ARIZONA SENATE BILL 1070

The Myth and The Law

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I. INTRODUCTION

A. The Problem

In a country where people of Hispanic/Latino origin or ethnicity comprise 15.1%[1] of the population, Arizona's passage of Senate Bill 1070[2], which enables its state police to enforce federal immigration laws, has thrust the U.S. immigration policy debate into the center ring of our political arena. Due in part to Mexico's very public battle with organized crime and drug cartels specifically[3], Arizona, "whose border is the most popular point of entry for illegal immigrants into this country"[4] (with an estimated 460,000 illegal immigrants in residence)[5], "has become the superhighway of illegal drug and human smuggling activity."[6] While "theft, robbery, vandalism and drug smuggling have always been part of illegal immigration" as attendant crimes plaguing Arizona border towns, the recent instability in Mexico has exacerbated this problem beyond the point of toleration.[7]

In 2008, the U.S. Department of Justice stated that Mexican gangs were the "biggest organized crime threat to the United States."[8] In 2009, the Department of Homeland Security acknowledged that "[o]ur nation's southern border has experienced a dramatic surge in cross-border crime and violence in recent years due to intense competition between Mexican drug

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[1] *U.S. Hispanic Population Surpasses 45 Million Now 15 Percent of Total,* U.S. Census Bureau, May 1, 2008, *available at* http://www.census.gov/Press-Release/www/releases/archives/population/011910.html.
[2] 2010 Ariz. Legis. Serv. Ch. 113 (hereinafter, "S.B. 1070").
[3] Gov. Jan Brewer, *Arizona Governor: Boycott is Misguided,* May 5, 2010, http://sports.espn.go.com/espn/commentary/news/story?page=brewer/100505.
[4] Nicholas Riccardi, *Arizona Passes Strict Illegal Immigration Act,* L.A. Times, April 13, 2010, at 2, *available at* http://articles.latimes.com/2010/apr/13/nation/la-na-arizona-immigration14-2010apr14
[5] George F. Will, *A Law Arizona Can Live With,* The Washington Post, April 28, 2010.
[6] Brewer, *supra* note 3.
[7] William La Jeunesse, Illegal Immigrant Suspected in Murder of Arizona Rancher, FOXNews.com, March 30, 2010, http://www.foxnews.com/us/2010/03/30/illegal-immigrant-suspected-murder-arizona-rancher (local rancher and Good Samaritan, Robert Krentz, who was in the habit of bringing water to and helping injured illegal immigrants who attempting to cross the desert in an area where summer temperatures often hit 120 degrees, was gunned down early Saturday morning by an illegal immigrant. Local police believe Krentz was likely murdered by a human trafficker or drug smuggler who saw him as a threat to business).
[8] Brewer, *supra* note 3.

cartels and criminal smuggling organizations that employ predatory tactics to realize their profits."[9] Notwithstanding, Arizona maintains that "Washington" continues to turn a deaf ear to its pleas for help from the National Guard and other federal resources, and has simply failed to secure the Arizona-Mexico border.[10] In fact, a national survey reveals that even 33% of Hispanics are in favor of the statute and 52% believe the government should do more and 89% consider illegal immigration a "serious problem."[11]

Consequently, the State Legislature passed S.B. 1070 in April of this year.[12] The statute is, for all intents and purposes, a mere replica of the federal immigration law. As Arizona senator and author of the bill, Russell Pearce, clarifies, S.B. 1070 merely "takes the handcuffs off of law enforcement and lets them do their job."[13] That is, confronting the problem of illegal immigration head on in an effort to protect Arizona citizens from the dangerous fusillade of accompanying crimes that pose an imminent, and serious threat to public safety.[14]

B. The Law: Quick Look

First and foremost, unlawful entrance into the United States is a crime under Title 8 section 1325 of the U.S. Code. The section entitled "Improper Entry by Alien," provides:

> Any alien who
> (1) enters or attempts to enter the United States at any time or place other than as designated by immigration officers, or
> (2) eludes examination or inspection by immigration officers, or
> (3) attempts to enter or obtains entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact,

[9] U.S. Immigration & Customs Enforcement, Border Enforcement Security Task Forces (BEST), updated November 3, 2009, http://www.ice.gov/pi/news/factsheets/080226best_fact_sheet.htm.
[10] Brewer, *supra* note 3; La Jeunesse, *supra* note 7.
[11] Jordan Fabian, *Poll: 67 Percent of Latinos Oppose Arizona Immigration Law,* The Hill, May 14, 2010, http://thehill.com/blogs/blog-briefing-room/news/97885-poll-67-percent-of-latinos-oppose-arizona-immigration-law.
[12] Along with similar laws in 2006 and 2009, sanctioning the hiring and conferring of government benefits to illegal immigrants, respectively.
[13] Riccardi, *supra,* note 4, at 1 (quoting State Sen. Russell Pearce).
[14] Brewer, *supra* note 3.

> shall, for the first commission of any such offense, be fined under title 18 or imprisoned not more than 6 months, or both (as a misdemeanor), and, for a subsequent commission of any such offense, be fined under title 18, or imprisoned not more than 2 years, or both (as a felony).[15]

The discussion then turns to, the constitutionality of Arizona's immigration statute, and its enforcement.

Though the media and our elected officials have only fueled the fire in proliferating these fears, the allegations of unconstitutionality and equal protection violations are not rooted in truth. According to the Office of Legal Counsel, U.S. Department of Justice, and codified within federal immigration statutes and reflected in relevant case law, "it is recognized that state and local police may stop, detain, and arrest persons when there is reasonable suspicion or, in the case of arrests, probable cause that such persons have violated, or are violating, the federal immigration laws."[16]

The U.S. Supreme Court, in its practical wisdom, has aptly noted that race is an obvious consideration when it comes to suspecting a person is an illegal alien. "The likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor."[17]

The Arizona statute provides that an officer may detain a person "where reasonable suspicion exists that the person is an alien and is unlawfully present in the United States, a reasonable attempt shall be made, when practicable, to determine the immigration status of the person."[18] However, production of any government issued identification document will a provide a

[15] 8 U.S.C. §1325(a)(explanatory parentheses added).
[16] 20 U.S. Op. Off. Legal Counsel 26, 5 (1996).
[17] U.S. v. Brignoni-Ponce, 422 U.S. 873, 886-887 (1975) (discussing factors attributing to reasonable suspicion for Border Control agents along the California/Mexico border).
[18] S.B. 1070, Sec. 2, 11-1051(B).

presumption of lawful presence.[19] It also provides that "[a] peace officer, without a warrant, may arrest a person if the officer has probable cause to believe…a felony has been committed…a misdemeanor has been committed in the officer's presence…[or] the person to be arrested has committed any public offense that makes the person removable from the United States."[20] Probable cause would also be required to bring the individual back to the police station for continued questioning as such action would cease to be a temporary detention and rise to the level of a custodial interrogation and arrest.[21] All of the above rules are long-recognized constitutional standards.[22]

Arizona Gov. Jan Brewer issued an executive order to have the U.S. Immigration and Customs Enforcement (I.C.E) implement proper training and enforcement protocols ensuring Arizona police comport with federal standards in enforcing the law.[23] Adhering to consistence, the statute expressly states that the Arizona law "shall be implemented in a manner consistent with federal laws regulating immigration, protecting the civil rights of all persons and respecting the privileges and immunities of United States citizens."[24] Thus criticisms that the statute is "beyond the pale"[25] and allegations of unconstitutionality currently surrounding "the recently enacted Arizona immigration law, which in fact mirrors federal law,"[26] appear to be without

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[19] S.B. 1070, Sec. 2, 11-1051(B) 1-4.
[20] S.B. 1070, Sec. 6, 13-3883(A).
[21] Dunaway v. New York, 442 U.S. 200, 216 (1979) (holding that probable cause required for police to seize and transported a suspect to the police station for interrogation); *see also* Miranda v. Arizona, 384 U.S. 436, 444 (1966) ("By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.").
[22] *See* Illinois v. Gates*,* 462 U.S. 213 (1983); *see also* Terry v. Ohio, 392 U.S. 1, (1968).
[23] Brewer, *supra* note 3; Kirk Adams, *The Truth Behind the Arizona Immigration Law* , The Atlanta Journal-Constitution, June 1, 2010, *available at* http://www.ajc.com/opinion/the-truth-behind-the-539151.html.
[24] S.B. 1070, Sec. 2, 11-1051(L).
[25] Riccardi, *supra* note 4 (quoting Chris Newman, Legal Director, National Day Laborer Organizing Network).
[26] Penny Starr, *Mexican President Denounces Arizona Law Despite Laws Against Illegal Immigration in His Own Country*, CNSNews.com, May 20, 2010, http://www.cnsnews.com/news/article/66332 (quoting Rep. Lamar Smith (R-Texas), the ranking member on the House Judiciary Committee).

much merit as the intent of the Arizona statute is to emulate, not exceed, the federal laws regarding immigration.

C. The Controversy

Undeniably, the State of Arizona's trailblazing legislation mandating state-level enforcement of federal immigration law has raised more than a few eyebrows and also some legitimate concerns about U.S. immigration policy in general: On the one hand promoting discrimination of minorities; on the other many view the general failure of enforcing these laws as tantamount to a federal policy of encouraging illegal immigration.[27] Still, as Mark Krikorian, Executive Director at the Center for Immigration Studies, Washington, D.C., notes, "It makes sense [Arizona] would be the first to do it since they're ground zero for illegal immigration."[28]

Nonetheless, the passage of Senate Bill 1070 has provided the catalyst for nationwide debate and evaluation of our immigration laws, and perhaps compelling grounds for change. However, there are major concerns surrounding the statute. On May 20, 2010, President Obama concisely described the heart of the debate when he said that a "'fair reading of the language of the statute' raises the possibility that individuals suspected of being in the country illegally could be 'harassed or arrested.'"[29] Most notably, opponents believe that it is facially unconstitutional and will enable racial profiling and indiscriminate harassment of citizens based solely upon their appearance.

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[27] Rassmussen Reports, *56% Say U.S. Government Policies Encourage Illegal Immigration,* October 13, 2009, *available at* http://www.rasmussenreports.com/public_content/politics/current_events/immigration/56_say_u_s_government_policies_encourage_illegal_immigration (In a national poll, 56% Americans feel that the inaction of action by the federal government to regulate immigration amount to it being the "polic[y] of the federal government encourage people to enter the United States illegally.").
[28] Riccardi, *supra* note 4 (quoting Mark Krikorian).
[29] Starr, *supra* note 25.

Lastly, there are fears that implementation of S.B. 1070 will effectively turn Arizona into a police-state where one can be imprisoned and even deported for lack of the proper immigration documents when stopped on the street by an officer of the law. Particularly, that "[a] lot of U.S. citizens are going to be swept up in the application of this law for something as simple as having an accent or leaving their wallet at home," as Alessandra Soler Meetze, president of the American Civil Liberties Union of Arizona, suggests.[30]

There is an additional consideration that is being entirely neglected in this debate; and that is the injustice to those immigrants who, out of respect for our nation and what it means to be an American, have gone through the grueling and often extremely costly process of lawfully securing their place in U.S. society. Failure to make the distinction between "immigrants" and "illegal immigrants" naively insults those who take on the difficult task of going through the proper legal channels in an effort to be here.[31]

D. The Bottom Line

The bottom line is that Arizona's statute neither modifies nor expands immigration law, but merely permits local law enforcement to avail itself of the already existing federal law to protect its citizens from what Arizona has deemed a serious problem and threat to public safety.[32] As is the same for every other law, there are protections in place to provide remedy and punishment for any abuses in its implementation.

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[30] Riccardi, *supra* note 4 (quoting Alessandra Soler Meetze, president of the American Civil Liberties Union of Arizona).
[31] Will, *supra* note 5 ("Arizonans should not be judged disdainfully and from a distance by people whose closest contacts with Hispanics are with fine men and women who trim their lawns and put plates in front of them at restaurants, not with illegal immigrants passing through their back yards at 3 a.m.").
[32] Brewer, *supra* note 3.

II. ARIZONA SENATE BILL 1070

A. Legislative Purpose

> **Section 1. Intent**
> The legislature finds that there is a compelling interest in the cooperative enforcement of federal immigration laws throughout all of Arizona. The legislature declares that the intent of this act is to make attrition through enforcement the public policy of all state and local government agencies in Arizona. The provisions of this act are intended to work together to discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States.[33]

B. Enforcement Provisions

Senate Bill 1070 allows Arizona state police to temporarily detain a person in a reasonable attempt to determine that person's immigration status where there exists "reasonable suspicion that the person is an alien who is unlawfully present in the United States." S.B. 1070 Sec. 2 (B). Reasonable suspicion has been the standard for temporary detention dating back to *Terry v. Ohio* in 1968.[34] Except to the extent it is allowed by the U.S. or Arizona Constitution, "[a] law enforcement official…may not consider race, color or national origin in implementing the requirements of this subsection."[35]

Moreover, requiring the production of immigration documents is hardly novel as federal law already mandates that non-citizens residing in the United States carry with them their green card or other document showing evidencing their lawful presence.[36] However under section B, green cards, visas or other immigration documents are not necessary as there will be a presumption of lawful presence upon the showing of:

1. A valid Arizona driver license.
2. A valid Arizona non-operating identification license.
3. A valid tribal enrollment card or other form of tribal identification.

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[33] S.B. 1070, Sec. 1.
[34] *Terry v. Ohio*, *supra* note 21, at 25-26.
[35] S.B. 1070 Sec. 2 (B).
[36] 8 U.S.C. §§1304(e), 1306(a).

4. If the entity requires proof of legal presence in the United States before issuance, any valid United States federal, state or local government issued identification.[37]

Therefore, and contrary to popular belief, citizens and foreign nationals will not be required to carry their passports or other immigration documents with them at all times. If an individual is unable to produce one of the materials above, and prove they are lawfully within the United States, that person's immigration status is to be verified with the federal government, specifically, the Immigration and Naturalization Service (INS), pursuant to federal laws already in place. There must be properly confirmed verification of unlawful presence before any removal type action is taken.[38] Thus lack of papers alone, will never serve as grounds for deportation.

Finally, Arizona's statute allows an officer to arrest a person without a warrant where probable cause exists to believe that person has committed a felony, a misdemeanor in the officer's presence, or "any public offense that makes the person removable from the United States."[39] Probable cause is the constitutional standard for arrest without a warrant.[40] Under federal law, aliens are removable for a variety of reasons–including but not limited to where they were inadmissible at the time of entry, have been convicted of a criminal offense, fail to properly register or commit document fraud, among others.[41]

Upon receiving confirmation of illegal alienage by the INS, law enforcement agencies are to then securely transport and transfer that person into federal custody.[42]

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[37] *Id.*
[38] S.B. 1070, Sec. 2 (D).
[39] S.B. 1070, Sec. 6, 13-3883(A).
[40] Illinois v. Gates, *supra* note 21.
[41] 8 U.S.C. §1227.
[42] S.B. 1070, Sec. 2 (D).

The Arizona statute expressly requires that its implementation fully comport with Constitutional standards, and any semantic ambiguities be reconciled in accordance with existing federal immigration law.[43] And among those who are familiar with both the Arizona statute and the federal immigration law, there is really no debate that "[S.B. 1070] is basically a copy of a similar federal statute."[44]

C. The Mexican Immigration Law

On Wednesday, May 19th 2010, CNN correspondent Wolf Blitzer interviewed Felipe Calderon the president of Mexico shortly after President Calderon's White House meeting with President Obama, during which he openly denounced the Arizona law. It was revealed during the interview however, that Mexico employs the same type of practice.

> **Wolf Blitzer:** Do Mexican police go around asking for papers of people they suspect are illegal immigrants?
>
> **President Calderon:** Of course. Of course, in the border, we are asking the people, who are you?...what the Mexican police do is, of course, enforce the law.[45]

Though Calderon mentions the word "border" in his answer, the Mexican immigration law appears to give Mexican officials the general right to check the immigration status of anyone found within its territory.[46] And as passport/identification documents are always required at border entry/exit points, the question and answer above can only reasonably be interpreted as referencing non-border related inspections.

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[43] S.B. 1070, Sec. 12 (B)&(C).
[44] Danielle Todesco, *UA Law Professors Dissect SB 1070,* KVOA.com, May 7, 2010, http://www.kvoa.com/news/ua-law-professors-dissect-sb-1070 (quoting Prof. Gabriel J. Chin, Univ. of Arizona College of Law).
[45] Starr, *supra* note 25 (quoting Wolf Blitzer interview with Mexican President Felipe Calderon, May 19, 2010, from CNN's "The Situation Room.").
[46] Starr, *supra* note 25.

Moreover, the comparable Mexican immigration law, is far more strict than its U.S./Arizona counterpart, and contains no cognizable due process protections.[47] As revised in 2009, and written in non-restrictive terms, Mexico's statute "gives Mexican officials the right to check people's immigration status, and if someone is found to be in the country illegally, they can be fined and deported."[48] Their law contains no explicit restrictions on where, when, and upon what basis a person's immigration status may be questioned and further action taken.[49]

Chapter III of the statute addresses immigration and simply provides that "[f]oreigners, when required by the Secretary of the Interior, shall prove their legal admission and stay in the country and meet the other requirements laid down this Act and its regulations."[50] Again, no procedural mandates or restrictions are enumerated.

Though bearing many significant differences that would violate U.S. law, the Mexican statute is similar to Arizona's in that it allows local and municipal agencies to assist federal immigration authorities in their enforcement of the law.[51]

It should be noted that only hours after President Calderon criticized Arizona's law as "discriminatory," he seemed to change his position somewhat after confronted with the facts and "admitted that Americans have a 'very powerful argument' when they say that Arizona and other border states are only trying to do what Mexico itself does with illegal immigrants – find them and send them back."[52]

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[47] *See* Ley General de Población (The Law of the General Population), *as amended,* Diario Oficial de la Federación (D.O.), 7 de Enero de 1974 (Última reforma publicada DOF 17-04-2009).
[48] Starr, *supra* note 25.
[49] Ley General de Población, *supra* note 43.
[50] *Id.* at Art. 64.
[51] *Id.* at Art. 73.
[52] Starr, *supra* note 25.

III. FEDERALISM & THE SUPREMACY CLAUSE

A. Exclusive v. Concurrent Jurisdiction

Article IV section 2 of the U.S. Constitution is commonly referred to as the "Supremacy Clause", and states:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.[53]

Consequently, when state law is incompatible with federal law, it will be preempted.[54] Preemption can be express, where a federal statute expressly prohibits state legislation on a matter, or implied, where a look at the relevant factors indicate the federal government is to maintain exclusive jurisdiction. If jurisdiction is not exclusive, then it is concurrent and states may supplement legislation to the extent they do not undermine the spirit of or purpose behind the Supremacy Clause.

B. Inherent Authority & Express Delegation of Authority to the States

Several provisions of Title 8 of the United States Code, also referred to as the Immigration and Nationality Act of 1952, concede to at least a modicum of concurrent jurisdiction in the area of immigration law via express references to the use of State authority to assist in the carrying out of federal immigration laws.[55] According to U.S. immigration laws, the Secretary of Homeland Security has "the power and duty to control and guard the boundaries

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[53] U.S. Const. art. VI, §2.

[54] *E.g.,* New York v. U.S., 505 U.S. 144, 159 (1992) ("As the Federal Government's willingness to exercise power within the confines of the Constitution has grown, the authority of the States has correspondingly diminished to the extent that federal and state policies have conflicted.").

[55] 8 U.S.C. §1358 ("…State and local officers may preserve the peace and make arrests for crimes under the laws of the States and Territories. For the purpose of this section the jurisdiction of such State and local officers and of the State and local courts shall extend over such immigrant stations."); *see also* 8 U.S.C. §§1373, 1366, 1601 (inter alia).

and borders of the United States against the illegal entry of aliens" subject to a "determination and ruling by the Attorney General with respect to all questions of law."[56] To that end, where the Attorney General deems necessary, he "may authorize any State or local law enforcement officer, with the consent of the head of the department, agency, or establishment under whose jurisdiction the individual is serving, to perform or exercise any of the powers, privileges, or duties conferred or imposed by this chapter."[57]

First, as announced by the Office of Legal Counsel, U.S. Department of Justice in February of 1996, "state and local police may constitutionally detain or arrest aliens for violating the criminal provisions of the Immigration and Naturalization Act."[58] To that end, and upon a showing of probable cause, State and local officers may "make an arrest for a criminal violation of the immigration law, such as illegal reentry or alien smuggling, they were authorized to do so under their inherent law enforcement authority."[59] Further, "[c]ourts have made clear that federal and state officers have authority briefly to detain persons based on reasonable suspicion that they have committed or are committing a violation of federal law, including the immigration laws."[60]

Originally, these powers were limited to criminal violations. However, post 9/11 concerns and the formation of the Department of Homeland Security have broadened this power

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[56] 8 U.S.C. §1103(a)(5), (a)(1), respectively.
[57] 8 U.S.C. §1103(a)(10).
[58] Assistance by State and Local Police in Apprehending Illegal Aliens, 20 U.S. Op. Off. Legal Counsel 26, 1 (1996).
[59] Jennifer M. Chacón, *A Diversion of Attention? Immigration Courts and the Adjudication of Fourth and Fifth Amendment Rights*, 59 Duke L. J. 1563, 1580 (2010); *see* Assistance by State and Local Police in Apprehending Illegal Aliens, 20 Op. Off. Legal Counsel at 27 ("Subject to the provisions of state law, state and local police may constitutionally detain or arrest aliens who have violated the criminal provisions of the Immigration and Nationality Act...." (footnote omitted)).
[60] *Id.; see also* Martinez v. Nygaard, 831 F.2d 822, 827 (9th Cir. 1987).

significantly since 1991..[61] In fact, "the federal immigration enforcement strategy has come to rely heavily upon thousands of state and local law enforcement agents who assist in interior immigration enforcement."[62] Less than a year after the Attorney General authorized state level enforcement of criminal immigration violations, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) [63] in September of 1996, which empowers authorization of "local officials to enforce civil immigration laws when 'an actual or imminent mass influx of aliens . . . presents urgent circumstances requiring an immediate Federal response.'"[64] Prior to this enactment, enforcement of civil immigration law by state or local authority was expressly prohibited.[65]

More recently, in 2002, then-serving U.S. Attorney General John Ashcroft "declared that state and local police had 'inherent authority' to make civil immigration arrests."[66] The "once-secret 2002 memo" from the Attorney General, affirming the above, has yet to be rescinded or otherwise declared illegitimate.[67] In his June 6, 2002 speech "Prepared Remarks on the National Security Entry-Exit Registration System", Ashcroft made the following announcement:

> The Justice Department's Office of Legal Counsel has concluded that this narrow, limited mission that we are asking state and local police to undertake voluntarily--arresting aliens who have violated criminal provisions of Immigration and Nationality Act or civil provisions that render an alien deportable, and who are

[61] Chacón, *supra* note 52.
[62] *Id.* at 1573.
[63] IIRIRA, Pub. L. No. 104-208, div. C, 110 Stat. 3009-546 (codified as amended in scattered sections of 8 U.S.C. and 18 U.S.C.) (Sept. 30, 1996).
[64] Chacón, *supra* note 52, at 1580 (emphasis added).
[65] Op. Off. Legal Counsel 26, *supra* at 32 ("[S]tate and local police lack recognized legal authority to stop and detain an alien solely on suspicion of civil deportability, as opposed to criminal violations of the immigration laws or other laws.").
[66] *Id.* ; *see also* Attorney General John Ashcroft, *Attorney General Prepared Remarks on the National Security Entry-Exit Registration System* Washington, D.C., June 6, 2002, http://www.justice.gov/archive/ag/speeches/2002/060502agpreparedremarks.htm.
[67] New York Times, "Stopping Arizona" editorial. March 30, 2010. http://www.nytimes.com/2010/04/30/opinion/30fri1.html?pagewanted=print.

> listed on the NCIC [National Crime Information Center] -- is within the inherent authority of the states.[68]

Joining in this position is current Secretary of Homeland Security, and former governor of Arizona, Janet Napolitano. Napolitano, who is intimately familiar with Arizona's unique plight, openly "defends the use of state and local police as 'force multipliers'" in immigration enforcement.[69]

Finally, the gestalt of each point addressed above was comprehensively articulated in a U.S. House of Representatives discussion regarding local enforcement of federal immigration laws on April 2, 2009:

> The inherent authority of local police to make immigration arrests was recognized by the Justice Department's Office of Legal Counsel (OLC) and was announced by Attorney General Ashcroft on June 6, 2002. OLC's unequivocal conclusion was that arresting aliens who have violated either criminal provisions of the Immigration and Nationality Act (INA) or civil provisions of the INA that render an alien deportable "is within the inherent authority of the states." n1 Such inherent arrest authority has never been preempted by Congress. This inherent authority is simply the power to arrest an illegal alien who is removable, detain the alien temporarily, and then transfer the alien to the custody of the Bureau of Immigration and Customs Enforcement (ICE).[70]

However, if circumstances prove that the States, and Arizona specifically, have not been conferred authority to regulate immigration by the relevant federal statutes delineated above nor through delegation of that power by the Attorney General, Arizona still may have this power under the 10th Amendment so long as it is not preempted by federal law.

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[68] Ashcroft, *supra* note 58.
[69] New York Times, "Stopping Arizona" editorial. March 30, 2010. http://www.nytimes.com/2010/04/30/opinion/30fri1.html?pagewanted=print.
[70] House Judiciary Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law and the Constitution, Civil Rights, and Civil Liberties Hearing, 111th Cong., "The Public Safety and Civil Rights Implications of State and Local Enforcement of Federal Immigration Laws." H.R. Doc. 2009 (WLNR 7431533)(Testimony by Kris W. Kobach, Professor of Law, University of Missouri-Kansas City School of Law).

C. ICE and the BEST Program

The Immigration and Customs Enforcement, along with the Customs and Border Protection (CBP), which is a branch of the Department of Homeland Security, "have increasingly collaborated with law enforcement agents outside of the immigration enforcement bureaucracy" asking "numerous state and local law enforcement agencies--to facilitate interior enforcement efforts." [71] This collaborative effort is referred to as the BEST program, which stands for Border Enforcement Security Task Forces, and signifies not only the need, but also the trend to have state and local authorities aid the federal government in its battle against illegal immigration.

The purpose behind the BEST program is described on the Department of Homeland Security website:

> Our nation's southern border has experienced a dramatic surge in cross-border crime and violence in recent years due to intense competition between Mexican drug cartels and criminal smuggling organizations that employ predatory tactics to realize their profits. Law enforcement agencies at the northern border face similar challenges from transnational smuggling organizations.
>
> In response to this trend, ICE has partnered with federal, state, local and foreign law enforcement counterparts to create the Border Enforcement Security Task Force (BEST) initiative, a series of multi-agency teams developed as a comprehensive approach to identifying, disrupting and dismantling criminal organizations posing significant threats to border security.[72]

In the last two years, the BEST program has utilized this cooperative effort of federal and state powers to crack down on illegal immigration generally, but more importantly and central to its purpose, it greatly reduced the drug-related and violent crimes that come with it. In 2008 alone, the BEST program efforts have already contributed to 1,000 criminal arrests, "seizing approximately 1,803 lbs. of cocaine; 52,420 lbs. of marijuana; 121 lbs. of methamphetamine; 25

[71] Chacón, *supra* note 52, at 1566.
[72] U.S. Immigration & Customs Enforcement, Border Enforcement Security Task Forces (BEST), updated November 3, 2009, http://www.ice.gov/pi/news/factsheets/080226best_fact_sheet.htm.

lbs. of crystal methamphetamine; 850 lbs. of ecstasy; 66 lbs. of heroin; 46 lbs. of hashish; 20 lbs. of opium; and 432 weapons."[73]

Further, BEST officers have aided in not only the prosecution of criminals and apprehension of contraband, but they have made significant contributions to crime prevention. "Border-related arms and ammunition smuggling investigations in Texas and Arizona have led to numerous criminal arrests and the seizure of thousands of rounds of ammunition and multiple firearms, including a cache of AK-47 assault rifles destined for Mexico."[74] In short, a pooling of resources among the several branches and divisions of government may well prove the most effective means to combat the crimes that are often an inherent symptom of illegal immigration.

D. Federal Preemption

As a general rule, it is fair to presume that states will have concurrent jurisdiction (and sometimes total autonomy) when it comes to affairs traditionally reserved to them under the 10th Amendment. This is especially true in matters concerning the State's police powers, namely employment, education, and health and safety. However, that power is limited by the Supremacy Clause which recognizes that United States federal law as "the supreme law of the land" and will preempt any conflicting state law as discussed above under "conflict preemption."[75] It will also preempt any state law that encroaches into an area where the federal government maintains sole authority under the doctrine of "field preemption."[76] A non-conflicting state law will nonetheless be preempted if evidence indicates that Congress intended for federal law to have exclusive jurisdiction in that area.[77]

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[73] *Id.*
[74] *Id.*
[75] U.S. Const. art. VI, §2.; *see, e.g.,* Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 152 (1982).
[76] Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta, *supra* note 75 at 153.
[77] Pennsylvania v. Nelson, 350 U.S. 497, 500 (1956).

When conflicts between federal and state laws are readily identifiable on their face, they rarely require much analysis. Moreover, and in consideration of the 10th Amendment, "[i]t is the established policy of both the State and Federal Governments to treat possible conflicts between their powers in such a manner as to produce as little conflict and friction as possible."[78] Conversely, resolving whether the federal design reflects Congress's judgment to completely occupy a particular field of law requires a more comprehensive examination of congressional history, policy and intent.[79]

In determining whether Congress intended federal law to serve as the plenary power in a specific area of law, a reviewing court must look at 1) whether "[t]he scheme of federal regulation [is] so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it"; or 2) whether the federal laws "touch a field in which the federal interest is so dominant that the federal system [must] be assumed to preclude enforcement of state laws on the same subject."[80] If either element is satisfied, state law will be deemed preempted by its federal counterpart. *Id.*, *see also* U.S. CONST. art. VI, §2.

However, it should be noted that "when the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily 'accept the reading that disfavors pre-emption.'"[81] More specifically:

> When Congress legislates 'in a field which the States have traditionally occupied .... we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.' Conversely, we do not assume non-preemption 'when the State regulates in an area where there has been a history of significant federal presence.'[82]

[78] Bute v. Illinois, 333 U.S. 640, 659 (1948).
[79] Chicanos Por La Causa, Inc. v. Napolitano, 558 F.3d 856 (9th Cir. 2009).
[80] Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).
[81] Altria Group, Inc. v. Good, 129 S.Ct. 538, 543 (2008).
[82] Chicanos, *supra* note 79 at 864 (internal citations omitted).

Though regulation of immigration traditionally falls under federal domain as it deals with matters of foreign policy, case law has clearly established that regulation of <u>all</u> matters surrounding immigration is not exclusive to the federal government.

Chicanos v. Napolitano, supra, involved a challenge to the Legal Arizona Workers Act, passed during Janet Napolitano's tenure as governor, which penalized employers who knowingly hired illegal aliens. Though an employment case, the analysis is similar to the issues presented by S.B. 1070 in that both involve the use of state legislation to regulate <u>an aspect</u> of what may otherwise be considered a distinctively federal concern.

> A leading case involving the employment of illegal aliens is *De Canas v. Bica*, (1976). The Supreme Court there upheld a state law prohibiting the employment of unauthorized aliens against a preemption challenge because it concluded that the authority to regulate the employment of unauthorized workers is "within the mainstream" of the state's police powers. The Court reasoned that "the fact that aliens are the subject of a state statute does not render it a regulation of immigration, which is essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain."[83]

In *De Canas*, the Supreme Court held that a California labor law prohibiting employers from knowingly hiring illegal aliens was neither an unconstitutional regulation of immigration, nor pre-empted by the federal Immigration and Nationality Act.[84] The Court appeared to almost praise California's availment of federal immigration law when it noted:

> In this case, California has sought to strengthen its economy by adopting federal standards in imposing criminal sanctions against state employers who knowingly employ aliens who have no federal right to employment within the country; even if such local regulation has some purely speculative and indirect impact on immigration, it does not thereby become a constitutionally proscribed regulation of immigration that Congress itself would be powerless to authorize or approve.

[83] Chicanos**,** *supra* note 79 at 864 (quoting DeCanas v. Bica, 424 U.S. 351 (1976)).
[84] DeCanas, *supra* note 83 at 365.

> Thus, absent congressional action, [Cal. Labor Code section 2805] would not be an invalid state incursion on federal power.[85]

The labor law deliberated in the *DeCanas* case is strikingly similar to Arizona's adoption of S.B. 1070 in that both allow local criminal enforcement of federal immigration law. The *DeCanas* court explained that even though the "[p]ower to regulate immigration is unquestionably exclusively a federal power…the Court has never held that every state enactment which in any way deals with aliens is a regulation of immigration and thus per se pre-empted by this constitutional power, whether latent or exercised."[86]

It would seem then, that where there is both national and state-level interest in the regulation of an area of law, the power to legislate in that area is to be shared concurrently between the two governmental authorities.

E. Arizona's Concurrent Jurisdiction

There are many compelling sources which support Arizona's concurrent jurisdiction to regulate immigration: express statutory provisions within the National Immigration Act referencing local enforcement of federal immigration laws; declarations by the Attorney General and Secretary of Homeland Security authorizing state and local police to aid in immigration arrests; and a multitude of U.S. Supreme Court cases allowing state imposed sanctions for violations of the federal immigration law—unequivocally amounting to state enforcement of that law. In sum, it does not appear the intention of the federal government to wholly occupy the field of immigration regulation.

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[85] *Id.* at 355-56.
[86] *Id.* at 354-55.

Therefore, if jurisdiction is concurrent, then Arizona may legislate in the area of immigration so long as it neither conflicts with nor broadens federal laws.[87] Because the Arizona statute is virtually identical in language, it will likely not be adjudged to go beyond the scope of its federal counterpart. The Arizona legislature directly acknowledges this limitation in section 12 of the statute:

> B. The terms of this act regarding immigration shall be construed to have the meanings given to them under federal immigration law.
> C. This act shall be implemented in a manner consistent with federal laws regulating immigration, protecting the civil rights of all persons and respecting the privileges and immunities of United States citizens.[88]

In conclusion, federal law does not purport occupy the field of immigration law so as to pre-empt state level enforcement, nor does Arizona's S.B. 1070 violate the Supremacy Clause by imposing stricter or broader regulations the federal law allows. That which is not prevented by the U.S. Constitution nor preempted by federal law, will be fair game for state legislatures under the powers vested to them by the 10th Amendment.

IV. SOVEREIGNTY OF THE STATES

A. The 10th Amendment

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X (1791). Our Forefathers recognized the need to be free from all forms of tyranny; whether it be a king, or overly powerful central government.[89] Having just won independence from the tyrannical rule of King George III of England, the framers of the Constitution unquestionably appreciated the dangers of rule by an absolute and undivided power. With this in mind, they

[87] Charleston & Western Carolina R. Co. v. Varnville Furniture Co., 237 U.S. 597, 604 (1915).
[88] S.B. 1070, Section 12 (B)&(C).
[89] *See* F.E.R.C. v. Mississippi, 456 U.S. 742 (1982); *see also* DECL. OF INDEP.(1776) (inter alia).

structured the American government upon a system of checks, accountability, and most of all a balancing of power.

Accordingly, the Constitution was drafted to both expressly and procedurally ensure that every citizen and state has a voice regarding its governance, and no single entity could ever grow so powerful to beyond reproach. "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front."[90] Properly, the Declaration of Independence, paragraph two, asserts these foundational ideals in a mission-statement-like manner:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. — That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, — That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.[91]

At the outset, Articles I-III of the Constitution divide the federal powers that be into three distinct spheres, each with the ability to check the other. While state sovereignty was certainly an important feature of our government infrastructure, the interplay between the federal and state powers had not been specifically delineated during those nascent years.

However, the inherent rights of the sovereign states to "retain[] [their] sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation

[90] Gregory v. Ashcroft, 501 U.S. 452, 458 (1991).
[91] DECL. OF INDEP., para. 2 (U.S. 1776).

expressly delegated to the United States,"[92] referred to by preceding documents such as the Articles of Confederation (1781), were announced by explicit decree in the 10th Amendment ratified as the anchoring amendment to The Bill of Rights in 1791.[93]

Often called the "Reservation Clause", the 10th Amendment defers regulation power to the states in certain areas that do not mandate nationwide regulation and conformity.[94] Thus, the states are free to experiment and act for the benefit of their particular citizens' needs. "The differing needs and customs of the respective states and even of the respective communities within each state emphasize the principle that familiarity with, and complete understanding of, local characteristics, customs and standards are foundation stones of successful self-government."[95] And in fact, "Arizona's law might give the nation information about whether judicious enforcement discourages illegality. If so, it is a worthwhile experiment in federalism."[96]

B. Reverse Federalism

Assuming there is no preemption issue, a state using its own resources to enforce a purely federal law is nevertheless a unique proposal. It is a fairly atypical occurrence, as the customary relationship of federal and state law is somewhat adversarial; at least at the individual state level, as states are highly protective of their sovereignty and therefore typically hesitant to enforce federal regulatory laws.[97]

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[92] ART. OF CONFED., art. 2.
[93] U.S. CONST. amend. X.
[94] Gibbons v. Ogden, 22 U.S. 1 at 13 (1824) (Powers not expressly delegated to the federal government but preempted by the need for uniformity of law will most always involve the regulation of interstate commerce).
[95] Bute v. Illinois, *supra* note 78, at 652.
[96] Will, *supra* note 5.
[97] *See* Federalist Papers, Number XLIV, Restrictions on the Authority of the Several States; Number XLV, The Alleged Danger from the Powers of the Union to the State Governments Considered; Number XLVI, The Influence of the State and Federal Governments Compared.

The Tenth Amendment is <u>traditionally</u> used to "shield[] the States from generally applicable federal regulations," in order to protect their sovereignty, and thwart an overly officious federal government.[98] As a result, states really only flex their Tenth Amendment muscles in the face of federal government attempts to mandate state enforcement of federal programs. For example, in *Printz v. United States*,[99] Arizona challenged the Brady Act, a federal law that required state and local law enforcement officials to conduct background checks on people purchasing handguns. The Supreme Court ruled it unconstitutional because it "forced participation of the State's executive in the actual administration of a federal program."[100] Correspondingly, the Constitution also "contemplates that a State's government will represent and remain accountable to its own citizens."[101]

Here, in response to the lack of federal action, Arizona has sought to impose upon itself statewide enforcement of federal immigration law. In fact Arizona is not alone in feeling that the federal government is shirking its responsibility when it comes to securing the U.S. border. A staggering "[s]eventy-four percent (74%) of U.S. voters continue to believe the federal government is not doing enough to secure the country's borders, even as President-elect Obama has named a new secretary of Homeland Security who is opposed to a border fence."[102]

While novel, it would certainly not be an inane argument for Arizona to assert its right to enforce regulation laws as a necessary means of reducing crime under the 10th Amendment. Basically, and to the extent state action does not violate the Constitution or other federal law, the

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[98] F.E.R.C. v. Mississippi, *supra* note 89, at 759.
[99] Printz v. United States, 521 U.S. 898 (1997).
[100] *Id.*
[101] *Id.* at 920.
[102] Rasmussen Reports, *74% Say Government Not Doing Enough to Secure Borders,* December 3, 2008, *available at* http://www.rasmussenreports.com/public_content/politics/current_events/immigration/74_say_government_not_doing_enough_to_secure_borders.

10th Amendment reserves to the states is the power to regulate[103] in the areas of education, health & safety, and police power.

> Throughout our history the several States have exercised their police powers to protect the health and safety of their citizens. Because these are "primarily, and historically, ... matter[s] of local concern," *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 719 (1985), the "States traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons," *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985) (internal quotation marks omitted).[104]

As mentioned *supra,* Arizona has enacted this statute, fittingly referred to as the "Support Our Law Enforcement and Safe Neighborhoods Act," for the protection of it's citizens from the increasing problem of attendant crimes being perpetrated due to the presence of illegal immigrants.[105] Arizona's legislation then, falls squarely within "the historic primacy of state regulation of matters of health and safety."[106] Since we are to "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress," and all evidence above indicates a sharing of this power, Arizona's enforcement of the federal immigration law in an effort to reduce crime is likely a lawful exercise of its 10th Amendment power.[107]

V. DUE PROCESS & EQUAL PROTECTION

A. The 14th Amendment Protections

The principle concern voiced by opponents of the Arizona law is that it will impermissibly infringe upon individual rights and amount to a denial of due process and equal protection for those of Hispanic decent. The rights to due process and equal protection are contained in several

[103] Texas v. White, 7 Wall. 700, 725 (1869).
[104] Medtronic, Inc. v. Lohr, 518 U.S. 470 (1996).
[105] Brewer, *supra* note 3.
[106] *Id.* at 485.
[107] Hillsborough County, Fla. v. Automated Medical Laboratories, Inc., 471 U.S. 707, 715-716 (1985).

provisions of the Constitution, but more specifically guaranteed by the all-encompassing 14th Amendment which states:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[108]

Consequently, a violation of the 14th Amendment would occur if a citizen shows that he or she was detained for questioning about his or her immigration status (a deprivation of liberty at minimum) without due process of the law.[109] Due process, however, is satisfied so long as the stop or detention is performed by an officer acting in compliance with the constitutional standard of reasonable suspicion already written into the statute. Deprivation of liberty, even where the suspicion is erroneous, will not infringe on Equal Protection rights so long as the individual is afforded proper due process.[110]

Though subject to exception, the privileges and protections of the Constitution are for the benefit of the citizens or lawful residents of the United States.[111] "The Bill of Rights is a futile authority for the alien seeking admission for the first time to these shores. But once an alien

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[108] U.S. Const. amend. XIV §1.
[109] Terry v.Ohio, *supra* note 22.
[110] *See e.g.,* Loving v. Virginia, 388 U.S. 1 (1967).
[111] Certain constitutional protections such as 4th Amendment, for illegal immigrants still under debate. *U.S. v Verdugo-Urquidez*, 494 U.S. 259 (1990). However, certain other constitutional rights have been afforded to non-citizens, and even those who are here unlawfully. See, e. g., Plyler v. Doe, 457 U.S. 202, 211 -212 (1982) (illegal aliens protected by Equal Protection Clause); Kwong Hai Chew v. Colding, 344 U.S. 590, 596 (1953) (resident alien is a "person" within the meaning of the Fifth Amendment); Bridges v. Wixon, 326 U.S. 135, 148 (1945) (resident aliens have First Amendment rights); Russian Volunteer Fleet v. United States, 282 U.S. 481 (1931) (Just Compensation Clause of Fifth Amendment); Wong Wing v. United States, 163 U.S. 228, 238 (1896) (resident aliens entitled to Fifth and Sixth Amendment rights); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) (Fourteenth Amendment protects resident aliens). Id.

lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders."[112]

Similarly, state law privileges and protections are for the benefit of citizens of that state. Congruent with both premises is the conclusion that "the State has no legitimate interest in protecting nonresident[s]."[113] It naturally follows then, that states have no interest in protecting non U.S. citizens as they would not qualify for the protections afforded under the Privileges and Immunities clause of the 14th Amendment.

Equal Protection of the law under the 14th Amendment is somewhat of a misnomer as it is not a guarantee of unilateral and indiscriminate protection for all citizens. Rather, where implementation of a law may infringe upon a fundamental rights (life, liberty or property) of a suspect group (usually a racial minority, though women have qualified in the past as well), the government will have to prove the law is necessary to achieve a compelling government interest.[114]

B. Arizona's Compelling Government Interest

"[T]he Government's general interest in preventing crime" is a hallmark example of what the Supreme Court considers a compelling interest for the purposes of a 14th Amendment analysis.[115] Accordingly, "the Court has in a wide variety of constitutional contexts found such public-safety concerns sufficiently forceful to justify restrictions on individual liberties."[116]

As articulated by Governor Jan Brewer, and numerous other sources discussed herein, Arizona's compelling interest is protecting the safety of its citizens through efforts to secure its

[112] Kwong Hai Chew v. Colding, 344 U.S. 590, at 596, n. 5 (1953)(emphasis added).
[113] Edgar v. MITE Corp., 457 U.S. 624, 644 (1982).
[114] Loving v. Virginia, *supra* note 110, at 11.
[115] United States v. Salerno, 481 U.S. 739, 750-754 (1987).
[116] Dist. of Columbia v. Heller, 128 S.Ct. 2783, 2851 (2008).

southern border and prevent spill over of the violent crime and organized gangs that are currently a serious epidemic within the country Mexico.[117] Without question, public safety will always be a compelling government interest.[118] Hence, any governmental law that is aimed at promoting welfare of its citizens will be constitutional so long as it is not overly broad and restrictive of individual rights.

C. Narrowly Tailored

In making the "narrowly tailored" determination, "the Court generally asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests."[119] Since the federal law has not been over-turned for Equal Protection violations, it is safe to assume that Arizona SB 1070, a law that merely replicates the federal law language for the same effect, does not violation the Equal Protection clause.

VI. FREEDOM FROM UNREASONABLE SEARCH & SEIZURE

A. 4th Amendment Protections

Like the Fourteenth Amendment, the Fourth Amendment is a due process protection and guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."[120] As with Equal Protection, a careful weighing of all relevant considerations to ensure the statute at issue comports with due process protections is essential; this requires balancing the level of intrusion upon the rights of the individual against the policy and social utility of the law.

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[117] Compelling interest addressed also in HB 1070, section 1. *See Appendix 1.*
[118] See Craig v. Boren, 429 U.S. 190 (1976); see also Illinois v. Andreas, 463 U.S. 765 (1983).
[119] Dist. of Columbia v. Heller, 128 S.Ct. at 2852.
[120] U.S. CONST. amend. IV (1791).

The Fourth Amendment is implicated when a government actor trespasses into an area where a person has a reasonable expectation of privacy (search) or causes meaningful interference with individual's possessory interest (seizure).[121] There is no reasonable expectation of privacy with regards to one's citizenship as that information is already a part of government record. Thus, the analysis will focus upon the concept of seizure.

When analyzing the legitimacy of a search or seizure, this consideration is discussed in terms of "reasonableness." Reasonableness and validity of government action depends upon whether the citizen was afforded due process of the law. So long as the procedural protections are met, the government may indeed intrude upon life, liberty, property, and privacy where public policy dictates the importance of social welfare outweighs individual rights.

The reasonableness of seizures that amount to mere temporary detention (as opposed to traditional arrest), depends " 'on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers.' "[122] The State of Arizona demonstrated a public interest in protecting its borders and citizenry from unlawful entry, and the concomitant crime it brings. With a strong government interest in safety and both procedural and substantive due process protections in place, no 4th Amendment violation transpires even where a citizen is erroneously stopped and questioned about his or her immigration status.

[121] U.S. v. Jacobsen, 466 U.S. 109 (1984).
[122] Brown v. Texas, 443 U.S. 47, 99 (1979) (quoting Pennsylvania v. Mimms, 434 U.S. 106, 109 (1977)).

B. The Rights of "The People"

"The people" being referenced are the citizens of the United States as well as lawful foreign nationals.[123] Though it has yet to be solidified as a matter of law, case law has implied that illegal immigrants are not afforded full constitutional protections; in particular, when it comes to unreasonable search and seizure. [124] In *INS v. Lopez-Mendoza*[125], Defendants appealed their deportation orders claiming that their Fourth Amendment rights were violated due to unlawful searches and arrests by INS agents. However, the Supreme Court observed that "[t]he 'body' or identity of a defendant or respondent in a criminal or civil proceeding is never itself suppressible as a fruit of an unlawful arrest, even if it is conceded that an unlawful arrest, search, or interrogation occurred."[126] Consequently, "[t]he mere fact of an illegal arrest has no bearing on a subsequent deportation proceeding."[127]

Fourth Amendment violations are generally remedied by exclusion of the evidence obtained as a result of the unlawful conduct, and do not give a defendant a free-pass.

> [A] person whose unregistered presence in this country, without more, constitutes a crime. His release within our borders would immediately subject him to criminal penalties. His release would clearly frustrate the express public policy against an alien's unregistered presence in this country…we have never suggested that it allows the criminal to continue in the commission of an ongoing crime. When the crime in question involves unlawful presence in this country, the criminal may go free, but he should not go free within our borders.[128]

Though in a criminal trial an illegal alien may be afforded remedies such as injunction or a Bivens Action to redress Fourth Amendment and other constitutional violations committed by

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[123] U.S. v Verdugo-Urquidez, 494 U.S. 259, 264-66 (1990) ("'[T]he people' refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.").
[124] U.S. v Verdugo-Urquidez, *supra* note 85.
[125] INS v. Lopez-Mendoza, 468 US 1032, 1040 (1984),
[126] INS v. Lopez-Mendoza, *supra* note 125, at 1039-40.
[127] *Id.* at 1040.
[128] *Id.* at 1047.

government agents, the Fourth Amendment will not provide a shield for an illegal alien in a deportation hearing.

In conclusion, and at least within the confines of the enforcement of immigration law and subsequent deportation process, Fourth Amendment protections are really only afforded to persons who are in the United States lawfully, aka "the people." It is for their benefit then that the standards of reasonable suspicion and probable cause must be applied to government seizures.[129]

C. Questioning, Detention & Reasonable Suspicion

"[W]henever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person, and the Fourth Amendment requires that the seizure be 'reasonable.'"[130] It is when enforcement of a law falls into this grey area between a brief encounter and prolonged detention that problems arise. Unlike formal arrest, temporary detention has no clear boundary lines. It can range from a few passing questions on the street, to a more in-depth interrogation and search of one's belongings after being relocated from an airport terminal to an isolated DEA airport office.[131]

Beginning with hallmark case of *Terry v. Ohio*,[132] "the Court has recognized that a law enforcement officer's reasonable suspicion that a person may be involved in criminal activity

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[129] INS v. Lopez-Mendoza, *supra* note 125, at 1044-45 ("To safeguard the rights of those who are lawfully present at inspected workplaces the INS has developed rules restricting stop, interrogation, and arrest practices. These regulations require that no one be detained without reasonable suspicion of illegal alienage, and that no one be arrested unless there is an admission of illegal alienage or other strong evidence thereof." (Internal citations omitted)).

[130] U.S. v. Brignoni-Ponce, *supra* note 17, at 878 (internal quotes and citation omitted).

[131] United States v. Mendenhall, 446 U.S. 544 (1980) (DEA agents observing defendant's conduct after arrival at a Detroit airport, determined she had the characteristics of persons unlawfully carrying narcotics, approached defendant asking for her identification, and when it did not match the name on her plane ticket asked if she would accompany them to the airport DEA office for further questions, which she did. Held, not an unlawful detention as defendant was free to leave at any time).

[132] Terry, *supra* note 22.

permits the officer to stop the person for a brief time and take additional steps to investigate further."[133] Further, it has been noted that "[a]sking questions is an essential part of police investigations. In the ordinary course a police officer is free to ask a person for identification without implicating the Fourth Amendment."[134] "This is based, in part on the Court's earlier finding that 'interrogation relating to one's identity or a request for identification by the police does not, by itself, constitute a Fourth Amendment seizure.'"[135]

The Arizona statute specifies reasonable suspicion as a prerequisite to making contact for the purposes of determining the immigration status of a suspected illegal alien.[136] The general rule is that an officer has reasonable suspicion if, when looking at the "totality of the circumstances" he or she can articulate a "particularized and objective" basis for suspecting illegal conduct.[137]

The factors that may be considered when forming the basis for reasonable suspicion are somewhat amorphous as they necessarily depend on the circumstances. As a result, the standard of reasonable suspicion has been broadly developed through Supreme Court case law and presently allows "[o]fficers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that 'might well elude an untrained person.'"[138] Though the reasonable suspicion allows for a certain amount of subjective analysis, officers must provide objective evidence beyond simply having an "inchoate and unparticularized suspicion or 'hunch.'"[139]

As the phrase implies, when looking at the totality of the circumstances no single element may form the basis of reasonable suspicion, but many factors must be taken into account.

[133] Hiibel v. Sixth Judicial District Court of Nevada, 542 U.S. 177, 185 (2004).
[134] *Id.* at 185.
[135] *Id.* (quoting INS v. Delgado, 466 U.S. 210, 216 (1984)).
[136] *See Appendix,* section 2(B).
[137] U.S. v. Arvizu, 534 U.S. 266, 273 (2002) (see, United States v. Cortez, 449 U.S., at 417-418 (1981)).
[138] Arvizu,*supra* note 133, at 273 (*citing* Cortez*,* 449 U.S. at 418).
[139] Terry, *supra* note 22, at 27.

Making an evaluation via the totality of the circumstances "does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain common-sense conclusions about human behavior; jurors as fact-finders are permitted to do the same-and so are law enforcement officers."[140] Consequently, "innocent behavior will frequently provide the basis for a showing of probable cause," and that "'[i]n making a determination of probable cause the relevant inquiry is not whether particular conduct is 'innocent' or 'guilty,' but the degree of suspicion that attaches to particular types of noncriminal acts.' That principle applies equally well to the reasonable suspicion inquiry."[141]

In *Sokolow,* the Court recognized "profiling" as a lawful mechanism that trained agents may utilize when determining reasonable suspicion.[142] That these factors have been prior-assessed probabilities of certain characteristics and circumstances did not render them outside the scope of a "particularized and objective basis" for reasonable suspicion.[143]

In *Brignoni-Ponce*, the Court combined the above principles as applied to "the special function of the Border Patrol, and the importance of the governmental interests in policing the border area."[144]

> Consequently, a requirement of reasonable suspicion for stops allows the Government adequate means of guarding the public interest and also protects residents of the border areas from indiscriminate official interference…
> … For the same reasons that the Fourth Amendment forbids stopping vehicles at random to inquire if they are carrying aliens who are illegally in the country, it also forbids stopping or detaining persons for questioning about their citizenship on less than a reasonable suspicion that they may be aliens.[145]

[140] Cortez, *supra* note 137, at 418.
[141] U.S. v. Sokolow, 490 U.S. 1, 10 (1989) (quoting Illinois v. Gates, 462 U.S. 213, 243-244, n. 13 (1983) (internal citations omitted).
[142] Sokolow, *supra* note 141, at 10.
[143] *Id.* at 10-11.
[144] Brignoni-Ponce*, supra* note 17, at 883 fn.8.
[145] *Id.* at 883-884.

For cases involving drug possession or other offenses whose criminality are in no way based on or connected to a suspect's race or nationality, it makes sense that variables such as race or ethnicity have no legitimate relevance. By contrast, the crime of illegal immigration is entirely based upon the person's status as a non-citizen of the United States.[146] Indeed, "entering or remaining unlawfully in this country is itself a crime."[147]

Thus, forming reasonable suspicion that a person is an illegal alien would necessarily have to include factors which indicate they might not be a U.S. citizen. Appearing to be of foreign origin by itself would not be enough for reasonable suspicion standards (nor useful given the diverse cultural makeup of our nation) but it is certainly an essential consideration within the illegal alien evaluation.

D. Arrest & Probable Cause

Section 6 (A) of the Arizona statute allows for warrantless arrest based upon the long-standing notion of probable cause.[148] The bar for establishing probable cause is higher than what is required for reasonable suspicion but similarly involves an officer's drawing of conclusions based upon the relevant facts.

> "In dealing with probable cause, . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." Probable cause exists where "the facts and circumstances within [the arresting officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that" an offense has been or is being committed.[149]

[146] 8 U. S. C. §§ 1302, 1306, 1325.
[147] INS v. Lopez-Mendoza, *supra* note 125, at 1038.
[148] Carroll v. United States, 267 U.S. 132 (1925).
[149] Draper v. United States, 358 U.S. 307, 313 (1959).

No warrant is needed to make an arrest in public where an officer has probable cause of a felony, or is witness to a felony or misdemeanor.[150] At minimum, crossing the U.S. border without authorization is a misdemeanor. And as noted above, an unregistered alien's continued presence within the country is an ongoing commission of that crime.[151] By definition then, any officer observing or making contact with an illegal immigrant is witnessing the commission of that crime.

Therefore, if an officer witnesses the felony or misdemeanor presence of an illegal immigrant or can articulate probable cause to believe the suspect's actions have risen to felony status, a warrantless arrest can be made.

VII. PROFILING v. RACIAL PROFILING

A. Factors Indicative of Culpability

As a general rule, we are uneasy to consider facts about a defendant that are not a result of choice when assigning criminal fault—and rightfully so. Traits such as a person's gender, age, race, sexual orientation or religion are highly protected in American culture; a society that was founded upon the ideas of diversity and freedom from persecution. Traits that are inherent, or simply possess no identifiable connection indicative of fault, have no place in the discussion of culpability. Under the U.S. legal system, punishment is only warranted where there exists a nexus between a person's wrongful act and the maleficent intent behind it. Where a characteristic is beyond defendant's control, we cannot readily assign blame or impose moral judgment.

[150] U.S. v Watson, 423 U.S. 411 (1976).
[151] INS v. Lopez-Mendoza, *supra* note 125, at 1047.

In some circumstances, a person's traits are relevant in that they constitute an element of the crime, or have been statistically linked to the class of persons with a proclivity to commit the crime at issue. As such, pointing to qualities that do not necessarily relate to fault may still be useful in determining a person's likelihood to commit a crime.

When diagnosing illness, doctors consider their patient's symptoms along with factors such as their age, sex, and sometimes race where relevant, and his determination is based upon an objective analysis of the facts without any type of moral judgment. Here, a suspects race is not only statistically linked but undeniably logically linked to the crime of illegal alienage. Especially in consideration of the "totality of the circumstances." Some of the base circumstances are going to be that the suspects are found within the State of Arizona, which borders Mexico, and is the #1 border crossing point. Should Minnesota pass a similar law, their circumstances leading to reasonable suspicion would be that they border Canada, and thus the targeted group would not be those who look Hispanic or speak with a Spanish accent (<u>among others</u>), but those persons who look Canadian, speak with a French accent perhaps, and a multitude of other characteristics that are commonly attributed to Canadian citizens.

Statistical probabilities can be analyzed like any string of coincidences; the more factors that are considered, the more accurate the prediction becomes. It is upon that same basic principle that the universal axiom "once is an accident, twice is a coincidence and thrice is enemy action." The high rate of frequency with which certain factor combinations accurately indicate the proper conclusion allows a professional to reasonably rely on those generalizations that, in their particular field of work, have proven themselves true in an overwhelming majority of the cases.

Just as doctor Gregory House relies on his whiteboard full of factors to narrow down possible diagnosis and point to the conclusion that is most probable, so too do forensic psychologists

implement the same science for profiling purposes. Of course, doctors are not omniscient. Further, as people and circumstances of each case differ, along with the inevitable occurrence of human error or misinformation from time to time, doctors may not always arrive at the right diagnosis. But, for say 90% of the cases, symptoms 1, 2, 3, 4, and 5 lead doctors to correctly believe the patient has disease X. And we are readily willing to accept what amounts to an educated guess. And this is in situations where our health and possibly even our lives are at stake. To accept the science of statistical probabilities in matters of life and death, but then dismiss that same science as "bogus" when applied to law enforcement defies logic.

B. The Science of Profiling

Profiling is the scientific "process extrapolating information about a person based on known traits or tendencies," or "the act of suspecting or targeting a person on the basis of observed characteristics or behavior."[152] By plugging statistically linked predictor variables of certain proclivities into a "multiple regression equation", forensic psychologists are provided a purely objective manner with which to predict future behavior, in some instances, criminality.[153] Traits such as race, gender, age, location, and educational background are often the basic factors considered, along with other, more specific factors based upon what behavior one is attempting to predict. Again, one can never 100% accurately predict future behavior, but the science of profiling can provide compelling statistical probabilities.

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[152] Merriam-Webster Online Dictionary.
[153] Interview with Carl E. Osborn, Ph.D. Clinical Associate Professor, Institute of Psychiatry, Psychology, Law and Behavioral Science Dept. of Psychiatry, Keck School of Medicine, USC (May 11, 2010); *see also* Cohen, J., & Cohen, P. (1983). *Applied multiple regression/correlation analysis for the behavioral sciences.* Hillsdale, NJ: Lawrence Erlbaum Associates, Inc..

In the same vein, reasonable suspicion cannot be based solely on race, however race can be a factor in making that determination. However, when considered alongside other relevant factors, can be a useful tool for identifying persons exhibiting a likelihood of being here illegally.

C. Race as a Factor for Profiling

Not to be confused with the unconstitutional practice of racial profiling, which draws conclusions upon the unrelated and often sole factor of race[154], simply using race or ethnicity as one of many factors that create the basis for reasonable suspicion is not only constitutional, but widely practiced and useful in situations where statistics show race has a significant connection to the underlying offense.

For example, the profile of a serial killer seems to be widely accepted as public knowledge. That is generally: white, male, and middle-aged, among others. Each of those variables alone would be discriminatory (white= racist; male= sexist; middle-aged= ageist) and of little use.

In a case involving Border Patrol's detention of a suspected illegal immigrant at the California/Mexico border, the Supreme Court makes the logical admission that race necessarily plays a particular role where immigration violations are concerned.

> Even if [the officers] saw enough to think that the occupants were of Mexican descent, this factor alone would justify neither a reasonable belief that they were aliens, nor a reasonable belief that the car concealed other aliens who were illegally in the country…The likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor, but standing alone it does not justify stopping all Mexican-Americans to ask if they are aliens.[155]

[154] *Report on Racial Profiling*, Office of the Arizona Attorney General, Civil Right Division and Office of Intergovernmental Affairs, http://www.azag.gov/law_enforcement/racial%20profiling.PDF. Retrieved 2010-05-11.
[155] Brignoni-Ponce, *supra* note 17, at 886-887 (emphasis added).

In fact, several appearance-based factors were held as appropriate circumstances to be considered in making the case for reasonable suspicion such as "mode of dress and haircut."[156] Thus police may consider different aspects of appearance in conjunction with more widely accepted factors such as where and when the suspect is observed (such as a known meeting spot or hangout), nervousness of the suspect, and other situational variables that may alert an officer's suspicion.[157]

It should highlighted that unlike the *Sokolow* case, where the crime being committed was possession for sale of a controlled substance, here national origin or "race" is a factor that is directly related to the crime. The crime at issue is the unlawful U.S. presence of a person of foreign origin. Thus, the most important factor and basis for the existence of immigration law is necessarily foreign origin. Consequently, in most instances, closely related indicating factors such as race and color will be relevant to this determination.

Notwithstanding that race is and can be considered as a relevant factor for the purposes of illegal immigration suspicion, the Arizona law limits the use of this factor to constitutional compliance. "A law enforcement official or agency of this state …may not consider race, color or national origin in implementing the requirements of this subsection except to the extent permitted by the United States or Arizona Constitution."[158] Therefore, and consistent with Supreme Court holding, race may be considered as a factor, but race cannot be the sole basis for reasonable suspicion.

[156] *Id.* at 885.
[157] U. S. v. Ortiz**,** 422 U.S. 891 (1975); see also Brignoni-Ponce at 884-5.
[158] S.B. 1070, Sec. 2(B).

VIII. POLICE MISCONDUCT

Individual officers are punishable for their misconduct in applying the law both civilly and criminally.[159] Therefore, if as feared some police officers will use S.B. 1070 to engage in discriminatory behavior, they will be individually liable for their transgressions. Sanction for police misconduct can come in many forms including: Internal Affairs investigation and disciplinary action, civil lawsuits for damages or injunctive relief, and criminal prosecution.[160] On a federal level, "the Civil Rights Act of 1871 (now 42 U.S.C. 1983) allows citizens to sue public officials for violations of their civil rights."[161] Hence, police are highly incentivized to abide by the law and avoid potentially severe consequences of misconduct.

Further, in a state where 30.1%[162] of the residents are Hispanic, officers purporting to question or detain persons based on the sole factor of their Hispanic appearance would simply be nonsensical and adverse to the interests of Arizona state police for a variety of reasons. In an op-ed piece, Washington Post columnist George F. Will succinctly makes the point above:

> Arizona police officers, like officers everywhere, have enough to do without being required to seek arrests by violating settled law with random stops of people who speak Spanish. In the practice of the complex and demanding craft of policing, good officers -- the vast majority -- routinely make nuanced judgments about when there is probable cause for acting on reasonable suspicions of illegality.[163]

However, even where a statute is constitutional on its face, there is the possibility that its enforcement will violate certain protections, such as the Fourteenth Amendment right to equal

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[159] Appendix B
[160] *Police Brutality*, CliffsNotes.com, 11 Jun 2010 <http://www.cliffsnotes.com/study_guide/topicArticleId-10065,articleId-9975.html>.
[161] *Id.*.
[162] U.S. Census Bureau, Arizona population statistics for 2008, *available at* http://quickfacts.census.gov/qfd/states/04000.html.
[163] Will, *supra* note 5.

protection.[164] In *Yick Wo*, [165] a San Francisco ordinance that was waived only for non-Chinese Laundromat owners violated 14th because the application of the facially neutral law, was a in practice, a denial of Equal Protection.

> The necessary tendency if not the specific purpose, of this ordinance, and of enforcing it in the manner indicated in the record, is to drive out of business all the numerous small laundries, especially those owned by Chinese, and give a monopoly of the business to the large institutions established and carried on by means of large associated Caucasian capital.[166]

Yick Wo stands for the notion that an otherwise constitutional law may be invalidated under Equal Protection if it has a discriminatory purpose or effect.

Even where application of a law has a disproportionate affect on a certain class of people, this alone is not enough to amount to an equal protection violation. For example, a police department implemented a written test for applicants as a prerequisite to their hiring. Though it was shown that members of particular racial minorities consistently received low scores on the exam, that was seen as an outcome unrelated to any discriminatory purpose; thus there was no equal protection violation.[167] Similarly, a statistical showing that black defendants in capital cases are much more likely to receive the death penalty than their white counterparts, did not establish a denial of equal protection.[168]

The purpose of the Arizona is to allow local enforcement of the federal immigration law, not harass or discriminate against Hispanics—which again, make up a third of Arizona's citizenry. The class of persons targeted by the Arizona (and federal statute) is illegal immigrants. As Arizona is implementing this law to combat its specific problem with illegal crossing of the

[164] Yick Wo v. Hopkins, 118 U.S. 356 (1886).
[165] *Id.*.
[166] *Id.* at 363.
[167] Washington v. Davis, 426 U.S. 229 (1976).
[168] McCleskey v. Kemp, 481 U.S. 279 (1987).

Mexican/American border, enforcement of this law will affect Mexicans and other Hispanic persons more than anyone. However, like the cases mentioned above, that is a fact-based circumstance that cannot be said to evidence ill-will or purposeful discrimination against that race.

Again, there are many avenues to punish police misconduct and compensate individuals who were victimized by it. It should be noted however that discriminatory actions amounting to police misconduct are ones that step beyond the lines that the law permits. An Arizona officer that maliciously harasses a person simply because they are Hispanic does so with clear disregard for the law. As such, the immigration law really has no relation to a rouge officer that chooses to abandon his duties and break the law. Bad behavior of a few has never been, nor should be a valid reason to strike down an entire law. If it were, the rule of law would cease to exist as every law will inevitably be subject to a handful of individuals who elect to abuse it. Accordingly, we have measures in place that sanction officers for improper or discriminatory enforcement practices.

IX. CONCLUSION

There is nothing about Arizona Senate Bill 1070 that makes it facially invalid or unconstitutional. So long as not pre-empted by, or in conflict with, federal immigration laws, it does not violate the Supremacy Clause. From its nearly identical language, S.B. 1070 does not modify or expand federal law[169], but merely authorizes local police agencies to enforce it. In fact, Arizona likely shares concurrent power to regulate the area of immigration to the extent that it touches upon matters that are solely of state concern like police powers and safety under the 10th Amendment.

[169] With the possible exception of section 6(A)(5) Re: Warrantless Arrests.

Though enforcement of this statute will undeniably target people of Hispanic appearance because the problem being addressed is the unlawful crossing of the Mexican/American border, Arizona has a compelling government interest in providing safety for its citizens, and this statute appears to be narrowly tailored to that effect. There is likely not an Equal Protection claim under the 14th Amendment.

The language of the statute fully comports with Due Process protections, and thus will not violate 4th Amendment rights to be free from unreasonable search and seizure so long as properly enforced.

It appears that the real debate is over U.S. immigration policy as a whole. However, until changes are made at the federal level, Arizona, who's Mexican border is the #1 most popular point of entry of illegal aliens into this country[170], may lawfully avail itself of preexisting federal immigration laws in an attempt to protect itself from what it has determined is a major problem and threat to the safety of its citizens.

[170] Brewer, *supra* note 3.

APPENDIX A

S.B. 1070 Engrossed with House Bill 2162

(*In pertinent part*)

House Engrossed Senate Bill

State of Arizona
Senate
Forty-ninth Legislature
Second Regular Session
2010

SENATE BILL 1070 Engrossed with House Bill 2162

AN ACT

Amending title 11, chapter 7, Arizona Revised Statutes, by adding article 8; amending title 13, chapter 15, Arizona Revised Statutes, by adding section 13-1509; amending section 13-2319, Arizona Revised Statutes; amending Title 13, chapter 29, Arizona Revised Statutes, by adding sections 13-2928 and 13-2929; amending sections 13-3883, 23-212, 23-212.01, 23-214 and 28-3511, Arizona revised statutes; amending title 41, chapter 12, article 2, Arizona Revised Statutes, by adding section 41-1724; relating to unlawfully present aliens.

(TEXT OF BILL BEGINS ON NEXT PAGE)

Be it enacted by the Legislature of the State of Arizona:

Section 1. Intent
The legislature finds that there is a compelling interest in the cooperative enforcement of federal immigration laws throughout all of Arizona. The legislature declares that the intent of this act is to make attrition through enforcement the public policy of all state and local government agencies in Arizona. The provisions of this act are intended to work together to discourage and deter the unlawful entry and presence of aliens and economic activity by persons unlawfully present in the United States.

Section 2. 11-1051. Cooperation and assistance in enforcement of immigration laws; indemnification

A. No official or agency of this state or a county, city, town or other political subdivision of this state may limit or restrict the enforcement of federal immigration laws to less than the full extent permitted by federal law.
B. For any lawful stop, detention or arrest made by a law enforcement official or a law enforcement agency of this state or a law enforcement official or a law enforcement agency of a county, city, town or other political subdivision of this state in the enforcement of any other law or ordinance of a county, city or town or this state where reasonable suspicion exists that the

person is an alien and is unlawfully present in the United States, a reasonable attempt shall be made, when practicable, to determine the immigration status of the person, except if the determination may hinder or obstruct an investigation. Any person who is arrested shall have the person's immigration status determined before the person is released. The person's immigration status shall be verified with the federal government pursuant to 8 United States code section 1373(c). A law enforcement official or agency of this state or a county, city, town or other political subdivision of this state may not consider race, color or national origin in implementing the requirements of this subsection except to the extent permitted by the United States or Arizona Constitution. A person is presumed to not be an alien who is unlawfully present in the United States if the person provides to the law enforcement officer or agency any of the following:

1. A valid Arizona driver license.
2. A valid Arizona nonoperating identification license.
3. A valid tribal enrollment card or other form of tribal identification.
4. If the entity requires proof of legal presence in the United States before issuance, any valid United States federal, state or local government issued identification.

C. If an alien who is unlawfully present in the United States is convicted of a violation of state or local law, on discharge from imprisonment or on the assessment of any monetary obligation that is imposed, the United States immigration and customs enforcement or the United States customs and border protection shall be immediately notified.

D. Notwithstanding any other law, a law enforcement agency may securely transport an alien who the agency has received verification is unlawfully present in the united states and who is in the agency's custody to a federal facility in this state or to any other point of transfer into federal custody that is outside the jurisdiction of the law enforcement agency. a law enforcement agency shall obtain judicial authorization before securely transporting an alien who is unlawfully present in the United States to a point of transfer that is outside of this state.

E. In the implementation of this section, an alien's immigration status may be determined by:

1. A law enforcement officer who is authorized by the federal government to verify or ascertain an alien's immigration status.
2. The United States immigration and customs enforcement or the United States customs and border protection pursuant to 8 United States Code section 1373(c).

F. Except as provided in federal law, officials or agencies of this state and counties, cities, towns and other political subdivisions of this state may not be prohibited or in any way be restricted from sending, receiving or maintaining information relating to the immigration status, lawful or unlawful, of any individual or exchanging that information with any other federal, state or local governmental entity for the following official purposes:

1. Determining eligibility for any public benefit, service or license provided by any federal, state, local or other political subdivision of this state.
2. Verifying any claim of residence or domicile if determination of residence or domicile is required under the laws of this state or a judicial order issued pursuant to a civil or criminal proceeding in this state.
3. If the person is an alien, determining whether the person is in compliance with the federal registration laws prescribed by title II, chapter 7 of the federal immigration and Nationality act.
4. Pursuant to 8 United States Code section 1373 and 8 United States Code section 1644.

G. This section does not implement, authorize or establish and shall not be construed to implement, authorize or establish the REAL ID act of 2005 (P.L. 109-13, division B; 119 Stat. 302), including the use of a radio frequency identification chip.
H. A person who is a legal resident of this state may bring an action in superior court to challenge any official or agency of this state or a county, city, town or other political subdivision of this state that adopts or implements a policy that limits or restricts the enforcement of federal immigration laws, including 8 United States Code sections 1373 and 1644, to less than the full extent permitted by federal law. If there is a judicial finding that an entity has violated this section, the court shall order that the entity pay a civil penalty of not less than hundred dollars and not more than five thousand dollars for each day that the policy has remained in effect after the filing of an action pursuant to this subsection.
I. A court shall collect the civil penalty prescribed in subsection H of this section and remit the civil penalty to the state treasurer for deposit in the gang and immigration intelligence team enforcement mission fund established by section 41-1724.
J. The court may award court costs and reasonable attorney fees to any person or any official or agency of this state or a county, city, town or other political subdivision of this state that prevails by an adjudication on the merits in a proceeding brought pursuant to this section.
K. Except in relation to matters in which the officer is adjudged to have acted in bad faith, a law enforcement officer is indemnified by the law enforcement officer's agency against reasonable costs and expenses, including attorney fees, incurred by the officer in connection with any action, suit or proceeding brought pursuant to this section in which the officer may be a defendant by reason of the officer being or having been a member of the law enforcement agency.
L. This section shall be implemented in a manner consistent with federal laws regulating immigration, protecting the civil rights of all persons and respecting the privileges and immunities of United States citizens.

Section 3. <u>13-1509. Willful failure to complete or carry an alien registration document; assessment; exception; authenticated records; classification</u>
A. In addition to any violation of federal law, a person is guilty of willful failure to complete or carry an alien registration document if the person is in violation of 8 United States Code section 1304(e) or 1306(a).
B. In the enforcement of this section, an alien's immigration status may be determined by:
1. A law enforcement officer who is authorized by the federal government to verify or ascertain an alien's immigration status.
2. The United States immigration and customs enforcement or the United States customs and border protection pursuant to 8 United States Code section 1373(c).

C. A law enforcement official or agency of this state or a county, city, town or other political subdivision of this state may not consider race, color or national origin in the enforcement of this section except to the extent permitted by the United States or Arizona constitution.
D. A person who is sentenced pursuant to this section is not eligible for suspension of sentence, probation, pardon, commutation of sentence, or release from confinement on any basis except as authorized by section 31-233, subsection A or B until the sentence imposed by the court has been served or the person is eligible for release pursuant to section 41-1604.07.
E. In addition to any other penalty prescribed by law, the court shall order the person to pay jail costs.

F. This section does not apply to a person who maintains authorization from the federal government to remain in the United States.
G. Any record that relates to the immigration status of a person is admissible in any court without further foundation or testimony from a custodian of records if the record is certified as authentic by the government agency that is responsible for maintaining the record.
H. A violation of this section is a class 1 misdemeanor, except that the maximum fine is one hundred dollars and for a first violation of this section the court shall not sentence the person to more than twenty days in jail and for a second or subsequent violation the court shall not sentence the person to more than thirty days in jail.
…

Section 6. 13-3883. Arrest by officer without warrant

A. A peace officer may, without a warrant, may arrest a person if he the officer has probable cause to believe:

1. A felony has been committed and probable cause to believe the person to be arrested has committed the felony.
2. A misdemeanor has been committed in his the officer's presence and probable cause to believe the person to be arrested has committed the offense.
3. The person to be arrested has been involved in a traffic accident and violated any criminal section of title 28, and that such violation occurred prior to or immediately following such traffic accident.
4. A misdemeanor or a petty offense has been committed and probable cause to believe the person to be arrested has committed the offense. A person arrested under this paragraph is eligible for release under section 13-3903.
5. The person to be arrested has committed any public offense that makes the person removable from the United States.

…

Section 12. Severability, implementation and construction

A. If a provision of this act or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the act that can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.
B. The terms of this act regarding immigration shall be construed to have the meanings given to them under federal immigration law.
C. This act shall be implemented in a manner consistent with federal laws regulating immigration, protecting the civil rights of all persons and respecting the privileges and immunities of United States citizens.
D. Nothing in this act shall implement or shall be construed or interpreted to implement or establish the REAL ID act of 2005 (P.L. 109-13, division B; 119 Stat. 302) including the use of a radio frequency identification chip.

APPENDIX B

ADDRESSING POLICE MISCONDUCT

LAWS ENFORCED BY THE

UNITED STATES DEPARTMENT OF JUSTICE

The vast majority of the law enforcement officers in this country perform their very difficult jobs with respect for their communities and in compliance with the law. Even so, there are incidents in which this is not the case. This document outlines the laws enforced by the United States Department of Justice (DOJ) that address police misconduct and explains how you can file a complaint with DOJ if you believe that your rights have been violated.

Federal laws that address police misconduct include both criminal and civil statutes. These laws cover the actions of State, county, and local officers, including those who work in prisons and jails. In addition, several laws also apply to Federal law enforcement officers. The laws protect all persons in the United States (citizens and non-citizens).

Each law DOJ enforces is briefly discussed below. In DOJ investigations, whether criminal or civil, the person whose rights have been reportedly violated is referred to as a victim and often is an important witness. DOJ generally will inform the victim of the results of the investigation, but we do not act as the victim's lawyer and cannot give legal advice as a private attorney could.

The various offices within DOJ that are responsible for enforcing the laws discussed in this document coordinate their investigation and enforcement efforts where appropriate. For example, a complaint received by one office may be referred to another if necessary to address the allegations. In addition, more than one office may investigate the same complaint if the allegations raise issues covered by more than one statute.

What is the difference between criminal and civil cases?

Criminal and civil laws are different. Criminal cases usually are investigated and handled separately from civil cases, even if they concern the same incident. In a criminal case, DOJ brings a case against the accused person; in a civil case, DOJ brings the case (either through litigation or an administrative investigation) against a governmental authority or law enforcement agency. In a criminal case, the evidence

must establish proof "beyond a reasonable doubt," while in civil cases the proof need only satisfy the lower standard of a "preponderance of the evidence." Finally, in criminal cases, DOJ seeks to punish a wrongdoer for past misconduct through imprisonment or other sanction. In civil cases, DOJ seeks to correct a law enforcement agency's policies and practices that fostered the misconduct and, where appropriate, may require individual relief for the victim(s).

Federal Criminal Enforcement

It is a crime for one or more persons acting under color of law willfully to deprive or conspire to deprive another person of any right protected by the Constitution or laws of the United States. (18 U.S.C. §§ 241, 242). "Color of law" simply means that the person doing the act is using power given to him or her by a governmental agency (local, State, or Federal). A law enforcement officer acts "under color of law" even if he or she is exceeding his or her rightful power. The types of law enforcement misconduct covered by these laws include excessive force, sexual assault, intentional false arrests, or the intentional fabrication of evidence resulting in a loss of liberty to another. Enforcement of these provisions does not require that any racial, religious, or other discriminatory motive existed.

What remedies are available under these laws?

Violations of these laws are punishable by fine and/or imprisonment. There is no private right of action under these statutes; in other words, these are not the legal provisions under which you would file a lawsuit on your own.

Federal Civil Enforcement

"Police Misconduct Provision"

This law makes it unlawful for State or local law enforcement officers to engage in a pattern or practice of conduct that deprives persons of rights protected by the Constitution or laws of the United States. (42 U.S.C. § 14141). The types of conduct covered by this law can include, among other things, excessive force, discriminatory harassment, false arrests, coercive sexual conduct, and unlawful stops, searches or arrests. In order to be covered by this law, the misconduct must constitute a "pattern or practice" -- it may not simply be an isolated incident. The DOJ must be able to show in court that the agency has an unlawful policy or that the incidents constituted a pattern of unlawful conduct. However, unlike the other civil laws discussed below, DOJ does not have to show that discrimination has occurred in order to prove a pattern or practice of misconduct.

What remedies are available under this law?

The remedies available under this law do not provide for individual monetary relief for the victims of the misconduct. Rather, they provide for injunctive relief, such as orders to end the misconduct and changes in the agency's policies and procedures that resulted in or allowed

the misconduct. There is no private right of action under this law; only DOJ may file suit for violations of the Police Misconduct Provision.

Title VI of the Civil Rights Act of 1964
and the "OJP Program Statute"

Together, these laws prohibit discrimination on the basis of race, color, national origin, sex, and religion by State and local law enforcement agencies that receive financial assistance from the Department of Justice. (42 U.S.C. § 2000d, et seq. and 42 U.S.C. § 3789d(c)). Currently, most persons are served by a law enforcement agency that receives DOJ funds. These laws prohibit both individual instances and patterns or practices of discriminatory misconduct, i.e., treating a person differently because of race, color, national origin, sex, or religion. The misconduct covered by Title VI and the OJP (Office of Justice Programs) Program Statute includes, for example, harassment or use of racial slurs, unjustified arrests, discriminatory traffic stops, coercive sexual conduct, retaliation for filing a complaint with DOJ or participating in the investigation, use of excessive force, or refusal by the agency to respond to complaints alleging discriminatory treatment by its officers.

What remedies are available under these laws?

DOJ may seek changes in the policies and procedures of the agency to remedy violations of these laws and, if appropriate, also seek individual remedial relief for the victim(s). Individuals also have a private right of action under Title VI and under the OJP Program Statute; in other words, you may file a lawsuit yourself under these laws. However, you must first exhaust your administrative remedies by filing a complaint with DOJ if you wish to file in Federal Court under the OJP Program Statute.

Title II of the Americans with Disabilities Act of 1990
and Section 504 of the Rehabilitation Act of 1973

The Americans with Disabilities Act (ADA) and Section 504 prohibit discrimination against individuals with disabilities on the basis of disability. (42 U.S.C. § 12131, et seq. and 29 U.S.C. § 794). These laws protect all people with disabilities in the United States. An individual is considered to have a "disability" if he or she has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment.

The ADA prohibits discrimination on the basis of disability in all State and local government programs, services, and activities regardless of whether they receive DOJ financial assistance; it also protects people who are discriminated against because of their association with a person with a disability. Section 504 prohibits discrimination by State and local law enforcement agencies that receive financial assistance from DOJ. Section 504 also prohibits discrimination in programs and activities conducted by Federal agencies, including law enforcement agencies.

These laws prohibit discriminatory treatment, including misconduct, on the basis of disability in virtually all law enforcement services and activities. These activities include, among others, interrogating witnesses, providing emergency services, enforcing laws, addressing citizen complaints, and arresting, booking, and holding suspects. These laws also prohibit retaliation for filing a complaint with DOJ or participating in the investigation.

What remedies are available under these laws?

If appropriate, DOJ may seek individual relief for the victim(s), in addition to changes in the policies and procedures of the law enforcement agency. Individuals have a private right of action under both the ADA and Section 504; you may file a private lawsuit for violations of these statutes. There is no requirement that you exhaust your administrative remedies by filing a complaint with DOJ first.