



# ENFORCING ARIZONA'S **SB 1070**

A STATE OF CONFUSION

By Jeffrey Kaye

JULY 2010

Photo by Jeffrey Kaye.

# ENFORCING ARIZONA'S SB 1070

## A STATE OF CONFUSION

JEFFREY KAYE

JULY 2010

### ABOUT SPECIAL REPORTS ON IMMIGRATION

The Immigration Policy Center's Special Reports are our most in-depth publication, providing detailed analyses of special topics in U.S. immigration policy.

### ABOUT THE AUTHOR

Veteran journalist **Jeffrey Kaye** is a longtime contributor to the PBS NewsHour, public television's week nightly news program, and to World Report, the public affairs program of HDNet television. Between 1980 and 1984, Kaye was a reporter and senior producer at KCET-TV (PBS) in Los Angeles. Previously, he worked as a magazine writer, a freelance reporter for National Public Radio, a TV producer, and as a special correspondent for the Washington Post and other publications. Kaye's abiding interest in immigration is formed in part by his own history. Along with his parents and sister, he himself immigrated to the United States from England in 1963. His grandparents and great grandparents were immigrants to England from Poland. As a journalist he has covered immigration on four continents. And as a resident of Los Angeles, Kaye has seen the world arrive on his doorstep. Kaye's reports and documentaries have earned him numerous national and local awards, including a Cine Golden Eagle and seven Los Angeles Emmys. Kaye has also previously published with IPC, [\*Re-Living Our Immigrant Past: From Hazleton to Arizona and Back Again\*](#). Kaye was born in London and lives in Los Angeles with his wife Deborah, a college instructor. They have two daughters.

### ABOUT THE IMMIGRATION POLICY CENTER

The Immigration Policy Center, established in 2003, is the policy arm of the American Immigration Council. IPC's mission is to shape a rational national conversation on immigration and immigrant integration. Through its research and analysis, IPC provides policymakers, the media, and the general public with accurate information about the role of immigrants and immigration policy on U.S. society. IPC reports and materials are widely disseminated and relied upon by press and policymakers. IPC staff regularly serves as experts to leaders on Capitol Hill, opinion-makers, and the media. IPC is a non-partisan organization that neither supports nor opposes any political party or candidate for office. Visit our website at [www.immigrationpolicy.org](http://www.immigrationpolicy.org) and our blog at [www.immigrationimpact.com](http://www.immigrationimpact.com).

# TABLE OF CONTENTS

A Patchwork of Guidelines.....	4
A State of Confusion.....	5
The Training Video .....	5
<i>La Línea</i> .....	6
Reasonable Suspicion.....	7
Different Agency, Different Policy .....	8
Undermining Asylum.....	9
Community Mistrust .....	9
Dividing Police Officers.....	10
The High Cost of Enforcement.....	11

## A Patchwork of Guidelines

In April, when Arizona Governor Jan Brewer signed SB 1070, the "Support Our Law Enforcement and Safe Neighborhoods Act" into law, she also issued an executive order requiring police agencies to have a "course of training" with "statewide and uniform practices" to implement the statute. In recent weeks, as lawyers challenged and defended SB 1070, and with the fate of the law now in the hands of U.S. District Judge Susan Bolton, Arizona law enforcement departments haven't waited for the wrangling to end. They have had to assume that the immigration law will take effect July 29 and have struggled to have policies in place to enforce it by then. But instead of "statewide and uniform practices" as directed by the governor, Arizona police agencies have developed a patchwork of guidelines based on varying interpretations of the law. Interviews with police officials and a review of training materials suggest that the implementation of SB 1070 will differ from one jurisdiction to another, and even within police agencies.

“What you’re going to have is 15,000 variations on a theme,” suggested Tucson lawyer Richard Martinez, referring to the number of officers in Arizona local law enforcement agencies. Martinez represents one of the two police officers challenging the statute. “Because of the manner in which the statute was written, the manner by which it’s being interpreted, and then the manner by which it’s actually implemented, and even among officers, you’ll have them inconsistently applying the law,” he said.

For example, in the city of Chandler, Arizona, a suburb to the southeast of Phoenix, if a police officer stops a driver for a minor traffic infraction, believes the motorist is in the country illegally, but can't confirm the suspicion with federal immigration officials, the cop will be expected to issue a citation and let the suspect go, according to a department representative. But, under the same circumstances, just outside Chandler's city limits, in neighboring Pinal County, deputies will most likely hand the person over to the Border Patrol, says Sheriff Paul Babeu. In Phoenix, the police department has issued a policy requiring officers to check the immigration status of every person arrested, regardless of whether they suspect the person is in the United States illegally. However, in rural Pima County, which shares a 123-mile stretch of border with Mexico, deputies will release an arrestee from custody without verifying immigration status unless they have a "reasonable suspicion" the person is in the U.S. unlawfully, according to legal counsel Sean Holguin.

Acrimonious police politics has contributed to the adoption of disparate policies. Tension between gung ho rank-and-file leaders and their more reticent brass over how much discretion patrol officers should have in immigration enforcement shaped the language of SB 1070, and is now playing out in procedural directives, particularly in the city of Phoenix. Across the state, not only have officials, some expressing confusion about the measure's requirements, adopted varying policing procedures, they have also developed an inconsistent assortment of training plans. Some agencies require officers to attend sessions of three hours or more and distribute manuals; others simply oblige their officers to watch a 94-minute video. At the same time, the repeated insistence by the bill's proponents and by police officials that racial considerations should play no part in SB 1070's implementation has ironically helped keep the incendiary issue of race front and center in training regimes and agency bulletins.

## A State of Confusion

Arizona's SB 1070 (amended by HB 2162) will require state and local police officers "when practicable" to check the immigration status of individuals whom they stop, detain, or arrest if they have "reasonable suspicion" to believe the suspects are in the country illegally. Among other provisions, the law restricts the use of "race, color, or national origin ... except to the extent permitted by the United States or Arizona Constitution." It also allows Arizona residents to sue local law enforcement officials and agencies if they are perceived as not fully enforcing federal immigration laws. With passions stoked on both sides of the issue, police officials will be under a spotlight, subject to accusations of racial profiling on the one hand and of lax enforcement on the other.

"The scrutiny you will be placed under during the next few months will be unlike anything you've ever seen," cautions Tucson lawyer Beverly Ginn on an SB 1070 police training video. The video was produced and distributed by the Arizona Peace Officer Standards and Training Board (AZPOST) in response to the governor's training directive. "You should expect in the course of day-to-day business to be challenged in terms of what you do," warns Ginn, who is being paid by AZPOST and other Arizona police agencies as a consultant on SB 1070 training. "You should expect people to be asking you questions. You should expect to be videotaped and audio taped. You should expect your reports to be examined in a way they haven't been examined before."

## The Training Video

But despite the anticipated scrutiny, the video which forms the core of training leaves a host of unanswered questions about the nuts and bolts of SB 1070 enforcement. On the video, Ginn, who would not be interviewed for this article, and other speakers repeatedly advise officers to check with their individual agencies on some of the specifics. And, while police training on other matters is often scenario-based so that officers may have the opportunity to observe or engage in true-to-life encounters, the video offers no such examples. Not only wasn't there time to develop scenarios, explained Lyle Mann, the AZPOST executive director, it didn't make practical sense.

"What we decided to do is leave the what ifs—and that is what scenario training is all about—to the policy side and let agencies talk about it, because every one is going to be different," he said.

The training video devotes a separate section to the hot-button issue of racial profiling. Speaker after speaker stresses it will not be tolerated. "Racial profiling is police misconduct," says Mann into the camera. The emphasis has drawn varying reactions from Arizona law enforcement officials. Sgt. John Ortalano, a highway patrol officer and president of the 7,000-member Arizona Fraternal Order of Police, a rank-and-file group that supported SB 1070, seemed insulted by the repeated warnings about racial profiling. "The video to me appeared to be more geared toward either the media or the general public," he said. "Saying racial profiling is not permitted and not allowed, that's taught to a guy in the basic academy."

Santa Cruz County sheriff Tony Estrada takes a more sinister view of the admonitions. "Every speaker keeps saying over and over 'there will be no racial profiling,'" he observed. "And I say to myself, 'If there is no racial profiling, why do you keep harping

about racial profiling unless you're really concerned about it?' No matter how you amend, it, no matter how you tweak it, no matter how you disguise it, it's racial profiling. You're focusing on a particular group of people.”

## ***La Línea***

Arizona's I-19 from Tucson south to Nogales, the Santa Cruz County seat, climbs about 1,000 feet as the landscape turns from arid desert to a hilly valley made green by summer monsoon rains. Outside of Tucson, the highway runs past giant flat mounds of tailings from copper mines, long a mainstay of the Arizona economy and a reminder of the area's profound ties to Mexican migrants who provided the bulk of the workforce that extracted the mineral. Nogales itself, 60 miles from Tucson, sits astride the international boundary, with a border fence essentially dividing the town—the twin communities of Nogales, Arizona (population 21,000) and Nogales, Sonora (population 204,000) often known collectively as “Ambos Nogales,” or both Nogales.

But while the fence may separate Ambos Nogales politically and economically, in reality, *la línea* (the line) as the boundary is known throughout border communities, is a blurry division between populations united by culture, race, and family ties. Such blended communities, not only in border areas, but throughout Arizona, will make race-neutral enforcement of SB 1070 impossible, according to Sheriff Estrada and others. “We are one big community,” said Estrada who has been in office for 17 years. Previously he was a captain in the Nogales police department. “We're uncertain as to how we're going to be able to apply this law without discriminating and violating somebody's rights and avoiding racial profiling.”

Tucson police officer Martín Escobar shares the same concern. A plaintiff in one of the lawsuits seeking to block SB 1070, he says that despite have been through the department's training, he can't carry out the law:

“In my view I can't enforce this law because unless they tell me they're here illegally, what's going to lead me to start questioning them about their legal status? There's no way to distinguish someone being here legally or not legally, because we've got so much immigration here,” he said. “In this area, you have a ‘mixed community’ of Mexican Americans, U.S. citizens of Mexican ancestry, brand new immigrants who immigrated here legally, and illegal immigrants. It's a very touchy issue.”

Escobar described a recent incident to illustrate his point. He was questioning three men in Spanish. One spoke no English; the others spoke just a little English. One man said he had come legally across the border to visit his sister. Escobar asked another one, who spoke hardly any English, where he was from. The man replied, “I'm from here. I'm a U.S. citizen.”

In his recent SB 1070 training session, Escobar said, a deputy city attorney tested the trainees by asking what an illegal immigrant looks like. “One officer says, ‘Well I think of an illegal alien as someone wearing matching boots with a belt, and a cowboy hat,’” Escobar recalled. He said the lawyer explained that was racial profiling, but Escobar was not surprised by the response. “I don't think that officer was being malicious, or whatever, but ... officers are going to do this and it's wrong.”

## Reasonable Suspicion

AZPOST has published a set of “factors which may be considered, among others, in developing reasonable suspicion of unlawful presence.” They include:

- Lack of identification or possession of foreign identification
- Flight and/or preparation for flight
- Engaging in evasive maneuvers, in vehicle, on foot, etc.
- Voluntary statements by the person regarding his or her citizenship or unlawful presence
- Foreign vehicle registration
- Counter-surveillance or lookout activity
- In company of other unlawfully present aliens
- Location, including for example:
  - A place where unlawfully present aliens are known to congregate looking for work
  - A location known for human smuggling or known smuggling routes
- Traveling in tandem
- Vehicle is overcrowded or rides heavily
- Passengers in vehicle attempt to hide or avoid detection
- Prior information about the person
- Inability to provide his or her residential address
- Claim of not knowing others in same vehicle or at same location
- Providing inconsistent or illogical information
- Dress
- Demeanor – for example, unusual or unexplained nervousness, erratic behavior, refusal to make eye contact
- Significant difficulty communicating in English

Among critics, this list of factors has been met with derision. Attorney Martinez describes the “traveling in tandem” item as “the two or more Mexicans rule.” Others have pointed out that packed cars, lack of English proficiency, style of dress, or location are hardly unique to illegal immigrants. As for lack of ID, Officer Escobar says he has often encountered motorists who are legal residents and whose licenses have been suspended.

“Escobar’s boss, Roberto Villaseñor, the police chief of Tucson, says he is also troubled by the list of factors. “A lot of the same things that can be considered reasonable suspicion for [criminal] conduct are being touted for reasonable suspicion for [immigration] status,” he said. “I think there’s an understanding that unless you get a voluntary statement—someone says ‘Yeah, I’m here illegally, that’s why I don’t have papers and stuff’—that usually you’ll have to have several of the issues listed to establish reasonable suspicion.”

Villaseñor, who expressed opposition to the law before its enactment, but who has attended each of his department's training sessions since, feels the general public doesn't realize how complicated enforcing the law will be. "They all think it's such an easy thing," he said. "That if they're here illegally, they're here illegally; they don't understand."

The Tucson chief said that among the more difficult questions are:

- Whether to check the immigration status of every person arrested or just those suspected of being in the country illegally. The law doesn't specify.
- What to do if an officer who has a "reasonable suspicion" that a suspect is in the country unlawfully checks with federal immigration authorities but gets no response.

Villaseñor said the Tucson P.D. will check every arrestee's immigration status, but hadn't decided how to handle suspects believed to be in the country illegally if federal immigration officials provide no timely answer.

According to officials, uneven enforcement of the law will, in many cases, be driven by geography and police priorities. In rural areas close to the border, police officers and sheriffs' deputies call the Border Patrol on a daily basis, particularly if they spot people not far from the fence walking along routes used by smugglers of drugs or migrants. As we drove along a dirt road hugging the border fence near Nogales, Joe Bunting, a Santa Cruz County deputy sheriff explained "I'm not going to do anything different," although he does expect that SB 1070 will require him to fill out more paperwork.

Police managers say they will be asking officers to carefully document what steps they took to determine immigration status during stops. The aspect of the law that requires law enforcement officials to delve into immigration issues "when practicable" allows police to weigh other considerations at the time of the stop such as call load, available personnel and potential backup. "It's going to be different for each agency about what they want," said AZPOST's Lyle Mann. "It could be different between squad to squad on how they want their people to look at it, because a DPS [Department of Public Safety] officer on I-10 in the middle of Phoenix has more resources than a person on I-8 near Dateland or Yuma."

## **Different Agency, Different Policy**

Additional issues regarding SB 1070 implementation are being interpreted by Arizona authorities in different ways. For instance, the law specifies that only certain forms of identification will be accepted as "presumptive" of legal residency. So, for the most part, if a person suspected of being in the country illegally shows a valid driver license, that counts as proof of legal status. However, the states of Illinois, Utah, Washington, and New Mexico issue driver licenses to illegal immigrants. Tucson police officers have been told to ask for additional identification if shown a driver license from the neighboring state of New Mexico. But in the city of Chandler and in Pima County, officers will accept New Mexico licenses. Sheriff Paul Babeu of Pinal County, Arizona said he had no policy on the issue.

Another troublesome area involves the handling of juveniles suspected of being in the country unlawfully. Again, nothing is spelled out by SB 1070, and different agencies are adopting different policies. In the city of Chandler, according to Sgt. Joe Favazzo, if police suspect the immigration status of a juvenile, they will likely conduct an investigation of the parents. Pima County legal counsel Sean



Holguin said he did not know how sheriff's deputies should handle juveniles under SB 1070. And in the city of Nogales, Lt. Octavio Gradillas said police will turn kids over to county juvenile authorities.

But Phoenix police will investigate the immigration status of juveniles, wrote Chief Jack Harris in a court declaration:

“If a school resource officer [a Phoenix Police officer assigned to a local school] is investigating a student for allegations of criminal activity at school (assaulting another student, theft), and the officer develops reasonable suspicion the student is an unlawful alien, pursuant to SB 1070 the officer must make a ‘reasonable attempt’ to contact ICE [Immigration and Customs Enforcement] and verify the student's immigration status, unless the officer applies one of the limited discretionary exceptions.” (SB 1070 does allow police officers to forgo immigration investigations if doing so will hinder an investigation).

That policy of running immigration checks on juveniles would put Arizona in the position of ratcheting up current immigration enforcement policy, according to lawyer Stephen Montoya, who is representing Phoenix police officers trying to block SB 1070. “Unless a kid runs up to an ICE agent and says ‘I’m undocumented, take me to Mexico,’ the ICE agent will ask where are your parents, and tell him to go back home. The only way an ICE agent will arrest a kid is if the kid is homeless with no legal guardian. ICE does not arrest kids unless they’re abandoned in the United States or are crossing the border.”

## Undermining Asylum

Another policy that Arizona police agencies could undermine by their interpretation of SB 1070 is asylum. U.S. laws and international treaties require immigration officials to allow asylum seekers who are fleeing persecution or abuse in their homelands to remain in the country while they apply for the right to stay. However, Lt. James Berry of the Pima County sheriff's department said individual deputies could make their own judgment if an illegal immigrant claims his or her asylum application is pending. Chandler police will notify foreign consulates if they encounter applicants for asylum, according to a spokesman. The Phoenix P.D. will also notify “the appropriate foreign consulate for [arrested] persons who self identify as being foreign citizens.” It's a policy that shocks Phoenix migrant rights activist Lydia Guzman. “It's like turning a person back to their country,” she said. “If someone's running from their country, you don't want to turn them in.” Not only that, but officers who turn in asylum applicants to their consulates would actually be violating federal law (8 C.F.R. §208.6): “Information contained in or pertaining to any asylum application shall not be disclosed [to third parties] without the written consent of the applicant...”

## Community Mistrust

Even though question marks loom over the fate of SB 1070 and how it may be enforced, its impact is already being felt. Guzman says Latino residents and business owners are leaving Arizona out of fear they will be targeted. Police officers say they are starting to see the erosion of community trust.

“We've already felt the shift in the community because of this wedge of fear,” said Phoenix police officer Corbet Klack, a supporter of the lawsuit seeking to block SB 1070

filed by his colleague David Salgado. “Over time, you build a rapport with the community, with kids and parents,” added Salgado, a Spanish speaker who often interprets for fellow officers. Salgado recounted a couple of recent cases, one involving a child molester, the other in which a street gang was engaged in extortion. In both situations, community members, confident that their immigration status would not be investigated, cooperated with police officers. As a result, police were able to track down the pedophile and put a stop to the protection racket. But community attitudes changed after Gov. Brewer enacted SB 1070, said Salgado. “After the signing of this bill, in the same area, it was like a ghost town,” he explained. “I parked in the same area and these people wouldn’t even look at me.”

Mesa police chief Frank Milstead worries that SB 1070 will increase crime. “It will interfere with our ability to do community based policy, and it will probably also interfere with people reporting crimes,” he said. “People will not report crimes that they’re victims of in fear of being questioned about their immigration status.”

Milstead also says that SB 1070 could compromise the safety of his officers:

“If you think about the fact that people who have misdemeanor or felony warrants will, under some circumstances, flee or fight so they don’t go to jail, so now you’ve compounded that by another half a million people in the state who may do one of those things to not be deported,” he said. “And they would do a crime of violence against a police officer or put the public at risk trying to flee from an officer to get away from being deported. We’ve just increased that number exponentially. Before they were just people wanted by the law... Now there are people who are just out of status who have just become new threats to the safety of law enforcement.”

## Dividing Police Officers

In Phoenix, enforcement of immigration law has sharply divided officers in the police department. It has become a labor-management issue. On one side is the leadership of the Phoenix Law Enforcement Association (PLEA), representing many patrol officers who want the freedom to rigorously enforce federal immigration laws. On the other are police officials who have tried to keep a check on cops who are intent on more exuberant crack downs on illegal immigrants. As a moderating influence, in 2008, the brass implemented Operations Order 1.4 that says “[f]ederal immigration law may be utilized to further a criminal investigation, *with the approval of a supervisor...*” (emphasis added). However, in an attempt to do an end run around the Phoenix policy that PLEA leaders believed was too restrictive, when SB 1070 was being drafted, PLEA lobbyist Levi Bolton suggested legislative language to, in his words, give police officers “discretionary ability” to act on immigration issues without consulting supervisors. As a result of PLEA’s influence, SB 1070 prohibits Arizona officials or agencies from “limit[ing] or restrict[ing] the enforcement of federal immigration laws to less than the full extent permitted by federal law.”

The insertion of that clause represented a victory for PLEA over management, and when Gov. Brewer signed the law, the organization’s president Mark Spencer proudly stood behind her. (Notably, the Phoenix police chief along with the Arizona Association of Chiefs of Police opposed SB 1070).

However, PLEA's glee did not last for long, and now Spencer is crying foul. A new 11-page immigration enforcement policy issued by the Phoenix Police Department not only eliminates discretion, it requires police officers to contact federal immigration authorities or local officers with special immigration training (under a so-called 287(g) arrangement) to perform immigration checks on *all* arrestees and people being cited. In the view of Spencer, it's an attempt to sabotage SB 1070 by overburdening the system. "You want to cut the legs out from underneath it, make it costly, make it time consuming and make it burdensome for ICE, that's exactly what this policy does," Spencer told a television reporter.

But even before the Phoenix Police Department issued its policy, federal officials were raising similar concerns about potentially hefty demands as a result of SB 1070's implementation. David C. Palmatier, head of the Law Enforcement Support Center (LESC) within ICE, wrote in a court declaration that the expected "increase in queries from Arizona will delay response times for all IAQs [Immigration Alien Queries] and risks (sic) exceeding the capacity of the LESC to respond to higher priority requests for criminal alien status determinations from law enforcement partners nationwide." Palmatier said, "the potential increase in queries by Arizona along with the possibility of other states adopting similar legislation could overwhelm the system ... meaning that very serious violators may well escape scrutiny and be released before the LESC can respond to police and inform them of the serious nature of the illegal alien they have encountered."

## The High Cost of Enforcement

Arizona police officials, particularly in smaller jurisdictions with tight budgets, are also complaining that SB 1070 will be burdensome, costly, and distort priorities. Sheriff Tony Estrada in Santa Cruz County says the requirement to enforce immigration law or risk being sued is an unwelcome imposition. "That will take away from the quality of life issues for residents—things that are important—whether it's theft or vandalism, or burglary or fraud, stolen identification, graffiti, things that impact on the community," he said. "I may have to be spending more time dealing with immigration issues that I have no desire to do."

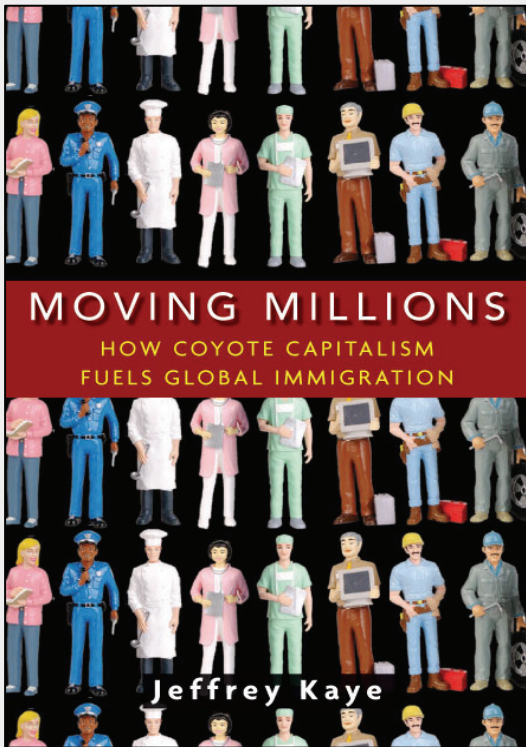
As police agencies gear up for the possible implementation of SB 1070, watchdog organizations are preparing to intensify their monitoring efforts. Dennis Gilman of Phoenix Copwatch says his organization has trained 100 people to listen to police scanners and race to record police activity with video cameras. In Tucson, Chief Villaseñor feels confident that his officers will withstand the scrutiny. "I don't believe this law will increase racial profiling," he said. "It will increase accusations of racial profiling." Lawyer Richard Martinez expects that if SB 1070 takes effect, defense lawyers will have their work cut out for them. "The motions to suppress to come out of this will be phenomenal based on profiling, and failure to Mirandize [warn criminal suspects in custody of their rights], and then you'll get into Mirandizing in Spanish, which the vast majority of officers will not be able to do."

While many officers will use caution in enforcing SB 1070, others will be less discrete. As he left a training session at the sheriff's training academy on the outskirts of Tucson in Pima County, I asked Deputy Dan Vatterrodt how SB 1070 might change the way he deals with suspected illegal immigrants. "For the most part, you can sort of tell the kind of person you're talking to whether you should be asking in the first place," he replied. "So with this new law, it just gives you, I don't want to call it an excuse but a better reason to ask them why or if they're supposed to be here, so it's really not going to change anything."

Another way of expressing the policy was articulated by Tucson lawyer Beverly Ginn in the AZPOST training video. Her description was obscure, dense, virtually impenetrable, and thus, a fitting candidate for inclusion on Comedy Central’s “Daily Show” news parody program.

“Help out the cops and just sum this law up in plain English,” suggested host Jon Stewart in introducing the clip. Beverly Ginn: “Reasonable suspicion exists when an officer is aware of specific articulable facts which, when considered with the objective and reasonable inferences, form a basis for particularized suspicion.” Cut back to Stewart in studio: “Mexicans are f\*\*\*ed.”

**If you enjoyed this Special Report, you might also like Jeffrey Kaye’s recent book:**



**Moving Millions: How Coyote Capitalism Fuels Global Immigration (Wiley)**

This book is available for purchase through Kaye’s website, [www.jeffreykaye.net](http://www.jeffreykaye.net).

*“A really wonderful book. With vivid writing that brings policy to life... Moving Millions pulls us across the global landscape of ... human migration ...”*

**—Judy Woodruff, PBS NewsHour**

*“Read this book if you want a well-written, honest guide to how [global immigration] works and why any solution has to focus on where immigrants come from as well as where they go.”*

**—Jeff Faux, Founder of the Economic Policy Institute and author of *The Global Class War***