

EDUCATING ABOUT IMMIGRATION

Arizona's SB1070 and State Policing of Immigration

Overview

Students will examine a controversial law passed in the state of Arizona that directs law enforcement officers to investigate suspected unauthorized immigration. They will recognize the constitutional issues of preemption, reasonable suspicion, and equal protection and relate them to the facts of the Arizona law. Students will then judge whether several sets of facts are valid examples of reasonable suspicion. They will also evaluate the law in a simulation using the GRADE policy-analysis rubric.

Time

One to two class periods.

Standards Addressed

National U.S. History Standard 31: Understands economic, social, and cultural developments in the contemporary United States.... IV (2) Understands how recent immigration and migration patterns, and demographic shifts, impacted social and political issues.

California Grades Six Through Eight Historical and Social Science Analysis Skills:

Chronological and Spatial Thinking: (1) Students explain how major events are related to one another in time. **Historical Interpretation:** (3) Students explain the sources of historical continuity and how the combination of ideas and events explains the emergence of new patterns.

California History-Social Science Standard 11.9: Students analyze U.S. foreign policy since World War II. (7) Examine relations between the United States and Mexico in the twentieth century, including key economic, political, immigration, and environmental issues.

California History-Social Science Standard 11.11: Students analyze the major social problems and domestic policy issues in contemporary American society. (1) Discuss the reasons for the nation's changing immigration policy, with emphasis on how the Immigration Act of 1965 and successor acts have transformed American society.

California History-Social Science Standard 12.7: Students analyze and compare the powers and procedures of the national, state, tribal, and local governments. (7) Identify the organization and jurisdiction of federal, state, and local (e.g., California) courts and the interrelationships among them.

Materials

- A class set of the article "SB1070 and State Policing of Immigration"
- A class set of Handout A (Activity: Cases of Reasonable Suspicion)
- A class set of Handout B (Activity: What Should the Law Be?)

Procedure

Step One. Have the students read "SB1070 and State Policing of Immigration Law" and answer the questions for discussion. They can read it in class or as homework. Check for understanding.

Step Two. Ask students: Based on the reading, what is probable cause to arrest? Where does it come from? What is "reasonable suspicion?" When is it used? How is it different from probable cause?

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Activity: Cases of Reasonable Suspicion?

Step Three. Organize the class into pairs. Distribute Handout A to each student. Read the instructions on the handout and ask students to discuss the examples in their pairs. They need to agree on whether each example meets the requirements of reasonable suspicion. Once all the groups have recorded their answers, have them share-back what they concluded.

Guidelines for Discussing the Examples

Keep in mind during discussion and share-back that police cannot use race and ethnicity as factors to determine whether they have reasonable suspicion.

1. The child is not the abducted child, and the nanny has not shown any behavior that is suspicious. If there were more facts that showed her acting suspiciously, then there might be a stronger argument for the officers' reasonable suspicion. For example, suspicious behaviors could include evading the police or not answering their questions as they investigate the abduction.
2. Students might want to compare these facts to the facts of *U.S. v. Arvizu*, explained in the reading. The officer should look at the totality of the circumstances and not base suspicion on race or ethnicity.
3. As in example #2 above, the police should look at the totality of the circumstances. Because the police could point to observable factors that do not involve race or ethnicity, they might have a stronger argument that their suspicion is reasonable.
4. The bumper sticker clearly displays some affinity for Mexico, whether the driver is from Mexico or not. Simply looking at the bumper sticker would not be enough for the police to claim their suspicion was reasonable.
5. There are no facts to show the woman is not cooperating with the sheriff's deputy. If there were some facts to show that the woman is a victim of a crime, however, the deputy would have a stronger reason for detaining her and therefore asking her for valid identification documents.

Debriefing Questions:

- Did any group find none of the examples to be valid cases of reasonable suspicion?
- Did any group find all of the examples to be valid examples of reasonable suspicion?
- Which of the examples was the weakest case for reasonable suspicion? The strongest case? Why?
- Do you think the reasonable suspicion standard is too vague to be applied? Why or why not?

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Activity: What Should the Law Be?

Step Four. Organize the class into groups of three to five students each. Distribute Handout B to each student. Read the instructions on the handout and explain that GRADE is a way to evaluate law and policy. If asked about policy, you can say “Policy means public policy, or the way government does things to carry out the law.”

Step Five. Explain that each group will role-play a committee of legislators in our state. Their task is to evaluate their state's version of SB1070, which is identical to the Arizona law.

IMPORTANT NOTE: The Arizona law is likely to bring up strong feelings in students, some in favor of the law, others against it. To complete the GRADE analysis, they will need to be able to set aside, for a time, their feelings in order to look at the law from both sides. In the “E” stage of the analysis, they can weigh the advantages and disadvantages and reach the conclusion that may best fit with how they feel. The key is that they will know both the advantages and disadvantages in order to do this.

Step Six. As the groups discuss each step of GRADE, they should be thinking as lawmakers. Here are some additional notes to tell the students on each step of GRADE that could be helpful:

Goals. Here the students should identify what the goals of the law are intended to be.

Rivals. Here, they can think of political groups, political parties, different demographic groups (e.g., groups organized around age, ethnicity, immigration status, etc.), professional organizations, labor unions, government agencies, and noted leaders in the community or in government.

Advantages. What benefits might society as a whole gain if the law passes? What benefits might specific groups gain?

Disadvantages. What might be the harms to society as a whole or to particular groups if the law passes?

Evaluation. After weighing the interest of the rivals and the advantages versus the disadvantages, is this a good law? If not, is there any way this law could be changed to meet its goals but still be a good law?

Step Seven. When the members of each group have completed the evaluation step, each group should discuss their individual evaluations. Then they should vote to see if their committee supports the new bill. If so, then the bill would be brought to the full legislature for a vote to see if it passes. If not, the bill would not be presented to the full legislature for a vote.

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Lead a discussion on what the goals, rivals, advantages, and disadvantages of the bill were. Write these on the board. Have each group share-back their committee's decision with reasons why.

Debrief

- Was it difficult for any groups to reach a decision? Why or why not?
- Do you disagree with any decisions made by the majority of the members in your task force? Why do you disagree? Did you make your opinion known to the group before it took a vote?
- Were any of you able to convince others on your committee to change their minds about anything? If so, how?
- For those who gave this bill a negative evaluation, are there any changes that could be made to the bill that would make it all right, in your opinion?

NOTE: Students will have different opinions about what should be done to address the issue of unauthorized immigration. In this activity, they have to assume the role of legislators. For help in addressing controversy in the classroom, please see [Handling Controversy in the Classroom](#), available on this website from CRF.

Related Lessons

[Local Police and Immigration Law: The Case of Special Order 40](#). This lesson addresses a policy in Los Angeles that is at odds with the policy of SB1070.

[Issues of Unauthorized Immigration](#). This lesson introduces students to many of the interest groups that could be “rivals” in the GRADE policy-analysis activity.

[Driver's Licenses and Unauthorized Immigrants](#). This lesson addresses whether unauthorized immigrants should have driver's licenses.

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On April 23, 2010, Arizona Governor Jan Brewer signed into law a controversial state immigration bill. The bill, SB1070, restricts employment of unauthorized immigrants, directs police officers to investigate suspected unauthorized immigrants, and penalizes government agencies that do not enforce immigration laws. Legislators in Oklahoma, Texas, Utah, Maryland, and many other states then considered passing laws similar to SB1070. The government of Alabama also enacted H.B. 56, a controversial law similar to Arizona's.



At a press event following the signing, Governor Brewer stated that SB1070 was necessary because the federal government had not been performing its function in controlling unlawful immigration. In March 2010, for example, rancher Robert Krentz was found shot to death in his vehicle in an area known to be used by smugglers of unauthorized immigrants. Investigators believe he was killed by smugglers.

Based on this and other incidents, many in the state called on federal authorities to take more action to seal the border, including sending in the National Guard. In the meantime, the Arizona legislature passed SB1070. Its stated purpose is to have state and local law enforcement “deter the unlawful entry and presence” of unauthorized immigrants.

What the Law Says

The law bears the name Support Our Law Enforcement and Safe Neighborhoods Act. Most of the act revises Arizona's criminal code, but it contains several controversial provisions, among them:

Section 2(B) directs police to question those they reasonably suspect of unauthorized status. This section states: “For any lawful stop, detention or arrest made by a law enforcement official...where reasonable suspicion exists that the person is an alien who is unlawfully present in the United States, a reasonable attempt shall be made, when practicable, to determine the immigration status of that person.”

Section 2(G) states that a “person may bring an action in Superior Court to challenge any official or agency of this state...that adopts or implements a policy that limits or restricts the enforcement of federal immigration laws....” This means individual citizens may sue police if they believe police are intentionally not enforcing the new law adequately.

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Section 3(A) requires lawful resident immigrants to have provide proof of authorized status or else be prosecuted for misdemeanor trespassing. It states: “In addition to any violation of federal law, a person is guilty of trespassing if the person is both: (1) present on any public or private land in this state [and] (2) in violation of [federal law that requires resident aliens to at all times have in their possession proof of alien registration].” (Trespassing is the crime of going onto another person’s property without permission.)

What Is Reasonable Suspicion?

Perhaps the most controversial provision is Section 2(B), which directs law enforcement officers to determine the immigration status of those persons they have lawful contact with, provided they have a reasonable suspicion that the person is an unauthorized immigrant. Over the years, the U.S. Supreme Court has outlined requirements for reasonable suspicion, but the specific requirements are still under debate in the courts.

Arrests must be based on probable cause. This requirement comes from the Fourth Amendment to the U.S. Constitution. Courts have defined probable cause as evidence strong enough to give a careful law enforcement officer reason to believe that the suspect is committing or has committed a crime.

Reasonable suspicion is different. It is not sufficient to make an arrest, but it is evidence that would give police a reasonable suspicion that a person either is about to commit a crime or has committed a crime. It must be more than a mere “hunch.” Specifically, the U.S. Supreme Court case of *Terry v. Ohio* (1968) outlined that officers may “stop and frisk” for weapons someone they reasonably suspect may have committed or is about to commit a crime. If a weapon is found, then the officers would have probable cause to make an arrest.

The Supreme Court has since clarified reasonable suspicion in specific situations. In one case, a U.S. Border Patrol agent in Arizona had seen a minivan on a deserted, unpaved road. Children in the van all waved at the agent in unison, as if instructed to do so. Smugglers were known to drive minivans, and smugglers often passed through the area. Based upon the “totality of the circumstances,” the court in *U.S. v. Arvizu* (2002) held that the agent had reasonable suspicion to stop the minivan, which was found to have 100 pounds of marijuana in it.

Questions of Equal Protection

A major controversy surrounding SB1070 is the issue of racial profiling. Arizona shares its southern border with Mexico. Of Arizona’s 6.5 million residents, an estimated half million are unauthorized immigrants, most of them from neighboring Mexico.

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Critics of the law ask how an officer can reasonably suspect someone to be an unauthorized immigrant or ask for proof of lawful resident status without using race or ethnicity as the main factor. Singling out racial or ethnic groups for investigation could mean the officers are violating the equal protection clause in the 14th Amendment of the U.S. Constitution. It declares: "No State shall...deny to any person within its jurisdiction the equal protection of the laws."

In analyzing equal protection cases, the Supreme Court has applied different levels of scrutiny, or tests, to evaluate them. If a state government (through its laws or policies) discriminates based upon a racial or ethnic classification, the court applies a "strict scrutiny" test to determine whether the law in question is valid. This means that the government must prove that it had a compelling (extremely important) interest in passing the law and that the discrimination was the least restrictive way to achieve that interest. Most laws tested under strict scrutiny fail the test.

On the other hand, when the court deals with a law that discriminates against unauthorized immigrants, the court evaluates the law using "minimal scrutiny," or the "rational basis" test. Under this test, the government must only prove that the law is rationally related to a legitimate state interest (almost any interest). Most laws tested for a rational basis are upheld.

In *Plyler v. Doe* (1982), however, the court carved out a separate level of scrutiny for some unauthorized immigrants, known as "heightened scrutiny." A Texas law had denied free public education to children who were unauthorized immigrants. The court found that the law was not substantially related to a legitimate state interest and that children were in a particularly vulnerable position if denied public education. Laws that discriminate against children must meet the heightened scrutiny test and therefore often fail.

Supporters of SB1070 argue that the law does not involve a racial or ethnic classification and can be neutrally applied. After signing the bill into law, Governor Brewer said her signature represents "steadfast support for enforcing the law — both against illegal immigration and against racial profiling." She issued a state executive order to develop training for officers in protecting the civil rights of Arizona residents.

The *National Review*'s Andrew McCarthy wrote "there is to be no inquiry about a person's immigration status unless the 'contact' between the police officer and the person is 'lawful' in the first instance." In other words, he argues, officers may not single out people based on their ethnic or racial identity. Officers must have a lawful reason to contact those persons to begin with. Moreover, a few days after its passage, the legislature voted to clarify the law. In its original version, the law only required a "lawful contact" by a police officer. The legislature changed this to "any lawful stop, detention or arrest."

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Opponents of the law, however, warned that the law would lead to abuses of civil rights. Alessandra Soler Meetze of the American Civil Liberties Union (ACLU) filed a lawsuit challenging the law, stating: “If this law were implemented, citizens would effectively have to carry ‘their papers’ at all times to avoid arrest.” In addition, Vivek Malhotra, also of the ACLU, argues that the law will inevitably cause officers to look at the color of people’s skins. “How do you know people are unauthorized to be in the United States,” she asked, “just by looking at them?”

A law that would allow officers to base their decision on skin color almost surely would not meet strict scrutiny (in the case of adults) or even heightened scrutiny (in the case of minors). But supporters of SB1070 say that the law does not authorize such discrimination.

Is SB1070 Preempted?

Another legal challenge to the law is that federal immigration law preempts the state law. The doctrine of preemption simply means that federal law (made by Congress) is higher than state law (made by Arizona or any other state) and therefore preempts, or trumps, the state law. In fact, the supremacy clause in Article VI of the U.S. Constitution states: “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof... shall be the supreme Law of the Land.”

There are two kinds of preemption. If a state law makes it impossible for someone to comply with both state law and federal law, it is called a *conflict preemption*. If, however, a state law merely says the same thing as a federal law, but Congress has thoroughly dominated that field of law, it is called *field preemption*. In either case, the state law is invalid.

Critics say that SB1070 can be challenged on both preemption grounds. Steven D. Schwinn at John Marshall Law School argues that Congress has created a “comprehensive federal scheme” in Title 8 of the U.S. Code that regulates the “treatment of aliens” (non-citizens). Therefore, he argues, SB1070 is invalid because of a field preemption.

Schwinn also argues for conflict preemption, because Title 8 allows state and local officers to “arrest and detain” unauthorized immigrants only if they also have a prior conviction for a felony. SB1070, on the other hand, authorizes arrests for unauthorized immigrants who have committed “any public offense that makes them removable from the United States.”

Supporters of SB1070 disagree. Kris Kobach, law professor at the University of Missouri-Kansas City and co-author of SB1070, argues that under the legal doctrine of “concurrent enforcement,” states may make laws that prohibit actions or crimes already

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prohibited by the federal government. For example, federal law already requires immigrants to carry their legal registration with them. SB1070 merely says the same thing, and so it is consistent with federal law.

Legal Challenges to the Arizona Law

SB1070 faced several challenges after it was approved in Arizona. The ACLU and other civil rights organizations filed suit in federal court in Arizona alleging equal protection and preemption doctrine violations. Many citizens in Arizona petitioned to keep SB1070 from being enforced until 2012, giving voters a chance to have a referendum to decide whether it should be repealed.

The U.S. Department of Justice challenged the law in court, too, on the grounds that the state law was preempted by federal law. On July 28, 2010, a federal judge issued an injunction in *U.S. v. Arizona*, stopping key sections of Arizona's immigration law from going into effect until legal issues are resolved. (An injunction is a court order.)

The judge's injunction was directed at the most controversial parts of the Arizona law. These included a provision that required officers to check a person's immigration status during a traffic stop, detainment, or arrest. The injunction also blocked the part that made it illegal for undocumented workers to ask for work in public places, and the part that required immigrants to carry their paperwork with them at all times.

"Requiring Arizona's law enforcement officials and agencies to determine the immigration status of every person who is arrested burdens lawfully-present aliens because their liberty will be restricted while their status is checked," U.S. District Judge Susan Bolton ruled. Other provisions of the law, most of them procedural, went into effect. Governor Brewer, a defendant in the case, appealed the decision.

The Alabama Law

In June 2011, the state government of Alabama passed similar legislation to SB1070. Known as H.B. 56, the Alabama law would also allow a law enforcement officer to determine a person's citizenship status upon a lawful stop or detention. The officer would have to base the status-check on reasonable suspicion that the person is present in the U.S. unlawfully.

H.B. 56 had several other controversial provisions. It would make it a misdemeanor for immigrants to willfully fail to carry an "alien registration card." A misdemeanor is a crime that is less serious than a felony and punishable by a prison sentence up to one year. H.B. 56 would also require public schools to determine the immigration status of students when the students enroll in school.

As with SB1070, the U.S. Justice Department challenged H.B. 56 in court. The U.S. claimed that the sections listed above were preempted by federal law. In October 2011,

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the federal 11th Circuit Court of Appeals issued an injunction in *U.S. v. Alabama* against the public schools' requirement to check each student's status and against the alien registration card requirement. The reasonable suspicion and other provisions, however, were allowed to go into effect.

For Writing and Discussion

1. Legal scholars disagree about whether preemption applies in the case of SB1070. Which argument do you think is stronger: that SB1070 is preempted by federal law, or that SB1070 is simply concurrent enforcement of the law?
2. Many states have passed laws that require employers to use an electronic program called E-Verify that certifies if employees are legally authorized to work in the United States. If these laws are valid, shouldn't SB1070 also be valid? Why or why not?
3. One part of Alabama's H.B. 56 law requires immigrant residents in the state to carry an "alien registration card." Failure to have the card is a misdemeanor. The court enjoined (stopped) this part of the law until an appeals court is able to review it. What, if any, constitutional problems do you think there are in this part of the law? Do you think it was a good idea for the court to enjoin this part of the law? Why or why not?
4. Section 2(B) of SB1070 contains the following language: "For any lawful stop, detention, or arrest made by a law enforcement official...where a reasonable suspicion exists that the person is an alien who is unlawfully present in the country... a reasonable attempt shall be made...to determine the immigration status of that person."
 - a. In the original version signed by Governor Brewer, it read as follows: "For any lawful *contact* made by a law enforcement official..." (Italics added.) One week later, the Arizona legislature changed the word "contact" to the phrase "stop, detain, or arrest," which is how the law now reads. Why do you think it made that change?
 - b. There could be two interpretations of the phrase "where a reasonable suspicion exists." It could mean that police must make a legal stop, detention, or arrest and then if they have reasonable suspicion that the person is an unauthorized immigrant, they may check the person's immigration status. It could also mean that police only need a reasonable suspicion that a person is an unauthorized immigrant before they may stop the person and check the person's immigration status. Which interpretation do you think is correct? Why?

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Glossary for “Arizona's SB1070 and State Policing of Immigration”

equal protection The constitutional principle that all laws must apply equally to all people in a state. The 14th Amendment of the U.S. Constitution declares: “No State shall...deny to any person within its jurisdiction the equal protection of the laws.”

felony A crime that is more serious than a misdemeanor and punishable by a prison sentence of one year or more.

misdemeanor A crime that is less serious than a felony and punishable by a prison sentence up to one year. Some misdemeanors are punishable by fines with or without jail time.

preemption The doctrine that federal law (made by Congress) is higher than state law (made by Arizona or any other state) and therefore preempts, or trumps, the state law.

probable cause Evidence strong enough to give a careful law enforcement officer a strong reason to believe that a suspect is committing or has committed a crime. Arrests must be based on probable cause.

rational basis Courts use this test to determine whether a law that classifies people not based on protected categories, such as race or ethnicity, is constitutional. For example, a person's immigration status is not a protected category. The government must only prove that the law is rationally related to a legitimate state interest (almost any interest). Most laws tested for a rational basis are upheld.

reasonable suspicion Evidence that would give a law enforcement officer a suspicion that a person either is about to commit a crime or has committed a crime. It must be based on explainable, valid reasons and more than a “hunch.” With reasonable suspicion, officers may “stop and frisk” suspicious persons or conduct traffic stops, but they need probable cause to make arrests.

strict scrutiny The test courts use to decide if a law that classifies people based on protected categories, such as race or ethnicity, is constitutional. The government must prove that it had a compelling (extremely important) interest in passing the law and that the discrimination was the least restrictive way to achieve that interest. Most laws tested under strict scrutiny fail the test.

unauthorized immigrant A person who is present in the United States without legal authorization.

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HANDOUT A

Activity: Cases of Reasonable Suspicion?

The SB1070 law states that when police make a lawful stop or detention of an individual, police shall check the person's immigration status if they have reasonable suspicion, based on the police officers' experience, that the person is an unauthorized immigrant. Reasonable suspicion may not be a guess, it must be based on explainable, valid reasons.

Examine the following case examples. For each, assume that the initial police stop was lawful. You must decide whether the police in each case have reasonable suspicion to check the person's immigration status.

1. A child had been abducted in the neighborhood, and police stop a woman pushing a stroller with a baby in it. The baby is not the abducted child. But the woman appears to be a different ethnicity than the baby. It is known that many unauthorized immigrant women are nannies and babysitters for the children of lawful residents and citizens. Police detain the woman to check her immigration status.
2. On a commercial road in a suburban community, a police officer sees a van driving down the street. One of its taillights does not work. The officer stops the van to give the driver a "fix-it ticket" and notices three adult passengers in the back of the van. The driver has a valid driver's license, but the area is known for smuggling unauthorized immigrants from Mexico. Vans are often used in the smuggling. The officer detains the passengers to check their immigration statuses.
3. Police are making random vehicle inspection stops. A pickup truck is stopped and the driver is wearing work clothes and boots. The driver tells officers that he is late for work as a gardener in an affluent residential neighborhood. Police know that many gardeners in this neighborhood are unauthorized immigrants. They detain the man to check his immigration status.
4. Police stop another car at the random vehicle inspection. Police notice that the car that has a sticker of the flag of Mexico on the rear window. They detain the driver to check his immigration status.
5. A woman walks down the street holding her arm and appears to be in pain. A sheriff's deputy stops her and asks if she needs help. She looks at him and says in broken English that she is all right. The officer detains her to check her immigration status.

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HANDOUT B

Activity: What Should the Law Be?

Imagine you are a lawmaker in your state. You are a member of the legislature. You must vote either "Yes" or "No" on a bill that is identical to SB1070. To make an informed decision and to be able to support your decision either way, you must be able to take a critical look at the policy or law proposed. Look at the text of SB1070 in the article "Arizona's SB1070 and State Policing of Immigration." Use the following GRADE tests to evaluate that law:

Goal. What is the goal of the policy? If you don't know what it's supposed to do, you can't measure its success or failure. Policies are designed to address problems. What problem or problems is this policy supposed to address?

Rivals. Who might (or does) support the policy? Who might (or does) oppose it? Knowing the rivals can help you understand who the policy might affect and whether the policy favors special interests. Also, rivals are terrific sources for information, but you must check their facts.

Advantages. What are the policy's benefits? What is good about the policy? Does the policy address the causes or effects of the problem? Will it achieve (or has it achieved) its goal? Will it achieve the goal efficiently? Is it inexpensive? Does it protect people from harm? Does it ensure people's liberties?

Disadvantages. What are the policy's costs? What is bad about the policy? Does the policy fail to address the causes or effects of the problem? Is it inefficient? Is it expensive? Does it cause harm? Does it intrude on people's liberties? Are there any potential consequences that may cause damage?

Evaluate. Weigh the advantages versus the disadvantages. Are there alternative policies? One alternative is to do nothing. Most serious problems have various policy proposals. Evaluate them. Look at their goals, advantages, and disadvantages.

See next page for the GRADE Policy Analysis chart.

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Policy Analysis

Proposed Policy:

Problem or Issue the policy is attempting to address:

G
Goal/s

R
Rivals

A
Advantages

D
Disadvantages

E
Evaluate