



December 1991

# FBI

## **Law Enforcement Bulletin**



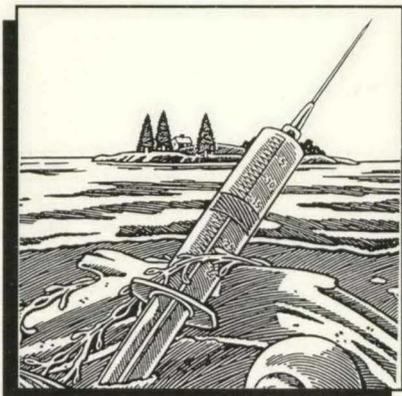
***U.S. Law Enforcement  
During World War II***



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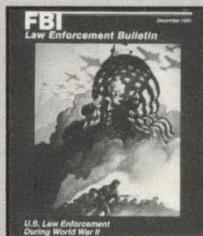
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**Cover:** The Bulletin commemorates the 50th anniversary of the attack on Pearl Harbor with an article describing the changes on American law enforcement brought about by World War II. All posters and photos used with this article were obtained from the National Archives.

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William S. Sessions, Director

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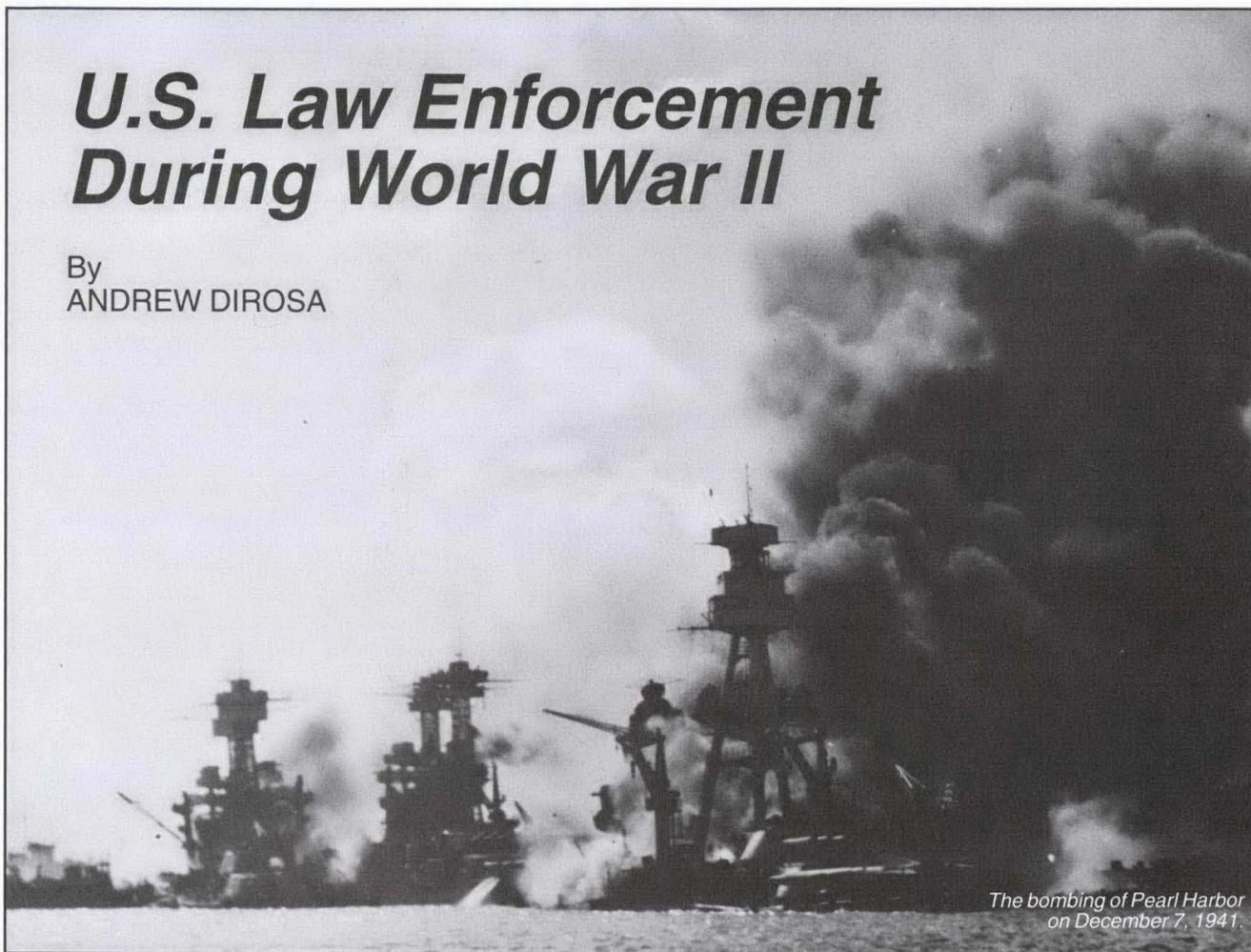
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# *U.S. Law Enforcement During World War II*

By  
ANDREW DIROSA



*The bombing of Pearl Harbor  
on December 7, 1941.*

**T**he bombing of Pearl Harbor is one of a handful of events that, by its drastic nature, produced immediate and profound change. Within days of the attack, the United States was at war with the three Axis powers—Germany, Italy, and Japan—that had collectively overrun Europe, much of North Africa, and the Far East. America's major allies in the war effort—England and the Soviet Union—had been battered by the lightening speed of Hitler's war and needed help badly. The United States, for its part, was just begin-

ning to recover from the devastating depression that had drained capital, as well as hope, for more than a decade.

However, as American industry, guided by the War Department, began to deliver the weapons of battle in staggering quantities, the tide of war gradually turned. To accomplish this manufacturing miracle, American society was almost completely transformed. Every aspect—from entertainment to government, from sports to product research—was vastly affected by the war.

Law enforcement, too, changed dramatically during the war years. Just as the "gangster era" was coming to a close, the war heralded different criminal opportunities and new anxieties for the public. Espionage, little more than a remote concept during much of American history, became a national concern. New regulations were developed to provide effective rationing enforcement. Even traditional crimes, such as burglary or interstate transportation of restricted goods, were enforced with increased vigilance, usually with an eye toward the war

effort. And, as with most other social institutions, the changes brought about by the war continued to shape law enforcement into the postwar era.

### NATIONAL SECURITY

Even before the outbreak of hostilities in Europe, American law enforcement agencies began preparing for the possibility of war. Officials from Federal, State, and municipal agencies, as well as the Army and Navy, held conferences to begin formulating a wartime strategy.<sup>1</sup>

When the war in Europe began, concerns mounted for the integrity of American borders. During the summer of 1940, the size of the Border Patrol doubled. On May 22, 1940, the Immigration and Naturalization Service, responsible for the administration of the 3.5 million legal aliens residing in the United

States, was made part of the Department of Justice.<sup>2</sup>

As the war continued to rage in Europe, Federal authorities began to track nationals from Axis countries residing in the United States who could pose a threat to national security. This also included Americans suspected of engaging in pro-Axis activities.<sup>3</sup>

However, U.S. Government officials, remembering the mistreatment of German-Americans during the last war, warned against victimization of citizens from Axis Nations. As noted in the January 1942, *FBI Law Enforcement Bulletin*:

"The FBI has continuously cautioned against any attitude that suggests every alien as a fifth columnist. Oppression of the innocent, it has maintained, only makes recruiting of such forces easier....The FBI has, since the fall of

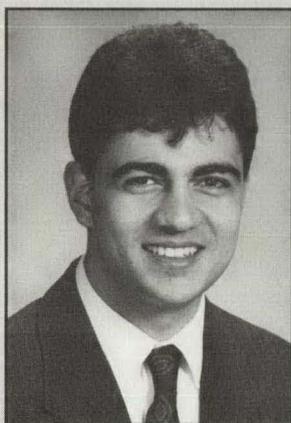
1939, urged citizens to remain calm, to avoid hysteria, to discourage vigilantism, to report all suspected fifth columnists to the FBI and to act as the eyes and ears of Uncle Sam to spot subversive activities, but to leave the actual investigation of cases to duly qualified police officers."<sup>4</sup>

### AMERICA AT WAR: CHALLENGES FOR LAW ENFORCEMENT

While the American military mobilized for the two-front war in Europe and the Pacific, U.S. law enforcement agencies on the Federal, State, and local level confronted the problem of crime on the homefront. Though espionage and sabotage were a constant concern, there were remarkably few incidents of foreign-directed activity on American soil during the war.

Often overlooked, however, were the domestic problems either created or intensified by the war. By and large, these potentially disastrous problems were faced on the local level by small police and sheriff's departments. In most cases, officers from these departments had volunteered or were drafted into the military, leaving agencies with fewer officers to confront the new demands of wartime law enforcement.

As a result, many departments activated auxiliary and reserve police units to help augment depleted forces. These units were largely made up of men who, because of age or health requirements, could not serve in the military. These indi-



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**“Police departments around the Nation rose to meet the challenges of wartime law enforcement and newly emerging criminal activity.”**

## Espionage on the Homefront

During the First World War, German agents and Americans sympathetic to the German cause succeeded in staging acts of sabotage on American soil. To avoid a recurrence of this, President Franklin Roosevelt, on September 6, 1939, signed into law a directive giving the FBI responsibility for all matters relating to espionage, sabotage, and violations of neutrality laws.

In early 1940, the FBI learned of an extensive ring of German spies attempting, among other things, to smuggle blueprints for American weapons to Germany. A citizen named William Sebold first brought the ring to the attention of American authorities after he was contacted by the Gestapo, the German secret police, who had threatened harm to his relatives living in Germany if he did not cooperate with them. With his assistance, the Bureau set a trap for the members of the ring, complete with phony shortwave messages, doctored defense documents, offices with two-way mirrors, and hidden cameras.

For nearly 2 years, FBI Agents collected information on the German spy ring. Then, during the weekend of June 28, 1941, the FBI sprang the trap, seizing 33 people involved in the conspiracy, including Frederick Joubert Duquesne—a professional German spy for 40 years. In January 1942, the spies received combined prison terms exceeding 300 years.

The FBI also sought to safeguard the production of war materials by providing security training

to defense plant managers. With the cooperation of the War Department (later the Department of Defense), the FBI contacted factories producing war materials. Agents alerted plant managers of Axis recruitment strategies and sabotage techniques. This program proved very effective not only in making defense plants more secure but also in establishing a cooperative relationship between Federal authorities and industry.

However, the threat of German sabotage remained. During the summer of 1942, Nazi U-Boats landed two teams of saboteurs on the American east coast. One group paddled ashore in New York, landing on Long Island; the other on a deserted beach near Jacksonville, Florida.

The two groups carried a large amount of American currency and enough explosives to last years. They were directed by their superiors in Germany to spread terror

—to dynamite the HellGate Bridge in New York, to place timebombs in railroad stations, to start fires in department stores, and to make it appear as if an army of saboteurs was at work.

Within weeks of landing on American soil, however, all of the saboteurs were in FBI custody. None had succeeded in committing any act of sabotage before they were apprehended. Although a few other attempts were made, there were no successful acts of enemy-directed sabotage committed on American soil during World War II.



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*The wreckage of a Japanese Zero being raised shortly after the attack on Pearl Harbor.*



*One of several Japanese two-man submarines that were either captured or ran aground on the American west coast during the months following the attack.*

viduals did, however, make an invaluable contribution to the war effort by bolstering agencies and by freeing full-time officers to combat criminal activity.<sup>5</sup>

While departments across the country had to confront the special challenges produced by the war, the demands placed on the Washington, D.C., Metropolitan Police Department, though in some ways unique, were emblematic of problems facing departments in communities around the country. Over 340 officers from the department were

called to join the Armed Services during the war, leaving a reduced force to protect the power plants, bridges, and other vital strategic sites in the city. In addition, many officers were assigned to augment the White House police force, as well as to guard embassies and other government buildings.

These responsibilities, of course, were in addition to the department's regular patrol functions. Shortly after the attack on Pearl Harbor, 50 additional officers were hired to alleviate the personnel

shortage. However, it was the selfless civic spirit of thousands of citizens, volunteering to form auxiliary police units, that freed officers for patrol duties. The new Washington Police Academy was built and helped to train 6,000 recruit volunteers. These auxiliary officers assisted in administrative and technical, as well as patrol, functions throughout the war.<sup>6</sup>

### **CRIME PROBLEMS**

Although the rates for many crimes fell and prison populations actually declined during the war, law enforcement was faced with a change in crime patterns brought on by the war effort.<sup>7</sup> Police departments around the Nation rose to meet the challenges of wartime law enforcement and newly emerging criminal activity.

### **Juvenile Delinquency**

The strains placed by the war on the social fabric of America were dramatic. Thousands of men—fathers, sons, brothers, and uncles—were called into military service, leaving women, most of whom had never worked outside the home, to fill positions on the assembly lines and in the offices. These women usually worked long hours and spent the time they had away from the job tending to household tasks.

The resulting lack of parental control contributed to a sharp rise in juvenile delinquency. Without effective supervision, many children began engaging in criminal activity ranging from seemingly petty crimes—shoplifting and annoying neighbors—to more serious

ones, such as illegal gambling, burglary, and vandalism.

Other factors also contributed to this increase in lawlessness among the Nation's youth. Many families had to move far from their hometowns in order to be near the defense plants that offered employment. The uprooting of so many families caused a general decline in the adherence to social norms and to invisible codes of community behavior.<sup>8</sup> In addition, the unlikely, but constant, threat of enemy air attacks also helped to create an atmosphere of bewilderment and disorientation among children.

In an effort to confront the growing problem of juvenile delinquency, law enforcement agencies began to establish crime prevention bureaus and to assign officers special duties aimed at deterring juvenile crime.<sup>9</sup> Officers were also urged to stop and talk to any youths encountered during patrols, reinforcing positive codes of behavior.

### Blackouts and Traffic Control

Although the likelihood of air attack was extremely remote, American law enforcement and civil defense agencies prepared for the possibility with steadfast vigilance. During the first months of the war, especially, citizens on both coasts feared an air blitz was imminent and looked toward law enforcement to offer leadership and direction.

In this area, American officials could learn from the events occurring in Europe. Throughout the summer of 1940, England was subjected to devastating air raids by the Luftwaffe, the German Air Force. While these raids caused consider-

able destruction, there was little panic among the population due to effective civil defense strategies and well-developed evacuation plans. American intelligence officials stationed in England witnessed the raids and the almost methodical response of the British public.

When America entered the war, the FBI sponsored several regional conferences, called traffic schools, in which local and State law enforcement officials were briefed on traffic control procedures during blackouts and/or air raids. Nonilluminating traffic signals, developed at the urging of the War Department, replaced standard traffic lights in some cities. In addition, the sale of even simple street maps was restricted since they could assist enemy agents attempting to locate defense plants or other sensitive installations.

Gasoline rationing, however, limited the number of cars on the road, easing the burden of traffic enforcement. And the development of radar, crucial to England's victory in the Battle of Britain, reduced the likelihood of a sneak air attack in the skies over America. While blackouts continued throughout the war (New Year's Eve celebrations were cancelled in Times Square through 1945), they were generally accepted as little more than an inconvenience by the American public.

### Rationing Enforcement

The rationing of consumer goods caused by the war, however, had a profound effect upon the daily lives of most Americans. In addition to gasoline, the sale of almost all consumer products from basic food stocks, such as sugar and flour, to metal screws and nails was re-



stricted. Although most Americans accepted rationing as a sacrifice necessary for the war effort, others sought to capitalize on the shortage of goods caused by these restrictions.

These criminals ranged from small time hoods who raided warehouses and delivery trucks to organized crime figures who used the war to further entrench themselves into society. All of these opportunists tried to profit illegally from the shortages caused by the war.

However, due to increased cooperation between law enforcement agencies at all levels, many of these rings were broken before they could adversely effect the war effort. For example, a black market operation that attempted to divert nylon—essential to the manufacture of parachutes—from military use to the production of hosiery was typical. The ring, operating from sites in

Pennsylvania and New Jersey, was smashed by Federal agents before its activities could significantly effect the supply of nylon for the military.<sup>10</sup>

### CONCLUSION

World War II induced a transformation in American society that changed many institutions dramatically, including law enforcement. The war opened new opportunities to criminals but also helped to forge a closer relationship between Federal, State, and local law enforcement agencies which, at all levels, confronted common adversaries to the war effort.

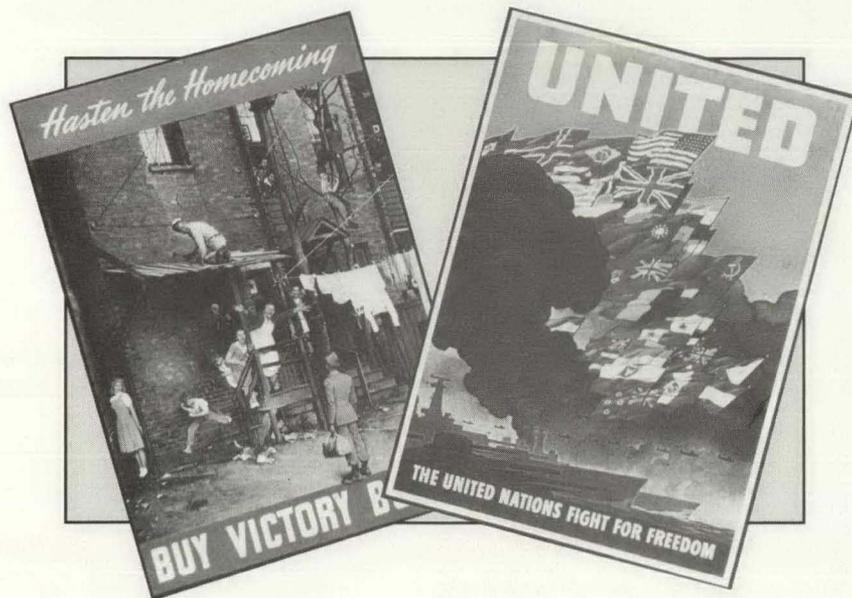
Products and technologies developed during the war, from synthetic rubber to radar, had a direct impact upon law enforcement. Other factors, including the large number of wartime juvenile delinquents who entered adulthood dur-

ing the 1950s and 60s—when crime rates began to rise dramatically—had a more subtle effect.

The war affected law enforcement in other ways, too. Many returning servicemen would seek employment in the police departments serving the sprawling suburbs that developed after the war. Espionage—and the fear of communist subversion—continued to be a national preoccupation for many years following the war.

During the war, law enforcement agencies at all levels contributed significantly to eventual victory. Law enforcement authorities confronted changing crime trends, as well as new public needs and expectations. Together, Federal, State, and local agencies provided the American people with effective law enforcement and a sense of security during some of the darkest days of this Nation's history.

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### Footnotes

<sup>1</sup> J. Edgar Hoover, "America at War," *FBI Law Enforcement Bulletin*, 11, January 1942, 1.

<sup>2</sup> U.S. Department of Justice, *Proceedings: Federal-State Conference on Law Enforcement Problems of National Defense, August 5-6, 1940*, (Washington, D.C.: Government Printing Office, 1940).

<sup>3</sup> "FBI and War Department Apprehend Axis Nationals," *FBI Law Enforcement Bulletin*, 11, January 1942, 32.

<sup>4</sup> *Supra* note 2.

<sup>5</sup> William J. Bopp, M.A. and Donald O. Schultz, M.P.A., *Principles of American Law Enforcement and Criminal Justice* (Springfield, Illinois: Charles C. Thomas, 1975), 117-119.

<sup>6</sup> *Ibid*, reprinted therein with editorial adaption from Howard V. Covell's "A Brief History of the Metropolitan Police Department," (Washington, DC, 1946), 7-9.

<sup>7</sup> *Supra* note 5.

<sup>8</sup> John Edgar Hoover, "Juvenile Delinquency Strikes Home," *FBI Law Enforcement Bulletin*, May-June 1943, 1.

<sup>9</sup> *Ibid*.

<sup>10</sup> *FBI Facts and History*, U.S. Department of Justice, Federal Bureau of Investigation, printed by the U.S. Government Printing Office, 1990, p. 14.

# The Bulletin Reports

## Crime in the United States—1990

Final Uniform Crime Reporting (UCR) figures indicate that 14.5 million Crime Index offenses were committed in 1990. These statistics, released in August 1991, are included in the FBI's annual publication, *Crime in the United States—1990*.

The publication includes a compilation of data collected from 16,000 law enforcement agencies nationwide, representing 96 percent of the U.S. population. Estimates are also given for nonreporting areas.

The Crime Index is comprised of the crimes of murder, forcible rape, robbery, aggravated assault, burglary, larceny-theft, motor vehicle theft, and arson. These crimes are grouped collectively into violent and property categories to gauge overall fluctuations in the volume and rate of crime.

Sections of the publication are dedicated to the volume of each crime, the rate per 100,000 inhabitants, and the nature of the crime. State, city, and geographical data are also provided.

Other areas covered in the publication include crime trends, crime clearances, and arrests. Coverage is also given to law enforcement officers killed and assaulted in the line of duty.

*Copies of this publication can be obtained by contacting the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402.*

## Rand Research Report on Drugs

*Money From Crime: A Study of the Economics of Drug Dealing in Washington, D.C.*, is one of the latest research reports on drug use published by the Rand Corporation. The data and the subsequent analyses contained in this report would be of interest to those concerned with drug policy and urban poverty.

The report examines the role of street drug selling in the economic life of persons at risk of long-term poverty. It estimates the number of persons involved in street distribution, describes their characteristics, and discusses their earnings. It also offers insight into the attitudes of adolescent drug dealers.

*Copies of this report and other reports published by the Rand Corporation that address drug problems and policy issues can be obtained from the Rand Drug Policy Research Center, P.O. Box 2138, 1700 Main Street, Santa Monica, California 90406-2138, 1-213-393-0411.*

## Monograph on Police Ethics

The Florida Criminal Justice Executive Institute researches timely issues and concerns facing today's law enforcement executives. It has published a monograph, *Against Brutality and Corruption: Integrity, Wisdom, and Professionalism*, written by Edwin J. Delattre, Ph.D. Dr. Delattre is a renowned educator and currently is the Olin scholar in applied ethics at Boston University.

The monograph covers such issues as ethics and professional competence, police corruption, brutality, and the social context of policing. It also addresses the moral authority of leadership and the duty of police executives to promote professional integrity in their departments.

*Copies of this monograph can be obtained from the Florida Criminal Justice Executive Institute, P.O. Box 1489, Tallahassee, Florida 32302, 1-904-488-8771.*

**The Bulletin Reports**, a collection of criminal justice studies, reports, and project findings, is written by Kathy Sulewski. Send your material for consideration to: *FBI Law Enforcement Bulletin*, Room 7262, 10th & Pennsylvania Ave., NW, Washington, DC 20535.

(NOTE: The material presented in this section is intended to be strictly an information source and should not be considered as an endorsement by the FBI for any product or service.)

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# Child Abuse

## Munchausen's Syndrome by Proxy

By  
KATHRYN A. HANON

**T**he range of investigations for modern day law enforcement officers is unparalleled in the history of criminology. Investigators must use innovative techniques in order to solve today's more sophisticated, bizarre criminal acts.

For example, cases of an obscure form of child abuse—Munchausen's Syndrome by Proxy (MSBP)—are being seen more and more frequently. MSBP is a form of child abuse that involves long-term physical abuse, usually by a parent.

However, in order to conduct MSBP investigations effectively, it is necessary to understand the complexity of the disorder and the unorthodox investigative procedures that may be necessary to prosecute the case successfully. This article discusses the disorder and how officers should approach the investigation of this crime.

### Defining the Syndrome

Munchausen's Syndrome by Proxy is a form of child abuse in which the abuser fabricates an illness in a child. When the child is taken for medical care, the parent tells physicians that there is no apparent cause for the illness, knowing that this will most likely result in the hospitalization of the victim for

tests or observation. It is during this period of hospitalization that the actual abuse usually occurs. In one known case of MSBP, a mother injected fecal material into the victim; in another case, a mother suffocated and then revived her child on several occasions during the hospitalization period.

Symptoms of MSBP are generally recognizable by the time the victim reaches 14 months of age. However, MSBP is usually not di-

agnosed until the child is approximately 3 years of age. The mortality rate for this type of abuse is high.

There are both mild and severe cases of MSBP. In mild cases, the parent fabricates a history of a non-existent condition in the child. For example, some parents contaminate their children's feces with blood and claim that they passed the blood.

In severe cases of MSBP, a parent actually harms the child in order to create symptoms of an ill-



ness. Suffocation or blood poisoning are typical in this form of MSBP.

### **Offender and Victim Characteristics**

Most MSBP offenders are mothers of the victims. However, there have been cases where the offender was the father or a person outside of the family.

MSBP offenders are uncharacteristically calm in view of the victims' baffling medical symptoms, and they welcome medical tests that are painful to the children. They also maintain a high degree of involvement in the care of their children during treatment and will excessively praise the medical staff. They seem very knowledgeable of the victims' illnesses, which may indicate some medical study or training. They may also have a history of the same illnesses being exhibited by their victims.

In addition, MSBP offenders typically shelter their victims from outside activities, such as school or playing with other children, allowing only certain persons to be close to them. They may even speak for the victims when anyone approaches them. MSBP offenders are attentive to their victims, even though they are harming them. They seem to find emotional satisfaction when their child is hospitalized because the hospital staff believes that their attentiveness indicates that they are good parents.

Victims of MSBP can be of either gender. They are often immature for their age, due to their forced dependency on the abusing parent, and female victims may assume

multiple roles. For example, they may take on a motherly role as they imitate their closest role model—the offender—and then regress to the role of a sick, weak, dependent child.

### **Characteristics of Non-offending Parent**

MSBP victims are rarely abused by their fathers. Passive and indifferent, the father does not play a primary role in the care of the sick child. His hospital visits with the victim are limited, and although he may be suspicious of the baffling course of his child's illness, he is unable to stop the child's abuse.

### **The Victim's Siblings**

There is a good chance that younger siblings of MSBP victims will also be abused. When offenders stop abusing their victims—either because the child gets older and more mature or because the child dies—they may look to their other

children in order to continue the abuse. A study of the medical history of these children may indicate whether there is a pattern of abuse within the family.

### **Recognizing MSBP**

Because cases of MSBP are oftentimes first recognized in hospitals or doctor's offices, it is imperative that the medical community be aware of this type of abuse. MSBP should be suspected if illnesses in children remain unexplained after medical testing, and there is a history of multiple visits to different hospitals and physicians.

Primarily, observing an ill child during a hospital stay can support a suspicion of MSBP. In such instances, the suspected victim should be placed in an open ward, where there is less opportunity for the offender to continue the abuse. This also gives hospital personnel a chance to observe any changes in the patient's symptoms. If the

“ ***Munchausen's Syndrome by Proxy is a form of child abuse in which the abuser fabricates an illness in a child.*** ”



*Investigator Hanon is with the Orlando, Florida, Police Department.*

symptoms cease and then recur when the victim is again readily accessible to the offender, in all likelihood, MSBP is taking place.

### A Team Approach

When law enforcement officials are contacted concerning suspected cases of MSBP, it is critical to use a multidisciplinary approach to the case. Medical staff, child protection teams, social services personnel, and hospital administrators, as well as prosecutors and law enforcement personnel, should assist in the investigation.

The early involvement of prosecutors is especially helpful in MSBP cases because there is little existing case law to which investigators can refer for guidance. Therefore, it is important to coordinate the investigation with those who will prosecute the case.

Medical staff, including physicians and nurses who have attended the victim, may suspect abuse before law enforcement's involvement in the case, and therefore, may be able to contribute valuable information to the investigation. However, for security reasons, investigators should limit the number of staff who are aware of the investigation. Investigators should gain the cooperation of some primary care personnel during the investigation, and after the investigation is completed, officials should strongly consider seeking psychological treatment for both the victim and the offender.

Many States require that investigators inform social services of any child abuse investigations they conduct. Those in social services



can help investigators follow particular guidelines and meet set time constraints for resolving this type of case. It may also be necessary to have social services waive certain requirements because MSBP investigations are sometimes lengthy due to the confidentiality aspect.

Child protection teams work directly with the medical staff and serve as excellent liaison between law enforcement and medical personnel. Because interagency agreement is important in these investigations, it is a good idea to hold regular meetings to discuss how the case is being managed. Cooperation between all of the involved agencies is imperative in cases such as these.

Although all team members should approach cases from their respective jurisdictions, the common goal should be to ensure the safety of the victims. If the abuse is not stopped, the family will relocate, and the abuse will continue. As the cycle of abuse continues, the victim is subjected to further risk of permanent injury, painful medical tests, or even death.

### Evidence

In order to stop the cycle of abuse, investigators must obtain sufficient admissible evidence to convict the abuser. A particularly effective way to obtain proof in MSBP cases is to use concealed cameras to videotape evidence. For example, ceiling cameras can record a wide range of movement, and they can be easily hidden in hospital rooms.

However, placement of video cameras in hospital rooms will likely require a court order.<sup>1</sup> In making application for such an order, investigators should stress the necessity of videotape evidence so that judges will better understand exactly what is needed in MSBP cases.

Frequently, obtaining a court order for videotaping is considerably less complicated when the request omits sound because judges do not have to consider wire tap laws.<sup>2</sup> However, sound is not a critical element in videotapes of MSBP cases that involve suffocation, poisoning, or fabrication through simulation.

If investigators suspect that a child is being poisoned, they should collect relevant evidence, such as tubing, I.V.s, and needles. Other

possible evidence might include towels that offenders use to suffocate their victims or medicine bottles that suspected abusers bring into the hospital.

Investigators should also check bio-hazard containers and garbage cans for evidence. In addition, they should check receptacles used to store urine or stool if foreign matter is present in these items.

And finally, in hospitals, investigators should be aware of any missing syringes or other medical equipment. Because MSBP offenders sometimes use items of opportunity, they obtain instruments from hospitals to abuse their victims.

#### Arrest of Offenders

When there is sufficient proof in an MSBP case, investigators should arrest the offender quickly. This will preclude relocation, further injury to the child, or self-inflicted injury by the offender.

However, arresting an abuser in front of the victim causes unnecessary trauma to the child, who may view the offender as an ideal caretaker. At this juncture in the case, investigators may find it helpful to elicit the help of medical personnel who can reasonably explain the situation to the child.

#### Interviewing the Offender

Some investigators are affected by the fact that certain offenders are suspected of child abuse. However, in order to interview the offender successfully, it is important to always maintain a neutral position.

During the interview, many offenders will continue to deny their

guilt, even when confronted with videotapes that prove intentional abuse. In some cases, they may not even recognize that they have a problem until the magnitude of the offense is brought to their attention. However, a subtle suggestion to offenders that their continued denial of guilt could lead to the untimely death of their child may be a useful interview technique.

Although MSBP offenders intentionally abuse their children, they may truly love them. That love may eventually extend beyond the fear of punishment and the shame they feel to provide an excellent avenue of dialogue between the offender and the interviewer. This dialogue is especially important in cases of unidentified poisonings,

aware that it is likely that the offenders were also abused as children.

#### Conclusion

Although Munchausen's Syndrome by Proxy is a problem already recognized by the mental health community, it is a problem that must also be recognized by the law enforcement community, which must remain alert to any existing cases. Sadly, previous unexplained deaths of children may actually have been preventable homicides if recognized early as cases of MSBP.

The education of both law enforcement personnel and those in the medical community, coupled with a commitment by law enforcement to prosecute cases of MSBP, may be the only hope for halting this

“

***MSBP should be suspected if illnesses in children remain unexplained after medical testing, and there is a history of multiple visits to different hospitals and physicians.***

”

where the ability of medical personnel or investigators to determine the source of the poison directly affects the future health of the child.

When interviewing MSBP offenders, investigators should understand that the offenders need to have a feeling of self-worth. It is important for investigators to discuss the offenders' families and personal histories in an effort to build a rapport with them. It is also important for investigators to be

type of abuse of children. The lives of innocent children may depend on the swift recognition and immediate prosecution of those suffering from this bizarre form of abuse.

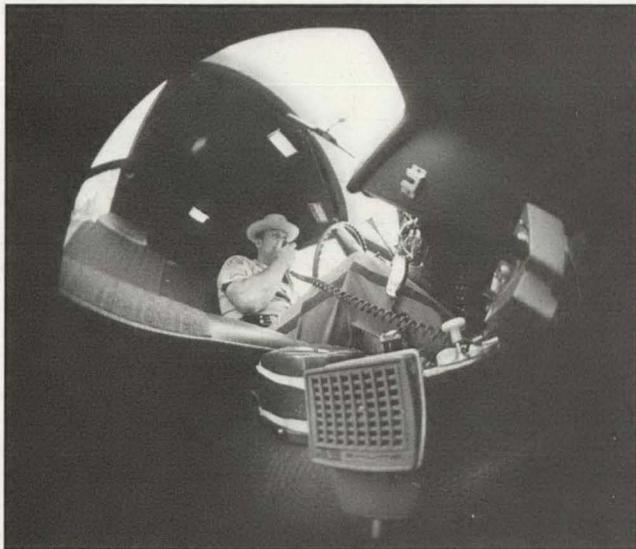
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#### Footnotes

<sup>1</sup> Officers should consult their legal advisors to determine appropriate applicable statutes. For a more in-depth discussion of video surveillance, see Robert A. Fialat, "Lights, Camera, Action: Video Surveillance and the Fourth Amendment," *FBI Law Enforcement Bulletin*, January and February 1989.

<sup>2</sup> *Ibid.*

## Focus on Communications



### *Police Communications in the Information Age*

**L**aw enforcement has benefited greatly from the development of two-way radios, and more recently, the facsimile (fax) machine. Both devices allow agencies to transmit and receive information instantaneously, thereby greatly enhancing the ability of a relatively small number of people to provide law enforcement to entire communities.

However, if used carelessly, these tools can have a negative impact as well. Because information transmitted by fax and conversations broadcast via two-way radios can be easily accessed by individuals other than the intended recipient, great care should be exercised when these devices are used by law enforcement personnel.

#### **THE FAX**

In recent years, the facsimile machine has enhanced productivity considerably in many fields, including law enforcement. Many departments are taking advantage of the fax machine, using it to forward various documents and reports to other agencies.

Under certain circumstances, however, the misuse of a fax machine may hinder a pending investigation or create other dilemmas. Potential problems can be generated by two different sets of circumstances.

The first occurs when the facsimile number is misdialed. If the error is not caught, the document may be transmitted to a location other than the intended one. It may be days before the

sender learns of the error, and the identity of the actual recipient may never be known. Obviously, depending on the substance of the transmission, significant damage to an ongoing case could result.

A second problem can be caused by disclosure of information to unauthorized personnel at the point of the fax's acceptance. This can occur when information is left "on display" to everyone with access to the facsimile machine.

These situations can threaten police operations, and care should be taken to avert any potential problems by exercising caution when using the fax. The fax number of the recipient should be confirmed before the number is dialed. Highly sensitive material should not be transmitted by facsimile if other, more secure, methods are available. However, if faxing is the only option, the sender should arrange to have the message received by authorized personnel at the time it is being transmitted.

#### **TWO-WAY RADIO**

Few developments have affected law enforcement as profoundly as the two-way radio. Since its introduction in the 1920s, this device has provided police departments with distinct advantages over lawbreakers. And while the police radio has been in wide use for many years, criminal efforts have failed to neutralize its effectiveness. Still, the benefits of the two-way radio can be fully realized only when it is used with caution and good sense.

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## Listening In

When communicating via the police radio, officers and dispatchers should remember that other people may be monitoring their transmissions. While most listeners are simply average citizens who monitor police frequencies for entertainment, there are those who may be listening in for other reasons. These listeners may include police officials, news reporters, citizens who are over-eager to assist in police operations, and criminals. Each of these groups has specific reasons for listening and should prompt special consideration before messages are broadcast over police radios.

## Types of Listeners

The average listener monitoring a police scanner for personal enjoyment is a law-abiding citizen who supports the police. Unprofessional or sarcastic remarks broadcast over the radio create a negative impression of law enforcement for this group of listeners. Therefore, derogatory suspect descriptions and other unprofessional messages should be avoided. These transmissions upset the average listener and could needlessly turn supporters into opponents.

Other police officials who may be monitoring the radio make up the group of listeners most capable of identifying mistakes and unsuitable radio behavior. Individuals in this group may include supervisors, coworkers, or officials from neighboring jurisdictions. All of these could initiate

disciplinary actions against an officer or dispatcher who has transmitted improper radio messages.

News reporters monitor police radio transmissions for rather apparent reasons. Since the police are an excellent source for news, reporters often track police

**“It should always be remembered that once a message has been transmitted over the air, it is gone forever.”**

radio transmissions for possible leads. News organizations usually understand the importance of limiting the release of sensitive information concerning ongoing cases. Still, law enforcement personnel can never be sure that messages broadcast over the two-way radio will not lead to published reports in the media. For this reason, extreme care should be exercised when information concerning current investigations is communicated over the airwaves.

Citizens with a tendency to become involved in police activities make up another potentially disruptive group of listeners. Though usually supportive of the police, these citizens can, nonetheless, interfere with police operations and threaten ongoing investigations. Providing unnecessary information over the airwaves

can serve to fuel the negative actions of these listeners.

However, the most potentially harmful listeners are law-breakers. Individuals in this group monitor police scanners in order to gather intelligence and avoid apprehension. Providing these individuals with advance information through careless discussion on two-way radios can threaten lives, as well as investigations. Extreme care should be exercised to limit transmissions concerning operations, especially during drug raids.

It should always be remembered that once a message has been transmitted over the air, it is gone forever. It cannot be called back or done over. Radio transmissions should be brief and to the point. They should also be made with the knowledge that a diverse group of people may be listening. Officers must live with what went out over the radio, sometimes with dire consequences.

## CONCLUSION

Both the fax machine and the two-way radio are important assets to law enforcement, especially in this information age. However, in order to ensure the maximum effectiveness of these devices, reasonable caution and care should be exercised when they are used by law enforcement agencies.

**LEB**

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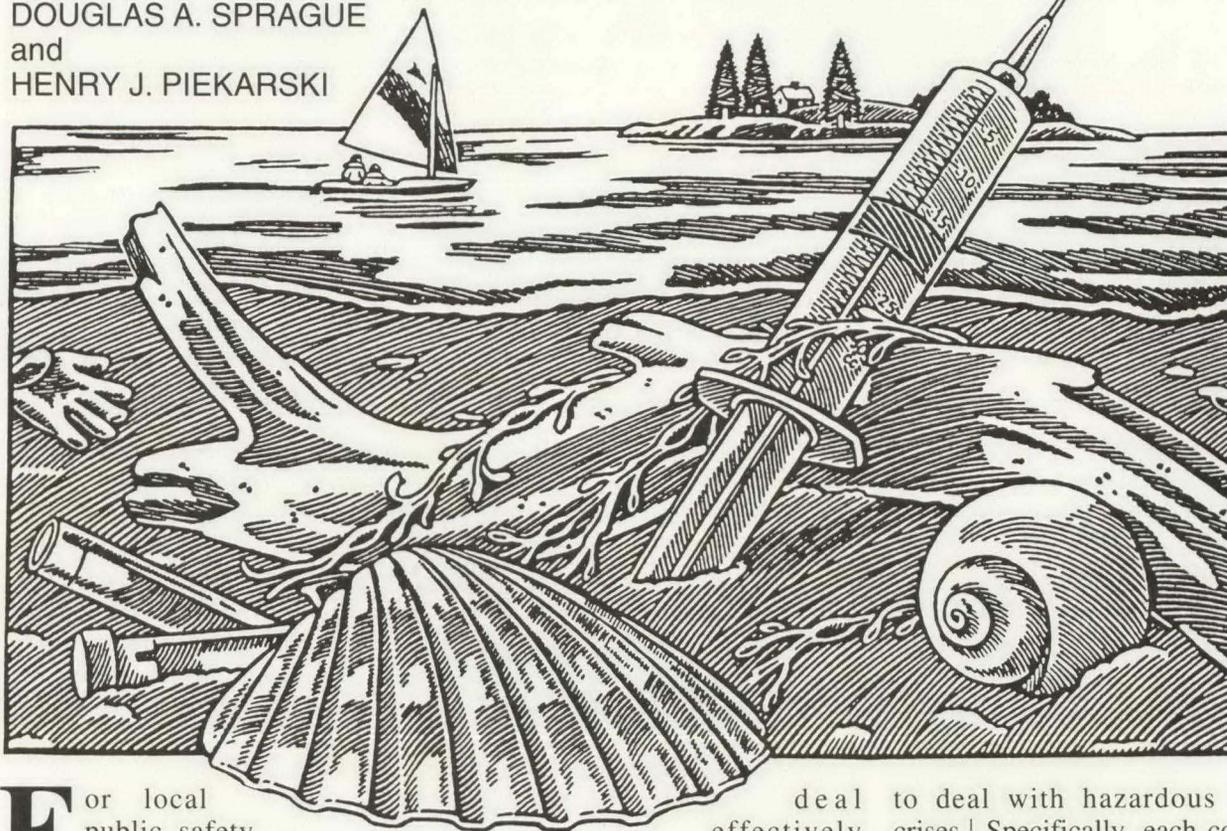
Information for this column was provided by Martin J. Dunn, a senior investigator with the Burlington County, New Jersey, Prosecutor's Office.

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# Hazardous Waste Spills

## Police-Community Cooperation

By  
DOUGLAS A. SPRAGUE  
and  
HENRY J. PIEKARSKI



**F**or local public safety officials, meeting day-to-day community public safety requirements is often a frustrating task that becomes more and more difficult each year. Oftentimes, there are no resources available to respond to catastrophic events, such as hazardous waste spills. This article discusses a low-cost program that the Sayreville, New Jersey, Police Department implemented to tap community resources and to

deal effectively with hazardous waste emergencies.

### LOCAL EMERGENCY PLANNING COMMITTEES

Under Title III of the Federal Superfund Amendments and Reauthorization Act (SARA), passed by Congress in 1986, each community must create a Local Emergency Planning Committee (LEPC) with representation from industry, local government, and the community

to deal with hazardous waste crises.<sup>1</sup> Specifically, each committee should set rules to include notification of committee activities and meetings and should discuss the emergency plan, comments and the committee's responses, and the distribution of the emergency plan to industry, local government, and the community.

### Industry Participation

One of the first steps to organize an LEPC is to determine which area businesses should be included.

In order to do this, public safety officials must identify the industrial safety professionals from the community's largest employers and from firms that produce, use, import, or export hazardous materials. These professionals can provide technical guidance regarding the toxic materials present within their communities, risk assessments, areas of potential concern, and information concerning the impact on vehicle traffic flow in the affected areas.

Industrial safety professionals can also provide information on the development of internal health and safety policies and procedures, security personnel, industrial fire brigades, expanded first aid response, and trained hazardous materials response teams. This information can be integrated into the LEPC's overall resource capability. Knowledge concerning each of these areas is critical to effective and efficient governmental response, and unfortunately, is often overlooked in initial planning steps.

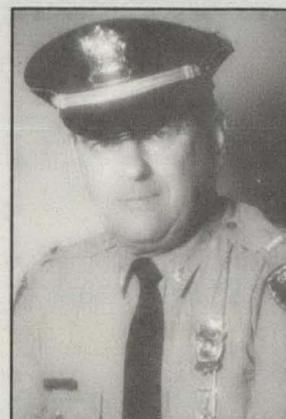
### Government Participation

In addition to industry, law enforcement must also identify the appropriate government agencies to include in the LEPC based upon their practical knowledge, experience, and their access to primary policymakers and external resources. During a crisis, it is the responsibility of these government agencies to provide for:

- Traffic control
- Evacuation
- Police patrol



*Chief Sprague commands the Sayreville, New Jersey, Police Department.*



*Detective Lieutenant Piekarski is also with the Sayreville, New Jersey, Police Department.*

- Fire response
- Emergency medical and rescue response
- Public and environmental health
- Public works
- Engineering
- Code enforcement
- Schools
- Purchasing
- Transportation, and
- Social services.

Senior officials from the government agencies that provide for these services should also be organized into various task forces to deal with policy, operations, and support services.

### Community Involvement

While required by SARA, community involvement can be the

most difficult aspect of the LEPC to organize and control. Community involvement should include representatives from the local environmental commission, hospitals, amateur radio operators, and support groups, such as the auxiliary police, Red Cross, Salvation Army, and local professional associations.

For maximum control and accountability, community groups should also be involved in the goal-setting process from the beginning. Having community groups participate in this process helps to prevent or alleviate any adversarial relationships that could develop between the community groups and authorized government agencies.

### COOPERATIVE EFFORTS

After all the participants in the LEPC have been organized, the first meeting should be conducted under the direction of the chief law enforcement official and a designated

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industrial leader. This meeting's agenda must include completing a community risk profile, a discussion of resource capabilities, and a community crisis impact

centers of operation. Most communities designate the police or fire chief as the on-scene commander.

In addition, the LEPC must also choose a site for an emergency

systems. This could include a series of specialized telephone lines to reduce the load through the dispatch center and for command and rumor control.

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***Local paraprofessional support forces, such as auxiliary police, can be of great benefit...if they have been properly trained.***

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analysis. Subsequent meetings should be hosted by corporate safety professionals.

Additionally, in order for the representatives from government agencies to better understand the corporate atmosphere, corporate safety professionals should arrange for the group to tour their respective facilities. Also, any joint training sessions should be scheduled well enough in advance so that as many as possible can attend.

#### **Command and Control**

After the LEPC has established its goals, members must develop policies and a planning document that outline which governmental officials will be accountable for the various response elements mandated under SARA. Completed planning documents must be examined to ensure compliance to SARA and that all goals are attained uniformly. Authority should also be delineated clearly to eliminate any possible confusion. Leaders are necessary for the on-scene command post, forward command post, and central command

operations center, because for large-scale crisis situations, it may be necessary to conduct policy and support functions at an off-site location. In many cases, if the community has a properly equipped emergency operations center, this would be the logical site for the central command center, the forward command post, and the service commanders. However, if this facility does not meet operating criteria, either another site must be selected or finances must be committed to upgrade the facility.

#### **Communications System Expansion**

Oftentimes, increased field-level communications as a result of an emergency situation reduces the capability of a community's communications system. Therefore, it is necessary to prioritize radio traffic and establish alternate command channels. Computer-based systems can help to reduce the overall load on a system and provide a record of all transactions. Similarly, telephone communications will also require the augmentation of existing

#### **Support Forces**

Local paraprofessional support forces, such as auxiliary police, can be of great benefit in crisis situations if they have been properly trained. Trained supplementary forces, under the supervision of professionals, free more personnel to work within the crisis area by performing less critical duties, such as traffic control and operating amateur radios. The Red Cross, Salvation Army, veterans groups, and churches can also provide needed manpower and resources to perform necessary tasks, such as operating evacuation centers.

#### **CONCLUSION**

With today's ever-increasing budgetary constraints, local public safety officials must look for more effective and creative uses for their community's resources when dealing with emergency situations. Without community resources of personnel and equipment, public safety forces will be hard pressed to maintain their level of service during large-scale crises. But, with the right indepth planning and increased community involvement, community needs can be addressed effectively and inexpensively.

**LEB**

#### **Footnote**

<sup>1</sup>Federal Superfund Amendments and Reauthorization Act, Pub. L. 99-499, Sec. 301, 100 Stat 1729 (1986); 42 U.S.C. sect. 11001 et seq.

## John Joseph Fautenberry

### Crime:

John Joseph Fautenberry has been in custody since 3/16/91, when he was arrested by the Juneau, Alaska, Police Department for the robbery/murder of a woman in Portland, Oregon, and the robbery/murder of a man in Juneau. Fautenberry has confessed to four other homicides, one each in New Jersey and Ohio and two in Oregon, and is suspected of having committed other murders.

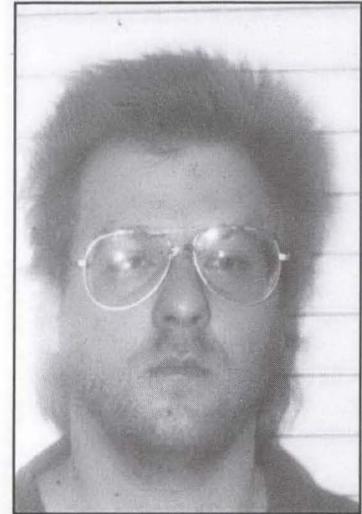
### Background:

After spending 1 year in the U.S. Navy, Fautenberry was discharged in 1981 for using drugs/alcohol and possessing a gun. Since then, he can be traced criss-crossing through 44 of the contiguous United States and Alaska and Hawaii. His travels *exclude* only Maine, New Hampshire, Vermont, and Wisconsin.

As a long-distance truck driver, Fautenberry's travels were extensive. However, they can be regionalized as follows:

- 1982 & 1983: All travel east of the Mississippi
- 1987, 1988, 1989: All travel west of the Mississippi
- 1985: Rhode Island
- 1984, 1986, 1990, 1991: Cross country, 40+ different States, especially in the Pacific Northwest

Fautenberry had addresses in Rhode Island, Ohio, and Oregon. He was previously arrested for carrying a concealed weapon and theft.



### John Joseph Fautenberry

aka: John Faultenberry, John Fautner, John Garbano, John Gargal, John Gargano, John Herndon, John Smith, John Winman, John Yuchiniuk (birth name)

RACE: Caucasian

WEIGHT: 230 lbs.

DOB: 7/4/63

HAIR: Blond (thinning)

POB: New London, Connecticut

EYES: Blue

HEIGHT: 6'2"

SSAN: 545-55-5307

### Modus Operandi:

Fautenberry committed most of his known murders with a Jennings .22-caliber handgun with 16 land and grooves with a right-hand twist. He used a knife in at least one murder and also owned various other firearms. Fautenberry was quick and indiscriminate in his killings. The motive was robbery for quick access to cash, automatic teller bank cards, credit cards, jewelry, weapons (guns and knives), or transportation. He is also known to have taken briefcases and a Bible. The victims

were often met near truck stops (especially the "Flying J" chain) or at bars.

### Alert to Chiefs and Sheriffs:

Please bring this information to the attention of all homicide investigators. If unsolved cases in your jurisdiction resemble Fautenberry's MO, please contact Mr. Jim Bell, National Center for the Analysis of Violent Crime, VICAP, FBI Academy, Quantico, Virginia 22135, phone 800-634-4097 or 703-640-1483.

**LEB**

# Employment Discrimination A Title VII Primer

By  
JOHN GALES SAULS



Suppose three law enforcement managers are making personnel decisions. One approves the implementation of a hiring standard that requires new officers to be able to bench press weight equal to their own. This rule is enacted because the manager sincerely believes that officers must possess physical strength in order to protect themselves and the public. Another manager is deciding which of several captains to assign to a district that has a predominant Hispanic population. An Hispanic officer is chosen based on a belief that the community will be more comfortable with "one of their own" in command of their police officers. The third manager is deciding which officer should be promoted to the rank of captain. A female officer is selected because the department, at present, has no female executives. While these managers may have the best of intentions, each is likely in violation of Federal law.

This article discusses Title VII of the Civil Rights Act of 1964, a Federal statute that prohibits employment discrimination based upon race, sex, color, national origin, or religion.<sup>1</sup> It begins with a discussion of the statute's broad prohibition against considering these forbidden criteria in employment actions and then reviews the remedies the statute provides for victims of illegal employment discrimination. It then addresses two distinct theoretical bases that courts have used to support findings of illegal discrimination under Title VII and notes some narrow exceptions to the statute's prohibition that allow race, sex, color, national ori-

gin, or religion to be considered in employment actions. The article concludes with some suggested strategies that employers may use to avoid violation of the statute.

### TITLE VII's PROHIBITIONS

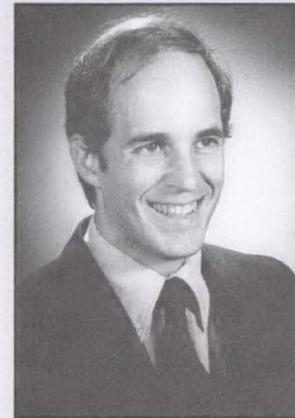
Title VII makes it unlawful for an employer:<sup>2</sup>

"...(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin."<sup>3</sup>

The U.S. Supreme Court has described this prohibition as "...the simple but momentous announcement that sex, race, religion, and national origin are not relevant to the selection, evaluation, or compensation of employees."<sup>4</sup>

The plain language of Title VII makes it clear that employers take race, color, religion, sex, or national origin into consideration in employment actions at their peril, whether their intentions are noble or ignoble.<sup>5</sup> Consequently, considering only men for a particular position because its physical demands

**“...employers who vigilantly seek to prevent Title VII problems are making a sensible investment in the continuing unimpeded function of their businesses.”**



*Special Agent Sauls is a legal instructor at the FBI Academy.*

might prove too great for women is no more likely lawful than considering only men because of misogyny.

In the 27 years since Title VII's passage, overt employment discrimination, such as formal employment policies that discriminate based upon race, color, religion, sex, or national origin, have become relatively rare.<sup>6</sup> Claims of employers covertly taking employment actions based upon race, color, religion, sex, or national origin are more frequent.<sup>7</sup>

To evaluate the validity of such claims, courts frequently probe employment decisions that were made behind closed doors, using circumstantial evidence to assess undocumented processes.<sup>8</sup> Tests and other employment selection procedures are also the target of legal challenges, based upon allegations that overtly equal procedures have covert unequal impact.<sup>9</sup> Title VII has also been interpreted to prohibit harassment in the workplace based upon race, color, sex, religion, and national origin.<sup>10</sup>

Title VII allows employers great latitude in making employment decisions, permitting consideration in employment actions any factors other than those prohibited.<sup>11</sup> The statute's existence and enforcement, nonetheless, provide a sound motive for employers exercising careful control over employment decisions to ensure that race, color, religion, sex, and national origin are not factors in the decision-making. Documenting the bases for employment actions is also important for defending employment actions where allegations of illegal discrimination are lodged.

### TITLE VII's REMEDIES

Title VII is a remedial statute.<sup>12</sup> Its design places the burden on employers to put the victims of illegal discrimination in the employment position they would have occupied absent the discrimination.<sup>13</sup> The statute has no punitive provisions.

Title VII includes provisions creating the Equal Employment Opportunity Commission (EEOC)

and granting this body significant powers to enforce the statute.<sup>14</sup> Persons who believe that they are victims of illegal employment discrimination may complain to the EEOC. The EEOC investigates such complaints, and through its subpoena powers, compels disclosure of information about the alleged discrimination.<sup>15</sup>

The EEOC has authority under Title VII to negotiate settlements with employers on behalf of complainants. Where such negotiations fail, the EEOC is authorized to file suit to vindicate the claim of the complainant.<sup>16</sup> In such suits, courts may order specific relief for complainants, such as reinstatement, back pay, and other measures, to position employees where they would have been absent the discrimination. Courts may also grant injunctive relief to prevent further discrimination by the employer.<sup>17</sup> A complainant after concluding cer-

tain required nonjudicial procedures may also pursue judicial action without the assistance or participation of the EEOC.<sup>18</sup>

Title VII also provides for payment to the prevailing party of reasonable attorneys' fees.<sup>19</sup> Thus, employers who are sued and fail to prevail are required to pay the litigation expenses of the complainant.

The impact of a Title VII action on an employer can be extreme. In *Vulcan Pioneers v. N.J. Dept. of Civil Service*,<sup>20</sup> a U.S. District judge ordered that all promotions to the rank of captain cease and that the departments fill their operational needs through the rotation of acting captains.

The imposition of this extreme, temporary remedy in *Vulcan Pioneers* followed a consent decree under which the departments totally revamped their promotional processes, instituting a formal written

promotional exam based on a structured job-task analysis.<sup>21</sup> Upon determining that the new promotional process was faulty, the court solicited alternate processes from the litigants, and after rejecting each offered alternative, ordered the promotional process to a halt.

Employers who run afoul of Title VII may find they have lost control of important aspects of their operations. Consequently, employers who vigilantly seek to prevent Title VII problems are making a sensible investment in the continuing unimpeded function of their businesses.

### THEORIES UNDERLYING PROOF OF VIOLATIONS

There are two potential paths employers may follow that violate Title VII. Employers may intentionally take employment actions based upon race, color, sex, religion, or national origin. This is known as "disparate treatment" discrimination. Employers may also use employment processes that are equally applied to all groups on their face but operate to the disadvantage of some groups in practice. Such processes are said to have a "disparate impact."

Differences between allegations of "disparate treatment" and "disparate impact" are more than semantic. The means typically used to prove the violations differ. More significantly, the exceptions to Title VII allowing the use of the forbidden criteria under certain circumstances differ depending on whether a proposed employment action will result in disparate treatment or will have a disparate impact.



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## Disparate Treatment Discrimination

Allegations of disparate treatment involve claimed intentional use by an employer in employment actions of the forbidden criteria. For example, in *Price Waterhouse v. Hopkins*,<sup>22</sup> Hopkins claimed that she had been denied promotion to partner because she was a female. The decision to deny Hopkins partnership was made by a committee behind closed doors, and Hopkins had no access to the committee's deliberations.

In her attempt to demonstrate illegal sex discrimination, Hopkins used written materials considered by the committee, as well as circumstantial proof. The fact that at the time of Hopkins' action, Price Waterhouse had only 7 female partners among 662 in the firm clearly concerned the court that heard her case. The fact that when her partnership consideration was placed on hold, she was instructed that her chances for favorable consideration would improve were she to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry"<sup>23</sup> was also a factor in the court's determination that her sex had impermissibly been considered.

Consequently, Price Waterhouse was required, if they were to escape a finding of illegal discrimination, to show that they would have made the same decision (denying partnership), even if the impermissible matters had not been considered.<sup>24</sup> Such proof, especially where a personnel decision was a close one, is difficult to assemble. Success might require proving that

every person selected for partnership that year was more qualified than Hopkins.

Reported decisions demonstrate that consideration of the forbidden criteria in employment actions for apparently good reasons is

employee] in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of [the] particular business...."<sup>27</sup> This exception is quite difficult to use in practice.

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**...Title VII makes it clear that employers take race, color, religion, sex, or national origin into consideration in employment actions at their peril, whether their intentions are noble or ignoble.**

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no more lawful than their use based upon malice. Employment actions based upon race, color, sex, national origin, or religion are only lawful if authorized under one of the narrow exceptions to Title VII's ban on disparate treatment.

### Exceptions: Lawful Disparate Treatment

There are two exceptions to Title VII's prohibition of disparate treatment—the bona fide occupational qualification (BFOQ) exception<sup>25</sup> and the affirmation action exception.<sup>26</sup> Both allow employment actions based upon consideration of some or all of the otherwise forbidden criteria, but both are very strictly interpreted and may be used by employers only where absolutely necessary.

#### *The BFOQ exception*

The BFOQ exception allows employers to consider the "...religion, sex, or national origin [of an

In *International Union, UAW v. Johnson Controls*,<sup>28</sup> for example, the employer, a manufacturer of electric storage batteries, sought to limit the exposure to toxic lead of its female employees who were able to bear children in order to prevent injury to the unborn. In assessing this intended use of the exception, the Court ruled that manufacture of batteries was the business of Johnson Controls, not protection of the unborn, and therefore, the protection of the unborn could be in no way necessary to the operation of the business. The Court noted that "[f]ertile women, as far as appears in the record, participate in the manufacture of batteries as efficiently as anyone else. Johnson Controls' professed moral and ethical concerns about the welfare of the next generation do not suffice to establish a BFOQ of female sterility."<sup>29</sup>

Similarly, in *Fernandez v. Wynn Oil Co.*,<sup>30</sup> the employer was alleged to have denied a female

employee an account representative position because in the position she would have to interact with businessmen native to Latin American countries. The employer believed that because of the Latin American culture, the businessmen would not accept a woman in the position in question. This justification also failed to place the employer within an exception. In *Fernandez*, the court stated: "...stereotypic impressions of male and female roles do not qualify gender as a BFOQ. Nor does stereotyped customer preference justify a sexually discriminatory practice."<sup>31</sup>

It is clear that sex, religion, and national origin qualify as BFOQs only where an absence of the requirement would "...destroy the essence of the business or would create serious safety and efficacy problems."<sup>32</sup> It also should be noted that race and color are specifically excluded from the exception and cannot be used lawfully as BFOQs.<sup>33</sup>

#### *The affirmative action exception*

A second exception that allows consideration of the forbidden criteria in employment actions is the "affirmative action" exception. Use of this exception is also strictly limited by courts. It has been held permissible only as a necessary remedy for prior discrimination.<sup>34</sup>

Employers who have previously disadvantaged members of a particular race, religion, or sex, or persons of a particular national origin or color may extend preference to the same group in an effort to correct for past discrimination.

Great care must be exercised in determining the effects of prior discrimination,<sup>35</sup> crafting the preference so that it is not overbroad<sup>36</sup> and does not unnecessarily frustrate the legitimate aspirations of those not receiving the preference.<sup>37</sup> Employers must also establish a termination point for the preference when the effects of prior discrimination have been eliminated.<sup>38</sup>

An example of a voluntary affirmative action program is found in *Johnson v. Transportation Agency, Santa Clara County*.<sup>39</sup> In *Johnson*, the Transportation Agency determined that it had denied women certain promotional opportunities in the past in some of its job categories. It established a

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***It is advantageous for employers to assess their employment practices for potential legal problems.***  
”

component of preference for women in the promotional process for those job categories that allowed the consideration of the sex of an applicant at the stage where selections were being made among candidates that had been determined highly qualified for promotion.

In *Johnson*, a male employee, who was passed over for a promotion awarded to a woman, asserted that he had been a victim of illegal

sex discrimination.<sup>40</sup> After a careful assessment of the Transportation Agency's preferential treatment scheme, the Court concluded that the limited consideration of sex in the employment action was lawful, since it fit within the affirmative action exception.<sup>41</sup>

The reluctance of courts to approve the intentional use by employers of the forbidden criteria is apparent in these decisions. Employers contemplating such use based upon the BFOQ exception or the affirmative action exception should proceed with great caution and deliberation. Employers considering the use of the forbidden criteria for other reasons are cautioned that no other exceptions exist that allow intentional use of the forbidden criteria.

#### **Disparate Impact Discrimination**

Employers may also be held to have engaged in illegal employment discrimination where they use employment practices that although apparently unbiased on their face, operate to the disadvantage of groups of persons based upon race, color, sex, religion, or national origin.<sup>42</sup> This is true, even where no intent on the part of the employer to discriminate illegally is shown.<sup>43</sup> This "disparate impact" theory of Title VII liability is based upon a judicial recognition that uniform standards have potentially unequal impact.<sup>44</sup> It is also based on judicial recognition that the use of subjective employment standards may shield discriminatory intention from judicial scrutiny.<sup>45</sup>

For example, a written aptitude or achievement test on which

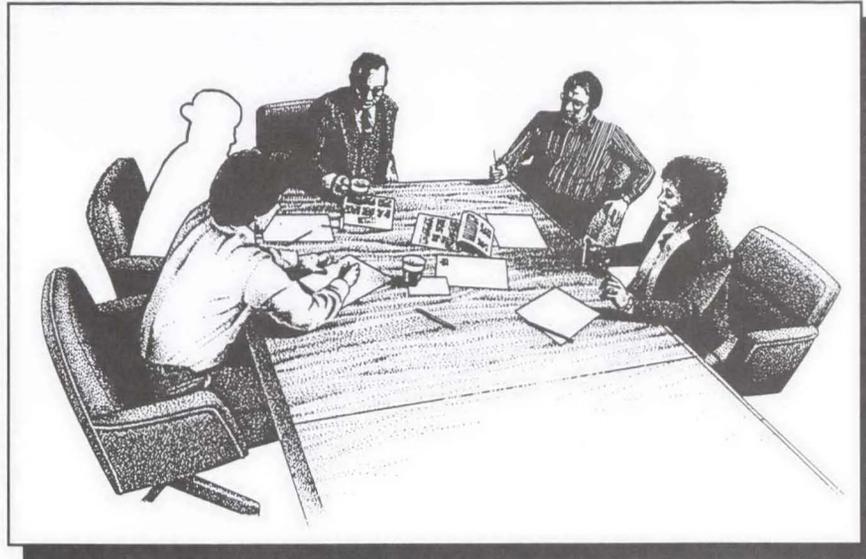
a significantly higher percentage of whites achieve passing scores than minorities is a potential instrument of illegal discrimination.<sup>46</sup> So too is a subjective promotional process that advances a substantially higher percentage of whites than minorities.<sup>47</sup>

Such cases are proven by statistical comparisons of either actual success rates of one group versus another,<sup>48</sup> by the composition of the employee group in question versus the composition of the relevant qualified labor pool available,<sup>49</sup> by testimony of discriminatory words or actions on the part of the employer, or by a combination of these means. It is advantageous for employers to assess their employment practices for potential legal problems. Such self-examination allows corrective measures to be made to the employment practices before an employer is accused of illegal discrimination.

### **Lawful Disparate Impact: The Business Necessity Exception**

Employment practices having a disparate impact may be lawful where they "...serve, in a significant way, the legitimate employment goals of the employer."<sup>50</sup> Such practices will be lawful where no readily available equally effective alternative practice exists that has a significantly lesser or no disparate impact.<sup>51</sup>

There are numerous necessary job standards that have potential disparate impact. For example, police officers might be required to demonstrate the ability to speak and write the English language. Such a requirement might significantly dis-



advantage groups of certain national origins whose primary language is other than English. An employer using such a standard would need to be prepared to show that the test was used fairly and uniformly assessed the skill in question, that the skill level tested is indeed necessary for successful performance of the job in question, and that alternative methods, such as educational programs to teach new officers English skills, are not practicable.<sup>52</sup>

### **SUMMARY**

At the beginning of this article, three examples were set forth. In the first example, a police manager had instituted an employment requirement that all police officers be able to bench press a weight equal to their own. This requirement on its face treats all persons equally, but because of the lower degree of upper body strength possessed on average by women, the requirement would have a disparate impact on females. Consequently, the manager would be required, if chal-

lenged, to demonstrate business necessity, i.e., that police officers need to be able to bench press their own weight in order to perform their jobs effectively. It is unlikely that this could be shown.

In the second example, a police manager selected a Hispanic officer to command a predominately Hispanic precinct. This is disparate treatment and may only be justified by the establishment of a BFOQ. It is unlikely that the manager can establish that only an Hispanic captain can effectively command the precinct. This manager may wish to focus on Spanish language skills rather than national origin in making a selection. A requirement that the precinct commander speak Spanish might have a disparate impact, but could likely be supported by "business necessity."

The third manager chose a female for promotion because no females have achieved executive status in the department previously. This also is disparate treatment. Consequently, the manager must be



prepared to show that the selection falls within the bounds of the "affirmative action" exception. An assessment much more detailed than the one made to justify the selection is required.

Employers may benefit from assessing all of their employment practices in light of Title VII. In doing so, they should seek practices that evaluate in a fair and uniform way knowledge, skills, and abilities necessary for the performance of the job in question. This is true for reasons of effectiveness, as well as compliance with the law. Such employment practices assist employers in selecting individuals who are most likely to succeed and in assuring the confidence of their employees in the practices used.

**LEB**

**Footnotes**

<sup>1</sup>42 U.S.C. secs. 2000e-2000e-17 (1972).  
<sup>2</sup>"Employer" is defined in 42 U.S.C. sec. 2000e as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such

a person...." "Person" is defined in sec. 2000e as "...one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under title 11, United States Code, or receivers." "Industry affecting commerce" is defined to include "...any governmental industry, business, or activity." Title VII is made applicable to the Federal Government in 42 U.S.C. sec. 2000e-16.

<sup>3</sup>42 U.S.C. sec. 2000e-2(a).  
<sup>4</sup>*Price Waterhouse v. Hopkins*, 109 S.Ct. 1775, 1784 (1989).  
<sup>5</sup>*See International Union, UAW v. Johnson Controls*, 111 S.Ct. 1196 (1991).  
<sup>6</sup>*See, e.g., Griggs v. Duke Power Co.*, 401 U.S. 424, 427 (1971).  
<sup>7</sup>*See, e.g., Watson v. Fort Worth Bank and Trust*, 108 S.Ct. 2777 (1988).  
<sup>8</sup>*Id.* *See also Price Waterhouse v. Hopkins*, *supra* note 4.  
<sup>9</sup>*Supra* note 6.  
<sup>10</sup>*See, e.g., Henson v. City of Dundee*, 682 F.2d 897 (11th Cir. 1982). For an excellent discussion of sexual harassment employment discrimination, *see Higginbotham, "Sexual Harassment in the Police Station," FBI Law Enforcement Bulletin*, vol. 57, No. 9, September 1988, pp. 22-29.  
<sup>11</sup>*Supra* note 4.  
<sup>12</sup>Available remedies are stated at 42 U.S.C. sec. 2000e-5(g).  
<sup>13</sup>*Id.*  
<sup>14</sup>42 U.S.C. sec. 2000e-4.  
<sup>15</sup>The EEOC's subpoena power is broadly interpreted. *See University of Pennsylvania v. EEOC*, 110 S.Ct. 577 (1990).  
<sup>16</sup>42 U.S.C. sec. 2000e-5(f). Suits against governmental agencies must be filed by the U.S. Department of Justice.  
<sup>17</sup>*Supra* note 12.

<sup>18</sup>*Supra* note 15.  
<sup>19</sup>42 U.S.C. sec. 2000e-5(k).  
<sup>20</sup>832 F.2d 811 (3d Cir. 1987).  
<sup>21</sup>*Id.* at 814-15.  
<sup>22</sup>*Supra* note 4.  
<sup>23</sup>*Id.* at 1782.  
<sup>24</sup>*Id.* at 1787-88.  
<sup>25</sup>This exception is set forth in the statute. 42 U.S.C. sec. 2000e-2(e).  
<sup>26</sup>This exception was created through court decision. *See, e.g., Johnson v. Transportation Agency, Santa Clara County*, 107 S.Ct. 1442 (1987).  
<sup>27</sup>*Supra* note 25.  
<sup>28</sup>*Supra* note 5.  
<sup>29</sup>*Supra* note 5, at 1207.  
<sup>30</sup>653 F.2d 1273 (9th Cir. 1981).  
<sup>31</sup>*Id.* at 1276-77.  
<sup>32</sup>*Id.*  
<sup>33</sup>*Supra* note 28.  
<sup>34</sup>*See Johnson v. Transportation Agency, Santa Clara County*, *supra* note 26.  
<sup>35</sup>*See Hammon v. Barry*, 826 F.2d 73 (D.C. Cir. 1987), *cert. denied*, 108 S.Ct. 2023 (1988).  
<sup>36</sup>*Cf. City of Richmond v. J.A. Croson, Co.*, 109 S.Ct. 706 (1989).  
<sup>37</sup>*See Steelworkers v. Weber*, 443 U.S. 193 (1979). EEOC guidelines for voluntary affirmative action are found at 29 CFR 1608.3(b) et seq.  
<sup>38</sup>*Supra* note 35.  
<sup>39</sup>*Supra* note 26.  
<sup>40</sup>Title VII protects members of majority groups from employment discrimination based on race, color, sex, religion, and national origin. *McDonald v. Sante Fe Trail Transfer Co.*, 427 U.S. 273 (1976).  
<sup>41</sup>*Supra* note 26, at 1457.  
<sup>42</sup>*Griggs v. Duke Power Co.*, *supra* note 6.  
<sup>43</sup>*Id.*  
<sup>44</sup>*Id.*  
<sup>45</sup>*Watson v. Fort Worth Bank and Trust*, *supra* note 7.  
<sup>46</sup>*Supra* note 42.  
<sup>47</sup>*Supra* note 45.  
<sup>48</sup>*Id.*  
<sup>49</sup>*See Wards Cove Packing Co. v. Atonio*, 109 S.Ct. 2115 (1989).  
<sup>50</sup>*Id.* at 2125-26.  
<sup>51</sup>*Id.* at 2126-27.  
<sup>52</sup>For a detailed discussion of potential disparate impact problems in establishment of health and fitness standards for law enforcement officers, *see Schofield, "Establishing Health and Fitness Standards: Legal Considerations," FBI Law Enforcement Bulletin*, vol. 58, No. 6, June 1989, pp. 25-31.

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

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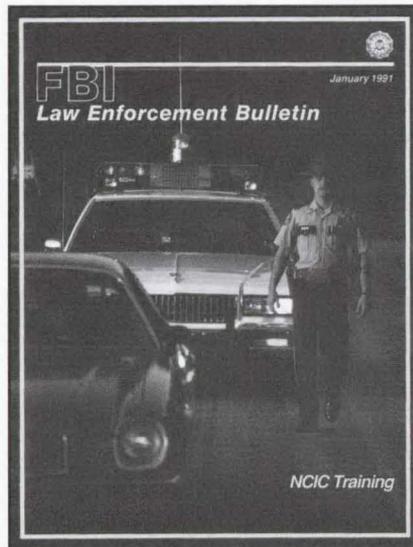
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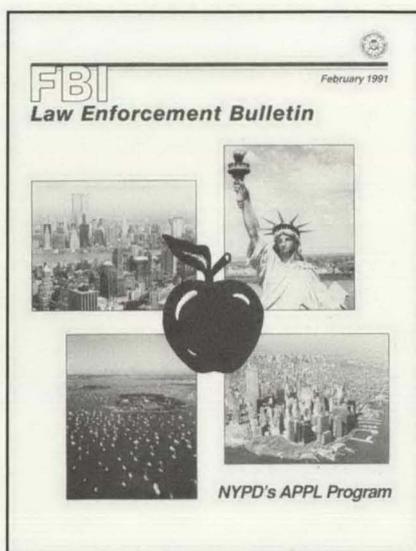
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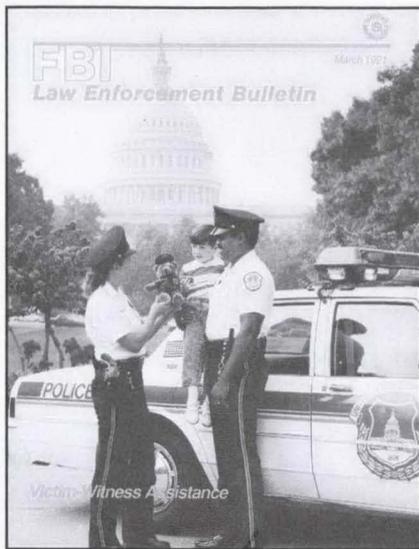
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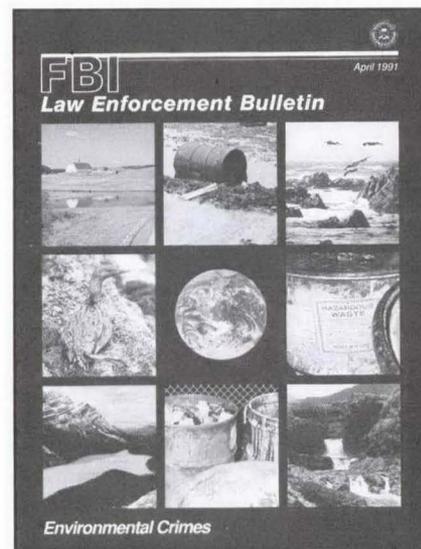
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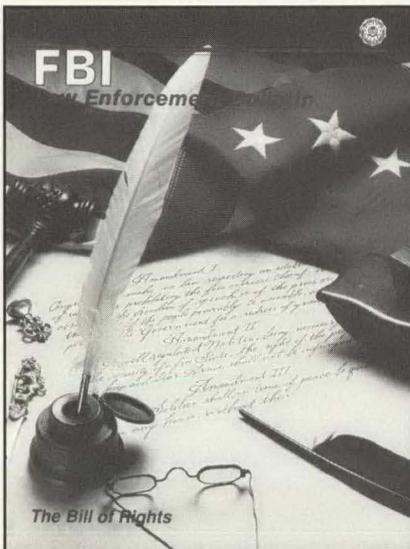
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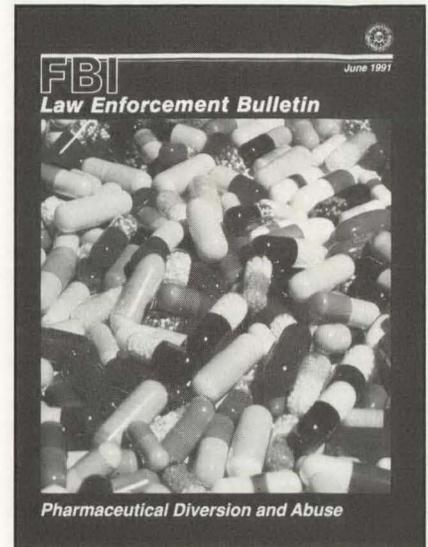
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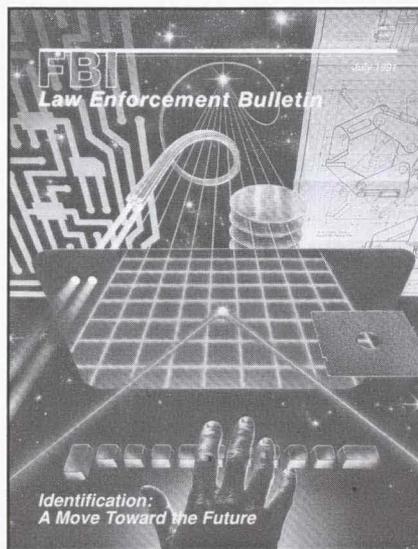
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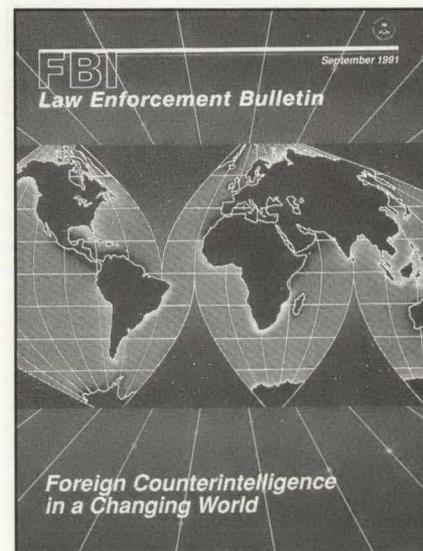
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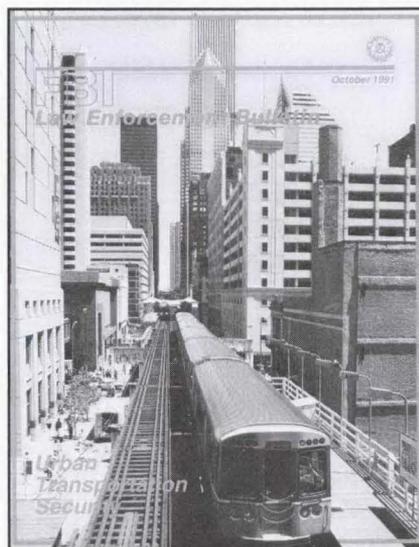
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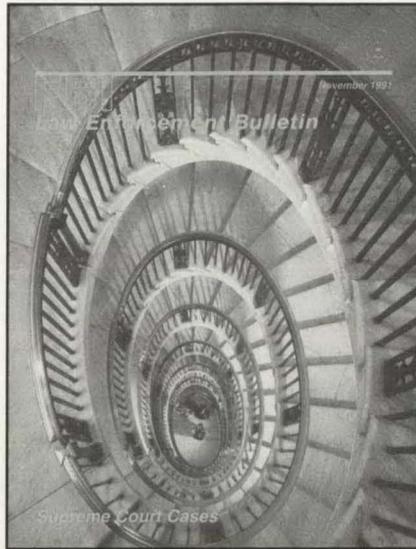
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Wright, Thomas H., Lieutenant/Investigator, Police Department, Anniston, AL, "Pre-employment Background Investigations," November, p. 16.

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Youngs, Alan, Captain, Police Department, Lakewood, CO, "Teamwork: An Innovative Approach," May, p. 6.

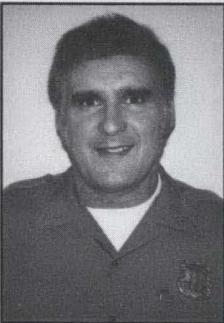
## The Bulletin Notes

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 their exemplary service to the law enforcement profession.



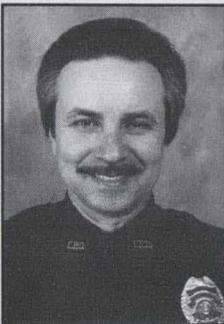
*Officer Hesseltine*

Officer Larry Hesseltine of the Lincoln, Maine, Police Department observed a vehicle that fit the description given by the State Police of an automobile used by two suspects during the robbery of an area convenience store just 2 hours earlier. The vehicle was parked at a local mart similar to the one that had been robbed, and one of the suspects was in the store with the sole clerk. Officer Hesseltine confronted both suspects and placed them into custody. Subsequent searches of both the vehicle and suspects uncovered weapons and stolen money.



*Patrolman Oceak*

While off duty, Patrolman Frank Oceak of the Englewood Cliffs, New Jersey, Police Department responded to the frantic pleas of a neighbor whose 6-year-old daughter was choking. Patrolman Oceak immediately ran to the house and initiated CPR, performing a mouth sweep and holding the unconscious child upside down, which dislodged an object obstructing her windpipe. The child regained consciousness and gradually resumed normal breathing. The victim was then transported to a local hospital, treated, and released.



*Officer Widener*



*Officer Jessie*

During the early morning hours, Officers Jack Widener and Curtis Jessie of the LaFollette, Tennessee, Police Department responded to the report of a fire at an area business. Upon arriving at the scene, they observed that an occupied residence next door had also caught fire. The officers rushed to the porch to assist a woman who was exiting the house. They then entered the burning structure, where they located two other adult occupants and an infant and carried them to safety.

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