

**Heavy  
Equipment  
Theft**



# FBI LAW ENFORCEMENT BULLETIN

MARCH 1981, VOLUME 50, NUMBER 3

## Contents

- Crime Problems**    **1**    **Heavy Equipment Theft**  
By George J. Lyford
- Cooperation**    **6**    **Police and Prosecutors—A Professional Partnership**
- Research**    **8**    **Murder Victimization: A Statistical Analysis**  
By Yoshio Akiyama, Ph.D.
- Crime Problems**    **12**    **Shopping Malls: New Problems for Law Enforcement**  
By Tom Mahoney
- Management**    **17**    **Internal Auditing: A Management Tool**  
By Robert H. Gebhardt
- Operations**    **22**    **Organizing an Arson Task Force**  
By Kenneth J. Braun and Robert E. Ford
- The Legal Digest**    **27**    **Documentary Subpenas and Fifth Amendment Protection**  
By Kenneth A. Jacobsen
- 32**    **Wanted By the FBI**



THE COVER: This month's cover highlights the problem of heavy equipment theft. See story p. 1.

**Federal Bureau of Investigation  
United States Department of Justice  
Washington, D.C. 20535**

**William H. Webster, Director**

The Attorney General has determined that the publication of this periodical is necessary in the transaction of the public business required by law of the Department of Justice. Use of funds for printing this periodical has been approved by the Director of the Office of Management and Budget through December 28, 1983.

Published by the Office of Congressional and Public Affairs,  
Roger S. Young  
Assistant Director

*Editor*—Thomas J. Deakin  
*Assistant Editor*—Kathryn E. Sulewski  
*Art Director*—Carl A. Gnam, Jr.  
*Writer/Editor*—Karen McCarron  
*Production Manager*—Jeffery L. Summers



# Heavy Equipment Theft

By GEORGE J. LYFORD

*Special Agent, National Crime Information Center,  
Federal Bureau of Investigation, Washington, D.C.*





Figure 1

General Contractor Theft and Vandalism Losses

	1979	1978	1977
Theft of Equipment	\$408,088,108	\$341,854,000	\$328,600,000
Vandalism to Equipment	97,531,655	124,471,000	161,120,000
Theft of Material	108,977,532	91,274,000	167,920,000
Vandalism to Material	25,117,915	20,710,000	
Vandalism to Work-in-Place	43,576,832	46,461,000	64,660,000
Sabotage	91,169,520	13,869,000	
Total	\$774,461,562	\$638,639,000	\$722,300,000
Average per General Contractor	12,642	10,425	10,216

Figure 3

Make	Model	Value
1. Case Backhoe	580C	\$38,000
2. Caterpillar Truck Loader	977	115,000
3. John Deere Bulldozer	JD750	71,000
4. Caterpillar Wheel Loader	966	131,000
5. Ford Front Loader	340	18,000
6. Massey-Ferguson Loader Backhoe	MF40	27,000
7. Caterpillar Bulldozer	D8	234,000
8. John Deere Backhoe	JD410	35,000

Thefts of construction and farm equipment are growing problems affecting equipment manufacturers, distributors, owners, and law enforcement personnel across the entire country. The Associated General Contractors of America reported in June 1980, that the total losses from theft and vandalism to general contractors was a staggering \$774 million in 1979. This figure represented a 21-percent increase over the 1978 figure of \$638 million. The average loss per general contractor went from \$10,425 to \$12,642. Theft losses alone rose from \$341 million to \$408 million, a 22-percent increase.<sup>1</sup> (See fig. 1.)

Most affected by this type of theft are the contractors, and ultimately, the consumer. Contractors lose equipment and suffer construction delays, higher insurance payments, and increased financial burdens. The cost of construction theft must, therefore, be absorbed by the consumer if contractors are to stay in business.

There are no complete statistics that show the extent of the heavy construction and farm equipment theft problem, but an analysis of records presently contained in the National Crime Information Center (NCIC) by W. E. Rutledge, California Highway Patrol, revealed that presently there are approximately 10,000 pieces of heavy construction and farm equipment on file as stolen.<sup>2</sup> (See fig. 2.) This same analysis reveals that there are eight pieces of equipment which are "most often stolen." (See fig. 3.)

These figures are astronomical and disheartening when the recovery rate for heavy construction equipment is approximately 6 percent.<sup>3</sup>

The investigation of construction and farm equipment theft is a frustrating and time-consuming experience that is made difficult by problems with manufacturers, owners, and law enforcement itself. These problems make construction equipment theft a high-profit, low-risk crime.

**Types of Thieves**

Construction and farm equipment theft is unique. Many thefts are for profit by professional theft operators stealing, to order, for stripping or export. Daily, we see newspaper articles that depict professional theft operations of intrastate, interstate, and international movement of stolen equipment.<sup>4</sup> This type of movement can only be accomplished by well-organized professional criminals.

**Manufacturers**

Construction and farm equipment, unlike conventional motor vehicles familiar to every police officer, have no standard permanently affixed identification number. Each manufacturer has its own numbering system which can vary from 4 to 15 characters in length. The identification numbers vary in height, composition, and location, and identification plates are easily removed.



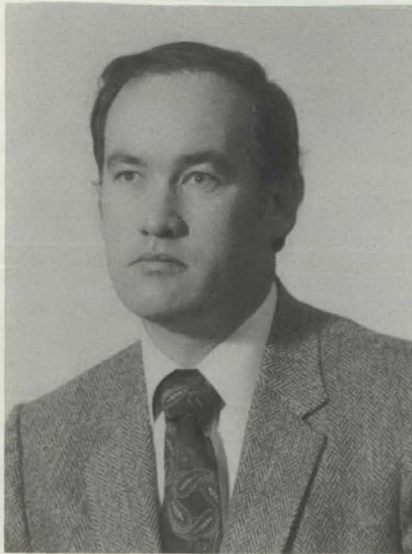
**Figure 2**

The following is a numerical list of outstanding farm and construction vehicles by state. These figures represent information taken from a NCIC printout, which was examined entry by entry to validate each entry. These figures are as accurate as can be determined.

	Sept. 1978	Sept. 1979	Mar. 1980		Sept. 1978	Sept. 1979	Mar. 1980		Sept. 1978	Sept. 1979	Mar. 1980
Alabama	143	175	163	Kentucky	353	276	281	Ohio	494	464	462
Alaska	6	6	7	Louisiana	72	80	92	Oklahoma	301	266	272
Arizona	187	230	279	Maine	10	8	6	Oregon	79	72	81
Arkansas	83	148	101	Maryland	174	168	146	Pennsylvania	796	374	344
California	909	1,054	1,373	Massachusetts	130	109	108	Rhode Island	33	20	14
Colorado	45	58	58	Michigan	750	609	452	South Carolina	53	68	65
Connecticut	67	76	56	Minnesota	81	106	95	South Dakota	12	9	10
Delaware	35	34	23	Mississippi	116	85	106	Tennessee	330	289	298
Dist. of Columbia	5	3	4	Missouri	365	382	389	Texas	1,293	1,750	1,959
Florida	202	201	217	Montana	6	13	10	Utah	15	31	40
Georgia	237	278	324	Nebraska	94	61	66	Vermont	3	5	2
Hawaii	11	11	11	Nevada	17	25	32	Virginia	197	157	162
Idaho	11	15	20	New Hampshire	7	12	15	Washington	99	104	99
Illinois	738	585	505	New Jersey	161	155	170	West Virginia	41	41	69
Indiana	733	544	369	New Mexico	22	22	16	Wisconsin	94	81	96
Iowa	125	155	53	New York	337	266	251	Wyoming	4	4	6
Kansas	133	116	92	North Carolina	182	200	217	Misc.			7
				North Dakota	13	9	15				
					1978	1979	1980				
				Total	10,404	10,010	10,108				

Compiled by W. E. Rutledge, California Highway Patrol





Special Agent Lyford

Most pieces of heavy construction equipment have several identification plates for component parts. These plates are frequently confused by police officers who are unfamiliar with construction equipment. Professional thieves merely remove the identification plate and replace it with a counterfeit plate. Confidential numbers are spot-welded over or completely cut out, making later identification and recovery very difficult.

Equipment that has key locks is easily jumped by placing a screwdriver or pocketknife blade across the electrical posts on the starter. Thieves carry common keys, one key per make or model; a single key can be used to start that make or model.<sup>5</sup> Antitheft devices that would help solve these problems are costly options offered by most manufacturers.

The International Association of Auto Theft Investigators and the Construction Industry Manufacturers Association are addressing these problems and have formed committees that are working to develop standards relevant to construction machine identification numbers. Standardized identification numbers will assist law enforcement personnel in investigating construction and farm equipment theft.

#### **Owners**

Owners of construction and farm equipment have a unique theft problem because there is generally no registration or title required for any of the off-road equipment. Owners are against any titling or registration because they believe it limits the ability of the contractor to move equipment freely around the country. It could also be a form of taxation at local, State, and Federal levels. The potential amount of taxes levied on equipment valued at millions of dollars for an individual contractor would cause an additional financial burden that would be passed on to the consumer. The fact that there is no required titling, in itself, generates

major problems. There frequently is no way to determine the accurate serial number of stolen equipment, causing entry of stolen equipment information into NCIC to be inaccurate or incomplete. There is no method for quickly tracing equipment to determine a chain of ownership. As a result, equipment can be easily sold to unsuspecting buyers or to someone who wants a "good deal."

Equipment owners also have the problem of inventory control. Construction equipment spread over several miles of a job site, left idle for days or weeks at a time in isolated areas, is a temptation to a professional thief. If the equipment is stolen, it is frequently days before the theft is noticed and reported to the police. This gives the thief an advantage when transporting and selling the equipment.

#### **Law Enforcement Problems**

The primary law enforcement problem when dealing with construction and farm equipment theft is the unfamiliarity of most law enforcement officers with construction equipment or terminology. Few departments have officers specialized in construction and farm equipment theft who can properly locate valid identification plates for entry into State computer systems and NCIC. Theft reports with inaccurate or improper information are used for entering the vehicle into NCIC, thereby making retrieval of accurate information difficult. The law enforcement officer must depend on the owner's records and expertise when reporting the thefts and when identifying stolen equipment.

#### **National Crime Information Center**

The FBI, as manager of NCIC, maintains computerized files of wanted and missing persons and stolen articles. More than 11,000 Federal, State, and local law enforcement agencies are linked, through computers and a sophisticated telecommunications network, to NCIC. The purpose of NCIC is to provide law enforcement officers with timely and accurate information that enables them to determine whether an article or vehicle is stolen.



Construction equipment is included in NCIC under two separate categories. The vehicle file category includes "any motor-driven conveyance designed to carry its operator." This includes trailers, engines, and transmissions. Any serialized item not meeting the criteria for entry into the vehicle file can be entered in the article file. For example, items such as hay balers, cultivators, plows, and buckets for bulldozers and tractors would be entered in the article file.

Another problem with heavy equipment is that a piece of equipment can be known by different names in different parts of the country. An example of this is front-end loaders which have been entered in NCIC as backhoes with loaders attached, loaders with backhoes, shovels, tractor crawlers, farm tractors, bulldozers, and motorized farm equipment. This equipment should also be identified as farm or construction equipment. Computer edits on NCIC vehicle entries implemented in October 1980, will assist in controlling this problem.

### Theft Prevention Techniques

Construction and farm equipment owners can follow some simple rules which should enhance their chances of recovering stolen equipment and aid law enforcement personnel.<sup>6</sup>

Immediately upon delivery of purchased equipment, owners should:

- 1) Ask the equipment dealer to assist in locating and recording the identification numbers and the serial numbers of all components, attachments, and parts. The owner should be sure the numbers are accurately recorded with the insurance company and should file these numbers where they are readily accessible for quick reference.

- 2) Discourage thieves by installing and maintaining adequate lighting, gates, and fencing of equipment at yards and job sites. Request neighbors and the appropriate law enforcement agency to give extra attention to these areas during weekends and evenings.
  - 3) Make frequent inventories of equipment to detect losses as early as possible.
- In the event of theft, an owner should:

- 1) Notify the nearest law enforcement agency, provide investigators with all serial numbers, and inform them where these numbers are located on the equipment. Remind investigators to submit the identification number to the NCIC.
- 2) Doublecheck the theft report for accuracy. Within 24 to 72 hours, request a law enforcement agency to make an NCIC administrative check to confirm that the identification numbers have been accurately recorded in NCIC.
- 3) Make periodic contacts with investigators to ensure that the stolen equipment remains on NCIC's active list.
- 4) Ask the dealer to provide investigators with pictures or illustrations of the type of equipment stolen and the location of the serial numbers on this type of equipment. Also ask him to post a description of the machine, including serial number, for his sales and service personnel and customers to see.

### What Can Law Enforcement Do?

Law enforcement can take the following steps to help reverse increasing equipment thefts:

- 1) Become familiar with off-road equipment by visiting dealerships and learning about the various numbering systems being used, where the serial plates are located, and where, if applicable, the component numbers are found.

- 2) Determine what type of documentation, if any, the dealer supplies to the purchaser of equipment and what type record system the dealer maintains in order to verify ownership.
- 3) Become familiar with the workings of NCIC. He can learn what type of equipment is entered in the vehicle file and which machines are entered into the article file.
- 4) When checking out suspicious equipment, don't stop with NCIC if there is reason to believe the machine was obtained under less than legitimate circumstances. Contact the manufacturer, supply all identification numbers, and request that they furnish the name of the purchaser so ownership can be established.
- 5) Make contact with operators of off-road equipment to obtain their help in tracking down stolen equipment.<sup>7</sup>

FBI

### Footnotes

<sup>1</sup> The Associated General Contractors of America Crime Prevention Bulletin #80-11, June 17, 1980.

<sup>2</sup> W. E. Rutledge, California Highway Patrol, Visalia, California Summary Analysis of NCIC Records, March 1980.

<sup>3</sup> Construction Equipment Anti-Theft Program, Summary Report for J. I. Case Company, by Bozell & Jacobs Public Relations, Inc., Milwaukee, Wis., April 29, 1980.

<sup>4</sup> Sun Paper, (Baltimore, Md.), by Kelly Gilbert and Wiley Hall, March 21, 1980; Pioneer Press, (St. Paul, Minn.), February 11, 1980; Los Angeles Times, by Ronald B. Taylor, July 27, 1980.

<sup>5</sup> Ronald B. Taylor, "Heavy Equipment Thieves, Taking Heavy Toll in State," Los Angeles Times, July 27, 1980.

<sup>6</sup> Stop Construction Equipment Theft, by J. I. Case, Company Form CE91579, 1980.

<sup>7</sup> Henry J. Balevic, "Off-Road Equipment Theft: Law Enforcement's Latent Challenge," *The Police Chief*, December 1979.



# POLICE AND PROSECUTORS

## A Professional Partnership

### EDITOR'S NOTE

*On December 12, 1980, District Attorney Robert M. Morgenthau of New York addressed the graduating class of the 123d session of the National Academy at Quantico, Va. His comments on the symbiosis of prosecutors and police are thought-provoking for our profession, and we are pleased to print excerpts of his remarks.*

These are troubled times for the men and women involved in law enforcement. Once considered primarily an urban problem, now crime is increasing everywhere—in the suburbs and rural areas as well as in the big cities. Even more disturbing, we are seeing many more senseless, violent, and vicious crimes.

Frustrated by what seems to be an insoluble problem, the public blames the criminal justice system for rising crime rates. In turn, the various agencies within the criminal justice system—the police, prosecutors, judges, and correctional officials—sometimes blame each other. Pointing fingers at each other may make us feel better, but it does not help the public. The crime problem will not be solved until police and prosecutors forge a working partnership and develop a coordinated strategy for fighting crime.

The policeman and prosecutor have separate and distinct roles in the criminal justice system. Working undercover, pounding the street, knocking on doors, the policeman searches out witnesses, and using the language of the streets, convinces often reluctant citizens to tell their story to the district attorney. The prosecutor's beat is the courtroom. His language is that of the law. It is his job to mold the raw evidence into a coherent and persuasive picture which a judge and jury can understand and accept. But while prosecutor and policeman, in one sense, stand at opposite poles in the criminal justice system, they are bound together by an umbilical cord. That umbilical cord is their common interest in seeing that guilty criminals are convicted and punished for their crimes.

The primary purpose of an arrest is to bring guilty defendants into court so that they can be convicted according to law and punished according to their just deserts. This can only be accomplished if the police officer and prosecutor work together as partners. Every police officer knows that brilliant police work is of no avail if a prosecutor does not know how to present a case to a court and jury. And as you no doubt know, even the most modest prosecutor—if there is such an animal—tends to forget in an important case that his success depends largely on the quality of the police work.

Unfortunately, there is a pervasive view—among police officers, prosecutors, politicians, and the public at large—that the policeman's job is "to make arrests" and the prosecutor's job is "to convict defendants." While technically true, criminals cannot be brought to justice unless police and prosecutor work together at every stage of the case—the investigation, the arrest, the trial, and the sentence. We must remember that in every case, the bottom line for society is the conviction of criminals and not precinct clearance rates.

In order to combat rising crime rates, the police and prosecutors must develop a close working relationship and together create an effective strategy to secure the public's safety.

There are, of course, many situations where an arrest is made while a crime is in progress. But the majority of crimes require investigation to identify and apprehend the criminal. Many of these cases would benefit from close cooperation between investigator and prosecutor in the investigative stage. . . .

Today, a police officer's job calls for sophisticated knowledge and skills. Besides knowing how to operate effectively on the streets, a police officer must have a working knowledge of the law, know what evidence is important to build a strong case, and be able to communicate in the courtroom. But despite the sophistication of modern police work, many police officers do not receive adequate training in how to build a strong case, how to be a good witness, or in current legal procedures.



Modern police departments must spend more time training their officers in the knowledge and skills necessary to obtain convictions of guilty defendants. Prosecutors' offices should assist in this training effort in every way possible. The National Police Academy serves as a model for law enforcement training programs. I know that you will return to your commands not only with much substantive information but also with a deep appreciation of the importance of training. As Director Webster has said, "Continuing education is the hallmark of a profession, and today, the problems and challenges that face law enforcement mandate a professional response by all of us in the criminal justice field."

To promote the highest professional standards, police departments must recognize and reward police officers who do quality work. In too many jurisdictions, officers are evaluated only on the number of arrests they make. The quality of arrests, long hours spent on investigation and trial preparation, the officer's performance on the witness stand go unrecognized. Sensing that merit is not rewarded, police officers become embittered and the quality of police work declines. Eventually, the most idealistic young police officer will become cynical and cease to care about his work if talent and effort are not appreciated.

Prosecutors must also treat the police officer as a full partner. Too often, officers work on cases, spend time in preparing for trial, testify in court, and then are never told about the outcome of the case. Prosecutors should never be too busy to notify police officers of the disposition of their cases and to write letters of commendation when officers have done excellent work.

As partners, policeman and prosecutor must develop a strategy for attacking the crime problem. In most jurisdictions, a relatively small proportion of criminals commit the majority of crimes. In New York County, the average defendant prosecuted by my office has seven prior arrests, and nearly a quarter of all defendants who are arrested for a felony have an open case pending when they are arrested. Police and prosecutors should concentrate resources on building cases against these career criminals in the hopes that we can obtain appropriate prison sentences which will incapacitate them from committing more crimes and deter fellow criminals. . . .

The prime responsibility of government is to provide for the public safety. If citizens do not feel safe in their homes and communities, the quality of life is affected and the foundation of a democratic society is threatened. The ability of government to meet its covenant to protect its citizens is in your hands.

**FBI**



*District Attorney Morgenthau*



# MURDER VICTIMIZATION

## A Statistical Analysis

By Yoshio Akiyama, Ph. D.

*Chief Statistician  
Uniform Crime Reporting Program  
Federal Bureau of Investigation  
Washington, D.C.*

During the past 2 decades, 1960-1979, the number of reported murders in the United States has risen 140 percent. As the frequency of this most serious offense has increased, murder clearance rates have steadily declined from 92 percent in 1960 to 73 percent in 1979. Since the fear of becoming a homicide victim is a reality to the American public and the crime is a growing concern of law enforcement agencies, the Uniform Crime Reporting (UCR) Program recently launched a comprehensive homicide analysis project with its initial thrust directed at two areas:

Given an individual belonging to a specific sex and race category, how does his/her chance of murder victimization change by age? For instance, at what age would he or she be subjected to the highest and lowest chance of being murdered?

and

What is the lifetime chance of murder victimization of an average U.S. citizen? In other words, what percentage of their deaths are caused by murder?

### **Background**

UCR data, gathered from over 15,000 law enforcement agencies nationwide, represent a wealth of information for use in analyzing crime problems. FBI Director William H. Webster has demonstrated a special interest in criminological research and has directed the UCR Program's increased emphasis on substantive crime analysis. The recent research effort focusing on murder victimization addresses a growing problem that has attracted the attention and concern of American citizens.

### **Methodology**

The UCR Program defines murder as "the willful and nonnegligent killing of one human being by another." Attempted murder, justifiable homicide, manslaughter by negligence, suicide, etc., are excluded. It should further be understood that in UCR, an incident is



classified as a murder through the medium of a law enforcement investigation. The findings of a medical examiner, court, grand jury, etc., are not considered.

Homicide data collected monthly through UCR's Supplementary Homicide Report (SHR) were the primary information source for the research project. Rather than aggregated, data from the SHR are incident-based, i.e., information is collected for each murder incident. Due to the refined nature of the data, murder statistics are far more comprehensive than those for other crimes, thereby providing an excellent basis for more indepth analysis.

The required vital statistics were provided by the National Center for Health Statistics, and population data from the U.S. Bureau of the Census were used to compute murder rates. In this study, the first phase of a comprehensive homicide analysis, both life expectancy and murder frequency were held constant rather than projecting long-range future changes.

### Findings

To address the questions posed in the analysis, the interrelationship between UCR homicide data, vital statistics, and population data was examined. Survival statistics and homicide data were used to separate, at each age, the number of murder deaths from those caused by other reasons.

The first question addressed differences in the probability of murder victimization in terms of age. When graphically presented, the chance of murder victimization for males was, as expected, substantially higher at all ages than for females, regardless of race. With respect to age, the probability of murder victimization for males peaked during the "mid-to-late 20's."

The chance of murder victimization for females also maximized during the age range of the 20's, but the peak for females was not as pronounced as that for males. Childhood murder victimization proved highest at infancy and lessened with age. In fact, the lifetime low for murder victimization was shown to be between the ages of 5 and 10. Figure 1 illustrates the national murder experience by age and sex.

A more striking aspect of the murder victim data was the factor of race. For the sake of this analysis the U.S. population was divided into "white" and "all other," with the latter including all persons who were not white.

The analysis showed persons of races other than white were more likely to be murder victims. The "all other" male group showed a disproportionately higher chance of murder victimization at all ages. Even females in the "all other" category showed a higher

murder victimization chance than white males. To graphically illustrate these observations, murder rates have been depicted, by age, for "white" totals and for "all other" totals in figure 2. Similar murder victimization chances have been observed in other studies using non-UCR data.<sup>1</sup>

Now to address the second area of the analysis—what is the lifetime chance of murder victimization for an average U.S. citizen?

A group of 100,000 live-born babies was chosen as the basis for the computation. At each age, a number of the babies expired (some of the deaths being due to murder). If the same process were repeated each year as the "survivors" matured and 100,000 infants born alive were tracked until all died, we would then know how many of the 100,000 live births ended because of murder.

Figure 1

### Murder Rate by Age and Sex, United States, 1978

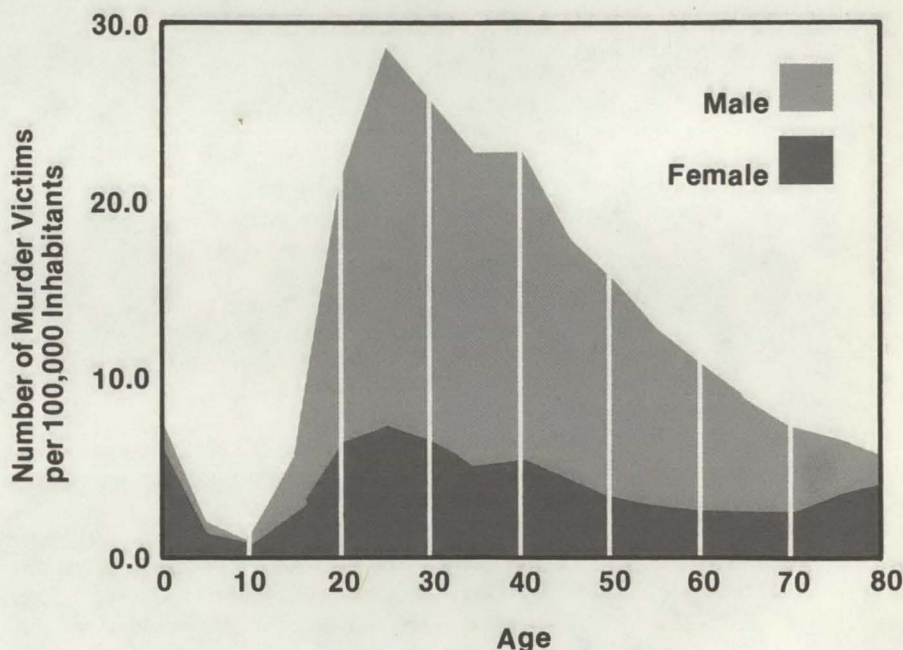




Table 1 describes the expected number of murder deaths out of 100,000 live births. For example, the table indicates that 538 out of 100,000 live-born white males are expected to be murder victims in their lifetime. It should be realized, however, that this figure (538) does not reflect the "annual" number of murder deaths per 100,000 inhabitants; it is a "lifetime" statistic. In other words, 0.538 percent (538 out of 100,000) of white males are expected to be murder victims, while the remaining percent will die from causes other than murder.

**Table 1**  
**Expected Number of Lifetime Murder Victims Out of 100,000 Live Births**

	Male	Female	Total
All Races	912	268	636
White	538	165	349
Other	3,460	806	2,088

As mentioned earlier, the current murder rates were kept constant throughout the computation, although historically they have shown a steady upward trend. UCR personnel avoided making a long-range forecast of murder crime rates. If the historical upward trend continues in the coming years,

Dr. Akiyama



however, the actual number of lifetime murder victims listed in table 1 would be higher.

Viewed from another perspective, one can derive from the data in table 1 the ratio of deaths due to murder as compared to those due to other causes. Table 2, based on table 1, was generated from this viewpoint. It was seen, for example, that the "all other" male group evidenced the highest chance of lifetime murder victimization, with a ratio of 1 out of 29. In other words, an average of 1 out of 29 males belonging to the "all other" race category are expected to lose their lives due to murder, while the remaining 28 will die from causes other than murder.

**Table 2**  
**Probabilities of Lifetime Murder Victimization**

	Male	Female	Total
All Races	1 110	1 373	1 157
White	1 186	1 606	1 287
Other	1 29	1 124	1 48

The victimization rate for these males was more than six times higher than the rate for white males. Similarly, 1 out of 124 "all other" females are expected to suffer a murder death, a rate approximately five times higher than that for white females. The nationwide average ratio of murder deaths was 1 out of 157 individuals, or .6 percent of all deaths.

It should be noted that the lifetime victimization rate by murder showed a large variance both by sex and race. The variance due to sex is not totally surprising when the differences in general behavior patterns between males and females are considered. It is noteworthy that individuals other than whites are subjected to a substantially higher chance of murder victimization

than white persons. The statistics indicate that as addressed with respect to the first question, race is a factor accounting for a significant difference in lifetime murder victim chances.

**Table 3**  
**Percent of Murder Deaths for Persons Aged 20-29**

	Male	Female	Total
All Races	13.4	10.0	13.1
White	8.3	6.4	7.7
Other	31.3	20.8	28.0

As mentioned earlier, the age group of the 20's represents the peak murder victimization generation. Table 3 presents the proportion of murder deaths (out of all deaths) for those aged 20-29. In other words, the figures represent the percent of the expected number of murder victims of all deaths. It will be noted in table 3 for example that nationwide, 13.1 percent of individuals in their 20's are murdered (if they die at all in their 20's). Here again, the variance in murder victimization associated with differences in race is substantial. Nearly one-third (31.3 percent) of the deaths for "all other" males (if they die in their 20's) are caused by murder. It should be remembered, however, that the chance of death that any individual in this age group faces in his/her 20's is not high for any race.

As a person lives longer the chance of being a murder victim during the rest of his/her life reduces. For example, an average 30-year-old citizen (a survivor of 30 years) faces a murder chance of 1 out of 242 during the remaining years of life. The murder victimization ratio, 1 out of 157 mentioned earlier as the average for the total population, is applicable to an infant at age 0. At the age of 30, a male in the "all other" race category faces a "1 out of 41" murder victimization chance during the remainder of his life. Similarly, at the age of 30, a female in the "all other" race category faces 1 out of 205 chances of becoming a murder victim during the rest of her life,



a reduction from the 1 out of 124 chance at age 0. These statistics were generated for each age, though limitations of space do not permit a complete enumeration.

**Summary**

In terms of age, the following observations with respect to murder victimization were made:

- 1) Regardless of race, the chance of murder victimization for males is higher, at all ages, than for females.
- 2) Regardless of race, the chance of murder victimization peaks during the 20's both for males and females and reduces steadily after the age of 30. Child murder victimization, high at infancy, reaches the lifetime low between the ages of 5 and 10.
- 3) At all ages, persons of races other than white collectively are subjected to a substantially higher probability of murder victimization than whites.

It was noted that the chance of murder victimization for an average U.S. citizen is 1 out of 157. However, the term "an average United States citizen" may not be totally relevant, as murder victimization is not uniform throughout the different segments of the U.S. population. The chances are highly skewed in the direction of all races other than white, particularly males in that group, who have a 1 out of 29 chance of being victimized by murder.

As stated before, this lifetime murder victimization project is one dimension of the UCR homicide study. The ongoing homicide analysis project will continue to address other aspects of the homicide problem.

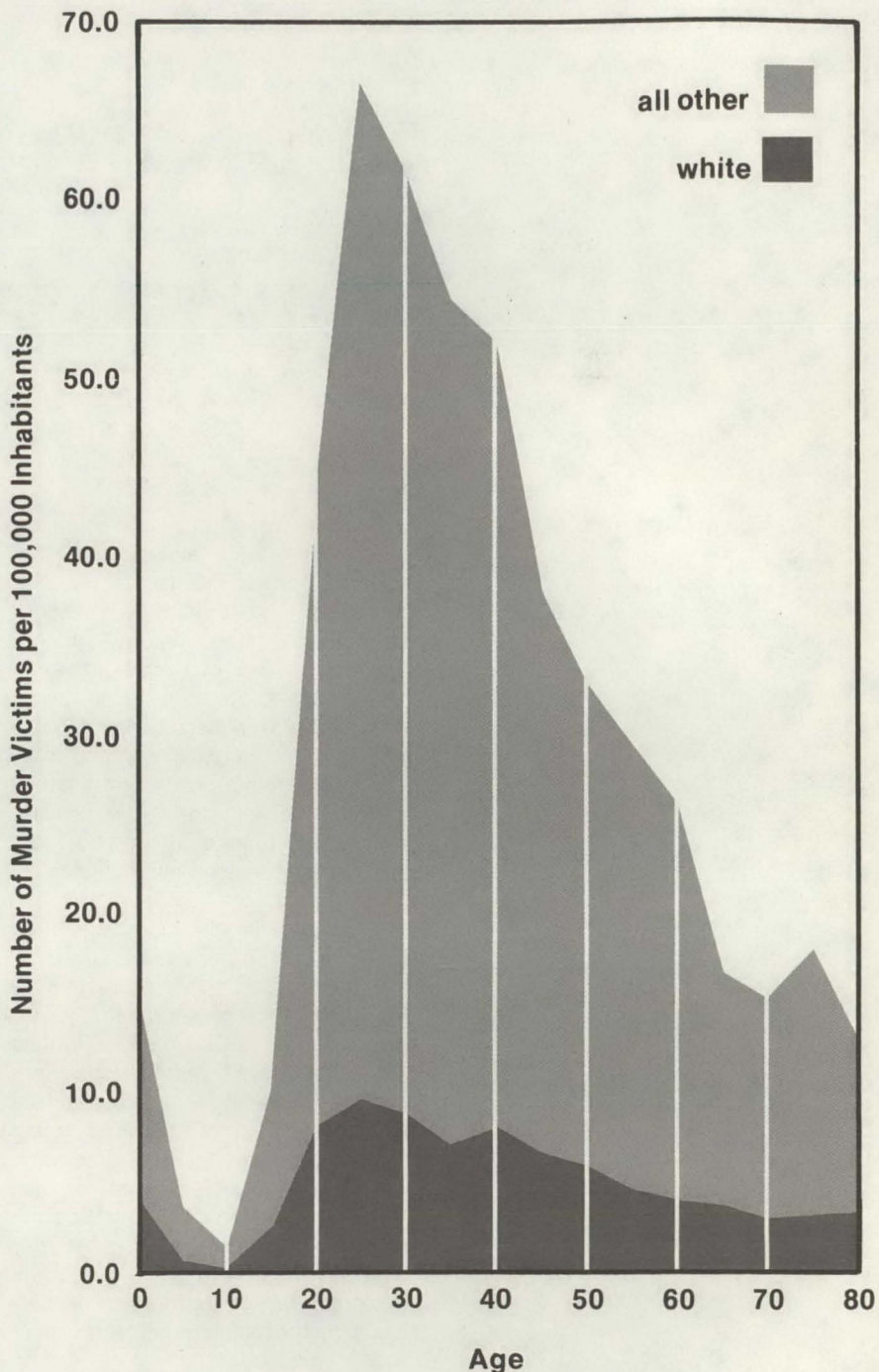
**FBI**

**Footnote**

<sup>1</sup> "United States Life Tables by Causes of Death: 1969-1971" vol. 1, no. 5, National Center for Health Statistics, U.S. Department of Health, Education, and Welfare.

Figure 2

**Murder Rate by Age and Race, United States, 1978**





# Shopping Malls

## New Problems for Law Enforcement

By Sgt. Tom Mahoney  
*Personnel & Training  
Police Department  
Culver City, Calif.*

Twenty years ago, a "shopping center" consisted of a single-story row of stores, 20 or so, fronting an open-air parking lot. The center usually contained a drug store, a large grocery store, some sort of five-and-dime, a few specialty shops, and the obligatory barber shop with its prominently displayed rotating red, white, and blue pole. At that time, police and security problems were minimal, and for the most part, increased during the Christmas shopping season and summer vacation from school.

However, times have changed. Today, we are in the age of multilevel, climate-controlled shopping centers, or malls as they are called, generally containing 80 to 120 or more individual stores, boutiques, novelty shops, and restaurants. The barber shop and its classic pole have disappeared, being replaced by unisex hairstyling centers. At least two of the stores in the mall are major chainstores, and where the earlier form of shopping center may have drawn 2,000 to 3,000 customers on a good day, modern malls routinely attract patrons numbering in the hundreds of thousands.

This increase in size and patronage has brought with it more than a commensurate rise in the number and scope of security and police-related problems. Management of most malls find it necessary to employ full-time, uniformed security officers, and even with these forces on duty, many of the major chainstores also hire their own plainclothes security staff to deal with in-house problems.

### What Are The Problems?

Externally, most of the problems are confined to the parking areas. The high volume of customers frequenting the malls each day necessitates the construction of expansive outdoor lots or multileveled, closely packed indoor parking structures. These areas quickly become the haunts of auto tamperers and thieves. In some instances, the poorly planned but decorative landscaping adds to the number of hiding places available to muggers and purse snatchers. The size and configuration of these areas often make them difficult for police and security personnel to patrol effectively.

The seasonal high volume of traffic through these areas also gives rise to traffic congestion problems as motorists fight for ingress and egress. Private property traffic laws are, at best,



difficult to enforce, and minor traffic accidents and hit-and-run collisions become serious problems.

Inside the mall, problems can be much greater, and in many cases, even more difficult for police and security personnel to detect or deter. Petty theft by shoplifting is undoubtedly one of the biggest problems facing shopping malls. Both the amateurs and the professionals are attracted to the stores, and sufficient numbers of active shoplifters can literally strip an unprotected mall in a matter of a few days.

Forged checks and stolen credit cards are also prevalent offenses. The passage of forged and nonsufficient funds checks and the use of stolen credit cards can easily account for millions of dollars in lost merchandise and profit if preventive measures are not instituted early to suppress their use.

Another serious problem is employee thefts. There is often a large turnover in sales and clerical help, especially during the holiday seasons, and many of these employees leave their jobs taking with them quite a bit more than the management and the law allows.

### **Law Enforcement and a Shopping Mall**

In October 1975, the Fox Hills Mall opened its doors for the first time in Culver City, Calif. The 130-plus store mall with its large, expansive parking lots and three-story parking structure, set on over 60 acres of land, make it one of the largest shopping malls on the west coast. To complicate matters, the mall opened its doors at the very beginning of the Christmas shopping season.

The immediate effects upon the police patrol function were seen in increased calls for service to the mall and an increase in the number and type of crime reports being generated. Chainstore security personnel began almost at once to arrest both adult and juvenile shoplifters. In the beginning, responding officers were required to do all of the crime and arrest reports, as well as handle the transportation of suspects to the station for booking procedures.

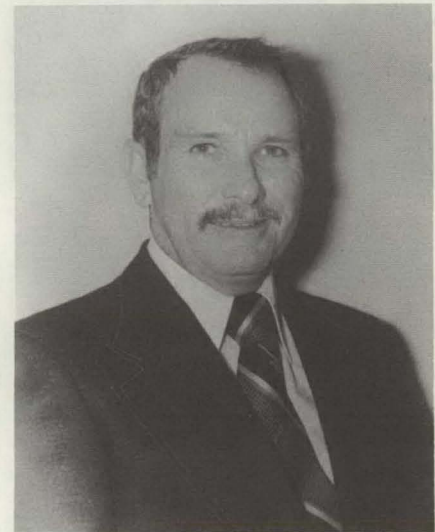
The large and difficult-to-monitor parking lots began to fall victim to increasing auto thefts and auto tamperings. This was not because the area was a "bad place" but simply because the dramatic increase in the number of vehicles present naturally caused an incident increase in real numbers if not in percentages.

The resulting increase in calls for service, along with the increase in per occurrence worktime, directly affected the number of officers available for other service calls within the city and decreased the amount of patrol time available to officers.

Within weeks it became apparent to the Culver City Police Department that the mall would require adaptive changes in such areas as patrol patterns, distribution of available manpower, adult and juvenile arrest policies, and crime reporting policies and procedures.

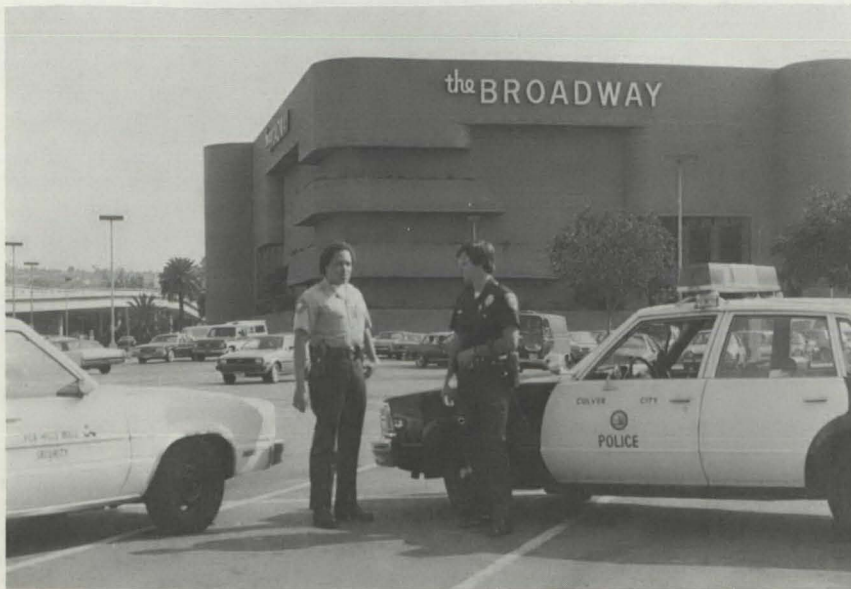


*Sergeant Mahoney*



*Elvin C. "Ted" Cooke  
Chief of Police*





*Mall security and police department personnel patrol the vast parking areas.*



*A police officer interviews a victim in the mall's security office.*



*Fingerprint equipment in the mall's security office facilitates the processing of detainees.*

### **Changes in Reporting and Arrest Procedures**

Working in conjunction with the Fox Hills Mall Security Department, the Culver City Police Department set aside and equipped a room containing report writing equipment, fingerprint facilities, and the necessary desk and telephone. This office is connected to the mall security office and is centrally located within the mall.

Members of the chainstore security departments were taught the proper methods for completing basic misdemeanor crime and arrest forms. They were also instructed to bring arrestees, when possible, to the centrally located security/police office and to complete the necessary forms there. After completing the paperwork, they were to contact police dispatch for a patrol unit.

Officers responding to these misdemeanor arrests were to take into consideration several factors:

- 1) Did the arrestee have valid identification and some indication of community ties?
- 2) Did the arrestee have any outstanding arrest warrants?
- 3) Was there any indication of violence or resistance in the apprehension?
- 4) Was the arrestee intoxicated or under the influence of a drug or narcotic?
- 5) Was the arrestee an adult or juvenile?

If the arrestee was an adult with apparent ties to the community, had valid identification and no outstanding arrest warrants, he was given a field "misdemeanor release" citation, similar to a traffic ticket, and advised to appear in court at a later date. The citation was then forwarded with the accompanying arrest paperwork to the district attorney's office for filing of criminal charges. Such releases were always authorized by the on duty watch commander.

If the subject arrested was a juvenile, officers made every attempt to contact responsible parents or guardians. They would then be instructed to come to the mall security office or the police station to pick up their child. Only in extreme cases were juveniles incarcerated at the station or taken to a juvenile detention facility.

These changes have been successful. Security personnel have become adept in properly completing necessary paperwork, and the "dead time" initially incurred in the handling of such arrestees has all but been eliminated.

### **Community Relations Efforts**

The police department began a series of community relations programs at the mall in an effort to curb incidents of shoplifting and bad checks. Community relations and detective personnel collaborated to produce instructional handbooks to explain private person's arrest procedures, to suggest preventive measures, and to offer tips for improving efficiency in reporting occurrences to the police department.



The programs were well-received. Members of the department met with shop managers and sales employees in one of the mall's restaurants. These meetings were generally held just before the start of the business day. The pamphlets were handed out and lectures were presented on subjects ranging from "Shoplifter Recognition, Apprehension and Prosecution" to "Holding the Line Against Bad Check Losses." Afterwards, question-and-answer periods were held and notes compared between store employees regarding past occurrences and methods in which they were handled.

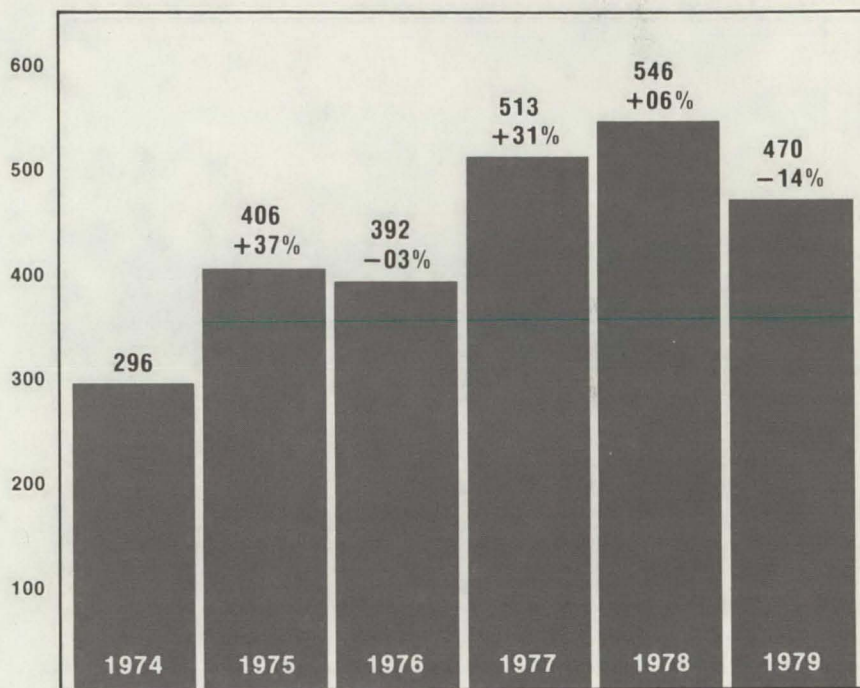
### Changes in Patrol Procedures

By the end of 1977, several changes had been made in procedures for patrolling the mall. First, the mall itself was considered a separate police patrol district, with a car assigned almost exclusively to police the mall. Officers were instructed to patrol the parking areas and to make frequent high-visibility walk-throughs of the interior when not handling radio calls or arrestees. Along those same lines, every effort was made *not* to assign mall-related calls for service to other police units within the city.

Second, as the third Christmas season approached, additional uniformed and plainclothes officers were assigned on an extra-duty basis to patrol the mall and immediate surrounding areas. Almost immediately, the arrests for in-progress crimes, such as auto theft, burglary from motor vehicles, and possession of stolen property, increased. Officers, while filling out field contact cards, arrested persons for outstanding warrants on similar charges and began to become familiar with mall "regulars."

Figure 1

## GRAND THEFT AUTO - PASSENGER VEHICLES



Traffic enforcement was stepped up in an effort to control the increasing traffic jams occurring on peak traffic days. The main thoroughfare through the mall was made an official city street, allowing officers to cite motorists for traffic violations and unlawful parking.

By the beginning of 1978, virtually all of the requirements for police services to the mall had stabilized. As depicted in figures 1, 2, and 3, the years 1977-1978 were more or less the turning point for enforcement efforts. Shoplifting occurrences began a noticeable decrease, as did instances of auto theft and burglary from motor vehicles. (Although these statistics reflect the number of reported crime citywide, they are affected most by the occurrences at the Fox Hills Mall.)

Crime prevention programs have increased. Programs such as "Safety City," aimed at instructing young people in basic safety laws, have been instrumental in maintaining a well-respected image of the police department with mall patrons and employees.

There was, and still is, an excellent working relationship between the Culver City Police Department and the mall management and security staffs. Combined efforts have made the Fox Hills Mall a safer, more desirable place for people to shop.

### What Was Learned?

The intense environment of the Fox Hills Mall brought about major changes in patrol and reporting procedures for the department. It soon became clear that such environments require adaptive changes in the law enforcement approach of any police agency having a shopping mall as one of its responsibilities.



Figure 2

## LARCENY - BURGLARY FROM MOTOR VEHICLE

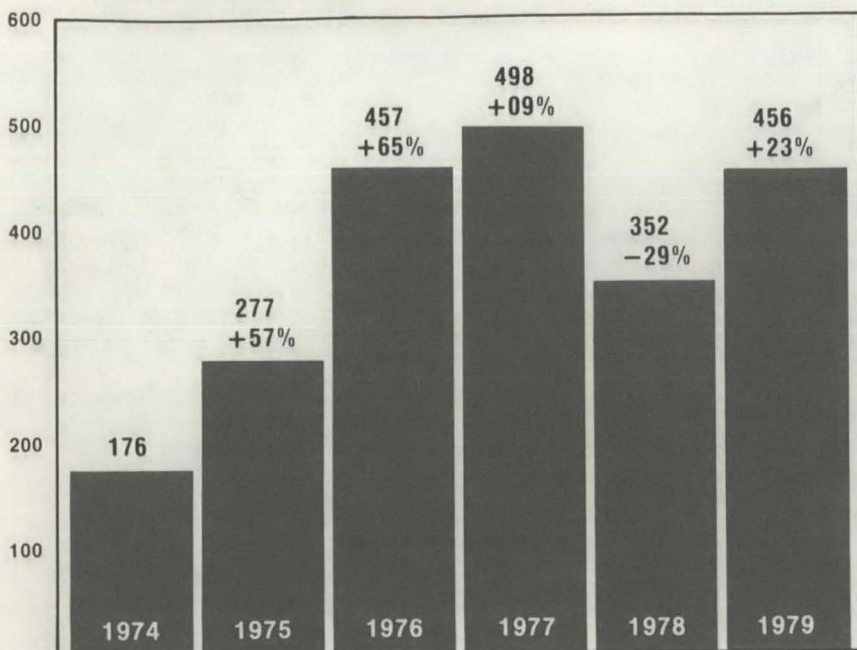
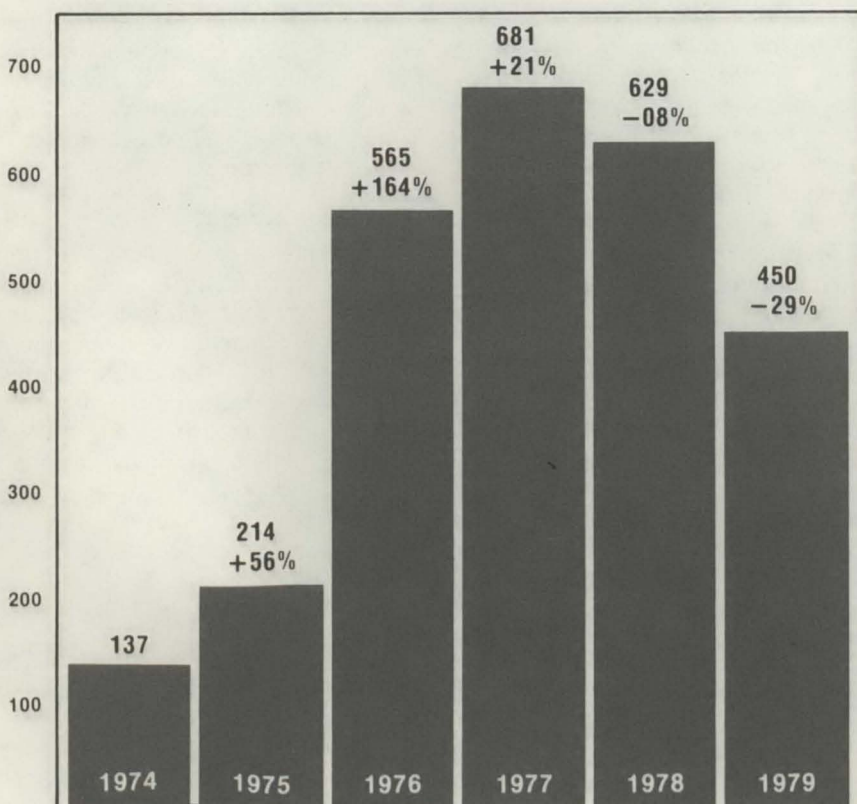


Figure 3

## LARCENY - SHOPLIFTING



Some suggestions for those agencies with new or proposed shopping malls would be:

- 1) Try to become involved in the physical planning of the mall *before* it is built. Make sure that planners and architects are aware of modern, effective lighting techniques and are equally aware of the dangers of over-landscaping.
- 2) Establish a centrally located police office or substation within the mall. Make the location clearly identifiable so that customers, as well as potential criminals, are aware of your presence.
- 3) Contact mall management and security staffs and develop mutually acceptable enforcement and response policies. To be effective, one cannot exist without the aid of the other.
- 4) Plan your crime prevention efforts early. Inform merchants, management, and security of your department's policies on private person's arrests, crime reporting, and nonsufficient funds and forged check offenses. Bring preventive measures and alternatives to their attention early.
- 5) Train your personnel so that they can be aware of the types of problems that can develop at a shopping mall and plan ahead for solutions. Develop patrol procedures for such contingencies as the Christmas shopping season and the summer break from school when malls become "playgrounds" for juveniles.

There are no "sure-fire" answers to mall law enforcement problems. Each mall will be different in relation to its location, the demographic makeup of the area, and its size and facilities. Law enforcement's responsibilities lie in making it as safe and secure as possible. A coordinated, preventive approach to policing a shopping mall can bring about nothing but positive results.

FBI



# INTERNAL AUDITING

## A Management Tool

By ROBERT H. GEBHARDT

*Director  
Bureau of Management Analysis  
Division of Inspectional Services  
St. Louis County Police Department  
St. Louis, Mo.*

The purpose of an internal auditing unit within a police department is to report to top management the conditions and problems of the organization which are usually beyond their scrutiny. An internal audit assures management that the services are functioning as intended and lends support to budgetary requirements. Conversely, the audit may disclose inefficiencies, unnecessary duplication of services, budget or personnel excesses, to name just a few. While an internal audit function should be considered a positive and constructive tool, it will inevitably point out areas requiring change. Audit reports will also be free of the subjectivity frequently injected by the managers who are responsible for the examined operation.

The Bureau of Management Analysis within the St. Louis County Police Department serves this purpose by routinely analyzing and auditing department units and functions to determine the efficiency and effectiveness of policies, written procedures, operations, and facilities. The bureau compiles reports on each such analysis for the information of the superintendent and the actions of the managers involved.

The Bureau of Management Analysis evolved from the Bureau of Field Inspections, which was organized in 1970. Since that time, the name has changed from field inspections to management analysis. Additionally, the organization definition of responsibility has expanded to more closely resemble the more developed and refined internal auditing function used in the private sector. Normally, this type of audit function in police departments is identified as a staff inspection which is conducted outside the normal lines of authority and responsibility by personnel neither responsible to the supervisor of the unit being inspected nor for its performance.<sup>1</sup> These inspections are conducted generally to insure and promote effectiveness and economy and involve almost every policy, operation, and type of material or facility within the department.<sup>2</sup>

The Institute of Internal Auditors, formed in 1941, furthers the development of the new field of internal auditing.<sup>3</sup> This formation and eventual incorporation was not limited to industry. The institute's stated purpose is:

"To cultivate, promote and disseminate knowledge and information concerning internal auditing and subjects related thereto. . . ."<sup>4</sup>

They identify the scope of work to be accomplished by internal auditors as:

- 1) Reviewing and appraising the soundness, adequacy, and application of accounting, financial, and other operating controls and promoting effective control at a reasonable cost;
- 2) Ascertaining the extent of compliance with established policies, plans, and procedures;
- 3) Ascertaining the extent to which company assets are accounted for and safeguarded from losses of all kinds;





Mr. Gebhardt

- 4) Ascertaining the reliability of management data developed within the organization;
- 5) Appraising the quality of performance in carrying out assigned responsibility; and
- 6) Recommending operating improvements.<sup>5</sup>

The Management Analysis Bureau is located within the Division of Inspectional Services, and the director reports to the executive director of that division, who in turn reports directly to the superintendent. The bureau director does have functional access to the superintendent in audit matters. The tasks of the bureau are primarily staff, and the personnel have no line authority or responsibility to the elements being audited. In this staff capacity, the auditors are able to cross diplomatically most lines of authority, including the chain of command, to accomplish their goals. Consequently, they have unlimited access to the organization, as well as to all physical areas and records. There are some exceptions, such as internal affairs' disciplinary files and personnel files concerning medical, psychiatric, or polygraph reports. These reports are kept confidential by law.

When there is disagreement with a recommendation submitted by the bureau, the final decision requiring compliance or that the recommendation be dropped is made by the superintendent. Once a decision has been made or an agreement is obtained, the bureau assures compliance by conducting followup audits 30 days, 90 days, and 1 year after the completion of analysis. Followup reports indicating compliance or noncompliance are also submitted to the superintendent.

The bureau is staffed by a civilian director from the commissioned ranks and three sergeants, who are analysts, all of whom are chosen for their abilities, knowledge, education, and temperament. This small staff is able to conduct 12 detailed general analyses and 30 special analyses of smaller facilities or operational functions per year.

A general analysis, just as the name implies, is general in nature and covers any area brought to the analyst's attention during the examination. However, also taken into consideration are specific topics identified by command personnel that need study, improvement, or examination. In addition to this, a list of specific topics or problems collected throughout the year by the bureau on areas that appear to need examination, as well as a list of standard audit topics, is used to guide the analysis or inspection.

A special analysis concerns itself with a very specific topic, such as an audit of voided traffic tickets, examination of the technique and witnessing destruction of evidence, and compensatory and overtime pay function. This special type of audit is also used to examine specific programs, such as watchman training and licensing, deputization of municipal officers, and upon request, the analysis of other police departments within the jurisdiction.

The analysis process is not used to obtain evidence of breach of integrity or proof of wrongdoing. In the event serious misconduct on the part of department personnel is found, the facts are immediately turned over to the bureau of internal affairs. Connection or association with an investigative arm involving integrity (internal affairs) is counterproductive.

The general analyses are scheduled 2 years in advance. Detailed scheduling is done on a quarterly basis and involves anticipated hours to be spent, names a specific analyst as project director, and lists all the special analyses to be accomplished during this period. Even though there is long and short range planning, the schedule remains flexible so that the bureau may respond almost immediately to areas designated by the superintendent as requiring immediate examination.



The sequence of a general analysis involves a 1-month notification of intent to audit. The project director is given preliminary directions so that he may start preanalysis research to become familiar with the unit and its operation. The next step involves a preanalysis meeting that is chaired by the superintendent and attended by the command staff of the unit to be reviewed. During this meeting, the objectives of the analysis are discussed and some specific topics for review are outlined.

Shortly after the initial meeting, the project director and his assistants meet with the unit supervisor and key management personnel to again review the objectives of the analysis, as well as set the stage for the mechanical and cooperative needs of the audit team. The next stage is the detailed analysis during which findings or concerns are developed, along with recommendations for correction or improvement. These concerns are reduced to the briefest, most direct form by answering the following questions:

- 1) What is the specific condition with which we are concerned?
- 2) What should the condition be as dictated by law, rule, procedure, policy, budget, commonsense, logic, commonly accepted practices, etc.?
- 3) Is there a meaningful deviation between what is and what should be, and if so, what effect will it have if allowed to continue?
- 4) Why or how did this come about?
- 5) What action is needed to correct or improve the situation?

---

**“An internal audit assures management that the services are functioning as intended and lends support to budgetary requirements.”**

---

Once developed, this information is immediately communicated to the director and key management personnel through an interim audit memorandum (IAM) which solicits written comments, both positive and negative. Using this method allows the concerns to be refined and areas of agreement and disagreement to be established. A meeting is then held with the executive directors and bureau directors to discuss areas of agreement or disagreement and to set tentative implementation schedules on those recommendations agreed upon. The last meeting in the series is with the superintendent. At this time, findings and recommendations are discussed and any disagreements are arbitrated by the superintendent. At the end of this meeting, the total report is considered resolved, inasmuch as recommendations agreed upon are assigned dates to be completed. Finally, the followup audits are conducted to ensure that the recommendations have been completed in the manner intended.

Special analyses, on the other hand, require no advance notification. If the unit or operation is notified, it is usually done orally a day or two prior to the audit. The audit, usually of very short duration, is conducted, and a report is written and distributed. Presentation of this type of report may be made in several different manners, depending on the subject. The report could be presented at a meeting with the superintendent and the unit, to the command staff at the open meeting, or by written report only.

The method of analysis is quite flexible and changes with each situation; however, it generally includes onsite examinations, interviews, statistical analysis, and research. It has been found that onsite examinations of operational functions are only productive after the analyst has been present for a number of hours. He must generally busy himself with reading, record review, or light conversation, in order to put the people at ease. Only then does he see actual operational functions rather than acted out scenarios. This time period also allows the analyst to acquaint himself with the specific functions so that he is comfortable in his role of critically analyzing what is occurring.

Interviewing techniques follow generally accepted standards. An attempt is made to remove the person from his own work area and place him in a quiet, uninterrupted atmosphere. Interviews are usually conducted by two analysts who attempt to put the subject at ease with light conversation. He is advised of the reasons for the interview and assurances are made that it will be kept confidential. Specific questions are made part of the conversation rather than formed into an interrogative-type question.

A questionnaire is routinely used and is distributed in advance of the audit. The questionnaire is used to seek candid information on how employees perceive their morale, what type of work they are doing that seems to be unnecessary, the most pressing problems they have concerning their job, and an invitation is made to comment on anything they wish concerning their job. This type of questionnaire must be kept confidential in order to obtain objective answers. Caution must be used when interpreting these questionnaires in order to weed out the person who has a specific problem with his supervisor or who may report numerous problems that may, in fact, not be true. As a general rule, if several employees relate the same problem, it would appear to merit a closer look.





*Auditor inspects a tactical officer's equipment.*



*Auditor examines clerical logs.*

Telephone interviews are occasionally conducted with citizens and victims in an attempt to determine how they perceive the services they have received. Telephone interviews, although the least desirable, can be used to contact individuals who are difficult to reach.

Statistical analysis usually involves a study of the unit's manual or computerized quantitative records, crime and clearance rates, cost studies, response time averages, beat manning figures, etc. The research preceding the analysis usually reveals the need for statistical data which is requested from data processing, management, or the planning and research staff well in advance of the audit. This type of research involves a broad spectrum and can include almost any intelligence concerning the area of audit. Research on the subject matter usually improves the audit team's credibility and ability to deal with specialized units. If they have basic disagreements with the material they have read, they are able to make an intelligent decision based on other ideas and experience.

During the preanalysis research, a determination is made as to whether the unit can be physically "exercised" for proficiency. If it is determined that a proficiency exercise can be conducted, a scenario is written, locations are arranged, and materials and equipment obtained beforehand. During the analysis, the audit team conducts the exercise and monitors it from the beginning, reporting on its progress and results. Practical exercises that have been used include bomb disposals for the arson and explosives team, earthquake disaster for the civil preparedness staff, hostage situations for SWAT teams, and simulated crimes for crime scene, crime laboratory, firearms, photo, and fingerprint technicians.

The format used for the general analysis report is a booklet form with each analysis placed in a different sequential color so that the current analysis is immediately discernible through color. The report is preceded by a letter of transmittal to the superintendent, informing him that an analysis was conducted and specific items being singled out for review. The narration of the report begins with a brief history of the unit being analyzed, the tenure of the supervisor, and a summary of the last analysis record. At this point, the narrative findings start, which is a repeat of the IAM as they were refined.

The recommendations are broken down into segments to allow rejection or acceptance and eventual completion of any portion without causing disruption of the entire theme. An example of a typical recommendation would be to purchase smaller 6-cylinder vehicles and equip them with a smaller and more efficient type of red light and radio system. This recommendation would be broken down as: 1) Recommending smaller vehicles; 2) recommending different red lights; and 3) recommending different radios.

All recommendations must be written in such a style that the unit supervisor is held accountable for implementation or initiation. Immediately following the findings/recommendations are the observations of the audit team when the operation is functioning in the



manner that does not require a recommendation. This section of the booklet is also used for commendations to the unit for work well done. The final section of the booklet includes the exhibits. This section is not meant to contain evidence but rather documentation or illustrations supporting statements made within the finding/recommendation section.

The form of reports on special audits differs depending on the circumstances. Most often, they are in memo form, again setting out the findings followed by specific recommendations to correct any deficiencies noted in the findings.

Distribution of the reports is limited to the superintendent and top management staff of the division or unit where the analysis occurred. The report is considered by the Bureau of Management Analysis to be confidential due to the sensitive material and the fact that it may be critical of the operations of the unit.

The image of an internal auditing unit must remain high. This is accomplished through diplomacy, integrity, accuracy, objectivity, and honesty. This image and support of top management are the main ingredients of credibility that is absolutely necessary to perform the audit function.

Most departments can not afford outside consultants or auditors on a regular basis and must strive for the most efficient and effective use of budgetary funds available. Use of usually less than 1 percent of the work force as independent and objective internal auditors will produce surprising results.

---

**“ . . . inspections are conducted generally to insure and promote effectiveness and economy and involve almost every policy, operation and type of material or facility within the department.”**

---

It is interesting to note the private sector's involvement when profits are of prime concern. This is indicated in a survey conducted of 114 corporations which disclosed “83% of the entities have audit staffs performing what is now known as management auditing.”<sup>6</sup>

Due to pressures on government tax money and the demands put on public officials by the taxpayers, it is essential that local agencies use what is available to the fullest. Mike Connelly, Director of Internal Audit for Hennepin County, Minn., put the problem into historical perspective:

“Politicians at the local government level, like policy-makers in the private sector, base their understanding of internal auditing primarily on their direct exposure to the function or, to be more specific, their direct exposure to the results of the function.

“Modern internal auditing at the local government level does not enjoy the history that it does in the private sector and, accordingly, local government politicians have not developed the same understanding of the function that private sector policymakers have.”<sup>7</sup>

In 1967, the President's Commission on Law Enforcement recognized the concept of staff inspection and its essential use, but reported that only a few American police forces have put it into practice. They also identified the concept as a military practice, thus

inferring that law enforcement adopted this from the military prior to a study done in 1965.<sup>8</sup>

The National Advisory Commission on Criminal Justice Standards and Goals, in their 1973 report, related that every police department should conduct scheduled and unscheduled inspections by personnel or units designated for staff inspections. This document also identified the staff inspection function as one that is conducted by a staff member or organization not directly related or responsible for the subject of the inspection.<sup>9</sup>

Not only has the military used the staff inspection concept for decades, it has been used in the FBI, Secret Service, and other Federal agencies.<sup>10</sup> The FBI's advice to police departments indicates a very strong need for inspections to assure the citizen demand for a good return on his investment. The techniques they recommend are not unlike other references on the subject.<sup>11</sup>

The Bureau of Management Analysis has been given the support, time, monies, and equipment to perform, which is indicative of the St. Louis County Police Department's progressive and sincere approach to management improvement. **FBI**

#### Footnotes

<sup>1</sup> George E. Eastman and Ester J. Eastman, eds., *Municipal Police Administration*, (Washington, D.C.: International City Managers Association, 1969), pp. 200-201.

<sup>2</sup> International Association of Chiefs of Police, *Measuring Work Performance and Employee Efficiency*, Unit 11 N, p. 2.

<sup>3</sup> Victor Z. Brink, *Foundations for Unlimited Horizons*, (Altamonte Springs, Fla.: The Institute of Internal Auditors, Inc., 1977), pp. 3-6.

<sup>4</sup> *Ibid.*

<sup>5</sup> The Institute of Internal Auditors, Inc., *Statement of Responsibilities of Internal Auditors*, Altamonte Springs, Fla., 1976.

<sup>6</sup> Dr. William L. Campfield, CPA, “Is Auditing a Sine Qua Qua Now in the Management Process?”, *Concepts of Governmental Auditing*, (Altamonte Springs, Fla.: The Institute of Internal Auditors, Inc., 1977), p. 61.

<sup>7</sup> Robert M. Atkisson, CIA, and Edward P. Chait, CPA, *The Case for Internal Auditing in Local Government*, (Altamonte Springs, Fla.: The Institute of Internal Auditors Inc., 1979), pp. 1-4.

<sup>8</sup> The President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: The Police*, (Washington, D.C.: U.S. Government Printing Office, 1967), p. 49.

<sup>9</sup> The National Advisory Commission on Criminal Justice Standards and Goals, *Police*, (Washington, D.C.: U.S. Government Printing Office, 1973), pp. 57-58.

<sup>10</sup> Eastman, *ibid.*

<sup>11</sup> Federal Bureau of Investigation, *Inspections Lecture Note Guide*, pp. 1-3.



# Organizing An Arson Task Force

By Sheriff Kenneth J. Braun *And* Robert E. Ford

*Chief of Operations  
Erie County Sheriff's Office  
Erie County, N.Y.*

During the past 2 decades, arson has become one of the most rapidly increasing serious crimes. While arson is national in scope and recognizes no political or geographic boundaries, its toll is most evident in older urban locations, specifically where wood frame construction prevails.

In 1977, known arson losses in the city of Buffalo alone amounted to over \$1 million. These arson loss figures are direct losses and do not take into consideration the hidden costs of arson, which include loss of jobs with resulting loss of income, increased fire insurance premiums, loss of business, erosion of the tax base, injuries and loss of life, and increased costs of fire protection. For example, the city of Buffalo's tax base shrunk by \$4 million in 1977. Much of this loss was occasioned by arson. And, experts claim that approximately one-third of the \$7.3 billion which businesses pay in fire insurance premiums go to arson losses. The cost in blighted neighborhoods is even higher.

In Erie County, in 1978, there were 336 known arsons. However, this figure does not include the far more numerous fires which are listed as being of suspicious origin. A conservative estimate would be that more than half of those fires were caused by arson.

In addition, auto fires have recently been recodified as arsons in New York State. Most fire investigators have standing orders not to investigate these because of the more important work regarding family dwellings and other buildings. Still, auto fires occur daily. On a dilapidated car or on a late model car in poor condition with heavy monthly payments, the owner can collect the value by throwing a railroad flare on the seat and watching it burn. In the city of Buffalo alone, in 1976, there were 1,212 auto fires resulting in an estimated \$816,685 in damages. No one is certain how many of these were arson.











Sheriff Braun



Mr. Ford

### The Problem

By 1977, it became clear to business leaders, law enforcement personnel, and area firefighters that the costs of arson in Buffalo, N.Y., and Erie County were far too high. Notwithstanding several ongoing efforts to combat arson which were achieving results, it was believed that further action had to be taken to stem the rising cost of arson. Accordingly, top law enforcement, political, and business leaders participated in a series of strategy sessions. From these sessions it became clear that arson could not be treated as just another crime. There were certain elements which necessitated a different approach if the effort to combat arson was to be successful.

### The Existing Enforcement Network

In Erie County, there were 96 volunteer fire companies and 3 paid units. It was observed that these fire services would be central to any arson control effort. Within the city of Buffalo, cooperation and communication between police and fire services were excellent. However, in many other jurisdictions, this communication was almost nonexistent.

Of the 27 police agencies within Erie County, only 3 have fully trained and experienced arson investigators. Basically, the function of the fire departments was to extinguish the fires and notify the police agency of any possible arsons. Police would then follow up with the criminal investigations. Unfortunately, many of the volunteer fire departments had little or no idea of what evidence to seek out.

It became clear that several elements were sorely needed, including:

- 1) Arson awareness programs for fire service personnel,
- 2) Basic arson investigation training for police officers,
- 3) Basic crime scene and rules of evidence training for fire service personnel,
- 4) Interchange of information between agencies, and
- 5) Arson awareness programs for citizens.

Jurisdictional boundaries also posed a problem. Analysis of persistent arson problems, particularly a series of lumberyard fires, revealed that in case after case, these arsons transcended limited police jurisdictions. As is characteristic, individual investigators limited their investigation and information retrieved to only those fires occurring within their own jurisdiction. In the lumberyard fires mentioned, at least seven different jurisdictions were involved. Problems of communication and coordination were overwhelming. Without proper investigative coordination, important information on such offenses is likely to be lost, thereby reducing the probability of arrest and successful prosecution.

Jurisdictional boundaries are further fragmented by disciplinary boundaries. Characteristically, most arson fires are first discovered by firefighters who, in most cases, make the initial investigation. It is often quite late into the investigation that the police enter the scene. In most cases, this is appropriate because firefighters have particularly well-developed skills in establishing the causes and origins of fires. However, without arson awareness, potentially valuable evidence and information could easily be overlooked, ignored, or destroyed.

### The Arson Task Force

Previous experience, as well as a review of available literature, suggests the following components are necessary for an effective arson task force:

- 1) An arson task force should feature the team concept. There should be full integration of police and fire officers working together, each one bringing their unique training and background to the investigation.
- 2) An arson task force should be oriented toward a greater range of areas. Arson investigations should not stop or be impeded by political boundaries. Arsonists are unconcerned with political subdivisions; investigators should be similarly unconcerned.



- 3) Wherever practical or possible, an arson task force should involve the active participation of volunteer firemen since most suburban firefighting is on a volunteer basis.
- 4) Close integration should be maintained with the district attorney's office. In fact, it would be appropriate that an assistant district attorney be dedicated solely to arson cases.
- 5) The arson task force should conduct periodic training for all paid and volunteer firemen in arson awareness. This is essential since these personnel are the eyes and ears of any arson task force.
- 6) Arson awareness programs should be conducted by the arson task force. These programs should be directed toward gaining the attention and cooperation of the public.

During late 1977 and early 1978, a proposal was developed to establish a countywide arson task force, and a \$186,000 grant was received from the Law Enforcement Assistance Administration (LEAA) for this purpose. This cooperative effort by both police and fire agencies involved a total of 10 police and fire investigators.

### Personnel

Selecting personnel to man the arson task force was considered critical. The 10-man task force was to be composed of two deputies from the Erie County Sheriff's Office, two police officers from the Buffalo Police Department, two fire investigators from the Buffalo Fire Department, two volunteer firemen, and two officers from suburban police departments.

In the case of the volunteer firemen, the area volunteer fire chiefs formed a committee and selected five possible nominees. These were given to the Erie County sheriff who selected the top two names on the list.

The Erie County Chiefs of Police Association was requested to furnish the names of five officers from suburban police departments. Again, the top two officers were chosen by the Erie County sheriff.

Although the task force was comprised of six police officers and four firefighters, three of the first five police officers chosen had a background in volunteer fire work. In addition, two of the police officers assigned to the unit have each been volunteer firemen for 20 years in the communities in which they live.

While the arson task force was extremely fortunate in the caliber of officers selected, this will not always be the case. In some jurisdictions, one might encounter the problem of a police or fire agency which did not wish to release top quality people for detail with another agency for an extended period of time and might be tempted to assign less competent personnel.

The arson task force is comprised of five 2-man teams. Each team consists of a trained police officer and fireman. This unit is available 365 days a year, 24 hours a day, and provides a coordinated, responsive investigative effort in cases of suspected arson and related crimes. All members of the force are fully deputized. The Erie County arson task force is particularly unique because of the full-time employment of volunteer firemen and the notable close relationship between the arson task force and the area's volunteer fire companies.

While this task force, for grant purposes, operates under the authority of the sheriff of Erie County, it is seen by the sheriff's department as a cooperative effort. Its purpose is not to supplant, but rather to assist and aid, all county agencies in dealing with the serious problem of arson.

To insure that this spirit of cooperation continues, guidelines have been developed that stress the cooperative nature of this enterprise. In addition, the arson task force has established liaisons between all police and fire agencies.

### Results

In its first 14 months of operation, the Erie County arson task force has been quite successful. From April 1979 to June 1980, the task force compiled an enviable record. The 774 total investigations have led to determinations of 336 confirmed arsons. Of these 336 arsons, 63 have been cleared by arrest. The arrests have led to 88 separate arson charges. In addition to direct arrest charges, there have been an additional 55 arrests for arson-related crimes. This had led to a total of 143 arrests. Nineteen percent of arsons investigated have been cleared by the arson task force, which contrasts favorably with a national clearance rate of 9 percent.

Possibly the most innovative approach to fire investigation was the inclusion of volunteer firemen as full-time investigators. There are 28,700 fire departments in the United States, of which 85 percent are volunteer. Therefore, it seems only logical to include them in the attack on arson. With 96 volunteer and only 3 paid fire companies and departments in the county, we believed that their representation was critical to the success of the task force. Over 7,500 volunteer firemen provide protection for over 80 percent of the county. They comprise a large group of supporters for the arson task force and were one of the prime movers advocating the formation of the unit. They were one of the first groups to recognize that arson is not just an urban problem but a suburban and rural one as well.

Prior to the formation of the unit, several of the larger police departments outside the city of Buffalo had one detective who would handle fire investigations as needed and who performed other investigative duties as well. In all of these towns, the fire investigation workload was not sufficient to warrant full-time assignment, and the investigator might end up investigating only one or two fires per month. In some smaller jurisdictions the detective may only have one every 6 months or so. We believed that a full-time unit investigating fires would de-



velop more quickly the expertise necessary to improve the quality of fire investigations throughout the county. The statistics from the first full year of operations showing an almost 20-percent arrest rate of confirmed arson cases supports that contention.

### **Training**

An integral part of the LEAA grant is training. The task force through use of the Sheriff's Department Training Academy, the Erie County Department of Central Police Services Training Academy, and the Erie County Department of Fire Safety has trained approximately 300 volunteer firemen in a 40-hour arson detection course. As suspected, this training produced an increase in the fires classified as incendiary in the rural and suburban areas of our county. Fires which were previously listed as electrical or spontaneous combustion or left undetermined as to cause are now being investigated by trained personnel.

Of the 10 members of the arson task force, 4 have completed the arson investigation course at the National Fire Academy. The other members of the unit have completed numerous local and State schools sponsored by the Federal Bureau of Investigation, Alcohol, Tobacco and Firearms, National Fire Protection Association, International Association of Arson Investigators, and New York State Municipal Training Council.

### **Police/Fire Team**

The LEAA grant calls for the teaming up of a policeman and firefighter. This allows the team to draw on the experience of the police officer during the course of investigations in such areas as rules of evidence, interviewing witnesses and suspects, sources of information, etc., and the firefighter in turn gives his attention to his area of expertise. The team members, learning from each other, quickly become the complete fire investigator. This approach played an important part in the

success of the arson task force thus far and definitely helped to bridge the gap that existed in our communities between police and fire departments. By combining efforts and joining together for the common goal of reducing incendiary fire, it is possible to eliminate the seemingly innate competition that exists between the two disciplines.

All members of the task force are deputized by the sheriff of Erie County, and therefore, have full police powers. Although this aids greatly during the course of investigations, it initially raised several problems concerning liability. Insurance was purchased through the National Sheriff's Association, and weapons training and instruction dealing with the legal use of force was conducted. All volunteer firemen in the unit have completed the 14-week basic police recruit school.

### **Request for Investigation**

Since there are 27 police and 99 fire departments in Erie County, the task force adopted a policy of providing investigations requested by either the fire or police chief of the jurisdiction involved. Since this is the first countywide investigative unit, there were obstacles to overcome. After a period of virtually selling the product of quality fire investigations, all police and fire agencies have requested this service. The arson task force in no way usurps, but rather assists, the local police on any investigation, using the equipment and specialized training received under the grant.

### **Problems**

Up to this point, the positive aspects of forming and implementing an arson task force has been conveyed. As with all endeavors, however, there have been problems to overcome along the way.

At the outset, it was envisioned that all participating personnel would be paid directly from grant funds. Variances in salaries, retirement systems, seniority rights, vacations, overtime, personal leave time, etc., made this impossible. It was necessary to approach the combined efforts of these five separate agencies contractually,

whereby each officer continues to receive his salary from his department which in turn vouchers these costs to the county to be paid by grant funds. These vouchered costs include all expenditures for hospitalization insurance, retirement contributions, etc., and allows the municipality to replace the officer while he is on loan to the grant as a consultant.

After many time-consuming problems with this contractual system, it is now operating smoothly and will surely make any future countywide combined efforts using officers from various municipalities much less time-consuming to initiate.

### **Working Hours**

The grant requires that we keep a police/fire team working together whenever possible. With a supervisory lieutenant and nine officers, four firefighters and five police officers, it was impossible to work the traditional three shifts of 8:00 a.m. to 4:00 p.m., 4:00 p.m. to midnight, and midnight to 8:00 a.m. and adhere to this provision of the grant. This, coupled with the fact that we believed it was necessary to provide coverage 24 hours a day, 7 days a week, made it necessary to operate with a four platoon system. This work schedule provides for each platoon working 2 days 8:00 a.m. to 5:00 p.m., two nights from 5:00 p.m. to 8:00 a.m., and then having 4 days off before starting the cycle over again. This not only allows for complete coverage with four 2-man teams but has been well accepted by the officers of the unit.

### **Summary**

The accomplishments of the task force speak for themselves. It has been and will continue to be a noteworthy effort in the continuing battle against arson for profit. While the LEAA grant was not renewed, the arson task force will continue to operate because of the appropriations allotted by the Erie County Legislature for a portion of the cost.

**FBI**



# Documentary Subpenas And Fifth Amendment Protection

By Kenneth A. Jacobsen  
Special Agent  
Legal Adviser  
Federal Bureau of Investigation  
Los Angeles, Calif.

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

The fifth amendment to the U.S. Constitution guarantees that "no person . . . shall be compelled in any criminal case to be a witness against himself." As early as 1886, the U.S. Supreme Court in *Boyd v. United States*<sup>1</sup> held that "a compulsory production of the private books and papers of the owner of goods sought to be forfeited . . . is compelling him to be a witness against himself within the meaning of the Fifth Amendment to the Constitution," thereby indicating possible fifth amendment protection in any situation where a documentary subpoena sought papers which were incriminating.

Since this broad statement in *Boyd*, the Court has limited the fifth amendment protection "to its historic function of protecting only the natural individual from compulsory incrimination through his own testimony or personal records."<sup>2</sup> The Court's holdings clearly establish that corporations,<sup>3</sup> labor unions,<sup>4</sup> political organizations,<sup>5</sup> partnerships,<sup>6</sup> and other types of associations which have a legal identity of their own<sup>7</sup> have no fifth amendment protection against the compelled production of records. Moreover, the custodian of those records cannot raise a fifth amendment objection to their production pursuant to a lawfully issued documentary subpoena, even though the contents of the documents would incriminate him personally.<sup>8</sup>

In light of these decisions, the fifth amendment protection is available only when the documentary subpoena seeks incriminatory records associated with an individual, sole proprietorship, or sole practitioner. There are pertinent cases which have dealt with documentary subpoenas issued for records associated with an individual, sole proprietorship, or sole practitioner, and rules and guidelines have been established by the courts for answering the question of when the fifth amendment privilege against self-incrimination can be asserted successfully as a bar to the enforcement of the subpoena.

The U.S. Supreme Court in *Couch v. United States*,<sup>9</sup> *Fisher v. United States*,<sup>10</sup> and *Andresen v. Maryland*<sup>11</sup> has established the rule that the fifth amendment privilege against self-incrimination can be invoked to block the enforcement of a documentary subpoena demanding the production of records associated with an individual, sole proprietorship, or sole practitioner, only where compliance with the subpoena would *compel* a *testimonial* communication which is *self-incriminating*. In applying this rule to specific factual situations, the courts look at the identity of the party to whom the subpoena is directed, the act compelled by the subpoena, the authorship of the records sought by the subpoena, and the public or private nature of those records.



**“ . . . the class of documents involved  
 . . . indicate a difference between  
 private documents and public documents,**



Special Agent Jacobsen

**Identity of the Party to Whom the Subpena is Directed**

In *Fisher*, the Court stated the fifth amendment privilege against self-incrimination only prohibits the use of "physical or moral compulsion exerted on the person asserting the privilege."<sup>12</sup> When dealing with a documentary subpoena, the identity of the party to whom the subpoena is directed will determine whether compliance is required. Only two factual situations are possible. One is when the subpoena is directed to a third party and the records sought do not incriminate him. The other is where the subpoena seeks records possessed by the criminal defendant himself.

Examples of the former are *Couch*, where the subpoena was directed to an accountant for records in his possession which incriminated his client-taxpayer, and *Fisher*, where the subpoena similarly was directed to an attorney for his client's tax records. In both cases, the fifth amendment privilege was asserted by or for the party, i.e., the client, who was not commanded to do anything by the subpoena. In both cases, the Court upheld the enforcement of the documentary subpoena. The Court based its rulings upon a literal interpretation of the language of the fifth amendment. It simply held the fifth amendment only prohibits *compelled self-incrimination*. Although the subpoenas in *Couch* and *Fisher* compelled the accountant and the attorney to produce records, the production was not incriminating as to them, and even though the records might be incriminating as to the client-taxpayers, the subpoenas did not compel them to do anything. The Court in *Fisher* explained:

"Here, the taxpayers retained any privilege they ever had not to be compelled to testify against themselves and not to be compelled themselves to produce private papers in their possession. This personal privilege was in no way decreased by the transfer. It is simply that by reason of the transfer of the documents to the attorneys, those papers may be subpoenaed without compulsion of the taxpayer. The protection of the Fifth Amendment is therefore not available."<sup>13</sup>

In view of the holdings in *Couch* and *Fisher*, any individual who wishes to assert a fifth amendment claim<sup>14</sup> as a bar to compliance with a lawfully issued documentary subpoena must, as a first step, be able to show the subpoena has been directed to him, calling for the production of documents under his control or in his actual or constructive possession<sup>15</sup> which would incriminate him. If he cannot establish these factors, no additional inquiry regarding his claim is necessary, since the *compelled self-incrimination* required by the fifth amendment privilege is not present.<sup>16</sup>

The second possible factual situation is where the subpoena is directed to an individual who is the proper claimant of the privilege (e.g., the client-taxpayers in *Couch* and *Fisher*). In this situation, both compulsion and self-



## with the private documents being granted greater fifth amendment protection and authorship remaining a crucial issue."

incrimination are present and directed against the same individual. In light of *Couch* and *Fisher*, this individual has the right to raise and argue a fifth amendment privilege claim. In determining whether this claim will be upheld, the courts will next focus upon the act compelled by the subpoena, the authorship of the records sought by the subpoena, and the public or private nature of such records.

### The Act Compelled by the Subpena

The Court in *Fisher* identified two different acts which can be compelled by a documentary subpoena. The first of these centers on the actual creation of the documents being sought and involves the compulsion to bring into existence a document which is both testimonial and self-incriminating. This compulsion is present in situations where the Government has forced the creation of the document by statute<sup>17</sup> or seeks the creation of the document through the subpoena itself. In either case, if the individual is compelled to testify in writing through the creation of the document and the testimony created is self-incriminating, then the fifth amendment privilege is applicable. The Court found this type of testimonial compulsion was not present in *Fisher*, because the documents in question were already in existence prior to the issuance of the subpoena and had been created voluntarily. In such a case, the Court pointed out the documents cannot "be said to contain compelled testimonial evidence either of the taxpayer or of anyone else."<sup>18</sup>

The second act of testimonial compulsion the Court considered does not, in the first instance, focus upon the creation of the documents or their contents. Instead, it considers the compulsion created by the demand to produce the documents sought in the subpoena and weighs the communicative aspects attendant upon such production. The Court found these communicative aspects could be considered testimonial on two grounds. First, the person who complies with the subpoena admits the existence of the documents and his custody and control over them. Second, he may be implicitly authenticating the documents by identifying them as those demanded by the subpoena. The issue, therefore, is whether these undeniably communicative aspects are sufficiently testimonial and incriminating to trigger the fifth amendment protection. In resolving this issue, the courts look to the authorship of the documents sought and the public or private nature of the documents.

### Authorship of the Documents

The Court in *Fisher* found the authorship of the records sought by the subpoena to be determinative of whether compliance with the subpoena would produce a compelled testimonial communication which was self-incriminating. The Court, after deciding the attorney could not successfully resist compliance with the subpoena on fifth amendment grounds, also rendered a decision on the issue of whether the fifth amendment privilege would have allowed the client-taxpayer to oppose a subpoena directed to him had the records remained in his possession.

Regarding the communicative aspects of the taxpayer admitting the existence of the documents and his custody and control over them, the Court noted the records belonged to the taxpayer's accountant, were prepared by the accountant, and were the type normally prepared by an accountant working on the tax returns of his client. The Court found the existence and location of the papers were a foregone conclusion, and the taxpayer, by admitting his possession of the documents, added little or nothing to the Government's information. In addition, the Court noted that even if this admission was found to have testimonial significance, it is clearly not illegal to seek assistance in preparing one's tax returns, and consequently, an admission that accounting papers existed and were in one's possession and control, even if testimonial for fifth amendment purposes, would not be self-incriminating.

Regarding the argument that the taxpayer would implicitly authenticate the documents by complying with the subpoena, the Court said such compliance would do no more than indicate the taxpayer's belief that the papers he delivers are those demanded. The Court premised this conclusion upon the fact the taxpayer had not prepared the papers, could not vouch for their accuracy, and the documents would not be admissible in evidence against him without authenticating testimony. The Court did not believe that on these facts the simple admission that the documents produced were those demanded by the subpoena would amount to testimonial self-incrimination. As the Court said, "In light of the records now before us, we are confident that however incriminating the contents of the accountant's workpapers might be, the act of producing them—the only thing



## “In determining whether . . . testimonial communication is present, and . . . whether it is self-incriminating,

which the taxpayer is compelled to do—would not itself involve testimonial self-incrimination.”<sup>19</sup>

It is important to emphasize that the records sought in *Fisher* had not been prepared by the defendant, but rather by his accountant. Had Fisher himself prepared them, his production of them in response to a subpoena would have constituted an authentication of the documents. Most lower courts which have considered similar situations have held that this inherent authentication is a compelled communicative act sufficient to invoke fifth amendment protection.

For example, the fifth amendment has been held to bar compliance with a subpoena issued to a person for incriminating tape recordings *made by him* and in his possession,<sup>20</sup> for incriminating personal business records *created by him* and in his possession,<sup>21</sup> for incriminating records of monies lent or paid *created by the person* and in his possession,<sup>22</sup> for incriminating doctor's records where the *doctor had made all entries personally* and had the records in his possession,<sup>23</sup> for incriminating business records *authored by an attorney* and in his possession,<sup>24</sup> and for incriminating letters *sent from a taxpayer to his accountant* which were now back in the possession of the taxpayer.<sup>25</sup> In all of these cases, the courts found the factor of authorship to be crucial in holding that compliance with the subpoena would result in a self-incriminating testimonial communication either under the implied authentication or the admission of existence, possession, and control theories established by the *Fisher* decision.

This, of course, does not mean that documentary evidence prepared and maintained by a sole practitioner or single proprietor may not be obtained by the Government. For example, a search warrant could be obtained. Because the execution of a search warrant does not compel a defendant to do anything, no fifth amendment values are implicated.<sup>26</sup> And some courts have suggested that the Government could use a subpoena if immunity were granted to the defendant regarding his authentication of the subpoenaed documents.<sup>27</sup>

### The Public or Private Nature of the Documents

The factor of authorship alone is not, however, sufficient to guarantee the protection of the fifth amendment privilege. The courts also give close scrutiny to the class of documents involved in the subpoena demand. Many of the cases decided in this area indicate a difference between private documents and public documents, with private documents being granted greater fifth amendment protection and authorship remaining a crucial issue. In the area of public documents, i.e., documents which a lawful statute or regulation requires be created, maintained, recorded, or filed, or documents which are themselves owned or generated by the Government, there is a lessening of fifth amendment protection, and authorship is not a critical issue.<sup>28</sup> This lessening of protection is directly related to the impact the public nature of the documents has upon the two self-incriminating testimonial communication theories established in *Fisher*. First, an admission of the existence and control over or possession of documents which are required to be created, maintained, or filed by statute is not much of a testimonial communica-

tion since, as in *Fisher*, the admission would add little, if anything, to the Government's evidence and the existence of the records is a foregone conclusion. Also, if the statute or regulation requiring the records does not itself compel self-incrimination, then the fact someone has complied with the statute and created the records is not self-incriminating.

Second, the implicit authentication argument is also weakened by the public nature of the documents, because the mere response by production is arguably no more a violation of the fifth amendment privilege against self-incrimination than requiring the creation, maintenance, or filing of the document itself. In other words, if the initial compelled creation, filing, or maintenance of the record is not a violation of the fifth amendment, a later compelled authentication of the document similarly should not be a violation.



# the authorship of the documents and the public or private nature of the documents are determinative factors."

## Summary

A fifth amendment claim can only be raised as a successful bar to the enforcement of a documentary subpoena when the person challenging the subpoena can establish all of the following: (1) The subpoena has been issued for records associated with an individual, sole practitioner, or sole proprietorship; (2) the individual asserting the privilege must be in actual or constructive possession of the documents sought by the subpoena and the privilege asserted must be his own personal privilege; and (3) compliance with the subpoena would compel him to perform an act which constitutes a self-incriminating testimonial communication. In the case of documents already in existence whose preparation was voluntary, the testimonial communication can come about as an admission of the existence of and/or possession of or control over the documents or as an implicit authentication of the documents. In determining whether this testimonial communication is present, and if so, whether it is self-incriminating, the authorship of the documents and the public or private nature of the documents are determinative factors.

FBI

## Footnotes

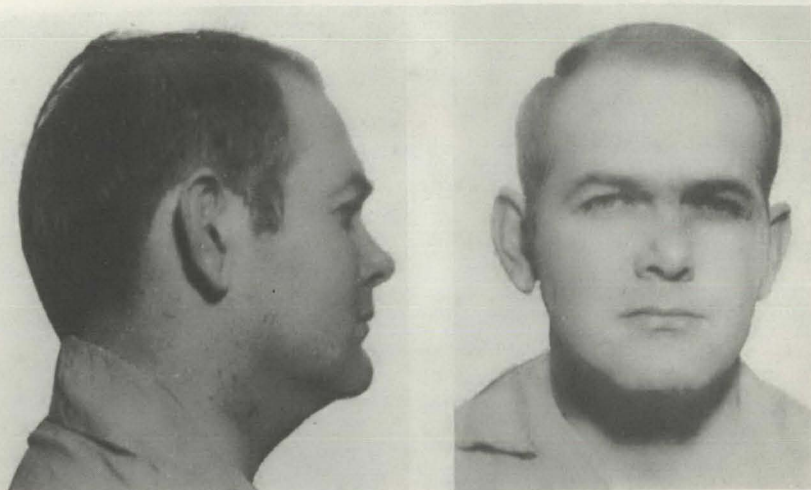
- <sup>1</sup> 116 U.S. 616, 634-635 (1886).
- <sup>2</sup> *Bellis v. United States*, 417 U.S. 85, 89-90 (1974).
- <sup>3</sup> *Wilson v. United States*, 221 U.S. 361 (1911).
- <sup>4</sup> *United States v. White*, 322 U.S. 694 (1944).
- <sup>5</sup> *Rogers v. United States*, 340 U.S. 367 (1951).
- <sup>6</sup> *Bellis*, *supra* note 2.
- <sup>7</sup> For factors the courts look at in deciding the issue of separate legal identity, see *Bellis*, *supra* note 2, as well as *In the Matter of Grand Jury Empanelled February 14, 1978 (Colucci)*, 597 F.2d 851, 859 (3d Cir. 1979); *Matter of Special Grand Jury No. 1 Impanelled December, 1977*, 465 F. Supp. 800 (D. Md. 1978); *In Re Grand Jury Proceedings (Rodriguez)*, 626 F.2d 1051 (1st Cir. 1980).
- <sup>8</sup> For a general discussion of this area of law and an exhaustive listing of case decisions see Annot. 52 A.L.R. 3d 636 (1973). This limitation on the fifth amendment protection applies only to the act of production and authentication of the documents themselves. The U.S. Supreme Court has found the protection to still be available where the custodian does not produce the records and the questions posed to him regarding the whereabouts of the documents require answers which would be incriminating. See *Curcio v. United States*, 354 U.S. 118 (1957).
- <sup>9</sup> 409 U.S. 322 (1973).
- <sup>10</sup> 425 U.S. 391 (1976).
- <sup>11</sup> 427 U.S. 463 (1976). In *Andresen*, a documentary subpoena was not involved. Instead, a fifth amendment challenge was raised in an attempt to suppress the use in evidence of the private papers of the defendant which had been procured by the State pursuant to the execution of a search warrant. The Court's decision regarding this claim was based on the same grounds as its decisions in *Couch* and *Fisher*.
- <sup>12</sup> *Supra* note 10, at 397.
- <sup>13</sup> *Id.* at 399-400.
- <sup>14</sup> The Court in *Fisher* narrowed the scope of the fifth amendment privilege significantly by making it clear this amendment is not a general protector of privacy, and only forbids the compelled production of evidence and not the production without compulsion of private, personal, or incriminating information. The Court stated that if the production of such evidence is forbidden in the absence of personal compulsion, it is forbidden by other evidentiary privileges or constitutional amendments distinct from the fifth. In this regard, see *United States v. Bennett*, 409 F.2d 888, 896-897 (2d Cir. 1969), *cert. denied*, 396 U.S. 852 (1969), which is cited by the *Fisher* Court and raises the intriguing possibility of some documents being so personal and private in nature as to never be subject to a reasonable search and seizure under the fourth amendment.
- <sup>15</sup> *Couch* recognized, and *Fisher* reiterated, the possibility of factual situations where constructive possession is so clear or the relinquishment of possession is so temporary and insignificant as to leave the personal compulsion upon a party claiming the privilege, even though the subpoena is directed to someone else who has the actual possession of the documents. For a discussion of the possibility of constructive possession, see also *In Re Horowitz*, 482 F.2d 72, 83-87, (2d Cir. 1973), *cert. denied*, 414 U.S. 867 (1973), *reh. denied*, 414 U.S. 1052 (1973), and *In The Matter of Grand Jury Empanelled February 14, 1978 (Colucci)*, *supra*, note 7, at 861-862. For a discussion of a transfer of the records after the subpoena is served, see *United States v. Braswell*, 436 F. Supp. 669 (E.D.N.C. 1977).

<sup>16</sup> One exception to this general rule was recognized in *Fisher*. It arises where the documents are in the possession of an attorney and were delivered to him by the client for the purpose of obtaining legal advice. In such a case, the Court decreed the fifth amendment privilege of the client must be examined. If the fifth amendment privilege of the client would have blocked the enforcement of a subpoena directed to him while he was in possession of the documents sought, then the attorney-client privilege successfully blocks the enforcement of the subpoena directed to the attorney. The Court premised this holding on the need to further the attorney-client relationship through full disclosure by the client to the attorney. The Court felt if the client knew incriminating information could be more readily obtained from his attorney than from himself, he would be reluctant to make such information available to the attorney. As to how the *Fisher* holding applies to a State-issued documentary subpoena, see *Beckler v. Superior Court*, 568 F.2d 661 (9th Cir. 1978), where the Court held *Fisher* was applying a Federal rule of evidence which was not of constitutional dimension, and therefore, each State is free to decide how the attorney-client privilege should be safeguarded in this type of factual setting.

- <sup>17</sup> *Fisher*, *supra* note 10, at 410 n. 11.
- <sup>18</sup> *Id.* at 410.
- <sup>19</sup> *Id.* at 410-411.
- <sup>20</sup> *In Re Bernstein*, 425 F. Supp. 37 (S.D. Fla. 1977).
- <sup>21</sup> *United States v. Helina*, 549 F.2d 713 (9th Cir. 1977).
- <sup>22</sup> *Matter of Grand Jury Subpoena Duces Tecum, etc.*, 466 F. Supp. 325 (S.D. N.Y. 1979).
- <sup>23</sup> *United States v. Plesons*, 560 F.2d 890, 892-893 (8th Cir. 1977), *cert. denied*, 434 U.S. 966 (1977) (dicta in that doctor did not make a claim but court says if he had done so it would have been successful); *In Re Grand Jury Proceedings (Rodriguez)*, *supra* note 7.
- <sup>24</sup> *Matter of Special Grand Jury No. 1, Impanelled December, 1977 Term.*, 465 F. Supp. 800 (D. Md. 1978). The court here makes the distinction between records in the possession of the attorney which were authored by him and those which were not. As to the latter, the court extends no fifth amendment protection.
- <sup>25</sup> *United States v. Beattie, Jr.*, 522 F.2d 267 (2d Cir. 1975), *vacated and remanded*, 425 U.S. 967 (1976), *modified on remand per curiam*, 541 F.2d 329 (2d Cir. 1976). In this case, the subpoena, directed to the taxpayer, demanded all correspondence between the taxpayer and his accountant. The Court originally blocked enforcement of this part of the subpoena on fifth amendment grounds. Both parties requested *certiorari*. The U.S. Supreme Court decided the *Fisher* case in the interim, granted the Government's request for *certiorari*, and remanded for reconsideration in light of *Fisher*. On remand, the court enforced the subpoena for the correspondence written by the accountant to the taxpayer, but still blocked the subpoena's demand for the correspondence written by the taxpayer to the accountant.
- <sup>26</sup> *Andresen v. Maryland*, *supra* note 11.
- <sup>27</sup> See *In Re Grand Jury (Rodriguez)*, *supra* note 7; *State v. Alexander*, 281 N.W.2d 349, 352 (Minn. 1979).
- <sup>28</sup> *United States v. Falley*, 489 F.2d 33 (2d Cir. 1973) (passport); *Davis v. United States*, 328 U.S. 582, 602 (1946) (Frankfurter, J., dissenting) (gas rationing coupons); *Wilson v. United States*, *supra* note 3, at 380 (discussion of records made in public office and corporate records); *United States v. La Page*, 441 F. Supp. 824 (N.D. N.Y. 1977) (business records required to be kept by a State licensed cattleman); *In Re Grand Jury Proceedings (McCoy)* 601 F.2d 162 (5th Cir. 1979) (customs house brokerage records required by statute); *Braswell*, *supra* note 15 (tax return).



# WANTED BY THE FBI



Photographs taken 1974

## Johnny Evans Lowe

Johnny Evans Lowe, also known as Johnnie Evans Lowe (true name), Johnny Lowe, Johnny E. Lowe, and Johnny Eveans Lowe.

## Wanted For:

Interstate flight to avoid confinement

## The Crime

Lowe is an escapee from a correctional center at Atmore, Ala. Since his escape in August 1976, he has reportedly robbed a gas station in Alabama and a bank in Tennessee.

A Federal warrant for Lowe's arrest was issued on October 5, 1976, at Mobile, Ala.

## Criminal Record

Lowe has been convicted of robbery, assault on a police officer, and grand larceny.

## Description

Age .....32, born July 29, 1948, Hixson, Tenn.  
Height .....6'1".  
Weight .....200 to 220 pounds.  
Build .....Medium.  
Hair .....Black.  
Eyes .....Blue.  
Complexion .....Medium.  
Race .....White.  
Nationality .....American.  
Scars  
and Marks .....Tattoo of boot with chain and ball on right shoulder.  
Occupations .....Drum machine operator, factory worker, farmer, laborer, and mechanic's helper.  
Social Security  
Nos. Used .....412-30-5159.  
412-80-5159.  
FBI No. ....267,810 H

## Caution

Lowe should be considered armed, dangerous, and an escape risk.

## Notify the FBI

Any person having information which might assist in locating this fugitive is requested to notify immediately the Director of the Federal Bureau of Investigation, U.S. Department of Justice, Washington, D.C. 20535, or the Special Agent in Charge of the nearest FBI field office, the telephone number of which appears on the first page of most local directories.

## Classification Data:

NCIC Classification:  
PO520606081251080906  
Fingerprint Classification:  
2 0 1 R III 8  
M 17 R III



Left index fingerprint



# Change of Address

Not an order form

# FBI LAW ENFORCEMENT BULLETIN

Complete this form and return to:

Director  
Federal Bureau of Investigation  
Washington, D.C. 20535

Name \_\_\_\_\_

Title \_\_\_\_\_

Address \_\_\_\_\_

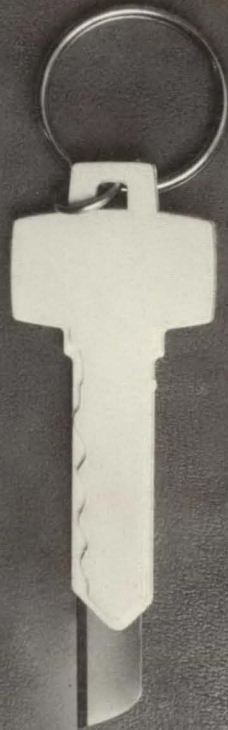
City \_\_\_\_\_

State \_\_\_\_\_

Zip \_\_\_\_\_

## Key Conceals Blade

Promoted as the "world's handiest retractable knife," this plastic key with advertising on one side was distributed in quantity and found in an FBI raid on the west coast. Officers should be alert to the potentially dangerous razor-sharp concealed blade.





**U.S. Department of Justice**  
Federal Bureau of Investigation

Official Business  
Penalty for Private Use \$300  
Address Correction Requested

Postage and Fees Paid  
Federal Bureau of Investigation  
JUS-432

Controlled Circulation Rate



*Washington, D.C. 20535*

## **Questionable Pattern**

This questionable pattern is classified as a double loop-type whorl with an outer tracing and is referenced to an accidental whorl.

The reference is necessary due to the possibility of the crease or cut spoiling the innermost looping ridge, thereby creating a combination of two patterns—a loop over a tented arch.

