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OPINION	:	No. 83-902
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of	:	<u>JULY 24, 1984</u>
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THE HONORABLE JAMES P. FOX, DISTRICT ATTORNEY, SAN MATEO COUNTY, has requested our opinion on the following question:

Is there a general legal duty for California judges and peace officers to report persons to the Immigration and Naturalization Service who they learn have entered the United States illegally in violation of title 8, United States Code section 1325?

CONCLUSION

There is no general affirmative legal duty in the sense of a legally enforceable obligation incumbent on peace officers and judges in California to report to the Immigration and Naturalization Service (INS) knowledge they might have about persons who entered the United States by violating title 8, United States Code section 1325, but such public officials may report that knowledge if they choose to do so unless it was learned in a process made confidential by law.

ANALYSIS

Section 1325 of title 8 of the United States Code makes it a first-time misdemeanor for an "alien"¹ to enter the United States illegally—that is (a) at any undesignated time or place, or (b) by eluding examination or inspection by immigration officers, or (c) through willfully false or misleading misrepresentations or the willful concealment of a material fact.² A subsequent violation of the section is declared a felony. (8 U.S.C. § 1325; compare *id.*, § 1326 (entering, attempting to enter, or *being found* in this country after once having been arrested and deported).) A foreign national who has entered the country in violation of the section, or whose presence here is otherwise illegal, is subject to *civil* deportation proceedings under the Immigration and Nationality Act (8 U.S.C. § 1101 et seq.). (8 U.S.C. § 1251(a)(2)³; *Ramirez v. Immigration & Naturalization Service* (9th Cir. 1977) 550 F.2d 560, 563; *Bufalino v. Immigration and Naturalization Service* (3rd Cir. 1973) 473 F.2d 728, 739.)

We are asked whether officials of the state or of local government in California, such as peace officers and judges, who in the course of the performance of their official duties come to learn that a person is in the United States "illegally" because of having violated section 1325 have a general legal duty to report that knowledge to the

¹ Title 8, United States Code section 1101(a)(3), defines the term "alien" as "any person not a citizen or national of the United States." We will sometimes substitute the term "foreign national" herein.

² Section 1325 provides:

"Any alien who (1) enters the United States at any time or place other than as designated by immigration officers, or (2) eludes examination or inspection by immigration officers, or (3) obtains entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact, shall, for the first commission of any such offenses, be guilty of a misdemeanor and upon conviction thereof be punished by imprisonment for not more than six months, or by a fine of not more than \$500, or by both, and for a subsequent commission of any such offenses shall be guilty of a felony and upon conviction thereof shall be punished by imprisonment for not more than two years, or by a fine of not more than \$1,000, or both."

³ The Immigration and Nationality Act (I.N.A.) posits a comprehensive body of legislation providing for uniform federal control over the admission, exclusion, and deportation of aliens within the United States. (See generally Auerbach & Harper, Immigration Laws of the United States, 21-23 (3d ed. 1975).) Under it, "there are numerous reasons why a person could be illegally present in the United States without having violated section 1325 [I.N.A., § 241(a)]. Examples include expiration of a visitor's visa, change of student status, or acquisition of prohibited employment." (*Gonzales v. City of Peoria [Arizona]* (9th Cir. 1983) 722 F.2d 468, 476.) This opinion is confined to violations of that section.

federal Immigration and Naturalization Service ("the INS"). We conclude that while there is no legally enforceable obligation imposed on them to do so, as a matter of comity and good citizenship such officials of the state or of local government *may* report knowledge they might have of a foreign national present in the United States following an entry in violation of section 1325 *unless* that knowledge is made confidential by law.

Needless to say, it behooves us at the outset to define our understanding of what is meant by a "general legal duty." The task is not easy because the term "duty" has been used to serve a variety of purposes and it therefore comes with no consistent or singular meaning. There are, to be sure, clear situations in which persons are specifically *statutorily* compelled to take certain actions which create an affirmative duty for them to do so. (E.g., Pen. Code, §§ 11165-11174 (reporting victims of child abuse); Veh. Code, § 410 (reporting persons with "blackout" disorders); Civ. Code, § 19512 (landlord mitigating damages); and see especially Health & Saf. Code, § 11369, fn. 8, *post* (reporting persons arrested for certain drug-related offenses to INS where arresting authority has reason to believe they are not citizens).) But they barely touch the "tip of the iceberg" of defining the obligations, legal and other, of community interaction. That need has been filled by the notion of "duty" which has been developed by the courts as a means, peculiar to the "common law," of defining the obligations and the consequences of social interaction. (Prosser, *Torts* (4th ed. 1971) pp. 325, 338-340.) Unfortunately, even there the notion has no inherent meaning of its own but rather has been used to serve as a "tail to wag the dog," an "artificial" and "conclusionary" statement "not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say [what is due to or from a particular person in particular circumstances]." (Prosser, *Torts*, *supra*, § 53, pp. 325-326.)⁴

⁴ Prosser is less than sanguine that the term "duty" can ever be defined in negligence cases:

"The statement that there is or is not a duty begs the essential question—whether the plaintiff's interests are entitled to legal protection against the defendant's conduct. It is therefore not surprising to find that the problem of duty is as broad as the whole law of negligence, and that no universal test for it ever has been formulated. It is a shorthand statement of a conclusion, rather than an aid to analysis in itself. It is embedded far too firmly in our law to be discarded, and no satisfactory substitute for it . . . has been devised.

"There is little analysis of the problem of duty in the courts. Frequently it is dealt with in terms of what is called 'proximate cause,' usually with resulting confusion. In such cases, the question of what is 'proximate' and that of duty are fundamentally the same: whether the interests of the plaintiff are to be protected against the particular invasion by the defendant's conduct." (Prosser, *Torts*, *supra*, 53, pp. 325-326; fns. omitted.)

Generally though, the notion of "duty" may be thought of as an obligation the performance of which is enjoined, required, or compelled by some law, order, usage, custom, or moral injunction which may or may not bring a corresponding sanction to bear on its subject for nonperformance.⁵ We say "may or may not" because the California cases which have explored the notion of "duty" have done so in at least two different situations. The first involves a line of cases which have used the term as a vehicle to characterize the propriety of one person's action or inaction in a particular situation for the purpose of imposing or absolving him or her of *liability*.⁶ Where such a duty is found, its exercise is mandatory and on failure thereof, legal sanction follows as a consequence. We characterize that type of duty herein as an "affirmative" or an "imperative" legal duty. In the second line of cases the notion of duty has been mentioned, often more loosely than not, as an adjunct in describing or discussing a *right* a person may voluntarily exercise, the consequences of which become an issue either with respect to him or with respect to another.⁷ This type of duty is "nonimperative"; since one's exercise of the corresponding

⁵ Webster's *Third New International Dictionary* (1971 ed. at p. 705) defines a duty both as "2a. obligatory tasks, conduct, service, or functions enjoined by order or usage according to rank, occupation, or profession" and as "3a. behavior required by moral obligation, demanded by custom, or enjoined by feelings of rightness or fitness."

⁶ See, e.g., *Tarasoff v. Regents of University of California* (1976) 17 Cal.3d 425, 435 (duty of psychiatrist to warn identifiable foreseeable victims of patient's possible conduct; *Landeros v. Flood* (1976) 17 Cal.3d 399, 414 (duty of physician to report child abuse.)

⁷ See, e.g., *Barela v. Superior Court* (1981) 30 Cal.3d 244 (eviction following tenant's report to police that landlord had committed a crime founds defense of retaliatory eviction; "Citizens have a *right and a duty* to report violations of the law to the authorities" (at p. 253); "It is *the duty and the right*, not only of every peace officer of the United States, but of every citizen, to assist in prosecuting, and in securing the punishment of any breach of the peace of the United States." [Citation]" (at p. 252)); *Custom Parking, Inc. v. Superior Court* (1982) 138 Cal.App.3d 90, 101 (defense of retaliatory eviction found in "tenant's *exercise of his duty* to testify truthfully," and not to perjure himself in an action involving the landlord); *People v. McKinnon* (1972) 7 Cal.3d 899, 914 ("a common carrier, no less than any other citizen, *has the right, indeed the duty*, not to knowingly allow its property to be used for criminal purposes"; carrier has right to open and inspect a package which it suspects contains contraband without an illegal search and suppression of evidence therefrom ensuing); *People v. Cohn* (1973) 30 Cal.App.3d 738, fn. 9 ("Citizens have the *duty to report unlawful activities* to the proper authorities"; citizen taking contraband from defendant's garage to police was not an illegal search); cf. *United States v. Bumbola* (2d Cir. 1932) 23 F.2d 696, 698 (New York State Troopers not only have the right, but ". . . it is [their] *duty* to arrest without a warrant any person committing an offense against the laws of the United States in their presence [e.g., violations of federal Prohibition Act]"); *Kilgore v. Younger* (1982) 30 Cal.3d 770, 779-781 (official duty of attorney general to discuss law enforcement issues with press; defamation suit dismissed). And see *Tomlinson v. Pierce* (1968) 178 Cal.App.2d 112, 116-117 (authority of peace officer to arrest under Pen. Code, 836 is discretionary; "if he 'may' arrest, he may [also] 'not' arrest" and no sanction or liability attaches for breach of duty if he does not).)

"right" is discretionary, sanction does not follow if it is not performed. (Cf. *Doeg v. Cook* (1899) 126 Cal. 213, 216.) If our question is understood to refer to a duty in the first sense, i.e., a positive obligation imposed upon judges or peace officers of the state or local government, their exercise of which can be compelled and their failure of which to exercise will bring an appropriate legal sanction, we conclude that there would be no general legal duty as such to report persons to the Immigration and Naturalization Service who they learn have entered the United States in violation of title 8 United States Code section 1325. However, if the question asks of a duty as an adjunct to a right, the exercise of which is discretionary with the holder, such as the right and "duty" to vote, we would conclude that as a matter of comity and good citizenship those officials *may* inform the INS of a foreign national's presence in the United States following an entry in violation of section 1325, unless of course that knowledge is made confidential by law.

We are unaware of any California statutory authority which would impose on our California public officials an affirmative legal duty to report persons who they know have violated section 1325 to the INS the way, for example, section 11369 of the Health and Safety Code imposes a duty to notify that agency upon an arresting agency having reason to believe that any person arrested for certain enumerated drug (controlled substances) related offenses may not be a citizen.⁸ The duty, if any, would come from a duty to assist in the enforcement of the federal Immigration Act.

In that regard, as we had occasion to discuss recently, state and local law enforcement officials do have the authority to assist in the enforcement of federal *criminal* laws within their jurisdiction unless, of course, federal law provides otherwise. (66 Ops.Cal.Atty.Gen. 497 (1983) (CHP assisting federal officials enforce 18 U.S.C.A. § 795 (photographing classified material) and 50 U.S.C.A. § 797 (entry into a restricted National Defense Area)); accord *Gonzales v. City of Peoria [Arizona]*, *supra*, 722 F.2d at 474.) "Where [those] enforcement activities do not impair federal regulatory interests [such] concurrent enforcement activity is authorized." (*Gonzales v. City of Peoria [Arizona]*, *supra*.) The rule finds its underpinnings in principles of our national federalism: since the Supremacy Clause of the federal Constitution (art. VI, § 2) declares the laws of the United States "[to] be the supreme law of the land," they "are as much a part of the law of every state as its own local laws . . . ' [citation] . . . 'as though expressly written into them."

⁸ Health and Safety Code section 11369 provides:

"When there is reason to believe that any person arrested for violation of Section 11350, 11352, 11353, 11355, 11357, 11360, 11361, 11363, 11366, 11368 or 11550, may not be a citizen of the United States, the arresting agency shall notify the appropriate agency of the United States having charge of deportation matters."

The use of the word "shall" in section 11369 indicates that its directive is mandatory. (Health & Saf. Code, § 16.)

[Citations.]" (66 Ops.Cal.Atty.Gen., *supra*, at 500.) Thus with respect to local enforcement of the federal immigration laws, and particularly with regard to section 1325 itself, it has been specifically held that since the supremacy clause is "a two edged sword, . . . in the absence of a limitation, the states are *bound* by it to enforce violations [thereof]." (*People v. Barajas* (1978) 81 Cal.App.3d 999, 1006 (original emphasis); accord *Gonzales v. City of Peoria [Arizona]*, *supra*, at 474, 475 (§ 1325); I.L. 77-116, *supra*, at 4-6 (1325); I.L. 73-123 (Aug. 8, 1973) at 4, 8 (§ 1325); cf. *United States v. Mallides* (S.D. Cal. 1972) 339 F.Supp. 1, 2-3 (§ 1325 + 2 (aiding and abetting).)

In situations involving the "enforcement" of the federal immigration statutes (or any federal statutes) by state or local officials, absent a federal prescription for or a limitation on the mode and manner of that enforcement, the propriety thereof is determined by reference to state law, insofar as it does not conflict with the federal Constitution. (*Gonzales v. City of Peoria [Arizona]*, *supra*, at 477; *United States v. Mallides*, *supra*, at 2-3; *People v. Barajas*, *supra*, at 1006, citing *Ker v. California* (1963) 374 U.S. 23, 37; cf. 66 Ops.Cal.Atty.Gen., *supra*, at 500 and cases collected thereat.) Inasmuch as federal law does not impose a limitation on *who* may "enforce" section 1325, or on the mode of its enforcement (*Gonzales v. City of Peoria [Arizona]*, *supra*, at 475 approving *People v. Barajas*, *supra*, at 1006; cf. *United States v. DiRe* (1948) 332 U.S. 581, 591), we would look to California law to determine the role state and local officials in California may play in that regard. (*People v. Barajas*, *supra*; *United States v. Mallides*, *supra*, at 3; I.L. 77-116, *supra*, at 6; I.L. 73-123, *supra*, at 4; cf. *Gonzales v. City of Peoria [Arizona]*, *supra*, at 475-476 (Arizona law in Arizona); 66 Ops.Cal.Atty.Gen., *supra*, at 500 (California law determines enforcement role of CHP vis-a-vis 50 U.S.C.A. § 797 & 18 U.S.C.A. § 795).) When we do though we see that while peace officers and judges (magistrates)⁹ might be given authority to arrest, without a warrant, persons who have violated section 1325 *in their presence*¹⁰, and while they might summon INS officials to aid in that endeavor (Pen.

⁹ Section 7(a) of the Penal Code provides that the term "magistrate" signifies any of those persons listed in section 808 thereof. The latter section provides that judges of the Supreme Court, the courts of appeal, the superior courts, the municipal courts and the justice courts are magistrates.

¹⁰ Section 836 of the California Penal Code provides that a *peace officer* may arrest a person without a warrant "whenever he has reasonable cause to believe that the person has committed a public offense in his presence." Under that authority a California peace officer could arrest persons who he has reasonable cause to believe have violated section 1325 *in his presence*. (*People v. Barajas*, *supra*, 81 Cal.App.3d 999; I.L. 77-116, *supra*, I.L. 73-123, *supra*; cf. *Gonzales v. City of Peoria [Arizona]*, *supra*, 722 F.2d at 476 (Arizona law, city police); 66 Ops.Cal.Atty.Gen., *supra*, at 500 (CHP for 50 U.S.C.A. § 797 & 18 U.S.C. § 795); cf. Pen. Code, § 17 & *People v. Campbell* (1972) 27 Cal.App.3d 849, 854 ("public offense" includes misdemeanors).) Similarly, since section 838 of the Penal Code provides that a magistrate (cf. *id.*, §§ 7(a), 808) may orally order a peace officer or private person to arrest anyone committing a public offense *in his or her presence*, California judges thereunder would also have authority to have persons arrested who violate

Code, § 839), that cannot be parlayed into a *general* affirmative and sanctionable legal *duty* to report a person to the INS who is illegally present in the United States through violating the section.

Aside from the notion that the authority of peace officers and judges to arrest is *discretionary*, which means that there could be no "flat and unequivocal [sanctionable] duty on the[ir] shoulders to [do so]" (*Tomlinson v. Pierce*, *supra*, 178 Cal.App.2d at 116-117; see fn. 10, *ante*; cf. fn. 7, *ante*), the problem with extrapolating an affirmative legal duty for these public officials to report knowledge that a person might be in the United States illegally through violating section 1325 from their authority to enforce the section by effecting a warrantless arrest of persons who violate it in their presence is that the offense for which they would arrest is not one of unlimited duration. It "begins with [a] person's physical presence in the United States free from official restraint, and ends when the person reaches a place of temporary safety." (I.L. 77-116, *supra*, at 9-11; accord *Gonzales v. City of Peoria [Arizona]*, *supra*, 722 F.2d at 476; *United States v. Rincon-Jimenez* (9th Cir. 1979) 595 F.2d 1192, 1194 (offense committed at time of entry); *United States v. Oscar* (9th Cir. 1974) 496 F.2d 492, 493-494 ("entry" = physical presence + freedom from official restraint); cf. *Mallides v. United States*, *supra*, 339 U.S. 1, 4 (entry was completed before appellant met aliens in San Diego to transport them to Los Angeles via Oceanside).) A foreign national therefore commits no "continuing" violation of the section merely by being present in this country. (*United States v. Rincon-Jimenez*, *supra*, at 1194; compare § 1326, *supra*.) Since the provisions of the California Penal Code which would authorize our public officials to arrest a person for violating the section without a warrant require that the offense actually have been committed *in their presence* (see fn. 10, *ante*), "as a practical matter the limited duration of the . . . offense [would mean] that [they would be] authorized to make arrests for [it] without a warrant only near the immediate area of the border or its functional equivalent" (I.L. 77-116, *supra*, at 9) which would not be the case in the scenario presented. Since there the offense of illegal entry would already have been completed elsewhere when our California official would learn of it, it perforce would not occur in *the presence of* the official, and he or she would have no authority to

section 1325 *in their presence*. It is thus apparent that these California "officers" (peace officers, judges and agency employees *qua* private citizens) would have the authority to *arrest* a person, without a warrant, for entering the United States illegally in violation of section 1325 when that offense *is committed in their presence*. Moreover it is important to note that even then the authority of the peace officer, or the judge, to arrest would be discretionary ("if he 'may' arrest, he may [also] 'not' arrest"); as such, there would not be any "flat and unequivocal" affirmative and imperative sanctionable legal duty upon the shoulders of the officer [or the judge] to [do so]." (*Tomlinson v. Pierce*, *supra*, 178 Cal.App.2d at 117; and see Gov. Code, § 820.2 (public employee not liable for act or omission in exercise of discretion), § 846 (public employee not liable for injury caused by failure to make an arrest).)

make a warrantless arrest for its violation.¹¹ (I.L. 77-116, *supra* at 9, 11, 13-14; *United States v. Mallides*, *supra*, 339 U.S. at 4; cf. *United States v. Rincon-Jiminez*, *supra*, 595 F.2d at 1194.)

But what of a duty to report the foreign national nevertheless? It is true that subsequent to an illegal entry the illegally-entering foreign national is not yet "home free" because he or she is still subject to deportation from this country.¹² (8 U.S.C. §§ 1251, 1252; *United States v. Rincon-Jiminez*, *supra*, 595 F.2d at 1194.) But those (deportation) proceedings are *civil*, not criminal, in nature (*Ramirez v. Immigration & Naturalization Service* (9th Cir. 1977) 550 F.2d 560, 563; *Bufalino v. Immigration and Naturalization Service*, *supra*, 473 F.2d at 739) and, as the Ninth Circuit has recently taught, there is no duty for state and local officials to enforce the *civil* aspects of the federal immigration laws. (*Gonzales v. City of Peoria [Arizona]*, *supra*, 722 F.2d 468.) Indeed they may well be preempted from doing so.

Gonzales v. City of Peoria [Arizona], *supra*, 722 F.2d 468, involved the propriety of an arrest made by Arizona local officers for violations of section 1325 under a state statute which authorized a peace officer to arrest a person, without a warrant, "when he has probable cause to believe a misdemeanor has been committed and probable cause to believe the person to be arrested has committed the offense." (Ariz. Rev. Stats. (1978) B-3883(4).) (722 F.2d at 476.) It was contended that the regulation of immigration was an exclusive federal power and that the structure of the Immigration and Naturalization Act was such as to evidence a congressional intent to preclude local enforcement of the Act's criminal and civil provisions. (*Id.*, at 474).

The court reviewed when preemption of enforcement of federal statutes by others than federal enforcement agencies occurs:

"[F]ederal regulation of a particular field should not be presumed to preempt state enforcement activity 'in the absence of persuasive reasons—either that

¹¹ Even if California law departed from the common law and permitted certain officials to arrest for a misdemeanor or public offense when they have "probable cause to believe a misdemeanor [or public offense] has been committed [outside their presence] and probable cause to believe the person to be arrested has committed the offense" (see, e.g., Ariz. Rev. Stat. Ann., 13-3883(4) (1978)), mere presence in the country would not "without more provide probable cause to arrest [a person] for the criminal violation of illegal entry." (*Gonzales v. City of Peoria [Arizona]*, *supra*, 722 F.2d at 477.) As noted before, there are numerous reasons why a person could be illegally present without having violated that section. (*Id.*, at 476.)

¹² The possibility also exists of arrest upon a federal arrest warrant being secured for the criminal violation of section 1325.

the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained.' *DeCanas v. Bica*, 424 U.S. 351, 356 (1976), quoting *Florida Avocado Growers [v. Paul]* 373 U.S. [132] at 142 [(1963)]. [s] . . . To conclude preclusion was the legislative intent, we would have to find that 'complete ouster of state power . . . was "the clear and manifest purpose of Congress"' *De Canas*, 424 U.S. at 357 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). . . . [] . . . [A]n intent to preclude local enforcement may be inferred where the system of federal regulation is so pervasive that no opportunity for state activity remains. *Id.*" (722 F.2d at 474.)

The court found that not to have been the case with respect to local enforcement of the *criminal provisions* of the Immigration and Naturalization Act. (722 F.2d at 475, 477.)¹³ It therefore concluded that enforcement by state and local officers *of those provisions* was authorized (*id.*, at 474, 477) and held that under the aforementioned Arizona statute that state's peace officers could enforce them and that their arrests made thereunder were legal. (*Id.*, at 476.)

The court found the case to be otherwise with respect to local enforcement of the *civil aspects* of the Act. There the court *assumed* "that the *civil* provisions of the Act regulating authorized entry, length of stay, resident status, *and deportation* [did] constitute such a pervasive regulatory scheme, as would be consistent with the *exclusive* federal power over immigration." (*Id.*, at 474-475.) From it one could rightly infer that a "complete ouster of state power [to enforce the Act's civil aspects] . . . was the clear and manifest purpose of Congress." (*De Canas v. Bien, supra*, 424 U.S. at 357 quoting *Rice v. Santa Fe Elevator Corp.* (1947) 331 U.S. 218, 230.)¹⁴ Accordingly, while the court

¹³ "The statutes relating to that element [i.e., the regulation of criminal activities by aliens] are few in number and relatively simple in their terms. They are not, and could not be, supported by a complex administrative structure. It therefore cannot be inferred that the federal government has occupied the field of criminal immigration enforcement." (722 F.2d at 475.)

¹⁴ Certainly enforcement of the civil provisions of the Act are supported by a "complete administrative structure" of specially trained personnel. The Immigration and Naturalization Act assigns enforcement of the immigration laws to the Attorney General (8 U.S.C. § 1103), who has delegated that duty to the Immigration and Naturalization Service, a federal agency with national jurisdiction organized under the Department of Justice. (8 C.F.R. §§ 1.1-499.) The INA authorizes the Attorney General to utilize such officers and employees of the Department of Justice and INS as he may appoint in order to administer the immigration laws. (8 U.S.C. § 1103.)

The congressional purpose "to imbue immigration investigators with rather broad investigatory powers" (*Cheug Tin Wong v. INS* (D.C. Cir. 1972) 468 F.2d 1123, 1126, fn. 1) and the Supreme Court's approval of the exercise of those powers have depended largely on the extensive training and expertise of those officers. (*United States v. Martinez-Fuerte* (1976) 428 U.S. 543, 563 n. 16;

concluded that Arizona law could and did authorize its local police to enforce the *criminal* provisions of the Immigration and Naturalization Act, it "firmly emphasize[d]" that that authorization "was limited to *criminal* violations." (722 F.2d at 476.) Thus the court said the "arrest of a person for *illegal presence* [a *civil* violation] would exceed the authority granted [Arizona local] police by state law." (*Id.*, at 476.)

Gonzales thus cautioned of the need to carefully distinguish between civil (e.g., illegal presence) and criminal (e.g., illegal entry) violations of the federal immigration laws (722 F.2d at 476, 477)¹⁵ and circumscribed local enforcement of them to the latter. (*Id.*, at 476.)

California public officers, we have seen, do not share the latitude accorded their Arizona brothers and sisters of being able to arrest without a warrant for misdemeanors committed outside their presence. (Compare Cal. Pen. Code, §§ 836, 837, 838, with Ariz. Rev. Stats. (1978) § 13-3883(4).) Since the offense of illegal entry in the situation posited, as well as in all but "rare circumstances" (I.L. 77-116, *supra*, at 13), would have terminated *before* our California public official learns of its occurrence, he or she would lack the authority to make a warrantless arrest therefor. (I.L. 77-116, *supra*, at 9, 11, 13-14.) And now, as *Gonzales* teaches, he or she would also be without authority to enforce (via deportation) the existing *civil* violation (of illegal presence). (722 F.2d at 476.) Given that want of authority to enforce either aspect of the immigration laws in the situation posed, there can be no general affirmative legal duty with sanction following nonperformance incumbent on California public officials to do so or to see that they are enforced by others with requisite authority. We therefore conclude that those California officials have no such duty to report to the Immigration and Naturalization Service knowledge they might have about persons being present in the United States who are so by having violated title 8, United States Code section 1325.¹⁶

United States v. Brignoni-Ponce (1975) 422 U.S. 873, 884-885.) In many instances, local police officers would lack comparable expertise or training. (*Gonzales v. City of Peoria [Arizona]*, *supra*, 722 F.2d at 477; I.L. 77-116, *supra*, at 12.)

¹⁵ The term "illegal alien", noted the court, obscures that distinction when used to indiscriminately describe both the person who has entered the country illegally (a *criminal* violation under 1325) and the person who is illegally present in the United States (which is only a *civil* violation). (722 F.2d at 476.) The former, as we have seen, does not presuppose the latter.

¹⁶ Our attention has been invited to title 8, United States Code section 1324(a)(3) which makes it a felony for any person to "willfully or knowingly conceal[], harbor[] or shield[] from detection . . . in any place . . . any [illegal] alien." It is pointed out that the section, by its terms and as construed by the courts, is comprehensive. (See, e.g., *United States v. Rubio-Gonzales* (5th Cir. 1982) 674 F.2d 1067, 1073, fn. 5 (*any* conduct which tends to facilitate an alien's remaining in the United States illegally); *United States v. Acosta de Evans* (9th Cir. 1976) 531 F.2d 428, 430 ("the purpose of the section is to keep unauthorized aliens from entering *or remaining* in the country");

In so concluding we do not mean to suggest that a California peace officer or judge *may* not report such knowledge to the INS for its agents to take appropriate action (e.g., 8 U.S.C. § 1357).¹⁷ As we now proceed to explain, it is still their "business" and they still have a right and a "duty" in the other sense of that term to do so.

No less an authority than the High Court has said that "It is the *duty and the right*, not only of every peace officer of the United States, but of every citizen, to assist in prosecuting, and in securing the punishment of *any breach of the peace of the United States*" (*In re Quarles and Butler* (1895) 158 U.S. 532, 535) and has called it "an act of responsible citizenship for individuals to give whatever information that they may have to aid law enforcement." (*Miranda v. Arizona* (1966) 384 U.S. 436, 477-478.) Our own Supreme Court has said likewise:

"The important public policy asserted by petitioner is clear. *Citizens have a right and a duty to report violations of the law to the authorities*. The effective enforcement of this state's criminal laws depends upon the willingness of victims and witnesses to report crime and to participate in the criminal justice process." (Emphasis added.)

(*Barela v. Superior Court, supra*, 30 Cal.3d at 253; see also *People v. McKinnon, supra*, 7 Cal.3d at 914, fn. 6 quoting with approval the conclusion of the President's Commission on Law Enforcement and Administration of Justice.¹⁸)

United States v. Cantu (5th Cir. 1977) 557 F.2d 1173, 1180 (words to be broadly inclusive not restrictive); *United States v. Lopez* (2d Cir. 1975) 521 F.2d 437, 441 (its purpose was "to strengthen the law generally in preventing aliens from entering or remaining in the United States illegally").) Despite its comprehensive prohibition and manifest purpose however, the fact nonetheless remains that the section only prohibits *affirmative* types of conduct and does not deal with nonactivity. One cannot eke a duty to act out of a prohibition on activity, no matter how broad a spectrum it might cover.

¹⁷ Section 1357(a)(1) of the INA authorizes any officer or employee of the INS to "interrogate any alien . . . as to his right to be or remain in the United States." The foreign national may then be arrested pending a deportation hearing. (*Id.*, 1252.)

¹⁸ "That every American should cooperate fully with officers of justice is obvious [T]he complexity and anonymity of modern urban life, the existence of professional police forces and other institutions whose official duty it is to deal with crime, must not disguise the need—far greater today than in the village societies of the past—for *citizens to report all crimes or suspicious incidents immediately; to cooperate with police investigations of crime; in short, to "get involved."* (*The Challenge of Crime in a Free Society*, Report by the President's Commission on Law Enforcement and Administration of Justice (1967) p. 288.)" (Emphasis added.)

This "duty" of "all citizens to assist the . . . authorities in maintaining the peace and in suppressing crime . . . goes back hundreds of years in the common law"¹⁹ (*People v. Ford* (1965) 234 Cal.App.2d 480, 487) and "California has a long history of protecting those citizens who [exercise their right and perform a nonimperative civic duty] to report violations of the criminal laws." (*Barela v. Superior Court, supra*, 30 Cal.3d at 252, citing *Ball v. Rawles* (1892) 93 Cal. 222, 228.) In short, "It is for the best interests of society that those who offend against the laws shall be promptly punished, and that any citizen who has good reason to believe that the law has been violated shall have the *right to cause the arrest* of the offender." (Emphasis added.) Indeed, peace officers have a special "duty" to do so. As was said in *People v. West* (1956) 144 Cal.App.2d 214:

"Police officers are guardians of the peace and security of the community and are concerned with criminals in a complex society—'. . . and the efficiency of our whole system, designed for the purpose of maintaining law and order, depends upon the extent to which such officers perform their duties and are faithful to the trust reposed in them. *Among the duties of police officers are those of preventing the commission of crime, of assisting in its detection, and of disclosing all information known to them which may lead to the apprehension and punishment of those who have transgressed our laws.* . . . It is for the performance of these duties that police officers are commissioned and paid by the community, . . .' (*Christal v. Police Com.*, 33 Cal.App.2d 564, 567.)" (144 Cal.App.2d at 220-221; emphasis added.)

As we have mentioned, although a foreign national's crime of illegally entering this country by violating section 1325 may be "complete" on entry, the consequences of his/her having done so vis-a-vis the INA are not. The foreign national would still be subject to arrest and apprehension under a federal court-issued arrest warrant for the criminal violation of illegal entry and/or a federal "administrative" arrest warrant pending deportation itself for his or her illegal presence (*id.*, §§ 1251(a)(2), 1252; 1357(a); *United States v. Rincon-Jiminez, supra*, 595 F.2d at 1194). The Immigration and Naturalization Act is the law of this land and it is an "act of responsible citizenship" and the "duty" and the right of every citizen to assist in prosecuting and securing punishment

¹⁹ Witness the remarks of Sir Frances Bacon in the Countess of Shrewsbury's Trial in 1612:

"You must know that all subjects, without distinction of degrees, owe to the king tribute and service, not only of their deed and hand, but of their knowledge and discovery. *If there be anything that imports the king's service, they ought themselves undemanded to impart it;* much more, if they be called and examined, whether it be of their own fact or of another's, they ought to make direct answer." (Emphasis added.)

(2 How.St.Tr. 769, 778, as quoted in 8 *Wigmore on Evidence* (3d ed.) 2190, p. 60, and cited and requoted in *People v. Ford, supra*, 234 Cal.App.2d at 488, fn. 1.)

for its breach by giving whatever information he or she may have in that regard to aid those who enforce it. (Cf. *Miranda v. Arizona*, *supra*, 384 U.S. 436; *In re Quarles*, *supra*.) If a California judge or peace officer has knowledge that a foreign national is in this country illegally through violating section 1325, assuming such knowledge has not been learned in a process that is confidential or is otherwise made confidential by law (e.g., Welf. & Inst. Code, § 10850; cf. Evid. Code, § 1040; but see 62 Ops.Cal.Atty.Gen. 70 (1979); *In re Lynna B.* (1979) 92 Cal.App.3d 682, 705 (need for information may outweigh need for confidentiality)), he or she would have such a "duty" to so impart it. But that "act of good citizenship" is different from an affirmative "duty" incumbent on the official to relay the information, which "duty" may be sanctioned if not performed. (Cf. *Doeg v. Cook*, *supra*; *Tomlinson v. Pierce*, *supra*, 178 Cal.App.2d 112, 116-117.)

Accordingly we conclude that there is no general affirmative legal duty imposed on California judges and peace officers to report knowledge they might have to the INS of persons being in the United States after having violated section 1325 but that such public officials may report that knowledge if they choose to do so unless it was learned in a process made confidential by law.
