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Features

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Hostage/Barricade Management

A Hidden Conflict Within Law Enforcement

By GREGORY M. VECCHI

Intragency conflict between law enforcement tactical teams, such as special weapons and tactics (SWAT) and crisis negotiation teams (CNT), occurs seemingly as a result of competing paradigms on how best to handle hostage/barricade (H/B) situations. Much literature exists on the strategies and tactics employed by these teams; however, there is minimal research on how the overall paradigms of SWAT and crisis negotiation (CN) influence conflict between the teams and, more important, how their differing perspectives influence the outcomes of H/B situations.

CRISIS MANAGEMENT TEAMS AND THEIR ENVIRONMENTS

H/B situations constitute the ultimate form of conflict resolution because, if not managed in an optimal manner, death or serious injury likely can result. As such, H/B management is a very specialized activity, even within the law enforcement community, and requires special training and experience beyond what law enforcement officers generally receive. Therefore, agencies have developed specialized tactical and negotiation units to address these types of situations. Most local, county, state, and federal law enforcement agencies maintain officers on their tactical and negotiation teams on a collateral or part-time basis. Due to the collateral nature of these duties, agencies usually fill positions within tactical and negotiation teams with officers who work full time in other positions within the organization, such as patrol, investigations, administration, narcotics, organized crime, or vice,

depending on the size and type of the department (e.g., local, county, state, or federal). Once activated for training scenarios or actual situations, these individuals leave their daily routine, rally together, and deploy as required to address the situation.

Tactical and negotiation teams often are highly regarded and considered elite, both within and outside of law enforcement circles, because they tend to generate a high degree of interest from upper-agency management, politicians, and, especially, the media. A properly handled H/B situation averts catastrophe and creates "heroes," while poorly managed ones create disasters and can cost individuals their careers. Therefore, these teams usually are well funded and equipped and their members are competitively screened. For example, SWAT teams often have the best tactical equipment available, such as special rifles and handguns with laser/night sites, armored vehicles and aircraft, night vision devices, and camouflaged uniforms and equipment. In addition, SWAT team applicants usually must pass grueling physical fitness standards and possess excellent marksmanship skills before agencies select them for the team. Another example concerns the negotiation team, which oftentimes has special equipment, such as "throw phones,"[1] listening and video devices, and surveillance/communication vans. Additionally, negotiator applicants may have to compete with others to attend specialized training schools, which they must successfully complete before joining the team.

The high-profile nature of these teams, as well as the competitiveness of joining their ranks, results in team members who have a high degree of solidarity, confidence, and esprit-de-corps for their unit, especially in their shared team-related culture and perspectives. This constitutes an important factor when considering conflict between the teams because the culture and perspective of each team differ immensely. For example, tactical teams, generally paramilitary in nature, embody the core of police culture, which means reacting to situations and fixing them now. To them, the suspect presents a threat they must neutralize. In sharp contrast, negotiators prefer to take their time and negotiate with suspects in an effort to get them over their crises to end the situation peacefully and nonviolently, thereby saving lives. To the negotiators, the suspect is a human being who responds to needs fulfillment and active listening. Thus, conflict develops between tactical and negotiation teams as a result of the individual organizational culture of each team. This separateness defines and promotes their respective cultures while advancing their bonds, both socially and professionally.[2]

> ***"...agencies can use contemporary negotiation theory to focus on the importance of reducing and managing the conflict...."***

In addition, conflict potentially can magnify between the teams because the characteristics of H/B situations often become political and media events, which oftentimes results in intense external and internal pressure on the responsible agency on how best to handle and report the situation. This factor increases the likelihood of friction between the SWAT and negotiation teams, as each promotes their strategic recommendations. At this point, clashing parochial paradigms and points of view may converge into an intense tug-of-war between the teams over how best to resolve the situation, which may result in the teams becoming focused on countering each other instead of jointly focusing on the existing situation and mission.

REDUCTION AND MANAGEMENT OF CONFLICT BETWEEN TEAMS

During any H/B situation, saving lives is the primary goal. Although both teams share this goal, their approaches to achieving it sometimes are different and commensurate with their perspectives and world views. For example, tactical teams often favor physically dynamic methods to neutralize a threat, such as containing, assaulting, and sniping. On the other hand, negotiation teams generally favor an emotion-lowering behavioral approach, such as active listening and needs assessment. In each case,

both teams attempt to influence the on-scene commander (OSC) by providing assessment and recommending options. If both teams agree on the recommended options, the potential for conflict is low. However, where little or no agreement exists between the teams on options, the potential for conflict can escalate.

When teams disagree on how best to resolve the situation, a unique conflict triangle exists comprising the OSC, the SWAT commander, and the negotiation commander. Similar to a quasi-arbitration process, the OSC acts as the arbitrator, listening to the arguments and views of the SWAT and negotiation commanders, who represent their respective team constituencies. Throughout the incident, the OSC, acting like an arbitrator, renders decisions on how best to address the situation, based on what the teams present. If the complimentary and sometimes conflicting information is not addressed properly, the resulting confusion tends to create a zero-sum[3] environment between the two teams, thus increasing their competitive positions on how best to handle the situation.

In addressing this unique problem, agencies can use contemporary negotiation theory to focus on the importance of reducing and managing the conflict between the two teams by applying a three-stage process—understand, prenegotiate, and negotiate—using the concepts of relationship outcomes, prenegotiation, and collaboration and intrateam/interteam negotiation.

Stage One (Understand): Fostering Relationships

This stage involves reducing the potential for conflict before it surfaces, which is accomplished by each team understanding and acknowledging the importance and legitimacy of each other, especially through fostering relationships. Throughout this continuing stage, the potential for conflict diminishes as both teams develop and promote social bonds through continuous interaction, thereby reducing their organizational cultural barriers. The strategies and underlying attitudes by which the two teams relate are indicators of their relationship and serve as guides to determine whether or not to apply structural interventions.

To further clarify these indicators, departments can use certain strategies[4] to deal with four possible results relating to the importance of substantive and relationship outcomes for a given situation. In hostage/barricade situations, this relates to the importance of the relationship between members of the tactical and negotiation teams (are they going to have to continue to work together in the future?) and the importance of the content of the outcome of their work (the desire to save lives). In this model, people use a *trustingly collaborative strategy* when relationship and substantive outcomes are important, an *avoidance strategy* when relationship and substantive outcomes are unimportant, *a firmly competitive strategy* when substantive outcomes are high and relationship outcomes are low, and an *openly subordinate strategy* when relationship outcomes are high and substantive outcomes are low. Of greater importance is the notion that individuals adopt different strategies in different relational and content contexts.[5] This becomes a significant point, especially concerning the context of the interaction between the teams and their environment.

In any H/B situation, both the tactical and negotiation teams, by their very nature, place great importance on substantive outcomes (saving lives); however, the importance placed on their relationship outcomes determines much of the potential conflict. The degrees of team interaction, positive or negative or present or absent, influence the overall relationship and the importance placed on it by each team. In this area, positive team interaction can encourage the reduction of potential conflict before the onset of a H/B situation.

Many agencies have fostered relationships through eliminating "tactical" and "negotiation" rhetoric by placing and, therefore, perceiving SWAT operators and

hostage negotiators as elements of the same "team," albeit the fact that they remain distinct teams, which has led to the use of trustingly collaborative strategies between the SWAT members and the negotiators during deployment. In addition, some SWAT and negotiation teams routinely train as a unit, which further fosters positive relationships because all of the differing elements have a chance to display and practice their unique skills during training with the assurance that the situation will dictate the strategy and tactics of the team, rather than parochial preset positions.

Stage Two (Prenegotiate): Setting the Stage for Collaboration

The importance of each team understanding and acknowledging the significance of their interdependence and relationship outcomes is critical; however, this alone will not necessarily prevent conflicts that may arise during H/B situations. Therefore, both teams first must be poised to negotiate their perspectives with each other to facilitate collaborative interaction to solve H/B situations as they occur. This posturing or "stage setting" is "prenegotiation."

Prenegotiation is the time period before negotiations take place when agencies consider a multilateral track as a possible alternative to a unilateral track to a solution in a conflict.[6] For SWAT and negotiation teams, this represents an upfront agreement to define the problem and make a commitment to negotiate jointly to obtain the best solution possible. In prenegotiation, SWAT operators and negotiators agree to avoid parochial perspectives (unilateral track), address H/B situations from both perspectives (multilateral track), and make collaborative decisions on which options to choose as dictated by the unfolding H/B situation. The prenegotiation stage also requires both teams to accept final decisions uniformly by the OSC without prejudice to the other team. Departments should address any disagreements in an appropriate after-action review process subsequent to the incident being resolved.

> ***"Law enforcement... has used collaboration for resolving conflict and advancing shared visions."***

Stage Three: (Negotiate): Using Collaboration and Intrateam/ Interteam Negotiation

Once the teams successfully complete stage one and stage two, they can move easily into the next stage. In stage three, both teams work together and among themselves toward achieving their common goal of saving lives and bringing the H/B situation to a peaceful end if at all possible. Members can accomplish this by collaboration and intrateam/interteam negotiation.

Collaboration entails building a common understanding of a problem from varying points of view as the basis for choosing a collective course of action.[7] This represents a process where parties can constructively explore their differences and search for solutions that go beyond their own limited vision of what is possible. Law enforcement effectively has used collaboration for resolving conflict and advancing shared visions. It implies interdependence, involves joint ownership of decisions, and assumes collective responsibility for the future direction of the domain.[8] Agencies may find collaboration useful in handling problems displaying characteristics such as:[9]

- The problems are ill defined, or a disagreement exists about how they should be defined. (Is it a hostage or crisis situation?)
- There may be a disparity of power and resources for dealing with the problem. (The OSC may be oriented tactically, or there is insufficient money to pay officer overtime expenses if the situation becomes protracted.)
- Stakeholders may have different levels of expertise and different access to information about the problem. (SWAT members know the location of the suspect within the structure and the negotiators do not.)
- Technical complexity and scientific uncertainty exists. (Suspect reactions to police action are difficult to predict.)

- Differing perspectives on the problem often lead to adversarial relationships among the stakeholders. (Should law enforcement take a tactical or negotiated approach?)
- Incremental or unilateral efforts to deal with the problem typically produce less than satisfactory solutions. (Forcing a tactical resolution without regard for other options.)
- Existing processes for addressing the problems have proved insufficient and may even exacerbate them. (Continued negotiations with no success.)

A win-win approach is based on the concept that each party in the negotiation represents a problem solver and that all the parties share a need to solve the same problem.[10] In this style, negotiators keep the goal in mind and focus exclusively on reaching the goal. When applying the concept of teamwork to negotiations, "at the outset it is made clear that the sole purpose of the negotiation is to discuss a mutual problem, identify areas of agreement, identify areas of disagreement, understand why there is disagreement, identify and explore alternatives, and, finally, reach a mutually acceptable resolution."[11]

Although both the tactical and negotiation teams may have differing perspectives or world views about how best to handle H/B situations, they both share the underlying goal of saving lives and bringing the situation to a peaceful resolution. Interteam negotiations (SWAT and negotiators) and intrateam negotiations (SWAT commander and SWAT operatives or negotiation commander and negotiators), in training and in actual deployment, promote the understanding that everyone shares the same goal and seeks to turn potential adversaries into partners. This team approach reduces potential conflict because it gives ownership of possible options ultimately presented to the OSC to everyone on both teams. Thus, instead of picturing SWAT and negotiators as opposing teams, they are viewed as

one team, composed of interdependent elements, akin to offensive (tactical) and defensive (negotiation) elements, with the goal of working together to solve the same problem, albeit from different perspectives and with different motives.[12]

THE IMPACT AND ROLE OF THE ON-SCENE COMMANDER

On-scene commanders have tremendous impact on the potential conflict between tactical and negotiation teams simply because they determine how a department will address and ultimately resolve a H/B situation. However, arriving at an acceptable resolution and averting potential disaster require the OSC to rely on the SWAT and negotiations commanders, who provide the OSC with the necessary assessment and options to make informed decisions to resolve the situation in the safest way possible. One expert believes that, "Influence must replace the use of formal authority in relationships with subordinates, peers, outside contacts, and others on whom the job makes one dependent."[13] This holds true especially between the OSC and the SWAT and negotiations commanders and it requires the OSC to balance influence and power, much like a mediator-arbitrator, who encourages the teams to collaboratively and collectively conceive strategic options based on their perspectives and available information, yet who still reserves the right to make the final decision on which option to choose. The OSC who uses this approach also encourages and fortifies the principles of the three stages by developing a web of influence, which can be mutually advantageous to all who interact within it.[14]

On-scene commanders can foster continued understanding and positive relationships between the teams by balancing the time they spend with each team according to the needs of the work, rather than on the basis of habit or social preference.[15] This constitutes an important consideration for OSCs because they inadvertently may favor

one team over the other, straining the team relationships, especially if they agree more with one team based on their previous experience as a SWAT operator or negotiator.

The OSC can greatly influence whether or not departments encourage prenegotiation between the teams. Parties shift from unilateral solutions toward multilateral or negotiated ones when the unilateral track is blocked or overly costly or when the alternative track is more promising or comparatively cheaper.[16] Thus, keeping prenegotiation alive between the teams requires the OSC to move the teams in a multilateral direction by understanding and acknowledging the perspectives of each team and their strengths and weaknesses while, at the same time, applying their specific skills and tactics to the problem, based on the parameters of the situation and on the experience of the OSC. This approach tends to poise both teams toward collaborative negotiation and subsequent consensus of action because they will perceive the distribution of power between them moving toward equality.[17] This constitutes an important consideration because, oftentimes, a real or perceived imbalance of power exists between the tactical and negotiation teams. For example, this power imbalance may result from the perception by some officers on the tactical team that the field of hostage negotiations is somehow less legitimate because it represents a relatively new phenomenon. Additionally, a real power imbalance may occur based on the fact that, in many cases, the SWAT team responds first to a H/B situation and takes control with little or no regard for the negotiation team.

Finally, on-scene commanders can encourage collaboration and intrateam/interteam negotiation through properly choosing influence tactics and by communicating them effectively. Certain H/B situations may cause OSCs to select options or tactics that conflict with the perspectives and recommendations of one or both teams, which may be due to their past experiences or political mandates outside of the OSC's control. Thus, when dealing with the teams in these situations, OSCs must preserve their continued efforts to collaboratively negotiate their perspectives and options by influencing them to accept any divisive outcomes in a palatable way, based on rationality and the needs of those to be influenced. One expert believes that, "Effective communications become interwoven coils of silk in the web of influence that help ensure success of tactics."[18]

> ***"On-scene commanders have tremendous impact on the potential conflict between tactical and negotiation teams...."***

CONCLUSION

Depending on the circumstances, agencies may deal with hostage/barricade situations on a response continuum ranging from a tactical response using force to a purely nontactical response using negotiation. This dichotomy results in differing perspectives and skills, which SWAT and negotiation teams exhibit, and a potential for conflict.

To reduce this conflict potential, under the full support of the on-scene commander, the tactical and negotiation teams should strive to understand each other by fostering relationships, prenegotiating by setting the stage for collaboration, and negotiating options through collaboration and consensus. In doing so, options have a higher measure of validity because teams process them through two general perspectives, rather than just one, and, more important, both teams may claim ownership of the options, thereby moving onto more pressing issues instead of dwelling on one. This approach allows the two teams the flexibility of agreeing to disagree on certain issues leading to the recommended options, yet remaining jointly committed to the course of action on which they have settled, thereby providing the on-scene commander with reliable assessment and options for making informed decisions.

Teams manage conflict when it does not interfere substantially with the ongoing functional (as opposed to personal) relationship between the parties involved.[19] In hostage/barricade situations, tactical and negotiation teams must work together with the OSC to resolve the incident in the safest and most nonviolent manner possible by using their unique perspectives and skills in a

way that is consistent with the overall goal of saving lives. ✦

Endnotes

[1] Specialized telephones that are literally "thrown," usually through a window, to where the subject is located. These telephones are used to establish direct communication between the negotiator and the subject.

[2] L.G. Bolman and T. E. Deal, *Reframing Organizations: Artistry, Choice, and Leadership*, 2nd ed. (San Francisco, CA: Jossey-Bass Publishers, 1997), 217.

[3] An outcome where one side loses and the other side wins; as opposed to a win-win outcome where the needs of both sides are met.

[4] G. T. Savage, J. D. Blair, and R. L. Sorenson, "Consider Both Relationships and Substance When Negotiating Strategically," in *Negotiation: Readings, Exercises, and Cases,* eds. R. J. Lewicki, D. M. Saunders, and J. W. Minton (Boston, MA: Irwin McGraw-Hill, 1989), 32-49.

[5] Ibid.

[6] I.W. Zartman, "Prenegotiations: Phases and Functions," in *Getting to the Table: The Processes of International Prenegotiation,* ed. J. Stein (Baltimore, MD: Johns Hopkins University Press, 1989).

[7] B. Gray, "Collaboration: The Constructive Management of Difference," in *Negotiation: Readings, Exercises, and Cases,* eds. R. J. Lewicki, D. M. Saunders, and J. W. Minton (Boston, MA: Irwin McGraw-Hill, 1989), 111-126.

[8] Ibid.

[9] Ibid. These problems also are characteristic of H/B situations, which are highlighted in parentheses.

[10] J. G. Zack, "The Negotiation of Settlements: A Team Sport," in *Negotiation: Readings, Exercises, and Cases,* eds. R. J. Lewicki, D. M. Saunders, and J. W. Minton (Boston, MA: Irwin McGraw-Hill, 1994), 328.

[11] Ibid., 333.

[12] Ibid.

[13] B. Keys and T. Case, "How to Become an Influential Manager," in *Negotiation: Readings, Exercises, and Cases,* eds. R. J. Lewicki, D. M. Saunders, and J.W. Minton (Boston, MA: Irwin McGraw-Hill, 1990), 204-209.

[14] Ibid.

[15] Ibid., 210.

[16] Supra note 4, 8.

[17] Supra note 4.

[18] Supra note 13, 214.

[19] L. Greenhalgh, "Managing Conflict," in *Negotiation: Readings, Exercises, and Cases,* eds. R. J. Lewicki, D. M. Saunders, and J. W. Minton (Boston, MA: Irwin McGraw-Hill, 1986), 6-13.

Special Agent Vecchi serves in the FBI's Miami office.

Attention: Homicide and Missing Person Units

VICAP Alert

Unidentified Body

The U.S. Park Police are investigating the discovery of an unidentified male on April 13, 2000, at approximately 5:30 p.m. The decomposed body was discovered in Beaver Dam Creek, located on the grounds of the U.S. Agricultural Research Center in Beltsville, Prince Georges County, Maryland.

Crime Scene

The victim was described as a white male, between 30 and 35 years of age, about 6'3" in height, and weighing more than 200 pounds. The color and length of hair were undetermined. He was wearing a brown wool jacket, brand name "L.L. Bean," size 48 tall; a green hooded sweat jacket; a T-shirt, brand name "Haines," size XL with the "Nike" logo; blue jeans, brand name "Wrangler," size 36x36; and "Original Rugged" hiking shoes, brand name "Outback." A set of keys on a large safety pin and four $1 bills also were found in the victim's clothing.

The victim had several strands of barbed wire wrapped around his neck. The cause of death may have been blunt force trauma to the head, along with strangulation. The victim may have been in the water for as long as 2 months. Partial fingerprints are available, as well as two facial reconstructions.

Alert to Law Enforcement

Any agency with information about this victim or with similar solved or unsolved crimes should contact Detective A. Kapetanakos of the U.S. Park Police at 202-690-5065 or Special Agent Kevin Crawford of the FBI's Violent Criminal Apprehension Program (VICAP) at 800-634-4097. ✦

Perspective

Collecting Statistics in Response to Racial Profiling Allegations

By Karen J. Kruger, J.D.

"This isn't a problem that can be quantified just in terms of statistics.... It's like the guy who is unemployed; the unemployment rate for him is 100 percent. For people who have been the victim of racial profiling, the statistic is 100 percent."[1]

—U.S. Attorney General John Ashcroft

The simple collection of data will neither prevent so-called "racial profiling" nor accurately document a law enforcement agency's activities as a means of protecting it from public criticism, scrutiny, and litigation.[2] Statistics represent meaningless numbers unless they are put in a relevant context or used as a legitimate means of comparison.[3] Standing alone, statistics, much like legal arguments, can be used to make or defend any position that someone may adopt on an issue. Law enforcement agencies, therefore, must take additional steps to ensure that the numbers they collect accurately reflect reality and support the positive enforcement and crime prevention efforts that they conduct.[4]

UNDERSTANDING THE TERMINOLOGY

Understanding the terminology of racial profiling constitutes the first step to gathering relevant statistical information. As some commentators have noted, the use of race for law enforcement purposes is unconstitutional when it is *the* factor used in selecting potential criminal suspects.[5] Other commentators have described the problem as a "targeting of individuals for police investigations based on their *race alone*."[6]

Because the Constitution requires that a law enforcement officer have "reasonable suspicion to stop and detain a person,"[7] no one disputes that stopping or detaining individuals because of their race or ethnicity is unconstitutional. As two researchers describe it: "There is no one list of factors that gives rise to reasonable suspicion, as the varieties of suspicious behavior are as diverse as the types of activity punishable under the criminal law. However, reasonable suspicion may not be based on race alone."[8] No Fourth Amendment action, be it an investigative detention, an arrest, or a search, can be undertaken based solely upon race. Therefore, officers who base their *Terry* stops or other investigative activities on a suspect's race alone violate the law and are guilty of misconduct that very well may be sufficient to terminate their employment.[9] In short, no circumstances exist under which officers may stop citizens based solely on their race, sex, religion, national origin, or sexual orientation. Rather, officers must base stops on reasonable suspicion—facts and information that they can articulate, which, in turn, lead to their sense of suspicion that a violation of law has been or is about to be committed.[10]

The law enforcement community must strive to remind the public and the press of the correct definition of the problem, lest they come to believe that race has no importance in the investigation and prevention of crime or that such uses are improper.

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For instance, the race of an at-large suspect often represents an important identifying characteristic that agencies must include in radio broadcasts.[11]

Similarly, law enforcement officials should remain alert to any inappropriate use of terminology that is not legally accurate or recognized, but appeals to the emotional or political aspect of this debate. For example, some legislative proposals use the terms *consensual* and *nonconsensual* when setting parameters for data collection relating to searches of motor vehicles. The term *nonconsensual* conveys that a search was conducted by use of force against the will of the individual, rather than on a recognized legal basis, such as incident to arrest.[12] Law enforcement authorities should avoid such misleading terminology because it creates mistaken and unfavorable impressions.

EXPLORING THE PROBLEM

Apparently, the public has come to believe that if the police are required to keep a record of their investigative activities, the "problem"[13] of racial profiling will be curtailed.[14] While accurate and meaningful data collection may have some social science and management value, it is fraught with pitfalls. In fact, the effort to collect statistics may further erode the public's trust in law enforcement and the morale among its members, as well as spend government dollars that could be better used on law enforcement training and education, community crime prevention, and drug treatment.

> **"Statistics represent meaningless numbers unless they are put in a relevant context or used as a legitimate means of comparison."**

A more effective way to alleviate the problems caused by the perception that police engage in racial profiling rests with education—of the police and the public. Those officers who actually stop citizens only because of their race are either ignorant of the law or are unethical or immoral. Training in constitutional law and ethics, along with effective first-line supervision, would directly address this problem. It also may prove helpful for agencies to develop procedures for making more professional traffic stops that demonstrate sensitivity to this issue by including, for instance, informing the driver of the facts that led the officer to make the stop. Those facts would, and must, establish the reasonableness of the stop.[15]

Equally important are departmental policies, supervision, and discipline. Law enforcement agencies should send a clear message to all personnel that using race alone as the basis for any investigative stop is unacceptable conduct and can lead to termination from employment. In short, this is a "zero tolerance" issue. Officers who do not respond to training and discipline or appear simply immoral have no place in law enforcement.

A need also exists to educate the public. Agencies should convey to their communities that law enforcement is a difficult and dangerous profession and that most who enter it do so for only the best reasons. The public needs to know that the narrow scope of the racial profiling problem and the U.S. Constitution protect them from such abuses and that such abuses are not tolerated or advocated by law enforcement agencies.

COLLECTING THE STATISTICS

These thoughts aside, the perception appears to exist that the public wants law enforcement to do nothing more than "collect statistics," but with no apparent defined purpose. If agencies find themselves in a posture that requires this collection—either by legislation or some kind of executive order—or decides to do so voluntarily, they should bear in mind some complexities and sophisticated issues that generally are not acknowledged as problems with statistical collection of this kind.[16]

Methodology

The collection and application of statistical data is a scientific and academic exercise requiring a well-designed protocol.[17] Most mandated law enforcement data collection occurs as the result of a legislative compromise or an effort to appease particular interest

groups and contains weak methodology. The protocols are determined not by academics or mathematicians but by legislators, governors, or other officials who may have no training or expertise in the field of statistics and, therefore, may pay little attention to the purpose, quantity, or nature of the data that they need to collect.

Experts in the field should design the data collection system and base it on a testable hypothesis. They should include protocols that will ensure that the process will collect empirical data for research purposes and not merely to provide evidence for a particular advocacy group or to falsely defend an errant officer.[18] These protocols must screen out other behavioral variables that may be culturally or geographically based or that include other relevant but nonracial factors.[19] Examples include highway safety studies that show African-American youth as 50 percent less likely to use seat belts than whites or Hispanics.[20] Similarly, traffic stops based on vehicle equipment violations may occur more often in some minority neighborhoods because owners may have fewer resources to devote to repairing their vehicles.[21]

"Experts in the field should design the data collection system and base it on a testable hypothesis."

The data collection methodology also should require that agencies collect sufficient data to allow for meaningful analysis. The notion of a "statistically significant number" is important but rarely mentioned when discussing data collection. Primarily, agencies must ensure that they collect enough data over a specific period of time to adequately appraise the circumstances surrounding the types of stops that their officers make.

Implementation

With all of these elements in mind, the collection of data must not burden the officers and agencies to the extent that it has a "chilling effect" on enforcement. The record keeping by officers may become quite time-consuming, interfere with their lawful discretion, and create animosity with the public.[22] There is even the potential for civil liability, depending on the time required and the method used. For example, if a citizen has to remain on the scene during the time an officer needs to fill out an "extra" form, the citizen may perceive this as an unlawful detention. Also, the collection of "racial" statistics may imply that race discrimination problems exist, thereby enhancing the public's negative perceptions at the cost of both the morale and effectiveness of officers. Finally, officers become burdened with attempting to identify the race of motorists by sight or by asking them outright, which may escalate tensions and create a dangerous, or at least uncomfortable, situation for both parties.[23]

The financial impact represents another consideration in the data collection process. Accurate and well-designed collection methods may require the purchase of new computer equipment, the hiring of persons to input data, and the employment of experts to analyze the meaning of the data. When a legislative body or governing executive requires the collection of statistics, appropriate funding rarely is attached to the mandate.[24] Agencies must consider whether it is in their communities' best interests to impose such a burden on their budgets, rather than seeing that money spent on crime prevention and enforcement efforts.

A data collection initiative also must take into account the differences between municipal and highway policing. The work of urban and suburban officers is responsive in nature—they engage in police work when and where they are summoned. Their enforcement pattern depends on the character of the neighborhoods that they serve. Highway policing is more self-initiated and, arguably, calls for more discretion. Conceivably then, municipal and highway collection models should be quite different from each other. Moreover, it may prove useful for the collection and analysis to distinguish between low and high discretion stops.[25]

Analysis

Finally, the data collection process must include a clear direction for the analysis of the data. If agencies compare the collected statistics to some demographic statistic, what is the relevant demography or benchmarks? In a highway patrol situation, this issue proves especially problematic because an interstate highway has neither a static "population" nor a counting mechanism, such as a census. To compare highway statistics to the local population is disingenuous because the highway is populated with interstate travelers. Similarly, when comparing urban data, agencies must establish a concomitant analysis of the local criminology and appropriate benchmarks or a comparative control group.

Even the U.S. Department of Justice acknowledges that jurisdictions need assistance "in designing statistical benchmarks and determining comparative populations"[26] and that "the characteristics of a traffic stop are difficult to interpret."[27] Likewise, the author's research has yet to find an analytical model that has established a meaningful benchmark for comparison or a sufficiently sophisticated method of interpretation.[28]

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With respect to these benchmarks, another neglected issue arises in the discussion concerning the analysis of the data collected. A racial disparity, if one can be established, is only legally significant under the Equal Protection Clause of the Fourteenth Amendment if individuals stopped solely on the basis of their race were similarly situated to others who were not stopped.[29] In other words, the correct comparison is *not* to the people living in the neighborhood or driving on the highway who did *not* engage in the same conduct as the person stopped. Rather, the complainant must show that those who *did* engage in the same conduct were not stopped because they were not of a minority race. Therefore, to demonstrate racial bias, the statistics used by the complainant must show that officers had an equal opportunity to stop others who were similarly situated to the suspect person but who they did not stop solely because they were not of a minority race.[30]

CONCLUSION

The collection of data concerning the issue of racial profiling cannot be taken lightly. Superficially, it may seem like a relatively painless way to appease public and political concerns, especially to those law enforcement executives who are confident that their departments are functioning properly. However, significant pitfalls exist. If agencies do not base their collection methodology on a well-designed scientific model, the resulting statistics can be manipulated easily to serve as a sword, rather than a shield. To then defend against this sword, agencies may be forced to attack the basis of their own statistical collection efforts, which ultimately may be perceived as an effort to engage in a cover-up.

There is no question that agencies must address the public concerns about racial profiling and the related issues of public confidence and respect for the law enforcement community. However, it remains naive to believe that data collection is the sole answer. Indeed, if agencies do not properly conduct the data collection process, it may only serve to exacerbate the problem and undermine legitimate crime-fighting efforts. ✦

The opinions expressed in this article are the author's alone and not those of the Maryland Attorney General or his staff.

Endnotes

[1] "Bush and Ashcroft Announce Racial Profiling Initiative," *Criminal Justice Newsletter* 31, no. 8 (2001): 2-4.

[2] For an overview of racial profiling see, Richard G. Schott, "The Role of Race in Law Enforcement," *FBI Law Enforcement Bulletin*, November 2001, 24-32.

[3] See, for example, T. Ginsberg, "High Probability of Befuddlement," *Baltimore Sun*, July 15, 2001, sec. C, p. 5, noting that "[e]ven if statistical findings are repudiated, they can still perpetuate statistical myths"; and H. MacDonald, "The Myth of Racial Profiling," *City Journal* 11, no. 2 (spring 2001), "Their alleged evidence for racial profiling comes in two varieties: anecdotal, which is of limited value, and statistical, which on examination proves entirely worthless."

[4] For information on racial profiling data collection systems, see Deborah Ramirez, Jack McDevitt, and Amy Farrell, Northeastern University, *A Resource Guide on Racial Profiling Data Collection Systems: Promising Practices and Lessons Learned*, NCJ 184768 (U.S. Department of Justice, November 2000).

[5] Grady Carrick, "Professional Police Traffic Stops: Strategies to Address Racial Profiling," *FBI Law Enforcement Bulletin*, November 2000, 8-10.

[6] Abraham Abramovsky and Jonathan I. Edelstein, "Pretext Stops and Racial Profiling After *Whren v. United States*: The New York and New Jersey Responses Compared," 63 Alb. Law Rev. 725, 729 (2000). See U.S. Department of Justice, *A Resource Guide on Racial Profiling Data Collection Systems: Promising Practices and Lessons Learned* (Washington, DC, 2001), 3, defining racial profiling as "police-initiated action that relies on...race..."; and Earl M. Sweeney, "Ohio's Statewide Effort to End Profiling," *Police Chief*, July 2001, 16.

[7] *Terry v. Ohio*, 392 U.S. 1 (1968). See David Rudovsky, "Law Enforcement by Stereotypes and Serendipity: Racial Profiling and Stops and Searches Without Cause," 3: 1 *Journal of Const. Law* 296, 306 (2001).

[8] 63 Alb. Law Rev. 725, 729; and supra note 7 (Rudovsky).

[9] A recent legislative proposal (2000) in Maryland offered that an officer who engaged in racial profiling be fined $1,000 and be required to attend training. The Maryland legislators appeared surprised when several chiefs of police informed them that they would fire any officer they found to have committed racial profiling.

[10] *Terry v. Ohio*, 392 U.S. at 30-31.

[11] See *Brown v. City of Oneonta*, 221 F.3d 329 (2d Cir. 2000); and supra note 3 (MacDonald) noting that DEA has identified common characteristics of drug couriers that may include "the ethnic makeup of drug-trafficking organizations." MacDonald also asserts that "[t]he antiprofiling crusade thrives on ignorance of policing and a willful blindness to the demographics of crime." See also Hoover, "Why the Resistance to Collecting Race Data on Police Traffic Stops," *Police Labor Monthly*, July 2000, 5.

[12] See, for example, *New York v. Belton*, 453 U.S. 454, 460 (1981).

[13] It continues to be difficult to discern how prevalent the practice of racial profiling—using race as the sole reason for initiating an investigative stop—really is. Many anecdotal accounts are based only on the perception of the individuals who were stopped and who may or may not be aware of other factors that officers considered in determining that they had reasonable suspicion to stop these individuals. Others argue that statistical evidence exists; however, that evidence often seems to have been collected under questionable circumstances and by nonobjective parties. Those statistical studies also may suffer from some of the shortcomings that this article discusses, see supra note 3 (MacDonald). Other commentators pointedly disagree, see supra note 7 (Rudovsky), 298-303.

[14] See supra note 6 (U.S. Department of Justice), 13, asserting that data collection can identify potential police misconduct and deter it.

[15] Supra note 6 (Sweeney), 18.

[16] At present, a growing recognition exists that the attendant issues to data collection are unknown, uncertain, or unresolved, as demonstrated by the references noted in this article. See, in particular, Fridell, Luaney, Diamond, Kubu, Scott, and Laing, *Racially Biased Policing: A Principled Response*, Police Executive Research Forum, July 2001.

[17] The U.S. Department of Justice has suggested a "core set of data" to be collected, consisting of nine elements. U.S. Department of Justice, *Traffic Stops and Data Collection: Analyzing and Using the Data* (Washington, DC, February 2000), 5-6. See also supra note 6 (U.S. Department of Justice) and supra note 16 (Fridell et al), 126-128.

[18] On this issue, the author gratefully acknowledges the insights provided by Carl Milazzo and Aimee B. Anderson during their lecture, "Current Legal Issues in Racial Profiling: 2000 Update," presented at the annual conference of the International Association of Chiefs of Police in November 2000.

[19] Supra note 7 (Rudovsky), 365.

[20] Benson, Crawford, and Mitchell, 1998, cited in U.S. Department of Transportation, *Blue Ribbon Panel to Increase Seat Belt Use Among African-Americans: A Report to the Nation* (Washington, DC, 2000).

[21] Supra note 11 (Hoover).

[22] U.S. Department of Justice, *Traffic Stops and Data Collection: Analyzing and Using the Data* (Washington, DC, February 2000), 9-10.

[23] Jerry A. Oliver and Alicia R. Zatcoff, "Lessons Learned: Collecting Data on Officer Traffic Stops," *Police Chief*, July 2001, 23; supra note 11 (Hoover), 2; and supra note 16 (Fridell et al.), 129.

[24] See generally supra note 6 (U.S. Department of Justice).

[25] Supra note 6 (U.S. Department of Justice), 9-10.

[26] Supra note 6 (U.S. Department of Justice), 56.

[27] Supra note 6 (U.S. Department of Justice), 53.

[28] See supra note 3 (MacDonald) noting that "no traffic study to date comes near the requisite sophistication"; and supra note 16 (Fridell et al.), 137.

[29] *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). See also supra note 16 (Fridell et al.), 133-134, noting that "these data cannot prove *causation*—only *correlation*."

[30] See supra note 7 (Rudovsky), 322; and *Chavez v. Illinois State Police*, 251 F.3d 612, 645-48, (7th Cir. 2001), "without comparative racial information, plaintiffs cannot prove that they were stopped, detained, or searched, when similarly situated whites were not."

> **"...the data collection process must include a clear direction for the analysis of the data."**

Bulletin Reports

Juvenile Justice

The National Criminal Justice Reference Service presents *Restorative Justice Conferences as an Early Response to Young Offenders* (NCJ 187769). This report describes restorative justice conferencing, a promising form of early intervention for very young offenders that brings together offending youths with their victims, and supporters of both, with a trained facilitator. Youths who become involved in the juvenile justice system at an early age are significantly more likely to continue offending than their older counterparts. Because very young offenders are at greater risk to reoffend and progress to serious delinquency, effective early intervention is crucial. Early offenders pose special challenges, but restorative justice conferencing offers unique benefits, as shown by the Indianapolis Restorative Justice Conferencing Experiment. As described in this Office of Juvenile Justice and Delinquency Prevention Bulletin, such conferencing holds youths accountable for their actions and allows them to repair the harm that they have caused while involving families and victims in the process. For a copy of this report, call the National Criminal Justice Reference Service at 800-851-3420 or access its Web site at *http://www.ncjrs.org*.

Corrections

Census of Jails, 1999 presents facility characteristics of persons under the jurisdiction of local and federal jail authorities on June 30, 1999. The report summarizes changes in the number of local jails during the 1990s; average daily population and number of men, women, and juveniles confined in local jails; number of inmates and facilities by size of facility; inmate sex, race, and conviction status; and facility-rated capacity and percent of capacity occupied. Additionally, the document includes information on the 25 largest jail jurisdictions, such as number of staff and staff characteristics, facility health services and inmate health, and facility programs. For a copy of this report (NCJ 186633), call the National Criminal Justice Reference Service at 800-851-3420 or access its Web site at *http://www.ncjrs.org*.

Bulletin Reports is an edited collection of criminal justice studies, reports, and project findings. Send your material for consideration to: *FBI Law Enforcement Bulletin*, Room 209, Madison Building, FBI Academy, Quantico, VA 22135. (NOTE: The material in this section is intended to be strictly an information source and should not be considered an endorsement by the FBI for any product or service.)

Making Ethical Decisions
A Practical Model

By JOHN R. SCHAFER, M.A.

A rookie police officer smelled alcohol on his partner's breath as he entered the squad car at the beginning of the shift. The senior officer admitted he drank one glass of wine with dinner but insisted that he could drive safely. To avoid a confrontation, the rookie did not protest. Shortly thereafter, the squad car driven by the senior officer collided with another vehicle. The driver of the other vehicle died 3 weeks later from the severe injuries sustained in the accident. The traffic officer investigating the accident smelled alcohol on the senior officer's breath but did not report this fact nor did he ask the senior officer to take a breath test. A subsequent lawsuit alleged that the senior officer caused the accident because he drove under the influence of alcohol. During the internal affairs inquiry, the rookie faced a high-stakes ethical dilemma, tell the truth or lie to protect the senior officer. Because the rookie failed to take action when he encountered his first ethical dilemma, he struggled with an even greater ethical quandary. If the rookie lies, he gains immediate trust and acceptance from fellow police officers. If the rookie tells the truth, he risks alienation and the possibility of administrative action.

Ethical conflicts arise when the actions of one person or a group of people interfere with the interests of another person, group of people, or the community as a whole. Unfortunately, ethical decision-making models, no matter how elaborate, cannot adequately portray the complexity of ethical dilemmas.[1]

Contrived scenarios in the classroom differ significantly from real-life ethical dilemmas. In the classroom, detached participants review facts, calmly discuss options, and provide idealized solutions that neatly fit a prescribed code of ethics. Choosing the right answer in an artificial setting requires little effort. On the other hand, making the right decision in real life demands strength of character because the reality of circumstances often blurs the line between right and wrong.

Police officers must develop decision-making strategies before they confront ethical dilemmas. The process officers use to make ethical decisions does not differ from the decision-making process used by ordinary people who face ethical dilemmas in their everyday lives.

> *"Modeling ethical behavior can motivate others to act ethically."*

Special Agent Schafer is assigned to the FBI's Lancaster, California, resident agency and also serves as a member of the FBI's National Security Division's Behavioral Analysis Program.

IDENTIFYING ETHIC CODES

Ethic codes and guidelines protect professionals from themselves, as well as from those who, they perceive, abuse the power of their profession.[2] Nonetheless, the inherent power of a code of ethics rises no higher than the collective moral character of those who subscribe to the code. Theoretically, a code of ethics sets guidelines for ideal behavior. However, in reality, it represents minimum standards of behavior. These minimum standards often become the goal, rather than a "trip wire" to signal unacceptable behavior.[3] Typically, after achieving minimum standards, motivation to achieve higher moral and ethical standards becomes less ardent.

Ethic codes encompass a wide range of issues but cannot include every possible scenario. Necessarily vague guidelines provide flexibility for individual interpretations and for unique circumstances.[4] Nonspecific issues confound the ethical decision-making process because individuals must rely on objective standards, as well as subjective values when seeking solutions.

Mandatory Ethics

The foundation of ethic codes rests either on the rule of law or administrative policies. Federal, state, and local governing bodies enact legislation to ensure a minimum standard of legal conformity. Ethic codes based on the rule of law carry legal sanctions. Administrative policies, often based on the rule of law, impact employment status or violate the values of the group that agreed to the set of self-imposed ethical standards. In either case, violating mandatory ethics can trigger legal or administrative sanctions, a change in job status, the permanent loss of employment, or any combination thereof.

Aspirational Ethics

Aspirational ethics represent the optimum standard of behavior.[5] Unlike mandatory ethics, aspirational ethics differ among individuals depending on their personal values, cultural influences, and sense of right and wrong. Aspirational ethics serve as an internal standard against which an individual judges personal behavior. For example, no law obligates a person strolling on a beach to save a child drowning 50 feet from shore. Conversely, a person may feel a moral obligation to assist the drowning child because aspirational ethics compel a person to strive for optimal moral and ethical outcomes.[6]

Personal Orientation

Personal orientation takes into account individual values, cultures, religious beliefs, personal biases, and other idiosyncrasies.[7] The degree to which outward behavior differs from internal behavior expectations contributes to the amount of intrapersonal conflict experienced as a result of making an ethical decision. Conflicting feelings regarding a perceived duty and the need for peer acceptance also contribute to intrapersonal stress.[8]

Ethical Decision-Making Process

The ethical decision-making process consists of three questions: What should I do? What will I do?[9] How does the decision I make

comport with my personal orientation?[10] Ethical decisions engender fear—a fear of change in the status quo. People strive to maintain equilibrium in their lives and seldom act in a manner that disrupts this equilibrium.[11] When confronted with an ethical decision, a person's ability to make objective decisions often becomes warped by this inherent tendency to maintain equilibrium.

In a classroom setting, anyone who answers other than, "The rookie should tell the truth," risks indignation and ridicule. In reality, however, an array of emotions clouds the answer. When making an ethical decision, a person conducts a personal risk-benefit analysis.[12] Many ethical dilemmas present both short- and long-term solutions. An inverse relationship exists between short-term and long-term ethical solutions. Short-term solutions often benefit the individual and harm society, while long-term decisions tend to hurt the individual and benefit the community.

Short-term Solutions

Reporting the senior officer carries certain short-term risks. The rookie not only brings into question the senior officer's ability to drive but, by inference, his suitability for duty. The rookie places himself in an awkward position when he reports the senior officer. Ideally, the rookie makes the right ethical decision; however, in reality, he most likely will lose the trust of his fellow officers and suffer certain social sanctions, including ostracism. In this scenario, the personal risks of confronting the senior officer far outweigh the personal benefits. The rookie knew the answer to the question, "What should I do?" but chose not to act accordingly. Studies confirmed that people confronted with ethical decisions do less than they believe they should do.[13] People tend to choose a course of action that benefits themselves first over the benefit of others or the community at large.

Long-term Solutions

Long-term ethical solutions present a more complex set of circumstances with higher personal risks and an intangible measure of worth. For example, the rookie may save a life if he reports the senior officer; however, the life spared becomes immeasurable because, in reality, the loss never happened.

> ***...violating mandatory ethics can trigger legal or administrative sanctions....***

Without knowing the true impact of his ethical decision, the rookie's words, "Because of my actions today, I saved a life," ring hollow to police peers and especially to the senior officer. In reality, the rookie exposes himself to detrimental consequences without realizing the rewards of the sacrifice rendered. More likely than not, the rookie will second-guess his decision to knowingly place himself in a precarious social and professional predicament.

People who make bad initial ethical decisions often get caught in the "ethical trap." As a result of a primary ethical decision with an adverse outcome, a secondary ethical dilemma results. Solving a secondary ethical dilemma becomes inherently more difficult because not only does the secondary decision need a resolution but the primary decision, now judged as errant, requires justification. If the rookie tells the truth, he faces both administrative sanctions for failing to report the senior officer and, ironically, the same social sanctions he feared when he decided initially not to report the senior officer. If the rookie lies, he may save himself and the senior officer from legal and administrative action, but, depending on the rookie's personal orientation, he may experience life-long guilt and regret. The life lost from the accident never can be recovered, and, in retrospect, a decision to report the senior officer becomes blatantly obvious. The rookie now must face the consequences of his decision and wonder, "If I only had the courage to make the right decision in the first place, I could have saved a life." Once ensnared in the ethical trap, few people escape.

FINDING RESOLUTIONS

People compare the "fit" of various ethical decision-making options to their personal orientation.[14] A good fit maintains personal equilibrium; whereas, a bad fit increases intrapersonal conflict, stress, and guilt. Rationalization hastens the

return of intrapersonal equilibrium. Primary ethical decisions with good outcomes resolve more easily. For example, if the senior officer completes his shift without incident, the rookie can rationalize his decision to allow the senior officer to drive under the influence of alcohol because nothing happened. Primary ethical decisions with bad outcomes take an extra measure of rationalization to resolve. In extreme cases, no amount of rationalization brings equilibrium. Making appropriate primary ethical decisions may cause some degree of discomfort in the short term but may save a lifetime of guilt, remorse, and shame.

AVOIDING THE ETHICAL TRAP

Living an ethical life reduces the number of ethical dilemmas a person faces. Unethical people instinctively refrain from inappropriate behavior in the presence of an ethical person, especially a person who holds unethical people accountable. If the rookie historically made ethical decisions regarding both large and small unethical acts, then the probability of the senior officer coming to work intoxicated lessens significantly. In the event the senior officer came to work intoxicated, the rookie could offer the senior officer two options, take the day off and go home or face the consequences. If the rookie habitually made ethical decisions, the act of reporting the senior officer will meet the expectations of the rookie's peers. In fact, the other officers probably would experience more shock if the rookie did not act ethically. In this event, the senior officer likely would become the victim of his own bad decision, rather than the victim of betrayal.

Modeling ethical behavior can motivate others to act ethically. The next time a merchant offers a police officer a free cup of coffee or a meal, the police officer could say, "I appreciate your generous offer, but I'll pay my way this time." Learning how to tactfully make ethical decisions may provide the necessary courage for others to act in a similar manner. Practicing ethical decision making on small matters renders larger ethical decision making less formidable.

Time constraints also may restrict clear thinking.[15] When circumstances limit the time available to evaluate ethical decisions, officers should seek temporary solutions.[16] For example, after the rookie first smelled alcohol on the senior officer's breath, he could excuse himself to make an urgent telephone call. This temporary solution provides additional time for the rookie to review more permanent solutions. During this reprieve, consulting a trusted friend, ethic codes, or legal guidelines could provide a more objective perspective. Officers should avoid making ethical decisions when time prevents a thorough review of the available options. Notwithstanding, sometimes, no amount of thorough analysis can lift the burden of the decision.[17]

CONCLUSION

An ethical decision consists of a series of choices, not simply one decision. Making bad primary ethical decisions increases not only the number of choices but also the future impact of those choices. More important, a bad primary ethical decision spring-loads the ethical trap, resulting in an increased potential for legal or administrative action or unresolved intrapersonal conflict.

Ethical dilemmas challenge the intellect because of the conflicting answers to the questions, "What should I do?" and "What will I do?" If a person must choose between two options that do not oppose one another, selecting an option becomes a matter of choice and not a decision between right and wrong. In most cases, choosing right over wrong takes courage because people who make ethical choices often subject themselves to social and professional ridicule. Ethical decisions build personal character, but not without pain. ✦

Endnotes

[1] Nancy D. Hansen and Susan G. Goldberg, "Navigating the Nuances: A Matrix of Considerations for Ethical-Legal Dilemmas," *Professional Psychology: Research and Practice* 30, no. 5 (1999): 495-503.

[2] Concept derived from David J. Miller, "The Necessity of Principles in Virtue Ethics," *Professional Psychology: Research and Practice* 2, no. 2 (2000): 107.

[3] Jody L. Newman, Elizabeth A. Gray, and Dale R. Fuqua, "Beyond Ethical Decision Making," *Consulting Psychology Journal: Practice and Research* 48, no. 4 (1996): 230-236.

[4] Todd S. Smith, John M. McGuire, David W. Abbott, and Burton I. Blau, "Clinical Ethical Decision Making: An Investigation of the Rationales Used to Justify Doing Less Than One Believes One Should," *Professional Psychology: Research and Practice* 22, no. 3 (1991): 235-239.

[5] Supra note 3, 1.

[6] Supra note 3, 2.

[7] Concept derived from Tory E. Higgins, "Making a Good Decision: Value from Fit," *American Psychologist* 55, no. 11 (2000): 1217-1230.

[8] Concept derived from Gerald P. Koocher and Patricia Keith-Spiegel, *Ethics in Psychology: Professional Standards and Cases* (New York, NY: Oxford University Press, 1998), 19.

[9] Supra note 4, 1.

[10] Concept derived from supra note 7, 1224.

[11] Jo-Ellen Dimitrius and Mark Mazzarella, *Reading People* (New York, NY: Ballantine Books, 1999), 16.

[12] Supra note 7, 1218.

[13] Supra note 4, 3.

[14] Supra note 7, 1224.

[15] Supra note 11.

[16] Supra note 11.

[17] Augustus E. Jordan and Naomi M. Meara, "Ethics and the Professional Practice of Psychologists: The Role of Virtues and Principles," *Professional Psychology: Research and Practice* 21, no. 2 (1990): 107-114.

Technology Update

The FBI Intelligence Bulletin *Is Online Weekly*

The FBI has begun producing the *FBI Intelligence Bulletin,* a weekly online publication containing information relating to terrorism in the United States. Its publication resulted from the FBI's meeting with state homeland security directors and local law enforcement officials in late February. The *FBI Intelligence Bulletin* is intended to provide information to patrol officers and other law enforcement personnel who have direct contact with the general public. It is hoped that these contacts could result in the discovery of crucial information and aid in prevention efforts against terrorism.

The *FBI Intelligence Bulletin* is transmitted each Wednesday through the National Law Enforcement Telecommunications System (NLETS), the Regional Information Sharing Systems (RISS), and Law Enforcement Online (LEO). The recipients include duly authorized members of all law enforcement agencies who have registered with these networks.

The content of the *FBI Intelligence Bulletin* may be altered or expanded in future issues, although the publication will not be used to transmit threat warnings or urgent information. Interested agencies may register for access to these online systems by having their administrative offices contact each network directly for instructions. ✦

Making the Most of Press Interviews

By Dennis Staszak

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Law enforcement officials can succeed in giving effective, dynamic press interviews by first arming themselves with two crucial, yet basic, weapons. First, they must do their homework. Second, they must be themselves. Doing the homework requires finding the three or four most important messages that the press needs to know and then weaving those messages into every answer. The audience may hear the reporter's questions taking the speaker into various areas and directions, but the answers consistently should include elements of the speaker's prepared messages. Being themselves means that law enforcement officials must be the same individuals when talking to the reporter as they are when talking to respected superiors with whom they feel comfortable. The speaker should feel relaxed, look confident, and address reporters by the first name.

Additional suggestions are presented to assist law enforcement officials to do the proper homework and be themselves.

- **Keep to the messages**: Reinforce the messages with statistics and brief anecdotes. The longer the interview lasts, the greater the chance that statements made inadvertently may contradict those messages.
- **Answer in a positive manner**: Do not restate a negative premise because it only will be reinforced by the listener. Be careful when using humor. Humor can be a great ally and help defuse a situation, but it also can backfire. Critics will not hesitate to take it out of context.
- **Reinforce the most important points**: Preface them with statements, such as "The best part of this program is..." or "Every member of the community will benefit because...."
- **Always plan for the worst-case scenario**: Rehearse with a trusted colleague and talk to others who have handled similar issues or problems. Know exactly what the final words spoken to the reporter will be.
- **Personalize the messages**: Most law enforcement officials are not appointed or elected to their positions because their views are radically different from those of the community. Speakers should combine their hopes and beliefs with the messages they are communicating. The messenger and message should not be separated.
- **Project sincerity and empathy**: Sincerity and empathy cannot be portrayed when speakers look at their notes and read statements in a monotone voice. Arranging briefing papers and thumping them on the lectern while saying, "Thanks for coming today," also does not exemplify these qualities.
- **Make a friend**: Everyone wants to be liked and have friends. Reporters are no different. Respect the many good ones, learn how tough their job really is, and be both available and credible. ✦

Special Agent Staszak serves as a media relations instructor in the Law Enforcement Communication Unit at the FBI Academy.

Law Enforcement and the Elderly

A Concern for the 21st Century

By LAMAR JORDAN, M.Ed.

The baby-boom generation, consisting of persons born in the United States between 1946 and 1960, is beginning to turn gray. This generation has had a profound socioeconomic impact on American society for the past 50 years and, based on a comparison of the Uniform Crime Reports from the 1960s through the 1980s, this group even may have contributed to the growing crime rates during that period as they entered their teens and their twenties. What will be the impact of this large demographic group on crime, either as offenders or victims, in the new millennium?

Today, approximately 1 out of 8 Americans must face the realities of aging.[1] Their situations vary as do the ways they deal with growing older. Regardless of their circumstances, however, most older people say that they worry about crime.

As a group, older people can represent a powerful and active force. As individuals, they can be vulnerable and may need help. This vulnerability sets the elderly apart from other age groups also concerned about crime because it requires an innovative community-wide approach to the singular problem of the elderly and crime. With some reports showing there are as many as 35 million people over the age of 65 in the United States, older people remain a growing influence in our society.[2] The time when America was a nation of young people remains in the past and will not likely return. If figures today show older people dominating, as the baby boomers grow older, the demographics will shift more dramatically toward an older society.

Law enforcement must consider the elderly and those crimes that most often victimize senior citizens. Additionally, they must address the older offender and focus on the challenge facing law enforcement in dealing with this growing segment of the population.

The Elderly and Crime

Generalizations are no more valid when describing the aging than when used in connection with other categories. No matter the physical or mental condition of older persons, they still can become a victim of crime—just like anyone

of any age. The difference lies, in part, in the effects of the crime. Whatever the reasons leading to victimization, the results could have lasting and unhappy consequences for an older person who may be limited physically, emotionally, and financially.

The elderly may not recover with the same agility as when they were younger. A broken hip as the result of a mugging, the frightening encounter with a criminal bent on harm, or the loss of savings to a con artist may diminish an older person's quality of life and make some elderly live the last of their years in fear and distress. As reflected in reported crime, the elderly are not in the age group most frequently victimized by crime, fear of crime remains greater among this age group. In fact, for many seniors, the fear of crime may alter their lifestyles. Even if this fear remains an extreme reaction or is based on an imagined, rather than an actual, situation, it proves no less debilitating or stressful. The fear of crime denotes a disturbing element in the existence of many older people.

> ***"...for many seniors, the fear of crime may alter their lifestyles."***

Mr. Jordan serves as an assistant professor of criminal justice at Southern Utah University in Cedar City.

Types of Crime

While many crimes could involve any age, certain categories—frauds and scams, purse snatching, pocket-picking, stealing checks from the mail, and committing crimes in long-term care settings—claim more older than younger victims.[3] The litany of crimes against the elderly remains virtually endless, with nearly every community reporting such distressing accounts.

In particular, the elderly remain specifically susceptible to fraud schemes that can destroy their financial resources and personal security. The FBI's Operation Disconnect revealed deliberate targeting of older persons by con artists.[4] The U.S. Postal Inspection Service also revealed disproportionate numbers of older potential victims.

Many elderly people have insurance, pension plans, proceeds from the sale of homes, and money from Social Security and savings that makes them attractive financial targets for criminals. Their lifestyles provide a friendly environment for con artists. Because many elderly live by themselves and are lonely, they remain more susceptible to telephone and mail fraud. They often have limited experience with investments, live in older homes in need of repair, and have immediate access to their money, much of it in cash.

Their fear of violent crime and disregard for other types of crime may make older people more vulnerable to con artists. The older generation often are more trusting and polite than younger people and may intimidate more easily. They tend to be complacent if the con artist is young; they fear inflation; they do not understand modern investments; and they may forget details. They often are persuaded by references to authority and embarrassed to admit, or may not realize, that they were swindled.

Older victims have limited recovery potential. Law enforcement usually cannot recover money lost to a con artist. Often, older victims experience a loss of self-esteem because they allowed themselves to be conned and may feel a loss of independence because they can no longer live alone or may have moved in with their children. Some even fear that their children will attempt to seize their assets. The loss of money can prove critical for anyone with limited resources, and it can devastate many older persons.

Although all cities experience burglaries, thefts, and vandalism, which affect individuals of all ages, these crimes remain especially distressing for older people. The invasion of a person's living quarters or

damage to their possessions may prove economically and emotionally destructive. Property crimes may seriously affect individuals whose security and well-being are tenuous or who may have a limited ability to replace stolen or damaged property. In addition to the loss of possessions, the elderly victim may never feel secure in their home after the incident.

Some older persons may not report many crimes or suspicious activities because they may fear retaliation. In the case of vandalism, they may fear a repeat of the crime. The elderly may see defacing a building, or damaging a lawn, plants, or an automobile as a personal attack.

Some authorities suggest that as many as 2.5 million incidents of abuse of older persons may occur in any given year[5] and generally recognize that mistreatment can occur both in domestic and institutional settings. As the older population increases, the incidents of mistreatment also likely will grow. Although the criminal justice system has become actively involved in the prevention and prosecution of child abuse cases, the awareness of, and protocols for, dealing with abuse of the elderly may not be as well defined in some jurisdictions. Despite the number of estimated cases, abuse of the elderly remains a hidden problem in many areas. Although the social services network has established numerous procedures for intervention and treatment, few exist in the criminal justice system.

The Older Offender

Crime reports consistently have shown that the majority of serious offenses are committed by persons under 25 years of age, and, in general, the likelihood a person will commit a crime decreases with age.[6] As people mature, they become capable of more rational thought and can calculate the probability of success in crime more accurately. Although the amount remains insignificant when compared to the total number of arrests, crime by the elderly could become a critical concern in view of the increasing percentage of this population. The criminal justice system will need to give more attention to processing the elderly, as well as custodial care for those who are incarcerated.

> ***"Working with older people will become a necessity for almost all law enforcement agencies."***

The greatest number of arrests for serious offenses committed by the elderly is for larceny-theft, and most of these arrests are for shoplifting.[7] Some studies describe shoplifting among the elderly as alarming and reaching epidemic proportions.[8] Aggravated assaults remain the second highest number of arrests for serious offenses. Additionally, law enforcement agencies frequently arrest the elderly for other offenses, such as driving under the influence and public drunkenness.[9]

Law Enforcement's Response

The criminal justice system always has depended on cooperation and communication between law enforcement personnel and the public. Most successful prosecutions rely upon the willingness of citizens to testify in court simply because citizens witness a large number of crimes.

Because the average age of America's population is increasing rapidly, law enforcement agencies likely may deal with a higher percentage of older citizens in the future. More older people will witness crimes, testify in court, and become victims of certain types of criminal activity.

Law enforcement must understand the elderly's expectations, vulnerabilities, and fears to communicate effectively with them. Additionally, officers must realize that different groups of citizens have varying needs and that persons over 65 years of age now constitute the fastest growing segment of the U.S. population Several factors play a daily role in the conduct of law enforcement duties that can work against good communication with people of any age, but particularly with many older adults. Time pressures, emotional situations, and the tendency to mask vision or hearing deficiencies are factors that disrupt the communication process. To resolve these potential problems, law enforcement should remain alert to clues that many elderly people do not hear or see well and then implement compensation techniques.

Older people not only can have an increasing impact within their communities and upon government but they generally are supportive of

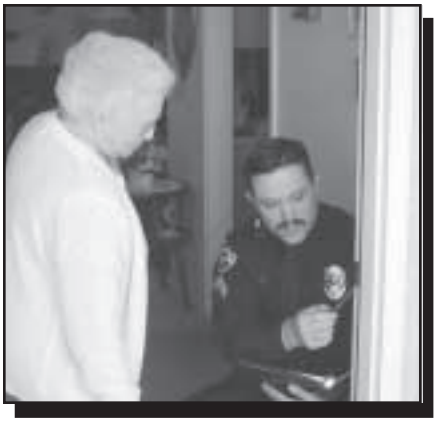
law enforcement and can constitute a valuable source of political support, information, and volunteer capability. Misunderstandings about older persons, however, can restrict the effectiveness of even the best-intentioned law enforcement programs.

Working with older people will become a necessity for almost all law enforcement agencies. Those departments with community policing objectives should develop special service and crime prevention programs to assist members of the older population.[10]

Many factors will facilitate good working relationships between older citizens and law enforcement agencies. Law enforcement personnel usually are highly motivated and eager to assist older members of their communities, and most older adults look to law enforcement officers to protect and help them. Although times have changed, the attitudes of most older people toward the police remain positive.

Law enforcement agencies face some challenges when working with older people. Usually, officers having the most frequent contact with older people are young and have little experience working with older adults. Few academies offer training that would help new officers understand the particular problems and attitudes of older people concerning crime and the criminal justice system in general.

The issue of crime and older persons does not always involve dependency upon law enforcement. Many older people can assist law enforcement authorities in several significant ways. For example, police and sheriff's departments often find that older people make capable volunteers because of their good work habits and past work experiences. Because many older residents are at home during the day, they can assist law enforcement in other ways, such as reporting crime and participating in Neighborhood Watch programs. Law enforcement must remember that most elderly people can function normally and that age alone should not hinder communication or learning new skills, such as crime prevention techniques.



Conclusion

A large percentage of the population is aging. The baby-boom generation will impact as many facets of society as senior citizens as they have throughout their lives. The criminal justice system and, in particular, law enforcement face the aging population as a special challenge for the 21st century. Police managers must take steps to improve communication with this growing segment. Law enforcement training academies should modify their programs to help prepare officers to deal more effectively with the elderly.

The average age of law enforcement officers probably will not increase as fast as the general population they serve. Law enforcement personnel must learn to understand the attitudes, capabilities, and limitations of older people and how to communicate in an effective and sensitive way with this important and growing element of society. In so doing, this will help law enforcement remain ready to address this challenge in an adequate and professional manner. ✦

Endnotes

[1] U.S. Department of Justice, Bureau of Justice Assistance, Office for Victims of Crime, *TRIAD, Reducing Crime Against the Elderly, An Implementation Handbook* (Washington, DC, 1993), 11.

[2] Senator John Glenn, "NBC Nightly News," August 24, 1998.

[3] Supra note 1, 15.

[4] In 1993, the FBI implemented Operation Disconnect, which targeted telemarketing fraud resulting in the indictment and conviction of 402 subjects and the seizure of $7.65 million in property and $6.76 million in forfeiture. For additional information on this investigative effort, see, *http://www.fbi.gov/hq/cid/fc/ec/cases/criminalecu.htm*.

[5] Supra note 1, 20.

[6] Neal Shaver, "Age, Differential Expectations and Crime Desistance," *Criminology* 30, February 1992.

[7] U.S. Department of Justice, Federal Bureau of Investigation, *Crime in the United States 1998* (Washington, DC), 221.

[8] "Old Enough to Know Better, A Stunning Rise in Crime by Senior Citizens Creates a Quandry," *Time*, September 20, 1982.

[9] Supra note 7.

[10] For example, TRIAD consists of a three-way effort among sheriffs, police chiefs, and the AARP or older/retired leadership in the area who agree to work together to reduce the criminal victimization of older citizens and enhance the delivery of law enforcement services to the older population.

Book Review

Actual Innocence *by Barry Scheck, Peter Neufeld, and Jim Dwyer, Doubleday, New York, New York, 2000.*

Imagine what it would be like to be convicted of a brutal murder and then sentenced to die by lethal injection. Imagine languishing on death row for years as appeal after appeal is turned down. Imagine, within days of your scheduled execution, you are moved to a holding area near the prison's death chamber and asked to provide a list of five people who will be allowed to visit. Imagine being told that a form will be sent to one of your relatives, asking what the funeral home should do with your body. Now, imagine this—you are innocent!

Actual Innocence by Barry Scheck, Peter Neufeld, and Jim Dwyer explores the science of deoxyribonucleic acid (DNA) analysis and examines its importance not only as a crime-fighting tool but as a truth-finding tool that has assisted in winning the freedom of dozens of people who were wrongfully convicted of crimes that they never committed.

To begin, *Actual Innocence* provides the reader with a forensic history of DNA analysis. It explores its infancy when it was first used successfully in England to assist in solving two brutal murders, to its eventual refinement by a California researcher, and, finally, to its everyday use by law enforcement agencies around the world.

The body of *Actual Innocence,* by way of the authors' Innocence Project, explores several cases involving people convicted of crimes that they did not commit. Through exhaustive research and painstaking detail, the authors describe the crimes committed, the investigations that followed, and the factors that led to the wrongful convictions. The authors then explain how they reexamined these cases, with the assistance of DNA analysis, and eventually won the release of those wrongfully convicted. Each chapter is punctuated with personal interviews that allow the reader to relive the experiences of the innocent as they served their sentences in a prison cell or awaited execution on death row.

In one particularly poignant chapter, the authors tell the story of the criminal investigation that landed Ron Williamson on Oklahoma's death row for a murder he never committed. The authors accentuate Williamson's ordeal by providing a detailed description of his life on death row, specifically describing his mental and physical anguish as he anticipated his impending execution.

In *Actual Innocence*, the authors also examine the various law enforcement techniques that ultimately contributed to their defendants' wrongful convictions. Traditional investigative techniques, such as photo and station line-ups, confessions, informant information, and forensic science examinations, are explored and scrutinized. The authors' critiques of these techniques allow the reader to understand that even when used correctly, these techniques are not always perfect.

The authors added a poignant touch at the end of *Actual Innocence* by providing postincarceration interviews of some of the people who were released from their prison sentences through the Innocence Project. Through these candid interviews, the reader learns about the personal struggles and hardships innocent people are forced to deal with as a result of being wrongfully convicted.

In *Actual Innocence*, the authors have created an excellent thought-provoking book. It not only takes a hard look at the crime fighting science of DNA analysis but also enables the reader to realize that when society allows truth to be sacrificed in the name of justice, its government becomes not a guardian of law and order, but a tool of oppression.

Reviewed by
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Law Enforcement Ethics Unit
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Consent Searches

Factors Courts Consider in Determining Voluntariness

By JAYME WALKER HOLCOMB

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Law enforcement officers often ask individuals if they will consent to a search of something, such as a package, vehicle, or dwelling. The Fourth Amendment preserves the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."[1] The U.S. Supreme Court has stated that a search conducted pursuant to lawfully given consent is an exception to the warrant and probable cause requirements of the Fourth Amendment.[2] However, because a consensual search of an item or location still is a search, the Fourth Amendment reasonableness requirement still applies.

For a consent search to be constitutionally valid, the consent must be voluntarily given by a person with proper authority.[3] The government has the burden of proving that an individual voluntarily consented to the search.[4] In 1973, the U.S. Supreme Court ruled in *Schneckloth v. Bustamonte*[5] that to determine whether an individual voluntarily consented to a search, the reviewing court should consider the totality of the circumstances surrounding the consent. This article provides a broad overview of the types of factors courts have considered in conducting their totality of the circumstances analysis into whether a person has voluntarily consented to a search.

FACTORS

Under the U.S. Supreme Court's totality of the circumstances test, the impact of everything that occurs during the course of an individual giving consent to

search a particular person, place, or thing must be considered when determining if the consent was voluntary. Courts may consider virtually any factor surrounding an individual's consent. However, an analysis of court decisions indicates that there are a number of factors that are particularly relevant. These factors can be placed into four broad categories: the characteristics of the subject giving the consent, the environment in which the consent is given, the actions taken or statements made by the subject giving the consent, and the actions taken or statements made by law enforcement officers during the course of asking for consent to search.

Characteristics of the Subject

Courts carefully will examine the characteristics of the individual who is asked to give consent to a search. Courts have, for example, specifically considered the individual's age,[6] education,[7] background,[8] experience with the legal system,[9] physical condition,[10] and ability to understand and communicate[11] in determining the voluntariness of a consent to search.

The U.S. Court of Appeals for the Tenth Circuit considered many of these characteristics in *United States v. Zapata.*[12] In *Zapata,* a DEA agent approached Zapata while he sat in the coach section of a train stopped in Albuquerque. The agent and backup officer both wore plainclothes, did not display weapons, asked routine questions in a regular tone of voice, and did not tell Zapata that he need not answer the agent's questions.

The district court suppressed the evidence found during the consent search for several reasons. The agent blocked Zapata from leaving his seat and had not told him that he did not have to comply with the agent's requests. In addition, the court was concerned that Zapata had difficulty speaking and understanding English.

The appellate court reversed the district court's decision that Zapata's consent was not freely and voluntarily given. It rejected Zapata's argument that he did not voluntarily consent to the search because of his background and attitudes resulting from his experiences in Mexico. The appellate court stated:

> But even assuming some subjective characteristics are relevant to the validity of Mr. Zapata's consent, we reject the notion that his attitude toward police, from whatever source, can constitute such a relevant subjective characteristic. While such attributes as the age, gender, education, and intelligence of the accused have been recognized as relevant, an intangible characteristic, such as attitude toward authority, is inherently unverifiable and unquantifiable.[13]

In *United States v. George,*[14] the U.S. Court of Appeals for the Ninth Circuit upheld the district court's conclusion that George voluntarily consented to a search of his hotel room. George passed out in the back of a taxi cab 3 days after arriving in Seattle on a flight from Hong Kong. The cab driver called the police to help George. After being transported to the hospital, medical personnel informed law enforcement officers that George's X-rays revealed what they believed to be balloons in his stomach and that he was suffering from a drug overdose. A police officer placed George under arrest and gave him *Miranda* warnings. George indicated that he understood his rights,

"For a consent search to be constitutionally valid, the consent must be voluntarily given by a person with proper authority."

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and answered "yes" when asked whether he would consent to a search of his hotel room. In rejecting George's motion to suppress evidence found in his hotel room, the court stated that George voluntarily consented.

> [The officer] told George that he was under arrest and asked if he understood. George answered "yes." [The officer] advised George of his *Miranda* rights and asked if he understood. George answered "yes." George then agreed to answer some questions. In response to [the officer's] questioning, George identified the name of the motel where he was staying and the room number. George also answered "yes" when [the officer] asked him for consent to search his motel room and any belongings in it. George was coherent, gave responsive answers to [the officer's] questions, and was able to remember accurately his motel and room number. Although George was undoubtedly in critical condition at the time, his injuries "did not render him unconscious or comatose."[15]

Environment

The environment in which a person is asked to consent to a search also will be considered by the courts. Factors viewed as significant with regard to the environment include the nature of the location where the consent is given,[16] the number of people present,[17] the number of law enforcement officers present,[18] and the time of day.[19]

For example, in *United States v. Thomas,*[20] police stopped Thomas's vehicle after observing that neither Thomas nor the passenger in his car were wearing seatbelts as required by state law. One of the officers received permission from Thomas to search the car. The officers found crack cocaine inside the vehicle.

> ***"The government has the burden of proving that an individual voluntarily consented to the search."***

In upholding the district court's ruling that Thomas voluntarily consented to the search, the U.S. Court of Appeals for the Eighth Circuit rejected Thomas's argument that the seizure of his person and coercive nature of the traffic stop tainted the consent to search. The court found that:

> The age of the consent giver, the intimidating actions of police, the time of day, and the consent giver's familiarity with the area are proper considerations under the totality of the circumstances evaluation of whether consent is voluntary. In this instance, however, they are not sufficient to establish that Thomas acted against his will when he told police they could search his automobile.[21]

In *United States v. Winningham*,[22] the U.S. Court of Appeals for the Tenth Circuit upheld the district court's suppression of marijuana found during the search of a vehicle because the subject's consent to search was given involuntarily. In *Winningham*, Border Patrol agents in New Mexico stopped a van based on information that it might contain illegal aliens. The van driver consented to a search of the vehicle. After opening the van and finding no one inside, one of the four agents told the driver that he had information that the van contained narcotics and asked the driver if he could "run a dog on [the] vehicle."[23] The agents remained next to the driver and passenger while waiting 5 or 6 minutes for two additional Border Patrol agents to arrive with a dog. The dog jumped inside the van through a door the agents had opened and alerted to a vent in which the agents discovered 50 pounds of marijuana.

The appellate court found that the reasonable suspicion for stopping the van ended when the agents failed to locate illegal aliens inside. The court further considered the totality of the circumstances surrounding the search and found the defendant had not given voluntary consent for the dog to enter the van. In reaching this conclusion, the court stated that the driver had been asked to get out of the van and stand next to three uniformed armed officers, was never told he had a right to refuse consent, was never told he could leave, and was blocked from moving around freely. The district court further noted that the phrase, "run a dog on the van," was unclear and could not be understood

as consent to permit the dog to enter the vehicle.[24]

Subject's Actions or Statements

Courts carefully will examine any actions taken, or statements made, by the individual who is asked to give consent to a search by a law enforcement officer. Factors particularly relevant to courts in evaluating cases involving consent searches include: whether the individual signed a consent to search form or provided consent in writing,[25] whether the individual requested or consulted with counsel,[26] whether the individual indicated consent through a physical action, such as handing an item to an officer,[27] and what the individual said in response to the officer's request to search.[28]

Many of these factors were considered by the U.S. Court of Appeals for the Eighth Circuit in *United States v. Chaidez*.[29] In *Chaidez*, the court of appeals confirmed the district court's finding that Chaidez voluntarily consented to the search of his vehicle. After a Missouri State Highway Patrol trooper pulled Chaidez over for speeding, the trooper asked Chaidez if it would be all right to look in the car. The trooper then completed portions of a consent to search form and handed it to Chaidez to read and sign. After having the form long enough to read it, Chaidez signed the form and opened the car trunk for the trooper. Upon inspecting the trunk, the trooper noticed that the back portion of the passenger seat looked as if it had been removed and replaced. The trooper found a package under the seat containing cocaine and placed Chaidez under arrest. A search of the vehicle at the trooper's headquarters revealed 50 kilograms of cocaine secreted inside.

After listing a number of personal characteristics and environmental factors important to consider, the court analyzed the facts in this case.[30] The court found that Chaidez, an adult, had a sufficient comprehension of English, was not impaired by drugs or alcohol when he gave consent, and his prior conviction for heroin distribution increased his awareness of the rights of accused persons and the criminal justice system. In addition, Chaidez

> ***"The environment in which a person is asked to consent to a search also will be considered by the courts."***

was questioned only briefly in a public area prior to consenting to the search. He was not threatened or intimidated prior to consenting, and he did not rely on any promises or misrepresentations made by the trooper. Finally, he orally consented to the search of the car, and he opened the trunk for the trooper. The court noted that while the trooper apparently did not tell Chaidez that he had the right to refuse to consent, that fact, while cutting against the voluntariness of the consent, was not dispositive.[31]

In *United States v. Worley*,[32] the U.S. Court of Appeals for the Sixth Circuit upheld the district court's suppression of evidence obtained by police during a warrantless search. In *Worley,* an officer observing Worley thought it was suspicious that he appeared to be using plastic bags as luggage. The officer told another officer of his suspicions, and the two began to follow Worley. The officers approached Worley as he was placing the bags in a locker and asked if he would speak with them. Worley agreed to talk with the officers and produced a valid California driver's license. One of the officers returned the license and asked to see Worley's ticket. The officer looked at the ticket and noticed that it had been purchased with cash and that there were no baggage claim tickets attached. The officer asked Worley about the ticket and was informed that it was a round trip ticket that a friend of Worley's had purchased. Despite Worley's assertion to the contrary, after reviewing the ticket and based on the low fare, the officer insisted that the ticket was a one-way ticket and returned it to Worley.

The officer then asked Worley whether a beige bag he had placed in the locker belonged to him and what it contained. Worley told the officer that the bag contained a pair of drumsticks and a T-shirt he had just purchased from a gift shop. The officer asked Worley if he could look in the bag, and Worley told the officer, "[Y]ou've got the badge, I guess you can."[33] The officer opened the locker, took out the bag, searched it, and found methamphetamine inside.

The appellate court upheld the district court's granting of Worley's motion to suppress. The court agreed with the government that there was no overt duress or coercion, officers were in plainclothes with no visible weapons, spoke in conversational tones, and were in a public place. In addition, it agreed that Worley was of sufficient age, intelligence, and educational level to consent to the search and there was no lengthy detention and interrogation. However, the court was concerned about the officer's misunderstanding about the ticket and his insistence that the ticket was in fact one-way. The court believed that the mistaken insistence indicated to Worley that further disagreement with the officer would be unproductive and that he had no choice but to comply with the request to search. The court pointed out that Worley did not assist the officers in the search or make any additional statements regarding his willingness to permit the search. The court further noted that while there is no requirement for officers to inform subjects of the right to refuse consent to search, the failure to inform Worley was a factor to consider, as was the anxiety that frequently comes with being in an airport, and the fact that Worley saw the officers' badges. In affirming the district court's denial of the motion to suppress, the court of appeals quoted extensively from the lower court's ruling.

> In this case the defendant has argued that in permitting the search, he merely acquiesced to the officer's authority rather than giving his unequivocal voluntary consent to search. It's the determination of the Court after a very, very careful review of the entire record and much submittal by all of you...that the position of the defendant is supported by the record. In this case, the statement that was given by the defendant ["You've got the badge, I guess you can"], which is agreed upon by really everyone...does not show by a preponderance of the evidence through clear and convincing testimony that valid consent was obtained.... This was a circumstance where when you look at the burden, and I kept coming back to that, when you look at the burden in the case and the fact that it is the government's burden to show by a preponderance of the evidence that...valid consent was obtained, that that is just not satisfied here.... In this case, you really didn't have much conduct to look at for context, and the conduct that you did have to look at for context put us in sort of an odd situation with the review of the ticket.... Mr. Worley's response in this case, which is not really debated, was not an unequivocal expression of free and voluntary consent. In fact, it was... somewhat of the opposite, it was an expression of futility in resistance to authority....[34]

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Law Enforcement's Actions or Statements

Courts scrutinize the actions and statements made by law enforcement officers during the course of asking for consent to search. Police actions that courts have considered relevant when determining if the consent given was voluntary include whether the officers—

- told the individual of their right to refuse to consent;[35]
- were armed;[36]
- displayed weapons;[37]
- used force;[38]
- made threats;[39]
- asked for consent to search multiple times;[40]

- physically or verbally abused the individual;[41]
- identified themselves as law enforcement officers;[42]
- intimidated the individual;[43]
- detained or arrested the individual;[44]
- gave *Miranda* warnings to the individual;[45]
- claimed they had a warrant to conduct a search when they did not;[46]
- made promises or inducements to the individual;[47] and
- issued a request to search that was plain enough to understand.[48]

It is important to understand that any single action or statement made by a law enforcement officer could result in the individual's consent being found involuntary, particularly because the government bears the burden of demonstrating the voluntariness of the consent.

An example of a case where the actions taken by law enforcement officers constituted coercion is the 1968 case of *Bumper v. North Carolina*.[49] In *Bumper*, four law enforcement officers went to the rural home of the 66-year-old grandmother of a rape suspect 2 days after the rape had occurred but before the suspect had been arrested. The officers told the woman that they had a warrant to search her house even though they actually did not possess one. The woman let the officers in the house, whereupon they found a rifle on the kitchen table that was later introduced at trial as evidence.

The trial court denied the defendant's motion to suppress the rifle, finding that the woman voluntarily consented to the search. While the state supreme court upheld the denial of the motion to suppress, the U.S. Supreme Court reversed, stating:

> The issue thus presented is whether a search can be justified as lawful on the basis of consent when that "consent" has been given only after the official conducting the search has asserted that he possesses a warrant. We hold that there can be no consent under such circumstances.[50]

> ***"...courts will consider all of the facts surrounding a consent to search...."***

The Court emphatically stated that "[w]here there is coercion there cannot be consent." A law enforcement officer who claims authority to search a home with a warrant when there is no warrant is, according to the Court, essentially informing the individual that there is no right to object to the search.

In the more recent case of *United States v. Ivy*,[51] the U.S. Court of Appeals for the Sixth Circuit reversed the lower court's denial of the defendant's motion to suppress evidence obtained during the course of a search of a home. In *Ivy*, officers went to Ivy's home in search of a fugitive named Hall. The officers knocked on the door and asked Ivy if he was Hall. Ivy told the officers that he was not Hall. After that point, the testimony of the officers and defendant witnesses differ as to what happened. The district court credited the testimony of the officers regarding what happened when the police arrived at Ivy's house.

The appellate court found that the district court did not commit clear error in finding that Ivy consented to the officers entry into the house. However, the appellate court found the trial court's decision that Ivy's consent to search was voluntary to be clearly erroneous and suppressed the evidence found during the course of the unlawful search, stating that:

> [g]iven the overwhelming evidence of coercion and intimidation employed by the police in obtaining Ivy's signature on the consent form, we agree that the government did not meet its burden of proving by clear and positive testimony that Ivy's consent was voluntarily given.[52]

The appellate court found that comments made by the officers during the course of asking for consent to search the house constituted unlawful threats. More particularly, the officers told Ivy that if he did not sign the consent to search form, his girlfriend would be arrested and their small child would be taken away by the police. In addition to the threatening statements, the officers handcuffed Ivy's girlfriend's legs to the kitchen table, and, during the 1 1/2 hours in which they attempted to get either Ivy or

his girlfriend to sign a consent to search form, they repeatedly took the young child away from Ivy's handcuffed girlfriend. After Ivy signed the consent form, the girlfriend was allowed to keep the child. The court stated that:

> Courts have found that antagonistic actions by the police against a suspect's family taint the voluntariness of any subsequent consent.... This Court now finds that such hostile police action against a suspect's family is a factor which significantly undermines the voluntariness of any subsequent consent given by the suspect.[53]

CONCLUSION

The U.S. Supreme Court has determined that to decide whether a consent to search is voluntarily, courts are to examine the totality of the circumstances surrounding the consent. This article has provided a broad overview of the types of factors courts have considered as part of this determination. As this overview indicates, courts will consider all of the facts surrounding a consent to search, with no one particular fact necessarily being dispositive in deciding whether the consent was voluntary. As the U.S. Court of Appeals for the Sixth Circuit aptly stated in *United States v.Worley*,[54] "there is no 'magic' formula or equation that a court must apply in all cases to determine whether consent was validly and voluntarily given. Indeed, such an argument has been flatly rejected by this court and the Supreme Court."[55] Similarly, the U.S. Court of Appeals for the Eighth Circuit stated in *United States v. Zamoran-Coronel,*[56] that "[o]ur cases recount a variety of factors a court might consider in determining voluntariness, but recognize that such factors 'should not be applied mechanically.' The inquiry turns on the totality of the circumstances, which must demonstrate that 'the police reasonably believed the search to be consensual.' "[57]

Law enforcement officers frequently ask individuals if they will consent to a search of a dwelling, item, or object. Officers should be aware of the factors courts will consider when determining the voluntariness of the consent, the government's burden of proving voluntariness, and, ultimately, of the reasonableness requirement of the Fourth Amendment when seeking consent to conduct a search. ✦

Endnotes

[1] U.S. CONST. Amend. IV.

[2] *Schneckloth v. Bustamonte,* 412 U.S. 218, 219 (1973).

[3] *United States v. Matlock,* 415 U.S. 164 (1974).

[4] *Bumper v. North Carolina,* 391 U.S. 543 (1968).

[5] 412 U.S. 218 (1973).

[6] *See, e.g., United States v. Mendenhall,* 446 U.S. 544 (1980); *United States v. Zamoran-Coronel,* 231 F.3d 466 (8th Cir. 2000); *United States v. Riascos-Suarez,* 73 F.3d 616 (6th Cir. 1996).

[7] *See, e.g., United States v. Mendenhall,* 446 U.S. 544 (1980); *United States v. LaGrone,* 43 F.3d 332 (7th Cir. 1994); *United States v. Velasquez,* 885 F.2d 1076 (3d Cir. 1989).

[8] *See, e.g., United States v. Zapata*, 997 F.2d 751 (10th Cir. 1993).

[9] *See, e.g., United States v. Martinez*, 168 F.3d 1043 (8th Cir. 1999).

[10] *See, e.g., United States v. Dickerson,* 975 F.2d 1245 (7th Cir. 1992)(consent to search given by naked defendant found voluntary); *United States v. Mason*, 966 F.2d 1488 (D.C. Cir. 1992)(consent to search voluntarily given by defendant who had been shot in the leg).

[11] *See, e.g., United States v. Zamoran-Coronel,* 231 F.3d 466 (8th Cir. 2000); *United States v. Brown*, 102 F.3d 1390 (5th Cir. 1996); *United States v. Velasquez,* 885 F.2d 1076 (3d Cir. 1989).

[12] 997 F.2d 751 (10th Cir. 1993).

[13] *Id.* at 759.

[14] 987 F.2d 1428 (9th Cir. 1993).

[15] *Id.* at 1431.

[16] *See, e.g., United States v. Wilson,* 895 F.2d 168 (4th Cir. 1990) (standing in public area); *United States v. Velasquez,* 885 F.2d

1076 (3d Cir. 1989) (on shoulder of major road).

[17] *See, e.g., United States v. Zapata,* 997 F.2d 751 (10th Cir. 1993).

[18] *See, e.g., United States v. Zamoran-Coronel,* 231 F.3d 466 (8th Cir. 2000) (presence of four law enforcement officers in a confined space does not necessarily amount to coercion).

[19] *See, e.g., United States v. Thomas,* 93 F.3d 479 (8th Cir. 1996) (consent to search given at night); *United States v. Velasquez,* 885 F.2d 1076 (3d Cir. 1989) (consent to search given during daylight hours).

[20] 93 F.3d 479 (8th Cir. 1996).

[21] *Id.* at 486.

[22] 140 F.3d 1328 (10th Cir. 1998).

[23] *Id.* at 1329.

[24] *Id.* at 1332.

[25] *See, e.g., United States v. Zamoran-Coronel,* 231 F.3d 466 (8th Cir. 2000) (defendant signed consent form); *United States v. Saadeh,* 61 F.3d 510 (7th Cir. 1995); *United States v. Castillo*, 866 F.2d 1071 (9th Cir. 1988) (voluntary consent when defendant orally consented to search but refused to sign form).

[26] *See, e.g., United States v. LaGrone,* 43 F.3d 332 (7th Cir. 1994).

[27] *See, e.g., Unites States v. Pollington,* 98 F.3d 341 (8th Cir. 1996) (driver offered to open back door of motor home to facilitate search); *United States v. White,* 42 F.3d 457 (8th Cir. 1994) (defendant provided keys to cargo area of truck after giving verbal consent to search).

[28] *See, e.g., United States v. Worley,* 193 F.3d 380 (6th Cir. 1999); *United States v. Ladell,* 127 F.3d 622 (7th Cir. 1997) ("search anywhere"); *United States v. Brown*, 102 F.2d 1390 (5th Cir. 1996) ("go ahead"); *United States v. Hernandez,* 5 F.3d 628 (2nd Cir. 1993) ("[N]o problem, go ahead and search the car.").

[29] 906 F.2d 377 (8th Cir. 1990).

[30] *Id.* at 381.

[31] *Id.*

[32] 193 F.3d 380 (6th Cir. 1999).

[33] *Id.* at 383.

[34] *Id.* at 384.

[35] *See, e.g., Schneckloth v. Bustamonte,* 412 U.S. 218 (1973); *United States v. Zamoran-Coronel,* 231 F.3d 466 (8th Cir. 2000) (officers have no obligation to inform subject of the right to refuse to consent to a search); *United States v. Wilson,* 895 F.2d 168 (4th Cir. 1990); *United States v. Velasquez,* 885 F.2d 1076 (3d Cir. 1989) ("The individual's knowledge of her right to refuse consent is only one factor in the totality of the circumstances inquiry."); *United States v. Vasquez,* 858 F.2d 1387 (9th Cir. 1988). *But see United States v. Drayton,* 231 F.3d 787 (11th Cir. 2000), *cert. granted,* 70 U.S.L.W. 3292 (2002). Relying on *United States v. Washington,* 151 F.3d 1354 (11th Cir. 1998), and *United States v. Guapi,* 144 F.3d 1393 (11th Cir. 1998), in *Drayton* the U.S. Court of Appeals for the Eleventh Circuit held that the district court erred in denying defendants'motion to suppress evidence obtained during a consent search of the clothing of two bus passengers. The court did not believe there were any significant factual differences between *Drayton* and *Washington*, stating that the court in *Washington* concluded "that the facts and circumstances surrounding the search indicated that 'a reasonable person...would not have felt free to disregard [the agents'] requests without some positive indication that consent could have been refused.' " *Id.* at 790.

[36] *See, e.g., United States v. Guiterrez,* 92 F.3d 468 (7th Cir. 1996) (an officer being armed will not necessarily vitiate a subject's consent to search).

[37] *See, e.g., United States v. Martinez,* 168 F.3d 1043 (8th Cir. 1999) (officer did not display a weapon when asking defendant for consent to search car); *United States v. Morning,* 64 F.3d 531 (9th Cir. 1995) (consent found voluntary; officers did not unholster their guns); *United States v. Smith,* 973 F.2d 1374 (8th Cir. 1992) (consent to search found voluntary in case where weapons were displayed during security sweep of home).

[38] *See, e.g., United States v. Erwin,* 155 F.3d 818 (6th Cir. 1998) (officers did not make a show of force such as drawing weapons or touching defendant); *United States v. Dewitt,* 946 F.2d 1497 (10th Cir. 1991).

[39] *See, e.g., United States v. Carrate,* 122 F.3d 666 (8th Cir. 1997); *United States v. Morning,* 64 F.3d 531 (9th Cir. 1995); *United States v. Wilson,* 895 F.2d 168 (4th Cir. 1990); *United States v. Velasquez,* 885 F.2d 1076 (3d Cir. 1989).

[40] *See, e.g., United States v. Kozinski,* 16 F.3d 795 (7th Cir. 1994) (consent found voluntary where handcuffed defendant was advised of right to refuse consent and not asked for consent repeatedly or harassed).

[41] *See, e.g., United States v. Moreno,* 897 F.2d 26 (2nd Cir. 1990); *United States v. Brady,* 842 F.2d 1313 (D.C. Cir. 1988).

[42] *See, e.g., United States v. Gordon,* 173 F.3d 761 (10th Cir. 1999) (failure of officer to plainly identify himself is a factor to consider in determining whether consent was voluntarily given but was not dispositive).

[43] *See, e.g., United States v. Carrate,* 122 F.3d 666 (8th Cir. 1997); *United States v. Thomas,* 93 F.3d 479 (8th Cir. 1996) (intimidating actions of the police are relevant in determining whether consent to search is voluntarily given).

[44] *See, e.g., United States v. Carrate,* 122 F.3d 666 (8th Cir. 1997); *United States v. Riascos-Suarez,* 73 F.3d 616 (6th Cir. 1996) (length and nature of detention is a factor in determining whether consent is valid).

[45] *See, e.g., United States v. LaGrone,* 43 F.3d 332 (7th Cir. 1994); *United States v. Moreno,* 897 F.2d 26 (2nd Cir. 1990) (failure to inform defendant of *Miranda* warnings prior to consent search did not invalidate consent); *United States v. Vasquez,* 858 F.2d 1387 (9th Cir. 1988) (whether *Miranda* warnings were given is a factor to consider in evaluating the voluntariness of consent). Issues regarding when *Miranda* warnings should be given to a subject are beyond the scope of this article. A number of federal circuits have found that requesting consent to search does not constitute interrogation for purposes of *Miranda. See United States v. Lagrone,* 43 F.3d 332, 335 (7th Cir. 1994).

[46] *Bumper v. North Carolina,* 391 U.S. 543 (1968).

[47] *See, e.g., United States v. Carrate,* 122 F.3d 666 (8th Cir. 1997); *United States v. Velasquez,* 885 F.2d 1076 (3d Cir. 1989).

[48] *See, e.g., United States v. Gordon*, 173 F.3d 761 (10th Cir. 1999); *United States v. Erwin,* 155 F.3d 818 (6th Cir. 1998).

[49] 391 U.S. 543 (1968).

[50] *Id.* at 548.

[51] 165 F.3d 397 (6th Cir. 1998).

[52] *Id.* at 402.

[53] *Id.* at 403-404.

[54] 193 F.3d 380 (6th Cir. 1999).

[55] *Id.* at 387.

[56] 231 F.3d 466 (8th Cir. 2000).

[57] *Id.* at 469.

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

The Bulletin Notes

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

Officer Collins

Officer Campbell

Officer Mealy

Officers Robert M. Collins and Paul Campbell of the Brookline, Massachusetts, Police Department were on patrol when they observed an empty vehicle in a closed parking lot. They discovered that the vehicle's registration was revoked and that the registered owner had a suspended driver's license. As they approached the vehicle, the driver and a rear seat passenger suddenly sat up in the car. The officers asked for the driver's license, which the driver produced. As the officers stepped back to make a thorough observation of the vehicle, the operator started the vehicle and fled the lot. As the officers pursued the vehicle, Officer Kevin G. Mealy joined the pursuit in a second cruiser. As the subject vehicle attempted a u-turn, the two cruisers were able to box it in, with the first cruiser in front. The driver of the subject vehicle reached out of his window and began firing at the cruiser in front, blowing out the rear windshield. Officer Campbell, who was pinned in his seat in the first cruiser, returned fire. The passenger in the rear of the subject vehicle began firing at Officer Mealy in the second cruiser. Officer Mealy returned fire. Both suspects exited the vehicle, attempted to flee on foot, and sprayed gunfire at the officers. Officer Mealy shot one suspect, who was wanted in connection with two fatal shootings 2 weeks prior and quickly arrested him. A foot pursuit for the second suspect continued. This suspect, who was wanted on attempted murder and various other charges, carjacked a vehicle at gunpoint from an elderly woman. When the car became disabled, he stole a bicycle, fled, and remained at large for several months. Officers Collins, Campbell, and Mealy courageously risked their own lives to ensure the public's safety in the pursuit and subsequent arrest of these suspects.

Officer Duhaime

Officer Henry Duhaime of the Barre City, Vermont, Police Department was working an outside duty at a local craft show when he was summoned by a person who reported that a man was slumped over in a chair. Within seconds, Officer Duhaime arrived and realized that the man was in cardiac arrest. He began CPR while other individuals called for additional help. The man, who was in his 70s, was transported to the hospital where he was treated and eventually released. The hospital emergency room doctor credited the immediate response and initiation of CPR by Officer Duhaime with saving the man's life.

Clarification

Officers Nick Susuras and Genea Stephens, who appeared in the February 2002 issue's ***Bulletin Notes***, serve in the Glendale, Arizona, Police Department. This information was not included in that issue, and the ***Bulletin*** staff regrets any confusion this may have caused.

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