

## **CHILLING EFFECT AND THE ENFORCEMENT OF IMMIGRATION LAW**

Philosophically, all who enforce the laws have adopted by oath the proposition that we will honor the “rule of law”<sup>1</sup> by enforcing the law consistently without prejudice and in defiance and denial of external influences. This dispassionate enforcement of law is taught at every American law enforcement academy.

This idea of dispassionate application of law elevates to the highest plane the preservation of the public’s interest for justice and reinforces the notion that the application of law will not be subordinated to the interests of any person(s). “Lady Justice” is intentionally blind to external influence and has come to epitomize the concept of our system of laws.

### **SITUATIONAL DISCRETION VS. WHOLESALE COMPASSION**

Some have suggested that application of law in the immigration arena should combine both the rule of law and compassion and that both could co-exist. If the definition of compassion in this context is identical to the common usage<sup>2</sup> there is a natural inconsistency in use of the terms “compassion” and “rule of law” together in the wholesale application of law. While situational discretion (compassion) remains an attribute of professional law enforcement, permitting compassion in the enforcement of law for an entire population of people (all illegally present aliens) would violate the rule of law as it is commonly understood. If application of law (i.e., enforcement) may be altered by influences who suggest that by enforcing law we chill relations with the population violating our laws then there is no “rule” of law, by definition; there is instead a perversion of form to one of negotiated enforcement advancing favoritism and benefits to those otherwise subject to enforcement. No other entire population of violators of law (whether traffic law violators, “deadbeat” dads, burglars and all others) has been granted such consideration in deference to the strict enforcement of law. The beneficiaries of such exceptional consideration go beyond the patent population of immigration law violators to other purveyors of external influence such as the employers of illegally present foreign nationals and organizations that profit by the presence of the illegal foreign national. I believe that such a quid pro quo formulation of enforcement (that we will receive greater reporting of crime in return for not enforcing immigration laws) is a slippery slope in the destruction of meaningful trust. Permitting external influence to determine our role in the enforcement transaction is a corruption of principled enforcement inviting cynicism in law enforcement professionals as well as the public we serve.

### **Dura Lex Sed Lex (The law is harsh, but it is the law)**

Unbiased, unprejudiced and influence free enforcement of law is a keystone principle of professional U.S. law enforcement; an ideal inviolate. Principled enforcement sets the U.S. apart from other nations where corruption is incipient and palpable.

Dispassionate and consistent enforcement of law sans wholesale discretion (compassion) creates a clear and bright line expectation of certainty in the public we serve and the criminal

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<sup>1</sup> “The rule of law, sometimes called “the supremacy of law”, provides that decisions should be made by the application of known principles or laws without the intervention of discretion in their application.” Black’s Law Dictionary, sixth edition, page 1332.

<sup>2</sup> “Compassion” ... sympathetic consciousness of others’ distress **together with a desire to alleviate it**”. (emphasis added). Webster’s New Collegiate Dictionary, Anniversary Edition.

element we intend to deter. “Certainty” in the enforcement realm is as relevant as “certainty” and “swiftness” is in the formulation of effective punishment.

The alleged “chilling effect” of immigration law enforcement has been offered as a putative apology for the wholesale application of discretion. In effect, this notion is that if we enforce immigration law then the illegally present foreign national will refuse to report their personal victimization to law enforcement for fear of deportation/removal.

I disagree. Trust is not inspired in the idea that certain crimes will not be enforced by law enforcement. The reverse is true. Trust is built on a foundation of predictability; consistent application of law creates predictability which inspires trust. Our Law is codified purposefully to further predictability. Codification of law permits all to view the law while minimizing mis-interpretation and manipulation of meaning.

Certainty is a derivative of consistency and in the final formulation of our enforcement / prevention model deterrence is the result. Had immigration law enforcement been properly performed there would not be a vast resident population of illegal aliens. In the absence of this vast population of illegal aliens there would be no discussion now discouraging the application of law on that population. “Chilling effect” would revert to the more proper application of the phrase. In every other enforcement discussion “chilling effect” is nothing more than deterrence; the ultimate goal of law enforcement. Had we been successful in applying current law at the borders, wet and dry, there would be no discussion underway about how to manage the vast population of illegals, no potential perversion of the “rule of law” and no revisionism in the use of chilling effect as a term that should be reserved as a synonym for deterrence.

Although the idea of a chilling effect is intuitively appealing I believe that those who allege the effect carry the burden of proving that such an effect exists. How would we go about proving the negative, that crime will not be reported if law is enforced? We are unlikely to prove that a specific crime will not be reported if we enforce immigration law just as we cannot demonstrate that we prevented a specific crime in our most recent patrol tour. We can make assumptions from cumulated data but we cannot specifically demonstrate a cause and effect relationship. Confusion of which laws to enforce and which to ignore grants a theoretical toehold to those who would exploit the indecisiveness of an equivocal position in an otherwise unassailable American policing tradition. Equivocating subjectivity in law enforcement breeds contempt of the law, a sense of empowerment to those violating it and a belief that the law is subject to bargain. This quid pro quo formulation of equivocation is a contradiction to our professional philosophy and a direct challenge to ethics.

### **CHILLING THE FROZEN RELATIONSHIP?**

The frozen relationship between law enforcement and communities of people from emerging and developing nations is well documented. Cultural predilection opposed to reporting crime and cooperating with American law enforcement is apparent in communities with strong first generation populations from the “third world”. In emerging nations, corruption of law enforcement is a given or strongly believed to exist by the people living there. We can’t undo these cultural predilections by practicing favoritism and equivocation in law enforcement. The majority of illegally present aliens come from countries with suspected corruption in law enforcement.

Though counter-intuitive I believe that the trust relationship built on unequivocal enforcement of all law is more durable and authentic because it is founded on our traditions and because we

become predictable. In this way the illegal alien population is guided to law compliance by our steady and consistent application of law, thereby causing the alien population to orient themselves to U.S. law and custom rather than orienting U.S. law to the illegally present foreign national. In my view this outcome is superior.

Federal law and policy currently provides 230 visa varieties for virtually every condition found in the non-immigrant populations, at least two of which were created for victims of crime<sup>3</sup>. Clearly adjustment of status for cooperating victims of crime is a feature of current practice and a possible antidote to the alleged “chilling effect”.

I question whether we are building a case against enforcement when we might be more fruitful in reminding those who come here legally and illegally that to become a part of the social fabric of the nation civic responsibility must be exercised. In other words, the non-immigrant, whether legal or otherwise has a duty while present to report crime in some fashion.

Whether the report is made direct to law enforcement or by anonymous means, civic duties must include shared protection of the public by vigilance from all present. This is a basic ingredient in the execution of law enforcement duties as we all know that the unreported crime will go largely undetected; the undetected crime will likely not be solved.

Law enforcement agency-heads must answer two critical questions:

1. Is the current immigration law (Immigration and Nationality Act – INA) valid law? Or, conversely, has the current INA been found to be unconstitutional in whole or in part?
2. Would the enforcement of current immigration law have a reasonable expectation of identifying and/or obviating the efforts of a Mohammed Atta, a terror cell, organized crime groups and violent street gangs composed in part or wholly of illegally present foreign nationals?

Current law is valid law and I would answer the succeeding question in the positive; we could have a positive effect on organized crime groups (terror related or otherwise) by removing operational elements of the groups by incarceration or deportation.

I would also add that the most recent National Intelligence Estimate (NIE) clearly demonstrates that though “only a handful of individuals” have been discovered in the U.S. with ties to al-Qa’ida leadership, the expectation is that “al-Qa’ida will intensify efforts to put operatives here”; i.e., immigrate here<sup>4</sup>. Under such circumstance, unequivocal enforcement of immigration law becomes the very front line of defense.

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<sup>3</sup> The “T” visa provides a path to legal permanent resident (LPR) status for persons who are victims of human trafficking who agree to cooperate in the prosecution of the violators. The “U” visa provides a path to LPR status to victims of violent / serious crime.

<sup>4</sup> “National Intelligence Estimate; The Terrorist Threat to the US Homeland; July 2007”.

“Key Judgments:

We assess (al-Qa’ida) has protected or regenerated key elements of its Homeland attack capability, including: a safehaven in the Pakistan Federally Administered Tribal Areas (FATA), operational lieutenants, and its top leadership. Although we have discovered only a handful of individuals in the United States with ties to al-Qa’ida senior leadership since 9/11, we judge that al-Qa’ida will intensify its efforts to put operatives here.”

Under the informal contract created in “sanctuary” cities the illegally present foreign national is encouraged to report crime and reassured that violations of law – especially immigration law - will not be enforced against them. From a practical aspect the quid pro quo “contract” created in this arrangement between law enforcement and the illegal alien population does not appear to hold much promise. A review of Uniform Crime Reports and victimization surveys suggests crime is under-reported during an era that supports “sanctuary” jurisdictions.

In calendar year 2005 the total number of part 1 crime victimizations was 23.44 million. In that year, only 41.3% of these crimes were reported to the police (only 39.6% of the property crimes were reported). Whether the person was illegally present or not, almost 58% of all crime was not reported (sanctuary laws were well under way by 2005)<sup>5</sup> and almost 60% of property crime was not reported.

Of the 23.44 million victimizations, 77% were property crimes (18M) and 23% were personal (5.4M); the clearance rates for these classifications were 16.3% and 45.5% respectively, in 2005. The composite clearance rate is calculated to be 23.9% for both crime classifications. If we assume that crime victimizations are smoothly distributed across all population groups (the illegally present foreign national population is either no more or no less likely to be victims of crime) the illegally present foreign national population suffered victimization in property crimes of at most 1.2M (upper population magnitude calculation of 20 million present) and 362k personal crimes (see attached Graph 1). If we solve only 155k (23.9% clearance rate) of these 1.5M crime victimizations occurring to illegal aliens, our total loss in crimes cleared to total victimizations nationwide would be less than 1% (see attached Chart 1).

Thus for a potential loss of not more than one percent (0.7%) of crimes solved we would suffer the lost potential of finding and incapacitating or removing terror cells and serious organized crime and sacrifice both our domestic security and the “rule of law”<sup>6</sup>.

Said in a different way, even though each victim of crime is a priority to us, we lose very little by the theoretical chilling of crime reporting by the illegally present foreign national. The illegally present would appear to be a small fraction of victims of crime and crime is significantly under-reported today across all ethnic and racial groups. Trust will be built with predictability. Through unequivocal enforcement we would stand to gain a huge advantage strategically.

### **SANCTUARY FOR WHOM?**

I would suggest that the use of “sanctuary laws” in which jurisdictional authorities forbid the reporting of discovered illegally present foreign nationals to federal authorities do not invalidate federal immigration law. As such, the refusal to report law violation to federal authorities facilitates the illegal alien to remain in the United States, exposes the sanctuary government to liability exposure for every crime committed by the illegally present foreign national and inspires further criminal activity by evidencing disinterest in the enforcement of all law. Suggesting that sanctuary law is built on the proposition that illegal presence is a civil violation only does not solve the dilemma positively for the local “sanctuary” government. Virtually all moving and non-moving traffic violations are civil infractions. Yet we know that not only does the public

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<sup>5</sup> U.S. Department of Justice, Bureau of Justice Statistics, Criminal Victimization in the United States, 2005 Statistical Tables, NCJ 217198, Table 91.

<sup>6</sup> U.S. Department of Justice, FBI Uniform Crime Report, “Crime in the United States, 2005”; released September, 2006

emphasize a strong interest in traffic safety, national law enforcement organizations have inspired nationwide contests in innovative and high volume enforcement of those laws. Granted, the public calculus for support continues to be founded on whether immigration law merits enforcing as a public safety threat avoidance strategy. Traffic laws engage the public's sense of safety for their families. Immigration law has not received either the duration or degree of scrutiny that traffic law enforcement enjoys relative to public or family safety. As public safety leaders we have a duty to educate our constituents and elected officials on the vagaries of sanctuary laws and the threat that illegal immigration truly represents. We should not create law with an expectation that it will not be enforced.

Legal liabilities would appear to attach to any government that facilitates the continued presence of illegal aliens who commit criminal offenses. Current events are rife with examples of crime committed by the illegally present. While only the most heinous becomes national news we are all familiar with local threats. The legal liabilities and benefits of enforcement of immigration law by local and state law enforcement are ripe for research and review and deserve more than a cursory exploration. At a minimum we have a duty to protect all who reside in or visit our jurisdictions from crime.

Certainly a rigorous review of data and logic would lead to more than an off-hand dismissal of enforcement in favor of continued under-reporting of crime, the governmental liability exposures and public safety and domestic security threats that continued unabated illegal immigration represents.

Finally, much discussion has occurred pertaining to whether local law enforcement has authority, either inherent sovereign authority or statutory, to enforce immigration law. This debate cannot be determined in this article; however I would hasten to add that this is an area deserving final treatment and clarification if we are serious about the control of our borders. Clearly illegal immigration will not be controlled until we have gained a level of deterrence through enforcement.

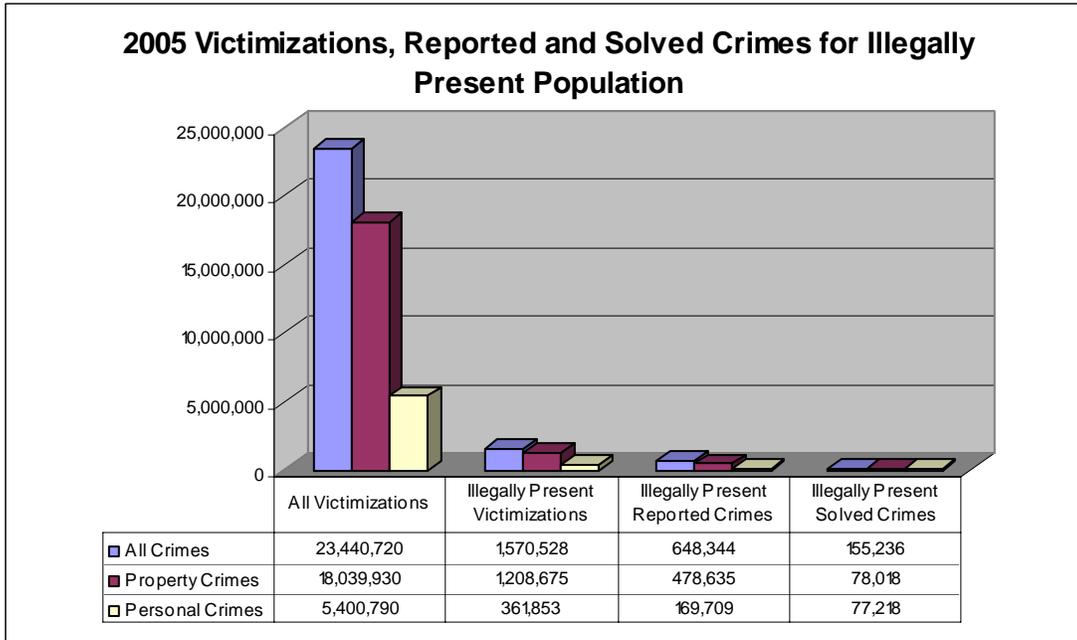
Sheriff Don Hunter  
Collier County Sheriff's Office  
August 2007

NOTE: The interpretation of law remains as much art as science. The most recent summary of United States Supreme Court statistics (October Term 2006) reflects that the Justices of the U.S. Supreme Court unanimously agreed with one another on points of written established law in 25% of the cases reviewed!<sup>7</sup>

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<sup>7</sup> Akin Gump Strauss Hauer & Feld LLP, Memorandum of June 2007, from SCOTUS blog, accessed by internet, 9August07

**Graph 1. 2005 Estimated Victimizations, Crimes Reported and Crimes Solved for Illegally Present Population (estimate based on 20 million illegally present aliens).**



**Chart 1. 2005 Percentage of Victimizations and Illegally Present Crimes Known to Police and Illegally Present Crimes Solved (estimated at 20 million illegally present aliens).**

