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*

I. INTRODUCTION

Since the late 1980s and early 1990s,1 groups of concerned citizens have banded together to pick up where the federal government failed and to combat illegal immigration at its source: the unguarded borders.2 Armed with the concepts of citizen's arrest and property

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1. See Steven W. Bender, Sight, Sound, and Stereotype: The War on Terrorism and its Consequences for Latinas/os, 81 OR. L. REV. 1153, 1173 (2002) (outlining the modern history of vigilante groups along the border, beginning with the “Light up the Night” campaign of 1989 and 1990). See also infra Part II.

2. Whether the United States/Mexico border is “guarded” was debated on the television show Hardball, MSNBC Television broadcast, May 22, 2003 (transcript on file with

1419
rights, vigilante ranchers in California, Arizona, New Mexico, and Texas began detaining illegal aliens and turning them over to the authorities.\(^5\) As the vigilante ranchers grew in number, so did the rumors of their violent and abusive tactics. Now, in the national post-9/11 environment, vigilante ranchers have a renewed sense of purpose, and with the country on alert, they are preying on Americans' fear and anger, using words like terrorism, patriotism, and duty to justify their crusade on the border.\(^4\)

Before 9/11, Americans' primary concern with the problem of illegal immigration was the economic effect of the poor, unskilled workforce entering the country by the hundreds of thousands.\(^5\) But since 9/11 the concern evolved and intensified with questions about who is crossing our southern border and what evil designs they have for our country.\(^6\) Only after 9/11 did it become evident to the Americans who do not live on the border that Mexicans are not the only ones who cross it. In 1998, upon finding over one hundred illegal aliens in his yard, one rancher remarked:

> Damnedest bunch of illegals I ever saw. All of them were wearing black pants, white shirts and string ties. Maybe they were hoping to blend in . . . [chuckles]. They took off, I called the Border Patrol . . . [who later] let me know that they had caught them . . . [and] that they were all Iranians.\(^7\)

The post-9/11 stories of Middle Eastern illegal aliens crossing the border are more sensationalized. On a website maintained by Supporters of United States Border Patrol,\(^8\) the first paragraph claims a group of Middle Eastern aliens were so frightening to the Mexican illegals (who, 

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3. The activities of vigilante ranchers discussed in this Comment, for the most part, take place on rural desert ranches where the border is still an invisible, but very real, line in the middle of no where.  
5. See Nancy Gibbs, Keep Out, You Tired, You Poor . . ., TIME MAG., Oct. 3, 1994, at 46 (citing a study sponsored by the Clinton Administration that found illegal aliens cost states two billion dollars a year, but interestingly created twenty-five to thirty billion dollars in tax revenue).  
7. Id. In 2001 one border patrol agent estimated that one out of every ten illegal aliens caught crossing the United States/Mexico border is from a country other than Mexico. Id.  
2005 ACTION TO CURB VIGILANTE ACTIVITY 1421

by the way, paid between $150 and $350 to be smuggled into the country) that they called border patrol themselves—but the "Arabs got away and melted into America."9

The vigilante border groups are operating in a legal and moral shade of grey. On the one hand, they are acting within the legal framework of citizen's arrest and fulfilling a societal need, which the government has not had the resources to provide. On the other, these groups are motivated by racist, xenophobic agendas, whose violent and abusive tactics are offensive to fundamental American values. Part II of this Comment offers a brief history of the United States/Mexico border and its legacy of vigilante justice. Part III recognizes the complexity of the problem posed by the border vigilantes. In an attempt to explain why it is difficult to label the border vigilantes' activities as entirely good or entirely bad, Part III will explain the inherent conflict between social contract theory and the practical realities of law enforcement.

In Part IV, the focus of the Comment shifts to the potential legal solutions to vigilantism on the border and identifies the strengths and weaknesses of each alternative. The first section of Part IV is an examination of the causes of action, which focus on the individual actor (including criminal violations, civil suits for false imprisonment, and civil suits brought under the Racketeer Influenced and Corrupt Organizations Act10). The second section of Part IV begins with a comparison of the vigilante border groups to the Ku Klux Klan of the Reconstruction Era. Drawing on the relevant similarities and differences in both the composition of the groups and national environment, one can see the danger that these groups pose to illegal immigrants and equally importantly to American values. The conclusion drawn is that the best way to combat the vigilante ranchers is first to recognize them for what they are—violent militias pursuing racist agendas—and second to prosecute them under either state anti-militia laws or federal anti-conspiracy laws.

II. HISTORY OF THE UNITED STATES/MEXICO BORDER AND THE EMERGENCE OF ANTI-IMMIGRATION VIGILANTE GROUPS

At first glance, the vigilante ranchers are both respectable and fascinating. Upon learning of the vigilante border groups' existence, one cannot help but conjure up images of the Wild West and lone star justice: romantic visions of cowboys fighting against lawlessness and bad men. But investigation beyond the sound bites and propaganda

9. Id.
uncovers the truth—patriotism, civic duty, and protection of property rights are simply ad hoc justifications for “wetback” sport hunting.\textsuperscript{11}

The United States/Mexico border has been a source of tension for both countries since its creation. By the mid-1800s, American settlers made their way into the Mexican province of Texas.\textsuperscript{12} The Americans, frustrated by Mexican taxes, overran the Mexican garrison in 1835.\textsuperscript{13} In response, Mexico sent six thousand troops to the region led by General Antonio Lopez de Santa Anna (“Santa Anna”).\textsuperscript{14} The Mexican army reached the city of San Antonio in February 1836, and it was there that the thirteen day Battle of the Alamo took place.\textsuperscript{15} The Mexican army left the Alamo victorious, but was defeated two months later by the United States army fighting to the cry of “[r]emember the Alamo.”\textsuperscript{16} Santa Anna was captured and sent to Washington to meet with President Jackson.\textsuperscript{17} He made two promises to the Americans: first, he would keep Mexican troops south of the Rio Grande, and second, he would persuade the Mexican Congress to ratify Texas’s independence.\textsuperscript{18} The Mexican Congress was not convinced and never recognized Texas’s independence; even so, in 1845 the United States Congress admitted Texas into the Union.\textsuperscript{19} Viewing this as an act of war, Mexico sent troops north of the Rio Grande into Texas where they were met by the United States Army.\textsuperscript{20} After securing land in Texas, New Mexico, and California, the United States moved south and invaded Mexico City.\textsuperscript{21} Mexico surrendered and the Treaty of Guadalupe-Hidalgo\textsuperscript{22} was signed on February 2, 1848, selling California, Arizona, New Mexico, and Texas to the United States for a mere fifteen million dollars.\textsuperscript{23}

\textsuperscript{13} Id.
\textsuperscript{14} Id.
\textsuperscript{15} Id.
\textsuperscript{16} Id.
\textsuperscript{17} Id.
\textsuperscript{18} Id.
\textsuperscript{19} Id. at 36.
\textsuperscript{20} Id.
\textsuperscript{21} Id.
\textsuperscript{22} 9 Stat. 922, T. S. No. 207 (Feb. 2, 1848).
\textsuperscript{23} RIDING, supra note 12, at 36.
From these bloody beginnings, the United States/Mexico border was born, but the new border did little to quell the tensions between “gringos” and “greasers” in the borderlands. Blood shed from war was replaced with blood shed from mob violence. An estimated 597 Mexicans were lynched between 1848 and 1928 by vigilante Americans who were using violence and terror in an effort to keep “wetbacks” off the land that they viewed as rightfully theirs. Not all nineteenth century ranchers advocated vigilante justice, nevertheless, the value of Mexican life was still treated with a certain degree of apathy. According to one rancher “[t]o shoot these Greasers ain’t the best way. Give ’em a fair trial, and rope ’em up with all the majesty of the law. That’s the cure.”

In the late 1980s and early 1990s the battle over the border heated up again. In 1990 El Paso Border Patrol Agents took aggressive action to curb the influx of illegal traffic across the border. The Border Patrol started “Operation Hold the Line” and erected a twenty-four hour blockade along the Rio Grande. The operation was successful, resulting in an impressive drop in illicit traffic across the border. The circumstances in California, however, were strikingly different because, unlike Texas, California did not have the Rio Grande to act as a physical barrier between the two countries. As of 1990 there was no wall, let alone fence, that separated San Diego and Mexico. Knowing that the Border Patrol lacked the resources to stop them all, potential illegal immigrants would congregate at the border, then simply run across. In 1989 and 1990, concerned California citizens participated in the “Light Up the Border” campaign, in which Californians would form a line with their cars and shine their lights towards the border. Though the campaign was successful in numbers, it received a dose of its own medicine when immigration activists, wielding mirrors and tin foil, fought back against the demonstrators.

Irritated that the government was not investing more time, money, and energy into curbing the flood of illegal immigrants, citizens who called themselves the “Airport Posse” began patrolling California

25. See Bender, supra note 1, at 1173.
26. Id.
27. Id.
29. Id.
30. Bender, supra note 1, at 1173.
31. Id.
airports looking for suspicious persons with brown skin. In their blue and gold "US Citizen Patrol" tee-shirts, the Airport Posse took it upon themselves to monitor the passengers traveling on early morning/late night flights out of San Diego's International Airport. The group's activities were, for the most part, mild and non-intrusive. According to the Airport Posse, they were doing nothing more than standing around, watching, taking notes on what they saw, and every so often reminding airport personnel that travelers must show government issued identification before boarding their flights. Notwithstanding the Airport Posse's assertions regarding their activities, immigrant rights groups viewed the Airport Posse as racist vigilantes and speculated as to "what's next?"

Growing concern over immigration problems at the border prompted President Clinton to institute a new border policy called "Operation Gatekeeper," which focused on border cities. Operation Gatekeeper alleviated many of the illegal immigration problems San Diego was facing. A ten foot wall, constructed out of surplus runway mats and covered in lights was built along fourteen miles of the California/Mexico border. 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. This new policy was designed to slow the illicit human traffic across the border, but instead, the "traffic" was merely diverted to the deserts, creating new problems. Instead of flooding border cities, illegal

32. Tony Perry, Citizen's on the Lookout for Illegal Immigrants, L.A. TIMES, May 19, 1996, at A3. Private citizens were not the only ones fed up with the federal government. Several state governments sued the federal government for funds that the states spent on illegal aliens the feds failed to keep out. Gil Klein, Dying to Cross; A Special Report from the Mexican Border; Illegal Immigrants Who Circumvent Tough Barriers Often Pay with Their Lives, RICHMOND TIMES DISPATCH, Nov. 30, 2003, at A1.
33. Perry, supra note 32, at A3.
34. Id.
35. Id. (quoting Herman Baca, Chairman of the National City-based Committee on Chicano Rights). See also Vincent Schodolski, Citizens Patrol Angers Hispanics in San Diego, CHI. TRIB., May 26, 1996, at C4 (quoting executive director of the Chicano Federation as stating "[w]e are not going to tolerate the invasion of people's privacy and the invasion of that privacy just because people have brown skin.").
37. Id.
38. Id.
immigrants now cross vast desert ranches where hundreds die each year from exposure, heat exhaustion, and dehydration. 40

Diverting the flow of illegal immigrants to the deserts did more than increase the deaths of illegal aliens from the desert heat; it angered the ranchers whose land was now being used as an immigration highway. Irritated by heavy human traffic, 41 trash, and broken fences, ranchers in California, Arizona, New Mexico, and Texas began to form groups aimed at preventing trespassing, illegal aliens from entering the United States. 42

The largest most active vigilante border groups include “Ranch Rescue” (claiming 250 members) and the “Barnett Boys” (claiming to have caught over 5000 illegal aliens). 43 Ranch Rescue is one of the more secretive and frightening groups. 44 Members of Ranch Rescue


42. See Walley, supra note 6. See also Hammer-Tomizuka & Allen, supra note 4, at 1-7.

43. Hammer-Tomizuka & Allen, supra note 4, at 2-4. Other groups include Cochise County Concerned Citizens, Civilian Homeland Defense, and American Border Patrol. Id. at 2-7.

44. The following poem is published on Ranch Rescue’s website and is illustrative of the frightening nature of the group:

“Volunteer’s Prayer For Strength, Guidance, and Preservation of our Nation”

And when I vest my flashing sword and my hand takes hold in judgement,
I will take vengeance upon mine enemies.
And I will repay those who hate me O Lord,
Raise me to Thy right hand and count me among Thy Saints.
Whosoever shed last blood, by Man shall his blood be shed.
For immunity of God make he the man.
Destroy all that which is evil, so that which is good may flourish.
And I shall count thee among my favored sheep.
And you shall have the protection of all the angels in heaven.
Never shall innocent blood be shed.
Yet the blood of the wicked shall flow like a river.
The Three shall spread their blackened wings and be the vengeful striking
Hammer of God.
And Shepherds we shall be for Thee, my Lord, for Thee.
Power hath descended forth from Thy hand
Our feet may swiftly carry our Thy commands.
So we shall flow a river forth to Thee.
participate in operations carried out in various border states, the details of which are known only to tactical team members.\textsuperscript{45} Ranch Rescue puts on airs of legitimacy by wearing army fatigues and encouraging members to bring tools normally used by legitimate law enforcement, including night vision equipment, guard dogs, and weapons.\textsuperscript{46}

There are certain noteworthy characteristics consistently shared by such vigilante border groups. First, there is a tone in statements made by these groups that borderland ranchers are fighting a war against a lawless savage, and so their tactics, which have lawless characteristics themselves, are justified.\textsuperscript{47} Second, the groups impersonate legitimate law enforcement.\textsuperscript{48} Their badges and graphics bear striking resemblance to those of Border Patrol, and some adopt official sounding names like American Border Patrol and Civilian Homeland Defense.\textsuperscript{49}

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46. Hammer-Tomizuka & Allen, supra note 4, at 2. Ranch Rescue volunteers are encouraged to bring weapons for "protection." \textit{Id.}
47. Lisheron, supra note 45 (quoting Foote who refers to Mexican government officials as "narco-state thuggery officials"). \textit{See also} Walley, supra note 6.
49. \textit{Id.}
Third, these groups operate under a sense of urgency—that is, if they do not act now then all that is good in American society will be lost; and they believe that they are the only ones who are doing anything to prevent it. Take, for example, Jack Foote (“Foote”), founder of Ranch Rescue, who believes that the illegal immigrants crossing the border are “wrestling” away from Americans their “property rights and way of life.”

These sentiments were reiterated by Nethercott, a fellow Ranch Rescue member. Nethercott claims “[w]e’ve got about five more years and this country is ruined . . . illegals are destroying our fabric of life.” Surprisingly these sentiments are echoed in the main stream media. Hardball, an MSNBC news show, did a piece on the border vigilantes where Pat Buchanan commented that “we [are] losing our country.”

This sense of urgency is used to justify the groups actions because the Border Patrol “get[s] an A for effort and an F for actuality,” so “[s]omeone needs to be doing the government’s job.”

Fourth, and probably the most disturbing shared characteristic, is the undeniable fact that racially motivated, xenophobic ideologies and agendas permeate the groups. The vigilante border groups, and their supporters, dehumanize the Mexican migrants and refer to them as “illegals,” “dog turds,” and “wetbacks.” One website states:

[T]here are real problems with you illegals today. You have all sorts of diseases. Terrible diseases. These diseases are so bad that the Border Patrol Agent will always wear gloves when he is near you. But your breath might be far more deadly than it smells . . . [and thanks to an air filter the Border Patrol Agent will not] get whatever you are pumping from your lungs—including small pox . . .

Passages, like the one above, are designed to humiliate Mexican immigrants, and instill fear in Americans by implying that illegal aliens are disease carrying sub-humans who should only be interacted with from a distance or with gloves. Racist sentiments can also be detected in the vigilante border groups’ criticism of law enforcement agencies. Ranch Rescue has not been well received by legitimate law enforcement in Jim Hogg County, Texas. Foote blames the poor reception on the
lack of “white people” in the sheriff’s department. He claims that the “county has been ethnically cleansed” of Caucasians and refers to the sheriff's department as the “Texas Taliban.”

Undeniably, illegal immigration is a serious problem for the United States and the ranchers who suffer the everyday disturbance and inconvenience of heavy human traffic across their land. The economic burdens illegal aliens impose on the state and federal governments alone are enough to raise some concerned eyebrows. But, with the added threat of terror attacks by international organizations on every American’s mind, foreigners’ unauthorized entry into the United States should do more than raise eyebrows—it should put Americans on alert. President Bush stated that “every American is a soldier, and every citizen is in this fight,” but the border vigilante groups take advantage of logical and legitimate illegal immigration concerns to further their racially motivated xenophobic agendas. Their vigilante tactics threaten core American values that, even in times of war, should not be sacrificed.

III. EXPLORING THE DICHOTOMY BETWEEN THE PHILOSOPHY OF POWER IN A LIBERAL SOCIETY, AND THE HISTORICAL AND PRACTICAL REALITIES OF LAW ENFORCEMENT

The issues surrounding the vigilante border groups are fascinating, complex, and conflicting. By taking the law into their own hands and arresting illegal aliens, the border vigilante groups exemplify the dichotomy between one of the foundational philosophical tenants of liberal society—that the state has a monopoly on force—and the historical reality of law enforcement—that private citizens have, and still do, play a key role in effective policing.

A. Social Contract Theory and the State's Monopoly on Force

Liberal theorists, from Hobbes to Nozick, have legitimized their vision of the state by demonstrating its superiority to the state of nature.

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58. Id.
59. Id.
61. The type of force, or power, the individuals trade for protection is specific, but difficult to define. It is the type of force ordinarily associated with the state, i.e. guns and prisons, but does not include other types of power or force, like those acquired in the workplace or the home.
62. See generally THOMAS HOBBES, LEVIATHAN (Barnes & Noble Books 2004) (1651); LOCKE, TWO TREATISES OF GOVERNMENT (Peter Laslett ed., Cambridge University Press
For all their differences, social contract theories share at least two hypothetical constructions. First, the theories have a similar beginning—once upon a time, long ago, individuals were in the state of nature where everyone was for and by himself. Second, individuals in the state of nature agreed to forfeit some of their rights to the state in return for a higher degree of security than they would otherwise have.

Hobbes was one of the first philosophers to employ the idea of a social contract in creating a comprehensive moral and political theory. In a methodical and scientific manner, he established the obligations an individual has to both the state and morality. To do this, Hobbes engaged in a thought experiment: he described a hypothetical history of mankind, in which a commonwealth is established in order to escape a dreadful state of nature that is characterized by war and fear. In Hobbes's state of nature, each man has approximately equal powers in both "strength of body" and "faculties of the mind." Hobbes recognized that in terms of physical capability, some are naturally stronger. Yet, even when there are differences in ability, the weak can reconcile the discrepancy by creating a confederacy with others who are in the same situation.

Hobbes believed that there is greater equality among men when speaking of their mental capacities. However, this does not mean that all men view others as mentally equal because, generally, the individual will not admit another is wiser than himself. This "equality of ability" results in every man having an equal hope in attaining his desired ends. In a world of limited resources, Hobbes argued that these individuals, of relatively equal powers, war with each other for three reasons: the first is "for gain," the second "for safety," and the third "for reputation." The void in common power results in a constant state of all inclusive war. This "solitary, poore, nasty,

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1688) (1632-1704); ROBERT NOZICK, ANARCHY, STATE AND UTOPIA (Basic Books, Inc. 1974). The term "liberal" as used in this Comment is not meant to describe particular political views but rather is a short hand term for social contract theory. See Clifford J. Rosky, Force, Inc.: The Privatization of Punishment, Policing, and Military Force in Liberal States, 36 CONN. L. REV. 879, 1032 n.19 (2004).

63. HOBBES, supra note 62, at 89-93.
64. Id. at 89.
65. Id. at 90.
66. Id. at 93.
67. Id. at 89.
68. Id. at 90.
69. Id.
70. Id. at 91.
71. Id.
72. Id.
brutish, and short" life in the state of nature leaves little reason to doubt
the individual's decision to contract out of it.72

Robert Nozick, also described a state of nature in his social contract
theory.73 Although the individuals in Nozick's state of nature are
generally good and moral creatures, conflicts still arise.74 The "personal-
enforcement of one's rights . . . leads to feuds, to an endless series of
acts of retaliation," thus conflict resolution necessarily requires needed
protection, mediation, and retribution.75 The way in which people
satisfy these needs evolves through stages of society, ending with a
"night watchman state"—a minimal state whose authority lies in, and
is restricted to, the protection and preservation of negative rights.76

According to Nozick, a state, by definition, has a monopoly on force: "a
necessary condition for the existence of a state is that it . . . announce
that, to the best of its ability . . ., it will punish everyone whom it
discovers to have used force without its express permission."77

Implicit in Hobbes's and Nozick's theories is the idea that rational
citizens realize that an unbridled right to use force does nothing to
further their interest in a stable society. And so the rational citizen is
willing to forfeit the right to use particular types of force to the state in
exchange for protection. Thus, the state's existence and purpose are
reliant upon its monopoly on force.

B. The Historical Role of Citizen's Arrest in Law Enforcement

Today, by virtue of their novelty, stories of citizens arresting other
citizens are quickly picked up by local news media and become topics for
discussion around the water cooler. Though citizen's arrests by private
security or extra-jurisdictional police are common;78 stories of citizens
utilizing self-help tactics to arrest neighbors for violating the city's
pooper-scooper ordinance are rare.79 It is only relatively recently in law
enforcement history, however, that the quintessential citizen's arrest
became noteworthy.

During much of common law history there was virtually no distinction
between public and private actors.80 Public law enforcement was a

72. Id. at 92.
73. Nozick, supra note 62, at 10-25.
74. Id.
75. Id. at 11.
76. Id. at 26.
77. Id. at 24.
78. M. Cherif Bassiouini, Citizen's Arrest: The Law of Arrest, Search, and
Seizure for Private Citizens and Private Police 3 (Charles C. Thomas Publisher 1979).
80. See Bassiouini, supra note 78, at 9-10.
foreign idea in thirteenth century England when criminal justice was reliant upon the private citizen. In 1235 England enacted the Statutes of Winchester, which became early guidelines for what is now called criminal procedure. Under these statutes, law enforcement was a private affair and each citizen had a positive duty to "drop all work when the 'hue and cry' was raised, and . . . 'join immediately in the pursuit'" of criminals.

Eventually two distinctions arose between arrest by a citizen and arrest by a king's officer. First, officers were excused if they made a warrantless arrest of a felon for a crime that was not actually committed; whereas the private citizen was not. Second, a private citizen could only effectuate an arrest when his suspicion arose from personal knowledge. An officer, however, could rely on suspicion based on second hand information.

In the seventeenth century, groups identifying themselves as "thief-catchers," usually composed of felons themselves, arose and began hunting criminals for monetary rewards. The eighteenth century saw the rise of private funds being allocated to groups whose sole purpose was the "watch and ward." Private law enforcement was simply inadequate to fulfill society's law enforcement needs when cities became larger and more densely populated. With the growth of cities, public law enforcement was born and so were new, more specific laws of arrest. Magistrates and peace officers were not only given the authority to arrest individuals for felonies and breaches of the peace but also the authority to order private citizen's to arrest as well. Citizens were still required to arrest when ordered to do so, but what was once a positive duty became a permissive right that was not only voluntary but done at his own peril.

In the United States, citizen's arrest also played an important role in the development of law enforcement, but unlike the laws in England, the

81. Id. at 9.
82. Id.
83. Id.
84. Id. at 9-10.
85. Id. at 10.
86. Id.
87. Id.
88. Id.
89. Id.
90. Id.
91. Id. at 11.
92. Id.
United States citizen never had a positive duty to make citizen's arrests. Constitutional separation between the state and federal governments gave states exclusive control over citizen's arrest laws. Additionally, the arrest laws in the United States focus on state actors, and constitutional protections only attach to defendants when the state is an actor. Thus, citizen's arrest laws were doomed to develop inconsistently as they were subject to state by state variation.

Vigilantism was prevalent in the first hundred years of United States history. Initially, public peace officers were on duty during the day, and private citizens would be "watchmen" at night. Eventually, the night watchman system proved insufficient due to internal flaws and the expanding cities' growing need for additional law enforcement. In 1844 the first public police forces were formed, but private law enforcement did not fall by the wayside. Today, it is estimated that private security guards outnumber public police officers by approximately two to one.

By the turn of the century, states began to recognize there were competing interests between the citizen's common law right to make arrests and the individual's liberty interests. States enacted statutes, which were designed to curb self-help law enforcement, defining citizen's arrest and the situations that warrant its use. Though most citizen's arrest statutes share fundamental similarities, there is variation from state to state and their interpretations "depend[] upon the social context of the times.

Throughout its history, citizen's arrest has been a valuable crime fighting resource and supplemented public law enforcement efforts when governmental resources were slim or non-existent. The citizen's right to arrest is broadened in times of need and reined in when citizens' efforts look more like meddling and less like aid for the public good. But

93. Id. at 6.
94. Id.
95. Id. at 13.
96. Id. at 6.
98. Id. at 1829.
99. Id.
100. Id. at 1808.
101. BASSIOUNI, supra note 78, at 13.
102. Id. at 14.
103. Id. at 6.
104. Id. at 6-7. The need for private security forces comes in waves. Id. For instance, when the United States expanded westward and the railroads were in need of security;
the inherent conflict remains: when citizens arrest others they are infringing on the liberty of another individual who is not afforded the constitutional protections that this country proudly values.

The purpose of Part III is to provide a contextual framework under which the morality of the border vigilante groups can be analyzed. Describing the border vigilantes as holistically “good” or “bad” is a tricky endeavor because their actions lie squarely in the dichotomy between the philosophical underpinnings of American society and the historical, practical reality of law enforcement. However, on balance, the border vigilante groups pose a threat, not only to the illegal aliens they confront but also to core American values. Thus, the remainder of this Comment explores the potential legal causes of action against these border vigilante groups.

IV. FINDING A SOLUTION: POTENTIAL CAUSES OF ACTION TO COMBAT VIGILANTISM ON THE BORDER

Identifying the actions of the border vigilantes as problematic is simple compared to the challenge of coming up with a viable solution. There are several potential legal courses of action that can be taken against the border vigilante groups, but each presents potentially fatal flaws. This section outlines the potential legal causes of action against the border vigilantes and identifies the strengths and weaknesses of each. First is an examination of causes of action against individual members of the vigilante border groups, with recognition that these possibilities are inadequate, have legal pitfalls, or both. Second is a comparison between the border vigilante groups and the Ku Klux Klan of the Reconstruction Era (the “Klan”). The conclusion drawn is that the best way to solve the problem in the borderlands is to take advantage of legal causes of action that focus on the groups as a whole, either under state anti-militia laws or federal anti-conspiracy laws.

A. Focusing on The Individual Actor: Criminal Prosecutions, False Imprisonment, and the RICO Act

While most vigilante ranchers operate in groups, one obvious way to curb their activities is to prosecute or sue the individual members. Possible solutions to the problem of vigilantism in the Southwestern borderlands, which focus on the individual actor, include: (1) prosecution for criminal violations; (2) civil suits for false imprisonment; and (3) civil
suits brought under the Racketeer Influenced and Corrupt Organizations Act ("RICO").

1. Criminal Violations. Prosecuting border vigilantes when they commit crimes is a necessary and positive step towards curbing the aggressive tactics employed by the vigilante border groups. But criminal prosecutions do not offer a complete solution. Ranch Rescue, for instance, is "proud of the fact that no criminal complaints have ever been filed against [it], nor against any of [its] volunteers during field missions. That alone speaks volumes for the absolute legality of what [Ranch Rescue has] done and what [it] will continue to do." Since that statement was made, Ranch Rescue's pride was bruised when criminal charges were filed against Casey Nethercott and Henry Conner. Nethercott pistol whipped, and his dog attacked, a Salvadoran during a Ranch Rescue mission on a Texas ranch.

In September 2004 Nethercott was arrested again, this time in Arizona. The incident began on August 31, 2004 when he refused to pull over for the Border Patrol. He was followed to his house, where he got out of his car and said at least twice "[w]e're going to have a shootout." Border Patrol defused the situation and reported it to the Federal Bureau of Investigation ("FBI"). On September 15 Nethercott and a fellow group member Kalen Robert Riddle were approached by FBI agents. When they refused to stop, Riddle was shot and seriously injured by an FBI agent. Nethercott was arrested, and when FBI searched his house they found fifteen rifles, three handguns, smoke grenades, and several hundred pounds of ammunition.

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106. Lisheron, supra note 45 (quoting Foote).
107. Id.
110. Susan Carroll, Border Group Member to Stay in U.S. Custody; Accused of Vowing Shootout with Agents, ARIZ. REPUBLIC, Sept. 23, 2004, at 7B.
111. Id.
112. Id.
113. Id.
114. Id.
115. Id. Criminal charges against the leaders of vigilante border groups are not uncommon. Simcox, the leader of Civilian Homeland Defense has been arrested on gun charges. Cooper, supra note 40, at 26.
One positive result of the criminal prosecutions is that other groups have re-thought their tactics. In response to the Texas criminal charges against Nethercott, David Cheney, head of the Arizona chapter of Ranch Rescue, announced a new name and a new mission for his group.\footnote{116} Disgusted by Ranch Rescue's defense of Nethercott, Cheney stated that his members will simply clean up trash along the border, and instead of detaining the illegal aliens they come across, they will simply call the Border Patrol.\footnote{117}

Nevertheless, the criminal law cannot provide a complete solution to the problem created by the vigilante border groups for several reasons. First, the repugnant nature of the border vigilantes' activities is not limited to criminal acts. Relying solely on criminal prosecutions to legally challenge the members of these groups would be ineffective because the state would have to essentially sit around and wait for someone to do something illegal. Second, the victims are usually illegal aliens who are deported shortly after they are discovered. It is reasonable to assume that many of the crimes committed by the border vigilante groups go unnoticed because the victims are illegal immigrants who are often immediately deported, who are too unknowledgeable, or too frightened to speak up.

Third, the members of these groups consider themselves to be patriotic, law abiding citizens so not only do they try to operate within the law, one can reasonably anticipate that the group will disassociate itself from those that break the law.\footnote{118} Fourth, prosecuting criminal violations by the individual ignores the most disturbing aspect of the border vigilante's behavior—that he is more dangerous when his racially motivated xenophobia is furthered by concerted group activity than when he is acting alone.

\subsection{Civil Suits.} Depending on the circumstances, illegal aliens may have civil causes of action against the vigilantes who detain them. In many instances, the potential civil liability of border vigilantes is predicated on the facts and circumstances of each case; but, because the goal of the groups is to detain the aliens they encounter, false imprisonment is an obvious civil remedy generally applicable against the vigilantes.\footnote{119} For a claim of false imprisonment to succeed, illegal

\begin{footnotes}
\footnote{116} Claudine Lo Monaco, Militia Group to Clean, Not Apprehend, TUCSON CITIZEN, June 13, 2003, at E1.

\footnote{117} Id.

\footnote{118} See Lisheron, supra note 45 (quoting Foote).

\footnote{119} Other potential causes of action include assault, intentional infliction of emotional distress, and negligence per se. However, of the foregoing, each depend on the particular
aliens would have to overcome two substantial hurdles: (1) lack of standing, and (2) citizen's arrest as an affirmative defense.120

a. Standing Issues: Can Illegal Aliens Sue in United States Courts? Under the Fourteenth Amendment, "[n]o State shall ... 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."121 Since the 1886 Supreme Court decision of Yick Wo v. Hopkins,122 an alien is a "person" under the Fourteenth Amendment.123 But "due process" and "equal protection" do not have concrete definitions, and have not, as of yet, been applied to illegal aliens whose only contact with the United States is cursory and illegal.

In Mathews v. Diaz,124 the lawsuit was brought by legal, resident aliens who were denied Social Security benefits.125 The Social Security Act126 requires aliens to (1) continuously live in the United States for at least five years and (2) be admitted for permanent residence, before they are eligible for benefits.127

The Court began its analysis by reiterating that "[e]ven one whose presence in this country is unlawful, involuntary, or transitory is entitled to [the] constitutional protection" of the Fifth and Fourteenth Amendments.128 But the Court quickly noted that while the Fifth and Fourteenth Amendments apply to "all persons, ... aliens are [not] entitled to enjoy all the advantages of citizenship [n]or ... [are they] placed in a single homogenous legal classification."129 This reasoning led the Court to hold that while the federal government may not invidiously discriminate, it was "unquestionably reasonable for Congress

circumstances under which the arrest is made. In each action taken by the vigilante border groups, illegal aliens are detained against their will; thus, this Comment will address only the false imprisonment cause of action.

120. The elements of a claim of false imprisonment are: (1) willful detention, (2) without consent of the plaintiff, and (3) without authority under law. See Sears, Roebuck & Co. v. Castillo, 693 S.W.2d 374, 375 (Tex., 1985); Slade v. City of Phoenix, 541 P.2d 550, 552 (Ariz. 1975); Fermino v. Fedco, Inc., 30 Cal. Rptr. 2d 18, 26 (1994); State v. Fish, 701 P.2d 374, 378 (N.M. App. 1985).
121. U.S. CONST. amend. XIV, § 1.
122. 118 U.S. 356 (1886).
123. Id. at 369.
125. Id. at 69.
127. Mathews, 426 U.S. at 69.
128. Id. at 77.
129. Id. at 78.
to make an alien’s eligibility [for benefits] depend[ent] on both the
character and duration of his residence.130

In Plyler v. Doe,131 the Court again addressed the issue of constitu-
tional protections for non-citizens, but this time in the context of the
undocumented person.132 The Court held that undocumented Mexican
children were denied equal protection when they were refused access to
the Texas public school system.133 The Court rejected the State’s
argument that the aliens were not “persons” under the Fourteenth
Amendment.134 Relying on a long history of constitutional case law,
the Court reiterated what it held several times before: aliens, even
illegal ones, are persons under the Fifth and Fourteenth Amendments
and are thus protected against invidious discrimination by Federal and
State governments.135

Holding that presence “within [the state’s] jurisdiction” is all that is
required for an alien to invoke the protections of the Fifth and Four-
teenth Amendments, the Court turned to the issue of whether the
undocumented Mexican Children were denied equal protection.136 The
Court noted that the millions of illegal immigrants living in the United
States “present[] most difficult problems for a Nation that prides itself
on adherence to principles of equality under law.”137 The Court
seemed sympathetic to the minor children of illegal immigrants and
distinguished them from their parents.138 The Court reasoned that the
children of illegal aliens are not similarly situated to their parents
because they did not “elect to enter our territory by stealth and in
violation of our law.”139 Thus, the Court held it unfair to expect that
the minors would be “prepared to bear the consequences” of their
parents’ violation of the law.140

The Court was careful to note that undocumented status could be
relevant to “any proper legislative goal” and that it is not necessarily an

130. Id. at 77, 83.
132. Id. at 205.
133. Id. at 215.
134. Id. at 210.
135. Id. (citing Mathews v. Diaz, 426 U.S. 67, 77 (1976); Shaughnessy v. Mezei, 345
U.S. 206, 212 (1953); Wong Wing v. United States, 163 U.S. 228, 238 (1896); Yick Wo v.
Hopkins, 118 U.S. 356, 369 (1886)). In footnote 9, the Court noted that it would be
inconsistent to hold that the State could invidiously discriminate when the federal
government could not. Id. at 210 n.9.
136. Id. at 215-16.
137. Id. at 218-19.
138. Id. at 219-20.
139. Id. at 220.
140. Id.
immutable characteristic. The Court went on to recognize that this case involved more than traditional questions of constitutional law of whether illegal aliens are a suspect class (which the Court concludes they are not) and whether education is a fundamental right (which the Court concludes it is not). Rather, the Court viewed the more important issue to be the fact that in denying undocumented children access to the public school system, Texas was placing the children at a life long disadvantage.

Mathews and Plyler both recognize some constitutional protections afforded to undocumented persons, but the class of undocumented persons entitled to constitutional protection was narrowed considerably in United States v. Verdugo-Urquidez. In that case, defendant was an illegal drug smuggler who was apprehended in Mexico, transported across the border to California, and arrested. The Court held that defendant was not entitled to the protections of the Fourth Amendment. The Court reasoned that the constitutional protections afforded to aliens in Plyler and its progeny are only afforded to aliens that have "developed substantial connections" with the United States. Thus, defendant could not rely on those cases to extend the constitutional protections to include the Fourth Amendment.

Following the adoption of the Fourteenth Amendment, the United States Supreme Court made strong statements about the new amendments breadth and inclusiveness. Under the Fourteenth Amendment, any person, according to the Court, meant any person. However, the Court interprets the meaning of due process and equal protection differently for different classes of people. It is uncertain whether standing to sue in United States courts is included in the meaning of due process or equal protection for aliens detained while in the process of entering the country illegally. Verdugo-Urquidez suggests

141. Id.
142. Id. at 223.
143. Id.
145. Id. at 262.
146. Id. at 268.
147. Id. at 271.
148. Id. In Hoffman v. National Labor Relations Board, the Court held that the Immigration Reform and Control Act of 1986 prevented the National Labor Relations Board from awarding back pay to an illegal alien who had not received legal authorization to work in the United States. 535 U.S. 137, 151 (2002).
149. See generally Part IV(A)(2)(a).
150. See generally Part IV(A)(2)(a).
151. See generally Part IV(A)(2)(a).
that if the Court were to decide the issue, standing would not be extended to the migrant illegal aliens at issue here because they have not "develope[d] substantial connections" with the United States.152

b. Citizen’s Arrest as an Affirmative Defense. Even assuming that illegal aliens have standing to sue in United States courts, the vigilante ranchers have an affirmative defense of citizen’s arrest.153 The right to effectuate a citizen’s arrest is rooted in common law but has been codified in most states. Thus, while the wording of each state’s citizen’s arrest law may be different, case law suggests that they are substantially similar to one another in application. Generally, one citizen may arrest another for a misdemeanor amounting to a breach of the peace that was committed in his presence.154 This section surveys the citizen’s arrest laws of California, Arizona, New Mexico, and Texas and concludes that the vigilante ranchers may be able to successfully assert the citizen’s arrest defense.

(1) California. California’s citizen’s arrest statute provides “[a] private person may arrest another . . . [f]or a public offense committed or attempted in his presence.”155 Therefore, to be valid, a citizen’s arrest must satisfy two elements: (1) the crime must amount to a “public offense;” and (2) the crime must have been “committed or attempted” in the arresting citizen’s presence.156 The California courts defined “public offense” broadly to include crimes as diverse as hit and runs, prowling, shoplifting, and disturbing the

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152. Verdugo-Urquidez, 494 U.S. at 271.
153. See infra Part IV(A)(2)(b)(1-4). Citizen’s arrest laws also allow for felony arrests, but the laws for which the illegal aliens are being arrested are misdemeanors. Thus, felony citizen’s arrests are not discussed in this Comment.
154. See generally infra Part IV(A)(2)(b)(1-4). In at least one state, citizen’s arrests must be reasonable to be valid, even if the arrest meets all the other requirements. Whitten v. Cox, 799 So. 2d 1, 8 (Miss. 2000). In Whitten, the Supreme Court of Mississippi held that a citizen may have the right to make a citizen’s arrest but the unreasonable manner in which he carried it out invalidated the arrest. Id. In that case the citizen drew a firearm, fired several shots, ordered the arrestees out of a truck, and ordered an arrestee to kneel on the ground. Id. at 6. The court held that the force used to effectuate the arrest was unreasonable and excessive, thereby rendering the arrest invalid. Id. at 8. The court reasoned that police are only permitted to use firearms when protecting themselves; therefore, citizens should be held to the same standard. Id. Assuming that the vigilante ranchers are authorized to make arrests of illegal aliens, accounts of their behavior while doing so indicate that the method of arrest may be unreasonable, especially considering the fact that the illegal aliens they are arresting are under extreme stress, fear, and fatigue and may not speak English.
156. Id.
peace. In fact, California courts seem to interpret the term “public offense” so broadly that it may be used to allow pre-textual arrests to get around constitutional search and seizure laws. In People v. Wilkins, defendant Wilkins was approached by a university police officer. Earlier that day the officer had taken a report about some stolen law school books and suspected that Wilkins was the thief. After watching Wilkins peer into parked vehicles, and knowing of the high vehicular theft rate on campus, the university police officer took him to the police station. At the station, the police questioned and eventually arrested Wilkins in connection with the missing books. Wilkins subsequently challenged the arrest and the admissibility of the evidence seized as a result of the arrest. The court held that the officer’s arrest was a valid citizen’s arrest and the evidence was admissible.

The California Supreme Court reasoned that the university police officer could make a valid citizen’s arrest because the officer witnessed Wilkins engaging in behavior that amounted to a public offense. California’s “in presence” requirement is also liberally construed by the courts. In People v. Lee, the California Supreme Court examined the meaning of “in presence.” A retail security guard saw defendant Lee place three items of merchandise under her clothes then go into the dressing room. When she came out of the dressing room, and returned less clothing than she entered the dressing room with, the security guard went into the dressing room and looked for the additional clothing. The clothes were not there so the security guard arrested Lee for shoplifting. The issue on appeal was whether the act of shoplifting was committed in the “presence” of the security guard. The court answered the question affirmatively because in California a private citizen can make a citizen’s arrest if a reasonable person, based on the circumstances, would believe a crime was being committed in his presence. The court reasoned that because the terms have been liberally construed by the California courts, “physical proximity” and

160. Id. at 91-92.
161. Id. at 92.
162. Id.
165. Id. at 668-69.
166. Id.
167. Id. (internal citations omitted).
"sight" are not essential for the crime to be committed "in the presence." 168

In People v. Sjosten, 169 the California Court of Appeals returned to the issue of defining the meaning of "in presence" under the California citizen's arrest statute. 170 In that case, defendant Sjosten was convicted of burglary and challenged the conviction on the grounds that his arrest was invalid. Two older ladies, peering from their bedroom window, spotted Sjosten removing items from a house and putting them in his car. After watching this for approximately a half hour, the ladies called the police. When the police arrived, Sjosten was in the house and the officers were there to see him emerge from it. The ladies identified Sjosten, and the officer informed the ladies that even though he lacked probable cause to make an arrest, one of them could make a citizen's arrest for prowling. Acting on this advice, one of the ladies arrested Sjosten. After the citizen's arrest was made, the officers took Sjosten into custody, searched his car, and found evidence of the burglary. 171 The court reasoned that the term "in his presence" under the citizen's arrest statute is identical to that found in the peace officer arrest statute. 172 Therefore, both should be afforded the same treatment. 173 The court noted that under the peace officer arrest statute "in his presence" does not mean "mere proximity" but rather is "liberally construed" and can be determined "by whether the offense is apparent to the . . . senses." 174 The court held that because the ladies saw defendant prowling, the offense was committed in their "presence" for the purpose of the statute. 175

(2) Arizona. Arizona's citizen's arrest statute provides that a private citizen is authorized to make an arrest when he is present during the commission of a misdemeanor amounting to a breach of the peace or a felony. 176 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. 177 Therefore, when

168. Id.
169. 68 Cal. Rptr. 832 (1968).
171. Sjosten, 68 Cal Rptr. at 834-35.
172. Id. at 835-36.
173. Id. at 834-35.
174. Id. at 835-36.
175. Id. at 836.
177. Id.
analyzing the validity of a citizen's arrest, disputes will arise as to whether the arrest is for an offense committed in his presence and, if the offense is a misdemeanor, whether it amounts to a breach of the peace.

A citizen can arrest for misdemeanors amounting to a breach of the peace, but the type of conduct that amounts to a "breach of the peace" is not statutorily defined. In Arizona, for example, disorderly conduct, proscribed by A.R.S. section 13-2904, are examples of misdemeanors amounting to a breach of the peace, but A.R.S. section 13-2904 is not an exhaustive list. A.R.S. section 13-2904(a) states that:

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

The section does not define breach of the peace, rather, it prohibits certain types of conduct committed with the mens rea of intent to disturb the peace. There is nothing in the statute that indicates the activities enumerated are the only activities under Arizona law considered breaches of the peace.

In Williams v. Superior Court of Pima County, the Arizona Court of Appeals' definition of disturbing the peace looks at the effect the actor's actions have on tranquility and fear in the community. The court defined breach of the peace as "a disturbance of public tranquility [sic] or order and may be created by any act which molests inhabitants

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180. Id.
181. Id.
182. See id.
184. Id. at 46.
in the enjoyment of peace and quiet or excites disquietude or fear."\textsuperscript{185} The court in \textit{Williams} was interpreting A.R.S. section 13-371\textsuperscript{186} when it defined breach of the peace.\textsuperscript{187} Section 13-371 has since been incorporated into the disorderly conduct statute found in A.R.S. section 13-2904.\textsuperscript{188} In spite of the statutory change, \textit{Williams} is still being cited for its definition of breach of the peace.\textsuperscript{189}

Careful interpretation of section 13-2904 indicates that the continued use of the \textit{Williams} definition is not by mistake or oversight on the part of lawyers and judges; rather, it is necessary to understanding section 13-2904.\textsuperscript{190} Section 13-2904 prohibits certain types of disorderly conduct; to be guilty under the statute the defendant must: (1) possess the necessary mens rea of disturbing the peace, and (2) commit one of the acts enumerated in the statute.\textsuperscript{191} The statute incorporates breach of the peace as an element of disorderly conduct offenses but does not actually define the term “breach of the peace.”\textsuperscript{192} Canons of statutory interpretation suggest that when a legislature amends one part of a statute but leaves another unchanged, the unaltered portion retains the meaning it had before the revision.\textsuperscript{193} Here, the Arizona legislature, knowing of the \textit{Williams} definition of breaching the peace, did not offer a different definition when section 13-371 was incorporated into section 13-2904. Therefore, it seems the legislature intended for disturbing the peace to retain the \textit{Williams} definition.

\textbf{(3) New Mexico.} In New Mexico, citizen’s arrests are also based on an individual’s common law right to make an arrest for “breach of the peace committed in his presence.”\textsuperscript{194} But New Mexico has not codified its citizen’s arrest laws, and its case law dealing with citizen’s arrest is sparse. In \textit{State v. Peterson},\textsuperscript{195} the New Mexico Court of Appeals defined what an appropriate jury instruction on citizen’s arrest should include.\textsuperscript{196} A citizen’s arrest in New Mexico is valid if the arresting citizen has personal knowledge of facts and circumstances “(1) that

\textsuperscript{185} \textit{Id.} (internal citations omitted).
\textsuperscript{187} \textit{Williams}, 512 P.2d at 46.
\textsuperscript{188} \textit{Id.}.
\textsuperscript{189} \textit{Id.}
\textsuperscript{190} See \textit{State v. Miranda}, 10 P.3d 1213, 1215 (Ariz. 2000).
\textsuperscript{191} A.R.S. § 13-2904.
\textsuperscript{192} \textit{See id.}
\textsuperscript{193} \textit{Id.}
\textsuperscript{194} \textit{Id.}
\textsuperscript{196} \textit{Id.} at 854 (N.M. App. 1998).
would induce an objectively-reasonable person to believe (2) that a . . . breach of the peace was being committed in his presence . . . (3) that [he] acted in good faith based upon that belief and, . . . (4) that [he] acted with reasonable force under the circumstances.\(^n197\)

(4) Texas. Texas's statute provides that a private citizen may make an arrest for a breach of the peace that is "committed in his presence or within his view."\(^n198\) The Texas Court of Appeals has made clear that when a citizen takes it upon himself to arrest another citizen it is a matter of "deep public concern" because citizen's arrests "are fraught with grave danger to the public tranquility, peace, and individual freedom."\(^n199\)

Texas courts have explicitly defined the meaning of breach of the peace.\(^n200\) Breach of the peace is a generic term and is defined as follows: breach of the peace includes all violations of the public peace or order, or decorum; in other words, it signifies the offense of disturbing the public peace or tranquility enjoyed by the citizens of a community; a disturbance of the public tranquility by any act or conduct inciting to violence or tending to provoke or excite others to break the peace; a disturbance of public order by an act of violence, or by any act likely to produce violence, or which, by causing consternation and alarm disturbs the peace and quiet of the community. By "peace," as used in this connection, is meant the tranquility enjoyed by the citizens of a municipality or a community where good order reigns among its members. Breach of the peace . . . may consist of acts of public turbulence or indecorum in violation of the common peace and quiet, of an invasion of the security and protection which the laws afford every citizen, or of acts such as tend to excite violent resentment or to provoke or excite others to break the peace.\(^n201\)

The Texas Court of Appeals further held that whether conduct amounts to a breach of the peace is determined on a case by case basis.\(^n202\)

In Texas the term "committed within his presence or view" requires that the citizen have actual knowledge that the arrestee committed the crime.\(^n203\) In *United States v. Perkins*,\(^n204\) the Border Patrol received a

\(^{197}\) *Id.*


\(^{201}\) *Id.*

\(^{202}\) *Id.*


\(^{204}\) 166 F. Supp. 2d 1116 (W.D. Tex 2001).
tip from a confidential informant that a recreational vehicle ("RV") in the area was carrying drugs. Two Border Patrol agents spotted an RV fitting the description they received in the tip and stopped the vehicle because two of its safety straps appeared loose. Though the Border Patrol agents verified defendant was a United States citizen, they suspected he was involved in narcotics trafficking and asked to look in the vehicle. The agents found bundles of marijuana and arrested defendant. One issue on appeal was whether the Border Patrol agents had witnessed a crime "committed within his presence or view" giving them the authority to make a citizen's arrest. The district court held the Border Patrol Agents did not witness a crime because anything short of actual knowledge would allow citizens to make arrests based on reasonable suspicion, which is not acceptable.

(5) Application. Initially, vigilante border groups claimed that they were making citizen's arrests for criminal trespass and property damage. However, a stronger argument as to the validity of the vigilante rancher's citizen's arrests can be made: the vigilante ranchers are arresting the aliens for illegal entry into the United States. Undocumented persons coming and remaining in the United States can reasonably be expected to excite fear in our communities. Especially considering that the threat of terrorism is a pervasive concern in American society. But the ranchers cannot make arrests of aliens who unlawfully remain in the United States because "remaining" here unlawfully is a civil, not a criminal, offense.

Section 1325(a) prohibits unauthorized entry into the United States at any time or place other than those designated by immigration officials. Thus, the ranchers must be present for the "unauthorized entry" into the United States to successfully assert the defense. Border Patrol agents are authorized under 8 U.S.C. § 1357(a)(3) to patrol private land, without warrants, within twenty-five miles of an external boundary, for the purpose of preventing the unauthorized entry of aliens into the United States. Read together, these two code sections suggest that Congress intended the word "entry" to encompass a broader range of activity than merely crossing an international border.

205. Id. at 1119-20, 1130.
206. Id. at 1130.
207. See supra Section II.
208. Gonzales v. City of Peoria, 722 F.2d 468, 477 (9th Cir. 1983).
210. See id.
212. Id.
Additionally, the fact that Congress chose the word “entry” instead of “cross” suggests that the commission of this crime is a process, rather than something that occurs instantaneously when someone steps foot over an invisible line. At a minimum, it can be argued that the commission of unauthorized entry into the United States from Mexico would not be complete until the aliens have traveled a distance greater than twenty-five miles north of the border.

The second issue is whether “undocumented entry” amounts to a breach of the peace. It can be argued that unauthorized entry into the United States is a misdemeanor amounting to a breach of the peace. Understanding breach of the peace to be any activity that “excites disquietude or fear,” it is not difficult to see how unauthorized entry into the United States amounts to breach of the peace.213 Aliens entering the United States without authorization is more than unsettling given the heightened threat of terrorism by foreign terrorist groups. The argument that unauthorized entry is a breach of the peace is more persuasive since September 11, 2001, but the arrests prior to 9/11 are not necessarily invalid. A breach of the peace is judged by the community's sensibilities.214 Therefore, it can be argued that unauthorized entry has always excited disquietude and fear in the borderland ranching communities, and it was only after 9/11 that the rest of the country joined in those fears.

c. The RICO Alternative. In his article Exorcising Tombstone’s Evil Spirits: Eradicating Vigilante Ranch Enterprises Through Public Interest Litigation, Robert Castro creatively argues that civil actions under RICO are a possible strategy that can be used to combat the vigilante border groups.215 A RICO claim has three elements. First, the plaintiff must prove that the group is “an enterprise affecting interstate commerce.”216 Castro argues that “affecting interstate commerce” requires only that some finished product move through the stream of interstate commerce.217 Second, “one or more individual defendants are employed or associated with an enterprise whose activities affect interstate commerce.”218 Third, the defendant’s “participation in the enterprise constitutes a pattern of racketeering activity.”219 A pattern exists

213. Williams, 512 P.2d at 46.
214. Id.
216. Id.
217. Id. (citing Musik v. Burke, 913 F.2d 1390, 1394-95, 1398 (9th Cir. 1990)).
218. Id.
219. Id. at 220.
where the activities are related and continuous. Castro identifies lack of standing as a potential problem in using RICO laws to combat the border vigilantes. But lack of standing is not the only problem faced by the potential RICO cases against the vigilante border groups.

Castro uses federal case law to further define the elements of a RICO cause of action, but he ignores the simple fact that the statutory definition of "racketeering activity" may not be broad enough to cover the activities of the border vigilantes. The statute defines racketeering activity as:

any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), which is chargeable under State law and punishable by imprisonment for more than one year.

Arguably, the only prohibited offense that the groups engage in is kidnapping. Kidnapping is "[t]he crime of seizing and taking a person away by force . . . ." Kidnapping does not occur in every situation where force is used to transport or detain someone against their will. Parents, for example, can use force to ground their children and police officers can use force to detain criminals. In both situations the use of force for the detention or transportation is not considered kidnapping. These are simple examples, but they illustrate the point that what makes kidnapping a criminal act is that the force used to seize and to take the person is unauthorized.

The problem with trying to apply RICO to the border vigilante groups is the same problem that plagues a cause of action for false imprisonment: citizen's arrest statutes authorize the use of force in certain circumstances. If it is true that the citizen's arrests conducted by the border vigilantes are valid, then it provides the vigilante ranchers

220. Id. 221. Id. 222. Id. Castro recognizes that to have standing to bring a RICO claim, plaintiffs must "demonstrate that they have suffered harm to their business or property as a result of the defendant's racketeering activities." Id. Considering that the victims here are poor, Mexican immigrants who are accosted while illegally present in the United States, arguments for standing will invariably be creative and novel. See id. at 227-28. 223. 18 U.S.C. § 1961(1) (2004). 224. Id. 225. BLACK'S LAW DICTIONARY 886 (8th ed. 2004). 226. See supra Section IV(A)(2)(ii).
with an affirmative defense not only to false imprisonment but also to the criminal charge of kidnapping.

Suing individual vigilante ranchers may not be the best or most effective way to combat the problem. Aside from the legal difficulties of lack of standing and the citizen’s arrest defense, the individual approach does not address the most troubling aspect of the vigilante activity—groups driven by racially motivated xenophobia, who take the law into their own hands with the aim of infringing on the civil liberties of a minority class, run contrary to the spirit of the American legal system. By looking at the history of the Ku Klux Klan (the “Klan”), valuable insight is gained as to how these groups should be handled.

B. Lessons Learned from the Klan—Focusing on Group Activity:

State Anti-Militia Laws and Federal Anti-Conspiracy Laws

When Ranch Rescue was planning an operation in Southern Arizona for spring 2001, the Immigration and Naturalization Service (“INS”) issued a confidential memo to Arizona government officials warning them of Ranch Rescue’s planned operation. The memo listed Ranch Rescue among other hate groups including the Klan and expressed INS’s concern that Ranch Rescue may pose a threat to illegal aliens and Border Patrol agents. Eventually, the memo was leaked to the local news media and caused a stir within the Arizona community and Ranch Rescue itself.

Ranch Rescue’s leader, Jack Foote, responded to the memo by stating that “[l]umping our group together with known hate groups is a massive insult.” But coming from a man who earlier that year referred to Hispanics as “dog turds,” his personal disassociation with the Klan is not satisfying. Despite Foote’s clamoring to the contrary, there are many similarities between the border vigilante groups and the Klan of

227. Hegstrom, supra note 11, at A37.
228. Id.
229. Id. The government later issued the following statement: “[t]his bulletin mistakenly implied an affiliation between legitimate organizations concerned about the effects of illegal immigration with anti-immigrant or racial-supremacy hate groups.” Id.
230. Id.
231. Korosec, supra note 11. This article quotes an online conversation between Foote and a man with a Hispanic name. Foote is quoted as writing the following: “You and the vast majority of your fellow dog turds are ignorant, uneducated and desperate for a life in a decent nation because the one that you live in is nothing but a pile of dog shit, made up of millions of little dog turds like you. You stand around your entire lives, whining about how bad things are in your dog of a nation, waiting for the dog to stick its ass under our fence and shit each one of you into our backyards. Just be careful where the dog shits pal, because sooner or later we will be there.” Id.
the Reconstruction Era. Comparing these two groups offers insight into potential legal solutions and the importance of legally challenging the groups as a whole.

1. A Brief History of the Ku Klux Klan. In May 1866 the Klan was born in a law office in Pulaski, Tennessee. The six confederate veterans who started the Klan originally intended it to be a social club; but soon after its formation, the Klan evolved into a mysterious and ritualistic secret society with a frightening agenda.

The evolution from a social club, whose meetings consisted of picnics in the woods where the men could drink, dance, and show off their costumes, to social regulator can, in part, be attributed to the chaotic environment of the post-war South. During the Reconstruction, Pulaski, Tennessee was plagued with "chronic drunkenness and debauchery." Crime was a common occurrence and the Southern locals attributed much of the chaos to two sources: (1) the newly emancipated and impoverished ex-slaves who stole to survive, and (2) the Northerners who were not "acquainted with the excessive vanity and emotional nature of the Negro" mind.

Prior to the war, the slave owners had the "slave patrol" to police crimes committed by slaves, but in the post-war environment there was a void that could not be filled by the existing, often incompetent, law enforcement. According to one Reconstruction Era Klan member, "[t]he feeling had become almost universal that there should be some organization of good men for the suppression of crime and to counteract the pernicious teaching of the [Union] League." Vigilante groups began popping up in an effort to re-establish a lawful society; the Klan was one of these groups.

233. Id. Mecklin argues that the Klan's role as "social regulator" was in part "thrust" upon them by the social conditions of the post-war South. Id. He argues that the rituals, secrecy, and mystery surrounding the Klan gave it an aura of "serious purpose" and "unforeseen possibilities for control over the [newly emancipated] Negro population." Id.
234. The Klan costumes of no specific color, consisting of masks, robes, and a conical hat, were required for public appearances because of the vow of secrecy from each of the members. ALLEN W. TRELEASE, WHITE TERROR: THE KU KLUX KLAN CONSPIRACY AND SOUTHERN RECONSTRUCTION 4 (Louisiana State University Press 1995) (1971).
235. MECKLIN, supra note 232, at 63.
236. TRELEASE, supra note 234, at 9.
237. MECKLIN, supra note 232, at 57-59, 58.
238. TRELEASE, supra note 234, at 10-11.
239. MECKLIN, supra note 232, at 61.
240. TRELEASE, supra note 234, at 11.
Some of the original founders, disgusted by the "rash, imprudent and bad men" that had become members of the Klan, discussed disbanding the group altogether.241 But in reality it was too late—control of the Klan, which now had dens in many southern states, had slipped through the hands of its founders.242

One year after its formation, at a Klan convention in Nashville, Tennessee, the group was restructured, officially marking its transition from social club to vigilante organization.243 Named the "Invisible Empire" of the South, the Klan vowed to be "all that is chivalric in conduct, noble in sentiment, generous in manhood and patriotic in purpose."244 It articulated the following specific objectives:

"(1) To protect the weak, the innocent, the defenseless, from the indignities, wrongs, and outrages of the lawless, the violent, and the brutal; to relieve the injured and oppressed, to succor the suffering and unfortunate and especially the widows and orphans of Confederate soldiers. (2) To protect and defend the Constitution of the United States, and all the laws passed in conformity thereto and to protect the states and the people thereof from all invasion from any source whatever. (3) To aid and assist in the execution of all constitutional laws and to protect the people from all unlawful seizure and from trial except by their peers in conformity with the laws of the land."245

The articulated goals of the Klan are both ironic and tragic because of the violence and cruelty for which it became famous. The Klan's "chivalric conduct" and protection of the "innocent and defenseless" was manifested in the beatings and murders of countless African Americans.246 The Klan experienced most of its success in reestablishing white rule in North Carolina, Georgia, and Tennessee.247 Its success in those states was not solely attributable to their violent tactics but also the mystery that surrounded them. Operating at night, cloaked in costumes meant to intimidate and conceal their identity, the Klan was able to invoke fear in its targets above and beyond that resulting from their violence.248

241. Id.
242. See id. at 11-13; MECKLIN, supra note 232, at 62.
243. TRELEASE, supra note 234, at 14.
244. MECKLIN, supra note 232, at 64.
245. Id.
246. See id. See generally TRELEASE, supra note 234.
248. MECKLIN, supra note 232, at 63.
The federal government took an active role in combating the Klan's terrorist activities. Congress passed the Ku Klux Klan Act in 1871 authorizing the President to "suspend the writ of habeas corpus, suppress disturbances by force and impose heavy penalties upon terrorist organizations." By 1882 the Klan had practically disappeared.

There are several important similarities and differences that can be noted between the vigilante border groups of today and the Klan of the Reconstruction Era. Drawing on these comparisons offers insight into the importance of fighting border vigilante groups and possible ways of doing so.

The first, most obvious, and simple similarity between the groups is that they are racially motivated organizations whose veil of secrecy is designed to intimidate and terrorize their targets. The second, more interesting similarity is more complicated. Both groups operate under a sense of urgency—i.e., that if no action is taken against the lawless savages, all that is valuable in American society will be lost. The urgency of their cause has even more weight when the nation is in a time of crisis. The Civil War and the 9/11 terrorist attacks are two of the most traumatic events the United States has faced. After each of these events the country was left in a state of shock and confusion perpetuating the groups' sense of legitimacy, which is based in large part on the idea that the core values of American society are at stake.

There are important differences as well. First, the Klan terrorized African Americans who had done nothing wrong. The vigilante border groups are different: they terrorize illegal immigrants who have broken the law. This does not mean, however, that immigrants who committed a misdemeanor crime to get here are not people and do not deserve protection against terror and violence. Second, the Klan was acting outside the law: they employed criminal tactics to further their goals. The vigilante border groups, on the other hand, are not necessarily acting illegally. Instead they are taking advantage of legal loopholes. Immigrants' rights organizations must be legally creative when commencing litigation against the border vigilantes whose actions are only palpably wrong.

Even though the Klan's activities were clearly illegal, Congress saw the need to enact legislation addressing the problem the Klan presented to society. What can be learned here is that the danger of these groups

249. See TRELEASE, supra note 234, at 383-98.
251. ENCYCLOPEDIA BRITANNIA, supra note 248 at 18.
252. Id.
does not lie in the individual actors but the existence of the groups themselves. Thus, the creative lawyering of the immigrants’ rights attorneys should take advantage of the lessons taught by the Klan and employ state anti-militia laws and federal anti-conspiracy laws to combat the border vigilantes.

2. State Anti-Militia Laws. In 1886 the Supreme Court decided *Presser v. Illinois* where it held that the Second Amendment is not offended by state anti-militia laws. The Court reasoned that the state power to regulate militias was “necessary to the public peace, safety and good order.” Following this decision, almost half of the states exercised that power and enacted anti-militia laws. While Arizona and Texas are among the states that have enacted anti-militia laws, California and New Mexico have not. Therefore, despite the usefulness of state anti-militia laws to curb vigilante border group activity in some states, it is not an effective remedy to completely extinguish the groups' offensive behavior considering only two of the four border states have anti-militia laws.

a. Arizona. Arizona’s anti-militia law makes it a felony for a “person, partnership or corporation [to] . . . maintain troops under arms.” The statute does provide an exception allowing for businesses, plants, and firms to have armed guards on their property for protection of their property from damage or loss.

There have been no cases interpreting A.R.S. section 26-123, and so it is unclear whether the vigilante border groups who patrol Arizona ranches are in violation of the statute. Prosecution under the statute may not be successful because one of the long held justifications of the

254. Id. at 264-65.
255. Id. at 267-68.
257. See Woods, 213 S.W.2d at 687.
259. Id.
groups' activities is the protection of property rights.\textsuperscript{260} Thus, it seems that the statute would not be generally applicable against the border vigilante groups. Its applicability would be dependent on whether the groups were invited on the land they patrol or whether the groups entered on their own volition.

\textbf{b. Texas.} There is a higher probability of a successful claim under the Texas anti-militia statute than under Arizona’s anti-militia statute. Texas’s statute prohibits “a body of persons other than the regularly organized state military forces or the troops of the United States . . . [from] associat[ing] as a military company or organization or parade in public with firearms in a municipality of the state.”\textsuperscript{261} To fall within the prohibitions of the statute, the vigilante groups must be either “(1) . . . associating themselves together as a military company or organization; [or] (2) . . . parad[ing] in public with firearms in any city or town of Texas.”\textsuperscript{262} The vigilante border groups wear army fatigues, engage in “operations,” and encourage members to carry weapons.\textsuperscript{263} Based on these activities, a strong argument can be made that the members of the vigilante border groups “associat[e] themselves together as a military company or organization.”\textsuperscript{264}

One of the advantages offered by the Texas anti-militia statute is that it allows plaintiffs to sue for injunctive relief.\textsuperscript{265} The value of an injunction against vigilante border groups is immeasurable to immigrants’ rights organizations. With one court order, immigrants’ rights organizations could put a stop to vigilante border activity indefinitely. Nevertheless, a disadvantage exists—this remedy’s availability is limited to Texas, leaving the vigilante border groups free to relocate and resume their vigilante tactics in neighboring border states.

\textbf{3. Federal Anti-Conspiracy Laws.} The legal avenue that has the most potential to remedy the lawlessness created in the borderlands by the vigilante ranchers is to sue them under federal anti-conspiracy laws. Under 42 U.S.C. § 1983,\textsuperscript{266} liability is created against any individual who “subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any

\footnotesize{\textsuperscript{260} See supra Part II.}
\footnotesize{\textsuperscript{261} TEX CODE ANN. § 431.010 (2004).}
\footnotesize{\textsuperscript{262} Vietnamese Fishermen’s Ass’n v. Knights of the Ku Klux Klan, 543 F. Supp. 198, 217 (S.D. Tex. 1982).}
\footnotesize{\textsuperscript{263} Hammer-Tomizuka & Allen, supra note 4, at 2-7.}
\footnotesize{\textsuperscript{264} Vietnamese Fishermen’s Ass’n, 543 F. Supp. at 217.}
\footnotesize{\textsuperscript{265} See id. at 207.}
\footnotesize{\textsuperscript{266} 42 U.S.C. § 1983 (1996).}
rights, privileges, or immunities secured by the Constitution and laws.\textsuperscript{267} Section 1985(3) establishes the elements required for a successful cause of action for conspiracy to deprive a person of his civil liberties.\textsuperscript{268} Under § 1985(3),

\begin{quote}
[i]f two or more persons \ldots conspire or go in disguise \ldots on the premises of another, for the purpose of depriving, either directly or indirectly, \ldots [a] class of persons of [1] the equal protection of the laws, or [2] 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 \ldots 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 \ldots, 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.\textsuperscript{269}
\end{quote}

Thus, to state a cause of action under the statute, the plaintiff must show that (1) defendant(s) engaged in a conspiracy designed to deprive him of his civil liberties, and (2) that he was injured when the defendant(s) acted in furtherance of the conspiracy.\textsuperscript{270}

One element of a cause of action for conspiracy that is not clear from the statute itself is that the conspiracy must be based on some sort of invidious discrimination.\textsuperscript{271} In \textit{Sever v. Alaska Pulp Corp.},\textsuperscript{272} the Ninth Circuit Court of Appeals held that an individual who wants to petition the government is not a suspect class for the purposes of 42 U.S.C. §§ 1983 and 1985(3).\textsuperscript{273} The court reasoned that courts have interpreted 42 U.S.C. §§ 1983 and 1985(3) to apply primarily to race based animus and have been reluctant to extend the statute’s coverage to other groups.\textsuperscript{274}

One of the benefits of pursuing a cause of action against the vigilante border groups under the federal anti-conspiracy statutes is that the plaintiff can argue that the targeted group extends beyond illegal immigrants to include all people of Mexican dissent. On October 30,
2004, Roger Barnett, one of the Barnett Boys, threatened a Mexican American family with his gun and dogs. The family was traumatized, particularly one eleven year old victim, who wrote in a prepared statement: "[w]hat Barnett did was wrong because he pointed a gun at us and made us think he was going to kill us. (My little sister) was shaking and screaming . . . Barnett didn't care how it affected us. And now we have to live . . . with it everyday. We could have died!"

Theoretically, this family could bring a lawsuit under the federal anti-conspiracy statute and bypass any problems that may be presented by lack of standing issues.

Federal anti-conspiracy laws codified at 42 U.S.C. §§ 1983 and 1985(3) offer advantages that the other legal remedies do not. First, because they are federal statutes, they apply to the vigilante border groups universally, regardless of the state they are located in. Second, and more importantly, the statutes target groups for the very reason that the vigilante border groups’ actions are troubling—the act of conspiracy. Thus, unlike causes of action for false imprisonment, the illegal actions of the border vigilante groups would be separate and distinct from the illegal acts of the aliens.

V. CONCLUSION

With increasing numbers of illegal aliens deciding to risk everything and make the dangerous trek across the desert, residents in the Southwest are sadly accustomed to news stories of illegal aliens who died from exposure, heat exhaustion, and dehydration. What is happening in our Southwestern deserts is a tragedy, and vigilante justice is not the answer.

Hatred and violence in the United States/Mexico borderlands have characterized the region since the borders creation a century and a half ago. The legacy of animosity is not a justification for inaction.

Though none of the potential legal courses of action identified in this Comment are perfect, that does not mean that taking a stand against the vigilante border groups is futile. Recognition, on a public and national level, that these groups are not acting in the best interest of the country when they take the law into their own hands is the first step to thwarting their efforts and creating a stronger America.

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276. Id.