

Misconceptions about Language in Law Cases

As far as I can tell, nobody has ever been indicted or convicted for thanking someone for something or for apologizing for a thoughtless act or statement. Crimes are reserved for other types of language use, including threatening, offering a bribe, extorting, or soliciting things like murder or illicit sex. These and other acts are accomplished through language, not through physical acts. For this reason, the field of law must rely on what is known about how language works in order to evaluate legal evidence which just happens to be in the form of language.

Many people, when presented with the words "language crimes" think immediately of their pet indiscretions against standard English. But we are not talking here about such things as ending sentences with prepositions, using "contact" as a verb, or the overuse of the common expression, "you know." Although such phrases are frowned upon, they do not lead to criminal indictments or trials. In contrast, when one person threatens another, that threat can lead to litigation. Something as simple and harmless as an offer can also lead to a criminal trial if the offer is for something that it is not legal to accomplish. Likewise, one can solicit or request something quite legally. But if one solicits or requests certain things, such as the murder of one's wife or sexual favors from a prostitute, one is committing a crime through language alone. One does not actually need to do harm to the person threatened, give the bribe, have the wife killed, or engage in sex with the prostitute. The language threat, offer, or solicitation is enough to constitute a crime.

However obvious the above may seem, it is not generally recognized that the use of language can be so closely associated with criminality. The general public tends to conceive of crime in terms of physical acts such as stealing, killing, molesting, or hurting another person, the widely recognized crimes of violence. We fear these things, and it is not surprising that they should be foremost in our consciousness.

Traditionally, persons who have been injured, robbed, or molested accuse someone of such acts and report what they have seen and experienced to the police and in the trial court. Likewise, persons who are accused report what they believe to be true about the event. Witnesses, if any, also report what they believe to have happened. All of this, of course, takes place in the form of language. But all this language has one thing in common – it reports memories and perceptions of past events – it does not comprise the events themselves. As remembered reports, they are, of course, subject to all the failures of recall, misunderstanding, and misperception of human life. Elizabeth Loftus, among others, has provided many important insights into the difficulties of eyewitness evidence (see her *Eyewitness Testimony*, Harvard University Press, 1979).

Whatever problems may arise when memory and perception of physical events involving crimes are concerned, such problems can be multiplied when a language crime is suspected. The same problems of memory, understanding, and perception are there but to these we now must add the clues to intention that language offers. 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 the participants, and many other factors.

On the surface, this may seem to be a rather easy thing for a juror to do. But it is not easy at all. For one thing, the average person begins the task of listening to tape-recorded conversation of other people with a number of preconceptions about the event being recorded and, very significantly, about language itself. Such preconceptions can easily lead to misconceptions if the juror is not very careful.

Misconceptions about defendants

- 1 If they are on tape at all, they must be guilty of something; otherwise the police would not have been after them.
- 2 If they are guilty of one of the charges, they are probably guilty of the other charges as well.
- 3 The defendants hear, understand, and remember everything said by the agent or other persons in the taped conversation.

These three misconceptions, individually or together, can lead to a gross misunderstanding of any conversation being examined. We need look no farther than to conversations in which we have been involved ourselves. Suppose somebody recorded us at a party when we were cornered by a person we do not particularly like. That person insists on telling us an off-color joke. What we might *like* to do is to tell that person that the joke is inappropriate or insulting, but social constraints, personal weakness or sheer indifference cause us to go along with it, laugh politely and try to excuse ourselves from that person as quickly as possible. Then, later on in the evening, the person who secretly taped the incident plays it back and observes that we were *all* telling dirty jokes. "No!" We object. "We were not telling dirty jokes, *John* was." But the objection falls on deaf ears. The tape speaks for itself. We laughed. We went along with it. We didn't object. We didn't turn and walk away. We were there; therefore we were as guilty as the man who told the joke. The person who taped the conversation must have suspected how we would react. Otherwise he wouldn't have taped it.

The police and other government agencies who decide to surreptitiously tape record people have their own reasons for doing so. Often, their suspicions are justified, but sometimes they are not. Such occasions are mere tests, fishing expeditions, or attempts to expand an existing network of evidence to include other people. At worst, the agency may simply be trying to catch "a big fish" to justify the expense of an investigation that had, to that point, netted only petty crooks.

It has been claimed by prosecutors in tape cases that "the tapes speak for themselves," and that "all the jury has to do is listen

to the tapes and they can easily determine what they say." This is in one sense quite true but, in another sense, *not* an easy thing to do. Often the jurors must listen to a great many tapes of a number of speakers talking to different people about various topics over long periods of time. Simply keeping the thread of conversation straight is no easy task. Keeping the context straight is even more difficult. Deciding on the meaning of ambiguous statements is monumentally troublesome.

Add to this the fact that the agent who wears the body microphone has one major goal – to capture, on tape, the target's involvement in a language crime. The target's mere presence in that conversation is not evidence enough but when a tape is presented as evidence of criminality, those who listen to it easily forget this fact.

Citizens have a justifiable belief that the police, the FBI, postal inspectors and other government agencies have good reason to suspect targets of investigation. Such a belief, however justifiable, is made subject to suspicion, however, whenever that agency goes beyond its factual intelligence information and slips into the role of "fishing for others." How many times have we been in a conversation when someone goes into great detail to tell us something that is of little concern to us? We ask ourselves, "Why is he telling me this?" We have our own concerns, our own conversational agendas and this person's topic is so far off our base that we tend to ignore it, discount it and soon forget it.

But suppose that person was telling us about an illegal act he had committed or was thinking about committing. Do we believe him? Do we attempt to dissuade him? Do we even *hear* him? Conversation is guided, as the language philosopher H. P. Grice has indicated, by several principles, or maxims, one of which is the maxim of relevance (see his "Logic and conversation" in P. Cole and J. Morgan (eds), *Syntax and Semantics* 3, Academic Press, 1976). People hear that which is relevant; they focus on it and organize what they hear around it. They have frames of reference (what psychologists call *schemas*) which cause them either to hear non-relevant topics in ways that are relevant to their own schemas or to sort them out as irrelevant, perhaps not even hearing them, but certainly not retaining them in memory. As we hear this person talk about an illegal event, we have to make a number of rapid adjustments, even if we listen carefully. Is he serious or

joking? Is he just trying to shock us? Can the statement be categorized along with utterances like, "I'd kill my wife if she didn't do the dishes." Just where does the proper meaning really fall?

The second misconception is equally common. The "all or none" logical fallacy can work either for or against a defendant. I have seen defendants judged innocent of all charges when the taped evidence argued strongly for guilt on one or more charges but not all of them. But, more commonly, I have seen defendants found guilty of all charges when the evidence was clear on only one. The jury system is imperfect, but it is still the best thing we have.

This "all or none" problem exists for all types of criminal cases but it seems to be exacerbated where language crimes are the focus. In the example above, for instance, the person who tape recorded the dirty joke conversation might well hear and recall the incident as *all* of us telling dirty jokes. This is a classic example of the contamination principle of language. Those who listen to recordings of people talking tend to overgeneralize many things. For example, in the tapes involved in the case of Senator Harrison A. Williams Jr. (discussed in chapters 2 and 8) careful listening makes it clear that swearing on the tapes is being done overall by the government agents and by other participants, but *not* by Senator Williams. By the same token, the government operatives use the words *hidden interest*. Senator Williams uses the words *blind trust*. In a very few instances, the government agents use the words *government contracts*. Senator Williams does not. The words used by the government operatives about Senator Williams in the first meeting with the presumed Arab sheik contrasts sharply with what Senator Williams actually says about himself. Despite these clear contrasts in who said what, the court and even the US Senate Ethics Committee became victims of contamination and overgeneralized meanings which were not there. The principle of contamination is especially dangerous and unfair. Careful analysis of who said what in the actual recorded evidence is carried out by linguists to defuse and dispell this contamination.

Likewise, in the case of Congressman John Murphy, overt criminal acts (what I refer to as language crimes) occur only on tapes in which Murphy is not present. Money was exchanged between Angelo Errichetti and an FBI agent in the case of Kenneth

McDonald, but careful viewing of the video tape shows McDonald looking out of the window on the opposite side of the room (see chapter 3). He was clearly *not* a part of the conversation and not involved in what Errichetti and the agent were talking about.

In the jury's overall memory of the Williams, Murphy and McDonald tapes, it is precariously easy for jurors to be contaminated by confusing who was present and who was not, who suggested the illegal acts and who did not, and whether what was said was said to the target, or to someone else entirely. To confuse these important conversational tasks is to be contaminated by the taped evidence, or to be contaminated by the presentation of that evidence by one or both sides.

The written transcript of a tape-recorded conversation can also create listener contamination. The written transcript cannot possibly present all of the important information that the actual tape provides. Transcripts collapse time, making events appear immediate when, in fact, long pauses may have taken place. Transcripts do not usually show interrupted or overlapped speech, which is particularly important when more than one conversation is recorded at the same time. Transcripts do not show stressed words, a vital indication to the intentions of a speaker.

Furthermore, it has been my experience that government transcripts are almost always inaccurate in many places, by including misattribution of the speaker, by the addition of words *not* on the tape, by the deletion of words that *are* on the tape and by errors in representation of words on the tape. Almost invariably, crucial judgments must be made by jurors in areas where government transcripts are in error. In the Murphy and Thompson cases, crucial controversy hinged on whether or not the words "for me" were present in the target's sentence, "Take care of this." In the Senator Williams case, the transcript shows Williams saying "aye" to a motion made by the middle man, but his voice is not on the tape at that point.

The third misconception about defendants, that the target actually heard, understood, and remembered everything said by the agent or other persons in the tape-recorded conversation, is also dangerous. In the celebrated FBI operation in Chicago, called Greyford, various attorneys and judges were taped in their chambers and in their courtrooms. The general image of a judge's

chambers, held by most people, is quite different from the offices of traffic court justices in many large cities. Many people come and go, shout and scream, engage in multiple topics at the same time. The fact that an agent says something that the microphone can record is clearly no guarantee that the target, or for that matter anyone else, could hear. But it is on tape and becomes reflected in the transcript of that tape. If the judge's voice can be heard at all, his next words also are recorded by the microphone and reflected on the transcript. If that judge happens to say "yes" to a bailiff's question about whether or not he wants a cup of coffee and that "yes" happens to occur after the agent simultaneously asks the question: "Would you take a \$100 to fix a fine?" the tape recorder will pick up the agent's voice, not the bailiff's, and the judge will appear, to later listeners such as juries, to have agreed to a bribe.

Law is a culture of the written word, not the spoken. Once jurors see a written transcript, they think of it in the way they might view a written play. One actor says one thing and the next actor responds to that person with clear understanding, complete recall and perfect hearing. In real life, however, stage conditions do not exist. Lines are not memorized. The speakers do not have voices trained to carry to the last row of a theatre. Real people hear according to their schemas and overlook that which does not fit. Things get missed. Ideas are misunderstood. People come and go, often not even standing near each other. The distance that participants are from each other can be estimated from the sounds of their voices. In one case I worked on, the target's voice starts loud and gradually gets weaker throughout his sentence. This fading is accompanied by the sounds of footsteps. The agent's following statement is then uttered very softly. The statement was a crucial, incriminating one. Did the target even hear the agent? If one were to read the transcript only and not listen to the tape carefully, one would believe that there was a dyadic interaction. But when one listens to the tape, such an exchange seems highly improbable. Jurors who do not take these things into consideration run serious risks of misconception about the defendant.

They tend to assume guilt from the onset, rather than studying carefully the context of the conversation.

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 in a conversation understand the same things by their words.
- 5 People say what they mean and intend.

It would be convenient if these five points were true rather than misconceptions. Life would be simpler, if not duller. But meaning is conveyed in many ways besides words. Language is so complex and rapid that it goes by us too quickly for total processing. The written version of spoken language, however beautiful and useful it is for many purposes, simply does not reflect all the information conveyed by speech. People in conversations often do not understand the same things even though they hear the same words. And, since conversation is a social event as well as an information exchange event, people often say what social graces prescribe rather than what they really mean or want to say.

It is extremely dangerous to isolate anything from context, especially words. Consider the following conversation in a criminal case involving the alleged efforts of a Japanese industrial engineer to buy internal product secrets from an FBI agent posing as the representative of an American company:

Agent: You see, these plans are very hard to get.

Engr: Uh-huh.

Agent: I'd need to get them at night.

Engr: Uh-huh.

Agent: It's not done easily.

Engr: Uh-huh.

Agent: Understand?

Engr: Uh-huh.

It was alleged by the prosecutor in this case that the engineer understood from what the agent said that the act of obtaining these plans was illegal. Further, it was averred, the engineer gave

his consent to the effort by saying "uh-huh." Several things are wrong with such an assertion. For one thing, the second guideline of the FBI states: "It must be made clear and unambiguous that the act proposed is illegal." Although to an American, the inference of illegality may be rather clear (largely from the words, "get them at night"), to a person from a different culture, the clarity is questionable. The staff may be reduced in size at night, or it may not be scheduled to do such tasks during the day.

Likewise, the engineer's use of "uh-huh" does not signal agreement, assent, or even knowledge of the event. It is the culture of the Japanese to be polite and agreeable. When they speak English, however faltering, they tend to nod agreement and say "yes" and "uh-huh" constantly, even where it is inappropriate to do so. Politeness and face count for more than resolution in that culture. In any case, the engineer's first three "uh-huh" responses cannot be agreement since the words presented by the agent presumably conveyed new information. There is no logical way to agree with new information, opinions, or many other acts of speech. For example, one cannot logically agree with the statement, "I really liked that movie." One has no right to agree to someone else's opinion. To agree one would have to say that he or she liked that movie also. These three "uh-huh" responses, therefore, are nothing more than feedback markers, words that acknowledge that one is listening or, on occasion, that one is understanding so far.

The last "uh-huh" response, to the agent's question, "understand" is more likely to convey agreement, but not even then with any certainty. The illegality in this case has not been "clearly and unambiguously" presented, particularly to a foreigner. In addition, this selected passage and elsewhere throughout all the tapes in all the conversations, the engineer says "uh-huh" to everything said by the agent, including many instances in which such a response is totally inappropriate, such as:

Agent: Hello. How are you?

Engr: Uh-huh.

Agent: (to colleague:) Joe, bring me some coffee.

Engr: Uh-huh.

The point here is that meaning is not communicated by individual words by themselves. No American baseball fan would

suspect murderous intent upon hearing "kill the umpire!" at a Red Sox game. The context tells us otherwise. "Kill" does not mean to make dead. It means something like a complaint about the umpire's decision. But "I disagree" is too pretentious at a ballgame. The social rules of such an event prescribe more colorful, if not violent, imagery. And nobody is confused by it.

The second misconception about language, that listening to the tape just once is adequate for understanding and memory, is equally fallacious. Once the government decided to use tape recordings of conversation as evidence, it embarked on a totally new kind of court procedure, one which most courts still do not fully comprehend.

It is likely, due to the frequency of the practice of tape recording, that many, if not most, criminal lawyers will get such a case sooner or later. Most attorneys are ill prepared, in terms of specific training or experience, to present such a case effectively. Since the tape recordings are of the language used in conversation, the government's evidence is of a totally different type from that which they are used to.

Typically, trial lawyers have testimony to deal with — what different people say they remember about what happened. From a researcher's perspective, this second-hand type of data is the least highly regarded. No self-respecting scientist would present an academic paper which was based on the recollections of researchers on the phenomenon being studied. Instead, they meticulously gather first-hand evidence, analyze it, and display it for verification or counter-analysis in their reports. This distinction is between what we call primary and secondary evidence. With the advent of surreptitious tape-recorded evidence, the government has moved into the research scientist's world. Primary data are now the key — data which can be analyzed, subject to the scrutiny of specialists who have long worked in the academic field which studies such data. For attorneys, this is a different prospect; one which requires a different kind of thinking, a different kind of analysis, a different kind of preparation and a different kind of courtroom presentation. One listening to the tape-recorded evidence is often all that the jury will get. There are many reasons for this, not the least of which is time. Already crowded courts do the best they can to get trials expedited quickly and efficiently. Some tape cases have only one or two tape recordings to deal

with and several listenings are possible. But in the case of John DeLorean (see chapter 4), for example, there were over 60 audio and video recordings. Even one listening to all tapes involved a tremendous expenditure of courtroom time.

When an attorney sends me the tapes in his case, I listen to them over and over again. The first task is to correct (or create) an accurate transcript, one that includes everything humanly possible to hear. For tape recordings done with a body microphone, often in restaurants, automobiles or other noisy places, I will listen to certain parts of a tape as many as 50 times. Such effort is especially necessary when the participants in a conversation talk at the same time, interrupt each other, get excited, speak at some distance from each other, have speech impediments, peculiarities or dialects, use a foreign language some of the time, or when the government's recording quality is poor.

It has been argued by prosecutors that multiple listenings to the tape create a kind of unreality. The people who were *in* that conversation originally, they argue, only got to hear it once. In a sense, they are right. But the task of later listeners, whether it is the prosecution, the defense, the jury, or the linguistic consultant, is very different from the task of the person who was *in* that conversation. We are not that person and yet we have to reconstruct, as nearly as possible, what it was like to *have been* that person at that time – both target and agent. We have to try to walk in their shoes in order to construct hypotheses of what was in their minds.

Language goes by so fast and is so complex that the outsider who tries to reconstruct that event *must* listen to it several times. The principle is similar to that involved in written composition with students and teachers. Good writers do not really need to be able to talk about how they use language to construct their essays or fiction. Likewise, good teachers have learned to distinguish high-quality writing from mundane prose. If teaching were no more than the assignment of grades, quality writing would get A and poor writing D and that would be the end of it. But good teaching is more than evaluation. It requires teachers to assist writers to improve. This, in turn, requires them to be able to analyze with meaningful categories made up of labels or words. It requires many re-readings with suggestions about other alternative wordings. It necessitates a shared frame of reference and a

set of tools and concepts with which to discuss the problems. Such tools include grammatical categories and discourse analysis concepts. Teachers are required to know *more* than their students if they are in any way to be helpful, or teach them.

Later listeners, including jurors, are in a position similar to that of the teacher. They *could* just give the tape a grade of guilty or not guilty, basing it on some intuitive gut feeling. But they *should* be able to know *why* they assigned such a grade. Obviously, so should prosecutors and defense attorneys. They *should* have in their tool box a set of analytical routines to apply to a conversation in order to justify (to themselves, at least) the grade they assigned.

When the grade assigned by jurors hinges on whether or not a loose pronoun actually referred to a specific person, the task becomes even more critical. When the grade assigned by the jurors depends upon who, indeed, actually introduced the incriminating topic, the jury had better have some way to discover this fact. When the grade assigned by the jury revolves around the contextual meaning of an "uh-huh" response, that jury had better understand the difference between affirmation and a feedback response.

One way to get over the tendency of spoken language to be so complex and so fast is to make use of outside expertise, in this case, the linguistic expert witness. The task of such an expert is, essentially, to analyze the tape outside the courtroom and to present the findings at the trial. Unfortunately, this requires the expert to be hired by either the prosecution or the defense. Which-ever it is, the other side screams lack of objectivity and favoritism. This issue, of course, is inherent in the advocacy system but one wonders why it is not possible for such expertise to be employed in some more neutral capacity, perhaps by the court itself.

Another possible resolution is to try to teach the jury to analyze the tapes themselves. Such a procedure once happened to me in a bribery/conspiracy case in Newark. The judge seemed uncertain whether or not to permit me to testify about my analysis of the tapes in that case. Finally, he decided that I could not mention the specific case, but that I could teach the jury what kinds of things to listen for in the conversations. However good the idea may have been, I found it extremely difficult to communicate so much information in the trial context and I finished with a clear impression that I had not succeeded.

The answer to the problem created by the use of hours and hours of taped conversation as evidence remains unclear. Juries should be able to listen to the tapes many times (naturally they can do so during deliberation, but it is unclear how extensive such practice really is). Juries should have some kind of linguistic guidance in how to do this, but the methods are still unresolved. Perhaps the best answer is to use a linguist as an expert witness but, at this time, there are very few linguists available for this type of work, either by inclination or by training. The irony of it is that the tapes are listened to *many* times by the prosecution and, less so, by the defense. Why the jury, of all people, should be so restricted is a complex issue. The time of the trial issue is important but, upon reflection, it is an odd definition of justice. More depressing is the argument given by some defense attorneys who simply do not want the tapes heard any more than necessary – possibly because they fear that their clients are guilty or because they fear the jury will not understand and will be contaminated in the ways discussed earlier.

The third misconception, of transcript versus tape recording, is rampant in criminal law. As noted earlier, law is a literary culture. The written word takes precedence over the spoken, as evidenced by the use of court reporter's written transcripts over the oral proceedings of a trial or deposition. This literary predisposition causes attorneys, courts, and even intelligence analysts to move as quickly as possible to produce a written transcript of all oral presentations, including surreptitiously taped conversation of suspected criminals.

As an index or guide to such conversations, written transcripts can be useful. But even courts of law claim that transcripts are not the evidence; tape recordings are. Transcripts are usually permitted during jury deliberation, and jurors are permitted to follow transcripts while tapes are being played in court. As harmless as such practice may seem, the effect of the written word, accurate or inaccurate, in front of jurors causes them to hear on the tapes what they see on the printed page. It is not unusual for the prosecution and the defense to submit competing transcripts in a criminal case, the judge often deciding that it cannot be determined which one is accurate.

The point here is that tape-recorded intelligence is unlike other types of intelligence. As noted earlier, language goes by the listener

very quickly and *many* listenings are absolutely necessary. A common procedure for addressing the odious task of multiple listenings is to produce a written transcript, to slow down the rapid oral process for analytical purposes. Another common procedure is to have a secretary prepare such a transcript, since secretaries often do dictation and are familiar with such practice. Still another common practice is to have the government representatives (agents, cooperating informants, etc.) go over the tape and transcript draft to correct it from their own perceptions of what occurred. As logical as such a procedure may seem, it is fraught with dangers of perceptual bias. People who participate in the taped events are actually less able to determine what is actually on the tape than are well-trained total outsiders to the event.

Defendants in criminal cases are no better able to analyze conversation after the event, simply because the average person does not have the meta-language to describe his/her own language. Likewise, agents or surrogate agents who are wearing the microphone are easily influenced in their listening by their goals in taping a suspected criminal in the first place. That is, they may think they hear the suspect utter a given word or phrase simply because it is their goal to capture such words on tape. In a Nevada case in 1981, the prosecution and the defense were at total odds about one crucial sentence:

Prosecution transcript: I would take a bribe, wouldn't you?

Defense transcript: I wouldn't take a bribe, would you?

A simple machine analysis of this sentence could have made clear to the prosecution that syllable sequence argued for the defense transcript and against the prosecution's. Representing each syllable as a dash, the actual words on the tape were as follows:

-----, -----?

That is, the tape displayed six syllables with a junctural pause (comma) followed by two syllables, not the five-three sequence argued by the prosecution. This clearly indicates that the defense transcript was the accurate one.

The point here is that the evaluator of the intelligence offered

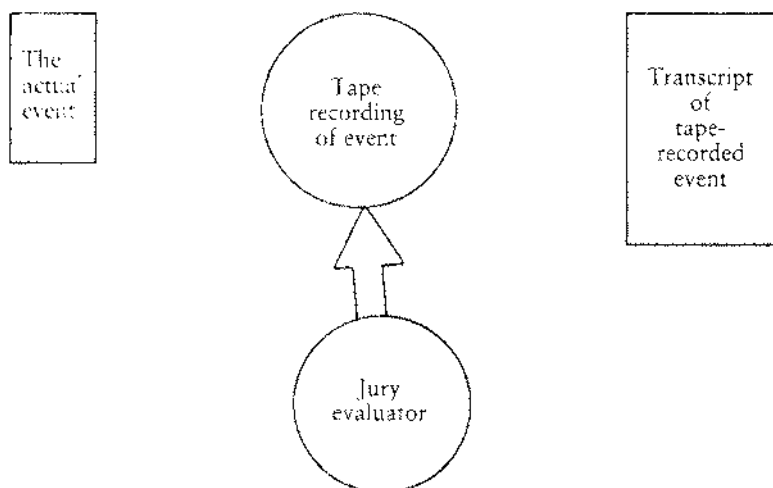


Figure 1.1 Evaluation of the tape, not the transcript.

by the tape had a schema in which the suspect said he would take a bribe. Therefore, the analyst heard it that way, despite the physical evidence to the contrary. The listener must not fall into the trap of overdependence on the written transcript of an oral event. Hours of painstaking effort must be spent on listening to the tape itself before a transcript is used at all. The transcript is *not* the evidence. It is, at best, only a weak representation of it or guide to the tape. Accurate evaluation should be made of the tape recording, not of the transcript of it, as figure 1.1 indicates.

There is a real danger in relying entirely on the written transcript of a conversation to determine exactly what is going on. Transcripts do not specify to whom a particular speech is intended or who has heard it. Assuming that transcripts are accurate in recording the words that were said (and they are often *not* accurate), they do not usually provide the important clues to conversation such as: *stress* (loudness), *intonation* (question marking versus statements), *pauses* (which carry their own form of meaning), *interrupting* (which can be a significant indication of speaker control and speaker intention), and many other things.

As defense attorneys try more and more tape cases, they are becoming increasingly aware of the principle of tape superiority

to transcript both in their analyses of the evidence and in their courtroom presentations. It is therefore crucial that juries, prosecutors and defense attorneys rely on the tapes rather than the transcripts. Since transcripts are useful as points of reference, and for reporting purposes, it is equally important that they be as accurate as possible.

The fourth general misconception about language is that participants in a conversation understand the same things by the words that were spoken. For example, suppose a wife said to her husband, "The man came today." If there had been an earlier conversation about the need to call a plumber, her vague reference to "the man" might be predictable. On the other hand, without such a context, the husband might have some cause to be worried about just exactly who this man was.

Many people, including attorneys, have a naive but firm belief that language can be explicit and unambiguous. The truth is that language can only be *relatively* clear and explicit, simply because no two people share exactly the same experiences, feelings, and concerns. I define my house as clean and tidy if the floors are swept. Others may define a clean house as one with clean windows. I pay less attention to windows than floors. My uncle Roy inspected the house cleaning by running his fingers over the tops of picture frames. Unless they were dusted, his house wasn't clean. There is, in short, no way that language can account for all of the possible experiences and concerns that any two people can bring to a conversation. This is not to say that we cannot be somewhat clear or that we cannot avoid some ambiguities. Figure 1.2 shows one way to visualize these differences in comprehension of the same words.

The more alike two people are, the more they will have shared knowledge of the world, shared beliefs, shared feelings, shared concerns. But, as we said, even family members do not share all such knowledge. In much of life, ambiguous sentences result, usually brought about by incomplete statements or ambiguously uttered ones. Pronouns are the major culprit here. *They, he, she, it* and others are supposed to refer to specific, previously identified persons or things. But every day we engage in many conversations in which these pronouns are imperfectly referenced. When this happens, listeners are forced to infer the intended meaning and often they guess incorrectly, leading to a misunderstanding.

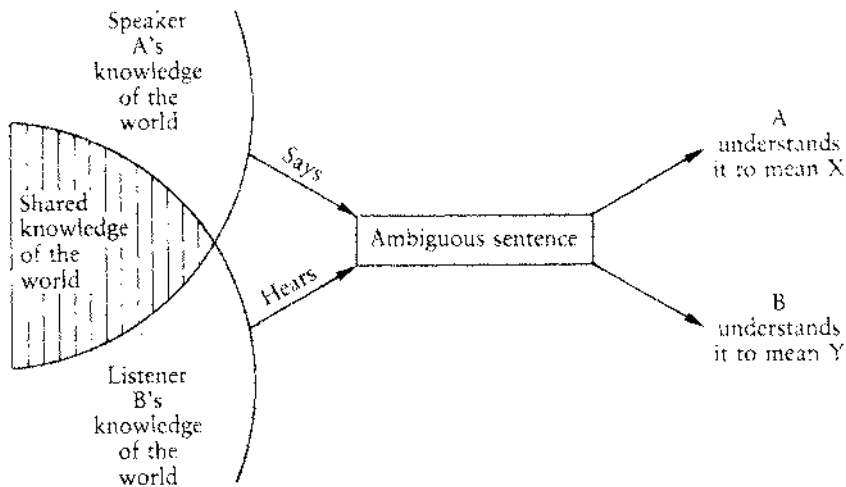


Figure 1.2 Differences in comprehension of the same words.

Sometimes one or both participants come to realize that something is wrong and the mistake is repaired. More often than not, however, the conversation goes on without either party understanding that two different meanings have evolved.

In a case involving a language crime, it is essential that such misunderstandings be noted if at all possible. The actual participants may have comprehended the same statement quite differently and the larger context of the conversation often makes clear that this is the case. If the jury is to “walk in the shoes” of the participants, it must be able to spot such ambiguities even though the participants may not have understood what was happening at the time of the actual event.

The fifth common misconception is that people say what they mean or what they really intend. The prosecutor’s frequent claim, “the tapes speak for themselves,” is not entirely true. The reason we often do not say what we mean has little or nothing to do with lying or evil intentions. It comes about simply because language is a social event, not just a cognitive one. There are socially accepted patterns of life, ones we have absorbed so fully and completely that we don’t even know that we know them. We have already noted the maxim of relevance in conversation. People

try to be relevant but, unfortunately, we define relevance differently. What seems very important to me may seem trivial or marginal to you. Role relationships also play an important role in conversation. We often hold back telling another person things that might disturb our concept of the propriety of our relationship. One of my graduate students for whom I have great fondness may not want to trouble me with facts about his deteriorating health, even though it affects the quality of his work. He deems it inappropriate to our role relationship. Physicians may not deem it necessary to correct their patients' misconceptions about anatomy on the grounds that their role is to heal, not to teach. An attorney may not see fit to correct a client's question, "How can I buy a pardon for my husband in prison?" deciding that the client has mis-spoken herself or that she is too upset to be given a lecture on the integrity of the legal system. But, if this conversation were tape recorded, the attorney would be criticized, if not indicted, as a willing conspirator in a plot to bribe an influential state senator.

The point here is that role relationships have a way of affecting a speaker to the extent that he may not choose to say what he really means. Politicians are particularly susceptible to this, as the FBI agents in the Abscam operation (see chapter 2) knew full well. What US senator would launch into a treatise on ethics and law to a presumed foreign dignitary who offers a bribe for assistance in getting into the USA? Of course, a bribe is illegal. But would this foreigner know American definitions of bribery? Would foreign relations be damaged by self-righteous indignation? Politicians get where they are by not offending, by being tactful, by avoiding confrontation. This, of course, makes them vulnerable to the kind of scenario posed in Abscam. Those who rejected the bribes, such as Senator Williams, did so, according to accusers, without moral indignation and disgust. Even though he rejected the bribe with a series of the word "no" and an explanation of why he could not accept money, the critics screamed "not good enough." But, as a politician, as a representative of one government to another, the social role of diplomacy did not permit indignation or disgust. He could not say what he meant.

Language crimes *are* committed with some regularity. People offer bribes, accept such offers, threaten people, extort them, perjure themselves and suborn perjury in others, solicit illegal

things, slander, and libel people. Those who do so deliberately and illegally should be punished for breaking the law. If this were all there is to it, the job of the courts would be simple. As in most of life, however, serious problems arise in determining whether or not a bribe offer was actually made, or whether a solicitation really happened. The dimensions of these problems will be explored in the following chapters. All language crimes are subject to rigorous linguistic tests of authenticity, tests that distinguish a threat from a warning or distinguish acceptance of money designated as a campaign contribution from money designated as a bribe. In the rush of a single listening, in the clamor and excitement of a jury trial, and in the context of general misconceptions about language held by most people, language crimes can be very complex to identify and comprehend, and each one has its own story behind it.