

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

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INTRODUCTION

In *Creating Language Crimes: How Law Enforcement Uses (and Misuses) Language*,¹ 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.² Professor Lininger's review begins by describing the "near reverence" that jurors have developed for expert forensic testimony in criminal cases.³ 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.⁴ Professor Lininger questions whether jurors need such testimony and fears that it may "obfuscate as well as elucidate,"⁵ "usurp the jury's fact-finding role,"⁶ and "invite[] jurors to disengage their common sense."⁷

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

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

³ *Id.* at 833.

⁴ *Id.*

⁵ *Id.* at 834.

⁶ *Id.*

⁷ *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.⁸ Informants thus pose a formidable challenge. They are necessary but can never be fully trusted.⁹

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.¹⁰ Drawing from a sample of cases involving undercover recordings, some made by informants and some by undercover agents, Professor Shuy contends

⁸ 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)).

⁹ 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).

¹⁰ 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.¹¹ These “strategies”—more aptly described as “tactics”—include using ambiguous language;¹² 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;¹³ making passing references that appear incriminating without giving the suspect a chance to question or deny them (“the hit and run strategy”);¹⁴ concealing incriminating or other crucial information from the suspect;¹⁵ and inaccurately paraphrasing what the suspect has said to make it appear incriminating.¹⁶ According to Professor Shuy, both the planned and the unintentional use of these tactics can and does create an illusion of criminality.¹⁷ He suggests that expert linguistics testimony can bring this potential for deception to the attention of juries.¹⁸

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

¹¹ *Id.* at 14.

¹² *See id.* at 15–16.

¹³ *See id.* at 16–20.

¹⁴ *See id.* at 44–49.

¹⁵ *See id.* at 24–25.

¹⁶ *See id.* at 26–27.

¹⁷ *See id.* at 14.

¹⁸ *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."¹⁹ He later notes, "I want to be very clear that I am not saying that all undercover operatives . . . use . . . conversational strategies unfairly."²⁰ 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"²¹

¹⁹ *Id.* at x.

²⁰ *Id.* at 29.

²¹ *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,"²² but he later complains that the book "marshals evidence selectively"²³ and "omits the mundane stories of straightforward controlled transactions in which targets plainly reveal their criminal intent."²⁴ In the end, however, Professor Lininger does not "challenge the validity of Professor Shuy's general thesis."²⁵

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,"²⁶ 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.²⁷ 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"²⁸ and "conversational strategies"²⁹—

²² Lininger, *supra* note 2, at 834.

²³ *Id.* at 840.

²⁴ *Id.*

²⁵ *Id.* at 841.

²⁶ SHUY, *supra* note 1, at 15.

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

²⁸ *Id.* at 3–12.

²⁹ *Id.* at 13–29.

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

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.³¹ 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.³² Even these exam-

³⁰ 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.

³¹ 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.

³² 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.³³ 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.³⁴ 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.

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.

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

³⁴ 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.³⁵ 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").³⁶ Because the government arguably induces criminal conduct during many undercover operations,³⁷ the prosecution often responds to entrapment claims by proving that the defendant was predisposed to commit the charged offense.³⁸ The government commonly does so by presenting evidence that the defendant has been convicted for similar offenses in the past.³⁹ 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.

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

³⁶ *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).

³⁷ *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.")

³⁸ *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))).

³⁹ *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.”⁴⁰ 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”;⁴¹ it also could “better protect suspects who have prior convictions”⁴² and “stop abusive law enforcement tactics.”⁴³

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.”⁴⁴ 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.⁴⁵

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.⁴⁶ 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.⁴⁷ Even if

⁴⁰ Lininger, *supra* note 2, at 842.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 843.

⁴⁴ *Id.* at 842.

⁴⁵ See SHUY, *supra* note 1, at 14.

⁴⁶ 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”).

⁴⁷ 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,⁴⁸ 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."⁴⁹

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.

⁴⁸ 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.

⁴⁹ *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”⁵⁰ and “preference for passive listening by undercover officers,”⁵¹ and believes that officers should be permitted to “contrive circumstances that squarely present suspects with opportunities to commit crimes,”⁵² 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,⁵³ 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.⁵⁴ 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.⁵⁵ Second, it would deter such misleading practices and bring their use to the prosecutor’s attention before a defendant’s indictment.⁵⁶ 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.⁵⁷ If so, this proposed reform is problematic.

⁵⁰ Lininger, *supra* note 2, at 841.

⁵¹ *Id.*

⁵² *Id.*

⁵³ 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”).

⁵⁴ See Lininger, *supra* note 2, at 843.

⁵⁵ See SHUY, *supra* note 1, at 24–25.

⁵⁶ 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.”).

⁵⁷ 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,”⁵⁸ 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*,⁵⁹ 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

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.

⁵⁸ Lininger, *supra* note 2, at 843.

⁵⁹ 373 U.S. 83, 87 (1963).

that appear to favor the prosecution.”⁶⁰ 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.⁶¹

Despite what Professor Lininger describes as an expansion of the *Brady* rule over the past three decades,⁶² 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,⁶³ 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.⁶⁴ 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.”⁶⁵

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

⁶⁰ Lininger, *supra* note 2, at 844.

⁶¹ 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.

⁶² 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).

⁶³ *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”).

⁶⁴ *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))).

⁶⁵ 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.⁶⁶ 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 Clause⁶⁷ 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."⁶⁸ 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.⁶⁹ 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

⁶⁶ 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.").

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

⁶⁸ 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).

⁶⁹ 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.⁷⁰ If those witnesses are hostile to the defendant, Rule 607 of the Federal Rules of Evidence empowers the defendant to cross-examine them.⁷¹

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-

⁷⁰ "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).

⁷¹ 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.⁷² 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.⁷³ 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.⁷⁴ As Professor Shuy explains, linguistics experts can help educate those actors in the criminal justice system, preferably before indictment and trial.⁷⁵ Although he also supports

⁷² 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.”).

⁷³ 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).

⁷⁴ 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[]”).

⁷⁵ See *id.* at 179–85.

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

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.

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

