ARIZONA, IMMIGRATION, AND LATINOS: The Epistemology of Whiteness, the Geography of Race, Interest Convergence, and the View from the Perspective of Critical Theory

George A. Martínez*

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* Professor of Law, Dedman School of Law at Southern Methodist University, B.A. Arizona State University; M.A. (Philosophy) University of Michigan; J.D. Harvard University. I would like to thank Dean John Attanasio, the Law Faculty Excellence Fund, and Southern Methodist University for providing a research grant to support this project.
I. INTRODUCTION

Arizona recently enacted or proposed a scheme of laws regarding immigration and Latinos/as. These laws proved to be extremely controversial. Some of the most important of these laws or proposed laws are as follows.

On April 23, 2010, Arizona Governor Jan Brewer signed legislation known as Senate Bill 1070 (S.B. 1070), which deals with the issue of immigration in Arizona. The purpose of S.B. 1070 is to make "attrition [of undocumented persons] through enforcement the public policy of all state and local government agencies in Arizona" and "to discourage and deter the unlawful entry and presence of aliens." Importantly, Section 2 of S.B. 1070 requires:

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3. For background on the political situation in Arizona which generated S.B. 1070, see generally Kristina M. Campbell, The Road to S.B. 1070: How Arizona Became Ground Zero for the Immigrants' Rights Movement and the Continuing Struggle for Latino Civil Rights in America, 14 HARV. LATINO L. REV. 1 (2011). See also Keith Aoki & John Shuford, Welcome to Amerizona—Immigrants Out! Assessing "Dystopian Dreams" and "Usable Futures" of Immigration Reform, and Considering Whether "Immigration Regionalism" Is an Idea Whose Time Has Come, 38 FORDHAM URB. L.J. 1, 3 (2010) (describing the "state of internal disorder represented by Arizona's recently passed S.B. 1070" as "one of many possible futures for states").

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 country, 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.\(^5\)

The law further states that in determining whether there is a “reasonable suspicion” that someone is an undocumented person a “law enforcement official . . . 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.”\(^6\) Section 2 also provides that Arizona residents may file a lawsuit against Arizona officials that fail to enforce the “federal immigration laws . . . to less than the full extent permitted by federal law.”\(^7\)

In addition, in May 2010, Governor Brewer signed legislation, House Bill 2281 (H.B. 2281), which outlawed ethnic studies.\(^8\) Section 1 of H.B. 2281 forbids school districts from teaching any courses which, among other things, “are designed primarily for pupils of a particular ethnic group” or “advocate ethnic solidarity.”\(^9\)

\(^5\) Ariz. S.B. 1070, at § 2.


\(^7\) Ariz. S.B. 1070, at § 2. Some see this provision, which authorizes lawsuits to enforce S.B. 1070, as “an attack on local discretion given the way it mandates enforcement activity regardless of any preexisting policies to the contrary.” Rick Su, Police Discretion and Local Immigration Policymaking, 79 UMKC L. Rev. 901, 912 (2011).

\(^8\) Ariz. H.B. 2281, 49th Leg., 2d Reg. Sess., at § 1 (Ariz. 2010); Nicole Santa Cruz, Arizona Bill Targeting Ethnic Studies Signed into Law, L.A. TIMES (May 12, 2010), http://articles.latimes.com/2010/may/12/nation/la-na-ethnic-studies-20100512 (“A bill that aims to ban ethnic studies in Arizona schools was signed into law Tuesday by Gov. Jan Brewer . . . ”).

Finally, House Bill 2582 (H.B. 2582) proposes legislation that would forbid courts in Arizona from applying international law as either "controlling or influential authority."\(^{10}\)

On July 6, 2010, the United States of America filed a suit in the Arizona federal district court challenging S.B. 1070 as unconstitutional and preempted by federal law and seeking a preliminary and permanent injunction to prevent the enforcement of S.B. 1070.\(^{11}\) On July 28, 2010, Judge Susan Bolton ruled in favor of the United States and issued a preliminary injunction against the enforcement of certain sections of S.B. 1070.\(^{12}\) On April 11, 2011, the United States Court of Appeals for the Ninth Circuit affirmed the decision of the district court and upheld the preliminary injunction.\(^{13}\) On August 10, 2010, the State of Arizona filed a petition in the United States Supreme Court that sought to overturn the lower federal court rulings regarding the Arizona immigration law.\(^{14}\)

\(^{10}\) H.B. 2582, 49th Leg., 2d Reg. Sess., at § 1 (Ariz. 2010).

\(^{11}\) Complaint at 1, United States v. Arizona, 703 F. Supp. 2d 980 (D. Ariz. 2010) (No. CV-10-1413-PHX-SRB). The intervention of the United States in the Arizona immigration litigation apparently took some proponents of the Arizona law by surprise. See Kris W. Kobach, Arizona’s S.B. 1070 Explained, 79 UMKC L. Rev. 815, 818 (2011) ("[T]he decision by the Holder Justice Department to sue Arizona was unexpected."). The entry by the United States into the S.B. 1070 litigation also generated significant controversy. See Josh Gerstein, Justice Department Sues over Arizona Immigration Law, POLITICO (July 7, 2010, 11:49 AM), http://www.politico.com/news/stories/0710/39413.html (stating that Arizona Governor Jan Brewer called the federal lawsuit an "attack" on Arizona by "President Obama and his Department of Justice" and "nothing more than a massive waste of taxpayer funds"); Jerry Markon & Michael D. Shear, Justice Department Sues Arizona over Immigration Law, WASH. POST (July 7, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/07/06/AR2010070601928.html ("Reaction to the suit poured in from all sides, much of it blistering.").

\(^{12}\) United States v. Arizona, 703 F. Supp. 2d 980, 1007–08 (D. Ariz. 2010), aff’d, 641 F.3d 339 (9th Cir. 2011), cert. granted, 132 S. Ct. 845 (2011). The district court preliminarily enjoined the portions of S.B. 1070:

\(\text{[1]}\) requiring an officer make a reasonable attempt to determine the immigration status of a person stopped, detained or arrested if there is a reasonable suspicion that the person is unlawfully present in the United States, and requiring verification of the immigration status of any person arrested prior to releasing that person; \(\text{[2]}\) creating a crime for the failure to apply for or carry alien registration papers; \(\text{[3]}\) creating a crime for an unauthorized alien to solicit, apply for, or perform work; \(\text{[and]}\) \(\text{[4]}\) authorizing the warrantless search of a person where there is probable cause to believe the person has committed a public offense that makes the person removable from the United States.


In this Article, I analyze this scheme of laws in Arizona regarding immigration and Latinos by using the powerful tools of contemporary critical theory, which have been especially developed to analyze issues of race such as those presented in the laws at issue. As discussed below, critical theory, as applied to Arizona, reveals (1) that the newly enacted scheme of laws reflects an epistemology of whiteness and operates to transform Arizona into a white geographical landscape; (2) that the outlawing of ethnic studies in Arizona is a corollary to the establishment of a white geographical space in Arizona; (3) that legal decision-making regarding the Arizona immigration law is explained by interest convergence theory especially as reflected in the federal government’s concern about the Arizona law’s impact on international relations; (4) that Arizona’s effort to escape the reach of international law is explainable by state-of-nature theory and that theoretical work on the changing nature of the American constitutional order, which holds that our country is shifting from a nation state into a market state, shows that this effort will not succeed; (5) that to the extent that Arizona’s laws have been enacted to preserve American culture, the laws are wrongheaded and will fail; (6) that Arizona’s new legal regime provides evidence to support a new power threat theory that the dominant group will impose legal controls on Latinos as the Latino population grows in size; and (7) that it would appear to be premature to conclude that the Arizona legal regime is the first step toward establishing apartheid in America.

II. A CRITICAL PERSPECTIVE ON ARIZONA AND THE NEW IMMIGRATION LAW AND OTHER LAWS IMPACTING LATINOS

In recent years, a paradigm shift has taken place in the area of immigration law and scholarship in that it is now well recognized that immigration law and policy necessarily implicate issues of race. This shift


follows from the fact that most immigrants to the United States are persons of color. It is therefore appropriate to use the tools and resources of critical theory—which have been especially developed to examine issues of race—to analyze the various issues, including issues of race, that have been raised by the Arizona regime of laws regarding immigration and Latinos.

A. The Epistemology of Whiteness and the Creation of a White Geography or Space in Arizona

Professor Patricia Price recently observed that critical race theorists and critical geographers of race both analyze issues of race and racism but that they have so far failed to “fully engage with one another.” As a result, she urges scholars to analyze racial phenomena by using the tools of critical-race theory and critical geographies of race. Accordingly, this section and this article will analyze Arizona and its legal regime from a critical perspective but also respond to Professor Price’s call to apply the insights of critical race theory and critical geographies of race in analyzing racial processes and, thereby, help contribute to a “closer and substantive engagement between critical geographies of race and critical race theory.” This approach, which incorporates critical geographies of race into the

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19. CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT, supra note 15 (Critical race theory seeks to understand “the ways in which race and racial power are constructed and represented in American legal culture and, more generally, in American society as a whole.”).

20. Gabriel J. Chin et al., A Legal Labyrinth: Issues Raised by Arizona Senate Bill 1070, 25 GEO. IMMIGR. L.J. 47, 48 (2010) (S.B. 1070 “raises critical issues of race”); Hing, supra note 4, at 291 (“When we consider laws like SB 1070, we should not lose sight of the racialized nature of immigration laws—federal or local . . . . What we find is that racism has been institutionalized in federal and state immigration laws although they may be drafted in nonracial terms.”).


22. Id. at 150.

23. Id.
analysis of the Arizona laws, is fully consistent with critical race theory's traditional commitment to an interdisciplinary analysis of race.\textsuperscript{24}

In this regard, the statutory scheme that Arizona has enacted regarding immigrants and Latinos reflects an epistemology of whiteness,\textsuperscript{25} and it is operating to turn Arizona into a white geographical space.\textsuperscript{26} Critical theorists have recognized that the whiteness of the dominant group operates "as an epistemology."\textsuperscript{27} In other words, whiteness is "a particular way of knowing and valuing social life."\textsuperscript{28} In particular, the epistemology of whiteness involves "the ability to survey and navigate social space from a position of authority."\textsuperscript{29} This epistemological stance represents racial minorities as not only knowable but as "transparently obvious."\textsuperscript{30} Thus, the slave master wanted to keep tabs on the slaves at all times in terms of

\textsuperscript{24}See Charles Lawrence III, \textit{The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism}, 39 STAN. L. REV. 317 (1987) (using psychological theory to analyze racial discrimination); George A. Martinez, \textit{Philosophical Considerations and the Use of Narrative in Law}, 30 RUTGERS L.J. 683, 699–700 (1999) (contending that race theorists should utilize approaches "external" to traditional legal argument such as narrative to bring about practical change or improvements).

\textsuperscript{25}In recent years, scholars have begun to analyze issues of whiteness. \textit{See Critical White Studies: Looking Behind the Mirror} (Richard Delgado & Jean Stefancic eds., 1997); Jacqueline A. Housel, \textit{Geographies of Whiteness: The Active Construction of Racialized Privilege in Buffalo, New York}, 10 SOC. & CULTURAL GEOGRAPHY 131, 131 (2009) ("An interest in white identity and its attendant privilege developed in the USA in the 1980s, responding to the civil rights movement . . . . From this interest, a burgeoning literature in Whiteness Studies emerged . . . .").

\textsuperscript{26}See Housel, \textit{supra} note 25, at 132 (observing that geographers have advanced whiteness studies "by offering historical and geographic understandings of whiteness" and "the formation of racialized landscapes/place").


\textsuperscript{28}\textit{Id.; see also} Ruth Frankenberg, \textit{Growing Up White: Feminism, Racism and the Social Geography of Childhood}, 45 FEMINIST REV. 51, 54 ("[W]hiteness is a ‘standpoint’ or place from which to look at oneself, others and society."); Zeus Leonardo, \textit{The Souls of White Folk: Critical Pedagogy, Whiteness Studies, and Globalization Discourse}, 5 RACE, ETHNICITY & EDUC. 29, 31 (2002) ("[W]hiteness is also a racial perspective or a world-view.").

\textsuperscript{29}Dwyer & Jones, \textit{supra} note 27; \textit{see also} id. at 210 ("Whiteness can tap a rich epistemological field from which to gather its authoritative and distanced subjectivity."); Audrey Kobayashi & Linda Peake, \textit{Racism Out of Place: Thoughts on Whiteness and an Antiracist Geography in the New Millennium}, 90 ANNALS ASS’N AM. GEOGRAPHERS 392, 394 (2000) ("Whiteness is also a standpoint: a place from which to look at ourselves and the surrounding society, a position of normalcy, and perhaps moral superiority, from which to construct a landscape of what is same and what is different."); Leonardo, \textit{supra} note 28, at 32 ("Aspects of white culture assume superiority over others . . . .").

\textsuperscript{30}Dwyer & Jones, \textit{supra} note 27, at 215; \textit{see also} David R. Roediger, \textit{Introduction} to \textit{Black on White: Black Writers on What It Means to Be White}, 4 (David R. Roediger ed., 1998) ("White writers have long been positioned as the leading and most dispassionate investigators of the lives, values, and abilities of people of color.").
knowing their location and subjective thoughts. On the other hand, the epistemology of whiteness imagines that the dominant group is “insulate[d] . . . from a critical gaze” and “imagines it is altogether invisible to racialized Others.”

The Arizona immigration law—S.B. 1070—presents us with a situation where the dominant group seems to be attempting to escape the critical gaze of the Other and imagines that its actions regarding the law are inscrutable. For example, the key actors in Arizona and elsewhere insisted that S.B. 1070 did not permit racial profiling. For instance, Governor Brewer stated that

[the language in S.B. 1070 saying that government agents may not consider race in enforcing S.B. 1070 “except to the extent permitted by the United States Constitution or Arizona Constitution”] specifically answer[s] legal questions raised by some who expressed fears that the original law would somehow allow or lead to racial profiling. [These words] make it crystal clear and undeniable that racial profiling is illegal, and will not be tolerated in Arizona.

After signing the new immigration law, the governor further said that “[r]acial profiling is illegal. It is illegal in America, and it’s certainly illegal in Arizona.” Similarly, former vice-presidential candidate Sarah Palin stated that the Arizona immigration law did not allow racial profiling. With respect to S.B. 1070, she said: “There is no ability or opportunity in there for the racial profiling . . . . It’s shameful, too, that the Obama

32. Id.; see also Roediger, supra note 30, at 6 (“What bell hooks describes as the fantastic white ability to imagine ‘that black people cannot see them’ constitutes a white illusion at once durable, powerful, and fragile. It exists alongside a profound fear of actually being seen by people of color.”); id. (racial minorities have developed “knowledge of whiteness” that has been suppressed).
33. Dwyer & Jones, supra note 27, at 215; see also James Baldwin, White Man’s Guilt, in BLACK ON WHITE: BLACK WRITERS ON WHAT IT MEANS TO BE WHITE, supra note 30, at 320, 323 (“The American situation is very peculiar and it may be without precedent in the world. No curtain under heaven is heavier than the curtain of guilt and lies behind which white Americans hide.”).
administration has allowed . . . this to become more of a racial issue by perpetuating this myth that racial profiling is a part of this law.\textsuperscript{36}

Likewise, one of the drafters\textsuperscript{37} of S.B. 1070, law professor Kris Kobach, stated that: “S.B. 1070 expressly prohibits racial profiling. In four different sections, the law reiterates that a law enforcement official ‘may not consider race, color, or national origin’ in making any stops or determining an alien’s immigration status.”\textsuperscript{38}

Yet members of racial minorities and others pointed out and explained in careful detail that the S.B. 1070 did authorize racial profiling. For instance, Professor Gabriel Chin et al, in an exhaustive legal analysis of the Arizona immigration bill, concluded that the very language referenced by the Arizona governor as not permitting racial profiling, in fact, does permit racial profiling.\textsuperscript{39} Professor Chin explains:

If the purpose of amending the original text of S.B. 1070 in HB 2162 was to prohibit the consideration of race as part of determinations whether to stop or inquire about nationality or immigration status, then the revised language should have eliminated the final clause, which suggests that race may be considered “to the extent permitted by the United States or Arizona Constitution.” . . . There’s the rub. According to the 1975 United States Supreme Court decision United States v. Brignoni-Ponce, the United States Constitution allows race to be considered in immigration enforcement: “The likelihood that any given person of Mexican ancestry is an alien is high enough to make Mexican appearance a relevant factor.” The Arizona Supreme Court agrees that “enforcement of immigration laws often involves a relevant consideration of ethnic factors.”\textsuperscript{40}


\textsuperscript{37} See Suzy Khimm, \textit{The Man Behind Arizona’s Immigration Law}, MOTHER JONES (May 7, 2010, 2:00 AM), http://motherjones.com/politics/2010/05/kobach-arizona-immigration-law (describing Kris Kobach’s role in drafting S.B. 1070 and stating that Kobach “has been the brains behind similarly tough local-level immigration measures and legal actions across the country”).

\textsuperscript{38} Kobach, supra note 11, at 816.

\textsuperscript{39} Chin et al., supra note 20, at 66–67.

\textsuperscript{40} Id. (emphasis omitted); see also Hing, supra note 4, at 281 (“[R]acial profiling . . . will likely occur” under S.B. 1070); Gabriel J. Chin & Kevin R. Johnson, Op-Ed., \textit{Profiling's Enabler: High Court Ruling Underpins Arizona Immigration Law}, WASH. POST, July 13, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/07/12/AR2010071204049.html (“In fact, the U.S. Supreme Court has approved the racial profiling permitted—indeed encouraged—by S.B. 1070.”). For more on the issue of racial profiling in the immigration context, see Brian R. Gallini & Elizabeth L. Young, \textit{Car Stops, Borders, and Profiling: The Hunt for Undocumented (Illegal?) Immigrants in Border Towns}, 89 NEB. L. REV. 709 (2011);
Given this, we see that racial minorities are able to decode the dominant group and subject it to a critical gaze notwithstanding the tenets of a white epistemology or theory of knowledge holding otherwise.

By authorizing officials to ask for the papers of those suspected of being undocumented immigrants, S.B. 1070 also illustrates the epistemology of the dominant group in that it indicates a desire to keep tabs on racial minorities. Indeed, when the law is applied, the dominant group likely will not be targeted by law enforcement officials, but instead the law will be used to keep racial minorities—especially Latinos—under surveillance. Georgetown University Law Professor David Cole explains:

In practice, it is inevitable that this law will lead to racial profiling. People don’t wear signs saying that they are illegal immigrants, nor do illegal immigrants engage in any particular behavior that distinguishes them from legal immigrants and citizens. So police officers will not stop white people and will stop Latinos, especially poor Latinos.41

Similarly, former Arizona State Senator Alfredo Gutierrez observed that whites would not be targeted by the new law but instead “it’s going to be someone who looks like my family.”42 Indeed, a national poll showed that 82% of the American people believed the Arizona law would lead to racial profiling of minorities.43 The immigration statute in this way invests whites with the means to keep track of Latinos and other minorities and with the “ability to survey and navigate social space from a position of authority.”44

Perhaps the leading symbol of the dominant group’s surveillance of the Arizona landscape from a position of authority is Maricopa County Sheriff

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44. Dwyer & Jones, supra note 27, at 210.
Joe Arpaio. Describing himself as “America’s Toughest Sheriff,” Arpaio has risen to national prominence as perhaps Arizona’s leading enforcer of the laws against Latino immigrants. Arpaio seeks to convey a clear warning to undocumented immigrants: “Stay out of Maricopa County, because I’m the sheriff here.” Some allege that Sheriff Arpaio targets Latinos on the basis of race. In this regard, Sheriff Arpaio recently settled a claim for racial profiling, which had arisen out of a 2009 incident, for $200,000. In any event, this role of Sheriff Arpaio is consistent with the views of the theorists of the epistemology of whiteness who state that at the position of authority, “from which the world may be surveilled,” one is “likely to find . . . the . . . white (male) subject, secure in his position as surveyor of the social terrain.”

45. Campbell, supra note 3, at 2 (observing that “more than three-fifths of the state’s population . . . is under the jurisdiction of the notorious Sheriff Joe Arpaio”); Melone et al., supra note 4, at 26 (“Among the prominent persons supporting S.B. 1070 is Maricopa County Sheriff Joe Arpaio.”).


47. Pomfret & Geis, supra note 46.


What is the effect of such surveillance? According to theorist Michel Foucault, the effect of the constant possibility of surveillance is that one is rendered permanently visible. The power of the observer is intensified and strengthened because the surveillance causes the ones observed to behave as if they are being watched at all times. As a result, the one observed must police himself in an effort to please the observer. Thus, the surveillance authorized by S.B. 1070 operates to make the dominant group more powerful and renders Latinos permanently visible and forces them to act in ways that they think will please the dominant group—i.e., they will police themselves.

In addition, the epistemology of whiteness operates to create a distance between whites and racial minorities in the socio-spatial world. Thus, the races are largely segregated in a “racialized geography” in America. Applying these ideas to Arizona, we see that S.B. 1070 operates to create distance between the Anglo majority and Latinos as it authorizes the racial profiling of Latinos and those suspected of being undocumented.

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51. HUBERT L. DREYFUS & PAUL RABINOW, MICHEL FOUCAULT: BEYOND STRUCTURALISM AND HERMENEUTICS 189 (2d ed. 1983); see also Mark Fenster. Seeing the State: Transparency as Metaphor, 62 ADMIN. L. REV. 617, 669 (2010) (continuous surveillance generates a “subject who considers himself to be the object of permanent surveillance.”).

52. DREYFUS & RABINOW, supra note 51.

53. Id.; see also Fenster, supra note 51, at 669 (Surveillance “disciplines and organizes the behavior, thought, and desire of the surveilled.”); Barbara Prainsack & Victor Toom, The Prüm Regime: Situated Dis/Empowerment in Transnational DNA Profile Exchange, 50 BRIT. J. CRIMINOLOGY 1117, 1117 (2010) (“Because those who are surveilled are aware that they could be watched at any moment, they discipline themselves.”).

54. Dwyer & Jones, supra note 27, at 213–15. James Baldwin suggests that this “distance” between whites and people of color is constructed to protect whites from feelings of guilt:

One can measure very neatly the white American’s distance from his conscience—from himself—by observing the distance between white America and black America. One has only to ask oneself who established this distance, who is this distance designed to protect, and from what is this distance designed to offer protection?

Baldwin, supra note 33., at 323.

55. Dwyer & Jones, supra note 27, at 213; see also DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 2 (1993); J. William Callison, Achieving Our Country: Geographic Desegregation and the Low-Income Housing Tax Credit, 19 S. CAL. REV. L. & SOC. JUST. 213, 219–22 (2010) (stating that “geographic segregation in residential housing did not result from acts of nature and unfettered private choice; to the contrary, a series of deliberate public policy decisions, including some by the federal government, denied minorities access to certain housing markets and reinforced spatial segregation” and setting out those decisions); Richard Thompson Ford, Geography and Sovereignty: Jurisdictional Formation and Racial Segregation, 49 STAN. L. REV. 1365, 1389 (1997) (“The segregation that we presently experience would never have emerged without explicitly racist laws and public policies and would not continue without a legally maintained structure designed to perpetuate it.”).
Accordingly, there are reports that Latinos are leaving Arizona in significant numbers because of the harsh environment created by the new laws. Obviously, when Latinos leave the state of Arizona, they are separating geographically from the Anglo majority in Arizona and, thereby, whitening the geography of Arizona.

As a result of the whitening of the geography, critical theorists have recognized that “mobility . . . is racialized” and that minorities experience “the terror of moving through places that whites have claimed as their own.” Indeed, “whiteness is about who is able to monitor the social spaces of travel.” Latinos argue that S.B. 1070 generates fear and terror in Latinos as they will inevitably be targeted through racial profiling as they attempt to move through Arizona spaces and geography. For example, one Latino—a U.S. citizen—explained that he fears arrest as officials apply S.B. 1070: “If a cop sees [people riding with me], and they look Mexican, he’s going to stop me . . . . What if people are U.S. citizens? They’re going to be asking them if they have papers because of the color of their skin.”


57. See Kobayashi & Peake, supra note 29, at 392 (observing that “no geography is complete, no understanding of place or landscape comprehensive, without recognizing that American geography, both as discipline and as the spatial expression of American life, is racialized”).

58. Dwyer & Jones, supra note 27, at 216.

59. Id.; see also bell hooks, Representations of Whiteness in the Black Imagination, in BLACK ON WHITE: BLACK WRITERS ON WHAT IT MEANS TO BE WHITE, supra note 30, at 38, 44 (“Returning to memories of growing up in the social circumstances created by racial apartheid, to all black spaces on the edge of town, I reinhabit a location where black folks associated whiteness with the terrible, the terrifying, the terrorizing.”); id. at 48 (“[T]o travel is to encounter the terrorizing force of white supremacy.”); id. at 50 (“It was a movement away from the segregated blackness of our community into a poor white neighborhood. I remember the fear, being scared to walk to . . . our grandmother’s house, because we would have to pass that terrifying whiteness — those white faces on the porches staring us down with hate.”).

60. Dwyer & Jones, supra note 27, at 218.

In addition, polls showed that many Latinos in Arizona "feared and resented" the Arizona immigration law. Even Latinos who live outside the state but have to travel through Arizona fear the new immigration law. For instance, one El Paso, Texas resident stated: "There's a lot of people that right now they're scared about the new law. . . . [T]hey're going to be stopping people . . . to question and have problems . . . because just the color of their skin." Another Latina describes the fear that has been generated in the wake of the enactment of the Arizona bill: "Even members of the Latino community who were born in the U.S. or who have become citizens feel they're being looked at with suspicion at times . . . . There's so much fear being created.

Critical geographers who analyze geographies of exclusion also have recognized that power is exercised in the construction of space and that the dominant group consigns "weaker groups in society to less desirable environments." The Arizona S.B. 1070 law can be seen as a device to relegate weaker groups—Latinos and other minorities—to an undesirable geographical environment. Latinos are relegated to an unappealing landscape where they are subject to racial profiling and the fear that such targeting generates.

In analyzing a geographical landscape such as Arizona, critical geographers suggest that we ask: "Who are places for?" and "Whom do they exclude?" The conclusion seems inescapable: The Arizona law and the hostile environment that it creates are meant to exclude Latinos. As Joe Garcia, an American citizen and resident of Chandler, Arizona, explained,

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65. David Delaney, The Space that Race Makes, 54 PROF. GEOGRAPHER 6, 6 (2002) ("In the past decade, geographers in the English-speaking world have turned their attention to questions of race, racism, and racialization to a degree that is unprecedented.").

66. DAVID SIBLEY, GEOGRAPHIES OF EXCLUSION, at ix (1995).

67. See id. at x; see also Delaney, supra note 65, at 7 ("The questions for geographers might then be: how does the racial formation shape space, give meanings to places, and condition the experience of embodied subjects emplaced in and moving through the material world?").
"SB 1070 just brought home the point: If you are Hispanic or Mexican, you are just not wanted in Arizona."  

In this regard, sometimes the geographical boundaries between the dominant group and racial minorities are drawn so as to prevent minorities from "polluting" the space of the dominant group. Thus, minorities are excluded from certain environments, allegedly to prevent them from introducing crime, dirt, disease or other undesirable things into the environment. Supporters of the new Arizona laws also seem to be attempting to prevent Latinos from polluting the Arizona environment.

For instance, Arizona Senator Russell Pearce, one of the key proponents of S.B. 1070, linked immigrants to crime and stated that:

Illegal aliens that commit a crime are an extremely difficult challenge for law enforcement and growing threat to our citizens. Large, well-organized gangs of illegal aliens have flooded many neighborhoods with violence to the point where Arizona now has the highest crime rate in the nation.

Similarly, Arizona Governor Jan Brewer justified signing S.B. 1070 into law on the grounds that immigrants have brought crime into Arizona:

I’ve decided to sign Senate Bill 1070 into law because, though many people disagree, I firmly believe it represents what’s best for Arizona. Border-related violence and crime due to illegal immigration are critically important issues to the people of our state . . . . There is no higher priority than protecting the citizens of Arizona. We cannot sacrifice our safety to the murderous greed of

68. Anna Gorman, Arizona Immigration Law a Unpleasant Reminder of Town’s Past, L.A. TIMES, June 6, 2010, at A1, available at http://articles.latimes.com/2010/jun/06/nation/la-na-chandler-20100606; see also Campbell, supra note 3, at 2 (S.B. 1070 is “designed to purge the State of Arizona not only of undocumented persons, but of all persons who are or appear to be of Latino heritage”); Hing, supra note 4, at 293 (S.B. 1070 “symbolizes ‘attrition through profiling’”).

69. SIBLEY, supra note 66, at xiv, 36–46.

70. Id. at xiv, 14–46; see also Terry S. Kogan, Transsexuals in Public Restrooms: Law, Cultural Geography and Etitty v. Utah Transit Authority, 18 TEMP. POL. & CIV. RTS. L. REV. 673, 678 (2009) (“Sibley explored how societies establish an identity through a process of exclusion, first labeling a group as abject, and then erecting spatial boundaries to separate that marginalized group from mainstream society.”); David Sibley, The Problematic Nature of Exclusion, 29 GEOFORUM 119, 120 (1998) (describing how groups that are identified as risky or dangerous or “whose presence disturbs a desired vision of space . . . have to be removed in the process of sanitizing that space”).

drug cartels. We cannot stand idly by as drop houses, kidnappings and violence compromise our quality of life. 72

Likewise, some supporters of the S.B. 1070 immigration bill alleged immigrants were dirty and brought disease into the community:

The most outspoken proponents of Arizona's immigration enforcement efforts, in the government and out of it, are using increasingly virulent language to describe illegal immigrants — they're dirty, they're disease ridden, they're criminals, they're lazy social service free loaders and so on. 73

Significantly, it is an old stereotype that Mexicans are "dirty" or polluting, which has been used historically as a justification to exclude or subordinate Latinos. For example, Richard Delgado describes the stereotype of a "dirty Mexican" as

one of the most common of the Latino stereotypes. Even relatively modern movies and stories reinforce it. Historians say they find it in practically every era. Mexicans particularly are invested with this awful image, which includes at least the following ingredients: filthy, unshaven, never bathes, lacking in personal hygiene, and likely to give you a communicable disease. 74

Thus, the Arizona laws are constructing a boundary of separation between the dominant group and Latinos in order to prevent pollution in constructing the geographical space of Arizona. These boundaries operate to keep Latinos at a distance from the dominant group.

In this regard, the legal regime in Arizona finds a parallel in England. In 1994, British lawmakers enacted legislation, which did not expressly


74. Richard Delgado, Rodrigo’s Corrido: Race, Postcolonial Theory, and U.S. Civil Rights, 60 VAND. L. REV. 1691, 1728 (2007); see also Jane E. Larson, Free Markets Deep in the Heart of Texas, 84 GEO. L.J. 179, 225 (1995) (“[A] persistent expression of anti-Mexican prejudice in Texas has been the belief that the skin and bodies of Mexicans are dirty, and by extension so too are their habits and morals.”); Ian Haney López, Race and Colorblindness After Hernandez and Brown, 25 CHICANO-LATINO L. REV. 61, 63 (2005) (“Applying established prejudices regarding miscegenation and dark skin to Mexicans, Anglos denigrated that group as dark, filthy, lazy, cowardly, and criminal—with each of these calumnies informing the most common anti-Mexican epithet, ‘dirty greaser.’”).
mention gypsies, but that was designed to remove gypsies and the danger they allegedly posed to English values from the English countryside.\textsuperscript{75} As critical geographer David Sibley explains, this law creates "a space of white, middle-class Englishness" and "signals the exclusion of all racialized minorities."\textsuperscript{76}

Critical geographers also observe that people and things that are "socially valued enjoy[] a presence in the landscape, while . . . those who are devalued are kept out of sight."\textsuperscript{77} Racial segregation, deportation, imprisonment and ethnic cleansing are all techniques for separating or removing devalued people from geographical landscapes.\textsuperscript{78} The new immigration law—S.B. 1070—reveals that Latinos are not socially valued in that it operates to remove Latinos from the Arizona landscape—e.g., through incarceration or deportation or simply by scaring people away from Arizona because they are afraid of being racially profiled or having the criminal process invoked against them. Indeed, since 2007, more than 26,000 immigrants have been deported through the efforts of the Maricopa County Sheriff's Office.\textsuperscript{79} In this regard, a leading Latino political figure, United States Congressman Luis Gutierrez, described the fear of arrest and deportation in Arizona as follows:

It is open season on the Latino community in Arizona. In Phoenix, Tucson, and across the state, people in Latino neighborhoods are afraid to leave their houses, afraid to be apart from their children for even a minute, and afraid to walk the streets because they feel their arrest on suspicion of being an undocumented immigrant could happen at any moment.\textsuperscript{80}

\textsuperscript{76} Id. at 126–27.
\textsuperscript{77} Price, supra note 21, at 153.
\textsuperscript{78} Id.; see also Richard T. Ford, Urban Space and the Color Line: The Consequences of Demarcation and Disorientation in the Postmodern Metropolis, 9 HARV. BLACKLETTER J. 117, 117 (1992) (noting that, with respect to race, "spatial organization has always been a mode of social control and differentiation"); Linda Peake & Audrey Kobayashi, Policies and Practices for an Antiracist Geography at the Millennium, 54 PROF. GEOGRAPHER 50, 57 (2002) ("Whether racialization involves large-scale relegation to segregated areas, the exclusion of people from areas . . . it always has a geography, which results in the placement of racialized people in specific sociospatial circumstances.").
\textsuperscript{80} Luis Gutierrez, Obama Must Act to Ease Arizona’s Deportation Panic, HUFFINGTON POST (Apr. 17, 2010, 4:10 PM) http://www.huffingtonpost.com/rep-luis-gutierrez/obama-must-act-to-ease-ar_b_541710.html (emphasis omitted). The United States is currently deporting undocumented immigrants at the rate of approximately 400,000 per year. See Hing, supra note
In summary, the Arizona immigration statute implicates an epistemology of whiteness and creates a white geography or space in Arizona. This conclusion is consistent with the critical geographical insight that the world is “wholly racialized” and with the fact that racial subjugation in America has a “spatial nature” where historically “[t]he power of the state has been deployed to ‘protect’ white space . . . .”

B. The Outlawing of Ethnic Studies in Arizona and the Segregation of Knowledge as a Corollary to the Establishment of a White Geography or Space in Arizona

Critical geographer David Sibley has pointed out that exclusion of minorities from geographical space finds a corollary in the exclusion of certain knowledge produced by the Other. In other words, “the defen[s]e of social space has its counterpart in the defen[s]e of regions of knowledge.” The forces that operate to separate or exclude minorities from the dominant group in spatial environments also operate to “determine the boundaries of ‘knowledge’ and exclude dangerous or threatening ideas and authors.”

4, at 293–94 ("The Obama administration is deporting record numbers of undocumented immigrants, and ICE expected to remove about 400,000 individuals in the 2010 fiscal year."); Yolanda Vásquez, Perpetuating the Marginalization of Latinos: A Collateral Consequence of the Incorporation of Immigration Law into the Criminal Justice System, 54 HOW. L.J. 639, 641–42 (2011) ("[I]n 2009, 393,000 noncitizens were removed from the United States . . . ."). Significantly, more than 94% of those deported nationwide are Latinos. Id. at 643 ("Latinos presently represent over 94% of the total number of noncitizens removed."). For an argument that this deportation program is questionable because it may reintroduce “de facto the old and now infamous requirement . . . . that only white persons could become citizens of the United States," see George A. Martinez, Immigration: Deportation and the Pseudo-Science of Unassimilable Peoples, 61 SMU L. REV. 7, 13 (2008). See also Vásquez, supra, at 645 (observing that the United States has “consistently worked to prevent Latinos . . . from migrating or remaining in this country. . . . In this way, immigration law has absorbed and reflected the country’s desire to maintain and uphold a ‘white’ national identity, even at the cost of marginalizing Latinos as well as other immigrants of color”).

81. Delaney, supra note 65, at 7.

82. Elise C. Boddie, Racial Territoriality, 58 UCLA L. REV. 401, 425 (2010). Professor Boddie further observes that “this country’s racial hierarchy has depended to a significant degree on the maintenance of racially distinct spatial territories across neighborhoods and a vast swath of other private and public institutional spaces. The spatial separation of whites, the exclusion of people of color from white-identified spaces, and the vigilant enforcement of racial boundaries have been integral to this effort.” Id.

83. SIBLEY, supra note 66, at xvi.

84. Id.; see also Keith J. Hayward & Jock Young, Cultural Criminology: Some Notes on the Script, 8 THEORETICAL CRIMINOLOGY 259, 269 (2004) (observing that “David Sibley, in his remarkable Geographies of Exclusion (1995), talks not only of spatial and social exclusion—the exclusion of the dangerous classes—but the exclusion of dangerous knowledge”).
Arizona has recently outlawed ethnic studies. According to the state’s superintendent of public instruction, the law—H.B. 2281—is particularly directed at curricula that offer instruction in Mexican-American history and culture. This law has been enacted in conjunction with S.B. 1070—the immigration statute. Thus, we can see that this is explained by critical theory, which predicts that exclusion or separation of Latinos in geographical space will find a counterpart in the exclusion of knowledge. Apparently, knowledge of Latinos is now considered threatening to the dominant group in Arizona, and these ideas must now be excluded and not regarded as knowledge. In particular, the dominant group seems to have banned ethnic studies because they fear growing Latino political and cultural power and that Latinos might resent whites for oppression or unfairness, which could be revealed in a course on ethnic studies.

Interestingly, the creation of a white geographical space in Arizona through S.B. 1070 finds an analogous creation of whiteness in the educational curriculum through H.B. 2281. As one scholar has observed, the effect of outlawing ethnic studies in Arizona is to “further entrench[] whiteness in[] the K-12 school curriculum” because instructors will be unable to teach that there is an “unequal playing field” in America where whites enjoy certain privileges as a result of being white.

Is this effort to suppress the ideas contained in ethnic studies likely to succeed in Arizona? The history of critical theory in America suggests that...
it will not succeed. Richard Delgado recently described how establishment forces attempted to suppress the development of critical theory in the 1960s and 1970s when certain professors were purged from their universities.\textsuperscript{90} Despite this, Delgado argues that critical theory continued to develop and flourish—especially critical-race theory and critical-legal studies.\textsuperscript{91} Delgado draws a lesson from this history of critical theory: “Ideas are not easy to kill” and “education is an inherently destabilizing force that cannot readily be contained.”\textsuperscript{92} Given this experience, it seems unlikely that the Arizona law will be successful in destroying the ideas contained in the ethnic studies curriculum in Arizona.

In this regard, it is worth remembering that the old American-slave codes also tried to deprive African-Americans of knowledge about African culture—an outlawing of the ethnic studies of that era.\textsuperscript{93} Judge A. Leon Higginbotham states that one of the central precepts of the law of American slavery was: “Deny blacks any education, deny them knowledge of their culture, and make it a crime to teach those who are slaves how to read or to write.”\textsuperscript{94} Clearly, these slave laws did not prevent the eventual rise of African-American studies in America. In the same way, it seems unlikely that these Arizona laws will succeed in eliminating ethnic studies in Arizona.


\textsuperscript{91} \textit{Id.} at 1543–45.

\textsuperscript{92} \textit{Id.} at 1544.


The legal decision-making regarding the Arizona immigration law is explainable by interest convergence theory—a central tool of critical theory—especially given the federal government's concern with the impact of the law on international relations. Critical scholar Derrick Bell argues that with respect to racial minorities, when the white majority acts, it acts out of self-interest. As a result, racial minorities can only improve their condition if it is in the interest of the dominant group. I have also explained this behavior as doing what would be expected in a state of nature—one acts out of self-interest or self-preservation. Bell contends that when the U.S. Supreme Court decided *Brown v. Board of Education*, which overturned racial
segregation in public schools, it acted not from the point of view of morality as some have thought\(^1\) but out of a concern to advance the interests—especially the foreign policy interests—of the dominant group.\(^2\) In particular, Bell argues that the United States was concerned that racism in the United States was tarnishing its image abroad in that the Soviet Union was portraying the United States as a racist country as the Soviet Union sought to compete with the United States during the Cold War for influence in other countries, especially in the Third World, and that this concern generated the decision to desegregate in *Brown*.\(^3\) Thus, the white majority has been concerned about its image among other nations in the area of race.

Critical theory, therefore, suggests that we should examine the record to see if after the signing by the Arizona governor of the new immigration law, the United States was concerned about its image in the world and foreign relations as word filtered out that Arizona had enacted an arguably racist law against Latino immigrants. This is exactly what we find. For instance, the Voice of America,\(^4\) which distributes the official United States government positions throughout the world, put out a story almost immediately to explain that the Obama administration was opposed to the Arizona immigration law. The article states: “President Barack Obama has called the Arizona law ‘misguided’ and says that Congress needs to pass

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101. *See* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 77 (1990) (“The end of state-mandated segregation was the greatest moral triumph constitutional law had ever produced.”); Book Note, The Priest Who Kept His Faith but Lost His Job, 103 HARV. L. REV. 2074, 2075 (1990) (reviewing BORK, supra) (noting that *Brown* was “a decision which was at once hailed as constitutional law’s greatest moral triumph”).

102. Bell, *supra* note 96, at 524; see also BELL, *supra* note 97, at 22 (“But even a rather cursory look at American political history suggests that in the past, the most significant political advances for blacks resulted from policies that were intended to, and had the effect of, serving the interests and convenience of whites rather than remedying racial injustices against blacks.”); *id.* at 48 (“Values and morals . . . appear to be powerless to motivate any large segment of whites to action in unison against their perceived interests.”).


comprehensive immigration reform. The president said the law threatens to undermine ‘basic notions of fairness.”’ In addition, the article says: “U.S. Attorney General Eric Holder said Tuesday that the federal government may challenge Arizona’s new law in court.” Shortly thereafter, Secretary of State, Hillary Clinton, while on an official visit to Ecuador, announced that President Obama had ordered the United States Justice Department to challenge the validity of the Arizona immigration statute.

Subsequently, the United States challenged the constitutionality of the new Arizona immigration statute. The concern of the federal government regarding the impact of the law on foreign relations—as predicted by interest convergence theory—is evidenced in the government’s brief and pleadings and in the decisions in the federal courts. In its complaint, the United States asserted that the Arizona immigration law was preempted by federal law in part because “it will interfere with vital foreign policy and national security interests by disrupting the United States’ relationship with Mexico and other countries.” The complaint also points out that “S.B. 1070 has subjected the United States to direct criticism by other countries and international organizations . . .” In its brief arguing that the law was unconstitutional, the United States argued that the law should be struck down in part because it had a negative impact on the international relations of the United States. In particular, the United States asserted in its brief that the Arizona immigration law was preempted by federal law because “it impermissibly conflicts with U.S. foreign policy.” The United States further stated in its brief that:

[T]he State Department has concluded that S.B. 1070’s interference with the federal government’s exclusive control over the foreign policy implications of an area of law unquestionably imbued with foreign policy significance “runs counter to American foreign policy interests” and, if uninterrupted, “would

106. Id.
108. Complaint, supra note 11, at 1.
109. Id. at 3.
110. Id. at 16.
112. Id. at 22.
further undermine American foreign policy.” S.B. 1070 represents an impediment to U.S. foreign policy and U.S. diplomatic interests—both with Mexico and other countries. . . . Indeed, the impact of S.B. 1070 on U.S. foreign policy has been immediate and negative. . . . In enacting . . . a comprehensive, novel, and aggressive set of immigration provisions, Arizona has predictably provoke the ire of those foreign nations whose citizens are being targeted for detention and criminalization—and has thereby damaged the United States’ broader set of diplomatic relations with those same nations.113

In this connection, the government of Mexico submitted an amicus brief in the S.B. 1070 litigation. In its brief, Mexico stated that “[t]he enactment of SB 1070 has been closely followed at the highest levels of the Mexican government and throughout Mexican society.”114 The brief further states that: “SB 1070 creates an imminent threat of state-sanctioned bias or discrimination, resulting not only in individual injury, but also in broader social and economic harms to its citizens; thereby undermining U.S.-Mexico relations.”115 Mexico further asserted that S.B. 1070 “is already straining U.S.-Mexico relations” and “threatens to poison the well from which our two nations have found and should continue to find inspiration for a joint future of prosperity, security, tolerance and justice.”116 Later, when the district court struck down S.B. 1070 as likely unconstitutional, it pointed to the fact that the law disrupted the foreign relations of the United States.117 In particular, in finding that the United States was likely to succeed on its claim that the portion of the Arizona immigration law that required the determination of immigration status was unconstitutional and preempted by federal law, the district court relied on the Supreme Court’s decision in *Hines v. Davidowitz,*118 which emphasized that such “intrusive police practices . . . might affect international relations” and that there was an “important federal responsibility to maintain international relationships, for the protection of American citizens abroad as well as to ensure uniform national foreign policy.”119

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113. Id. at 24–25 (internal citations omitted).
115. Id.
116. Id. at 2 (internal citation omitted).
118. 312 U.S. 52 (1941).
On appeal in the United States Court of Appeals for the Ninth Circuit, the appellate court affirmed the ruling of the district court emphasizing that S.B. 1070 was preempted by federal law in part because "the record unmistakably demonstrates that S.B. 1070 has had a deleterious effect on the United States' foreign relations . . . ." The court of appeals further stated:

Arizona's law has created actual foreign policy problems of a magnitude far greater than incidental. Thus far, the following foreign leaders and bodies have publicly criticized Arizona's law: The Presidents of Mexico, Bolivia, Ecuador, El Salvador, and Guatemala; the governments of Brazil, Colombia, Honduras, and Nicaragua; the national assemblies in Ecuador and Nicaragua and the Central American Parliament; six human rights experts at the United Nations; the Secretary General and many permanent representatives of the Organization of American States; the Inter-American Commission on Human Rights; and the Union of South American Nations. In addition to criticizing S.B. 1070, Mexico has taken affirmative steps to protest it.121

In dissent, Judge Bea argued that S.B. 1070 was not preempted by federal law because it did not conflict with any "established" foreign relations policy.122 He further stated that: "[A] foreign nation may not cause a state law to be preempted simply by complaining about the law's effects on foreign relations generally. We do not grant other nations' foreign ministries a 'heckler's veto.'"123

Thus, the decisions of the federal courts to find the law in Arizona as likely unconstitutional are consistent with the view advanced by Derrick

122. United States v. Arizona, 641 F.3d at 381 (Bea, J., dissenting).
123. Id. at 383. Professor Kris Kobach, one of the authors of S.B. 1070, criticized the Ninth Circuit's preemption theory saying that the decision means that "any time a foreign leader chooses to criticize a state's law, the state's law is therefore preempted." Kobach, supra note 11, at 824. Kobach further observed that "[t]he majority opinion effectively gave foreign governments the power to preempt state laws." Id.
Bell, that the dominant group was advancing its interest in preserving its image abroad and in maintaining foreign policy relations on good terms rather than out of a concern for the morality of the Arizona law. Indeed, Arizona Attorney General Tom Horne observed “that the 9th Circuit relied heavily on the opposition of foreign governments in upholding the injunction” of the district court. These decisions, and interest-convergence theory, suggest that litigators in the Supreme Court and elsewhere who oppose Arizona’s laws or similar anti-immigrant laws should emphasize the laws’ negative impact on the foreign relations of the United States. According to interest-convergence theory, this strategy may provide their best chances for success and for defeat of these laws.

D. Arizona’s Effort to Escape the Reach of International Law

As we have seen in the previous section, the existence of international norms, pressures and relations played an important role in the litigation regarding the legality of S.B. 1070. This fact raises a question: Can Arizona escape the reach of international law and norms?

In this regard, a number of Arizona politicians are supporting new legislation, H.B. 2582, which would prohibit Arizona courts from applying international law as either governing or persuasive precedent when ruling in particular cases. If this effort succeeds, Arizona would join three other states—Oklahoma, Tennessee and Louisiana—that have already prohibited the use of foreign or international law in their courts. The Arizona proposal has come about following a statement by certain United Nations experts on international-human-rights law that the S.B. 1070 immigration law and H.B. 2281, which makes ethnic studies programs illegal in Arizona, amount to a “disturbing pattern of legislative activity hostile to ethnic minorities and immigrants.” These experts also suggested that this legislative scheme may violate international-human-rights law. In light of

128. Nebehay, supra note 127.
this sequence of events, the proposed legislation regarding international law seems to be an attempt to place Arizona beyond the reach of international law and thereby remove legal protection in the form of international human rights from Latinos and other minorities in Arizona.

Historically, there have been efforts to prevent the use of international human rights norms from being used to challenge racial discrimination in the United States. After the United States ratified the United Nations Charter in 1946, in the late 1940s and early 1950s, some American judges relied on the U.N. Charter to overturn laws—the Alien Land Laws— that authorized racial discrimination. As a result, some in Congress feared that the international norms contained in the U.N. Charter or other treaties might be used to strike down the Jim Crow segregationist laws of the day. Accordingly, in the 1950s, some Congressmen, led by Senator John Bricker, sought to enact an amendment to the Constitution that would render an international treaty unenforceable unless Congress had enacted

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130. Henry J. Richardson, III, Two Treaties, and Global Influences of the American Civil Rights Movement, Through the Black International Tradition, 18 VA. J. SOC. POL’Y & L. 59, 74 (2010) ("[T]he United Nations Charter... was ratified by the United States as a major treaty and came into force in 1946.").


133. Gruber, supra note 129, at 315; see also Louis Henkin, U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker, 89 AM. J. INT’L L. 341, 348 (1995) (describing "a move [in the early 1950s] by anti-civil-rights and ‘states’ rights forces to seek to prevent—in particular—bringing an end to racial discrimination and segregation by international treaty"); Vicki C. Jackson, Democracy and Judicial Review, Will and Reason, Amendment and Interpretation: A Review of Barry Friedman’s The Will of the People, 13 U. PA. J. CONST. L. 413, 418 (2010) (observing that the 1950s movement “to limit the domestic legal effects of treaties” was intended “to prevent reliance on the UN Charter, the Universal Declaration of Human Rights, or other human rights instruments to invalidate state segregation laws”); Richardson, supra note 130, at 76–77 (describing how “defenders of southern American apartheid” did not want to permit the use of international human rights norms to do “an ‘end run’ around their ‘segregation forever”—decades of opposition, nullification, and interposition of all potential civil rights legislation”).
ratifying legislation to make it enforceable. This effort to amend the Constitution was unsuccessful.

In any event, critical theory can explain this activity in Arizona through state of nature theory—a theory I have recently advanced in another article. This theory posits that the dominant group tends to relate to racial minorities as if it were in a state of nature—i.e., there is a tendency to act as if there were no legal or moral constraints on their actions or to move to a situation where there are fewer constraints in contexts in which it deals with racial minorities. This is a dangerous situation because where the dominant group is wielding unchecked power there is too much temptation to do bad things such as abusing human rights. As the Arizona example shows, the dominant group seems to be attempting to remove the constraint of international law, so that it may place restrictions on racial minorities such as racial profiling and outlawing ethnic studies. This attempt to lift constraints off of the majority is predicted by state-of-nature theory.

In placing this attack on international law in context, it is also useful to consider the work of theorist Philip Bobbitt who has advanced a celebrated theory that holds that our country is in the process of shifting from a nation state into a market state. The legitimacy or the basis of the

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134. Gruber, supra note 129, at 315; see also Henkin, supra note 133 ("Between 1950 and 1955 Senator Bricker of Ohio led a movement to amend the Constitution in ways designed to make it impossible for the United States to adhere to human rights treaties . . . . In its principal version, the Bricker Amendment included the following provision: 'A treaty shall become effective in the United States only through legislation which would be valid in the absence of treaty.'").

135. Gruber, supra note 129, at 315.

136. Martinez, supra note 98, at 806–33.

137. Id.; see also Alan Ryan, Hobbes’s Political Philosophy, in The Cambridge Companion to Hobbes 217–18 (Tom Sorrell ed., 1996) (the state of nature “is simply the condition where we are forced into contact with each other in the absence of a superior authority that can lay down and enforce rules to govern our behavior toward each other”); Id. (in the state of nature “we are governed by no rules” and “recognize no authority”).

138. Martinez, supra note 98, at 833-37; cf. Thomas Hobbes, Leviathan 83–84 (A.R. Waller ed., 1904) (Hobbes states that when there is no “common Power to keep them all in awe” people live in a “condition which is called War[]; and such a war[], is of every man, against every man,” and in this state of nature where “every man is Enemy to every man” there is “continual[] fear[], and the danger of violent death; And the life of man, solitary, poor[], nasty, brutish, and short.”).

139. Dennis Patterson, The New Leviathan, 101 Mich. L. Rev. 1715 (2003) (“It is hard to imagine a book by a law professor that has had more immediate impact on world leaders than Philip Bobbitt’s The Shield of Achilles.”); id. at 1732 (noting that “we are already assured by none other than Sir Michael Howard that [Bobbitt’s The Shield of Achilles] will become ‘[o]ne of the most important works on international relations [in] the last fifty years’”).

140. Philip Bobbitt, The Shield of Achilles: War, Peace, and the Course of History (2002). For analysis of Bobbitt’s theory, see Ari Afilalo & Dennis Patterson, Statecraft, Trade and the Order of States, 6 Chi. J. Int’l L. 725 (2006); Robert J. Delahunty & Antonio F. Perez,
nation state is founded on the idea that it will provide for the material welfare of its citizens.\footnote{Bobbitt, supra note 140, at 215; See also id. at 230 ("In the era of the nation-state, the State took responsibility for the well-being of groups."); Thompson, supra note 140, at 363 ("Phil Bobbitt describes the modern nation state as a three-dimensional social contract where, "[i]n exchange for allegiance to the State and fulfilling the duties of citizenship, citizens are assured of national borders protected from external threats, domestic security protecting people and property within national borders, and social benefits . . . .").} Bobbitt contends that the nation state will not be able to provide for the material well-being of its people because of certain events that are now taking place worldwide, and it will lose its legitimacy.\footnote{Bobbitt summarizes the strategic threats to the viability of the nation state as follows: "These various developments . . . have led to a disintegration of the legitimacy of the nation-state. In summary, no nation-state can assure its citizens safety from weapons of mass destruction; no nation-state can, by obeying its own national laws (including its international treaties) be assured that its leaders will not be arraigned as criminals or its behavior be used as a legal justification for international coercion; no nation-state can effectively control its own economic life or its own currency; no nation-state can protect its culture and way of life from the depiction and presentation of images and ideas, however foreign or offensive; no nation-state can protect its society from transnational perils, such as ozone depletion, global warming, and infectious epidemics.").} According to Bobbitt, one of the reasons the nation state will fail is because it will be unable to escape the reach of international law, including human rights norms.\footnote{Thompson, supra note 140, at 364–65 (explaining Bobbitt’s view that universal human rights norms threaten to undermine the nation state because they subject states "to increasing external scrutiny for what were once regarded as strictly internal affairs").} As the nation state falls to the side, the market state will arise to take its place.\footnote{Bobbitt argues that the international order of nation states is being supplanted by an emerging political economy of market states, with profound and far-reaching implications for human societies.} The authority of the market state is based on maximizing individual opportunities for its citizens.\footnote{Bobbitt argues that the international order of nation states is being supplanted by an emerging political economy of market states, with profound and far-reaching implications for human societies.}

Given Bobbitt’s theory, we can see that Arizona’s attack on international law and human rights norms is doomed to failure. The United States cannot resist the governance of international law. The attack on international law is therefore one of the last efforts of the failing nation state.
In this regard, some scholars have argued that minorities should use human-rights norms to protect the rights of minorities and immigrants. In light of Bobbitt’s theory that the nation state will not be able to evade the force of international law including human-rights norms, the advocacy of international law would appear to be a good strategy for racial minorities to pursue.

E. Arizona Immigrants as a Cultural Threat and the Market State

Opponents of immigration—especially Latino immigration—often contend that immigrants pose a threat to American cultural identity or the American way of life. This is because Latinos allegedly fail to assimilate into dominant Anglo-American culture in terms of learning English and accepting other core American values. Supporters of S.B. 1070 seem to share this view of Latino immigrants as a cultural threat. For instance, Arizona Senator Russell Pearce, a leading proponent of S.B. 1070, has expressed cultural concerns as follows:

Pearce claims illegal immigrants are responsible for much of Arizona’s crime and he admits to feeling uncomfortable with the way society is changing in Arizona. He attributes it partly to Mexicans’ and Central Americans’ “way of doing business.” “Drive around parts of Phoenix. I get calls all the time and it’s not that they’re Hispanic, it’s because the culture is different. The


147. See, e.g., SAMUEL P. HUNTINGTON, WHO ARE WE?: THE CHALLENGES TO AMERICA’S NATIONAL IDENTITY (2004).

148. Id. at 221–22 (Huntington contends that Latino immigrants “could change America into a culturally bifurcated Anglo-Hispanic society with two national languages” since “Mexican immigrants and their progeny have not assimilated into American society as other immigrants did in the past.”). See generally id. at 221–56. One Arizona professor has characterized the alleged cultural threat posed by Latino immigrants as follows: “Cultural threats involve the belief that immigrants somehow threaten ‘our way of life.’ That is, immigrants with distinct cultural patterns infiltrate our country, drastically altering, diluting or destroying American culture. Today these cultural concerns include the belief that immigrants, particularly Latinos, possess an inability to assimilate, are unintelligent, and lack proper work ethics and, thus, consequently live in habitual poverty.” Michael T. Costelloe, Immigration as Threat: A Content Analysis of Citizen Perception, J. Pub. & Prof. Soc., Dec. 2008 art. 5, at 4 (Dec. 1, 2008), http://digitalcommons.kennesaw.edu/cgi/viewcontent.cgi?article=1006&context=jpps.
gangs are bigger. There’s more violence, kidnappings are way up,” he says.149

Similarly, Katie Dionne, a supporter of S.B. 1070 and a self-described “average everyday American,” favors the new Arizona immigration law in order “to prevent illegal immigrants from changing her way of life.”150

Bobbitt’s theory suggests that efforts, such as S.B. 1070, to regulate immigration as a way to preserve American culture will not succeed because the nation state will be unable to protect the integrity of its culture.151 The market state, which is taking the place of the nation state, according to Bobbitt’s account, will be multicultural and “largely indifferent to the norms of justice, or . . . to any particular set of moral values” and will not be “held together by adherence to fundamental values.”152 To the extent then that Arizona’s immigration statute has been enacted in order to preserve American culture, it is misguided and will fail.

Indeed, according to Robert Delahunty and Antonio Perez, the Supreme Court of the United States is now in the process of reconfiguring American law, including constitutional law, in order to accommodate the rise of the market state as theorized and outlined by Bobbitt.153 In essence, American law is being restructured so as to allow the United States to be competitive in the international or globalized economy.154 Delahunty and Perez write:

The Court is more or less self-consciously engaged in the project of adapting and restructuring the Constitution so that it can be made to fit the perceived requirements of the multicultural, value-free, libertarian Market State whose emergence Professor Bobbitt


150. Marc Lacey, Arizona Lawmakers Push New Round of Immigration Restrictions, N.Y. TIMES, Feb. 24, 2011, at A16, available at http://www.nytimes.com/2011/02/24/us/24arizona.html?_r=1; see also Costelloe, supra note 148 (study analyzing the content of letters to the editor of the Arizona Republic regarding immigration in Arizona for a one year time period found that “25% of them referred to a cultural threat” posed by immigrants).

151. Delahunty & Perez, supra note 140, at 646 (explaining Bobbitt’s view that the nation state will be unable “to protect the State’s cultural integrity”). I have discussed some of these matters in general terms in George A. Martínez, Bobbitt, the Rise of the Market State, and Race, 18 AM. U. J. GENDER SOC. POL’Y & L. 587, 603 (2010). In this section of the article, I apply these general principles to the specific case of Arizona.

152. BOBBITT, supra note 140, at 230; Delahunty & Perez, supra note 140, at 647 (“Culturally, the Market State” does not envision “the idea of a dominant or favored ethnicity, common substantive values and traditions, or a shared way of life.”).

153. Delahunty & Perez, supra note 140, at 643.

154. Id. (“Proponents of this vision of a globalized economy characterize the United States as ‘a giant corporation locked in a fierce competitive struggle with other nations for economic survival,’ so that ‘the central task of the federal government’ is ‘to increase the international competitiveness of the American economy.’”) (citation omitted).
envisages and describes. The Court’s individual rights, equal protection jurisprudence, and federalism jurisprudence converge to serve the same transformative end.\textsuperscript{155} The resulting changes in constitutional law will be “revolutionary” and will constitute a “tectonic shift from one kind of constitutional order—the Nation State—to another—the Market State.”\textsuperscript{156} Accordingly, with respect to Arizona’s immigration statute, Bobbitt’s theory suggests that the only important and dispositive issue to consider is whether or not S.B. 1070 will advance the economic interest and competitiveness of the United States in the global economy.\textsuperscript{157} In fact, research demonstrates that a liberalized immigration policy—including promoting the movement of labor\textsuperscript{158}—will advance the economic interests of the United States.\textsuperscript{159} Indeed, Bobbitt observes that market states are developing their own “economic orthodoxy” and one of the central tenets of market state economic policy is that “labor markets have to become more flexible in order to compete with other, foreign labor markets . . . .”\textsuperscript{160} Immigrants make important contributions to

\begin{itemize}
  \item \textsuperscript{155} Id. at 722.
  \item \textsuperscript{156} Id. at 644.
  \item \textsuperscript{157} BOBBITT, supra note 140, at 230 (stating that the law should be structured so as to not impede economic competition).
  \item \textsuperscript{158} Kevin R. Johnson, Ten Guiding Principles for Truly Comprehensive Immigration Reform: A Blueprint, 55 WAYNE L. REV. 1599, 1611 (2009) (“[I]mmigration is primarily about labor migration.”).
  \item \textsuperscript{159} KEVIN R. JOHNSON, OPENING THE FLOODGATES: WHY AMERICA NEEDS TO RETHINK ITS BORDERS AND IMMIGRATION LAWS 137 (2007) (arguing that free immigration and the promotion of labor mobility will confer substantial economic benefits on the United States); Donald J. Boudreaux, Some Basic Economics of Immigration, 5 J. L. ECON. & POL’Y 199, 208 (2009) (“properly understood economics of immigration create a presumption in favor of opening the United States’ borders much more widely to immigrants.”); Howard F. Chang, Liberalized Immigration As Free Trade: Economic Welfare and the Optimal Immigration Policy, 145 U. PA. L. REV. 1147, 1150 (1997) (citing studies suggesting that the world economy would gain more from the removal of immigration barriers than it has from the removal of trade barriers).
  \item \textsuperscript{160} BOBBITT, supra note 140, at 667. Bobbitt describes the key aspects of market state economic policy as follows:
    \begin{itemize}
      \item That capital markets have to become less regulated in order to attract capital investment and that capital has to become more global in order to achieve the maximum returns on investment; that labor markets have to become more flexible in order to compete with other foreign labor markets . . . ; that if the world economy is to grow, access to all markets has to be assured and trade has to become less regulated; that a state’s trade policy will have to become more free if that state’s goods are to be able to penetrate foreign markets . . . ; that government subsidies . . . have to be managed . . . ; and that tax policy has to provide incentives for growth . . . .
    \end{itemize}
\end{itemize}
the maintenance of a strong American economy. In this regard, Judith Gans of the University of Arizona found that in 2004 Arizona immigrants contributed $29 billion to Arizona's total economic output. As Bobbitt further explains, the market state can "usefully employ the lower cost labor of new immigrants to increase the productivity of the society." Other nations are relaxing their immigration policies in order to maximize their ability to compete in the world economy. In the same way, the United States will have to liberalize its immigration policy if it is to remain economically competitive in the international economy. Bobbitt warns that, in the emerging international order of market states, a "state that resists liberalizing its labor markets in order to protect high-wage jobs will end up with no jobs to protect." Accordingly, the draconian policy of attrition through enforcement expressed in the tough and restrictive Arizona immigration statute goes directly contrary to the need to relax immigration regulation in order for America to compete in the world markets. Given this, and the current restructuring of American law to facilitate American economic competitiveness, we can expect the United States Supreme Court, if it decides to hear the case on the merits, to eventually strike down S.B. 1070 as it prepares the legal landscape for the rise of the market state.

F. Latinos and Power-Threat Theory

We have now considered a number of laws that are impacting or could impact Latinos in Arizona. What is bringing about the creation of these laws?

Recently, sociologist John Markert has argued that as Latinos become the largest minority group in America, they will pose a greater threat to

163. BOBBITT, supra note 140, at 696.
165. JOHNSON, supra note 159, at 166–67 (the competitive demands of the global market require the United States to relax its immigration policy).
166. BOBBITT, supra note 140, at 668.
whites than do blacks. According to his account, Latinos may have to contend with even greater racial hostility than that experienced by blacks because Latinos are perceived to be undocumented and illegally present in the United States and allegedly fail to assimilate in terms of learning English. As this threat posed by Latinos emerges, the dominant group will enact “legal controls and other measures to protect their dominant status.” The Latino population in Arizona has grown significantly in recent decades. In 1980, Latinos comprised 16% of the Arizona population. Latinos now make up 30% of the Arizona population. In light of this demographic change in Arizona, the system of laws recently enacted in Arizona—the immigration and the anti-ethnic studies legislation—provide some evidence that this new power-threat theory is correct. The dominant group may be enacting legal controls—authorizing racial profiling and outlawing ethnic studies—in order to try to maintain its dominant position with respect to Latinos.

G. Does Arizona Signal the Advent of Apartheid in America?

As the philosopher David Lewis has explained, “There are ever so many ways that a world might be.” What way or path might our country take? Does the Arizona regime of laws indicate what way lies ahead for America and its people?

168. Id. at 308.
169. Id. at 307. For general statements of the traditional power threat theory, see Karen F. Parker, Mari A. DeWees & Michael L. Radelet, Race, the Death Penalty, and Wrongful Convictions, 18 CRIM. JUST. 49, 51 (2003) (According to power threat theory, “as the relative size of the minority group increases, members of the majority group perceive a growing threat to their position and will take steps to reduce the threat of competition . . . and thus will intensify social control to maintain the dominant position of whites.”); Geoff Ward, Amy Farrell & Danielle Rousseau, Does Racial Balance in Workforce Representation Yield Equal Justice? Race Relations of Sentencing in Federal Court Organizations, 43 LAW & SOC’Y REV. 757, 765 (2009) (“The power threat thesis proposes that as minority groups grow in size and accumulate resources, they threaten majority group control, creating ‘a fear of political power [shifting to] the minority,’ which encourages the majority group to intensify efforts to maintain social dominance.”) (citation omitted).
171. Id.
172. Id.
173. DAVID LEWIS, ON THE PLURALITY OF WORLDS 2 (1986).
Critical race theorist Richard Delgado recently suggested that as minorities become a majority in this country, the dominant group may seek to try to remain in power and prevent a shift in political power to minorities.\(^{174}\) He suggests that this might be accomplished by the dominant group acting to increase the misery of racial minorities to the point that minorities respond with violence.\(^{175}\) At that point, the rebellion would be quashed and martial law would be imposed, and “[t]he U.S. will have a system of apartheid, in effect, with whites wielding power over a large but powerless black and brown population of laborers and domestics.”\(^{176}\)

Are the Arizona laws leading to apartheid? Some critics of the Arizona immigration have branded S.B. 1070 as an effort to establish apartheid in Arizona. For instance former Arizona State Senator Alfredo Gutierrez stated that S.B. 1070 “is the first step toward apartheid.”\(^{177}\) South-African Bishop Desmond Tutu also suggested that the Arizona laws are the beginnings of apartheid.\(^{178}\) At this point in history it would seem to be premature to conclude that the Arizona regime of laws is the first step to apartheid. As discussed, Arizona and the United States are still subject to international human rights norms and international pressure.\(^{179}\) These international forces would likely work to prevent the rise of any apartheid nation.

In addition, Professor Bobbitt’s theory on the emergence of the market state informs us that the coming market state will be multicultural and its constitutional doctrines will reflect the need for the country to be competitive in the international market.\(^{180}\) As we have seen, the market state would seem to be incompatible with a restrictive immigration regime such as that presented in S.B. 1070, which would inhibit competition in the


\(^{175}\) Id.

\(^{176}\) Id. at 120–21.


\(^{178}\) See Desmond Tutu, Arizona: The Wrong Answer, HUFFINGTON POST (Apr. 29, 2010, 9:24 PM), http://www.huffingtonpost.com/dsmond-tutu/arizona-----the-wrong-answ b_557955.html (“Abominations such as apartheid do not start with an entire population suddenly becoming inhumane. They start here. They start with generalizing unwanted characteristics across an entire segment of a population. They start with trying to solve a problem by asserting superior force over a population. They start with stripping people of rights and dignity—such as the right to be presumed innocent until proven guilty—that you yourself enjoy.”).

\(^{179}\) See supra notes 95–146.

\(^{180}\) See supra notes 147–66.
globalized economy. As a result, we can expect the rise of the market state to prevent the establishment of an apartheid regime in America.

Given all of this and in light of the victories in the lower courts holding that the immigration law is likely unconstitutional, it would appear that these laws in Arizona do not represent the early stages of apartheid.

III. CONCLUSION

Arizona has recently enacted or proposed a legal regime regarding immigration and Latinos. These laws have generated a great deal of controversy and have given rise to a national debate over immigration policy and race relations in America. Among these laws are (1) S.B. 1070—the Arizona immigration law that promotes attrition of undocumented persons through the enforcement of a variety of laws designed to crack down on immigrants; (2) H.B. 2285, which bans ethnic studies courses in Arizona school districts; and (3) H.B. 2582, which proposes legislation that would prevent courts in Arizona from applying international law, including international human rights norms, to decide cases.

In this paper, I analyzed this set of laws in Arizona by using the powerful tools and insights of critical theory, including critical-race theory and critical geographies of race. As I have demonstrated, critical theory, as applied in Arizona, reveals (1) that the newly enacted scheme of laws reflects an epistemology of whiteness and operates to transform the State of Arizona into a white geographical landscape; (2) that the outlawing of ethnic studies in Arizona is a corollary to the establishment of a white geographical space in Arizona; (3) that judicial decision-making regarding the Arizona immigration law is explained by interest-convergence theory especially as shown in the federal government’s concern about the Arizona law’s impact on international relations; (4) that Arizona’s effort to escape the reach of international law is explainable by state-of-nature theory and that this effort is unlikely to succeed in light of theoretical work on the changing nature of the American constitutional order, which holds that our nation is changing from a nation state into a market state; (5) that to the extent Arizona’s laws have been enacted to preserve American culture, the laws are misguided and will fail; (6) that Arizona’s new legal regime provides evidence to support a new power threat theory that the majority will impose legal controls on Latinos as the Latino population grows in size; and (7) that it would appear to be premature to conclude that the new

181. See supra notes 157–66.
Arizona system of laws is the first step toward establishing apartheid in America.