Journal of Criminal Law and Criminology

Volume 96
Issue 1 *Fall*

Article 10

Fall 2005

Criminal Law and Criminology: A Survey of Recent Books

Peter Neumer

0091-4169/05/9601-0385
THE JOURNAL OF CRIMINAL LAW & CRIMINOLOGY
Vol. 96, No. 1

Printed in U.S.A.

RECENT BOOKS

CRIMINAL LAW AND CRIMINOLOGY: A SURVEY OF RECENT BOOKS

PETER NEUMER*

ROGER W. SHUY, CREATING LANGUAGE CRIMES: HOW LAW ENFORCEMENT USES (AND MISUSES) LANGUAGE, (Oxford University Press 2005) 185 PP.

In *Creating Language Crimes: How Law Enforcement Uses (and Misuses) Language*, Roger W. Shuy draws on his decades of experience as a forensic linguistics expert to argue that law enforcement officials are, at times, guilty of using "conversational power strategies" in order to manipulate tape-recorded conversations and create language crimes such as bribery, obstruction of justice, or solicitation of murder. Shuy, while noting the recent scholarship documenting the abuse of forensic evidence generally in criminal trials, is careful to point out that not all, or even many, law enforcement groups systematically manufacture language crimes. Rather, Shuy asserts that law enforcement agents have engaged in problematic behavior with respect to tape recordings only in certain instances. Shuy bases his conclusions almost exclusively on anecdotal evidence culled from the various criminal proceedings Shuy has worked on first-hand.

Shuy identifies eleven conversational strategies law enforcement agents and cooperating witnesses use to "create the illusion of a crime when one was not otherwise happening." These strategies range from the rather benign—employing linguistic ambiguity to suggest the presence of a crime (e.g., using a euphemism for the word "kill")—to the downright nefarious—artificially creating static on the recording tape to obscure the future defendant's exculpatory statements or manipulating the on/off switch of the tape recorder to give the impression that the defendant is present when she is not.

Shuy suggests that conversational strategies are effective in fabricating language crimes for three primary reasons: (1) the strategies are not noticeable to targets because they are commonplace in standard conversation (for example: people often refer to items or acts ambiguously); (2) the strategies, although potentially confusing or offensive (the insertion of offensive language into a conversation to suggest a

* J.D. Candidate 2006, Northwestern University School of Law.

rough, "criminal" element), do not arouse suspicion that one is being set up to appear to be committing an illegal act; and (3) the strategies are invidiously deceptive ("lying about critical facts upon which the targets have to rely to make decisions either to commit illegal acts or to reject them").

For Shuy, conversational power strategies are particularly troublesome in the context of a criminal investigation based on tape recordings, because the targets of an investigation do not know they are being recorded and thus cannot properly respond to the questionable conversational practices promulgated by a law enforcement agent or a cooperating witness. Were a target to be aware of the recording process, he could clarify vague terms or take the time to correct a cooperating witness' false statement. Absent this information, however, conversational strategies become powerful and effective in the fabrication of a language crime.

Shuy divides his examples of the usage of conversational power strategies into two sections: uses by cooperating witnesses and uses by law enforcement officers. In the cooperating witness section, Shuy describes six separate criminal investigations involving alleged solicitation of murder, murder, stolen property, business fraud, contract fraud, and sexual misconduct respectively and then analyzes how cooperating witnesses attempted to use the conversational techniques of using ambiguous phrases, not taking "no" for an answer to a inculpating question, or lying to establish the target's guilt.

Similarly, in the uses by law enforcement officers section, Shuy relates the details of five criminal investigations where the law enforcement agents actually were the ones employing questionable conversational approaches. Shuy's most disturbing chapter involves a child sex abuse investigation conducted by former detective Robert Perez. During Perez's investigation, which ultimately led to forty-three adults being charged with twenty-nine thousand counts of rape and molestation of sixty children, Perez substituted his own words for the words of defendants in defendants' signed confessions, used abusive questioning procedures to produce confessions, and induced children to make accusations. At the present time, eight of the convictions that resulted from Perez's investigation have been thrown out by the Washington Court of Appeals, and five appeals are still pending.

Shuy concludes his book by recommending that prosecutors and defense attorneys should be more aware of the power of conversational power strategies. For Shuy, greater awareness of the problems of criminal tape recording investigations would reduce wrongful convictions and allow greater resources to be devoted to catching and punishing the true criminals.

THE TRIAL ON TRIAL (Antony Duff, Lindsay Farmer, Sandra Marshall and Victor Tadros eds.) 202 PP.

The Trial on Trial is a compilation of ten essays that examine the criminal trial from different legal, cultural, and philosophical perspectives. Written by an international group of legal scholars, the book explores the significance of the trial and compares the strengths and weaknesses of the adversarial trial to those of the inquisitorial or truth-seeking model. Although the essays focus on different aspects of the criminal trial, all the scholars look to answer the questions of what role the trial should play in

the criminal justice system and whether the trial is indeed a worthy procedural practice.

In Antony Duff's introductory piece, he establishes the prominent themes of the book. Duff first argues that the decreasing numbers of criminal trials have not reduced the importance of the trial. Duff details that the criminal trial has historically been considered of such great import because it was one of the primary ways the state attempted to protect the rights of the accused. The public trial, by forcing the state to present its case in open court, functioned as a significant check on state power. Moreover, the defendant's ability to participate in the process transformed him into an active participant instead of a passive "object of proceedings."

For Duff, the criminal trial remains important because of the influence it has on criminal proceedings in general. Just as the rules of evidence at trial affect the investigation techniques employed by law enforcement, Duff argues that "[t]he norms that govern the trial process will determine the appropriate way in which the accused is to be treated pre-trial." Thus, because the specific nature of the criminal trial casts an influential shadow on the proceedings before it, the trial remains an essential object of inquiry, even if most criminal matters are decided outside a trial setting.

Duff next identifies the crucial tension present in the criminal trial: the extent to which the trial should function as a "truth-seeking" process versus the extent to which the trial should respect the rights of those affected by it. If one favors a truth-seeking model, how much is one willing to limit the procedural rights of a defendant to attain the truth (the easy example of this dilemma is the "fruit of the poisonous tree" doctrine)? Conversely, to what degree would an advocate of a process-oriented trial model be willing to ignore negative consequentialist outcomes in favor of formalist procedure? Without definitively resolving this thorny debate, Duff creates a helpful frame for the discussions of the trial that follow.

Jenny McEwan, directly addressing the adversarial/inquisitorial debate, cautiously commends the recent legislative reforms in Britain that have begun to chip away at the adversarial elements of the criminal trial. Arguing that the adversarial system is incompatible with the search for the truth, McEwan views Britain's legal reform as a method of ensuring that reliable evidence is brought before court. In particular, McEwan singles out measures established to allow "vulnerable" witnesses the ability to give evidence more fluently. Nevertheless, McEwan is quick to note that some measures meant to ease the burden on vulnerable witnesses may in fact increase that burden by causing judges to inquire into an alleged victim's sexual history for example. Thus, McEwan acknowledges that proper reform of the excesses of the adversarial system is not an easy task.

Matt Matravers' essay addresses an oft-ignored element of the criminal trial: jury nullification. In Matravers' essay, he defends jury nullification—a jury's decision to acquit or convict a defendant in defiance of the law—as a truth-seeking measure. To make this argument, Matravers argues that the jury should not be seen as "lying" about its decision. Rather, the jury should be seen as answering a different type of question. The question for Matravers is not "did the defendant steal a pizza," but did the defendant "steal the pizza under condition such that he deserves twenty-five years to life in prison?"

Matravers, while portraying jury nullification as a search for truth, does acknowledge that jury nullification can occur for both noble and desultory reasons. Matravers even puts forth an argument defending racist jury nullification (imagine a factually innocent African-American defendant in the early 20th century American south). According to the argument, part of the jury's function is to reflect local norms and without the element of moral condemnation, the jury is not fulfilling its duty. Matravers acknowledges the weakness of this argument but suggests that from a pragmatic standpoint, jury nullification may produce more benefits than costs.

The notions of truth and certainty in the criminal trial continue to be dissected throughout the book. Duncan Pritchard provides an in-depth look at trial testimony, paying specific attention to the question of how we can verify the truth of a given piece of testimony. John D. Jackson explores how the need for finality limits the truth-seeking capability of the trial, while Robert Burns examines the narrative structure present in trials.

The diverse group of opinions present in *The Trial on Trial* leaves one with the strong impression that while the symbolic and practical importance of the criminal trial may be accepted, we are far from establishing a consensus regarding the trial's ideal form or ultimate meaning.