



September 2005  
Volume 74  
Number 9

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

Robert S. Mueller III  
Director

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

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

The *FBI Law Enforcement Bulletin* (ISSN-0014-5688) is published monthly by the Federal Bureau of Investigation, 935 Pennsylvania Avenue, N.W., Washington, D.C. 20535-0001. Periodicals postage paid at Washington, D.C., and additional mailing offices. Postmaster: Send address changes to Editor, *FBI Law Enforcement Bulletin*, FBI Academy, Madison Building, Room 201, Quantico, VA 22135.

**Editor**

John E. Ott

**Associate Editors**

Cynthia L. Lewis

David W. MacWha

Bunny S. Morris

**Art Director**

Denise Bennett Smith

**Assistant Art Director**

Stephanie L. Lowe

This publication is produced by members of the Law Enforcement Communication Unit, Training and Development Division.

**Internet Address**

leb@fbiacademy.edu

Send article submissions to Editor,  
*FBI Law Enforcement Bulletin*,  
FBI Academy, Madison Building,  
Room 201, Quantico, VA 22135.

# FBI Law Enforcement Bulletin

## Features

### The Future of Officer Safety in an Age of Terrorism

By Michael E. Buerger  
and Bernard H. Levin

2

*The potential for terrorist activity on American soil demands new conceptual understandings and practical applications of officer safety.*

### The Patrol Officer

By Earl M. Sweeney

14

*Law enforcement officers constitute an effective resource in the fight against terrorism.*

### When Is Force Excessive?

By Thomas D. Petrowski

27

*The U.S. Supreme Court recently revisited the issue of excessive force and provided a significant ruling.*

## Departments

### 8 Perspective

After Firing the Shots,  
What Happens?

### 22 Focus on Marine Enforcement

Terror by Sea

### *The Future of Law Enforcement Safety Training in the Face of Terrorism*

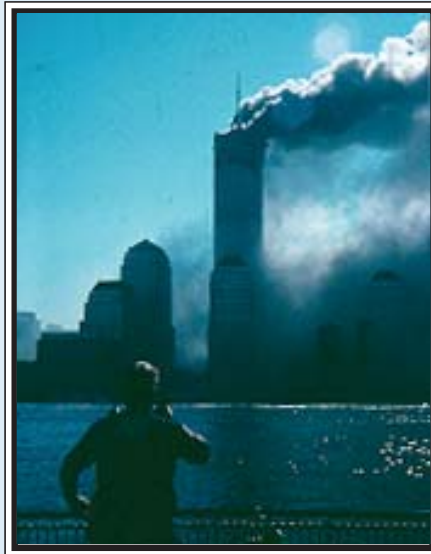
**T**he articles contained in this issue were presented at the Future of Law Enforcement Safety Training in the Face of Terrorism conference held at the FBI Academy on January 3 through 7, 2005. Anthony J. Pinizzotto and Edward F. Davis with the Behavioral Science Unit of the FBI's Training and Development Division and Charles E. Miller III with the Training and Systems Education Unit of the Criminal Justice Information Services Division hosted 50 individuals from local, state, and federal law enforcement agencies. The attendees represented street-level officers, supervisors, administrators, and trainers.

One of the goals of the conference involved examining information-gathering methods and disseminating more data to members of the criminal justice system by the FBI's Law Enforcement Officers Killed and Assaulted Program. Sharing their keen insights into current and future requirements of the law enforcement community, the conference participants recognized the need to develop better, realistic, and more focused safety training. Historical data gathered and published annually in the *Law Enforcement Officers Killed and Assaulted* report have enabled researchers to predict under what circumstances officers will continue to die while performing their official duties. A dire necessity exists to establish different ways to train

officers to survive these daily interactions with criminal elements, both foreign and domestic.

On September 11, 2001, a group of terrorists not only deliberately caused death and destruction at the World Trade Center, the Pentagon, and in the skies above the United States but also killed 73 of this nation's law enforcement officers. This resulted in more felonious deaths of officers than died due to adversarial action for that entire year. This tragedy caused a reexamination of training philosophies concerning law enforcement safety. Future training programs, while incorporating traditional safety methods to combat criminal assaults, also must focus on the possibility of additional terrorist attacks.

© Ronald Jeffers



The Future of Law Enforcement Safety Training in the Face of Terrorism conference examined two areas of law enforcement training: 1) issues regarding traditional training in law enforcement and 2) the need to develop new and innovative ways to implement law enforcement safety issues in training curricula. The articles in this publication reflect these views.

Most law enforcement agencies have mottos on their patrol vehicles that include the phrase "To Protect and Serve." Officers continue to protect their communities from terrorists, as well as the criminal element. But, to serve and protect their citizens, officers also must protect themselves. ♦

# *The Future of Officer Safety in an Age of Terrorism*

By: MICHAEL E. BUERGER, Ph.D.,  
and BERNARD H. LEVIN, Ed.D.

**T**raditionally, most people consider officer safety in terms of an individual officer, in extreme circumstances, facing a “bad guy” intent upon doing harm to that officer. The armed encounter—and the possibility of death—puts into high relief the entire range of tactical defenses that have constant application: awareness of the environment, including reading “cues” from subjects; threat assessment; and approach and contact techniques, such as handcuffing, weapons retention, and firearms handling and use. The elements that officers must focus on are concentrated in time and, usually, space, with the majority of violent encounters occurring within a 10- to 20-foot radius.<sup>1</sup>

We do not intend to denigrate or underestimate the

importance of incident-specific tactical defenses, which remain critical parts of police training. Rather, as futurists, we proffer that the potential for terrorist activity on American soil demands new conceptual understandings and practical applications of officer safety. The elements of safety expand across time and space, broadening the threshold beyond the potential for incident-based

contacts. Our offerings here add to the existing canon of safety concerns, building upon it in some instances and supplementing it in others.<sup>2</sup>

If a terrorist incident occurs as a large-scale public event—an attack with conventional, chemical, biological, or nuclear weapons against symbolic or densely populated targets—officer safety concerns change. Individual safety will be



© Ronald Jeffers

---

subsumed as an element of large-scale concern for survival. Officers will have to take on additional risks in managing the public's safety, as well as dealing with the perpetrators.

Looking at the issue broadly, three main categories, or theaters, of terrorism-related safety concerns exist. The first, intelligence gathering, is a prevention activity. The second involves direct contact with known or suspected terrorists in which the individual officer's safety becomes as acute as in the standard armed encounter. The third, the wake of a successful terror attack and its aftermath, joins the officer's safety with that of the larger public. In addition, a fourth category spans the other three: administrative and supervisory responsibility for management of the long-term and large-scale concerns.

### **Intelligence and Prevention**

Training to prevent terrorist attacks is essentially a matter of intelligence gathering. Officers best protect themselves by helping to ensure that no terror attack succeeds. To this end, individual officers must perceive their duties to be more than merely handling calls. Information gathering and, perhaps more important, information *seeking* represent ongoing efforts that have secondary benefits.

Armed encounters are relatively rare events in most police careers; acts of terror will be even more so. An important theme (and an ongoing lament) of traditional officer training is the need to maintain constant vigilance, even under conditions that seem to belie that edict. Maintaining peak mobilization for long periods of time proves difficult, as Aesop's timeless fable of the boy who cried wolf and the contemporary "orange alert fatigue" demonstrate.<sup>3</sup> A conceptual change must occur to mount a sustained, focused intelligence-gathering effort to intercept a devastating event.

“

***Officers will have to take on additional risks in managing the public's safety, as well as dealing with the perpetrators.***

”

Law enforcement agencies can incorporate many of the precepts of community policing into their intelligence-gathering efforts, such as developing cultural awareness, initiating contact with and identifying sympathetic guides and mentors among new immigrant and alternative cultural groups, and

maintaining the respect and sympathy of the people being policed. New information concerning potential trouble is much more likely to come from the communities than from patrol-based observation. The ability to act upon intelligence developed outside the locality most likely will require some form of community assistance.

Many of the fundamental activities of traditional policing also will attend the endeavor. Agencies must continue to keep an eye on known perpetrators and identify new players, develop informants and information from the fringes of the underworld, and maintain a baseline understanding of how the neighborhoods live and move to detect when something is "just wrong."

At the intellectual level, officers must maintain an awareness that the targets of their suspicion almost certainly belong to a larger organized enterprise. While officers involved in multijurisdictional task forces and RICO-based investigations understand the demands of enterprise crime investigation, most local officers are trained and indoctrinated with an incident-based frame of reference. Officers will require a longer time frame and broader set of resources to identify a suspect's or a cell's contacts, support bases, and potential targets.



---

This perceptual shift also places action-oriented officers in a new and unsatisfying role. Instead of intervening directly and “solving” the problem through arrest of an individual, officers will need to remain near-invisible elements in a larger and more deliberate network. Premature individual heroics simply may alert the terrorist network to surveillance and deflect or postpone any planned attack. Critical portions of the network may escape not only arrest but even detection.

These concerns apply only to those few officers who encounter an ongoing or imminent terrorist action. Most of the officers charged with intelligence seeking will contribute little or nothing to any antiterrorist action; those who report activity into the gathering endeavor never will receive positive feedback in the form of an arrest or thwarted attack because they did not cross paths with a terrorist network or associate. This lack of feedback on even local events constitutes a long-standing complaint of local officers; the needle-in-a-haystack nature of terrorism intelligence undoubtedly will exacerbate that problem.

To counter skepticism and disgruntlement, the efforts to develop intelligence on terror must be transformed into a larger understanding of the intelligence function. The same

activities will have a local payoff in terms of criminal activity in the officers’ jurisdictions, if managed correctly. Clear- and far-sighted officers should make the connection between their activities and traditional (if underserved) functions, such as preventing crime, nipping developing problems in the bud, and integrating new residents into the larger community.

“

***Law enforcement agencies can incorporate many of the precepts of community policing into their intelligence-gathering efforts....***

”

A strategic understanding of community vulnerability will identify critical infrastructure (e.g., power plants, bridges, transportation facilities, and manufacturing concerns) that would make tempting targets for terror attacks.

### **Interception**

Antiterrorist preparations must anticipate the possibility that a patrol officer, a detail officer from another assignment, or even an off-duty

officer of any rank will encounter one or more terrorists preparing or launching an attack. While most of the interceptions of terrorists have been intelligence based and conducted by federal authorities, officer safety concerns are framed in terms of “it’s only a matter of time” before an officer or deputy encounters terrorists on the way to or in the act of mounting an attack. In such an event, the individual officer becomes a secondary but immediate target—someone the terrorists must eliminate to achieve their primary objective. Unplanned interception contacts involve protecting the individual officer’s safety in an incident-specific context, similar to the armed encounter but with a wider range of threat.

The possibility of unplanned interception increases if officers take their intelligence duties seriously, particularly a focus on infrastructure sites. Nevertheless, even everyday enforcement actions may instigate the contact. After all, one of the great “What if?” moments in American policing involves the course that history would have taken had authorities stopped Timothy McVeigh in the rental truck on the way to Oklahoma City, rather than afterwards as he fled the area in a car.

Much of the contingency preparation for unplanned interception rests on the nature of

---

the attack contemplated by the terrorists. Conventional assaults, such as the North Hollywood bank shooting on February 17, 1998 (a “shock and awe” takeover robbery in support of militia groups in eastern Europe), may involve a variation of the traditional armed encounter. Discovery of terrorists planting explosives at a critical juncture creates other risks, as do the various scenarios for launching chemical or biological attacks. Officers must anticipate armed terrorists in any encounter, but chemical and biological ones pose special hazards.

Both biological and chemical incidents, as well as the more distant concern of a nuclear “dirty bomb” weapon, require considerable preplanning with public health officials and other emergency responders. Most preplanning events assume a successful or partial attack, however, with little emphasis on serendipitous discovery. Developing a curriculum to prepare officers for such an eventuality remains a pressing need.

Officer safety at the point of discovering a suspected biological, chemical, or nuclear device reflects a new dimension. Effective training should be diverse, able to accommodate the variety of biological and chemical threats ranging from the terrorist to the transportation

accident. The likelihood of the latter is considerably greater in the multiple police jurisdictions of the country and provides a more suitable cognitive platform on which to build anti-terrorist training.

At the present time, clandestine drug labs and industrial or transportation accidents constitute the primary viable model for chemical attacks but with considerably different surrounding circumstances. These incidents are localized; are accidental, rather than designed to



inflict mass casualties; and have smaller areas of danger than a successful terrorist attack. Nevertheless, they form a logical and practical framework for adapting antiterrorist safety training.

A variation on the interception model involves law enforcement officers attacked by terrorist groups or agents. Right-wing separatist groups

have targeted public officials with threats, nuisance lawsuits, and, in some cases, violence. While the current public model of “terrorist” is an al Qaeda affiliate, multiple models of potential threats could be transplanted to American soil and used either by foreign or domestic groups.

The potential for incorporation of terrorist methods into criminal actions coexists with terrorist aspirations. Although the ideology that fuels suicide bombings under the guise of “martyr actions” has not been associated with American radicalism, some U.S. cults have embraced suicide (from the Jonestown slaughter to the Heaven’s Gate apotheosis); the barrier between the two may be very thin. The threat of sleeper cells may turn out to be more potential concern than actual threat, but law enforcement training should anticipate the arrival or emergence of newer, more lethal assaults.

The Iraqi situation has shown the devastating results of the improvised explosive device (IED) and the vehicle-borne improvised explosive device (VBIED). While domestic officers have some experience with bomb training and bomb squads exist, law enforcement agencies should anticipate new wrinkles beyond the Oklahoma City scenario. For example, three Irish nationals with IRA

---

connections were arrested in Colombia in 2001, thought to be teaching bomb-making techniques to the Revolutionary Armed Forces of Colombia.<sup>4</sup> In the wake of the robbery of the Northern Bank in Belfast, police suspect that some element of the IRA is turning to organized crime.<sup>5</sup>

Resources for coping with any such new threats already exist. Prior to its dissolution, the Royal Ulster Constabulary of Northern Ireland learned to contend with the constant threat of assassination of its officers. The Israeli police have dealt with the potential for renewed suicide bombings on an almost daily basis. Americans training Iraqi police, like those engaged in similar peacekeeping missions in other parts of the globe, have encountered and adapted to variations of similar threats. New and modified training regimens can capitalize on the antiterrorist lessons already learned throughout the world.

### Aftermath

The odds that terrorists will succeed in launching an attack are slightly greater than those of serendipitous interception. In that event, officers' safety becomes a subordinate part of the general welfare of the citizenry in the attack area. Even more pressing, perhaps, is the fact that officers will have to function under circumstances

that also pose a threat to their loved ones, from whom they will be separated by duty.

Americans have few exemplars of mass panic, the worst-case scenario. Most of the prior examples involve serious but geographically bound events. Wide-scale civil disorders and antiwar protests in the late 1960s had specific geographic dimensions and involved only a portion of the populace. Large-scale mass evacuations from

***“The most vivid portrayal of cataclysmic events is found in motion pictures, and that image is of sheer panic.”***

hurricane-threatened areas are implemented with several hours' warning and along pre-planned, well-publicized routes.

Even the unexpected attacks on the Murrah building in Oklahoma City and the World Trade Center, catastrophic as they were in terms of casualties, remained localized in time and physical dimensions. The longer-term environmental impacts of the collapse of the Twin Towers may have greater ramifications, but they were

overwhelmed by the horror of the main incident. Additional lessons may be derived from the Aum Shinriyko cult's attack on the Tokyo subway or the Chernobyl nuclear accident, even though they occurred in foreign countries and have become increasingly distant in time.

None of these predecessor events can provide a reliable road map for an event that instigates mass panic. Americans must travel back to a much different age, Orson Welles' broadcast dramatization of *War of the Worlds*, to find a real-life event involving open panic. The most vivid portrayal of cataclysmic events is found in motion pictures, and that image is of sheer panic. One of the concerns will be how to avoid modeling fictitious behavior. Preplanning (not seen publicly since the civil defense plans for nuclear attack during the Cold War) will be necessary for both the guides (police, emergency medical services, and other public safety entities) and the guided (the general public).

Ideally, the public's reaction will be more disciplined, along the lines of the evacuation of projected hurricane landfall sites. Even in such a case, provisions should be made in advance and not left to ad hoc solutions. Evacuation will be a natural reaction to any mass-casualty possibility; therefore, preplanning for evacuation;

---

alternative routes in the event of artery-choking accidents or inclement weather conditions; and logistics of communication, shelter, and remobilization of the affected communities will require multiple layers of contingency planning adaptable to multiple scenarios, not just terrorist attacks.

### Management

Traditional focus on individual officer safety to survive a single encounter proves insufficient in the face of mass attack. The lesson of the World Trade Center attacks is that the entire agency must be prepared. Communications and the ability to work with other agencies responding to the same emergency represent organization-level considerations, as do the procurement of proper equipment, provision of adequate training, and commitment to coordinated preparations.

Police managers also will have to prepare for and cope with officers' very human need to see to the protection of their families and loved ones in case of a general disaster. Creation of a plan-within-a-plan for evacuation of families to a central protected shelter, for instance, may help relieve anxieties and allow officers to focus on larger duty concerns.

In addition, a series of long-term questions about safety must be asked, incorporating

not only the demonstrated threats of today but the potential threats on the horizon, such as the impact of nanotechnology, the possible disasters resulting from corruption of the Internet and other cyberattacks, and the remote but possible geological cataclysms similar to the December 2004 earthquake and tsunami. These questions include how the perception of officer safety may change over



time. Would law enforcement agencies be satisfied today with 1970s-level training? If not, what training would the profession expect to develop, change, and deliver over the next decade? For patrol officers, what has changed and what will change?

Deeper questions are embedded in the safety issue. Over the next decade, what changes will occur in the jurisdiction of the police? Will the police role become altered? What is the

profession developing, products or lifelong learners? Is the patrol officer of tomorrow a combatant; a peace officer; an information warrior; a community builder; or a flexible, agile public servant who needs the attributes of all of those roles? The distinct survival disadvantages of going one-on-one against a terrorist armed with chemical or biological agents should turn the focus back onto prevention, the gathering of intelligence that will prove useful across a broad spectrum of issues affecting the police.

Looking at management itself, what is the proper role of hierarchy? Is it primarily information systems serving the line officer? Or, must it remain an industrial-age artifact of controlling behavior? Is it possible to adapt and do both? What applicant must an agency hire today who can lead it 15 years hence? What will those leaders look like?

### Conclusion

The future of officer safety in an age of terrorism raises many questions. Some may prove extremely hard to answer. Ultimately, though, the unifying question is, Will we in law enforcement continue to venerate our dysfunctional past, or will we see change as our friend? If crisis does indeed present an opportunity for positive change, the crisis of



---

global terrorism offers us a chance to use an issue of deep emotional significance to all officers, regardless of other interests, to begin to move larger questions forward. ♦

#### Endnotes

<sup>1</sup> For additional information, see Anthony J. Pinizzotto, Edward F. Davis, and Charles E. Miller III, "Escape from the Killing Zone," *FBI Law Enforcement Bulletin*, March 2002, 1-7.

<sup>2</sup> Both authors have extensive experience in the law enforcement profession

and have actively participated in the Futures Working Group, including Dr. Levin's recent contribution as the futurist in residence at the FBI Academy.

<sup>3</sup> Bryan Vila and Dennis J. Kenney, National Institute of Justice, "Tired Cops: The Prevalence and Potential Consequences of Police Fatigue," *NIJ Journal* 248 (2000): 17-21; retrieved on May 3, 2005, from <http://www.ncjrs.org/pdffiles1/jr000248d.pdf>.

<sup>4</sup> Juan Forero, "IRA Men Accused of Aiding Rebels to Go on Trial in Colombia," *The New York Times*; retrieved on October 5, 2002, from <http://www.nytimes.com/2002/10/04/international/americas/04BOGO.html>.

<sup>5</sup> Lizette Alvarez, "Police Fear IRA Is Turning Expertise to Organized Crime," *The New York Times*; retrieved on January 19, 2005, from <http://www.nytimes.com/2005/01/19/international/europe/19ireland.html>.

---

*Dr. Buerger, a former police officer, is an associate professor of criminal justice at Bowling Green State University in Ohio.*

*Dr. Levin commands the Policy and Planning Bureau of the Waynesboro, Virginia, Police Department and is a professor at Blue Ridge Community College.*

---

---

## Perspective

### ***After Firing the Shots, What Happens?***

By Shannon Bohrer, M.B.A.

Every law enforcement academy in the United States trains officers for the possibility that they may have to use force, meaning any physical force up to and including deadly force.<sup>1</sup> Most academies base this training on the equation of criticality and frequency. In other words, how critical is the training, and how frequently will officers need the training? When looking at the use of force at the upper end of a continuum (deadly force), the frequency of the act may not occur that often; however, the criticality is extremely high.

Officers receive instruction in the use of firearms, batons, chemical agents, and defensive tactics, thereby demonstrating that part of their job

involves violent confrontations. In fact, a large segment of use-of-force training in law enforcement covers the mental preparation for such an act. Academy instructors often tell their students, "The training is not because you *might* be involved in a violent confrontation; the training is to prepare you for the violent confrontation that you *will* be involved in."

Such an expectation for officers to use force in the performance of their duties has merit. After all, in 2002, law enforcement officers in the United States locked up 13,741,438 people, or an estimated 37,647 arrests per day.<sup>2</sup> Given this large volume of apprehensions and the propensity for violence of many of those taken into custody, training officers for violent confrontations proves logical, especially considering that many of the individuals arrested carried lethal weapons. Law enforcement is a dangerous profession that sometimes requires officers to use deadly force as their only option.

---

With this in mind, is use-of-force training effective? Does it reflect the needs of individual officers? Because most officers survive assaults, including shootings, the training apparently works.<sup>3</sup> However, if officers received even more effective training, would still fewer die each year? Of course, a limit to this type of analysis rests with the measurement used, physical survival. Generally, agencies do not trace the mental or emotional health of officers involved in critical incidents nor do they track family problems, substance abuse, or any other long-term effects that develop. They usually do not examine physical disabilities or even the use of sick leave when looking at program needs. Seemingly, the profession prepares its members for critical incidents but does not always equip them for what happens after such events.

Interviews with involved officers have revealed some deficiencies or gaps in training programs related to the aftermath of critical incidents.<sup>4</sup> While many indicated that they survived because of their training, they were not prepared for the chain of events that occurred afterwards. Investigations of law enforcement's use of force, after-action reviews, and interviews with officers have shown that more training may be needed in such areas as—

- critical incident report writing as it deals with perceptual and memory distortions;
- perspectives and responsibilities of law enforcement agencies and the media;
- mental and emotional health of officers;
- long-term consequences of events and actions; and
- officers' best and worst friends, their "Band of Brothers."<sup>5</sup>

## Report Writing

Every law enforcement academy teaches report writing. Generally, trainees fill out a variety of reports concerning the facts: the basic who, what, when, where, why, and how. They may participate in practical scenarios, take photographs, gather evidence, interview witnesses, and then complete all of the required reports. Their instructors emphasize accurate accounts for criminal investigations

and prosecution of cases. Recruits learn that the reports they submit will be reviewed, scrutinized, and evaluated, so they must prepare complete, organized, and well-written documents. Years afterwards, however, they are involved in a critical incident as the only witness. Their reports "look as if they were written in crayon"<sup>6</sup> and are incomplete, nonsequential, and lack critical elements. The officers, however,

believe that the accounts are accurate and clearly explain their use of deadly force. Why does this occur?

Officers are human. A normal reaction to an abnormal event often means that the involved person will experience sensory deprivations. Diminished sounds; tunnel vision; slow-motion time; memory loss for parts of the event or actions taken; and perceptual distortions that individuals, including police, experience during critical incidents are normal.<sup>7</sup> Given these natural sensory deprivations, agencies should expect officers' reports to be incomplete. Not every officer in every critical incident will experience the same sensory deprivations or to the same degree. In fact, when multiple officers are involved in one critical incident, they rarely have identical stories. After all, how can officers involved in a critical incident that lasted only 2 seconds remember every detail, each sight

“

**A normal reaction to an abnormal event often means that the involved person will experience sensory deprivations.**

”

---

and sound, the number of rounds fired, and even the words spoken?<sup>8</sup>

Officers should receive training on how to report critical incidents. They must learn to convey the facts as they know them, not reconstructed from other sources. For example, if officers use their firearms, they may not remember how many shots they fired. If so, they should state that information in the report. Officers should have sufficient time to gather their thoughts and have the benefit of legal counsel before submitting a report or participating in taped or recorded interviews. These documents can affect officers for years, from internal investigations to criminal and civil cases. For example, some officers have had their critical incident reports returned because reviewers or investigators found them incomplete. So, the involved officers filled in the blanks, trying to do the right thing, and later had the added information used against them. This reveals another important training matter. Law enforcement personnel who investigate police shootings also need special training to ensure that officers involved in critical incidents are treated fairly.

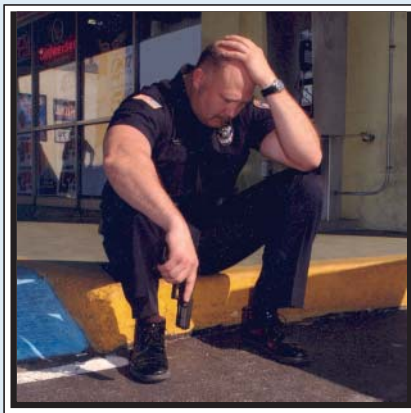
Of importance, these training issues on memory and critical incidents do not represent an excuse for officers regarding accuracy and completeness of reports. Instead, they are intended to reflect reality, not television policing.

### **Agencies and the Media**

From their perspective, the involved officers see the critical incident very clearly. Any force required was to prevent injury or death to a citizen, a fellow officer, or themselves. However, the chief or public information officer has made statements to the press that the investigation is continuing.

Additionally, almost as an afterthought, the chief mentioned conferring with the prosecutor's office. The involved officers know this from reading it in the newspaper and also watching the interview on the local news. It is not uncommon for officers to relate that they were reading a newspaper about an incident and discovered that it was the one that they were involved in. Such events, especially when the involved officers do not expect them, can cause unnecessary stress.

To combat these reactions, officers should receive training on what to expect from their agency and the media if they become involved in a such a situation. Simply communicating to officers that their agency could make these type of statements, before they appear on the nightly news, can help alleviate this stress. It is the agency's duty to fully investigate every incident involving the use of deadly force. Society gives law enforcement organizations authority under certain circumstances to employ such action, which represents a significant responsibility. Officers



must understand that any department would be negligent if it did not fully investigate a critical incident. The investigation does not constitute a direct reflection on the involved officers nor on the specific incident in which they participated.

As the department has an obligation to investigate every detail, even a clearly justifiable shooting, the media feels a similar need and believes it is on the front line of free speech. Officers involved in a critical incident may not like what they see, hear, or read about the event, but expecting a variety of reactions can prove helpful. Fortunately, not every critical incident results in negative comments from the department or the media. Sometimes, both support the involved officers wholeheartedly.

---

## Officer's Mental and Emotional Health

In the past, some perceived it as a sign of weakness if an officer involved in a critical incident saw a mental health professional. Sadly, many officers still feel this way. Conversely, teaching officers that counseling is appropriate remains a problem because critical incidents affect individuals in different ways. While some officers may need counseling, others may not.

Today, most departments have a policy that requires an officer involved in a critical incident to see a mental health professional within days of the event. Some may view the visit as an "inspection sticker" and approval for the officer to return to work. This perspective, similar to having a vehicle inspected and then knowing that it is safe to drive, is not accurate. After all, an individual's health and a vehicle's maintenance are not the same. Before the profession can train officers about what to expect after a critical incident, it may need to examine some departmental cultures and policies related to such situations.

A valid reason exists as to why a significant emotional event is called a critical incident. The stress of belonging to the law enforcement profession affects every officer; it is just a matter of the degree. The short- and long-term effects of critical incidents, if they exist, are not necessarily erased by one office visit or two peer-counseling sessions. Mandated professional services and peer counseling should exist, but officers also should have additional options after completing such interventions. In addition, they should have mandated leave with the ability to choose how much additional time off they need. Some officers would take only a day, whereas others may need a week or more.

Recent research has indicated that this could be a larger problem than many realize. In one study of assaulted officers, two officers from the same department involved in two different incidents were sent to a mental health professional who fell asleep during both visits.<sup>9</sup> Neither knew of the other's incident and mental health visit. But, both related that they never told anyone because of their concern about not receiving their mental health "inspection stickers." This department paid a lot of money for a nonexistent service, which brings to light another important consideration. Agencies should have a follow-up method in place to justify and validate the services offered, including evaluations by involved officers.

Just as officers should know that they may experience sensory deprivation, they also should understand that they may develop psychological and emotional problems after an incident. Not all officers will have difficulties, but for those who do, they should have avenues available for seeking help.

In the area of mental health, the department's policy can greatly affect training. It is not uncommon to have espoused theory in conflict with in-use theory. Unfortunately, some officers, administrators, and heads of agencies believe that all psychological services are a waste

of resources. Such a mind-set can prove detrimental to the department, its officers, and the community it serves. To safeguard its citizens, an agency must recognize that its officers are human and need appropriate and effective intervention after a critical incident.

## Long-Term Consequences

After graduating from a police academy and belonging to the profession for 4 years, an officer

“

**It is the agency's duty to fully investigate every incident involving the use of deadly force.**

”



---

became involved in a critical incident that required the use of deadly force. Even years later, the officer's thoughts return to that event on what seems like a daily basis. This prolonged timetable does not occur in every instance, but it also is not that unusual. Aside from dealing with the media, counseling, and other internal factors, officers can face another challenge: becoming embroiled in civil suits for extended periods of time.

Sometimes, the departmental investigation, the media's reporting, and any legal issues are resolved relatively quickly. However, other critical incidents appear to have a life of their own. This seems especially true with civil litigation issues. For example, two officers responded to a call concerning a male who was emotionally disturbed and fighting with his parents. When the officers tried to help, the man stabbed one officer, who almost died. The second officer shot and killed the subject, and his parents later sued both officers. What would have happened if the son had stabbed his father, mother, or himself? Television policing makes it clear: the police are the "good guys"; they arrest and shoot the "bad guys." However, in the real world, the bad guys do not always resemble the imagined model. This, in turn, reflects a possible problem with training.

The choice that officers have to make in the use of force generally is not a win-win or even a win-lose proposition. Many times, the option is either bad or worse, and, sometimes, worse is the better choice. No officer expects or wants to shoot an individual who is emotionally disturbed. But, if the officer fails to shoot and someone else gets hurt, was the choice wrong? Sometimes, it does not matter how right officers are or how justified the shooting was, if they use deadly force, they probably will be sued.

Again, officers should have training *before* they become involved in a critical incident to understand that it could become a major issue in their professional and personal lives for years. Data collected from previous incidents and interviews with involved officers have revealed that the after-incident actions can span years, and officers need to know this. Many police instructors feel that examining previous civil suits can be helpful, even though most of the suits have little merit. Training should not imply that every event will take years to resolve but, rather, should stress the possibility of such long-term consequences.

**“  
The choice that  
officers have to make  
in the use of force  
generally is not a win-  
win or even a win-  
lose proposition.  
”**

### **Best and Worst Friends**

Officers involved in critical incidents generally do not speak about their experiences. Their fellow officers often critique them and not always in a positive light. It may not matter that the shooting was justified or saved a life. If they did anything wrong, their fellow officers will let them know. Such statements as “If I were there, I would have

done...” and “Why did you do that?” are not uncommon. Conversely, many involved officers have advised that the best thing that a fellow officer said was, “If you feel the need for company or to talk, call me anytime, and I will be there.”

The reactions of fellow officers, family, friends, and neighbors surprised many involved officers and caused unintended consequences. Expressions, such as “Hey, killer”; physical gestures of a fast draw; and silence or total avoidance of the subject depict a few of the responses that involved officers have endured. While the individuals offering these often had no intention of doing any harm, they caused the involved officer increased stress with their thoughtless words and actions.

Therefore, educating officers about what to expect if they are involved in a critical incident

---

remains important, especially when the training includes what to expect from their “Band of Brothers,” families, and friends. Many of these officers have experienced a substantial amount of stress, and, while under stress, they can misinterpret benign comments. Additionally, the training for all officers should include how their statements, and even their silence, can be misunderstood.

## Conclusion

The law enforcement community spends significant time and resources, as it should, training officers for critical incidents that occur usually in extremely short periods of time. It also must prepare officers equally well for the aftereffects that can take many years to resolve. Teaching officers what can happen after a critical incident is like giving them a road map and directions to a place that they do not want to visit. They even may subconsciously think, *I don’t need this information; this won’t happen to me*. However, when it does, they have a plan and an understanding that can prepare them to deal with the aftereffects.

Law enforcement academies and agencies can accomplish the training recommended in a few hours. When conducting the training, it is vital to qualify each point. After all, some officers experience no after-action negative effects and have their situations resolved in a few weeks. Conversely, other officers involved in critical incidents that lasted only a few seconds have endured aftermaths that continued for years.

The matters discussed—report writing, perceptions, perspectives, mental and emotional health, events lasting for years, and reactions of friends and families—have come from individuals who actually experienced them. What remains unknown is the scope of each problem, how each one interacts with the others, and any degree of dependency among them. The law enforcement community has the greatest resources in the world to resolve the concerns raised: the officers involved in critical incidents. These issues need to be

examined, researched, and studied. Not looking at them does not mean that they do not exist. ♦

## Endnotes

<sup>1</sup> This article deals with what happens after an officer uses deadly force. The focus is narrow, specifically concerned with how events and processes occur and the possible effects on the involved officer. This is an area of law enforcement that has not been scrutinized. The author used the limited printed information available about the topic and relied heavily on officer interviews. The involved officers’ perceptions of processes and events are the cornerstone of the author’s suggested training.

<sup>2</sup> U.S. Department of Justice, Federal Bureau of Investigation, *Crime in the United States, 2002* (Washington, DC, 2003), 234.

<sup>3</sup> U.S. Department of Justice, Federal Bureau of Investigation, *Law Enforcement Officers Killed and Assaulted*, annual issues from 1989 through 2002 (Washington, DC).

<sup>4</sup> Anthony J. Pinizzotto, Edward F. Davis, and Charles E. Miller III, U.S. Department of Justice, Federal Bureau of Investigation, *In the Line of Fire* (Washington, DC, 1997); and interviews by author of National Academy students, FBI Academy, Quantico, VA, 1995 through 1999.

<sup>5</sup> “Band of Brothers” refers to a group of warriors preparing for battle and appears in William Shakespeare’s *Henry V*.

<sup>6</sup> Reports in “crayon” are unreadable; from a presentation by Attorney Michael A. Brave, “Use of Force Legal Liability and Risk Management Update,” at ILEETA, Training Conference, April 2004, Rolling Meadows, IL.

<sup>7</sup> Alexis Artwohl and Loren W. Christensen, *Deadly Force Encounters* (Boulder, CO: Paladin Press, 1997), 49.

<sup>8</sup> An insight on the issue of memory and critical incidents was demonstrated at a training conference on the use of deadly force by law enforcement for assistant U.S. attorneys held at the FBI Academy, Quantico, VA, January 19, 1999. One participant commented that before the training, if several officers were involved in an incident and they all had different stories, she thought they were lying. After attending the conference, however, she realized that if they all have identical stories, they could be lying.

<sup>9</sup> Supra note 4 (Pinizzotto, Davis, and Miller); and presentations by Edward F. Davis to FBI National Academy in 1998 and 1999 and to Maryland Police and Correctional Training Commissions in 2001, 2002, and 2003.

---

*Mr. Bohrer is the range master for the Maryland Police and Correctional Training Commissions in Sykesville and a member of the International Law Enforcement Educators and Trainers Association, the International Association of Law Enforcement Firearms Instructors, the Maryland Troopers Association, and the American Association of State Troopers.*

---

# *The Patrol Officer*

## *America's Intelligence on the Ground*

By EARL M. SWEENEY, M.S.

In recent wars, international police conflicts, and military skirmishes, America's strategists and troops in action have faced the continual challenge of obtaining accurate "intelligence on the ground." Neither satellite photos nor early warning radar can achieve the level of valuable knowledge provided by well-trained operatives familiar with diverse cultures and languages and well-funded intelligence agencies cooperating fully to coordinate their findings. Now that this country has become the target of international terrorists, the need for accurate intelligence has increased significantly. Unlike during the Cold War when the United States prepared against the threat of missiles fired from across the sea, today, a more likely attack will come from within, designed to strike fear in the populace, disrupt the economy, and destroy the sense of security and the freedom of movement that Americans enjoy. Just as a skirmish in a



foreign country requires U.S. troops to have accurate intelligence on the ground in that location, so too does the prevention and rapid mitigation of terrorist acts within America's borders necessitate the accumulation of pertinent facts about those who wish to commit these attacks.

This nation cannot rely exclusively on technology to provide it with essential information to help fight this different kind of enemy: one as diverse and numerous as the imagination of those who have

shown an ability to turn everyday products and equipment—from large airliners to crop dusters, tractor-trailer units to backpacks, and model airplanes to toy rockets—into instruments of death and destruction. Whether male or female, young or old, or foreigners who harbor grudges against cultures and religions dating back to the Middle Ages or homegrown Americans with right- or left-wing leanings that impel them to commit violent acts, these adversaries have lived and moved freely in this country,

---

planning their attacks and gathering the necessary materials. Technology alone cannot safeguard America from such threats. Instead, this nation must have intelligence on the ground that involves an awareness and understanding of the people and cultures in each community and that has the ability to interact with these individuals to gain their trust and cooperation.

Fortunately, this country has a largely untapped and unrecognized source of intelligence on terrorists and potential terrorist acts: the local police officer, the county deputy sheriff, and the state trooper or highway patrol officer. While conducting their daily activities, such as foot, vehicle, and bicycle patrol; community policing efforts; traffic stops; accident investigations; and answering calls for service, these officers already are accepted by their communities and, therefore, can become America's intelligence on the ground. The challenge is to train them in what to look for, what to report, and how and to whom to report it, ensuring that appropriate follow-up occurs and that these officers receive feedback and appreciation for their efforts.

### TOOLS IN PLACE

As a team, the Highway Safety Committee of the International Association of Chiefs of Police and the National

Highway Traffic Safety Administration have engaged in numerous projects aimed at increasing the interest of law enforcement officers and administrators in proactive traffic patrol. Examples include *Traffic Safety in the New Millennium: Strategies for Law Enforcement—A Planning Guide for Law Enforcement Executives, Administrators, and Managers*;

“

**To keep American communities safe from terrorists, all law enforcement officers must learn certain techniques and tactics.**

”

*The Highway Safety Desk Book*; and *Police Traffic Services Policies and Procedures*. These publications, available on the International Association of Chiefs of Police Web site at <http://www.theiacp.org>, are updated on a regular basis. Recent revisions have included references to the possibility of interdicting and preventing terrorism through the activities of officers engaged in traffic patrol.

“Traffic law enforcement gives officers at the state, local, and county police levels the

unparalleled opportunity to save lives. The causal relationship between consistent, goal-oriented enforcement and casualty reduction stands clear and unimpeachable.... Yet, today an emerging secondary benefit reinforces the value of roving patrol officers. They have become major crime fighters! America's long-standing reliance on the motor vehicle has put crime literally on the nation's streets and highways. Murderers, robbers, auto thieves, and drug traffickers all travel by motor vehicle. And, when they violate the traffic laws—a frequent occurrence because criminals typically are preoccupied by their crimes—that familiar police light appears in the mirror. This once meant two things: a short conversation with the officer and a traffic citation. Today, much more can follow.... The subject's demeanor, the caliber of responses to questions, a lack of knowledge of the vehicle—these and similar factors noted by the alert, trained observer recommend further investigation. And, further investigation pays off in criminal arrests.”<sup>1</sup>

A noted criminologist stated, “The higher the level of traffic enforcement, the lower the level of robbery. Aggressive traffic enforcement creates a broad general effect of deterrence.” He also has said that some crimes can be prevented



---

simply by a visible police presence.<sup>2</sup>

The misbegotten idea that stopping motorists somehow hurts police-community relations has hampered traffic law enforcement efforts in some locales. Community policing and traffic enforcement need not be mutually exclusive. “These new policing styles also realize that the officer on the beat or in the squad car, delivering direct police services to the people, often is in the best position to recognize problems” as the police go about the task of reducing fear and making a safer environment.<sup>3</sup> To a large extent, how well the public accepts police traffic enforcement depends on the attitude and approach of the officers as they go about this task.

Pointing out both the criticality of police-citizen contacts to community relations and the wellspring of information that can be derived through increasing these contacts, a national survey indicated that in 1 year, 21 percent of citizens had a contact with the police and that 52 percent of those encounters involved traffic stops, whereas only 19 percent were to report a crime. In only 1 percent of these did the police have to use any physical force, and 84 percent of the drivers stopped felt that they deserved it.<sup>4</sup>

As law enforcement agencies have used traffic

enforcement and community policing in communities throughout the United States to reduce both traffic crashes and street crime and to apprehend more criminals and wanted persons, they certainly could employ the same strategies to deter and apprehend terrorists and root out sleeper cells buried within their jurisdictions. Some police researchers have theorized that one reason terrorists have not been as bold in this

“

***This nation cannot  
rely exclusively on  
technology to provide  
it with essential  
information to help  
fight this different  
kind of enemy....***

”

country rests with the fragmented nature of law enforcement. Rather than having a national police force, American law enforcement consists of a hodgepodge of federal officers plus more than 17,000 state, county, and local officers wearing different uniforms and driving vehicles of varied appearance, working, in many cases, in small geographic areas on contrasting schedules and adhering to a mixture of

policies. Some feel that this diversity makes it more difficult for terrorists, especially those familiar with police in foreign countries, to predict when and where they will encounter a police presence and that this, in itself, may serve as a deterrent.

## **TRAINING NEEDS**

Americans do not want a future where terrorism becomes as common a street crime as robberies of all-night convenience stores. To prevent this, law enforcement officials need to study the modus operandi of the terrorists in other nations and determine from their counterparts in these countries what has worked and what has not in preventing and reacting to terrorist violence. Then, they must communicate this information to patrol officers, detectives, supervisors, and administrators in a form that they can use, ensuring that they remain proactive in their efforts to identify potential terrorist threats.

To keep American communities safe from terrorists, all law enforcement officers must learn certain techniques and tactics. Teaching them will take time and cost money. Most state POST (peace officer standards and training) commissions or councils require police academies to provide recruits with a minimum number of hours or weeks of basic academy training. Typically, this ranges from

---

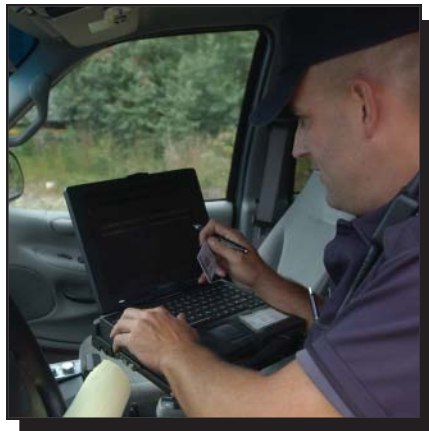
10 to 16 weeks. Some major metropolitan police departments and state police or highway patrol agencies provide additional basic training beyond what the state regulatory agency deems necessary, often doubling the requirement. But, this remains far less than that required of police officers in Europe, where their entry-level training may consume a year or more.

### Allocating Funds

The cost of providing basic training is high, both in terms of the actual expenses of operating an academy and the salary paid to the recruits while attending, including the overtime or backfill to cover the vacant shift until the newly hired officers can perform adequately. Some states have restrictions in their constitutions against passing unfunded mandates along to local units of government. This means that if the state does not have the financial resources to reimburse the counties, towns, or cities for the cost of lengthening the academy, it cannot expand the curriculum. Some jurisdictions have attempted to short-circuit this requirement by offering all or part of the basic academy curriculum on a tuition basis, either at a regular academy or through the community college system, to persons willing to expend their own funds to prepare themselves for

a law enforcement career. If antiterrorism training beyond the most basic becomes part of the curriculum, tuition students must be screened and background checked as carefully as actual police hires. After all, terrorists have shown their willingness to enroll in flight schools to fulfill their suicide missions of flying airplanes into buildings, so they undoubtedly would welcome the chance to attend police schools and learn what U.S. officers are being taught about terrorism.

© Mark C. Ide



Just as with any other effort at training law enforcement officers, terrorism subjects beyond the usual introductory weapons of mass destruction classes should become part of the curriculum used in FTO (field training officer) programs; roll-call briefings; annual update training; and as part of supervisory, mid-management, and executive-level

professional development programs. Training officers should be required to include antiterrorism instruction in their annual plans and to budget time and human resources to make it happen.

Once again, the cost of expanding the amount of time devoted to in-service training remains a problem for local, county, and state agencies. Some state POST agencies currently require officers to complete a specified number of hours of professional development training as a condition of continued certification. This varies from state to state, anywhere from 8 hours a year to 80 hours every 2 years. As with basic training, state constitutional or legislative restrictions on unfunded mandates may hinder increasing the amount of in-service training delivered.

Overcoming these obstacles requires creative thinking. States should consider allocating more of their terrorism prevention funds made available in federal grants to reimburse police academies for backfill and overtime costs associated with lengthening both their basic training and professional development programs to offer more terrorism-related training. At the federal level, legislators should allocate specific funding to local and state police academies

---

to further the advancement of such training.

### Using Technology

Technology may help in the search for more innovative and efficient means of training delivery. In addition to such ordinary items as roll-call videos, audiotapes for officers to play at odd moments in their cruisers, CDs for laptops, and satellite broadcasts to remote locations, numerous other ways can carry more training to the officer, rather than always bringing the officer to a remote site for training. For example, New Hampshire and Kansas are conducting an experiment to supply public safety and emergency medical personnel with 24-hour educational programming via satellite hookups and television sets installed in every police station, fire department, and trauma hospital in the state. This will offer a regular schedule of training in a variety of subjects with a special emphasis on terrorism. The schedule includes several hours of locally based, state-specific programming.

While not all subjects can be taught in a typical classroom environment or by television hookup, all training must be practiced on a regular basis because the skills needed to combat terrorism are perishable. Some academies recently have added terrorist scenarios to their

firearms training and vehicular pursuit simulators. Others have included them in officer-survival scenarios in their basic and in-service programs. The New Hampshire Police Academy is one of several that has acquired a portable, scale-model mock-up of a typical community. The academy takes the model around the state, giving law enforcement officers, firefighters, public works officials, and others the opportunity to

“

***Technology may help in the search for more innovative and efficient means of training delivery.***

”

participate in a range of scenarios involving natural disasters and terrorist acts as a means of practicing the unified command principles of the Incident Command System (ICS) and the National Incident Management System (NIMS), recently mandated by Congress for all states as a condition of continued receipt of federal funds.

### Gathering Intelligence

One of the most important tasks involves increasing the ability of local, county, and

state law enforcement organizations to gather intelligence. After perceived abuses in the 1960s, many agencies disbanded their intelligence units. Others never had the need to develop an intelligence function and, therefore, must learn. If departments truly regard their patrol officers and general assignment detectives as America's intelligence on the ground, they cannot reserve this training for special units; every sworn officer needs a basic awareness.

Terrorists may tip their hands before an attack in many different ways. They may purchase or steal military equipment; buy or rent heavy vehicles or limousines; lease crop dusters; purchase former police vehicles or ambulances at auction; attend schools to qualify for commercial driver licenses with hazardous materials endorsements; buy or steal industrial chemicals, fertilizers, explosives, detonation devices, and containers for constructing bombs; enroll in flight schools; videotape critical infrastructure, such as public buildings and bridges, for surveillance and to test security measures of local police presence in and around such sites; make threats or brag to friends, family, or like-minded individuals or on Web sites; travel to countries known to host terrorist activities; have sudden new or unidentified

---

sources of income; meet with known radical persons or groups; or display sudden changes in behavior, such as giving away their property or going on “one last fling” of worldly pleasures.

Law enforcement officers may discover clues to impending terrorist threats that would help fill in the missing parts of an investigation. Officers must know what to look for in traffic stops and regular patrols. They must gain a new appreciation for the importance of regular, ongoing contacts with private security personnel assigned to critical sites because a 3-to-1 ratio of private to public police currently exists in this country. Officers on the street also must learn to use their community policing skills in new ways to develop and acquire assets among trusted citizens, such as media representatives, religious leaders, community activists, and professionals.<sup>5</sup> Liaison with college campus police can prove particularly important as research facilities and other campus activities may comprise potential terrorist targets.<sup>6</sup>

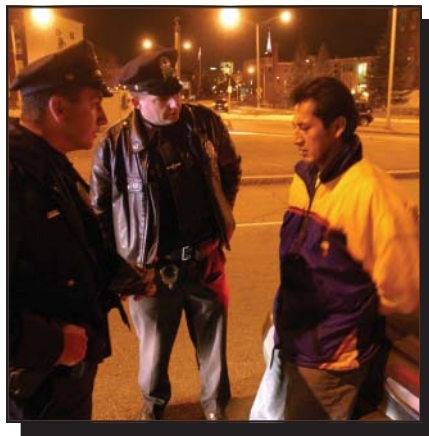
### **Increasing Cultural Awareness**

Through no fault of their own, innocent members of certain ethnic and religious groups share a common background or heritage with the particular terrorists who currently constitute

the greatest threat to Americans. Because of this, authorities must develop methods that protect the innocent from investigative harassment and hate crimes yet allow the penetration of terrorist cells and the practice of proactive street inquiries into suspicious persons and circumstances to continue.

Law enforcement officials can accomplish this by giving their officers more training in cultural awareness and competence; by creatively using the media to reach minority communities; and by increasing

© Mark C. Ide



everyday, friendly patrol contacts with members of these groups. Cultivating friendships between police executives and the leaders of these communities, as well as between patrol officers and everyday citizens, can help overcome these barriers and educate community members as to what and how to report suspicious activities.

Moreover, providing them with feedback when they do can further cement the relationship. Neighborhood Watch groups and citizen police academies can expand their missions to include a focus on detecting terrorists and terrorist cells. Real estate agents can furnish information about groups of seemingly unrelated persons who purchase or lease property in remote areas that may lead to the discovery, if not of a sleeper terrorist cell, of someone setting up a methamphetamine lab or some other illegal enterprise. Other accurate street intelligence can come from cultivating regular contacts with personnel at retail outlets for bomb-making materials, such as stores that sell electrical components, car and truck rental companies, and chemical and fertilizer businesses.

Educating officers in the customs of the various ethnic and religious groups in their communities can help them avoid actions that some might view as disrespectful or insulting. For example, officers need to learn about removing their shoes before entering a mosque and postponing contacts with Muslims on religious holidays, during prayers, or on sacred days. Male officers should minimize eye contact with Arab females during conversations or interviews and should never enter Arab houses uninvited



---

when no males are present. Officers visiting Arab homes also should not slouch in chairs or display the soles of the shoes to the hosts when visiting.<sup>7</sup> Other ethnic groups have similar sensitive characteristics, such as the reverence shown by Asians to their elders, that officers must learn.

Interestingly, most law enforcement officers seldom react favorably to cultural awareness courses billed as “sensitivity” classes that concentrate only on past transgressions and infer that officers are thoughtless and unfeeling. Instead, the cultural competency training that focuses on officer survival resonates best. If officers believe that the training will help them better detect and react to or defuse a threat, gather more information in an investigation, and avoid becoming the target of a lawsuit or disciplinary action, they likely will listen and absorb the information.

### **Recognizing the Threat**

Patrol officers need specialized training because they may be the first responders to a bombing or other terrorist act, or they may discover a terrorist act in progress while on special duty protecting a critical asset or during a heightened or intensified patrol of a potential target area. They must know how to—

- spot attackers, such as suicide bombers;
- carry out rescue and evacuation tasks simultaneously with investigative duties and countersurveillance to detect accomplices who may have remained nearby to make sure the attack succeeded; and
- protect themselves while responding to such incidents.

“

***The challenge is to train them in what to look for, what to report, and how and to whom to report it....***

”

This training must involve not only the proper use of personal protective equipment and the role of the patrol officer in the incident command system but also the possibility of multiple, synchronized attacks or secondary explosive devices placed to harm first responders. Patrol officers need to know, for example, that suicide bombers may wear clothing out of sync with the weather, their location, or their social positions; carry heavy luggage, bags, or backpacks; repeatedly and nervously

pat their upper bodies with their hands; display hyper-vigilant stares; or fail to respond to voice commands. When they detect these telltale signs, officers must know the best course of action to take.<sup>8</sup>

Law enforcement executives, administrators, and other high-level commanders will benefit from training and discussions that increase their familiarity and comfort level with the principles of NIMS and ICS, the legal issues surrounding police surveillance and intelligence-gathering activities, the emerging nature of terrorist threats, the methods for identifying the top terrorist targets located in or near their jurisdictions, the availability of federal grants and effective techniques for developing grant requests, and the appropriate modifications to resource allocation that they should make during periods of heightened terrorist alert. Local, county, state, and federal agencies in the area will profit from regularly scheduled conference calls to assess the nature of any current threats and quarterly face-to-face meetings with presentations by intelligence analysts and others. Depending on the level of threat and activity in a given area, Compstat-style briefings with mapping and geographic analysis can help ensure that mid-managers, precinct and bureau commanders, and others take the terrorist

---

threat seriously and follow up on intelligence information.<sup>9</sup>

## FEEDBACK AND RECOGNITION

While providing training to patrol officers constitutes an extremely important aspect of countering the threat of terrorism, an equally crucial factor involves recognizing the efforts of those officers. Law enforcement agencies must ensure that their officers know how to gather and report potential terrorism intelligence, that they have an organized way of receiving and evaluating this information, and that they can pass it on quickly to the proper authorities. But, departments also must acknowledge the patrol officer or citizen who reports something of interest. This does not mean disclosing sensitive information or strategies but simply thanking the person and indicating what additional information might help. If the information leads to an arrest, the officer or citizen who provided it should receive recognition and the deserved accolades.

Feedback and recognition can build closer alliances between "wholesale and retail law enforcement," the officers who provide the raw intelligence data and those who distill and act upon it. Requiring detectives and intelligence analysts to attend patrol roll-call

briefings and make presentations at training programs can foster a better working relationship and show patrol officers the importance of their contributions. In addition, receiving feedback can help patrol officers distinguish the types of information that they should attempt to acquire and, thus, enhance their intelligence-gathering abilities.

## CONCLUSION

Today, the United States faces its greatest threat since the atomic bomb: foreign and domestic terrorism. Such a challenge requires the wholehearted commitment of every citizen to maintain a constant vigilance to detect those who wish this country harm.

One largely untapped resource, however, can provide America with accurate intelligence about an enigmatic enemy. A cadre of well-trained police officers, deputy sheriffs, and state troopers and highway patrol officers, familiar with their local communities and keenly aware of their vital role in safeguarding innocent lives, can significantly hinder even the most determined terrorist. The law enforcement profession always has stood at the forefront whenever this nation faced peril and will continue its protective role to ensure a safe future for all law-abiding individuals. ♦

## Endnotes

<sup>1</sup> International Association of Chiefs of Police, "Two for the Price of One," *The Highway Safety Desk Book*; 2-5; retrieved on February 22, 2005, from <http://www.theiacp.org>.

<sup>2</sup> *Ibid.*, 2-6.

<sup>3</sup> International Association of Chiefs of Police, "Community Policing and Traffic Enforcement: Not Mutually Exclusive," *The Highway Safety Desk Book*, 2-19; retrieved on February 22, 2005, from <http://www.theiacp.org>.

<sup>4</sup> U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, *Contacts Between Police and the Public: Findings from the 1999 National Survey* (Washington, DC, February 2001).

<sup>5</sup> The Police Foundation, *Protecting Your Community from Terrorism: Strategies for Local Law Enforcement* (Washington, DC, September 2004).

<sup>6</sup> For additional information, see Tony Aeilts, "Defending Against Cybercrime and Terrorism: A New Role for Universities," *FBI Law Enforcement Bulletin*, January 2005, 14-20.

<sup>7</sup> For additional information, see Joe Navarro, "Interacting with Arabs and Muslims," *FBI Law Enforcement Bulletin*, September 2002, 20-23.

<sup>8</sup> U.S. Department of Justice, Federal Bureau of Investigation, Behavioral Analysis Program, *Suicide/Homicide Attacker Behaviors and Suggested Countermeasures* (Quantico, VA, January 2003).

<sup>9</sup> For additional information, see Jon M. Shane, "Compstat Process," *FBI Law Enforcement Bulletin*, April 2004, 12-21; "Compstat Design," *FBI Law Enforcement Bulletin*, May 2004, 12-19; and "Compstat Implementation," *FBI Law Enforcement Bulletin*, June 2004, 13-21.

---

*Mr. Sweeney, a retired chief of police and director of the New Hampshire Police Standards and Training Council, is the assistant commissioner of the New Hampshire Department of Safety in Concord.*

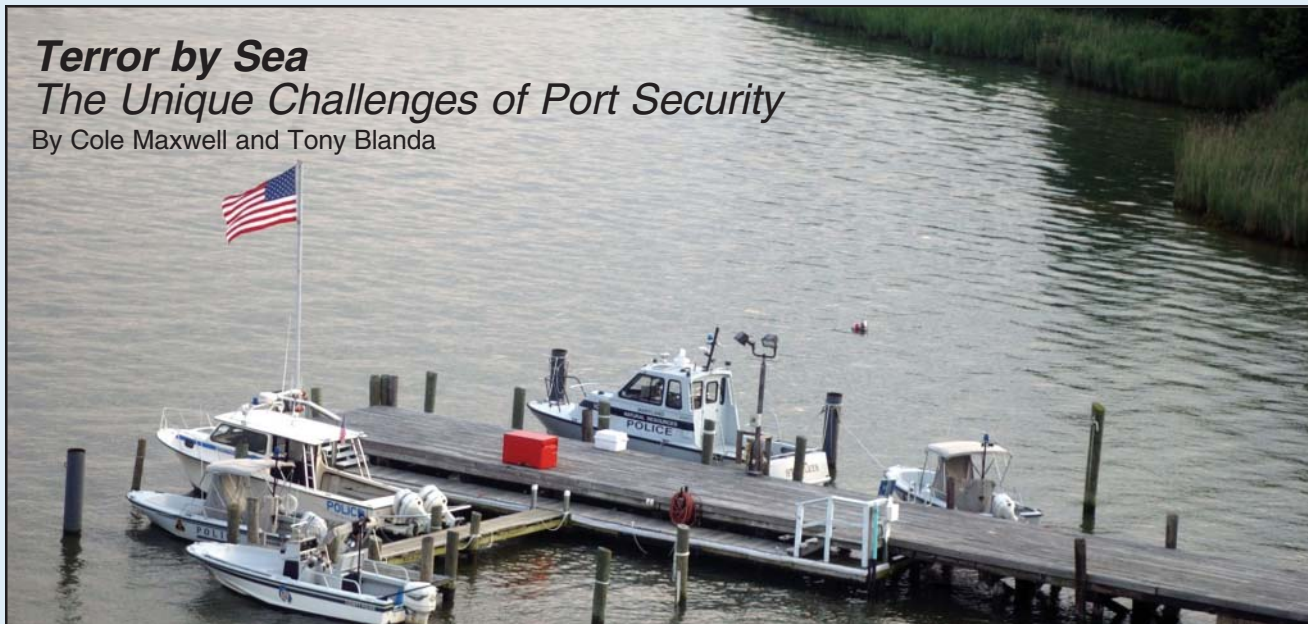
---

# Focus on Marine Enforcement

## ***Terror by Sea***

### ***The Unique Challenges of Port Security***

By Cole Maxwell and Tony Blanda



© Mark C. Ide

**T**he United States always has defended its borders and natural resources from harm. Unlike threats of the past, however, maritime terrorism constitutes a multifront conflict both at home and abroad. It recognizes no borders and can originate from organized groups and individuals operating inside or outside the United States. The fight against maritime terrorism, unlike conventional threats, is a complicated struggle with neither an easy nor a rapid conclusion. The U.S. maritime jurisdiction represents a daunting challenge: more than 1,000 harbor channels with 25,000 miles of inland intracoastal and coastal waterways that serve 361 ports containing more than 3,700 passenger and cargo terminals. Annually, the U.S. Maritime Transportation System manages over 2 billion tons of freight, 3 billion tons of oil, more than 134 million ferry passengers, and an estimated 7 million cruise ship travelers. The dimensions of the extraordinarily difficult task confronting the United States center on an estimated 7,500 foreign ships, manned by 200,000 sailors, entering

U.S. ports every year. The more than 6 million intermodal cargo containers that enter annually represent two-thirds of the total value (as opposed to tonnage) of all U.S. maritime trade.<sup>1</sup> Monitoring the intricate waterways, ports, and interstate connections falls to the marine enforcement officers in the field.

Perhaps, a review of the ports on the Mississippi River can put the challenge these officers face into proper perspective. The lower 255 miles of the Mississippi River, from the mouth to Baton Rouge, contain 4 of the top 11 ports in the country. The Port of South Louisiana, located between New Orleans and Baton Rouge, encompasses a total of 54 miles, while the Port of New Orleans includes 33 miles of the river. The Port of Greater Baton Rouge comprises 85 miles, and the Port of Plaquemines, located south of New Orleans, covers over 80 miles of the Mississippi River. Of particular interest is the Louisiana Offshore Oil Port, internationally known as the LOOP, located about 18 nautical miles south of Grand Isle.

---

The nation's only offshore deepwater port, it can handle 100,000 barrels of oil an hour, or 2.4 million barrels per day, and services over 30 percent of this country's refineries. Such a valuable resource as the Mississippi River obviously requires protection from the threat of maritime terrorism.

### Piracy Connection

A report on piracy and other criminal attacks at sea highlighted the vulnerability of shipping to terrorist attacks. "Today's pirate is tomorrow's terrorist and one can foresee that a nexus will ultimately develop between terrorist organizations and pirates. Both are acts of violence against innocent people, one done for monetary gains and the other perhaps for a political purpose. Since piracy is largely undertaken for a commercial gain, pirates will not hesitate to carry out a terrorist act if someone pays them enough and they have a reasonable chance of getting away."<sup>2</sup> This nexus cannot be ruled out. After all, if terrorist groups are to sustain their operations, they likely will tend toward mounting suicide attacks on commercial and military vessels for such purposes as—

- procuring alternative revenue for their main initiatives (i.e., simple piracy);
- carrying out suicide attacks on unsuspecting ships or ports in the spirit of September 11;
- smuggling weapons and explosives to their affiliates in other parts of the world, probably by hijacking a ship before renaming and otherwise disguising its identity and providing a new crew and manifest;
- seeking ransoms and trading hostages for members of their groups detained by authorities; and

- placing mines aboard innocent-looking tugs and barges, commonly found in the coastal and intracoastal waters and ports of the United States.

As an example, the Strait of Malacca, the world's busiest waterway, provides passage to more than one-third of the global trade. The number of vessels that ply the waters ranges from 50,000 to 330,000 each year. Geographically, the Strait of Malacca is 500 nautical miles in length and extremely narrow, especially along its southern half where it ranges from a mere 20 nautical miles wide to as little as 9 nautical miles at the southern end. A terrorist attack on a steamer could

endanger the lives of its crew, threaten the safe passage of other vessels and the lives of their crews, and disrupt maritime traffic along the straits, crippling regional and international trade.

### Post-September 11 World

Before the tragic events of September 11, marine enforcement officers received specialized training to combat drug smuggling and illegal immigration and to protect America's natural resources and environ-

ment. Today, however, because of the threat of maritime terrorism, the need for advanced, specialized, and tactical training of these officers has become far more critical.

As the tip of the spear, the U.S. Coast Guard and Customs and Border Protection (CBP) are tasked with the protection of America's ports. One of the Coast Guard's principal missions involves safeguarding U.S. ports and waterways, whereas the primary mission of CBP is to inspect cargoes and cargo containers entering U.S. ports.<sup>3</sup> To meet the unprecedented challenges facing them, the Coast Guard and the CBP have allocated

**“The fight against maritime terrorism, unlike conventional threats, is a complicated struggle with neither an easy nor a rapid conclusion.”**



---

additional workers to their respective port- and cargo-security missions and have initiated several programs designed to tighten security not only of port areas but also of merchant ships, the cargoes they carry, and their crews.

The United States has taken the common-sense approach of detecting and deterring potential threats long before they escalate into clear and present dangers. In the maritime arena, this requires “identifying and intercepting threats well before they reach U.S. shores.”<sup>4</sup> This strategy supports national-level objectives while recognizing the uniqueness of the maritime environment, including the difficulty associated with the shared use of oceans and waterways.

Denying the use and exploitation of the maritime domain by terrorists as a means to attack U.S. territory, population, and critical infrastructure requires increased maritime domain awareness (MDA) and enhanced security operations. Currently, the U.S. maritime domain is protected via intelligence information and layered, multiagency security operations nationwide, including the strengthening of the security posture and reduction of vulnerability of American ports.

The first MDA consideration is the effective understanding of anything in the marine environment that could adversely affect America’s security, safety, economy, or environment. Given the physical impossibility of patrolling the entire maritime domain, building a robust MDA capability can provide national leaders, operational commanders, and maritime stakeholders the information, intelligence, and knowledge needed to make operational and policy decisions. Enhancing maritime security operations includes the reality that

resources are finite and security forces must be enduring, sustainable, and flexible enough to accommodate both local and regional requirements while remaining able to adjust to changing security levels. The shifting priorities have resulted in marine enforcement units evolving into special operations as opposed to merely patrol. For example, the Coast Guard created active-duty, multimission, mobile teams with specialized capabilities to close critical security gaps in the nation’s strategic seaports. Representing just one element of the defense posture in U.S. ports, these teams augment existing

Coast Guard units and law enforcement agencies as opposed to working alone. CBP also follows a forward-deployed strategy. The Container Security Initiative represents over two-thirds of all cargo containers shipped to the United States and requires, among other things, that incoming containers be screened before they depart for U.S. ports of entry, rather than after they arrive on American shores.

Other national efforts include greater intelligence collection, new regulations, increased patrols, additional assets, and partnering with other law enforcement agencies and the maritime industry.

### **New Training**

U.S. policies direct agencies in the maritime community to deter, detect, and defend against traditional and asymmetric attacks. Every federal, state, and local marine enforcement officer *should* have training that addresses the current trends in worldwide maritime terrorism. However, the agencies needing maritime enforcement training have limited qualified educational facilities that, in turn, have few vessels, specialized equipment, and vehicles with which to conduct training.



---

With this in mind, on April 6, 2004, the Federal Law Enforcement Training Center, Driver and Marine Division convened a Curriculum Review Conference of the Advanced Marine Law Enforcement Training Program. Protecting over 90,000 miles of U.S. coastline has become an increasingly difficult task. Therefore, the conference proposed a new curriculum to address the contemporary tactical skills required in the marine enforcement specialty. In addition, the participants recommended changing the program name to the Antiterrorism/Port Security Boat Operations Training Program. Five days in length, the program trains marine law enforcement officers, security personnel, executive protection agents, supervisors of marine units, and others in the knowledge and skills needed to deal with contemporary threats in the maritime environment. The target audience for the revised program includes federal officers and agents with marine enforcement duties or supervisory responsibilities of marine enforcement units; state and local officers who support or work closely with federal agencies involved in marine enforcement; and U.S. Department of Defense personnel involved in harbor security, marine counterterrorism, and other marine tactical operations.

The new curriculum includes several innovative courses. The Strategic Maritime Threat provides marine enforcement officers with a comprehensive review of the history of maritime terrorism, crime, and piracy with a view toward identifying relevant, current trends. Upon completion, students will have a greater appreciation of the role of enforcement agencies to prevent, deter, and mitigate threats to security in the maritime environment.

“

**A report on piracy and other criminal attacks at sea highlighted the vulnerability of shipping to terrorist attacks.**

”

DHS Use-of-Force Policy familiarizes students with the use-of-force policy adopted by the U.S. Department of Homeland Security. It includes a detailed explanation of the use of force during vessel pursuits and port security evolutions.

Tactical Navigation Techniques teaches students to adapt navigational skills to a law enforcement situation. It concentrates on using radar in reduced visibility or at night to assist in pursuits and intercepts. It also trains students to use radar to assist them in enforcing security zones. Finally, the course introduces students to state-of-the-art integrated electronic navigation tools.

Defensive Boat Tactics shows students how to operate a patrol boat during maritime security operations. Knowing these skills will enhance students' abilities to work in cooperation with the Coast Guard during these critical evolutions, improve their confidence, and increase their performance of other marine enforcement duties.

Tactical Boat Pursuits introduces students to the tactics of single- and multiple-vessel pursuits, including positioning, screening, blocking, and handing off. Students practice these tactics during underway laboratories, while a pursuit scenario in a graded practical exercise evaluates their mastery of these skills.

High-Risk Boarding trains students how to conduct tactical boarding in high-risk situations. It covers tactical techniques, such as line of fire and triangulation, as well as assessing threats and reacting appropriately. It teaches students to deal with aggressive behavior by methodically escalating the level of force necessary to bring a situation under control.

In the post-September 11 world, the threat of terrorist attacks reaches into every segment of American life, whether on land, sea, or in the air. Protecting this country's ports and waterways constitutes a daunting challenge due to the sheer magnitude of the task.

## Endnotes

- <sup>1</sup> John F. Frittelli, "CRS Report for Congress," *Analyst in Transportation*, RS21979 (Washington, DC, 2003), 2.
- <sup>2</sup> International Maritime Bureau, *High Seas Terrorism Alert in Piracy Report* (London, 2002).
- <sup>3</sup> James D. Hessman, "A Maritime Challenge of Staggering Dimensions," *Navy League of the United States*, May 2003, 1.
- <sup>4</sup> Admiral Thomas H. Collins, *Maritime Strategy for Homeland Security* (Washington, DC, 2002), 2.

*Mr. Maxwell is a senior instructor in the Marine Training Branch of the Federal Law Enforcement Training Center in Glynco, Georgia.*

*Mr. Blanda is a senior instructor in the Marine Training Branch of the Federal Law Enforcement Training Center in Glynco, Georgia.*



Order Processing Code:

\* 5902

☐ YES, please send \_\_\_\_\_ subscriptions to:  
**FBI Law Enforcement Bulletin**

The total cost of my order is \$ \_\_\_\_\_.

Name or title (Please type or print)

Company name	Room, floor, suite
--------------	--------------------

Street address

City	State	Zip code+4
------	-------	------------

Daytime phone including area code \_\_\_\_\_

Purchase order number (optional) \_\_\_\_\_

***Credit card orders are welcome!***

Fax orders: (202) 512-2250

Phone orders: (202) 512-1800

Online orders: [bookstore.gpo.gov](http://bookstore.gpo.gov)

(FBIEB) at \$36 each (\$45 foreign) per year.

Price includes regular shipping & handling and is subject to change.

**Check method of payment:**

Check payable to: Superintendent of Documents

[illegible]

☐ VISA    ☐ MasterCard    ☐ Discover

[illegible]

(expiration date)

--	--	--	--

Authorizing signature

1/2001

Mail to: Superintendent of Documents, PO Box 371954, Pittsburgh PA 15250-7954

**Important: Please include this completed order form with your remittance.**

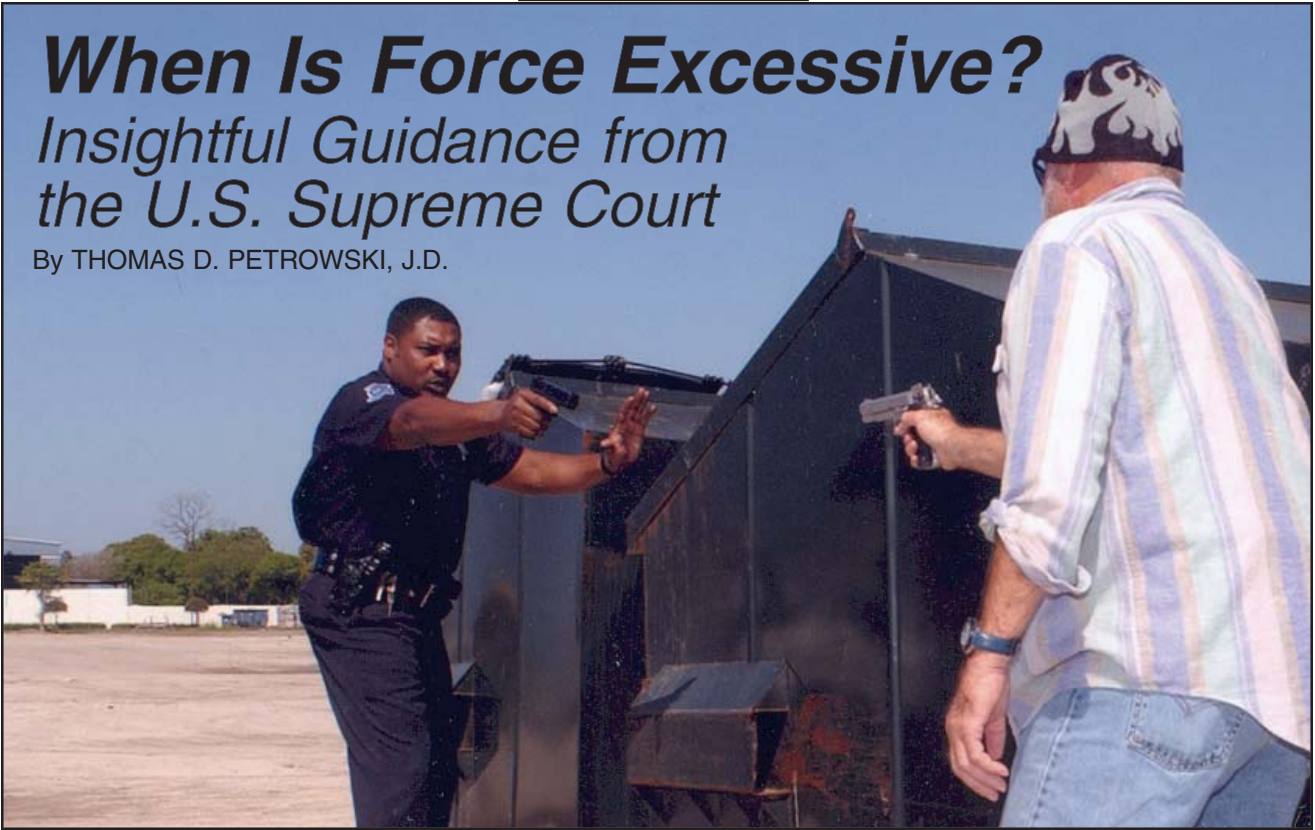
**Thank you for your order!**



# When Is Force Excessive?

## Insightful Guidance from the U.S. Supreme Court

By THOMAS D. PETROWSKI, J.D.



**T**oo often, it seems, news footage shows American law enforcement officers using force to effect an arrest or defend themselves. The sight of a sworn peace officer, who has taken an oath to serve and protect, using violence naturally appears inconsistent and inherently repulsive to any objective viewer who likely knows little of the realities of law enforcement. Naive commentary labeling the force used as excessive often accompanies such footage.<sup>1</sup> But, when *is* force excessive? While some critics may be quick to characterize force as excessive, the law reflects the realities that officers face in making use-of-force

decisions. The U.S. Supreme Court recently revisited this issue and provided a significant ruling.

In December 2004, the Court announced its decision in *Brosseau v. Haugen*.<sup>2</sup> In *Brosseau*, the Court further examined how to evaluate law enforcement uses of force to determine whether such actions were excessive. This decision refines the current trilogy of U.S. Supreme Court decisions that define when law enforcement officers are civilly liable for uses of force. *Tennessee v. Garner*,<sup>3</sup> *Graham v. Connor*,<sup>4</sup> and *Saucier v. Katz*<sup>5</sup> comprise those cases. *Garner* and *Graham* set out the general

approach to defining constitutional constraints on the use of force by law enforcement, stating that force used by officers constitutes a seizure under the Fourth Amendment<sup>6</sup> and is objectively evaluated for reasonableness.<sup>7</sup>

The *Katz* decision profoundly impacted the way courts analyze civil rights lawsuits brought pursuant to Title 42, Section 1983 of the U.S. Code (and its federal counterpart *Bivens v. Six Unknown Agents*<sup>8</sup>). In *Katz*, the Court established a two-step approach to these lawsuits. It held that courts first view the alleged facts<sup>9</sup> and establish whether a constitutional violation could exist pursuant





Special Agent Petrowski is the associate division counsel for the FBI's Dallas field office.

“

***Simply put, only force that is clearly and plainly something no reasonable police officer could ever do violates the Constitution.***

”

to the principles enunciated in *Garner* and *Graham*. If no possible constitutional violation occurred, then the court would summarily dismiss the lawsuit. However, if the court found a constitutional violation, then it would determine if the officer involved should be entitled to qualified immunity.<sup>10</sup> The evaluation of whether the officer can receive qualified immunity constitutes a separate and distinct analysis from the initial determination of whether the force used was constitutional.

In *Katz*, the Court specifically held that law enforcement officers may apply force that eventually is determined to be unconstitutional yet remain protected by qualified immunity. In the words of the Court, “[q]ualified immunity operates to protect officers from the sometimes hazy border between excessive and acceptable force.”<sup>11</sup> The Court plainly

stated that while uses of force by police occur that are clearly excessive or clearly appropriate, a gray area remains in between. The Court went on to say that when an officer’s use of force falls within this gray area, deference must be paid to the officer and qualified immunity granted.

After the *Katz* decision, there were numerous cases evaluating whether police uses of force fell in the “hazy border” between the clearly excessive and the clearly constitutional as defined in that decision. *Brosseau* was the U.S. Supreme Court’s vehicle to address this issue.

### **The Facts**

Like virtually all case law related to law enforcement use of force, *Brosseau* was a civil rights lawsuit brought by Kenneth Haugen against Officer Rochelle Brosseau of the Puyallup, Washington, Police

Department. A former crime partner had complained that Haugen had stolen tools from his shop. Brosseau later learned that a felony no-bail warrant existed for Haugen’s arrest on drug and other nonviolent offenses. The day after receiving the associate’s complaint and verifying the arrest warrant for Haugen, Brosseau responded to a report that Haugen and others were fighting in the yard of his mother’s home. When Brosseau arrived, Haugen ran out of his mother’s yard and hid in the neighborhood. Brosseau requested assistance, and, shortly thereafter, two officers and a canine arrived to assist in locating and arresting Haugen. The two associates with whom Haugen had been fighting and Haugen’s girlfriend and her 3-year-old daughter were at the scene. Haugen’s SUV was parked in the driveway facing his girlfriend’s car (occupied by her and her child) with about 4 feet between the two vehicles. The two associates were in a pickup truck parked on the street in front of the driveway about 20 to 30 feet away.

After being spotted by a neighbor who alerted the officers, Haugen appeared and ran into the driveway. With Brosseau in pursuit, he jumped into the driver’s seat of his SUV and closed and locked the door. When she caught up, Brosseau pointed her gun at Haugen and ordered him to get out of the

---

vehicle. Haugen ignored her command and attempted to find his keys to start the SUV and escape. Brosseau repeated her commands and struck the driver's side window several times with her handgun. This had no effect on Haugen. On the third or fourth strike, the window shattered. Brosseau then tried to take the keys away from Haugen and struck him on the head with her gun. Haugen, still undeterred, started the SUV. After it started but before it moved, Brosseau jumped back and fired one shot through the rear driver's side window at a forward angle, hitting Haugen in the back. She later testified that she shot Haugen because she was "fearful for the other officers on foot who [she] believed were in the immediate area, [and] for the occupied vehicles in [Haugen's] path and for any other citizens who might be in the area."<sup>12</sup> In justifying her use of force, Officer Brosseau also cited the fact that Haugen had a no-bail drug warrant and that she had probable cause to believe that he had committed a burglary. She also stated that she originally thought he was attempting to access a weapon when he ran to his vehicle.

Even though he was wounded, Haugen accelerated aggressively and drove through the small, tight space between the other vehicles. He swerved across a neighbor's lawn and

proceeded down the street. After going about one-half of a block, Haugen realized that he had been shot and stopped. He survived the shooting and subsequently pleaded guilty to a state felony charge of eluding.<sup>13</sup> In pleading to this offense, he admitted that he drove his vehicle in a manner indicating "a wanton or willful disregard for the lives...of others."<sup>14</sup>

“

***In Brosseau, the Court further examined how to evaluate law enforcement uses of force....***

”

#### **The Court's Evaluation**

It should be noted that the Court's decision in *Brosseau* was an appeal by Officer Brosseau to the decision of the Ninth Circuit Court of Appeals to deny her summary judgment<sup>15</sup> in the lawsuit brought by Kenneth Haugen. That is to say, the lower court found that the facts indicated that Officer Brosseau's use of force might have violated Haugen's constitutional rights. Applying the second inquiry per *Katz*, the lower court then found that Officer Brosseau was not entitled to qualified immunity

and, therefore, the matter should proceed to trial. Officer Brosseau's appeal to the U.S. Supreme Court requested the Court to find that her use of force was constitutional or, in the alternative, that if her actions were unconstitutional, she nonetheless was entitled to qualified immunity.

In evaluating Officer Brosseau's shooting of Haugen, the Court—pursuant to the two-step approach it prescribed in *Katz*—first touched on the issue of whether the force used was constitutional, indicating that it would bypass this and focus solely on the qualified immunity question. “[W]e express no view as to the correctness of the Court of Appeals' decision on the constitutional question itself. We believe that, however that question is decided, the [Ninth Circuit] Court of Appeals was wrong on the issue of qualified immunity...[w]e exercise our summary reversal procedure here simply to correct a clear misapprehension of the qualified immunity standard.”<sup>16</sup> Essentially, the Court assumed for the purposes of this decision that Officer Brosseau's conduct was unconstitutional and presented this case as illustration that officers still may be entitled to qualified immunity even though they used force in an unconstitutional manner.

The Court reiterated that “qualified immunity shields an officer from suit when she

---

makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances she confronted.”<sup>17</sup> The Court then stressed that the critical issue in determining if qualified immunity is warranted is whether the officer had fair notice that the conduct in issue was unlawful. This is determined by the state of the law at the time of the conduct. If the law at that time did not clearly establish that the officer’s conduct would violate the Constitution, the officer is entitled to qualified immunity. In defining whether certain conduct is clearly established, the Court referenced one of its often-cited qualified immunity decisions—“that the right the official is alleged to have violated must have been ‘clearly established’ in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.”<sup>18</sup>

The ultimate issue then is whether the use of force by Officer Brosseau, if it was unconstitutional, was clearly established at the time. The Court noted that both sides in the lawsuit offered numerous examples in case law that supported their respective positions. The Court found that the disparate bodies of case law “undoubtedly show that this area is one in which the result

depends very much on the facts of each case. None of them squarely governs the case here; they do suggest that Brosseau’s actions fell in the ‘hazy border between excessive and acceptable force.’ The cases by no means clearly establish that Brosseau’s conduct violated the Fourth Amendment.”<sup>19</sup>

With this in mind, how familiar do police officers need to be with the current state of the law? As Judge Gould wrote

“

***The answer is for law enforcement managers to deal with the issue in a forthright and instructive manner.***

”

in his excellent dissenting opinion in the Ninth Circuit *Brosseau* decision, “[J]udges, unlike police officers, have the luxury of studying the constitutional issues in the calm of their chambers, with the benefit of lawyers’ briefing, and after hearing oral arguments...judges should not expect police officers to read *United States Reports* in their spare time, to study arcane constitutional law treatises, or to analyze Fourth Amendment developments with a law professor’s precision.”<sup>20</sup>

## **The Practical Impact**

*Brosseau* provides one example of a use of force by a police officer that, while constitutionally questionable, was certainly in the “sometimes hazy border between excessive and acceptable force,” and, therefore, the officer was entitled to qualified immunity. There have been numerous lawsuits evaluating law enforcement officers’ uses of force under the *Katz* “hazy border” qualified immunity mandate. As noted by the Court in *Brosseau*, the evaluation of force used by officers always is very fact specific. Predictably, because use-of-force cases are so fact specific, court decisions can vary, finding that police uses of force are inside<sup>21</sup> or outside<sup>22</sup> *Katz*’s “hazy border.” It is this inherent uniqueness to every use-of-force incident that makes it difficult to characterize particular police conduct as being clearly established. If not clearly established, then—as in *Brosseau*—the officer’s conduct is in *Katz*’s “hazy border,” requiring the court to grant qualified immunity to the officer.

## **Conclusion**

In a broader sense, the U.S. Supreme Court in *Brosseau* reminds society that it must pay great deference to law enforcement officers in use-of-force situations and that the law clearly reflects this deference.

Qualified immunity always has been available to police officers in use-of-force civil rights lawsuits. By conspicuously removing the qualified immunity question from the constitutional *Graham-Garner* inquiry in *Katz* and underscoring this as the Court did in *Brosseau*, the Court has taken the previous standard for evaluating police use of force to a new level. It has implemented what might be called a “Graham plus” standard. If the constitutional question is close—if it is in that “hazy border”—then courts must defer to the law enforcement officer and grant her qualified immunity. Simply put, only force that is clearly and plainly something no reasonable police officer could ever do violates the Constitution.

That said, law enforcement managers today often are in the unenviable situation of dealing with uses of force by their officers that, while constitutional, are politically unpalatable. As one court noted, “[t]o say that police officers have acted within the bounds that the Constitution sets is not necessarily to say that they have acted wisely.”<sup>23</sup> The challenge then becomes dealing with unwise, but legal, uses of force. This management issue is more common today because of the ubiquitous video camera, exacerbated by segments of video footage receiving significant

public exposure and being shown out of context.

The answer is for law enforcement managers to deal with the issue in a forthright and instructive manner. Managers and trainers must refrain from imposing overly restrictive policies that are unreasonably more constraining than what the law allows<sup>24</sup> or from overreacting to uses of force by their officers.<sup>25</sup>



Although allegations of police brutality are quick to get public exposure, the risks and realities American law enforcement officers face are not. On average, a law enforcement officer in the United States is feloniously slain every 5.4 days<sup>26</sup> with even greater numbers dying from accidents and still more becoming victims of aggravated assault.<sup>27</sup> While some critics ignore these realities, their comments must be kept in context.

Like the Constitution, training and policies must reflect the realities of the law

enforcement profession and support its mission of serving and protecting the public. While there always will be the vocal few who are critical of any use of force by a law enforcement officer, the large, silent public relies on the peace officer for its safety. Violence by American law enforcement officers, particularly deadly force, is rarely the answer. But, when it is the answer, it is the only answer. As George Orwell remarked, “People sleep peaceably in their beds at night only because rough men stand ready to do violence on their behalf....” ♦

#### Endnotes

<sup>1</sup> The concept of excessive force in the context of this article is synonymous with whether force creates civil liability for the officer using that force. Courts, to include the U.S. Supreme Court in its law enforcement use-of-force decisions, employ these concepts interchangeably.

<sup>2</sup> 125 S.Ct. 596 (2004). It was an 8 to 1 decision, with Justice Stevens dissenting.

<sup>3</sup> 471 U.S. 1 (1985).

<sup>4</sup> 490 U.S. 396 (1989).

<sup>5</sup> 533 U.S. 194 (2001).

<sup>6</sup> The Fourth Amendment to the Constitution of the United States.

<sup>7</sup> For an elaboration on *Graham, Garner*, and constitutional law related to police use of force, see generally the work of John C. Hall, particularly *In Defense of Self and Others... Issues, Facts & Fallacies: The Realities of Law Enforcement's Use of Deadly Force*, coauthored with Urey W. Patrick, (Durham, NC: Carolina Academic Press, 2004); Mr. Hall's extensive writings in the *FBI Law Enforcement Bulletin*; and Thomas D. Petrowski, “Use-of-Force Policies and Training: A Reasoned Approach (Parts One and Two),” *FBI Law Enforcement Bulletin*, October and November 2002.

<sup>8</sup> 102 S.Ct. 2727 (1982).

<sup>9</sup> Contested facts are to be viewed in a light most favorable to the party asserting the injury. *Katz* at 201.



<sup>10</sup> Qualified immunity is available to defendants in a §1983 and *Bivens* suit if they can show the actions in question did not violate any clearly established law of which they should have been aware at the time. The standard for qualified immunity is “government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Harlow v. Fitzgerald*, 457 U.S. 800, at 818 (1982). See also note 18.

<sup>11</sup> *Katz* at 206, internal quotations omitted, recited in *Brosseau* at 600. When the Court originally used “hazy border between excessive and acceptable force” in this context, it was quoting *Smith v. Mattox*, 127 F.3d 1416 (11th Cir. 1997) at 1419.

<sup>12</sup> *Haugen v. Brosseau*, 339 F.3d 857 (2003) (the original Ninth Circuit opinion, which was reversed by the U.S. Supreme Court) at 865.

<sup>13</sup> Wash. Rev. Code §46.61.024 (1994).

<sup>14</sup> *Id.*

<sup>15</sup> Summary judgment is brought pursuant to Federal Rule of Civil Procedure 56. It allows a court to dismiss all, or part of, a lawsuit before trial. In granting summary judgment, a court indicates that as a matter of law, no issues exist that should go to a jury.

<sup>16</sup> *Brosseau* at 598.

<sup>17</sup> *Katz* at 206.

<sup>18</sup> *Anderson v. Creighton*, 483 U.S. 635 at 640 (1987). The Court also stated in *Anderson* that “it is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present, and we have indicated that in such cases those officials—like other officials who act in ways they reasonably believe to be lawful—should not be held personally liable” (internal quotations and citations omitted).

<sup>19</sup> *Brosseau* at 600 (internal quotations and citations omitted).

<sup>20</sup> *Haugen v. Brosseau*, 339 F.3d 857 (2003) (the original Ninth Circuit opinion, which was reversed by the U.S. Supreme Court) at 886. That said, American law enforcement professionals have an obligation to maintain a consistent academic element to their training. As the Greek historian and martial philosopher Thucydides wrote in his record of the Peloponnesian Wars, “That [state] which separates its scholars from its warriors will have its thinking done by cowards, and its fighting done by fools.”

<sup>21</sup> The following are pre-*Brosseau* decisions that found uses of force by law enforcement officers to be in the “hazy border” between the

clearly excessive and the clearly acceptable, therefore entitling the officers to qualified immunity and summary judgment (the lawsuits were dismissed before trial): *Carswell v. Borough of Homestead*, 381 F.3d 235 (3rd Cir. 2004) (unarmed subject was fatally shot when, while attempting to escape, he turned and charged police officer); *Garrett v. Athens-Clarke County, Georgia*, 378 F.3d 1274 (11th Cir. 2004) (unarmed subject died of positional asphyxia while hog-tied after extended violent noncompliant arrest); *Rogers v. Gooding*, 84 Fed. Appx. 473 (6th Cir. (Tenn.) 2003) (in removing noncompliant protester from a courthouse, officer struck nonviolent protester in the neck, took him down to the ground, and dragged him out of the building by his legs); *Mace v. City of Palestine*, 333 F.3d 621 (5th Cir. 2003) (police shot, then pepper sprayed, subject after he threatened them with a sword); *Willingham v. Loughan*, 261 F.3d 1178 (11th Cir. 2001) (subject simultaneously shot by two police officers after she threw a knife at them); *Kerman v. City of New York*, 261 F.3d 229 (2nd Cir., 2001) (responding to a 911 call regarding a subject with mental health issues, police handcuffed and immobilized the noncompliant subject. Officers were qualifiedly immune for initial seizure, but not for subsequent treatment of subject. See note 22). For an example of a post-*Brosseau* decision-granting summary judgment, see *Blanford v. Sacramento County*, \_\_\_ F.3d \_\_\_, (9th Cir. 2005) (police officers shoot noncompliant subject armed with a sword attempting to enter a residence).

<sup>22</sup> The following are pre-*Brosseau* decisions that refer to the “hazy border” between clearly excessive and clearly acceptable uses of force but found law enforcement officers not entitled to summary judgment (these were not judgments in favor of the plaintiff; the lawsuits were merely allowed to proceed to trial): *Kerman v. City of New York*, 261 F.3d 229 (2nd Cir. 2001) (after taking subject into custody, officers were alleged to have tightened subject’s handcuffs to cause him pain, verbally abused him, and placed him unnecessarily in a restraint bag in a painful position); *Solomon v. Auburn Hills Police Department*, 389 F.3d 167 (6th Cir. 2004) (compliant subject, who was at a movie theater with her children, was departing theater at request of officers who then violently took her to the ground and handcuffed her, breaking subject’s arm); *Burden v. Carroll*, 108 Fed. Appx. 291 (6th Cir. (Mich.) 2004) (after officer screamed profanities and expressed national origin animus toward subject, subject replied in kind, resulting in officer striking subject); *Vinyard v. Wilson*, 311 F.3d 1340 (11th Cir. 2002) (while transporting arrested

subject in patrol car, officer, after heated mutual exchange of profanities, stopped patrol car and pepper sprayed handcuffed subject in back seat); *Clem v. Corbeau*, 284 F.3d 543 (4th Cir. 2002) (while interacting with a subject who was emotionally disturbed and had been pepper sprayed and apparently presented no threat, officer shot subject three times); *Lee v. Ferraro*, 284 F.3d 1188 (11th Cir. 2002) (during the course of a compliant arrest, officer shoved handcuffed subject’s face into her car and slammed her head onto the car trunk). For an example of a post-*Brosseau* decision denying summary judgment, see *Sample v. Bailey*, \_\_\_ F.3d \_\_\_, (6th Cir. 2005) (nonthreatening, unarmed, compliant burglar shot during arrest).

<sup>23</sup> *Bell v. Irwin*, 321 F.3d 637 (7th Cir. 2003) at 641.

<sup>24</sup> Most American law enforcement departments have numerous policies addressing many police functions that are more restrictive than applicable law, including use-of-force policies. For example, many departments forbid the use of certain techniques (e.g., carotid restraint or certain restraining procedures) or specific weapons (e.g., saps, blackjacks, knuckles, and stun guns). Other departments limit the use of deadly force to prevent the escape of dangerous subjects, even though clearly constitutionally appropriate under *Garner*. Other departments have policies that mandate elaborate use-of-force continua that serve only to instill hesitation when officers face serious threats. See Thomas D. Petrowski, “Use-of-Force Policies and Training: A Reasoned Approach (Parts One and Two),” *FBI Law Enforcement Bulletin*, October and November 2002.

<sup>25</sup> A recent example of this was the Inglewood Police Department’s handling of Officer Jeremy Morse who was fired, and his partner disciplined, for punching a teenager and slamming him against a patrol car. A few seconds of the lengthy incident were videoed and received significant national exposure. Morse and his partner, Bijan Darvish, were found not guilty of all criminal charges and in a civil suit against the department awarded \$1.6 million and offered their jobs back. See generally <http://www.cnn.com>.

<sup>26</sup> According to U.S. Department of Justice, Federal Bureau of Investigation, *Law Enforcement Officers Killed and Assaulted*, 2003, 688 law enforcement officers were feloniously slain during the 10-year period of 1994 through 2003.

<sup>27</sup> See generally U.S. Department of Justice, Federal Bureau of Investigation, *Law Enforcement Officers Killed and Assaulted*.

## The Bulletin Notes

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



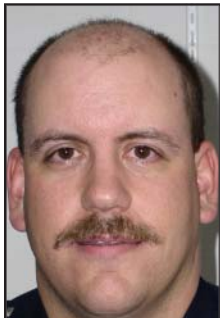
Officer McGoldrick



Officer Timlin

Officers Randolph McGoldrick and Andrew Timlin of the Brookhaven, Pennsylvania, Police Department entered a residence to serve mental health commitment papers to one of the tenants. They observed the male resident descend the stairwell while carrying a container of liquid gas. The officers told him to put the fuel down. Instead, the man ignited the gas with a lighter and threw it at them. The container landed on a sofa and started a fire, which spread quickly. The officers began fleeing the residence but, noticing the tenant did not follow them, returned to

forcibly subdue and remove him from the blaze. After taking the resident to safety, Officer McGoldrick reentered to save the only others present in the home—a dog and a cat. Subsequently, the man was sent to a crisis center and eventually was tried for his crimes. These two officers displayed professionalism and courage while saving a person who tried to harm them.



Officer Ebbighausen



Officer Roberts

One afternoon, Officers Karl Ebbighausen and Douglas Roberts of the Hartford, Vermont, Police Department responded to a report of a possible suicide at a bridge spanning a deep gorge. Upon arrival, Officers Ebbighausen and Roberts observed a female on the bridge's sidewalk. When she noticed the two officers, the woman jumped over the railing, stood on the outside edge, and threatened to jump if they came any closer. Officer Ebbighausen began speaking with her, attempting to convince her to come back to the sidewalk. After approximately 10 minutes, the woman

became completely unresponsive. Then, the two officers drew closer, and Officer Ebbighausen lunged and grabbed her just as she let go. He was able to keep her pinned to the railing until Officer Roberts helped him pull her to safety. She was transported to a local hospital for treatment. The quick, responsive actions of these two officers saved this woman from certain death.

Nominations for the *Bulletin Notes* should be based on either the rescue of one or more citizens or arrest(s) made at unusual risk to an officer's safety. Submissions should include a short write-up (maximum of 250 words), a separate photograph of each nominee, and a letter from the department's ranking officer endorsing the nomination. Submissions should be sent to the Editor, *FBI Law Enforcement Bulletin*, FBI Academy, Madison Building, Room 201, Quantico, VA 22135.



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

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

Official Business

Penalty for Private Use \$300

## Patch Call



The patch of the Vermillion, South Dakota, Police Department features Spirit Mound, part of the Lewis and Clark Trail. From the top, the explorers made their first observation of numerous herds of grazing buffalo.



Moreland Hills, Ohio, is the birthplace of the 20th president of the United States, James Garfield. Its police department's patch shows areas of the state seal, along with a representation of the log cabin where President Garfield was born in 1831.