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Conducting Successful Interrogations

By DAVID VESSEL, J.D.

Obtaining information that an individual does not want to provide constitutes the sole purpose of an interrogation. A successful interrogation results in a guilty or involved criminal suspect's making a confession or admitting participation in an illegal activity. However, interrogators frequently do not acquire information critical to successful case resolution. Often, guilty suspects leave the interrogation environment without making the smallest admission. Many experienced officers leave an interview or interrogation knowingly outwitted by the suspects. When these situations occur, criminals go unpunished and remain free to strike again, causing the entire community to suffer.

Interrogations can fail for any number of reasons. Some reasons are foreseeable; some are not. However, interrogators can increase their success rates by eliminating or minimizing identifiable causes of failure. Once investigators have identified these factors, they can consider and act upon them to increase the probability of successful interrogations. These major components include preparing for the interrogation, distinguishing between interrogations and interviews, developing persuasive themes and arguments,



establishing a set plan, building a good relationship with the interrogation subject, allowing enough time for the interrogation, acquiring adequate interrogation training, and understanding that some interrogations will fail regardless of the amount of effort employed.

While not all-inclusive, these factors prove vital to successful interrogations.

PREPARING FOR THE INTERROGATION

Preparation stands as the most important factor in conducting



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Interrogation training greatly increases the probability of success.

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successful interrogations. Too often, the unplanned approach leads to interrogation failures. Factors to consider when preparing interrogations include setting and environmental considerations, knowledge of case facts, familiarity with subjects' backgrounds, and methods of documenting confessions.

Setting and Environmental Considerations

Successful interrogations mandate that interrogators, not subjects, control not only the topics of discussion but also the physical environment.¹ Officers should not conduct interrogations unless they can guarantee privacy and control of the environment. A good setting is a small, controlled, sound-insulated room void of distractions. Investigators should avoid environments with windows, telephones, clocks, pagers, and intercom systems. A setting free from diversions forces subjects to respond only to the inquiries. It also gives investigators a much better

opportunity to observe the subjects' verbal and nonverbal responses to the issues presented. Accordingly, interrogators know that these reactions result from the issues and not from any extraneous stimulus. The further the situation gets from a controlled setting, the higher the chance that the interrogation will fail. If investigators cannot guarantee this environment, they should conduct the interrogation at another time and place. Often, only one good interrogation opportunity exists. Risking that opportunity in an unacceptable environment may be a poor investigative decision.

Case Facts Knowledge

Understanding case facts remains critical to any interview or interrogation, but some facts may prove more important than others. Knowledge of how a crime occurred can be an effective persuasion tool.² If investigators can tell subjects how the crimes were committed, the subjects may give the

reasons for their involvement in these incidents. However, interrogators must exercise caution in using this technique. In presenting crime facts to subjects, interrogators must ensure that all prove correct. Otherwise, interrogators will risk losing credibility, which greatly increases the chance of interrogation failures.³

Familiarity with Subjects' Backgrounds

Acquiring adequate background information about subjects constitutes another critical factor in achieving successful interrogations. Subjects' feelings, attitudes, and personal values directly impact successful interrogations. Individuals often make the choice to confess based on their emotions, then defend their positions or choices with logic.⁴ Therefore, the more officers know about the subjects they interrogate, the better their chances for success. When interrogators understand subjects' goals, needs, and conflicts, they can use this information to persuade subjects that confessing the truth is in their best interest.

Documenting Confessions

Officers should resolve the critical details of documenting the confession before beginning the interrogation. Once the procedure starts, interrogators should not be involved in extraneous activities, such as changing audiotapes or searching for needed forms. These actions distract subjects, make them feel less important than the interrogation process, and greatly decrease the possibility of successful interrogations.

Although interrogators document the process by audio or video recordings, they also should obtain a signed, written statement as an accurate summary of the essential facts. Moreover, if the audio or video recordings prove defective, this written record can be admitted as evidence and examined by a jury.

DISTINGUISHING BETWEEN INTERROGATIONS AND INTERVIEWS

Investigators must make a clear distinction between the two processes of interviewing and interrogating subjects. An interview should precede every interrogation. Through the interview, officers learn about the subjects and their needs, fears, concerns, and attitudes. They then use this information to prepare themes or arguments to use during interrogations.

During interviews, subjects answer questions from investigators about the crimes, themselves, and others involved in these incidents. Through this nonthreatening initial inquiry, investigators identify non-verbal and verbal behavior exhibited by the subjects, build rapport and find common ground with them, determine if they should be interrogated (if doubt exists about the subjects' involvement, no interrogation should be conducted), and obtain additional case facts.

Conversely, interrogations bring investigations to a close. Investigators use different skills in interrogations, confronting subjects with statements rather than asking for information. In interrogations, investigators lead, and subjects follow.⁵ Investigators do

not seek information. They do not take notes. They only want to obtain truthful admissions or confessions.

Continuing to obtain erroneous or fabricated facts while trying to secure truthful admissions causes investigators to lose the advantage in the interrogation process. Once investigators determine that interrogation is warranted, obtaining the truth from the subjects becomes their only goal.

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A...four-step plan can provide investigators with an effective, well-proven method of ensuring interrogation success.

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DEVELOPING PERSUASIVE THEMES AND ARGUMENTS

Lack of arguments and themes to persuade subjects to tell the truth stands as a major cause of interrogation failures. Three main solutions exist for combating this problem. First, experience provides investigators with an ever-increasing supply of arguments. Conducting more interrogations gives investigators additional ideas and a wider variety of themes to pursue.

Next, preparation allows investigators to plan their persuasive themes and arguments before interrogating subjects. Certain themes and arguments remain universally valuable in conducting successful

interrogations. These concepts include minimizing the crime, blaming the victim, decreasing the shamefulness of the act, increasing guilt feelings, and appealing to the subject's hope for a better outcome. However, the interrogator should not make this latter appeal as a promise of leniency for the subject. Such a promise violates the subject's right to due process of law and may provide the legal basis for excluding the confession as evidence.⁶ Also, many crimes suggest a number of related themes. For example, theft may bring to mind such themes as stealing to support certain lifestyles, blaming the victims, obtaining the subjects' version of the incidents, or even commending the subjects for the professionalism of the crimes.

Finally, conducting good interviews before the interrogations and noting the subjects' key responses allow investigators to convert these answers into persuasive themes and arguments in interrogations.⁷ Knowing what is important to subjects gives interrogators plenty of topics to convert into themes, which helps combat their greatest problem—running out of things to talk about during interrogations.

Investigators should have themes and arguments ready and be prepared to relate them to the facts of the case. If investigators present all of their prepared themes and arguments, they can start over and present them again using different words and examples. This process can continue for as long as necessary to obtain confessions. Generally, the skillful presentation of frequently used themes and arguments, along with any specific ones

developed during interviews, results in successful interrogations.

ESTABLISHING A PLAN

An uncomplicated, four-step plan can provide investigators with an effective, well-proven method of ensuring interrogation success.⁸ First, investigators confront subjects, either forcefully or moderately, with the facts and issues surrounding the incidents and usually accuse them of complicity in the crimes. Generally, subjects deny the allegations. Then, investigators begin to cut off or stop these denials. They must frustrate the subjects' attempts to circumvent the truth by continually halting these denials throughout the interrogation process. Otherwise, subjects increasingly will believe that they can avoid confessing their actual involvement in the crimes.

An effective method of cutting off these denials involves interrogators' repeatedly acknowledging the subjects' participation in the crimes while questioning only their motivations for committing the acts. By continually affirming the subjects' involvement, investigators can maintain better control of the interrogation process. At this point, subjects may stop offering denials and begin providing excuses or justifications for their actions. This shift in their behavior encourages investigators because it indicates progress in the interrogation.

During the third step, investigators present their themes, and arguments. If subjects again offer denials, interrogators should stop them and present additional themes and arguments. As the core of

interrogations, themes, and arguments originate from investigators' experiences, observations, and personal knowledge. Some themes are universal; others apply to specific crimes. Still others appear to have no direct relevance to the incident.⁹ Any theme may have a substantial emotional impact on interrogation subjects. Themes convince subjects to tell the truth, regardless of the consequences. Without a solid foundation of prepared themes and arguments, interrogations usually fail.

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Preparation stands as the most important factor in conducting successful interrogations.

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Finally, as subjects begin to succumb to the interrogation but still need slightly more inducement to tell the truth, officers can present alternative or closing questions. These face-saving questions allow subjects to make an admission without losing their dignity. Alternative questions include asking subjects whether they planned the crime or committed it on impulse and whether they stole to support an addiction or to help their families. Any positive responses to these inquiries reveal an admission of truthful involvement by the subjects.

Using such a plan allows interrogators to monitor the ongoing development and progress occurring during interrogations. Also, it provides interrogators with a proven road map for obtaining the confessions that can lead to successfully resolving criminal cases.

BUILDING A GOOD RELATIONSHIP

Investigators can achieve significant success in interrogations by ensuring that the subjects remain the central focus in interrogations, surpassing even the interrogation plan, the themes and arguments, the environmental considerations, or any other component. Individuals often confess for no other reason than their respect for and trust in their interrogators.¹⁰ Therefore, investigators must build a good relationship with subjects. Anything that appears more important than the subjects or the relationship may prove detrimental to the interrogation process.

Moreover, investigators should consider some specific critical personal elements. These components focus on empathizing, not sympathizing, with the subjects' views of the world and attitudes toward interrogation. The perspectives and outlooks of subjects and investigators lie in opposite directions. Therefore, investigators should consider the interrogations, the crimes, and the discussed life experiences from the subjects' points of view. To succeed, investigators should examine some of the human variables that result in different viewpoints.¹¹ Such variables can include differences in sex, culture, values, and economic

circumstances, as well as personal needs and goals. As investigators realize and understand these differences, interrogations become more personal and more effective.

ALLOWING ENOUGH TIME

Investigators must remember that successful interrogations require a certain amount of time to complete. Some confessions or admissions come quickly, but most do not. Those involving a polygraph examination usually occur between the second and third hours of the interrogation session. Generally, the chances of obtaining a confession increase 25 percent for every hour (up to 4 hours) of interrogation.¹² Investigators spend up to the first hour of the session learning about the subjects, building rapport, obtaining background information, and discussing the crimes. Verbal and nonverbal responses form the basis of the investigators' evaluations concerning the subjects' degree of truthfulness and degree of criminal involvement. It takes time for investigators to observe these responses and relate them to the critical issues of the cases. Stopping after 30 minutes or an hour of interrogation dooms investigators to a 75 percent interrogation failure rate.¹³ Admitting the truth will impact profoundly on these subjects' lives and relationships. Subjects make critical life decisions based on their personal needs, wants, and perceived ideas about their situations balanced against the themes, arguments, and facts presented by interrogators. Such a complicated process requires ample time to conclude successfully.

Suggested Reading

Theme Development:

John MacDonald, M.D., and Lt. David Michaud, *The Confession-Interrogation and Criminal Profiles for Police Officers* (Denver: Apache Press, 1987).

The Plan:

F.E. Inbau, J.E. Reid, and J.P. Buckley, *Criminal Interrogations and Confessions* (Baltimore: Williams and Wilkins Company, 1986).

Antisocial Personalities:

Stanton E. Samenow, *Inside the Criminal Mind* (New York: Times Books, 1984).

Interpersonal Communication:

Deborah Tannen, Ph.D., *That's Not What I Meant!* (New York: Ballantine Books, 1986).

Intercultural Communication:

Edward T. Hall, *Beyond Culture* (New York: Anchor Books/Doubleday, 1976).

ACQUIRING ADEQUATE TRAINING

Interrogation training greatly increases the probability of success. Formal interview and interrogation courses that have earned the respect of the law enforcement community offer a valuable training experience. Numerous officers advise that they would not have obtained confessions in many of their investigations without such training.¹⁴ Large police departments, law enforcement academies and associations, federal agencies, and commercial vendors offer several excellent courses.¹⁵ Further, a few years of on-the-job interviewing experience provides officers with a useful background before attending formal classroom training.

KNOWING SOME INTERROGATIONS WILL FAIL

No investigator can succeed in every interrogation. At least 10 percent of subjects will not confess regardless of the investigator's talent or hard work.¹⁶ Professional, hard-core criminals fall into this category of interrogation failures. These subjects are often repeat offenders and know the criminal justice system well.¹⁷ Many exhibit sociopathic tendencies and display antisocial behavior, especially to authority figures. Even though interrogating these subjects frequently proves unsuccessful, investigators may be at the right place, at the right time, to produce the right reason for a subject to confess. In any case, investigators

should not become discouraged if their best efforts do not yield productive results with these types of criminals.

CONCLUSION

Interrogations fail for any number of reasons. Addressing and eliminating the interrelated, identifiable causes can prevent most failures. Preparing adequately, understanding the interrogation process, and appreciating the subjects' needs and values remain paramount in achieving successful interrogations. Additionally, sufficient training and ample experience in conducting interrogations provide specific assistance to investigators involved in the process. Establishing a well-developed plan and allowing sufficient time for the interrogation to evolve also prove important factors in ensuring successful interrogations.

All of these elements need constant attention for investigators to acquire the information critical to successfully resolve their cases. Properly addressing these factors greatly contributes to increasing the number of confessions obtained from guilty or involved suspects and to reducing the number of times officers are duped by these individuals. While interrogation failures impact all aspects of the criminal justice system, the investigators conducting these inquiries remain the most critical factor in reducing these failures. With adequate training, increased awareness, and established plans, officers can become successful interrogators and effectively reduce the number of unsolved crimes that

plague not only the law enforcement community but also the general, law-abiding population. ♦

Endnotes

¹ Arthur S. Aubrey, Jr., and Rudolph R. Caputo, *Criminal Interrogation*, 3d ed. (Springfield, IL: Charles C. Thomas, 1986), 37.

² John MacDonald, M.D., and Lt. David Michaud, *The Confession—Interrogation and Criminal Profiles for Police Officers* (Denver: Apache Press, 1987), 149.

³ Bert Decker and James Denney, *You've Got to be Believed to be Heard* (New York: St. Martin's Press, 1992), 34-35.

⁴ *Ibid.*, 16.

⁵ *Supra* note 1.

⁶ *Miller v. Fenton*, 106 S. Ct. 445 (1985).

⁷ Stan B. Walters, *Principles of Kinesic Interview and Interrogation* (New York: CRC Press, 1996), 2.

⁸ "The Reid Technique of Interview and Interrogation," *Advanced Course Study Guide* (Chicago: John E. Reid and Associates, 1989), 23-25.

⁹ *Supra* note 2, 84-90.

¹⁰ Frederick Link and Glen Foster, *The Kinesic Interview Technique* (Riverdale, CA: Interotec Associates, 1989), 56.

¹¹ Los Angeles Police Department Interview and Interrogation School Course Study Guide, undated, 6.

¹² Ronald W. Hilley, retired FBI polygrapher and instructor, interview by author, June 3, 1997.

¹³ *Ibid.*

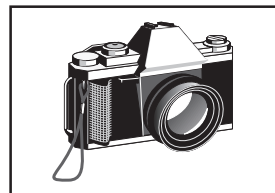
¹⁴ This information is based on the author's experience teaching these courses for the past 10 years.

¹⁵ Such organizations include the Los Angeles Police Department, the New Mexico Department of Public Safety, the FBI, and the Georgia Police Academy.

¹⁶ To the author's knowledge, no interrogation publication claims higher than a 90 percent success rate. None of the hundreds of interrogators interviewed by the author over the past 10 years admits to a success rate higher than 90 percent. Retired FBI polygrapher Ronald W. Hilley advised that federal polygraphers maintain a "...65 to 70 percent confession rate, on the whole."

¹⁷ Stanton E. Samenow, *Inside the Criminal Mind* (New York: Times Books, 1984), 180-181.

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Focus on Computer Crime

Crime Prevention and the Electronic Frontier

By Matt Parsons

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Advances in computer technology have increased the capabilities of users by leaps and bounds. Private citizens, business owners, and law enforcement agencies all have benefitted as a result. At the same time, computer hackers and other cyberspace criminals have grown better able to penetrate computer systems once thought secure. Violations range from minor network intrusions to the unleashing of malicious viruses and the criminal manipulation of both hardware and software. The resulting losses can soar into millions of dollars. Moreover, from a national security perspective, the cost may include the loss of human lives.

In response to this growing threat, the Naval Criminal Investigative Service (NCIS), the primary law enforcement, security, and counterintelligence agency for the U.S. Department of the Navy, established the Computer Investigations and Operations Department (CIOD), formerly the Computer Crime Investigations Group. In addition to investigating violations of the law after they occur, the CIOD maintains a proactive crime prevention effort. This comprehensive program uses a variety of media to reach Navy personnel, Navy and Marine Corps families, and system administrators, who

maintain the Navy and Marine Corps information infrastructure.

A BIT OF PREVENTION...

Members of the CIOD work by the motto, "A bit of prevention is worth a gigabyte of cure." This new twist to an old saying proves as true today as it did in the days of typewriters, index cards, and rotary-dial telephones. Special agents stationed in 14 field offices that serve over 150 NCIS field units worldwide respond to requests for briefings or training not only from military commands but also from military family groups on bases around the world. These briefings provide basic information on the types of computer crime and security countermeasures, while giving audience members a chance to ask questions.

In conjunction with these seminars, the CIOD publishes a series of brochures, each one tailored to a specific audience. "Protecting Your Children in Cyberspace" gives advice to parents and comes with a software program; "Taking a Byte out of Computer Crime" and "Protecting Navy and Marine Corps Information Assets" aim for employees; and "Protecting Our Networks: Electronic Triage for System Administrators" targets Navy and Marine Corps network operators. Another pamphlet, also directed at employees, publicizes the department's Computer Crime Prevention Hotline.

Protecting Children

Most parents would not think of leaving their children alone in a strange neighborhood, allowing them to browse through an adult book store, or letting them meet with strangers in secret. Yet, many parents let their children navigate the Internet unchaperoned. The CIOD pamphlet, "Protecting Your Children in Cyberspace," provides parents with basic information on computers and how they work, lists potential warning signs of a child who may be getting into trouble with the computer, and offers advice on how to monitor their children's activity on the Internet.

An accompanying shareware¹ program helps parents monitor their children's Internet activity. Among other things, the program searches hard drives and disks for the presence of 30 types of

graphic images and displays them by location. This way, parents will know if their children have been downloading inappropriate material from the Internet. The software does not allow censorship of the material; rather, it lets parents make personal decisions, in the privacy of their own homes, as to what they find offensive. Still, in addition to letting parents delete such files, the software suggests a range of options—including holding frank discussions, attending family counseling, and, when warranted, notifying law enforcement—to help resolve this sensitive issue.²

Taking a Byte Out of Computer Crime

This general information pamphlet, “Taking a Byte Out of Computer Crime,” provides Navy employees with basic tips and ideas to reduce their chances of suffering at the hands of computer criminals. Specifically, the pamphlet discusses copyright violations and pirated software, computer viruses, and social engineering, a tactic used to induce victims into disclosing their passwords or other sensitive information about their computers. In addition to providing advice for secure computer operations, the pamphlet cautions employees to be wary when using other types of technology, from cellular phones to automatic teller machine cards.

Guarding Information

Another pamphlet aimed at employees, “Protecting Navy and Marine Corps Information Assets,” discusses the problem of computer theft, which includes both theft of computers and information. The pamphlet first outlines the scope of these crimes, which cost the Navy \$1.9 million in 1997 alone. It also provides suggestions for preventing them and includes tips for protecting laptop computers. Finally, it describes what to do in the event of a theft.

Securing Networks

System administrators literally have the security of the nation at their fingertips. “Protecting Our

Networks, Electronic Triage for System Administrators” acknowledges the important role these network operators play in national security and offers tips on

maintaining computer security, as well as guidelines on how to respond to unauthorized intrusions. Frequently asked questions cover the procedures involved in handling an intrusion, and a listing of important phone numbers includes the Navy Computer Incident Response Team, which provides administrative support in the event of an intrusion, and the Intrusion Response Group, special agents who enforce violations of the law. In fact, in

most instances, an intrusion constitutes a felony.³

Calling the Hotline

Like most employees, the Navy’s civilian and military personnel remain committed to excellence in the performance and completion of their missions. They feel frustrated by frequent and often-unreported misuse of their employer’s computers, networks, and information. With this in mind, the Naval Criminal Investigative Service established a Computer Crime Prevention Hotline⁴ to allow employees to report such incidents as employees taking home copies of government software or stealing other computer equipment, employees downloading pornography onto their government computers during work hours, and employees playing computer games at work. Another pamphlet describes these and other violations and challenges employees to report them. A computer mouse pad also publicizes the hotline, while reminding users how to protect their equipment and the information it contains.

RESULTS

By all accounts, the NCIS program is achieving its goals. Employees have grown more aware of the types and effects of computer crime, and they have become more likely to report suspicious activity. In fact, the Computer Crime Prevention Hotline has received several hundred calls since its inception in

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”

The NCIS Argentine Computer Intrusion Investigation

In August 1995, a hacker broke into the computer network at the Navy Command Control Oceanographic Surveillance Center (NCCOSC) in San Diego, California. Investigation by the NCIS, the FBI, and NASA determined that the source of the intrusion was an individual dialing into the Faculty of Arts and Sciences at Harvard University. He accessed the system again later via the Internet. By March 29, 1996, the hacker had invaded at least 367 sites worldwide on 836 occasions. Sixty-two U.S. military and government sites fell victim on 118 occasions, including 12 U.S. Department of the Navy sites, which were hit on 38 separate occasions. Further, the intruder targeted 138 sites in 23 countries on 395 occasions.

The hacker allegedly altered some files, but the majority of the activity involved the installation of "sniffer" files to remove user identification names and passwords. While the Navy continues to conduct damage assessments, the loss to NASA networks, alone, has been estimated at more than \$100,000.

In pursuit of the unknown intruder, NCIS compiled evidence that resulted in the first-ever issuance of a court order permitting the interception of electronic communications against an unknown subject on a computer network. The computer wiretap, placed at Harvard University, enabled NCIS to successfully identify the intruder from among 16,500 user accounts, between 8,000 and 9,000 networked computers, and from 200 to 300 online users generating an estimated 60,000 e-mail messages per day, or 4.3 million electronic communications during a 73-day period. With assistance from the U.S. attorney in Boston, NCIS agents intercepted only two communications that might not have been generated by the intruder, thus following the letter of the law governing interception of communications and maintaining the Fourth Amendment privacy rights of innocent citizens. A software program automated this "minimization" process.

Through the use of these previously untried investigative techniques, NCIS identified a 21-year-old Argentine graduate student, as the suspect. Using the moniker *griton*, Spanish for "screamer," he operated a hacker electronic bulletin board called "Scream!" He also had previously served with the Argentine Navy. Based on information provided by the NCIS, Argentine authorities executed a search warrant at his residence and seized his computer equipment. Preliminary investigations indicated that the hacker had compromised the Argentine telephone system. With assistance from INTERPOL and the Argentine government, a U.S. felony warrant, charging violation of several computer-related statutes, was issued for the subject's arrest. The subject recently pleaded guilty and was sentenced to 3 years' probation and a \$5,000 fine.

A number of agencies came together to provide technical, administrative, and law enforcement assistance in this case. In addition to the NCIS, the Navy's Fleet Information Warfare Center, the Naval Warfare Assessment Division, and the Marine Corps Tactical Systems Support Activity represented the U.S. military. Numerous law enforcement agencies and information systems experts became involved, as well. The U.S. Department of Justice also played a critical role in the investigation.

This case represented a number of firsts: the first time a wiretap had ever targeted an unknown subject on a computer network, the first time the minimization process had been automated, and the first time a military criminal investigative organization had investigated such a case. Moreover, this case demonstrates the ability of law enforcement to adapt current technology to pursue computer intruders and protect national security while protecting Fourth Amendment rights under the Constitution.

April 1996. The Navy has distributed over 10,000 copies of the software program, and a number of parents have called to request additional support. Further, the company that designed the program has created a version that law enforcement agencies can use in their own crime prevention efforts.⁵ Finally, the Maryland State Police has adopted a computer crime prevention program of its own, based on the one developed by the NCIS.

CONCLUSION

One of the first steps in solving a problem is recognizing that one exists. By making Navy and Marine Corps personnel aware of the nature and consequences of computer-related crime, the Computer Investigations and Operations Department of the U.S. Naval Criminal Investigative Service has begun to dismantle the efforts of lawbreakers worldwide. Whether the offenders are professional hackers bent on bringing down the U.S. Navy,

pedophiles threatening children on the Internet, or merely co-workers using government computers for personal gain, employees and their families now are in a better position to identify and report them. Both military and civilian law enforcement agencies owe it to themselves, their employees, and the citizens they serve to do the same. ♦

Endnotes

¹ Shareware is a type of software given to users with the understanding that if they like the program, they will send the author a nominal fee for continued use. This particular program expires after a 30-day trial period, after which the user must purchase or uninstall the software.

² The software is available at <http://www.ncis.navy.mil/comprim.htm>.

³ Title 18, U.S. Code, Section 1030.

⁴ The phone number is 1-800-278-9917.

⁵ For information, contact the company at 704-529-0200.

A former Buffalo, New York, police officer, Special Agent Parsons now serves with the Computer Investigations and Operations Department of the U.S. Naval Criminal Investigative Service in Washington, DC.

Author Guidelines

Manuscript Specifications

Length: 2,000 to 3,500 words or 8 to 14 pages.

Format: All manuscripts should be double-spaced and typed on 8 1/2- by 11-inch white paper. All pages should be numbered, and three copies should be submitted for review purposes. When possible, an electronic version of the article saved on computer disk should accompany typed manuscripts.

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Basis For Judging Manuscripts: Manuscripts are judged on the following points: relevance to audience, factual accuracy, analysis of information, structure and logical flow, style and ease of reading, and length. Favorable consideration cannot be given to an article that has been published previously or that is being considered for publication by another magazine. Articles that are used to advertise a product or a service will be returned to the author.

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Magic Words to Obtain Confessions

By MICHAEL R. NAPIER
and SUSAN H. ADAMS, M.A.

Investigators often ask, “Do any magic words exist for obtaining confessions?” The answer is an unequivocal yes. Certain words and phrases, such as “*accidents happen....*,” “*anyone in this situation could have....*,” “*everybody makes mistakes....*,” can give offenders a dignified way to admit their involvement in a crime and provide investigators with a proven approach to obtaining confessions. After identifying the appropriate words to use to obtain confessions, any investigator can become adept in using the magic words of interrogation.

Where do these magic words come from? Before interrogating suspects, investigators conduct in-depth interviews to gain insight into suspects’ backgrounds, thoughts, and feelings. Experienced investigators know that by nature, everyone uses an often-unconscious mental process to justify their behavior or cope with personal problems. Criminals frequently employ these defense mechanisms to rationalize their actions, to project blame onto someone or something else, and to minimize their crimes. While offenders do not blatantly reveal these devices, they do give

clues when investigators ask them about their backgrounds, attitudes, beliefs, and values during the initial interview. By listening attentively to suspects, investigators can discover important information that leads to developing the magic words that they can use later to obtain confessions.

Magic words come from three commonly used defense mechanisms—*rationalization, projection, and minimization*. Investigators call these three defense mechanisms the RPMs of interrogation and use them to help suspects maintain their dignity, or save face,

which often pays significant dividends in the form of confessions. In offering face-saving statements, investigators employ the same defense mechanisms used by the suspects to justify their crimes. After listening intently during the interview, alert investigators feed back to suspects the same magic words of rationalization, projection, and minimization.

Equally important, RPMs make moral and psychological, not legal, excuses for suspects' actions. Therefore, offenders remain accountable for their behavior.

A recent homicide case illustrates four techniques of developing magic words and an effective style of delivering them. In this example, the investigator uses the information gained in the initial interview with the suspect to develop the RPMs and obtain a confession.

The Case

Valerie, a petite but strong-willed 16-year-old, was reported

missing by her mother and stepfather. Because the girl had run away from home twice before, investigators lacked clear evidence of a crime. However, the mother suspected foul play, even though the daughter's body had not been found. First, investigators determined that Valerie's mother and stepfather had separated a few days before the girl's disappearance and only 6 months after their wedding. Second, they discovered that Valerie and her stepfather had been alone in the residence immediately before her disappearance. Soon, the stepfather, Brad, became the prime suspect. If harm had come to Valerie, resolution of the case hinged on the investigators' skill in obtaining a confession from Brad.

While sitting knee-to-knee with an investigator, Brad vehemently denied any involvement in Valerie's disappearance but seemed to lack concern for her safety. A glib, self-confident truck driver, Brad projected the image of

a con man who relished outwitting opponents. Immediately, the investigator realized that in this contest of wills, Brad could be a formidable adversary. To induce a confession, the investigator would need a complete reserve of face-saving magic words to rationalize Brad's actions ("*I understand how you might...*"), to project the blame onto someone else ("*teenagers can be difficult to deal with...*"), to minimize the crime ("*accidents like this happen...*"), and to provide reasons to confess ("*only you can tell your side of the story...*").

Rationalize Suspects' Actions

Rationalization offers plausible explanations for suspects' actions that reflect favorably on them by presenting their actions in a positive light. Many individuals rationalize their actions to excuse errors of all kinds and degrees. Competent investigators comprehend this psychological process and convey empathy by indicating that they understand suspects' frames of reference. When delivered in a gentle, sincere manner, this empathetic approach projects acceptance of suspects as "good" individuals who have experienced devastating events.

By asking open-ended questions during the in-depth interview with Brad, the investigator learned of Brad's strong need to control his new wife and teenage stepdaughter. His attempts at control had resulted in his wife's telling him to pack up and move out. During the interrogation that followed the interview, the investigator rationalized Brad's actions.



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Brad, being suddenly placed in the situation of having a wife and teenager in your home must have been *stressful*. Any man would have seen the need to define the rules for a teenager, like curfews, use of the car, whom she dated. Constant tension existed in the house, ending with your wife's taking her daughter's side and forcing you out of the picture.

The persuasive act of rationalization plays to the psychological natures or desires of the suspects to explain or justify their behavior. Investigators seemingly get inside the suspects' minds and tell the suspects why they acted as they did, thus conveying a capacity to understand.

Project the Blame onto Others

Projection excuses an act by placing the blame on something or someone else. In Brad's interrogation, the investigator projected the blame onto Valerie's mother for her failure to cooperate, onto Valerie for her arrogance and challenging demeanor, and onto the tension in the house.

Brad, if only *Valerie's mother* had set clear rules when Valerie was growing up, she wouldn't be such a defiant teenager. If her mother had backed your reasonable rules for Valerie, maybe Valerie would have understood. If *Valerie* hadn't openly ridiculed and taunted you, you would have held your temper as you usually do. It was *Valerie* who started this.

Minimize the Crime

Minimizing the offense helps suspects reduce, to their psychological satisfaction, their roles in or the seriousness of their crimes. By carefully using such soft words as "mistake" and "accident," which minimize the gravity of the situation, investigators can decrease suspects' resistance to persuasion. Careful wordsmithing minimizes

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...investigators should deliver their magic words with a 'feather approach,' revealing sincere understanding and empathy...
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the impact of criminal acts in suspects' minds. Conversely, such emotionally charged harsh words as "rape" and "murder" may cause suspects to focus on the consequences of listening to the investigators and making admissions. Harsh words also may make suspects feel ashamed of some aspect of their crimes, and therefore, should be avoided. In interrogations, investigators must reduce suspects' hesitation to confess by minimizing the crimes. If investigators do not minimize the crimes, they do not create incentives for suspects to confess. However, while investigators downplay the seriousness of crimes to garner

confessions, they never lessen the impact that these criminal acts have on society.

During Brad's interrogation, the investigator diminished the attack on Valerie by calling it an accident and something that Brad normally would never do.

I have looked at this case very carefully, Brad. This was probably an *accident*. You *didn't intend to do this*. You wish you could change it and would change it, if possible. It was *not a planned, intentional act; it just happened*. This is *not like you*. You normally don't act this way.

Provide Reasons to Confess

To improve the possibility of obtaining confessions, investigators must provide suspects with reasons to confess after employing the techniques of rationalization, projection, and minimization. This approach involves giving suspects good reasons why confessing their crimes will work to their advantage. Some investigators use the term "themes" for the combined approaches of using RPMs and providing reasons to confess. Investigators develop effective reasons to confess from the extensive, preliminary "getting to know you" interview. By understanding suspects' situations, motivations, and pressures in their lives, investigators can offer possible solutions.

Why should offenders confess? For the mother who abuses her children, the chance of receiving psychological treatment and ending the cycle of abuse might give her a reason to confess. For the

hit-and-run driver who injures a cyclist, confession may bring relief through lifting the burden and easing the guilt associated with such an act. For the woman who kills her spouse, the chance to tell her side of the story—the years of abuse by her husband—may prove reason enough for her to tell the truth. For the repeat burglar, knowing that continuing to break into homes could result in being killed or wounded by a homeowner armed with a firearm may constitute a reason to confess. The investigator used similar reasons to encourage Brad to tell the truth about Valerie.

What I have seen in situations like this, Brad, is people asking themselves later, ‘Where would I be if I had taken the opportunity to tell my side when I had the chance?’ Today is your opportunity; don’t let it pass. Your story will never sound better than it does right now. If you wait, the story will be in the newspapers and on the radio, and it won’t be your side of the story. Brad, I am prepared to write my report. The prosecutor is certain to ask about this interview, particularly whether you were sorry, if you wanted to make amends, and if you cooperated when you knew all the facts. I’m giving you the *opportunity to determine your future*. You can help me write the end to my report.

While encouraging suspects to confess, investigators must take care when making promises. A

promise of lenient treatment by the judicial system could make confessions inadmissible in court by denying suspects the right to due process of the law.¹

Deliver RPMs Effectively

Once investigators develop their magic words and reasons to confess, they must ensure that their style of delivery corresponds with the overall empathetic approach. Magic words alone cannot obtain a confession; they can lose their effectiveness if delivered inappropriately.

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...RPMs make moral and psychological, not legal, excuses for suspects’ actions.
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Investigators should avoid high-pressure approaches to interrogating suspects. Rapid, machine-gun delivery of RPMs causes the presentation to sound false. Rather than using a heavy-handed, “sledgehammer” approach that verbally bullies suspects, investigators should deliver their magic words with a “feather” approach, revealing sincere understanding and empathy for suspects’ dilemmas. Because the genuine feel and sound of sincerity represent the most important aspects of persuasion, investigators must demonstrate their sincerity by decreasing the volume and speed of their speech.

RPMs and reasons to confess take on added impetus when delivered with the feather touch because the essence of the approach involves investigators’ attempting to get inside suspects’ thought processes, virtually reading their minds.² For its full impact, investigators should use the feather touch to explain suspects’ psychological states before offenders have the opportunity to address these issues themselves, as illustrated in the following examples contrasting the sledgehammer and feather approaches with Brad.

Sledgehammer: Brad, you have lied to me from the beginning. You’re not fooling me with that story, and I’m going to shove it down your throat. You’ll be sorry.

Feather: Brad, I have some problems understanding your story. I’ve seen this happen before and realize you are uncertain about what you can tell me. That’s natural, but I’m really concerned with how you got into this mess. Let’s keep this simple and honest. Let’s not make this any worse than it is.

Sledgehammer: You strangled Valerie. Why don’t you just say you did it?

Feather: Brad, my experience in similar cases is that the person sitting in your chair has a lot on his mind. He is asking himself, ‘What is going to happen to me? Who is going to know that I did this thing? Am I better off telling the entire story and my

version of how this thing started?' Let's handle these questions one at a time, keeping each concern in its proper perspective and not letting it run wild.

The ability of investigators to demonstrate warmth and sincerity proves paramount in obtaining confessions.³ If investigators' delivery styles lack spontaneity and feeling, any attempt to persuade will not garner the trust that allows offenders to confess.

Reap the Rewards of RPMs

Today, even with the presence of such scientific evidence as DNA profiling, RPMs and reasons to confess prove significant because investigators still must rely on confessions to solve many crimes. Recognized as a complex process and often regarded as an art form, interrogation has been the lifeblood of investigations and considered "the nerve center of crime detection."⁴ Because RPMs play an important role in the interrogation process, investigators may need to repeat them many times because suspects, as if in shock, are reacting and adjusting to being confronted directly with the crimes. At this point, investigators should amplify, combine, and alter the RPMs to determine which process resonates with the suspect. The final phase of Brad's interrogation shows the value of the investigator's well-developed RPMs and reasons to confess.

After the investigator used the techniques of rationalization, projection, and minimization, he then offered Brad several

reasons to confess. Remaining quiet for a long time, Brad finally spoke. He blamed his wife for setting the stage for the confrontation with Valerie. He blamed Valerie for attacking him verbally, demeaning him, and not backing away. He said he struggled with her, ended up with his hands on her throat, and before he knew it, she was dead. He drove his truck to a lightly traveled bridge, parked it, removed Valerie's body from beneath a tarp, and dumped it over the railing into the muddy river below. Then, he disposed of her personal belongings to set the stage for a runaway scenario. Months later, a body washed up on shore; it was identified as Valerie.



Conclusion

Brad confessed because the investigator offered him face-saving options. The investigator brought the RPMs to life in the interrogation room and provided Brad with a

respectable way out. The investigator rationalized Brad's actions by focusing on the stress and tension in the house, projected the blame onto Valerie's mother and Valerie herself, minimized the homicide by calling it unplanned, and provided viable reasons for a confession by encouraging Brad to tell his side of the story as an opportunity to determine his own future. By employing the feather instead of the sledgehammer approach, the investigator maintained the necessary sincerity to persuade Brad to tell the truth. The investigator's magic words and effective style of delivery led to a confession.

Suspects do not give up their secrets easily. Persuading suspects to admit their involvement in crimes requires a variety of skills and techniques. However, investigators who can rationalize suspects' actions, project the blame onto others, minimize their crimes, and provide viable reasons for suspects to tell the truth are well on the way to obtaining confessions. ♦

Endnotes

¹ *Miller v. Fenton*, 106 S. Ct. 445 (1985).

² Warren D. Holmes, "Interrogation," *Polygraph* 24 (1995): 258. Holmes refers to this approach in a similar manner, characterizing it as taking the wind out of the suspect's sails.

³ Charles Yeschke, *Interviewing: A Forensic Guide to Interrogation* (Springfield, IL: Charles C. Thomas, 1993), 36; and Fred E. Inbau, John E. Reid, and Joseph P. Buckley, *Criminal Interrogation and Confessions* (Baltimore, MD: Williams and Wilkins, 1986), 52.

⁴ Quoted in the dissenting opinion of *Miranda*, in Fred E. Inbau, John E. Reid, and Joseph P. Buckley, *Criminal Interrogation and Confessions* (Baltimore, MD: Williams and Wilkins, 1986), 319.

Police Practice

The Advanced Criminal Investigation Course An Innovative Approach to Detective In-service Training

By William P. Kiley, M.S.



Law enforcement administrators know that providing training for their personnel remains an important, yet oftentimes difficult, task. Offering advanced training to experienced personnel, such as detectives, proves troublesome because of their responsibilities and schedules. Traditional classroom-based training that requires officers to attend for several consecutive weeks can cause significant staff shortages that adversely affect a department's investigative operations. While scheduling conflicts, time constraints, and operational concerns impact even the most critical advanced-training needs, administrators can find alternate training methods that work within these confines.

ONE DEPARTMENT'S SOLUTION

The Suffolk County, New York, Police Department created an innovative and cost-effective in-service advanced-training program to address the needs of its experienced detectives. Of its 2,800

sworn members, over 500 are detectives or detective supervisors. Their assignments range from general investigations to specialized crimes, such as homicides, robberies, and arsons. All detectives have attended the department's required basic criminal investigation course, and many have completed courses and seminars in their areas of specialization. However, no organized, in-service training program existed for detectives assigned for many years to investigative work. The chief of detectives decided that the department should have an advanced criminal investigation course as an update for these seasoned detectives.

The overall vision for the new course required that it be informative, interesting, and, most important, a primarily hands-on, outside-the-classroom experience. Enrollment in the course would be totally voluntary, and participants would need a minimum of 3 years of service as detectives in addition to several years as patrol officers. With these basic concepts in mind, the staff of the detective division set out to develop a unique new training opportunity, the Advanced Criminal Investigation (ACI) course.

Curriculum Development

All levels of supervisors, teams of detectives, prosecutors, and representatives from the county's crime laboratory formed a committee and developed a list of possible topics for inclusion in the ACI course curriculum. They determined that some of the subjects proved germane to all detectives, while others would interest only a portion of the investigators. Therefore, the committee decided to use a college curriculum approach to the ACI course—some subjects would be core requirements and others would be electives. The ACI course includes required subjects, such as advanced forensics, electronic and physical surveillance, courtroom testimony, high-tech crimes, major case investigations, legal updates, as well as interview and interrogation. Training in criminal intelligence, advanced crime prevention, and interviewing child victims of sexual assault comprise some of the elective subjects. Volunteers for the course would receive a certificate of completion once they finished the required

subjects and at least one elective course. Moreover, participants could take as many electives as they wanted based on space availability and scheduling arrangements.

Schedule Challenges

After determining the curriculum, it became evident that training of this scope would require significant time commitments from the participants. Additionally, a wide variety of work assignments and an austere overtime budget made scheduling ACI courses a challenge. Therefore, the department had to find a way to accomplish the training without adversely impacting its day-to-day operations and without expending overtime funds. To answer this challenge, the committee developed an ongoing schedule of the various training modules, which would be offered on dates coordinated with the detectives' diverse work schedules. For example, the electronic and physical surveillance module would be presented six times during the period of October through May each year on dates selected to coincide with the different duty rosters of the detectives. No modules would be offered during peak vacation or holiday periods. Because each training module takes at least 1 full day and sometimes 2 days to complete, students might not finish the ACI course for several years. However, after careful analysis, the department decided that this method proved the most effective and efficient. By presenting the ACI course in individual modules and not sending detectives to its academy for several consecutive weeks, the department could achieve the training goals with minimal overtime costs and very little impact on investigative operations.

Moreover, the ability to create, delete, and modify modules as needed represents a by-product of the modular approach to training. If new technology that would help the detectives becomes available, an additional module can be added to the ACI

course. Conversely, if an existing module becomes outdated, it can be deleted from the program.

Program Administration

Assigned the collateral duty of program administration for the ACI course, a member of the detective division became responsible for the overall development, implementation, and administration of the training program. The program administrator

designed a database to compile information on the enrollees, courses completed, and other pertinent data, while also selecting detective lieutenants to serve as coordinators of each training module. Their responsibilities involved developing student learning objectives, selecting instructors, and determining the best methods of presentation. Once the coordinators created their module outlines, they met with the chief of detectives and the senior commanders to review

the content and approach. After the chief approved the outlines, each training module underwent a complete dress rehearsal and evaluation before being presented to the students. Although time-consuming and demanding, administration and coordination represent critical components to ensure the success of the ACI program.

Course Innovations

Because the chief of detectives believed hands-on training would benefit seasoned officers by giving them opportunities to use their real-life experiences, module coordinators had to find innovative ways for students to interact and participate actively in the training. For example, the coordinator of the electronic and physical surveillance module has detectives fly in helicopters to get actual experience in using an infrared tracking system for surveillance. Students also use a variety of photo and video surveillance equipment and work with electronic tracking and communication devices. In a demanding 4-hour surveillance exercise, the students use all of

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the tools, tips, and techniques demonstrated to them during the training. A second example involves the advanced forensics module. Students attend class at the county's crime laboratory and examine such techniques as DNA testing and computer-assisted accident reconstruction. While not easy to accomplish in all areas, participatory, hands-on training has become a hallmark of the ACI course.

Another technique used in the ACI course involves using department subject-matter experts for instructors in most instances. Because it is a large department, the Suffolk County Police Department has many detectives and detective supervisors who have developed their expertise through years of working in the field. The credibility these instructors bring to the training has contributed greatly to the course's success. However, some modules benefit from bringing in outside professionals. For example, the courtroom testimony module incorporates the experiences of a senior assistant district attorney, while the child abuse module includes a Cornell University professor's expertise. These guest lecturers prove valuable as sources of real-life information and have been well received by the students.

Results and Future Ideas

While no grading system currently exists for the ACI course, one may be included in the future. However, students critique each module by assigning a numerical rating and completing a narrative portion describing the positive and negative aspects of the training. These critiques have been used to obtain and react to the feedback given by the participants. For example, following the first group of 30 detectives to complete the ACI course in January 1998, two of the modules were lengthened from 1-day to 2-day sessions based on requests from these students.

Shortly after the training began, the number of detectives enrolling in the course dramatically increased from the initial 30 to over 400. The initial

volunteers related their experiences to their fellow detectives and recommended that they attend; the ACI course had sold itself. Further, other agencies began contacting the Suffolk County Police Department with requests for their officers to attend the course. Once the department's own detectives receive training, other agencies may be included in future sessions. Additionally, as advances in technology occur, patterns of crime change, or requests for specific subjects are received, other courses will be added to the curriculum as needed.

CONCLUSION

While training represents an important component for law enforcement officers, finding the time to attend courses can prove difficult, especially for higher-ranking personnel and supervisors. Police administrators continually face the dilemma of providing advanced training for these officers while maintaining full coverage of work schedules. The Suffolk County, New York, Police Department found a creative way to offer its seasoned detectives advanced training.

Using experts within the department as instructors, coordinating efforts among all levels of supervision, and incorporating flexibility into the planning of the

program, the department succeeded in developing a training program that keeps its detectives on the job and its overtime budget minimally affected. Other law enforcement agencies may benefit from implementing such an in-service as the Advanced Criminal Investigation course.

Experienced officers need refresher and advanced courses to stay in the forefront of their profession. Administrators must find ways to help their officers, who have given many years of loyal service, obtain the training they need and deserve. ♦

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Violence and Conflict: Understanding the Issues and Consequences by Karl Schonborn, published by Kendall Hunt Publishing Company, Dubuque, Iowa, 1998.

The author of *Violence and Conflict: Understanding the Issues and Consequences* has compiled an anthology that provides readers with an understanding of the issues and consequences surrounding some of the unconventional types of violence in America. Consequently, the readings revolve around the less commonly recognized and understood types of violent behavior, such as terrorism and elder abuse, as opposed to the typical homicide or robbery.

The author astutely presents an exploration of violence from a perspective of the whole system (i.e., police officers and probation officers may analyze the same situation in different ways). This represents a more logical method of categorizing the different types of unconventional violence that occur at all levels of society. The result is a comprehensive overview that addresses violence along the entire sociological continuum. Micro-, mid-, and macro-level explanations receive equal presentation as the book progresses from discussions of violence between individuals to the larger concerns of community conflict.

Divided into five sections, the book begins with an introduction to the study of violence. The author delineates key definitional terms and proposes typologies for the various subcategories of violent behavior, such as gang violence. The remaining four sections offer descriptions of these behaviors as they occur between individuals, groups, organizations, and communities. Family violence receives extensive coverage in the second section. Overviews are provided for spousal, child, and elder abuse, as well as gun control and the fear of crime. The third section addresses group violence and provides concise summaries on gang violence and the gang-drug connection. Section four examines organizational violence through discussions of religious and political violence and violence by and against the police. The final section analyzes violence at the community level and offers exceptional historical

depictions of civil rioting and several case studies of recent domestic terrorism incidents. The inclusion of both historical and contemporary material enables the reader to compare and contrast violent behavior over time and across jurisdictions. This historical perspective is most apparent in the chapters on gangs and civil disorders. The book provides excellent summaries that trace the evolution of gangs and document the racial tension that has plagued America over the past 200 years. Contemporary case studies on such events as the Oklahoma City bombing and the migration of drug-trafficking gangs significantly enhance the volume's utility as a tool for understanding today's violence and its relationship to preceding acts of violent conflict.

The author's ability to incorporate numerous articles into one coherent manuscript represents the book's greatest strength. *Violence and Conflict* is well written, user-friendly, and flows logically from one section to the next. The author should be commended for expending additional effort on a study guide, which raises provocative discussion questions, recommends challenging student assignments, and provides an extensive list of related books, videos, and Internet resources.

The author attains, and surpasses, his initial objective by producing a volume that advances a systemwide understanding of violence and provides excellent summaries of unconventional violence in America. The author successfully targets his work to a large and diversified general audience. Students, practitioners, and policy makers within the criminal justice field, as well as others from such disciplines as sociology, psychology, political science, and public health should read and study *Violence and Conflict: Understanding the Issues and Consequences*.

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Third-Party Intermediaries and Crisis Negotiations

By STEPHEN J. ROMANO

From March 25 to June 13, 1996, a remote ranch in Montana provided the backdrop for the longest siege between armed suspects and law enforcement authorities in the history of the United States. The group of lawbreakers, known as the Freemen, reportedly held strong anti-government beliefs, threatened public officials, and produced fraudulent financial instruments to purchase vehicles and cover tax and mortgage debts. The majority of the members had several local and federal warrants outstanding for their arrest.

This 81-day standoff served as the first major test of the FBI's

Critical Incident Response Group (CIRG) and provided an opportunity to examine, implement, and reassess several crisis negotiation techniques, particularly the use of third-party intermediaries (TPIs). As a result of this experience, the FBI's policy regarding the use of TPIs has not changed: The negotiation of hostage or barricade situations remains the responsibility of law enforcement and should be conducted by law enforcement negotiators. However, these incidents often require flexibility and creativity from negotiators to resolve successfully. Using TPIs illustrates one crisis negotiation technique that proves effective if

employed prudently and within an appropriately controlled atmosphere.

CAUTION AND CONTROL

While TPIs consist of individuals not connected with the law enforcement profession, two main types predominate: family/associate and formal/official intermediaries. Family members and close friends can appeal to subjects' emotional needs, furthering a "divide and conquer" strategy and undermining the unity inherent among subjects in a siege situation. Public officials or other advocates can influence subjects' viewpoints and broker solutions more


acceptable to the group. During the Freeman siege, CIRG negotiators used both types of TPIs. Regardless of the category, negotiators carefully scrutinized each TPI for suitability and effectiveness in achieving prescribed mission objectives. While TPIs proved valuable in the successful resolution of the Freeman siege, crisis managers and negotiators should understand that using TPIs in all hostage or barricade situations remains uncertain and should not be considered a panacea for these types of incidents.

Negotiators must exercise caution when using TPIs because these individuals are not trained in negotiation skills. Also, they may respond inappropriately to stress; they may bring unknown biases and relationships into play; and they may serve as potential audiences for homicides or suicides. While these limitations exist, they can be minimized through deliberate and calculated selection and screening of potential TPIs. Further, law enforcement negotiators should provide TPIs with complete instructions, stressing restrictions and precautions, regarding the role TPIs play in the negotiation process. Also, negotiators must employ certain controls in determining when to use TPIs, how to identify appropriate ones, what relationships exist between TPIs and subjects, and how TPIs should contact subjects in hostage or barricade incidents.

When to Use TPIs

First, negotiators should not rush into using TPIs, but determine carefully if such intervention will

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Using TPIs during the surrender process provides a frequently needed face-saving device for subjects....
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help the operation. It takes time to develop the essential intelligence that allows negotiators to ascertain the advantage of using TPIs. Often, TPIs prove useful in surmounting the mistrust subjects have for law enforcement officials. During the Freeman siege, for example, group members repeatedly refused to recognize any government authority, thereby necessitating the use of TPIs to open the dialogue and later to facilitate a reasonable settlement.

Additionally, negotiators must identify the risks and benefits of using untrained individuals who may be emotionally involved with the subjects in these situations. Once negotiators decide that TPIs may help to resolve an incident, they must allow strong emotions and tensions to subside before permitting TPIs to enter the process. Moreover, subjects in these situations must ventilate and reduce their hostilities before they can begin to discuss matters rationally. Therefore, negotiators should pursue the use of TPIs only after thoroughly considering the potential

problems, as well as advantages, that may result from this type of intervention.

How to Identify Appropriate TPIs

Negotiators must identify potential TPIs carefully. Several issues impact this selection process. First, negotiators must consider whether the subjects asked to speak with particular individuals or if family members, friends, or associates came forward and requested to speak with the subjects. Who initiated the contact influences the identification process and can prioritize the importance of specific potential TPIs. Also, negotiators must examine the reasons that the subjects want to talk with the requested individuals and vice versa. During the Freeman siege, examples of these two issues involved the use of TPIs with credentials and beliefs acceptable to the group. Over time, however, the Freeman rejected these TPIs, who reported to the media that the Freeman were not true believers but criminals unwilling to compromise. These

reports undercut Freeman support throughout the United States and left them isolated and condemned by the people they had looked to for sustenance.

Finally, negotiators need to determine whether hidden agendas exist between the subjects and the potential TPIs and if these situations could place the TPIs in danger. Negotiators must remember that these incidents involve highly charged human emotions and must be examined from everyone's perspective to avoid placing potential TPIs in unsafe circumstances.

What Relationships Exist Between TPIs and Subjects

Negotiators should obtain as much information as possible regarding the relationships between the subjects and the potential TPIs. Through independent investigation and in-depth interviews, negotiators can gather pertinent details to establish the nature of these relationships. Besides determining suitability, negotiators also should assess potential TPIs' abilities to accept directions and coaching from law enforcement professionals. TPIs must understand what their roles are and how they must conduct themselves during the negotiation process, regardless of their feelings for the subjects. For example, during the Freeman siege, all TPIs were fully briefed before and debriefed after each contact. They had to perform as instructed or they could not function in that capacity again. Out of the 45 TPIs used during the siege, only 2 failed to follow instructions. While knowledge of the relationships between subjects and TPIs

can help negotiators use these individuals to the greatest operational advantage, determining TPIs' willingness to cooperate and work with law enforcement authorities proves paramount to successful negotiations.

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...the judicious and controlled use of carefully selected TPIs stands as a potent negotiation weapon....

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How TPIs Should Contact Subjects

To effectively use TPIs, negotiators must choose the appropriate method of contacting subjects in hostage or barricade situations. Some methods afford a greater degree of safety and control, while others offer unique and varied aspects for specific situations. Negotiators should consider their ability to monitor the interactions, provide real-time input or coaching for TPIs, ensure adequate safety for TPIs, and terminate the contact if necessary. Five primary methods of contact exist for negotiators to explore when considering the use of TPIs in hostage or barricade incidents. Most methods proved useful to some extent during the Freeman siege.

Telephone Contact

Telephone contact provides the safest, optimal method of

controlling TPIs. This method prevents TPIs from becoming exposed to physical danger or capture. It further facilitates monitoring and active coaching, through handwritten notes, by the negotiation team. Also, negotiators can initiate and terminate the telephone calls, which allow them to proactively structure the tone and content of the contact and keep within their desired negotiation strategy.

Voice Contact

While similar to telephone contact, voice contact from behind cover proves less desirable, yet remains an acceptable method. Negotiators can monitor and coach TPIs during the interaction and adequately address safety concerns because TPIs remain shielded from subjects. However, despite good TPI dialogue preparation, this type of contact still lends itself to a free-flowing interaction that can result in control problems and termination difficulties for negotiators. Therefore, negotiators must weigh the risks and benefits carefully before employing this method of contact.

One-way Communication

Alternately, one-way communication techniques, including written notes and audiotapes or videotapes, make excellent use of TPIs. Negotiators can control the interactions in this method of contact by actually preparing what TPIs say. Moreover, the lack of physical proximity guarantees the safety of TPIs. Frequently, subjects threatening to commit suicide prove responsive to this form of communication. A positive taped message

from a loved one, scripted by negotiators, can provide subjects with needed support, yet prevent them from responding negatively, lashing out and blaming TPIs, or resurrecting unresolved problems or issues.

Formal Meetings

The formalized meeting method proves effective in situations involving groups of subjects, especially during prison uprisings and domestic terrorist confrontations. Subjects view these structured meetings as a formal coming together of equals on neutral ground, similar to a wartime peace summit. TPIs can effectively suggest and facilitate such meetings to bring hostile adversaries (police and subjects) together. Negotiators must use great care in setting the ground rules and structure for such meetings, to include a firm no-weapons policy. Further, negotiators should try to ensure that these meetings occur in an open area where all participants can be plainly observed, providing an enhanced sense of security and safety. However, negotiators should not use this method of contact too early in the incident. They should wait until relationships have become clear, leadership has been established, and threats have subsided.

Face-to-face Contact

Finally, the face-to-face method of contact, either outside or inside the crisis site, provides the least amount of safety and control for TPIs. Before using this method, negotiators must ensure that they fully comprehend the relationships existing between the subjects and



the TPIs, the loyalty of the TPIs, and the TPIs' abilities to think quickly and effectively under pressure. If possible, negotiators should have a technical means in place to monitor what the TPIs say and to detect potential safety concerns.

RESOLUTIONS AND CONSEQUENCES

Although every hostage or barricade situation has unique aspects, past incidents have demonstrated how TPIs can act as stimuli or rewards for subjects who surrender and as guarantors of prearranged agreements between the subjects and the authorities. Withholding the ability to talk or meet with a desired individual constitutes a powerful motivator in achieving successful hostage or barricade resolution. Moreover, whenever possible, negotiators should honor the promises made as part of a negotiated surrender.

Using TPIs during the surrender process provides a frequently needed face-saving device for subjects to maintain their dignity. Subjects surrendering to TPIs may

perceive the act as easier and more culturally acceptable. Often, subjects view surrendering to law enforcement authorities as total capitulation and something to avoid at all costs. However, trusted TPIs can provide an alternative solution.

In most cases, the last hurdle for negotiators to overcome involves the subjects' mistrust of law enforcement officials. Questioning the credibility of authorities, especially with regard to guaranteeing their safety, remains the consummate concern of subjects involved in hostage or barricade situations. The presence of reliable and loyal TPIs can serve to allay the anxiety subjects harbor about surrender agreements. This watchdog role of TPIs proves significant in sealing the surrender process and obtaining peaceful resolutions to these incidents.

CONCLUSION

During the Freeman siege, negotiators faced many challenges and used numerous third-party intermediators in several methods of contact with varying degrees of effectiveness. However, the

successful resolution of the Freeman siege does not mean that this crisis management strategy should serve as a template for negotiating with similar groups in the future.

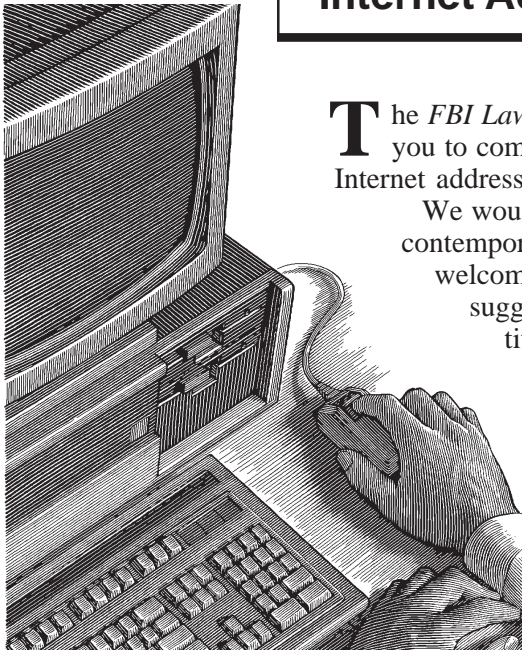
All hostage or barricade situations prove unique, and few absolute strategies exist in the negotiation profession. Random, uncontrolled use of TPIs in any incident remains unwise and probably counterproductive. The simplistic and potentially dangerous view of sending in a vast quantity of individuals in the hope that someone will eventually succeed remains a

mistaken belief. Twenty years of anecdotal and impressionist evidence suggests that the uncontrolled use of TPIs often has led to tragic consequences for all involved. Instead, negotiators must understand that the judicious and controlled use of carefully selected TPIs stands as a potent negotiation weapon in some hostage or barricade situations.

The 81-day Freeman siege in Montana provided a unique opportunity to examine the effectiveness of using TPIs. While this technique, combined with restraint,

patience, and flexibility, contributed greatly to the peaceful resolution of a potentially dangerous incident, not all hostage or barricade situations warrant such intervention. Law enforcement authorities must ensure that caution and control remain uppermost in the minds of negotiators when TPIs become part of their crisis management strategy. In this way, negotiators can use third-party intermediaries as another tool in their attempts to resolve tense and potentially tragic hostage or barricade situations. ♦

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Supreme Court Cases 1997-1998 Term

By LISA A. REGINI, J.D.



During the 1997-1998 term, the Supreme Court ruled on eight cases of particular importance to law enforcement officers and the agencies for whom they work. In these cases, the Court addressed constitutional issues and provided guidance on the interpretation of federal civil rights and employment statutes. Specifically, the Court ruled on the proper standard to apply in a police pursuit case when it is alleged that the government deprived an individual of substantive due process and whether procedural due process permits an employee to

falsely deny allegations of misconduct. The Court also addressed the extent to which a prosecutor is afforded absolute immunity and whether law enforcement is held to a higher standard when making an unannounced entry to execute a warrant when, in the course of the entry, property is damaged. Finally, the Court declared in three separate opinions that same-sex harassment is actionable under Title VII and clarified what legal principles to apply in assessing employer liability in a harassment case when a supervisory employee engages in the offensive behavior.

County of Sacramento v. Lewis, 118 S. Ct. 1708 (1998)

The family of Mr. Lewis brought a civil action under 42 U.S.C. § 1983 against Sacramento County sheriff's deputies after Mr. Lewis was killed during a police chase. The decedent's family argued that the decedent was denied substantive due process, guaranteed by the 14th Amendment to the Constitution. The Supreme Court held that in a high-speed police chase, a police officer does not deprive an individual of substantive due process by causing death through actions that indicate a

deliberate indifference or a reckless disregard for the rights of others. Instead, the standard to be applied in assessing officer culpability is higher. Only conduct that shows an intent on the part of the officer to cause harm unrelated to the legitimate object of making the arrest will meet the test of arbitrary and shocking conduct actionable as a deprivation of substantive due process.

A high-speed chase began after a motorcycle on which the decedent was a passenger failed to obey an officer's command to stop. In violation of departmental policy, the deputies continued to pursue the motorcycle even as it exceeded 100 miles per hour in a residential neighborhood. The chase ended when the driver of the motorcycle lost control, spilling the passenger onto the pavement and in the path of the oncoming police vehicle. The passenger suffered massive

head injuries and was pronounced dead at the scene. The Ninth Circuit Court of Appeals held that the appropriate standard to apply in determining whether the deputies' conduct deprived the decedent of due process was that of deliberate indifference and not the higher "shocks the conscience" standard other federal courts had applied. In order to resolve the conflict that existed among the federal courts, the Supreme Court agreed to hear the case.

In its ruling, the Supreme Court first noted that the case does not involve a question of Fourth Amendment interpretation because the conduct at issue does not meet the definition of "seizure" established in the Court's prior decisions.¹ Turning to the substantive due process question, the Court stated that the question presented is whether the deputies' actions constituted an abuse of power so clearly unjustified by legitimate law enforcement objectives that the conduct can only be properly characterized as conscience-shocking. The Court went on to hold that the standard to be applied in a substantive due process claim arising from a high-speed police pursuit is whether there was intent to harm unrelated from the legitimate object of the arrest.

The Court commented that such a high standard of culpability is warranted by not only the Constitution itself but also the very nature of the police chase. The Court reiterates that the Constitution "does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together

in society."² Conduct on the part of the government that is intended to cause injury to others and is not justified by a legitimate government interest represents the type of conduct that the Constitution is intended to redress. To hold officers to a lesser standard in a pursuit case fails to recognize both the haste with which the decision to give chase arises and the competing concerns of the officers. A lesser standard requires that officers balance the need to stop the subject's flight and not reward attempts to flee from law enforcement against the risk high-speed pursuit poses to everyone in the path, including the subject. The Court noted that while the federal Constitution is not the appropriate remedy for police conduct that causes injury such as described in this case, remedies under state tort laws may provide an alternative basis for lawsuits against officers or their employers.³



Kalina v. Fletcher,
118 S. Ct. 502 (1997)

A prosecuting attorney commenced criminal proceedings against the plaintiff by filing



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customary in court documents, including a sworn probable cause certification that summarized the evidence. Based on the attorney's representation, the court determined probable cause existed and the plaintiff was subsequently arrested and spent a night in jail. Shortly thereafter, the charges were dismissed. The plaintiff brought a civil suit under 42 U.S.C. § 1983 against the prosecuting attorney, claiming that factual statements in the probable cause certification were inaccurate thus violating his constitutional right to be free of unreasonable searches and seizures. The prosecutor requested that the suit be dismissed on the grounds that she was protected by the doctrine of absolute immunity. The lower federal courts, including the Ninth Circuit Court of Appeals, denied the motion for summary judgment.⁴ The prosecutor subsequently petitioned the Supreme Court for review. The Supreme Court agreed to hear the case in order to resolve a conflict that existed in the federal circuit courts on whether a prosecutor enjoys absolute immunity for conduct in obtaining arrest warrants.

In denying the prosecutor's request, the Supreme Court revisited its earlier decisions concerning prosecutorial immunity and concluded that the act of swearing to a probable cause statement is for a witness, such as an investigating officer, and not an exercise of an advocate's professional judgment. The Court distinguished the actions of the prosecutor in this case from those of the prosecutor in *Imbler v. Pachtman*,⁵ where the Court held that a prosecutor should enjoy



Photo © Ron Dunnivan

absolute immunity when performing traditional advocate functions, such as deciding whom to prosecute. In contrast with the actions of the prosecutor in *Imbler*, the prosecutor in *Kalina* sought absolute protection for performing a function that commonly is performed by witnesses, the swearing to facts. The Court noted that had she sought protection for decisions made while exercising her professional judgment, such as determining whether sufficient evidence existed to establish probable cause and proceed with prosecution or selecting what facts to include in the certification before the court, the protection of absolute immunity would be appropriate. In performing a function that is normally performed by a law enforcement officer, the Court concluded that absolute immunity is not appropriate, and that in such cases, prosecutors, like law enforcement officers, should only be afforded a qualified immunity.



***U.S. v. Ramirez,*
118 S. Ct. 992 (1998)**

This case represented the third recent opinion of the Supreme Court concerning the manner in which law enforcement officers make entry into a dwelling to execute an arrest or a search. In the first case, the Court held that the manner in which an officer makes entry into a dwelling is a factor in the reasonableness of the search.⁶ In the second case, the Court addressed circumstances that would justify an unannounced entry. The

Court reasoned that unannounced entries are justified if officers have reasonable suspicion that knocking and announcing would “be dangerous or futile, or...inhibit the effective investigation of the crime.”⁷

In *Ramirez*, the Supreme Court unanimously rejected the Ninth Circuit’s conclusion that the Fourth Amendment imposes a higher standard on officers than reasonable suspicion when a “no-knock” entry results in damage to property. In this case, law enforcement officers received reliable information that a fugitive, who had escaped from custody by attacking a deputy sheriff, was staying at a residence occupied by Mr. Ramirez. Additionally, they had information that there were weapons and drugs stashed in the garage attached to the Ramirez residence. Based on this information, including the violent criminal history of the fugitive, officers obtained a no-knock warrant to enter the residence to locate the fugitive. Early the next morning, the arrest team set up to execute the warrant. The plan was to establish a perimeter and use a loudspeaker to call out the fugitive. Just prior to the call-out and in accordance with the plan, one of the officers broke a window in the garage and pointed his weapon into the area in order to dissuade anyone from rushing into the garage to retrieve the weapons the officers had information were inside. Upon hearing the shattering glass, Mr. Ramirez seized a pistol and fired it in the direction of the garage. Ultimately, the officers were able to gain control of the situation. Mr. Ramirez was placed in custody af-

ter it was learned he was a felon and thus unlawfully had the weapon. He moved to suppress the discovery of the weapon.

The Ninth Circuit Court of Appeals concluded that the weapon was the fruit of an unlawful search by the officers and thus should be suppressed. The court stated that while a “mild exigency” sufficiently justifies an unannounced entry where no property is damaged, if the government is going to damage property during the entry, more than a mild exigency is required.⁸ The Supreme Court rejected this reasoning and held that whether reasonable suspicion to make an unannounced entry exists is in no manner dependent on whether officers must damage property in order to make the entry. The Court noted that excessive or unnecessary damage to property may violate the Fourth Amendment, but whether property is damaged or not, the standard governing an unannounced entry remains the same—the existence of a reasonable suspicion to announce would be dangerous, futile, or inhibit the investigation.



***Crawford-El v. Britton*,
118 S. Ct. 1584 (1998)**

A divided Supreme Court held that the Circuit Court of Appeals for the District of Columbia exceeded its authority when it ordered the plaintiff in a 42 U.S.C. § 1983 action to offer clear and convincing evidence of a public official’s unconstitutional motive in order to defeat the defendant’s request for summary judgment. The Court concluded that neither the federal civil rights statute nor the federal rules of civil procedure support the circuit court’s conclusion that a heightened pleading standard, clear and convincing evidence, is proper in a case involving an alleged unconstitutional motive.

The plaintiff in this case, serving a life sentence in a District of Columbia correctional facility, had a reputation for filing numerous lawsuits and assisting other prisoners with their suits and was described by the Supreme Court as a “litigious and outspoken prisoner.”⁹ Due to overcrowding in the prison, the plaintiff was transferred to several facilities throughout the country until he was placed permanently in a facility in Florida. During these transfers, three boxes of personal belongings were transferred separately, ultimately ending up back at the D.C. facility. The defendant contacted the plaintiff’s brother-in-law, also an employee in the corrections office, and requested that he retrieve the boxes. The boxes were then shipped to the Florida facility and eventually returned to the plaintiff. The plaintiff alleged that the defendant deliberately misdirected the

boxes in retaliation for the plaintiff's outspoken comments to a newspaper reporter on the issue of prison overcrowding. Accordingly, the plaintiff filed an action under 42 U.S.C. § 1983, arguing that the diversion of his property was improperly motivated by a desire to retaliate against him for exercising his First Amendment rights. The defendant denied any improper motive and moved for dismissal prior to the initiation of discovery.

The circuit court of appeals, concerned over the social costs associated with this type of litigation, imposed a heightened pleading burden on the plaintiff, requiring that the plaintiff produce "clear and convincing evidence" of the improper motive. The case was appealed to the Supreme Court, which held that the circuit court of appeals had no authority to impose this type of heightened standard on the plaintiff.

Like the lower court, the Supreme Court also expressed concern with the large number of civil rights actions filed by prisoners, recognizing that more attention to this issue may be appropriate. The Court stated, "Many of [the lawsuits] are plainly frivolous and some may be motivated more by a desire to obtain a 'holiday in court' than by a realistic expectation of tangible relief."¹⁰ However, assuming there is a problem with such litigation, the Court cited Congress as the appropriate forum for undertaking reform in this area. For example, Congress demonstrated its sensitivity to this problem in 1996 with the passage

of the Prison Litigation Reform Act.

The Court also pointed out that the civil rights statute currently contains provisions that courts could use to protect public officials from the burdens of defending frivolous suits. A federal court has authority to do the following:

- 1) consider a defendant's motion for a more definite statement of facts;
- 2) resolve the issue of qualified immunity;
- 3) narrowly tailor discovery and dictate the time, place, and manner of discovery;
- 4) summarily dismiss the claim; and
- 5) impose sanctions on a plaintiff for filing frivolous papers that lack factual support or are filed for an improper purpose, such as harassment.



LaChance v. Erickson,
118 S. Ct. 753 (1998)

As comprehensively discussed in the article "Ensuring Officer Integrity and Accountability" in the August 1998 issue of the *FBI Law Enforcement Bulletin*,¹¹ this case represented a unanimous rejection by the Supreme Court of the idea that due process includes the right to falsely deny allegations of misconduct. In this case, a U.S. Department of the Treasury supervisory police officer was investigated for his role in a series of "mad laughter" telephone calls to fellow employees. During the investigation, he was interviewed and denied any involvement in the calls. Later, when the allegations proved true, the agency discharged him for falsely denying the allegations. While he was removed for the falsification charge, he would merely have been suspended for the misconduct charge.

The U.S. Circuit Court of Appeals for the Federal Circuit agreed with the discharged employee that due process permits him to respond to the charges in a meaningful way, including the right to falsely deny allegations of misconduct. The Supreme Court rejected this argument, holding that due process does give an individual the right to notice and a meaningful opportunity to be heard but not the right to falsely deny. An employee may not provide a false statement in response to a question; instead, the employee can challenge the employer's right to ask a question by, for example, refusing to answer unless compelled to do so in which case the law relating to the

privilege against self-incrimination would apply.



***Oncala v. Sundowner Offshore Services, Inc.*,
118 S. Ct. 998 (1998)**

An offshore oil rig worker resigned from his job after being subjected to sexual harassment and verbal abuse by coworkers, also males. He subsequently filed a complaint in federal court alleging that he was discriminated against in his employment because of his sex in violation of Title VII of the Civil Rights Act. The district court dismissed the complaint, holding that Title VII does not encompass same-sex harassment. The Fifth Circuit Court of Appeals, relying on its earlier decision in *Garcia v. Elf Atochem North America*,¹² upheld the district court's dismissal. The Supreme Court granted certiorari and reversed, concluding that same-sex harassment is actionable under Title VII.

The conduct targeted by the prohibitions of Title VII

includes discriminating against an individual in the terms, conditions, or privileges of employment because of the individual's sex. As the Supreme Court has stated previously, one of the conditions of employment is the right to be free from discriminatory intimidation, insult, and ridicule that is sufficiently pervasive as to alter the conditions of one's employment. The Court reasoned that individuals can be just as humiliated and abused by a person of the same sex as by a person of the opposite sex, just as they can be discriminated against by a member of their own race. The Court found "no justification in the statutory language or our precedents for a categorical rule excluding same-sex harassment claims from the coverage of Title VII."

The Court also addressed concerns expressed by some that Title VII would be transformed into a general civility code for the workplace. The Court stated that this risk is no greater for same-sex than for opposite-sex harassment cases. Title VII only reaches conduct that is so severe and pervasive as to alter the conditions of employment and create an objectively hostile atmosphere. The Court emphasized the importance of the objective element to the plaintiff's complaint, as well as consideration of the context in which the behavior occurs as a way to "ensure that courts and juries do not mistake ordinary socializing in the workplace—such as male-on-male horseplay or intersexual flirtation—for discriminatory 'conditions of employment.'"¹³

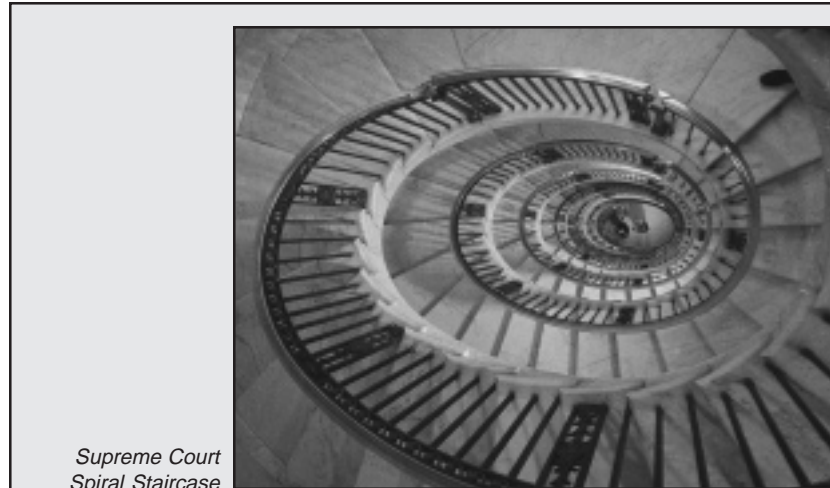


***Burlington Industries v. Ellerth*,
118 S. Ct. 2257 (1998)**

The plaintiff quit her job after being subjected to repeated offensive remarks and gestures by her supervisor. The conduct essentially consisted of numerous offensive comments in addition to a few incidents that could be described as threats to withhold tangible benefits of employment unless she submitted to a sexual act. The threats were never carried out and it appeared as though the plaintiff suffered no tangible loss and was, in fact, promoted once. The plaintiff ultimately resigned and subsequently brought a Title VII action against her employer. The lower federal courts disagreed on whether the conduct at issue could be described as quid pro quo harassment since the conduct consisted of unfulfilled threats, and if it was not quid pro quo, whether vicarious liability is the appropriate legal standard to apply. The Supreme Court agreed to hear the case in order to define the appropriate legal standard to apply in assessing employer liability in a sexual harassment case.

The Court accepted the premise that the unfulfilled threats did not constitute quid pro quo harassment; however, the conduct did create a hostile work environment. The Court then noted that previously this distinction between types of harassment would dictate the legal standard that a court would apply. The Court concluded that regardless of the type of harassment, if the harasser is the victim's supervisor, the employer ought to be held vicariously liable for the improper sexual conduct of the supervisor. The Court reached this conclusion by applying common-law agency principles. The Court opined that because a supervisor is charged with maintaining a safe, productive environment and is given authority over subordinates to accomplish this task, it is logical to conclude that conduct by the supervisor that fosters a hostile environment and affects the well-being of employees is conduct that the employer should reasonably anticipate. As such, the burden and cost associated with such conduct should fall on the employer rather than the victim. The Court further commented that the nature of the supervisor-subordinate relationship warrants a conclusion that vicarious liability on the part of the employer is appropriate for the harassing conduct attributable to the supervisors selected, trained, and managed by the employer.

However, while vicarious liability is the appropriate standard, the employer may assert an affirmative defense subject to proof by a preponderance of the evidence. The affirmative defense has two elements: 1) that the employer



exercised reasonable care to prevent and correct improper conduct; and 2) that the plaintiff unreasonably failed to take advantage of the preventive and corrective opportunities provided by the employer. The defense is not available if the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable assignment.



Faragher v. Boca Raton,
118 S. Ct. 2275 (1998)

While this opinion was authored by a different Justice, it offers a discussion of the principles of sexual harassment litigation very similar to that in *Burlington*

Industries v. Ellerth. The Supreme Court reiterated that vicarious liability is the appropriate legal theory on which to assess liability for the harassing conduct of supervisory employees. If the allegations involve the fostering of a hostile work environment as opposed to quid pro quo harassment, the employer is able to assert an affirmative defense.

After resigning her position as a lifeguard for the City of Boca Raton, Florida, plaintiff brought a civil action under Title VII, alleging that conduct directed to her by her immediate supervisors created a sexually hostile atmosphere. She alleged that she was subjected to uninvited and offensive touching and frequent lewd and offensive remarks. In addition to naming her immediate supervisors in the suit, she also sought a judgment against the city for nominal damages and other costs associated with the suit. The lower federal courts determined that the conduct of her supervisors was sufficiently severe and pervasive so as to alter the conditions of her employment. However, the court of appeals concluded that the city should not

be held liable because the supervisors were not acting within the scope of their employment when engaging in the offensive conduct, thus their conduct could not be imputed to the city.

The Supreme Court reversed, applying traditional agency principles discussed in *Burlington Industries*, concluding that vicarious liability is appropriate. Holding the employer accountable for the conduct of its supervisors is appropriate, especially in the context of a superior-subordinate relationship where the victim/subordinate is reluctant to confront the harasser. As Justice Souter stated in his opinion, "When a fellow employee harasses, the victim can walk away or tell the offender where to go, but it may be difficult to offer such responses to a supervisor."⁴ While vicarious liability is the appropriate standard to impose for misuse of a supervisor's authority, the employer does have available an affirmative defense when the employee suffers no adverse tangible job consequence.

Applying these principles to the case at hand, the Supreme Court concluded that the degree of hostility and offensive conduct caused by the plaintiff's supervisors was sufficiently severe and pervasive as to be actionable under Title VII. Furthermore, because the district court found that the employer failed to disseminate its anti-harassment policy, to monitor the conduct of its supervisors, or indicate to employees that they could bypass their supervisor if they wished to file a grievance, the affirmative defense was not available to the city.



1998-1999 Term: Cases Granted Review

The Supreme Court carried over several cases from last term, some of which are of particular interest to law enforcement. During the next term, the Supreme Court will consider *Chicago, Illinois v. Morales*,¹⁵ involving the constitutionality of a municipal ordinance authorizing police officers to order individuals they reasonably believe to be gang members to disperse when loitering together in public and making it a criminal offense to fail to comply with such orders.

The Court also will consider the constitutionality of a state statute that permits officers to search a vehicle involved in a traffic violation that would constitute grounds for an arrest¹⁶ and whether procedural due process requires that the government provide individuals with guidance on post-deprivation remedies for return of property seized during the execution of a search warrant.¹⁷

The Court also will consider the extent to which a guest invited

into an apartment for a few hours has standing to challenge a search by the government and whether an unenhanced observation by an officer outside an apartment window while standing in a publicly accessible area but within an area regarded as curtilage constituted a search.¹⁸ ♦

Endnotes

¹ *Hodari D. v. California*, 499 U.S. 621 (1991); *Brower v. Inyo County, California*, 489 U.S. 593 (1989).

² *County of Sacramento v. Lewis*, 118 S.Ct. 1708, 1718 (1998) (quoting *Daniels v. Williams*, 474 U.S. 327, 332 (1986)).

³ *Lewis* at 1721, n.14, (citing *Collins v. Harker Heights*, 503 U.S. 115, 129 (1992)) (decisions about liability standards that "involve a host of policy choices...must be made by locally elected representatives [or by courts enforcing the common law of torts], rather than by federal judges interpreting the basic charter of Government for the entire country.").

⁴ *Fletcher v. Kalina*, 93 F.3d 653 (1996); *Joseph v. Patterson*, 795 F.2d 549 (6th Cir. 1996), cert. denied, 481 U.S. 1023 (1987).

⁵ 424 U.S. 409 (1976).

⁶ *Wilson v. Arkansas*, 115 S. Ct. 1914 (1995).

⁷ *Richards v. Wisconsin*, 117 S. Ct. 1416, 1421 (1997).

⁸ 91 F.3d 1297 (9th Cir. 1996).

⁹ *Crawford-El v. Britton*, 118 S. Ct. 1584, 1587 (1998).

¹⁰ *Id.* at 1596 (quoting *Harris v. Pate*, 440 F.2d 315, 320 (7th Cir. 1971)).

¹¹ D. L. Schofield, "Ensuring Officer Integrity and Accountability," *FBI Law Enforcement Bulletin*, August 1998, 28-32.

¹² 28 F.3d 446 (5th Cir. 1994).

¹³ *Oncala* at 1003.

¹⁴ *Faragher* at 2290.

¹⁵ 177 Ill.2d 440, 687 N.E.2d 53 (1997), cert. granted, 118 S.Ct. 1510 (1998).

¹⁶ *Knowles v. Iowa*, 569 N.W.2d 601 (Iowa 1997), cert. granted, 118 S.Ct. 1298 (1998).

¹⁷ *West Covina v. Perkins*, 113 F.2d 1004 (9th Cir. 1997), cert. granted, 118 S.Ct. 1690 (1998).

¹⁸ *Minnesota v. Carter*, 569 N.W.2d 169 (Minn. 1997); *State v. Johns*, 569 N.W.2d 180 (1997), cert. granted, 118 S.Ct. 1183 (1998).

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 Smith

While driving to work, Officer Jamel Smith of the Cincinnati, Ohio, Police Department observed two armed subjects entering a bank. Immediately, Officer Smith advised the police dispatcher of an armed robbery in progress. After the subjects exited the bank, Officer Smith pursued them on foot, until they fled in an awaiting vehicle. Shortly after Officer Smith radioed the description of the getaway vehicle, responding officers apprehended the suspects and recovered over \$20,000. Officer Smith's accurate observations and dedication to duty prevented the robbers from escaping.



Patrolman McClay

Patrolman Bradlee McClay of the Township of South Strabane Department of Police in Washington, Pennsylvania, responded to a residential fire. At the scene, neighbors advised Patrolman McClay that they knew an elderly resident was alone inside the dwelling. Patrolman McClay kicked in the front door of the smoke-filled house and made three unsuccessful attempts to locate the elderly resident. On his fourth attempt, he found the man, who was unable to walk, and carried him to safety. Without Patrolman McClay's persistence and selflessness, the elderly man would not have survived.



Officer VandenBosch

Driving to work, Officer Thomas VandenBosch of the Rockford, Michigan, Police Department saw two males fighting on the shoulder of a local expressway. As he stopped to investigate, one man ran toward him shouting that the other had a knife. Before Officer VandenBosch could exit his vehicle, the other man ran up and began slashing at him with the knife through the vehicle's open door. Ignoring the officer's orders to drop the knife, the man stabbed Officer VandenBosch in the leg. Officer VandenBosch shot the man, who fled the scene but was captured nearby. Officer VandenBosch's courageous intervention undoubtedly saved the intended victim's life.

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