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Civilian Border Patrols: The Right to Safely Cross the Border vs. the Right to Protect Private Property.

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COMMENTS

CIVILIAN BORDER PATROLS: THE RIGHT TO SAFELY CROSS THE BORDER VS. THE RIGHT TO PROTECT PRIVATE PROPERTY

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I. INTRODUCTION

The United States Census Bureau reported in 2000 that there were over thirty-one million foreign-born immigrants living in the United States.¹ According to United States Immigration Support, an independent organization, the Council of Economic Advisors (CEA) reported that immigrants positively contributed more than \$30 billion to the U.S. economy; were more likely than native-born citizens to start-up a business; and were less likely than natives to commit crime and to be sent to prison.² On a macroeconomic level, the CEA reported that immigrants supplied \$80,000 more in tax revenue than native U.S. citizens, which increases public budgets to offset the nation’s Social Security concerns as Baby Boomers retire.³ However, many citizens and local governments

1. POPULATION DIV., U.S. CENSUS BUREAU, FOREIGN-BORN PROFILES, PROFILE OF SELECTED DEMOGRAPHIC AND SOCIAL CHARACTERISTICS FOR THE FOREIGN-BORN POPULATION: 2000, at 1 tbl.FBP-1 (2000), <http://www.census.gov/population/cen2000/stp-159/foreignborn.pdf> (providing demographic and social characteristics of the foreign born population for the year 2000).

2. See United States Immigration Support, Contributions of Immigrants to the United States, <http://www.usimmigrationsupport.org/contributions.html> (last visited Apr. 5, 2009) (discussing immigrant contributions to U.S. society in light of a common-held belief among Americans that immigrants flood the United States’ job market, take jobs away from U.S. citizens, and simultaneously cause wages to decrease). Additionally, the Pew Hispanic Center reported that there was a lack of evidence to support the proposition that immigrants contribute to a higher unemployment rate in the United States economy. *Id.*

[T]he study found that there was no significant correlation among employment rates and immigration rates. This data was taken from the U.S. Census Data, comparing data from 1990 up until 2004. In one example, the study took the 10 states with the highest employment rates during a four year period (2000 to 2004). Half of the states experienced high immigration but the other half had low immigration growth. Even in times where there was some degree of economic slowdown, there was found to be no significant correlation between immigrant growth and unemployment rate. In the states with a lower influx of immigrants, 60% of American workers did not post permanent gains in the employment sector. However, the study did not distinguish between immigrants that are legal and those who are illegal in the United States. *Id.*

3. See *id.* (highlighting the fact that immigrants also make many non-economic contributions to the United States). The immigrant population helps diversify the United States’ societal norms and gives U.S. citizens an opportunity to understand differing cultures. *Id.*

In a study conducted by Harvard University, findings indicate that many immigrant children value education more highly than young children born in the United States.

have become concerned that the immigrant population may be taking more away from the U.S. economy and society than it contributes. The Congressional Budget Office warns against the use of limited estimates that show that the cost of public services provided by state and local governments to unauthorized immigrants is greater than the taxes paid by such immigrants because these estimates are prone to error.⁴ In fact, it has been reported that “in aggregate and over the long term, tax revenues of all types generated by immigrants—both legal and unauthorized—exceed the cost of the services they use.”⁵

Despite the positive contributions of the immigrant population to the U.S. economy, the past decade has brought with it a newly incited wave of anti-immigrant sentiment due in part to the United States’ incomplete, twisted, and confusing immigration policy. The failure of our Congress to enact comprehensive immigration reform has caused both legislative and civilian bodies to use local and state patches to plug holes in federal immigration policy. “In the continued absence of a comprehensive federal reform of the United States’ challenged immigration system, states have displayed an unprecedented level of activity—and have developed a variety of their own approaches and solutions.”⁶ In 2008, approximately 1305 bills relating to immigration were proposed with forty-one states of which no less than one law or resolution was enacted.⁷ States are often left to

In many immigrant families, education is stressed as the way to a better life. Many immigrant children end up pursuing higher education and this adds to a greater number of individuals in the U.S. with a college education. As a result of an increased population attaining advanced degrees, the U.S. can be even more competitive in today’s global market. *Id.*

4. See CONG. BUDGET OFFICE, THE IMPACT OF UNAUTHORIZED IMMIGRANTS ON THE BUDGETS OF STATE AND LOCAL GOVERNMENTS 7 (2007), <http://www.cbo.gov/ftpdocs/87xx/doc8711/12-6-Immigration.pdf> (indicating that current estimates are based on federal, state, and local level spending and that their use to determine an aggregate, nation-wide impact would be prone to error).

5. *Id.* at 1 (adding that these estimates combine spending by federal, state, and local governments). The proponents of these estimates concede, however, that the tax revenue generated by unauthorized immigrants does not fully compensate state and local governments for money spent to provide public services to such immigrants. *Id.* To clarify, “unauthorized immigrant” refers to an immigrant who either enters the United States without inspection or who violates the terms of his or her admission into the United States. *Id.* at n.1.

6. NAT’L CONFERENCE OF STATE LEGISLATURES, 2007 ENACTED STATE LEGISLATION RELATED TO IMMIGRANTS AND IMMIGRATION 1 (2007), <http://www.ncsl.org/print/immig/2007Immigrationfinal.pdf> (adding that the immigration legislation individual states have proposed covers almost all policy issues, but especially focuses on identification, employment, public health, law enforcement, state licenses, and human trafficking issues).

7. See NAT’L CONFERENCE OF STATE LEGISLATURES, STATE LAWS RELATED TO IMMIGRANTS AND IMMIGRATION IN 2008 1 (2008), <http://www.ncsl.org/print/immig/StateImmigReportFinal2008.pdf> (detailing that the 2008 level of activity falls in sync with the level

interpret the intricacies of federal immigration law and for the first time, two state representatives have asked the Attorney General to issue an opinion concerning certain immigration issues before passing legislation.⁸ During Texas's last legislative session (the 80th session), numerous bills were proposed to deal with the immigrant population and sixty of those bills included anti-immigrant provisions.⁹

The failure to enact comprehensive immigration reform has also caused a response from local civilian groups. "Over the past fifteen years, civilian border patrol organizations appear to have proliferated along the U.S.-Mexico border . . ."¹⁰ In an effort to strengthen immigration policy enforcement, the 109th Congress introduced bills that would have the effect of expanding civilian activities as well as bills that addressed the effect of civilian border patrol groups on current border enforcement operations.¹¹

of activity in 2007 when 1562 bills were proposed to deal with immigration and 240 of those bills were enacted into law).

8. See Letter from Frank J. Corte, Jr. and Dan Patrick, Tex. H.R., to Greg Abbott, Attorney Gen., Tex. (Aug. 6, 2008) (RQ-0732-GA) (on file with Texas Attorney General Office) (requesting that the Attorney General address the issue of whether "state legislation affecting employers of unauthorized aliens is permissible under federal law"); see also Letter from Frank J. Corte, Jr. and Dan Patrick, Tex. H.R., to Greg Abbott, Attorney Gen., Tex. (Aug. 6, 2008) (RQ-0733-GA) (on file with Texas Attorney General Office) (requesting that the Attorney General address whether the Texas Legislature has the authority to deter local governments from creating "sanctuary cities").

9. See American Civil Liberties Union of Texas, ACLU Highlights Successes in 80th Legislative Session, <http://www.aclutx.org/projects/article.php?aid=493&cid=31> (last visited Mar. 17, 2009) (tracing the legislative activity concerning immigration during the 80th legislative session). Of the sixty anti-immigrant bills that were proposed, "H.B. 13, the controversial border security bill, passed as an amendment to S.B. 11, but all of the anti-immigrant provisions were stripped out." *Id.* Additionally, two bills, H.B. 1196 and H.B. 1121, which respectively provide employer sanctions for hiring unauthorized workers and support for human trafficking and severe crime victims, were sent to the governor. *Id.*

10. Stephen R. Vina, Blas Nunez-Neto & Alyssa Bartlett Weir, *Civilian Patrols Along the Border: Legal and Policy Issues* 1 (Cong. Research. Serv., CRS Report for Congress, Order Code RL33353, Apr. 7, 2006), available at <http://www.fas.org/sgp/crs/homsec/RL33353.pdf> (pointing to the fact that civilian border patrol groups have monitored the border for various reasons over the past 150 years).

In the spring of 2005, attention focused on these civilian patrols, when the "Minuteman Project" mobilized hundreds of volunteers along the Arizona-Mexico border to observe and report the movement of illegal aliens to the U.S. Border Patrol. Although some participants were armed, Minutemen volunteers were instructed not to engage in hostile confrontations with any illegal alien. *Id.*

11. See *id.* (implying that groups like the Minutemen have "sparked a national debate on the legality and effectiveness of such civilian action along the border"). The debate centers around issues such as the authority border patrol groups have to enforce federal immigration laws, whether a border volunteer is technically a private or a federal actor,

There are many different kinds of border patrol groups. Ad hoc groups lack formal organizational structure¹² while organized civilian patrol groups “feature formal organizations that actively recruit members, raise funds, and issue press releases, in addition to patrolling the border.”¹³ These groups often link social problems to illegal immigration and implement “pseudo-military style operations featuring armed camouflage-clad volunteers, [that] allegedly [use] violence.”¹⁴

This increased civilian vigilantism against immigrants has led to an increase in race-related hate crimes. “[R]acial discrimination is as much an exercise of in-group favoritism as it is an exercise of out-group derision” which leads to racially polarized group dynamics.¹⁵ The Mexican-American Legal Defense and Educational Fund (MALDEF) reports that “[r]ecent FBI statistics show that hate crimes against Latinos, U.S.-born and immigrant alike, have shot up by a disturbing [thirty-seven] percent in recent years” as a result of, among other things, anti-immigrant legislation.¹⁶

and whether or not the federal government should grant border patrol groups express authority to conduct their border activities. *Id.*

12. *See id.* at 6 (defining ad hoc groups as groups “typically comprised of local citizens reacting to increasing numbers of unauthorized immigrants crossing into the country through their land”); *see also* Geoffrey Mohan, *Arizona Ranchers Move to Limit Border Crossings*, ALBANY TIMES UNION, May 28, 2000, at 22 (illustrating, by example, the story of Roger Barnett who patrols his 22,000-acre cattle ranch in an effort to catch illegal border crossers who trespass on his land). However, “this privatized approach by the Barnetts and a handful of others has raised charges that . . . [it has] . . . become open season on undocumented immigrants who use the Arizona desert as their illegal bridge to jobs farther north.” *Id.*

13. Stephen R. Vina, Blas Nunez-Neto & Alyssa Bartlett Weir, *Civilian Patrols Along the Border: Legal and Policy Issues 7* (Cong. Research. Serv., CRS Report for Congress, Order Code RL33353, Apr. 7, 2006), available at <http://www.fas.org/sgp/crs/homesecc/RL33353.pdf> (differentiating organized groups due to their express goal of using their activities to specifically address the issues surrounding undocumented immigrants crossing the border). Ranch Rescue, an organization formed by Jack Foote in 2000 to protect border ranchers’ property rights, is an example of an organized civilian Border Patrol group. *Id.* at 8. It is comprised of “a heavily armed tactical team” and its members receive military-style training. *Id.* at 8–9.

14. *See id.* at 7–8 (commenting on Glen Spencer, who formed an organized civilian patrol group in 1992, and “launched a newsletter which linked the various social problems facing Los Angeles, including poverty, violence, illiteracy, and [W]hite flight, to illegal immigration”).

15. *See* Catherine E. Smith, *The Group Dangers of Race-Based Conspiracies*, 59 RUTGERS L. REV. 55, 55 (2006) (exploring how race plays a factor in group behavior). “The racial identification and resulting racialized group dynamics of race-based conspiracies pose special dangers to society and individuals because racial loyalty, racial persuasion, and racial conformity create a particularly virulent form of racist acts.” *Id.*

16. News Release, Mexican Am. Legal Def. & Educ. Fund, MALDEF Calls for Peace and Justice in Wake of Hate Crime (July 29, 2008).

This Comment seeks to call for comprehensive immigration reform by outlining the results of a failed federal immigration policy that does not address society's pressing concerns pertaining to immigration. The discussion will begin with the source of federal power to control immigration issues and then shift to the civilian response to a lack of federal immigration reform. It will outline the source of a civilian border patrol group's right to monitor the border and make arrests; the ensuing litigation; immigrant's rights at the border; the racial tensions that result from the lack of federal immigration reform; and conclude with a proposed resolution to calm civilian tensions on the U.S.-Mexico border. The legislative and civilian backlash against immigrants has led to an upswing in civilian border patrol groups who are often driven by racial prejudices and who advocate and influence the enactment of racially-biased legislation which leads to the creation of a new, second-class immigrant American citizen.

II. LEGAL BACKGROUND

A. *The Federal Government's Statutory Right to Control Immigration*

In its policy-making guide, the American Immigration Lawyers Association asserts that "public frustration with our broken immigration system and federal inaction is now hyper-charged."¹⁷ However, only the federal government "has the constitutional authority, institutional orientation, and national perspective" to address the breakdown of our immigration structure.¹⁸ Until the enactment of the Homeland Security Act (HSA), the Attorney General had almost exclusive administrative authority over immigration law as set out in former § 103(a)(1) of the Immigration and Nationality Act of 1952 (INA).¹⁹ Administrative authority over immigra-

17. AM. IMMIGRATION LAWYERS ASS'N, NAVIGATING THE IMMIGRATION DEBATE 1 (2008), <http://www.aila.org/content/fileviewer.aspx?docid=24681&linkid=172618> (discussing the growth of immigration policy as a topic of debate). To illustrate its point, the American Immigration Lawyers Association (AILA) recounts how a declining Maryland farm town "recently debated restrictive immigration legislation even though there are less than two dozen foreign-born residents living [in the town]." *Id.* In reality, most local governments who debate immigration policy cannot legitimately claim that there has been such an influx of immigrants into their jurisdictions as to necessitate the implementation of immigration legislation. *Id.* "The Legislative backlash . . . has been disproportionate to any actual public policy problem." *Id.*

18. *Id.* at 2 (suggesting that the United States' broken immigration system is a result of federal inaction which produces "localized skirmishes that . . . [spread] . . . like prairie fires across the land"). The failures in the United States' immigration system have begun to fester in local communities and have led to the passage of unconstitutional immigration legislation. *Id.*

19. See Stephen R. Vina, Blas Nunez-Neto & Alyssa Bartlett Weir, *Civilian Patrols Along the Border: Legal and Policy Issues 2* (Cong. Research. Serv., CRS Report for Congress, Order Code RL33353, Apr. 7, 2006), available at <http://www.fas.org/sgp/crs/homesecl>

tion law was transferred by the HSA from the Department of Justice (DOJ) to the Department of Homeland Security (DHS).²⁰ The amended version of § 103(a)(1) of the INA vests administration and enforcement of immigration laws in the Secretary of Homeland Security.²¹ Under INA § 103(a)(5), the Secretary of Homeland Security is in charge of controlling undocumented immigrant's illegal passage across the United State's borders.²² Immigration law enforcement at ports of entry is headed by DHS's Customs Border Protection (CBP) while immigration law enforcement between ports of entry is headed by the U.S. Border Patrol (USBP).²³ The Secretary of Homeland Security is further charged with the ability to delegate any DHS authority or function to other DHS employees or officers.²⁴ This authority includes the ability to delegate border enforcement to any CBP, DHS, USBP, or Immigration and Customs Enforcement (ICE) employee, any United States employee, and to local and state law enforcement officers.²⁵ The authority of an individual officer to enforce immigration laws at the border between ports of entry is given in INA § 287, which gives immigration officers the power not

RL33353.pdf (outlining an antiquated section of the INA that vested virtually all administrative legal authority of immigration laws in the Attorney General and was fundamental in regulating alien entry).

20. *See id.* (identifying the changes in the INA due to the HSA). "The HSA makes clear that all functions of all officers, employees, and organizational units of the DHS are vested in the Secretary." *Id.*

21. *See* 8 U.S.C. § 1103(a)(1) (2006) ("The Secretary of Homeland Security shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens . . ."). The ruling of the Attorney General shall be controlling over legal questions regarding the validity of the laws enforced by the Secretary of Homeland Security. *Id.*

22. *See id.* § 1103(a)(6) (may require or authorize any employee of the Service or the Department of Justice to perform or exercise any of the powers, privileges, or duties conferred or imposed by this Act or regulations issued there under upon any other employee of the Service").

23. *See* Stephen R. Vina, Blas Nunez-Neto & Alyssa Bartlett Weir, *Civilian Patrols Along the Border: Legal and Policy Issues* 3 (Cong. Research. Serv., CRS Report for Congress, Order Code RL33353, Apr. 7, 2006), available at <http://www.fas.org/sgp/crs/homesecc/RL33353.pdf> (distinguishing Customs and Border Protection from United States Border Patrol). "Although CBP is charged with overall border enforcement, a distinction is made concerning border enforcement *at* and *between* ports of entry. Immigration enforcement responsibilities between ports of entry fall primarily on USBP, while responsibilities at the ports of entry fall on CBP inspectors." *Id.*

24. *See* 8 C.F.R. § 2.1 (2008) (emphasizing that the Secretary of Homeland Security has the discretion to delegate any "official, officer, or employee of the Department of Homeland Security" to handle issues resulting from the enforcement of immigration law).

25. *See* Stephen R. Vina, Blas Nunez-Neto & Alyssa Bartlett Weir, *Civilian Patrols Along the Border: Legal and Policy Issues* 3 (Cong. Research. Serv., CRS Report for Congress, Order Code RL33353, Apr. 7, 2006), available at <http://www.fas.org/sgp/crs/homesecc/RL33353.pdf>.

only to access private lands within twenty-five miles of the border,²⁶ but to interrogate aliens, make arrests, board vessels, and conduct searches without warrants.²⁷ Furthermore, the term “immigration officer” is restricted to only those DHS or United States employees that the Secretary of Homeland Security or Attorney General authorize to implement the immigration laws of the federal government.²⁸

B. *Civilian Border Patrol Groups’ Legal Rights*

The proliferation of civilian border patrol groups began in the 1990s as a response to increased illegal immigration.²⁹ Up until the early 1990s, border vigilante groups were prevalent along the San Diego border.³⁰ However, such groups began to multiply, principally in Arizona, after President Bill Clinton enacted “Operation Gatekeeper,” which focused on decreasing illegal immigration in border towns in California by constructing a ten-foot wall along fourteen miles of the border between California and Mexico.³¹ Additional programs in California, such as

26. See 8 U.S.C. § 1357(a)(3) (2006) (allowing an immigration officer to access private lands “within a distance of twenty-five miles from any . . . external boundary . . . but not dwellings, for the purpose of patrolling the border to prevent the illegal entry of aliens into the United States”). An immigration officer can only use the power described when he is authorized by the Attorney General. *Id.*

27. See generally *id.* § 1357 (detailing the broad authority conferred upon the Attorney General and immigration officers in regards to immigration law); see also Stephen R. Vina, Blas Nunez-Neto & Alyssa Bartlett Weir, *Civilian Patrols Along the Border: Legal and Policy Issues* 4 (Cong. Research. Serv., CRS Report for Congress, Order Code RL33353, Apr. 7, 2006), available at <http://www.fas.org/sgp/crs/homesecc/RL33353.pdf> (summarizing the authority of immigration officers to prevent illegal immigrants from entering the United States).

28. See 8 U.S.C. § 1101(a)(18) (2006) (“The term ‘immigration officer’ means any employee or class of employees of the Service or of the United States designated by the Attorney General, individually or by regulation, to perform the functions of an immigration officer . . .”).

29. See Peter Yoxall, Comment, *The Minuteman Project, Gone in a Minute or Here to Stay? The Origin, History and Future of Citizen Activism on the United States-Mexico Border*, 37 U. MIAMI INTER-AM. L. REV. 517, 530 (2006) (indicating that the majority of civilian vigilante ranch groups that formed in the 1990s had similar characteristics and used similar rationale to justify their patrolling behavior). Furthermore, “many of their reasons, justifications, and characteristics bear similar relations to the early historical vigilante groups that patrolled the United States-Mexico border.” *Id.* These civilian border patrols justify their actions as necessary to “avoid the deterioration and ultimate loss of American society.” *Id.*

30. See Stephen R. Vina, Blas Nunez-Neto & Alyssa Bartlett Weir, *Civilian Patrols Along the Border: Legal and Policy Issues* 6 (Cong. Research. Serv., CRS Report for Congress, Order Code RL33353, Apr. 7, 2006), available at <http://www.fas.org/sgp/crs/homesecc/RL33353.pdf> (tracing the expansion of civilian border patrol groups).

31. See 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 Activ-*

“Prevention Through Deterrence,” coincided with the growth of border patrol groups in Texas and Arizona³² because illegal immigration was merely diverted from the California-Mexico border to the desert lands on the Texas-Mexico and Arizona-Mexico border.³³ Citizens and property owners became infuriated about the property damage that resulted due to the newly created illegal traffic across their ranches and balked at the government’s refusal to address the problem.³⁴ As a result, civilian border patrol groups increased along the borders where illegal traffic had been diverted.³⁵

Civilian border patrol groups claim to be private actors not operating under the color of law; however, their activities, organization, equipment, and mode of dress cause them to appear as official federal border patrol agents.³⁶ This is true to such a degree that their activities have sparked a national concern about their legality and right to patrol the U.S.-Mexico

ity on the United States/Mexico Border, 56 *MERCER L. REV.* 1419, 1424 (2005) (asserting that Operation Gatekeeper was successful in curing San Diego’s immigration issues). “San Diego’s Border Patrol resources were also increased; they received new computers, new vehicles, a fingerprinting system, and a sixty percent increase in the number of Border Patrol agents.” *Id.*

32. See Stephen R. Vina, Blas Nunez Neto & Alyssa Bartlett Weir, *Civilian Patrols Along the Border: Legal and Policy Issues* 6 (Cong. Research. Serv., CRS Report for Congress, Order Code RL33353, Apr. 7, 2006), available at <http://www.fas.org/sgp/crs/homesecl/RL33353.pdf> (commenting that the emergence of civilian border patrol groups tend to correlate with unauthorized migration trends).

33. See 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, 1424–25 (2005) (recognizing that the immigration policies in California were “designed to slow the illicit human traffic across the [U.S.-Mexico] border, but instead, the ‘traffic’ was merely diverted to the deserts, creating new problems”).

34. See Stephen R. Vina, Blas Nunez-Neto & Alyssa Bartlett Weir, *Civilian Patrols Along the Border: Legal and Policy Issues* 6 (Cong. Research. Serv., CRS Report for Congress, Order Code RL33353, Apr. 7, 2006), available at <http://www.fas.org/sgp/crs/homesecl/RL33353.pdf> (demonstrating the frustration among property owners affected by the influx of illegal immigrants entering the United States through their respective private lands).

35. See *id.* (“Not surprisingly, civilian border patrol groups have tended to follow the trends of unauthorized migration.”).

36. See Adalgiza A. Núñez, Note, *Civilian Border Patrols: Activists, Vigilantes, or Agents of the Government?*, 60 *RUTGERS L. REV.* 797, 810 (2008) (emphasizing the fact that although civilian border patrol groups state they are merely volunteer organizations, their media interaction and other paramilitary actions prove a desire to appear as Border Patrol agents).

The Minuteman groups, as well as Ranch Rescue, purporting to be a second level of defense that secures the national border from “invasion,” make a concerted attempt to engage in official state activity. They patrol the border (sometimes entering private property), question individuals, make detentions, carry weapons, and attempt to determine whether individuals are documented. *Id.*

border and whether or not such volunteers should be “deputized” in order to better regulate and control the groups’ activities.³⁷

Nevertheless, these border patrol groups derive their right to organize from the First Amendment of the U. S. Constitution which grants United States citizens freedom of speech, to assemble peaceably, and to ask the government to address certain grievances.³⁸ Under this rationale, border patrol groups need no statutory authority to conduct their activities and the volunteers’ right to “assemble, carry weapons, report potentially illegal activities, and to protect their property and themselves in some instances stems independently under a combination of constitutional and common law rights and privileges.”³⁹ There is a common law right to defend one’s self, one’s property, and to make citizen’s arrests,⁴⁰ many of

37. Stephen R. Vina, Blas Nunez-Neto & Alyssa Bartlett Weir, *Civilian Patrols Along the Border: Legal and Policy Issues* Summary-1 (Cong. Research. Serv., CRS Report for Congress, Order Code RL33353, Apr. 7, 2006), available at <http://www.fas.org/sgp/crs/homesecc/RL33353.pdf> (describing the debate concerning exactly what federal or state authority gives border patrol groups the right to conduct their activities).

Some questioned, for instance, the authority that allows civilians to undertake immigration-related enforcement activities and the legal status of a volunteer (i.e., private vs. federal actor). Others suggested that the Secretary of Homeland Security should “deputize” the Minuteman volunteers or other private citizens so that they may play a larger and more regulated role. *Id.* at Summary.

38. See U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”).

39. Stephen R. Vina, Blas Nunez-Neto & Alyssa Bartlett Weir, *Civilian Patrols Along the Border: Legal and Policy Issues* 12 (Cong. Research. Serv., CRS Report for Congress, Order Code RL33353, Apr. 7, 2006), available at <http://www.fas.org/sgp/crs/homesecc/RL33353.pdf> (emphasizing that civilian border patrol groups seem to have a constitutional and common law right to carry-out their activities).

While some may question whether the Minuteman Project is a peaceful assembly (since they are armed and performing *quasi* law enforcement function), there seem[] to be few, if any, transgressions. There is also little doubt that the Minuteman Project has formed, in part, to send a message to law makers that more needs to be done to secure the border. *Id.*

40. See 5 AM. JUR. 2D Arrest § 48 (2008) (outlining the requirements for making a citizen’s arrest at common law). “At common law, a private person can arrest without warrant for a felony or breach of the peace committed in his or her presence.” *Id.* Furthermore, a private individual has the right and duty to arrest any person who commits a felony in the private citizen’s presence. *Id.* “Actual knowledge of the commission of the felony is not required to authorize a valid citizen’s arrest, as all that is required is reasonable grounds to believe that: (1) a felony had been committed, and (2) that the person arrested was the responsible agent.” *Id.* A person making a citizen’s arrest has a general duty to promptly deliver the wrongdoer to the proper authorities. See Stephen R. Vina, Blas Nunez-Neto & Alyssa Bartlett Weir, *Civilian Patrols Along the Border: Legal and Policy Issues* 13 n.56 (Cong. Research. Serv., CRS Report for Congress, Order Code

which have been codified into state law.⁴¹ For example, under Texas law, a private person may make a citizen's arrest if, in his presence, the offender commits a felony or public peace offense.⁴² Under the Texas Penal Code, a citizen may use self-defense to an immediately necessary degree to protect himself against an offender's use or threat to use unlawful force.⁴³ The Code also gives a private individual the right to use deadly force against an offender to the degree immediately necessary to protect himself from the aggressor's use or threat to use deadly force against the private individual.⁴⁴ Finally, in Texas, a person may use the

RL33353, Apr. 7, 2006), available at <http://www.fas.org/sgp/crs/homsec/RL33353.pdf> (outlining the requirements for making a citizen's arrest).

41. Stephen R. Vina, Blas Nunez-Neto & Alyssa Bartlett Weir, *Civilian Patrols Along the Border: Legal and Policy Issues* 12–13 (Cong. Research. Serv., CRS Report for Congress, Order Code RL33353, Apr. 7, 2006), available at <http://www.fas.org/sgp/crs/homsec/RL33353.pdf> (discussing the common law privileges of self defense, defense of property, and citizen's arrest). Citizen arrest authority "generally permits a private person to arrest another without a warrant for misdemeanors that amount to a 'breach of the peace' and felonies committed in his presence." *Id.* at 13.

42. See TEX. CODE CRIM. PROC. ANN. art. 14.01(Vernon 2005) (stating the Texas citizen's arrest law when the offense occurs within the citizen's view).

- (a) 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.
- (b) A peace officer may arrest an offender without a warrant for any offense committed in his presence or within his view. *Id.*

43. See TEX. PENAL CODE ANN. § 9.31 (Vernon 2003) (outlining the situations where self defense is justifiable). "[A] person is justified in using force against another when and to the degree the actor reasonably believes the force is immediately necessary to protect the actor against the other's use or attempted use of unlawful force." *Id.*

44. See *id.* § 9.32(a)-(b) (indicating when the use of deadly force would be justified).

- (a) A person is justified in using deadly force against another:
 - (1) if the actor would be justified in using force against the other under Section 9.31; and when and to the degree the actor reasonably believes the deadly force is immediately necessary:
 - (A) to protect the actor against the other's use or attempted use of unlawful deadly force; or
 - (B) to prevent the other's imminent commission of aggravated kidnapping, murder, sexual assault, aggravated sexual assault, robbery, or aggravated robbery.
 - (b) The actor's belief under Subsection (a)(2) that the deadly force was immediately necessary as described by that subdivision is presumed to be reasonable if the actor:
 - (1) knew or had reason to believe that the person against whom the deadly force was used:
 - (A) unlawfully and with force entered, or was attempting to enter unlawfully and with force, the actor's occupied habitation, vehicle, or place of business or employment;

amount of force that is reasonable and necessary to eject a trespasser from his or her land.⁴⁵

Civilian border patrol groups do not appear to be explicitly authorized by any state or federal government and have an armory of affirmative defenses, but even as such, they often get into trouble due to the fact that they must abide by federal and state laws like any other citizen.⁴⁶ For example, many individual border patrol group volunteers have had suits brought against them for trespassing onto private property while attempting to patrol the border, or for inadvertently passing into federal border land while carrying a firearm, all of which are against state and federal laws.⁴⁷ Furthermore, many vigilante groups clad themselves in official-looking attire, including badges and uniforms that strongly resemble USBP uniforms, and use equipment and dogs to hunt immigrants who may be crossing the border illegally.⁴⁸ Nevertheless, these groups must heed to federal laws that criminalize those who impersonate federal of-

(B) unlawfully and with force removed, or was attempting to remove unlawfully and with force, the actor from the actor's habitation, vehicle, or place of business or employment; or

(C) was committing or attempting to commit an offense described by Subsection (a)(2)(B);

(A) did not provoke the person against whom the force was used; and

(B) was not otherwise engaged in criminal activity, other than a Class C misdemeanor that is a violation of a law or ordinance regulating traffic at the time the force was used. *Id.*

45. *See id.* § 9.41(a) (“A person in lawful possession of land or tangible, movable property is justified in using force against another when and to the degree the actor reasonably believes the force is immediately necessary to prevent or terminate the other’s trespass on the land or unlawful interference with the property.”). Although the use of physical force is usually prohibited, it is justifiable in several situations. *Id.*; *see also* TEX. PENAL CODE ANN. § 9.42(Vernon 2003) (highlighting when deadly force may be used to protect one’s property).

46. *See* Stephen R. Vina, Blas Nunez-Neto & Alyssa Bartlett Weir, *Civilian Patrols Along the Border: Legal and Policy Issues* 13 (Cong. Research. Serv., CRS Report for Congress, Order Code RL33353, Apr. 7, 2006), available at <http://www.fas.org/sgp/crs/homesecl/RL33353.pdf> (warning that all civilian border patrol groups must comply with federal and state laws).

47. *See id.* (“[C]ivilian border patrol groups must be mindful of laws that make it a crime to trespass or carry a firearm on federal lands.”). Additionally, border patrol groups must comply with special requirements pertaining to entry upon Indian territories on or near the border. *Id.*

48. *See* 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, 1426 (2005) (describing the uniforms of members of one particular group of border patrol volunteers, Ranch Rescue). “Ranch Rescue puts on airs of legitimacy by wearing army fatigues and encouraging members to bring tools normally used by legitimate law enforcement [officers], including night vision equipment, guard dogs, and weapons.” *Id.*

ficers or employees.⁴⁹ What is more, federal law prohibits civilian border patrol groups from impeding the duties of federal immigration officers.⁵⁰

In terms of state laws, border patrol group members are often held liable for crimes of false imprisonment, trespass, assault and battery, and manslaughter.⁵¹ Additionally, some states, including Texas, have anti-militia laws which may apply to civilian border patrol groups depending on how the group carries out its activities.⁵²

C. *Constitutional Protections for Aliens*

Border patrol groups are not alone under the umbrella of constitutional protection. The United States Constitution affords certain protections to undocumented persons who have already entered the United States. The Fourth Amendment of the United States Constitution protects such persons from unreasonable searches and seizures⁵³ and from

49. See 18 U.S.C. § 912 (2006).

Whoever falsely assumes or pretends to be an officer or employee acting under the authority of the United States or any department, agency or officer thereof, and acts as such, or in such pretended character demands or obtains any money, paper, document, or thing of value, shall be fined under this title or imprisoned not more than three years, or both. *Id.*

See also 18 U.S.C. § 913 (2006).

Whoever falsely represents himself to be an officer, agent, or employee of the United States, and in such assumed character arrests or detains any person or in any manner searches the person, buildings, or other property of any person, shall be fined under this title or imprisoned not more than three years, or both. *Id.*

50. See 18 U.S.C. § 111 (2006) (condemning those who impede the work of federal officers and employees, which is punishable as a simple assault and merits a fine and/or imprisonment of up to one year). If the act involves physical contact of the officer or is done with the intent to commit a felony, the time for imprisonment can rise up to eight years; if the act is committed with a deadly or dangerous weapon, the imprisonment penalty can go up to twenty years. *Id.*

51. See Stephen R. Vina, Blas Nunez-Neto & Alyssa Bartlett Weir, *Civilian Patrols Along the Border: Legal and Policy Issues* 14 (Cong. Research. Serv., CRS Report for Congress, Order Code RL33353, Apr. 7, 2006), available at <http://www.fas.org/sgp/crs/homesecc/RL33353.pdf> (stating that in regards “to state crimes, assault, false arrest or imprisonment, trespass, disorderly conduct, and manslaughter are among offenses that could arise in the context of a civilian conducting *quasi* law enforcement duties along the often violent international border”).

52. See TEX. GOV'T CODE ANN. § 431.010(a) (Vernon 2007) (“[A] body of persons other than the regularly organized state military forces or the troops of the United States may not associate as a military company or organization or parade in public with firearms in a municipality of the state.”).

53. U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .”).

harm inflicted when federal authority is enforced.⁵⁴ In *INS v. Lopez-Mendoza*,⁵⁵ the Supreme Court acknowledged that although illegal entry is a crime, proper administration of immigration law requires that an illegal entrant in removal proceedings receive a hearing.⁵⁶ The Supreme Court has further ruled that a noncitizen illegally present in the United States may not be deprived of life, liberty, or property without due process of law as provided in the Fifth Amendment.⁵⁷ Finally, it has been held that other than the “core immigration issues of admission and expulsion,” noncitizens physically present in the United States are also protected by the First Amendment⁵⁸ which provides protection in matters relating to religion, speech, press, the right to assemble, and the right to petition the government and the Sixth Amendment⁵⁹ which affords protection in criminal prosecutions.⁶⁰

54. See Michael J. Nunez, Note, *Violence at Our Border: Rights and Status of Immigrant Victims of Hate Crimes and Violence Along the Border Between the U.S. and Mexico*, 43 HASTINGS L.J. 1573, 1580 (1992) (outlining the limited constitutional protection afforded to alien immigrants through the Fourth Amendment).

The Fourth Amendment of the United States Constitution provides that the right of the people to be secure against unreasonable searches and seizures of their persons, houses, papers, and effects, shall not be violated. This amendment limits the exercise of federal power and guarantees citizens freedom from harm inflicted pursuant to federal authority. *Id.* (footnote omitted).

55. 468 U.S. 1032 (1984).

56. See *INS v. Mendoza-Lopez*, 468 U.S. 1032, 1038 (1984) (“Deportation proceeding is a purely civil action to determine eligibility to remain in this country, not to punish an unlawful entry, though entering or remaining unlawfully in this country is itself a crime.”); see also Michael J. Nunez, Note, *Violence at Our Border: Rights and Status of Immigrant Victims of Hate Crimes and Violence Along the Border Between the United States and Mexico*, 43 HASTINGS L.J. 1573, 1580–81 (1992).

In *INS v. Lopez-Mendoza*, the Supreme Court examined whether an alien’s admission of his or her unlawful presence in the United States, obtained during an unlawful arrest that violated the Fourth Amendment, must be excluded from a civil deportation hearing. The Court held that the exclusionary rule did not apply in a civil deportation proceeding, but it did not stop there; it also reasoned that use of the exclusionary rule would not be beneficial in a deportation hearing. *Id.*

57. U.S. CONST. amend. V (stating that no person shall be deprived of “life, liberty, or property, without due process of law”); see Michael J. Nunez, Note, *Violence at Our Border: Rights and Status of Immigrant Victims of Hate Crimes and Violence Along the Border Between the U.S. and Mexico*, 43 HASTINGS L.J. 1573, 1584–85 (1992) (“[C]omparing the words and spirit of the Fifth Amendment as interpreted by the Court with the realities of the daily abuses reveals a vast disparity between the protection theoretically afforded illegal aliens and the protection they actually receive.”).

58. U.S. CONST. amend. I.

59. See *id.* at amend. VI.

60. See THOMAS ALEXANDER ALEINIKOFF ET AL., *IMMIGRATION AND CITIZENSHIP* 207 (6th ed. 2008) (discussing the constitutional protections of noncitizen immigrants physically present in the United States). Although case law establishes that Congress’s power

Federal inaction to enforce immigration laws has caused an explosion between citizens' and noncitizens' free exercise of constitutional rights, leaving American society to deal with the debris.

III. LEGAL ANALYSIS

A. *Political and Social Issues*

Civilian border patrol groups paint a bleak picture of the U.S.-Mexico Border. They claim their presence and shrewdly constructed fences are needed to repel the storm of criminals and terrorists that threaten to pour into the United States.⁶¹ An analysis of the U.S.-Mexico border, however, reveals a different story. In fact, the Census Bureau reports that due to the current economic downturn and a governmental "crack-down on illegal immigration," a border vigilante may observe a slight reversal in migration patterns.⁶² Traditionally, immigration to the United States increases year after year, but trends reflect that illegal immigration from Mexico and Central America has decreased and more startling, immigrants already present in the U.S. are returning to their native countries.⁶³

to regulate immigration is inherent to sovereignty and is not one of the powers granted to it by the Constitution, noncitizens living in the United States are still afforded certain constitutional protections. *Id.*

61. See Christopher J. Walker, *Border Vigilantism and Comprehensive Immigration Reform*, 10 HARV. LATINO L. REV. 135, 137-38 (2007).

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. . . . These groups have reportedly even begun to build fences along the border, without permission or sanction from the U.S. Border Patrol, in areas where undocumented migrants are known to cross. 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. *Id.*

62. Miriam Jordan & Conor Dougherty, *Immigration Slows in Face of Economic Downturn—U.S. Crackdown on Illegals Further Dims Opportunity*, WALL ST. J., Sept. 28, 2008, at A12 (illustrating the current state of immigration). "The economic downturn, coupled with a government crackdown on illegal immigration, is dramatically slowing immigration to the U.S., according to new data from the Census Bureau." *Id.* The Census Bureau's annual American Community Survey, reflects that the United States' foreign-born population had a 500,000 increase last year, which is approximately half the reported annual average for the years of 2000 through 2007. *Id.*

63. See Miriam Jordan, *Latest Immigration Wave: Retreat*, WALL ST. J., Oct. 2, 2008, at A1 (retelling the story of Ambrosio Carrillo, a Guatemala native who made the dangerous trek to illegally cross the United States border only to return in the face of the United States' economic downturn). "After years of growth, illegal immigration to the U.S. from Mexico and Central America has slowed sharply." *Id.* According to the Pew Hispanic

Furthermore, the average member of a civilian border patrol group has never even seen the U.S.-Mexico border he or she claims to protect.⁶⁴ Those who actually patrol to the border are more likely *not* to report an actual observance of the alleged illegal immigrant deluge because “they rarely encounter migrants of any kind.”⁶⁵ Nonetheless, border vigilante groups have been successful in influencing border dynamics and government policy.⁶⁶

1. The Threat of Federal Interference Posed by Civilian Border Patrol Groups

The potential for violence at the border caused former President George W. Bush and his administration to be wary of civilian border patrol groups.⁶⁷ However, the political force of these groups has lead many

Center, undocumented immigration from Mexico has decreased by twenty-five percent and has not only affected the U.S. economy, but has had side-effects on small Central American towns that are dependent on a cash flow from the United States. *Id.*

64. See Christopher J. Walker, *Border Vigilantism and Comprehensive Immigration Reform*, 10 HARV. LATINO L. REV. 135, 138 (2007) (emphasizing that many civilian border patrol members have only seen the U.S.-Mexico border on their computer screens and, without first-hand knowledge of the situation, continue to impact immigration policy-making).

In the other Border States—Arizona, New Mexico, and Texas—less than 500 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. *Id.*

65. *Id.* (“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.”)

66. See *id.* at 138–39 (stating that civilian border patrol groups impact public policy although few vigilantes actually patrol the border). “Scarcity in numbers should not deceive one into assuming that vigilantes’ impact, either physically at the border or at the ballot box, is inconsequential. Vigilantes have not only affected the policy-making process; their influence at the border is real.” *Id.*

67. See Stephen R. Vina, Blas Nunez-Neto & Alyssa Bartlett Weir, *Civilian Patrols Along the Border: Legal and Policy Issues* 15 (Cong. Research. Serv., CRS Report for Congress, Order Code RL33353, Apr. 7, 2006), available at <http://www.fas.org/sgp/crs/homesecl/RL33353.pdf> (construing former President Bush’s wariness toward citizen border patrols as a symptom of the increased threat of violence posed by these groups at the border). “While [former] President Bush . . . asked the public to be vigilant and mindful of suspicious activities, he and others in the Administration . . . [were] . . . wary of citizen patrols for a number of reasons, including the potentially violent nature of such activities along the border.” *Id.* The former President’s doubts toward these groups, however, have not hindered civilian border patrol groups’ willingness to continue watching the border. *Id.* “[M]any civilians have continued to gather along the border region irrespective of the admonitions.” *Id.*

people in Congress to propose bills that would authorize the utilization of civilian patrols along the border.⁶⁸ Though 8 C.F.R. § 287.5(b) designates many authorized immigration personnel who can legally patrol the border alongside USBP,⁶⁹ there seems to be no authority under the Immigration and Nationality Act (INA) empowering the Secretary of DHS to use civilians to enforce immigration law.⁷⁰ However, due to the government's oversight of civilian border patrols' activities and such groups' assumption of legal duties, it almost seems feasible to grant the groups explicit authority to patrol the border.⁷¹ This assertion may sound extreme at first, but as they now stand, vigilante volunteers act as private

68. *See id.* (describing Congress's support for civilian border patrol groups). "In Congress, many have introduced bills that would authorize and enhance the use of civilians for immigration purposes along the border." *Id.* The report forecasts that "[t]he enhanced use of civilian patrols along the border may present a number of legal and policy issues due to the law enforcement nature of the mission and the overwhelming federal responsibilities in immigration matters." *Id.*

69. 8 C.F.R. § 287.5 (2008) (listing the various types of immigration personnel authorized with the power to patrol U.S. borders).

70. *See* Stephen R. Vina, Blas Nunez-Neto & Alyssa Bartlett Weir, *Civilian Patrols Along the Border: Legal and Policy Issues* 16 (Cong. Research. Serv., CRS Report for Congress, Order Code RL33353, Apr. 7, 2006), available at <http://www.fas.org/sgp/crs/homesecc/RL33353.pdf> (noting that though the INA does not grant specific authority to the Secretary of DHS to deputize citizens to help with illegal immigration on the U.S.-Mexico border, it does prohibit federal employees from consulting and cooperating with civilian border patrol groups). This has not stopped the federal government from collaborating with civilians in order to patrol the borders. *Id.* "The apparent lack of authority to formally deputize civilians with all the powers of an immigration officer, of course, does not prevent the federal government from cooperating with civilians." *Id.* Specifically, DHS has offered its willingness to utilize information from civilian patrol groups. *Id.* "DHS, for instance, has stated that 'it would accept and investigate information from the Minuteman like it does from the general public.'" *Id.*

71. *See id.* at 17 (making an argument for the viability of using civilian groups to patrol the border). Customs and Border Protection officials have shown "some support for the use of volunteers at the border" ranging from clerical work to "something akin to a Border Patrol auxiliary" unit in which volunteers would be trained and organized to help provide support. *Id.* at 16. DHS, on the other hand, has contradicted Customs and Border Patrol's sentiments by declaring that it has no plans to utilize civilian border patrol units on the border. *Id.* at 16–17. Governmental authorization of civilian border patrol groups has been justified by some based on 32 U.S.C. § 109(c) (2006) which permits states to raise a State Defense Force (SDF). *See* 32 U.S.C. § 109(c) (2006); (stating that a state may "organize and maintain defense forces"). "An SDF is a volunteer state force, in addition to its National Guard, that is regulated under state law, and is under the command of the governor." *See* Stephen R. Vina, Blas Nunez-Neto & Alyssa Bartlett Weir, *Civilian Patrols Along the Border: Legal and Policy Issues* 17 (Cong. Research. Serv., CRS Report for Congress, Order Code RL33353, Apr. 7, 2006), available at <http://www.fas.org/sgp/crs/homesecc/RL33353.pdf> Since SDFs operate without federal funds, states may not be willing to use such groups to help enforce immigration law since its nature is a federal matter. *Id.* "States, however, may be reluctant to use such authority without more federal support,

individuals; thus, the implications of the Fourth Amendment that guard against unreasonable searches and seizures are not invoked when a vigilante detains and searches a noncitizen migrant unless the private person is acting as an agent of the government.⁷² Two factors determine whether a person is acting as an agent of the government: (1) whether or not the government knew about and permitted the offensive conduct and (2) whether or not the private individual's actions were motivated by a desire to assist law enforcement officers rather than to advance his or her own personal objectives.⁷³ With respect to the first element, courts have maintained that "de minimis" contact between the private individual and government officials during the course of the search and seizure does not qualify as an act acquiesced by the government, with a possible exception if immigration officials actively participate "in encouraging or assisting" the volunteers in some manner.⁷⁴ As far as the second prong is concerned, some courts have determined that if an individual is motivated by both a desire to assist law enforcement officers *and* a personal desire to track illegal border crossers, this is not by itself sufficient to nominate the

particularly because of the federal nature of immigration, additional administrative burdens, and existing budget constraints." *Id.*

72. See Stephen R. Vina, Blas Nunez-Neto & Alyssa Bartlett Weir, *Civilian Patrols Along the Border: Legal and Policy Issues* 18 (Cong. Research. Serv., CRS Report for Congress, Order Code RL33353, Apr. 7, 2006), available at <http://www.fas.org/sgp/crs/homesecc/RL33353.pdf> (exploring the Minuteman Project's policy against allowing volunteers to detain and search those suspected of illegal entry into the United States). It is possible that some vigilante group volunteers will inevitably encounter situations in which it could be contended that they illegally detained and searched an undocumented person. *Id.* at 17–18. Even as such, a search and seizure by a private individual "does not implicate the protections afforded by the Fourth Amendment against unreasonable searches and seizures unless he acts as an 'instrument or agent of the government.'" *Id.* at 18.

73. See *United States v. Steiger*, 318 F.3d 1039, 1045 (11th Cir. 2003) (stating that a search conducted by a private person implicates the Fourth Amendment only if the person acts as an "instrument or agent of the government"); see also Stephen R. Vina, Blas Nunez-Neto & Alyssa Bartlett Weir, *Civilian Patrols Along the Border: Legal and Policy Issues* 18 (Cong. Research. Serv., CRS Report for Congress, Order Code RL33353, Apr. 7, 2006), available at <http://www.fas.org/sgp/crs/homesecc/RL33353.pdf> (indicating the test to determine if a person is acting as an agent of the government).

74. See Stephen R. Vina, Blas Nunez-Neto & Alyssa Bartlett Weir, *Civilian Patrols Along the Border: Legal and Policy Issues* 18 (Cong. Research. Serv., CRS Report for Congress, Order Code RL33353, Apr. 7, 2006), available at <http://www.fas.org/sgp/crs/homesecc/RL33353.pdf> (illustrating how courts address the first factor in determining whether a private person has acted as an agent of the government). Therefore, minimal or incidental contacts between a private individual and a law enforcement agent are not enough to classify the encounter as one that would invoke the Fourth Amendment. *Id.* "[A] general exchange of information, or mere cooperation with authorities would probably not make [civilian border patrol groups] agents of the government." *Id.* Contrarily, if a private individual's acts are directed, suggested, encouraged, or assisted by an immigration officer, the first prong of the test could be met. *Id.*

private individual as a governmental agent.⁷⁵ Therefore, this eliminates the possibility for those harmed by the violent acts of civilian vigilante groups to prosecute the government for its lack of interference to control such groups' behavior. Furthermore, since these groups are not explicitly "deputized" by the federal government, the government has no authority to control civilian border patrol groups' activities until the last possible moment when they exceed their legal right to patrol the border. Unfortunately, that moment comes too late for many migrants detained by such groups.

A further problem border vigilante groups pose is the possibility that their activities will interfere with USBP's execution of its federal duty to patrol the border.⁷⁶ Vigilante volunteers often trip USBP's sensors and motion detectors in their attempt to monitor the border which causes USBP to expend resources due to false alarms and decreases its ability to effectively secure the border.⁷⁷ Coordination between USBP and border vigilante groups would alleviate the collision between federal immigration officers and civilian volunteers,⁷⁸ but this, of course, would leave the federal government liable for civilian vigilantes' actions, which may explain the federal government's failure to address this border issue.⁷⁹

75. *See id.* at 19 (discussing how some courts have interpreted the second prong). For the second prong, courts again analyze the individual's mental state and the level of persuasion his goal to help federal immigration objectives measures against any personal goals he may have for attempting to enact federal immigration laws. *Id.* Regarding their assistance to the government, some volunteers "claim that they are doing 'the job the government should be doing.'" *Id.* However, some volunteers' personal goals vary "from protecting personal property to creating a type of symbolic or civil movement." *Id.* In the end, this analysis is totally dependent on the mental state of the private individual. *Id.*

76. *See id.* at 19–20 (suggesting one problem that civilian border patrol groups cause). "A potential issue could include whether the existence of civilian border patrol groups may inhibit the USBP's ability to execute its mission effectively." *Id.* For example, while guarding their posts at the border, Minuteman volunteers have occasionally triggered sensors and motion detectors. *Id.* at 19.

77. *See id.* 19 (providing one example of how civilian patrol groups interfere with USBP). "USBP Chief David Aguilar noted that 'anything that taxes our resources takes away from our capability to secure our nation's borders.'" *Id.* Every time a sensor or detector is set off, USBP agents are deployed to the scene. *Id.* Thus, vigilante border patrol volunteers who accidentally trip the wires cause the cost of monitoring the border to increase. *Id.*

78. *See id.* at 20 (suggesting how to prevent the efforts of civilian border patrol groups from interfering with the USBP agents' execution of their duties). Some type of coordinating mechanism between civilian border patrol groups and USBP would decrease the chances that volunteers would accidentally trip wires and cause false alarms. *Id.* In addition, "CBP officials . . . have suggested that training and organizing the volunteers or allowing them to do clerical work could be helpful." *Id.*

79. *See* Peter Yoxall, Comment, *The Minuteman Project, Gone in a Minute or Here to Stay? The Origin, History and Future of Citizen Activism on the United States-Mexico Bor-*

2. Federal and State Action for or Against Civilian Border Patrol Groups

It seems the only way to reduce violence on the border and to end the clash between federal immigration law enforcement efforts and civilian border patrol activities is for the government to either explicitly authorize or explicitly forbid civilian patrols along the border. Since the threat of liability is too great with option one, the latter option seems to be the better solution. Per the Constitution, the federal government has the exclusive duty to enforce immigration laws⁸⁰ and thus, the federal government is in the best position to take preventative measures against civilian vigilante groups.⁸¹ Many factors including the potential for the government to be crushed with liability for civilian border patrol groups' activities; the increased violence at the border and its effect on foreign policy; and the constitutional mandate that the federal government be the sole enforcer of immigration policy should provide the federal government with enough motivation to ensure ranch vigilantes stay on their respective ranches and cease to act like official federal immigration officers.⁸²

der, 37 U. MIAMI INTER-AM. L. REV. 517, 550 (2006) (positing that if civilian vigilante groups acted as government agents, the federal government would be liable for any wrongful acts committed in their border patrolling activities). For example, "if [a civilian border patrol group], acting as a government agent, commits any tortious acts when searching or seizing individuals, the federal government may also be liable under the Federal Tort Claims Act." *Id.*

80. *See, e.g.*, Chinese Exclusion Case, 130 U.S. 581, 603 (1889) (holding that the U.S. government has the exclusive authority to exclude aliens from the United States); Huyen Pham, *The Inherent Flaws in the Inherent Authority Position: Why Inviting Local Enforcement of Immigration Laws Violates the Constitution*, 31 FLA. ST. U. L. REV. 965, 987 (2004) (stating that it is a widely accepted principle that the federal government is tasked with regulating immigration).

81. *See* Chae Chan Ping v. United States, 130 U.S. 581, 609 (1889) (holding that the "power of exclusion of foreigners" is a matter belonging to the U.S. government as pertaining to the nation's sovereign power); Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892) (discussing the accepted principles of international law whereby sovereign nations may exclude foreigners from their borders). *See generally* Peter Yoxall, Comment, *The Minuteman Project, Gone in a Minute or Here to Stay? The Origin, History and Future of Citizen Activism on the United States-Mexico Border*, 37 U. MIAMI INTER-AM. L. REV. 517, 550-51 (2006) (pointing out that immigration power has been compared and judged to be as important as the power to declare war and make treaties). The Supreme Court has reasoned that the government's immigration power affects foreign policy and, thus, it is exclusive to the federal government and cannot be delegated. *Id.* at 550. "The federal government has a mandate to take measures against [civilian border patrol groups]." *Id.* at 550.

82. *See* Peter Yoxall, Comment, *The Minuteman Project, Gone in a Minute or Here to Stay? The Origin, History and Future of Citizen Activism on the United States-Mexico Border*, 37 U. MIAMI INTER-AM. L. REV. 517, 550-51 (2006) (asserting that former Mexican President Vicente Fox indicated his concern over civilian border patrol groups, but the U.S.

3. Armed Civilian Border Patrol Groups and Racism

It is not fair to deem every person who wishes to secure our nation's borders a racist. Many people wish no harm to illegal immigrants, but only seek to strike a balance between keeping their family and property safe while allowing others to pursue their dream of a better life.⁸³ The line between the urge to protect one's property and certain inherent prejudices, however, is often blurred when civilian border patrol groups unite to protect our borders. The promotion of a safer, more democratic way to solve our nation's immigration issues often is not in the forefront of the volunteers' minds. Though some civilian border patrol groups do not explicitly endorse racism, the sentiment is implicit in the volunteers' attitudes and sometimes made explicit through individual members' comments and actions.⁸⁴ Many individual members' patrols along the border are motivated by xenophobic and nativistic ideals masked by a secondary goal of securing our nation's borders from criminals, terrorists, murderers, and thieves.⁸⁵

government seems to remain complacent). Therefore, the actions of civilian border patrol groups have had a negative effect on foreign relations with Mexico. *Id.*

83. See, e.g., Sara A. Martinez, Comment, *Declaring Open Season: The Outbreak of Violence Against Undocumented Immigrants by Vigilante Ranchers in South Texas*, 7 SCHOLAR 95, 110–12 (2004) (stating that not all property owners on the border are inclined to use paramilitary patrols to secure their person and property). For example, Robert Fulbright, a fourth generation rancher, has had damage done to his property due to illegal migrant traffic crossing his land, but instead of resorting to extreme measures, he calls the Border Patrol himself since he “does not believe that violent tactics are the way to solve the [illegal immigration] problem.” *Id.*

84. See Christopher J. Walker, *Border Vigilantism and Comprehensive Immigration Reform*, 10 HARV. LATINO L. REV. 135, 153 (2007) (urging that an investigation would reveal that patriotism and protection of property merely mask the real, race-specific motivation of civilian border patrol groups).

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 they have “no affiliation with, nor will . . . accept any assistance by or interference from separatists, racists, or supremacy groups or individuals.” 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.” *Id.* (footnote omitted).

85. See *id.* at 152 (emphasizing the fact that many members of border vigilante groups have a misguided fear that an eminent force from abroad threatens the American way of life from the inside).

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 As one commentator notes, “investigation beyond the

The racist undertones that civilian border patrol groups exude seems to reflect national policy. Before the terrorist attacks of September 11, national polls revealed a public that was vehemently opposed to racial profiling which led to its condemnation by both the Attorney General and former President George W. Bush.⁸⁶ After the attacks, however, both the United States government and the Department of Justice (DOJ) actively endorsed racial profiling, driven by the fear that terrorists were hiding within our borders.⁸⁷ The United States government placed over 1200 noncitizens who had not even been accused of participating in terrorist activity into detention.⁸⁸ Furthermore, the DOJ investigated more than 5,000 male noncitizens between the ages of eighteen and thirty-three based solely on their country of origin or personal religious beliefs.⁸⁹ The increased fear of terrorist attacks coupled with the issue of illegal immigration on the U.S.-Mexico border served as fuel to the xenophobic and nativist fire espoused by many civilian border patrol group members and aroused within them an even greater need to monitor the border for illegal crossers.⁹⁰

sound bites and propaganda uncovers the truth—patriotism, civic duty, and protection of property rights are simply ad hoc justifications for ‘wetback’ sport hunting.” *Id.* (footnote omitted).

86. See Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575, 1576 (2002) (“Before September 11, national polls showed such overwhelming public opposition to racial profiling that both [former] U.S. Attorney General John Ashcroft and [former] President George W. Bush felt compelled to condemn the practice.”). Now, the public seems to concede that “racial profiling is a good thing, and in fact necessary for survival.” *Id.* at 1576–77.

87. See *id.* at 1577–78 (expounding that the government detained over 1200 noncitizens for investigatory purposes in order to “prevent terrorist attacks”). “We know too, that the majority [of those detained] were identified to the government through suspicions and tips based solely upon perceptions of their racial, religious, or ethnic identity.” *Id.*

88. *Id.* (stating that after their detention, the government withheld the detainee’s basic identification information, the charges brought against them, and the location where they were being detained).

89. See *id.* at 1578 (arguing that due to the racially motivated investigations, “one student in Cleveland, Ohio [was] criminally charged and indefinitely detained for telling the Federal Bureau of Investigation (FBI) that he worked twenty hours per week, when he actually worked twenty-seven”). The Department of Justice further implemented a policy in which all immigration status violations, including minor ones, had to be reported to Immigration and Naturalization Service (INS), now the Department of Homeland Security. *Id.* at 1578–79.

90. See Christopher J. Walker, *Border Vigilantism and Comprehensive Immigration Reform*, 10 HARV. LATINO L. REV. 135, 147 (2007) (stating that the post-September 11 climate caused border patrol groups to feel an even greater need to patrol the U.S. border). “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 [b]order [s]tates, patrolling the U.S.-Mexico line and attempting to prevent undocumented migration.” *Id.*

4. The Interplay Between a Vigilante's Right to Arrest and Illegal Entry

Under the majority and the Texas rule, a civilian may not arrest an alien based solely on his or her illegal entry.⁹¹ Citizen's arrests under the majority rule must be limited to felonies and misdemeanors that amount to a breach of the peace and the private citizen must have witnessed the arrest-worthy offense take place.⁹² Entering the United States illegally is considered a criminal immigration offense and traditionally, state and local law enforcement officers have had the authority to put into effect federal immigration law in criminal immigration matters.⁹³ The Anti-

91. See *Head v. State*, 131 Tex. Crim. 96, 96 S.W.2d 981, 982 (1936) (justifying the right to make a warrantless arrest when a breach of the peace has been committed in the presence of the person making the arrest). The court defined "breach of peace" in terms of disturbances to the public decorum, peace, or tranquility. *Id.* at 982–83. This standard seems to necessitate threatened or actual violence to constitute a breach of the peace. *Id.* at 982. Where there is disquiet or disorder that "threatens danger or disaster to the community" then that amounts to a breach of peace. *Id.*; see also Christopher J. Walker, *Border Vigilantism and Comprehensive Immigration Reform*, 10 HARV. LATINO L. REV. 135, 154–55 (2007) (discussing the majority rule which allows individuals to make citizen's arrests for any felony and for a misdemeanor that amounts to a breach of the peace).

92. See Christopher J. Walker, *Border Vigilantism and Comprehensive Immigration Reform*, 10 HARV. LATINO L. REV. 135, 154 (2007) (exploring the majority rule for citizen's arrest which requires actual presence when the illegal activity is committed as opposed to probable cause).

Under Arizona, New Mexico, and Texas 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." (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.

....

Instead of utilizing the exact term "breach of peace," Texas law allows citizen's arrests for any "offense against the public peace."

....

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 fighting, making loud noises, using profane language or gestures, or recklessly displaying a deadly weapon. *Id.* at 154–161.

93. See Jennifer M. Hansen, Comment, *Sanctuary's Demise: The Unintended Effects of State and Local Enforcement of Immigration Law*, 10 SCHOLAR 289, 292–93 (2008) (differentiating between civil and criminal violations of immigration law). Illegal presence or failure to depart upon the expiration of a visa constitutes a civil offense, while felonies, federally governed misdemeanors, and illegal entrance into the United States are criminal

Terrorism and Effective Death Penalty Act⁹⁴ (AEDPA) explicitly grants state and local police this authority and permits them to arrest and detain immigrants who have been *both* previously deported and have been convicted of a felony.⁹⁵ The Illegal Immigration Reform and Immigrant Responsibility Act⁹⁶ (IIRIRA) allows state and local authorities to enforce civil immigration law only when there is a “mass influx” of immigrants.⁹⁷

Though civilians cannot technically make arrests based solely on illegal entry, this does not deter their patrols along the border. In fact, the Mexican government reported that there were forty possible illegal citizen’s arrests in 1999 in Cochise County, Arizona alone.⁹⁸ Rancher-vigilante, Roger Barnett, illustrates this point. Mr. Barnett began to patrol the border due to his claims that his ranch had been trespassed upon, damaged,

offenses. *Id.* “[H]istorically it has been viewed that states and localities have the authority to enforce criminal violations of immigration law” *Id.*

94. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 8, 18, 22, 28, 40, and 42 U.S.C.).

95. See Jennifer M. Hansen, Comment, *Sanctuary’s Demise: The Unintended Effects of State and Local Enforcement of Immigration Law*, 10 SCHOLAR 289, 294 (2008) (commenting that both the AEDPA and Illegal Immigration Reform and Immigrant Responsibility Act were attempts to define the boundaries between state and local authority to enforce federal immigration law). “The AEDPA permits state and local police to enforce criminal violations by arresting and detaining previously deported immigrants who have also been convicted of a felony.” *Id.*

96. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, enacted as Division C of Omnibus Consolidated Appropriations Act for Fiscal Year 1997, Pub. L. No. 104-208, 110 Stat. 3009 (codified in scattered sections of U.S.C.).

97. See Jennifer M. Hansen, Comment, *Sanctuary’s Demise: The Unintended Effects of State and Local Enforcement of Immigration Law*, 10 SCHOLAR 289, 294–95 (2008) (listing the ways in which IIRIRA would allow state and local police to “enforce civil violations”). Two provisions of IIRIRA are important in terms of state and local enforcement of immigration law. *Id.* Section 287(g) grants state and local police authority to enact federal immigration laws if they participate in the appropriate training and have enacted a Memorandum of Agreement (MOA) between the Department of Justice and the local or state law enforcement agency. *Id.* The second important provision prohibits the restriction of state employees’ ability to report specific, individual information to federal authorities. *Id.*

98. See Bob Moser, Open Season, INTELLIGENCE REP., Spring 2003, available at <http://www.splcenter.org/intel/intelreport/article.jsp?aid=19> (discussing the probability that civilian border patrol members are making arrests based on illegal entry). Within fourteen specific incidents, migrants claimed to have been detained at gunpoint, shot at, and physically harassed by civilian border patrol volunteers before Border Patrol arrived to assess the situation. *Id.* More disturbing is the fact that most migrants do not report the abuses they suffer at the hands of border vigilantes. *Id.* The U.S. General Accounting Office said in a 2001 report that border vigilantes had shot at least two migrants in the course of a citizen’s arrest and “two more migrants were murdered, execution-style, just outside of Tucson.” *Id.* When asked about civilian brutality toward migrants, Roger Barnett, former deputy sheriff who owns a 22,000-acre ranch on the Arizona-Mexico border, told an Arizona newspaper that migrants who complain about abuses just “better stay home.” *Id.*

and littered upon by “thousands of illegal entrants.”⁹⁹ He also claims to have found “loads of illegal drugs dotting his ranch.”¹⁰⁰ Mr. Barnett and his family have since invested in arms, all-terrain vehicles, and specially trained dogs in order to monitor their land.¹⁰¹ Consequently, Mr. Barnett and his family have been accused of illegally detaining and assaulting both citizens and noncitizens found on and off the property Mr. Barnett owns or leases.¹⁰² In fact, Mr. Barnett was found liable for damages after he detained, assaulted, and screamed racial slurs to a Latino family of United States citizens, comprised of three girls who were under the age of twelve, while they were hunting on state-leased land.¹⁰³ Recently, Mr. Barnett was found liable for damages after he detained a group of nonimmigrants, assaulted them with his weapons and human track dog, yelled racial slurs at the group in English and Spanish, and battered one of the

99. See Defendant’s Opposition to Motion for Partial Summary Judgment at 2, *Vicente v. Barnett*, No. 05-CV-00157-JMR (D. Ariz. June 8, 2007) (asserting that the Barnetts elected to take matters into their own hands in order to protect their property). The Barnetts claim that due to illegal traffic across their land, their property is constantly littered with trash and human waste; furthermore, their cars have been stolen and irreparable damage has been done to their property. *Id.* The Barnetts boast to have apprehended over 12,000 “smugglers and illegal entrants” on their land. *Id.*; see also Bob Moser, *Open Season*, INTELLIGENCE REP., Spring 2003, available at <http://www.splcenter.org/intel/intelreport/article.jsp?aid=19> (declaring that Roger Barnett “boasts of personally rounding up more than 2,000 migrants around his 22,000-acre ranch—in 2002 alone”).

100. See Defendant’s Opposition to Motion for Summary Judgment at 2, *Vicente v. Barnett*, No. 05-CV-00157-JMR (D. Ariz. May 5, 2007) (summarizing Barnett’s rationale for resorting to vigilante operations to protect his ranch).

101. See *id.* (“The Barnetts chose to stand up for the law rather than be resigned to its violation.”). To assist in this endeavor, the Barnetts bought infrared cameras and ground sensors to better track border crossers. *Id.*; see also Ray Ybarra, Note, *Thinking and Acting Beyond Borders: An Evaluation of Diverse Strategies to Challenge Vigilante Violence Along the U.S.-Mexico Border*, 3 STAN. J. C.R. & C.L. 377, 392–93 (2007) (describing an incident in which Robert Barnett, alerted by his attack dog, approached a group of noncitizens who had allegedly crossed through his land).

102. See Joint Pretrial Order at 7, *Vicente v. Barnett*, No. 05-CV-00157-JMR (D. Ariz. May 9, 2008) (claiming that Roger Barnett, along with his wife, Barbara Barnett, and his brother, Donald Barnett, have conspired to deny Latinos found near their ranch their federal right to interstate travel). The Barnetts’ “actions taken in furtherance of their conspiracy have not been limited to immigrants and have not been limited to the property that [they] own or lease from the State.” *Id.*

103. See News Release, Mexican Am. Legal Def. & Educ. Fund, Arizona Supreme Court Rejects Appeal of Vigilante Rancher Who Attacked U.S. Citizens on Arizona Border (Sept. 23, 2008), available at http://www.maldef.org/news/releases/morales_barnett_092308/ (relating the Arizona Supreme Court’s rejection of Roger Barnett’s appeal from a judgment granting damages to the Morales family). Mr. Barnett encountered the family hunting on state-leased land and assaulted them with his “semi-automatic military-style assault rifle” and “held the family at gunpoint, cursed and screamed racial slurs at them and threatened to kill them all.” *Id.*

females in the group by kicking her twice.¹⁰⁴ In response, Mr. Barnett raised the defenses of citizen's arrest and defense of premises.¹⁰⁵ According to Mr. Barnett, he was authorized to make a citizen's arrest on the whole group because the noncitizens were committing a federal felony when he encountered them due to the fact that none of the members of the group said that they had never previously entered the United States illegally and a record check found that many members had in fact previously entered illegally.¹⁰⁶ However, the activities Mr. Barnett and other

104. See Plaintiff's Motion for Partial Summary Judgment on Defendants' Affirmative Defenses of Citizen's Arrest and Defense of Premises with Memorandum of Law in Support at 2–3, *Vicente v. Barnett*, No. 05-CV-00157-JMR (D. Ariz. May 5, 2007) (challenging Barnett's assertion of affirmative defenses by claiming that his actions were "privileged under the law because [the migrants] were in violation of . . . state and federal smuggling laws and because [they] were trespassing upon [Barnett's] land"); see also Ray Ybarra, Note, *Thinking and Acting Beyond Borders: An Evaluation of Diverse Strategies to Challenge Vigilante Violence Along the U.S.-Mexico Border*, 3 STAN. J. C.R. & C.L. 377, 392–93 (2007) (describing the manner in which Mr. Barnett detained the group of noncitizens); see also News Release, Mexican Am. Legal Def. & Educ. Fund, Arizona Jury Finds Vigilante Rancher Liable for Attack on Immigrants (Feb. 18, 2009), available at http://maldef.org/news/releases/vicente_barnett_2_18_09/ (asserting that a jury found Roger Barnett liable for "assault and intentional infliction of emotional distress" in the amount of \$73,352 for his actions against a group of immigrants resting on public land near Mr. Barnett's ranch in Douglas, Arizona).

105. See Plaintiff's Motion for Partial Summary Judgment on Defendants' Affirmative Defenses of Citizen's Arrest and Defense of Premises with Memorandum of Law in Support at 7, *Vicente v. Barnett*, No. 05-CV-00157-JMR (D. Ariz. May 5, 2007) (requesting the court "enter summary judgment against Defendants on their asserted affirmative defenses of citizen's arrest and defense of premises").

106. See 8 U.S.C. § 1325 (2006) (outlining the statute concerning "improper entry by an alien").

(a) Improper time or place; avoidance of examination or inspection; misrepresentation and concealment of facts.

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 under title 18, United States Code, or imprisoned not more than 6 months, or both, and, for a *subsequent commission* of any such offense, be fined under title 18, or imprisoned not more than 2 years, or both. *Id.* (emphasis added).

See also Defendant's Opposition to Motion for Partial Summary Judgment at 4, *Vicente v. Barnett*, No. 05-CV-00157-JMR (D. Ariz. June 8, 2007) (highlighting the Barnetts' claim that "the felony provision does not require a past conviction, but only a past 'commission'"). The Ninth Circuit has ruled, however, that "[t]he existence of a prior *conviction* under 8 U.S.C. § 1325(a) substantively transforms a second conviction under the statute from a misdemeanor to a felony and "[a] prior *conviction*. . . must be charged explicitly"; and, without a prior *conviction*, a defendant should not receive the felony sentence. *United States v. Rodriguez-Gonzales*, 358 F.3d 1156, 1160 (9th Cir. 2004) (emphasis ad-

border patrol groups conduct along the border are more reflective of a past time of hunting any Latino, citizen or not, that may cross in any area remotely close to their property.¹⁰⁷

5. Race-Based Violence at the Border

Civilian border patrol groups sometimes openly try to dissuade racist participation in their activities, but despite these efforts, the groups inevitably serve as a stomping ground for the White supremacist community.¹⁰⁸ Therefore, the likelihood of violence against “foreign looking” individuals, documented or undocumented, is very likely despite any “no contact” or other non-violent policies the border patrol group may enact.¹⁰⁹

Examples of race-motivated violence at the border by border patrol groups abound. Recently, Casey Nethercott, a member of civilian vigilante group, Ranch Rescue, had to give his seventy-acre paramilitary ranch compound to two El Salvadoran immigrants he terrorized on the

ded); *see also* *United States v. Arambula-Alvarado*, 677 F.2d 51, 52 (9th Cir. 1982) (stating that since appellant was convicted of violating two counts of immigration laws, he was then convicted of illegal entry under 8 U.S.C. § 1325). Thus, the Arizona circuit court “made it clear that a previous *conviction* for illegal entry is an element of the felony offense under section 1325.” *United States v. Campos-Martinez*, 976 F.2d 589, 591 (9th Cir. 1992) (emphasis added).

107. *See* Plaintiff’s Motion for Partial Summary Judgment on Defendants’ Affirmative Defenses of Citizen’s Arrest and Defense of Premises with Memorandum of Law in Support at 5, *Vicente v. Barnett*, No. 05-CV-00157-JMR (D. Ariz. May 5, 2007) (emphasizing that the incident in which Mr. Barnett kicked Maria Vicente was not Barnett’s first act of armed, forcible detention of Latinos). In fact, “it has been the regular practice and weekend hobby of Defendants Roger, Barbara and Donald Barnett to patrol the area near [their] Douglas, Arizona [ranch] and track, hunt and confront Latinos at gunpoint.” *Id.*

108. *See* Ray Ybarra, Note, *Thinking and Acting Beyond Borders: An Evaluation of Diverse Strategies to Challenge Vigilante Violence Along the U.S.-Mexico Border*, 3 *STAN. J. C.R. & C.L.* 377, 402 (2007) (describing the Minutemen and their “no contact” policy at the border). To the public, the Minutemen claim to discourage racists from joining their group, but the Minutemen Project nevertheless serves as a “rallying point for the White Supremacist community.” *Id.*

109. *See id.* (asserting that there is little doubt that White supremacists will be the ones in the desert carrying-out their mission to detain any non-White person at the border); *see also* Christopher J. Walker, *Border Vigilantism and Comprehensive Immigration Reform*, 10 *HARV. LATINO L. REV.* 135, 153 (2007) (stating, in reference to civilian border patrol groups, that “[t]hese groups might not explicitly promote such [racist] attitudes, but they can be found in the rhetoric in their online discussion forums and in their members’ words”). Racist attitudes undoubtedly influence some of the groups’ actions at the border and despite any internal group policies, “there is still the potential for violence and abuse by errant individual members.” *Id.* However, vigilante groups fail to understand that despite the violence that potential immigrants meet at the border, abusive race-based tactics are “unlikely to dissuade . . . [illegal entrants] . . . from their intended path.” *Id.*

border.¹¹⁰ Nethercott purposely bought the ranch on the Mexico border, not to invest in property, but to hunt Latino migrants near the border.¹¹¹ The case brought against Nethercott spawns from the actions of Joe Sutton, a Texas Rancher and co-owner of the paramilitary ranch where the El Salvadorans were detained and assaulted,¹¹² because Sutton invited Ranch Rescue to his property to help him detain Latinos crossing his land.¹¹³ Groups like Ranch Rescue are said to share many similarities with other historic hate groups.¹¹⁴ This case, and others like it in which the property of the wrongdoer is awarded to the victim, has caused many ranchers, including Mr. Sutton, to reconsider taking federal immigration matters into their own hands.¹¹⁵

110. See *Paramilitary Compound Goes to SPLC Clients*, S. POVERTY L. CENTER, Jan. 27, 2006, http://www.splcenter.org/legal/news/article.jsp?aid=157&site_area=1 (reporting that an Arizona court transferred a seventy-acre compound to two individuals from El Salvador who were terrorized by the former the owner of the property). The article recounts that Nethercott confronted the two migrants, Leiva and Mancía, hiding in the brush on his ranch near Hebbronville, Texas. *Id.* Leiva and Mancía were subsequently surrounded by men “shooting bullets into the air, cursing in Spanish and shouting that they would kill them.” *Id.* Mancía was attacked by one of the vigilante’s rottweilers and was beaten on the head with a gun. *Id.*

111. See *id.* (emphasizing the fact that many civilian vigilante ranchers do not seek to protect their property, but purposely go out of their way to hunt those who may be entering into the United States illegally). Nethercott has a “history of anti-immigrant activities in Texas, California and Arizona.” *Id.* Surprisingly, the jury deadlocked on the issue of the assault charge, but nevertheless convicted Nethercott due to the fact that he is a felon and was in possession of a firearm. *Id.*

112. Plaintiff’s Fourth Amended Petition at 3, *Leiva v. Ranch Rescue*, No. CC-03-77 (229th Dist. Ct., Jim Hogg County, Tex. Mar. 4, 2004) (establishing how Mr. Sutton is the co-owner of the rescue ranch in question where he authorized illegal acts).

113. See *Immigrants Win Arizona Ranch*, S. POVERTY L. CENTER, Aug. 19, 2005, http://www.splcenter.org/legal/news/article.jsp?aid=125&site_area=1 (pointing out that Sutton made an out-of-court settlement with Leiva and Mancía that totaled \$100,000 and a \$1 million judgment was rendered against Nethercott and Ranch Rescue’s leader, Torre John “Jack” Foote). All of this was in addition to a previous \$350,000 judgment that was made in the same case. *Id.*

114. See *id.* (advancing the view that the court’s property seizure in Leiva and Mancía’s case is a resemblance to previous Southern Poverty Law Center cases against hate groups). “In 1987 the headquarters of the United Klans of America were awarded to Beulah Mae Donald, the mother of Michael Donald who was lynched by members of the group in 1981.” *Id.* “The Center has also managed to seize property from the Aryan Nations and the White Aryan Resistance.” *Id.*

115. See *id.* (quoting Joseph Sutton who indicated to a local newspaper that due to the possible legal consequences, he is “less willing to take matters into his own hands”); see also Southern Poverty Law Center, *Leiva v. Ranch Rescue: Ranch Rescue Case*, <http://www.splcenter.org/legal/docket/files.jsp?cdrID=44> (last visited Apr. 9, 2009) (emphasizing that cases like Leiva and Mancía’s case against Ranch Rescue help stop violent border vigilante activity). “If vigilante groups like Ranch Rescue and the ranchers who conspire with them are forced to pay money damages for their unlawful actions, they will think

Outside of formally filed lawsuits, vigilantes have been suspected of race-based crimes of which never resulted in a charge or conviction. For example, in the fall of 2002, no prosecutions were made when, about ninety miles north of a Ranch Rescue member's Arizona ranch, two gunmen described by a witness as "soldiers" began to shoot aimlessly at a group of twelve migrants gathered at a watering pond, resulting in the death of two migrants and the disappearance of nine.¹¹⁶

To make things worse, there are both federal and state policy makers who would like to make illegal entry or presence in the United States a felony.¹¹⁷ Such legislation would give civilian vigilante groups the power to use illegal entry as their sole motivation for arresting any Latino they claim to have crossed the border without permission, which would lead to increased race-based violence on or near the border.¹¹⁸ How do state legislatures prevent violent acts from occurring at the U.S.-Mexico border? The safest and easiest way is to change state citizen's arrests laws to explicitly exclude permission to make arrests based solely on unlawful presence or entry into the United States.¹¹⁹ This would keep rancher-

twice before taking the law into their own hands and attacking peaceful, unarmed migrants in the future." *Id.*

116. See Bob Moser, Open Season, INTELLIGENCE REP., Spring 2003, available at <http://www.splcenter.org/intel/intelreport/article.jsp?aid=19> (questioning the lack of state, local, and federal authority involvement in investigating possible vigilante violence). Initially, investigators suspected vigilante ranchers to be the culprits considering that the crime occurred close to a Ranch Rescue member's land; it was customary for the group to be divided into smaller teams of two to six members to be dispatched to patrol certain border locations for up to a twenty-four-hour block; and the fact that volunteers donned military style apparel and sniper rifles. *Id.* However, in the month following the crime, the Pinal County Sheriff's Department struck the possibility of vigilante involvement in the crime, although a neighboring county sheriff's department, where Ranch Rescue was located, was still considering the possibility. *Id.* Congressman Raul Grijalva, representative of a large portion of southern Arizona, contends that race plays a large part in the infrequent prosecutions against civilian border patrol agents. *Id.*

117. See Christopher J. Walker, *Border Vigilantism and Comprehensive Immigration Reform*, 10 HARV. LATINO L. REV. 135, 169-70 (2007) (recounting that 2005's Antiterrorism and Illegal Immigration Control Act originally sought to make illegal entry a felony and that Arizona's State Legislature "would have allowed the arrest and prosecution of undocumented immigrants under [its] trespassing law"). "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." *Id.*

118. See *id.* at 170.

119. See *id.* (listing proposed state statutes that explicitly prohibit a citizen's arrest based on the immigration violations of unlawful entry or unlawful presence). The addition of the sentence, "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" to state statutes would help alleviate confusion concerning an individual's power to enforce federal immigration law. *Id.* Changing the law in Texas and New Mexico would not be as simple as the addition of a sentence, but these states can still make

vigilante groups on their own property and give only federal and local law enforcement officers the ability to enforce federal immigration law. Moreover, this would reduce violence on the border by taking away one of the legal “back doors” racist vigilantes use to stalk Latinos on the border and it would keep border vigilante groups from interfering with federal efforts to enforce immigration laws.

Additionally, an indirect method to put a reign on civilian border patrol groups is through non-governmental initiatives such as legal observing.¹²⁰ Legal observers help deter abuses by vigilante groups and law enforcement officers by observing the border and reporting civil and human rights violations.¹²¹ Other social strategies used to ensure safety at the border include “Good Samaritan Patrols” who offer water and medical supplies to undocumented immigrants,¹²² and “Trek Survival,” a program implemented by the Mexican government that teaches potential illegal border crossers survival basics and gives them medical kits equipped with tools to help decrease the chances of a mortal attempt to cross the U.S.-Mexico border.¹²³ Furthermore, dignitaries and law enforcement bodies from both the United States and Mexico are joining

changes to exclude “unlawful entry,” “unlawful presence,” or similar border-crossing violations as being the basis for citizens arrests. *Id.* at 170–71.

120. *See id.* at 171 (giving the historical background of legal observing). Legal observing originated from the American Civil Liberty Union’s model it developed in the 1960s to protect free speech during the civil rights disputes. *Id.*

121. *See id.* at 171–72 (exploring the majority rule for citizen’s arrest that requires actual presence when the illegal activity is committed as opposed to probable cause). This standard differs from that of police officers and border patrol agents. *Id.* at 155. Private citizens may not make a citizen’s arrest unless they “see and know that another person is committing a felony or a breach-of-peace misdemeanor.” *Id.*; *see also* Ray Ybarra, Note, *Thinking and Acting Beyond Borders: An Evaluation of Diverse Strategies to Challenge Vigilante Violence Along the U.S.-Mexico Border*, 3 STAN. J. C.R. & C.L. 377, 402 (2007) (stating that the purpose of legal observers is to prevent abuses and document the activities occurring along the border in an attempt to bring awareness to the problems posed by vigilante groups patrolling the border).

122. *See* Sara A. Martinez, Comment, *Declaring Open Season: The Outbreak of Violence Against Undocumented Immigrants by Vigilante Ranchers in South Texas*, 7 SCHOLAR 95, 122–23 (2004) (outlining the strategies of “Good Samaritan Patrols” to protest the violent tactics used by border vigilante groups). Good Samaritan patrols are comprised of doctors and nuns who offer medical services and water to illegal entrants along the border. *Id.* Humane Borders, another Good Samaritan group, carries large amounts of water knowing that illegal immigrants cannot “physically carry enough liquid to sustain them through the trek.” *Id.*

123. *See id.* at 123 (discussing an effort by the Mexican government that was implemented in 2001 to save lives on the U.S.-Mexico border). Under this program, about 3000 volunteers from a few selected rural Mexican villages were trained in basic survival and were given medical kits complete with “snake-bite antidotes, bandages and medicines to treat dehydration, diarrhea and other ailments.” *Id.* (quoting Susan Ferriss, *Mexicans Learning Trek Survival*, LAREDO MORNING TIMES, May 19, 2001, at 1A).

together in an effort to deter illegal immigration, but if people still decide to make the dangerous journey, medical services are made available.¹²⁴

B. *Causes of Action Against Civilian Border Patrol Groups*

The Supreme Court, in *Yick Wo v. Hopkins*,¹²⁵ decided that the protections of the Fourteenth Amendment extended to all aliens within the territorial jurisdiction of the United States¹²⁶ and in *Mathews v. Diaz*,¹²⁷ it ruled that undocumented individuals had the right to sue their wrongdoers in court because the Fifth and Fourteenth Amendments provide *every person* within the United States equal protection against the wrongful taking of life, liberty, and property.¹²⁸ Finally, the United States Supreme Court mandated in *Wong Wing v. United States*¹²⁹ that noncitizens, apart from their right to enter and remain in this country, comprise part of the constitutional community.¹³⁰ Thus, undocumented immigrants

124. See *id.* 123–24 (showing that “[i]n an effort to prevent the unnecessary death of illegal immigrants crossing the border, dignitaries and law enforcement from the United States and Mexico are joining forces” with the goal to “prevent illegal immigration” and to “provide life saving services in the event people decide to cross the border under dangerous conditions” (quoting Laurel Almada, *Agencies Join Forces to Save Lives*, LAREDO MORNING TIMES, Feb. 1, 2002, at 3A)). On the Mexico side, signs have been placed near the border and television and radio ads have aired to warn potential crossers of the dangers and risks involved in making an illegal entrance into the United States. *Id.*

125. 118 U.S. 356 (1886).

126. *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (stating that the Fourteenth Amendment is not just confined to the protection of citizens, but “to all persons within the territorial jurisdiction” of the United States); see Sara A. Martinez, Comment, *Declaring Open Season: The Outbreak of Violence Against Undocumented Immigrants by Vigilante Ranchers in South Texas*, 7 SCHOLAR 95, 112 (2004) (discussing how in *Yick Wo v. Hopkins*, the term “persons” in the Fourteenth Amendment was found to be inclusive of immigrants); see also U.S. CONST. amend. XIV, § 1 (indicating that “[n]or shall any State deprive any *person* of life, liberty or property without due process of law; nor deny to any *person within its jurisdiction* the equal protection of the laws”) (emphasis added).

127. 426 U.S. 67 (1976).

128. *Mathews v. Diaz*, 426 U.S. 67, 77 (1976) (stating that constitutional protection even extends to individuals whose presence in the United States is unlawful); see U.S. CONST. amend. V (stating that “[nor shall any person] be deprived of life, liberty, or property, without due process of law”); see also Sara A. Martinez, Comment, *Declaring Open Season: The Outbreak of Violence Against Undocumented Immigrants by Vigilante Ranchers in South Texas*, 7 SCHOLAR 95, 112 (2004) (discussing cases regarding legal rights of undocumented immigrants).

129. 163 U.S. 228 (1896).

130. *Wong Wing v. United States*, 163 U.S. 228, 238 (1896) (finding that the right to habeas corpus review is afforded to undocumented immigrants). The Supreme Court stated that “it must be concluded that all persons within the territory of the United States are entitled to the protection guaranteed by those amendments, and that even aliens shall not be held to answer for a capital or other infamous crimes, unless on a presentment or

have many possible causes of action to assert against the wrongdoings of civilian border patrol groups.

1. Civil Liability

Typical causes of action an immigrant has against individual vigilantes who wrongfully detain him or her are “assault, false imprisonment, intentional infliction of emotional distress, negligence per se, negligence and gross negligence.”¹³¹ However, many undocumented immigrants are unaware of their right to bring suit against individual members of vigilante groups or fear pursuing these legal options because it would necessitate an admission in court of their illegal entrance.¹³² Currently, these causes of action may not be brought against the group as a whole and can only be brought against individual vigilante group members, requiring that each individual element of the specific civil claim be proven against each member.¹³³ Since many vigilante group activities are driven by racially motivated xenophobia, the best solution would be to pursue state and federal causes of action against the whole group instead of suing individual group members.¹³⁴ This would effectively make the group, as an or-

indictment of a grand jury, nor be deprived of life, liberty, or property without due process of law.” *Id.*

131. See Sara A. Martinez, Comment, *Declaring Open Season: The Outbreak of Violence Against Undocumented Immigrants by Vigilante Ranchers in South Texas*, 7 SCHOLAR 95, 113 (2004) (outlining several civil remedies available to undocumented immigrants who are harmed by landowners). In Texas, the causes of action available are the following: “assault, false imprisonment, intentional infliction of emotional distress, negligence per se, negligence, and gross negligence.” *Id.* Each cause of action has different elements which must be proven. *Id.*

132. See Peter Yoxall, Comment, *The Minuteman Project, Gone in a Minute or Here to Stay? The Origin, History and Future of Citizen Activism on the United States-Mexico Border*, 37 U. MIAMI INTER-AM. L. REV. 517, 544 (2006) (“[U]ndocumented immigrants are unlikely to bring individual civil suits against [civilian border patrol groups] because they either do not realize the rights that they possess, or they fear the consequences of admitting to officials the illegality of their initial presence.”). Prosecution through state or federal laws may be the most effective way to deal with illegal actions by civilian border patrol groups. *Id.*

133. See Adalgiza A. Núñez, Note, *Civilian Border Patrols: Activists, Vigilantes, or Agents of the Government?*, 60 RUTGERS L. REV. 797, 818 (2008) (pointing to the few cases in which an injured immigrant brought a civil cause of action against an individual member of a vigilante border group). With a few present day exceptions, such causes of action reaped very low damage awards and did little to deter the illegal actions of individual vigilante group volunteers. *Id.* The low damage awards in previous suits can be attributed to prejudices in the judicial system in the areas in which such vigilante groups operate. *Id.*

134. See Peter Yoxall, Comment, *The Minuteman Project, Gone in a Minute or Here to Stay? The Origin, History and Future of Citizen Activism on the United States-Mexico Border*, 37 U. MIAMI INTER-AM. L. REV. 517, 544 (2006) (“It has been contended that when groups are driven by racially motivated xenophobia, their actions will run contrary to the

ganization, liable for its members' activities and responsible for ensuring that members do not take part in illegal acts against migrants near the border.¹³⁵

2. Federal and State Criminal Liability

Both Texas and Arizona have the ability to curb illegal border patrol group activity by allowing prosecution based on each state's anti-militia laws, which generally reprimand persons or groups of persons who "maintain troops under arms" or, as is the case in Texas, prohibit organized civilian military groups from acting as a military company and from parading in public with firearms.¹³⁶

Furthermore, The Racketeer Influenced and Corrupt Organizations Act¹³⁷ (RICO) provides an example of a federal law that could be construed to allow for the prosecution of a civilian border patrol group.¹³⁸ In order to succeed under this cause of action, the immigrant has the burden of proving the following three elements: (1) the civilian border patrol group affects interstate commerce, (2) at least one of the offenders is associated or affiliated with the border patrol group, and (3) that through the offender's active participation in the group, the group's activities amount to a pattern of racketeering.¹³⁹

American legal system, thus, the most effective method of dealing with such groups may be to prosecute the [group] through federal and state laws."). Individual suits against individual members of border patrol groups, although likely to be successful, pose problems for those in the United States illegally. *Id.*

135. See Adalgiza A. Núñez, Note, *Civilian Border Patrols: Activists, Vigilantes, or Agents of the Government?*, 60 RUTGERS L. REV. 797, 818 (2008) (upholding the proposition that casting liability on civilian border patrol groups for violations of undocumented immigrants' constitutional and federal rights would help shift the responsibility from the individual members to the group as a whole).

136. See TEX. GOV'T CODE ANN. § 431.010(a) (Vernon 2005) (stating that the United States military and state organized military forces are to be the only militia groups that are allowed to carry firearms in public); see also Peter Yoxall, Comment, *The Minuteman Project, Gone in a Minute or Here to Stay? The Origin, History and Future of Citizen Activism on the United States-Mexico Border*, 37 U. MIAMI INTER-AM. L. REV. 517, 545 (2006) (citing to the Texas and Arizona anti-militia statutes).

137. 18 U.S.C. § 1962 (2006) (listing the prohibited activities under the Racketeer Influenced and Corrupt Organizations Act).

138. See Peter Yoxall, Comment, *The Minuteman Project, Gone in a Minute or Here to Stay? The Origin, History and Future of Citizen Activism on the United States-Mexico Border*, 37 U. MIAMI INTER-AM. L. REV. 517, 545 (2006) (conceding that although some civilian border patrol groups earn money from donations and souvenirs, a pattern of racketeering stemming from such activity would be difficult to find). It appears that only proving a pattern of kidnapping would suffice to subject civilian vigilante groups to liability under the RICO Act. *Id.*

139. See 18 U.S.C. § 1962(c) (2006); see also *Salinas v. United State*, 522 U.S. 52, 62 (1997) (discussing the pertinent elements of establishing a RICO offense); see also Sara A.

Alternatively, there is also a federal statute against conspiracy to interfere with civil rights that prohibits the conspiracy between two or more persons to deprive any class of individuals the equal protections granted under the law.¹⁴⁰ It can be conceived that due to the definite racial and xenophobic animus of civilian border patrol groups, when they act together they work to deprive Latino migrants of equal protection under the law through intimidation.¹⁴¹ This statute was originally used to suppress another hate group, the Ku Klux Klan, from violent attacks on racial minorities.¹⁴²

Martinez, Comment, *Declaring Open Season: The Outbreak of Violence Against Undocumented Immigrants by Vigilante Ranchers in South Texas*, 7 SCHOLAR 95, 120 (2004) (explaining how to succeed with a RICO claim).

140. See 42 U.S.C. § 1985(3) (2006).

If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators. *Id.*

See also Peter Yoxall, Comment, *The Minuteman Project, Gone In a Minute or Here to Stay? The Origin, History and Future of Citizen Activism on the United States-Mexico Border*, 37 U. MIAMI INTER-AM. L. REV. 517, 545–46 (2006) (suggesting that because of the racist undertones present in many civilian border patrol activities, many group members' actions could be construed as conspiracies derived from class and race-based prejudices that result in an injury).

141. See *Griffin v. Breckenridge*, 403 U.S. 88, 102–103 (1971) (highlighting that the statute further requires that there be “some racial or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators’ action”); see also Sara A. Martinez, Comment, *Declaring Open Season: The Outbreak of Violence Against Undocumented Immigrants by Vigilante Ranchers in South Texas*, 7 SCHOLAR 95, 120 (2004) (justifying the use of federal anti-conspiracy statutes against vigilante groups because the statutes were originally designed to suppress organized racial violence).

142. See Sara A. Martinez, Comment, *Declaring Open Season: The Outbreak of Violence Against Undocumented Immigrants by Vigilante Ranchers in South Texas*, 7 SCHOLAR 95, 120 (2004) (explaining that the origin of the anti-conspiracy statute was to suppress the violence of the Ku Klux Klan).

3. Federal Government Liability

Given the relationship between federal border patrol agents and civilian border patrol volunteers, it can be argued that their activities have become so comingled that vigilante volunteers act as agents of the government.¹⁴³ As discussed above, if civilian border patrol volunteers are found to be acting as government agents, they have to abide by the Fourth Amendment's protections against unreasonable searches and seizures.¹⁴⁴ This would restrict civilian border patrol groups' civil defenses against detaining aliens outside of the vicinity of the border.¹⁴⁵ Federal officials have the right to perform "extended border" searches and seizures only if there is: (1) a reasonable certainty that the alien crossed the border illegally, (2) a reasonable certainty that the object of the search has not changed between the time the alien crossed the border and when he or she is detained, and (3) a reasonable suspicion that criminal activity has occurred.¹⁴⁶ If vigilante border patrol groups had to com-

143. See Peter Yoxall, Comment, *The Minuteman Project, Gone in a Minute or Here to Stay? The Origin, History and Future of Citizen Activism on the United States-Mexico Border*, 37 U. MIAMI INTER-AM. L. REV. 517, 546 (2006) (stating that the Congressional Immigration Reform Caucus (CIRC) has supported civilian border patrol groups such as the Minuteman Project). "CIRC . . . has conducted formal meetings with the [Minuteman Civil Defense Corps]." *Id.* At these meetings, CIRC has fomented the group's activities and congratulated its members for encouraging the U.S. government to protect the borders, communities, jobs and families of the United States from illegal immigration. *Id.*

144. See *id.* at 548 (indicating that Congress has become concerned with the issue of civilian border patrol groups, like the Minuteman Project, becoming *de facto* government agents who must uphold Fourth Amendment rights). USBP uses border patrol groups as an "extra set of eyes and ears at the border" and groups like the Minuteman Project sell clothing with logos that say "U.S. Border Patrol." *Id.* This excessive comingling of USBP with groups like the Minuteman Project raises arguments that civilian border patrol groups can in fact act as government agents and are responsible for upholding the mandates of the constitution. *Id.*; see also U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.").

145. See *United States v. Fogelman*, 586 F.2d 337, 343 (5th Cir. 1978) (differentiating searches made in proximity to the border versus searches not made in proximity to the border). A search and seizure not made on the border is judged to be illegal or legal based on the totality of the circumstances which includes "elapsed time and distance as well as the manner and extent of surveyance." *Id.* Those factors "must convince the fact-finder with reasonable certainty" that there was no change of condition between the border to the location where one is searched. *Id.*

146. See *United States v. Cardenas*, 9 F.3d 1139, 1148 (5th Cir. 1993) (discussing the three factors that must be established for an extended border search); see also Peter Yoxall, Comment, *The Minuteman Project, Gone in a Minute or Here To Stay? The Origin, History and Future of Citizen Activism on the United States-Mexico Border*, 37 U. MIAMI INTER-AM. L. REV. 517, 549 (2006) (elaborating on the elements of an "extended border" search).

ply with these standards, individual volunteers and ranchers would have to change their activities in order to prevent an illegal search or seizure in the lands they patrol outside of the vicinity of the border.¹⁴⁷ Furthermore, border vigilantes will be held in violation of the Fourth Amendment if they conduct searches and seizures based on race, nationality, or their use of a foreign language.¹⁴⁸

Additionally, if border vigilante groups were found to be government agents they would have to abide by all constitutional mandates and would be held liable for individual members' activities designed to obstruct aliens' constitutional rights.¹⁴⁹ Federal statute 42 U.S.C. § 1983 gives a cause of action to anyone who is the victim of another person who, while acting under the color of state law, deprives his or her victim of constitutional and legal rights.¹⁵⁰ This law also applies to entities that engage in similar activities.¹⁵¹ According to most courts, an individual vigilante member, or the organization as a whole, could be held liable under § 1983

147. See Peter Yoxall, Comment, *The Minuteman Project, Gone in a Minute or Here to Stay? The Origin, History and Future of Citizen Activism on the United States-Mexico Border*, 37 U. MIAMI INTER-AM. L. REV. 517, 549 (2006) (warning that even minor interactions by border vigilantes with illegal border crossers could be deemed illegal searches and seizures if the vigilante group is deemed an agent of the government and if the encounter occurs outside the vicinity of the border). "For example, if . . . volunteers gave water and assistance to undocumented immigrants until the United States Border Patrol arrived [and this] occurred outside the vicinity of the border, these minor incidents could constitute illegal seizures." *Id.*

148. See *id.* (indicating that this type of racial profiling can be held to be a violation of the Fourth Amendment). In addition to the vigilantes being held liable, any federal official that was aware of the racial profiling could also be prosecuted under the Federal Anti-Conspiracy Statute as contributing to the conspiracy and under the Failure to Prevent Conspiracy Act for failure to prevent the conspiracy. *Id.* at 549–550.

149. See Adalgiza A. Núñez, Note, *Civilian Border Patrols: Activists, Vigilantes, or Agents of the Government?*, 60 RUTGERS L. REV. 797, 818 (2008) (noting that civilians who violate the constitutional rights of other persons, such as illegal immigrants, may be liable under 42 U.S.C. § 1983 for acting under color of law).

150. See 42 U.S.C. § 1983 (Supp. V 2000).

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. *Id.*

151. See Adalgiza A. Núñez, Note, *Civilian Border Patrols: Activists, Vigilantes, or Agents of the Government?*, 60 RUTGERS L. REV. 797, 818–19 (2008) (asserting that "[a]ny entity engaging in deprivation of rights protected under § 1983" is also liable to the injured party).

if the individual or the organization intentionally or recklessly deprived the alien of his or her constitutional rights.¹⁵² This standard, the most stringent that may be applied, can easily be met due to civilian border patrol members' willingness to express their anti-immigrant sentiments and to outline their overt, intentional plans to cease illegal border crossing.¹⁵³

Finally, if civilian border patrol groups were found to be acting as government instrumentalities and if the constitutional violations of their individual members were found to be occurring on such a frequent basis that they could not rationally be overlooked, the organized group would be liable as a government agency and would thus have to uphold constitutional regulations and safeguards that have been implemented by U.S. immigration authorities to protect aliens from things such as illegal interrogations, arrests, and constitutional violations.¹⁵⁴

IV. CONCLUSION

President John F. Kennedy once remarked, "There is no part of our nation that has not been touched by our immigrant background. Everywhere immigrants have enriched and strengthened the fabric of American life."¹⁵⁵ However, hostility toward the immigrant population has become more and more evident and is a reflection of the federal government's failure to enact comprehensive immigration reform. The government's inaction leaves local governments and individuals with the task of creating their own solutions to help their communities and states deal

152. *See id.* at 819 ("The state of mind needed for liability under § 1983 varies among circuits . . . [but] . . . [m]ost courts use the recklessness, deliberate indifference, or callous indifference test.").

153. *See id.* (indicating that this standard is usually the highest applied in cases). The standard is easily met because "[g]iven the level of press coverage and the willingness of civilian border patrol volunteers and organizers to express their anti-immigrant animus, any reasonable person would see that the actions of these groups are completely intentional." *Id.*

154. *See Rizzo v. Goode*, 423 U.S. 362, 386 (1976) (Blackmun, J., dissenting) (showing that according to Supreme Court precedent, if individual vigilante group members' activities occur "with such frequency that they cannot be dismissed as rare, isolated instances," then the vigilante organization acting as a government agent may be held liable for constitutional violations); *see also* Adalgiza A. Núñez, Note, *Civilian Border Patrols: Activists, Vigilantes, or Agents of the Government?*, 60 RUTGERS L. REV 797, 819–20 (2008) ("Once federal courts recognize that civilian border patrol groups are acting as agents or instrumentalities of government, many other possible causes of action arise.").

155. Sara A. Martinez, Comment, *Declaring Open Season: The Outbreak of Violence Against Undocumented Immigrants by Vigilante Ranchers in South Texas*, 7 SCHOLAR 95, 126 (2004).

with illegal immigration.¹⁵⁶ The United States now houses approximately thirty-eight million legal immigrants, twelve million illegal immigrants, and thirty-one million people who are children of immigrants.¹⁵⁷ Many argue that immigrants play an important role in ensuring a healthy state economy,¹⁵⁸ yet immigrants frequently fall victim to harassment from both civilians and the local and federal government. Sons and daughters of immigrants living on the Texas-Mexico border who are applying for passports are suddenly having their citizenship questioned by the federal government, which often requires additional proof outside of a birth certificate to show that the applicant was in fact born in the United States.¹⁵⁹ This type of short-coming illustrates the failure of the United States' immigration policy. Even former President Bush remarked, "It is important that we reform a system that is not working."¹⁶⁰

156. See Miriam Jordan, *Some States Seek Integration Path for Immigrants*, WALL ST. J., Aug. 14, 2008, at A9 (emphasizing that each state government takes different steps to cope with the problem of illegal immigration). "The federal government's failure to enact comprehensive immigration reform has prompted states and localities to come up with their own solutions to illegal immigration." *Id.* Some states are taking a more defensive approach and are issuing orders allowing local governments to enforce federal immigration laws. *Id.* On the other hand, some state governments are implementing integration plans to help immigrants transition into the local society. *Id.*

157. *Id.* (highlighting that since 1990, a record number of immigrants have entered the United States, mainly from Central and South America, Asia, and Africa). The failure of comprehensive immigration reform has led "a handful of Democratic governors [to mount] a quiet offensive to integrate, rather than repel, foreign newcomers," no matter the manner in which they arrived into the United States. *Id.*

158. See *id.* (outlining Massachusetts's coordinated effort to integrate immigrants). Massachusetts put together an advisory council "composed of business leaders, immigrant advocates, academics and policy makers [who] will submit policy recommendations to the governor by July 2009." *Id.* The executive director of Massachusetts's Office for Refugees and Immigrants believes that if it were not for the immigrant population, the state's population would have declined over the past seven years, thus having a negative impact on the state's economy. *Id.*

159. See Miriam Jordan, *They Say They Were Born in the U.S.A. The State Department Says Prove It—An Old Scam Casts Doubt on the Citizenship of Texans Delivered by Midwives*, WALL ST. J., Aug. 11, 2008, at A1 (recounting the story of Juan Aranda, who was born in Weslaco, Texas by a midwife and is now unable to obtain his United States passport). Aranda needs his passport due to a new law that will go into effect that does not allow people living on the U.S.-Mexico border to cross with just a driver's license or birth certificate. *Id.* at A12. Aranda's citizenship is in limbo, even after he sent the government school and baptism records in response to its request for additional evidence in order for it to be able to issue a passport. *Id.* However, the government indicated that the evidence was insufficient to prove Aranda's citizenship. *Id.*

160. Christopher J. Walker, *Border Vigilantism and Comprehensive Immigration Reform*, 10 HARV. LATINO L. REV. 135, 173 (2007) (corroborating former President Bush's apparent concern for immigration reform). Considering the amount of undocumented immigrants living in the United States and the instability at the 2000-mile long U.S.-Mexico border, governmental officials, both on the federal and the state level, are concerned with

The harassment does not end at the federal level. Immigrants have been attacked by civilians motivated by racism and hate. In the summer of 2008, Luiz Ramirez, who was living in Pennsylvania with his fiancée, was attacked by White teenagers in a public park.¹⁶¹ While yelling racial and ethnic slurs, they brutally beat him and he died two days later.¹⁶²

One can imagine the difficulty involved in convincing an undocumented immigrant who has faced violence near the border to press civil charges against his or her aggressor in light of the increased violence against individuals based solely on their “immigrant” appearance and the fact that even United States-born citizens have their citizenship doubted by the federal government.¹⁶³ Civil suits, however, are important because they serve as a means to compensate those who have been victimized at the border and deter members of border groups from participating in similar actions in the future.¹⁶⁴ If border vigilante groups were sued as organizations, along with the law enforcement agencies that acquiesce and help their activities, the leaders of both organizations would be motivated to ensure that the individuals participating in the activities of these groups obey the laws and recognize the constitutional rights of immigrants at the border.¹⁶⁵ Additionally, if border vigilante groups were found to act as government agents, the federal government would be ex-

comprehensive immigration reform. *Id.* Reform is also critical because of the growing population—currently at eleven million people—at the border. *Id.*

161. See News Release, Mexican Am. Legal Def. & Educ. Fund, MALDEF Calls for Peace and Justice in Wake of Hate Crime (July 29, 2008) (describing the racially-motivated crime committed against Mr. Ramirez). “Two of the teens were charged as adults with homicide and ethnic intimidation. A third teen was charged with aggravated assault and ethnic intimidation.” *Id.*

162. See *id.*

163. See Adalgiza A. Núñez, Note, *Civilian Border Patrols: Activists, Vigilantes, or Agents of the Government?*, 60 RUTGERS L. REV 797, 823 (2008) (stating that immigrants’ rights groups have found it hard to convince victims of border violence to file a complaint against their aggressors). “Additionally, bringing claims against individual civilian border patrol volunteers for intentional torts can be time consuming and unproductive as this deters individuals and not organizations.” *Id.*

164. See *id.* (conceding that civil suits against individual members of border vigilante groups “have some effect on deterring physical abuse on the border”).

165. See *id.* (“The purpose of civil suits against civilian border patrol groups and law enforcement agencies acting in conjunction with them would not only provide monetary compensation for those whose rights have been violated, but would also deter such action in the future.”). However, it is easy for legislators and those charged with ensuring that the law is properly enforced to ignore the issues concerning illegal immigrants’ rights since undocumented immigrants are not part of the constituency that elects decision-making government officials. *Id.*

posed to massive liability and would be motivated to create measures to prevent violence near the border at the hands of such groups.¹⁶⁶

Illegal border crossers are afforded limited constitutional protections once they are within the jurisdiction of the United States.¹⁶⁷ It is important to clearly define immigrants' rights on or near the border while striking a balance between border vigilante members' rights to freely associate and protect their own property.¹⁶⁸ This can be done by explicitly eliminating border-crossing violations from state citizen's arrest statutes.¹⁶⁹ This will prevent border vigilantes' use of citizen's arrest statutes to wrongfully detain any "foreign-looking" person found near the border. Furthermore, legal observing activities will also help ensure that immigrants' rights are not infringed upon in the border area.¹⁷⁰

Unfortunately, though violence at the border is an ominous social ill, it has been largely ignored by the judiciary, legislature, and the Department of Homeland Security.¹⁷¹ Former President George W. Bush addressed

166. See Peter Yoxall, Comment, *The Minuteman Project, Gone in a Minute or Here to Stay? The Origin, History and Future of Citizen Activism on the United States-Mexico Border*, 37 U. MIAMI INTER-AM. L. REV. 517, 552 (2006) (urging the importance of government intervention to prevent violence at the border). The political strength border vigilante groups possess today coupled with their racist and xenophobic tendencies "may indeed bring violence to the border and even destabilize relationships within and among the states." *Id.* "[T]he federal government must be immediately stirred into preventative action in order to evade future violence and avoid the prospect of having to take extreme remedial measures in the future." *Id.*

167. See Michael J. Nunez, Note, *Violence at Our Border: Rights and Status of Immigrant Victims of Hate Crimes and Violence Along the Border Between the U.S. and Mexico*, 43 HASTINGS L.J. 1573, 1602 (1992) (stating that although illegal border crossers represent a large part of the population in border states and are afforded limited constitutional protections once inside the jurisdiction of the United States, illegal immigrants are nevertheless underrepresented in governmental decision-making bodies).

168. See Christopher J. Walker, *Border Vigilantism and Comprehensive Immigration Reform*, 10 HARV. LATINO L. REV. 135, 174 (2007) (accentuating the importance of respecting both border vigilantes' and undocumented migrants' rights at the border). Border vigilante groups have the right to freely associate and to protect their property and undocumented migrants have the right to attempt to cross the border with the protections of basic human rights. *Id.*

169. See *id.* (advocating that border states eliminate border-crossing violations from their citizen's arrest statutes). "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." *Id.*

170. See *id.* (encouraging legal observers to "continue and increase their legal observing efforts at the border").

171. See Michael J. Nunez, Note, *Violence at Our Border: Rights and Status of Immigrant Victims of Hate Crimes and Violence Along the Border Between the U.S. and Mexico*, 43 HASTINGS L.J. 1573, 1604 (1992) (noting that the judiciary, legislature, and INS (now DHS) have done little to address violence at the border). Unless "those who represent the alien's interest in the legislatures and courts" make a change in the current immigration

violence at the border by stating, “I’m against vigilantes in the United States of America. I’m for enforcing law in a rational way. That’s why you got [sic] a Border Patrol, and they ought to be in charge of enforcing the border.”¹⁷² The U.S.-Mexico border has been plagued with violence and hatred since its inception, but a history of violence cannot be used as a basis for inaction.¹⁷³ Under Secretary of DHS’s Border and Transportation Security Directorate, Asa Hutchinson, emphasized “the importance of gathering and sharing intelligence, using technology, and balancing resources between the northern and southern borders,” but added that “he hopes that private homeland defense groups (an apparent reference to vigilante groups patrolling the U.S.-Mexico border) will ‘let law enforcement do their job. It’s a law enforcement function.’”¹⁷⁴ As far back as 1990, Representative Gus Yatron (D-PA), the Chairman of the Subcommittee on Human Rights and International Organizations of the House Foreign Affairs Committee, recognized the following:

[S]omething is wrong on our borders and the cooperation between U.S. and Mexican authorities in addressing this matter is not what it should be. The Border Patrol has a responsibility to protect our borders and to ensure that the laws are enforced. They are also responsible to ensure that illegal aliens are treated in a humanitarian

system, “alien[s] will continue to face problems with securing basic constitutional protection[s].” *Id.* at 1602.

172. *Recent Border Developments: The Minutemen and Their Humanitarian Counter Groups*, 82 INTERPRETER RELEASE 1221, 1221 (2005) (referring to a 2005 press conference with the controversial group of private citizens patrolling the U.S.-Mexico border). The Congressional Research Service (CRS) raised similar concerns about the Minutemen in two recent reports, citing complaints from USBP that the citizen group interferes in USBP operations, as well as constitutional concerns about the Minutemen group acting as a *de facto* governmental agent. *Id.*

173. See 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, 1455 (2005) (“Hatred and violence in the United States/Mexico borderlands have characterized the region since the borders creation a century and a half ago. . . . [T]he legacy of animosity is not a justification for inaction.”).

174. *Senate Confirms Hutchinson to Head Border and Transportation Security Directorate; New Bills*, 80 INTERPRETER RELEASE 126, 127 (2003) (responding to Senator John McCain’s (R-Ariz.) request to discuss his opinion of the placement of military personnel on the U.S.-Mexico border and illustrating Mr. Hutchinson’s desire that border vigilante groups not interfere with the work of USBP officers). Hutchinson was firm that he does not support militarization of the borders, but does believe that the military can support border patrol efforts. *Id.*

manner and when abuses occur formal investigations are conducted and disciplinary actions taken.¹⁷⁵

It is necessary that all citizens and noncitizens within the United States unite and voice opposition against the injustices that immigrants face while attempting to secure a life in the United States and to push Congress and President Barack Obama and his administration to enact comprehensive immigration reform.¹⁷⁶ Ultimately, our elected officials, and not private individuals, have the responsibility to ensure that the borders of the United States are safe. Such comprehensive reform will help ease racial tensions, prevent border vigilante violence on or near the U.S.-Mexico border, and will help to more effectively secure our nation's borders.

175. *House Subcommittee Hears About Border Violence*, 67 INTERPRETER RELEASE 504, 504 (1990) (referring to increasing reports of border violence and reinforcing the idea that border vigilante groups should not be the ones to enforce immigration laws at the border). Other U.S. representatives agreed with the Chairman's position and commented that a virtual war was being waged on the U.S.-Mexico border. *Id.* However, Representative Mel Levine (D-Cal.) noted, while it is not correct to promote illegal immigration, "violence and discrimination cannot be the weapons for enforcement and control of our border." *Id.*

176. *See* News Release, Mexican Am. Legal Def. & Educ. Fund, MALDEF Calls for Peace and Justice in Wake of Hate Crime (July 29, 2008) (echoing the President of MALDEF, who in response to the brutal attack against Luis Ramirez, summoned "all Latinos and all Americans . . . [to]come together to prevent the next hate crime against immigrants"). "That means Congress and the next [P]resident must enact comprehensive immigration reform and the voices of democracy and justice must overwhelm the decibels of hatred and bigotry." *Id.*