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# **FBI** Law Enforcement

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## Environmental Crimes



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Louis J. Freeh  
Director

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# FBI Law Enforcement

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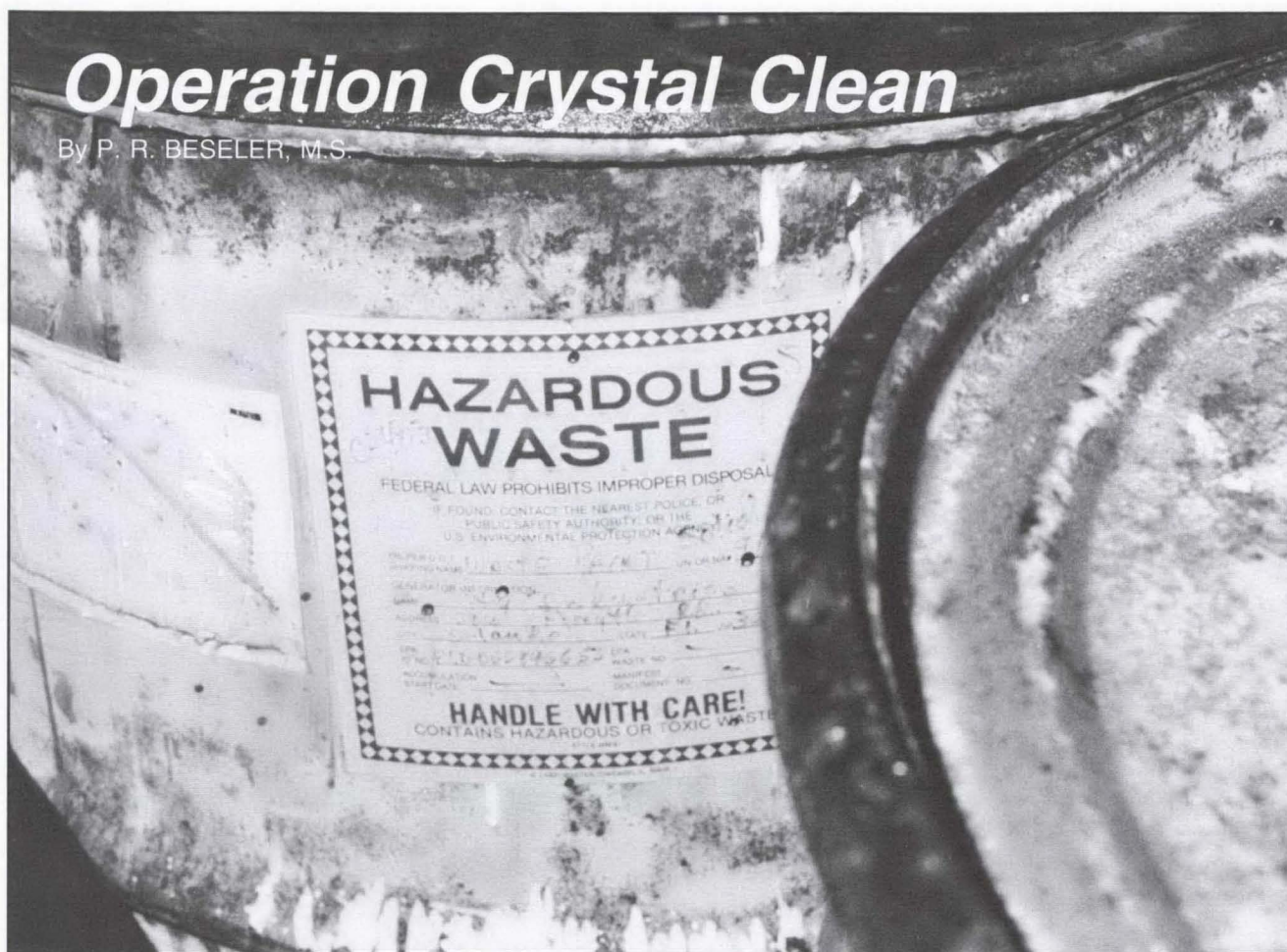
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# Operation Crystal Clean

By P. R. BESELER, M.S.



**A** young patrol officer doing a routine drive-through of a wooded area on his beat makes an ominous discovery. Several 55-gallon barrels bearing hazardous waste markings lie illegally dumped and leaking their deadly contents into the ground. The officer backs off, establishes a perimeter, and calls in the Hazardous Materials Unit to begin the costly cleanup and removal process.

This scenario is repeated thousands of times each year across the United States. As the cost for proper disposal of hazardous waste continues to rise, many more such incidents likely will occur.

In Jacksonville, Florida, during 1993, over 300 barrels of hazardous waste were dumped illegally into woodlands and waterways in 49 separate incidents. These numbers represent only those sites that authorities found, believed to be a mere fraction of the total number of barrels leaking harmful contaminants into the earth this very minute. Because the lack of eye witnesses makes investigation of these crimes difficult, the criminal justice community must establish procedures to stop environmental criminals before they pollute again.

In an effort to curb illegal hazardous waste disposal, the State attorney's office in Jacksonville

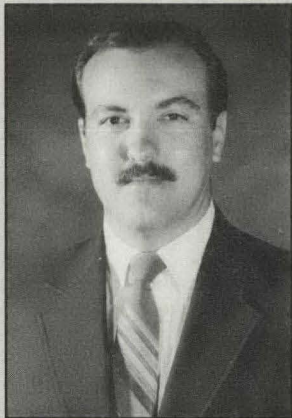
designed and implemented an undercover operation codenamed "Operation Crystal Clean." Nineteen suspects arrested in the sting operation brazenly dumped barrels of hazardous waste, sometimes in plain view at busy shopping centers in broad daylight.

## THE INVESTIGATIVE PROCESS

### Baiting the Hook

In order to ensure the integrity of the cases in criminal court, investigators followed all standard evidentiary and investigative guidelines. Still, the method of investigation proved simple and effective.





Mr. Beseler is chief investigator for the State attorney's office in Jacksonville, Florida.

**“  
... law enforcement can  
identify and capture  
illegal waste haulers by  
using conventional  
undercover techniques.  
”**

First, investigators rented a small storage warehouse to set up shop for the undercover operation. They obtained several 55-gallon barrels and affixed hazardous waste decals and markings to them. The barrels held a mixture of water and a fluorescent green dye obtained from the Department of Environmental Protection. Though harmless, the dye made the liquid appear toxic. It also would mark a dump site if spilled into a waterway. With these steps taken, Operation Crystal Clean opened for business.

Investigators used several methods to locate suspects. They targeted companies that had histories of illegal dumping. They asked generators of hazardous waste how they disposed of their toxic byproducts. Finally, they identified companies advertising hauling services in the classified ads section of the local newspaper.

### **Casting the Line**

With a list of potential suspects in hand, undercover officers began to make phone calls and personal contacts, putting out the word that they

had some hazardous waste of which they wanted to dispose. They also distributed business cards with the covert business' name, address, and phone number to those vendors who seemed willing to make a fast, illegal buck.

Before long, the phone at the undercover site began to ring, with suspects offering to take the barrels off the investigators' hands. Legitimate haulers were easy to distinguish from illegal ones, often by the fees they charged. The cost to dispose of real hazardous waste properly can be as high as \$1,000 per barrel, depending on its contents. The fee covers licensing, insurance, and fees paid by the hauler for equipment, transportation, and disposal at sites approved for hazardous waste.

Legitimate haulers also leave a paper trail. Cargo manifest documents detail information about the barrels, including their contents, owner, place of origin, and final destination. In addition, reputable firms maintain disposal records.

Some companies refused the business; they were not licensed to remove hazardous waste and

admitted it. One reliable business even reported the undercover operation to the FBI.

By contrast, illegal haulers offered to remove the waste for less than \$100 per barrel. They never required any paperwork to accompany the transaction. One firm advertised that it would haul "anything, anytime, anywhere, no questions asked."

For those haulers who did ask questions, the undercover officers developed a simple cover story. They told curious individuals that a former tenant had abandoned the waste at the warehouse; they merely wanted to rid themselves of this mess.

### **Catching a Fish**

After reaching an agreement—usually by phone—the undercover officers and the suspects met at the warehouse. When the suspects arrived, officers videotaped them loading the barrels and collecting their money. Recording this meeting, as well as other contacts with the suspects, allowed undercover officers to avoid entrapment issues.

By recording every conversation, they documented exactly who said what to whom. More important, the tapes demonstrated the suspects' willingness to break the law. Indeed, the fact that they set the price, provided their own transportation and equipment, suggested where to dump the waste, and removed the hazardous waste labels showed a predisposition to engage in illegal activity, even before they committed a crime.

To help track the suspects, undercover officers tried to identify the suspects and a probable dump site before they left the warehouse. Often, all they had to do was ask. In fact, most suspects gave their real



names. If the officers could not identify the subjects, marked patrol units from the local jurisdiction would conduct a routine traffic stop several miles from the warehouse and complete field interrogation cards on the occupants of the vehicle.

Undercover surveillance teams trailed the suspects as they left the warehouse with their illicit cargo. Maintaining an eye on the vehicle proved relatively easy. Most suspects used large trucks or trailers to haul the barrels, which they left in plain view or covered with a tarp. When available, air units assisted in the surveillance.

Most suspects drove to secluded wooded areas, unloaded the barrels, and drove away. Occasionally, they dumped the contents and saved the barrels for storage. In the most brazen incident, the offenders unloaded nine barrels from a U-Haul truck at 4 p.m. in the parking lot of a shopping mall, which was located adjacent to a busy four-lane highway, then calmly drove away.

The surveillance team allowed the subjects to leave the site before moving in to photograph the area. Officers recovered the barrels and returned them to the warehouse to use on the next unwitting suspect.

### **Reeling in the Catch: Hook, Line, and Sinker**

At the conclusion of the investigation, an assistant State's attorney reviewed each case and issued arrest warrants for commercial dumping, a felony. Florida statutes prohibited charging the suspects with illegal disposal of hazardous waste, because the nontoxic contents of the barrels did not meet the statutory definition of hazardous waste.

The conviction rate for the 19 suspects arrested was 100 percent, with no cases going to trial. The cost of the investigation, excluding investigators' salaries, totaled approximately \$2,500, most of which paid the suspects' hauling fees. The State recovered the cost of the investigation several times over through fines and forfeiture.

The punishments in these cases fit the crimes. Judges rarely sentenced the haulers to jail time; instead, offenders faced hundreds of hours of community service to clean

“

***...offenders faced hundreds of hours of community service to clean up illegal dump sites and paid hefty fines to support other cleanup efforts.***

”

up illegal dump sites and paid hefty fines to support other cleanup efforts. These sentences proved popular with corrections officials at already-overcrowded jails and with landowners whose properties had served as the subjects' dumping grounds.

Operation Crystal Clean also succeeded in its secondary goal to heighten public awareness of the dangers of illegal hazardous waste disposal. What many consider a petty crime can have horrific consequences. Carcinogens dumped into the environment pose long-term

health risks, as well as immediate threats. Such was the case in the deaths of two 9-year-old boys immediately after being exposed to hazardous waste left in a dumpster in Tampa, Florida, in 1992.

Still, in order for a sting operation to have a deterrent effect, the public must hear about it. For this reason, members of the media were included in the latter stages of the operation and actually accompanied investigators during several transactions. Because Operation Crystal Clean was one of the first operations of its kind in the United States, a national network news organization featured the story on a weekly television news-magazine show, thus providing maximum public awareness.

### **CONCLUSION**

Every drop of hazardous waste spilled by these offenders contaminates the earth's natural resources and jeopardizes the lives of generations born and unborn. As Operation Crystal Clean demonstrates, law enforcement can identify and capture illegal waste haulers by using conventional undercover techniques. Airtight cases can eliminate the need for costly trials. Court-imposed community service forces offenders to clean up their own messes and to view the results of their actions.

Criminals often ply their trades without regard to the consequences. With dollar signs in their eyes, they fail to see that they endanger even their own lives. Environmental crimes put everyone in the community at risk. The combined efforts of criminal justice professionals, the media, and the public can put environmental criminals out of business. ♦



## Research Forum



### *The Kansas City Gun Experiment*

**I**ncreased seizures of illegally carried guns led to a decrease in gun crime, according to a study sponsored by the National Institute of Justice and conducted by a team of researchers headed by a University of Maryland professor. The findings come from an evaluation of the Kansas City Gun Experiment, in which supplemental police patrols focused on gun detection. The Kansas City, Missouri, Police Department reduced gun crimes in one neighborhood by almost 50 percent in 6 months by deploying extra patrol teams focused exclusively on detecting guns.

#### **Study Design**

For 29 weeks, from July 7, 1992, to January 27, 1993, police patrols were increased in gun crime "hot spots" in patrol beat 144 of the Central Patrol District. Researchers identified the hot spot locations by computer analysis of all gun crimes in the target area, an 80-block neighborhood normally covered by one

patrol car, and that had a homicide rate 20 times higher than the national average. The population was almost entirely nonwhite, with more than two-thirds of all residences being owner-occupied, single-family, detached homes.

Officers assigned to the target area focused exclusively on gun detection through proactive, directed patrol and did not respond to calls for service. Four officers, who worked 6 hours of overtime each night (7 p.m. to 1 a.m.), 7 days a week, for 176 nights, handled the extra patrol, with 2 officers working an additional 24 nights. A total of 4,512 officer-hours and 2,256 patrol car-hours were logged.

Officers on the directed patrols found guns during frisks and searches and following arrests on other charges. Every search had to conform to legal guidelines for adequate articulable suspicion to ensure the protection of civil liberties, and every arrest for carrying concealed weapons had to be approved by a supervisory detective.

To gather information for the study, a University of Maryland evaluator accompanied the officers on 300 hours of directed patrol in the target area. Property room data on guns seized, computerized crime reports, calls-for-service data, and arrest records were analyzed for the 29 weeks before the program began and for the 29 weeks the program was in operation.

Data for the same time period also were collected for a comparison area (patrol beat 242 in the Metro Patrol District), which experienced approximately the same volume of violent crimes and drive-by shootings as the target area. No changes were made in the number or duties of patrol officers in the comparison area.

#### **Increased Enforcement**

During the program, officers reported spending 3.27 car-hours of the 12 car-hours per night (or 27 percent of their time) actually patrolling the target area. This resulted in a total of 1,218 officer-hours of potential gun detection and visible patrol presence in the area. The officers thus spent about 70 percent of their time processing arrests and performing other patrol-related duties.

Despite the limited amount of time the officers actually spent on patrol in the target area, the volume



### Significant Findings of the Kansas City Gun Experiment

- Traffic stops were the most productive means of finding illegal guns, yielding an average of 1 gun discovered for every 28 stops
- The ratio of guns seized to actual time spent on patrol in the target area was 1 gun seized per 84 officer hours
- Two-thirds of the persons arrested for carrying guns in the target area resided outside the area
- After the directed patrol stopped, crimes involving guns gradually increased for the first 5 months of 1993; when the patrols resumed in June 1993, gun crimes decreased again, although not as consistently as in the second half of 1992
- Drive-by shootings dropped from 7 to 1 in the target area, doubled from 6 to 12 in the comparison area, and showed no displacement to adjacent beats
- Directed patrols affected only gun crimes; no changes were observed in either the target area or the comparison area regarding the number of calls for service or in the total number of other violent and nonviolent crimes reported
- The decline in gun crimes in the target area did not appear to cause a displacement of crime to adjoining neighborhoods; gun crimes did not increase significantly in any of the surrounding seven patrol beats.

of activity was significant. The officers on directed patrol issued 1,090 traffic citations and made 948 car checks, 532 pedestrian checks, 170 State or Federal arrests, and 446 city arrests, for an average of 1 intervention every 40 minutes per patrol car.

#### Guns Seized

In the target area, police seized 65 percent more guns from July through December 1992 than in the first 6 months of the year. Gun seizures increased from 46 during January through June 1992 to 76 in the last 6 months of 1992. In the comparison area, gun seizures decreased slightly in the second half of 1992.

#### Impact on Gun Crimes

Comparison of the data from the first and second halves of 1992 shows that gun crimes declined significantly in the latter part of the year. Eighty-three fewer gun crimes were committed, for a 49-percent decline. In the comparison area, the number of gun crimes increased slightly.

#### Conclusion

This study shows that a police department can implement a program to increase seizures of illegally carried guns in high gun-crime areas. Police officers can be very productive when given the opportunity to focus on gun detection in identified crime hot spots without being obligated to answer calls for service.

In addition, gun seizures do not appear to require large tactical operations. In the Kansas City high-crime target area, the officers worked in two-officer patrol units, and no gun attacks on officers were reported during the directed patrols. Directed patrols also were shown to be, on the average, about three times more cost-effective than normal uniformed police activity citywide in getting guns off the street. ♦

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Source: *National Institute of Justice Update*, November 1994, U.S. Department of Justice, Office of Justice Programs. Results from the evaluation are reported in an *NIJ Research in Brief* (NCJ 150855), which can be obtained from the National Criminal Justice Reference Service, Box 6000, Rockville, MD 20850, 1-800-851-3420.

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# Traditional Policing and Environmental Enforcement

By  
WAYNE BREWER, M.S.



**F**ew police officers would hesitate to volunteer for an assignment investigating a serial murderer who has killed 10 people. But how many would volunteer to investigate a company whose president directed employees to dump hazardous waste illegally into a community's water supply, resulting in 10 deaths over a 20-year period? The serial murderer probably would receive greater media attention, but in each case, 10 lives were lost.

Whether they like it or not, law enforcement officers have one more life-threatening responsibility to add to their duties—environmental

criminal enforcement. By the nature of the job, police officers often are the first public officials to arrive at hazardous materials incidents, environmental crime scenes, or traffic mishaps involving hazardous cargo. Environmental crimes take a great toll on communities by generating serious health risks, expensive cleanup operations, and a degraded environment. As communities become more aware of the severity of these crimes, they demand that all law enforcement agencies become involved in environmental crimes enforcement.

The good news is that local law enforcement agencies do not have

to do it alone. In fact, successful environmental crimes enforcement requires interagency cooperation and coordination.

Local agencies can and should join forces with the State environmental regulatory agency; the State attorney general, district attorney, or county prosecutor; State and local health departments; and State law enforcement agencies to form an "environmental enforcement team." In many States, the environmental regulatory agency contains a division or unit of police officers who specialize in environmental enforcement. Other States have environmental crime specialists assigned to the



State police or the State investigation unit. Working together, members of these agencies can develop a successful team approach to environmental crime enforcement.

### **WHY CRIMINAL ENFORCEMENT?**

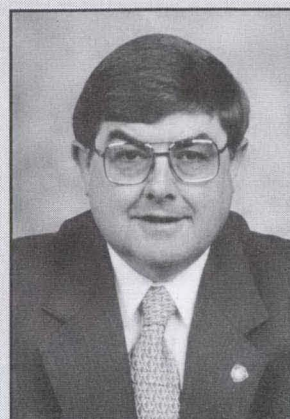
Criminal law is a relatively new tool for enforcing environmental laws. A decade ago, only a few States had adopted criminal environmental statutes. As society's awareness and concern about the serious public health and environmental consequences of pollution have increased through the years, criminal law has become the prevalent means of dealing with willful violations of environmental regulations.<sup>1</sup>

Historically, civil and administrative enforcement controlled and prevented pollution. In recent years, however, it has become apparent that those enforcement efforts have not been adequate for several reasons.

First, environmental crimes often involve hazardous wastes and other toxic chemicals, which pose extreme risks to the public and the environment. Civil penalties generally consist only of fines; companies often consider those fines part of the cost of doing business and pass on that cost to consumers. In addition, businesses often pay others to dispose of their waste materials, but those who frequently dispose of it find it more profitable to dump the waste illegally. Finally, improper handling of wastes and pollutants<sup>2</sup> can have a detrimental effect on both the environment and the public, resulting in terminal illnesses and genetically transmitted diseases.

Courts are more likely to impose criminal penalties on actions that

**“  
Knowledge of the  
community...gives local  
law enforcement officers  
the best vantage point  
for identifying pollution  
problems.  
”**



*Colonel Brewer is assistant director of the New York State Department of Environmental Conservation in Albany.*

have detrimental effects on public welfare. Criminal enforcement enables courts to levy stiff fines and impose significant jail sentences that reflect the seriousness of the crimes and serve as more effective deterrents. Strong criminal enforcement efforts also increase the incentive for businesses to handle and dispose of waste properly.

Environmental criminal liability can occur at any stage in the generation, treatment, transportation, and disposal of wastes or pollutants. Criminal prosecution for these offenses may be brought under Federal, State, or local laws and regulations. Such regulations may stem from specific environmental statutes that carry criminal sanctions; criminal statutes from other laws dealing with public health and welfare; general penal law dealing with false statements, forgery, public corruption, criminal conspiracy, and solicitation; Federal laws dealing with mail fraud and tax evasion; and the Racketeer Influence and Corrupt Organization (RICO) statutes.

### **CRIMINAL ENVIRONMENTAL STATUTES**

The overall strategy for enforcing laws and regulations designed to protect the environment has become criminal—instead of civil—enforcement. However, because of the complexity of many environmental laws, the development and passage of good environmental statutes remain difficult tasks.<sup>3</sup> Until such time as clear, comprehensive environmental statutes become standard across the country, local officers will need to research carefully the regulations applicable to their jurisdictions.

Federal law allows each State to implement its own environmental regulatory program, but only if it is as stringent as the Federal program.<sup>4</sup> Most States have criminal provisions within their environmental regulatory statutes. The language in these statutes is generally very similar from State to State, but not identical.<sup>5</sup> Law enforcement officers, therefore, should obtain copies of



their State's criminal statutes and become familiar with them.

Copies of criminal environmental statutes may be obtained from State environmental regulatory agencies, local district attorneys or prosecutors, or State attorneys general. In addition, the appropriate Regional Environmental Enforcement Association can provide copies of the laws for States within its purview. These regional associations consist of environmental regulatory agencies, offices of attorneys general, law enforcement agencies, as well as local prosecutors from 47 States, the District of Columbia, the territories of Puerto Rico and the Virgin Islands, and 4 Canadian provinces. The associations provide members with enforcement skills training, valuable information-sharing mechanisms, and professional networking opportunities.

## WHO POLLUTES AND WHY?

### The Polluters

The list of potential polluters can be surprising. It ranges from large manufacturers and chemical plants to local body shops and the neighbor who dumps old paint, pesticides, and debris along an abandoned road. Generally, individual homeowners are not subject to regulations for common, everyday disposal of household items. However, many small and medium-sized businesses in the local community that produce hazardous and other types of waste are governed by environmental regulations and are liable for proper treatment, storage, and disposal of those waste products.

Large manufacturing companies that make cars, furniture, and textile and chemical industries that produce acids, cyanide, heavy metals, and solvents generate most waste products. Although chemical industries top the list of waste producers, accounting for 71 percent of all hazardous waste produced, they comprise only 17 percent of all waste generators. In fact, most criminal charges are brought against small businesses.<sup>6</sup>

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”**

Certain generators are exempt from particular regulations, either because they fall into the category of small waste generators (creating less than 220 pounds or 25 gallons per month) or because they store the waste on site for 90 days or less.<sup>7</sup> State environmental regulatory agencies can provide law enforcement administrators with specifics on such exemptions.

### The Motivation

Money usually motivates the polluter, whether it is a company saving thousands of dollars or a neighbor trying to avoid paying landfill fees. The cost of legal disposal of hazardous waste ranges from \$15 to

\$1,000 per 55-gallon drum, depending on the chemical involved.<sup>8</sup> Legal methods for disposal or treatment of waste include incineration at extremely high temperatures, biological treatment, surface impoundment, and storage in underground wells.

Even when businesses that generate waste pay the cost of legitimate disposal at treatment, storage, and disposal facilities, transporters do not always dispose of the waste properly, opting instead to dump it illegally and make an enormous profit. Illegal dumping of waste material usually takes place in secluded areas under cover of darkness, hence the term “midnight dumping.” Such midnight dumping makes illegal disposal difficult to detect.

## RECOGNIZING VIOLATIONS

The pollution that threatens the environment and the health of the community can occur in several ways. In addition to illegal disposal of hazardous wastes, other forms of pollution include the illegal dumping of used oil, asbestos, medical waste, industrial waste, and other forms of solid waste; the unauthorized discharge of pollutants into both surface and ground waters; and the release of chemicals into the air.

### Clues that Signal Problems

Pollution cannot always be identified easily without sophisticated detection equipment. However, law enforcement officers can use certain clues to help recognize pollution or potential violations. Such clues include smoke or colored plumes in the air; chemical odors; unusual truck activity at disposal sites or on abandoned roads; stained



or discolored water; large fish kills; and leaking tank trucks.

Officers also should look for stressed or dead vegetation along creeks, channels, and other drainage areas flowing from manufacturing, chemical, or other businesses; factory pipes running into overflows or other water courses; and filling and dredging of wetlands. In addition, officers may detect altered, incomplete, or discrepant information on manifests,<sup>9</sup> shipping papers,<sup>10</sup> and labels in the course of routine stops or other investigations.

### **Guidelines for Detection**

Knowledge of the community, its businesses, and their normal patterns of operation gives local law enforcement officers the best vantage point for identifying pollution problems. Several indicators can serve as general guides for officers to use in detecting such violations. While these guidelines will not expose every violation, they will indicate many potential problems. They should help officers become more aware of local environmental enforcement problems.

If officers are uncertain of whether a violation is occurring, they should contact the State or local environmental regulatory agency to report their observations and to seek assistance. The initial observations and referral made by local law enforcement officers may be the keys to the subsequent successful investigation and prosecution of the offenders.

#### *Abnormal Activity*

One of the biggest indicators of a problem is a change in normal patterns of activity. Is something

## **Regional Environmental Enforcement Associations**

**T**hese associations include environmental regulatory agencies, attorneys general offices, law enforcement agencies, and local prosecutor associations from 47 States, the District of Columbia, the territories of Puerto Rico and the Virgin Islands, and 4 Canadian provinces. They provide members of the environmental enforcement team with enforcement skills training, professional networking opportunities, and valuable information-sharing mechanisms.

### **Midwest Environmental Enforcement Association**

(IL, IN, IO, KY, MI, MN, MO, NE, ND, OH,  
OK, SD, WI, Ontario)  
595 South State Street, Suite 210  
Elgin, Illinois 60123  
Phone: 708/742-1249  
Fax: 708/742-1478

### **Northeast Environmental Enforcement Project**

(CT, DE, DC, ME, MD, MA, NH, NJ, NY, OH,  
PA, RI, VA, VT, WV, Quebec)  
CN101  
Trenton, New Jersey 08625  
Phone: 609/292-0987  
Fax: 609/984-7688

### **Southern Environmental Enforcement Network**

(AL, AR, FL, GA, KY, LA, MS, NC, SC, TN, TX,  
Puerto Rico, Virgin Islands)  
560 South McDonough Street  
Montgomery, Alabama 36130-0158  
Phone: 205/242-7369  
Fax: 205/240-3455

### **Western States Hazardous Waste Project**

(AK, AZ, CA, CO, HI, ID, NV, NM, OR, UT, WA,  
Alberta, British Columbia)  
1275 West Washington Street  
Phoenix, Arizona 85007  
Phone: 602/542-3881  
Fax: 602/542-3522



different from how it used to look or work? Has the department received complaints about an unusual amount of nighttime truck activity in an area where several abandoned warehouses or other storage buildings are located? Or, have tank trucks been seen parking at the end of a lot, pumping material from one truck to another?

#### *Offensive Odor*

Strong, unpleasant smells often indicate the presence of hazardous materials. Has the police department received reports about an odor that has not been reported before or has gotten stronger? If officers encounter a smell that burns their eyes, mouth, nose, and skin, they should leave the area immediately, contact local public health officials or State environmental regulatory personnel, and seek medical attention, particularly if the burning sensation continues. The scene should be evacuated and a perimeter established.

#### *Unusual Appearance*

Pollution usually affects the environment in obvious ways. Does the suspected pollution look unusual? Is it foul and offensive? Is there a discharge of discolored water coming from a pipe draining into a clear stream? Is smoke too dark to see through being emitted from a stack? Is a pipe leading from a plant to a body of water discharging visible solids or leaving a sheen on the water?

#### *Mysterious Movement*

As with most criminals, polluters try to disguise their actions. Is there something secretive or

suspicious about the pollution-causing activity? Is a bulldozer operating at night in a marsh or wetland? Is a truck pouring waste water into a sewer on the side of a road? Is someone dumping garbage into a ravine? If the answer to one or more of these questions is yes, officers likely have discovered pollution and possible violations of environmental statutes or regulations.

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***...in any incident requiring the rescue of an injured person, the officers must not become victims themselves.***

”

#### **RESPONDING TO ENVIRONMENTAL CRIME SCENES**

The same basic investigative techniques that apply to all other crimes also pertain to the relatively new and unfamiliar realm of environmental law enforcement, just with an added environmental twist. Even agencies without standard operating procedures for responding to environmental crime scenes can follow certain procedures to guide their investigations.

#### **Make Safety a Top Priority**

Officers must approach all potential hazardous waste sites and hazardous materials spills with caution. Individuals without proper training in dealing with hazardous

waste should never enter a site. Officers responding to a hazardous materials spill should take special precautionary measures, which include 1) staying upwind and uphill from the spill; 2) using binoculars to observe the scene; 3) isolating the area; and 4) relaying information to Federal, State, or local regulatory agencies.<sup>11</sup>

In addition, officers must recognize that in any incident requiring the rescue of an injured person, the officers must not become victims themselves. Personnel on the scene who lack either the training or the equipment necessary to effect a safe rescue should not take action until properly trained and equipped rescuers arrive.

#### **Secure the Crime Scene**

Police commanders must enforce strict control over access to the hazardous materials site by the public, reporters, and other curious law enforcement personnel. Persons exposed to the hazardous substances should not be allowed to leave the scene or to make contact with other individuals. Officers should segregate exposed persons in an area upwind and a safe distance from the hazardous materials until they have received treatment or have been transported to a medical facility. This will help limit the spread of any contamination.

#### **Look for Physical Evidence**

Investigators should search the scene for evidence, such as tire impressions, footprints, mail with names, addresses on boxes in the debris pile, lot numbers on drums, and all types of traditional evidence



normally collected at any crime scene. When responding to environmental incidents suspected to be criminal acts, officers should keep in mind that printed warnings, labels, markings on drums, and information on shipping papers should not be relied on for accuracy. Individuals involved in the illegal disposal or transportation of waste will omit the proper information or falsify it to conceal the illegal act. Perpetrators might place the hazardous waste in old drums with the original (and now incorrect) labels, markings, and placards still attached.

In the search for physical evidence, officers should not take deep breaths to determine what the chemicals smell like and should avoid physical contact with the hazardous substances. Care should be taken not to move drums or containers, which might have deteriorated and could crumble if disturbed.

### **Take Photographs**

Photographs of all aspects of the crime scene—including damage to the surrounding area, any evidence found, vehicles present, tire tracks, the equipment used by the offenders, and if possible, the suspect(s)—play a key role in the investigation and prosecution of environmental crimes. A good rule of thumb is, "When in doubt, photograph."

### **Interview Witnesses**

Area residents often can provide valuable information about suspicious behavior or unusual activity around a crime scene. Often, these individuals witness the illegal acts. In illegal dumping cases, investigators also should locate the property

owner, who could be a prime suspect or, at the very least, a victim.

### **Identify and Interview All Suspects**

If possible, investigators should take taped statements. If other law enforcement agencies are assisting,

police administrators may want to detain all suspects until the other officers arrive to conduct further questioning. When interviewing company officials and employees, it is important for officers to remember that company personnel may become suspects later.

### **Possible Polluters**

**R**elatively small businesses (fewer than 50 employees) receive the most criminal charges. Some of the small and medium-sized businesses that generate hazardous waste or that can be sources of pollution include:

- Automotive shops that do repairs and body work
- Canning and food processing plants
- Car washes
- Chemical and petroleum storage facilities and transporters
- Contract building cleaners
- Dairy plants
- Dry cleaners
- Funeral homes
- Furniture builders and refinishers
- Gas stations
- Hospitals
- Metal shops that do plating or stamping work
- Pesticide dealers
- Photo shops
- Power plants
- Research laboratories
- Tanneries



### Seize Paperwork

All paperwork or items—such as invoices, proposals, checks, and business cards—that are found in any involved vehicle should be seized. Police departments commonly execute search warrants during environmental crime investigations to retrieve records, invoices, and other documents from the company's files and computer systems.

### Satisfy All Elements of the Violation

Investigators should try to satisfy as many elements of the violation as possible using familiar police investigative techniques. However, unless they are trained and equipped to sample the waste or pollution, officers should leave that up to the experts. Police administrators should not hesitate to request assistance from other members of the environmental enforcement team to complete investigations.

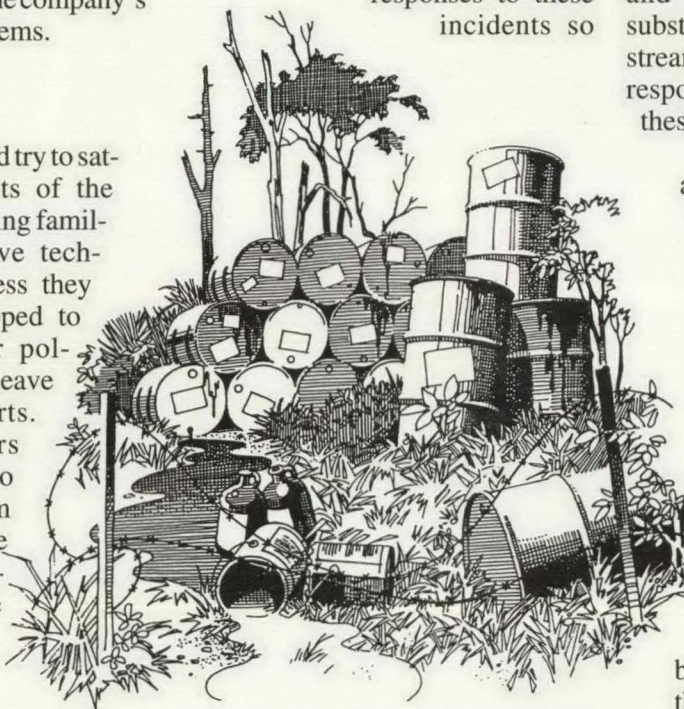
### Check for Self-Contamination

Officers must not leave a hazardous substance incident or crime scene without being checked for possible contamination. If contaminated, officers should notify personnel from the fire department, rescue squad, hazardous materials team, or paramedics or other trained response personnel for proper treatment.

### SAFETY AND TRAINING

Police officers are trained to respond to calls for assistance by

taking immediate, decisive action. Indeed, action becomes the reflexive response. Contrary to that reflex, at incidents involving spills, leaks, releases, or illegal discharges involving hazardous substances, the correct action often is no action at all. Officers must receive training to learn the proper responses to these incidents so



they may avoid possible exposure to hazardous substances. In fact, the Federal Occupational Safety and Health Administration (OSHA) and similar State agencies require specific levels of training, based on the officers' roles and activities at hazardous substance incidents.

Hazardous substances present particular dangers because they can enter the body in four ways: Inhalation, ingestion, absorption, and injection. Inhalation provides the most rapid route for substances to

enter the body. Ingestion results from hand-to-mouth contact, including eating and drinking contaminated food and water. Absorption occurs with certain substances that can pass directly through the skin into the bloodstream. Injection happens when cuts and puncture wounds from contaminated jagged metal and broken glass introduce the substance directly into the bloodstream. Officers must be trained to respond safely and effectively to these risks.

Effective training programs address skill levels consistent with an officer's particular job function and expected degree of involvement with hazardous substances. The Los Angeles Police Department (LAPD) designed its course material to accomplish the following general objectives for all officers who may be first responders at hazardous materials incidents:

- 1) Create an awareness of the potential threat presented by hazardous substances and the circumstances under which they might be encountered
- 2) Provide an understanding of the tactics and sources of information available to minimize the risk of injury to department personnel, the public, and the environment
- 3) Ensure that appropriate hazardous materials exposure records are maintained, and where necessary, medical monitoring is arranged.<sup>12</sup>



The more specialized a police officer becomes in environmental crimes enforcement, the more specialized the training needed. In addition to the awareness training described above, an environmental criminal investigator would be required to pass the 40-hour LAPD Personal Protection and Safety Course. The course provides indepth coverage of such topics as hazard identification and assessment, personal protection equipment, safety precautions, evacuation and isolation considerations, command post operations and staffing, decontamination procedures, legal considerations, and the investigative process applied to environmental crimes and incidents.

Various agencies can provide this important training for police officers. In addition to State environmental regulatory agencies, Federal and State departments of transportation, State emergency management offices, fire departments, and the U.S. Environmental Protection Agency, some private consulting firms and colleges will develop special training programs to meet the needs of a particular police department.

## CONCLUSION

Increased awareness of the detrimental effects of pollution on the community and the environment has engendered a new area of responsibility for law enforcement officers nationwide. As the first responders to hazardous material incidents and as investigators of environmental crimes, police personnel must be trained and ready to deal with the unique dangers

involved. The public demands protection from both accidental and intentional exposure to hazardous waste materials.

Working with regulatory agencies, prosecutors, transportation departments, and other law enforcement agencies, local police departments can play a vital role on the environmental enforcement team. Together, team members can use their collective experience, training, and assistance to ferret out the offenders and to keep their communities safe from harm. ♦

**“**

**The public demands protection from both accidental and intentional exposure to hazardous waste materials.**

**”**

## Endnotes

<sup>1</sup> *Sample Criminal Environmental Enforcement Statutes* (Washington, DC: National Association of Attorneys General, 1991), Preface.

<sup>2</sup> Possible pollutants include dredged soil; solid waste; incinerator residue; sewage (except from ships); garbage; sewage sludge; munitions; chemical wastes; biological or radioactive materials; heat; wrecked or discarded equipment; rock, sand, and cellar dirt; and industrial, municipal, and agricultural waste discharged into water.

<sup>3</sup> Supra note 1.

<sup>4</sup> Specific Federal regulations governing environmental crimes and defining hazardous materials include: Resource Conservation and Recovery Act of 1976 (RCRA); Comprehensive Environmental Response, Compensation and

Liability Act of 1980 (CERCLA—also known as “Superfund”); Superfund Amendments and Reauthorization Act of 1986 (SARA); Transportation of Hazardous Materials Regulations (49 CFR 172-177); National Pollution Discharge Elimination System (NPDES) of the Federal Water Pollution Control Act, and the Clean Water Act of 1977.

<sup>5</sup> Supra note 1. See also, *Introduction to Environmental Crime Enforcement: A Guide for Local Law Enforcement* (Washington, DC: Northeast Environmental Enforcement Project, U.S. Environmental Protection Agency, 1994), 2.

<sup>6</sup> Supra note 1, 1.

<sup>7</sup> *Guide to New York State Environmental Conservation Laws Related to Hazardous, Medical and Solid Waste* (Albany: New York State Division of Criminal Justice Services, 1991), 130.

<sup>8</sup> Supra note 5, *Introduction to Environmental Crime Enforcement*, 2.

<sup>9</sup> Manifests must designate the facility to which the waste is being shipped, an alternate site, the name of the transporter, all identification numbers, and signatures of all parties responsible for the waste during the course of shipment.

<sup>10</sup> For each hazardous material, shipping papers must include proper shipping names, proper hazard class (e.g., flammable, corrosive, etc.), correct identification number, and total quantity.

<sup>11</sup> *The Emergency Response Guidebook*, published by the U.S. Department of Transportation, contains specific information on dealing with hazardous materials, chemicals, and waste. The Chemical Transportation Emergency Center (CHEMTREC), at 1-800-434-9300, also provides assistance and information on chemicals and hazardous materials and usually can provide immediate hazard information, warnings, and guidance when given the *identification number or name of the product and the nature of the problem*.

<sup>12</sup> D.F. Gates and B.J. Pearson, “Hazardous Materials: Accident Response Training for Law Enforcement,” *The Police Chief*, September 1991, 15.

For further information on environmental crime, readers may contact the author at the New York State Department of Environmental Conservation, 50 Wolf Road, Albany, New York 12233, phone: 518-457-1002.



## Sound Off

### *The Juvenile Justice System*

#### *Is It Working?*

By Judy A. Bradshaw, M.P.A.

**W**hile recent crime statistics indicate that the number of violent crimes reported in 1993 decreased by 3 percent, they also confirm a more ominous trend. Juveniles are committing an increasing percentage of the violent crimes reported.<sup>1</sup> In fact, admissions to juvenile facilities have risen steadily since 1984.<sup>2</sup> The number of juveniles in confinement grew from 50,800 in 1979 to 63,300 in 1991 (the last year for which figures are available).<sup>3</sup>

Juveniles confined for crimes against persons rose from 21 percent in 1987 to 28 percent in 1991, while the number of juveniles confined for drug-related offenses continued a trend of gradual increase—from 6 percent of the total in 1987 to 10 percent in 1991. During that same period, the percentage of youths confined for *non-violent* property offenses declined.<sup>4</sup>

As the constant barrage of news reports seems to indicate, the level of violence among America's youth continues to rise.<sup>5</sup> No one can deny that the Nation's youth engage in adult behavior. Nor can anyone argue that society must be prepared to respond to the rise in serious crimes committed by juveniles. Unfortunately, the law enforcement community has been frustrated by a number of factors, including a lack of specific knowledge regarding the juvenile justice system. Because varying perspectives exist within the criminal justice community concerning how youthful offenders should be handled, law enforcement administrators should be informed enough to recognize when special interest groups overstate their positions in order to impact legislation or public opinion.

The most daunting obstacle facing law enforcement may be the structure of the juvenile justice system itself. Over the past three decades, this system has evolved into a shadow of its adult counterpart. To obtain Federal grant money, States and municipalities must focus on conforming to national mandates rather than addressing community needs. These and other



*Sergeant Bradshaw serves with the Des Moines, Iowa, Police Department.*

factors hinder the ability of law enforcement and State and municipal courts to address adequately the increasingly violent nature of juvenile crime.

In the long term, this country must reassess its response to juvenile crime. In the short term, law enforcement agencies should become more adept at working within the established structure. To respond effectively to juvenile crime, agency administrators must first gain a better understanding of the various components and players within the system.

#### **Federal Mandate**

Nearly every State's juvenile justice system bases its policies on language from the Federal Juvenile Justice Delinquency Prevention Act of 1974 (JJDPA). This act allows States to take advantage of Federal grant funds but requires them to comply fully with all aspects and ideals of the JJDPA. Full application of the JJDPA took place throughout the 1980s as Federal judges mandated States to amend their statutes to comply with the act.

The JJDPA, which is now Title 42, Section 72, of the U.S. Code, established executive branch offices and programs dealing with the entire juvenile justice



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system. Federal grant money also is channeled through these offices to States that support JJDPA goals.

### **Federal Offices**

The Office of Juvenile Justice and Delinquency Prevention operates under the authority of the Department of Justice. The office's administrator is authorized to regulate, modify, extend, monitor, evaluate, terminate, reject, or deny all grants, contracts, and applications for grant funds. This office develops the overall policy for all Federal juvenile delinquency programs.

The Coordinating Council on Juvenile Justice and Delinquency Prevention coordinates all Federal juvenile delinquency programs. This office also advises the President and Congress on issues relating to juvenile crime. The National Institute for Juvenile Justice and Delinquency collects information and data regarding the treatment and control of juvenile offenders.

In addition, subchapter III of the JJDPA establishes a framework for dealing with runaways and homeless youth. This section of the act empowers the Secretary of Health and Human Services to provide technical assistance to local facilities that develop programs dealing with runaways, homeless youth, and their families.

### **Response to the JJDPA**

In response to the JJDPA and its mandates, the States have established an additional layer of juvenile offices to coordinate with the national executive offices. Currently, each State has its own juvenile justice system comprised of juvenile justice planning councils, committees, detention centers, officers, and court administrators.

The private sector also provides resources and services to the juvenile justice system. These include temporary shelters, group care facilities, and mental health and substance abuse treatment facilities. Private

youth advocates and youth attorneys also make up an important component of the system.

### **Weak Response to Juvenile Crime**

Collectively, the Nation's juvenile justice system is a complex and fragmented intergovernmental process. It has evolved into a national approach developed by a Federal office that State and local law enforcement agencies must follow in order to receive grant monies.

The Federal approach labels all but the most serious juvenile crimes as "status" offenses for which juvenile offenders should not be punished. To comply with the Federal model, many States decriminalized these transgressions and prohibited confinement for the commission of status offenses. In addition, many States now impose restrictions on the

use of fingerprints and photographs by law enforcement agencies investigating cases in which a juvenile is the suspect. Many States also prohibit the use of juvenile fingerprints and photographs for identification once a juvenile offender becomes an adult. Further, a number of States restrict agencies from exchanging juvenile records regarding status offenses.

Yet, experience indicates that status offenses often represent the first signs of antisocial behavior. Indeed, most observers of the criminal justice system—whether liberal or conservative—agree that violent behavior generally develops in increments. The vast majority of adults in prison today have extensive juvenile records indicating a long history of status offenses.

However, for the most part, the juvenile justice system ignores young status offenders. It should come as no surprise, then, that youthful offenders often develop into violent habitual offenders as adults. The current approach of addressing juvenile offenders with the least possible level of restriction and retribution allows juveniles to die literally with their rights in their back pockets.

**“  
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”**



Such an approach serves no one well. Youths develop unrealistic expectations regarding the justice system. The police must respond to a string of offenses committed by the same youthful offenders. And, community residents receive little protection from youths who sense a wide gulf between crime and punishment. The first step to improving the juvenile justice system is to restore a sense of accountability.

### Restoring Accountability

The national system of formula grants does not allow local communities the discretion necessary to develop their own philosophies or approaches. State and local criminal justice systems must have the latitude to develop their own processes for handling juveniles. One community might choose to funnel Federal grant funds to programs that focus on parents and families and assist them in accessing available local resources. Another community might develop programs that teach juveniles to manage anger properly. Still another might use the grants to provide youths with job training.

As a Nation, we attempt to demonstrate to children what the consequences of their actions may be. Whether educating them on drug and alcohol abuse or stressing the importance of a job and a balanced checkbook, we are remiss when we do not teach them that their actions do have significant consequences. They also should understand that, as adults, they may go to prison for committing a crime for which they would be released as a juvenile. As it stands today, the juvenile justice system does not communicate such accountability to youthful offenders.

The national approach toward juvenile justice is far too convoluted and weighted with bureaucratic layers to address juvenile crime properly on a local level. The juvenile justice system's institutional structure of offices and agencies is neither clearly defined nor accountable. Ironically, many youthful offenders who experience this lack of accountability within the justice system internalize the same philosophical perspective. They excuse themselves from any sense of responsibility for their actions.

Youthful offenders who abuse the system designed to help them mock society's right to protect

itself from crime. Accountability must be restored to the juvenile justice system, so that juveniles are treated similarly to the way they would be treated if they entered the adult criminal justice system. Additionally, to make the system more responsive to local needs, the current "top down" funding structure should be inverted. Rather than being used to induce State and local agencies to comply with national goals and mandates, funding should be allocated to support effective programs developed at the State and local level.

### Conclusion

Youths are committing a growing share of the crimes reported to police. By and large, the crimes increase in severity as the offenders get older.

The Nation's current approach to juvenile justice does little to impede this progression. By downplaying the local impact of juvenile crime in lieu of national mandates, the current system effectively ties the hands of communities to address the problem. Until States and municipalities are allowed to develop their own approaches and ideals for what works within their communities—and determine how appropriated monies should be spent—the juvenile justice system will continue to be ineffective at responding to growing levels of juvenile crime. ♦

### Endnotes

<sup>1</sup> Dale G. Parent, "Conditions of Confinement," *Juvenile Justice*, U.S. Department of Justice, Office of Juvenile Justice and Delinquency Prevention, Spring/Summer 1993, 3.

<sup>2</sup> Ibid.

<sup>3</sup> Ibid.

<sup>4</sup> Ibid.

<sup>5</sup> Mortimer B. Zuckerman, "The Case for More Cops," *U.S. News and World Reports*, May 9, 1994, 72.

**Sound Off** provides a forum for criminal justice professionals to express alternative views on accepted practices or to address emerging, and perhaps controversial, issues. *Law Enforcement* provides this platform to stimulate thought within the law enforcement community and to encourage administrators to consider new ways of addressing such issues. However, ideas expressed in **Sound Off** are strictly those of the author; their appearance in *Law Enforcement* should not be considered an endorsement by the FBI.



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# ***U.S. Sentencing Guidelines*** ***Their Impact on Federal Drug Offenders***

By  
GREGORY D. LEE, M.P.A.

**N**ot long ago, defendants in similar Federal cases but different judicial districts often received different sentences, ranging from probation to several years in prison. Then, after being sent to prison, defendants became eligible for parole automatically after serving only about one-third of their sentences. Thus, a 5-year prison sentence became, in reality, less than 2 years' incarceration.

The Sentencing Reform Act of 1984, part of Title II of the Comprehensive Crime Control Act of 1984, took steps to prevent such scenarios from occurring. The Comprehensive Crime Control Act established the U.S. Sentencing Commission, a nine-member panel working as an independent agency of the Federal judiciary. The commission's seemingly monumental task was to overhaul the sentencing policies of the Federal criminal justice system; its mission, to achieve uniformity and proportionality in sentencing. This article explains the changes made by the commission to sentencing guidelines and how these changes affect enforcement of Federal drug laws.

## **THE PUNISHMENT FITS THE CRIME**

In the past, the latitude given Federal judges created wide disparity in sentencing. The guidelines were designed to close the gap by requiring that defendants be sentenced





according to their criminal backgrounds and the seriousness of the crime(s) they commit. Thus, a defendant with two prior convictions who commits a crime will receive more prison time than a defendant with no criminal record who commits an identical crime.

The guidelines also factor in the particular role the defendant played in the criminal endeavor and any aggravating or mitigating circumstance that would warrant either an increase or decrease in the sentence. However, the commission mandated that the sentence range be narrow. That is, the maximum prison sentence cannot exceed the minimum sentence by more than 25 percent or 6 months, whichever is greater.<sup>1</sup>

As part of the same legislation that created the U.S. Sentencing Commission, Congress established mandatory minimum sentences for certain Federal crimes, including drug offenses. Mandatory minimum

penalties also limit the discretion of Federal judges by requiring that sentences be based solely on the type and amount of drugs involved, the criminal history of the defendant, and other aggravating circumstances, such as possession of a weapon during the crime. Unlike the sentencing guidelines, however, mandatory minimums give judges little flexibility in sentencing.

### **FEDERAL PAROLE ABOLISHED**

Previously, the U.S. Parole Commission could, and often did, authorize the early release of Federal prisoners. The Sentencing Reform Act limited this authority by abolishing Federal parole. As a result, defendants serve their court-imposed sentences, minus approximately 15 percent for good behavior, if applicable. Such sentence reductions may not exceed 54 days per year. Other types of early release are prohibited.

### **LONGER PRISON SENTENCES**

The sentencing guidelines, in conjunction with Federal mandatory minimum sentences, have resulted in longer prison sentences for offenders who violate Federal drug laws. According to the Bureau of Justice Statistics, from 1980 to 1989, the average sentence for Federal drug offenders increased by 59 percent. In 1980, drug traffickers received an average sentence of 48.1 months; in 1985, 60.8 months; in 1988, 71.3 months; and in 1990, 84 months.<sup>2</sup> Furthermore, without parole, Federal prisoners now serve almost their entire sentences.

### **THE SENTENCING TABLE**

Federal judges sentence offenders according to a table established by the guidelines. Using a two-dimensional grid, the table categorizes offenses according to the seriousness of the crime (levels 1 through 43) and the defendant's criminal history (categories I through VI). The higher the level, the longer the possible sentence. The maximum offense mandates a life sentence. Lower figures represent the minimum a defendant with no criminal history would receive.

The sentencing tables used in drug cases base punishments on the type and the amount of the drug, as well as the criminal history of the defendant. Heroin and methamphetamine violations receive greater punishments than those involving cocaine or marijuana. Also, offenses involving crack cocaine receive substantially higher sentences than those dealing with cocaine in its powdered form, due to crack's higher addictive qualities.



**“ Coupled with mandatory minimum sentences, the sentencing guidelines may provide a strong deterrent to drug law violators. ”**

*Special Agent Lee, formerly an instructor at the Drug Enforcement Administration's Office of Training in Quantico, Virginia, currently is assigned to the DEA's Islamabad, Pakistan, Office.*



Defendants convicted of conspiracy or an attempt to commit any offense involving a controlled substance warrant the same level as if they had completed the objective of the conspiracy. For example, if two or more people conspire to import 500 kilograms of cocaine, but the plane containing the drugs crashes into the Gulf of Mexico, the defendants would be punished the same as if the plane had landed safely in the United States.

## DEPARTURES FROM THE GUIDELINES

### Commission-Mandated Adjustments

In formulating the guidelines, the commission analyzed thousands of cases and based punishments on scenarios considered typical for certain crimes. Still, in some instances, aggravating or mitigating circumstances may warrant departure from the guidelines.

Based on its research, the commission anticipated when departures likely would occur. The guidelines provide for adjustments, up or down, in cases where, for example, the defendant obstructs justice, physically restrains the victim, and/or plays a major or minor role in the crime.

Thus, if a defendant organizes, leads, manages, or supervises a criminal activity, the sentence increases, depending on the specific role and the number of co-defendants involved. On the other hand, if a defendant clearly plays a minor role, the sentence decreases accordingly.

The punishment also increases if a defendant abuses a position of public or private trust or uses a special skill to commit or conceal an offense.

By definition, a "special skill" is not possessed by members of the general public and usually requires substantial education, training, or licensing to learn and use. Examples of individuals with special skills include accountants, attorneys, boat captains, pilots, chemists, and demolition experts.<sup>3</sup>

“

***U.S. sentencing guidelines...mandate consideration of the defendant's criminal history, the severity of the crime, and other aggravating or mitigating factors.***

”

A hypothetical situation may serve to illustrate sentences based on defendants' roles. A group of people conspire to smuggle 12 tons of marijuana into the United States from Thailand. They use a fishing vessel to transport the contraband to a deserted beach where they off-load it. Investigators arrest the organizers, managers, supervisors, and the boat captain, as well as the individuals who off-loaded the drugs onto the beach. Assuming identical criminal backgrounds, according to the guidelines, the organizers would receive more prison time than the managers and supervisors, who would receive more time than the captain or those who merely unloaded the illicit cargo. But, the captain would receive

a greater sentence than the off-loaders, because of the special skill required to navigate a boat.

Regardless of their skills and abilities, defendants who complete drug transactions within 1,000 yards of a school or college,<sup>4</sup> or who use pregnant or juvenile accomplices,<sup>5</sup> also receive increased sentences. In contrast, defendants may receive reduced sentences for clearly accepting personal responsibility for their criminal conduct. That is, defendants who, for example, cooperate with authorities, express remorse to their victims, or make restitution for their crimes may receive reduced sentences. However, merely entering a guilty plea does not entitle a defendant, as a matter of right, to a reduced sentence.

### Court-Ordered Departures

The commission recognizes that some cases will not fit the guidelines, even with adjustments, and will require departures. Still, judges who depart from the guidelines must provide written justification for doing so.

Some offenses mandating an increase above the guidelines include significant disruption of a governmental function, extreme conduct by the defendant, substantial property damage or loss, and extreme psychological injury to the victim.<sup>6</sup> In drug cases, death or serious bodily injury resulting from the use of controlled substances that the defendant distributed would warrant an increase in the sentence. In cases that carry mandatory minimum penalties, the sentence doubles, at least. If an individual commits such a violation after a prior felony drug conviction, the sentence doubles again. Coupled



## Drug Offense Sentencing Tables

### Cocaine

Base Offense Level	Amount	Sentence Range
26	500 g < 2 kg	63 - 150 months
28	2 < 3.5 kg	78 - 175 months
30	3.5 < 5 kg	97 - 210 months
32	5 < 15 kg	121 - 262 months
34	15 < 50 kg	151 - 327 months
36	50 < 150 kg	188 - 405 months
38	150 < 500 kg	235 months - Life
40	500 < 1,500 kg	292 months - Life
42	1,500 kg or more	360 months - Life

### Marijuana

Base Offense Level	Amount	Sentence Range
26	100 < 400 kg	63 - 150 month
28	400 < 700 kg	78 - 175 months
30	700 < 1,000 kg	97 - 210 months
32	1,000 < 3,000 kg	121 - 262 months
34	3,000 < 10,000 kg	151 - 327 months
36	10,000 < 30,000 kg	188 - 405 months
38	30,000 < 100,000 kg	235 months - Life
40	100,000 < 300,000 kg	292 months - Life
42	300,000 kg or more	360 months - Life

### Heroin and Methamphetamine

Base Offense Level	Amount	Sentence Range
32	1 < 3 kg	121-262 months
34	3 < 10 kg	151-327 months
36	10 < 30 kg	188-405 months
38	30 < 100 kg	235 months - Life
40	100 < 300 kg	292 months - Life
42	300 kg or more	360 months - Life

with mandatory minimum sentences, the sentencing guidelines may provide a strong deterrent to drug law violators.

Defendants can receive a shorter sentence if they provide substantial assistance to authorities, defined as providing investigators and prosecutors with information leading to the indictment of other offenders. Only the prosecution can motion for a reduced sentence based on the substantial assistance clause of the guidelines.

The possibility of receiving a reduced sentence often provides a powerful incentive for defendants to cooperate. The assistance they provide often results in the arrest and prosecution of previously unknown accomplices and the seizure of hidden assets that would have gone undetected otherwise.

### CRITICISM OF THE GUIDELINES

Although the guidelines have brought uniformity to Federal sentencing, they have generated considerable controversy. From 1987,

Base Offense Levels, which range from 1 to 43, correspond to the seriousness of the crime committed. In drug cases, they depend on the type and the amount of the drug. Level 43 commands a life sentence in all cases. The sentence range represents the minimum category I sentence, for a defendant with no criminal history, and the maximum category VI sentence, for a defendant with an extensive criminal background.

Source: U.S. Sentencing Commission, *Guidelines Manual*, (Nov. 1991), 76-78, 280.



when the guidelines took effect, to 1989, when the U.S. Supreme Court upheld their constitutionality,<sup>7</sup> over 150 Federal judges claimed that the guidelines violated the Constitution and refused to follow them.<sup>8</sup>

Even today, Federal judges criticize the guidelines, mainly because they limit their discretion in sentencing, especially in drug matters. In fact, several Federal judges around the Nation have removed themselves from the random draw by which criminal cases are assigned in order to avoid imposing what they believe are excessive sentences in drug offenses.<sup>9</sup>

### EVOLUTIONARY PROCESS

The sentencing guidelines have evolved since their inception in 1987 and will continue to do so. As judges sentence according to the guidelines, and as they depart from them, the commission gains insight into what areas require modification. The group meets at least once each year to review the guidelines, and revisions are published in the Federal Register. The changes become effective after 180 days, unless Congress enacts a law to the contrary.

With the passage of the Violent Crime Control and Law Enforcement Act of 1994, Congress hopes to reduce punishments for individuals convicted of low-level drug violations. The act waives mandatory minimum sentences in cases in which offenders did not act as organizers, leaders, managers, or supervisors and did not use guns, commit violence, or harm others while committing their crimes. In addition, offender must have only minor

criminal histories and must cooperate with authorities.<sup>10</sup>

### CONCLUSION

U.S. sentencing guidelines have changed the way judges sentence Federal offenders. They mandate consideration of the defendant's criminal history, the severity of the crime, and other aggravating or mitigating factors. The guidelines place a limit on the sentencing discretion of judges and provide harsher sentences where warranted.

Some view the guidelines as too harsh and inflexible. Others believe they are not strict enough. And still others champion them as a necessary deterrent to crime because of the certainty of the sentence to be served. Despite the debate, the sentencing guidelines, coupled with mandatory minimum penalties, clearly have raised the ante for individuals contemplating violating Federal drug laws.♦

#### Endnotes

<sup>1</sup> 28 USC Section 994 (b)(2).

<sup>2</sup> "Federal Criminal Case Processing, 1980-89, with Preliminary Data for 1990," Bureau of Justice Statistics, October 1991, 17.

<sup>3</sup> U.S. Sentencing Commission, *Guidelines Manual* (USSG), Section 3B1.3, (Nov. 1991), comment. (n.2).

<sup>4</sup> USSG, Section 2D1.2 applies an enhancement for defendants convicted under 21 USC, Sections 859, 860, and 861.

<sup>5</sup> USSG, Sections 2D1.2, 3A1.1.

<sup>6</sup> USSG, Ch.3, Pt.k.

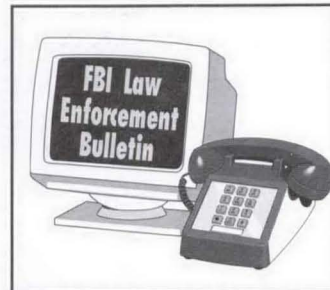
<sup>7</sup> *Mistretta v. United States*, 488 US 361 (1989).

<sup>8</sup> Sandra Torrey, "Some Federal Judges Just Say No to Drug Cases," *The Washington Post*, May 17, 1993, F7.

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

<sup>10</sup> The Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, Sec. 80001, 108 Stat. 1985.

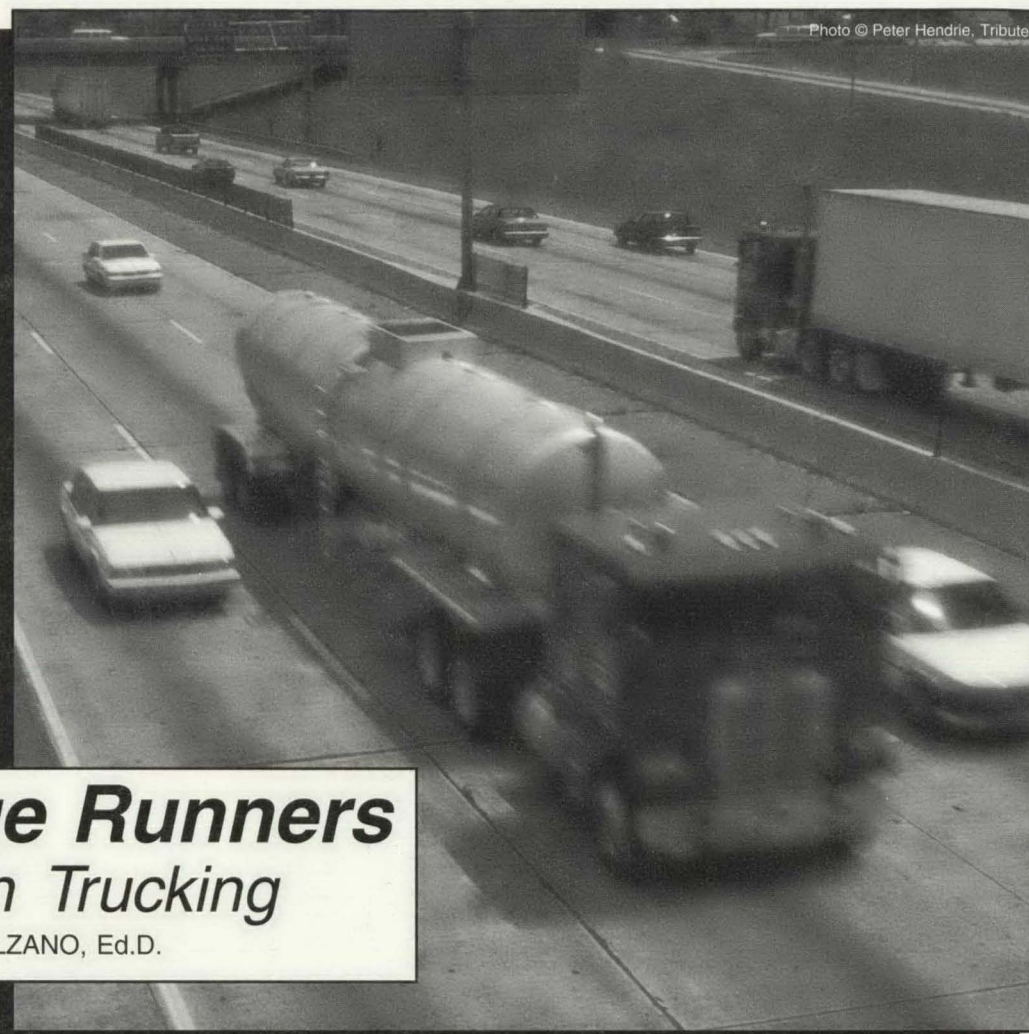
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## ***Sludge Runners Keep on Trucking***

By JULIENNE SALZANO, Ed.D.

**W**hen the Mianus River Bridge in Connecticut collapsed on June 28, 1983, it appeared that nature and years of heavy use had finally taken their toll. However, investigators soon determined that the untimely demise of the bridge was caused by more than simple time and travel.

For years, unscrupulous waste haulers had taken advantage of rainy days, opening the spigots of their storage tanks as they drove across the span. Gallon after gallon of corrosive liquid drained off the roadway, not only polluting the river below, but also seriously weakening the metal support joints of the bridge.

Eventually, these joints rotted and broke apart under the road surface, leading to the sudden collapse of the bridge.

The practice that led to the Mianus River Bridge incident is part of a growing menace that threatens both environmental and consumer safety. The waste haulers who choose to abuse the environment rather than dispose of their cargo in a legal and safe manner represent a growing minority of truckers who disregard public safety to increase profits. These "sludge runners" generally work for, or are part of, organized crime groups and specialize in

circumventing State and local environmental ordinances.

The public safety community should be aware of the various offenses committed by these criminals. The offenses—ranging from the sale of contaminated fuel mixtures to the illegal disposal of hazardous materials—pose an especially menacing threat both to the public and to law enforcement personnel.

### **SCOPE OF THE PROBLEM**

One of the inherent difficulties in detecting and prosecuting illegal trucking practices is that truckers often cross State lines. What is illegal in one State may be



legal in another. However, sludge runners often violate laws in several jurisdictions.

In 1993, investigators with the New Jersey attorney general's office executed 40 search warrants for offenders in New Jersey, New York, and Pennsylvania. Investigators arrested members of three crime families, as well as Russian crime figures, for their involvement in a scheme that defrauded the State of New Jersey and the Federal Government for \$1 billion in taxes.<sup>1</sup> These offenders also had defrauded their customers, selling pure diesel fuel mixed with corrosives, solvents, and other hazardous waste as home heating oil.

### Dirty Business

Selling compromised fuel mixtures represents one of the most widespread offenses perpetrated by sludge runners. Because these adulterated mixtures generate far more pollution than does virgin fuel, these offenses ultimately victimize entire communities. A recent study cited the Greenpoint section of Brooklyn as having one of the highest concentrations of airborne toxins in the State of New York.<sup>2</sup> The State's Environmental Protection Agency attributes this unusually high residential reading to the many apartment houses in the area that routinely burn contaminated fuel sold to them by sludge runners.

Apartment managers may or may not know what their furnaces are burning. While smaller residential heating systems would break down quickly if fed a steady diet of impurities, the larger furnaces found in apartment houses, housing projects, industrial plants, and

hospitals generally can tolerate the impure fuels. However, as the residents of Greenpoint are discovering, serious environmental problems can result from these practices.

### Waste Not, Want Not

Sludge runners actually pervert the environmentally friendly concept of recycling as they commit their crimes against consumers and the environment. They recycle waste oils, or sludge, back into the market. In doing so, they reap substantial profits from contaminated waste products.

The procedures employed are quite simple. Over time, sludge forms at the bottom of residential and commercial heating oil fuel tanks. If not removed periodically, this sludge eventually clogs the burners, reducing the output of the heating systems.

A professional tank cleaner (individuals known in the trade as "generators") must be called to drain the old, contaminated fuel from a tank. Generators also remove accumulated waste oil that has been drained

***“Selling compromised fuel mixtures represents one of the most widespread offenses perpetrated by sludge runners.”***



*Dr. Salzano is an associate professor of criminal justice at Pace University in New York City.*

from vehicles at service stations and automobile dealerships. After generators transport waste oil to their plants, they can do one of two things: Dispose of the waste fuel at a legal dump site in a manner that complies with EPA guidelines, or they can "bootleg" the waste to a sludge runner.

Generators can save considerable money by opting for the latter scenario. In doing so, they pay only a modest fee to have the dirty oil removed from their site; disposal at a legal dump is far more costly.

Increasingly, however, sludge runners are honing in on the middleman's turf altogether and undercutting the sludge removal prices offered by generators. Although the difference per gallon amounts to pennies, the overall price tag for large-scale waste removal is substantial.

Legitimate generators charge approximately 15 cents per gallon to remove sludge from private residences; the cost to service stations, auto distributors, and other commercial enterprises is about 10 cents.



## Tragedy Stirs Action

**O**n a cold December day in the early 1980s, two New York State troopers responded to the site of an accident involving an overturned truck. The troopers quickly found themselves ankle-deep in the thick liquid that had spilled from the truck's storage tank.

Once the truck had been removed from the scene and the troopers had completed their accident paperwork, they returned to patrol. But, not for long. Although the troopers had not touched the spilled liquid—Toluenedisocyanate (known as TDI), a solvent used in paint and tar removal—their boots had become immersed in the powerful agent. They could not foresee the consequences.

The heater in their cruiser vaporized the TDI on their boots. Inhaling the poisonous fumes rendered them lethargic and weak. They pulled to the side of the road and phoned for assistance. By the time help arrived, the troopers were unconscious. They were transported by ambulance to a nearby hospital.

The troopers were discharged after a brief hospital stay, but neither was able to return to duty. Both retired on disability, too ill to resume service with their troop. One of the troopers died shortly thereafter.

Prompted by this tragedy, hazardous waste training for emergency services personnel in New York, including police officers, was enhanced. Law enforcement officials also encouraged the legislature to strengthen State hazardous waste laws. One of the measures enacted made illegal dumping a felony that mandated imprisonment upon conviction.

(Information provided by James Atkins, Director of Public Information for the New York State Police.)

Sludge runners often offer to remove the waste oil for half the market rate.

When in possession of the used fuel, sludge runners create a new blend of diesel by mixing the sludge with virgin fuel oil. The similar weight and appearance of No.2 heating oil and diesel fuel make the illegal blend nearly impossible to distinguish from virgin fuel.

The bootlegged fuel then is sold for 50 cents or more per gallon to gas stations, apartment houses, hospitals, industrial plants and other

users of heavy-duty oil. Because few of these facilities are equipped with a treatment or "washing" process for emissions passing through smokestacks, the impure fuel mixture contaminates the air as it is burned.

### Illegal Dumping

Illicit trucking operations routinely dispose of a variety of dangerous waste products in other unsafe or illegal ways. This refuse usually consists of toxic liquids, but may also include such materials as "red

bag" medical waste or polychlorinated biphenyl (PCB). Because proper disposal of hazardous waste is costly—in some parts of the country averaging \$2,000 to \$4,000 a truckload—companies run by organized crime families and individual truckers may dump dangerous waste illegally and pocket the savings.

Many offenders place the waste in 55-gallon drums and leave the containers in vacant lots or along railroad lines, or they may transport the drums to rural areas out of State. Authorities rarely discover the illegal waste until the drums begin leaking perilous materials into the ground.

Other offenders simply abandon dilapidated trucks along with the illicit cargo. In New York City, for example, authorities routinely impound unattended trucks carrying dangerous waste products. The steep fine for such an offense makes it economically preferable for drivers to lose the vehicle as well as the waste. In many cases, the penalty fee to reclaim the vehicle and pay for any cleanup would far surpass the value of the truck.

### Rainy-Day Bandits

Like most criminals, sludge runners adapt in various ways to intensified law enforcement scrutiny. Instead of abandoning their trucks, some sludge haulers open a back drain on their storage tanks and let the fuel "accidentally" drain out while they drive. Truckers generally wait for a rainy day, making it difficult for law enforcement officers to detect the fuel falling onto the road surface with the rain water. As in the case of the truckers whose practices led to the untimely collapse of the



Mianus River Bridge, sludge runners often open their valves while crossing bridges so that the contaminated fuel will drain unnoticed into the waterways below.

## CONFRONTING THE PROBLEM

While police departments routinely train recruits to handle safely hazardous materials (hazmat), many of these same agencies fail to train officers and detectives to recognize a hazmat crime scene. The integration of environmental detective squads into police operations is an important step in enhancing law enforcement's response to the illegal transportation and disposal of toxic waste.

### Environmental Detectives

Suffolk County, New York, is one of a growing number of jurisdictions that fields an environmental crime unit. Nearly two-thirds of its cases come from other agencies through routine regulatory inspections of plants and factories. Other cases are generated by the unit's own emergency services officers.

Typically, these officers receive training in handling toxic waste from the National Fire Academy. As part of this training, officers are taught how to stop a leak, rescue trapped people, and identify potentially explosive conditions. However, the training does not prepare officers to conduct criminal investigations of environmental crimes.

The unique qualities of environmental crimes require that experienced detectives, who are familiar with long-term, investigative techniques and who have the ability to work cooperatively with other agencies, be assigned permanently to

investigate such crimes. Prior knowledge of environmental law is not essential; specific training in this area can be provided to environmental detectives. Instead, when staffing these positions, administrators should look for detectives with proven *investigative* abilities.

**“Due to the potential dangers of hazmat crime scenes, no officer should inspect conditions alone.”**

### Cooperation

The complexity of many environmental crime cases underscores the importance of a cooperative relationship between police detectives and prosecutors in State and county attorney's offices. So that prosecutors can coordinate effective criminal cases, personnel from the environmental crimes unit should familiarize them with the standard techniques employed in long-term investigations.

Environmental detectives also must be able to work closely with other agencies, such as fire and health department officials, as well as county waste generators. Wherever possible, detectives in the environmental crimes unit should explain relevant points of the law to personnel in these agencies. For example, it is not unusual for fire department personnel to issue a minor summons to an offender, unaware that such a summons frees

the subject from further prosecution due to prohibitions against “double jeopardy.” Thus, many offenders pay only a modest fine and then continue their illegal practices.

### Looking for Leads

County and municipal health departments can be very good sources of information for environmental crime cases. Often, their investigators are the first to detect discrepancies in facilities that have a record of waste disposal. For example, they may find that a factory that traditionally manifests 2,000 gallons of contaminated fuel a week suddenly begins manifesting only 150 gallons. Such information may be sufficient grounds to launch a police investigation.

### Safety and Chain of Custody

During any investigation involving hazardous materials, safety must be a paramount concern. To protect themselves and members of the community, it is imperative that police and fire department personnel be familiar with proper security procedures for hazmat crime scenes.

Law enforcement officers also should maintain the same rules of evidence for hazmat crime scenes as those for other serious crimes, such as homicide or assault. Agencies must be prepared to store safely hazardous materials that later may serve as criminal evidence. Chain-of-custody procedures must be maintained regardless of the type of evidence recovered.

### Cost

In a time of limited budgets, the ultimate consideration often comes down to cost. It is undisputably



Community and officer safety is the ultimate goal. At a minimum, two class A hazmat suits with full-breathing apparatus (costing approximately \$10,000 each) should be obtained so that officers can inspect hazardous areas in teams. Due to the potential dangers of hazmat crime scenes, no officer should inspect conditions alone. Special communication equipment also may be necessary so that inspection teams can inform personnel outside the

## CONCLUSION

The vast majority of truckers operate in accordance with State laws. In contrast, sludge runners threaten public safety and the environment in pursuit of illicit profits. These offenders rely on inexplicit legislation and lax code enforcement to commit their crimes.

The seriousness of these and other environmental crimes demands an integrated response from the entire public safety community. Ultimately, the challenge must be met on the national level through enhanced legislation and more stringent regulation of the waste disposal industry.

But, even with increased regulation, abuses undoubtedly will continue. Therefore, communities must act now to confront those who disregard public and environmental safety for their own purposes. With cooperation from other agencies, law enforcement can prevent the occurrence of such incidents as the collapse of the Mianus River Bridge. ♦

## Endnotes

<sup>1</sup> Press release, New Jersey Department of Law and Public Safety, Office of the State Attorney General, May 27, 1993.

<sup>2</sup> "Toxic Air Emissions in North Brooklyn are 60 Times the National Average," press release from Hunter College of the City University of New York (the Community Environmental Health Center at Hunters College), May 20, 1992.



### *Environmental Crime*

"Law Enforcement Response to Environmental Crime," an *Issues and Practices* publication of the National Institute of Justice, describes how communities can create or enhance their environmental crime response, depending on particular needs. This report contains useful information on investigating a range of environmental offenses, including hazardous waste dumping and disposal of construction and demolition debris.

The report offers basic information on how to initiate and enhance law enforcement programs to respond to environmental crimes. It discusses the characteristics and extent of

environmental crime and the legal context of environmental enforcement, including obstacles to effective investigation and prosecution of environmental crime. It also covers interagency coordination, working with prosecutors, investigative and case development strategies, and training and education.

Copies of the report can be obtained from the National Criminal Justice Reference Service, Box 6000, Rockville, MD 20849-6000. Orders also can be placed by e-mail at [askncjrs@ncjrs.aspensys.com](mailto:askncjrs@ncjrs.aspensys.com) or by phone at 1-800-851-3420.

### *PERF Catalogue*

The Police Executive Research Forum (PERF) has released its 1995 catalogue of PERF products and publications. The 22-page catalogue contains listings for publications and videotapes on police management theory and practice, problem-oriented and community policing, personal development for the police

executive, research, education, and police response to special populations.

To receive a copy of the catalogue, contact the Police Executive Research Forum, 1120 Connecticut Avenue, NW, Suite 930, Washington, DC 20036. The telephone number is 202-466-7820; the fax number is 202-466-7826.

### *Editor's Note*

The article "Best Foot Forward," featured in the November 1994 issue of **Law Enforcement**, incorrectly stated that footprinting establishes *probable* personal identity, when in fact, it establishes *positive* identity.



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# Law Enforcement and the Fair Labor Standards Act

By  
WILLIAM U. McCORMACK, J.D.

Since 1986, as a result of the Supreme Court's decision in *Garcia v. San Antonio Metropolitan Transit Authority*,<sup>1</sup> the provisions of the Fair Labor Standards Act (FLSA) have been imposed on State and local law enforcement agencies. As a result of the FLSA, law enforcement managers face many complicated and detailed regulations concerning the wages and hours of their officers.<sup>2</sup> They have struggled to implement the act in a manner that promotes efficient and effective provision of police services at a reasonable cost to the taxpayer.

This article sets forth the basic rules the FLSA imposes on law enforcement agencies. It discusses recent court decisions concerning who is exempt from the act and what constitutes compensable work time.

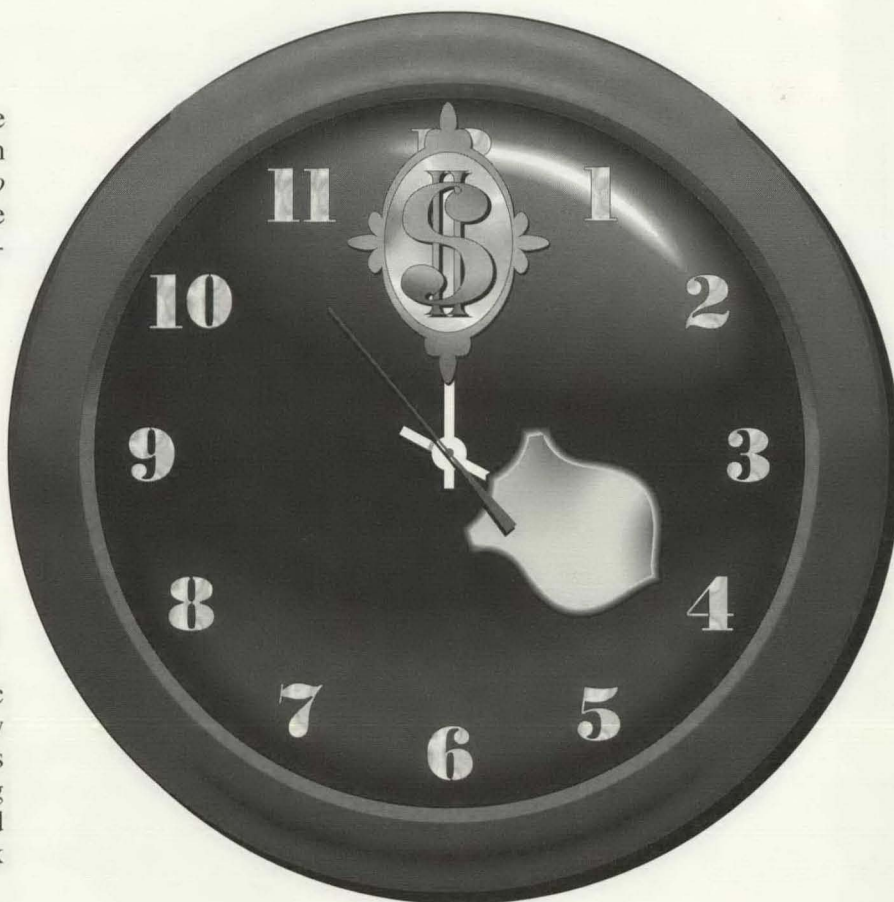
## Basic Provisions of the FLSA

Congress initially passed the FLSA in the 1930s to regulate wages and work hours in the United States and to encourage employers to hire more employees by requiring employers to pay overtime pay at a rate of one and one-half times the employee's regular wage rate for hours worked beyond the 40-hour-per-week threshold.<sup>3</sup> Law

enforcement agencies, however, are excepted partially from this basic rule in that overtime pay only is required based on a sliding scale from 43 hours in a 7-day work period to 171 hours in a 28-day work period.<sup>4</sup> The FLSA also provides that law enforcement officers be compensated for overtime with compensatory time off at a rate not less than

one and one-half hours for each hour of employment.<sup>5</sup>

One of the basic concepts of the FLSA is that a nonexempt employee covered under the act must be compensated for the entire time that the employee is required or permitted to work.<sup>6</sup> This includes all preshift and postshift activities that are integral parts of the officer's principal duties,





including attending roll call and writing and completing tickets or reports. Often, this means a manager must tell an officer not to volunteer time for work-related activities and not allow the officer to come in early or stay late, even when the officer is enthusiastic and offers to work without compensation.

Because the restrictive nature of these rules may be perceived by some as destroying initiative, dedication, and morale, law enforcement agencies often desire to exempt some officers from the FLSA. The act provides that certain law enforcement officers either are not covered by the act or are exempt.

#### **Employees Not Covered by The Act**

The FLSA does not cover law enforcement agencies that employ fewer than five officers within a workweek.<sup>7</sup> Also not covered are elected officials who are not subject to civil service laws, such as sheriffs,<sup>8</sup> the personal staffs of such elected officials,<sup>9</sup> legal advisors,<sup>10</sup> certain volunteers,<sup>11</sup> and newly hired trainees attending a training academy.<sup>12</sup>

The courts have disagreed over who qualifies as personal staff of an elected official. In *Nichols v. Hurley*,<sup>13</sup> the U.S. Court of Appeals for the 10th Circuit ruled that deputy sheriffs and undersheriffs were personal staff of the sheriff and, thus, not covered by the FLSA. However, the U.S. Court of Appeals for the Fourth Circuit held in *Brewster v. Barnes*<sup>14</sup> that a deputy sheriff was not a member of the sheriff's personal staff because she was not in a highly sensitive position of responsibility on his staff.

The act also provides that an individual performing volunteer services for local government units will not be regarded as an employee under the statute.<sup>15</sup> FLSA regulations allow volunteers to be paid expenses, reasonable benefits, or a nominal fee and not lose their status as volunteers.<sup>16</sup> However, an individual otherwise employed by the same agency to perform the same type of service cannot be considered a volunteer.<sup>17</sup> For example, if a police officer ran a basketball program as part of his community policing or outreach work, he could not do the same thing for the city free.

#### **Exempt Employees**

One of the most difficult issues law enforcement managers face in implementing the FLSA is determining which employees are exempt. The act establishes three categories of employees who are exempt from FLSA wage and hour restrictions:

Executive, administrative, and professional employees.<sup>18</sup>

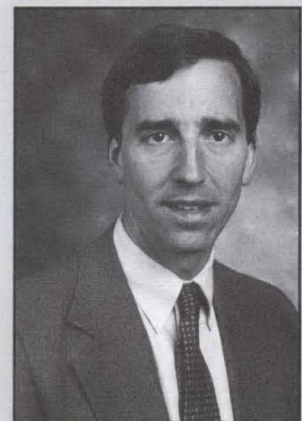
A threshold requirement for these three exemptions is that the employee must be paid on a salary basis. Generally, this means the employee must be paid a fixed sum, regardless of the quantity or quality of work.<sup>19</sup> Law enforcement officers have challenged their status as salaried employees when their pay is reduced for certain disciplinary infractions.

For example, in *Avery v. City of Talledega, Ala.*,<sup>20</sup> the U.S. Court of Appeals for the 11th Circuit ruled that police lieutenants were not salaried employees under the FLSA, where their pay could be reduced based on discipline that was not for a violation of a safety rule of major significance. Courts generally require that to be exempt under the FLSA, officers should not be subject to loss of pay for disciplinary infractions unless they violate a safety rule

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**...every decision  
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hours, and leave  
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principles....**

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*Special Agent McCormack, formerly a legal instructor at the FBI Academy, currently serves in the FBI's Rutland, Vermont, Resident Agency, Albany Division.*



of major significance, such as endangering another person's life.<sup>21</sup>

To be considered an exempt employee, an officer also must meet the executive, administrative, or professional employee "duties test" under the FLSA. Executive employees are those employees primarily engaged in management duties and who customarily and regularly direct two or more employees.<sup>22</sup>

Court decisions have differed over whether officers at the sergeant level are exempt executive employees.<sup>23</sup> However, officers at the lieutenant, captain, major, or chief deputy level generally would meet the executive employee duties test under the FLSA. As a rule of thumb, officers who supervise at least two people and spend the majority of their time managing as opposed to investigating qualify as exempt executive employees.<sup>24</sup>

Officers meet the test for an administrative employee if they primarily perform office or nonmanual work directly related to management policies or general business operations and if their primary duties include work requiring the exercise of discretion and independent judgment.<sup>25</sup> The definition of an administrative employee under the FLSA has given rise to lawsuits in which criminal investigators claim to be production-oriented employees and, thus, nonexempt.

For example, in *Reich v. State of New York*,<sup>26</sup> the U.S. Court of Appeals for the Second Circuit ruled that criminal investigators in the New York State Police Bureau of Criminal Investigation were nonexempt employees under the FLSA and thus were entitled to

overtime pay. The court stated that the primary function of the investigators is to conduct or "produce" criminal investigations and not to administer the affairs of that bureau.<sup>27</sup>

Similarly, in *United States v. Adams*,<sup>28</sup> the U.S. Court of Federal Claims ruled that certain Federal criminal investigators at the GS-9 through GS-11 pay level were nonexempt employees because their job descriptions did not require them to perform administrative or managerial duties. However, some GS-12 and GS-13 criminal investigators were exempt because their job descriptions included managerial duties, such as planning investigations and operations and directing and coordinating the activities of other law enforcement officials.<sup>29</sup>

**“  
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compensable.  
”**

The final category of exempt employee is a professional employee, who is defined as an employee primarily performing work requiring advanced learning and who consistently exercises discretion and judgment. This category includes doctors, lawyers, accountants, engineers, scientists, and teachers.<sup>30</sup>

## Compensable Time

When an employee is nonexempt, a law enforcement manager faces the difficult issue of determining what time counts as work time or compensable time. Compensable time determinations concerning meal breaks have generated a significant number of lawsuits.

Under FLSA regulations, meal breaks may be excluded from compensable time if the employee normally is given at least 30 minutes for the meal break and is relieved completely of duty during that time.<sup>31</sup> However, court decisions concerning restrictions that may be placed on officers during their meal breaks have adopted a predominantly for-the-benefit-of-the-employer test.

For example, in *Henson v. Pulaski County Sheriff Dept.*,<sup>32</sup> the U.S. Court of Appeals for the Eighth Circuit ruled that a meal period for police officers was not compensable, even though the officers 1) were required to obtain clearance from headquarters before beginning their break; 2) were subject to being approached by members of the public; and 3) were required to monitor their radios and respond in case of an emergency. The court found the officers were permitted to change into civilian clothes during the 30-minute break and were allowed to go wherever they pleased, even outside their patrol area. Thus, the meal period was not predominantly for the benefit of the employer.<sup>33</sup>

However, in *Lamon v. Shawnee, Kansas*,<sup>34</sup> the U.S. Court of Appeals for the 10th Circuit ruled that police officers were entitled to compensation for their meal break,



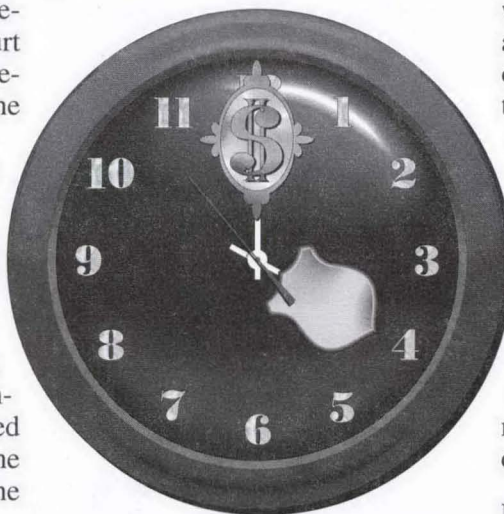
because during the break, they were required to 1) leave a phone number or monitor a radio; 2) respond to emergency calls; 3) answer to personnel shortages if ordered; 4) respond to citizen requests and inquiries; and 5) confront crimes committed in their presence. Because of these restrictions, the court held that the meal period was predominantly for the benefit of the employer.

Similar to the meal break issue is on-call time, which nonexempt employees also have claimed is compensable. FLSA regulations state that where an employee is relieved completely of duty for periods long enough to engage in personal pursuits and under circumstances where the time can be used effectively for personal purposes, the time is not compensable, even if the employee is on call.<sup>35</sup>

Generally, if an employee is not required to remain on the employer's premises and is not restricted severely in personal pursuits, the on-call time is not compensable. In *Birdwell v. Gadsen, Ala.*,<sup>36</sup> detectives were not entitled to overtime, even though during a municipal strike they 1) were required to be near a telephone or carry a beeper; 2) were not allowed to leave town; 3) had to respond promptly; and 4) could not consume alcohol.

In addition, training and traveling time can raise compensability issues under the FLSA. Job-related training for employees who are not newly hired trainees generally is compensable, unless the attendance is outside of regular working hours and is specialized or followup training required by law

for certification.<sup>37</sup> Also, police officers who attend an academy or training facility are not considered on duty during the times they are not in class or training, as long as they are free to use such time for personal pursuits.<sup>38</sup>



The compensability of travel time depends on the kind of travel involved. Ordinary home-to-work commuting is not compensable.<sup>39</sup> However, travel from home to an emergency after an officer has completed a day's work is compensable.<sup>40</sup> With respect to out-of-town travel, an officer need not be paid for the time spent traveling from home to the airport or train station, but generally must be paid for all other travel time if it is during normal working hours.<sup>41</sup>

Two final issues that law enforcement managers must consider concerning nonexempt officers' compensable time is secondary employment and time spent caring for police dogs. FLSA regulations contain a special provision for law enforcement employees who, at their

own option, perform special duty work in law enforcement or related activities for a separate and independent employer during their off-duty hours. The hours of work for the separate and independent employer are not combined with the hours worked for the primary public agency employer for purposes of overtime compensation, even when the primary employer facilitates the secondary employment.<sup>42</sup>

Law enforcement employers also should be aware that dog handlers must be compensated for time spent, even at home, caring for police dogs.<sup>43</sup> However, the U.S. Court of Appeals for the Second Circuit ruled in *Reich v. New York Transit Authority*<sup>44</sup> that commuting time, when the dog is in the officer's car, is not compensable.

### Remedies

When the FLSA is violated, law enforcement officers may sue their departments for the recovery of back wages, liquidated damages (an amount equal to the back wages), costs of the lawsuit, and attorney's fees.<sup>45</sup> However, if an employer acts in good faith with a reasonable basis for believing it is complying with the FLSA, the employer may be excused from paying liquidated damages.<sup>46</sup> The Secretary of Labor also can bring lawsuits on behalf of an officer, and criminal sanctions are available for willful violations of the act.<sup>47</sup>

### Conclusion

This article has focused on some of the major issues law enforcement managers face when attempting to implement the FLSA. It is important that every decision involving pay,



work hours, and leave be consistent with these basic FLSA principles, because even unintentional violations of the act can be extremely costly to a law enforcement agency.

Information and guidance concerning the FLSA are available from the U.S. Department of Labor, Wage and Hour Division, which has published regulations and issues advisory letters. However, any final determination concerning a particular FLSA issue should be made only after consulting with counsel, because court decisions ultimately provide the final meaning of any FLSA provision. ♦

#### Endnotes

<sup>1</sup> 29 U.S.C. Sections 201-262.

<sup>2</sup> 469 U.S. 528 (1985).

<sup>3</sup> 29 U.S.C. Section 207.

<sup>4</sup> 29 U.S.C. Section 207(k) and 29 C.F.R.

Section 553.224. A law enforcement agency using this sliding scale exemption must establish it before relying on it. *McGrath v. City of Philadelphia*, 864 F.Supp. 466 (E.D. Pa. 1994).

<sup>5</sup> 29 U.S.C. Section 207(o). 29 U.S.C. Section 207(o)(5) provides that an employee shall be permitted to use such time within a reasonable period after making a request if the use does not disrupt unduly the operations of the agency. 29 C.F.R. Section 553.23 requires that as a condition for use of compensatory time in lieu of overtime, an agreement or understanding reached prior to the performance of work must exist. See *Moreau v. Klevenhagen*, 113 S.Ct. 1905 (1993) (Public employee in a State that prohibits public collective bargaining may provide compensatory time off pursuant to individual agreements with the employee).

<sup>6</sup> 29 C.F.R. Section 553.221. However, the hours worked exclude vacation, sick, or administrative leave hours. 29 C.F.R. Sections 778.102 and 778.218.

<sup>7</sup> 29 U.S.C. Section 213(b)(20). *Miller v. Borough of Riegelsville*, 131 F.R.D. 90 (E.D. Pa. 1990) (A sole police officer has no claim under the FLSA, because the act expressly excludes law enforcement agencies with fewer than five law enforcement employees).

<sup>8</sup> 29 U.S.C. Section 203(e)(2)(C)(I).

<sup>9</sup> 29 U.S.C. Section 203(e)(2)(C)(II).

<sup>10</sup> 29 U.S.C. Section 203(e)(2)(C)(IV).

<sup>11</sup> 29 U.S.C. Section 203(e)(4)(A).

<sup>12</sup> Department of Labor (DOL) Opinion Letter, 1/6/69. See also, *Reich v. Parker Fire Protection District*, 992 F.2d 1023 (10th Cir. 1993) (Persons selected to attend the firefighter academy are not employees until graduation).

<sup>13</sup> 921 F.2d 1101 (10th Cir. 1991).

<sup>14</sup> 788 F.2d 985 (4th Cir. 1986).

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”**

<sup>15</sup> 29 U.S.C. Section 203(e)(4)(A). But see *Rodriguez v. Township of Holiday Lakes*, 866 F.Supp. 1012 (S.D. Tex. 1994) (“Non-paid, full-time” patrol officer was entitled to compensation because he volunteered for police work to obtain other government employment and not out of a civic, charitable, or humanitarian reason).

<sup>16</sup> 29 C.F.R. Section 553.101.

<sup>17</sup> 29 C.F.R. Section 553.103(c).

<sup>18</sup> 29 U.S.C. Section 213(a)(1).

<sup>19</sup> 29 C.F.R. Section 541.118.

<sup>20</sup> 24 F.3d 1337 (11th Cir. 1994).

<sup>21</sup> See *Shockley v. City of Newport News*, 997 F.2d 18 (4th Cir. 1993) (As a result of 29 C.F.R. Section 541.5d, discipline imposed on exempt employees for unaccounted for absences of less than a day are permissible; however, disciplinary reductions in pay for other reasons that do not constitute a major violation of a safety rule cause the employee to lose the salaried/exempt status.); *Hurley v. State of Oregon*, 27 F.3d 392 (9th Cir. 1994); *Paulitz v. City of Naperville*, 781 F.Supp. 1368 (N.D. Ill. 1992) and *Lacey v. Indiana State Police Department*, 810 F.Supp. 244 (S.D. Ind. 1993). But see *Mueller v. Thompson*, 858 F.Supp. 885 (W.D. Wisc. 1994) (The FLSA regulatory provision concerning

loss of exempt status for pay deductions for disciplinary infractions is invalid).

<sup>22</sup> 29 C.F.R. Section 541.1(f).

<sup>23</sup> *Shockley v. City of Newport News*, 997 F.2d 18 (4th Cir. 1993).

<sup>24</sup> See *Barner v. City of Novato*, 17 F.3d 1256 (9th Cir. 1994).

<sup>25</sup> 29 C.F.R. Section 541.2(e)(2).

<sup>26</sup> 3 F.3d 581 (2d Cir. 1993), cert. denied, 114 S.Ct. 1187 (1994).

<sup>27</sup> *Id.* at 587.

<sup>28</sup> 27 Fed. Cl. 5 (U.S. Ct. of Claims 1992).

This decision was based on an interpretation of 5 C.F.R. Section 551.101, *et seq.*, which are regulations promulgated by the Office of Personnel Management to implement the FLSA with respect to Federal employees.

<sup>29</sup> Federal criminal investigators now are exempt from the FLSA as a result of the “Law Enforcement Availability Pay Act of 1994,” 5 U.S.C. Section 5545a.

<sup>30</sup> 29 C.F.R. Section 541.3(e).

<sup>31</sup> 29 C.F.R. Section 553.223.

<sup>32</sup> 6 F.3d 531 (8th Cir. 1993).

<sup>33</sup> *Id.* at 536.

<sup>34</sup> 972 F.2d 1145 (10th Cir. 1992), cert. denied, 113 S.Ct. 1414 (1993).

<sup>35</sup> 29 C.F.R. Sections 785.16 and 787.17.

<sup>36</sup> 970 F.2d 802 (11th Cir. 1992).

<sup>37</sup> 29 C.F.R. Sections 785.27 through 785.32 and 29 C.F.R. Section 553.226. See *Moreau v. Klevenhagen*, 956 F.2d 516 (5th Cir. 1992), *aff’d on other grounds*, 113 S.Ct. 1905 (1993) (Deputy sheriffs are not entitled to overtime for their annual State-mandated firearms training; however, a second qualification required by county policy is compensable time).

<sup>38</sup> 29 C.F.R. Section 553.226(c).

<sup>39</sup> 29 C.F.R. Section 785.35.

<sup>40</sup> 29 C.F.R. Section 785.36.

<sup>41</sup> 29 C.F.R. Section 785.39.

<sup>42</sup> 29 C.F.R. Section 553.220.

<sup>43</sup> See, e.g., *Truslow v. Spotsylvania County Sheriff*, 783 F.Supp. 274 (E.D. Va. 1992), *aff’d*, 993 F.2d 1539 (4th Cir. 1993) and *Nichols v. City of Chicago*, 789 F.Supp. 1438 (N.D. Ill. 1992).

<sup>44</sup> \_\_\_ F.3d \_\_\_ (2d Cir. 1995).

<sup>45</sup> 29 U.S.C. Section 216(b).

<sup>46</sup> 29 U.S.C. Section 260.

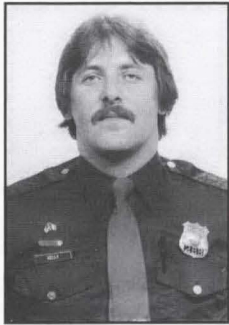
<sup>47</sup> 29 U.S.C. Section 216(a).

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



## The Bulletin Notes

Law enforcement officers are challenged daily in the performance of their duties; they face each challenge freely and unselfishly while answering the call to duty. In certain instances, their actions warrant special attention from their respective departments. *Law Enforcement* also wants to recognize their exemplary service to the law enforcement profession.



*Officer Kelly*

**W**hile on routine patrol, Officer James Kelly of the New Haven, Connecticut, Police Department's Motorcycle Unit observed a suspicious man near a young boy. When Officer Kelly approached the man to investigate, the subject produced a handgun and ordered the officer to take

him by motorcycle to a neighboring city. Unable to contact the dispatcher for backup, Officer Kelly was forced to comply. As they began to ride, the subject placed the gun to the officer's head. When they approached an interstate onramp, Officer Kelly executed a "controlled dump" in an attempt to separate himself from the subject. The subject then shot Officer Kelly

several times at point-blank range and carjacked a vehicle stopped at a traffic light nearby, forcing the driver out of the car. The subject again fired at Officer Kelly who was lying wounded on the pavement. Before the subject began to drive away, Officer Kelly managed to return fire and contact a dispatcher to request assistance. The subject, who was seriously wounded, crashed the vehicle a short distance away. Responding officers apprehended the subject and secured two children who were in the vehicle at the time of the carjacking. It was later determined that the subject, wanted on numerous felony warrants, recently committed an armed robbery in a nearby town and had fled to New Haven when Officer Kelly came upon him. The subject was sentenced to a detention facility; after a 3-month period of recuperation, Officer Kelly returned to patrol duty.



*Detective Alexander*

**D**et. Thad Alexander of the Columbus, Ohio, Department of Public Safety, Police Division, was conducting an investigation when he heard a woman screaming for help. He located the woman standing on the front porch of a residence and observed flames erupting from the first floor. After quickly radioing for assistance, Detective Alexander learned from the woman that two other individuals remained trapped in the house. Without hesitation, he

entered the burning house, and fighting the heat and thick smoke, located a man staggering in the living room. After leading the man to safety, Detective Alexander reentered the house, found a second man trapped in the kitchen, and retracing his steps through the smoke, led the second victim to the safety. Detective Alexander received treatment for smoke inhalation and was released later that evening.



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## Patch Call



The patch of the Florence, Alabama, Police Department features several local points of interest, including the Wilson Dam, the Tennessee River, and the University of North Alabama. The greenery represents Florence, "Tree City U.S.A.," and the evening sun honors a native son, W. C. Handy, for his famous song, "St. Louis Blues."



The Edgewater Park Township, New Jersey, Police Department patch depicts a sailboat on the nearby Delaware River. On the shore of the river is the historical Red Dragon Canoe Club, which shares its history with the sculling clubs of Philadelphia's Boathouse Row.