The Excited Utterance: Constructing an Essential Link between the Event and the Statement in Anglo-American Hearsay Doctrine

Jennifer Andrus
Carnegie Mellon University

1. Introduction

The excited utterance is an exception to the hearsay rule of evidence in the Anglo-American legal system. The hearsay rule and its 20+ exceptions have the task of determining which statements are reliable and constructing applications for measuring that reliability and arguments that explain why a statement is (or is not) reliable. The Federal Rules of Evidence 803.2 defines the excited utterance as a statement made by a witness or victim in response to an event so startling that the reflective faculties of the speaker have been stilled. Such a blurted statement is admissible hearsay because the circumstances in which the statement was uttered are taken to provide adequate indicia of reliability (indicators or factors of reliability). In this paper, I analyze the metadiscourse of the hearsay rule and the excited utterance exception to understand the way Anglo-American law conceives of this kind of discursive evidence and the language of victims and witnesses. In appellate opinions, the excited utterance is used to "entextualize" (Silverstein and Urban, 1996) the statements of victims and witnesses rendering them evidence. I suggest that the excited utterance is produced via the process of entextualization that occurs when an utterance is evaluated via Anglo-American case-law and the language ideology that is circulated and reiterated in that case law. This language ideology is constructed intertextually in a network of ideas and case citations that together reiterate a conception of language as supplemental to events rather than either a part of the event or active in the representation and communication of the event.

I analyze the descriptions and discussion of the excited utterance in opinions of the US Court of Appeals from 2005 and 2006 where the reliability of statements, the object of analysis in these cases, is discussed almost entirely in terms of the event (or circumstance) and the speaker. In the metadiscourse that relies heavily on events, I argue that with the case law of the excited utterance, the statements are effectively delinked from speakers and linked to events. The speaker, in turn, is linked to a subject position that is either silent, has no utterance associated with it because the utterance is associated with the event, or is false, is associated with an untrue statement.

The excited utterance tends to be thought of in terms of blurting—the thing that you might say without thinking. Some examples from my corpus are "My husband just set the house on fire, call the fire department." "That's him, that's the guy that pulled the gun on me, Joseph Arnold, that's him." "He has a gun" and "he's going to kill me." They are typically said to police who repeat the statements in their testimony and in 911 calls that are replayed in court. They are admitted in situations where the physical evidence points to a crime, but not a person who committed the crime. But what is a blurt, especially in the incredibly discursive environment of the law? Even in the original trial, the statement has been reiterated

Texas Linguistics Forum 51: 38-42
Proceedings of the Fifteenth Annual Symposium About Language and Society-Austin
April 13-15, 2007

and entextualized at least two times, if not more. And even if somebody does blurt something out, the process of blurting doesn't authorize the appropriation of the statement. Such an action is authorized by constructing a metadiscursive link between the event and the statement that bypasses the speaker and then treating the constructed link as though it is natural and self-evident. The metadiscourse of the excited utterance is a process in which the blurt is disciplined and brought within the realm of the hearsay language ideology that distrusts the repetition of statements by stripping away the context, history and speaker, from the true statement. At the same time, the speaker, the person who produced the blurt, is disciplined as well. She is constructed as out of control when she made the statements, and thus, she is unable to control the statement once entextualized in/as legal discourse.

The current excited utterance is related to an Enlightenment language ideology explained in detail in *Voices of Modernity* (2003) by Richard Bauman and Charles Briggs. In what follows, I will first situate the excited utterance in the Enlightenment language ideology by giving a backward look at the history of the rule in English common law; and then to get a snapshot of the excited utterance as it is currently used, I will discuss the most recent definitions and applications. In particular, I focus on the way that the phrase "indicia of reliability" helps to construct the notion that the reliable statements are produced by events rather than people.

2. *The Distrust of 'Tales Twice Told': Locating the 'Indicia of Reliability'*

The language ideology of the excited utterance exception to hearsay begins in the principle of *res gestae* from English common law; the excited utterance is an extension of the spontaneous utterance. Typically translated from the Latin as "things done" or "things that happened," *Res gestae* was used to determine which statements, actions and things are a part of the event and which came before or after. During the Enlightenment, at about the same time that *res gestae* first made its way into the Wigmore treatise on evidence circa 1749, there was a shift in the way the law conceived of the relationship between the verbal and the physical, reflecting a cultural shift that favored the physical, that which could be witnessed with the senses, commonly associated with Bacon. This shift repositioned *res gestae* as the exception to hearsay rather than the rule. Where *res gestae* treated things said and things done as (nearly) equal, hearsay was a new rule with the single task of evaluating statements in a new cultural climate that according to Foucault in *The Order of Things*, conceived of language as a neutral and transparent apparatus that merely provided a vehicle for meaning. Before I go on to detail the construction and function of the language ideology of the excited utterance, let me first describe the rule prohibiting hearsay to which the excited utterance is an exception.

Hearsay is the repetition in testimony of an out-of-court statement made by somebody else. Hearsay is excluded because if the speaker of the statement is not in the court, the accused does not have an opportunity confront his or her accuser, nor do the jury and judge have the opportunity to view the demeanor of the speaker as he or she testifies under oath. The right to confrontation plays an important role in constructing the ideology of hearsay, but the excited utterance is typically taken to satisfy the requirements of the confrontation clause and due to time constraints I will not be addressing the Clause in this analysis. Instead, I will focus on another reason why hearsay is excluded, which, according to legal scholar Roger Park, "depends upon the belief that a witness describing an out-of-court statement is likely to be less reliable than a witness describing nonverbal events" (1987, p. 58). A statement filtered through more than one speaker is less reliable than an original statement describing an original event, an idea that mirrors a fundamental distrust of citation and repetition that Bauman and Briggs link with the language ideology in the works of Bacon and Locke.

And so, during the Enlightenment, a base-line approach to hearsay was developed that excluded things repeated, but because of the real need to admit third-party statements, res gestae could not be done away with. Thus, the spontaneous or excited utterance must be delinked from the speaker and her individual agency and linked to an original event in order to make it so trustworthy that its repetition, which explicitly disrupts the language ideology of hearsay, is admissible. In the current legal context, the phrase indicia of reliability maintains the link between the statement and the original event. Indicia of reliability are the

indicators of reliability that are established across a number of Federal cases and the appellate court can invoke all or some, as the case they are dealing with requires. The most important indicium of reliability is the event or the circumstances surrounding the production of a statement. The Supreme Court case, *Roberts v. Ohio* (1980) is nearly always cited at the outset of such discussions in an appellate opinion. *Roberts* states that:

> "[a] statement is admissible only if it bears adequate indicia of reliability; reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception, but in other cases the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness."

The excited utterance is admissible via its status as a firmly rooted exception to hearsay, but when it is the point of appeal, the court must determine whether it bears the indicia of reliability. In such discussions, the circumstance in which the statement was uttered plays a key role in deciding which statements are reliable. As the examples in this paper show, the measure of reliability of an excited utterance is actually its ability to index the event that it was produced in and that it is about. But to be sure, any event in the world is little more than a jumble of actions and statements that require organization by which some things are fore-grounded, others back-grounded, and in the case of the excited utterance, the statements separated out all together. The link between the event and the statement is not self-evident, as the excited utterance would have it appear. The link is constructed. The indicia, or the indicators and criteria, of reliability work together to organize the event and entextualize some statements as excited utterances and essentially link those utterances to the "real" event as it has already been constructed at trial.

The following definitions illustrate the role of the circumstance or event in establishing the indicia of reliability. The circumstance in which the statement was uttered, I want to make clear, are only available to the court as an entextualization itself. By the time the case reaches the Federal system, the facts of the event are no longer disputed, only the application of law. That is to say, the event that the excited utterance is linked to has been fully entextualized. In the US Court of Appeals, the excited utterance definition from the Federal Rules of Evidence that I gave at the beginning of the paper has been turned into a three-pronged test, each prong emphasizing the event as the agent of discourse in the special category of reliable statement, excited utterance. *US v. Hadley* explains the test this way:

> "Under the pertinent federal evidentiary rule, an excited utterance is defined as a "statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." We apply a three-factor test for determining whether a statement qualifies as an excited utterance. "First, there must be an event startling enough to cause nervous excitement." "Second, the statement must be made before there is time to contrive or misrepresent." Finally, "the statement must be made while the person is under the stress of the excitement caused by the event." More generally, we ask whether the statements at issue were made "under circumstances *that eliminate the possibility of fabrication, coaching, or confabulation,* and that therefore the circumstances surrounding the making of the statement provide sufficient assurance that the statement is trustworthy and that cross-examination would be superfluous." (internal citations omitted)

The first and third prongs of the test position the event as the subject that puts actions in motion: the event causes nervous excitement and the event puts the speaking individual under stress. The second prong of the test establishes the speaker's potential for falsification that must be controlled by the event in the first and third prongs. Then, the circumstances eliminate the possibility of fabrication, etc. in a sentence that does not even reference the speaker at all. The reflective faculties have been so stilled that the speaker need not even be referenced. The circumstances in which the statement was uttered also provides assurance that the statement is trustworthy—indeed, more trustworthy than in-court testimony. The indicia of reliability for the excited utterance in question here lies in the active circumstances and the passive/absent speaker.

Another example of a definition of excited utterance is found in *US v. Clemmons*.

> "Rule 803 (2) of the Federal Rules of Evidence provides that excited utterances, statements relating to a startling event and made while under the stress of excitement caused by the event, are not excluded by the hearsay rule. 'For the excited utterance exception to apply, the declarant's condition at the time of making the statement must be such that the statement was spontaneous, excited or impulsive rather than the product of reflection and deliberation.' Reed v. Thalacker, 198 F.3d 1058, 1061 (8th Cir. 1999) (internal quotation omitted)."

As usual, in *Clemmons* the excited utterance is admitted based on the idea that spontaneity produced by a startling event can stop a person from speaking intentionally. So, here we see that the content of the discussion explains that the speaker is not speaking consciously or at least not deliberately. Like *Hadley*, the structure of the language in *Clemmons* also supports the idea that an event is more active than the speaker.

In the legal arguments in these opinions, in which a statement is established as an excited utterance, the event controls the verbs; the event or circumstance is discursively positioned to do things: the speaker is affected by the event, and the statement is directly related to the event. Subjectivity, it is assumed, doesn't function in a blurt because the event, which is typically the thing that does something in this legal context, can halt subjectivity—that is one of the things that the circumstances can do. The event/circumstance renders the speaker a passive medium through which a statement that bears the indicia of reliability (rather than the marks of the rhetorical goals of the speaker) is produced.

White v. Illinois explains that "those same factors that contribute to the statements' reliability cannot be recaptured even by later in-court testimony. A statement that has been offered in a moment of excitement—without the opportunity to reflect on the consequences of one's exclamation—may justifiably carry more weight with a trier of fact than a similar statement offered in the relative calm of the courtroom." That is, even testimony is not as reliable as an excited utterance because testimony emanates from the speaker and his or her self-interest. But those whose statements are taken up by the law via the excited utterance do not always agree with the assumption that their statements were particularly true or lacked self interest. For example, in *US v. Carlisle* the speaker asserts that she was not speaking truthfully in her blurt using the same logic that the law uses to assert that her blurt was accurate. "Ms. Carlisle explained the inconsistency by saying that she had been 'badgered to make a statement.' On redirect examination, she said that she had 'just blurted out some stuff, and [she] shouldn't have because stuff on that statement is not true.'"

The excited utterance allows a statement to be used regardless of the intentions of the speaker because the statement is not the product of the speaker whose reflective faculties have been stilled. The thing she or he blurts out is linked instead to the event that it indexes and that tautologically proves its reliability. Once it is delinked from the speaker who actually produced the statement, it can be used by the court as evidence even if the speaker has recanted or just refused to appear in court. Though it seems strange that a statement that is produced by an actually present body could be understood to be the product of something else, the event, it fits with the Enlightenment language ideology that understands true language in terms of its purity, in Bauman and Briggs' terms, "purified of interest—that is, from individual agency, social location and history" (2003, p. 45). In order to satisfy the concerns of hearsay, the excited utterance must fit a Lockean conception of language that Bauman and Briggs see as a "stable signs…accordingly free from all of the indexicality that links rhetoric to personal authority and discursive interactions" (2003, p. 45). That is, in order to understand the excited utterance as a stable representation of the event (which is must appear to be), then it must be delinked from personal authority, history and agency. It must be rendered, via institutionally authorized entextualization, an objective and neutral icon of the event.

3. Conclusions

The modern excited utterance is deeply indebted to the co-evolution of the hearsay/res gestae binary, and so it is not surprising that when hearsay was conceptualized and excluded and res gestae made an exception to the rule that the statement would be affected. What is surprising, I think, is how the speaker was affected and the ways the relationship between legal rule (the law), statement, speaker and event is naturalized in the

law. The reliability of the excited utterance has its roots in the tradition that separated statements out of the event and made them the supplement to the event. In the process, language was shifted from a "thing" to a representational medium that merely indicates the truth of the event or the goals and intentions of the speaker. In the process, the link between the event is naturalized, and the links to an individual history and the actual body speaking about an event that happened to her, is erased.

The emphasis on the event in the language ideology of the excited utterance leads to a situation in which the court is allowed to overlook the speaker of the utterance and her rhetorical goals in an act of institutional erasure. This is a consequence that Anglo-American law perhaps did not foresee, but it nevertheless continues to provide support for the structure of the legal language ideology. The byproduct of the process of defining a set of terms and concepts that can be used to sort and categorize statements as an excited utterance results in the sorting and categorization of speakers which ultimately curbs the discursive agency of those whose statements are taken up via the excited utterance.

References

Bauman, R. and Briggs, C. L. (2003). *Voices of modernity: Language ideologies and the politics of inequality*. New York: Cambridge University Press.

Federal Rules of Evidence. Section VIII, article 3. (2004). Washington, D. C.: U.S. Government Printing Office. 19 January 2007.

Foucault, M. (1994, 1970). *The order of things: An archaeology of human sciences*. New York: Vintage Books.

Ohio v. Roberts. 448 U.S. 56. No. 78-756. (1980). Supreme Court of the United States. [Online] Available: LexisNexis Academic http://web.lexis-nexis.com/universe. 8 February 2007.

Park, R. (1987). A subject matter approach to hearsay reform. *Michigan Law Review*, 86, 51-122.

Silverstein, M. and Urban, G. (1996). The natural history of discourse. In M. Silverstein and G. Urban (Eds.), *Natural histories of discourse.* Chicago: University of Chicago Press. 1-17.

United States of America v. Joseph Carlis Carlisle. 173 Fed. Appx. 796; No. 05-12091. (2006). Court of Appeals for the Eleventh Circuit. [Online] Available: LexisNexis Academic http://web.lexis-nexis.com/universe. 8 February 2007.

United States of America v. Antonio Clemmons. 461 F.3d 1057. No. 05-4235. (2005). [Online] Available: LexisNexis Academic http://web.lexis-nexis.com/universe. 8 February 2007.

United States of America v. Jerome Hadley. 431 F.3d 484, No. 03- 5838. (2005). United States Court of Appeals for the Sixth Circuit. [Online] Available: LexisNexis Academic http://web.lexis-nexis.com/universe. 8 February 2007.

White v. Illinois. 502 U.S. 346. No. 89-260. (1992). Supreme Court of the United States. [Online] Available: LexisNexis Academic http://web.lexis-nexis.com/universe. 8 February 2007.