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Computer Software: An Investigative Tool

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Features

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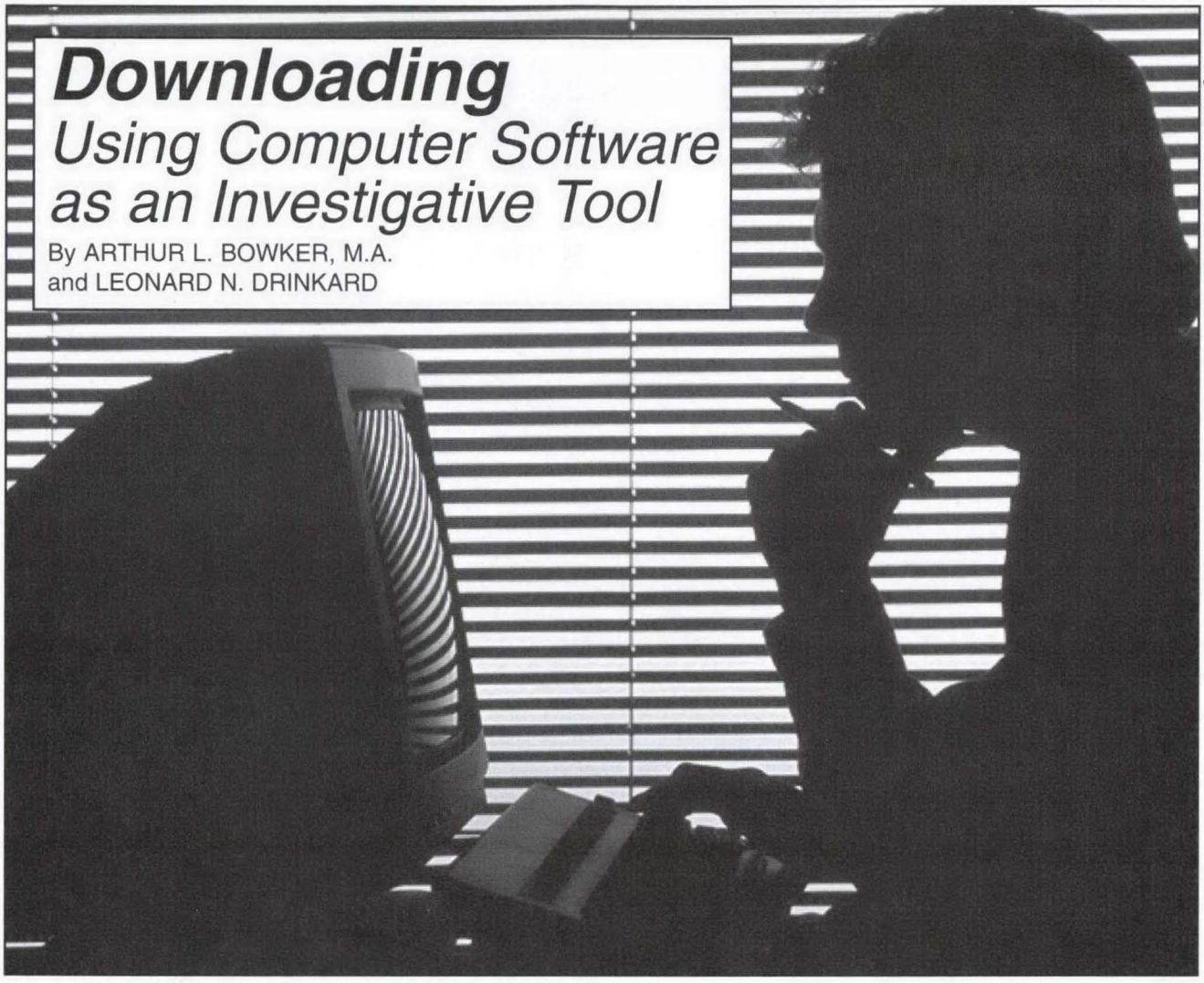
Downloading
Using Computer Software as an Investigative Tool

By ARTHUR L. BOWKER, M.A.
and LEONARD N. DRINKARD



Consider the following scenario. At 9 o'clock one Monday morning, the owner of a local business makes a frantic call to your agency's fraud unit. She reports that she arrived at work early that morning and was surprised to find the office manager, a 5-year employee, already busy at the computer. He appeared extremely nervous, and as the owner approached the computer, she discovered that he had gained unauthorized access to the company's payroll files.

When asked why, the office manager nervously responded that he thought the system had miscalculated the withholdings on his last paycheck, and he was only "checking it out." Suspicious of this response, the owner checked the computer's access log for the payroll system, something she had not done for some time.

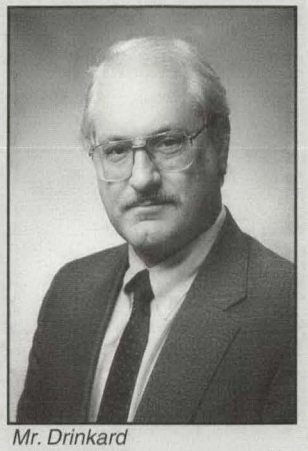
Her inquiry revealed that the office manager had accessed the system before and after each payday for the past year. Investigating further, the owner made a startling discovery. The company that prepares her firm's checks had been issuing 60 paychecks every pay period, even though she employs only 55 people.

Confronted with the discrepancy, the office manager admitted to "borrowing" some funds. Heavy drinking had dulled his memory of exactly how much money he had "borrowed." He refused to answer any more questions and tendered his letter of resignation.

When the police responded, the owner promised to cooperate with the investigation. Yet, she also informed the officers that she could not afford to have her business disrupted in any way.

This unfortunate business owner had fallen victim to a computer manipulation crime, an offense that

Mr. Bowker



Mr. Drinkard

Mr. Bowker and Mr. Drinkard are investigators with the Office of Labor Management Standards, U.S. Department of Labor, Cleveland, Ohio.

involves changing data or creating records in a computer system to commit another crime,[1] in this scenario, embezzlement. Although the law enforcement community has recognized the seriousness of these crimes for more than a decade,[2] investigations typically have been complicated, time-consuming, and disruptive to the victim's business operations. However, using a technique known as downloading, law enforcement agencies now can use their computer software as an investigative tool to solve computer manipulation crimes quickly and easily.

NOT FOR COMPUTER EXPERTS ONLY

Downloading is the process of transferring a computer program, file, or other electronic information from a remote database or other computer to a user's own computer.[3] When investigating computer manipulation crimes, law enforcement officers can download the victim's computerized financial records to a disk, return to their office, and use their agency's software to reorganize the data into a format that enables them to detect falsifications.

Specifically, downloading enables investigators to sort, select, and organize entries in whatever manner the investigation demands. This method makes analyzing the data much easier than manually examining journals, ledgers, or check registers in whatever manner the entries might be organized, such as by date or check number.

Investigators can examine only those entries that may be evidence of a crime—such as checks with false payees, fictitious voided checks, or checks for large dollar amounts—without searching every computer entry and every canceled check by hand. By reducing the number of computer entries investigators need to compare to hard-copy evidence (for example, canceled checks, vouchers, or invoices), downloading permits easy detection of any discrepancy and/or falsification the embezzler used to conceal the crime.

In short, downloading allows law enforcement agencies to use commercially available software to analyze volumes of data without seizing computer equipment, disrupting the victim's business, and manually searching every piece of evidence. Downloading possesses clear advantages over the methods traditionally used to investigate computer manipulation crimes.

TRADITIONAL INVESTIGATIVE METHODS

Some investigators note that investigations into computer manipulation crimes comprise 90-percent detective work and 10-percent computer work.[4] This division between detective and computer work also is reflected in the two types of software law enforcement officers traditionally have used to solve these crimes—investigative and application software.

Investigative Software

Investigative software allows users to search computer systems, particularly the computer's hard drive, for hidden files or data, that subjects sometimes conceal in a deliberate attempt to thwart law enforcement. For instance, drug traffickers might hide information about their foreign bank accounts on a hard drive.

Investigative software packages typically prove most useful in cases involving uncooperative subjects whose business is crime. In such cases, investigators must serve a search warrant and seize all of the components of the computer

system,[5] a cumbersome, time-consuming, and disruptive process.

In computer manipulation cases, however, subjects most often commit their crimes against their employer, who operates a legitimate business. Furthermore, these subjects usually have limited computer expertise; rather, they have a general understanding of how the victim's computer system works and where its weaknesses lie. This limited knowledge allows them to manipulate the system, but not to hide files. For this reason, traditional investigative software is inappropriate in these types of crimes.[6]

Application Software

Investigators primarily use application software—which includes programs for word processing, spreadsheet, and database functions—to document and later to present their findings to the proper authorities. By doing so, they do not use the software to its fullest potential. Because of increased compatibility among computer systems, many of today's application software packages permit the easy downloading of data created in other software packages. As a result, white-collar crime investigators can use today's application software to do more than write reports and present evidence. With the ability to download, investigators can use application software as an investigative tool.

GUIDELINES FOR DOWNLOADING EVIDENCE

Preparation

Investigators first should try downloading on a small scale, such as in a case where an embezzler only had access to the computer for a short time or where the organization's receipts or disbursements are small. By starting out with smaller cases, investigators will gain the experience and confidence they need to solve those cases involving greater amounts of data.

As with any new investigative technique, before downloading, investigators must become thoroughly familiar with the functions and limitations of their agency's application software. In particular, they should know what data files it can translate into a readable format.

Procedures

First and foremost, investigators must secure the victim's system. This ensures that the subject no longer can access the system to change or destroy data, or worse, to steal additional funds.

Methods to secure the victim's system vary, but generally they consist of changing the passwords for all users and from all points of entry, including computers in the office and telephone lines that allow users to access the system from remote locations. The subject also must be prevented from entering the premises after the passwords have been changed, which may mean placing the subject on administrative leave and notifying co-workers that this person no longer has clearance to enter the workplace.

After securing the system, investigators should determine what software the company uses to maintain its financial data. Some small companies contract with computer firms for customized financial

The Benefits of Downloading

Downloading allows investigators to:

- Use a familiar software package to examine, analyze, and organize volumes of data
- Reduce considerably the time required to investigate and document a case
- Limit greatly the intrusion into the victim's business by avoiding the need to seize hardware and software to investigate the crime
- Authenticate work papers and schedules that document a loss and can be used in court because they represent an exact copy of the original data
- Eliminate errors that might occur if investigators needed to enter data into the computer from hard copies of ledgers, journals, check registers, canceled checks, etc.

software packages, and as a result, may not know what format they use.

Fortunately, these computer firms often customize a product by making only minor modifications in a standard software program. In such cases, investigators can determine which program the victim uses by viewing a directory of its financial files and checking the three-symbol extension after each file name. For example, WKS and WK1 represent two types of Lotus® software.

If the victim and the agency use the same file format, the downloading process entails merely copying the necessary files to a disk. If not, the company's system or the agency's software may be able to convert the data into a compatible format. Specifically, if the victim's or agency's software can save the file in the American Standard Character Information Interchange (ASCII), a standard data information format, then any spreadsheet or database program can read the file.

Although not all software packages can convert data to ASCII, they can transmit data to a printer and produce a hard copy of the file. By the same token, with a slight variation in print commands, users can send data to a file instead of to the printer. Once created, this print file can be copied to a disk. Special software, called a print file reader, can read the data and convert it to a format that the agency's application software will understand.

Downloading's Investigative Counterparts

In addition to downloading, investigators can use the password-based security controls built into many computer systems to discover who made the fraudulent entries and when. In many cases, computer access logs reveal that suspects enter the system after-hours and on weekends, when they have no legitimate reason to do so. In such cases, suspects will be hard-pressed to deny the evidence, as well as to explain why they needed to access the computer system at times when no one could witness their actions.

> ***"Law enforcement agencies must accept the fact that financial records, once falsified by pen and pencil, now can be altered by computer."***

LEGAL CONSIDERATIONS

Although law enforcement officers traditionally have seized entire computer systems to investigate white-collar crimes, victims of computer manipulation cases usually cannot afford to have their businesses disrupted in this manner. Downloading allows investigators to access computerized records without removing the computer itself. Still, search warrants may be required, and investigators should consult their department's legal advisor or the local prosecutor for guidance.

Another important area of consideration involves the admissibility of computerized records in court. In general, computerized records are subject to the hearsay rule, the best evidence rule, and the authentication requirement.[7] Investigators should seek legal advice in these areas as well.

Furthermore, as with any piece of evidence, establishing a proper chain of custody helps to ensure the admissibility of computerized records in court. To accomplish this, investigators must document fully the procedures they used to obtain and store the downloaded data, including where, by whom, and under what circumstances they gained access to the victim's system, and which specific files they downloaded. These files must be maintained on a write-protected disk, which prevents data from being altered. To provide additional protection against data loss, investigators should use copies of the downloaded files to sort, select, and organize the data during the investigative process and should remember to back up the files periodically.

HELPING BUSINESSES PREVENT COMPUTER EMBEZZLEMENT

White-collar crime investigators should encourage businesses to institute security procedures to combat computer manipulation crimes.[8] First, companies should institute computer access controls. Specifically, employees authorized to access the computer should have access codes or passwords.

Computer systems should recognize authorized users, as well as their level of authority, and admit them accordingly. For example, the payroll clerk might be permitted to sign on to the system only every

payday, while an office assistant might be denied access entirely. Computer systems also should change access codes periodically.

In addition, companies should establish and maintain internal accounting controls. These include separating financial duties so that the person who keeps the records is not the same person who prints the checks; periodically rotating duties; developing and documenting financial policies and procedures, such as defining authorization limits for checks; and conducting periodic internal audits and surprise inspections.

Third, the computer system should log every unusual occurrence automatically. For example, a system might search for checks that are out of sequence; transactions that are out of the ordinary—too high, too low, too many, too often; or an employee who repeatedly attempts to gain access improperly. To be effective tools, however, these reports must be inspected periodically. The business owner in the opening scenario who fell prey to computer embezzlement failed to check her computer's access log on a regular basis.

Finally, employers should pay attention to their workers. The behavior of employees who deviate from the firm's standard operating procedures or merely from their own past performance levels may signal that something is amiss.

Investigative Tips

Guidelines for Downloading

Investigators should:

- Try downloading on a small scale to gain confidence
- Become familiar with the functions and limitations of your agency's application software
- Secure the victim's system to prevent unauthorized access
- Determine the victim's software package

  (If the package is the same as your own, copy the data onto a disk, if it is not the same:

  —convert to an ASCII file and use spreadsheet or database software to read; or

  —create print file, copy onto disk, and use print file reader software to convert data)

Preventing Computer Manipulation Crime

Business owners should:

- Institute computer access controls
- Establish and maintain internal accounting controls
- Program computers to record unusual occurrences
- Regularly review security logs
- Note employees who deviate from acceptable procedures or performance levels.

Source: Jack Bologna, How to Detect Embezzlement *(Madison, WI: Assets Protection Publishing, 1994), 7-8.*

CONCLUSION

In the past, businesses locked up their books and records to prevent destruction, falsifications, and losses. Unfortunately, today's technology enables embezzlers to manipulate data and falsify records, even at their leisure from their own homes. Law enforcement agencies must accept the fact that financial records, once falsified by pen and pencil, now can be altered by computer.

Fortunately, investigators can fight back by using their agency's own computers to detect false entries quickly and accurately, establish criminal intent, and successfully prosecute embezzlers. By using downloading as an investigative tool, white-collar crime investigators can take a "byte" out of computer crime.✦

Endnotes

[1] U.S. Department of Justice, National Institute of Justice, Office of Justice Programs, "Computer Crime," *NIJ Reports*, January/February 1990, by C. Conly and J.T. McEwen, 3.

[2] A 1986 survey conducted by the National Institute of Justice determined that between 63

and 84 percent (range based on differences in jurisdiction size) of responding police chiefs and sheriffs believed that computer crime investigations would be a "significant cause of future workload in their departments." Follow-up contacts with selected respondents revealed specific concerns over computer manipulation to commit fraud and embezzlement. J.T. McEwen, U.S. Department of Justice, National Institute of Justice, *Dedicated Computer Crime Units*, June 1989, 8.

[3] Charles Sippl, *The New Webster's Computer Terms* (Costa Mesa, CA: Lexicon Publications Inc., 1990), 120.

[4] Ibid, 49.

[5] Supra note 1, 5.

[6] Certain software packages prove advantageous in rare cases involving a computer-literate subject who tampers with the victim's software or hardware to facilitate the embezzlement. An example of this is a bank computer specialist who designs a hidden program that "slices" a penny of earned interest from every customer's account and deposits the proceeds into a personal account, a scheme known as the "salami method."

[7] *See* John Gales Sauls, "Computerized Business Records As Evidence: Required Predicates to Admission," *FBI Law Enforcement Bulletin*, October 1985, 26. *See, e.g* , *Brandon* v. *State*, 396 N.E.2d 365 (Ind. 1979); *United States* v. *Vela*, 673 F.2d 86 (5th Cir. 1982); *Hatton* v. *State*, 498 N.E.2d 398 (Ind. App. 4 Dist. 1986); *American Oil Co.* v. *Valenti*, 426 A.2d 305 (Conn. 1979); *Barbiarz* v. *Hartford Special Inc.*, 480 A.2d 561, 567 (Conn. App. 1984); *King* v. *State ex rel Murdock Acceptance Corporation*, 222 So.2d 393, 397 (Miss. 1969); *United States* v. *Russo*, 480 F.2d 1228, 1241 (6th Cir. 1973); *United States* v. *Sanders*, 749 F.2d 195, 199 (5th Cir. 1984); *Monarch Federal Savings and Loan Association* v. *Genser*, 383 A.2d 475 (N.J. Super. St. Ct. Ch. Div. 1977); *Palmer* v. *A.H. Robbins Co., Inc.*, 684 P.2d 187, 201 (Colo. 1984).

[8] Jack Bologna, *How to Detect Embezzlement* (Madison, WI: Assets Protection Publishing, 1994), 7-8.

For additional information on downloading, contact Leonard Drinkard, U.S. Department of Labor, Office of Labor Management Standards, Room 831 Federal Office Building, 1240 East Ninth Street, Cleveland, Ohio 44199-2054, phone 216-522-3855.

Point of View

Police Supervision in the 21st Century

By Michael L. Birzer, M.A.

As we near the end of the 20th century, policing is in the midst of some very critical changes. In the past several years, community-based policing strategies have emerged as the driving force behind most of these changes. Many police agencies—large and small, rural and urban—have incorporated a community-oriented philosophy into their operational approach. While the specific objectives and tactics of this proactive policing strategy may be as numerous and varied as the communities being served, the basic premise remains the same: To promote a partnership with citizens in order to solve problems and improve the quality of life in the community.

It is too early to measure fully the success of this philosophy. Still, academicians and practitioners have devoted a considerable amount of time to analyzing different aspects of community-oriented policing (COP). Most focus on how COP requires agencies to alter their ways of conducting operations. But, despite the volumes written on the subject, little time has been spent evaluating and projecting the changes in the supervision of line personnel required under a community-oriented policing model.

In reality, if COP is to be successful, law enforcement agencies must reevaluate the way in which administrators supervise line-level personnel. The changes ushered in by community-oriented policing require agency executives to examine not only the new external environment created by COP but also the new internal environment. To do so, executives must take a close look at their organizations and become responsive to initiating change within them. Community-oriented policing requires such change and evaluation in order for agencies to predict and control their futures effectively.

TRADITIONAL ASSUMPTIONS

Few law enforcement officers know the name Fredrick W. Taylor, but nearly every officer sworn in during the past 75 years has served under the command structure he advocated. Taylor's classical

theory—organizations indoctrinated along traditional lines; highly centralized, bureaucratic, and designed on the premise of divisions of labor and unity of control—has been the enduring model of organizational command and control adopted by law enforcement agencies across America for most of the 20th century.[1]

This classical theory, modified and refined during implementation by progressive era police executives, such as August Vollmer and O.W. Wilson, represented a reaction to the rampant corruption and other inequities that had plagued American policing since its early days.[2] To reduce the contaminating effects of local ward politics on line officers, the classical model centralized authority in police headquarters. To alleviate favoritism and petty corruption in neighborhoods, the classical model established beats and revolving assignments for patrol officers. To ensure officers performed their assigned duties, the classical model instituted a military-style structure of authority and discipline. And to encourage personnel to follow the rules established by headquarters, proponents of the classical model—most notably Wilson—believed that line-level officers should adhere to a rigid chain of command and be supervised closely through massive amounts of written policy pronouncements.[3]

These command and control measures corrected many of the problems that they were designed to remedy. But in time, they created some new ones. One of the most enduring is law enforcement's inability to adapt to new policing strategies.

NEW PROBLEMS, OLD SOLUTIONS

For the most part, police agencies have remained amenable to the classical hierarchy of organization, command, and supervision that dictates a rigid manual of procedures for employees. Unfortunately, adherence to these procedures prevents personnel in many instances from solving problems in the communities that they serve. For line officers, the strict pyramid control structure of the classical model severely limits discretion when carrying out their duties. Historically, central headquarters reserves full and final authority in all police matters.

Many have argued that this rigid top-down organizational structure precipitated the downfall of the team policing concept of the 1970s.[4] In many ways a precursor to today's community policing efforts, team policing called for the aggressive decentralization of police operations. Almost from the beginning, the movement encountered a host of problems—perhaps none more formidable than the reluctance of administrators in central headquarters to relinquish control to station and precinct commanders.

The demise of team policing and the tepid response of some agencies and officers toward community-oriented policing do not necessarily indicate a defect in these approaches. Rather, these reactions may stem from the internal environment that evolved in many agencies as a result of the classical theory.

INTERNAL ENVIRONMENT

At one time, a rigid, centralized command structure represented the best prescription to deter corruption and misconduct. However, as policing evolves with newer strategies, this centralized command and control structure will require redefinition. Police operations must become decentralized (through substations, neighborhood stations, satellite offices in storefronts for example) and move into the communities being served.

Commanders should allow these decentralized operations to become more participatory and to function with minimal interference from headquarters. Administrators should review organizational policies and procedures to ensure that ample discretion exists for officers so that they may search for solutions to problems and not merely respond according to narrowly written procedures. To bring about these

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changes, agencies must transform what evolved as the operational counterpart of the classical theory of organizational structure—the professional model of policing.

THE PROFESSIONAL MODEL

In many ways, the professional model represents an inevitable by-product of the classical theory. Police agencies during the reform era became vastly out of touch with the general citizenry. In fact, reform-minded police leaders became so intent on shielding their agencies from political influences that police departments grew into some of the most detached and self-reliant public organizations in government.[5]

Because the professional model was driven by technology—new scientific processes, police cruisers, two-way radios, etc.—it greatly improved the ability of law enforcement agencies to investigate crimes that had been committed. However, for much the same reason, it reinforced the estrangement of police officers from the citizens they served.[6]

Currently, the vast majority of police agencies still adhere to the professional model. For over half a century, this model—based on the premise that, as professionals, police officers should act aloof from the communities they serve—has provided an operational framework for the classical theory. Unfortunately, it also has fostered an assembly line mentality among rank-and-file police officers and line-level supervisors.

Subsequently, field officers are expected to take reports, write tickets, and make arrests—often instead of addressing the more immediate concerns of the community. Under the professional model, supervisors have scorned any deviation from this easily quantifiable mode of policing. Not surprisingly, police agencies have long based police effectiveness on arrest numbers and little else.

> **"In their newly emerging roles, supervisors will spend less time commanding and controlling and more time helping officers identify and find solutions to community problems."**

The combined effect of the classical theory's strict organizational structure and the professional model's dependence on quantitative measurements discourages line-level officers from suggesting even minor changes to the everyday operations of the police department. To this day, in some departments, officers are met with strict discipline for slight deviations from the traditional system. Such a heavyhanded, top-down management structure represents a significant stumbling block to the implementation of any innovative policing approach.[7] Before agencies can take community policing to the streets, they must confront internal impediments to its successful implementation. To do so, it might help to view the changes coming to law enforcement within the larger context of changes occurring in society as the 21st century approaches.

THE 21ST CENTURY

In his book, *The Third Wave*, noted futurist Alvin Toffler examines many of the forces that will shape society in the next century. He predicts that to survive in the 21st century, organizations will become significantly less top heavy.[8] Flattened hierarchies will, in turn, vastly alter the traditional bureaucratic pyramid structure common in most organizations, including law enforcement agencies.

Toffler also speculates that successful organizations will become more flexible, capable of interchanging two or more structural shapes as conditions warrant.[9] If we apply Toffler's thesis to police agencies, the advantages of such structural flexibility become clear. In times of riots or other mass disorder, the police must quickly become a rigid, central unit of operation. A clearly defined and strict chain of command becomes critical to applying force efficiently and to initiating a quick response to social upheaval. However, when relative tranquility prevails, the rigid command structure must give way to a flexible response to specific community problems.

This structural duality requires that police supervisors operate flexibly under both systems. In one sense, it means adapting to a situation that demands strict command and control for the sake of public and officer safety; in another, it calls for allowing patrol personnel more accountability, control, and input in their daily beat work.

The coming changes to and expectations of society will require law enforcement leaders to reexamine many fundamental components of policing. Three that will assume particular importance are agency mission statements, approaches to supervision, and methods of evaluation.

> **"Now is a good time for law enforcement administrators and supervisors to ask themselves if they are looking toward the future or living in the past."**

Changing Mission

The mission statements of the 21st century must be redesigned to reflect values. The underlying premise of these mission statements will change from merely enforcing laws to encompass problem solving and the formation of partnerships with the community.

To support these redefined mission statements, supervisors will be expected to promote creativity and broaden the scope of their leadership. They must become leaders with a vision for pulling their organizations forward.

In adjusting their command styles, supervisors will find that it makes good sense to allow the line-level personnel who are most familiar with problems in the community to have a say in developing solutions to those problems. In fact, effective community-oriented policing *requires* input from line-level personnel.

As we move toward the next century, the challenges facing communities show every indication of becoming more complex and difficult. To respond adequately to these challenges, police agencies will be required to reexamine their supervision methods.

Supervision

The coming years will bring changes to many long-accepted maxims of police supervision. Police supervisors in the 21st century will be required to alter the traditional role of merely seeing that subordinates follow procedures, adhere to manual regulations, and engage in behavior that is consistent with departmental expectations.

In their newly emerging roles, supervisors will spend less time commanding and controlling and more time helping officers identify and find solutions to community problems. The supervisors of tomorrow will guide and coach line officers and encourage problem solving, risk taking, and innovation.

Evaluation

As the roles of officers and supervisors change, so too must the methods by which supervisors evaluate their officers. If community policing is to succeed in reducing crime through closer police-community cooperation, simply requiring officers to produce numbers every month will prove to be an inadequate measure of performance.

Instead, supervisors of the 21st century will evaluate officers primarily on their abilities to assess and solve community problems. Supervisors also will assess officers' effectiveness based on their ability to remain in touch and to communicate with the various groups within their beats.

CONCLUSION

Community-oriented policing ultimately will change the way that law enforcement agencies provide service to the community. These changes represent philosophical innovations, as well as stylistic ones. Police commanders must remain responsive to the evolution necessary in supervision strategies to ensure the effective implementation of community policing.

Today's officers come from a far different ideological plane than officers who entered policing just 20 years ago. Supervisors have an obligation to mold these officers' performance according to the community-based strategies that will be the standard of

policing in the next century. To do this, supervisors must inspire these officers to become problem solvers and encourage them to become more entrepreneurial in their jobs.

Despite the many challenges facing society and policing in the coming years, the future looks bright for those in law enforcement. If agency administrators and supervisors embrace change rather than fight it, they stand a much better chance at controlling their own destinies.

But, the future is fast approaching. As the authors of the book *Megatrends 2000* put it: "The dominant principle of organization has shifted, from management in order to control an enterprise to leadership in order to bring out the best in people and to respond quickly to change."[10] Now is a good time for law enforcement administrators and supervisors to ask themselves if they are looking toward the future or living in the past.✦

Endnotes

[1] G.L. Kelling and W. J. Bratton, "Implementing Community Policing: The Administrative Problem," *National Institute of Justice*, July 1993, 3.

[2] Jeffrey Patterson, "Community Policing: Learning the Lessons of History," *FBI Law Enforcement Bulletin*, November 1995, 5.

[3] W.J. Bopp, *O.W. Wilson and the Search for a Police Profession* (Port Washington, NY: Kennikat Press, 1977), 5.

[4] L.K. Gaines, M.D. Southerland and J.E. Angell, *Police Administration* (New York: McGraw-Hill, 1991), 125.

[5] G.L. Kelling and M.H. Moore, "The Evolving Strategy of Policing," *National Institute of Justice*, September 1988, 108.

[6] Supra, note 2.

[7] M.K. Sparrow, M.H. Moore, and D.M. Kennedy, *Beyond 911: A New Era for Policing* (New York: Basic Books, 1990), 57.

[8] A. Toffler, *The Third Wave* (New York: Bantam Books, 1981).

[9] Ibid., 263.

[10] J. Naisbitt and P. Aburdene, *Megatrends 2000: Ten New Directions for the 1990s* (New York: Avon Books, 1990), 231.

Negotiating With Foreign Language-Speaking Subjects

By PETER V. DIVASTO, Ph.D.

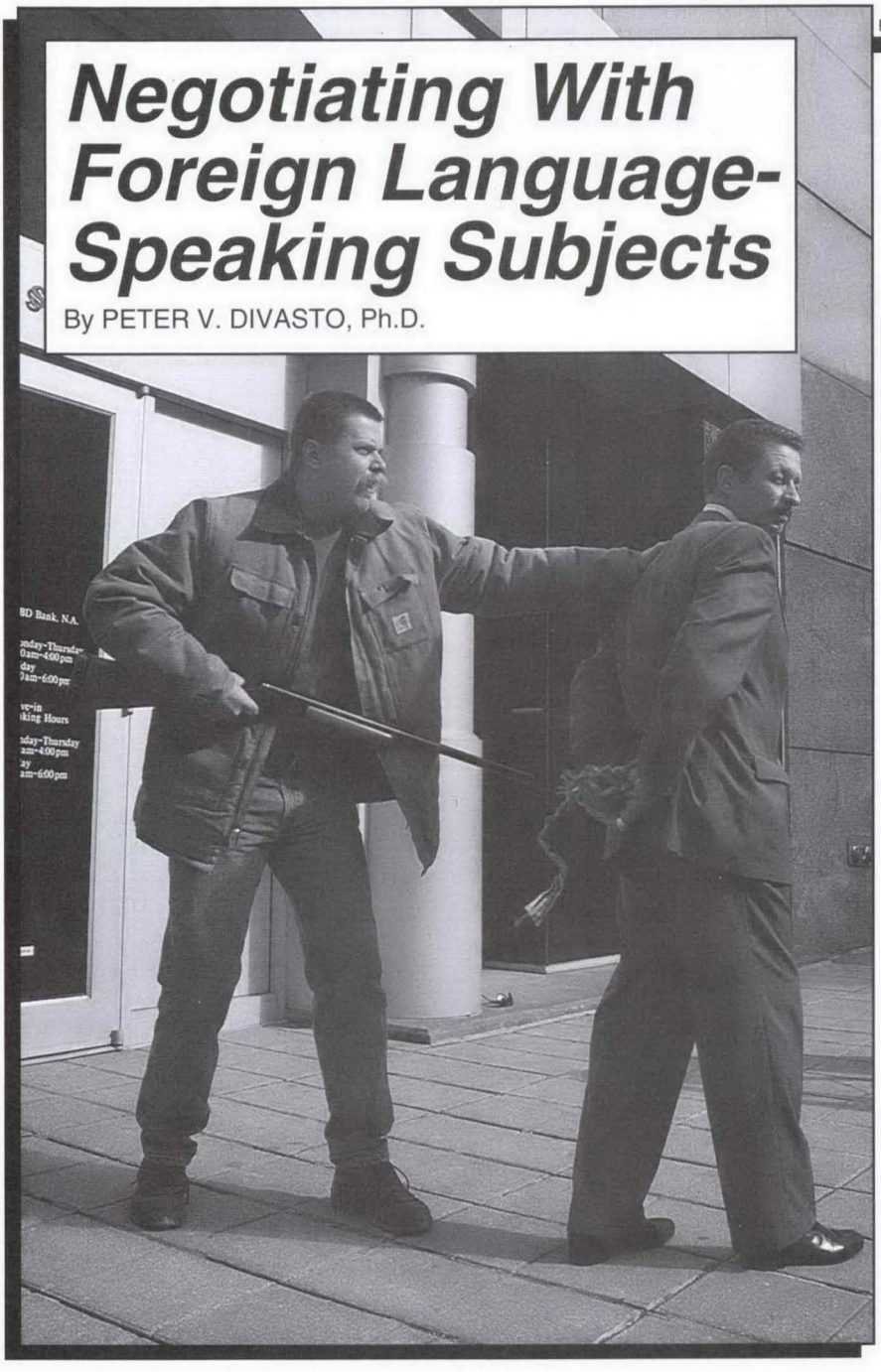


Photo © Don Ennis

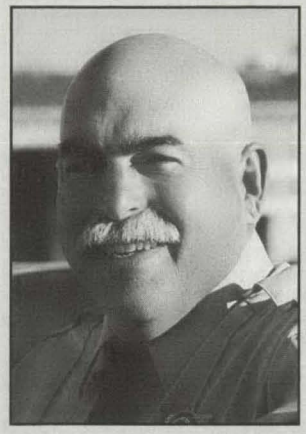
To resolve critical incidents, negotiators rely on their ability to communicate with subjects. Skill in the art of communication, when combined with tactical presence, intelligence gathering, psychological acumen, and a bit of luck, contributes significantly to the enviable track record of negotiators in the United States.

Negotiators rely on conversation to build rapport with subjects. As the primary tools of conversation, words represent the key ingredient—but not the only component—of communication. Voice inflection, tone, and speed of delivery all play an important part in the communication and negotiation processes.[1]

Likewise, in negotiations, establishing a "hook"—a topic of emotional meaning to the subject—depends on good listening skills, coupled with understanding and sincerity.[2] Simply put, lives may depend on the ability of negotiators to converse with and listen to hostage takers or barricaded individuals.[3]

Even when negotiators and subjects speak the same language, a great deal of room for error still exists. Criminal offenders may express themselves in unfamiliar idioms. Subjects suffering from extreme forms of mental illness may be so idiosyncratic in their speech as to make verbal communication nearly impossible. Prisoners in revolt may become so focused on real or imagined grievances that they resist meaningful dialogue for days.[4] Yet, even in these types of situations, a skilled negotiation team, in concert with tactical units, usually can help bring a crisis to a peaceful conclusion.

A more significant challenge awaits negotiators who arrive at the scene of a critical incident only to be informed that the subject does not speak English. Such scenarios are occurring more frequently with the ebb and flow of events in central America, southeast Asia, eastern Europe, and other regions of the world. Once again, the United States is attracting large numbers of immigrants to its shores.



> ***"The first priority for negotiators attempting to establish dialogue with a subject is to gauge the individual's level of fluency in English."***

Dr. DiVasto is the psychologist for the Bernalillo County Sheriff's Office in Albuquerque, New Mexico.

Across America, as Little Saigons and Borscht Beaches join Chinatowns and Little Italys, the recently arrived Americans living in these districts must deal with the stresses of a strange culture, as well as those of their personal lives. When the stress becomes too great, crisis incidents often develop.

Negotiators who confront these situations face a number of challenges in addition to those that normally accompany critical incidents. Because of the increasing likelihood of encountering suspects who speak only a foreign language, negotiators and their agencies should prepare to address the unique issues presented by critical incidents involving those who cannot communicate in English.

LEVEL OF FLUENCY

The first priority for negotiators attempting to establish dialogue with a subject is to gauge the individual's level of fluency in English. To accomplish this, negotiators can use the same sources they use for conventional aspects of intelligence gathering. Significant others, neighbors, employers, and friends can provide information regarding the subject's ability to converse in English.

Confirmation that the subject speaks some English indicates that negotiators can communicate sufficiently with the subject without an interpreter. In the absence of precipitous behavior on the part of the subject, negotiators should initiate dialogue in English, working on the assumption that the subject might take the opportunity to talk. The time allotted to pursue this line of communication depends on the negotiation team's patience and resources, as well as the tactical situation and the subject's English-speaking ability.

USE OF ENGLISH IN NEGOTIATION

After determining that the subject possesses *some* English language capabilities, negotiators must decide whether to conduct negotiations in English or in the subject's native language. Although negotiating in English presents some minor problems–most notably, a loss of idiomatic nuance in the verbal exchange and diminished opportunities for negotiators to express empathy–several advantages of negotiating in English generally outweigh these drawbacks.

First, forcing a subject to wrestle with formulating thoughts in an unfamiliar language greatly reduces the opportunity for over-animated displays of emotion. Second, the mechanics of translating thoughts into English keeps the subject's mind working and thereby increases fatigue. Third, the continued use of English by negotiators sends a subliminal message to the subject that law enforcement is in control of the situation.

However, law enforcement agencies increasingly find themselves confronting subjects who possess very limited or no ability to communicate in English. In these cases, negotiators must establish communication in the subject's native language.

FOREIGN LANGUAGE NEGOTIATION

A telephone survey of 14 major negotiation teams revealed that one-half of the teams possess experience in conducting foreign language negotiation.[5] Each of the seven had negotiated in Spanish, and three teams had conducted negotiation in a language other than English or Spanish. The FBI negotiated with a Russian speaker; the King County Police Department in Seattle, Washington, dealt with a subject in

Laotian; and the Houston, Texas, Police Department negotiated with a subject in Vietnamese.[6]

During the initial stages of a critical incident, responding officers automatically begin to assess the language abilities of the subject. Once field commanders decide to negotiate in a language other than English, the negotiation team faces an important decision: Whether to use a negotiator who speaks the language or use an interpreter to relay information between the negotiation team and the subject. Each option harbors advantages and potential disadvantages.

Using a Foreign Language Negotiator

Ideally, the negotiation team will include a negotiator who is fluent in the subject's language and can negotiate directly with the individual. Under less-than-optimal conditions, a bilingual law enforcement officer trained in the negotiation process might be available to assist the negotiation team. In either of these scenarios, the negotiation process will closely resemble that of a standard negotiation conducted in English. The negotiator will be familiar with the tension of the interplay.

Unfortunately, agencies may have difficulty locating a trained negotiator who can communicate with subjects in a given language. While a number of negotiators—especially in southwestern states—may be fluent in Spanish, the ranks thin when the language in question becomes Laotian, Farsi, or Chinese.

Agencies that cannot locate a fluent negotiator typically cast about for a an officer who speaks the subject's language. While this approach may solve the language problem, it introduces into the negotiation picture an actor with little practical knowledge of the process, a person whom the negotiation team constantly must monitor and support.

This approach can lead to feelings of isolation for the negotiator who converses with the subject in a foreign language. The negotiator must translate for other team members, who find themselves in the unenviable position of being spectators to the negotiations. Not being able to understand the subject's words may diminish the rich fabric of suggestions, brainstorming, stress-relieving humor, and mutual support that normally help negotiation teams move smoothly toward a peaceful resolution. The multiple roles required of the foreign language negotiator also lead to heightened levels of fatigue.

> **"...the negotiation team should instruct interpreters to convey only *the team's comments and act solely as a conduit of prescribed information.*"**

Using an Interpreter

As an alternative to using a negotiator who speaks the subject's language, agencies may choose to engage an interpreter to assist in the negotiation process. This option offers several advantages. First, the choice of languages is limited only by the number of available interpreters. Agencies can, in fact, develop a pool of qualified interpreters to be available in case of critical incidents.

In Texas, for example, the court system retains interpreters for every commonly encountered foreign language. While the courts do not certify the interpreters' level of proficiency, the public safety agencies that employ the language experts test them to determine their level of competence.

As the Texas example demonstrates, public safety agencies can look to local or state courts to identify foreign language experts. Developing such a pool gives negotiators and interpreters an opportunity to polish select words and phrases for maximum impact before an incident occurs.

An additional advantage of using interpreters rests with the pacing of the negotiation. Translation typically slows the pace considerably. This not only promotes reflection on the part of the subject, but it also gives the negotiation team all of the advantages that time brings. Finally, being highly attuned to the nuances of language, a trained interpreter can provide the team with useful information that a bilingual officer or negotiator may miss.

During the negotiation process, the interpreter should use short, concise, and precisely worded sentences designed by the negotiation team. Negotiators should provide

their instructions via handwritten notes to ensure the accuracy of the thoughts to be expressed. The interpreter must refrain from undertaking any dialogue not expressly delineated by the negotiators. The interpreter must provide negotiators with a precise translation of all dialogue with the subject.

However, the use of interpreters presents its own set of potential drawbacks. Interpreters untrained in police negotiations may find the trappings of a crisis scene, such as police vehicles, lights, and heavily armed tactical officers, unsettling. In addition, interpreters may overestimate their roles and begin to believe that the success of the negotiation process lies with them. Combined, these factors may cause such stress that they render an interpreter incapable of assisting the negotiation team.

Another potential drawback may emerge as the negotiations proceed. Interpreters may grow impatient and come to believe that they have a better approach to resolving the situation.

Having an interpreter influence negotiations is tantamount to allowing a third party intermediary to become personally involved with the negotiation process. Either scenario compounds the danger because the negotiation team may be unaware of new turns that the negotiations have taken. Such dangers intensify if an interpreter begins to identify with the subject's cause. A remote possibility exists that such an interpreter may intentionally work to sabotage the negotiations.

To counteract these potential problems, the negotiation team should instruct interpreters to convey *only* the team's comments and act solely as a conduit of prescribed information. Such guidelines were developed and are now taught by the London Metropolitan Police Department in its negotiations course. Under no circumstances should interpreters be allowed to editorialize. Likewise, they should be told to refrain from expressing personal sentiments or revealing any show of emotions to the subject. One way to ensure additional problems do not arise involves the use of a second interpreter.

Suggestions for Choosing Interpreters

To avert potential problems, agencies that elect to employ or retain an interpreter or a pool of language experts should:

- Select only those interpreters whose proficiency is guaranteed by a recognized authority
- Conduct a background check of each interpreter
- Teach interpreters the principles of negotiations and instruct them on the limitations and restrictions of their roles
- Emphasize that interpreters must act as a conduit to provide precise translations of the communication of both sides
- Include interpreters in real-life exercises at least semiannually.

Adding Another Interpreter

Agencies should make every effort to have a second interpreter on the scene for quality control. Two interpreters provide a more fluid course for the conversations. The second interpreter also provides instantaneous translation for the negotiation team. This running account allows the negotiators to write notes

and design specific phrases for the initial interpreter to use in the upcoming contacts. The continuous flow of the negotiation keeps pressure on the subject without placing undue pressure on either interpreter.

ADDITIONAL CONSIDERATIONS

The identity and nationality of interpreters must remain anonymous. A subject who learns the nationality of an interpreter may create additional barriers that prolong the entire process. Other issues, such as the interpreters' religion, political affiliation, and past residences also may arise from the nationality issue. Therefore, negotiators should make every effort to maintain the interpreter's anonymity. Accordingly, interpreters should not use their own names, but instead, should indicate that they are serving only as the voice of the police negotiators.

Negotiation teams also should include interpreters in post-incident debriefings. Because the stress that interpreters experience may mirror that of negotiators, negotiation team leaders should check on them in the weeks following an incident.

CONCLUSION

As an open and dynamic society, the United States continues to attract people from all over the world. Like their predecessors, these newcomers face the daunting task of adjusting to a strange culture that offers a bewildering array of cultural norms and social pressures.

The growing number of recent immigrants, foreign nationals, and illegal aliens residing in the United States who possess limited abilities to communicate in English has led to an increase in the number of critical incidents involving subjects who speak only foreign languages. Public safety agencies in every part of the United States face the possibility of negotiating with hostage takers or barricaded subjects who cannot communicate effectively in English.

To ensure that their negotiation teams are prepared, agency administrators must develop a response strategy. The most important consideration in preplanning is to identify bilingual negotiators or interpreters who can act as the voice and ears of the negotiation team. For, although the language may be different, the key component to successful negotiation remains the same—communication.✦

Endnotes

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[5] P. DiVasto and Michelle Medley (1994), Telephone survey of hostage negotiators. Unpublished raw data.

[6] In addition, police in Baton Rouge, Louisiana, communicated with a deaf subject by using sign language.

Law Enforcement's New Internet Address

The *FBI Law Enforcement Bulletin's* Internet address has changed. We invite you to communicate with us via e-mail. Our new Internet address is:

leb@fbi.gov

We would like to know your thoughts on contemporary law enforcement issues. We welcome your comments, questions, and suggestions. Please include your name, title, and agency on all e-mail messages.

Also, *Law Enforcement* is still available for viewing or downloading on a number of computer services, including the FBI's Home Page. The Home Page's address is:

http://www.fbi.gov

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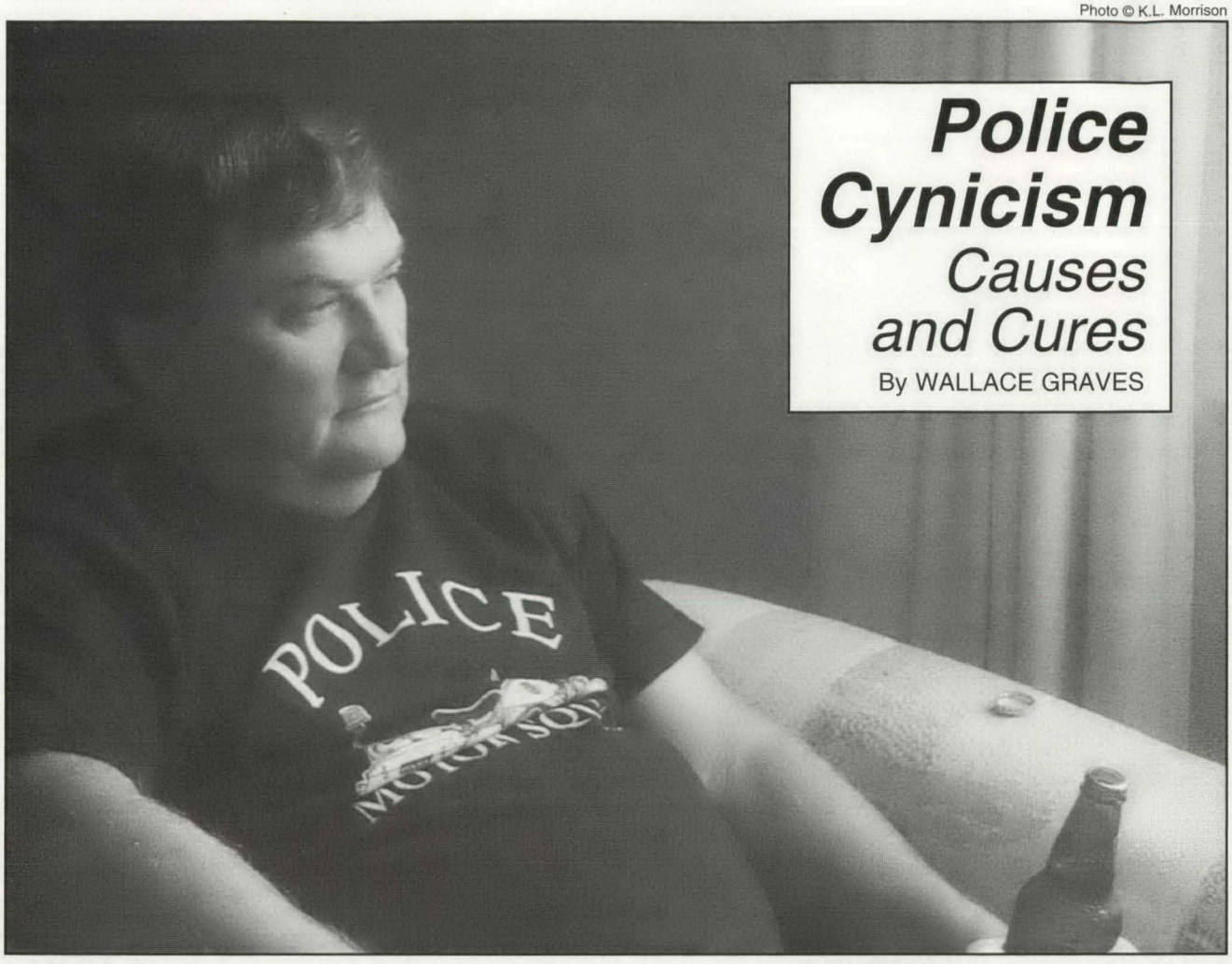


Police Cynicism
Causes and Cures

By WALLACE GRAVES

What makes a junkyard dog so mean and a cop so cynical? In the case of the dog, it is a matter of conditioning. The police officer undergoes a similar, but much more complex, process. Unfortunately, the public sometimes perceives the results to be the same.

Cynicism often adversely affects officers' productivity, impacts the morale of their colleagues, and chills community relations. It also tends to breed a poor quality of life for officers and their families. In some cases, cynicism can be a precursor to emotional problems, misconduct, brutality, and even corruption.

Cynical, distrustful officers hinder a department's efforts to forge collaborative relationships with members of the community. Therefore, police leaders must build a culture of policing that prevents cynicism and promotes a healthy, positive environment. This article examines police cynicism—what it is, what causes it, and how to prevent it.

WHAT IS CYNICISM?

Cynicism is an attitude of "contemptuous distrust of human nature and motives."[1] A cynic expects nothing but the worst in human behavior. In short, cynicism is the antithesis of idealism, truth, and justice—the very virtues that law enforcement officers swear to uphold.

Most research on police cynicism took place in the late 1960s and mid-1970s. Using test groups, researchers conducted studies that revealed cynicism to be more prevalent in large urban police departments and in the lower ranks, especially among college-educated officers. The degree of cynicism among officers studied generally increased during their first 10 years

of service, then declined slightly, and finally leveled off. Notably, officers in the studies who received meritorious awards experienced lower levels of cynicism.[2]

Recent research has focused on burnout and stress, two emotional conditions related to cynicism and caused largely by the excessive demands of the police profession. As with cynicism, burnout and stress can result in reduced performance, alienation, and the use of defense mechanisms. Burnout, stress, and cynicism produce two main unhealthy responses from police officers: Withdrawal from society and antipathy to idealism.

Withdrawal from Society

The sordid reality of the streets, particularly in large cities that have higher crime rates and more anonymity, often shocks officers fresh from the academy. As a result, many of the situations they experience cause them to lose faith in others and develop an us-versus-them view in the process. They soon begin to trust only other police officers, the only people who they believe understand how the world really is. Unfortunately, senior partners oftentimes reinforce such views.

As a consequence, officers socialize with fewer and fewer people outside of the law enforcement circle and might even gradually withdraw from their families and friends. If carried too far, this phenomenon courts domestic disaster. It can even lead to suicide.

As officers withdraw further and further from society, they lose their social safety net—the norms and values that help them make sense of the world—and fall deeper into a state of confusion, alienation, apathy, and frustration. This social estrangement is compounded as officers eventually lose respect for the law. Almost simultaneously, they learn to manipulate the law in their everyday dealings with what they believe to be a dysfunctional judicial system.[3]

Antipathy to Idealism

One of the main reasons young people go into law enforcement is to serve society.[4] When confronted with an unexpectedly hostile or indifferent public, or with a justice system that allows criminals to go free, idealistic officers feel betrayed and victimized by such injustice. They soon learn that the idealism of the academy and of the Law Enforcement Code of Ethics does not reflect reality.

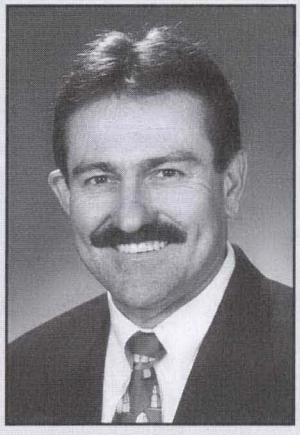
As they lose respect for law and society, these officers might lose their self-respect as well. Embittered, they cannot attack the public they have sworn to protect; so, they nurse their hatreds and become victims of cynicism.

Cynical officers no longer show concern for the values that led them to police service in the first place. Instead, they often view those values with contempt. Unlike employees in other occupations, police officers usually will not leave for another job because they are disillusioned with more than just the job. Like many combat veterans returning from war, they believe that their world has changed forever, no matter what job they hold.

WHAT CAUSES CYNICISM?

In addition to the conditions on the streets and the officers' ensuing loss of respect for the law, occupational stagnation also contributes to police cynicism.[5] This specialization often restricts patrol officers' opportunities for new and enriching experiences. For those

> ***"...cynicism is the antithesis of idealism, truth, and justice—the very virtues that law enforcement officers swear to uphold."***



Lieutenant Graves serves in the Los Angeles, California, Police Department.

officers who cannot be promoted, which happens to be the majority, the job provides few incentives and little built-in satisfaction. Instead, it may become tedious, especially for officers with a college education and high expectations. In a society that defines success in materialistic terms, the lack of promotability causes further frustration, disappointment, and a decrease in self-esteem.

Two concepts introduced here merit further exploration—the need for work to be rewarding and the effects of an excessively materialistic society on police officers. Some researchers postulate that work itself must yield feelings of achievement, responsibility, personal growth, and recognition to satisfy the worker's ego and self-actualization needs.[6] According to police cynicism studies, present methods of policing necessarily do not meet this need for the patrol officer.[7]

The second issue involves the effects of the high value placed on material success in American society. Many researchers over the years have identified the American dream of material success as a significant factor contributing to the soaring crime rate.[8] Such ambition promotes deviant behavior as individuals trade ethical values for personal gain, thus creating a culture of crime. Police officers not only see this phenomenon in the streets, where everyone is out for themselves, but they also might see it demonstrated by their own political and law enforcement leaders.

Some believe that cynicism has become an ingrained part of everyday life in this country. People adopt a cynical attitude as a reaction to and a defense against dashed hopes—hopes that have been culturally induced and socially reinforced.[9] As members of society, police officers fall victim to the same types of social forces that befall everyone else.

Photo © K.L. Morrison

HOW CAN CYNICISM BE PREVENTED?

Just as some of the causes of police cynicism correspond to the causes of burnout and stress among other types of employees, some methods of prevention and cure that help them also work for law enforcement. Leadership plays a significant part.

Competent, principle-centered, people-oriented leadership, as espoused by some current writers[10] on the topic, is required if the law enforcement profession is to develop an ethos based on universally acknowledged ethics, principles, and values. This ethos must accommodate and encourage personal ambition, but not exclude other values and goals.

Leadership

Police leaders must demonstrate their commitment to the ideals of honesty, fairness, justice, courage, integrity, loyalty, and compassion. Leaders who fail to prove themselves trustworthy help spread the seeds of cynicism.

Police leaders must exhibit appropriate conduct by example, not just by words. They also must nurture their employees by working to expose officers to the many good people and good deeds in their communities so they see more than just the bad.

By explaining the intent of rules of evidence and providing comprehensive and continuous training on the subject, leaders can help officers feel confident and empowered in the legal arena. Such confidence can help officers respect the judicial system rather than feel manipulated by it. Most important, leaders need to build a culture of integrity within their agencies, so that officers have something to believe in when all else seems to fail.

Research on cynicism suggests that principle-centered, compassionate leadership inspires employees and therefore decreases cynicism. To be effective, however, such leadership must be consistent over a long period of time. Role models and mentors also have a positive effect. Employee-oriented leadership and team building provide essential elements of a positive, "upbeat company."[11]

The research further recommends other ways to help prevent employees from becoming cynical, including job enrichment programs, participatory management styles

where employees share responsibility and have a say in workplace policies and practices, and reward systems in which employees have a voice.[12] In policing, as in society in general, an increased emphasis must be placed on sharing power and rewards with employees at all levels.

Every element of effective leadership, from setting an example to listening actively to employees, affects cynicism. As leaders promote esprit de corps, they directly help build esteem and self-worth among employees. Establishing standards, providing the training to reach those standards, and continuously offering refresher training builds officers' competence, which in turn builds their confidence. Following up with positive recognition or guidance when necessary creates and maintains good morale.

Those who write about motivation nearly always discuss the power of positive recognition. In *A Passion for Excellence*, Tom Peters recommends using any excuse to celebrate employee success.[13] Police managers have an obligation to their employees and their agencies to use this and all leadership tools to combat the debilitating disease of cynicism.

Recruiting

Experts routinely recommend that employees become involved in something larger than themselves to combat burnout and cynicism. An organizational culture committed to a quality product, the community, and/or the environment can accomplish this. Caution must be exercised here, however, because thwarted idealism might have made the public servant cynical in the first place. Their idealistic visions of public service did not match the realities, which caused them to lose faith and become cynical.

To prevent a repeat of this scenario, some researchers recommend providing a realistic job preview to potential applicants.[14] Recruits should know the exact realities of policing from the outset. At present, some departments offer limited orientation for the families of officers, but few, if any, offer a realistic preview to officers. College police science courses also could address such issues.

> ***"Cynicism often adversely affects officers' productivity, impacts the morale of their colleagues, and chills community relations."***

Training

In addition to a realistic job preview, recruit and ongoing roll call training should be provided on the subjects of cynicism, burnout, and stress management. While many departments offer psychological services to employees once symptoms develop, few offer preventative training.

Police officers must be taught the early warning signs of stress and burnout, as well as the difference between healthy suspicion and insidious cynicism. Once they know how to identify these problems, officers should be taught productive coping techniques and stress management methods. Left to their own devices, too many officers choose counterproductive methods, such as alcohol abuse and withdrawal. In addition, officers' families should receive similar training so that they can provide first-line detection and long-term support to their loved ones.[15]

Mentors and Peer Counselors

Because distraught officers often feel most comfortable talking to their colleagues, peer counseling provides another method for treating cynicism once symptoms appear. A more proactive measure, however, would be to recruit peer counselors as mentors for new officers.

Mentors provide instruction and help officers manage their expectations early in their assimilation into the police culture. By establishing realistic expectations, officers are less likely to become disillusioned by actual police work.

Community Policing

Community policing offers police departments a unique opportunity to combat cynicism. Involving the police and the public in collaborative problem solving has the positive side effect of reducing officers' alienation and withdrawal.

In community policing, management empowers employees, and trust is given and ultimately received. When officers feel that they can trust management and that management trusts them,

cynicism declines. In such a relationship, two-way accountability ensures that tasks get completed.

The empowerment aspect of community policing enables leaders to help employees develop their potential through creative and innovative problem solving. This leads to a better quality of service to the community achieved with greater efficiency and effectiveness. Particularly at the patrol level where studies have shown the levels of cynicism to be the highest, community policing can provide an outlet for accomplishment that builds employees' self-esteem and fulfills their needs for growth.

CONCLUSION

Police leaders must take a moment to reflect on cynicism, acknowledge its harmful effects, and use the tools available to prevent it. These tools—employee- and principle-centered leadership, realistic job previews, training, positive recognition, and empowerment—will serve to develop an organizational culture where personal ambition becomes second to the good of the organization and the good of the community.

Police cynicism is insidious and costly. It can attack officers of all ranks in departments of all sizes. Its cumulative effects sneak up on its victims, crushing their idealism and enthusiasm before they even realize what has happened.

Cynicism robs the profession of the very values needed to accomplish its goals. Each time it creates a negative contact with a citizen or impinges on professionalism and productivity among the ranks, cynicism impacts on police officers everywhere.

The demands of policing in the next century require that police leaders examine this disease and take action against it. Cynicism does not have to be a natural part of policing. With realistic expectations, strong and compassionate leadership, and continuous training, officers can avoid the conditions that lead to the pitfalls of cynicism and maintain their ideals and values.✦

Endnotes

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The Middle Manager

Managing Innovation in Policing: The Untapped Potential of the Middle Manager, a Police Executive Research Forum (PERF) book prepared under a National Institute of Justice (NIJ) grant, concludes that middle management's power to affect change can be harnessed to advance community policing objectives. This can be accomplished by including those managers in planning, acknowledging their legitimate self-interests, and motivating their investment in long-range solutions that enhance community safety and security. The book's research underscores the potential power of police middle managers to devise, implement, and monitor strategic innovation.

A copy of *Managing Innovation* can be purchased from PERF, 1120 Connecticut Ave, NW, Suite 930, Washington, DC 20036. The phone number is 202-466-7820; the fax number, 202-466-7826.

Guns and Crime

A report released by the Bureau of Justice Statistics (BJS) summarizes information from it's National Crime Victimization Survey, the FBI's Uniform Crime Reports, and the Bureau of Alcohol, Tobacco and Firearms files on criminal incidents and the use of guns. The report reveals that approximately 1.3 million U.S. residents faced an assailant armed with a firearm during 1993 and that the weapon was a handgun 86 percent of the time (in 1.1 million violent crimes). Of the 24,526 murders committed in 1993, 70 percent were committed with a firearm, of which four out of five were with a handgun.

The report looks at many issues regarding guns used in crime, including types of firearms, stolen guns, and assault weapons. It also covers the caliber of guns used in the killings of law enforcement officers and the guns most frequently traced.

Single copies of the publication "Guns Used in Crime" (NCJ-148201) may be obtained from the BJS Clearinghouse, Box 179, Annapolis Junction, MD 20701-0179. The telephone number is 1-800-732-3277, or orders can be faxed to (410) 792-4358. Data from tables and graphs used in many BJS reports can be obtained in spreadsheet files on 5 1/4- and 3 1/2-inch diskettes by calling 202-307-0784.

Financial Investigations Program

The Bureau of Justice Assistance (BJA) created the Financial Investigations (Finvest) Program in 1989 to help state and local law enforcement agencies implement specialized initiatives to investigate and prosecute drug-related crimes. The Finvest Program strategy is to promote a multiagency enforcement response and prosecutorial strategy against major drug trafficking conspiracies operating throughout a multijurisdictional area. It also establishes a formal mechanism whereby investigative and prosecutorial resources can be allocated, managed, and focused effectively on targeted offenses and offenders.

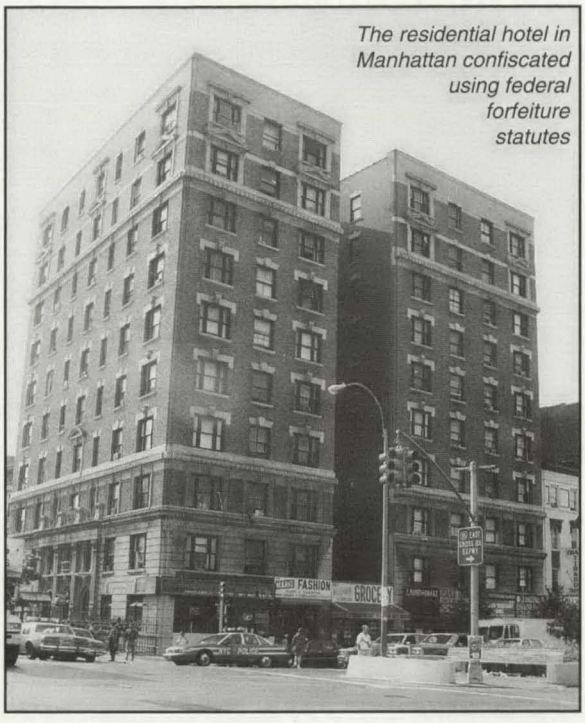
A BJA-funded monograph, *Narcotics-Related Financial Investigations: Lessons Learned From the Finvest Program Model*, recounts the origin and strategy of the Finvest Program, as well as its desired and actual operational results. The monograph describes briefly each of the Finvest projects and addresses project initiation and development, presenting lessons learned throughout the program's operation. It can serve as an implementation guide for initiating similar efforts to investigate financial aspects of drug crimes.

The monograph, NCJ 148215, can be obtained by contacting the BJA Clearinghouse, P.O. Box 6000, Rockville, MD 20849-6000. Requests can be made by phone, fax, or the Internet. The phone number is 1-800-688-4252; the fax number, 301-251-5212; the Internet address, look@ncjrs.aspensys.com.

Case Study

Under New Management
Using Federal Forfeiture Statutes to Attack the Drug Trade

By Carl G. Ringwald



The residential hotel in Manhattan confiscated using federal forfeiture statutes

Washington Heights, a neighborhood in upper Manhattan, has a long and colorful history. Heavy fighting took place in the area during the early years of the American Revolution. Throughout the late 19th and early 20th centuries, the expanding city gradually annexed the farms and estates in the region and developed the neighborhood as residential and light commercial property.

Since that time, Washington Heights has become a home to newcomers—in the early 20th century to European immigrants and southern blacks who migrated north. Today, most residents come from Latin American and Caribbean countries.

Unfortunately, in recent years, Washington Heights also has emerged as one of the principal cocaine markets in the northeastern United States. Many customers commute from New York suburbs, but others come from as far away as the South and Midwest to purchase drugs for resale in their hometowns.

While some dealers work on the streets, many more operate out of apartment buildings. Major distributors occasionally commandeer abandoned apartments, others rent under assumed names, and still others pay legitimate tenants several thousand dollars to move out. The dealers then set up shop and simply pay the rent in the legal tenant's name.

The Building

In the center of Washington Heights, across the street from the old Audubon Ballroom where Malcolm X was assassinated, sits a 10-story residential hotel. The aging hotel contains approximately 215 units, each rented separately. The units are grouped into sections of six; each section has a common bathroom and kitchen used by all of the tenants in that section. A family named Hutton (a pseudonym) purchased the building in 1976. Experienced landlords, the Huttons already owned several properties in Manhattan when they purchased the hotel.

Drug dealers began appearing in the building in the mid-1980s. Others started to congregate in front of the hotel. Customers looking for a few grams of cocaine made their purchases on the street; those seeking larger quantities went up to one of the hotel rooms, where the transaction took place. Lookouts posted on the street and in the building kept an eye out for the police.

Despite the lookouts' efforts, precinct patrol officers and Narcotics Division detectives from the New York City Police Department (NYPD) began making large numbers of arrests in the hotel. From 1989 to 1992, officers and detectives executed 78 search warrants and made arrests in rooms, hallways, and the lobby. Investigators determined that by 1992, arrests, seizures, or other drug-related activities had occurred in one-third of the building's rooms.

The Manhattan District Attorney's Office informed the building's owners of each drug arrest and asked them to evict the tenants involved, but the owners took no action. In 1991, police and prosecutors met with the Huttons on two occasions to discuss the escalating drug problem in their hotel, the history of

drug activity in the building, the danger it posed to law-abiding residents of the hotel, and the Huttons' responsibility as owners to address the problem. Still, the Huttons never expressed any interest in getting help with the drug problem in their building.

Police officers even provided a number of suggestions to reduce the level of drug sales at the building. These included adopting better screening procedures for prospective tenants, initiating eviction proceedings against tenants who sold drugs in the building, notifying the police of any drug activity in the building, and hiring private security guards to discourage drug dealers and their customers from using the hotel as a drug bazaar.

Police pointed out that other property owners in the neighborhood had used these same means to reduce or eliminate drug dealing in their buildings. However, despite repeated promises, the Huttons made no moves to improve the situation, and drug sales in the hotel continued.

> **"In worst case scenarios, the government can step in where property owners refuse to make buildings safe for tenants."**

The Investigation

In the spring of 1992, members of the Manhattan North Major Case Unit, part of the police department's Narcotics Division, opened an investigation into a drug ring controlled by two brothers who operated from the hotel. An undercover detective purchased 1 pound of cocaine from the brothers on two separate occasions. Both of these purchases took place in a room the brothers rented on the eighth floor of the hotel. Soon thereafter, the police placed a court-authorized tap on the suspects' telephone. In one 6-week period, detectives counted 1,559 incoming calls and 2,625 outgoing calls over this line. Seventy percent of these calls lasted less than 2 minutes; eight percent of the outgoing calls were to pagers.

Detectives also determined that 400 of these calls were to or from other rooms in the same building; 300 calls were placed to or received from the third floor room used by the ring's lookouts. The volume of calls and their brief duration indicated that the brothers ran a large-scale drug operation.

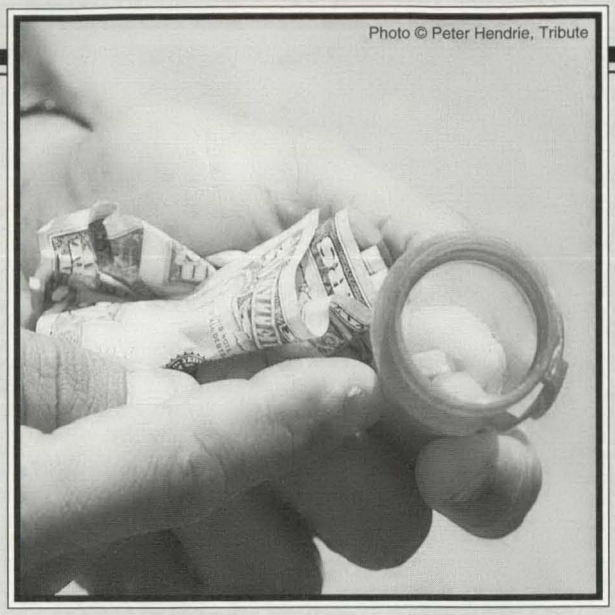
Detectives from the Major Case Unit calculated that the ring could move 15 to 20 kilograms of cocaine a day. The organization worked every day except Sunday and was open for business from late morning until 9 or 10 p.m. Intelligence revealed that Colombian importers supplied the ring, while most of the brothers' customers were local dealers.

The brothers also owned a restaurant and a travel agency in the neighborhood. They advertised the restaurant on Spanish language television and occasionally used it as a meeting place to discuss drug transactions and as a storage place for cocaine. One of the brothers used the travel agency, managed by his wife, to receive and launder the ring's money.

On July 29, 1992, a buyer—having made arrangements by telephone the preceding day—came to the travel agency and gave the wife $37,000. Detectives then watched as the man walked from the agency to the hotel. A few moments later, he emerged carrying a shopping bag, being escorted by one of the group's workers. The worker hailed a taxicab, and the buyer got in and left. The surveillance team stopped the cab one-half mile away and arrested the man. On the seat next to him were 2 kilograms of cocaine in a shopping bag.

One week later, detectives from the Major Case Unit executed a search warrant in room 8B6 of the hotel, the same room in which the undercover officer and the buyer had made their purchases. The detectives recovered 16 kilograms of cocaine and arrested two of the brothers' associates, along with the courier who had just delivered the drugs. The two associates posted bail and promptly fled the country. The courier, a Columbian national, pled guilty and is now serving 6 years to life in a state prison.

The brothers then moved the operation to another room in the hotel, and fearing wiretaps, changed their telephone number. Investigators subsequently obtained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an eavesdropping order for the new line and continued monitoring the operation.

On September 16, 1992, Major Case Unit detectives arrested one of the brothers, his wife (who operated the travel agency), and six associates. As the group was being arrested, another hapless courier arrived to make a delivery of cocaine. Detectives also placed him in custody. After the arrests, the district attorney seized the restaurant and travel agency. As always, the district attorney's office and the police department notified the Huttons of the arrests. However, nothing changed in the building; drug sales continued unchecked.

The Seizure

Investigators from the Manhattan North Narcotics Division became increasingly frustrated by the Huttons' failure to address the drug trade in their building. After consultations with local prosecutors, the investigators decided that the only way to end drug dealing in the hotel permanently was to seize the building from its owners. Fortunately, the Huttons' refusal to take any action to combat the problem even after repeated requests from police and prosecutors had been well-documented.

Under New York State law, real property used to facilitate a crime can only be seized from an owner who is *not* a criminal subject if the owner consented to the illegal activity *and* received a "substantial benefit" for allowing the illegal activity to take place.[1] The Huttons themselves had never been accused of any criminal act, and no proof existed that they received any payments or other benefits for permitting the drug trade to continue.[2]

Under federal law, however, real property can be seized from an owner who is not accused of any crime if the government can show that the owner knew about and consented to the criminal activity.[3] Where the owner knows of the illegal activity, consent is presumed, unless the owner can show that *all reasonable steps under the circumstances* were taken to combat it.[4] The government does not have to prove that the owner received any benefit for allowing the activity.

Given the limitations of New York State law, local prosecutors contacted the U.S. Attorney's Office for the Southern District of New York to enlist its assistance in pursuing federal indictments against the Huttons. The local prosecutors cited the following reasons for pursuing forfeiture in federal court:

- The Huttons never evicted any tenant whose room had been used for drug sales.
- They never improved the application process for new tenants, even after the two meetings with local prosecutors and police. In fact, the application process became less, not more, comprehensive as time passed.
- The Huttons and their managers knew that drug dealers in the building rented blocks of rooms under assumed names.
- Employees of the hotel never screened visitors entering the building.
- The building manager knew that street dealers hid in the hotel's lobby when officers patrolled the area outside the building.
- The Huttons used private security guards in the building for only a brief period. During that time, the only people the guards were known to have challenged were police officers entering the building to execute a search warrant.
- Except for a few telephone calls of little substance, the Huttons never reached out to the police or the district attorney's office with information or requests for assistance.

• The Huttons never fired any employee involved in drug dealing. Even after officers executing a search warrant found one of the building's managers in the room, the owners refused to believe that he was dealing in drugs and kept him on the payroll.

After extensive discussions with police officials and prosecutors, and a review of the history of illegal activity at the hotel, federal prosecutors agreed to bring forfeiture proceedings against the Huttons.

Federal forfeiture law requires notice and an opportunity for a hearing prior to the seizure of real property *except* where exigent circumstances are present.[5] In this case, ongoing drug sales and the failure of repeated arrests to end the drug trade at the hotel created the exigent circumstances. Based on this information, in addition to multiple undercover drug purchases and warranted searches of the building by police, federal prosecutors requested a court order authorizing seizure of the hotel.

On October 22, 1992, a U.S. District Court judge issued an *ex parte* order granting the U.S. Marshals Service permission to seize the hotel without prior notice to the owners. The next day, 150 detectives from the Narcotics Division, backed by uniformed patrol officers, executed search warrants throughout the hotel. They made multiple arrests; seized cocaine, currency, and other contraband from tenants; and shut down the open-air drug market in front of the building. A marshal then formally seized the building, escorting the one member of the Hutton family on the premises to the door.

> **"The federal forfeiture statutes that the local police and federal prosecutors pursued...could be applied against negligent landlords in jurisdictions across the country."**

The Trial and Appeals

The Huttons challenged the seizure by contesting the forfeiture action and seeking the building's return. During the trial, they never contested factual evidence about the nature and extent of the drug problem in the hotel. Instead, their lawyers contended that the Huttons had not consented to it, and had, in fact, done everything they could to fight the drug problem.

However, using testimony from investigators, patrol officers, an undercover detective, an informant, and others, prosecutors presented overwhelming evidence establishing that the Huttons had done little or nothing to curtail the drug trade in the hotel. After a 6-day trial, the jury took less than 2 hours to come to a verdict, deciding that the Huttons should forfeit the building permanently.

The Huttons asked a federal appeals court to set aside the jury's verdict. They argued that the seizure without prior notice was improper, that the trial judge had made a number of improper rulings, and that the forfeiture was unreasonable under the excessive fines clause of the eighth amendment.

A panel of the Second Circuit Court of Appeals upheld the rulings of the trial judge and denied the Huttons' application to overthrow the verdict. The Huttons then attempted to appeal the ruling to the U.S. Supreme Court. However, on October 2, 1995, the Court denied their *writ of certiorari* and refused to hear the case.

Another Successful Seizure

In June 1994, just 6 months after the jury returned its verdict against the Huttons, the NYPD and the U.S. attorney's office used the same federal forfeiture statute to seize an even larger residential hotel in Manhattan. Like the Huttons, the owner of this hotel had never been charged with any criminal wrongdoing. Also like the Huttons, he had permitted a drug problem in his property to go unchecked, refusing all requests from police and prosecutors to take any measures to combat the problem. The courts have upheld this seizure as well.

Forfeiture Documentation

When local and state statutes prove inadequate, police and prosecutors should consider using federal

forfeiture laws against owners who permit criminal activity on their property. To do so, investigators must show that the illegal activity is chronic, that the owner knows about the illegal activity, and that the owner failed to take reasonable steps to address the problem. To support such a case, investigators must maintain detailed records of the following:

- The history and extent of criminal activity at the property
- All arrests made on the property and all contraband seized
- All criminal investigations of tenants and guests
- All relevant information from confidential sources
- All documented contacts with and notifications to the owner(s) or their agents
- The owner's action (or inaction) in response to the illegal activity
- The effect of the illegal conduct on the surrounding area
- All complaints from citizens and information from other agencies regarding the criminal activity at the property.

> **"...federal forfeiture statutes represent a viable way for local police and prosecutors to give deteriorating residential properties, and the tenants who live in them, a new lease on life."**

Conclusion

A private management firm under contract to the U.S. Marshals Service now operates the hotel once owned by the Huttons. Drug deals no longer take place in the building, and the crowds of dealers who lined the sidewalks outside the hotel for so many years have disappeared. Law-abiding tenants who once lived in fear of the drug dealers and their customers now feel safer in their surroundings.

Although the Huttons had not been charged with any crime, the courts ultimately held them responsible for their refusal to exercise even minimal controls over the illicit activities occurring in their building. The federal forfeiture statutes that the local police and federal prosecutors pursued against the Huttons could be applied against negligent landlords in jurisdictions across the country. However, investigators must maintain detailed records that prosecutors can use to prove a sustained pattern of neglect on the part of the property owner.

At the very least, the credible threat of forfeiture may encourage inattentive landlords to address crime problems in their buildings. In worst case scenarios, the government can step in where property owners refuse to make buildings safe for tenants. Either way, federal forfeiture statutes represent a viable way for local police and prosecutors to give deteriorating residential properties, and the tenants who live in them, a new lease on life.✦

Endnotes

[1] New York Civil Practice Law and Rules, sec. 1311 3(b)(v) (Mckinney 1995).

[2] Unconfirmed reports from tenants and confidential informants alleged that the Huttons were being paid off by drug dealers who used the hotel. However, the police could not develop legally sufficient proof of such payments.

[3] 21 USC sec. 881(a)7.

[4] *United States* v. *Two Parcels of Property Located at 19 and 25 Castle Street*, 31 F.3d 35, 39 (2d Cir. July 18, 1994). An owner who knew that a property was being used for illegal activity must demonstrate lack of consent by proving that he did "all that reasonably could be expected to prevent the illegal activity once he learned of it."

[5] The standard for "exigent circumstances" in such cases was established in *United States* v. *James Daniel Good Real Property*, 114 S.Ct. 492 (1993). See also, *United States* v. *141st Street Realty Corporation*, 911 F.2d 870 (2d Cir. 1990), *cert denied*, 498 U.S. 1109 (1991).

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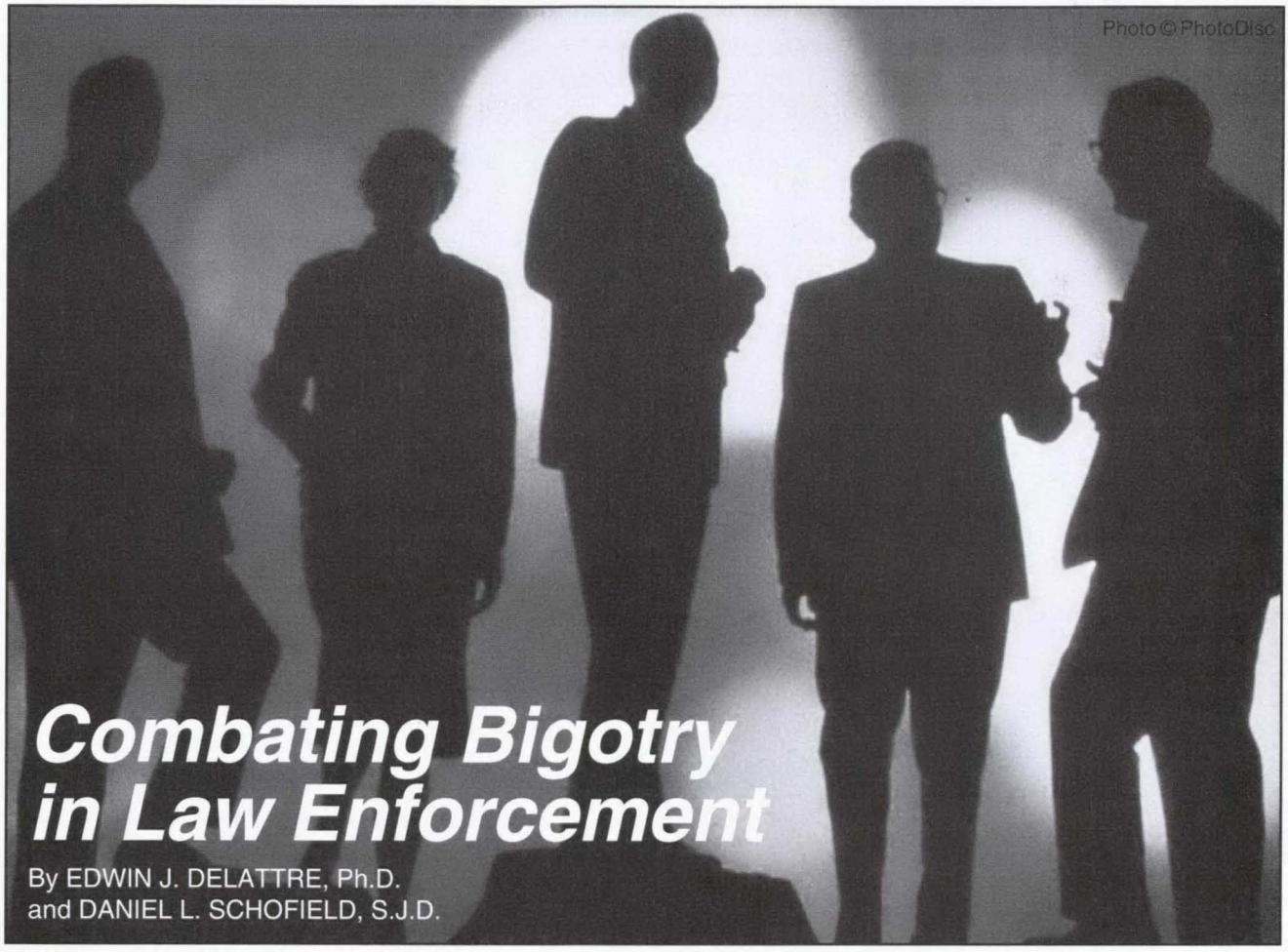

Combating Bigotry in Law Enforcement

By EDWIN J. DELATTRE, Ph.D.
and DANIEL L. SCHOFIELD, S.J.D.

It is not unusual for police and law enforcement leaders to believe that first amendment rights of sworn and civilian personnel prevent firm departmental policies and sanctions against bigoted speech and expressive conduct. Police executives understand that ethnic slurs, racial epithets, sexist insults, and other expressions of bigotry are morally indefensible and have no rightful place in public service. But, along with elected officials, they may feel legally constrained from implementing policies designed to prevent and root out bigoted speech and behavior.

In civilized nations, freedom of thought is sacred. Human dignity is grounded in respect for equality, liberty, and the equal right of individuals to think as they see fit. So profound is the right to freedom of thought that no one may be punished legitimately for what they think, no matter how benighted, wrong, or irresponsible their thoughts may be. Freedom of thought is the most basic of all obstacles to governmental tyranny.

The right to freedom of thought is unconditional. And, because words and actions normally give expression to what individuals think, traditions of civility embrace great respect for freedom of expression. However, neither the U.S. Constitution nor first amendment case law guarantees unconditional freedom of speech and nonverbal expression.

To what extent, then, do law enforcement employees enjoy first amendment protection for ethnic slurs, racial epithets, demeaning sexist insults, and other bigoted speech and nonverbal conduct? The U.S. Supreme Court never has answered this question directly, but the Court did reaffirm recently the broad latitude allowed public employers to prohibit employees from using "...offensive utterances to members of the public, or to the people with whom they work"[1] that interfere with the effective accomplishment of the governmental employer's mission. A fair

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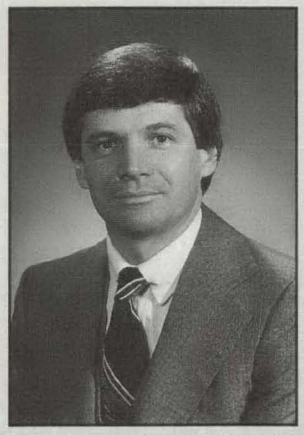

Special Agent Schofield is chief of the Legal Instruction Unit at the FBI Academy.

conclusion from the results reached by those lower courts that have addressed the issue is that the first amendment provides little, if any, protection for the bigoted speech of law enforcement employees.

This article begins with a discussion of the analytical framework for determining first amendment protection for public employees. Next, it reviews court decisions involving law enforcement employees who claim first amendment protection for speech or expressive conduct that can fairly be characterized as bigoted. Finally, the article discusses the ethical duty to combat bigotry in law enforcement organizations.[2]

The Analytical Framework

The threshold question for determining whether a particular expression by an employee is protected by the first amendment is whether it may be "...fairly characterized as constituting speech on a matter of public concern."[3] Courts examine the content, form, and context of employee speech to determine whether it relates to any matter of political, social, or other legitimate concern to the community.

An employee's expressive activity that fails to satisfy this so-called public concern test is generally not protected by the first amendment.[4] Examples of an employee's speech that courts have ruled not to be a matter of public concern include:

1) A police chief's personal opinion of another person because the purpose for the speech was to advance his private interests;[5]

2) A college professor's incessant use of profanity in the classroom because his intent was merely to exhibit his attitude toward his students;[6] and

3) The locker room speech of a college basketball coach in which he used the word "nigger" because his purpose was to motivate his players rather than to impart any socially or politically relevant message.[7]

Conversely, a college professor's derogatory comments about Jews that were characterized as "hateful and repugnant" were held to be speech on a matter of public concern. The court found that these comments were made in the context of the professor's criticism of the public school curriculum for reflecting bias against minorities and a history of black oppression that the court said are issues "...suffused with social and political hues."[8] In contrast to the locker room speech of the basketball coach, the professor's derogatory comments arguably advanced viewpoints, however repugnant, the purpose of which was to influence or inform public debate.[9]

Once the public concern requirement is satisfied, courts then employ a balancing of interests test to determine whether the value of the speech outweighs legitimate interests of the governmental employer. The closer the expressive activity reflects on matters of public concern, the more conclusive the employer's evidence must be to show that the speech is likely to disrupt legitimate governmental interests and purposes. However, employee speech on a matter of public concern has no first amendment protection if under this balancing of interests analysis its potential disruptiveness to governmental interests outweighs its value to the public interest.

For example, in the case involving the college professor who made derogatory comments about Jews that were deemed a matter of public concern, the U.S. Court of Appeals for the Second Circuit nonetheless

ruled that the speech was unprotected under the balancing test, based on the university's showing that the comments would likely disrupt university operations.[10] The court concluded that the first amendment "...permits a government employer to fire an employee for speaking on a matter of public concern if 1) the employer's prediction of disruption is reasonable; 2) the potential disruptiveness is enough to outweigh the value of the speech; and 3) the employer took action against the employee based on this disruption and not in retaliation for the speech."[11]

The Public Concern Test

In assessing the content, form, and context of an employee's speech to determine whether it relates to a matter of public concern, courts tend to focus on the following three closely related factors: 1) The communicative purpose or motivation of the speaker, 2) whether the speech merely reflects a personal bias or grievance of the speaker, and 3) whether the expression is directed to the public. Courts employing these factors generally conclude that bigoted speech by law enforcement employees fails the public concern test.

For example, in *Pruitt* v. *Howard County Sheriff's Department*,[12] the Maryland Court of Special Appeals concluded that "Nazi-like" comments and behavior by officers were not a matter of public concern in the technical sense that they could not "be fairly characterized as constituting speech on a matter of public concern." The conduct ranged from parodies of "Hogan's Heroes," exaggerated German accents, and military mannerisms, such as the Hitler hand salute and heel clicks, to the use of terms like "achtung" and "sieg heil." The conduct was intended solely for the private amusement of other department and courthouse employees.

In ruling the officers' dismissal did not violate the first amendment, the court concluded that the officers' conduct merely reflected a personal bias, was bereft of any political content, and was intended for amusement rather than for debate on any matter of public concern.[13] The court accepted the general proposition that a law enforcement employee's "resort to epithets and personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution."[14] The court also distinguished this private parody in front of co-workers from a public performance containing satire or humor and suggested the latter would more likely be deemed a matter of public concern.[15]

> ***"...neither the U.S. Constitution nor first amendment case law guarantees unconditional freedom of speech and nonverbal expression."***

In *Tindle* v. *Caudell*,[16] the U.S. Court of Appeals for the Eighth Circuit concluded that a costume worn by an officer at a Halloween party at the Fraternal Order of Police lodge did not constitute speech on any matter of legitimate public concern. The officer attended the party dressed in blackface, wearing bib overalls and a black, curly wig, and carrying a watermelon. The court noted that wearing a particular outfit or costume is nonverbal conduct that is protected as speech if it is intended to convey a message likely to be understood by those who view it.

The court reasoned that the officer's admitted motivation for wearing the costume, i.e., to have a good time and entertain other party guests, lessened the costume's expressive attributes because "[a]musing other guests at a private party with no showing of any intended message is not speech on a matter of public concern."[17] The court also agreed with *Pruitt* that an officer's artistic expression of satire or humor before a public audience would more likely be deemed speech on a matter of public concern.

In *Hawkins* v. *Department of Public Safety*,[18] the Maryland Court of Appeals ruled that a prison guard's abusive words and conduct directed toward a private citizen while the guard was off duty, away from the prison, and out of uniform failed the test of speech on a matter of public concern. After arguing with a bank teller over a check, the guard proclaimed loudly: "Hitler should have gotten rid of all you Jews." The court ruled the guard's words were not speech on a matter of public concern, because he was not attempting to stimulate a dialogue on the Holocaust but instead giving vent to his anger and using

speech as a weapon to abuse the teller who had inconvenienced him.[19]

In *Lawrenz* v. *James*,[20] a corrections officer, while attending a barbecue on Martin Luther King Day wearing a t-shirt adorned with a swastika and the words "White Power," discussed with other officers their shared perception of managerial bias against white officers and the department's affirmative action program. A federal district court ruled the officer's "...beliefs relating to the swastika and the strength or power of white people are purely matters of personal interest, not matters of public concern."[21]

The court acknowledged that the officer's speech relating to the alleged discriminatory treatment against white officers posed a harder question. Still, the court concluded that it was not speech on a matter of public concern because the officer's motivation for discussing with his co-workers the alleged race discrimination was not to bring the issue to the public's attention but was merely an airing of a personal employee grievance, and the statements were not made publicly or intended for the public.[22]

The Balancing Process

The cases discussed in the preceding section suggest courts will find most bigoted expression by employees not to be speech on a matter of public concern. However, even in those instances where employee speech is considered a matter of public concern, that speech is protected by the first amendment only if a court also determines that its value to the public interest outweighs its adverse effects on legitimate law enforcement interests.

In this balancing process, courts do not require a demonstration of actual disruption of law enforcement caused by the employee's speech; instead, courts afford substantial weight to the employer's reasonable prediction of disruption.[23] The cases discussed below illustrate judicial acceptance of the connections between an employee's bigoted expression and disruption of law enforcement and the related need for departmental regulations prohibiting bigoted expressions that undermine law enforcement efficiency and effectiveness.[24]

> ***"No excuse can be given for laxity in the efforts of police leaders and their agencies to limit...the continuing presence of bigoted expression in law enforcement."***

In *Tindle*, the court reasoned that even if the officer's offensive appearance at the Halloween party had satisfied the public concern requirement, the interests of the police department outweighed the value of the officer's expressive conduct. First, the need for harmony and close working relationships in a police department is of great importance, and the undisputed evidence showed that some African-American members of the department felt belittled and ridiculed by the costume. Second, management had a reasonable basis for believing the officer's conduct had the clear potential to disrupt working relationships in the department. Third, the primary basis for the department's imposition of discipline was the potential internal disruption within the police department, not negative publicity or repercussions in the community resulting from the officer's behavior.[25]

The court in *Tindle* also rejected the officer's constitutional challenge to the underlying departmental regulations that purported to "...prohibit a police officer from engaging in conduct that could result in justified criticism of the officer or the department and from ridiculing, mocking, taunting, or deriding any person." The court stated that because "...police departments function as paramilitary organizations, their members may be subject to stringent rules and regulations that could not apply to other government agencies."[26]

The court found the regulations rationally related to the department's legitimate interest in developing discipline, esprit de corps, and uniformity within its ranks. Moreover, while conceding that the regulations did not precisely define what would constitute impermissible conduct, the court believed they gave officers adequate notice that high standards of conduct are required.[27]

In *Lawrenz*, the court concluded that even if the officer's wearing of the "White Power" t-shirt with the swastika was deemed to be speech on a matter of public concern, the balancing process would strongly

favor departmental interests for a number of reasons. First, management had reasonable grounds for believing the incident would have a negative effect on prison safety and operations. Second, the first amendment does not require law enforcement agencies to wait until racial tensions erupt before taking action. Third, employees in law enforcement-type organizations who engage in expressions only tangentially related to speech on a matter of public concern are entitled to less protection than in other contexts.[28]

The Ethical Duty to Combat Bigotry

Fidelity to the public trust in law enforcement and living up to the oath to uphold and defend the Constitution are impossible without respect for justice. Justice, including respect for human dignity and equal standing under the law, is simply antithetical to bigotry. Because the achievement of justice is the highest ideal and purpose of government itself, courts do not provide any blanket protection for bigoted speech and expressive action by law enforcement personnel.

The mission of police and law enforcement agencies is severely undermined and can be utterly ruined wherever sworn and civilian personnel are bigoted against members of the public or against each other. Sworn and civilian personnel, like everyone else, have a right to think what they will, but they do not have any comparable right to give expression to bigotry, or to do so without sanction.

Recruitment, training, supervision, and procedures for accountability in law enforcement should be unambiguous in such matters. Where background investigations disclose habits of bigoted speech, as in ethnic slurs, racial epithets, gender insults, and the like, those habits of conduct may be entirely sufficient to disqualify applicants. Bad habits are hard to change, and recruitment should not treat habits that are inimical to responsible policing as if they were unimportant in any way.

Experienced police administrators know that it is harder to rid a department of employees who are unfit for public service than it is to avoid hiring them initially. The first line of defense against bigotry is in hiring policies and practices and in appropriately focused background investigations.


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In training, supervision, and overall accountability, departments are obligated to explain why bigotry is wrong and why the department will not tolerate bigoted speech or expression. The right to freedom of thought should be emphasized and, with it, the duty of respect for human dignity and for justice in everyday life and in the performance of duty.

Police officers should understand that the right to freedom of thought protects benighted thinking, but does not make it right and does not protect speech and behavior that give voice to it. Such instruction is not "sensitivity training." It is a matter of teaching without equivocation the duties of justice in speech and action that are incumbent on police, and of teaching what an oath to uphold the Constitution means. Good instruction necessarily includes close attention to the words of the preamble to the Constitution.

Likewise, police officers should learn that no one is exempt, by virtue of any inherited quality, from being prejudiced. Bigotry is a human failing, not a failing to which only some people by reason of birth are susceptible. The bigot, as law enforcement personnel should understand, is in a profoundly consequential way a moral failure.

No matter what color, ethnicity, religion, or gender they are, if individuals are prejudiced against others because of color, ethnicity, religion, or gender, they are failures in their understanding of humanity. The inability to grasp this marks not only the ways in which the bigot is contemptible but also all the ways in which the bigot is pitiable.

Contempt for the person whose bigotry is inevitably a form of self-debasement tends, therefore, to be mingled with a disdainful pity that the person should be so divorced from a trustworthy perception of reality about human beings, human feelings, and human life. Police officers cannot serve the public interest faithfully, cannot enforce the

law justly, if they are so divorced from reality that they speak and act with bigoted contempt for either fellow employees or members of the public they serve.

The duty to combat bigotry in policing and law enforcement is among the most important obligations in the tradition of higher intellectual and moral standards for public servants than for the general public. Law enforcement leaders who have mistakenly believed themselves to be constrained by the first amendment from taking action against bigoted expression should recognize that they have very considerable authority to bring to bear against bigotry.

Failure to exercise that authority in recruitment, training, supervision, and policies of accountability threatens to place the police, law enforcement agencies, and the public in jeopardy time and again from the bigots of the world. Expressions of bigotry by police poison public confidence in the entire criminal justice system and reduce criminal trials to tests of police credibility.

Bigoted speech and expression are wrong by their nature and destructive in their consequences. They are, in a word, a moral outrage. No excuse can be given for laxity in the efforts of police leaders and their agencies to limit, as fully as the law allows, the continuing presence of bigoted expression in law enforcement.✦

Endnotes

[1] *Waters* v. *Churchill*, 114 S.Ct. 1878, 1886 (1994).

[2] For a comprehensive discussion of ethics in policing, *see* Edwin J. Delattre, *Character and Cops: Ethics in Policing*, 2d ed. (Washington, DC: American Enterprise Institute for Public Policy Research, 1994).

[3] *Connick* v. *Myers*, 103 S.Ct. 1684, 1689 (1983).

[4] However, several courts have found the public concern test inapplicable to speech that occurs away from the job and is not about the job. *See, e.g., Flanagan* v. *Munger*, 890 F.2d 1557 (10th Cir. 1989); *Berger* v. *Battaglia*, 779 F.2d 992 (4th Cir. 1985); and *Hawkins* v. *Public Safety Dept*, 602 A.2d 712 (Md. 1992)(Bell, dissenting).

[5] *Linhart* v. *Glatfelter*, 771 F.2d 1004 (7th Cir. 1985).

[6] *Martin* v. *Parrish*, 805 F.2d 583 (5th Cir. 1986).

[7] *Dambrot* v. *Central Michigan University*, 55 F.3d 1177 (6th Cir. 1995).

> ***"Courts examine the content, form, and context of employee speech to determine whether it relates to any matter of political, social, or other legitimate concern to the community."***

[8] *Jeffries* v. *Harleston*, 21 F.3d 1238, 1245 (2d Cir. 1238 1994), *rev'd on other grounds*, 52 F.3d 9, *cert. denied*, 116 S.Ct. 173 (1995).

[9] In *Skruggs* v. *Keen*, 900 F.Supp. 821 (W.D.Va.1995), the court said that a teacher's negative comments about interracial dating and racial discrimination during a private conversation with students are a matter of public concern, even if potentially insulting to a certain group. However, the court suggests that a racial slur during such a conversation would not be protected: "Indeed, if the racial slur were used, it would arguably not be protected. Even in cases where the government regulates speech as a sovereign, speech containing 'fighting words' is not given protection." *Chaplinsky* v. *New Hampshire*, 315 U.S. 568 (1942).

[10] *Jeffries* v. *Harleston*, 52 F.3d 9 (2d Cir. 1995), *cert. denied*, 116 S.Ct. 173 (1995).

[11] *Id.* at 13.

[12] 623 A.2d 696 (Md. App. 1993), *cert. denied*, 114 S.Ct. 1059 (1994).

[13] *Id.* at 701, 702. The U.S. Court of Appeals for the Fourth Circuit, in an unpublished disposition, reported at 76 F.3d 374 (1996), held that the officers had no recourse under Title VII of the 1964 Civil Rights Act or other federal civil rights laws and dismissed their claim of discrimination.

[14] *Id.* at 702.

[15] *Id.*

[16] 56 F.3d 966 (8th Cir. 1995).

[17] *Id.* at 970.

[18] 602 A.2d 712 (Md. 1992).

[19] *Id.* at 717-18.

[20] 852 F.Supp. 986 (M.D. Fla. 1994), *aff'd*, 46 F.3d 70 (11th Cir. 1995).

[21] *Id.* at 992. In *West Baton Rouge Parish* v. *Westside Aero*, 572 So.2d 1127 (La.App.1 Cir. 1990), the court held that racially and sexually offensive cartoons created and circulated by a police officer did not involve matters of public concern because they pertained to personal disputes and grievances and were not calculated to disclose misconduct.

[22] *Id.*

[23] *See, e.g., Jeffries* v. *Harleston*, 52 F.3d at 13.

[24] In *Rankin* v. *McPerson*, 107 S.Ct. 2891 (1987), the Court suggests the nature of an employee's duties in a law enforcement organization is relevant to the balancing process and that an employee whose duties are purely clerical with minimal involvement in law enforcement may have slightly greater first amendment protection to engage in controversial speech.

[25] 56 F.3d at 971-72.

[26] *Id.* at 973

[27] *Id.*

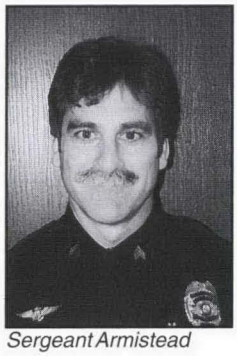
[28] 852 F.Supp. at 993-94. *See also, Bayges* v. *Southeastern Pennsylvania Transportation Authority*, 1992 WL 392596 (E.D.Pa. 1992), *aff'd*, 5 F.3d 1488 (3d Cir. 1993)(employee who made racially derogatory remarks that were overheard by reason of an inadvertently keyed radio transmitter could lawfully be disciplined); and *Griggs* v. *No. Maine Fire Dist.*, 576 N.E.2d 1082 (Ill. 1991)(an employee's vulgar and ethnically derogatory speech occurring during a private conversation at the station was not protected speech).

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. *Law Enforcement* also wants to recognize their exemplary service to the law enforcement profession.

Officer Pruneau

While off duty, Officer Michael R. Pruneau of the Crystal City, Missouri, Police Department was driving through town when he observed a small boy with his head hanging out of the window of a parked vehicle. The child's face appeared to be discolored as if he were being strangled by the window. As Officer Pruneau later determined, the child's 2-year-old brother had closed the window while the boy's head was outside the vehicle. Officer Pruneau immediately pulled over, alerted the parents, and freed the child. He removed the boy from the vehicle, but could not locate a pulse. Officer Pruneau initiated CPR to stimulate a heartbeat and administered rescue breathing until the child began to breathe on his own. Arriving paramedics transported the child to an area hospital. He was later flown to a children's hospital in St. Louis for further treatment. Officer Pruneau's quick response saved the child's life.



Sergeant Armistead

Officer Bouvrette

During routine patrol, Sergeant Earnest Armistead and Officer Ronald Bouvrette of the Belleair Beach, Florida, Police Department observed smoke coming from a residence. Without regard for their own safety, the officers entered the home to search for occupants. They located an elderly man and carried him out of the house. Responding fire officials stated that the man would have perished if not for the quick actions of the officers. Sergeant Armistead was treated for smoke inhalation at a local hospital and released. Three juveniles were later charged with starting the blaze.

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*, Law Enforcement Communication Unit, Quantico, VA 22135.

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Patch Call

The Hill City, Kansas, Police Department patch features a pheasant bordered by stalks of wheat, both of which are endemic to the area. In the background is a line of stone fence posts under a pale blue sky.

The patch of the Homestead, Florida, Police Department depicts an F-16 flying over a tractor, farmland, and palm trees. The jet is symbolic of the city's close ties to the Homestead Air Reserve Base. The tractor and farmland represent the city's agricultural community.