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FBI Law Enforcement

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The Manageable Future

Envisioning the End State

By CHARLES S. HEAL, M.S., M.P.A.



As for the future, your task is not to foresee it, but to enable it.

—Antoine de Saint-Exupéry¹

Late in January 1994, the Los Angeles County, California, Emergency Operations Center continued recovering from the Northridge earthquake, which occurred earlier that month. Many personnel, however, began to sense that the operation was winding down. But, after an employee asked a senior commander when he wanted to resume normal operations, the commander shrugged his shoulders and laughingly replied, “When everything is back to normal.” The employee responded

immediately, “Sir, it’s *never* going to be normal.” He was right; the future had been indelibly altered. The aftershocks and aftereffects continued for months, even years—bridges down, roads impassable, traffic patterns altered, buildings condemned and boarded up, houses unlivable, and people’s lives forever changed.

But the immediate question demanded an answer. When *would* normal operations resume? A lot was at stake. The county had reassigned thousands of workers to the stricken area, and normal duties had suffered. Refugee centers, designed as temporary quarters at best, needed assistance. The transportation system, brought to a standstill, required the

establishment of alternate methods of conveyance. Workers needed to repair damaged buildings and make roads passable, or bypass them all together. Nevertheless, authorities could not accomplish all of these tasks simultaneously. Some concerns would compete with others for the same resources, causing officials to establish priorities and develop a plan. Before any planning could occur, however, the county would need to consider an “end state,” or acceptable outcome, to provide focus and direction. What would a desirable future look like? How could it be achieved?

Most people probably do not think of law enforcement officers as futurists. However, contemplating a future resolution, or end state,

constitutes a critical aspect in operational planning, particularly in responding to major disasters with their rapidly unfolding and ambiguous circumstances coupled with far-reaching consequences. To aid in grappling with such events, law enforcement administrators need to examine the fundamentals of planning and consider employing a method for envisioning an end state that combines identifying the event horizon and reviewing scenarios of possible outcomes.² These techniques provide a means for emergency managers to quickly identify the manageable future without time-consuming and labor-intensive analyses. Although designed for law enforcement officers, the method has applications for anyone tasked with responding to rapidly unfolding events.

GENESIS OF THE MANAGEABLE FUTURE

Humankind's earliest efforts to influence the future almost

certainly began with the hunt for food. Experience with prey, knowledge of the terrain, availability of weapons, and the skills of other hunters all played a part in the undertaking. The first debriefings probably existed as tales around a campfire. But, as humans continued to hone their skills in stalking quarry, the significance of critical factors became more and more apparent. Successful clans exploited the lessons that they learned and held skilled hunters in high esteem. As these groups began fighting with each other, members easily transferred the skills learned during the hunt to the defense of their clan, as well as the exploitation of weaker tribes.

This ability to work together and maximize the lessons learned served to encourage the formation of armies and government. Down through history, armies gained fame for their innovations in warfare and conquered vast areas of the world. Over time, the effort to reduce

uncertainty and apply scientific principles to achieve tactical success has grown into a large body of doctrine. From this knowledge, sound plans can evolve.

FUNDAMENTALS OF PLANNING

First and foremost, planning *always* attempts to alter the future in some manner. If the future is immutable, planning would prove pointless. For better or worse, humans would be doomed to accept their fate. But, because people *can* change the future, they expend great effort influencing those factors most likely to yield a more desirable outcome. Thus, the axiom—"all planning is future oriented"—remains a viable tenet.

In addition, the future always consists of more than one possibility. For example, one future will occur without human intervention. A second future will transpire if the intervention is effective, and still another will happen if it is not. Also, depending upon the effectiveness of the efforts, an infinite number of possibilities can occur in between. This conceptual framework provides a foundation for understanding how administrators can conceive and implement successful tactical interventions.

Because all plans are future oriented and designed to bring about a more desirable outcome, any method that makes the future more predictable becomes a valuable aid in planning. Although the future is fraught with uncertainty, this ambiguity is not distributed equally. For example, the closer an event is to the present, the more predictable its resolution becomes. By contrast,



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Because all plans are future oriented...any method that makes the future more predictable becomes a valuable aid in planning.

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the more distant an event is in the future, the more difficult it becomes to imagine the impact of intervening actions on the outcome.

Unfortunately, absolute certainty remains an impossibility. However, the more managers can reduce this ambiguity, the more reliably they can conceive and implement an effective intervention. This quest for certainty relies heavily upon a great amount of accurate and current information. However, obtaining this information has one major flaw—it takes time. Because the luxury of time does not exist in tactical operations, commanders attempting to intervene must react in one of two ways—they can either increase their information processing capacity, or they can operate on the basis of less information. Both of these approaches have merit and represent methods used by tactical units throughout the world.

To increase their information processing, agencies can add another headquarters, use faster computers, or employ more information gatherers. An organization that operates under this method, called “deterministic,”³ tends to centralize all information by funneling it upward to a central processing point where high-ranking officials make all of the decisions. Such organizations view the necessary operational skills as a science, producing highly predictable results based upon proven principles.

The opposite approach, called “probabilistic,”⁴ describes an organization that views operational skills as an art. In these types of agencies, personnel must live with abstractness and operate in an environment of extreme uncertainty.

Furthermore, managers must accept considerable risk and take bigger chances. To achieve success, this type of organization seeks out and values people noted for attributes, such as intuition, ingenuity, and initiative.

A more moderate view supports a position somewhere between these two extremes. While recognizing that they can never attain certainty, commanders still can base sound decisions on the best information available. This balanced approach advocates using scientific

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...contemplating a future resolution, or end state, constitutes a critical aspect in operational planning....

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skills to obtain and evaluate information to the maximum extent possible while recognizing that time constraints will not allow an exhaustive search for a conclusive picture. At some point, commanders will *have* to make decisions based on available information.

Regardless of the approach used, commanders must have some idea of what they wish the end state to look like to develop an effective plan. Then, they can attempt to identify those actions that will have a positive influence on the ultimate resolution and to implement them in a timely manner.⁵ Without a clear

vision of the desired end state, commanders’ directions become aimless and devoid of a cohesive strategy.

APPLICATIONS OF THE END STATE

Because the end state describes the desired result, or final outcome, of a tactical operation, it is *never* a return to the way it was before. Any situation that requires an intervention to achieve a resolution *already* has altered the future indelibly. Thus, it is impossible to return to an identical previous state. Consequently, commanders must develop a clear picture of what they will need to achieve a satisfactory end state to provide a focal point for directing efforts to attain it. Without this vision, the operation will run on its own inertia, lacking both guidance and impetus. In short, the operation becomes an “end in itself,” neither efficient nor effective.

However, inasmuch as the end state may occur hours, days, weeks, or even months into the future, commanders cannot obtain a totally clear vision of the final resolution. Although a certain amount of vagueness and ambiguity always will exist, commanders can reduce it by limiting the possibilities to a range of likely outcomes. The more precisely they define this range, the more they can focus their efforts to achieve a favorable future. This has momentous implications for strategic planning.

For tactical situations, defining a future can involve two discrete steps. These include identifying the event horizon and reviewing scenarios to eliminate the most unlikely possibilities.

Identify the Event Horizon

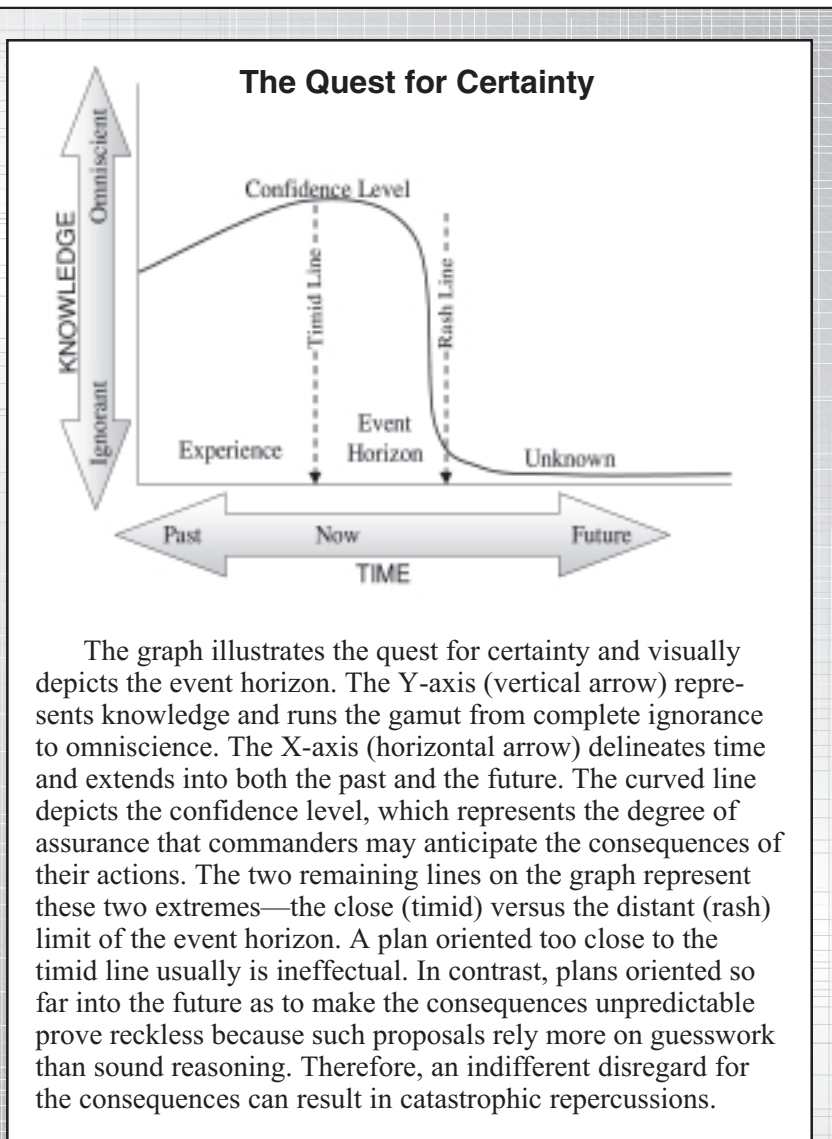
The event horizon describes that portion of the future in which administrators reasonably can anticipate the consequences of their actions. This represents the part of the future where managers most likely can succeed in shaping a desirable outcome. It constitutes a

valuable planning aid because it guides commanders to integrate their decisions and actions into a viable strategy.

Because the consequences of actions are relative, so too is the event horizon. Commanders must anticipate some actions, of necessity, relatively close to the present,

while others may have far-reaching effects. Generally, higher ranking officials need to orient the event horizon farther into the future. For example, in a tactical operation, a sergeant most likely would be concerned with the detailed deployment of subordinate officers and their immediate well-being, while a lieutenant may be considering rest periods or shift changes that would occur 12 or more hours into the future. In the same fashion, a captain probably would be contemplating actions that will ensure the eventual success of the operation several days into the future, whereas the chief of police may be looking at ways to enhance the abilities of the department for similar operations in the months and years to come. All of these sets of decisions have their own criteria and a different event horizon, which provides a means of identifying that portion of the future commanders realistically can influence and so becomes a foundation for planning.

Commanders never remain completely ignorant nor become all knowing; rather, their level of confidence gradually increases the closer it approaches the present. Factors, such as memory lapse and incomplete information, always make the past somewhat less sure and the future never completely reliable. In fact, commanders never will be more sure of a decision than at the moment they make it; thus, the level of confidence always is highest at the present. After commanders make a decision, their level of confidence begins to drop sharply because they, like everyone, cannot determine precisely what the future holds. Eventually,



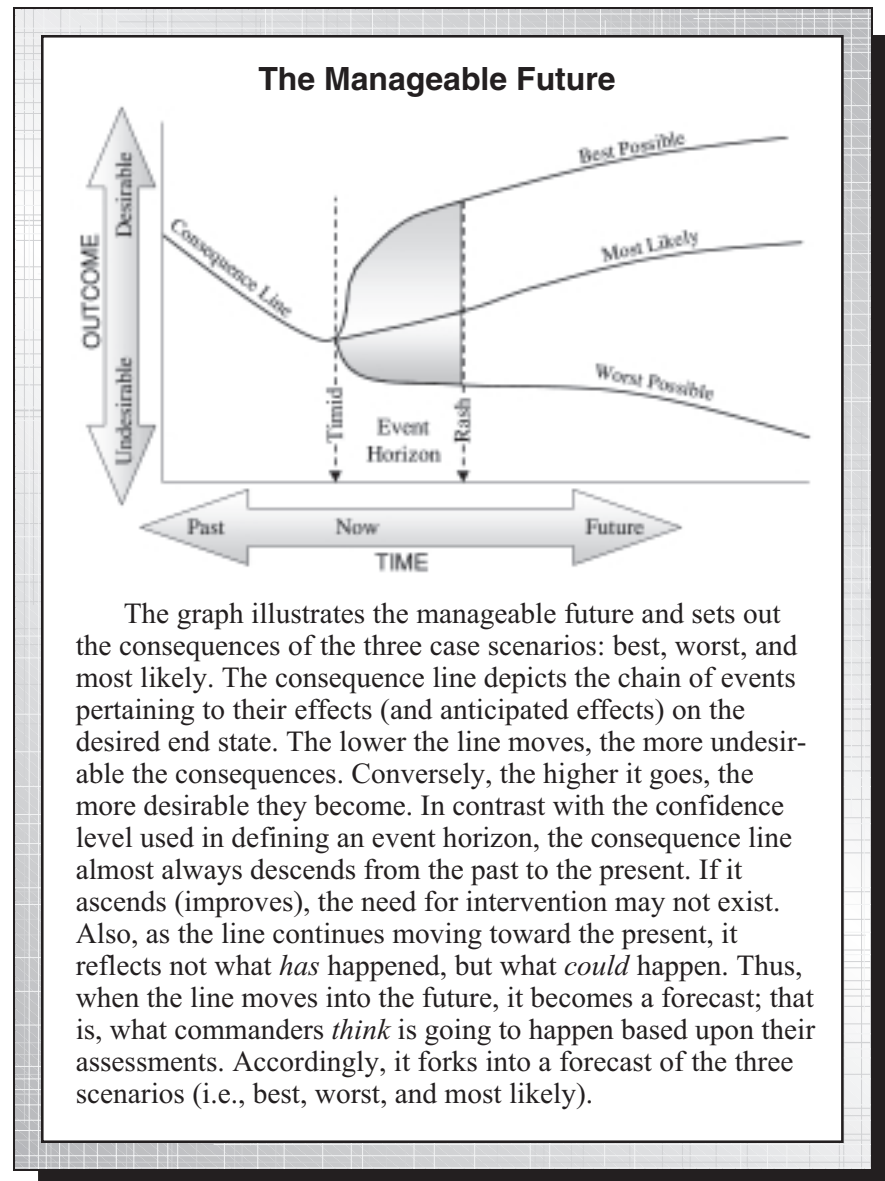
commanders reach a point where they can no longer reasonably anticipate the impact of their decisions, and their level of confidence drops dramatically. This defines the farther limit of the event horizon.

However, the closer commanders orient their decisions to the present, the less efficiently they generally can achieve their ultimate objective. These lackluster actions often result from overcautious and anxious commanders and usually are not bold enough to alter the future sufficiently to achieve a successful resolution. Commanders who fail to implement actions to achieve their end state surrender the initiative and remain in a reactionary posture. This results in the situation being “driven by events.”⁶

Review Possible Scenarios

Besides identifying the event horizon, commanders can refine the future further by eliminating those possibilities so remote that they do not merit serious consideration. This constitutes the second step in the process of envisioning an end state and involves a scenario review. A scenario simply is an outline, or model, of a set of expected, or supposed, sequence of events. Commanders take the premises that support a scenario from the situation at hand. In turn, these suppositions will provide some idea of the best, worst, and most likely things that can happen.

When considering everything that *could* happen, the best-case scenario defines the absolute upper limit, if everything proceeds well. This scenario takes all factors into account and assumes effective actions and favorable influences. It



provides the upper limit of the potentialities, but stops short of the miraculous. On the other hand, the worst-case scenario represents the absolute lower limit and describes the worst possible outcome. Like the other, this scenario takes all factors into account, but assumes that actions will prove minimally effective and unfavorable influences will exist. It provides the lower limit of the potentialities, but

stops short of unreasonable, catastrophic consequences. The third type of scenario describes the outcome that, based upon all known factors, is most likely to occur. This scenario always lies somewhere between the best- and worst-case scenarios. Not surprisingly, the farther away from the most likely scenario a plan is oriented, the more unpredictable its outcome. Commanders use the most likely

scenario primarily to provide direction and focus to their efforts while not ignoring the best- and worst-case possibilities.

When commanders use the scenario review process in conjunction with the event horizon, they readily can see that the manageable future lies between the present and the event horizon and the best- and worst-case scenarios. The most likely course of events lies closest to the present and along the most likely scenario line.

CONCLUSION

Catastrophes create grave problems for public safety agencies. Administrators face the unenviable task of reacting to disasters not only with an eye toward the immediate needs of the situation, but with the knowledge that the consequences of their actions can impact future events for good or ill. To help them

handle such life-altering incidents, managers can employ a method that allows them to envision a desirable future, or end state, and implement strategies to achieve a favorable resolution.

By understanding that the indefinable future is not quite so uncertain, administrators can begin to collect the information that will enable them to forecast an acceptable outcome to the situation. Then, by looking at a variety of possibilities, from best- to worst-case scenarios, managers can plan their courses of action with greater certainty of success. In turn, they will create a manageable, and more desirable, future for themselves and the citizens they serve. ♦

Endnotes

¹ Antoine de Saint-Exupéry, *The Wisdom of the Sands*, trans. Stuart Gilbert (New York, NY: Harcourt, Brace and Company, 1948), 50.

² The author learned about the event horizon from the U.S. Marine Corps and helped develop the concept for his department. He discovered the scenario review technique while attending the Command College, Center for Leadership Development, California Commission on Peace Officers Standards and Training and based this article on a document he composed for training supervisors and managers assigned to handle major disasters and other emergency situations.

³ A theory or doctrine that acts of the will, occurrences in nature, or social or psychological phenomena are causally determined by preceding events or natural laws; *Merriam-Webster's Collegiate Dictionary*, 10th ed. (1996), s.v. "determinism."

⁴ A theory that in disputed moral questions any solidly probable course of action may be followed even though an opposed course is or appears more probable; *Merriam-Webster's Collegiate Dictionary*, 10th ed. (1996), s.v. "probabilism."

⁵ Conversely, it may be just as effective to inhibit negative influences to avoid their consequences.

⁶ "Driven by events" is a term that describes a condition in which the organization is responding or reacting to events, rather than managing them.

Bulletin Alert



Hidden Compartment

During a drug investigation, special agents of the FBI's Cleveland Office uncovered a hidden compartment in the passenger seat headrest of a suspect's automobile. The compartment was designed to hide a brick of cocaine.

*Submitted by Special Agent Robert Hawk
of the FBI's Cleveland Field Office.*

License to Steal—How Fraud Bleeds America's Health Care System, updated edition by Dr. Malcolm K. Sparrow, Westview Press, Boulder, Colorado, 2000.

Few crime problems in the United States have grown as rapidly and extensively as health care fraud. In 1999, federal health care fraud efforts produced a 16 percent increase in criminal indictments, 396 convictions, 2,278 civil matters pending, and \$524 million obtained from judgments, settlements, and administrative proceedings. With such alarming statistics in mind, Dr. Malcolm Sparrow's updated book, *License to Steal—How Fraud Bleeds America's Health Care System*, stands as a comprehensive, analytical, illustrative, and useful tool not only for investigators, but also for anyone even remotely connected to this issue.

Dr. Sparrow begins by contrasting and comparing the perspectives of the insurance industry, government, and consumers. He describes the insurance industry as an attractive target of fraud, or socially acceptable victim, which correctly reflects attitudes of many of the insured (i.e., customers), as well as that of the insurance criminal. This is especially true for government insurance programs. His evidence points to one Medicare contractor claims official who said, "it's not our money...just government money passing through." That same official went on to say, "you know the cheapest way to process a claim? Pay it without question." Dr. Sparrow further illustrates this failed approach to safeguarding health care dollars with the quote of one industry official who stated that the approach in fighting health care fraud to date has been "to pay and chase." He also cites a 1998 study of actions taken by medical licensing boards against corrupt practitioners, which showed that 57 percent had no action taken against them and, more astonishing, 82 percent retained their licenses as

practitioners. This clearly reflects a tolerant and indifferent attitude.

He then describes, in great detail, how controls to date have failed. This is followed by a chapter that describes the tremendous federal effort during the 1990s to combat health care fraud and the industry's response.

As a main attribute, this book offers a detailed proposed solution to the problem that Dr. Sparrow terms, "A Model Fraud-Control Strategy." However, having concluded that health care fraud remains uncontrolled, he maintains that two essential things must happen before this model strategy can become a reality. First, the industry, government, and the public must understand the complexity of the fraud control challenge. And, second, they must learn the true extent of the crime problem through a commitment to systematic measurement. In describing this model strategy, the author illustrates just how different the model is from the current practice in both the private and public sector.

Dr. Sparrow's credentials and perspective also add to the validity of the information he provides. A former detective chief inspector with the British police service, he currently teaches regulatory and enforcement strategy and analytical methods at Harvard's John F. Kennedy School of Government. He also specializes in risk control and is the acknowledged national expert on the subject of health care fraud. With this background and perspective, he has employed some of the most knowledgeable and cooperative sources of information, from both the private and public sector, in his research and provides a comprehensive explanation of the nature of this complex problem.

Reviewed by
Special Agent James A. Robertson
Investigative Training Unit
FBI Academy



The Impact of Community Growth on the Staffing and Structure of a Midsized Police Department

By Mike Maloney, B.A., and Leonard Moty, M.B.A.

Many law enforcement agencies have experienced significant staffing changes in conjunction with increased community growth over the last two decades.¹ In fact, some California cities currently face a crisis in their efforts to provide law enforcement services to their communities because of the high demand for thousands of new police officers needed to serve a constantly growing population.² Substantial future growth may impact many law enforcement agencies throughout the nation.

Predictably, when agencies focus on the future, questions will arise, such as what new forms of organization they must create and how they should deploy their forces.³ To address these questions, the authors conducted a futures-oriented project under the auspices of the Commission on Peace Officer Standards and Training Command College. Although the authors recognized that a number of issues can affect community growth and that this growth can influence a number of community issues, they limited the scope of the project to the impact of increased community growth on the organizational structure and staffing

resources of a midsized municipal police department. However, their findings may help law enforcement administrators in agencies of any size face similar challenges.

THE PROJECT

The authors created a hypothetical model, named “Central City,” for their project. They based this model on the Chico, California, Police Department where the population has increased an average of nearly 4 percent for each of the last 20 years and where analysts predict continued major growth, primarily through annexation, for the next few years.⁴ Additionally, researchers included certain aspects of the city of Redding, California, and its police department in the model. The cities of Redding and Chico lie in close proximity to each other, and both cities and police departments have experienced substantial growth over the last 25 years.

The project included an examination of the issue through a review of the literature and interviews with subject-matter experts. Literature reviewed included

statistical employment data that helped identify municipal police departments in California that experienced substantial growth in short periods of time. The review of the literature also incorporated data related to police department staffing levels on the state and national levels, local data that provided a historical perspective on population and police department staffing, sources that discussed future issues in policing, and sources that related to future aspects of the business organizations in general.

Interviews with subject-matter experts included discussions with representatives of law enforcement agencies that experienced significant growth, as well as two city administrators. The researchers also used a futures-forecasting exercise to predict trends and events that could impact the issue.

Based upon a cumulation of the information examined, the researchers developed three scenarios, each reflective of a possible future, and chose one as the most probable. This scenario became the focus for developing a strategic plan.

THE LITERATURE

Research consistently found that organizations of the future, including police departments, will look flat, lean, flexible, and decentralized, with responsibility and accountability pushed to the lowest levels.⁵ In addition to the continued existence of dedicated patrol officers, departments still will need specialized assignments to address unique or time-consuming police problems.⁶ The integration of the community-oriented policing/problem solving (COPPS) philosophy into the way police departments conduct business will enhance the overall efficiency of services provided and promote community support of law enforcement, but agencies will still need to engage in planning efforts to meet their staffing needs.⁷

Population growth remains one issue that may affect staffing needs for police departments.⁸ An increase in population will result in additional calls for service, which will result in a need for additional

police personnel.⁹ The degree to which a police agency integrates technology into their organization can affect staffing levels as well. Technology either can assist in making an organization's staffing levels leaner and flatter or may have little influence.¹⁰

Regardless of the issues that can affect staffing, at some point, managers must make a decision on how many additional personnel to add to their department. Data from several sources indicates that a number of different staffing ratios exist that police managers

could use to project future staffing scenarios for their departments. They should view their new and existing staff in terms of some unit of measure, such as in relation to community population on a per-capita basis.¹¹

Most law enforcement administrators will agree that funding for additional positions remains difficult to secure. In addition, as departments add personnel, administrators must maintain standards, and most important, they must base their

staffing levels and goals on a predetermined officer-per-population ratio. Conversely, some city administrators believe that community growth through annexation has great potential to stretch the resources of a city and that a police department should base its staffing increases upon need, rather than a per-population ratio.

THE PLAN

The authors convened a group of subject-matter experts to forecast trends and events that potentially could impact a police department's response to staffing growth. The group identified six trends—changing population demographics, cost of technology, global economy, tax revenue, quantity of qualified applicants, and quality of life. Additionally, they identified six events that could impact a department's response to staffing growth—less tax revenue, a mandated retirement package, city council elections, unfunded mandates, the arrival of a large industry in the city, and a large annexation. These top six trends

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Population growth remains one issue that may affect staffing needs for police departments.

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and events were used to formulate three fictional scenarios, each illustrating a possible future that related the potential impact of community growth on the staffing and organizational structure of a police department. The researchers labeled the three scenarios as best, worst, and most probable and used the most probable scenario as a vehicle to develop a plan to take an agency from its current state to a desired future state. The plan included a description of the Central City Police Department's present situation, an analysis of the department's internal strengths and weaknesses and external opportunities and threats (SWOT analysis), an assessment of stakeholders, and an overview of specific strategies to make the most probable scenario a reality.

The Situation

The hypothetical Central City has around 55,000 residents living in an urban area of approximately 95,000 inhabitants and constitutes the largest city in the county, which has a population of approximately 202,000. The city houses a state university campus with approximately 15,000 students, and many of the 14,000 students from a nearby community college also reside in the city. Central City is a liberal community, very diverse socioeconomically, a charter city, and governed by a council/city manager form of government with a seven-member council.

The Central City Police Department has existed for nearly 80 years as a full-service law enforcement agency with a conventional bureaucratic hierarchy and subscribes to the COPPS philosophy. The department has 116 full-time employees, 75 of whom are sworn, and a complement of nearly 200 part-time volunteers. The department has two divisions, operations and support, each managed by a captain who works directly for the chief. The operations division consists of the patrol, traffic, and community outreach sections. The support division consists of the communications, records, animal control, and criminal investigations sections. The detectives and youth

services bureaus fall under the criminal investigations section.

The chief of the Central City Police Department is excited about the prospects that the upcoming year might hold for her department. Although she is a young chief, she already has distinguished herself with her accomplishments. Of particular note is her ability to view circumstances related to her department with careful and reasoned realism. The new city council selected her as chief because they believed that she could successfully maneuver the department through a variety of adversities that would occur in the near future.

The quality of life and the community support for the police department and local government in Central City has remained high for decades. The stable economy makes planning an annual budget an easy task for Central City managers. The city enjoyed about 25 percent growth during the past 5 years through a planned balance of annexation and commercial and residential development. A slight increase in sales tax revenues for each of the last 5 years allowed the city to conservatively expand its services.

The police chief has maintained an acceptable level of service to the public. Although the geographical service area of the department has grown, she has made adjustments to the patrol sectors to accommodate the growth. Even though the economy and Central City's overall fiscal picture remains bright, the police department has been unable to add positions in direct proportion to the population growth in the city. Although the department had maintained specialized programs, the chief had to justify them each year to the city manager and council. Grant opportunities, however, have allowed the department to add personnel in some specialized areas. The department also acquired additional general fund positions, but only enough to provide extra patrol coverage during peak periods. Full integration of the COPPS philosophy and an overall commitment to

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finding ways to work smarter, rather than harder, has resulted in an efficiently run department.

The chief entered her new position faced with many dilemmas, one of which was two vacant police officer positions that she was not authorized to fill—one because an officer would be off work for 6 months due to a work-related injury and another for maternity leave. Although the department would feel the impact of these absences, the chief made temporary staffing adjustments to maintain minimum coverage in patrol areas.

At the beginning of the new fiscal year, the city council will make a retirement system available to public safety employees that provides for retirement at an earlier age. The chief anticipates this to affect only three of her officers—not a significant impact on the department. She will maintain a police officer eligibility list through the end of the calendar year, with several viable experienced candidates.

The chief is pleased with the future prospects and the current personnel available. Although she would like to acquire more resources for her department, she must make the best use of what she has and remain ready for any challenges. Although the city manager and the council have committed to a staffing-per-population formula, they cannot guarantee funding for projected positions, but have assured the chief that it will remain one of their top priorities.

The Analysis

The analysis intended to identify internal strengths, weaknesses, opportunities, and threats (SWOT) for the Central City Police Department that could impact the development of specific strategies. The analysis found that the department's strengths related primarily to its high quality of personnel and services provided, whereas its weaknesses generally pertained to the inexperience of staff and employees in particular areas. The opportunities discovered

correlated primarily to technologies, grants and other funding, and potential community partnerships, while threats pertained to competition for grant funds, politics, and unfavorable views and attitudes toward law enforcement.

The Stakeholders

Assessment identified a number of individuals and groups as stakeholders with regard to the issue. The authors viewed them from two different perspectives relative to the department—internal and external. Internally, the research identified six groups: administration/middle management, supervisors, officers, nonsworn personnel, the peace officer's association, and volunteers. Externally, the research identified five individuals/groups: city manager, city council, business community, citizens, and special interest groups of the identified stakeholders. The city manager, the chief of police, and the peace officer's association proved critical for the overall success of the strategic plan.



The Strategies

Taking into consideration the situation, the results of the SWOT, and the stakeholder analyses, the authors developed four specific strategies. When employed collectively, the strategies could help achieve the desired future state and also aid the Central City Police Department in maintaining staffing levels commensurate with the population growth. The strategies promote working smarter, rather than harder, as members of the Central City Police Department are called upon to do more with proportionately less resources; encourage and reinforce the integration of the COPPS philosophy into the way the Central City Police Department conducts its business; actively cultivate community support of the department through community enhancement strategies, police and community partnerships, as well

as COPPS-related activities; and develop and promote the support of a departmental staffing growth plan that balances identified minimally acceptable staffing levels and a standard for increasing personnel based on a per-thousand population ratio with the demonstrated needs of the community.

The Transition

The researchers posited that the chief of police would prove the most essential to the successful implementation of the identified strategies and should assume the lead role in the transition of the Central City Police Department from its current state to its desired future state. The chief essentially acts as a intermediary between the city manager and the peace officer's association and holds the position to influence both. The chief could ensure that her department enjoys a successful transition by communicating the vision of the desired state and other educational efforts, employing role modeling at various levels, and recognizing and rewarding performance that reinforces aspects of the specific strategies and the desired future state.

CONCLUSION

When considering the impact community growth will have on the future staffing resources and organizational structure of their departments, police managers must consider adding personnel and anticipate that the impact on the structure will prove minimal. Additionally, police leaders must ensure that they address all future law enforcement interests. Through continued monitoring, law enforcement executives should recognize trends and anticipate events that potentially could influence the future of policing. Leaders must develop strategies for assisting their organization in reaching a beneficial result and implement a plan to manage the transition of the organization from the present into the future.

Police leaders have a choice about the future of law enforcement—they can wait for the future to happen, or they can make it happen. By creating a growth plan for the future, including the staffing and organizational structure of their department, law enforcement leaders will remain better equipped to develop, propose, and implement alternative responses specific to their department. ♦

Endnotes

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⁷ California Office of the Attorney General, *Violence Prevention: A Vision of Hope* (Sacramento: Office of the Attorney General, 1995), 65.

⁸ N.F. Iannone, *Supervision of Police Personnel*, 2nd ed. (New Jersey: Prentice-Hall, Inc., 1975), 128-130.

⁹ Robert C. Carden, "What Impact Will Rapid Population Influx Have on Rural Law Enforcement Agencies by the Year 2001?" *POST Command College*, July 1996, 5-8.

¹⁰ Peter S. DeLisi, "Lessons from the Steel Axe: Culture, Technology and Organizational Change," *Sloan Management Review*, Fall 1990, 88; supra note 6, Harvey.

¹¹ Edward P. Ammann and Jim Hey, "Establishing Agency Personnel Levels," *FBI Law Enforcement Bulletin*, July 1986, 16-20.

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...funding for
additional positions
remains difficult to
secure.
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Captain Maloney serves with the Chico, California, Police Department. Lieutenant Moty serves with the Redding, California, Police Department.

Hate Crimes

Addressing Hate Crimes: Six Initiatives That Are Enhancing the Efforts of Criminal Justice Practitioners, prepared by Stephen Wessler, identifies projects that support police and prosecutorial agencies in responding to hate crimes. Police officers generally are the first professionals responding to the scene of a hate crime. Therefore, to successfully carry out their roles, police officers and prosecutors must receive training on recognizing and investigating potential hate crimes, have clear protocols on how to respond to hate violence, and develop innovative programs for preventing and responding to hate crimes. This Bureau of Justice Assistance (BJA) monograph highlights six BJA-funded projects that demonstrate the creativity and deep commitment of local, state, and federal law enforcement agencies in leading the nation's effort to combat bias-motivated crime. The document supplies sources for additional information as well. To obtain a copy of this monograph (NCJ 179559), contact the National Criminal Justice Reference Service at 800-851-3420 or access its Web site at <http://www.ncjrs.org>.

RADAR Flashlight

Laboratory and field test models of the RADAR Flashlight, designed to detect the respiration signature of a motionless individual standing behind various types of solid walls, produced promising results. Sworn officers of the Smyrna, Georgia, Police Department, who responded to a survey on potential operational features, performance requirements, and other possible applications, field tested the flashlight. Results were mixed. Responses indicated that the configuration required very little training and was easy to use. In contrast, the stability of the flashlight was a problem because any discernible motion gave a false reading and the locking system produced noise that exposed the officer. The flashlight has not been tested in inclement weather, on wet materials, or in extreme cold. For more information on the RADAR Flashlight, access the National Criminal Justice Reference Service's Web site at <http://www.ncjrs.org>.

Grants/Funding

The Bureau of Justice Assistance (BJA) presents *FY 2001 Local Law Enforcement Block Grants Program*, which describes the Local Law Enforcement Block Grants (LLEBG) Program. It is administered by the BJA and provides funds for units of local government to reduce crime and improve public safety. This BJA Fact Sheet provides information on program eligibility, distribution of funds, program purpose areas and requirements, and use of funds. The LLEBG application process, a listing of other technical assistance programs offered by BJA, and an explanation for resolving funding disparities within jurisdictions also are included. A copy of this report (FS 000268) is available electronically at <http://ncjrs.org/txtfiles1/bja/fs000268.txt> or from the National Criminal Justice Reference Service at 800-851-3420.

Police and the Sexual Assault Examination

By CRAIG R. WILSON

Suppose you are a detective assigned to investigate a sexual assault complaint. You know that any physical evidence available in the case will play a vital role in determining what happened and whether or not an arrest will occur and later will affect the ability of the prosecutor to file charges and obtain a conviction against the perpetrator. You will work closely with a sexual assault examiner who is a member of a sexual assault response team, rather than a member of your department's forensic evidence team. If this were a case of homicide, robbery, or any other major felony, you would rely on your department's crime scene investigators, medical examiner, and other forensic analysts to provide you with facts needed to make decisions about the case. But this is a sexual assault case. Why are the medical professionals who examine sexual assault victims not members of a law enforcement agency forensic team?

THE SEXUAL ASSAULT RESPONSE TEAM MODEL

Most law enforcement agencies throughout the United States rely on a variation of the sexual assault response team model. Developed in California, this model involves a coordinated response among various professionals to meet the



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needs of the assault victim and to collect physical evidence associated with the complaint. Typical members of the team include a victim advocate, a police officer, and a sexual assault examiner. Team members work together to ensure a sensitive, thorough investigation. The advocate provides support to the victim and sets the stage for continued services. The police officer investigates the facts of the

case and takes appropriate action. The examiner assesses, documents, and collects forensic evidence and reports obvious pathology or suspicious findings to the victim with a suggestion for follow-up care and referral. Evaluation and diagnosis of pathology extends beyond the scope of the forensic examination.¹

Currently, two prevalent team models exist. In the hospital-based program, a community hospital

maintains responsibility for the administration of the program, including the selection, training, and scheduling of medical personnel involved. In the second model, the community-based program, a non-profit agency assumes administrative responsibility for the program. Dedicated professionals with unquestionable commitment to the proper treatment and investigation of sexual assault cases support both team models. The primary purpose of the sexual assault examination, however, is forensic in nature. The examination is not intended to provide medical care, which is performed by the emergency department or the victim's physician, nor to substitute for the services provided by a counselor or therapist. The unique purpose of the examination is evidentiary-based, which assumes that law enforcement later may introduce findings of the examination as evidence against a defendant.

All team members play an important role. But, professionals who approach the sexual assault examination with priorities other than the standards required of forensic evidence collection designed to stand up in the court system render a disservice to the victims of sexual assault. This particularly holds true of the sexual assault examiner.

THE HISTORY OF SEXUAL ASSAULT EXAMINER PROGRAMS

The role of forensic evidence collection and examination traditionally has been assigned to the police. Police departments employ and train personnel in such forensic areas as evidence collection and

analysis, fingerprint analysis, and blood-spatter evidence. In cases requiring advanced professional credentials, such as forensic medical pathology, dentistry, or anthropology, the police have employed, or contracted with, professionals for those services. In the area of sexual assault examination, however, the police have not assumed an active role. The reasons for the lack of police involvement in sexual assault examination programs may be found in the history of the development of the programs.

Nurses and other medical professionals, counselors, and advocates working with rape victims in hospitals, clinics, and other settings established the first Sexual Assault Nurse Examiner programs in Memphis, Tennessee, in 1976, and Minneapolis, Minnesota, in 1977.² These professionals recognized the inadequacy of services to sexual assault victims. Women's advocacy groups asserted that law enforcement did not approach these

cases in a sensitive manner and, too often, dismissed a woman's claim of rape based on cultural misconceptions, bias, or lack of understanding. Additionally, the prosecution of cases suffered due to scarce research or specialization in the body of knowledge concerning sexual assault.

To address many of those concerns, teams throughout the United States formed. The 1994 Violence Against Women Act provided funding for training and program development. Nurses who have received specialized training in the field, have completed a proctorship, and are available on a rotating on-call basis usually staff sexual assault response teams. However, in the existing model, examiners do not get enough regular exposure to cases nor enough time to conduct the follow-up, research, or court preparation time to truly develop solid expertise in the field. Examiners who staff the programs remain genuinely devoted to them, but

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Law enforcement agencies...may play a critical role in the collection of forensic evidence....

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Sergeant Wilson serves with the Santa Cruz, California, Sheriff's Office.

must direct the majority of their time to their full-time careers.

Unfortunately, law enforcement did not play a pivotal role in the administration of the newly formed programs, despite their critical role in the investigation and prosecution of sexual assault cases. While law enforcement may have been slow to recognize and respond to the needs of sexual assault victims in the past, tremendous changes in attitude have taken place within police organizations. Many agencies have formed specialized units to investigate sexual assault and have trained their officers to prioritize their response to sexual assault cases and to treat victims with sensitivity while thoroughly investigating cases. Departments have forged new partnerships with community-based organizations, including women's advocacy groups, and have raised the credibility level of the police by addressing mutual needs.

A NEW LEADERSHIP ROLE

Law enforcement agencies once again may play a critical role in the collection of forensic evidence of sexual assault cases. If existing teams work well and the forensic standards supply the evidence needed to make decisions and prosecute cases of sexual assault, then no changes may be necessary. If, however, teams are not focused clearly on their primary roles, experience role conflict, or waste valuable energy in political conflict, law enforcement should assume a leadership role. Clearly, the examination remains critical to the successful investigation and resolution of a sexual assault case.

Large agencies may employ full-time forensic examiners to conduct examinations. Smaller agencies may devise a funding scheme to share the costs of funding for an examiner position. To obtain professional, reliable evidence collection, departments should employ or contract a full-time forensic examiner to conduct examinations at the highest standards.

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Better investigated and prepared cases enhance the likelihood of a disposition prior to trial.

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ONE AGENCY'S EXPERIENCE

Santa Cruz was one of the first counties in California to adopt the sexual assault response team model.³ The team operated in a manner commonly found throughout California: a full-time administrative coordinator scheduled several registered nurses who had completed examiner training. The administrator of the program was the local Criminal Justice Council, a nonoperational agency. Examiners struggled to find the time needed to devote to the program and felt unable to develop true expertise in the field. Because the examiners worked on an infrequent, on-call basis, they often were unfamiliar with procedures and equipment and

had to relearn essential job functions during actual examinations. They could not find enough time to keep up with the reading, research, and developments in the field, which would prepare them to conduct the most thorough examination and later testify in court concerning their findings.

Team Transition

Due to concerns over the quality of the examinations, reliability of findings, and stability of service, the Criminal Justice Council asked the Santa Cruz County Sheriff's Office to submit a proposal concerning how it may assume administration of the team. The sheriff's office recommended the elimination of the coordinator model with the existing funding, which previously had supplied the coordinator's salary, on-call pay, and compensation for examinations, to fund full-time forensic examiners. The sheriff's office assembled a multidisciplinary panel, including representatives from the advocacy, medical, and prosecutorial communities, and chose candidates based on their professional experience. The selected nurses became full-time examiners, rather than nurses who were available but had careers elsewhere. The sheriff's office also saw the importance of forming partnerships with all of the various team members and program users to ensure the best possible program. The office established regular meetings between the team members and users so that interested parties could discuss what worked well and what needed further attention to improve the quality and service level of the program.

Benefits of Increased Law Enforcement Involvement

The current examiners now have the time necessary to prioritize and attend professional training, stay abreast of current research and developments, and thoroughly network among other entities in the criminal justice system. All team members have benefitted from the transition. The examiners have formed instructive relationships with the local branch of the state crime laboratory, agency crime scene investigators, and prosecutors. Law enforcement agencies have benefitted from receiving reliable, consistent examinations, which yield more accurate and relevant information than previously available. Prosecutors have been able to train and develop the examiners to be the best possible expert witnesses. Further, the examiners are available to conduct case-specific research in preparation for court.

The local women's advocacy group has formed a close association with the examiners and meet regularly to ensure a seamless delivery of services to sexual assault victims. The local hospitals have discovered benefits from the examiners whose interaction with the emergency room staff now are consistent and reliable. Finally, and most important, sexual assault victims have benefitted. Examiners, fully committed to their profession, can conduct sensitive and thorough examinations, which provide the tools for law enforcement agencies to investigate and arrest perpetrators. Better investigated

and prepared cases enhance the likelihood of a disposition prior to trial. A strong, well-prepared case constitutes the best way to obtain a conviction, and a dedicated, well-trained examiner program represents a key component in obtaining reliable and relevant forensic evidence in a sexual assault complaint.

CONCLUSION

The concept of designing a sexual assault examiner program with authority and direction associated with law enforcement and staffed by full-time, dedicated examiners with a clearly defined mission is the next logical step in the development of the field of sexual assault forensic examination. To accomplish this goal, law enforcement agencies must establish credibility within the community by assuming responsibility for the sensitive and thorough investigation of all sexual assault complaints and providing leadership concerning this area of criminal forensics. ♦

Endnotes

¹ U.S. Department of Justice, Office of Justice Programs, *Sexual Assault Nurse Examiner Development and Operation Guide*, (Minneapolis, MN, 1999), 9.

² *Ibid.*, 5.

³ The first Sexual Assault Response Team (SART) Program in Santa Cruz, California, began in June 1986 and was registered nurse-based. This multidisciplinary approach was based on the SART program in San Luis Obispo County, California, which was physician-based. See, S. Arndt and S. Goldstein, *The SART/SANE Orientation Guide*, 1997 (Santa Cruz, CA: Forensic Nursing Services) and Sherry Arndt, interview by author, July 2001.

Wanted: Notable Speeches

The *FBI Law Enforcement Bulletin* seeks transcripts of presentations made by criminal justice professionals for its Notable Speech department. Anyone who has delivered a speech recently and would like to share the information with a wider audience may submit a transcript of the presentation to the *Bulletin* for consideration.

As with article submissions, the *Bulletin* staff will edit the speech for length and clarity, but, realizing that the information was presented orally, maintain as much of the original flavor as possible. Presenters should submit their transcripts typed and double-spaced on 8 1/2" by 11-inch white paper with all pages numbered. When possible, an electronic version of the transcript saved on computer disk should accompany the document. Send the material to:

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Perspective

Surviving Assaults After the Physical Battle Ends, the Psychological Battle Begins

By Arthur W. Kureczka, M.S.

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Researchers have estimated that approximately 87 percent of all emergency service personnel will experience a critical incident—an extraordinary event that causes extraordinary stress reactions—at least once in their careers.¹ Such occurrences include, but are not limited to, line-of-duty deaths or serious injuries, officer-involved shootings, life-threatening assaults, deaths of children, deaths caused by officers, hostage situations, highly profiled media events, and multiple victim or mass casualty incidents. As a Wethersfield, Connecticut, police officer, I became part of this statistical prediction after surviving a violent, life-and-death struggle.²

THE PHYSICAL BATTLE

On November 19, 1982, while on patrol, I received a broadcast of an armed robbery that had just occurred in a nearby town. Shortly afterwards, I spotted the suspect and vehicle described in the broadcast and pursued it for several miles. The suspect stopped and abandoned his vehicle in an apartment complex; however, the vehicle continued to roll forward striking and seriously injuring a child. After a foot chase, I captured the suspect. As I attempted to handcuff him, a violent struggle ensued.

The suspect managed to gain control of my holstered service weapon. As I fought for the gun, he shot me in the leg. Exhausted and in fear of my life, I managed to regain control of my weapon and fatally shoot the suspect once in the chest as he again tried to attack me.

I had been a member of the department for 2 ° years and had just survived the ultimate test as a police officer, or so I thought. I soon realized, however, that the ultimate test would be to survive the psychological battle that had just begun.

THE PSYCHOLOGICAL BATTLE

I was apprehensive as to what would happen next. The department did not have a written post-shooting policy or procedure at that time, so for me, it became a live-and-learn experience. Over the next week, my emotional feelings began to break through. I was fearful that the victim's relatives or friends would retaliate against my family and me. I became angry when the media sensationally labeled the shooting racially controversial, and I was not allowed to publicly defend their embellished, untrue accounts of the incident.

Mr. Kureczka, a retired Wethersfield, Connecticut, Police Department officer, currently is a program manager and counselor at a Connecticut-based private employee assistance provider.



As the investigations began, the emotional pressure increased. I became anxious for a quick and favorable conclusion. As the weeks dragged on, the victim's estate named me in a civil action seeking punitive damages. My doubts began to intensify. I replayed the shooting over and over in my mind, questioning if I could have done anything differently and wondering why this had happened to me.

I felt alone, coming from a department in which no one had been involved in a shooting situation resulting in someone's death. No one really knew what I was feeling, so I began to isolate my emotions.

Lack of Pre-Incident Academy Training

The extraordinary stress that followed was known then as post-shooting trauma, an aspect of policing I was never trained for. Twenty years ago, the police academy training covered most aspects of law enforcement and prepared me for physical survival. However, it ignored the psychological aspects of the profession. The term, *critical incident stress*, had not been conceived. As defined by recent standards, I had suffered three critical incidents as a result of the confrontation: a life-threatening assault, an officer-involved shooting that resulted in death, and a highly profiled media event.

Perceptions of the Mental Health Profession

The day of the incident, my department offered me the services of a mental health professional. That produced my initial denial: not me, *I* didn't need help. After all, the use of deadly force comes with the territory. I felt that seeing a "shrink" would stereotype me as weak or crazy. Instead, I began to search for a trusted peer who I could relate to, someone who could understand what I was going through. However, my search for a police officer/counselor who also had used deadly force proved fruitless.

Approximately 2 weeks after the incident and not knowing where else to turn, I went to a

psychotherapist who worked independently with the Connecticut State Police and had counseled other officers involved in shootings. With this decision, my stress became compounded by my immature, shallow fears regarding trust and, more important, my insecurities of what my family, friends, and peers would think of me.

After a few visits, I developed trust and confidence in the counselor. I began to accept, in my own mind, the needed counseling and stress management. Still, I felt ashamed and would make excuses to everyone who knew I was receiving professional help. I blamed my department for sending me and told everyone that I was okay.

Impact of Counseling

Through counseling, I learned that the emotional feelings that I experienced were "common" for someone involved in the use of deadly force. In time, I was able to accept my feelings as normal and openly talk to others about the help I received. Surprisingly, my family, friends, and coworkers supported me.

Legal Outcomes

Two months after the incident, all of the investigations, including the most extensive one ever conducted by the State Attorney's office, concluded that the shooting was justified and in self-defense. After a 4-week trial, I was exonerated in my last-resort decision to use deadly force by a jury that cleared me of any civil wrongdoing. Six years after the incident, the legal process finally ended.

THE RESOLUTION

Following my 6-year ordeal, I became an advocate of the mental health profession. I discovered that early 1980s research found that 70 percent of officers involved in the use of deadly force who did not receive professional help left the job within 5 years, compounded by personal and job-related stress.³ I

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Through counseling, I learned that the emotional feelings that I experienced were 'common' for someone involved in the use of deadly force.

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wondered what, if anything, I could do to change this.

Understanding the Police Personality

The police personality stands as a major stumbling block in understanding why counseling has been slow to evolve. Police officers surround themselves in “image armor” and perceive the expression of emotion as a weakness. They are themselves suspicious people, and many find it hard to trust and confide in others, so they isolate their feelings. This isolation leads to negative insulation that, in turn, leads directly to sick leave abuse, aggressive behavior, job loss, and high rates of divorce, suicide, and substance abuse.⁴

Because critical incident stress manifests itself physically, cognitively, and emotionally, officers might experience some or all of these reactions immediately, or perhaps not until after a delay. While in most instances the symptoms will subside in a matter of weeks, a few of those affected by such stress will suffer permanent emotional trauma that adversely will affect their continued value to the department and cause serious problems in their personal lives.⁵

Although the increased involvement of the “stigmatized” mental health profession to the law enforcement community has been slow to evolve, the fact remains that it *is* being accepted. Supported by articles on police stress, critical incident stress, post-shooting trauma, and peer support programs published since the late 1980s, the mental health community’s commitment constitutes an important proactive concept in modern-day policing.

Creating Support

To resolve my own experiences and to help others who have endured the psychological battle of using deadly force, I created a Critical Incident Stress Management/Post-Shooting Trauma program to address psychological survival at the recruit level. I received training and became a member

of a peer support team. I obtained a master’s degree in counseling, and for the past 11 years, I have instructed at various police academies and recertification classes throughout the state of Connecticut, thus filling the void that I encountered during my critical incident.

In May 2000, I retired from the police department after 20 years of service. Now, as the program manager at an employee assistance provider that targets emergency service personnel, I am a member of the incident response team trained in crisis diffusing and debriefing techniques. I facilitate an incident support group for public safety personnel involved in critical incidents and help officers throughout the country deal with shooting aftermaths.

On a monthly basis, the group meets in an informal and confidential atmosphere that brings together members of the law enforcement community who have a common bond. It is not group therapy; however, information shared at the meeting is educational and may have therapeutic value. Members of the group direct the topics for discussion, and individual participation is optional. It represents an exceptional opportunity for

members to share their experiences with each other unlike any other method that I have encountered.

One of the most important objectives of the group involves helping other officers who become involved in a critical incident. Their experiences are an invaluable tool to support other officers when dealing with the first few days and weeks following an event. By helping another officer, they help themselves. This supports the idea that “when public safety personnel have the opportunity to process a critical incident properly, they can integrate the experience into their lives in a way that is manageable and mitigate the long-term potential for post-traumatic stress.”⁶

CONCLUSION

Over the past 20 years, I have seen the success of employee assistance programs and the mental health profession working together with all levels of the law

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The police personality stands as a major stumbling block in understanding why counseling has been slow to evolve.
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enforcement community. The commitment to provide these services not only benefits the involved officers but also their families, their departments, and the communities they serve.

It is not a pleasant experience to suffer from critical incident stress. No one can predict how powerful an incident will be or how it will affect them. While it took strength, courage, and the will to live to survive my physical battle, it took far more moral fortitude and emotional resolve to survive the aftermath. If anything could be construed as brave or heroic as a result of my incident, it would be that I broke through the "image armor" and triumphed over tragedy by honestly confronting and resolving my psychological battle, the ultimate test. ♦

Endnotes

¹ T. Pierson, "Critical Incident Stress: A Serious Law Enforcement Problem," *Police Chief*, February 1989, 32-33.

² For additional information, contact the author at the toll free number (888) 327-1060.

³ M. Ayoob, "The Killing Experience," *Police Product News*, July 1980.

⁴ R. Conroy, "Critical Incident Stress Debriefing," *FBI Law Enforcement Bulletin*, February 1990, 20-22.

⁵ A. Kureczka, Public Safety EAP, *UPDATE Newsletter* (North Haven, CT, 2000).

⁶ T. Hodges, Public Safety EAP, *UPDATE Newsletter* (North Haven, CT, 2001).

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Supreme Court Cases 2000-2001 Term

During the 2000-2001 term, the U.S. Supreme Court ruled on several significant constitutional issues relating to criminal law and procedure, as well as cases involving the civil liability of law enforcement officers acting in the performance of their official duties and one case involving the civil liability of state agencies for violations of the Americans with Disabilities Act. The following is a brief synopsis of these cases. As always, local and state agencies must insure that their own state laws and constitutions have not provided even greater protections than

the U.S. constitutional standards before relying on these opinions.

***City of Indianapolis v. Edmond,* 121 S. Ct. 447 (2000)**

In 1990, the Supreme Court held that brief, suspicionless seizures at highway checkpoints for the purpose of combating drunk driving was constitutional.¹ In *City of Indianapolis v. Edmond*, the Court ruled that when the primary purpose of the checkpoint is to locate illegal drugs, the seizure involved is unconstitutional.

A vehicle stop at a highway checkpoint is a seizure under the

Fourth Amendment.² Supreme Court checkpoint cases have recognized limited exceptions to the general Fourth Amendment rule that a seizure must be justified by some measure of individualized suspicion. In *Edmond*, the Court declined to add narcotics checkpoints to the limited exceptions.

The opinion distinguished the narcotics checkpoint from the drunk driving checkpoint by examining the motive for the respective stops. The Court recognized that the drunk driving checkpoint was clearly aimed at reducing the immediate hazard posed by drunk drivers

on the highways. On the other hand, “[w]hen law enforcement authorities pursue primarily general crime control purposes at checkpoints..., stops can only be justified by some quantum of individualized suspicion.”³

It is important to note that Justice O’Connor’s majority opinion acknowledged that certain emergency situations likely would permit checkpoints even if their primary purpose was ordinary crime control. O’Connor agreed with the lower appellate court’s proposition that the “Fourth Amendment would almost certainly permit an appropriately tailored roadblock set up to thwart an imminent terrorist attack or to catch a dangerous criminal who is likely to flee by way of a particular route.”⁴ *Edmond*, however, signals the end of routine narcotics checkpoints.



***Illinois v. McArthur*,
121 S. Ct. 946 (2001)**

The Supreme Court held that a police officer’s refusal to allow residents to enter their homes without a police officer until a search warrant was obtained was a reasonable seizure that did not violate the

Fourth Amendment. Police officers, with probable cause to believe that McArthur had hidden marijuana in his home, knocked on McArthur’s door and requested his consent to search his home. He refused. The investigating police officers then told McArthur that he was to stay outside of his home and could not reenter it unless accompanied by a police officer. McArthur was prevented from entering the home unaccompanied for about 2 hours while the police obtained a search warrant. When the warrant was issued, the officers searched McArthur’s home and found drug paraphernalia and marijuana, resulting in McArthur’s arrest. He was charged with misdemeanor possession of those items. He moved to suppress the evidence on the ground that it was the “fruit” of an unlawful police seizure, namely, the refusal to let him reenter his home unaccompanied.

The central requirement of the Fourth Amendment is one of reasonableness. Although seizures of personal property are presumed unreasonable unless accomplished pursuant to a warrant, there are exceptions to this rule involving special law enforcement needs and diminished expectations of privacy. The Court recognized that the circumstances in this case were exigent, and the seizure of McArthur’s home was tailored to that exigency: it was as limited in time as possible and as unintrusive as possible.⁵ In reaching its decision, the Court balanced both privacy and law enforcement concerns to determine if the intrusion was reasonable.

The Court cited four reasons for its conclusion that the seizure of

McArthur’s home was reasonable. First, the police had probable cause to believe that McArthur’s home contained evidence of a crime and unlawful drugs. Second, they had good reason to fear that, unless the home was seized, he would destroy the drugs before they could return with a warrant. Third, they avoided an unnecessary, warrantless entry and warrantless arrest simply by preventing McArthur from entering his home unaccompanied (McArthur was not detained). Fourth, they imposed the restraint for a limited period, only as long as reasonably necessary for them, acting with diligence, to obtain the warrant.

The third and fourth points made by the Court are the most important considerations to law enforcement. The determination of reasonableness is based on the specific facts of each case, that is; the specific circumstances and the options available to—and ultimately taken by—the police. The fact that the police waited outside McArthur’s home, thus minimizing the time spent inside without a warrant, was a significant consideration to the Court. Anything police can do to be less intrusive to the subject’s privacy will be well received by a court later evaluating their reasonableness. Like any temporary Fourth Amendment seizure (such as an investigative detention), any unnecessary delay or lack of investigative diligence may render a seizure unreasonable. Obviously the warrant must be secured as quickly as possible, to include consideration of a telephonic warrant or any other means to limit the delay. New and emerging

technologies are decreasing the time to acquire a warrant. Failing to take advantage of a telephonic or other enhanced method of securing a warrant may render the delay unnecessarily long and, therefore, unreasonable.



***Board of Trustees of the University of Alabama v. Garrett,* 121 S. Ct. 955 (2001)**

The question before the Supreme Court in this case was whether the Eleventh Amendment to the Constitution bars federal lawsuits for money damages by individuals against states under the Americans with Disabilities Act (ADA). The Eleventh Amendment to the Constitution is brief: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." The Supreme Court has ruled that the amendment means that nonconsenting states may not be sued by private individuals in federal court, whether they are citizens

of the state itself, or another state or foreign power. However, Congress may take away the states' Eleventh Amendment immunity in certain circumstances. The question before the Court was whether the ADA properly abrogated that immunity making the states subject to federal lawsuits under the act.

Ms. Garrett was a nurse employed by the University of Alabama in Birmingham Hospital, a state hospital. She was diagnosed with breast cancer and her treatment forced her to take extended leave from her job. When she returned, her employer told her she would have to give up her former position as Director of Nursing. She applied for and received a lower paying job as a nurse manager. She sued, claiming the hospital had discriminated against her based upon her disability in violation of the ADA. The District Court dismissed the case, finding the state was immune from suit under the Eleventh Amendment. The U.S. Court of Appeals for the Eleventh Circuit reversed, ruling that Congress had properly abrogated the states' Eleventh Amendment immunity when it passed the ADA.

The Supreme Court ruled that Congress did not properly abrogate the states' Eleventh Amendment immunity when it passed the ADA. Consequently, nonconsenting states, and units of those states such as state police and state hospitals, are not subject to lawsuits in federal court by private individuals for money damages for violations of the ADA.

This opinion does not mean that states and state entities are free to ignore the ADA. The federal

government can enforce the ADA against the states in federal court. In addition, states are free to waive their immunity and permit suits against them for disability discrimination. Some states have done so. Many states have their own laws prohibiting discrimination. In those states, people alleging disability discrimination under state law may be able to assert their ADA claims at the same time in state court.



***Ferguson v. City of Charleston,* 121 S. Ct. 1281 (2001)**

In this case, the Supreme Court addresses the lengths that the police can go in using medical personnel to provide information for criminal prosecution purposes. In response to an increase in the number of prenatal patients who were found to be abusing narcotics, a South Carolina public hospital instituted a policy of testing urine obtained from certain expectant mothers for the presence of narcotics. The policy was intended to protect unborn children by threatening their mothers with criminal prosecution for the use of narcotics (if the use was detected early in the pregnancy) or for child

endangerment (if the use was detected late in the pregnancy). Only patients who fell within nine criteria were tested. The testing policy was instituted after earlier programs, which only referred patients who tested positive for narcotics to abuse counseling, failed to stem the abuse of narcotics by expectant mothers. The policy notified patients that all positive test results would be forwarded to the police for possible criminal prosecution and it set forth procedures to ensure that proper chain of custody was maintained during the process. Several women who were arrested after testing positive sued the hospital and police officials for Fourth Amendment violations.

Justice Stevens ruled that the policy violated the Fourth Amendment reasonableness requirement because it constituted an unjustified warrantless search. The Court decided that the urine test, as administered under the policy, was a search as defined by the Fourth Amendment. Therefore, the action was subject to the Fourth Amendment reasonableness requirement. The Fourth Circuit Court of Appeals had previously ruled that the policy was reasonable under the Fourth Amendment because “special needs” justified the testing to serve nonlaw enforcement ends. The Supreme Court rejected this reasoning. The Court ruled that in previous cases where it had allowed such warrantless, suspicionless searches under the “special needs” justification, a balancing of the intrusion into the individual’s privacy interest and the “special needs” that justified the policy resulted in findings in favor of the government.⁶ In



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performing the same balancing test in this case, the Court ruled that the intrusion here was far more substantial and was not justified by the perceived “special needs.” Here, adverse test results were not used to disqualify someone for a benefit, but were instead used for criminal prosecution. The court ruled that, despite the hospital’s assertions that it only desired to curtail prenatal narcotics abuse, the primary purpose of this testing was law enforcement. Absent probable cause and a warrant, or consent or exigent circumstances, such governmental conduct is prohibited by the Fourth Amendment. The Court remanded the case to determine if the patients’ conduct constituted consent to the testing.

It is important to note that the Court did not prohibit the use of all medical test results in criminal prosecutions. When such testing is done by private hospitals, not acting at governmental direction, or for primarily medical purposes, or pursuant to an exigent need (such as drawing blood from someone when there is a reasonable belief that their

use of alcohol contributed to a motor vehicle collision), or pursuant to the patient’s voluntary consent, the test results may be used by law enforcement for criminal prosecution in compliance with the Fourth Amendment.



Shaw v. Murphy,
121 S. Ct. 1475 (2001)

In this First Amendment case, the Supreme Court ruled that prison inmates do not have heightened protection in their speech when that speech contains legal advice. The



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case arose when Murphy, an “inmate law clerk” in the Montana State Prison system, attempted to assist a fellow inmate who had been charged with assault. Murphy sent the charged inmate a letter offering his legal advice on the assault charge. Pursuant to prison policy, the letter was intercepted and reviewed. Murphy filed a suit alleging, among other things, that his First Amendment right to free speech had been violated.

While recognizing that “incarceration does not divest prisoners of all constitutional protections,”⁷ the Supreme Court has recognized that “the constitutional rights that prisoners possess are more limited in scope than the constitutional rights held by individuals in society at large.”⁸ In 1987, the Supreme Court pronounced that “a prison regulation impinging on inmates’ constitutional rights is valid ‘if it is reasonably related to legitimate penological interests.’”⁹ In *Shaw*, the Court pronounced that this standard is not heightened when the prison regulation in question restricts First Amendment speech rights, even if

the restricted speech contains potential legal advice. Rather, the analysis is identical to that applied to restrictions affecting any other constitutional rights.

This constitutional analysis requires consideration of four relevant factors: 1) the existence of a “‘valid, rational connection’ between the prison regulation and the legitimate [and neutral] governmental interest put forward to justify it;” 2) the existence of “‘alternative means of exercising the right’ available to inmates; 3) “the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally;” 4) “the absence of ready alternatives” available to the prison for achieving the governmental objectives.¹⁰ The Supreme Court did not conduct the analysis to determine whether the restriction affecting Murphy was valid; rather, the case was remanded to the lower courts for that determination.

By remanding the case with instruction to apply the “rational basis” standard to the prison

restriction at issue, the Supreme Court refused to “cloak the provision of legal assistance with any First Amendment protection above and beyond the protection normally accorded prisoners’ speech.”¹¹ In addition to remanding the case for the relevant analysis, the Court reminded the examining lower court that “because the ‘problems of prisons in America are complex and intractable,’ and because courts are particularly ‘ill equipped’ to deal with [prison] problems, [courts] generally have deferred to the judgments of prison officials in upholding these regulations against constitutional challenge.”¹² Clearly, prison administrators have wide latitude in restricting inmate activities. *Shaw* makes clear that their discretion is not more limited when the inmate activity is the dispensing of legal advice.



Atwater v. City of Lago Vista,
121 S. Ct. 1536 (2001)

This case establishes that custodial arrests are reasonable seizures under the Fourth Amendment regardless of the possible punishment for the crime, which resulted in

the arrest. Lago Vista is a city in central Texas. Texas law makes the failure to wear a front seat belt a misdemeanor punishable by a maximum fine of \$50. Imprisonment is not a possible penalty. However, as in many other states, Texas law permits police officers to make warrantless arrests for misdemeanors. In March 1997, Gail Atwater was driving her vehicle with her 3-year-old and 5-year-old children in the front seat. Not one of them was wearing a seatbelt. After being stopped by the police, Atwater was handcuffed and transported to the police station for booking. After her mug shot was taken, Atwater was placed alone in a cell for 1 hour. She then appeared before a magistrate and posted a bond for her release. Although she pleaded no contest to the seatbelt violation and paid a \$50 fine, Atwater and her husband filed a Section 1983 civil lawsuit against the arresting officer, the Lago Vista police chief, and the City of Lago Vista. The constitutional basis for the civil suit was that Atwater had been subjected to an unreasonable Fourth Amendment seizure.

The Supreme Court affirmed the appellate court's ruling that the Fourth Amendment does not prohibit an arrest for a minor criminal offense, even one punishable only by a fine. The Court stated bluntly that "Atwater's arrest satisfied constitutional requirements,"¹³ because it was based on probable cause to believe that Atwater had committed a crime in the arresting officer's presence. Although the Court recognized that the arrest of Atwater was an exercise of poor judgment, it refused to accept her argument advocating a rule forbidding custodial

arrest if conviction for the offense carried no jail time and the government can show no compelling need for immediate detention. Instead, the Supreme Court confirmed what it has held previously: "the standard of probable cause 'applie[s] to all arrests, without the need to balance the interests and circumstances involved in particular situations.'" ¹⁴ Therefore, officers can make arrests whenever they possess probable cause that a person has committed an offense for which an arrest is authorized by law.



***Kyllo v. United States,*
121 S. Ct. 2038 (2001)**

This case raised the issue of whether or not thermal scanning a private residence from outside the residence is a search under the Fourth Amendment. Indoor marijuana growing operations typically require high-intensity lights which produce great amounts of heat. The heat generated by the growing operation escapes from the home and can be detected from outside the home using a thermal imager. The

thermal imager converts infrared radiation, which is invisible to the naked eye, into images that depict the relative temperatures of the object scanned—dark areas on the image are cool; light areas are hot. By comparing the thermal image of the suspect's home to that of other homes in the neighborhood, officers can determine if more heat is escaping from the suspect's home, indicating a possible indoor marijuana growing operation. The result of the thermal scan, in combination with other information developed, is then used to secure a search warrant for the suspect's premises.

The legal issue raised by the use of the thermal imager to scan a home is whether or not the scanning is a Fourth Amendment search, requiring a search warrant or an exception to the search warrant requirement. Prior to the *Kyllo* case, the majority of U.S. Circuit Courts of Appeals considering the issue decided targeting a home with a thermal imager was not a Fourth Amendment search. They reasoned that by taking no steps to conceal the heat emissions, the home owner exhibited no expectation of privacy in the "waste heat" and, even if the home owner did have an expectation of privacy, it was not objectively reasonable. Danny Kyllo brought this issue to the Supreme Court.

A federal officer suspected that Kyllo was growing marijuana in his home. To bolster his probable cause to search Kyllo's home, the officer requested a thermal scan of the home. At three o'clock in the morning, another officer scanned Kyllo's home from the street. The scan showed that certain areas of the

home were relatively hot compared to other portions of the home, and that his home was substantially warmer than other homes in the neighborhood. Based in part on the results of the thermal scan, a federal magistrate issued a warrant to search Kyllo's home. Officers found marijuana plants. The district court found that the use of the thermal imager was not a Fourth Amendment search, and refused to suppress the marijuana. Kyllo was convicted, and he appealed.

The U.S. Court of Appeals for the Ninth Circuit eventually found that using a thermal imager to scan a home from the street is not a Fourth Amendment search. Kyllo then petitioned the Supreme Court, which agreed to hear his case.

In a five to four decision, the Supreme Court ruled that targeting a home with a thermal imager from outside the home is a search under the Fourth Amendment. The Court emphasized that inside a private home an expectation of privacy exists, and that expectation is reasonable. Consequently, police use of sense-enhancing technology to obtain any information regarding a private home's interior that could not otherwise have been obtained without physical intrusion into the home, is a search under the Fourth Amendment. Absent a search warrant, or an exception to the warrant requirement, such a search is presumptively unreasonable.

As a practical matter, the *Kyllo* case will severely restrict the use of thermal imagers to scan private homes or other premises where there is an expectation of privacy. Such scans now require a search

warrant, absent exceptions such as consent or emergency.

Kyllo also has broader implications. The Supreme Court clearly expressed concerns regarding any technology used by police to gather information about the interior of any premises from the outside. In light of the *Kyllo* decision, law enforcement must reexamine its use of any technology to probe anywhere a reasonable expectation might exist for compliance with the Fourth Amendment.



***Saucier v. Katz,*
121 S. Ct. 2151 (2001)**

The Supreme Court held that the inquiry as to whether an arresting police officer is entitled to qualified immunity for the use of excessive force is distinct from the inquiry as to whether the use of force was objectively reasonable under Fourth Amendment excessive force analysis. The two issues must be addressed separately and not combined into one question.

Katz, president of an animal rights group, filed a suit against Saucier, a military policeman. Katz alleged, among other things, that

Saucier had violated his Fourth Amendment rights by using excessive force in arresting him while he protested during a speech by former vice president Gore at a San Francisco, California, army base.

In any civil rights lawsuit alleging excessive force, there are two critical issues: whether the actions of the arresting officer violated the Constitution and, if so, whether the officer is entitled to qualified immunity. The first question is evaluated under the Fourth Amendment reasonableness standard that focuses on whether the officer's conduct was objectively reasonable.¹⁵ The second question focuses on whether the officer's actions violated any clearly established law of which the police officer should have been aware at the time.¹⁶

The Ninth Circuit Court of Appeals held that the two questions were essentially identical, because both concern the objective reasonableness of the officer's conduct in light of the circumstances the officer faced at the scene. The Supreme Court disagreed, holding that a qualified immunity ruling requires an analysis not susceptible of fusion with the question whether unreasonable force was used in making the arrest. It held that each issue must be considered in proper sequence, and that a ruling on qualified immunity should be made early in the proceedings so that the cost and expenses of trial may be avoided. Qualified immunity is an entitlement not to stand trial, not a defense from liability. The initial inquiry is whether a constitutional right would have been violated on the facts alleged by the

plaintiff; if no right was violated, there is no need for further inquiry into immunity. However, if a violation could be made viewing the facts in a light most favorable to the plaintiff/arrestee, the next, sequential step is to inquire whether the right was clearly established at the time of the seizure. Like the Fourth Amendment analysis, this inquiry is made in the factual context of the specific case, not as a broad general proposition. The relevant inquiry is whether it would be clear to a reasonable officer that the specific conduct was unlawful in the situation he confronted.

In overruling the Ninth Circuit, the Court reiterated its previous position in *Graham v. Connor*¹⁷ that an officer's conduct in searching or seizing may be reasonable but still incorrect. The Court gave the example of an officer who reasonably, but mistakenly, believes that a suspect is likely to fight back, resulting in the officer justifiably using more force than in fact was needed. The qualified immunity inquiry's concern, on the other hand, is to acknowledge that reasonable mistakes can be made as to the legal constraints on particular police conduct. An officer might correctly perceive all of the relevant facts, but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances. The Court characterized the qualified immunity inquiry as having a "further dimension;"¹⁸ it made a distinction between a use of force being objectively reasonable and a police officer understanding whether a particular use of force is legal.

It is difficult to assess what practical effect the *Katz* decision will have on American law enforcement. Cases involving an objectively unreasonable use of force by a police officer where the officer is entitled to qualified immunity are relatively unusual.¹⁹ Also, even though individual officers/defendants may receive qualified immunity, such immunity will not extend to their departments who may remain liable.²⁰ That said, the tone of the opinion in *Katz* makes clear that the Court pays great deference to the risks assumed by law enforcement and strongly reinforces its previous decisions in police use of force cases.



***Texas v. Cobb*,
121 S. Ct. 1335 (2001)**

In *Cobb*, the Supreme Court clearly limited the scope of the protections under the Sixth Amendment right to counsel to charged offenses. The case arose when Raymond Cobb was accused of burglarizing a home. At the time of the burglary, the home was occupied by a woman and her 16-month-old

daughter. When the owner of the home returned from work he found the house burglarized and his family missing. After receiving a report of the burglary and disappearances, the police conducted an investigation and eventually questioned Cobb regarding the incident. Cobb admitted to the burglary but denied any knowledge of the whereabouts of the woman and child.

Cobb was indicted on the burglary charge and invoked his Sixth Amendment right to counsel. After being freed on bond, Cobb admitted to his father that he had killed the woman and child. Cobb's father reported his son's confession to the police and a warrant was obtained for the arrest of Cobb on charges of murder. Following his arrest, Cobb waived his Miranda rights, reiterated his confession, and led police to the location where he had buried the woman and child.

After a trial, during which Cobb's confession was admitted and evidence obtained from the grave site was introduced, Cobb was convicted of capital murder and sentenced to death. Cobb subsequently appealed his conviction on the ground that the interrogation that followed his arrest on the murder charges violated his Sixth Amendment right to counsel. The defense argued that the Sixth Amendment right to counsel, which had attached and had been invoked with respect to the burglary charges, precluded any attempts by the police to deliberately elicit information from Cobb about the factually related murders. The Court of Criminal Appeals agreed that the murders were "factually

interwoven with the burglary”²¹ and, therefore, Cobb’s Sixth Amendment right to counsel had attached on the capital murder charge even though he had not been charged with the offense at the time of the interrogation. Cobb’s conviction was reversed and the case was remanded for a new trial.

The Supreme Court made clear its view regarding the scope of the Sixth Amendment protections when it stated “[t]he Texas Court of Criminal Appeals held that a criminal defendant’s Sixth Amendment right to counsel attaches not only to the offense with which he is charged, but to other offenses ‘closely related factually’ to the charged offense. We hold that our [earlier] decision in *McNeil v. Wisconsin*²² meant what it said, and that the Sixth Amendment right is ‘offense specific.’”²³ Recognizing that many criminal statutes are similar, the definition of an ‘offense’ cannot necessarily be “limited to the four corners of a charging instrument.”²⁴ Rather, the Court applied a definition it had conceived in another context. In *Blockburger v. United States*²⁵ the court explained “where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact, which the other does not.”²⁶

Applying the Blockburger test to the case at hand, the Supreme Court noted that, at the time of the confession in question, Cobb had been indicted for the burglary but had not been charged in the

murders. After reviewing the Texas Penal Code, the Court concluded that each offense required proof of at least one fact that the other did not and, therefore, were not the same offenses under Blockburger. Thus, the interrogation did not violate Cobb’s Sixth Amendment right to counsel and the confession was admissible.

When law enforcement officers find themselves investigating an individual who already has been charged with an offense, concerns regarding the Sixth Amendment can be assuaged by reviewing the criminal statutes and applying the Blockburger test. If each crime requires proof of at least one additional fact, the crimes are not the same for purposes of the Sixth Amendment.



***Nevada v. Hicks*,
121 S. Ct. 2304 (2001)**

This case involves tribal court jurisdiction in a civil liability matter involving state officials acting within the scope of their employment. On two occasions, Nevada game wardens obtained state

warrants to search Hicks’ home, located on tribal land, for evidence of poaching that occurred on nontribal land. Neither search produced evidence of the alleged crime. However, Hicks claimed that some of his property had been damaged during the searches and that the second search exceeded the bounds of the warrant. Hicks filed a Section 1983 civil lawsuit in tribal court alleging constitutional violations by the game wardens, as well as claims of trespass and other civil wrongs. The tribal court decided it had jurisdiction over Hicks’ claims. The game wardens and the State of Nevada appealed that decision. The U.S. Circuit Court of Appeals for the Ninth Circuit held that the tribal court had jurisdiction because the searches had occurred on land owned by the tribe within the reservation’s boundaries.

The case was appealed to the U.S. Supreme Court. The Court held that 1) the tribal court did not have jurisdiction to decide tort claims arising from the execution of search warrants by state officials on tribal land for evidence of crimes committed outside the boundaries of the reservation; 2) the tribal court did not have authority to adjudicate Section 1983 claims; and 3) exhaustion of claims in tribal court was not required before seeking federal court relief. The Court reversed and remanded the case.

The Court found that the tribal court did not automatically have jurisdiction over the acts Hicks complained of simply because they occurred on tribal land. Land ownership is merely one factor to consider. The tribe does have the

right to make laws and be governed by them, and any tribal assertion of regulatory authority over nontribal members must be tied to those tribal laws. The Court noted, however, that states have authority to issue process authorizing its officials to enter tribal lands to enforce state law. The Court recognized that states have criminal jurisdiction over tribal members dwelling on reservations for crimes committed off the reservation. Considering these facts, the Court concluded that tribal authority to regulate state officers executing process related to the violation of state laws committed outside the boundaries of the reservation is not essential to tribal self-government or internal relations.

The Court also found that tribal courts are not courts of general jurisdiction comparable to state courts. Therefore, they do not have jurisdiction over lawsuits filed under Section 1983. To consider tribal courts as courts of general jurisdiction would create an anomaly in the law. Title 28 Section, 1441, U.S. Code permits Section 1983 actions brought in state courts to be removed to federal courts. However, the law makes no provision for removal of such actions from tribal courts into federal courts. Rather than judicially creating a right of removal, the Court decided that tribal courts cannot entertain Section 1983 suits. Because tribal courts lack jurisdiction over Section 1983 lawsuits and lawsuits involving state officials performing their official duties on tribal lands, the Court concluded that there is no need for state officials to exhaust

tribal remedies prior to seeking relief in federal court. ♦

Endnotes

¹ *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444 (1990).

² *Id.* at 450.

³ *Edmond*, 121 S. Ct. at 457.

⁴ *Id.* at 455.

⁵ In this case, the police had been in the home immediately prior to having probable cause of the existence of the contraband, so they knew no one was in the home. Had they been unsure of whether anyone else was present, they would have been justified in doing a “protective sweep” of the home to ensure no one was present that might destroy the evidence.

⁶ *Skinner v. Railway Labor Executives’ Assn.*, 109 S. Ct. 1402 (1989) (mandatory narcotics testing of railway employees involved in accidents); *Treasury Employees v. Von Raab*, 109 S. Ct. 1384 (1989) (U.S. Customs employees seeking promotion to sensitive positions); and *Vernonia School Dist. 47J v. Acton*, 115 S. Ct. 2386 (1995) (high school students participating in team sports).

⁷ 121 S. Ct. at 1479.

⁸ *Id.*

⁹ 121 S. Ct. at 1478 (quoting *Turner v. Safley*, 482 U.S. 78, 89 (1987)).

¹⁰ *Shaw*, 121 S. Ct. at 1479 (quoting *Turner v. Safley*, 482 U.S. at 90.)

¹¹ *Shaw*, 121 S. Ct. at 1480.

¹² *Shaw*, 121 S. Ct. at 1479 (quoting *Turner v. Safley*, 482 U.S. at 404-405).

¹³ *Atwater*, 121 S. Ct. at 1557.

¹⁴ *Atwater*, 121 S. Ct. at 1557 (quoting *Dunaway v. New York*, 442 U.S. at 208).

¹⁵ The Court defined this evaluation in *Graham v. Connor*, 490 U.S. 386, 396 (1989):

Where...the excessive force claim arises in the context of an arrest or investigatory stop of a free citizen, it is most properly characterized as one invoking the protections of the Fourth Amendment, which guarantees citizens the right “to be secure in their persons...against unreasonable...seizures” of the person... Determining whether the force used to effect a particular seizure is “reasonable” under the Fourth Amendment requires a careful balancing of “ ‘the nature and quality of the intrusion on the individual’s Fourth Amendment interests’ ” against the countervailing governmental interests at stake. Our Fourth Amendment jurisprudence has long recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it.... Because “[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application,” however, its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is



actively resisting arrest or attempting to evade arrest by flight.

The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. The Fourth Amendment is not violated by an arrest based on probable cause, even though the wrong person is arrested, nor by the mistaken execution of a valid search warrant on the wrong premises. With respect to a claim of excessive force, the same standard of reasonableness at the moment applies: "Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers," violates the Fourth Amendment. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.

¹⁶ The standard for qualified immunity is "[G]overnment officials performing

discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). See also *Malley v. Briggs*, 475 U.S. 335, 341 (1986); where the Court said that qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." See also *Anderson v. Creighton*, 483 U.S. 635, 640 (1987), in which the Court defined what constitutes a clearly established right:

The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful,... but it is to say that in the light of preexisting law the unlawfulness must be apparent.

¹⁷ *Supra* note 7.

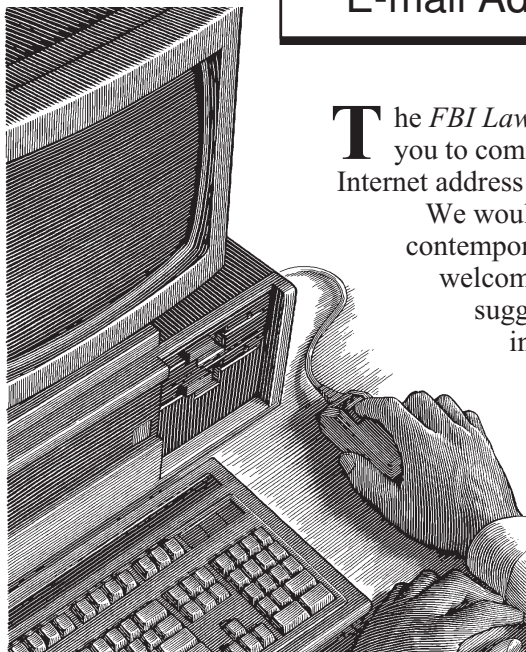
¹⁸ *Saucier*, 121 S. Ct. at 2159.

¹⁹ See *Cruz v. Laramie*, 239 F.3d 1183 (2001), Tenth Circuit. The Court of Appeals held that the use of "hog-tie" restraint on an arrestee whose diminished capacity is apparent constitutes excessive force in violation of the Fourth Amendment, but because the right was not clearly established in June 1996, when such a restraint was used on arrestee while he appeared to be on drugs, the officers were protected by qualified immunity with respect to federal civil rights claims. See also *Tennessee v. Garner*, 471 U.S. 1 (1985) where the Court held that the use of deadly force against an unarmed nondangerous fleeing subject was objectively unreasonable but, as in *Cruz*, held the individual officer/defendants to be immune.

²⁰ See *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658

Instructors in the Legal Instruction Unit at the FBI Academy prepared this article.

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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.



Officer Mertz



Officer Botefur

As Officers Corey Mertz and Dennis Botefur of the City of Junction, Oregon, Police Department were searching a wooded area for stolen property, they noticed an individual sitting in a pickup truck with the engine running, the windows up, and a flexible hose running from the truck's exhaust pipe to the passenger window. The officers immediately removed the hose and attempted to get the occupant out of the truck and into the fresh air. The man quickly became aggressive and angry at the officers and placed a knife at his own throat. Although the man wanted the officers to shoot him, the officers were able to use less-than-lethal means to control

the man, place him into custody, and, subsequently, transport him to the hospital. The officers' perseverance and use of appropriate law enforcement procedures prevented the loss of the man's life.



Officer Hollinhead

Wildlife Officer Mark Hollinhead of the Florida Game and Fresh Water Fish Commission was on patrol on Lake Okeechobee when a rapidly approaching cold front turned the calm water into a sea of froth. The area is open water frequented by boaters using small boats to fish. Concerned for the safety of four men in a small rental boat, Officer Hollinhead returned to the area to find their boat, quickly taking on water. Three of the men swam to Officer Hollinhead's boat while the fourth man was in a state of panic and would not leave the sinking craft. Officer Hollinhead jumped into the water and brought the man to his patrol boat. After safely delivering the four men to shore, Officer Hollinhead returned to the area and found two additional boats submerged with only the bows above water. He overcame strong winds and dangerous conditions to maneuver his patrol boat close enough to the floating victims to retrieve all of

them. Officer Hollinhead assisted a total of four children and eight adults to safety that day. His quick response and dedication to the law enforcement profession led to the successful rescue of these individuals.

Nominations for the *Bulletin Notes* should be based on either the rescue of one or more citizens or arrest(s) made at unusual risk to an officer's safety. Submissions should include a short write-up (maximum of 250 words), a separate photograph of each nominee, and a letter from the department's ranking officer endorsing the nomination. Submissions should be sent to the Editor, *FBI Law Enforcement Bulletin*, FBI Academy, Madison Building, Room 209, Quantico, VA 22135.

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Patch Call



The patch of the Oklahoma State Bureau of Investigation draws from that state's rich Native American heritage and each symbol and color has a special significance. The center of the patch, derived from the state's flag, depicts an Osage Indian warrior's shield crossed by a peace pipe and an olive branch. The eagle symbolizes vigilance and the microscope and scales represent the individual phases of the agency's history.



The Searcy, Arkansas, Police Department's patch depicts landmarks in the downtown area of Searcy, including the county courthouse, which was built in 1870 and remains the oldest working courthouse in the state of Arkansas.