks, and the Commission released its findings in July 2004.⁶¹

With respect to immigration policy at the border, three recommendations stand out as particularly noteworthy.⁶² First, the Commission stressed the importance of traveling across American borders: "Targeting travel is at least as powerful a weapon against terrorists as targeting their money. The United States should combine intelligence, operations, and law enforcement in a strategy to intercept terrorists, find terrorist travel facilitators, and constrain terrorist mobility."⁶³ Second, the 9/11 Commission underscored the need to integrate border control with other infrastructure:

The U.S. border security system should be integrated into a larger network of screening points that includes the nation's transportation system and access to vital facilities, such as nuclear reactors. The President should direct the Department of Homeland Security to lead the effort to design a comprehensive screening system, addressing common problems and setting common standards with systemwide goals in mind. Extending those standards among other governments could dramatically strengthen America and the world's collective ability to intercept individuals who pose catastrophic threats.⁶⁴

Third, "[t]he Department of Homeland Security, properly supported by the Congress, should complete, as quickly as possible, a biometric entry-exit screening system, including a single system for speeding qualified travelers."⁶⁵

Each of these recommendations called on Congress to increase border security. Perhaps more importantly, the 9/11 Commission Report also engaged the public, and arguably the vigilantes, in the problems at America's borders. Lofgren explains:

⁶⁰ NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE SEPTEMBER 11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 4-14 (2004), available at <http://www.9-11commission.gov/report/index.htm> [hereinafter SEPTEMBER 11 COMMISSION REPORT].

⁶¹ Thomas H. Kean & Lee H. Hamilton, Public Statement on the Release of the September 11 Commission Report, available at http://www.9-11commission.gov/report/911Report_State ment.pdf. See generally SEPTEMBER 11 COMMISSION REPORT, *supra* note 60.

⁶² Representative Lofgren explains these recommendations in more detail. See Lofgren, *supra* note 8, at 354-56.

⁶³ SEPTEMBER 11 COMMISSION REPORT, *supra* note 60, at 385.

⁶⁴ *Id.* at 387.

⁶⁵ *Id.* at 389.

These are certainly worthy and essential recommendations, especially considering the findings of fact that the 9/11 Commission uncovered about the events leading up to the September 11th tragedy. Similar to the events preceding the 1996 reforms, the public became very engaged with the release of the 9/11 Commission Report. In fact, the 9/11 Commission Report remained on the *New York Times* best-seller list for twenty-five straight weeks. Once again, Congress had to respond to public calls for reform.⁶⁶

And when it appeared that Congress did not adequately “respond to [these] public calls for reform,”⁶⁷ border vigilantism arguably emerged as the self-appointed private alternative for border enforcement.

C. *The Emergence of Border Vigilantism*

Perhaps in response to the post-September 11 climate and the federal government’s apparent inability to find a solution to the border dilemma, border vigilantes have congregated in each of the border states, patrolling the U.S.-Mexico line and attempting to prevent undocumented migration.

This current manifestation is not the first time self-appointed, citizen border enforcers have mobilized in our nation’s recent history. In 1989 and 1990, for instance, some California residents formed a “Light Up the Border” campaign, in which citizens would illuminate a section of the border to prevent illegal border-crossing.⁶⁸ In 1996, another group of citizens

⁶⁶ Lofgren, *supra* note 8, at 372 (internal citations omitted).

⁶⁷ Lofgren further explains the ineffectiveness of the post-September 11 immigration reforms. *See id.* at 372–77; *see also* Melissa Blair, *Terrorism, America’s Porous Borders, and the Role of the Invasion Clause Post-September 11/2001*, 87 MARQ. L. REV. 167 (2003) (arguing that the post-September 11 federal government has employed the most minimal measures to strengthen the security of America’s borders).

Congress has passed four laws since September 11 that directly affect the U.S.-Mexico Border. *See* REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231 (ordering security studies to be done at the border and authorizing the DHS Secretary to “all laws as necessary” to expedite the construction of barriers and roads along the border); Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638 (adding 2000 additional Border Patrol agents at U.S.-Mexico border, as well as requiring the integration of the entry and exit data system with other databases and data systems); Enhanced Border Security and Visa Entry Reform Act of 2002, Pub. L. No. 107-173, 116 Stat. 543 (requiring biometric data readers and scanners at all ports of entry and extending the deadline for border crossing identification cards (Laser Visas) to contain a biometric identifier that matches the biometric characteristic of the card holder); USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (calling for the immediate implementation of the integrated entry and exit data system, among other provisions). For a summary of these statutes, *see* LISA M. SEGHEITTI ET AL., CONG. RESEARCH SERV., BORDER SECURITY AND THE SOUTHWEST BORDER: BACKGROUND, LEGISLATION, AND ISSUES, CRS REP. NO. RL33106 (2005), *available at* <http://fpc.state.gov/documents/organization/54514.pdf>.

⁶⁸ Steven W. Bender, *Sight, Sound, and Stereotype: The War on Terrorism and its Consequences for Latinas/os*, 81 OR. L. REV. 1153, 1173 (2002).

patrolled California airports looking for undocumented migrants. Calling themselves the “Airport Posse,” their stated mission was to curb the flood of illegal immigrants, fulfilling the role that the government forfeited by not investing more time, energy, or money.⁶⁹

The current crop of border vigilantes, however, is much larger and more active than others in recent history. The different border vigilante groups will be briefly presented in Part I.C.1—with particular emphasis on the three main groups. While these groups vary greatly in origin and activity, they share three common themes that will be explored in Part I.C.2.

1. Vigilante Groups at the Border

Numerous vigilante groups have surfaced at the border post-September 11—some groups reemerging with different names and many members cross-enrolled in groups that conduct essentially the same type of activities.⁷⁰ For instance, “Friends of the Border Patrol” installed electronic surveillance at the border on April 1, 2006, to assist with preventing undocumented migration.⁷¹ Similarly, the “American Border Patrol” provides border surveillance.⁷² “Save Our State” operates in California and hosts a very active Internet forum for like-minded advocates.⁷³ “No Invaders” also utilizes the Internet to promote the movement by posting the contact information of suspected immigration law violators and those who help undocumented migrants.⁷⁴

While many groups are currently operating or have been active in recent years at the border, three are particularly illustrative of the entire movement. The Minuteman Project is the largest and most politically active vigilante group. This group is followed in size and influence by Ranch Rescue and the Barnett Boys.⁷⁵

a. The Minuteman Project

Borrowing its moniker from American revolutionaries, the Minuteman Project—also known as the Minuteman Civil Defense Corps—is arguably the largest, most active, and most influential border vigilante group.⁷⁶

⁶⁹ Conaway, *supra* note 22, at 1423.

⁷⁰ For a critical summary of the groups as of 2002, see BORDER ACTION NETWORK, HATE OR HEROISM: BORDER VIGILANTES ON THE ARIZONA-MEXICO BORDER (2002), *available at* [http://www.borderaction.org/PDFs/BAN-Vigilante%20 Report.pdf](http://www.borderaction.org/PDFs/BAN-Vigilante%20Report.pdf).

⁷¹ See Friends of the Border Website, <http://www.friendsoftheborderpatrol.com> (last visited Jan. 19, 2007).

⁷² See American Border Patrol Website, <http://www.americanborderpatrol.com> (last visited Jan. 19, 2007).

⁷³ See Save Our State Website, <http://www.saveourstate.org> (last visited Jan. 19, 2007).

⁷⁴ See No Invaders Website, <http://www.noinvaders.org/> (last visited Jan. 19, 2007).

⁷⁵ Conaway, *supra* note 22, at 1425.

⁷⁶ Leo R. Chavez, professor of anthropology at the University of California, Irvine, has just completed an excellent study on the Minuteman Project, which is forthcoming this year.

Their mission statement echoes the common rule-of-law theme: “[A] call to voices seeking a peaceful and respectable resolve to the chaotic neglect by members of our local, state and federal governments charged with applying U.S. immigration law.”⁷⁷ Furthermore, their website seeks to remind “Americans that our nation was founded as a nation governed by the ‘rule of law,’ not by the whims of mobs of ILLEGAL aliens who endlessly stream across U.S. borders.”⁷⁸

The Minuteman Project boasts more than 1000 members and actively patrols the border. While at any time there may only be a handful of Minutemen actually at the border, the volume of blog posts, online journals, and press releases stays constant. Their public relations campaign and courting of the media seem to have been successful: the group was covered in over 1750 news articles in 2005 alone.⁷⁹ The Minutemen have also taken their message to the ballot box. Jim Gilchrist, founder of the Minuteman Project, competed for a Southern California congressional seat in 2005. Gilchrist came in third in the primary election with 14.8% of the vote.⁸⁰

More than anything else, the Minutemen seek media attention; their efforts are meant as “a call to bring national awareness to the decades-long careless disregard of effective U.S. immigration law enforcement.”⁸¹ And their strategy has been relatively successful.⁸²

b. Ranch Rescue

Organized by an activist named Jack Foote, Ranch Rescue is a volunteer organization composed of people who believe “that when government fails or refuses to act, individual Citizens are obligated to act on their own.”⁸³ The group boasts over 250 members. Because they are “through waiting for government to do something substantial about the crime that has engulfed our border counties,”⁸⁴ Ranch Rescue members devote their

See Chavez, *supra* note 12. The Southern Poverty Law Center has also published several critical articles on the Minutemen. See, e.g., David Holthouse, *Arizona Showdown: High-Powered Firearms, Militia Maneuvers and Racism at the Minuteman Project*, INTELLIGENCE REP., Summer 2005; *The Watcher: Ray Ybarra Monitors Anti-Immigration Militants in Arizona for the ACLU*, INTELLIGENCE REP., Summer 2005.

⁷⁷ The Minuteman Project Official Website, <http://www.minutemanproject.com> (last visited Nov. 14, 2006).

⁷⁸ *Id.*

⁷⁹ See *supra* note 12 and accompanying text.

⁸⁰ California Congress Election, <http://www.ballot-access.org/2005/1105.html#18> (last visited Nov. 14, 2006).

⁸¹ Minuteman Website, *supra* note 77.

⁸² The Minutemen have also been subject to quite a bit of negative publicity as of late, in particular with respect to controversial membership dues and other financing issues. See Susan Carroll, *Border Group's Finances Scrutinized*, HOUSTON CHRON., Nov. 25, 2006, at B1, available at http://www.chron.com/CDA/archives/archive.mpl?id=2006_4236097.

⁸³ Ranch Rescue Mission Statement, <http://ranchrescue.com/#missionstatement> (last visited Jan. 14, 2007).

⁸⁴ Sara A. Martinez, *Declaring Open Season: The Outbreak of Violence Against Un-*

time and membership “to preserve and protect the individual private property rights of all our nation’s Citizens.”⁸⁵ Concerned mainly with the landowners who live along the southern borders of Arizona, California, New Mexico, and Texas, the ranchers garner support by emphasizing the incidences of and possibility for violence and terrorism along the border.⁸⁶

c. Barnett Boys

The creation of the Barnett Boys can be attributed to fifty-eight-year-old Roger Barnett, who is a retired deputy sheriff turned cattleman. Originally conceived as a type of neighborhood watch, the group quickly militarized. Similar to the monitoring of the border at the beginning of the U.S. Border Patrol in the 1920s, the Barnett Boys monitor their property on horseback and are heavily armed with assault rifles.⁸⁷ Of these three groups, the Barnett Boys claim the highest number of migrants detained (asserting around 5000 migrants) and are not concerned with whatever fright or worry their detentions may incite. As Barnett states, “If them poor bastards felt threatened, sorry. If they don’t like it, they better stay home.”⁸⁸

Although the Barnett Boys originally began as simply the Barnett brothers, reportedly dozens of ranchers now join their ranks. For the past two years, they have been reportedly encouraging each other to “round [the migrants] up with trained dogs, then—at gunpoint—hand the scared migrants to the nearest U.S. Border Patrol.”⁸⁹

2. Common Themes of Border Vigilante Groups

While each group varies in membership composition, vigilante activities, and level of anti-immigrant rhetoric, three main themes—reflecting the post-September 11 climate—permeate all of the groups’ mission statements and activities.

a. National Security and Counterterrorism

The first common theme is a strong emphasis on national security and concern about terrorist and drug-smuggling activity at the U.S.-Mexico

documented Immigrants by Vigilante Ranchers in South Texas, 7 SCHOLAR 95, 105 (2004) (quoting a flier on file with Martinez).

⁸⁵ Ranch Rescue Mission Statement, *supra* note 83.

⁸⁶ *Id.* For a critical summary of Ranch Rescue, see BORDER ACTION NETWORK, *supra* note 70, at 2–3.

⁸⁷ Jan McGirk, *Blood and Bullets Along the Border as Arizona’s Private Posse’s Hunt Mexican Migrants for Sport*, INDP’T UK, May 6, 2000, available at <http://www.commondreams.org/headlines/050600-01.htm>. For a critical summary of the Barnett Boys, see BORDER ACTION NETWORK, *supra* note 70, at 3–4.

⁸⁸ Bob Moser, *Open Season: As Extremists Peddle Their Anti-Immigrant Rhetoric Along the Troubled Arizona Border, a Storm Gathers*, INTELLIGENCE REP., Spring 2003.

⁸⁹ Martinez, *supra* note 84, at 106.

border. A note from the literature succinctly summarizes the boilerplate security concerns voiced by border vigilante groups in the press and at the border:

In a perfect world there would be no war, no terrorism, and no need for national borders. In this perfect world, the mass murder of innocent civilians in furtherance of some radical religious or political ideology would be merely a bad dream. Instead, all individuals would live together in peace and harmony. Unfortunately, we do not live in a perfect world. The terrorist acts that occurred on September 11, 2001, sadly illustrated that the dream of a world without borders is still far from being realized.⁹⁰

The security argument would continue that the U.S.-Mexico border is relatively unprotected, with thousands of undocumented migrants crossing the border each month, and little or no actual barrier along most of the 2000-mile border. While the federal government has instituted comprehensive screening systems at airports, ports, and other places of entry, the U.S.-Mexico border remains relatively unguarded, unfenced, and open for terrorists and other illegal entrants.

b. The Rule of Law

The second common theme concerns the rule of law. As President Bush proclaimed in his May 2006 address to the nation concerning immigration reform, “We’re a nation of laws, and we must enforce our laws.”⁹¹ While himself not an advocate of border vigilantism, Senator Jeff Sessions (R-Ala.) aptly captures this theme.⁹² Senator Sessions argues for a strong rule of law, in that democracy requires that laws on the books must be enforced:

⁹⁰ Justin C. Glon, Note, “*Good Fences Make Good Neighbors:*” *National Security and Terrorism—Time To Fence in Our Southern Border*, 15 *IND. INT’L & COMP. L. REV.* 349, 361 (2005) (internal citations omitted). Glon provides an excellent summary of the type of national security arguments made by vigilante groups and by closed-border advocates more generally. *But see* WALTER EWING, IMMIGRATION POLICY CTR., AILF, BORDER INSECURITY: U.S. BORDER—ENFORCEMENT POLICIES AND NATIONAL SECURITY ii (2006) (“Until lawmakers create new avenues for both permanent and temporary immigration that are realistic and flexible, U.S. national security will continue to be undermined by border-enforcement efforts that divert labor migration through undocumented channels and into the hands of people smugglers.”), available at http://www.ailf.org/ipc/border_insecurity_spring06.pdf.

⁹¹ Bush Address to the Nation, *supra* note 1.

⁹² U.S. Senator Jeff Sessions & Cynthia Hayden, *The Growing Role for State and Local Law Enforcement in the Realm of Immigration Law*, 16 *STAN. L. & POL’Y REV.* 323, 323 (2005).

America's strength has always been founded on her commitment to the rule of law, and enforcement is critical to the integrity of law. Many nations have the appearance of the rule of law, but that is not enough; a legal system worthy of respect must consistently and fairly impose consequences on individuals who violate its commands. Unfortunately, the near total failure of this nation to enforce its immigration laws is eroding its legal system and inviting more illegality. It is time for an honest evaluation of our predicament; it is time to take action to correct our shortcomings.⁹³

In other words, immigration laws are not being adequately enforced at the border,⁹⁴ and the press and public have noted this lack of enforcement, especially with heightened terrorism and security concerns. And the federal government has not been successful in reinforcing the border and combating illegal immigration.⁹⁵ For instance, 77% of Americans believe the government is not doing all that it can "to control the border and to screen people allowed into the country"; 85% think that "enforcement of immigration laws and the border has been too lax and this made it easier for the terrorists to enter the country"; and over 79% want the state to militarize the border.⁹⁶ Border vigilantes argue that they have intervened to assist the state in protecting the border and upholding the rule of law.

c. Xenophobia and Nativism

While these groups explicitly reject such characterizations, members of border vigilante groups have demonstrated a hint of xenophobia and nativism as motivating their actions at the border—"that some influence originating abroad threaten[s] the very life of the nation from within."⁹⁷ As one commentator notes, "investigation beyond the sound bites and propaganda uncovers the truth—patriotism, civic duty, and protection of property rights are simply ad hoc justifications for 'wetback' sport hunting."⁹⁸ For instance, Ranch Rescue founder Jack Foote described Mexican migrants as follows: "You and the vast majority of your fellow dog turds are ignorant, uneducated, and desperate for a life in a decent nation because the one you live in is nothing but a pile of dog s**t made up of mil-

⁹³ *Id.* at 323–24.

⁹⁴ *See id.* at 327–29 (describing how the rule of law at the border is not being adequately enforced in the post-September 11 climate).

⁹⁵ *See supra* note 67 (discussing Congress's post-September 11 attempts to protect the border).

⁹⁶ *See* Glon, *supra* note 90, at 368–69 (citing these public opinion polls).

⁹⁷ Gabriela A. Gallegos, *Border Matters: Redefining the National Interest in U.S.-Mexico Immigration and Trade Policy*, 92 CAL. L. REV. 1729, 1740 (2004).

⁹⁸ Conaway, *supra* note 22, at 1421–22.

lions of worthless little dog turds like you.”⁹⁹ Similarly, Roger Barnett has asserted: “Humans. That’s the greatest prey there is on earth.”¹⁰⁰

Unlike other vigilante groups, the Minuteman Project does not explicitly espouse xenophobic or nativist beliefs. For instance, their website states that they are multi-racial and multi-ethnic, that eight of their participants are married to immigrants, that sixteen of their members are immigrants, and that they have “no affiliation with, nor will . . . accept any assistance by or interference from separatists, racists, or supremacy groups or individuals.”¹⁰¹ A brief conversation with some of their members, however, belies this public pronouncement. As one Minuteman volunteer readily admitted at the U.S.-Mexico border south of San Diego, “[T]here are definitely some Good Old Boys in the bunch. . . . [T]hey add a little spice to the fire, if you know what I mean.”¹⁰²

This common theme of members’ nativist or xenophobic attitudes becomes particularly important with respect to vigilante rights and responsibilities at the border. These groups might not explicitly promote such attitudes, but they can be found in the rhetoric in their online discussion forums and in their members’ words. These attitudes undoubtedly influence some of their actions at the border.

II. CITIZEN’S ARRESTS OF UNDOCUMENTED MIGRANTS

The vigilante organizations might attempt to avoid physically harming the migrants, but there is still the potential for violence and abuse by errant individual members. The potential violence that greets aspiring migrants, however, is unlikely to dissuade them from their intended path. As one thirty-one-year-old undocumented migrant stated, “We know there are dangers. There are snakes, you run out of water, somebody can come and kill you It’s what you have to do if you want to get ahead.”¹⁰³ Because migrants continue to cross the border despite these dangers, and because vigilantes have the potential to cause harm to migrants (and indeed, as Part III discusses, border vigilante violence has been reported even though most abuses arguably go undocumented), it is important to examine vigilantes’ legal rights to be at the border and detain migrants.

One of the most controversial and unsettled areas of immigration law concerns the ability of U.S. citizens to arrest and detain migrants who are in the United States without proper documentation. U.S. Border Patrol and local law enforcement can arrest undocumented migrants for criminal immi-

⁹⁹ Moser, *supra* note 88, at 6 (quoting Jack Foote, Ranch Rescue founder).

¹⁰⁰ McGirk, *supra* note 87, at 6 (quoting Roger Barnett, Barnett Boys founder).

¹⁰¹ The Minuteman Website, *supra* note 77.

¹⁰² Interview by Shani Moore with Anonymous Minuteman (Oct. 8, 2005) (on file with author).

¹⁰³ Bonnie Pfister & John McCormack, *Looking for Some Justice: Mexicans Angry Over Rancher’s Sentence*, SAN ANTONIO EXPRESS-NEWS, Sept. 1, 2001, at 1A.

gration offenses,¹⁰⁴ but does this arrest power extend to normal citizens? Historically, U.S. citizens have had the right to arrest those who commit certain crimes.¹⁰⁵ But does that right extend to capturing undocumented migrants? Can vigilantes capture migrants who are crossing the border and turn them into the Border Patrol or local law enforcement?

The short answer is that the law varies by state. Border states' citizen's arrest laws roughly fall into two categories: the majority rule applied in Arizona, New Mexico, and Texas; and California's minority rule.

A. The Majority Rule: Citizens May Not Arrest Undocumented Migrants for Unlawful Entry

Under Arizona,¹⁰⁶ New Mexico,¹⁰⁷ and Texas¹⁰⁸ law—collectively referred to in this Part as the “majority rule”—a citizen has the right to arrest others when she is present during the commission of certain crimes. The majority rule hinges on what type of crime is being committed in the citizen's presence, and it allows citizen's arrests for two types of crimes: all felonies but *only* misdemeanors “amounting to a breach of peace.”¹⁰⁹

¹⁰⁴ It is contested whether state and local law enforcement can arrest individuals for civil immigration violations, and, in fact, many local law enforcement agencies do not even arrest migrants for criminal immigration violations. See Sessions, *supra* note 92, at 323 (describing the current debate about state and local law enforcement of immigration laws).

¹⁰⁵ Conaway, *supra* note 22, at 1430–33 & nn.78–104 (discussing the history of the law of citizen's arrest in the United States).

¹⁰⁶ ARIZ. REV. STAT. ANN. § 13-3884 (2006) (“A private person may make an arrest: 1. When the person to be arrested has in his presence committed a misdemeanor amounting to a breach of the peace, or a felony. 2. When a felony has been in fact committed and he has reasonable ground to believe that the person to be arrested has committed it.”); see also Conaway, *supra* note 22, at 1441–43 & nn.176–93 (discussing Arizona's citizen's arrest statute).

¹⁰⁷ No statutory authority in New Mexico explicitly creates the right to a citizen's arrest. However, under New Mexico law, when the legislature is silent, the common law applies. See N.M. STAT. ANN. § 38-1-3 (West 2006). At common law a private person can arrest for a breach of the peace committed in her presence, as well as for a felony. See RESTATEMENT (SECOND) OF TORTS § 119 (1994). New Mexico courts have upheld this citizen's arrest standard. See *State v. Johnson*, 930 P.2d 1148, 1151 (N.M. 1996); *State v. Peterson*, 956 P.2d 854 (N.M. Ct. App. 1998); *Downs v. Garay*, 742 P.2d 533, 535 (N.M. Ct. App. 1987). See generally Conaway, *supra* note 22, at 1443–44 & nn.194–197 (discussing New Mexico's citizen's arrest statute).

¹⁰⁸ TEX. CODE CRIM. PRO. ANN. art. 14.01 (Vernon 2006) (“A peace officer or any other person, may, without a warrant, arrest an offender when the offense is committed in his presence or within his view, if the offense is one classed as a felony or as an offense against the public peace.”); see also Conaway, *supra* note 22, at 1444–45 & nn.198–206 (discussing Texas's citizen's arrest statute).

¹⁰⁹ ARIZ. REV. STAT. ANN. § 13-3884 (2006). New Mexico also allows citizen's arrests for all felonies and lesser crimes that involve “a breach of the peace.” *Johnson*, 930 P.2d at 1151. Texas's law is virtually identical. TEX. CODE CRIM. PRO. ANN. art. 14.01 (Vernon 2005). A Texas treatise on criminal law aptly articulates state law:

Under this provision, a private citizen has the right to make an arrest under certain limited circumstances. It is essential that the offense committed constitutes either

(Felonies are crimes of greater severity and thus result in greater punishment than misdemeanors.)

Furthermore, unlike police officers and border patrol agents, private citizens may not arrest based on “probable cause”; instead, they must be present when the offense is committed. The majority rule requires that the citizen see and know that another person is committing a felony or a breach-of-peace misdemeanor.¹¹⁰ For instance, New Mexico courts have held that, for a valid citizen’s arrest, a citizen must have personal knowledge of facts and circumstances “(1) that would induce an objectively-reasonable person to believe (2) that a . . . breach of the peace was being committed in his presence . . . (3) that [he] acted in good faith based upon that belief and, . . . (4) that [he] acted with reasonable force under the circumstances.”¹¹¹

1. *Qualifying Crimes*

The critical issue is whether immigration violations qualify as such crimes for citizen’s arrests purposes.¹¹² Under § 275(a) of the Immigration and Nationality Act (INA), the act of unlawfully crossing the border is a federal criminal violation called “unlawful entry,” and undocumented migrants can be fined or imprisoned up to six months for their first unlawful entry.¹¹³ Unlawful entry is defined broadly under federal law to include “any alien” who “enters or attempts to enter the United States at any time or place other than as designated by immigration officers” or “eludes ex-

a felony or a breach of the peace and that all the elements of the offense exist at the time of the arrest. Moreover, a private person may make an arrest only at the time he or she sees the actual offense being committed; the person may not see an offense and then later pursue the guilty party in order to apprehend him or her for the police. Direct observance of the commission of the crime has been interpreted as requiring the private citizen to observe enough of the situation to establish probable cause that a crime is being committed.

22 TEX. JUR. (THIRD) CRIMINAL LAW § 2220 (2006) (internal citations omitted); *see also* United States v. Perkins, 166 F. Supp. 2d 1116 (W.D. Tex. 2001) (describing the requirement of presence or within view in more detail).

¹¹⁰ In Arizona, “presence” is not required “[w]hen a felony has been in fact committed and he has reasonable ground to believe that the person to be arrested has committed it.” ARIZ. REV. STAT. ANN. § 13-3884 (West 2006).

¹¹¹ *Peterson*, 956 P.2d at 857.

¹¹² It should be noted that an undocumented migrant might violate other laws while crossing the border, such as unlawful possession or use of firearms, criminal trespass, or perhaps illegal drug possession.

¹¹³ Immigration & Nationality Act (INA) § 275(a), 8 U.S.C. § 1325(a) (2006) (“Any alien who (1) enters or attempts to enter the United States at any time or place other than as designated by immigration officers, or (2) eludes examination or inspection by immigration officers, or (3) attempts to enter or obtains entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact, shall, for the first commission of any such offense, be fined . . . or imprisoned not more than 6 months, or both, and, for a subsequent commission of any such offense, be fined . . . or imprisoned not more than 2 years, or both.”).

amination or inspection by immigration officers.”¹¹⁴ The key question here is whether unlawful entry qualifies as a felony or, in the alternative, a misdemeanor amounting to a breach of the peace.

Felony: It is not a felony for a migrant to cross the U.S.-Mexico border without proper documentation—at least not for the first attempt. The migrant must have been previously convicted of unlawful entry for the second unlawful entry to be charged as a felony.¹¹⁵ More importantly, vigilantes have virtually no way of knowing—or even having a reasonable belief—that a particular migrant has already been convicted for unlawful entry. So, they cannot make citizen’s arrests based on the felony reasoning.¹¹⁶

As discussed in Part III, the Antiterrorism and Illegal Immigration Control Act—passed by the House in 2005 but killed in the Senate—would have further criminalized undocumented border-crossing as a felony.¹¹⁷ This change in federal law would have trickled down to the majority rule for citizen’s arrests, allowing vigilantes to arrest anyone crossing the border at an improper place. Furthermore, states could also criminalize border-crossing as a felony, which would have the same effect on citizen’s arrests. The Arizona State Legislature, for instance, passed a law in 2006 that would have allowed the arrest and prosecution of undocumented migrants under Arizona’s trespassing law.¹¹⁸ While the governor vetoed the bill and the bill did not felonize first-time trespassing offenses, this legislation could be indicative of future state-based attempts to criminalize (and felonize) immigration violations.

¹¹⁴ *Id.*

¹¹⁵ Compare INA § 275(a), 8 U.S.C. § 1325(a) (2005) (stating the first commission involves fine and/or imprisonment of not more than six months (misdemeanor), but any subsequent commission involves fine and/or imprisonment of not more than two years (felony)), with INA § 276, 8 U.S.C. § 1325 (2005) (stating that illegal reentry results in two years, or a felony conviction); see also *United States v. Arambula-Alvarado*, 677 F.2d 51, 52 (9th Cir. 1982) (“Absent proof of a former ‘conviction’ [for unlawful entry], the appellant should not have been given a felony sentence.”).

¹¹⁶ Of course, if vigilantes ask and ascertain that a particular migrant has already been convicted for unlawful entry, then the vigilantes would have actual knowledge that the subsequent border crossing would constitute a felony. Under those circumstances, the vigilantes would arguably have the legal right to make a citizen’s arrest.

¹¹⁷ Antiterrorism and Illegal Immigration Control Act, H.R. 4437, 109th Cong. (2005); see also Lochhead, *supra* note 4, at A5 (describing how H.R. 4437 criminalizes illegal presence in the United States); Sensenbrenner & King, *supra* note 4 (describing the legislation).

¹¹⁸ S. 1157, 47th Leg., 2d Reg. Sess (Ariz. 2006). Senate Bill 1157 was passed by the Arizona State Senate (17-12) and House (33-27) on April 12, 2006, but Governor Janet Napolitano vetoed the bill on April 17, 2006. See also Casey Newton, *Senate OKs Arrests of Immigrant Trespassers; Bill Sent to Governor*, ARIZ. REPUBLIC, Apr. 13, 2006, at 1B (“‘This is common-sense legislation,’ said Rep. Russell Pearce, R-Mesa, shortly before the House voted 33-27 to pass the bill. ‘It’s about time we started standing up for the legal residents, the legal citizens of the United States and enforce our laws (and) protect our neighborhoods.’”).

Misdemeanor: Unlawful entry is probably not a misdemeanor amounting to a breach of the peace. Each state has taken a slightly different approach to define (or not define) a breach of the peace. For instance, the Arizona Legislature has not explicitly defined “breach of the peace.”¹¹⁹ However, Arizona law does include “disorderly conduct” as a breach of peace.¹²⁰ For migrants to be found guilty of disorderly conduct, they must mean to disturb the peace by engaging in fighting, making loud noises, using profane language or gestures, or recklessly displaying a deadly weapon.¹²¹ Migrants seldom engage in “disorderly conduct,” and Arizona

¹¹⁹ ARIZ. REV. STAT. ANN. § 13-3884 (2006).

¹²⁰ ARIZ. REV. STAT. ANN. § 13-2904(A) (2006). The statute provides:

A person commits disorderly conduct if, with intent to disturb the peace or quiet of a neighborhood, family or person, or with knowledge of doing so, such person:

1. Engages in fighting, violent or seriously disruptive behavior; or
2. Makes unreasonable noise; or
3. Uses abusive or offensive language or gestures to any person present in a manner likely to provoke immediate physical retaliation by such person; or
4. Makes any protracted commotion, utterance or display with the intent to prevent the transaction of the business of a lawful meeting, gathering or procession; or
5. Refuses to obey a lawful order to disperse issued to maintain public safety in dangerous proximity to a fire, a hazard or any other emergency; or
6. Recklessly handles, displays or discharges a deadly weapon or dangerous instrument.

¹²¹ It should be noted that breaches of the peace are not confined to disorderly conduct. *See, e.g., State v. Chavez*, 96 P.3d 1093 (Ariz. Ct. App. 2004) (holding that while disorderly conduct can include a breach of the peace, which would support a citizen’s arrest, breach of the peace is not limited to behavior prohibited by the disorderly conduct statute); *see also Williams v. Sup. Ct. of Pima Cty.*, 512 P.2d 45 (Ariz. Ct. App. 1973). Conaway explains the importance of *Williams* to defining breach of peace:

In *Williams v. Superior Court of Pima County*, the Arizona Court of Appeals’ definition of disturbing the peace looks at the effect the actor’s actions have on tranquility and fear in the community. The court defined breach of the peace as “a disturbance of public tranquillity [sic] or order and may be created by any act which molests inhabitants in the enjoyment of peace and quiet or excites disquietude or fear.” The court in *Williams* was interpreting A.R.S. section 13-371 when it defined breach of the peace. Section 13-371 has since been incorporated into the disorderly conduct statute found in A.R.S. section 13-2904. In spite of the statutory change, *Williams* is still being cited for its definition of breach of the peace. Careful interpretation of section 13-2904 indicates that the continued use of the *Williams* definition is not by mistake or oversight on the part of lawyers and judges; rather, it is necessary to understanding section 13-2904. Section 13-2904 prohibits certain types of disorderly conduct; to be guilty under the statute the defendant must: (1) possess the necessary mens rea of disturbing the peace, and (2) commit one of the acts enumerated in the statute. The statute incorporates breach of the peace as an element of disorderly conduct offenses but does not actually define the term “breach of the peace.” Canons of statutory interpretation suggest that when a legislature amends one part of a statute but leaves another unchanged, the unaltered portion retains the meaning it had before the revision. Here, the Arizona legislature, knowing of the *Williams* definition of breaching the peace, did not offer a different definition when section 13-371 was incorporated into section 13-2904. Therefore, it seems the legislature intended for disturbing

courts have not found, and likely would not find, unlawful entry to be disorderly conduct. The New Mexico Legislature has similarly not explicitly defined “breach of the peace,” and New Mexico courts have not provided a clear definition.¹²²

Instead of utilizing the exact term “breach of peace,” Texas law allows citizen’s arrests for any “offense against the public peace.”¹²³ The Texas Legislature has not explicitly defined this offense, but Texas courts have provided some definitions.¹²⁴ A leading treatise on Texas law provides an

the peace to retain the *Williams* definition.

Conaway, *supra* note 22, at 1442–43 (internal citations omitted). Consequently, no Arizona court would likely find that unlawful entry constitutes a breach of the peace under Arizona law.

¹²² See *State v. Johnson*, 930 P.2d 1148, 1151 (N.M. 1996) (“Neither *Tijerina* nor *Downs* sets out the essential elements of the defense of citizen’s arrest”); *State v. Peterson*, 956 P.2d 854, 857 (N.M. Ct. App. 1998); *Downs v. Garay*, 742 P.2d 533, 535 (N.M. Ct. App. 1987); see also Conaway, *supra* note 22, at 1443 (“But New Mexico has not codified its citizen’s arrest laws, and its case law dealing with citizen’s arrest is sparse.”).

¹²³ TEX. CODE CRIM. PRO. ANN. art. 14.01 (Vernon 2005).

¹²⁴ The Texas Court of Criminal Appeals, in *Head v. State*, 96 S.W.2d 981, 982–83 (Tex. Crim. App. 1936), established the basic definition of an offense against the public peace:

The term “breach of the peace” is generic, and includes all violations of the public peace or order, or decorum; in other words, it signifies the offense of disturbing the public peace or tranquility enjoyed by the citizens of a community; a disturbance of the public tranquility by any act or conduct inciting to violence or tending to provoke or excite others to break the peace; a disturbance of public order by an act of violence, or by any act likely to produce violence, or which, by causing consternation and alarm disturbs the peace and quiet of the community. By “peace,” as used in this connection, is meant the tranquility enjoyed by the citizens of a municipality or a community where good order reigns among its members

The offense may consist of acts of public turbulence or indecorum in violation of the common peace and quiet, of an invasion of the security and protection which the laws afford to every citizen, or of acts such as tend to excite violent resentment or to provoke or excite others to break the peace. *Actual or threatened violence is an essential element of a breach of the peace.* Either one is sufficient to constitute the offense. Accordingly, where means which cause disquiet and disorder, and which threaten danger and disaster to the community, are used, it amounts to a breach of the peace, although no actual personal violence is employed. Where the incitement of terror or fear of personal violence is a necessary element, the conduct or language of the wrongdoer must be of a character to induce such a condition in a person of ordinary firmness.

Id. at 982 (emphasis added).

Courts have discussed arrests under Texas law for breach of peace in great detail. See, e.g., *United States v. Sealed Juvenile*, 255 F.3d 213 (5th Cir. 2001) (holding that a motorist’s violation of traffic laws—in crossing centerline on two-lane road, and at one point driving on wrong side of road with high beam lights flashing at other driver—rose to level of “breach of the peace” necessary for a citizen’s arrest under Texas law); *Heath v. Boyd*, 175 S.W.2d 214 (Tex. 1943) (holding that trespass without any accompanying disruptive behavior is not enough to constitute an offense against the public peace); *Hackett v. State*, 357 S.W.2d 391 (Tex. Crim. App. 1962) (holding that throwing an empty bottle at a police car is an offense against public peace); *Romine v. State*, 336 S.W.2d 181 (Tex. Crim. App.

excellent summary of how Texas courts have defined an offense against the public peace (also known as “a breach of the peace”):

To be a breach of the peace, the act complained of must be one that disturbs or threatens to disturb the tranquility enjoyed by the citizens. . . . Being intoxicated in public in violation of the penal provisions relating to public intoxication is an offense against the public peace for the purpose of an arrest without warrant. Moreover, driving while intoxicated constitutes a breach of the peace that justifies a warrantless arrest by a citizen. Thus, an intoxicated person may be arrested without warrant whether he or she is on foot or in a vehicle.

Knowingly and intentionally making an unreasonable noise in a public place constitutes a breach of the peace that justifies a warrantless arrest by a police officer. Other conduct which has been found to be a breach of the peace includes possession of a handgun; loud swearing or cursing in a public place; a man’s unprovoked assault on a woman in a public place; throwing or swinging a beer bottle at another person; and failing to stop and give information after a traffic accident.

On the other hand, trespassing generally is not an offense that will authorize an arrest without warrant, although a breach of the peace may include criminal trespass on fenced land containing livestock where the trespasser previously has been asked to leave. Operation of an overloaded vehicle on a highway that is in violation of statute and the refusal of the vehicle’s operator to obey a constable’s order to drive to certain scales for the purpose of ascertaining the vehicle’s weight has been found to be not such conduct as to constitute a breach of peace and authorize a constable who is not specifically designated by the regulatory act to arrest the offender without a warrant. In addition, an act of sexual intercourse occurring at nighttime in a car parked on a secluded property operated by one of the parties to the act has been found not an offense against the public peace authorizing an arrest without warrant.¹²⁵

For migrants to be found guilty of an offense against the public peace under Texas law, they must mean to disturb the peace by engaging in fight-

1960) (holding that exposing oneself to another is an offense against public peace); *Head v. State*, 96 S.W.2d 981 (Tex. Crim. App. 1936) (holding that operation of overloaded truck is *not* per se a “breach of the peace”); *Samino v. State*, 204 S.W. 233 (Tex. Crim. App. 1918) (creating a disturbance by shooting, hollering, and cursing constitutes an offense against the public peace).

¹²⁵ 22 TEX. JUR. (THIRD) CRIM. L. § 2221 (2005) (internal citations omitted).

ing, making loud noises, using profane language or gestures, or recklessly displaying a deadly weapon. In fact, the standard appears to require that “[a]ctual or threatened violence is an essential element of a breach of the peace.”¹²⁶ Consequently, a Texas court would not find that unlawful entry alone is such an offense, though certain disruptive actions arguably elevate the action to a breach of peace.¹²⁷

In sum, for migrants to be found in breach of the peace under the majority rule, they must mean to disturb the peace by engaging in fighting, making loud noises, using profane language or gestures, or recklessly displaying a deadly weapon. On the other hand, one commentator counters:

Undocumented persons coming and remaining in the United States can reasonably be expected to excite fear in our communities. . . . Aliens entering the United States without authorization is more than unsettling given the heightened threat of terrorism by foreign terrorist groups. The argument that unauthorized entry is a breach of the peace is more persuasive since September 11, 2001, but the arrests prior to September 11 are not necessarily invalid.¹²⁸

Courts applying the majority rule, however, do not seem to allow an expansive definition for a breach of peace. For example, a misdemeanor battery charge was not considered violent or disruptive enough to amount to a breach of peace in New Mexico.¹²⁹ Unlawful entry is certainly more peaceful than that, though perhaps certain migrant activities (e.g., crossing the border in large groups and trespassing) might be enough. In general, it is highly unlikely that unlawful entry (or unlawful presence) would be considered a breach of peace under the majority rule. Because the majority rule allows citizen’s arrest law for only a narrow class of crimes, vigilantes most likely do not have the right to arrest undocumented migrants for unlawful entry.

And the punishments for an unlawful arrest are significant. A person who makes an unlawful citizen’s arrest can be charged with “unlawful imprisonment” under Arizona law,¹³⁰ which is also known as “false imprisonment” under New Mexico law¹³¹ and “unlawful restraint” under Texas law.¹³² The basic elements of an unlawful imprisonment claim are: (1) will-

¹²⁶ *Head v. State*, 96 S.W.2d 981, 982 (Tex. Crim. App. 1936).

¹²⁷ See cases cited *supra* note 124.

¹²⁸ Conaway, *supra* note 22, at 1445–46.

¹²⁹ *Downs v. Garay*, 742 P.2d 533, 535 (N.M. Ct. App. 1987).

¹³⁰ ARIZ. REV. STAT. ANN. § 13-1303 (2006) (“A person commits unlawful imprisonment by knowingly restraining another person. . . . Unlawful imprisonment is a class 6 felony unless the victim is released voluntarily by the defendant without physical injury in a safe place prior to arrest in which case it is a class 1 misdemeanor.”).

¹³¹ N.M. STAT. ANN. § 30-4-3 (West 2006) (“False imprisonment consists of intentionally confining or restraining another person without his consent and with knowledge that he has no lawful authority to do so.”).

¹³² TEX. PENAL CODE ANN. § 20.02(a) (Vernon 2006) (“A person commits an offense if

ful detention (2) without consent of the plaintiff and (3) without authority under law.¹³³ This crime is punishable by fine and/or imprisonment.¹³⁴ If vigilantes attempt a citizen's arrest, they can be further penalized under state law depending on whether the vigilante uses unreasonable force or unreasonable delay before delivering the offender to a law enforcement officer. These limitations are briefly explored in the next two sub-Parts.

2. Use of Force

The first limitation concerns whether a vigilante can use force when making a citizen's arrest. Courts in majority rule states have held that citizens may not use any force unless it is reasonably necessary.¹³⁵ In other words, force may only be used in arrests if there is reasonable necessity—e.g., resisting arrest, fleeing, or carrying a weapon. Note that Arizona courts, unlike courts in New Mexico and Texas, have held that citizens may not use any force unless they are arresting someone who they know is in the act of committing a felony, not just a misdemeanor.¹³⁶ Vigilantes

he intentionally or knowingly restrains another person.”)

¹³³ See, e.g., *Fermino v. Fedco, Inc.*, 30 Cal. Rptr. 2d 18, 26 (1994); *Sears, Roebuck & Co. v. Castillo*, 693 S.W.2d 374, 375 (Tex. 1985); *State v. Fish*, 701 P.2d 374, 378 (N.M. Ct. App. 1985); *Slade v. City of Phoenix*, 541 P.2d 550, 552 (Ariz. 1975). Other potential causes of action include assault, intentional infliction of emotional distress, and negligence. Each depends on the particular circumstances of the arrest made or attempted. In each action taken by the vigilante border groups, undocumented migrants are detained against their will, so unlawful imprisonment would be an available claim in just about every action.

¹³⁴ ARIZ. REV. STAT. ANN. § 13-1303; N.M. STAT. ANN. § 30-4-3 (West 2005) (“Whoever commits false imprisonment is guilty of a fourth degree felony.”); TEX. PENAL CODE ANN. § 20.02(c) (Vernon 2005) (“An offense under this section [regarding unlawful restraint] is a Class A misdemeanor, except that the offense is: (1) a state jail felony if the person restrained was a child younger than 17 years of age; or (2) a felony of the third degree if: (A) the actor recklessly exposes the victim to a substantial risk of serious bodily injury; (B) the actor restrains an individual the actor knows is a public servant while the public servant is lawfully discharging an official duty or in retaliation or on account of an exercise of official power or performance of an official duty as a public servant; or (C) the actor while in custody restrains any other person.”).

¹³⁵ On Arizona, see ARIZ. REV. STAT. ANN. § 13-3881(B) (2005) (“No unnecessary or unreasonable force shall be used in making an arrest, and the person arrested shall not be subjected to any greater restraint than necessary for his detention.”). The same is true for New Mexico. See *State v. Tijerina*, 504 P.2d 642 (N.M. Ct. App. 1972), *adopted by* 519 P.2d 127 (N.M. 1973), *cert. denied*, 417 U.S. 956 (1974); see also *State v. Peterson*, 956 P.2d 854, 857 (N.M. Ct. App. 1998). Texas courts have held that citizens may not use any force unless it is reasonably necessary. See *Spoon v. State*, 184 S.W.2d 627 (Tex. Crim. App. 1945); *Logan v. State*, 296 S.W. 570 (Tex. Crim. App. 1927); *Fread v. State*, 210 S.W. 695 (Tex. Crim. App. 1919).

¹³⁶ See, e.g., *State v. Barr*, 565 P.2d 526, 528 (Ariz. Ct. App. 1977) (“While a police officer may arrest with impunity upon probable cause to believe a crime has been committed, a private person may arrest only where a felony has in fact been committed. A.R.S. § 13-1404. If no felony was committed, an arrest by a private person is illegal. Therefore, since a homicide is justified under A.R.S. § 13-462(4) only where the arrest is attempted by ‘lawful ways and means,’ a private person is not authorized to shoot or kill another in an attempt to arrest merely on suspicion that a felony has been committed.”).

will never possess this knowledge unless they know that a particular migrant has already been convicted of unlawful entry, which is highly unlikely.

Consequently, if the migrant crosses the border without a weapon and does not resist the arrest, the vigilantes should have no reason to use force. If the vigilante is found to have used force unreasonably, then the arrest will be considered even more unlawful, which could result in greater fines and/or imprisonment.¹³⁷

3. *Unlawful Detainment*

The second limitation deals with unlawful detainment. Each majority rule state has restrictions on how long and/or in what manner a citizen may detain an offender. Under Arizona and Texas law, any individual making such an arrest without a warrant must, “without unnecessary delay,” deliver the arrested person to the proper law enforcement officer.¹³⁸ In other words, vigilantes cannot hold or detain migrants for any period of time that is unnecessary.¹³⁹ Vigilantes should proceed immediately to deliver the migrant to the proper authorities to avoid further penalties for unlawful arrest.

Similarly, under New Mexico law, any individual who makes an unlawful arrest will be found guilty of false imprisonment.¹⁴⁰ In addition, “arrest” is interpreted broadly as unlawfully “confining or restraining another person without his consent.”¹⁴¹ Consequently, vigilantes cannot hold or detain migrants for any period of time under New Mexico law and the majority rule more generally.

In sum, under the current majority rule, vigilantes may not make citizen’s arrests of individuals as they cross the border, and they face criminal penalties for arresting, detaining, and/or using unreasonable force.

¹³⁷ See ARIZ. REV. STAT. ANN. § 13-1303 (2005). For New Mexico, see *Peterson*, 956 P.2d at 857. For Texas, see TEX. PENAL CODE ANN. § 20.02(a) (Vernon 2005); see also cases cited *supra* note 135.

¹³⁸ ARIZ. REV. STAT. ANN. § 13-3898A (2005) (“A person arrested without a warrant shall *without unnecessary delay* be taken before the nearest or most accessible magistrate in the county in which the arrest occurs, and a complaint shall be made before the magistrate setting forth the facts, and the basis for his statement of the facts, showing the offense for which the person was arrested.”) (emphasis added); TEX. CODE CRIM. PRO. ANN. art. 14.06 (Vernon 2005).

¹³⁹ In Arizona, “unnecessary delay” has not been defined by the courts or the legislature. Similarly in Texas, “unnecessary delay” has not been clearly defined by statute or common law, but the absolute maximum time is forty-eight hours from the time of the arrest. TEX. CODE CRIM. PRO. ANN. art. 14.06 (Vernon 2005).

¹⁴⁰ N.M. STAT. ANN. § 30-4-3 (West 2005).

¹⁴¹ *Id.*

B. The Minority Rule: Citizens May Arrest Undocumented Migrants for Unlawful Entry Made in Their Presence

In contrast to the majority rule applied in Arizona, New Mexico, and Texas, California law most likely allows vigilantes to make citizen's arrests of undocumented border-crossers.¹⁴² Under this minority rule, a Californian citizen has the right to arrest others who commit, or attempt to commit, a "public offense" while in the citizen's "presence."¹⁴³ California's standard for allowing citizens to arrest offenders appears quite broad: it allows citizen's arrests for just about every crime, regardless of the lack of violent or disruptive content. However, as this Part illustrates, California law is also very restrictive on what a citizen may do once she has detained or arrested an offender. In fact, just about every citizen's arrest for immigration violations is in danger of being unlawful imprisonment, which is punishable by fine and imprisonment.

The law poses two important questions: What is a public offense? And what does it mean to be committed in the citizen's presence?

1. Qualifying Crimes

In stark contrast to the majority rule, California law defines "public offense" broadly to include any act that violates the law and is punishable by death, imprisonment, or fine.¹⁴⁴ Under this broad definition, it is a public offense for a migrant to cross the U.S.-Mexico border without proper documentation. As discussed in Part II.A, undocumented migrants can be fined or imprisoned for up to six months for their first unlawful entry.¹⁴⁵ Under § 275(a) of the INA, "unlawful entry" is defined broadly under fed-

¹⁴² Whether citizen's arrests are allowed for immigration violations is an issue of first impression of California courts and is not explicitly answered by any state statute. For this reason, I am cautious in stating that vigilantes "most likely" can make citizen's arrests for border-crossing.

¹⁴³ CAL. PENAL CODE § 837 (West 2005) ("ARRESTS BY PRIVATE PERSONS. A private person may arrest another: 1. For a public offense committed or attempted in his presence. 2. When the person arrested has committed a felony, although not in his presence. 3. When a felony has been in fact committed, and he has reasonable cause for believing the person arrested to have committed it."); *see also* Conaway, *supra* note 22, at 1439–41 & nn.153–175 (discussing California's citizen's arrest statute).

¹⁴⁴ CAL. PENAL CODE § 15 (West 2005) ("A crime or public offense is an act committed or omitted in violation of a law forbidding or commanding it, and to which is annexed, upon conviction, either of the following punishments: 1. Death; 2. Imprisonment; 3. Fine; 4. Removal from office; or, 5. Disqualification to hold and enjoy any office of honor, trust, or profit in this state."). One might argue that a public offense should not include federal laws, since they are not explicitly included in the statute. However, a public offense includes any violation of law that results in the punishment of death, imprisonment, fine, and so forth. Furthermore, California courts have interpreted "public offense" in the citizen-arrest context quite broadly. *See, e.g.*, *Kinney v. County of Contra Costa*, 87 Cal. Rptr. 638, 641–42 (Ct. App. 1970) (defining "public offense" so broadly to include crimes as diverse as hit and runs, prowling, shoplifting, and disturbing the peace).

¹⁴⁵ Immigration & Nationality Act (INA) § 275(a), 8 U.S.C. § 1325(a) (2005).

eral law to include “any alien” who “enters or attempts to enter the United States at any time *or place* other than as designated by immigration officers” or “eludes examination or inspection by immigration officers.”¹⁴⁶ So, under California law, all undocumented migrants are committing a public offense by entering the United States without proper documentation.¹⁴⁷

2. *Witness to Public Offense*

A second question is of particular importance for border vigilantism under the minority rule: How close does a vigilante need to be to the border when observing a migrant enter the United States in order to claim the migrant committed unlawful entry “in his presence”? Like New Mexico,¹⁴⁸ California law requires that the arrestor be present when the qualifying offense is committed.¹⁴⁹

One might argue that observation through binoculars or from a distance would not qualify as being in a person’s presence. California courts, however, have interpreted the “presence” requirement quite broadly, saying that close physical proximity and even “sight” are not required.¹⁵⁰ No California court has specifically ruled on the use of binoculars, so one might argue that this observation is too far removed from “presence.” However, one California court has allowed citizens to arrest their neighbor for actions they saw done through their second-floor window.¹⁵¹ Consequently, California courts would likely find that most vigilante observations at the border meet the “presence” requirement for citizen’s arrests.

Because California has a very broad citizen’s arrest law, vigilantes likely have the right to arrest undocumented migrants for unlawful entry in most cases. But there are some limitations in how the arrest is executed.

¹⁴⁶ *Id.* (emphasis added); *see also supra* Part II.A.

¹⁴⁷ One might creatively argue that the vigilantes do not know that the migrants are “aliens” until they arrest them. It is important to note that § 275(a) of the INA states that it is a criminal offense for “any alien” to commit unlawful entry. The statute, on its face, does not extend to U.S. citizens. This question appears to be one of first impression, and one of particular importance for citizen’s arrests at the border in California, as the border vigilantes do not have actual knowledge that the person committing unlawful entry is indeed an “alien,” thus violating federal law.

¹⁴⁸ *See State v. Peterson*, 956 P.2d 854, 857 (N.M. Ct. App. 1998); *see also supra* text accompanying note 111.

¹⁴⁹ CAL. PENAL CODE § 837 (West 2005). California law only requires “presence” for public offenses—not for felonies so long as the arrestor “has reasonable cause for believing the person arrested to have committed it.” *Id.*

¹⁵⁰ *See, e.g., People v. Lee*, 204 Cal. Rptr. 667, 668–69 (App. Ct. 1984) (holding that “physical proximity” and “sight” are not essential for the crime to be committed “in the presence”).

¹⁵¹ *See, e.g., People v. Sjosten*, 68 Cal. Rptr. 832 (App. Ct. 1968) (allowing citizen’s arrest for prowling when citizens viewed public offense through a second-floor window across the street).

3. Use of Force

Similar to the majority rule in Arizona, New Mexico, and Texas, California law states that force may only be used when it is reasonably necessary to make the arrest, prevent escape, or overcome resistance.¹⁵² So, as under the majority rule, if the migrant crosses the border without a weapon and does not resist the arrest, the vigilantes should have no reason to use force. If the vigilantes are found to have used force unreasonably, then the citizen's arrest will be considered unlawful.

Under California law, as under the majority rule, when a citizen's arrest is committed unlawfully, the citizen can be charged with "false imprisonment"—"the unlawful violation of the personal liberty of another."¹⁵³ This crime is punishable by a fine up to \$1,000 and/or imprisonment for up to a year in a county jail. More importantly, if the unlawful imprisonment involved "violence, menace, fraud, or deceit," the punishment becomes a felony, a much more severe crime, with imprisonment in a state prison, instead of a county jail.¹⁵⁴ Here, "violence" means the citizen used unnecessary force in making the arrest,¹⁵⁵ while "menace" means that the citizen threatened to harm the person while making the arrest.¹⁵⁶ Threats of violence or harm can be demonstrated in word or deed, such as showing the migrant a gun or using violent or abusive language. "Deceit" and "fraud" have not been defined by California courts in this context, but they could

¹⁵² CAL. PENAL CODE § 835a (West 2005) ("Any peace officer who has reasonable cause to believe that the person to be arrested has committed a public offense may use reasonable force to effect the arrest, to prevent escape or to overcome resistance."). The California Supreme Court has interpreted "peace officer" to include citizens making lawful citizen's arrests and thus allows citizens to use force when making citizen's arrests if that force is reasonably necessary. *See* *People v. Fosselman*, 659 P.2d 1144 (Cal. 1983) (holding that when the arrestee pulled free and began to walk away from scene, the citizen arrestor was entitled to use reasonable force to detain him); *see also* *People v. Garcia*, 78 Cal. Rptr. 775 (Ct. App. 1969) (allowing citizens to use reasonable force when making citizen's arrests in order to combat resistance).

¹⁵³ CAL. PENAL CODE § 236 (West 2005) ("False imprisonment is the unlawful violation of the personal liberty of another."). The basic elements of a false imprisonment claim are: (1) willful detention, (2) without consent of the plaintiff, and (3) without authority under law. *See e.g.*, *Fermino v. Fedco, Inc.*, 30 Cal. Rptr. 2d 18, 26 (1994); *Sears, Roebuck & Co. v. Castillo*, 693 S.W.2d 374, 375 (Tex. 1985); *State v. Fish*, 701 P.2d 374, 378 (N.M. Ct. App. 1985); *Slade v. City of Phoenix*, 541 P.2d 550, 552 (Ariz. 1975). Other potential causes of action include assault, intentional infliction of emotional distress, and negligence. Each depends on the particular circumstances of the arrest made or attempted. In each action taken by the vigilante border groups, undocumented migrants are detained against their will, so false imprisonment would be an available claim in just about every action.

¹⁵⁴ CAL. PENAL CODE § 237(a) (West 2005) ("False imprisonment is punishable by a fine not exceeding one thousand dollars (\$1,000), or by imprisonment in the county jail for not more than one year, or by both that fine and imprisonment. If the false imprisonment be effected by violence, menace, fraud, or deceit, it shall be punishable by imprisonment in the state prison.").

¹⁵⁵ *See, e.g.*, *People v. Reed*, 92 Cal. Rptr. 2d 781 (Ct. App. 2000) (holding that "violence" means "the exercise of physical force used to restrain over and above the force reasonably necessary to effect such restraint").

¹⁵⁶ *See id.* (defining "menace" as implied or explicit threats to harm).

include vigilantes posing as law enforcement or using other fraudulent means during the arrest or detention. So if vigilantes use force or threat of force in any way—or misrepresent themselves or otherwise engage in dishonest or fraudulent behavior—these arrests would be unlawful.

4. Unlawful Detainment

Similar to laws in Arizona and Texas, California law requires that the citizen making a citizen's arrest must, "without unnecessary delay," deliver the arrested person to a judge or law enforcement.¹⁵⁷ In other words, vigilantes must proceed immediately to deliver the migrant to the proper authorities—though the California courts and legislature have not explicitly defined the amount of time that constitutes an "unnecessary delay." Any violation of this law is considered "unlawful imprisonment," and the same criminal penalties apply as to those who use unlawful force.

In sum, under the current minority rule applied in California, vigilantes may make citizen's arrests of individuals as they cross the border, but as with the majority rule, they may face criminal penalties for using unreasonable force or for failing to deliver the offenders to law enforcement without unnecessary delay. Table 1 summarizes citizen's arrest laws in each border state:

Table 1. Comparison of Citizen's Arrest Law in the Border States

	Qualifying Offenses			Arrestor "Presence" Requirement	Use of Force or Threat of Force	Deliverance to Law Enforcement
	Felonies	Non-Felonies	Border- Crossing			
Arizona	All	Breach of Peace	No	No for Felony; Yes for Non- Felonies	Only for Felonies if Reasonably Necessary	Without Unnecessary Delay
New Mexico	All	Breach of Peace	No	Yes	Only if Reasonably Necessary	Not Defined by Law
Texas	All	Offense Against Public Peace	No	Yes	Only if Reasonably Necessary	Without Unnecessary Delay
California	Public Offenses*		Yes	No for Felony; Yes for Public Offense**	No Violence, Menace, Fraud, or Deceit***	Without Unnecessary Delay

* Public offenses include any offense punished by fine or imprisonment.

** California courts have a substantially weakened "presence" requirement for public offenses.

*** California law allows necessary force, but always prohibits menace, fraud, and deceit.

¹⁵⁷ CAL. PENAL CODE § 847(a) (West 2005) ("A private person who has arrested another for the commission of a public offense must, *without unnecessary delay*, take the person arrested before a magistrate, or deliver him or her to a peace officer.") (emphasis added).

III. POLICY PRESCRIPTIONS

Part I presented a history of the U.S.-Mexico border that has been cyclical in nature—phases of inclusion during labor shortages, followed by anti-immigrant phases of exclusion, deportation, and often violence. This cycle is motivated by the economics of migration, and the exclusionary phases are also spurred by calls for a strong rule of law, heightened national security, and perhaps underlying xenophobic and nativist attitudes.¹⁵⁸ The terrorist attacks of September 11, 2001, have rekindled and enhanced these themes in border politics, and a new group of law enforcers has (re-) emerged: border vigilantes.

As Part II outlined, these vigilantes (and citizens more generally) do not enjoy the same rights as law enforcement officers with respect to arresting undocumented migrants. Under the majority rule applied in Arizona, New Mexico, and Texas, vigilantes may not arrest individuals for border-crossing alone. Conversely, California law does allow such arrests because the definition of public offense is so all-encompassing—though what vigilantes can do after the arrest is still severely limited. Nevertheless, these vigilantes still operate at the border in an attempt to curb undocumented migration: they set up command posts, carry weapons and radios, light up common border-crossing points at night, and confront any migrants they discover through their surveillance.

But what have not been adequately addressed in this Article, or in the border debate more generally, are the rights and conditions of Mexican migrants. For Mexican nationals seeking entry into the United States, the chosen journey may vary widely. Some travel as individuals, some travel in groups, and occasionally entire families make the trip together. Most share a common goal: “Their objective is to cross the international boundary known as *La Linea*, enter the United States, and then remain undetected in this country, where they can live, work, and prosper.”¹⁵⁹ But not all prosper. Every year, hundreds of migrants die while attempting to cross the U.S.-Mexico border.¹⁶⁰ The U.S. Border Patrol estimates that 1896 border crossers died from 1998 to 2003, and the Mexican Ministry of Foreign Relations places the total at 2455 from 1997 through 2003.¹⁶¹ According to other records kept by Mexican authorities, an average of 387 migrants die each year.¹⁶² In light of the current border enforcement efforts, more and more migrants are hiring smugglers or “coyotes”—who often exploit and abuse their clients—to lead them across the border in the dark hours of night.¹⁶³

¹⁵⁸ For more discussion on these three common themes, see *supra* Part I.C.2.

¹⁵⁹ Vargas, *supra* note 23, at 19 (footnote omitted).

¹⁶⁰ Guillermo Alonso Meneses, *Human Rights and Undocumented Migration Along the Mexican-U.S. Border*, 51 UCLA L. REV. 267, 269 (2003).

¹⁶¹ See Ewing, *supra* note 21, fig.2, 454 n.37.

¹⁶² Meneses, *supra* note 160, at 269, 274.

¹⁶³ MASSEY ET AL., *supra* note 29, at 129–31; BELINDA I. REYES ET AL., PUB. POLICY

The federal government has documented that current enforcement efforts have also channeled undocumented migration to the most dangerous and remote regions of the border—desert and mountainous regions where migrants' chances for survival are much lower.¹⁶⁴

More importantly for the purposes of this Article, this phenomenon of pushing migration to the most remote and dangerous parts of the border has also increased the chance of human rights violations at the hands of border vigilantes. Because migrants now cross the border at night and in the most remote areas, vigilantes also do most of their work then and there, when and where law enforcement is less likely to be present.

This lack of law enforcement presence has two interrelated effects. First, as the Santa Cruz, CA county attorney noted, crimes against illegal aliens have increased because the migrants are forced by U.S. border policies to enter through remote areas, where criminal activity is less likely to be detected and more difficult to respond to.¹⁶⁵ In other words, no law enforcement officers are near areas where migrants and vigilantes interact to protect migrants from vigilante abuses or to even witness and report any civil or human rights violations. The chance that a witness would be present is slim; equally important, the chance that a surviving illegal alien would self-report such violations to local law enforcement—and thus risk being deported—is similarly unlikely.

The other byproduct is that civil and human rights abuses at the border are difficult to document. But government and nonprofit groups have begun the investigatory process. For instance, the Border Action Network has assembled a relatively extensive record of reported human and civil rights violations by border vigilantes.¹⁶⁶ The ACLU has also begun to document abuses.¹⁶⁷ Scholars and the media have likewise joined the documentation efforts.¹⁶⁸

INST. OF CAL., HOLDING THE LINE? THE EFFECT OF THE RECENT BORDER BUILD-UP ON UNAUTHORIZED IMMIGRATION 61 (2002), available at http://www.ppic.org/content/pubs/report/R_702Brr.pdf.

¹⁶⁴ See U.S. GEN. ACCOUNTING OFFICE, INS' SOUTHWEST BORDER STRATEGY: RESOURCE AND IMPACT ISSUES REMAIN AFTER SEVEN YEARS 24-28 (2001) (providing detailed analysis on migration trends and migrant deaths), available at <http://www.gao.gov/new.items/d01842.pdf>.

¹⁶⁵ *Id.* at 19.

¹⁶⁶ The Border Action Network has established the *Derechos Pa' Todos* project, which released a comprehensive report in September 2006 that extensively documents all reported vigilante violence at the border. See Border Action Network: Campaigns, <http://www.borderaction.org/campaigns2.php?articleID=2> (last visited Oct. 31, 2006); see also BORDER ACTION NETWORK, *supra* note 70, at 19–20 (listing acts of vigilante violence at the border).

¹⁶⁷ See, e.g., Press Release, ACLU, Border Vigilante Arrested for Illegally Detaining Immigrant (Oct. 24, 2005) (detailing vigilante civil rights violations in New Mexico), available at <http://www.aclu.org/immigrants/gen/21241prs20051024.html>.

¹⁶⁸ See, e.g., RODOLFO F. ACUÑA, ANYTHING BUT MEXICAN: CHICANOS IN CONTEMPORARY LOS ANGELES 109–31 (1996); STEVEN W. BENDER, GREASERS AND GRINGOS: LATINOS, LAW, AND THE AMERICAN IMAGINATION 128–34 (2005) (detailing vigilante violence); HUMAN RIGHTS WATCH, BRUTALITY UNCHECKED: HUMAN RIGHTS ABUSES ALONG THE U.S. BORDER WITH MEXICO (1992) (detailing pre-September 11 human rights abuses at the

While the numbers and degree of civil and human rights violations are uncertain, one thing is clear: border vigilantes have violated migrants' human rights and civil liberties, and more importantly, they have actively detained and turned away migrants at places where no witnesses are present to document their actions.

This Article does not pretend to solve the border crisis, but this Part does suggest two policies that could lessen the chances for violence and human rights violations by border vigilantes. The first is for state legislatures to more narrowly tailor citizen's arrest laws to prohibit such arrests for immigration violations at the border. This initiative is particularly important as federal and border state governments undertake "comprehensive immigration reform." The second proposal is for nonprofit organizations to expand their legal observing programs at the border. These proposals, taken together, would have a dramatic effect on protecting migrants while preserving vigilantes' ability to express their views at the border and also furthering the government's attempts to secure the borders.

A. Legislative Initiatives to Remove Undocumented Migrants from the Reach of Citizen's Arrest Laws

As discussed in Part II and illustrated in Table 1, border states currently have different and unclear laws regarding whether border vigilantes can detain and arrest migrants for unlawful entry or illegal presence. Under the minority rule applied in California, border vigilantes can make citizen's arrests of undocumented migrants as they attempt to cross the border. Because of the unique likelihood for violence and abuse discussed above, vigilantes should not have this right; immigration law enforcement should be left to the thousands of U.S. Border Patrol officers who are explicitly commissioned to patrol and protect the U.S.-Mexico border. These law enforcement officials are not only publicly charged with this task, but they are also held publicly accountable for their actions.

In the current post-September 11 "comprehensive immigration reform" climate, however, even the majority rule, applied in Arizona, New Mexico, and Texas, could prove problematic; a clear answer to this legal question has become even more critical. As mentioned in the Introduction, the Antiterrorism and Illegal Immigration Control Act of 2005 would have criminalized undocumented border-crossing as a felony,¹⁶⁹ and a new law out of the Arizona State Legislature would have allowed the arrest and prosecution of undocumented immigrants under Arizona's trespassing law.¹⁷⁰ Neither bill became law, but their provisions are still under debate at the

border); Martinez, *supra* note 84, at 95 (detailing vigilante violence in Texas); Bob Moser, *Vigilante Violence*, INTELLIGENCE REP., Spring 2003 (detailing violations in 2003).

¹⁶⁹ See *supra* note 4 and accompanying text.

¹⁷⁰ See *supra* note 118 and accompanying text.

federal, state, and local levels.¹⁷¹ Further criminalizing immigration law violations to make unlawful entry or presence a felony would allow vigilantes to make arrests in each of the border states. These laws should be changed.

The simplest way to change these laws in order to prohibit citizen's arrests for unlawful presence is for state legislatures to explicitly exclude "unlawful presence" and "unlawful entry" from the list of offenses qualifying for citizen's arrests. In Arizona and California, it is only a matter of inserting an additional provision into the current citizen's arrest laws:

PROPOSED ARIZONA CITIZEN'S ARREST STATUTE

A private person may make an arrest:

1. When the person to be arrested has in his presence committed a misdemeanor amounting to a breach of the peace, or a felony.
2. When a felony has been in fact committed and he has reasonable ground to believe that the person to be arrested has committed it.
3. *Citizens may not make arrests for immigration violations for "unlawful entry," "unlawful presence," or similar border-crossing violations—as outlined by federal, state, or local law.*¹⁷²

PROPOSED CALIFORNIA CITIZEN'S ARREST STATUTE

A private person may arrest another:

1. For a public offense committed or attempted in his presence.
2. When the person arrested has committed a felony, although not in his presence.
3. When a felony has been in fact committed, and he has reasonable cause for believing the person arrested to have committed it.
4. *Citizens may not make arrests for immigration violations for "unlawful entry," "unlawful presence," or similar border-crossing violations—as outlined by federal, state, or local law.*¹⁷³

In Texas and New Mexico, changing citizen's arrests laws is a little more complicated. In New Mexico, the citizen's arrest law is based on common law and has never been codified by the state legislature.¹⁷⁴ Con-

¹⁷¹ For example, local law enforcement officials in Maricopa County, Arizona, have enlisted "a civilian force of 300 volunteers, many of them retired deputies . . . to fan out over desert backcountry, watching for smugglers and the people they guide into these parts." Randal C. Archibold, *Arizona County Uses New Law To Look for Illegal Immigrants*, N.Y. TIMES, May 9, 2006, at A19.

¹⁷² This revised law is based on ARIZ. REV. STAT. ANN. § 13-3884 (2006), with author's proposal in italics.

¹⁷³ This revised law is based on CAL. PENAL CODE § 837 (West 2006), with author's proposal in italics.

¹⁷⁴ See *supra* note 107 (articulating the common law). See generally *supra* Part II.A.

sequently, the New Mexico Legislature should pass the Uniform Citizen's Arrest Statute proposed below (based on Arizona's current statute):

UNIFORM CITIZEN'S ARREST STATUTE

A private person may make an arrest:

1. When the person to be arrested has in his presence committed a misdemeanor amounting to a breach of the peace, or a felony.
2. When a felony has been in fact committed and he has reasonable ground to believe that the person to be arrested has committed it.
3. Citizens may not make arrests for immigration violations for "unlawful entry," "unlawful presence," or similar border-crossing violations—as outlined by federal, state, or local law.

In Texas, the legislature has grouped together broad arrest powers in one statute.¹⁷⁵ Thus, the current statute should be amended to strike out the citizen's arrest provision: "A peace officer ~~or any other person~~, may, without a warrant, arrest an offender when the offense is committed in his presence or within his view, if the offense is one classed as a felony or as an offense against the public peace." Then, the Uniform Citizen's Arrest Statute (presented above) should be inserted into the Texas Code of Criminal Procedure right after the current arrest statute.

These legislative proposals are not drastic or politically unrealistic; they are narrowly tailored and would not frustrate other legitimate state interests in law enforcement and public safety. Of course, these legislative fixes would not necessarily stop border vigilantes from violating migrants' rights. They would, however, constitute a huge step forward in preventing border vigilante violence because vigilantes would clearly know that any contact with migrants could violate the state unlawful imprisonment laws discussed in Part II. They would also reflect public norms about how migrants should be treated and what rights citizens should have to detain and arrest other human beings. Equally important, these clear legal standards would assist legal observers, discussed below, in better documenting and prosecuting civil rights violators.

B. Non-Governmental Initiatives To Check Vigilantism: The Reemergence of Legal Observers

Another important means to check vigilantism emerges from the non-governmental sector: legal observing. Based on the ACLU model used to protect speech during civil rights protests in the 1960s, legal observers monitor the border to document and report civil and human rights violations of undocumented migrants at the hands of vigilantes and law enforce-

¹⁷⁵ TEX. CODE CRIM. PRO. ANN. art. 14.01 (Vernon 2006).

ment officials. Some observing groups do even more to help migrants. Arizona, for example, features groups such as “Samaritan Patrol” and “Humane Borders,” in which doctors, nuns, and other volunteers offer migrants being tracked by vigilantes water, aid, and medical supplies.¹⁷⁶ In terms of pure legal observing, volunteer groups are composed of men and women of varying age, race, educational level, and class. There is no skill or experience needed to participate, although the organization with which a volunteer decides to affiliate may affect the overall scope of observation.

The degree to which legal observers interact with the vigilantes, protestors, and migrants varies. For example, the Los Angeles chapter of the National Lawyers Guild advises that their legal observers can assist activists who are arrested unexpectedly.¹⁷⁷ On the other hand, Juan Gallegos, project coordinator of a San Diego–based legal observer coalition that includes the ACLU and La Raza Lawyers of San Diego, teaches his volunteers that their only concern is the migrants’ interests, and that protestors are outside the realm of their responsibility.¹⁷⁸

All legal observers, however, train their volunteers to be witnesses, not participants: “The role of a legal observer differs in important ways from that of a peace monitor or spokesperson. Legal observers should not become involved in crowd control, conflict resolution, or speaking for the demonstrators.”¹⁷⁹ In the worst case scenario, legal observers hope to be present at an incident of violence so that they can document the events and potentially serve as solid witnesses against the vigilantes. In the best case scenario, legal observers hope to prevent violence against migrants entirely, in that their mere presence deters the violation. In the ideal world, legal observing shifts “will be boring” because vigilantes will not act inappropriately if they are being watched.¹⁸⁰

Legal observers, even in their intentionally passive role, must be actively aware of the rights of the migrants, the border vigilantes, and themselves; they must be able to accurately identify violations that occur and not unintentionally violate any laws of their own, such as by harboring any migrants they may encounter. If they can do that, they arguably can serve as a strong deterrent to human rights violations at the border.

Indeed, the deterrent effect of such nongovernmental action has already become quite apparent. Just last November, an Arizona jury ordered Roger Barnett, the founder of the Barnett Boys, to pay nearly \$100,000 in damages to a group of Mexican American hunters for detaining them

¹⁷⁶ Martinez, *supra* note 84, at 122–23.

¹⁷⁷ Nat’l Lawyers Guild, Instructions for Legal Observers, <http://nlg-la.org/handbook.htm> (last visited Oct. 31, 2006).

¹⁷⁸ Personal Interview with Juan Gallegos, Project Coordinator, San Diego Legal Observer Coal. (Oct. 8, 2005).

¹⁷⁹ Nat’l Lawyers Guild, *supra* note 177.

¹⁸⁰ SAN DIEGO LEGAL OBSERVER COALITION TRAINING MANUAL (2005) (on file with author).

at gunpoint in October 2004.¹⁸¹ This legal victory was the result of the Border Action Network's legal observing efforts, as it collected testimony from numerous individuals who had been threatened and detained.¹⁸² This is just one of many lawsuits that such organizations have brought against border vigilante groups.¹⁸³

One reason the legal strategy has focused on filing civil actions for monetary damages—instead of seeking criminal sanctions for unlawful imprisonment—is because state officials have been reluctant to bring criminal charges.¹⁸⁴ Such reluctance could be due, in part, to the ambiguities in state citizen's arrest laws. Consequently, the legislative proposals presented in Part III.A would greatly assist observers in their efforts to protect migrants. Equally important, the continued and heightened presence of observers at the border increases the enforcement of the proposed legislation and thus the protection of migrants from vigilante violence. Both proposals should be pursued in tandem in order to ensure a safer and more secure border for migrants, vigilantes, and the public more generally.

CONCLUSION

As President Bush recently remarked, "It is important that we reform a system that is not working. . . . I strongly believe that we have a chance to get an immigration bill that is comprehensive in nature to my desk before the end of this year."¹⁸⁵ "Comprehensive immigration reform" is on the mind of federal, state, and local lawmakers, and changes to the current system will be made. In this post-September 11 climate that emphasizes national security and the rule of law, America's porous, 2000-mile Mexican border—and its growing population of 11 million undocumented migrants—will be a likely target for reform. And as President Bush remarks, America is a nation with a dual nature:

We're a nation of laws, and we must enforce our laws. We are also a nation of immigrants, and we must uphold that tradition, which has strengthened our country in so many ways. These are

¹⁸¹ Randal C. Archibold, *A Border Watcher Finds Himself Under Scrutiny*, N.Y. TIMES, Nov. 24, 2006, at A1; Press Release, Border Action Network, Jury Orders AZ Border Vigilante to Pay Nearly \$100,000 in Damages to Families (Nov. 24, 2005), available at http://lawprofessors.typepad.com/immigration/2006/11/jury_verdict_ag.html [hereinafter Border Action Network Press Release].

¹⁸² Archibold, *supra* note 181; Border Action Network Press Release, *supra* note 181.

¹⁸³ Archibold, *supra* note 181.

¹⁸⁴ Border Action Network Press Release, *supra* note 181.

¹⁸⁵ Bush, *Senators Seek Common Ground on Immigration*, *supra* note 16 (quoting President Bush).

not contradictory goals—America can be a lawful society and a welcoming society at the same time.¹⁸⁶

The rights and responsibilities of border vigilantes should not be ignored during these reform efforts—nor should the rights and struggles of undocumented migrants. It is imperative to clearly define these rights at the border—to balance vigilantes' ability to freely associate and patrol the border with the basic human rights, dignity, and safety of migrants attempting to cross it. Border states citizen's arrest laws should be modified to exclude border-crossing violations from the list of offenses qualifying for citizen's arrests. And nonprofit organizations must continue and increase their legal observing efforts at the border.

These two policy proposals are mutually reinforcing to balance migrant and vigilante rights at the border and to ensure that all border actors are treated with dignity. After all, as President Bush has remarked with respect to immigration reform, "It's important that we uphold the values of the United States of America. It's important that we treat people with dignity."¹⁸⁷

¹⁸⁶ Bush, *supra* note 1.

¹⁸⁷ Bush, *Senators Seek Common Ground on Immigration*, *supra* note 16 (quoting President Bush).