

## ABSTRACT

# THE WAR ON TERROR, LOCAL POLICE, AND IMMIGRATION ENFORCEMENT: A CURIOUS TALE OF POLICE POWER IN POST-9/11 AMERICA

David A. Harris

In post-9/11 America, no goal ranks higher for law enforcement than preventing the next terrorist attack. This is as true for local police departments as it is for the FBI, and police in cities. At the same time, many advocates of tightening U.S. immigration enforcement have recast their efforts as national security and anti-terrorism campaigns. Thus, these advocates and their many allies in the current administration and in Congress have called for local police to become involved in enforcing immigration law. Officials in both the executive and legislative branches of the federal government have taken a number of actions designed to make this happen, pushing expanded power and authority on law enforcement in order that these agencies take up the fight.

In the past, as national crises over crime have been declared – think, for example, of the war on drugs – state and local police have risen as one to enlist in the struggle, and have both fought for and accepted expanded authority to carry out their duties. Thus it will surprise many to hear that, in this instance – with nothing less than the prevention of terrorist attacks at stake – local law enforcement has, for the most part, vehemently refused to accept the increased authority to enforce immigration law that the federal government has proffered.

Various explanations have been tendered for this, but the one that rings truest by far is that police do not wish to become involved in immigration enforcement because doing so constitutes bad police work – that is, poor public safety policy. Becoming adjunct soldiers to federal immigration enforcement agencies will actually make the public not safer, but less safe, from criminals and predators. Ironically, it will also make Americans less safe from the dangers posed by terrorists. The reasons for this have much to do with the building success and popularity of community policing among police officers over the last twenty years. As police officers in departments of all sizes in every region of the U.S. know, making communities safe depends on intelligence gathering – which in turn depends on the very types of relationships between the public and the police that community policing produces.

Thus the refusal of state and local law enforcement to become involved in immigration enforcement both illuminates a turning point in American policing, and teaches us important lessons in how we must go forward in the war on terror if we are to succeed.

# THE WAR ON TERROR, LOCAL POLICE, AND IMMIGRATION ENFORCEMENT: A CURIOUS TALE OF POLICE POWER IN POST-9/11 AMERICA

David A. Harris\*

*Another way to help during this period of transition is through state and local law enforcement...State and local law enforcement officials are an important part of our border security, and they need to be a part of our strategy to secure our borders.*

President George W. Bush, addressing the nation on the subject of immigration, May 15, 2006

## I. INTRODUCTION

The terrorist attacks of September 11, 2001, resulted in the deaths of almost three thousand people. This was an act of war, but members of the law enforcement community and many others viewed the attacks as a massive crime – the largest act of mass murder in the history of our country.<sup>1</sup> These acts will likely have significant and long-lasting impact on many aspects of our criminal justice system, particularly on what we expect law enforcement to do to keep us safe, and we have already witnessed some

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<sup>1</sup> For example, Professor William Stuntz of Harvard Law School has described the attacks as a huge, one-day crime wave. William J. Stuntz, *Local Policing After the Terror*, 111 YALE L. J. 2137, 2138 (2002).

highly visible changes in policing. For example, the attacks resulted in a change in the primary mission of the Federal Bureau of Investigation. For all of the prior years of its existence, the FBI pursued interstate criminals, white-collar offenders, bank robbers, and organized crime; since September of 2001, the Bureau has the front-line responsibility for the prevention of terrorist acts.<sup>2</sup> In order to have the tools to carry out these tasks, the FBI has received new law enforcement powers. The USA PATRIOT Act allows FBI agents to perform so-called “sneak and peek” searches,<sup>3</sup> and to gather a limitless number of “business” records on anyone in the U.S. with nothing more than an application presented to a judge.<sup>4</sup> The Act also allows the FBI to obtain warrants for surveillance activities without meeting traditional Fourth Amendment standards as long as suspicion of foreign intelligence or terror-related activities is just one reason for the intrusion; it need not be the primary reason.<sup>5</sup>

But the effects of the 9/11 attacks on American law enforcement will reach far beyond the FBI. State and local police departments – from state police and highway patrol agencies, to county sheriffs and the police departments of large cities and small towns – already feel the impact. Elected officials and citizens will expect not just the FBI but these local police agencies to do anything necessary to stop terrorism on our soil. And while the FBI may have the more glamorous, leading role in these efforts – the surveillance and arrests of members of terrorist cells that make headlines across the country – local law enforcement may have to carry the bulk of the everyday anti-

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<sup>2</sup> *Change of Mandate: 2001—Present, Federal Bureau of Investigation*, at <http://www.fbi.gov/libref/historic/history/changeman.htm>, visited February 17, 2006 (explaining how the terrorist attacks led directly to a change in the Bureau’s responsibilities, with primary emphasis on fighting terrorism and international counter-intelligence work).

<sup>3</sup> USA PATRIOT Act, Pub. Law 107-56, Sec. 213 (2001)

<sup>4</sup> *Id.* at Sec. 215.

<sup>5</sup> *Id.* at Sec. 218

terrorism work: guarding non-federal facilities, securing large public events, industrial sites, critical infrastructure, and the like. Police must accomplish all of this while still carrying the responsibility for addressing garden-variety law enforcement. In addition, they may also have to pick up the slack on crimes that federal law enforcement simply cannot pursue to the extent that they once did.

This is the brave new world for law enforcement in post-9/11 America: using police power to thwart terrorists has become a top priority for every police agency, federal, state, or local. What with the enemies we face – terrorists who will seemingly do anything to harm us, and who want to kill us more than they themselves want to live – and the scale of the harm these enemies can do with one well-planned attack, the risk involved in these attacks becomes so great that stopping them naturally becomes *the* public safety imperative – even if the risk to any one individual in the U.S. is actually quite small. And much of this burden will fall to local police.

Seasoned observers of law enforcement over the last thirty years would expect police agencies to try to meet these new challenges by seeking greater power and authority in order to accomplish this new mission. Cases decided by U.S. courts dealing with police authority exhibit exactly this pattern over the past several decades. When a new criminal justice mission becomes important to public officials and citizens – for example, the war on drugs in the 1980s and 1990s – police departments and prosecuting authorities seek greater power to take on the bad guys. And this power usually takes the form of greater legal flexibility to deal with suspects, investigations, and evidence, with less post-hoc interference from courts. Given the risks and dangers involved in potential terrorism, it would shock no one if courts gave greater power to all of law enforcement,

including state and local police. In fact, courts might find it difficult to do otherwise because the shadow of the attacks would lurk in the background of all of their decisions on the scope of police power;<sup>6</sup> viewed in any fair way, our courts and other criminal justice institutions have often responded this way in the past. Indeed, increasing police authority has become one of the essential features of anti-crime policy in the United States over the last several decades: law enforcement – not just police departments but prosecutors and the U.S. Department of Justice – seek greater power for police to use in the investigation of crime, in response to some perceived criminal justice crisis. This often begins with the deployment of new tactics or technologies. When the new tactics – roadway checkpoints to detect drunk driving, for example<sup>7</sup> – become contested issues in courts, law enforcement agencies and their allies fight hard to get judges to bless the new approaches. Once approved, these new tactics come into wider use throughout law enforcement, and yet another new tactic at the next legal boundary line – for example, roadway checkpoints not to apprehend drunk drivers but to detect those carrying narcotics<sup>8</sup> – undergoes the same cycle of use and constitutional testing in court. The great run of cases in criminal procedure over the last twenty to thirty years shows this repeated pushing out against constitutional boundaries, and a resulting incremental (but steady) increase in law enforcement authority granted by courts to police over the years. Law enforcement and its allies seek greater police authority from the courts, usually receive the new power they seek, and then seek more in the next case. Given the latest

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<sup>6</sup> William J. Stuntz, *supra* note 2, at 2140-2141; *see also* Steven G. Brandl, *Back to the Future: The Implications of September 11, 2001 on Law Enforcement Practice and Policy*, 1 OH. ST. J. CRIM. L 133, 144 (Fall 2003) (with greater demands on police in the post-9/11 era, especially as regards global terrorism issues, law enforcement agencies will be given more authority). One need not look hard to find evidence that Professor Stuntz was right. *See* note 110, *infra*, and accompanying text.

<sup>7</sup> *Mich. Dept. of State Police v. Sitz*, 496 U.S. 444 (1990).

<sup>8</sup> *Indianapolis v. Edmund*, 531 U.S. 32 (2000).

enforcement imperative – fighting terrorism – local police would likely seek, and receive, a considerable array of new power and discretion as soldiers in the war on terror.

But the story of state and local policing after September 11 breaks with this familiar pattern. Local police will undoubtedly receive greater discretionary power in the post-9/11 world, and will use that power – not only in cases involving terrorism, but also in garden-variety criminal cases; this has actually begun to happen already.<sup>9</sup> But in one very visible category of enforcement, local police departments have been offered greater authority in the war on terror – and for the most part, they have refused it.

The enforcement of immigration law forms the context for this unusual set of events. In the days since September 11, 2001, the federal government has repeatedly made extensive use of immigration law to investigate persons suspected of involvement with terrorism.<sup>10</sup> All of the 19 hijackers involved in the attacks on that day came from outside the U.S.; all were young Muslim men from Middle Eastern countries. Fifteen came from Saudi Arabia. And al Qaeda, the group that planned and carried out the attacks, has its base and finds its members in the Middle East and South Asia. With the focus on foreigners, the U.S. government found in immigration law a handy and powerful tool. Many common violations of immigration law are civil, not criminal, in nature.<sup>11</sup>

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<sup>9</sup> *E.g.*, Illinois v. Lidster, 540 U.S. 419 (2003) (police may stop drivers without suspicion at checkpoint, which was at site of hit and run accident and held on same day of week and at same time of day, to attempt to gather information about accident). Prosecutors have also begun using powers granted to them in the USA PATRIOT Act to conduct investigations other than those that involve terrorism. *See, e.g.*, Steve Friess, *Patriot Act Gets Mixed Reviews in Vegas*, BOSTON GLOBE, Nov. 8, 2003, at A 3 (use of Patriot Act to investigate finances of Las Vegas strip club in garden-variety corruption case unrelated to terrorism).

<sup>10</sup> For a comprehensive overview of how the federal government used immigration law as an anti-terrorism tool in the months immediately after September 11, 2001, *see* Office of the Inspector General, U.S. Department of Justice, *The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks*, April 2003, accessed Feb. 21, 2006, at <http://www.usdoj.gov/oig/special/0306/index.htm>.

<sup>11</sup> *See generally* Steve H. Legomsky, IMMIGRATION LAW AND POLICY 1204 (4<sup>th</sup> ed. 2005) (explaining that as far as immigration violations, some are civil while a select group are criminal: “[I]n some instances

This means, of course, that certain constitutional and criminal procedure concepts do not apply in such cases. Immigration law and regulations have also become incredibly complex, and understanding the system and the law often requires detailed knowledge and considerable experience.<sup>12</sup> Additionally, when people have violated immigration law, the government has the power to detain them while it makes efforts to remove them.<sup>13</sup> All of this makes immigration law an incredibly potent weapon, because it essentially gives the government the ability to incarcerate undocumented aliens<sup>14</sup> preventively, without any proof of involvement in any criminal or terrorist action, and certainly without proof that might meet a criminal court's probable cause standard. Immigration law is also quite easy to violate, because of its many technical requirements.<sup>15</sup> And police can use immigration law this way even if they actually have an interest not in immigration, but in terrorism, of which they have scant or no evidence

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Congress has made the conduct a crime. In others, Congress has chosen instead to make the conduct a civil offense and attach generally milder penalties.”).

<sup>12</sup> *Lok v. Immigration and Naturalization Service*, 548 F.2d 37, 38 (2d. Cir. 1977) (putting the Immigration and Nationality Act on par with the federal tax code for excruciating complexity).

<sup>13</sup> Immigration and Nationality Act, sec. 236, codified at 8 U.S.C. sec 1226 (a); *see also Report of the Office of the Inspector General, supra* note 10, at (“The INS has authority to arrest aliens if they are present in the United States in violation of immigration law. Aliens who were never lawfully admitted into the United States are labeled ‘inadmissible.’ Aliens who were lawfully admitted into the United States but failed to maintain their immigration status, overstayed their visa, or engaged in unlawful conduct are ‘removable’ or ‘deportable.’”) Removal proceedings take place under section 240 of the Immigration and Nationality Act, codified at 8 U.S.C. §§ 1101-1537.

<sup>14</sup> There is, of course, an ongoing and robust controversy concerning how to properly refer to police who are in the U.S. in violation of immigration law. Some use the term “illegal aliens,” *e.g.*, *Illegal Immigration and Public Health*, report by Federation for American Immigration Reform, accessed at [http://www.fairus.org/site/PageServer?pagename=iic\\_immigrationissuecenters64bf](http://www.fairus.org/site/PageServer?pagename=iic_immigrationissuecenters64bf), while others prefer the term “undocumented migrants,” *e.g.*, Jeffrey S. Passel, *Undocumented Migrants: Numbers and Characteristics*, Pew Hispanic Center, June 14, 2005, accessed at <http://pewhispanic.org/reports/report.php?ReportID=46>. The stakes in this discussion are not trivial; how one names something can have enormous impact upon how the public debate on the issue is framed. See, *e.g.*, Michele Norris, *Speaking the Language of the Immigration Debate, All Things Considered*, NATIONAL PUBLIC RADIO, April 6, 2006 (quoting Frank Luntz, communications advisor to Republican politicians, as saying, “Well, let’s be blunt, the words that you use to describe illegal immigration are the words that determine whether people support or oppose a whole variety of different issues.”). But since the resolution of this debate is well beyond the scope of this article, I will use the term “undocumented alien,” simply as a way to split the proverbial baby.

<sup>15</sup> *See* note 67 through 70, *infra*, and accompanying text.

– in other words, even if immigration issues serve only as a pretext for the government’s interest in something else. It was this power – the largely unfettered authority to use immigration law to stop, detain, question and lock up anyone with an immigration problem – that local police publicly declared they did not want. To be sure, the context in which local police refused this new power had unusual aspects. A court would not confer this power and discretion; rather, it would come through legislation and regulation. But given the magnitude of the risk of terrorism, and the size of the task of fighting it, turning away additional power is not something one would have expected police to do – especially given the well-established, years-long pattern of continually seeking to enlarge their power. But local law enforcement agencies were not just *uninterested* in becoming involved in this part of the federal government’s efforts against immigration; they were *vehemently opposed* to it. Thus in the central law enforcement battle of our time, we see state and local police doing something curiously unusual – saying “no, thank you” to greater police power.

Grave shortfalls in available police resources and manpower no doubt account for some of this opposition. Local police responsibilities have mushroomed, what with an avalanche of new homeland security duties, at the same time that state and local budgets have become leaner.<sup>16</sup> And some of the resistance no doubt comes from a sincere, good faith conviction that enforcing immigration law remains a task uniquely appropriate for federal authorities and particularly unsuited for local police.<sup>17</sup> But something more fundamental caused the opposition to these federal proposals. Police work has changed in some basic ways over the last fifteen to twenty years in America. To be sure, it has

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<sup>16</sup> See notes 121 through 123, *infra*, and accompanying text.

<sup>17</sup> See notes 124 through 127, *infra*, and accompanying text.



changed neither widely nor deeply enough. But with community policing, problem-oriented policing and other new approaches to public safety becoming increasingly commonplace in law enforcement,<sup>18</sup> police officers, police supervisors, and whole police departments had no difficulty recognizing a problem implicit in the federal efforts: getting local police involved in immigration enforcement would be just plain poor police work, because it would hurt the ability of police to fulfill their primary mission: fighting crime and assuring public safety. Police departments that have adopted a community policing philosophy know that getting on the wrong side of the immigrant communities in their midst constitutes a basic mistake. This is not an example of political correctness run amok, or of police officers mesmerized by cultural diversity training. Rather, officers and departments using community policing know that they can only make their communities safe – from criminals, from terrorists, or any other threat – by working *with* communities, and decidedly *not* by instilling the type of fear that working as adjunct immigration agents will create. State and local law enforcement’s resistance to enforcing immigration law thus represents progress – both because it shows a new level of the awareness of what makes for good police work, and because it shows our police departments getting smarter about what they do, in the best sense of the word. Perhaps police have begun to learn that having ever more power, with fewer legal limits, does not necessarily make for better, more successful, or more efficient law enforcement. That is the possibility, and the promise, that this article will examine.

Part II of this article will discuss the risks in the post-9/11 era as we search for public safety, and the role of local police in that effort. Part III examines immigration

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<sup>18</sup> For an introduction to these topics and some discussion of their widespread use today, see David A. Harris, *GOOD COPS: THE CASE FOR PREVENTIVE POLICING* (2005).

law as a front in the anti-terrorism struggle, and the federal efforts to involve state and local police in immigration enforcement. Part IV discusses the reaction of non-federal law enforcement to these efforts, and Part V attempts to draw lessons from this reaction.

## **II. THE POST 9/11 CONTEXT: THE RISKS PRESENTED BY TERRORISM, THE SUPREME COURT'S REACTION, AND THE NEW ROLES OF LOCAL POLICE**

Terrorism did not, of course, arrive in the United States on September 11, 2001. This becomes obvious even when looking back only as far as the 1990s. The attacks on the World Trade Towers in September of 2001 were the second attempt, not the first, to destroy these buildings. The first came in 1993, when terrorists struck the Towers with a truck bomb.<sup>19</sup> The attacks resulted in five deaths and hundreds of injuries.<sup>20</sup> And the deadliest terrorist attack in U.S. history before September of 2001 came in 1995: Timothy McVeigh's bombing of the federal building in Oklahoma City, which killed one hundred and sixty-seven people.<sup>21</sup> Nevertheless, the attacks of September 11 surely marked a difference in scale and scope. The nineteen al Qaeda terrorists turned full-size commercial airliners loaded with fuel and passengers into guided missiles, killing not tens or hundreds but thousands,<sup>22</sup> and destroying or (in the case of the Pentagon) badly damaging several of the most recognizable landmarks in the country. Perhaps more to the point, the death, injury, and destruction of 9/11 seemed to require a re-assessment in

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<sup>19</sup> *Explosion at the World Trade Center: Death and Fear Rock a Landmark*, N.Y. TIMES, Feb. 27, 1993, at p. 21.

<sup>20</sup> *Id.*

<sup>21</sup> *Roses in Remembrance at Oklahoma City*, N. Y. TIMES, May 10, 1995, at D 21 (describing tribute to 167 victims).

<sup>22</sup> When Professor Stuntz of Harvard called September 11, 2001, a one-day crime wave, he points to the thousands of deaths as the cause of a twenty percent increase in the homicide rate for the year for the whole nation. William J. Stuntz, *supra* note 2, at 2138.

the customary calculus of the risk of terrorism: Americans suddenly found their own country in danger of terrorist assaults of catastrophic dimensions. Those types of attacks, so often thought of as something that happened only in other countries, had suddenly become real threats at home. All at once, the possibility of terrorism resulting in massive casualties on American soil became very real.

One consequence of this was that courts would likely do what they had done in the past in other crime crises: in their decisions, courts would interpret the Fourth Amendment in ways that would give police a greater amount of power in search and seizure matters. This seemed inevitable, even in cases having nothing to do with terrorism; judges would invariably see everyday criminal justice issues through the lens of terrorism.<sup>23</sup> For example, a judge deciding a case the use of police dogs, such as *Illinois v. Caballes*,<sup>24</sup> would likely consider not just about the issue presented – under what circumstances police could use a dog to sniff for narcotics? – but also the use of dogs to detect explosives or other weapons. Not wanting to rule in a way that might restrict police in the latter situation, courts would more likely give police more authority in the former.

Some of the criminal procedure cases decided by the Supreme Court after 9/11 with only indirect anti-terrorism implications have proven this point. Take *Caballes* as just one example. One can make a reasonable argument (as the Illinois Supreme Court did in its opinion<sup>25</sup>) that the way that the police used the drug-sniffing dog in *Caballes* changed a simple traffic stop into a drug interdiction investigation, without any

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<sup>23</sup> *Id.* at 2139-2140.

<sup>24</sup> 543 U.S. 405 (2005).

<sup>25</sup> *People v. Caballes*, 207 Ill. 2d 504, 820 N.E. 2d 202 (2003).

evidentiary basis. But one needs very little imagination to see that the U.S. Supreme Court had in mind the use of dogs not just in drug interdiction, but in anti terrorism work. At least one of the *amicus* briefs before the Court in *Caballes* made explicit the connection between the case and the use of dogs against terrorism, stating that *any* legal restriction on the use of police dogs “threatens to undermine the government’s war on terror, which relies on canines to sniff vehicles and luggage...”<sup>26</sup> The post-9/11 coloring of the case becomes more obvious yet in Justice Ginsburg’s dissent. Justice Ginsburg states her disagreement with the majority without equivocation: using a dog trained to detect narcotics in a run of the mill traffic offense case turns the encounter into an investigation of drug crime; therefore, police should have probable cause to walk the dog around the defendant’s car.<sup>27</sup> But Justice Ginsburg carefully noted she would not feel the same way about a terrorism-related use of a trained dog. “A dog sniff for explosives, involving security interests not presented here, would be an entirely different matter...The use of bomb-detection dogs to check vehicles for explosives” meets constitutional standards.<sup>28</sup> In case anyone had missed her point, Justice Ginsburg quoted approvingly from *Indianapolis v. Edmond*: “the Fourth Amendment would almost certainly permit an appropriately tailored roadblock set up to thwart an imminent terrorist attack...”<sup>29</sup>

In this same post-9/11 time frame, the situation of state and local police in the U.S. has changed dramatically. The FBI has, of course, assumed the lead role in

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<sup>26</sup> *Illinois v. Caballes*, , Brief for Amici Curiae Illinois Association of Chiefs of Police and Major City Chiefs Association, Lexis 2003 U.S. Briefs 923 (2004).

<sup>27</sup> *Illinois v. Caballes*, 543 U.S. 405, 421-23 (Ginsburg, J., dissenting).

<sup>28</sup> *Id.* at 423, 425 (2005) (Ginsburg, J., dissenting).

<sup>29</sup> *Indianapolis v. Edmond*, 531 U.S. 31, at 44.

terrorism prevention and investigation,<sup>30</sup> but state and local police agencies have also had to assume a vast number of new responsibilities. A few of these new tasks deal directly with terrorism; most of these are not nearly as exotic as the new roles the FBI had to fill. All told, and they have become a vast new drain on department manpower and resources.<sup>31</sup>

For example, state and local police in virtually any city now participate in joint terrorism task forces with their federal law enforcement counterparts in their jurisdictions.<sup>32</sup> These task forces typically bring together state and local police with the locally-assigned agents of the FBI, immigration, customs, and border patrol agents, port security personnel, and other officials. The idea is to build coordinated structures to uncover and investigate potential threats, and to prepare for communication and response in the event of an attack.

But the new work and manpower demands on state and local police only begin with the joint terrorism task forces. Far less intriguing work abounds, often requiring much larger, long-term commitments of resources.<sup>33</sup> For example, local police frequently find themselves guarding critical public infrastructure items, such as airports, bridges, tunnels, stadiums, and the like.<sup>34</sup> Any city with a rail or bus system of any size has come

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<sup>30</sup> See note 2, *supra*, and accompanying text.

<sup>31</sup> See, e.g., Jim Rutenberg and Sewell Chan, *In a Shift, New York Says It Will Add 800 Officers*, N.Y. TIMES, March 22, 2006, at A 23 (quoting Robert Maguire, former New York police commissioner, stating that ““where you have the dual mission of fighting and continuing to reduce crime, and to combat terrorism, where we are probably the No. 1 target in the world, you cannot reduce your police force.””).

<sup>32</sup> U.S. Department of Justice, Federal Bureau of Investigation, *Protecting America Against Terrorist Attack: A Closer Look at the FBI's Joint Terrorism Task Forces*, December 1, 2004, accessed March 3, 2006, at <http://www.fbi.gov/page2/dec04/jttf120114.htm>.

<sup>33</sup> Nicholas Kulish, *Local Police Are Enlisted to Fight Terror*, WALL STREET JOURNAL, Aug. 30, 2002, at B1 (“[O]fficials hope to teach local police how to fight terrorism...All around the country...police forces are focusing on terrorism, both in preventing an attack and handling the aftermath.”)

<sup>34</sup> Fox Butterfield, *As Cities Struggle, Police Get By With Less*, N.Y. TIMES, July 27, 2004 (many police departments have been forced by the federal government to divert considerable resources into protecting critical infrastructure, “like airports and water works” against terrorism).

to see those transit routes as vulnerable, given the train bombings in Madrid in March of 2004 and the attacks on London's underground railcars and buses in July of 2005. Local police and transportation security agencies must do whatever it takes to safeguard these systems – from putting checkpoints manned by several officers in subway stations, as the New York Police Department did in the wake of the London bombings, to installing closed-circuit camera systems and other high-tech security items, sometimes costing hundreds of millions of dollars.<sup>35</sup> Beyond transit systems, local police must also assure the security of other kinds of potentially dangerous structures: large industrial installations, such as chemical plants or oil refineries; nuclear-powered generating stations and other types of electrical facilities; or manufacturing plants that use or ship toxic substances as industrial process ingredients or waste. Police must also keep watch over other kinds of facilities not dangerous in themselves but still potential terrorist targets: synagogues, mosques, community centers, museums, and landmarks such as monuments or historic sites. Another layer of new responsibilities comes from having to safeguard large, temporary gatherings of people. In the post-9/11 world, such attacks loom as a distinct possibility for every big event with substantial visibility: political conventions, sporting events, demonstrations, or large outdoor concerts.<sup>36</sup>

All of these new tasks for state and local police could not have come at a worse time. The new terrorism-related law enforcement burdens would have stretched law

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<sup>35</sup> Sewell Chan, Critics See Risk in M.T.A. Security Pact, N.Y. Times, August 26, 2005, at B 4 (discussing awarding of \$212 million contract to defense contractor Lockheed Martin to develop a system of video cameras, motion sensors, and computers for subway terrorism security); *Low-Tech Security*, NY Times, Oct. 2, 2005, at Sec. 14, p. 13 (detailing plan to spend \$600 million on subway security technology, including \$212 million on 1,000 video cameras)

<sup>36</sup> For example, when Detroit hosted the Super Bowl in February of 2006, law enforcement put the danger of terrorism at the top of their list of security concerns, devoting a huge amount of resources to the effort. See, e.g., Amber Hunt, *Technology Helps Cops Keep Downtown Safe*, DETROIT FREE PRESS, Feb. 2, 2006, at 13 (describing huge amounts of sophisticated, expensive technology used in Detroit “all in the name of Super Bowl security.”)

enforcement thin at any point, but significant economic problems hit state and municipal budgets hard at the same time, cutting drastically into their revenues just as these new demands landed on police departments. This combination of forces has made the situation truly dire, resulting in once-unthinkable cuts in police personnel.<sup>37</sup> This has pushed many police departments to “the breaking point,” leaving public safety forces dangerously thin – at precisely the same time that the danger of terrorism has emerged.<sup>38</sup> And the federal government itself intensified this fiscal squeeze by phasing out a ten billion dollar Department of Justice program that had helped localities pay for new local police officers.<sup>39</sup>

Therefore, just as local police took up a whole new array of duties in the post-9/11 era – from assisting federal law enforcement as part of joint terrorism task forces, to protecting the multitude of potential targets for terrorist attacks – they found themselves offered new authority to use against potential terrorists: the power to enforce immigration law.<sup>40</sup> This may seem not surprising; with all the new duties and responsibilities to carry, perhaps police needed more power to carry out a job that had become even more difficult than usual. One might therefore expect police to cheer the new power they were offered.

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<sup>37</sup> Fox Butterfield, *supra* note 34 (many cities coping with budget shortfalls have found themselves forced to cut police officers from their police departments).

<sup>38</sup> Kevin Johnson, *Police Scoff at Ashcroft Speech*, USA TODAY, Nov. 20, 2004, at 3A (leadership and members of International Association of Chiefs of Police reacted harshly to a speech by then-Attorney General John Ashcroft at its convention because “new anti-terrorism duties for local cops – which have come as state and local budgets have declined and historically low crime rates have crept upward – have pushed police agencies to ‘the breaking point.’”)

<sup>39</sup> Fox Butterfield, *supra* note 34 (explaining drastic reduction in federal aid to local police departments); Kevin Johnson, *supra* note 40 (discussing opposition to the ending of the program).

<sup>40</sup> Some new post-9/11 power for the police came from the U.S. Supreme Court, *see* notes 25 through 29, *supra*, and accompanying text, but new power to enforce immigration law came from another source, as section III, *infra*, shows.

But this is where the story of police power in the post-9/11 era gets curious. Police did not cheer the new authority given to them. In fact, in a very visible and important instance, they not only did not cheer their new authority; they refused it.

### **III. THE IMMIGRATION ISSUE, TRANSFORMED: HOW “ILLEGAL IMMIGRATION” BECAME “NATIONAL SECURITY”**

Americans had concerns about illegal immigration to the U.S. well before September 11, 2001.<sup>41</sup> According to the most current estimate, between 11.5 and 12 million undocumented aliens lived in the U.S. in March 2006.<sup>42</sup> While they came from all over the world, the largest group by far – 78 percent -- came from Latin American

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<sup>41</sup> In fact, in the days before the terrorist attacks, President Vicente Fox of Mexico came to the U.S. to meet with President George W. Bush, and the two leaders discussed proposals to address the problem of illegal immigration from Mexico. Ginger Thompson, *Mexico President Urges U.S. to Act Soon on Migrants*, N.Y. TIMES, Sept. 6, 2001, at A 1 (Mexican president’s proposal for an immigration agreement, made at the very beginning of his visit to the U.S. on the South Lawn of the White House, “added a new sense of urgency” to the issue). But with the attacks of 9/11, these proposal simply disappeared from the political agenda in the *U.S. Border Talks on Tap as ‘NAFTA’ Leaders Meet in Mexico*, All Things Considered, NATIONAL PUBLIC RADIO, March 30, 2006 (“If you’d look all the way back to 2001, Fox has been pushing Mr. Bush for a guest worker program. The president was keen on the idea, but a few days after that first meeting in Washington were the 9/11 attacks, and that sort of pushed the guest worker plan to the bottom of the agenda and Mr. Bush hasn’t been able to get it back to [Congress] until” 2005 and 2006). Meetings between Bush and Fox in early 2006 were the first attempt to re-start their joint efforts since 2001. Ginger Thompson and David E. Sanger, *Bush and Fox Repeat Vows on Immigration*, N.Y. TIMES, April 1, 2006, at A 9 (“Five years after they first pledged to work together to find ways to open legal channels for Mexicans to seek work in the United States, President Bush and President Vicente Fox ended a two-day meeting on Friday essentially where they were in 2001...”).

<sup>42</sup> Jeffrey S. Passel, *The Size and Characteristics of the Unauthorized Migrant Population in the U.S., Estimates Based on the March 2005 Current Population Survey*, Pew Hispanic Center, at 2 (best estimate for March 2006 is between 11.5 and 12 million unauthorized migrants). Passel uses the term “unauthorized migrants” instead of illegal immigrants or illegal aliens; he defines it as “a person who *resides* in the United States but who is *not* a U.S. citizen, has *not* been admitted for permanent residence, and is *not* in a set of specific authorized temporary statuses permitting longer-term residence and work.” *Id.* at i (emphases in original).



countries, chiefly Mexico.<sup>43</sup> Illegal immigration from Mexico has long supplied the American economy with cheap labor for agriculture, cleaning, construction, food preparation and many other sectors of the economy.<sup>44</sup> This has created a steady stream of migrants flowing from the grinding poverty and pervasive unemployment of Mexico and other Latin American countries to the U.S. in search of jobs and wages. These migrants may get only difficult and menial jobs, and illegal status makes them susceptible to cheating on wages and other forms of exploitation. But the existence of relatively well-paying work in the U.S. makes the country an irresistible magnet. With little chance to earn enough to support their families in their own countries, many Mexicans and other Latin Americans simply see no alternative to economic migration to the U.S., whatever the legalities. The U.S. has a steadily growing economy and a need for workers to do unskilled work at low wages, even as severe Mexican and Latin American poverty persist. This creates a “push-pull” dynamic between “prosperity-fueled job opportunities in the United States in contrast to limited or nonexistent job opportunities in sending countries.”<sup>45</sup> This pattern has characterized immigration to the U.S. for years; the search for jobs and better wages drives most unauthorized migration, and almost always has.<sup>46</sup> Indeed, the American economy has become addicted to underpaid illegal labor, which provides us with everything from fresh fruits and vegetables, to construction work, to clean hotel rooms, to restaurant food – all at prices well below what we would

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<sup>43</sup> Id. at 4 (of all unauthorized migrants, 56 percent came from Mexico and 22 percent came from other Latin American countries, chiefly countries in Central America, for a total of 78 percent).

<sup>44</sup> Id. (unauthorized migrants make up significant shares of all workers in farming occupations (24 percent), cleaning (17 percent), construction (14 percent), and food preparation (12 percent)).

<sup>45</sup> Ruth Ellen Wasem, *Unauthorized Aliens in the United States: Estimates Since 1986*, Congressional Research Service, September 15, 2004, at 5.

<sup>46</sup> Rakesh Lochlar, *Latino Labor Report, 2004: More Jobs for New Immigrants but at Lower Wages*, Pew Hispanic Center, Washington, D.C., May 2005, accessed at <http://pewhispanic.org/reports/report.php?ReportID=45>.

otherwise have to pay.<sup>47</sup> For all of these reasons, Americans on all sides of the immigration debate have, until recently, typically seen illegal immigration as an economic and labor issue: do illegal immigration take jobs from Americans? Does this depress wages? Does it strain the finances of our social support systems?<sup>48</sup>

Then came September 11, 2001. The events of that day transformed the immigration debate – from one about economics, about rich and poor nations, about legal and illegal labor, to one about a different concept: national security.

#### **A. The Attacks and the Immediate Aftermath**

Americans learned soon after September 11, 2001, that none of the attackers held U.S. citizenship; all but two of them had entered the U.S. legally. They had taken advantage of our openness to outsiders, and had used our own assets – the aviation industry, the internet, the banking system – to carefully plan and execute a precision strike against some of our highest-profile targets. All nineteen of them were young Muslim men from the Middle East; fifteen were from one country alone – Saudi Arabia.

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<sup>47</sup> See, e.g., Eric Schlosser, REEFER MADNESS (2003) (making the case that the American economy, and all who benefit from it, are addicted to the availability of low-wage illegal labor); Eduardo Porter, *Who Will Work the Farms?*, N.Y. TIMES, March 23, 2006, at C 1 (farmers, who need low-wage workers to run their operations competitively, will use legal guest workers if possible, but will certainly use illegal immigrants if guest worker programs do not work or do not materialize; quotes one farmer who has hired legal guest workers as saying “ ‘We would rather use legal workers,’ but ‘if we don’t get a reasonable guest worker program we are going to hire illegals.’”).

<sup>48</sup> This set of issues, particularly the question of whether or not illegal immigration depresses wages, remains part of the dialogue today. See, e.g., George J. Borjas and Lawrence F. Katz, *The Evolution of the Mexican-Born Workforce in the United States*, National Bureau of Economic Research Working Paper Series, Working Paper 11281 (April, 2005), accessed at <http://www.nber.org/papers/w11281>, at 37 (illegal immigration from Mexico in the 1980s and 1990s “lowered the wage of most native workers...[[t]he wage fell by 8.2 percent for high school dropouts, and by 3.8 percent for college graduates.”) Others believe that the effect of illegal immigration on wages is far less. Eduardo Porter, *Cost of Illegal Immigration May Be Less Than Meets the Eye*, N.Y. TIMES, April 16, 2006, at Bu 4 (surveying a number of economists and their works which portray the effect of illegal immigration on wages as “much, much lower” than the Borjas and Katz have estimated).

And all were part of al Qaeda – a terrorist group based, at that time, in Afghanistan, whose leadership acted on what it claimed were Islamic religious principles.

Despite rhetoric to the contrary from the President himself,<sup>49</sup> the federal government quickly began to go after Muslim immigrants from Middle Eastern countries with great vigor, in pursuit of possible terrorist cells. In the first several months after the attacks, the government incarcerated hundreds of Muslims, mostly from the Middle East and South Asian countries, in order to investigate them for links to al Qaeda.<sup>50</sup> Not one of these hundreds of people had any connection to terrorism.<sup>51</sup> The government charged a few with petty crimes; it held the overwhelming number on immigration violations.<sup>52</sup> Many were detained for months; under the FBI’s “hold until cleared” policy, the authorities refused to release them despite the lack of any substantive evidence until the FBI essentially proved their innocence to its own satisfaction.<sup>53</sup> Most were held incommunicado, without benefit of counsel and without any criminal charges lodged;<sup>54</sup> once cleared, the government deported them based on immigration violations.<sup>55</sup>

The federal government also investigated Middle Easterners in other ways. In November of 2001, Attorney General John Ashcroft’s Department of Justice announced a new initiative: federal agents would interview 5,000 young men regarding terrorism.<sup>56</sup>

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<sup>49</sup> Dana Milbank and Emily Wax, *Bush Visits Mosque to Forestall Hate Crimes*, WASH. POST, Sept. 18, 2001, at A1 (detailing President Bush’s personal visit to the Islamic Center of Washington to speak against retaliation against American Arabs and Muslims).

<sup>50</sup> Office of the Inspector General, *supra* note 110.

<sup>51</sup> *Id.* at ; see also Eric Boehlert, *The Dragnet Comes Up Empty*, SALON, June 19, 2002 (quoting Department of Justice official as stating that among the 128 criminal charges that have been filed against the 1,000-plus detainees, none...have been for terrorist activity.”)

<sup>52</sup> Office of the Inspector General, *supra* note 10, at Chapter 6.

<sup>53</sup> *Id.* at 38-40.

<sup>54</sup> *Id.* at 39; Susan Sachs, *U.S. Defends Withholding of Jailed Immigrants’ Names*, N.Y. TIMES, May 21, 2002.

<sup>55</sup> *Id.* at Chapter 6.

<sup>56</sup> Deputy Attorney General of the U.S., *Memorandum for All United States Attorneys, All Members of the Joint Terrorism Task Forces*, Nov. 9, 2001 (copy on file with the author).

The young men were not suspects; furthermore, the interviews were to be strictly voluntary.<sup>57</sup> But all of the men on the list had recently entered the U.S. from Muslim countries.<sup>58</sup> As for the voluntariness of these interviews, they would take place against the backdrop of the roundups and detentions of Muslim Middle Easterners already occurring; thus it seemed likely that interviewees would fear displeasing the federal government by refusing to talk. And the Deputy Attorney General’s instructions for carrying out the interviews made the game even clearer: although the interviews did not concern immigration issues, agents could surely check on the interviewee’s status before the interview took place<sup>59</sup> – no doubt to have a little bit of persuasive leverage available should the interviewee fail to see the virtue in a “voluntary” interview.

By the end of 2001, a clear pattern had emerged. The federal government would pursue, detain, or investigate anyone it suspected of involvement with terrorism on even the thinnest of evidence, and the Department of Justice would use any legal method available to carry out this mission. Because it wished above all to stop terrorists before they could strike again, the government would not hesitate to go forward without probable cause or even reasonable suspicion of terrorist conduct – the amount of evidence usually needed under the Fourth Amendment to the Constitution to proceed with an arrest or even a brief detention.<sup>60</sup> Instead, the government would use “pretexts” – laws meant for other situations and other purposes, but which could be pressed into service as an excuse to allow the government to detain and investigate persons suspected

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<sup>57</sup> Id.

<sup>58</sup> Id.

<sup>59</sup> Deputy Attorney General of the U.S., *supra* note 56, at .

<sup>60</sup> See *Illinois v. Gates*, 462 U.S. 213 (1983) (articulating standard of probable cause); *Terry v. Ohio*, 392 U.S. 1 (1968) (allowing a temporary detention and a pat down of outer clothing when police officer has a reasonable, articulable suspicion of wrongdoing).

of terrorist involvement. There is nothing new in this tactic; for example, police have used traffic enforcement for years as a pretext to conduct drug interdiction through searches of vehicles and drivers.<sup>61</sup> Attorney General Ashcroft himself talked openly about using any available pretext to investigate terrorists suspects. Ashcroft invoked the famous statement by Attorney General Robert F. Kennedy, then engaged in an effort to prosecute major organized crime figures, who said that the government would gladly arrest gangsters for any minor crime, even “spitting on the sidewalk;” Ashcroft said he would take the same approach against potential terrorists.<sup>62</sup> And chief among the tools available to Ashcroft was immigration law.<sup>63</sup>

Using immigration law as a pretext to investigate immigrants has a number of important advantages. In contrast to run-of-the-mill criminal investigations, in which the government must obey search and seizure rules, the Fourth Amendment’s exclusionary rule does not apply in immigration proceedings.<sup>64</sup> Under the Fourth Amendment, the authorities must have some (small) amount of evidence – probable cause, or just reasonable suspicion – to search or detain a person;<sup>65</sup> with no exclusionary rule in effect, immigration investigations simply do not require this. Fifth Amendment protections

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<sup>61</sup> See, e.g., David Cole, *NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM* (1999); David A. Harris, *PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK* (2002); Angela J. Davis, *Race, Cops, and Traffic Stops*, 51 *MIAMI L. REV.* 425 (1997); David A. Harris, *Car Wars: The Fourth Amendment’s Death on the Highway*, 66 *GEO. WASH. L. REV.* 566 (1998); David A. Sklansky, *Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment*, 1997 *SUP. CT. REV.* 271; Anthony Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 71 *N.Y.U. L. R.* 956 (1999).

<sup>62</sup> Speech by U.S. Attorney General John Ashcroft to the U.S. Conference of Mayors, Oct. 25, 2001, accessed at [http://usdoj.gov/ag/speeches/2001/afcrisisremarks10\\_25.htm](http://usdoj.gov/ag/speeches/2001/afcrisisremarks10_25.htm), May 21, 2004.

<sup>63</sup> Immigration law, while the most frequently used pretextual basis for these detentions, was not the only one. Another was the use of the federal statute authorizing detention of material witnesses, 18 U.S.C. 3144. See, e.g., Adam Liptak, *New Scrutiny for Law On Material Witnesses*, *N. Y. TIMES*, March 22, 2003, at A 18 (indicating increasing concern about the use of material witness law to accomplish preventive detentions).

<sup>64</sup> *I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032 (1984) (deciding Fourth Amendment’s exclusionary rule does not apply in a civil deportation hearing).

<sup>65</sup> See note 60, *supra*, and accompanying text.

apply in the immigration context vis-a-vis questioning; the government cannot compel suspected immigration law violators to incriminate themselves. However, should an immigration suspect choose to avail himself of the right to remain silent, the fact finder can draw an adverse inference from a failure of the suspect to speak – something not allowed in the typical criminal case. The Supreme Court’s criminal procedure cases require that anyone charged and detained come before a judicial officer promptly, usually in less than 48 hours, to ascertain whether probable cause exists for the authorities to hold the defendant pending charges;<sup>66</sup> these rules do not apply in the immigration arena. These and other differences between the protections available to suspects in immigration contexts versus criminal procedure give the government vastly more power under immigration law than the criminal law would in any dealings with an immigrant, and impose much less oversight and accountability. Best of all from the government’s point of view, finding an immigration violation is relatively simple. All the government need do is find a reason that the immigrant is “out of status” – i.e., out of compliance with his or her visa conditions, whether this constitutes a civil violation or a crime. Among the most common forms of civil “out of status” violations are overstaying one’s visa<sup>67</sup> and

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<sup>66</sup> *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991) (requiring probable cause hearing for detained arrestee within 48 hours in most cases).

<sup>67</sup> Immigration and Nationality Act sec. 237 (a) (1) (B), 8 U.S.C. sec. 1227 (a) (1) (B) (making deportable “[a]ny alien who is present in the United States in violation of this Act...”) is sometimes invoked when an individual violates the conditions under which he or she was admitted, such as the time limits of one’s visa. This kind of violation will also trigger Immigration and Nationality Act sec. 237 (a) (1) (C) (1), 8 U.S.C. sec. 1227 (a) (1) (C) (1), which makes deportable “[a]ny alien who...has failed to maintain the nonimmigrant status in which the alien was admitted...or to comply with the conditions of any such status...” See *Karageorgious v. Ashcroft*, 374 F.3d 152 (2d Cir. 2004) (aliens who stayed in U.S. after expiration of visa period and without other authorization were deportable under 8 U.S.C. sec 1227 (a) (1) (C) (i), and were not deprived of due process by elimination of suspension of deportation proceedings under new statute); *Milande v. INS*, 484 F.2d 774 (7<sup>th</sup> Cir. 1973) (proof of overstay requires only that government show alien’s admission to U.S. for a temporary period, that the period had elapsed, and that alien had not departed).

violating rules against employment while temporarily in the country.<sup>68</sup> But other simple ways to violate immigration laws abound. For example, immigrants in the U.S. on student visas must maintain a “full course of study” to qualify for residence in the U.S.<sup>69</sup> Should the immigrant student’s record show fewer credit hours than required – because of a clerical error, a misunderstanding about the credits a course carries, or just dropping a course, for example – the student would fall out of compliance and would become subject to deportation.<sup>70</sup>

Illegal immigration, especially from Latin America, had been a concern in many areas of the U.S. for years. After 9/11, with immigration law coming into use as one of the primary levers law enforcement would use in domestic efforts to fight terrorists, many of those who had long opposed illegal immigration from Latin America, began to re-cast their arguments into efforts to protect national security against terrorism. They saw September 11 and its aftermath as an opportunity: they began to talk about the U.S.’s broken immigration system and porous borders with Mexico not as an economic or labor problem, but as an anti-terrorism problem. Potential terrorists could easily enter the United States across the Southwestern border, just as thousands of Mexicans and Central Americans did every day in search of work. If poor, uneducated economic migrants could do it, surely a determined terrorist could, too. Mark Krikorian, executive director of the Center for Immigration Studies, has made this very point.

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<sup>68</sup> Working without proper permission would violate the same statutes. Immigration and Nationality Act sec. 237 (a) (1) (B), 8 U.S.C. sec. 1227 (a) (1) (B) and sec. 237 (a) (1) (C) (1), 8 U.S.C. sec. 1227 (a) (1) (C) (1). *See, e.g., Tashnizi v. INS*, 585 F.2d 781 (5<sup>th</sup> Cir. 1978) (student’s full-time employment, without any authorization from the INS, made student deportable for failing to comply with conditions of status).

<sup>69</sup> Immigration and Nationality Act, sec. (a) (15) (F), 8 U.S.C. sec 1101 (a) (15) (F) (allowing student visas for an alien “who is a bona fide student qualified to pursue a full course of study and who seeks to enter the United States temporarily and solely for the purpose of pursuing such a course of study...”).

<sup>70</sup> *Id.*; *Khano v. INS*, 999 F.2d 1203 (7<sup>th</sup> Cir. 1993) (student’s admission that he had not maintained full-time study sufficient to serve as basis for deportability).

In a very real sense, the primary weapons of our enemies are not inanimate objects at all, but rather the terrorists themselves—especially in the case of suicide attackers. Thus keeping the terrorists out or apprehending them after they get in is indispensable to victory [in the war on terror]....[C]ontrolling the Mexican border, apart from other benefits it would produce, is an important security objective; at least two major rings have been uncovered which smuggled Middle Easterners into the United States from Mexico, with help from corrupt Mexican government employees.<sup>71</sup>

Many strongly disagreed with the basic assumptions underlying this argument. For example, researchers at the Migration Policy Institute came to a much different conclusion regarding the intersection of immigration policy and the war against terrorism.

Al Qaeda's hijackers were chosen to avoid detection: all but two were educated young men from middle-class families with no criminal record and no known connection to terrorism...This does not mean that immigration controls are not useful. It means they are only as useful as the information provided by intelligence and law enforcement agencies. What immigration measures are able to do is bar terrorists about whom the government already has information from entering the country, and set up gateways and tracking systems so that someone already here can be found if intelligence agencies identify him as a suspect.<sup>72</sup>

Nevertheless, advocates against illegal immigration transformed their argument – despite a lack of any convincing evidence that the border with Mexico presented any kind of national security or terrorist threat.<sup>73</sup> No matter – immigration became a national security issue.

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<sup>71</sup>Mark Krikorian, *Keeping Terror Out – Immigration Policy and Asymmetric Warfare*, THE NATIONAL INTEREST, Spring 2004. For more detail on this transformation, see David A. Harris, *supra* note 18, at 193-194.

<sup>72</sup>Muzaffar A. Chishti, Doris Meissner, Demetrios G. Papademetriou, Jay Peterzell, Michal J. Wishnie & Stephen W. Yale-Loehr, *America's Challenge: Domestic Security, Civil Liberties, and National Security After September 11*, 5-7, Migration Policy Institute, 2003.

<sup>73</sup>Krikorian himself cites only one example of such a danger: a man named Mahmoud Kourani, the brother of Hizbollah's security chief, allegedly entered the country this way. Mark Krikorian, *supra* note 71. But Kourani, arrested in Dearborn, Michigan with much anti-terrorism fanfare, was found guilty only of harboring an illegal immigrant, not terrorism-related activity, and served only several months in jail. David Shepardson, *FBI Links Two Terror Cases*, DETROIT NEWS, April 18, 2004, at 1B. Others besides Krikorian have made the argument as well. See, e.g., Tony Blankley, THE WEST'S LAST CHANCE: WILL WE WIN THE CLASH OF CIVILIZATIONS? 172 (Regnery, 2005) (arguing that the Mexican border with the U.S. is a national security threat, based on Congressional testimony by Deputy Director of Homeland



## **B. The Federal Response: Give Local Police New Discretionary Power to Enforce Immigration Law**

The government's response to these currents in the post-9/11 environment seems predictable: an increase in the duties of local police, and increased police power to enable police to meet these responsibilities. Advocates of immigration restriction began their own parallel efforts based on a national security, anti-terrorism rationale, to see that local police also would have a role in, and increased authority specifically for, immigration enforcement. Given the immediate nature of the threat, it was not the courts but the legislative and executive branches that allied and took action to make this happen. U.S. Department of Justice officials made decisions, and members of Congress began to craft and introduce legislation, that would involve local and state police agencies in immigration enforcement, to a much greater degree than had ever happened before.

With illegal immigration cast as a national security issue, it would have to become a top priority for all law enforcement agencies, along with terrorism. The federal agencies charged with enforcement along the border had never had adequate staff in terms of the number of agents needed to do the job. Despite President Bush's attention to the issue of illegal immigration early in his presidency, none of his budgets or plans or proposals

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Security James Loy on Feb. 16, 2005, given before the Senate Select Committee on Intelligence.) Blankley says that Loy testified that “[r]ecent information from ongoing investigations, detentions, and emerging threat streams strongly suggests that al Qaeda has considered using the southwest border to infiltrate the United States. Several al Qaeda leaders believe operatives can pay their way into the country through Mexico and also believe illegal entry is more advantageous than legal entry for operational security purposes.” Hearing Before the Select Committee on Intelligence, U.S. Senate, *Current and Projected National Security Threats to the United States*, S. Hrg. 109-61, Feb. 16, 2005, at 40-41. Tellingly, Blankley fails to mention the very next sentence in Loy's testimony: “However, there is currently no conclusive evidence that indicates al-Qaida operatives have made successful penetrations into the United States via this method. *Id.* at 41. *See also* Jennifer Ludden, *Consular ID Cards for Aliens Draw Fire*, NATIONAL PUBLIC RADIO, *Morning Edition*, Nov. 25, 2003 (quoting David Aufhauser, former Treasury Department official in the Bush Administration, as describing asserted connection between of illegal immigrants from Mexico and their use of the Mexican *matricula consular* cards to facilitate terrorist operations from across the Mexican border as “comic” and completely lacking in any evidence).

made any provision for hiring the number of federal agents necessary to address the problem with any real prospect of success; even Bush's 2006 plan to increase the Border Patrol's staffing by 6,000 agents, to a total of 18,000, drew fire from critics who called it completely inadequate.<sup>74</sup> Thus government proponents of stronger border protections had to look somewhere else for manpower: state and local police forces. And they resolved to do this with a series of legislative proposals that would give local police new authority to enforce immigration law.<sup>75</sup>

These new proposals did not come against a blank slate. First, state and local police had always had the authority to make arrests for the most serious immigration offenses, such as felonies like returning to the U.S. illegally after deportation,<sup>76</sup> or absconding and remaining in the country after a deportation order.<sup>77</sup> This limited authority did *not*, however, extend to low-level civil infractions, such as violating immigration status. Second, since 1996, the federal government had had an existing program that invited

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<sup>74</sup> Michael Hedges, *Bush Budget Scraps 9,790 Border Patrol Agents*, HOUSTON CHRONICLE, Feb. 9, 2005 (despite earlier promise to hire 10,000 new border patrol agents, president's proposed 2006 budget funded only 210 new border patrol officers); Mark Sappenfield, *Guard's Impact at Border*, CHRISTIAN SCI. MON., May 17, 2006 ("[E]ven the ultimate goal – 18,000 border patrol agents – is insufficient, critics say.")

<sup>75</sup> Thus one difference between past crime "crises" and the post-9/11 era in the enlargement of police discretion is the fact that, in the past, the increase in police discretion came mostly, or even entirely, from courts, as they passed upon the constitutional propriety of police action. In contrast, the prospect of increased discretion in the post-9/11 immigration context came from proposed legislative action, not court decision. It also came in the form of executive-branch actions and interpretations of existing law, but the greatest potential for increase in police discretion in the immigration area arose from legislative action, as detailed in this Section of this article. But this distinction has no real significance; more discretion for police means more discretion, whether it last until courts re-interpret their own decisions or the actions of the legislative branch, or until the legislative branch repeals laws it has made. Perhaps its only significance is that we are more likely to see discretion enlarged through legislative action when the need is perceived to be dire and immediate, and political leaders feel the need to act instead of waiting years for courts to react to police actions. This would follow the pattern set by enactment of the USA PATRIOT Act, Pub. Law 107-56 (2001), enacted just weeks after the 9/11 attacks to enlarge the power and discretion of federal law enforcement agencies.

<sup>76</sup> Immigration and Naturalization Act sec. 276 (a), 8 U.S.C. sec 1326 (a) (making any alien who has been, inter alia, deported and who thereafter "enters, attempts to enter, or is at any time found in, the United States," subject to fine, jail for up to two years, or both).

<sup>77</sup> Immigration and Naturalization Act sec. 243 (a), 8 U.S.C. sec 1253 (a) (any alien against whom a final deportation order is outstanding who does not depart within 90 days is subject to a fine, may be jailed for up to four years (ten years in some limited circumstances), or both).

state and local police departments to become involved extensively in immigration enforcement. Under Section 287 (g) of the Immigration and Nationality Act,<sup>78</sup> the U.S. government and any state or local police department willing to become involved in immigration enforcement could sign a Memorandum of Understanding, or MOU. Under the MOU, some members of the state or local police department would receive extensive training in the wide-ranging complexities of immigration law enforcement.<sup>79</sup> They would then enforce some aspects of immigration law under the “direction and supervision” of federal immigration authorities.<sup>80</sup> States and localities would foot the expense of their own involvement in these efforts.<sup>81</sup>

The MOU structure had much to recommend it from the point of view of professional and effective policing, especially the training and supervision that these arrangements required.<sup>82</sup> But from the point of view of advocates for greater state and local police involvement in immigration enforcement, the MOU structure did not do enough – simply because it did not *require* police departments to join in the enforcement of immigration law; rather, it allowed them to choose whether or not to do so. Prior to September 11,

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<sup>78</sup> Immigration and Nationality Act, sec. 287 (g), 8 U.S.C. sec. 1357 (g).

<sup>79</sup> Id. at (g) (2) (noting that the MOU must “contain a written certification that the officers...have received adequate training regarding the enforcement of relevant Federal immigration laws”). According to one source, the training consists of a “five-week training course.” Miriam Jordan, *The New Immigration Cops*, WALL STREET JOURNAL, Feb. 2, 2006, at B1.

<sup>80</sup> 8 U.S.C. Sec. 1357 (g) (3) (“In performing an [immigration enforcement] function under this section,” state and local police “shall be subject to the direction and supervision of the Attorney General”). Since the creation of the Department of Homeland Security in 2002, MOU functions are now under the direction of that Department, not the Department of Justice.

<sup>81</sup> Id. at (g) (state and local police forces performing under an MOU “may carry out [immigration enforcement tasks] at the expense of the State or political subdivision...”).

<sup>82</sup> See, e.g., James Jay Carafano, *No Need for the CLEAR Act: Building Capacity for Immigration Counterterrorism Investigations*, Executive Memorandum # 925, The Heritage Foundation, April 21, 2004, accessed at <http://www.heritage.org/Research/HomelandDefense/em925.cfm?renderforprint=1>, Feb. 2, 2006. Of course, this only addresses the policy perspective; at least one scholar has argued that constitutional federal exclusivity in the immigration sphere prohibits these arrangements. Huyen Pham, *The Inherent Flaws in the Inherent Authority Position: Why inviting Local Enforcement of the Immigration Laws Violates the Constitution*, 31 FLA. ST. L. REV. 965 (2004).

2001, no state or local police department had chosen to enter into an MOU with the federal government; even in the immediate aftermath of the terrorist attacks, only one agency – the Florida State Police – signed an MOU.<sup>83</sup> More recently, several other agencies have done so.<sup>84</sup> Others agencies have reportedly begun to consider doing so,<sup>85</sup> but the number remains negligible relative to the roughly 18,000 state and local police agencies in the country.<sup>86</sup> It seems that, given the chance to voluntarily undertake immigration enforcement duties, even with a commitment to proper training and federal

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<sup>83</sup> *Id.* at 2 (“...Florida signed a memorandum of understanding (MOU) in 2002 to allow a small group of Florida law enforcement officers to conduct federal immigration investigations.”); Miriam Jordan, *supra* note 79, at B 1 (“Florida, the first state to join the federal program in the wake of the Sept. 11, 2001, terrorist attacks, tailored its version to help block possible terrorist infiltrators.”)

<sup>84</sup> *Id.* (citing the Alabama state police as operating under an MOU, and the Costa Mesa Police Department and the Orange County Sheriff’s Department, both in California, have decided to enter into MOUs). Other agencies under MOUs reportedly include at least one agency in Arizona, the San Bernardino County (California) Sheriff’s Department, and a group of Los Angeles County Sheriff’s Department deputies who work exclusively at the Los Angeles County Jail. Report, *Forcing Our Blues into Gray Areas: Local Police and Federal Immigration Enforcement*, Appleseed, Jan. 2006, at 3, 11, 19, accessed at <http://appleseeds.net/servlet/PublicationInfo?articleId=70> (hereinafter, *Forcing Our Blues into Gray Areas*) (reporting that state police in Florida, Arizona, and Alabama, an sheriff’s offices in Los Angeles County and San Bernardino County, California have signed MOUs).

<sup>85</sup> Miriam Jordan, *supra* note 79, at B1 (stating that “a slew of cities and states in the U.S. are increasingly taking on the duty” of immigration work, but identifying only Florida and Alabama as having actually done so and Costa Mesa and Orange County as having decided to do so. The article states that federal immigration authorities have “received requests from several states in New England and the Midwest, as well as counties in Texas and California, which are interested in immigration training,” but does not identify these interested police agencies any further. One wonders whether this is because there is, in fact, no groundswell of support among law enforcement to take on these tasks, even within the MOU structure. Other reports on the issue seem to show that Ms. Jordan may have greatly overstated law enforcement enthusiasm for the MOU arrangement. Richard Winton and Daniel Yi, *Police Split on Plan for Migrant Checks*, L.A. TIMES, Jan. 23, 2006 (reporting strong negative reaction of top law enforcement officials in Los Angeles County to decisions of Costa Mesa Police and Orange County Sheriff to enter into MOUs). A later article on MOU arrangements identified individual police agencies in Florida, Alabama, Arizona, Los Angeles County, and San Bernardino County as having trained some of their officers under MOUs, and “11 additional state and county jurisdictions have applied to enter the program in the past year...,” still a relatively small number by any reckoning. Paul Vitello, *Path to Deportation Can Start With a Traffic Stop*, N.Y. TIMES, April 14, 2006, at A1. An attempt by the author to obtain further information or clarification from Ms. Jordan of the Wall Street Journal -- even just a definition of “slew” -- went unanswered. Email communication from the author to Miriam Jordan, Wall Street Journal, March 4, 2006 (copy on file with the author).

<sup>86</sup> Bureau of Justice Statistics, U.S. Dept. of Justice, *Law Enforcement Statistics*, accessed April 4, 2006, at <http://www.ojp.usdoj.gov/bjs/lawenf.htm> (stating that there are just under 18,000 state and local police agencies in the U.S.). Even the largest estimate found by the author (five agencies active under MOUs, with 11 more having applied) Paul Vitello, *supra* note 85, is nothing more than a tiny fraction of U.S. police agencies.

supervision necessary to the task, the overwhelming number of police agencies simply have no desire to get involved.

Given this tepid response to the federal offer to become enforcers of immigration law, those who wanted more state and local police involvement in immigration matters realized that they could not rely on voluntary efforts. They would, instead, have to use pressure and coercion.

The first step in this process came in April of 2002, when the U.S. Department of Justice announced a new policy. Until that point, everyone involved in immigration enforcement had understood that while state and local police had limited authority to enforce the most serious immigration law provisions,<sup>87</sup> they did not have authority to take action against much less serious civil immigration offenses. This interpretation of the law had been reviewed and reaffirmed several times by the Department of Justice, most recently in 1996.<sup>88</sup> But the Department of Justice's new April 2002 policy, based on a new legal opinion, differed significantly from the prior understandings. According to the new opinion, state and local police had "inherent authority" to enforce *all* immigration laws – serious and less so, criminal or civil.<sup>89</sup> Therefore, said the Justice Department, state and local police agencies should no longer consider themselves limited in the

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<sup>87</sup> See, e.g., notes 76-77, *supra*.

<sup>88</sup> *Memorandum from the Officer of the Associate Deputy Attorney General, to the U.S. Attorney, Southern District of California*, Feb. 5, 1996, accessed at <http://www.usdoj.gov/olc/immstopo1a.htm>.

<sup>89</sup> U.S. Department of Justice, Office of Legal Counsel, *Memorandum for the Attorney General Re: Non-preemption of the authority of state and local law enforcement officials to arrest aliens for immigration violations*, April 3, 2002 (copy on file with the author). Incredibly, even though the opinion constituted a 180-degree reversal of years of long-standing immigration enforcement policy, the Department of Justice refused to release the opinion publicly, instead simply announcing the new policy. The opinion itself was not released until a lawsuit forced the Department to do so; only after the U.S. Court of Appeals for the Second Circuit affirmed the order of the U.S. District Court for the Southern District of New York in *National Council of La Raza v. Department of Justice*, Dkt. No 04-5474-cv, and mandated the release of the opinion, did the government finally do so, albeit with a heavily redacted version.

immigration enforcement arena; on the contrary, they had full authority to do anything any federal agent could do.

With the legal path for state and local police involvement prepared by the Justice Department's new "inherent authority" policy,<sup>90</sup> members of Congress allied with the advocates of immigration enforcement by state and local police ratcheted up the pressure. Representative Charlie Norwood of Georgia introduced a bill in the 108<sup>th</sup> Congress called the Clear Law Enforcement for Criminal Alien Removal, or CLEAR, Act.<sup>91</sup> The CLEAR Act and its Senate counterpart, the Homeland Security Enhancement Act (HSEA),<sup>92</sup> made apparent how far the proponents of greater state and local involvement in immigration enforcement had shifted the debate. Under CLEAR and the HSEA, the federal government said, state and local police should get involved in immigration enforcement using their new inherent powers;<sup>93</sup> at the very least, they were to have no policies that in any way limited their police officers in enforcing immigration laws such as those that prohibited police officers from questioning people about their immigration

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<sup>90</sup> This article does not take a position on the correctness of the new DOJ policy; instead, it views the policy as a given, an illustration of what those wanting greater local enforcement of immigration laws wanted to accomplish and one of the steps they took to attain their goals. The policy has been criticized elsewhere, but that discussion is beyond the scope of what the author wishes to accomplish here. For an analysis of the "inherent authority" issue, *see, e.g.*, Huyen Pham, *supra* note \_\_\_\_, at 987-998 (arguing for an exclusively federal immigration power which must be exercised uniformly, and that cannot be exercised by states or localities).

<sup>91</sup> U.S. House of Representatives, Clear Law Enforcement for Criminal Alien Removal Act, H.R. 2671, (108<sup>th</sup> Cong.).

<sup>92</sup> U.S. Senate, Homeland Security Enhancement Act, S. 1906 (108<sup>th</sup> Cong.). Disclosure: the author testified against the Homeland Security Enhancement Act before the Senate Judiciary Subcommittee on Immigration. David A. Harris, *The Homeland Security Enhancement Act: The Wrong Way to Public Safety*, April 22, 2004, [http://judiciary.senate.gov/testimony.cfm?id=1156&wit\\_id=3324](http://judiciary.senate.gov/testimony.cfm?id=1156&wit_id=3324).

<sup>93</sup> U.S. House of Representatives, Clear Law Enforcement for Criminal Alien Removal Act, H.R. 2671, (108<sup>th</sup> Cong.), sec. 101 ("Notwithstanding any other provision of law and reaffirming the existing general authority, law enforcement personnel of a State or a political subdivision of a State are fully authorized to investigate, apprehend, detain, or remove aliens in the United States (including the transportation of such aliens across State lines to detention centers), in the enforcement of the immigration laws of the United States.")

status.<sup>94</sup> Any local government or police department that retained policies like this would lose sorely-needed federal reimbursement funds available for the millions of dollars localities spent when they detained persons who turn out to be illegal immigrants.<sup>95</sup> For a number of states and counties, these detentions represent a considerable expense, and the CLEAR Act and the HSEA represented a pointed threat: state and local police must get involved against illegal immigration, or states would have to carry the cost of detaining illegal immigrants without any federal help. While the CLEAR Act and the HSEA recognized that state and local police would face dauntingly complex legal and enforcement question if they did get involved – the bills mandated the preparation of some rudimentary instructional materials<sup>96</sup> -- the Act made no resources available for training or extra supervision. In fact, the CLEAR Act and the HSEA explicitly stated that local police *need not* have *any* training to do immigration enforcement.<sup>97</sup>

Apart from Congressional efforts, the Department of Justice itself made another attempt to get local police into immigration enforcement: the Department began to put information on immigration violations into the National Crime Information Center

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<sup>94</sup> For examples of some of these so-called sanctuary policies, *see* notes 112 through 118, *supra*, and accompanying text.

<sup>95</sup> U.S. House of Representatives, Clear Law Enforcement for Criminal Alien Removal Act, H.R. 2671, (108<sup>th</sup> Cong.), sec. 102 (“...a State (or political subdivision of a State) that fails to have in effect a statute that expressly authorizes law enforcement officers of the State, or of a political subdivision within the State, to enforce Federal immigration laws in the course of carrying out the officer's law enforcement duties shall not receive any of the funds that would otherwise be allocated to the State under section 241(i) of the Immigration and Nationality Act...”)

<sup>96</sup> U.S. House of Representatives, Clear Law Enforcement for Criminal Alien Removal Act, H.R. 2671, (108<sup>th</sup> Cong.), sec. 109 (a) (“Not later than 180 days after the date of the enactment of this Act, the Attorney General or the Secretary of the Department of Homeland Security shall establish a training manual for law enforcement personnel of a State or a political subdivision of a State that has in effect a statute under section 102 or a policy under section 105 to train such personnel in the investigation, identification, apprehension, arrest, detention, and removal of aliens in the United States (including the transportation of such aliens across State lines to detention centers and identification of fraudulent documents).”)

<sup>97</sup> U.S. House of Representatives, Clear Law Enforcement for Criminal Alien Removal Act, H.R. 2671, (108<sup>th</sup> Cong.), sec. 109 (d) (“Nothing in this Act or any other provision of law shall be construed as making any immigration-related training a requirement for or prerequisite to any State or local law enforcement officer to enforce Federal immigration laws in the normal course of carrying out their law enforcement duties.”)

(NCIC) database.<sup>98</sup> The NCIC<sup>99</sup> holds all of the records police need to search in the course of their routine enforcement tasks every day: arrest warrants, stolen vehicle reports, and criminal records, among others. Police officers all over the country make millions of NCIC queries every day. For example, every time a police officer makes a traffic stop, the officer probably queries NCIC to get criminal histories, to check whether or not anyone has reported either the vehicle or the license tags it displays stolen, and to ascertain whether any outstanding warrants exist for the driver. Should a warrant for the driver (or for anyone else the officer has checked) show up in NCIC, the officer arrests the person; the report of the warrant from NCIC serves as probable cause for the arrest. Beginning in 2002 and 2003, the Department of Justice began putting into NCIC information on civil immigration violations.<sup>100</sup> By late 2003, the Department of Justice had added more than 300,000 names of noncitizens subject to civil deportation orders to NCIC.<sup>101</sup> Most of these cases concerned noncitizens who failed to leave the country when their visas expired.<sup>102</sup> The Department later expanded this policy by putting into NCIC records of foreign students who had fallen “out of status” by failing to maintain enough credits, earn minimum grades, or violating some other student visa condition.<sup>103</sup> All of this meant that, whenever local police made an NCIC query and immigration violations showed up, officers would likely feel compelled to make an arrest.

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<sup>98</sup> E.g., Hector Gutierrez, *Agents Seek Alien Fugitives*, ROCKY MOUNTAIN NEWS, Feb. 28, 2002 (Justice Department “entering the names of the absconders into the National Crime Information Center, the database for criminal records, so local law enforcement agencies can be aware of fugitives wanted by the INS and with whom they come in contact.”); *Minority Groups Sue Over Crime Database*, SAN DIEGO UNION-TRIBUNE, Dec. 18, 2003, at A 14 (lawsuit aims “to stop the federal government from entering immigration information into a national crime database, saying the practice illegally targets immigrants under the guise of post-Sept. 11 security.”)

<sup>99</sup> The NCIC and its use are governed by federal statute. See 28 U.S.C. sec. 534.

<sup>100</sup> Nina Bernstein, *Crime Database Misused for Civil Issues*, N. Y. TIMES, Dec. 17, 2003, at A 5 (detailing use of NCIC by U.S. Justice Department for civil immigration violations.)

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*



Putting millions of pieces of immigration information into NCIC raised two important problems. First, immigration information from the government is notoriously inaccurate and out of date. Recall, for example, the issuance by the Immigration and Naturalization Service of visa extensions for two of the dead suicide hijackers of the September 11, 2001 plot – *six months after* saturation news coverage revealed their identities and faces to the world.<sup>104</sup> Nothing indicates that the accuracy or timeliness of immigration records has improved since, even with the transformation of the INS into a component of the Bureau of Immigration and Customs Enforcement (BICE), which is itself part of the Department of Homeland Security. On the contrary, the opposite appears to hold true. According to a study released by the Migration Policy Institute in December of 2005, data from the Department of Homeland Security dating from 2002 through 2004 show that immigration information in the NCIC is incorrect 42 percent of the time when it identified immigrants police stopped as wanted.<sup>105</sup> Including so much typically inaccurate immigration information risks contamination of this crucial law enforcement resource. When this happens, the result is not increased security, based on “better-safe-than-sorry” reasoning; rather, our police officers waste crucial law enforcement time and manpower, through absolutely no fault of their own. Second, inserting this immigration information into NCIC remains flat-out illegal.<sup>106</sup> According to Professor Michael Wishnie of New York University Law School, Congress created the

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<sup>104</sup> *E.g.*, David Johnston, *6 Months Late, I.N.S. Notifies Flight School of Hijackers' Visas*, N.Y. Times, March 13, 2002, at 16 (“Six months after Mohamed Atta and Marwan al-Shehhi crashed hijacked airliners into the World Trade Center, the Immigration and Naturalization Service sent out a routine notice this week telling a flight school that the two men had been approved for student visas to study there.”)

<sup>105</sup> Michael Wishnie et al., *Blurring the Lines*, Migration Policy Institute, December 2005 (hereinafter *Blurring the Lines*); see also Rachel L. Swarns, *Crime Database Often Wrong on Immigration, Study Finds*, N.Y. TIMES, Dec. 9, 2005.

<sup>106</sup> 8 U.S.C. 1252c (a), (b) (state and local police allowed to arrest and detain aliens apprehended in the U.S. who were previously convicted of felony and either left or deported the U.S., and information concerning such individuals may be placed in the NCIC database); see also *Blurring the Lines*, *supra* note 105, at 6-7.

NCIC database with a strong awareness of the importance of its accuracy. Because law enforcement officers use NCIC to make crucial decisions when handling people whom they do not know, decisions that directly impact the safety of both officers and the public, Professor Wishnie says that “Congress carefully delineated the categories of information that may be entered into this very powerful database” in order to ensure its correctness and completeness.<sup>107</sup> And neither the use of NCIC nor the data it contains have ever had anything to do with immigration. Thus in its zeal to get local law enforcement to enforce immigration law, the Department of Justice showed itself both willing to violate the law, and to corrupt a vital and basic law enforcement tool. All of this comes against the background of the federal government’s claim that it inserted the immigration information into NCIC for one purpose: fighting terrorism and apprehending terrorists. Alberto Gonzales, then Counsel to the President and now Attorney General, made the point explicit: “Only high-risk aliens who fit a terrorist profile will be placed in NCIC. The Administration is taking these measures in its effort strengthen homeland security and combat terrorism.”<sup>108</sup> It thus seems curious, then, that most of the immigrants whose information the Department of Justice has put into NCIC were Latinos wanted on civil immigration charges.<sup>109</sup>

The proposed CLEAR Act, the Department of Justice’s new “inherent authority” policy, and the Department’s willingness to thrust untrustworthy immigration information into the NCIC system illegally sent a simple message to local police. The federal

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<sup>107</sup> Interview with Professor Michael Wishnie, New York University School of Law, June 12 2003 (copy on file with the author); *see also* Nina Bernstein, *supra* note 100. Professor Wishnie is counsel for the plaintiffs in a federal lawsuit challenging the practice of putting immigration information into NCIC. *National Council of La Raza v. Ashcroft*, No. 03 Civ. 6324 (E.D.N.Y.).

<sup>108</sup> Letter from Alberto Gonzales, Counsel to the President, to Demetrios G. Papademetriou, Migration Policy Institute, June 24, 2002 (copy on file with the author).

<sup>109</sup> *Blurring the Lines*, *supra* note 105, at 14 -15.

government, particularly the Department of Justice, wants all law enforcement agencies arresting illegal immigrants, no matter how ill suited local police may feel for the task, and regardless of how little officers may know about the intricacies of immigration issues. The federal government would give them authority as well as the information (unreliable though it might be) necessary to carry out this important task. And the federal authorities announced their intention through actions that signaled unmistakably that they would no longer wait for agencies to volunteer under the MOU process. Those agencies that did not volunteer would experience fiscal pain unless they joined the fight.

#### **IV. LAW ENFORCEMENT’S REACTION TO NEW DISCRETIONARY POWER TO ENFORCE IMMIGRATION LAW**

How did local law enforcement agencies react to the “offer” of new authority to fight illegal immigration that the Congress and the Department of Justice wished to give them? Remember that all of this happened in the name of the top priority of the federal government: a war on terrorism in which a ruthless enemy had killed three thousand people in one day on our soil. In that context, it seems inconceivable that local law enforcement would consider anything other than a positive response. Particularly when viewed against the backdrop of the constant push by law enforcement and its allies over decades to secure ever greater power to fight crime, it seems difficult to imagine anything else. After all, state and local police departments and their officers had enlisted enthusiastically in the war on drugs. Indeed, state and local police and their allies formed the backbone of the drug war enforcement effort; law enforcement had fought hard and consistently for the ever-greater police authority for the anti-drug effort from the U.S.

Supreme Court.<sup>110</sup> One would expect no less enthusiasm in the newest war – the war on terrorism.

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<sup>110</sup> Even a brief examination of a few of the most important U.S. Supreme Court cases involving power of police to stop, detain and search drivers and passengers in vehicles shows the strength and consistency of the drive for ever-greater police power and authority. In *Whren v. U.S.*, 517 U.S. 806 (1996), the Supreme Court gave police the power to use traffic enforcement as a pretext for investigating vehicles and their drivers for as-yet-unknown drug offenses. *Id.* at 814-818. *Whren* legitimized the legal basis of the ability of police to fight the war on drugs as they had for at least the prior ten years: stopping vehicles for traffic offenses as a pretext for conducting drug investigations without evidence of drug involvement. The prosecution in *Whren* argued strongly in favor of affirming police power to use traffic enforcement as a pretext for drug investigation, *Whren v. U.S.*, Brief of the United States, 1995 U.S. Briefs 5841 (March 5, 1996), and several organizations describing themselves as champions of law enforcement's interests filed *amicus curiae* briefs in support. The Criminal Justice Legal Foundation asserted that a contrary ruling would lead to "judicial micromanagement of police departments" – a barely coded reference to the idea that judges should not second guess police departments and should allow officers maximum power and flexibility. *Whren v. U.S.*, Brief of *Amicus Curiae* Criminal Justice Legal Foundation, Lexis 1995 U.S. Briefs 5841. The *amicus* brief by the California District Attorney's Association argued that siding with the defendant in *Whren* might force police departments to create standardized policies and regulations – something usually seen as a positive step in law enforcement, *see, e.g.*, Wayne R. LaFave, *Controlling Discretion by Administrative Regulations: The Use, Misuse, and Nonuse of Police Rules and Policies in Fourth Amendment Adjudication*, 89 MICH. L. REV. 442 (1990), but which the Association vehemently opposed. "Requiring police departments to draw up standardized policies," Association said, "would be detrimental to effective law enforcement" by depriving police officers of "essential" discretion. *Whren v. U.S.*, Brief of *Amicus Curiae* California District Attorney's Association, Lexis 1995 U.S. Briefs 5841. In *Ohio v. Robinette*, 519 U.S. 33 (1996), the Supreme Court gave police the power to ask for consent to search after a vehicle stop when the procedures for the stop have been completed, without advising the driver that he or she is free to go. In its *amicus* brief in *Robinette*, Americans for Effective Law Enforcement argued that the U.S. Supreme Court should not require police officers to tell citizens that they could leave the scene of a (completed) traffic enforcement action before asking for the citizen's consent to search. *Ohio v. Robinette*, Brief of *Amicus Curiae* Americans for Effective Law Enforcement, Inc., Lexis 1995 U.S. Briefs 891 (1996). While conceding that giving such a warning constituted good police practice, the organization argued that the Court should nevertheless impose no limit whatsoever on this police tactic. Police departments and officers themselves, the *amicus* brief states, should decide whether or not citizens receive such a warning; it should not be a constitutionally mandated duty. In *Maryland v. Wilson*, 519 U.S. 408 (1997), the Supreme Court decided that police could order any passenger in a vehicle stopped by police to get out, without any evidence that the passenger had done anything wrong. A number of law enforcement organizations filed *amicus* briefs in *Wilson*, supporting this expansion of police power. In one brief, Americans for Effective Law Enforcement was joined by the International Association of Chiefs of Police (IACP), The National Sheriffs Association, the Police Law Institute, and the National District Attorneys Association asserted that, for the sake of officer safety, nothing should limit an officer's power to remove the passenger from the vehicle. *Maryland v. Wilson*, Brief for *Amicus Curiae* Americans for Effective Law Enforcement, the International Association of Chiefs of Police, The National Sheriff's Association, the Police Law Institute, and the National District Attorneys Association, Lexis 1995 U.S. Briefs 1268 (1996). When a police officer conducts a traffic stop, "the officer has an absolute right to control both the driver and the passenger, by requiring them to either remain inside in [sic] the vehicle or exit and remain in the immediate vicinity during the stop." *Id.* In its *amicus* brief in *Wilson*, the National Association of Police Organizations stated unequivocally that courts should always consider reasonable and constitutional any "police request that any occupant of a lawfully stopped motor vehicle alight during a routine traffic stop," regardless of the facts or circumstances. *Maryland v. Wilson*, Brief for *Amicus Curiae* National Association of Police Organizations, Lexis 1995 U.S. Briefs 1268. And in its *amicus* brief in *Wilson*, the Criminal Justice Legal Foundation argued that courts should not constrain the authority of officers vis-à-vis vehicle passengers in any way. For safety's sake, "ordering the passenger out of the car is

## A. The Reply: “No, Thanks”

The reply of local law enforcement to Congressional and Department of Justice efforts to involve them surprised almost everyone involved, except police officers themselves. While a few organizations representing police announced their willingness

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a reasonable tactic for maintaining control.” *Maryland v. Wilson*, Brief for *Amicus Curiae* Criminal Justice Legal Foundation, Lexis 1995 U.S. Briefs 1268. And in *Illinois v. Caballes*, 543 U.S. 405 (2005), the first case surveyed here decided after September of 2001, the Supreme Court decided that police could use drug-sniffing dogs on vehicles in the absence of any evidence raising suspicions of crime. A joint *amicus* brief in the case from the Illinois Association of Chiefs of Police and the Major Cities Chiefs Association used blunt language to argue that any limitation on the use of the drug-sniffing dogs “undercuts a valuable tool in the war on drugs...” *Illinois v. Caballes*, Brief for *Amicus Curiae* Illinois Association of Chiefs of Police and Major City Chiefs Association, Lexis 2003 U.S. Briefs 923 (2004). They also invoked the specter of 9/11: any restrictions on the use of police canines “threatens to undermine the government’s war on terror, which relies on canines to sniff vehicles and luggage for narcotics and explosives at large gatherings or at transportation centers such as our nation’s airports.” *Id.* This seems to demonstrate the correctness of Professor Stuntz’s idea of a “shadow” cast by 9/11 over all criminal procedure questions. *See* note 2, *supra*, and accompanying text. And an *amicus* brief filed in *Caballes* by a coalition of twenty-seven states argued just as forcefully that police needed the unbounded authority to use drug-sniffing dogs: “the *amici* states have an interest in ensuring that law enforcement officers are not unduly restricted in the actions they can take during valid traffic stops,” because police “in many of the *amici* States use drug-detection dogs during traffic stops as one method of combating the drug trade. If the ruling of the Illinois Supreme Court is not reversed, this valuable law enforcement tool will be severely curtailed.” *Illinois v. Caballes*, Brief for *Amicus Curiae* Arkansas and 27 Other States in Support of Petitioner, Lexis 2003 U.S. Briefs 923 (2004). Finally, in *U.S. v. Drayton*, 536 U.S. 194 (2002), the Supreme Court gave its constitutional blessing to the use of so-called consensual encounters and consent searches in drug interdiction operations on interstate buses. In a joint *amicus* brief, Americans for Effective Law Enforcement, the National Sheriff’s Association and the International Association of Chiefs of Police argued that police officers needed unlimited power to use consensual encounters and consent searches. *U.S. v. Drayton*, , Brief for *Amici Curiae* Americans for Effective Law Enforcement, National Sheriffs Association, and International Association of Chiefs of Police, in Support of Petitioner, Lexis 2001 U.S. Briefs 631 (2004). Any legal requirement that officers must warn defendants that they need not give consent to these procedures would interfere with the ability of officers to conduct these bus interdiction at their discretion – i.e., without any evidence of the commission of a crime – because some defendants might take the warning to heart, and refuse. *Id.* In its *amicus* brief, the Washington Legal Foundation stated that unlimited police power to engage in “consensual police questioning of citizens...[is] vital to the safety and security of all citizens.” *U.S. v. Drayton*, Brief for *Amici Curiae* Washington Legal Foundation and Allied Educational Association in Support of Petitioner, Lexis 2001 U.S. Briefs 631 (2004). Raising the phantom of terrorism, the brief stated that in the context of public surface transportation, “in the new domestic security environment, we can legitimately expect the criminal focus on public surface transportation to increase.” *Id.* This survey of a small set of the Supreme Court’s criminal procedure cases and the *amicus* briefs filed in those cases shows the clear direction of law enforcement over the last two decades. With the objective of fighting and winning the war on drugs, police, prosecutors, and their allies have joined together, time and again, with one request for the Supreme Court: give police greater power and authority; loosen investigative restrictions imposed through court interpretations of the Fourth Amendment. They haven’t always won, *see, e.g., Indianapolis v. Edmund*, 531 U.S. 32 (2000) holding stationary checkpoints utilizing suspicionless searches for drug interdiction unconstitutional), but that is not the point. Rather, one should observe the great difference in the police reaction to the war on drugs, and the efforts against illegal immigration.

to go along with these federal requests,<sup>111</sup> most police agencies and departments responded to the CLEAR Act and the other initiatives with “no, thanks.” They did not want a part in immigration enforcement on the local level, even if the Department of Justice said they had the discretion and the authority to get involved, even if the Attorney General and members of Congress deemed their help crucial to the nation’s success against terrorists, even if it would cost them funding that they could hardly spare.

Police agencies voiced several reasons for their opposition. In some jurisdictions, cities had made their own policy decisions; they had already decided that local police would not assume any role in immigration enforcement. For example, for almost thirty years, the Los Angeles Police Department has operated under Special Order 40, a policy prohibiting officers from stopping or questioning somebody based solely on immigration status.<sup>112</sup> It provides that “[u]ndocumented alien status in itself is not a matter for police action” and prevents Los Angeles Police Department officers from beginning “police action with the objective of discovering the alien status of a person,” and from arresting and processing anyone for “illegal entry” into the U.S.<sup>113</sup> Former Chief Daryl Gates instituted the policy in “an effort to improve relations between officers and illegal immigrants, who officials say were afraid to report crimes or cooperate as witnesses.”<sup>114</sup>

In New York, Mayor Michael Bloomberg issued Executive Order 41 in 2003, which

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<sup>111</sup> E.g., National Sheriffs Assn., \_\_\_\_\_. With the climate increasingly hostile to illegal immigration in 2006, a few police departments have made unilateral decisions to get involved in immigration enforcement. E.g., Randal C. Archibold, *Arizona County Uses New Law to Look for Illegal Immigrants*, N.Y. TIMES, May 10, 2006, at A 14 (sheriff of Maricopa County, Arizona, is using an interpretation of a new Arizona law to justify sending out a civilian posse of 300 volunteers to apprehend illegal aliens and those who smuggle them into the U.S.); *Stop Profiling, Area Sheriff Told*, TOLEDO BLADE, Oct. 27, 2005 (sheriff of Allen County, Ohio, accused of ethnic profiling in the course of his extensive and very public efforts to enforce laws against illegal immigrants). Perhaps it is no accident that most law enforcement officials who moved in this direction are sheriffs; they are almost always elected officials, and therefore more likely by far than other local police administrators to look for ways to appeal to the popular will.

<sup>112</sup> Office of the Chief of Police, *Special Order No. 40*, Nov. 27, 1979.

<sup>113</sup> *Id.*

<sup>114</sup> Richard Winton and Daniel Yi, *supra* note 84.

prohibits disclosure of “confidential information,” including immigration information status, except when required by law, or in the case of immigration status information, when police suspect person of “engaging in illegal activity, other than mere status as an undocumented alien,” or in investigations of potential terrorist activity. Executive Order 41 also prohibits city employees from inquiring about a person’s immigration status.<sup>115</sup> When the late Harold Washington served as mayor of Chicago in the 1980s, he instituted Executive Order 85-1, which prohibited Chicago city employees, including the police, from cooperating with the INS on enforcement matters.<sup>116</sup> San Diego Police Department spokesman David Cohen explained that his department has a strong policy against involvement in immigration enforcement. “Our policy has been and continues to be that we are not federal immigration officers, and our department guidelines for dealing with undocumented persons are very strict and unlikely to change.”<sup>117</sup> Where such policies exist, local government has effectively settled the question for local officials.<sup>118</sup>

For other police departments, lack of resources simply would not allow their officers to take on immigration responsibilities, especially in light of the overwhelming number

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<sup>115</sup> Executive Order 41, City-Wide Privacy Policy and Amendment of Executive Order 34 Relating to City Policy Concerning Immigrant access to City Services, (Sept, 17, 2003).

<sup>116</sup> City of Chicago, Exec. Order No. 85-1 (March 7, 1985). For more on Executive Order No. 85-1, see Craig B. Mousin, *A Clear View from the Prairie: Harold Washington and the People of Illinois Respond to Federal Encroachment of Human Rights*, 29 SO. ILL. L. REV. 285 (2005).

<sup>117</sup> *Police May Gain Power to Enforce Immigration*, SAN DIEGO UNION-TRIBUNE, April 3, 2002.

<sup>118</sup> In an interesting twist, the police chief and police board of Los Angeles are being sued to overturn Special Order 40. Patrick McGreevy, *Suit Targets LAPD Policy*, L.A. TIMES, May 2, 2006 (explaining details of suit designed “to prevent the LAPD from enforcing Special Order 40...”). The plaintiff is described as “a taxpayer and resident of the City of Los Angeles.” *Sturgeon v. Bratton et al.*, Case No. BC351646, Cal. Super. Ct., Los Angeles Co., filed, May 1, 2006. But for all intents and purposes the lawsuit is actually brought by Judicial Watch, a Washington, D.C. organization that calls itself “a conservative, non-partisan educational foundation.” Home page for Judicial Watch, Inc., accessed May 6, 2006, at <http://www.judicialwatch.org/about.shtml>. Apparently Judicial Watch’s brand of conservatism does not include the idea that local officials decide what is best for a local community.

of new homeland security tasks they now had to undertake.<sup>119</sup> Perhaps it is a truism that there is never enough money for public safety and other needs, but as discussed earlier, the pressures of the post-9/11 era, along with the contemporaneous collapse of the economy in many regions of the country, had made this problem especially acute.<sup>120</sup> “The strain on local police already is enormous,” said Glenn White, a Senior Corporal in the Dallas Police Department and President of the Dallas Police Association, “and to ask us to arrest and detain immigrants is something the federal government needs to address by funding the INS some more and hiring additional personnel.”<sup>121</sup>

In other police departments, the refusal to get involved in immigration enforcement stemmed from strong beliefs about the proper responsibility of the federal government to secure the nation’s borders. Without doubt, the federal government has always had the lead role on these issues. The borders of the nation are, quite correctly, the concern of the national government. Congress has always possessed primary authority over immigration policy;<sup>122</sup> that authority comes from the Naturalization Clause of the Constitution, which gives Congress the power to “establish a uniform Rule of

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<sup>119</sup> Craig Ferrell, *Immigration Enforcement: Is It a Local Issue?*, THE POLICE CHIEF, Feb. 2004 (“The taxpayers...expect the local police department to use the community’s resources to address burglaries, robberies, assaults, rapes, murders, and even traffic violations occurring in the communities rather than spend those resources addressing the massive national problem of illegal immigration.”).

<sup>120</sup> See, e.g., Jim Ruttenberg and Sewell Chan, “In a Shift, New York Says It Will Add 800 Officers,” N.Y. TIMES, March 22, 2006, at A 23 (noting that New York’s move to add hundreds of officers was highly unusual in an environment in which most big-city departments are not growing, because of the tough financial conditions facing local governments, and all of this is made more acute because of the new burdens of combating terrorism); see also notes 33 through 36, *supra*, and accompanying text.

<sup>121</sup> *U.S. May Let State, Local Authorities Enforce Federal Immigration Law*, DALLAS MORNING NEWS, April 3, 2002. White was not alone in expressing this sentiment. Chief Albert Ortiz of the San Antonio Police Department echoed these sentiments. “Any time we get mandates and more work without a commensurate amount of resources, something has to suffer...[W]e’d really have to think very hard about where [immigration enforcement] would be on our priority list, and if it would even be a priority.” *Sheriff, Top Cop Blast INS Proposal*, SAN ANTONIO EXPRESS NEWS, April 5, 2002.

<sup>122</sup> See, e.g., *DeCanas v. Bica*, 424 U.S. 351, 354 (1976) (stating that the “[p]ower to regulate immigration is unquestionably exclusively a federal power”); *Chy Lung v. Freeman*, 92 U.S. 275, 280 (1875) (power to regulate immigration “belongs to Congress, and not to the States”); *Henderson v. Mayor of New York*, 92 U.S. 259, 273 (1876); *Smith v. Turner*, 48 U.S. (1 How.) 283 (1849) (The Passenger Cases).



Naturalization.”<sup>123</sup> Indeed, from the point of view of our federalism-based constitutional system – the division of power into federal and state systems, each with discrete powers and responsibilities– no other arrangement makes sense. One cannot imagine how, for example, Minnesota, North Dakota, and Montana could each have their own immigration policies concerning “their” borders with Canada. California, with its strong need for immigrant labor for its large agribusiness sector, could not declare a more open policy on immigration from Mexico than the federal government mandated. The control of the country’s borders has always remained a distinctly national issue – as appropriate for federal government control as it is inappropriate for state regulation. Thus the exceedingly complex and frequently changing body of law that governs the national border has always been a distinctly federal matter.

Enforcement of that law has always fallen to special units of federal law enforcement created, trained, equipped, and deployed with the very particular mission of protecting the borders. These federal immigration agencies enforce completely different bodies of law than state and local police departments do. They have been trained for different missions; they use their authority for different purposes. A well-trained border or immigration agent could easily find him or herself in trouble trying to handle a common 911 call for a serious domestic violence incident; just the same, a very good city police officer might have no idea how to spot questionable immigration documents, or even which visa designations might allow a person to enter the U.S. And make no mistake: immigration enforcement is one of the most complicated bodies of law in the United States. One court has noted the “striking resemblance” between immigration law and “King Minos’s labyrinth in ancient Crete,” and said that immigration law is among

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<sup>123</sup> U.S. Const, Art. 1, sec. 8, cl. 4.

“examples we have cited of Congress’s ingenuity in passing statutes certain to accelerate the aging process of judges.”<sup>124</sup> Thus enforcement of immigration law under the best circumstances remains difficult because immigration law “is notoriously complex, extremely technical, and subject to frequent change. Immigration laws have been compared to the tax code in their complexity,” putting local officers, untrained in the law’s unending nuances, at a great disadvantage.<sup>125</sup>

But another argument overshadowed police objections based on laws and policies already in place, on lack of resources or training, or on ideas about the federal government’s proper responsibility for the border. By far, the most frequent and impassioned objection to involvement in immigration enforcement came from state and local police concerned their own effectiveness: becoming players in the enforcement of immigration law was bad police work, plain and simple. Police wanted no part of immigration enforcement because they knew that taking on this task would undermine their ability to keep the public safe. Involvement in immigration enforcement was bad police work from the point of view of both garden-variety crime fighting, and from the perspective of making the country safe from terrorists. The reasons for this objection teach us much about the varied roles police play in America today. In American cities and towns, the day-to-day practical experience of keeping the peace, particularly in the immigrant neighborhoods they patrol, has taught police officers an important lesson: involvement in immigration enforcement would destroy their ability meet their core law

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<sup>124</sup> *Lok v. I.N.S.*, 548 F.2d 37, 38 (2d. Cir. 1977).

<sup>125</sup> *Forcing Our Blues into Gray Areas*, supra note 84, at 4. Eric Nishimoto, spokesperson for the Ventura County (California) Sheriff’s Department, put the matter bluntly: officers in his department simply don’t know enough about immigration law to enforce it, and that would likely hurt the department. “We’re not in favor of having our department being responsible for [immigration enforcement]... We feel our officers are not equipped to make that kind of determination of who is legal.” *Proposal for Police to Act as INS Agents Denounced*, VENTURA COUNTY STAR, April 6, 2002.

enforcement responsibility of assuring public safety. In other words, greater authority to get involved in the national struggle against terrorism by exercising power over immigration *would not make people in the U.S. more safe* – certainly not from common criminal predators, and not from terrorists. Rather, using this new authority to enforce immigration law *would actually make our people less safe*.

The most important experience local police have that sets them apart from either federal policy makers or even federal law enforcement officers is that, in any city or town with an immigrant population, local police regularly put considerable time and effort into crime fighting in immigrant communities. And many more officers, in a much greater number and variety of police departments than used to be the case end up doing police work among immigrant populations. During the 1990s and into this decade, the settlement patterns of immigrants to the U.S. changed. Immigrants now settle not just in the largest traditional “immigrant gateway” cities of the nation – New York, Chicago, Los Angeles, and others, which still receive much of the country’s arriving immigrant population<sup>126</sup> – but in many areas that have not traditionally seen immigrant settlement. The largest percentage growth in immigrant populations in the U.S. between 1990 and 2000 came in states that one would rarely think of as immigrant destinations: North Carolina (274 percent), Georgia (233 percent), Nevada (202 percent), Arkansas (196 percent), Utah (171 percent) and Tennessee (169); two other unlikely immigrant

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<sup>126</sup> Aubrey Singer, *The Rise of New Immigrant Gateways*, The Brookings Institution, February, 2004, accessed at <http://www.brook.edu/rios/dat/sources/report/5cbcd1b48d86ff3d3e4b85b90a1415cb.xml> (explaining that immigrants have continue to settle in “long-established” immigrant gateway cities such as New York and Chicago, as well as emerging gateway cities such as Atlanta, Dallas, and Washington, D.C., and re-emerging gateway cities such as Minneapolis-St. Paul and Seattle); Brian K. Ray, *Building the New American Community, Newcomer Integration and Inclusion Experiences in Non-Traditional Gateway Cities*, Migration Policy Institute, 2004, at ii, accessed at [http://www.migrationpolicy.org/news/BNAC\\_REPT\\_SUM.pdf](http://www.migrationpolicy.org/news/BNAC_REPT_SUM.pdf) (most of the U.S. foreign-born population is settled “in long-established gateway cities like New York, Los Angeles, Chicago, Boston, Miami, and Houston).

destination states, Nebraska (165 percent) and Kentucky (135 percent), also ranked among the top ten states in percentage growth in that period.<sup>127</sup> And not all of this growth in immigrant populations has settled in the urban areas of these non-traditional states; on the contrary, many immigrants have come to suburban areas, small towns, and rural areas.<sup>128</sup> The diversity of these immigrant populations also stands out, with Somali and Hmong immigrants in Minneapolis/St. Paul,<sup>129</sup> Haitians in Miami,<sup>130</sup> Cambodians in Lowell, Massachusetts,<sup>131</sup> African immigrants in Seattle,<sup>132</sup> and people from the Cape Verde Islands in Boston.<sup>133</sup> Thus in just the past fifteen years, many police departments

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<sup>127</sup> Randy Capps, Jeffrey S. Passel, Daniel Perez-Lopez and Michael Fix, *The New Neighbors: A User's Guide to Data on Immigrants in U.S. Communities*, The Urban Institute, Washington, D.C., at 5 (naming North Carolina, Georgia, Nevada, Arkansas, Utah, Tennessee, Nebraska, Colorado, Arizona, and Kentucky as "the ten states with the fastest growing immigrant populations"); *States and Regions Ranked by Percent Change of the Foreign Born: 1990 and 2000*, Migration Information Source, accessed at <http://www.migrationinformation.org/USFocus/ranktable.4.html> (same).

<sup>128</sup> See, e.g., The Urban Institute, *The New Neighbors*, supra note \_\_, at 5-6 (noting that while some recent immigrant population growth has occurred in cities, much has come in near-in suburbs, and in other areas has come in the outer suburbs and rural areas); *New Immigrant States*, National Immigration Forum, Community Resource Bank, accessed at <http://communityresourcebank.org/DesktopDefault.aspx?tabid=335> (high percentage growth of immigrant populations outside of traditional gateway areas "has created many opportunities and challenges for states and local communities; particularly in rural and suburban communities"); Aubrey Singer, supra note \_\_, at 1 ("By 2000 more immigrants in metropolitan areas lived in suburbs than cities, and their growth rates there exceeded those in the cities").

<sup>129</sup> The Minneapolis Foundation, *Immigration in Minnesota: Discovering Common Ground*, 10, 12 (October 2004), accessed May 17, 2006, at <http://www.mplsfoundation.org/publications/ImmigrationBrochure.pdf> (Minnesota and the Minneapolis/St. Paul metropolitan area is home to the nation's largest population of Somalis, and the world's largest urban population of Hmong people).

<sup>130</sup> The Brookings Institution, *The Haitian Community in Miami-Dade*, (2005) at 4, accessed May 17, 2006, at [http://www.brookings.edu/metro/pubs/20050901\\_haiti.pdf](http://www.brookings.edu/metro/pubs/20050901_haiti.pdf) (almost 100,000 Haitians live in the Miami-Dade area, making it the largest Haitian community in the U.S. and the second largest immigrant group in Miami-Dade, with only the Cuban community larger).

<sup>131</sup> Suzanne Presto, *Cambodian Immigrants Make Impact on City in U.S. Northeast*, VOICE OF AMERICA, accessed May 17, 2006, at [http://www.voanews.com/english/archive/2005-05/2005-05-04\\_voa72.cfm](http://www.voanews.com/english/archive/2005-05/2005-05-04_voa72.cfm) (Lowell, Mass, has second largest concentration of Cambodians in the U.S. at 25,000 – local leaders say it may be as large as 35,000 – behind only Long Beach, California).

<sup>132</sup> The Brookings Institution, *Seattle in Focus: A Profile from Census 2000* (2003) at 28, accessed May 17, 2006, at <http://www.brookings.edu/es/urban/livingcities/seattle.pdf> (Seattle's population is increasingly diverse, with eight percent of foreign-born residents now from Africa).

<sup>133</sup> Boston Redevelopment Authority, *New Bostonians 2005* (2005), at 8, 13, accessed May 17, 2006, at [http://www.microalition.org/uploads/4B/WY/4BWY7\\_xuOGol0IzRfjQ5Q?New-Bostonians-2005-MK-Final.pdf](http://www.microalition.org/uploads/4B/WY/4BWY7_xuOGol0IzRfjQ5Q?New-Bostonians-2005-MK-Final.pdf) (the 2000 Census tallied more than 11,000 people of Cape Verdean descent in Boston, more than four percent of Boston's foreign-born population).

have had considerable experience dealing with many different immigrant populations – not just the big-city police in New York, Chicago, and Los Angeles, but police in every type and size of community in every area of the country, because so many have immigrant populations of their own.

Police in these communities know that their immigrant population often consists of a mixture of legal and illegal residents. With illegal immigrants, the threat posed by police is obvious: these people fear that police, as representatives of the government, will either seize them for deportation, perhaps after some substantial period of incarceration, or report them to another agency that will do this. Thus they naturally avoid any contact with police. Legal residents may not have to worry about their own deportation, but many may feel apprehensive nonetheless, thinking that contact with police will lead law enforcement to family, friends, or acquaintances who have significant immigration difficulties – especially family. In 2005, the Pew Hispanic Center reported that 13.9 million people in the U.S. live in families in which the head of the household or a spouse is an illegal immigrant. Of those 13.9 million, 3.2 million hold American citizenship.<sup>134</sup> Even though these American citizens may have nothing to fear themselves, they may have strong concerns about the other members of the household – perhaps their own parents.<sup>135</sup> This goes some way toward explaining why many of those in immigrant communities, not just those in the U.S. illegally, would want to avoid contact with authorities if they thought that this might have immigration consequences.

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<sup>134</sup> Jeffrey S. Passel, *Unauthorized Migrants: Numbers and Characteristics*, Pew Hispanic Center, June 14, 2005 (“the number of persons living in families in which the head of the household or the spouse is an unauthorized immigrant – 13.9 million as of March 2005, including 4.7 million children. Of those individuals, some 3.2 million are U.S. citizens by birth....”).

<sup>135</sup> Jeffrey S. Passel, *supra* note 134, at 1 (of the 3.2 million people living in “‘mixed status’ families in which some members are [illegal],” the illegal persons are often parents of children who are American citizens).

Additionally, some immigrants, legal and illegal, may have come from countries in which figures of authority, particularly the police, have regularly been brazenly corrupt and horrifyingly brutal. Imagine, for example, coming to the U.S. as an immigrant from Cambodia, where the country's ruling party murdered more than a million Cambodians. Among such people, it would not seem unreasonable at all to find fear of police. Chief Ray Samuels of the Newark (California) Police Department understands this problem. "We deal with immigrants from all over the world," he says, "many who [sic] are steeped in beliefs and practices that alienate them from law enforcement."<sup>136</sup> Working with people with lots of past experience that causes them to fear the police makes the always-challenging task of securing public safety even more difficult than it might otherwise be.

Thus for local police, immigrants' fear of contact with law enforcement emerges as a major obstacle in the constant fight to make the streets safe. If legal or illegal immigrants in these communities fear the police, whether for good reasons or bad, they will avoid the police in every way possible, going out of their way to steer clear of officers. Among police officers, this is not a secret. Most have experienced it and they know it to be a wide-spread phenomenon that constantly hinders their effectiveness.<sup>137</sup> When immigrants fear the police enough to make efforts to avoid them, many fewer of them will report crimes, whether they are victims or witnesses, than would be the case

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<sup>136</sup> Letter of Chief Ray Samuels, Newark (California) Police Department, to U.S. Rep. Pete Stark, September 17, 2003, quoted in National Immigration Forum, *State and Local Police Enforcement: Border Officials Say "No, Thanks" to Proposal for Federal Immigration Enforcement by Local Police*, November 12, 2003, <http://www.immigrationforum.org/PrintFriendly.aspx?tabid=568>, accessed Feb. 28, 2006.

<sup>137</sup> According to Arturo Venegas, Jr., former chief of the Sacramento Police Department, immigration enforcement by local police would not serve his city well. "We've made tremendous inroads into a lot of our immigrant communities. To get into the enforcement of immigration laws would build wedges and walls [between the police and the community] that have taken a long time to break down." *Administration Split on Local Role in Terror Fight*, N.Y. TIMES, April 29, 2002. Chief Richard Miranda of the Tucson Police Department agrees. "We have worked hard to build bridges and establish partnerships with the diverse population of our city. I believe that taking on [immigration enforcement] would jeopardize those relationships and create unneeded tension in our community." *Expansion of Foreigner Arrest Plan is Feared*, ARIZ. DAILY STAR, July 12, 2002.

were they not afraid of the police. “It’s very difficult in the immigration [sic] communities to get information from folks,” says Hans Marticiuc, President of the Houston Police Officers Union, “and if there’s a fear of being reported...because of illegal status, that just makes our job that much more difficult and it makes the city have that much more criminal activity.”<sup>138</sup>

Unfortunately, the police are not the only ones who know that fearful immigrants will hesitate to report crimes they witness or even their own victimization; criminal predators know it, too, and take advantage. Lt. Armando Mayoya of the San Joaquin County (California) Sheriff’s Office puts it bluntly. “If police officers start [conducting immigration enforcement], [c]riminals soon would realize that undocumented workers would be unlikely to call police for fear of being deported, and [the criminals would] target them for attacks.”<sup>139</sup> This goes even for the most serious offenses. For example, officers know that women who fear police are far less likely to call 911 when they have been raped. “It’s a matter of practical policing,” says Los Angeles Police Department Assistant Chief George Gascon. “If an undocumented woman is raped and doesn’t report

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<sup>138</sup> *Houston Police Stick to Hands-Off Immigrant Policy*, HOUSTON CHRONICLE, March 3, 2003. Chief Alberto Melis of the Waco, Texas, Police Department makes the same point. “I worry that there are people who don’t ask for help because they have fear of the police,” he says. *Waco Police Chief Asks Immigrants Not to be Afraid to Report Crimes*, WACO TRIBUNE-HERALD, April 15, 2002.

<sup>139</sup> *U.S. May Let State, Local Authorities Enforce Federal Immigration Laws*, DALLAS MORNING NEWS, April 3, 2002. Many in law enforcement have echoed this concern. According to Gene Voegtlin, legislative counsel for the International Association of Chiefs of Police, the oldest and largest association of law enforcement executives in the world, involving local officers in immigration enforcement would hurt efforts to make the streets safe by cutting off the possibility of communication between police officers and immigrant communities. “A key concern is that state and local enforcement involvement in immigration can have a chilling effect on the relationship [police have] with the immigrant community in their jurisdiction.” Miriam Jordan, *supra* note 79, at B 1. According to Joseph Estey, President of the IACP, “[m]any leaders in the law enforcement community have serious concerns about the chilling effect any measure of this sort would have on legal and illegal aliens reporting criminal activity or assisting police in criminal investigations. This lack of cooperation could diminish the ability of law enforcement agencies to police effectively their communities and protect the public they serve.” *Police Chiefs Announce Immigration Enforcement Policy*, press release from the International Association of Chiefs of Police, Dec. 1, 2004, accessed at [http://www.theiacp.org/documents/index.cfm?fuseaction=document&document\\_type\\_id=7&document\\_id=634&subtype\\_id=](http://www.theiacp.org/documents/index.cfm?fuseaction=document&document_type_id=7&document_id=634&subtype_id=) .

it, the suspect who raped that woman, remember, could be the suspect who rapes someone else's sister, mother, or wife later."<sup>140</sup> According to an American Bar Association report, local police involvement in immigration enforcement and consequent fear of police would also have a drastic impact on victims of domestic violence.<sup>141</sup> When fear of police makes pickings so easy, crime and criminals can saturate a neighborhood, making it unsafe not just for illegal immigrants, but for anyone who lives, works, or walks there.

Fear of police therefore plays an important role in determining how much local police can do to make communities with immigrant populations safe. Accordingly, many police departments have done the smart thing in these communities: police have actively courted immigrants to try to win their cooperation, sought contact with their leaders, looked for ways to build bridges and enhance opportunities for communication – all for the purpose of carrying one message: we, the local police, are not part of the immigration enforcement apparatus, and we are not interested in your immigration status. Assistant Chief Rudy Landeros of the Austin (Texas) Police Department, who has spearheaded his department's successful efforts to reduce crime in immigrant communities by working with immigrants regardless of their legal status, makes an effort to be as clear as possible when he addresses these issues. As he said on a local television broadcast, "our officers will not, and let me stress this because it is very important, our officers will not stop, detain, or arrest anybody solely based on their immigration status. Period."<sup>142</sup> In other words, police are interested in one thing: the safety of every human being in the city,

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<sup>140</sup> Richard Winton and Daniel Yi, *supra* note 84.

<sup>141</sup> Gail Pendelton, *Local Police Enforcement of Immigration Laws and its Effects on Victims of Domestic Violence*, American Bar Association Commission on Domestic Violence, CITE

<sup>142</sup> *Austin Police Won't Arrest People Only for Immigration Status*, STATION KEYE, CBS, Austin, Texas, April 5, 2002)



regardless of status. As Garland (Texas) Police Officer Steve Dye told the Dallas Morning News, “even if they’re here illegally, they still have [human] rights. They should call the police and report [crimes]. They are residents. We serve them like all other residents.”<sup>143</sup> In all, local police have learned something that federal officials who want local involvement in immigration enforcement seem not to realize: success or failure at assuring public safety in towns and cities that have immigrant populations depends on local police departments having *no* active involvement in immigration enforcement, and on the community’s clear understanding that they have no such role.

Thus, many local police departments around the country have actually done everything possible *to avoid* involving themselves in immigration enforcement efforts, but rather to distance themselves from it. For example, Assistant Chief Landeros of the Austin, Texas Police Department, says that several years ago, Austin found itself with a burgeoning rate of violent crimes against immigrants.<sup>144</sup> Landeros and his officers found themselves especially shocked by a string of armed robberies that turned into violent murders when predators attempted to steal the large amounts of cash that male victims – all illegal immigrants – carried with them, because they could not open American bank accounts without acceptable identification.<sup>145</sup> The police in Austin built partnerships with numerous immigrant groups in the community, formulated a marketing campaign, and actively reached out to the immigrant population of their city. The slogan: “In Austin, it’s different.” The department and its allies put together four Spanish-language public service announcements for radio, all of which got frequent play on local Spanish

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<sup>143</sup> *Non-English Speakers May Face Questionable Business Dealings*, DALLAS MORNING NEWS, Aug. 27, 2003.

<sup>144</sup> David A. Harris, *supra* note 18, at 191.

<sup>145</sup> *Id.* Prior to the advent of the use of the *matricula consular* card as acceptable identification, bank accounts were simply off limits to undocumented aliens; they could not open them. *Id.* at 191-192.

stations. The message of all of this was simple: the Austin police were not interested in learning the immigration status of victims or witnesses; they would not do anything that might get someone deported. Rather, they wanted the community's help in getting criminals off the street, no questions asked. These and other efforts made a dramatic difference. After an initial spike in the crime rate due to a new wave of witness and victim reporting of crimes stimulated by the police department's campaign, nearly all categories of criminal victimization dropped, and stayed lower.

### **B. Is Terrorism Different Vis-a-Vis Local Policing?**

One might ask whether fighting terrorism, as opposed to garden-variety street crime, would move law enforcement in a different direction. Given the risk – the catastrophe of a successful mass-casualty attack by terrorists – would it not be better, on balance, for our state and local police departments to become involved in immigration enforcement, just in case this might head off an attack? The answer, of course, is that local police *already* participate in the fight against terrorists, and this is as it should be. Indeed, if we wish to prevent as many terrorist attacks as possible, we really have no alternative. According to Brian Michael Jenkins, a senior advisor at the RAND Corporation and a nationally-respected authority on terrorism, local law enforcement is actually the long-term key to the defeat of terrorism. While the federal government must always protect Americans against terrorism at the border, local police will stop terrorists and their attacks as these tactics spread inside the U.S. “As this thing [terrorism] metastasizes, cops are it. We’re going to win this at the local level.”<sup>146</sup>

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<sup>146</sup> William Finnegan, *The Terrorism Beat: How is the N.Y.P.D. Defending the City?* THE NEW YORKER, July 25, 2005, at 58, 61.

So the question is not *whether* local police will participate in anti-terrorism efforts, but *how* they should do this. And even the imperative of defeating terrorists does not mean that local police should involve themselves in immigration enforcement. On the contrary, involvement in anti-immigration efforts would be strongly counterproductive. The New York Police Department may provide the best example. The N.Y.P.D., of course, must protect the city that terrorists targeted with two airplanes on September 11, 2001; by all estimates, New York City remains in the terrorist crosshairs. Thus the N.Y.P.D. has created its own anti-terrorism intelligence infrastructure and capabilities. It has accomplished this in ways far more effective than anything achieved by any federal agency, including the FBI and the Department of Homeland Security. “The N.Y.P.D. is really cutting-edge,” said Brian Michael Jenkins of RAND. “They’re developing best practices here that should be emulated across the country. The Feds could learn from them.”<sup>147</sup> Yet there remains one type of enforcement in which the N.Y.P.D. has absolutely no interest: becoming involved in immigration enforcement in their city. Ray Kelly, the Commissioner of the N.Y.P.D., regularly makes this point publicly. For example, on the eve of the Muslim holiday of Ramadan, Muslim community leaders from all over New York City were invited to an annual pre-holiday conference at the N.Y.P.D.’s headquarters, One Police Plaza. After an address by Mayor Michael Bloomberg, Kelly took the podium. He was not coy in speaking to the city’s Muslim leaders about immigration. “We want recent immigrants in particular to know that the Police Department is not an immigration agency,” Kelly said.<sup>148</sup>

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<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 69. Note that the same article quotes Donna Lieberman, Executive Director with the New York Civil Liberties Union, accusing the police of asking suspects under arrest routinely whether they are citizens, and sometimes turning the answers over to immigration authorities. *Id.* at 70. This is an important

The reason Kelly makes this point to the Muslim community (and no doubt to the many other immigrant communities in New York) dovetails perfectly with the reason that police in Austin, Texas, and so many other American cities do their best to distance themselves from immigration enforcement: fear. Fear is the enemy of police trying to fight everyday crime against immigrants and others, because immigrant victims or witnesses fearful of police won't come forward, making it easier for predators to remain undetected and to victimize others. If fear is the enemy of police as they work to fight garden-variety crime, it is just as much the enemy of police trying to fight terrorists. This is because the prime ingredient for anti-terrorism work on any level is, and will always be, information. Information is the lifeblood of all efforts to root out terrorists and to prevent their horrifying acts.<sup>149</sup> Cities and nations must have anti-terror assets – trained officers, high-powered weapons, bomb-sniffing dogs, the latest technology. But information on the threats is what puts them in a position not just *to respond* after of terrorist attacks, but *to prevent* them by acting beforehand.<sup>150</sup> Without this kind of strategic information, all of the weapons and tactics and technology in the world cannot protect us.

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point that Lieberman is absolutely correct to bring to light. But even if Lieberman is correct, this does not necessarily contradict Kelly's statement. Arrested suspects are routinely asked many questions about themselves, and the discovery of illegal status would sometimes be worthy of the attention of government authorities – for example, that a suspect had been deported once and had re-entered the country, which would be a felony. What is surely more important is whether immigration status is a question asked of those *not* under arrest.

<sup>149</sup> See, e.g., Remarks of Vincent Cannistraro, former chief of operations and analysis, Central Intelligence Agency Counterterrorism Center, and former special assistant for intelligence, Office of the Secretary of Defense, 26<sup>th</sup> National Legal Conference on Immigration & Refugee Policy, Session I: National Security and Immigrant Rights, sponsored by the Center for Migration Studies and the Catholic Legal Immigration Network, Inc., Thursday, April 3, 2003, Washington, D.C. ("I've always said that the problem of terrorism is one of getting intelligence, having the information to preempt" terrorist acts before they occur. "If you don't have good intelligence, you don't have good antiterror.")

<sup>150</sup> *Id.* ("If you're investigating [the results of] an act of terrorism, then you've already failed.")

The threat we face today comes from extremist terrorists who are young Muslim men, either from or with their roots in the Middle East or South Asia. Those who might carry out these attacks organize into so-called “sleeper cells,” either planted in our country from without or “homegrown,” waiting for a signal to go into action. As hard as it may be to gather information on such small, insular groups, we must do everything possible to maximize the chances that we will get useful information about them. Certainly, the government will attempt to use infiltrators and informers, though this will no doubt prove extremely difficult with such groups. Considering the ethnic, religious, and linguistic differences between members of the cells and law enforcement, few agents will have the unique characteristics and skills to pull this off. Therefore, the best—indeed, often the only—source of information on possible terrorist cells on our soil will be Muslim communities themselves. The people in these communities will know the language, they will know the cultural nuances, and they will know who has just moved in to the community. They will know which people might have traveled to the Middle East lately, and who might recently, unexpectedly, have become much more religious after such a trip. They will know who spouts radical opinions or advocates the use of violence against American or Western targets. The information will not always be available to the Muslim community; witness the London bombings in July of 2005, in which no police or intelligence agency seems to have had any idea of what these British citizens had planned.<sup>151</sup> But maintaining the *opportunity* for this information to pass between the Muslim community and the police remains crucial. Making sure that any scrap of possibly helpful information can flow to the authorities at least gives them a chance to

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<sup>151</sup> Alan Cowell, *Panels Say Britain Underrated Threat Before July Attacks*, N.Y. TIMES, May 12, 2006, at A 21 (parliamentary report finds that British counterterrorism agencies failed to understand the growing threat of “homegrown” terrorists and failed to follow up on two of the bombers who were known to them).

prevent harm, and this absolutely requires strong alliances with our own Muslim communities. Richard A. Clarke, former National Counterterrorism Coordinator for the National Security Council who advised both the Clinton and George W. Bush administrations, says that such alliances must be our top priority if we are to defeat sleeper cells of terrorists in our midst. “In the first instance,” Clarke says, “we should seek the cooperation of the American Muslim community in identifying possible problem groups and individuals.”<sup>152</sup>

Given the situation in which we find ourselves, fear of the police in immigrant communities could not loom larger as an issue. Fear does not pave the way for communication. Rather, fear breaks down and destroys avenues and opportunities for communication between the immigrant communities and the police. Police officers who work the streets everyday know this well. They understand the old joke: if a shooting occurs in a neighborhood on a Saturday night, everyone knows who did it by Monday morning – except the police. The unspoken implication of this tired old gag is that police can find out who did the crime, of course, but despite what we see on television, they will almost certainly not learn the shooter’s identity through high-tech forensic tests. Instead they will solve the case only if people in the community will talk to them. This explains the importance of having good, strong relationships with citizens in every community, especially immigrant communities, in which police work. Those relationships help improve the public image of police, to be sure, but much more importantly, they are the sources of all the information that police will get about the neighborhoods in which they work. This is absolutely crucial for the success of investigations targeted at preventing terror or apprehending terrorists.

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<sup>152</sup> Richard A. Clarke, *Finding the Sleeper Cells*, N.Y TIMES MAGAZINE, Aug. 14, 2005, at 16.

In the immediate aftermath of the bombing in London in July of 2005, the police searched for the source of the attack. Despite a well-earned reputation as well prepared for, and on top of, terrorist threats, British police and intelligence services had seen no danger signs before the attack. This was not lost on Sir Ian Blair, head of the investigation; he understood the importance of information in solving the crime and in preventing another attack, and he also understood where police would have to get that information. “It is not the police and it is not the intelligence services who will defeat terrorism,” Blair said; “it is communities who defeat terrorism.”<sup>153</sup> The attack, which bore all the hallmarks of an al Qaeda operation, put Muslims in London and all of Britain in fear – fear of retribution, fear of targeting by law enforcement. They might fear sharing important information with the police. Fearful community members, Blair knew, might hesitate to come forward with important information. Thus Blair appealed to them directly, because only communities, working with the police, could stop attacks like this.

Two excellent examples exist of how we can prevent terrorist attacks on American soil. In Lackawanna, New York, federal authorities broke up what they claimed to be a “sleeper cell” awaiting instructions from al Qaeda.<sup>154</sup> The members of the cell, all young Muslim men of Yemeni extraction who lived in Lackawanna, an industrial town just outside of Buffalo, pleaded guilty and are now serving substantial prison terms.<sup>155</sup> The FBI stopped the Lackawanna cell not with high-technology

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<sup>153</sup> Glenn Frankel, *Londoners Warily Resume Their Lives*, WASH. POST, July 10, 2005, at A 17.

<sup>154</sup> Philip Shenon, *U.S. Says Suspects Awaited an Order for Terror Strike*, N.Y. TIMES, Sept. 15, 2002, at 1 (Department of Justice charged five men with operating “an active cell of Al Qaeda” in Lackawanna, N.Y., a suburb of Buffalo, where they were to “await the order for an attack”).

<sup>155</sup> For example, three of the men sentenced early December, 2003, received sentences of ten, eight, and eight years, respectively. David Staba, *New York Man in Qaeda Case Will Serve 8 Years*, N.Y. TIMES, Dec. 10, 2003, at A 3 (defendant Shafal Mosed sentenced to eight years in prison); David Staba, *Queda Trainee Is Sentenced to 8-Year Term*, N.Y. TIMES, Dec. 5, 2002, at A 6 (defendant Yasein Taher sentenced to eight years, and Mukhtar al-Bakri received ten years).

electronic wiretaps, or by infiltration of the cell by an informer. Rather, law enforcement became aware of the cell's existence only because members of the local Yemeni community – which has been part of Lackawanna for years – told law enforcement that the young men had visited training camps in the Middle East.<sup>156</sup> Without that information, al Qaeda might have activated the cell, with disastrous consequences. And in early 2006, in Toledo, Ohio, the federal government indicted three young Muslim men – two of them American citizens and the third a lawful resident – alleging that they constituted a terrorist cell.<sup>157</sup> As is typical in such cases, the FBI agent in charge of the investigation made a public statement when the government announced the indictments, but in this case the agent actually took great pains to say something unusual: he went out of his way to single out the Muslim community for praise because of its cooperation in the case, specifically in the way it had brought information about the suspects to law enforcement. “They are the ones who deserve the most credit,” said Special Agent in Charge Ted Wasky of the Cleveland field office of the FBI. “The ability to prevent another terrorist attack cannot be won without the support that the community gave.”<sup>158</sup>

We must view the negative reaction of American police to all of the recent efforts to get them involved in immigration enforcement through the lens of the successes in

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<sup>156</sup> Philip Shannon, *supra* note 154 (“Officials said it was information from inside that [Yemeni community where the suspects lived] that lead them to conduct and inquiry there.”); *Frontline: Chasing the Sleeper Cell* (PBS Broadcast, Oct. 16, 2003) (FBI agent in charge of investigation declared that investigation began with information from the community that arrived in a letter to the FBI).

<sup>157</sup> Indictment, *U.S. v. Mohammad Zaki Amawi, et al.*, U.S. District Court for the Northern District of Ohio, Western Div., Feb. 21, 2006.

<sup>158</sup> Mike Wilkinson and Christina Hall, *3 Charged in Terror Plot: Local Suspects Planned Attacks in U.S.*, TOLEDO BLADE, Feb. 22, 2006, at A1; *Toledo's Arab Community Called “Crucial” to Terrorism Investigation*, STATION WTOL, Toledo, Ohio, Feb. 22, 2006, web site print story, accessed at <http://www.wtol.com/Global/story.asp?S=4533250>. It is worth noting that law enforcement also seems to have had the help of an informant in the Toledo case, though the informant's involvement is, at this writing, less than fully clear. Brian Bennett, *How the U.S. Nabbed Alleged Terrorists in Toledo*, TIME, Feb 21, 2006 (explaining role of informant. In any case, the informant's involvement followed the passing the information from the community to law enforcement, not the other way around. Mike Wilkinson and Christina Hall, *supra*).



both Lackawanna and Toledo. American police understand that becoming assistants to federal agents in enforcement of immigration law will only inspire people in immigrant communities to fear them. This is true whether police aim to fight regular street crime or terrorism. Without the help of our communities of Muslims and Middle Easterners, many of whom are immigrants, police know that we have little hope of heading off terrorist attacks by al Qaeda-inspired cells. Thus it is profoundly in our interest to avoid anything that might cause members of those communities to fear police, or to feel any hesitancy in coming to them with information. And how sharp the fear in Muslim communities must be in the post-9/11 era -- after the government used immigration law after the attacks to round up and detain hundreds of immigrants, mostly Muslims, as terrorism suspects, with no hard evidence at all to hold them incommunicado for long periods; to deny them access to lawyers; and then to deport them. With all of this as background, it becomes quite easy to understand why not just Commissioner Ray Kelly of the New York Police Department but law enforcement officials all over the country want nothing to do with immigration enforcement. Getting mixed up in it will harm their efforts to gather intelligence crucial to anti-terrorism work.

Thus while law enforcement's turning away from increased discretion may seem unexpected at first blush, it actually makes perfect sense. State and local police knew, from their own experience, that more discretion under immigration law to be used as a pretext to get at another crime -- possible terrorism -- was just not good law enforcement policy. It would make their towns and cities *harder, not easier, to protect* from both ordinary criminals and from terrorists.

### **C. What Are the Anti-Terrorism Benefits From Immigration Enforcement by Local Police?**

Given the persistence of advocates for local police involvement in immigration enforcement, many of them may remain unconvinced by law enforcement's arguments that putting this burden on local police can only hurt efforts to attain public safety.

Perhaps, then, the discussion should proceed from the other direction. Proponents of immigration enforcement by local police should shoulder the burden of answering the question that their position pre-supposes: what anti-terrorism benefits would accrue if they had things their way? In other words, what would we gain in terms of terrorism prevention if local police actively engaged in immigration enforcement? What if police actively sought out, or used legal pretexts to have encounters with, those people they suspected of immigration violations? Would this, in fact, make us safer from terrorists?

This is certainly the assumption of many who argue for police to enforce immigration laws. Mark Krikorian, executive director of the Center for Immigration Studies, clearly believes this approach would benefit our domestic security efforts.

[K]eeping the terrorists out or apprehending them after they get in [using immigration enforcement] is indispensable to victory...Our enemies have repeatedly...insert[ed] terrorists by exploiting weaknesses in our immigration system...[M]any of the [9/11] hijackers, including Mohammed Atta and several others, were young, single, and had little income – precisely the kind of person likely to overstay his visa and become an illegal alien, and thus the kind of applicant [for entry into the U.S.] who should be rejected.<sup>159</sup>

This, Krikorian says, means that people with Atta's demographic characteristics should be denied entry into the U.S., and, once they are here, scrutinized much more closely by local police on virtually any pretext or occasion.

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<sup>159</sup> Mark Krikorian, *supra* note 71.

In the normal course of their work, police frequently encounter aliens. For instance, Mohammed Atta was ticketed in Broward County, Florida, in the spring of 2001 for driving without a license. But the officer had no mechanism to inform him that Atta had overstayed his visa during his prior trip to the United States. Although not an overstayer, another hijacker, Ziad Samir Jarrah, was issued a speeding ticket in Maryland just two days before 9/11, proving that even the most effective terrorists have run afoul of the law before launching their attacks.<sup>160</sup>

But this line of reasoning really represents nothing more than the use of proxy characteristics for what should really interest us. That is, Krikorian assumes that, if we focus on persons as possible terror suspects because they are young, male, Muslim immigrants from the Middle East or South Asia, we will be looking at the “right” people. This will make us safer by keeping them out, getting them out once they are already here, or interfering with their conduct enough that they leave on their own. But he offers no evidence that this will work; his assumption appears to be that the matter is self evident, and requires no proof.

This would always constitute a thin argument, but in this context it also carries dangers with it. Experience with proxy characteristics like ethnicity in other law enforcement settings suggests that, at the very least, there exist real, concrete reasons to doubt that proxy-based law enforcement producers hoped-for successes. Indeed, the evidence seems to show exactly the opposite: using characteristics like race or ethnicity depresses rates of law enforcement success.<sup>161</sup> Moreover, using proxy characteristics will waste valuable law enforcement time and resources, because it will inevitably sweep broadly and produce an overwhelming number of false positives. In short, Krikorian’s argument amounts to a brief for ethnic profiling, and would inexorably lead to exclusion

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<sup>160</sup> *Id.*

<sup>161</sup> For a broad introduction to the evidence in this field, see David A. Harris, *PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK* (2002), at chapter 4.

and to harassment by accent, appearance, national origin, and the like, *without any proven, or even likely, benefit*. This type of immigration enforcement would have done nothing to prevent the terrorist acts of September 11, 2001. Mary Ryan, former head of the U.S. State Department's Bureau of Consular Affairs, testified before the 9/11 Commission that "[e]ven under the best immigration controls, most of the September 11 terrorists would still be admitted to the United States today...because they had no criminal records, or known terrorist connections, and had not been identified by intelligence methods for special scrutiny."<sup>162</sup> This is because al Qaeda carefully chose its hijackers to avoid detection: they came from educated families, had no criminal records, and no known connections to terrorism. Therefore, there would be no reason to suspect them; they would appear on no watch list or terrorism tip sheet.<sup>163</sup>

Beyond the lack of benefits, enforcement of immigration law by local police would also produce substantial damage to anti-terrorism efforts. As discussed earlier, these kinds of interactions between local police and immigrants would not just offend many in these communities; they would produce tangible fear of police – exactly what police do not want or need now, as they seek to build bridges with, and get information from, Muslim and Middle Eastern immigrants. Fearful people will avoid police, pure and simple. And that will constitute a loss for anti terrorism enforcement – not a gain. The Migration Policy Institute puts it this way.

[T]he Justice Department's efforts to enlist state and local law enforcement agencies into enforcing federal immigration law risks making our cities and towns more dangerous while hurting the effort to fight terrorism. Such action undercuts the trust that local law enforcement agencies have built with immigrant communities, making immigrants less

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<sup>162</sup> Testimony of Mary Ryan, formerly head of the Bureau of Consular Affairs, U.S. Department of State, before the 9/11 Commission investigating the September 11 attacks, January, 2004.

<sup>163</sup> Migration Policy Institute, *supra* note 72, at 7.

likely to report crimes, come forward as witnesses, or provide intelligence information, out of fear that they or their families risk detention or deportation.<sup>164</sup>

## **V. A DIFFERENT APPROACH: THE FEDERAL GOVERNMENT SHOULD LISTEN TO POLICE; POLICE SHOULD LISTEN TO THEMSELVES**

This curious tale of post-9/11 police power leaves us to wonder what we might do differently – to make ourselves safe from crime and terrorism, and to address the very serious problems our country faces with immigration. Neither of these questions have easy answers. But the unexpected refusal of local police to participate in immigration enforcement – to push away a heaping helping of increased discretion, once law enforcement’s favorite dish – can help us learn at least two important lessons. One lesson may help the federal government improve its odds against terrorists and even give it a better direction in the effort to fix our immigration problems. The other lesson is one that, perhaps, state and local police can teach themselves.

### **A. The Federal Government Must Listen to State and Local Police**

This may strike some as too obvious a suggestion to make. But the federal government’s track record on this subject has never been good, and in the post-9/11 era, it is worse than ever. Thus it bears stating clearly: federal officials in both the executive and legislative branches who want state and local law enforcement to become involved in immigration enforcement should re-think their positions, in light of the overwhelming objections they have heard from local police. It is time for the federal government to stop dictating and begin listening to those who actually know something about public safety – the officers who labor in the field every day.

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<sup>164</sup> Migration Policy Institute, *supra* note 72, at 8.

As small a recommendation as this may seem, it is hard to be optimistic about whether federal officials would adopt it. The examples we have of their actions after September 11 supply little reason for hope. Take, for example, the U.S. Department of Justice's questioning of the five thousand "nonsuspects" who had recently come from countries in the Middle East or the Muslim world.<sup>165</sup> State and local police leaders, asked to help the FBI and other federal agencies to help find people on the Justice Department's list, condemned the program. Benny Napoleon, then Chief of Police in Detroit, sounded more like the head of the ACLU than of a police department, and his comments typified those of many other chiefs. "We're standing with the fundamental rights of individuals under the Constitution and our state constitution and our municipal law."<sup>166</sup> Even former leaders of the FBI itself derided the program, saying it was unlikely to produce any information more important than "the recipe to Mom's chicken soup."<sup>167</sup> Still, the Justice Department did not listen and went ahead with the interviews, in fact extending them to another three thousand individuals.<sup>168</sup> And, despite the Department of Justice's insistence that the interviews proved useful,<sup>169</sup> no evidence exists to show this. The Department itself asserted the usefulness of the interviews without undertaking any systematic examination and analysis of either the information resulting from the interviews or the interview program as a whole; as of early 2003, the Department of Justice said it had "no specific plans" to determine whether any aspect of the exercise had

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<sup>165</sup> See notes 56 through 59, *supra*, and accompanying text.

<sup>166</sup> Fox Butterfield, *Police Are Split on Interviewing Mideast Men*, N.Y. TIMES, Nov. 22, 2001, at A1.

<sup>167</sup> Jim McGee, *Ex-FBI Officials Criticize Tactics on Terrorism*, WASH. POST, Nov. 28, 2001, at A1.

<sup>168</sup> Philip Shenon, "Justice Dept. Wants to Query More Foreigners," N.Y. TIMES, March 21, 2002, at A 19.

<sup>169</sup> U.S. General Accounting Office, *Homeland Security: Justice Department's Project to Interview Aliens after September 11, 2001*, April 2003, report no. GAO-03-459, accessed at [www.gao.gov/cgi-bin/getrpt?GAO-03-459](http://www.gao.gov/cgi-bin/getrpt?GAO-03-459), at 6 (stating that internal Department of Justice report found that the interviews "resulted in useful leads," but provided no examples)

produced anything useful.<sup>170</sup> Thus the assertion that the interviews helped the anti-terrorism effort seems based not on fact, but on faith. More than half of the law enforcement officials involved who were interviewed by the General Accounting Office “expressed concerns about the quality of the questions asked and the value of the responses obtained” in the interviews;<sup>171</sup> and an examination of the interviews themselves, drawn from tape recordings by the attorneys of interviewees, confirms that law enforcement officers were right to suspect that the interviews provided nothing useful.<sup>172</sup> All of them consist of long strings of basic questions with obvious answers; the agents asking them seem convinced that the whole exercise means nothing, but that they must go through the motions as ordered by their Department of Justice superiors.<sup>173</sup> Some questions – for example, “Have you ever engaged in terrorist activity of any kind?” – seem nothing short of ludicrous. As one attorney who represented numerous interviewees said, “what kind of jackass would say yes?”<sup>174</sup>

If the federal government wants help in fighting the war on terror in our own country, the people with relevant experience sit not at the top of the FBI or Department of Justice’s policy machinery, but in the city police station. These are the people who understand what it takes to solve a crime when law enforcement knows neither the crime itself nor the perpetrators. If, as the 9/11 Commission and other investigative bodies have told us, the death and destruction of September 11, 2001, had a lot to do with a failure of our intelligence apparatus,<sup>175</sup> the federal government should turn to those who understand

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<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at 5.

<sup>172</sup> David A. Harris, *supra* note 18, at 175-180.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.* at 174.

<sup>175</sup> THE 9/11 COMMISSION REPORT, FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 339-360 (describing these shortcomings as failures of imagination, policy,

that, at least on the streets of American cities, intelligence is just a fancy way of talking about information. Police officers who solve crimes and make arrests know how to gather information from people close to the ground; they are, after all, on the ground themselves.

Thankfully, there are signs that those in the FBI on the front lines – the agents in the field offices – do understand this. One can see that this is so by noticing that FBI field offices now make a regular practice of reaching out to the community in ways that would have seemed unthinkable just several years ago. These agents seem to have come to the realization – perhaps a little late, but they have come to it nevertheless – that they need the help of those who live in the Muslim communities of their cities if they want to have any information on what goes on among Muslims. For example, outreach workers in the FBI’s Cleveland field office work with community groups of all types, including Muslims, on a host of issues that include ethnic and religious hate crimes.<sup>176</sup> The office’s Northern Ohio Hate Crimes Working Group has had considerable contact with the city’s Muslim, Arab, and Asian communities since September 11, 2001, and it has become a centerpiece of the FBI office’s efforts to build bridges into the community so as to have the best possible chance to head off a terrorist attack.<sup>177</sup> The Working Group’s meetings have, in the process, become a well-known forum on cross-cultural issues for the Muslim community and Cleveland’s law enforcement agencies.<sup>178</sup> This gives Muslims, Arabs, and others a regular chance to talk to the FBI and local police on an ongoing basis; this,

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capabilities, and management throughout the federal government, but especially in foreign and domestic intelligence agencies).

<sup>176</sup> David A. Harris, *supra* note 18, at 226-229.

<sup>177</sup> *Id.* at 227

<sup>178</sup> *Id.*



of course, establishes and keeps open lines of communication.<sup>179</sup> People who live in the community know law enforcement has heard their concerns, since the people deliver them face to face, in open meetings. The FBI agents get a chance to build or nurture relationships that they will need in order to have a way to get information from people who live in the community. They will also have an opportunity to recruit desperately-needed new agents from Middle Eastern and Arab cultures, as well as translators and other vital personnel.<sup>180</sup> In addition, dealing directly with these communities gives agents and police officers an unbeatable opportunity for cultural education, a necessary ingredient in any effort to build relationships with people from very different cultural backgrounds.<sup>181</sup> This type of knowledge is also a key to greater safety for officers and agents on the street; with greater knowledge of an immigrant community's cultural norms and behaviors come reduced chances of the kinds of misunderstandings and confusion that, in the heat of a moment requiring a split-second decision, could turn deadly.

So the FBI agents on the ground seem to understand the importance of using the methods of local police – building relationships in order to create opportunities for the exchange of intelligence and the cultivation of other mutually advantageous activities. This is all to the good, but it is not enough. Federal policy makers must recognize the reason that the FBI's field agents and officers have begun to see the wisdom of the ways that local cops do things: they understand that anything that breaks the trust between police and immigrant communities makes everyone in the city (not just illegal immigrants, or even just immigrants) less safe. The idea that local police can be a “force multiplier” in the fight against illegal immigration and by doing so make us safer from

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<sup>179</sup> *Id.* at 227-228.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

terrorists is a dangerous illusion. And it is an illusion that immigration opponents are exploiting in their hopes of introducing a stricter legal regime on the question of immigration generally. Thus the federal authorities should listen to the police officers who spend every day trying to make America's streets safe.

Of course, even if leaders in the federal executive and legislative branches suddenly did begin to listen to state and local law enforcement and to pay attention to the way they do things, and even if they actually followed the state and local example, this would only address what they should *not* do: press state and local police into immigration enforcement. It would not tell them how to solve the great problems of the broken immigration system in this country; rather, it would only tell them how not to do it. But even this would make for an improvement over the way things stand now.

On the legislative front, our leaders seem to have all but tuned out the objections of police all over the country. In late 2005, the U.S. House of Representatives passed a bill – the Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005<sup>182</sup> -- that would actually go further down the wrong path of local immigration enforcement than the CLEAR Act had. This bill would attempt to meet police objections to enforcing civil immigration matters by making virtually all immigration violations into felony offenses;<sup>183</sup> in addition, it might criminalize help given to illegal immigrants by people like social workers, nurses and doctors, and clergy.<sup>184</sup> The thinking appears to be that doing this will sweep away any objection to enforcing non-criminal immigration matters

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<sup>182</sup> U.S. House of Representatives, Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, H.R. 4437 (109<sup>th</sup> Cong.)

<sup>183</sup> *Id.* at sec. 203 (making illegal entry into, or presence in, U.S. by aliens a felony).

<sup>184</sup> *Id.* at sec. 202 (criminalizing any action that “assists, encourages, directs, or induces a person to reside in or remain in the United States, or to attempt to reside in or remain in the United States, knowing or in reckless disregard of the fact that such person is an alien who lacks lawful authority to reside in or remain in the United States”).

– because, of course, all immigration violations will be criminal by definition. Of course, this bill does nothing to meet the real issue – that immigrants who fear deportation will avoid the police if police are involved in immigration enforcement, resulting in increased crime and a weakened ability to gather intelligence on both crime and potential terrorists.

### **C. The State and Local Police Should Listen to Themselves**

If listening to state and local police and paying attention to their experiences is what the federal government should be doing, it may seem surprising to turn around and prescribe the same remedy to state and local police. But it turns out that they could benefit immensely by learning from their own unwillingness to accept the enlarged discretion to enforce illegal immigration – if they will apply this lesson to some of the other areas of law enforcement.

The starting point here is the war on drugs, the decades-long struggle in which state and local police have played a leading role. It was, after all, as part of this effort that a great expansion of police power took place.<sup>185</sup> But if police ask themselves the inevitable question – have we won the war on drugs? *Can* we win it? – they may see the reflection of the wisdom of their own approach to immigration enforcement. In the immigration context, police could see that enforcing immigration law could only hurt them, because they knew what worked in their immigrant communities, and what didn't. The time is certainly ripe (if not late) for asking what works in the context of the drug war, and whether in fact all of the discretion that courts have granted police to fight the war has helped them.

In the last few years, especially in the context of the national discussion of racial profiling, some members of the law enforcement camp have started to ask questions like

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<sup>185</sup> See note 110, *supra*.

this; and, in at least one instance, there is movement. More than three decades ago, the U.S. Supreme Court gave police the discretion to ask drivers for permission to conduct searches of their vehicles.<sup>186</sup> Officers need not trouble themselves with the Fourth Amendment's requirement of probable cause for a search, which would otherwise limit an officer's discretion. All the officer need do is ask the driver for permission; as long as the driver gives permission voluntarily, no other restraint on police power to search applies.<sup>187</sup> The discretion to conduct these consent searches – for any reason or for no reason at all – has long been a standard tool for police engaged in drug interdiction. But in the last several years, data from studies around the country has revealed some uncomfortable truths. First, blacks, Latinos, and other minorities are more likely than whites to be subjected to consent search “requests” by police officers – in other words, police officers use their discretion more often when confronted with minority drivers.<sup>188</sup> Second, the use of this discretion does not yield higher rates of recovered contraband, or even the same rates of contraband, discovered on whites. In fact, the consent searches of minorities typically yield contraband at lower rates than comparable searches of whites.<sup>189</sup> This has caused some members of the law enforcement fraternity to re-assess the wisdom of the (for all practical purposes, unlimited) discretion they now have to conduct consent searches, and to impose their own limiting standards on the use of those searches. For example, Brian Mackie, the elected chief prosecutor of Washtenaw County, Michigan, has told all of the police officers who work in his jurisdiction that he

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<sup>186</sup> *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).

<sup>187</sup> *Id.* at 248-49.

<sup>188</sup> See generally Ilya Lichtenberg, *Voluntary Consent or Obedience to Authority: An Inquiry Into the Consensual Police-Citizen Encounter*, Ph. D. dissertation, Rutgers University, 1999 (copy on file with the author); for a sample of some of these data, see David A. Harris, *supra* note 161, at Chapter 4.

<sup>189</sup> *Id.*

will not bring cases involving consent searches to court, unless the officer can articulate a reasonable suspicion for having asked the driver for consent.<sup>190</sup> In effect, Mackie has refused law enforcement's discretion to conduct consent searches without any legal basis, and replaced it with a rule requiring that officers meet a *Terry v. Ohio*<sup>191</sup> standard before they can ask for consent. Several police forces, including the Michigan State Police, utilize such a standard,<sup>192</sup> and all police in New Jersey now operate under similar court-made rules.<sup>193</sup>

The example of consent searches is, thus far, a lonely one, but perhaps it shows that there is reason to hope. Police and their supporters may, finally, be ready to learn a lesson from their own experience: more discretion does not always translate into better enforcement.<sup>194</sup>

## VI. CONCLUSION

This article discusses an anomaly: a situation in which a great crime is done, a crisis of major proportions proclaimed, and a role carved out for local police entailing the exercise of greater power – and police refuse this new authority. In the war on terror – surely a real war, not a metaphorical one like the war on drugs, and one with terrible consequences should our efforts fail – the last thing that we would expect would be for

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<sup>190</sup> *Id.* at 158-59

<sup>191</sup> *Terry v. Ohio*, 392 U.S. 1 (1968) (requiring reasonable suspicion based on facts and inferences that the officer can articulate to justify a temporary stop and a pat-down search).

<sup>192</sup> *Michigan Department of State Police Traffic Enforcement Summary, Third Quarter, 2000*, cited in David A. Harris, *supra* note 161, at 157-58.

<sup>193</sup> *State v. Carty*, 332 N.J. Super. 200; 753 A.2d 149 (2002).

<sup>194</sup> One could certainly object that the local enforcement of immigration law and the wide use of consent searches differ: the former may undermine community safety, but the latter does not undermine the war on drugs, even though it may have other deleterious effects. I would disagree, because the negative effects of the overuse of consent searches may also undermine public support for police efforts in the war on drugs. And any loss of public support will hurt the ability of the police to successfully carry out their mission, and to obtain convictions from jurors who have become skeptical of police through personal experience with police tactics like consent searches.

law enforcement to say, “sorry, but no” to the power our leaders wish to confer upon them so that they can carry out the mission. But that is exactly what has happened.

Our state and local law enforcement officials have not shown disloyalty by doing this, or a lack of caring. They have not refused to do what we want out of shortsightedness, or narrow self-interest. Rather, they have done us a favor: they have refused because what is being proposed will not work. Putting the power to enforce immigration law in their hands, and charging them with the responsibility to carry out the task, is a grave blunder. They know it, and they’ve told us so. If we and our leaders do not listen to them and force this task on them anyway, our police officers will not be the only losers. We will also lose, because we will be less safe from both crime and terrorists.

The debate over whether state and local police should enforce immigration law illuminates a unique moment in the history of American law enforcement over the last thirty years. If we are smart, we will notice it and grasp the opportunity to do better.

