BOOK REVIEW

THE PROMISE AND SHORTCOMINGS OF FORENSIC LINGUISTICS

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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*.[1] In a high-profile case, jurors expect to hear about DNA testing, ballistics analysis, fingerprint matching, handwriting comparisons, and autopsies.[2] Indeed, jurors have developed a near reverence for such expert testimony in criminal trials.[3]

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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1 *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.'").

2 *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.").

3 *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.[4] 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.[5] With the aid of an expert linguist, the defense can show that the recorded language does not necessarily evince the defendant's guilt.[6]

Professor Shuy, himself an expert in linguistics,[7] 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.[8]

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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4 *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.

5 *See id.* at 173–77.

6 *See id.* at 184.

7 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 (last visited Feb. 19, 2007).

8 *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.[9] 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).[10]

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."[11] He focuses on investigations of fraud, bribery, solicitation, threats to witnesses, and other crimes committed through the utterance of words.[12] These crimes are, in effect, "language crimes."[13]

Professor Shuy offers a taxonomy of the conversational strategies through which police "create" language crimes in recorded conversations.[14] 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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9 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 (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.*

10 Shuy, *supra* note 4, at 180.

11 *Id.* at 5.

12 *See id.* at 6.

13 *Id.*

14 *Id.* at 13–29.

target may in fact have lacked criminal intent.[15] 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."[16] A third manipulative strategy is to conceal important information so that the target does not fully appreciate the significance of the matters under discussion.[17] Fourth, the government's operative might simply refuse to acquiesce when the target says "no."[18] Fifth, the undercover agent or informant might restate the target's words in a misleading manner.[19] 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.[20]

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.[21] 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.[22] An audio recording does not capture the nuances of gestures or facial expressions.[23] Moreover, even under the best of circumstances, audio recording technology generally cannot accurately preserve all the words in a conversation.[24]

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

16 *Id.* at 16–20.

17 *See id.* at 24–25.

18 *See id.* at 26.

19 *See id.* at 26–27.

20 *Id.* at 28–29.

21 *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").

22 *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.").

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

24 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.[25] 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.[26] 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.[27] 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.[28] 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.[29] 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.[30]

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.[31] 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.[32] 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.[33] 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.[34] They also used frequent interruptions, inaccurate restatements, and "scripting" to create the impression that the target had confessed.[35]

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25 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.

26 *Id.* at 44–49.

27 *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.'").

28 *See id.* at 51–57.

29 *See id.* at 69–80.

30 *See id.* at 89–98.

31 *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).

32 *See id.* at 117–27.

33 *See id.* at 139, 153–57.

34 *See id.* at 159–64.

35 *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.[36] Noting that "[l]inguists are trained to identify such conversational strategies and describe their overall significance to a given conversation,"[37] Professor Shuy believes that expert linguists can detect the purposeful use of ambiguity, interruption, overlapping, and other "blocking" strategies.[38] 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.[39] While admitting that "[i]t will normally take longer this way," he concludes that "the evidence elicited can be much stronger."[40] 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."[41] 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.[42]

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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36 *See id.* at 173–77.
37 *Id.* at 175–76.
38 *Id.* at 174–76.
39 *Id.* at 9.
40 *Id.*
41 *Id.* at 8.
42 *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.[43] 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.[44] 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.[45] 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.[46] 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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43 *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).

44 *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").

45 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.").

46 SHUY, *supra* note 4, at 13.

Rule of Evidence 704 so that experts could not opine on the mental state of the accused.[47]

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.[48] We should be wary of extending the "*CSI* effect"[49] to linguistics: if jurors come to expect expert linguists, the absence of such linguists might appear to signal a party's weakness.[50]

Ironically, while Professor Shuy criticizes police for selectively presenting certain aspects of undercover conversations "to make their targets look guilty,"[51] 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.[52] 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. Yaworksy, 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[53] 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.[54]

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*[55] in investigations that utilize surreptitious recording, and (4) fortification of defendants' right to confront participants in recorded conversations.

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53 *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.").

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

55 373 U.S. 83 (1963).

To begin with, courts and legislatures should revitalize entrapment law.[56] 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.[57] 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.[58] This emphasis on predisposition allows the prosecution to overcome an entrapment defense by showing that the defendant has a criminal history,[59] 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.[60] Reconcep-

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56 *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).

57 *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.").

58 *See* Bennett L. Gershman, Comment, *Abscam, 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).

59 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.

60 *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.[61]

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.[62] 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.[63]

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,[64] but it could also lay

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61 *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).

62 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).

63 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).

64 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.[65] Indeed, agents might be deterred from misconduct in the first place if they know their conversations will be videotaped.[66]

Third, the courts should strengthen their enforcement of *Brady v. Maryland*[67] 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.[68] 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[69] 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),[70] the government

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65 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.

66 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/1206fbitaping.html (observing that the FBI's current policy allows recording of interrogations only on a "limited, highly selective basis" (quotation omitted)).

67 373 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).

68 *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).

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

70 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.[71] 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.[72]

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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serted"). 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).

71 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).

72 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.

Forensic Linguistics is one of the fastest growing fields within Applied Linguistics. Its relevance for law and justice practices makes it a very important and interesting area of science. The diversity of disciplines and the possibilities for research as well as its relation to allied disciplines such as Sociolinguistics, Psychology, Pragmatics, Sociology and Law draw the attention and establish its popularity among young scholars and practitioners even more. Maybe, you are one of the next generation linguist experts in the field of Forensic Linguistics? Acknowledgement: Very special thanks g Now, forensic researchers rely on a specific set of short, tandem repeat (STR) markers combined with PCR and other methods to analyze DNA samples. Forensic Science: The Promise and Perils of Using Science in the Courtroom. 5. Criminal databases in Europe currently use a standard set of 12 STR markers; the U.S. CODIS system uses 13.Â Hair â€“ Typically, forensic analysis of human hair relies on a microscopic exam of its physical featuresâ€”a method that lacks clear quantitative standards.