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A black and white photograph showing a person's hand holding a card over the keypad of an ATM. The ATM screen and keypad are visible in the background. The image is used as a background for the article's title.

Authentication Technology *Identity Theft and Account Takeover*

By JOHN POLLOCK and JAMES MAY

In Miami, Florida, a woman wrote personal checks to pay her bills, then dropped them into a mailbox. Criminals stole her bills from the mailbox, and, within hours, a gang of identity thieves dipped her checks into chemicals and rewrote the checks to themselves for up to \$450 each.¹

Such stories are common to law enforcement authorities, who, almost daily, receive calls and complaints pertaining to identity theft across the country. Recently, the International Association of Chiefs of Police (IACP) adopted a resolution to help curb identity theft. The IACP requested, for

example, that law enforcement agencies take a more active role in reporting all incidents of identity theft. Additionally, the IACP requested that departments refer victims to the Federal Trade Commission (FTC) or the Identity Theft Clearinghouse.²

DEFINING IDENTITY THEFT

Identity theft is the criminal act of assuming someone else's identity for some type of gain, normally financial, and it can happen in different ways. For example, a thief can use a victim's personal identifying information to gain access to current accounts and make

fraudulent purchases against them, also known as account takeover, or to open new accounts. A recent survey indicated that 38 percent of individuals have been victims of account takeover.³

FIGHTING THE INCREASE

Identity theft, considered one of the fastest growing crimes in the United States, affects an estimated 900,000 new victims every year.⁴ The FTC is the lead agency in coordinating with other law enforcement organizations in the fight toward reducing identity theft. Recently, testifying before members of the U.S. Senate Judiciary

Subcommittee on Technology, Terrorism, and Government Information, the FTC estimated that it will receive approximately 200,000 identity theft calls on its newly installed identity theft hotline.⁵ A General Accounting Office (GAO) investigation revealed that inquiries by consumers to the TransUnion Credit Bureau's Fraud Victim Assistant Department increased from approximately 35,000 in 1992 to almost 523,000 in 1997.⁶ Also, in 1999, the Social Security Administration, Office of the Inspector General's telephone hotline received approximately 39,000 reports of social security number misuses.⁷

UNDERSTANDING ACCOUNT TAKEOVER METHODS

Thieves easily can obtain and use an individual's personal checks and credit cards to initiate an account takeover. For example, criminals can steal original personal checks in transit at a mailbox or mail distribution center. They can copy information about an individual's financial accounts as it appears on checks and then request duplicate checks from a mail order or Internet company. Further, thieves can copy an individual's credit card number during or after a financial transaction or they can steal a credit card database. Also, thieves can record an individual's credit card number using a skimming device during or after a financial transaction. Some criminals resort to "dumpster diving" to obtain an individual's financial information. These offenders retrieve material discarded by

individuals or businesses to obtain account numbers, addresses, and other personal information.⁸ Although thieves use a variety of methods to commit identity theft, authentication techniques are improving.

IDENTIFYING LEVELS OF AUTHENTICATION

Technology will continue to play a vital role in overcoming identity theft by improving ways that individuals and organizations conduct financial transactions and by increasing authentication methods.

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Authentication can help verify the identity of the individual processing the access device (credit or debit card) or personal check. Because account takeovers make up a large percentage of identity theft, several potential authentication techniques appear possible now or in the near future.

Point-of-Sale Transactions

When individuals use a debit card to complete point-of-sale transactions with a merchant,

they authenticate their identity by entering a personal identification number (PIN) into the keypad terminal, also known as a payment terminal or automatic teller machine (ATM) device. Although credit cards use the same keypad, a PIN currently is not required to authenticate the account holder during this type of transaction. However, many credit cards already have a PIN, allowing individuals to use them to obtain cash advances.

Personal checks also could function in connection with keypads. When individuals present a personal check at the point-of-sale, companies could require the customer to provide a PIN prior to the completion of the financial transaction.

Credit, debit, and ATM transactions are authenticated differently than personal checks. Financial organizations that provide ATM and credit or debit card transaction services are built upon the electronic funds transfer (EFT) network and processing platform.⁹ The network platform involves the routing of financial transactions through the ATM computer network. The processing platform involves the authorization processing of financial accounts and terminal/ATM connections.¹⁰ Financial organizations can perform these functions themselves, or they can belong to an electronic payment company that will conduct one or both of these services for them.

Personal checks do not use the EFT platform. Merchants authenticate personal checks through check verification companies.¹¹ Check verification methods are constantly

improving as technology moves toward combining a personal check terminal with the keypad. As terminals become more multifunctional, merchants will be able to use the same one to process checks and debit and credit cards. If this type of terminal integrates the check verification process with EFT platforms, the probability of authenticating true account holders significantly increases. Requiring customers to use a PIN adds to that possibility even further.

Telephonic and Electronic Commerce Transactions

Consumers want to know the credibility of merchants. Check verification companies and financial enterprises that provide EFT platforms might be able to move toward a PIN authentication system. If merchants and the PIN authentication system remain separate entities, conducting business will be more secure.

Many individuals still consider on-line payments in an area of immaturity.¹² They have concerns about the privacy of both the data transmitted and the purchaser engaging in a valid on-line transaction.¹³ Even though companies can secure the data transmitted, verifying the customer remains a problem. Today, many merchants accept the true credit card account holder on face value. When an electronic commerce transaction takes place, the purchaser provides the type of credit card, as well as the account number, name, and expiration date on the card. But, the individual placing the order may not be the true account holder.

Financial organizations using the EFT platform have begun to provide secure debit card transactions over the Internet. These debit cards use the CD-ROM from an individual's personal computer to provide secure transactions using a PIN.¹⁴ Also, companies are developing smart cards with a PIN (cards with computer chips holding information about various financial accounts).¹⁵ For example, the U.S. Postal Service's certified e-mail system will use a smart card with a digital signature encoded into it.¹⁶

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...38 percent of individuals have been victims of account takeover.

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Further, check verification companies have begun to provide business owners with secure payment methods. When someone places an order telephonically or over the Internet, these companies verify the validity of the check to the merchant. But, once again, the true account holder may not be the individual placing the order.

Biometric Authentication

The next generation of authentication most likely will occur in the area of biometrics; future infrastructure is moving toward

it.¹⁷ Biometrics accurately captures an individual's unique physical attributes, such as fingerprints, voices, eyes (iris and retina), faces, and written signatures, in electronic format. Biometric methods authenticate who has access to specific records and verify identities of both parties during the transaction.¹⁸ Biometrics can authenticate all financial transactions and greatly reduce identity theft and account takeover. If an individual's physical attributes could be compared to that of the account holder possessing a user ID or smart card on a database of registered users, authentication will occur, known as a one-to-one search.¹⁹ A one-to-many search occurs when an account holder is not required to have a user ID.²⁰

Various government entities have begun using biometric authentication techniques. For example, social service agencies in several states have installed fingerprinting devices,²¹ and at least one state offers its residents the option of having their fingerprints scanned when they apply for their drivers' licenses.²² Further, one federal agency uses hand geometry at airports.²³

Biometrics research also is expanding. For example, Michigan State University's Pattern Recognition and Image Processing Lab is studying this type of identification²⁴ and one research testing lab estimates that, by 2005, all personal computers will have at least one type of biometric technology.²⁵

Biometrics can serve as good authentication mechanisms when used properly.²⁶ This technique

works if the biometric (an individual's physical attributes) came from the actual person being verified, and it matches the biometric master file.²⁷ As with any new technology, the infrastructure must support it. Whatever is developed to satisfy future needs, it must be the best solution for merchants, financial institutions, and the consumer.²⁸ Some states have tried to use biometrics; however, privacy advocate groups have persuaded some government officials to think twice about what they are doing. Opponents are concerned that personal information stored in databases will fall into the wrong hands.²⁹

CONCLUSION

Identity theft remains a major problem. Various levels of technology can help prevent identity theft and account takeover. The more options that become available to authenticate financial transactions by verifying the account holder's identity, the less likely individuals will become victims of identity theft. The ability to use a PIN during credit card and check transactions can help stop account takeover. All levels of technology might not be able to exist within the current infrastructure; however, with ongoing research, it will be only a matter of time before they can.

To fight identity theft, law enforcement personnel must commit to forming alliances with financial organizations, merchants, and developers of computer hardware and software. Stopping identity theft saves everyone from financial hardships, insecurity, grief, aggravation,

and time. Victims of identify theft deserve nothing less. ♦

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The Gift of Fear: Survival Signals that Protect Us from Violence by Gavin de Becker, Dell Publishing, New York, New York, 1997.

Through street experience, police officers develop a sixth sense about danger. They learn to rely on and use the signals that victims often deny or discount. Sometimes, though, the lessons come at too great a price. *The Gift of Fear* can help officers become more attuned to those natural danger detection systems, thus enabling them to respond to risky situations more quickly and safely. While the book does not focus on police-oriented scenarios, officers can readily apply its advice not only to help them understand their own reactions to various situations but also to help victims provide clues to the identity or actions of their attackers. Moreover, because of the heightened risks faced by their families, law enforcement officers may well want to take a copy of this book home to their loved ones.

An expert on predicting violent behavior, de Becker makes a simple claim: We all possess an internal guardian that recognizes the presence of danger, warns us of risks, and, if we listen to it, guides us through risky situations. De Becker demystifies that “gut feeling” and shows the reader how to detect and interpret the signals accurately. In the chapter “Survival Signals,” the author describes several methods that capable criminals use to deceive their victims. For example, criminals might use forced pairing

(an inappropriate “we’re in this together” attitude) or provide unsolicited assistance to make a victim feel indebted to him. The author also explores 13 messengers of intuition—such signals as nagging feelings, dark humor, hunches, doubt, hesitation, suspicion, apprehension, and outright fear—that can predict imminent danger.

Throughout the book, he uses true stories to illustrate how the messengers of intuition alerted crime victims to the presence of danger. For example, a group of employees heard firecracker-like sounds outside, and someone joked that it might be an angry coworker coming to shoot them; it was. A woman felt strong apprehension about an overly friendly stranger in the stairwell of her apartment building; he raped her. A convenience store patron felt sudden, overwhelming fear and left the building; a gunman in the store later shot and killed a police officer.

Most of the examples in the chapter on survival signals address threats posed by strangers, but strangers only account for a small percentage of the violent crime in the United States. Subsequent chapters address dangers posed by acquaintances or intimate relations. De Becker discusses death threats, obsessions, workplace violence, stalking, mental illness, child and spousal abuse, multiple shootings, and children who kill.

The Gift of Fear focuses on making accurate predictions about potential threats. It does not prescribe actions to take when a threat becomes a reality; an officer’s training would come into play then. For law enforcement officers—rookies and veterans alike—this book offers another set of tools for assessing potentially violent encounters. For their families, it offers the ability to distinguish between warranted and unwarranted fear, which can bring them newfound freedom from groundless worry.

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Policing and the Global Paradox

By DANIEL ALEXANDER

With the explosive growth of the Internet and the evolving world economy, much emphasis is placed on things “global.” As the world economy grows in size and complexity, the smaller players deserve attention because of their increased potency.¹ This contradiction is evidenced in the decentralization and restructuring of major corporations in an effort to maximize speed and flexibility in the marketplace.² Technological and economic forces also have impacted politics by weakening the traditional nation-state, yet strengthening certain long-held identities, such as language, culture, and ethnic heritage. The bonding commonality of human beings is distinctiveness.³

Police administrators of the future will have to engage in problem solving of the global and local variety. They will need to think globally by virtue of immigration and Internet technology. At the same time, they will face local issues, such as private-gated communities, because the citizens they serve will continue to organize themselves and assert their individuality in new, as well as traditional, fashions. Therefore, the



paradox of handling future global issues while dealing with future local concerns represents one of the law enforcement profession's most challenging endeavors.

FUTURE GLOBAL ISSUES

Immigration

From 1865 to 1915, the world experienced an expanding international economy, which coincided with an increase in the migration

of labor. Some experts believe that the current trend toward economic globalization also has led to an increase in labor migration.⁴ Due to the relatively low unemployment rate in America, many illegal immigrants take jobs that no one else wants. As the gap widens between the United States and poorer countries, immigration, both legal and illegal, will become a larger issue. More than likely, the United States will continue to lead in the

development of the world economy and, therefore, recognize the usefulness of immigration as an integral part of this evolution.⁵

The freedom of movement across U.S. borders and the limitations of a fragmented criminal justice system will provide serious challenges to law enforcement at every level. Although a fear of terrorism persists, many Americans support globalization. Changes in the economy, communication, technology, and transportation will force law enforcement practitioners at all levels to deal with the globalization of crime. Consider the following recent events:

- International crime rings have been formed around the trade in illegal Chinese immigrants.
- The number of immigrants sold or forced into prostitution has increased in recent years.
- In North Carolina, two white men beat a Chinese man to death, mistaking him for a Vietnamese man.
- In New York, federal agents uncovered an international drug smuggling ring that used Hasidic Jews as couriers.
- Chinese gangs imported more than 100,000 slave labor immigrants.
- Russian gangs trade in a variety of contraband, from gasoline to nuclear material.⁶

Many of these criminals either take up residence or seek temporary shelter in ethnic communities. Additionally, they often prey on residents in segregated communities. This problem is compounded by the

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reluctance of law-abiding immigrant citizens to communicate with the police. This reluctance is based on fear of retribution and mistrust of authorities due to their experiences in their countries of origin.

The increasing number of federal prosecutions of noncitizens highlights the challenge of dealing with immigrants in the criminal justice system. From 1984 to 1994, the number of noncitizens prosecuted in federal courts rose from 3,462 to 10,000.⁷ Some experts estimate that illegal immigrant trade is a \$3.2 billion dollar business. In addition, Russian, South American, Nigerian, Asian, Jamaican, African, Middle Eastern, and Italian organized crime groups have had a significant influence on crime in the United States.⁸

Technology

Emerging technology also has generated a new genre of crime, dubbed “cybercrime.” Criminals launder billions of dollars each year through electronic transfers. An estimated \$23 billion per year are lost

as a result of the piracy of software and other electronic products, and the theft of intellectual property by trusted employees may amount to over \$250 billion per year.⁹ With over 14 million on-line traders, the U.S. Security and Exchange Commission handles close to 100 investigations each day.¹⁰ Additionally, unknown numbers of pedophiles attempt to prey on children over the Internet.

The actual reporting of cybercrime is very low. Only 17 percent of companies report losses related to electronic crime to law enforcement.¹¹ Researchers investigated financial institutions, universities, government agencies, and corporations to determine the estimated number of illegal intrusions. Of the entities surveyed, 62 percent reported intrusions, and the FBI reports that offenders have penetrated almost all of the Fortune 500 companies.¹²

FUTURE LOCAL CONCERNS

The global issues of immigration and advances in technology

also have impacted many local concerns. Mostly, these issues have influenced how Americans have begun to view where they want to live and how they choose to interact with their neighbors. Traditionally, golf courses, swimming pools, tennis courts, and clubhouses represented amenities at the top of the list for developers planning new residential communities. Recently, most advertisements for new subdivisions include gated entrances as a primary feature for the prospective home buyer. Gates represent both a friendly “welcome home” to residents and, most important for homeowners in the subdivision, a warning to uninvited outsiders to stay away.

Planned Communities

Retirement developments brought gated-community living to the average American in the late 1960s and 1970s. Gates then became popular for resorts and middle-class neighborhoods. Opulence and a growing fear of crime helped drive the proliferation of gated communities in the 1980s.¹³ Although gates are more prevalent in upper-class communities, some government housing authorities are considering gates.¹⁴ Additionally, some central Los Angeles communities have erected barriers.¹⁵

Americans deliberately are isolating themselves from their neighbors at an alarming pace. Eight out of 10 new projects involve gated communities and close to four million Americans live in them,¹⁶ with California and Florida leading the way. Why are people of various backgrounds and persuasions

electing to isolate themselves behind gates and walls? Aside from the historical desire for prestige and distinction, other reasons commonly cited for choosing a gated alternative include higher property values, improved standard of living, and increased security. Gated communities no longer are developed exclusively for the retired or wealthy. Instead, the majority of the new gated subdivisions are marketed to the middle and upper middle class.¹⁷ Often, the cost of gated access is dispersed among a large subdivision of single family and multiunit dwellings.

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Gated communities will present unique challenges to policing in a number of different ways.
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While estimates vary considerably, security gates have a positive impact on property values in a community. For example, in one area of California, residents anticipate almost a 40 percent increase in value.¹⁸ More conservative estimates put the figure between 5 to 20 percent.¹⁹ Although a narrow estimate currently is elusive, experts believe that property values inside the gated communities are higher than comparable properties in free-access areas. Commenting on her interest in a new gated development, a mother of two

stated, “It will be nice to have them in a close-knit type of community.”²⁰ Developers argue that gates help enhance the sense of community and quality of living in a subdivision. Advertising includes terms, such as “village,” “community,” and “cozy,” suggesting a cordiality not found in traditional, nongated neighborhoods.²¹ Many planners and residents of free-access localities categorize gated communities as divisive.

Unquestionably, the primary driving force behind the recent growth in gated communities is the fear of crime. Interestingly, declining crime statistics do not impact this appetite for the security supposedly offered by gates. Sensational media coverage of crime continues to color the perception of individual safety.²² In a survey of gated community residents, two-thirds of the respondents believed less crime occurred in their area. Of the two-thirds, 80 percent attributed the difference to the gates.²³ Little evidence supports the contention that gates have a discernible effect on the crime rate.

On the other hand, many private communities bring residents closer together only in appearance. For example, in 1996, residents moved into a community near Orlando, Florida. The turn-of-the-century homes have large front porches facing central parks and are designed to foster close interaction among residents. Hidden beneath pleasant facades, these homes are wired for the 21st century. Residents aim to build community through the local intranet. The school, community groups, and

The Decline in Social Capital

Evidence indicates that Americans increasingly have become disconnected with each other. Clearly, communities must have coordination and cooperation to effectively solve problems. One expert introduces the concept “social capital” as “features of social organization, such as networks, norms and social trust, that facilitate coordination and cooperation for mutual benefit.” Are Americans experiencing a decline in social capital? Consider the following:

- The number of Americans who report that they have attended a public meeting related to school or town affairs declined from 22 percent in 1973 to 13 percent in 1993.
- Church attendance has declined steadily from the 1950s.
- Union membership plummeted from 32.5 percent in 1953 to 15.8 percent in 1992.
- PTA participation dropped from 12 million in 1964 to 7 million in 1999.
- Membership in the fraternal organizations, such as Lions, Elks, and Masons, has reduced to double digits since the late 1970s.
- The proportion of Americans who socialize with their neighbors declined from 72 percent in 1974 to 61 percent in 1993.

Factors, such as the movement of women into the work force, increased migration, fewer marriages, more divorces, and lower real wages, as well as technology, have contributed to the decline in social capital. Television allows individuals their leisure time at the expense of meaningful interaction. The Internet or an intranet allows for increased neighborhood isolation.

Source: R. Putnam, “Bowling Alone: America’s Declining Social Capital,” *Journal of Democracy* 6 (1) 1995, 65-78.

private individuals use the intranet to communicate with each other. Describing an electronic town meeting, the community’s general manager said, “The question and answer flow was organized and people didn’t have to get dressed and come down and get in the meeting hall and listen to a bunch of conversation.” A Cub Scout den mother was thrilled about posting scout information on the intranet because she was able to avoid “calling each boy on the phone every 3 weeks to explain what we were doing.”²⁴ Residents tout their interactive television capabilities that allow viewers to “participate” in community activities without leaving their homes.

Challenges to Policing

While gated communities have become prominent features on the American landscape, law enforcement leaders have done little to gauge the impact of this phenomenon on the future of policing. Gated communities will present unique challenges to policing in a number of different ways.

- Tax relief for services already provided by private entities may result in the threat of diminished public financial resources.
- The private status of a subdivision may reduce access to areas and people within police jurisdictions.

- The unrealistic perception of invulnerability on the part of residents in gated communities.

Paying Twice

A growing furor exists in gated communities over the issue of paying twice for some services. Generally, cities will not sweep the streets or test hydrants in gated communities because officials contend that public money only can be spent on services that benefit the general public. In 1990, the New Jersey legislature passed the Municipal Services Act. This law allowed residents who pay homeowner’s association dues to get rebates on property taxes paid to

support trash collection, street lighting, and snow removal. In the first year following its passage, the act cost New Jersey's cities approximately \$62 million.²⁵

In the near future, citizens may argue that gated communities should not have to pay double for police protection. Private security guards often perform the uniform patrol function. Current complaints about inadequate police protection in gated communities may develop into rebate demands for services already provided by private companies. Ultimately, this could result in the loss of valuable funding for police agencies.

Handling Access Problems

Gated communities also create access problems for police departments. Many subdivisions have unmanned gates, requiring a remote controller, card, or other device to open the gates.

In Florida, police departments cannot enforce traffic laws in private subdivisions without a written formal agreement. Because the roads in gated communities are private, police officers do not have automatic authorization to enter and perform routine patrol functions. Although the instances have not been well documented, some communities actually have turned away officers.

Protecting Themselves

Convincing residents in gated communities of the need for protecting themselves against criminal activity can present problems.²⁶ Residents in one gated community consistently left keys in the

ignitions of their unlocked automobiles, placed unsecured valuables in plain view, and failed to lock their homes. Following a rash of burglaries and thefts, the police department attached door hangars to targets potentially attractive to thieves. The card warned, "An opportunity for crime exists here. The city police department is concerned about your safety. We have observed a potential problem on your property and have filed a copy of this information with our crime prevention practitioner. The crime prevention practitioner is trained in the area of security surveys and will be happy to visit with you to recommend ways in which your home or business can be made safer."²⁷

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The ultimate goal of any police agency should be to lead the community in policing itself.

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LAW ENFORCEMENT RESPONSE

Unlike most countries, law enforcement in the United States is rooted in the local tradition. U.S. marshals who served the western territories represented the only federal law enforcement authority. The improvements in transportation and subsequent increase in mobility were a catalyst for the development of federal

police agencies. Ultimately, a very fragmented system of federal, state, and local law enforcement has evolved.

The Global View

Law enforcement officials at all levels of government will need to adjust to the increasing globalization of crime. The federal government must work to strengthen treaties, conventions, multilateral agreements, and memorandums of understanding to effectively collect evidence and extradite offenders for prosecution.

With current technology, the concept of conducting the criminal process from different venues may become reality. Short of full extradition, one country could try a defendant who is physically in another country. Using video conferencing technology, U.S. federal prosecutors could try a defendant in France under French law. Witnesses to the offense who reside in Italy could testify without having to leave their home country.²⁸

Local law enforcement agencies also must prepare for a future where issues related to globalization become increasingly important. The control of international crime will involve dealing with issues ranging from street crimes to highly organized criminal enterprises.²⁹

The relationship between federal and local agencies must improve to successfully resolve cases. The task force concept likely will help this occur. Continuity must exist between states in terms of interstate criminal investigations and procedures. Once again, the need

for cooperation will drive widely accepted standards for the investigation and prosecution of crimes that transcend jurisdictions.

As citizens and government officials struggle with limited financial resources and global crime issues, the concept of consolidation of services will become more appealing, especially for smaller agencies. In one Florida county, several cities have abolished their police departments in favor of contract policing through the much larger sheriff's office. This concept is fairly rare due to the historical resistance to any form of strong centralized government.

In all likelihood, the growing incidence and prosecution of international or multijurisdictional crime will emphasize national standards for local agencies in terms of the level of service that an agency may provide. Police administrators will have to demonstrate that their agencies can handle the volume and complexity of crime that they will face in the future. For officials in smaller agencies, this will lead to the evaluation of mutual aid agreements, the unification of some functions with other agencies, outsourcing of some services on a contract basis, and participation in task force arrangements.

In general, local law enforcement practitioners must expand their horizons in terms of how they view their service environments and what they know about their populations. Specifically, local police professionals must improve their language skills, understand the legal processes in other countries, and develop closer ties with

companies and groups with strong transnational relationships.

Law enforcement is presently 5 to 10 years behind the global crime curve in relation to technological capabilities.³⁰ Economic demands and increased awareness of issues probably will increase reporting and investigation of cybercrime. National standards in this area should set minimum requirements for data collection and cybercrime reporting, training, and certification of personnel responsible for investigations and forming and equipping cybercrime units.

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The Local View

With the current emphasis on technology and cybercrime, officials may further divert their attention away from organized subdivisions in their communities. Unfortunately, most community policing efforts target low-income areas where a high demand exists for services. Administrators usually do not commit time and resources to private communities until they face a specific problem. In the future,

progressive police executives can overcome these challenges by engaging their various communities in a continuous dialogue. The subdivision's public law enforcement agency represents the best entity to safeguard constitutional guarantees and to provide public safety services through a community-oriented problem solving (COPS) course.

Police leadership in the process of getting people involved with each other is well established and widely accepted. For example, police officers participate in outreach efforts, school programs, business organizations, or charities as a way of building social capital. In the future, wise law enforcement practitioners will become more involved in building networks of social interaction. Because of the way people will organize their residential communities, the police will continue to arrange their service areas in terms of local geographic districts and other subdivisions. Within those areas, getting people out of their houses or apartments to interact with the police and each other will remain the key.

The Internet and other technological advances have been criticized unfairly by technophobes who fear machines will rule everyone. No inherent contradiction exists between technology and social interaction. Police personnel must use these tools to unite people and to get important messages to the public. Aside from general information currently on the Internet, electronic interactivity will increase dramatically in the future. The public will have more

access to reporting and to crime analysis based on geographic information systems based crime analysis will be more widely available to the public. The content of the messages that police administrators deliver electronically should serve as a catalyst for increased social interaction and move people out of their technological isolation and into interacting with each other.

Future challenges should not change the model that police use for local service delivery. In fact, the need to acquire knowledge quickly and build social networks will strengthen the COPS model. The tools departments use to accomplish this mission definitely will change. Police and the public must avoid becoming isolated and paralyzed by the tools to the point that they abandon the mission.

One Agency's Answer

Some forward-thinking agencies have expanded their customer service efforts to include exclusive communities. The Okaloosa County Sheriff's Office (OCSO) serves a Florida panhandle community. Deputies sought to apply the COPS model to four gated communities located in a larger residential development. The OCSO assigned a community police officer to the gated communities. This officer received specific community-oriented training and became responsible for coordinating problem-solving activities within the subdivisions. The OCSO encouraged the officer to tap into internal resources (e.g., special response team or drug unit) or collaborate with external agencies (e.g., the U.S. Department of Transportation or local school

board) to resolve problems. Some of the issues that have received attention include vandalism, vehicle burglaries, school-crossing safety, and parking problems.

Aside from daily contact with the public while on patrol, the officer attends homeowner's association meetings and publishes a newsletter to inform residents and stay abreast of issues in each community. Immediately, the officer recognized the need to engage citizens in the four gated communities. Previously, residents called their private security companies and homeowner's association representatives to report suspicious activity and police-related problems. The

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Law enforcement officials at all levels of government will need to adjust to the increasing globalization of crime.

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community-policing officer educated the residents about the importance of calling the OCSO to advance the sharing of information and to ensure a prompt response to emergencies. Members of the OCSO have established positive relationships with the private security personnel and have recognized the guards as valuable participants in the problem-solving process. To expedite access, the officer received remote entry devices for the gated community's entry gates.

The bedrock of the OCSO's community-policing effort in these areas is the Citizen Volunteer Road Patrol Program, which establishes a partnership with citizens by actively involving them in the day-to-day operations of the sheriff's office. Prospective candidates complete an extensive application, receive training in a citizen's police academy program, and use marked vehicles and equipment provided by the OCSO. Citizens patrol their communities for a certain number of hours each month.

Can most agencies afford this level of commitment to exclusive communities? Can they afford not to commit? Too often, police officials are working to catch up to a particular problem, such as a crime trend that has developed and flourished in an area. The problem may be as simple as emergency vehicles gaining physical access to the front gate. If residents make a commitment to communicate with all segments of a jurisdiction, officers can foresee certain concerns and marshal the necessary resources to address other more complex problems. In terms of old-fashioned prevention, an open dialogue will allow the police and citizens to share a realistic perspective of the nature of crime in a specific geographical area.

CONCLUSION

Historically, police practitioners have been skilled at dealing with paradoxes. They balance the protection of rights with the necessity to remove those rights at times. They are driven by rules, but they value discretion in the application of the trade. In the future, police

leaders will learn to be responsive to small segments of their jurisdictions while keeping a watchful eye on events of a regional and worldwide nature.

In the tradition of the American village, people will seek to identify with relatively small groups. These associations only will be significant if the group members participate in meaningful civic engagement. Police officials must use old and new tools to acquire knowledge about segments of their jurisdictions and then motivate their residents to participate in the betterment of their communities.

The ultimate goal of any police agency should be to lead the community in policing itself. While community-oriented, problem-solving programs tout “partnerships,” the actual intent of any local strategy is for citizens to resolve the problem and collectively create an environment where crime cannot take root and flourish. The assumption that private gated communities provide a recipe for forming “close-knit” groups of people who are well organized and socially committed to each other may not be accurate.

On a much larger scale, federal, state, and local police officials must piece together a fragmented justice system to protect their clients from threats on the global level. Similar to the local community-oriented, problem-solving approach, law enforcement administrators must identify problems of an international nature, involve all affected parties in a search for solutions, and collectively evaluate the potency of their responses.

Because of the principles that police represent, citizens consistently have looked to them for leadership in the face of uncertainty. The future presents an opportunity to demonstrate the ability to adapt to change and overcome new challenges. ♦

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This article is not an attempt to reflect the impact that the tragic events of September 11, 2001, will have on the law enforcement community. Rather, it deals with the challenges that this profession faces concerning the globalization of all types of crimes.

Force Continuums A Liability to Law Enforcement?

By George T. Williams

Perhaps, no more important and potentially inflammatory issue faces the law enforcement community today than the use of force. Because of this, force continuums have become such an accepted part of the culture that many do not question their existence or utility. Is this wise? Should law enforcement professionals begin to challenge the strict adherence to and propagation of force continuums? Should agencies continue to require their officers to start at the lowest level of force and escalate to higher levels without considering the effectiveness such action has in serving the law enforcement mission?

Such questions call for serious, reflective, and frank discussions among the entire criminal justice community.¹ These deliberations should center on the rational examination of the theory of force continuum versus its reality, the legal requirements of the use of force, the consequences of force continuums to the law enforcement profession and the public it serves, and the available alternatives to force continuums.

FORCE CONTINUUM THEORY

Prior to the 1960s, little organization existed within most law enforcement agencies regarding training officers in the use of force against suspects. Most officers received their service weapons and other equipment and then spent a month or two riding with veteran officers before going out on their own to do their best to enforce the law. Agencies expected their officers to use common sense in their arrests and to maintain a safe environment for the citizens they served.

A growing understanding of constitutional limits to force created the need to train officers in when and how much force they legally can employ during an arrest. Therefore, in the late 1960s, law enforcement trainers who sincerely desired to assist officers in properly employing force developed force continuums. The first continuums provided officers with guidelines for the use of force. The most recent, however, define the concept in the form of stairs,

pyramids, tables, and ladders. For better or worse, the terms *escalation* and *de-escalation* have become inextricably linked with force continuums.

Force continuum theory states that officers should begin at the lowest levels of force *necessary* to effect an arrest (e.g., command presence and oral commands represent the lowest level on the force continuum ladder). Failing to gain compliance, officers then attempt a progression of graduating force options, each increasing in severity and probability of injury to the suspect. This, in effect, requires officers to experiment to see what level of force finally will succeed, eventually concluding with deadly force should the other “lower” efforts fail. In short, continuums require officers to escalate *progressively* from one level to another until they have control of the suspect. Then, once the suspect decreases resistance, officers must de-escalate their actions to an appropriate level of force.

FORCE CONTINUUM REALITY

Rather than reflecting the real world of confusion, fear, and sometimes an overwhelming sense of urgency that officers face in any violent confrontation with offenders, force continuums often represent an unrealistic, almost wishful ideal. Apparently, law enforcement trainers developed the continuum theory based on the premise that officers take resisting suspects into custody through an orderly, sterile, and

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inevitable process. In this atmosphere, escalation constitutes an easy, logical transition, climbing the ladder or stair steps of force to the reasonable and proper level of force before instantly de-escalating. This concept requires officers to continuously consider lesser alternatives of force to know when to properly de-escalate.

The real world, however, is different. While most offenders submit to arrest² and many of those who resist generally are controlled by officers, a police fight is anything but a clear progression of enforcement tools and tactics. In reality, “a series of mistakes corrected as they are made,”³ generally defines most physical confrontations. Struggling with or sometimes fighting a suspect is not sterile, orderly, or clean; rather, it often is ugly, chaotic, desperate, and bloody. When fighting with offenders, officers must *react* to the suspects’ actions. In addition, officers have various weapons and tools that offenders can gain control of and use against them. Even more important, officers cannot be certain of the motivations and goals of aggressive suspects. Such issues emphasize the disparity between theory and reality when examining force continuums and bring to mind the necessity of understanding the legal requirements regarding the use of force.

LEGAL REQUIREMENTS

Since 1989, courts have evaluated the constitutional limits to the use of force based on the Fourth Amendment to the U.S. Constitution.⁴ *Graham v. Connor* requires officers to use force based on the “reasonable officer standard”⁵ given the totality of the facts known to the officer at the time. The officer must use objectively reasonable force given the severity of the crime at issue, the immediate threat of the suspect to officers and the public, and the active resistance of the suspect to arrest or to attempts to evade arrest.

This requirement by the U.S. Supreme Court states nothing about “escalating” or “de-escalating” force. The Court does not require de-escalating, or

decreasing, the officer’s response to the suspect’s resistance progressively. The standard for force employment remains simply that of objective reasonableness. What the officer reasonably perceives as a threat legally can be responded to with force that reasonably is calculated to overcome the threat of resistance perceived by the officer.⁶ “With such insightful language from the Supreme Court, why would any agency impose a policy (or training guideline) which begs so-called experts to apply ‘precise definitions’ or ‘mechanical application’”⁷ to the use of force?

Legally, officers do not have to consider less intrusive alternatives of force in a fight, something that inherently is subjective and creates endless second-guessing of the officer’s use of force.⁸ To create the requirement of escalating and de-escalating according to a progressive scale limits the spontaneity and flexibility of officers in the field to protect themselves and the public.

Moreover, it does not reflect the real world where officers who hesitate during use-of-force incidents often are injured or even killed, demonstrating the grave consequences of adhering too closely to force continuum policies.

CONSEQUENCES OF FORCE CONTINUUMS

Self-imposed requirements of a force continuum can cause various consequences. While sincerely attempting to adhere to the policies and training that they have received about employing force continuums, officers can encounter threats to their personal safety and can face departmental, as well as civil, liability.

Officer Safety

When officers respond to a call, they frequently arrive knowing little more than an address, a reporting party’s name, a vague description of the suspect, and an even more general description of the problem they must resolve. More often than not, officers must make quick threat assessments based on limited information. Furthermore, when they make an arrest, officers

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Self-imposed requirements of a force continuum can cause various consequences.
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often know little about the capabilities, goals, or level of intensity with which an offender will respond and usually possess limited knowledge as to whether, or to what extent, the individual is armed.

If an officer effects an arrest, the suspect *might* resist in some manner. Suffering from the human performance limitations of stress, attention, and reaction times, the officer begins to decide what to do upon interpreting that something is happening. Often, the officer is a second, or sometimes several seconds, behind the offender whose motives and goals remain unknown. If operating under the dictates of a force continuum, the officer now must consider whether to *escalate* to muscular force, attempt a pain-compliance hold, or use a chemical irritant. In a very real sense, the officer must experiment with some type of force and wait to discover whether the suspect responds positively and whether the situation requires escalation or de-escalation.

Within this formal equation, discussion rarely occurs about the physical and emotional reaction of an officer under threat. At the beginning of any physical conflict, all of those involved likely are frightened and nervous. Adrenaline flows and all of the well-known physical and emotional effects occur, most of which prove detrimental to the officer's ability to cognitively choose the path of least intrusiveness. The inability to make complex decisions when under threat represents the most important of these effects. As the complexity of any decision increases, especially when under threat, an officer's ability to decide quickly and efficiently erodes. Because of the natural human will to survive, an officer's ability to select less-injurious alternatives may dissolve.

Moreover, in a fight, an officer must react to what the offender did nearly a second, or more, before—that is, when the officer first perceived the action. The more options the officer must consider, the slower the reaction⁹ and the more likely that the officer is making a decision no longer relevant to the situation.

Physical confrontations with dangerous offenders do not allow the officer the luxury of considering and then implementing a complex strategy. The time it takes to observe, orient, decide, and act upon the lesser-force alternative may make whatever option the officer elects moot and could translate into needless injury and death.

By definition, force continuums represent complex systems. While proponents may say that continuums easily allow officers to instantly respond with higher levels of force, they also, by definition, require officers to instantly de-escalate whenever possible. This creates a state of doubt in the mind of an officer who then becomes constantly worried not only about being injured but also about being disciplined or sued due to a failure to *properly* de-escalate, a highly subjective matter. Officers with doubts about the force they employ in a fight are neither effective nor desirable. In fact, they can become a liability to the safety of all involved.¹⁰

Therefore, officers must employ force confidently to be effective. An effective application of force results in fewer injuries to both officers and offenders by quickly ending the confrontation.¹¹ This can occur only when officers are required to engage suspects with *reasonable force*, per *Graham v. Connor*. Officers are permitted to use reasonable force to overcome a suspect's resistance, among other reasons.¹² The courts do not require officers to ponder the level of force that they use nor to consider whether the force is slightly higher than that which someone else might use (and may second-guess later). The law asks, Was the force reasonable given the totality of the circumstances at that moment? While it calls for officers to use reasonable force given the situation, it does not ask, What was the *best* level of force an officer could have used at that moment?

Being involved in a fight is hard enough without being required to consider the best and most appropriate choice at the moment. The law does not require this, but continuums do.

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...continuums require officers to escalate progressively from one level to another until they have control of the suspect.
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Liability Issues

Departmental Considerations

Officers should consider their agency's use-of-force policy as a guide in the employment of force in the field. A modern use-of-force policy should contain administrative limitations, legal restrictions, and general behavior guidelines consistent with community expectations as opposed to a force continuum.

Force continuums can create a double standard for officers as they attempt to follow not only the limits to force as set by the Constitution but also the implacable requirements of their agency's policy. This, in turn, reinforces the belief that administrators *always* will second-guess an officer's actions. In practice, few uses of force exist that someone cannot second-guess when placed side by side with any continuum of force. This frequently occurs not only in law enforcement agencies that have policies containing continuums but also in civil court.

Civil Concerns

Consider the situation where your officer is fully prepared by your defense counsel for his upcoming testimony at the civil trial. Suddenly, your well-prepared officer walks into the awe-inspiring federal courtroom as a defendant.... All of the preparation succumbs to fear and he becomes fair game for any of the skillful plaintiff's lawyers currently making their living suing cops. When the officer is shown only the escalation of force portions of your use of force policy (or training), he acknowledges it and is asked how much time he spent considering each of the listed alternative levels of force.... At this point, don't expect plaintiff's counsel to remind the officer of your convenient disclaimer that suggests that it might be appropriate to skip steps on the scale. Unfortunately, that only comes when your defense counsel tries to rehabilitate the officer the next day.¹³

This statement reflects the problem agencies can face in the courtroom when plaintiff counsels begin using force continuums to try and sway juries into finding that an officer failed to use the *best* level of force. Some have gone so far as to refer to the "nationally accepted force continuum" in their zeal to help their clients. The fact that no nationally accepted force continuum exists seems not to matter.

Another problem with the theory of escalating or de-escalating force is that it hinges on actions committed by the officer. It places the onus on the officer for the situation, rather than on the offender where it rightly belongs. Juries hear that the officer escalated, or should have escalated, to a certain level, then to the

next level, and then to yet another before de-escalating. This focuses on the officer and creates an atmosphere where plaintiff counsels may introduce the following strategy: The officer, out of control and outraged by what the officer believed to be an affront to authority, used force against the suspect who merely reacted to the officer's provocations and aggression.

Such a strategy, however, contradicts how force reasonably is employed and properly evaluated in the United States. In reality, officers receive training

on how to react to a suspect's resistance. Therefore, the suspect's actions *require* the officer's reasonable reactions. What other, *less-injurious* option the officer had to choose from becomes irrelevant. The suspect acted in a particular manner, and the officer perceived and then reacted to the resistance or threat by using a particular type of force. Only one question remains—was the force the officer used reasonable given the circumstances?

ALTERNATIVES TO CONTINUUMS

To combat these consequences of adhering to the strict interpretation of force continuums, the law enforcement community should examine some alternatives. Primarily, if the profession does not use

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continuums, how will it train its members in the proper and reasonable use of force?

Officers regularly receive training in common skill and knowledge domains involving tactical communications; methods of empty-hand control and strikes; aerosol restraints; various impact, electrical, and less-than-lethal weapons; several tools and other devices; and firearms. They even learn about employing service dogs, although perhaps not technically weapons, as force in limited circumstances. Regardless, officers must learn not only *how* to use force but *when*. They also must become thoroughly conversant with the legal aspects of the use of force.

Parameters

During each training session, officers should receive instruction in the parameters of force. For each type of weapon and degree of force, officers should answer four main questions, illustrated here with the baton as the weapon.

- 1) When is it proper to employ an impact weapon?
- 2) What offender behavior and actions should an officer perceive prior to striking various targets with a baton?
- 3) What level of imminent danger must the officer perceive prior to using a baton as deadly force?
- 4) What type and degree of injury can an officer expect from this type of tool and duration of force during typical employment scenarios?

Such parameters create a “threshold requirement” for every degree of force. As a subject meets the threshold for the type of weapon or degree of force, the officer then can decide to employ that amount of force reasonably suited to overcome the suspect’s resistance given the offender’s conduct at the moment. This places the onus for reasonable force on the officer to justify the type or level of force used given the suspect’s behavior and, most important, mirrors the legal requirements of the use of force.

In this type of training, no need exists for the “escalation” or “de-escalation” of force. When the officer’s perception of the offender’s behavior meets the requirements that the officer has been trained to observe, the officer may employ the tools, tactics, or methods that are appropriate and reasonable.

Legal Aspects

Training also must include the legal aspects of the use of force. Officers must have thorough knowledge of the federal laws, as well as their own state laws, relative to the use of force. During training, whether on the firing range, the defensive tactics training floor, or in front of the impact weapon mannequin, instructors constantly should remind officers of the context in which they should use the force being presented. Then, instructors should test the officers on this knowledge. Moreover, agencies should impose regular examinations requiring officers to articulate their knowledge of the force laws and departmental policies as a condition of employment.

Overall, well-trained officers are confident officers, and confident officers know the law and the context in which they can use force. In the end, confident officers employ force reasonably and sustain fewer injuries and less liability exposure.

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...an open and honest discussion of the continued employment of force continuums should occur throughout the criminal justice community.

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CONCLUSION

While use of force stands as a difficult issue for all law enforcement agencies, force continuums often represent an additional obstacle in the overall debate. Policies that require officers to strictly adhere to force continuums can cause problems not only for the officers but also for the public they serve. Now may be the time to begin an earnest look at the concept of gradual force response that many agencies require.

While the law enforcement community must not overstate the problems associated with force continuums, it must not understate them either.

Rather, an open and honest discussion of the continued employment of force continuums should occur throughout the criminal justice community. The officers who must use force as a means of protecting the public must have the best policies, guidelines, and training to help them carry out their duties and, equally important, to help safeguard their own lives as well. ♦

Endnotes

¹ The author based this article on his 10 years of experience as a police defense expert in civil cases and his 20 years of teaching force skills to law enforcement officers. He has found that most officers have great difficulty in explaining their actions when relying exclusively on the defense of "I followed the force continuum." His experience has led to his strong belief in the need for agencies to avoid relying on the strict interpretation of a force continuum as a means of policy for their officers who confront the issue of using force on a daily basis. To discuss the matter further, contact the author at 360-671-2007 or at gtwilliams@cuttingedgetraining.org.

² National Institute of Justice, *Understanding the Use of Force By and Against the Police* (Washington, DC, November 1996).

³ Police Close Defense and Ground Fighting seminar presented by Cutting Edge Training, Bellingham, Washington.

⁴ *Graham v. Connor*, (1989) 490 U.S. 386, 109 S.Ct. 1865.

⁵ Reasonable officer standard is defined as: Would another officer with the same or similar training and experience, given the same or similar circumstances as presented to the officer being evaluated, do the same thing or use similar judgment?

⁶ In an attempt to provide officers with an alternative to the force continuums, as well as an explanation of how to employ "objectively reasonable force," the author developed the use-of-force wheel. See George T. Williams, "Use-of-Force Wheel," *The Police Marksman*, July/August 1994.

⁷ Bruce D. Praet, "An Alternative Use of Force Policy Without an Escalation Scale," handout material for training session about investigating the officer-involved shooting, Cutting Edge Training, Bellingham, Washington.

⁸ *Scott v. Heinrich*, (9th Cir. 1994) 39 F. 3d 912.

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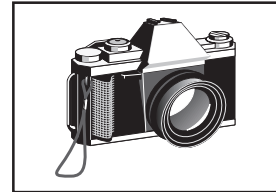
¹⁰ The author interviewed numerous officers who voiced doubts or concerns about their responses in the middle of a difficult, sometimes desperate, struggle with a suspect because they were not "sure" about whether to escalate or de-escalate. One officer, paralyzed from the waist down after being shot by an assailant he was grappling with, stated that he hesitated to make a contact shot to the head to end the fight because he was concerned about administrative issues relative to the continuum. Many officers revealed that they are not comfortable with the continuum's artificial requirements to de-escalate in the middle of a fight. This can lead to hesitation and possible officer injury or death.

¹¹ Greg Meyers, "Nonlethal Weapons Versus Conventional Police Tactics: The Los Angeles Police Department Experience," (master's thesis).

¹² *Reed v. Hoy*, (9th Cir. 1989) 909 F. 2d 324.

¹³ Supra note 7.

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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.

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Article IV Prosecutions

By ERNEST J. DURAN

A U.S. law enforcement agency received a report of a serious violent crime. Investigating officers determined from witnesses that the suspect, a Mexican national, returned to his homeland to avoid arrest. The investigators subsequently uncovered a Mexican address for the fugitive. Now, they want to bring him to justice. What course of action should they take?

Traditionally, law enforcement authorities seek to extradite Mexican national fugitives who flee the United States to evade justice and take refuge in Mexico. While extradition represents a viable option and the clear preference for most jurisdictions, U.S. law enforcement

officials, particularly when seeking justice in exceptional cases, should consider exploring another legal process called domestic prosecution, foreign prosecution, or, simply, Article IV.

Defining Article IV

Article IV refers to the law under the Mexican Federal Penal Code that permits Mexican federal authorities to prosecute Mexican nationals who commit crimes in foreign countries or to prosecute other nationals who commit crimes against Mexican citizens outside of Mexico.¹ Usually, law enforcement officials in the United States (e.g., state and local county prosecutors) seek recourse under the mechanism

of Article IV of the Mexican Federal Penal Code because Mexico's domestic law on international extradition prohibits Mexican authorities from extraditing its citizens in all but the most exceptional circumstances. The extradition treaty between the United States and Mexico expressly provides that extradition of nationals is a matter of discretion. In 2000, for instance, the government of Mexico extradited a Mexican national for the murder of a U.S. Border Patrol agent.

Because many U.S. prosecutors' requests for extradition often fail to meet this exceptional circumstances threshold, officials may choose to forego prosecution in their jurisdiction and surrender their right to prosecute to Mexican federal authorities. In effect, prosecutors in the United States request that Mexican federal prosecutors seek justice on their behalf generally for egregious and violent crimes, such as murder, child molestation, forcible rape, kidnapping, robbery, and aggravated assault. Article IV is similar to an extradition in that the fugitive must be found in Mexico. Unlike extradition, however, defendants (Mexican nationals) are prosecuted in Mexico and, if convicted, serve their sentences there.

Using Article IV

To use Article IV, U.S. law enforcement officials, first and foremost, must prove that either the suspect or victim is a Mexican national. Without this proof, Mexico lacks jurisdiction to prosecute. During the investigative stage of the crime, officers can obtain information from witnesses or

documentation of the suspect's or victim's Mexican nationality. Other times, investigators might rely on the suspect's or victim's U.S. Immigration and Naturalization green immigration card, personal letters, or similar documents to prove Mexican nationality. Mexican prosecutors even have accepted statements from family members, friends, and acquaintances as proof that the suspect or victim is a Mexican national.

Dual nationality does not affect the application of Article IV. Historically, Mexico recognizes and treats first-generation U.S. nationals as Mexican nationals for purposes of extradition and Article IV prosecution. Mexican officials emphasize that their government does not intend to provide a safe haven for violent fugitives and will not allow Mexican nationals to flee with impunity from the criminal prosecution of any country's jurisdiction.

When Mexico has Article IV jurisdiction, the case must meet three conditions and requirements before Mexican federal prosecutors can initiate and begin an Article IV prosecution. First, U.S. law enforcement agencies requesting Article IV prosecution must provide the fugitive's address in Mexico. Generally, the majority of the fugitives who flee from U.S. prosecution return to their hometowns. Addresses in Mexico are very different from those in the United States, particularly in the rural areas. Often, rural addresses are listed as *ranchitos* (ranches) or *ejidos* (communal properties) or designated by the kilometer of that area of the

state. The residences in these locations do not have specific home addresses. In the urban areas of Mexico, addresses are listed by *colonias* (colony or settlement) and *fraccionamientos* (a particular section or neighborhood). The *colonia* and *fraccionamiento* generally will have a specific home address. Providing ample and specific locations or addresses in the rural and urban areas of Mexico assists Mexican law enforcement authorities in the apprehension of the fugitives. Even telephone numbers can assist Mexican authorities in locating the fugitives.

Second, U.S. prosecutors must confirm that the fugitive has not been "definitively judged" in the U.S. jurisdiction for the criminal act that the fugitive committed. U.S. prosecutors must submit a letter with the completed Article IV package stating that the fugitive has not been "tried and convicted" with no appellate recourse or "tried and acquitted." Under the Mexican

Constitution and Mexican Federal Penal Law, accused suspects cannot be tried twice for the same crime, prescribing the principle of double jeopardy.

However, fugitives who flee to Mexico while on bail or are free on recognizance, pending sentencing and awaiting appellate resolution, can be prosecuted under Article IV. According to Mexican authorities, a fugitive located in Mexico can be prosecuted under Article IV for any outstanding judicial procedural or appellate issue outside of Mexico.

Finally, the offense or offenses for which U.S. law enforcement officials seek prosecution in Mexico must exist as a crime in both countries. Mexican law may not recognize some U.S. crimes because of social and cultural differences. For example, parental child abduction offenses are penalized throughout the United States, but not generally, at least not yet, in Mexico. How Mexico prosecutes juveniles who are accused of committing serious

“

Article IV...permits Mexican federal authorities to prosecute Mexican nationals who commit crimes in foreign countries....

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Special Agent Duran heads the Division of Gambling Control of the California Department of Justice in San Diego.

and violent crimes represents another difference between the United States and Mexico that arises from time to time. In the United States, juveniles who commit serious and violent crimes can be tried as adults at the federal level, if not in all states. Under Mexican penal law, juveniles cannot be tried as adults. In general, however, most violent crimes committed by adults fall under the dual criminality requirements of Article IV.

Creating Liaison

In the early 1970s, filing Article IV cases with the Mexican Federal Attorney General's Office (PGR) constituted a new frontier for California law enforcement, and specific guidelines did not exist. The number of violent crimes being committed by Mexican nationals were proliferating significantly throughout the state, and many fugitives wanted in the United States sought safe haven or refuge in their hometowns in the Republic of Mexico. Concerned with this developing trend, in 1975, the California Department of Justice established a Mexican Liaison Unit (MLU), staffed by one bilingual agent, within the California Bureau of Investigation to assist California law enforcement agencies in addressing Article IV cases and other liaison requests.

Next, the California attorney general asked the MLU agent to explore alternative solutions with Mexico's federal prosecutors. Meeting in Tijuana in the Mexican state of Baja California, Mexican federal prosecutors and the MLU agent soon focused on Article IV of the Mexican Federal Penal Code to

address the arrest and prosecution of Mexican nationals in Mexico accused of committing violent crimes in California.

In that same year, the California attorney general authorized the MLU agent to travel to the Republic of Mexico and file Article IV criminal complaints for California police departments, sheriffs' offices, and district attorneys. From 1975 to 1987, the agent handled, on average, three Article IV filings a year.

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...the case must meet three conditions...before Mexican federal prosecutors can initiate...prosecution.
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Renamed the Foreign Prosecution Unit (FPU) in 1991, the program's mission remained the same: to assist California law enforcement officials with identifying, developing, preparing, and presenting Article IV cases in Mexico. FPU has grown to include two special agent supervisors, two special agents, and a full-time professional translator at the California Bureau of Investigation's San Diego regional office. With this current staff, FPU averages approximately 15 Article IV filings each year. Due to achieving numerous successful Article IV filings in Mexico, FPU now receives requests for Article IV assistance from law enforcement agencies outside of California.²

Assisting Local Agencies

When FPU receives an Article IV request from a local, county, or state law enforcement agency for an evaluation of a case, an FPU agent reviews the facts and circumstances of the particular case to determine if it satisfies the legal requirements to file the complaint in Mexico. To arrive at a decision, the FPU agent will confirm with the requesting jurisdiction's investigator the nationality of the fugitive, whether an address has been established in the Republic of Mexico, if the crime has dual criminality in both countries, and the prosecutor's interest in surrendering jurisdiction. Many law enforcement officials favor extradition as it is a matter of policy that a defendant should be tried in the jurisdiction where the crime occurred.³

After discussing the underlying facts of a case with an FPU agent, law enforcement officials may believe that the case will not reach the exceptional circumstances threshold of an extradition required under Mexican law. After law enforcement officials concur with the filing of an Article IV complaint, rather than extradition, FPU agents explain the costs to file the case. These include travel expenses and other ancillary costs that the U.S. agency must pay to file the case with Mexico's Federal Attorney General's Office in Mexico City or at Mexican state delegation offices in other areas of the country.

Preparing the Article IV Package

Once a jurisdiction has decided to seek prosecution of a fugitive under Article IV, the law enforcement

agency must assemble an Article IV package. For a homicide case, the package includes the crime report describing the officers arriving at the scene and the description of the crime scene; follow-up or continuation reports describing witnesses' statements; scientific reports; medical and coroner reports; laboratory results; certified copies of the death certificate, the charging document or criminal complaint, and the arrest warrant; and copies of the state penal code sections describing the violation and the definition of a peace officer for that state. In addition, the package also must include crime scene and autopsy photographs and, if available, a photograph of the fugitive with an address or specific location of the fugitive in Mexico. Finally, a letter from the prosecutor, such as a district attorney, must confirm that the defendant has not been "definitively judged" for the offenses in that jurisdiction.

Next, the agency must have the Article IV package translated into Spanish. FPU has a full-time professional translator on staff who provides translation services to all California law enforcement agencies at no cost. With out-of-state agencies, FPU can recommend an experienced private translator whose services will cost a nominal fee. Once the Article IV package is translated and assembled, FPU agents will arrange to file the Article IV with the PGR Office of International Legal Affairs in Mexico City. Pursuant to Mexico's guidelines for authorizing the filings of Article IV complaints, authorities can file complaints 1) at the Mexican embassy in Washington, D.C.,

2) before a Mexican consul general at a Mexican consulate in the United States, 3) before a PGR legal attache in the United States, 4) at the Office of International Affairs in the Mexican Attorney General's Office in Mexico City, or 5) at a state PGR delegation office in the Republic of Mexico. Because of an agreement with the Office of International Affairs in the Mexican Attorney General's Office in Mexico City, FPU files all Article IV complaints from California in Mexico City.

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Filing the Article IV Complaint

Just like a criminal complaint is filed and commences the criminal process in the United States, the filing of an Article IV package before a Mexican federal prosecutor of the Office of International Affairs in the Mexican Attorney General's Office in Mexico City initiates the criminal process in Mexico. According to Mexico's law, a representative from the U.S. jurisdiction filing the complaint must appear personally and sign the

document or *denuncia* to initiate a formal complaint. When a law enforcement official appears before the Mexican prosecutor, the sole mission of that person is to process the Article IV package. The prosecutor reviews the package for legal sufficiency and, if satisfied, forwards the complaint to a judge for issuance of an arrest warrant. Generally, the prosecutor sends the complaint to the judge in the jurisdiction where the defendant resides. Once the arrest warrant is issued, the prosecutor will forward the warrant of arrest to the Mexican Federal Judicial Police in the same jurisdiction for service.

Because of the close working relationship that FPU enjoys with Mexico's Office of International Affairs, Mexican federal prosecutors keep FPU agents informed of each step during the process and convey the status of the case, from the issuance of the arrest warrant to apprehension of the fugitive and, finally, the conviction and sentencing. However, Mexican prosecutors cannot predict how long the prosecution of an Article IV will take, inasmuch as each prosecution depends, among other things, on the underlying facts of the case. The trial generally will occur before a single judge, and no live testimony is taken. Jury trials rarely occur, if ever, in an Article IV prosecution. A convicted defendant can appeal a judge's finding at any stage. Most Article IV prosecutions, however, do result in conviction, according to the results that FPU has received. When the defendant is convicted, the Mexican judge will sentence the defendant according to Mexican penal law,

and the defendant serves the sentence in Mexico. FPU has received Article IV homicide sentences ranging from 15 to 50 years in the Mexican penal system.

Conclusion

For many U.S. law enforcement officials, extradition stands as the traditional and preferred method to seek justice when a wanted suspect flees their jurisdiction after committing a serious or violent crime. In cases where a Mexican national returns to Mexico, U.S. law enforcement officers may seek justice

through Article IV of the Mexican Federal Penal Code. The California Department of Justice, California Bureau of Investigation, Foreign Prosecution Unit can assist U.S. law enforcement agencies initiate, prepare, and file Article IV criminal complaints against Mexican citizens who commit violent crimes in the United States. Article IV constitutes another tool for the criminal justice community to employ in its fight against criminals who prey on Americans and then seek refuge from justice in their home country. ♦

Endnotes

¹ To obtain information about other countries that have similar laws, with varying guidelines and criteria, contact the U.S. Department of Justice, Office of International Affairs in Washington, D.C., at 202-514-0000 or at the agency's Web site at <http://www.usdoj.gov/criminal/oia.html>.

² Agencies can contact the California Department of Justice, California Bureau of Investigation, Foreign Prosecution Unit at 858-268-5400.

³ If agencies need extradition information, they should contact the U.S. Department of Justice, Office of International Affairs (OIA) in Washington, D.C., at 202-514-0000. OIA trial attorneys can answer questions about extradition issues, as well as provide information on international law and foreign prosecution.

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Serial Rapist/Killer

The Orange County, California, Sheriff's Department is seeking the identity of a serial rapist and murderer. Between June 1976 and July 1979, the offender, known as the East Area Rapist (EAR), committed at least 50 sexual assaults in the counties of Sacramento and Contra Costa. In 2001, DNA linked the EAR to six murders occurring between March 1980 and May 1986 in southern California, and his method of operation also implicated him in additional area murders. The possibility exists that the suspect is deceased or currently in prison.

Crime Scenes

A nocturnal criminal, the suspect prowled and burglarized his victims' neighborhoods days, and sometimes weeks, prior to his attacks. He wore a ski mask, gloves, dark clothing with long sleeves, and tennis shoes or military-style boots. He brought a knife or firearm (.45-, .357-, or .38-caliber) with him. His method of entry often would involve prying open sliding-glass doors with a screwdriver. He would attack even in the presence of children or dogs. Initially, the suspect targeted single females, but evolved into attacking male-female couples while they slept or as they prepared to retire for the night.

Possible Suspect Information

Authorities describe the suspect as probably white with fair to light olive complexion and most likely dark hair, between 5'7" and 5'11" in height, currently in his late 40s to early 50s, and possibly bearing a tattoo of a bull on either forearm. His modus operandi included such actions as—

- talking/whispering to victims through clenched teeth;

- waking sleeping victims by shining a flashlight on them or speaking to them;
- telling victims that all he wanted was money and food and repeatedly asking where money or jewelry was located, but seldom taking anything of value;
- threatening victims by pressing a gun or knife against their skin and threatening to kill them;
- binding victims, often very tightly, with shoestrings, twine, or cord he brought to the scene;
- covering victims' heads or blindfolding them with a towel or article of clothing;
- separating the female victim from the male, moving the woman to another room where he raped and sometimes sodomized her or ordered her to perform fellatio;
- placing dishes or similar objects on the male's back prior to moving the female, telling the male that he would kill everyone if he heard any noise; and
- spending a significant amount of time with the victims, from several minutes to 4 hours.

The EAR evolved into a killer, generally bludgeoning his victims' heads multiple times with a blunt object or shooting those he could not control. Over time, he appeared to become more aware of evidence, removing the ligatures from his victims' bodies before leaving the crime scene. Investigators surmise that, in later cases, he observed the couples performing sexual intercourse, then entered the house and killed them in a blitz-type attack.

Alert to Law Enforcement

Authorities have eliminated known serial offenders Richard Ramirez, Gerald Parker, and Robert Mark Edward as suspects in these incidents. If any agency is aware of similar cases or has information that may assist in identifying this individual, please contact Investigator Larry Pool of the Orange County Sheriff's Department at 714-834-5445, 888-390-CLUE, or lpool@ocsd.org. ♦



Statements Compelled from Law Enforcement Employees

By MICHAEL E. BROOKS, J.D.

The self-incrimination clause of the Fifth Amendment to the U.S. Constitution prohibits forcing individuals to provide evidence against themselves in a criminal matter. The due process clause of the Fourteenth Amendment makes this requirement applicable to the states. However, individuals always can voluntarily decide to provide information to authorities that subsequently is admissible against them in a criminal proceeding.

The U.S. Supreme Court ruled in *Garrity v. New Jersey*¹ that a violation of the Fourteenth Amendment occurs when the government uses a police officer's statement in a criminal trial against that officer

when the statement resulted from his being told that he might lose his job if he failed to answer the questions. In *Garrity*, local New Jersey police officers who were the subjects of a public corruption probe were interviewed by state investigators. The officers were told that they did not have to answer any questions, but, if they did, their answers could be used against them in criminal proceedings. The officers also were informed that New Jersey law provides that a failure to answer questions concerning their duties during a criminal probe, even when the answers might incriminate them, could result in their removal from office. Several officers answered questions put to them after

receiving this warning and subsequently were tried in state criminal court where their answers were used against them. Upon conviction, these officers appealed to the New Jersey Supreme Court that affirmed that the officers' statements were made voluntarily and, therefore, were admissible under both the New Jersey and the U.S. Constitutions.²

Justice Douglas wrote in *Garrity* that a person who chooses self-incrimination over job forfeiture is not waiving a constitutional right voluntarily. He rejected New Jersey's argument that because there is no constitutional right to be a police officer, the state should be allowed to obtain the cooperation of

police officers by threatening job loss, even when that cooperation includes self-incrimination. He wrote, "We conclude that policemen, like teachers and lawyers, are not relegated to a watered-down version of constitutional rights." Therefore, public officials, including police officers, cannot be forced to make such a choice and answer questions and, then later, be found to have exercised their free will voluntarily, allowing their answers to be used against them in a criminal proceeding.³

The Supreme Court has subsequently held that a police officer can be threatened with job loss for failure to answer questions or otherwise cooperate with investigators. However, any answers given under such circumstances cannot be used against the officer in a criminal trial.⁴ This ruling has led to the creation of the so-called "Garrity warning" used in internal investigations. This warning, in various forms, advises law enforcement employees that they must answer questions posed by investigators or face the possibility of administrative sanction, including job loss. The warning also advises that answers provided by the employees cannot be used against them in a criminal proceeding. In cases where criminal prosecution against law enforcement employees is contemplated, the employees are advised that they do not have to answer questions but that any answers can be used against the employee in a criminal proceeding.⁵

This article addresses what triggers Garrity protection. It also discusses what administrative options a law enforcement manager has if

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The Garrity ruling imposes significant restraints on law enforcement administrators investigating misconduct allegations within an agency.
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Special Agent Brooks is a legal instructor at the FBI Academy.

an employee refuses to voluntarily answer questions during an internal investigation.⁶

Sanctions that Trigger Garrity

All law enforcement officers regularly file reports of investigative activity. An officer who fails to do so in a particular case could be subject to administrative sanctions. An officer who never files reports eventually would be fired for non-performance. An officer who refuses a superior's order to file a report concerning a specific incident could be dismissed for insubordination. Does this mean that any investigative report is subject to Garrity protection because the officer filing the report is subject to administrative sanctions, which might include termination, for failure to file the report?

The case law since the Garrity decision clearly holds that only the threat of severe administrative sanctions will trigger the Garrity protection. For example, in *Chan v. Wodnicki*,⁷ a Chicago police officer, Chan, sued a superior who had transferred him from a terrorist task

force to uniformed duty after he had invoked his Fifth Amendment rights before a grand jury investigating corruption. In his task force assignment, Chan regularly received overtime pay and had the use of an official vehicle. After his transfer, he did not have either of these benefits, and he claimed that the transfer caused him a loss of prestige. He sued, arguing that the transfer was in retaliation for his refusal to testify before the grand jury.⁸ The U. S. Circuit Court of Appeals, Seventh Circuit noted that the Garrity decision prohibits a government agency from threatening job loss to obtain a statement from a public employee without first granting the employee immunity. However, in upholding a directed verdict for the officer's superior, the court held that, "...not every consequence of invoking the Fifth Amendment is considered sufficiently severe to amount to coercion to waive the right. Rather, the effect must be sufficiently severe to be 'capable of forcing the self-incrimination which the amendment forbids.' ”⁹ The court found that

Chan's transfer did not result in any loss of base pay. It further noted that there were no reported cases where anything short of the threat of job loss or suspension constituted a severe enough threat to trigger *Garrity*.¹⁰

Overt Versus Implied Threats of Sanctions

What is not clear, however, is how overt the threat must be to trigger the *Garrity* protection. Is the implied threat of severe administrative sanction sufficient? In *United States v. Indorato*,¹¹ the U.S. Circuit Court of Appeals, First Circuit considered the appeal of a Massachusetts State Police officer who had been convicted of the theft of a trailer and its contents. Shortly after the theft, the officer was interviewed by his superiors and by FBI agents. Prior to one of the interviews, a superior began to read the officer his *Miranda* rights. The officer stopped his superior by saying that he already knew them. None of the other interviews were proceeded by warnings of any kind, and the officer was never in custody at the time of any of the interviews. The officer answered all of the questions put to him during the interviews, and some of his answers were used against him at trial. The officer, a lieutenant with over 20 years of experience, argued that he was aware that state police rules provided for the dismissal of an officer who refuses to follow the lawful order of a superior. In fact, the state police rules provided that officers must follow lawful orders promptly and that failure to do so could result in the convening of a trial board for failure to follow state

police rules. Upon being found guilty by a trial board, an officer could be dismissed. Because of this, the officer claimed to reasonably believe at the time of the interviews that he was being ordered to provide information based on common practice. During one of the interviews, a superior overtly ordered the officer to divulge the name of an informant the officer claimed to have met at the scene of the theft. Therefore, in the officer's mind, his superiors were ordering him to provide information or face possible job loss. The officer argued that this belief was objectively reasonable.¹²

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...nothing in *Garrity* prohibits forcing cooperation by law enforcement employees with internal investigators.
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The First Circuit ruled that to trigger *Garrity*, a public employee must show that he was ordered to waive his Fifth Amendment right against self-incrimination *and* that a statute or municipal ordinance must mandate the dismissal of an employee who fails to do so. In this case, the court noted that neither criteria was present and, for that reason, held that the officer's statements were admissible. The court found that the officer was never told that refusal to answer would subject him to dismissal and that the

state police rules did not specifically mandate that the officer answer questions or be dismissed. The court held that, “the subjective fears of [the] defendant as to what might happen if he refused to answer his superior officers [were not] sufficient to bring him within *Garrity*'s cloak of protection.”¹³

Other courts have not been as restrictive as the First Circuit was in *Indorato*. For example, in *United States v. Friedrich*,¹⁴ the Circuit Court of Appeals for the District of Columbia ruled that where a suspect agent has an objectively reasonable belief that failure to answer questions will cause him to lose his job, his statement in response to the questions is “compelled” under *Garrity*. In *Friedrich*, an FBI agent, suspected of making false official statements, was summoned to Washington for interviews by U.S. Department of Justice attorneys.

These interviews continued over several days, and the agent was never told that his answers were “compelled.” The District of Columbia Circuit Court ruled that such an overt warning was not required to make the agent's statements “compelled” under *Garrity* in light of the facts surrounding the interviews. Instead, the court ruled that the agent was objectively reasonable in believing that he would lose his job if he did not answer the attorneys' questions. This rendered his statements inadmissible against him in a criminal trial.¹⁵

Routine Investigative Reports

Routine reports prepared by law enforcement employees will not be considered “compelled” under *Garrity* regardless of which

of the two standards are applied to them. Even under the more liberal application of *Garrity* protection used by the District of Columbia Circuit Court of Appeals in *Friedrick*, it seems unlikely that an objectively reasonable officer could believe that failure to prepare a routine report concerning an incident would result in a severe administrative sanction.

Even if an officer specifically is ordered to prepare a particular report, the standard used by the First Circuit in *Indorato* would not provide *Garrity* immunity to the resulting statement absent an overt threat of severe administrative sanction coupled with a statute, ordinance, or regulation mandating the sanction. In the few cases that have addressed a specific order by a superior to provide a report using the *Friedrick* objectively reasonable standard, the courts have not found resulting statements to have been compelled under *Garrity*. For example, the Colorado Supreme Court addressed this issue in *People v. Sapp*.¹⁶ Sapp and another officer were suspected of misconduct while handling a domestic dispute incident. They were called in by their superiors and both were told to prepare a written report concerning the incident. No warnings of any type were provided. Both complied and were subsequently charged criminally. They moved to suppress their statements pursuant to *Garrity* arguing that they believed they would have been fired had they not provided their reports. Their superiors testified that while they would have considered refusal to provide the reports as insubordination and would have

punished the officers, they would not have fired the officers had they asserted their Fifth Amendment right and refused to provide a report. There was no regulation or statute that would have mandated a severe administrative punishment for a refusal to provide a report. The trial court suppressed the statement, and the Colorado Supreme Court reviewed.¹⁷



The Colorado Supreme Court adopted the standard detailed in *Friedrick* and held that as long as the officers had a subjective belief that they faced dismissal for a refusal to provide the report and that belief was objectively reasonable, *Garrity* would apply, and the report could not be used against them criminally. However, the court also noted that the objectively reasonable belief must be based upon an action of the state and cannot simply be the result of the general obligation to tell the truth in a report. The court reasoned here that although the officers held a subjective belief that they faced dismissal

for refusal to provide a report, that belief was not objectively reasonable because their superiors had done nothing to give them their subjective belief other than directing them to provide the reports. As a result, *Garrity* did not apply, and the reports were admissible against the officers during their criminal trials.¹⁸

Legal commentators who have addressed this issue have been unanimous in arguing that the Supreme Court in *Garrity* required some kind of imminent severe administrative punishment for failure to provide information before the employee providing the information will be deemed to have acted under compulsion.¹⁹ A review of case law fails to locate one decision where a court has extended any type of *Garrity* immunity to a routine investigative report. Instead, the courts have held that unless the employee has at least an objectively reasonable belief that failure to provide a specific report will lead to dismissal, there can be no finding of compulsion under *Garrity*.

Administrative Remedies When Employees Refuse to Provide Voluntary Statements

In *Gardiner v. Broderick*,²⁰ the U.S. Supreme Court ruled that public employees may not be fired for invoking their Fifth Amendment rights against self-incrimination unless such employees have been given use immunity. In *Gardiner*, a police officer was fired because he refused to sign a waiver of his self-incrimination privilege. The Court ruled that the firing was unconstitutional when it was based solely on

the exercise of a constitutional right.²¹ In light of *Gardiner*, what is the impact of a refusal to cooperate in an administrative investigation when the employee is not “compelled” to cooperate pursuant to *Garrity*?

The U.S. Supreme Court has ruled that a refusal to voluntarily waive the Fifth Amendment right against self-incrimination can be considered when determining an appropriate administrative punishment. In *Baxter v. Palmigiano*,²² the Court held that telling a prisoner at a disciplinary hearing that he could remain silent but that his silence would be considered when imposing administrative punishment did not amount to compulsion triggering *Garrity* immunity protection. The Court held that while the exercise of a right to silence can never be considered by a criminal court, there is no such prohibition to its consideration during an administrative proceeding. The Court ruled that as long as the silence is not used, in and of itself, to justify an adverse finding, there is no violation of the Constitution when considering the exercise of the right against self-incrimination in a non-criminal proceeding.²³

In *Harrison v. Wille*,²⁴ the U.S. Circuit Court of Appeals, Eleventh Circuit reviewed a case where a Florida deputy sheriff was fired after refusing to answer questions at an administrative hearing where he had been advised that he was not being compelled to answer any questions. The deputy, who was suspected of involvement in thefts from an evidence room, had previously answered investigators questions concerning the thefts

after being told that his answers could not be used against him criminally. Upon learning at the administrative hearing that he was not being compelled, the deputy’s attorney advised him not to answer any questions and assert his Fifth Amendment privilege against self-incrimination. The deputy followed this advice and was subsequently fired.²⁵ The Eleventh Circuit rejected the deputy’s claim that his

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...the law enforcement administrators should not be concerned that routine investigative reports will be cloaked with any Garrity immunity.
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superiors could not consider his assertion of his Fifth Amendment right in deciding to fire him. The court ruled that all *Broderick* requires is that a termination cannot be based solely on the exercise of the constitutional right. There is nothing that prohibits an agency from drawing an adverse inference from the exercise of the right against self-incrimination and considering it along with other factors in deciding on an appropriate administrative action, which can include termination.²⁶

Obligation to Tell the Truth

It equally is clear that nothing in the U.S. Constitution prohibits taking severe administrative action,

including employment termination, against individuals who lie during an administrative investigation. This is true regardless of whether subjects were told, or objectively believed, their statements were compelled. In *LaChance v. Erickson*,²⁷ a unanimous Supreme Court rejected a lower court ruling that there is a due process right to make false statements during an administrative inquiry. Federal employees who were suspected of misconduct were compelled upon threat of job loss to answer questions concerning the misconduct. The employees argued that being placed in the position of answering questions where truthful responses result in a severe administrative penalty violated the due process clause of the Fifth Amendment when they were disciplined for their false answers. The Supreme Court emphatically rejected this argument holding, “The core of due process is the right to notice and a meaningful opportunity to be heard (citations omitted). But we reject, on the basis of both precedent and principle, the view expressed by the Court of Appeals in this action that a ‘meaningful opportunity to be heard’ includes a right to make false statements with respect to the charged conduct.”²⁸ This ruling is especially important to the law enforcement administrator who must ensure the integrity of the organization by taking swift and severe administrative action against any employee who engages in a lack of candor.

Conclusion

The *Garrity* ruling imposes significant restraints on law

enforcement administrators investigating misconduct allegations within an agency. However, nothing in *Garrity* prohibits forcing cooperation by law enforcement employees with internal investigators. While those investigators must be careful to avoid “compelling” a subject to provide information when criminal prosecution is contemplated against that subject, they still have significant power to encourage cooperation by all law enforcement employees. More significant, the law enforcement administrators should not be concerned that routine investigative reports will be cloaked with any *Garrity* immunity. ♦

Endnotes

¹ 385 U.S. 493 (1967).
² *Id.* at 495.
³ *Id.* at 499-500.
⁴ See *Gardiner v. Broderick* 392 U.S. 273 (1968) and *Kastigar v. United States* 406 U.S. 441 (1972) where the Supreme Court ruled that governmental entities may compel a public employee to answer questions upon pain of job loss as long as the compelled statement cannot be used during criminal proceedings against the person who made it.
⁵ In the rare case where a law enforcement employee is in custody at the time of an interview, the warnings of rights provided in *Miranda v. Arizona* 384 U.S. 436 (1966) must also be given and a waiver of those rights must be obtained before any questioning. In addition, where a law enforcement employee has been indicted, that employee must be informed of the right to counsel provided in the Sixth Amendment regardless of whether the employee is in custody prior to questioning on the matter for which the employee has been indicted. *Massiah v. U.S.* 377 U.S. 201 (1964). Finally, under the Sixth Amendment, it is impermissible to approach a law enforcement employee who has appeared in court with counsel or who has requested counsel during a criminal court proceeding, without counsel being present, when the investigator desires to question the

employee about the matter for which the employee has appeared in court. *Michigan v. Jackson* 475 U.S. 625 (1986).

⁶ For a more detailed discussion of *Garrity* and the types of immunity which a *Garrity* warning will convey, see Kimberly A. Crawford, “Compelling Interviews of Public Employees,” FBI Law Enforcement Bulletin, (May 1993).

⁷ 123 F.3d 1005 (7th Cir., 1997) cert. denied 522 US 1117 (1998).

⁸ *Id.* at 1007.

⁹ *Id.* at 1009, quoting the U.S. Supreme Court decision in *Lefkowitz v. Cunningham* 431 U.S. 801 (1977).

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¹⁰ *Id.* at 1010, citing *Fraternal Order of Police Lodge Number 5 v. City of Philadelphia* 859 F.2d 276 (3d Cir., 1988).

¹¹ 628 F.2d 711 (1st Cir., 1980) cert. denied 499 U.S. 1016 (1980).

¹² *Id.* at 715.

¹³ *Id.* at 716. The *Indorato* case was cited by a New York court in *People v. Marchetta* 676 N.Y.S.2d 791 (N.Y. City Crim. Ct., 1998) where an officer who had been accused of menacing motorists with a weapon was told prior to an interview with superiors, during which he was told to provide a written statement, that he “must” cooperate in the investigation upon pain of possible job loss but that he did not have to “provide evidence against himself.” The New York court ruled that the officer’s written statement could be used against him in a criminal trial because he was clearly told that he did not have to provide evidence. The officer, who was accompanied by a police union official at the time of his

interview, also argued that the statement should be suppressed because it was taken in violation of his union’s contract with the department. The court rejected this argument holding that employment contract violations do not make evidence inadmissible in a criminal trial. The following courts have also adopted the *Indorato* standard: *United States v. Johnson* 131 F.3d 132 (2d Cir., 1997) and *People v. Bynum* 512 N.E.2d 826 (Ill. App., 1987).

¹⁴ 842 F.2d 382 (D.C. Cir., 1988).

¹⁵ *Id.* at 397-400. This standard has been adopted by the following courts: *State v. Chavarria* 33 P.3d 922 (N.M. App., 2001); *State v. Lacaille* 630 A.2d 328 (N.J. Super.A.D., 1993); *United States v. Comacho* 739 F.Supp. 1504 (S.D. Fla., 1990); and *State v. Connor* 861 P.2d 1212 (Idaho, 1993). In *People v. Coutu* 599 N.W.2d 556 (Mich. App., 1999) the court ruled that there must be an overt actual threat of dismissal before a statement will be deemed “compelled” under *Garrity*.

¹⁶ 934 P.2d 1367 (Colo., 1997).

¹⁷ *Id.* at 1370.

¹⁸ *Id.* at 1373.

¹⁹ See Robert M. Myers, *Police Shootings and the Right to Remain Silent*, 26 Golden Gate U. L. Rev. 497 (Spring 1996); and Steven D. Clymer, *Compelled Statements From Police Officers and Garrity Immunity*, 76 N.Y.U. L. Rev. 1309 (2001).

²⁰ 392 U.S. 273 (1968).

²¹ *Id.* at 279.

²² 425 U.S. 308 (1976).

²³ *Id.* at 317-18.

²⁴ 132 F.3d 679 (11th Cir., 1998).

²⁵ *Id.* at 681.

²⁶ *Id.* at 683. See also *Buckner v. City of Highland Park* 901 F.2d 491 (6th Cir., 1990); *Benjamin v. City of Montgomery* 785 F.2d 959 (11th Cir., 1986); *Hoover v. Knight* 678 F.2d 578 (5th Cir., 1982); and *Uniformed Sanitation Men v. Sanitation Commissioner of New York* 392 U.S. 280 (1968).

²⁷ 522 U.S. 262 (1998).

²⁸ *Id.* at 266.

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.

FBI Law Enforcement Bulletin

Author Guidelines

GENERAL INFORMATION

The *FBI Law Enforcement Bulletin* is an official publication of the Federal Bureau of Investigation and the U.S. Department of Justice.

Frequency of Publication: Monthly.

Purpose: To provide a forum for the exchange of information on law enforcement-related topics.

Audience: Criminal justice professionals, primarily law enforcement managers.

MANUSCRIPT SPECIFICATIONS

Length: Feature articles should contain 2,000 to 3,500 words (8 to 14 pages, double-spaced). Submissions for specialized departments, such as Police Practice and Case Study, should contain 1,200 to 2,000 words (5 to 8 pages, double-spaced).

Format: Authors should submit three copies of their articles typed and double-spaced on 8 1/2- by 11-inch white paper with all pages numbered. When possible, an electronic version of the article saved on computer disk should accompany the typed manuscript.

Authors should supply references when quoting a source exactly, citing or paraphrasing another person's work or ideas, or referring to information that generally is not well known. For proper footnote format, authors should refer to *A Manual for Writers of Term Papers, Theses, and Dissertations*, 6th ed., by Kate L. Turabian.

Writing Style and Grammar: The *Bulletin* prefers to publish articles in the third person (Point of View and Perspective submissions are exceptions) using active voice. Authors should follow *The New York Public Library Writer's Guide to Style and Usage* and should study several issues of the magazine to ensure that their writing style meets the *Bulletin's* requirements.

Authors also should contact the *Bulletin* staff for the expanded author guidelines, which contain

additional specifications, detailed examples, and effective writing techniques.

PHOTOGRAPHS AND GRAPHICS

A photograph of the author(s) should accompany the manuscript. Authors can submit photos and illustrations that visually enhance and support the text. Black-and-white glossy prints (3- by 5-inch to 5- by 7-inch) reproduce best. The *Bulletin* does not accept responsibility for lost or damaged photos or illustrations.

PUBLICATION

Judging Manuscripts: The *Bulletin* judges articles on relevance to the audience, factual accuracy, analysis of the information, structure and logical flow, style and ease of reading, and length. The *Bulletin* generally does not publish articles on similar topics within a 12-month period or accept articles previously published or currently under consideration by other magazines. Because it is a government publication, the *Bulletin* cannot accept articles that advertise a product or service.

Query Letters: Authors may submit a query letter along with a 1- to 2-page outline before writing an article. Although designed to help authors, this process does not guarantee acceptance of any article.

Author Notification: The *Bulletin* staff will review queries and articles and advise the authors of acceptance or rejection. The magazine cannot guarantee a publication date for accepted articles.

Editing: The *Bulletin* staff edits all manuscripts for length, clarity, format, and style.

SUBMISSION

Authors should mail their submissions to: Editor, *FBI Law Enforcement Bulletin*, FBI Academy, Madison Bldg., Room 209, Quantico, VA 22135; telephone: 703-632-1952; fax: 703-632-1968; e-mail: leb@fbiacademy.edu.

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.



Pilot Humphrey



Pilot Bouchard

During two separate snowstorms, Maine Game Warden Pilots Durward Humphrey and Jason Bouchard received calls to rescue lost hunters. Late on a snowy night, Warden Pilot Humphrey responded to a call of a hunter lost in the woods, who he found quite far from the search party. Warden Pilot Humphrey gave his latitude and longitude, but the weather was deteriorating rapidly. Unable to take his attention off the weather or controls to look at his map,

Warden Pilot Humphrey landed on a lake, breaking ice as he landed. Because of Warden Pilot Humphrey's commitment, the search party was able to reach the hunter and safely rescue him. Several weeks later, another hunter became lost during a fast approaching snowstorm. Three wardens and several local woodsmen began an exhaustive search, which continued throughout the night. In the early morning hours, flying conditions remained poor, but Warden Pilot Bouchard flew at low altitudes using various waterways and landmarks to navigate to the search area. Knowing that his fuel supply was low, he arranged for a landing strip to be plowed so he could land and refuel. After refueling and flying for another 15 minutes, Warden Pilot Bouchard located the lost hunter, circled him, and directed two teams of wardens who were on the ground searching in the area. Warden Pilots Humphrey and Bouchard exhibited courage, skill, and extraordinary efforts in extremely dangerous weather conditions to save the lives of these individuals.



Officer O'Connor

While off duty in his residence, Officer Scott O'Connor of the El Segundo, California, Police Department heard a noise from outside that sounded like an explosion. Moments later, he heard a neighbor screaming that her house was on fire, and, upon looking outside, he saw smoke coming from his neighbor's house. Officer O'Connor ran outside and entered the burning, smoke-filled home three separate times without breathing apparatus. He was able to rescue several people inside the house, two of which are individuals with mental disabilities. Officer O'Connor's quick thinking and rapid intervention prevented serious injury or death to the occupants of the home.

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Patch Call



The patch of the Bedford, Massachusetts, Police Department displays a replica of the Bedford flag, which is the oldest flag carried into battle in the United States. The Bedford Minutemen carried the flag in their march to join Minutemen companies from surrounding towns to successfully stop the British at the North Bridge in Concord.



The New Orleans, Louisiana, Police Department patch is a replica of the Seal of the City of New Orleans. The stars in the seal represent the states admitted to the Union between 1787 and 1850. The Indian man and woman signify the first inhabitants of New Orleans, and the alligator represents the marshes and swamps common to this area.