

Policy Critique of Arizona's Immigration Enforcement Law
S.B. 1070, as amended by H.B. 2162

Introduction

Faced with mounting public concern regarding the nearly 500,000 unauthorized immigrants within its borders, Arizona enacted a law in April aimed at strengthening its immigration enforcement (S.B. 1070, amended by H.B. 2162). In short, the law effectively criminalizes unlawful presence¹, making it a criminal misdemeanor for a person to willfully fail to carry documentation proving his or her lawful immigration status.² Second, it requires Arizona law enforcement officers to ask people about their immigration status in certain circumstances.³

Under the New Law:

- (1) If an Arizona officer stops, detains, or arrests a person for an unrelated offense, such as a traffic violation; and
- (2) Then develops "reasonable suspicion" to believe that person is an unauthorized immigrant, for instance if the person lacks any form of identification and cannot answer certain questions related to their immigration status; then
- (3) The officer *must*, when practicable, make a "reasonable attempt" to determine that person's immigration status, unless the determination "may hinder or obstruct" his investigation.

"Reasonable suspicion" -- is a legal standard established by the Supreme Court that allows an officer to stop and briefly detain a criminal suspect long enough to question him about suspected criminal activity.⁴ After questioning, the officer may only arrest the suspect if his reasonable suspicion has risen to "probable cause"--a higher standard requiring more proof.

"Stop, Detain, or Arrest" -- Some have said the law permits an officer to ask about immigration status during a random street encounter. This is not the case. But it does require an officer to make this query when he stops, detains, or arrests a person for an unrelated offense, such as speeding, and then develops reasonable suspicion that the person is an unauthorized immigrant. There is one exception: the officer need not make this immigration inquiry if it "may hinder or obstruct" his investigation. Still, the exception, while notable, can't swallow the rule. In fact, the law subjects police agencies, politicians, counties and cities to potential lawsuits from concerned citizens if it is shown that they adopted a policy of not fully enforcing the law.⁵

"May Not Consider Race" -- Importantly, the law was amended to attempt to avoid racial profiling. In enforcing the law, officers "may not consider race, color, or national origin...except to the extent permitted by the United States or Arizona Constitution." This language was taken

¹ Under federal law, a person is in an "unlawful presence" if that person is present in the United States after the expiration of the period of stay authorized by the Secretary of the Department of Homeland Security or is present in the United States without being admitted or paroled. 8 U.S.C. sec. 1182(a)(9)(B)(ii).

² Note that since at least 1952, it has been a federal civil offense to fail to carry documents proving one's lawful immigration status. *See* 8 USC 1304(e); 8 USC 1306(a). The Arizona law adopts the same standard, but makes it a criminal offense.

³ The law has several other provisions that are not treated here.

⁴ *Terry v. Ohio*, 392 U.S. 1 (1968).

⁵ Legal Arizona residents may sue if a state official or agency, or a county or town "adopts or implements a policy that limits or restricts the enforcement of federal immigration laws, including 8 U.S.C. 1373 and 1644, to less than the full extent permitted by federal law." Arizona H.B. 2162, Sec. 3(H), May 2010.

from the Department of Justice's Guidance on Racial Profiling.⁶ It means that an Arizona officer may not cite race as a factor in explaining why she decided to ask a person about his immigration status, unless a prior applicable court case allows it. In Arizona, the case law appears to oppose this use of race.⁷ The issue of profiling is more fully treated below.

Potential Difficulties With the New Law:

It May Divert Law Enforcement From Its Core Responsibilities

➤ ***Consumes scarce law enforcement resources***

The law consumes scarce police resources by requiring them to enforce immigration law in addition to their core responsibilities. How much immigration enforcement police undertake will depend on how they implement the law. The law technically grants police latitude to inquire about immigration status while enforcing such mundane matters as noise violations. But whether they will exercise this authority is another matter. Police chiefs must provide guidance to field officers on how broadly to enforce the law. This will be key.

Regardless, the law essentially forces state and local police to wear two hats: one for immigration enforcement and another for criminal enforcement. This will undoubtedly divert some police resources away from serious criminals. In fact, the Arizona Association of Chiefs of Police says it will “negatively affect the ability of law enforcement...to fulfill their responsibilities...”. But rank-and-file officers disagree, including the Arizona Association of Police. It says that working among a large illegal population endangers its officers. Nevertheless, the law will also require significant resources from overstretched prosecutors and judges who must process new criminal cases.

➤ ***May Discourage Victim and Witness Cooperation***

The law does not permit officers to ask victims and witnesses of crime about their immigration status. But will the news of this legal protection reach them? The challenge for Arizona will be ensuring that it does. Otherwise, victims and witnesses who lack lawful status may fear working with the police.

➤ ***May Commandeer Scarce Jail Space***

Judges sentencing immigrants convicted under the new law may impose up to 20 days in jail (or less). Probation and other non-custodial options are prohibited, but there is an exception if jails are overcrowded. Whether Arizona judges and prosecutors will opt to jail immigrants en masse remains to be seen. If they do, immigrants will occupy significant jail space in already overcrowded state and local jails. This will force Arizona to exercise one of three options: release criminals currently in jail, build additional prisons, or release immigrants more quickly. All three options carry significant safety and economic costs for the public, and thus impact the common good. How Arizona manages them will be important.

⁶ United States Department of Justice, Civil Rights Division, “Guidance Regarding the Use of Race by Federal Law Enforcement Agencies”, June 2003, at p. 2.

⁷ See e.g., U.S. v. Montero-Camargo, 208 F.3d 1122 (9th Cir. 2000).

It Places State and Local Officers in Difficult Immigration Enforcement Roles

➤ ***Could lead to heightened scrutiny of minority residents***

The law adopts sound language from the Department of Justice that appears to effectively prohibit explicit racial profiling. Officers may not use race in enforcing the law unless case law allows it, and the Appeals Court covering Arizona appears to ban it.⁸ In addition, the new law states that officers must enforce it in a way that protects civil rights.⁹

However, avoiding all forms of profiling may prove difficult for two related reasons. First, police have long been constitutionally permitted to conduct “pretextual stops” meaning a stop where an officer cites a technically-justifiable reason like a broken tail-light, but actually has an ulterior motive such as suspected drug activity.¹⁰ Arizona officers, in an attempt to enforce S.B. 1070, may conduct pretextual stops against suspected unauthorized immigrants. Second and relatedly, a challenge for Arizona police will be to minimize their use of more subtle racial or ethnic stereotypes such as clothing or behavior in deciding who to stop, question, and arrest.¹¹

We regret that the law places good officers in a tough spot. Helpfully, Governor Brewer did issue an executive order mandating immediate civil rights training for all officers. But this rapid measure may prove inadequate to properly equipping officers who are new to immigration enforcement. We will monitor implementation to ensure that minority residents are treated fairly and constitutionally.

➤ ***Could Ensnare Citizens and Lawful Residents***

The law casts a fairly wide net that could unintentionally ensnare U.S. citizens and lawful residents. The new law mandates certain circumstances in which police *must* try to determine immigration status. But separating unlawful residents from lawful ones could prove a difficult task. Those persons who can’t produce state-issued identification will be subject to increased police scrutiny about their immigration status, even if they simply left their I.D. at home. This may trigger lengthy questioning and wrongful detention of lawful citizens and residents, especially Hispanic residents. Fortunately, the law does require the officer to have probable cause to believe the suspect is unlawfully present before she arrests him, consistent with the Fourth Amendment. And it mandates that officers enforce the law in a way that respects the privileges and immunities of United Citizens and everyone’s civil rights.¹² However, even these protections may not prevent errors in police judgment about who is or is not a lawful resident.

It is Unnecessary to the Effective Enforcement of Immigration Law

Effective immigration enforcement can be achieved without the new law. Unlawful presence in the United States is already a federal civil offense triggering deportation. The question is

⁸ See fn. 7.

⁹ Arizona H.B. 2162, Sec. 2(K), May 2010.

¹⁰ See e.g. *Whren v. United States*, 517 U.S. 806 (1996).

¹¹ Note that courts are divided over the constitutionality of factors like clothing and behavior in forming reasonable suspicion.

¹² See fn. 9.

who should enforce it, and how. Some argue the law was necessary due to court rulings reserving immigration enforcement to federal authorities, a responsibility some say the feds have abdicated. Fair enough. But there are currently several federal programs that allow state and local police to cooperatively enforce federal immigration law, including the 287(g) program, the Secure Communities program, and the Criminal Alien Program.¹³ In fact, Arizona already participates in all three. S.B. 1070 represents Arizona's attempt to significantly broaden its enforcement authority vis-à-vis the federal government. Arizona argues that it has inherent authority—general police powers reserved to the states under the Constitution—to enforce immigration law. Others say the federal government has acted to preempt state immigration enforcement by passing laws reflecting sole federal responsibility for immigration enforcement. Courts must now judge the Arizona law's constitutionality.

It Marginalizes Immigrants and Hispanic Residents

Criminalizing unlawful presence and requiring frequent police questioning stigmatizes and marginalizes Arizona's immigrants and Hispanic residents. Arizona is the first state to criminalize unlawful presence; currently, it is a civil offense to be unlawfully present in the United States. The new law will, despite intentions to the contrary, create distrust and misunderstanding in immigrant communities and thus undermine solidarity among Arizonans.

¹³ While these programs are imperfect, they do offer federal training and oversight—aspects the Arizona law lacks.