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BOOK REVIEW

HELP FOR INNOCENT EARS

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LANGUAGE CRIMES: THE USE AND ABUSE OF LANGUAGE EVIDENCE IN THE COURTROOM. By *Roger W. Shuy*. Blackwell 1993. Pp. 205.

I. INTRODUCTION

In 1909, Hugo Muensterberg published his pioneering treatise on the psychology of witnessing, *On The Witness Stand*. He was greeted by John Henry Wigmore (in other contexts, no enemy of innovation) with a friendly wariness that has characterized the legal system's response to social science evidence ever since. Wigmore thought that Muensterberg's findings were interesting, but not sufficiently developed to be of use to the courts.[1] Still, when the psychologists were ready for the courts, Wigmore announced, the courts would be ready for the psychologists.[2] Subsequent events have cast more than a little doubt on that assertion.

While the courts have been quick to recognize the value of the physical and medical sciences in resolving forensic disputes, the various branches of psychology, and social sciences in general, have faced a comparatively chilly reception.[3] Perhaps that is unavoidable. The social scientist's knowledge is statistical and probablistic; the courts' task is clinical and diagnostic. The scientist can report whether a particular result is produced in ninety percent of experiments, but the courts must still decide whether *this* case is one of the

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[1] John Henry Wigmore, *Professor Muensterberg and the Psychology of Testimony*, 3 ILL. L. REV. 399 (1909).

[2] *Id.* at 404.

[3] *See generally* Lauren Walker & John Monahan, *Social Frameworks: A New Use of Social Science in Law*, 73 VA. L. REV. 559 (1987); Robert P. Mosteller, *Legal Doctrines Concerning the Admissibility of Expert Testimony Concerning Social Frameworks Evidence*, 52 L. & CONTEMP. PROBS. 85 (1989).

ninety percent, or one of the ten percent. For this reason alone, the translation of the social scientist's knowledge into the trial process can never be automatic or easy. Besides, perhaps even more than other evidence, the social scientist is subject to the distorting vagaries of adversary practice. No one is more convinced of this than scientists themselves, substantial numbers of whom view lawyers, courts, and their machinations with undisguised horror.[4] The social scientists and the courts clearly realize that they cannot live comfortably together, but at the same time, they are manifestly unwilling to live entirely apart.

Roger Shuy's book, *Language and Crimes: The Use and Abuse of Language Evidence in the Courtroom*,[5] is the account—lucid, balanced, and laudably free of jargon—of one social scientist's efforts to offer his knowledge to the legal system. It is a valuable document in the problematic history of the forensic use of social science learning. Shuy, a linguist, has consulted in over 200 criminal and civil cases and has testified in thirty-five of them. His interest is in crimes such as threats, bribery, extortion, or solicitation, which can be "[a]ccomplished through language, not through physical acts."[6] It might seem to lawyers that Shuy oversimplifies when he asserts that "[i]f one solicits or requests certain things . . . one is committing a crime through language alone."[7] For example, in the cases in which Shuy analyzes wiretap transcripts or videotaped sting operations, language (usually conversation) is not used "alone" but as an indication of meaning or intent. Shuy, however, means more by "language" than "words." Indeed, what the linguist brings to the courts is the recognition that, in assessing allegations of "language crime," context is as important as content:

> Not only must jurors consider the words that were said, for example, in a tape-recorded conversation that is used as evidence in a criminal case, but also they must consider the context in which these words were said, the several possible meanings provided by imperfect, inexplicit, vague word selection, the social roles of participants, and many other factors.[8]

In *Language Crimes*, Shuy analyzes in detail a number of cases in which he attempted to bring this truth home to the courts. Several of his examples—the "Abscam" corruption case of Senator Harri-

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[4] *See, e.g.*, Michael McCloskey et al., *The Experimental Psychologist in Court: The Ethics of Expert Testimony*, 10 L. & HUM. BEHAV. 1 (1986).

[5] ROGER W. SHUY, LANGUAGE CRIMES: THE USE AND ABUSE OF LANGUAGE EVIDENCE IN THE COURTROOM (1992).

[6] *Id.* at 1.

[7] *Id.*

[8] *Id.* at 2.

son Williams[9] and the John DeLorean drug prosecution[10]—are celebrated, but all are illuminating.

II. SEEING AND HEARING

For lawyers, Shuy's experiences will immediately evoke the familiar and protracted controversy over expert psychological testimony concerning the frailties of eyewitness identifications. Identification can be skewed by a variety of surprising factors, including stress, expectation, and social pressures, among many others.[11] While the differences between expert testimony about seeing and about hearing are at least as interesting as the similarities, the similarities are real enough, and provide a convenient place to begin. In each instance, the social sciences apparently have uncovered misconceptions about everyday life that can fatally distort jury fact finding.

A jury arrives at its conclusions by utilizing both specific data and general propositions. Where, for example, there is evidence of the specific fact that blood is found on the defendant's knife, the jurors can be counted on to apply the general proposition that if there is blood on the knife, that tends to prove battery. This general proposition is supplied by the jurors' everyday experiences. But what if the jurors harbor a mistaken general proposition? What if they believe, for example, that an eyewitness' confidence is a reliable indicator of the eyewitness' accuracy? In such a situation, some psychologists argue, the ordinary adversary process generates the specific piece of data, that is, eyewitness confidence. By doing so, however, the process impedes accurate factfinding, because the jurors will apply a general proposition which is simply wrong, such as the assertion that confidence proves accuracy.[12]

At the core of Shuy's book is a catalogue of mistaken general conceptions about language that are likely to be applied to taped or videotaped crimes. First, Shuy identifies three misconceptions about the defendants who appear on tape:

1. if they are on the tape at all, they must be guilty of something; . . .
2. [i]f they are guilty of one of the charges, they are probably guilty of the other charges as well[; and]
3. [t]he defendants hear, understand, and remember everything said

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9 *Id.* at 20-35.

10 *Id.* at 68-85.

11 For a survey, see James M. Doyle, *Legal Issues in Eyewitness Evidence*, *in* PSYCHOLOGICAL METHODS IN CRIMINAL INVESTIGATION AND EVIDENCE (David C. Raskin ed., 1989).

12 *See* Gary Wells et al., *The Tractability of Eyewitness Confidence and Its Implications for Triers of Fact*, 66 J. APPLIED PSYCHOL. 688 (1981).

by the [undercover] agent or other [participant to] the conversation.[13]

Trial lawyers will find Shuy's first two contributions less than astounding, but with the third, Shuy enters onto his own territory, and begins to suggest how much a linguist can add to our understanding of apparently cut-and-dried transactions.

Shuy provides examples when he identifies five misconceptions about language:

1. Meaning is found primarily in individual words.
2. Listening to a tape once will be enough to determine its content.
3. Reading a transcript of a tape is as good as hearing the tape itself. Transcripts are accurate and they convey everything that is on the tape.
4. All people understand the same things by their words.
5. People say what they mean and intend.[14]

The potential impact of these misconceptions is easy enough to see, and no one claims that Shuy is a charlatan or a quack. So, why would a trial court object to his testifying in correction of these misconceptions? Why would an appellate court uphold trial court exclusions? There are a number of answers, but the fundamental problem for a court examining Shuy's list of misconceptions is the fact that each of the statements could be saved by adding "sometimes," and not one of them could be quite corrected by adding "never." Sometimes, people *do* say what they mean and intend. It is not true that transcripts are *never* sufficiently correct. Shuy's probablistic explications of the *correct* conceptions of language can never quite complete the courts' diagnostic task of deciding what was meant or intended by the statements at issue in a particular case. Understanding or even agreeing with Shuy's points only takes the courts so far. From the legal system's point of view, there is still the problem of how Shuy's information will be used. Will the expert's credentials overwhelm the jury? Will the expert's bill bankrupt the courts? As with testimony about eyewitness performance, "human factors," and other social science research findings about normal, everyday life, the resolution of these questions falls on the trial courts.[15]

III. TRIAL COURT'S SYSTEMIC WORRIES

Professor G. Robert Blakey's helpful *Foreword* to Shuy's book

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[13] SHUY, *supra* note 5, at 3.

[14] *Id.* at 8-19.

[15] *See* Salem v. United States Lines Co., 370 U.S. 31, 35 (1962) ("The trial judge has broad discretion in the matter of admission or exclusion of expert evidence, and his action is to be sustained unless manifestly erroneous.").

rightly underscores the futility of looking to appellate opinions for an understanding of the general course of trial court practice.[16] There are a number of appellate court opinions upholding the exclusion of Professor Shuy's testimony,[17] but they say only that the trial court was not obligated to admit Shuy's opinions, not that the court was, or a future court should feel, forbidden to admit them. The abuse of discretion standard, which governs appellate review of evidentiary rulings, provides some comfort to a trial judge worried about appellate reversal of his or her mistakes, but it also deprives the trial judge of guidance that might help avoid the mistake in the first place.[18] Within the generous scope of the abuse of discretion standard, how do trial judges decide whether to admit or exclude evidence such as Shuy's? One of the virtues of Shuy's book is the light it sheds on judges' reactions to the information Shuy offers. To begin with, *Language Crimes* hints at constraints arising from outside the boundaries of a particular case, which are felt by trial judges, but seldom draw explicit mention in appellate opinions.

For example, a trial judge asked to rule on the admissibility of expert linguistics testimony cannot fail to see that her ruling will be perceived not only as admitting a particular piece of proof, but also as endorsing the opening of an entire new *field* of testimony. This recognition naturally engenders caution, not because judges believe that linguists (in contrast to, for example, polygraph experts) are peddling an unreliable new science but because of the potential system-wide impact of the decision.

Shuy's teachings share one feature with those offered by psychologists specializing in eyewitness reliability: both focus on what is normal, expected and typical. Linguists and experimental psychologists testify about how language ordinarily operates, or how witnesses ordinarily remember. This fact distinguishes offers of expert proof in the two fields from earlier, successful offers of psychological and social science proof—offers which focused, for example, on explaining to jurors the difficulties in perception, memory and expression associated with drugs or alcohol,[19] or organic brain damage.[20] Putting aside for a moment the debate over whether "nor-

16 G. Robert Blakey, *Foreword* to SHUY, *supra* note 5, at vi-xiv.

17 *See, e.g.*, United States v. Evans, 910 F.2d 790 (11th Cir. 1990), *aff'd on other grounds*, 112 S. Ct. 1881 (1992); United States v. Kupau, 781 F.2d 740 (9th Cir. 1986); United States v. Schmidt, 711 F.2d 595 (5th Cir. 1983).

18 James M. Doyle, *Applying Lawyers' Expertise to Scientific Experts: Some Thoughts About Trial Court Analysis of the Prejudicial Effects of Admitting and Excluding Expert Scientific Testimony*, 25 WM. & MARY L. REV. 619, 628-40 (1984).

19 *See, e.g.*, Fries v. Berberich, 177 S.W.2d 640 (Mo. Ct. App. 1944).

20 *See, e.g.*, Jones v. State, 208 S.E.2d 850 (Ga. 1974).

mal" translates into "understood by jurors," one thing "normal" clearly *does* mean to a trial judge in this context is "frequent." To admit expert testimony every time an eyewitness testifies or a wiretap is admitted would impose enormous costs on the legal system. From the perspective of the trial courts, it appears inevitable that these costs will be multiplied as a counter-expert inexorably follows the first one,[21] the docket slows to a crawl, nothing is concluded, and the case backlog burgeons.

It may be that the trial courts have been particularly sensitive to these dangers because Shuy's testimony, like the critiques of eyewitness performance, threatens to destabilize a portion of their caseload which might once have been thought to be pretty well under control. In the routine of the criminal courts, a case based on an eyewitness was a good bet to draw a quick guilty plea rather than a slow trial. At least before linguistic analysis showed defendants a ray of hope, cases with a videotaped "sting" were even less likely to go to trial. Videotaped stings, such as the DeLorean case, are less frequent than eyewitness street robbery cases, but their trial costs are not trivial. When investigators utilize undercover videotapes, they do so in expensive, highly visible prosecutions, and invest a substantial commitment of law enforcement's financial and moral resources. When a DeLorean is acquitted, continuing legal education programs explaining the virtues of linguistics evidence multiply instantly, and suddenly defendants, who once immediately pleaded guilty when confronted with their own indiscreet, wiretapped conversations, start to demand trials rather than admitting the error of their ways.

The essence of Shuy's helpfulness for a videotaped defendant is his capacity to generate alternative hypotheses about the meaning of the videotaped transaction. Was the defendant agreeing to a conspiracy, or was he just being polite?[22] Was that actually an attempt at bribery, or was it an offer of a legitimate contribution?[23] By focusing the tools of linguistic analysis on the subject of conversation, Shuy (as he demonstrates repeatedly in *Language Crimes*) can identify numerous innocent explanations for speech that seems guilty.

Shuy's participation in the defense of New Jersey Senator Harrison A. Williams provides an example. Beginning in 1978, the FBI labored for fifteen months to catch Williams committing a crime on

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21 *See, e.g.*, State v. Chapple, 660 P.2d 1208, 1227 (Ariz. 1983) (Hays, J., concurring in part, dissenting in part).

22 SHUY, *supra* note 5, at 66-96.

23 *Id.* at 43-51.

tape.[24] Eventually, FBI agents, impersonating representatives of the imaginary Abdul Enterprises, made a final effort to generate a statement by Williams indicating that Williams wanted his shares in a titanium mine hidden.[25] An FBI agent, posing as a sheik, approached Williams and asked for special legislation to permit the sheik to establish permanent residence in the United States. A bribe of $25,000 to $50,000 was proposed. A similar scheme had already resulted in the conviction of a number of New Jersey politicians. Shuy's analysis of the videotaped encounter is too intricate to describe fully here without unfair oversimplification, but his approach can be summarized.

Shuy first describes the structure of a typical "bribe event" and compares the Williams tape to it.[26] A "bribe event" involves elements present in the Williams tape: the statement of a problem (i.e., "I need immigration help") and a proposal ("I'll give you money for legislation"). A "bribe event," however, also requires a completion phase. In his analysis of the Williams conversations, Shuy draws from a variety of disciplines to demonstrate convincingly that the completion phase never arrived. In his discussion, for example, he explains why the phrase "government contracts" could easily have been misunderstood as "government contacts" by referring to the FBI agent's Eastern American dialect.[27] Shuy argues cogently that the dialogue between Williams and the "sheik" cannot be understood without remembering the social psychological aspects of a conversation between political leaders from different cultures.[28] Even readers who doubt Shuy's conclusion that Senator Williams was not accepting a bribe but politely brushing one off will have to concede that the Williams tapes have become a much richer source of information due to Shuy's explication.

There is a law-enforcement version of Shuy's testimony: police officers frequently offer expert assertions of *guilty* explanations for speech that seems *innocent*.[29] Where the "innocent eyes" of jurors might see nothing sinister in a conversation or chain of events, law-enforcement experts on organized crime, drug dealing, or loansharking are routinely permitted to explain the meaning of "coded"

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24 *Id.* at 25.

25 *Id.* at 25-26.

26 *Id.* at 24, 33.

27 *Id.* at 30-31.

28 *Id.* at 32.

29 *See, e.g.*, United States v. Vastola, 899 F.2d 211, 232-34 (3d Cir. 1990) ("coded" loansharking terms).

conversations or deceptive schemes.[30] The comparative ease with which this inculpatory expertise is admitted fuels the suspicion that Shuy, like the eyewitness' critics, is unwelcome in some courts because he testifies on the wrong side.

IV. One Case at a Time

Even if these general worries concerning linguistics testimony were to evaporate, however, specific offers in specific cases would still require evaluation. Again, reference to the eyewitness experience helps to focus the discussion. In this discussion, the differences between the eyewitness problem and the linguistics problem are more helpful than the similarities.

Courts upholding the exclusion of valid scientific testimony have generally employed two broad rationales, often in combination. The first is that the jurors will be so awed by the expert's "aura" of expertise that they will surrender the case to the expert, rather than exercise their own judgment.[31] The second rationale is that the expert testimony represents an expensive and burdensome solution to a problem that does not exist, either because the jurors already understand the witness' information[32] or because the standard tools of adversary presentation allow counsel to convey the thoughts behind the expert's testimony without resorting to the expert.[33] In short, novel science evidence is subjected to the traditional probative value/prejudicial effect analysis that forms the foundation of most evidentiary decisions.

A consensus may be forming in the long debate over the admissibility of eyewitness expert testimony concerning a procedure for dealing with the probative/prejudicial problem in that context. Courts favoring the admission of expert testimony on the psychology of eyewitness identification have sought to confine the testimony's prejudicial effect by embargoing direct comment on the eyewitness identification at issue, and confining the expert (and the expert's "aura") to a general lecture on the psychology of eyewitness identification.[34] *Language Crimes* demonstrates very clearly

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30 *See generally* Deon J. Nossel, *Note: The Admissibility of Ultimate Issue Expert Testimony by Law Enforcement Officers in Criminal Trials*, 93 Colum. L. Rev. 231 (1993).

31 *See, e.g.*, United States v. Amaral, 488 F.2d 1148, 1152 (9th Cir. 1973) (scientific or expert testimony may create/cause danger of undue prejudice, confuse issues or mislead jury due to "aura of special reliability and trustworthiness").

32 *See, e.g.*, Dyas v. United States, 376 A.2d 827 (D.C. 1977); United States v. Fosher, 590 F.2d 381, 383 (1st Cir. 1979).

33 *See, e.g.*, *Amaral*, 488 F.2d at 1153.

34 United States v. Downing, 753 F.2d 1224 (3d Cir. 1985). *But see* State v. Griffin, 626 P.2d 478, 481 (Utah 1981) (general lecture lacks probative force). For a discussion

that this strategy cannot be adapted to the linguistics expert without foregoing many of the most useful aspects of that expert's testimony.

Shuy's accounts of his analysis of alleged "language crimes" do contain consideration of probablistic, statistical findings that correct general misconceptions. For example, in writing about the Harrison Williams "Abscam" investigation, Shuy makes a strong case for the proposition that each of the participants to a conversation does not necessarily understand the same thing about the meaning of the language used. But the real significance of Shuy's contribution to understanding the "Abscam" transactions lies not in this general statement, but in his meticulous, rigorous, *diagnostic* examination of the actual tapes at issue.[35] Unlike most experts, a linguist such as Shuy can work carefully from the actual primary data.[36] He listens to a tape, or parts of it, "as many of 50 times,"[37] then subjects it to "rigorous linguistic tests of authenticity, tests that distinguish a threat from a warning . . . ."[38] Shuy states that "a linguist's hearing may be no better than a juror's hearing, but the linguist's *listening* skills are finely honed by training and experience."[39] To restrict a linguist's testimony to recitation of general principles deprives the jurors of the advantages of these enhanced listening skills.

Once a decision is made to embargo testimony about the specifics of a "language crime," there is very little point in having a linguist offer a lecture on general principles. To begin with, it is highly unlikely that a linguist will be able to make himself understood without reference to the specific factors comprising the "speech event" in issue.[40] Besides, a number of the *general* propositions that a linguist would offer (e.g., the potential inaccuracy of transcripts) can arguably be dealt with more efficiently—and, arguably, more authoritatively—in jury instructions.[41] As is usual with relevancy decisions, there is no escape from rigorous, case-by-case analysis. The various misconceptions about language will differ in their original extent, differ in the readiness with which they will yield to conventional adversary attack, and differ in their importance in individual

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of the strategic and tactical implications of these positions, see ELIZABETH LOFTUS & JAMES DOYLE, EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL, 328-30 (2d ed. 1992).

35 SHUY, *supra* note 5, at 11.

36 *Id.* at 204-05.

37 *Id.* at 11.

38 *Id.* at 19.

39 *Id.* at xvii.

40 *Id.* at 12.

41 *See, e.g.*, EDWARD DEVITT ET AL., FEDERAL JURY PRACTICE AND INSTRUCTIONS 442-46 (1992).

cases. No uniform strategy for dealing with the expert witness quandary emerges.

V. Off the Witness Stand

Perhaps the principal attribute of Shuy's book is its resistance to the legal community's endemic tendency to see all questions of social science information as questions of expert testimony. Throughout his narratives, Shuy provides examples of the value of teaching lawyers about linguistics, independently of testimony. It is impossible to read Shuy's book without recognizing that even if no linguist ever saw a courtroom, fact-finding in "language crime" cases would be greatly enhanced if law enforcement agencies, advocates, and courts absorbed the linguists' teachings. If law enforcement agencies conducted their "stings" with greater awareness of the complexity of "speech events," fewer ambiguous cases would result in arrests. If prosecutors evaluated tapes with an eye to Shuy's teachings, fewer prosecutions would be pursued without a clearer understanding of whether a "language crime" had occurred or could be proved. Certainly, if defense lawyers mastered the lessons that the linguists are prepared to teach, the lawyers' investigations, pretrial discovery, and cross-examination would all be far better aimed at generating the exculpatory hypotheses that the jurors will require before rejecting the superficially inculpatory evidence of a conversation or transaction. Finally, courts, simply by improving the procedures used by jurors in playing recordings, could eliminate many likely errors.

Whether these actors will heed Shuy's call is, of course, questionable. One final, melancholy lesson to be drawn from the history of the debate over the admissibility of psychological testimony regarding eyewitness identification is that the legal system's actors will resist any effort to persuade them that the linguist is anything but a nuisance hired by the other side, or a quick-fix for the problems encountered in their own cases. Still, *Language Crimes* makes the best case imaginable for abandoning those responses to social science information. In doing so, it is a welcome contribution.