

A View of Things to Come

by Michael Lindsay, ILEA Deputy Director

There are events that occasionally occur in other jurisdictions that seemingly should have no influence whatsoever on Indiana law enforcement. Nonetheless, these distant incidents sometimes produce a legacy for all of law enforcement. The O.J. trial and the Rodney King arrest are just such cases. Even though these occurred more than 2000 miles from Indiana, the allegations of police brutality and a hypersensitivity to race issues spread quickly and endure, even today.

Recently, Arizona passed an immigration law that has the potential for such a legacy. Within two week of passage, there were massive demonstrations in Washington, Los Angeles, Chicago, Dallas, Phoenix and Santa Cruz, with some of these demonstrations becoming violent. The claims—from many special interest groups and the far left—approach hysteria. One would think that our very way of life in the United States was coming to an end.

A cursory review of these issues would seem to support these fears. Unfortunately, the radicalization of our political system lends itself to distortion, if not premeditated falsehoods. Nonetheless, a closer look at these issues reveals quite a different set of circumstances.

The most grievous claims concerning this law are that the police will be able to stop people to inquire of their right to be in the country; that citizens will be required to carry documentation at all times proving their citizenship; that this law will lead to racial profiling; and that if people do not have documents to prove their citizenship, they can—and likely will—be detained/arrested until they can produce such documents.

A couple of additional, although less hysterical, claims are that the state of Arizona is usurping federal authority and that local units of government can be sued if they do not mechanically enforce this law. All of these claims sound as if Arizona has laid a foundation for creating a fascist regime. Is it any wonder that many politicians—who are sensitive to the Hispanic vote—are so vocal about their opposition to this law or that the Reverend Al Sharpton is threatening to organize a 1968-style march on Arizona because of the law?

Immediately after the passage of the law, the sheriff from Maricopa County (Phoenix) and the sheriff from Pima County (Tucson) appeared on television—one for and one against the law—but neither did much to relieve concerns or to clarify the all-important technical aspects of this law. Once these types of extreme claims are made, it becomes absolutely necessary to read the law in detail so that fact can be separated from emotional response.

Here are the most controversial portions of the law: *For any lawful contact made by a law enforcement official or agency of this state or ... political subdivision ... where reasonable suspicion exists that the person is an alien who is unlawfully present in the United States, a reasonable attempt shall be made, when practical, to determine the immigration status of the person. The person's immigration status shall be verified with the federal government pursuant to 8 United States Code section 1373(c).*

In addition to any violation of federal law, a person is guilty of trespassing if the person is both: present on any public or private land in this state. [and] in violation of 8 United States Code section 1304(e) or 1306(a).

In the enforcement of this section, the final determination of an alien's immigration status shall be determined by either: a law enforcement officer who is authorized by the federal government to verify or ascertain an alien's immigration status. [or] a law enforcement officer or agency communicating with the United States Immigration and Customs Enforcement or the United States Border Protection pursuant to 8 United States Code section 1373(c).

Those officers who are well versed in the concepts established by the U.S. Supreme Court in *Terry v. Ohio*, 88 S. Ct., 1868 (1968), concerning issues of reasonable suspicion and temporary detentions on less than probable cause will recognize that verbiage in this new law. Those provisions in *Terry* establish that a temporary street detention can occur when an officer has “reasonable suspicion” that criminal activity is afoot. That officer must then quickly develop that suspicion up to probable cause for arrest or release the suspect.

The all-important principle here is the order of events. Reasonable suspicion must be established before an involuntary detention, not after or as a result of. The Supreme Court has been refining the concepts of temporary detention and reasonable suspicion for more than 40 years now. This is not a new principle just introduced in this Arizona law.

Some curious wording also occurs at the beginning of this statute section which reads, “For any lawful contact made by a law enforcement official ... of this state ... where reasonable suspicion exists ...”

Did the Arizona legislature wish to require a stopping justification for all such contacts? Such an approach would be very much like the stopping justification in the previous safety belt law in Indiana. Could this verbiage also include casual, non-coerced conversations in a non-custodial street contact?

It is too early to tell if the Arizona courts will only allow an arrest for this immigration law if a stopping justification can be established. The addition of a stopping justification adds a layer of insulation between the citizen and officer. Such an approach provides an opportunity for an officer to ask about immigration status during a temporary detention for issuing a traffic ticket, for instance, rather than the temporary detention being just for an immigration check.

This provision does not authorize the police to “stop” *individual* citizens or immigrants just to inquire of about status. A question that should be of more concern to the protesters, however, is whether officers will be allowed to set up immigration checkpoints—like they do for DUI violations—with the passage of this law.

Although the law says that cities, counties and towns may not implement policies that prohibit officers from enforcing this law, it still gives the individual officer substantial discretion, i.e., “reasonable attempt ... when practical”.

The question concerning whether everyone will have to carry citizenship identification at all times has several facets to it. Federal law requires that immigrants carry what used to be called their “green card”. It does not require U.S. citizen to carry ID nor does this new Arizona law.

With Arizona converting the federal immigration status into a state criminal law, it obligates its officers to use *criminal* procedure. In criminal procedure, the burden is placed on the state to prove a violation, not on the individual to prove innocence.

Since a U.S. citizen stopped by a policeman is not required by either federal or state law to carry paperwork showing a right to be in the country, there is no obligation for a U.S. citizen to prove he is not an illegal alien. Even an *illegal alien* is not required to incriminate himself for a state criminal law violation. He is, of course, required to show a drivers license if driving on a public highway or a registration if in possession of a vehicle.

It is assumed by many protesters that this law is some type of civil procedure for taking illegal aliens into custody for a deportation hearing. The law allows for cooperation between the federal government and the state, but it does not make the state a deportation hearing board. That authority is specifically assigned to the federal government. This is a state criminal trespass law.

The Court has also said that merely identifying someone as coming from a race, certain gang, or ethnic group is not enough in itself to justify a *Terry* stop or an arrest for a particular crime even if that group statistically commits a particular type of crime more than another group.

Finally there is the question as to whether creating a state criminal trespass law aimed at illegal aliens usurps the federal government’s authority to legislate on immigration matters. This is a question of less concern to the protesters but was ultimately raised as a vehicle to void the state immigration law as a whole. These will be interesting cases to watch as they progress though the courts.

This federal-state split of governmental responsibility also begs several additional questions. Governments have, for years, incorporated law from other jurisdictions into their own law. A good example of this for Indiana officers is the Federal Motor Carrier Safety Regulations being incorporated as part of the Indiana Code.

This enables those state officers enforcing motor carrier laws to write these violations as state offenses, thereby keeping fines within the state system and creating a more unified approach to truck law enforcement. This approach, however, makes state law dependent on the verbiage of federal law. In the area of immigration law, the federal government could easily define terms like illegal alien/immigrant in such a way that it would make the Arizona state charge very difficult to prove.

This *de facto* veto of the Arizona law by the federal government does not even go to the Constitutional question as to whether the state law infringes on the federal enumerated power. Similarly, the state law itself requires that the federal government verify the immigration status of a suspect. There are certainly a number of ways that the federal government could easily quash the enforcement of this Arizona law.

As a result of the intense reaction to this law, the Arizona General Assembly enacted a couple of modifications to the law on the very last day of its session. The one generating the most interest is a provision that prohibits racial profiling? This codifies what was generally required by the courts and has been used for years. Constitutional requirements established by the U.S. Supreme Court are uniform across the nation. Nothing changed with Arizona incorporating such verbiage into its law for political reasons.

The second modification to the Arizona law was that the stopping justifications were expanded by allowing local ordinances to be used as well as statute violations. Even with this, however, the law does not absolutely require the officer to run a check.

The real question of substance (in highly charged environments such as this) is whether individual officers have an in-depth grasp of Constitutional requirements. This is an area in which a few bad decisions by street officers could repeatedly catapult an emotional issue back into public view, resulting in huge civil suits and ever worsening public relations.

A final, albeit important, consideration in this thorny matter is that Arizona is part of the 9th Circuit, i.e., the most liberal Circuit in the country. There is not likely to be many human rights violations tolerated by the 9th Circuit. In short, the new Arizona law really changes little except for creating a new criminal violation for being an illegal alien/immigrant within the state.

Those highly charged procedures of concern—surfacing immediately after the initial media blitz—are not any different than the procedures used by officers anywhere within the country for enforcing criminal law generally.

On the surface, the Arizona law appears to create a Gestapo-like system, e.g., “show me your papers”. This particular statute hits a hot button because it seems to have a racial component woven covertly into the fabric of the law. A closer examination, however, reveals that it does not require citizens to carry citizenship papers; it does not allow racial profiling; the burden of proof (because it is a criminal law) is on the state; and claiming that someone is an illegal alien must be certified through the federal government.

Other than the unfortunate effects of the media frenzy and the resulting boycott of Arizona businesses (which probably hurts Hispanic employees more than any other group), a genuine, open, long overdue discussion of federal-state responsibilities in this area is a likely consequence of the intense publicity generated by this law.

If Arizona officers discern the finer points of the *Terry* decision and its progeny concerning reasonable suspicion and temporary detentions, and fully understand the verbiage in this new Arizona statute, there will likely not be the abuse so many fear.

Nevertheless, the over-spill from such a political fray will undoubtedly manifest itself in Indiana as well. Like the O.J. case or the Rodney King incident, the distrust generated because of perceived abuses and racial profiling has already spread beyond Arizona.

Hopefully, the repercussions will not be as severe in Indiana as they have been in other places. It will, however, be important for Indiana officers to be sensitive to this fallout and exercise their authority within the strict limits of *Terry* so as not to feed the frenzy. Only then will Indiana officers be able to devote their full efforts to law enforcement rather than damage control.

(Charles Kettering, an American inventor and a holder of 140 patents who established the Kettering Research Foundation, the Kettering Cancer Center and Kettering University once said when talking about challenges, “This problem, too, will look simple after it is solved.”)