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Arizona SB 1070: Fighting the Effect of Anti-Immigration Bills against Latino Families

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Introduction

In 2010, Arizona legislators enacted the “Support our Law Enforcement and Safe Neighborhoods” Act, commonly known as Arizona State Bill 1070 (“S.B. 1070”).¹ This law was enacted in an effort to “discourage and deter the... entry and presence of aliens… unlawfully present in the United States.”² These laws will certainly have a harmful effect on the ability of Latino children to obtain access to essential benefits necessary for their well being.³

Arizona S.B. 1070 represents a threat to the Latino community’s ability to guarantee that their children will have access to an education, to essential health benefits, and to immunization programs, to name a few.⁴ Fear of persecution by law enforcement may lead parents to discourage any association with authorities, making the community, and by association their children, targets of crimes and abuses.⁵ Imposition of sanctions upon employers will lead businesses to err on the side of discrimination when hiring Latinos, leading families to hardship.⁶

Part I of this article will provide some background information on S.B. 1070, comparing S.B. 1070 to its sister acts in other states and examine the main arguments against S.B. 1070. Furthermore, Part I will also illustrate how S.B. 1070 and its sister acts target the Latino community, and severely affect Latino children by dissuading parents from sending their

¹ S.B 1070, 49th Leg. 2d Sess. (Az. 2010).
² Az. S.B 1070, see also BLACK’S LAW DICTIONARY 84 (9th ed. 2009) (defining alien as a person who resides within a country but is not a citizen or subject of that country).
³ Brief for Hispanic National Bar Association, et al. as Amici Curiae Supporting Appellee’s Brief at 2, United States v. Arizona, 641 F.3d 339 (9th Cir. 2011) [hereinafter Brief HNBA].
⁴ See Id. at 3.
children to school, participating in health programs and other benefits, and reporting crimes to police.

Part II will analyze the conflicting claims to S.B. 1070, including the assertions that illegal immigration has resulted in increasing crime rates, especially for violent, property, drug and gang related crimes and therefore requires drastic measures to deal with. Moreover, Part II will further observe additional assertions by proponents of S.B. 1070 that immigrants are a potential threat to the United States’ and Arizona’s economy.

Part III will explain the circumstances and politics that have led to the enactment of S.B. 1070 and its sister acts throughout the United States. Additionally, Part III will illustrate the factors that have led the United States to, at times encourage immigration under desperate need of a strong and cheap workforce, while hindering immigration at other times in its history, under irrational fear that immigrants were a source of crime and economic disaster.

Part IV will analyze the future of S.B. 1070 as reviewed by the Supreme Court, and based on those projections, present both a best case scenario, where S.B. 1070 would remain permanently enjoined by the courts and discourage state legislations from enacting immigration enforcement laws, and a worst case scenario, where S.B. 1070-like legislation is enacted by multiple state legislations, resulting in widespread discrimination against the Latino community.

Part V will appraise S.B. 1070 and illustrate why it cannot solve the problems it was expected to address. Part V will also present suggestions and ideas on immigration reform that may solve the problems S.B. 1070 was intended to address while avoiding the side effects that the bill created, and thereby creating a healthier environment for Latino children everywhere.

I. S.B. 1070 – Background Information
a. Inception and Enactment

On April 23, 2010, Governor Jan Brewer of Arizona signed the “Support Our Law Enforcement and Safe Neighborhoods Act, Arizona S.B. 1070. Containing some of the most punitive immigration legislation, it garnered immense support by Arizona citizens while also being widely condemned by many others, including the mayors of the state’s two largest cities, the Arizona Association of Chiefs of Police (AACP), the business community and various religious organizations, for “essentially codifying and legitimizing racial profiling.”

S.B. 1070 was conceived by the Arizona legislature amongst a perception that the illegal immigration problem is one that has spun out of control, and has escalated drug and human trafficking crimes, and has resulted in serious public safety concerns. These concerns were fueled by the rapid increase in the population of illegal aliens in Arizona. In the past 20 years Arizona’s illegal alien population has increased fivefold, from 100,000 up to 500,000.

However, unlike proponents of the bill who claim that illegal immigration is the source of violent crime in Arizona, “statistics show that even as Arizona’s population swelled, buoyed in part by illegal immigrants…, violent crime rates declined, to 447 incidents per 100,000 residents in 2008… In 2000, the rate was 532 incidents per 100,000.” Moreover, studies have suggested

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7 Az. S.B 1070.
that illegal aliens actually commit fewer crimes, partly because they “generally try to keep out of trouble to not risk being sent home.”

As illegal immigrants are already committing a crime by remaining within the United States without the required consent, politicians find it easier to ignore the statistics involved and improve their reputations by promising to rid their states of illegal immigrants. As a response, S.B. 1070 was created; it contains thirteen sections designed to target any person suspected of being an illegal alien, therefore “making all Latinos in Arizona suspect in their own communities, regardless of their immigration status.” The most relevant sections are 2, 3, 5 and 6.

S.B. 1070’s section 2 requires officers to make a reasonable attempt to determine an individual’s immigration status during any “lawful stop, detention or arrest.” Aside from providing a list of documents that may prove legal status, Section 2 makes no effort to define the circumstances where reasonable suspicion may be found, nor does it consider the burdens on both officers and suspects while verifying immigration status.

Section 3 makes it a misdemeanor to fail to carry a United States Permanent Resident Card (“green card”), resulting in a maximum fine of $100 and a maximum of 20 days in jail. In response to the Latino community’s concerns that the act would encourage racial profiling, the Arizona legislature amended S.B. 1070 to delete “solely” from the section providing that law enforcement may not “solely consider race, color or national origin, except to the extent

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12 Id.
13 See Id.
14 One Year Later, supra note 8, at 2.
15 See Az. S.B 1070. See also Terry v. Ohio, 392, U.S. 1, 30 (1968) (holding that law enforcement may stop a suspect under a reasonable belief of unlawful activity).
17 See Az. S.B 1070.
permitted by the United States...”\textsuperscript{18} However, as University of Arizona law professor Gabriel Chin asserts, “It’s always ‘race plus’ in these situations… The law still allows the consideration of race as a factor.”\textsuperscript{19}

Section 5 of the Act makes it a crime for an unauthorized alien to solicit, apply for, or perform work within the state.\textsuperscript{20} The section implies that its purpose is merely to comply with already established federal law, but aside from the penalties enacted against the use of false documents to obtain employment, federal law has traditionally abstained from directly penalizing illegal workers from seeking employment.\textsuperscript{21}

Finally, Section 6 of the Act allows officers to arrest a person without a warrant under “probable cause”\textsuperscript{22} that the person has committed a crime that would merit removal from the country, but the section makes no mention of what crimes may merit removal, or how law enforcement may distinguish which crimes may merit removal from those that do not.\textsuperscript{23}

These sections are currently enjoined by the federal courts and are currently awaiting review by the Supreme Court.\textsuperscript{24} This has not stopped other states from enacting their own versions of S.B. 1070. For example, as of August 5, 2011, Utah, Alabama, Indiana, Georgia and

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\textsuperscript{18} See H.B. 2162, 49th Leg., 2d Sess. § 3(B) (Az. 2010).
\textsuperscript{20} S.B 1070, 49th Leg., 2d Sess. § 2 (Az. 2010).
\textsuperscript{21} United States v. Arizona, 703 F. Supp. at 1000-1002.
\textsuperscript{22} Handler, J.G., Ballentine’s Law Dictionary: Legal Assistant Edition 431 (1994) (defining probable cause as “a reasonable amount of suspicion, supported by circumstances sufficiently strong to justify a prudent and cautious person’s belief that certain facts are probably true”).
\textsuperscript{23} United States v. Arizona, 703 F. Supp. at 1005-1006.
\textsuperscript{24} United States v. Arizona, 641 F.3d 339, 366 (9th Cir. 2011) (affirming preliminary injunction of Arizona S.B. 1070’s sections 2(B), 3, 5 and 6).
\end{flushleft}
South Carolina successfully enacted their own version. All are currently enjoined or awaiting review by district courts.\textsuperscript{25}

Moreover, 27 other states have considered enacting similar acts of their own at least once; many of them failing only after prominent business groups, law enforcement and several leaders and representatives voiced their opposition.\textsuperscript{26} For example, the Florida legislature has attempted to pass its own version of the law in 2010 and 2011.\textsuperscript{27} The law passed in both houses and failed only when a joint version was not agreed upon by the final deadline.\textsuperscript{28} Governor Rick Scott asserted that the legislature will attempt to pass the bill once again in 2012.\textsuperscript{29}

Some of these sister acts are more draconian than others. On January 31, 2011, New Mexico Governor Susana Martinez issued an executive order inspired by S.B. 1070, requiring law enforcement to question suspects on their immigration status.\textsuperscript{30} Unlike S.B. 1070, the executive order extends only towards criminal suspects, omitting inquiries on reasonable suspicion of illegal status and other controversial aspects.\textsuperscript{31}

In contrast, on January 12, 2011, Virginia legislators introduced at least sixteen bills considerably more severe than S.B. 1070, among them bills that would block illegal immigrants from attending public colleges and universities, require the state to begin tracking the number of


\textsuperscript{27} Id.


\textsuperscript{29} Id.


undocumented children in public schools, and requiring parents who enroll children in public
school to disclose their immigration status.32

b. Effects on Latino children’s schooling

As of April 2009, there were an estimated 5.5 million children with unauthorized
immigrant parents in the United States, and around three-quarters of these are U.S. born
citizens.33 Like other children in the United States, these children also deserve economic
security, a stable home, and access to schooling, health care and social services.34 But the
enactment of these measures and lifting the injunction on S.B. 1070 and its sister acts will
endanger the ability of Latino parents from providing these necessities for their children.35

Latino children were already considered to be disadvantaged within the educational
system even before the enactment of S.B. 1070.36 As of September 2009, thirty-nine percent of
Latino eight graders scored “below basic” reading levels, compared with only sixteen percent of
White children. Fifty-five percent of Latino children who entered ninth grade gained their high
school diploma on time, compared with seventy-six percent of White children.37

In Arizona, birthplace of S.B. 1070, at least one in ten students in grades kindergarten
through twelve has parents who are illegal immigrants.38 Bearing in mind that S.B. 1070 affects

32 Frederick Kundle, House GOP Announces Program Against Illegal Immigration, WASHINGTON POST, Jan. 18,
33 Jeffrey S. Passel & D’Vera Cohn, A Portrait of Unauthorized Immigrants in the United States, PEW HISPANIC
35 See Amicus Brief, supra note 3, at 2.
36 See Mark Mather & Patricia Foxen, America’s Future: Latino Child Well-Being in Numbers and Trends,
POPULATION REFERENCE BUREAU AND NATIONAL COUNCIL OF LA RAZA, 11 (April 28, 2010),
[hereinafter America’s Future].
37 Id.
38 Portrait, supra note 33, at 9.
all law enforcement and state agencies, its influence would extend to both school districts and police officers within school, who would be required to document and report any information on students’ immigration status or national origin to the state authorities.\(^{39}\)

Even a refusal from a Latino student to disclose his immigrant status is viewed as evidence that either he or his family may be within this country without permission, forcing parents to withdraw their children from school to avoid deportation.\(^{40}\) Just one month after S.B. 1070 was signed by the Governor, the Latino community in Phoenix called for their school district to implement a policy to keep schools from complying with S.B. 1070, fearing that police officers assigned to schools would seek to arrest students or their family members.\(^{41}\)

Ironically, both the Arizona Department of Education and the Arizona Peace Officer Standards and Training Board (AZPOST), the agency charged with training the state’s 16,000 law enforcement officers, have refused to provide any guidelines for the enforcement of S.B. 1070 in schools, claiming that situations involving school police officers are too problematic and specific to be included in the statewide training program.\(^{42}\)

S.B. 1070 effects were felt almost immediately within school districts. For example, in 2009, leaders of the Mesa, Arizona School District, already under years of enrollment decline,

\(^{39}\) See Amicus Brief, \textit{supra} note 3, at 2.
\(^{40}\) See \textit{Id.}
projected a loss of 700 students for 2010, but by September 2010, the district reported a 2,400 student loss, with two-thirds of withdrawals being associated with S.B. 1070’s enactment.43

More troubling is the effect on the Latino community itself. In 2011, a report based on over seventy voluntary interviews in Pima County, Arizona, revealed a Latino community frayed by the departure of parents, many of whom chose to leave while leaving their children behind to complete their schooling.44

When a teacher within the study was asked if S.B. 1070 was having an effect on academic performance, he responded, “Oh yeah- very obvious… it’s like, no wonder you have straight F’s! You’re dealing with all at this at home, and on top of that, you’re undocumented...”45 Moreover, teachers within the schools in the county reported a sharp drop in parent attendance to school activities and teacher conferences, evidencing a reinforced mistrust of schooling institutions by the community.46

c. Effects on Latino children’s health

Lack of access to health care is one of the most serious problems for Latino children within the United States. “In 2008, 19% of Latino children lacked health insurance, compared with 10% of Blacks and just 7% of Whites.”47 Health services available to undocumented families are limited in most states to emergency services or immunization programs.48 However,

45 Id. at 13, n.50.
46 Id. at 14.
47 America’s Future, supra note 36, at 21.
already many undocumented immigrants do not seek this limited care because of fear, confusion on eligibility and language barriers.\textsuperscript{49}

In the course of seeking health care, patients provide personal information to the hospital or clinic. However, Latino parents are concerned that the healthcare centers and emergency rooms may be monitored or policed by immigration authorities and fearful to yield such personal information.\textsuperscript{50} Dr. Valerie Arkoosh, President of the National Physicians Alliance has warned that the enforcement of these measures will discourage undocumented parents whose children are born in the United States, from bringing their children to the doctor, creating a direct link between fear of being asked for papers and avoiding healthcare.\textsuperscript{51}

These fears are not unfounded. For example, one of S.B. 1070’s sister acts, Louisiana H.B. 1205, requires that agencies verify the status of people using public benefits provided by state agencies, and while it lists a few exceptions for emergency room treatment and immunizations, “essentially the Louisiana bill proposes that healthcare workers, educators, and other public employees be converted into enforcers of immigration laws.”\textsuperscript{52}

The health care system works best when dangerous conditions are well controlled by broad immunization efforts, sparing states the cost of rising medical costs brought on by diseases that could have been prevented.\textsuperscript{53} However, fear and uncertainty about the health care providers'

\begin{footnotesize}
\textsuperscript{49} Id.
\textsuperscript{51} Id.
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role in enforcing the documentation requirement discourages Latino parents from immunizing their children, and therefore creating a public health risk for the community.\textsuperscript{54}

Lack of access to school-based nutrition programs is also a great concern. For Latino children living with food insecurity and hunger, the meals served in school breakfast and lunch programs may be the primary source of regular and nutritious foods eaten throughout the day.\textsuperscript{55} However, since S.B. 1070 actively blocks Latino children from accessing public schools, families effectively cannot take advantage of school-based nutrition programs, thereby eliminating an avenue of proper nutrition and diet that is otherwise available to all other children within the United States.

\textbf{d. Effects on Latino children’s safety}

Children who grow up in a safe environment are more likely to experience positive developmental outcomes during childhood, are less likely to engage in crime as they grow up and are also better positioned for success as adults.\textsuperscript{56} Over the past two decades, law enforcement officers have greatly contributed to create these safe environments through community policing, where police officers look to build positive relationships with communities to obtain important information from neighbors and rely on families to monitor suspicious activities within their neighborhoods.\textsuperscript{57}

\textsuperscript{54} See \textit{Id}.
\textsuperscript{57} \textit{Brief for Center on the Administration of Criminal Law, as Amici Curiae Supporting Appellee’s Brief at 6, United States v. Arizona}, 641 F.3d 339 (9th Cir. 2011) [hereinafter Brief CACL].
However, the sections of S.B. 1070 and its sister acts that allow for inquiries on legal status and warrantless arrests have put community policing in peril. Efforts to maintain safe communities lose a large part of their effectiveness if large segments of the community are unwilling to participate with law enforcement out of fear of deportation, either for themselves or their own families.

Law enforcement has already reported instant changes in the community. For example, David Salgado, a Phoenix police officer, and one of the many individuals that filed a lawsuit seeking to block S.B. 1070 in Arizona, recounted examples of criminal cases successfully solved only through the cooperation of Latino parents and children, including a street gang that was engaged in extorting the community, but once the bill was signed, “the same area, it was like a ghost town… these people wouldn’t even look at me.”

S.B. 1070 created mistrust of law enforcement not only among parents, but also among their children. Even in cases where the children themselves are born in the United States, they refrain from even approaching law enforcement even when they find themselves victims of crime, fearful that their parents may be deported.

In an effort to prevent unfair profiling of Latinos as a result of S.B. 1070, AZPOST published a set of alternate factors, other than race to consider in developing reasonable suspicion of an unlawful presence. These factors include: lack of identification, traveling in tandem, manner of dress, location of the stop, and difficulty to communicate in English.

58 See Brief HNBA, supra note 3, at 5
59 Brief CACL, supra note 57, at 7.
61 Left Back, supra note 44, at 19.
62 Id. at 20.
63 State of Confusion, supra note 60, at 7.
This list of factors was immediately met with derision, with critics describing the “traveling in tandem” as the “two or more Mexicans rule,” and pointing out that lack of identification, difficulty with the English language and the style of dress were hardly unique to illegal immigrants.64

Although Arizona’s crime statistics since the passage of S.B. 1070 have not yet been published, the precedent set by Sheriff Arpaio’s may very well foreshadow the result of the enforcement of S.B. 1070 by local law enforcement.65 Joe Arpaio of Maricopa County, the Sheriff made famous for his tough stance against crime, inspired the enactment of S.B. 1070 in part through his controversial methods to fight illegal immigration.66

Despite Sheriff Joe Arpaio’s assertions in the Maricopa County Sheriff’s Office (MCSO) website, that his methods have greatly reduced crime, the statistics have not supported his boasts. From 2004 to 2007, under his supervision, the violent crime rate increased by 66%, and there was an increase of 166% of in homicides during that same period.67 The rise in crime occurred despite the fact that the Sheriff shifted resources previously dedicated to combat violent crime to immigration enforcement and despite the fact that he implemented highly controversial random immigration sweeps both during that time frame.68

Moreover, even after multiple attempts, in 2007 only 200 people were identified as illegal immigrants as a result of the sweeps, compared to 16,000 illegal immigrants identified by the normal investigation of crimes.69 After these sweeps resulted in more than 4,500 extra overtime

64 Id.
66 See id.
68 Id.
69 Id. at 9.
hours and a $1.3 million deficit in 2007, several patrol deputies of the MSCO ceased to enforce
the immigration laws in most cases, even when the suspects were clearly involved in human
smuggling.70

Even if these results could be avoided by educating local law enforcement over how
much discretion they have to enforce immigration laws, S.B. 1070 itself contains no directions
on how police officers may handle different situations, such as minor traffic infractions,
questioning of witnesses and others.71 In fact, most training materials produced by AZPOST
refrain from mentioning sensitive circumstances, leading to the adoption of inconsistent policies
and contributing to confusion among jurisdictions on how to handle different encounters, such as
the investigation of juveniles suspected of illegal immigration status.72

For example, in the city of Chandler, Arizona, if a police officer reasonably suspects a
juvenile of being an illegal alien, they will likely conduct an investigation of the parents, while in
Phoenix, police will probably investigate the immigration status of the juvenile alone, in contrast
to the usual procedure followed by the U.S. Immigration and Customs Enforcement (ICE), who
would probably dismiss the kid without repercussions.73

II. Conflicting Claims on S.B. 1070

a. Illegal immigration’s alleged links on crime

Arizona’s state legislators responsible for the enactment of S.B. 1070 were quick to
defend their reasoning, claiming that their new immigration enforcement law will help them fight

70 Id.
71 See Az. S.B 1070.
72 State of Confusion, supra note 60, at 8.
73 Id. at 8-9.
an illegal immigrant crime wave that is sweeping the state.\textsuperscript{74} Law enforcement officers amiable to immigration enforcement such as Pinal County Sheriff Paul Babeu, also supported the enactment of the new act, claiming that criminal activity within Arizona was “off the scale.”\textsuperscript{75}

A report released in 2009 by the Center for Immigration Studies (CIS), a conservative think tank that advocates immigration reduction in the United States, also alleged disparaging data. CIS cited law enforcement data within only four counties throughout the United States, including Maricopa County. It found that illegal immigrants made up to approximately twenty percent of the prison populations within those counties.\textsuperscript{76}

The same report also attempted to refute claims that immigrants do not have high crime rates and also that immigration may actually reduce crime. In contrast, the report claimed that most studies comparing crime rates and immigration levels only have limited value, and pointed to data showing that from 1998 to 2007, 816,000 criminal aliens were removed from the United States because of a criminal charges or conviction.\textsuperscript{77}

Finally, CIS further contended in an earlier report that strong enforcement of immigration law at the local level is essential to the safety of American communities, pointing to the fact that many Latino gangs are famous for their violent activities; gangs such as MS-13, Surenos- 13 and 18\textsuperscript{th} Street, are largely comprised of illegal aliens.\textsuperscript{78} Other supporters of the law have also pointed

\textsuperscript{75} Id.
\textsuperscript{77} Id. at 2.

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out, in support of S.B. 1070, that aside from being a major hub for human smuggling, half the
drugs seized along the U.S.-Mexico border have been confiscated in Arizona.\textsuperscript{79}

\textbf{b. Proponents’ allegations on the “cost” of illegal immigration}

Supporters of S.B. 1070 also claim that illegal immigration not only has influenced the
increase of crime in the United States, it also has adversely affected the economy of the United
States. Kris Kobach, co-author of S.B. 1070, has previously argued out that the net fiscal cost to
the United States is approximately $99.2 billion a year, with $79.9 billion being borne by the
states and $19.3 billion by the federal government.\textsuperscript{80}

A 2010 report by the Federation for American Immigration Reform (FAIR), a well-
known conservative anti-immigration organization, has also claimed that in 2009, Arizona’s
illegal immigration population cost the state, among others, $1.6 billion in education, $694.8
million in health care and $85.5 million in welfare costs.\textsuperscript{81}

FAIR’s cost crunching further claims that the children of illegal immigrants constitute the
single largest cost to the United States, their education being nearly $52 billion, their medical
expenses approximately $5.9 billion, and their childcare, including programs such as school meal
programs, close to $3 billion.\textsuperscript{82}

\textsuperscript{80} Kris W. Kobach, \textit{Fact or Fiction? Setting the Record Straight on S.B. 1070}, 23 \textsc{Regent U.L. Rev.} 353, 354 (2011).
In its cost estimates, FAIR admits that it makes no distinction between children of illegal aliens born in the United States and the children that are illegal aliens themselves, “because the fiscal outlays for them are a direct result of the illegal immigration that led to their U.S. birth.”

CIS made similar claims, pointing to a study in 2003 where CIS claimed that even after the welfare reform in 1996 that barred many immigrants from access to multiple welfare programs, immigrants continued to heavily rely on Medicaid, amounting to twenty-two percent of households in major welfare programs compared to fifteen percent by native households, rendering any savings by the reform meaningless.

c. Critiques against S.B. 1070 supporter’s allegations

The reports by CIS and FAIR have been widely cited by media and policy makers in support of S.B. 1070. However, they have also been seriously questioned by multiple nonpartisan think-tanks, who have found that most claims against illegal immigrants constantly ignore government statistics, regularly rely on poor methodology and contain multiple errors and misleading numbers to support their findings.

The Cato Institute, a libertarian think-tank, asserts that fears of immigrant crime are completely unfounded, pointing out that according to the U.S. Department of Justice, the violent crime rate in Arizona in 2008 was the lowest it has since 1971, and as illegal immigrant

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83 Id.
84 Steven A. Camarota, Backgrounder, Back Where We Started: An Examination of Trends in Immigrant Welfare Use Since Welfare Reform, CENTER FOR IMMIGRATION STUDIES, 1, (Mar. 2003).
populations grew, the rate of violent crimes in Phoenix, Arizona and the entire state fell by more than twenty percent, a greater drop than the overall U.S. crime rate.\textsuperscript{87}

Competitive Enterprise Institute (CEI), a nonprofit libertarian think-tank, has also criticized FAIR’s methods to estimate the cost of illegal immigration, asserting that FAIR’s report has vastly overstated the costs of illegal immigration, totally ignored the benefits provided by immigrants, and relied in inflated numbers of immigrants for its analysis.\textsuperscript{88}

CEI found that FAIR’s report failed to account for any future taxes that illegal immigrants would pay, unsubstantially claiming that “most illegal aliens do not pay income taxes,” when according to the Internal Revenue Service, around sixty percent of illegal immigrants file tax returns every year.\textsuperscript{89} Moreover, CEI noted that FAIR’s reasoning on the costs of the children of illegal immigrants is flawed and unsound, claiming drastic costs for their upbringing without considering their future revenue.\textsuperscript{90}

In addition, The Urban Institute, a nonpartisan think-tank that focuses on economic and social policy research, has heavily criticized CIS’ analysis on immigrants’ enrollment in welfare, finding that its methods overstated the share of immigrants receiving Medicaid, and resulting in misleading conclusions about welfare use among immigrants.\textsuperscript{91} The Urban Institute found that from 1996 through 2001, noncitizens were actually less likely than native citizens to be enrolled in Medicaid, with thirty-three percent of native citizens applying for Medicaid, and compared with only fourteen percent of noncitizens.\textsuperscript{92}

\textbf{III. Politics, Factors and Perceptions of Immigration}


\textsuperscript{88} See FAIR Criticism, supra note 86, at 2-3.

\textsuperscript{89} Id. at 3.

\textsuperscript{90} Id. at 4.


\textsuperscript{92} Id. at 3.
a. Politics and circumstances behind S.B. 1070

While state Senator Russell Pearce is commonly considered the creator of S.B. 1070, the roots of the controversial legislators lie well beyond him.93 After efforts enacted during President Clinton’s administration to fortify the San Diego and El Paso sectors, routes well known to be immigrant crossing points, the influx of illegal migration was funneled onto Arizona, resulting in increasing numbers of immigrants present in the state.94

With Americans increasingly getting caught in the growing border violence brought about by the Mexican drug war, many Arizona citizens expressed a widespread fear that the violence could spill onto their neighborhoods.95 In 2009, the city of Phoenix, Arizona, reported an overwhelming 370 kidnapping cases, many of them connected to the Mexican drug war, leading many to label the city as the “Kidnapping Capital of the U.S.”96

The situation reached its tipping point with the murder of a prominent rancher, Robert Krentz, 20 miles north of the Mexican-Arizona border.97 The murder spawned an immediate clamor for action, many claiming that Krentz’s murder was not an unusual occurrence but the beginning of a trend, even when it is still unclear who killed him.98

Senator Pearce, already one of Arizona’s most vocal opponents of illegal immigration, drafted and sponsored S.B. 1070 under a claim that the act would “take handcuffs off police and

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94 See id.
98 Id.
Jan Brewer, Governor of Arizona, upon signing S.B. 1070 defended her support of the controversial act by claiming that “we cannot delay while the destruction happening south of our international border creeps its way north.” Another sponsor of the act, State Senator Al Melvin, further pointed to the sections of the act that would discourage their employment as a means to restore order to the state.

Although the illegal immigrant population decreased by a million between 2007 and 2009, and the flow of illegal immigration went down by seventy percent, images of a “horde” of illegal immigrants running rampant within the United States, spreading lurid violent crimes onto cities and towns, became the frame through which S.B. 1070 and similar laws were shaped and viewed.

As a result of these and many other claims by S.B. 1070 supporters, many Arizonans supported the enactment, “blindly accepting the premise that crime is up due to illegal immigration, and, therefore, lawmakers are protecting their citizens with S.B. 1070.” Following Arizona’s example, thirty one state legislations introduced bills similar to S.B. 1070, asserting many of the same reasons as Arizona legislators did. While five states, Utah, Indiana, Georgia, Alabama and South Carolina, were successful, both S.B. 1070 and its sister acts are currently enjoined at least in part, and currently awaiting review by appellate courts.

b. America’s ambivalent views on immigration

100 Brief HNBA, supra note 3, at 1.
103 Id. at 908.
106 Landscape, supra note 26.
The enactment of anti-immigration acts, spurred by fears of a racial transformation of America and an association of immigrants as a source of crime and economical disarray, may seem like a recent occurrence, but in fact it is far from it.  

After the initial growth of the original colonies, the United States has experienced three peak periods of large-scale immigration, each coinciding with a transformative economic change, and each was largely followed by strong opposition from anti-immigrant advocates, who endorsed measures explicitly designed to restrict immigration under economical and societal grounds.

No better example exists of America’s ambivalence towards immigration than the government’s stance towards the Chinese during the Gilded Age, from 1850 to 1900, beginning with President Lincoln’s message to Congress calling for the establishment of “a system for the encouragement of immigration.” Lincoln’s pronouncement led to congressional approval of a scheme that established a partnership between business organizations and the U.S. government to import labor from all over the world.

These initiatives inaugurated a more proactive policy towards immigration, in which the massive procurement of a foreign workforce came to be understood as an essential feature of the country’s emphasis on industrialism, but by the time of the severe recession that took hold of the country in the 1870’s, it was heavily opposed by anti-immigration forces throughout the Union, especially in California, where the Chinese were subjected to discriminating legislation.

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107 See generally Fan, supra note 102, at 913.
110 See id. at 166.
111 Id. at 166-167.
112 Id. at 167.
efforts seeking to ban Chinese immigration and block their naturalization into the United States.\footnote{Fan, supra note 102, at 912-913.}

Anti-Chinese advocates in California vilified the Chinese, accusing them of degrading labor and displacing white workers, attempting to “render America an Asiatic state,” and associating them with crime, claiming that China was sending masses of its unwanted criminals, and pointed out to incarceration statistics to back up their claims.\footnote{Id. at 913-914.} The parallel between the rhetoric of anti-Chinese advocates in the 1880’s and the rhetoric of anti-immigration advocates today is striking, to say the least.\footnote{Id.}

California state legislators, unable to exclude the Chinese, resorted to repeatedly enacting punitive ordinances to discourage their arrival and restrict their participation from economical activities, unsuccessfully appealing to a need to preserve the general health and safety of the community.\footnote{Nation by Design, supra note 109, at 184.} An ordinance that prohibited Chinese females from landing in California, rationalized under a presumption that most of these were prostitutes and therefore ridden with diseases, was quickly shot down by a state court.\footnote{In Re Ah Fong, 1 F. Cas. 213 (1874) (holding that a law prohibiting the landing of Chinese females violated the Fourteenth Amendment’s Due Process clause).} Another ordinance criminalizing the operation of laundries in wood buildings under a claim that they constituted a fire hazard, but only enforced against Chinese owners, was eventually declared unconstitutional by the U.S. Supreme Court.\footnote{Yick Wo v. Hopkins, 118 U.S. 356 (1886) (holding that the law, while impartial on its face, was applied arbitrarily and thus denied equal protection).}

Finally, years of widespread anti-Chinese claims had their toll, encouraging Congress to enact the Chinese Exclusion Act of 1882, which allowed the federal government to whimsically
ban Chinese immigration for twenty years, block the naturalization of Chinese immigrants, and
eventually creating a sixty year period of racist immigration policies against Asians.119

IV. Projections on S.B. 1070’s future

a. Regulating immigration, or regulating immigrants?

Any projections on the future of state legislation on immigration enforcement strongly
hinge upon whether the U.S. Supreme Court, as it analyzes Governor Brewer’s petition to review
the injunction order against S.B. 1070’s most controversial sections, may be swayed by S.B.
1070’s claim that it only mirrors already existing federal immigration laws, named by its
supporters as the “mirror image theory.”120

The mirror image theory, as conceived by the co-author of S.B. 1070, Kris Kobach, is
based upon the premise that as long as the immigration state act mirrors existing federal
immigration law, the state will then possess “the authority to criminalize particular conduct
concerning illegal immigration”.121

This theory presents a fundamental question that will probably induce the Supreme Court
to certify the petition: Can a state government can, by enacting state law similar to federal law,
unilaterally manage the enforcement of a field traditionally claimed by the federal
government?122

Although the holding of the Supreme Court on S.B. 1070, will technically only affect the
preliminary injunctions and not decide the case itself, whatever position that the Supreme Court
takes will invariably instruct the district court on how it should rule on the constitutionality of S.B. 1070.\footnote{Alia Beard Rau & Michael Kiefer, Block on SB 1070 Upheld, ARIZONA REPUBLIC, Apr. 12, 2011, http://www.azcentral.com/arizonarepublic/news/articles/2011/04/12/20110412ar-1070ruling0412.html.}

The crux of the case revolves on whether S.B. 1070 is attempting to regulate \textit{immigration}, or \textit{immigrants}. The power to regulate \textit{immigration} is an absolute power inherent in the sovereignty of the United States, and any state or local laws that attempt to regulate this power will be found to violate the U.S. Constitution, and preempted by federal law.\footnote{Chae Chan Ping v. United States, 130 U.S. 581(holding that an act to exclude Chinese laborers from the United States is a constitutional exercise of legislative power which abrogates other laws to the extent that they conflict); see also BLACK'S LAW DICTIONARY 1297 (9th ed. 2009) (defining preemption as a principle derived from the Supremacy Clause, that a federal law can supersede or supplant any inconsistent state law or regulation).} If the Court determines that S.B. 1070 is hindering the federal government’s power to regulate \textit{immigration}, it is unlikely that the injunctions on S.B. 1070 will be lifted.\footnote{See Tail Wagging Dog, \textit{supra} note 123.} However, if the Court determines that S.B. 1070 is merely regulating \textit{immigrants}, to only involve the actual regulation of employment and other activities, then most provisions of S.B. 1070 will likely be upheld.\footnote{See Tail Wagging Dog, \textit{supra} note 123.}

\textbf{b. Best Case Scenario}

The best scenario would be for the Court to review S.B. 1070 broadly. The Court could conclude that S.B. 1070’s section 5, which criminalizes illegal immigrants seeking employment, is preempted under the “field preemption doctrine,”\footnote{Gade v. National Solid Wastes Mgmt. Ass’n, 505 U.S. 88, 98 (1992) (holding that federal law will preempt state law even where there is no conflict between them, if the federal law regulating that particular field is so broad as to infer that Congress intended to exclude states from legislating on the issue).} holding that by criminalizing an action that Congress chose not to, Arizona is intruding in a field that Congress impliedly intended to exclude states from, and thus is in violation of the U.S. Constitution.\footnote{Tail Wagging Dog, \textit{supra} note 123.}
In addition, the Court could also conclude that the rest of the enjoined sections are preempted under the “conflict preemption doctrine,” holding that by creating mandatory criminal sanctions for actions which, under federal law, may amount to only minor civil violations, Arizona’s S.B. 1070 is likely to overwhelm civil immigration and federal court systems, and disrupt the federal government’s goal of enforcing immigration.

A holding from the Court that all or most of S.B. 1070’s sections are attempting to regulate immigration, would ensure the defeat of not only Arizona S.B. 1070, but its sister acts in Utah, South Carolina, Georgia, Indiana and Alabama as well. State legislations would also be heavily discouraged from resuming their assault on the Latino community on 2012, wary that their own versions would probably not stand up to scrutiny.

b. Worst Case Scenario

Unfortunately, not every state regulation of immigrants is necessarily considered to be a regulation of immigration. A recent ruling by the Supreme Court on the constitutionality of the Legal Arizona Workers Act (LAWA), another law conceived under the mirror image theory, found that while the “power to regulate immigration is unquestionably a federal power… prohibit[ing] the knowing employment of persons not entitled to lawful residence… is certainly within the mainstream of [the State’s] police power.”

The worst case scenario would be for the Court to review S.B. 1070 narrowly, accepting supporters’ claims that, like the Courts’ previous decision on LAWA, S.B. 1070 only regulates certain practices of immigrants, and therefore Arizona is rightfully employing its police powers

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130 See Tail Wagging Dog, supra note 123.
to regulate areas that are not included in the federal government’s power to regulate immigration.\textsuperscript{132}

Under this approach, the Court could find that S.B. 1070’s Section 5, criminalizing illegal immigrants from seeking employment, is not preempted since it is merely a regulation on the employment of illegal immigrants, and like its parallel ruling on LAWA, it is within the mainstream of Arizona’s police powers.\textsuperscript{133}

In addition, the Court could also find that S.B. 1070’s remaining sections are not preempted by federal law, holding that Congress’ numerous statutes encouraging states to assist with immigration law enforcement, are evidence that Congress did not intend to prevent the States from using their police powers in their assistance of the federal government’s goal of regulating immigration.\textsuperscript{134}

Unfortunately this scenario seems the most likely to occur. Recently, a majority of Supreme Court justices have shown a great reluctance to apply the field and conflict preemption doctrines, reasoning that these doctrines are incompatible with the Constitution, because it leads the Court to “routinely invalidat[ing] state laws on perceived conflicts with broad federal objectives… not embodied within the text of federal law.”\textsuperscript{135}

A holding lifting the injunctions on S.B. 1070’s most controversial sections would not only result on a victory for anti-immigration forces in Arizona, but very probably encourage state legislatures already sympathetic to state immigration enforcement to enact their own. Law enforcement, with no other realistic ways to differentiate between lawful residents and illegal


\textsuperscript{133} See id.

\textsuperscript{134} See id.

aliens would be forced to engage in racial profiling to enforce the new laws, alienating the Latino community, and endangering the ability of Latino parents to provide their children with education, health and safety.\textsuperscript{136}

There could be a silver lining to this situation. This scenario could rally the opponents of S.B. 1070-like legislation, to lobby Congress for real immigration reform, and enact federal laws that would directly preempt state immigration laws, thereby bypassing the Supreme Court’s decision and providing an end to the threat that these laws represent to the Latino Community.

\textbf{V. Appraisal, Alternatives and Recommendations}

\textbf{a. Appraisal of S.B. 1070}

Arizona, like many other states, has long been frustrated with our broken immigration system. S.B. 1070 was enacted by the Arizona legislature as an approach to curb the illegal immigration that has flooded its state, seeking to deter any more illegal aliens from entering and expel the ones already within. However, S.B. 1070 created even more problems that it would solve.

S.B. 1070 and its sister acts have immense potential to be abused. Despite Governor Brewer’s actions to remove the word “solely” from the section providing that law enforcement may not “solely consider race, color or national origin,” there are no realistic ways, other than race profiling, for police officers to determine reasonable suspicion that a person may be an illegal immigrant.

As local police does not currently have the training or the resources to determine whether a person may be an illegal alien after arrest, the enforcement of S.B. 1070 may very well lead to

the wrongful arrest and incarceration of lawful residents and U.S. citizens. Moreover, it will create numerous problems for law enforcement, from lawsuits likely resulting from wrongful arrests, to severely hindering their efforts to combat crime.

S.B. 1070 has led numerous Latino families to emigrate towards other states, leaving behind family relations, friendships, and a previously stable lifestyle. Many Latino children who are U.S. born citizens will likely see themselves torn apart from their parents, who may be incarcerated or deported simply because they were seeking employment, because they were applying for health and welfare benefits for their families, or simply because they violated a traffic ordinance.

b. Alternatives and Recommendations to S.B. 1070

Before enacting laws like S.B. 1070, whose constitutionality is questionable at best, and carry high societal and economical costs, there is a need to conduct a serious, non-partisan study of the economic contributions of immigrants, present and future, in order to dispel criticism and rally support for true immigration reform.137

Secondly, there is a great need for legislation that increases funding for naturalization workshops. Many immigrant families greatly desire to truly belong to this country, but do not have the required information and training to go through the process. Aiding these families through literature, work fairs, and job counseling would greatly increase their chances at obtaining a stable job, which would enable them to better provide for their children.

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137 See Not in Our State: Lessons From Arizona – Why SB 1070 Is the Wrong Approach in Your State, NATIONAL ASSOCIATION OF LATINO ELECTED AND APPOINTED OFFICIALS, 23, (last visited Nov. 4, 2011) [hereinafter Not in Our State].
Third, promoting legislation and organizations focused on increasing access to adult English-language instruction would greatly help immigrants to better integrate into the general community, and decrease discrimination against them, generally and in the workforce.\footnote{See Shirin Hakimazadeh & D’Vera Cohn, PEW HISPANIC CENTER, 1, (Nov. 29, 2007), http://pewhispanic.org/files/reports/82.pdf.}

Finally, my own recommendation would be to lobby for real immigration reform. Public opinion across most communities shows immense support for sensible immigration reform, clamoring for a federal solution that includes securing the U.S.-Mexico border, punishing employers that game the system, requiring immigrants to pay fines before gaining citizenship, and fixing our broken immigration system.\footnote{Not in Our State, supra note 138, at 23.}

Fighting for real immigration reform would fight the rampant discrimination against the Latino community, and allow Latino parents to obtain stable employment, better access to health and welfare benefits, and thereby provide better for their children, who one day will be the workers, businessmen, lawyers, and leaders of our country.