

The Criminalisation of an Immigrant Population (ARI)

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Theme: Arizona's Senate Bill 1070, that goes into effect on 29 July, criminalises the failure to carry immigration documents.

Summary: Arizona has taken up the cause of immigration enforcement with a law requiring police to arrest persons suspected of being undocumented, and by criminalising activities associated with immigration. This has brought new life to the long-simmering debate about how to respond to the nation's estimated 11 million unauthorised residents. The law is often described as an outgrowth of frustration with the federal government's 'broken' immigration system. This broad characterisation is somewhat misleading. Arizona does not want the federal government to establish 'a path towards citizenship' or to regularise resident immigrants as it did in 1986. Rather, SB 1070 is designed to shift the national debate in a more restrictive direction. Arizona's policy of 'attrition through enforcement' provides a rallying point for opponents of comprehensive immigration reform within parameters that appear legal and possibly appropriate in light of federal inaction. It was designed as a test case. Locally, SB 1070 signals the state's unrelenting hostility towards its unauthorised residents and its indifference to those who must carry papers to prove their right to remain. To local police agencies, the state sends a warning: either prioritise immigration enforcement or risk a citizen-initiated lawsuit.

Analysis: Arizona's recent legislation criminalising the status of being unauthorised within its borders occurs against the backdrop of long-standing American ambivalence about immigration, particularly in times of economic stress. As in the past, concerns about immigrants 'stealing' American 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. These concerns have been articulated by prominent intellectuals like Peter Brimelow, who argues in *Alien Nation* that today's immigrants are 'from completely different and arguably incompatible cultural traditions' (Brimelow, 1995, p. 25), and Samuel Huntington, who claims that Mexican migration into the US, 'looms as a unique and disturbing challenge to our cultural integrity, our national identity, and potentially to our future as a country' (Huntington, 2000). In studying this literature Leo Chavez (2008) finds evidence of a pervasive 'Latino Threat Narrative' that incorporates unsubstantiated beliefs about 'out-of-control' Latino fertility and a refusal to assimilate.

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 will probably always underlie 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 unauthorised immigrants and a desire for more restrictive policy at the national level. The trend appears to be gathering steam. Politicians across the nation have expressed interest in adopting a version of Arizona's law.

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SB 1070 subjects anyone who cannot prove legal status to be in the state to arrest by local police. The possibility of arrest occurs whenever an officer is engaged in a legitimate stop or arrest. Police must ask about immigration status ('when practicable') if their suspicions are aroused, but racial profiling is prohibited. There is no statutory guidance as to what constitutes reasonable suspicion of undocumented status and no required training for officers. Any law-enforcement agency that resists prioritising immigration enforcement in its day-to-day work is liable to a citizen-initiated lawsuit for damages. SB 1070 also contains provisions against solicitation of work by unauthorised residents and requirements for employers, but it is the criminalisation of one's presence in the state that has stirred controversy.

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 recently initiated 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 have already dismissed the federal lawsuit as 'pure politics'. A federal court decision against Arizona would presumably elicit a similar reaction. The goal of the law's creators may not be so much to transform law enforcement in Arizona as to signal the rest of the world that an enforcement-based approach is feasible and desirable in light of federal inaction. This is certainly the perspective of the Washington legal advisors who helped Arizona craft this law. Everyone involved must have anticipated litigation to block the law, but they also must have seen benefits, even if the law is struck down. Arizona will then be the righteous David pitted against the Goliath of big government and left-leaning national organisations in a legal theatre that is biased against a small western state. Attrition through enforcement will gain publicity and perhaps sympathisers, while proposals for eventual citizenship will be pushed further to the background in the national debate.

The adoption of SB 1070 should not come as a surprise to observers of Arizona's escalating war against unauthorised immigrants and the federal government's shifting stance towards enforcement of its immigration laws. The federal government over the past 15 years has progressively loosened its hold on immigration enforcement, creating a variety of programmes to partner with local police. At the same time the federal level has hardened its own actions against unauthorised immigrants, apparently in hopes of convincing legislators and the public of its seriousness about enforcement. The pro-enforcement policy has included some legally indefensible actions against immigrants, such as the federal raid in Postville, Iowa, where the prosecutorial strategy of over-charging immigrants was criticised by a unanimous US Supreme Court. It has also included more willingness to deport legal residents who engage in criminal acts; the list of crimes that result in deportation is growing and prosecutions for all types of immigration offenses are at an all-time high. On the border, Operation Streamline facilitates the charging and criminal conviction of immigrants caught in the act of entering the US. From this perspective, Arizona has simply accepted the federal government's implicit invitation to come down hard on unauthorised immigrants, while taking the approach a few steps further. Even the federal government appeared to accept this characterisation when it explained in its press release announcing its suit that Arizona had 'crossed a constitutional line' (Press release, 6/VII/2010).

There are many reasons why Arizona has taken the lead in declaring its opposition to accepting unauthorised immigrants into American society. They include an ugly and

obvious racism that regularly finds expression in blogs and demonstrations, but also a sense of injury at the past indifference of the federal government towards the costs that Arizona has borne as a border state. There are also practical political considerations. The state has an estimated 500,000 unauthorised immigrants in a population of approximately 6.5 million people. A wave of new immigrant voters might challenge the conservative Republican dominance of the state. A war on 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 to the federal government, a position that always plays well in Arizona.

The population that is the target of SB 1070 is largely Mexican, but also contains Central American and some Latin-American migrants. 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. Some are American citizens, children born here of unauthorised parents. Others are 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 white Arizonans, who nevertheless rely on them for low-wage services. These are not the only unauthorised immigrants 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 every modern nation. This was not always clear in the US because the federal constitution refers to immigration policy only cryptically, in reference to the federal power to naturalise citizens. Nearly a century ago, however, the Supreme Court clarified the matter, and the federal government's power to set the terms of immigration policy has not been seriously in dispute since then. The constitutional system also protects local authority in many matters from federal intrusion, 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 criminals, a strategy that was popular in the Prohibition era as a way of dealing with foreign-born gangsters.

The large-scale efforts to remove immigrants that have occurred from time to time in the nation's history have involved cooperative efforts between federal and local authority. Between 1929 and 1939, federal immigration authorities relied on the assistance of local police in several states to 'repatriate' an estimated 1 million people of Mexican descent – the term is inaccurate as applied to the majority of these people, who were actually US citizens—. Federal Border Patrol agents worked with local police in 1954 when they initiated sweeps to check IDs of 'Mexican-looking' people in Texas; Operation Wetback removed tens of thousands of people, and encouraged many others to leave on their own. Arizona has been no stranger to such removal actions, both with and without federal assistance. Not until 1996, however, did Congress formally recognise 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 unauthorised immigrants from the nation's interior. Given the constitutional arrangement of powers, 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) authorised training of local and state police to enforce federal immigration laws and provided a programme in furtherance of this policy, informally known as the '287g' programme, a reference to its location 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 give local police the authority to arrest previously deported non-citizen felons. Such power sharing is not unusual in the US. Federalism has long been a familiar solution to the problem of limited governing capacity, and involving all levels of government in addressing a social issue has long been common (see eg, Grodzins, 1966, p. 32). From this perspective, immigration has been a relatively late arrival on the devolution scene.

The Department of Homeland Security (DHS) added another dimension to the devolution of federal authority when it engaged local police in its anti-terrorism efforts after the September 11, 2001 attacks on the World Trade Center and Pentagon. The NSEERS program involved contacting and questioning Muslim men about their possible links to terrorism. At about the same time, the Office of Legal Counsel offered an expansive view of the relationship, claiming that states have inherent authority to enforce federal immigration laws. This much-criticised memo has never been rescinded. At the operational level, federal immigration officers are increasingly engaged with local police. The federal government has added civil immigration warrants to the data bases that it shares with local police agencies. Immigration agents have become part of local anti-gang and narcotics taskforces. A variety of partnering programs are now available under an umbrella programme entitled ICE ACCESS (Agreements of Cooperation in Communities to Enhance Safety and Security). One of the most far-reaching is Secure Communities, which is designed to link all local jails in the nation with ICE (Immigration and Customs Enforcement) so that anyone booked in a US jail can be checked for immigration status.

Federal devolution of enforcement authority to the local level has occurred in tandem with a stalemate in federal immigration reform. The current system does not offer enough temporary or permanent work permits to satisfy market demand, while legal entry based on family reunification requires years, and sometimes more than a decade, for people from Mexico. Even visitors visas, though theoretically unlimited in quantity, are difficult to obtain. This dysfunctional system encourages unauthorised immigration. The fortification of the southern border also tends to raise levels of unauthorised settlement by making returns more difficult. The estimated 11 million unauthorised immigrants who now reside in the US are more dispersed than in the past. Many are finding work and living in areas unaccustomed and unprepared for so many new foreign residents. The result, exacerbated by the sour economic climate, is a perfect storm of controversy across the nation.

Beginning in 2005, states began to respond to rising levels of unauthorised immigration with bills and resolutions. Statutes making English the state's official language and restricting drivers' licences to citizens and legal permanent residents have been favourite topics for legislation. The number of states considering immigration-related laws at first grew steadily, but may now be levelling off. In 2009, for example, a total of 1,040 bills and resolutions were introduced, a number lower than two years earlier. Although all 50 states participated in proposing bills or resolutions, only 35 laws were adopted. This pattern suggests that state legislators, while anxious to show their concern about uncontrolled immigration, have encountered obstacles in crafting viable legislation.

Cities and towns are also participants in this debate, with some doing everything in their power to discourage immigrants from living in their areas, and others, generally major cities, resisting this restrictive approach in various ways, including by providing local identification to migrants who lack legal status. Concerns that immigrants will become afraid of the police and unwilling to report criminal activity or their own victimisation have led some communities to adopt protective policies. Not surprisingly, there are conflicts among various levels of government, with cities sometimes being forced to comply with state or county initiatives that they consider inimical to their interests. Sometimes neighbouring cities and towns take opposing positions on the accommodation of unauthorised immigrants. The result is a multi-layered patchwork of local legislation attempting to control the employment, educational opportunities, social services, rentals and other concerns of immigrants in day-to-day living. While most of these are matters where localities have traditionally enjoyed legislative authority, it is unclear how far states can go before encroaching on the federal government's sovereign authority to determine immigration policy.

Arizona's Law

Arizona began its legal assault on its unauthorised immigrants 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 over 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 unauthorised immigrants 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 (Wingett & Benson, 2007). All of these propositions passed easily, some by a margin of nearly three to one.¹

The state has also experimented with criminal sanctions. In 2006 the Arizona legislature adopted an anti-human-smuggling law that the district attorney interpreted to criminalise immigrants, as if they were co-conspirators in the smuggling operation. In 2007 the legislature limited the availability of bail for unauthorised immigrants accused of serious crimes. Arizona gained national attention in January 2008 with a law that punishes employers who knowingly hire undocumented workers by suspending or revoking their business licenses. That law is currently under review by the US Supreme Court.

All of these earlier efforts to discourage unauthorised immigrants from moving into Arizona or remaining in residence laid the groundwork for Senate Bill 1070, the somewhat misleadingly entitled Support Our Law Enforcement and Safe Neighborhoods Act. In fact, the law ties the hands of police departments and cities that disagree with the enforcement-only approach. Some of them believe that public safety requires community trust in police and therefore favour a more nuanced approach to enforcement. Others are worried about the costs involved in detaining, housing, and transporting immigrants.

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>.

Supporters of SB 1070, however, claim that it mirrors current federal law, which requires that all non-citizens carry evidence of their legal status. Federal law requires that persons who enter without inspection register within 90 days. The Arizona law clearly goes beyond these requirements, however. Most notably, it criminalises failure to carry immigration documents; in federal law, this is a civil violation. The Arizona law also sets up a registration requirement that the federal government has largely abandoned in favour of other methods of removing unauthorised immigrants. Perhaps most importantly, it forces the federal government to respond to Arizona's view of immigration-enforcement priorities, essentially eliminating federal discretion to determine how it will use its resources to enforce immigration law.

Critics of the law have focused mostly on the problem of 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 on consent. Police officers have authority to ask questions, not just in an arrest situation, but any time their curiosity is aroused by a suspicious situation. Such questioning is likely to be directed to persons who appear to be immigrants, and the questions will likely focus on immigration status, given the state'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 pretextual stops based on 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. Officers sympathetic to the state's interest in removing unauthorised immigrants will not lack opportunities to become involved in immigration enforcement. There are anecdotal reports that racially-based requests for identification are already occurring, though the law has not yet taken effect. At this point an atmosphere of hardening enforcement already exists, thanks to highly publicised raids by the Maricopa county sheriff, an ardent supporter of SB 1070, and the actions of a few officers in units around the metropolitan area.

Individual police departments are not well-positioned to guard against racially-inspired stops and arrests by their officers. Although police have been warned not to racially profile to determine whom to suspect of immigration violations, there are no time-tested policies in this area. A nationwide recent survey of chiefs of police in large and medium-sized cities revealed that only 39% have written policies regarding an officer's immigration-related duties. Fifty-one per cent have no policy at all, written or unwritten (Decker *et al.*, 2009). Such policies are even more unlikely to be in place in small cities and towns.

Arizona is already feeling the impact of its new law. The prospect of implementation has provoked an exodus 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 (Gans, 2007). The law has also provoked political protests. Some professional organisations 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 so far. There

are also political impacts as immigrant-rights organisations find new support in their effort to register immigrant voters who have legal status, a development that 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 into effect, 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. Both inside and outside the state, there is wide public support for the statute. But what that support in the general public actually means is not yet clear. Many of those polled who favour the law also favour a path towards citizenship for unauthorised residents. This is not the position taken by Arizona's Republican leaders. None of them favour eventual citizenship for unauthorised immigrants, even Senator John McCain, who was once well-known for that position.

The local context includes many other signs of hostility toward the presence of these immigrants. Huge, sprawling Maricopa County, which contains over half of the state's population, has repeatedly chosen Joseph Arpaio as its sheriff. Since 2005, when Sheriff Arpaio realized that combating illegal immigration could be a winning platform, he has distinguished himself for the priority he puts on detecting and removing unauthorised immigrants. The sheriff was an early and enthusiastic adopter of the '287g' programme that allows local police to arrest people without legal status. Maricopa County led the nation in the number of officers trained for immigration work. The sheriff has worked closely with the County Attorney, who used a state law on human smuggling to prosecute those who had been smuggled as co-conspirators.

Many political leaders are also clear in their desire to remove these residents. J.D. Hayworth, a former Congressman and now a candidate for Senator McCain's Senate seat, has made hostility to immigrants a major campaign issue. Hayworth touts his anti-immigrant credentials and has published a book on the subject: *By Any Means Necessary*. The state legislators who proposed SB 1070 and earlier legislation in the same vein have also made reputations for their hostility to the unauthorised 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 of unauthorised immigrants born in Arizona. He also favours charging tuition for students without authorization to attend public schools in the state.

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. But there are certain implicit limits in their limits in this public debate. When Governor Brewer described most unauthorised immigrants as drug smugglers, even her supporters were critical of the evident untruth of that statement. When a candidate for the state commission that regulates utilities suggested that unauthorised immigrants be ineligible for gas, water and electricity, he was roundly criticised. Advocating violence against unauthorised immigrants is likewise clearly beyond the pale for the political class.

Conclusion: SB 1070 illustrates how the complex compromise of federalism that characterises the American 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. Arizona, with assistance from immigration restrictionists at the national level, 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 unauthorised immigration. In its complaint, the federal government carefully explains why it needs discretion in enforcing its law, and where the Arizona statute interferes with its policies and practices.

The government's brief entirely bypasses the issue of an individual's right to be free of unwarranted stops and intrusive questioning based on skin colour, a basic civil-rights guarantee. This could be a function of timing: the government is seeking a preliminary injunction, while violations of individual rights will not be concretely provable until after implementation. But the drafters of the government's complaint may also have concluded that the powerful concept of civil rights remains too linked to citizenship to be easily transportable to the field of immigration. Although the US Constitution draws no distinction between citizens and non-citizens in guaranteeing individual rights and liberties, this expansive idea has not shaped immigration law. Immigration policy in the US is fundamentally contractual: the government sets up requirements that the prospective immigrant must follow. Even as procedural protections have been engrafted on to this structure, they sound more like waivers of government authority than fundamental rights. And on the civil rights side, while the concept has expanded beyond its original focus on the legalised subordination of African Americans, that historical legacy remains strong. The base on which civil rights stands is citizenship in the US, not the human condition or other universalistic ethos.

Nevertheless, the situation facing Arizona's unauthorised immigrants is eerily reminiscent of the classic civil-rights struggle that Black Americans and their supporters waged. The connection is not just with the potential of racial profiling in the law's implementation. The connection also lies in Arizona's determination to root out visibly distinctive residents on the basis of legal status. The state has entirely disregarded the contributions these residents have made, and ignored their many connections to Arizona society. It is treating them as people of no value based on their legal status. The harsh policy of 'attrition through enforcement' would be indefensible and unpopular if Arizona's Mexican immigrants were regarded as neighbours and friends. It is this aversion to inclusion and disregard for those who appear different that defines most contemporary racism.

Law has been complicit in the process of de-sensitising Arizona citizens to SB 1070's fundamental cruelty. Arizona has spent years using lack of legal status to separate its residents into two distinctive legal classes, and constructing the undocumented one as undeserving. The federal government has sent mixed signals, but its increasingly heavy reliance on enforcement is as insensitive as Arizona to the contributions unauthorised immigrants make to American society. The federal government, in moving to block SB 1070, is attempting to retain its power to decide how welcoming the US will be to immigrants. Its inability to set a definitive course illustrates another facet of American federalism. The President has the power to sue to block a state's usurpation of national power, but does not have the power to create the path to citizenship that he believes to be in the best interests of the nation.

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