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## BOOK REVIEW

### THE PROMISE AND SHORTCOMINGS OF FORENSIC LINGUISTICS

Tom Lininger†

CREATING LANGUAGE CRIMES: HOW LAW ENFORCEMENT USES (AND MISUSES) LANGUAGE. By *Roger W. Shuy*. New York: Oxford University Press, 2005. Pp. 185. \$29.95.

#### INTRODUCTION

When many people think of expert testimony in the criminal justice system, they imagine testimony involving the forensic techniques employed by the fictional investigators on the television show *CSI: Crime Scene Investigation*.<sup>1</sup> In a high-profile case, jurors expect to hear about DNA testing, ballistics analysis, fingerprint matching, handwriting comparisons, and autopsies.<sup>2</sup> Indeed, jurors have developed a near reverence for such expert testimony in criminal trials.<sup>3</sup>

Professor Roger Shuy would add a new category of forensic expertise to the pantheon: linguistics. In his latest book, *Creating Language Crimes: How Law Enforcement Uses (and Misuses) Language*, Professor Shuy points out that police, either by themselves or through their cooperating witnesses, have been known to manipulate language

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<sup>1</sup> See, e.g., Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 925 (2006) ("Many citizens' sense of the criminal justice system comes from movies or television shows that build open-and-shut cases on forensic evidence and end with swift jury trials."); Jamie Stockwell, *Defense, Prosecution Play to New 'CSI' Savvy*, WASH. POST, May 22, 2005, at A1 ("Prosecutors say jurors are telling them they expect forensic evidence in criminal cases, just like on their favorite television shows, including 'CSI: Crime Scene Investigation.'").

<sup>2</sup> See, e.g., Tom R. Tyler, *Viewing CSI and the Threshold of Guilt: Managing Truth and Justice in Reality and Fiction*, 115 YALE L.J. 1050, 1053 (2006) (citing jurors' complaints over a lack of DNA, fingerprint, and gunshot residue evidence in Robert Blake's criminal trial); Rodney Uphoff, *Convicting the Innocent: Aberration or Systemic Problem?*, 2006 WIS. L. REV. 739, 783 n.304 ("Prosecutors worry that the 'CSI effect' places a heightened burden on them to produce forensic evidence.").

<sup>3</sup> See Andrew P. Thomas, *The CSI Effect: Fact or Fiction*, YALE L.J. POCKET PART (2006), <http://thepocketpart.org/2006/02/thomas.html> (reporting that in a survey of 102 Maricopa County prosecutors "38% believed they had at least one trial that resulted in either an acquittal or hung jury because forensic evidence was not available," even though the respondents felt that the other evidence in the record was sufficient to support a conviction).

in their undercover investigations.<sup>4</sup> The solution, according to Professor Shuy, is for defense attorneys to offer expert testimony by forensic linguists who can expose the misuse and misinterpretation of language by undercover agents.<sup>5</sup> With the aid of an expert linguist, the defense can show that the recorded language does not necessarily evince the defendant's guilt.<sup>6</sup>

Professor Shuy, himself an expert in linguistics,<sup>7</sup> deserves praise for drawing attention to the conversational strategies through which law enforcement officers create the appearance of a suspect's guilt. But Professor Shuy places too much faith in the ability of expert testimony to solve this problem. Experts can obfuscate as well as elucidate. In many cases, lay jurors are in the best position to discern the meaning of language, and reliance on experts to infer the defendant's intent in such cases would usurp the jury's fact-finding role. In any event, the increased importance of forensic experts would further skew the criminal justice system in favor of wealthy defendants who can afford to retain such experts, and would decrease the odds of acquittal for indigent defendants.<sup>8</sup>

This Book Review will proceed in three steps. First, I will examine the evidence and arguments that Professor Shuy presents, and I will suggest that his insights have made an important contribution to our understanding of undercover operations. Second, I will respect-

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<sup>4</sup> See generally ROGER W. SHUY, *CREATING LANGUAGE CRIMES: HOW LAW ENFORCEMENT USES (AND MISUSES) LANGUAGE passim* (2005). Professor Shuy does not claim that this language manipulation occurs all the time, but rather that it is unfair when it does occur. He writes:

I make no claim that all, or even many, undercover operations carried out by law enforcement agencies regularly engage in the practice of creating false illusions about their targets' guilt. However, in the quarter century that I have been analyzing tape-recorded sting operations and police interrogations, I have seen an ample number of instances that qualify as the kind of linguistic unfairness that can land people in prison when they only thought they had said something noninculpatory and benign.

*Id.* at x.

<sup>5</sup> See *id.* at 173-77.

<sup>6</sup> See *id.* at 184.

<sup>7</sup> Professor Shuy is Emeritus Distinguished Research Professor of Linguistics at Georgetown University. He is not a lawyer. He has a Ph.D. in English and linguistics. He has written five books on linguistics and the law. SHUY, *supra* note 4; ROGER W. SHUY, *THE LANGUAGE OF CONFESSION, INTERROGATION AND DECEPTION* (1998); ROGER W. SHUY, *LANGUAGE CRIMES* (1993); ROGER W. SHUY, *LINGUISTIC BATTLES IN TRADEMARK DISPUTES* (2002); ROGER W. SHUY, *LINGUISTICS IN THE COURTROOM: A PRACTICAL GUIDE* (2006); *accord* Curriculum Vitae of Roger W. Shuy, Ph.D., [http://www.rogershuy.com/pdf/RWS\\_curriculum\\_vitae.pdf](http://www.rogershuy.com/pdf/RWS_curriculum_vitae.pdf) (last visited Feb. 19, 2007).

<sup>8</sup> See Uphoff, *supra* note 2, at 782 ("[A]ccess to critical expert assistance is very uneven and largely illusory . . ."); ABA STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, *GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE* 10-11 (2004), available at <http://www.abanet.org/legalservices/sclaid/defender/brokenpromise/fullreport.pdf> (discussing disparities in the availability of experts and resulting unfairness).

fully disagree with Professor Shuy about the value of testimony by expert linguists in many categories of criminal cases. Third, I will propose other means through which the criminal justice system can avoid wrongful convictions based on manipulative conversational strategies used by police.

While my arguments will occasionally clash with Professor Shuy's, the overall tone of this Book Review is adulatory. Professor Shuy richly deserves his reputation as America's top forensic linguist. That his latest book provokes discussion—and respectful disagreement—is but a testament to his scholarly stature.

## I

### PROFESSOR SHUY'S EVIDENCE AND ARGUMENT

A brief comment about Roger Shuy's credentials should preface any review of his scholarship. Professor Shuy is to linguistics what Barry Scheck is to DNA evidence.<sup>9</sup> The analogy is fitting not only because of these two experts' unparalleled experience (Professor Shuy has testified in approximately five hundred criminal cases), but also because of their shared inclination to assist the defense (Professor Shuy has never testified for the government, and he has consulted for the government in only eleven of his five hundred cases).<sup>10</sup>

Professor Shuy's central concern is the "way undercover operatives in a sting case can bend and twist conversations to suit the goals of an eventual prosecution."<sup>11</sup> He focuses on investigations of fraud, bribery, solicitation, threats to witnesses, and other crimes committed through the utterance of words.<sup>12</sup> These crimes are, in effect, "language crimes."<sup>13</sup>

Professor Shuy offers a taxonomy of the conversational strategies through which police "create" language crimes in recorded conversations.<sup>14</sup> First, an undercover agent or informant might propose a criminal enterprise in a deliberately ambiguous manner to obtain the assent of a target, thus creating the appearance of a crime when the

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<sup>9</sup> Barry Scheck teaches as a clinical professor at the Benjamin N. Cardozo School of Law and is widely regarded as a leading figure in the use of forensics in criminal defense. He is perhaps best known for his roles as a co-founder of the Innocence Project and as a member of O.J. Simpson's successful defense team. See Cardozo Full-Time Faculty, [http://www.cardozo.yu.edu/faculty\\_staff/fulltime\\_QZ.asp](http://www.cardozo.yu.edu/faculty_staff/fulltime_QZ.asp) (last visited Mar. 2, 2007); The Innocence Project: About Us, <http://www.innocenceproject.org> (last visited Mar. 2, 2007). He "is known for his landmark litigation setting standards for forensic applications of DNA technology." Cardozo Full-Time Faculty, *supra*. Scheck has also "represented such notable clients as Hedda Nussbaum, . . . Louise Woodward, and Abner Louima." *Id.*

<sup>10</sup> SHUY, *supra* note 4, at 180.

<sup>11</sup> *Id.* at 5.

<sup>12</sup> See *id.* at 6.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 13–29.

target may in fact have lacked criminal intent.<sup>15</sup> Second, the agent or informant might block the target's words, either by "[c]reating static on the tape," by "[i]nterrupting or overlapping the target's words," or by "[s]peaking on behalf of the target."<sup>16</sup> A third manipulative strategy is to conceal important information so that the target does not fully appreciate the significance of the matters under discussion.<sup>17</sup> Fourth, the government's operative might simply refuse to acquiesce when the target says "no."<sup>18</sup> Fifth, the undercover agent or informant might restate the target's words in a misleading manner.<sup>19</sup> Finally, the most blatant strategy entails "scripting" the conversation by telling the target what to say—for example, by preparing the target for a meeting with a third party.<sup>20</sup>

As a general matter, Professor Shuy is leery of the tape recorder. It can be shut on or off at the whim of an undercover police officer—or, worse still, an informant.<sup>21</sup> A tape recorder picks up only those conversations in close proximity to the microphone. Consequently, the agent wearing the microphone may subtly manipulate the recording by turning away from the target or otherwise impeding the device's ability to record the conversation accurately.<sup>22</sup> An audio recording does not capture the nuances of gestures or facial expressions.<sup>23</sup> Moreover, even under the best of circumstances, audio recording technology generally cannot accurately preserve all the words in a conversation.<sup>24</sup>

A substantial portion of Professor Shuy's book offers illustrations from real-life cases in which informants secretly recorded the targets

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<sup>15</sup> See *id.* at 15–16 (noting that an agent might, for example, refer to a potential crime only as "it" or "the thing").

<sup>16</sup> *Id.* at 16–20.

<sup>17</sup> See *id.* at 24–25.

<sup>18</sup> See *id.* at 26.

<sup>19</sup> See *id.* at 26–27.

<sup>20</sup> *Id.* at 28–29.

<sup>21</sup> See *id.* at 20–21 (noting that the use of conversations tape-recorded by informants is especially problematic because many "[u]nscrupulous cooperating witnesses . . . have already been caught in a crime themselves").

<sup>22</sup> See *id.* at 17 ("The persons wearing the hidden microphone have control and power over what is being recorded. They can even move away from a conversation if it isn't going the way they want it to go. Many mikes are sensitive to movement sounds and produce a kind of static noise when the wearers move around. If they chose to move at a crucial point, the resulting noise can successfully block on tape what the target is saying.").

<sup>23</sup> Cf. *id.* at 3 (noting that audio recordings omit "important clues about nonverbal communication").

<sup>24</sup> For example, a tape recording sometimes cannot accurately capture a conversation in which two or more people speak simultaneously. See *id.* at 17. Professor Shuy notes that such interruption and overlap occur universally in human conversations. See *id.*

of sting operations.<sup>25</sup> For example, he highlights a solicitation-of-murder case in which the informant used the “hit and run” technique while recording the defendant’s allegedly inculpatory comments.<sup>26</sup> Through this technique, the informant captures a brief excerpt of recorded conversation that serves the government’s purpose and then quickly leaves before the target can clarify his meaning.<sup>27</sup> Professor Shuy also focuses on a homicide investigation in which the informant repeatedly retold the story of an alleged crime in terms that inculpated the target, hoping that the target might eventually assent to the incriminating version.<sup>28</sup> Another chapter covers an investigation of business fraud in which an informant recorded the target’s reactions to eleven fairly innocuous statements that, in the aggregate, created an impression of fraudulent intent.<sup>29</sup> Additionally, Professor Shuy recounts how an informant in a bribery case selectively recorded portions of his conversations with a target by purposefully creating electronic static to create an inference of guilt.<sup>30</sup>

Professor Shuy’s examples from real-life cases involve undercover officers as well as informants. In an obstruction of justice investigation, an undercover officer camouflaged the criminal nature of his proposition in order to induce the target’s assent.<sup>31</sup> Police employed a similar tactic in a prosecution for purchasing stolen property: to conceal the fact that goods were stolen, an undercover agent did not explicitly discuss the source of the property or the manner in which it had been obtained.<sup>32</sup> Another case involved an undercover officer who, while investigating a murder-for-hire, offered to kill the husband of the target’s daughter and repeatedly refused to take “no” for an answer.<sup>33</sup> In one particularly galling example, police interrogated a mentally infirm murder suspect for five consecutive days but recorded a cumulative total of only four hours’ worth of audio tape.<sup>34</sup> They also used frequent interruptions, inaccurate restatements, and “scripting” to create the impression that the target had confessed.<sup>35</sup>

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<sup>25</sup> Each of Chapters 4–15 focuses on a specific case illustrating the use of conversational strategies to create the illusion that the defendant committed a language crime. *See id.* at 41–164.

<sup>26</sup> *Id.* at 44–49.

<sup>27</sup> *See id.* at 44, 47, 49 (“After he put what he considered the allegedly incriminating words on the tape, McCrory quickly ran away, saying ‘I gotta go.’”).

<sup>28</sup> *See id.* at 51–57.

<sup>29</sup> *See id.* at 69–80.

<sup>30</sup> *See id.* at 89–98.

<sup>31</sup> *See id.* at 109–16 (describing an investigation of alleged obstruction of justice by a defense attorney who had assented when an undercover investigator used benign language such as “retrieve” and “make copies” rather than stark descriptions of obstructive conduct).

<sup>32</sup> *See id.* at 117–27.

<sup>33</sup> *See id.* at 139, 153–57.

<sup>34</sup> *See id.* at 159–64.

<sup>35</sup> *Id.*

Although Professor Shuy spends more time criticizing present law enforcement practices than offering solutions, one notion pervading his book is the salutary effect of expert testimony by linguists. Professor Shuy suggests that experts should review recordings carefully and point out manipulative conversational strategies to the jury.<sup>36</sup> Noting that "[l]inguists are trained to identify such conversational strategies and describe their overall significance to a given conversation,"<sup>37</sup> Professor Shuy believes that expert linguists can detect the purposeful use of ambiguity, interruption, overlapping, and other "blocking" strategies.<sup>38</sup> In virtually every case he cites, linguists insightfully expose the contrivances of undercover officers and informants.

More fundamentally, Professor Shuy suggests that as a general matter, proactive undercover operations are often too aggressive. He asserts that an ideal investigation would wait for the target to "self-generate[ ]" evidence of his guilt.<sup>39</sup> While admitting that "[i]t will normally take longer this way," he concludes that "the evidence elicited can be much stronger."<sup>40</sup> If the target is not forthcoming, the undercover agent or informant should "drop hints of illegality, hoping that the target[ ] will catch them and perhaps develop them further."<sup>41</sup> As a last resort, the government operative should simply propose a crime in unambiguous terms so that any recording made of the interaction will plainly reflect the target's acceptance or rejection of the proposal.<sup>42</sup>

There is a great deal of merit in Professor Shuy's analysis. The dynamics of controlled transactions are subtle. When police strive too zealously to capture guilt on tape, the recording takes on a life of its own. Rather than manifesting the defendant's criminal intent, the tape may simply reflect the officer's manipulation. Expert linguists can counteract this phenomenon by offering alternate explanations for defendants' statements or conduct. In this manner, the expert linguist may right the balance of power between an unsuspecting target who chooses words carelessly and an undercover agent or informant who is, in effect, conducting a surreptitious deposition.

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<sup>36</sup> See *id.* at 173-77.

<sup>37</sup> *Id.* at 175-76.

<sup>38</sup> *Id.* at 174-76.

<sup>39</sup> *Id.* at 9.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 8.

<sup>42</sup> See *id.*

## II

## CRITICISM OF PROFESSOR SHUY'S BOOK

I commend Professor Shuy for advancing our understanding of police tactics, but I think he overstates the benefit of involving linguistic experts in criminal trials. When the prosecution presents a surreptitiously recorded conversation, the key legal question is typically whether the language indicates that the defendant possessed the requisite mens rea.<sup>43</sup> Lay jurors are often capable of making this determination without the aid of an expert linguist. Lay jurors have used language all of their lives, allowing them to weigh the meaning of language without the aid of experts.<sup>44</sup> When the lay understanding of language diverges from the expert's understanding, the former carries more weight because the dispositive issue remains the lay defendant's understanding of the language at the time of its recording.<sup>45</sup> Indeed, if the language in question is so vague as to necessitate expert analysis, that fact alone likely means the prosecution will have trouble proving guilt beyond a reasonable doubt whether or not an expert linguist assists the defense.

Furthermore, allowing (or even requiring) such expert testimony might cause expert witnesses to usurp the jury's role in determining the meaning of language used in a controlled transaction. When an expert gives an opinion on a "conversational strategy," the expert invites jurors to disengage their common sense and rely instead on the expert's judgment.<sup>46</sup> It is this very concern about the intrusion of experts into the province of the jury that led Congress to amend Federal

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<sup>43</sup> See James F. Ponsoldt & Stephen Marsh, *Entrapment When the Spoken Word Is the Crime*, 68 FORDHAM L. REV. 1199, 1200–01 (2000) (noting that a defendant charged with a "spoken word" crime may be more likely than a typical defendant to raise a claim that he lacked the requisite mens rea by arguing that he sounds corrupt in this particular tape recording only because the prosecutor intentionally created that effect through his agent).

<sup>44</sup> See Dana R. Hassin, *How Much Is Too Much? Rule 704(b) Opinions on Personal Use vs. Intent to Distribute*, 55 U. MIAMI L. REV. 667, 669 (2001) (discussing the longstanding view that "absent inability or incompetence of jurors on the basis of their day-to-day experience and observation to comprehend the issues and to evaluate the evidence," the admission of expert testimony is "both unnecessary and improper"). Moreover, in contrast to their familiarity with language, lay jurors have not performed DNA testing, ballistics analysis, and other forensic techniques all of their lives; therefore, the Federal Rules of Evidence require expert testimony on these matters. See FED. R. EVID. 702 (barring the admission of expert testimony unless "scientific, technical, or other specialized knowledge will assist the trier of fact").

<sup>45</sup> The mens rea test inquires whether the defendant—generally a layperson rather than a linguistics expert—subjectively intended to commit a crime. Justin D. Levinson, *Mentally Misguided: How State of Mind Inquiries Ignore Psychological Reality and Overlook Cultural Differences*, 49 HOWARD L.J. 1, 4 (2005) ("[T]he mens rea inquiry looks at a specific actor's subjective mental state at the time of the crime. . . . [J]urors are asked to determine what the defendant was thinking at the time of the crime.").

<sup>46</sup> SHUY, *supra* note 4, at 13.



Rule of Evidence 704 so that experts could not opine on the mental state of the accused.<sup>47</sup>

Increased emphasis on expert linguists might also skew the criminal justice system further in favor of wealthy defendants who could afford to pay the expert's fees. Indeed, to the extent that judges and juries become accustomed to expert testimony on linguistics, the criminal justice system might begin not only to favor parties who employ linguists but also to oppose those who do not. Defendants might be able invoke a statutory or constitutional right to the assistance of experts in some circumstances, but this argument is rarely availing outside the context of death penalty cases.<sup>48</sup> We should be wary of extending the "CSI effect"<sup>49</sup> to linguistics: if jurors come to expect expert linguists, the absence of such linguists might appear to signal a party's weakness.<sup>50</sup>

Ironically, while Professor Shuy criticizes police for selectively presenting certain aspects of undercover conversations "to make their targets look guilty,"<sup>51</sup> Professor Shuy himself marshals evidence selectively. He offers illustrations that are horror stories rather than typical experiences. He omits the mundane stories of straightforward, controlled transactions in which targets plainly reveal their criminal intent.<sup>52</sup> It is understandable that Professor Shuy leaves out such stories—after all, he is not writing the textbook for Drug Investiga-

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47 Federal Rule of Evidence 704(b) states:

No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.

FED. R. EVID. 704(b).

Congress adopted this rule due to widespread public frustration with the use of expert testimony to establish the insanity of John Hinckley Jr., who shot President Ronald Reagan and Press Secretary James Brady. See Paul R. Rice & Neals-Erik William Delker, *Federal Rules of Evidence Advisory Committee: A Short History of Too Little Consequence*, 191 F.R.D. 678, 713–14 (2000). The premise of Rule 704(b) is that jurors who hear such expert testimony will simply adopt the expert's conclusions rather than closely scrutinizing the underlying evidence. See *id.*

48 See Michael J. Yaworsky, Annotation, *Right of Indigent Defendant in State Criminal Case to Assistance of Psychiatrist or Psychologist*, 85 A.L.R. 4th 19, § 12 (1991) (citing cases limiting the right to assistance by a psychiatrist to capital cases). See generally FED. R. EVID. 706 (allowing courts to appoint expert witnesses for indigent parties and provide these experts with reasonable compensation); CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE UNDER THE RULES 620 (5th ed. 2004) ("[C]ourts appoint experts only rarely, and Rule 706 is one of the least-used provisions in the Federal Rules.").

49 See *supra* notes 1–2.

50 See Thomas, *supra* note 3.

51 SHUY, *supra* note 4, at xiii.

52 See, e.g., Craig D. Uchida & Brian Forst, *Controlling Street-Level Drug Trafficking: Professional and Community Policing Approaches*, in DRUGS AND CRIME: EVALUATING PUBLIC POLICY INITIATIVES 77, 83–84 (Doris Layton MacKenzie & Craig D. Uchida eds., 1994).

tions 101—but the asymmetry of Professor Shuy's anecdotal evidence may say more about his own experience than about the general practices of police.

Finally, I take issue with Professor Shuy's general distrust of proactive investigative strategies. His preference for passive listening by undercover officers<sup>53</sup> is problematic. Officers who only listen to, rather than participate in, criminal activity may not be able to win the trust of the suspects under investigation. A passive investigative strategy would be inefficient and would likely require a greater amount of time to investigate each case, thereby reducing the number of investigations officers have the time and resources to conduct. If officers could not contrive circumstances that squarely present suspects with opportunities to commit crimes, they would likely hear only oblique references to criminal activity, and the evidence available to the prosecution would be much weaker. Indeed, why would a suspect reveal his or her criminal scheme to one who is uninvolved in the scheme? Further, the passive listening strategy may jeopardize the safety of officers: without the ability to control the precise date and time of the transaction under surveillance, police would be unable to intervene if something went wrong.<sup>54</sup>

In sum, while I do not challenge the validity of Professor Shuy's general thesis, I believe that his proposed method of relying on expert linguists and passive law enforcement techniques would not provide an ideal means of achieving his laudable goal: the protection of innocent defendants from conviction based on misleading conversational strategies. Additional measures are necessary to regulate overzealous undercover operations.

### III

#### ALTERNATIVE STRATEGIES

The best approach would blend Professor Shuy's suggestions with other strategies that could check inappropriate police conduct. This Book Review proposes four such reforms: (1) rejuvenation of entrapment law, (2) expanded use of videotape surveillance, (3) stricter enforcement of *Brady v. Maryland*<sup>55</sup> in investigations that utilize surreptitious recording, and (4) fortification of defendants' right to confront participants in recorded conversations.

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<sup>53</sup> See, e.g., SHUY, *supra* note 4, at 9 ("The best evidence [law enforcement officers] can get is when the target self-generates his own guilt without prompting or influence.").

<sup>54</sup> Professor Shuy himself recognizes that a strategy of passive listening by law enforcement officers is not feasible in every case. See *id.* at 8.

<sup>55</sup> 373 U.S. 83 (1963).

To begin with, courts and legislatures should revitalize entrapment law.<sup>56</sup> The conduct of which Professor Shuy complains is, in many cases, entrapment: government agents lure unwitting targets into linguistic traps that enable the government to convict suspects irrespective of their true mens rea. Indeed, the very title of Professor Shuy's book—*Creating . . . Crimes*—implies entrapment.

A robust entrapment doctrine should be able to reach such conduct. Where the government has used improper inducements to involve the defendant in criminal activity, the government should forfeit its right to prosecute that defendant.<sup>57</sup> For example, a court should not tolerate the prosecution of a target if the government has engaged in outrageous conduct such as badgering the target despite persistent rejections, "scripting" the target, or camouflaging a criminal plan to make it more attractive.

Unfortunately, the current doctrine of entrapment is anything but robust. The test for entrapment now focuses more on the predisposition of the accused than the government's conduct in inducing the criminal behavior at issue.<sup>58</sup> This emphasis on predisposition allows the prosecution to overcome an entrapment defense by showing that the defendant has a criminal history,<sup>59</sup> even when the government's inducement may be otherwise impermissible. An inducement-focused theory of entrapment would rein in manipulation of language and better protect suspects who have prior convictions.<sup>60</sup> Reconcep-

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<sup>56</sup> See *United States v. Ryan*, 289 F.3d 1339, 1343 (11th Cir. 2002) (explaining that a defense of entrapment may exist where the government induced the criminal activity in question and the defendant was not predisposed to commit the crime without that inducement).

<sup>57</sup> See *Jacobson v. United States*, 503 U.S. 540, 542 (1992) ("Because the Government overstepped the line between setting a trap for the unwary innocent and the unwary criminal, and as a matter of law failed to establish that petitioner was independently predisposed to commit the crime for which he was arrested, we reverse the Court of Appeals' judgment affirming his conviction." (quotations omitted)); *Sherman v. United States*, 356 U.S. 369, 372 (1958) ("The function of law enforcement is the prevention of crimes and the apprehension of criminals. Manifestly, that function does not include the manufacturing of crime.").

<sup>58</sup> See Bennett L. Gershman, Comment, *Abuse, the Judiciary, and the Ethics of Entrapment*, 91 YALE L.J. 1565, 1567–71 (1982) (explaining the courts' preference for the subjective theory of entrapment, which focuses on the defendant's predisposition, over the objective theory, which focuses on the nature of the government's inducement).

<sup>59</sup> An entrapment defense gives the government wide latitude to introduce evidence of a defendant's prior crimes, notwithstanding Federal Rule of Evidence 404(b) and its state counterparts. See *United States v. Johnson*, 439 F.3d 884, 889 (8th Cir. 2006) (quoting *United States v. Horn*, 277 F.3d 48, 57 (1st Cir. 2002)) (holding that a defendant who raises an entrapment defense foregoes protection of Rule 404(b)); Anthony M. Dillof, *Unraveling Unlawful Entrapment*, 94 J. CRIM. L. & CRIMINOLOGY 827, 840–41 (2004) ("[E]vidence such as past or subsequent criminal acts could support a finding of predisposition even in cases of high inducement."). Thus, the subjective theory of entrapment affords very little protection to defendants with criminal history.

<sup>60</sup> See Dillof, *supra* note 59, at 841.

tualized as a limit on government conduct rather than an excuse for defendants' misconduct, entrapment law could stop abusive law enforcement tactics without necessitating a difficult inquiry into defendants' intent.<sup>61</sup>

Entrapment law needs a complement in the ethical rules for lawyers. Rule 3.8 of the Model Rules of Professional Conduct should impose upon prosecutors a duty to refrain from charging cases that rest on evidence gained by entrapment.<sup>62</sup> Moreover, when prosecutors and law enforcement agents proactively work side by side, Rule 3.8 should require that prosecutors train officers concerning rules regulating entrapment. Ethical rules governing prosecutors in their investigative capacity can have a meaningful effect on the police officers with whom the prosecutors are working.<sup>63</sup>

As a second means for preventing manipulative conversational tactics, states should pass laws requiring videotaping in undercover investigations and interviews of suspects whenever practicable. This practice would diminish the importance of officers' use of conversational strategies and officers' characterizations of these conversations in court. Juries and judges could observe both the demeanor of the participants in the conversations and gestures that might convey meaning beyond the spoken words. Advances in technology allow police to install pinhole-sized cameras in purses and clothing, and videotaping interviews in a police station presents little technical difficulty. As such, if video evidence were available to a court in lieu of audio evidence, not only might the video relieve doubts about the voluntary nature of statements by suspects and witnesses,<sup>64</sup> but it could also lay

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<sup>61</sup> See *United States v. Russell*, 411 U.S. 423, 440–45 (1973) (Stewart, J., dissenting) (arguing that an “objective” approach to entrapment, focusing on the nature of the inducement, is preferable to a “subjective” approach, focusing on the defendant’s predisposition, because the objective approach is more likely to deter police misconduct).

<sup>62</sup> As currently written, Rule 3.8 imposes six duties on prosecutors: (a) to refrain from prosecuting charges not supported by probable cause, (b) to make “reasonable efforts” to ensure that the accused is advised of the right to counsel, (c) not to seek to obtain waivers of “important pretrial rights” by unrepresented defendants, (d) to disclose all exculpatory material, (e) not to subpoena lawyers to appear before the grand jury except in limited circumstances, and (f) to use caution in making public statements about pending matters. See MODEL RULES OF PROF’L CONDUCT R. 3.8 (2006).

<sup>63</sup> For example, when the Oregon Supreme Court interpreted the state’s bar code to prohibit lawyers from directing deceptive undercover investigations, this preclusion affected not only prosecutors but also law enforcement agents who depended on the authorization of prosecutors to proceed with their investigations. See *In re Gatti*, 8 P.3d 966, 976 (Or. 2000) (en banc); Tom Lininger, *Sects, Lies, and Videotape: The Surveillance and Infiltration of Religious Groups*, 89 IOWA L. REV. 1201, 1273–74 (2004) (observing that the *Gatti* rule had significantly affected police as well as prosecutors).

<sup>64</sup> The videotapes could show if the government agent used overbearing nonverbal cues, if the agent moved away from the suspect at crucial moments in order to prevent the microphone from picking up the conversation, if the suspect was in earshot when the agent explained the criminal proposition, and so on.

the groundwork for hearsay exceptions such as the “excited utterance” exception.<sup>65</sup> Indeed, agents might be deterred from misconduct in the first place if they know their conversations will be videotaped.<sup>66</sup>

Third, the courts should strengthen their enforcement of *Brady v. Maryland*<sup>67</sup> and its progeny—cases that require the government to disclose all exculpatory evidence to the defense. Courts have expanded the scope of the *Brady* obligation over the last three decades.<sup>68</sup> The next step is to infer that law enforcement officials have a duty under *Brady* to record all portions of conversations under surveillance, not just those portions that appear to favor the prosecution. Selective recording of conversations could deny the defense access to crucial exculpatory evidence. In addition, random audits of police investigations might improve compliance with *Brady* requirements.

Fourth, courts and legislatures should fortify the right of the accused to confront speakers who take part in recorded conversations. At present, certain circumstances excuse the government from producing informants who have spoken in tape recordings of controlled transactions. For example, if the government offers the target’s statements as admissions by a party opponent<sup>69</sup> and then characterizes the informant’s statements as nonhearsay offered to show the effect on the listener (e.g., to show which propositions posed by the informant the target affirmed or denied in his admissions),<sup>70</sup> the government

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<sup>65</sup> FED. R. EVID. 803(2). This exception allows the admission of a statement “relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition, or immediately thereafter.” *Id.* The videotape could help to establish the agitated state of the hearsay declarant.

<sup>66</sup> For further discussion of the value of videotaping police officers’ interaction with suspects and witnesses, see Tom Lininger, *Reconceptualizing Confrontation After Davis*, 85 TEX. L. REV. 271, 324 (2006). Some law enforcement agencies seem wary of the accountability that a universal recording requirement might bring. See Dennis Wagner, *FBI’s Policy Drawing Fire*, ARIZ. REPUBLIC, Dec. 6, 2005, at 1A, available at <http://www.azcentral.com/specials/special21/articles/1206fbtaping.html> (observing that the FBI’s current policy allows recording of interrogations only on a “limited, highly selective basis” (quotation omitted)).

<sup>67</sup> 373 U.S. 83, 87 (1963) (interpreting the Due Process Clause to require that the prosecution disclose any evidence in its possession that could exculpate the accused).

<sup>68</sup> See, e.g., *Kyles v. Whitley*, 514 U.S. 419, 437 (1995) (holding the prosecution accountable for all *Brady* material in the possession of law enforcement officials); *United States v. Bagley*, 473 U.S. 667, 683–84 (1985) (requiring the government to disclose evidence of charging or sentencing concessions to government witnesses if the evidence materially affected the outcome); *Giglio v. United States*, 405 U.S. 150, 153–55 (1972) (extending the *Brady* rule to evidence that could be used to impeach government witnesses).

<sup>69</sup> Admissions by a party opponent are not hearsay pursuant to Federal Rule of Evidence 801(d)(2) and its state counterparts.

<sup>70</sup> The definition of hearsay excludes a statement offered for a purpose other than to establish the truth of the matter asserted therein. See FED. R. EVID. 801(c) (defining hearsay as an out-of-court statement “offered in evidence to prove the truth of the matter as-

could evade its obligation to produce the informant for cross-examination. Alternately, if the informant did not turn state's evidence until after the recorded conversation, his involvement in the conversation may amount to a co-conspirator statement, which is not subject to the Confrontation Clause.<sup>71</sup> These loopholes in confrontation law are unfortunate given the urgent need to resolve ambiguities in recorded conversations. A better approach would be to require, perhaps by statute, that the government produce for cross-examination any speaker who took part in a recorded conversation, unless the government can show that such a speaker is unavailable.<sup>72</sup>

### CONCLUSION

The purpose of language is to communicate the speaker's intent, but language cannot serve this purpose when the listener manipulates the message. Professor Shuy has helped to show the pernicious effect of conversational strategies that police use in undercover investigations. These strategies can create the appearance of a target's guilt when in fact the target lacks the requisite criminal intent to be guilty of a crime.

Professor Shuy is correct that expert linguists could help to expose such conversational strategies, but other reforms could prove

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served"). Arguably, then, a proponent who introduces an out-of-court statement to show its effect on the listener or reader is using the statement for a purpose other than to prove the statement's assertive aspect. See MUELLER & KIRKPATRICK, *supra* note 48, at 126 (stating that the definition of hearsay excludes any statement offered for its effect on the listener or reader). Courts generally agree that no confrontation right attaches to statements that are not offered for their truth. See *Crawford v. Washington*, 541 U.S. 36, 59 n.9 (2004) ("The [Confrontation] Clause also does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted."); *United States v. Paulino*, 445 F.3d 211, 216 (2d Cir.), *cert. denied*, 127 S. Ct. 446 (2006); *United States v. Lore*, 430 F.3d 190, 209 (3d Cir. 2005); *United States v. Eberhart*, 388 F.3d 1043, 1050-51 (7th Cir. 2004), *rev'd on other grounds*, 546 U.S. 12 (2005).

<sup>71</sup> Statements by a co-conspirator of the party opponent are admissible as nonhearsay, provided that the declarant was seeking to further the conspiracy at the time he made the statement. See FED. R. EVID. 801(d)(2)(E). As nonhearsay, these statements are not subject to the Confrontation Clause. See *United States v. Underwood*, 446 F.3d 1340, 1347-48 (11th Cir.) (holding that co-conspirator recorded conversations were not testimonial evidence and therefore not subject to the Confrontation Clause), *cert. denied*, 127 S. Ct. 225 (2006); *United States v. Bridgeforth*, 441 F.3d 864, 869 (9th Cir. 2006) ("If a statement is admissible under Rule 801(d)(2)(E), the defendant's right of confrontation is not violated."); *United States v. Hansen*, 434 F.3d 92, 100 (1st Cir.), *cert. denied*, 127 S. Ct. 203 (2006); *United States v. Delgado*, 401 F.3d 290 (5th Cir. 2005).

<sup>72</sup> A few states presently require the government to prove the unavailability of the hearsay declarant before the government can offer hearsay against the accused. *State v. McGriff*, 871 P.2d 782, 790 (Haw. 1994); *State v. Lopez*, 926 P.2d 784, 789 (N.M. Ct. App. 1996); *State v. Moore*, 49 P.3d 785, 792 (Or. 2002); see also *State v. Branch*, 865 A.2d 673, 692-93 (N.J. 2005) (declining to require the declarant's testimony or unavailability as a condition of admissibility, but stating that "the issue deserves careful study," and submitting the matter to the Supreme Court Committee on the Rules of Evidence "to consider whether a rule change would be advisable").

helpful as well. Indeed, some other reforms might be preferable to enlisting the aid of experts. This Book Review has advocated a more rigorous entrapment doctrine, wider use of video cameras, expansion of prosecutors' *Brady* obligations, and fortification of confrontation rights. These reforms would help to ensure that the intent of the accused, not the gamesmanship of the police, is the key variable that determines the outcome of a criminal prosecution.

# UNDERCOVER OPERATIVES AND RECORDED CONVERSATIONS: A RESPONSE TO PROFESSORS SHUY AND LININGER

Steven D. Clymer†

## INTRODUCTION

In *Creating Language Crimes: How Law Enforcement Uses (and Misuses) Language*,<sup>1</sup> Professor Roger W. Shuy contends that audio recordings of suspects made by undercover operatives, a staple of modern criminal investigations and prosecutions, are potentially misleading. He warns that the unchecked use of such recordings at trial can result in conviction of the innocent. In a review of that book, Professor Tom Lininger focuses on and criticizes one feature of Professor Shuy's treatment of that danger: his advocacy of expert linguistics testimony to alert juries that undercover recordings may be falsely suggestive of guilt.<sup>2</sup> Professor Lininger's review begins by describing the "near reverence" that jurors have developed for expert forensic testimony in criminal cases.<sup>3</sup> He is troubled by Professor Shuy's proposed introduction into criminal trials of "a new category of forensic expertise," one that presumably will become yet another object of juror veneration.<sup>4</sup> Professor Lininger questions whether jurors need such testimony and fears that it may "obfuscate as well as elucidate,"<sup>5</sup> "usurp the jury's fact-finding role,"<sup>6</sup> and "invite[ ] jurors to disengage their common sense."<sup>7</sup>

Reverence also came to my mind as I read Professor Shuy's book, but reverence of a different sort—namely, that which prosecutors have for both undercover law enforcement agents and surreptitious recordings of criminal suspects. This particular reverence flows from the quandary that informants present for prosecutors. Undercover informants, those willing to pose as co-schemers, accomplices, or confidants of criminal suspects, are the lifeblood of innumerable

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<sup>1</sup> ROGER W. SHUY, *CREATING LANGUAGE CRIMES: HOW LAW ENFORCEMENT USES (AND MISUSES) LANGUAGE* (2005).

<sup>2</sup> Tom Lininger, *The Promise and Shortcomings of Forensic Linguistics*, 92 CORNELL L. REV. 833, 833–34, 839–40 (2007).

<sup>3</sup> *Id.* at 833.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 834.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 839.



investigations and prosecutions. They offer police and prosecutors the prospect of gaining admissible, incriminating, and extremely persuasive evidence: damning statements that suspects make to those whom they mistakenly trust. At the same time, however, informants are notoriously unreliable, and their use threatens the moral legitimacy of law enforcement. At best, undercover informants are willing to betray factually guilty friends, co-workers, and associates for personal gain. At worst, they are willing to do so to those whom they know to be innocent. Prosecutors should never forget that some informants will entrap the innocent, manufacture evidence, lie, commit perjury, and manipulate law enforcement officials, judges, and jurors.<sup>8</sup> Informants thus pose a formidable challenge. They are necessary but can never be fully trusted.<sup>9</sup>

Law enforcement officials navigate the horns of this dilemma daily. They strive to obtain real-time incriminating statements from unwitting suspects without having to rely completely on questionable information or testimony from informants whom juries may reasonably view as dishonest, unreliable, or repugnant. A first possible solution is to introduce an undercover law enforcement officer into the relationship with the suspect. This provides a more credible witness to the suspect's statements—one who is not being paid a bounty or trying to avoid or mitigate punishment. A second and even more attractive solution, often undertaken in conjunction with the first, is to secretly record conversations with the suspect. Whether operated by an undercover law enforcement official or an informant, a recording device removes doubt about what the suspect really said and places the jury's focus at trial squarely on the suspect's own words and deeds rather than on an informant's reliability. One need no longer rely, or ask a jury to rely, on an informant's testimony. It is no wonder that law enforcement officials revere the use of undercover agents and recording devices: They solve the informant quandary.

Or so one might have thought. In *Creating Language Crimes*, Professor Shuy argues that such reverence is misguided.<sup>10</sup> Drawing from a sample of cases involving undercover recordings, some made by informants and some by undercover agents, Professor Shuy contends

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<sup>8</sup> A particularly egregious example is Leslie Vernon White, a jailhouse informant who routinely provided false testimony about "confessions" by other inmates. See Robert Reinhold, *California Shaken over an Informer*, N.Y. TIMES, Feb. 17, 1989, at A1 ("[Informants] are scum, the underbelly of the system. Informants will not testify because they are nice guys. They are not out to improve the world." (quoting Curt Livesay, a high-level official in the Los Angeles District Attorney's Office)).

<sup>9</sup> For a discussion of the dangers of informant testimony, see Hon. Stephen S. Trott, *Words of Warning for Prosecutors Using Criminals as Witnesses*, 47 HASTINGS L.J. 1381 (1996).

<sup>10</sup> See SHUY, *supra* note 1, at 9 ("[T]he appearance of a crime can be created in undercover sting operations . . .").

that undercover operatives, with an eye (and an ear) toward future court proceedings, can employ a host of “conversational strategies” to manipulate recorded conversations with unwitting suspects to create an “illusion” of guilt, thereby deceiving prosecutors, judges, and juries.<sup>11</sup> These “strategies”—more aptly described as “tactics”—include using ambiguous language;<sup>12</sup> preventing the recording of the suspect’s exculpatory words, either by talking over the suspect, creating static on the tape, putting words in the suspect’s mouth, or selectively shutting off the recorder;<sup>13</sup> making passing references that appear incriminating without giving the suspect a chance to question or deny them (“the hit and run strategy”);<sup>14</sup> concealing incriminating or other crucial information from the suspect;<sup>15</sup> and inaccurately paraphrasing what the suspect has said to make it appear incriminating.<sup>16</sup> According to Professor Shuy, both the planned and the unintentional use of these tactics can and does create an illusion of criminality.<sup>17</sup> He suggests that expert linguistics testimony can bring this potential for deception to the attention of juries.<sup>18</sup>

In this brief Response to Professor Shuy’s book and Professor Lininger’s review of it, I address three topics. First, I consider whether there is reason to fear that the danger that Professor Shuy identifies is pervasive. To assess proposed responses to the threat posed by deceptive conversational tactics—responses that may impose their own costs—it is worth asking whether Professor Shuy has demonstrated that there is a significant problem afoot.

Second, I offer some tentative thoughts about the four reforms that Professor Lininger advances, reforms that he sees as better responses to the danger of misleading audio recordings than expert linguistics testimony. Professor Lininger advocates: (a) replacing the prevailing approach to entrapment with an objective defense, one that focuses on whether the government induced the defendant to engage in criminal conduct rather than the defendant’s predisposition towards such conduct; (b) enacting laws that mandate the videotaping of undercover operations whenever practicable; (c) interpreting the Constitution to impose a requirement that law enforcement officials capture entire conversations when making undercover recordings; and (d) creating a constitutional or statutory

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<sup>11</sup> *Id.* at 14.

<sup>12</sup> *See id.* at 15–16.

<sup>13</sup> *See id.* at 16–20.

<sup>14</sup> *See id.* at 44–49.

<sup>15</sup> *See id.* at 24–25.

<sup>16</sup> *See id.* at 26–27.

<sup>17</sup> *See id.* at 14.

<sup>18</sup> *See id.* at 176–77 (explaining that linguistic analysis can aid jury understanding as well as assist defense attorneys, prosecutors, judges, and law enforcement officials).

obligation that the prosecution call as witnesses all participants in recorded conversations who are available to testify. Although space limitations do not permit a full analysis of these proposals, I contend that all four are problematic. Nonetheless, the proposals that Professor Lininger offers share an attractive feature. They attempt to do more than uncover during trial the use of misleading conversational tactics by undercover operatives. Rather, they seek to minimize the use of such tactics in the first instance, thereby preventing the indictment and prosecution of those who would otherwise fall victim to them.

Third, I return to Professor Shuy's book and offer some general comments. Unlike Professor Lininger, I am not troubled by the admission of expert linguistics testimony in appropriate cases. In any event, I do not read Professor Shuy's book as a call for the extensive use of expert linguistic testimony. Rather, I see it as a warning that undercover recordings are not a certain solution to the informant quandary. The cases described in the Shuy book are cautionary tales for law enforcement officials, prosecutors, and defense attorneys—lessons that demonstrate that those who show too much reverence for recorded conversations invite disaster. Although I doubt that the use of misleading conversational tactics is as prevalent as Professor Shuy may lead readers to believe, his book is nonetheless a valuable contribution—not because it supports the adoption of a new rule, statute, or judicial fix, but because it reminds us that no evidence is foolproof.

## I

### HOW PERVASIVE IS THE USE OF MISLEADING CONVERSATIONAL TACTICS?

At the outset, it is worth considering whether the problem that Professor Shuy's book identifies occurs routinely. Professor Shuy himself is equivocal about the frequency with which undercover operatives use misleading conversational tactics. Initially, he states, "I make no claim that all, or even many, undercover operations carried out by law enforcement agencies regularly engage in the practice of creating false illusions about their targets' guilt."<sup>19</sup> He later notes, "I want to be very clear that I am not saying that all undercover operatives . . . use . . . conversational strategies unfairly."<sup>20</sup> Elsewhere, however, Professor Shuy contends that on "many" of the thousands of tape recordings in the hundreds of criminal cases that he has examined, "the alleged crime was cleverly created by the person wearing the mike" and that "[i]n their effort to capture crime on tape, people wearing the mike often employ certain conversational strategies . . . ."<sup>21</sup>

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<sup>19</sup> *Id.* at x.

<sup>20</sup> *Id.* at 29.

<sup>21</sup> *Id.* at 14.

Professor Lininger also seems ambivalent on the prevalence of the problem. He initially praises Professor Shuy's book "for drawing attention to the conversational strategies through which law enforcement officers create the appearance of a suspect's guilt,"<sup>22</sup> but he later complains that the book "marshals evidence selectively"<sup>23</sup> and "omits the mundane stories of straightforward controlled transactions in which targets plainly reveal their criminal intent."<sup>24</sup> In the end, however, Professor Lininger does not "challenge the validity of Professor Shuy's general thesis."<sup>25</sup>

To the extent that Professor Shuy's thesis is that a significant number of undercover investigations result in the creation of "the illusion of a crime when one was not otherwise happening,"<sup>26</sup> there is reason to question it. Professor Shuy's book presents a compelling case that undercover recordings can be and perhaps occasionally are manipulated but not that such manipulation is a recurring problem that merits fundamental changes in doctrine or evidentiary rulings.

Professor Shuy's concern seems to apply only with respect to what he calls "language crimes," those offenses for which a suspect's guilt is established wholly or largely by what he says rather than what he does.<sup>27</sup> It is in these cases that ambiguity and other misleading tactics can have pernicious consequences. If, at the end of the day, a predisposed suspect delivers ten kilograms of heroin to an undercover agent, there is little reason to be concerned that the two used opaque language when arranging the transaction. It is unlikely that ambiguity in such a situation will result in an erroneous conviction. Thus, whatever threat conversational tactics pose, this threat is absent in many—and likely most—cases involving undercover recordings.

Further, in the subset of cases in which guilt does turn largely on what a suspect says, law enforcement officials have a powerful incentive to avoid the very tactics that Professor Shuy accuses them of using. To be sure, Professor Shuy's book maintains that the use of these problematic practices sometimes may be inadvertent, but his choice of words suggests that he really thinks otherwise. His chosen terminology—"creating language crimes"<sup>28</sup> and "conversational strategies"<sup>29</sup>—

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<sup>22</sup> Lininger, *supra* note 2, at 834.

<sup>23</sup> *Id.* at 840.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 841.

<sup>26</sup> SHUY, *supra* note 1, at 15.

<sup>27</sup> Professor Shuy defines a language crime as a "crime that is accomplished through language alone." *Id.* at 6.

<sup>28</sup> *Id.* at 3–12.

<sup>29</sup> *Id.* at 13–29.

implies that those involved set out to use manipulative tactics to create a misleading appearance of guilt.<sup>30</sup>

One of the principal aims of undercover operations is to record suspects making, adopting, or acknowledging unambiguously incriminating statements. Such clarity is an important investigative objective because, if obtained, it will leave the suspect with little room to maneuver and usually will result in a guilty plea or a conviction after trial. The use of ambiguous language, concealment, interruptions, and the like, all of which Professor Shuy attributes to undercover operatives, undermine, rather than further, that fundamental objective.

If this objective is so important, Professor Shuy might respond, why are undercover tape recordings so often replete with ambiguous conversations rather than clearly inculpatory statements? There may be several explanations. When parties to a conversation have a shared knowledge of the topic about which they are communicating, there is little need to be explicit about it. When that topic involves illegal and morally reprehensible conduct, a fear of hidden recording devices may inhibit the parties from discussing it openly. One need only read or listen to transcripts of conversations recorded using wiretaps and room bugs—conversations that typically do not involve undercover operatives, and thus are, by definition, free from manipulative conversational tactics—to realize that it is common for criminals to discuss their trade ambiguously or in code.<sup>31</sup> An undercover operative who attempts to discuss criminal conduct with a suspect openly, using clear and unambiguous language, threatens the investigation's viability. Seen in this light, the use of ambiguous language is less a clever tactic than a reality of undercover work.

There may be informants or undercover police officers who, when all else fails, resort to misleading and manipulative conversational tactics to ensnare a possibly innocent suspect. But Professor Shuy's book does not make the case that the use of such tactics is routine. Professor Shuy describes approximately a dozen cases in which he concludes that such conduct took place.<sup>32</sup> Even these exam-

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<sup>30</sup> Professor Shuy contends that "there is a better than average chance that the choice of discourse strategies by the person wearing the mike is very conscious . . ." *Id.* at 13. He explains that in his experience, it was often the case that "the alleged crime was cleverly created by the person wearing the mike." *Id.* at 14.

<sup>31</sup> See, e.g., *Scott v. United States*, 436 U.S. 128, 140 (1978) (recognizing that intercepted conversations may be "ambiguous in nature or . . . involve[] guarded or coded language"). Indeed, the federal wiretap statute permits an exception to the general duty to contemporaneously "minimize" the interception of communications for coded conversations, see 18 U.S.C. § 2518(5) (2000) (permitting postinterception minimization), reflecting Congress's awareness that such communications are commonly in code.

<sup>32</sup> In Chapters Four through Ten of the book, Professor Shuy describes what he perceives to be the use of misleading conversational tactics by cooperating witnesses during undercover operations. In Chapters Eleven, Twelve, and Fourteen, Professor Shuy de-

ples present a murky picture, however. For each case, Professor Shuy provides the reader with a description of the pertinent facts, portions of transcripts of recordings that he has selected, and his perspective, which was formed as a defense-retained expert witness.<sup>33</sup> Criminal cases are complex, however, and without a fuller account of each case, it is hard to reach an informed opinion about whether manipulative conversational tactics were truly at work. Had the prosecution retained a linguistics expert for these cases, that expert likely would have drawn conclusions different from Professor Shuy's, at least in some instances.

The point here is not that Professor Shuy's presentation of the cases is unfairly one-sided or abbreviated. Rather, it is that although Professor Shuy makes a good case that recorded conversations *can* be manipulated to create an illusion of guilt, it is less clear that undercover operatives did so in every case described in his book. More to the point, Professor Shuy's book does not prove, and indeed does not attempt to prove, that these practices occur with any regularity in undercover operations. Later in this Response, I will examine the relevance of this point to the merits of Professor Shuy's book.

## II

### ASSESSING PROFESSOR LININGER'S PROPOSALS FOR REFORM

Because, as noted above, Professor Lininger seems both ambivalent about the gravity of the problem of conversational tactics and opposed to the increased use of expert testimony as a response, it is surprising that his alternative proposals, sweeping doctrinal changes in the form of revised constitutional doctrine and new statutes, are so dramatic. By itself, the limited anecdotal evidence that Professor Shuy provides hardly merits reform on the order that Professor Lininger recommends. Further, as explained below, there is reason to question whether all of Professor Lininger's proposed reforms are truly responsive to the concerns that Professor Shuy's book identifies.

In fairness to Professor Lininger, he apparently intends his proposals to "check inappropriate police conduct" beyond the misuse of conversational tactics.<sup>34</sup> In the limited space available to him, Professor Lininger offers reasons for his proposals in addition to their claimed efficacy in addressing the misuse of conversational tactics.

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scribes what he believes to be similar conduct by undercover law enforcement officials. Chapters Thirteen and Fifteen do not involve recorded conversations by undercover operatives: Chapter Thirteen describes witness interviews in a criminal investigation, and Chapter Fifteen discusses an interrogation of a crime suspect.

<sup>33</sup> See SHUY, *supra* note 1, at 179–82, for a description of Professor Shuy's experience as an expert witness.

<sup>34</sup> Lininger, *supra* note 2, at 841.

Even so, whether meant only to address Professor Shuy's concerns or also as an effort to remedy other defects in the criminal justice system, there are reasons to be cautious about Professor Lininger's proposed reforms.

### A. An Objective Entrapment Defense

Professor Lininger first proposes a "revitaliz[ation]" of entrapment law to address the misuse of conversational tactics.<sup>35</sup> In federal court, a defendant who presents some evidence of entrapment is entitled to a jury instruction requiring acquittal unless the prosecution can prove one or both of the following beyond a reasonable doubt: that the government did not induce the defendant to commit the offense ("inducement"); or that the defendant was predisposed to commit the offense ("predisposition").<sup>36</sup> Because the government arguably induces criminal conduct during many undercover operations,<sup>37</sup> the prosecution often responds to entrapment claims by proving that the defendant was predisposed to commit the charged offense.<sup>38</sup> The government commonly does so by presenting evidence that the defendant has been convicted for similar offenses in the past.<sup>39</sup> Although such evidence legitimately undercuts the defense by establishing predisposition, it also can unfairly prejudice the defendant by prompting a jury to convict because of general concerns about dangerousness rather than a determination that the defendant committed the charged crime.

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<sup>35</sup> *Id.* at 842. ("[C]ourts and legislatures should revitalize entrapment law.").

<sup>36</sup> See *Mathews v. United States*, 485 U.S. 58, 63 (1988) (noting that "a valid entrapment defense has two related elements: government inducement of the crime, and a lack of predisposition on the part of the defendant to engage in the criminal conduct," and that a defendant is entitled to an entrapment instruction if "there exists evidence sufficient for a reasonable jury to find in his favor" regarding the defense); MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS FOR THE DIST. COURTS OF THE EIGHTH CIRCUIT § 9.01 (2000) ("The government has the burden of proving beyond a reasonable doubt that the defendant was not entrapped."). For a general discussion of entrapment law in federal courts, see Fred Warren Bennett, *From Sorrells to Jacobson: Reflections on Six Decades of Entrapment Law, and Related Defenses*, in *Federal Court*, 27 WAKE FOREST L. REV. 829 (1992).

<sup>37</sup> Cf. Bennett, *supra* note 36, at 831 ("Because of the difficulties inherent in detecting and successfully prosecuting consensual crimes, federal and state law enforcement agencies often use undercover agents and informants in their efforts to expose the offenses. A common method employed is the solicitation of the offense by an informant or an undercover law enforcement official.").

<sup>38</sup> See *Hampton v. United States*, 425 U.S. 484, 488 (1976) ("[T]he entrapment defense 'focus[es] on the intent or predisposition of the defendant to commit the crime,' rather than upon the conduct of the Government's agents." (quoting *United States v. Russell*, 411 U.S. 423, 429 (1973))).

<sup>39</sup> See, e.g., *United States v. Van Horn*, 277 F.3d 48, 57 (1st Cir. 2002) (noting that "in situations where the defendant employs entrapment as a defense to criminal liability, prior bad acts relevant to a defendant's predisposition to commit a crime are highly probative and can overcome the [Federal Rules of Evidence] Rule 404(b) bar" on the use of other bad acts or crimes to show propensity).

Professor Lininger proposes jettisoning the predisposition prong in cases in which “the government has used improper inducements to involve the defendant in criminal activity.”<sup>40</sup> Thus, he urges recognition of an entrapment defense even in (at least some) cases when the person whom the government induced already was predisposed to commit the crime. According to Professor Lininger, this not only would address Professor Shuy’s concern by “rein[ing] in manipulation of language”;<sup>41</sup> it also could “better protect suspects who have prior convictions”<sup>42</sup> and “stop abusive law enforcement tactics.”<sup>43</sup>

I question whether this reform would yield the first of those benefits. Professor Lininger’s contention that this reform responds to Professor Shuy’s concern is based on the faulty premise that “the conduct of which Professor Shuy complains”—the manipulative creation of language crimes—“is, in many cases, entrapment.”<sup>44</sup> In fact, the two concerns are distinct. Professor Shuy’s book focuses on the danger that the use of conversational tactics during recorded conversations will deceive prosecutors and juries, causing them to wrongly believe that a suspect has incriminated himself. Professor Shuy is concerned that suspects who have not committed crimes will find themselves accused, tried, and convicted because undercover operatives have created an illusion of guilt.<sup>45</sup>

In contrast, entrapment doctrine focuses on the danger that government inducement will persuade unwilling suspects to *actually commit* crimes. By definition, an entrapped suspect has engaged in conduct that would be criminal but for the government inducement and the suspect’s lack of predisposition.<sup>46</sup> Changes to entrapment doctrine may protect those whom the government induces to commit crimes but will not provide relief to those who have not committed crimes yet nonetheless appear guilty as a result of an undercover operative’s manipulation of a recorded conversation.

Whether the proposed modification of entrapment doctrine speaks to Professor Shuy’s concerns, it presents problems.<sup>47</sup> Even if

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<sup>40</sup> Lininger, *supra* note 2, at 842.

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

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 843.

<sup>44</sup> *Id.* at 842.

<sup>45</sup> See SHUY, *supra* note 1, at 14.

<sup>46</sup> See, e.g., *Jacobson v. United States*, 503 U.S. 540, 548–49 (1992) (noting that “the defense of entrapment is at issue” in cases “[w]here the Government has induced an individual to break the law”).

<sup>47</sup> Professor Lininger’s proposed modification to entrapment law is part of an ongoing debate between those who favor an “objective” approach to entrapment, meaning one that turns on the propriety of the government’s conduct, and proponents of the prevailing “subjective” approach, which permits such inquiry but typically focuses on whether the defendant was predisposed to commit the offense. For a discussion of the subjective and objective theories of entrapment, see Bennett, *supra* note 36, at 864–67; Anthony M. Dillof,



Professor Lininger is correct about some of the claimed benefits, there are compelling reasons why those who are predisposed to break the law and do so should not have the benefit of an affirmative defense merely because government agents have encouraged their criminal conduct. Predisposed lawbreakers are both morally culpable and socially dangerous regardless of whether it is the government or a private actor who persuades them to commit a crime. Given an opportunity to break the law, they have chosen to do so and presumably will again. Fashioning a rule that gives them a windfall would be a costly means of addressing concerns about aggressive government investigative tactics, particularly without compelling evidence that abuses are widespread.

Another troubling feature of Professor Lininger's proposal, which would hinge an entrapment defense on a determination that a government investigation improperly induced the commission of a crime, is that it would vest federal jurors, who lack the knowledge and expertise to properly assess the propriety of various undercover investigative tactics, with responsibility for making ad hoc determinations about whether law enforcement practices are "outrageous" or "abusive." An entrapment defense that places primary reliance on such vague and subjective standards will result in inconsistent verdicts, thereby confronting law enforcement officials with contradictory guidance.

Further, adopting a rule that effectively prohibits the government from inducing willing suspects to commit crimes would greatly impair, if not foreclose, many undercover investigations. The line between passive undercover investigation and inducement is not a clear one,<sup>48</sup> and a rule creating an affirmative defense whenever there is government inducement could chill undercover operations. As Judge Learned Hand observed, providing a predisposed defendant with an entrapment defense based solely on government inducement would make it "impossible ever to secure convictions of any offences which consist of transactions that are carried on in secret."<sup>49</sup>

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*Unraveling Unlawful Entrapment*, 94 J. CRIM. L. & CRIMINOLOGY 827, 889-95 (2004). According to Bennett, "no current Justice on the Supreme Court seems remotely interested in adopting the objective approach to entrapment, and defense attorneys with even a modicum of common sense are perfectly content with the present situation." Bennett, *supra* note 36, at 867.

<sup>48</sup> The standard used to determine whether the government has induced a defendant to commit a crime—sometimes phrased as whether there is "government conduct which creates a substantial risk that an undisposed person or otherwise law-abiding citizen would commit the offense," *United States v. Ortiz*, 804 F.2d 1161, 1165 (10th Cir. 1986)—is susceptible to inconsistent application.

<sup>49</sup> *United States v. Sherman*, 200 F.2d 880, 882 (2d Cir. 1952) (explaining why no entrapment defense is available to a defendant who "was ready and willing to commit the offence charged, whenever the opportunity offered [sic]").

Although Professor Lininger takes issue with “Professor Shuy’s general distrust of proactive investigative strategies”<sup>50</sup> and “preference for passive listening by undercover officers,”<sup>51</sup> and believes that officers should be permitted to “contrive circumstances that squarely present suspects with opportunities to commit crimes,”<sup>52</sup> his proposed reform would make such proactive undercover operations more susceptible to entrapment challenges by criminal defendants and thus less attractive to law enforcement. At a time when pedophiles roam the Internet and laws designed to protect children from exploitation are enforced largely by undercover agents posing as victims,<sup>53</sup> a rule forcing the government to refrain from inducing even predisposed suspects to violate the law would come at a high cost.

### B. Required Videotaping

Professor Lininger also proposes legislation requiring that undercover encounters be videotaped unless it is impracticable to do so.<sup>54</sup> This proposal has three attractive features. First, it responds directly to some of the troubling tactics that Professor Shuy identifies, such as an undercover operative recording incriminating conversations that, unbeknownst to a subsequent listener, occur outside the presence of the suspect.<sup>55</sup> Second, it would deter such misleading practices and bring their use to the prosecutor’s attention before a defendant’s indictment.<sup>56</sup> Third, it would provide juries with reliable visual evidence of undercover operations.

However, it is one thing to *promote* the use of technology that captures sight as well as sound and quite another to *require* it. Although he does not say so, by proposing the latter, Professor Lininger may well mean that a failure to comply with the proposed videotaping requirement would result in exclusion of other evidence of undercover conversations including, for example, audio recordings.<sup>57</sup> If so, this proposed reform is problematic.

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<sup>50</sup> Lininger, *supra* note 2, at 841.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> See Donald S. Yamagami, Comment, *Prosecuting Cyber-pedophiles: How Can Intent Be Shown in a Virtual World in Light of the Fantasy Defense?*, 41 SANTA CLARA L. REV. 547, 551 (2001) (explaining that most FBI cases against pedophiles who arrange to meet children through internet conversations are investigated by an “FBI agent [who] poses as a female minor in chat rooms known to attract pedophiles”).

<sup>54</sup> See Lininger, *supra* note 2, at 843.

<sup>55</sup> See SHUY, *supra* note 1, at 24–25.

<sup>56</sup> See Lininger, *supra* note 2, at 844 (“[A]gents might be deterred from misconduct in the first place if they know their conversations will be videotaped.”).

<sup>57</sup> Professor Lininger does not suggest any other sanction or remedy for a violation of his proposed rule requiring that police videotape undercover operations. In another context, Professor Lininger proposes protocols for police use of videotape recorders. See Tom Lininger, *Reconceptualizing Confrontation After Davis*, 85 TEX. L. REV. 271, 324 (2006) (rec-

If the suppression of evidence of incriminating conversations may result from a failure to videotape when practicable, there will be hotly contested suppression hearings concerning practicability whenever police fail to produce a video recording that clearly depicts an encounter between an undercover operative and the defendant. Because of a host of practical impediments to obtaining clear video recordings, such hearings will likely occur with some frequency. Although "[a]dvances in technology allow police to install pinhole-sized cameras in purses and clothing,"<sup>58</sup> not all police departments have sufficient resources to maintain and use such cutting-edge technology, or even the capability to videotape undercover operations effectively on a routine basis, using any kind of technology. The proposed reform will confront courts with questions of police-department budget choices, claimed technological glitches, equipment failure, insufficient recording tape, poor lighting conditions, misdirected camera angles, and out-of-focus lenses. Even if video recording is desirable, it is hard to make the case that a criminal defendant should be entitled to suppress evidence because a police officer neglected to charge a battery on a video recorder before a critical undercover meeting or because an undercover operative mistakenly pointed a purse containing a pinhole camera in the wrong direction.

Further, the proposed requirement would threaten to exclude reliable audio recordings of undercover operations, as well as testimony from credible participants in those operations, all on the mere chance that an undercover operative may have manipulated the recording or the conversation. It would be an odd rule that required the suppression of such evidence and testimony merely because of a failure to use videotaping technology to obtain the same evidence in a marginally more reliable format.

### C. A Constitutional Obligation to Record Entire Conversations

Professor Lininger also proposes that courts reinterpret the Supreme Court's landmark decision in *Brady v. Maryland*,<sup>59</sup> which requires that the prosecution disclose to the defense in criminal cases evidence in its possession that is both exculpatory (or mitigating) and material, to impose on law enforcement officials a duty to "record all portions of conversations under surveillance, not just those portions

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ommending protocol for police video recording during responses to reports of domestic violence). In contrast, in his response to Professor Shuy, Professor Lininger argues that "states should pass laws requiring videotaping in undercover investigations." Lininger, *supra* note 2, at 843. Presumably, violation of police protocols would not result in suppression of evidence. It is unclear whether the same is true for the statutory reform under consideration here.

<sup>58</sup> Lininger, *supra* note 2, at 843.

<sup>59</sup> 373 U.S. 83, 87 (1963).

that appear to favor the prosecution.”<sup>60</sup> This reform also directly addresses one of the conversational tactics that Professor Shuy identifies—namely, the deceptive practice of shutting off a recording device to avoid capturing exculpatory portions of a conversation with the suspect.<sup>61</sup>

Despite what Professor Lininger describes as an expansion of the *Brady* rule over the past three decades,<sup>62</sup> there is nothing in the Supreme Court’s decisions to suggest that the Court will interpret *Brady* and its progeny in a manner consistent with his proposal. The *Brady* doctrine imposes on the prosecution only an obligation to produce to the defense exculpatory evidence that already is in the government’s possession,<sup>63</sup> not a duty to collect evidence. Indeed, the Supreme Court has refused to impose more than minimal constitutional restrictions on the government’s destruction of already-collected evidence, even if it may be exculpatory.<sup>64</sup> This makes clear that the Court will not recognize a constitutional obligation to record all portions of conversations, especially on the speculative showing that Professor Lininger’s article describes: that a failure to record an entire conversation “could deny the defense access to crucial exculpatory evidence.”<sup>65</sup>

As a policy matter, it may be desirable to promote full recording, but a legal requirement, like the proposal for legally mandated videotaping, is problematic, particularly if the remedy is exclusion of those portions of the conversation that were recorded. In cases in which it is shown that an undercover operative chose to record only a portion

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<sup>60</sup> Lininger, *supra* note 2, at 844.

<sup>61</sup> See Shuy, *supra* note 1, at 20–21. As is true for other manipulative conversational tactics that Professor Shuy identifies, there is only thin anecdotal evidence suggesting that law enforcement officers engage in such selective recording.

<sup>62</sup> See Lininger, *supra* note 2, at 844. Although Professor Lininger correctly notes that some of the Supreme Court’s decisions interpreting *Brady* have enhanced the protection that it affords criminal defendants, *see, e.g.,* Giglio v. United States, 405 U.S. 150, 153–54 (1972) (holding that the *Brady* disclosure obligation applies to impeachment evidence), *cited in* Lininger, *supra* note 2, at 844 n.68; Kyles v. Whitley, 514 U.S. 419, 436–38 (1995) (holding that the cumulative effect of undisclosed exculpatory evidence must be considered when assessing materiality, even if the prosecution was unaware of some such evidence), *cited in* Lininger, *supra* note 2, at 844 n.68, the Court also has limited the *Brady* doctrine, *see* United States v. Bagley, 473 U.S. 667, 682–83 (1985) (holding that the *Brady* disclosure obligation applies to exculpatory or impeachment evidence only if the failure to disclose would “undermine confidence in the outcome” of the trial). *But see* Lininger, *supra* note 2, at 844 n.68 (interpreting *Bagley* as expanding the scope of the *Brady* obligation).

<sup>63</sup> *See, e.g.,* Pennsylvania v. Ritchie, 480 U.S. 39, 57 (1987) (describing *Brady* as imposing a duty on the prosecution to “turn over evidence in its possession that is both favorable to the accused and material to guilt or punishment”).

<sup>64</sup> *See* Illinois v. Fisher, 540 U.S. 544, 547–48 (2004) (“[T]he failure to preserve . . . ‘potentially useful evidence’ does not violate due process ‘unless a criminal defendant can show bad faith on the part of the police.’” (quoting Arizona v. Youngblood, 488 U.S. 51, 58 (1988) (emphasis omitted))).

<sup>65</sup> Lininger, *supra* note 2, at 844 (emphasis added).

of a conversation and there is no plausible explanation for that choice, a more acceptable alternative would be to instruct the jury that it may draw an inference that the unrecorded portion of the conversation would be harmful to the government's case. This would be similar to the venerable "missing witness instruction," which courts sometimes use when the government fails to produce at trial a witness exclusively within its control who has knowledge of critical events.<sup>66</sup> Although the use of a "missing conversation instruction" may not be ideal, insofar as it will be difficult for the jury to determine when to draw an adverse inference and what to make of such an inference, it is preferable to concealing probative evidence from the jury, namely the portions of the conversation that were recorded, based solely on a hunch or claim that the unrecorded portions undercut the incriminating effect of the recording. In addition, defendants already have the ability to prove through evidence or suggest through cross-examination what was said when the recording device was turned off.

#### D. Expanded Confrontation Rights

Professor Lininger also proposes that either courts by interpretation of the Sixth Amendment's Confrontation Clause<sup>67</sup> or legislatures by statute create a rule that obligates the government to "produce for cross-examination any speaker who took part in a recorded conversation."<sup>68</sup> Presumably, such a rule would enable the defendant to cross-examine all participants to ferret out the true nature of the defendant's contributions to recorded conversations.<sup>69</sup> This proposal is both ill-advised and unnecessary.

It is ill-advised because it would favor less reliable evidence over more reliable evidence. The prosecution could escape the proposed call-all-participants rule by proving the content of a conversation

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<sup>66</sup> See, e.g., *Graves v. United States*, 150 U.S. 118, 121 (1893) ("The rule, even in criminal cases, is that, if a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable.").

<sup>67</sup> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ." U.S. CONST. amend. VI.

<sup>68</sup> Lininger, *supra* note 2, at 845. This proposal can be read in two ways. Professor Lininger may mean that the proposed obligation to produce as witnesses at trial all participants to a recorded conversation arises only when the government seeks to introduce the recording into evidence. Alternatively, his proposal may be read to mean that the obligation to produce all witnesses arises whenever the government records a conversation, whether or not it later seeks to have the jury hear the recording. The former interpretation is more consistent with Professor Lininger's discussion of the proposal. See *id.* at 844. (discussing the use of evidentiary rules to overcome hearsay objections to recorded statements offered during trial when the prosecution does not call as witnesses those who made the statements).

<sup>69</sup> See *id.* at 845. (arguing that the proposal would address "the urgent need to resolve ambiguities in recorded conversations").

through the testimony of a percipient witness to the conversation (such as an undercover agent). Such testimony would be based on the witness's imperfect and perhaps biased recollection. In the same trial, however, the proposed reform would preclude the prosecution from introducing the more reliable recording of the conversation unless it is willing to call all participants as witnesses.

The proposed rule is unnecessary because the Compulsory Process Clause of the Sixth Amendment gives criminal defendants the right to subpoena and call as witnesses all available participants to any conversation.<sup>70</sup> If those witnesses are hostile to the defendant, Rule 607 of the Federal Rules of Evidence empowers the defendant to cross-examine them.<sup>71</sup>

### III

#### LINGUISTICS EXPERTS AND EARLY RECOGNITION THAT RECORDED CONVERSATIONS CAN BE MANIPULATED

In the end, Professor Shuy's proposal for use of expert testimony from linguists in appropriate cases is preferable to the more dramatic doctrinal responses that Professor Lininger offers. Even if use of deceptive conversational tactics is not commonplace, Professor Shuy presents a persuasive argument that there may be some cases in which detailed linguistic analysis can shed light on recorded conversations. There is no reason to believe that expert testimony on this subject in such cases has a greater tendency to confuse or mislead jurors than similar expert testimony that routinely is admitted in criminal cases. For example, in narcotics prosecutions, courts often permit prosecu-

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<sup>70</sup> "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor." U.S. CONST. amend. VI.

The Supreme Court has rejected a broader version of the rule that Professor Lininger suggests—one that would require that the government either produce out-of-court declarants or demonstrate their unavailability before introducing their out-of-court statements. Characterizing such a requirement as "an unavailability rule," the Court gave reasons for its rejection that are applicable in this narrower context:

Nor is an unavailability rule likely to produce much testimony that adds meaningfully to the trial's truth-determining process. Many declarants will be subpoenaed by the prosecution or defense, regardless of any Confrontation Clause requirement, while the Compulsory Process Clause and evidentiary rules permitting a defendant to treat witnesses as hostile will aid defendants in obtaining a declarant's live testimony. And while an unavailability rule would therefore do little to improve the accuracy of factfinding, it is likely to impose substantial additional burdens on the factfinding process. The prosecution would be required to repeatedly locate and keep continuously available each declarant, even when neither the prosecution nor the defense has any interest in calling the witness to the stand. An additional inquiry would be injected into the question of admissibility of evidence, to be litigated both at trial and on appeal.

White v. Illinois, 502 U.S. 346, 354–55 (1992) (citations and footnote omitted).

<sup>71</sup> Rule 607 provides that "[t]he credibility of a witness may be attacked by any party, including the party calling the witness." FED. R. EVID. 607.

tion-proffered expert witnesses to explain to juries the significance and meaning of coded language in recorded conversations.<sup>72</sup> It is hard to see why criminal defendants should not be permitted, in appropriate cases, to elicit similar testimony from their own experts. If proffered expert testimony appears to be unreliable or unhelpful to the jury, courts have the authority to exclude it.<sup>73</sup> And while Professor Lininger rightly fears that wealthy defendants will enjoy greater access to such testimony than indigents, the same can be said for access to other expert testimony as well as litigation resources generally. The proper response to disproportionate access to litigation resources is to increase indigents' access, not deny them to otherwise deserving defendants who can afford them.

The principal deficiency of expert testimony at trial as a response to the threat of conversational tactics is that it offers too little, too late. The most that it can achieve is the eventual acquittal of a wrongly accused defendant. Professor Shuy would likely agree that such an outcome is not a victory for the criminal justice system; it is merely a lesser form of failure. To his credit, Professor Lininger appears to recognize this deficiency and has proposed reforms designed to prevent the execution of the tactics in the first instance.

Ultimately, however, Professor Shuy's book is not a call for expert linguistics testimony at trial. Nor is its contribution the revelation of an endemic problem that merits doctrinal remedies. Rather, its virtue is that it cautions against inordinate reverence for undercover recordings. His book is meant to serve as a wake-up call—not only for prosecutors deciding whether to seek an indictment based on an apparently incriminating recording and defense attorneys deciding whether to recommend that a client plead guilty or go to trial, but also for law enforcement officials deciding how to handle undercover operatives and whether to arrest.<sup>74</sup> As Professor Shuy explains, linguistics experts can help educate those actors in the criminal justice system, preferably before indictment and trial.<sup>75</sup> Although he also supports

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<sup>72</sup> See, e.g., *United States v. Gibbs*, 190 F.3d 188, 211 (3d Cir. 1999) (“[I]t is well established that experienced government agents may testify to the meaning of coded drug language under [Federal Rule of Evidence] 702.”).

<sup>73</sup> Federal Rule of Evidence 702 empowers federal courts to exclude proffered expert testimony if it will not “assist the trier of fact to understand the evidence,” if there is insufficient factual support, or if the proponent is unable to establish that “the testimony is the product of reliable principles and methods” and that “the [expert] witness has applied the principles and methods reliably to the facts of the case.” FED. R. EVID. 702. Similarly, Rule 704(b) prohibits the admission of expert linguistics testimony “as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto.” *Id.* 704(b).

<sup>74</sup> See SHUY, *supra* note 1, at 183–85 (identifying “defense attorneys, prosecutors, and law enforcement officers who plan and carry out undercover operations by tape-recording conversations of targets,” along with other forensic linguists, as his “primary audience[ ]”).

<sup>75</sup> See *id.* at 179–85.

the use of expert linguistics testimony at trial, he does so only when all else fails.<sup>76</sup>

#### CONCLUSION

Although they offer different solutions, Professors Shuy and Lininger both recognize that the problematic use of manipulative conversational tactics ought to be addressed, preferably before arrest, indictment, and trial. Because there is no clear evidence that the problem is widespread, and because the doctrinal remedies that Professor Lininger proposes carry unacceptable costs, I favor more limited responses. Whatever the relative merits of the solutions that Professors Shuy and Lininger propose, however, the real contribution of Professor Shuy's book is not that he has solved a problem but rather that he has brought one to our attention.

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<sup>76</sup> See *id.* at 184 ("It's always better to avoid a problem before it happens.").



