

**SENATE BILL 1070: AN OPPORTUNITY TO ALIGN THE INTERESTS
OF FEDERAL AND STATE GOVERNMENTS WITH
THE RIGHTS OF THE CHILD**

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I. INTRODUCTION

The United States immigration system has been an immense failure for many years and, at the current pace, it appears the issue will not be adequately addressed anytime soon.¹ As a result, children's rights,² public safety,³ police officer safety,⁴ border security,⁵ and the

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¹ See Michael Doyle, *Supreme Court Will Act on Immigration, Even if Congress Doesn't*, MIAMI HERALD, Dec. 6, 2010, available at 2010 WLNR 24180336; Dan Nowicki, *SB 1070 Suit May Stymie Reform*, ARIZ. REPUBLIC, July 10, 2010, at A1, available at 2010 WLNR 13872881. "Congress largely has shied away from serious immigration debate since 2007, when a comprehensive legalization and border security package faded in the Senate. The last Senate Judiciary Committee hearing on immigration was in May, and the full Senate declined to consider a major legalization bill." Doyle, *supra*. "Kareem Crayton, a political scientist and associate professor of law at the University of North Carolina-Chapel Hill, said he wouldn't be surprised if it took another presidential election before Congress could accomplish comprehensive immigration reform." Nowicki, *supra*.

² See *infra* Part II.C.

³ A 2008 special report by the *Houston Chronicle* sheds light on the ill effects of the faulty immigration system on public safety. See Susan Carroll & Chase Davis, *Special Report: Elusive Justice*, HOUSTON CHRON., Nov. 16, 2008, at A1, available at 2008 WLNR 21960025. "Federal immigration officials allowed scores of violent criminals - some ordered deported decades ago - to walk away from Harris County Jail despite the inmates' admission to local authorities that they were in the country illegally . . ." *Id.* "A review of thousands of criminal and immigration records shows that [ICE] officials didn't file the paperwork to detain roughly 75 percent of the more than 3,500 inmates who told jailers . . . they were in the U.S. illegally." *Id.* The investigation reviewed many cases showing that individuals admitting to being here illegally later commit additional crimes—more than half were felonies, including aggravated sexual assault of a child and murder. *Id.* It is important to note, however, the article states most research shows that recent immigrants are far less likely to commit crimes than those born in the United States. *Id.*

economic health of the nation⁶ are suffering. This Article highlights the effect of the immigration crisis on the rights of the child because the children are entirely innocent stakeholders. This Article also highlights children's rights because the immigration issue is merely a side effect of an overarching lack of interest in human rights, partly pursuant to politics.⁷ As such, the United States has likewise neglected to treat the ratification of the Convention on the Rights of the Child⁸ (CRC) with due diligence.⁹

Nonetheless, this Article's primary emphasis is on immigration; more specifically, Arizona's Senate Bill 1070 (SB 1070), which requires Arizona's state and local law enforcement to enforce federal immigration law.¹⁰ This issue is the most timely and relevant to the

⁴ "In the last few years, six Phoenix officers have been murdered by illegal aliens, six seriously injured." Press Release, Arizona State Senate, Tennessee House Passes Resolution in Support of Arizona's SB 1070 (May 26, 2010) (on file with author).

⁵ "Americans are now banned from 5,500 U.S. National Park Acres overrun by dangerous Mexican drug cartels and smugglers of illegal aliens. Five federal lands in Arizona have been declared too dangerous for Americans to travel through." Marc Chamot, *Arizona Under Siege*, THE MARC CHAMOT REPORT (June 19, 2010, 1:42 PM), <http://marcchamot.blogspot.com/2010/06/arizona-under-siege-americans-banned.html>.

⁶ "The cost of harboring illegal immigrants in the United States is a staggering \$113 billion a year — an average of \$1,117 for every 'native-headed' household in America — according to a study conducted by the Federation for American Immigration Reform (FAIR)." Ed Barnes, *Illegal Immigration Costs U.S. \$113 Billion a Year, Study Finds*, FOX NEWS, July 6, 2010, <http://www.foxnews.com/us/2010/07/02/immigration-costs-fair-amnesty-educations-costs-reform/>.

⁷ See *infra* Part IV.A.1-2.

⁸ United Nations Convention on the Rights of the Child, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 149, U.N. Doc. A/44/736 (Nov. 20, 1989) (entered into force Sept. 2, 1990).

⁹ See *What is the Status of the CRC?*, CAMPAIGN FOR U.S. RATIFICATION OF THE CONVENTION ON THE RTS. OF THE CHILD, http://www.childrightscampaign.org/crc/index.php?sNav=getinformed_snav.php&sDat=status_dat.php (last visited May 20, 2011). "In 1995, Madeleine Albright, acting as the U.S. Delegate to the UN, signed the CRC on behalf of President Clinton and the United States. However, the Convention has not been forwarded to the Senate Foreign Relations Committee for consideration due to procedural and political barriers." *Id.* Moreover, President Obama has not addressed the issue since taking office. See *id.*

¹⁰ S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010), amended by H.B. 2162, 49th Leg., 2d Reg. Sess. (Ariz. 2010), <http://azleg.gov/alispdfs/council/SB1070-HB2162.pdf>.

interrelated immigration and children's rights issues and has great potential for prompting positive change. Thus, the United States' general apathy for human rights is scrutinized by simultaneous consideration of the CRC nonratification and immigration issues. This Article argues that President Obama should embrace the instant and constructive potential the SB 1070 framework has to offer, combined with the interconnected and likewise urgent children's rights issues, as an impetus to unite the federal government with state governments to overcome political and institutional competence obstacles to reform. If President Obama were to take the course of action suggested in this Article, rather than challenging states' attempts at self-defense, both issues could be dramatically improved.

Section I of this Article provides an overview of the CRC and how it relates to the United States, and concludes that the United States is obligated to refrain from defeating the purpose of the CRC. Section II describes how the United States' systematic nonenforcement of immigration laws and subsequent incongruent treatment of illegal immigrants leads to the violation of children's rights because of the exploitable circumstances they find themselves in. Section III provides an overview of SB 1070 and the various problems it faces as a state law. Section IV establishes that SB 1070's perceived flaws are paradoxically nothing more than an invitation for the federal government to entertain similar legislation on the federal level. In which case, the incidence of children's rights abuses will be fewer, as the circumstances making the children exploitable will be improved.

II. THE CONVENTION ON THE RIGHTS OF THE CHILD AND THE UNITED STATES

A. *Overview*

In November of 1989, the United Nations General Assembly adopted the CRC.¹¹ "By 2002, 192 states had become party to the CRC," with the United States and Somalia being the only holdouts.¹²

¹¹ CHILDREN'S HUMAN RIGHTS: PROGRESS AND CHALLENGES FOR CHILDREN WORLDWIDE 12 (Mark Ensalaco & Linda C. Majka eds., 2005).

¹² *Id.*

The CRC encompasses a set of autonomy, development, and protection norms that relate to the following: the rights and responsibilities of parents; the best interests of the child; nondiscrimination; the child's right to life, survival, and development; protection from harmful influences, abuse, and exploitation; respect for the views of the child; and the full participation of the child in family, cultural, and social life. It also recognizes a comprehensive list of rights and corresponding state obligations.¹³

The CRC essentially translated the universal needs of children into rights, and recorded them as law.¹⁴

The movement behind the CRC would likely have a much greater chance of success if the United States were an active participant because of the nation's immense power and influence.¹⁵ However, the CRC has not been ratified due to the following issues: infringement on United States sovereignty by the United Nations determining the best interests of the child,¹⁶ fear of excessive government involvement in the parent-child relationship,¹⁷ concern over abortion issues,¹⁸ concerns of

¹³ *Id.* at 12-13.

¹⁴ Cleveland Ferguson III, *Of Politics and Policy: Can the U.S. Maintain its Credibility Abroad While Ignoring the Needs of its Children at Home?—Revisiting the U.N. Convention on the Rights of the Child as a Transnational Framework for Local Governing*, 14 *TULSA J. COMP. & INT'L L.* 191, 232 (2007).

¹⁵ *Id.* at 209.

¹⁶ *The United Nations Convention on the Rights of the Child: Background and Policy Issues*, CONG. RES. SERVICE, OPEN CRS, <http://openocrs.com/document/R40484/> (last visited May 20, 2011).

¹⁷ See David M. Smolin, *Overcoming Religious Objections to the Convention on the Rights of the Child*, 20 *EMORY INT'L L. REV.* 81, 108 (2006); see also *The United Nations Convention on the Rights of the Child: Background and Policy Issues*, *supra* note 16.

¹⁸ Katie Hatzivramidis, *Parental Involvement Laws for Abortion in the United States and the United Nations Conventions on the Rights of the Child: Can International Law Secure the Right to Choose for Minors?*, 16 *TEX. J. WOMEN & L.* 185, 201 (2007) (mentioning President Bush's objections to the CRC based on abortions obtained by minors, and without parental involvement).

federalism,¹⁹ and direct conflict with United States law by banning the death penalty for juveniles.²⁰

B. The United States is Obligated to Refrain From Defeating the Purpose of the Convention on the Rights of the Child as a Signatory to the Treaty

The issues of whether the United States should ratify the CRC as a treaty and whether the United States is bound under principles of customary international law are unresolved. This Article addresses the latter issue only, as the former seems to be less plausible and thus less relevant.²¹ In essence, *if* the CRC is customary international law,²² the United States is bound to the provisions that are not contrary to domestic law.²³ One theory is that the CRC operates somewhere between binding treaty law and customary international law because of the active participation of the 193 signatories of the CRC, in addition to President Clinton's signature on the CRC without subsequent ratification or withdrawal.²⁴ While this view appears theoretically correct, no United

¹⁹ Lainie Rutkow & Joshua T. Lozman, *Suffer the Children?: A Call for United States Ratification of the United Nations Convention on the Rights of the Child*, 19 HARV. HUM. RTS. J. 161, 182 (2006) (discussing arguments that ratification of the CRC would grant the federal government unconstitutional authority over the states).

²⁰ See Lawrence L. Stentzel II, *Prospects for United States Ratification of the Convention on the Rights of the Child*, 48 WASH. & LEE L. REV. 1285, 1288 (1991). This is no longer an issue, however, since the Supreme Court held that the death penalty is unconstitutional for offenders who were under eighteen at the time of their crime. *Roper v. Simmons*, 543 U.S. 551, 578 (2005).

²¹ See *supra* note 9.

²² “‘Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation’ and binds nations that have not dissented from the rule while it was developing.” Ferguson, *supra* note 14, at 236 (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102(2) (1987)) (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102 cmt. d).

²³ See *In re Agent Orange Prod. Liab. Litig.*, 373 F. Supp. 2d 7, 131 (E.D.N.Y. 2005). “Customary international law is binding upon all states, even in the absence of a particular state’s consent, but may be modified within a state by subsequent legislation or a treaty, provided that the customary international law was not a peremptory norm (*jus cogens*).” *Id.*

²⁴ See *What is the Status of the CRC?*, *supra* note 9 (“As of 2008, 193 countries have ratified the Convention, signifying their commitment to universal child welfare.”); Ferguson, *supra* note 14, at 236.

States authority has recognized the idea of customary international law being the floor of the CRC's legal status.

For example, the Fifth Circuit Court of Appeals refused to apply the CRC to United States immigration law and refused to apply customary international law where there was an applicable statute.²⁵ The Second Circuit Court of Appeals rejected the CRC as binding customary international law because Congress had enacted legislation controlling the issue.²⁶ The Eighth Circuit Court of Appeals also refused to consider the CRC where Congress had expressed its intent for how the matter should be resolved.²⁷ However, the Ninth Circuit Court of Appeals assumed, without deciding, that the CRC had attained customary international law status in order to determine whether the Department of Justice's interpretation of a federal statute contravened the CRC.²⁸

The Ninth Circuit's assumption of the CRC as customary international law was dictum, but perhaps this illustrates that the CRC may be gaining recognition as customary international law.²⁹ In any event, the CRC has not yet been accepted as customary international law.³⁰ However, under Article Eighteen of the Vienna Convention on the Law of Treaties (VCLT), the United States is "obliged to refrain from acts which would defeat the object and purpose of a treaty when . . . it has signed the treaty . . . [and has not] made its intention clear not to become a party to the treaty."³¹ Therefore, at an absolute minimum, the United States, having signed but not ratified the CRC, and neglecting to

²⁵ *Martinez-Lopez v. Gonzales*, 454 F.3d 500, 502-03 (5th Cir. 2006).

²⁶ *Oliva v. U.S. Dep't of Justice*, 433 F.3d 229, 233-34 (2d Cir. 2005).

²⁷ *Arellano-Garcia v. Gonzales*, 429 F.3d 1183, 1188 (8th Cir. 2005).

²⁸ *Cabrera-Alvarez v. Gonzales*, 423 F.3d 1006, 1010-13 (9th Cir. 2005).

²⁹ *See Roper v. Simmons*, 543 U.S. 551, 575-78 (2005) (holding execution of individuals under eighteen years of age is prohibited by the Eight and Fourteenth Amendments, based in part on the "overwhelming weight of international opinion against the juvenile death penalty," as evidenced by the near universal ratification of CRC, Article 37).

³⁰ Importantly, however, the CRC has not been declared less than customary international law, as the cases mentioned above involve the situation in which domestic law was applicable to the respective issues. *See supra* notes 25-29. In other words, determining whether the CRC was customary international law was unnecessary, as domestic law would have trumped it anyway. *See supra* note 24.

³¹ Vienna Convention on the Law of Treaties art. 18, May 23, 1969, 1155 U.N.T.S. 331, http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

withdraw from it, must avoid enacting or enforcing laws in a manner which adversely affect the rights of children so as to defeat the purpose of the CRC.

III. THE UNITED STATES DEFEATS THE PURPOSE OF THE CONVENTION ON THE RIGHTS OF THE CHILD WITH NONENFORCEMENT OF IMMIGRATION LAWS AND INCONGRUENT TREATMENT OF ILLEGAL IMMIGRANTS WITHIN ITS BORDERS

A. *Incongruent Treatment*

The United States' nonenforcement of immigration laws and incongruent treatment of illegal immigrants, depending on the context, entices these individuals to enter the country illegally—a rule is not law unless it is recognized and enforced. The ineffectiveness of United States immigration laws is obvious.³² On the other hand, the inconsistent treatment of immigrants once they arrive is more subtle, but just as problematic.³³ Examples of incongruence include unrealistic visa quotas compared with employment demand;³⁴ children's health care policy compared with federal reporting statutes that authorize or mandate reporting parents' undocumented status to Immigration and Customs Enforcement (ICE);³⁵ and the ability of a state to withhold benefits from

³² See Peter Nicholas & Christi Parsons, *Obama Calls Out GOP on Immigration*, L.A. TIMES, July 1, 2010, at A1. During President Obama's first major speech on immigration since taking office, he said the United States immigration system "offends our most basic American values." *Id.* "The estimated 850,000 new illegal immigrant arrivals each year is about as large as the highest level of legal immigrant admissions in our history before the current mass immigration was unleashed by the 1965 Immigration Act." *Immigration Facts*, FED'N FOR AM. IMMIGR. REFORM, http://www.fairus.org/site/PageNavigator/facts/research_current_immigration/ (last visited May 20, 2011).

³³ See *infra* notes 34-36.

³⁴ See, e.g., Marisa Silenzi Cianciarulo, *Can't Live With 'Em, Can't Deport 'Em: Why Recent Immigration Reform Efforts Have Failed*, 13 NEXUS 13, 21-22 (2008) (comparing an estimated six million jobs filled by immigrant labor with fewer than 200,000 visas to accommodate them).

³⁵ See, e.g., John A. Castro, Note, *Second-Class Citizens: The Schism Between Immigration Policy and Children's Health Care*, 37 HASTINGS CONST. L.Q. 199, 199-208 (2009) (explaining how the health of citizen-children of undocumented immigrants is neglected despite initiatives such as the State Children's Health Insurance Plan because parents of these children refrain from seeking health care for

illegal adults compared with the *Plyler v. Doe* Court's disallowing of a comparable withholding of education from illegal minor children;³⁶ and so on.

Upon consideration of these inconsistencies, the analysis circles around again to nonenforcement of immigration laws as the problem. This is because each of the above listed examples are arguably valid solutions to the respective issues, given that immigration laws are not enforced. For example, businesses are expected to act in the best interests of stakeholders by maximizing profits—hiring productive and inexpensive labor is desirable. Children ought to have their healthcare needs met, regardless of their parents' immigration status. Moreover, the *Plyler* Court's reasoning³⁷ is sound, even in the eyes of the avid immigration enforcement proponent, because educating children that are a part of society—regardless of citizenship—is in the nation's best interest.

B. Nonenforcement of Immigration Laws

As a result of opportunities existing in the United States—jobs, education, healthcare—Latin Americans with lesser opportunities have the incentive to migrate to the United States.³⁸ When immigration laws are not enforced, and when the institutions making the United States so attractive accommodate illegal status, there is nothing deterring prospective immigrants from bypassing the unreasonably long wait for a visa.³⁹ They wisely migrate here illegally.⁴⁰ Therefore, the United States essentially invites the immigrants to enter illegally without af-

fear of reporting statutes that authorize or mandate that federal agencies report the parents' undocumented status to ICE).

³⁶ See *Plyler v. Doe*, 457 U.S. 202, 218-30 (1982) (affirming the Fifth Circuit's invalidation of a Texas law authorizing school districts to deny enrollment to children who were not legally admitted into the United States).

³⁷ *Id.* "In sum, education has a fundamental role in maintaining the fabric of our society. We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests." *Id.* at 221.

³⁸ See, e.g., Cianciarulo, *supra* note 34, at 13-14.

³⁹ See, e.g., *id.* at 17 (explaining that immigration quotas have resulted in waits of over ten years for some classes of immigrants).

⁴⁰ See, e.g., *id.* at 13-14.

fording them the full rights of American citizenship. Illegal immigrants are then open to exploitation by employers, human smugglers, human traffickers, and so on because they fear law enforcement officials, as the illegal immigrants themselves have dirty hands.⁴¹

Even more significant, as Justice William Brennan of the *Plyler* Court so aptly put it, “legislation directing the onus of a parent’s misconduct against his children does not comport with fundamental conceptions of justice.”⁴² Taking into account the effect of systematic nonenforcement of federal immigration law, it “does not comport with fundamental conceptions of [American] justice,”⁴³ for children to be subject to exploitation with no recourse because they are brought here illegally—through no fault of their own. Moreover, this de facto legislation, which targets illegal immigrant children, does not comport with *international* justice, as provided by the CRC—a treaty the United States is prohibited from defeating.⁴⁴

C. *Exploitation of Children and Violation of Their Rights as a Result of Black Markets and Less than Full Protection of the Law*

1. Child Labor

A 2008 *USA Today* article gives an account of child laborers in Mexico who have to work because their parents’ income is insufficient.⁴⁵ Teresa Rojas, a professor at Mexico’s National Teachers’ University, says children as young as five years old are involved in farming.⁴⁶ Furthermore, the work the children perform is often dangerous.⁴⁷ The latest estimates of the United Nation Children’s Fund (UNICEF) indicate that approximately fifteen percent of Mexican chil-

⁴¹ See discussion *infra* Part II.C.

⁴² *Plyler*, 457 U.S. at 220.

⁴³ *Id.*

⁴⁴ See *supra* Part I.B.

⁴⁵ See Chris Hawley, *Children Work Illegally in Mexico’s Farm Fields*, USA TODAY, May 9, 2008, at 17A.

⁴⁶ *Id.*

⁴⁷ *Id.* (“In December, nine children were killed when a truck carrying coffee pickers flipped over in Mexico’s central Puebla state.”).

dren, ages five to fourteen are involved in child labor.⁴⁸ The child labor problem is not confined to Latin America.⁴⁹ *USA Today* reports, “In the USA, an estimated 300,000 to 500,000 youth, ages 12 to 17, work in agriculture[,]” many being “exposed to dangerous machinery and pesticides.”⁵⁰ Some of these children often miss school, and some drop out.⁵¹

Illegal immigrants who gain employment in legitimate industries are susceptible to exploitation by their employers.⁵² Since the immigrants are here illegally, they fear blowing the whistle on their employers for matters such as unsafe working conditions, pay below minimum wage, long hours, and so on.⁵³ For example, immigration officials discovered numerous child labor violations when they raided the largest kosher meatpacking plant in the United States.⁵⁴ Thirty-two of the 389 undocumented illegal aliens officials discovered did not meet Iowa’s child labor law age requirements for slaughterhouse employment.⁵⁵

Authorities charged the meatpacking plant with 9311 counts of child labor law violations, including “exposing a child to dangerous or poisonous chemicals” and “employing a child who operated power machinery.”⁵⁶ Furthermore, the complaint alleged the slaughterhouse employed children for “more than eight hours on a specified day and for more than forty hours a week,” and “while school was in session for more than four hours a day and more than 28 hours in a week.”⁵⁷ Finally, the complaint alleged that “underage employees were not even compensated for overtime work.”⁵⁸ The jury eventually found the man-

⁴⁸ UNITED NATIONS CHILDREN’S FUND, *THE STATE OF THE WORLD’S CHILDREN 2009* 150 (2008), <http://www.unicef.org/sowc09/docs/SOWC09-FullReport-EN.pdf>.

⁴⁹ See, e.g., *Problems with Child Labor Also Occur in USA*, *USA TODAY*, May 16, 2008, at 18A.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² See, e.g., Sonia Nazario & Doug Smith, *Workers Getting Soaked at Southland Carwashes*, *L.A. TIMES*, Mar. 23, 2008, at A1.

⁵³ *Id.*

⁵⁴ Ana Maria Echiburu, *Immigration Raid Results in Charges Filed Against Iowa Slaughterhouse for Child Labor Violations*, 14 *PUB. INT. L. REP.* 93, 93-94 (2008).

⁵⁵ *Id.* at 93.

⁵⁶ *Id.* at 95.

⁵⁷ *Id.*

⁵⁸ *Id.*

ager of the slaughterhouse not guilty on all counts of child labor violations due to insufficient evidence the manager actually knew that minors were working in the plant.⁵⁹ However, the trial testimony clearly showed that the meatpacking plant employed at least twenty-nine underage workers.⁶⁰

One of the undocumented, underage workers, Elmer, was a sixteen-year-old Guatemalan who worked seventeen hours per day, six days per week.⁶¹ Elmer endured extreme temperatures and fatigue, and the plant made him work after stitches from a previous injury reopened.⁶² Because of his illegal status, Elmer did not complain for fear of retaliation by his employer.⁶³

This is an egregious account of violations of children's rights that the CRC protects. For example, Article 32 recognizes the "right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development."⁶⁴ The meatpacking plant's employment of minors and the hours it required the children to work clearly implicates this article. Similarly, the plant's actions also likely implicate Article 27, relating to standard of living.⁶⁵ Moreover, whether these working hours and conditions would constitute such a violation in another country is of no concern as Article 41 establishes that a state must meet a higher standard as its laws so establish.⁶⁶

Article 4 requires that parties to the treaty take "measures to the maximum extent of their available resources" in undertaking all appro-

⁵⁹ Julia Preston, *Former Manager of Iowa Slaughterhouse Is Acquitted of Labor Charges*, N.Y. TIMES, June 7, 2010, at A14.

⁶⁰ *Id.*

⁶¹ Echiburu, *supra* note 54, at 94.

⁶² *Id.* at 94-95.

⁶³ *Id.* at 94.

⁶⁴ United Nations Convention on the Rights of the Child, *supra* note 8, art. 32(1).

⁶⁵ *See id.* art. 27(1) ("States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.").

⁶⁶ *See id.* art. 41.

appropriate measures for the rights that the CRC recognizes.⁶⁷ The United States need not enforce the CRC as if it were treaty law; however, as a signatory, the United States must refrain from defeating CRC Articles.⁶⁸ Elmer's employer was able to exploit underage children because of their illegal status. The child's illegal presence is largely a result of the United States' nonenforcement of immigration laws, thereby operating entirely counter to Articles 4 and 32 of the CRC.⁶⁹

A *Los Angeles Times* investigation reveals that many California carwashes blatantly violate basic labor and immigration laws.⁷⁰ Many workers said they receive only tips, and some said they earned as little as \$1.63 per hour—far below \$8 per hour, minimum wage.⁷¹ Again, these undocumented workers hesitate to complain for fear of being fired, physically threatened, or deported.⁷² One pair of carwash owners “w[as] fined \$372,000 for not paying minimum wage and for overtime and child-labor violations.”⁷³ Furthermore, state labor officials acknowledge that workers who receive settlements for such violations often get a third of what they claim to be owed.⁷⁴ The authors explain, “Immigration authorities have done little to discourage the steady flow of undocumented workers into carwash jobs, affording owners an end-

⁶⁷ *Id.* art. 4.

⁶⁸ *See supra* note 31 and accompanying text.

⁶⁹ This assertion has the potential for rebuttal with the argument that the immigration issue is being addressed to the maximum extent of the United States' available resources. For example, a 2006 *Los Angeles Times* article, in illustrating that federal authorities are overwhelmed, quotes Secretary of Homeland Security Michael Chertoff, “There's a lot of crime out there There just aren't enough prosecutors and judges to prosecute everything.” Richard Marosi, *Feel the Rush of a Smuggler*, L.A. TIMES, Jan. 25, 2006, at A1. However, President Obama claims the Mexican border is more secure than it has been for years, and that Republican opposition is to blame for preventing much needed change, stating, “under the pressures of partisanship and election-year politics, many of the 11 Republican senators who voted for reform in the past have now backed away from their previous support.” Nicholas & Parsons, *supra* note 32. Therefore, it appears political holdout is the real issue and not unavailability of resources.

⁷⁰ Nazario & Smith, *supra* note 52.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

less supply of cheap, eager and easily exploited laborers.”⁷⁵ The same analysis applies to this account as to the previous one detailed above: Articles 4⁷⁶ and 32⁷⁷ are clearly implicated because immigration authorities are not enforcing immigration laws, and children are being put to work in violation of child labor laws as a result of the children’s exploitable circumstance of being in the United States illegally.

2. Dangerous Conditions in Crossing the Border

Some families who migrate to the United States illegally in pursuit of better opportunities are not as fortunate as those who are vulnerable to employer exploitation. Immigrants often face inhumane conditions upon crossing the border and sometimes die as a result.⁷⁸ For example, a 2007 *Los Angeles Times* article depicts a terrifying scenario in which a five-year-old boy and his father were smuggled across the border in a tractor trailer so full of people they were standing shoulder to shoulder.⁷⁹ The tractor trailer, locked from the outside, became a convection oven in which nineteen people died from a combination of extreme heat, dehydration, and shortage of oxygen.⁸⁰ The article gives gruesome accounts of surviving passengers, including descriptions of seizures and living people being pinned by dead bodies.⁸¹ In particular, the father of the five-year-old boy eventually died while kneeling over his already-deceased son.⁸² When the truck went through the border checkpoint, the dangling taillight that had been knocked out by the passengers who were desperate for air did not arouse the border patrol’s suspicion.⁸³

⁷⁵ *Id.*

⁷⁶ United Nations Convention on the Rights of the Child, *supra* note 8, art. 4.

⁷⁷ *Id.* art. 32.

⁷⁸ *See, e.g., infra* notes 79-83 and accompanying text.

⁷⁹ Peter H. King, ‘*We Are on a Trailer. We Are Suffocating.*’, L.A. TIMES, Mar. 18, 2007, at A1.

⁸⁰ *Id.* “By now, the passengers were stripping off blouses and shirts. Their bodies poured sweat, and the more they perspired, the more they became dehydrated. One man squeezed sweat from his shirt and tried to drink it. The 5-year-old boy was wailing.” *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *See id.*

This account transcends any one of the articles of the CRC, and violates the entire underlying basis of the CRC. For example, the preamble states, “*Bearing in mind* that the peoples of the United Nations have, in the Charter, reaffirmed their faith in fundamental human rights and in the dignity and worth of the human person, and have determined to promote social progress and better standards of life in larger freedom”⁸⁴ If any accounts have the potential to contradict the CRC, this account is among them. While one border patrol agent’s negligence or carelessness in and of itself is insufficient to impute to the United States a defeat of the treaty to which it is a signatory, these accounts serve to exemplify the results of grossly inadequate border enforcement.

3. Exploitation by Human Smugglers/Traffickers

Some individuals put their lives in the hands of human smugglers who are often prone to exploiting the immigrants.⁸⁵ In 2007, a grand jury indicted nine people for allegedly running a sex trafficking ring that lured girls—some as young as thirteen years old—from Guatemala with the promise of honest work.⁸⁶ Once the victims arrived in the United States, they were forced into prostitution to pay inflated smuggling debts.⁸⁷ Furthermore, the girls were compelled to cooperate with threats that their families would be beaten or killed.⁸⁸ Ultimately, in 2009, five people were found guilty of sex trafficking by force and the importation of people for purposes of prostitution.⁸⁹

Similarly, in 2008, the leaders of a sex trafficking ring were convicted of forced labor, conspiracy, and harboring illegal aliens.⁹⁰ Some

⁸⁴ United Nations Convention on the Rights of the Child, *supra* note 8, Preamble (emphasis added).

⁸⁵ See, e.g., Greg Krikorian, *U.S. Grand Jury Indicts 9 in Sex Trafficking Case*, L.A. TIMES, Aug. 10, 2007, at B4.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ Raja Abdulrahim, *Prison for 5 in Sex Trafficking Ring*, L.A. TIMES, Aug. 19, 2009, at A8.

⁹⁰ Brian Donohue, *For Woman Who Enslaved Others, a Prison Cell Awaits: Leader, Sister and Boyfriend Get Maximum Terms in Honduran Human Trafficking*, STAR-LEDGER, Jan. 5, 2008, 2008 WLNR 282222.

of the girls exploited in this account were as young as fourteen.⁹¹ The sex traffickers forced the girls to work six days per week and encouraged their prostitution to repay inflated smuggling fees as high as \$20,000.⁹²

In all cases, the pattern has been the same: women desperate to escape poverty in their home countries are smuggled illegally into the United States and promised a good job in America, only to wind up in indentured servitude with their traffickers using violence, abuse and threats of turning them over to immigration to keep them in line.⁹³

These two horrendous accounts of inhumane exploitation violate CRC Articles 4,⁹⁴ 11,⁹⁵ 32,⁹⁶ 34,⁹⁷ and 35.⁹⁸

A smuggler recently held a four-year-old for ransom in California, threatening to kill the girl if he did not immediately receive

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ United Nations Convention on the Rights of the Child, *supra* note 8, art. 4. Again, the United States consistently neglects to pursue immigration to the maximum extent of its resources, and children suffer as a result. *See supra* note 69 and accompanying text.

⁹⁵ United Nations Convention on the Rights of the Child, *supra* note 8, art. 11. The article provides in part, “States Parties shall take measures to combat the illicit transfer and non-return of children abroad.” *Id.* The United States’ nonenforcement of immigration laws allows for this black market to exist, on which thirteen-year-old girls are subject to such exploitation. *See supra* Part II.C.3.

⁹⁶ United Nations Convention on the Rights of the Child, *supra* note 8, art. 32. Forced or coerced prostitution is certainly work that threatens “the child’s education [or is] harmful to the child’s health or . . . social development.” *Id.*

⁹⁷ *Id.* art. 34. “States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent . . .” *Id.* Immigration reform, which destroys the ability for black markets on which teens may be sexually exploited, would surely correct the frustration of this article.

⁹⁸ *Id.* art. 35. “States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form.” *Id.*

\$11,500.⁹⁹ This situation was a result of a family's attempt at crossing the border gone wrong.¹⁰⁰ The four-year-old was successfully smuggled in the smuggler's car, but border agents caught the mother and brother crossing the border on foot.¹⁰¹ Once the family was reunited, the mother learned the smugglers had beaten and sexually assaulted her daughter.¹⁰² This is yet another example of the ill effects of a black market that the United States created by a systematic failure to enforce immigration law: a human smuggler turned trafficker. Anna Gorman goes on to explain: "Smugglers make deals and break them. They hold men, women and children in locked stash houses, while using violence and threats to extort money from their relatives. The kidnapped immigrants have been beaten, starved, raped, even killed, said Miguel Unzueta, who oversees the [ICE] office in Los Angeles."¹⁰³

D. Increasingly Desperate Attempts at Border Crossing Exemplify Mere Border Enforcement is Inadequate

A 2009 *New York Times* article illustrates how bold human smuggling operations are becoming, as an increasing number of immigrants try to cross illegally through border posts to avoid the grueling trek through areas between the stations.¹⁰⁴ In this particular incident, border agents opened fire on three vans that were attempting to crash the border at a high rate of speed.¹⁰⁵ This attempted border crashing resulted in a multicar collision, for which one of the drivers, a minor, was arrested.¹⁰⁶ An ICE official stated that the violence linked to human smuggling was rising because well-organized criminal groups from Mexico were getting involved.¹⁰⁷ The increase is also due in part to tougher border enforcement making crossing through deserts and mountains riskier and more expensive.¹⁰⁸

⁹⁹ Anna Gorman, *Smuggled, Kidnapped and Worse*, L.A. TIMES, Mar. 9, 2010, at A1.

¹⁰⁰ *See id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ Julia Preston, *Two Arrested in Attempt to Crash Border*, N.Y. TIMES, Sept. 24, 2009, at A29.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

This account illustrates that some immigrants are so desperate they will do almost anything to get across the border. Therefore, a comprehensive solution is needed—one that involves many levels of cooperation and many facets of implementation. The framework SB 1070 provides has enormous potential for the first step in what needs to be a multifarious solution, because the United States must make clear that getting across the border is not going to be the end of the story for those entering illegally. State and federal officials working together is the first step in harmonizing treatment of illegal aliens and enforcement of immigration laws.

IV. SENATE BILL 1070: AN IMPERFECT AND DESPERATE ATTEMPT TO IMPROVE THE IMMIGRATION CRISIS, BUT A DECISIVELY NEEDED STEP IN THE RIGHT DIRECTION

A. Overview

SB 1070 is particularly controversial legislation that “[r]equires officials and agencies of [Arizona] to fully comply with and assist in the enforcement of federal immigration laws.”¹⁰⁹ The Bill also establishes crimes involving failure to complete an alien registration document, hiring or soliciting work from illegal immigrants under certain circumstances, and transporting or harboring unlawful aliens.¹¹⁰ The offenses range from explicit state enforcement of federal law to criminalizing activity that is not criminal under federal law.¹¹¹ The issues raised by this new Arizona legislation are too numerous for this Article. For example, four law professors from the University of Arizona and Arizona State University recently authored a thirty-nine page report on the legal issues raised by SB 1070.¹¹² While the report is very in depth, there is no gratuitous analysis.

¹⁰⁹ ARIZ. STATE S., FINAL AMENDED FACT SHEET FOR S.B. 1070, 49th Leg., 2d Reg. Sess. (2010), available at http://www.azleg.gov/FormatDocument.asp?inDoc=/legtext/49leg/2r/summary/s.1070pshs_asenacted.doc.htm.

¹¹⁰ *Id.*

¹¹¹ Gabriel J. Chin, Carissa Byrne Hessick, Toni Massaro & Marc L. Miller, *A Legal Labyrinth: Issues Raised by Arizona Senate Bill 1070*, 25 GEO. IMMIGR. L.J. 47 (2010).

¹¹² *Id.*

Although this Article proposes SB 1070 has great potential for fundamental improvement of the immigration crisis, there is no doubt SB 1070 is seriously flawed. However, this Section addresses the problematic issues raised by SB 1070 generally, and the next Section offers a solution. Reasonable views of SB 1070 range from encouraging racial profiling¹¹³ to merely allowing Arizona to enforce federal immigration law against those who enter and stay in the country illegally.¹¹⁴ Both of these statements are mostly true but without more, this information is misleading.

B. Racial Profiling or State Enforcement of Federal Law? Both

1. Racial Profiling

The Arizona professors explain that racial profiling can be defined as “reliance on race, skin color and/or ethnicity as an indication of criminality, reasonable suspicion, or probable cause, except when part of a description of a suspect, and said description is timely, reliable, and geographically relevant.”¹¹⁵ SB 1070 as amended by HB 2162¹¹⁶ states that law enforcement “may not consider race, color or national origin in implementing [the law] except to the extent permitted by the United States or Arizona Constitution.”¹¹⁷ Decisions by both the United States Supreme Court and the Arizona Supreme Court have identified ethnic

¹¹³ *E.g.*, *A Hostile Arizona*, L.A. TIMES, Apr. 16, 2010, at A26 (stating the Bill would strongly encourage police officers to engage in racial profiling by ordering them to check the status of people they merely suspect of being in the U.S. illegally).

¹¹⁴ Press Release, *supra* note 4. Senator Pearce is quoted as saying:

This has been the law of the land for many years, and all SB1070 does is take the handcuffs off from our law enforcement officers and let them enforce this crime of entering and remaining in the U.S. in violation of federal law. Illegal is not a race, it is a crime.

Id.

¹¹⁵ Chin et al., *supra* note 111, at 65 (citing *Arnold v. Ariz. Dep’t of Pub. Safety*, No. CV-01-1463-PHX-LOA, 2006 WL 2168637, at *1 (D. Ariz. July 31, 2006)).

¹¹⁶ S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010), *amended by* H.B. 2162, 49th Leg., 2d Reg. Sess. (Ariz. 2010), <http://azleg.gov/alispdfs/council/SB1070-HB2162.pdf>.

¹¹⁷ ARIZ. REV. STAT. ANN. § 11-1051(B) (2010).

factors as a relevant consideration in immigration enforcement.¹¹⁸ Therefore, prior to SB 1070 state and local law enforcement had the authority to consider racial and ethnic factors, nonexclusively, in formulating reasonable suspicion for violation of criminal immigration offenses.¹¹⁹ Since federal law permits racial profiling, one may reasonably assert that SB 1070 encourages, and even requires, racial profiling because SB 1070 requires that immigration enforcement in Arizona not be restricted “to less than the full extent permitted by federal law.”¹²⁰

The perceived problem with respect to racial profiling lies in how law enforcement learns that someone is undocumented. Again, prior to SB 1070, as established by the Supreme Court of the United States, police have the authority to speak with and ask questions of anyone, without suspicion, so long as the person is free to leave.¹²¹ More specifically, independent and reasonable suspicion is not needed for police to question someone about immigration status.¹²² Law enforcement may determine immigration status based on the totality of the circumstances, including factors such as language, accent, clothing, neighborhood, proximity to the border, origin and destination of travel, evasiveness, nervousness, and so on.¹²³ However, at a minimum, of-

¹¹⁸ See, e.g., *United States v. Brignoni-Ponce*, 422 U.S. 873, 886-87 (1975) (“The likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor. . . .”); *State v. Graciano*, 653 P.2d 683, 687 n.7 (Ariz. 1982) (“[E]nforcement of immigration laws often involves a relevant consideration of ethnic factors.”).

¹¹⁹ See, e.g., *State v. Gonzalez-Gutierrez*, 927 P.2d 776, 780 (Ariz. 1996) (holding that “Mexican ancestry alone, that is, Hispanic appearance, is not enough to establish reasonable cause”); see also *Chin et al.*, *supra* note 111, at 52-53 (explaining that many people in the country without documentation are in violation of criminal statute 8 U.S.C. § 1325 (2006), thus giving rise to probable cause for arrest).

¹²⁰ § 11-1051(A).

¹²¹ See *Terry v. Ohio*, 392 U.S. 1, 20 n.16 (1968). “[M]ere questioning does not constitute a seizure.” *Florida v. Bostick*, 501 U.S. 429, 434 (1991). “[E]ven when officers have no basis for suspecting a particular individual, they may generally ask questions of that individual [and] ask to examine the individual’s identification” *Id.* at 434-35 (citations omitted).

¹²² See, e.g., *Muehler v. Mena*, 544 U.S. 93, 100-02 (2005) (holding that it is not a violation of the Fourth Amendment to question a detainee about his or her immigration status during a lawful detention regarding another matter).

¹²³ See *Chin et al.*, *supra* note 111, at 70-71.

ficers may stop a vehicle only when “they are aware of specific articulable facts, together with rational inferences from those facts,” leading to suspicion that illegal immigrants may occupy a vehicle.¹²⁴ This has been the state of the law and Arizona does not attempt to change it. Therefore, sensational claims that SB 1070 *grants* police the power to stop anyone to inquire into immigration status are incorrect.

2. State Enforcement of Federal Law

On the other hand, SB 1070 does not merely mandate the enforcement of federal immigration law. The most direct illustration is that the Bill creates new state laws.¹²⁵ Even where the new law does no more than mandate state enforcement of federal law, state power and preemption issues have made SB 1070 highly controversial.¹²⁶ Indeed, on July 6, 2010, the United States filed a complaint in federal district court, challenging the constitutionality of SB 1070, and a motion requesting a preliminary injunction to enjoin Arizona from enforcing the new law while the court makes a determination on the merits of the complaint.¹²⁷

The United States’ principle argument is “the power to regulate immigration is vested exclusively in the federal government, and that the provisions of S.B. 1070 are therefore preempted by federal law.”¹²⁸ The day before the new Arizona law was to take effect, the *United States v. Arizona* court granted the motion as to four specific sections of SB 1070, and otherwise denied the remainder of the motion.¹²⁹ This of course is not determinative of how the court will ultimately rule on the

¹²⁴ *United States v. Brignoni-Ponce*, 422 U.S. 873, 884 (1975).

¹²⁵ S.B. 1070, 49th Leg., 2d Reg. Sess., 2010 Ariz. Legis. Serv. Ch. 113 (West). A person may not attempt to hire or be hired if the person enters a car that is blocking traffic. *See* ARIZ. REV. STAT. ANN. § 13-2928(A)-(B) (2010). An unlawfully present alien may not knowingly apply for or solicit work in a public place. *See* § 13-2928(C). A person may not transport, move, conceal, harbor, or shield an undocumented alien in furtherance of a crime. *See* § 13-2929(A). A noncitizen not authorized to be in the United States must not fail to register or fail to carry documents issued to them. *See* § 13-1509(A), (F).

¹²⁶ *See infra* Part III.B.2.a, b.

¹²⁷ *United States v. Arizona*, 703 F. Supp. 2d 980, 986 (D. Ariz. 2010).

¹²⁸ *Id.*

¹²⁹ *Id.* at 1008.

validity of the law, but it is a strong indication of the relevant issues. The Ninth Circuit is currently entertaining an appeal of the lower court's preliminary injunction, and Arizona Governor Jan Brewer has stated she is willing to appeal the matter all the way to the United States Supreme Court.¹³⁰

Besides SB 1070, the issue of preemption in the immigration arena has become much more strained as a circuit split has emerged between the Third and Ninth Circuits with respect to local laws regulating the employment of immigrants. The Ninth Circuit in *Chicanos Por La Causa, Inc. v. Napolitano* considered Arizona's Legal Arizona Workers Act, which requires employers to check the immigration status of employees through E-Verify, the federal employer database.¹³¹ The *Napolitano* court held that federal law did not preempt the Arizona statute.¹³² In *Lozano v. City of Hazleton*, the Third Circuit, in contradiction to the Ninth Circuit, held federal law preempted a similar city ordinance.¹³³ The Supreme Court will review the *Napolitano* decision in *Chamber of Commerce of U.S. v. Candelaria*.¹³⁴ The review will likely be a precursor to the SB 1070 litigation, as the issues in *Candelaria* are very similar to those raised in *United States v. Arizona*.¹³⁵ The remainder of this Section describes some of the issues that have already emerged in the *United States v. Arizona* preliminary injunction matter

¹³⁰ Jennifer Medina, *Federal Appeals Court Weighs Arizona Law on Immigrants*, N.Y. TIMES, Nov. 2, 2010, at A16, available at http://www.nytimes.com/2010/11/02/us/02immig.html?_r=2&hp.

¹³¹ *Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856, 860 (9th Cir. 2009), cert. granted sub nom. *Chamber of Commerce of U.S. v. Candelaria*, 130 S. Ct. 3498 (2010).

¹³² *Id.* at 860-61.

¹³³ *Lozano v. City of Hazleton*, 620 F.3d 170, 219 (3d Cir. 2010).

¹³⁴ *Candelaria*, 130 S. Ct. 3498.

¹³⁵ See Carrie L. Rosenbaum, *Third Circuit Strikes Down Controversial Anti-Immigrant Housing and Employment Ordinances*, 2010 EMERGING ISSUES 5330 (Sept. 30, 2010) (LEXIS) ("The Court has the opportunity to weigh in on the broader issue of whether States can, essentially, conduct their own foreign policies by legislating in the area of immigration law."); Seth Freed Wessler, *Supreme Court Weighs Case That's Likely Precursor to SB 1070*, COLOR LINES (Dec. 10, 2010, 12:08 PM), http://colorlines.com/archives/2010/12/the_supreme_court_heard_arguments.html (describing arguments that the 1986 Immigration Control and Reform Act grants the federal government exclusive enforcement of immigration policy and that the state oversteps its authority by requiring businesses to check E-Verify).

and some of the issues that are likely to arise once the case is tried on its merits.

a. State Power

Starting in the late nineteenth century, cases invalidated a number of state immigration laws on the ground that regulation of immigration was an exclusively federal power.¹³⁶ During this time state enforcement of federal laws was also curtailed.¹³⁷ Over time, the United States Supreme Court “has allowed some incidental regulation of immigration;” however, SB 1070 “is explicitly a direct regulation of immigration.”¹³⁸ Given immigration has historically been the province of the federal government and SB 1070 is a direct regulation of immigration, federal immigration law must expressly or impliedly authorize Arizona to regulate immigration.¹³⁹ Since federal immigration law does not explicitly delegate, implied delegation is the only basis upon which SB 1070 can be a valid state power.¹⁴⁰

Professor Kris Kobach, who assisted with the Bill, has argued that “[s]tate governments possess the authority to criminalize particular conduct concerning illegal immigration, provided that they do so in a way that mirrors the terms of federal law.”¹⁴¹ The Arizona law professors¹⁴² point out, however, that Professor Kobach bases his argument on cases in which “state officers [] make arrests for federal crimes, *and then turn over* defendants to federal authorities for prosecution.”¹⁴³ A likely troubling distinction exists between (1) state officials merely making an arrest; and (2) state officials arresting *and prosecuting* per-

¹³⁶ See, e.g., *Edye v. Robertson*, 112 U.S. 580, 596 (1884); *Chy Lung v. Freeman*, 92 U.S. 275, 280 (1875); *Henderson v. Mayor of New York*, 92 U.S. 259, 270 (1875).

¹³⁷ See, e.g., *Chy Lung*, 92 U.S. at 279 (“[A] silly, an obstinate, or a wicked [state] commissioner may bring disgrace upon the whole country, the enmity of a powerful nation, or the loss of an equally powerful friend.”).

¹³⁸ Chin et al., *supra* note 111, at 78.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 78-79 (quoting Kris W. Kobach, *Reinforcing the Rule of Law: What States Can and Should Do to Reduce Illegal Immigration*, 22 GEO. IMMIGR. L.J. 459, 475 (2008)).

¹⁴² See generally Chin et al., *supra* note 111.

¹⁴³ *Id.* at 79 (emphasis added).

sons for violation of federal law, because federal authorities can decline to prosecute or choose to apply the law differently in pursuit of some uniform federal policy.¹⁴⁴ In essence, Arizona might invade the province of the federal government by potentially exercising prosecutorial discretion differently than would the federal government,¹⁴⁵ or by frustrating foreign policy objectives between the United States and other nations.¹⁴⁶ Therefore, it seems unlikely that Arizona has express or implied authority to regulate immigration.

b. Preemption

Judge Bolton began the *United States v. Arizona* opinion by establishing that “[a]gainst a backdrop of rampant illegal immigration, escalating drug and human trafficking crimes, and serious public safety concerns, the Arizona Legislature enacted a set of statutes” based on SB 1070.¹⁴⁷ Yet Judge Bolton preliminarily enjoined Arizona from enforcing four provisions of the new law based on preemption grounds.¹⁴⁸

Section 2(B) of SB 1070 requires Arizona law enforcement to determine the immigration status of all arrestees and of all those subject to lawful stops, detentions, or arrests when practicable.¹⁴⁹ The court determined this provision to be preempted because “[f]ederal resources will be taxed and diverted from federal enforcement priorities as a result of the increase in requests for immigration status determination[,]” and because enforcement would place substantial burdens on lawfully present aliens.¹⁵⁰ The court relied on *Hines v. Davidowitz*, which invalidated a state alien registration law that in some ways duplicated federal law.¹⁵¹ In doing so, the United States asserted in the instant case that the Court in *Hines* observed Congress “manifested a purpose to [regulate immigration] in such a way as to protect the personal liberties of

¹⁴⁴ *Id.*

¹⁴⁵ *See id.* at 79-80 & n.147 (listing all the options open to the federal government with respect to any given undocumented person, such as criminal prosecution, civil removal, allowing the alien to stay and work, and so on).

¹⁴⁶ *Id.* at 80.

¹⁴⁷ *United States v. Arizona*, 703 F. Supp. 2d 980, 985 (D. Ariz. 2010).

¹⁴⁸ *Id.* at 992-1008.

¹⁴⁹ *See* ARIZ. REV. STAT. ANN. § 11-1051(B) (2010).

¹⁵⁰ *Arizona*, 703 F. Supp. 2d at 998.

¹⁵¹ *Hines v. Davidowitz*, 312 U.S. 52, 72-74 (1941).

law-abiding aliens through one uniform national . . . system”¹⁵² Furthermore, the court relied on *Buckman Co. v. Plaintiffs’ Legal Committee* to establish that “[s]tate laws have been found to be preempted where they imposed a burden on a federal agency’s resources that impeded the agency’s function.”¹⁵³ However, the instant case may be distinguishable from the rule illustrated in *Buckman*, as “it was the intent of Congress that [the Department of Homeland Security and] ICE respond to inquiries by state and local governments.”¹⁵⁴ Therefore, perhaps a higher court would be reluctant to view increased requests for immigration status determination as running counter to federal priorities.

Section 3 of SB 1070 makes it a state crime for a person to willfully fail to complete or carry an alien registration document in violation of federal law.¹⁵⁵ In *Hines*, the Court established that the purpose of the Federal Alien Registration Act was to make a single unified alien registration system for the nation.¹⁵⁶ Although Section 3 does not create additional registration requirements, it alters penalties and can lead to state prosecutions for violation of federal law.¹⁵⁷ The court declared Section 3 preempted because it “stands as an obstacle to the uniform, federal registration scheme and is therefore an impermissible attempt by Arizona to regulate alien registration.”¹⁵⁸

Section 5 makes it a crime for an illegal alien to apply for or solicit work in Arizona.¹⁵⁹ The Ninth Circuit, in *Chicanos Por La Causa*, stated “because the power to regulate the employment of unauthorized aliens remains within the states’ historic police powers, an as-

¹⁵² *Id.* at 74.

¹⁵³ *Arizona*, 703 F. Supp. 2d at 995 (citing *Buckman Co. v. Plaintiffs’ Legal Comm.*, 531 U.S. 341, 351 (2001)).

¹⁵⁴ Julie Myers Wood, *Flawed Analysis Blocks Parts of 2010 Arizona Immigration Law*, 2010 EMERGING ISSUES 5271 (Aug. 18, 2010) (LEXIS).

¹⁵⁵ See ARIZ. REV. STAT. ANN. § 13-1509(A) (2010).

¹⁵⁶ *Hines*, 312 U.S. at 74.

¹⁵⁷ *Arizona*, 703 F. Supp. 2d at 999.

¹⁵⁸ *Id.*

¹⁵⁹ See § 13-2928(C).

sumption of non-preemption appli[ed].”¹⁶⁰ However, Judge Bolton reasoned that because Title Eight has robust sanctions for employers who hire, employ, or refer unauthorized workers, Congress employed a comprehensive federal scheme, wherein it deliberately decided not to regulate potential unauthorized workers.¹⁶¹

Finally, Section 6 of SB 1070 “provide[s] that an officer may arrest a person without a warrant if the officer has probable cause to believe that ‘the person to be arrested has committed any public offense that makes the person removable from the United States.’”¹⁶² The court stated that the complex determination of whether a public offense makes an alien removable is for federal judges, and that officers are likely to wrongfully arrest legal resident aliens.¹⁶³ Again, relying on *Hines*, the court stated that the Arizona law “would impose a . . . burden on legal resident aliens that only the federal government has the authority to impose.”¹⁶⁴

States somewhat concede to a preemption argument by declaring that they are acting because the federal government has neglected to take control of the immigration crisis.¹⁶⁵ In the same vein, the argument that Arizona is usurping federal authority grows weaker the longer Congress does not pass regulation targeting the immigration crisis.¹⁶⁶ If Congress remains silent while other states follow Arizona’s lead, courts will increasingly be able to construe federal silence as approval of state action in the field of immigration.¹⁶⁷ In fact, eighty-one members of Congress filed an amicus brief supporting Arizona in *United States v. Arizona*.¹⁶⁸

¹⁶⁰ *Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856, 865 (9th Cir. 2009), cert. granted sub nom. *Chamber of Commerce of U.S. v. Candelaria*, 130 S. Ct. 3498 (2010).

¹⁶¹ *Arizona*, 703 F. Supp. 2d at 1000-02.

¹⁶² *Id.* at 1004 (quoting § 13-3883(A)(5)).

¹⁶³ *Id.* at 1006.

¹⁶⁴ *Id.* (quoting *Hines v. Davidowitz*, 312 U.S. 52, 65-66 (1941)).

¹⁶⁵ See Chin et al., *supra* note 111, at 88.

¹⁶⁶ *Id.* at 89.

¹⁶⁷ *Id.*

¹⁶⁸ *81 Members of Congress Support AZ Law, Jay Sekulow’s Trial Notebook, ACLJ* (July 21, 2010, 12:00 AM), <http://www.aclj.org/TrialNotebook/Read.aspx?ID=979>.

c. *Dormant Commerce and Privileges & Immunities Clauses*

Judge Bolton confronted the Dormant Commerce Clause issue in discussing a second provision in Section 5 of SB 1070.¹⁶⁹ Section 5 makes it illegal for a person in violation of a criminal offense to transport, conceal, harbor, or encourage illegal aliens in pursuit of unlawful presence.¹⁷⁰ “The Supreme Court has interpreted the Commerce Clause ‘to have a “negative” aspect that denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce.’”¹⁷¹ “[D]iscrimination’ simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.”¹⁷² Furthermore, courts must compare the benefits and burdens relevant to nondiscriminatory statutes to find a violation only when the burdens are clearly excessive as compared to the benefits.¹⁷³ Judge Bolton found that statute “does not discriminate between in-state and out-of-state economic interests.”¹⁷⁴ Furthermore, the nondiscriminatory statute imposed a minimal burden on interstate commerce compared to the benefits to Arizona.¹⁷⁵ Therefore, with respect to this provision of SB 1070’s Section 5, the court determined the United States is unlikely to succeed on its arguments.¹⁷⁶

V. SENATE BILL 1070: A BLESSING IN DISGUISE

As outlined above, there are many reasons why SB 1070 is likely to fail. However, any argument against SB 1070, as a state law—sovereignty, state power, foreign relations, and state protectionism—are based on issues peripheral to the true issue. The bottom line is that it is extremely urgent that a solution be implemented soon: public safety, children’s rights, police officer safety, border security, the economic

¹⁶⁹ *Arizona*, 703 F. Supp. 2d at 1002-04.

¹⁷⁰ See ARIZ. REV. STAT. ANN. § 13-2929 (2010).

¹⁷¹ *Arizona*, 703 F. Supp. 2d at 1003 (quoting *Or. Waste Sys., Inc. v. Dep’t of Envtl. Quality*, 511 U.S. 93, 98 (1994)).

¹⁷² *United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338 (2007).

¹⁷³ *Arizona*, 703 F. Supp. 2d at 1003 (quoting *United Haulers*, 550 U.S. at 346).

¹⁷⁴ *Id.* at 1004.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

health of the nation and public opinion,¹⁷⁷ all require that a solution be implemented as soon as possible.¹⁷⁸ SB 1070 has already been enacted into law and “[a]t least five other states have pending legislation that mirrors parts of [SB] 1070.”¹⁷⁹ “Multiple other states are at various stages in considering legislation similar to Arizona’s [SB] 1070. Many of these states have put legislative action on hold in anticipation of the outcome of legal challenges to Arizona’s law.”¹⁸⁰ Forty-five state legislatures have introduced 1180 bills and resolutions on immigration related issues such as education, employment, identification/driver’s licenses, and law enforcement.¹⁸¹

Faced with the federal government’s inability to enforce immigration laws, the states long to take action—an immediate, albeit imperfect, resolution is ready to be implemented. After all, Arizona’s immigration law does not authorize anything in the way of racial profiling that the federal government has not already authorized. The fact that Arizona’s law is primarily objectionable on federalism grounds is a blessing in disguise. That is to say, if SB 1070 were federal legislation recruiting the help of state law enforcement, many would likely classify

¹⁷⁷ See *supra* notes 2-6 and accompanying text.

¹⁷⁸ See generally *Public Opinion Polls on Immigration*, FAIR, http://www.fairus.org/site/PageNavigator/facts/public_opinion/ (last visited May 9, 2011). FAIR provides a compilation of public opinion polls with conclusions on the matter. *Id.* (“The general public overwhelmingly favors immigration reform. Poll after poll shows that Americans want well-enforced, sensible, and sustainable immigration laws.”). According to the polls, “58% of Americans support Arizona SB1070 (Washington Post/ABC, June 2010).” *Id.*

¹⁷⁹ Glen M. Krebs & Gregory L. Adams, *Arizona’s Immigration Laws: Where Do We Go From Here?*, FED. LAW., Nov.-Dec. 2010, at 28, 29.

South Carolina’s S. 1446, Pennsylvania’s H.R. 2479, Minnesota’s H.R. 3830, Rhode Island’s H.R. 8142, and Michigan’s S. 1388 all would require law enforcement officers to verify the immigration status of a person during a lawful stop, detention, or arrest if there is reasonable suspicion that the person is unlawfully present in the United States. With the exception of South Carolina’s proposed legislation, all the proposed state bills would also impose criminal penalties on immigrants for failure to carry their immigration documents with them at all times.

Id.

¹⁸⁰ *Id.*

¹⁸¹ Mary L. Field, *The Future of U.S. Immigration Law and Policy: Obstacles and Proposals*, DCBA BRIEF, Dec. 2010, at 22.

it as a much needed step in the direction of improving the immigration crisis.

A. *Human Rights is the Solution: The Convention on the Rights of the Child and the Immigration Crisis as Impetus for Change*

The impetus for President Obama to overcome the partisan holdout in Congress he recently complained of is a focus on the children's rights violations that are a result of the broken immigration system.¹⁸² In other words, President Obama has the ability to emphasize the magnitude of the problem so that the federal government may overcome tangential issues such as politics and institutional competency, to address the real issue—the needs and rights of American *and* foreign, adult *and* child human beings.

1. Politics: Personal Self-Interest

One might ask what would separate President Obama from politics¹⁸³ to the extent that he, himself, might look upon measures such as SB 1070 with optimism. Perhaps President Obama making good on some of his own previous statements would instill trust in his constituents, to the extent that they would believe his support in legislation like SB 1070 is for a purpose that benefits humanity, and not for improper purposes. For example, in 2008, President Obama “promised to make comprehensive immigration reform ‘a top priority in my first year as

¹⁸² See generally Nicholas & Parsons, *supra* note 32. President Obama said, “Now, under the pressures of partisanship and election-year politics, many of the 11 Republican senators who voted for reform in the past have now backed away from their previous support.” *Id.*

¹⁸³ See generally Nowicki, *supra* note 1 (discussing the political response and issues impacting immigration reform). In response to the Obama administration's decision to file suit against Arizona, Tamar Jacoby, president of ImmigrationWorks USA, a national organization that supports comprehensive immigration reform said, “I also think it's a pretty naked play for Latino voters. To me, it was a risky and troubling move.” *Id.* But John McCain, R-Arizona, responded to this same lawsuit by stating, “It's purely a political move, and one that contradicts the majority of the American people who want our border secured.” *Id.*

president.’”¹⁸⁴ Also in 2008, at the Walden University Presidential Youth Debate, President Obama was asked, “As president, would you seek the ratification of the [CRC]?”¹⁸⁵ President Obama replied:

It’s important that the United States return to its position as a respected global leader and promoter of human rights. It’s embarrassing to find ourselves in the company of Somalia, a lawless land. I will review this, and other treaties, and ensure that the United States resumes its global leadership in human rights.¹⁸⁶

The interests of a majority of Americans, immigrant children, the states, and the federal government can be aligned if President Obama would embrace Arizona’s legislation, and emphasize the need to restore proper treatment of children in the United States. Of course, this is assuming further steps are taken in the future to adjust the imbalances that create the incentive for people to risk their lives and liberty in pursuit of the same.

2. Politics: National Self-Interest

The analysis established above regarding the application of the CRC to the United States falls in line nicely as well.¹⁸⁷ The federal government would be able to address children’s rights as proposed here, on the basis of fulfilling its duty to avoid defying the VCLT, as a signatory of the CRC. The United States would not have to ratify the CRC—or concede to the CRC being customary international law—while taking a substantial step in the direction of “return[ing] to its position as a respected global leader and promoter of human rights.”¹⁸⁸ The United States could maintain its position of being free from the outside influence of the United Nations, while accounting for its responsibility to respect children’s rights.

¹⁸⁴ Ruben Navarrette Jr., *Immigration Unlikely to be Obama Priority*, SAN DIEGO UNION-TRIB., Nov. 12, 2008, at B7.

¹⁸⁵ *Question 12 of 14: UN Convention on the Rights of the Child*, WALDEN U. PRESIDENTIAL YOUTH DEBATE, Oct. 22, 2008, <http://youthdebate2008.org/video/question-12/#content>.

¹⁸⁶ *Id.* (quoting from Obama’s video response, embedded on page).

¹⁸⁷ *See supra* Part I.B.

¹⁸⁸ *Supra* note 188 (quoting from Obama’s video response, embedded on page).

**B. Implementing Cooperation: President Obama, Congress,
and the States Unite**

1. Congressional Authorization and Encouragement
Through Congress's Spending Power

Pursuant to the urging of President Obama, Congress must enact national legislation incorporating SB 1070-like framework, essentially enabling the states to overcome the tangential issues discussed in this Article. This would be best accomplished through Congress's spending power, established by the effect given to Article I, Section Eight of the United States Constitution.¹⁸⁹ Congress could design legislation that allows and encourages states to fully enforce federal immigration law, with careful consideration paid to provisions that guide the states in exercising prosecutorial discretion—one of the few legitimate arguments SB 1070 opposition is based upon.

The result would be empowerment of the states to enforce immigration and a framework for federal and state governments to cooperate. Federal immigration authorities would get the help they desperately need in enforcing immigration violations. The nation would be able to speak with a unified voice, eliminating fear of jeopardizing foreign relations. State hostilities and concerns of protectionism would be eliminated as all states would be governed by the same rules, which would appear less suspect as Congress would be perceived as more objective. Once these side issues are appropriately addressed, and immigration enforcement and consistent treatment of illegal immigrants are established, the federal government can pursue more comprehensive legislation, targeting the problems that lead to such desperation of South Americans.

¹⁸⁹ See U.S. CONST. art. 1, § 8 (stating, Congress may “lay and collect Taxes . . . to pay the Debts and provide for the common Defense and general Welfare of the United States . . .”). This clause has been interpreted as allowing Congress to indirectly compel states to comply with federal statutory and administrative directives by conditioning the receipt of related federal funds on such compliance. See *South Dakota v. Dole*, 483 U.S. 203, 206-07 (1987) (citing *Fullilove v. Klutznick*, 448 U.S. 448, 474 (1980); *Lau v. Nichols*, 414 U.S. 563, 569 (1974); *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275, 295 (1958); *Oklahoma v. U.S. Civil Serv. Comm'n*, 330 U.S. 127, 143-44 (1947); *Steward Mach. Co. v. Davis*, 301 U.S. 548 (1937)).

2. Congressional Authorization Through the United States Attorney General

The method of congressional authorization established above would be most effective because this grant of authority would be the most direct, promoting the uniformity and national cooperation needed to implement SB 1070 framework. Alternatively, the United States Attorney General has the power to delegate immigration enforcement authority to state and local law enforcement authorities, on an individual basis, under certain conditions.¹⁹⁰ The Attorney General exercises this power pursuant to Immigration and Nationality Act Section 287(g), through what is known as 287(g) agreements.¹⁹¹ Congressional authorization would likely be less effective under this framework because respective jurisdictions would probably be treated non-uniformly, as the Attorney General would contract individually with the respective jurisdictions or only with those jurisdictions in an emergency situation.¹⁹² Moreover, the power granted to the Attorney General is permissive with respect to the states,¹⁹³ whereas congressional enforcement through its spending power would have a greater coercive effect.¹⁹⁴ This is a plausible method of the congressional authorization called for in this Article, but Congress would need to pass legislation granting the Attorney General the ability to exercise his or her power more broadly so that uniformity may be achieved.

¹⁹⁰ See 8 U.S.C. § 1357(g)(1) (2006) (granting power to the Attorney General to enter into agreements with state and local entities, providing the ability for such entities to perform functions of federal immigration authorities); see also *id.* § 1103(a)(10) (granting power to the Attorney General to authorize state and local law enforcement officers, in emergency situations, to exercise powers of federal immigration officials).

¹⁹¹ See Carrie L. Rosenbaum, *Introduction to 287(g) Agreements, Secure Communities, and Immigration Detainers*, 2010 EMERGING ISSUES 5400 (Nov. 15, 2010) (LEXIS).

¹⁹² See generally *supra* Part IV.B.1.

¹⁹³ See 8 U.S.C. § 1357(g)(1) (“[T]he Attorney General may enter into a written agreement”); see also *id.* § 1103(a)(10) (“[T]he Attorney General may authorize”).

¹⁹⁴ See *supra* note 189 and accompanying text.

VI. CONCLUSION

A substantial change is needed in the way illegal immigration is addressed and enforced in the United States. Arizona has attempted to implement such a change out of desperation, not racism. Arizona's attempt at redefining the boundaries between state and federal governments with respect to immigration enforcement illustrates how serious and unstable this issue has become. It is nonsensical for the federal government to be unresponsive to this enormous problem, yet to be confrontational toward Arizona for a step in a positive direction; especially when the federal government can address its own federalism objections by enabling Arizona to enforce immigration law, thereby improving the real problem—illegal immigration and violation of human/children's rights.

Instead, President Obama must exert his influence over the federal government, embracing the potential for change that exists within the current heightened awareness of the immigration crisis and the unacceptable effects it has on the welfare of children. By highlighting the enormous scope of the problem—reaching as far as systematic violations of children's rights—President Obama has the power to overcome the politics that have created a stalemate in Congress, and to implement the United States' compliance with its obligation to refrain from defeating the purpose of the CRC. Once the United States regains some control over the surge of illegal immigrants across the border, the disparities in wealth and quality of living between countries can be addressed with further legislation and international cooperation. The United States can resume its global leadership in human rights.