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## 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

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## COMMENT

**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**

*"Every American is a soldier, and every citizen is in this fight."*

—George W. Bush<sup>1</sup> quoted on the Internet  
homepage of Ranch Rescue.

On October 29, 2001, President George W. Bush called on the nation to be "vigilant"<sup>2</sup> against terrorism. This call for vigilance has reinvigorated "vigilante" groups,<sup>3</sup> particularly near the United States southern border with Mexico, an area harboring large populations of both legal and illegal migrant workers.<sup>4</sup> Local vigilantes are using this rhetoric to justify the creation of private militia with the expressed purposes of protecting private property,<sup>5</sup> keeping undocumented aliens<sup>6</sup> out of the United States,<sup>7</sup> and keep-

1. George W. Bush, Photo Opportunity with Homeland Security Counsel (October 29, 2001). *See also* Ranch Rescue, <http://www.ranchrescue.com> (last visited October 18, 2003).

2. George W. Bush, Speech on Homeland Security at the Center for Disease Control, Atlanta, GA (November 8, 2001).

3. Chris Simcox, a leader of a vigilante group in Arizona, defined vigilantism as, "a volunteer committee organized to suppress and punish crimes summarily (as when the processes of law appear inadequate)." Chris Simcox, *Enough is Enough*, *Tombstone Tumbleweed*, October 24, 2002, available at <http://www.tombstone-tumbleweed.com/chd.htm>.

4. *See* Gabriela Rodriguez Pizarro, Special Rapporteur, *Mission to the Border Between Mexico and the United States of America*, United Nations Commission on Human Rights, Economic and Social Council ¶ 41 – 44 (October 30, 2002).

5. "Private Property First, Foremost, and Always." Ranch Rescue, <http://www.ranchrescue.com> (last visited October 18, 2003); *See also* Civil Homeland Defense, available at <http://www.civilhomelanddefense.us/>; *See also* American Border Patrol, available at <http://www.americanborderpatrol.com>.

6. For this paper, I will refer to persons entering the United States without Federal documentation as undocumented aliens, *See* Michael R. Curran, Note, *Flickering Lamp Beside the Golden Door: Immigration, the Constitution, & Undocumented Aliens in the 1990s*, 30 CASE W. RES. J. INT'L L. 57, 62-68 (1998) (full discussion of labels of Aliens, Immigrants, Natives, Nationals, and Citizens).

7. "Our goal should be to staff the border each and every day, until the issue of

ing terrorists from entering the United States.<sup>8</sup> However, through their efforts to ostensibly protect the nation, these groups may be threatening the values for which the United States stands.

Six undocumented aliens are taking action against a group of aggressive vigilante ranchers who call themselves Ranch Rescue Texas.<sup>9</sup> At first glance, this case looks like an ordinary civil action under state tort laws. The Plaintiffs are bringing suit under tort claims of assault, false imprisonment, and negligence. However, even if Defendants are guilty of committing what would ordinarily be common law torts, Plaintiffs may not have any remedies available to them against these violent actors. The question is, whether an undocumented alien has a private remedy for damages under state or federal law against a United States citizen?

The answer to this question may surprisingly be no!

As Americans, we take for granted the rights and protections granted to citizens in the Bill of Rights and the US Constitution. However, these constitutionally granted rights are the only form of civil rights and remedies available to persons in the United States. If a person does not have rights under the Bill or Rights or the Constitution, they do not have rights within the United States government. Unlike many of the Western European countries, the United States does not subscribe to any international human rights treaties nor international human rights courts.

Though the rights enumerated in the Constitution are public rights of action, they directly affect private rights as well as the private right to bring an action in the court system. If the United States government will not recognize or protect the right of undocumented aliens to bring suit in the court system, then these persons are left with no alternative forum to assert the wrongs committed against them and collect damages for these actions.

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the invasion is resolved." Chris Simcox, *Enough is Enough*, Tombstone Tumbleweed, October 24, 2002, available at <http://www.tombstonetumbleweed.com/chd.htm>. See also Ranch Rescue, available at <http://www.ranchrescue.com> (last visited October 18, 2003).

8. Ranch Rescue available at <http://www.ranchrescue.com> (last visited October 18, 2003).

9. Plaintiff's Original Petition, Discovery Plan and Request for Disclosure, *Leiva et al. v. Ranch Rescue et al.* ¶54 – 58, No. CC-03-77 (229th Dist. Ct. 2003) (on file with author); Plaintiff's Second Amended Petition, Discovery Plan and Request for Disclosure, *Rodriguez et al. v. Ranch Rescue et al.*, No. CC-03-126 (229th Dist. Ct. 2003) (on file with author); for purposes of this article, these cases will be referred to as *Leiva and Rodriguez, et al.* Please note that on March 4, 2004 the Fourth Amended Complaint was filed for *Leiva et. al. v. Ranch Rescue*, No. CC-03-77 (229th Dist. Ct. 2004) (on file with author).

Furthermore, the Federal Government dominates the laws governing immigration, meaning the Federal Government retains control over all aspects of immigration law and the rights of undocumented aliens.<sup>10</sup>

The extent of rights granted to undocumented aliens inside the United States is yet to be determined by the federal and state courts or Congress. Because undocumented aliens fear that if they speak out against their assailants their illegal presence in the United States will become known, little case law exists defining the rights of undocumented persons.<sup>11</sup> The plight of undocumented aliens is further complicated by a lack of resources and legal forums available to bring legal action. The United States courts have provided little in the way of assistance.<sup>12</sup>

In this article, I will look at the first actions taken by undocumented aliens against vigilante ranchers, *Leiva and Rodriguez et al.*,<sup>13</sup> and the legal hurdles these Plaintiffs must surmount to bring this civil action in a United States civil court. The article is divided into four main parts.

Part I looks at Ranch Rescue and the organization's tactics in the United States border region to combat migrant travelers. It also examines the legitimization of these actions through legal and policy justifications. Part II explores the facts and allegations in *Leiva and Rodriguez et al.* These facts will be used to explain the points of law in the other sections of this article.

The remaining sections examine the major issues of law arising from *Leiva and Rodriguez et al.* and similar actions brought by undocumented aliens. Before a suit can be argued on its merits, plaintiffs must overcome basic standing issues. Part III discusses the standing issues faced by undocumented aliens<sup>14</sup> bringing an

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10. U.S. CONST. art. I, § 8. See also *Plyler v. Doe*, 457 U.S. 202, 219 (1982); *DeCanas v. Bica*, 96 S.Ct. 933 (1976).

11. See Jesus A. Trevino, Comment, *Border Violence Against Illegal Immigrants and the Need to Change the Border Patrol's Current Complaint Review Process*, 21 Hous. J. INT'L L. 85, 98 (1998); see also Michael Nunez, Note, *Violence at Our Border: Rights and Status of Immigrant Victims of Hate Crimes and Violence Along the Border Between the United States and Mexico*, 43 HASTINGS L.J. 1573, 1577-1578 (1992).

12. See Laura K. Abel and Risa E. Kaufman, *Preserving Aliens' and Migrant Workers' Access to Civil Legal Services: Constitutional and Policy Considerations*, 5 U. PA. J. CONST. L. 491 (2003) (addressing restrictions for legal aid groups who receive funding from the United States government to take cases on behalf of illegal immigrants).

13. *Leiva and Rodriguez et al.*, No. CC-03-77 (229th Dist. Ct. 2003).

14. Plaintiffs were traveling in the United States and in clear violation of Federal Immigration Laws, specifically 8 U.S.C.A. § 1325 (1996), stating general penalties for

action in the United States against private citizens and if these Plaintiffs will be able to collect the damages they seek in the complaint. This section reviews the constitutional issues raised in bringing these actions and the possible preclusion of damages due to Plaintiffs' undocumented status. If Plaintiffs are precluded from recovering damages, an alternative remedy may be available, injunctive relief. Part IV will look at the claim by Plaintiffs that Ranch Rescue's actions are contrary to § 431.010 of the Texas Government Code<sup>15</sup> prohibiting the creation of private militia. In this section, I will also examine the benefits of injunctive relief for Plaintiffs and the preemption issues of using state laws to govern immigration.

### I. RANCH RESCUE AND OTHER VIGILANTE GROUPS

Ranch Rescue's recruitment brochure states, "Private property owners have been threatened, harassed, intimidated, burglarized, and assaulted."<sup>16</sup> Ironically, these are the same charges alleged in *Leiva and Rodriguez et al.* by undocumented aliens against Ranch Rescue.

Two rivaling philosophies are at war in the border region between the United States and Mexico. On one hand there is the hope of immigrant migrant workers crossing the Mexican border intending to find jobs and a better life in the United States, however temporarily, and on the other hand, landowners who are American citizens and fear the intrusion of undocumented aliens on their private land and the economic and political challenges these people may bring.<sup>17</sup> Philosophically, the border battle is a clash between opportunity and security, and the meaning of the American Dream.

Ranch Rescue is "a volunteer network composed of people who believe that when government fails or refuses to act, individual citizens are obliged to act on their own."<sup>18</sup> The organization

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entering the United States "at any time or place other than as designated by immigration officers."

15. TEX. STAT. ANN. § 431.010 (1998).

16. See Ranch Rescue, [www.ranchrescue.com](http://www.ranchrescue.com) (last visited October 19, 2003); see also Ranch Rescue Texas Volunteer Brochure (on file with author).

17. David McLemore, *South Texas Rancher, Protection Group Deny Assaulting Illegal Immigrants*, DALLAS MORNING NEWS, June 29, 2003, available at 2003 WL 56751025.

18. Ranch Rescue Texas Volunteer Brochure (on file with author); see also Ranch Rescue, <http://www.ranchrescue.com> (last visited October 18, 2003) (ranch rescue operates in the states of Arizona, California, Colorado, New Mexico, Oklahoma, Texas, Virginia, and Washington).

describes its militia tactics as actions for the protection of property rights,<sup>19</sup> the protection of the United States from terrorist threats,<sup>20</sup> and the protection of American jobs. Ranch Rescue operates out of private farms, with state chapters in Arizona, California, Colorado, New Mexico, Oklahoma, Texas, Virginia, and Washington.<sup>21</sup>

One such Ranch Rescue volunteer is Ranch owner Joseph Sutton, a property owner in Southern Texas and a Defendant in the *Leiva and Rodriguez et al* actions. Sutton granted Ranch Rescue access to his property because he felt the United States Border Patrol was taking little interest in apprehending trespassing immigrants; Sutton invited Ranch Rescue to act as voluntary security guards.<sup>22</sup> Based on government statistics, Sutton's and other vigilante ranchers' concerns are extremely well founded. In recent years, the amount of immigrant traffic through the southern border areas has increased tremendously. In 2000, over 7 million illegal immigrants were reported to reside in the United States and of this population, an estimated 1 million illegal immigrants were believed to be residing in Texas alone.<sup>23</sup> Furthermore, the Department of Homeland Security's efforts to protect the United States border from terrorists and deter illegal entry are focused on the Northern United States border with Canada and not on the Southern border with Mexico.<sup>24</sup> The increases in immigration combined with increased national fears of terrorism have caused the rise in private militia groups.<sup>25</sup>

Ranch Rescue and its associates deny any wrongdoing in the recent lawsuits brought by undocumented aliens and argue that the assaults are a fabrication.<sup>26</sup> Furthermore, until now, Ranch

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19. *Id.*

20. *Id.*

21. *Id.*

22. Bob Edwards, Morning Edition: *Activist groups on the US-Mexico Border Could Spur More Violence with Illegal Immigrants* (NPR radio broadcast Sept. 16, 2003) (on file with author).

23. Bureau of Citizenship and Immigration Services, "Estimates of Unauthorized Immigrants," 2002 Yearbook of Immigration Statistics, at 213 – 217.

24. The Patriot Act contains an entire subtitle devoted to new, enhanced procedures to protect the Northern boarder; the Southern boarder crisis is not specially dealt with in the Patriot Act. PATRIOT ACT, PL107-56, 2001 HT 3162. Title IV-A (2001).

25. See Ranch Rescue at [www.ranchrescue.com](http://www.ranchrescue.com); American Border Patrol at [www.americanborderpatrol.com](http://www.americanborderpatrol.com); Civil Homeland Defense at [www.civilhomelanddefense.us/](http://www.civilhomelanddefense.us/).

26. John MacCormack, *Volunteer Denies Beating on the Border*, SAN ANTONIO EXPRESS-NEWS, Mar. 22, 2003, available at WWL 15637341.

Rescue has maintained a perfect record without any criminal convictions and a reputation for providing a needed service to the understaffed United States Border Patrol.<sup>27</sup> And, like Ranch Rescue, many other groups operate throughout the Southern United States border region and maintain similarly clean records and generally good relationships with local border patrol agencies. However, the more controversial issue is not the public service these vigilante citizens may provide in helping protect the border, but what happens when these armed civilians go too far and what rights undocumented victims have after being attacked.

## II. LEIVA ET AL. V. RANCH RESCUE ET AL.<sup>28</sup> AND RODRIGUEZ ET AL. V. RANCH RESCUE ET AL.<sup>29</sup>

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.<sup>30</sup> In both actions, civil charges are being filed against Ranch Rescue, its national spokesman Jack Foote, and Jim Hogg County ranch owners Joseph Sutton, Henry Mark Conner and Casey James Nethercott, claiming assault, false imprisonment, and threats of impending death.<sup>31</sup> The civil actions were filed on May 29, 2003, in Jim Hogg County, Texas, in the 229th Judicial District of Texas.<sup>32</sup> Two of the Defendants, Henry Mark Conner, Jr. and Casey James Nethercott, are also facing criminal charges based on actions taken against the Plaintiffs in *Leiva et al.*<sup>33</sup>

These lawsuits, the first of their kind, were filed on behalf of Plaintiffs by the law firm of Ricardo de Anda of Laredo,<sup>34</sup> Texas,

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27. Jon Dougherty, *Feds Harassing Citizen Border Groups?* Worldnet Daily, Aug. 10, 2003, available at [www.worldnetdaily.com/new/article.asp?ARTICLE\\_ID=34008](http://www.worldnetdaily.com/new/article.asp?ARTICLE_ID=34008) (9/16/03).

28. Plaintiffs' Original Petition, Discovery Plan and Request for Disclosure, *Leiva et al.* (No. CC-03-77).

29. Plaintiffs' Second Amended Petition, Discovery Plan and Request for Disclosure, *Rodriguez et al.* (No. CC-03-126) (on file with author).

30. *Leiva and Rodriguez et. al.*, No. CC-03-77, No. CC-03-126 (229th Dist. Ct. 2003).

31. *Id.* See also Mexican American Legal Defense and Educational Fund, *Migrants Sue Paramilitary Group and Rancher for Unlawful Violent Assaults on Texas Ranch*, May 29, 2003, available at <http://www.maldef.org/news/press.cfm?ID=161>.

32. *Id.*

33. *Id.* at 1.

34. Mexican American Legal Defense and Educational Fund, *Migrants Sue Paramilitary Group and Rancher for Unlawful Violent Assaults on Texas Ranch*

Southern Poverty Law Center,<sup>35</sup> the Mexican American Legal Defense and Educational Fund,<sup>36</sup> and the law firm of Judge & Brim, P.C. of Austin, Texas.

In both cases, Plaintiffs allege that armed persons accosted them at gunpoint while crossing Defendant Joseph Sutton's ranch.<sup>37</sup> Plaintiffs further allege that while held at gunpoint, the armed persons verbally abused and terrorized them,<sup>38</sup> including threatening them that they could be killed without their murders ever being discovered by authorities.<sup>39</sup> Plaintiffs allege Defendants detained both groups for approximately two hours.<sup>40</sup> In the case of *Leiva et al.*, Plaintiffs allege Defendants hit one of the Plaintiffs in the head with the back of a handgun and allowed a Rottweiler dog to attack another Plaintiff.<sup>41</sup> In *Rodriguez et al.*, Defendants allegedly stole \$3,000 hidden in one of the traveler's shoes.<sup>42</sup> Plaintiffs claim that during the entire ordeal, they feared severe injury and death.<sup>43</sup> As a result of the incidents, Plaintiffs claim they were terrified and traumatized, suffering physical injuries and severe emotional distress.<sup>44</sup> Plaintiffs in both actions seek to recover actual and exemplary damages.<sup>45</sup>

Defendant Joseph Sutton responded to the Complaint by denying all of Plaintiffs' allegations, setting out affirmative defenses, and alleging new facts arguing against the merits of the suit.<sup>46</sup> Defendants claim citizens of foreign states illegally inside the United States have no standing to seek monetary relief in the

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[hereinafter Migrants Sue Paramilitary Group] (May 29, 2003), available at <http://www.maldef.org/news/press.cfm?ID=161>.

35. *Id.* at 2; See also Southern Poverty Law Center, [www.splcenter.org](http://www.splcenter.org), (last visited October 18, 2003).

36. Migrants Sue Paramilitary Group, *supra* note 34, at 2; See also Mexican American Legal Defense and Educational Fund, [www.maldef.org](http://www.maldef.org), (last visited October 18, 2003).

37. *Leiva and Rodriguez et. al.*, No. CC-03-77, No. CC-03-126 at ¶ 23, 32.

38. *Id.* at ¶ 22, 25, 31, 32, 37.

39. *Id.* at ¶ 25.

40. *Id.* at ¶ 26, 38.

41. *Id.* at ¶ 34.

42. *Rodriguez et al.*, No. CC-03-126, at ¶29.

43. *Id.* at ¶ 30, 39.

44. *Id.* at ¶ 30, 39. Both civil actions allege counts of assault, false imprisonment, intentional infliction of emotional distress, negligence, gross negligence, and negligence per se. *Id.* at ¶ 41-108.

45. *Id.* at ¶ 119-121.

46. Defendant Joseph Sutton's Original Answer, *Leiva et al.*, (No. CC-03-77) (on file with author); Defendant Joseph Sutton's Original Answer, *Rodriguez et. al.*, (No. CC-03-126) (on file with author) (these documents are virtually identical in form and substance and therefore I will refer to them together as Defendant Sutton Answer).

state or federal courts of the United States.<sup>47</sup> Defendants also deny the factual allegations of the complaint because of the affirmative defense of the common law doctrine of citizen's arrest.<sup>48</sup>

### III. DO THE ILLEGAL MIGRANT TRAVELERS HAVE A RIGHT TO BRING THIS ACTION?

The courts must initially resolve the issue of whether the initial crime of entering the United States illegally, a violation of Federal Immigration Law, 8 U.S.C.A. § 1325 (1996),<sup>49</sup> will preclude Plaintiffs from recovery against Ranch Rescue. If the court finds this initial violation to preclude any form of civil remedy, then Plaintiffs have no right to bring these actions.

At first glance, this question appears to be settled. The Fourteenth Amendment to the United States Constitution expressly states, "no 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."<sup>50</sup> The Courts have consistently held that an alien, no matter his status under the immigration laws, is a person within the meaning and grants of due process of the Fifth and Fourteenth Amendments.<sup>51</sup> However, even though the Fifth and Fourteenth Amendments seemingly guarantee undocumented aliens the right to equal protection and due process, the Supreme Court is yet to rule on what equal protection and due process mean to persons whose presence inside the United States is based upon a violation of Federal Laws.<sup>52</sup>

#### A. *Plyler v. Doe: Does the Supreme Court Define the Rights of Illegal Aliens?*

In *Plyler v. Doe*,<sup>53</sup> the Supreme Court articulated a narrow set of rights for undocumented aliens. The Court's primary holding, based on guarantees of equal protection, struck down a Texas statute allowing school districts to deny illegal-alien children

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47. *Id.* at ¶3, 11.

48. *Id.* at ¶ 4, 12, 21.

49. 8 U.S.C.A. § 1325 (1996).

50. U.S. CONST. Amend. XIV, § 1.

51. *Plyler v. Doe*, 457 U.S. 202, 210 (1982); *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).

52. 8 U.S.C.A. § 1325 (1996).

53. *Plyler*, 457 U.S. at 202.

access to education, on the basis of equal protection.<sup>54</sup> In the decision, however, the Court stressed the narrow nature of the ruling, confining the holding to education. The Court also expressly distinguished the voluntary nature of the parents' illegal action of crossing the border from the involuntary action and consequences to the children, the deprivation of an education.

The children who are plaintiffs in these cases are special members of this underclass. Persuasive arguments support the view that a State may withhold its beneficence from those whose very presence within the United States is the product of unlawful conduct. These arguments do not apply with the same force to classifications imposing disabilities on the minor *children* of such illegal entrants.<sup>55</sup>

*Plyler*, though expressly declaring the Equal Protection Clause applicable to undocumented aliens and using an equal protection analysis in its determination that undocumented alien children are being deprived of equal protection rights, refused to grant undocumented aliens suspect class status and refused to define what rights such persons maintain while present in the United States. The Court stated: "Undocumented aliens cannot be treated as a suspect class because their presence in this country, in violation of federal law, is not a 'constitutional irrelevancy.'"<sup>56</sup> The Court leaves this powerful language to be defined by the lower courts. The lower courts must decide how substantial the initial violation of Federal immigration laws is and balance this violation against the rights granted to "all persons" under the Due Process and Equal Protection Clauses.

Since *Plyler*, the lower courts have grappled with the interpretation of the level of equal protection rights available to both documented and undocumented aliens and the meaning of the language "constitutional irrelevancy." Each case attempting to define this terminology and the rights of undocumented aliens against the state has read *Plyler* in its most limited form and held the discriminating statute is not a violation of the equal protection clause.<sup>57</sup> Initially seen as a victory for undocumented aliens, *Ply-*

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54. *Id.*

55. *Id.* at 219 - 220.

56. *Id.* at 223.

57. See *John Doe No. 1 v. Georgia Dept. of Public Safety*, 147 F. Supp.2d. 1369 (N.D. Ga. 2001) (Georgia law restricting issuance of Georgia driver's licenses to illegal aliens did not violate equal protection or right to travel); *State of Alaska Department of Revenue, Permanent Fund Division v. Cosio*, 858 P.2d 621 (Alaska 1993) (holding the equal protection clause was not violated when the state excluded an

ler has been used in its most narrow form by the lower courts, affording few constitutional protections to undocumented aliens.

As applied to *Leiva and Rodriguez et al*, the *Plyler* analysis offers Plaintiffs little chance for obtaining relief. Plaintiffs were illegally and voluntarily crossing the border into the United States at the time of the alleged assaults and furthermore, the alleged assaults occurred during Plaintiffs' violation of 8 U.S.C.A. §1325 (1996). Additionally, the Supreme Court has cited *Plyler* for the premise that the only aliens able to receive constitutional protections are those who have "developed substantial contacts with this country."<sup>58</sup> At the time of the attacks, Plaintiffs' contacts with the United States were limited to a secretive and illegal entrance across the Mexican border only a few miles from the Sutton farm.

Under *Plyler* and its progeny, the determination of Plaintiffs' rights falls within the Court's discretion to determine the extent of the Constitutional relevancy of the Plaintiffs' Immigration Law violations against Plaintiffs' due process and equal protection rights under the Constitution. Using the *Plyler* analysis, these violations may be seen by the court as significant enough to trump Plaintiffs ability of to bring a private action for damages.

*B. The Impact of Hoffman Plastic Compounds v. National Labor Relations Board in Defining Remedies for Undocumented Aliens.*

The Supreme Court revisited the status of undocumented aliens in *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board*, holding an undocumented worker could not collect damages for his employer's violations of the National Labor Rights Act (NLRA).<sup>59</sup> The Court primarily based this decision on *Sure-Tan v. National Labor Relations Board*, holding an illegal alien employees' remedies in a labor dispute must be "conditioned upon the employees' legal re-admittance to the United States."<sup>60</sup> The Court also stated reasons based upon Congressional intent

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undocumented alien inmate from access to a drug treatment program based primarily upon his alien status); *People v. Arciga*, 227 Cal. Rptr. 611 (Cal. App. 5th 1986) (Court used a narrow *Plyler* analysis to uphold a state statute denying illegal aliens financial assistance from the state, limiting *Plyler* to grants of educational opportunities).

58. *United States v. Verdugo-Urquidez*, 49 U.S. 259, 270 (1990).

59. *Hoffman Plastic Compounds, Inc., v. National Labor Relations Board*, 122 S.Ct. 1275 (2002) (abrogating *N.L.R.B. v. A.P.R.A. Fuel Oil Buyers Group, Inc.*, 134 F.3d 50 (2d Cir. 1997) and *Warehouse and Office Workers' Union v. N.L.R.B.*, 795 F.2d 705 (9th Cir. 1986)).

60. *Sure-Tan, Inc. v. N.L.R.B.*, 104 S.Ct. 2803 (1984).

and legislation for its decision and expansion of the *Sure-Tam* precedent:

By allowing the Board to award back pay to illegal aliens would unduly trench upon explicit statutory prohibitions critical to federal immigration policy, as expressed in IRCA. It would encourage the successful evasion of apprehension by immigrant authorities, condone prior violations of immigration laws, and encourage future violations.<sup>61</sup>

The Immigration Reform and Control Act of 1986<sup>62</sup> was enacted to discourage employers from hiring undocumented aliens. The Congressional purpose in enacting the statute is the belief that "employment is the magnet that attracts aliens here illegally. . . employers will be deterred by the penalties in this legislation from hiring unauthorized aliens and this, in turn, will deter aliens from entering illegally or violating their status in search of employment."<sup>63</sup> The Court defends the *Hoffman* decision to be inline with this Congressional reasoning.

The Supreme Court's decision is in direct contradiction to the National Labor Relations Board's [NLRB] reasoning to grant plaintiff Jose Castro back-pay for Hoffman Compounds' violations of the NLRA. The Board reasoned, "the most effective way to accommodate and further the immigration policies embodied in IRCA is to provide the protections and remedies of the [NLRA] to undocumented workers in the same manner as to other employees."<sup>64</sup> The *Hoffman* dissent written by Justice Breyer, in which three other Justices joined, follows the same line of reasoning articulated by the NLRB.<sup>65</sup> Furthermore, the dissent emphasizes the discretion of the NLRB to determine the appropriate remedy in addressing violations of the NLRA.<sup>66</sup>

*Hoffman* is compelling in understanding the direction the Court is taking in immigration cases. Because the case is distinguishable from *Leiva and Rodriguez et al*, in that it is based on labor laws and the equitable remedy of back pay, the critical

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61. *Hoffman Plastic Compounds, Inc.*, 122 S.Ct. at 1284.

62. Immigration Reform and Control Act of 1986.

63. H.R. REP. 99-682(I) at 46 (July 16, 1986).

64. *Hoffman Plastic Compounds, Inc.*, 122 S.Ct. at 1279 (quoting Hoffman Plastic Compounds and Casimiro Arauz, 326 N.L.R.B. 1060, 1998 WL 663933 \*1 (N.L.R.B. September 23, 1998)).

65. *Hoffman Plastic Compounds, Inc.*, 122 S.Ct. at 1285.

66. *Id.* at 1285 - 6, citing NLRB v. Gissel Packing Col, 395 U.S. 575, 612, n. 32 (1969) (Board "draws on a fund of knowledge and expertise all its own, and its choice of remedy must therefore be given special respect by reviewing courts.").

implications of the case are not necessarily only those articulated in the holding. Instead, the importance of the case for *Leiva and Rodriguez et. al.* is in the powerful dicta and the express intentions of the Court in rendering the opinion. The dicta and holding of *Hoffman* show the Court's direction towards precluding illegal aliens from the right to damages due to their initial violations of the Federal Immigration Laws.

It is especially interesting to note that in the wake of *Hoffman*, state courts and lower federal courts are uniformly refusing to render decisions consistent with the *Hoffman* holding and reasoning. In the case of *Cano v. Mallory Management* (2003), the New York Supreme Court stated, "every case citing *Hoffman* since it was rendered has either distinguished itself from it or has limited it greatly."<sup>67</sup> Defendants, in both state and federal courts, have attempted to use *Hoffman* to quench civil suits brought by undocumented aliens, arguing that as a result of the initial violation of the Federal Immigration Laws, plaintiffs do not have standing to bring suit.<sup>68</sup> In a recent case *Singh v. Jutla & C.D. & R's Oil, Inc.*, a California Federal Court limited *Hoffman* to only claims for back pay and allowed an undocumented alien employee to bring suit for retaliatory damages against his employer.<sup>69</sup> Singh recovered over \$200,000 in damages.<sup>70</sup>

The sheer volume of cases since *Hoffman* was rendered is also

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67. *Cano v. Mallory Management*, 760 N.Y.S. 2d 816, 818 (N.Y. Sup. Ct. 2003) citing *Zeng Liu v. Donna Karan Int'l, Inc.*, 207 F. Supp. 2d 191 (S.D.N.Y., 2002); *Cortez v. Medina's Landscaping*, No. 00 C 6320, 2002 WL 31175471 (N.D. Ill. September 13, 2002); *Rodriguez v. Texan, Inc.*, No. 01 C 1478, 2002 WL 3161237 (N.D. Ill. Sept. 13, 2002); *Flores v. Nissen*, 213 F. Supp. 2d 871 (N.D. Ill. 2002); *Medoza v. Zirkle Fruit Co.*, 301 F.3d 1163, (9th Cir. 2002); *Singh v. Jutla*, 214 F. Supp. 2d 1056 (N.D. Cal. 2002); *Flores v. Albertsons, Inc.*, No. CV0100515AHM (SHX), 2002 WL 1163623 (C.D. Cal. Apr. 9, 2002).

68. See *Escobar v. Spartan Security Service*, No. CIV.A.02-2685, 2003 WL 22129459 at \*1 (S.D. Tex. July 30, 2003) (indicating Spartan argues in reliance of *Hoffman* that plaintiff is not entitled to relief under Title VII because Escobar was not a documented worker at the time he was employed by defendant, Spartan.); *Cano*, 760 N.Y.S. 2d at 818 (attempting expansion of holding in *Hoffman* to dismiss the plaintiff's complaint for tortious conduct because he is an "illegal alien"); *United States v. Tyson Foods, Inc.*, 258 F. Supp 809, 818 (E.D. Tenn. 2003) (citing *Hoffman*, the government supported an interpretation of 18 U.S.C. § 1546(b)); *Martinez v. Mecca Farms, Inc.*, 213 F.R.D. 601, 604 (S.D. Fla. 2002) (Defendants argue that as per *Hoffman Plastic Compounds, Inc.*, plaintiffs, as undocumented aliens, are precluded from recovering the remedies they seek under the Migrant and Seasonal Agricultural Workers Protection Act (MPSA)).

69. *Singh v. Jutla & C. D. & R's Oil, Inc.*, 214 F. Supp. 1056, 1060-1061 (N.D. Cal. 2002).

70. Foreign Worker Wins Retaliation Case After Uncle Reports Him to the INS (National Public Radio, Jan. 21, 2004), available at 2004 WL 56911222.

an indication of the confusion occurring in the lower courts in applying the opinion.<sup>71</sup> The majority of the confusion stems from the dicta in the *Hoffman* decision, that awarding damages to an illegal immigrant not only trivializes the immigration laws but also condones and encourages future violations.<sup>72</sup> Another result of the *Hoffman* case is the possible far reaching implications of the Court's expansion of the ruling in *Sure-Tan, Inc., v. National Labor Relations Board*,<sup>73</sup> restricting back pay damages to all undocumented workers, not just workers who are deported before the court's decision is rendered.<sup>74</sup> Many experts in immigration law, including the NLRB, firmly believe the decision in *Hoffman* threatens to do the exact opposite of what the Court intended. Instead of maintaining the integrity of IRCA, they believe the decision will likely undermine the Act by encouraging an employer to hire undocumented workers.<sup>75</sup>

The courts in Texas are following the trend of other lower courts and distinguishing cases brought by undocumented aliens from *Hoffman*. The Court of Appeals of Texas held in the case *Tyson Foods Inc., v. Guzman* (2003), that Texas law does not require United States citizenship or the possession of immigration work authorization permits as a prerequisite to recovering damages for lost earning capacity.<sup>76</sup> Defendant Tyson Foods cited the case of *Hoffman* for the proposition that "national public policy, as expressed by the United States Congress in enacting immigration reforms, militates against any award of damages to undocu-

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71. Elizabeth Baldwin, Note, *Damage Control: Staking Claim to Employment Law Remedies for Undocumented Immigrant Workers After Hoffman Plastic Compounds, Inc.*, 27 SEAU LR 233, 251 – 252 (Summer 2003).

72. *Hoffman Plastic Compounds, Inc.*, 122 S.Ct. at 1284.

73. *Sure-Tan, Inc.*, 467 U.S. 883.

74. Eric Schnapper, *Righting Wrongs Against Immigrant Workers*, 39-MAR JTLATRIAL 46 (2003) ("Federal and state employment laws generally apply to [undocumented] workers, regardless of their immigration status. But last year in *Hoffman Plastic Compounds, Inc.*, the U.S. Supreme Court raised serious question about what remedies will be available to alien workers who lack work authorization.").

75. Elizabeth Baldwin, Note, *Damage Control: Staking Claim to Employment Law Remedies for Undocumented Immigrant Workers After Hoffman Plastic Compounds, Inc.*, 27 SEATTLE U. L. REV. 233, 251 – 2 (Summer 2003); See also, *Hoffman Plastic Compounds, Inc.*, 122 S.Ct. 1279 (2002) (reversing the NLRB's grant of back pay to undocumented alien employee); citing *Hoffman Plastic Compounds* and *Casimiro Arauz*, 326 N.L.R.B. 1060, 1998 WL 663933 at \*1 (N.L.R.B. September 23, 1998) (the Board determined that "the most effective way to accommodate and further the immigration policies embodied in [IRCA] is to provide the protections and remedies of the [NLRB] to undocumented workers in the same manner as other employees.").

76. *Tyson Foods Inc. v. Guzman*, 116 S.W.3d 233, 244 (Ct. App. TX 2003).

mented alien laborers.”<sup>77</sup> The Texas Court of Appeals, using an extremely limited application of *Hoffman*, stated the holding “only applies to an undocumented alien worker’s remedy for an employer’s violation of the NLRA and does not apply to common-law personal injury damages.”<sup>78</sup> *Tyson* is the only Texas case distinguishing *Hoffman* and therefore, important precedent as to how undocumented aliens will be treated under Texas laws. The *Tyson* precedent should be used by the Hogg County Court to hold that the Plaintiffs’ are eligible to receive the damages they seek in the complaint.

How are these lower courts able to distinguish their holdings from the Supreme Court’s precedent set in *Hoffman*? One answer may be that back pay is an equitable remedy and therefore, is guided by the maxim “he who comes into equity must come with clean hands.” Thus, while “‘equity does not demand that its suitors have led blameless lives,’ as to other matters, it does require that they shall have acted fairly and without fraud or deceit as to the controversy in issue.”<sup>79</sup>

All undocumented aliens working in the United States are in clear violation of IRCA and 8 U.S.C.A. § 1325 governing improper entry by aliens into the United States. Therefore, no undocumented person can enter a United States court with clean hands as to status in the United States, precluding all forms of equitable relief. Furthermore, the NLRB extended the holding in *Hoffman* by taking the position that undocumented persons who have been unlawfully discharged are precluded from back pay under the NLRA “regardless of the circumstances of their hire.”<sup>80</sup>

The lower court decisions mentioned above have uniformly distinguished cases from *Hoffman* upon the form of relief sought by the undocumented alien plaintiffs. Many of these remedies sought are under state workers compensation laws and the Federal Labor Standards Act (FLSA),<sup>81</sup> which is not a doctrine of equi-

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77. *Id.* at 243.

78. *Id.* at 244.

79. Precision Instruments Mfr. Co. et al. v. Automotive Maintenance Machinery Co., 324 U.S. 806, 814 (1945) (quoting Loughran v. Loughran, 292 U.S. 216, 229 (1934); Keystone Driller Co. v. General Excavator Co., 290 U.S. 240, 245 (1933); Pomeroy, Equity Jurisprudence (5th Ed.) § 397-399).

80. Dennise A. Calderon-Barrera, Note, *Hoffman v. NLRB: Leaving Undocumented Workers Unprotected Under United States Labor Laws?* 6 HARV. LATINO. L. REV. 119 (Spring 2003) (page numbers not cited, page 8) citing Gen. Couns. Mem. 02-06 (NLRB July 19, 2002), available at 2002 WL 1730518 \* 3 (modifying Gen. Couns. Mem. 98-15 (NLRB Dec. 4, 1998)).

81. See Flores v. Amigon, 233 F. Supp. 2d 462 (E.D.N.Y. 2002).

table relief and is regulated under the state's authority by state police powers.<sup>82</sup> In addition, the clean hands doctrine is not applicable to remedies at law, such as tort or retaliatory damages. Therefore, on this basis, the lower courts have been able to circumvent the Supremacy Clause issue of not following a Supreme Court decision.

*Hoffman* itself states, "undocumented employees are still entitled to the NLRB's 'traditional remedies.'"<sup>83</sup> Lower courts have also used this language to grant non-equitable remedies under state law. Lower court decisions have distinguished "between awards of post-termination back pay for work not actually performed and awards of unpaid wages."<sup>84</sup> In *Tyson Foods*, the Texas Appellate court distinguished *Hoffman* from a state-law claim stating *Hoffman* "does not apply to common-law personal injury damages" and instead such remedies are guided by state law.<sup>85</sup> Similarly, the Plaintiffs in *Levia and Rodriguez et. al.* are seeking relief under state common law and, similar to the cases cited above, Plaintiffs' claims are not precluded by *Hoffman*. The damages sought are most closely analogous to *Cano v. Mallory Management* in which plaintiff brought a tort action of negligence. The court distinguished *Hoffman* based upon the state police powers to regulate tortuous conduct.<sup>86</sup> Furthermore, the tortuous conduct of Defendants falls outside the purpose of the IRCA's attempts to control and punish undocumented aliens attaining employment in the United States.<sup>87</sup> Based on this analysis, Plaintiffs should not be precluded from the right to sue for damages under the current reading of *Hoffman*.

However, the policy language of *Hoffman* is clear regarding the majority's decision to deny damages to plaintiffs based upon their initial violations of Federal Immigrations Law. Based upon the Court's intent, Plaintiffs remain on unstable footing. How-

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82. See *Safeharbor Employer Services I, Inc., v. Cinto Velazquez*, 860 So.2d 984, 986 (Dist. Ct. Fla. 2003); citing *De Canas v. Bica*, 424 U.S. 351, 356 (1976).

83. See *Singh v. Jutla & C.D. & R's Oil, Inc.*, 214 F. Supp. 2d 1056, 1061 (N.D. Cal. 2002) citing *Hoffman*, 22 S.Ct. 1275, 1286.

84. *Zeng Liu v. Donna Karen International, Inc.*, 207 F. Supp.2d 191, 192 (S.D.N.Y. 2002); see also *Tyson Foods, Inc. v. Guzman*, 116 S.W.3d 233 (Tex. App. 2003).

85. *Tyson Foods, Inc.*, 116 S.W. 3d at 244.

86. *o Cano v. Mallory Management*, 760 N.Y.S. 2d 816, 817 (N.Y. Sup. Ct. 2003).

87. "The bill would prohibit the employment of aliens who are unauthorized to work in the United States. . . U.S. employers who violate this prohibition would be subject to civil and criminal penalties." H.R. REP.99-682(I), 1986 U.S.C.A.N.5649 at 5650.

ever, since state courts are not following the precedent set by the Court in *Hoffman*, and are uniformly distinguishing cases with similar facts by the form of relief sought, the Supreme Court may decide to clarify its holding. If this is the case, then *Leiva and Rodriguez et al* are an extremely vulnerable target. The cases have already received large amounts of media attention and factually involve suits for damages in which the initial breach of federal law directly resulted in the torts upon which the suits are based.

#### IV. ACTIONS OF PRIVATE MILITIA

Under the count of negligence per se, Plaintiffs allege Defendants owed a duty of care to Plaintiffs under § 431.010 of the Texas Government Code.<sup>88</sup> Plaintiffs are bringing this allegation as part of an overall claim for damages. Tort litigation for damages can be a powerful remedy for private individuals and public interest groups to speak out against vigilante groups like Ranch Rescue, particularly when the groups are under funded and the damage awards are high. However, only seeking damages limits Plaintiffs from the immediate relief necessary to stop the vigilante tactics of Ranch Rescue and similar patrol groups.<sup>89</sup> Injunctive relief under § 431.010 of the Texas Government Code would seem to be an extremely effective vehicle to stopping the terror and human rights violations in the border region.

Section § 431.010 of the Texas Government Code<sup>90</sup> prohibits the organization of private militia:

A body of persons other than the regularly organized state military forces or the troops of the United States may not associate as a military company or organization or parade in public with firearm in a municipality of the state.

The purpose of the Texas statute against organized militia is to provide for the public safety and to protect citizens from the threat of violence.<sup>91</sup> The history of this statute and similar anti-militia

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88. TEX. CODE. ANN. § 431.010 (1998),

89. Chief trial counsel Morris Dees stated, "If these groups and ranchers who conspire with them have to pay through their pockets, they will think twice before attacking innocent and peaceful migrants." *Migrants, Attacked on Texas Ranch, Sue Vigilantes for Violent Assault*, Southern Poverty Law Center, May 29, 2003, available at [http://www.splcenter.org/legal/news/article.jsp?aid=10&site\\_area=1](http://www.splcenter.org/legal/news/article.jsp?aid=10&site_area=1).

90. TEX. CODE. ANN. § 431.010 (1998).

91. *Vietnamese Fishermen's Ass'n v. Knights of the Ku Klux Klan*, 543 F. Supp. 198, 216 (S.D. Tex. 1982); citing *City of El Paso v. Simmons*, 379 U.S. 497, 508-509 (1965).

laws existing in twenty-four states<sup>92</sup> dates back to the Supreme Court decision in *Presser v. Illinois* (1886), holding state anti-militia laws "do not infringe the right of the people to keep and bear arms."<sup>93</sup> In *Presser*, the Court acknowledged the power of state governments to "control and regulate the organization, drilling, and parading of military bodies and associations. . . the exercise of this power by the states is necessary to the public peace, safety, and good order."<sup>94</sup>

State anti-militia laws have been successfully used in a variety of cases for injunctive relief in private actions against groups such as the Klu Klux Klan,<sup>95</sup> various groups of "unorganized militia,"<sup>96</sup> and in cases brought to restrict citizens' right to hold guns.<sup>97</sup> Anti-militia laws are based on the protection of public safety, not at preventing anti-government groups from communicating their views.<sup>98</sup>

To determine if a group like Ranch Rescue can be held liable under § 431.010 of the Texas Government Code requires clarification of the line between an organization's illegal "association as a military company or organization"<sup>99</sup> and legal freedom of expression granted by the First Amendment.

The Supreme Court's decision in *United States v. O'Brien*, though factually based upon defendant's conviction for burning his selective service registration certificate, is cited for the elements used to determine if a regulation of expressive conduct vio-

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92. Ellen M. Bowden and Morris S. Deed, *An Ounce of Prevention: The Constitutionality of State Anti-Militia Laws*, 32 GONZ. L. REV. 523, 525 (1997) (Symposium: Race Relations and Conflict in the United States); See ALA. CODE § 31-2-125 (1989); ARIZ. REV. STAT. ANN. § 26-123 (West 1991); FLA. STAT. CH. 870.06 (1994); GA. CODE ANN. § 38-2-277 (Harrison 1995); IDAHO CODE § 46-802 (1977); 20 ILL COMP. STAT. 1805/94 (West 1993); IOWA CODE § 29A.31 (1995); KAN. STAT. ANN. § 48-203 (1994); KY. REV. STAT. ANN. § 38.440 (Banks-Baldwin 1992); ME. REV. STAT. ANN. TIT. 37-B, § 342.2 (West 1993); MINN. STAT. § 624.61 (1987); MISS. CODE ANN. § 33-1-31 (1990); NEV. REV. STAT. § 203.080 (1995); N.H. REV. STAT. ANN. § 111:15 (1990); N.C. GEN. STAT. § 127A-151 (1986 & Supp. 1996); N.D. CENT. CODE § 37-01-21 (1984); N.Y. MIL. LAW § 240 (McKinney 1990); R.I. GEN. LAWS § 30-12-7 (1994); TEX. GOV'T CODE ANN. § 431.010 (West 1990); WASH. REV. CODE § 38.40.120 (1991); W. VA. CODE § 15-1F-7 (1995); WYO. STAT. ANN. § 19-1-106 (Michie 1996).

93. *Presser v. Illinois*, 116 U.S. 252, 264-5 (1886).

94. *Id.* at 267-8.

95. *Vietnamese Fishermen's Ass'n*, 543 F.Supp. at 198.

96. *United States v. Haney*, 264 F.3d 1161 (2001).

97. *Silveira v. Lockyer*, 238 F.3d 567 (2003).

98. Bowden and Deed, *supra* note 92, at 525.

99. TEX. CODE ANN. § 431.010, State Militia, Organization Prohibited (Vernon's 1987).

lates the First Amendment freedom of speech.<sup>100</sup> O'Brien states:

A government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial government interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is not greater than is essential to the furtherance of that interest.<sup>101</sup>

Texas Statute § 431.010 was specifically upheld as constitutional in *Vietnamese Fisherman's Association v. Knights of the Ku Klux Klan*.<sup>102</sup>

The conduct of Ranch Rescue must be distinguished from the group's speech and message. Militia members "remain free to express their views by means other than the threat of military force."<sup>103</sup> However, the use of force and military style tactics notoriously used by Ranch Rescue are the premise of these suits and therefore, fit within the prohibitions of § 431.010 of the Texas Government Code.

Plaintiffs must also show Defendants are militia within the meaning of the statute. In the case of *Vietnamese Fisherman*, an expert for the plaintiff testified to the definition of militia organization: "any unit command structure, training and discipline so as to function as a combat or combat support unit."<sup>104</sup> The court used this definition and determined the Knights of the Klu Klux Klan were a military organization. The court also used the judicial rules of construction to interpret the scope of the Texas statute.<sup>105</sup> In this analysis, the court concluded that Article 5780(6), currently called § 431.010 of the Texas Government Code, makes illegal: "(1) individuals associating as a military company; (2) individuals associating as a military organization; and (3) individ-

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100. *United States v. O'Brien*, 391 U.S. 367, 377 (1968); Bowden and Deed, *supra* note 92, at 528.

101. *O'Brien*, 391 U.S. at 376-377.

102. *Vietnamese Fishermen's Ass'n v. Knights of the Ku Klux Klan*, 543 F. Supp. 198 (S.D. Tex. 1982) (The Court did an O'Brien analysis of the Texas statute: (1) State of Texas may pursuant to its policing power enact and enforce laws to provide for the public safety and to protect its citizens from the threat of violence; (2) article 5790(6) was enacted to further the governmental interest of protecting citizens from the threat of violence posed by private military organizations—the proliferation of private military organizations threatens to result in lawlessness and destructive chaos; (3) article 5780(6) is unrelated to the suppression of free expression as it in no way limits defendants from expressing any view point they desire.)

103. *Id.* at 209.

104. *Id.* at 203.

105. *Id.* at 217.

uals parading in public with firearms in any city or town in Texas"; these alternatives are treated as separate violations.<sup>106</sup>

Defendant Sutton denies Ranch Rescue used force or weapons against trespassers.<sup>107</sup> However, both complaints in *Leiva and Rodriguez et al.* specifically allege the usage of guns to detain Plaintiffs,<sup>108</sup> the usage of guns by all Defendants, including Sutton,<sup>109</sup> the usage of a gun to assault Plaintiff Mancia<sup>110</sup> and, in the case of *Leiva et al.*, Defendant Nethercott told Plaintiffs that their assailants were United States soldiers who were protecting the border.<sup>111</sup> Both complaints state Defendants were wearing military fatigues and using military style equipment.<sup>112</sup> Furthermore, the entire equipment section of Ranch Rescue's website is dedicated to various forms of weapons available to members and weapons needed by members already engaged in Ranch Rescue operations.<sup>113</sup> These are clear examples of Ranch Rescue associating "as a military company"<sup>114</sup> against the provisions of § 431.010 of the Texas Government Code.

Ranch Rescue's actions also fit within the stated purpose of the anti-militia statutes, "to provide for the public safety and to protect its citizens from the threat of violence."<sup>115</sup> Ranch Rescue members patrol in the darkness of the night. The actions of the group threaten the safety of all persons within the vicinity of Ranch Rescue's patrols.<sup>116</sup> Neighbors, who are also landowners, live in greater fear of Ranch Rescue than of the undocumented

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106. *Id.*

107. Defendant Joseph Sutton Answer, No. CC-03-77, No. CC-03-126, at ¶ 5 and 13.

108. "Ranch Rescue associates were well-armed and well-equipped. . . Members of the paramilitary units were armed with high-powered assault rifles and handguns and were equipped with night-vision devices, two-way radios, flares, machetes, binoculars, observation posts, all terrain vehicles, and a railing dog trained to attack humans. Members of the paramilitary units of Ranch Rescue wore camouflaged uniforms and were required to carry firearms." See *Leiva and Rodriguez et al.*, *supra* note 9, at ¶ 21.

109. *Id.* at ¶ 25-26 and 32.

110. *Id.* at ¶ 34.

111. *Id.* at ¶ 34.

112. *Id.* at ¶ 22-40.

113. See Ranch Rescue Equipment, available at [www.ranchrescue.com/equipment.htm](http://www.ranchrescue.com/equipment.htm) (last visited February 15, 2004).

114. TEX. CODE ANN. § 431.010 (1998).

115. Vietnamese Fishermen's Ass'n v. Knights of the Ku Klux Klan, 543 F. Supp. 198, 216 (S.D. Tex., 1982).

116. Jim Hogg County Prosecutor Rudy Gutierrez stated, "the concern we have is that these private vigilante groups are going to overreact, end up shooting somebody that doesn't need to be shot." Bob Edwards, Morning Edition: *Activist Groups on the US-Mexico Border Could Spur More Violence with Illegal Immigrants* (NPR radio broadcast Sept. 16, 2003).

aliens crossing the border.<sup>117</sup>

For Plaintiffs to seek an injunction and sue under § 431.010 of the Texas Government Code, Plaintiff must use the Texas laws regarding private enforcement of public statutes. Individuals can bring an action under a Texas statute by a showing of special injury, damage, or harm.<sup>118</sup> This "special injury" standard applies even in cases in which the act sought to be enjoined violates penal statutes for which the state might have the clearest interest in asserting.<sup>119</sup> Plaintiffs can allege "special injury" due to Defendants' specific intent to parade against members of Plaintiffs' class. Furthermore, Plaintiffs and other persons within Plaintiffs' class allegedly suffered physical injury, emotional harm, and continuing fear. This injury is not directed nor felt by the general public, but instead limited to the Plaintiffs and persons in similar positions.

By suing for an injunction, Plaintiffs may be able to bypass addressing issues of standing, particularly because they will not be asking for personal damages. In *Hoffman*, the Court distinguished between other remedies and the remedy of back pay requested by the plaintiff and determined that "lack of authority to award back pay does not mean that the employer gets off scot-free."<sup>120</sup> Though injunctive relief, like back pay, is an equitable remedy, the undocumented immigrants have clean hands in regard to § 431.010 of the Texas Government Code because they did not either provoke the assaults or contribute to the organization of Ranch Rescue as a private militia company.<sup>121</sup> By using alternative forms of relief such as § 431.010 of the Texas Government Code, where Plaintiffs do not monetarily profit from the results or where Plaintiffs' own conduct does not come into question, Plaintiffs may be able to avoid addressing the issues of

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117. See *id.* Rancher Robert Fulbright stated, "Ranch Rescue scares the hell out of me."

118. *Vietnamese Fishermen's Ass'n*, 543 F. Supp. at 211-2 ) (citing *Scott v. Board of Adjustment*, 405 S.W.2d 55, 56 (Tex. 1966) (defining special injury as: "persons aggrieved," "party in interest," person "whose rights are substantially affected," and persons having "special interest in the subject matter"). Plaintiffs' claims clearly fall within this standard.

119. *Id.* at 211; citing *Scott*, 405 S.W.2d at 56.

120. *NLRB v. Hoffman*, 535 U.S. 137, 152 (2002).

121. *Precision Instruments Mfr. Co. et al. v. Automotive Maintenance Machinery Co.*, 324 U.S. 806, 814 (1945); quoting *Loughran v. Loughran*, 292 U.S. 216, 229 (1934); *Keystone Driller Co. v. General Excavator Co.*, 290 U.S. 240, 245 (1933); *Pomeroy, Equity Jurisprudence* (5th Ed.) § 397-399. Equity does not demand that its suitors have led blameless lives,' as to other matters, it does require that they shall have acted fairly and without fraud or deceit as to the controversy in issue."

standing and stop the actions of Ranch Rescue and similar vigilantes "guarding" the Texas border.

There may, however, be one other hurdle blocking a suit by Plaintiffs under § 431.010 of the Texas Government Code. That hurdle is one of federal preemption over immigration and naturalization.<sup>122</sup> In *Hoffman*, the Court stated that rewarding back pay to an undocumented alien through the labor laws would, "unduly trench upon explicit statutory prohibitions critical to federal immigration policy."<sup>123</sup> It has long been established that "when the national government by treaty or statute has established rules and regulations touching the rights, privileges, obligations or burdens of aliens as such, the treaty or statute is the supreme law of the land."<sup>124</sup>

In *Leiva and Rodriguez et. al.*, the law governing the entrance of aliens into the United States is U.S.C.A. § 1325. This statute falls under the general penalty provisions of the Immigration and Nationality Act and is a broad prohibition against the illegal entrance of undocumented persons into the United States. A state court may determine that due to this broad federal prohibition, the federal government has taken preemptive action in governing undocumented persons on the border. Such a ruling would also place the members of Ranch Rescue into the federal domain, since they too are interfering with the federal government's border patrol function. A court may determine that federal law should govern the consequences to Ranch Rescue's actions; under federal law, there are no provisions similar to § 431.010 of the Texas Government Code.

"The test of whether both federal and state regulations may operate, or the state regulation must give way, is whether both regulations can be enforced without impairing the federal superintendence of the field, not whether they are aimed at similar or different objectives."<sup>125</sup> Enforcement of § 431.010 of the Texas Government Code by the Texas court in *Leiva and Rodriguez et. al.* would reinforce federal control over immigration law and clear

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122. U.S. CONST. art. I, § 8, cls. 3, 4; *See also* Mathews v. Diaz, 426 U.S. 67 (1976); *Graham v. Richardson*, 403 U.S. 365, 377-380 (1971); *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 418-420(1948); *Hines v. Davidowitz*, 312 U.S. 52, 62-68 (1941); *Truax v. Raich*, 239 U.S. 33, 42 (1915).

123. *Hoffman*, 535 U.S. at 151.

124. *Hines*, 312 U.S. at 62-3.

125. *Florida Lime & Avocado Growers, Inc. v. Paul*, 83 S. Ct. 1210, 1217 (1963); *See also* *Missouri Pacific R.R. Co. v. Railroad Comm'n of Texas*, 833 F.2d 570, 573 (5th Cir. 1987).

the border of private militia, thereby leaving the region under the control of the federal authorities.<sup>126</sup> Injunctive relief would not only provide security to the border region, but would also allow more effective federal control of the United States border and the immigration challenges in the region.

## V. CONCLUSION

According to Ranch Rescue: "We are not, however, obligated in *any* way to other private citizens or groups, nor to any foreign national, government, entity or representative. Specifically, we are not obligated in any way to cater to the wishes of any foreign nation, nor the wishes of anyone from the United Nations. Neither is any other citizen within these United States."<sup>127</sup> Should the United States Government tolerate such lawlessness and disregard for the established laws of this country? America as a nation becomes hypocritical in its attempt to abolish similar human rights violations and anarchy elsewhere when it is uncontrolled at home.

Unlike the European Nations who are parties to the European Court of Human Rights,<sup>128</sup> the United States is only a party to the United Nations Counsel of Human Rights.<sup>129</sup> There is no International Court available to hear complaints similar those of the Plaintiffs' in *Levia and Rodriguez et. al.* Therefore, it is essential for the courts in the United States to firmly assert common law rules governing the rights of all persons within the United States' borders – even those who are present illegally.

The issue of standing for undocumented aliens will eventually come down to a question of pre-emption. Does the federal immigration law, 8 U.S.C.A. §1325, preempt the state common law violations allegedly committed by Defendants? Additionally, does the violation of federal immigration laws preclude Plaintiffs from the recovery of damages which resulted from these violations? In *Plyler*,<sup>130</sup> the Court refused to specify the extent of the rights granted to undocumented aliens and, since this decision, the Supreme Court has continued to rule narrowly on similar legal questions.

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126. See *Plyler v. Doe* 457 U.S. 229 (reinforcing the power of the States to deter the influx of persons entering the United States against federal law).

127. Ranch Rescue, available at <http://www.ranchrescue.com>.

128. Council of Europe, European Court of Human Rights, available at [www.echr.coe.int/](http://www.echr.coe.int/).

129. Universal Declaration of Human Rights, Dec. 10, 1948, G.A. Res. 217A(III), U.N. Doc. A/810 (1948).

130. *Plyler v. Doe*, 457 U.S. 202 (1982).

*Leiva and Rodriguez et al.* represent an opportunity for the Court to look at a broader range of rights and to balance immigration law violations against basic human freedoms.

As the number of undocumented aliens in the United States increases, it is becoming more and more important to define the rights of this population. On January 7, 2004, President Bush proposed a new temporary worker program allowing approximately eight million illegal immigrants to obtain legal status as temporary workers in the United States.<sup>131</sup> The expressed purpose of the program is to “allow workers who currently hold jobs to come out of hiding and participate legally in America’s economy while not encouraging further illegal behavior.”<sup>132</sup> Though this legislative attempt may help to decrease border violence by “promoting compassion for unprotected workers” and bringing to the surface “the underclass of workers, afraid and vulnerable to exploitation,”<sup>133</sup> the program will still not resolve the basic issue of what rights are held by undocumented aliens inside the United States.

Until now, the actions of Ranch Rescue and other vigilante groups have been accepted in their communities. The vigilantes believed their victims had little to no recourse against actions of violence in the courts. If these suits are eventually successful, the ultimate outcome will be that crimes against *any* person within the borders of the United States will not go uninvestigated or unpunished.

BROOKE H. RUSS\*

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131. *Bush Calls for Changes on Illegal Workers*, CNN Inside Politics, Jan. 8, 2004, available at, <http://www.cnn.com/2004/ALLPOLITICS/01/07/bush.immigration/index.html> (last visited 2/15/04).

132. Presidential Fact Sheet, available at, [www.whitehouse.gov/news/releases/2004/01/20040107-1.html](http://www.whitehouse.gov/news/releases/2004/01/20040107-1.html)

133. *Id.*

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