

If you have issues viewing or accessing this file contact us at NCJRS.gov.

U.S. Department of Justice
Office of Justice Programs
National Institute of Justice



NATIONAL CRIMINAL JUSTICE REFERENCE SERVICE

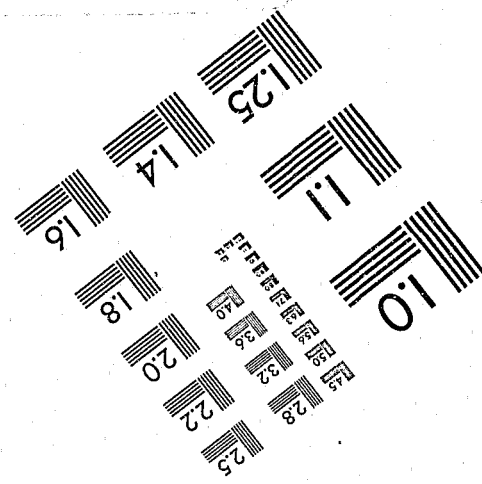
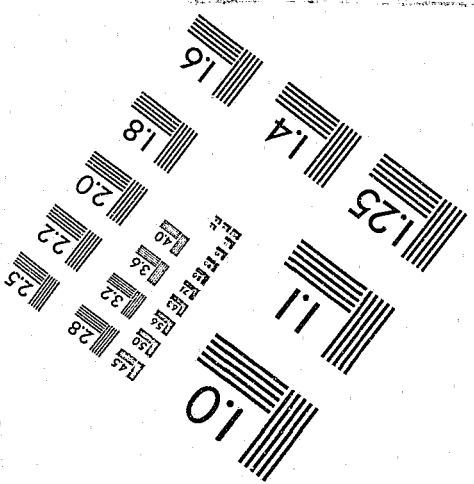
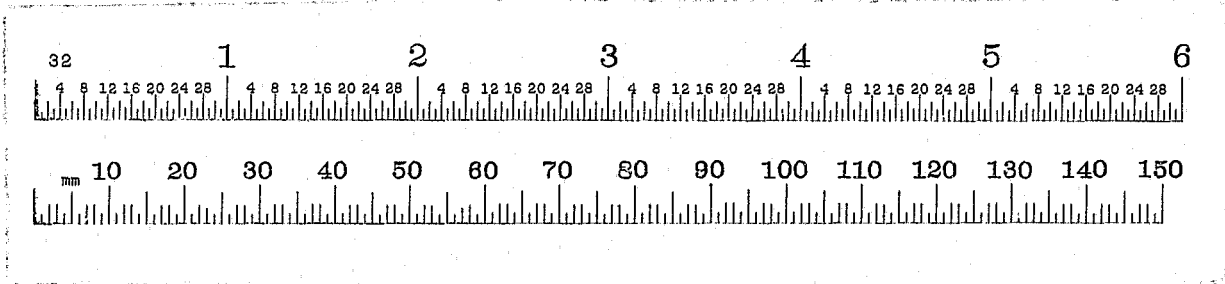
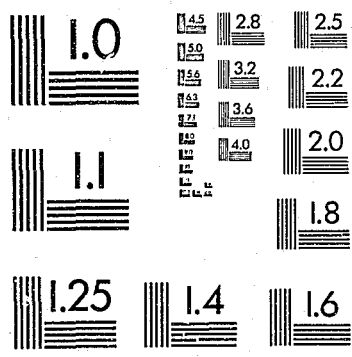
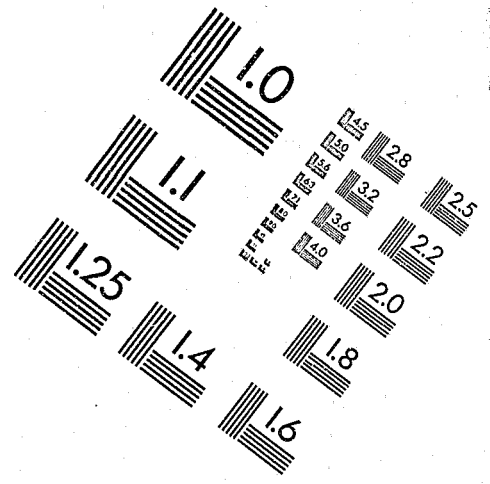
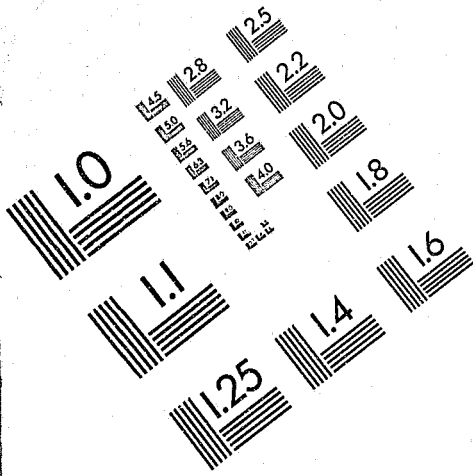
National Institute of Justice • United States Department of Justice • Washington, D.C. 20531

This microfiche was produced from documents received for inclusion in the NCJRS data base. Since NCJRS cannot exercise control over the physical condition of the documents submitted, the individual frame quality will vary. The resolution chart on the following frame may be used to evaluate the document quality.

Microfilming procedures used to create this fiche comply with the standards set forth in 41CFR 101-11.504.

Points of view or opinions stated in this document are those of the author(s) and do not represent the official position or policies of the U.S. Department of Justice.

IMAGE EVALUATION TEST TARGET (MT-3)



APPLIED IMAGE
 1653 E. MAIN STREET
 ROCHESTER, NY 14609
 TEL (716) 482-0300
 FAX (716) 288-5989



JUN 2002



148747

148750

June 1994
Volume 63
Number 6

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

Louis J. Freeh
Director

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

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

The *FBI Law Enforcement Bulletin* (ISSN-0014-5688) is published monthly by the Federal Bureau of Investigation, 10th and Pennsylvania Avenue, N.W., Washington, D.C. 20535. Second-Class postage paid at Washington, D.C., and additional mailing offices. Postmaster: Send address changes to *FBI Law Enforcement Bulletin*, Federal Bureau of Investigation, FBI Academy, Quantico, VA 22135.

Editor
Dr. Stephen D. Gladis
Managing Editor
Kathryn E. Sulewski
Art Director
John E. Ott
Associate Editors
Andrew DiRosa
Julie R. Linkins
Kimberly J. Waggoner
*Assistant Art Director /
Production Manager*
T.L. Wilson
Staff Assistant
Stephanie L. Plucker

Cover photo ©
K.L. Morrison



FBI Law Enforcement

B ♦ U ♦ L ♦ L ♦ E ♦ T ♦ I ♦ N

Features

148747
Interrogating Child Molesters

By Blaine D. McIlwaine

1

Skillful interviewing and interrogation are both essential elements in resolving child sexual abuse cases.

148748
The Mesa Crime-Free Multi-Housing Program

By Timothy L. Zehring

8

When apartment dwellers feel a sense of ownership, they can decrease crime in their communities.

148749
Travel Restrictions for Convicted Prostitutes

By John M. Gnagey III
and Chase Leonhard

16

A joint effort between the Champaign, Illinois, Police Department and the State Attorney's office led to a novel solution of an age-old problem.

148750
Legal Issues in Crisis Management

By Jeffrey Higginbotham

27

Law enforcement administrators should preplan for the various legal issues that could arise during crisis situations.

Departments

- 5 Point of View
Organizational Structure
- 13 Book Review
Personality Assessment
- 14 Police Practices
Senior Citizens
- 20 Focus on Administration
Written Directives

- 22 Bulletin Reports
Missing Children
Drug Problems
Violence and Gangs
- 24 Notable Speech
Cultural Diversity
- 32 Bulletin Alert
Hair-raising Comb

**U.S. Department of Justice
National Institute of Justice**

148747-
148750

This document has been reproduced exactly as received from the person or organization originating it. Points of view or opinions stated in this document are those of the authors and do not necessarily represent the official position or policies of the National Institute of Justice.

Permission to reproduce this copyrighted material has been granted by
FBI Law Enforcement Bulletin

to the National Criminal Justice Reference Service (NCJRS).

Further reproduction outside of the NCJRS system requires permission of the copyright owner.

Legal Issues in Crisis Management

By
JEFFREY HIGGINBOTHAM, J.D.

Newspaper headlines today too often herald crisis situations—hostages are taken during a robbery attempt, a man holds his estranged wife against her will in their home, an angry former employee storms into a business threatening those inside, a man barricades himself inside his home while firing randomly at passersby. All of these situations are examples of crises that demand an immediate police response. They also raise a variety of legal issues as the crisis is defused and the situation resolved.

This article addresses the legal issues most likely encountered by police responding to and managing such crisis situations. Before proceeding further, however, two important points should be made. First, in every life-threatening crisis situation, the law recognizes that a safe and peaceful resolution is the paramount objective. Though legal issues cannot be ignored, law enforcement officers should be confident in the knowledge that in the heat of a crisis situation, where "...the pressure becomes intense and decisions must be made quickly...",¹ the law sanctions a reasoned response to the situation at hand.

Second, because legal issues do arise, it is extremely beneficial to have a legal advisor as part of the crisis management team. When legal issues surface, the legal advisor



Photo by Janet Lockett, FBI

can begin working toward their resolution, freeing the negotiators and crisis commanders to continue their functions.

The following legal issues are most likely to arise in a crisis situation:

- 1) Application of the fourth amendment's proscription of

unreasonable searches and seizures

- 2) Admissibility of statements made during negotiations into evidence

- 3) Enforceability of promises made by negotiators

- 4) Use of electronic surveillance equipment



Special Agent Higginbotham is the Deputy General Counsel of the FBI.

“
...in the heat of a
crisis situation...the
law sanctions a
reasoned response
to the situation at
hand.
”

5) Use of force and

6) Control of the media.

Each of these issues will be discussed in turn.

Fourth Amendment Issues

The fourth amendment to the U.S. Constitution² is implicated whenever the police intrude into a reasonable expectation of privacy and imposes a presumptive warrant requirement for the legality of searches.³ However, there are exceptions to that warrant requirement, several of which are applicable to crisis situations.

For example, in *Mincey v. Arizona*,⁴ the Supreme Court recognized that emergencies relating to life and safety excused the normal warrant requirement. In *Mincey*, police officers made a warrantless entry into a home upon hearing a gun battle erupt inside shortly after an undercover officer entered the home. The officers' entry and immediate search of the premises to locate injured persons, render

medical assistance, and find those responsible were considered reasonable under the fourth amendment, even in the absence of a warrant.

The Court concluded that “the need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal...”⁵ Notably, the Court limited the scope of police authority in such situations to the immediate emergency at hand and suppressed evidence found in a subsequent 4-day search. The teaching of *Mincey* is clear: No warrant is necessary to enter a residence in a crisis situation where the purpose of the entry is to provide immediate aid to those inside or to locate and arrest the suspect, but the officer's actions are limited to that conduct which is immediately necessary to resolve the emergency.⁶

Admissibility of Statements Made During Negotiations

Occasionally, in the prosecution following the resolution of a crisis situation, a defendant will

challenge the admissibility into evidence of statements made to negotiators during the crisis. Usually, these challenges allege some violation of the rule of *Miranda v. Arizona*,⁷ where the Supreme Court held that statements made by a defendant while subject to custodial interrogation must be preceded by the now-familiar warnings and a valid waiver. For three reasons, however, a challenge to the admissibility of such statements based on *Miranda* will be unsuccessful.

First, *Miranda* applies only if the suspect is in custody. Custody, for purposes of *Miranda*, occurs when the suspect is under arrest or has been restrained in freedom of movement in a fashion normally associated with formal arrest.⁸ In crisis situations, where the suspect is not within the complete control of the police, there is no custody, and therefore, the *Miranda* rule is inapplicable. One court noted that this principle was the only workable approach for police:

“When confronted with an armed, barricaded suspect who is possibly holding hostages, their attention would be diverted from what should be their primary purpose—that of using the means most likely to convince the suspect to surrender peacefully without harming anyone else in the area. They would be forced to consider the possibility that the suspect might make a statement that the government eventually would want to introduce at trial, and then they would have to assess whether he would be likely to

react violently to the antagonistic-sounding *Miranda* warnings."⁹

Second, *Miranda* warnings are required only if the custodial suspect is subjected to interrogation. Negotiations for the safe and peaceful resolution of a crisis situation are not considered to be interrogation.¹⁰ It is for this reason that the court refused to suppress incriminating statements made by a defendant during hostage negotiations in *People v. Gantz*.¹¹

"Even assuming that the defendant was in custody during the hostage negotiations...the negotiations were directed toward providing defendant with medication and maintaining the hostage's safety, not to elicit inculpatory statements...Despite the lack of *Miranda* warnings, the trial court did not err in refusing to suppress those statements."

Third, the Supreme Court has recognized that the *Miranda* rule does not apply when questions are reasonably prompted by concerns for public safety.¹² The public safety exception to *Miranda* includes questions relating to the safety of persons who have been abducted by the suspect. For example, in *Minnesota v. Provost*,¹³ the court recognized a "rescue doctrine" exception to *Miranda*, where an urgent need presents no other course of action, the questions are necessary to preserve a human life, and rescue is the primary purpose and objective of the interrogators. Under those circumstances, *Provost* held the *Miranda* rule to be inapplicable.

Enforceability of Promises Made During Negotiations

During negotiations with police, a hostage taker may make demands that appear to have serious legal consequences. For example, a hostage taker may demand safe passage to a location outside the jurisdiction of the police or a promise that he will not be prosecuted for his crimes if he frees the hostages. Does the negotiator have the prerogative to agree to such demands without binding the government to enforce them? The answer, of course, is yes.

“

...it is extremely beneficial to have a legal advisor as part of the crisis management team.

”

In *State v. Sands*,¹⁴ a court ruled that a purported letter of immunity signed by the sheriff during the negotiation with a hostage taker was void, because it was given under duress. Because the hostage taker would have to allege breach of contract or some other similar theory to enforce the putative agreement, normal contract law prevails, and a "contract induced by duress is unenforceable."¹⁵ Moreover, a defendant may not even be entitled to raise such issues before a jury without a showing of relevance, because it might induce unwarranted sympathy.¹⁶

Whether a negotiator should agree to the demands of the hostage taker is a matter within the judgment and discretion of the negotiator and the crisis commander. If, however, they judge such an agreement to be useful, the law will not absolve the hostage taker of legal responsibility for actions based on those promises.

Electronic Surveillance Issues

Accurate and timely intelligence is an important component of successful crisis management. Because the very nature of crisis situations often disrupts the normal collection of relevant intelligence, electronic surveillance in the form of wiretaps and listening devices is often used to assist. Those techniques, however, raise legal issues.

Federal law,¹⁷ which establishes minimum requirements that are applicable to all law enforcement personnel, generally prohibits the interception of the contents of a telephone conversation without a court order or consent of one of the parties to the conversation.¹⁸ Thus, where the negotiator is talking directly to the hostage taker on a telephone, Federal law would permit the contents of that conversation to be recorded without a court order based on the consent of the negotiator. If, however, the hostage taker is talking over a commercial telephone line or cellular telephone to a person who has not consented to the interception of the conversation, the restrictions of Federal law would require either a court order or an emergency justification.¹⁹

Federal electronic surveillance law contains an emergency provision that allows the nonconsensual interception of telephone

conversations in cases involving the "...immediate danger of death or serious physical injury to any person..."²⁰ if the emergency interception has been approved by high-level prosecutorial personnel and the application for a court order is filed within 48 hours of the first actual interception.²¹ Ensuring that the statutory requirements for emergency electronic surveillance are met will enable the crisis management team to maintain the flow of necessary intelligence that could lead to the safe resolution of the crisis.

Federal law also governs the use of listening devices. Without a court order or an emergency affecting the life or safety of persons, Federal law prohibits the nonconsensual electronic surveillance of oral conversations in which there is a reasonable expectation of privacy.²² Arguably, two hostage takers inside their own home talking between themselves and outside the presence of any hostage have a reasonable expectation of privacy. Any electronic surveillance of that conversation would have to be in accordance with the Federal statute. On the other hand, prison inmates involved in a riot and takeover would likely have no reasonable expectation of privacy in their conversations overheard by crisis team electronic surveillance.²³

Because it is not always possible to predetermine when expectations of privacy may or may not exist, law enforcement personnel involved in the response to crisis situations should be aware that the use of listening devices may be circumscribed by Federal law. Accordingly, the crisis team legal advisor

should be prepared to secure emergency approval and to apply to the court for the necessary order.

Use of Force

While the safe and peaceful resolution of crisis situations is the goal of law enforcement, complete crisis management also includes a tactical component in the event a negotiated solution cannot be reached. If force is necessary, crisis managers should remember that the Supreme Court has established a constitutional standard for the use of deadly force.

“
**...the Miranda rule
does not apply when
questions are
reasonably prompted
by concerns for public
safety.**
”

In *Tennessee v. Garner*,²⁴ the Court sanctioned the use of deadly force when necessary for self-defense, defense of others, or to prevent the escape of a person who committed a felony involving the infliction or threatened infliction of serious bodily injury or death. The Court said:

“Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by

using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if where feasible, some warning has been given.”²⁵

The essence of most hostage situations or similar crises is that the offender has threatened the lives of the hostages, the officers, or both. Clearly, whenever there is an imminent threat to the lives or safety of either hostages or officers, force, including deadly force, necessary to resolve the threats is permissible. Likewise, force, including deadly force, can be employed whenever necessary to prevent the escape of suspects who meet the *Tennessee v. Garner* standard of a “dangerous person.”²⁶

Control of the Media

Crisis situations requiring a law enforcement response almost always draw the attention of the media. Reporters from the print and electronic media are quickly dispatched to the scene of the crisis and make demands on the crisis management team for access to news and information. Trying to accommodate media demands or dealing with overzealous reporters whose activities might interfere with police command of the situation raise additional concerns for the crisis management team.

Law enforcement personnel assigned to crisis response teams

should anticipate and plan for media presence at the crisis scene. Preplanning a response that includes accommodating the media will assist the orderly response to the crisis. In creating the plan, law enforcement officials should remember that the media play a special role in our system of Government:

"In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy. The press was to serve the governed, not the governors. The Government's power to censor the press was abolished so that the press could remain forever free to censure the Government."²⁷

Nonetheless, the media do not have an unlimited right to engage in news-gathering. The balance was described in *Branzburg v. Hayes*,²⁸ where the Supreme Court noted that "...news gathering is not without its First Amendment protections"²⁹ and the press has the right to acquire news "...from any source by means within the law."³⁰ However, "...the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally...Newsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded...."³¹

When the law enforcement crisis manager establishes a perimeter around the crisis scene, an order should be issued excluding both the public and the media.³² A media area safely away from the crisis scene could then be established

where the crisis manager or public information officer would brief the media. Such a system accommodates both the interests of law enforcement and the interests of the media without trammeling the prerogatives of law enforcement or the first amendment rights of the media.

Photo by Janet Lockett, FBI



Conclusion

Crisis situations are stressful and demanding. The legal issues that arise do not, however, pose insurmountable obstacles to the safe and peaceful resolution of the crises.

The fourth amendment recognizes that threats to life and safety may excuse the usual need for a warrant. The fifth amendment privilege against self-incrimination, protected by the *Miranda* rule, does not constrain the ability of negotiators to seek the surrender of suspects.

Irrational demands of hostage takers can be agreed to by crisis managers without fear of creating an enforceable right. Intelligence can be gathered through electronic surveillance techniques by consensual monitoring, under the authority of a

court order obtained in advance of the monitoring, or under the emergency provisions of the electronic surveillance statutes. Tactical resolutions of crisis situations can be reasonable and constitutional. The media's interests and rights can be accommodated without compromise to the operational necessities of the crisis.

Even though our legal system generally recognizes and sanctions reasonable police responses to crisis situations, law enforcement managers should integrate the various legal issues discussed in this article into their policy development, training programs, and operational decisionmaking. Preplanning for the legal issues inherent in crisis situations facilitates their solution later. ♦

Endnotes

¹*Taylor v. Watters*, 655 F.Supp. 801, 806 (E.D. Mich. 1987).

²The fourth amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized."

³*United States v. Katz*, 389 U.S. 347, 357 (1967).

⁴437 U.S. 385 (1978).

⁵*Id.* at 392. See also *United States v. Boyd*, 496 F.Supp. 25 (S.D.N.Y. 1980), *aff'd*, 636 F.2d 1204 (2d Cir.), *cert. denied*, 449 U.S. 1038 (1980); *People v. Cloud*, 587 N.E.2d 270 (N.Y. 1991); *Commonwealth v. Hinkson*, 461 A.2d 616 (Pa. Super. 1983); and *State v. Hammer*, 759 P.2d 979 (Mont. 1988).

⁶Evidence seen in plain view while police respond to the emergency may be seized. *Mincey v. Arizona*, 437 U.S. at 393. The warrant requirement of the fourth amendment is also excused when a police entry is necessary to prevent the imminent destruction of evidence, see, e.g., *Ker v. California*, 374 U.S. 23 (1963), or where the arrest is a product of "hot pursuit,"

Warden v. Hayden, 387 U.S. 294 (1967).
7 384 U.S. 436 (1966).

8 *Berkemer v. McCarty*, 468 U.S. 420 (1984).

9 *United States v. Mesa*, 638 F.2d 582, 588 (3d Cir. 1980). See also, *State v. Sands*, 700 P.2d 1369 (Ariz. App. 1985).

10 Interrogation may consist of direct questioning or its functional equivalent. *Rhode Island v. Innis*, 446 U.S. 291 (1980).

11 480 N.Y.S.2d 583 (N.Y. Sup. Ct. 1984).

12 *New York v. Quarles*, 467 U.S. 649 (1984).

13 490 N.W.2d 93 (Minn. 1992), cert. denied, 113 S.Ct. 1306 (1993).

14 700 P.2d 1369 (Ariz. App. 1985).

15 *Id.* at 1375. See also *People v. Pasch*, 604 N.E.2d 294 (Ill. 1992).

16 *United States v. Crosby*, 713 F.2d 1066 (5th Cir. 1983), cert. denied, 464 U.S. 1001 (1983). See also *United States v. Gorham*, 523 F.2d 1088 (D.C. Cir. 1975).

17 See Title 18, United States Code (U.S.C.), Section 2510, et. seq. State and local law

enforcement agencies may be subject to additional State laws.

18 18 U.S.C. §2511(2)(c).

19 This covers most situations, because commercial lines will likely be placed under control of the crisis management team and access to those lines by the hostage taker restricted or denied. If the hostage taker has access to cellular telephones, it is more difficult to establish control of or access to that technology.

20 18 U.S.C. §2518(7).

21 *Id.*

22 18 U.S.C. §2511(1).

23 468 U.S. 517 (1984).

24 471 U.S. 1 (1985).

25 *Id.* at 11-12. See also, *Fitzgerald v. Patrick*, 927 F.2d 1037 (8th Cir. 1991).

26 A verbal warning to surrender immediately prior to the use of deadly force is not always possible. Crisis situations may present facts where the suspect's repeated refusal to surrender or the immediate threat to life obviates the need for the verbal warning. See

Liebenstein v. Crowe, 826 F.Supp. 1174 (E.D. Wisc. 1992).

27 *New York Times Co. v. United States*, 403 U.S. 713, 717 (1971), Justice Black, concurring.
28 408 U.S. 665 (1972).

29 *Id.* at 707.

30 *Id.* at 681-82.

31 *Id.* at 684-85.

32 It is important to address the media's right to acquire news in the first instance. Once news is acquired, the government is hard pressed to prevent its publication. See, e.g., *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963); Privacy Protection Act of 1980, 42 U.S.C. §§2000aa, et seq.

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

Bulletin Alert

Hair-raising Comb

This "comb" quickly converts into a dangerous weapon. The toothed section of the comb slips off to reveal a 4-inch blade of hard plastic. Available in at least three colors (black, white, or pink), this concealed dagger could be overlooked easily by law enforcement or corrections personnel during searches.

Submitted by D.P. Van Blaricom, retired chief of the Bellevue, Washington, Police Department.

