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Rick Su

UNC School of Law

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THE OVERLOOKED SIGNIFICANCE OF ARIZONA'S NEW IMMIGRATION LAW

Rick Su^{*†}

Immigration has once again become the subject of widespread interest and public debate. This renewed interest, however, was not the result of Harry Reid's vow that the Senate will tackle comprehensive immigration reform sometime this year. Nor was it prompted by new policy initiatives with respect to immigration enforcement being implemented by the Department of Homeland Security. Rather, it has been the result of legislative action taken in one state—Arizona. Arizona's move to regulate immigration has predictably raised questions about the proper role of a state with respect to an area dominated by federal legislation. Yet the discussion thus far may have overlooked the most significant part of the new statute: the extent to which Arizona mandates local immigration enforcement by attacking local control.

The Arizona law at issue, S.B. 1070, is the state's most recent effort to step up local immigration enforcement. Among its most controversial provisions is the requirement that all law enforcement officials take steps to verify the immigration status of any individual they encounter if there is reason to suspect that the individual is in violation of federal immigration law. Whereas immigration law enforcement has traditionally been a federal responsibility, and most local law enforcement agencies normally inquire about immigration status, if at all, only when an individual has been arrested for an unrelated criminal violation, S.B. 1070 directs law enforcement officials in Arizona to prioritize immigration enforcement in all contexts and whenever there is reasonable suspicion.

With federal immigration policies as the backdrop, most of the debate surrounding S.B. 1070 has focused on the extent to which it “empowers” or “allows” state and local law enforcement officials to enforce federal immigration laws. Defenders of the measure have justified it as an appropriate response given Arizona's unique position as an immigration gateway and the lack of federal enforcement. Critics, on the other hand, have argued that such state legislation interferes with operation of federal law, and fear that this statute will ultimately lead to a patchwork of competing and inconsistent state immigration policies. In addition, critics question the expertise of state and local law enforcement officials, and are especially concerned that they may rely on abusive practices like racial profiling.

These are all important issues. But construing S.B. 1070 as an authorizing statute that “empowers” state and local law enforcement officials

* Associate Professor of Law, State University of New York at Buffalo Law School.

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mischaracterizes much of the law's actual significance, which, ironically, is not about empowerment at all. Indeed, what is striking about S.B. 1070 is how little it actually changes the legal landscape with respect to issues like state and local enforcement of federal immigration laws or racial profiling. Law enforcement officials eager to involve themselves in immigration enforcement in Arizona have long embraced many of the steps described in S.B. 1070, either by asserting their own inherent authority or with the explicit authorization of the federal government through its 287(g) program, which creates partnerships between local law enforcement and federal immigration officials. Similarly, although the risk that a particular police official or a law enforcement agency may employ racial profiling is real and worrisome, nothing in S.B. 1070 directly encourages, authorizes, or otherwise expands this practice. Moreover, a prior Arizona statute, the Legal Arizona Workers Act, which strengthened workplace enforcement of immigration laws, arguably instituted a more expansive role for state enforcement and was recently upheld as constitutional by the Federal Court of Appeals for the Ninth Circuit. Thus, as a statute that authorizes local immigration enforcement, S.B. 1070 is neither new nor particularly significant.

But if Arizona's new law does not radically alter the federal-state balance of immigration enforcement, it threatens to drastically alter the state-local relationship. Indeed, most of the recent discussions regarding S.B. 1070 have overlooked one of its central objectives: to eliminate local discretion with respect to immigration enforcement. In that regard, the law is inherently restrictive, not empowering, and it is through these restrictions on counties, cities, and towns that S.B. 1070 most directly encourages abusive profiling and harassment. The fact is, the purpose of S.B. 1070 is not to *allow* state and local law enforcement officials to enforce federal immigration laws. Rather it *requires* such officials and their departments to do so, even if—perhaps especially if—they would ordinarily refrain out of concerns about relations with immigrant neighborhoods, competing local priorities, or lack of fiscal resources. Thus, S.B. 1070 not only targets undocumented immigrants and those who may be suspected of being such, but also local law enforcement agencies and the counties, cities, and towns that they serve.

That S.B. 1070 was intended to undermine and restrict local discretion is further supported by the unique and truly novel sanction authorized against local governments if they take steps to direct local resources away from federal immigration enforcement. To be sure, governments routinely mandate that their agencies or officials implement certain policies or enforce particular legal regulations. At the same time, any failure to do so is ordinarily handled through internal sanctions, which afford some flexibility during times when limited resources or other priorities may justify lapses. Arizona's new law, however, authorizes any person in the state, regardless of their local residency, to sue any county, city, or town that adopts or implements a policy that would lead immigration enforcement in that locality to fall short in any way, and regardless of the rationale for doing so.

It should come as no surprise then that days after organizations like the ACLU and MALDEF vowed to challenge the constitutionality of S.B. 1070,

the city of Phoenix and the city of Flagstaff also took steps toward filing lawsuits against the state. Considering the extent to which the new Arizona law reorganizes local priorities, endangers community relations, and threatens to operate like an unfunded mandate at a time when many Arizona localities are dealing with severe financial shortfalls, it seems likely that other Arizona communities will join Phoenix and Flagstaff in taking legal action against the state. To be sure, the pragmatic concerns of these cities lack the flair accompanying arguments that center on the federal-state balance or the future of comprehensive immigration reform. But as the level of government most directly attuned to and affected by the real costs of undocumented immigration and local immigration enforcement local communities also have the most need for discretion in dealing with these problems. Yet it is precisely this kind of local discretion—particularly in those localities that would opt against enforcement—that is most directly threatened by S.B. 1070.

Is this assessment of S.B. 1070's effect on local control too dire? Are cities in Arizona worried for no good reason? Some may still feel that S.B. 1070 is merely permissive legislation as far as law enforcement agencies and local communities are concerned. And this conclusion may be supported by a very broad reading of the statute (i.e., reading the "shall" language more along the lines of "may" or "could") or by emphasizing the statute's various qualifiers and exceptions (e.g., "where reasonable suspicion exists," "when practicable," or the exception when verification would "hinder or obstruct an investigation"). Yet it is important to note how limited these exceptions are and that they cover few of the circumstances and reasons a locality may wish to limit enforcement. Moreover, the unique private cause of action authorized in S.B. 1070 makes clear that the state meant for the statute to operate as a strict mandate. Indeed, given the state of the law and practice in Arizona, there would have been no reason to pass S.B. 1070 if the legislature wanted only to allow, rather than require, local enforcement.

Others may argue that S.B. 1070 actually affords tremendous local discretion—it simply does so by giving that discretion to front-line law enforcement officials at the expense of police departments and the local communities that they serve. Indeed, whereas most of the restrictive language and sanctions are directed at law enforcement agencies, local governments, and supervising officials, law enforcement officials on the ground are specifically indemnified from suit under the new law. But this interpretation only further highlights the underlying problem with S.B. 1070. The disparity in treatment underscores that the target of S.B. 1070 is in fact local control over resource and priority decisions involving immigration enforcement. An individual police officer may shirk his other duties to focus on immigration enforcement—to in effect "go rogue" in the eyes of his department or community—without much fear. But if his immediate supervisor, the police chief, or the mayor for whom he works believes the only way to minimize racial profiling and other costs of his actions is to implement a policy redirecting his efforts away from immigration enforcement, they risk subjecting themselves and their community to lawsuits and

finer. And to the extent this restriction serves the state's objective in immigration enforcement at the expense of other objectives that those who employ such officers may wish to set, S.B. 1070 amounts to a conscription of local officials and a commandeering of local resources by the state. This may not be illegal in and of itself, but it does raise further serious doubts about the wisdom of the policy.

Ultimately, the manner in which S.B. 1070 imposes upon local priorities and undermines local discretion is more than merely an overlooked technicality. Rather, it also explains the depth and extent of the controversy over the law's enactment. Scattered local enforcement of immigration laws in certain parts of Arizona before the passage of S.B. 1070 prompted controversy, but many residents of the state took some comfort in knowing that they were not subject to a particular jurisdiction's conduct and could take steps to avoid it if they feared harassment or did not want to carry identification with them at all times. Arizona's new law, however, threatens to force every community in the state into conformity regarding immigration enforcement, regardless of differing community sentiments, local cultures, or competing priorities. That such a radical change can strike at home, and in a state that had been so committed to local control in the past, is the true significance, and one of the overlooked tragedies, of S.B. 1070.