



April 2008
Volume 77
Number 4

United States
Department of Justice
Federal Bureau of Investigation
Washington, DC 20535-0001

Robert S. Mueller III
Director

Contributors' opinions and statements should not be considered an endorsement by the FBI for any policy, program, or service.

The attorney general has determined that the publication of this periodical is necessary in the transaction of the public business required by law. Use of funds for printing this periodical has been approved by the director of the Office of Management and Budget.

The *FBI Law Enforcement Bulletin* (ISSN-0014-5688) is published monthly by the Federal Bureau of Investigation, 935 Pennsylvania Avenue, N.W., Washington, D.C. 20535-0001. Periodicals postage paid at Washington, D.C., and additional mailing offices. Postmaster: Send address changes to Editor, *FBI Law Enforcement Bulletin*, FBI Academy, Law Enforcement Communication Unit, Hall of Honor, Quantico, VA 22135.

Editor

John E. Ott

Associate Editors

Cynthia L. Lewis
David W. MacWha
Bunny S. Morris

Art Director

Denise Bennett Smith

Assistant Art Director

Stephanie L. Lowe

Staff Assistants

Cynthia H. McWhirt
Gabriel E. Ryan
Arlene F. Smith

This publication is produced by members of the Law Enforcement Communication Unit, Training Division. Issues are available online at <http://www.fbi.gov>.

E-mail Address

leb@fbiacademy.edu

Cover Photo

© Photos.com

Send article submissions to Editor, *FBI Law Enforcement Bulletin*, FBI Academy, Law Enforcement Communication Unit, Hall of Honor, Quantico, VA 22135.

FBI Law Enforcement Bulletin

Features

Laser Weapons

By Robert J. Bunker and
Dan Lindsay

2

No longer relegated to the realm of science fiction, laser devices have become weapons with potentially deadly consequences.

Disruptive and Destructive Effects of Laser Illuminations

By Matt Begert,
Lisa Campbell, and Sid Heal

10

Whether wielded intentionally by terrorists or mischievously by citizens, laser devices can produce potentially lethal results.

Laser Legal Issues

By Madelyn I. Sawyer and
John P. Sullivan

18

Deterring and prosecuting criminal laser strikes requires a unified effort among local, state, and federal authorities.

Criminal Speech

By Martin J. King

23

Law enforcement officers must know the extent to which the First Amendment permits preventative prosecution based on speech intended to persuade or induce others to engage in unlawful conduct.

Departments

8 Bulletin Reports

Arrest-Related Deaths
Juvenile Offenders
and Victims
NIDA InfoFacts
Cocaine Smuggling

16 Perspective

Community Involvement

21 Unusual Weapon

Tool Pen

22 Leadership Spotlight

The Heart of Leadership



Recognizing Laser Threats

© Dynamic Graphics

In the spirit of lessons learned from the tragic events of September 11, 2001, the *FBI Law Enforcement Bulletin* presents three feature articles on laser threats derived from both negligent use and the intentional criminal employment of laser devices and weapons that can disrupt human vision and potentially cause short- and long-term damage to the human eye. The danger this threat represents increases substantially when civil and private aircraft, commercial cargo carriers, and airborne law enforcement entities become the targets of these laser illuminations. Loss of pilot vision and air-ground reference can result in serious and catastrophic outcomes that can lead to both crew and passenger injury and loss of life, as well as imperil citizens on the ground.

To adequately address this topic, the *Bulletin* once again has joined with the Futures Working Group (FWG), a partnership between the FBI and the Society of Police Futurists International (<http://www.policefuturists.org>). The first such collaboration took place in the January 2004 issue on futures research and policing. The mission of the FWG is to promote innovation through the pursuit of scholarly research in the area of police futures to ethically maximize the effectiveness of local, state, federal, and international law enforcement bodies as they strive to maintain peace and security in the 21st century. Members have completed projects on such topics as the use of augmented-reality technology, neighborhood-driven policing, homeland security, policing mass casualty events, and the future of policing. As part of the FWG, the Futurists in Residence (FIR) program, operational since

2004, affords researchers and practitioners an opportunity to conduct original research. The FIR program, housed within the Behavioral Science Unit of the FBI Academy, has conducted research on human resource management in policing, the future of leadership in law enforcement, and the current effort on lasers as weapons that police may encounter today and, perhaps more so, in the future.

The three feature articles cover several aspects of laser threats, especially those most applicable to the law enforcement community. First, "Laser Weapons" provides an overview of weaponry evolution and how lasers and other forms of directed energy systems have begun to supplant conventional firearms because of enhanced tactical and operational functions. Next, "Disruptive and Destructive Effects of Laser Illuminations" describes the potential dangers associated with lasers and offers countermeasures for those targeted, especially law enforcement officers. Finally, "Laser Legal Issues" highlights the importance of deterring laser incidents and the need for statutory provisions to enable prosecution for these acts.

All three articles echo the need for the law enforcement profession and the public to become aware of the potential dangers associated with laser illuminations. Whether wielded by a terrorist intent on forcing an airliner to crash or by an ardent fan trying to attract a celebrity's attention, lasers can cause immense tragedy. But, by recognizing the dangers, taking steps to reduce illuminations, and enacting effective laws regarding the malicious use of lasers, society can ensure that this emerging threat will not flourish.

Laser Weapons An Emerging Threat

By ROBERT J. BUNKER, Ph.D., and DAN LINDSAY

Laser and beam weapons have been the stuff of science fiction lore for many years. Good science fiction, however, is based on some kind of science fact and, if done properly, will become less implausible over time. This now is occurring with lasers—both when used in an improvised weaponry role and when produced as dedicated laser weapons.¹

Military entities have debated the implications of a shift to laser and other forms of directed energy weaponry for quite some time. In today's world of terrorist plots and increasingly violent criminals, the law enforcement community must become aware of this development as well. While most information on the topic has been military in nature, a growing body of literature has begun to focus on the terrorism potential and criminal use of laser systems against civil aviation and airborne and ground law enforcement assets.² This law enforcement threat has emerged in tandem with a marked increase in lasings and illuminations over the past decade and the national tracking of these incidents by the Federal Aviation Administration (FAA).

Other issues of interest touch upon law enforcement's future utilization of lasers and directed energy weapons and citizens' future right to bear laserarms (handheld laser weapons). A

brief look at the early emergence and development of firearms can help explain what now is taking place with lasers.

Legacy of Firearms

Firearms have existed for well over 500 years. Prior to their emergence, however, less sophisticated forms of weaponry included the sword, spear, lance, and bow. During the transition to the modern world, the longbow and crossbow, the two reigning missile weapons of the medieval era, were successfully challenged and eventually replaced by the more advanced firearm first introduced to the battlefield in the 14th century.³

Early handheld firearms looked like miniature cannons. Wooden sticks were strapped to iron pipes with one end blocked and a touch hole bored so as to ignite the crude gunpowder mixture. Glowing sticks and wires brought to the touch hole served to fire the weapon, which shooters pointed in the general direction of the target because aiming was impossible. From these humble beginnings, firearms evolved over the course of centuries into true handheld weapons with many recognizably modern components. Gains in standoff range, accuracy, lethality, and reliability became dramatically evident as sophistication increased.

Firearms—then characterized as crude and unreliable—beat out competing weapons of



Dr. Bunker is the CEO of a security consulting corporation in Claremont, California.



Chief Safety Officer Lindsay serves with the Ontario International Airport, as well as the Los Angeles, California, Department of Airports and its Airport Law Enforcement and Protection Services.

late medieval and early modern times because they offered potentials the other, then dominant, systems did not. Whereas both longbows and crossbows had exhausted their human and quasi-mechanical power sources, firearms began to exploit the deadly force capability provided by chemical reactions and internal combustion. This new and advanced weapon ultimately would take down the old medieval order by shooting the knight from his horse and breaching the high walls of the lord's castle.

This end state came about by means of a gradual process. The development of the musket into the rifle and the addition of the bayonet culminated in the ascendancy of the modern firearm as the dominant system in warfare. In tandem with long-gun evolution, pistols became

available for military and eventual policing functions, and siege, later field, artillery began to emerge on the battlefield.

Transition to Laser Weapons

As in the transition from medieval to modern weaponry, legacy systems, such as conventional firearms, will not be supplanted overnight. Still, this process of weaponry evolution will not occur over centuries but in mere decades as a result of the ever-increasing pace of technological innovation.

It is projected that an incremental process will unfold over the course of many decades as lasers, and other forms of directed energy weapons, emerge haphazardly as components that will augment firearms (e.g., laser sights) and also be fielded as stand-alone systems both

complementing and challenging firearms.⁴ As energy source output, transmission efficiency (lessened energy loss), storage, and reliability increase, so, too, will handheld laser weapon capability. For this reason, this developmental pattern, except for its historically compressed nature, will likely mimic that of the firearm.

Beyond offering advanced power source exploitation potentials over firearms, lasers possess several enhanced tactical and operational functions.⁵ Moreover, for policing purposes, the most significant of these capabilities include those identified as exploiting fifth-dimensional operational space.⁶

- **Speed of light:** Because a laser beam travels at 186,000 miles per second, no time of flight exists for it to hit a target. As soon as the trigger of the laser weapon is pulled, the target has been engaged.
- **Energy concentrated on the target:** Unlike many omnidirectional munitions, all of the energy of a laser is focused in a coherent beam upon the target. The smaller and tighter the beam, the more energy is concentrated at the point of impact.
- **Straight line of flight:** No fire control is required to calculate a ballistic trajectory and lead.

Whatever is aimed at is hit, based on a straight line of sight and flight.

- **Extreme standoff potential:** Stronger lasers have stand-off ranges in excess of most modern firearms; however, beam coherence issues arise at extreme ranges of laser employment.

A laser, like any other device or weapon, may be employed by criminals, terrorists, or military combatants.

- **Silent:** No detonation or back blast is required as a by-product of operating a laser because no internal combustion or chemical reaction takes place to power the laser beam.
- **Potentially invisible:** Infrared lasers are invisible to the human eye, thus typically undetectable without infrared detection equipment. In the case of visible lasers, they can be pulsed, thereby limiting the opposing force's ability to detect their use.
- **Deep clip:** As long as a power source exists, a laser can continue to operate,

which eliminates the need for large quantities of ammunition. The only real potentially inhibiting factor is overheating because of long durations of use.

- **Rheostat:** The energy levels produced can be increased and lowered, allowing for the more tailored application of force. Low levels could cause less lethal effects, while more energy emitted could result in lethal-force applications.
- **Frequency shifting:** Tunable lasers, those with shifting wavelengths, are highly resistant to countermeasures based on filters that block known threat wavelengths.
- **Unique wounding:** Corneal and retinal damages to the eyes may take place with low-energy lasers. Besides thermal effects, the potential for photochemical changes in the eye also may result from some laser injuries. Combinations of charring and lacerations may occur with high-energy laser injuries, which require a far more complex medical response than ones produced by standard firearms.
- **Psychological impact:** Once personnel, both military and law enforcement, realize that utilizing magnifying optics or viewing the operational space with the

naked eye can pose the risk of being injured or blinded, their mission performance could become degraded. This is compounded by infrared laser use because damage to the eye can be taking place without the target initially even knowing that it is happening.

Target Sets

Laser devices and weapons have disruptive (visual) and destructive (primarily thermal) effects upon their targets. Under normal viewing conditions, weaker low-energy lasers have only disruptive effects, whereas stronger ones also have eye damage and destructive capabilities that allow them to start fires and either melt or burn through objects that have little density. The weaker lasers, such as laser pointers, typically are effective at night for vision disruption purposes, while the stronger systems can be used both in daytime and nighttime conditions. A laser, like any other device or weapon, may be employed by criminals, terrorists, or military combatants.

The target sets that can be disrupted, and potentially destroyed, by using lasers are pretty much the same for both law enforcement and civil aviation applications. However, civil aviation tends to have many more soft targets, such as fuel trucks, even though police

helicopters are much softer targets than passenger airliners.

Tactics, techniques, and procedures for individual user and opposing force laser applications can be generated for law enforcement red-teaming purposes.⁷ Needless to say, as with any targeting endeavor, weapons effects can be matched to target-set weaknesses and vulnerabilities, and a reasonably competent operations plan can be constructed. In this instance, the eyes (vision) of law enforcement and commercial aviation personnel are the greatest vulnerabilities.

Conclusion

Several years ago, one of the authors characterized the emergence of lasers and directed energy weapons as a

“new gunpowder revolution”⁸ and still adheres to that observation. Laser weapons and devices will have an immense impact on future policing activities, especially in the coming decades when they mature as systems and eventually move along the continuum from exotic to what will be considered more conventional weapons. This impact is projected to come about primarily because of two broad waves of change in this type of weapon’s usage.

The first, derived from negligence and ignorance, represents the vast majority of incidents, criminal intent, and eventual terrorist and global insurgent use of these systems.⁹ Millions of handheld laser pointers and other low-energy laser devices have been

Target Sets

Law Enforcement

- Personnel (line officers, specialized units, supervisors)
- Matériel (police cars, helicopters, fixed-wing aircraft, equipment)
- Infrastructure (buildings, communication systems)

Civil Aviation

- Personnel (pilots, flight crews, passengers, maintenance staff, rescue workers)
- Matériel (aircraft, fuel trucks, equipment)
- Infrastructure (terminals, control towers, radar, communication systems)

Airborne Law Enforcement Laser Illumination

By Alfredo Parra, Jr.

At about 10 p.m. on March 21, 1998, I was the flight officer aboard the Ontario, California, Police Department's helicopter orbiting a burglary in progress. As I was directing ground officers to the suspect, the pilot, Pete Ambriz, told me that we were being illuminated by a laser. Fortunately, he could maintain control of the helicopter. After officers took the suspect into custody, Pete turned in the direction of the laser and flew about 500 feet above the ground. Our aircraft, modified with two strobes for low-level operations in the area of our international airport, also had a 50-million candlepower searchlight, so we could be seen for miles.

At that point, I was looking at the horizon and saw the laser beam. It was angled from the ground below and to the left of the aircraft and was not bright enough to cause concern. Suddenly, however, it moved up and right and, within an instant, a bright intense red light covered the front windscreen and interior of the cockpit. The beam was too bright to see through, and there was no visibility to the front of the aircraft. I could see the beam moving, and, occasionally, I could see forward as the beam tracked our aircraft. I saw Pete flying while looking out the left side of the aircraft as he kept his heading. After about 10 seconds, I saw the beam move downward, fade, then turn off. As the beam was moving away from the aircraft, I could clearly see its source. The beam was so intense, straight, and bright that it pointed like an arrow to its source. As it was turned off, I saw it glow down and move north at the rear of a house and then inside what turned out to be the rear sliding door. Later, I determined the distance to be just over 1 mile, or about 14 city blocks. I learned from the manufacturer of the device that, at that distance, the beam would have been approximately 7 feet in diameter.

I directed Pete to the home and had a ground unit respond. The officer contacted the suspect and retrieved the device. The suspect subsequently admitted aiming the device at the helicopter and eventually pleaded guilty to a misdemeanor violation of California Penal Code Section 247.5, Discharging a Laser at an Aircraft. He was sentenced to 3 months in the county jail and 3 years on probation.

Detective Parra serves with the Ontario, California, Police Department.

manufactured over the past few decades, and now dozens, if not hundreds, of them are directed at civil, commercial, military, and law enforcement aircraft; police and emergency services personnel; professional and

amateur athletes; bus drivers; and everyday citizens on a yearly basis. Fortunately, the majority of these devices, under normal viewing conditions, do not pose eye hazards. Still, these lasers may offer significant

visual disruption potentials. Regardless of user intent, this wave of change already has begun and is based on lasers as threat systems to law enforcement officers. An eventual component of this wave

of change will be the creation of law enforcement policies, tactics, and countermeasures with respect to laser threats.¹⁰

The second wave of change is expected to be based on the utilization of lasers and other directed energy devices by law enforcement agencies themselves. This can be seen today with laser sights added to firearms and the use of laser dazzlers as less lethal forms of force. While this wave of change remains immature, over time, more and more directed-energy capabilities will be implemented for law enforcement use.

With such scenarios in mind, the law enforcement profession must recognize that lasers are emerging as the weapons of the future. Just as the firearm ushered in the modern era, the laser will profoundly influence what transpires for succeeding generations. ♦

Endnotes

¹ The authors' past writings on laser threats include Dan Lindsay and Robert J. Bunker, "The Laser Threat to California Airborne Law Enforcement," *The Journal of California Law Enforcement* 34, no. 2 (March-April 2000): 12-20 (an earlier version, "The Laser Threat to Airborne Law Enforcement," appeared in two parts in *Air Beat* (November/December 1998, 26-29 and January/February 1999, 14-16); and Robert J. Bunker, "Terrorist Laser Employment Against Civil Aviation: Issues, Concerns, and Potential Incidents," *Transit Policing* 8, no. 1 (Spring 1998): 7-8 and 21-28.

² U.S. Department of Justice, Federal Bureau of Investigation, FBI Academy Library, *Subject Bibliography: Laser Devices and Weapons* (Quantico, VA, June 2007).

³ T. Lindsay Moore, "The Structure of War: Early Fourth Epoch War Research," in *Non-State Threats and Future Wars*, ed. Robert J. Bunker (London, UK: Frank Cass, 2003), 157-170.

⁴ This projection has provided underlying guidance to less lethal weapons research and field activities initiated by the National Law Enforcement Corrections Technology Center; the National Institute of Justice Technical Working Group on Less Lethal Weapons; and the Technology Exploration Program of the Los Angeles County, California, Sheriff's Department.

⁵ Many of these capabilities were recognized initially quite sometime ago by Brigadier Bengt Anderberg, "The Low-Energy Laser Aimed at the Eye as a Potential Antipersonnel Weapon," *The RUSI Journal* 133, no. 1 (Spring 1988): 35-40.

⁶ Sid Heal, "Fighting in the Fifth Dimension," *OnPoint: A Counterterrorism Journal for Military and Law Enforcement Professionals* (April 2005); retrieved from <http://www.uscav.com>.

⁷ Robert J. Bunker, "Criminals and Laserarms: Counter-Optical Tactics," *The Tactical Edge* 14, no. 8 (Fall 2000): 45-48.

⁸ Robert J. Bunker, "New Gunpowder Revolution," *The Police Chief*, June 1998, 49. This observation was drawn from even earlier military-related research Dr. Bunker conducted on the topic.

⁹ With a fixation on man-portable air defense systems, rocket-propelled grenades, bombs and improvised explosive devices of various types, and small arms, a time lag before terrorist laser weapons use takes place is expected. Still, the Japanese terrorist group Aum Shrinkyo attempted to use a laser device as a weapon back in the 1990s, so wild-card scenarios are not out of the question.

¹⁰ Additional forms of directed energy defense against radio frequency and other devices also may, at some point, become warranted.

Wanted: Photographs



The *Bulletin* staff is always looking for dynamic, law enforcement-related photos for possible publication in the magazine. We are interested in photos that visually depict the many aspects of the law enforcement profession and illustrate the various tasks law enforcement personnel perform.

We can use color prints, digital photographs, and slides. It is our policy to credit photographers when their work appears in the magazine. Contributors should send duplicate, not original, prints as we do not accept responsibility for damaged or lost prints. Send photographs to:

Art Director
FBI Law Enforcement Bulletin, FBI Academy, Law Enforcement Communication Unit, Hall of Honor, Quantico, VA 22135.

Arrest-Related Deaths

Arrest-Related Deaths in the United States, 2003-2005 contains data from the first national measure of all types of arrest-related deaths under a new program mandated by the federal Death in Custody Reporting Act (Public Law 106-297). The statute directed all states to report deaths during arrests to remain eligible for federal correctional grants. This Bureau of Justice Statistics report provides the number of all arrest-related deaths over a 3-year period by cause of death and characteristics of the deceased. These fatalities include homicides (both those by law enforcement officers and other persons), suicides, alcohol or other drug intoxication deaths, accidental injuries, and fatal medical problems. The publication lists the deaths by cause for each state, and tables detail the circumstances surrounding arrest-related deaths, such as the criminal offenses relating to the arrests, the weapons or other behavior employed by arrest subjects, and the weapons or restraint devices used by officers involved in the arrest. In addition, the document presents the number of justifiable homicides by police as collected by the FBI's Uniform Crime Reporting Program. To obtain a copy of the report (NCJ 219534), access <http://www.ojp.usdoj.gov/bjs/abstract/ardus05.htm>.

Juvenile Offenders and Victims

The latest edition of the Office of Juvenile Justice and Delinquency Prevention's (OJJDP) flagship statistical publication, *Juvenile Offenders and Victims: 2006 National Report*, is available online at <http://ojjdp.ncjrs.gov/ojstatbb/index.html>. The 260-page report offers comprehensive statistics on juvenile offending, victimization of juveniles, and the justice system's response to these problems. It presents data in easy-to-read tables, graphs, and maps, narrated by clear, non-technical analysis. This report is part of OJJDP's online Statistical Briefing Book (SBB).

NIDA InfoFacts

Understanding Drug Abuse and Addiction represents one of many brief messages available through NIDA InfoFacts, developed by the National Institute on Drug Abuse (NIDA), National Institutes of Health, Department of Health and Human Services. NIDA supports most of the world's research on the health aspects of drug abuse and addiction. Updated regularly, NIDA InfoFacts have no copyright on any of the materials, and all can be reproduced for further distribution. Available at <http://www.nida.nih.gov/Infofacts/Index.html>, NIDA

InfoFacts cover a wide range of topics germane to all concerned with the tragic effects of drug abuse and addiction.

Cocaine Smuggling

Produced by the Office of National Drug Control Policy, *Cocaine Smuggling in 2006* provides an overview of the estimated cocaine flow to the United States for the year. The report covers such topics as coca cultivation and production, cocaine trafficking routes and methods, and cocaine seizures and disruptions. Estimates indicated that between 530 and 710 metric tons of cocaine departed South America toward the United States in 2006. About 90 percent of the flow traveled via the eastern Pacific and western Caribbean routes to Mexico and Central America. In 2006, interdiction efforts resulted in 492 metric tons of cocaine, the second highest total on record. The document (NCJ 220494) is available at the National Criminal Justice Reference Service's Web site, <http://www.ncjrs.org>.

Bulletin Reports is an edited collection of criminal justice studies, reports, and project findings. Send your material for consideration to: *FBI Law Enforcement Bulletin*, FBI Academy, Law Enforcement Communication Unit, Hall of Honor, Quantico, VA 22135. (NOTE: The material in this section is intended to be strictly an information source and should not be considered an endorsement by the FBI for any product or service.)

Disruptive and Destructive Effects of Laser Illuminations

By MATT BEGERT, LISA CAMPBELL, and SID HEAL



Most of the documented laser incidents (some intentionally disruptive, others not) have involved lasing aircraft. The primary operational effect in such incidents is visual disruption to pilots with the immediate and direct concern being the loss of control of the aircraft. For a hostile individual wielding a laser, disruption of the pilot's vision, as well as a wide range of other potentially destructive results, is intentional.

As lasers become more technologically advanced and

hostile forces modify their tactics for enhanced results, current disruptive outcomes may worsen, causing greater possible injury or death. Further, both disruptive and destructive effects of lasers may bring on psychological issues not only for the victims of such incidents but also for those who could become targets.

VISUAL DISRUPTION

The mechanics of visual disruption can be described in terms of the effect produced when the eye interacts with

light, specifically changes in light hitting the eye. The visual disruption that occurs when a laser strikes the eye includes one mechanical reaction—blinking, an involuntary, predictable startle reflex—and three physiological responses—glare, flash blinding, and afterimage.

Glare, a common and foreseen condition for pilots during flight, results from an intense light source that obscures an object in a person's central field of vision.¹ The effects last only as long as the light source is present. Pilots expect glare caused

by low sun angle, landing lights, and other sources. But, they do not anticipate the sudden illumination and resulting glare of collimated laser beam radiation, amplified by reflection and refraction in the cockpit.² The unexpected appearance of laser light causing glare proves disruptive unlike that from sunlight, which pilots know and can predict. In contrast, flash blindness, a temporary visual impairment, persists for several seconds or up to a few minutes after the light source is removed.³ Unfortunately, a laser does not have to be shined directly into the eye for this to occur. Reflected or refracted laser radiation hitting a cockpit canopy can produce flash blindness. Albeit temporary, the visual disruption can result in

the inability to detect or resolve a target, similar to the immediate blinding from a camera flashbulb. The final response, afterimage—the transient sensation or the perception of light, dark, or colored spots left in the visual field after exposure to bright light—can prove distracting or disruptive and last up to several minutes.

The disruption from lasing can affect an aircraft's mission or intended operation. A pilot startled by a laser flash and suffering from flash blindness, for example, may inadvertently divert or change a flight's course or lose visual references. In military applications, laser disruptions can result in a degraded mission, aborted flight, or denial of essential air support to ground operations. Further,

ongoing effective hostile lasings in a specific location may result in general area denial. In domestic circumstances, important consequences of laser disruption could include temporary restrictions or modifications to the use of aircraft in support of law enforcement or public safety missions.

HEALTH ISSUES

The unique properties of lasers play a role in their effect on the eye. A tightly collimated laser, for example, will cause the laser beam to become focused in a small retinal spot, much smaller than if another light source with comparable power were to hit the eye. This constricted focus combined with the increased output power of a laser may lead to exceptionally



Operations Officer Begert serves with the National Law Enforcement and Corrections Technology Center-West in El Segundo, California.



Major Campbell serves with the 146th Airlift Wing, Air National Guard, U.S. Air Force, at Port Hueneme, California.



Commander Heal serves with the Los Angeles County, California, Sheriff's Department.

hazardous conditions for the eye. The nearly monochromatic property, the very confined beam divergence over great distances, and the energy of a laser also can have an effect on the eye. In general, at the point where the eye no longer can withstand the power or energy density of a laser, referred to as the eye's damage threshold, barely visible but permanent physical damage to the retina will occur.

Three mechanisms can cause laser-induced eye injuries: thermal, mechanical, and photochemical. The most common laser eye injury is thermal in nature. When so affected, the eye absorbs laser energy, which raises the temperature and alters tissue proteins. Less common, mechanical damage results from lasers with very short high-frequency pulses and, thus, very high energy. Such high-energy pulses can inflict severe damage to the retina because of extremely rapid absorption of energy and sharp increases in temperature. Photochemical damage, characterized by lower power and longer energy pulses, occurs at the shorter visible wavelengths (e.g., in the blue or ultraviolet regions of the spectrum). In such cases, repeated or chronic exposure is cumulative with the effects being similar to sunburn.

Common but varying symptoms may assist in the

preliminary recognition of the nature and seriousness of the exposure. Victims of significant retinal laser injuries typically experience sudden, severe decreased vision in one or both eyes. They may notice a bright flash and occasionally hear a loud popping sound. They may or may not feel pain.⁴ Still, their affected vision may improve over several days or months.

“

The unique properties of lasers play a role in their effect on the eye.

”

Results from laser accidents of varying degrees have included such medical findings or symptoms as scotoma (dark spots); retinal, corneal, or macular burns; retinal lesions; swelling; blurred vision; vitreous hemorrhage (rupture of retinal blood vessels); and blind spots. Most real laser injuries are accompanied by some eye tissue damage. While many medical or symptomatic findings will improve over time, some may last much longer. In cases of more significant retinal laser injury, the clinical

presentation usually becomes apparent to ophthalmologists. Less significant retinal laser injuries may not be as easily diagnosed or apparent. For this reason, details of the event and all symptoms should be documented and given to an examiner following a suspected lasing. Notably, in some accidental workplace lasings, the clinical effects remained undetected until inadvertently discovered by ophthalmologists because they were asymptomatic and, therefore, never addressed.

As the number of lasing incidents increases, especially by misuse, so does the added potential for psychological effects that may occur as a result of being lased or simply from the threat of experiencing such an incident. According to some military researchers, the suppressive consequences of knowing that a lasing could occur may be numerous and must be factored into overall laser biological effects studies. Such psychological issues prior to, during, or after a laser incident may be accompanied by undue stress or performance inhibitions and, thus, have significant impact on mission accomplishment.⁵

OFFICER SAFETY CONCERNS

One highly troubling aspect for officers being lased is not knowing the circumstances of

the illumination. Is a criminal sighting a weapon at them? Is someone trying to harm them by striking them in the eye with a laser? Or, is a child, adolescent, or even an adult wielding the device accidentally or out of ignorance? Such questions necessitate quickly assessing the situation and employing some basic response protocols and countermeasures developed to protect officers during a laser illumination.⁶ These response measures, both passive and active in nature, partially depend on the intensity (brightness) of the laser and the officer's type of assignment (e.g., on foot, in a vehicle, or aboard an aircraft).

Countering the Attack

Officers on foot should readily seek cover if the illumination continues.⁷ They may need to look away from the laser or shield their eyes with a hand, hat, clipboard, or other opaque object. Officers should remember that the effects of a laser illumination are far greater at night and under other conditions of darkness because the human eye has adapted itself for nighttime vision (i.e., the pupil is dilated).

Officers in vehicles first need to make sure that the startle response from a laser illumination does not result in an accident. They have the option of driving through the incident or parking the car. Turning on

interior lights may help negate some of the intensity of the laser light. Looking down, shielding the eyes, or finding protection behind an open car door all represent viable options. If the illumination comes from behind, officers never should look into the rearview mirror.

An airborne officer's first mission is to aviate and navigate. Depending on the severity of the laser illumination, officers have some options. They could look away, shield their



eyes, raise or lower their helmet visor, place their head out of the window (in case of laser light scattering or opaqueness in the canopy), or make a 180-degree turn. At ranges close to the laser source, officers should maximize all interior and instrument lighting to counteract the disruptive visual effects of the laser illumination.

Regardless of whether officers are on foot, in a vehicle, or aboard an aircraft, under no

circumstances should they use a direct-viewing magnifying device, such as binoculars or a scope, because these instruments gather and intensify light, thereby boosting the energy of the laser that strikes the eye. Eyeglasses, as well as shiny objects and other reflective surfaces that laser energy can bounce (diffuse) off of, also pose visual disruption and injury issues. For this reason, officers should not use tactical mirrors for viewing the illumination.

Officers operating in environments where laser threats are prevalent can draw upon more sophisticated countermeasures. For example, military goggles and glasses exist that provide both ballistic and laser eye protection. Filters incorporated into such eyewear block out common laser threat wavelengths. For law enforcement use, red and green laser filters would have the greatest current utility. Film applied to windshields and windscreens and potentially even to mirrors can filter out harmful laser light. In addition, smoke rounds represent a sound tactical response to the threat of laser illumination because the particulate matter that blocks human vision does the same to laser energy. Laser detectors and warning receivers, found in some military vehicles and aircraft, alert crews to illuminations. This laser warning capability extends to both visible

and infrared (invisible) lasers.⁸ Finally, law enforcement agencies can utilize airborne, vehicular, and officer-carried white-light systems (flashlights through high-intensity spotlights) against the source of a laser illumination. Multiple white-light sources, and even the addition of laser dazzlers, can create an optical-wall effect that may isolate and disorient the wielder. Air units that have powerful spotlights with good standoff ranges have proven effective in providing overwhelming white light against suspects with lasers.

Aiding the Injured

All lasers are capable of eye damage as a result of three factors: exposure, aperture, and energy. Thus, even a weak laser with a small aperture and sufficient “loiter time” can cause injury. Of course, a more powerful laser needs less exposure because it has more energy. While in the vast majority of cases no damage will result from being illuminated by a weak laser, officers still should have their eyes examined. The stated energy output of many foreign lasers is inaccurate, and worn eyewear inadvertently may intensify a laser beam. Eye injuries easily can take place from direct beam exposure from more powerful lasers and potentially even from

laser energy reflected off of surfaces.⁹ In case of an eye injury, officers should keep the injured person calm. If a retinal injury is suspected and bleeding occurs inside the eye, the injured person should remain in an upright, seated position. Officers should arrange for transportation of the seriously injured for medical evaluation and treatment. The victim might be in shock or have impaired vision, so self-transportation is not advisable.¹⁰

“

The disruption from lasing can affect an aircraft’s mission or intended operation.

”

Injured officers should consult ophthalmologists who have specifically treated laser eye injuries. Because laser eye injuries are uncommon, some officers may encounter difficulty finding qualified medical doctors to conduct the examination. In the case of severe injuries and lingering eye pain, they should contact military ophthalmologists who are experts in this field.

CONCLUSION

Lasers currently used in antipersonnel roles are not the most advanced systems in existence. However, it is reasonable to assume that more sophisticated technology will be employed with malicious intent in the future.

The law enforcement profession must prepare for such a threat by ensuring that its members become aware of the potential dangers associated with lasers. These hazards exist whether the devices are wielded intentionally by criminals and terrorists or by citizens ignorant of the potentially lethal results of their mischievous actions. ♦

Endnotes

¹ Van B. Nakagawara, Ronald W. Montgomery, Archie E. Dillard, Leon N. McLin, and C. William Conner, U.S. Department of Transportation, Federal Aviation Administration, Office of Aerospace Medicine, *The Effects of Laser Illumination on Operational and Visual Performance of Pilots During Final Approach*, DOT/FAA/AM-04/9 (Washington, DC, June 2004).

² Collimated light means that the wavelengths of the light beams are parallel, resulting in little beam divergence over long distances.

³ Supra note 1.

⁴ Studies have shown that pain is not frequently reported. Pain may be caused by rubbing the eyes after laser exposure and more a result of transient corneal abrasion from the rubbing versus from the lasing itself.

⁵ Additional references employed by the authors include W.L. Makous and J.D. Gould, “Effects of Lasers on the Human

Community Involvement The Ultimate Force Multiplier

By Arlene A. Gaylord, M.A.

The events of September 11, 2001, dramatically changed the way Americans live. It also drastically altered how law enforcement organizations conduct business. Since that tragic day, local, state, federal, and tribal agencies have worked and trained together, having recognized the major shift in the roles and responsibilities of the law enforcement profession throughout the United States. Now that law enforcement officers have received terrorism training, they need to share this knowledge with the members of the communities they protect and serve. Educating the public to recognize suspicious activities that could possibly relate to terrorism may well comprise the ultimate force multiplier. After all, no locality has the luxury of having an officer on every street corner. Therefore, involving citizens is essential to effectively combat terrorism. Who better than someone living in a neighborhood or working in a business district to recognize what truly is happening in that area?

As an example, Neighborhood Watch programs have succeeded in making many communities across the nation safer.¹ The program enlists the active participation of citizens in cooperation with the agencies that police them in an effort to reduce crime. This time-tested formula has proven instrumental in ridding neighborhoods of different types of crime problems, such as gangs, prostitution, and drugs. This concept could be expanded to include offering appropriate training regarding terrorism and, thereby, equipping residents with the knowledge necessary to effectively identify suspicious activities that possibly could relate to terrorism.

San Diego's Initiative

The FBI's San Diego office has made building law enforcement-community partnerships a cornerstone in its investigative and preventative counterterrorism efforts. Since April 2004, the office has offered a training program for citizens. It has shared a 1½-hour course with community forums, private companies, and Neighborhood Watch groups throughout San Diego County and several other neighboring jurisdictions. The premise of this training is simple: a brief overview of terrorism that teaches community members not only how to recognize preincident indicators (PIIs) and suspicious activity but also how to provide an accurate report to the appropriate law enforcement agency in a timely fashion.

To help other law enforcement organizations develop a similar effort, the author presents the formula that has proven successful in San Diego.

Ms. Gaylord serves as an intelligence analyst in the FBI's San Diego, California, office.



First, agencies should identify employees who not only care greatly about educating the community but also have established themselves as effective trainers. Next, they should arm these individuals with the knowledge needed and give them sufficient time to go out into the community and teach a basic overview course on terrorism. Although specific items to cover in this training can vary by jurisdiction, four basic components have worked effectively in San Diego.

- 1) A brief historical overview of terrorism, both international and domestic
- 2) A review of terrorism PIIIs that members of the community may be in the position to observe
- 3) A discussion on the importance of providing information that not only is accurate but also timely
- 4) An explanation of appropriate reporting procedures, including instructions on who should receive the information

This type of training requires few resources. Most of all, it needs instructors who feel passionately about building law enforcement-community partnerships and who are approachable, knowledgeable, and enthusiastic about the subject. Who should receive the training will depend on the jurisdiction. For example, San Diego has offered the training to community groups that request it and has proactively contacted special interest groups, such as shopping mall security companies (supplying training specific to basic terrorism and suicide-bomber prevention) and businesses that provide security services to construction sites (conducting training regarding recent arson tactics

used by domestic terrorists against construction sites).

Agencies lacking enough sworn personnel to cover the time necessary to address community groups can turn to professional support employees or volunteers who have the appropriate skills and knowledge to provide this critical training. To this end, the California Commission on Peace Officer Standards and Training developed a train-the-trainer class and offered it to interested individuals, including terrorism liaison and community services officers and other employees nominated by their departments.

Conclusion

It is time to include the community in law enforcement's battle against the threat of terrorism. The profession must work to train residents to

become its eyes and ears because officers simply cannot do it alone. Citizens need to know what to look for and how to effectively report it to the appropriate agency.

Building law enforcement-community partnerships can constitute the ultimate force multiplier. Education and training offered by law enforcement agencies to the communities they protect and serve could lead to a tip that might identify a critical player in a terrorist cell and provide law enforcement with the opportunity to disrupt, deter, or stop the next egregious attack on American soil. ♦

Endnotes

¹ For additional information, access <http://www.usaonwatch.org>.

“
**Educating the public
to recognize suspicious
activities that could
possibly relate to
terrorism may well
comprise the ultimate
force multiplier.**
”

Laser Legal Issues Prosecuting Perpetrators

By MADELYN I. SAWYER, M.A., and JOHN P. SULLIVAN



© Digital Vision

Laser incidents are a current and emerging concern to the aviation and law enforcement communities. When directed against aircraft cockpits, lasers, under certain conditions, can distract or impair the pilot and flight crew, posing a significant safety hazard.

The continuance of acts targeting civil airliners and public safety helicopters highlights the importance of deterring laser incidents and demonstrates the need for statutory provisions

to enable prosecution for these acts under both federal and state statutes. Potential means of deterrence and threat mitigation include restricting the sales of certain laser devices; amending or enacting criminal statutes regarding the use of lasers as weapons, as well as their use against flight operations; providing pilots with laser eye protection; training pilots in laser countermeasures; expanding and enforcing laser-free zones proximate to airports; and educating law enforcement

officials and the public regarding the risks improper laser use poses to aviation.¹

Federal Regulations and Criminal Statutes

Over a decade ago, the aviation and law enforcement communities initiated the tracking and documenting of lasing incidents against aircraft and helicopters in flight. Lasings have continued, yet progress in enacting statutes for the prosecution of individuals who point lasers at aircraft has been uneven.

After informally tracking laser incidents for a decade, the Federal Aviation Administration (FAA) established a mechanism to record laser incidents through its operations center in Washington, D.C. When pilots report a lasing incident to the center, it contacts the FBI and local law enforcement agencies.²

Despite these regulatory efforts, a specific federal laser strike statute still is pending.³ This legislation would amend the federal criminal code to impose a fine or prison term of up to 5 years for any person who knowingly aims the beam of a laser pointer at an aircraft or its flight path. If enacted, this would create Title 18, U.S. Code, Section 39A, Aiming a Laser Pointer at an Aircraft. Currently, malicious use of lasers to interfere with aircraft can be prosecuted under the

provisions of Title 18, U.S. Code, Section 32, Interfering with Flight Crews, or under the Patriot Act (P.L. 107-56) section pertaining to acts of violence directed against mass transportation systems.

State Criminal Statutes

Several states, notably California, have specific statutes available to address laser strikes. The California Penal Code, for example, creates a felony for aircraft laser incidents and misdemeanor provisions for those interfering with aircraft.

- California Penal Code Section 247.5: Any person who willfully and maliciously discharges a laser at an aircraft, whether in motion or in flight, while occupied is guilty of a violation of this section, which shall be punishable as either a misdemeanor by imprisonment in the county jail for not more than 1 year or by a fine of \$1,000 or a felony by imprisonment in the state prison for 16 months, 2 years, or 3 years or by a fine of \$2,000.
- California Penal Code Section 248: Any person who, with the intent to interfere with the operation of an aircraft, willfully shines a light or other bright device, of an intensity capable of impairing the operation of an aircraft, at an aircraft

shall be punished by a fine not exceeding \$1,000 or by imprisonment in a county jail not exceeding 1 year or by both that fine and imprisonment.

Other California sections address pointing lasers at persons (CPC Section 417.25) and at peace officers (CPC Section 417.26) and prohibit sales of laser pointers to minors (CPC Section 417.27 [a]). Florida has similar provisions in Section 784.062: Assault; Battery; Culpable Negligence-Misuse of laser lighting devices, wherein subsection (3)(a) states that “Any person who knowingly and willfully shines, points, or focuses the beam of a laser lighting device on an individual operating a motor vehicle, vessel, or aircraft commits a

felony of the third degree” and subsection (3)(b) holds that when “such act results in bodily injury commits a felony of the second degree.” Most recently, Ohio created a second-degree felony in Section 2909.081 where “No person shall knowingly discharge a laser or other device that creates visible light into the cockpit of an aircraft that is in the process of taking off or landing or is in flight.”

The Banach Incident

The U.S. Attorney’s Office, District of New Jersey, successfully prosecuted a Parsippany, New Jersey, man for pointing a laser into the cockpit of an aircraft on final approach to Teterboro Airport.⁴ On December 29, 2004, a green laser (significantly more powerful than



Special Agent Sawyer, a former air traffic controller with the U.S. Navy, serves with the Federal Aviation Administration based in Los Angeles, California.



Lieutenant Sullivan serves with the Los Angeles County, California, Sheriff's Department.

Mitigating the Threat

Several measures are available to deter, detect, and mitigate the impact of laser threats.⁶

- Restrict the sales of certain laser devices
- Amend or enact criminal statutes regarding the use of lasers as weapons, as well as their use against flight operations
- Provide pilots with laser eye protection, potentially problematic for helicopters but worthy of research
- Train pilots, especially airborne law enforcement officers, in laser countermeasures
- Expand and enforce laser-free zones proximate to airports
- Educate law enforcement officials and the public regarding the risks improper laser use poses to aviation

a red one and readily available for less than \$120) was pointed into the cockpit of a charter aircraft with six passengers. The windscreen and cockpit were illuminated three times during final approach with the aircraft traveling at a speed of approximately 250 knots and an altitude of about 3,000 feet. Both pilots were disoriented and temporarily lost their night vision.

Two days after the incident, the pilots accompanied investigators in a Port Authority helicopter aerial surveillance flight to ascertain the laser location based on where the charter aircraft was at the time of illumination. During the helicopter's flight, it also was illuminated by a green laser, which led authorities to the home of David W. Banach. Mr. Banach denied intentionally

aiming a laser at the aircraft, claiming first that his 7-year-old daughter was responsible and then later that he was using the laser to point out stars to the child on the night of the initial charter aircraft illumination.

During subsequent interviews, Mr. Banach recanted his explanation implicating his daughter and admitted to shining the beam at the helicopter and at the charter aircraft. No charges were filed for the helicopter incident because it was not considered a mass transit vehicle.

Mr. Banach was charged with three counts under the Patriot Act, Title 18, Sections 1993, 1001, and 1002. Under count 1, Interference with Pilots of an Aircraft, he faced a potential sentence of 20 years

in prison. The Advisory U.S. Sentencing Guidelines allowed for a range of 18 to 24 months. As the guidelines were nonbinding, the judge imposed a sentence of 2 years' probation. U.S. Attorney Christopher J. Christie stated, "We accept the sentence imposed on Mr. Banach,...the needs of justice and deterrence had to be balanced. At no time did we believe Mr. Banach was involved in terrorism or that he should face 20 years in prison. Nonetheless, his conduct posed an immediate threat to innocent lives...and Mr. Banach now stands as a convicted felon. Everyone is now on notice: anyone considering such purposeful conduct can expect the full weight of federal prosecution and a potentially lengthy prison sentence."⁵

Conclusion

Deterring and prosecuting criminal laser strikes against aircraft requires a unified effort among local, state, and federal law enforcement; cooperation with the Federal Aviation Administration; and awareness and collaboration with the aviation community. Such efforts are essential to ensure safety in the national airspace, to protect airborne law enforcement activities, and, ultimately, to help prevent air crashes and disasters resulting from criminal and potential future terrorist employment of laser weapons—improvised or otherwise.

Indeed, the most successful way of denying terrorists the possibility of adopting this

“science fiction” weapons system is effective enforcement, prosecution, and prevention of laser crimes by routine criminals. In all of these cases, feasible deterrence and enforcement will benefit from the skillful and appropriate use of effective state and federal statutes specifically crafted to address laser threats, coupled with an awareness by law enforcement and prosecutorial authorities of the content of the statutes and the nature of the threat. ♦

Endnotes

¹ Adapted from Bart Elias, *Lasers Aimed at Aircraft Cockpits: Background and Possible Options to Address the Threat to Aviation Safety and Security*, Congressional Research Service, CRS Report for Congress, January 26, 2005.

² Commercial laser devices are regulated by the Food and Drug Administration, and enhanced provisions to restrict sales of more powerful lasers and more pronounced warning labels on all products may be warranted.

³ A House resolution (H.R. 1615), the “Securing Aircraft Cockpits Against Lasers Act of 2007,” was passed by the House and referred to the Senate on May 23, 2007.

⁴ Indictment in U.S. District Court, District of New Jersey-CJG/20050003; <http://www.usdoj.gov/usao/nj/press/files/pdf/Indbanach.pdf>.

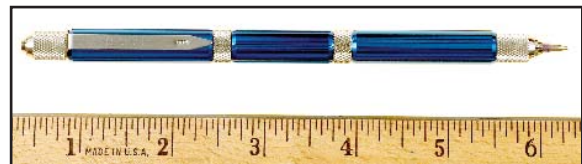
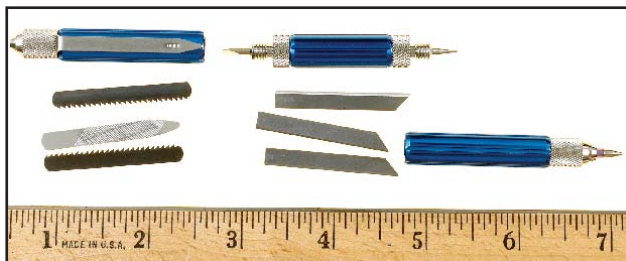
⁵ Press release, February 17, 2006, U.S. Attorney’s Office, District of New Jersey; http://www.usdoj.gov/usao/nj/press/files/bana0217_r.htm.

⁶ For additional information, see Dan Lindsay and Robert J. Bunker, “The Laser Threat to California Airborne Law Enforcement,” *The Journal of California Law Enforcement* 34, no. 2 (March-April 2000): 16.

Unusual Weapon

Tool Pen

These photos show an item that appears to be a pen. Actually, it is an unusual weapon containing various metal blades and tool attachments that offenders may attempt to use against law enforcement officers.



Leadership Spotlight

The Heart of Leadership

The essence of leadership is not giving things or even providing visions. It is offering oneself and one's spirit.

—Lee Bolman and Terrence Deal

When most of us think back to the leaders we have encountered and worked with throughout our careers, a few always stand out among the rest as exceptional. Over the years, I have noticed a common denominator in the leaders I admire the most—their desire and effort to help and serve others.

The act of providing help to the people we work with takes significant personal time and energy (e.g., physical, emotional, and psychological) and a sincere yearning to work toward the success of someone else. It also means potentially postponing or even disregarding our own desires, which can be difficult in a society that has a growing appetite for instant gratification and personal success.

Before graduating from college, I received valuable advice from a professor who recommended I seek a veteran employee to mentor me in my first job. Of all the advice I received, this tidbit stuck with me the most. Just as he recommended, I found a person willing to take me under his wings. As it

turned out, this individual demonstrated a desire to help me (and others) beyond anything I ever had anticipated. Without realizing it, his actions literally taught me the importance of helping and serving others and, ultimately, deepened my personal faith. What made the help special? There were no ulterior motives, and no strings were attached. The advice given was free of charge, abundant, direct, and always presented in a way to promote my growth. This person clung to the philosophy that helping others was the highest form of

Help and Serve

leadership and only could be accomplished through one's actions, not by words alone.

If you are a leader or aspire to be one, consider taking time in your career to help those within your circle of influence. The contributions of one person to the success of another equates to a lifetime of achievement built on a foundation of true and lasting success. This is the heart of leadership. ♦

Christopher Lenhard, program leader over the University Education Program's sabbatical component within the Leadership Development Institute, prepared this Leadership Spotlight.



Criminal Speech Inducement and the First Amendment

By MARTIN J. KING, J.D.

© Photos.com

*"It remains fundamental that while the state may not criminalize the expression of views—even including the view that violent overthrow of the government is desirable—it may nonetheless outlaw encouragement, inducement, or conspiracy to take violent action."*¹

The First Amendment provides that Congress shall make no law abridging the freedom of speech, press, or assembly.² However, these "freedoms are themselves dependent upon the power of a constitutional government to survive," and if the government is to survive, "it must have the power to protect itself against unlawful conduct and, under some circumstances, against incitements to commit

unlawful acts."³ The law recognizes that certain public dangers must be curtailed before they are realized or even imminent. Accordingly, early intervention and disruption of potential criminal activity at the stage of planning, organizing, and preparing are central components of law enforcement strategies designed to protect the public from harm.⁴ This article examines the extent to which the First Amendment permits

preventative prosecution based on speech intended to persuade or induce others to engage in unlawful conduct.

Preparation to commit a criminal act can itself be a criminal violation under conspiracy, attempt, or other provisions of federal criminal law defining preparatory crimes. Among these, Title 18, U.S. Code, Section 373 comes closest to a general prohibition of incitement by making it a crime to “solicit,” “command,” “induce,” or “otherwise endeavor to persuade” another person to commit a crime of violence.⁵ Crimes that induce the commission of criminal activity may implicate free speech principles because they characteristically are committed by speech advocating, advising, or teaching, albeit with the intent of causing a specific criminal objective.⁶ Although courts vigilantly

will ensure that prosecutions are not based improperly on the mere expression of unpopular ideas, if the evidence shows that speech crossed the line into criminal solicitation, procurement of criminal activity, or conspiracy to violate the laws, then prosecution is permissible.⁷

Preventative Prosecution: The Concept of Inchoate Crimes

The three main forms of inchoate crimes are attempt, solicitation, and conspiracy.⁸ Inchoate offenses allow law enforcement officials to prevent the consummation of substantive criminal offenses by permitting anticipatory intervention once an individual’s actions sufficiently have manifested intent.⁹ Like a completed offense, an inchoate offense requires that a defendant

engage in prohibited conduct (actus reus)—which can be limited to certain forms of speech—coupled with the requisite mental state (mens rea). Unlike the actus reus in a completed offense, however, the proscribed conduct in an inchoate offense is not prohibited because of its harmful effect but because it sufficiently demonstrates a purpose to act in furtherance of a criminal intent.¹⁰ The mens rea for inchoate crimes, therefore, is the specific intent to commit a particular completed offense, or target or object of crime.

Inchoate crimes focus on the mental state of the actor and render the prohibited conduct ancillary in the sense that it only serves to demonstrate the likelihood that the actor would have done everything necessary to realize the criminal intent.¹¹ Nevertheless, it must be emphasized that the attempt, solicitation, or act in furtherance of a conspiracy never is criminal in the abstract. Rather, criminality arises only when the inchoate conduct has the violation of some other law as its specifically intended objective. In this way, prosecution of inchoate crimes protects the public from harm by preventing the consummation of substantive offenses when an individual’s actions have demonstrated a serious intent to cause a criminal act to occur.¹²



Special Agent King is a legal instructor at the FBI Academy.

“Crimes that induce the commission of criminal activity may implicate free speech principles because they are characteristically committed by speech advocating, advising, or teaching....”

First Amendment Principles

The First Amendment's guarantee of freedom of expression is sweeping but not absolute. The categories of speech that do not receive constitutional protection include obscenity,¹³ defamation,¹⁴ fighting words,¹⁵ and words likely to incite imminent lawless action.¹⁶ The seminal case on incitement is *Brandenburg v. Ohio*,¹⁷ in which the U.S. Supreme Court overturned a conviction based on the Ohio Criminal Syndicalism Act because it punished "mere advocacy" as "distinguished from incitement to imminent lawless action."¹⁸ Clarence Brandenburg, who was the leader of a Ku Klux Klan group, was charged with advocating the "necessity, or propriety of crime, violence, or unlawful methods of terrorism as means of accomplishing political reform"¹⁹ as a result of a speech he made at a Klan rally in which he proclaimed that "if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible there might have to be some revenge taken."²⁰ Although the principle of freedom of speech does not sanction incitement to commit crimes, "the mere abstract teaching...of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action."²¹

A few years later, in *Hess v. Indiana*,²² the Supreme Court emphasized that the test enunciated in *Brandenburg* requires a factual basis to distinguish abstract expression from the concrete use of expression to effectuate prohibited conduct. In *Hess*, the defendant, who was among a crowd of protesters being lawfully dispersed by police during an antiwar rally, was arrested for loudly proclaiming, "We'll take the... street later."²³ Witnesses who overheard the statement testified

“
...criminality arises only when the inchoate conduct has the violation of some other law as its specifically intended objective.
”

that Hess did not appear to be exhorting the crowd to go back into the street, that his statement did not appear to be addressed to any particular person or group, and that his tone, although loud, was not louder than that of other people in the area. The Court held that *Brandenburg* prohibited the state from punishing this alleged advocacy of illegality as a form of disorderly conduct, principally because the defendant's

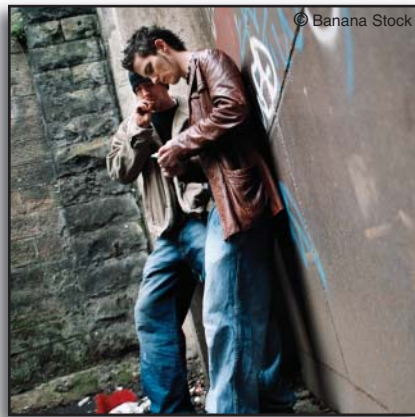
statement "amounted to nothing more than advocacy of illegal action at some indefinite future time."²⁴ Furthermore, the Court reasoned that "[s]ince the uncontroverted evidence showed that Hess' statement was not directed to any person or group of persons, it cannot be said that he was advocating, in the normal sense, any action."²⁵ The *Brandenburg* test, in other words, requires both an intent and likelihood that the expression in question—advocacy of the use of force or of law violation—will produce imminent unlawful action.²⁶

Federal courts consistently have applied the *Brandenburg* test to find speech that advocates, teaches, or justifies lawless action in an abstract way is fully protected under the First Amendment, so long as the speech is not directed to inciting imminent lawless action, and such protection endures even if it can be demonstrated that the speaker hopes that someday such lawlessness may occur.²⁷ For example, in *McCoy v. Stewart*,²⁸ a federal court of appeals affirmed a grant of habeas corpus for a conviction based on speech concerning gang-related activity because it was nothing more than abstract advocacy of overarching gang philosophy, which lacked the necessary intent to further or promote criminal acts.²⁹ As the court explained:

The circumstances of McCoy's speech—interspersed at a barbecue and a social party, while Bratz members were drinking, chatting and listening to music—made it unlikely anyone would act on it imminently. Moreover, his advice was very general. McCoy's ideas...were abstract in that they were not aimed at any particular person or any particular time.... In addition, McCoy's suggestion that the Bratz tag up the neighborhood to let their presence be known was given without any recommendation as to how or when to place the graffiti. Because McCoy's speech to the Bratz, like the protestor's speech in *Hess*, at most advocated lawlessness at some future indefinite time, and did not incite lawlessness, it was protected by the First Amendment.³⁰

The court's analysis in *McCoy* comports with the prevailing view that incitement as a particular form of unprotected advocacy can be punished only if the government can establish that the speaker intended to further an illegal aim through knowing affiliation with persons likely to be immediately animated by the speech. Advocating criminal gang activity by suggesting that it would be a good idea to "tag up" the neighborhood undoubtedly carries with it some potential for harm.

However, the role of the free speech principle is to insulate the sphere of expression from legal restrictions based on the determination that the negative consequences of speech may prevail only marginally over the positive ones.³¹ The harm resulting from expressing a point of view may be mitigated by the expression of contrary views, by the fact that people have the good sense and strong enough



moral values not to adopt harmful views, and by the fact that harmful opinions will disqualify themselves from general acceptance when people realize the negative consequences of acting on them.³² Because the expression of viewpoints typically is subject to a number of harm-mitigating factors, the net harm of advocacy usually is low. This supports the idea that the government should refrain from regulating viewpoints and explains the "imminent-incitement" requirement imposed by *Brandenburg*.

Of course, speech that does more than express a point of view also can be a form of criminal conduct not subject to First Amendment protection.³³ In this regard, a discernable distinction exists between incitement that likely will result in unlawful activity in the immediate future and speech uttered with criminal intent but not necessarily resulting in an *imminent* violation of the law. For example, speech in the form of purposeful instruction for criminal conduct can support liability for aiding and abetting unlawful activity in both the criminal and civil contexts if a crime actually eventuates from the instruction.³⁴ Among the most well known speech-based aiding and abetting cases is *Rice v. Paladin Enterprises, Inc.*, in which relatives of a murder victim brought a wrongful death action against the publisher of *Hit Man: A Technical Manual for Independent Contractors* because it gave "detailed factual instructions on how to murder and to become a professional killer" and allegedly incited the actual murder.³⁵ Clearly, *Hitman* was not abstract advocacy, and, indeed, an extraordinary aspect of the case was Paladin's stipulations that it not only knew its instructions might be used by murderers but it actually intended to provide assistance to would-be murderers upon receipt—in fact, that it assisted

in the commission of the crime at issue.³⁶ Nevertheless, the district court granted Paladin's motion for summary judgment and dismissed plaintiffs' claims that Paladin aided and abetted the commission of the murder, holding that these claims were barred by the First Amendment as a matter of law.³⁷

On appeal, the court specifically rejected the claim that the publication was protected under the *Brandenburg* doctrine, observing that the Supreme Court has recognized "that one obviously can prepare, and even steel, another to violent action not only through the dissident 'call to violence,' but also through speech, such as instruction in the methods of terror or other crime, that does not even remotely resemble advocacy, in either form or purpose."³⁸ The court acknowledged that to prevent the punishment or even the chilling of innocent, lawfully useful speech, the First Amendment may in some contexts stand as a bar to the imposition of liability on the basis of mere knowledge that the information imparted could be misused to advance criminal activity. Indeed, the court in *Paladin* noted that *Hitman* not only contained detailed and specific instructions but also was distributed to a narrow target audience.³⁹ An evidentiary requirement of purposeful, concrete action intended to further criminal

activity might be particularly important to reduce exposure to liability of those who publish, broadcast, or distribute information to large, undifferentiated audiences. At the same time, a specific intent requirement does not relieve from liability those who would, for profit or other motive, intentionally assist and encourage crime and then seek refuge in the Constitution:

"
The categories of speech that do not receive constitutional protection include... words likely to incite imminent lawless action.
"

Like our sister circuits, at the very least where a speaker—individual or media—acts with the purpose of assisting in the commission of crime, we do not believe that the First Amendment insulates that speaker from responsibility for his actions simply because he may have disseminated his message to a wide audience. Were the First Amendment to offer protection even in these circumstances, one could

publish, by traditional means or even on the Internet, the necessary plans and instructions for assassinating the President, for poisoning a city's water supply, for blowing up a skyscraper or public building, or for similar acts of terror and mass destruction, with the specific, indeed even the admitted, purpose of assisting such crimes—all with impunity.⁴⁰

The principle identified in *Brandenburg* is that the constitutional guarantees of free speech do not permit the government to proscribe advocacy "except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."⁴¹ When speech takes the form of advocacy—that is, when it appears to be expressed for the purpose of influencing beliefs—the imminent-incitement test is justified as a means to separate abstract expression of ideas from speech likely to cause injury. The same imminence requirement does not necessarily apply to speech intended to facilitate the commission of a crime in a concrete way by, for example, performing a teaching or instructional function.⁴² When speech is designed to help bring about criminal activity and eventually does so, the speaker may be guilty of aiding or abetting the commission of the completed offense.

When speech is specifically intended to induce another to engage in criminal activity, the request or command itself may constitute an inchoate crime, such as conspiracy or solicitation, even when a follow-up violation is not imminent. At least one justice of the U.S. Supreme Court has observed that “long range planning of criminal enterprises—which may include oral advice, training exercises, and perhaps the preparation of written materials—involves speech that should not be glibly characterized as mere ‘advocacy’ and certainly may create significant public danger.”⁴³

The Crime of Solicitation

In attempting to discern the sometimes hazy borderline between constitutionally protected expression of beliefs from unprotected inducement of criminal activity, an essential task is to distinguish speech that simply conveys an idea to another person (that later might be acted upon) from speech that amounts to actual participation in the performance of an illegal act.⁴⁴ The federal criminal code contains a provision, at Title 18, U.S. Code, Section 373, that serves as a general prohibition on the solicitation of violent criminal activity and may serve to illustrate how lines are drawn in this area. Section 373 provides, in pertinent part, that:

Whoever, with intent that another person engage in conduct constituting a felony that has as an element the use, attempted use, or threatened use of physical force against property or against the person of another in violation of the laws of the United States, and under circumstances strongly corroborative of that intent, solicits, commands, induces, or otherwise endeavors to persuade such other person to engage in such conduct, shall

© Digital Stock



be imprisoned not more than one-half the maximum term of imprisonment or...fined not more than one-half of the maximum fine prescribed for the punishment of the crime solicited, or both; or if the crime solicited is punishable by life imprisonment or death, shall be imprisoned for not more than twenty years.⁴⁵

Solicitation proscribed by this statute often will take the form of speech inasmuch as the

phrase “otherwise endeavors to persuade” is intended to be construed broadly to cover any situation “where a person seriously seeks to persuade another person to engage in criminal conduct.”⁴⁶ Criminal “solicitation” and “incitement” are not necessarily synonymous terms. Unlike incitement, the solicitation statute does not impose limits on the immediacy and likelihood of the completed crime. Rather, to be convicted of solicitation, it is sufficient to show that a speaker is serious about crimes of violence being carried out.⁴⁷ Solicitation is an offer or invitation to another to commit a crime with the intent that the crime be committed. The crime is complete once a verbal or other form of request is made with the requisite criminal intent. Solicitation is an inchoate crime, rather than a form of advocacy. The harm is in asking, irrespective of the reaction of the person solicited, and the crime of solicitation is completed by the solicitation itself, whether or not the object of the solicitation ever is achieved, any steps are taken toward accomplishing it, or the person solicited immediately rejects it.⁴⁸

By its terms, the federal solicitation statute requires proof of intent that another person engage in violent unlawful conduct, and the circumstances must strongly corroborate that

intent. Examples of circumstances strongly corroborative of intent as required for a conviction for soliciting a crime of violence “include the defendant offering payment or another benefit in exchange for committing the offense; repeatedly soliciting or discussing at length in soliciting the commission of the offense, or making explicit that the solicitation is serious; believing or knowing that the person solicited had previously committed similar offenses; and acquiring weapons, tools or information for use in committing the offense, or making other apparent preparations for its commission.”⁴⁹ Persuasion accompanied by an inducement, such as a money payment (e.g., murder for hire)⁵⁰ or an explicit or implicit threat or command evidences sufficient criminal intent and should raise no significant First Amendment issue. However, solicitation cases involving persuasion taking the form of advocacy or urging of unlawful action without adequate evidence of inducement could be subject to First Amendment challenges under the *Brandenburg* doctrine. There clearly is potential for ambiguity in this area, but charges based on advocacy of criminal activity without more could implicate imminence requirements.

Line drawing is most difficult, perhaps, in cases involving terrorist religious speech.⁵¹

Exhortations to violence by radical clerics to a body of followers may exhibit aspects of advocacy and religious exercise, both of which are protected by the First Amendment.⁵² Even to the extent that they are subject to First Amendment protections, “[s]ermons in all religions are by their nature not mere speeches that advocate ideas in the abstract but exhortations

**“
...to be convicted
of solicitation, it is
sufficient to show that
a speaker is serious
about crimes of violence
being carried out.
”**

designed to encourage action. Congregants do not listen to these teachings solely out of academic interest or for entertainment. Religion moves followers to act on their beliefs.”⁵³ The question, then, is when does exhortation become criminal inducement? The answer appears to lie at the point where adequate evidence exists to support the conclusion that the speech is more than ideological or rhetorical because it is communicated such that followers would perceive a serious intent to carry out the violent criminal activity urged upon them.

The prosecution of Sheik Omar Abdel Rahman may serve to illustrate this point. Sheik Abdel Rahman, an Islamic scholar and cleric, was convicted for actions arising out of a wide-ranging plot to conduct a campaign of urban terrorism.⁵⁴ The conviction rested substantially on sermons and discussions whereby Abdel Rahman instructed his followers to plan for violent criminal activity. On appeal, his lawyers argued that he was improperly convicted based on the inflammatory content of his speech and for his religious beliefs, both of which should have been protected under the First Amendment. In rejecting this argument and upholding the conviction, the U.S. Court of Appeals for the Second Circuit pointed out that freedom of speech and religion do not extend so far as to bar prosecution of one who uses a public speech or a religious ministry to commit crimes.⁵⁵

The evidence justifying Abdel Rahman’s conviction showed beyond a reasonable doubt that he crossed the line that separates protected speech from criminal conduct. His speeches were not simply the expression of ideas; in some instances they constituted the crime of conspiracy to wage war on the United States (Title 18, U.S. Code, Section 2384) and solicitation of attacks on U.S. military installations, as well as of the murder of

Egyptian President Hosni Mubarak (Title 18, U.S. Code, Section 373).⁵⁶ For example, Abdel Rahman told one of his followers that he “should make up with God...by turning his rifle’s barrel to President Mubarak’s chest, and kill[ing] him.”⁵⁷ On another occasion, speaking to a follower about murdering President Mubarak during his visit to the United States, Abdel Rahman said “Depend on God. Carry out this operation. It does not require a fatwa.... You are ready in training, but do it. Go ahead.”⁵⁸ The evidence further showed that when a follower consulted with Abdel Rahman about the bombing of the United Nations Headquarters, Rahman told him, “yes, it’s a must, it’s a duty.”⁵⁹ On another occasion, when Abdel Rahman was asked by a different follower about bombing the United Nations, he counseled against it on the ground that it would be “bad for Muslims” but added that the follower should instead “find a plan to destroy or to bomb or to...inflict damage to the American Army.”⁶⁰ The court concluded that words of this nature that instruct, solicit, or persuade others to commit crimes of violence violate the law and may be properly prosecuted regardless of whether uttered in private, in a public speech, or in administering the duties of a religious ministry.⁶¹

Conclusion

A person cannot be convicted on the basis of beliefs or the expression of them even if those beliefs favor violence. In *Brandenburg*, the Supreme Court held that the government may not criminalize advocacy of the use of force or violence except where such advocacy is directed at inciting imminent lawless action and is likely to do so. Speech or expressive conduct that does not incite imminent action but also does not amount to advocacy can be punished



without violating the constitutional rights of the speaker when the speech exhibits an unambiguous and serious intention to commit or induce the commission of a violent crime. Far from merely attempting to influence beliefs, such speech constitutes a step toward completed violence. “Speech is not protected by the First Amendment when it is the very vehicle of the crime itself.”⁶² ♦

Endnotes

¹ *Million Youth March, Inc. v. Safir*, 63 F. Supp. 2d 381, 390 (S.D.N.Y. 1999) (citing *U.S. v. Rahman*, 189 F.3d 88, 115 (2nd cir. 1999), cert denied; *Nosair v. U.S.*, 528 U.S. 982 (1999), et seq.

² The First Amendment provides that “congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or of abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.” U.S. Const., Amend. I.

³ *American Communications Ass’n., C.I.O. v. Douds*, 339 U.S. 382, 394 (1950).

⁴ See, e.g., *National Strategy for Homeland Security*, Homeland Security Counsel, October 2007; (retrieved from http://www.dhs.gov/xlibrary/assets/nat_strat_homelandsecurity_2007.pdf). The terrorist attacks on September 11, 2001, were acts of war against the United States and the principles of freedom, opportunity, and openness that define the American way of life. Today, homeland security is principally defined as a concerted national effort to prevent terrorist attacks within the United States.

⁵ 18 U.S.C. § 373(a).

⁶ See, e.g., Model Penal Code § 5.02(1) (“A person is guilty of solicitation to commit a crime if with the purpose of facilitating its commission he commands, encourages, or requests another person to engage in specific conduct that would constitute such crime or an attempt to commit such crime, or would establish his complicity in its commission or attempted commission.”).

⁷ 189 F.3d. at 117.

⁸ See, Model Penal Code §§ 5.01 (criminal attempt), 5.02 (criminal solicitation), 5.03 (criminal conspiracy); *Mizrahi v. Gonzales*, 492 F.3d. 156, 160-61 (2nd Cir. 2007).

⁹ “Terrorist Financing,” *U.S. Attorney’s Bulletin*, 51, no. 4 (July 2003): 6; (retrieved from http://www.usdoj.gov/usao/eousa/foia_reading_room/usab5104.pdf).

¹⁰ *Double Inchoate Crimes*, 26 Harv. J. on Legis. 1, 7-9 (1989).

¹¹ *Id.*

¹² *Id.*

¹³ *Sable Communications of California, Inc. v. F.C.C.*, 492 U.S. 115 (1989).

¹⁴ *Beuharnais v. Illinois*, 343 U.S. 250 (1952).

¹⁵ *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1952).

¹⁶ *Brandenburg v. Ohio*, 395 U.S. 444 (1969). There is a distinction between laws that criminalize threatening speech based on its content and laws that criminalize the incitement of illegal activity beyond the speech itself. In *Virginia v. Black*, 538 U.S. 343 (2003), the court held that a state may ban cross burning carried out with the intent to intimidate but that a provision in the Virginia statute treating any cross burning as prima facie evidence of intent to intimidate violated the First Amendment. *Id.* at 358-59. With respect to criminalizing threatening speech, “the speaker need not actually intend to carry out the threat. Rather, a prohibition on so-called true threats is justified when it ‘protect[s] individuals from the fear of violence’ and ‘from the disruption that fear engenders,’ in addition to protecting people ‘from the possibility that the threatened violence will occur.’” *Id.* at 360 (citing *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992)). However, as *Black* demonstrates, there may be circumstances, such as when conducted on private property in connection with a KKK rally, when even the inherently offensive act of cross burning is a form of protected expression. Accordingly, the constitutional status of legislation that purports to regulate hate speech or threatening speech based on the content of the speech itself may be less than clear. In contrast, statutes that criminalize speech that incites violent illegal action usually do not pose constitutional problems.

¹⁷ *Id.*

¹⁸ *Id.* at 449.

¹⁹ *Id.* at 449, FN 3.

²⁰ *Id.* at 446.

²¹ *Id.* at 448 (quoting *Noto v. United States*, 367 U.S. 290 (1961)).

²² 414 U.S. 105 (1973).

²³ *Id.* at 107.

²⁴ *Id.* at 108.

²⁵ *Id.* at 108-09.

²⁶ See, *Ashcroft v. Free Speech Coalition*, 122 S. Ct. 1389 (2002) (The mere tendency of speech to encourage unlawful acts is not a sufficient reason for banning it.).

²⁷ See, e.g., *U.S. v. Damon*, 676 F.2d 1060 (5th Cir. 1982); *Alliance to End Repression v. City of Chicago*, 742 F.2d 1007 (7th Cir. 1984); *Gay Lesbian Bisexual Alliance v. Pryor*, 110 F.3d 1543 (11th Cir. 1997).

²⁸ 282 F.3d 626 (9th Cir. 2002), *cert. denied*, 537 U.S. 993 (2002) (*see*, note 41 below).

²⁹ *Id.* at 631.

³⁰ *Id.* at 631-32.

“A person cannot be convicted on the basis of beliefs or the expression of them even if those beliefs favor violence.”

³¹ See W. Sadurski, *Freedom of Speech and Its Limits* (Norwell, MA: Kluwer Academic Publishers, 2002), 69.

³² *Id.*

³³ See, *A Test For Criminally Instructional Speech*, 91 Virginia Law Rev. 1973, 1987-91 (2005) (“[M]ere advocacy does not intend to foster lawless action, is not likely to do so, or both. In each case, it is completely protected. Incitement, by contrast, both intends to foster lawless action and is likely to do so. It is unprotected. Finally, speech that aids and abets both intends to foster lawless action and actually does so. It too is unprotected by the First

Amendment and faces penalties under the criminal law.”).

³⁴ In the federal criminal code, aiding and abetting is encompassed as a rule of criminal culpability at 18 U.S.C. § 2(a), which provides: “Whoever commits an offense against the United States or aids, abets, counsels, commands, induces, or procures its commission is punishable as a principle.” To convict for aiding and abetting a criminal offense, the evidence must establish that the offense actually was committed. See, e.g., *U.S. v. Korab*, 893 F.2d 212, 213 (9th Cir. 1989).

³⁵ *Rice v. Paladin Enterprises, Inc.*, 128 F.3d 233, 239 (4th Cir. 1997).

³⁶ *Id.* at 242.

³⁷ *Id.*

³⁸ *Id.* at 265 (internal citation omitted).

³⁹ *Id.* at 247.

⁴⁰ *Id.* at 248.

⁴¹ 395 U.S. 444, 447.

⁴² For example, 18 U.S.C. § 231(a)(1) prohibits a discrete type of conduct involving expression by making it a crime to teach or demonstrate the use, application, or making of any firearm, explosive, or incendiary device, as well as any technique capable of causing injury or death to persons, knowing, having reason to know, or intending that the same will be unlawfully used in furtherance of a civil disturbance. See, *U.S. v. Featherstone*, 461 F.2d 1119 (5th Cir. 1972), *cert. denied*, 409 U.S. 991. Specific teaching or instruction of particular persons also can constitute the crime of aiding and abetting various different completed offenses. See, *U.S. v. Knapp*, 25 F.3d 451, 457 (7th Cir. 1994); *U.S. v. Rowlee*, 899 F.2d 1275 (2nd Cir. 1990); *U.S. v. Buttorf*, 572 F.2d 619 (8th Cir. 1978) (all holding that persons who counsel and assist others to file false or fraudulent tax returns act outside the zone of mere advocacy protected under the *Brandenburg* doctrine).

⁴³ *Stewart v. McCoy*, 537 U.S. 993, 994 (2002) (statement of J. Stevens respecting the denial of the petition for writ of certiorari).

⁴⁴ See, 1997 Report on the Availability of Bombmaking Information (prepared

by the U.S. Department of Justice as required by section 709(a) of the Antirterrorism and Effective Death Penalty Act of 1996) (hereinafter: *Bombmaking Report*) (retrieved from <http://www.cybercrime.gov/bombmakinginfo.html>) (“This critical distinction—between advocacy of unlawful conduct on the one hand, and ‘instructions’ for unlawful conduct, on the other—was recognized by Professor Thomas Emerson in his seminal treatise on the First Amendment: [C]onduct that amounts to ‘advice’ or ‘persuasion’ should be protected; conduct that moves into the area of ‘instructions’ or ‘preparations’ should not. The essential task would be to distinguish between simply conveying an idea to another person, which idea he later may act upon, and actually participating with him in the performance of an illegal act. It is true that the distinction does not offer automatic solutions and that courts could easily disagree on any particular set of facts. But this process of decision making is related to the nature of ‘expression’ and the functions and operation of a system of freedom of expression. It is therefore a rational method of approaching the problem. Thomas Emerson, *The System of the Freedom of Expression* 75 (1970).”).

⁴⁵ 18 U.S.C. § 373(a) (*Thompson/West* 2007).

⁴⁶ *United States v. Buckalew*, 859 F.2d 1052, 1054 (1st Cir. 1988) (quoting S. Rep. No. 307, 97th Cong., 1st Sess. 183-84 (1982)).

⁴⁷ See, *U.S. v. Sattar*, 272 F. Supp. 2d 348, 374 (S.D.N.Y. 2003) (In upholding the sufficiency of an indictment of a member of a group engaged in international terrorism, known as The Islamic Group, aka Gam’a al-Islamiyya, et. al (IG), for violating 18 U.S.C. § 373, the court said: “The defendant’s arguments that the allegations are insufficient in that they fail to show that Sattar was serious about the crimes of violence being carried out is also without merit. The allegations that Sattar participated in drafting and distributing the fatwa and disseminating Sheik Abdel Rahman’s renunciation of IG’s cease fire are far more

specific as to his intent than the example posed by the defendant of someone who shouts ‘kill the empire.’”

⁴⁸ The crime of solicitation under 18 U.S.C. § 373 potentially is distinguishable from other conspiracy crimes that may be committed by speech but also must be accompanied by overt acts of co-conspirators that were animated by the speech. For example, 18 U.S.C. § 2384 prohibits seditious conspiracy. See, *Rahman*, 189 F.3d at 114-15. Sheik Abdel Rahman was convicted of violating both § 2384 and § 373 for his involvement in a terrorist conspiracy involving conspiracy to bomb buildings and soliciting assassination. More recently, Ali Al-Timini was convicted in 2005 and received a life sentence following indictment under both § 373 and § 2384 for soliciting others to engage in a conspiracy to wage war against the United States. See, *U.S. v. Khan*, 309 F. Supp. 2d 789, 821 (E.D. Va 2004), *U.S. v. Chandia*, 2008 WL 186180, FN1 (4th Cir. 2008). Khan was convicted for acting upon Al-Timini’s urging to fight for the Taliban against the United States and actually took some overt acts in furtherance of that suggestion.

⁴⁹ *U.S. v. Hale*, 448 F.3d 971, 983 (7th Cir. 2006).

⁵⁰ See, e.g., *U.S. v. Devorkin*, 159 F.3d 465 (9th Cir. 1996) (Upheld a conviction for solicitation, 18 U.S.C. § 373, where the underlying felony solicited was murder for hire, under 18 U.S.C. § 1958. Compare, *U.S. v. Chong*, 419 F.3d 1076 (9th cir. 2005) (Murder for hire requires as an element of the offense a promise or agreement to pay something of pecuniary value in exchange for seeking a murder). The involvement of a money payment is not a necessary element of the crime of solicitation but the existence of a payment or an agreement to pay money is evidence that strongly corroborates intent that a crime of violence be committed).

⁵¹ For a treatment of the complexity added when free exercise principles are intertwined with minatory religious speech, see, e.g., *Terroristic Speech: Giving the*

Devil the Benefit of the First Amendment Free Exercise and Free Speech Clauses, 28 SHLR 1230 (1998).

⁵² See, *Incitement in the Mosques: Testing the Limits of Free Speech and Religious Liberty*, 27 WTLR 3, 29-30 (2005).

⁵³ *Id.* at 63.

⁵⁴ 189 F.3d at 103. See also, *United States v. Salameh*, 152 F.3d 88 (2d Cir. 1998) (affirming convictions of all four defendants).

⁵⁵ *Id.* at 117.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* See also, *Id.* at 104 (“The government adduced evidence at trial showing the following: Abdel Rahman, a blind Islamic scholar and cleric, was the leader of the seditious conspiracy, the purpose of which was *jihad*, in the sense of a struggle against the enemies of Islam. Indicative of this purpose, in a speech to his followers, Abdel Rahman instructed that they were to ‘do *jihad* with the sword, with the cannon, with the grenades, with the missile... against God’s enemies.’ Govt. Ex. 550 at 22. Abdel Rahman’s role in the conspiracy generally was limited to overall supervision and direction of the membership, as he made efforts to remain a level above the details of individual operations. However, as a cleric and the group’s leader, Abdel Rahman was entitled to dispense *fatwas*, religious opinions on the holiness of an act, to members of the group sanctioning proposed courses of conduct and advising them whether the acts would be in furtherance of *jihad*”).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² 128 F.3d 233, 244 (citing *U.S. v. Varani*) 435 F.2d. 758, 762 (6th Cir. 1970).

Law enforcement officers of other than federal jurisdiction who are interested in this article should consult their legal advisors. Some police procedures ruled permissible under federal constitutional law are of questionable legality under state law or are not permitted at all.

The Bulletin Notes

Law enforcement officers are challenged daily in the performance of their duties; they face each challenge freely and unselfishly while answering the call to duty. In certain instances, their actions warrant special attention from their respective departments. The *Bulletin* also wants to recognize those situations that transcend the normal rigors of the law enforcement profession.



Officer Chaulklin

Officer David Chaulklin of the Division of Capitol Police in Richmond, Virginia, responded to a report of a man contemplating suicide on the roof of a seven-level parking deck. When Officer Chaulklin arrived, a security guard informed him that the individual was sitting on the top ledge and not responding. After Officer Chaulklin made contact, the man advised that he was having a bad day, turned his back, and placed his legs over the ledge. Quickly, Officer Chaulklin grabbed him around the waist, pulled him to the ground, and secured him with the assistance of the security guard. Later, officers recovered a loaded 20-gauge shotgun from the individual's vehicle.



Agent Strand



Trooper Vanderport



Sergeant Klein

One morning, Agent Joe Strand of the U.S. Customs and Border Protection, Trooper Steve Vanderport of the Minnesota State Patrol, and Sergeant Jeff Klein of the Roseau, Minnesota, Police Department responded to call of an infant not breathing. Knowing that the ambulance would take time to arrive, the officers rushed to the scene. Upon

arrival, the officers confirmed that the 4-month-old infant was not breathing and had no heart-beat. Immediately, they began CPR. Agent Strand performed rescue breathing, Trooper Vanderport provided chest compressions, and Sergeant Klein maintained telephonic communication with the ambulance crew and attended to the child's mother. After several minutes, their efforts were rewarded when the baby began breathing on his own and showing a weak pulse. The efforts of Agent Strand, Trooper Vanderport, and Sergeant Klein saved this baby's life.

Nominations for the *Bulletin Notes* should be based on either the rescue of one or more citizens or arrest(s) made at unusual risk to an officer's safety. Submissions should include a short write-up (maximum of 250 words), a separate photograph of each nominee, and a letter from the department's ranking officer endorsing the nomination. Submissions should be sent to the Editor, *FBI Law Enforcement Bulletin*, FBI Academy, Law Enforcement Communication Unit, Hall of Honor, Quantico, VA 22135.

U.S. Department of Justice
Federal Bureau of Investigation
FBI Law Enforcement Bulletin
935 Pennsylvania Avenue, N.W.
Washington, DC 20535-0001

Periodicals
Postage and Fees Paid
Federal Bureau of Investigation
ISSN 0014-5688

Official Business
Penalty for Private Use \$300

Patch Call



The patch of the Defiance, Ohio, Police Department depicts the city as it began. In 1794, General "Mad" Anthony Wayne established Fort Defiance as a base for operations against all opposing forces. The city derived its name from this pioneer fort.



The Pierre, South Dakota, Police Department serves the state capital. The agency's patch features the state capitol building and a shield with the colors of the United States. Red symbolizes courage, strength, and valor; white stands for peace and truth; and blue signifies vigilance, perseverance, and justice.