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LIS 626
February 21, 2012

Annotated Bibliography for an Attorney Representing Illegal Aliens in an Action
Against a Rancher Who Detained Them Against Their Will and Then Forcibly
Removed Them to Mexico

Question: A newspaper recently reported that a Texas ranch owner whose property is located near the US-Mexican border dresses in military garb and caps with insignia resembling the US Border Patrol, and intercepts what he perceives to be illegal immigrants, and imprisons them on his ranch only to bring them directly back to the border and force them to cross it back to Mexico at gun point. If true, his acts would violate what federal and state laws?

The questions raised a few researchable issues identified below:

1. general sources on immigration and vigilantes;
2. sources on potential crimes (torts) committed (federal and state);
3. sources on the affirmative defense of a citizen's arrest, and
4. sources on standing to sue the rancher in Texas.

Thus, in choosing among the sources available, materials relating to each of these four areas should be included.

1. general sources on immigration and vigilantes

a) Roxanne Lynn Doty, *The Law Into Their Own Hands: Immigration and the Politics of Exceptionalism* (2009)

This book is a history of the modern day border vigilante movement. It is helpful in getting a broader perspective on the problem. It also describes some of the successful private actions which have been brought, including the one against Casey Nethercott which is discussed in one of the newspaper articles. Particularly helpful is the bibliography which collects a vast array of sources, including internet sources, relevant to this topic.

b) Tucson Citizen, *Ranch Rescue member held in Texas case*, by Luke Turf, November 26, 2003

The article reports the FBI's arrest of Casey Nethercott, a member of Ranch Rescue, a border vigilante group, on charges stemming from an unlawful imprisonment case in Texas. Nethercott was accused of pistol-whipping a Salvadoran couple and holding them against their will. This article was selected because the facts appear to be similar to those in the instant case. It might be possible to find out what happened to the charges against Nethercott and whether there was a companion civil case brought against him and/or Ranch Rescue by The Salvadoran couple. The defendant's name might be a good additional search term.

- c) Arizona Capitol Times, *Arizona Legislature could fund militia for border* by Associated Press, February 13, 2012
<http://azcapitoltimes.com>.

This newspaper article was selected due to its currency. The proposal is to have Arizona fund “an armed, volunteer state militia” to patrol the U.S. –Mexico border. This news report illustrates the fact that the problem of vigilantes attacking those seeking to cross the border is likely to grow. It might be deemed advisable to fund raise to pay the cost of litigation against the ranchers. It might be possible to attract donors to pay the cost of the proposed litigation and articles like this one might help in the fundraising effort.

2: sources on potential crimes (torts) committed (federal and state):

- a) 35 CJS False Personation § 1 et seq., especially §§ 4,64 (ed. 2011.)
- b) 18 TXJUR 3d: Criminal Law: offenses against the person IIE.Ref.
(ed.2011)
- c) 20 TXJUR 3d: Criminal Law: offenses against public administration
§§103- 107; II I Refs. (ed. 2012)

These sections set forth the elements of false personation.

- d) 8 Tex. Prac., Criminal Forms and Trial Manual § 114.1 (11th ed.)

Section 114.1 sets forth the jury charge in a criminal case for unlawful restraint, the phrase Texas law uses to describe the common law tort of unlawful imprisonment. The elements of the offense under Texas law are set forth. The jury charge states that it is the defendant does not commit the offense of unlawful restraint if his purpose was to

engage in a lawful arrest. While this is a charge for a criminal action, it provides useful guidance.

- e) Adalgiza A. Nunez, Comment, *Civilian Border Patrols: Activist, Vigilantes or Agents of Government*, 60 Rutgers Law Review 797 (2008)

This note attempts to argue that the activities of civilian border patrols constitute state action under 42 USC § 1981 and that the government should be held responsible for their actions. Thus, the author argues that victims of the vigilante groups are entitled to bring actions under 42 USC Section 1983.

- f) Joseph G. Cook and John L. Sobieski, Jr., *Civil Rights Actions*, § 2:5.08 (ed.2011)

This section argues that discrimination against aliens comes within the scope of 42 USC Sections 1981 and 1983.

3. sources on the affirmative defense of a citizen's arrest

- a) Christopher J. Walker, *Border Vigilantism and Comprehensive Immigration Reform*, 10 Harvard Latino Law Review 135 (2007)

While this article appeared in a secondary law journal, it is one of the few articles about this subject which is neither a student note nor a personal account by vigilantes or their opponents. (Several of the personal accounts by opponents are by those who participated in an ACLU project which observed vigilante activity.). At the time the article was written, the author was a law clerk to Judge Alex Kozinski of the U.S. Court of Appeals for the Ninth Circuit. Walker reviews the histories of the three best known vigilante groups: the Minuteman Project, Ranch Rescue and the Barnett Boys. The most useful portion of the article for a practitioner is the review of case law regarding citizen's arrests of undocumented migrants. Walker reviews the law of three states, including Texas, on the issue of whether a civilian can arrest an undocumented alien for crossing the border. This review is useful because, while acknowledging that this is a gray area, Walker constructs a compelling argument that a civilian has no right under Texas law to arrest someone merely for crossing the border. He also notes restrictions on the right of citizen arrest when it does exist, including the use of excessive force and unreasonable delay in turning the arrested alien over to law enforcement personnel.

- b) Jessica Conway, Comment, *Reversion Back to a State of Nature in the United States Southern Borderlands: A Look at Potential Cause of Action to Curb Vigilante Activity on the United States/Mexico Border*, 56 Mercer Law Review 1419 (2005)

This is a student comment, but Part IV of the comment "Finding a Solution: Potential Causes of Action to Combat Vigilantism on the Border" does a good job reviewing the possible grounds for actions against border vigilantes and the pros and cons

of each approach. While much of the discussion focuses on possible criminal prosecution, the comment also discusses civil actions, focusing on two hurdles the potential alien-plaintiffs would have to overcome: (1) their standing to sue and (2) citizen's arrest as an affirmative defense. As to the first issue, the comment notes that it is unclear whether aliens detained while in the process of entering the country illegally have standing to sue in U.S. courts. Obviously, this issue should be researched in more detail before an action is commenced, in part because there is little point in investing time and money into bringing the action if it will be dismissed at the outset.

c) Restatement (2d) Torts Sections 112-132 (1965)

Chapter 5 of the first division of the Restatement deals with the topic of arrest and prevention of crime. The probable defense of the rancher in any action brought by the aliens against the rancher is that he was making a citizen's arrest of the aliens either for trespassing on his land or for illegally entering into the U.S. § 118 states the general principle that the use of force against another for the purpose of effecting his arrest and the arrest itself is privileged in certain circumstances and then describes these circumstances. It is noteworthy that the Restatement states whether the arrest is a criminal action is beyond the scope of the Restatement.

4. **sources on standing to sue the rancher in Texas:**

- a) Jessica Conway, Comment, *Reversion Back to a State of Nature in the United States Southern Borderlands. Etc., supra.*

The comment notes that it is uncertain whether aliens detained while in the process of entering the country illegally have standing to sue in U.S. courts. This is an issue which needs to be researched before commencing an action, in part because there is little point in investing time and money into bringing the action if it will be dismissed at the outset.

- b) Brooke H. Russ, Comments, *Secrets on the Texas-Mexico Border: Leiva et al. v. Ranch Rescue and Rodriguez et al. v. Ranch Rescue and the Right of Undocumented Aliens to Bring Suit*, 35 University of Miami Inner-American Law Review 405 (2004)

While this comment is probably a bit out of date, it discusses the issue of “whether an undocumented alien has a private remedy for damages under state or federal law against a United States citizen,” and concludes that the answer may be ‘no.’ The article notes:

Two separate groups of undocumented alien-travelers are bringing civil actions against a group of Defendants they encountered while traveling on foot through Jim Hogg County, Texas, in March 2003. In both actions, civil charges are being filed against Ranch Rescue, its national spokesman Jack Foote, and Jim Hogg County ranch owners Joseph Hutton, Henry Mark Conner and Casey James Nethercott, claiming assault, false imprisonment and threats of impending death.

The comment notes that the cases are “the first of their kind.” While, as noted above, the comment is out of date, it is probable that any subsequent cases in this area will cite the two cases discussed in this comment.

c) CJS Aliens Sections 181, 185

Section 181 states that an illegal alien has the right to bring an action for violation of his civil rights. Section 185 deals with pleading alienage as a basis for federal court jurisdiction. (It would probably be advisable to bring an action against the rancher in federal rather than state court.)

d) Aria Del Carmen Contreas, et al. v. KV Trucking, Inc. et al., Trial Motion, Memorandum and Affidavit, 2007 WL4903460

This trial motion memorandum was retrieved from the database TX-JUR in Westlaw. This is not a scholarly source; it is a memorandum of law submitted in a Texas case by plaintiffs' counsel. The memorandum, which is about 5 pages in length, argues that evidence that some of the plaintiffs were in the U.S. illegally is irrelevant and should be inadmissible as to the issue of lost wages. In doing so, it cites a Texas case which states that illegal aliens have the right to sue for personal injury. This memorandum is thus a good starting point for finding case law that states illegal aliens have the right to sue for personal injury and helpful in formulating an argument that the illegal status of the victims might be kept from the jury in a tort action against the rancher.