

Arizona's New Anti-immigrant Law and Federal Immigration Reform

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Arizona's Governor Jan Brewer with the press after the SB 1070 District Court hearing in Phoenix.

Arizona's recent legislation creating several immigration-related offenses occurs against the backdrop of long-standing U.S. ambivalence about immigration, particularly in times of economic stress. As in the past, concerns about immigrants "stealing" U.S. jobs and creating a drain on public resources are mixing with fears that the essential character of the republic will change under the pressure of too much immigration. Such fears of inassimilable "others" are a reminder that race, despite its lack of empirical basis, continues to play a role in national identity, and therefore in debates about who belongs. Racial fears have long underlain the sense of crisis and occasional violence that large-scale immigration provokes. What is new about the current wave of anti-immigrant anxiety is the widespread use

of local legislation to express anger at immigrants without legal status and a desire for more restrictive policy at the national level. The trend appears to be gathering steam. Politicians in nearly 20 states have expressed interest in adopting a version of Arizona's law.

SB 1070 creates several new misdemeanors, including working or seeking work without legal status and transporting an immigrant without legal status while engaged in other criminal activity. During any stop, police must ask about immigration status ("when practicable") if their suspicions are aroused. Racial profiling is prohibited, but there is no statutory guidance as to what constitutes reasonable suspicion of illegal status and no standardized training for police officers. Even before the law was scheduled to take effect, there were substantial differences in interpretation among police agencies over how to handle cases involving juveniles and asylum

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seekers and over whose status must be checked. Any law-enforcement agency that resists prioritizing immigration enforcement in its day-to-day work is liable to a citizen-initiated lawsuit for damages.

Arizona's new law has been widely and rightly condemned for stirring racial antagonisms and creating an impossible job for local police. Seven lawsuits, including one by the federal government, have been filed to block its enforcement on constitutional grounds. Arizona's law may not survive these legal challenges, but that does not appear to matter to the law's defenders, who dismiss the lawsuits as "pure politics." They appear undeterred by a federal judge's decision to temporarily block enforcement of key provisions of the law, including the requirement that police inquire about immigration status. One can assume that the goals of the law's creators extend beyond transforming law enforcement in Arizona to changing the national dialogue about the control of illegal immigration. The Arizona law makes "attrition through enforcement" the basis of its policy. The buzz created by the law helps to publicize this idea, while at the same time pushing proposals for eventual citizenship to the background.

The adoption of SB 1070 should not come as a surprise to observers of Arizona's escalating campaign against immigrants without legal status and the federal government's shifting stance toward enforcement of its immigration laws. Over the past 15 years, the federal government has progressively loosened its hold on immigration enforcement without overseeing the process effectively. It has created a variety of programs to partner with local police. The federal government's own enforcement efforts have included some legally indefensible actions against immigrants. Most significantly, the federal approach has become harsher. The list of crimes that result in deportation of legal immigrants has grown longer; prosecutions for immigration offenses are at an all-time high, and so is the use of detention. On the border, Operation Streamline facilitates the charging and criminal conviction of migrants caught in the act of entering the United States illegally. From this perspective, Arizona has simply accepted the federal government's implicit invitation to come down hard on immigrants without legal status, while taking the approach a few steps further.

Many reasons lie behind Arizona's decision to adopt a hard-line stand toward illegal immigration. They include an ugly and obvious racism that regularly finds expression in blogs and demonstrations, but also a sense of injury at the federal government's purported indifference toward the costs

that Arizona has borne as a border state. The flow of migrants into and across Arizona has increased dramatically in the past decade as easier routes through urban areas in other states have been cut off by federal initiatives like Operation Gatekeeper and Operation Hold the Line. Arizona has a large population of retired persons who have come from elsewhere in the United States, which contributes to a weak sense of history and place and a high potential for anxiety about non-English speaking foreigners. Enormous differences in wealth and education also separate voters from immigrants without legal status. Plus, there are practical political considerations. The state has an estimated 500,000 immigrants without legal status in a population of approximately 6.5 million people. New immigrant voters could challenge the conservative Republican domination of the state. A campaign that targets vulnerable people who cannot vote also helpfully diverts attention from other pressing problems in the state, while at the same time positioning its leaders as willing to stand up

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to the federal government, something that always plays well in Arizona.

The population that is the target of SB 1070 is largely Mexican. Most either neglected or were unable to obtain permission to migrate legally when they came to Arizona for jobs in agriculture, construction, restaurants, hotels, and factories. Others who will be affected by the law include U.S. citizens: for example, children born here of parents who lack legal status, and children who were brought to Arizona at a young age, the so-called 1.5 generation. This population of mixed legal status is visible and visibly disliked by some Arizonans, who nevertheless rely on them for low-wage services. These are not the only immigrants without legal status in the state. Arizona also attracts Canadians and some Europeans who violate the terms of their stays by obtaining jobs or moving in. These "non-visible" migrants, however, do not appear to be a concern of either Arizona lawmakers or the general public.

PLENARY POWER AND THE DEVOLUTION OF ENFORCEMENT AUTHORITY

The power to set immigration policy rests firmly at the national level in the United States, as it does in every modern nation. At the same time, the constitutional system also protects local authority from federal intrusion in many matters, including policing. This division of authority has not prevented federal immigration authorities from working with local police on an *ad hoc* and informal basis when the occasion demands. Local police have also sometimes initiated contacts with federal immigration authorities to seek deportation of criminal migrants, a strategy that was popular in the Prohibition era as a way of dealing with foreign-born gangsters. Not until 1996, however, did Congress formally recognize this relationship, for the first time offering a specific opportunity for local police to partner with federal authorities to enforce immigration law.

In 1996, Congress adopted two statutes with the idea that local police could be a “force multiplier” in the effort to root out criminal migrants from the nation’s interior. The constitutional separation of powers meant that all that could be offered was an invitation to participate: the federal government cannot require local police to enforce its laws. The Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) authorized training of local and state police to enforce federal immigration laws. The program that resulted and the agreements reached have become known informally as “287g,” a reference to the location of the law in the Immigration and Nationality Act. The second 1996 law, the Anti-Terrorism and Effective Death Penalty Act, amended the Immigration and Nationality Act to clarify that local police have the authority to arrest previously deported non-citizen felons. At the operational level, federal immigration officers are increasingly engaged with local police. A variety of partnering programs are now available under an umbrella program entitled ICE ACCESS (Agreements of Cooperation in Communities to Enhance Safety and Security). One of the most far-reaching is Secure Communities, designed to link all local jails in the nation with ICE (Immigration and Customs Enforcement) so that anyone booked in a U.S. jail can be checked for immigration status.

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of controversy across the nation about immigration enforcement. Beginning in 2005, states and municipalities began to respond to rising levels of illegal immigration with their own bills and resolutions that attempt to make it more difficult for immigrants without legal status to live in their jurisdictions. Most tracked areas of traditional state authority. Statutes making English the state’s official language and restricting drivers’ licenses to citizens and legal permanent residents, for example, have been favorite topics for legislation. But a few states and localities have pushed these limits, raising the question of how far a state or city may go before encroaching on the federal government’s claim of absolute power to determine who may remain in the country.

ARIZONA’S LAW

Arizona began its legal assault on its immigrants without legal status in 1988 with a ballot initiative to adopt English as the state’s official language. That law was struck down by the state Supreme Court as overly broad, but legislative leaders and anti-immigrant activists were undeterred. In 2004 voters approved restrictions on access to social services by residents without legal status and imposed stricter identification requirements to prevent non-citizen voting. A 2006 citizen’s initiative was successful in changing the state Constitution to make English the state’s official language. Another initiative cut off access to punitive damages for immigrants without legal status who seek redress in the state’s courts. The same year the state made people without legal status ineligible for state-sponsored English classes and other benefits, including in-state tuition and financial aid for the colleges and universities in the state. The law affected nearly 5,000 high school graduates when it took effect, and forced those already enrolled to pay much higher tuition to finish their education. All of these propositions passed easily, some by a margin of nearly three to one.¹

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The state has also experimented with criminal sanctions. In 2006 the Arizona legislature adopted an anti-smuggling law that the prosecuting attorney interpreted to apply to the immigrants who paid for these services. Under this interpretation of the law, persons smuggled into Arizona are treated as co-conspirators, facing the same criminal sentences as the smugglers. In 2007 the legislature limited the availability of bail for immigrants without legal status who are accused of serious crimes. Arizona gained national attention in January 2008 with a law that suspends or revokes the business licenses of employers who knowingly hire workers without legal status. That law is currently under review by the United States Supreme Court.

All of these earlier efforts to discourage immigrants without legal status from moving into Arizona or remaining in residence laid a kind of ideological groundwork for SB 1070, somewhat misleadingly entitled Support Our Law Enforcement and Safe Neighborhoods Act. In fact, the law ties the hands of police departments and cities that do not want to become involved in enforcing federal immigration law because it interferes with other priorities, such as community safety. A concept that has gained much favor with police departments across the nation is community policing, which seeks to cultivate the trust of *all* residents within an area in order to promote law-abiding behavior and crime reporting.² Some Arizona departments and municipalities are also worried about the costs involved in detaining, housing, and transporting immigrants.

Critics of the law have focused mostly on the potential for racial profiling. Although state leaders insist that racial profiling is prohibited in the legislation and in Arizona law generally, it is far from clear that it will not occur. Racial profiling is hard to detect except with difficult-to-gather statistical evidence of actual stops and interrogations. There is also the issue of consent. Under SB 1070, police officers are allowed and even encouraged to ask questions, not just in an arrest situation, but any time their curiosity is aroused by suspicious

circumstances. Such questioning is likely to be directed at persons who, because of skin color, dress, or language, appear to be immigrants; the questions police ask will likely focus on immigration status, given Arizona's priorities. The individual has the option of refusing to communicate, but many people, especially immigrants, do not know that, or fear retaliation for not cooperating. Another issue is stops based on the pretext of minor driving violations or other offenses. The Arizona law sweeps as broadly as possible to approve immigration questioning even in cases involving local ordinance violations. This makes people subject to police investigation for having grass that has grown too long, or for a loud party.

Arizona is already feeling the impact of its new law. The prospect of implementation has provoked an outflow of Mexican and Central American immigrants from the state. They are leaving behind vacant apartments and empty seats in public schools. Most are fleeing to other states, but some are returning to their countries of origin. A study released by the University of Arizona estimates a drop of at least US\$29 billion in annual output if all non-citizens were removed from the state's workforce.³ The law has also provoked political protests. Some professional organizations and city governments have pledged to boycott the state until the law is withdrawn. Mexico has expressed its dismay at Arizona's law and has refused to conduct much of its diplomatic business in the state. The loss of revenue from such actions has been estimated at US\$90 million thus far. There are also political impacts as immigrant-rights organizations find new support in their effort to register immigrant voters who have legal status, which may eventually affect the state's voting patterns.

UNDERSTANDING SUPPORT FOR SB 1070

Backers of the law have nevertheless gained at least short-term political support in this process. When she signed the legislation, Governor Jan Brewer received a significant boost in her approval ratings, enough to put her ahead of her rivals for the Republican nomination for governor. The federal government's success in winning a preliminary injunction against enforcement of key provisions of SB 1070 and President Obama's statements against the law have only boosted her political support more. The local context includes many other signs of hostility toward the presence of these immigrants. Huge, sprawling Maricopa County, with over half of the state's population, has repeatedly chosen Joseph Arpaio as its sher-

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iff. Since 2005, when Sheriff Arpaio realized that combating illegal immigration could be a winning platform, he has gained notoriety for the priority he puts on detecting and removing immigrants without legal status.

Many political leaders are also clear in their desire to remove these residents. The undisputed leader of this group, state Senator Russell Pearce, has been emboldened by his victory in sponsoring SB 1070. Now he is working on legislation to deny birth certificates to children born in Arizona of immigrants without legal status, a move that has resulted in a call for national hearings on this idea. There are, of course, dissenting voices, particularly among Latino politicians, political activists, and liberal Democrats. But in an election year, staking out a stand that falls into a reasonable middle ground is difficult. The Arizona public—or at least its most vocal elements—is clearly aroused.

CONCLUSION

SB 1070 illustrates how the complex compromise of federalism that characterizes the U.S. system of government works in a situation of high political anxiety. The system is flexible enough to permit localities to have a meaningful political voice, even in an area traditionally reserved to the federal government. With the warm support of national organizations seeking stronger immigration controls, Arizona has shown how a state can make its voice heard. By adopting SB 1070 the state was finally able to provoke a definitive response from the federal government concerning its policies on illegal immigration.

The government's brief in opposition to SB 1070 entirely bypassed the issue of an individual's right to be free of unwarranted stops and intrusive questioning based on skin color, a basic civil rights guarantee. This may be an issue of timing: the government's objective in its initial brief was a preliminary injunction to block enforcement. Issues based

on implementation are premature in this context. But it is also true that the powerful concept of civil rights remains too linked to citizenship to be easily transportable to the field of immigration. Immigration policy in the United States is fundamentally contractual: the government sets up requirements that the prospective immigrant must follow. And on the civil rights side, while the concept has expanded beyond its original focus on the legalized subordination of African Americans, that historical legacy remains strong. The basis on which civil rights stands is citizenship in the United States, not the human condition or other universal ethos.

Nevertheless, the situation in Arizona is eerily reminiscent of the on-going effort to achieve racial equality in the United States. The connection is not just with the potential that police will engage in racial profiling and stops on the pretext of skin color. The connection also lies in state leaders' decision to create a law like SB 1070, which disregards the many contributions that immigrants without legal status and mixed families have made in Arizona. SB 1070 treats these residents as if they are undeserving of respect and consideration, and unconnected to the state's economy, cultural life, and neighborhood vitality. The harsh policy of "attrition through enforcement" would be indefensible and unpopular if Arizona's immigrants were regarded as neighbors and friends. It is this aversion to inclusion and disregard for those who appear different that most clearly defines contemporary racism in the United States. ■■■

NOTES

¹ For an overview of Arizona ballot propositions, their contents, and their outcomes, see http://en.wikipedia.org/wiki/List_of_Arizona_Ballot_Propositions. For the complete text of Proposition 300, the ballot proposition that required citizenship for in-state tuition and various other social services, see <http://www.azsos.gov/election/2006/info/PubPamphlet/english/Prop300.htm>.

² Scott Decker, Paul G. Lewis, Doris Marie Provine, and Monica W. Varsanyi, "On the frontier of local law enforcement: Local police and federal immigration law," *Immigration, Crime, and Justice*, edited by W. F. McDonald (Bingley, United Kingdom: Emerald Publishing, 2009), pp. 263-278.

³ Judith Gans, "Immigrants in Arizona: Fiscal and Economic Impacts" (Tucson, Arizona: Udall Center for Studies in Public Policy, University of Arizona, 2007), <http://udallcenter.arizona.edu/immigration/>.