

ARTICLES

RACIAL PROFILING LEGALIZED IN ARIZONA

*Marjorie Cohn**

INTRODUCTION.....	169
I. CONSTITUTIONAL DEFICIENCIES OF S.B. 1070.....	170
A. S.B. 1070 Will Require Racial Profiling.....	170
B. S.B. 1070 Violates The Fourth Amendment.....	171
C. S.B. 1070 Is Unconstitutionally Vague.....	172
D. S.B. 1070 Violates The Supremacy Clause.....	172
II. PRACTICAL DEFICIENCIES OF S.B. 1070.....	174
A. S.B. 1070 Will Harm Communities.....	174
B. S.B. 1070 Will Increase Harassment Against Latinos.....	176
C. Immigration Status Cannot Generally Be Ascertained In A Brief Detention.....	177
D. Other States Have Adopted Legislation Similar To S.B. 1070.....	178
E. Other Insidious Sections Of S.B. 1070 Remain In Force.....	181
F. Local Law Enforcement Cannot Properly Enforce Federal Immigration Laws.....	181
III. S.B. 1070 AND HUMAN RIGHTS: S.B. 1070’S LEGALIZED RACISM VIOLATES UNIVERSALLY RECOGNIZED HUMAN RIGHTS.....	182
IV. IMMIGRATION ENFORCEMENT DURING THE OBAMA ADMINISTRATION.....	184
V. CONCLUSION.....	185

* Professor of Law, Thomas Jefferson School of Law; past president, National Lawyers Guild; deputy secretary general, International Association of Democratic Lawyers; U.S. representative, American Association of Jurists; board of directors, U.S. Human Rights Network; board of governors, Society of American Law Teachers. My thanks to the staff of the Columbia Journal of Race and Law for sponsoring the compelling and provocative symposium, “So Goes Arizona, So Goes the Nation? Immigration and Civil Rights in the 21st Century,” on Oct. 22, 2010. This essay is based on my presentation at that event.

INTRODUCTION

In 2010, Arizona enacted S.B. 1070, which legalizes racial profiling in that state, and effectively converts local law enforcement officials into *de facto* U.S. Immigration and Customs Enforcement (ICE) officials.

Section 2(B) requires law enforcement officials to make “a reasonable attempt . . . when practicable, to determine the immigration status” of any person subject to “any lawful stop, detention, or arrest” when enforcing any “law or ordinance of a county, city or town” of Arizona, if a reasonable suspicion exists that the detained individual is in the United States with “unlawful presence.”¹ That section further provides that “[a]ny person who is arrested shall have the person’s immigration status determined before the person is released,” and “[t]he person’s immigration status shall be verified with the federal government.”² Finally, a “person is presumed to not be an alien who is unlawfully present in the United States if the person provides” a form of identification listed in the statute.³ Section 2(B) requires officers to verify the immigration status of *all* arrestees before they are released, regardless of whether or not they have reasonable suspicion that the arrestee is an undocumented immigrant.⁴

Immigration status cannot be determined merely by a person’s appearance. Indeed, when Arizona Governor Janice Brewer, who signed S.B. 1070 into law, was asked what criteria will be used to determine reasonable suspicion that a person is not lawfully in the United States, she answered, “I do not know what an illegal immigrant looks like.”⁵

¹ ARIZ. REV. STAT. ANN. § 11-1051(B) (2010).

² *Id.*

³ Acceptable forms of identification include: a valid Arizona driver license; a valid Arizona non-operating identification license; a valid tribal enrollment card or other form of tribal identification; or any valid United States federal, state or local government issued identification if the entry requires proof of legal presence in the United States before issuance. *Id.*

⁴ *United States v. Arizona*, 641 F.3d 339, 344 (9th Cir. 2011), *cert. granted*, No. 11-182, 2011 WL 3556224 (S. Ct. Dec. 12, 2011).

⁵ Gov. Jan Brewer (R-AZ) doesn’t know what an “illegal immigrant” looks like, Apr. 23, 2010, <http://www.youtube.com/watch?v=F2VSGEWzEW0>.

I. CONSTITUTIONAL DEFICIENCIES OF S.B. 1070

A. S.B. 1070 Will Require Racial Profiling

By its very terms, S.B. 1070 necessitates racial profiling. The definition of racial profiling is “the reliance on race, skin color and/or ethnicity as an indication of criminality, reasonable suspicion, or probable cause, except when part of a description of a suspect, and said description is timely, reliable, and geographically relevant.”⁶ Although the new statute says that law enforcement officers “may not consider race, color or national origin in the enforcement of this section,” that language is followed by the words, “except to the extent permitted by the United States or Arizona Constitution.”⁷ Indeed, S.B. 1070 effectively requires the consideration of race, color and national origin because it is unfathomable how a law enforcement official could avoid considering those factors in deciding whom to investigate under the new law. Even the most well-meaning officer cannot possibly determine whether an individual may be undocumented without making judgments based on apparent race, color and national origin. As Tucson Police Chief Roberto A. Villasenor noted, “It [S.B. 1070] says you can’t use race and ethnicity. If you’re not paying attention to race and ethnicity, what other elements are there? . . . If it’s 95 percent based on race and ethnicity, what’s the other 5 percent? No one knows.”⁸

S.B. 1070 pays lip service to the ban on racial profiling while essentially requiring racial profiling during detentions and arrests. It casts a wide net over the entire Latino population of Arizona and thus, it will be impossible for the law to be enforced in a racially neutral manner.

⁶ Settlement Agreement at 8, *Arnold v. Arizona Dep’t of Pub. Safety*, No. CV-01-1463-PHX-LOA, 2006 WL 2168637 (D. Ariz. July 31, 2006); JOYCE MCMAHON ET AL., *HOW TO CORRECTLY ANALYZE RACIAL PROFILING DATA: YOUR REPUTATION DEPENDS ON IT!* 97 (2002) (defining “bias-based policing” as “[t]he act (intentional or unintentional) of applying or incorporating personal, societal, or organizational biases and/or stereotypes as the basis, or factors considered, in decision-making, police actions, or the administration of justice”).

⁷ ARIZ. REV. STAT. ANN. § 11-1051(B).

⁸ Peter Slevin, *Arizona Law on Immigration Puts Police in Tight Spot*, WASH. POST, Apr. 30, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/04/29/>.

B. S.B. 1070 Violates the Fourth Amendment

Arizona's new law also runs afoul of the Fourth Amendment, governing searches and seizures. That Amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.⁹

Moreover, under *Terry v. Ohio*, reasonable suspicion to support a stop must arise before the stop; police may not detain individuals on a “hunch.”¹⁰ S.B. 1070 violates this well-established Fourth Amendment jurisprudence by inviting officers to use “hunches” as a proxy for racial profiling. An officer must be able to articulate specific facts to justify the stop. In *United States v. Brignoni-Ponce*, the Supreme Court said that Hispanic appearance alone “would justify neither a reasonable belief that they were aliens, nor a reasonable belief that the car concealed other aliens who were illegally in the country.”¹¹

Additionally, the United States Court of Appeals for the Ninth Circuit held in *Gonzalez-Rivera v. Immigration & Naturalization Service* that subjective impressions are not sufficient to transform innocent behavior into suspicious activity.¹² Yet enforcement of S.B. 1070 requires law enforcement officers to use subjective considerations, such as skin color, language, and manner of dress, to determine whether they think a detainee is unlawfully present in the United States.

Race, ethnic appearance, and language are not reliable indicators of alienage. In *United States v. Montero-Camargo*, the Ninth Circuit noted, “The likelihood that in an area in which the majority—or even a substantial part—of the population is Hispanic, any given person of Hispanic ancestry is in fact an alien, let alone an illegal alien, is not high enough to make Hispanic appearance a

⁹ U.S. CONST. amend. IV.

¹⁰ 392 U.S. 1, 27 (1968).

¹¹ 422 U.S. 873, 886 (1975).

¹² 22 F.3d 1441, 1447 (9th Cir. 1994).

relevant factor in the reasonable suspicion calculus.”¹³ Likewise, the Ninth Circuit ruled in *United States v. Manzo-Jurado* that an individual’s appearance as a Hispanic work crew, the inability to speak English, proximity to the border, and unsuspecting behavior did not establish reasonable suspicion of illegal presence.¹⁴

In 2009, the United States Supreme Court held in *Arizona v. Johnson* that a seizure is unlawful if an officer extends the duration of the stop or alters the nature of the stop by inquiring into matters unrelated to the justification of the stop, including questions about immigration status.¹⁵ The Supreme Court ruled in *Hiibel v. Sixth Judicial District* that an officer cannot arrest a suspect for failure to identify himself unless the request for identification is reasonably related to the circumstances justifying the stop.¹⁶ By requiring an officer to demand papers for immigration purposes after a stop, detention, or arrest for a different matter, S.B. 1070 runs afoul of *Hiibel*.

C. S.B. 1070 Is Unconstitutionally Vague

In addition to enabling racial profiling, S.B. 1070 is facially vague and therefore unconstitutional. The Supreme Court struck down as unconstitutionally vague a California statute that criminalized the failure to produce “credible and reliable” identification upon demand after an otherwise lawful stop.¹⁷ Officers conducting an immigration status check on an individual need more information than the person’s name. Such a check requires identification as well as other federal documents proving one’s legal status. Mere inability to demonstrate one’s lawful presence cannot rise to the level of reasonable suspicion to believe the person is unlawfully present in the country. Thus, because S.B. 1070 criminalizes the failure to prove lawful presence in the United States, it is unconstitutionally vague.

D. S.B. 1070 Violates the Supremacy Clause

S.B. 1070 also violates the Supremacy Clause of the Constitution.¹⁸ On July 28, 2010, United States District Court Judge

¹³ 208 F.3d 1122, 1132 (9th Cir. 2000) (*en banc*), *cert. denied*, 531 U.S. 889 (2000).

¹⁴ 457 F.3d 928, 932 (9th Cir. 2006).

¹⁵ 129 S. Ct. 781, 783 (2009).

¹⁶ 542 U.S. 177, 188 (2004).

¹⁷ *Kolender v. Lawson*, 461 U.S. 352, 361 (1983).

¹⁸ U.S. CONST. art. VI, § 2.

Susan Bolton issued a preliminary injunction enjoining enforcement, on preemption grounds, of four sections of S.B. 1070.¹⁹ Judge Bolton enjoined the following sections of the statute: 1) Section 2(B), which requires that an officer make a reasonable attempt to determine the immigration status of a person stopped, detained, or arrested if there is reasonable suspicion that the person is unlawfully present in the United States, and it also requires verification of the immigration status of any person arrested prior to releasing that person;²⁰ 2) Section 3 creates a state crime for failure to apply for or carry alien registration papers;²¹ 3) Section 5(C) creates a state crime for an unauthorized alien to solicit, apply for, or perform work;²² and 4) Section 6 authorizes the warrantless arrest of a person where there is probable cause to believe the person has committed a public offense that makes her removable from the United States.²³

The Ninth Circuit agreed with Judge Bolton and affirmed the preliminary injunction enjoining enforcement of S.B. 1070 Sections 2(B), 3, 5(C), and 6.²⁴

The Immigration and Nationality Act (INA) grants the federal government exclusive power to regulate U.S. borders.²⁵ In Section 3 of S.B. 1070, undocumented immigrants in Arizona face twenty days in jail and a \$100 fine for the first offense and thirty days in jail for the subsequent violation.²⁶ By mandating that state officers enforce federal immigration law and by establishing a separate state crime for anyone who violates federal immigration law, S.B. 1070 contravenes the federal preemption doctrine that emanates from the Supremacy Clause of the Constitution, and the “fundamental principle of the Constitution [] that Congress has the power to preempt state law.”²⁷

Furthermore, S.B. 1070 requires the detention of individuals during inquiries and after arrests. The Ninth Circuit held that “[d]etention, whether intended or not, is an unavoidable consequence of Section 2(B)’s mandate.” That section, according to

¹⁹ *United States v. Arizona*, 703 F. Supp. 2d 980 (D. Ariz. 2010).

²⁰ ARIZ. REV. STAT. ANN. § 11-1051 (B).

²¹ *Id.* § 13-1509.

²² *Id.* § 13-2928(C).

²³ *Id.* § 13-3883(A)(5).

²⁴ *United States v. Arizona*, 641 F.3d at 366.

²⁵ 8 U.S.C. § 1357(g); *see United States v. Arizona*, 641 F.3d at 339.

²⁶ ARIZ. REV. STAT. ANN. § 13-1509(A).

²⁷ *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 372 (2000).
See United States v. Arizona, 641 F.3d at 350.

the appellate court, “requires much more than mere –inquiries—it requires that people be detained until those inquiries are settled, and in the event of an arrest, the person may not be released until the arresting agency obtains verification of the person’s immigration status.”²⁸

In holding that the federal government preempts Arizona from enforcing the Immigration & Nationality Act, the Ninth Circuit concluded, “Section 2(B) therefore interferes with Congress’ scheme because Arizona has assumed a role in directing its officers how to enforce the INA.”²⁹ Likewise, the court decided, “Section 6 interferes with the federal government’s prerogative to make removability determinations and set priorities with regard to the enforcement of civil immigration laws. Accordingly, Section 6 stands as an obstacle to the full purposes and objectives of Congress.”³⁰ Moreover, “Section 3 essentially makes it a state crime for unauthorized immigrants to violate federal registration laws,” according to the Ninth Circuit.³¹ Additionally, the court observed, Section 5(C) pulls “the lever of criminalizing work—which Congress specifically chose not to pull in the INA.”³²

II. PRACTICAL DEFICIENCIES OF S.B. 1070

A. S.B. 1070 Will Harm Communities

The new law effectively compels Arizona police to make immigration enforcement their top priority. Local law enforcement will be forced to divert scarce resources away from serious crime in order to enforce federal immigration laws. Indeed, several law enforcement groups oppose S.B. 1070. The Law Enforcement Engagement Initiative, an organization of police officials who favor federal immigration reform, condemned the law, saying it would likely result in racial profiling and threaten public safety because undocumented people would hesitate to come forward and report crimes or cooperate with police for fear of being deported.³³ The Arizona Association of Chiefs of Police also criticized the legislation because it will “negatively affect the ability of law enforcement

²⁸ *Id.* at 348, n.7.

²⁹ *Id.* at 350.

³⁰ *Id.* at 365.

³¹ *Id.* at 355.

³² *Id.* at 360.

³³ Randal C. Archibold, *Arizona’s Effort to Bolster Local Immigration Authority Divides Law Enforcement*, N.Y. TIMES, Apr. 21, 2010, <http://www.nytimes.com/2010/04/22/us/22immig.html>.

agencies across the state to fulfill their many responsibilities in a timely manner.” The group believes the immigration issue is best addressed at the federal level.³⁴

S.B. 1070 also will have detrimental effects on society as a whole. Children will fall behind their peers. The decline in enrollment will deprive schools of badly needed funding. Schools will lose the ability to maintain class sizes at appropriately small levels. Additionally, resources will be unavailable to all remaining students in these schools.³⁵ Some Latino families left Arizona after S.B. 1070 was enacted.³⁶ The exodus affects the entire community as friendships are severed, school sports teams lose players, and other school activities are deprived of participants.

In *Plyler v. Doe*, the Supreme Court held that all children—even undocumented children—are entitled to primary and secondary education.³⁷ Public schools are required to document the residence and educational history of each new student. If this information reveals that a student’s family recently emigrated from Mexico or another Latin American country, it could be viewed as evidence that the student or someone in her family is undocumented. Further, because S.B. 1070 makes it illegal for any governmental entity, including a public school, to prohibit the transfer of such information to law enforcement agencies in contravention of federal law,³⁸ this data could be used to deport the student or a family member.

The chilling effect of the law also could extend to other public benefits, including emergency Medicare assistance, immunization programs, school breakfast and lunch programs, and testing and treatment for communicable diseases. This reality will pose an acute risk to the health of all U.S. residents. The statute

³⁴ Fact Check: More Than Just a ‘Very Few’ Police Officers Oppose New Arizona Immigration Law, Think Progress, Apr. 21, 2010, <http://thinkprogress.org/2010/04/21/arizona-immigration-police/>.

³⁵ Pat Kossan, Schools: *Immigrant families leaving Arizona because of new immigration law*, ARIZONA REPUBLIC, May 28, 2010.

³⁶ *Id.*

³⁷ 457 U.S. 202 (1982).

³⁸ ARIZ. REV. STAT. ANN. § 11-1051(F). The Family and Educational Right and Privacy Act of 1974 (FERPA), codified at 20 U.S.C. § 1232g, establishes privacy guidelines for education records of schools that receive federal funding. FERPA prohibits schools from releasing “directory information,” which includes the student’s place of birth and the last educational institution attended by the student, without the student’s consent. See 20 U.S.C. § 1232g(a)(5); 34 C.F.R. § 00.3.

could transform the routine enforcement of local ordinances into targeted immigration raids.

A substantial portion of Arizona's population reasonably may be concerned that S.B. 1070 will apply disproportionately to them, even if they are legal residents. Nearly thirty percent of Arizona's population identify as Hispanic or Latino.³⁹ Since Arizona shares a substantial border with Mexico, it is likely that Hispanics will be constant targets for immigration status inquiry under the new law.

B. S.B. 1070 Will Increase Harassment against Latinos

There already have been negative repercussions from S.B. 1070. After its passage, Arizona's businesses saw a sharp decline in revenue because many in the Latino community—whose annual purchasing power is approximately \$31 billion⁴⁰—are choosing to stay home rather than risk harassment by the police whenever they go out to shop or dine.⁴¹

S.B. 1070 will increasingly polarize and further divide Arizona's residents along racial lines. It will embolden the Minutemen to engage in harassment of Arizona's Latino population. The media will report investigations, raids, and arrests of Latinos, which will reinforce the stereotype that most Latinos have unlawful immigration status. Arizona's Latino residents will face a heightened risk of hate crimes, which tend to rise substantially when anti-immigrant laws like S.B. 1070 are enacted.⁴² For example, after passage of California's Proposition 187, there was a dramatic increase in violence and civil rights violations against Latinos.⁴³

³⁹ U.S. CENSUS BUREAU, 2006-2008 AMERICAN COMMUNITY SURVEY 3-YEAR ESTIMATES, available at <http://www.factfinder.census.gov> (Arizona figures). The terms "Hispanic" and "Latino" are used interchangeably in this essay.

⁴⁰ Tim Gaynor, *Arizona Immigration Law Hits Latino Businesses*, REUTERS, May 11, 2010, <http://www.reuters.com/article/idUSTRE64A4EY20100511>.

⁴¹ Eugene Scott, *Latino-Focused Shops Feeling Impact of Bill*, ARIZONA REPUBLIC, May 11, 2010, at D3.

⁴² Leadership Conference on Civil Rights, *Cause for Concern: Hate Crimes in America* (1997), http://www.empowermentzone.com/hate_rpt.txt.

⁴³ California's Proposition 187 was a 1994 ballot initiative designed to create a state-run citizenship screening system in order to prohibit illegal immigrants from using health care, public education, and other social services in California. The law was struck down. See *LULAC v. Wilson*, 997 F. Supp. 1244 (C.D. Cal. 1997).

Moreover, S.B. 1070 contains a provision allowing any Arizona resident to bring an action in state court challenging any law enforcement agency or official “that adopts or implements a policy that limits or restricts the enforcement of federal immigration laws.”⁴⁴ In the current climate of xenophobia, this provision will invite increased harassment and intimidation of people of color, both documented and undocumented.

People will report their Latino neighbors and co-workers to the police. A complaint of excessive noise due to a barking dog or a festive party could trigger an investigation into a Latino neighbor’s immigration status. Police officials in Tucson reported that the day after S.B. 1070 was signed into law, their office was flooded with calls demanding that they dispatch officers to investigate “some Mexicans standing on the corner.”⁴⁵

C. Immigration Status Cannot Generally Be Ascertained in a Brief Detention

Immigration status cannot be determined by state and local law enforcement officers, or even by federal immigration officers, during a brief investigatory detention. “Unlawful presence” is not apparent from physical presence or language, but rather is a legal status established by operation of a complex set of immigration laws. Birth in the United States is a clear indicator that a person is not an alien.⁴⁶ However, foreign birth is not a certain indicator of alienage. Citizenship depends on many factors, such as the parents’ respective citizenship⁴⁷; the duration and timing of their residence in the United States⁴⁸; their marital status at the time of the person’s birth⁴⁹; the year in which the individual was born⁵⁰; the place where the person was born⁵¹; and possibly the date on which a child born out of wedlock was legitimated.⁵² None of these factors can be

⁴⁴ ARIZ. REV. STAT. ANN. § 11-1051 (G).

⁴⁵ Peter Slevin, *Arizona law on immigration puts police in tight spot*, WASH. POST, Apr. 30, 2010, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/04/29/ar2010042904970.html>.

⁴⁶ See U.S. CONST. amend. XIV, §1.

⁴⁷ 8 U.S.C. § 1401(c) – (e), (g) – (h) (2006).

⁴⁸ *Id.* § 140 (d) – (e), (g) – (h).

⁴⁹ *Id.* § 1409.

⁵⁰ *Id.* § 1401(h).

⁵¹ *Id.* § 1401(c) – (e), (g) – (h).

⁵² *Id.* § 1409.

ascertained in a brief detention in order to give rise to reasonable suspicion of unlawful presence.

The absence of immigration documents does not mean someone is unlawfully present in the United States. Although the statute contains a presumption of lawful immigration status if a Latino citizen produces an Arizona driver's license,⁵³ Arizona law does not require citizens to possess a driver's license when they leave home.

D. Other States Have Adopted Legislation Similar to S.B. 1070

In concluding that preemption prevents Arizona from enforcing the federal immigration laws, the Ninth Circuit expressed concern about "the threat of 50 states layering their own immigration enforcement rules on top of the INA."⁵⁴

Indeed, since Arizona enacted S.B. 1070, several other states have passed legislation with racial profiling provisions similar to Arizona's. Alabama adopted H.B. 56, the Beason-Hammon "Alabama Taxpayer and Citizen Protection Act."⁵⁵ On September 28, 2011, United States District Judge Sharon L. Blackburn upheld the racial profiling provisions of H.B. 56 as well as the section that requires school officials to verify the immigration status of children and their parents.⁵⁶ According to Linton Joaquin, General Counsel of National Immigration Law Center, "[t]he Alabama court has permitted provisions of the law to take effect that require local police, and even school teachers, to become de facto immigration agents."⁵⁷ Within days after Judge Blackburn's ruling, an immigrant-rights group hot line reported receiving more than one thousand calls from pregnant women who were afraid to go to the hospital, victims of crime who were afraid to go to the police and parents who feared sending their children to school.⁵⁸ The attendance of

⁵³ ARIZ. REV. STAT. ANN. § 11-1051(B).

⁵⁴ *United States v. Arizona*, 641 F.3d at 354.

⁵⁵ Alabama Taxpayer and Citizen Protection Act, 2011 Ala. Acts 535 ("H.B. 56").

⁵⁶ *Hispanic Interest Coalition of Ala., et al. v. Bentley, Parsley v. Bentley, United States v. State of Alabama*, 813 F. Supp. 2d 1282 (N.D. Ala. 2011).

⁵⁷ Press Release, National Immigrant Law Center, Court's Ruling Undermines Fundamental American Values Decision Out-of-Step with Previous Rebukes to State Anti-Immigrant Laws, Sep. 28, 2011, available at <http://www.nilc.org/pubs/news-releases/nr102.htm>.

⁵⁸ See Editorial, *Alabama's Shame: A harsh immigration law spreads fear and punishes the vulnerable*, N.Y. TIMES, Oct. 4, 2011, at A22.

Hispanic students fell noticeably as well.⁵⁹ Families have fled to other states, leaving behind mobile homes “sold fully furnished for a thousand dollars or even less . . . Dogs were fed one last time; if no home could be found, they were simply unleashed.”⁶⁰ Farmers, contractors, and home builders called the law “devastating,” citing rotting crops in the fields and critical labor shortages. Even Hispanic workers with legal documents are leaving, they said.⁶¹ Reverend Paul Zoghby, whose congregation at St. Margaret of Scotland Church in Foley, Alabama includes a large number of Hispanics, noted, “This is the saddest thing I have experienced in my 18 years as a priest.” He added, “We’ve already lost 20 percent of the congregation in the past few weeks, and many more will be gone by next week. It is a human tragedy.”⁶² Mary Bauer, Legal Director of the Southern Poverty Law Center, called the law a “humanitarian crisis.”⁶³ On October 14, 2011, the United States Court of Appeals for the Eleventh Circuit issued a preliminary injunction against the section of H.B. 56 that requires schools to determine the immigration status of children who are enrolling, and that of their parents as well; however, the court did not enjoin the racial profiling section of the Alabama law.⁶⁴

Georgia’s law, H.B. 87, is titled the “Illegal Immigration Reform and Enforcement Act of 2011.”⁶⁵ United States District Court Judge Thomas Thrash, Jr. granted a preliminary injunction temporarily enjoining provisions of the Georgia law.⁶⁶ United States

⁵⁹ *Id.*

⁶⁰ See Campbell Robertson, *After Ruling, Hispanics Flee an Alabama Town*, N.Y. TIMES, Oct. 4, 2011, at A1.

⁶¹ *Id.*

⁶² See Pamela Constable, *A tough new Alabama law targets illegal immigrants and sends families fleeing*, WASH. POST, Oct. 8, 2011, available at http://www.washingtonpost.com/local/a-tough-new-alabama-law-targets-illegal-immigrants-and-sends-families-fleeing/2011/10/07/gIQAAtZuPWL_story.html.

⁶³ Richard Fausset, *In Alabama, strict new immigration law prompts alarm*, L.A. TIMES, Oct. 9, 2011, at A18.

⁶⁴ United States v. Alabama et al., Nos. 11–14532–CC, 11–14535–CC 2011 WL 4863957 (11th Cir. Oct. 14, 2011).

⁶⁵ Illegal Immigration Reform and Enforcement Act of 2011, H.R. 87 (Ga. 2011), available at http://www1.legis.ga.gov/legis/2011_12/fulltext/hb87.htm.

⁶⁶ Ga. Latino Alliance for Human Rights et al. v. Deal, 793 F. Supp. 2d 1317 (N.D. Ga. 2011).

District Court Judge Sarah Evans Barker⁶⁷ enjoined sections of the Indiana Law, S.E.A. 590.⁶⁸ Additionally, United States District Court Judge Clark Waddoups stayed Utah's H.B. 497,⁶⁹ pending further review.⁷⁰ Additionally, South Carolina's S20,⁷¹ which was scheduled to take effect on January 1, 2012, will be challenged by the ACLU as well.⁷²

The Supreme Court granted certiorari in the Arizona case; it will rule on the constitutionality of S.B. 1070 by the end of the 2011-2012 term.⁷³ Last term, the Court, in *Chamber of Commerce of the United States v. Whiting*, ruled 5 to 3 in favor of the Legal Arizona Workers Act, which was enacted in 2007.⁷⁴ That statute requires employers to use an electronic verification program, E-verify, and it establishes state sanctions of employers who employ undocumented workers. In (ironically) affirming a decision of the Ninth Circuit, the high court held that "Arizona's licensing law falls well within the confines of the authority Congress chose to leave to the States and therefore is not expressly preempted."⁷⁵

But S.B. 1070 goes beyond the Legal Arizona Workers Act by criminalizing the solicitation, application for, or performance of work by an undocumented immigrant.⁷⁶ In upholding the district court's injunction in the S.B. 1070 case, the Ninth Circuit noted that federal immigration law and "legislative history demonstrating Congress' affirmative choice not to criminalize work as a method of discouraging unauthorized immigrant employment, likely reflects

⁶⁷ *Buquer et al. v. City of Indianapolis*, 797 F. Supp. 2d 905 (S.D. Ind. 2011).

⁶⁸ S.E.A. 590-117, First Reg. Sess. (Ind. 2011), *available at* <http://www.in.gov/legislative/bills/2011/SE/SE0590.1.html> (last visited Sept. 8, 2011).

⁶⁹ *Utah Coalition of La Raza et al. v. Herbert*, No. 2:11-CV-401 CW, 2011 WL 7143098 (C.D. Utah May 11, 2011). H.R. 497, 2011 Gen. Sess. (Utah 2011), *available at* <http://www.abc4.com/media/lib/5/9/9/b/99b4ca0d-0baa-4d76-9df4-581aa04f2f92/hb0497.pdf>.

⁷⁰ *Herbert*, 2011 WL 7143098, at *1.

⁷¹ S. 20-119 (S.C. 2011), *available at* http://www.scstatehouse.gov/sss119_2011-2012/bills/20.htm (last visited Sept. 8, 2011).

⁷² Kim Severson, *Federal Court Blocks Georgia Anti-Immigrant Law*, ACLU News (June 27, 2011), <http://www.acluga.org/news/2011/06/> (last visited Sept. 8, 2011).

⁷³ *Arizona v. United States*, No. 11-182, 2011 WL 3556224 (S. Ct. Dec. 12, 2011).

⁷⁴ 131 S. Ct. 1968 (2011).

⁷⁵ *Id.* at 1970.

⁷⁶ ARIZ. REV. STAT. ANN. § 13-2928 (C).

Congress' clear and manifest purpose to supercede [sic] state authority in this context."⁷⁷

E. Other Insidious Sections of S.B. 1070 Remain in Force

While suspending some of the most egregious sections of S.B. 1070, Judge Bolton let stand the sections that criminalize the harboring and transporting of undocumented immigrants⁷⁸ and that allow people to sue local governments if they believe federal immigration law is not being enforced.⁷⁹ The former section will deter relatives from driving family members to school or the hospital for fear of apprehension. The latter section will lead to baseless lawsuits and force municipalities to expend large sums of money to defend them. Unlawful profiling at the behest of private citizens already is occurring in connection with prior efforts by the police to enforce immigration laws. The defendant in a racial profiling lawsuit,⁸⁰ Sheriff Joe Arpaio of Maricopa County, receives numerous requests to detain undocumented immigrants.⁸¹

F. Local Law Enforcement Cannot Properly Enforce Federal Immigration Laws

S.B. 1070 is not the first recent racist attack on undocumented immigrants. The federal program created by INA sec. 287(g) allows certain state and local law enforcement agencies to engage in federal immigration enforcement activities.⁸² However, a report released in March 2010 by the Department of Homeland Security Office of Inspector General found a lack of oversight and training without adequate safeguards against racial profiling.⁸³

⁷⁷ United States v. Arizona, 641 F.3d at 359.

⁷⁸ United States v. Arizona, 703 F. Supp. 2d 980; ARIZ. REV. STAT. ANN. § 13-2929.

⁷⁹ United States v. Arizona, 703 F. Supp. 2d 980; ARIZ. REV. STAT. ANN. § 11-1051 (G).

⁸⁰ See *infra* text accompanying note 85.

⁸¹ See Maricopa County Sheriff's Office Website, <http://www.mcso.org/index.php?a=GetModule&mn=Posse>. The office uses a public hotline to enforce local ordinances. See Maricopa County Sheriff's Office Website, http://www.mcso.org/include/pr_pdf/CC.pdf.

⁸² Immigration & Nationality Act, § 287 (g), Illegal Immigration Reform & Immigrant Responsibility Act of 1996, codified at 8 U.S.C. § 1357(g) (2006).

⁸³ Dep't of Homeland Security Office of Inspector General, The Performance of 287(g) Agreements, Mar. 2010, <http://www.dhs.gov/>

Moreover, the March 2011 report of the Inter-American Commission on Human Rights recommended the elimination of 287(g) authorization for Task Force Enforcement, “as the federal authorities are unable to properly monitor to prevent and combat the use of racial profiling and the negative effects on security and crime prevention.”⁸⁴

The Department of Justice (DOJ) found reasonable cause to believe that the Maricopa County Sheriff’s Office (MCSO) engages in unconstitutional racial profiling and unlawful stops, detentions, and arrests of Latinos; and unlawfully retaliates against individuals who complain about or criticize MCSO’s policies or practices. These actions violate the Violent Crime Control and Law Enforcement Act of 1994, and Title VI of the Civil Rights Act of 1964, according to DOJ.⁸⁵

III. S.B. 1070 AND HUMAN RIGHTS: S.B. 1070’S LEGALIZED RACISM VIOLATES UNIVERSALLY RECOGNIZED HUMAN RIGHTS

International human rights bodies are also concerned about the pernicious effects of S.B. 1070. In its report, the Inter-American Commission on Human Rights urged “federal and local authorities to refrain from passing laws that use criminal offenses to criminalize immigration, and from developing administrative or other practices that violate the fundamental principle of nondiscrimination and the immigrants’ rights to due process of law, personal liberty, and humane treatment.”⁸⁶ The Commission also “underscore[d] the need to find appropriate ways to amend the law recently enacted in

xoig/assets/mgmtrpts/OIG_10-63_Mar10.pdf. In 2009, a coalition of 522 civil rights organizations sent a letter to President Obama urging the immediate termination of the 287(g) program due to concerns about racial profiling and other civil rights abuses. Letter from Marielena Hincapie, Exec. Dir., Nat’l Immigration Law Ctr., to Barack Obama, U.S. President (Aug. 25, 2009), *available at* http://salsa.democracyinaction.org/o/371/images/letter_to_president_20090825133229.pdf.

⁸⁴ Inter-American Commission on Human Rights, Report on Immigration in the United States: Detention and Due Process, para. 427, Mar. 17, 2011, *available at* <http://cidh.org/countryrep/USImmigration/Chap.V.htm>.

⁸⁵ See Thomas E. Perez, Assistant Attorney General, U.S. Dep’t of Justice, Letter to Bill Montgomery, Cnty. Attorney, Maricopa Cnty., http://www.justice.gov/crt/about/spl/documents/mcso_findletter_12-15-11.pdf; see also *Melendres v. Arpaio*, 598 F. Supp. 2d 1025 (D. Ariz. 2009).

⁸⁶ Inter-American Commission on Human Rights, *supra* note 84, at para. 425.

Arizona to adapt it to international human rights standards for the protection of immigrants.”⁸⁷

When the United States ratifies a treaty, it becomes part of U.S. law under the Supremacy Clause of the Constitution.⁸⁸ The United States has ratified both the International Convention on the Elimination of all Forms of Racial Discrimination (CERD) and the International Covenant on Civil and Political Rights (ICCPR).

CERD defines racial discrimination as “any *distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin, which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.*”⁸⁹

These fundamental rights extend to undocumented persons. When the United States ratified the ICCPR, it agreed to undertake “*to respect and to ensure to **all individuals within its territory** and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*”⁹⁰

The Human Rights Committee, which administers the ICCPR, explained, “*the rights set forth in the Covenant apply to everyone, irrespective of reciprocity, and irrespective of his or her nationality or statelessness. Thus, the general rule is that each one of the rights of the Covenant must be guaranteed without discrimination between citizens and aliens.*”⁹¹

⁸⁷ *Id.*

⁸⁸ U.S. Const. art VI, § 2.

⁸⁹ 660 U.N.T.S. 195, art. 1.1, *entered into force* Jan. 4, 1969 (emphasis added).

⁹⁰ G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, art. 2.1, *entered into force* March 23, 1976 (emphasis added).

⁹¹ General Comment No. 15: The position of aliens under the Covenant, 04/11/1986, *available at* <http://www.unhchr.ch/tbs/doc.nsf/%28Symbol%29/bc561aa81bc5d86ec12563ed004aaa1b?Opendocument> (emphasis added).

IV. IMMIGRATION ENFORCEMENT DURING THE OBAMA ADMINISTRATION

What is the current national policy on immigration? Isabel Garcia, co-chair of the Coalition of Human Rights in Tucson, told *Democracy Now!* that there have been more deportations during Obama presidency than in any other administration.⁹² Ms. Garcia stated, “This administration continues to follow the flawed concept that migration is somehow a law enforcement or national security issue. And it is not. It is an economic, social, political phenomenon.” Ms. Garcia said that NAFTA has displaced millions of workers in Mexico who flood into the United States.⁹³

There are indications that the administration’s immigration policy is undergoing changes, however. On June 17, 2011, ICE director John Morton issued a memorandum providing “guidance on the exercise of prosecutorial discretion to ensure that the agency’s immigration enforcement resources are focused on the agency’s enforcement priorities.”⁹⁴ The memo lists the following “positive factors” that “should prompt particular care and consideration”:

- veterans and members of the armed forces;
- long-time lawful permanent residents;
- minors and elderly individuals;
- individuals present in the United States since childhood;
- pregnant or nursing women;
- victims of domestic violence, trafficking or other serious crimes;
- individuals who suffer from a serious mental or physical disability; and
- individuals with serious health concerns.⁹⁵

⁹² Legal Defender Isabel Garcia: Arizona Bill Forcing Officers to Determine Immigration Status Marks “All-Out Assault” on Latino Communities, *Democracy Now!* Apr. 16, 2010, <http://www.democracynow.org/2010/4/16/az>.

⁹³ *Id.*

⁹⁴ John Morton, Director, U.S. Immigration & Customs Enforcement, Memorandum, Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens, June 17, 2011, www.ice.gov/doclib/secue-communities/pdf/prosecutorial-discretion-memo.pdf.

⁹⁵ *Id.*

Apparently, ICE is creating a presumption that individuals who fit these categories should not be high priorities for deportation. This is a constructive step that should guide future immigration reform. The new policy, however, has been enforced inconsistently.⁹⁶

However, the Obama administration convinced the Supreme Court to review a Ninth Circuit ruling that immigrants who entered the United States when they were children could stay if their parents became lawful permanent residents of the United States.⁹⁷ Solicitor General Donald B. Verrilli, Jr. wrote in one brief that the Ninth Circuit decision “impedes the government’s high-priority efforts to remove criminal aliens.”⁹⁸

There is promising news from California, however. On October 9, 2011, Governor Jerry Brown signed the “Dream Act” into law.⁹⁹ It will allow undocumented immigrants to obtain financial aid and fee waivers if they are accepted by California state universities after attending California secondary schools, demonstrate financial need, and apply to legalize their immigration status.¹⁰⁰

V. CONCLUSION

Instead of gratitude for the back-breaking work migrant laborers contribute to our society, there is an increasingly virulent strain of racism that leads to the targeting of non-citizens. Republican lawmakers are joining together to oppose federal immigration reform, opting instead for a “states rights” approach where each state is free to enact its own racist law.¹⁰¹

⁹⁶ See AMERICAN IMMIGRATION LAWYER’S ASSOCIATION & AMERICAN IMMIGRATION COUNCIL, AILA-AIC SURVEY REVEALS ICE OFFICIALS’ SPORADIC EXERCISE OF PROSECUTORIAL DISCRETION, Nov. 9, 2011, <http://www.aila.org/content/default.aspx?docid=37614> (“The overwhelming conclusion is that most ICE offices have not changed their practices since the issuance of these new directives.”).

⁹⁷ Petition for Writ of Certiorari, Holder v. Gutierrez, No. 10-1542, 2011 WL 2533820 (S. Ct. June 23, 2011); Petition for Writ of Certiorari, Holder v. Sawyers, No. 10-1543, 2011 WL 2533821 (S. Ct. June 23, 2011).

⁹⁸ Petition for Writ of Certiorari, Holder v. Gutierrez, No. 10-1542, 2011 WL 2533820.

⁹⁹ California Dream Act, 2011 Cal. Stat. ch. 93.

¹⁰⁰ *Id.*

¹⁰¹ See *supra* text accompanying notes 54-72.

Let us join the voices of compassion and oppose the mean-spirited actions that aim to legalize racial profiling and scapegoat immigrants. Laws like S.B. 1070 demean us all.