



April 1998  
Volume 67  
Number 4

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

Louis J. Freeh  
Director

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

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

The *FBI Law Enforcement Bulletin* (ISSN-0014-5688) is published monthly by the Federal Bureau of Investigation, 935 Pennsylvania Avenue, N.W., Washington, D.C. 20535-0001. Periodical postage paid at Washington, D.C., and additional mailing offices. Postmaster: Send address changes to Editor, *FBI Law Enforcement Bulletin*, FBI Academy, Madison Building, Room 209, Quantico, VA 22135.

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# FBI Law Enforcement

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# Forensic Diving

## The Latest in Underwater Investigation

TOD W. BURKE, Ph.D. and  
CHARLES E. O'REAR, Ph.D.



*Picture yourself blind, deep underwater, weighted down with 50 pounds of equipment....Unseen dangers lie everywhere, waiting to entangle you: tree limbs, fishing lines, barbed wire, and sharp steel support bars jutting from eroded concrete bridges....You're a detective and this is your crime scene. In this dark, forbidding world, you must collect evidence, take measurements...and document it all with the same accuracy as an investigator on dry land.<sup>1</sup>*

**P**lane crashes, submerged vehicles, boating accidents, suicides, criminal homicide, swimming fatalities, ice rescues, and lost, damaged, or stolen evidence recovery represent just a few of the incidents forensic divers encounter. These underwater investigative specialists face a number of dangers, from underwater hazards to critical incident stress, but emerge from each case better prepared for the next. Agencies that recognize the unique needs of forensic diving teams can properly equip, train, and assist them in their public safety missions.

### ENVIRONMENTAL AND PERSONAL RISKS

Environmental factors often create personal risks for divers.

These include underwater piping; debris; silt; water depth, current, and temperature; and contaminants. Pollution from lumber, oil, paper, and plastics; medical waste; and organic hazards from both people and animals also pose a threat to divers. NYPD divers once recovered a human corpse in a Bronx sewage treatment plant.<sup>2</sup>

Divers need not enter sewage systems to experience their effects. Sewers often overflow during heavy rains, allowing unfiltered waste to enter the waterways. Exposed to the bacteria, underwater investigators can contract exotic amoebas and parasites, which often lodge in the intestine. If left untreated, these parasites migrate to the liver, eventually destroying it.<sup>3</sup>



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In addition to sewage, underwater cables for power and telephones, pipelines for oil and gas, and other debris make locating evidence difficult and place divers at risk.<sup>4</sup> Divers have become snagged on wires, tree branches, fishing line, rope, and boat propellers.<sup>5</sup> One diver got tangled on rope during an underwater training exercise. As he reached down to free himself, some fishing line got caught on his regulator and pulled it from his mouth. Though only a foot below the surface, he had to be rescued by his colleagues.<sup>6</sup>

Even during ideal underwater rescue and recovery operations, visibility often is poor. Underwater sediment, or silt, can create visibility problems for divers. Just as a blizzard can cause a "whiteout," stirred-up sediment can create a "silt-out," decreasing visibility to near zero and hampering investigations.<sup>7</sup> In fact, forensic divers often conduct investigations using only their sense of touch to recover bodies, personal items, or other

important evidence. In one case, a rescue dive team responded to reports of a hand protruding from the silt of a California lake, only to discover that the hand was, in reality, a stick.<sup>8</sup> In another incident, two divers performing an underwater cave rescue in Venezuela became lost and then separated from each other in the zero-visibility water. One eventually surfaced to freedom, while his partner remained lost. After a 36-hour ordeal, the missing diver was located, dazed but alive.<sup>9</sup>

Forensic diving becomes additionally problematic because water depths and currents can be deceiving. What appears to be calm, shallow water on the surface may actually have deep, swift currents underneath. Some rivers are controlled by dams that may have to be closed to prevent swift currents from interfering with rescue operations. Rescuers may need to drain ponds to provide safety for rescue personnel and assist in recovery efforts, as was the case during a

search for a missing Virginia toddler, who was later discovered dead in a river near her home.<sup>10</sup>

Nitrogen poisoning presents another risk for divers who conduct frequent deep-water operations.<sup>11</sup> When divers surface quickly, nitrogen that has pooled in the blood bubbles out, causing decompression sickness,<sup>12</sup> or "the bends." Symptoms include joint pain, back or abdominal pain, paralysis, numbness, tingling, inability to control bowels or urine, headache, dizziness, partial blindness, confusion, shortness of breath, chest pains, coughing and/or shock.<sup>13</sup>

Cold-water rescues pose unique dangers for divers. Equipment may malfunction (regulators can freeze)<sup>14</sup> or be lost in cold water. The potential for disaster is magnified during ice rescues when the diver easily could become the victim. For instance, in 1993, three people died while snowmobiling on a lake in Midland County, Michigan. Rescue personnel arrived on the scene and used their own snowmobile to travel to one of the victims. The snowmobile crashed through the ice, and the rescue worker fell into the frigid water. Fortunately, it took only 3 to 5 minutes for the rescue worker to climb from the water. In the process, however, he lost his radio, rope, and snowmobile.<sup>15</sup>

Forensic divers may experience additional risks, including hypothermia, hyperthermia, air embolism, and dehydration. Hypothermia occurs when the body loses heat faster than it can produce it.<sup>16</sup> Divers exposed to cold water for prolonged periods are likely to suffer from

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hypothermia, experiencing fatigue, blurred vision, repressed breathing, and/or a lack of muscle control.<sup>17</sup>

In contrast to hypothermia, hyperthermia is a rise in the body's core temperature due to an inability to remain cool. Divers working in hot water or hot climates with cold water can experience hyperthermia, and dehydration increases susceptibility to the condition. As with hypothermia, hyperthermia can cause extreme fatigue, as well as impaired performance, disorientation, and, if severe, loss of consciousness and cardiac arrest.<sup>18</sup>

Air embolism occurs when the lungs overexpand while breathing compressed air underwater. It often happens when a diver rushes to the surface without exhaling<sup>19</sup> and can occur in water as shallow as 4 feet. Symptoms include headache, confusion, weakness, paralysis, unconsciousness, or neurological disorders.<sup>20</sup>

According to experts, dehydration can significantly affect diving operations. For example, a loss of only 1.5 liters of fluid can reduce endurance by 22 percent and cardiovascular efficiency by 10 percent. Moreover, dehydration can cause a decrease in thermal balance and an increase in decompression sickness.<sup>21</sup>

Proper equipment may reduce the dangers of underwater investigation. In addition to using basic diving equipment, underwater investigators often require specialized gear.

## **FORENSIC EQUIPMENT**

Forensic divers must have the necessary equipment to conduct

effective underwater investigations. Their specialized equipment includes suitwear, underwater locating and navigation devices, and transportation.

### **Suitwear**

Suitwear consists of two types: wet and dry. Wet suits represent standard equipment for divers. They are designed to protect divers from some of the hazards of underwater recovery, such as fish hooks and broken bottles.<sup>22</sup> Dry suits,



***Agencies that recognize the unique needs of forensic diving teams can properly equip, train, and assist them in their public safety missions.***



which surround divers with air instead of water, insulate divers from chemical, environmental, and thermal hazards.<sup>23</sup> The added thermal protection they provide makes them especially appropriate for forensic divers investigating in waters below 55 degrees.<sup>24</sup> However, while the layer of air can be beneficial, it also can prove dangerous. As a diver changes depths, the volume of air in the dry suit changes, as well, affecting the diver's buoyancy. Unaccustomed to such changes, inexperienced divers may place themselves

in jeopardy.<sup>25</sup> Despite their benefits, dry suits can cost as much as \$1,800, making them less attractive for dive teams on limited budgets. By contrast, the cost of a wet suit generally ranges from \$200 to \$600.<sup>26</sup>

### **Locating Devices**

From locating submarines to finding fish, sonar has proven particularly useful for underwater searches. Forensic divers find sonar particularly useful in deep water; it can help locate the target, as well as identify potential hazards. Unfortunately, sonar may not help divers identify unknown targets.<sup>27</sup>

Still, sonar has proven useful in many underwater investigations. Hampered by deep water, swift currents, and unknown boundaries, forensic experts used sonar to locate and recover bodies and parts of the aircraft following the crash of TWA Flight 800 off Long Island, New York, in 1996.<sup>28</sup>

### **Transportation**

During a search and recovery operation, transportation must not only move rescuers to and from the scene but also aid investigators in their missions. Some missions prove more difficult than others. Ice rescues, for example, require special modes of transportation. Ice rescue boards and sleds provide the rescuer a high degree of floatation while allowing easy transition from water to ice and protecting divers' upper torsos from hypothermia. On the other hand, these devices are difficult to maneuver through heavy snow, difficult to balance in moving or open water, and require a

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substantial amount of strength to manipulate.<sup>29</sup>

Though they require a major financial investment, hovercrafts and airboats are ideal for high-speed and long-distance responses. They prove particularly useful when investigators must respond to remote areas or cover large bodies of water.<sup>30</sup> Like a Jetski with sonar, sonar jetcrafts are well suited to search missions as long as the water stays calm.<sup>31</sup>

Vans can provide ground transportation to and from the scene, while serving as the command post for the operation. Helicopters also can transport divers and equipment to the scene, search for wanted and missing individuals, and rescue victims. While television and movies make helicopter rescues appear effortless, in reality, they require significant training to achieve without harm to both rescuers and victims. Several people have been injured or killed after falling during a helicopter rescue.<sup>32</sup>

The equipment for a successful underwater investigation is only as good as its operator. The proper equipment, in the hands of qualified diving professionals, is essential for safe, effective, and efficient evidence recovery.

## **EVIDENCE RECOVERY**

The success of any investigation depends on locating, preserving, and maintaining accurate records of evidence, and forensic divers face unique challenges in doing so. In addition to poor visibility; water currents, depth, and temperature; and underwater hazards, bottom suction and object shifting may hinder recovery efforts.

Bottom suction often occurs in waterways containing soft mud bottoms. Raising a heavy object underwater requires greater lifting force than on land. The amount of suction depends upon the size and shape of the object and bottom surface environment. Once the item is free of vacuum suction, the possibility exists that the object may break loose uncontrollably, injuring divers and/or destroying evidence. To minimize these dangers when

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***Qualification and training exercises for diving teams should supplement, not replace, departmental physical and/or psychological requirements.***  
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lifting heavy objects, divers should use “pillow bags” and “lift bags,” which, when inflated, help push or pull underwater objects. Overpressurization valves release air from the bags and help control the object’s ascent.<sup>33</sup>

Objects underwater can shift, trapping victims, endangering rescuers, or destroying valuable evidence. Shifting often occurs due to strong currents, settling, or manipulation by victims or divers. To minimize this problem, divers should secure the objects properly.<sup>34</sup>

Divers also must secure items of evidence located in the water. To do this, they mark the location with

buoys, although this might not be necessary in shallow water. Next, the distance from the buoy to a secure marker, such as a bridge, is measured, and a sketch is made to record this information. Using underwater photographic equipment, the item is recorded. Divers then collect the evidence, being careful not to destroy fingerprints or any other characteristics necessary for later identification. It may be necessary to immerse the object in fresh water to preserve its evidentiary value, particularly if it was recovered from polluted or salt water. At this point, divers should follow dry land evidence collection rules and chain of custody guidelines.<sup>35</sup>

The latest in underwater recovery efforts includes the use of canines. Experts agree that dogs can detect people underwater at depths as great as 150 feet.<sup>36</sup> While they sometimes lead investigators astray, they have proven themselves to be major assets in underwater investigations. For example, when a fisherman’s capsized boat and gear were found floating over a mile stretch of water on a lake in northern Minnesota, rescuers marked the search area, a region about 2 miles long and one-half mile wide. Approaching the area by boat with the rescue team, Kodi, a Newfoundland, jumped into the water before they even had reached the search site. Doubting her find, the team searched the marked area instead. A few days later, the victim’s body was found where Kodi had first indicated.<sup>37</sup>

Training and practice are crucial for effective canine operations, and handlers should follow certain criteria when training their dogs.

These include planning an appropriate search, working downwind, studying wind patterns, recognizing and understanding the dog's body language and limitations, using proper safety practices, eliminating the use of harnesses, and making training fun.<sup>38</sup>

Finding the right dog can help the process. Some agencies prefer Labrador retrievers, while others favor golden retrievers, bloodhounds, or Newfoundlands.<sup>39</sup> Regardless of the breed, the best dogs have an easygoing temperament, possess a healthy prey instinct, swim strongly, and possess a keen interest in their surroundings. They also should be trained as puppies.<sup>40</sup> One handler begins training search dogs at approximately 8 months old. Scent training starts on land

and eventually progresses to the water.<sup>41</sup> In short, the qualifications and training for diving dogs are as important as the qualifications and training required for forensic divers.

### **QUALIFICATIONS AND TRAINING**

Qualifications and training for forensic divers vary between agencies. To qualify for one of the Virginia State Police's seven diving teams, candidates must have at least 2 years' experience as troopers and receive written endorsements from their supervisors. They must pass a physical test that includes swimming 800 yards, treading water for 15 minutes, swimming 75 feet underwater without breathing apparatus, running 1.5 miles,

and completing a minimum number of push-ups and sit-ups. Following a successful interview, candidates attend a 5-week diving school, often followed by specialized training, and mandatory in-service training.<sup>42</sup> In addition to passing a physical endurance test, candidates for the New York Police Department's dive team must pass a written diving exam.<sup>43</sup>

Qualification and training exercises for diving teams should supplement, not replace, departmental physical and/or psychological requirements. Forensic divers must maintain their fitness and educational standards in order to stay on the team. While these requirements may appear stringent, divers must be prepared to handle the many environmental and personal

### **Diver Line Signals**

#### **Line Tender to Diver**

- 1 tug: "Are you O.K.?"
- 2 tugs: "Stop, change direction, take out line"
- 3 tugs: "Come to surface"
- 4 tugs: "Stop" (danger on surface or in water)

#### **Diver to Line Tender**

- 1 tug: "O.K."
- 2 tugs: "Need more line"
- 3 tugs: "Have located object"
- 4 tugs: "Need help"

#### **Diver to Diver**

- 1 tug: "O.K."
- 2 tugs: "Pattern completed, release more line"
- 3 tugs: "Mission completed—object found"
- 4 tugs: "Help" or "I need assistance"

*Source: Professional Association of Diving Instructors, Underwater Investigator, handout No. 12.*

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dangers associated with underwater investigation, as well as the stress that often accompanies the job.

### **STRESS MANAGEMENT**

While many employees experience occupational stress, forensic divers experience unique stressors, including dangerous working conditions; intensive and extensive training; 24-hour availability; high demand for success; and witnessing, preventing, or responding to disasters. As a result, divers and their supervisors should recognize the signs of stress, such as poor eating and sleeping habits, inability to focus, failure to perform duties, argumentativeness, unnecessary risk taking, decreased interaction with team members, increased cynicism, lack of caring, loss of motivation, and emotional exhaustion (burnout). Unmanaged stress can cause high blood pressure, fatigue, eye strain, shallow breathing, headaches, digestive problems, increased use of alcohol and tobacco, and domestic and personal problems. Although stress is an inevitable part of the job, dive team members can take certain steps to reduce it, including maintaining proper eating and rest schedules; participating in a physical fitness program; practicing relaxation methods; and turning to a friend, family member, therapist, clergy member, or other person who can lend a sympathetic ear.<sup>44</sup>

### **MEDIA RELATIONS**

The scene of a critical incident can become a media event, putting additional stress on the dive team. To prevent unnecessary

distractions for members of the team, investigators should appoint a media relations liaison. This person can establish a command post to give news people a central location to ask questions and conduct interviews. In addition, the liaison can review news coverage of the event with team members to serve as a teaching tool, indicating how the team can improve not only its relationship with the media operations but its operations, as well.<sup>45</sup>

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Qualification and training exercises for diving teams should supplement, not replace, departmental physical and/or psychological requirements.  
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Inviting the media to dive team training sessions can eliminate the need to explain basic procedures during actual events. Encouraging news stories during down times also would increase public awareness and possibly increase funding for diving operations.<sup>46</sup> In short, the media liaison should work to get the entire community behind the diving team.

### **TEAMWORK**

Underwater investigations require dedicated individuals working as a team to accomplish

a common goal. The work can be physically and emotionally demanding and requires strict adherence to many procedures, rules, and standards. Life-and-death decisions must be made in seconds. Team members must be able to meet the demands of the job without complaining or condemning; egos must take a backseat. Uncooperative members complicate the function of the team and place members at risk.

Cooperation includes effective communication. Communication during underwater investigations is hindered by the nature of the operation. Nonverbal communication is the rule rather than the exception. Members often use line signals to communicate. Team members must be able to recognize when other team members are in trouble, whether they signal or not. Communication also can be hampered when volunteers, who do not know the signals, help with a mission.

While the use of volunteers is under debate, the failure to allow volunteers to assist may be grounds for legal action. For example, in Lake County, Illinois, the family of a drowning victim received a \$1.3 million out-of-court settlement, after authorities at the scene prevented two civilian scuba divers from rescuing the victim. By the time county rescue divers reached the scene 18 minutes later, it was too late.<sup>47</sup> Still, for both safety reasons and evidence protection, forensic divers must not allow unqualified individuals to enter the scene. Volunteers who are not versed in evidence recovery can destroy valuable evidence.

Unfortunately, some smaller agencies with limited resources need volunteers to augment their recovery operations. Other agencies share dive team members and equipment. While this arrangement may appear cost-effective, difficulties can arise when divers from one region fail to respond to rescue operations, equipment needed for operations is stored in another region, or shared equipment proves incompatible.

A specialized regional diving team could solve these problems. One team could specialize in rescue diving; another team, evidence collection. This would minimize the dangers of mishandled evidence for courtroom presentation, while providing the necessary resources to complete the operation successfully.<sup>48</sup>

## CONCLUSION

The underwater world of a forensic diver is fraught with danger. Whether performing a rescue mission or salvaging evidence, law enforcement dive teams brave a myriad of elements to achieve their goals. They do so with a dedication to duty and an esprit de corps that makes so many difficult law enforcement duties possible.

While still in its infancy, forensic diving has made many contributions to law enforcement in search and rescue operations. This trend likely will continue as agencies recognize the value of dive teams, criminals seek alternate means of evidence disposal,<sup>49</sup> and accidents happen. With the right training, equipment, and support, forensic dive teams can take law



Photo © Bob Teather

enforcement operations to previously unattainable depths. ♦

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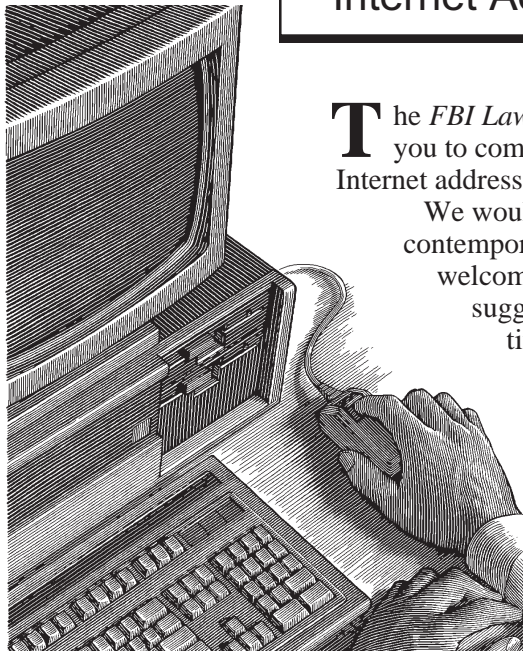
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***I Love a Cop: What Police Families Need to Know*, by Ellen Kirschman, Ph.D., Guilford Press, New York, New York, 1997.**

Police work has long been recognized as a stressful profession. This stress and the resulting problems or challenges it causes not only affect police officers and their co-workers but their families, as well. The author of *I Love a Cop: What Police Families Need to Know* draws upon her experience as a police psychologist to explain some of the common stress-producing experiences police officers face as they progress through their careers. From organizational factors and traumatic incidents to emotional issues and special circumstances, the author discusses a wide range of concerns. She uses real-life examples to illustrate her points and provides an exhaustive number of tips from both experts and officers on the street to help police families cope with these aspects of police work and mitigate their negative effects.

Most police practitioners know the various stages and corresponding behaviors that officers can experience during their careers, from the probationary period to the honeymoon period to disillusionment and, finally, burnout. In part 1, the author describes these phases, letting police families know what to expect at each stage, and provides tips for dealing with each one. Additional chapters in this section deal with the other realities of police work: long hours, shift work, unpredictability, public scrutiny, organizational stress, and injuries.

In part 2, the author addresses the various types of traumatic events that can occur, including police-involved shootings, line-of-duty deaths and injuries, and the like, as well as their effects on officers and their families. One chapter focuses specifically on helping children through traumatic incidents. Also in this section, the

author addresses what she calls emotional extremes—domestic abuse, alcoholism, and suicide.

Experience has shown that police officers and their families often are reluctant to seek counseling, primarily for reasons of confidentiality and the stigma associated with asking for help. Moreover, officers who feel unable to problem-solve and remain in control of their own lives often feel diminished and inadequate. In the last chapter in this section, the author discusses these concerns and lets police families know when they should seek professional help and the various types available.

The chapters in part 3 address the special concerns of female, minority, and gay officers, as well as police couples. Part 4, the book's final chapter, provides an ending to each of the real-life stories the author begins in earlier chapters. At the end of the book, the author provides an extensive reference list and a compilation of resources available, including organizations, books, and videos.

*I Love a Cop* is a comprehensive, easily understood source of valuable information. The difficulty comes in disseminating this information to the people who need and could benefit from it—police administrators, officers, and their families. This could be accomplished through various methods, including orientation programs for officers and their families, in-service and roll-call training, stress management programs, career counseling sessions, and retirement planning seminars. *I Love a Cop* provides such worthwhile information that police administrators should seriously consider making it required reading for promotional examinations.

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# Continuing Education

## Expanding Opportunities for Officers

By DOMENICK VARRICCHIO, M.A., Ed.S., C.P.M.

Photo © KL Morrison



**A**s one of the byproducts of the policing subculture, many law enforcement administrators become conditioned to looking at situations from a “zero-sum” perspective. That is, in order for one party to win, another party must lose.

While this model might apply to apprehension or arrest situations, it should not characterize a department’s approach to professional development for its officers. In fact, a solid emphasis on

continuing education is a winning proposition for all parties involved—the department, the officer, and the community.

Although law enforcement as a profession may have been slow to recognize the full value of education as a complement to specific job-related training, an increasing number of administrators now view it as an important component of a complete transition to community-based policing. As officers move to interact with citizens in new ways

and address a wide range of issues that impact crime problems in a community, continuing education helps enhance the problem-solving skills necessary for officers to operate successfully in this environment. In agencies across the country, revised mission statements mandate skills far beyond the rudimentary mechanics of uniformed patrol. At the same time, a broader approach toward enhanced professionalism involves higher educational levels, coupled

with increased interpersonal, technical, and managerial skills.

One of the challenges that confronts progressive police managers is how to make educational opportunities accessible to officers. In the late 1970s, the Port Authority of New York and New Jersey Public Safety Department was among the first law enforcement agencies in the country to develop an off-campus continuing education program in conjunction with a local university. Today, the program continues to expand and serves as a model for the type of constructive partnership that can exist between law enforcement and institutions of higher learning.

The growing program is a reflection of the evolving emphasis on education within the law enforcement profession. During the past three decades, education levels have risen steadily in the nation's police agencies. To attract and retain the types of individuals needed to fulfill the challenging community-based mandates of the 21st century, law enforcement agencies should not focus only on higher educational levels for recruits but also should work to increase educational opportunities available to all officers on the force.

### **A Call for Higher Learning**

The vast majority of police candidates who entered the profession from the end of World War II through the mid-1970s were military veterans in their early 20s, with high school or equivalency diplomas, seeking job security in a semi-skilled, blue-collar environment. Police and fire departments offered

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*Lieutenant Varricchio serves with the Port Authority of New York and New Jersey Public Safety Department in Staten Island, New York.*

this type of security with a steady income, excellent fringe benefits, and—like the military—early retirement eligibility after 20 to 25 years of service or at age 55, depending on the jurisdiction.

Amid the race riots and social protests of the 1960s, the President's Commission on Law Enforcement and Administration of Justice called for all police officers to possess college degrees.<sup>1</sup> Since this call was issued in 1967, law enforcement agencies and civil service commissions in a growing number of communities have raised educational requirements from the traditional high school diploma to 2- or 4-year degrees with a major in criminal justice or a related field.

Inevitably, this trend has met with a host of proponents and detractors. Many critics believe that certain criminal justice programs are merely extensions of basic recruit training, rather than substantial disciplines relating to pertinent sociological and psychological issues. Others challenge the

correlation between classroom theory and the reality of the streets—calling into question the value of a college education as it relates to police work. Still others fear that college-educated officers will quickly tire of the irregular hours, constant pressures, and relative low pay of policing and move on to greener pastures more readily than their counterparts without degrees.

Although these concerns should not be dismissed lightly, the experiences of departments across the country have shown that the advantages of increased education levels in policing generally far outweigh the potential disadvantages. A firm educational foundation not only enhances officers' general knowledge, but it also helps strengthen the problem-solving skills that have become integral to contemporary policing. As the importance of education in policing has grown, an increasing number of departments have instituted policies mandating educational

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requirements for appointments, specific assignments, and promotions, particularly to senior management positions.

### **Enhancing Prospects**

Clearly, the move toward higher education levels benefits individual officers as it benefits their departments. Officers who obtain degrees, either before joining a department or while serving in an agency, enhance their potential value in the job market considerably. An officer's employment prospects become an important issue as the officer approaches retirement age.<sup>2</sup> Most second career jobs of any merit require college education in addition to an individual's experience in police service. A resume must be broad-based to attract the attention of prospective employers, all of whom are aware of the pension entitlement available to officers after they separate from an agency. Higher education degrees often become the clincher, or at least the tie-breaker, when retirees interview for positions in the job market.

Basic recruit, in-service, and other specialized training officers receive cannot compete with a college degree from an accredited institution. Prospective employers outside law enforcement generally view police training as instruction in job-related concepts, whereas they view higher education as focusing on a deeper understanding and discussion of concepts from a more historical, theoretical, and philosophical level.

Interviewers perceive the educated job candidate as one who can converse on a variety of topics be-

yond the often-narrow confines of an occupation. They also realize that police retirees with higher education have sacrificed time, effort, and expense to achieve their goals. Although many universities accept and award undergraduate, and in some cases, graduate credit for certain recognized police training courses, it generally has been left to individual officers to balance rotating shifts, job stress, family responsibilities, and other forces to pursue the majority of those degree credits.

**// ...continuing education helps enhance the problem-solving skills necessary for officers to operate successfully... //**

### **Port Authority Program**

In 1977, the Port Authority of New York and New Jersey Public Safety Department was among the first law enforcement agencies in the country to offer an off-campus police graduate studies program in conjunction with the New Jersey State Police and the College of Education and Human Services of Seton Hall University. Since its founding by a former police chaplain 20 years ago, the program has awarded graduate degrees to hundreds of law enforcement officers from the Port Authority, as well as personnel from other federal, state, county, and municipal agencies.

Currently, graduate studies facilities are located in six counties in New Jersey. Students may attend classes at any of the sites and often do so in order to accommodate their academic requirements as they near the program's completion.

The graduate program offers a concentration of courses in the science of administration and supervision and human resources training and development. Additional courses are offered in ethics for the helping professions, psychological issues and implications, and directed research for administrators. In addition to a fully accredited 36-credit masters degree program, the college offers a certificate program for students who successfully complete 12 credits, either in human resources training and development or leadership and management.

Among its distinctive features, the program allows law enforcement personnel to attend classes in close proximity to where they live and work, which reduces overhead expenditures for the institution and enables the agency to negotiate lower tuition rates for its members. The Port Authority Police receive a 40 percent scholarship from Seton Hall University and additional financial support through the department's tuition assistance program. Personnel who qualify may receive up to 80 percent reimbursement for tuition costs. This benefit, coupled with the scholarship, helps make the program affordable. Officers may secure additional financial assistance through federal or university loans, and military veterans can apply tuition benefits to the program.

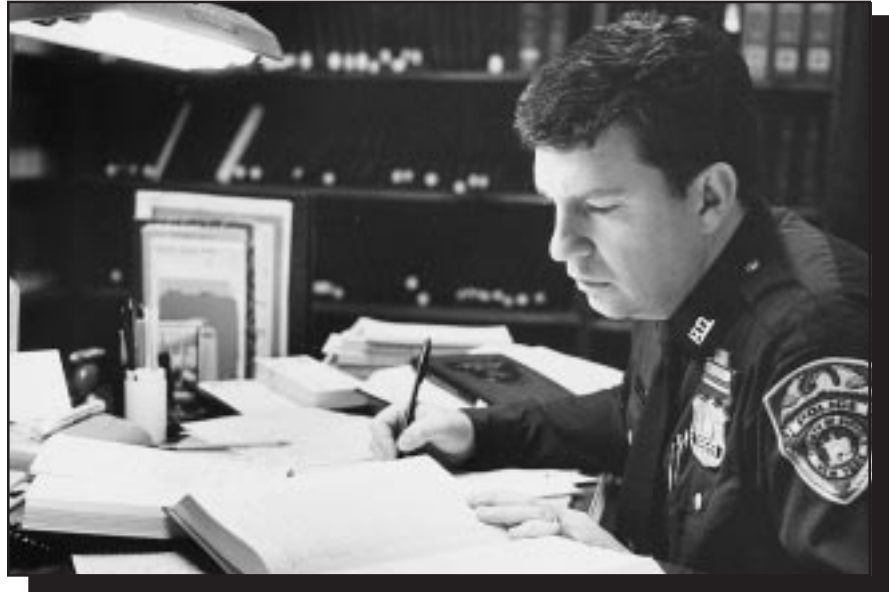
Academically, the program is designed to strengthen students' professional knowledge and skills and enhance their capacity for leadership in a wide spectrum of environments. It is staffed by full-time faculty from Seton Hall and qualified active and retired law enforcement officers, who serve as adjunct professors. The adjunct faculty rotates among the various off-campus sites, providing instructors an opportunity to expand teaching skills and experience the various disciplines offered at each location.

Course requirements also are tailored to meet changing needs in criminal justice. During the past several years, courses in leadership, ethics, finance, policy, administration, statistics, and a number of other pertinent subjects have been introduced into the graduate curriculum. Students take these classes in addition to the mandatory foundation courses.

### **Developing a Program**

Selling the concept of a police undergraduate, graduate, or certificate program may be easier than it once was. Until recently, upper-level management positions in agencies were inundated with administrators who knew little about administration and generally frowned on higher education as a means to enhance police performance and management.

Today, the story is different, and the composition of the upper-level administrative ranks in police agencies across the country reflects the quiet revolution that has taken place. A large-scale study in Illinois conducted during the mid-1980s indicated a substantial increase from



past years in academic qualifications for police chiefs: Of those surveyed, nearly 50 percent held bachelor's degrees and 21 percent held graduate degrees.<sup>3</sup> In the years since that study, growing numbers of college-educated officers have assumed leadership roles in law enforcement agencies. Thirty years after the President's Commission, higher education levels have at last become a hallmark for executive-level offices in agencies across the country.<sup>4</sup>

The logical extension of this move toward higher education levels among the executive ranks is to expand the emphasis on education throughout the rank structure of law enforcement agencies. To this end, departments should explore ways to make educational opportunities not only available but also convenient to officers. Although more than half of all police agencies currently offer educational pay incentives or tuition assistance programs to officers, only a small fraction have policies in place to more directly

accommodate higher education programs for officers.<sup>5</sup>

As the Police Graduate Studies Program model demonstrates, an important component of programs of this type is close cooperation between the senior management staff of the law enforcement agency and the learning institution. In January 1997, the program expanded to offer a distinct on-site graduate program for the Port Authority Police. Nearly 100 officers are currently enrolled in this on-site program.

### **Results**

For the past 20 years, Police Graduate Studies Program alumni have distinguished themselves in their respective agencies, using their education to enhance their abilities and performance. Many have gone on to enjoy productive postretirement careers. Several have become public safety directors for both public sector agencies and private organizations. Some have become associate professors at Seton Hall and other institutions of

higher learning. Still others have become chiefs of police in surrounding communities.

The success and popularity among officers of the Police Graduate Studies Program can be attributed to several important factors.

- The program focuses on areas of study viewed as relevant and practical to law enforcement officers who have an interest in the supervisory and managerial aspects of police work
- Classes are offered at several off-campus sites, making the program convenient for officers
- The Port Authority arranged a group scholarship price structure and provided tuition incentives, making the program economically viable for officers.

Further, officers understand that attaining a graduate degree enhances their value to their current agency as well as improving their value in the job market.

Agencies that wish to increase their education levels can adapt the basic principles of programs such as the one developed between the Port Authority and Seton Hall University.<sup>6</sup> Whether agencies develop graduate, undergraduate, or certificate programs, the basic tenets of relevance, convenience, and economic viability will encourage officer interest and involvement.

### Conclusion

In the 80 years since police visionary August Vollmer introduced college-educated officers into the Berkeley, California, Police Department, agencies have moved

slowly toward increasing educational levels in the policing profession. Despite repeated calls to raise the education levels of police officers, significant practical obstacles—as well as philosophical ones—have impeded progress in this area. Now that the philosophical obstacles have gradually diminished, progressive law enforcement administrators must work to address the remaining practical barriers to enhancing educational opportunities for officers. By working closely with institutions of higher learning, agencies can develop degree and certificate programs that are relevant, convenient, and economically viable for officers. By combining these factors with a work environment that encourages higher learning, agencies can develop a program that helps officers prepare for the postretirement job market as it enhances their value to their agencies and their communities today. ♦

### Endnotes

<sup>1</sup> Edward A. Thibault, Lawrence M. Lynch, and R. Bruce McBride, *Proactive Police Management, 3rd. ed.* (Englewood Cliffs, New Jersey: Prentice Hall, 1995), 263-264.

<sup>2</sup> See William Rehm, "Retirement: A New Chapter, Not the End of the Story," *FBI Law Enforcement Bulletin*, September 1996, 6.

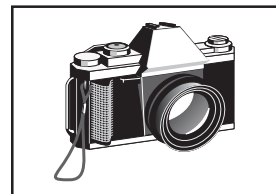
<sup>3</sup> Keith I. Chandler, "The Importance of Education in Police Chief Selection," *Police Chief*, January 1984, 28.

<sup>4</sup> David L. Carter, Allen D. Sapp, and Darrel W. Stephens, "The State of Police Education: Policy Direction for the 21st Century," (Washington, DC: Police Executive Research Forum, 1989), 59-65.

<sup>5</sup> Ibid.

<sup>6</sup> For more information about the Police Graduate Studies Program, contact the author at the Port Authority of New York and New Jersey, Port Authority Police, Goethals Bridge Administration Building, Staten Island, New York 10303.

## Wanted: Photographs



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

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

Brian Parnell, Art  
Director, *FBI Law  
Enforcement Bulletin*,  
FBI Academy, Madison  
Building 209, Quantico,  
VA 22135.

### **Transitions** *Responding to the Needs of Domestic Violence Victims*

By Cheryl Rucinski



Photo © Don Ennis

Over the years, various crimes have demanded law enforcement attention. Drugs, violent crime, and domestic violence all have pulled the focus of police departments, law makers, and society alike. In many cases, the law enforcement response to these types of crimes has changed.

Just as many police departments have done, the Cheektowaga, New York, Police Department identified domestic violence as a priority. The department developed a proarrest policy and provided extensive training to its 125-officer force. Yet, 10 years later, a significant number of officers misunderstood the department's domestic violence initiatives. In fact, the department seemed to have developed a culture that remained unresponsive to the needs of the victims and families of domestic violence. Discovering this through surveys, training evaluations, and verbal feedback from the officers, the department immediately set out to improve the officers' understanding, attitudes, and behavior.

#### **MISUNDERSTANDING THE NATURE OF DOMESTIC VIOLENCE**

In a home fractured by domestic violence, offenders seek power and control over their victims. Thus, when an officer exhibits biased or hostile attitudes or

controlling behavior, whether intentional or not, victims can view the officer's behavior as no different than that of the offender. Some victims withdraw under these circumstances; others become highly emotional. No one's needs are served in a discourse of this nature. The department does not develop sufficient information to prosecute the offender. The victim feels further victimized and becomes less likely to report future incidents of violence. When attitude problems become a barrier to the effective delivery of services to the victim, the cycle of violence continues.

#### **MAKING THE TRANSITION**

To address these concerns, the Cheektowaga Police Department entered into a joint endeavor with Haven House, the local battered women's shelter, and the National Conference, a human relations organization dedicated to recognizing diversity and combating prejudice. Because of its dual roles of moving the department to a new way of responding to domestic violence and helping victims transcend their abusers, the project was christened Transitions. Its objectives included:

- Dispelling invalid myths about victims of domestic violence that officers may harbor
- Increasing the interpersonal and communication skills of responding officers
- Reducing bias and discrimination by officers toward victims
- Increasing officers' ability to recognize the violent human dynamics in domestic scenarios
- Developing data identifying areas for growth and improvement.

In light of these objectives, the partners decided to focus the majority of the training on addressing attitude issues and the misconceptions held by the officers because these seemed to be the root cause of some of the communication problems between officers and domestic violence victims. Training was offered to all of the department's officers, emergency dispatchers, and civilian personnel, as well as to police officers from other local agencies. In all, 300 public safety employees attended the Transitions conference.



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## DESIGNING THE PROGRAM

The project director designed the initial framework for the 2-day program; however, all members of the police department, both sworn and unsworn, as well as the community partners, selected the training topics and scenarios by responding to a written survey. The survey listed a number of domestic violence-related topics—such as interviewing techniques, officer safety, and the signs of domestic violence—from which the respondents could choose. The top issues then provided the curriculum for the program.

Next, a core group of 15 representatives of the department—including police officers, detectives, captains, lieutenants, sergeants, civilian clerks, and public safety dispatchers—met with the presenters and discussed the format and content of the training. The ideas for three vignettes evolved from this group based on the members' perceptions of difficult domestic scenarios. Five officers volunteered to develop the plot, content, and dialogue of the vignettes with the "Theater for Change," a troupe of professional actors, writers, and directors who address difficult issues by performing plays, improvisations, and workshops. Officers attended rehearsals to critique the actions and dialogue of the actors for authenticity. The core group then reassembled to review the vignettes prior to the debut before the department.

## CONDUCTING THE PROGRAM

### Day One

A family counselor from a local counseling agency, who works primarily with domestic violence offenders and facilitates a battered women's group, presented the morning program on the first day. It covered a number of topics, from why women stay in abusive relationships and how violence affects children to offender profiling and interviewing techniques. An important part of the program centered on how offenders manipulate the police, especially

**“  
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male officers. Offenders may blame their victims, try to get officers to identify with them, lie to the officers, and/or make promises they do not keep, for example, returning to the house after the officers leave. Rather than empathize or identify with offenders, both male and female officers need to see through the offenders' manipulation techniques and instead focus on what actually occurred and who was at fault.

When discussing interviewing techniques, the presenter stressed the impact that an officer's words and actions can have on both offenders and victims. Many officers said they feel pressed for time on calls

and cannot stay and “play social worker.” To answer these officers, the presenter suggested specific words and phrases that could have an immediate impact on victims. For example, reminding the victim that hitting someone is a crime, explaining the cycle of violence and how it repeats itself, and emphasizing that the victim was not at fault can help to empower the victim to seek help.

Officers also learned three types of offender profiles: the family-only abuser, the generalized

aggressor, and the emotionally volatile offender.<sup>1</sup> Each of these offenders comes from a different family background, demonstrates a variety of attitudes and behaviors, and exhibits a varying degree of violence. Family-only offenders, for example, usually are violent only at home, whereas generalized aggressors are just that—generally violent both in and outside the home.

In the afternoon, the Theater for Change debuted. Three vignettes each depicted a different scenario, and each featured a different offender profile. Two of the three included children. In each vignette, as in real life, officers needed to cut through the surface issues to get to the heart of the situation.

The first vignette portrayed an emotionally volatile abuser and his wife, who were mutually combative. It challenged officers to determine who the primary aggressor was. To do so, officers needed to defuse the anger of the combatants to obtain the information they needed to make a decision.

## A Typology of Men Who Batter

<b>Family-Only Abuser</b>	<b>Generalized Aggressor</b>	<b>Emotionally Volatile Offender</b>
Violent only at home	Generally violent both in and outside the home	Sometimes violent outside the home
Least likely to have been abused as a child	Most likely to have been abused	Somewhat likely to have been abused
Least severe violence	Most severe violence	Midway between other two types
Lowest level of psychological abuse	Moderate level of psychological abuse	Highest level of psychological abuse
Suppresses feelings	Reports some feelings of anger, depression, and jealousy	High levels of anger, depression, and jealousy (more suicide attempts)
More liberal attitude about sex roles	Most rigid attitude	Rigid attitude
Satisfied with marriage/low conflict	Some satisfaction/some conflict	Least satisfaction/most conflict
Some alcohol use associated with violent acts	Alcohol use usually associated with violent acts	Alcohol use seldom associated with violent acts
Some chance of prior counseling	Some chance of prior counseling	Most likely to have had prior counseling

*Source: Daniel G. Saunders, Ph.D., A Typology of Men Who Batter, 1992, handout.*

The second short play depicted a reluctant, passive victim and a family-only abuser. In this case, the victim felt helpless to resolve the situation, and her husband, the type of abuser who usually remains a pillar of the community, rationally explained away his behavior. His calm and friendly demeanor easily could have won over responding officers, who needed to look past his facade while patiently addressing the victim's concerns.

The third scenario illustrated a violation of a protection order, even though the victim "let" the offender, a generalized aggressor, back into the residence. This vignette illustrated that officers should resist blaming the victim. Rather, offenders who manipulate victims to gain entry into the residence have violated the protection order and should be taken into custody.

After performing each vignette, the actors stayed in character and interacted with the officers. A trainer

from Haven House facilitated this portion of the program. The officers practiced interviewing techniques and employed different approaches to obtain information from the victims. They also questioned offenders to hear their justification for their behavior, and by interviewing the children, the officers saw the effect of violence on their lives.

This built-in interactive component proved the key to the session's success. Officers challenged one another and exchanged many useful strategies and ideas on protocol and interviewing techniques. Because group size was limited to 20-30 people, everyone had a chance to participate in the discussions.

### **Day Two**

On the second day, staff from the National Conference presented a cultural diversity program designed to provide strategies for identifying and

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resolving cross-cultural differences in an atmosphere of open discussion, problem solving, and understanding. In this way, officers would work to overcome the myths and stereotypes that hinder creative problem solving. After leading a general discussion on prejudice and discrimination, the staff focused on sexism, which plays a major role in domestic violence cases, as well as in the police response to them.

Domestic violence offenders, for example, often expect their partners to fulfill traditional sex roles. They seek power and control in the relationship, and if they do not get it, they batter. Thus, sexist attitudes, combined with additional offender traits, can create an atmosphere ripe for abuse. In addition, police officers who believe these same stereotypes may treat victims poorly. Finally, sexist attitudes may create a rift between male and female members of the department.

During this session, the officers broke into groups; many of them included at least one female officer and/or a victim advocate, who eventually would ride with officers to domestic violence calls. These advocates helped officers see the victim's point of view. In addition, by the end of the discussion, many officers had realized where their personal biases lay and felt better able to speak freely on a variety of sensitive topics.

During the afternoon presentation, the assistant district attorney assigned to the domestic violence bureau of the district attorney's office covered changes in the law in New York. Some recent changes include mandatory arrest for both felony and misdemeanor charges and new felony violations of protection orders.

## SEEING RESULTS

Following the training, officers completed a written survey to provide feedback. Several officers stated that it was the best training session they had attended in their careers. They learned how their prejudices, words, and actions had affected their

interaction with domestic violence partners and took away concrete ideas on how to improve their response to both offenders and victims. Many officers made suggestions for follow-up programs. Moreover, in the months following the Transitions training, domestic violence victims praised the department's responsiveness to their needs. Finally, formal recognition of the program came with a 1997 Excellence in Community Policing award from the National League of Cities.

## CONCLUSION

Domestic violence is a complicated issue, and responding officers no longer can afford to give offenders time to cool off or tell couples to kiss and make up. Both offenders and victims may need a variety of interventions to help them break the cycle of violence. The police represent their first step on the road to recovery. Yet, myths and misconceptions can block that route,

as the Cheektowaga Police Department discovered by paying attention to its officers' attitudes and behaviors.

Using nontraditional training methods—such as interactive vignettes and open-forum discussions on sensitive topics—collaborating with unique community partners, and presenting a police training program designed by police officers made Transitions different from other programs officers had attended in the past. These characteristics helped the department achieve its goal of developing a positive organizational culture with corresponding values, attitudes, and behaviors. In doing so, the Cheektowaga Police Department helped to ensure an effective and appropriate response to the domestic violence needs of the community. ♦

**“ When [officer] attitude problems become a barrier to the effective delivery of services to the victim, the cycle of violence continues. ”**

### Endnote

Daniel G. Saunders, Ph.D., *A Typology of Men Who Batter*, 1992, handout.

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*Lieutenant Rucinski serves with the Cheektowaga, New York, Police Department, and is the Transitions program director.*

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# ***Community Prosecution*** ***Community Policing's Legal Partner***

By SUSAN P. WEINSTEIN, J.D.

**A**lthough various reports indicate that violent crime rates have been decreasing, the American public continues to feel threatened by crime. Whether real or imagined, this dread pervades the lives of many people in today's society. When residents live in fear in their own neighborhoods, the criminal justice system has failed. While all disciplines working in the system bear the responsibility for promoting public safety, it is the prosecutor's first and foremost obligation. In today's climate, prosecutors must prosecute

crimes vigorously and explore creative solutions to addressing crime.

To increase public safety and enhance the quality of life in their districts, prosecutors have begun to transcend their traditional roles of reacting to crime as case processors. As crime and violence threaten communities and case-loads overwhelm the criminal justice system, some prosecutors have begun experimenting with creative approaches to fighting, as well as preventing, crime in their jurisdictions. Accordingly, district attorneys have embraced an innovative

philosophy called community prosecution.<sup>1</sup>

## **THE CONCEPT**

Community prosecution is a grassroots approach to law enforcement involving both traditional and nontraditional prosecutorial initiatives. It invites citizens to participate in establishing crime-fighting priorities and collaborating with prosecutors. By clearly defining an area in which to implement community-based programs, committing resources for the long term, and being sensitive to residents' concerns,

prosecutors can target key problems identified by residents.

Community prosecution contrasts sharply with the traditional method of setting prosecutorial priorities by assessing the seriousness of the crime, the weight of the evidence, and the threat that defendants pose to the public or to themselves. Community prosecution often addresses less serious crimes, such as prostitution or loitering, that threaten to deteriorate the quality of life in communities.

In September 1993 and February 1995, the American Prosecutors Research Institute (APRI) convened focus groups to discuss the concept of community prosecution. Both groups consisted of prosecutors actively involved in community prosecution programs and other allied professionals, including law enforcement officials, with expertise on the subject. The groups defined community prosecution, identified key components

of a successful program, discussed the issues that prosecutors should consider when planning and implementing a program, and determined the relationship of community prosecution to community policing.

While perspectives varied among jurisdictions, the groups agreed that community prosecution focuses on targeted areas and involves a long-term, proactive partnership among the prosecutor's office, law enforcement, the community, and public and private organizations in order to solve problems, improve public safety, and enhance the quality of life in the community.

Building on this definition, the focus groups identified nine key components that embody the general concept of community prosecution.

#### **Proactive Approach**

A community prosecution strategy must enforce the law and

prevent crime. Rather than merely waiting for a crime to occur, prosecutors work with the target community to prevent crime.

#### **Target Area**

The prosecutor must choose a site and focus all efforts into that area. The area may encompass one city block, a housing development, or a police district.<sup>2</sup>

#### **Partnerships**

The hallmark of community prosecution is forming partnerships. In a position to affect policy, prosecutors, law enforcement leaders, and public and private sector officials must work together to thoughtfully consider the community's public safety and quality-of-life concerns. As a group, they fashion an effective, coordinated approach and ensure the successful use of all legal tools.

Law enforcement and the district attorney's office combine to form a crucial partnership. Police officers and prosecutors have distinct roles but possess similar missions: securing public safety. Traditionally, both enforce laws, leaving crime prevention to others. However, the mission of both community prosecution and community policing *is* crime prevention. Consequently, community prosecution has derived some of its basic elements from community policing. Strong cooperation between police departments and prosecutors' offices has proven to enhance community prosecution programs immensely.

For example, the Local Intensive Narcotics Enforcement (LINE) Program in Philadelphia,



**“*In today's climate, prosecutors must prosecute crimes vigorously and explore creative solutions to addressing crime.*”**

*Formerly with the American Prosecutors Research Institute in Alexandria, Virginia, Ms. Weinstein now serves as the program attorney for the National Association of Drug Court Professionals in Alexandria.*

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Pennsylvania, is a high-impact enforcement campaign focusing intense prosecutorial efforts within a single district. Assistant district attorneys often ride with police, accompanying them to visit community groups and assisting with investigations, as appropriate. Through these collaborative efforts, prosecutors obtain firsthand knowledge of every arrest, which helps bring offenders swiftly to justice.

Numerous other community prosecution programs exist in which police and prosecutors work closely as partners, producing positive results in combating crime. Some include efforts in Austin, Texas; Kansas City, Missouri; Indianapolis, Indiana; Cambridge, Massachusetts; Rockville, Maryland; New York, New York; Boston, Massachusetts; and Milwaukee, Wisconsin.

### **Community Input**

Successful community prosecution also depends on the direct interaction between the prosecutor and the community, as well as the incorporation of the community's input into the courtroom. Prosecutors may keep residents apprised of pending felony and misdemeanor charges against offenders in their neighborhoods. At the same time, residents may provide information that strengthens the evidence against a specific defendant (e.g., community impact statements).<sup>3</sup>

### **Communication**

Maintaining open communication with residents of the target area and officials from other entities in the partnership remains crucial to the success of the program.

Through problem solving, prosecutors learn which issues most trouble citizens so they can address these priorities accordingly. Often, these priorities include public safety and quality-of-life issues.

**//**  
***Community prosecution often addresses less serious crimes...that threaten to deteriorate the quality of life in communities.***  
**//**

### **Varied Methods**

In conjunction with the other entities involved in the partnership, prosecutors incorporate varied strategies, such as civil sanctions and nuisance abatement, to strictly enforce the law. These varied enforcement strategies can eliminate problems without actually prosecuting defendants. For example, responding to residents' complaints about drug dealing in a restaurant or bar, health department inspectors may enter the establishment and search for health code violations. Upon discovering a sufficient number of violations, the inspectors can close the business, effectively shutting down the illegal drug operation.

### **Long-term Strategies**

Prosecutors must dedicate themselves to the community

prosecution concept and demonstrate this firm commitment in the long run. Only in this way can community prosecution establish credibility and acceptance among community residents and achieve its objectives.

### **Commitment**

As with all new programs, support from the prosecutor, as well as from other partnership policy makers, is critical to success. Only when the district attorney demonstrates a steadfast commitment to the effort and clearly communicates this dedication to middle managers, will those on the front lines be convinced that their efforts are priorities.

### **Continuous Evaluation**

The district attorney must provide for the collection of data at all stages of the community prosecution. Careful and continuous evaluation of a program is important for monitoring the delivery of services, identifying program strengths and weaknesses, and providing evidence of the effectiveness of the program strategy.

### **IMPLEMENTATION**

In theory, a community prosecution program is easy to implement. In practice, however, the transition may prove difficult and tedious. Prosecutors may face numerous obstacles from inside and outside their organizations.

One potential roadblock involves the residents of the target area. Initially, they may be suspicious of outsiders whom they perceive as insincere in their attempts to "help" them. Often, residents see

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prosecutors as enemies in business suits who send friends and loved ones to jail. Prosecutors must build trust carefully with these individuals.

Another possible hurdle is that the culture of district attorneys' offices does not always lend itself to this type of work. Many attorneys choose careers in prosecution to enforce laws and lock up "bad guys." Often, they view community involvement as "touchy-feely" or the job of social workers. Prosecutorial leaders must select staff members who remain open to the new concept and possess unique skills to act as community problem solvers. Not every assistant district attorney will be suited for the new endeavor, and the prosecutor must recognize this.

Turf battles represent the third obstacle, as they are inevitable in any partnership. Boundaries erected by and between various entities must be torn down. For example, the historically conflict-prone relationship between police and prosecutors must give way to a team approach.

Indeed, collaborative efforts work best when each member of the partnership understands that achieving the goals of public safety and crime prevention requires a team effort. Policy makers must cast aside stereotypes and acknowledge the abilities and limitations of their organizations. Open communication among all of the partners is essential.

Because of these and other challenges, prosecutors planning to make the transition to community prosecution should follow a specific approach. In general,

instituting a community prosecution program involves eight steps:

- Selecting a target area
- Conducting a needs assessment
- Identifying resources and garnering the support and commitment of policy makers
- Identifying funding sources
- Organizing program players and internal staff
- Developing the community prosecution program plan
- Implementing the program
- Evaluating the program.

**//**  
***Law enforcement and the district attorney's office combine to form a crucial partnership.***

**//**  
Of course, as with any program in its infancy, flexibility and open-mindedness are essential to its overall success.

#### **SUCCESS STORIES**

A number of jurisdictions, large and small, rural and metropolitan, throughout the nation have community prosecution programs in place. The following examples represent only two from an extensive list.

##### **Brooklyn, New York**

When the Kings County, New York, district attorney (DA) took

office in January 1990, the borough of Brooklyn was besieged by virtually insurmountable problems, such as burgeoning drug use, increasing street violence, crumbling community institutions, and a deteriorating infrastructure. Aware that the national trend toward community policing helped to reduce crime, the DA developed a community prosecution program to complement the New York Police Department's existing community policing program.

Based on data depicting the borough's demographic composition and on analyses of crime trends, the DA divided prosecutorial responsibility for the 23 police precincts in his district into 5 zones, assigning approximately 25 assistant prosecutors to each zone. Cases originating in a particular zone are prosecuted by the assigned assistants and adjudicated in courts in the zone,<sup>6</sup> although the assistants remain based in the district attorney's office. Within each zone, special programs exist to target problems specified by residents, and the DA has expanded and altered the program on an as-needed basis.

##### **Multnomah County, Oregon**

In 1990, the Multnomah County district attorney began exploring ways in which the services of his office could augment Portland's community policing effort. He formed a coalition of resources, both public and private, to fund a community prosecution program. Members of his staff, together with residents of various neighborhoods in the county, developed several ways of improving life

in targeted areas. They call it the Neighborhood DA Program.

As part of the program, the DA assigns one deputy district attorney to each of six geographic areas within Multnomah County. The deputy DAs work from offices in their assigned areas, making them readily accessible to residents. At the same time, the deputy can conduct a host of activities, from teaching citizens about restraining orders to reviewing criminal cases that originate in the district.

The District Public Safety Committee works in conjunction with the Neighborhood DA Program to provide a forum for collaboration and information dissemination among residents, business owners, and the Neighborhood DA. The committee meets monthly to identify quality-of-life issues and crime problems that are important to the area and devises strategies to address these problems.

For example, the Neighborhood DA distributes "trouble-shooter cards" at each committee meeting and on each block throughout the neighborhood. These cards, which contain questions on drug-related crimes and public safety issues, enable the deputy DA to obtain timely and accurate information on community observations. The prosecutor compiles the information, distributes it to district police officers, and uses it to develop crime prevention strategies.

The Neighborhood DA Program is focused and long term. It demonstrates the community-based commitment of the district attorney

to solving public safety and quality-of-life problems in innovative ways.

## EVALUATION

No formal or in-depth research evaluations have concluded definitively that community prosecution actually increases public safety and enhances the quality of life in many communities. However, prosecutors' observations indicate that the concept works.



Assistant district attorneys are asked to gather evidence at a crime scene.

One jurisdiction targeted street robberies by asking assistant district attorneys to respond quickly to crime scenes and precincts to question witnesses and gather evidence. During that 5-month period, street robberies in the target area decreased 8 percent.<sup>5</sup> As a result of an effort directed at drug trafficking operations on residential properties, one prosecutor's office closed three drug houses on one street and almost 700 properties in a 3-year period.<sup>6</sup>

Prosecutors from several jurisdictions report a surge in community involvement, ranging from help with graffiti removal to crime tips from residents and increased eyewitness participation. Moreover, residents write to thank community prosecutors for closing down drug houses and removing crack vials from their streets. Some residents have personally thanked prosecutors who removed the prostitution problem from their neighborhoods.<sup>7</sup> Others say that they no longer awaken to find broken car windows each morning.<sup>8</sup> Many residents have told community prosecutors that for the first time, they feel the criminal justice system is responsive to their needs. Thanks to community prosecution, these residents have become part of the solution to their problems.<sup>9</sup>

## THE FUTURE

As the concept receives wider acceptance, the future for community-based justice programs rests in the hands of those who join the partnership. Ideally, community policing and community prosecution will merge into a community justice movement. This movement will grow from the synergy created by law enforcement, prosecutors, and other allied professionals working together to help community members gain control over their neighborhoods and, ultimately, their lives.

When they believe that policy makers truly care about their communities, residents willingly risk involvement. As community



prosecution and community policing efforts achieve success, residents will feel safer and enjoy a better quality of life. Accordingly, they likely will continue such efforts in the future.

The community justice movement is a trend for the future. Working as partners to secure public safety and enhance the quality of life, prosecutors, law enforcement agencies, and public and private organizations can tap a tremendous resource—citizens. True partnerships also eliminate duplicate efforts and provide maximum benefits to all.

## CONCLUSION

In this era of community involvement, prosecutors are seeking innovative ways to fight and prevent crime in their jurisdictions. More and more prosecutors are augmenting their roles as case

processors, forming community-based partnerships, expanding their presence in otherwise-forgotten neighborhoods, and helping residents take charge of their lives.

Initiated in many jurisdictions as a response to escalating crime problems, community prosecution has become increasingly popular as a means to secure public safety and enhance the quality of life in ways that traditional prosecution could not. Like community policing, community prosecution is a philosophy whose time has come. ♦

### Endnotes

<sup>1</sup> Since 1990, the American Prosecutors Research Institute (APRI), the research and technical assistance affiliate of the National District Attorneys Association, has followed this prosecutorial trend closely. APRI's community prosecution work is supported by Cooperative Agreement numbers 94-DD-CX-0086 and 96-DD-BX-0055 from the Bureau of Justice Assistance, Office of Justice Programs,

U.S. Department of Justice. APRI has documented various innovative prevention programs led by prosecutors and has published numerous resources on the subject, including: *Beyond Convictions: Prosecutors as Community Leaders in the War on Drugs* (Alexandria, VA: APRI, 1993); *Community Prosecution: A Guide for Prosecutors*, (Alexandria, VA: APRI, 1995); and *The Community Prosecution Implementation Manual*, (Alexandria, VA: APRI, 1995).

<sup>2</sup> Prosecutors use various criteria when choosing a target area. For examples, see the American Prosecutors Research Institute's *Community Prosecution Implementation Manual*, 1995.

<sup>3</sup> Community impact statements, or victim impact statements, are presented as evidence in court to corroborate offenders' crimes and increase the severity of their sentences. There are many other ways in which prosecutors and residents can help each other in and out of the courtroom. For more information, see the *Community Prosecution Implementation Manual*.

<sup>4</sup> Approximately 85 percent of all cases are adjudicated in this manner. Special prosecutors, assigned to specialized units, handle the remaining 15 percent—which include sex crimes, organized crime, and high-profile cases—regardless of the zone in which the crimes occurred.

<sup>5</sup> Honorable Charles Hynes, District Attorney, Kings County, New York, interview by APRI staff, July 1992; and Jay Cohen, Deputy District Attorney, Kings County, New York, interview by author, September 1995.

<sup>6</sup> Willis L. Toney, "Drug Abatement Response Team (DART) Program," DART Newsletter, Kansas City, MO, June 1993.

<sup>7</sup> Honorable E. Michael McCann, Milwaukee County District Attorney, interview by author, September 1995.

<sup>8</sup> Albert Toczydlowski, LINE Project Director, Office of the District Attorney, Philadelphia, Pennsylvania, interview by APRI staff, March 1992; and "Taking Their Block Back," *The Philadelphia Daily News*, September 25, 1992.

<sup>9</sup> Wayne Pearson, assistant district attorney, Office of the Multnomah County District Attorney, August 1993, presentation; and Melinda Haag, deputy prosecuting attorney, Office of the Marion County District Attorney, interview by author, July 1995.

### Nine Components of Community Prosecution

- A proactive approach
- A clearly defined target area
- Community-based partnerships
- Community input
- Open communication
- Varied enforcement methods
- Long-term commitment
- Support from policy makers
- Continuous evaluation

# Curtilage

## *The Expectation of Privacy in the Yard*

By EDWARD M. HENDRIE, J.D.



**T**he English common law tradition of protecting the home against government intrusions existed long before this great republic was founded. William Pitt's 1763 address before the House of Commons in England perhaps best expresses the special status of the home. "The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; but the King of England cannot enter—all his force dares not cross the threshold of the ruined tenement."<sup>1</sup>

America's founding fathers embodied this tradition in the Fourth Amendment, which recognizes the right of the people to be secure in their houses from unreasonable searches and seizures. The U.S. Supreme Court has interpreted the Fourth Amendment as providing the greatest degree of protection against government encroachment to the home. For Fourth Amendment purposes, that area immediately surrounding the home, the curtilage, has customarily been viewed as part of the home.<sup>2</sup> This article explores the limits of the protection afforded the curtilage.<sup>3</sup>

The area that is outside the curtilage of the home, which courts refer to as an open field, is not protected by the Fourth Amendment.<sup>4</sup> "Open field" is a term of art; for an area to be considered an open field, it need not be in the open nor a field.<sup>5</sup>

The U.S. Supreme Court has ruled that "...in the case of open fields, the general rights of property protected by the common law of trespass have little or no relevance to the applicability of the Fourth Amendment."<sup>6</sup> A property owner cannot add to the constitutional protection of an open field or change its



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**The area that is outside the curtilage of the home, which courts refer to as an open field, is not protected by the Fourth Amendment.**  
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character to that of curtilage by posting “No Trespassing” signs at its boundaries.<sup>7</sup> The scope of the protection given an area does not depend on whether the owner has attempted to conceal some private conduct.<sup>8</sup> Rather, the courts inquire into whether the government has intruded upon the owner’s subjective and personal expectation of privacy and whether that expectation is one that society accepts as reasonable.<sup>9</sup>

If an officer trespasses onto another’s curtilage, that trespass would be a search if it was in an area of the curtilage where the owner has a reasonable expectation of privacy. If, however, an officer trespasses onto an open field, that will not be considered a search in a federal case, because an open field is not protected by the Fourth Amendment.<sup>10</sup> A few states, however, have chosen to disregard that federal rule as a matter of state law and have granted protection from police trespass in areas outside the curtilage.<sup>11</sup> State limitations on police conduct would apply only to that state’s

prosecutions; such limitations, to the extent that they differ from the federal standard, would not be relevant in federal prosecutions.

#### **Curtilage Defined**

Because curtilage is given Fourth Amendment protection, and in all federal and most state cases an open field is not, it is important to know where the curtilage ends and the open field begins. Once the boundaries of the curtilage are set, the area that is an open field also will be defined because an open field is simply that area that lies outside the curtilage. The focus of the inquiry, therefore, should be on the curtilage.

The U.S. Supreme Court has described the curtilage as “the area to which extends the intimate activity associated with the ‘sanctity of a man’s home and the privacies of life.’”<sup>12</sup> The boundaries of the curtilage for most homes are readily apparent. However, not every home is surrounded by property where the private boundaries are readily

apparent. In *United States v. Dunn*,<sup>13</sup> the U.S. Supreme Court set forth four factors to be considered when deciding whether an area is within the curtilage of the home: 1) what is the proximity of the area to the home, 2) is the area within the same enclosure as the home, 3) what is the nature of the use to which the area is put, and 4) what steps have been taken by the resident to protect the area from the view of passersby?

In *Dunn*, several DEA special agents and officers from the Houston Police Department crossed a perimeter fence that surrounded two barns and a house. They then walked onto the defendant’s property and smelled the odor of precursor chemicals used in the manufacture of illegal drugs coming from one of the barns. Based on that and other information, they obtained a search warrant and found sufficient evidence in the barn to convict the defendant of manufacturing illegal drugs.

The *Dunn* Court ruled that the barn was not within the curtilage of the house. Located on a 198-acre ranch, the barn was 60 yards from the house and 50 yards from a second fence surrounding the house. There was no indication that the barn was being used for those intimate activities normally associated with the home, and the defendant had not taken sufficient steps to protect the barn area from those standing in the open field. Finally, the fences were of the type to corral cattle and not those normally used to block the view of the public.<sup>14</sup>

Because the barn was in an open field, the officers did not violate the Fourth Amendment

when they walked onto the defendant's property to get to the barn.<sup>15</sup> The inside of the barn, however, was protected by the Fourth Amendment.<sup>16</sup> Based on the facts in this case, it was necessary for the officers to obtain a search warrant before they could lawfully enter the barn.

Under *Dunn*, in order for property to be considered curtilage it must be appurtenant to a residential building. If there is no residence on the property, then the property will be considered an open field. For example, in *Foley v. Kentucky*,<sup>17</sup> the police, acting on a tip and without a warrant, dug up a large septic tank that was buried on the defendant's father's property. In the tank they found the bodies of four murder victims. The Supreme Court of Kentucky upheld the warrantless unearthing of the septic tank and affirmed the defendant's murder conviction and death sentence. Although the septic tank was located close to a neighbor's cabin, the property on which the tank was found did not have a dwelling. The court ruled, therefore, that the tank was in an open field and not protected by the Fourth Amendment.

In *Foley*, the property was in a sparsely populated rural area, but at least one court has held that a fenced vacant lot in a densely populated urban area will also be considered an open field. In *O'Neal v. Florida*,<sup>18</sup> the police opened a gate and walked onto a fenced vacant lot and discovered a stolen vehicle and other stolen property. The court ruled that the fenced lot was an open field because it did not have a residence on it.

### Commercial Property

The U.S. Supreme Court has recognized that "[t]he businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property."<sup>19</sup> While this statement of general principle applies to the interior of a business, the courts have not given the same protection to the

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**...most courts have limited the application of the curtilage principles to homes and do not recognize commercial curtilages.**  
**//**

land surrounding a business as they traditionally have given to the curtilage of a home. Implicit in the *Dunn* decision is the conclusion that a barn used in a commercial enterprise has no curtilage of its own.<sup>20</sup> The property around a business is not like the area around a home; it does not harbor those intimate activities associated with the privacies of life and the sanctity of the home. As a matter of federal constitutional law, most courts have limited the application of the curtilage principles to homes and do not recognize commercial curtilages.<sup>21</sup>

What protection, if any, is given to the area surrounding a

business if it is not considered a curtilage? In *Illinois v. Janis*,<sup>22</sup> the Supreme Court of Illinois ruled that although the outdoor area surrounding a commercial establishment does not constitute a curtilage, the business' expectation of privacy in that area will be protected by the Fourth Amendment if the business takes affirmative steps to bar the public from that area.<sup>23</sup>

Similarly, in *United States v. Hall*,<sup>24</sup> the U.S. Court of Appeals for the Eleventh Circuit ruled that the property surrounding a business is not curtilage and that property will be given Fourth Amendment protection only if the business takes affirmative steps to bar the public from those premises.<sup>25</sup> In *Hall*, a U.S. Customs agent drove 40 yards down a private road to a dumpster located near a company parking area. The agent reached into the dumpster and seized a bag containing shredded documents that established probable cause for a subsequently obtained search warrant for that business. The defendant was ultimately indicted and convicted for selling restricted arms to Iran. He appealed his conviction, claiming that the initial search of the dumpster was an unlawful intrusion into his commercial curtilage.

The court determined that, although the road that the agent traveled on was private, there were no signs or barricades that would indicate that the public was prohibited from entering the area. The road appeared to be a public road, and the agent believed it to be so at the time. Because the company had taken no affirmative steps to keep the public out, the court ruled that

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the company's subjective expectation of privacy in the contents of the trash found on the property was not an expectation that society would accept as objectively reasonable.

### Peering into the Curtilage

The Fourth Amendment only provides protection for police conduct that is a search or seizure. If the police peer into the curtilage of the home, it does not necessarily indicate that the police have conducted a search. A search under the Fourth Amendment is defined as an intrusion by the government into an area in which a person has a reasonable expectation of privacy.<sup>26</sup> It is well established that "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."<sup>27</sup> Police conduct will not be considered a search, even though they look into the curtilage of the home, if that area of the curtilage is exposed to public view.

For example, in *California v. Ciraolo*,<sup>28</sup> the police received an anonymous tip that marijuana was growing in Ciraolo's yard. The police were unable to see into the yard, because it was surrounded by a 6-foot outer privacy fence and a 10-foot inner privacy fence. They decided to fly an airplane over the suspect's home at an altitude of 1,000 feet and take pictures of the marijuana growing within the curtilage. The U.S. Supreme Court ruled that, because any private aircraft could have flown over the house, Ciraolo's expectation that the marijuana would not be observed from the air was unreasonable and therefore was not an expectation of privacy that society was prepared to

honor. If the police are traveling in a public thoroughfare or in navigable airspace, they are not required to shield their eyes when passing by a home or yard. There is no expectation of privacy where an area of the curtilage is open to public view.

The *Ciraolo* decision makes it clear that the sighting of evidence on the curtilage need not be inadvertent. Courts will allow observations of the curtilage even if significant steps have been taken in order

**“ There is no expectation of privacy where an area of the curtilage is open to public view. ”**

to make the observations. For instance, in *Wisconsin v. Kennedy*,<sup>29</sup> the Court of Appeals of Wisconsin held that a county welfare fraud investigator did not violate the defendant's Fourth Amendment rights when he used binoculars to see into the curtilage from a position on the defendant's property that was outside the curtilage.

What if, instead of trespassing onto an open field, an officer trespasses on a neighbor's curtilage in order to peer into the defendant's property? In *Sarantopoulos v. Florida*,<sup>30</sup> an officer saw several marijuana plants growing in the defendant's backyard. In order to see the marijuana, the officer went onto the yard of the defendant's neighbor without the neighbor's

permission and stood on his tiptoes to look over a 6-foot privacy fence that surrounded the defendant's property. The Supreme Court of Florida ruled that the officer's conduct did not violate the Constitution because the defendant did not have a reasonable expectation that someone would not try to peek over his fence.

### Physical Entry onto the Curtilage

Simply because an area is open to observation, however, does not mean that it is open to physical intrusion. Although individuals may not have an expectation that the public will not look at their property, they may have a reasonable expectation that the public will not walk or otherwise physically intrude onto their property. Any police search without a warrant in an area on the curtilage where a person has a reasonable expectation of privacy is presumed unreasonable. That presumption of unreasonableness, however, is rebuttable. A warrantless intrusion onto premises is constitutionally permissible if the resident gives consent or exigent circumstances exist, such as: 1) an officer's reasonable belief that evidence may be imminently destroyed;<sup>31</sup> 2) hot pursuit of a suspect whom officers reasonably believe is in the area to be searched;<sup>32</sup> 3) a search where there is an immediate need to protect or preserve life;<sup>33</sup> or 4) a protective sweep of premises where officers reasonably suspect there is a threat to their safety.<sup>34</sup>

In *Massachusetts v. Straw*,<sup>35</sup> the police went to the defendant's residence to arrest him on the authority of a warrant for assault with intent

to commit murder. As the officers spoke with the defendant's mother at the front door, the defendant threw a briefcase out a second-story window. An officer, who had taken a position in the back of the house, saw the briefcase fly out of the window and land 6 to 10 feet from the house in the fenced backyard. The backyard was adjacent to the sidewalk but separated from it by a wrought iron fence. The officer entered the backyard, opened the briefcase, and found over 200 grams of cocaine inside it.

In *Straw*, the Supreme Judicial Court of Massachusetts ruled that the defendant's intentions were not to abandon the briefcase but to prevent the police from finding it so that he could retrieve it later.<sup>36</sup> The court felt that the defendant had the same reasonable expectation of privacy in his fenced backyard as he had inside his house. Even though the public could see the backyard from the adjacent sidewalk, people had no lawful physical access to the backyard. The court, however, stated that it was lawful for the officer to enter the yard without a search warrant and seize the briefcase because there was an emergency. It was reasonable to believe that the defendant's family might recover the briefcase and hide or destroy its contents.

The court, though, ultimately held that the officer unlawfully opened the briefcase because once he had it in his custody the emergency had passed. The court felt that the officer should have obtained a warrant before opening it. The evidence found in the briefcase, therefore, was suppressed and the defendant's con-

viction for trafficking in cocaine was reversed.

In *Straw*, the defendant attempted to hide evidence on his own fenced curtilage. In *United States v. Morgan*,<sup>37</sup> however, the suspect threw a bag containing two handguns and \$6,000 in cash from a recent robbery next to the back porch in an acquaintance's yard as he attempted to run from the police. The yard abutted an open field. The U.S. Court of Appeals for the Tenth Circuit found that by throwing the bag into the yard, the defendant,

Photo © Mark Ide



had abandoned the property. The court stated that the bag was plainly visible to the public, and his ability to recover the bag depended entirely upon the absence of inquisitive passersby.

#### **Areas Within the Curtilage that are Implicitly Open to the Public**

Not every physical intrusion onto a curtilage will be viewed as a search. Generally, the courts will not give the same level of protection to a home's front yard as they would give to a home's fenced backyard. The design of many front yards, with walkways leading to the front

door, implicitly invites the public to walk onto the front yard, at least insofar as the walkway allows them to get to the front door. In *United States v. Tobin*,<sup>38</sup> the full bench of the U.S. Court of Appeals for the Eleventh Circuit stated that "there is no rule of private or public conduct which makes it illegal per se, or a condemned invasion of the person's right of privacy, for anyone openly and peaceably, at high noon, to walk up the steps and knock on the front door of any man's 'castle' with the honest intent of asking questions of the occupant thereof—whether the questioner be a pollster, a salesman or an officer of the law."<sup>39</sup>

In *Jenkins v. Georgia*,<sup>40</sup> the court held that "[w]here a police officer enters upon private property only to the extent of knocking on outer doors, the Fourth Amendment is not violated....After all, such an officer is merely taking the same route as would any guest or other caller."<sup>41</sup>

Driveways, like walkways, are commonly used by neighbors, mail carriers, salespeople, and other visitors as an access route to the house. The courts typically allow police officers the same right to enter onto a driveway as any other member of the public.<sup>42</sup> In *North Dakota v. Winkler*,<sup>43</sup> the police were investigating a hit and run collision. They drove 200 feet up the defendant's driveway and shined their headlights into his open garage. The Supreme Court of North Dakota found that, although the police drove onto the defendant's curtilage, they did not intrude into a private area of the curtilage. The driveway was implicitly open to the

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public and anyone could have driven up the driveway just as the officers had done. That is not to say that homeowners must take affirmative steps to keep the public out of the curtilage before they will be afforded protection of that area under the Fourth Amendment.<sup>44</sup> If an area of the curtilage is not implicitly open to the public then the resident will have a protected right to privacy in that area.

In *New Hampshire v. Pinkham*,<sup>45</sup> an officer drove to the defendant's home after a citizen complained that the defendant may have been driving drunk. The officer got out of his police cruiser and walked onto the curtilage and up to the defendant, who was sitting in his car. The car was parked in his driveway, within 10 to 15 feet of the house. The Supreme Court of New Hampshire ruled that, as a matter of state law, there was an implied invitation for any member of the public to use the driveway as an access route to the house. The court noted that the view of the driveway from the road was not blocked by shrubbery or the house. In addition, entry into the driveway was not prohibited by a gate or "No Trespassing" signs. The court concluded that it was not necessary for the officer to obtain a search warrant before walking onto the driveway.

### Retrieving Trash from the Curtilage

The U.S. Supreme Court, in *California v. Greenwood*,<sup>46</sup> ruled that a person does not have a reasonable expectation of privacy in garbage that has been left at the curb for collection. Consequently, it

would not be a Fourth Amendment search if the police retrieved the trash from the curbside. Would it be proper for the police to enter onto the curtilage to retrieve trash that has not been put at the curb for collection? The *Greenwood* Court did not address that issue, so we must look to the state courts and lower federal courts to answer that question.

**“The court felt that the defendant had the same reasonable expectation of privacy in his fenced backyard as he had inside his house.”**

In *United States v. Hedrick*,<sup>47</sup> the defendant kept his garbage in a fixed area on his driveway 50 feet from the house, 20 feet from an unattached garage, and 18 feet from the sidewalk. The U.S. Court of Appeals for the Seventh Circuit ruled that the police did not conduct a search when they went onto his property to retrieve the garbage on the evening prior to the regularly scheduled garbage collection. The court held that the defendant had no reasonable expectation of privacy in garbage left in that area, even though it was on his curtilage, because there was no fence or other barrier securing the area, and it was readily accessible to children, scavengers, snoops, or other members of the public. Other courts have noted

that scavenging animals are not familiar with the curtilage rule of the Fourth Amendment and ordinarily cannot be relied upon to abide by it. “Urban raccoons are particularly skillful in ignoring the Fourth Amendment even when the garbage is secreted in a can with a lid. The attractive contents likely will soon be neatly spread out by ingenious and industrious raccoons for all to see.”<sup>48</sup>

A resident's expectation of privacy in areas on the curtilage increases the closer the area is to the house or the garage. If the area is not accessible to the public, then an intrusion by the police into that area will constitute a search under the Fourth Amendment. For example, in *United States v. Certain Real Property at 987 Fisher Road*,<sup>49</sup> the U.S. District Court for the Eastern District of Michigan was faced with an issue involving valet garbage pick up. The sanitation workers in that city drove scooters into the yards to pick up the garbage and then dump it into the larger truck waiting on the street.

In the *Fisher Road* decision, the court disapproved of a police officer portraying a sanitation worker and driving a scooter into the backyard of a residence to pick up the garbage bags from the back wall of the house on the scheduled day for trash pickup. The court held that closed trash bags in the backyard of the curtilage are entitled to Fourth Amendment protection from police intrusion until they either are taken to the curbside or removed from the premises by the owner or trash collector. Because the police in *Fisher Road* did not have a warrant and

there was no applicable exception to the warrant requirement, the evidence found in the trash was suppressed.

The court in *Fisher Road* focused on the fact that it was the officer himself who intruded onto the defendant's property. In *North Carolina v. Hauser*,<sup>50</sup> a police officer, rather than going into the yard himself, requested that a sanitation worker pick up the trash from the back of the defendant's residence on the appointed pickup day and deliver it to the officer. The Supreme Court of North Carolina approved of that tactic because the trash was collected from the curtilage by the regular garbage collector, in the usual manner, on the scheduled collection day.<sup>51</sup>

## Conclusion

The area immediately surrounding the home, known as the curtilage, is protected under the Fourth Amendment from unreasonable government intrusions. If, however, there is an area within the curtilage that is implicitly open to the public, such as a walkway to the front door, then it would not be considered a search if the police exercised the same freedom to walk on the curtilage as is implicitly granted to the public. The courts will also protect the property surrounding a business. Unlike the area around a home, however, owners of commercial property must take affirmative steps to keep the public out of an area in order to protect their constitutional privacy interest in that area. Any intrusion without a warrant onto the property around a home or business where a person has a



reasonable expectation of privacy is presumed unreasonable and must be justified through one of the recognized exceptions to the search warrant requirement. ♦

## Endnotes

<sup>1</sup> *The Oxford Dictionary of Quotations* 379 (2d ed. 1953), quoted in *United States v. Ross*, 456 U.S. 798, 822, n. 31 (1982).

<sup>2</sup> *Oliver v. United States*, 466 U.S. 170, 180 (1984).

<sup>3</sup> See also John Gales Sauls, "Curtilage, The Fourth Amendment in the Garden," *FBI Law Enforcement Bulletin*, May 1990, 26-32, for a comprehensive review of the pre-1990 cases involving curtilage issues.

<sup>4</sup> *Hester v. United States*, 265 U.S. 57, 59 (1924); *Oliver v. United States*, 466 U.S. 170 (1984); *United States v. McKeever*, 5 F.3d 863, 867-68 (5th Cir. 1993).

<sup>5</sup> *Oliver*, 466 U.S. at 180, n. 11.

<sup>6</sup> *Id.* at 183-84.

<sup>7</sup> *Id.* at 182.

<sup>8</sup> *Id.* at 182.

<sup>9</sup> *Id.* at 182-83.

<sup>10</sup> *Id.* at 182-83.

<sup>11</sup> E.g., *New York v. Scott*, 593 N.E.2d 1328, 1330 (N.Y. 1992); *Montana v. Bullock* 901 P.2d 61, 75-76 (Mont. 1995) (the Supreme Court of Montana interpreted the Montana State Constitution to mean that persons may have a reasonable expectation of privacy in their areas of land that are beyond the curtilage if there are fences, "No Trespassing" signs, or other indications that entry is forbidden).

<sup>12</sup> *Oliver*, 466 U.S. at 180 (quoting *Boyd v. United States*, 116 U.S. 616 (1886)).

<sup>13</sup> 480 U.S. 294, 301 (1987).

<sup>14</sup> See also *United States v. Depew*, 8 F.3d 1424 (9th Cir. 1993). In *Depew*, the U.S. Court of Appeals for the Ninth Circuit applied the *Dunn* factors and determined that an area 50 to 60 feet from a house, within 6 feet of the entrance of the garage but outside a low picket fence that surrounded the house, was within the curtilage of the home. The court noted that the defendant was a practicing nudist who purchased the house because the yard was not visible from the road. An officer walked approximately 120 yards from the road up to the garage on a ruse that his car had broken down on the road. While standing on the property the officer smelled the odor of marijuana, which was the basis for a subsequently obtained search warrant. The police seized 1,000 marijuana plants, which the court then suppressed as the fruit of the initial illegal search. *United States v. Jenkins*, 124 F.3d 768 (6th Cir. 1997) (area in backyard fenced on three sides was within curtilage).

<sup>15</sup> Not all barns will be considered outside the curtilage. The test under *Dunn* is a totality of the circumstances test, a distinction in any one of the operative facts could result in a different outcome. In *Pennsylvania v. Rood*, 686 A.2d 442 (Pa. Commw. 1996), appeal denied, 699 A.2d 736 (Pa. 1997), for instance, the barn was close to the house, although the court's opinion did not indicate the distance, and the court ruled that it was within the curtilage. See also *United States v. Reilly*, 76 F.3d 1271, reh'g granted, aff'd on reh'g, 91 F.3d 331 (2d Cir. 1996) (outcome of case not



altered on rehearing) (cottage that was 375 feet from the house was within the curtilage of the house).

<sup>16</sup> See also *United States v. Santa Maria*, 15 F.3d 879, 882-83 (9th Cir. 1994).

<sup>17</sup> 953 S.W. 2d 924, 934 (Ky. 1997).

<sup>18</sup> 689 So. 2d 1135 (Fla. App. 4th Dist. 1997).

<sup>19</sup> See *v. Seattle*, 387 U.S. 541, 543 (1967).

<sup>20</sup> 480 U.S. at 303-04.

<sup>21</sup> See *Dow Chemical v. United States*, 476 U.S. 227, 236-39 (1986). In *Dow*, the U.S. Supreme Court ruled that an industrial plant complex with numerous plant structures covering an area of over 2,000 acres falls somewhere between an open field and curtilage. The *Dow* Court ultimately ruled that, when subjected to aerial surveillance, the land surrounding the buildings was more comparable to an open field than to the curtilage of a home. *But cf. United States v. Seidel*, 794 F. Supp. 1098, 1104-05 (S.D. Fla. 1992) (the court ruled that the *Dunn* factors are applicable to the "commercial curtilage" of a small wholesale nursery business); *Pearl Meadow Mushroom Farm Inc. v. Nelson*, 723 F. Supp. 432, 440 (N.D. Cal. 1989) (The court adapted the *Dunn* factors to apply to "commercial curtilage" in a civil action against Immigration and Naturalization Service agents. The court, however, limited the Fourth Amendment protection to those areas where steps had been taken to prevent public intrusion.).

<sup>22</sup> 565 N.E.2d 633 (Ill. 1990).

<sup>23</sup> See also *Massachusetts v. Krisko Corp.*, 653 N.E.2d 579 (Mass. 1995). In *Krisko*, the owner of commercial property took affirmative steps to bar the public from access to his trash dumpster by installing gates at both ends of a fenced alley adjacent to his business. He only opened the gates when the trash hauler arrived to pick up the trash. The Supreme Court of Massachusetts ruled that a state environmental engineer conducted an unreasonable search when, without a search warrant, she climbed into the dumpster and seized paint cans containing hazardous waste.

<sup>24</sup> 47 F.3d 1091 (11th Cir.), *cert. denied*, 116 S. Ct. 71 (1995).

<sup>25</sup> *Id.* at 1097. See also *Air Pollution Variance Board of Colorado v. Western Alfalfa Corp.*, 416 U.S. 861, 865 (1974) (The Court ruled that a Health Department field inspector who walked on business property did not conduct a search. That finding was in part because he was on premises from which the public had not been excluded.); See *v. Seattle*, 387 U.S. 541, 545-46 (1967) (the Court ruled that a fire inspector must obtain a warrant or

have the owner's consent before conducting an inspection of an area on the premises of a business that is not open to the public).

<sup>26</sup> *Katz v. United States*, 389 U.S. 347 (1967).

<sup>27</sup> *Id.* at 351.

<sup>28</sup> 476 U.S. 207 (1986).

<sup>29</sup> 535 N.W.2d 43 (Wis. App. 1995).

<sup>30</sup> 629 So. 2d 121 (Fla. 1993).

<sup>31</sup> *Schmerber v. California*, 384 U.S. 757 (1966), *Ker v. California*, 374 U.S. 23 (1963) (plurality opinion).

<sup>32</sup> *Warden v. Hayden*, 387 U.S. 294 (1967).

<sup>33</sup> See *Mincey v. Arizona*, 437 U.S. 385, 392-93 (1978), citing *Michigan v. Tyler*, 436 U.S. 499, 509-10 (1978). See also *United States v. Mayes*, 670 F.2d 126 (9th Cir. 1982).

**“ ...it was not necessary for the officer to obtain a search warrant before walking on the driveway. ”**

<sup>34</sup> *Maryland v. Buie*, 494 U.S. 325 (1990).

<sup>35</sup> 665 N.E.2d 80 (Mass. 1996).

<sup>36</sup> *Id.* at 83. See also *Smith v. Ohio*, 494 U.S. 541, 543-44 (1990) (a suspect who throws a bag inside his car has not abandoned the bag).

<sup>37</sup> 936 F.2d 1561 (10th Cir. 1991), *cert. denied*, 502 U.S. 1102 (1992).

<sup>38</sup> 923 F.2d 1506 (11th Cir.) (en banc), *cert. denied*, 502 U.S. 907 (1991).

<sup>39</sup> *Id.* at 1511 (quoting *Davis v. United States*, 327 F.2d 301, 303 (9th Cir. 1964)).

<sup>40</sup> 477 S.E.2d 911, 912 (Ga. App. 1996).

<sup>41</sup> *Id.*

<sup>42</sup> *E.g., New Hampshire v. Pinkham*, 679 A.2d 589, 591 (N.H. 1996); *Maisano v Welcher*, 940 F.2d 499, 503 (9th Cir. 1991); *United States v. Smith*, 783 F.2d 648, 650 (6th Cir. 1986).

<sup>43</sup> 552 N.W.2d 347, 352 (N.D. 1996).

<sup>44</sup> *Washington v. Hoke*, 866 P.2d 670, 675 (Wash. 1994).

<sup>45</sup> 679 A.2d 589 (N.H. 1996).

<sup>46</sup> 486 U.S. 35 (1988). The *Greenwood* decision was not followed on state law grounds in the following cases: *Vermont v. Morris*, 680 A.2d 90 (Vt. 1996); *New Jersey*

*v. Hempele*, 576 A.2d 793 (N.J. 1990); *Washington v. Boland*, 800 P.2d 1112 (Wash. 1990).

<sup>47</sup> 922 F.2d 396 (7th Cir. 1991), *cert. denied*, 502 U.S. 847 (1991). See also *United States v. Shanks*, 97 F.3d 977 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 1002 (1997).

<sup>48</sup> *United States v. Redmon*, 117 F.3d 1036, 1038, n. 2 (7th Cir. 1997), *vacated for hearing en banc*, 122 F.3d 1081 (1997). In *Redmon*, “[t]he defendant, Joseph Redmon, deposited his trust and his cocaine accessories in his garbage cans. That was a mistake. The police got to his garbage cans before the garbage collectors.” Redmon sought to distinguish his case from the *Greenwood* decision by pointing out that his garbage cans were still on the curtilage of his townhouse and were not left at the curb. The *Redmon* court stated that it appeared that the garbage cans were not within the curtilage of the townhouse, but that even if they were on the curtilage, Redmon had no reasonable expectation of privacy in that area. The cans were located on the driveway, immediately outside his attached two-car garage, which he shared with another townhouse. The only approach to his front door required that visitors walk up the driveway to a walkway that ran along the side of the garage. Walkways to and from a front door, although on private property, are generally regarded as open to the public. The court pointed out that visitors to both Redmon’s townhouse and his neighbor’s townhouse would use that driveway and that Redmon had no control over visitors to his neighbor’s townhouse. Therefore, the area was open to the public. A dissenting judge in *Redmon* argued that the trash cans were on the curtilage of Redmon’s home and that he had a reasonable expectation of privacy in that area. The *Redmon* decision has since been vacated. The entire bench of the United States Court of Appeals for the Seventh Circuit will review the case and issue a superseding opinion. As of the date of the drafting of this article, the superseding opinion had not yet been issued.

<sup>49</sup> 719 F. Supp. 1396 (E.D. Mich. 1989).

<sup>50</sup> 464 S.E.2d 443 (N.C. 1995).

<sup>51</sup> See also *Crocker v. Wyoming*, 477 P.2d 122, 125 (Wyo. 1970); and *United States v. Bionich*, 652 F.2d 743 (8th Cir.), *cert. denied*, 454 U.S. 975 (1981).

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

## The Bulletin Notes

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



Officer Geagan

While patrolling a back country road, Officer Sean Geagan of the Bucksport, Maine, Police Department met an oncoming vehicle traveling in excess of 80 mph. Officer Geagan immediately turned around to pursue the vehicle, but due to its high speed, he never regained sight of it. Shortly thereafter, Officer Geagan came upon the scene of an automobile accident which involved this same vehicle. The car, which had flipped upside down, was on fire. The driver, contained by his

seatbelt, was uninjured, but his arm was pinned under the overturned vehicle. Using the fire extinguisher from his police cruiser, Officer Geagan was able to keep the flames and smoke away from the driver until the fire department arrived. Officer Geagan undoubtedly saved the man's life and kept him from sustaining serious injuries by protecting him from the fire while he was trapped inside the burning vehicle.



Officer McIvor

Field Training Officer Curt McIvor of the Bellevue, Washington, Police Department was on patrol with a student officer in a residential neighborhood. The pair stopped a vehicle for a traffic violation directly in front of a house in which a 7-week-old male infant had just stopped breathing. During his feeding, the infant had choked on food which completely obstructed his airway and his ability to breathe. The infant's father spotted the officers in front of the house and ran outside to obtain their assistance. Officer McIvor immediately entered the residence and successfully cleared the blockage from the baby's airway while the child's mother phoned 911. The infant promptly began breathing on his own. He was transported to a local hospital as a precaution where it was determined that he had suffered no injury or ill effects from the episode. The quick thinking and rapid response of Officer McIvor prevented the infant from choking to death.

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

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