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LANGUAGE IN THE JUDICIAL PROCESS

Edited by
Judith N. Levi

*Northwestern University
Evanston, Illinois*

and
Anne Graffam Walker

*Forensic Linguistics Associates
Falls Church, Virginia*

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Chapter 9

ON THE USE OF SOCIAL CONVERSATION AS EVIDENCE IN A COURT OF LAW

ELLEN F. PRINCE

1. INTRODUCTION

In this chapter, I shall discuss two issues which have come up in my work as a linguistic consultant and expert witness and which I feel are serious and in need of attention: first, what I take to be a misguided and dangerous use of covertly taped social conversation as courtroom evidence, and, second, the shockingly poor quality of FBI transcriptions of these tapes. I shall first describe the data on which my statements are based and then discuss the two issues, in reverse order.

2. THE DATA

As a linguist, I have been professionally involved in one way or another in 10 or so court cases in which the federal government was prosecuting some individual or individuals. My specific role was that of linguistic consultant for the defense lawyer. In addition, in two of the cases, I served as an expert

witness and testified in court. The cases involved a diverse set of charges, including conspiracy to murder, drug dealing, perjury, mail fraud, and graft.

In all but one case, one, if not the, major source of evidence presented by the government consisted of utterances made by the defendant in private social conversations, covertly taped by the defendant's interlocutor in the service of the FBI. The one case not involving social conversation made use instead of covertly taped service encounters. That case, however, will not be relevant in this chapter, as what I shall say pertains only to the more common practice of using social conversation.

In all the relevant cases, the interlocutor, wearing a hidden tape recorder, was an FBI agent posing as a peer (e.g., as a friend of a friend) or, more often, was an actual peer who was convicted of or was liable to be convicted of some related crime and was conducting the taping as part of a deal made with the federal government. In either case, it was of great interest to him that the defendant somehow incriminate himself/herself. (All the interlocutors in these cases were male; two of the defendants were female.)

3. THE USE OF SOCIAL CONVERSATION AS LEGAL EVIDENCE

In the cases in which I have been involved, the use of social conversation as legal evidence is grounded on an assumption that the government seems to make that there is a necessary and direct relationship between utterances and knowledge/beliefs. This is reflected primarily in two ways. In the simpler situation, the government acts as though the defendant's uttering of a statement conveying proposition *P* entails that that defendant knows/believes *P* (see section 4.2.1 for discussion and examples). In the more complex situation, the government acts as though the defendant's assenting to, or simply not contradicting, a proposition *P* conveyed by the interlocutor's utterance entails that the defendant either already knows/believes *P* or else comes to know/believe *P* (see section 4.2.2 for discussion and examples). Thus something the defendant says or appears to assent to in private social conversation is construed as a reflection of a piece of his/her belief state. This assumption and the inferences that are made on the basis of it become relevant, of course, when proposition *P* is in some way incriminating.

4. PROBLEMS WITH THE ASSUMPTION

I shall not here even touch upon the enormously problematic phenomenon of the interlocutor manipulating the conversation in order to get the defendant to say apparently self-incriminating things or otherwise to put himself/herself in an apparently self-incriminating position, as Roger Shuy

has discussed this elegantly and in detail, both in court and in linguistic contexts (see Shuy, 1981a,b, 1982, 1987, *inter alia*).

The two problems I shall discuss are, in my opinion, equally pervasive and pernicious: (1) the government's understanding of what was actually said and (2) the importance of "truth" in social conversation. Let us consider each separately.

4.1. Understanding What Was Said

The main problem I have come up against in the use of social conversation as legal evidence is, in my opinion, outrageously inexcusable: In the cases I have worked on (and they are not unique; cf. Walker, 1986), the government has on occasion simply misunderstood what was said, often to the detriment of the defendant. This comes about basically in two ways: (1) the government mishears and mistranscribes the tapes and (2) the government hears correctly what was said but proceeds to misunderstand it.

4.1.1. Mishearing/Mistranscribing

Mishearing and mistranscribing is rampant in the FBI work I have seen, where, working with a Sanyo transcriber, I have found an average of 14 substantive errors per typewritten page of transcript. Here I am not including the very large numbers of errors of punctuation and spelling, including "eye dialect," which may themselves have a pernicious effect. (Eye dialect is the spelling of words in such a way as to represent the standard pronunciation, where that spelling differs from the conventional, for example, "sez" for "says," "wimmin" for "women"; it is typically used in comic strips to suggest that the character is less than literate.)

First, whole words, phrases, and even sentences may be omitted, as in examples 1-3, where the *a* versions are from the FBI transcripts, and the *b* versions are what I clearly heard on the tapes. In all the examples, *T* is the individual wearing the tape recorder, that is, the informer, and *D* is the individual being taped without his knowledge, that is, the subsequent defendant. (In the transcriptions presented in this chapter, upper-case words indicate heavy stress, time periods, for example, 4 sec, in brackets indicates length of silences, double slashes, that is, //, indicate simultaneity of the following segment with the segment following the next set of double slashes, and underlining indicates the part of the utterance particularly relevant to the linguistic analysis.)

- (1a) T: . . . I don't know whether he said he followed him or they followed him when he left there. I don't know.

- b T: . . . I don't know whether he said HE followed THEM or THEY followed HIM when he left there. [4 sec]
 D: They can't HAVE anything.
 T: I don't know.
- (2)a T: [Discussion of FBI investigation and own fears]
 D: Jesus Christ—that's a shame. I don't know what the hell to do.
- b T: [Discussion of FBI investigation and own fears] [4 sec]
 D: Jesus Christ. [5 sec] That's a shame. [3 sec] I don't know what the hell to tell you.
- (3)a D: Just watch them. Don't do, don't let them know too much of your business—believe me. They are treacherous motherfuckers, I tell you. And I know dealing with freight, they're no good, they'll beat you to death. (Nonpertinent conversation.)
- b D: Just watch them. Don't do it, don't let them know too much of your business, believe me. They're treacherous motherfuckers, I'll tell you. And I know with dealing with freight, they're no good, they beat you to death. You give them fucking gold, they come back with the price of copper.
 T: Yeah. Right.
 D: I'm telling you, I KNOW what happens. You know, uh, we—

Such poor transcriptions are pernicious not only when the mistranscription constitutes direct evidence against the defendant but also—perhaps even more so—when it simply adds an aura of shadiness or guilt to the defendant. The reason is as follows. Typically the tapes are played (once) for the members of the jury, who are also given transcripts to read along. Now, we as linguists know only too well the difficulty of hearing what is actually said on a tape of naturally occurring discourse between acquaintances. Moreover, FBI tapes are typically of very poor quality, understandably so, given how and where they are made—with the tape recorder concealed on the person of the tapper and with the interaction often taking place in noisy public places. I would venture a very confident guess, therefore, that jurors rely entirely on the transcripts in front of them and would virtually never notice any discrepancy between the tape and the transcript. Therefore, for the jurors, the transcript is in fact what was said, but they have the mistaken belief that they have actually heard what they have read.

In 1, the omission on the transcript of "They can't HAVE anything" resulted in the jury's failing to be aware of one of the instances where D said something that would support his case.

In 2, the FBI version, "I don't know what the hell to do," makes D look as if he is personally involved and seeking his own plan of action, when in fact he said, "I don't know what the hell to tell you," simply responding to T's alleged fears.

In 3, where D is a fence, that is, a dealer in stolen goods, on trial for

conspiracy to murder, the omission of his wonderful metaphor about gold and copper as "nonpertinent conversation" makes the preceding sentence, about beating to death, seem intended literally. In fact, D is clearly being metaphoric in both sentences, commenting only on prices paid for "freight."

I have even found one instance in which the original transcript given to the defense was correct but where a pernicious change was made in the transcript given to the jury. The relevant passage is shown in 4, where 4a is the original correct version, 4b the incorrect one shown to the jury:

- (4)a [. . .] Uh, [X] has called me. [Y] has called me. [Z] has called me. All them guys have been calling me here at the house since I've been home. Jesus, I mean, uh, they all of them asking, do you need anything, can we do anything? No, man, you can't do nothing for me.
- b [. . .] Uh, [X] has called me. [Y] has called me. [Z] has called me. All them guys have been calling me here at the house since I've been home. Jesus, I mean, uh, they, all of them asking, "Do you know anything? Can we do anything?" "No, man, you can't do nothing for me."

The change in 4 from "Do you need anything?" to "Do you know anything?", quoted from [X,Y,Z], local gamblers, to D, the chief of police, inserts an implicature of collusion, of special "shared knowledge" between them. This tape and transcript were shown to the jury on the first day of the trial. In the evening paper, this passage was cited in a front-page article under the headline "Tape Ties [X] to Ex-Chief."

4.1.2. Misunderstanding

Even when some utterance is correctly transcribed, it can happen that it is grossly misunderstood by the government. The most extraordinary such instance I have found comes from a case involving an organized crime figure accused of conspiracy to murder. It is shown in 5, where 5a is the fragment as it was punctuated by the FBI, 5b the fragment as a linguist would have punctuated it:

- (5)a T: When we killed that [X].
 D: Yeah.
 T: He wanted to have me killed, you know.
 D: Yeah.
 T: Yeah, [Y]—You know?
 D: Yeah.
 T: And uh I still got that against him.
- b T: When we killed that [X],
 D: Yeah.
 T: He wanted to have ME killed, you know.
 D: Yeah.

T: Yeah, [Y]—You know?

D: Yeah.

T: And uh I still got that against him.

Hard to believe, perhaps, but D's first "Yeah" in 5 was considered as evidence that D had a part in killing X! This was in fact the most incriminating utterance in all the tapes made in this case.

Even the defense lawyer thought that this "Yeah" was a problem—and that is why a linguist was called in. I explained to him the two problems with construing this monomorphemic utterance as an admission of conspiracy to murder. First, as linguists know well, such "yeahs" do NOT mean "Yes, I hereby inform you that I am committed to the truth of the last-uttered proposition" but are rather what Goffman (1967) calls "back-channel cues," that is, items like "yeah," "uh huh," "mm," "I see," "right," which communicate something like "I have processed, or purport to have processed, the preceding clause; you may now go on." Second, English "we" is ambiguous: It can be either inclusive "we," denoting minimally the speaker and hearer, or exclusive "we," denoting the speaker and some third party or parties but excluding the hearer. (Many languages, e.g., Sedang, a language of Vietnam, have one word for the inclusive sense and another for the exclusive.) Therefore, even if, in 5, D were in full agreement with T's proposition, we still would not know if D thought he himself had killed [X]. (Of course, had they been speaking Sedang or some other language that differentiates between inclusive and exclusive "we," this would have been disambiguated, but unfortunately for the defense they were speaking English.)

I could continue at length on the errors of hearing, transcribing, and understanding that the federal government makes in such tapes, but I believe I have made my point and shall turn now to the second large problem with using social conversation as legal evidence—the role of truth in social conversation.

4.2. Truth

The second problem simply boils down to a fact which is well known among linguists and no doubt laymen alike but apparently unknown to the federal government: "The truth, the whole truth, and nothing but the truth" is not one of the higher priorities of individuals engaged in social conversation, not as speakers and not as hearers. A crucial entailment of this is, therefore, that there is no necessary correlation between what one says or what one assents to in social conversation and what one in fact believes.

It has been argued (Keenan, 1976) that, at least in one society, truth is entirely irrelevant in social discourse. Although I am not convinced by her

arguments, it seems relatively uncontroversial that people, hopefully all people, lie on a regular basis.

The government's apparent assumption that commitment to truth is of the highest priority in social conversation leads it to two conclusions: first, that one's statement reflects one's belief, and, second, that one's failure to contradict another's statement demonstrates that one shares with the other that belief.

4.2.1. D's Statement = D's Belief

Let us first consider the common situation, in which one's statement fails to reflect one's beliefs, that is, where people fail to tell the truth in social interaction. A number of possible reasons for this suggest themselves.

One reason has to do with matters of politeness and the general management of social interaction (see Brown & Levinson, 1978, *inter alia*). Consider the invented examples in 6:

- (6)a I just peeked in the nursery and saw him. What a sweet little baby. I think he has your mouth. [Re prunelike neonate that speaker finds hideous]
 b Don't feel so bad—everybody goes through a red light once in a while. [To friend who has just totaled a car]

The type of polite lying in 6 is hopefully universal. However, what one is lying about will presumably vary from subculture to subculture: Cloistered monks, for example, will presumably have little need for 6a, and city dwellers whose circle of friends do not drive will not need 6b. Of course, they will simply have other things to make people feel better about.

One instance of this type of polite lying is very likely exemplified in a covertly taped conversation in the perjury case I worked on in which the defendant (D) is a chief of police just home from the hospital and is being visited by the assistant chief of police (T), wearing a concealed tape recorder in the service of the FBI. The assistant chief, following a prearranged scenario, has been expressing great concern for more than a half hour that he (T) will be prosecuted for taking bribes. And, for a half hour, the chief has been responding that T has nothing to worry about because T never took anything. Finally, D utters the incriminating lines in 7:

- (7) T: [long speech expressing his fears of prosecution] [8 sec]
 D: I'll tell you, they certainly have created a monster. . . [10 sec] You just uh. . . [4 sec] You didn't do anything else—anything wrong o—other than what: everybody else on the police force did at that time. At Christmas time, we accepted//
 T: //Oh man! Christmas time, it was like—I remember the days, Christmas time used to be like//
 D: //Damn right. Christmas time, everybody accepted money.

D's statements in 7 were considered highly significant by the government, even though D had stated under oath that he himself had received gifts of money at Christmas. The issue was his knowledge of OTHERS receiving money from specific donors. T's donor was not relevant. The government claimed that this fragment showed that D knew that others (besides T) received money and implicated (i.e., suggested) that he knew specifically who they were and from whom the money had come.

In the trial, D testified with respect to this fragment that he did not specifically know who received money and that he had said what he did in 7 merely to calm T. I quote from D's testimony: "I imagine some of the fellows did receive Christmas gifts. I did. I received Christmas gifts. . . . When I started telling him [T] about other fellows taking money, it seemed to relax him. I thought that was what he wanted to hear." Given the preceding half-hour of T's expression of fear, D's testimony seems plausible. Supporting this are the (presumably manipulative) long periods of silence prior to D's utterances on the tape: Silence is painfully unacceptable in social conversation and often inspires speakers to take desperate measures.

Before leaving the topic of socially acceptable lying, I should like to point out that telling untruths occurs regularly in discourse also for affective reasons, for example, humor, sentiment, beauty. Consider the examples of sarcasm and hyperbole in 8a and the metaphors in 8b, c:

- (8)a You should see the geniuses I have in Ling. 101—My philodendron is more alert.
 b Ich bin ein Berliner. [As uttered by John F. Kennedy]
 c All the world's a stage.

In fact, Grice (1975) has pointed out that speakers do all kinds of creative things with the Maxim of Quality, the abstract presumption of truth, to produce a variety of indirect understandings, called "conversational implicatures," including those responsible for sarcasm, hyperbole, and metaphor.

Finally, people can simply lie. When one is engaged in social conversation in one's kitchen or in a neighborhood bar or on the telephone or wherever, one can say what one feels like. Social lying, bullshitting, telling fish stories or tall tales may or may not be admirable traits in a given subculture of our society, but they are not yet illegal.

Furthermore, speakers and hearers, from a very early age, it seems to me, take one another's utterances with a grain (or pound) of salt, but the government seems to believe that we are all under oath at all times, in all places. If, for example, I am overheard in a bar saying that it was I who shot John Kennedy, my statement could certainly prompt an investigation, but it cannot be taken as proof of my guilt or even, I would maintain, as serious evidence. And, presumably, no one would consider hiring me to remove their brain tumor simply because they had heard me say in a South Philly bar that, before becoming a teamster, I had been a brain surgeon.

So far, I have discussed situations in which the defendant's own utterance carries the supposedly incriminating proposition. I shall now turn to the closely related situation in which D's appearing to assent to someone else's utterance is assumed to reflect D's belief.

4.2.2. D's Assent = D's Belief

Let us reconsider the fragment in 5, this time imagining that the "we" in T's utterance is unambiguously inclusive, that is, that T has just uttered a proposition that would be false if both he and D had not killed [X].

The government would like to believe that, if it were the case that T and D had jointly killed [X], then D's failure to contradict T by stating explicitly that the proposition "D and T killed [X]" is false demonstrates that D is committed to the truth of that proposition.

Clearly, as is well known, that is simply not true: People fail to contradict others for a variety of reasons having to do with social interaction, cultural mores, power roles, and so forth, and no conclusion can be validly drawn about one's beliefs from one's failure to contradict. Moreover, in the case of 5, the social facts of the situation are such that it is particularly unlikely that D would contradict T, no matter what T said. T is an organized crime hitman—a hired killer. He is very large, strong, known to carry a gun and to use it. He is also known to be not too bright and basically illiterate. On the other hand, D is a small, nonphysical type in his 60s, a dealer in stolen goods, a man who has lived by his wits and who has been one of the quietest, least noticeable members of the area's organized crime operation. Their conversation is taking place in a neighborhood bar. Thus it seems most unlikely that D would contradict T, regardless of what D said or what T believed about what he said.

In fact, in the same set of tapes, we have direct evidence of D's disinclination to contradict or correct T, in an innocuous exchange where D has told a narrative that T has misunderstood. This exchange, omitted from the FBI transcript as "nonpertinent conversation," is presented in 9:

- (9)
 [Several people at bar have recounted humorous narratives about crime.]
 D: That guy in Chicago is the best one.
 T: What, the uh—//The [. . .]?
 D: //Did you read that, the [. . .]? No? Did you read that, [X]? That guy in Chicago? Every anniversary they write [the] story about it. He worked in a bank, OK? Now in this bank, they worked on a Saturday. Now he was a trustee, but he had NO right to go into the vault. You know, he wasn't one to go into the vault. On Saturday, they left the vault open, because they were closed, they did accountings and all that. He went in and stole over a million dollars, OK? They KNOW he did it. He's the only one, he resigned his job and all, rather than take a lie detector test. Every anniversary, they write it up in the paper. It's three years. It says, he now has four years. If he hits the four years, he keeps the money.

T: That's all in the paper?

D: They—It says the FBI are constantly [. . .] the Treasury Department; he has not changed his style of living; they don't know how he did it; they said he carried eighty pound of money out of that fucking bank, eighty pound, and they don't know how he did it. And//

T: // [. . .]

D: You know, they locked the bank up at night. [. . .] for three years. [. . .] his anniversary. And it says, and they—they're giving odds in Chicago that he'll go fo—four more years and wind up with that money.

T: Huh!

D: And he hasn't changed his style of living. Did you read that? It was in the paper about—about two months ago, his anniversary.

T: I didn't see it.

D: Yeah! Did you see it? A million and some dollars! Eighty pound of money! They—that's what baffled them: HOW did he get OUT of the building with eighty pound of money? They said that he couldn't put it in his clothes, you know, he had to have—and there was guards, security, like going out of the bank, in and out. And they searched everywhere, they can't find it. So when they asked him to take a lie detector test, he says nope, he says, "I'll resign my job [if that's what you want]."

*T: //Let me tell you something. We used to get four dollars a fucking bag for sugar. I could pick up three fucking bags and heave them motherfuckers in a truck. And at sixty pound a bag, that's sixty: hundred and twenty:::

\$D: But walking out with—Yeah, but walking out of a BANK—

T: When you're stealing, man, you can take it.

%D: Oh, I agree with you. There's a way, there's always a way. [6 sec]

T: Especially money, man, that don't weigh nothing.

D: They checked everything, they checked the [. . .] and all. He [. . .] where he put that fucking money. [8 sec] [Someone else begins another narrative. T heard in background talking about "three fucking bags."]

In 9, we see that T has missed the point of D's narrative: D is speaking of the money in terms of its weight, but listeners are expected to infer the *volume*: The interesting point of the narrative is that someone has walked out of a bank with a parcel that is as *large* as 80 pounds of money must be. T misses this inference entirely and thinks the point is that it is amazing that the robber could have carried out such a *heavy* parcel. (See turn marked *.) D most discreetly tries to give T another chance to draw the weight-to-volume inference (turn marked \$), T fails again, and D gives up (turn marked %) and *explicitly asserts agreement with T's misunderstanding!*

Thus we find compelling evidence that, even if, in 5, T's "we" meant "you and I," which it does not necessarily mean, and even if D's "yeah" meant "I hereby commit myself to the truth of the proposition just expressed," which it certainly does not mean, we still could not conclude from this that D in fact believed that he had any part in killing [X].

5. CONCLUSION

In this chapter, I have tried to bring attention to two areas that I feel are highly problematic for the use of social conversation as legal evidence: the inaccuracy that is found in the government's hearing, transcribing, and understanding what was said and the assumption that the participants are primarily concerned about getting the truth on the hidden tape.

How serious a problem is this? In point of fact, most of the defendants for whom I have worked are not terribly attractive people, and they may well have been guilty of all sorts of crimes, including those for which they were indicted. However, it seems very clear to me that, if such careless and uninformed work on the part of the federal government can incarcerate undesirables, the rest of us may be at risk as well because, given sufficiently imaginative charges and enough mishandled covert taping, anyone can be made to look guilty of a crime.

As is usually the case, the problem is easier to find than the solution. One solution, of course, would be to stop surreptitious taping of social conversations by the government. However, this is not likely to occur, as the practice seems to be constantly on the rise and the trend shows no signs of changing. Perhaps the best we can hope for is a more knowledgeable government, one that knows how to listen to speech, how to transcribe it, and how to interpret it, one that is informed by basic linguistic and sociolinguistic principles of how social conversations work and of how individuals interact verbally. In short, maybe it's time for Big Brother to learn some linguistics.

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