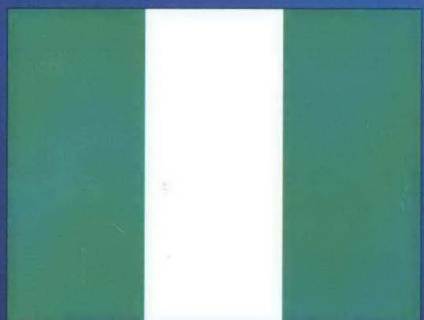
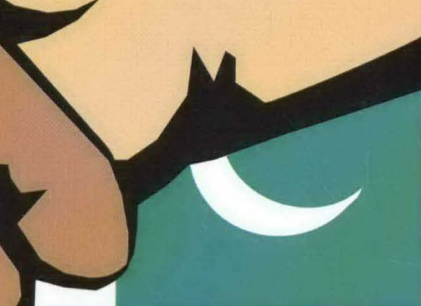
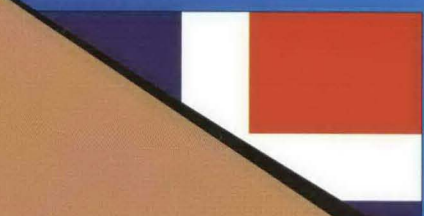




SEPTEMBER 1992

FBI Law Enforcement

B • U • L • L • E • T • I • N



Cultural Diversity

FBI Law Enforcement

B ♦ U ♦ L ♦ L ♦ E ♦ T ♦ I ♦ N

September 1992
Volume 61
Number 9



Features

Focus on Cultural Diversity

- 1** Law Enforcement in a Culturally Diverse Society
By Gary Weaver
- 10** Policing Cultural Celebrations
By Gordon E. Pitter
- 20** Foreign Languages
By Anita L. Colvard

- 16** Tamper Evident Packaging
By Jack L. Rosette
- 25** The Civil Rights Act of 1991
By John Gales Sauls

Departments

- 8** Focus on Police Pursuits
- 14** Police Practices
- 24** Book Review

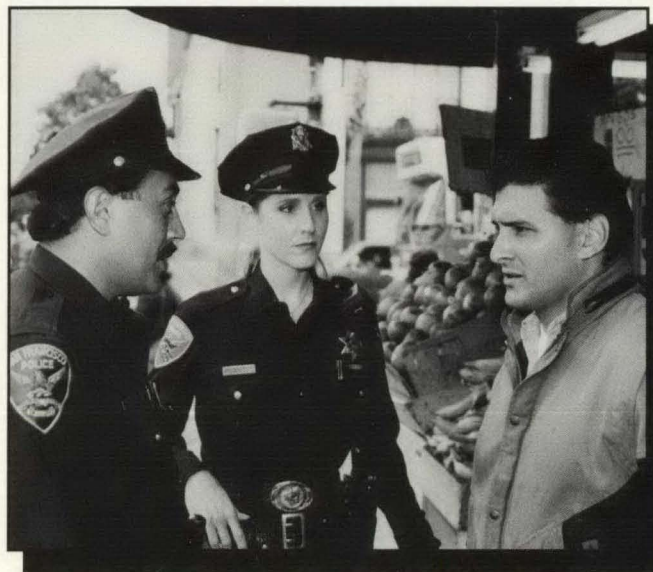
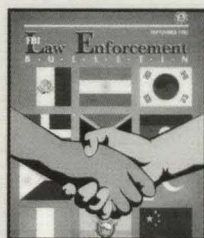


Photo courtesy of Dan Boyd



On the Cover: As the United States becomes an increasingly multicultural society, American law enforcement officers must learn to adapt to a changing world.

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

William S. Sessions, Director

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

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.

Editor—Dr. Stephen D. Gladis
Managing Editor—Kathryn E. Sulewski
Art Director—John E. Ott
Assistant Editor—Karen F. McCarron
Production Manager—Andrew DiRosa
Staff Assistant—Darlene J. Butler

The *FBI Law Enforcement Bulletin* (ISSN-0014-5688) is published monthly by the Federal Bureau of Investigation, 10th and Pennsylvania Avenue, N.W., Washington, D.C. 20535. Second-Class postage paid at Washington, D.C., and additional mailing offices. Postmaster: Send address changes to *FBI Law Enforcement Bulletin*, Federal Bureau of Investigation, Washington, D.C. 20535.



Law Enforcement in a Culturally Diverse Society

By GARY WEAVER, Ph.D.

To better serve citizens from increasingly diverse backgrounds, law enforcement officers need to understand the cultural aspects of communication and behavior. Frustrations will only mount if the criminal justice community ignores diversity or assumes that it can continue to function according to traditional expectations and norms. In short, officers need to know the dynamics of cross-cultural communications.

This article focuses on the cultural aspects of communication and behavior. It describes the basic nature of culture and then addresses the naive assumptions held by many Americans regarding cultural diversity. The article concludes with recommendations to overcome barriers to cross-cultural communication.

The Basic Nature of Culture

The complexity of culture can best be explained by comparing it to an iceberg. The tip of the iceberg represents the external or conscious part of culture—language, customs, food, etc. The portion that lies beneath the water's surface, which makes up by far the larger part of the iceberg, corresponds to the internal or subconscious aspects of culture. This includes the beliefs, thought patterns, and world views shared by all people in the same social group.¹

Furthermore, internal culture determines behavior. To realize what motivates other peoples' behavior and how they explain their

behavior, it is important to appreciate their internal culture.

When internal cultures come together, it is as if a collision occurs at the base of the two icebergs. The effects of this impact depend on the understanding that exists between the two cultures.

Naive Assumptions Regarding Cultural Diversity

While we all know that people from other cultures eat different types of food and speak different languages, we often fail to realize that they also have different values, beliefs, and thought patterns. More importantly, we seldom recognize that our own cultures also program us with a particular set of values, beliefs, and thought patterns.

People hold a number of assumptions about those from cultures other than their own. These assumptions must be examined before any consideration can be given to overcoming barriers to cross-cultural communication.

Assumption #1: As society and the workforce become more diverse, differences become less important.

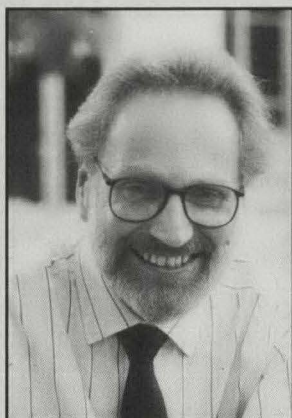
Simply mixing culturally different people together does not resolve misunderstandings and conflict. Quite the contrary. Differences usually become more apparent and hostilities can actually increase during encounters between culturally diverse individuals.²

As long as individuals surround themselves with those who share basic values, beliefs, and behaviors, culture can be taken for granted. However, when these individuals interact with people who are culturally different, they see contrasts and make comparisons. In turn, they become more aware of their own culture.

Ironically, the best way to discover one's culture is to leave it and enter another. This is especially true of internal culture. For example, the black identity movement among college students in the late 1960s did not begin on black campuses. Rather, it started when predominantly white colleges recruited large numbers of black students. When these African-American students found themselves literally surrounded by white people, they didn't become white. They simply became more aware of what it means to be black. The value and importance of their racial identities didn't diminish; they increased.

Assumption #2: "We're all the same" in the American melting pot.

The notion that "we are all the same" spins off the so-called "melting pot" myth. Granted, some truth



“
The criminal justice community needs to weave cross-cultural awareness into all aspects of law enforcement training.
”

Dr. Weaver is a professor of international and intercultural communications in The School of International Service at The American University, Washington, D.C.

lies in the idea that America is a nation of immigrants. Traditionally, people came from around the world, threw their culture into the American "melting pot," and advanced economically because of their own individual efforts. Unfortunately, this notion represents an exaggerated and romanticized truth. All cultures did not melt into the pot equally.

What many immigrants found could be described as a cultural cookie cutter—a white, male, Protestant, Anglo-Saxon mold. Those who could fit in the mold more easily advanced in the socioeconomic system. The Irish, Italians, and Poles could get rid of their accents, change their names, and blend into the dominant white community. But, African Americans, American Indians, and Latinos couldn't change the color of their skin or the texture of their hair to fit the mold. They were identifiably different.³

During the various cultural and racial identity movements of the 1960s and 1970s, people asserted their right to be different within a pluralistic society. These people continually asked, "Why couldn't individuals retain their differences and still have an equal opportunity? Why is it necessary to give up these differences to become part of the mainstream or dominant culture?" They wanted to be recognized not for fitting into the white, middle class, male mold, which people of color and women could never do, but for their differences.

Along these same lines, all cultural, racial, and gender differences do not disappear when someone dons a uniform. Even though law enforcement asserts that everyone is

the same when wearing blue, it becomes practically impossible to deny the diversity that shows itself in the ranks. What law enforcement needs to do is to accept and to manage this diversity. In the long run, this only strengthens law enforcement organizations.

“

...as society and the law enforcement workforce become more diverse, the ability to manage cultural diversity becomes essential.

”

Assumption #3: It's just a matter of communication and common sense.

At least 90 percent of the messages that people send are not communicated verbally, but by posture, facial expressions, gestures, tone of voice, etc.⁴ These nonverbal messages express and shape attitudes and feelings toward others. No one teaches their meanings in school. Rather, people subconsciously learn the meaning of nonverbal messages by growing up in a particular culture. At the same time, they assume that everyone shares these meanings. In reality, just the opposite is true.

Consider the following scenario:

A Nigerian cab driver runs a red light. An officer pulls him over in the next block, stop-

ping the patrol car at least three car lengths behind the cab. Before the police officer can exit the patrol car, the cabbie gets out of his vehicle and approaches the officer. Talking rapidly in a high-pitched voice and making wild gestures, the cab driver appears to be out of control, or so the officer believes.

As the officer steps from his car, he yells for the cab driver to stop, but the cabbie continues to walk toward the officer. When he is about 2 feet away, the officer orders the cabbie to step back and keep his hands to his sides. But the cab driver continues to babble and advance toward the officer. He does not make eye contact and appears to be talking to the ground.

Finally, the officer commands the cab driver to place his hands on the patrol vehicle and spread his feet. What began as a routine stop for a traffic violation culminates in charges of disorderly conduct and resisting arrest.

This scene typifies many of the encounters that take place daily in the United States between law enforcement and people of other cultures. A simple traffic violation escalates out of control and becomes more than a matter of communication and common sense. It represents two icebergs—different cultures—colliding with devastating results.

To understand the final outcome, we need to examine the breakdown in nonverbal communi-

cation. First, most Americans know to remain seated in their vehicles when stopped by the police. But the Nigerian exited his cab because he wanted to show respect and humility by not troubling the officer to leave his patrol car. The suspect used his own cultural rule of thumb (common sense), which conveyed a completely different message to the officer, who viewed it as a challenge to his authority.

The Nigerian then ignores the command to "step back." Most likely, this doesn't make any sense to him because, in his eyes, he is not even close to the officer. The social distance for conversation in Nigeria is much closer than in the United States. For Nigerians, it may be less than 15 inches, whereas 2 feet represents a comfortable conversation zone for Americans.

Another nonverbal communication behavior is eye contact. Anglo-Americans expect eye contact during conversation; the lack of it usually signifies deception, rudeness, defiance, or a means to end a conversation. In Nigeria, however, people often show respect and humility by averting their eyes. While the officer sees the cabbie defiantly "babbling to the ground," the Nigerian believes he is sending a message of respect and humility.

Most likely, the cab driver is not even aware of his wild gestures, high-pitched tone of voice, or rapid speech. But the officer believes him to be "out of control," "unstable," and probably, "dangerous." Had the cab driver been an Anglo-American, then the officer's reading of the cabbie's nonverbal behavior would have been correct.

One of the primary results of a breakdown in communications is a sense of being out of control; yet, in law enforcement, control and action are tantamount. Unfortunately, the need for control combined with the need to act often makes a situation worse. "Don't just stand there. Do something!" is a very Anglo-American admonition.

With the Nigerian cab driver, the officer took control using his cultural common sense when it might have been more useful to look at what was actually taking place. Of course, in ambiguous and stressful situations, people seldom take time to truly examine the motivating behaviors in terms of culture. Rather, they view what is happening in terms of their own experiences, which comes off being ethnocentric—and usually wrong.

“**Law enforcement professionals need to develop cultural empathy.**”

Law enforcement professionals need to develop *cultural empathy*. They need to put themselves in other people's cultural shoes to understand what motivates their behavior. By understanding internal cultures, they can usually explain why situations develop the way they do. And if they know their own internal cultures, they also know the reasons behind their reactions and realize why they may feel out of control.

Assumption # 4: Conflict is conflict, regardless of the culture.

During face-to-face negotiations with police at a local youth center, the leader of a gang of Mexican-American adolescents suddenly begins to make long, impassioned speeches, punctuated with gestures and threats. Other members of the group then join in by shouting words of encouragement and agreement.

A police negotiator tries to settle the group and get the negotiations back on track. This only leads to more shouting from the Chicano gang members. They then accuse the police of bad faith, deception, and an unwillingness to "really negotiate."

Believing that the negotiations are breaking down, the police negotiator begins to leave, but not before telling the leader, "We can't negotiate until you get your act together where we can deal with one spokesperson in a rational discussion about the issues and relevant facts."

At this point, a Spanish-speaking officer interrupts. He tells the police negotiator, "Negotiations aren't breaking down. They've just begun."

Among members of certain ethnic groups, inflammatory words or accelerated speech are often used for effect, not intent. Such words and gestures serve as a means to get attention and communicate feelings.

For example, during an argument, it would not be uncommon for a Mexican-American to shout to his friend, "I'm going to kill you if you do that again." In the Anglo culture, this clearly demonstrates a threat to do harm. But, in the context of the Hispanic culture, this simply conveys anger. Therefore, the Spanish word "matar" (to kill) is often used to show feelings, not intent.

In the gang scenario, the angry words merely indicated sincere emotional involvement by the gang members, not threats. But to the police negotiator, it appeared as if the gang was angry, irrational, and out of control. In reality, the emotional outburst showed that the gang members wanted to begin the negotiation process. To them, until an exchange of sincere emotional words occurred, no negotiations could take place.

Each culture presents arguments differently. For example, Anglo-Americans tend to assume that there is a short distance between an emotional, verbal expression of disagreement and a full-blown conflict. African-Americans think otherwise.⁵ For black Americans, stating a position with feeling shows sincerity. However, white Americans might interpret this as an indication of uncontrollable anger or instability, and even worse, an impending confrontation. For most blacks, threatening movements, not angry words, indicate the start of a fight. In fact, some would argue that fights don't begin when people are talking or arguing, but rather, when they stop talking.

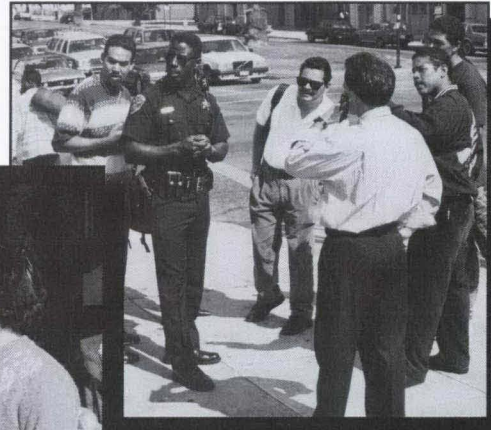
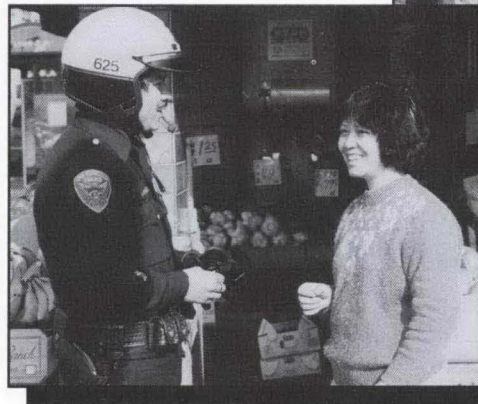
Mainstream Americans expect an argument to be stated in a factual-inductive manner.⁶ For them, facts

presented initially in a fairly unemotional way lead to a conclusion. The greater number of relevant facts at the onset, the more persuasive the argument.

African-Americans, on the other hand, tend to be more affective-intuitive. They begin with the emotional position, followed by a variety of facts somewhat poetically connected to support their conclusions. Black Americans often view the

united in a clique and on the verge of a confrontation.

Sometimes, Anglo-Americans react by withdrawing into a super-factual-inductive mode in an effort to calm things down. Unfortunately, the emphasis on facts, logical presentation, and lack of emotion often



Photos courtesy of Brenda Walker

comes off as cold, condescending, and patronizing, which further shows a disinterest in the views of others.

mainstream presentation as insincere and impersonal, while white Americans see the black presentation as irrational and too personal. Many times, arguments are lost because of differences in style, not substance. Deciding who's right and who's wrong depends on the cultural style of communication and thinking used.

Differences in argumentative styles add tension to any disagreement. As the Chicano gang leader presented his affective-intuitive argument, other gang members joined in with comments of encouragement, agreement, and support. To the police negotiator, the gang members appeared to be

Law enforcement officers should remember that racial and cultural perceptions affect attitudes and motivate behavior. In close-knit ethnic communities, avoiding loss of face or shame is often very important. Combatants find it difficult to back away or disengage from a conflict. As a result, third parties must intervene to avoid loss of face. These intermediaries must know all disputants. Their goal is to bring about compromise because everyone has to continue living together in the community.

This is exactly the role President Carter played in negotiations between Israel and Egypt. Begin and Sadat could not have signed the

Camp David Accords without President Carter being the third-party intermediary. Compromise was necessary because Israelis and Egyptians must live together in the Middle East.

In complex urban societies, there is no assumption of indirect responsibility. If a matter must be resolved by intervention, then the judge and jury must appear neutral or uninvolved. Resolution is determined by a decision of right or wrong based on the facts or merit of the case. Compromise is seldom a desired goal.

proactively develop cultural knowledge and skills fail to serve the needs of their communities. More importantly, however, they lose the opportunity to increase the effectiveness of their officers.

Unfortunately, cross-cultural training in law enforcement often occurs after an incident involving cross-cultural conflict takes place. If provided, this training can be characterized as a quick fix, a once-in-a-lifetime happening, when in reality it should be an ongoing process of developing awareness, knowledge, and skills.

At the very least, officers should know what terms are the least offensive when referring to ethnic or racial groups in their communities. For example, most Asians prefer not to be called Orientals. It is more appropriate to refer to their nationality of origin, such as Korean-American.

Likewise, very few Spanish speakers would refer to themselves

Central America. Some would rather be identified by their nationality of origin, such as Guatemalan or Salvadoran.

Many American Indians resent the term "Native American" because it was invented by the U.S. Government. They would prefer being called American Indian or known by their tribal ancestry, such as Crow, Menominee, or Winnebago.

The terms "black American" and "African American" can usually be used interchangeably. However, African American is more commonly used among younger people.

The criminal justice community needs to weave cross-cultural awareness into all aspects of law enforcement training. Law enforcement executives must realize that it is not enough to bring in a "gender" expert after someone files sexual harassment charges or a "race" expert after a racial incident occurs. Three-hour workshops on a specific topic do not solve problems. Cross-cultural issues are interrelated; they cannot be disconnected.

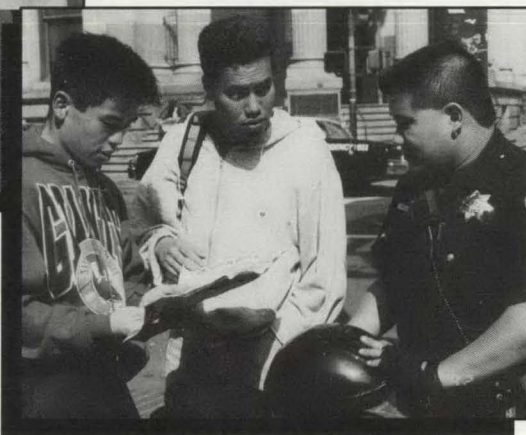
Overcoming Barriers to Cross-cultural Communication

What can the criminal justice community do to ensure a more culturally aware workforce? To begin, law enforcement professionals must *know their own culture*. Everyone needs to appreciate the impact of their individual cultures on their values and behaviors. Sometimes, the best way to gain this knowledge is by intensively interacting with those who are culturally different. However, law enforcement professionals must always bear in mind

Cross-cultural Training

Because of naive assumptions, the criminal justice community seldom views cross-cultural awareness and training as vital. Yet, as society and the law enforcement workforce become more diverse, the ability to manage cultural diversity becomes essential. Those agencies that do not

as Hispanics. Instead, the term "Chicano" is usually used by Mexican-Americans, while the term "Latino" is preferred by those from



Photos courtesy of Robert Slead and Brenda Walker

that culture, by definition, is a generalization. Cultural rules or patterns never apply to everyone in every situation.

The next step is to *learn about the different cultures found within the agency and in the community*. However, no one should rely on cultural-specific "guidebooks" or simplistic do's and don'ts lists. While such approaches to cultural awareness are tempting, they do not provide sufficient insight and are often counterproductive.

First, no guidebook can be absolutely accurate, and many cover important issues in abstract or generic terms. For example, several different nations comprise Southeast Asia. Therefore, when promoting cultural awareness, law enforcement agencies should concentrate on the nationality that is predominant within their respective communities, i.e., Vietnamese, Laotian, Cambodian, etc. At the same time, these agencies should keep in mind that cultures are complex and changing. Managing cultural diversity also means being able to adjust to the transformations that may be occurring within the ethnic community.

Second, relying on a guidebook approach can be disastrous if it does not provide the answers needed to questions arising during a crisis situation. It is much more useful to have a broad framework from which to operate when analyzing and interpreting any situation. Such a framework should focus on internal, not just external, culture. Knowing values, beliefs, behaviors, and thought patterns can only assist law enforcement when dealing with members of ethnic communities.

Law enforcement professionals should also *understand the dynamics of cross-cultural communication, adjustment, and conflict*. When communication breaks down, frustration sets in. When this happens, law enforcement reacts. This presents a very serious, and potentially dangerous, situation for officers because of the emphasis placed

“
The criminal justice community cannot afford to ignore the diversity of cultures in American society or within the profession itself.
”

on always being in control. Understanding the process of cross-cultural interaction gives a sense of control and allows for the development of coping strategies.

Finally, law enforcement should *develop cross-cultural communicative, analytical, and interpretative skills*. Awareness and knowledge are not enough. Knowing about the history and religion of a particular ethnic group does not necessarily allow a person to communicate effectively with someone from that group. The ability to communicate effectively can only be learned through experience, not by reading books or listening to lectures. At the same time, being able to analyze and interpret a conflict between people of different cultures can also only be mastered through experience.

Conclusion

Culture regulates people's behavior and thought patterns. During an encounter between individuals of different cultures, the dynamics of cross-cultural interaction comes into play. An inability to communicate on the part of those involved raises barriers that oftentimes magnify the differences and escalate the conflict.

The criminal justice community cannot afford to ignore the diversity of cultures in American society or within the profession itself. Maintaining traditional expectations and norms only serves to broaden the chasm between law enforcement agencies and the citizens whom they serve.

Police professionals need to understand the cultural aspects of communication. They also need to realize that the issue centers not on eliminating diversity, but rather on how to manage it, and more importantly, on how to learn from it. ♦

Endnotes

¹ Edward Hall, *Beyond Culture* (Garden City, New York: Doubleday), 1976.

² Nancy Adler, *International Dimensions of Organizational Behavior*, 2d ed. (Cambridge, Massachusetts: Kent Publishing, Co.), 1991; Richard Brislin, *Cross-Cultural Encounters*, (Elmsford, New York: Pergamon Press, 1981).

³ Gary Weaver, "American Identity Movements: A Cross-Cultural Confrontation," *Intellect*, March 1975, 377-380.

⁴ Albert Mehrabian, "Communication Without Words," in *Readings in Cross-Cultural Communication*, 2d ed., Gary Weaver (ed.) (Lexington, Massachusetts: Ginn Press, 1987), 84-87.

⁵ Thomas Kochman, *Black and White Styles in Conflict* (Chicago, Illinois: University of Chicago Press), 1981.

⁶ Edmund Glenn, D. Witmeyer, and K. Stevenson, "Cultural Styles of Persuasion," *International Journal of Intercultural Communication*, 1, 1977, 52-66.

Focus on Police Pursuits



The Precision Immobilization Technique

Police officers can intervene to halt a fleeing motorist. Yet, the decision to contact a violator's vehicle should be based on the totality of the facts, as related to the use of deadly force. Unfortunately, police administrators seldom address this issue unless a lawsuit is filed due to injury or death.

Experts warn agencies against forcing vehicles from the roadway, believing that there are no situations in which such actions would be justified. Yet, officers' past experiences indicate that pursuit attempts may require physical contact to prevent actions that could harm the public.

The department leaders of the Fairfax County, Virginia, Police Department recognized the importance of establishing parameters and training for intentional vehicle contact. As a result, the department trains all patrol officers and

special teams in a technique known as the precision immobilization technique.

Background

Before deciding which specific technique to use during lawful interventions, department managers analyzed previous instances of vehicle pursuits that involved contact. Guidelines pertaining to lawful intervention in Fairfax County already existed. For example, they allowed an officer, under certain circumstances, to force the vehicle of a fleeing suspect from the roadway. However, statistics revealed that violators rammed officers more frequently than officers made contact with them. It was also revealed that officers had intentionally contacted vehicles when the use of deadly force may not have been clearly defined. No one died as a result of any of these

incidents; nevertheless, police vehicles sustained extensive damage and injuries occurred.

It became evident from the research that police officers were using various techniques to halt fleeing suspects. Actual contacts needed to be practiced in a training environment to ensure that officers attempting this maneuver were doing so in a safe and educated manner. When deadly force is an issue, specific instruction on how to do the job can prevent a tragedy. Therefore, officials asked: "Is there a specific technique that should be used when striking a vehicle?"

Personnel from a German auto manufacturer explored the feasibility of controlled vehicle intervention and published the results of that project in 1982.¹ With the research conducted by the auto manufacturer, along with instruction from a private driving school, the Fairfax County Police Department developed the precision immobilization technique (PIT). The technique was then incorporated into a training program that includes discussions of deadly force, liability issues, vehicle dynamics, and driving instruction and practice.

The Precision Immobilization Technique

PIT involves a gentle push to the rear quarter panel of a fleeing suspect's car. Officers must consider the direction in which the violator's vehicle will go, once pushed. Also, the speeds at which the PIT occurs affects the distance the vehicle will travel after officers make contact.

When learning the maneuver, each trainee rides as a passenger, while an instructor demonstrates the strike. Then, the trainee practices four initial strikes—one during a left turn, one during a right turn, one while on a straight roadway striking the violator's vehicle on the left side, and one on a straight roadway striking the vehicle on the right side. This activity dispels the natural fear drivers experience when colliding with another vehicle, although this fear is somewhat ameliorated through classroom instruction that addresses the dynamics of the impact.

Next, students become passengers in the violator's vehicle. This helps them to develop an understanding of what the occupants of a pursued vehicle experience when PIT is used and shows them the technique's effectiveness.

Afterward, the trainee has another opportunity to tackle this pursuit situation, with the violator trying to avoid the patrol car. This places the trainees in a judgment situation. They must consider their location, speed, and stopping point, making certain to avoid gunfire from backup units, as well as from the suspect's car.

Safety

Three key concerns must be addressed when training for and employing the PIT—the safety of of the arresting officer, of the car, and of the suspect. When researching the technique, several areas of concern were examined, including maximum plausible speed for the maneuver, amount of damage incurred by the patrol cars, and possible loss of vehicular control.

Officers also practice avoiding PIT, because many civilians know of this technique and may use it on the officers during a pursuit. As the program evolves, testing continues to ensure that training is as complete and safe as possible.

PIT training requires the use of patrol vehicles equipped for the task. Officers who are trained in this technique operate an auto equipped with a crash cage and armor reinforcement to protect passengers, as well as the body of

“PIT involves a gentle push to the rear quarter panel of a fleeing suspect's car.”

the vehicle. These cars can safely perform several thousand immobilization maneuvers.

Since officers are also responsible for the safety of persons they are apprehending, the location of the PIT push is very important. Open areas with few obstructions are preferred. Officers learn in training that when violators' vehicles are hit, fatal injuries may result. Therefore, they must consider many complex factors before using this type of potentially deadly force.² In the liability class, officers learn and discuss many of these vital concerns.

Legal Issues

Fairfax County Police personnel contacted the county attorney concerning any legal problems that could result from PIT implementation. A precedent set in *Canton v.*

*Harris*³ established that municipalities must provide valid training in areas where officers respond to usual and recurring situations that they must handle. Failure to train in a task such as PIT could be considered as showing “deliberate indifference” to the rights of citizens who may be injured. After viewing the training exercises of the Fairfax County Police, the attorney advised that the reasonable effort to train officers in the use of PIT removed the possibility of action for failure to train.⁴

Conclusion

As a result of PIT training, officers engage in fewer vehicle contacts. Realizing the limitations and the effects of this action encourages officers to perform their jobs safely. The PIT, when done correctly, remains the safest method of immobilizing a vehicle operated by a dangerous suspect. ♦

Endnotes

¹ Researched by Daimler/Benz for *Safety is No Coincidence (Sicherheit Ist Kein Zufall)*, Germany, 1982.

² See John C. Hall, “Police Use of Deadly Force to Arrest: A Constitutional Standard (Part 1),” *FBI Law Enforcement Bulletin*, June 1988, 23; John C. Hall, “Police Use of Deadly Force to Arrest: A Constitutional Standard” (Conclusion), *FBI Law Enforcement Bulletin*, July 1988, 20; John C. Hall, “Deadly Force: The Common Law and the Constitution,” *FBI Law Enforcement Bulletin*, April 1984, 26.

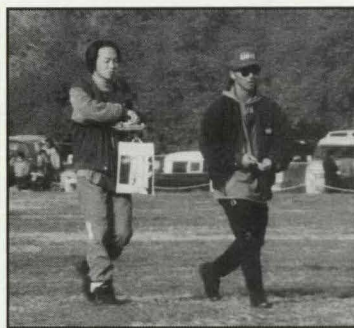
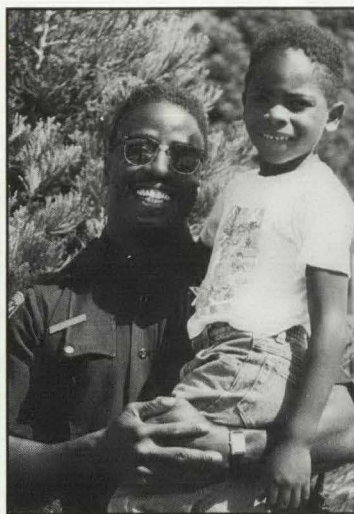
³ 109 S.Ct. 1197 (1989).

⁴ For a more complete discussion of the liability issues involved in pursuit driving, see Daniel L. Schofield, “Legal Issues in Pursuit Driving,” *FBI Law Enforcement Bulletin*, May 1988, 23.

Information for this column was provided by MPO Terry L. Pearson of the Public Safety Academy, Fairfax County, Virginia.

Policing Cultural Celebrations

By
GORDON E. PITTER, M.A.



America continues to be a primary destination for refugees from around the world. The most recent influx of immigrants to the United States arrived from Southeast Asia. In Oroville, California, Laotian refugees, consisting primarily of the Hmong, Mien, and Lao, represent the largest immigrant population.

As with other people from Southeast Asia, Laotian refugees bring with them a culture and lifestyle quite different from that of Western populations. Unfortunately, such differences can inhibit the acceptance of refugees by the

community, thereby creating disharmony and threatening the status quo.

One way communities can bridge the gap between differing cultures is to support ethnic and cultural events. The Hmong New Year celebration provided such an opportunity for the City of Oroville.

This article describes how the Oroville Police Department worked with the Hmong community to prepare for a cultural celebration. It also provides a model for how other law enforcement agencies could better prepare for similar events in their communities.

Immigration of Southeast Asians

Laotian refugees comprise approximately 25 percent of the city's 12,500 residents. Although the city has made progress toward integration since their arrival in the mid-1980s, citizens still experience some difficulty accepting these people into the community.

Unfortunately, the mistrust and contempt of government institutions that the refugees brought with them compound the problem. In addition, the Laotian community suffers from a form of cultural and family dysfunction when their young readily accept American

ways, since many of the traditional Laotian values differ significantly from those of their newly adopted society.

One tradition that the Hmong continue to celebrate is their new year, which takes place during November and December. This public celebration mixes religious expression, social interaction, and competitive sporting events. Local Hmong families coordinate the festivities and invite other family members from throughout the region to attend.

Preparing for the Event

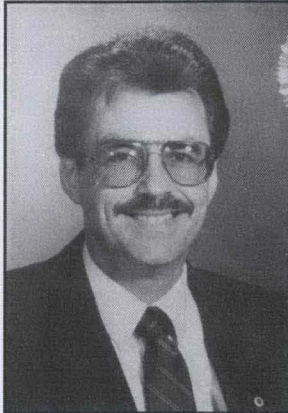
Approximately 6 weeks before the celebration, Hmong leaders requested the police department to assist with security. From the beginning, the celebration challenged the department's staff and planning skills.

The department's concerns centered on three issues. First, the department wanted to curb the possibility of violent confrontations between rival Asian street gangs. Second, it wanted to ensure the safety of all citizens in the community. And third, the department wanted to promote trust between department personnel and members of the Hmong community.

Site Location

While the department planned for security, Hmong leaders located a place in which to hold the celebration—a local middle school. They received permission to use the school only after they assured school officials that no more than 400 people would attend. Site loca-

“
One way communities can bridge the gap between differing cultures is to support ethnic and cultural events.
”



Captain Pitter is the commander of the Operations Division and Technical Services Division of the Oroville, California, Police Department.

tion alone posed a problem for law enforcement.

The site chosen borders the city/county limits, which is a predominantly black working class community that experienced difficulty adjusting to the city's growing cultural pluralism. Unfortunately, the influx of Southeast Asian refugees to the area created friction with the other ethnic groups that occupied this area for years.

In addition, directly across from the middle school is a park well-known for nightly drug activity and drive-by shootings. Because the celebration would extend into the night, and depending on the degree of pedestrian and vehicle traffic, parking in and around the park could incite territorial confrontations between ethnic groups.

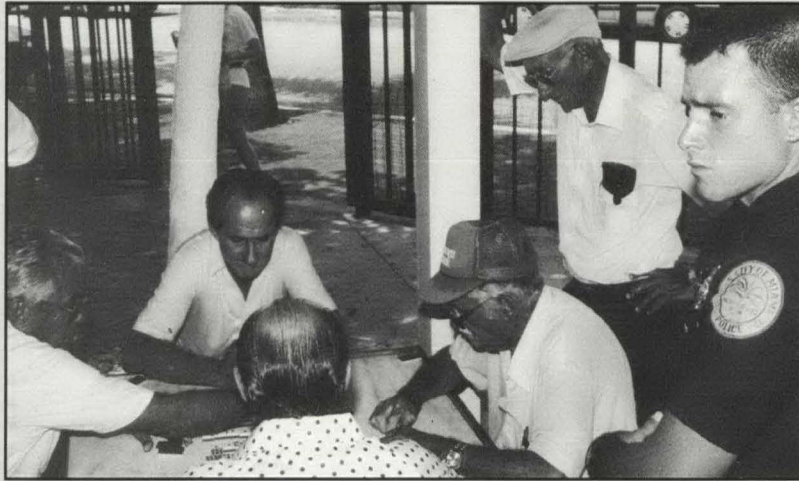
The police department addressed these concerns to black community leaders. These leaders helped to diffuse a potentially explosive situation by providing police with emergency contact numbers they could call should trouble

start to develop between rival groups.

Gathering Information

When the police department first became aware of the pending celebration, it started to gather the information necessary to manage the event successfully. To begin, department officials contacted the Yuba County Police Department, which policed a similar event the previous year. This department underestimated attendance, which strained the resources of the department. Also, during the first hour, Yuba County police confiscated over 24 guns, mostly small revolvers and automatics, from suspected gang members. This event also resulted in a gang-related homicide.

The Oroville Police Department's gang officer also received information from a local Hmong gang member that several gangs from other cities planned to attend the event. This informant stated that approximately 3,000 people should be expected, not the 400 originally



"The celebration of an ethnic event offers the opportunity for cultural awareness."

anticipated. In light of this information, the department decided to remain in constant contact with local gang members to gain information and to promote concern about the safety of the celebration's participants and other segments of the community.

Briefing

Two days before the event, the department held a briefing for officers. During the briefing, supervisors passed on intelligence information and addressed enforcement strategies, particularly regarding allocation and deployment of personnel and parking and traffic regulations. The department also invited other local public safety agencies to attend the briefing, in case their services would be needed, as well as officers from neighboring jurisdictions.

Because of the cultural differences between members of the department and the Hmong commu-

nity, the department's gang officer explained the Hmong culture to those in attendance. Officers learned of the importance of status among the Hmong and of their increased emphasis on the extended family, fatalism, harmony with nature, and interdependence.

They also learned that to show respect, they should address the eldest male or female in the group and that they should not point their fingers or cross their arms when talking. For the Hmong, pointing fingers is reserved for small children and animals, and crossing one's arms signifies that the person is bored, which the Hmong consider insulting.

At the same time, the department wanted the officers to profit from the event. It encouraged officers to participate in the activities, talk and interact with the participants, and taste the traditional food, as long as their actions didn't interfere with their duties.

Local Gangs

The information gathered regarding Asian gang movement was instrumental in dictating the department's response. The department knew that local gang members would arrive in compact cars, possibly sporting fluorescent windshield wipers and distinctive license plate frames. Medallions and certain types of decals also marked gang vehicles.

Intelligence also suggested that gang members would gather in groups of four to six and stay on the outskirts of the activities, because joining in was just "not cool." Most gang members could be identified by their dress, e.g., different colored bandannas, shoes and shoe laces, black jackets with professional sport emblems, or by their distinctive look, e.g., slicked-back hair or punk/New Wave hairstyles.

The department believed that violence could occur, but not in the form of stereotypical gang fights. Gangs would most likely retaliate later, either at the event or somewhere else in the community. Gang members might also try to conceal handguns, such as small frame revolvers and semiautomatics. Larger weapons possessed by gang members would, most likely, remain in their vehicles.

Officer Behavior

While on patrol during the celebration, department supervisors instructed both uniform and plainclothes officers to remain highly visible, to contact known gang members frequently, and to always obtain consent for voluntary

searches. Supervisors also directed officers to avoid physical contact, not to interfere with gang members' freedom of movement, and if possible, not to move them from the original point of contact unless they intended to arrest them. Additionally, officers were always to assume that gang members carried weapons.

The supervisors wanted the officers to remain assertive, but to show the gang members respect. They told officers that they should obtain any gang member's full name, not just the street moniker. And, whenever possible, officers should photograph gang members and their vehicles.

The officers' enforcement activities primarily entailed gathering information, collecting evidence, identifying suspects, and addressing criminal complaints. This allowed the optimum number of officers to remain conspicuously on the scene. Of course, the officers would act immediately if a violent crime occurred.

The Celebration

The celebration lasted 2 days—Saturday and Sunday. On the first day, approximately 2,800 persons attended the festivities; on the second day, an estimated 2,000 people joined in the celebration.

The scheduled Saturday night dance caused the most concern for law enforcement, because it posed the most opportunity for violence. For this reason, the department took extra precautionary measures by assigning additional personnel and requesting assistance from sheriff's departments to maximize

Important Tasks When Policing Cultural Events

- Talk with organizers and gang informants frequently to make them aware that the police department is prepared for the event.
- Do not rely completely on event organizers for information. Check with other law enforcement agencies that policed similar celebrations for intelligence information. Rely on law enforcement resources for planning and ensure those offering their facilities know what to expect before they authorize use.
- Advise the local health department of the celebration to ensure food concessions and restroom facilities meet local regulations.
- Legislate for an ordinance requiring that fees for public events be paid at least 30 days before the event.
- Brief officers on the group's culture. Encourage officers to partake in the activities if invited and if it does not take them away from their duties.
- Do not take enforcement action for minor offenses, thereby depleting the number of available personnel.
- Deploy officers using an inverted pyramid model, i.e., have more officers on duty as the event progresses into the late afternoon and evening hours.
- Establish a secure command site for bookings and collecting evidence.
- Debrief officers shortly after the event and share information with other law enforcement agencies that police similar populations and events.
- Manage the event by promoting respect for the culture of the event organizers.

Police Practices

the law enforcement presence at the event.

Sergeants supervised the site for the duration of the event, while captains made periodic inspections. Each new contingent of officers reporting for duty received an information sheet that covered the event, Hmong cultural mores, gangs, and authorized tactics.

The department also set up a command post for officers to use as a break area. The command post officers controlled the entrance to the school parking lot, with only one point available for entering and exiting the area. And, because of the possibility for violence away from the celebration, officers also patrolled the Hmong neighborhoods.

During the event, officers intervened in only one gang-related incident. They also received six prank 911 hang-ups originating from the school during the event. However, no visible alcohol or drug use occurred.

After the Celebration

The department subsequently contacted one of its informants to determine why this particular celebration did not experience many of the same problems that other similar celebrations had. The informant told police that the numerous contacts they made with local gang members and the Hmong community made it appear that the department was well-prepared for the event.

Another informant later told the police that presumably a gang

concealed two guns along the school fence, although this was only hearsay. In addition, a registrations check of vehicles parked around the event site verified that participants came from as far as 100 miles away.

In another instance, dealers' records of sale received by the police department showed that a local resident with a Federal firearms license sold three small semiautomatic pistols to Hmong from the Sacramento/Galt area. The Oroville Police Department relayed this information to the proper jurisdiction.

Conclusion

Throughout the celebration, the Oroville Police Department focused primarily on the safety of the people attending the Hmong New Year celebration. To do so, it depended on intelligence-based planning, which provided the key to success in policing this cultural event. The police department developed and maintained open lines of communication with the sponsoring ethnic community, gathered data from other law enforcement agencies policing similar events, and managed the event with respect for the Hmong culture.

The celebration of an ethnic event offers the opportunity for cultural awareness. It yields a wealth of information about the people, their culture, and the obstacles they face integrating into the community. For the Oroville Police Department, successfully managing the Hmong New Year celebration strengthened the department's ability to deal more effectively with cultural diversity. ♦

The Air Bag Rescue System A New Solution to an Old Problem

When the New York City Transit Police recognized a need for an emergency unit on the subway line, it formed the Emergency Medical Rescue Unit (EMRU). Initially, the unit's primary goal was to assist subway riders who became ill. However, the transit police soon realized that the unit could respond to other types of emergencies as well.

Emergency Situations

One of the most life-threatening situations results when a person becomes trapped under a train. Oftentimes, the victim is still alive and pinned under the wheels when the unit arrives. Previously, it took approximately an hour to jack up the train and free the individual, using a complicated configuration of hydraulic jacks and wood cribbing.

Administrators realized that due to advances in medical techniques, they could save many limbs and lives if a quicker and safer means of extraction existed. After research, officials decided that the air bag rescue system could best accomplish the job.

Equipment

The EMRU worked closely with both the manufacturer and the Transit Authority's Car Equipment



Section to develop an air bag that would serve its purposes. The equipment had to be economical and easy to transport, since the EMRU serviced a large metropolitan area.

The bags currently in use are constructed of steel mesh and kevlar, which makes them lightweight and durable. Each rescue truck carries a set of five bags, with lifting capacities ranging from 17 to 73 tons, a regulator and controller, and a 4,500 psi air tank. The 17-ton bag, most commonly used to extract victims, measures 15 by 21 inches and weighs 11 pounds. It can lift the wheel of a 77,000 pound subway car 5 to 6 inches off the track.

Rescue Operations

The equipment was carefully designed to allow two officers to carry it to the subway in one trip.

Where they position the air bag depends on the location of the victim, the extent of the injury, and the type of structure. Usually, however, the officers can remove the victim within minutes of arrival.

Emergency personnel also use air bags to rescue persons trapped between the platform and the subway car. Before the implementation of the air bag system, rescue personnel needed to cut away a section of the subway platform, set up a configuration of "z" bars and hydraulic jacks, and attempt to push the subway car away from

the platform. This was time consuming, as well as dangerous to the victim.

The air bag system now allows officers to simply position the bag, along with a specially designed block, next to the trapped person. The bag is inflated, and within seconds, the car can be moved and the individual extricated.

Other Uses

EMRU personnel constantly train with the air bags and always look for new ways to use them. Even though the bag primarily serves to rescue persons trapped beneath trains, it can also be used to rerail trains, remove persons from damaged vehicles, and release hands caught in machinery.

Conclusion

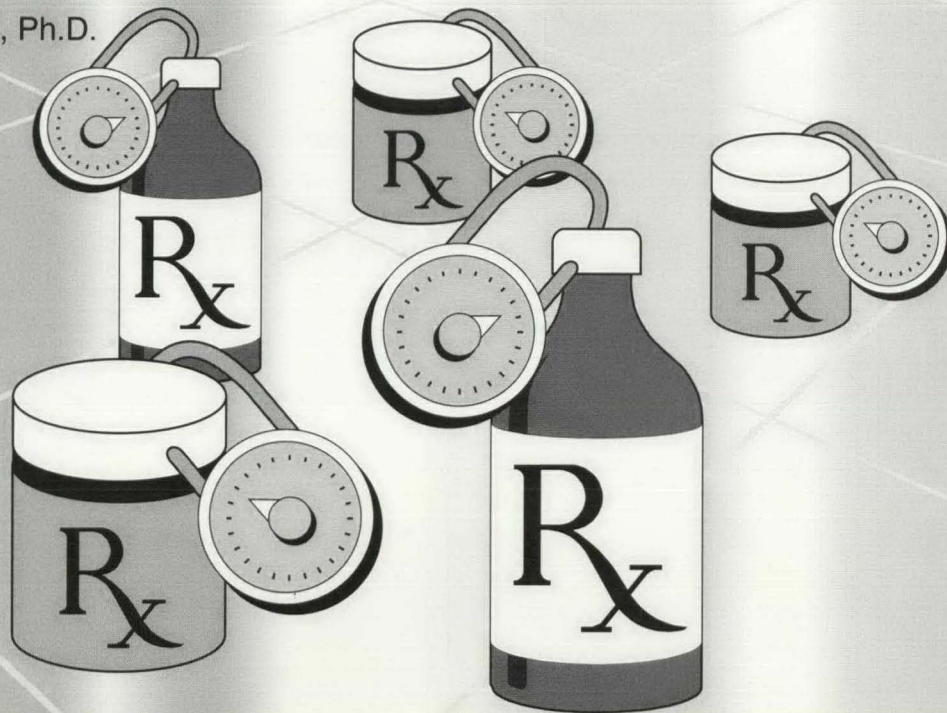
EMRU personnel save lives with the air bag. In 1991, the unit responded to 175 calls that required the use of this type of equipment. Other police agencies may wish to consider similar rescue systems to provide the fastest and most efficient emergency service for their communities. ♦

This information was submitted by Chief William J. Bratton and Officer Joelyn Barrett of the New York City Transit Police Department.

Police Practices serves as an information source for unique or noteworthy methods, techniques, or operations of law enforcement agencies. Submissions should be no more than 750 words (3 pages, double spaced and typed) and should be directed to Kathy Sulewski, Managing Editor, *FBI Law Enforcement Bulletin*, Room 7262, 10th & Pennsylvania Ave., NW, Washington, DC 20535.

Tamper Evident Packaging ***Law Enforcement and the Consumer***

By
JACK L. ROSETTE, Ph.D.



For centuries, civilizations used various forms of product packaging to store and transport food and other items. As time passed, these product packages underwent an evolution in design and material composition. For example, ancient civilizations used goatskins and earthenware to store liquids and food items. Then, as recently as the 1950s, any reference to a food package usually meant a glass, metal, or paper container. Now, the term "food container" also refers to rigid or flexible plastic packaging in which the food oftentimes can be cooked and served.

Today, however, a primary concern in packaging extends not only to storing food and other items but also to limiting access to the container's contents only to the product's final consumer. This concern grew as a result of incidents of product tampering that occurred in various products, such as over-the-counter (OTC) drugs, beverages, food products, candy, and vitamins. In fact, in recent years, every part of the United States experienced incidents of product tampering.

This article provides law enforcement with background information concerning product tamper-

ing. It also discusses its rate of occurrence in American society and the legal jurisdiction concerning product tampering cases. The article then addresses how consumers can reduce the possibility of becoming victims of product tampering.

Background

In September and October 1982, seven people died in Chicago, Illinois, after they consumed adulterated Tylenol. As a result of these incidents, the Food and Drug Administration (FDA) implemented regulations in late 1982 to require tamper-evident packaging on all OTC drugs and certain cosmetics.

These regulations became effective in 1983.¹ This marked the introduction of tamper-evident packaging to American consumers. These antitampering features, if they remain intact, assure the consumer of the product's safety.

Also in 1982, Congress passed the Federal Anti-Tampering Act (FATA).² This act authorized the FBI to investigate cases of product tampering. With the implementation of this new legislation, consumers became increasingly aware of product packaging. However, this awareness also led to an increase in the number of complaints of possible product tampering.

For instance, prior to 1982, the FDA received a total of 37 complaints of possible tampering, dating back to the early 1970s. But, by 1986, the number of possible product tampering cases reported to the FDA jumped to over 1,700, of which less than 5 percent proved to have potentially harmful effects.³ Obviously, based on these statistics, a need exists for a method to determine quickly the likelihood of possible package violations.

Is Product Tampering Widespread?

Based on the number of cases the author is familiar with, in addition to the 1,700 reported, the number of cases of possible product tampering annually is approximately 1,800.⁴ About 1,300 of these cases result from manufacturing defects, false claims, or false alarms. This leaves about 500 serious claims per year. Of these 500 complaints, case investigators confirm approximately 11 percent as product tampering.

Additionally, each year, industry produces billions of packages of food, cosmetics, and OTC products. This means that statistically, approximately one person in every 120,000 files a report concerning a case of suspected product tampering. The statistical probability of injury, of any type, from product tampering is approximately 1 in 3 million. Yet, despite this limited number of complaints, the statistics do not matter if even one person is harmed because of product tampering.

For this reason, local law enforcement agencies must be prepared to investigate such cases. Prompt, efficient response in preserving evidence is critical to ultimate success in resolving cases.

Another danger often associated with product tampering is the possibility of copycat reports. Because the media often publicizes product tampering incidents, the number of identical reports and/or

incidents can increase over widespread areas. Law enforcement agencies, however, should not automatically label these reports as copycat complaints. Someone knowledgeable of a complaint, later proved false, may actually violate the product in the same manner as the initial false call, but using a toxic substance that could injure anyone consuming the adulterated product. Therefore, law enforcement must investigate thoroughly each complaint.

Legal Jurisdiction

On the Federal level, the FBI has jurisdiction in tampering cases under Title 18, U.S. Code, sec. 1365.⁵ Title 18 defines the various classes of tampering as follows:⁶

1. *Attempt to tamper*; fine up to \$25,000, imprisonment for 10 years, or both
2. *If death results from tampering*; fine up to \$100,000,

“
Educating consumers to inspect closely all packages and the products within could drastically reduce the chance of injury from adulterated products....



”
Dr. Rosette is a consultant and a sales manager for a plastics corporation in Atlanta, Georgia.

imprisonment for any term of years or life, or both,

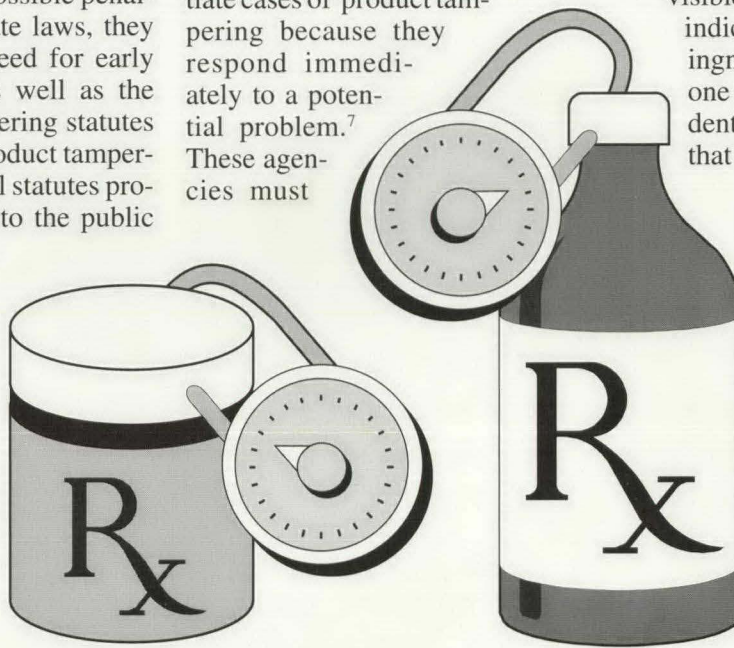
3. *If serious bodily injury to an individual results*; fine up to \$100,000, imprisonment for not more than 20 years, or both, and
4. *Any other case*; fine up to \$50,000, imprisonment not more than 10 years, or both.

Most of the cases prosecuted at the Federal level result in prison terms ranging from 18 months to life. Although these penalties do not take into account all possible penalties under various State laws, they do demonstrate the need for early local involvement, as well as the potential use of tampering statutes for cases other than product tampering. Additionally, local statutes provide more protection to the public than Federal statutes because prosecutors can combine offenses, thereby allowing for greater penalties upon conviction.

Ideally, all jurisdictions should prosecute and obtain convictions whenever possible. For example, an offender could be charged on the Federal level with product tampering (for the act of tampering), the State could also charge the individual with aggravated assault (for placing the product in a retail display), and the local jurisdiction could possibly charge the offender with filing a false police report.

However, State and Federal penalties do not deter some individuals from product tampering. Product tampering offenders are exceedingly inventive and have various motives for performing an act of product tampering. For example, some offenders may wish to have revenge against a store, product, or even a certain individual, while others may commit acts of product tampering for money or to create excitement or publicity.

State and local police departments are often in a position to initiate cases of product tampering because they respond immediately to a potential problem.⁷ These agencies must



then turn to the FBI and FDA for assistance to determine whether a specific item has actually been tampered with and whether it contains a foreign substance. Such early identification enhances the chances of apprehending the perpetrator, as well as prevents other possible inju-

ries from the consumption of adulterated products.

Product Tampering Prevention

Industry and consumers continue to demonstrate increased awareness of tamper-evident packaging. This awareness reduces the loss of life due to the consumption of adulterated products. In addition, studies into consumer preferences concerning tamper-evident packaging consistently reveal that consumers prefer tamper-evident products and want these features to be shelf-visible.⁸ These same studies also indicate the consumers' willingness to pay slightly more for one brand that is tamper-evident than for a competing brand that is not.⁹

Manufacturers of tamper-evident packaging features have also improved the effectiveness of their products. Unfortunately, most consumers tend to take tamper-evident features for granted, unless an incident of product tampering appears on the evening news. However, in reality, this trust is often misplaced. An individual may consider a stranger a possible threat

to personal safety, but think nothing of using a product where the tamper-evident feature is obviously broken or where the product appears unusual. Educating consumers to inspect closely all packages and the products within could drastically reduce the chance of injury from

adulterated products to a point where it would not be worth the offender's effort.

However, in order for tamper-evident packaging to work as intended, manufacturers, as well as consumers, must be educated. To this end, manufacturers attend annual seminars on their responsibilities and how they can improve the effectiveness of their packaging. For example, manufacturers could further improve the effectiveness of their packaging by placing pictures of the product on the label and in their advertisements. This one step could eliminate many cases of product tampering and loss of life where the consumer used a product despite its altered appearance.

The component manufacturers can make the best tamper-evident packages; the product manufacturers can set high standards for package effectiveness; and law enforcement can achieve a high rate of solving product tampering cases. But, all of this is in vain if consumers ignore the appearance of the package and/or the product they are about to consume. If consumers have concerns about the integrity of specific packages, they should alert the proper law enforcement personnel. This could lead to other actions on the part of law enforcement that would prevent expansion of the incidents.

Consumers can improve these odds by inspecting product packaging before use. If consumers detected even half of the packages that could harm them, the probability of injury could decrease to one in six million. Therefore, consumers should regularly observe pack-

ages, report those suspect, and maintain a high level of awareness of what to look for in tamper-evident packaging.

Ideally, this preventive stance should extend to others involved in package design and in the marketplace; yet, oftentimes, it does not.

“
Product tampering offenders are exceedingly inventive and have various motives for performing an act of product tampering.
”

For example, during research, the author sent questionnaires to numerous packaging engineers and others in the industry. One executive of a major tamper-evident component manufacturer did not want to participate because “it's not our responsibility to make sure they work.”

Unfortunately, industry executives were not the only ones to express such disregard for effective tamper-evident packaging. A search in retail stores for defective packages led to the discovery of several examples of defective tamper-evident packaging, indicating possible prior opening, or tamper-evident packaging that was otherwise defective. When asked about the packages, the store managers responded, “Just put it back on the shelf, and I'll have the supplier pick it up.” What if someone bought the

defective item before the supplier's next visit?

Conclusion

Since industry instituted tamper-evident packaging, injuries resulting from product tampering have declined. While this trend is encouraging, vigilance in the battle to protect consumers against the possibility of product tampering must continue.

Product tampering will not disappear. Industry must remain committed to providing consumers with quality products in tamper-evident packages, and law enforcement must continue to prosecute aggressively cases of possible product tampering. There is no such thing as “tamper proof,” and consumers should examine carefully the products they use.

Since 1982, industry and law enforcement have come a long way. Still, all parties must continue to research and develop improvements in packaging and actively prosecute product tampering cases. ♦

Endnotes

¹ *Federal Register*, vol. 42, No. 215, November 5, 1982.

² Title 18, U.S.C., Section 1365.

³ U.S. Government report courtesy of the Food and Drug Administration and the Federal Bureau of Investigation.

⁴ *Ibid.*

⁵ Title 18, U.S.C., Section 1365.

⁶ *Ibid.*

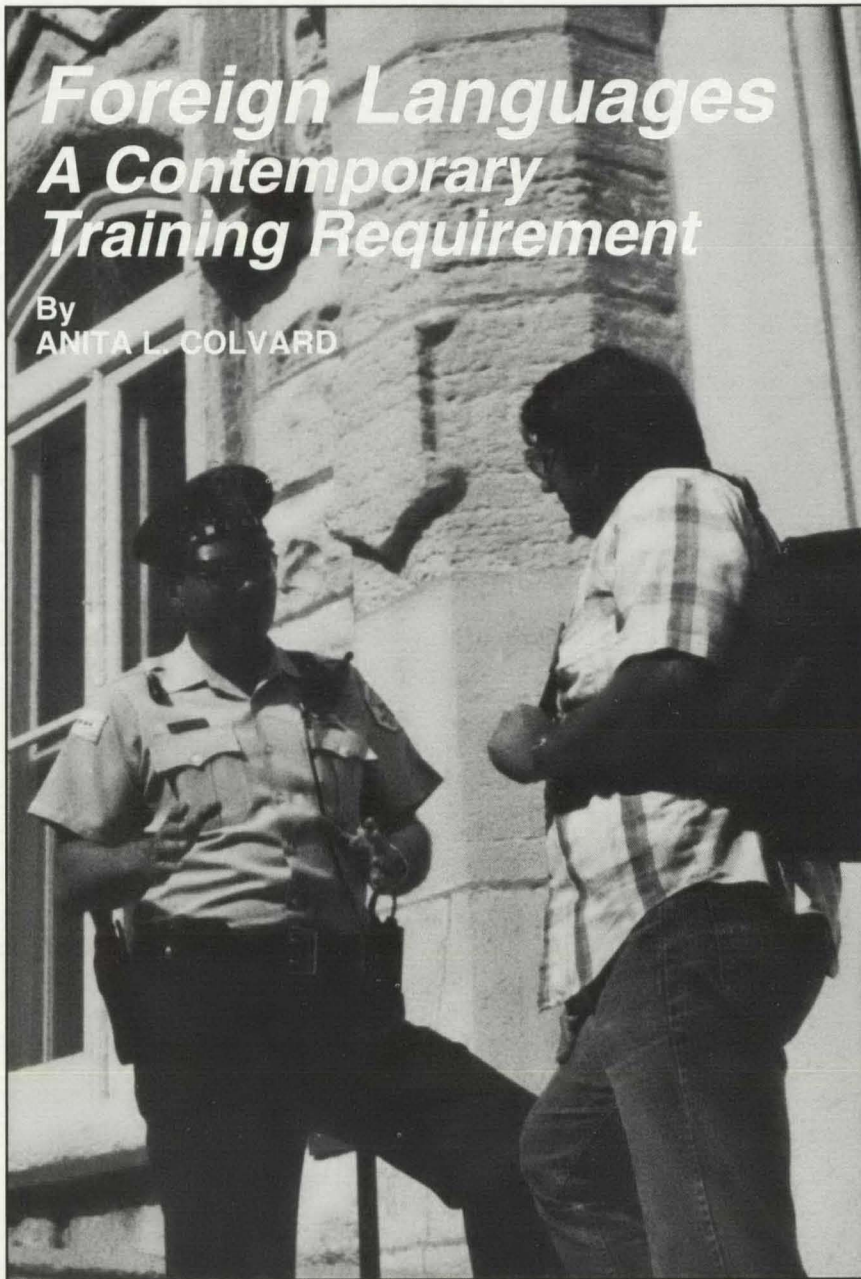
⁷ *Supra* note 3.

⁸ Greg Erickson, “Consumer Survey: Which Packages Do Consumers Like?,” *Packaging Magazine*, June 1988, 42; Mike Ligett, “Tamper Evidence in the Marketplace,” *Food and Drug Packaging Magazine*, May 1987; John Sneden, Dr. Hugh Lockhart, and Michael Richmond, “Tamper-Evident Packaging: Is it Really?” *Packaging Engineering Magazine*, June 1983.

⁹ *Ibid.*

Foreign Languages A Contemporary Training Requirement

By
ANITA L. COLVARD



Consider the following traffic stop: Officer Smith pulls over a motor vehicle occupied by four Hispanic males. She approaches the driver of the vehicle and asks for his license and vehicle registration. Not understanding English, the driver replies, "No hablo ingles." Officer Smith, who does not speak Spanish,

continues to make inquiries in English, which results in both parties becoming frustrated and excited.

The officer then motions for the driver to exit the vehicle. Within moments, the repeated attempts at communication and apparent misunderstanding between the driver and the officer lead to a confrontation in which Officer Smith sustains

injuries. The men then drive away, and a high-speed chase follows. The pursuit ends when the driver wrecks his vehicle.

This seemingly routine traffic stop results in severe consequences. The department places Officer Smith on injury leave. The innocent bystanders injured as a result of the high-speed chase bring civil action against the law enforcement agency. The occupants of the stopped vehicle suffer injuries, which lead to their hospitalization. And, two police cruisers remain out of service for an extended period of time.

Unfortunately, situations such as this will likely increase as scores of people from foreign countries continue to immigrate, both legally and illegally, to the United States. For the most part, these immigrants experience many difficulties while trying to assimilate into American society. They also pose problems for criminal justice personnel because of language barriers and cultural differences that neither group fully comprehends.

This article explains some of the reasons behind the misunderstandings and lack of communication that occur between law enforcement and the various ethnic communities. It then suggests that one way to overcome these problems is to incorporate foreign language instruction into criminal justice training programs.

REASONS FOR LACK OF COMMUNICATION

Language Barriers

The primary reason why law enforcement officers and many foreign-born residents of the United

States fail to communicate is that neither group can sufficiently comprehend the native language of the other. Often, immigrants have little or no knowledge of the English language when they come to the United States, and they experience great difficulty learning the language once they arrive.

Compounding the situation is the fact that their children often also have difficulty communicating. Since their parents do not speak English, the language of their native country is the only one they learn at home.


In the school system, these children often face isolation from fellow students, which sometimes leads to discrimination and blatant hostility. One metropolitan newspaper editorial described the taunting of Hispanic students with epitaphs of "Go Home." Students voice "what many adults not only hope but also believe—that the Central American 'problem'...will disappear, that 'these people' will go home to their [native] countries."¹

Placement of students in English-as-a-Second Language classes also isolates them from the mainstream. Although such action may be necessary, it is somewhat self-defeating in that it reinforces the segregation of these students. Also, many schools cannot afford bilingual counselors, who could help foreign-born students or those born of immigrants assimilate into the school system.

Mistrust of the Criminal Justice System

For many immigrants, the criminal justice systems in their native countries acted as puppets of the

“
...a working knowledge of ethnic languages and cultures... enhance[s] communication and understanding.
”



Deputy Colvard serves with the Loudoun County, Virginia, Sheriff's Office.

ruling political regimes. For them, "Law enforcement is feared, not respected."²

As an assistant director of the Miami Human Resources Department stated, "In a majority of countries...police officers are not seen as community servants, but as oppressors..."³ This makes it extremely difficult for these people to change their beliefs of law enforcement once they arrive in this country. As a result, they do not trust and will not cooperate with criminal justice personnel.

Fear of Deportation

Another segment of immigrants include those who fled the economic and political oppression in their countries and entered the United States illegally. These immigrants fear deportation because they see it as tantamount to a death sentence upon their return. This fear, as well as their inability to comprehend the differences between the criminal justice system of the United States and that of their native countries, augments the pos-

sibility of violence if an encounter should take place.

WHAT LAW ENFORCEMENT CAN DO

To begin, law enforcement must realize that the United States will continue to be a sought-after refuge for immigrants. In fact, by the year 2010, more than one-third of all children in the United States will be black, Hispanic, or Asian; whites of European descent will no longer be the majority.⁴

This means that law enforcement must put forth a concerted effort to ensure that officers will be able to communicate with and relate to members of ethnic communities. One way for this to occur is to incorporate training in the foreign languages and cultures into police academies.

Academy Training

The Northern Virginia Criminal Justice Academy, a regional police academy serving over 20 police departments, offers a 2-day "Survival Spanish" course for those

being trained at the facility. Enrollment is open to all sworn and civilian personnel. The course consists of verbal, visual, and practical exercises and concentrates on commonly used phrases and questions.

During the course, students learn the vocabulary needed during an encounter with a Spanish-speaking person. They learn to identify certain Spanish words and phrases, including those that might show hostile intent. At the end of the class, they receive a cassette tape of what was taught so they can continue to practice their language skills.

This regional police academy also offers a "cultural sensitivity" workshop that addresses the differences between the current mainstream culture of the United States and the cultures of both Latin America and Asia. This course covers such areas as "body space," "machismo," and "touching," among others.

Another course currently under consideration is a Spanish course designed specifically for telecommunications operators. This course would concentrate on the proper words and phrases needed to obtain the information that dispatched police units need to know when responding to calls for service.

College Courses

Many universities and colleges offer foreign language courses, which provide another avenue for law enforcement officers. While such courses are geared to the entire student population, foreign language departments may oblige local police departments by tailoring a course to meet the specific needs of

law enforcement personnel. This would include incorporating commonly used greetings, questions, and commands, as well a vocabulary needed to obtain physical descriptions or to use during traffic stops and other general enforcement situations.

**“
...law enforcement
must put forth a
concerted effort to
ensure that officers will
be able to
communicate with and
relate to members of
ethnic communities.
”**

One county police department made arrangements for a community college language instructor to come to the police department to teach Spanish to its employees. According to a police officer who attended this training session, "It's a survival tool. When one guy tells another that he's going to pull a *cuchillo* (knife) on me, I don't have to see it to know about it." The same officer then noted, "Speaking Spanish...is a positive public relations tool, reducing distrust between the Hispanic community and the police department."⁵

Those police departments that choose to work with colleges in structuring a language course should keep in mind that patrol officers are not the only ones who need language instruction. Courses should also be tailored for administrative, communications, and cor-

rections personnel. For these department members, knowledge of a language spoken by many residents of their community will help them to perform administrative, investigative, and public relations functions.

TRAINING BENEFITS

As America becomes more ethnically diverse, police training, especially in language and cultural sensitivity, becomes more critical. Training develops better police officers and lessens the chance of lawsuits brought against the department.

When officers are afforded language and cultural sensitivity training, the possibility of misunderstanding between law enforcement officers and members of an ethnic community decreases. Such training can also avert violent encounters or at least diminish the extent of violence should such a confrontation occur.

Language and cultural sensitivity training can also result in substantial cost savings for a department. Obviously, a department can save money by taking every step necessary to protect itself from litigation. It can also save the cost of acquiring translators for street encounters in which officers cannot understand what suspects are saying. In such situations, law enforcement personnel with a working knowledge of the language could serve the department just as well, or even better, than a paid translator performing the same service.

Most importantly, officers who can understand and speak a foreign language demonstrate to that ethnic community that they are committed

to serve them as best they can. People appreciate knowing that their police department is trying to communicate with them in order to better understand their wants and needs. This fosters trust and improves the department's public image in the community. In turn, the community members may be more willing to come forth with information about local crimes and problems.

CONCLUSION

Law enforcement agencies throughout the United States serve members of various ethnic communities. For this reason, police department employees should be afforded practical training in both foreign languages and cultures.

Such training averts future problems. Providing criminal justice personnel with a working knowledge of ethnic languages and cultures through academy, college, or agency training can enhance communication and understanding. It can also guard against encounters that could threaten the prospect of a peaceful coexistence. ♦

Endnotes

¹Patrick Welsh, "Our Classroom Barrios," *The Washington Post*, September 8, 1991, C1.

²Robert C. Trojanowicz and David L. Carter, "The Changing Face of America," *FBI Law Enforcement Bulletin*, 59, January 1990, 6.

³Charles R. Swanson, Leonard Territo, and Robert W. Taylor, *Police Administration: Structures, Processes and Behaviors*, 2d ed. (New York: MacMillan Publishing Co., 1988), pp. 216-218.

⁴Supra note 2.

⁵Stephanie Griffith, "A New Accent on Police Work," *The Washington Post*, March 28, 1991, p. Va. 4.

Author Guidelines

Manuscript Specifications

Length: 1,000 to 3,000 words or 5 to 12 pages double-spaced.

Format: All manuscripts should be double-spaced and typed on 8 1/2" by 11" white paper. All pages should be numbered, and three copies should be submitted for review purposes.

Publication

Basis For Judging Manuscripts: Manuscripts are judged on the following points: Factual accuracy, style and ease of reading, structure and logical flow, length, relevance to audience, and analysis of information. Favorable consideration will generally not be given to an article that has been published previously or that is being considered for publication by another magazine. Articles that are used to advertise a product or a service will be rejected.

Query Letters: The Editor suggests that authors submit a detailed one- to two-page outline before writing an article. This is intended to help authors but does not guarantee publication of the article.

Author Notification: Receipt of manuscript will be confirmed. Letters of acceptance or rejection will be sent following review. Articles accepted for publication cannot be guaranteed a publication date.

Copyright: Because the *Bulletin* is a government publication, materials published within it are not copyrighted.

Editing: The *Bulletin* reserves the right to edit all manuscripts.

Submission

Authors may contact the Special Agent police training coordinator at the nearest FBI field office for help in submitting articles, or manuscripts may be forwarded directly to: Editor, *FBI Law Enforcement Bulletin*, Federal Bureau of Investigation, Room 7262, 10th and Pennsylvania Ave., NW, Washington, DC 20535.

Book Review



Criminal Investigation: Managing for Results by John Bizzack, Autumn House Publishing, Lexington, Kentucky, 1991, (606) 272-0775.

The author of *Criminal Investigation* directs the book to individuals “assigned to and responsible for detective operations in police service,” but his audience easily extends to law enforcement planners, midmanagers, and executives. The wide range of issues discussed in the book include leadership factors, accreditation, media relations, intelligence collection, and informant matters, as well as other factors that affect criminal investigations.

The first part of the book presents a brief but informative history of criminal investigations. The second part—the heart of the book—provides a “how to” guide for small departments looking for a systematic approach to investigative work. This section also serves as a no-nonsense refresher course for larger departments that may be losing sight of the goals and objectives of criminal investigations. Here, the author explores a host of relevant issues, including supervisory responsibility, investigative problems, and staffing.

This section also provides information on screening cases, distributing caseloads, and managing for productivity and results. The author cites an important RAND Corporation study of the 1970s and strongly suggests that agencies redesign crime investigative reports to include yes/no response choices for each of the study’s 12 indicators.

The book offers alternatives to traditional police management techniques, which the author believes lack innovation. He suggests police managers devote more time studying the nature of specific crime problems. Once problems have been thoroughly analyzed, then managers should determine whether the existing solutions represent the most effective option. If not, different avenues should be explored.

The author also urges departments to consider implementing the systems approach to management. Because it tends to streamline procedures and increase cooperation between different operational entities, this approach may be instrumental in enhancing departments’ investigative capabilities.

The third part of the book addresses additional issues that affect the criminal investigative process: Leadership, drug enforcement/education strategies, corruption, and relations with prosecutors and the courts. Again, helpful reminders and creative suggestions provide readers with practical advice.

Criminal Investigation provides a practitioner’s insight into a vitally important aspect of modern law enforcement. The discussion is sometimes hard-hitting, but always thought provoking. It is well worth reading.

Reviewed by
SA Marita Malone, M.A.
Management Science Unit
FBI Academy
Quantico, Virginia

The Civil Rights Act of 1991

New Challenges for Employers

By
JOHN GALES SAULS

Suppose three law enforcement managers are making personnel decisions. One manager approves implementation of an employment standard requiring newly hired female officers to complete a 2-mile run in under 20 minutes. Newly hired male officers must complete the 2-mile run in under 18 1/2 minutes. These maximum times are based on research that indicates an equal quantum of fitness is shown by the different times for males and females because of physical differences between the sexes.

A second manager is making a promotional decision. Two equally qualified candidates, one white and one black, are competing for promotion to captain. In an effort to increase the number of minorities in the department's leadership ranks,

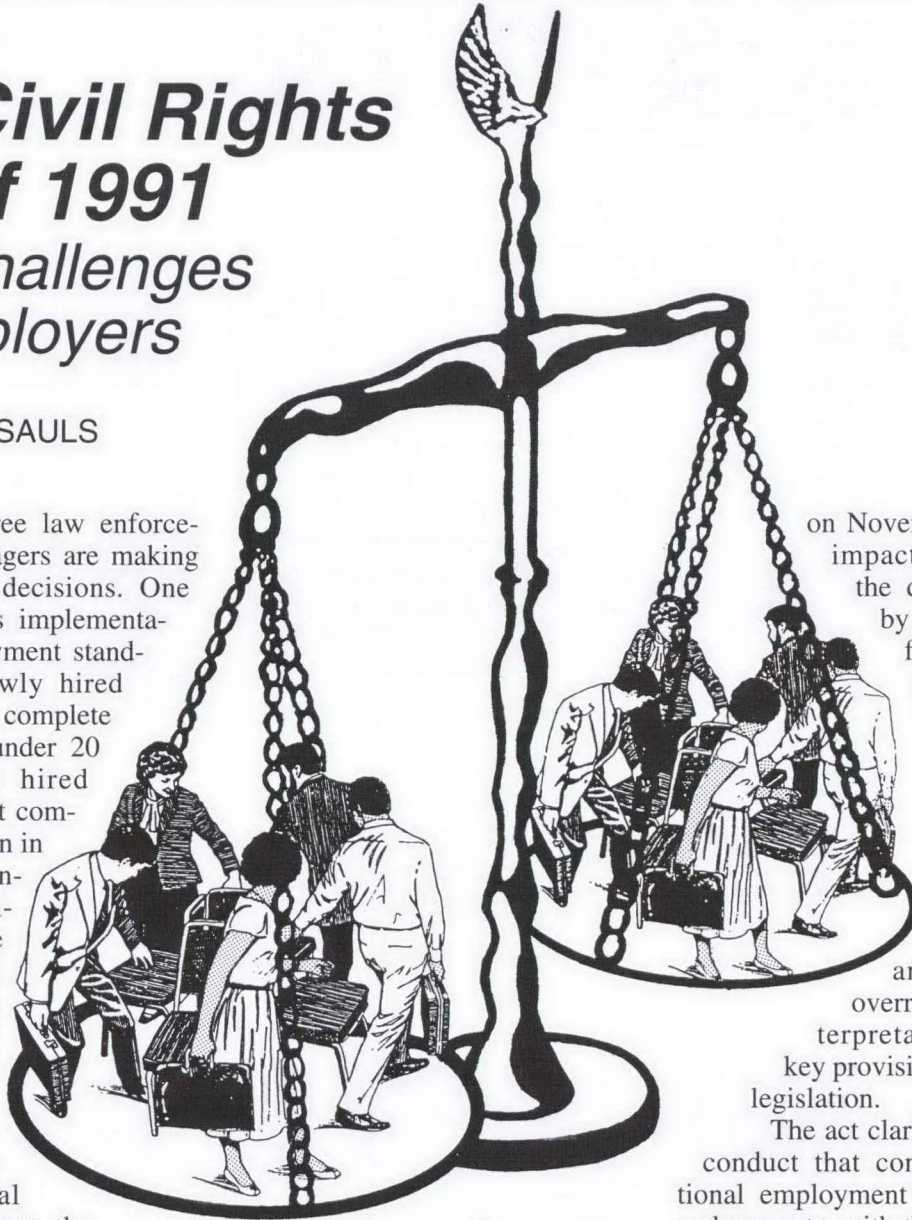
the manager chooses the black candidate.

The third manager hopes to enhance the professionalism of the department. This manager elects to adopt a college degree requirement for newly hired police officers.

The Civil Rights Act of 1991, signed into law by President Bush

on November 21, 1991, impacts on each of the decisions made by these law enforcement managers. This act amends prior employment discrimination law, primarily Title VII of the Civil Rights Act of 1964, and effectively overrules judicial interpretation of some key provisions of previous legislation.

The act clarifies the sort of conduct that constitutes intentional employment discrimination and presents, with the provision of new remedies and reallocation of burdens of proof, new challenges to employers who litigate claims of employment discrimination. This article discusses the impact of this legislation on law enforcement employers¹ and suggests steps these employers might take to



ensure compliance with the new provisions.

Consideration of Forbidden Factors

Prior to the 1991 amendments, Title VII made it unlawful for an employer "...to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin...." Nor could an employer "...limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin."² The U. S. Supreme Court described this prohibition as "...the simple but momentous announcement that sex, race, religion, and

national origin are not relevant to the selection, evaluation, or compensation of employees."³

Nonetheless, the precise impact of this announcement was a matter of dispute prior to the 1991 amendment. For example, in *Price Waterhouse v. Hopkins*,⁴ Hopkins, a former senior manager in the accounting firm, filed suit against Price Waterhouse alleging that it had, in its decision to deny her partnership, discriminated against her on the basis of her sex in violation of Title VII. Evidence presented by Hopkins showed that at the time it declined to make her a partner, Price Waterhouse had 662 partners, 7 of whom were women. Of 88 persons proposed for partnership that year, Hopkins was the sole female.

In the materials considered by Price Waterhouse in the partnership decision were a number of accolades for Hopkins indicating a considerable record of achievement as an employee of the firm. Also present were statements indicating

that Hopkins, at times, had difficulty with other staff members and was sometimes abrupt and abrasive in these relations.

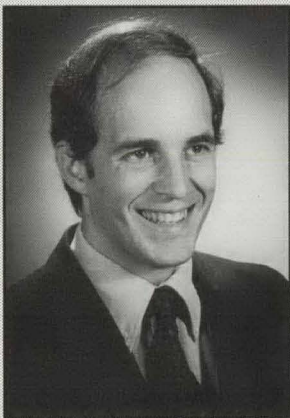
Included as well were comments indicative of sexual prejudice. One partner negatively characterized Hopkins as "macho." Another speculated that Hopkins "overcompensated for being a woman." A third suggested that she take "a course in charm school."

Furthermore, the messenger from the decisionmaking board, who told Hopkins that her candidacy had been placed on hold, made suggestions to improve her chances for future favorable consideration. Specifically, she was told to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."⁵

Hopkins also presented expert testimony from a social psychologist. This psychologist noted that based on the facts presented, sex stereotyping likely influenced the partnership process at Price Waterhouse.

In its 1989 decision, the Court held that even if Price Waterhouse improperly considered sex in its partnership decision, the firm could escape a finding of illegal discrimination. The Court stated that to do this, Price Waterhouse needed to show that it *would have* reached the same decision regarding Hopkins absent consideration of her sex.

Under the terms of the 1991 amendment, however, a *violation* is shown when an employee demonstrates that "race, color, religion, sex, or national origin was a motivating factor"⁶ in an employment



“
**The [Civil Rights] Act
of 1991...clarifies the
sort of conduct that
constitutes intentional
employment
discrimination....**
”

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

action. This eliminates the previously available defense that the employer *would have* made the same decision absent consideration of the forbidden factors.

As a result, any demonstrated consideration of the forbidden factors, combined with the selection of a person of a different race, sex, color, national origin or religion than that of the complainant, is likely sufficient to constitute proof that consideration of the forbidden criteria was "a motivating factor." The employer that demonstrates the same decision would have been reached anyway does not escape a finding of illegal discrimination; it only limits the range of relief available to the employee.⁷

To escape a finding of discrimination, an employer must assert that although it considered a forbidden factor, this consideration did not motivate the action taken. Although the burden of proof is on the plaintiff on this point, an employer proven to have considered a forbidden factor in an employment action is at a considerable legal disadvantage.

"Affirmative Action" and "BFOQ" Exceptions

The 1991 amendments did not disturb the two exceptions to Title VII's general prohibition of consideration of the forbidden factors in employment actions. These are the "bona fide occupational qualification" (BFOQ) exception, and the "affirmative action" exception. However, the use of these exceptions for law enforcement employers is limited.

The BFOQ exception allows employers to consider the "...reli-

gion, sex, or national origin [of an employee] in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of [the] particular business...."⁸ This exception is quite difficult to use in practice.

“...courts require less of a showing of 'business necessity' where public safety hangs in the balance.”

For example, in *International Union, UAW v. Johnson Controls*,⁹ the employer, a manufacturer of electric storage batteries, sought to limit the exposure to toxic lead of its female employees of childbearing age in order to prevent injury to the unborn. In assessing this intended use of the exception, the Supreme Court ruled that the business of Johnson Controls was the manufacture of batteries, not protection of the unborn, and therefore, protection of the unborn could in no way be necessary to the operation of the business.

The Court noted that "[f]ertile women, as far as appears in the record, participate in the manufacture of batteries as efficiently as anyone else. Johnson Controls' professed moral and ethical concerns about the welfare of the next generation do not suffice to establish a BFOQ of female sterility."¹⁰

Similarly, in *Fernandez v. Wynn Oil Co.*,¹¹ the employer allegedly denied a female employee an account representative position because in this position she would have to interact with businessmen native to Latin American countries. The employer believed that because of differences in culture, most Latin American businessmen would not accept a woman in the position in question. The court concluded this justification failed to place the employer within the BFOQ exception because "...stereotypic impressions of male and female roles do not qualify gender as a BFOQ. Nor does stereotyped customer preference justify a sexually discriminatory practice."¹²

It is clear that sex, religion, and national origin qualify as BFOQs only where an absence of the requirement would "...destroy the essence of the business or would create serious safety and efficacy problems."¹³ It also should be noted that race and color are specifically excluded from the exception and cannot be used lawfully as BFOQs.

A second exception that allows consideration of the forbidden criteria in employment actions is the "affirmative action" exception. Use of this exception is also strictly limited by courts and is permissible only as a necessary remedy for prior discrimination.¹⁴

An employer that has previously disadvantaged members of a particular race, religion, or sex, or persons of a particular national origin or color may extend preference to the same group in an effort to correct for past discrimination. Great care must be exercised in de-

terminating the effects of prior discrimination,¹⁵ and in crafting the preference so that it is not overbroad¹⁶ and does not unnecessarily frustrate the legitimate aspirations of those not receiving the preference.¹⁷ Employers must also establish a termination point for the preference when the effects of prior discrimination have been eliminated.¹⁸

Apparent in these decisions is the reluctance of courts to approve employers' intentional use of the forbidden criteria. Employers contemplating using either the BFOQ exception or the affirmative action exception should proceed with great caution and deliberation.

They should be mindful that the use of the forbidden criteria in employment actions for other reasons is not lawful.

"Norming" of Test Scores Prohibited

A second issue addressed by the 1991 amendment to Title VII is that of adjustment (or "norming") of scores for employment-related tests based on race, color, sex, religion, or national origin in relation to hiring or promotional selection. The 1991 amendment specifically prohibits such adjustment.¹⁹ This pro-

vision merely makes explicit what was already implicit, i.e., adjustment of test scores upon which employment actions will be taken is contrary to Title VII where the adjustment is based upon the act's forbidden factors.

This provision was likely adopted to forbid the adjustment of scores on standardized written tests to "equalize" the impact of such tests on members of minority groups. The language used, however, has a much broader impact, particularly in the arena of assessment of physical fitness in selection for law enforcement employment.

If courts interpreted the term "employment-related test" to mean a measure of individual performance, then certain assessments of physical characteristics do not fall within the definition. As such, separate scoring scales based upon sex in these assessments would continue to be lawful. Included in this category are such things as height/weight proportionality and body fat assessment. Thus, sex-adjusted height/weight charts that are routinely used for weight control arguably would not violate Title VII's new "norming" prohibition.

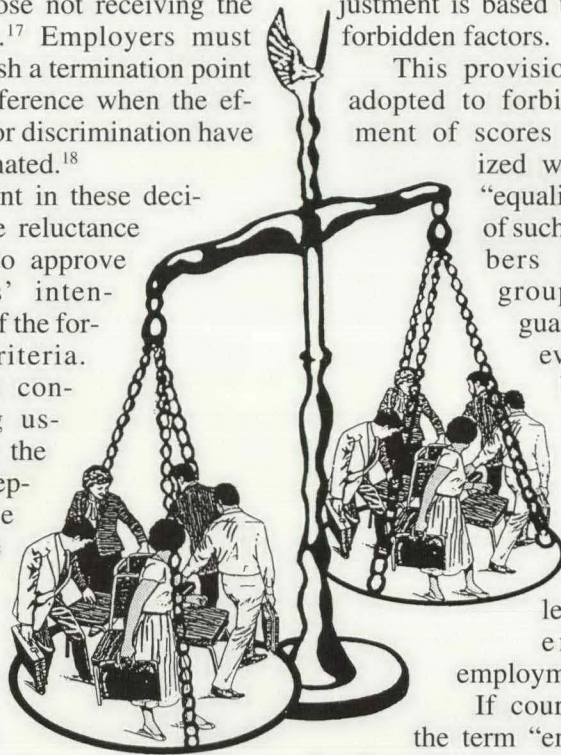
More problematic are physical performance tests, such as timed

runs and measured calisthenics, that have commonly been "normed" to equalize physiological differences between the sexes. The plain language of the amended statute prohibits this sort of well-intended equalization. Instead, it requires employers to use single physical performance standards for men and women, which may result in a disparate impact based upon sex.

Consequently, use of single physical performance standards for hiring or promotion violates Title VII if the standards have a disparate impact and do not come within the "business necessity" exception that permits standards with disparate impact. The challenges presented in attempting to demonstrate "business necessity" are discussed later in this article.

The amendment, however, does not prohibit all "normed" standards. Many employers have adopted "normed" standards pursuant to the exception to Title VII's prohibition, which allows limited preferential treatment to remedy past discrimination. Such standards continue to be lawful under the amended statute.²⁰ Section 116 of the Civil Rights Act of 1991 provides that "[n]othing in the amendments made by this title shall be construed to affect court-ordered remedies, affirmative action, or conciliation agreements, that are in accordance with the law."

"Normed" standards may also be lawfully used where they are not the basis of hiring or promotion. For example, a police department might adopt a voluntary physical fitness program where the progress of participants is assessed using sex-ad-



justed scores.²¹ Since these scores are not used to determine whether someone is hired or promoted, their "norming" is not illegal.

New Remedies for Intentional Discrimination

Before passage of the Civil Rights Act of 1991, Title VII's remedies were limited to employment matters. Its design placed the burden on employers to put the victims of illegal discrimination in the employment position they would have occupied absent the discrimination. Available remedies for victims of illegal discrimination included reinstatement, back pay, and other measures to position employees where they would have been absent the discrimination. Injunctive relief to prevent further discrimination by the employer was also available.

The amended statute retains these remedies and adds limited compensatory (and for defendants who are private employers, punitive) damages to remedy the effects of the emotional distress associated with employment discrimination. These damages are limited to \$300,000 per plaintiff for employers with 500 or more employees and lesser amounts for smaller employers.²² The statute provides a right to have such damages determined by a jury as well.²³

In addition, Title VII has always provided for payment to the prevailing party of reasonable attorneys' fees. Thus, employers who are sued and fail to prevail are required to pay the litigation expenses of the complainant. The 1991 amendments extended to judges the discretion to include fees for the services of ex-

perts within attorneys' fee awards.²⁴

This combination of compensatory damages, enhanced provision for payment of the successful plaintiff's litigation expenses, and the right to have the matter decided by a jury increases the uncertainty and potential expense of litigation under Title VII.²⁵ Consequently, employer policies that seek to avoid such litigation where practicable are even more sensible under the amended statute and should be continued. This includes proactive examination of policies relating to such matters as hiring and promotion for Title VII compliance.

“
...law enforcement employers should select physical performance tests that simulate the physical challenges of the job.
”

Burden of Proof in Disparate Impact Discrimination

It is critical that employers recognize that unless justified by business necessity, employment practices that operate to the disadvantage of groups of persons based upon race, color, sex, religion, or national origin are unlawful, regardless of the lack of an intent on the part of the employer to illegally discriminate.²⁶ This holds

true even if these employment practices are apparently unbiased on their face.

For example, a written aptitude or achievement test on which a significantly higher percentage of whites achieve passing scores than minorities is a potential instrument of illegal discrimination.²⁷ So, too, is a subjective promotional process that advances a substantially higher percentage of whites than minorities.²⁸

Claims of disparate impact discrimination are proven by statistical comparisons of either actual success rates of one group versus another or by the composition of the employee group in question versus the composition of the relevant qualified labor pool available.²⁹ The 1991 amendments place the burden of proof on the key defense to claims of disparate impact discrimination, the "business necessity" exception, on employers.

As a consequence, employers should scrutinize their employment standards to detect potential disparate impact. Where a standard with such potential is being used, the employer should assess whether the standard is required by "business necessity." Where it is not, the standard should be eliminated. If the employer retains a standard with potential disparate impact, it should be prepared to prove its necessity.

Establishing "Business Necessity" for Law Enforcement Employment

Establishing business necessity has been described as a "heavy burden"³⁰ that requires employers to prove that performance at the re-

quired level has a "manifest relationship to the employment in question."³¹ Law enforcement employers must be prepared to prove that the level of performance required on a test is *necessary* to perform the duties of the job in question safely and effectively.

In assessing a law enforcement employer's burden, three principles likely come into play. First, courts have recognized that employers making personnel decisions that have an impact on public safety need greater latitude in establishing "business necessity." Consequently, courts require less of a showing of "business necessity" where public safety hangs in the balance. In this regard, the U.S. Court of Appeals for the 10th Circuit stated:

"When a job requires a small amount of skill and training and the consequences of hiring an unqualified applicant are insignificant, the courts should examine closely any pre-employment standard or criteria which discriminated against minorities. In such a case, the employer should have a heavy burden to demonstrate to the court's satisfaction that his employment criteria are job-related. On the other hand, when the job clearly requires a high degree of skill and the economic and human risks involved in hiring an unqualified applicant are great, the employer bears a correspondingly lighter burden to show that his employment criteria are job-related."³²

Thus, law enforcement employers enjoy greater latitude in hiring police officers than clerical employees because police officers play a critical role in preserving

public safety. In this regard, one court observed:

"Unlike other work positions this Court or the Supreme Court has considered, the position of officer on the Dallas police force combines aspects of both professionalism and significant public risk and responsibility. We regard this distinction as crucial..."³³

A second "business necessity" principle is that the greater the disparate impact of a particular standard, the stronger the justification required. For example, a standard that excludes a slightly greater percentage of women than men may be lawful in the absence of any demonstration of "business necessity."³⁴ However, law enforcement standards that exclude nearly all women,

**“
Use of [the affirmative
action] exception
is...permissible only as
a necessary remedy for
prior discrimination.
”**

such as a requirement that all officers be at least 6 1/2 feet tall, would require an exhaustive showing of "business necessity" to be lawful under Title VII.³⁵

A third principle of "business necessity" contrasts standards that can be achieved versus those that are innate. The standards that may be achieved by most are more easily defended than those that focus on characteristics determined by birth or circumstance.

For example, it is much easier to defend a high school diploma requirement than one that requires applicants to be at least 6 feet tall. The high school diploma is accessible to vast multitudes if they put forth the required effort, but 6-foot stature is not a matter of desire, ability, and effort. A person can have little, if any, impact on adult stature.

Physical fitness standards frequently become a "business necessity" legal battleground for law enforcement employers. The fact that law enforcement duties require a certain level of physical fitness is beyond dispute. However, the precise amount required and appropriate means of measurement are markedly more open to dispute. In order to demonstrate successfully the "business necessity" of a physical performance standard, law enforcement employers must be prepared to demonstrate that the quantum of fitness required is necessary for successful performance in the position in question.

Law enforcement employers have failed, at times, to make such a showing successfully. For example, in *Harless v. Duck*,³⁶ the Toledo Police Department used a physical ability test to select patrol officers. In order to pass, applicants needed to complete three parts of the four-part test. The parts included 15 push-ups, 25 sit-ups, 6-foot standing broad jump, and a 25-second obstacle course. After finding that the physical ability test impacted disparately on women, the court noted that the police department showed no justification for the "types of exercises chosen or the passing marks for each exercise."³⁷

Especially instructive are the cases in which public safety entities successfully defended physical performance tests shown by plaintiffs to have a disparate impact.³⁸ It is noteworthy that the physical performance tests used in such cases consisted of performing tasks commonly encountered by individuals engaged in the type of employment in question, rather than abstract measures of particular physical abilities. For example, using a ladder climb or hose carry rather than pushups to assess the physical abilities of those applying to be firefighters would greatly increase the likelihood of successful defense.

Consequently, law enforcement employers should select physical performance tests that simulate the physical challenges of the job. For example, a short, timed run that simulates the type of sprint officers frequently engage in to apprehend suspects might be more easily defended than a timed 2-mile run, because officers would almost never be called upon to run such a distance as a part of their enforcement duties. Similarly, a test of physical strength measured using a machine that simulates the motion and strength required to handcuff a resisting suspect might be more easily defended than push-ups or pull-ups.

Summary

At the beginning of this article, three examples were set forth. In the first example, the manager sought to implement a sex-equalized physical performance test as part of the department's hiring process. Such a provision violates the 1991 Civil Rights Act prohibition of

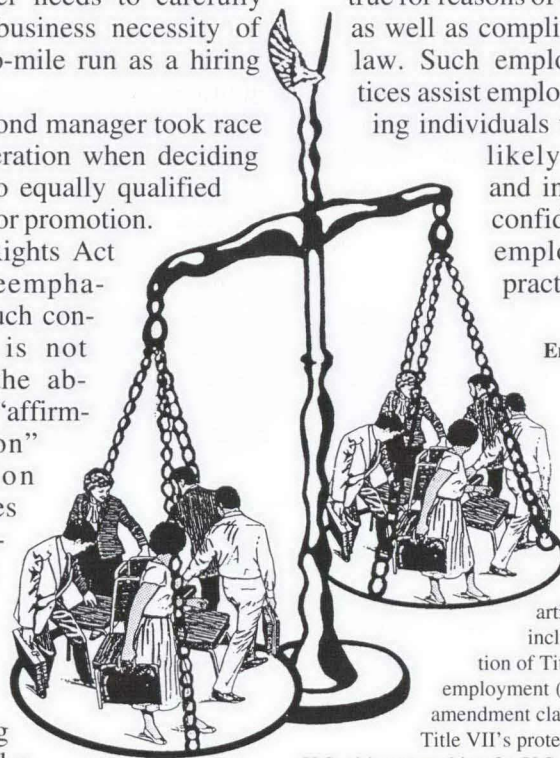
"norming" employment standards. Because a unisex standard for a timed 2-mile run could possibly have a disparate impact on women, this manager needs to carefully assess the business necessity of a timed two-mile run as a hiring standard.

The second manager took race into consideration when deciding between two equally qualified candidates for promotion. The Civil Rights Act of 1991 reemphasized that such consideration is not lawful in the absence of an "affirmative action" justification that satisfies that exception's strict requirements.

The third manager, hoping to enhance the professionalism of the department, adopted a college degree requirement for newly hired police officers. Because statistics indicate such a standard impacts disparately on certain minorities, this manager should carefully assess the business necessity of this new employment standard. A demonstrated need for well-educated, professional officers has been held to be a sufficient justification to require at least a certain number of college credits.³⁹

Employers will likely benefit from assessing all of their employment practices in light of Title VII. In doing so, they should seek prac-

tices that evaluate, in a fair and uniform way, knowledge, skills, and abilities necessary for the performance of the job in question. This is true for reasons of effectiveness, as well as compliance with the law. Such employment practices assist employers in selecting individuals who are most likely to succeed and in assuring the confidence of their employees in the practices used. ♦



Endnotes

¹ Due to limitations of space, certain provisions of the Civil Rights Act of 1991 are not discussed in the body of this article. These include: 1) Application of Title VII to overseas employment (The 1991 amendment clarifies the fact that Title VII's protections extend to

U.S. citizens working for U.S. employers in overseas operations. 42 U.S.C. 2000e(f)(1991), 42 U.S.C. 2000e-1(B)(b)(1991).); 2) filing time for suits against the U.S. Government (The 1991 amendment extends the filing time, from 30 to 90 days, for court actions under Title VII where the U.S. Government is the defendant. 42 U.S.C. 2000e-16(c)(1991).); 3) limitation on collateral attack on consent decrees (The 1991 amendment contains a provision making it futile for employees to attack collaterally consent decrees and judgments of which the employees had actual notice and an opportunity to present objections, or whose interests were adequately represented by others who challenged the decree on the same legal grounds and similar facts. 42 U.S.C. 2000e-2(n)(1)(A) *et seq.* (1991).

The 1991 amendment also revitalized section 1981 of the Civil Rights Act of 1866 (42 U.S.C. 1981) by clearly extending rights protected under that statute to discrimination

that occurs after the formation of an employment relationship. Previously, the statute had been interpreted to apply only to the formation of the employment relationship. The amendment also extends the protection of this statute to victims of nongovernmental discrimination.

The 1991 amendment also extends the time during which an employee may challenge discriminatory seniority systems. The statute of limitations will now run from the latter of the time of adoption of the system, the time the employee becomes subject to the system, or the time when the employee is actually injured by the system. 42 U.S.C. 2000e-5(e) (1991).

² 42 U.S.C. 2000e-2(a)(1991).

³ *Price Waterhouse v. Hopkins*, 109 S.Ct. 1775, 1784 (1989).

⁴ *Id.*

⁵ *Id.* at 1782.

⁶ 42 U.S.C. 2000e-2(m) (1991).

⁷ 42 U.S.C. 2000e-5(g)(B)(1991)(only declaratory relief, injunctive relief, and attorney fees and costs are available in this circumstance).

⁸ 42 U.S.C. 2000e-2(e)(1991).

⁹ 111 S.Ct. 1196 (1991).

¹⁰ *Id.* at 1207.

¹¹ 653 F.2d 1273 (9th Cir. 1981).

¹² 653 F.2d at 1276-77.

¹³ *Id.*

¹⁴ See *Johnson v. Transportation Agency, Santa Clara County*, 107 S.Ct. 1442 (1987).

¹⁵ See *Hammon v. Barry*, 826 F.2d 73 (D.C. Cir. 1987), *cert. denied*, 108 S.Ct. 2023 (1988).

¹⁶ Cf. *City of Richmond v. J.A. Croson Co.*, 109 S.Ct. 706 (1989).

¹⁷ See *Steelworkers v. Weber*, 443 U.S. 193 (1979). EEOC guidelines for voluntary affirmative action are found at 29 CFR 1608.3(b) *et seq.*

¹⁸ See *Hammon v. Barry*, 826 F.2d 73 (D.C. Cir. 1987), *cert. denied*, 108 S.Ct. 2023 (1988).

¹⁹ 42 U.S.C. 2000e-2(l)(1991).

²⁰ See *Johnson v. Transportation Agency, Santa Clara County*, 107 S.Ct. 1442 (1987).

²¹ For an excellent discussion of the legal issues associated with such programs, see Schofield, "Establishing Health and Fitness Standards: Legal Considerations," *FBI Law Enforcement Bulletin*, June 1989, 25-31.

²² 42 U.S.C. 1981a(b)(3)(1991).

²³ 42 U.S.C. 1981a(c)(1991).

²⁴ 42 U.S.C. 2000e-5(k)(1991).

²⁵ A contested issue under the amended statute is whether its provisions should be given retroactive effect, particularly the compensatory damages provisions. There is no language in the

amendment that gives its new remedies retroactive effect. The issue has been twice decided at the Circuit Court of Appeals level, both courts holding that retroactive application is not appropriate. *Vogel v. Cincinnati*, 959 F.2d 594 (6th Cir. 1992); *Fray v. Omaha World Herald Co.*, 960 F.2d 1370 (8th Cir. 1992).

²⁶ *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

²⁷ *Id.*

²⁸ See *Watson v. Fort Worth Bank and Trust*, 108 S.Ct. 2777 (1988).

²⁹ *Id.* See also, *Wards Cove Packing Co. v. Atonio*, 109 S.Ct. 2115 (1989).

³⁰ See *Chambers v. Omaha Girls Club, Inc.*, 834 F.2d 697 (8th Cir. 1987).

³¹ *Dothard v. Rawlinson*, 433 U.S. 321 (1977).

³² *Spurlock v. United Airlines*, 475 F.2d 216, 219 (10th Cir. 1972) (approving requirement of 500 hours of previous pilot experience and a college degree for airline pilot trainees).

³³ *Davis v. City of Dallas*, 777 F.2d 205, 211 (5th Cir. 1985), *cert. denied*, 476 U.S. 1116 (1985) (approving requirement of at least 45 college credits with at least a "C" average, no recent marijuana use, and no recent hazardous driving convictions for consideration in hiring police officers).

³⁴ In general, so long as the "pass rate" for the disadvantaged group is at least 80% of that of the comparison group, the disparity is not considered legally significant. See EEOC "Uniform Guidelines on Employee Selection Procedures," 29 CFR 1607.4(D)(1988).

³⁵ See *Zamlen v. City of Cleveland*, 906 F.2d 209 (6th Cir. 1990), *cert. denied*, 111 S.Ct. 1388.

³⁶ 619 F.2d 611 (6th Cir. 1980).

³⁷ *Id.* at 616.

³⁸ See *Evans v. City of Evanston*, 881 F.2d 382 (7th Cir. 1989); *Zamlen v. City of Cleveland*, 906 F.2d 209 (6th Cir. 1990); *United States v. Wichita Falls*, 704 F.Supp 709 (N.D. Tex. 1988).

³⁹ *Davis v. City of Dallas*, 777 F.2d 205 (5th Cir. 1985).

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

Wanted: Photographs



The *Bulletin* staff is always on the lookout for dynamic, law enforcement-related photos for possible publication in our magazine. We are interested in photos that visually depict the many aspects of the law enforcement profession and illustrate the numerous tasks law enforcement personnel perform.

We can use either black-and-white glossy or color prints or slides, although we prefer prints (5x7 or 8x10). Appropriate credit will be given to contributing photographers when their work appears in the magazine. We suggest that you send duplicate, not original, prints as the *Bulletin* does not accept responsibility for prints that may be damaged or lost.

Send your photographs to:

John Ott, Art Director,
FBI Law Enforcement Bulletin, J. Edgar Hoover
F.B.I. Building, 10th and
Pennsylvania Avenue, NW,
Washington DC, 20535.
Telephone (202) 324-3237.

The Bulletin Notes

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

When a passing motorist informed Ohio State Trooper William J. Abrams of a possible kidnaping, he immediately initiated a search for the vehicle used in the abduction. Trooper Abrams quickly located a van matching the description given by the witness, stopped the vehicle, and tactfully engaged the driver in casual conversation. After determining that the young girl in the passenger seat was, in fact, a kidnap victim, Trooper Abrams arrested the offender without incident, preventing a potentially dangerous situation from escalating into a tragic confrontation.



Trooper Abrams



Officer Colistro

Officer Joseph Colistro of the Astoria, Oregon, Police Department saved the life of a woman caught in the currents of the Columbia River. Officer Colistro dove into the frigid waters and kept the woman afloat while another officer directed a private pilot boat to them. Both Officer Colistro and the victim were pulled from the river and treated for hypothermia.



Deputy Matuzek

Deputy Dorothy Matuzek of the Santa Clara County, California, Sheriff's Department responded to the report of a residential fire. A neighbor informed Deputy Matuzek when she arrived on the scene that an elderly couple remained inside the house. Without hesitation, Deputy Matuzek entered the burning house, located the couple, and guided them to safety.

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

Second Class Mail
Postage and Fees Paid
Federal Bureau of Investigation
ISSN 0014-5688

Washington, D.C. 20535

Official Business
Penalty for Private Use \$300

Superintendent of Documents Subscriptions Order Form

Order Processing Code

***5079**

YES, please send me _____ subscriptions to **FBI LAW ENFORCEMENT BULLETIN**, List ID is **FBIEB**, at \$14 each per year (\$17.50 foreign).

**Charge your order.
It's easy!**



To fax your orders and inquiries—(202) 275-0019

The total cost of my order is \$_____. Prices include regular domestic postage and handling and are subject to change.

(Company or personal name) (Please type or print)

(Additional address/attention line)

(Street address)

(City, State, ZIP Code)

()

(Daytime phone including area code)

Please Choose Method of Payment:

Check payable to the Superintendent of Documents

GPO Deposit Account []-[]

VISA or MasterCard Account

[]-[]

(Credit card expiration date)

(Signature)

Thank you for your order!

12/89

Mail To: Superintendent of Documents, Government Printing Office, Washington, DC 20402-9325